

Nos. 19-416 & 19-453

IN THE
Supreme Court of the United States

NESTLÉ USA, INC.,

Petitioner,

v.

JOHN DOE I, ET AL.

(For continuation of caption, see inside cover.)

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

**Brief for the World Cocoa Foundation, the
National Confectioners Association, the
European Cocoa Association, the Cocoa
Merchants' Association of America Inc., and
the Association of Chocolate, Biscuits, and
Confectionery Industries of Europe,
as *Amici Curiae* Supporting Reversal**

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<i>Presbyterian Church of Sudan v.</i> <i>Talisman Energy, Inc.</i> , 582 F.3d 244 (2d Cir. 2009)	21
<i>Sosa v. Alvarez-Machain</i> , 542 U.S. 692 (2004).....	5
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- 147 Cong. Rec. 12,269 (2001)
(statement of Rep. Engel) 8
- 148 Cong. Rec. 370 (2002)
(statement of Sen. Harkin) 9
- Joint Statement from U.S. Senator Tom
Harkin, Representative Eliot Engel, and
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- Joint Statement from U.S. Sen. Tom
Harkin, Rep. Eliot Engel, and the
Chocolate Cocoa/Industry on Efforts to
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(July 1, 2005)..... 9
- CIA, *The World Factbook*,
[https://www.cia.gov/library/
publications/resources/the-world-
factbook/](https://www.cia.gov/library/publications/resources/the-world-factbook/) 6
- Comité National de Surveillance des
Actions de Lutte contre la Traite,
l'Exploitation et le travail des Enfants,
*Le Plan d'Action National De Lutte
Contre le Travail des Enfants*,
[http://www.travaildesenfants.org/fr/page
s/le-plan-daction-national-de-lutte-
contre-le-travail-des-enfants](http://www.travaildesenfants.org/fr/pages/le-plan-daction-national-de-lutte-contre-le-travail-des-enfants) 14

- 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..... 3, 8
- Côte d’Ivoire Ninth Economic Update: Key Messages*, World Bank (July 11, 2019), <https://www.worldbank.org/en/country/cotedivoire/publication/cote-divoire-ninth-economic-update-key-messages>..... 6
- Elke de Buhr & Elise Gordon, *Bitter Sweets: Prevalence of Forced Labour & Child Labour in the Cocoa Sectors of Côte d’Ivoire & Ghana* (2018), available at https://cocoainitiative.org/wp-content/uploads/2018/10/Cocoa-Report_181004_V15-FNL_digital.pdf 7
- Int’l Cocoa Initiative Found., *New Report Highlights Nestle’s Efforts to Tackle Child Labour in Its Cocoa Supply Chain* (Oct. 4, 2017), <https://cocoainitiative.org/news-media-post/new-report-highlights-nestles-efforts-to-tackle-child-labour-in-its-cocoa-supply-chain/> 18
- Int’l Cocoa Initiative Found., *ICI Strategy: 2021-2026*, available at https://cocoainitiative.org/wp-content/uploads/2020/09/ICI-2021-2026-Strategy_EN.pdf 12

- Republic of Ghana, *National Plan of Action Phase II (NPA2) for the Elimination of the Worst Forms of Child Labour in Ghana (2017-2021)*,
<https://www.unicef.org/ghana//1836/file/National%20Plan%20of%20Action%20to%20Eliminate%20the%20Worst%20Forms%20of%20Child%20Labour.pdf> 15
- Richard Scobey, *To Stop Child Labor, First Address Poverty*, Brink (Aug. 10, 2020),
<https://www.brinknews.com/child-labor-in-africa-cannot-be-tackled-without-addressing-poverty/>..... 17
- Alyse Thompson, *Ghana, Côte d'Ivoire Institute \$400-Per-Tonne 'Living Income Differential' Ahead of 2020-2021 Cocoa Season*, Candy Industry (July 9, 2019),
<https://www.candyindustry.com/articles/88740-ghana-cote-divoire-institute-400-per-tonne-living-income-differential-ahead-of-2020-2021-cocoa-season>..... 13
- U.S. Dep't of Labor, *2018 CLCCG Annual Report, available at*
<https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/CLCCG2018AnnualRep.pdf> 8, 10, 11, 13, 14
- U.S. Dep't of Labor, Bureau of Int'l Affairs, *Child Labor in the Production of Cocoa, available at*
<https://www.dol.gov//ilab/our-work/child-forcedlabor-trafficking/child-labor-cocoa>.... 10, 13

- U.S. Dep't of Labor, Bureau of Int'l Labor Affairs, *Child Labor and Forced Labor Reports: Côte d'Ivoire*,
<https://www.dol.gov/ilab/resources/reports/child-labor/cote-divoire>..... 14, 15
- U.S. Dep't of Labor, Bureau of Int'l Labor Affairs, *Child Labor and Forced Labor Reports: Ghana*,
<https://www.dol.gov/agencies///reports/child-labor/ghana> 15
- 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/GhanaSignedDecla.pdf>..... 10
- UNESCO, *Côte d'Ivoire: Education and Literacy*,
<http://uis.unesco.org/en/country/ci>..... 19
- UNESCO, *Ghana: Education and Literacy*,
<http://uis.unesco.org/en/country/gh> 19
- United Nations Human Rights: Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011) 7

WCF Strategy: Pathway to Sustainable Cocoa,
<https://www.worldcocoafoundation.org/wp-content/uploads/2020/02/Pathway-2020.pdf>..... 13

World Bank Grp. et al., *Eliminating Deforestation from the Cocoa Supply Chain* (Mar. 2017), available at <https://openknowledge.worldbank.org/bitstream/handle/10986/26549/114812-5-5-2017-12-49-5-Cocoafinal.pdf>..... 6

INTEREST OF THE *AMICI CURIAE*¹

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 National Confectioners Association (“NCA”) is the leading trade organization for the \$36 billion U.S. confectionary industry. Confections are produced in all 50 states, creating jobs for approximately 54,000 workers in more than 1,300 manufacturing facilities across the country. NCA’s mission is to foster an environment that enables chocolate and candy makers to thrive and promote the unique role of confections in a happy, balanced lifestyle.

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

¹ All parties have consented to the filing of 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 include national governments and civil-society organizations) to understand, communicate, and address the root causes of child labor in smallholder farming.

The Cocoa Merchants' Association of America Inc. (CMAA) is the leading trade association for the U.S. cocoa industry. Its members include stakeholders from every aspect of the cocoa supply chain, from shippers and growers to manufacturers of cocoa-based products. CMAA represents its members' interests before Congress and U.S. regulatory authorities. It also educates its members on legislative and regulatory initiatives that may affect the U.S. cocoa industry, including efforts to combat and eliminate forced child labor abroad.

The Association of Chocolate, Biscuit, and Confectionery Industries of Europe (CAOBISCO) is an association that represents more than 13,000 European chocolate, biscuits, and confectionery manufacturing companies, 99% of which are small and medium-sized enterprises, in addition to 12 national associations and seven direct member companies. The confectionery industry is a major contributor to the European economy, employing more than 400,000 direct employees.

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 the governments of both cocoa-producing and cocoa-consuming nations, as well as international development organizations, farmer 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 that human rights are protected in cocoa-growing communities. This includes supporting measures to eliminate child labor generally and especially the worst forms of child labor, which are defined by an international convention to mean “forced or compulsory” labor or labor that “is likely to harm the health, safety or morals of children.”²

Amici and their members have invested hundreds of millions of dollars in these efforts, in line with their member companies’ sustainability programs, and with the encouragement of members of Congress, the Department of Labor, and the governments of the leading cocoa-producing countries. *Amici* are concerned because the decision of the court of appeals below improperly treats cocoa-using companies’ efforts to *combat* the worst forms of child labor occurring overseas as evidence of their *aiding and abetting* forced child labor, and thereby subjects the companies to the burden of litigation and potential liability under the Alien Tort Statute (“ATS”), 28 U.S.C. § 1350. For the reasons given by petitioners, this result is wrong as a matter of law.

The battle against child labor in cocoa-producing countries has had many successes, but much remains to be done. If allowed to stand, the decision below risks undoing the progress that already has been achieved under the collaborative framework that the political branches chose to address the worst forms of child la-

² 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.

bor on overseas cocoa farms, and discouraging American companies from participating in future efforts.

SUMMARY OF ARGUMENT

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 use of child labor in the cocoa supply chain. This collaboration has been encouraged and supported by the Harkin-Engel Protocol. The political branches selected this voluntary agreement and framework to address the problem of the worst forms of child labor on overseas cocoa farms.

Respondents brought ATS claims alleging that petitioners' efforts to combat the use of 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.

This Court should reverse. 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 child labor at a time when such participation is crucial—much progress has been made, but there is still much work to be done.

ARGUMENT

I. **The Ninth Circuit’s decision undermines the political branches’ solution to the use of child labor on overseas cocoa farms.**

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).

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 the worst forms of 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—indeed, based on their very 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.

A. The Harkin-Engel Protocol reflects Congress’s decision to use a multi-governmental, public-private partnership to bring an end to the worst forms of child labor.

1. Most of the world’s cocoa comes from West Africa, and in particular from just two countries—Ghana and Côte d’Ivoire—which together account for 60% of the global cocoa supply. Both countries have low average incomes; in 2017, the per capita GDP of Côte d’Ivoire at purchase powering parity was only \$3,900, and of Ghana only \$4,700.³ Many cocoa farmers in West Africa live below the poverty line, with lower farm productivity compared to other regions. *See Côte d’Ivoire Ninth Economic Update: Key Messages*, World Bank (July 11, 2019), <https://www.worldbank.org/en/country/cotedivoire/publication/cote-divoire-ninth-economic-update-key-messages>. Over 90 percent of cocoa beans are grown on small, family-owned farms that are usually no larger than 5-7 acres. World Bank Grp. et al., *Eliminating Deforestation from the Cocoa Supply Chain* 11 (Mar. 2017), *available at* <https://openknowledge.worldbank.org/bitstream/hand>

³ See CIA, *The World Factbook*, <https://www.cia.gov/library/publications/resources/the-world-factbook/>.

le/10986/26549/114812-5-5-2017-12-49-5-Cocoafinal.pdf.

Unsurprisingly, children on small, family-owned farms, particularly in capital-poor regions, often work alongside their parents or other relatives. While many children are expected to work by their own families, forced child labor in the form of human trafficking or slave labor is extremely rare. According to one recent study by Tulane University and the Walk Free Foundation covering the period 2013 and 2017, approximately 1.6 million children work on cocoa farms in Ghana and Côte d'Ivoire, of whom it is estimated that about 16,000—or only one percent—were being required to work by someone other than their parents. And the study came across very limited evidence that children were forced to work by someone outside of the extended family: around 1,000, or 0.15 percent of those working in cocoa. See Elke de Buhr & Elise Gordon, *Bitter Sweets: Prevalence of Forced Labour & Child Labour in the Cocoa Sectors of Côte d'Ivoire & Ghana* 28 (2018), available at https://cocoainitiative.org/wp-content/uploads/2018/10/Cocoa-Report_181004_V15-FNL_digital.pdf. The mere presence of children working on a West African cocoa farm is therefore no indication that human trafficking or slave labor is occurring.

The cocoa and chocolate industry believes that child labor has no place in the supply chain, in line with the United Nations' Guiding Principles on Business and Human Rights. See generally United Nations Human Rights: Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (2011). Accordingly, the cocoa industry long has been committed to working with governments,

farmer organizations, and NGOs not only to combat the scourge of human trafficking, but also to assist family farmers to shield their own children from the worst forms of child labor, which are defined by an international convention to mean “forced or compulsory” labor or labor that “is likely to harm the health, safety or morals of children.”⁴ The persistent poverty of the region, however, as well as the large expansion in cocoa production in recent years, has made the full eradication of the use of child labor difficult.

2. 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 selected 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 FDA itself explained, however, such a labeling program was “un-

⁴ 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.

realistic 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.*

For the past nineteen years, the political branches have maintained their commitment to the Protocol as the framework for addressing child labor in the West African cocoa sector. 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 governments, 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.”⁵ Likewise, in 2008, they issued another joint statement declaring that “[s]ince its signing, the Protocol has been a positive and

⁵ 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>.

important catalyst for change, driving a number of important achievements.”⁶

The U.S. Department of Labor (DOL) has provided extensive oversight and support for 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*, available at <https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa>. Since 2002, DOL has awarded government contracts worth more than \$55 million to different organizations to support the implementation and monitoring of the Protocol. *Id.*

In 2010, DOL, the governments of Ghana and Côte d’Ivoire, and *amicus* NCA 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

⁶ 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-.

CLCCG Annual Report at 49-55 (providing the text of the Framework of Action).

The Framework of Action sets 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 of Action's "key stakeholders" include cocoa growing communities, producer governments, industry, foreign donors, social partners and civil society, and implementing organizations. The Framework of Action established the Child Labor Cocoa Coordinating Group, a coordination and steering group convened by DOL that brought together 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.

3. Consistent with these international frameworks and cooperative agreements, industry, governments, and NGOs have dedicated significant resources in recent years to eliminating the use of child labor in cocoa farming.

Through a combination of individual-company efforts, industry-wide endeavors and multi-stakeholder initiatives, members of the cocoa products industry have committed hundreds of millions of dollars to projects aimed at boosting farmer income and eliminating the worst forms of child labor. On a collective basis, the Protocol's industry partners have used platforms such as the International Cocoa Initiative⁷ and *amicus* WCF's CocoaAction initiative to support the Framework of Action's priorities and to promote cocoa sustainability.

In the International Cocoa Initiative, industry members have invested more than \$70 million since 2010 supporting research, child-centered community development activities, and child labor monitoring and remediation efforts, with more than 380,000 children directly assisted between 2015 and 2019, and a target to reach 1.7 million children at-risk of child labor by 2025. See Int'l Cocoa Initiative Found., *ICI Strategy: 2021-2026*, available at https://cocoainitiative.org/wp-content/uploads/2020/09/ICI-2021-2026-Strategy_EN.pdf.

⁷ The International Cocoa Initiative was established in 2002, under Article 5 of the Harkin-Engel Protocol as an international, not-for-profit Foundation, jointly governed by a Board comprised of industry and other non-governmental stakeholders, to implement field projects and serve as a clearinghouse on best practices to eliminate the worst forms of child labor.

Under the umbrella of CocoaAction, industry members also have provided resources directly to cocoa farmers to make sustainable farming an achievable goal, and to provide cocoa-growing communities educational opportunities and child labor monitoring. *2018 CLCCG Report* at 4. Between 2015 and 2020, industry supporters will have contributed an estimated \$400 million in investments to support CocoaAction implementation. *Id.*

CocoaAction is set to conclude in 2020, but collective action by the industry will continue through WCF's Pathway to Sustainable Cocoa, which is designed to accelerate the elimination of child and forced labor. *WCF Strategy: Pathway to Sustainable Cocoa*, <https://www.worldcocoafoundation.org/wp-content/uploads/2020/02/Pathway-2020.pdf>. In addition, the industry is implementing the new Living Income Differential policy that the governments of Côte d'Ivoire and Ghana enacted in 2019 for the 2020-2021 crop season to raise the income of cocoa farmers, which will provide an estimated \$360 million in additional revenues for cocoa farmers on top of official market prices. Alyse Thompson, *Ghana, Côte d'Ivoire Institute \$400-Per-Tonne 'Living Income Differential' Ahead of 2020-2021 Cocoa Season*, Candy Industry (July 9, 2019), <https://www.candyindustry.com/articles/88740-ghana-cote-divoire-institute-400-per-tonne-living-income-differential-ahead-of-2020-2021-cocoa-season>.

In addition, between 2010 and 2017, DOL committed over \$50 million in technical assistance funds for implementation of the Framework of Action. U.S. Dep't of Labor, *Child Labor in the Production of Cocoa*, <https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa>. This includes over

\$24 million for projects in Côte d’Ivoire and Ghana devoted to (1) assessing the extent of the use of child labor in the cocoa industry; (2) providing education services for the households and children at risk; and (3) promoting acceptable working conditions for youth workers. *2018 CLCCG Report* at 4-5.

As a result of the actions of the cocoa-producing governments, industry, and key development partners, the foreign countries most affected by the use of child labor have made “significant strides” in addressing the problem. *Id.* at 4.

For example, the United States government has recognized that Côte d’Ivoire has made “a significant advancement in efforts to eliminate the worst forms of child labor” for six years in a row, the highest designation that a foreign government can achieve in the fight against the use of the worst forms of child labor. U.S. Dep’t of Labor, Bureau of Int’l Labor Affairs, *Child Labor and Forced Labor Reports: Côte d’Ivoire (Côte d’Ivoire Child Labor Reports)*, <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/cote-divoire>. The Ivorian government has made such progress by implementing measures including its new “National Action Plan of the Fight Against Trafficking, Exploitation, and Child Labor” for 2019-2021 and a “National Labor Inspection Strategy.” Comité National de Surveillance des Actions de Lutte contre la Traite, l’Exploitation et le travail des Enfants, *Le Plan d’Action National De Lutte Contre le Travail des Enfants*, <http://www.travaildesenfants.org/fr/pages/le-plan-daction-national-de-lutte-contre-le-travail-des-enfants>. Côte d’Ivoire also has committed to the continued study of child labor in cocoa-growing areas, and has ramped up efforts to provide “education, medical

care, counseling, and vocational training” for the victims of the worst forms of child labor. *See Côte d’Ivoire Child Labor Reports, supra.*

Ghana has made “moderate advancement in efforts to eliminate the worst forms of child labor”; the Ghanaian Government is implementing a “National Plan of Action Phase II on the Elimination of the Worst Forms of Child Labor” for 2017-2021. U.S. Dep’t of Labor, Bureau of Int’l Labor Affairs, *Child Labor and Forced Labor Reports: Ghana*, <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/ghana>. Under the Plan of Action, Ghana aims to reduce the worst forms of child labor to “the barest minimum” by 2021, and will focus on providing educational opportunities and resources to children and families in the communities most affected by the worst forms of child labor. Republic of Ghana, *National Plan of Action Phase II (NPA2) for the Elimination of the Worst Forms of Child Labour in Ghana (2017-2021)*, at 7, <https://www.unicef.org/ghana/media/1836/file/National%20Plan%20of%20Action%20to%20Eliminate%20the%20Worst%20Forms%20of%20Child%20Labour.pdf>.

B. The Ninth Circuit’s expansion of the ATS will penalize those who participate in the political branches’ preferred approach to resolving the problem of child labor.

As detailed above, the political branches have carefully crafted voluntary solutions to the problem of forced child labor on overseas cocoa farms. The Harkin-Engel Protocol and similar initiatives, the political branches’ chosen approach, did not create a cause of action for respondents to bring against the cocoa industry. 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. J.A. 342. 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, because it reduces their poverty and hence their incentive to rely on unpaid child labor. 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," J.A. 316, 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 *specifically* 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 v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 116 (2013). The court of appeals' decision to instead rely on strained inferences to allow the case to proceed runs afoul of this Court's repeated warnings against an overly expansive use of the ATS by the judiciary. That decision should therefore be reversed.

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

Since the launch of the Protocol in 2001, the industry is estimated to have invested more than \$215 million in specific projects and activities in Côte d'Ivoire and Ghana to address child labor. Richard Scobey, *To Stop Child Labor, First Address Poverty*, Brink (Aug. 10, 2020), <https://www.brinknews.com/child-labor-in-africa-cannot-be-tackled-without-addressing-poverty/>. 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 or cooperative-based community monitors to identify vulnerable children at risk, and remediate 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.

Industry programs to reduce child labor are making a difference. For example, the International Cocoa Initiative estimates that labor monitoring and remediation systems implemented by petitioner Nestlé have reduced hazardous child labor by about 50 percent among identified child laborers. *See Int'l Cocoa Initiative Found., New Report Highlights Nestle's Efforts to Tackle Child Labour in Its Cocoa Supply Chain* (Oct. 4, 2017), <https://cocoainitiative.org/news-media-post/new-report-highlights-nestles-efforts-to-tackle-child-labour-in-its-cocoa-supply-chain/>. There also has been an impressive increase in education access for children in cocoa-growing countries: school attendance among 5- to

17-year-olds is estimated to have increased from 67% to 90% in Côte d'Ivoire between 2013 and 2018, and from 81% to 86% in Ghana between 2011 and 2019. See UNESCO, *Côte d'Ivoire: Education and Literacy*, <http://uis.unesco.org/en/country/ci>; UNESCO, *Ghana: Education and Literacy*, <http://uis.unesco.org/en/country/gh>.

Industry has been working with the governments of Côte d'Ivoire and Ghana, DOL, and international development partners like UNICEF, the International Labor Organization, and the International Cocoa Initiative, to develop a new public-private partnership to accelerate investment and action to eliminate child labor in the cocoa supply chain. The new partnership is expected to be announced at the end of 2020, with increased investment in four critical areas: (1) an adequate standard of living for cocoa farmers, (2) full supply-chain coverage of child protection systems to monitor and remediate child labor, (3) expanded access to quality education, and (4) increased support for child development, including health, nutrition, and water and sanitation.

Despite the widespread agreement among experts in the field that joint industry and government action to combat the use of child labor should be scaled up, the court of appeals' decision will deter American companies from participating. The court of appeals' inexperienced decision 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 experts and the political branches have encouraged. *Nestlé Pet.* App. 36a, 43a. 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 is 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, as well as their transparency in reporting efforts and progress in identifying and remediating child labor, as recommended by the UN Guiding Principles on Business and Human Rights.

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 lengthy history of this case demonstrates, ATS cases 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 combina-

tion 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.

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 reversed, American companies in the cocoa industry will be forced to reevaluate their continued par-

ticipation in the West African economy and in addressing the root causes of child labor. That is an outcome that will benefit no one, least of all the children of West Africa.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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