**Nos. 19-416 and 19-453**

# In the Supreme Court of the United States

NESTLÉ USA, INC., PETITIONER

*v.*

JOHN DOE I, ET AL.

CARGILL, INC., PETITIONER

*v.*

JOHN DOE I, ET AL.

*ON WRITS OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS**


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## QUESTIONS PRESENTED

1. Whether domestic corporations are subject to liability under the Alien Tort Statute (ATS), 28 U.S.C. 1350.

2. Whether respondents have pleaded a plausible claim of domestic aiding and abetting under the ATS.

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## INTEREST OF THE UNITED STATES

This case concerns the scope of claims that may be brought in a federal common-law action under the Alien Tort Statute (ATS), 28 U.S.C. 1350. The United States has a substantial interest in the proper application of the ATS because actions under the ATS involve the interpretation of international law and can have implications for the Nation's foreign relations.

## STATEMENT

1. The ATS provides in full: "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 the United States." 28 U.S.C. 1350. In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court held that although the "ATS is a jurisdictional statute creating no new causes of action," it was "enacted on the understanding that the common law would provide a cause of action for [a] modest number of international law violations." *Id.* at 724. Under *Sosa*, to recognize a new cause of action, courts must apply a two-step test: first, the suit must be based on an international-law norm that is "specific, universal, and obligatory," and second, the court must determine whether permitting the suit to proceed is an appropriate exercise of judicial discretion. *Id.* at 732-733 (citation omitted); see *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1402-1403, 1406-1407 (2018).

Respondents allege that they are former child slaves from Mali who were trafficked and forced to work cultivating cocoa beans on farms in Côte d'Ivoire in violation of international law. J.A. 304, 338. They brought suit under the ATS, alleging that petitioners, who are U.S. corporations, aided and abetted these international-law violations by, among other things, purchasing cocoa beans from farms that used child slaves and providing those farms with general technical assistance. J.A. 313-332.

Petitioners moved to dismiss the complaint for failure to state a claim, and the district court granted the motion. 748 F. Supp. 2d 1057. The court concluded that aiding and abetting slavery is a cognizable theory of liability under the ATS, *id.* at 1078-1079, but held that

the complaint's allegations pleaded neither the mens rea nor the actus reus necessary to state a claim under international law, *id.* at 1098. The court further held that corporations are not amenable to suit under the ATS. *Id.* at 1124.

Following the district court's dismissal, this Court decided *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), in which it determined that the presumption against extraterritoriality applies to the ATS and nothing in the statute's text or context overcomes that presumption. *Id.* at 116, 124. Accordingly, "even where the claims touch and concern the territory of the United States, they must do so with sufficient force" to state a domestic claim. *Id.* at 124-125. "[M]ere corporate presence" does not "suffice[]." *Id.* at 125.

On appeal of the district court's ruling, the Ninth Circuit reversed and remanded. 766 F.3d 1013, cert. denied, 136 S. Ct. 798. It held that corporations are subject to suit under the ATS for violating the international-law prohibition on slavery, reasoning that the enforceability of this particular norm does not depend "on the identity of the perpetrator." *Id.* at 1022. The court further held that aiding-and-abetting liability is cognizable under the ATS. *Id.* at 1023. But it declined to decide whether aiding and abetting under international law requires a mens rea of knowledge or purpose, concluding that respondents' allegations showed both. *Id.* at 1024. The court similarly declined to settle on a standard for the actus reus, and instead remanded for repleading. *Id.* at 1026. The court also allowed respondents on remand to amend their complaint in light of *Kiobel*. *Id.* at 1027.

Petitioners sought rehearing en banc, which the court of appeals denied. 788 F.3d 946. Judge Bea dissented, joined by seven other judges. *Id.* at 946-956. In his view, the requisite mens rea is purpose, and respondents plausibly alleged at most that petitioners intended "to buy cocoa cheap," not "to promote slavery as a means of buying cheap." *Id.* at 949; see *id.* at 951. He also disagreed that corporate liability is permissible under the ATS. *Id.* at 955.

2. On remand, the district court again dismissed respondents' claims. Pet. App. 52a-70a.[1] The court noted that under *Kiobel* and *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016), the question whether respondents' claims are extraterritorial or domestic turns on whether "the conduct relevant to the statute's focus occurred in the United States." Pet. App. 55a (quoting *RJR Nabisco*, 136 S. Ct. at 2101). The court concluded that the "focus" in this case is petitioners' aiding-and-abetting conduct, *id.* at 58a, and characterized respondents' allegations on this point as "essentially that Defendants are U.S. corporations" who "had 'general corporate supervision' over subsidiaries in Côte d'Ivoire," *id.* at 69a (citation omitted). The court deemed those allegations insufficient. *Id.* at 60a, 66a-67a.

While the case was on appeal for the second time, this Court decided *Jesner*, *supra*, holding that foreign corporations are not subject to ATS liability. *Jesner* declined to resolve whether *Sosa*'s first step applies to the question whether a particular class of defendants is amenable to suit under the ATS, 138 S. Ct. at 1399-1400 (plurality opinion), though the plurality noted there was

[1] All references are to the petition appendix and brief in opposition in No. 19-453.

"considerable force" to the view that it does apply, and a "strong argument" that international law does not impose an obligatory norm of corporate liability, *id.* at 1400. A majority of the Court instead resolved the case at *Sosa*'s second step. Invoking recent precedents limiting the judicial creation of implied-damages claims against federal officers under *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the Court held that "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy" under the ATS, "courts must refrain from creating the remedy." *Jesner*, 138 S. Ct. at 1402 (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1858 (2017)). The Court found ample reason for caution in extending ATS liability to foreign corporations in light of its refusal to recognize any corporate liability under *Bivens*, as well as the disruption to U.S. foreign relations that foreign-corporation liability could cause. *Id.* at 1403, 1406.

After *Jesner*, the Ninth Circuit again reversed and remanded. Pet. App. 28a-39a. Noting its previous holding that corporations were amenable to liability, the court determined that *Jesner* abrogated this holding as to foreign corporations but had no effect with respect to domestic corporations. *Id.* at 31a-32a. The court further held that, for extraterritoriality purposes, the statutory "focus" under *RJR Nabisco* is petitioners' aiding-and-abetting conduct. *Id.* at 35a. In concluding that conduct occurred in the United States, the court homed in on respondents' allegations that petitioners provided "'personal spending money to maintain the farmers' and/or the cooperatives' loyalty'" and "had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to

the United States offices," where petitioners' financing decisions "originated." *Id.* at 36a.

Petitioners argued in the alternative that respondents had failed to state a claim for aiding and abetting, but the court of appeals declined to reach that issue. Instead, it remanded for respondents to replead "to specify whether aiding and abetting conduct that took place in the United States is attributable to the domestic corporations in this case." Pet. App. 39a; see *id.* at 37a (noting that the operative complaint "names several foreign corporations" that respondents concede "must be dismissed").[2]

Petitioners sought rehearing en banc, which the court of appeals denied. Pet. App. 3a. Judge Bennett dissented, joined by seven other judges in full or in part, *id.* at 4a, reasoning that after *Jesner*, "corporations (foreign or not) are clearly not proper ATS defendants," *id.* at 7a. He further contended that the proper statutory "'focus'" for extraterritoriality purposes is "[p]laintiffs' enslavement on cocoa plantations" overseas. *Id.* at 20a (citation omitted).

## SUMMARY OF ARGUMENT

The United States is committed to fostering respect for human rights and condemns child slavery and those who aid and abet it. This case, however, involves more specific issues: whether domestic corporations that are alleged to have aided and abetted slavery overseas may be held liable in an implied right of action under the

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[2] The court also concluded that respondents "raise sufficiently specific allegations regarding Cargill's involvement in farms that rely on child slavery" to satisfy Article III's traceability requirement, Pet. App. 38a, but that the allegations against Nestlé were "far less clear," requiring a remand for repleading as to Nestlé, *id.* at 38a-39a.

ATS. In the ATS context, this Court has repeatedly made clear that courts "must exercise 'great caution' before recognizing new forms of liability." *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 728 (2004)). And even when the ATS does permit liability for a particular international-law violation, a plaintiff's claim must be domestic rather than extraterritorial. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013). Under these principles, the claims here fail in at least two respects.

*First*, domestic corporations are not subject to liability under the ATS. At the outset, there is a "strong argument" that respondents "cannot satisfy the high bar of demonstrating a specific, universal, and obligatory norm of liability for corporations" under international law. *Jesner*, 138 S. Ct. at 1400 (plurality opinion). More importantly, this Court has made clear that the requisite "caution" in recognizing new causes of action under the ATS "extends" to whether courts should "impose[] liability upon artificial entities like corporations." *Id.* at 1402-1403 (majority opinion). Here, as in other contexts where plaintiffs assert an implied cause of action for damages, "[w]hether corporate defendants should be subject to suit [is] 'a question for Congress, not [the courts], to decide.'" *Id.* at 1403 (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 72 (2001)). In addition, ATS suits against domestic corporations have the potential to interfere with U.S. foreign-policy priorities. They regularly implicate the conduct of foreign states and may undermine the strategies preferred by the Executive and Congress for addressing particular issues.

*Second*, respondents have failed to state a domestic aiding-and-abetting claim under the ATS. As a threshold matter, this Court has never resolved whether and on what terms aiding-and-abetting liability is available under the ATS. Because the answer to that question is both logically antecedent to, and intimately bound up with, the inquiry into the "focus" of any aiding-and-abetting claim for extraterritoriality purposes, see *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016), the Court may wish to address it before turning to extraterritoriality. The Court should conclude that aiding and abetting is not cognizable under the ATS. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), held that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* at 182. *Central Bank* and other considerations together provide numerous "sound reasons to think Congress might doubt the efficacy or necessity" of aiding-and-abetting liability, and courts should accordingly "refrain from creating the remedy." *Jesner*, 138 S. Ct. at 1402 (citation omitted).

Assuming that aiding and abetting is cognizable under the ATS, respondents' claims are impermissibly extraterritorial. Because the ATS does not apply extraterritorially, respondents must show that the conduct representing the statutory "focus" took place in the United States. *Kiobel*, 569 U.S. at 124-125; *RJR Nabisco*, 136 S. Ct. at 2101. The focus of an aiding-and-abetting claim is the principal tort, as both domestic and international law predominantly treat aiding and abetting as a means for allocating secondary responsibility

to additional persons for the commission of the principal tort, rather than as a discrete tort by those persons. See, *e.g.*, *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 279-281 (2d Cir. 2007) (per curiam) (Katzmann, J., concurring), aff'd *sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008). The alleged principal tort here occurred entirely in Côte d'Ivoire. Moreover, even if the proper focus of an aiding-and-abetting claim were instead the defendant's own conduct, the outcome would still be the same. Respondents would at least need to allege sufficient domestic conduct by petitioners to state a plausible claim for aiding and abetting. See *Bell Atl. Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007). They have not come close to doing so, alleging little more than routine corporate transactions and oversight of foreign operations. That is insufficient under any reasonable conception of the actus reus and mens rea elements of aiding and abetting.

## ARGUMENT

Originally enacted by the First Congress in 1789, the ATS, 28 U.S.C. 1350, grants federal district courts "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 the United States." See Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 76-77. In *Sosa* v. *Alvarez-Machain*, 542 U.S. 692 (2004), this Court held that the "ATS is a jurisdictional statute creating no new causes of action." *Id.* at 724. The Court recognized that under modern jurisprudence, "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. Because it concluded, however, that the ATS was "enacted on the understanding that the common law would provide a cause

of action for [a] modest number of international law violations," *id.* at 724, the Court adopted a limited exception to background principles of judicial restraint for ATS suits, permitting courts to recognize a "narrow class" of implied rights of action so long as they exercised "great caution" in doing so. *Id.* at 728-729.

To constrain judicial discretion in this context, *Sosa* established a two-step framework for determining whether to recognize a common-law cause of action under the ATS. Courts must consider first whether "the alleged violation is 'of a norm that is specific, universal, and obligatory,'" and second "whether caution requires the political branches to grant specific authority" to impose liability. *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1399 (2018) (plurality opinion) (quoting *Sosa*, 542 U.S. at 732). In addition, even when *Sosa*'s framework permits liability for a particular international-law violation, a plaintiff's claim must be domestic rather than extraterritorial. *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 124 (2013).

Here, respondents' claims fail on both counts: they are not cognizable under *Sosa*, and they are impermissibly extraterritorial under *Kiobel*.

## I. THE ATS DOES NOT AUTHORIZE LIABILITY FOR DOMESTIC CORPORATIONS

Domestic corporations are not proper ATS defendants. Although *Jesner*'s holding did not squarely cover domestic corporations, its reasoning with respect to foreign corporations likewise forecloses liability for domestic corporations.

As a threshold matter, although the Court in *Jesner* declined to resolve whether corporate liability is subject to *Sosa*'s step-one requirement of an international-law norm, 138 S. Ct. at 1402 (plurality opinion), "[t]here is

considerable force and weight," as the plurality explained, to the position that corporate liability is cognizable only if supported by a "specific, universal, and obligatory" international-law norm. *Id.* at 1400, 1402. Likewise, there is an "equally strong argument" that respondents "cannot satisfy the high bar of demonstrating" such a norm. *Id.* at 1400 (plurality opinion).

After all, "[i]nternational law is not silent on the question of the *subjects* of international law—that is, those that, to varying extents, have legal status, personality, rights, and *duties* under international law." *Jesner*, 138 S. Ct. at 1400 (plurality opinion) (quoting *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 126 (2d Cir. 2010), aff'd, 565 U.S. 961 (2011)) (brackets in original). As the *Jesner* plurality explained, whether an international-law norm extends to a particular category of actors arguably represents an important aspect of the norm itself. *Id.* at 1399-1400, 1402. Moreover, "the charters of respective international criminal tribunals often exclude corporations from their jurisdictional reach," *id.* at 1400 (plurality opinion), and "jurisdiction over corporations was considered but expressly rejected" for several of those tribunals, *Kiobel*, 621 F.3d at 136-137. "[A]t most," respondents could potentially show "that corporate liability might be permissible under international law in some circumstances." *Jesner*, 138 S. Ct. at 1401 (plurality opinion). But that "falls far short of establishing a specific, universal, and obligatory norm of corporate liability" under *Sosa*. *Ibid.*; see *Doe VIII* v. *Exxon Mobil Corp.*, 654 F.3d 11, 81 (D.C. Cir. 2011) (Kavanaugh, J., dissenting in part), vacated on other grounds, 527 Fed. Appx. 7 (D.C. Cir. 2013).

Ultimately, as in *Jesner*, this "Court need not resolve" whether *Sosa*'s first step forecloses domestic-

corporation liability, 138 S. Ct. at 1402 (plurality opinion), as *Sosa*'s second step plainly does so. In particular, multiple considerations—including the separation of powers, foreign policy, and analogous statutes—indicate that imposing ATS liability on domestic corporations would not represent an appropriate exercise of judicial discretion. See *id.* at 1402-1403, 1406-1407 (majority opinion); *id.* at 1403-1406 (plurality opinion); see also *Sosa*, 542 U.S. at 732-733. The court of appeals failed to engage meaningfully with *Jesner*, instead adhering to a pre-*Jesner* circuit precedent solely on the ground that *Jesner* did not expressly address domestic-corporation liability. See Pet. App. 44a-45a. That analysis is untenable.[3]

### A. Separation-Of-Powers Principles Foreclose Domestic-Corporation Liability

As the *Jesner* majority noted, *Sosa*'s second step "is consistent with this Court's general reluctance to extend judicially created private rights of action." 138 S. Ct. at 1402. "[E]ven in the realm of domestic law," "recent precedents cast doubt on the authority of courts to extend or create private causes of action." *Ibid.* (discussing cases applying *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971)); see *Hernandez* v. *Mesa*, 140 S. Ct. 735, 742, 749 (2020) (in converse scenario, applying *Jesner*'s logic to a *Bivens* claim). This Court has "repeatedly said" that

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[3] In *Jesner*, the United States contended that corporate liability was appropriate because corporations were traditionally liable in tort actions at common law. Amicus Br. at 8-9, *Jesner*, *supra* (No. 16-499). The Court declined to adopt that argument, however, and the United States has revisited its position in light of the *Jesner* opinion, which rejected not only the government's conclusion but also its basic framework for analysis.

such judgments are generally best left to the legislature, *Jesner*, 138 S. Ct. at 1402 (citation omitted), which is "better position[ed] to consider if the public interest would be served by imposing" legal liability in a particular type of case, *ibid.* (quoting *Ziglar* v. *Abbasi*, 137 S. Ct. 1843, 1857 (2017)). Accordingly, "if there are sound reasons to think Congress might doubt the efficacy or necessity of a damages remedy, . . . courts must refrain from creating the remedy in order to respect the role of Congress." *Ibid.* (quoting *Abbasi*, 137 S. Ct. at 1858).

The *Jesner* Court underscored that these background "separation-of-powers concerns * * * apply with particular force" to the ATS, given the "foreign-policy" considerations "inherent in ATS litigation," which by definition involves claimed violations of *international* law. 138 S. Ct. at 1403. Indeed, "there is an argument that a proper application of *Sosa* would preclude courts from ever recognizing any new causes of action under the ATS" beyond the three traditional torts *Sosa* recognized—piracy, offenses against ambassadors, and interference with safe passage. *Ibid.*; see *id.* at 1397; cf. *Abbasi*, 137 S. Ct. at 1856 ("[I]t is possible that the analysis in the Court's three *Bivens* cases might have been different if they were decided today.").

Critically, the Court in *Jesner* specifically held that the need to exercise "caution" in implying new rights of action "extends to the question whether the courts should exercise the judicial authority to mandate a rule that imposes liability upon artificial entities like corporations." 138 S. Ct. at 1402-1403. And it found the *Bivens* jurisprudence instructive at that more granular level, too. *Jesner* emphasized that the Court has de-

clined to impose corporate liability under *Bivens* because doing so "would have been a 'marked extension' of *Bivens* that was unnecessary to advance its purpose of holding individual officers responsible." *Id.* at 1403 (quoting *Correctional Servs. Corp.* v. *Malesko*, 534 U.S. 61, 74 (2001)). In *Malesko*, the Court further reasoned that corporate liability might even have obstructed *Bivens*' purpose by encouraging plaintiffs to "focus their collection efforts on [the corporate defendant], and not the individual directly responsible for the alleged injury." 534 U.S. at 71. Similar reasoning holds true here. See *Jesner*, 138 S. Ct. at 1402 (plurality opinion) (recognizing that "only by punishing individuals who commit [crimes against international law] can the provisions of international law be enforced") (quoting *The Nurnberg Trial*, 6 F.R.D. 69, 110 (Int'l Military Trib. 1946)). The *Malesko* Court ultimately concluded that whether corporate defendants should be subject to civil suit is "a question for Congress, not [the Court], to decide." 534 U.S. at 72. As *Jesner* recognized, that logic applies with equal force to the ATS. 138 S. Ct. at 1403 (discussing *Malesko*).

Significantly, none of this reasoning from *Jesner* provides any basis for differentiating between foreign and domestic corporations. The same separation-of-powers principles preclude ATS liability for both. Making the intrinsically policy-oriented judgment to extend ATS liability to corporations of any kind "absent further action from Congress" would "be inappropriate." *Jesner*, 138 S. Ct. at 1403.

### B. Foreign-Policy Considerations Confirm That Domestic Corporations Should Not Be Held Liable

Although separation-of-powers considerations alone sufficed to foreclose foreign-corporation liability in *Jesner*, see 138 S. Ct. at 1402-1403, the majority separately relied on the ATS's original purpose, see *id.* at 1406-1407. Namely, the ATS "was intended 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. The Court observed that "here, and in similar cases, the opposite is occurring." *Ibid.*

The same is true of cases brought against domestic corporations, which frequently involve claims challenging foreign conduct and the policies of foreign states, thereby embroiling courts in difficult and politically sensitive disputes. See, *e.g.*, *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007) (per curiam), aff'd *sub nom. American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (alleging corporate aiding and abetting of apartheid); *Exxon Mobil Corp.*, 654 F.3d at 15-16 (alleging corporate aiding and abetting of the Indonesian military); see also *Jesner*, 138 S. Ct. at 1404 (plurality opinion) (noting that plaintiffs may "use corporations as surrogate defendants to challenge the conduct of foreign governments"). Although some of these lawsuits may be foreclosed by a proper application of the presumption against extraterritoriality, the presumption is not a panacea in this context. See p. 20, *infra*. These cases thus illustrate that domestic-corporation liability may provoke—and, indeed, "*ha[s]* provoked," *Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment)—"the very foreign-

relations tensions the First Congress sought to avoid," *id.* at 1407 (majority opinion); see, *e.g.*, *Sosa*, 542 U.S. at 733 n.21.

Apart from the evidence of practice, other considerations confirm that domestic-corporation liability is unnecessary to advance the ATS's original purpose. Contra Br. in Opp. 21-22. Because "customary international law does not *require* corporate liability," see p. 11, *supra*, "declining to create it under the ATS cannot give other nations just cause for complaint against the United States." *Jesner*, 138 S. Ct. at 1410 (Alito, J., concurring in part and concurring in the judgment); see *id.* at 1420 (Sotomayor, J., dissenting). This is particularly true given that ATS suits against corporations "will seldom be the only way for plaintiffs to hold the perpetrators liable." *Id.* at 1405 (plurality opinion) (discussing alternative remedies). Ultimately, because recognizing domestic-corporation liability under the ATS would not "*decrease* diplomatic disputes," *id.* at 1411 (Alito, J., concurring in part and concurring in the judgment), "[i]t has not been shown that corporate liability under the ATS is essential to serve the goals of the statute," *id.* at 1405 (plurality opinion).

In addition to diplomatic strife, ATS lawsuits against domestic corporations carry the potential to undermine U.S. economic initiatives. ATS liability poses the potential risk of limiting U.S. efforts to encourage investment in certain developing countries, where "active corporate investment * * * so often is an essential foundation for human rights." *Jesner*, 138 S. Ct. at 1406 (plurality opinion); see 788 F.3d 946, 950 n.10 (Bea, J., dissenting from the denial of reh'g en banc) ("An embargo by chocolate manufacturers on Ivory Coast chocolate farmers

is precisely the predictable economic effect plaintiffs' successful action would have.").

Some cases—like this one—may also threaten more specific policies. In an effort to address child slavery in the cocoa industry, members of Congress facilitated the Harkin-Engel Protocol (Protocol), which is a commitment by major chocolate manufacturers to take steps to eliminate the worst forms of child labor.[4] To achieve the Protocol's objectives, the U.S. Department of Labor has participated in various public-private partnerships, and industry participants, among other things, joined a coalition with a goal of "train[ing] and deliver[ing] improved planting material and fertilizer" to hundreds of thousands of cocoa farmers. Child Labor Cocoa Coordinating Grp., *2018 Annual Report* 4, https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/CLCCG2018AnnualReport.pdf. In this case, however, respondents characterize the Protocol as a critical *part* of the alleged misconduct, describing it as a way for petitioners to avoid more intrusive legislation. See J.A. 330-331. And they treat petitioners' provision of training and supplies to farmers in Côte d'Ivoire as integral to the actus reus of their aiding-and-abetting claim. See, *e.g.*, J.A. 342. In short, respondents' theory of the case is in serious tension with the policy underlying the Protocol and its implementing initiatives.

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[4] See Chocolate Mfr. Ass'n, *Protocol for the Growing and Processing of Cocoa Beans and their Derivative Products in a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor* (2001), https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Harkin_Engel_Protocol.pdf.

At bottom, it is unsurprising that ATS lawsuits against domestic corporations pose risks for U.S. foreign policy. Although the United States condemns human-rights violators and those who aid and abet them, the blunt instrument of ATS liability may be at cross-purposes with the political branches' need for flexibility in "calibrat[ing]" diplomatic measures to accomplish foreign-policy objectives. *Crosby* v. *National Foreign Trade Council*, 530 U.S. 363, 376-378 (2000). The President and Congress rely on a variety of tools to promote compliance with international law and respect for human rights, and they are uniquely situated to gauge when a particular foreign-policy goal must be subordinated to other priorities. See, *e.g.*, USAID, *Democracy, Human Rights, and Governance*, https://www.usaid.gov/cote-divoire/democracy-human-rights-and-governance (describing initiatives in Côte d'Ivoire). These nuanced foreign-policy choices are precisely the sort of judgments that the Constitution commits to the political branches. See *Jesner*, 138 S. Ct. at 1403 ("The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns."); *Hernandez*, 140 S. Ct. at 744. Civil-damages lawsuits brought by private plaintiffs, in contrast, will virtually never take into account the broader considerations that necessarily inform the political branches' judgments in this area. Courts applying the ATS must accordingly be "particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Kiobel*, 569 U.S. at 116 (quoting *Sosa*, 542 U.S. at 727).

In an effort to distinguish *Jesner* on this point, respondents contend that the particular claims in *Jesner* "had significant implications for foreign governments

and international relations"—unlike here, where the claims "present[] no relevant foreign policy implications." Br. in Opp. 20-21. Respondents err in both their premise and conclusion.

Even on its own terms, respondents' argument is dubious. The complaint specifically alleges that "Defendants' actions were undertaken under the color of foreign authority" and that "several of the cocoa farms in Côte d'Ivoire from which Defendants source are owned" or "protected by government officials." J.A. 319-320, 341-342. As discussed, respondents' theory of culpability impugns the Protocol and its implementing initiatives. And nearly all the alleged misconduct, including the child slavery itself, is foreign; the alleged domestic conduct amounts to no more than generic business transactions and oversight of foreign operations. See pp. 33-34, *infra*; see also *Jesner*, 138 S. Ct. at 1406 ("At a minimum, the relatively minor connection between the terrorist attacks at issue in this case and the alleged conduct in the United States well illustrates the perils of extending the scope of ATS liability.").

In any event, the *Jesner* Court made a *categorical* judgment that foreign-corporation liability is inappropriate under the ATS. See *Jesner*, 138 S. Ct. at 1407 ("[F]oreign corporations may not be defendants in suits brought under the ATS."). That judgment was not dependent on the facts of any particular case. See *id.* at 1406 (noting that the facts of the case merely "*illustrate[d]* the perils of extending the scope of ATS liability to foreign multinational corporations") (emphasis added). As explained above, the foreign-policy reasons the Court gave in support of this categorical holding similarly foreclose liability for domestic corporations.

To be sure, other legal mechanisms, such as the presumption against extraterritoriality, may mitigate the negative foreign-policy implications of domestic-corporation liability in particular cases. But even threshold issues like the presumption against extraterritoriality are likely to be "hotly litigated," and it "may be years before incorrect initial decisions" can be overturned, *Jesner*, 138 S. Ct. at 1411 (Alito, J., concurring in part and concurring in the judgment)—as in this very case, which has been pending since 2005, see 748 F. Supp. 2d 1057, 1063. And regardless, the mere possibility that some other doctrine may alleviate the potential for adverse consequences in a subset of cases does not change the fact that domestic corporate defendants, just like "foreign" ones, "create unique problems." *Jesner*, 138 S. Ct. at 1407; see *ibid.* ("Petitioners insist that whatever the faults of this litigation[,] * * * the fact that Arab Bank is a foreign corporate entity, as distinct from a natural person, is not one of them. That misses the point."). The history of ATS suits brought against domestic corporations challenging foreign and foreign-state conduct confirms the point. See p. 15, *supra*. Courts simply "are not well suited to make the required policy judgments that are implicated by corporate liability in cases like this one." *Jesner*, 138 S. Ct. at 1407.

### C. Additional Considerations Counsel Against Domestic-Corporation Liability

Recognizing domestic-corporation liability would also be in serious tension with congressional intent as reflected in analogous statutes. Such statutes provide critical "legislative guidance" in recognizing causes of action under the ATS. *Jesner*, 138 S. Ct. at 1403 (plurality opinion) (quoting *Sosa*, 542 U.S. at 726); see *Hernandez*, 140 S. Ct. at 747 ("It would be 'anomalous to

impute a judicially implied cause of action beyond the bounds Congress has delineated for a comparable express cause of action.'") (brackets, citation, and ellipsis omitted). The "logical place to look for a statutory analogy to an ATS common-law action is the [Torture Victim Protection Act of 1991 (TVPA), Pub. L. No. 102-256, 106 Stat. 73 (28 U.S.C. 1350 note)]—the only cause of action under the ATS created by Congress rather than the courts." *Jesner*, 138 S. Ct. at 1403 (plurality opinion). A "key feature" of the TVPA is that it limits liability to "natural persons," *id.* at 1404 (plurality opinion), a legislative judgment that "'carries with it significant foreign policy implications,'" *id.* at 1403 (plurality opinion) (quoting *Kiobel*, 569 U.S. at 117). "Congress' decision to exclude liability for corporations in actions brought under the TVPA is all but dispositive of the present case," as it "'would be remarkable to take a more aggressive role in exercising a jurisdiction that remained largely in shadow for much of the prior two centuries.'" *Id.* at 1404 (plurality opinion) (quoting *Sosa*, 542 U.S. at 726).

Moreover, in light of *Jesner*'s holding rejecting foreign-corporation liability under the ATS, a contrary rule for domestic-corporation liability would facially discriminate against U.S. corporations. There is no persuasive textual or historical indication that the ATS should be construed to have the counterintuitive effect of exposing U.S. businesses to greater liability risk than foreign businesses engaged in exactly the same conduct. Such a rule would place U.S. corporations at a distinct disadvantage, particularly when operating "in developing economies" where there may be "a history of alleged human-rights violations" and a correspondingly heightened potential for liability exposure. *Jesner*, 138 S. Ct.

at 1406 (plurality opinion). And perversely, to the extent the threat of ATS litigation deters domestic corporations from investing in certain nations or prompts them to divest, foreign companies less susceptible to U.S. influence on human rights may take their place. See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Geo. L.J. 709, 726 & n.128 (2012).

## II. RESPONDENTS FAIL TO STATE A CLAIM OF DOMESTIC AIDING AND ABETTING

Respondents have not pleaded a plausible domestic aiding-and-abetting claim. At the outset, this Court may wish to consider whether aiding-and-abetting liability is cognizable under the ATS, as the analysis of whether and why it is may affect the extraterritoriality analysis and could obviate the need to conduct that analysis at all. And in fact, *Jesner* makes clear that *Sosa*'s second step alone precludes such liability. Even assuming, however, that aiding-and-abetting liability is cognizable, respondents' allegations do not avoid the bar on extraterritoriality. The primary tort—the child slavery—occurred abroad, and even considering only the secondary tort, respondents' general allegations of domestic corporate transactions and oversight are insufficient.

### A. Aiding And Abetting Is Not Cognizable Under The ATS

To determine whether a particular claim is impermissibly extraterritorial, a court must identify the "focus" of the relevant cause of action. *RJR Nabisco, Inc.* v. *European Cmty.*, 136 S. Ct. 2090, 2101 (2016); see pp. 26-27, *infra*. Because the focus of a cause of action depends on the contours of that cause of action, see *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 266-268 (2010), the focus inquiry is complicated here by the

fact that this Court has never determined whether and how an aiding-and-abetting cause of action is available under the ATS. The Court accordingly may wish to address the availability of aiding-and-abetting liability as a precursor to the extraterritoriality analysis. This Court should conclude—as the government has long argued—that "aiding and abetting liability constitutes an improper expansion of judicial authority to fashion federal common law" under the ATS. Gov't Amicus Br. at 8, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919) (capitalization and emphasis omitted). A ruling that aiding-and-abetting liability is unavailable in this context would also provide critical guidance to the courts of appeals, which have consistently (though erroneously) permitted such liability. See Gov't Cert. Amicus Br. 17-18, Nos. 19-416, 19-453 (listing cases).

Here, the court of appeals upheld aiding-and-abetting liability based solely on what it perceived to be a norm of international law, *Sarei* v. *Rio Tinto, PLC*, 671 F.3d 736, 748-749 (9th Cir. 2011) (en banc), cert. granted, judgment vacated, 569 U.S. 945 (2013); see 766 F.3d 1013, 1023 (citing *Sarei*), but that analysis is untenable after *Jesner*. Under *Jesner*'s application of *Sosa*'s second step, permitting aiding-and-abetting claims "to proceed" would not represent "a proper exercise of judicial discretion," 138 S. Ct. at 1399 (plurality opinion), as there are numerous "sound reasons to think Congress might doubt the efficacy or necessity" of aiding-and-abetting liability in ATS suits, *id.* at 1402 (majority opinion) (quoting *Abbasi*, 137 S. Ct. at 1858). As explained further below, aiding-and-abetting liability is properly characterized as a means of allocating secondary responsibility for another's primary tort, rather

than as a separate primary tort. See pp. 28-30, *infra*. Thus, much like *Jesner* declined to extend liability beyond individual perpetrators to foreign corporations, so too this Court should decline to extend liability beyond primary violators to aiders and abettors. Consistent with fundamental separation-of-powers principles, whether a "new form[] of liability" should be imposed on an entire category of actors, *id.* at 1403, is "a question for Congress, not [this Court], to decide," *ibid.* (quoting *Malesko*, 534 U.S. at 72).

*Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994), confirms the point. There, the Court held that "when Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant's violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors." *Id.* at 182. The Court observed that recognizing aiding-and-abetting liability in cases of statutory silence would work a "vast expansion of federal law" and should not be undertaken in the absence of "congressional direction." *Id.* at 183. The need to respect Congress's role is only "magnified" where, as here, "the question is not what Congress has done but instead what courts may do." *Kiobel*, 569 U.S. at 116.[5]

*Central Bank* also recognized that, as a practical matter, "the rules for determining aiding and abetting liability are unclear." 511 U.S. at 188. In private suits

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[5] *Central Bank* arguably resolves this case without need to resort to the *Sosa* framework. The ATS refers to "tort[s] * * * committed in violation of the law of nations," 28 U.S.C. 1350, and does not mention secondary liability. The text thus fails to provide the requisite "congressional direction" for recognizing secondary liability under *Central Bank*. 511 U.S. at 183.

asserting aiding-and-abetting claims—including this one—"[t]he issues [are] hazy, their litigation protracted, and their resolution unreliable." *Id.* at 189 (citation omitted). And in the civil arena, private plaintiffs are able to leverage vague standards "without the check imposed by prosecutorial discretion." *Sosa*, 542 U.S. at 727; see *Central Bank*, 511 U.S. at 188. Given the immense economic and reputational costs at stake in ATS litigation, however, this is "an area that demands certainty and predictability." *Central Bank*, 511 U.S. at 188 (citation omitted).

Respect for the political branches' authority over foreign affairs similarly counsels against recognizing liability for aiding and abetting. Aiding-and-abetting claims provide plaintiffs with a means for evading the limitations of sovereign immunity and challenging the policies and conduct of foreign states and officials. See, *e.g.*, *Exxon Mobil Corp.*, 654 F.3d at 15-16; see also *Khulumani*, 504 F.3d at 281 (Katzmann, J., concurring) ("[A] private actor may be held responsible for aiding and abetting the violation of a norm that requires state action."). And even when concerns of sovereign immunity are not directly implicated, aiding-and-abetting claims present many of the same foreign-policy concerns that corporate liability does. See pp. 15-20, *supra*.

Finally, congressional action provides an additional reason to abstain from implying a cause of action for aiding and abetting. The TVPA does not provide for aiding-and-abetting liability, see 28 U.S.C. 1350 note, and "[a]bsent a compelling justification, courts should not deviate from that model." *Jesner*, 138 S. Ct. at 1403 (plurality opinion). Although Congress authorized a form of secondary liability in the Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, Div. A, 114

Stat. 1466 (22 U.S.C. 7101 *et seq.*), see 18 U.S.C. 1595(a), that merely illustrates "that there are two reasonable choices" and that "Congress, not the Judiciary, must decide whether to expand the scope of liability." *Jesner*, 138 S. Ct. at 1405 (plurality opinion).

**B. Respondents' Aiding-And-Abetting Claims Are Impermissibly Extraterritorial**

Even assuming aiding-and-abetting suits are cognizable under the ATS, respondents' claims do not satisfy the presumption against extraterritoriality. Because the ATS does not apply extraterritorially, respondents' allegations must "touch and concern the territory of the United States * * * with sufficient force to" state a domestic claim. *Kiobel*, 569 U.S. at 124-125. In *RJR Nabisco*, the Court clarified that this test is satisfied only if the conduct that forms "the statute's 'focus'" occurred in the United States. 136 S. Ct. at 2101; see *Kiobel*, 569 U.S. at 126 (Alito, J., concurring).

To identify a statute's "focus," courts look to the "object[] of the statute's solicitude," including the conduct "the statute seeks to 'regulate'" and the persons and interests it "seeks to 'protect.'" *Morrison*, 561 U.S. at 267 (brackets and citation omitted). In conducting this analysis, courts typically examine the statutory provisions creating and governing the relevant cause of action, standard of conduct, and available remedy. See, *e.g.*, *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2137 (2018) ("If the statutory provision at issue works in tandem with other provisions, it must be assessed in concert with those other provisions.").

The fact that the ATS "is a jurisdictional statute" that neither creates "causes of action" nor establishes standards of conduct, *Sosa*, 542 U.S. at 724, makes it difficult to conduct the focus inquiry contemplated in

*WesternGeco* and this Court's other extraterritoriality precedents. Nevertheless, the text of the ATS provides at least some guidance: at a high level of generality, the statute's textual "focus" is "tort[s]" committed in violation of international law. 28 U.S.C. 1350; see *Kiobel*, 569 U.S. at 124; *id.* at 126 (Alito, J., concurring). And *Kiobel* further elaborates that the statute is specifically focused on the conduct underlying those "tort[s]." See 569 U.S. at 124 ("On these facts, all the relevant *conduct* took place outside the United States.") (emphasis added); see also *id.* at 126-127 (Alito, J., concurring) ("[O]nly conduct that satisfies *Sosa*'s requirements * * * can be said to have been 'the "focus" of congressional concern.'") (citation omitted). In short, the focus of the ATS is the tortious conduct.

But neither the text of the ATS nor this Court's precedents provide definitive guidance as to the relevant focus in cases involving *secondary* liability. In those cases, either the defendant's *or* the primary actor's tortious conduct could potentially represent the proper focus, and those actions may well have occurred in different locations. To identify which actor's conduct is relevant, it is thus necessary to look beyond the text to the focus of the specific common-law cause of action at issue. See *Kiobel*, 569 U.S. at 117 (asking "whether a *cause of action* under the ATS reaches conduct within the territory of another sovereign") (emphasis added). By examining the common-law cause of action—just as it would examine the statutory cause of action in a typical extraterritoriality case, see *WesternGeco*, 138 S. Ct. at 2137—the Court can define the relevant focus with the requisite precision.[6]

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[6] Given the ATS's reference to "tort[s]," 28 U.S.C. 1350, it could be argued that the injury (in addition to the culpable conduct) forms

1. In deeming respondents' aiding-and-abetting claims domestic, the court of appeals held, without meaningful analysis, that the relevant "focus" is petitioners' conduct. See Pet. App. 35a-36a. That holding was incorrect. To the extent a cause of action for aiding-and-abetting is cognizable under the ATS at all, its "focus" is the underlying principal conduct.

Aiding and abetting is typically characterized as a mode of liability for the principal offense, rather than a standalone wrong. In the domestic criminal context, sources treat aiding and abetting as "a more particularized way of identifying persons" responsible for the underlying offense, rather than "a discrete criminal offense." *Khulumani*, 504 F.3d at 280-281 (Katzmann, J., concurring) (quoting *United States* v. *Smith*, 198 F.3d 377, 383 (2d Cir. 1999), cert. denied, 531 U.S. 864 (2000)); see 18 U.S.C. 2(a); *Rosemond* v. *United States*, 572 US. 65, 70 (2014) (concluding that the federal aiding-and-abetting statute "reflects a centuries-old view of culpability: that a person may be responsible for a crime he has not personally carried out if he helps another to complete its commission"); *United States* v. *Johnson*, 319 U.S. 503, 513-515 (1943). The limited civil sources available similarly suggest that aiding and abetting "is a basis for imposing liability for the tort aided and abetted rather than being a separate tort." *Eastern Trading Co.* v. *Refco, Inc.*, 229 F.3d 617, 623-624 (7th Cir. 2000); see Restatement (Second) of Torts § 876

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a necessary part of the statute's focus. See *Sosa*, 542 U.S. at 705 (noting the traditional choice-of-law rule that torts are deemed to have taken place "where the injury occurred"). Because the claims here are impermissibly extraterritorial based on the conduct alone, however, the Court need not reach this issue.

(1979); *Halberstam* v. *Welch*, 705 F.2d 472, 479 (D.C. Cir. 1983).

In the international realm, various authorities have also taken an approach "consistent with the understanding that aiding and abetting is a theory of liability for acts committed by a third party." *Khulumani*, 504 F.3d at 280 (Katzmann, J., concurring); *id.* at 280-281 (canvassing sources); see *Hamdan* v. *Rumsfeld*, 548 U.S. 557, 611 n.40 (2006) (plurality opinion). Several major statutes governing international criminal tribunals, including the Rome Statute, treat aiding and abetting as a basis for "individual criminal responsibility" for the enumerated substantive crimes, rather than mentioning it within the catalogue of substantive crimes itself. See Rome Statute of the International Criminal Court (Rome Statute) arts. 5, 25, *opened for signature* July 17, 1998, 2187 U.N.T.S. 90.[7] International tribunals have characterized aiding and abetting similarly. See, *e.g.*, *Prosecutor* v. *Kunarac,* Case Nos. IT–96–23–T & IT–96–23/1–T, Trial Chamber Judgment, ¶ 391 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001) ("As opposed to the 'commission' of a crime, aiding and abetting is a form of accessory liability.").

That characterization finds additional support in the fact that completion of the principal offense is generally a necessary element of an aiding-and-abetting cause of action. See, *e.g.*, Dan B. Dobbs et al., *The Law of Torts*

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[7] The United States has not ratified the Rome Statute and does not regard all of its provisions as reflecting customary international law, especially insofar as it has expressed "concerns about significant flaws in the treaty." *Statement on the Rome Treaty on the International Criminal Court,* 3 Pub. Papers 2816 (Dec. 31, 2000) (President William J. Clinton); see Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (June 15, 2020).

§ 435 (2d ed. 2011); 2 Wayne R. LaFave, *Substantive Criminal Law* § 13.3(c), at 498 (3d ed. 2017). That makes sense, as there is often nothing inherently unlawful about the activity alleged to constitute aiding and abetting, such as providing funding or goods. It is only when such activity is conducted with a particular mens rea in connection with the principal crime or tort that it becomes unlawful. Cf. *Morrison*, 561 U.S. at 266 ("Section 10(b) does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'") (citation omitted).

Collectively, these considerations show that the "focus" of an aiding-and-abetting cause of action is the principal tort: it is the principal-tort conduct that the law "seeks to 'regulate,'" and the victim of that tort whom the law "seeks to 'protect.'" *Morrison*, 561 U.S. at 267 (brackets and citations omitted). That conclusion is consistent with this Court's recognition that even conduct-regulating statutes may have a focus other than the defendant's conduct. See *id.* at 266 (concluding that the "focus" of a particular federal securities-fraud provision "is not upon the place where the deception originated, but upon purchases and sales of securities"). Here, respondents allege claims of forced labor, torture, and cruel, inhuman, or degrading treatment; and they purport to sue on behalf of individuals "who were trafficked from Mali to any cocoa producing region of Côte d'Ivoire and forced to perform labor as children under the age of 18 on any farm and/or farmer cooperative within any cocoa producing region of Côte d'Ivoire." J.A. 307-308, 338-342. Because the alleged

principal conduct occurred entirely overseas, respondents' claims are impermissibly extraterritorial.

2. Even if the proper "focus" of an aiding-and-abetting claim were the defendant's own conduct, respondents' claims still would fail. The proper standard at the pleading stage would require plaintiffs to plausibly allege, consistent with *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 557 (2007), enough domestic conduct by the defendants to satisfy the actus reus and mens rea for an aiding-and-abetting claim. See *Kiobel*, 569 U.S. at 127 (Alito, J., concurring) ("[A] putative ATS cause of action will fall within the scope of the presumption against extraterritoriality—and will therefore be barred—unless the domestic conduct is sufficient to violate an international law norm that satisfies *Sosa*[ ]."). The mere existence of *some* domestic conduct is plainly insufficient under this Court's precedents. See *id.* at 124-125 ("[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."); cf. *Morrison*, 561 U.S. at 266 ("[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.").

Although this Court has not previously settled the elements of an aiding-and-abetting claim under the ATS, the court of appeals suggested that, at a minimum, international law requires a plaintiff to allege that the defendant provided knowing, "substantial" assistance with the requisite "causal link" "to the commission of a crime." 766 F.3d at 1023, 1026. The standard for civil

aiding and abetting under domestic law appears generally to require a similar showing. See Restatement (Second) of Torts § 876.

In concluding that respondents' complaint rested on sufficient domestic conduct, the court of appeals emphasized their allegation that petitioners provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier." Pet. App. 36a. The court characterized these payments as "'kickbacks,'" "infer[ring] that the personal spending money was outside the ordinary business contract and given with the purpose to maintain ongoing relations with the farms so that defendants could continue receiving cocoa at a price that would not be obtainable without employing child slave labor." *Ibid.* (citation omitted). The court also pointed to allegations that petitioners "had employees from their United States headquarters regularly inspect operations in the Ivory Coast and report back to the United States offices, where these financing decisions * * * originated." *Ibid.*

This analysis was in error. Nearly all of the supposedly relevant conduct cited by the court of appeals occurred overseas. The alleged farm inspections plainly occurred in Côte d'Ivoire. With respect to the purported "'kickbacks,'" "[t]he complaint does not even allege that the funds originated in the U.S., only that they were paid to 'local farmers.'" Pet. App. 21a (Bennett, J., dissenting from the denial of reh'g en banc); see J.A. 316. Overseas conduct, of course, does not help respondents demonstrate a domestic application of the ATS. See *RJR Nabisco*, 136 S. Ct. at 2101 ("[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application.").

After excising the foreign conduct, the domestic conduct alleged in the complaint is insufficient to satisfy any reasonable view of the actus reus and mens rea elements of an aiding-and-abetting claim. The fact that employees from petitioners' domestic headquarters oversaw foreign operations does not imply that they provided "substantial" assistance to the perpetrators of child slavery in Côte d'Ivoire. 766 F.3d at 1026. And even assuming the alleged funding arrangements originated in the United States, the complaint "is devoid of any allegation that the provision of 'spending money' was improper or illegal." Pet. App. 25a (Bennett, J., dissenting from the denial of reh'g en banc). Tellingly, the majority identified no plausible factual support for its characterization of these payments as "kickbacks" for using child labor. *Id.* at 36a; see J.A. 316 (omitting any such allegation). To the contrary, "*[t]he factual* allegations in the complaint show only that Defendants sought to stabilize their supply lines and minimize costs by entering into exclusive-dealing arrangements." Pet. App. 25a-26a (Bennett, J., dissenting from the denial of reh'g en banc). Courts have acknowledged that "such agreements provide well-recognized economic benefits," *ibid.* (citation and internal quotation marks omitted), and "merely 'supplying a violator of the law of nations with funds' as part of a commercial transaction, without more, cannot constitute aiding and abetting." 748 F. Supp. 2d at 1099 (discussing cases) (citation omitted).

In short, the well-pleaded facts of the complaint "do not permit the court to infer more than the mere possibility of misconduct." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 679 (2009). Respondents' domestic allegations boil down to the "normal business conduct" that could be associated with any corporate headquarters. Pet. App. 25a

(Bennett, J., dissenting from the denial of reh'g en banc). On any plausible understanding of the elements of an aiding-and-abetting claim, that is not enough. See *Kiobel*, 569 U.S. at 125 ("Corporations are often present in many countries, and it would reach too far to say that mere corporate presence suffices.").

**CONCLUSION**

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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