Nos. 19-416 and 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 Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF FORMER GOVERNMENT OFFICIALS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

PHILLIP SPECTOR
MESSING & SPECTOR LLP
1200 Steuart Street
#1414
Baltimore, MD 21230
(202) 277-8173

HAROLD HONGJU KOH
Counsel of Record
HOPE R. METCALF
PETER GRUBER RULE OF LAW CLINIC
YALE LAW SCHOOL
127 Wall Street
P.O. Box 208215
New Haven, CT 06520
(203) 432-4932
harold.koh@ylsclinics.org

Counsel for Amici Curiae

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STATEMENT OF INTEREST

Amici curiae are former U.S. government officials who have worked in the national security, foreign policy, international commerce, homeland security, and intelligence sectors. They have worked on these matters at the senior-most levels of the U.S. government, and in the presidential administrations of both major political parties. They have devoted their careers to promoting the United States' commitments to the values of human rights and the rule of law. Amici take no position on the factual allegations in this case. They write only to offer the Court their perspective on the implications of this case for those values.[1]

Amici consist of the following individuals[2]:

Madeleine K. Albright served as Secretary of State from 1997 to 2001, and as U.S. Permanent Representative to the United Nations from 1993 to 1997.

Daniel Baer served as Deputy Assistant Secretary of State for Democracy, Human Rights, and Labor from 2009 to 2013, and as U.S. Ambassador to the Organization for Security and Cooperation in Europe from 2013 to 2017.

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[1] No counsel for a party to this case authored this brief in whole or in part, and no such counsel or party contributed monetarily to the preparation or submission of any portion of this brief. This brief is filed with the consent of all parties. Respondents and Petitioner Nestlé USA, Inc. filed with the Court letters providing blanket consent. Petitioner Cargill, Inc. provided written consent to counsel for amici curiae.

[2] Institutional affiliations are listed for identification purposes only, and do not indicate institutional endorsement of the legal position stated here.

William Burns served as U.S. Ambassador to Russia from 2005 to 2008, as Under Secretary of State for Political Affairs from 2008 to 2011, and as Deputy Secretary of State from 2011 to 2014.

Johnnie Carson served as Principal Deputy Assistant Secretary of State for African Affairs from 1997 to 1998, as U.S. Ambassador to Kenya from 1999 to 2003, and as Assistant Secretary of State for African Affairs from 2009 to 2013.

Susan Coppedge served as Senior Advisor to the Secretary of State and U.S. Ambassador at Large to Monitor and Combat Trafficking in Persons from 2015 to 2017. Previously, she served as Assistant U.S. Attorney in the U.S. Attorney's Office for the Northern District of Georgia from 1999 to 2015 and was the Human Trafficking Coordinator from 2010 to 2015.

Luis C. deBaca served as Involuntary Servitude and Slavery Coordinator for the Department of Justice from 1997 to 2006, as Chief Counsel of the Department of Justice's Human Trafficking Prosecutions Unit from 2006 to 2007, and as Senior Advisor to the Secretary of State and U.S. Ambassador at Large to Monitor and Combat Trafficking in Persons from 2009 to 2014.

Nancy Ely-Raphel served as Principal Deputy Assistant Secretary of State for Democracy Human Rights and Labor from 1990 to 1996, as U.S. Ambassador to Slovenia from 1998 to 2001, and as Senior Adviser to the Secretary of State and Director of the Office to Monitor Trafficking in Persons from 2001 to 2003.

Michael Guest served as Principal Deputy Assistant Secretary of State for Legislative Affairs from

1999 to 2001, and as U.S. Ambassador to Romania from 2001 to 2004.

Cameron Kerry served as General Counsel of the U.S. Department of Commerce from 2009 to 2013. In that capacity, he co-signed the amicus briefs filed before this Court by the United States in *Kiobel* v. *Royal Dutch Petroleum Co.* and *Mohamad* v. *Palestinian Authority*.

John F. Kerry served as U.S. Secretary of State from 2013 to 2017.

David J. Kramer served as Assistant Secretary of State for Democracy, Human Rights, and Labor from 2008 to 2009.

James C. O'Brien served as Special Presidential Envoy for Hostage Affairs from 2015 to 2017. Previously, he served in the U.S. Department of State from 1989 to 2001, including as Principal Deputy Director of Policy Planning with special responsibility for human rights and rule of law issues, as Special Presidential Envoy for the Balkans, and as Attorney-Adviser at the Office of the Legal Adviser.

Thomas R. Pickering, a career Ambassador, served as U.S. Ambassador to El Salvador from 1983 to 1985, as U.S. Permanent Representative to the United Nations from 1989 to 1992, and as Under Secretary of State for Political Affairs from 1997 to 2000.

John Shattuck served as Assistant Secretary of State for Democracy, Human Rights and Labor from 1993 to 1998, and as U.S. Ambassador to the Czech Republic from 1998 to 2000.

Wendy Sherman served as Counselor of the U.S. Department of State from 1997 to 2001, and as Under Secretary for Political Affairs from 2011 to 2015.

Strobe Talbott served as Deputy Secretary of State from 1994 to 2001.

SUMMARY OF ARGUMENT

Respondent Malian nationals filed suit against U.S.-based petitioners Cargill and Nestlé, alleging that those companies were complicit in plaintiffs having been trafficked as children into Côte d'Ivoire, beaten, and forced to work as slave labor on cocoa plantations. Past administrations, as well as this Administration earlier in its term, had consistently taken positions allowing for U.S. corporations to be held liable under the Alien Tort Statute ("ATS"), 28 U.S.C. 1350. But the Acting Solicitor General has now filed an amicus brief arguing, among its positions, that no matter how severe the human rights violation, a U.S. corporation can *never* be subject to liability under the ATS.

The United States has radically shifted from its previous, correct position on corporate liability under the ATS. In construing a statute whose key provisions have not changed in more than 230 years, the United States has departed not just from its own longstanding legal understanding of the statute—expressed in a brief to this Court in *Kiobel* v. *Royal Dutch Petroleum Co.*[3] signed by certain of the amici and counsel when they were government officials—but this Administration's own reading of that same statutory provision just three years ago in *Jesner* v. *Arab Bank, PLC*.[4] To explain this Administration's diametric shift, the Acting Solicitor General points to no sudden change in circumstance, no new foreign policy harm, and no actual foreign policy injury. He cannot cite a

[3] 569 U.S. 108 (2013).
[4] 138 S. Ct. 1386 (2018).

single instance of damage to U.S. foreign policy that has resulted from our decades of experience with suits against U.S. corporations under the ATS, speculating only that such suits may "carry the potential" for burdening U.S. foreign policy.

This newly minted position cannot be squared with the historic reading of the statute by all three branches of the federal government.

The policy consequences of this Administration's drastic shift are just as radical. The Acting Solicitor General's historically aberrant argument would undermine the conduct of U.S. foreign policy, contradict longstanding priorities overseas, and improperly thrust the Court into the conduct of foreign affairs. In amici's experience, the longstanding U.S. government position has well served U.S. foreign policy and diplomatic interests in monitoring human rights violations abroad by U.S. and corporate actors. This position helped to create a level playing field among U.S citizens, including U.S. corporations, and reduced the incentive for either U.S. persons or their foreign counterparts to seek the involvement of U.S. citizens, including corporations, in activities that violate settled and universal tenets of international law.

This Court should not enact a flat ban entirely eliminating the possibility that ATS liability might extend to U.S. corporate actions. Foreclosing U.S. corporate liability under the ATS would gut the statute in a way that contradicts the understanding of all recent administrations, the First Congress, and the many subsequent Congresses that have re-enacted the ATS. The clear norms against slavery, forced labor, and human trafficking here are well-established rules of human rights and decency that every modern administration has supported and expected of U.S.

citizens, including corporations, wherever they operate. U.S. foreign policy has consistently supported international law and required U.S. citizens, including U.S. corporations, to comply with that law. As designed by Congress more than two centuries ago, the ATS complements other tools in maintaining this bipartisan commitment, by allowing private parties to pursue and obtain relief for the most egregious violations.

ARGUMENT

I. This Administration's Radical Departure From The Longstanding Executive Branch Reading Of The ATS Flouts The Settled Understanding Of All Three Branches Of The Federal Government.

The ATS authorizes suits by aliens for torts in violation of the law of nations, but its plain text nowhere limits either plaintiffs or defendants to natural persons. In *Sosa* v. *Alvarez-Machain*, this Court held by a vote of 6-3, without exempting any defendants, that "courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."[5] The Acting Solicitor General now abruptly urges this Court to rewrite the statute's 230-year-old text to read, "The district courts shall have original jurisdiction of any civil action by an alien, *unless it is against a corporation*, for a tort only, committed in violation of the law of nations or a treaty of the United States."

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[5] 542 U.S. 692, 725 (2004). Part IV, the quoted portion of Justice Souter's majority opinion in *Sosa,* was joined by Justices Stevens, O'Connor, Kennedy, Ginsburg, and Breyer.

This interpretation would radically depart from the prior views of the Executive Branch, the Congress, and this and other courts.

A. For several decades, the Executive Branch has taken the view that federal courts have original jurisdiction over civil actions for torts committed in violation of the law of nations, without exempting torts committed by U.S. corporations.

This Administration's call to exempt defendants from the ATS is a first for the Executive Branch, which has never so previously argued across multiple administrations. Most remarkable, this reading reverses the view this very Administration took *just three years ago*. Appearing as an amicus in *Jesner*, this Administration actively asserted that the ATS provides for corporate liability for human rights violations. This Administration affirmed the logical and longstanding understanding that the ATS does not categorically exclude any corporations, arguing to this Court that "if the set of potential plaintiffs under the ATS * * * was understood to include corporations, *then the set of potential defendants * * * would naturally have been as well*."[6] As this Administration then rightly noted, "[n]o principle of international law precludes the existence of a norm for the conduct of private actors that applies to the conduct of corporations" under the ATS.[7]

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[6] U.S. Br. as Amicus Curiae Supporting Neither Party at 11, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018) (No. 16-499) (U.S. Br., *Jesner*) (emphasis added).

[7] *Id.* at 13.

This Administration's position in *Jesner* followed that of the Obama Administration six years earlier in *Kiobel*, where the United States explained to this Court that "the text of the ATS does not support" a "categorical bar" for corporations.[8] At that time, the Executive Branch found no "'reason to conclude that the First Congress was supremely concerned with the risk that natural persons would cause the United States to be drawn into foreign entanglements, but was content to allow formal legal associations of individuals, i.e., corporations, to do so.'"[9] The Executive continued, "[h]olding corporations liable in tort for violations of the law of nations" is "consistent with the common law backdrop against which the ATS was enacted and subsequently amended."[10]

The anomalous position now adopted by this Administration also departs sharply from earlier Executive Branch positions under the ATS. In the landmark case of *Filartiga* v. *Peña-Irala*, the Carter Administration supported ATS litigation by foreigners against foreign individual defendants based on extraterritorial acts, without any indication that the statute exempted liability for any specific type of defendants.[11] Neither the Reagan Administration nor the George H.W. Bush Administration ever argued that the ATS' open-ended text contained a silent exemption

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[8] U.S. Br. as Amicus Curiae Supporting Petitioners at 22, *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013) (No. 10-1491) (U.S. Br., *Kiobel*).

[9] *Id.* at 24 (citing *Doe* v. *Exxon Mobil Corp.*, 654 F.3d 11, 47 (D.C. Cir. 2011), vacated 527 F. App'x 7 (D.C. Cir. 2013)).

[10] *Id.* at 26. See also *id.* at 28 (explaining that "nothing in international law counsels in favor of the Second Circuit's categorical bar to corporate liability" under the ATS).

[11] U.S. Br. as Amicus Curiae Supporting Neither Party, *Filartiga* v. *Peña-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090).

excusing U.S. corporate misbehavior.[12] The Clinton Administration endorsed ATS suits against nonstate actors in *Kadic* v. *Karadzic*,[13] and never sought to eliminate corporate liability under the ATS.[14]

And in its numerous submissions to courts about the ATS, the George W. Bush Administration never once argued for a categorical bar against U.S. corporate liability, even though a great many of the cases in which it made submissions involved U.S. corporate defendants.[15] While the Bush Administration marshaled other arguments in these cases,[16] not once did

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[12] U.S. Br. as Amicus Curiae Supporting Neither Party, *Tel-Oren* v. *Libyan Arab Republic,* 470 U.S. 1003 (1985) (No. 83-2052); U.S. Statement of Interest in *Von Dardel* v. *U.S.S.R.*, 736 F. Supp. 1 (D.D.C. 1990) (No. 84-0353).

[13] U.S. Br. as Amicus Curiae Supporting Neither Party, *Kadic* v. *Karadzic*, 70 F.3d 232 (2d Cir. 1995) (Nos. 94-9035, 94-9069).

[14] The Clinton Administration, for instance, took no position on the legal issues presented in *Nat. Coalition Gov't. of the Union of Burma* v. *Unocal, Inc.*, 176 F.R.D. 329 (C.D. Cal. 1997). See Cong. Research Serv., RL32118, CRS Report for Congress: The Alien Tort Statute: Legislative History and Executive Branch Views, fn. 109 (2003).

[15] See, *e.g.*, U.S. Br. as Amicus Curiae Supporting Neither Party, *Doe* v. *Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (No. 00-56603); U.S. Br. as Amicus Curiae Supporting Neither Party, *Corrie* v. *Caterpillar*, 503 F.3d 974, 997 (9th Cir. 2007) (No. 05-36210); Declaration of Assistant Secretary of State for the Bureau of Int'l Narcotics and Law Enforcement Affairs, *Arias* v. *DynCorp*, 517 F. Supp. 2d 221 (D.D.C. 2007) (No. 01-1980); Letter from William H. Taft IV, Legal Adviser, U.S. Dep't of State, *Doe* v. *Exxon Mobil*, 393 F. Supp. 2d 20 (D.D.C. 2005) (No. 01-1357); Letter from William H. Taft IV, Legal Adviser, U.S. Dep't of State, *Mujica* v. *Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164 (C.D. Cal. 2005) (No. 03-2860).

[16] For example, the George W. Bush Administration did argue in certain cases involving U.S. corporate defendants that aiding-and-abetting claims could not be brought under the ATS, an

it claim that the ATS entirely bars U.S. corporations from any liability, no matter how egregious and direct their tortious violations of international law.

The United States' decades-old position cannot simply be waved away. The Acting Solicitor General now urges this Court to usurp the role of Congress in order to write into the ATS a categorical bar against corporate liability. But his brief never even acknowledges that he seeks to dramatically reverse a long-settled statutory reading on this score—let alone provides any explanation for such a startling change. The brief points to no change in circumstance that would justify such a radical departure. Nor does it explain its reversal by citing any adverse consequences to U.S. foreign policy that arose during the decades that ATS corporate liability has been permitted.[17]

In the oral arguments for *Kiobel*, Justice Scalia pointed out that the then-Solicitor General was taking a "new position" on extraterritoriality and questioned why the court should "defer to the views of * * * the current administration" when prior solicitors general "took the opposite position * * * not only in several

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issue on which amici here take no position. See, *e.g.*, Supplemental U.S. Br. as Amicus Curiae Supporting Neither Party, *Doe* v. *Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603, 00-56628); U.S. Br. as Amicus Curiae Supporting Neither Party, *Corrie* v. *Caterpillar*, 503 F.3d 974 (9th Cir. 2007) (No. 05-036210).

[17] ATS suits against corporations have been filed since the 1980s. See, *e.g.*, *Carmichael v. United Tech Co.*, 835 F.2d 109 (5th Cir. 1988) (affirming dismissal of claims for failure to demonstrate that a tort in violation of the law of nations was committed by the defendants); *Hamid* v. *Price Waterhouse*, 51 F.3d 1411 (9th Cir. 1995) (affirming dismissal of ATS claim, among others, for failure to allege violations of international law).

courts of appeals, but even up here."[18] Chief Justice Roberts also suggested to the then-Solicitor General that "whatever deference you are entitled to is compromised by the fact that your predecessors took a different stance."[19] The Court, in the ensuing opinion by the Chief Justice, highlighted the change in views, and rejected the new position.[20] Skepticism of such a reversal is especially warranted here, where this Administration offers no rationale whatsoever for the reversal, after embracing precisely the opposite statutory reading just three years ago.

B. This Administration's new claim that U.S. corporate liability is "a question for Congress" ignores that Congress has already decided that U.S. corporations may be held liable for supporting human trafficking, slavery, and forced labor.[21]

In both *Kiobel* and *Jesner*, the United States based its position permitting corporate liability on Congress' original intent in establishing tort liability for violations of the law of nations under the ATS.[22] As the United States explained in its briefs in those cases, the ATS was intended to keep the country from being drawn into conflicts with other nations by providing foreign nationals with a federal forum whenever a U.S. person, whether natural or juridical, committed a tort against the foreign person.[23] The First Congress was concerned that such offenses, "if not adequately redressed could rise to an issue of

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[18] Tr. of Oral Arg. 43 (Oct. 1, 2012).
[19] *Ibid.*
[20] *Kiobel*, 569 U.S. at 122.
[21] U.S. Br., *Jesner* 17.
[22] *Id.* at 15–17; U.S. Br., *Kiobel* 22–25.
[23] U.S. Br., *Jesner* 15–17; U.S. Br., *Kiobel* 22–25.

war."[24] It addressed this concern by "providing jurisdiction under the ATS over actions by aliens seeking civil remedies,"[25] which were "thought necessary for diplomatic offenses under the law of nations."[26] Ensuring that all U.S. persons, both natural and juridical, could be held legally accountable for certain torts in violations of the law of nations helped avoid costly diplomatic strife. The "ATS ensured that the United States could provide a forum for adjudicating such incidents."[27] And in the words of this Administration in its brief in *Jesner*, Congress "did not have good reason to distinguish between foreign entanglements for which natural persons were responsible and foreign entanglements for which organizations of natural persons, such as corporations, were responsible."[28] This Administration's newly minted call for the judicial creation of such a categorical bar to corporate liability would reintroduce civil immunity for foreign entanglements caused by U.S. corporations, running afoul of the purposes that motivated the First Congress to enact the ATS in the first place.

In *Kiobel* and *Jesner*, this Court noted that alien tort suits against foreign corporations based on foreign actions may not "touch and concern" the United States with sufficient force to displace the statutory presumption against extraterritoriality.[29] But this concern does not mandate blanket immunization of U.S. corporations for all foreign human rights violations, no matter how horrific they may be, or how

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[24] U.S. Br., *Jesner* 16 (citing *Kiobel*, 569 U.S. at 123).
[25] *Ibid.*
[26] *Sosa*, 542 U.S. at 724.
[27] *Kiobel*, 569 U.S. at 124.
[28] U.S. Br., *Jesner* 17.
[29] *Kiobel*, 569 U.S. at 124–125; *Jesner*, 1386 S. Ct. at 1398.

firmly they touch and concern the United States. If, as has been true since the beginning of the Republic, an ATS suit may be brought against a U.S. citizen-pirate,[30] it makes no sense to bar such a suit just because the pirate then chooses to incorporate in a U.S. jurisdiction. And if a survivor may bring an ATS suit against a U.S. individual who engages in torture abroad,[31] it equally makes no sense to bar such a suit just because the torturer then chooses to incorporate in a U.S. jurisdiction.

Although the ATS has been repeatedly invoked to provide subject-matter jurisdiction against U.S. corporations since *Filartiga v. Peña-Irala*,[32] Congress has taken no steps to reject those underlying principles or to revise the ATS categorically to bar or circumscribe corporate liability. The lone congressional proposal to amend the ATS, which did not pass a

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[30] See *Sosa*, 542 U.S. at 724 (2004) ("[T]he First Congress understood that the district courts would recognize private causes of action for certain torts in violation of the law of nations" including "violation of safe conducts, infringement of the rights of ambassadors, and piracy."); Anne-Marie Burley, The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor, 83 Am. J. Int'l L. 469 (1989) (citing W. Blackstone, Commentaries on the Laws of England 881 (4th ed. 1923)) (listing piracy as an offense in violation of the law of nations that could be committed by an individual).

[31] See *Kadic* v. *Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995) ("[W]e hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals * * * Later examples are prohibitions against the slave trade and certain war crimes."), *cert denied*, 116 S. Ct. 2524 (1996).

[32] See*, e.g.*, cases referenced *supra*, note 15.

single chamber, did not seek to categorically foreclose corporate liability.[33]

Furthermore, over the past two decades, Congress has addressed and reauthorized five times remedies for victims against the very human rights violations at issue here—human trafficking, slavery, and forced labor—beginning with the 2003 reauthorization of the Trafficking Victims Protection Act of 2000.[34] This bipartisan law, which several of the amici helped to enact or implement, demonstrates Congress' continued commitment to protecting against corporate abuse for trafficking and forced labor offenses. Most telling, the statute allows victims to seek a monetary remedy from "whoever knowingly benefits" from acts of trafficking or forced labor,[35] language that has been understood to encompass civil actions against any "person or *legitimate business*."[36]

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[33] Alien Tort Statute Reform Act, S. 1874, 109th Cong. (2005). See Kevin R. Carter, Amending the Alien Tort Claims Act: Protecting Human Rights or Closing off Corporate Accountability, 38 Case W. Reserve J. Int'l L. 646–647 (2007).

[34] Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (adding a civil cause of action to the Trafficking Victims Protection Act that allows victims to bring claims against traffickers in federal courts); Trafficking Victims Protection Reauthorization Act of 2005, Pub. L. No. 109-164, 119 Stat. 3558; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; Trafficking Victims Protection Reauthorization Act of 2013, Pub. L. No. 113-14, 127 Stat. 54; Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Pub. L. No. 115-425, 132 Stat. 5472.

[35] 18 U.S.C. 1595(a).

[36] *A.B.* v. *Marriott Int'l, Inc.*, No. CV 19-5770, 2020 WL 1939678, at *1 (E.D. Pa. 2020) (emphasis added). See also *M.A.* v. *Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959 (S.D. Ohio 2019) (denying a corporate defendant's motion to dismiss a claim

C. Consistent judicial precedent reinforces the longstanding statutory interpretation that U.S. corporations are not immune from civil liability under the ATS.

The United States' longstanding reading of the ATS to allow corporate liability follows established judicial precedent. This and other courts have declined to categorically foreclose suits under the ATS against U.S. corporations for human rights violations abroad that touch and concern the United States.

Leaving the door open for U.S. corporate liability under ATS in the most egregious cases squares with Justice Kennedy's judicious opinion in *Kiobel*, which carefully sought to "leave open a number of significant questions regarding the reach * * * of the Alien Tort Statute."[37] In none of its seven cases implicating the ATS did this Court ever indicate that there should be a categorical bar against all corporate liability under

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under the TVPRA). The Acting Solicitor General also makes the unfounded suggestion that the different wording of the Torture Victim Protection Act (TVPA) implies that Congress never intended to impose corporate liability under the ATS. U.S. Br. as Amicus Curiae Supporting Petitioners 21, citing Torture Victim Protection Act of 1991, 106 Stat. 73, note following 28 U.S.C. 1350. But it is settled law that the two statutes vary in scope, and that the TVPA was intended to complement, not supplant, the ATS. As a previous Solicitor General explained to this Court, unlike the TVPA, the text of the ATS "does not distinguish among classes of defendants," and so "[t]he United States agrees that corporations can be held liable in a suit based on the ATS." See U.S. Br. as Amicus Curiae Supporting Affirmance at 30, *Mohamad* v. *Palestinian Authority*, 566 U.S. 449 (2012) (No. 11-88) ("But critical differences between the two statutes prevent the answer from being the same with respect to the TVPA.").

[37] *Kiobel*, 569 U.S. at 125.

the ATS, regardless of the corporation's ties to the United States and the severity of its behavior.[38]

Independently, several U.S. courts of appeals have refused to read an absolute immunity for all corporate acts into the ATS.[39] In the Second Circuit's sharply divided ruling in *Kiobel*[40]—the only circuit court decision reflecting this Administration's new stance—the U.S. government relied on the well-established existence in common law of corporate liability to argue that the ATS *permits* lawsuits against corporations, and on further review, this Court declined to establish a general bar to corporate liability.[41]

II. Rewriting The Statute To Add A Categorical Bar To U.S. Corporate Liability Would Undermine U.S. Foreign Policy.

In their briefs in *Jesner* and *Kiobel*, both the Obama Administration and this Administration

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[38] See *Hernandez* v. *Mesa*, 140 S. Ct. 735 (2020); *Jesner*, 138 S. Ct. 1386; *Daimler AG* v. *Bauman*, 571 U.S. 117 (2014); *Kiobel*, 569 U.S. at 125; *Rasul* v. *Bush*, 542 U.S. 466 (2004); *Sosa*, 542 U.S. at 724; *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

[39] *Flomo* v. *Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011); *Doe v. Exxon Mobil Corp.*, 654 F.3d at 15, vacated 527 F. App'x 7; *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 748, 759–761, 764–765 (9th Cir. 2011) (en banc); *Romero* v. *Drummond Co.*, 552 F.3d 1303, 1315 (11th Cir. 2008). See also *Estate of Alvarez* v. *Johns Hopkins Univ.*, 373 F. Supp. 3d 639, 647 (D. Md. 2019) ("[T]o the extent that *Jesner* provides guidance on how to assess whether ATS liability is available against domestic corporations, such guidance does not lead to the conclusion that domestic corporate liability is categorically foreclosed under the ATS."), appeal pending (4th Cir. 2020).

[40] *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

[41] U.S. Br. as Amicus Curiae, Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (No. 10-1491)

correctly argued that U.S. corporate liability under the ATS would serve the best interest of U.S. foreign policy.[42] To justify its novel position in this case, this Administration manufactures vague policy claims that liability for U.S. corporations under the ATS would threaten congressional and executive action to address child labor, undermine U.S. economic initiatives abroad, and embroil the courts in politically sensitive disputes. The Acting Solicitor General is unable to identify any concrete foreign policy harm that has arisen from the decades during which U.S. corporations have been subject to suit under the ATS. Instead, the Administration recites as "foreign policy implications" a long pastiche of speculative claims: that ATS cases against U.S. corporations "carry the potential" to undermine U.S. initiatives; "may be at cross-purposes" with the political branches' need for flexibility in foreign policy goals; and "pose[] the potential risk" of limiting U.S. economic initiatives.[43]

In amici's long experience, these specious claims are entirely unsubstantiated. Past administrations—including this Administration, until just three years ago—never identified any foreign policy harms that required a categorical rule against U.S. corporate liability.[44]

In fact, amici's extensive experience as executive officials highlights that U.S. corporate liability under the ATS *fully aligns* with longstanding U.S.

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[42] *Id.* at 23–24; U.S. Br., *Jesner* 5.

[43] U.S. Br. as Amicus Curiae Supporting Petitioners 16–18.

[44] See, *e.g.*, U.S. Br., *Jesner* 1 (arguing in favor of corporate liability under the ATS and recognizing that "[t]he United States has an interest in the proper application of the ATS because such actions can have implications for the Nation's foreign and commercial relations."); U.S. Br., *Kiobel* 1.

government foreign policy. First, the ATS comports with U.S. congressional and executive actions to address the use of impermissible child labor and promote U.S. moral leadership on human rights: while the ATS is hardly the only tool, U.S. corporate liability under the ATS helps deter U.S. corporations from offshoring their human rights abuses. Second, ensuring that U.S. corporations can be held accountable in U.S. courts for their abuses abroad supports the government's longstanding interest in maintaining high standards for overseas conduct of U.S. companies. Finally, a categorical bar on ATS liability for domestic corporations is unnecessary, because judicial tools of civil procedure can more accurately and effectively eliminate frivolous claims.

A. Categorically barring U.S. corporate liability under the ATS would undermine congressional and executive actions to promote U.S. corporate leadership on human rights and forced labor.

Preserving corporate liability under the ATS supports a clear U.S. policy: that *no U.S. entities should perpetuate human rights abuses anywhere in the world*. U.S. foreign policy has consistently sought to ensure that U.S. corporations cannot profit from human rights abuses abroad. Abruptly abandoning U.S. corporate liability under ATS would be an unwise and unwarranted deviation from this approach.

Both the executive and legislative branches have repeatedly condemned the practice of child and forced labor. Executive Order 13126, issued by President Clinton in 1999, directs that "executive agencies shall take appropriate actions to enforce the laws prohibiting the manufacture or importation of goods, wares, articles, and merchandise mined, produced, or

manufactured wholly or in part by forced or indentured child labor."[45] The Bush Administration deemed human trafficking, including forced labor, a "dehumanizing crime" and called on the U.S. government, the NGO community, and businesses to "eradicate the evil which is child slavery,"[46] taking special note of the "widespread forced child labor in the cocoa industry in West Africa."[47] Congress passed the TVPRA specifically to combat trafficking in persons, a contemporary manifestation of slavery that "includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide."[48] Recently, this Administration called out "tragic examples" of forced labor in Burma and North Korea and declared that the United States "will not stop until human trafficking is a thing of the past."[49] To this day, the Department of Labor's Bureau of International Labor Affairs calls out cocoa from Côte d'Ivoire as a product for which it has "reason to believe [is] produced by forced labor or child labor."[50] A study the Bureau recently commissioned estimated that 38 percent of children living in agricultural households in Côte D'Ivoire's cocoa growing areas were engaged in child

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[45] Exec. Order No. 13,126, 64 Fed. Reg. 32,383, § 1 (June 16, 1999).

[46] Mark P. Lagon, Director, Office to Monitor and Combat Trafficking in Persons, U.S. Dep't of State, Remarks at InterAction: Child Trafficking and Labor Prevention Programs (Sept. 16, 2008).

[47] *Ibid*.

[48] Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(3), 114 Stat. 1464, 1466.

[49] Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, Remarks at the 2018 Trafficking in Persons Report Launch Ceremony (June 28, 2018).

[50] U.S. Dep't of Labor, *2020 List of Goods Produced by Forced or Indentured Child Labor*, 1, 10, 16, 21, 32, 87 (2020).

labor in cocoa production during the 2018 to 2019 harvest season.[51]

Using the ATS to hold U.S. corporations accountable for human rights violations comports with the U.S. government's conviction that U.S. corporations acting abroad should be moral leaders on business and human rights. During a 2000 press briefing, the State Department emphasized that "U.S. companies are models overseas for the kind of business practices that we encourage others to adopt."[52] In a 2002 speech, the George W. Bush Administration's Assistant Secretary of State for Democracy, Human Rights and Labor emphasized that the State Department "support[s] corporate responsibility for several reasons" including "to promote strong corporate values[,] * * * legal and ethical behavior as well as respect for human rights and labor rights. U.S. corporations abroad are among our best ambassadors. They play an important role in changing global perceptions about the U.S."[53]

In 2011, the United States cosponsored the resolution for the United Nations Guiding Principles on Business and Human Rights, which has been

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[51] NORC, University of Chicago, *Assessing Progress in Reducing Child Labor in Cocoa Growing Areas of Côte d'Ivoire and Ghana* 1 (2020).

[52] E. Anthony Wayne, Assistant Sec'y of State for Econ. & Bus. Affairs, U.S. Dep't of State, Announcement of "Voluntary Principles on Security and Human Rights" (Dec. 20, 2000).

[53] Lorne W. Craner, Assistant Sec'y of State for Democracy, Human Rights and Labor, U.S. Dep't of State, Promoting Corporate Social Responsibility Abroad: The Human Rights and Democracy Perspective, Remarks at the 2002 Surrey Memorial Lecture (June 18, 2002).

endorsed by the UN Human Rights Council.[54] The Guiding Principles declare:

> "The responsibility to respect human rights is a global standard of expected conduct *for all business enterprises wherever they operate.* It exists independently of States' abilities and/or willingness to fulfil their own human rights obligations, and does not diminish those obligations. And it exists over and above compliance with national laws and regulations protecting human rights."[55]

Two years later, the State Department made it "incumbent on U.S. companies to encourage broad implementation of good corporate human rights practice," by leading by example and pressing for endorsement of the Guiding Principles.[56]

The Acting Solicitor General now claims that it would be "counterintuitive" to "expos[e] U.S. businesses to greater liability risk than foreign businesses engaged in exactly the same conduct."[57] But this neglects the longstanding U.S. government position, consistently urged by amici, that whether or not foreign corporations reach the same standard, U.S. corporations should lead by example and meet the

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[54] See U.N. Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* iv (2011).

[55] *Id.* at 13 (emphasis added).

[56] Bureau of Democracy, Human Rights & Labor, U.S. Dep't of State, *U.S. Government Approach on Business and Human Rights* 16 (2013).

[57] U.S. Br. as Amicus Curiae Supporting Petitioners 21.

highest standard on human rights.[58] The current Secretary of State recently reaffirmed that America's commitment to global human rights is a fundamental value that we pursue even when—and precisely because—those rights are ignored elsewhere.[59]

In amici's experience, U.S. foreign policy has never condoned a race to the bottom, wherein U.S. corporations stoop to the level of foreign corporations that may commit human rights abuses.[60] Eliminating corporate liability under the ATS would contribute to a vicious cycle whereby corporations could repeatedly relocate their overseas operations to take advantage of the lowest available labor and human rights

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[58] See, *e.g.*, Madeleine K. Albright, Sec'y of State, U.S. Dep't of State, Remarks at Presenting Inaugural Corporate Excellence Awards (Dec. 21, 1999) (lauding U.S. companies for "demonstrat[ing] also that we can set a standard of corporate excellence to which all your peers may aspire"); Colin Powell, Sec'y of State, U.S. Dep't of State, Remarks at Awards for Corporate Excellence (Oct. 1, 2002) (explaining how a U.S. company had "become a model for local and foreign companies doing business in Egypt" through its "enlightened corporate citizenship and sense of social responsibility"); John Kerry, Sec'y of State, U.S. Dep't of State, Remarks at the 15th Annual Awards for Corporate Excellence (Jan. 29, 2014) (describing how, "instead of joining the race to the bottom," the honored company "fundamentally changed the entire ebony trade" to make it "more sustainable than ever before").

[59] Michael R. Pompeo, Sec'y of State, U.S. Dep't of State, Remarks, Promoting and Protecting Human Rights (Sept. 23, 2020) ("We must defend unalienable rights today, because * * * many multinational organizations have lost their way, focusing on partisan policy preferences while failing to defend fundamental rights.").

[60] See U.S. Dep't of Homeland Sec., *Trump Administration Strongly Warns U.S. Businesses Against Contributing to China's Human Rights Abuses* (July 1, 2020) (warning U.S. corporations against allowing human rights abuses in their supply chains in China).

standards, basing operations in developing countries that are unwilling or unable to enforce international human rights commitments. Allowing U.S. corporations abroad to commit human rights abuses that would be illegal if committed on U.S. soil would abdicate the moral leadership that has long been a centerpiece of U.S. human rights policy.

B. Domestic corporate liability under the ATS comports with the U.S. government's broad foreign policy goals of promoting good corporate behavior abroad by U.S. actors.

Ensuring the accountability of U.S. corporations in U.S. courts for their abuses abroad comports with the U.S. government's longstanding foreign policy goals. The United States' foreign policy has consistently required U.S. actors, including U.S. corporations, to comply with international law. As the United States argued in both *Jesner* and *Kiobel*, the ATS was designed to provide redress for harms committed by U.S. actors against aliens.[61] Preserving U.S. corporate compliance creates a level playing field among U.S. citizens (including U.S. corporations) by reducing the incentive for either U.S. persons or their foreign counterparts to seek the involvement of U.S. citizens (including U.S. corporations) in activities that violate settled and universal tenets of international law.

Amici know well from personal experience that, acting alone, U.S. departments and agencies cannot realistically monitor and discourage all potential human rights abuses by U.S. corporations that might engender conflict with other states. ATS jurisdiction supports enforcement of U.S. foreign policy goals and

[61] See U.S. Br., *Jesner* 15; U.S. Br., *Kiobel* 24.

reduces overall monitoring costs by allowing individuals to file suits that discourage wayward corporations from committing or aiding human rights violations.

U.S. corporate liability under the ATS promotes not only America's modern foreign policy agenda, but also the law's original foreign-policy purpose. As this Administration rightly argued in *Jesner*, the First Congress had "foreign entanglements" in mind when drafting the ATS, and had no "good reason" to distinguish between "natural persons" and "organizations of natural persons, such as corporations."[62] To be sure, the ATS is not the only tool to achieve this foreign policy goal, and the U.S. government's concern with the conduct of U.S. companies abroad is not limited to the area of human rights. Through the Foreign Corrupt Practices Act (FCPA), for example, the U.S. government also seeks to manage U.S. companies' engagements with foreign officials.[63] Like the FCPA, the ATS' imposition of corporate liability assures U.S. corporations that *do not* violate human rights abroad that they will not be placed at a relative disadvantage vis-à-vis irresponsible U.S. corporations acting abroad. The ATS, as designed by Congress more than 200 years ago, complements other congressionally mandated policy tools such as the TVPRA and FCPA to help maintain the bipartisan commitment to U.S. companies respecting international law. By allowing private parties to pursue relief for egregious violations of well-established rules of human rights that every administration has supported, the availability of U.S. corporate liability under the ATS reflects the policy

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[62] U.S. Br., *Jesner* 17. See also U.S. Br., *Kiobel* 24.

[63] 15 U.S.C. 78dd-1, et seq. (criminalizing bribery and similar offenses abroad).

expectation that U.S. citizens—including U.S. corporations—will respect universally accepted human rights norms wherever they may operate.

The Acting Solicitor General nevertheless makes the spurious claim that "ATS lawsuits against domestic corporations carry the potential to undermine U.S. economic initiatives."[64] He goes on to claim that "ATS liability poses the potential risk of limiting U.S. efforts to encourage investment in certain developing countries, where 'active corporate investment * * * so often is an essential foundation for human rights.'"[65] In reality, the only investments that ATS liability might "limit" are those that result in gross human rights torts abroad, "committed in violation of the law of nations."[66]

Republican and Democratic administrations alike have long taken the position that U.S. corporate respect for human rights "makes good business sense" and is an integral part of the "value proposition" for U.S. firms.[67] As government officials, amici have

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[64] U.S. Br. as Amicus Curiae Supporting Petitioners 16.

[65] *Ibid.*

[66] 28 U.S.C. 1350.

[67] Bureau of Democracy, Human Rights, and Labor, U.S. Dep't of State, *U.S. Government Approach on Business and Human Rights* 16 (2013). See also, *e.g.*, Colin Powell, Sec'y of State, U.S. Dep't of State, Remarks at Awards for Corporate Excellence (Oct. 1, 2002) ("The best American companies, however, do not measure excellence simply in terms of dollars and cents, simply in terms of profits. They realize that economies flourish only when * * * basic human rights are protected by the rule of law."); Susan Rice, U.S. National Security Advisor, Remarks at Human Rights First Annual Summit: Human Rights: Advancing American Interests and Values (Dec. 4, 2013) ("Advancing democracy and respect for human rights is central to our foreign policy. It is what our history and our values demand, but it's also profoundly in our interests.").

shared the State Department's unwavering belief that "it is good not only for American business, * * * but also for the global investment climate that U.S firms be the best corporate citizens possible."[68] By granting U.S. corporations no "free pass" to commit gross human rights abuses abroad, the ATS incentivizes U.S. corporations to be the best corporate citizens possible.

The Acting Solicitor General's claims cannot even be squared with his own Administration's policy positions. Earlier this year, the Department of Homeland Security "warn[ed] US businesses * * * that choose to operate in Xinjiang or engage with entities that use labor or goods from Xinjiang [that they] will face reputational, economic, and *legal risks* associated with certain types of involvement with entities that engage in human rights abuses."[69] So even while this Administration claims to this Court that lawsuits that deter U.S. companies from engaging in forced labor abroad will have a negative economic impact on those companies, it insists elsewhere that U.S. corporate actions that *support* forced labor would have exactly the same effect. In any event, the Acting Solicitor General points this Court to no concrete evidence whatsoever that U.S. corporate liability under the ATS has actually diminished the economic strength of U.S. corporations abroad.

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[68] E. Anthony Wayne, Assistant Sec'y of State for Econ. & Bus. Affairs, U.S. Dep't of State, Announcement of "Voluntary Principles on Security and Human Rights" (Dec. 20, 2000).

[69] U.S. Dep't of Homeland Sec., *Trump Administration Strongly Warns U.S. Businesses Against Contributing to China's Human Rights Abuses* (July 1, 2020) (emphasis added).

C. There is no need for a categorical bar on ATS liability for domestic corporations because judicial tools of civil procedure can effectively eliminate frivolous claims.

Finally, there is no need for this Court to foreclose permanently all subject-matter jurisdiction for all ATS cases against U.S. corporations—however egregious the conduct may be—based on a speculative fear that there may be some cases of frivolous litigation. Petitioners' quest for total corporate exemption from civil liability for abuses under the ATS—even for cases alleging torture and genocide—ignores the reality that such conduct, when it occurs, flatly offends U.S. foreign policy.

The continuing availability of ATS jurisdiction for human rights abuses committed by U.S. corporations abroad will not force courts to hear frivolous claims. In amici's experience, one need not be overly alarmist about U.S. corporate misbehavior abroad to acknowledge that the generally high standard of U.S. corporate behavior abroad does not ensure that U.S. corporations will never fall far below those human rights standards.

Existing judicial canons and doctrines of civil procedure provide ample tools to manage ATS claims and to dismiss frivolous suits against U.S. corporations that do not belong in U.S. courts. Any imprudent cases may be judicially managed—and whenever appropriate, dismissed—through prudent judicial application of such doctrines as the presumption against extraterritoriality, personal jurisdiction, venue, discovery, Fed. R. Civ. P. 11, and motions to dismiss and for summary judgment. Given that able judges can easily screen out unmeritorious cases on a case-by-case

basis, there is no cause, at this late date, for this Court to twist an unambiguous jurisdictional statute to eliminate all potential suits against U.S. corporations—including for the most egregious human rights violations—at the earliest threshold stage. This Court should not deploy a jurisdictional meat ax, when nuanced procedural scalpels are available.

CONCLUSION

For the foregoing reasons, amici urge the Court to rule in favor of the respondents, and to reject the United States government's radical request to categorically bar U.S. corporate liability under the Alien Tort Statute.

Respectfully submitted,

PHILLIP SPECTOR[70]
Messing & Spector LLP
1200 Steuart Street
#1414
Baltimore, MD 21230
(202) 277-8173

HAROLD HONGJU KOH[71]
Counsel of Record
HOPE R. METCALF
Peter Gruber Rule of Law Clinic
Yale Law School
127 Wall Street
P.O. Box 208215
New Haven, CT 06520
(203) 432-4932
harold.koh@ylsclinics.org

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[70] As Senior Advisor to the Legal Adviser of the U.S. Department of State for periods from 2009 to 2012, Mr. Spector participated in the submission of the amicus brief filed in this Court by the United States as amicus curiae in *Kiobel* v. *Royal Dutch Petroleum Co*. See U.S. Br., *Kiobel*.

[71] As Legal Adviser of the U.S. Department of State from 2009 to 2013, Professor Koh signed the amicus briefs filed in this Court by the United States as amicus curiae supporting Petitioners in *Kiobel* v. *Royal Dutch Petroleum Co.* and U.S. Br. as Amicus Curiae Supporting Affirmance, *Mohamad v. Palestinian Authority*. From 1998 to 2001, he served as Assistant Secretary of State for Democracy, Human Rights and Labor. As Attorney-Adviser at the Office of Legal Counsel at the U.S. Department of Justice from 1983 to 1985, he co-authored the brief filed in this Court by the United States as amicus curiae in *Tel-Oren* v. *Libyan Arab Republic*. See U.S. Br. as Amicus Curiae Supporting Neither Party, *Tel-Oren* v. *Libyan Arab Republic*.