No. 15-349

IN THE

Supreme Court of the United States

NESTLÉ USA, INC., ET AL.,

Petitioners,

v.

JOHN DOE I, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR GROCERY MANUFACTURERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

PERLETTE M. JURA
Counsel of Record
WILLIAM E. THOMSON
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7121
PJura@gibsondunn.com

ANDREW S. TULUMELLO
CHRISTOPHER B. LEACH
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

KARIN F.R. MOORE
GROCERY MANUFACTURERS ASSOCIATION
1350 I Street, Suite 300
Washington, D.C. 20005

Counsel for Amicus Curiae

TABLE OF CONTENTS

Page

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. The Ninth Circuit's Decision Creates an Anomalous and Counterproductive Regime 3

A. The Decision Facilitates Meritless ATS Suits Against GMA Members and Other American Companies Based on Lawful Commercial Activity 3

B. The Decision Creates a Host of Pernicious Incentives and Adverse Collateral Effects 6

1. GMA Members and Other American Companies Provide Numerous Social Benefit Programs in Developing Countries 7

2. The Decision Puts Foreign Direct Investment and Foreign Social Benefit Programs in Jeopardy 11

3. The Decision's Anomalous Standard Will Unfairly Disadvantage Many GMA Members and Other American Companies 12

II. The Ninth Circuit's Decision Intrudes on the Foreign Policy Prerogatives of the Political Branches 14

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Crosby v. *Nat'l Foreign Trade Council*,
530 U.S. 363 (2000)..18

Kiobel v. *Royal Dutch Petroleum Co.*,
133 S. Ct. 1659 (2013)...17

Kiobel v. *Royal Dutch Petroleum Co.*,
642 F.3d 268 (2d Cir. 2011) 14

La. Mun. Police Emps.' Ret. Sys. v. *Hershey Co.*,
No. 7996-ML (Del. Ch. Mar. 18, 2014)..............11

Liberty Lobby, Inc. v. *Pearson*,
390 F.2d 489 (D.C. Cir. 1967)..............................6

Presbyterian Church of Sudan v. *Talisman Energy, Inc.*,
582 F.3d 244 (2d Cir. 2009) 16, 18

Sosa v. *Alvarez-Machain*,
542 U.S. 692 (2004)......................................17, 18

Statutes

28 U.S.C. § 1350 2

Regulations

74 Fed. Reg. 16,763 (Apr. 13, 2009)..........................15

Other Authorities

Better Cotton Initiative, *2014 Annual Report*
(2014)...10

Chocolate Mfrs. Ass'n, *Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor* (2001) 5

Global Compact Network USA, How to Join 9

H. Amend. 142, H.R. 2330 (2001) 5, 6

James K. Jackson, Cong. Research Serv., RS21118, *U.S. Direct Investment Abroad: Trends and Current Issues* (2013) 7

OECD, *Benchmark Definition of Foreign Direct Investment* (4th ed. 2008) 7

OECD, *Foreign Direct Investment for Development: Maximizing Benefits, Minimizing Costs* (2002) 7, 8

Shell, Shell in Nigeria: Improving Lives in the Niger Delta (Apr. 2012) 10

Trade & Investment Framework Agreement Between the Government of the United States of America and the Economic Community of West African States (Aug. 5, 2014) 15

U.N. Conf. on Trade & Dev., *World Investment Report 2014* (2014) 15

U.S. Dep't of State, Bureau of Econ. & Bus. Affairs, 2013 Investment Climate Statement – Cote d'Ivoire (2013) 15

United Nations Global Compact, Our Mission 9

Marissa Vahlsing, *California & NY Courts' D ecisions Leave Door Open for Transnational ATS Litigation After Kiobel*, Earth Rights Int'l Blog (Jan. 8, 2014) 13

Staci Warden, Ctr. for Global Dev., *Joining the Fight Against Global Poverty: A Menu for Corporate Engagement* (2007) 12

Wendy J. Werner, *Corporate Social Responsibility Initiatives Addressing Social Exclusion in Bangladesh*, 27 J. of Health, Population, & Nutrition 545 (2009) 10

World Cocoa Found., History & Mission 8

World Cocoa Found., Reducing Child Labor Is a Shared Responsibility (July 30, 2015) 8, 9

World Cocoa Found., WCF ECHOES 9

BRIEF FOR *AMICUS CURIAE* GROCERY MANUFACTURERS ASSOCIATION[1]

INTEREST OF *AMICUS CURIAE*

The Grocery Manufacturers Association ("GMA") is the largest association of food, beverage, and consumer product companies in the world. Its members operate in all 50 states, with sales in the United States totaling approximately $320 billion annually. GMA has been an active advocate for leading food, beverage, and consumer product companies in the United States since 1908, applying the accumulated expertise of its member companies to vital public policy issues affecting the industry.

GMA and its members have a weighty interest in the question presented in this case. U.S. companies that manufacture and sell consumable products play a significant role in the global economy.

Many of the GMA's members purchase commodities through supply chains that are ultimately sourced from developing countries—countries that often face serious social and economic challenges. Some GMA members have implemented and funded

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* states that 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 person or entity other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2, *amicus curiae* states that Petitioner and Respondents, upon timely receipt of amici's intent to file this brief, have consented to its filing.

numerous social benefit programs in developing countries to try to help address global social problems, such as those presented in this case. However, the Ninth Circuit's decision invites plaintiffs' attorneys to recast these efforts as evidence of "aiding and abetting" Alien Tort Claims violations by others, 28 U.S.C. § 1350 ("ATS"). Inevitably, this decision will prompt many companies to re-evaluate whether to invest in social benefit programs overseas and whether to purchase commodities sourced from developing countries.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision creates a series of perverse incentives likely to harm the very people it is ostensibly designed to help. It will make companies *less* likely to adopt policies and undertake practices that are intended to positively influence conditions in developing countries, for fear that these policies and practices will be used against them in litigation. Indeed, the decision below increases companies' incentives to pull out from developing countries altogether, depriving those economies of badly needed foreign investment. Because American companies are far more likely to be subject to ATS jurisdiction than are their foreign competitors, the decision's anomalous aiding and abetting standard threatens to disadvantage American companies uniquely in the global marketplace, without improving conditions in the subject developing countries. And any U.S. businesses that withdraw from the challenged locales are likely to be replaced by actors *less* committed to improving conditions on the ground. Further, the decision threatens to interfere with foreign policy, to

punish lawful commercial behavior, and to invite protracted litigation against U.S.-based corporations for alleged crimes they did not commit, direct, or sanction, while leaving the actual perpetrators untouched.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION CREATES AN ANOMALOUS AND COUNTERPRODUCTIVE REGIME.

American companies do not control the social conditions of foreign nations and the Ninth Circuit's decision, though perhaps motivated by sympathy, will spawn unintended adverse consequences. Indeed, the decision invites a destructive theory of liability that will subject American companies to punitive and meritless suits predicated on lawful commercial trade activity. This will cause GMA members and many other companies to change their approaches to foreign direct investment and social benefit programs in ways that will make those investments and programs less impactful overseas.

A. The Decision Facilitates Meritless ATS Suits Against GMA Members and Other American Companies Based on Lawful Commercial Activity.

The present case is a striking illustration of the danger to lawful, routine commercial behavior that the Ninth Circuit's "aiding and abetting" theory presents. Respondents purport to bring a class action, spanning 20 years, on behalf of unnamed Plaintiffs who live or lived in Mali and claim that they were victims of trafficking and child slave labor in the Ivo-

ry Coast. First Am. Class Action Compl. ¶ 11, *Doe* v. *Nestlé, S.A.*, No. 05-cv-5133 (D.E. 118) (C.D. Cal. July 22, 2009) ("Compl."). They do not allege that Petitioners trafficked, enslaved, employed, or otherwise had any relationship with them. Pet. App. 3a–4a. In fact, Respondents admit that Petitioners did not have the subjective motive to harm children and have policies against forced labor. Pet. App. 21a. Respondents claim that the people who carried out the alleged enslavement are local farmers in the Ivory Coast. They are not Petitioners' employees and are not parties to this suit. Pet. App. 3a.

Nevertheless, Respondents assert that U.S.-based companies (including Petitioners) should be liable for "aiding and abetting" alleged crimes committed by these unaffiliated foreign actors because Petitioners and other corporations purchased commodities through a global supply chain sourced from a developing country that allegedly includes components of forced labor. Although those U.S. companies do not engage in forced labor practices themselves, Respondents allege that the companies have market power in the region and provide training and supplies to individuals in those countries, together with affirmative social benefit programs aimed at helping to address the global social problem of forced labor, including a voluntary protocol to help combat forced labor. Respondents recast the training and programs as evidence that the corporations must "know" about the social challenges bedeviling the region and have the ability to "control" the forced labor and trafficking problems. Because the corporations' social benefit programs and anti-forced labor policies have not stopped these problems and the corporations

profit from selling their products, they are, in Respondents' view, "aiding and abetting" whatever bad conditions and acts afflict those employed by foreign farm owners, at the opposite end of the supply chain.

In the case of cocoa production, Respondents have turned these affirmative efforts to help bring about positive change on their head. Petitioners and other members of the cocoa industry *voluntarily* entered into the Harkin Engel Protocol in 2001, which, among other things, sought to "implement credible, mutually-acceptable, voluntary, industry-wide standards of public certification … that cocoa beans … have been grown and/or processed without any of the worst forms of child labor." Chocolate Mfrs. Ass'n, *Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor* (2001), *available at* http://tinyurl.com/pccd9w2.

Respondents point to this as evidence of knowledge of forced labor and/or intent to perpetuate forced labor, based on the theory that Petitioners entered into this voluntary protocol only to avoid adverse legislation, against which Respondents claim that Petitioners lobbied. *See* Pet. App. 20a. But this attack makes little sense. The Harkin Engel Protocol involved far more ambitious and significant goals to help combat slave labor than the proposed legislation mentioned by Petitioners. Indeed, the legislation, which was never enacted, would have merely provided the FDA with $250,000 to fund development of an FDA label certifying chocolate as "slave free." Compl. ¶¶ 53–55; H. Amend. 142, H.R. 2330

(2001) (in 147 Cong. Rec. H3781 (daily ed. June 28, 2001)). But the rejected legislation did not require chocolate companies to use the label nor did it provide a plan of action about what would happen after the FDA obtained funding to work on developing a label. H. Amend. 142, *supra*. And Respondents' efforts to recast Petitioners' alleged lobbying—and the Ninth Circuit's reliance on this argument—as evidence of aiding and abetting impedes Petitioners' First Amendment rights to petition their government. *See Liberty Lobby, Inc.* v. *Pearson*, 390 F.2d 489, 491 (D.C. Cir. 1967).

In short, Respondents suggest that profitable, lawful global trade sourced from developing countries (especially when companies have on-the-ground auditing, training, and benefit programs) is tantamount to aiding and abetting alleged human rights violations instigated and directed by others. And the Ninth Circuit panel concluded that the suit should proceed beyond the motion to dismiss stage because, in significant part, "reading the allegations in the light most favorable to the plaintiffs, one is led to the inference that the defendants placed increased revenues before basic human welfare." Pet. App. 18a.

B. The Decision Creates a Host of Pernicious Incentives and Adverse Collateral Effects.

In addition to the numerous flaws in Respondent's case that Petitioners identify, the Ninth Circuit's anomalous "ATS aiding and abetting" standard contravenes U.S. foreign trade policies and thwarts U.S. and U.N. initiatives. The decision also threatens unwarranted and protracted litigation for any

American company buying products through a supply chain tied to a developing country facing global social problems. It likewise sends the message that American companies' efforts to provide supplies, education, and inputs to these developing countries, and efforts to implement social benefit programs, may be used against them by plaintiffs' lawyers in an effort to make those companies pay for alleged human rights abuses perpetrated overseas by foreign actors against foreign individuals.

1. GMA Members and Other American Companies Provide Numerous Social Benefit Programs in Developing Countries.

Several GMA members and other American multinationals provide numerous benefits to developing countries, the most widely discussed of which is foreign direct investment ("FDI")[2]—a category that, in 2014, exceeded $388 billion. James K. Jackson, Cong. Research Serv., RS21118, *U.S. Direct Investment Abroad: Trends and Current Issues* 1 (2013), *available at* http://tinyurl.com/p47wmrk.

These companies also help developing economies by, *inter alia*, "provid[ing] technical assistance, training, and other information to raise the quality of the [in-country] suppliers' products." OECD, *Foreign Di-*

---

[2] Foreign direct investment is "a category of cross-border investment made by a resident in one economy (the direct investor) with the objective of establishing a lasting interest in an enterprise (the direct investment enterprise) that is resident in an economy other than that of the direct investor." OECD, *Benchmark Definition of Foreign Direct Investment* 17 (4th ed. 2008), *available at* http://tinyurl.com/psd4gas.

rect Investment for Development: Maximizing Benefits, Minimizing Costs 13 (2002), *available at* http://tinyurl.com/oha5dkg. Indeed, this technical assistance is "*perhaps the most important channel through which foreign corporate presence may produce positive externalities in the host developing economy*." *Id.* at 12 (emphasis added).

In addition to these investments that are directly tied to a company's core business, companies often provide social benefit programs that help to improve the lives of citizens in developing economies. For example, the World Cocoa Foundation—a member organization supported by more than 100 companies, including Petitioners and many GMA members—"work[s] through public-private partnerships that bring together donors, industry members, producing country governments, research institutes and non-governmental organizations to … deliver the necessary social, agricultural and economic advances to promote a healthy, sustainable cocoa economy that benefits everyone from producer to consumer." World Cocoa Found., History & Mission, http://tinyurl.com/omznwzx (last accessed Oct. 19, 2015).

Many of the industry's efforts seek to help address the global social problem of forced labor. For example, the Foundation "train[ed] teams of [adult] professionals to safely apply agrochemicals to cocoa farms in areas where children have previously been involved in this task." World Cocoa Found., Reducing Child Labor Is a Shared Responsibility 2 (July 30, 2015), *available at* http://tinyurl.com/nubgyxo. It also initiated "child labor awareness sessions" that

were attended by tens of thousands of farmers and members of the local community. *Ibid.*

And, to increase the educational opportunities for children, the Foundation operates the ECHOES program, which has awarded more than 1,600 scholarships and has provided literacy training to more than 6,500 people. World Cocoa Foundation, WCF ECHOES, http://tinyurl.com/oy8jyf5 (last visited Oct. 19, 2015).

Corporate-sponsored social benefit programs are not unique to the cocoa industry. The most prominent of these endeavors is the United Nations Global Compact, an NGO that, among other things, "supports companies to [d]o business responsibly by aligning their strategies and operations with [the Global Compact's] Ten Principles on human rights, labour, environment, and anti-corruption." United Nations Global Compact, Our Mission, http://tinyurl.com/npp9zjz (last visited Oct. 19, 2015). Among these principles is the abolition of forced labor. The Compact encourages members to work toward this goal by helping to ameliorate the underlying social circumstances that result in forced labor.

More than 500 U.S. Companies—including numerous GMA members—have signed onto the UN Global Compact. By volunteering to join the Compact, members are expected to "make the Global Compact and its principles an integral part of business strategy, day-to-day operations, and organizational culture." Global Compact Network USA, How to Join, http://tinyurl.com/nvchctd (last visited Oct. 19, 2015).

Companies and industry groups thus have taken various actions to improve the lives of citizens in developing countries.

And there are numerous other concrete examples:

- An oil company operating in West Africa has trained more than 3,000 individuals in enterprise development and management, has awarded more than 2,700 scholarships to secondary school students, and supports 27 health care clinics that, in 2011 alone, serviced more than 275,000 people. Shell, Shell in Nigeria: Improving Lives in the Niger Delta (Apr. 2012), *available at* http://tinyurl.com/ohwqtre.

- Numerous companies operating in Bangladesh have provided an array of medical services to the local population, including hospitals, HIV/AIDS prevention programs, and even medical insurance. Wendy J. Werner, *Corporate Social Responsibility Initiatives Addressing Social Exclusion in Bangladesh*, 27 J. of Health, Population, & Nutrition 545 (2009), http://tinyurl.com/qjvurlf.

- Members of the cotton industry formed the Better Cotton Initiative which, among other things, aims to provide environmentally sustainable cotton using standards that can be met by "smallholder farms in Mali, Mozambique and Tajikistan" and "large, industrialised operations in Brazil, China and Australia." Better Cotton Initiative, *2014 Annual*

Report 6 (2014), *available at* http://tinyurl.com/pdanw9p.

Guided by principles from the United Nations and elsewhere, U.S. companies have thus invested tremendous resources into programs that improve the lives of residents in developing nations.

2. The Decision Puts Foreign Direct Investment and Foreign Social Benefit Programs in Jeopardy.

The Ninth Circuit's decision jeopardizes these beneficial programs and investments by encouraging plaintiffs to recast interactive social welfare programs and supply policies as evidence of aiding and abetting. Indeed, this has already happened in at least one case since the panel's original decision was rendered. *See* Oral Ruling, Hr'g Tr. 77:15–20, *La. Mun. Police Emps.' Ret. Sys.* v. *Hershey Co.*, No. 7996-ML (Del. Ch. Mar. 18, 2014) (citing the original Ninth Circuit panel decision multiple times and stating: "I think you can draw the inference of knowledge from [Petitioner's] cocoa sustainability efforts, which include its eight 'on-the-ground programs' through which [Petitioner] has contact with farmers in West Africa and high-level visits, such as visits by [Petitioner's] chairman."); *see also* Pet. App. 234a (Bea, J., dissenting from denial of rehearing en banc) ("How was the cocoa buyers' [*mens rea*] purpose shown? By their purchase of cocoa and their conduct of 'commercial activities [such] as resource development.'").

This reasoning will likely prompt renewed analyses of the social benefit programs that GMA's members operate and whether they can be justified in light of increased litigation risks. Indeed, to avoid

costly and disruptive ATS litigation—and the burdens that such suits impose unequally on U.S. companies—U.S. companies will almost certainly scale back these social benefit programs and voluntary protocols. *See also supra*, pp. 6–10.

In the end, this means that less investment and social engagement programs will flow to these countries. Additionally, given the often deeply rooted nature of these problems, many GMA members may conclude that it does not make sense to source supplies from these countries at all. Both of these results threaten to erode the positive social changes evolving in developing countries. *See* Staci Warden, Ctr. for Global Dev., *Joining the Fight Against Global Poverty: A Menu for Corporate Engagement* 7 (2007), *available at* http://tinyurl.com/omkqqwj (if corporate philanthropy is seen not as a benefit, but rather as a risk, budgets for social benefit programs risk "downsizing" or complete elimination).

3. The Decision's Anomalous Standard Will Unfairly Disadvantage Many GMA Members and Other American Companies.

The decision also puts several GMA members and other American companies at a competitive disadvantage vis-à-vis their foreign counterparts, without just cause. Defending ATS lawsuits—regardless of their lack of merit—is expensive, both in terms of dollars and reputation. Here, the Petitioners are not even alleged to be the perpetrators of the wrongful conduct, yet the unduly expansive concept of ATS "aiding and abetting" is so broad and subject to such abuse that many GMA members and other American

companies are likely to be targeted with costly and meritless ATS suits that will take years to litigate.[3] Meanwhile, foreign companies not subject to U.S. jurisdiction will remain free from these misdirected attacks that cost millions.

Indeed, ATS suits against corporate defendants are notable for the length of their duration—much longer than normal civil litigation: 63 months for corporate ATS defendants versus 7.3 months for all civil litigation. *See* Br. of Product Liability Advisory Counsel, Inc., as *Amicus Curiae* In Supp. of Resp. 6–7, *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 3, 2012) (citing Statistical Tables for the Federal Judiciary, Table C-5, U.S. Courts (June 30, 2011), and collecting cases).

And, if the case proceeds beyond the motion to dismiss stage, the discovery costs of an ATS suit are significant. The underlying conduct in these cases often occurs in foreign countries where documentary evidence may be slim or nonexistent. Even where documents exist, simply obtaining that discovery of-

---

[3] After the Ninth Circuit issued its opinion, one NGO announced that "2014 will be a year to watch" because the "historic" decision had made it clear that "the Supreme Court's recent decision in *Kiobel* v. *Royal Dutch Petroleum Co*. does not end the prospect of transnational ATS litigation." *See* Marissa Vahlsing, *California & NY Courts' Decisions Leave Door Open for Transnational ATS Litigation After Kiobel*, Earth Rights Int'l Blog (Jan. 8, 2014), http://tinyurl.com/ln59w8z (last visited October 10, 2015). This result will only exacerbate the upward trend in ATS suits present when this Court decided *Kiobel*. *See* Br. of *Amicus Curiae* In Supp. of Resp. 5, *Kiobel* v. *Royal Dutch Petroleum Co.*, No. 10-1491 (U.S. Feb. 3, 2012) (of 245 ATS suits between 2000 and 2012, "48% were filed on or after 2008").

ten requires additional layers of lawyers and a variety of potential transnational proceedings.

To pay for all of this—and a potential adverse judgment—companies may need to tie up capital in contingency reserves for the duration of the litigation. *See Kiobel* v. *Royal Dutch Petroleum Co.*, 642 F.3d 268, 271–72 (2d Cir. 2011) (Jacobs, C.J., concurring in denial of panel rehearing).

As Judge Bea's dissent from the denial of rehearing *en banc* underscored, this case is not against alleged enslavers, it is not against Respondents' employers; it is a suit trying to convert lawful U.S.-sanctioned trade and direct foreign investment into a new form of so-called "aiding and abetting." *See* Pet. App. 234a. The Ninth's Circuit's decision is misguided and will hurt the very people it is intended to benefit.

II. THE NINTH CIRCUIT'S DECISION INTRUDES ON THE FOREIGN POLICY PREROGATIVES OF THE POLITICAL BRANCHES.

Nor should America's courts dictate foreign relations and trade policy, decisions that are best left to Congress and the President.

This expansive notion of ATS "aiding and abetting" liability will foster *de facto* embargos and international sanctions through civil actions in U.S. Courts, contrary to U.S. policy.

Indeed, U.S. trade policy is directed to fostering, not limiting, commercial contact and investment in developing countries, including the Ivory Coast. For example, just last year, the United States signed a "trade and investment framework" with a group of

West African states that includes the Ivory Coast. *See* Trade & Investment Framework Agreement Between the Government of the United States of America and the Economic Community of West African States (Aug. 5, 2014), *available at* http://tinyurl.com/q96rc8h. That pact made clear that the United States "desir[es]" "to strengthen economic relations between" the United States and the Ivory Coast. *Ibid.* According to the State Department, the purpose of this increased trade is to return Ivory Coast to its status "as West Africa's regional economic and financial powerhouse." U.S. Dep't of State, Bureau of Econ. & Bus. Affairs, 2013 Investment Climate Statement – Cote d'Ivoire (2013), http://tinyurl.com/njdvkr4. Part of that pathway necessarily includes the participation of "foreign businesses, particularly in mining, petroleum, and the cocoa industries" to "provide social infrastructure, including schools and health care clinics to communities close to their sites of operation." *Ibid.*[4]

But, as the Second Circuit's Chief Judge Jacobs has explained, expansive ATS aiding-and-abetting liability can significantly deter and/or limit investment in developing countries:

---

[4] *See also* 74 Fed. Reg. 16,763, 16,764 (Apr. 13, 2009) (explaining that economic sanctions against three individuals involved in violence following political unrest in 2004 was not a sanction "directed against" Ivory Coast and "do[es] not generally prohibit trade or the provision of banking or other financial services to the country."); U.N. Conf. on Trade & Dev., *World Investment Report 2014* 185 (2014), *available at* http://tinyurl.com/mez7q7k (discussing the need to "increase[e] the engagement of the private sector in raising finance for, and investing in, sustainable development.").

> [I]f ATS liability could be established by knowledge of those [alleged human rights] abuses coupled only with such commercial activities as resource development, the statute would act as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts.

Presbyterian Church of Sudan v. *Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009); *see also* Pet. App. 234a–235a (Bea, J., dissenting from denial of rehearing en banc) ("the 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."). As noted above, this is an outcome that would substantially harm developing countries, depriving them of the benefits from corporate programs—including the schools, hospitals, and training programs that foreign companies bring with them. It also will deprive developing countries of billions of dollars in foreign direct investment, which leads to jobs that employ thousands of people and give developing nations exposure to technology and business practices that they might not otherwise learn.

It is precisely because of the risk of such incoherent and inconsistent foreign policy outcomes that judicial restraint is especially appropriate in the realm of ATS litigation.

First, by their very nature, ATS suits implicate grave extraterritoriality concerns that require courts to act with caution before reflexively applying U.S. law to impose liability for alleged wrongs perpetrated

overseas. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664–65 (2013). For the reasons detailed in Petitioners' brief, Pet. 24–34, this alone should foreclose Respondents' suit.

Second, ATS suits often strike at the heart of the intersection between U.S. and foreign laws. The concerns for having unwanted or unintended effects on foreign relations, intruding into matters of foreign policy or having other inadvertent collateral consequences are therefore acutely heightened. *See Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 728 (2004). And "the subject of those collateral consequences is itself a reason for a high bar to new private causes of action for violating international law …." *Sosa*, 542 U.S. at 727. "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.*[5]

Consequently, this Court has urged "judicial caution" when deciding whether, under the guise of the

---

[5] It is for this reason, among others, that the wisdom of allowing ATS aiding and abetting claims—which are not universally recognized—merits serious consideration. Indeed, Respondents (and the Ninth Circuit) seem to presume that civil aiding and abetting suits such as this can proceed through the ATS. This Court has never made such a pronouncement and this case underscores the danger of adding so-called "aiding and abetting" liability to the list of actions that can be brought through the ATS. Likewise, many foreign states do not even recognize corporate criminal liability, thus belying any suggestion that corporate liability is sufficiently "definite" to satisfy the ATS.

ATS, to punish conduct beyond "Blackstone's three primary offenses: violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Sosa*, 542 U.S. at 724–25.

Third, this Court has stressed that "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases" and our courts have "no congressional mandate to seek out and define new and debatable violations of the law of nations." *Sosa*, 542 U.S. at 727–28. Yet that is precisely what has happened here. Indeed, that is why the ATS does not permit "private parties to impose embargos or international sanctions through civil actions in United States courts." *See*, *e.g.*, *Presbyterian Church*, 582 F.3d at 264; *cf. Crosby* v. *Nat'l Foreign Trade Council*, 530 U.S. 363, 366 (2000) (holding that a Massachusetts law that "restrict[ed] the authority of its agencies to purchase goods or services from companies doing business with Burma" was invalid under the Supremacy Clause because the law threatened federal statutory objectives).

The Ninth Circuit's decision encourages plaintiffs' lawyers to stretch the law—well beyond any universally accepted norm—to convert permitted business activity into threatened liability for aiding and abetting purported international law violations. This result not only is contrary to this Court's settled law, but also contravenes U.S. policy seeking to expand U.S. trade with the developing world.

CONCLUSION

The Ninth Circuit's decision will—indeed, already has—negatively affected efforts by GMA members to improve the lives of residents in developing countries. It runs contrary to U.S. foreign policy and will cause further harm to this nation and developing countries around the world. These are the very real collateral consequences this Court warned of in *Sosa*. Because corporations, including GMA members, incorporate litigation risk into their policies and practices, the fact that this case will be remanded to the district court for further proceedings does nothing to diminish the urgent need for this Court's intervention. The petition for a writ of certiorari should be granted.

Respectfully submitted.

ANDREW S. TULUMELLO
CHRISTOPHER B. LEACH
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500

KARIN F.R. MOORE
GROCERY MANUFACTURERS ASSOCIATION
1350 I Street, Suite 300
Washington, D.C. 20005

PERLETTE M. JURA
Counsel of Record
WILLIAM E. THOMSON
GIBSON, DUNN & CRUTCHER LLP
333 South Grand Avenue
Los Angeles, CA 90071
(213) 229-7891
PJura@gibsondunn.com

Counsel for Amicus Curiae

October 21, 2015