Nos. 19-416 & 19-453

IN THE

Supreme Court of the United States

NESTLÉ USA, INC.,

Petitioner,

v.

JOHN DOE I, ET AL.

Respondents.

(For continuation of caption, see inside cover.)

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

BRIEF FOR THE NATIONAL CONFECTIONERS ASSOCIATION, THE WORLD COCOA FOUNDATION, AND THE EUROPEAN COCOA ASSOCIATION AS *AMICI CURIAE* SUPPORTING PETITIONERS

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October 28, 2019

CARGILL, INC.,

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INTEREST OF THE *AMICI CURIAE*[1]

The National Confectioners Association ("NCA") is the leading trade organization for the $35 billion American confectionary industry. NCA's members are located across 40 states, and they collectively employ approximately 54,000 workers in more than 1,300 facilities across the country. NCA's mission is to advance, protect, and promote the American confectionary industry.

The World Cocoa Foundation ("WCF") is an international membership organization that promotes sustainability in the cocoa sector. WCF catalyzes public-private action to help farmers prosper, empower cocoa-growing communities, respect human rights, and conserve the environment. WCF's members include cocoa and chocolate manufacturers, processors, supply-chain managers, and other companies worldwide, representing more than 80% of the global cocoa market.

The European Cocoa Association ("ECA") is a trade association composed of the major companies involved in cocoa-bean trade, processing, warehousing, and other logistical activities in Europe. ECA monitors and reports on regulatory and scientific developments affecting the cocoa sector. In addition, ECA is actively engaged in European and international forums in working toward a sustainable cocoa economy. Over the

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[1] All parties have consented to the filing of this brief. *Amici curiae* timely provided notice of intent to file this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to the brief's preparation or submission.

years, ECA has worked closely with its members and partners (which includes national governments and civil-society organizations) to understand, communicate, and address the root causes of child labor in smallholder farming.

One of *amici*'s shared objectives is to promote sustainable and responsible cocoa-farming practices around the world. *Amici* and their members have partnered with cocoa-producing and cocoa-consuming governments, international development organizations, famer groups, and civil society organizations to improve the income and livelihood of cocoa-farming families, enhance community institutions and infrastructure, promote environmentally sustainable land-use and farming practices, and ensure human rights are protected in cocoa-growing communities, including elimination of labor practices recognized as the worst forms of child labor.[2] In line with their member company sustainability programs, and with the encouragement of members of Congress, the Department of Labor, and the governments of the leading cocoa-producing countries, *amici* and their members have invested hundreds of millions of dollars in these efforts.

The decision of the court of appeals represents the worst form of judicial intrusion into foreign relations under the Alien Tort Statute (ATS), 28 U.S.C. § 1350. It would treat cocoa-using companies' efforts in coordi-

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[2] An international Convention defines the "worst forms of child labor" as "forced or compulsory" labor or labor that "is likely to harm the health, safety or morals of children." Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art. 3, June 17, 1999, 2133 U.N.T.S. 161.

nation with the political branches to *combat* overseas forced child labor as evidence of *aiding and abetting* forced child labor and subject the companies to ATS liability. If left to stand, the decision risks undoing the progress achieved under the collaborative framework the political branches chose to address forced child labor on overseas cocoa farms, and discouraging American companies from participating in future efforts.

SUMMARY OF ARGUMENT

The Ninth Circuit's decision will inevitably have chilling effects in many areas of foreign commerce. Allegations of forced child labor have been made not only with respect to cocoa farmers in West Africa, but against some of the United States' largest trading partners and against numerous industries. The Ninth Circuit's virtual nullification of the presumption against extraterritoriality, which conflicts with two other circuits' proper applications of the presumption, inevitably will be used to hale into court numerous U.S.-based corporations that merely do business and invest in economic development in developing countries. The Court should grant the petitions for writs of certiorari to resolve the split on how to apply the ATS's presumption against extraterritorial application. In doing so, it should put an end to the Ninth Circuit's disruption of the political branches' solution to the problem of forced labor in overseas industries.

For nearly two decades, the makers of cocoa-based products (which includes *amici*'s members) have worked with the federal government, members of Congress, the governments of the leading cocoa-producing countries, international development organizations, non-government organizations (NGOs),

and foreign cocoa farmers to combat the worst forms of child labor in the cocoa supply chain. This collaboration has been encouraged and supported by the Harkin-Engel Protocol. The political branches elected this voluntary agreement and framework to address the problem of forced child labor on overseas cocoa farms, rather than a mandatory certification process. To the extent Congress has enacted laws providing civil claims against those involved in forced child labor, they would not reach the U.S. cocoa industry under the allegations in this case.

Respondents brought ATS claims alleging that petitioners' efforts to combat forced child labor in West Africa actually *aided and abetted* forced child labor in violation of international law. The Ninth Circuit concluded that it was plausible to infer that petitioners' payments to impoverished African farmers—provided as part of standard agreements to purchase cocoa—actually constituted "kickbacks" to encourage the use of forced child labor. *Nestlé* Pet. App. 43a-44a. According to the court of appeals, because petitioners' U.S. headquarters exercised normal corporate oversight of their overseas operations, this is enough to overcome the presumption against extraterritoriality. That decision represents an error of law. Allowing ATS claims to go forward under such an expansive theory and on such vague allegations will encourage further lawsuits against U.S. companies in the cocoa industry. This will discourage industry participation in the ongoing fight against forced child labor at a time in which such participation is crucial—much progress has been made, but there is still much work to be done.

ARGUMENT

A. The court of appeals' decision effectively negates the presumption against extraterritoriality, exposing a wide range of American companies to ATS lawsuits.

The Constitution unquestionably vests authority over foreign relations not in the judiciary, but in the executive and legislative branches. Accordingly, and as this Court has cautioned, courts should be wary of "craft[ing] remedies for the violation of new norms of international law [that] would raise risks of adverse foreign policy consequences." *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727-28 (2004). "[T]he potential implications for the foreign relations of the United States of recognizing such causes should make courts particularly wary of impinging on the discretion of the Legislative and Executive Branches in managing foreign affairs." *Id.* at 727. Even if there is a "specific" and "controlling" norm of international law that can serve as the basis for an ATS claim, "it must be determined . . . whether allowing [a] case to proceed under the ATS is a proper exercise of judicial discretion, or instead whether caution requires the political branches to grant specific authority before corporate liability can be imposed." *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1399, 1403 (2018).

This case presents an instance in which the need for judicial restraint from interference in the political branches' foreign-policy choices is at its greatest: "when the question is whether a cause of action under the ATS reaches the conduct within the territory of another sovereign." *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116-17 (2013). The presumption against

extraterritoriality does not "retreat[] . . . whenever *some* domestic activity is involved in the case." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010). While the ATS requires that claims "touch and concern the territory of the United States . . . with sufficient force to displace the presumption against extraterritorial application," *Kiobel*, 569 U.S. at 124-25, the Ninth Circuit has lowered that bar to require only some modicum of conduct that *touches* the territory of the United States, full stop.

It is not difficult to see how many other industries might be exposed to ATS liability under the court of appeals' relaxed standard for applying the ATS to essentially foreign conduct. A plaintiff looking to hold a U.S. corporation responsible for some violation of international law that occurs entirely abroad can survive a motion to dismiss if he alleges that: (1) an agent of a U.S. corporation made some payment overseas that went beyond the market price of specific goods received, for example a payment to secure an "exclusive supplier" relationship in a foreign market, (2) the defendant superintended that payment from its headquarters in the United States, and (3) somewhere in the foreign supply chain forced labor was used. *Nestlé* Pet. App. 43a-44a (nexus to United States consisted of "financing decisions" or "financing arrangements" "originat[ing]" in "United States offices"). No allegation that the U.S. defendant even intended or directed the overseas human rights abuse is necessary.

On the issue of forced child labor alone, U.S. companies in a number of industries potentially could be exposed to ATS liability under the Ninth Circuit's reasoning. For example, the U.S. Department of Labor

reports that forced and child labor exists in the Chinese toy and electronics industries. U.S. Dep't of Labor, *2018 List of Goods Produced by Child Labor or Forced Labor* 8. The same problem exists with respect to cattle and sugarcane from Brazil; textiles and garments from India; tomatoes from Mexico; carpets from Pakistan; and shrimp from Thailand. *Id*. at 11-14.

The burden of defending an ATS suit—even if the lawsuit is ultimately unsuccessful on the merits—is a heavy one. ATS lawsuits involve complex issues and often require discovery from foreign sources, making litigating a case even to summary judgment prohibitively expensive and practically impossible. As the 14-year history of this case demonstrates, ATS cases also can drag on for years. And in those years of defending what should have been an easily-dismissed suit about extraterritorial conduct, a company may suffer significant reputational harm. The combination of these factors will increase pressure on a defendant to settle the lawsuit. *See Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 295 (2d Cir. 2007) (Korman, J., concurring in part and dissenting in part) (describing an ATS lawsuit as a "vehicle to coerce a settlement"), *aff'd for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008).

The ATS was not intended to put American companies at risk of expensive and damaging litigation merely because they are engaged in international commerce with major U.S. trading partners. As another court of appeals has recognized, the ATS is not a "vehicle for private parties to impose embargos or international sanctions through civil actions" by alleging a combination of "knowledge of . . . abuses coupled only with

. . . commercial activities." *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 264 (2d Cir. 2009). Much less was the ATS intended to raise the specter of litigation should—as here—U.S. companies merely provide financial support to impoverished foreign suppliers as part of a long-recognized type of commercial arrangement that is, in addition, consistent with Congressionally-approved policies.

Tellingly, respondents all but admit that they brought their claims in the United States because "such claims cannot be maintained in their home country of Mali as currently there is no law in Mali" for such claims, and (they allege) their claims cannot be brought in Côte d'Ivoire because "the judicial system . . . would likely be unresponsive to" respondents' claims. Second Am. Compl. ¶ 2. But the ATS does not exist to remedy flaws in foreign legal systems. The ATS is a "strictly jurisdictional" statute that allows for a federal court's consideration of a "limited category of" claims "of torts in violation of the law of nations," *Jesner*, 138 S. Ct. at 1397; *see also Mastafa v. Chevron Corp.*, 770 F.3d 170, 178 (2d Cir. 2014) ("[T]he ATS's 'reference to the law of nations must be narrowly read if the section is to be kept within the confines of Article III." (citation and internal quotation marks omitted)); *Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 75 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("'Foreign conduct is generally the domain of foreign law,' and 'courts should assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws.'" (quoting *Microsoft Corp. v. AT&T*, 550 U.S. 437, 455 (2007))).

So long as the Ninth Circuit's decision stands, it will encourage litigation not only against American members of the cocoa industry, but against any American company doing business in a foreign market where forced labor exists. This will necessarily discourage American companies from investing in economic development and supporting the achievement of the United Nations Sustainable Development Goals in developing countries, including achieving needed labor reforms abroad. The Court should grant the petitions for certiorari, reverse the court of appeals' decision, and thereby confirm that normal corporate oversight of overseas operations from a U.S. corporate headquarters does not suffice to overcome the presumption against extraterritoriality under the ATS.

B. The Ninth Circuit's decision undermines the political branches' solution to the problem of forced child labor in other countries.

The need for caution is particularly acute in this case because the political branches *already* have given considerable thought to the best means for advancing our nation's interest in combatting the use of forced child labor on overseas cocoa farms, and it is not through litigation. Allowing suits against American companies under the ATS for what is effectively their mere involvement in the international cocoa trade and efforts to combat forced child labor will upend the balance struck by the political branches. The judiciary has neither the resources nor the institutional competence to second guess the political branches on this subject.

1. Forced child labor on farms in overseas cocoa-producing regions is an acknowledged problem that

governments in West Africa and industry have been working together to address for decades. These efforts have been greatly complicated by the fragmented nature of the cocoa farming economy. In Ghana and Côte d'Ivoire, two of the largest exporters of cocoa, over 90 percent of the cocoa beans are grown on small, family-owned farms that are usually no larger than 7-10 acres. Paul C. Rosenthal & Anne E. Hawkins, *Applying the Law of Child Labor in Agricultural Supply Chains: A Realistic Approach*, 21 U.C. Davis J. Int'l L. & Pol'y 157, 177 (2015); *Forest- and Farmer-Friendly Cocoa in West Africa*, The World Bank (Dec. 19, 2017), https://www.worldbank.org/en/news/feature/2017/12/19/forest-and-farmer-friendly-cocoa-in-west-africa.

Unsurprisingly, children on small, family-owned farms, particularly in capital-poor regions, often work alongside their parents. The vast majority of children working on cocoa farms are not forced laborers. *See* Elke de Buhr & Elise Gordon, *Bitter Sweets: Prevalence of Forced Labour & Child Labour in the Cocoa Sectors of Côte d'Ivoire & Ghana* 28 (estimating that less than 1% of child laborers on Ivorian cocoa farms, and 2% of child laborers on Ghanaian cocoa farms, are forced laborers). The mere presence of children on a West African cocoa farm is therefore no indication of *forced* child labor.

Against this backdrop, the Harkin-Engel Protocol, formally known as the Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products in a Manner that Complies with ILO Convention 182, is the means by which the political branches have opted to address the worst forms of child labor in overseas cocoa production for the past two decades.

The Protocol was implemented in 2001 as a "response to reports of child labor in West African cocoa production." U.S. Dep't of Labor, *2018 CLCCG Annual Report* 2, *available at* https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/CLCCG2018AnnualReport.pdf. One of the Protocol's sponsors, Congressman Eliot Engel, had initially proposed an appropriations rider that would have required the U.S. Food and Drug Administration (FDA) to "develop labeling requirements indicating that no child slave labor was used in the growing and harvesting of cocoa." 147 Cong. Rec. 12,269 (2001) (statement of Rep. Engel). As the FDA itself explained, however, such a labeling program was "unrealistic and impossible to attain." 148 Cong. Rec. 370 (2002) (statement of Sen. Harkin).

Congressman Engel, joined by Senators Tom Harkin and Herb Kohl, therefore determined that the best means for ensuring that cocoa products "have been produced without any of the worst forms of child labor" would be an "unprecedented framework agreement" that would "result in a credible, public certification system." *Id.* The Protocol reflected a decision by lawmakers to "set[] out a specific, finite timetable" during which "the capacity to publicly and credibly certify" cocoa and cocoa products would be built "incrementally." *Id.*

Over the past eighteen years, the political branches maintained their commitment to the Protocol as the framework for addressing child labor in the West African cocoa sectors. In 2005, Senator Harkin and Congressman Engel issued a joint statement that said "[t]oday, the Protocol stands as a framework for progress, bringing together industry, West African gov-

ernments, organized labor, non-governmental organizations (NGOs), farmer groups and experts in a concerted effort to eliminate the worst forms of child labor and forced labor from the growing, processing and supply chain of cocoa in West Africa."[3] Likewise, in 2008, they issued another joint statement that said "[s]ince its signing, the Protocol has been a positive and important catalyst for change, driving a number of important achievements."[4]

The U.S. Department of Labor has provided extensive oversight and support to the implementation of the Protocol—DOL describes its role as "a driving force in bringing people together to coordinate efforts, share ideas, and foster new collaborations to alleviate child labor in cocoa." U.S. Dep't of Labor, Bureau of Int'l Affairs, *Child Labor in the Production of Cocoa*, https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa. Since 2002, it has awarded government contracts worth more than $55

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[3] Joint Statement from U.S. Sen. Tom Harkin, Rep. Eliot Engel, and the Chocolate Cocoa/Industry on Efforts to Address the Worst Forms of Child Labor in the Cocoa Growing Protocol (July 1, 2005), *available at* https://votesmart.org/public-statement/111420/joint-statement-from-u-s-sen-tom-harkin-rep-eliot-engel-and-the-chocolatecocoa-industry-on-efforts-to-address-the-worst-forms-of-child-labor#.XbRbVehKjIV.

[4] Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel, and the Chocolate and Cocoa Industry on the Implementation of the Harkin-Engel Protocol (June 16, 2008), *available at* https://www.csrwire.com/press_releases/14132-Joint-Statement-from-U-S-Senator-Tom-Harkin-Representative-Eliot-Engel-and-the-Chocolate-and-Cocoa-Industry-on-the-Implementation-of-the-Harkin-Engel-Protocol-.

million to different organizations to support the implementation and monitoring of the Protocol. *Id.*

In 2010, the Department of Labor, the governments of Ghana and Côte d'Ivoire, and the U.S. National Confectioners Association signed a Declaration of Joint Action to Support the Implementation of the Harkin-Engel Protocol. U.S. Dep't of Labor, *Declaration of Joint Action to Support Implementation of the Harkin-Engel Protocol* (Sept. 13, 2010), https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/GhanaSignedDeclaration.pdf. The signatories, which included Senator Harkin and Congressman Engel as witnesses, both reaffirmed a commitment to the Protocol and agreed to a "Framework of Action." *2018 CLCCG Annual Report* at 49-55 (providing the text of the Framework).

The Framework set out the following areas in which the signatories would seek improvement with new or expanded initiatives:

- Provision of education and vocational training services to children as a means to remove children from, or prevent them from entering into the worst forms of child labor;
- Application of protective measures to remove workplace hazards from cocoa farming to allow children of legal working age to work under safe conditions;
- Promotion of livelihood services for the households of children working in the cocoa sector;
- Establishment and implementation of community-based child labor monitoring systems in cocoa growing areas; and

- Conducting of national representative child labor surveys at least every five years.

Reflecting the public-private partnership at the heart of the Protocol, the Framework's "key stakeholders" include cocoa growing communities, producer governments, industry, foreign donors, social partners and civil society, and implementing organizations. The Framework established the Child Labor Cocoa Coordinating Group in 2010, a coordination and steering group convened by the U.S. Department of Labor that has brought together the U.S. Department of Labor, the offices of Senator Harkin and Congressman Engel, the producer governments, and industry on an annual basis to review progress under the Protocol. *Id.* at 50.

2. In addition to the Harkin-Engel Protocol's specific approach to addressing forced child labor on overseas cocoa farms, Congress also has enacted legislation more generally aimed at the problem of forced labor abroad. In 2000, Congress passed the Victims of Trafficking and Violence Protection Act of 2000 ("TVPA"), a law intended to combat the "transnational crime" of "forced labor," such as "involuntary servitude [and] peonage," which "substantially affects interstate and foreign commerce." H.R. Rep. No. 106-939, at 4 (2000). The Act makes it an offense to, *inter alia*, "knowingly benefit[], financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of" forced labor. 18 U.S.C. § 1589(b). Congress specifically made this offense extraterritorial when it renewed the Act in 2008, *id.* § 1596. The Act allows victims to seek civil remedies. *Id.* § 1595. Thus, to the extent that forced labor abroad can be the subject of a damages suit in the United

States, Congress has prescribed a specific statutory scheme for it.

Notably, respondents' allegations against petitioners would not have stated a claim under the TVPA. The TVPA does not impose liability for receiving (and selling) goods that may have been made with involuntary child labor. The TVPA instead requires participation in the "venture" of the forced labor. *E.g.*, *Ratha v. Phatthana Seafood Co.*, No. 16-4271, 2017 WL 8293174, at *4 (C.D. Cal. Dec. 21, 2017) (granting summary judgment to defendants on the TVPRA claim previously allowed at the motion-to-dismiss stage because defendants were passive beneficiaries and took no "action to operate or manage the venture," such as "directing or participating in" "labor recruitment," "employment practices," or "working conditions at [the] factory"), *appeal filed* No. 18-55041 (9th Cir. Jan. 1, 2018). The vague allegations of corporate oversight over financial and technical support provided to foreign farmers found in respondents' complaint are plainly insufficient to state a TVPA claim.

In addition to the TVPA, in 2008, Congress established the Consultative Group to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products, which developed standards later adopted by the Department of Agriculture for importers to follow in production, processing, and distribution. *Consultative Group to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products*, 76 Fed. Reg. 20,305 (Apr. 12, 2011); *see also* Food, Conservation, and Energy Act of 2008, § 3205, Pub. L. No. 110-246, 122 Stat. 1838 (establishing the Consultative Group). Under the Group's guidelines, companies were

encouraged to "engage with governments, international organizations, and/or local communities to promote the provision of social safety nets that prevent child and forced labor and provide services to victims and persons at risk." 76 Fed. Reg. at 20,307.

3. As detailed above, the political branches have carefully crafted both voluntary solutions (the Harkin-Engel Protocol and subsequent Framework) and mandatory solutions (the TVPA) to the problem of forced labor in overseas industry. Neither would allow respondents to bring a claim against petitioners under the allegations in this case. The court of appeals erred by stretching the boundaries of the ATS to provide a remedy against petitioners when Congress had considered the question and elected to provide none.

The decision by the court of appeals in fact turns the political branches' chosen methods of addressing forced labor on foreign cocoa farms on their head. Petitioners allege that "Defendants are directly liable for any actions that they aided and abetted by knowingly providing financial support, supplies, training, and/or other substantial assistance" to cocoa farmers and farmer cooperatives. Second Am. Compl. ¶ 96. The court of appeals panel determined that a decision to provide "personal spending money" to farmers in foreign countries is actionable under the ATS, if the decision to provide it was made in the United States. *Nestlé* Pet. App. 43a.

Members of the cocoa-products industry, however, have provided financial and technical support to farmers *at the encouragement of the political branches*. The Ninth Circuit's inference that this support constitutes an unlawful "kickback" to encourage forced child labor

runs directly counter to the political branches' determination that financial assistance to cocoa farmers is a net positive. The Ninth Circuit's inference is also entirely illogical: our own nation's experience demonstrates that increasing wealth diminishes the incentive to use child labor. Respondents allege that the payments were made to "maintain the farmers' and/or the cooperatives' loyalty as exclusive suppliers," Second Am. Compl. ¶ 37, but even assuming that were true, no one has argued that payments to incentivize farmer loyalty violate the law of nations. And there is *no* allegation that "personal spending money" was provided *only* to farmers who allegedly used forced child labor.

At bottom, the court of appeals should have affirmed the dismissal of respondents' ATS claim because of the mere *risk* of interference with the political branches' chosen strategies in this area—the need for the presumption against extraterritoriality is at its greatest when such a risk exists. *See Jesner*, 138 S. Ct. at 1403; *Kiobel*, 569 U.S. at 116. The court of appeals' decision to instead rely on strained inferences to allow the case to proceed runs of afoul of this Court's repeated warnings against an overly expansive use of the ATS by the judiciary, and merits this Court's immediate review.

C. If allowed to stand, the court of appeals' decision will discourage American companies' involvement in the fight against forced child labor

Since the launch of the Protocol in 2001, the industry is estimated to have invested more than $150 million in specific projects and activities in Côte d'Ivoire

and Ghana to address the worst forms of child labor. *2018 CLCCG Report at 4*. Key actions include:

- **Raising incomes of farmers**: providing additional premium payments for sustainably grown cocoa, supporting new income generating activities for farmers, improving productivity of crop yields, increasing farmer access to financial services, and capacity building of farmer organizations;
- **Awareness raising**: sensitizing all parents and children to the dangers of child labor and long-term negative impact on children's development;
- **Child protection services**: setting up community-level Child Protection Committees of trained volunteers, identifying vulnerable children at risk, and remediating cases of child labor with the support of local and regional authorities, and NGOs;
- **Access to quality education**: promoting school enrollment and attendance, helping families secure birth certificates for school-age children, and contributing to school construction and equipment and materials; and
- **Women's empowerment**: strengthening women's financial independence and decision-making power, which leads to families prioritizing children's education and well-being.

Unfortunately, the court of appeals' decision can only serve to deter American companies from investing in these activities and participating in the ongoing battle against forced child labor. The court of appeals' deci-

sion actually condemns petitioners for their very acts—"provid[ing] financial support and technical farming aid" and "personal spending money" to those who supply petitioners' cocoa—that the political branches have encouraged. *Nestlé* Pet. App. 36a, 43a. Against the backdrop of the Harkin-Engel Protocol, the Ninth Circuit's conclusion that American companies' provision of financial and technical support to the farmers from whom they purchase cocoa is a *bad* thing for which they should be punished only can be seen as an improvident undermining of Congress's considered judgments. It will trigger even more litigation against the U.S. cocoa industry and discourage companies' investment in West Africa.

Troublingly, the Ninth Circuit's instant decision is only the latest in a series of unreasonable decisions by that court in this case. To provide another example: the Ninth Circuit previously determined that it was plausible that "lobbying efforts" in support of the Harkin-Engel Protocol, *i.e.*, dialogue between industry and the political branches about the best ways to address the issue of forced child labor, supported respondents' ATS claims because they reflected efforts to "guarantee[] the continued use of . . . child slaves." *Doe I v. Nestle USA, Inc.*, 766 F.3d 1013, 1025 (9th Cir. 2014). That determination (not reiterated by the court of appeals in its most recent decision) has staggering implications, turning an exercise of the constitutional right to petition the legislature into a violation of the law of nations. It risks chilling industry's willingness to consult with the political branches on finding solutions to persistent foreign labor issues.

In the end, the decision below unfairly derives an inference of "pro-slavery purpose from anti-slavery activity." *Doe I v. Nestle USA, Inc.*, 788 F.3d 946, 950 n.11 (9th Cir. 2015) (Bea, J., dissenting from the denial of rehearing en banc). If the court of appeals' decision is not reviewed and reversed, American companies in the cocoa industry will be forced to reevaluate their continued participation in the West African economy and in addressing the root causes of forced child labor. That is an outcome that will benefit no one.

CONCLUSION

The petitions for writs of certiorari should be granted.

Respectfully submitted.

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October 28, 2019