No. 19-453

In the Supreme Court of the United States

CARGILL, INCORPORATED,

Petitioner,

v.

JOHN DOE I, ET AL.,
INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS,

Respondents.

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

REPLY BRIEF FOR PETITIONER

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Respondents completely ignore the dissent from denial of rehearing *en banc* describing in detail the conflict among the lower courts and the panel's errors of law and joined by eight judges with respect to the first question presented and six judges regarding to the second.[1] Respondents also ignore the five amicus briefs—signed by, among others, seven national and international business associations—urging the Court to grant review. Those briefs further explain the conflict and the panel's errors, as well as the pressing need for this Court's review.

Respondents instead rely on diversion and obfuscation. Their inability to provide a credible response to the demonstrated circuit conflicts or to the powerful explanations of the importance of the issues simply confirms the urgent need for this Court's intervention.

Indeed, as the amicus briefs emphasize, the combined effect of the panel's rulings "threatens to open the floodgates to a new wave of Ninth Circuit ATS litigation against U.S.-based companies." Chamber, *et al*. Br. 18. The decision below "will cause companies with international operations to think twice" before working to combat human rights violations abroad, because "[a]s this case shows, such efforts can and will be used against corporations," with the only "safe[] course" being to "[s]tick[] one's (corporate) head in the sand[.]" Coca-Cola Br. 10-11. The panel's approach "will induce the very response feared by the plurality in *Jesner* [v. *Arab Bank, PLC*, 138 S. Ct. 1386 (2018)]: less 'global investment in developing countries, where it is most needed.'" *Id*. at 2-3; see also Chamber, *et al*. Br. 5 (the panel's decision "threatens alarming practi-

[1] The Petition's Rule 29.6 Statement remains accurate.

cal consequences—among them deterring U.S. businesses from investing or operating in any country where human rights abuses occur"); Nat'l Confectioners Ass'n, *et al.* Br. 4 ("Allowing ATS claims to go forward under such an expansive theory * * * will discourage industry participation in the ongoing fight against forced child labor."). These dire consequences necessitate this Court's review.

Finally, respondents claim (Opp. 10) that petitioner bears responsibility for this action's fourteen-years-and-counting stall at the motion-to-dismiss stage. Not so. On each appeal, the Ninth Circuit panel decided to remand rather than rule on issues ripe for decision (Pet. 8, 12)—each time over the objections of the *en banc* dissenters—and thereby prolonged the proceedings. This Court's intervention is needed to eliminate the conflict among the lower courts and definitively resolve these important legal issues.

I. Extraterritoriality.

Respondents attempt to avoid review of the panel's extraterritoriality ruling by denying that the issue is ripe, and by trying to paper over the conflict by ignoring the facts of the conflicting cases. As the eight *en banc* dissenters recognized, the panel's ruling creates a clear conflict and cannot be reconciled with this Court's holdings in *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013), and *RJR Nabisco, Inc.* v. *European Community*, 136 S. Ct. 2090 (2016).

A. The Issue Is Ripe For Review.

Respondents claim (Opp. 1, 18) that the panel majority's decision to remand for repleading provides a reason to deny review of the extraterritoriality issue. That is wrong for multiple reasons.

To begin with, the panel's remand has nothing whatever to do with its extraterritoriality holding. The panel squarely held the current complaint sufficient to establish that the claim is not extraterritorial. Pet. App. 36a-37a.

The panel's remand for repleading related to petitioner's separate arguments that the current complaint failed to establish respondents' standing or to allege the conduct element of the aiding-and-abetting claim. See Pet. App. 37a, 38a-39a. And the repleading allowed by the panel was limited to those issues. See Pet. App. 39a (standing) & 37a (aiding and abetting).

Because the panel squarely addressed the extraterritoriality issue based on the current complaint, and the repleading directive was wholly unrelated to the extraterritoriality ruling, that holding is ripe for review.

That is particularly true because respondents already amended the complaint to incorporate any additional allegations relevant to extraterritoriality. On the prior appeal—which remanded the extraterritoriality issue for reconsideration by the district court (Pet. 8)—the Ninth Circuit permitted respondents "to amend their complaint on the issue[] of extraterritoriality" and "[respondents] did so." Pet. App. 53a (district court). And the current complaint was filed in July 2016—after this Court's extraterritoriality ruling in *RJR Nabisco*.

After more than fourteen years, further delaying a definitive ruling on extraterritoriality is unjustifiable.

B. There Is A Square Conflict.

Respondents argue that no conflict exists because the courts of appeals "have reached a consensus" that ATS claims "alleging aiding and abetting may proceed if the aiding and abetting occurred on U.S. soil even if the injury occurred on foreign soil." Opp. 13. But that ignores the critical question—whether the conduct within the U.S. is sufficiently relevant to the ATS's "focus" to displace the presumption against extraterritoriality. See Pet. 17. The fact that some conduct occurred within the U.S. is not sufficient, as this Court recognized in *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 266 (2010). See Pet. 30.

Here, it is undisputed that the overwhelming majority of the claimed aiding and abetting—the payments to farmers, the training and other support, the purchases of cocoa, and the inspections of farms—occurred in Côte d'Ivoire. The alleged U.S. conduct was headquarters' oversight and decisionmaking. Pet. 17-20. The panel's decision that such allegations are sufficient to render a claim non-extraterritorial conflicts with the rulings of the Eleventh, Fifth and Second Circuits.[2]

Respondents' attempt (Opp. 13-15) to conceal the conflict by quoting generalities from these courts' opinions is unavailing. The facts of the cases make clear that each of these courts would bar the claim here as extraterritorial.

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[2] Respondents' descriptions of the alleged conduct (Opp. 4-5, 6, 18) range beyond the complaint's allegations and the panel's statements (compare Pet. 18-20), but even respondents claim only headquarters oversight and decisionmaking facilitated by inspection visits. They do not assert financing from U.S.-based banks or other conduct in the U.S.

Thus, respondents' discussion (Opp. 15-16) of *Doe* v. *Drummond Co.*, 782 F.3d 576 (11th Cir. 2015), inexplicably fails to mention the allegation in that case that the defendants "made funding and policy decisions in the United States" (*id.* at 598)—and the court nonetheless found the claim to be extraterritorial. That is the precise conduct relied on by the panel here to reach the opposite result. See also *ibid.* (stating that the allegations of domestic decisionmaking "do[] not outweigh the extraterritorial location of the rest of [a plaintiff's] claims").

The same is true of the other Eleventh Circuit decisions. See *Baloco* v. *Drummond Co.*, 767 F.3d 1229, 1236 (11th Cir. 2014) (ATS claim extraterritorial despite allegation that company "consent[ed] in" its U.S. headquarters "to provide substantial support to" Colombian paramilitaries); *Cardona* v. *Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1189 (11th Cir. 2014) (same, despite allegation that the defendants reviewed, approved, and concealed payments and weapons transfers to Colombian terrorist organizations from their offices in the United States); Pet. 21-22; Pet. App. 23a (*en banc* dissent). Respondents hint (Opp. 16) that *Cardona* did not squarely decide that the claim was extraterritorial; it did (see 760 F.3d at 1189-91), as Judge Martin confirmed in her dissent (*id.* at 1192).

The Fifth Circuit held the claim extraterritorial in *Adhikari* v. *Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017), even though funds paying the alleged perpetrator were transferred from the United States. *Id.* at 198. Respondents point (Opp. 15) to that court's statement that the plaintiffs failed to demonstrate that U.S-based employees knew of the unlawful activity—but they ignore the reasons for the court's denial of leave to amend the complaint. The plaintiffs stated

that "they '[would] be able to allege that U.S.-based managers knew they were obtaining trafficked labor, and continued to do so despite this knowledge'"—but the court stated that the amendment "would bring Plaintiffs no closer to satisfying the test articulated in *Morrison* and in *RJR Nabisco*. Accordingly, amendment would be futile." 845 F.3d at 199-200. The court thus made clear that headquarters oversight activities would not be sufficient to displace the presumption against extraterritoriality.

Finally, respondents quote (Opp. 13-14) general statements from Second Circuit decisions regarding the standards for aiding-and-abetting liability and extraterritoriality. But they ignore that court's holding that "[a]llegations of general corporate supervision are insufficient to rebut the presumption against [extra]territoriality." *Balintulo* v. *Ford Motor Co.*, 796 F.3d 160, 168 (2d Cir. 2015); see also *Mastafa* v. *Chevron Corp.*, 770 F.3d 170, 190 (2d Cir. 2014) (rejecting argument that if a company's headquarters is in the United States, it can be inferred that "much of the decisionmaking * * * was necessarily made in the United States"). And they ignore the Second Circuit rule that the U.S.-based conduct, standing alone, must be sufficient to establish the elements of an aiding-and-abetting claim. Pet. 23.

That is why the detailed allegations regarding a broad range of U.S.-based activity in *Mastafa* and *Licci* v. *Lebanese Canadian Bank, SAL*, 834 F.3d 201 (2d Cir. 2016), were found sufficient: they included financing of illicit deals from U.S. bank accounts and return of illegitimate profits to the U.S., as well as wire transfers from a U.S. bank account to finance terrorist purchases. Pet. 23-24.

Here, there are no such allegations of financing transactions from U.S. accounts and only the generalized assertion of headquarters decisionmaking. That is why the eight *en banc* dissenters concluded that "*Mastafa* supports dismissal of the claims here." Pet. App. 24a.; see also Pet. 24-25.

Respondents assert (Opp. 14) that *Al-Shimari* v. *CACI Premier Technology, Inc.*, 758 F.3d 516 (4th Cir. 2014), is consistent with the decision below. But *Al-Shamari* involved a domestic relationship between the corporate defendant and the U.S. military. *Id.* at 530-31 (discussing U.S. government contracts and need for employees to obtain U.S. government security clearances).

In any event, the possibility that the Fourth Circuit also disagrees with the Second, Fifth, and Eleventh Circuits merely demonstrates that this Court should grant review. Indeed, the Fifth Circuit in *Adhikari* expressly rejected the Fourth Circuit's approach in *Al-Shimari*. See 845 F.3d at 193-194.

The conflict among the lower courts is thus clear. The Ninth Circuit's decision also is inconsistent with this Court's decisions and, in addition, will render non-extraterritorial, and therefore permissible—any ATS claim against a U.S.-based company. Chamber, *et al*. Br. 11 ("in the Ninth Circuit, ATS lawsuits can proceed against an American company based on allegedly tortious acts committed outside the United States by foreign individuals, foreign governments, or other actors with whom the company does business, so long as the plaintiff raises bare allegations of corporate decision-making in the United States"). That result would inevitably lead companies to refrain from transactions in developing countries.

This Court's review is urgently needed.

II. Corporate Liability.

The amicus briefs confirm the practical importance of the corporate-liability issue. Chamber, *et al*. Br. 10 ("[b]ecause a domestic corporation can be sued in San Francisco but not New York, exposure to ATS liability could turn solely on the region in which the corporation does business"); Chevron Br. 1, 4 (explaining that "[c]orporations with a global presence like Chevron have been subjected to ATS claims that seek enormous damages for alleged wrongdoing by third parties—usually foreign governments—in foreign countries," and noting the "longstanding split in authority" on the "corporate liability issue," which is "worthy of review"). Respondents' arguments confirm the need for review.[3]

A. Respondents Acknowledge The Conflict Among The Lower Courts.

Respondents recognize (Opp. 24-25) that the Second Circuit's holdings regarding corporate liability conflict with those of other courts of appeals. But they try to downplay the conflict, citing a 2013 decision. Opp. 25-26.

In fact, the Second Circuit—in decisions in 2015 and 2016, after the case that respondents cite—reaffirmed its holding that corporations are not subject to ATS liability. *Licci*, 834 F.3d at 207 (affirming that the court would "faithfully apply [its precedent] and

[3] Respondents suggest (Opp. 1, 10) that they are entitled to replead to address *Jesner*'s application to this case. But whether domestic corporations are subject to liability for violation of a specified international-law norm is a pure question of law—the particular factual allegations are irrelevant.

affirm the District Court's dismissal of th[e] case on that basis"); *Balintulo*, 796 F.3d at 166 n.28 (concluding that "*Kiobel II* * * * did not modify" the circuit's precedent regarding corporate liability).[4]

This conflict is likely to worsen as other courts reevaluate their holdings in light of this Court's decision in *Jesner*. Indeed, district courts are already in disarray. See Pet. 32-33. Without clear guidance from this Court, that division will only deepen.

Because only this Court can authoritatively apply *Jesner*'s analysis to domestic corporations, and the conflict on this critical threshold issue—which arises in virtually every ATS action—has persisted for the better part of a decade, the Court should take this opportunity to resolve the issue.

B. Respondents Do Not Defend The Panel's Rationale For Reaffirming Domestic Corporate Liability.

Respondents acknowledge that *Jesner* applied *Sosa*'s "two-step framework for evaluating ATS claims," asking first whether "the alleged violation is 'of a norm that is specific, universal, and obligatory,'" and second whether "allowing the case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed." Opp. 20 (quoting *Jesner*, 138

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[4] Respondents suggest that *Licci ex rel. Licci* v. *Lebanese Canadian Bank, SAL*, 732 F.3d 161 (2d Cir. 2013), "specifically questioned the binding nature" of the Second Circuit's corporate-liability precedent. Op. 25. But *Licci* merely noted that the prior "predict[ion]" that this Court would reach the corporate liability issue in *Kiobel* was mistaken because the Court affirmed on extraterritoriality grounds. 732 F.3d at 174.

S. Ct. at 1399) (quoting *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 732 (2004)).

But they ignore the fact that the panel did not apply that test in reaffirming its prior ruling that domestic corporations are subject to ATS liability. In applying the first step, *Jesner* looked to the liability of corporations under international law. 138 S. Ct. at 1401 (plurality). The ruling re-affirmed by the panel rejected that inquiry and focused instead on whether an international-law norm was "universal." Pet. App. 31a ("corporate liability under an ATS claim does not depend on the existence of international precedent enforcing legal norms against corporations" and "norms that are universal and absolute, or applicable to all actors" can support corporate liability) (internal quotation marks omitted).

As the *en banc* dissenters explained, *Jesner* "requires us to discard th[at] approach[.]" Pet. App. 9a. "Not only did the panel majority fail to conduct a *meaningful inquiry* into corporate liability, it inexplicably failed to conduct any inquiry at all." *Ibid.*

The panel compounded that error by ignoring the second step specified in *Jesner*: neither the panel here nor the prior Ninth Circuit precedent addressed whether allowing claims to proceed against corporations "is a proper exercise of judicial discretion" or instead whether "caution requires the political branches to grant specific authority" for such claims. Pet. App. at 16a; see *Doe I* v. *Nestle USA, Inc.*, 766 F.3d 1013, 1020-1023 (9th Cir. 2014).

This Court should grant review to correct the panel's remarkable decision simply to reaffirm the prior Ninth Circuit ruling despite *Jesner*'s rejection of the legal principles underlying that prior ruling—and

to make clear that the lower court was obligated instead to undertake the analysis that this Court specified in *Jesner*.

Review is especially appropriate because the principles applied by the *Jesner* plurality and concurring opinions make clear that domestic corporations cannot be subjected to ATS liability. Pet. App. 10a-19a (en banc dissent); Chevron Br. 12-18; Coca-Cola Br. 11-25; Pet. 33-36.

Respondents' principal contention is that *Jesner*'s analysis is inapplicable because imposing liability on domestic corporations presents "no relevant foreign policy implications" (Opp. 21). But a majority of the Court in *Jesner* emphasized "the separation-of-powers concerns that counsel against courts creating private rights of action" (138 S. Ct. at 1403), and the plurality and concurring opinions further emphasized separation-of-powers concerns. Pet. 35-36; Pet. App. 16a-19a.

And respondents are wrong that foreign-policy concerns are absent in cases against domestic corporations. As in this case, these claims typically assert that the domestic corporation aided and abetted wrongdoing abroad by foreign nationals or governments. Chamber, *et al.* Br. 14-17. These claims therefore require U.S. courts to adjudicate claims of foreign wrongdoing that inevitably risk international friction.

Respondents also assert that corporate liability is required by the ATS' original purpose of providing a federal forum for certain injuries to foreign citizens. Opp. 22. But Congress's decision to exclude corporations from liability under the Torture Victims Protection Act (Pet. 34) demonstrates that corporate liability is not essential to vindicate international-law protections. And a decision that corporations are not subject

to ATS liability simply leaves the decision to Congress.

Finally, relying on the Solicitor General's arguments in *Jesner*, respondents argue that domestic law controls the corporate-liability question as a matter of "federal common law." Opp. 22-23. But that contention was squarely rejected in *Jesner*—the Court held that the question turned, first, on international law and, second, on separation-of-powers considerations—and the Court ultimately rejected the Solicitor General's position that corporations generally are subject to ATS liability.

In sum, the conflict among the lower courts, the panel's flagrant disregard of *Jesner*, and the importance of the issue demonstrate the urgent need for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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