No. 15-1020

IN THE
Supreme Court of the United States

LUNGISILE NTSEBEZA, ET AL.,
Petitioners,

v.

FORD MOTOR COMPANY AND INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded that a complaint fails to satisfy the mens rea requirement for a claim under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, when it alleges that a company created and sold to a foreign government hardware and software allowing for the collection of "innocuous population data," Pet. App. A20, that later aided that government in the commission of an international crime.

2. Whether the court of appeals correctly concluded that allegations that a domestic parent corporation's domestic acts of general corporate supervision of its foreign subsidiary do not suffice to displace the presumption against extraterritoriality applicable to ATS claims.

3. Whether this Court should grant review of the question whether corporations are subject to suit under the ATS when that question had no bearing on the outcome below.

PARTIES TO THE PROCEEDING

Petitioners, plaintiffs-appellants below, are a putative class of South African citizens suing under the Alien Tort Statute, 28 U.S.C. § 1350.

Respondents, defendants-appellees below, are Ford Motor Company ("Ford") and International Business Machines Corporation ("IBM").

RULE 29.6 STATEMENT

Respondent Ford Motor Company has no parent corporation. As of December 31, 2015, no publicly traded companies had disclosed that they own 10% or more of Ford's common stock.

Respondent International Business Machines Corporation is a non-governmental entity with no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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INTRODUCTION

Fourteen years ago, petitioners and other plaintiffs first brought claims under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, against Ford and IBM (the "Companies") for allegedly aiding and abetting apartheid-era crimes committed by the South African government against South African citizens on South African soil. In the intervening years, however, this Court's decisions have narrowed the ATS considerably. The Court in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), placed strict limits on the type of conduct subject to ATS claims, and held in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013) ("*Kiobel II*"), that extraterritorial claims are not cognizable under the ATS at all. In response to these rulings and lower court decisions implementing them, petitioners have amended, withdrawn, and modified their claims in five separate complaints. After carefully analyzing their latest allegations, and applying broadly accepted legal rules to them, both courts below correctly concluded that petitioners have failed to overcome the legal limits on ATS claims. There is no basis for further review of those decisions.

Petitioners' principal argument for certiorari is that the decision below implicates a circuit conflict as to the proper mens rea standard for ATS aid-and-abet claims. According to petitioners, the Second and Fourth Circuits have required plaintiffs to allege that the defendant acted with the purpose of facilitating the underlying international crime, whereas the Ninth and Eleventh Circuits merely require the defendant to have acted knowingly (but not purposefully) in facilitating the crime. But there is no con-

flict on that issue—neither the Ninth nor the Eleventh Circuit has adopted a mens rea standard for ATS aiding-and-abetting claims, and no court of appeals has adopted the "knowledge" standard petitioners propose.

Further, this case does not properly present any mens rea question. The Second Circuit's conclusion that petitioners' allegations fail as to Ford was based entirely on extraterritoriality and corporate separateness principles and had nothing to do with mens rea at all. And as to IBM, the single act of domestic conduct alleged as the basis for liability—*viz.*, that IBM developed and sold to a South African government entity hardware and software "to collect innocuous population data," Pet. App. A20, which the government then used to further its apartheid policies—would not establish mens rea for an ATS aid-and-abet claim in *any* court.

This Court should not consider the mens rea standard for ATS aid-and-abet claims unless and until a genuine circuit conflict arises, and only then in a case where the standard actually matters.

There is similarly no basis for review of the second question presented in the petition. Petitioners allege a circuit conflict over the proper standard for assessing whether an ATS claim has overcome the presumption against extraterritoriality under *Kiobel II*. But again, there is no circuit conflict relevant to this case. The court below concluded that Ford's only alleged domestic conduct was its general corporate supervision of its South African subsidiary, which the court held could not by itself overcome the presumption against extraterritoriality. Every other

court of appeals similarly requires some allegation of relevant domestic conduct to overcome the presumption against extraterritoriality, and no circuit holds that domestic acts of corporate supervision by themselves suffice. And the extraterritoriality question is not even presented as to IBM—the court below *did* find that petitioners alleged relevant domestic conduct by IBM, but rejected those allegations on (noncertworthy) mens rea grounds.

Finally, petitioners ask this Court to resolve a circuit conflict over whether the ATS supports corporate liability, but that question did not affect the outcome of the decision below, and is thus not presented here.

Petitioners' objection to the decision below is ultimately not about the court's adoption of any controversial legal principle, but about the court's application of settled legal rules to what one set of plaintiffs forthrightly labels the court's "fact intensive" reading of the pleadings. Balintulo Resp. Br. 5. That concededly factbound question plainly is not worthy of this Court's intervention. The petition should be denied.

STATEMENT OF THE CASE

A. The Original Complaints, This Court's Decision In *Sosa*, And The First Motion To Dismiss

In 2002, three sets of plaintiffs filed ten separate actions against several dozen corporations—including the Companies—alleging that the defendants, *inter alia*, aided and abetted the South African apartheid regime in committing violations of customary international law against its citizens by do-

ing business in South Africa. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 258 (2d Cir. 2007) (per curiam). Jurisdiction was predicated on the ATS, which provides that "district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350. The cases were eventually consolidated into the two putative class actions at issue in the decision below.

In June 2004, this Court decided *Sosa*, which held that the ATS does not itself confer a cause of action for violations of the law of nations because "the statute is in terms only jurisdictional." 542 U.S. at 712. Nevertheless, the Court held that courts could in some circumstances entertain, under federal common law, a narrow class of claims based on a "norm of international character accepted by the civilized world and defined with a specificity comparable to" the small set of 18th-century actions under international law that were then recognized at common law. *Id.* at 725.

The district court, relying on *Sosa*, granted defendants' motion to dismiss, holding, *inter alia*, that the ATS does not encompass aiding-and-abetting claims. *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538, 554-55 (S.D.N.Y. 2004).

B. The First Appeal And Petition For Certiorari

In a per curiam opinion, a divided Second Circuit panel reversed, concluding that "the district court erred in holding that aiding and abetting violations of customary international law cannot provide

a basis for [ATS] jurisdiction." *Khulumani*, 504 F.3d at 260.

Defendants petitioned for certiorari, with the United States arguing in an uninvited amicus brief that the ATS does not apply extraterritorially, and does not encompass aiding-and-abetting claims alleging unlawful primary conduct by a foreign sovereign. Br. of United States as *Amicus Curiae*, 2008 WL 408389 (Feb. 11, 2008) ("U.S. *Ntsebeza* Amicus Br."). This Court, however, lacked a quorum, and the judgment accordingly was affirmed as if by an equally divided Court under 28 U.S.C. § 2109. *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2008).

C. Remand To The District Court

1. On remand, plaintiffs amended their complaint and dropped most of the defendants, but retained the Companies (along with several other defendants that have since been dismissed). The amended complaints alleged that the Companies' South African subsidiaries aided and abetted apartheid, and sought to hold the Companies vicariously liable for their subsidiaries' conduct. *See In re S. African Apartheid Litig.*, 617 F. Supp. 2d 228, 272 (S.D.N.Y. 2009).

Specifically, plaintiffs alleged that Ford's South African subsidiary ("FSA") "aided and abetted" extrajudicial killing by selling "specialized vehicles" to the South African government, and aided and abetted torture because its "management provided information about anti-apartheid activists to the South African Security Forces." *Id.* at 264.

Plaintiffs also alleged that IBM (through its South African subsidiary IBM South Africa) "aided and abetted the South African Government's denationalization of black South Africans through the provision of computers, software, training, and technical support." *Id.* at 265.

2. The Companies (and other defendants) moved to dismiss the complaints. The district court denied the motion to dismiss as to (among other defendants) the Companies. *Id.* at 296.

D. Interlocutory Appeal And Intervening Decisions Of The Court Of Appeals And This Court

1. The Companies and several other defendants appealed under the collateral order doctrine, and urged the court in the alternative to treat the appeal as a mandamus petition. *See Balintulo v. Daimler AG*, 727 F.3d 174, 181 (2d Cir. 2013) ("*Balintulo I*"). The court of appeals subsequently stayed proceedings in the district court to consider the appeal. *Id.*

2. While that appeal was pending, two intervening precedents undermined the basis for plaintiffs' extraterritorial aiding-and-abetting theory.

First, the Second Circuit held in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), that a plaintiff may not state an aiding-and-abetting ATS claim merely by alleging that the defendant "*knowingly* (but not purposefully) aid[ed] and abet[ted] a violation of international law." *Id.* at 259 (emphasis added). Rather, plaintiffs must allege facts establishing that the defendant

acted for the "purpose of facilitating the commission of th[e] crime." *Id.* (quotation omitted).

The court, following then-Judge Katzmann's previous separate opinion in this case, adopted that standard based on *Sosa*'s admonition that courts may recognize a cause of action under the ATS only for "violations of ... international law ... with ... definite content and acceptance among civilized nations [equivalent to] the historical paradigms familiar when § 1350 was enacted." *Id.* (quoting *Sosa*, 542 U.S. at 732) (omissions in original). While some international tribunals may have engaged in "sporadic forays in the direction of a knowledge standard," the court explained, the "purpose" standard has been applied from Nuremberg to the recently adopted Rome Statute of the International Criminal Court ("Rome Statute"), July 17, 1998, 2187 U.N.T.S. 90, art. 25(3)(c). 582 F.3d at 259. The "purpose" standard was thus the only standard over which there "is a sufficient international consensus for imposing liability on individuals" for aiding and abetting the acts of others. *Id.* (citing *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring)).

Second, this Court held in *Kiobel II* that the ATS does not recognize extraterritorial claims. 133 S. Ct. at 1669. The *Kiobel* plaintiffs, like plaintiffs here, alleged that corporate defendants "aided and abetted [a foreign] Government in committing violations of the law of nations in [the foreign country]." *Id.* at 1662. The Court held that claim non-cognizable under the ATS, concluding that the "presumption against extraterritoriality applies to claims under the ATS," and "nothing in the statute rebuts that presumption." *Id.* at 1669.

The Court accordingly held that the ATS does not allow for suits "seeking relief for violations of the law of nations occurring outside the United States." *Id.* at 1664. That rule barred the *Kiobel* plaintiffs' claims because "all the relevant conduct took place outside the United States." *Id.* at 1669.

E. The Court Of Appeals' Decision In *Balintulo I*

After *Kiobel II*, the court of appeals ruled that because this action was based "solely on conduct occurring abroad," "the Supreme Court's holding in *Kiobel* plainly bars the plaintiffs' claims." *Balintulo I*, 727 F.3d at 182, 193. In light of that conclusion, the court of appeals denied the Companies' mandamus petition as "unnecessary," because "defendants can seek the dismissal of all of the plaintiffs' claims, and prevail," through a district court motion for judgment on the pleadings under Rule 12(c). *Id.* at 188. The court accordingly held the pending appeal in abeyance and vacated the district court stay to allow defendants to file such a motion. *Id.* at 182.

F. Plaintiffs' Motion To Amend And The District Court's Decision

1. On remand, the district court granted judgment to all remaining defendants other than the Companies, but ordered the remaining parties to brief the question whether the Second Circuit's prior holding that the ATS "does not provide subject matter jurisdiction over claims against corporations," *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 149 (2d Cir. 2010) ("*Kiobel I*"), survived after *Kiobel II*, which had affirmed *Kiobel I* on extraterritoriality grounds without considering corporate liability. The

district court held that *Kiobel I* was no longer good law, C.A. App. A373-A376, and that "corporations may be held liable for claims brought under the ATS," C.A. App. A377.

2. Having concluded that corporations may be sued under the ATS, the court again allowed plaintiffs to seek leave to amend their complaint to allege facts sufficient to establish the U.S. connection required by *Kiobel II* and the "purpose" aiding-and-abetting mens rea required by *Talisman*. C.A. App. A387.

a. Plaintiffs' proposed complaints included two sets of allegations against "Ford."

First, the proposed complaints alleged that "Ford" "provided specialized vehicles to the South African police and security forces to enable these forces to enforce apartheid." Pet. App. A8.[1] As the court of appeals explained, "[i]t was Ford's subsidiary in South Africa, not Ford, that is alleged to have assembled and sold the specialized vehicles to South Africa's government, with parts shipped principally from Canada and the United Kingdom—not from the United States." Pet. App. A15.

Second, the proposed complaints alleged that "Ford" "shared information with the South African regime about anti-apartheid and union activists, thereby facilitating the suppression of anti-apartheid

[1] Specifically, plaintiffs' proposed complaints alleged that "Ford" sold vehicles to the South African government that "had three Weber model double carburetors, as opposed to all other [similar vehicles] that had only one double carburetor." C.A. App. A515-A516.

activity." Pet. App. A8. But again it was FSA in South Africa, "not Ford" in the United States, that allegedly provided this information. Pet. App. A15.

The proposed complaints' allegations as to Ford's *own* conduct in the United States are limited to the assertion that Ford "controlled [its] South African subsidiar[y] from the United States." Pet. App. A15. Plaintiffs did not allege that the corporate veil between Ford and FSA could be pierced, and did not even "suggest that Ford's control over its subsidiaries differed from that of most companies headquartered in the United States with subsidiaries abroad." Pet. App. A16. The complaint was instead limited to "[a]llegations of general corporate supervision." Pet. App. A16; *see* Pet. App. B11-B12.

b. Plaintiffs' proposed complaints included three sets of allegations against IBM.

First, the complaints alleged that "IBM" "provided training, support, and expertise to the South African government in using IBM's specialized technologies." Pet. App. A9. But it was "IBM's South African subsidiary—not IBM—that is alleged to have trained South African government employees to use IBM hardware and software to create identity materials." Pet. App. A17. As with Ford, IBM's own alleged conduct with respect to the actions of its South African subsidiary was that IBM "controlled [its] South African subsidiar[y] from the United States." Pet. App. A15.

Second, the proposed complaints alleged that "IBM" "bid on, and executed, contracts in South Africa with unlawful purposes such as 'denationalization' of black South Africans." Pet. App. A8-A9. But

the complaints admit that "IBM did not win the contract for the only bid specifically alleged to have been made by IBM, rather than IBM's South African subsidiary." Pet. App. A17.

Third, IBM is alleged to have "designed specific technologies that were essential for racial separation under apartheid and the denationalization of black South Africans." Pet. App. A8. Apart from the allegations of general corporate "control," this was the only allegation against either of the Companies implicating United States conduct, *viz.*, that IBM "[i]n the United States … developed both the hardware and the software … to create the Bophuthatswana ID," which was then "transferred to the Bophuthatswana government for implementation" and allegedly used to perpetrate apartheid. Pet. App. A18.[2] This hardware and software allegedly allowed Bophuthatswana "to collect innocuous population data." Pet. App. A20.

3. The district court held that the proposed amendments were futile because they failed to overcome the presumption against extraterritoriality under *Kiobel II*. Pet. App. B16-B17.

G. The Decision Below

The court of appeals affirmed.

1. The court first explained the applicable governing standard. In *Kiobel II*, the court noted, this Court "dismiss[ed] the plaintiffs' claims because 'all the relevant conduct took place outside the United

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[2] "Bophuthatswana was a Bantustan, a territory set aside by the South African government for particular ethnic groups." Pet. App. A18 n.58.

States.'" Pet. App. A11 (quoting *Kiobel II*, 133 S. Ct. at 1669). The court also recognized, however, that in some cases, "some of the 'relevant conduct' occur[s] in the United States." Pet. App. A11. Thus, the "court must isolate the 'relevant conduct' of a defendant—conduct that is alleged to be either a direct violation of the law of nations or the aiding and abetting of another's violation of the law of nations—in a complaint and then conduct a two-step jurisdictional analysis." Pet. App. A12.

"Step one" of that analysis requires the court to determine "whether [the] 'relevant conduct' sufficiently 'touches and concerns' the United States so as to displace the presumption against extraterritoriality." Pet. App. A12 (quoting *Kiobel II*, 133 S. Ct. at 1669).

"Step two is a determination of whether that same conduct states a claim for a violation of the law of nations or aiding and abetting another's violation of the law of nations." Pet. App. A12. In aid-and-abet cases like this one, that determination must be made with reference to the applicable mens rea standard, i.e., the plaintiff "must demonstrate that the defendant [acted] with the purpose of facilitating the commission of [the underlying] crime.'" Pet. App. A12 (quoting *Talisman*, 582 F.3d at 259).

2. After a close reading of the proposed complaints, the court of appeals determined that plaintiffs failed to satisfy the foregoing standards.

a. The court held that plaintiffs' complaints as to Ford "fail[ed] to satisfy step one" of the court's analysis because "plaintiffs only allege 'relevant conduct' that occurred in South Africa," Pet. App. A14,

i.e., FSA's alleged vehicle sales and provision of information, Pet. App. A15.

As the court of appeals observed, the only allegations of domestic conduct as to Ford itself merely established "that Ford controlled [its] South African subsidiary." Pet. App. A15. According to plaintiffs, "the Companies controlled their South African subsidiaries from the United States such that they could be found directly—and not just vicariously—liable for their subsidiaries' conduct under the ATS." Pet. App. A15-A16. But adopting that position, the court held, "would ignore well settled principles of corporate law, which treat parent corporations and their subsidiaries as legally distinct entities." Pet. App. A16. The court noted that the complaints alleged only routine general supervision of FSA by Ford, and "[a]llegations of general corporate supervision are insufficient to rebut the presumption against [extra]territoriality and establish aiding and abetting liability under the ATS." Pet. App. A16.

The court accordingly affirmed the dismissal of all claims against Ford without considering whether plaintiffs' allegations satisfied the applicable aiding-and-abetting mens rea standard.

b. The court similarly held that most of the allegations as to "IBM" actually involved conduct in South Africa by its separate South African subsidiary. *See* Pet. App. A17. Moreover, as to plaintiffs' contract-bidding claims, "IBM did not win the contract for the only bid specifically alleged to have been made by IBM, rather than IBM's South African subsidiary." Pet. App. A17.

The only allegation of domestic "relevant conduct," the court held, was plaintiffs' assertion that IBM developed in the United States, and then delivered to the Bophuthatswana authorities "hardware and … software … to create the Bophuthatswana ID." Pet. App. A18. The court explained that, although this "hardware and software … collect[ed] innocuous population data," Pet. App. A19, the "[i]dentity documents" of the sort that the Bophuthatswana government created with IBM's products "were an essential component of the system of racial separation in South Africa," Pet. App. A18. And, the court explained, "designing particular technologies in the United States that would facilitate South African racial separation would appear to be both 'specific and domestic' conduct that would satisfy the first of the two steps of our jurisdictional analysis." Pet. App. A18-A19.

The next question, then, was whether "such conduct aided and abetted a violation of the law of nations." Pet. App. A19. The court found that it did not, explaining that these allegations do "not meet the *mens rea* requirement for aiding and abetting liability," because they "plausibly allege[], at most, that the company acted with knowledge that its acts might facilitate the South African government's apartheid policies," and not with the "purpose" of facilitating the apartheid government's crimes. Pet. App. A18-A19. The court accordingly dismissed the claims against IBM.

3. The court of appeals denied plaintiffs' petition for rehearing en banc without noted dissent. Pet. App. D1-D2.

One set of plaintiffs (the *Ntsebeza* plaintiffs) filed this petition. Pet. 9. The other set of plaintiffs (the *Balintulo* plaintiffs) have not petitioned for certiorari, but filed a respondents' brief supporting the petition. The *Balintulo* plaintiffs felt compelled to write separately because of "the fact intensive nature" of the questions presented. Balintulo Resp. Br. 5.

REASONS FOR DENYING THE PETITION

The petition offers no basis for this Court's review.

The first question presented is whether this Court should recognize aiding-and-abetting claims under the ATS alleging that a defendant acted with *knowledge* that his conduct might facilitate the commission of an international crime, but without the *purpose* of facilitating that crime. Petitioners allege that the Second and Fourth Circuits have adopted a "purpose" mens rea standard, whereas the Ninth and Eleventh Circuits have merely required "knowledge." But there is no circuit conflict over the proper mens rea standard, and the question is not properly presented here in any event, because petitioners' claims would fail under any mens rea standard. Review of the first question presented, which the court below decided correctly, should be denied.

The Court also should deny review of the second question presented. Petitioners allege a circuit conflict over the proper approach to determining whether a complaint has alleged relevant domestic conduct sufficient to overcome the presumption against extraterritoriality. But all courts are in complete agreement as to the question actually implicated

here. All courts of appeals to have considered the question require that the plaintiff allege at least some domestic conduct relevant to its ATS claim, and the court below held that petitioners' claims against Ford failed on extraterritoriality grounds because petitioners alleged *no* such relevant United States conduct. Meanwhile, petitioners have no basis to complain about the court of appeals' extraterritoriality decision as to IBM, since that court *agreed* with petitioners that the complaints alleged relevant domestic conduct sufficient to overcome the presumption against extraterritoriality. Petitioners' claims against IBM were dismissed for the separate reason that they failed adequately to allege mens rea, an issue that is not itself certworthy.

Finally, the third question presented—whether corporations may be held liable under the ATS—did not matter to the decision below and is thus not actually presented here.

The petition should be denied.

I. THERE IS NO BASIS FOR REVIEW OF THE MENS REA STANDARD FOR AIDING-AND-ABETTING ATS CLAIMS

A. There Is No Circuit Conflict As To The Proper Mens Rea Standard

Petitioners allege a circuit conflict over the proper mens rea standard for ATS aiding-and-abetting claims. According to petitioners, the Second and Fourth Circuits have adopted a "purpose" standard, Pet. 13; *see* Pet. App. A12-A13, A19-A20; *Aziz v. Alcolac*, 658 F.3d 388, 400 (4th Cir. 2011), whereas the Ninth and Eleventh Circuits have supposedly adopted a mere "knowledge" standard, Pet.

13; *see* Pet. 11-16 (citing *Doe v. Drummond Co.*, 782 F.3d 576, 604 (11th Cir. 2015); *Cabello v. Fernandez-Larios*, 402 F.3d 1148, 1158 (11th Cir. 2005) (per curiam); *Doe v. Nestle USA, Inc.*, 766 F.3d 1013, 1026 (9th Cir. 2014)). Petitioners are wrong—there is no circuit conflict over the proper aiding-and-abetting mens rea standard under the ATS.

1. To start, the standard petitioners ascribe to the Ninth and Eleventh Circuits is materially identical to the standard adopted by the Second and Fourth Circuits. According to petitioners, the Ninth and Eleventh Circuits require an "intent to facilitate a violation" with "knowledge of the end result." Pet. 13. The standard applied by the Second and Fourth Circuits is the same: a plaintiff must show that the defendant acted "'with the purpose of facilitating the commission of [the] crime.'" Pet. App. A12 (quoting *Talisman*, 582 F.3d at 259); *see Aziz*, 658 F.3d at 398 (same). Even as petitioners describe the conflict, in other words, the conflict reduces to the difference between acting "with intent" and acting "with purpose," which is no difference at all. *See* Model Penal Code § 1.13(12) ("'intentionally' or 'with intent' means purposely").

2. The conflict is illusory for another reason as well: the Ninth and Eleventh Circuits have not actually adopted the "intent to facilitate with knowledge" standard petitioners describe. In fact, those circuits *have not adopted any mens rea standard at all*.

a. Petitioners themselves admit that "the Ninth Circuit has yet formally to adopt a *mens rea* standard for aiding and abetting." Pet. 14. As the Ninth

Circuit stated in *Nestle*, the court "need not decide whether a purpose or knowledge standard applies to aiding and abetting ATS claims" because "the plaintiffs' allegations satisfy the more stringent purpose standard." 766 F.3d at 1024.

Petitioners nevertheless assert that *Nestle* interprets the "purpose" standard differently than the Second Circuit in *Talisman* and the Fourth Circuit in *Aziz*. Pet. 14-15. But *Nestle* explicitly *invokes* the *Talisman* and *Aziz* decisions in holding that the *Nestle* plaintiffs' allegations sufficed to "demonstrate a purpose to support child slavery." 766 F.3d at 1017, 1025. *Nestle* does not conflict with *Talisman* and *Aziz*—it *applies* those decisions.

Indeed, in opposing certiorari in *Nestle*, the plaintiffs—represented by the same counsel as petitioners here—recognized the absence of a ripe disagreement among the circuits, explaining that any alleged conflict between *Nestle* and the Second Circuit was "speculative," and that "[t]here is no reason to believe that the Fourth Circuit's analysis [in *Aziz*] is necessarily in conflict with [*Nestle*]." *Nestle* Opp. Br. 8-9 (No. 15-349). This Court denied certiorari in *Nestle*, 136 S. Ct. 798 (2016), and the grounds for review have not improved with time.[3]

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[3] Petitioners also argue that the Second Circuit's decision in this case conflicts with *Nestle* by adding "a further element to the *mens rea*: shared motive with the principal." Pet. 13-14; *see* Pet. 15-16, 21, 26. The decision below, however, merely states that the defendant must act "with the purpose of facilitating the commission of [the principal's] crime." Pet. App. A12; *see* Pet. App. A13 (claim requires "evidence that a defendant purposefully facilitated the commission of [the] crime"). That formulation of the mens rea standard is consistent with

b. The Eleventh Circuit also has not adopted any mens rea standard for ATS aid-and-abet claims. In *Cabello*, the Eleventh Circuit held that the Torture Victims Protection Act ("TVPA") and ATS support indirect theories of liability. 402 F.3d at 1158. The jury had been instructed that the defendant could be found liable for aiding and abetting if he "knew that his actions would assist in the illegal or wrongful activity at the time he provided the assistance," *id.*, but the court did not consider the validity of that instruction.

The Eleventh Circuit in *Drummond* also did not consider the mens rea standard for ATS aiding-and-abetting claims. The court instead affirmed the district court's dismissal of the plaintiffs' ATS claims on the ground that "the presumption against extraterritoriality [wa]s not displaced." 782 F.3d at 601. The court did discuss mens rea *under the TVPA*, concluding that "the appropriate standard for aiding and abetting liability is knowing substantial assistance." *Id.* at 609 (citing *Cabello*, 402 F.3d at 1158). But in reaching that conclusion, the court of appeals specifically *contrasted* the TVPA from the ATS, explaining that *Sosa*'s admonition that courts must exercise "vigilant doorkeeping"—the basis for *Talisman*'s adoption of the "purpose" standard, *see supra* at 6-

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the Second Circuit's prior decisions. *See Talisman*, 582 F.3d at 259; *Mastafa v. Chevron Corp.*, 770 F.3d 170, 192 (2d Cir. 2014). And no formulation of the standard in any decision includes a requirement of a "shared motive with the principal." Petitioners are at most complaining about how the court applied the well-worn "purpose" standard to the particular allegations of their complaint—a factbound question that does not warrant this Court's review.

7—"only applies to the ATS" and has "no effect" on analysis of the TVPA. 782 F.3d at 606. Whatever the merits of *Drummond*'s conclusion that a "knowledge" mens rea applies under the TVPA, that conclusion has no application to the ATS, and *Drummond* if anything suggests agreement with *Talisman*'s holding that the ATS requires a more demanding mens rea standard.

The principal conflict petitioners allege thus simply does not exist. Certiorari should be denied.[4]

B. The Petition Presents A Poor Vehicle Because Petitioners' Claims Would Fail Under Any Mens Rea Standard

This case is also a poor vehicle for choosing between different mens rea standards because petitioners' allegations do not establish mens rea under any standard.

Indeed, as to Ford, the aid-and-abet mens rea standard is not even *relevant*—the court of appeals' ruling as to Ford was based entirely on the court's conclusion that the relevant aiding-and-abetting al-

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[4] Petitioners also allege a circuit conflict over the proper source of law for determining mens rea under the ATS, i.e., international law or federal common law. Pet. 11 n.2, 13 n.4. Whereas the Second, Fourth, and Ninth Circuits have relied on international law, petitioners argue that the Eleventh Circuit has relied on federal common law. Pet. 13 n.4. That supposed conflict would only matter, of course, if the circuits were in conflict over the substantive standard, and they are not. And there is no conflict over the source of law for mens rea in any event: *Cabello* did not consider the proper ATS mens rea standard at all, *see supra* at 19, and *Drummond* invoked federal common law to determine the proper standard under the *TVPA*, not the ATS, 782 F.3d at 608.

legations involved foreign conduct by Ford's separate South African subsidiary that could not be properly attributed to Ford itself under standard corporate-separateness principles. Pet. App. A14-A15. Because the court thus found no U.S. conduct by Ford relevant to petitioners' claim of aiding-and-abetting liability, the court did not even consider whether petitioners had adequately alleged mens rea as to Ford. It is simply false to say, as petitioners do, that if the Second Circuit had applied a "knowledge" standard for aiding-and-abetting liability, "Ford would have been held responsible for [its] actions." Pet. 24. Given the court's analysis of corporate separateness, Ford would not be liable no matter what mens rea standard applies.

The same is true for IBM. The Second Circuit rejected most IBM allegations either because they were actually allegations of conduct in South Africa by IBM's separate South African subsidiary, or, in one instance, because IBM's having *lost* a contract bid obviously did not amount to aiding and abetting an international law violation. Pet. App. A17-A18; *see also* Pet. App. A15-A16.

The only allegation that even potentially implicates any mens rea issue in this case is IBM's alleged development and sale of hardware and software that allowed the Bophuthatswana authorities "to collect innocuous population data," Pet. App. A20—i.e., hardware and software that had obvious innocent uses, but that were in fact allegedly used by the authorities to enforce apartheid. There is no indication that the Second Circuit would have sustained that allegation under a "knowledge" standard—the court held only that petitioners have "plau-

sibly allege[d], *at most*, that the company acted with knowledge that its acts might facilitate the South African government's apartheid policies." Pet. App. A19 (emphasis added). Nor is there any reason to believe that this allegation would satisfy the mens rea standard adopted in any other circuit.

Petitioners cannot plausibly suggest, for example, that this allegation is comparable to the facts of any of the other cases they say are on the "knowledge" side of the alleged circuit split. The cases on which petitioners rely involved:

- A company "supply[ing] money, equipment, and training to Ivorian farmers, knowing that these provisions will facilitate [those farmers' notorious] use of forced child labor." *Nestle*, 766 F.3d at 1017.
- A company paying "violent paramilitaries" within the Autodefensas Unidas de Colombia ("AUC"), a group designated as a terrorist organization by the U.S. Government, to provide "security" for one's own "mining operations and facilities," with the specific objective of "driving competing, non-AUC guerilla fighters out of the [surrounding] area … and ensuring that the civilian population in and around that area would not provide any support to guerilla groups or rebels." *Drummond*, 782 F.3d at 580-81.
- A Chilean military officer acting as part of a "squad" that "instructed local military officers to provide them with the prisoners' files from which the squad selected thirteen prisoners … for execution," who were then "executed each

> by gunfire or by stabbing." *Cabello*, 402 F.3d at 1152.

Creating and selling hardware and software that can collect population data is not remotely comparable to the facts at issue in the cases cited by petitioners, and there is no reason to believe that the courts that allowed the claims alleged in those cases to go forward would similarly allow the complaint against IBM to proceed.

Or take *The Zyklon B Case* decided at Nuremberg, which petitioners repeatedly cite as an exemplar of the proper mens rea standard. Pet. 15, 18, 27. According to petitioners, the *Zyklon B* defendants would have been acquitted under the "purpose" standard applied by the Second Circuit. No. The *Zyklon B* defendants not only supplied the poisonous gas used at Auschwitz, but the lead defendant himself specifically "undertook to train the S.S. men in this new method of killing human beings." *Trial of Bruno Tesch and Two Others ("The Zyklon B Case")*, 1 Law Reports of Trials of War Criminals 93, 95 (1947). *Zyklon B* thus does nothing to establish a meaningful distinction between the standard applied by the Second Circuit and the standard applied in the cases on which petitioners rely. Put differently, neither *Zyklon B* nor any other case suggests that the allegations here would satisfy the mens rea standard applied in those cases.

C. The Decision Below Is Correct

The Companies agree with the United States that this Court should, in a case that properly presents the question, hold that federal common law does not provide for aiding-and-abetting claims un-

der the ATS at all. U.S. *Ntsebeza* Amicus Br. 8-11.[5] But accepting for present purposes that such a theory of liability exists, the decision below correctly adopts the "purpose" mens rea standard.

1. The proper analysis for determining mens rea is set forth in *Sosa*, which petitioners barely mention. Under *Sosa*, courts must "require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms." 542 U.S. at 725. Moreover, the *Sosa* standard of concrete definition and universal recognition also applies to "whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued," *id.* at 732 n.20—for example, whether a secondary actor can be held liable for an international crime.

Thus, the proper mens rea standard for aiding-and-abetting claims under the ATS depends on what standard is universally accepted and concretely defined under international law.

2. Only the "purpose" standard satisfies the *Sosa* test. Multiple sources of international law have demanded proof of purpose and rejected efforts to establish aiding-and-abetting liability based on knowledge alone.

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[5] If the Court grants certiorari, it should add the question whether there is aiding-and-abetting liability under the ATS at all, which the Companies preserved below. *See* Companies' C.A. Br. 58-59.

a. The Rome Statute, which has been signed by 139 countries and ratified by 124, imposes criminal responsibility on any person who, "[f]or the *purpose of facilitating the commission of … a crime* [within the ICC's jurisdiction], aids, abets, or otherwise assists in its commission or its attempted commission." Rome Statute art. 25(3)(c) (emphasis added). The ICC's Pre-Trial Chamber has specifically held that "article 25(3)(c) of the Statute requires that the person act with the purpose to facilitate the crime; *knowledge is not enough for responsibility under this article*." *Prosecutor v. Mbarushimana*, Situation in the Democratic Republic of Congo, No. ICC-01/04-01/10, Decision on the Confirmation of Charges ¶ 274 (Pre-Trial Chamber Dec. 16, 2011) (emphasis added).

Contrary to petitioners' assertion (Pet. 16-17, 20), the *Blé Goudé* decision does not hold otherwise. There, the ICC's Pre-Trial Chamber specifically held that "what is required" under article 25(3)(c) "is that the [defendant] provides assistance to the commission of a crime and that, in engaging in this conduct, he or she *intends to facilitate the commission of the crime*." *Prosecutor v. Blé Goudé*, Situation in the Republic of Côte d'Ivoire, No. ICC-02/11-02/11, Decision on the Confirmation of Charges ¶ 167 (Pre-Trial Chamber Dec. 11, 2014) (emphasis added). The court explained that, in its view, the defendant's "activities were *intentional* and were *performed for the purpose of facilitating the commission of the crimes*." *Id.* ¶ 170 (emphasis added). The court did observe that, "[i]n addition, they were performed in the knowledge that the crimes were committed as part of a widespread and systematic attack against the civil-

ian population." *Id.* But the ICC clearly required that, to be held liable for aiding and abetting, the defendant had to have the *purpose* of facilitating the principal's crime—exactly the standard applied by the Second Circuit below. Pet. App. A12; *see Talisman*, 582 F.3d at 258-59 (adopting Rome Statute's "purpose" standard). The Rome Statute itself precludes any conclusion that a "knowledge" mens rea standard is universally accepted, as *Sosa* requires.

The Nuremberg cases prove the same point. As the *Zyklon B* case discussed above shows, the verbal formulation of the standard as "knowledge" was hardly determinative—a defendant that not only sells poison gas to the S.S. but teaches them how to kill human beings with it would satisfy any mens rea standard. More important, at least one Nuremberg case—*The Ministries Case* before the American military court—specifically *rejected* the "knowledge" standard.

In *The Ministries Case*, the tribunal declined to impose criminal liability on a bank officer who allegedly made significant loans to various Nazi entities knowing that the borrowers would use the funds to commit crimes, but *without* the purpose of facilitating those crimes. *United States v. von Weizsaecker ("The Ministries Case")*, 14 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 308, 621-22 (1949). The "real question," according to the court, was whether it is "a crime to make a loan, knowing or having good reason to believe that the borrower will us[e] the funds in financing enterprises which are employed in using labor in violation of either national or international law?" *Id.* at 622. The answer was no: "Our

duty is to try and punish those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law." *Id.* at 622.

The Rome Statute and Nuremberg prosecutions confirm the absence of universal acceptance that mere knowledge is enough to establish the mens rea for aiding-and-abetting liability. As the Second Circuit explained in *Talisman*, "[e]ven if there is a sufficient international consensus for imposing liability on individuals who *purposefully* aid and abet a violation of international law, no such consensus exists for imposing liability on individuals who *knowingly* (but not purposefully) aid and abet a violation of international law." 582 F.3d at 259 (citations omitted). In the face of the Rome Statute and *The Ministries Case*, petitioners' reliance on some modern decisions applying a "knowledge" standard falls far short of the universal acceptance required by *Sosa*.

3. Nor is there any merit to petitioners' protest that the Second Circuit's standard "defeats the purpose of the ATS" by excluding knowing, but not purposeful, secondary conduct from its scope. Pet. 24. In *Sosa*, the Court recognized that "Congress intended the ATS to furnish jurisdiction for a relatively modest set of actions." 542 U.S. at 720. *Kiobel II* similarly observes that "there is no indication that the ATS was passed to make the United States a uniquely hospitable forum for the enforcement of international norms." 133 S. Ct. at 1668.

Rather, the ATS was enacted to "ensure[] that the United States could provide a forum for adjudicating" universally recognized international viola-

tions, thereby "avoiding diplomatic strife." *Id.* at 1668-69. Yet as *Kiobel II* recounted, modern aid-and-abet suits against corporations—which nearly always allege, as this case alleges, that the corporation aided and abetted "conduct occurring in the territory of another sovereign"—have *caused*, rather than avoided, diplomatic strife. *Id.* at 1669. Limiting the ATS's scope to aiding-and-abetting claims where the defendant purposefully facilitated the underlying crime—and thus narrowing such claims to the most serious allegations of international criminal conduct—would ameliorate such diplomatic tension, consistent with the ATS's ultimate purpose.

Review of the first question presented should be denied.

II. THERE IS NO BASIS FOR REVIEW OF THE SECOND CIRCUIT'S EXTRATERRITORIALITY HOLDING

Petitioners separately assert that certiorari is warranted because "[t]he circuits are split on the application of the presumption against extraterritoriality announced in *Kiobel II*." Pet. 29. But petitioners' assertion of circuit conflict is based on a mischaracterization of the decision below. There is in fact no circuit conflict relevant to this case, and no basis for certiorari.

A. The Decision Below Did Not Adopt A "Place Of The Harm" Test

This Court held in *Kiobel II* "that the presumption against extraterritoriality applies to claims under the ATS," and the complaint in that case failed because "all the relevant conduct took place outside

the United States." 133 S. Ct. at 1669. According to petitioners, a circuit conflict has arisen over when a plaintiff has alleged "relevant" domestic conduct sufficient to "displace the presumption against extraterritorial application." *Id.* Petitioners contend that the Second Circuit in the decision below joined the Eleventh Circuit in adopting a "place of the harm" test, which ostensibly treats as relevant only those "actions occurring in the same place where the plaintiff suffered harm," whereas the Fourth and Ninth Circuits instead "analyze entire 'claims' rather than simply the place of harm." Pet. 31.

Contrary to petitioners' misreading, the decision below expressly does *not* limit its extraterritoriality analysis to conduct that occurred in the place of the plaintiffs' harm. Under the Second Circuit test, "relevant conduct" encompasses *either* conduct that is itself "a direct violation of the law of nations" *or* conduct that is "aiding and abetting of another's violation of the law of nations." Pet. App. A12. And aiding-and-abetting conduct need not occur in the place of the plaintiff's harm, as the Second Circuit's analysis *in this case* makes clear—the harm to petitioners obviously occurred in South Africa, but the court treated IBM's acts *in the United States* as "relevant conduct" that potentially could overcome the presumption against extraterritoriality. Pet. App. A18-A19. The court ultimately held that the alleged conduct was insufficient to state a claim because petitioners failed to adequately plead mens rea, *see supra* at 13-14, but the court's extraterritoriality analysis unambiguously refutes petitioners' characterization of the decision as adopting a "place of the harm" test. Pet. 31.

Nor does the Eleventh Circuit apply any such test. As that court held in *Drummond*, "the location … where the actual injuries were inflicted" must be taken into account when evaluating a claim alleging secondary responsibility, 782 F.3d at 592-93, but that inquiry is "not dispositive," *id.* at 593 n.24.

In short, no circuit holds that "relevant conduct" for purposes of overcoming the presumption against extraterritoriality in ATS cases is limited to "the place of the harm" suffered by the plaintiffs.

B. There Is No Circuit Conflict Over Whether A Plaintiff Can Overcome The Presumption Against Extraterritoriality Without Alleging Any Relevant Conduct Within The United States

Petitioners also allege a separate disagreement over the extraterritoriality test—*viz.*, that the Second and Eleventh Circuits focus primarily on the defendant's conduct in determining whether the presumption against extraterritoriality is overcome, whereas the Fourth and Ninth Circuits look at a wider range of factors. Pet. 31-33. But if there are differences in the manner in which different circuits articulate their extraterritoriality analyses, they are not differences that affect any legal question presented here.

1. The court of appeals concluded that petitioners' allegations as to Ford failed to overcome the presumption against extraterritoriality because it held that *all* the conduct relevant to petitioners' aiding-and-abetting claims was committed in South Africa by Ford's separate South African subsidiary. *See* Pet. App. A15; *supra* at 12-13. The only domestic

conduct alleged in the complaints, the court concluded, were allegations "of general corporate supervision" typical of any corporate parent of any foreign subsidiary. Pet. App. A16. And the court held that such domestic allegations of "general corporate supervision" alone do not suffice "to rebut the presumption against [extra]territoriality and establish aiding and abetting liability under the ATS." Pet. App. A16.

Petitioners object to the court's reading of their allegations concerning Ford, insisting that they alleged more than general corporate supervision of FSA. Pet. 35 n.22. But whether the Second Circuit properly read petitioners' complaint obviously is a factbound question not worthy of this Court's review, which is presumably why petitioners try to hide their objection in a footnote.

Petitioners also complain in the same footnote that the court of appeals misconstrued their legal theory as well as their factual allegations. According to petitioners, the court incorrectly understood them as seeking to hold Ford *vicariously* liable for the conduct of FSA, when in fact they seek to hold Ford itself *directly* liable for its own conduct. Pet. 35 n.22. The court of appeals labored under no such misconception; it understood their legal theory perfectly—"Plaintiffs contend that their amended pleadings demonstrate that the Companies controlled their South African subsidiaries from the United States such that they could be found *directly*—and *not* just vicariously—liable for their subsidiaries' conduct under the ATS." Pet. App. A15-A16 (emphasis added). The court held that such domestic allegations of ordinary corporate control cannot establish Ford's

own direct liability, Pet. App. A16, but petitioners do not challenge that holding here.[6]

As the case comes to this Court, then, the only *legal* question properly presented is whether U.S.-based general acts of ordinary corporate supervision over a foreign subsidiary suffice to rebut the presumption against extraterritoriality and permit an aiding-and-abetting claim against the U.S.-based parent. And there is no controversy whatever as to that question. Plaintiffs say the decision below conflicts with the Fourth and Ninth Circuits, but the Ninth Circuit has emphasized, citing Fourth Circuit precedent, that in every post-*Kiobel* case in which claims against a U.S. defendant went forward, "the plaintiffs have alleged that at least some of the *conduct relevant to their claims* occurred in the United States." *Mujica v. AirScan Inc.*, 771 F.3d 580, 595 (9th Cir. 2014) (emphasis added) (citing *Al Shimari v. CACI Premier Tech., Inc.*, 758 F.3d 516, 530-31 (4th Cir. 2014)). And neither *Mujica* nor *Al Shimari* nor any other case has even suggested that general acts of corporate supervision constitute conduct that is "relevant" under the ATS for purposes of rebutting the presumption against extraterritoriality.

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[6] The Second Circuit's holding was plainly correct. *See United States v. Bestfoods*, 524 U.S. 51, 68 (1998) ("[c]ontrol of the subsidiary, if extensive enough, gives rise to *indirect* liability under piercing doctrine," but "*not* direct liability" (emphasis added)); *cf. Finerty v. Abex Corp.*, __ N.E.3d __, 2016 WL 1735804 (N.Y. May 3, 2016) (Ford not directly or vicariously liable under New York law for acts of foreign subsidiary despite allegation that Ford "impos[ed]" its product "design, distribution and marketing" decisions on its subsidiary).

2. Petitioners' argument as to IBM is equally meritless. As with Ford, the court below held that most allegations against IBM cannot overcome the presumption against extraterritoriality because they are really allegations of South African conduct by IBM's South African subsidiary, whereas most domestic allegations against IBM itself amounted only to general corporate supervision of a subsidiary. Pet. App. A15-A17. But the court concluded that petitioners *also* alleged that IBM itself engaged in domestic conduct relevant to petitioners' claim, and that those allegations *did* amount to "relevant conduct" for purposes of the extraterritoriality analysis.[7] Just as in other circuits, in other words, the court below considered whether "the plaintiffs have alleged that at least some of the conduct relevant to their claims occurred in the United States," *Mujica*, 771 F.3d at 595, and concluded that petitioners *had* alleged such domestic conduct as to IBM.

The court rejected petitioners' claim against IBM not because the Second Circuit's extraterritoriality analysis differs in any relevant respect from that of any circuit, but because IBM's alleged U.S. conduct did not satisfy the mens rea for aid-and-abet claims under the ATS. Pet. App. A18-A20. And

[7] IBM believes that the Second Circuit erred in concluding that even this allegation overcomes the presumption against extraterritoriality. But the Second Circuit's determination that petitioners' claims against IBM fail even though they *did* overcome the presumption against extraterritoriality highlights the inadequacy of this petition as a vehicle to consider the proper extraterritoriality standard.

there is no basis for review of that independent mens rea decision. *See supra* at 16-28.[8]

C. The Decision Below Applied *Kiobel II* Correctly

The lack of any relevant disagreement among the courts of appeals concerning the second question presented renders this Court's intervention unwarranted. But there should be no question that the Second Circuit's focus on whether the complaints alleged any domestic conduct relevant to petitioners' ATS aiding-and-abetting claims is correct, and follows directly from *Kiobel II* and *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010).

Kiobel II holds that the presumption against extraterritoriality requires dismissal of ATS claims when "all the relevant conduct took place outside the United States," citing *Morrison* as providing the proper analytical framework for determining what conduct counts as "relevant." *See* 133 S. Ct. at 1669 (citing *Morrison*, 561 U.S. at 266-73). And *Morrison* explained that when "some domestic activity is involved in the case," courts must identify the particular conduct that was the "'focus' of congressional concern" in enacting the statute, and, if that conduct occurred within the United States, the claim may proceed. 561 U.S. at 266.

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[8] Petitioners also assert that there is disagreement *within* the Eleventh Circuit over the proper extraterritoriality analysis under the ATS. Pet. 33. Even if that were true, it would not matter—"[o]rdinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari." Stern & Gressman, Supreme Court Practice § 4.6 (10th ed. 2013).

The focus of the ATS is obviously a "violation of the law of nations." 28 U.S.C. § 1350. Thus, the question here is whether conduct relevant to defendants' alleged law-of-nations violation—here, aiding and abetting apartheid—occurred in the United States.

All of petitioners' allegations as to Ford, and most allegations as to IBM, were of general corporate supervision typical of parent corporations. Pet. App. A16. Petitioners offer no basis to reject the Second Circuit's sensible conclusion that ordinary corporate supervision of a foreign subsidiary by a U.S. parent is not itself conduct relevant to the ATS's focus of law-of-nations violations. Indeed, petitioners do not even *challenge* the Second Circuit's legal conclusion that general corporate supervision is not "relevant conduct"—they argue only that the court below misconstrued their allegations, which they say went beyond such general supervision. Pet. 35 n.22.

Moreover, petitioners *agree* with the court of appeals that IBM's domestic development and sale of hardware and software to the South African government *does* count as "relevant conduct" that displaces the presumption against extraterritoriality, Pet. 36, complaining only that the court should not have dismissed those allegations on mens rea grounds.

The Second Circuit's legal extraterritoriality analysis is, in short, entirely correct, while its fact-bound construction of the pleadings is not a matter worthy of this Court's intervention. The second question presented should be denied.

III. THE PETITION DOES NOT PRESENT A SUITABLE VEHICLE TO CONSIDER THE CORPORATE LIABILITY QUESTION

Finally, petitioners ask the Court to grant certiorari to decide whether corporations are subject to ATS liability. Pet. 37-38. That question has no bearing on the outcome here. While the court of appeals mentioned in a footnote that petitioners' claims would fail because "they cannot establish jurisdiction under the ATS for claims against corporations," the court also stated that it did not need to rely on that ground because it had "dispose[d] of plaintiffs' claims on other jurisdictional grounds," i.e., extraterritoriality and mens rea. Pet. App. A10 n.28.

Thus, if the Court wishes to consider the question whether the ATS—like the TVPA, *see Mohamad v. Palestinian Auth.*, 132 S. Ct. 1702, 1705 (2012)—precludes suits against corporations, it should await a case (unlike this case) in which that question matters to the outcome.[9]

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[9] As petitioners note, the Second Circuit later dismissed an ATS complaint solely on corporate-liability grounds in *In re Arab Bank, plc Alien Tort Statute Litigation*, 808 F.3d 144, 158 (2d Cir. 2015). The Second Circuit recently denied (over the dissents of Judges Pooler, Chin, and Carney) the *Arab Bank* plaintiffs' petition for rehearing en banc. *See In re Arab Bank, plc Alien Tort Statute Litig.*, __ F.3d __, 2016 WL 2620283 (2d Cir. May 9, 2016). Judge Jacobs's concurrence in the denial of rehearing explained that the full court declined to rehear the matter in part because "the population of cases dismissible under [a no-corporate-liability rule] is largely coextensive with those dismissible under *Kiobel II*," so the "circuit split that so worries the *Arab Bank* panel"—the same split petitioners allege here, Pet. 38—"is illusory." *Arab Bank*, 2016 WL 2620283, at *1, *3 (Jacobs, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

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