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, INCORPORATED,
Petitioner,
v.
JOHN DOE I, *et al.*,
Respondents.

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

REPLY BRIEF FOR PETITIONER NESTLÉ USA, INC.

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RULE 29.6 DISCLOSURE STATEMENT

The disclosure made in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR PETITIONER NESTLÉ USA, INC.

INTRODUCTION

Nestlé USA condemns in the strongest possible terms slavery, forced labor, and human trafficking. It has taken extensive steps to help eradicate these practices. And it firmly believes that traffickers

deserve punishment. This case is not about any of that.

Instead, this case is about a 15-year old lawsuit brought against the wrong defendant, in the wrong place, and under the wrong statute. Plaintiffs' brief confirms that all they have alleged (and can allege) is that Nestlé USA lawfully purchased some cocoa from Côte d'Ivoire and exercised some generalized supervision. The true wrongdoers are the Malian and Ivorian traffickers, farmers, and overseers who injured Plaintiffs in West Africa.

This is not enough to make a federal case. The Alien Tort Statute (ATS) does not allow Plaintiffs to hold Nestlé USA liable. In over 200 years, this Court has never once suggested otherwise or embraced such an expansive theory of liability. First, because Congress has not made the ATS extraterritorial, it only applies to domestic torts with domestic injuries. Plaintiffs' proposed rule is irreconcilable with the presumption against extraterritoriality and would create roving jurisdiction whenever there is a U.S.-national defendant, no matter where the injurious conduct occurred. Second, the ATS permits courts to recognize only specific, universal, and obligatory international-law violations—and Plaintiffs' arguments effectively concede that no sufficiently specific, universal, and obligatory corporate-liability norm exists. Indeed, Plaintiffs primarily recycle the same arguments the Court already rejected in *Jesner*.

This Court should reverse.

ARGUMENT

I. PLAINTIFFS IMPERMISSIBLY SEEK TO APPLY THE ATS EXTRATERRITORIALLY.

A. The ATS Is Not Extraterritorial.

Under the presumption against extraterritoriality, a trans-substantive canon of construction, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2100 (2016). It is applied through a "two-step framework." *Id.* at 2101. "At the first step," the Court "ask[s] whether the presumption against extraterritoriality has been rebutted—that is, whether the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.*

Kiobel definitively resolved that inquiry for the ATS: "[T]he presumption against extraterritoriality applies to claims under the ATS," and "nothing in the statute rebuts that presumption." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). Yet Plaintiffs fight *Kiobel*'s holding, confirmed by *RJR Nabisco*, with a series of elisions.

1. Plaintiffs say (at 21) that the ATS is "non-geographic." All three cases they cite, however, are consistent with *Kiobel*'s holding that the ATS is geographically constrained by the presumption against extraterritoriality. Two concern whether sales abroad may exhaust intellectual-property rights for *domestic*-enforcement purposes. *See Impression Prods., Inc.* v. *Lexmark Int'l, Inc.*, 137 S. Ct. 1523, 1529, 1537 (2017); *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519, 525 (2013). They had

nothing to do with the presumption against extraterritoriality.

The third, *United States* v. *Bowman*, 260 U.S. 94, 97-102 (1922), predates this Court's modern extraterritoriality jurisprudence by nearly a century. Read in light of *RJR Nabisco*, it held that Congress at the first step did intend certain criminal laws to have extraterritorial reach. In the process, *Bowman* explained that for wrongdoing against persons—like that alleged by Plaintiffs—enforcement is "of course" limited to the government's "territorial jurisdiction" unless Congress says otherwise. *Id.* at 97-98. The passage Plaintiffs quote merely explained that Congress intended an extraterritorial reach for statutes—unlike the ATS—that impose *criminal* liability for fraud against the *government* itself. *Id.* at 98; *see also Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004) (recognizing that private rights of action raise greater extraterritoriality concerns than prohibitions "check[ed]" by "prosecutorial discretion").

2. Plaintiffs also say repeatedly (at 11, 14-15, 20-21) that *RJR Nabisco*'s two-step "focus" framework does not apply to the ATS, which is governed by a looser "touch and concern" standard. Wrong again. "*Kiobel* reflect[s] a two-step framework for analyzing extraterritoriality issues," a framework elaborated on in *RJR Nabisco*. 136 S. Ct. at 2101. Even the Ninth Circuit agreed and abrogated its prior extraterritoriality case law, which accorded more with Plaintiffs' proposed test. Pet. App. 41a.

3. Plaintiffs appear to argue (at 27-28) that because the Trafficking Victims Protection Reauthorization Act (TVPRA), 18 U.S.C. § 1581, *et seq.*, was made extraterritorial for some cases in 2008, Congress

intended to give the ATS a similar reach. But *Kiobel* held that the ATS lacked extraterritorial reach five years *after* Plaintiffs say the TVPRA became extraterritorial. *RJR Nabisco* also makes clear that the extraterritoriality analysis is statute-specific. *See* 136 S. Ct. at 2101. The TVPRA thus says nothing about the ATS's reach, and certainly nothing that would overrule *Kiobel*. If anything, it shows that Congress knows how to draft a law that applies extraterritorially. *See* 18 U.S.C. § 1596(a) (providing for "extra-territorial jurisdiction over" a specific list of "offense[s]"); *infra* pp. 22-23.

B. The ATS's Focus Is The Place Of Injury.

Because the ATS's text does not displace the presumption against extraterritoriality, this case must be resolved at *RJR Nabisco*'s "second step," which looks to "the statute's 'focus.'" 136 S. Ct. at 2101. Plaintiffs say (at 22) that the ATS's focus is any injury "when a U.S. national is responsible," whether directly or secondarily. In other words, Plaintiffs believe a defendant's U.S. nationality alone can overcome the extraterritoriality bar. That capacious view guts the presumption, and it conflicts with this Court's extraterritoriality principles and the ATS's history and purpose.

1. Grounding the ATS's focus in the defendant's identity runs counter to *RJR Nabisco*'s instruction that "the *conduct* relevant to the statute's focus" must have "occurred in the United States." 136 S. Ct. at 2101 (emphasis added). Plaintiffs' half-hearted defense of their standard (at 26) virtually ignores this Court's extraterritoriality case law, which, as Nestlé USA explained, supports looking to the place of injury as a guide for whether a suit falls

within a statute's focus. Opening Br. 19-21; *see, e.g.*, *RJR Nabisco*, 136 S. Ct. at 2107 (presumption "militates against recognizing foreign-injury claims without clear direction from Congress.").

The only case Plaintiffs substantively address is *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437 (2007). But *Microsoft rejected* Plaintiffs' suggestion (at 26 n.12) that "exporting assistance" from the United States could overcome the presumption against extraterritoriality. Rather, when the *Microsoft* plaintiff pressed a policy concern that a territoriality rule could create a "loophole" whereby copies could "be made abroad * * * from a master supplied from the United States," this Court refused to engage in "dynamic judicial interpretation" to cure that supposed loophole, instead leaving it to Congress to decide whether to remedy any foreign-copying injuries. 550 U.S. at 456-457.

2. Plaintiffs further suggest the ATS was meant to remedy all tortious conduct committed by U.S. nationals worldwide. Not so. The ATS addressed a "narrow set of violations," *Sosa*, 542 U.S. at 715, occurring on U.S. soil and the high seas—not in other sovereigns' territory.

a. Plaintiffs rely (at 16-18) primarily on one article that argues Congress meant for the ATS to address more than Blackstone's three law-of-nations offenses. *See* Anthony J. Bellia Jr & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 539, 542-543 (2011). That view is squarely at odds with this Court's holdings. *See, e.g.*, *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1397 (2018). Indeed, *Kiobel* relied on the narrower Blackstone understanding of the ATS in applying the

presumption against extraterritoriality. 569 U.S. at 119.[1]

Even if the ATS were enacted with more than just the three Blackstone offenses in mind, the First Congress's general concerns about providing redress to foreigners were tied to U.S. soil: failure to uphold British creditors' rights against debtors *in this country*, interference with ambassadors' rights *here*, and failure to redress acts of violence against British subjects by Americans *within U.S. territory*. Bellia & Clark, *supra*, at 466-467, 499, 501.

Many of those concerns were addressed by early laws other than the ATS. Section 11 of the First Judiciary Act provided a federal forum for British creditors by granting circuit courts jurisdictions over all civil suits exceeding a certain value where "an alien was a party." Bellia and Clark, *supra*, at 511. Another early act criminalized "infract[ions of] the law of nations." An Act for the Punishment of Certain Crimes Against the United States, § 28, 1 Stat. 112, 118 (1790). And the Jay Treaty consented to extradition rights for Britain. *See* Treaty of Amity, Commerce and Navigation, between His Britannic Majesty and the United States of America, by their President, with the Advice and Consent of their Senate, Gr. Brit.-U.S., art. XXVII, Nov. 19, 1794, 8 Stat. 116, 129. The First Congress did not see the

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[1] Professors Bellia and Clark's understanding would not help Plaintiffs anyway because, under their view, the ATS does not support the kind of federal-court-fashioned causes of action on which Plaintiffs base their suit. *See* Bellia & Clark, *supra*, at 544-545; *accord Jesner*, 138 S. Ct. at 1413-14 (Gorsuch, J., concurring in part and concurring in the judgment).

ATS as a catch-all remedy for U.S. citizens' worldwide wrongdoing.

b. Plaintiffs' efforts to expand the three Blackstone offenses also fall flat.

Plaintiffs propose a hypothetical assault by a U.S. national on an ambassador abroad. Resps. Br. 19. But one of the *actual* "notorious episodes" that motivated the ATS involved a *French* citizen attacking a *French* Secretary in Philadelphia. *Kiobel*, 569 U.S. at 120. Responsibility attached to the nation *where* the attack occurred, not the nation *whose national* committed the attack.

Plaintiffs' discussion (at 19) of safe conducts where the United States has a military presence simply clarifies what counts as U.S. territory. A safe-conducts duty is triggered where a sovereign is the "master" of the territory, whether by virtue of ownership or occupation. *See* Thomas H. Lee, *The Safe-Conduct Theory of the Alien Tort Statute*, 106 Colum. L. Rev. 830, 871-873 (2006). Côte d'Ivoire is neither within the United States nor occupied by it.

And pirates are likely "a category unto themselves," *Kiobel*, 569 U.S. at 121, because "[t]he high seas are jurisdictionally unique" and "governed by no single sovereign," *Doe VIII* v. *Exxon Corp.,* 654 F.3d 11, 78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part), *vacated on other grounds*, 527 F. App'x 7 (D.C. Cir. 2013). True, "asserting jurisdiction" on the high seas might "not offend foreign sovereigns." Resps. Br. 26. But it is a far leap from foreign sovereigns not objecting to the U.S. exerting jurisdiction over acts on the high seas to foreign sovereigns not objecting to the U.S. exerting jurisdiction over acts in their territories. Plaintiffs' discussion of early high-seas

admiralty cases (at 24-26) thus says nothing about cases like this one.

Nor does Attorney General Bradford's 1795 opinion letter help Plaintiffs. It discussed American citizens' participation in a French attack on a British colony. The British complained, and Bradford noted that those "injured by these acts of hostility have a remedy by a civil suit in the courts of the United States." Breach of Neutrality, 1 Op. Att'y Gen. 57, 59 (1795) (emphasis omitted). But Bradford likely considered such "acts of hostility" to fall within the ATS only because they were acts of piracy on the high seas. *See, e.g.*, *Exxon,* 654 F.3d at 80 (Kavanaugh, J., dissenting in part); *Kiobel* v. *Royal Dutch Petroleum Co.,* 621 F.3d 111, 142 n.44 (2d Cir. 2010). Moreover, because Bradford did not specify which prong of the ATS—treaty or law of nations—supplied jurisdiction, he may have believed that the American marauders had violated the recently ratified Jay Treaty and not the law of nations. *See Sosa*, 542 U.S. at 721.

c. More generally, the traditional understanding of state responsibility supports a territorial focus for the ATS. As Vattel—who Plaintiffs repeatedly cite (at 16, 17, 22) —explained, "[s]overeignty following upon ownership gives a Nation jurisdiction over the territory which belongs to it * * * to take cognizance of crimes committed therein." 3 Emmerich de Vattel, The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns 139 (Charles G. Fenwick trans., Carnegie Inst. 1916) (1758) (emphasis omitted). That is why "[t]erritoriality is considered the normal, and nationality an exceptional, basis for the exercise of jurisdiction." Restatement (Third) of Foreign Relations Law § 402, cmt. b (1987). And there is no

indication that the First Congress intended to invoke this "exceptional" jurisdiction in passing the ATS.

3. Plaintiffs appear to acknowledge that under *Sosa*'s second step this Court may "exercise its common law discretion" to define the contours of the ATS's focus, Resps. Br. 27 (capitalization altered), and their arguments highlight precisely why a bright-line domestic-injury rule is essential. Plaintiffs have no answer to Nestlé USA's demonstration that because aiding-and-abetting liability is derived from the underlying offense, that offense—and the resulting injury—is where the "tort" occurs. Opening Br. 22-23; Cargill Opening Br. 29-33.

Plaintiffs instead claim (at 24) that aiding and abetting is itself tortious, and then contend that the presumption against extraterritorial application is displaced anytime domestic aiding-and-abetting conduct is alleged. But the inference cuts the other way: To the extent aiding-and-abetting liability is cognizable under the ATS,[2] a bright-line injury rule is critical because any other rule invites protracted litigation to decide whether sufficient conduct ancillary to the aided-or-abetted tort occurred in the United States. *See* Opening Br. 22-23; U.S. Chamber of Commerce et al. (Chamber) Br. 14-22.

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[2] *See* U.S. Br. 22-26 (explaining that it is not); Washington Legal Found. et al. Br. 4-15 (same).

C. Plaintiffs Cannot Satisfy Any Reasonable Focus Inquiry.

1. Plaintiffs do not defend their collective-pleading approach, which makes it impossible to tie almost any of their allegations to Nestlé USA specifically. Opening Br. 23-24. Although their brief refers to "Petitioner," the underlying complaint actually refers to "Defendants" or to "Nestlé" generally—without differentiating among the three named Nestlé entities—for all the substantive allegations. *Compare, e.g.*, Resps. Br. 5-6, *with* JA 315-316, 318-320, 324, 329-331, 336. Their complaint says next-to-nothing about Nestlé USA specifically, other than that it exists, is wholly owned by Nestlé, S.A., and has significant activity in North America. *See* Opening Br. 6-7, 23-24.

Nor do Plaintiffs meaningfully justify their dubious claim to Article III standing. They simply proclaim (at 34-35) that they "easily" satisfy standing, without confronting the Ninth Circuit's recognition that their collective pleading made it impossible to trace any alleged injuries to Nestlé USA. *See* Opening Br. 24-25; Pet App. 46a. More than 15 years and three complaints in, it is intolerable that we still do not know exactly what Plaintiffs think Nestlé USA did or even if they have standing to maintain this suit.

2. Plaintiffs do not explain how their collectively-pled allegations—which describe alleged training, supplies, and assistance provided to cocoa farmers entirely *in Côte d'Ivoire*, JA 315-316—create a sufficient territorial nexus with the United States. They now assert (at 35) that some of these things were provided by "U.S.-based employees," but the complaint alleges only that "Nestlé" (collectively) "had

employees from their Swiss and U.S. headquarters inspecting their operations in Côte d'Ivoire and reporting back to these offices." JA 315. Even accepting Plaintiffs' newfound claim, all the complaint alleges is that Nestlé USA does business with farms in Côte d'Ivoire with some ill-defined U.S. corporate supervision. That is no more than the "mere corporate presence" *Kiobel* already rejected. 569 U.S. at 125. By definition, a domestic corporation *always* engages in high-level supervision from its U.S. corporate headquarters. *See Hertz Corp.* v. *Friend*, 559 U.S. 77, 80-81 (2010) (corporation's headquarters is where its "high level officers direct, control, and coordinate [its] activities"). And Plaintiffs do not attempt to meaningfully distinguish this Court's other cases finding even more domestic conduct to be insufficient to displace the presumption. Opening Br. 26-29.[3]

Finally, Plaintiffs claim they have "developed additional specific facts" that they would add to the complaint if allowed to amend again. Resps. Br. 34. This litigation started 15 years ago, and the operative *second* amended complaint was filed three years after *Kiobel* and a month after *RJR Nabisco*. It is too late for yet a fourth bite at the apple. *See Foman* v. *Davis*, 371 U.S. 178, 182 (1962) (leave to amend unwarranted where there is "undue delay" or a

[3] Plaintiffs do invoke (at 23) a Second Circuit decision. If it is persuasive, it cuts against Plaintiffs—it *rejected* the kind of "conclusory" allegations about domestic "decisionmaking" that Plaintiffs rely on. *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 190 (2d Cir. 2014); *see* Pet. 18-19.

"repeated failure to cure deficiencies by amendments previously allowed"); Pet. App. 32a n.9.

D. Plaintiffs' Policy-Oriented Arguments Are Wrong.

1. Plaintiffs acknowledge (at 29 n.14) that their complaint repeatedly criticizes the Ivorian government. They now say those allegations are irrelevant, yet the premise of Plaintiffs' suit is that human-rights violations are rampant in Mali and Côte d'Ivoire and that merely purchasing from those countries is tantamount to supporting child slavery. Plaintiffs cannot prevail without a U.S. court explicitly or implicitly criticizing foreign nations.

2. Plaintiffs also suggest (at 29-32) that this suit does not upset the political branches' foreign policy, because it allegedly serves the same general purposes as policies like the Harkin-Engel Protocol. Even if some action has a similar "goal" as federal policy, it conflicts with that policy if it "interferes with the methods." *Int'l Paper Co.* v. *Ouellette*, 479 U.S. 481, 494 (1987); *cf. Hernandez* v. *Mesa*, 140 S. Ct. 735, 741-742 (2020) ("No law pursues its purposes at all costs. * * * [L]awmaking involves balancing interests and often demands compromise." (internal quotation marks omitted)). The Harkin-Engel Protocol encourages cocoa companies to invest in Côte d'Ivoire to combat child labor, and it has had significant positive effects. Opening Br. 32-33; *see* World Cocoa Foundation et al. (WCF) Br. 8-15, 17-20. Yet Plaintiffs treat the "Protocol as a critical *part* of the alleged misconduct," U.S. Br. 17, and seek to use companies' support of and investment in the Protocol as evidence of malfeasance, *see* Resps. Br. 5-6. If Plaintiffs' view of the ATS is correct, companies will

have to think twice before partnering with the U.S. government to combat human-rights challenges abroad.

3. The basis of Plaintiffs' suit belies their assertion (at 33) that they are not asking for an embargo on the Ivorian cocoa industry. They do not (and cannot) allege that Nestlé USA specifically intended child labor to occur or even that it did business with those who harmed Plaintiffs. Opening Br. 7-8. Rather, the crux of Plaintiffs' claim is that Nestlé USA knows illicit child labor exists in Côte d'Ivoire, and it could supposedly "end the system" if it just used its market power in some unspecified way. Resps. Br. 1. Plaintiffs could level these accusations against anyone who does business with Ivorian cocoa farms, exposing them to years of litigation and potentially massive liability. *See* Opening Br. 33.

Those are sanctions in ATS clothing, and they would cause more harm than good by undermining the economic development that ameliorates the poverty at the root of child labor. Presumably, that is why the political branches have not adopted this approach. *See* WCF Br. 6-8; *see also Jesner*, 138 S. Ct. at 1406 (plurality opinion) (ATS liability threatens "the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights").

Plaintiffs' remaining policy arguments boil down to a disagreement about the risk of foreign retaliation and injury to U.S. businesses if the ATS reaches their claims. Resps. Br. 32-33 & n.20. Plaintiffs' assessment of those risks is wrong. *See* Opening Br. 31; WCF Br. 20-21; Chamber Br. 24-26. And irrele-

vant: how to weigh these concerns is a choice for the political branches, not the Judiciary.

II. THIS COURT CANNOT AND SHOULD NOT CREATE AN ATS CAUSE OF ACTION AGAINST DOMESTIC CORPORATIONS.

A. Domestic Corporate Liability Flunks *Sosa* Step One.

Plaintiffs do not claim that there is a specific, universal, obligatory international-law norm of corporate liability. Nor could they, because no such norm exists. Opening Br. 36-39; Cargill Opening Br. 41-43; Cato Inst. Br. 4-21; Coca-Cola Br. 13-24; Professors of Int'l Law, Foreign Relations Law, and Federal Jurisdiction (Professors) Br. 15-22; *see Jesner*, 138 S. Ct. at 1400-1402 (plurality opinion).[4]

Plaintiffs instead claim that evidence about the text, history, and purpose of the ATS—evidence the *Jesner* petitioners likewise relied on, *see* Br. for Petitioners at 17-26, *Jesner*, 138 S. Ct. 1386 (No. 16-499)—supports corporate liability. And they argue that the *Sosa* step-one question focuses on *substantive* international-law norms, while questions of

[4] Some of Plaintiffs' *amici* quibble with this evidence or point to isolated examples that they say demonstrate an international corporate-liability norm. But the burden is on *Plaintiffs* to demonstrate that a specific, universal, and obligatory norm exists. *Jesner*, 138 S. Ct. at 1400 (plurality opinion). A smattering of extra-judicial actions by an occupying force, *see* Nuremberg Scholars Br. 13, and a "few" purported "examples of corporations being held liable for violations of international law" in other countries do not clear that bar, *Jesner*, 138 S. Ct. at 1401 (plurality opinion).

"liability" are left to domestic law. They are wrong across the board.

1. The ATS provides jurisdiction over "only" torts "committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. Congress thereby decoupled ATS liability from conventional U.S.-tort liability and linked it to international law, which is "distinct from domestic law in its domain as well as its objectives." *Jesner*, 138 S. Ct. at 1401 (plurality opinion); *see* Cato Inst. Br. 7-8; Professors Br. 14. It is immaterial whether corporations could be held liable in tort in *the United States* at the time the ATS was enacted. In any event, there was no consensus on corporate liability in U.S. law at the time, either. *See* Professors Br. 23.

Even assuming substantive "tort" liability typically "include[d] corporate liability" as of 1789, Resps. Br. 38 (capitalization altered), Plaintiffs do not cite anything stating that Congress legislates against background principles of *substantive* liability when it enacts a *jurisdictional* statute. As Plaintiffs' sources (at 38) explain, this Court "start[s] from the premise that when Congress *creates a federal tort* it adopts the background of general tort law." *Staub* v. *Proctor Hosp.*, 562 U.S. 411, 417 (2011) (emphasis added); *accord Meyer* v. *Holley*, 537 U.S. 280, 285 (2003). But "[t]he ATS is 'strictly jurisdictional' and does not by its own terms provide or delineate the definition of a cause of action." *Jesner*, 138 S. Ct. at 1397 (quoting *Sosa*, 542 U.S. at 713-714).

It is likewise irrelevant that Congress did not limit the ATS's text to specific categories of defendants. Such limits are typically found in the statute creating the cause of action, not the statute creating

jurisdiction. *Compare, e.g.*, 28 U.S.C. § 1331 (creating federal-question jurisdiction), *with, e.g.*, 42 U.S.C. § 2000e(b) (limiting federal anti-discrimination lawsuits to employers with more than 15 employees).

2. Citing three temporally disparate cases, Plaintiffs claim (at 40-41) that Congress must have intended to include corporations within the ATS. None supports that conclusion. *Skinner* v. *East India Co.* (1666) 6 State Trials 710 (H.L.), involved the *sui generis* East India Company, which operated more like a sovereign than a corporation. The decision was ultimately vacated because of disputes related to the Company's juridical status. Philip J. Stern, *The English East India Company and the Modern Corporation: Legacies, Lessons, and Limitations*, 39 Seattle U. L. Rev. 423, 443-444 (2016). *The Malek Adhel*, 43 U.S. (2 How.) 210, 233 (1844), was an *in rem* action against a pirate ship. A ship is not like a corporation: "To say that" a "vessel is liable" but its "owner is not" is "like talking in riddles." *Place* v. *Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 503 (1886). Corporate liability seeks something else: to hold an entity vicariously liable for the actions of its agents. *See* Professors Br. 26. And *Purviance* v. *Angus*, 1 U.S. (1 Dall.) 180 (Pa. High Ct. Err. & App. 1786), held that the captain of a ship had to reimburse its individual owners for costs he incurred; it did not comment on corporate liability.

3.a. Reprising another argument from *Jesner*, Plaintiffs contend (at 42-44) that international law governs *what* constitutes a violation of international law, whereas domestic law governs *who* can be held liable.

Not so. *Sosa* explained that, in considering whether to create an ATS cause of action, the Court must assess whether "international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732 n.20. The "fundamental point" is that "courts must look to customary international law to determine the 'scope' of liability under the ATS." *Kiobel*, 621 F.3d at 129 n.31. That is equally true "when a court is questioning whether the scope of liability under the ATS includes private actors (as opposed to state actors)" as "when a court is questioning whether the scope of liability under the ATS includes juridical persons." *Id.*

That makes sense. "[I]nternational law is not silent on the question of the *subjects* of international law." *Jesner*, 138 S. Ct. at 1400 (plurality opinion) (quoting *Kiobel*, 621 F.3d at 126). Thus, international tribunals have looked to international law to determine whether to recognize "individual liability." *Kiobel*, 621 F.3d at 127 (emphasis omitted).

Plaintiffs' only new response is to point to the Solicitor General's prior ATS briefs. Resps. Br. 42-44. But although the United States previously "contended that corporate liability was appropriate because corporations were traditionally liable in tort actions at common law," this "Court declined to adopt that argument" in *Jesner*. U.S. Br. 12 n.3. Because *Jesner* "rejected not only the government's conclusion but also its basic framework," the government "revisited its position," *id.*, and has concluded that "[d]omestic corporations are not proper ATS defendants," *id.* at 10. Just so.

b. Plaintiffs' fallback position—that "even if the question of corporate liability is determined under international law," it must be analyzed on a norm-by-norm basis—fares no better. Resps. Br. 48.[5]

As an initial matter, Plaintiffs offer no rebuttal to the mountain of evidence demonstrating that "there is no corporate liability in customary international law." *Exxon*, 654 F.3d at 83 (Kavanaugh, J., dissenting in part).

Nor is Plaintiffs' norm-specific evidence compelling. The Conventions they cite (at 46) define *what* constitutes "forced or compulsory" or "child" labor; they do not dictate *who* can be held liable for extracting such labor. Convention Concerning Forced or Compulsory Labor art. 2, June 28, 1930, 39 U.N.T.S. 55; *see* Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor art. 6, June 17, 1999, 2133 U.N.T.S. 161. That leaves Plaintiffs with one source, a 1930 report on forced labor and slavery in Liberia, which found that, although *government officials* often used their "authority" to "impress[]" forced labor "for private purposes on privately owned plantations," there was "no evidence" that the only corporation operating in the country did so. *Report of the International Commission of Enquiry into the Existence of Slavery and*

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[5] Plaintiffs assert that corporate liability is warranted here because other countries "provide[] for the equivalent of civil tort liability for the kinds of violations at issue here." Resps. Br. 47-48. Even if that is so, because "customary international law governs this issue, foreign nations' domestic laws are not relevant here." *Exxon*, 654 F.3d at 82 n.9 (Kavanaugh, J., dissenting in part); *see Kiobel*, 621 F.3d at 118, 141 n.43.

Forced Labour in the Republic of Liberia 84, League of Nations Doc. C.658 M.272 1930 VI (1930); *see id.* at 77.[6]

Even Plaintiffs' own sources acknowledge that it "would represent a dramatic shift in the focus of international human rights law" to hold corporations liable for "human rights abuses." Jenny S. Martinez, *The Slave Trade and the Origins of International Human Rights Law* 163 (2011); *see id.* at 164 (suggesting only that "the history of the slave trade treaties *casts doubt*" on the idea "that corporations are immune from international human rights law," not that corporate liability for slavery is a specific, universal, obligatory international-law norm (emphasis added)); *see also Nevsun Res. Ltd.* v. *Araya*, 2020 SCC 5, para. 113 (Can.) ("[I]t is not plain and obvious that corporations today enjoy a blanket *exclusion* under customary international law from direct liability for violations of obligatory, definable, and universal norms of international law *** ." (emphasis added and internal quotation marks omitted)). Similarly, although "various international bodies have recently discussed the possibility *** of an international code of conduct for business activities, a motivating premise of these discussions is that no such law presently exists." Professors Br. 15-16.

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[6] Plaintiffs also point to Attorney General's Bradford's 1795 suggestion that a corporation could sue an individual under the ATS. Resps. Br. 48. That says nothing about whether corporations were subject to international-law *obligations*. *See* Professors Br. 9.

In short, even when it comes to the specific norms at issue here, there is an insufficient consensus on the corporate-liability question to satisfy *Sosa*.

c. Finally, even assuming this Court is now inclined to adopt the *Jesner* dissenters' reading of *Sosa* or a norm-by-norm analysis, that still requires accepting that courts may create new causes of action under the ATS—something that several Justices have rejected outright or expressed significant skepticism about. Opening Br. 41 & n.7; *see Sosa*, 542 U.S. at 724 ("[W]e have found no basis to suspect Congress" understood the ATS to reach "beyond those torts corresponding to Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy."). Plaintiffs have no response to these serious separation-of-powers concerns.

B. Domestic Corporate Liability Flunks *Sosa* Step Two.

Even if this Court *could* recognize an ATS cause of action against domestic corporations, it *should not* for all the same reasons *Jesner* declined to recognize one against international corporations.

Sosa step two asks whether the Court should make an exception to the ordinary rule that the "decision to create a private right of action is one better left to legislative judgment." 542 U.S. at 727. Plaintiffs try to flip the framing, arguing that this Court should not create "corporate immunity." Resps. Br. 50. But the question is not whether to immunize domestic corporations from ATS lawsuits; it is whether this Court should step outside its traditional role and *create* a cause of action for domestic corporate liability. It should not. As *Jesner* held, courts should

exercise "caution" in determining whether to "mandate a rule that imposes liability upon artificial entities like corporations." 138 S. Ct. at 1402-03. Regardless of whether corporate liability is a question of international or domestic law, none of Plaintiffs' arguments overcome the numerous compelling reasons for leaving this choice to Congress.

1. Plaintiffs' TVPRA and Torture Victim Protection Act (TVPA) arguments fall flat.

As Plaintiffs recognize, Congress created some liability for corporations accused of similar conduct under some circumstances in the TVPRA. Resps. Br. 51. That is why recognizing ATS liability alongside TVPRA liability conflicts with congressional policy.

The TVPRA contains important, carefully tailored limits on corporate liability that do not appear in the ATS. *See* Members of Congress Br. 9 ("Congress spent years studying and developing a response to the global scourge of human trafficking."). For example, an individual may sue a corporation under the TVPRA only if the corporation directly perpetrated the crime or "knowingly benefit[ted]" from it. 18 U.S.C. § 1595(a). Recognizing a cause of action under the ATS effectively renders that limit meaningless. *See Jesner*, 138 S. Ct. at 1405 (plurality opinion). Out of "respect [for] the role of Congress," this Court "must refrain from creating" a separate ATS "remedy" for conduct already addressed by the TVPRA. *Id.* at 1402 (majority opinion) (internal quotation marks omitted); *accord Hernandez*, 140 S. Ct. at 747.

Moreover, the TVPA provides a better analogy to this case than the TVPRA. Contrary to Plaintiffs' claims (at 52-53), a plurality of the Court has already

recognized that because the TVPA is "the only cause of action under the ATS created by Congress," it is the most "logical * * * statutory analogy to an ATS common-law action." *Jesner*, 138 S. Ct. at 1403 (plurality opinion). The *Jesner* plurality deemed the TVPA analogous because of how and why it was created, not because it governed torture and extrajudicial killings. The plurality's conclusion that "Congress' decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive" under *Sosa* step two is therefore applicable here, too. *Id.* at 1404.

And even if the TVPRA were a more "suitable model for an ATS suit," Congress's decision to create corporate liability under the TVPRA but not the TVPA "demonstrates that there are two reasonable choices. In this area, that is dispositive—Congress, not the Judiciary, must decide whether to expand the scope of liability under the ATS * * * ." *Id.* at 1405.

2. Plaintiffs next contend (at 53-54) that *Bivens* is an inapt comparison. *See* Opening Br. 50. Once again, Plaintiffs' quarrel is with this Court, which has already looked to *Bivens* cases as a model under the ATS for when to "exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations." *Jesner*, 138 S. Ct. at 1402-03. Nestlé USA simply pointed out that this statement applies equally to both foreign and domestic corporations. Opening Br. 40, 50; *see* U.S. Br. 14.

3. Contrary to Plaintiffs' claim (at 54-55), recognizing domestic corporate liability carries "significant foreign-policy implications." *Jesner*, 138 S. Ct. at 1404 (plurality opinion). Like suits against foreign corporations, "cases brought against domestic corpo-

rations *** frequently involve claims challenging foreign conduct and the policies of foreign states, thereby embroiling courts in difficult and politically sensitive disputes." U.S. Br. 15. And just because a handful of countries have purportedly expressed some willingness to "hold their corporations accountable" in similar circumstances, Resps. Br. 54, that does not mean that the remaining 180-plus would not object. *See* Coca-Cola Br. 17-20 (explaining why many countries are reluctant to recognize corporate liability under international law).

4. Nor would domestic corporate ATS liability further U.S. foreign-policy interests. *Cf.* Br. of Former Gov't Officials 16-26. To the contrary, extending ATS liability to domestic corporations will undermine the political branches' attempts to encourage corporations to "tak[e] steps to address human rights issues" abroad and to promote "foreign investment" in the United States. Coca-Cola Br. 12, 29. It "may also threaten more specific policies," such as the Harkin-Engel Protocol. U.S. Br. 17. And as long as there is *some* risk that creating this cause of action would prompt "international strife," this Court must defer to Congress. *Jesner*, 138 S. Ct. at 1408 (Thomas, J., concurring); *accord id.* at 1411 (Alito, J., concurring in part and concurring in the judgment); *id.* at 1418-19 (Gorsuch, J., concurring in part and concurring in the judgment); *see id.* at 1405 (plurality opinion) (asking whether corporate liability "is essential to serve" the ATS's goals). At a minimum, some risk exists, *see* U.S. Br. 15-20, and that is reason enough for this Court to defer to the political branches' judgments.

* * *

This is, at bottom, a suit against the wrong defendant, in the wrong place, under the wrong statute. ATS plaintiffs may use the statute to sue *individuals* who harmed them in the United States for a "narrow set of" international law violations. *Sosa*, 542 U.S. at 715. They can file claims under more-nuanced statutory schemes like the TVPA and TVPRA, if available. And if those remedies prove insufficient, such plaintiffs may ask Congress to provide them with an extraterritorial remedy. But Plaintiffs here have not done any of those things, and their claims against Nestlé USA should accordingly be dismissed.

CONCLUSION

The judgment of the Ninth Circuit should be reversed.

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