No. 15-349

In the Supreme Court of the United States

NESTLÉ U.S.A., INC.; ARCHER DANIELS MIDLAND CO.; 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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This Court has repeatedly held that the Alien Torts Statute (ATS), 28 U.S.C. § 1350, permits a cause of action in very limited circumstances. *Kiobel* v. *Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1669 (2013); *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 714 (2004). Disregarding these admonitions, the Ninth Circuit opened the floodgates to aiding-and-abetting claims grounded in a legal theory that lacks universal acceptance in international law and based on corporate conduct that is extraterritorial in nature. In so doing, it creates or deepens three conflicts among the courts of appeals.

Respondents assert that review of this now ten-year-old case would be "premature," claiming that the Ninth Circuit has yet to rule on the *mens rea* for aiding-and-abetting liability. But the panel held the allegations here sufficient, and its ruling means that ATS plaintiffs in the Ninth Circuit can survive a motion to dismiss merely by alleging that a defendant had a profit motive and knowledge of human rights abuses in the developing country in which it does business. That standard lacks anything close to universal support in international law, directly conflicts with the specific-intent standard applied in the Second and Fourth Circuits, and threatens to chill foreign investment and impede foreign policy.

Respondents next assert that the Ninth Circuit has yet to reach a holding on extraterritoriality. That is incorrect. The panel specifically held that "*Kiobel*[] did not incorporate *Morrison*'s focus test." Pet. App. 26a. That holding is at odds with decisions of the Second and Eleventh Circuits.

Finally, respondents erroneously claim that there is no conflict on corporate liability because the Second Circuit's holding on the issue in *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) ("*Kiobel I*"), may no longer be good law. But just this month the Second Circuit reiterated that "*Kiobel I* is and remains the law of this Circuit." *In re Arab Bank, PLC Alien Tort Statute Litig.*, __ F.3d __, 2015 WL 8122895, at *4 (2d Cir. Dec. 8, 2015).

Review by this Court is plainly warranted.

I. Aiding-and-Abetting.

Respondents assert that the Ninth Circuit decision upholding the aiding-and-abetting claim did not address "whether a *mens rea* of knowledge [is] sufficient to support an aiding and abetting claim under the ATS" (Opp. 6); does not conflict with the legal standard applied by other courts of appeals; rests on "unique facts" (*id.* at 8); and will have no adverse practical consequences. Respondents are wrong on all counts, as the dissents by Judge Rawlinson and eight other judges make clear (see Pet. 8-10)—dissents that are not even mentioned, let alone addressed, by respondents.

1. The legal label that the Ninth Circuit panel applied to its analysis does not determine whether that holding should be reviewed by this Court. Rather, the questions are whether the holding conflicts with the legal rule applied by other courts—*i.e.*, whether the claim here would be dismissed if the case had been brought in the Second or Fourth Circuits—and whether the issue is important. The answer to both questions is "yes."

But respondents' argument also is wrong on its own terms: Respondents assert that the Ninth Cir-

cuit did not decide the proper *mens rea* standard, but the panel plainly applied a "knowledge" test. It held in holding the *mens rea* requirement satisfied by allegations that petitioners intended "to reduce their costs for purchasing cocoa" while knowing of child labor problems in Côte D'Ivoire. Pet. App. 18a. In other words, it is enough to allege that a defendant corporation has knowledge of a human-rights abuse from which the corporation theoretically might "obtain[] a direct benefit"—paying a lower price for cocoa. *Id.* at 19a. That is a knowledge standard, no matter how hard respondents, and the Ninth Circuit majority, argue to the contrary. See *id.* at 33a (Rawlinson, J., dissent).

Notably, respondents' counsel in this case—seeking rehearing of a Second Circuit decision reaffirming the specific-intent *mens rea* for ATS aiding and abetting—listed the decision below as a case in which a court has "applied a knowledge standard." Petition for Panel Rehearing and Rehearing En Banc, *Balintulo* v. *Ford Motor Co.*, No. 14-4104-cv, at 12 (2d Cir. Aug. 10, 2015).

2. Respondents next assert (at 8) that there is no conflict in the circuits because *Presbyterian Church of Sudan* v. *Talisman Energy*, 582 F.3d 244 (2nd Cir. 2009), was decided at the summary-judgment stage, based on a factual record. But that difference is irrelevant; what matters is the conflicting legal standards. The Second Circuit held that the requisite *mens rea* is specific intent; knowledge is insufficient, even where the human rights abuses "facilitated the [defendant's] enterprise." *Id.* at 264. The Second Circuit would have rejected the allegations in this case at the motion-to-dismiss stage because they do not meet that standard.

Were there any doubt, the Second Circuit eliminated it in its subsequent decision at the motion-to-dismiss stage in *Balintulo* v. *Ford Motor Co.*, 727 F.3d 150 (2d Cir. 2015). The plaintiffs there alleged that IBM developed technology for a government ID program that was "an essential component of the system of racial separation in South Africa." *Id.* at 169. There is no question that, if those allegations were true, IBM benefitted from its sale of such technologies and therefore benefitted from the apartheid system. Yet the Second Circuit affirmed dismissal of the complaint because it "allege[d], at most, that the company acted with knowledge that its acts might facilitate the * * * apartheid policies." *Id.* at 170. The split is square.

The conflict with the Fourth Circuit is just as clear. As respondents acknowledge (at 9), in *Aziz* v. *Alcolac,* 658 F.3d 388, 390 (4th Cir. 2011), the Fourth Circuit expressly adopted the Second Circuit's rule and affirmed the dismissal of an ATS complaint at the pleading stage for failure to allege specific intent. Thus, contrary to respondents' assertion, there is no doubt that the Fourth Circuit would have dismissed respondents' complaint.

Nor is the conflict somehow undermined by respondents' claim (at 7) that petitioners had lobbied against federal regulation of labor practices in the cocoa industry. Respondents neglect to mention that petitioners spearheaded an alternative, voluntary system designed to combat child labor—a system that has proved highly effective in reducing the problem. See Amicus Br. of National Confectioners Association *et al.* 4, 8-15. That hardly suggests an intent to perpetuate illegal labor practices, even if lobbying

were a valid basis for an ATS suit—which it is not. Pet. 18-19 & n.3.

3. Respondents also claim that the decision below rests on "unique facts." Opp. 8. That is simply wrong.

The panel majority held that a company that purchases goods in a developing country has the requisite *mens rea* for aiding and abetting so long as it has knowledge of human-rights violations in the market and a goal of minimizing costs. Those allegations can be replicated easily, because agricultural products and other raw materials frequently are purchased in developing nations in which such violations are present.

The potential reach of the Ninth Circuit's rule is extraordinary: "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." Amicus Br. of Chamber of Commerce *et al.* 21; see also Amicus Br. of Grocery Manufacturers of America 6. As the *en banc* dissenters pointed out, this theory would have subjected "buyers of Soviet gold" to liability for aiding and abetting "gulag prison slavery." Pet. App. 234a.

That result is directly contrary to the U.S. government's policy of supporting commercial engagement, and means the elimination of beneficial training and other efforts in which U.S. companies engage to alleviate labor abuses. Indeed, petitioners here did just that, and respondents' complaint paradoxically cited it as evidence of their complicity in the abuses.

Nor does it matter that respondents might have a chance to amend their complaint on remand. Such an amendment, if it ever materialized, would not

change the state of the law in the Ninth Circuit with respect to aiding-and-abetting liability. And, in any event, respondents have repeatedly admitted that they cannot plead "facts sufficient" to meet a specific-intent requirement. Resp. CA Br. 48; see also Pet. 16 n.2.

4. Respondents also try to downplay the practical consequences of the Ninth Circuit's opinion. They begin by asserting (at 11) that, because some courts in the United States and other advanced economies sometimes apply the equivalent of a knowledge standard in criminal cases without adverse investment consequences, there is no reason to think a radical expansion of the ATS will chill investment in *developing* countries. They speculate (at 13) that the threat of ATS litigation is "just one among many considerations that drive investment decisions." That is wrong for at least three reasons.

First, there is no meaningful parallel between the enforcement of state and national laws by public prosecutors and the enforcement of claimed standards of international law by unaccountable plaintiffs' lawyers. See *Sosa*, 542 U.S. at 727 (caution required in recognizing an ATS cause of action given the absence of "the check imposed by prosecutorial discretion").

Second, the balance of risks and incentives facing investors in the world's leading economies cannot be compared to conditions in the developing world. The amicus briefs from industry groups underscore the significant impact of the Ninth Circuit's decision on the business community. Amicus Br. of Chamber of Commerce *et al.* 15-16, 21-22; Amicus Br. of Grocery Manufacturers of America 6-14.

Third, the claimed practices of a handful of jurisdictions—even if established—would not come close to demonstrating the universal acceptance required to recognize a cause of action under *Sosa*, as discussed in the petition and below.

These concerns are not abated by respondents' suggestion (at 11 n.2) that the Eleventh Circuit has applied a knowledge standard without triggering a flood of ATS suits. Respondents cite *Doe* v. *Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), petition for certiorari pending, No. 15-707 (filed Nov. 25, 2015), but *Drummond* rejected an ATS claim as improperly extraterritorial; its holding did not turn on *mens rea*. And the case *Drummond* cited, in dicta, as endorsing a knowledge standard concerned a soldier accused of helping a death squad select candidates for extrajudicial execution. *Id.* at 608-609 (citing *Cabello* v. *Fernandez-Larios*, 402 F.3d 1148, 1158-1159 (11th Cir. 2005)). That can hardly be read as an endorsement of knowledge-based aiding-and-abetting liability for a corporation that participates in routine commercial activities with knowledge that others acting earlier in the supply chain may be engaged in labor violations. To the extent *Drummond* or *Cabello* could be stretched that far, they underscore the urgent need for this Court's intervention.

Respondents are left with the weak assertion (at 13) that there is no need to fear an increase in ATS suits because *Kiobel* will screen some cases out. But *Kiobel*'s impact in the Ninth Circuit has been undermined by the decision in this case. See *infra* Part II. And the fact that the door has been closed on unacceptably extraterritorial suits does not warrant opening a window to suits based on knowledge of a third party's human-rights abuses.

5. Respondents finally argue (at 14-19) that knowledge is the appropriate *mens rea* for aiding-and-abetting liability. But that defense of a legal rule rejected by the Second and Fourth Circuits is a reason to grant review, and in any event, respondents are wrong.

Respondents insist that the knowledge standard has gained universal acceptance since Judge Katzmann rejected that contention in his concurring opinion in *Khulumani* v. *Barclay Nat'l Bank Ltd*, 504 F.3d 254, 275 (2d Cir. 2007), aff'd under 28 U.S.C. § 2109 *sub nom. Am. Isuzu Motors* v. *Ntsebeza*, 553 U.S. 1028 (2008). It would be remarkable if that standard could have garnered universal accord in eight years, and in fact, it has not. The Second Circuit reiterated that *purpose*—not knowledge—is the standard just five months ago in *Balintulo*, rejecting an identical argument that the knowledge standard now has universal acceptance.

Moreover Judge Katzmann's *Khulumani* concurrence rested largely on the Rome Statute establishing the International Criminal Court (ICC). 504 F.3d at 275. That treaty authorizes aiding-and-abetting liability only if the defendant provided assistance "[f]or the purpose of facilitating the commission of [a] crime." Rome Statute, art. 25(3)(c).

Contrary to respondents' argument (at 18), the Rome Statute's "purpose" requirement does not somehow mean "knowledge." Respondents cite *Rosemond* v. *United States*, 134 S. Ct. 1240 (2014), but *Rosemond* made very clear that it "did not deal * * * with defendants who incidentally facilitate a criminal venture rather than actively participat[ing] in it." *Id.* at 1249 n. 8. The Court reiterated Judge Learned Hand's "canonical formulation

of th[e] needed state of mind" for aiding-and-abetting liability: "a defendant must not just in some sort associate himself with the venture, but also participate in it as in something that he wishes to bring about and seek by his action to make it succeed." *Id.* at 1248 (internal quotation marks omitted).

Further, one of the very sources respondents quote in support of the knowledge standard states that "[i]n essence, what is required [under the Rome Statute] for this form of responsibility is that the person * * * *intends* to facilitate the commission of the crime." *Prosecutor* v. *Ble Goude*, Case No. ICC-02/11-2/11 ¶ 167 (Dec. 11, 2014) (emphasis added).

In sum, the circuit split is clear, the importance of the question is obvious, and the departure from this Court's precedent calls out for correction.

II. Extraterritoriality.

The petition (Pet. 24-34) and the dissent from denial of rehearing *en banc* (Pet. App. 243a-249a) explain that the court of appeals failed to follow *Kiobel*'s unmistakable directive that *Morrison* v. *National Australian Bank, Ltd.*, 561 U.S. 247, 248 (2010), supplies the test for determining when an ATS suit is impermissibly extraterritorial. In so doing, the Ninth Circuit broke with the Second and Eleventh Circuits, both of which apply *Morrison*'s focus test.

Respondents do not dispute the circuit conflict over the applicability of *Morrison*.[1] Nor do they deny

[1] One of respondents' counsel recently filed a petition seeking review of the Eleventh Circuit's decision in *Doe* v. *Drummond Co.*, identifying the same post-*Kiobel* split (at pages 28-32 of

that their allegations require dismissal under the ATS extraterritoriality standard, based on *Morrison*, that is applied by the Second and Eleventh Circuits.

Indeed, respondents ignore the Ninth Circuit's central conclusion that *Kiobel* "did not incorporate *Morrison*'s focus test." Pet. App. 26a. *Morrison* is cited *not once* in the brief in opposition—even though it is the *only* decision that *Kiobel* invokes to explain the test for extraterritoriality.

Respondents suggest that perhaps "the Ninth Circuit will [not] adopt an approach in conflict with [other Circuits']" (Opp. 21). But that result is not possible: the Ninth Circuit already has held inapplicable the foundational precedent on which *Kiobel* and the Second and Eleventh Circuits' post-*Kiobel* ATS jurisprudence rest.

Respondents next suggest that the district court should first try to apply the Ninth Circuit's amorphous and undefined "touch and concern" test to unspecified amendments to the complaint. That exercise would be pointless for two reasons.

First, the Ninth Circuit has precluded the district court from applying the *Morrison* test for extraterritoriality that *Kiobel* prescribes. At best, the district court might reject an amended complaint under some other "touch and concern" test, but gambling on the district court's reaching the right result for the

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that petition) described here. This case, however, allows the Court to consider two other important and related ATS questions. Moreover, counsel for the petitioner in *Drummond* has been found to have engaged in misconduct in that case, compromising *Drummond* as a vehicle. See *Drummond, Inc.* v. *Collingsworth*, No. 11-cv-3695, Doc. 417 (N.D. Ala. Dec. 7, 2015).

wrong reason is no way to address a circuit split. The Ninth Circuit's flawed approach would remain in place and govern future cases.

Second, amending the complaint would be pointless. Respondents avoid providing even a hint of what the amended allegations might be and do not contend that an amended complaint could satisfy *Morrison*. That is because the critical question is the location of the alleged violation of international law, as the Second and Eleventh Circuits have held. No new allegations could change the fact that the alleged violations of the law of nations here—both the alleged forced labor and the alleged acts of aiding and abetting—all took place in Africa. See Pet. 29-30.[2]

The Court should review and reject the Ninth Circuit's misreading of *Kiobel*.

III. Corporate Liability.

Respondents contend (at 22-25) that there is no clear split because the Second Circuit has retreated from its view—set forth in *Kiobel I*—that ATS actions may not be asserted against corporate defendants because there is no international consensus on corporate liability for international law violations. Respondents state (at 25): "Until the Second Circuit determines whether its original *Kiobel* decision * * * is still good law there is no conflict in the Circuits for this Court to resolve."

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[2] Respondents mention petitioners' protected petitioning activity in the United States (Opp. 4), but later concede that such activity is not itself alone a proper "basis of liability" (*id.* at 7 n.1).

The Second Circuit recently satisfied respondents' condition for this Court's review, upholding dismissal of an ATS claim on the "sole[]" ground that "federal courts lack jurisdiction over ATS suits against corporations," expressly clarifying that *Kiobel*'s rejection of corporate ATS liability "remains authoritative." *In re Arab Bank,* 2015 WL 8122895, at *6, *10. The court specifically reaffirmed that its decision in "*Kiobel I* is and remains the law of this Circuit." *Id*. at *4. Indeed, it suggested that the corporate liability issue may be ripe for this Court's review, "especially in light of the divergence of federal case law since" *Kiobel*. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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