No. 17-55435

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN DOE I, *et al.*,
Plaintiffs-Appellants,

v.

NESTLÉ USA, INC., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California,
No. 2:05-cv-05133 (Hon. Stephen V. Wilson)

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF DEFENDANTS-APPELLEES' PETITIONS FOR REHEARING AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

The National Association of Manufacturers is a nonprofit corporation organized under the laws of New York. It has no parent company and has issued no stock.

The Organization for International Investment is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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IDENTITY AND INTEREST OF *AMICI CURIAE* [1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The U.S. Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the U.S. Chamber is to represent the interests of its members before the courts, Congress, and the Executive Branch.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

[1] No party's counsel authored this brief in whole or in part. No party or a party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person other than *amici curiae*, their members, or their counsel made such a monetary contribution. All parties have consented to the filing of this brief pursuant to Circuit Rule 29-2(a).

The NAM's Manufacturers' Center for Legal Action advocates on behalf of manufacturers in the courts.

Representing the U.S. operations of many of the world's leading international companies, the Organization for International Investment (OFII) ensures that policymakers at the federal, state and local level understand the critical role that foreign direct investment plays in America's economy. OFII advocates for fair, non-discriminatory treatment of foreign-based companies and promotes policies that will encourage them to establish U.S. operations, which in turn increases American employment and U.S. economic growth.

Amici have a direct and substantial interest in the issues presented in this case. Numerous members have been and may continue to be defendants in suits predicated on expansive theories of liability under the Alien Tort Statute (ATS), 28 U.S.C. § 1350, based on their operations—or, more often, those of their affiliates—in developing countries. Over the past 25 years, U.S. and foreign companies have been named as defendants in hundreds of ATS lawsuits, many of which have been filed in this Circuit. These suits typically last a decade or more, imposing substantial legal and reputational costs on corporations that operate in developing countries and chilling further investment. Unless this Court grants rehearing to correct the panel's expansive theories of ATS liability, the stream of ATS lawsuits in this Circuit will continue.

The issues before this Court are purely legal. They address whether the ATS can be stretched beyond its intended scope—one that the Supreme Court repeatedly has limited—to sweep in ordinary business conduct that does not violate international or U.S. law. *Amici* can offer a helpful perspective on these issues. They have participated in dozens of cases involving the ATS's reach before this Court and other federal courts, including prior appearances as *amici* in this litigation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Rehearing *en banc* is necessary to decide two questions of exceptional importance in ATS suits. First, whether a U.S. company's purported awareness of lawful commercial transactions with foreign suppliers—who, in turn, allegedly committed human rights violations outside the United States—constitutes domestic conduct that "touch[es] and concern[s] the territory of the United States … with sufficient force to displace the presumption against extraterritorial[ity]." *Kiobel v. Royal Dutch Petroleum Co*, 569 U.S. 108, 124–25 (2013). And, second, whether U.S. corporations are subject to liability under the ATS following the Supreme Court's decision in *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386 (2018).

As a legal matter, the panel's affirmative answers to both questions conflict with the Supreme Court's guidance in *Kiobel* and *Jesner*, create or deepen circuit splits with at least three other federal courts of appeals, and conflict with this

Circuit's prior decision in *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014). As a practical matter, the decision restarts, yet again, this 13-year-old lawsuit by allowing plaintiffs to amend their complaint for a third time.

The panel's decision is another instance in which members of this Court have taken the ATS's textual brevity and lack of express restrictions as an invitation to allow ever-more-creative claims to survive motions to dismiss. Rather than engaging in the "vigilant doorkeeping" over ATS claims mandated by the Supreme Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), this Court has thrown open the door to a new wave of post-*Kiobel* ATS claims. As a result, the Ninth Circuit has positioned itself as a World Court "exercis[ing] jurisdiction over all the earth, on whatever matters [it] decide[s] are so important that all civilized people should agree with [it]." *Sarei v. Rio Tinto, PLC*, 671 F.3d 736, 797–98 (9th Cir. 2011) (*en banc*) (Kleinfeld, J., dissenting), *vacated by* 569 U.S. 945 (2013).

The panel's departure from Circuit precedent and its rejection of positions adopted by other courts is especially problematic for *amici*'s members. In many cases, companies that operate nationwide are subject to jurisdiction in several states. But whether a company must bear the financial and reputational costs of defending against an ATS suit—often lasting more than a decade—should not depend on whether the company is located in Dallas or Sacramento. Moreover,

because a great number of businesses operate in the Ninth Circuit and thus may be sued here, the division among the circuits is ripe for exploitation.

This Circuit's history of accepting expansive theories of ATS liability has precipitated a familiar cycle: a panel adopts a broad construction of the ATS's jurisdictional reach; the full Court allows the ATS claim to proceed or narrowly declines *en banc* review; members of the Court vigorously dissent; and the Supreme Court reverses or vacates the decision after announcing a more restrained position. Three seminal ATS decisions from this Court—*Alvarez-Machain v. United States*, 331 F.3d 604 (9th Cir. 2003) (*en banc*), *rev'd sub nom. Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004); *Sarei v. Rio Tinto, PLC*, 671 F.3d 736 (9th Cir. 2011) (*en banc*), *vacated by* 569 U.S. 945 (2013); and *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909 (9th Cir. 2011), *rev'd sub nom. Daimler AG v. Bauman*, 571 U.S. 117 (2014)—fit this mold. In each case, the Supreme Court overturned this Court's decision after imposing constraints on the jurisdictional reach of U.S. courts. In each case, the members of this Court who sought to narrow the scope of the decision were proved right. *See, e.g.*, *Alvarez-Machain*, 331 F.3d at 647 (O'Scannlain, J., dissenting from *en banc* decision) ("[T]he majority has imprudently ignored the relevant underpinnings of the [ATS]."); *Sarei*, 671 F.3d at 814 (Kleinfield, J., dissenting from *en banc* decision) ("Our decision makes the Ninth Circuit the best place in the world to bring class

actions against deep-pocket private defendants … for the evils so prevalent all over the world. This claim of supervisory authority over the entire planet is unwise as well as legally incorrect."); *Bauman*, 676 F.3d 774, 775 (9th Cir. 2011) (O'Scannlain, J., dissenting from denial of rehearing *en banc*) ("We thus place ourselves at odds again with the dictates of the Supreme Court, which has never approved such a broad jurisdictional reach as in this case.").

Likewise, after the first panel decision in this case held that *Kiobel*'s "touch and concern" requirement "did not incorporate *Morrison*'s focus test," *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1028 (9th Cir. 2014), nine members of this Court dissented from the decision or denial of rehearing *en banc*, *Doe I v. Nestle USA, Inc.*, 788 F.3d 946 (9th Cir. 2015). Two years later, the Supreme Court reiterated in *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2101 (2016), that *Kiobel* did, in fact, incorporate the focus test, and this Court was forced to reverse course, once again. Op. 10–11.

These petitions for *en banc* review give the full Court an opportunity to align the Ninth Circuit's ATS jurisprudence with the mainstream decisions of other circuits and the instructions of the Supreme Court.

ARGUMENT

I. *En Banc* Review Is Warranted to Address Questions of Exceptional Importance to the ATS

A. The Panel's Extraterritoriality Holding Misapplies the Supreme Court's Guidance in *Kiobel*, Breaks from the Fifth and Eleventh Circuits, and Departs from Ninth Circuit Precedent

In 2013, the Supreme Court in *Kiobel v. Royal Dutch Petroleum* held that the ATS does not ordinarily supply jurisdiction when "all the relevant conduct took place outside the United States." 569 U.S. at 124. In order for an ATS case to proceed, the plaintiffs' claims must "touch and concern the territory of the United States … with sufficient force to displace the presumption against extraterritorial application." *Id.* at 124–25. The Supreme Court did not elaborate on the parameters of conduct that would "touch and concern" U.S. territory with "sufficient force," but the majority opinion clarified that "mere corporate presence" is insufficient to establish jurisdiction. *Id.* at 125.

Although the Ninth Circuit panel in this case properly articulated that legal standard, its application was deeply flawed. The panel concluded that the plaintiffs' complaint could proceed under *Kiobel* based on two allegations that the panel interpreted to qualify as domestic conduct. The panel relied, first, on the allegation that unspecified defendants provided "personal spending money" to farmers in Côte d'Ivoire. Op. 13. From this allegation, the panel inferred that the funds must have "originated" in the United States and could have been "given with

the purpose" of "continu[ing] [to] receiv[e] cocoa at a price that would not be obtainable without employing child slave labor." *Id.* The panel next relied on allegations that defendants' U.S. employees conducted oversight visits to Côte d'Ivoire—visits that were not linked to the forced-labor allegations—and reported back to headquarters. *Id.* The panel concluded that these two indisputably lawful activities were somehow the "focus" of congressional concern in enacting the ATS in 1789, and further that this limited domestic activity carried "sufficient force" to clear the presumption against extraterritoriality. *See id.*

The panel's conclusion is dramatically out of step with other circuits. Courts have uniformly agreed that claims arising from routine business activity within the United States, including business payments to alleged wrongdoers abroad, do not satisfy *Kiobel*'s "touch and concern" test. As petitioners aptly explain, both the Fifth and Eleventh Circuits have held that routine U.S.-based business transactions, including decisions to make payments to alleged foreign tortfeasors, are insufficient to establish ATS jurisdiction for domestic conduct. *See* Nestle Pet. 10–11, ECF No. 70-1; Cargill Pet. 12–13, ECF No. 71.

The panel's extraterritoriality holding also conflicts with this Court's decision in *Mujica v. AirScan Inc.*, 771 F.3d 580 (9th Cir. 2014). Unlike the panel decision here, this Court in *Mujica* declined to infer a domestic nexus based on the defendant's U.S. presence—namely, "that the acts [plaintiffs] allege occurred in

Colombia 'could not have occurred' without support from Defendants' U.S. offices.'" *Id.* at 592 n.6. The Court thus held that domestic oversight of allegedly unlawful foreign conduct did not satisfy the "touch and concern" test, reasoning that "the Supreme Court has never suggested that a plaintiff can bring an action based solely on extraterritorial conduct *merely because* the defendant is a U.S. national." *Id.* at 594.

But that is exactly what the panel did here—inferring a domestic connection based exclusively on the defendants' presence in the United States and the fact that decision-making presumably emanates from a company's headquarters. Because *Mujica* and the panel decision announce conflicting commands about what U.S.-based business activities trigger application of the ATS, the Court should grant rehearing to clarify that *Mujica* states the correct principle of law.

In this respect, the panel's extraterritoriality holding also strays from the Supreme Court's statements in *Kiobel* that the nexus to the United States must have "sufficient force" to overcome the presumption, and that "mere corporate presence" is not enough for ATS jurisdiction. 569 U.S. at 125. Rather than relying on a defendant's nationality or treating *any* allegation of domestic activity as sufficient, the Supreme Court assesses whether a case involves a permissible "domestic application" of the statute, which depends on the location of the relevant conduct—that is, the conduct that constitutes the "focus" of Congress's concern in

enacting the law. *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010). "[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." *RJR Nabisco, Inc.*, 136 S. Ct. at 2101.

Here, the relevant conduct occurred in Côte d'Ivoire. As the ATS's text makes clear, the focus of Congress's concern in enacting the statute in 1789 was on "tort[s] … committed in violation of the law of nations." 28 U.S.C. § 1350; *see Kiobel*, 569 U.S. at 126–27 (Alito, Thomas, JJ., concurring). The relevant "tort" is the forced labor imposed upon the plaintiffs, which allegedly occurred on farms located in Côte d'Ivoire. Indeed, plaintiffs do not allege *any* independent tort that occurred in the United States, let alone one "committed in violation of the law of nations." 28 U.S.C. § 1350.

The panel side-stepped this conclusion by reasoning that "[t]he focus of the ATS is not limited to principal offenses" and that "aiding and abetting" also "comes within the ATS's focus." Op. 11–12. Even if the ATS could be read to encompass aiding-and-abetting claims—an issue the Supreme Court has not yet considered—the panel's decision goes too far. *Kiobel* requires not just that the relevant claim "touch and concern" the United States, but that it do so with "sufficient force to displace the presumption." 569 U.S. at 124–25. "[T]he burden of showing sufficient domestic contact is substantial," and "not any old domestic

contact will do." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1035 (9th Cir. 2014) (Rawlinson, J., concurring in part and dissenting in part); *see also Warfaa v. Ali*, 811 F.3d 653, 660 (4th Cir. 2016) (it is the "rare case" that can overcome the presumption, which requires "a strong and direct connection" between the alleged conduct and the United States).

Thus, the Eleventh Circuit rejected ATS claims involving nearly identical allegations—that U.S. corporations "made funding and policy decisions in the United States" to aid and abet human rights violations overseas—because "the domestic location of the decision-making alleged in general terms here does not outweigh the extraterritorial location of the rest of Plaintiffs' claims." *Doe v. Drummond Co.*, 782 F.3d 576, 598 (11th Cir. 2015). This application of *Kiobel* is consistent with both the "sufficient force" limitation and the Supreme Court's guidance in *Morrison*, which cautioned against reading the requirement of sufficient domestic contact out of the focus test. *Morrison*, 561 U.S. at 266 ("[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.").

Moreover, ATS jurisdiction cannot be based on lawful business conduct in the United States without running afoul of *Kiobel*'s declaration that "mere corporate presence" is not enough for ATS jurisdiction. 569 U.S. at 125.

Corporate "presence," if it means anything, encompasses the routine activities of a U.S.-based business, such as decision-making, financial oversight, and supervision of global operations. The panel's standard thus would extend ATS liability to virtually any U.S.-based company operating in a country where human rights abuses occur, in stark contrast to the Supreme Court's contrary instruction in *Kiobel*.

B. The Panel's Corporate Liability Holding Misapplies the Supreme Court's Decision in *Jesner*

En banc review is also warranted to address the panel's holding that domestic corporations face liability under the ATS. In *Jesner v. Arab Bank, PLC*, the Supreme Court held that ATS liability does not extend to foreign corporations because no international precedent presently establishes a universal and obligatory norm of international law extending liability to foreign corporate entities. 138 S. Ct. at 1402. Because the defendant in *Jesner* happened to be a foreign corporation, the Court had no occasion to decide the similar status of domestic corporate defendants.

Before *Jesner*, this Court ruled in *Sarei v. Rio Tinto PLC*, 671 F.3d 736 (9th Cir. 2011) (*en banc*), *vacated on other grounds*, 569 U.S. 945 (2013), that all corporations—foreign and domestic—were subject to ATS liability. When this case was previously on appeal in 2014, the panel adopted the reasoning of *Sarei* and held that the ATS extends to all corporate defendants. Notwithstanding the

obvious impact of *Jesner* on the continued persuasive force of *Sarei* and the validity of *Nestle I*, the panel here disposed of the corporate liability question in a single sentence, holding that "*Jesner* did not eliminate all corporate liability under the ATS, and we therefore continue to follow *Nestle I*'s holding as applied to domestic corporations." Op. 9.

The panel's reversion to pre-*Jesner* Circuit precedent regarding liability for domestic corporations ignores Justice Kennedy's analysis in the *Jesner* opinion. The holding of *Jesner* may be limited to foreign corporations, but the evidence upon which at least three justices relied (and which additional justices did not expressly consider) groups all corporations together and would not provide a basis for distinguishing between domestic and foreign companies. *See*, *e.g.*, *Jesner*, 138 S. Ct. at 1400 (Kennedy, J., joined by Roberts, C.J. and Thomas, J.) (noting that "the charters of … international criminal tribunals often exclude corporations from their jurisdictional reach"); *id.* at 1404 ("Congress' decision to exclude liability for corporations in actions brought under the [Torture Victim Protection Act] is all but dispositive of the present case.").

At a minimum, the intervening decision in *Jesner* and the continued circuit split on the issue of corporate liability require re-examination of Circuit precedent. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118 (2d. Cir. 2010) (holding that corporations are not subject to liability under the ATS).

II. Sweeping ATS Liability Has Harmful Practical Consequences

A. The Panel's Decision Threatens International Trade and Usurps U.S. Foreign Policy

Unless corrected, the panel's decision would result in alarming "practical consequences" for business operations around the globe. *Sosa*, 542 U.S. at 732–33 (requiring courts to consider the "practical consequences" of expanding ATS jurisdiction). By holding that routine and relatively minor U.S.-based business decisions clear the high hurdle of "sufficiently force[ful]" domestic conduct, the panel effectively decreed that a company can avoid ATS liability only by forgoing business opportunities in countries where human rights abuses might occur. The decision leaves no room for U.S. defendants to safely invoke the extraterritorial bar; even corporate vigilance measures could be deemed "oversight" of alleged wrongdoing abroad, as the panel found here.

In other words, "[t]he panel majority allows a single plaintiff's civil action to effect an embargo of trade with foreign nations, forcing the judiciary to trench upon the authority of Congress and the President." *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 947 (9th Cir. 2015) (Bea, J., dissenting); *accord Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 261 (2d. Cir. 2009). Some judges might genuinely desire that U.S. companies stop doing business with cocoa farmers in Côte d'Ivoire, perhaps hoping that such nonparticipation would benefit local farmers and children. That foreign affairs decision, however, is not the

judiciary's to make, and the ATS is not a tool that private parties may wield to dictate foreign policy.

Nor is the result practical. When American corporations or their foreign subsidiaries do business in developing countries, they sometime have no choice but to interact with government officials or local groups that may engage in objectionable behavior. Congress chooses to regulate those interactions in specific ways—for example, by enacting the Foreign Corrupt Practices Act. *See* 15 U.S.C. § 78dd-1 *et seq*. Absent such legislation, those contacts alone provide no basis for holding a U.S. company liable in the United States for alleged wrongdoing by the foreign government or foreign private actor abroad. Indeed, the official foreign policy of the United States often encourages commercial interaction with still-developing nations, in the hope of promoting the rule of law and change from within the system. For example, when the United States suspended sanctions against Burma in May 2012 to encourage further democratic reform, the Secretary of State declared, "[s]o today, we say to American business: Invest in Burma," notwithstanding prior ATS suits against corporations that operated in that country. Sec'y of State, Remarks with Foreign Minister of Burma (May 17, 2012), https://bit.ly/2Un44M4. The panel decision puts the Ninth Circuit at odds with such declarations of U.S. policy.

B. The Nature of ATS Litigation Continues to Impose Serious Burdens on U.S. Companies

These concerns are not abstract. In the past 25 years, plaintiffs have filed more than 150 ATS lawsuits against U.S. and foreign corporations in over twenty industry sectors for business activities in roughly sixty countries. Donald E. Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Geo. L.J. 709, 713 (2012); *see also* John B. Bellinger, III & R. Reeves Anderson, *Whither to "Touch and Concern": The Battle to Construe the Supreme Court's Holding in* Kiobel v. Royal Dutch Petroleum, *in Federal Cases From Foreign Places* 23 (U.S. Chamber Institute for Legal Reform 2014). Dozens of major U.S. corporations have been targeted, particularly with respect to their activities in developing and post-conflict countries. In all, more than 50% of the companies listed on the Dow Jones Industrial Average have been named as defendants in ATS actions.

Courts have struggled to resolve these cases and often flounder on threshold questions for a decade or more. For example, the *Bauman* case against Daimler was pending in California for 10 years before the Supreme Court reversed this Court's expansive jurisdictional holding and ended the case; Chevron defended an ATS case for 13 years; and Rio Tinto likewise had to litigate for 13 years before securing a dismissal that stuck. All the while, ATS suits threaten substantial reputational harm and require considerable resources to defend. They also impose

massive settlement pressure on companies that bear no culpability for the alleged conduct overseas.

The Supreme Court's limiting instructions in *Sosa*, *Kiobel*, *Bauman*, and *Jesner* helped stem the tide but regrettably failed to ensure the swift dismissal of some long-running ATS suits, like this one. An *en banc* decision on the questions presented in this appeal would facilitate a more streamlined path to resolution of this case while also clarifying threshold issues to sift out unmeritorious ATS cases going forward.

CONCLUSION

The Court should grant defendants' petitions for rehearing and rehearing *en banc*.

Dated: December 7, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(b) and Circuit Rule 29-2(c)(2) because this brief contains 3,809 words, excluding the parts of the brief exempted by Rule 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

Dated: December 7, 2018

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CERTIFICATE OF SERVICE

I hereby certify that, on December 7, 2018, I caused the foregoing brief to be filed with the Clerk of the Court using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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