No. 19-1530

IN THE
United States Court of Appeals for the Fourth Circuit

ESTATE OF ARTURO GIRON ALVAREZ,
by and through Maria Ana Giron Galindo, 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
(The Honorable Theodore D. Chuang)

BRIEF OF DEFENDANTS-APPELLANTS THE JOHNS HOPKINS UNIVERSITY, THE JOHNS HOPKINS SCHOOL OF MEDICINE, THE JOHNS HOPKINS HOSPITAL, THE JOHNS HOPKINS BLOOMBERG SCHOOL OF PUBLIC HEALTH, F/K/A JOHNS HOPKINS UNIVERSITY SCHOOL OF HYGIENE AND PUBLIC HEALTH, THE JOHNS HOPKINS HEALTH SYSTEMS CORPORATION, AND THE BRISTOL-MYERS SQUIBB COMPANY

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July 29, 2019

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

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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 Johns Hopkins Hospital
(name of party/amicus)

who is Appellant, 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:
The Johns Hopkins Hospital's sole parent corporation and corporate member is The Johns Hopkins Health System Corporation.

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/ Catherine E. Stetson Date: 5/31/2019

Counsel for: The Johns Hopkins Hospital

CERTIFICATE OF SERVICE

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I certify that on 5/31/2019 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/ Catherine E. Stetson
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5/31/2019
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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 Johns Hopkins University; The Johns Hopkins School of Medicine; The Johns Hopkins Bloomberg School of Public Health; The Johns Hopkins Health System Corporation
(name of party/amicus)

who is Appellant(s), 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

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Signature: /s/ Catherine E. Stetson Date: 5/31/2019

Counsel for: The Johns Hopkins University, et al.

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If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 19-1530 Caption: Estate of Arturo Giron Alvarez v. The Johns Hopkins University

Pursuant to FRAP 26.1 and Local Rule 26.1,

BRISTOL-MYERS SQUIBB COMPANY
(name of party/amicus)

who is Appellant, 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
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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/ Ashley C. Parrish Date: 5/31/2019

Counsel for: BRISTOL-MYERS SQUIBB CO.

CERTIFICATE OF SERVICE

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I certify that on 5/31/2019 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/ Ashley C. Parrish (signature) 5/31/2019 (date)

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(The Honorable Theodore D. Chuang)

BRIEF OF DEFENDANTS-APPELLANTS

STATEMENT OF JURISDICTION

Plaintiffs raise one claim, a federal common law cause of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. The District Court denied Defendants' motion for judgment on the pleadings and then certified its order for an interlocutory appeal. JA423-428 (Mem. Order). Defendants-Appellants sought permission to appeal, which this Court granted. JA429 (Order, No. 19-216). This Court has jurisdiction under 28 U.S.C. § 1292(b).

STATEMENT OF THE ISSUE FOR REVIEW

Whether, in light of *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018), the District Court erred in recognizing a new federal common law cause of action against domestic corporations under the Alien Tort Statute.

INTRODUCTION

Just two years ago, the Supreme Court made clear that federal courts should rarely—if ever—recognize new common law causes of action under the Alien Tort Statute. As the Court has emphasized in every ATS case since *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), its "precedents cast doubt on the authority of courts to extend or create private causes of action even in the realm of domestic law" governing solely domestic events. *Jesner*, 138 S. Ct. at 1402; *accord Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 117 (2013). That strong presumption is all the stronger when foreign interests are implicated. *Jesner*, 138 S. Ct. at 1402; *Kiobel*, 569 U.S. at 117.

Plaintiffs nevertheless have asked the courts to recognize a cause of action against domestic corporations under the Alien Tort Statute based on events that occurred more than 70 years ago in Guatemala. This Court should decline that invitation.

Jesner set up two barriers to creating new federal common law causes of action under the Alien Tort Statute. Plaintiffs have cleared neither of them. First,

Jesner teaches that recognizing a new federal common law cause of action is inappropriate where there is reason to think Congress would question the necessity of a damages remedy for the violation of international law. Here, there is. Extending international law liability to corporations will force courts to resolve layer upon layer of difficult policy questions that the political branches are better positioned to answer. Second, *Jesner* teaches that recognizing a new cause of action is inappropriate where it might carry serious foreign policy consequences. Here, it does. ATS suits against domestic corporations often concern events that occurred in foreign countries and the actions of foreign governments; this very case is evidence of that. Adjudicating these disputes risks calling other countries' actions into question.

Even if *Jesner*'s teachings were not conclusive, *Sosa* closes the door on Plaintiffs' proposed cause of action against domestic corporations. Corporations are not the subjects of international law. And even setting that fundamental problem aside, a new federal common law cause of action against domestic corporations implicates separation-of-powers concerns; flouts Congress's express choice *not* to impose corporate liability in the Torture Victim Protection Act, a provision enacted as part of the Alien Tort Statute; does not further the purpose of the statute; and risks serious foreign policy consequences.

This Court should reverse.

STATEMENT OF THE CASE

A. Plaintiffs seek relief based on the Alien Tort Statute.

The allegations in this case center on conduct that took place in Guatemala over seventy years ago. Plaintiffs are Guatemalan citizens or their family members or estate representatives. JA102-104 (3d Am. Compl. ¶¶ 40–46).[1] They allege that "[a] small group of powerful and highly influential men," "in conjunction with high-ranking officials in Guatemala and the United States," conducted a series of non-consensual medical experiments that took place in Guatemala between 1945 and 1956. JA89, 259 (*Id.* at ¶¶ 1–2, 550).

Plaintiffs did not sue these men, who, along with the others alleged to have led or run the experiments, are deceased. Previously, a putative class of those similarly-situated to Plaintiffs had sued several officials serving in the United States government or the Pan-American Health Organization, raising claims under the Alien Tort Statute and the U.S. Constitution. *See Garcia v. Sebelius*, 867 F. Supp. 2d 125, 131 (D.D.C. 2012), *opinion vacated in part*, 919 F. Supp. 2d 43 (D.D.C. 2013). Those claims were dismissed for failure to state a claim and on immunity grounds. *See id.* at 144.

[1] The complaint names 842 plaintiffs; however, one holds dual Guatemalan and U.S. citizenship. Because he is not an alien, he "cannot proceed with an ATS claim." JA70 (Decision Re: 2d Am. Compl. at 24).

Plaintiffs filed this suit against a different set of defendants: the Johns Hopkins Defendants, Bristol-Myers Squibb, and the Rockefeller Foundation—all domestic corporations.[2] They allege that Defendants, or their corporate predecessors, had employed the small group of men in the 1940s or '50s. JA145, 171 (3d Am. Compl. ¶¶ 160, 252). Plaintiffs raised Maryland state-law claims, Guatemalan-law claims, and a claim for "Tortious Violation of Well Established and Customary Norms of International Law." JA232 (*Id.* at 147). The District Court dismissed the Maryland claims as time-barred. JA46 (Order Re: 2d Am. Compl.). It dismissed the Guatemalan-law claims because Guatemalan law does not impose vicarious liability on employers. JA341 (Decision Re: Third Amended Complaint at 76). That leaves "the only remaining claim in the case": Plaintiffs' federal common law claim under the Alien Tort Statute. JA406 (Mem. Op. at 3).

First enacted as part of the Judiciary Act of 1789, the Alien Tort Statute provides: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of

[2] Defendants are The Johns Hopkins University, The Johns Hopkins School of Medicine, The Johns Hopkins Hospital, The Johns Hopkins Bloomberg School of Public Health, f/k/a Johns Hopkins University School of Hygiene and Public Health, The Johns Hopkins Health Systems Corporation (collectively, the "Johns Hopkins Defendants"), the Bristol-Myers Squibb Company, and the Rockefeller Foundation. *See* JA143 (3d Am. Compl. ¶ 154). The Rockefeller Foundation is not participating in this appeal.

the United States." 28 U.S.C. § 1350. As the Supreme Court explained in *Sosa*, the Alien Tort Statute is "a jurisdictional statute" only; it "creat[es] no new causes of action." 542 U.S. at 724. This "jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time" of its enactment in the late 1700s. *Id.* In setting out that reading, the Court "found no basis to suspect Congress had any examples in mind beyond those torts corresponding to" the "three primary offenses" identified by Blackstone—"violation of safe conducts, infringement of the rights of ambassadors, and piracy." *Id.* The *Sosa* Court nonetheless stopped short of "categorically preclud[ing] federal courts from recognizing a claim under the law of nations as an element of common law." *Id.* at 725.

Sosa did, however, impose "a restrained" view "of the discretion a federal court should exercise in considering a new cause of action" under the Alien Tort Statute. *Id.* A court should not create a new federal common law cause of action "for violations of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the Alien Tort Statute] was enacted." *Id.* at 732. Determining whether this threshold has been met "should (and, indeed, inevitably must) involve an element

of judgment about the practical consequences of making that cause available." *Id.* at 732–733.

Sosa set forth the prevailing analytical framework when the underlying complaints in this case were filed and amended. And as the District Court acknowledged in addressing earlier iterations of the complaint, the question whether "corporate liability is possible under the ATS" was one on which the circuit courts at the time were divided. JA75 (Decision Re: 2d Am. Compl. at 29) (internal quotation marks omitted). The District Court did not analyze this question in much detail itself at that point; it stated only that it would "follow" what at the time it viewed as the "majority consensus" approach. JA76 (*Id.* at 30) (noting the circuit split on this issue); JA291 (Decision Re: 3d Am. Compl. at 26 n.21). But by the time the District Court narrowed Plaintiffs' claims to the sole remaining federal common law claim under the Alien Tort Statute, the Supreme Court had granted certiorari to resolve that circuit split. *See Jesner v. Arab Bank, PLC*, 137 S. Ct. 1432 (2017). In response, the District Court stated that it would "readdress this issue after the Supreme Court reach[ed] a decision." JA291 (Decision Re: 3d Am. Compl. at 26 n.21).

B. The Supreme Court decides *Jesner*.

The Supreme Court held in *Jesner* "that foreign corporations may not be defendants in suits brought under the [Alien Tort Statute]." 138 S. Ct. at 1407.

And while the Court limited its core holding to the case at hand—the defendant was a Jordanian bank—it offered a clear set of principles to guide future cases.

First, the Court stated its "general reluctance," expressed across multiple areas of law, "to extend judicially created private rights of action." *Id.* at 1402. That principle applies when courts consider "[w]hether corporate defendants should be subject to suit," which implicates separation-of-powers concerns because the decision whether to impose a new form of liability rests with the legislature. *Id.* at 1403. And it applies "with particular force in the context of the" Alien Tort Statute, which grants federal jurisdiction over certain suits by foreign citizens, because foreign policy is the purview of the political branches. *Id.*

In no uncertain terms, the Court explained that courts should steer well clear of these concerns: "[I]f there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy . . . courts must refrain from creating the remedy." *Id.* at 1402 (internal quotation marks and citation omitted). The Court noted that these same concerns might support a categorical rule "preclud[ing] courts from ever recognizing *any* new causes of action under the [Alien Tort Statute]." *Id.* at 1403 (emphasis added). But the Court did not need to resolve that broader question to reach its holding. Applying its directive to the case before it, the Court held that "absent further action from Congress it would be inappropriate for courts to extend . . . liability to foreign corporations." *Id.*

The *second* principle to emerge from *Jesner* is that creating a cause of action could have frustrated, rather than furthered, the purpose of the Alien Tort Statute. *Id.* at 1407. The statute's purpose "when first enacted, was to avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible for an injury to a foreign citizen." *Id.* at 1397. But in *Jesner* "and in similar cases, the opposite [was] occurring"—litigation under the Alien Tort Statute had caused diplomatic friction. *Id.* at 1406–407.

The Court thus implemented a second rule to avoid these foreign-policy concerns: Where the decision to create a new cause of action would require a court "to hold that it has the discretion to make [a] determination" that could "trigger[ ] . . . serious foreign policy consequences," that decision is one for the political branches. *Id.* at 1407 (internal quotation marks omitted). Applying that rule, the Court noted "all the concerns that must be weighed before imposing liability on foreign corporations via [Alien Tort Statute] suits." *Id.* Disclaiming the authority to weigh those concerns and invent a cause of action, the Court held "that foreign corporations may not be defendants" under the Alien Tort Statute. *Id.*

The Justices in the *Jesner* majority penned four other opinions, each cautioning against a claim of judicial authority to recognize new federal common law causes of action under the Alien Tort Statute.

A plurality—Justice Kennedy, joined by the Chief Justice and Justice Thomas—deployed *Sosa*'s two-step test for "recognizing a common-law action under the ATS." *Id.* at 1399 (plurality op.). The first step asks "whether a plaintiff can demonstrate that the alleged violation is of a norm that is specific, universal, and obligatory." *Id.* (internal quotation marks omitted). The second asks whether, even if that showing is made, recognizing a cause of action under the Alien Tort Statute "is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority." *Id.*

At the first step, the *Jesner* plurality walked through the evidence that "counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under . . . international law." *Id.* at 1401 (plurality op.). It found "considerable force and weight to the position" that the Alien Tort Statute treats the availability of corporate liability as a question of international law. *Id.* at 1400 (plurality op.).[3] International law recognizes "that human-rights norms must bind the individual men and women responsible . . . , not just nation-states." *Id.* But, the plurality went on, "[i]t does not follow, however, that current principles of

[3] As a "related consideration" that speaks to "whether a norm is sufficiently definite" to support a cause of action under the Alien Tort Statute, *Sosa* identified "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 542 U.S. at 732–733 & n.20.

international law extend liability—civil or criminal—for human-rights violations to corporations," such that they would be liable for the actions of individual employees. *Id.* Indeed, the available evidence suggested just the opposite: The "Charter for the Nuremberg Tribunal," the charters of "more recent international tribunals," and the "Rome Statute of the International Criminal Court" were limited to "natural persons only." *Id.* at 1400–401 (plurality op.). In contrast, the evidence petitioners could muster to show "that liability for corporations is well established" amounted to only "weak support" for that view. *Id.* at 1401 (plurality op.).

In the end, the plurality decided not to resolve the question at *Sosa*'s first step because it viewed the answer at the second step as clear. *Id.* at 1402 (plurality op.). The plurality identified four reasons why "judicial deference requires" that the *political* branches impose "corporate liability on foreign corporations for violations of international law." *Id.* at 1408 (plurality op.):

- Congress, in the Torture Victim Protection Act of 1991—"the only cause of action under the ATS created by Congress rather than the courts"—chose to impose liability only on natural persons. *Id.* at 1403–404 (plurality op.).

- "It has not been shown that corporate liability under the ATS is essential to serve the goals of the statute," given other potential causes of action against corporations and against individual defendants. *Id.* at 1405 (plurality op.).

- Creating a cause of action against foreign corporations could cause other nations to do the same, "establish[ing] a precedent that discourages American corporations from investing abroad." *Id.* at 1406 (plurality op.).

- Questions of whether, and how, to create liability "more than two centuries on" from the statute's enactment were classic policy judgments that "the political branches are better equipped to make." *Id.* at 1407–408 (plurality op.).

The three *Jesner* concurrences expressed even greater unwillingness to recognize new federal common law causes of action under the Alien Tort Statute. Justice Alito professed doubt that "*Sosa* was correctly decided." *Id.* at 1409 (Alito, J., concurring in part and concurring in the judgment). Even accepting *Sosa*, Justice Alito took the view that the set of the claims that could pass through its second step was vanishingly small: "Unless corporate liability would actively *decrease* diplomatic disputes, we have no authority to act." *Id.* at 1411 (Alito, J., concurring in part and concurring in the judgment) (emphasis in original). Justice Gorsuch would "would end ATS exceptionalism," "refuse invitations to create new forms of legal liability," and leave that task "to the political branches." *Id.* at 1412–413 (Gorsuch, J., concurring in part and concurring in the judgment). Justice Thomas "agree[d] with the points raised by [his] concurring colleagues." *Id.* at 1408 (Thomas, J., concurring).

C. Despite *Jesner*, the District Court adheres to its ruling.

Following *Jesner*, Defendants moved for judgment on the pleadings, arguing that courts may not recognize a new federal common law cause of action against domestic corporations under the Alien Tort Statute. JA352 (Mem. of Law at 1). Defendants explained that while *Jesner*'s "formal holding applied to foreign corporations," its "reasoning makes clear that courts are likewise not free to extend ATS liability to domestic corporations absent a specific direction from Congress to do so." *Id.*

The District Court disagreed. It did so based on a tightly constricted reading of every opinion in *Jesner*, from the majority on down. As the District Court saw things, nothing in *Jesner* counseled against creating a new cause of action against *domestic* corporations under the Alien Tort Statute: The *Jesner* majority "expressly did not conclude that there is no ATS liability for all corporations without further action by Congress." JA415 (Mem. Op. at 12). The plurality "did not reach a definitive conclusion on this issue." JA416 (*Id.* at 13). Justice Alito "expressly focused on foreign corporations only and emphasized the foreign-policy concerns associated with such suits." *Id.* And Justice Gorsuch "did not address domestic corporate liability" but "honed in on the separate issue" of a missing domestic defendant, *id.*—an "*independent* problem" Justice Gorsuch had identified

in addition to his more categorical concerns. *Jesner*, 138 S. Ct. at 1414 (Gorsuch, J., concurring in part and concurring in the judgment) (emphasis added).

The District Court dismissed the *Jesner* majority's references to courts' "general reluctance" to create new causes of action, finding that the majority's statements "did not preclude" recognizing a cause of action against domestic corporations under the Alien Tort Statute. JA415 (Mem. Op. at 12). It opined that any "need for judicial caution is markedly reduced" in this context because suits against domestic corporations "likely will not" cause diplomatic strife. JA419 (Mem. Op. at 16). Instead, these suits "further the purposes of the [Alien Tort Statute], by affording a remedy in U.S. courts to foreign nationals for violations of international law by a U.S. corporation." JA420 (Mem. Op. at 17). The District Court therefore did "not alter its prior decisions." JA421 (Mem. Op. at 18).

Even so, the District Court certified its ruling for interlocutory appeal, finding that the requirements of 28 U.S.C. § 1292(b) were met. Its order involved a controlling question of law: whether a court can recognize a new federal common law cause of action against domestic corporations under the Alien Tort Statute. JA424 (Mem. Order at 2). "[T]here is 'substantial ground' for difference of opinion" on that question. JA424, 426 (Mem. Order at 2, 4) (quoting 28 U.S.C. § 1292(b)). And a ruling in Defendants' favor would end this years-long litigation. JA426–427 (*Id.* at 4–5).

This Court then granted Defendants permission to appeal. JA429 (Order, No. 19-216).

SUMMARY OF THE ARGUMENT

The sole question in this case is one of first impression for this Court[4]: Does a court have discretion under the Alien Tort Statute to recognize a new federal common law cause of action against a domestic corporation for a tort committed in violation of international law? The answer is no.

I. *Jesner* identified two factors that prohibit courts from creating new causes of action under the Alien Tort Statute. The first is grounded in separation-of-powers concerns; it asks whether "sound reasons" exist "to think Congress might doubt the efficacy or necessity of [such] a damages remedy." *Jesner*, 138 S. Ct. at 1402 (internal quotation marks omitted). If so, it is inappropriate for a court to create a new cause of action; legislatures, not courts, should undertake the policy judgments involved in "imposing a new substantive legal liability." *Id.* (internal quotation marks omitted). The second is whether the creation of a new cause of action risks "triggering . . . serious foreign policy consequences." *Id.* at 1407

[4] This Court has not addressed the question before. *See Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 525 n.5 (4th Cir. 2014) ("We also do not have before us the question whether a corporation can be held liable for the tortious conduct of its employees constituting international law violations under the ATS."); *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 394 n.6 (4th Cir. 2011) (declining to address the question, raised for the first time on appeal).

(internal quotation marks omitted). The political branches are well equipped to weigh the benefits of a new cause of action against those foreign-policy risks; courts are not. *See id.*

Under *Jesner*, the presence of either factor forecloses an attempt to create a new federal common law cause of action. *See id.* at 1403 (concluding, after discussing the presumption against judicially-created causes of action, that "absent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations"); *id.* at 1407 (concluding, after discussing the foreign-policy implications, "that foreign corporations may not be defendants in suits brought under the ATS"). And both factors are satisfied here. A cause of action under the Alien Tort Statute against domestic corporations indisputably would be a new, judicially created federal common law cause of action. *See Kiobel*, 569 U.S. at 115. There are many "sound reasons to think Congress might" decide against the remedy, *Jesner*, 138 S. Ct. at 1402 (internal quotation marks omitted), not least among them that when Congress *itself* created a cause of action tied to the Alien Tort Statute, it did not include corporations among the potential defendants. And creating this new cause of action risks serious foreign policy consequences. A suit raising a cause of action under the Alien Tort Statute is, by definition, brought "by an alien," *see* 28 U.S.C. § 1350, and suits against domestic corporations often—perhaps nearly always—involve events that occurred in the

alien plaintiff's country, often with the alleged participation or indulgence of the foreign sovereign itself. In passing judgment on these events, a federal court steps into foreign policy and risks upsetting this country's relations with other nations.

II. Even if this Court looked only to *Sosa*, the conclusion—that a cause of action against domestic corporations is not available under the Alien Tort Statute—would be the same. *Sosa* imposed two preconditions before a court may recognize a new cause of action under the Alien Tort Statute. The claim must allege a violation of a specific, universal, and obligatory international norm—one so clear that the United States risks reprisal if it is not enforced. *See Sosa*, 542 U.S. at 732. In addition, the court must consider the "practical consequences" of recognizing a new cause of action. *See id.* at 732–733. And both preconditions should be examined with "great caution." *Id.* at 728.

Neither precondition is met here. There is no specific, universal, and obligatory norm of *corporate* liability under international law. And there are strong reasons to exercise caution before creating a cause of action against domestic corporations. Creating a cause of action against domestic corporations would require disagreeing with the judgment Congress itself made in a statute enacted under the Alien Tort Statute, and it would do nothing to further the statute's purpose.

III. Even if *Jesner* and *Sosa* left open some basis to conclude that domestic corporate liability might be appropriate in some future case, this is not that case. The Alien Tort Statute exists to ensure that a remedy is available where the United States' failure to provide one would "threaten[ ] serious consequences in international affairs." *Sosa*, 542 U.S. at 715. Here, Plaintiffs allege that the United States participated in, and indeed apologized for, the events at issue. Plaintiffs do not allege, and have not pointed to, any suggestion that the United States has abdicated its responsibility to enforce international law. Given that, to allow Plaintiffs to press a new federal common law claim would all but overrule the decision of another branch.

Because Plaintiffs lack a cause of action, Defendants are entitled to judgment as a matter of law. This Court should reverse.

STANDARD OF REVIEW

This Court reviews the denial of a motion for judgment on the pleadings de novo. *See Bakery & Confectionary Union & Indus. Int'l Pension Fund v. Just Born II, Inc.*, 888 F.3d 696, 701 (4th Cir. 2018). "The same standard applies to questions of statutory interpretation." *Id.*

ARGUMENT

I. This Court Should Not Recognize A New Federal Common Law Cause Of Action Against A Domestic Company Under The Alien Tort Statute.

Jesner identified two factors, either of which if present forecloses the judicial creation of a new cause of action under the Alien Tort Statute. *See* 138 S. Ct. at 1402, 1407. Both are present here.

A. Separation-of-powers concerns counsel against creating a new cause of action.

There are sound reasons to conclude that Congress might doubt the benefit of or need for a cause of action against domestic corporations. *Id.* at 1402. As a result, the courts "must refrain" from recognizing such a claim, "in order to respect the role of Congress." *Id.* (internal quotation marks omitted).

In multiple cases across multiple contexts, the Supreme Court has emphasized that courts should exercise caution before taking it upon themselves to create new causes of action. *See id.* These decisions rest on a shared premise, grounded in separation-of-powers principles: "In most instances . . . the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (internal quotation marks omitted). As a result, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001).

This strong preference for legislative action applies no matter the source of the right sought to be enforced. It applies when the right to be enforced flows from a statute. *See id.* It applies when the right flows from the Constitution. *See Ziglar*, 137 S. Ct. at 1857. And it applies when the right to be enforced flows from international law. *See Jesner*, 138 S. Ct. at 1403 (rejecting "an exception to these general principles in this context"); *see also Sosa*, 542 U.S. at 727 ("[T]he possible collateral consequences of making international rules privately actionable argue for judicial caution."). It also "extends to the question whether the courts should exercise the judicial authority to mandate a rule imposing liability upon artificial entities like corporations." *Jesner*, 138 S. Ct. at 1389–390.

All of the separation-of-powers concerns that counsel in favor of deference to legislative action are heightened where the Alien Tort Statute is involved. A cause of action under the Alien Tort Statute may be raised only "for certain torts in violation of the law of nations." *Sosa*, 542 U.S. at 724; *see also id.* at 732 (requiring courts to determine whether that law is "sufficiently definite to support a cause of action" before creating a new cause of action). Creating a new cause of action against domestic corporations under the Alien Tort Statute would therefore require federal courts to make sensitive policy judgments best left to Congress in the first instance. *Cf. Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 428 (1964) (noting, in the context of the act of state doctrine, "the sensitive task of

establishing a principle not inconsistent with the national interest or with international justice"). For example, the courts would have to identify rules of *international* law that bind all nations. *Cf. Sosa*, 542 U.S. at 727 (stating that it is "one thing for American courts to" police our government; it is "quite another to . . . go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits").

As the Supreme Court has explained, moreover, "identifying . . . a norm is only the beginning of defining a cause of action." *Kiobel*, 569 U.S. at 117. The same is true here. Stating that a cause of action may be available against a corporate defendant under the Alien Tort Statute is only the beginning of defining that cause of action. The inevitable follow-on questions are complex. To name a few: What is the appropriate international-law test for corporate liability for the acts of its employees? Can a corporation be held liable under international law for the acts of a predecessor; if so, when? Can a corporation be held liable under international law for the acts of its subsidiaries; if so, when? Can corporate officers be held liable alongside a corporation, under international law? Should the liability scheme attempt to avoid punishing shareholders, or should that consideration play no role in international law?

"Each of these decisions carries with it significant foreign policy implications." *Id.* These judicial decisions would have the effect of stating the United States' view of the standard for deeming a corporation in violation of international law. By defining the rules of the international game, courts would impose obligations on international actors. That is because holding a domestic corporation liable for violating international law would put *all* corporations on notice of what they must do to avoid violating international law. And it would constrain *all* nations to enforce these violations. *See* Anthony J. Bellia Jr. & Bradford R. Clark, *The Alien Tort Statute and the Law of Nations*, 78 U. Chi. L. Rev. 445, 448 (2011) (explaining that "[i]n 1789, every nation had a duty to redress certain violations of the law of nations committed by its citizens or subjects against other nations or their citizens."); *The Paquete Habana*, 175 U.S. 677, 711 (1900) (noting "the historical fact that by common consent of mankind these rules have been acquiesced in as of general obligation"). These decisions therefore risk "impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Sosa*, 542 U.S. at 727–728.

The difficult policy choices these decisions would require of courts cannot be dismissed as theoretical. They are already on full display in the courts that, before *Jesner*, chose to recognize a common law cause of action against corporations under the Alien Tort Statute. Consider the Seventh Circuit's decision

in *Flomo v. Firestone Natural Rubber Company*. After deciding in 2011 to recognize a cause of action under the Alien Tort Statute against a domestic corporation, the court declined to answer the question that inexorably followed: "how far corporate vicarious liability for violations of customary international law extends." 643 F.3d 1013, 1021 (7th Cir. 2011). The court of appeals could say only that it saw "no objection to corporate civil liability" using a test borrowed from *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658 (1978) (interpreting 42 U.S.C. § 1983). *See Flomo*, 643 F.3d at 1021. The Ninth Circuit similarly declined to address the issue. *See Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1022–023 (9th Cir. 2014) ("leav[ing]" issues of "questions related to corporate liability . . . to be addressed by the district court in the first instance").[5] So did the District Court below. *See* JA302 (Decision Re: 3d Am. Compl. at 37) ("The Court finds it unnecessary herein to resolve the legal issue . . . ."). These

[5] The Seventh Circuit and the Ninth Circuit both viewed the availability of corporate liability as a question of federal common law, not international law. These views are wrong, as discussed *infra* at 33–35. But even if they were not, creating this cause of action would still require just as much new judge-made law. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 147 n.51 (2d Cir. 2010) ("[E]ven within our federal system, there are a variety of approaches to determining how the courts are to impute to a corporation the conduct and intent of its employees or agents."), *aff'd*, 569 U.S. 108 (2013). That is no less of a mark against creating the cause of action. *See Jesner*, 138 S. Ct. at 1402 ("[T]he Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." (internal quotation marks omitted)).

courts' seeming inability, and collective unwillingness, to locate *any* guidance from international law on a workable standard for corporate liability shows that recognizing this new cause of action would require courts to make the kinds of foreign-policy judgments that are the purview of the political branches.

Or consider the difficulties the courts of appeals have faced in an analogous context. The courts that have allowed a cause of action for aiding-and-abetting liability under the Alien Tort Statute have subsequently confronted a difficult follow-on question: the mens rea requirement for aiding-and-abetting liability under international law. These courts have pored over documents such as the Rome Statute of the International Criminal Court and the charters of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda—and have reached different conclusions. Two (including this Court) have held that international law sets a "specific intent mens rea standard." *Aziz*, 658 F.3d at 400; *accord Balintulo v. Ford Motor Co.*, 796 F.3d 160, 170 (2d Cir. 2015). Another court read the same source materials to have settled on a lesser standard. *See Nestle*, 766 F.3d at 1026 (rejecting specific intent).

In sum, creating a cause of action against domestic corporations under the Alien Tort Statute would commit the federal courts to a doubly indeterminate task: Divine what international law has to say about various subsidiary questions of corporate liability; then determine whether that international law "has gained 'the

requisite acceptance among civilized nations for application in an action under the' " Alien Tort Statute. *Aziz*, 658 F.3d at 401; *see also id.* at 398 (explaining that determining the content of international law "is complicated . . . by the fact that several sources comprise that law"). The need to answer these difficult policy questions is precisely the kind of "sound reason[ ]" that would lead one "to think Congress might doubt the efficacy or necessity of a damages remedy." *Jesner*, 138 S. Ct. at 1402 (internal quotation marks omitted). Courts therefore "must"—not should—"refrain from creating the remedy in order to respect the role of Congress." *Id.* (internal quotation marks omitted).

The *Jesner* majority's conclusion thus holds true here: "If, in light of all the concerns that must be weighed before imposing liability," this Court "were to hold that it has the discretion to" answer all these questions and create a new cause of action against domestic corporations, "then the cautionary language of *Sosa* would be little more than empty rhetoric." *Id.* at 1407.

B. A new cause of action would increase the risk of foreign strife.

Plaintiffs' request that the courts recognize a common law cause of action against domestic corporations also fails *Jesner*'s second factor. That factor is designed to " 'guard[] against our courts triggering . . . serious foreign policy consequences' " by creating an ill-conceived new cause of action. *Id.* (quoting *Kiobel*, 569 U.S. at 124).

The Alien Tort Statute does not guarantee a remedy for all wrongs. It was enacted "to promote harmony in international relations by ensuring foreign plaintiffs a remedy for international-law violations in circumstances where the absence of such a remedy might provoke foreign nations to hold the United States accountable." *Id.* at 1406. Its remedy applies to only a "narrow set of violations of the law of nations, . . . threatening serious consequences in international affairs" if left unaddressed. *Sosa*, 542 U.S. at 715.

Plaintiffs have pointed to no evidence that the United States will face reprisal unless a judicially created cause of action against *domestic corporations* exists under the Alien Tort Statute. As discussed *infra* at 36–39, there is no "specific, universal, and obligatory norm of corporate liability under currently prevailing international law." *Jesner*, 138 S. Ct. at 1405 (plurality op.); *id.* at 1410 (Alito, J., concurring in part and concurring in the judgment) ("All parties agree that customary international law does not require corporate liability as a general matter."); *Doe VIII v. Exxon Mobil Corp.*, 654 F.3d 11, 72 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part) ("Customary international law does not recognize corporate liability."), *vacated in light of Kiobel*, 527 F. App'x 7 (D.C. Cir. 2013). Because nations are not obligated under international law to impose liability on corporations, the Alien Tort Statute does not grant courts permission to create a cause of action to do so. *See Sosa*, 542 U.S. at 728 ("We have no

congressional mandate to seek out and define new and debatable violations of the law of nations . . . ."); *Kiobel*, 569 U.S. at 123 ("[T]here is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms."); *see also Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment) (stating that if "international law does not require corporate liability," then "declining to create it under the ATS cannot give other nations just cause for complaint against the United States").

There is also evidence that creating a cause of action against domestic corporations under the Alien Tort Statute would *cause*, not mitigate, diplomatic strife. The short history of claims against corporations under this statute shows that foreign plaintiffs, unsurprisingly, most often bring suit based on wrongs allegedly committed in foreign countries. *See, e.g.*, *Doe, I v. Nestle, S.A.*, No. 17-55435, 2018 WL 8731558, at *12 (9th Cir. Oct. 23, 2018) (Bennett, J., dissenting from denial of rehearing en banc) (alleging that plaintiffs were forced to work on cocoa farms in the Ivory Coast); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 163 (5th Cir. 1999) (alleging "violations of international law committed by domestic corporations conducting mining activities abroad in the Pacific Rim"). And these suits, also unsurprisingly, often allege the foreign sovereign's involvement or acquiescence. *See, e.g.*, *Doe I v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1066 (C.D. Cal. 2010) (procedural history omitted) ("Plaintiffs also allege

that some of the cocoa farms are linked to the Ivorian government."), *rev'd and vacated*, 766 F.3d 1013 (9th Cir. 2014); *Beanal*, 197 F.3d at 163 (allegation that defendant's "private security force acted in concert with the Republic [of Indonesia] to violate international human rights").

This case is no different. Plaintiffs here, all (but one) Guatemalan citizens, allege that Defendants "acted in conjunction with high-ranking officials in Guatemala and the United States." JA259 (3d Am. Compl. ¶ 550). These governments are not named parties. But this case affects them nonetheless. Resolving Plaintiffs' claim "will necessarily require [a court] to look beyond [Defendants] in this case and toward the foreign policy interests and judgments of the United States government" and the Guatemalan government. *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 984 (9th Cir. 2007) (dismissing on political question grounds a complaint that included Alien Tort Statute claims). "It is not the role of the courts to indirectly indict" governments in this way. *Id.*; *accord Jesner*, 138 S. Ct. at 1404 (plurality op.) (noting that even where a foreign government is not formally a party to a case, "plaintiffs can still use corporations as surrogate defendants to challenge the conduct of foreign governments.").

The long-running *Exxon* litigation provides another concrete example of the problems caused by a new common-law claim against domestic corporations under the Alien Tort Statute. There, Indonesian citizens sued for alleged human rights

abuses at "natural gas development facilities operated by Exxon in . . . Indonesia," claiming "that Exxon's security forces were comprised of members of the Indonesian military." *Doe I v. Exxon Mobil Corp.*, No. 01-cv-1357-RCL, 2019 WL 2343014, at *1 (D.D.C. June 3, 2019). In concluding—after *Jesner*—that Exxon could not be held liable under the Alien Tort Statute, the court explained that the case "has caused significant diplomatic strife." *Id.* at *7. The Indonesian government stated that it "cannot accept" a foreign court's judgment on allegations about its military. *Id.* at *8 (internal quotation marks omitted). And the Executive Branch had "articulated its concern that allowing plaintiffs' ATS claims to proceed would harm U.S. foreign policy interests" by damaging its relationship with Indonesia. *Id.* at *8–9. Given these foreign policy implications, the court acknowledged and applied *Jesner*'s holding that " 'courts are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one.' " *Id.* at *9 (quoting *Jesner*, 138 S. Ct. at 1407).

Domestic corporate defendants, then, just like foreign corporate defendants, "create unique problems" that compel a conclusion that courts should not recognize a new federal common law cause of action against domestic corporations under the Alien Tort Statute. *Jesner*, 138 S. Ct. at 1407.

C. Creating a new cause of action would exceed a court's proper function and role.

For Plaintiffs to prevail on their ATS claim following *Jesner*, they will have to convince this Court that *neither Jesner* factor is satisfied. That is a vertical uphill battle, for all of the reasons given above.

While this Court could resolve this case on this basis, it should also recognize another fundamental teaching implicit in *Jesner*. A majority of Justices have indicated their view that the Alien Tort Statute does not permit the judicial creation of *any* new causes of action—or, at the least, any beyond those few *Sosa* identified as the impetus for the statute. *See supra* at 6 (discussing Blackstone); *see also Jesner*, 138 S. Ct. at 1403 ("[T]here is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS."); *id.* at 1408 (Thomas, J., concurring) ("Courts should not be in the business of creating new causes of action under the Alien Tort Statute . . . ."); *id.* at 1409 (Alito, J., concurring in part and concurring in the judgment) ("I am not certain that *Sosa* was correctly decided."); *id.* at 1412 (Gorsuch, J., concurring in part and concurring in the judgment) ("We should refuse invitations to create new forms of legal liability."); *see also Exxon Mobil*, 654 F.3d at 73 n.2 (Kavanaugh, J., dissenting in part) (noting that "[f]rom a lower court's perspective in an ATS case, there may be as many as seven currently cognizable customary international law norms").

That the *Jesner* majority saw fit to resolve the case on narrower grounds does not undermine five Justices' considered view that courts should get altogether out of the business of creating new federal common law causes of action under the Alien Tort Statute. *See County of Allegheny v. ACLU*, 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part) ("As a general rule, the principle of stare decisis directs us to adhere not only to the holdings of our prior cases, but also to their explications of the governing rules of law."), *abrogated on other grounds by Town of Greece v. Galloway*, 572 U.S. 565 (2014); *Al Shimari*, 758 F.3d at 529 (recognizing that this Court "cannot decline to consider the Supreme Court's guidance"); *see also Nestle*, 2018 WL 8731558, at *5 (Bennett, J., dissenting from denial of rehearing en banc) ("[F]ive justices signaled in *Jesner* that they would hold that corporations are not subject to the ATS."). No fine parsing of *Jesner*'s separate opinions is required to conclude that courts may not start with a presumption in favor of creating new causes of action, nor may they hold that, unless the Supreme Court has explicitly barred a new cause of action against domestic corporations, the lower courts may do what they please. *Jesner* should be applied consistent with the principles and reasoning that the majority and separate concurrences embrace.

II. Recognizing A Cause Of Action Against Domestic Corporations Under The Alien Tort Statute Would Exceed Any Residual Common-Law Authority Federal Courts May Exercise.

Any new cause of action under the Alien Tort Statute also has to pass through *Sosa*'s two-part test. *See Jesner*, 138 S. Ct. at 1399 (plurality op.) ("Before recognizing a common-law action under the ATS, federal courts must apply . . . *Sosa*."); *id.* at 1414 (Gorsuch, J., concurring) (agreeing "that lower federal courts are not free to overrule *Sosa*'s framework or treat it as optional").

And applying *Sosa*'s two-part test yields the same result. The federal courts should not create a common law cause of action against domestic corporations under the Alien Tort Statute because there is no specific, universal, and obligatory international law norm of corporate liability. Even if there were, courts should exercise caution to allow the political branches to decide whether and how to hold domestic corporations liable.

A. *Sosa*'s first step: International law does not extend the scope of liability for a violation of international norms to corporations.

Sosa requires that any cause of action under the Alien Tort Statute be based on an "international law norm with" sufficiently "definite content and acceptance among civilized nations." 542 U.S. at 732. This requirement serves an important purpose. Courts have no "mandate to seek out and define new and debatable violations of the law of nations." *Id.* at 728. Rather, the statute is concerned only with violations that, precisely because of their universal recognition, "threaten[ ]

serious consequences in international affairs" if left unaddressed. *Id.* at 715. *Sosa*'s threshold requirement thus polices the statute's bounds by ensuring that a cause of action addresses only a claim actually "derived from the law of nations" for which the statute "was meant to underwrite litigation." *Id.* at 721.

1. Sosa *requires a specific, universal, and obligatory norm of corporate liability for violations of international law.*

This Court has explained that courts "must necessarily look to the law of nations to determine the reach of the" the Alien Tort Statute, because the statute permits a cause of action only for a tort committed in violation of international law. *Aziz*, 658 F.3d at 398 (discussing whether aiding and abetting liability can be imposed under the Alien Tort Statute). Drawing from international law is the only way to ensure "that courts limit liability to 'violations of international law with definite content and acceptance among civilized nations equivalent to the historical paradigms familiar when [the ATS] was enacted.' " *Id.* (quoting *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009)).

"There is no principled basis for treating the question of corporate liability differently." *Kiobel*, 621 F.3d at 130. As with imposing aiding and abetting liability, imposing corporate liability "is no less significant a decision than whether to recognize a whole new tort in the first place." *Id.* at 130–131 (quoting *Talisman Energy*, 582 F.3d at 259). As a result, that decision must be made "only by reference to customary international law." *Id.* at 131.

The Supreme Court agrees. When "determin[ing] whether a norm is sufficiently definite to support a cause of action," courts must address "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." *Sosa*, 542 U.S. at 732 & n.20 (citing, as examples, evidence that the norms against genocide and torture bind individuals); *see Jesner*, 138 S. Ct. at 1400 (plurality op.) (finding "considerable force and weight to the position" that " '[i]nternational law is not silent on the question of the subjects of international law' ") (quoting *Kiobel*, 621 F.3d, at 126); Restatement (Third) of Foreign Relations Law pt. II, intro. note (1987) ("In principle . . . private juridical entities can have any status, capacity, rights, or duties *given them by international law or agreement* . . . ." (emphasis added)).

That question—whether international law binds the defendant—matters because the Alien Tort Statute can support the creation of a cause of action *only if* the answer is yes. As discussed, Congress enacted the Alien Tort Statute to avoid the "serious consequences," *Sosa*, 542 U.S. at 715, that might result if the United States was seen as refusing to enforce international law. If international law does not treat an actor—here, a domestic corporation—as liable for violations of international norms, the United States cannot be accused of refusing to enforce those universal norms by not permitting claims against that actor. *See Jesner*, 138

S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment) (noting that if international law does not require liability, "declining to create it under the [Alien Tort Statute] cannot give other nations just cause for complaint against the United States").

Any conclusion otherwise cannot be squared with *Sosa* and, in any event, cannot stand after *Jesner*. Both the Seventh and Ninth Circuits previously held that so long as international law defines a *norm*—for example, against genocide—a court may create a cause of action to enforce that norm *against any actor* under the Alien Tort Statute. *See Flomo*, 643 F.3d at 1020; *Nestle*, 766 F.3d at 1022. *Sosa* and *Jesner* say otherwise. Even if international law defines only impermissible actions—such as genocide—that just means that international law gives nations discretion as to how to police those actions. *See, e.g.*, 45 C.F.R pt. 46, subpart A (regulating how human subjects research may be conducted). That flexibility would "counsel[ ] against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law." *Jesner*, 138 S. Ct. at 1401 (plurality op.). Without that norm, courts have no discretion to create a cause of action against a domestic corporation under the Alien Tort Statute.

2. There is no specific, universal, and obligatory norm of imposing corporate liability for violations of international law.

When the correct question is asked—whether there exists a specific, universal, and obligatory international norm *of corporate liability* that is "sufficiently definite to support a cause of action," *Sosa*, 542 U.S. at 732—the answer is clearly no.

International law's traditional focus has been on states, not non-state actors. The "law of nations" was viewed as "the rights subsisting between nations or states, and the obligations correspondent to those rights." Emer de Vattel, Law of Nations § 3 (1797). As a result, "[t]he principal persons under international law are states." Restatement (Third) of Foreign Relations Law pt. II, intro. note.

That focus widened to reach natural persons with the establishment of the Nuremberg Tribunal, which "authorized the punishment of the major war criminals of the European Axis following the Second World War." *Kiobel*, 621 F.3d at 132. The Tribunal was given jurisdiction to "try and punish persons." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis ("London Charter"), art. 6, Aug. 8, 1945, 59 Stat. 1544, 1547, 82 U.N.T.S. 279. As a result, "the subjects of customary international law—i.e., those with international rights, duties, and liabilities—now include not merely states, but also individuals." *Kiobel*, 621 F.3d at 118 (describing the London Charter and trials as "[t]he singular achievement of international law since the Second World War"). It

represented a collective, moral judgment that the punishment of natural persons was *necessary* to enforce international law. *See The Nurnberg Trial 1946*, 6 F.R.D. 69, 110 (1947) ("Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.").

No international body imposed criminal liability on corporations involved in these war crimes. While the Tribunal could declare an organization "criminal," it could do so only "to facilitate the prosecution of *individuals* who were members of the organization." *Kiobel*, 621 F.3d at 134 (emphasis in original). The U.S. Military Tribunals, which followed the Tribunal, also prosecuted individuals—including corporate executives—but not corporations. *See id.*

Later international tribunals have similarly cabined their focus to natural persons, without taking the additional step of declaring *legal* persons to be subjects of international law. The jurisdiction of the International Criminal Tribunals for the former Yugoslavia and for Rwanda is limited to "natural persons." *See* Statute of the International Criminal Tribunal for the Former Yugoslavia art. 6, May 25, 1993, 32 I.L.M. 1159; Statute of the International Tribunal for Rwanda art. 5, Nov. 8, 1994, 33 I.L.M. 1598. The Rome Statute of the International Criminal Court is equally constrained. *See* Rome Statute of the International Criminal Court art. 25(1), July 17, 1998, 2187 U.N.T.S. 90. "The drafters of the Rome Statute

considered, but rejected, a proposal to give the International Criminal Court jurisdiction over corporations." *Jesner*, 138 S. Ct. at 1401 (plurality op.); *see also Aziz*, 658 F.3d at 400 ("Granting the Rome Statute preference over customary international law" to determine the mens rea standard for accessorial liability "is particularly appropriate given the latter's elusive characteristics.").

The effort to codify the international law governing crimes against humanity shows that current international views on the liability of legal persons are unspecified and divergent. The United Nations' International Law Commission, which has been drafting articles on this area of international law, has recently recognized that it is unsettled. *See* Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc A/71/10, at 262 (2016) (noting "criminal liability of legal persons" such as corporations "is still unknown in many" nations); *id.* ("Criminal liability of legal persons has not featured significantly to date in the international criminal courts or tribunals."). As a result, the Commission limited its proposal to language "that contains considerable flexibility." *Id.* at 264. The most recent proposal reads:

> Subject to the provisions of its national law, each State shall take measures, where appropriate, to establish the liability of legal persons for the offences referred to in this draft article. Subject to the legal principles of the State, such liability of legal persons may be criminal, civil or administrative.

Id. at 248. The extent of this obligation is a requirement "to pursue such measures in good faith" and only where the nation deems it "appropriate." *Id.* at 265. Even

this hazy provision has garnered opposition. *See, e.g.*, Int'l Law Comm'n, Third Report on Crimes Against Humanity, U.N. Doc. A/CN.4/704* (2017); Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session (continued), U.N. Doc. A/C.6/71/SR.26, at 13 (2016) (objection of Vietnam "that the provision did not reflect customary norms," that "sanctions for the acts of legal persons should be addressed in the domestic law of States, and" that "the matter should be removed from the draft"). The ongoing debate demonstrates the obvious absence of any consensus even now about whether—and, it follows, how—to impose international law obligations on corporations.

There is, in short, no "specific, universal, and obligatory norm of corporate liability under currently prevailing international law." *Jesner*, 138 S. Ct. at 1401 (plurality op.); *see id.* at 1410 (Alito, J., concurring in part and concurring in the judgment) ("All parties agree that customary international law does not require corporate liability as a general matter."); *Exxon Mobil*, 654 F.3d at 83 (Kavanaugh, J., dissenting in part) ("[T]here is no corporate liability in customary international law."). Without that kind of norm—an international norm the United States would be clearly obligated to enforce—the courts lack discretion to create a new cause of action under the Alien Tort Statute. *See Sosa*, 542 U.S. at 728 ("We have no congressional mandate to seek out and define new and debatable violations of the law of nations."). That resolves this case.

B. *Sosa*'s second step: The political branches must decide whether and how to render domestic corporations liable.

But there is more still. Courts must exercise "great caution in adapting the law of nations to private rights." *Id.* And there are many reasons to act with great caution here.

First, "a decision to create a private right of action is one better left to legislative judgment in the great majority of cases." *Id.* at 727. This case is no different. The concerns that in *Jesner* counseled against recognizing a cause of action against foreign corporations apply equally to a cause of action against domestic corporations. *See Jesner*, 138 S. Ct. at 1402 (noting as a general principle that the Supreme Court's "precedents cast doubt on the authority of courts to extend or create private causes of action."). Both causes of action sound in federal common law, meaning the courts would be taking on a task "the Legislature is in the better position to consider." *Id.* (internal quotation marks omitted). Both causes of action would require a "marked extension" of liability under the Alien Tort Statute, meaning the courts would have little information from which to weigh the consequences of that extension. *Id.* at 1403 (internal quotation marks omitted). And both causes of action equally pose "the foreign-policy and separation-of-powers concerns inherent in ATS litigation," meaning the justifications for declining to act "apply with particular force." *Id.*

Second, a cause of action against domestic corporations would "deviate from th[e] model" Congress enacted in the Torture Victim Protection Act. *Id.* (plurality op.). Congress passed that Act to provide "an unambiguous and modern basis for a cause of action under the ATS." *Id.* (plurality op.) (internal quotation marks omitted). And that Act makes only individuals, not corporations, liable. "It would be inconsistent with that" choice to create a cause of action under the Alien Tort Statute "broader than the one created by Congress." *Id.* at 1404 (plurality op.); *accord Kiobel*, 621 F.3d at 122 n.23 (explaining that it is "neither novel nor eccentric" to reach "the same rule adopted by Congress"). Congress has shown that it can and will create a cause of action when it concludes one is necessary, and that it will limit the cause of action accordingly. And the Act itself shows that "defining a cause of action" has "significant foreign policy implications," and that courts should exercise caution and allow the political branches to debate and weigh those implications. *Kiobel*, 569 U.S. at 117 (citing the Act as evidence of this point).

Third, recognizing a cause of action against domestic corporations is not "essential to serve the goals of the statute"—and may undermine them. *Jesner*, 138 S. Ct. at 1405 (plurality op.). No one can dispute that international law treats *individual* responsibility as vital, both as a moral matter and as the most effective means of enforcing international norms. *See supra* at 36–37. Recognizing and

fostering a new cause of action against domestic corporations "may well" give plaintiffs an incentive to "ignore the human perpetrators and concentrate instead on multinational corporate entities" with deeper pockets. *Jesner*, 138 S. Ct. at 1405 (plurality op.). Straying even further from the principle of individual responsibility, creating this cause of action could have the collateral consequence of punishing the shareholders—individuals who are less culpable, if at all—while leaving the perpetrators in the clear.

Fourth, a cause of action against domestic corporations could allow claims that strain rather than ease the United States' relationships with other nations. *See id.* at 1406 (plurality op.). Plaintiffs often sue corporations—even domestic corporations—to recover for alleged wrongs committed by governments or by other foreign individuals. These suits have the potential to cause strife directly, by causing affront to another nation. *See supra* at 27–29; *Exxon Mobil Corp.*, 2019 WL 2343014, at *14 ("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."). And they have the potential to cause strife indirectly, by interfering with the role the United States plays—as part of our nation's foreign policy—in facilitating and promoting economic development in other nations. *See* Br. for United States as Amicus Curiae in Support of Petitioners at 21, *Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919),

2008 WL 408389 ("Such policies would be greatly undermined if the corporations that invest or operate in the foreign country are subjected to lawsuits under the ATS as a consequence."). For courts to assert authority over such claims would "raise risks of adverse foreign policy consequences," *Sosa*, 542 U.S. at 727–728, while serving none of the purposes of the Alien Tort Statute.

From the very start of its engagement with the Alien Tort Statute, the Supreme Court has directed courts to think long and hard before creating new federal common law causes of action to enforce international law. *See id.* at 727 (describing the "high bar to new private causes of action for violating international law"). Creating a new cause of action against domestic corporations under the Alien Tort Statute implicates all of the above concerns. That caution therefore controls here.

III. Creating A Cause Of Action Here Would Be Particularly Ill-Advised.

Even if *Jesner* and *Sosa* left the door ajar a crack, this is not the case in which to recognize domestic corporate liability. *Sosa* entertained the concept of federal common law causes of action under the Alien Tort Statute to give effect to Congress's view in 1789 that a cause of action may sometimes be needed to prevent the international backlash that would result if other nations viewed the United States as incapable of enforcing, or unwilling to enforce, international law.

See Sosa, 542 U.S. at 714–720. This case does not present the need for this judicial fail-safe.

Plaintiffs allege that the Guatemalan and United States governments participated in the alleged events at issue here. *See* JA259 (3d Am. Compl., ¶ 550). The United States nearly a decade ago acknowledged and "apologize[d]" for these alleged events. JA229 (*Id.* at ¶ 468). But the United States has not gone further than that. Indeed, when similarly-situated plaintiffs sued federal officials for damages, the United States declined to waive sovereign immunity. *See supra* at 4.

If anything were to provoke international ire, it would surely be allegations that the United States itself participated in violations of international law without any consequence. As discussed, the law of nations has been, for much of its tenure, a law of sovereigns. *See supra* 36–37; *see also Kiobel*, 621 F.3d at 118. And Plaintiffs do not allege, and have not pointed to, any backlash akin to a suggestion that the United States has abdicated its responsibility to enforce international law by failing to compensate the alleged victims.

One explanation for the lack of an international call for a remedy might be the distance from the events alleged in the complaint. Plaintiffs' claims deal with events that occurred more than seventy years ago in Guatemala on the alleged orders of a "small group of men." *See* JA89 (3d Am. Compl. ¶¶ 1–12). The

responsible individuals have long since passed away, and Plaintiffs do not allege that any of Defendants' living employees were involved. Plaintiffs' suit is instead predicated entirely on the fact that Defendants, as corporations, have perpetual existence. The Alien Tort Statute was intended to alleviate diplomatic frictions that might arise from widely accepted violations of international law, permitting recompense in certain unique instances. It is difficult to see how permitting liability against perpetual, artificial entities based on long-ago events involving long-dead natural persons supports that end.

It will also contravene the policy judgments embodied in American law—and indeed, embodied by the United States government's litigation choices. The government's decision not to waive sovereign immunity for these types of claims reflects a judgment that remedies, if any, should be provided through the political process. In these circumstances, it would be particularly perverse to allow the claims to proceed against corporations whose only connection to the experiments is through an allegation that individuals once affiliated with their predecessor companies either worked for the U.S. government or purportedly engaged in a conspiracy with the U.S. government. The proper process for providing individuals with relief is the political process, not a new federal common-law claim.

CONCLUSION

For the foregoing reasons, the District Court's judgment should be reversed.

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Respectfully submitted,

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Pursuant to Fed. R. App. P. 32(g) and Local R. 31.1, I certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,710 words, excluding those parts exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6) because the brief has been prepared in Times New Roman 14-point font using Microsoft Word 2010.

3. This brief complies with the electronic filing requirements of Local R. 31.1(c) because the text of the electronic brief is identical to the text of the paper copies and because Malwarebytes Anti-Malware was run on the file containing the electronic version of this brief and no viruses were detected.

July 29, 2019

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CERTIFICATE OF SERVICE

I certify that the foregoing was filed with the Clerk using the appellate CM/ECF system on July 29, 2019. All counsel of record are registered CM/ECF users, and service will be accomplished by the CM/ECF system.

I further certify that on July 29, 2019, a true and correct copy of the Brief of Defendants-Appellants was sent to the Clerk of Court via Federal Express.

July 29, 2019 /s/ Catherine E. Stetson

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