Nos. 19-416 & 19-453

In the Supreme Court of the United States

NESTLÉ USA, INC.,
Petitioner,
v.
JOHN DOE I, ET AL.,
Respondents.

CARGILL, INCORPORATED,
Petitioner,
v.
JOHN DOE I, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER CARGILL, INCORPORATED

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ARGUMENT

If Congress had enacted the ATS's text in 2019, or 1969, and the law was before this Court for the first time, the Court almost certainly would hold that the statute establishes subject-matter jurisdiction, but does not create a private cause of action. The Court has abandoned the practice of "inferr[ing] 'causes of action' that were 'not explicit' in" the statutory text. *Hernandez* v. *Mesa*, 140 S. Ct. 735, 741 (2020) (citation omitted); see *Alexander* v. *Sandoval*, 532 U.S. 275, 286 (2001).

The Court reached a different conclusion in *Sosa* v. *Alvarez-Machain*, stating that even though the ATS "creat[ed] no new causes of action," the law was "enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time." 542 U.S. 692, 724 (2004). *Sosa* emphasized the importance of "judicial caution" in recognizing ATS claims. *Id.* at 725.

Plaintiffs and their *amici* urge the Court to throw that caution to the winds and promulgate legal rules that would open U.S. courts to a broad range of ATS lawsuits. *E.g.*, Access Now Br. 5-6 (urging recognition of claims against "American technology companies"); Center for Justice Accountability Br. 17-18 (urging the Court not to "weaken the ATS's ability to make certain that no great crime against the law of nations goes unanswered"); Grant & Eisenhofer ESG Inst. Br. 23 (advocating "corporate liability * * * for human rights abuses, environmental harm, and other [environmental, social, and governance] abuses").

Plaintiffs' arguments suffer from numerous flaws, discussed in detail below, but two overarching points should be addressed at the outset.

First, Plaintiffs repeatedly invoke Congress's creation of a private action for victims of forced labor in the Trafficking Victims Protection Reauthorization Act (TVPRA), 18 U.S.C. §§ 1595-96—asserting, for example (Br. 2[1]), that "concerns about separation of powers or infringement of U.S. foreign relations ring hollow" in light of Congress's action. But the opposite is true—when Congress has addressed an issue, that fact weighs heavily against the exercise of federal common law authority. *E.g.*, *Ziglar* v. *Abbas*i, 137 S. Ct. 1843, 1865 (2017); *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 313-314 (1981). Creation by the Court of a common-law action different from the congressionally designed claim would effectively override Congress's determinations, and therefore directly infringe separation-of-powers principles.

Second, Plaintiffs contend (Br. 27-30) that their arguments for expansive ATS liability present no risk of collision with U.S. foreign policy. They point to Congress's enactment of the TVPRA, the absence of expressions of concern about this case by Côte d'Ivoire or other nations, and filings by the United States in prior cases.

But the TVPRA action was crafted by the branches responsible for foreign policy; its existence does not eliminate the risk that an action with different parameters designed by courts will "erroneously adopt an interpretation of U.S. law that carries foreign policy consequences not clearly intended by the

[1] Citations to Plaintiffs' brief refer to the brief filed in No. 19-453.

political branches," *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013).

In addition, although this Court has referenced expressions of concern by other nations, it has not limited the effect of its rulings to cases in which other nations protest. Rather, the Court has adopted general legal rules applicable in all ATS cases. And Plaintiffs inexplicably ignore the brief filed by the United States in this case, which provides further evidence of the harm to U.S. foreign policy resulting from Plaintiffs' expansive conception of the ATS.

Cargill abhors forced labor and trafficking. It is working cooperatively under programs put in place by Côte d'Ivoire and by the United States—and is devoting substantial resources to addressing these issues. The broad liability rules advocated by Plaintiffs would interfere with these efforts and inflict serious harm on the Ivorian economy. Cargill Br. 36-40; WCF Br. 5-22.

In this sensitive area, the Court should leave to Congress the decisions whether to create—and how to fashion—a private action. It should hold that the ATS applies only to principal wrongdoing within the United States and does not impose liability on domestic corporations.

I. Plaintiffs' ATS Claims Are Extraterritorial.

Plaintiffs' claims are extraterritorial because the relevant "focus" of the ATS is the principal wrongdoer's violation of international law—which occurred in Côte d'Ivoire. Cargill Br. 27-33. Even if claimed aiding-and-abetting conduct could be considered, the general headquarters oversight alleged here falls far short of the necessary connection to the United States, given that all of the other activity took place in Côte

d'Ivoire. Cargill Br. 33-36. Indeed, the Court could decide this case by holding that general headquarters oversight is categorically insufficient to render a claim not extraterritorial. Cargill Br. 23-25.

A. An ATS Claim Is Extraterritorial If The Conduct Relevant To the Statute's "Focus" Occurred In a Foreign Country.

Plaintiffs argue (Br. 14-15) that the "focus" standard does not apply in ATS cases. That contention is precluded by this Court's ruling in *RJR Nabisco, Inc.* v. *European Community,* 136 S. Ct. 2090 (2016).

The *RJR Nabisco* Court stated that "*Morrison* [v. *National Australia Bank Ltd.,* 561 U.S. 247 (2010),] and *Kiobel* reflect a two-step framework for analyzing extraterritoriality issues." 136 S. Ct. at 2101. The first step is to determine whether the statute applies extraterritorially. "If the statute is not extraterritorial, then at the second step we determine whether the case involves a domestic application of the statute, and we do this by looking to the statute's 'focus.'" *Ibid.* "[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Ibid.*

Plaintiffs point (Br. 14-15) to *Kiobel*'s statement that, because the ATS does not apply extraterritorially, claims are permissible only if they "touch and concern the territory of the United States * * * with sufficient force to displace the presumption against extraterritorial application." 569 U.S. at 124-25. But the Court supported the "touch and concern" reference with a citation to *Morrison*'s discussion of the "focus"

inquiry (*id.* at 125 (citing 561 U.S. at 265-269))—making clear that *Kiobel* incorporated the "focus" standard, as *RJR Nabisco* subsequently held.

Plaintiffs do not suggest any reason why the extraterritoriality inquiry under the ATS would, or should, differ from the generally-applicable rule—and there is none. See also *WesternGeco LLC* v. *ION Geophysical Corp.*, 138 S. Ct. 2129, 2137-38 (2018) (applying "focus" test to patent claim).

B. The ATS's "Focus" Is The Principal Violation of International Law, And That Conduct And Resulting Injury Occurred In Côte d'Ivoire.

Cargill explained (Br. 27-33) that the ATS's "focus"—"the objects of the statute's solicitude," as determined by the persons whom "the statute seeks to 'protec[t]'" and the conduct that "the statute seeks to 'regulate,'" *Morrison*, 561 U.S. at 267 (citations omitted)—is the principal wrongdoer's international law violation. Here, the alleged forced labor and injuries to Plaintiffs occurred in Côte d'Ivoire.

Plaintiffs argue that the ATS has a "non-geographic" focus, and that a claim is not extraterritorial whenever "the United States could be responsible [under international law] in the absence of redress." Br. 16. Alternatively, they argue that an aiding-and-abetting action may proceed as long as any claimed aiding-and-abetting conduct took place within the United States. Both contentions are wrong.

1. Plaintiffs' argument for a "non-geographic" focus is nonsensical.

Pointing (Br. 21) to the statement in *Jesner* v. *Arab Bank, PLC,* 138 S. Ct. 1386 (2018) that the ATS's

purpose was "[t]o avoid foreign entanglements by ensuring the availability of a federal forum where the failure to provide one might cause another nation to hold the United States responsible," *id.* at 1397, Plaintiffs suggest that the statute's "focus" is whether the failure to adjudicate the claim "might cause another nation to hold the United States responsible" under international law (Br. 21)—and that a claim is not extraterritorial if the United States might be subjected to such responsibility. But extraterritoriality is inherently a geographic inquiry, and Plaintiffs' wholly indeterminate standard should be rejected.

To begin with, the cases on which Plaintiffs rely (Br. 20-21) provide no support for a "non-geographic" approach. *Kirtsaeng* v. *John Wiley & Sons, Inc.*, 568 U.S. 519 (2013) (copyright "first sale" doctrine), and *Impression Products, Inc.* v. *Lexmark International, Inc.*, 137 S. Ct. 1523 (2017) (patent exhaustion), did not involve extraterritorial application of U.S. laws, but rather the extent to which acts in foreign countries affected the plaintiffs' ability to enforce in the United States the intellectual-property rights granted by the United States. And in *United States* v. *Bowman*, 260 U.S. 94, 102 (1922), the Court found that the criminal statute at issue applied extraterritorially, and therefore had no occasion to address the "focus" issue.

The Court's prior cases determined the "focus" of a statute by reference to particular conduct identified in the statutory text—such as the purchase or sale of securities in *Morrison*. 561 U.S. at 266-67; see also *WesternGeco*, 138 S. Ct. 2137-38. Tying the focus to statutory text provides a clear standard and also tethers the extraterritoriality test to the law Congress enacted.

Plaintiffs argue that the Court should instead rely on their view of the ATS's purpose. But that approach would be fraught with problems. "No law pursues its purposes at all costs. Instead, lawmaking involves balancing interests and often demands compromise." *Hernandez*, 140 S. Ct. at 741-42 (citations and internal quotation marks omitted). Courts lack the expertise to make such judgments. Indeed, *Morrison* rejected a test based on the goals of the securities laws. See 561 U.S. at 270.

Plaintiffs try to bolster their position with an extended historical discussion (Br. 16-19). But "[t]he two cases in which the ATS was invoked shortly after its passage * * * concerned conduct within the territory of the United States" (*Kiobel*, 569 U.S. at 120)—demonstrating that the statute was understood to focus on the primary, injury-causing violation of international law.[2]

Indeed, Plaintiffs candidly acknowledge (Br. 20-22) that, under their theory, a claim would not be extraterritorial even if all of the conduct occurred outside the United States, as long as the defendant is a U.S. citizen. But that would result in the very intrusion into the affairs of other nations that *Kiobel* sought to prevent, "provid[ing] a cause of action for conduct occurring in the territory of another sovereign," 569 U.S. at 124. Even if the defendant was a citizen of another country who engaged in wrongdoing there, but was present in the United States, Plaintiffs'

[2] Although the ATS was understood to provide jurisdiction for claims of piracy on the high seas, pirates are "a category unto themselves" in that they "did not operate within any nation's jurisdiction." *Kiobel*, 569 U.S. at 121.

standard could still render the claim "domestic" if international law would expect the United States to take action. Center for Justice Accountability Br. 17. That stretches the definition of a non-extraterritorial claim well beyond the breaking point.

Moreover, Plaintiffs' standard would be extremely difficult to apply. How would a court determine whether other nations would "hold the United States responsible" in the absence of an ATS claim? That inquiry does not turn on the ATS alone—there may be other U.S. criminal and civil statutes enacted to address the conduct at issue. See Cargill Br. 49 (collecting statutes). And whether other nations would hold the United States "responsible" is a vague and uncertain standard, transforming the threshold question of extraterritoriality into an indeterminate, broad-ranging inquiry.

2. Aiding-and-abetting conduct is not the statute's focus.

Plaintiffs argue in the alternative (Br. 22-25) that aiding-and-abetting conduct falls within the ATS's focus. Cargill (Br. 27-33) and its *amici* (U.S. Br. 30; Chamber Br. 18-19) explain in detail why the ATS's focus is the primary tort, and not ancillary conduct alleged to trigger secondary liability.

Morrison squarely rejects Plaintiffs' argument that any conduct relevant to liability should be included in a law's "focus." There, the statutory "focus" was the "purchase-and-sale transactions" that directly caused the plaintiff's injury—and *not* the deceptive conduct through which the transactions were allegedly procured—even though false statements were a critical element of statutory liability. 561 U.S. at 266-67.

Moreover, a key purpose of the extraterritoriality presumption is "to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco*, 136 S. Ct. at 2100 (collecting cases). Basing the determination on the location of the principal wrongdoer's acts injuring the plaintiff minimizes that risk. By contrast—as this case demonstrates—Plaintiffs' approach will necessarily force U.S. courts to decide the legality of conduct occurring entirely in another country (the site of the principal wrongdoer's actions).

Moreover, the ATS's textual focus on "a tort only" excludes from the statute's focus conduct relating to claims of secondary liability such as aiding and abetting. Cargill Br. 30-32; U.S. Br. 26-27. Plaintiffs have no credible response.

First, they assert (at 24) that "aiding and abetting a law-of-nations violation is itself * * * a tort." But this Court has stated that aiding and abetting is *not* a tort, but "'a method by which courts create secondary liability' in persons other than the violator" of a legal prohibition. *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 184 (1994) (citation omitted). And while Plaintiffs cite Professor Dobbs' treatise in passing (Br. 24), they ignore his explanation that an aider-and-abettor becomes "jointly and severally liable" through a doctrine of "vicarious liability"—"liability for the tort of another person." Dan B. Dobbs et al., Dobbs' Law of Torts §§ 425, 435 (2d ed.).

Indeed, parties typically assert aiding-and-abetting claims—rather than claims of primary liability—precisely because the conduct alleged to constitute aiding and abetting is not by itself tortious (as in this case). That conduct produces liability for the primary

tortfeasor's wrong only because of the connection to the acts of the principal wrongdoer. Cargill Br. 30-32.

As the United States explains (Br. 28-29), the same conception of aiding-and-abetting holds true in both the domestic criminal context and in the realm of international law. It is not "a discrete criminal offense," but a doctrine for "identifying persons" who bear liability for the underlying offense. *Khulumani* v. *Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 280-281 (2d Cir. 2007) (Katzmann, J., concurring).

Plaintiffs cite (Br. 25) *Talbot* v. *Jansen*, 3 U.S. 133 (1795), but jurisdiction there was founded principally on admiralty—not the ATS. *The Vrow Christina Magdamena*, 13 F. Cas. 356, 359 (1794) (citing *Glass* v. *The Sloop Betsey*, 3 U.S. 6 (1794)), aff'd *sub nom. Talbot*, 3 U.S. 133. Importantly, the only mention of the word "tort" in *Talbot* was in counsel's description of the *principal* offense (wrongful seizure of a Dutch ship) as "[t]he tortious act" that *preceded* Talbot's involvement as an accessory. 3 U.S. at 151.[3]

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[3] Plaintiffs assert (Br. 24) that "[t]he Founders would have known that aiders and abettors could embroil the country in foreign affairs entanglements," but that says nothing about the ATS's focus—because determining that a law does not apply extraterritorially by definition means that the law will not encompass every possible claim. *Henfield's Case*, 11 F. Cas. 1099 (C.C.D. Pa. 1793), was a criminal action, and therefore did not address the question whether aiding and abetting is a civil tort.

Plaintiffs reference (Br. 13 n.7) Attorney General Bradford's opinion in *Breach of Neutrality*, 1 Op. Att'y Gen. 57 (1795), but the actual conduct there involved far more than mere aiding and abetting: American citizens "voluntarily joined" and "conducted" the attack. *Id.* at 58. In any event, "Attorney General Bradford's opinion defies a definitive reading," and does not "suffice[] to

Second, Plaintiffs point (Br. 23) to comments to the Restatement (Second) of Torts, but misstate their meaning. Comment c to § 876 describes subsection (a), which addresses the situation where one person "does a tortious act in concert with [an]other"—that is, *each* defendant engages in wrongdoing. Restatement (Second) of Torts § 876, cmt. c & illus. 3. The complaint here does not fall within that description—Plaintiffs do not and cannot allege that Cargill itself engaged in forced labor.

The relevant Restatement provision is instead § 876(b), governing "substantial assistance or encouragement to [an]other" who commits a tort—the most the complaint even arguably alleges. And § 876(b) draws a clear distinction between the actual tort and the mere provision of assistance thereto. Cargill Br. 31.

Plaintiffs cite the statement in comment d that a person who has provided "substantial assistance" "is himself a tortfeasor," but the substance of that comment is that the aider-and-abettor "is responsible for the consequences of the other's [tortious] act"—not that the provision of assistance is a tort in its own right. Restatement (Second) of Torts § 876, cmt. d.

Third, Plaintiffs' reliance on dictionary definitions (Br. 23) is misplaced. They cite only a portion of Black's definition of "tort," disregarding the part explaining that the term means "a breach of a duty that the law imposes on persons who stand in a particular relation to one another," Tort, Black's Law Dictionary (11th ed. 2019) (noting sixteenth-century origin). That description does not encompass aiding and abetting,

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counter the weighty concerns underlying the presumption against extraterritoriality." *Kiobel*, 569 U.S. at 123.

where there need not be any relation *at all* between the injured person and the person to be held secondarily liable. Plaintiffs also omit Black's identification of "four types" of "[t]ortious conduct"—none of which encompasses aiding-and-abetting. *Ibid.*

Webster similarly described "[t]orts" as "injuries done to the person or property of another, as trespass, assault and battery, defamation and the like"—again describing primary torts rather than standards governing secondary liability. Tort, Noah Webster, American Dictionary of the English Language (1828), https://archive.org/details/americandictiona02websrich/page/n781/mode/1up. Plaintiffs' remaining citation simply describes "tort" as a "French word for injury or wrong," without suggesting that it encompasses secondary conduct. Tort, Owen Ruffhead & J. Morgan, A New Law Dictionary (9th ed. 1772), https://archive.org/details/in.ernet.dli.2015.93143/. And the fact that both of these historical sources define "tort" in terms of an *injury* further supports the conclusion that the term means primary conduct that directly causes injury—not legal doctrines for secondary liability.

Fourth, *amici* Professors of Legal History (Br. 15-20) assert that correspondence between Thomas Jefferson and Edmund Randolph shows that the ATS provides a "civil remedy for * * * law of nations violation[s] committed by U.S. citizens extraterritorially." But the two incidents discussed involved primary wrongdoing *within the United States*: U.S. citizens unlawfully seized enslaved persons abroad and then brought them back to the United States as their "property." See *id.* at 16. The correspondence says nothing about aiding-and-abetting claims based on primary

wrongdoing that takes place exclusively abroad. Certainly it is insufficient "to counter the weighty concerns underlying the presumption against extraterritoriality." *Kiobel*, 569 U.S. at 123.[4]

Fifth, Plaintiffs observe (Br. 25) that *Microsoft Corp.* v. *AT&T Corp.*, 550 U.S. 437 (2007), "noted that supplying goods and services from the United States * * * was domestic conduct." But that observation says nothing about whether such conduct falls within a particular statute's focus, which varies from statute to statute.

Here, the ATS's focus is the conduct constituting the principal international-law violations that injured Plaintiffs—which allegedly occurred in foreign territory. This case therefore "involves an impermissible extraterritorial application" of the ATS, "regardless of any other conduct that occurred in U.S. territory." *RJR Nabisco*, 136 S. Ct. at 2101.

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[4] The Jefferson papers on which *amici* rely are available at https://founders.archives.gov/?q=Volume%3AJefferson-01-24&s=1511211112&r=661.

The same *amici* assert (at 10) that "[t]he law of nations encompassed the concept of aiding and abetting," but the treatise on which they rely uses the terms "accessory" and "accomplice" liability in a colloquial sense to refer to *nations'* potential *secondary* liability for offenses committed by their citizens. See Emmerich de Vattel, The Law of Nations; or Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns, bk. 2, ch. 6, § 77 and bk. 3, ch. 16, § 241 (1759), https://hdl.handle.net/2027/hvd.hxhscx. Vattel does not assert that aiding and abetting—as distinguished from primary wrongdoing—is a "tort."

C. Even If Aiding-And-Abetting Conduct Is Relevant To the "Focus" Inquiry, Plaintiffs' Claims Are Extraterritorial.

If the Court concludes, contrary to our submission, that alleged aiding-and-abetting conduct relates to the ATS's focus, the extraterritoriality bar still can be overcome only if a claim's overall connection to the United States is strong enough to justify application of U.S. law. Cargill Br. 33-36; *WesternGeco*, 138 S. Ct. at 2138 (weighing domestic and foreign conduct).

Here, all of the principal wrongdoing and virtually all of the alleged aiding-and abetting conduct took place in Côte d'Ivoire. The alleged headquarters oversight from the United States is not sufficient to displace the presumption. Cargill Br. 35-36; U.S. Br. 31-34.[5]

Plaintiffs do not even attempt to explain how their minimal allegations—inspection visits by U.S.-based employees and the making or approval in the U.S. of "every major operational decision," which they argue should be construed to include cocoa purchasing decisions (Plaintiffs Br. 33)—could outweigh the conduct that is alleged to have taken place in Africa,

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[5] As the case comes to this Court, there has been no determination that Plaintiffs have adequately alleged aiding-and-abetting claims. The Ninth Circuit vacated and remanded the district court's holding that Plaintiffs failed to allege facts establishing the conduct element (J.A. 253-61). Although Defendants again moved to dismiss based on Plaintiffs' failure to allege the elements of an aiding-and-abetting claim, the district court did not address the issue—it dismissed solely on extraterritoriality grounds (Pet. App. 58a-70a). The Ninth Circuit did not decide the issue on the second appeal. *Id.* at 37a-39a. As the United States points out (Br. 22-26), this Court has not held that aiding-and-abetting claims are cognizable under the ATS.

which includes both the forced labor by the farmers and other principal wrongdoers *and* the alleged provision to farmers in Côte d'Ivoire of the various forms of support. See also pages 16-17, *infra*.

The complaint therefore does not allege conduct touching the United States "with sufficient force to displace the presumption against extraterritorial application." *Kiobel*, 569 U.S. at 125.[6]

D. General Allegations Of Headquarters Oversight Cannot Displace The Extraterritoriality Presumption.

Although Plaintiffs' claims are extraterritorial under any possible "focus" analysis, the Court also could hold the claims extraterritorial on the ground that none of the relevant conduct took place within the United States—because boilerplate assertions of general headquarters oversight, the only U.S. conduct that Plaintiffs allege, are categorically insufficient to displace the presumption. Cargill Br. 23-26.

Plaintiffs' response to this point is puzzling. They cite (Br. 33) allegations regarding the supposed inspection activities of Cargill employees *in Côte d'Ivoire*. And, invoking their general allegation regarding headquarters decisionmaking (see Cargill Br. 24), Plaintiffs assert (Br. 33) that it is a "reasonable

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[6] Plaintiffs suggest (at 34) that they should be granted leave to amend to plead "additional specific facts," but as the *en banc* dissenters explained, "Plaintiffs already had the opportunity to replead to allege domestic aiding and abetting after *Kiobel*." Pet. App. 26a-27a n.9. Plaintiffs do not claim to have any new facts regarding conduct within the United States—they state only (at 34) that the facts to be pleaded "bear[] on" "whether Cargill or foreign corporations engaged in conduct at issue." That is irrelevant to the extraterritoriality issue.

inference" that Cargill headquarters personnel had knowledge of forced labor on farms from which Cargill purchased cocoa and directed the provision of support to those farms.

But a complaint's allegations must "give rise to a plausible inference" that there was relevant domestic conduct. *Ashcroft* v. *Iqbal*, 556 U.S. 662, 682 (2009). Determining whether an inference is "plausible" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense" (*id*. at 679) as well as the other allegations in the complaint. See *Bell Atlantic Corp*. v. *Twombly*, 550 U.S. 544, 566-69 (2007) (holding it implausible to infer antitrust conspiracy from parallel conduct in light of complaint allegations explaining companies' self-interested motives for parallel conduct).

It simply is not "plausible" to infer from the complaint's bare allegation of headquarters oversight of "major operational decisions" that Cargill made or approved in the United States any decisions to support forced labor in Côte d'Ivoire. Importantly, (a) the complaint does not allege that Cargill purchased cocoa from farms that it knew to be using forced labor at the time of its purchases (Cargill Br. 5 n.2); and (b) nothing in the complaint supports an inference that cocoa purchasing qualified as a "major operational decision" that would be "made or approved" in the United States. And that is particularly true of a company as large as Cargill—"one of the largest privately held corporate providers of food and agricultural products and services worldwide with over 100,000 employees in 59 countries." J.A. 310 (¶ 23).

"[G]iven more likely explanations," the complaint's conclusory allegations "do not plausibly establish" that Cargill made any particular decisions in the

United States. *Iqbal*, 556 U.S. at 681; see also U.S. Br. 33-34.

Moreover, if allegations of general headquarters inspection activity and headquarters decisionmaking—without any allegation specific to the activity outside the U.S.—were sufficient, then the presumption against extraterritoriality could easily be overcome in any ATS case with respect to every U.S.-based business. The Court should reject a standard that renders the presumption meaningless with respect to such entities, and produces significant adverse consequences for U.S. businesses and developing countries. See Cargill Br. 36-40; U.S. Br. 16-18; Chamber of Commerce Br. 24-26; WCF Br. 17-18.

II. Domestic Corporations Are Not Subject To ATS Liability.

Jesner and related precedents bar recognition of corporate ATS liability. Cargill Br. 40-50. Plaintiffs' contrary arguments are unavailing.

A. There Is No Specific, Universal, And Obligatory Norm Of Corporate Liability.

The *Jesner* plurality began its analysis by assessing whether there is a "specific, universal, and obligatory norm of liability for corporations." 138 S. Ct. at 1400. Plaintiffs claim (Br. 40) that inquiry is irrelevant but then proceed to argue that international law supports corporate liability. They are wrong.

To begin with, there simply is no sufficiently established norm of corporate liability for international law violations. Cargill Br. 41-43; U.S. Br. 11; Professors of International Law Br. 16-30 (surveying sources—including Nuremburg precedents—and con-

cluding that "[t]here was no international law consensus in 1789, and there is none today, that private corporations are suable for violations of customary international law"); Coca-Cola Br. 13-14 ("international law precedents for subjecting artificial entities such as corporations to the strictures of international law are virtually nonexistent"); Cato Br. 9-18.

Plaintiffs try to change the question, asserting (Br. 46) that the relevant inquiry is "whether the [substantive international law] norms in question apply to corporations." But the *Jesner* plurality found "considerable force and weight to the position" that "corporate defendants may be held liable under the ATS only if there is a specific, universal, and obligatory norm that corporations are liable for violations of international law" *in general*. 138 S. Ct. at 1400 (citing *Kiobel* v. *Royal Dutch Petroleum Co.*, 621 F.3d 111, 127 (2d Cir. 2010) (Cabranes, J.)).

In any event, Plaintiffs fail their own test. They argue at length (Br. 43-46) that "slavery and forced labor norms apply to * * * corporations," but Plaintiffs do not allege that Cargill itself violated any such norms. Their claims are for *aiding and abetting* breaches of those norms committed by *other* persons. Plaintiffs do not even try to establish the existence of a mandatory international-law norm of corporate aiding-and-abetting liability.

Plaintiffs also contend that corporate liability should be decided on the basis of domestic law. But *Sosa* made clear that it is a question of "*international law*" whether liability "extends" "to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." 124 S. Ct. at 732 n.20. That rule makes sense, because identifying possible defendants "is not a question of remedy" that might be

left to domestic law, *Kiobel*, 621 F.3d at 147, but instead "represents an important aspect of the norm itself." U.S. Br. 11 (citing *Jesner*, 138 S. Ct. at 1399-1400, 1402 (plurality)); see Coca-Cola Br. 23; Professors of International Law Br. 13-14.

Plaintiffs' claims accordingly fail for want of a "specific, universal, and obligatory [international law] norm of liability for corporations." *Jesner*, 138 S. Ct. at 1400 (plurality).

B. The ATS's Text And History Do Not Support Corporate Liability.

Plaintiffs' domestic-law argument rests principally (Br. 36-39) on the text and history of the ATS. But this Court made clear in *Sosa* that "the ATS is a jurisdictional statute creating no new causes of action" that was "enacted on the understanding that the common law would provide a cause of action." 542 U.S. at 724. Congress did not address the metes and bounds of the private action.

Indeed, if, as Plaintiffs contend, Congress's use of the word "tort" means that background principles regarding the scope of tort law govern the scope of ATS liability, then the *Sosa* Court erred in limiting potentially-actionable international law norms to those "accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms" and further restricting potential claims based on a number of cautionary factors. 542 U.S. at 725-28.

Similarly, in arguing that the absence of any textual limits on the class of defendants is dispositive of the scope of liability, Plaintiffs run headlong into *Jesner*—which held that foreign corporations are not sub-

ject to liability notwithstanding the absence of a textual limit. The same conclusion applies with respect to Plaintiffs' argument (Br. 38) based on the ATS's purpose.

Finally, Plaintiffs point (Br. 39) to common-law decisions recognizing entity liability at the time the ATS was enacted. But if those cases were dispositive, *Jesner* would have recognized corporate liability.

C. *Sosa*'s Cautionary Factors Preclude Recognition Of Corporate Liability.

Recognition of liability here is foreclosed by the same separation-of-powers and foreign-relations concerns that formed independent bases for *Jesner*'s rejection of foreign corporate liability. Cargill Br. 43-46.

1. Separation of powers.

Plaintiffs assert that "[t]here is no separation of powers issue" in the ATS context, but *Jesner* holds the opposite: "the separation-of-powers concerns that counsel against courts creating private rights of action apply with particular force in the context of the ATS." 138 S. Ct. at 1403.

Plaintiffs also contend (Br. 50-51) that *Bivens* precedents are "[i]napt." But *Jesner* relied on those precedents to hold that "a decision to create a private right of action'" under federal common law is "better left to legislative judgment in the great majority of cases," because "the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability." *Jesner*, 138 S. Ct. at 1402 (citations and internal quotation marks omitted). The Court expressly stated that "[n]either the language of the ATS nor the precedents interpreting it support an exception to these general

principles in this context." *Id.* at 1403; see U.S. Br. 12-13.

Because *Jesner* relied on those precedents in delineating the scope of ATS corporate liability, Plaintiffs cannot argue that they are irrelevant to resolving the very similar question presented here regarding ATS corporate liability. To the contrary, they weigh heavily against judicial law-making to establish corporate liability.

Plaintiffs point (Br. 48-49) to Congress's creation of a private action for victims of forced labor under the TVPRA. They argue that the Court should be guided by that determination rather than by Congress's decision in the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 (note), not to impose liability on corporations.

But these congressional determinations with respect to "analogous statutes" (*Jesner*, 138 S. Ct. at 1403) together prelude judicial creation of corporate liability under the ATS.

First, the TVPA makes clear that Congress has rejected across-the-board corporate liability for violations of international law norms. A decision by this Court to recognize such liability would effectively nullify the congressional decision embodied in the TVPA. Cargill Br. 47; U.S. Br. 21. And, as the *Jesner* plurality recognized, that congressional determination provides a guide generally for ATS claims. 138 S. Ct. 1403.[7]

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[7] Plaintiffs cite (Br. 49-50) the Act's legislative history, but it reveals that Congress was responding to Judge Bork's concurring opinion in *Tel-Oren* v. *Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir. 1984)—which had "questioned the existence of a private

Second, Congress in the TVPRA did not simply establish a private action and authorize courts to flesh out the liability standard. Congress specified the elements of a private TVPRA claim—requiring proof of a predicate criminal violation as well as additional facts necessary to establish civil liability. To take just one example, the statute does not authorize aiding-and-abetting claims—because there the law contains no textual authorization of such claims. *Central Bank*, 511 U.S. at 177. It instead requires proof that the defendant "knowingly benefit[ed], financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter." 18 U.S.C. § 1595(a).

Recognizing corporate liability limited to the forced labor context, as Plaintiffs seem to suggest, would require courts to flesh out the details of the ATS claim—such as the standards for aiding and abetting liability and how to determine which acts are attributable to the corporation.

To the extent these standards differed from those established by Congress in the TVPRA, they would constitute an impermissible intrusion by courts into the legislative sphere—"[t]he political branches, not the Judiciary, have the responsibility and institutional capacity" to make judgments on these matters. *Jesner*, 138 S. Ct. at 1403. To the extent the standards

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right of action under the [ATS]" on separation-of-powers grounds. H.R. Rep. 102-367, at 4 (1991). Recognizing the force of Judge Bork's argument, Congress enacted a specific statute providing both authorization for a particular cause of action and a model for any future claims that might be recognized. See *ibid.*

were identical to the TVPRA, the ATS cause of action would be superfluous.

In sum, these congressional enactments make clear that the proper course is for the Court to stay its hand and leave to Congress decisions regarding whether and to what extent corporations should be subject to ATS liability. Indeed, the amicus brief filed by a group of Senators and Representatives confirms (Br. 5) that addressing forced labor "is a bipartisan congressional priority of grave importance." Because Congress is thus focused on the issue, there simply is no warrant for an extraordinary exercise of judicial law-making.

2. Interference with foreign relations.

ATS claims may only be brought by foreign plaintiffs and therefore inevitably implicate "foreign-policy * * * concerns" that are better left to Congress. *Jesner*, 138 S. Ct. at 1403; see U.S. Br. 13, 15-20.

That is just as true of claims against U.S. corporations as for claims against foreign corporations, because permitting ATS suits against U.S. corporations would allow plaintiffs to use those entities "as surrogate defendants to challenge the conduct of foreign governments." *Jesner*, 138 S. Ct. at 1404 (plurality); see U.S. Br. 15 (collecting examples). As the Chamber of Commerce *et al.* explain (Br. 15-16), allowing private plaintiffs to use the courts to "impugn foreign sovereigns" has created diplomatic friction, "prompt[ing] vigorous objections from other countries." See also Coca-Cola Br. 17-20 (explaining that imposing international-law obligations and authority on corporations is viewed as an impingement of state sovereignty).

And this is particularly true here, as the United States explains, because the government has adopted a specific policy to address forced labor in Côte d'Ivoire—the Harkin-Engel Protocol—and Plaintiffs' "theory of the case is in serious tension with the policy underlying the Protocol and its implementing initiatives." U.S. Br. 17; see WCF Br. 5-17.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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