No. 19-____

IN THE
# Supreme Court of the United States

NESTLÉ USA, INC.,
*Petitioner*,

v.

JOHN DOE I, ET AL.,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

1. Whether an aiding and abetting claim against a domestic corporation brought under the Alien Tort Statute, 28 U.S.C. § 1350, may overcome the extra-territoriality bar where the claim is based on allegations of general corporate activity in the United States and where plaintiffs cannot trace the alleged harms, which occurred abroad at the hands of unidentified foreign actors, to that activity.

2. Whether the Judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations.

## PARTIES TO THE PROCEEDING

Nestlé USA, Inc., petitioner on review, was a defendant-appellee below.

John Does I-VI, each individually and on behalf of proposed class members, respondents on review, were the plaintiffs-appellants below.

## RULE 29.6 DISCLOSURE STATEMENT

Petitioner Nestlé USA, Inc. is a wholly owned subsidiary of Nestlé Holdings, Inc., which is a wholly owned subsidiary of NIMCO US, Inc., which is a wholly owned subsidiary of Nestlé US Holdco, Inc., which is a wholly owned subsidiary of Société des Produits Nestlé S.A., which is a wholly owned subsidiary of Nestlé S.A., a publicly traded Swiss corporation, the shares of which are traded in the United States in the form of American Depositary Receipts.

## RELATED PROCEEDINGS

All proceedings directly related to this petition include:

- *Doe I* v. *Nestle S.A.*, No. 2:05-cv-05133-SVW-MRW (C.D. Cal. Sept. 8, 2010) (reported at 748 F. Supp. 2d 1057), *rev'd sub. nom, Doe I* v. *Nestle USA, Inc.*, No. 10-56739 (9th Cir. Dec. 19, 2013) (reported at 738 F.3d 1048), *as amended* (Sept. 4, 2014) (reported at 766 F.3d 1013), *cert. denied*, No. 15-349 (Jan. 11, 2016) (reported at 136 S. Ct. 798)
- On remand: *Doe I* v. *Nestle, S.A.*, No. 2:05-cv-05133-SVW-MRW (C.D. Cal. Mar. 2, 2017) (available at 2017 WL 6059134), *rev'd,* No. 17-55435 (9th Cir. Oct. 23, 2018) (reported at 906 F.3d 1120), *as amended* (July 5, 2019) (reported at 929 F.3d 623)

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Nestlé USA, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Ninth Circuit in this case.

## OPINIONS BELOW

The district court's first order dismissing the case is reported at 748 F. Supp. 2d 1057. The Ninth Circuit's initial opinion vacating and remanding that dismissal is reported at 738 F.3d 1048, and its revised opinion is reported at 766 F.3d 1013. The Ninth Circuit's order denying en banc review is reported at 788 F.3d 946. This Court's order denying certiorari review is reported at 136 S. Ct. 798.

On remand, the district court's second order dismissing the case (Pet. App. 63a-84a) is not reported

but is available at 2017 WL 6059134. The Ninth Circuit's initial opinion reversing this second dismissal (Pet. App. 47a-62a) is reported at 906 F.3d 1120, and its revised opinion (Pet. App. 1a-6a, 34a-46a) is reported at 929 F.3d 623. The order denying en banc review (Pet. App. 1a-33a) is also reported at 929 F.3d 623.

## JURISDICTION

The Ninth Circuit entered judgment on October 23, 2018. Petitioner filed a timely petition for rehearing, which was denied on July 5, 2019. On the same date, the Ninth Circuit entered an amended judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Alien Tort Statute, 28 U.S.C. § 1350, 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 the United States.

## INTRODUCTION

As this Court recently underscored, Alien Tort Statute litigation "must be 'subject to vigilant doorkeeping' " to ensure that the statute is narrowly construed and sparingly applied. *Jesner* v. *Arab Bank, PLC*, 138 S. Ct. 1386, 1398 (2018) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 729 (2004)). In the decision below, the Ninth Circuit took the opposite approach. It reversed the district court's straightforward determination that a plaintiff may not overcome the bar on extraterritorial ATS claims through generic allegations of corporate oversight activities in the United States. As eight members of

the Ninth Circuit recognized in a dissent from denial of en banc rehearing, the panel's extraterritoriality holding conflicts with the decisions of its sister circuits and is irreconcilable with the precedents of this Court. And that is only the tip of the iceberg.

The panel also perpetuated a circuit split regarding domestic corporate liability under the ATS, disregarding this Court's guidance in *Jesner* in the process. And—despite acknowledging that in the *fourteen years* this case has been pending, Plaintiffs have not yet alleged the *actus reus* for aiding and abetting or even established Article III standing as to Nestlé USA—the panel remanded to give Plaintiffs yet another opportunity to try to make out their case.

Enough is enough. The allegations of child slavery in Côte d'Ivoire at the base of this suit unquestionably represent terrible human rights abuses, and Petitioner unequivocally condemns child slavery in Côte d'Ivoire and slave labor anywhere in the world. But Plaintiffs have *never* asserted that Petitioner Nestlé USA or any of the other Defendants are the perpetrators of those grievous wrongs. Rather, Plaintiffs allege that Defendants should be held liable for child slavery in Côte d'Ivoire because they purchased cocoa from that country, and because they allegedly provided farmers with assistance in Côte d'Ivoire in order to aid in the production of that cocoa.

Those allegations do not come close to satisfying the extraterritoriality standard that this Court articulated in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U.S. 108 (2013) and *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016).

And the panel's determination that the ATS permits courts to impose liability on the domestic corporations in this case is squarely at odds with this Court's repeated holdings that "federal courts must exercise 'great caution' " before allowing ATS claims to move forward. *Jesner*, 138 S. Ct. at 1403 (quoting *Sosa*, 542 U.S. at 728).

Further prolonging this suit will only impinge on the separation of powers and interfere with the foreign policy of the political branches without doing anything to advance the goal of combatting child slavery. Indeed, allowing ATS suits like this to proceed discourages the very foreign investment that "contributes to the economic development that so often is an essential foundation for human rights." *Id.* at 1406 (plurality op.).

This Court should grant certiorari to clarify the threshold ATS requirements that will prevent similar meritless ATS litigation in the future and bring this case to a long-overdue close.

## STATEMENT

This ATS case arises from a putative class action filed *fourteen years ago* on behalf of several unnamed Malian citizens. Plaintiffs allege that unidentified foreigners enslaved them and forced them to work on Ivorian-owned cocoa farms in West Africa. Their suit, however, is not against these alleged malefactors, but rather against multinational cocoa suppliers and food and beverage companies. Plaintiffs allege that these companies aided and abetted forced labor through their involvement with the cocoa industry in West Africa.

Specifically, Plaintiffs contend that a broad swath of named and unnamed corporate defendants, includ-

ing Nestlé USA, purchased cocoa that originated from West Africa, and that unspecified Defendants contracted with cocoa farmers in Côte d'Ivoire to provide them with funds, farming supplies, and training. They also allege that in 2001, Defendants lobbied against a bill that would have funded research about creating a slave-free label for chocolate products and instead entered into a voluntary agreement—the Harkin-Engel Protocol—aimed at eradicating forced labor in West Africa.

Over the last fourteen years, Plaintiffs have amended their allegations on multiple occasions, and various parties have been added to or dismissed from the case. But it is worth noting what has *never* been in dispute: Plaintiffs have never alleged that Nestlé USA ever owned or operated farms in West Africa; it has not. Plaintiffs have also admitted that they have not and cannot allege that Defendants "specifically intended the human rights violation at issue," *Doe I* v. *Nestle USA, Inc.* (*Nestlé I*), 766 F.3d 1013, 1029 (9th Cir. 2014) (Rawlinson, J., concurring in part and dissenting in part), or that Defendants "wanted child slave labor to go on," *Doe* v. *Nestle, S.A.*, 748 F. Supp. 2d 1057, 1110 n.52 (C.D. Cal. 2010). In fact, Plaintiffs' complaints have consistently pointed to Nestlé's statements condemning child slavery and explaining the company's extensive efforts to counteract it, because—according to Plaintiffs—these statements indicate knowledge of child slavery, and therefore intent to abet it.

It is also worth noting that, over the course of fourteen years, no court has ever held that Plaintiffs stated a valid claim for aiding and abetting child slavery. Rather, during this time, the district court

twice dismissed Plaintiffs' allegations for failure to state a claim. The Ninth Circuit, in turn, twice reversed in opinions acknowledging crucial defects in Plaintiffs' claims, but nonetheless granting leave to amend. Collectively, *twelve* different judges have dissented from denials of en banc rehearing spurred by the Ninth Circuit's holdings.

The following presents a condensed version of this voluminous procedural history.

**1. Initial District Court Proceedings**

Plaintiffs filed their initial complaint in 2005, and a First Amended Class Action Complaint (FAC) in 2009. That complaint, like its precursor, named Petitioner Nestlé USA as one of many Defendants, along with its Swiss parent company Nestlé S.A.; its Côte d'Ivoire affiliate, Nestlé Côte d'Ivoire; Cargill, Inc. and several affiliates; Archer Daniels Midland, Co.; and ten unnamed "Corporate Doe" defendants. C.A. ER 241 (No. 10-56739).

The FAC alleged that this group of "Defendants" purchase "ongoing, cheap suppl[ies] of cocoa" from Côte d'Ivoire through "exclusive supplier/buyer relationships" with farmers and farming cooperatives in the country. *Id.* at 251. The FAC also alleged that unspecified "Defendants control" conditions in Côte d'Ivoire by providing "ongoing financial support," as well as "farming supplies" and "training and capacity building." *Id.* It alleged that these tasks "require frequent and ongoing visits to the farms either by Defendants directly or via their contracted agents." *Id.*

In addition, the FAC alleged that the "U.S. chocolate industry" lobbied against a 2001 bill proposed by Representative Engel that would have worked to

stem child labor in West Africa by "forc[ing] U.S. chocolate importers and manufacturers to adhere to a certification and labeling system." *Id.* at 257. Plaintiffs alleged that the industry threw its support behind an alternate "Harkin-Eng[el] Protocol" that implemented "a private, voluntary mechanism to ensure child labor free chocolate." *Id.*

These allegations were lodged against "Defendants" in general, even though the complaint acknowledged that different Defendants have different roles in the cocoa supply chain. For example, the FAC recognized that Cargill is a cocoa supplier whereas Nestlé USA is a food and beverage manufacturer and processor. *Id.* at 247-248. Moreover, neither the 2005 Complaint nor the FAC contained *any* allegations regarding conduct by Nestlé USA in particular. Beyond specifying that Nestlé USA is a food and beverage company, the FAC simply alleged that it (like the other subsidiaries named in the complaints) was an "agent" and "alter-ego" of its corporate parent, Swiss-based Nestlé S.A. Plaintiffs then treated the different Nestlé entities interchangeably, alleging—for example—that "Nestlé" had "exclusive supplier/buyer relationships" with certain farms in Côte d'Ivoire, and citing extensively from "Nestlé" policies. *See id.* at 251-253.

In 2010, the district court dismissed the case in a 161-page opinion. *Nestle, S.A.*, 748 F. Supp. 2d 1057. The district court held that Plaintiffs had not alleged sufficient facts to support the *mens rea* for aiding and abetting liability because they "do not—and, as they conceded at oral argument * * *, *cannot*—allege that Defendants acted with the purpose and intent that their conduct would perpetuate child slavery on

Ivorian farms." *Id.* at 1110. Moreover, Plaintiffs had not alleged the *actus reus* for aiding and abetting child slavery because they alleged nothing more than "ordinary commercial transactions." *Id.* at 1109. The district court also held that international law precludes ATS claims against corporate defendants. *Id*. at 1143.

**2. Initial Appeal**

Plaintiffs appealed, and the Ninth Circuit vacated and remanded for further proceedings. It originally overturned the district court's opinion through a three paragraph per curiam order, with a partial dissent from Judge Rawlinson. Following a petition for rehearing, the panel withdrew its order and issued a new, longer opinion, again vacating the district court's decision over Judge Rawlinson's partial dissent.

The panel's revised opinion held that corporate liability exists under the ATS. *Nestlé I*, 766 F.3d at 1021-22. It then held that Plaintiffs had sufficiently pled *mens rea* through allegations that Defendants had attempted to purchase the "the cheapest cocoa possible, even if it meant facilitating child slavery." *Id.* at 1026. The panel further explained that, given Plaintiffs' allegations that Defendants exercise financial control in the Ivorian cocoa market, Defendants' "failure to stop or limit child slavery supports the inference that they intended to keep that system in place." *Id.* at 1024-25.

The panel declined to decide, however, whether Plaintiffs had satisfied the *actus reus* requirement, stating instead that Plaintiffs should be permitted to amend their complaint. *Id.* at 1026-27.

The panel also declined to decide whether the suit was impermissibly extraterritorial under this Court's decision in *Kiobel*, 569 U.S. 108, issued while the appeal was pending. It observed that the FAC made "no attempt to explain what portion of the conduct underlying the plaintiffs[']claims took place within the United States." *Nestlé I*, 766 F.3d at 1028. It remanded to allow Plaintiffs to attempt to correct this deficiency. *Id.* at 1027-29.

The Ninth Circuit denied the petition for en banc rehearing over the dissent of eight judges. *Doe I* v. *Nestle USA, Inc.*, 788 F.3d 946 (9th Cir. 2015). The dissent recognized that Plaintiffs had allegedly suffered grievous harms and that they were "deserving of sympathy." *Id.* at 946-947. But the dissenters also noted that Plaintiffs had not brought "this action against the slavers who kidnapped them, nor against the plantation owners who mistreated them." *Id.* at 947. By permitting Plaintiffs to move forward with their suit against a set of Defendants whose primary alleged misconduct was purchasing cocoa, "the panel majority * * * substituted sympathy for legal analysis." *Id.* at 946.

Defendants petitioned for certiorari, which was denied in January 2016. *Nestle U.S.A., Inc.* v. *Doe I*, 136 S. Ct. 798 (2016) (mem.).

**3. Second District Court Dismissal**

Back before the district court, Plaintiffs filed their Second Amended Complaint (SAC) in June 2016. The SAC is markedly similar to Plaintiffs' prior complaints. It modestly changed the roster of named and unnamed parties, but continued to reference Nestlé S.A., Nestlé Côte d'Ivoire, and Cargill's for-

eign affiliates, though none of these entities have been served.

As to substance, Plaintiffs' allegations remain fundamentally the same. The SAC contains scant allegations with respect to Nestlé USA's alleged conduct. It reiterates (incorrectly) that "Nestlé established Nestlé, USA as a wholly-owned subsidiary of Nestlé, S.A.," but it does not attribute any conduct to Nestlé USA in particular. C.A. ER 143 (No. 17-55435). Instead, it again makes allegations with respect to "Nestlé" as whole, asserting that "Nestlé had the ability and control in the U.S. to take any necessary steps to eradicate the practice of using child slaves to harvest its cocoa in Côte D'Ivoire," and that "Nestlé" in general "regularly had employees from their Swiss and U.S. headquarters inspecting their operations in Côte D'Ivoire." *Id.*

In addition, the SAC continues to allege that "Nestlé" had "exclusive supplier/buyer relationships" with Côte d'Ivoire farming cooperatives, and that "Nestlé" has ample literature explaining its commitment to corporate responsibility and the eradication of child slavery. In this regard, however, Plaintiffs amended their prior allegations by adding the assertion that this literature was "published in the U.S." *Id.* at 144, 148-151.

Defendants once again moved to dismiss,[1] and the district court again granted the motion. Applying the "focus" test for extraterritoriality announced in *Morrison*, 561 U.S. 247, and applied to the ATS in

[1] Archer Daniel Midlands, Co. was voluntarily dismissed from the case before the motion-to-dismiss proceedings.

*RJR Nabisco,* 136 S. Ct. 2090, the district court held that the "focus" of Plaintiffs' claim is impermissibly outside the United States. *See* Pet. App. 66a-77a. The district court dismissed the case with prejudice. *Id.* at 83a-84a.

**4. Second Appeal**

The Ninth Circuit again reversed, with Judge Nelson again writing for the majority and Judge Shea concurring only in the judgment.

*First*, the panel reasserted the Ninth Circuit's rule that domestic corporations may be liable under the ATS. It acknowledged that, while the appeal was pending, this Court had issued *Jesner*, barring foreign corporate ATS liability. Pet. App. 55a-56a. But the panel concluded that nothing in *Jesner* necessitated revisiting the Circuit's position. *Id.*

*Second*, the panel held that Plaintiffs' claims are sufficiently domestic. It rejected the assertion that the ATS "focus" analysis should center on "the location where the principal offense took place or the location where the injury occurred." *Id.* at 58a. Instead, it held that the "focus" analysis requires courts to look more broadly to any conduct that might constitute "aiding and abetting." *Id.* at 58a-59a. And it held that standard was satisfied by a single, unsupported allegation that "[D]efendants" had provided "personal spending money to maintain the farmers' and/or the cooperatives' loyalty as an exclusive supplier." *Id.* at 60a. The panel "infer[red]" that these alleged payments to farmers in Côte d'Ivoire were "akin to kickbacks," even though Plaintiffs never used that term in the complaint. *Id.* (internal quotation marks omitted). The panel apparently also inferred that these payments were

orchestrated from the United States—though that also was never alleged. *Id.* at 60a-61a.

*Third,* like the first *Doe* panel, the Ninth Circuit refused to rule on Defendants' argument that Plaintiffs had not adequately pled *actus reus*. The panel observed that "the operative complaint names several foreign corporations as defendants" and it recognized that the SAC adopts the "problematic approach" of "discuss[ing] defendants as if they are a single bloc." *Id.* at 61a. The panel concluded that, in light of *Jesner*, "it is not possible on the current record to connect culpable conduct to defendants that may be sued under the ATS." *Id.* But the panel nevertheless held that this pleading failure, after fourteen years, was not fatal to Plaintiffs' suit and that Plaintiffs should be allowed yet another opportunity to amend to "remove those defendants who are no longer amenable to suit under the ATS, and specify which potentially liable party is responsible for what culpable conduct." *Id.* at 62a.

Defendants' petitions for rehearing were again denied, over the dissent of eight judges. But, as in the prior appeal, the rehearing petitions prompted the panel to issue an amended order. That revised opinion added a new section addressing Article III standing, which the panel had previously ignored. *Id.* at 5a-6a, 45a-46a. The panel held that Plaintiffs had met two of the three fundamental requirements for Article III standing because they had alleged (1) an injury that (2) could be redressed. *Id.* at 5a, 45a. The panel also held that Plaintiffs had satisfied the third fundamental requirement—traceability—with respect to Defendant Cargill because the SAC purportedly "raise[s] sufficiently specific allegations

regarding Cargill's involvement in farms that rely on child slavery" (though the panel did not explain what those might be). *Id.* at 6a, 45a-46a.

The panel acknowledged that "Plaintiffs' allegations against Nestlé are far less clear," in part because of "plaintiffs' reliance on collective allegations against all or at least multiple defendants." *Id.* at 6a, 46a. But, despite the panel's recognition that—fourteen years into the case—Plaintiffs *still* had not sufficiently alleged standing to sue Nestlé USA, the panel remanded to give Plaintiffs a chance to amend their pleadings to address this "deficiency." *Id.*

Judge Bennett dissented from the denial of rehearing. Seven judges agreed that en banc review should have been granted to reconsider the panel's extraterritoriality holding.

As the dissent explained, the panel's holding that the extraterritoriality bar may be overcome by allegations of domestic financing arrangements and decisionmaking "conflicts with two other circuits that have considered the question" and is inconsistent with this Court's own holdings. *Id.* at 24a-25a, 28a-29a.

The dissent also explained, in agreement with five other judges, that rehearing should have been granted because, after *Jesner*, actions against domestic corporations are not cognizable under the ATS. *Id.* at 14a-18a.

This petition followed.

## REASONS FOR GRANTING THE PETITION

### I. THE NINTH CIRCUIT'S PERMISSIVE EXTRATERRITORIALITY STANDARD CONFLICTS WITH THE OPINIONS OF ITS SISTER CIRCUITS AND THE PRECEDENTS OF THIS COURT.

In *Kiobel*, this Court held that "the presumption against extraterritoriality applies to claims under the ATS." 569 U.S. at 124. As a result, ATS suits may move forward only where the "claims touch and concern the territory of the United States" with "sufficient force to displace the presumption." *Id.* at 124-125. In *RJR Nabisco*, this Court further clarified that *Kiobel*'s "touch and concern" inquiry is merely another way of capturing the basic extraterritoriality standard articulated in *Morrison*: A claim may displace the presumption against extraterritoriality only where the "conduct relevant to the statute's focus occurred in the United States." 136 S. Ct. at 2101.

Despite that clarification, the courts of appeals remain confused as to when an ATS suit is impermissibly extraterritorial. Two circuits—the Fifth and the Eleventh—have held that an ATS claim cannot displace the presumption against extraterritoriality based on conclusory allegations of corporate oversight activities in the United States. By contrast, the Ninth Circuit held in this case that the extraterritoriality bar is overcome by Plaintiffs' allegations that Defendants made payments to farmers *in Côte d'Ivoire* based on the panel's inference that "financing decisions" were made "from headquarters in the United States." Pet. App. 43a-44a.

Not only does that holding conflict with those of the Fifth and Eleventh Circuits, but it is also irreconcilable with the precedents of this Court. In case after case, the Court has emphasized the importance of a robust extraterritoriality standard. That is particularly true in the ATS context because the ATS was intended to ensure redress for ambassadors "injured in the United States," not to open U.S. courts to sit in judgment on all manner of harms inflicted overseas. *Kiobel*, 569 U.S. at 123-124.

The Court should take this opportunity to resolve the confusion in the Circuits and to confirm the importance of a stringent bar on extraterritorial ATS claims. At a bare minimum, it should clarify that an ATS claim cannot overcome the extraterritoriality bar where—as here—plaintiffs have not even alleged that their injuries can be traced to the domestic conduct of a defendant.

### A. Certiorari Is Necessary To Resolve The Conflict In The Courts of Appeals Regarding The Proper Extraterritoriality Standard For ATS Claims.

There is a clear split as to whether a plaintiff may overcome the bar on extraterritorial claims through allegations of corporate oversight activities in the United States.

1. Two circuits, the Fifth and the Eleventh, squarely hold that such allegations are insufficient. *See, e.g.*, *Doe* v. *Drummond Co.*, 782 F.3d 576, 598 (11th Cir. 2015); *Adhikari* v. *Kellogg Brown & Root, Inc.*, 845 F.3d 184, 197-198 (5th Cir. 2017). The Eleventh Circuit developed that position in a trio of cases, rejecting far more dramatic allegations of aiding and

abetting conduct than the ones here. In the first case, *Baloco* v. *Drummond Co.*, 767 F.3d 1229, 1235-36 (11th Cir. 2014), the Eleventh Circuit held that claims that a U.S. corporation had aided and abetted extrajudicial killings were impermissibly extraterritorial. The *Baloco* Court began its extraterritoriality analysis by emphasizing that the murders themselves had occurred in Columbia. *Id.* at 1236. It then explained that—while plaintiffs had alleged that the defendant corporation "consent[ed] to support" the killings in the United States and even sent U.S. employees to overseas meetings about the killings—those allegations did not "touch and concern *the territory* of the United States * * * with sufficient force." *Id.* (internal quotation marks omitted).

Shortly after *Baloco*, the Eleventh Circuit issued a second opinion that arrived at a similar conclusion, *Cardona* v. *Chiquita Brands International, Inc.*, 760 F.3d 1185 (11th Cir. 2014). In that case, the court determined that the extraterritoriality bar prohibited plaintiffs' claims from going forward even though they had alleged that a U.S. corporate defendant "review[ed], approv[ed], and conceal[ed] a scheme of payments and weapons shipments to Colombian terrorist organizations" from within the United States. *Id.* at 1192 (Martin, J., dissenting); *see id.* at 1191.

In the third case, *Doe* v. *Drummond*, the Eleventh Circuit synthesized the lessons of these prior precedents. It recognized that both *Baloco* and *Cardona* make clear that the presumption against extraterritorial claims is not displaced by "general allegations involving U.S. defendants' domestic decision-making

with regard to supporting and funding" human rights violations abroad. 782 F.3d at 598. Accordingly, the court of appeals found that the allegations in *Drummond*—which amounted to an assertion of fiscal oversight and policy making in the United States—did not "outweigh the extraterritorial location of the rest of Plaintiffs' claims." *Id.*

The Fifth Circuit has followed the Eleventh Circuit's lead in holding that the extraterritoriality bar is not overcome by allegations of corporate oversight activities in the United States. The *Adhikari* plaintiffs alleged that a U.S. corporation used New York bank accounts to make "domestic payments" to a subcontractor accused of human trafficking abroad. 845 F.3d at 197. Plaintiffs also alleged the corporation's U.S. employees were "aware of allegations of human trafficking." *Id.* But the Fifth Circuit nevertheless found these allegations insufficient to establish jurisdiction under the ATS. *Id*. at 198.

2. In sharp contrast, the Ninth Circuit held that Plaintiffs could satisfy the "focus" test in this case based on allegations that Defendants made payments to farmers and cooperatives *in Côte d'Ivoire*,[2] apparently because these allegations were coupled with an entirely distinct assertion that Defendants'

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[2] Perhaps recognizing the weakness of its argument, the Ninth Circuit attempted to make these payments seem more nefarious than Plaintiffs have asserted. While the Complaint describes them as payments of "spending money" to farmers and cooperatives in the Cote d'Ivoire, the panel "infer[red]" that they were "more akin to kickbacks" than regular payments. Pet. App. 43a. The en banc dissent deemed this conclusion "flatly wrong." *Id.* at 30a-31a.

U.S. employees made oversight visits to farms in Côte d'Ivoire and reported back to the United States, where—according to still another set of conclusory allegations—"financing decisions" originated. Pet. App. 43a-44a. In the panel's view, these allegations "paint[ed] a picture of overseas slave labor that defendants perpetuated from headquarters in the United States." *Id.* And that "picture" of corporate oversight was enough to satisfy the ATS's "focus" inquiry. *Id.*

As eight judges pointed out in the en banc dissent, that holding undoubtedly "conflicts with two other circuits that have considered the question." *Id.* at 28a. Given the *Adhikari* Court's holding that allegations of "domestic payments" were insufficient to overcome the extraterritoriality bar, 845 F.3d at 197-198, the Fifth Circuit obviously would not agree that the bar may be overcome by assertions of payments made *in Côte d'Ivoire*, even if those payments could somehow be tied back to Defendants' United States headquarters. And given that the Eleventh Circuit has held that providing "consent to support" killings in the United States is not enough, *Baloco*, 760 F.3d at 1236, it is inconceivable that it would agree that general assertions of fiscal oversight are sufficient.

Indeed, *no* other court of appeals has embraced such a lenient standard, under which a plaintiff may overcome the extraterritoriality bar so long as it alleges corporate oversight from a company's United States headquarters. The panel suggested otherwise, citing to two Second Circuit cases, *Mastafa* v. *Chevron Corp.*, 770 F.3d 170 (2d Cir. 2014) and *Licci ex rel. Licci* v. *Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016). Pet. App. 42a-44a. But both

of those cases concerned allegations of far more detailed, particularized, and discrete domestic conduct.

In *Mastafa*, the plaintiffs alleged "multiple domestic purchases and financing transactions" and "New York-based payments and 'financing arrangements' conducted exclusively through a New York bank account." 770 F.3d at 191. In other words, unlike in this case, plaintiffs alleged that defendants made payments from the United States, using funds held in the United States, in order to support the human rights violations at issue. Far from embracing a permissive extraterritoriality standard, the *Mastafa* Court explicitly rejected the plaintiffs' attempts to rely on "conclusory" allegations that "much of the decisionmaking to participate in the * * * scheme" took place in the United States—the same allegations the Ninth Circuit accepted here. *Id.* at 190. Only the more specific allegations of domestic financial transactions carried the day for the *Mastafa* plaintiffs.

Nor did the *Licci* Court give any indication that it would have deemed sufficient "conclusory" allegations that corporate oversight activities occurred in the United States. In *Licci*, the defendant allegedly created a U.S. bank account and facilitated wire transfers through that account to fund a terrorist organization. 834 F.3d at 217. Thus—like *Mastafa*, but unlike in this case—*Licci* involved specific allegations of domestic financial transactions rather than general assertions that "financial decisions" were made in the United States. Moreover, the *Licci* defendant allegedly carried out the banking services on behalf of a terrorist organization—a violation of

U.S. law in and of itself, notwithstanding its connection to specific terrorist activity overseas. Pet. App. 30a. (Bennett, J., dissenting) (distinguishing *Licci* on this basis). These allegations of overtly unlawful domestic conduct far exceed Plaintiffs' nebulous assertions regarding routine, legal payments to farmers *in Côte d'Ivoire*.

To be sure, *Licci* and *Mastafa* may be in some tension with the holdings of the Fifth and Eleventh Circuits, which have held that even allegations of "domestic payments" and U.S.-based "funding" are insufficient to overcome the extraterritoriality bar. But the panel simply failed to appreciate that *every* other court of appeals to address the issue, including the Second Circuit, has rejected the sufficiency of allegations of general corporate oversight.

### B. This Court Should Grant Review Because The Ninth Circuit's Holding Cannot Be Squared With The Precedents Of This Court.

This Court has held that a claim overcomes the extraterritoriality bar only when the conduct relevant to the statute's "focus" occurred in the United States, *RJR Nabisco*, 136 S. Ct. at 2101, and when the allegations "touch and concern" the United States with "sufficient force," *Kiobel*, 569 U.S. at 124-125. Plaintiffs' allegations do not come close to satisfying that test. As the en banc dissent explained, the "focus" of the ATS is conduct that violates specific and universal norms of international law. Pet. App. 25a. (Bennett, J., dissenting). "Here, that conduct—Plaintiffs' enslavement on cocoa plantations—took place abroad" and involved entire-

ly distinct actors. *Id.* Accordingly, the ATS claim "must be dismissed." *Id.*

The panel reached a contrary conclusion based on its assertion that *any* conduct that purportedly aids or abets a human rights violation comes within the "focus" of the ATS. But broadening the "focus" inquiry beyond the location of the primary human rights violation cannot be squared with this Court's repeated statements that a robust extraterritoriality standard is essential to protecting the United States' interests in comity. *See Jesner*, 138 S. Ct. at 1407 (reiterating that the presumption against extraterritoriality guards against triggering serious foreign policy consequences (citing *Kiobel*, 569 U.S. at 124)); *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in judgment) (explaining that the extraterritoriality bar is necessary "to ensure that ATS litigation does not undermine the very harmony that it was intended to promote").

A "focus" inquiry that looks to the location of *any* alleged aiding and abetting activities is also inconsistent with this Court's decision in *Kiobel*. There, the Court emphasized that the ATS was created to ensure a forum "to provide judicial relief to foreign officials *injured in the United States*." 569 U.S. at 123 (emphasis added). That history strongly suggests that the "focus" of an ATS claim is the place where the direct harm, and therefore the injury, occurred. Similarly, longstanding tort principles direct courts to focus on the location where the *injury* occurred. *See* Restatement (Second) of Conflict of Laws § 146 (1971) ("[T]he local law of the state where the injury occurred determines the rights and liabilities of the parties * * *."); *Sosa*, 542 U.S. at 705

("[T]ort cases" generally apply "the law of the place where the injury occurred."); *cf.*, *RJR Nabisco*, 136 S. Ct. at 2106, 2111 (Under RICO's extraterritoriality standard, a plaintiff must "allege and prove a *domestic* injury." (emphasis in original)).

Further, the Ninth Circuit's analysis is irreconcilable with *Morrison*, in which the Court held that the "focus" of the anti-fraud provision of the Securities and Exchange Act "is not upon the place where the deception originated, but upon purchases and sales of securities." 561 U.S. at 266. In so holding, the Court explained that the deceptive conduct could not be the "focus" of the Securities and Exchange Act because the Act "does not punish deceptive conduct" in general, "but only deceptive conduct '*in connection with* the purchase or sale of any security.'" *Id.* (emphasis added). The same logic dictates that aiding and abetting conduct that is unlawful only because it occurs "in connection with" a violation of a specific, universal human rights norm cannot be the "focus" of an ATS claim.

Finally, even if this Court's precedents could somehow be understood to extend the ATS's "focus" to *some* allegations of domestic aiding and abetting activity, the extraterritoriality bar could not possibly be overcome by the scant allegations here. Pet. App. 28a (Bennett, J., dissenting) ("[V]ague allegations of domestic 'decisions furthering the [] conspiracy' will not imbue an otherwise entirely foreign claim with the territorial connection that the ATS absolutely requires." (citations omitted)). Holding that the presumption against extraterritoriality is displaced by allegations of corporate oversight from U.S. headquarters is tantamount to holding that mere

corporate presence is sufficient to overcome the extraterritoriality bar, a position expressly rejected in *Kiobel*. 569 U.S. at 125.

### C. At A Minimum, This Court Should Clarify That The Extraterritoriality Bar Requires Dismissal Where A Plaintiff's Injury Cannot Be Traced To Defendant's Domestic Conduct.

This case presents an ideal opportunity for the Court to resolve the confusion in the circuits by articulating the appropriate extraterritoriality standard under the ATS. It also offers the Court a chance to clarify a simple proposition regarding which there should be *no* confusion: A plaintiff may not overcome the extraterritoriality bar if her allegations do not establish that her injury may be traced to defendant's domestic conduct.

That would seem to be an obvious point. As this Court has explained, a plaintiff cannot even satisfy the constitutional minima for Article III standing unless she is able to trace her injury to defendant's allegedly harmful conduct. *See Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992). And, when a federal law's scope does not reach beyond U.S. borders, the relevant conduct is that which occurs within the United States. *Morrison*, 561 U.S. at 266. Thus, a plaintiff must be able to demonstrate that her harm can be traced to the defendant's domestic conduct.

The Ninth Circuit ignored that straightforward principle. As the panel itself acknowledged, Plaintiffs have not put forward any allegations that make clear how their injuries can be traced to *any* of Nestlé USA's conduct. Pet. App. 6a, 46a. While the Ninth

Circuit concluded that Plaintiffs made "sufficiently specific allegations" regarding Cargill's supposed "involvement in farms that rely on child slavery," *id.* at 6a, 45a-46a,[3] the panel did not identify and Plaintiffs have not made any similar allegations with respect to Nestlé USA, or even with respect to "Nestlé" in general. This "deficiency" led the panel to doubt that Plaintiffs had satisfied the Article III traceability requirement with respect to Nestlé USA. *Id.* But despite those doubts, the panel reached the definitive conclusion that Plaintiffs *had* sufficiently overcome the extraterritoriality bar with respect to their claims against both Defendants. As a result, under the Ninth Circuit's decision, allegations of domestic conduct may be sufficient to displace the presumption against extraterritoriality even if the plaintiff cannot not trace any connection between that conduct and her injury. That simply cannot be, and this Court should grant certiorari to clarify as much.

## II. THE NINTH CIRCUIT'S CORPORATE LIABILITY HOLDING RESUSCITATES A DIVISION IN THE CIRCUITS AND CONFLICTS WITH THE PRECEDENT OF THIS COURT.

In addition to creating a split as to extraterritoriality, the Ninth Circuit's opinion reinvigorates an established circuit split as to corporate liability under the ATS. *Jesner* conclusively resolved that split with respect to whether the ATS permits courts

[3] Cargill vehemently disputed these allegations and their specificity below. Cargill Reh'g Pet. 20 (No. 17-55435).

to impose liability on foreign corporations and provided detailed guidance that should have eliminated any confusion regarding domestic corporate liability as well. But the panel ignored that guidance, reentrenching the circuit split and even offering plaintiffs a potential end-run around *Jesner*'s bar on ATS suits against foreign corporations.

1. Before *Jesner*, lower courts were split on the broad question of whether courts may impose liability on a corporation under the ATS. The Second Circuit has long held that they may not. *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010). By contrast, the District of Columbia, Seventh, and Eleventh Circuits have held that the ATS allows judges to recognize causes of action against corporate defendants. *See, e.g.*, *Doe VIII* v. *Exxon Mobil Corp.,* 654 F.3d 11 (D.C. Cir. 2011), *vacated on other grounds by Doe VIII* v. *Exxon Mobil Corp.*, 527 F. App'x 7 (D.C. Cir. 2013); *Flomo* v. *Firestone Nat. Rubber Co.*, 643 F.3d 1013 (7th Cir. 2011); *Romero* v. *Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008). In *Nestlé I*, the Ninth Circuit embraced the same position. 766 F.3d at 1020-22.

This Court granted certiorari in *Jesner* to resolve this division in the lower courts. The *Jesner* Court ultimately confined its holding to foreign corporations like the defendant before it, concluding that the ATS does not permit the Judiciary to impose liability on foreign corporate defendants. But the decision also offered detailed guidance for courts confronting the closely related question of *domestic* corporate liability. In particular, *Jesner* emphasized that in our constitutional system, it is *Congress's* role to create a cause of action and decide its contours,

including which parties may face liability. The ATS permits an exceedingly minor deviation from that rule that allows the *Judiciary* to create causes of action. But this authority must be exercised with "great caution," and courts may impose liability on a class of defendants only in "narrow circumstances," when doing so is supported by an international law "'norm that is specific, universal, and obligatory'" *and* when countervailing policy concerns do not dictate otherwise. *Jesner*, 138 S. Ct. at 1398-99, 1402-03 (quoting *Sosa*, 542 U.S. at 728, 732).

That guidance should have removed any doubt as to whether domestic corporations are susceptible to ATS suits: As the *Jesner* plurality explained, international law does not recognize a "specific, universal, and obligatory norm" of corporate liability *of any kind*. *Id.* at 1401-02 (plurality op.). That means that domestic corporate liability is foreclosed out of the gate. And even if a court did move on to consider whether policy concerns permit recognizing domestic corporate liability, there is abundant evidence that they do not. In *Correctional Services Corporation* v. *Malesko*, 534 U.S. 61 (2001), for example, this Court refused to recognize corporate liability in the *Bivens* context in part because of the danger that plaintiffs would focus their litigation efforts on corporate defendants, rather than the individuals directly responsible for the alleged misconduct that *Bivens* was meant to deter. *Id.* at 70-71. The same reasoning applies in the ATS context: "[C]rimes 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." *Jesner*, 138 S. Ct. at 1402

(plurality op.) (quoting *The Nurnberg Trial*, 6 F.R.D. 69, 110 (1946)).

Moreover, all five Justices in the *Jesner* majority advanced compelling reasons why jurisdiction under the ATS should not extend to *any* corporate defendants, domestic or foreign. *See id.* at 1401 (plurality op.) ("The international community's conscious decision to limit the authority of these international tribunals to natural persons counsels against a broad holding that there is a specific, universal, and obligatory norm of corporate liability under currently prevailing international law."); *id.* at 1410 (Alito, J., concurring in part and concurring in judgment) (explaining that corporate liability is not necessary to "avoid[] diplomatic strife" and therefore is not proper under the ATS); *id.* at 1412 (Gorsuch, J., concurring in part and concurring in judgment) (asserting that courts "should refuse invitations to create new forms of legal liability" full stop).

Even before *Jesner*, then-Judge Kavanaugh had provided yet another reason why domestic corporate liability cannot stand. He observed that Congress has foreclosed corporate liability through the TVPA, creating the strong inference that Congress did not intend for corporations to face liability in the ATS context, either. *Exxon Mobil Corp.*, 654 F.3d at 73 (Kavanaugh, J., dissenting in part); *see Sosa*, 542 U.S. at 731 (Congress may "shut the door to the law of nations" either "explicitly, or implicitly by treaties or statutes that occupy the field."); *id.* at 760 (Breyer, J., concurring in part and concurring in judgment) ("Congress can make clear that courts should not recognize any such norm, through a direct or indirect command or by occupying the field.").

2. Despite these extensive and compelling reasons for precluding domestic corporate liability under the ATS, the panel in this case declined to reconsider the Ninth Circuit's prior holding in favor of domestic corporate liability. By way of explanation, the Ninth Circuit stated only that "*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestlé I*'s holding as applied to domestic corporations." Pet. App. 39a. The en banc dissent vehemently disagreed with that assertion, arguing that—at least at the en banc stage—it was incumbent on the Ninth Circuit to revisit its prior precedents in light of *Jesner*'s reasoning. *Id.* at 12a-13a. The fact that this argument did not carry the day means that, despite *Jesner*'s guidance, lower courts will continue to be divided as to domestic corporate liability under the ATS unless and until this Court intervenes.

3. Further, that intervention is urgently needed in *this* case because the panel's decision does not merely ignore *Jesner*'s implications for domestic corporate liability; it threatens to undermine *Jesner*'s holding with respect to foreign corporations as well. The panel permitted Plaintiffs' suit to go forward against Nestlé USA even though the complaint expressly asserts that it is Nestlé S.A.—the *Swiss* parent company—that "control[s] every aspect of [Nestlé USA's] operations, particularly with respect to the sourcing, purchasing, manufacturing, distribution, and/or retailing of cocoa." C.A. ER 140-141 (No. 17-55435). In other words, the panel allowed Plaintiffs to work an end-run around *Jesner*'s bar on foreign corporate liability by bringing suit against a U.S. subsidiary that Plaintiffs themselves allege is wholly controlled by its foreign parent. As most multina-

tional companies have subsidiaries in the United States, the panel established a dangerous precedent that will assist future plaintiffs in evading *Jesner*'s bar on ATS suits against foreign corporations.

## III. THE NINTH CIRCUIT'S EXPANSIVE VIEW OF ATS LIABILITY CANNOT BE RECONCILED WITH BASIC PRINCIPLES OF SEPARATION OF POWERS AND COMITY.

This case provides an ideal vehicle for the Court to offer conclusive guidance with respect to two threshold issues that have confused the lower courts. The Ninth Circuit made definitive—and erroneous—holdings with respect to extraterritoriality and corporate liability. If these holdings are not reviewed, the panel's expansive understanding of ATS liability threatens to become the law of the land, as plaintiffs' attorneys will make every attempt to channel ATS suits to courts in the Ninth Circuit. Permitting ATS litigation to flourish in this way contravenes the will of Congress and usurps the political branches' control over foreign affairs, while simultaneously threatening basic principles of comity.

1. This Court has repeatedly warned that judges must exercise "great caution" before permitting any new claim to go forward under the ATS. *Jesner*, 138 S. Ct. at 1403 (quoting *Sosa*, 542 U.S. at 728). That "caution" is warranted by the fact that the ATS represents a narrow exception to the fundamental separation of powers principle that *Congress* creates and defines every federal cause of action. As a result, courts must be vigilant in ensuring that they do not allow an ATS suit to go forward where it does

not clearly fit within the "narrow" circumstances in which Congress intended to permit ATS litigation.

Moreover, the general separation-of-powers concerns "apply with particular force in the context of the ATS" because the "political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns." *Id.* When courts permit expansive ATS liability, they often usurp that foreign relations authority and impede the foreign policy efforts of the Legislative and Executive Branches.

In this case, for example, the Executive Branch has announced a policy of *encouraging* foreign investment in Côte d'Ivoire. The United States maintains a "trade and investment" agreement with a group of West African states that includes Côte d'Ivoire. *See* Agreement Between the Government of the United States of America and the West African Economic and Monetary Union Concerning the Development of Trade and Investment Relations (2002), https://tinyurl.com/yapttovj. According to the State Department, the purpose of this increased trade is to return Côte d'Ivoire to its status "as West Africa's regional economic and financial powerhouse." Bureau of Econ. & Bus. Affairs, U.S. Dep't of State, 2013 Investment Climate Statement—Côte d'Ivoire (2013), https://tinyurl.com/y6jgkb2r. "With investments by the United States and other international partners, Côte d'Ivoire can act as a bulwark against religious extremism and support U.S. efforts to promote democratic institutions, regional stability and counter the spread of terrorism." Bureau of African Affairs, U.S. Dep't of State, U.S. Relations

with Côte d'Ivoire: Bilateral Relations Fact Sheet (Dec. 4, 2018), https://tinyurl.com/yauodor7.

The Ninth Circuit's decision threatens these goals and undermines the separation of powers by making companies leery of doing business in Côte d'Ivoire, *see* pp. 35-37, *infra*. It therefore chills the very foreign investment that our Government has sought to promote.

2. Comity, too, is often a casualty of expansive ATS liability. As Justice Breyer has explained, carefully limiting the scope of ATS litigation is essential to "those notions of comity that lead each nation to respect the sovereign rights of other nations by limiting the reach of its laws and their enforcement." *Sosa*, 542 U.S. at 761 (Breyer, J., concurring in part and concurring in judgment). These comity concerns are particularly heightened where an ATS suit seeks to impose aiding and abetting liability on U.S. entities based on a primary human rights violation that has occurred abroad. In these circumstances, U.S. courts are compelled to examine and pass judgment on alleged violations of human rights committed by citizens of other nations in other countries.

Again, this case illustrates the problem: Plaintiffs have sued Defendants for aiding and abetting child slavery offenses that were allegedly committed by citizens of West Africa and that allegedly occurred in Côte d'Ivoire. Allowing this case to go forward will therefore likely mean the Plaintiffs will ask the district court to examine conduct that is far outside the jurisdiction of the United States. That is precisely what *Jesner* held U.S. courts may not do.

In short, allowing the Ninth Circuit's decision to stand will lead to the very outcomes this Court has

sought to avoid through its ATS precedents: It will invite courts to run roughshod over basic principles of separation of powers and comity by permitting plaintiffs to pursue all manner of ATS claims, no matter how flimsy the allegations and how tenuous the connection with the United States. The need for certiorari review is clear.

## IV. THIS COURT'S INTERVENTION IS URGENTLY NEEDED TO BRING AN END TO PROTRACTED AND MERITLESS ATS SUITS AND THE SEVERE HARMS THEY INFLICT.

Certiorari review is warranted for a final reason. As this case vividly illustrates, meritless ATS litigation often drags on for a decade or more, imposing drastic and unnecessary burdens on courts and litigants, including unwarranted reputational harms, and creating a powerful *dis*incentive for companies considering foreign investments in developing nations. Only this Court can bring an end to such litigation by issuing definitive guidance as to when an ATS suit should be dismissed at the threshold.

### A. Until This Court Steps In, Lower Courts Will Continue To Permit Protracted And Meritless ATS Suits Like This One.

1. In the past two decades, plaintiffs have filed more than 150 ATS lawsuits against corporations in over 20 industry sectors for business activities in roughly 60 countries, the vast majority of which allege that the corporate defendant aided and abetted the wrongdoing of a foreign actor. Jonathan A. Drimmer & Sarah R. Lamoree*, Think Globally, Sue*

*Locally: Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkeley J. Int'l L. 456, 460-464 (2011).

While some of these ATS suits have reached a timely resolution, many more linger on. *See, e.g.*, *Doe I* v. *Exxon Mobil Corp.*, 69 F. Supp. 3d 75, 106 (D.D.C. 2014) (granting leave to amend complaint after eight years; case still pending). And many cases stretch on for years, only to end in a dismissal on threshold grounds that should have been dispositive from the outset. *See, e.g.*, *Baloco*, 767 F.3d 1229. Courts in the Ninth Circuit, in particular, have often struggled to bring meritless claims to a speedy resolution. *See Daimler AG* v. *Bauman*, 571 U.S. 117 (2014) (pending for ten years before this Court reversed the Ninth Circuit's expansive jurisdictional holding); *Mujica* v. *Airscan Inc*, 771 F.3d 580 (9th Cir. 2014) (pending for a decade before being dismissed on extraterritoriality grounds); *Sarei* v. *Rio Tinto, PLC*, 722 F.3d 1109 (9th Cir. 2013) (en banc) (pending for thirteen years and requiring reversal by this Court); *Bowoto* v. *Chevron Corp.*, 621 F.3d 1116 (9th Cir. 2010) (pending for thirteen years before the Ninth Circuit finally ruled that plaintiffs could not pursue an ATS claim).

2. This suit is a paradigmatic example of the problem. The parties have been litigating the case for fourteen years. During this time, the Ninth Circuit has twice revived Plaintiffs' claims even as it acknowledged fundamental defects in the adequacy of their pleadings. Plaintiffs' claims were first dismissed by the district court nine years ago because Plaintiffs failed to allege the requisite *mens rea* or *actus reus* for aiding and abetting child slavery. The

defects the district court pointed to were glaring: Plaintiffs had acknowledged the absence of any evidence establishing that Defendants intended to aid child slavery, and Plaintiffs allegations of aiding and abetting activity amounted to an assertion that Defendants had engaged in "ordinary commercial transactions" in West Africa. *Nestle, S.A.*, 748 F. Supp. 2d at 1109-10.

Nonetheless, the Ninth Circuit revived the suit, holding that Plaintiffs had established *mens rea* by alleging that Defendants "act[ed] with the purpose of obtaining the cheapest cocoa possible." *Nestlé I*, 766 F.3d at 1026. And it remanded to permit Plaintiffs an opportunity to amend their allegations with respect to *actus reus*.

The district court next dismissed the suit in 2017, again because of a glaring defect in Plaintiffs' pleadings, and again the Ninth Circuit revived the suit. Moreover, it did so despite acknowledging that Plaintiffs' complaint continues to suffer fundamental pleading deficiencies with respect to *actus reus* and Article III standing. Pet. App. 6a, 46a. Instead of ordering dismissal on this basis, the panel ordered that Plaintiffs be given yet another opportunity to amend their complaint, justifying that order by observing that *Jesner* was decided while the appeal was pending. *Id.* at 44a-46a. According to the panel, *Jesner* made clear for the first time that Plaintiffs could not continue to press their claims against the international affiliates named in the complaint. *Id.* The panel posited that, once Plaintiffs remove the allegations against the international affiliates, all other deficiencies may resolve themselves. *Id.*

But this invocation of *Jesner*-as-intervening-authority is unpersuasive on its face. The foreign affiliates that Plaintiffs were directed to remove in light of *Jesner*—Nestlé S.A. and Nestlé Côte d'Ivoire—were terminated from Plaintiffs' first appeal in 2010 because Plaintiffs had never served them. Because the international affiliates have *never* been parties to the suit, the Ninth Circuit had no basis to provide Plaintiffs with yet another opportunity to replead to remove them. *See Foman* v. *Davis*, 371 U.S. 178, 182 (1962) (explaining that it is particularly appropriate to deny leave to amend where there has been a "repeated failure to cure deficiencies by amendments previously allowed").

The Ninth Circuit's efforts to prolong a meritless ATS case undoubtedly go well beyond the norm. But this case is merely an extreme example of what has repeatedly occurred in ATS suits in the past, and what will continue to occur in lower courts unless and until this Court issues definitive guidance as to when an ATS suit must be dismissed at the threshold.

### B. Lengthy And Meritless ATS Suits Burden Courts and Litigants, While Discouraging Foreign Investment In The Developing Countries That Need It Most.

Prolonged and ultimately fruitless litigation obviously imposes severe burdens on the resources of courts and litigants alike. Defendant companies also suffer substantial reputational harms that are often impossible to remedy, even after the cases have been terminated in the companies' favor. *See* Brief of Chamber of Commerce et al. as Amici Curiae Sup-

porting Petitioners at 2, *Nestle U.S.A., Inc.*, 136 S. Ct. 798 (No. 15-349).

Moreover, allowing plaintiffs to pursue meritless ATS suits like this one does not advance the goal of eliminating human rights abuses in developing countries. To the contrary, such suits discourage the foreign investment necessary to improve human rights conditions and chill corporate efforts to ameliorate human rights violations in developing nations.

As the *Jesner* plurality recognized, "active corporate investment" in developing countries "contributes to the economic development that so often is an essential foundation for human rights." 138 S. Ct. at 1406 (plurality op.). But such investment is hindered when companies face the "constant risk of claims seeking to impose massive liability for the alleged conduct of their employees and subsidiaries around the world." *Id.* at 1405. While the *Jesner* Court was referring to the risk of suits in foreign courts, the same consequences flow from the proliferation of prolonged and meritless ATS litigation in the United States courts based on international law violations abroad. Corporations will be reluctant to do business in developing nations if they fear that routine business interactions with those countries will spawn protracted ATS litigation. And decreased investment will bring with it decreased contributions to fighting the sort of harms at the heart of ATS suits.

Moreover, companies that do continue to invest in developing nations may be fearful of taking steps to eradicate human rights problems they may encounter there out of concern that plaintiffs will use their

efforts against them. This is not mere speculation; it is exactly what happened here. Nestlé USA and Cargill, Inc. have developed extensive policies intended to combat forced child labor. Plaintiffs cite those very policies *as evidence of an ATS violation* because they allegedly show that Defendants knew of this problem, even if they also show that Defendants were actively trying to combat it. *See* pp. 5, 7, 10, *supra*.

By allowing the case below to move forward based on such allegations—and based on an asserted international law violation that occurred entirely abroad—the Ninth Circuit has imposed a barrier to foreign investment and foreign aid efforts in the very countries that need it most.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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