No. 19-1530

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ESTATE OF ARTURO GIRON ALVAREZ, *et al.*,
Plaintiffs-Appellees,

v.

THE JOHNS HOPKINS UNIVERSITY, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
for the District of Maryland,
No. 1:15-cv-00950-TDC (Hon. Theodore D. Chuang)

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 19-1530 Caption: Estate of Arturo Giron Alvarez v. The Johns Hopkins University

Pursuant to FRAP 26.1 and Local Rule 26.1,

The Chamber of Commerce of the United States of America
(name of party/amicus)

who is amicus curiae, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(a)(2)(B))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ John B. Bellinger, III Date: August 5, 2019

Counsel for: The Chamber of Commerce of the United States of America

CERTIFICATE OF SERVICE

****

I certify that on August 5, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ John B. Bellinger, III (signature)

August 5, 2019 (date)

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America 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.

The Chamber has a substantial interest in the issues presented in this case. Numerous businesses 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, sometimes for events that transpired many decades ago. U.S. companies have been named as defendants in dozens of ATS lawsuits. These suits often last a decade or more, imposing substantial legal and reputational costs on U.S. corporations that operate in foreign countries and chilling further investment.

[1] No party's counsel authored this brief in whole or in part. No party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than the Chamber, its members, or its counsel made such a monetary contribution. All parties have consented to the filing of this brief.

The Chamber submits this brief solely to address the legal question of whether U.S. corporations are proper defendants under the ATS. The Chamber can offer a helpful perspective on this issue. The Chamber has participated as *amicus curiae* in dozens of cases involving the ATS's reach in the Supreme Court and other federal courts. *E.g.*, Br. as Amicus Curiae of The Chamber of Commerce of the United States, *Jesner v. Arab Bank, PLC*, No. 16-499 (U.S. June 27, 2017).

INTRODUCTION AND SUMMARY OF ARGUMENT

This Circuit has not previously decided whether U.S. corporations are proper defendants under the ATS.[2] Prior to the Supreme Court's decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), which held that liability under the ATS does not extend to foreign corporations, other circuits had split on whether the ATS provides for *any* corporate liability.[3] This Court will be just the second court of appeals to consider whether the reasoning of *Jesner* forecloses ATS suits against domestic corporations. Only the Ninth Circuit has ruled on the issue since *Jesner*, and it did so without analyzing the Supreme Court's reasoning or its effect on existing circuit precedent. *Doe v. Nestle, S.A.* (*Nestle II*), 906 F.3d 1120, 1124 (9th Cir. 2018), *opinion amended and superseded on denial of reh'g*, 929 F.3d 623 (9th Cir. 2019).

[2] *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 525 n.5 (4th Cir. 2014).

[3] *Compare Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel I*), 621 F.3d 111 (2d Cir. 2010), *aff'd*, 569 U.S. 108, 133 S. Ct. 1659 (2013), *with, e.g.*, *Doe I v. Nestle USA, Inc.* (*Nestle I*), 766 F.3d 1013 (9th Cir. 2014).

In contrast, the district court for the District of Columbia recently dismissed an 18-year-old ATS suit against Exxon Mobil on the basis that, after *Jesner*, Exxon could not be held liable under the ATS. *Doe I v. Exxon Mobil Corp.*, No. 01-cv-1357, 2019 WL 2343014, at *7 (D.D.C. June 3, 2019) (Lamberth, J.) ("The reasoning of the five Justices in *Jesner* leads this Court to believe it is appropriate to re-examine whether Exxon can be held liable under the ATS in this suit.").

The Supreme Court repeatedly has emphasized the narrow scope of the ATS and the need to tread carefully in recognizing new forms of ATS liability. In *Sosa v. Alvarez-Machain*, the Court limited the types of claims that can be recognized under the ATS to those based on violations of "specific, universal, and obligatory" norms under customary international law. 542 U.S. 692, 732 (2004). The Court explained that ATS claims give rise to significant separation-of-powers and foreign relations concerns and thus must be subject to "vigilant doorkeeping" by the courts. *Id.* at 727-29. In *Kiobel v. Royal Dutch Petroleum Co.* (*Kiobel II*), the Court barred suits that involve an extraterritorial application of the ATS unless the claims "touch and concern" the territory of the United States with sufficient force to displace the presumption against extraterritoriality. 569 U.S. 108, 124-25 (2013). And in *Jesner*, the Court's most recent statement on the scope of ATS liability, the Court held that foreign corporations are not proper defendants in ATS suits. 138 S. Ct. at 1407.

Although the holding in *Jesner* was limited to liability of foreign corporations, its reasoning forecloses ATS liability for domestic corporations, as well. *First*, under separation-of-powers principles, courts may not create or extend a private right of action where "there are sound reasons to think that Congress might doubt the efficacy or necessity of a damages remedy." *Id.* at 1402 (quoting *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017)). This principle applies with particular force in the ATS context, given that "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 1402-03. *Second*, in cases that risk "triggering . . . serious foreign policy consequences," judicial caution dictates that the courts defer to the political branches to decide whether a private right of action is appropriate. *Id.* at 1406-07 (quoting *Kiobel II*, 569 U.S. at 124). Here, either line of reasoning requires dismissal of plaintiffs' ATS claims.

Moreover, recognizing ATS liability in cases like this one would run afoul of *Sosa*'s requirement that courts consider the "practical consequences" of expanding ATS jurisdiction. 542 U.S. at 732-33. As modern ATS suits have shown, the nature of ATS litigation allows plaintiffs to subject corporations to enormous economic and reputational costs over a period of years or decades, even when the underlying claims are meritless and ultimately will be—or, under the proper standard, should be—dismissed. In addition to imposing high costs, allowing ATS liability for U.S.

corporations where it is barred for their foreign counterparts would operate as a discriminatory tax on U.S. corporations engaged in global business activities, harming U.S. competitiveness and potentially the global economy. The threat of litigation based on overseas business activities also chills investment and, contrary to policies of the Executive Branch, deters U.S. corporations from operating in developing countries, where their presence could contribute to local economies and enhance the rule of law.

Because no private right of action is available under the ATS for plaintiffs' claims, defendants are entitled to judgment as a matter of law. This Court should reverse the decision below.

ARGUMENT

I. The Reasoning of *Jesner* Forecloses ATS Liability for U.S. Corporations

Applying the Supreme Court's analysis in *Jesner*, this Court should hold that U.S. corporations may not be sued under the ATS. Because the defendant in *Jesner* happened to be a foreign corporation, the Supreme Court had no occasion to decide the status of domestic corporate defendants, but the reasoning of that decision forecloses ATS suits against both.

Jesner provides a roadmap for dismissal under the second step of *Sosa*'s two-step framework for evaluating ATS claims. Justice Kennedy summarized this framework as follows:

> Before recognizing a common-law action under the ATS, federal courts must apply the test announced in *Sosa*. An initial, threshold question is whether a plaintiff can demonstrate that the alleged violation is "of a norm that is specific, universal, and obligatory." And even assuming that, under international law, there is a specific norm that can be controlling, it must be determined further whether allowing this case to proceed under the ATS is *a proper exercise of judicial discretion*, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed.

Jesner, 138 S. Ct. at 1399 (citations omitted) (emphasis added); *see also id.* at 1420 (Sotomayor, J., dissenting) (explaining that if the "threshold hurdle" of recognizing a "specific, universal, and obligatory" norm is satisfied, "a court should consider whether allowing a particular case to proceed is an appropriate exercise of judicial discretion").

The *Jesner* majority joined in portions of Justice Kennedy's opinion that analyze the question of foreign corporate liability under *Sosa*'s second step, holding that separation-of-powers and foreign relations concerns require Congress, not the courts, to decide whether to impose ATS liability on foreign corporate defendants. *Id.* at 1402-03, 1406-07; *see also id.* at 1402 (plurality opinion) (explaining that the Court "need not resolve" the issues under *Sosa* step one and would instead "turn to *Sosa*'s second question").[4] The Court's reasoning leads to the same conclusion for U.S. corporations, for the reasons discussed below.

[4] Although this *amicus* brief focuses on the reasoning of the *Jesner* majority, which did not address the first step of the *Sosa* framework, defendants separately are (continued . . .)

A. *Jesner* Requires the Courts to Defer to Congress in Extending ATS Liability to U.S. Corporations

The Court's analysis in *Jesner*, properly applied, forecloses suits against domestic as well as foreign corporations under the ATS. The district court's cramped analysis ignores controlling reasoning from the majority opinion, emphasizes non-dispositive differences between the plurality and concurring opinions, and adopts an expansive view of ATS liability that is inconsistent with the Supreme Court's clear instruction to tread cautiously in ATS cases.

As the Supreme Court explained in *Jesner*, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 1402 (quoting *Sosa*, 542 U.S. at 727). This principle applies with particular force in contexts that raise separation-of-powers and foreign policy concerns, which are "inherent in" ATS litigation. *Id.* at 1403. Indeed, in the ATS context, "foreign-policy and separation-of-powers concerns" are so pronounced that "there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing new causes of action under the ATS." *Id.*

The dispositive principle in *Jesner* was the primacy of Congress in creating causes of action that implicate separation-of-powers and foreign relations concerns. *Id.* at 1402-03. Specifically, the Court recognized that its recent precedents, in line

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entitled to dismissal under *Sosa* step one for the reasons discussed in appellants' brief. *See* Appellants' Br. 32-39.

with *Sosa*, "cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law" and that "'the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.'" *Id.* at 1402 (quoting *Ziglar*, 137 S. Ct. at 1857). The Court further reasoned that the "separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS" because "[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* at 1403.

Rather than applying these principles to the ATS claims here, the district court engaged in a blinkered vote-counting exercise that ignores the Supreme Court's instruction to tread carefully in ATS cases. *See* JA407-19 (Mem. Op. at 4-16). After summarizing the opinions of the *Jesner* majority, the plurality, and the concurring justices, the district court concluded that the *failure* of those opinions to resolve or tailor their reasoning to the question of domestic corporate liability—an issue not presented by the case, which named only a single foreign defendant—"prevents a conclusion that domestic corporate liability in an ATS case has effectively been deemed unavailable." JA417 (*Id.* at 14).

By focusing on the issues the Justices *did not* reach (and did not have to reach), the district court failed to recognize that the legal principle that was dispositive in *Jesner*—namely, the primacy of Congress in creating causes of action that implicate

separation-of-powers and foreign policy concerns—also resolves the question for domestic corporations sued under the ATS. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 67 ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."); *United States v. Danielczyk*, 683 F.3d 611, 616-17 (4th Cir. 2012) (applying Supreme Court precedent involving non-profit corporations in a case involving for-profit corporations, where that precedent "st[ood] for the proposition" that "all corporations implicate the asserted government interests" relevant to the inquiry).

For at least three reasons, the separation-of-powers principles that dictated the result in *Jesner* apply equally to U.S. corporations.

First, to the extent there is any "congressional guidance in exercising jurisdiction," *Sosa*, 542 U.S. at 731, that guidance weighs against extending ATS liability to U.S. corporations. It is undisputed that Congress has not created a cause of action permitting plaintiffs to sue corporations under the ATS. On the contrary, the only cause of action Congress *has* created relating to the ATS—the Torture Victim Protection Act, 28 U.S.C. § 1350 note—expressly excludes corporations from the scope of possible defendants. As the *Jesner* plurality explained, the fact that TVPA liability is limited to individuals "reflects Congress' considered judgment of the proper structure for a right of action under the ATS." 138 S. Ct. at 1403 (plurality opinion). Together, these markers of congressional intent—first, that

Congress has so far declined to create an express cause of action against corporations under the ATS, and, second, that it limited the only ATS-related cause of action it *did* create to individual defendants—provide "sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" against U.S. corporations. *Id.* at 1402 (quoting *Ziglar*, 137 S. Ct. at 1858).

Second, the Supreme Court's *Bivens* precedents strongly suggest that Congress, not the courts, must decide whether to extend ATS liability to corporate defendants. *See Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971); *Sosa*, 542 U.S. at 743 (Scalia, J., concurring in part and concurring in the judgment) (explaining that the implied cause of action under *Bivens* "provides perhaps the closest analogy [to the ATS]"). In *Jesner*, the Court cited *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), for the point that the judicial caution reflected in its precedents "extends to the question whether courts should exercise judicial authority to mandate a rule that imposes liability upon artificial entities like corporations." 138 S. Ct. at 1402-03. The Court explained in *Malesko* that permitting corporate liability "would have been a 'marked extension' of *Bivens* that was unnecessary to advance its purpose of holding individual officers responsible for 'engaging in unconstitutional wrongdoing.'" *Id.* at 1403 (quoting *Malesko*, 534 U.S. at 74). The Court further observed that "[w]hether corporate defendants should be subject to suit was 'a question for Congress, not us, to decide.'" *Id.* (quoting

Malesko, 534 U.S. at 72). This Court should adopt the same analysis here, particularly because the *Jesner* Court made clear that it views its *Bivens* precedents as the appropriate analogue. *Id.* (concluding, immediately after discussing *Malesko*, that "[n]either the language of the ATS nor the precedents interpreting it support an exception to these general principles in this context").

Third, *Jesner* shows that *all* ATS cases—not just those involving foreign corporate defendants—implicate the kinds of "foreign-policy and separation-of-powers concerns" that require deference to Congress in creating or expanding a private right of action. *Id.* Nowhere in its separation-of-powers analysis does the Court distinguish between domestic and foreign corporations. *See, e.g.*, *id.* ("the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS"); *id.* ("That the ATS implicates foreign relations 'is itself a reason for a high bar to new private causes of action for violating international law.'" (quoting *Sosa*, 542 U.S. at 727)); *id.* ("In *Sosa*, the Court emphasized that federal courts must exercise 'great caution' before recognizing new forms of liability under the ATS." (quoting *Sosa*, 542 U.S. at 728)). Those animating concerns apply equally to foreign and domestic corporations, warranting dismissal here.

This Court should hold that the decision to extend ATS liability to U.S. corporations, like the decision to extend ATS liability to foreign corporations, "is one better left to legislative judgment." *Id.* at 1402 (quoting *Sosa*, 542 U.S. at 727).

B. *Jesner* Also Forecloses ATS Suits Like This One Because Such Suits Frustrate, Rather Than Further, the ATS's Purpose of Avoiding Foreign Strife

Alternatively, this Court should hold that the ATS does not provide for corporate liability in cases like this one because the Supreme Court's decisions foreclose ATS suits that frustrate, rather than further, the statute's purpose of avoiding foreign strife. Like suits against foreign corporations, suits against U.S. corporations for alleged human rights abuses that occurred in the territory of another sovereign risk "triggering . . . serious foreign policy consequences." *Id.* at 1407 (quoting *Kiobel II*, 569 U.S. at 124). As the *Jesner* Court noted, "courts are not well suited to make the required policy judgments that are implicated by corporate liability" in cases that raise these concerns. *Id.*; *see also* Appellants' Br. 21-25.

Congress enacted the ATS to safeguard the United States' relations with foreign nations, *see Jesner*, 138 S. Ct. at 1397; *Kiobel II*, 569 U.S. at 123-24; *Sosa*, 542 U.S. at 715-19, but ATS suits that seek to hold U.S. corporations responsible for overseas human rights violations undermine that goal. Due to both the pleading requirements of the ATS and the practical development of ATS litigation in recent decades, suits against U.S. corporations tend to fit a familiar mold: large groups of

plaintiffs alleging wide-scale human rights abuses committed on foreign soil, often with the purported participation or complicity of a foreign government.[5] Even when plaintiffs do not allege direct involvement by a foreign government, the nature of the claim implies, at least, that the corporation was allowed to commit or aid in horrific crimes with impunity on foreign soil. Thus, these lawsuits—though nominally brought against U.S. corporations—require U.S. courts to consider the action or inaction of foreign governments and potentially brand them as complicit in universally condemned acts. *See Jesner*, 138 S. Ct. at 1404 (plurality opinion) (explaining that "even for international-law norms that do not require state action, plaintiffs can still use corporations as surrogate defendants to challenge the conduct of foreign governments"). Past ATS lawsuits against U.S. companies have required, or would have required, U.S. courts to review the actions of Israel, China, South Africa, Indonesia, and Nigeria, among others.[6]

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[5] In some cases, plaintiffs have specifically stated their intent to use the ATS to challenge the actions of foreign governments. *See* Center for Constitutional Rights, *Corrie et al. v. Caterpillar*, https://bit.ly/2YLdDtk ("*Corrie v. Caterpillar* was a federal lawsuit filed against Illinois-based Caterpillar, Inc. on behalf of the parents of Rachel Corrie and four Palestinian families whose relatives were killed or injured when Caterpillar bulldozers demolished their homes . . . The case is representative of CCR's commitment to challenge human rights violations against civilians in Palestine, *whether they are committed by the Israeli government or corporations complicit in those violations*." (emphasis added)).

[6] *See, e.g., Doe I v. Exxon Mobil Corp.*, No. 01-cv-1357, 2019 WL 2343014, at *1-2 (D.D.C. June 3, 2019) (alleging torture, sexual assault, killing, and other abuse by members of the Indonesian military who worked as security personnel for Exxon);

(continued . . .)

That is true of plaintiffs' claims here.[7] The allegations in the Third Amended Complaint expressly implicate the Guatemalan government. *See, e.g.*, JA201 (3d Am. Compl. ¶ 366) ("Guatemala was an ideal location for the Experiments . . . [Defendants] had already established an outpost there and . . . had connections with national and local government officials . . . These officials were highly cooperative

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Doe I v. Cisco Systems, Inc., 66 F. Supp. 3d 1239, 1241-42 (N.D. Cal. 2014) (bringing claims against Cisco for human rights abuses in China at the hands of the Chinese Communist Party and Public Security officers); *Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1120 (9th Cir. 2010) (seeking to hold Chevron liable after Nigerian Government Security Forces allegedly shot protestors on an oil platform operated by Chevron's Nigerian subsidiary); *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 977 (9th Cir. 2007) (alleging that Israeli Defense Forces used bulldozers manufactured by Caterpillar to demolish homes in the Palestinian territories, causing deaths and injury); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 542, 548 (S.D.N.Y. 2004) (seeking to hold "a slew of multinational corporations that did business in apartheid South Africa" liable for "forced labor, genocide, torture, sexual assault, unlawful detention, extrajudicial killings, war crimes, and racial discrimination" that occurred under the apartheid regime) (subsequent history omitted); *Doe v. Unocal Corp.*, 27 F. Supp. 2d 1174, 1178 (C.D. Cal. 1998) (suing corporate and individual defendants, including U.S. corporation Unocal, for alleged human rights abuses "in furtherance of" a gas pipeline project between the corporate defendants and a state-owned energy company in Burma), *aff'd and adopted*, 248 F.3d 915 (9th Cir. 2001).

[7] The district court's analysis of whether ATS suits against U.S. corporations are likely to lead to diplomatic strife was conclusory and unpersuasive. *See, e.g.*, JA419 (Mem. Op. at 16) (explaining that in suits against U.S. corporations, compared to suits against foreign corporations, "the need for judicial caution is markedly reduced"); *id.* ("Unlike a suit against a foreign corporation as in *Jesner*, which can cause, and has caused in other cases, diplomatic tension or objections from foreign governments that a suit is an 'affront' to their sovereignty, suits against U.S. corporations likely will not generate such complaints." (internal citations omitted)); JA420 (*Id.* at 17) ("[A]llowing domestic corporate liability would further the purposes of the ATS, by affording a remedy in U.S. courts to foreign nationals for violations of international law by a U.S. corporation.").

and eager to assist."); JA217 (*Id.* ¶ 426) (alleging that Dr. Soper, the "Responsible Investigator" for the Guatemala Experiments, "met with Guatemalan government officials"). The Complaint goes so far as to suggest that the support of the Guatemalan government was necessary to defendants' alleged malfeasance. *See* JA90 (*Id.* ¶ 5) ("[Agents of defendants] used their influence and connections to obtain approval for the Guatemala Experiments, convince the government to provide the *resources they needed* (researchers, facilities, and *government-to-government connections*), and implement the Guatemala Experiments." (emphasis added)). Thus, although plaintiffs have sued U.S. corporations, their claims implicate—and will require a U.S. court to review—the conduct of a foreign government.

For the reasons discussed above, ATS suits like this one—cases that seek to hold U.S. corporations liable for human rights abuses committed in the territory of another sovereign—carry a high risk of provoking diplomatic strife. "To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations,'" particularly where the acts of the foreign government were "done within its own territory." *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303-04 (1918). In such circumstances, recognizing domestic corporate liability "would not only fail to meaningfully advance the objectives of the ATS, but . . . would also lead to precisely those 'serious consequences in

international affairs that the ATS was enacted to avoid.'" *Jesner*, 138 S. Ct. at 1412 (Alito, J., concurring in part and concurring in the judgment) (quoting *Sosa*, 542 U.S. at 715).

These principles hold true even when a *particular* ATS suit against a U.S. corporation has not yet generated serious diplomatic tensions. The position a foreign government takes at the beginning of a litigation may not be the same as the one it takes years later. Domestic politics and country conditions may evolve; relations with the United States may change; and developments in the litigation itself, such as arguments raised in filings and the discovery sought by the parties, may affect the foreign government's views. Moreover, a rule that conditions dismissal of an ATS action on a finding of *existing* diplomatic strife would be at odds with the ATS's *prospective* purpose of "avoid[ing] foreign entanglements." *Id.* at 1397. For these reasons, this Court should conclude that Congress did not intend the ATS to cover "cases like this one." *See id.* at 1407 (holding that "foreign corporate defendants create unique problems" and that "courts are not suited to make the required policy judgments that are implicated by corporate liability in cases like this one").

Extending ATS liability to U.S. corporations would "[allow] 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." *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 947 (9th Cir. 2015) (Bea, J., dissenting). These foreign

affairs decisions are not the judiciary's to make, and the ATS is not a tool that private parties may wield to dictate foreign policy. *See Doe I v. Exxon Mobil Corp.*, No. 01-cv-1357, 2019 WL 2343014, at *14 (D.D.C. June 3, 2019) ("Plaintiffs have caused foreign relations tensions by using the ATS as a sword in this case, but the ATS was enacted to shield the U.S. from such diplomatic imbroglios."). Here, "in light of all the concerns that must be weighed before imposing liability," this Court should defer to the political branches to make the required policy judgments. *Jesner*, 138 S. Ct. at 1407.

C. This Court Should Apply the Reasoning of *Jesner* to Decide Whether Domestic Corporate Liability Is Available Under the ATS

In deciding whether the claims here can proceed, this Court should follow the reasoning of *Jesner*, which changed the standard by which courts evaluate whether particular defendants may be sued under the ATS.

As Judge Lamberth recently recognized in *Doe I v. Exxon Mobil Corp.*, applying the framework set forth in *Jesner* is not optional. *See* 2019 WL 2343014, at *7-14 (following *Jesner*'s roadmap to dismiss claims against Exxon Mobil, a U.S. corporation). Judge Lamberth explained that it was "appropriate to re-examine whether Exxon can be held liable under the ATS in this suit" based on "the reasoning of the five Justices in *Jesner*," despite a prior decision of the D.C. Circuit rejecting Exxon's corporate liability arguments and allowing the ATS claims to proceed. *Id.*

at *7. Applying that framework to the ATS claims against Exxon, Judge Lamberth held that Exxon was not a proper ATS defendant and dismissed the claims.

A recent decision of the Ninth Circuit illustrates the pitfalls of narrowly construing *Jesner*'s holding without accounting for its logic. Before *Jesner*, the Ninth Circuit had held that "there is no categorical rule of corporate immunity or liability"; rather, such "analysis proceeds norm-by-norm." *Nestle I*, 766 F.3d 1013, 1022 (9th Cir. 2014) (citing *Sarei v. Rio Tinto PLC*, 671 F.3d 736, 747-48 (9th Cir. 2011) (*en banc*), *vacated on other grounds*, 569 U.S. 945 (2013)). The Supreme Court then decided *Jesner*, holding that there *is* a categorical prohibition on ATS liability for at least one class of defendants: foreign corporations. 138 S. Ct. at 1407. Notwithstanding the clear impact of *Jesner* on the validity of *Nestle I*, however, the Ninth Circuit panel in *Nestle II* disposed of the corporate liability issue in a single sentence, holding that "*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations." *Nestle II*, 906 F.3d 1120, 1124 (9th Cir. 2018).

Six judges dissented when the full court declined to revisit that decision. The dissenting judges observed that the panel majority had avoided the issue of whether corporations can ever be proper ATS defendants "by relying on discredited circuit

precedent."[8] *Doe v. Nestle, S.A.*, 929 F.3d 623, 627 (9th Cir. 2019) (Bennett, J., dissenting). The dissenting judges explained:

> In holding that foreign corporate defendants are categorically not amenable to suit under the ATS, *Jesner* was explicit that federal courts can and must—contrary to *Nestle I*—determine whether certain categories of defendant are beyond the reach of an ATS claim. The panel majority's application of *Nestle I* to the corporate defendants here, post-*Jesner*, was at best incomplete and at worst simply wrong.

Id. at 628 (citations omitted).

As the dissenting judges correctly recognized, *Jesner* provides the controlling framework for questions of both domestic and foreign corporate liability under the ATS. *See id.* at 627 ("*Jesner* changed the standard by which we evaluate whether a class of defendants is amenable to suit under the ATS."). Thus, although the Ninth Circuit has addressed the question of domestic corporate liability since *Jesner*, its *Nestle* decisions—which the district court cited in support of its own *Jesner* analysis in the decision below—are based on a flawed and incomplete application of *Jesner*, and they are of minimal persuasive value.[9] This Court, like

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[8] Another two judges joined Part II of the dissent, which addressed the issue of extraterritoriality. *Id.* at 626.

[9] The district court cited *Nestle II* as an example of decisions in which courts have "considered whether *Jesner* bars ATS suits against U.S. corporations" and "similarly declined to conclude that it does so." JA421 (Mem. Op. at 18). The court also cited to a district court decision from within this Circuit, *Al Shimari v. CACI Premier Tech., Inc.*, in which the court erred in part by holding that "there is *no* risk that holding [the corporate defendant] liable would offend any foreign government" (continued . . .)

Judge Lamberth in *Doe v. Exxon*, should look directly to *Jesner* to determine whether U.S. corporations, as a "class of defendants," are "amenable to suit under the ATS." *Id.*

II. ATS Liability for U.S. Corporations Has Harmful Practical Consequences

Extending ATS liability to U.S. corporations would ignore additional adverse consequences for both U.S. foreign policy and business operations around the globe. *Sosa*, 542 U.S. at 732-33 (requiring courts to consider the "practical consequences" of expanding ATS jurisdiction). Due to the complex and often lengthy nature of ATS litigation, ATS suits against corporations impose serious and lasting burdens on companies, shareholders, and global economies. After *Jesner*, these burdens operate as a discriminatory tax on U.S. corporations operating abroad. In addition, the threat of reputation-tarnishing litigation has the potential to chill investment and discourage U.S. corporations from operating in foreign countries, where they could contribute to the development of economies and the rule of law. These factors support the exercise of judicial caution in light of the "practical consequences" of extending ATS liability to U.S. corporations.

First, permitting ATS suits against corporations would have—and already has had—serious practical consequences for the defendant companies. ATS litigation

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because that defendant was "an American, rather than a foreign, corporation." 320 F. Supp. 3d 781, 787 (E.D. Va. 2018) (emphasis added).

carries tremendous reputational harms. Regardless of a case's merits, this reputational harm alone can lower a defendant's stock price, force a costly settlement, or require a defendant to spend millions on litigation. *See*, *e.g.*, Cheryl Holzmeyer, *Human Rights in an Era of Neoliberal Globalization: The Alien Tort Claims Act and Grassroots Mobilization in* Doe v. Unocal, 43 Law & Soc'y Rev. 271, 290-91 (2009); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (describing South Africa apartheid litigation as "a vehicle to coerce a settlement"). ATS litigation also imposes heavy legal costs. *See* Br. as Amicus Curiae of The Chamber of Commerce of the United States, *Rio Tinto v. Sarei*, No. 11-649 (U.S. Dec. 28, 2011), at 5-14. These costs are high because the legal issues are complex, the allegations overwhelmingly relate to foreign conduct, and the accusations often are many years old.

This case illustrates the point. Although the statute of limitations under the ATS is 10 years, tolling principles can allow plaintiffs to bring claims that are much older. Here, plaintiffs allege facts that relate to the actions of a small group of men between 1945 and 1956. JA89 (3d Am. Compl. ¶ 1). The allegations thus require defendants to address alleged events that not only occurred in a foreign country, but also arose before most or all company executives and employees were even born. This feature of ATS suits against corporations, which are fictional "persons" that

live forever and therefore are subject to suit for conduct as long as the claims can be tolled, trigger practical consequences that are not present in suits against natural persons.

Beyond the length of time it may take a plaintiff to bring ATS claims, ATS lawsuits often last for many years. Courts have struggled to resolve these cases and routinely flounder on threshold questions for a decade or more. The *Nestle* case, which remains pending against Nestle and Cargill in California, is 14 years old; Chevron defended an ATS case for 13 years; Ford and IBM likewise were defendants in the South African apartheid litigation for 13 years; and the ATS claims against Exxon, which Judge Lamberth dismissed in June, had been pending for 18 years. All the while, ATS suits threaten substantial reputational harm and require considerable resources to defend. They also impose massive settlement pressure on companies that bear no culpability for the alleged conduct.

Permitting ATS liability against U.S. corporate defendants not only would impose high costs on U.S. companies engaged in global business activities, but would impose them in a manner that disadvantages U.S. corporations vis-à-vis their foreign counterparts. After *Jesner*, no foreign corporation may be sued under the ATS. 138 S. Ct. at 1407. Thus, a private right of action against U.S. corporations would operate as a discriminatory tax on U.S. corporations with foreign operations, undermining U.S. competitiveness abroad and potentially harming the global

economy. *See, e.g.*, Alan O. Sykes, *Transnational Forum Shopping as a Trade and Investment Issue*, 37 J. Legal Stud. 339, 372 (2008) ("If plaintiffs can extract substantial amounts from U.S. defendants by alleging their complicity in such acts and persuading (or threatening to persuade) a jury that the U.S. defendant was somehow involved, the result may simply be a shift of business opportunities from U.S. firms to their less efficient competitors with little effect on the level of objectionable behavior.").

Second, allowing ATS lawsuits to proceed against U.S. companies "could establish a precedent that discourages American corporations from investing abroad, including in developing economies where the host government might have a history of alleged human-rights violations, or where judicial systems might lack the safeguards of United States courts." *Jesner*, 138 S. Ct. at 1406 (plurality opinion). The political branches, not the courts, are responsible for regulating the foreign commerce of U.S. corporations. Congress has chosen to regulate only certain foreign activities of U.S. companies—for example, by enacting the Foreign Corrupt Practices Act. *See* 15 U.S.C. § 78dd-1 *et seq*. And the State Department has encouraged commercial interaction with still-developing nations, in the hope of promoting the rule of law and change from within the system.[10] ATS suits against

[10] For example, when the United States suspended sanctions against Burma in May 2012 to encourage further democratic reform, the Secretary of State declared, "[s]o (continued . . .)

U.S. companies put the judiciary at odds with these policies. *See Jesner*, 138 S. Ct. at 1406 (plurality op.) (explaining that "allowing plaintiffs to sue foreign corporations under the ATS . . . might deter the active corporate investment that contributes to the economic development that so often is an essential foundation for human rights"). For the reasons discussed in Section I, the courts should not deter foreign activities of U.S. companies that Congress has allowed and the State Department has promoted.

These concerns are not abstract. In the past 25 years, plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations in a wide range of industry sectors for business activities in more than sixty countries. John B. Bellinger, III & R. Reeves Anderson, *Whither to "Touch and Concern": The Battle to Construe the Supreme Court's Holding in* Kiobel v. Royal Dutch Petroleum, *in Federal Cases From Foreign Places* 23 (U.S. Chamber Institute for Legal Reform 2014); *see also* 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.

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today, we say to American business: Invest in Burma," notwithstanding prior ATS suits against corporations that operated in that country. Sec'y of State, Remarks with Foreign Minister of Burma (May 17, 2012), https://bit.ly/2Un44M4.

The Supreme Court's limiting instructions in *Sosa*, *Kiobel II*, and *Jesner* have helped stem the tide, but further guidance is required to ensure that courts in this Circuit properly apply the reasoning of *Jesner* to dismiss ATS claims against U.S. corporations.

CONCLUSION

This Court should reverse the District Court's order denying the motion for judgment on the pleadings, and remand with directions to enter judgment for Defendants.

Dated: August 5, 2019

Respectfully submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I certify that on August 5, 2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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