No. 15-349

IN THE

Supreme Court of the United States

NESTLÉ U.S.A., INC.; ARCHER-DANIELS-MIDLAND COMPANY; and CARGILL, INC.,

Petitioners,

v.

JOHN DOE I; JOHN DOE II; JOHN DOE III, individually and on behalf of proposed class members,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members before the courts, Congress, and the Executive Branch.[1]

The National Foreign Trade Council (NFTC) is the premier business organization advocating a rules-based world economy. Formed in 1914 by a group of American companies, NFTC and its affiliates now serve more than 200 member companies.

The National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amici curiae*, their members, or *amici*'s counsel made a monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court. Counsel of record for all parties received notice at least ten days prior to the due date of *amici*'s intention to file this brief.

The Organization for International Investment (OFII) represents the U.S. operations of many of the world's leading global companies, which insource millions of American jobs. OFII promotes policies that facilitate global investment in the United States and advocates for fair, non-discriminatory treatment of U.S. subsidiaries of foreign companies.

Amici have a direct and substantial interest in the issues presented in the petition. Numerous members have been and may continue to be defendants in suits predicated on expansive theories of liability under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, based on their operations—or, more often, those of their affiliates—in developing countries. Over the past two decades, U.S. and foreign companies have been named as defendants in hundreds of ATS lawsuits, many of which have been filed in the Ninth Circuit, from which this petition arises. These suits typically are litigated for a decade or more, imposing substantial legal and reputational costs on corporations that operate in developing countries and chilling further investment. Unless certiorari is granted to address the Ninth Circuit's expansive theories of ATS liability—including its unprecedented "profit equals purpose" rule regarding the *mens rea* standard for aiding and abetting liability—the stream of ATS lawsuits, especially in the Ninth Circuit, will continue.

Amici unequivocally condemn forced labor practices and take no position on the factual allegations in this case. The questions in the petition, though, do not require resolution of whether such wrongs occurred. Instead, the legal issues presented ask whether the 1789 Alien Tort Statute can be stretched beyond its intended scope—one that this Court repeatedly has limited—to sweep up ordinary overseas business

transactions that violate neither international nor U.S. law. *Amici* can offer a helpful perspective on that issue. They have participated in more than a dozen cases involving the ATS's reach before this Court and other federal courts, including prior appearances as *amici* in this litigation.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision below splits with other federal courts of appeals on three legal issues, each of which is vitally important to the U.S. business community and independently warrants this Court's review.

First, the decision below adopted an unprecedented—and unsupportable—standard for the *mens rea* required to state an ATS claim predicated on aiding and abetting liability. Putting aside the fact that this Court has never endorsed the viability of secondary liability under the ATS, the panel majority concluded that the defendants had the "purpose" of facilitating child slavery due *only* to the fact that they sought to purchase affordable cocoa and thereby maximize profits. That line of reasoning—inferring the required "purpose" from a defendant's alleged profit-seeking motive—finds no support in international law and squarely conflicts with decisions of other federal appellate courts. *See, e.g.*, *Mastafa v. Chevron Corp.*, 770 F.3d 170, 193 (2d Cir. 2014) ("Plaintiffs' allegations that defendants *intentionally* flouted the sanctions regime for profit . . . are irrelevant to the *mens rea* inquiry . . . ."). Unless corrected, the panel's permissive standard exposes U.S. businesses to the risk of liability for engaging in ordinary commercial activities in countries with human rights violations, even if

those activities are lawful as a matter of U.S. and international law.

Second, the panel's decision distorts the Court's holding in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013), by permitting the plaintiffs to maintain their ATS suit without alleging that a tort "committed in violation of the law of nations," 28 U.S.C. § 1350, occurred in the United States.[2] The panel's approach cannot be reconciled with *Kiobel*'s reliance on *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), in which this Court held that judges must examine the conduct that is the "focus" of Congress's concern in enacting the statute to determine whether the case is impermissibly extraterritorial. *See Kiobel*, 133 S. Ct. at 1669. The panel's expansive approach to extraterritorial application of the ATS clashes with decisions of two other circuits that have interpreted *Kiobel* to require application of *Morrison*'s "focus" test to ATS cases. *See Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014).

Third, the decision below deepens an existing split over whether corporations may be subject to liability under the ATS for violations of the law of nations. This circuit split, which prompted the Court to grant certiorari in *Kiobel*, remains.

Each of these questions warrants certiorari in its own right. Collectively, the Ninth Circuit's three errors have a compounding effect that permits ATS lawsuits to proceed against American companies for

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[2] This case does not involve allegations of human rights abuses where the primary perpetrator has sought safe harbor in the United States. *See infra*, note 4.

allegedly tortious acts committed outside the United States by foreign governments or persons with whom the company does business, so long as the company intended to turn a profit. That conclusion is as extraordinary as it is incorrect under international law.

The Ninth Circuit has repeatedly taken statutory ambiguity as an invitation to allow ever-more-creative ATS claims to survive motions to dismiss. Rather than engaging in the "vigilant doorkeeping" over ATS claims mandated by the Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), the decision below throws open the door to a new wave of post-*Kiobel* ATS claims in the Ninth Circuit. As a result, the Ninth Circuit has positioned itself as a World Court "exercis[ing] jurisdiction over all the earth, on whatever matters [it] decide[s] are so important that all civilized people should agree with [it]." *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 797–98 (9th Cir. 2011) (Kleinfeld, J., dissenting).

This case presents an excellent and timely vehicle to consider all three questions presented. Resolution of any question in petitioners' favor would require immediate dismissal, as respondents have conceded that (1) petitioners had no specific intent to support child slavery or harm children, Pet. App. 21a; *id*. at 237a (Bea, J., dissenting); (2) all the acts of enslavement and maintenance of slavery are alleged to have been committed by persons other than the petitioners and in the territory of another country, *id*. at 243a; and (3) no individuals are named as defendants in this action.

THE WRIT SHOULD BE GRANTED

I. The decision below creates circuit conflicts on two issues at the heart of the ATS and deepens a third split.

The petition explains how the decision below creates or deepens circuit conflicts on three legal questions at the center of modern ATS litigation: *mens rea*, Pet. at 13–20; extraterritoriality, *id*. at 31–33; and corporate liability, *id*. at 34–35. These splits are especially problematic for the business community because, in many cases, plaintiffs can exploit the division among the circuits by opting to bring ATS suits in the Ninth Circuit, where a great number of U.S. businesses operate. That risk is made even more acute by the fact that the Ninth Circuit has positioned itself on the indulgent side of all three circuit conflicts, as explained below.

1. The first conflict turns on whether "purpose" or "knowledge" supplies the governing *mens rea* standard for ATS claims predicated on secondary (accessorial) liability. The panel below disavowed any need to resolve the governing standard because, in the majority's view, the allegations here "satisfy the more stringent purpose standard." Pet. App. 18a. The panel rested this conclusion on an "inference that the defendants placed increased revenues before basic human welfare, and *intended* to pursue all options available to reduce their cost for purchasing cocoa." *Id*. (emphasis added). Drawing proof of "purpose" to commit a human rights violation from a defendant's profit motive creates a new and unprecedented *mens rea* standard for aiding and abetting liability under the ATS.

The predicate question is, of course, whether the ATS even supports a claim for aiding and abetting liability. In *Sosa*, the Court flagged the issue but did not resolve it. *Sosa*, 542 U.S. at 732 n.20. Yet "[r]ecognition of secondary liability is no less significant a decision than whether to recognize a whole new tort in the first place." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009). And aiding-and-abetting claims have generated considerable diplomatic friction and forced U.S. courts to sit in judgment of the actions of foreign governments.[3]

Even if one were to assume the possibility of aiding and abetting liability under the ATS, the panel's application of the "purpose" standard cannot be reconciled with decisions from other appellate courts,

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[3] Lower courts have relied on the existence of *criminal* aiding and abetting liability under international law to infer the existence of a concurrent *civil* norm of accessory liability, as well. That inference is unfounded. Although international tribunals have held individuals accountable for aiding and abetting international crimes, no ATS case has identified a universally accepted norm of *civil* liability under customary international law for individuals, much less for corporations. In U.S. law, the existence of a criminal aiding-and-abetting norm does not transplant automatically to civil law—particularly where "[a]iding and abetting is an ancient criminal law doctrine." *Cent. Bank of Denv., N.A. v. First Interstate Bank of Denv., N.A.*, 511 U.S. 164, 181 (1994). In the civil context, "there is no general presumption that the plaintiff may also sue aiders and abettors." *Id*. at 182. That difference reflects the judgment that while aiding and abetting is a useful tool for prosecutors, it must be cautiously and expressly extended to private parties, who are unconstrained by prosecutorial discretion. *Cf. Stoneridge Inv. Partners, LLC v. Scientific-Atlanta*, 552 U.S. 148, 158 (2008) (noting that Congress responded to *Central Bank* by authorizing the SEC, but not private parties, to sue aiders and abettors).

which have (properly) looked to international practice to discern the governing standard. Both the Second Circuit and the Fourth Circuit have applied the "purpose" standard to reject ATS claims against corporations based on alleged aiding and abetting of human rights violations, recognizing that a corporation's profit motive is *not* relevant to the *mens rea* analysis. *See Mastafa*, 770 F.3d at 193; *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011); *Talisman*, 582 F.3d at 261.

The panel majority's attempt to disclaim their "profit equals purpose" standard does not withstand scrutiny. The majority concedes "the complaint is clear that the defendants' motive was finding cheap sources of cocoa; there is no allegation that the defendants supported child slavery due to an interest in harming children in West Africa." Pet. App. 21a. Yet, while the majority claims that the purpose standard would not be "satisfied merely because the defendants intended to profit by doing business in the Ivory Coast," the panel then says, "however, the defendants allegedly intended to support the use of child slavery as a means of reducing their production costs." *Id*.

That double-speak can only mean one of two things. Either the panel *was* applying the "profit equals purpose" test it disclaims, or else the panel believed that the defendants had the intent to facilitate child slavery because they did not leverage their market power to influence local farmers to stop child labor practices. *See id*. at 19a–20a ("the defendants had enough control over the Ivorian cocoa market that they could have stopped or limited the use of child slave labor by their suppliers").

This reasoning, however, assumes an affirmative duty to intervene that does not exist under U.S. or

international law. *See* Restatement (Third) of Torts § 37 (2012) ("An actor whose conduct has not created a risk of physical or emotional harm to another has no duty of care to the other . . . ."). There is a vast difference between not taking affirmative steps to stop wrongdoing and intending to facilitate it.

2. On extraterritoriality, the decision below clashes with *Kiobel* and conflicts with decisions from the Second and Eleventh Circuits. Both courts have interpreted *Kiobel* to require application of *Morrison*'s "focus" test in determining whether an ATS claim sufficiently "touches and concerns" the United States to overcome the presumption against extraterritorial application of U.S. law.

The panel below held that *Kiobel*'s "touch and concern" requirement "did not incorporate *Morrison*'s focus test." Pet. App. 26a. Instead, the panel majority concluded that the Court in *Kiobel* crafted an entirely new extraterritoriality test. The panel then granted respondents leave to amend their complaint to show that "some of the activity underlying their ATS claim took place in the United States." *Id*. at 27a. That is, the panel invited plaintiffs to allege that "*some* domestic activity is involved in the case"—the same overbroad standard the Court rejected in *Morrison*, 561 U.S. at 266.

Kiobel, of course, supports no such distinction. The Court cited *Morrison*—and only *Morrison*—when it articulated the "touch and concern" requirement in *Kiobel*. 133 S. Ct. at 1669. As a result, other federal appellate courts have acknowledged *Kiobel*'s incorporation of the "focus" test and dismissed ATS actions where, as in this case, the alleged international law violation took place outside the United States. *See, e.g.*, *Baloco v. Drummond Co.*, 767 F.3d 1229, 1237

(11th Cir. 2014) (applying *Morrison*'s focus test); *Mastafa*, 770 F.3d at 185 (same). As stated by the eight judges dissenting from rehearing *en banc*, the decision below "puts [the Ninth Circuit] on one side of yet another circuit split; yet again, the majority has taken the minority, incorrect side." Pet. App. 249a.[4]

3. The panel's third error was holding, as a matter "of first impression in th[e] circuit," that ATS liability extends to corporations. *Id*. This Court previously granted certiorari in *Kiobel* to resolve a conflict among the circuits on this question. 132 S. Ct. 472 (2011). Because *Kiobel* was decided on other grounds, that circuit split remains.

Any one of the Ninth Circuit's errors below would be sufficient to warrant the Court's plenary review in light of the existing circuit conflicts and the importance of the issues at stake. Reversal on any of the questions presented also would lead to the immediate dismissal of this ATS case that has languished at the motion-to-dismiss stage for ten years (which is regrettably typical for ATS litigation, *see* Part III).

But the cumulative effect of the decision below is worse than three independent errors. Collectively, the Ninth Circuit's errors compound the harm by layering one expansive ATS theory atop another. The upshot is that in the Ninth Circuit, ATS lawsuits can proceed against an American company based on allegedly

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[4] This case does not present the issue—and thus can be resolved without addressing—whether the ATS serves to "prevent[] the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind." *Kiobel*, 133 S. Ct. at 1674 (Breyer, J., concurring); *cf*. *Sosa*, 542 U.S. at 732 (citing such cases).

tortious acts committed outside the United States by foreign governments or other actors with whom the company does business, so long as the company intended to turn a profit. The fact that ATS liability could exist under circumstances that are perfectly permissible under international law is a stark indication that ATS jurisprudence has gone awry in the Ninth Circuit.

II. The decision below ignores this Court's mandate of restraint in *Sosa*, exceeds the bounds of international law, and invites international friction.

At every doctrinal junction in this case, the Ninth Circuit opted for the most expansive interpretation of the ATS's scope. This approach is contrary to the Court's instruction in *Sosa* that lower courts must exercise caution and restraint in ATS cases and apply only those liability principles that have a consensus under international law. The Ninth Circuit's disregard of this Court's instructions and the limits of international law will inevitably increase international tensions, contrary to the ATS's purpose.

A. The Ninth Circuit did not proceed with "great caution" in vastly expanding the ATS's scope.

In *Sosa*, the Court admonished federal courts to exercise discretion in expanding the scope of the ATS based on present-day norms of international law. On a dozen separate occasions, the majority opinion describes the ATS's scope as "narrow," "modest," or "limited." 542 U.S. at 712, 715, 720, 721, 724, 729, 732. Ten times the Court instructed lower courts to be "wary" of efforts to expand the scope of the ATS, or to

exercise "caution," "restraint," and "vigilance." *Id*. at 725, 727, 728, 729, 733.

The Court offered several "good reasons" for judicial restraint. *Id*. at 725. First, the concept of judicial participation in the development of federal common law has eroded since the enactment of the ATS in 1789. The Court observed that the current "general practice has been to look for legislative guidance before exercising innovative authority over substantive law" and that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id*. at 726–27. Second, the Court recognized that "the potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id*. at 727. Third, the Court warned that "the possible collateral consequences of making international rules privately actionable argue for judicial caution." *Id*. These concerns prompted Justice Breyer in concurrence to call for even greater caution, questioning "whether the exercise of jurisdiction under the ATS is consistent with those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." *Id*. at 761 (Breyer, J., concurring).

Unfortunately, the Ninth Circuit has repeatedly disregarded *Sosa*'s mandate, allowing ever-more-creative ATS claims to survive motions to dismiss. This Court has thrice overturned ATS decisions originating from the Ninth Circuit. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Rio Tinto PLC v. Sarei*, 133 S. Ct. 1995 (2013) (granting, vacating, and remanding in light *Kiobel*); *Daimler AG v. Bauman*,

134 S. Ct. 746 (2014) (reversing broad theory of personal jurisdiction in ATS case). The third time apparently was not the charm, and this Court should grant certiorari once again to rein in the Ninth Circuit's expansive interpretation of the ATS.

B. The decision below is inconsistent with generally accepted principles of international law on *mens rea* and corporate liability.

In *Sosa*, the Court gave effect to its admonition of judicial restraint by limiting potentially actionable norms to those that are "specific, universal, and obligatory" under international law. *Sosa*, 542 U.S. at 732. The Court adopted this approach to avoid the friction that would arise if U.S. courts purported to "apply[] internationally generated norms" for which there is no consensus in the international community. *Id*. at 725. Only after establishing the requisite international consensus could a U.S. court then proceed to consider "the practical consequences of making that cause available to litigants in the federal courts." *Id*. at 732–33; *id*. at 733 n.21.

This threshold requirement holds true for all facets of ATS litigation. The Court stated in *Sosa* that "international law" must "extend[] 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." *Id*. at 732 n.20. Justice Breyer confirmed in concurrence that "[t]he norm [of international law] must extend liability to the type of perpetrator (*e.g.*, a private actor) the plaintiff seeks to sue." *Id*. at 760 (Breyer, J., concurring). In light of these admonitions, "[i]t is inconceivable that a defendant who is *not liable* under

customary international law could be *liable* under the ATS." *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 122 (2d Cir. 2010).

Yet that is precisely the effect of the decision below. International law does not support the *mens rea* standard adopted by the Ninth Circuit. Nor does international law extend liability to the corporate form.

1. Stripped of labels, the Ninth Circuit's *mens rea* test below boils down to *knowledge* of wrongdoing plus *intent* to turn a profit. Given the reality that nearly all for-profit companies have the intent to maximize profit, the Ninth Circuit's *mens rea* standard is nothing more than a knowledge test that has been rejected by every circuit to consider the issue. *See* Pet. 12–20.

The other circuits rejected the knowledge standard for good reason: it has no consensus in international law, even for individuals accused of the most serious human rights violations. The panel below reluctantly acknowledged this fact, observing that "the Rome Statute [creating the International Criminal Court] rejects a knowledge standard and requires the heightened *mens rea* of purpose, suggesting that a knowledge standard lacks the universal acceptance that *Sosa* demands." Pet. App. 18a. This concession makes the panel's decision to apply an "effective" knowledge test for *civil* liability all the more astounding. *Id*. at 243a (Bea, J., dissenting).

But even if one were to entertain the fiction that the panel applied the heightened "purpose" test, the panel's coupling of purpose with a defendant's profit motive finds no support in international criminal law, either. Multiple international law authorities describe

the purpose standard without any indication that a defendant's "profit motive" is relevant to the *mens rea* determination. *See, e.g.*, *United States v. von Weizsaecker (the Ministries Case)*, in 14 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, at 343 (1949) (bank officer who loaned funds not criminally liable because he lacked purpose of supporting borrower's commission of crime); *United States v. Carl Krauch, et al. (The Farben Case)*, in 8 Trials of War Criminals Before the Nuremberg Military Tribunals Under Council Law No. 10, at 1211–13 (1952) ("That their actions in this regard were not the normal activities of businessmen is equally clear.").

There are good reasons for applying a heightened *mens rea* standard for aiding and abetting claims under the ATS. When American corporations or their foreign subsidiaries do business in developing countries, they often have contacts with government officials or local groups that may engage in objectionable behavior. Those contacts alone provide no basis for holding the *company* liable for alleged wrongdoing by the foreign government or foreign private actor. For example, even though Second Circuit Judge Leval believed that corporations may be held liable for violations of international law, he concluded that where a company "requires protection in order to be able to carry out its operations, its provision of assistance to the local government in order to obtain the protection, even with knowledge that the local government will go beyond provision of legitimate protection . . . does not without more support the inference of a purpose to advance or facilitate the human rights abuses." *Kiobel*, 621 F.3d at 193–94 (Leval, J., concurring in the judgment).

Indeed, the official foreign policy of the United States often *encourages* commercial interaction with still-developing nations, in the hope of promoting the rule of law and change from within the system. The United States has long supported "[c]onstructive economic engagement" with China, even as it seeks to encourage greater political freedom in that country. *See* Supp. Br. for United States as Amicus Curiae at 12–13, *Doe I v. Unocal*, 403 F.3d 708 (9th Cir. 2005) (Nos. 00-56603 & 00-56628). Similarly, when the United States suspended sanctions against Burma in May 2012 to encourage further democratic reform, the Secretary of State declared, "[s]o today, we say to American business: Invest in Burma,"[5] notwithstanding prior ATS suits against corporations that operated in that country. A purpose-based standard of *mens rea* would ensure that multinational corporations operating in developing nations are not faced with billion-dollar ATS claims based solely on their subsidiaries' incidental contacts with a government or other local entity that has been accused of violating international law.

2. In *Kiobel*, this Court received full briefing and heard argument on the question of whether corporate defendants, as opposed to only natural persons, can be liable under the ATS. *Amici* will not repeat those arguments here. Suffice to say that the panel below did not cite any source of international law in support of a blanket extension of civil liability to corporate defendants for what the panel deemed "universal and absolute" criminal norms. Pet. App. 13a. Rather, the panel turned the *Sosa* presumption on its head by

[5] Hillary Rodham Clinton, Sec'y of State, Remarks with Foreign Minister of Burma (May 17, 2012), *available at* http://www.state.gov/secretary/20092013clinton/rm/2012/05/190260.htm.

reasoning that "the absence of decisions finding corporations liable does not imply that corporate liability is a legal impossibility under international law." *Id*. That reasoning is precisely backward. The absence of an international law precedent on corporate liability is persuasive, perhaps dispositive, evidence that an international law norm has not reached the consensus necessary to substantiate ATS jurisdiction. The ATS is not a license for U.S. courts to break ground on new and expansive theories of liability under international law.[6]

C. The decision below threatens to increase international friction.

By stretching the ATS beyond universally accepted contours of international law, the Ninth Circuit is fulfilling Judge Kleinfeld's prior warning that "the Ninth Circuit now exercise[s] jurisdiction over all the earth, on whatever matters [it] decide[s] are so important that all civilized people should agree with [it]." *Sarei*, 671 F.3d at 797–98 (Kleinfeld, J., dissenting). The broad exercise of jurisdiction embraced in the decision below threatens to exacerbate international

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[6] The affirmative evidence supports the conclusion that customary international law does not impose liability on corporations. To take one well-documented example, the drafters of the Rome Statute, which established the International Criminal Court, specifically rejected a proposal by France to grant the ICC jurisdiction over corporations and other juridical persons. Opponents of the proposal included delegations from 25 countries representing an array of legal traditions. *See* Pet. App. 220a. A primary objection to the proposal was "the disparity in practice among states." *Id*. Accordingly, the jurisdiction of the ICC is limited to "natural persons." Rome Statute, art. 25(1), July 17, 1998, 2187 U.N.T.S. 90, 105; 37 I.L.M. 1002, 1016.

tensions, rather than alleviate them as the drafters of the ATS intended.

This Court in *Kiobel* recognized that the concerns underpinning the presumption against extraterritoriality—namely "unintended clashes between our laws and those of other nations" and the "danger of unwanted judicial interference in the conduct of foreign policy"—are "magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." 133 S. Ct. at 1664 (citation omitted). To drive the point home, the Court's opinion in *Kiobel* referred ten times to Congress's intent in the ATS to minimize international discord and avoid "serious foreign policy consequences." *Id*. at 1664, 1665, 1667, 1668, 1669.

Diplomatic protests in ATS cases generally stem from two distinct, but often overlapping, aspects of modern ATS litigation.

First, the extraterritorial application of the ATS disrupts the ability and responsibility of other sovereigns to redress wrongful acts committed on their own territory. For instance, plaintiffs have filed ATS suits to second-guess foreign nations' reconciliation measures, including decisions to grant amnesty. El Salvador, South Africa, and Colombia have all objected to ATS suits as an infringement of their rights to resolve territorial disputes. *See also* Br. of the Netherlands and the United Kingdom at 6, *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) (No. 10-1491), 2012 WL 2312825 (extraterritorial ATS jurisdiction "interfere[s] with and complicate[s] efforts within the territorial State to remedy human rights abuses that may have occurred within its own territory").

The allegedly wrongful conduct in this case took place in Côte d'Ivoire, which has the prerogative and responsibility to redress wrongdoing that occurs on its territory. The precedent set by the decision below will encourage similar suits that require U.S. courts to assume jurisdiction over the actions of U.S. corporations in the territory of other sovereigns, inviting future diplomatic protests.

Second, although not the case here, ATS suits frequently impugn the actions of foreign sovereigns by accusing private actors of aiding and abetting the wrongful acts of a foreign government. Following this Court's decision in *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), which held that the ATS does not provide jurisdiction over foreign states, ATS plaintiffs have targeted "corporations as proxies for what are essentially attacks on [foreign] government policy." Anne-Marie Slaughter & David Bosco, *Plaintiff's Diplomacy*, Foreign Affairs, Sept.-Oct. 2000, at 102, 107. These attempts to condemn a foreign government's sovereign acts within its own territory have prompted vigorous objections from numerous countries. *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 77–78 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) (listing objections from Indonesia, Papua New Guinea, and South Africa).

In light of these and other diplomatic protests, the United States in 2008 asked this Court to end ATS suits that "challeng[e] the conduct of foreign governments toward their own citizens in their own countries—conduct as to which the foreign states are themselves immune from suit—through the simple expedient of naming as defendants those private corporations that lawfully did business with the governments." Br. for United States as Amicus Curiae

in Support of Petitioners at 5, *American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919), 2008 WL 408389. "Such lawsuits," the United States explained, "inevitably create tension between the United States and foreign nations." *Id*.

Under the decision below, U.S. courts will be indirectly judging the acts of foreigners committed in the territory of another sovereign. The Court should grant certiorari to prevent this end-run around *Kiobel*'s extraterritoriality holding.

III. The absence of bright lines in the ATS context has harmful practical consequences.

In the past two decades, plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations in over twenty industry sectors for business activities in roughly sixty countries. Donald E. Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Geo. L.J. 709, 713 (2012). Dozens of major U.S. corporations have been targeted, particularly with respect to their activities in developing and post-conflict countries. In all, more than 50% of the companies listed on the Dow Jones Industrial Average have been named as defendants in ATS actions. Such suits typically allege that the corporate defendant aided and abetted the wrongdoing of a foreign government or foreign private actor.

Courts have struggled to resolve these cases and often flounder on threshold questions for a decade or more. For example, the *Bauman* case against Daimler was pending for 10 years before this Court reversed the Ninth Circuit's expansive jurisdictional holding; a case against Occidental Petroleum has been pending

for 12 years (and counting); Chevron defended an ATS case for 13 years; and Rio Tinto likewise had to litigate for 13 years before securing a dismissal that stuck. All of those ATS cases originated in the Ninth Circuit and were eventually dismissed on Rule 12 grounds. The present case, which has been pending for a decade, is typical of the Ninth Circuit's practice. All the while, ATS suits threaten substantial reputational harm and require considerable resources to defend.

This Court's limiting instructions in *Sosa* and *Kiobel* helped stem the tide but regrettably failed to ensure the swift dismissal of some long-running ATS suits, as this case illustrates. *See also Doe v. Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 97 (D.D.C. 2014) (permitting plaintiffs leave to amend their complaint 14 years after suit was filed "so that they may show that these claims sufficiently touch and concern the United States"). Plenary review of the questions presented in this case would resolve the most common threshold questions and help lower courts more easily sift out those ATS cases that should be swiftly dismissed.

The decision below also portends dire "practical consequences" for business operations around the globe. *Sosa*, 542 U.S. at 732–33 (requiring federal courts to consider the "practical consequences of making [a cause of action] available to litigants in the federal courts"). By conflating profit motive with an intent to injure, the panel effectively decreed that a company can avoid ATS liability only if it foregoes business opportunities in countries with dubious human rights records. In other words, "[t]he panel majority allows a single plaintiff's civil action to effect an embargo of trade with foreign nations, forcing the judiciary to trench upon the authority of Congress and

the President." Pet. App. 234a–235a (Bea, J., dissenting); *accord Talisman*, 582 F.3d at 261 (same). Some judges might genuinely desire that U.S. companies stop doing business with cocoa farmers in Côte d'Ivoire, perhaps hoping that such nonparticipation would benefit local farmers and children. That foreign affairs decision, however, is not the judiciary's to make, and the ATS certainly is not a tool that private parties may wield to dictate foreign policy.

That concern is exacerbated by the panel's implication that an allegation of domestic conduct can overcome the presumption against extraterritoriality, even if the wrongful tort occurred overseas. Without clear direction from this Court, plaintiffs can be expected to "plead around" the territorial limits of the ATS by alleging some form of U.S.-based conduct (or failure to act), such as a parent company's authorization or failure to supervise the actions of a foreign subsidiary. The Court in *Sosa* rejected a similar attempt to "repackage[]" foreign conduct as a U.S.-based claim in suits arising under the Federal Tort Claims Act, 542 U.S. at 702, and the Court should grant certiorari to affirm the same rule applies to the ATS. As the Court explained in *Morrison*, "the presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 561 U.S. at 266.

The petition presents an ideal vehicle to articulate clear and easily administrable rules needed to limit the "judicial creativity" that has continued unabated in the Ninth Circuit, notwithstanding this Court's mandates in *Sosa* and *Kiobel*. *Sosa*, 542 U.S. at 728.

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted,

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