Nos. 19-416 and 19-453

In the Supreme Court of The United States

NESTLÉ USA, INC., *Petitioner,*
V.
JOHN DOE I, *ET AL.*, *Respondents*,

CARGILL, INC., *Petitioner*,
V.
JOHN DOE I, *ET AL.*, *Respondents*.

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

BRIEF OF *AMICI CURIAE* OXFAM AMERICA AND PROFESSORS OF ECONOMICS JOSEPH E. STIGLITZ AND GEOFFREY M. HEAL IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

This brief *amici curiae* is respectfully submitted by Columbia University Professors of Economics Joseph E. Stiglitz and Geoffrey M. Heal and by Oxfam America.[1]

Amici offer their research, expertise, and experience to clarify central principles of investment, economic development, and socially responsible corporate behavior relevant to the question of corporate liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350, to address arguments, presented by Petitioners and certain *amici* that corporate liability under the ATS will deter investment in both the United States and less developed countries ("LDCs"), obstruct economic development in LDCs, undermine the competitiveness of U.S. corporations, and discourage proactive efforts by domestic corporations to prevent human rights abuses in the countries in which they operate or from which they source inputs. *Amici* demonstrate that there is no foundation for any of these arguments.

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[1] All parties have consented to the filing of this brief. Nestlé USA and Respondents filed with the Court letters providing blanket consent. Cargill provided written consent. No counsel for any party authored this brief in whole or in part, nor did counsel for any party, any party itself, or any other person make a monetary contribution to support this brief.

Joseph Stiglitz is a Professor of Economics at Columbia University. He previously taught at Princeton University, Stanford University, Yale University, and the Massachusetts Institute of Technology. In 2001, he was awarded the Nobel Prize in Economic Sciences for his analyses of markets with asymmetric information. He was a lead author of the 1995 Report of Intergovernmental Panel on Climate Changes, which shared the 2007 Nobel Peace Prize.

Professor Stiglitz was a member of the Council of Economic Advisers from 1993 to 1997, serving as its chairman for two years. He was Chief Economist and Senior Vice President of the World Bank from 1997 to 2000. In 2009, he was appointed by the President of the United Nations General Assembly to chair the Commission of Experts on Reform of the International Financial and Monetary System. He founded Columbia's Initiative for Policy Dialogue, which addresses international development, and is co-chair of the High-Level Expert Group on the Measurement of Economic Performance and Social Progress at the Organization for Economic Cooperation and Development.

Professor Stiglitz founded the *Journal of Economic Perspectives*, co-founded the *Journal of Globalization and Development* and *Economists' Voice,* and has authored or co-authored leading economics texts including *Economics of the Public Sector*; *Economics*; *Principles of Macroeconomics*; and *Principles of Microeconomics*. He has authored or co-authored popular and scholarly titles including *Globalization and Its Discontents*; *People, Power, and Profits;*

Rewriting the Rules of the European Economy; Fair Trade for All; and *Making Globalization Work*; *Stability with Growth.*

Geoffrey Heal is a Professor of Economics at Columbia University and the Donald C. Waite III Professor of Social Enterprise. He previously taught at the University of Sussex, the University of Essex, Yale University, Stanford University, École Polytechnique, Stockholm University, and Princeton University. Professor Heal has made significant contributions to economic theory and environmental economics. He studies developments in energy markets, the impact of climate change on business, and the economics of corporate social responsibility. Among the courses he teaches are "Business and Society: Doing Well by Doing Good?" and "The Business of Sustainability."

Professor Heal currently serves as Chair of the Board of the Coalition of Rainforest Nations and as a member of the board of the Union of Concerned Scientists. He sits on the advisory board of the Environmental Defense Fund. He has also chaired a National Academy of Sciences committee on valuing ecosystem services, was a Commissioner of the Pew Oceans Commission, was a coordinating lead author of the Intergovernmental Panel on Climate Change's Fifth Assessment Report, and was a member of President Sarkozy's Commission on the Measurement of Economic Performance and Social Progress.

He is the author of 18 books and over 200 articles. His latest book, *Endangered Economies: How the*

Neglect of Nature Threatens our Prosperity, sets out the economic and business case for environmental conservation.

Oxfam America is a non-profit organization that works to end the injustice of poverty and help people build better futures for themselves, save lives in disasters, and hold the powerful accountable for violations of international law. Oxfam America is part of a global Oxfam Confederation with offices located in 67 countries. Oxfam focuses its humanitarian efforts in economically, socially, and politically volatile countries, providing grants and technical support to boost local economies, improve food access and labor conditions, establish land rights, and address water quality and scarcity.

As part of that mission, Oxfam challenges multinational companies through shareholder and private sector engagement to use their power to improve living and labor conditions in the countries in which they operate or source their products and inputs. Oxfam America's Private Sector Department works with some of the world's largest companies across a variety of industries, including the agribusiness, extractive, financial, and pharmaceutical sectors. It works to ensure that corporate practices align with international human rights obligations, result in positive social and environmental impacts for vulnerable communities, and mitigate externalities of business operations—all of which ultimately provide long-term financial benefit to the companies.

Oxfam's Private Sector Department has developed rich expertise in the field of corporate human rights obligations, providing it with unique insight into norms that companies and states are expected to adopt, and the financial impacts that result from ensuring that companies respect human rights and avoid contributing to egregious human rights abuses such as child slavery.

SUMMARY OF ARGUMENT

This litigation asks whether a domestic corporation can be liable for egregious human rights abuses under the ATS. In addition to questions involving statutory interpretation and international law, Petitioners and their supporting *amici* have raised economic and policy arguments concerning corporate liability.

Persistent among these are whether corporate liability will: (1) cause corporations to disinvest in less developed countries ("LDCs"), undermining LDC economic development, and deter foreign investment in the United States; (2) place U.S. businesses at a competitive disadvantage vis-à-vis their foreign competitors; and (3) discourage proactive corporate efforts to address human rights abuses in their supply chains. [2] These arguments are without merit and should be rejected.

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[2] *E.g.*, Nestlé USA Merits Br. 47-50; Cargill Merits Br. 40, 50 48; Coca-Cola Merits-Stage *Amicus* Br. 6-12; World Cocoa Found., *et al.* Merits-Stage *Amicus* Br. 17-21; Wash. Legal

Corporate civil liability under the ATS is one of several incentives that induce firms to prevent human rights abuses in their operations and supply chains. This system of incentives includes civil liability under the ATS as well as other federal, state, and foreign laws that enforce compliance, and marketplace and reputational pressures that encourage voluntary compliance. Standing alone, each of these is imperfect and have their own limitations, but together they are complementary, reinforcing incentives to prevent and mitigate the worst human rights abuses and promote responsible corporate behavior.

Among these mechanisms, corporate civil liability under the ATS is an important and economically efficient means of enforcing laws against the most egregious human rights abuses because it puts enforcement in the hands of those with the greatest incentive to enforce compliance—the victims—and targets the costs of non-compliance to those with the greatest ability to police their own actions—corporations. This is particularly so where local regulatory systems and judicial enforcement mechanisms are weak or non-existent. Corporate ATS liability reduces transaction costs associated with enforcing human rights law. It also promotes long-term economic development and foreign direct investment in LDCs.

Found., *et al.* Merits-Stage *Amicus* Br. 13-14; Chamber of Commerce, *et al.* Merits-Stage *Amicus* Br. 26.

Concerns that the expected cost of potential future ATS suits will cause U.S. corporations to withdraw from or decline to invest in LDCs and deter foreign investment in the United States lack both empirical support and any logical underpinning. Appropriate analysis demands the opposite conclusion. Although domestic corporations have faced the specter of ATS liability for decades, those promoting corporate immunity have not pointed to any credible evidence that foreign direct investment ("FDI") in LDCs has declined. Corporations make investment decisions—regarding investment in LDCs and investment in the United States—based on a variety of economic considerations. If investment is profitable, the risk of potential liability is unlikely to dissuade economically desirable investment in the United States or abroad. Moreover, corporate liability incentivizes behavior that can be expected to result in improved human rights conditions in the LDCs in which they operate. That, in turn, fosters stability and long-term economic development and attracts further FDI—all benefits that inure to U.S. corporations and to the reputation of the United States.

Further, concern that U.S. firms would be disadvantaged relative to their foreign competitors is unsubstantiated and without merit. First, it rests on the premise that bad businesses in the United States should be on the same footing as bad businesses in other countries. That is the wrong analysis and creates a race to the bottom. Corporate accountability under the ATS levels the playing field for U.S. corporations that already comply with human rights norms (and internalize the costs of doing so) vis-à-vis

their competitors that do not, and encourages a race to the top to avoid liability. The U.S. experience with the Foreign Corrupt Practices Act and the Sarbanes-Oxley Act demonstrates that this race to the top benefits U.S. corporations (and the United States) and encourages compliance abroad. Additionally, many foreign competitors already face pressure to comply with human rights norms and incur costs for compliance and monitoring; domestic corporations that are incentivized by the risk of ATS liability to do the same are not disadvantaged vis-à-vis such foreign competitors.

Additionally, domestic corporations whose conduct comports with customary international law may experience a competitive *advantage*. LDC governments that lack strong enforcement mechanisms but nevertheless seek investment by corporations more likely to adhere to international human rights standards are more likely to welcome domestic corporations. Moreover, any short-term disinvestment that might occur (despite lack of evidence that it would) should be more than offset by long-term improvements in LDCs' economic and social climate, which the ATS encourages and which ultimately benefit U.S. corporations.

Last, claims that liability will discourage domestic corporations from taking proactive measures to mitigate and prevent human rights abuses in their supply chains and promote economic development in LDCs are baseless. Corporations face pressures in product, labor, and capital markets to undertake such efforts, which are complementary with corporate civil

liability. Such proactive efforts are prompted, in part, by the need to avoid or mitigate the reputational and brand image harm that Oxfam and other non-governmental organizations ("NGOs") bring to bear when they expose corporations with weak or no human rights due diligence. The ATS reinforces these marketplace incentives; it does not counter or undermine them.

ARGUMENT

I. TORT LIABILITY CREATES APPROPRIATE INCENTIVES THAT ENHANCE ECONOMIC EFFICIENCIES.

Tort law represents an important part of an efficient economic system. It provides incentives for appropriate behavior by requiring those who injure others, to pay damages to those whom they have harmed. Permitting corporate liability under the ATS (or any other law) might be unwelcome for *bad* businesses but discouraging conduct that violates human rights—as here—embodies the very purpose of tort law. It requires firms to internalize the negative externalities[3] their harmful acts impose on others.

Tort law functions as a complement to other mechanisms created to deter negative externalities and infractions of law—including mandatory means

[3] A negative externality occurs when one's actions cause harm that is neither compensated by enforcing private rights nor addressed by public law means.

such as regulation, taxation, and sanctions, and voluntary mechanisms like the Harkin-Engel framework[4] in the cocoa industry. These means can prevent only some violations from occurring and, in the absence of an omniscient and omnipotent regulator, persons and companies can continue to cause harm to others. Tort law complements these other mechanisms because it provides those with the most information about the harm with the ability to seek redress. And corporations' awareness that such redress is available provides incentives for market participants to avoid injurious behavior in their operations and supply chains, minimizing human rights violations.

The literature on the economic impact of labor standards provides some indication of the economic efficiency of corporate tort liability and of the absence of adverse investment effects. Even after the establishment of labor standards, violations often continue to occur because enforcement is never perfect. Targeted penalties—imposed in the form of fines—represent one incentive that has been incorporated into several U.S. bilateral trade agreements to *extend* in-country labor protections and improve enforcement efficiencies. See Sandra Polaski & Katherine Vyborny, *Labor Clauses in Trade*

[4] Despite the framework, the VOICE Network, in which *amicus* Oxfam is a member, reported that in 2018, no member of the cocoa sector was anywhere near the goal of a 70% reduction in child labor by 2020. Antonie Fountain & Friedel Huetz-Adams, Cocoa Barometer 2018, https://www.voicenetwork.eu/wp-content/uploads/2019/08/Cocoaborometer2018_web4.pdf.

Agreements: Policy and Practice, 10 Integration & Trade 95 (2006). Corporate civil liability for violations of human rights norms is analogous to focusing penalties on non-compliant corporations and would enhance both efficiency of oversight and fairness to other market participants.

Private redress under the ATS is particularly advantageous. This is because the harmful acts at issue are the most egregious torts in violation of customary international law and often occur in locations in which domestic courts provide an inadequate forum for pursuing and enforcing tort claims, while other forms of sanctions, such as regulation and taxes, are weakly applied.

Moreover, it is now well-recognized that in a modern economy, the provision of appropriate incentives (to avoid injury to others) *must* extend beyond the imposition of liability to the person who commits the injury.[5] In particular, corporations must be provided with incentives to discourage and deter their agents from engaging in such potentially harmful acts and to develop monitoring systems that promote compliance. Because corporations are in the best position to monitor such activities, domestic corporate liability can minimize enforcement

[5] Petitioners claim that corporate ATS liability will *undermine* the deterrent effect on natural persons (*e.g.*, Nestlé Merits-Stage Br. 50) ignores both (1) that corporate liability does not foreclose suits against both natural persons that carry out the violation *and* against corporations for secondary liability; and (2) the difficulty of obtaining personal jurisdiction over individual perpetrators located abroad.

transactions costs. In addition, the limited resources of persons—as compared to those of the corporations for which they work—attenuates the effectiveness of liability on persons alone.

Similarly, specious reasoning lies behind the claim that the specter of frivolous lawsuits counsels against corporate liability. Like any other tool used to elicit appropriate behavior, tort law has costs and benefits. On the benefit side, it is often a more efficient means than regulation for creating accountability and inducing appropriate behavior. On the cost side, there is frivolous litigation. But every advanced country has, in a variety of arenas, concluded that it is important to complement regulations with civil liability; even with a reasonable regulatory structure, the benefits of civil liability exceed the costs. This argument is even more compelling with regard to the ATS, reserved for the most egregious human rights abuses and cases where there are marked deficiencies in regulatory structures or their enforcement.

Furthermore, recognition of corporate liability would demonstrate commitment to a variety of widely shared principles. The liability imposed by the ATS reflects universally recognized human rights norms. The United States values, and benefits from, the existence of such international norms. Its reputation vis-à-vis human rights has declined at the same time as the reputation of other countries has improved.[6]

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[6] *See*, *e.g.*, U.S. News Staff, Countries Seen to Care about Human Rights, U.S. News & World Reports, Apr. 21, 2020, www.usnews.com/news/best-countries/articles/the-10-countries-

The United States and its corporations benefit in the increasingly global markets for labor, capital, and consumers by improving this reputation.

II. CORPORATE LIABILITY WILL DETER NEITHER U.S. FOREIGN DIRECT INVESTMENT IN LDCS NOR FOREIGN INVESTMENT IN THE UNITED STATES.

Those seeking corporate immunity from the ATS argue that domestic corporate accountability for human rights violations will impede economic investment in and development of LDCs that rely on valuable FDI and discourage foreign corporations from investing in the United States. But these claims lack any empirical evidence, rest on unreasonable implicit assumptions, and are contradicted by available empirical evidence and sound economic principles.

A. Domestic Corporate Liability Will Not Deter, and Can Be Expected to Promote, Foreign Direct Investment in LDCs.

Petitioners and certain *amici* erroneously assert that without corporate immunity from the ATS, domestic corporations will exit LDCs in which they had invested and refrain from future investment.

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that-care-the-most-about-human-rights-according-to-perception.

This claim lacks any empirical support.[7] In fact, although victims have used the ATS to enforce violations of human rights for the last 40 years[8] and courts have assumed for several decades that corporations may be subject to ATS liability,[9] to date, no study has shown that this potential liability has reduced investment in LDCs despite dire predictions to the contrary. *See* Robert Knowles, *A Realist Defense of the Alien Tort Statute*, 88 Wash. U. L. Rev. 1117, 1156–59 (2011) (discussing Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *Awakening Monster: The Alien Tort Statute of 1789*, Inst. for Int'l Econ. (2003), and noting those authors' predictions that the ATS would depress worldwide trade, result in lower FDI in target countries, and cost the United States hundreds of thousands of manufacturing jobs have not materialized). In our judgment, corporate liability ultimately promotes FDI, and, in particular, makes LDCs more willing to accept profitable FDI from the United States.

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[7] For example, Nestlé's support for that proposition—Sykes (2012)—offers no empirical evidence regarding such harm. Nestlé Merits Br. 47. That author's only evidence is Talisman Energy's exit from Sudan. As discussed *infra*, Talisman divested for myriad other reasons.

[8] *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 743, (2004) (recognizing *Filartiga v. Pena–Irala*, 630 F.2d 876 (2d Cir. 1980), as the first of a series of cases applying the ATS to human rights abuses in violation of international law).

[9] *See Doe v. Exxon Mobil Corp.*, 654 F.3d 11, 57 (D.C. Cir. 2011) (noting the issue of corporate liability has remained in the background since the Second Circuit decided *Filartiga* and that courts have assumed corporations were liable).

Certain *amici* attribute Talisman Energy's divestment in Sudan to ATS litigation relating to its complicity in the Sudanese government's human rights violations.[10] Talisman's decision, however, was influenced by a range of factors—a complex web of political risks with adverse economic and public relations outcomes. These include Canada's investigation of Talisman's Sudanese operations, the United States' designation of Sudan as a state-sponsor of terrorism, and a campaign by NGOs targeted at both the U.S. and Canadian governments and Talisman's shareholders that caused a sell-off of institutional investors' shares, reducing Talisman's share price and enterprise value. Stephen J. Kobrin, *Oil and Politics: Talisman Energy and Sudan*, 36 N.Y.U. J. Int'l L. & Pol. 425, 439–42, 444, 446–47 426 (2004).[11] Thus, Talisman would likely have divested regardless of the ATS litigation.

Second, as Talisman's divestment demonstrates, corporations' foreign investment decisions are influenced by overall business opportunities. These include access to new markets; access to complementary assets, such as technology; access to natural resources (as is the case with the Nestlé investment in West Africa); and efficiency-seeking largely through lower labor costs. Federico Carril-Caccia & Elana Pavlova, *Foreign Direct Investment and its Drivers: A Global and EU Perspective*, ECB

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[10] *E.g.*, Wash. Legal Found., *et al.*, Merits-Stage *Amicus* Br. 13.

[11] *See also*, *Talisman to Sell Its Stake in Company in Sudan*, N.Y. Times, Oct. 31, 2002, at C15.

Econ. Bull., June 26, 2018.[12] Each of these factors describe profit-generating activity, which in turn is enhanced by political and economic stability in the target country. Results from a survey of more than 2,400 CEOs of firms engaged in FDI identified the most important factors to be political stability, macroeconomic stability, and the legal and regulatory environment. World Bank Grp., *2019/2020 Global Investment Competitiveness Report, Rebuilding Investor Confidence in Times of Uncertainty* 16 (2020). Notably, no respondent identified civil litigation risk as a factor, let alone ATS litigation.[13]

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[12] *Available at* https://www.ecb.europa.eu/pub/economic-bulletin/articles/2018/html/ecb.ebart201804_01.en.html#toc1.

[13] This may be because the ATS is reserved for the most egregious human rights abuses. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004). And those egregious cases require the safety net the ATS provides.

As various *amici* admit, far from a flood of corporate ATS litigation over the last 40 years, there has been but a trickle. *See e.g.,* Chamber of Commerce, *et al.* Merits-Stage *Amicus* Br. 24. (stating there have been 155 ATS cases filed against corporations) (citing Donald Earl Childress, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 Geo. L.J. 709, 713 (2012) (citing Jonathan Drimmer & Sarah R. Larmoree, *Think Globally, Sue Locally, Trends and Out-of-Court Tactics in Transnational Tort Actions*, 29 Berkley J. Int'l L. 456, 460)). But this number includes cases that were consolidated, and only 120 involved cases even plausibly fell under the statute, with the remainder involving commercial or employment disputes, securities actions and the like (sometimes brought *by* corporations). Drimmer, *supra* at 461 & nn.10, 33 (citing Michael Goldhaber, *The Life and Death of the Corporate Alien Tort*, Am. Lawyer, Oct. 12, 2010) which identifies the 155 actions). And the vast majority of those actions

Nestlé's own conduct reinforces this conclusion. Despite nearly two-decades of ATS litigation relating to its cocoa operations in Côte D'Ivoire and accusations that it sources inputs from fisheries in Thailand that rely on forced labor, Nestlé continues to source its inputs from, and invest in, both countries. [14] *Amicus* Coca-Cola, too, lauds its continued investment in LDC economic development and human rights prevention in countries from which it sources sugarcane despite the purported risk of

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were not class actions, which Nestlé asserts impose intolerable risk (Nestlé Merits Br. 33), but rather claims by individuals.

Contrast this with the 200,000 to 300,000 civil cases filed *annually* in our federal courts over roughly the same period. Admin. Office of the U.S. Courts, *Judicial Facts and Figures 2019*, tbl. 4.1, Civil Cases Filed, Terminated and Pending, https://www.uscourts.gov/statistics-reports/judicial-facts-and-figures-2019.

[14] *See, e.g.,* Press Release, Nestlé, Nestlé scales up action against child labor and expands cocoa sustainability program, Dec. 10, 2019, https://www.nestle.com/media/news/nestle-action-against-child-labor-cocoa-sustainability-program; Press Release, Nestlé, Nestlé invests CHF 2.5 million and partners with the government of Côte d'Ivoire to protect and restore the Cavally forest reserve, July 20, 2020 ; https://www.nestle.com/media/news/nestle-partners-government-cote-ivoire-protect-cavally; Nestlé, How Has Nestle Improved Its Seafood Sourcing?, https://www.nestle.com/ask-nestle/human-rights/answers/nestle-forced-labour-supply-chains; Nestlé Procurement, Responsible Sourcing of Seafood at Nestlé, https://www.nestle.com/sites/default/files/asset-library/documents/creating-shared-value/responsible-sourcing/seafood-responsible-sourcing-update-2017.pdf.

aiding and abetting liability. Coca-Cola Merits-Stage *Amicus* Br. 8-10.

Consistent with the economic evidence discussed *supra*, empirical evidence suggests that foreign capital flows to countries that respect human rights because such respect signals greater political stability and reduced corporate vulnerability to consumer outcries and facilitates an economic environment that is conducive to developing human capital, which attracts FDI. Shannon L. Blanton & Robert G. Blanton, *What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment,* 69 J. of Pol. 143, 153 (2007). Hence, as corporate ATS liability incentivizes human rights compliance, it can be expected to increase, not decrease, capital flows to those LDCs, especially those outflows that are particular benefit to LDCs. If FDI were undertaken only *because* human rights violations make that investment profitable, neither the United States nor the recipient country should want to encourage it. Such investment would, as *amici* argue elsewhere here, harm U.S. corporate reputation and potentially discourage investment from the United States.

The argument that U.S. corporations would divest also assumes that economic development is unrelated to respect for human rights. But several economic studies show that respect for civil liberties and human rights are associated with improved economic performance in LDCs, potentially enhancing returns from FDI. Among the most compelling evidence comes from work done at the World Bank while *amicus*

Stiglitz was Chief Economist there. It found that economic returns to World Bank-financed projects were systematically higher in countries with higher human rights and civil liberties scores. Jonathan Isham, *et al.*, *Civil Liberties, Democracy, and the Performance of Government Projects*, 11 World Bank Econ. Rev. 219, 229-30 (1997). There is empirical evidence that protection of human rights and other civil liberties is associated with increased investment and economic growth and disregard for the same is associated with poorer economic outcomes.[15] Wade M. Cole, *The Effects of Human Rights on Economic Growth, 1965 to 2010*, 2 Soc. of Dev. 375 (2016).

It is also important to recognize that worldwide efforts to improve LDC labor standards have not produced any measurable declines in FDI in LDCs; indeed, evidence points in the opposite direction—improved labor rights may be associated with greater FDI. *See* David Kucera, *The Effects of Core Workers Rights on Labour Costs and Foreign Direct Investment: Evaluating the "Conventional Wisdom"* 2, Int'l Inst. for Labour Studies, Discussion Paper No. 130 (2001); Emmanuel Teitelbaum, *Measuring Trade Union Rights Through Violations Recorded in Textual Sources: An Assessment*, 63 Pol. Res. Q. 461, 471–72 (2010). The movement to improve LDC labor

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[15] The World Bank has reported evidence linking human trafficking to a range of development issues, including poverty, human capital investment, gender inequality, and gender-based violence. The World Bank, Human Rights and Development Trust Fund, https://www.worldbank.org/en/programs/human-rights-and-development-trust-fund.

standards is, in some ways, analogous to the application of ATS. It seems obvious that a firm is more likely to run afoul of national laws regarding labor standards than it is to violate international law regarding human rights. Given that improved LDC labor standards have had no measurable impact on investment (in LDCs or in the United States), the claim that liability under the ATS—which should improve human rights standards in LDCs—will result in a significant decrease in FDI appears far-fetched.

The argument also disregards that many corporations that operate in an LDC to extract resources may not have the option to divest because there are few other alternative sources. For example, in 2018, Côte D'Ivoire and Ghana accounted for nearly two-thirds of global cocoa bean production, and no country comes remotely close the Côte D'Ivoire's volumes. *See* 46 Q. Bull. of Cocoa Stat., Int'l Cocoa Org. (2019/2020). And in 2019, the Democratic Republic of the Congo ("DRC") alone was responsible for over 70 percent of the world's mine cobalt supplies; its next largest country competitor produced only 6 percent of the DRC's volume.[16] Where resources are geographically concentrated, ATS liability is unlikely to have any effect on FDI. Where resources are not geographically concentrated, even if ATS liability changes FDI decisions (though no evidence suggests

[16] Mines & Metals, The World's Top 10 Largest Cobalt Producers in 2019 (May 5, 2020), https://www.minesandmetals.com/2020/05/the-worlds-top-10-largest-cobalt-producers-in-2019/.

it does) that would at most shift investment to countries with better practices, but not affect the overall level of global investment. Again, the ATS's main effect is to encourage countries and companies to adopt better practices, the consequences of which are positive for the United States, domestic corporations, investment in LDCs, and the LDCs themselves.

ATS and other measures attempting to ensure good corporate behavior may in fact have a positive effect on the flow of capital to developing countries, for several reasons. First, in many countries, there are strong pressures from civil society and responsible policy makers to restrict the entry of foreign firms because of concern about abuses of the kind presented here. Such pressures arise in part because of concerns that local governments may not take appropriate actions to curb these abuses. Confidence in foreign investment is increased when corporations are incentivized by ATS liability to adhere to human rights norms. This particularly benefits the United States and other countries with similar tort frameworks.

Moreover, some American shareholders (including institutional investors) are reluctant to have the companies in which they have invested make investments in LDCs, lest they engage in practices that are in violation of international law and norms—knowing that there may be inadequate enforcement in the local jurisdiction. The ATS helps assure that the corporation and its executives have incentives not to engage in such practices. As *amici* have noted,

better human rights practices create an economic and political environment that is more conducive to growth and investment.

B. Domestic Corporate Liability Will Not Deter Foreign Investment in the U.S.

Because of the considerations that drive foreign investment discussed *supra*, domestic corporate liability under the ATS will not deter foreign investment in the United States. Like their other arguments discussed herein, proponents of corporate immunity present no empirical evidence for such claims, let alone any evidence that such an effect, were it present, would have a significant adverse effect on the US economy. The argument is based on a fundamental misunderstanding of the determinants of investment in the United States.

Foreign firms locating in the U.S. are typically drawn by its large domestic market[17] or its unique concentration of innovative scientific and technological institutions and companies, and the human capital of their researchers, engineers and scientists.[18] Other factors attracting investment in the U.S. include advanced infrastructure, strong protection of property rights, social and political

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[17] Raymond Vernon, *International Investment and International Trade in the Product Cycle,* 80 Q. J. Econ. 190 (1966).

[18] Richard Florida, *The Globalization of R&D: Results of a Survey of Foreign-Affiliated R&D laboratories in the USA*, 26 Research Pol'y 85 (1997).

stability, well-functioning capital markets, and a highly educated and mobile labor force. Thus, the benefits of operating in the U.S. are likely to outweigh any potential liability under the ATS.[19]

Moreover, the threat of foreign corporations withdrawing from, or declining to invest, in the United States would have a significant adverse impact only if there were large numbers of foreign companies with access to technology, knowledge, or resources that were not available to U.S. firms. Because there are few—if any—niches in the U.S. market for which these conditions hold true, any decrease in investment by the foreign firm would be offset by increased investment by American firms. Hence, even if one were to assume, *arguendo*, that

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[19] The argument also disregards that most foreign corporations with U.S. operations do business here *despite* our legal regime that may expose them to greater civil liability generally than they may face at home as well as stronger substantive law. Many countries lack mechanisms available here that make redress more available, such as opt-out class actions (that may increase potential damages), liberal discovery rules, and the "American Rule" on fees and costs. *See, e.g.*, Manning Gilbert Warren III, *The U.S. Securities Fraud Class Action: An Unlikely Export to the European Union*, 37 Brook. J. Int'l L. 1075, 1083 (2012); Csongor István Nagy, *The Reception of Collective Actions in Europe: Reconstructing the Mental Process of a Legal Transplantation*, 2020 J. Disp. Resol. 413, 426 (2020). For example, collective redress is nascent and limited in Europe. *See* Istvan, *supra* at 426. If increased risk of liability in the United States deterred investment, one would expect there to be empirical evidence of the same. Yet neither Petitioners nor their supporting *amici* offer any such support. One would not expect domestic corporate ATS liability to change that result.

foreign firms might decrease their investment in the United States, such disinvestment would not have a significant negative impact on the U.S. economy.

III. CORPORATE LIABILITY WILL NOT PLACE U.S. CORPORATIONS AT A COMPETITIVE DISADVANTAGE.

Proponents of corporate immunity claim U.S. corporations will be disadvantaged vis-à-vis foreign competitors that will displace domestic corporations that disinvest in LDCs with a history of human rights violations and that are not subject to jurisdiction under the ATS. But proponents cite no credible evidence to support this argument and logic suggests that the opposite is more likely to be true.

First, as discussed *supra*, there is no convincing evidence that the possibility of ATS litigation has ever deterred U.S. companies from investing where that investment is profitable, or that acting in a socially responsible way (not engaging in human rights violations) would make an investment that is otherwise profitable unprofitable. [20] Corporations that do not disinvest cannot be displaced. But even if corporate liability under the ATS were to deter FDI in the short-run, in the long-run it would create a more attractive environment for U.S. FDI by inducing governments to change their behavior. U.S. disinvestment from countries that systematically

[20] From a public policy perspective, if an investment were only profitable, say, because of child labor, it is not clear that investment should be encouraged.

violate human rights puts pressure on governments to respect international law if they want to become attractive to US investors.

Once governments ensure protection of human rights, U.S. and foreign firms alike operating in LDCs become accountable. The playing field becomes more level. The Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. §§ 78dd-1, *et seq.*, for example, has actually created an international environment that is more attractive for U.S. firms. While there were initial complaints that domestic firms were disadvantaged by not being able to bribe foreign officials (and to take tax deductions for bribes) it led to an economic and political environment in which bribery was discouraged both by host countries and other source countries. American businesses have been the overall beneficiaries: in addition to the more conducive business environment they now encounter, domestic corporations also earn a reputational premium because they are known to be good corporate actors.

Second, a vast number of multinational corporations have at least some business presence in the United States that subjects them to jurisdiction (or at least creates the possibility of jurisdiction). Foreign firms, operating in our markets, thus face a similar risk. Some may also face risks of liability or due diligence requirements in their home countries. Human rights due diligence and corporate accountability are global trends. Some jurisdictions impose corporate liability for human rights violations, including for conduct abroad. For example, the Canadian Supreme Court permitted Eritrean

plaintiffs alleging forced labor and other human rights abuses occurring at an Eritrean mine to pursue in Canadian courts their claims for violations of customary international law against a Canadian defendant for the actions of its foreign sub-contractor. *Nevsun Res. Ltd. v. Araya*, [2020] SCC 5 (CanLII) (Can.). [21] And many have enacted laws requiring corporations to publicly report the actions they are taking to prevent human rights abuses in their supply chains[22] and, in some cases, impose standards for due

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[21] Courts in other countries have done likewise. *See* Morrison Foerster, *UK Companies Responsible for Business and Human Rights Violations Overseas,* June 8, 2020, https://www.mofo.com/resources/insights/200608-uk-human-rights-violations.html; Nicol Jägers*, et al.*, *The Future of Corporate Liability for Extraterritorial Human Rights Abuses: The Dutch Case Against Shell*, 107 Am. J. Int'l L. Unbound 36-41 (2013), doi:10.1017/S2398772300009673.

The French "Duty of Vigilance" law provides a private right of action for harms caused by failure to comply with their duty to develop and implement a vigilance plan. Loi 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre Journal Officiel de la République Française [J.O.] Code de commerce [C. com.] [Commercial Code] art. L. 225-102-5 (Fr.), https://www.legifrance.gouv.fr/jo_pdf.do?id=JORFTEXT000034290626.

[22] *See* European Commission, *Study on Due Diligence Requirements Through the Supply Chain, Final Report* 19 (Jan. 2020), https://www.traffickingmatters.com/wp-content/uploads/2020/02/DS0120017ENN.en_.pdf (discussing new and pending due diligence requirements throughout European Union).

Contrary to the Cato Institute's claims, Cato Inst. Merits-Stage *Amicus* Br. 16-17, these due diligence laws have nothing whatever to say about a country's views on corporate civil

diligence to detect and prevent human rights violations for which there is mandatory compliance.[23]

Third, corporate ATS liability may make U.S. firms with a reputation for human rights compliance more attractive to LDC governments that are concerned about violations of international law but lack sufficient enforcement tools. Côte D'Ivoire is just one example: it has strong labor laws but lacks enforcement resources. *See* U.S. Dep't of Labor, *Child Labor and Forced Labor Reports*, Côte D'Ivoire, https://www.dol.gov/agencies/ilab/resources/reports/child-labor/cote-divoire. The threat of corporate liability under ATS can encourage corporate behavior that assures such governments that U.S. firms respect human rights norms.

Fourth, corporate liability does not increase costs for all companies equally. A company that does not need to change its behavior to comply with international human rights norms will not incur extra

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liability; their focus is on *prevention* of the violations in the first instance. *See* Office of the High Comm'r Human Rights, United Nations, https://www.ohchr.org/EN/Issues/Business/Pages/CorporateHRDueDiligence.aspx. ("The prevention of adverse impacts on people is the main purpose of human rights due diligence.").

[23] For example, the European Commission's Conflict Minerals Regulation requires importers of certain minerals produced in countries in which sales and production perpetuates human rights abuses to meet responsible sourcing standards. European Commission, *The Regulation Explained*, https://ec.europa.eu/trade/policy/in-focus/conflict-minerals-regulation/regulation-explained/.

costs of compliance. Corporate liability will put such domestic companies on a more favorable footing with corporations that have not implemented policies and procedures to protect against such violations. "Businesses in countries that have and enforce laws against child labor are hurt by competition from businesses that employ child labor in countries in which employing children is condoned." *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013, 1021 (7th Cir. 2011).

The impact of the Sarbanes–Oxley Act of 2002, P.L. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C.), which imposed potentially costly accounting standards on companies operating in the United States, is instructive. Some foreign companies chose to delist from U.S. exchanges. Yet several studies found that the firms that delisted in order to avoid compliance with the Act had weaker corporate governance than foreign firms that did not delist. These delisting decisions had economic consequences: stock prices fell relative to those of foreign firms that continued to cross-list. *See, e.g.,* Peter Hostak, *et al.*, *An Examination of the Impact of the Sarbanes-Oxley Act on the Attractiveness of U.S. Capital Markets for Foreign Firm*, 18 Rev. Acct. Stud. 522 (2013). Thus, when corporations are held to account, compliant corporations can reap economic benefits over non-compliant firms. *See* John C. Coffee, Jr., *Law and the Market: The Impact of Enforcement*, 156 U. Pa. L. Rev. 229, 231 n.2 (2007) (noting that foreign firms' decision to list in U.S. may be the cause of empirically observed U.S. listing premium).

IV. CORPORATE LIABILITY WILL NOT DISCOURAGE PROACTIVE EFFORTS TO ADDRESS HUMAN RIGHTS ABUSES.

Another speculative argument advanced by certain *amici* and Petitioners is that without immunity from the ATS, socially responsible corporations will abandon or decline to undertake proactive measures that both address and mitigate human rights abuses in connection with their supply chains or that promote economic and social development in LDCs. As with their other arguments, this contention lacks both empirical support and foundation in the realities of modern markets. Corporations that undertake these measures do so because of the economic and reputational advantages such efforts bring and to avoid or respond to public campaigns that expose such abuses and other negative externalities of multinational operations. The risk of corporate liability under the ATS may complement these motivations, but it will not undermine or displace them.

Nestlé and *amicus* Coca-Cola Co., which advance this argument, themselves demonstrate why it should be rejected. Nestlé continues to publicly promote its efforts to end child labor in Côte D'Ivoire despite years of litigation, and, in 2016, voluntarily disclosed that its pet food supply chain included sources using forced labor after NGO reports exposed them and undertook efforts to prevent such abuses, despite the risk it would be sued for its knowledge of and monitoring of the abuses. *See supra* n.14 and accompanying text. And Coca-Cola extolls both its efforts to remediate

human rights violations associated with its foreign business activities as well as its steadfast commitment to these efforts, all despite the risk of ATS liability. Coca-Cola Merits-Stage *Amicus* Br. 7-12. There are clear economic reasons why this is so.

Corporations necessarily operate in three markets: for their products, for employees, and for capital. Since the early years of this century, the counterparties in these markets have increasingly become concerned about the environmental and social behavior of the corporations with whom they deal. Today, attracting customers, capital, and employees requires attention to human rights and other social and environment impact.

In the product market, a proactive commitment to positive social impact enhances a corporation's reputation and brand image. Reputation matters. Retail consumers are increasingly voting with their wallets and improved reputation translates into improved financial performance. *See, e.g.*, Organization for Economic Co-operation and Development, Quantifying the Costs, Benefits and Risks of Due Diligence for Responsible Business Conduct ("OECD") 8 (June 2016).[24] Consumers direct their business to sellers whose values appear to align with their own. Karen Moore, Corporate Social Responsibility: Consumers Will Remember Companies That Led in 2020, Forbes, Jul. 31, 2020

[24] http://mneguidelines.oecd.org/Quantifying-the-Cost-Benefits-Risks-of-Due-Diligence-for-RBC.pdf (summarizing studies).

("If your brand and CSR are not in alignment, you run the risk of alienating audiences and undermining brand trust."); Cone Comm'ns, 2017 CSR Study, https://www.conecomm.com/2017-cone-communications-csr-study-pdf. This is particularly true for an important set of consumers—millennials, the largest living adult generation in the United States. *See, e.g.*, Kelsey Chong, *Millennials and the Rising Demand for Corporate Social Responsibility*, Cal. Mgmt. Rev., Jan. 201, 2017. [25] Research buttresses the conclusion that customers respond favorably to businesses that align with their concerns and values. *See e.g.*, Michael Hiscox and Nicholas Smyth, *Is There Consumer Demand for Improved Labor Standards? Evidence from Field Experiments in Social Product Labeling* 2, Working Paper (2005) (finding sales rose for products labeled as made under good labor standards); [26] Daniel Elfenbeim, *et al.*, *Reputation Altruism and the Benefits of Seller Charity in an Online Marketplace*, Nat'l Bureau of Econ. Research, Working Paper 15614 (Dec. 2009) (charitable contributions lead to greater sales and higher prices). Most major corporations are well aware of the marketplace benefits of doing so.

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[25] https://cmr.berkeley.edu/2017/01/millennials-and-csr/; *see also*, *e.g.*, Nielson Co., *Investing in the Future: Millennials are Willing to Pay Extra for a Good Cause*, July 23, 2014, https://www.nielsen.com/us/en/insights/article/2014/investing-in-the-future-millennials-are-willing-to-pay-extra-for-a-good-cause/.

[26] https://scholar.harvard.edu/hiscox/publications/there-consumer-demand-fair-labor-standards-evidence-field-experiment.

Public campaigns exposing human rights abuses, particularly labor issues, and targeting companies can have direct, negative economic effects on businesses found to have engaged in them. Few companies can afford to ignore scathing exposés, such as the 2016 report by Amnesty International regarding corporations' use of inputs sourced from cobalt mines in the Democratic Republic of Congo using forced child labor.[27] Apple, one of the targets, responded not by sticking its head in the sand and discontinuing its supply chain monitoring program to reduce ATS liability, but instead by expanding upon it, publishing the names of its cobalt suppliers, and promoting economic development projects in Congolese mining communities.[28]

NGOs, including *amicus* Oxfam, bring product market pressures to bear by creating a market for human rights. Oxfam and others rank brand sensitive competitors on their human rights and other social practices (or lack thereof). [29] In addition to partnering

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[27] Amnesty International, *Exposed: Child Labour Behind Smart Phone and Electric Car Batteries* (Jan. 16, 2016), https://www.amnesty.org/en/latest/news/2016/01/child-labour-behind-smart-phone-and-electric-car-batteries/.

[28] *Apple Supplier Responsibility 2018 Progress Report* 21-24, https://www.apple.com/supplier-responsibility/pdf/Apple_SR_2018_Progress_Report.pdf.

[29] Other NGOs have similar programs ranking multinational corporations' human rights practices. *E.g.*, Corporate Human Rights Benchmark, https://www.corporatebenchmark.org/ (ranking the top publicly traded multinationals across a range of human rights indicators,

with corporations to advance socially responsible initiatives, including efforts to eliminate child labor, Oxfam launched a "Behind the Brands" campaign, which targets brand name products to raise consumer awareness and scores the companies based on seven factors, including labor. Among other corporations, Oxfam annually ranked Nestlé and its competitors Mondelez and Mars, generating competition for favorable rankings, criticizing bad conduct, and promoting these corporations' proactive efforts to address economic development and human rights abuses, including child labor.[30] Oxfam's finding that scores for these companies gradually improved supports the proposition that reputational competition spurs proactive improved human rights practices.

Similarly, in labor markets, there is growing evidence that better-trained workers are choosing to work with companies whose values reflect their own, and that working for a company perceived as a "good" company—meeting high ethical standards—boosts employee morale and increases productivity. *See, e.g.*, OECD, *supra* at 8-9, 39-41 (summarizing studies); H.S. Albinger and S.J. Freeman, *Corporate Social*

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including actual practices and response to allegations, including Nestlé and Coca-Cola and their competitors); Know the Chain, https://knowthechain.org/, (same, with respect to forced and child labor).

[30] *E.g.*, Mars, Protecting Children Action Plan, www.mars.com/about/policies-and-practices/protecting-children-action-plan.; Mondelez, Cocoa Life, *Stepping Up Efforts to Help Address Child Labor,* www.cocoalife.org/.

Performance and Attractiveness as an Employer to Different Job Seeking Populations, 28 J. Bus. Ethics 243 (2000); *cf.* Christiane Bode, *et al.*, *Corporate Social Initiatives and Employee Retention,* 26 Org. Science 1702 (2015).

In capital markets, a distinctive phenomenon of the last few decades has been the rapid growth of environmentally, socially, and environmentally responsible investing ("ESG"), [31] a component of which is attention to human rights. Recent estimates suggest that in, the U.S., more than 26 percent of all institutionally managed money has an ESG mandate, accounting for some $11 trillion in assets under management. Global Sustainable Investment Alliance, *2018 Global Sustainable Investment* Review 4. [32] Globally, investment funds using ESG factors had more than $26 trillion in assets under management. *See also* John G. Ruggie and Emily K. Middleton, Harvard Kennedy School *Money, Millennials and Human Rights—Sustaining "Sustainable Investing"* 2-3, (June 2018). [33] The importance of ensuring corporate supply chains are free of human rights abuses will only grow given global demographics: studies have found that most high net-worth millennial investors review their

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[31] ESG mandates refer to preferences for corporations with good environmental, social and governance records.

[32] *Available at* https://www.ussif.org/files/GSIR_Review2018F.pdf.

[33] *Available at* https://www.hks.harvard.edu/sites/default/files/centers/mrcbg/working.papers/CRI69_FINAL.pdf.

assets for ESG components. Ruggie, *supra* at 4. ESG indicators are also correlated with lower risk and better financial performance. *See, e.g.,* Guido Giese, *et al.*, *Foundations of ESG Investing: How ESG Affects Equity Valuation, Risk and Performance*, 45 J. Portfolio Mgmt. 69 (July 2019). Research shows that top-ranked ESG companies outperform other corporations in both the short- and long-term. [34] Corporations thus have incentives to engage in proactive efforts to stem human rights abuses and promote economic development in LDCs to attract and retain investors.

Shareholder ESG engagement is also an important incentive for proactive corporate human rights initiatives. *See, e.g.,* Erika George, *Shareholder Activism and Stakeholder Engagement Strategies: Promoting Environmental Justice, Human Rights, and Sustainable Development Goals*, 36 Wis. Int'l L.J. 298, 339-348 (2019). Oxfam and other NGOs hold investments in companies and use their rights as shareholders to push these companies, through shareholder resolutions, to internalize the costs necessary to prevent human rights abuses for a more equitable society. These resolutions, even if rarely successful in themselves, draw unwanted publicity to corporations and have successfully prompted the

[34] *See, e.g.*, OECD, *supra* at 7-10 (summarizing studies); Ishika Mookerjee, Bank of America Says Buyers Pay Up for Top-Ranked ESG Firms, Bloomberg Daily Green, Sept. 24, 2020, www.bloomberg.com/news/articles/2020-09-24/bank-of-america-says-investors-pay-up-for-high-scoring-esg-firms (good ESG firms have better returns on equity, lower earnings volatility, lower share price volatility, and lower debt costs).

corporations Oxfam has targeted, such as Nestlé's competitor Mondelez, to voluntarily adopt reforms in exchange for withdrawal of the resolutions that would impose reputational harms.[35] And last year, an Oxfam shareholder resolution demanding that Amazon conduct human rights assessments in its supply chains garnered the votes of nearly 40 percent of independent shareholders, demonstrating that shareholders, including mainstream asset managers, value efforts to prevent human rights abuses.

Given these considerations, domestic corporate liability for human rights violations complements, rather than undermines, marketplace pressure to undertake proactive efforts to reduce human rights abuses. Initiatives and human rights due diligence (whether legislatively mandated or voluntarily undertaken), are, however, no substitute for civil liability to redress human rights harms.

CONCLUSION

For the foregoing reasons, this Court should reject policy arguments asserting adverse economic consequences from corporate liability under the ATS and affirm the judgment below.

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[35] *See, e.g.,* Press Release, Oxfam, *Mondelez International agrees to address women's inequality in chocolate production*, Apr. 3, 2013, https://www.oxfam.org/en/press-releases/mondelez-international-agrees-address-womens-inequality-chocolate-production.

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