No. 15-349

IN THE
# Supreme Court of the United States

NESTLÉ U.S.A., INC.; ARCHER-DANIELS-MIDLAND COMPANY; and CARGILL, INCORPORATED,
*Petitioners,*
v.

JOHN DOE I; JOHN DOE II; JOHN DOE III, 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**

## BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

*Amici curiae* address the following two issues:

1. Whether a defendant is subject to suit under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, for aiding and abetting another person's alleged violation of the law of nations based on allegations that the defendant intended to pursue a legitimate business objective while knowing (but not intending) that the objective could be advanced by the other person's violation of international law.

2. Whether the "focus" test of *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247, 248 (2010), governs whether a proposed application of the ATS would be impermissibly extraterritorial under *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013).

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**BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

## INTERESTS OF *AMICI CURIAE*

Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, a limited and accountable government, and the rule of law.

WLF has frequently appeared as *amicus curiae* in this and other federal courts to oppose litigation designed to create new and expanded private rights of action under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. *See, e.g., Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013); *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.* ["*Talisman*"], 582 F.3d 244 (2d Cir. 2009), *cert. denied*, 562 U.S. 946 (2010). WLF believes that an overly expansive interpretation of the ATS threatens to undermine American foreign and domestic policy interests.

The Allied Educational Foundation (AEF) is a

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondents with notice of its intent to file. All parties have consented to the filing; letters of consent have been lodged with the Court.

non-profit charitable foundation based in Tenafly, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared in this Court on a number of occasions.

*Amici* are concerned that the decision below, if allowed to stand, will impose unwarranted litigation costs on American corporations conducting business overseas. It will expose them to ATS liability even in the absence of any evidence that they intended to bring about the foreign human rights violations they routinely are alleged to have aided and abetted.

*Amici* are also concerned that allowing ATS suits of this sort to proceed through the discovery phase will likely harm the very groups of people that attorneys who file such suits claim to be helping. The decision below will make American companies less willing to do business in under-developed regions, thereby making it more difficult for residents of those regions to make economic advances.

## STATEMENT OF THE CASE

Respondents are citizens of Mali who claim that they were treated inhumanely while (as children) they worked on cocoa plantations in Côte d'Ivoire (hereinafter, "Ivory Coast"). The plantations were owned by private farmers, and Respondents do not contend that Petitioners (collectively, "Nestlé") ever managed them or held any ownership interest. Nonetheless, Respondents contend that their mistreatment amounted to international human rights violations and that Petitioners—chocolate

manufacturers that purchased significant quantities of cocoa from the plantations—aided and abetted those violations.

The district court granted Nestlé's motion to dismiss claims filed by Respondents under the ATS. Pet. App. 54a-231a. The court held that Respondents' allegations were insufficient to meet the ATS's *mens rea* requirement. *Id.* at 156a-160a. It explained that the ATS requires allegations that the defendants acted for the "purpose" of violating human rights protected under the statute, but that "Plaintiffs do not—and, as they conceded at oral argument on November 10, 2009, cannot—allege that Defendants acted with the purpose and intent that their conduct would perpetuate child slavery on Ivorian farms." *Id.* at 157a.

On appeal, the Ninth Circuit issued two separate opinions. Its initial *per curiam* order, issued in December 2013, vacated the dismissal and remanded the case to the district court. Pet. App. 43a-48a. The panel held that the district court had applied an overly exacting *mens rea* standard: "the district court erred in requiring plaintiff-appellants to allege specific intent in order to satisfy the applicable purpose *mens rea* standard." *Id.* at 44a. The panel further held that Respondents should be permitted to amend their complaint in light of recent authority regarding "the extraterritorial reach of the Alien Tort Statute" (citing this Court's *Kiobel* decision) and "the *actus reus* standard for aiding and abetting" (citing two decisions from international criminal tribunals). *Ibid.* Judge Rawlinson dissented from the panel's *mens rea* ruling. She would have upheld the district court's determination that "the appropriate *mens rea* standard

was 'specific intent (*i.e.*, for the purpose) of substantially assisting the commission of that crime.'" *Id*. at 48a (quoting district court Order, Pet. App. 108a).

In September 2014, the panel withdrew its initial decision and replaced it with an opinion that reversed the district court's dismissal. Pet. App. 1a-42a. The court declined to specify a precise *mens rea* standard but nonetheless concluded that the complaint's factual allegations in support of its aiding and abetting claim were sufficient to demonstrate *mens rea*. *Id.* at 15a-22a.

The court acknowledged that both the Second and Fourth Circuits have held that knowledge of the principal's wrongdoing is insufficient to establish aiding-and-abetting liability under the ATS and that the plaintiff must also demonstrate that the defendant "act[ed] with the *purpose* of facilitating the [principal's] criminal act." *Id.* at 17a. The court noted that Respondents urged it to adopt a far less exacting standard—to hold that "the required *mens rea* for aiding and abetting is knowledge, specifically, knowledge that the aider and abetter's acts would facilitate the commission of the underlying offense." *Id*. at 16a. The court stated that it need not choose between a purpose or knowledge standard because "the plaintiffs' allegations satisfy the more stringent purpose standard." *Id.* at 18a.

The appeals court also acknowledged that Respondents did not allege that Nestlé acted for the

purpose of harming children. *Id.* at 21a.[2] The court nonetheless concluded that Respondents satisfied the purpose standard (as the court understood it) by alleging, *inter alia*, that Nestlé intended to pursue all options available to reduce its cocoa-purchase costs, and that buying cocoa from farms that used slave labor (the least expensive form of labor) would result in the lowest possible purchase prices. *Id.* at 18a-22a.

The appeals court also rejected Nestlé's assertion that the district court's dismissal should be upheld on the alternative ground that the complaint sought an extraterritorial application of federal law and thus was barred by *Kiobel*. Pet. App. 23a-28a. Nestlé asserted that *Kiobel* required use of the "focus" test—set forth in *Morrison v. National Australian Bank Ltd.*, 561 U.S. 247, 248 (2010)—to determine the extraterritoriality issue; and that use of that test demonstrated that the ATS was inapplicable to Respondents' claims. The Ninth Circuit disagreed, holding that *Kiobel* did not endorse use of *Morrison*'s "focus" test but instead adopted an as-yet undefined "touch and concern" test for determining when a claim alleging law-of-nations violations is sufficiently tied to the United States to permit it to be heard under the ATS. *Id.* at 25a. Rather than attempting to discern the content of what

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[2] Counsel for Respondents told the district court during oral argument on the motion to dismiss, "Now, if what was required was a state of mind that the defendants wanted child slave labor to go on, you know, positively desired it, which is what I think you're saying, . . . [t]hen we would not be able to allege that." Id. at 157a. n. 52. Respondents' opening brief on appeal stated that "they do not currently possess facts sufficient to support the district court's standard that Defendants specifically intended the human rights violations in this case."

it described as the "amorphous touch and concern test" or to determine whether the allegations of the complaint were sufficient to satisfy that test, the appeals court remanded the issue to the district court to allow it to flesh out the meaning of "touch and concern" and to give Respondents another opportunity to amend their complaint. *Id.* at 27a-28a.

Judge Rawlinson again dissented in part. Pet. App. 28a-42a. She would have "definitively and unequivocally decide[d] that the purpose standard applies to the pleading of aiding and abetting liability under the ATS." *Id.* at 29a. She also "strongly disagree[d] with the majority's conclusion that Respondents' allegations were sufficient to meet the purpose standard," particularly "in light of the Plaintiffs' concession of their inability to meet the standard." *Id.* at 33a.

The Ninth Circuit denied Nestlé's petition for rehearing *en banc*. Pet. App. 232a-233a. Judge Bea, joined by seven other judges, issued an opinion dissenting from the denial of rehearing *en banc*. *Id.* at 233a-253a. He asserted that the panel decision improperly equated a purpose to maximize profits with a purpose to aid and abet slavery; "[b]y this metric, buyers of Soviet gold had the purpose of facilitating gulag prison slavery." *Id.* at 234a. He stated that "regardless what the majority contends," its "purpose standard" creates a circuit split because it directly conflicts with the purpose standard adopted by the Second and Fourth Circuits. *Id.* at 238a-242a. Judge Bea also stated that the majority was "quite wrong" in concluding that *Kiobel* did not incorporate *Morrison*'s "focus" test, *id.* at 245a, and "puts our court on one side

of yet another circuit split; . . . the minority, incorrect side." *Id.* at 247a.

## SUMMARY OF ARGUMENT

This case presents issues of exceptional importance to the business community. The Court in *Sosa* made clear that courts should exercise "great caution" in recognizing new federal common-law rights of action under the ATS. *Sosa*, 542 U.S. at 728. Indeed, it indicated that there might not be *any* additional causes beyond the three common-law rights of action generally recognized at the time Congress adopted the ATS in 1789. *Id.* at 724. The Court held in *Kiobel* that relief under the ATS is unavailable for "violations of the law of nations occurring outside the United States," because "the presumption against extraterritoriality applies to claims under the ATS" and "nothing in the statute rebuts that presumption." *Kiobel*, 133 S. Ct. at 1669.

But far from heeding *Sosa*'s and *Kiobel*'s words of caution, the Ninth Circuit has taken *Sosa* and *Kiobel* as license to continue with business as usual and to create an ever-expanding array of federal common law causes of action for alleged violations of the law of nations. The causes of action recognized by the Ninth Circuit panel in this case carry that trend to new heights. In the course of doing so, the appeals court has created and/or exacerbated several circuit splits that warrant this Court's immediate review.

First, the Ninth Circuit has adopted a *mens rea* standard for ATS aiding-and-abetting claims that directly conflicts with rulings from the Second and

Fourth Circuits. The court below held that an aiding-and-abetting defendant can be deemed to have acted with the requisite *mens rea* even when the plaintiff admits that the defendant did not assist a human rights violator for the purpose of facilitating the violations, so long as the defendant had knowledge of the violations and a continuation of those violations would redound to the defendant's financial benefit. Pet. App. 18a-22a. In sharp contrast, the Second Circuit requires a showing that the defendant acts "with the purpose of facilitating the commission of [the principal's] crime." *Talisman*, 582 F.3d at 258. The Fourth Circuit has expressly adopted *Talisman*'s "purpose" standard, and thus the Fourth Circuit's standard also conflicts with the decision below. *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011). Review is warranted to resolve the conflict.

As the dissenting opinions of Judges Rawlinson and Bea demonstrate, there is no merit to the Ninth Circuit's claim that its decision can be harmonized with *Talisman* and *Aziz*. The appeals court asserted that Nestlé could be deemed to have acted for the purpose of enslaving Malian children (despite Respondents' admission that they had no evidence that Nestlé desired to enslave anyone) because the complaint alleged that child enslavement served Nestlé's financial interests. Pet. App. 19a. But that assertion does not explain the Second and Fourth Circuit decisions. The defendants in the Second and Fourth Circuit cases also derived financial benefit by taking steps that allegedly facilitated the principal's crimes—crimes of which they were well aware—yet those courts did not deem the existence of financial benefit as evidence of a "purpose" to facilitate the crimes.

Review is also warranted because the Ninth Circuit, in adopting its expansive *mens rea* standard, failed to adhere to *Sosa*'s cautionary admonition that "federal courts should not recognize private claims under federal common law for violation of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." *Sosa*, 542 U.S. 732. The Ninth Circuit cited several international criminal court decisions that have imposed aiding-and-abetting liability even in the absence of evidence that the defendant acted for the *purpose* of facilitating a law-of-nations violation. Pet. App. 16a-17a. But as the Ninth Circuit conceded, that expansive *mens rea* standard has not been universally accepted by international legal authorities. *Id.* at 17a.

Moreover, *Sosa* directed lower courts—when considering whether to exercise their federal-common-law authority to recognize a cause of action under the ATS—to take into account "the practical consequences" of doing so. *Id.* at 732-33. *Amici* submit that the adverse practical consequences of recognizing an aiding-and-abetting cause of action against defendants who lack a purpose to facilitate law-of-nations violations would be significant. In particular, impoverished nations—many of whose governments and business communities have spotty human rights records—cannot hope to improve their living standards unless they can persuade large, multi-national corporations to conduct business within those nations. Yet, if corporations find themselves targeted by ATS suits whenever they enter into a contract with a foreign government or foreign business that violates human rights, they will be less likely to enter into such

business transactions in the future—thereby harming the very people most likely to be victims of human rights abuses.

Second, review is warranted to resolve the conflict between the Ninth Circuit and other federal appeals courts regarding *Kiobel*'s test for determining whether an ATS claim constitutes unwarranted extraterritorial application of the statute. According to the Second and Eleventh Circuits, *Kiobel* directs lower courts to apply *Morrison*'s "focus" test when making that determination—a test that will virtually never permit recognition of an ATS aiding-and-abetting claim where the principal's allegedly illegal conduct occurred overseas. The Ninth Circuit rejected that interpretation of *Kiobel*, thereby creating another circuit conflict. Pet. App. 23a-28a.

Moreover, the Ninth Circuit's idiosyncratic interpretation of *Kiobel* leaves the Ninth Circuit entirely free to make up its own standard for determining the ATS exposure of alleged aiders and abetters whose activities have at least some connection with the United States. The appeals court contends that *Kiobel* gave a name to the appropriate standard (the "touch and concern" test) but left it entirely up to appeals courts in the first instance to provide content to that standard. *Id.* at 25a-26a. Delaying review of this circuit conflict will simply provide the Ninth Circuit an opportunity to engage in many more years of ATS adventurism. Such delay is unwarranted, particularly in light of the large financial and reputational costs imposed on businesses forced to defend extraterritorial ATS lawsuits for years on end.

## REASONS FOR GRANTING THE PETITION

### I. Review Is Warranted to Determine Whether ATS Aiding-and-Abetting Liability May Be Imposed Even When a Defendant Does Not Act with an Intent to Aid or Abet a Violation of the Law of Nations

The ATS, adopted in 1789, provides that a district court shall have original jurisdiction over civil actions "by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 29 U.S.C. § 1350. *Sosa* held that the ATS is solely a jurisdictional statute and does not create any new causes of action for torts in violation of the law of nations. 542 U.S. at 713. It also held, however, that by adopting the ATS, Congress authorized federal courts to immediately begin hearing law-of-nations claims "because torts in violation of the law of nations would have been recognized within the common law of the time." *Id.* at 714. The Court identified three such torts recognized by the common law (and Blackstone) in 1789: (1) violation of safe conducts; (2) infringement of the rights of ambassadors; and (3) piracy.

*Sosa* did not categorically rule out judicial recognition of new torts beyond the three recognized in 1789. But the Court identified numerous reasons for exercising "great caution" in recognizing *any* new federal-common-law causes of action. *Id.* at 728. Among those reasons was the radical transformation during the nineteenth century of the understanding of the nature of common law—a transformation that led the Court to "den[y] the existence of any federal

'general' common law." *Id.* at 725-26 (citing *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)). The Court said that "a decision to create a private right of action" under the ATS "is one best left to legislative judgment in the great majority of cases." *Id.* at 727.

In light of *Sosa*'s directive that federal courts exercise "great caution in adapting the law of nations to private rights," *id.* at 729, there is reason to doubt that federal courts should recognize an ATS cause of action for aiding and abetting another's violation of the law of nations. But because many federal appeals courts have held that the ATS creates a cause of action for aiding and abetting another's law-of-nations violation, it is incumbent on this Court to ensure that the various appeals courts enforce that cause of action in a consistent manner.

### A. The Ninth Circuit Ruling Directly Conflicts with Rulings from the Second and Fourth Circuits

The Second and Fourth Circuits have adopted a *mens rea* standard for ATS aiding-and-abetting claims that requires evidence that "the defendant (1) provides practical assistance to the principal which has a substantial effect on the perpetration of the crime, and (2) does so with *the purpose* of facilitating the commission of that crime." *Talisman*, 582 F.3d at 258 (emphasis added); *Aziz*, 658 F.3d at 396. Given Respondents' admission that they have no evidence that Nestlé ever took any action for the purpose of facilitating the continued enslavement of children on Ivory Coast plantations, *see* Note 2 *supra*, their

complaint would have been dismissed had it been filed in either the Second or Fourth Circuit.

The Ninth Circuit's conclusion that Respondents' complaint adequately alleged *mens rea* is proof positive that the Ninth Circuit's *mens rea* standard conflicts with that of the Second and Fourth Circuits. The Ninth Circuit stated that it "need not decide whether a purpose or knowledge standard applies to aiding and abetting ATS claims," because it concluded that "the plaintiffs' allegations satisfy the more stringent purpose standard and therefore state a claim for aiding and abetting slavery." Pet. App. 18a. But the factual analysis undertaken by the Ninth Circuit makes clear that the "purpose standard" it purported to apply is a far cry from the "purpose standard" adopted by the Second and Fourth Circuits.[3]

The panel pointed to four types of conduct as its bases for concluding that the allegations in Respondents' complaint satisfied its "purpose standard": (1) Nestlé intended to pursue all options available to reduce its cocoa-purchase costs, and buying cocoa from farms that used slave labor (the least expensive form of labor) would result in the lowest

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[3] Judge Bea termed "inexplicable" the panel's decision that Respondents satisfied the Ninth Circuit's "purpose standard," given "the concession from the plaintiffs that the defendants did not have the purpose of promoting slavery." Pet. App. 238a n.6. The panel's analysis of Respondents' claims provides the obvious explanation: what the Ninth Circuit refers to as a "purpose standard" does not actually require Respondents to demonstrate that Nestlé had the purpose of promoting slavery or any other violation of the law of nations.

possible purchase prices; (2) Nestlé's influence over the cocoa market was sufficient that it could have taken steps to stop or limit the use of child slave labor by its suppliers, but it failed to take such steps; (3) Nestlé supplied plantation owners with equipment and training for the cultivation of cocoa, despite knowing that these supplies would make the plantations more profitable and thus facilitate the use of child slave labor; and (4) Nestlé participated in lobbying efforts designed to defeat federal legislation that would have required chocolate importers and manufacturers to certify and label their chocolate as "slave free." *Id.* at 18a-22a.

The Ninth Circuit could not plausibly have concluded that such allegations supported an inference that Nestlé's actual purpose in engaging in these four types of conduct was to promote child slavery. To the contrary, it explicitly denied that it so concluded. *Id.* at 21a ("Indeed, *the complaint is clear that the defendants' motive was finding cheap sources of cocoa*; there is no allegation that the defendants support child slavery due to an interest in harming children in West Africa.") (emphasis added).

In other words, the Ninth Circuit's "purpose standard" does *not* require evidence that the defendant's purpose was to facilitate a violation of the law of nations. Rather, that standard is satisfied by evidence of knowledge of the principal's wrongdoing, combined with: (1) a single-minded focus on maximizing profits; and (2) the other allegations cited by the appeals court (which might be collectively described as allegations that Nestlé acted with

inadequate regard for working conditions on the cocoa plantations).

In contrast, the Second and Fourth Circuits have made clear that their "purpose standard" does, indeed, require plausible allegations that the defendant intended to facilitate the commission of a violation of the law of nations. The Ninth Circuit's efforts to distinguish *Talisman* and *Aziz* (both of which held that ATS plaintiffs had failed to meet the "purpose standard") were unavailing. It asserted:

> In *Talisman*, by contrast, the defendant did not in any way benefit from the underlying human rights atrocities carried out by the Sudanese military, and in fact, those atrocities ran contrary to the defendant's goals in the area, and even forced the defendant to abandon its operations.

Pet. App. 19a (citing *Talisman*, 582 F.3d at 262).

That account of *Talisman* is inaccurate. The defendant, a Canadian oil company, was accused of aiding and abetting human rights violations by the Sudanese military in the vicinity of the company's oil fields in South Sudan. Contrary to the Ninth Circuit's assertion, the company was both aware of and *directly benefitted* from the military's activities, whose principal purpose was to protect the oil fields from rebel attacks and thereby assure the profitability of the company's operations. 582 F.3d at 262-63. The Second Circuit affirmed dismissal of the ATS claims not because the

defendant had not benefitted from the actions of the Sudanese military but because the plaintiffs failed to provide evidence that the company "acted with the purpose to assist persecution" of the local population. *Id.* at 263.

The Ninth Circuit's characterization of the facts in *Aziz* is similarly inaccurate. It asserted, "[I]n *Aziz*, the plaintiffs alleged that the defendants sold chemicals knowing they would be used to murder Kurds in northern Iraq, but failed to allege that the defendants had anything to gain from the use of chemical weapons." Pet. App. 19a (citing *Aziz*, 658 F.3d at 394, 401). To the contrary: the corporate defendant had much to gain from its sales; it garnered substantial income from the huge quantities of chemicals it sold to Iraq. Indeed, it knew that the chemical in question (TDG) was subject to export controls (because it could be used to manufacture mustard gas), and it later pled guilty to criminal charges that its sales to Iraq violated U.S. law. It also knew that Iraq would not have needed to purchase the chemicals had it not intended to use them to manufacture mustard gas. The Fourth Circuit affirmed dismissal of the ATS claims *despite* the defendant's guilty knowledge and *despite* the substantial profit it derived from its illegal chemical sales, because the plaintiffs had not adequately alleged that the defendant assisted Iraq "with the purpose of facilitating" Iraq's chemical weapons attacks against the Kurds. 658 F.3d at 401.[4]

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[4] The Fourth Circuit noted that those attacks "left thousands dead, maimed, or suffering from physical and

In sum, although the Ninth Circuit termed the *mens rea* standard it applied in this case a "purpose standard" and stated that its standard was indistinguishable from the *mens rea* standard adopted by the Second and Fourth Circuits, the evidence demonstrates that the Ninth Circuit's standard differs sharply from the one employed by those circuits. Review is warranted to resolve that conflict.

### B. The Ninth Circuit's Analysis Conflicts with this Court's Rulings Regarding the Narrow Scope of ATS Causes of Action

Review is also warranted because the Ninth Circuit, in adopting its expansive *mens rea* standard, failed to adhere to *Sosa*'s cautionary admonition that "federal courts should not recognize private claims under federal common law for violation of any international law norm with less definite content and acceptance among civilized nations than the historical paradigms familiar when [the ATS] was enacted." *Sosa*, 542 U.S. 732. Although the Ninth Circuit cited several international criminal court decisions that have imposed aiding-and-abetting liability even in the absence of evidence that the defendant acted for the purpose of facilitating a law-of-nations violation, the only *mens rea* standard that can claim the widespread acceptance demanded by *Sosa* is the purpose standard.

The district court undertook a lengthy analysis of the scope of aiding-and-abetting liability under

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psychological trauma." 658 F.3d at 391.

international law. Pet. App. 90a-160a. As it explained:

> Although there are various formulations of the proper standard of aiding and abetting liability in international law, it is important to remember *Sosa*'s instruction that norms are actionable only if they are universally recognized and defined with specificity. . . . In other words, where there are a variety of formulations, the court should look to the formulation that is agreed upon by all—a lowest common denominator or a common "core definition" of the norm.

*Id.* at 91a (quoting *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 254, 277 n.12 (2d Cir. 2007) (Katzmann, J., concurring)).

The district court examined numerous international-law sources from the past century. Its well-considered judgment: "the 'purpose' *mens rea* standard is the proper standard to use in [ATS] litigation. The less-stringent 'knowledge' standard . . . rests on a number of premises that . . . fail to satisfy the requirements set forth in *Sosa*," particularly the requirement of universal acceptance. *Id.* at 98a-99a. The court added:

> Notably, this conclusion is further supported by the Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, which "has been signed by 139 countries and ratified by

> 105, including most of the mature democracies of the world."

*Id.* at 102a-03a (quoting *Khulumani*, 504 F.3d at 333 (Korman, J., concurring)). As noted above, the court below adopted a *mens rea* standard that is less stringent than the purpose standard, the only standard that enjoys universal acceptance and thus the only standard that, per *Sosa*, can even arguably be adopted as the basis for ATS liability. Review is warranted to address the conflict between *Sosa* and the decision below.

The Ninth Circuit's recognition of Respondents' ATS cause of action—despite their concession that Nestlé did not act for the purpose of facilitating childhood slavery—is particularly problematic because it applies the ATS to purely private activity. The district court found that neither Nestlé nor the Ivory Coast farmers with which it did business were state actors. Pet. App. 173-79. The law of nations concerns itself principally with the rights and duties of sovereign nations. As Judge Bea noted in dissent, "*Sosa* repeatedly emphasizes the need for restraint in extending liability to a defendant who is 'a private actor such as a corporation or individual.'" *Id.* at 236a (quoting *Sosa*, 542 U.S. at 732 n.20).

Many criminal activities do not constitute violations of the law of nations, which are limited to "violations of specific and universally accepted rules that the nations of the world treat as binding *in their dealings with one another*." *Mastafa v. Chevron Corp.*, 770 F.3d 170, 180 (2d Cir. 2014). "For example,

murder of one private party by another, universally proscribed by the domestic law of all countries (subject to varying definitions), is not actionable under the ATS as a violation of [the law of nations] because the nations of the world have not demonstrated that this wrong is of mutual, and not merely several concern." *Id.* at 180-81.

Because Nestlé and the Ivory Coast plantation owners are all private parties whose activities are not a principal focus of the law of nations, it is particularly problematic under *Sosa* to apply a relaxed *mens rea* standard to Nestlé's alleged aiding-and-abetting activities. Review is warranted to address those concerns.

### C. The Ninth Circuit's Ruling Will Have Significantly Adverse "Practical Consequences"

*Sosa* directed lower courts—when considering whether to exercise their federal-common-law authority to recognize a cause of action under the ATS—to take into account "the practical consequences" of doing so. *Id.* at 732-33. *Amici* submit that the adverse practical consequences of recognizing ATS aiding-and-abetting causes of action against defendants who lack a purpose to facilitate law-of-nations violations would be significant.

As a practical matter, multi-national corporations cannot undertake major industrial or commercial activities in an impoverished nation without the active cooperation of that nation's

government and business community. It is a regrettable but undeniable fact that the governments and large domestic employers in many such nations do not respect the human rights of their citizens. *See, e.g.,* Human Rights Watch, *World Report 2015* (January 2015) (documenting human rights abuses in 90 countries).

If multi-national corporations find themselves targeted by ATS suits whenever they enter into a contract with a foreign government or foreign business that violates human rights, they will be less likely to enter into such business transactions in the future—thereby harming the very people that ATS litigation is designed to help. Indeed, Talisman Energy, Inc.'s decision to abandon its oil exploration activities in South Sudan was triggered in significant part by the adverse publicity it suffered while being targeted with an ATS lawsuit by activists in New York.

There are more than 900,000 cocoa farmers in the Ivory Coast, most of whom operate small family farms. Three-and-one half million people (out of a total national population of 22 million) rely on cocoa production for their livelihood. *See generally*, Sarah Grossman-Greene and Chris Byer, *A Brief History of Cocoa in Ghana and Côte d'Ivoire* (Tulane University 2009). Abuse of child labor has been a persistent problem on Ivory Coast farms for decades. The Ninth Circuit apparently believes that it has the answer to ending such abuse: multinational corporations should cease doing business with farms that engage in abusive labor practices. Pet. App. 20a.

But it is difficult to see how boycotts of the Ivory Coast cocoa market—steps likely to decrease cocoa production and agricultural employment—could lead to improved conditions among the nation's agricultural workers. Nor are improved conditions likely to be achieved by authorizing expanded ATS lawsuits against multinational corporations.

## II. Review Is Warranted to Determine the Circumstances Under Which the Presumption Against Extraterritorial Application of the ATS Can Be Overcome

Review is also warranted to resolve the conflict between the Ninth Circuit and other federal appeals courts regarding *Kiobel*'s test for determining whether a particular ATS claim constitutes unwarranted extraterritorial application of the statute.

*Kiobel* held that relief under the ATS is unavailable for "violations of the law of nations occurring outside the United States," because "the presumption against extraterritoriality applies to claims under the ATS" and "nothing in the statute rebuts that presumption." *Kiobel*, 133 S. Ct. at 1669. In *Kiobel*, *all* of the relevant conduct occurred outside the United States, so the Court did not consider the ATS's applicability when some but not all of the relevant conduct occurs in the U.S. The Court said simply, "[E]ven where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application. *See Morrison*, 130 S. Ct. at 2883-2888." *Ibid.*

### A. The Ninth Circuit's Rejection of *Morrison*'s "Focus" Test Conflicts with Rulings from Other Circuits

The Second and Eleventh Circuits have interpreted *Kiobel*'s citation to *Morrison* as an indication that ATS extraterritoriality issues should be resolved by applying *Morrison*'s "focus" test. *Mastafa v. Chevron Corp.*, 770 F.3d 170, 183 (2d Cir. 2014); *Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185, 1191 (11th Cir. 2014). *Morrison*'s "focus" test directs courts to ask whether the conduct that is the "focus" of the statute at issue occurred in the United States or overseas. If the conduct on which the statute focuses occurred overseas, then the presumption against extraterritorial application kicks in to bar a cause of action—even when other relevant conduct (not the "focus" of the statute) occurred in the United States.

In direct conflict with the Second and Eleventh Circuit, the court below held that despite *Kiobel*'s citation to *Morrison*, *Kiobel* did *not* intend the focus test to govern extraterritoriality issues arising in ATS cases. Rather, the Ninth Circuit concluded, *Kiobel* intended such issues to be resolved in accordance with a "touch and concern test." Pet. App. 26a (stating that *Kiobel* "did not explicitly adopt *Morrison*'s focus test, and chose to use the phrase 'touch and concern' rather than the term 'focus' when articulating the legal standard it did adopt.").

The inter-circuit conflict is readily apparent. Moreover, the conflict is likely outcome-determinative. On the one hand, the case can be easily decided if the

"focus" test is applied to Respondents' claims. The focus of the ATS is violations of the law of nations, and all the alleged violations of the law of nations in this case are alleged to have occurred in the Ivory Coast. Accordingly, Respondents' claims would be deemed extraterritorial and subject to dismissal. On the other hand, the Ninth Circuit provided no guidance regarding the meaning of its "touch and concern" test, so it would be left to the district court on remand both to define the test and to apply it to the facts of this case.

### B. No Good Reason Exists to Postpone Resolution of the Conflict

Respondent is likely to oppose review of the extraterritoriality issue on the ground that review would be premature; *i.e.*, even though the Ninth Circuit has explicitly rejected using *Morrison*'s "focus" test, it has not yet adopted a new test, and the Court should wait until after the Ninth Circuit has fully explicated its "touch and concern" test to determine whether review is warranted. *Amici* urge the Court to reject that approach; no good reason exists to postpone resolution of the circuit split.

This lawsuit, which alleges human rights violations in Africa, has been pending in U.S. courts for more than a decade. *Kiobel*'s holding that violations of the law of nations that occur outside the United States are not actionable under the ATS strongly suggests that the case should never have been filed. Yet, unless the Court grants review on the extraterritoriality issue, Nestlé faces the prospect of being required to continue

to litigate this matter for several more years to come. Moreover, other ATS cases pending within the Ninth Circuit raise similar extraterritoriality issues. *See, e.g., Doe I v. Cisco Systems, Inc.*, 9th Cir. No. 15-16909 (appeal docketed Sept. 24, 2015). Defendants in this and other similar ATS cases should not be held hostage by the circuit split that is keeping their lawsuits alive.

## CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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