No. 15-349

In the Supreme Court of the United States

NESTLE U.S.A., INC., ET AL., PETITIONERS

v.

JOHN DOE I, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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

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INTEREST OF AMICI CURIAE*

The National Confectioners Association (NCA) is the trade organization representing the $35 billion American confections industry. With members in more than 40

* No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel has made a monetary contribution intended to fund the preparation or

States employing approximately 55,000 workers in more than 1,000 facilities across the country, NCA exists to advance, protect, and promote the confectionery industry.

The World Cocoa Foundation (WCF) is an international membership organization that promotes sustainability in the cocoa sector. WCF provides cocoa farmers with the support they need to grow quality cocoa and to strengthen their communities economically and socially. 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 programs of the WCF benefit farmers and their communities in cocoa-growing regions around the world. See www.worldcocoafoundation.org.

CAOBISCO is the Association of Chocolate, Biscuit and Confectionery Industries of Europe. With 17 member national associations as well as direct member companies and affiliated members, CAOBISCO is the voice of more than 11,000 chocolate, biscuit, and confectionery manufacturers all over Europe.

The European Cocoa Association (ECA) is a trade association composed of the major companies involved in cocoa-bean trade, processing, warehousing, and related logistical activities in Europe. On behalf of its members, ECA monitors and reports on regulatory and scientific developments affecting the cocoa sector. In addition, ECA is actively engaged in European and international

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submission of the brief. Amici timely notified all parties of their intention to file this brief, and letters of consent from all parties to the filing of this brief have been submitted to the Clerk.

forums in working toward a sustainable cocoa economy. Over the years ECA has worked closely with its members and partners, including producing and consuming countries, as well as civil-society organizations, to understand, communicate, and help address the root causes of child labor in smallholder farming.

Among amici's paramount objectives is to promote sustainable, responsible, and humane cocoa-farming practices around the world. In West Africa, millions of people depend on cocoa for their livelihood. Together with their partners in government and civil society, amici have worked in partnership for more than a decade to improve cocoa-farming families' quality of life, modernize agricultural techniques, and eliminate abusive labor practices, including practices identified by international convention as the worst forms of child labor.

The court of appeals has held that companies that purchase cocoa from West Africa may be subject to liability under the Alien Tort Statute (ATS), 28 U.S.C. 1350, on the theory that they have aided and abetted abusive labor practices committed by farmers. Perversely, the decision below treats the industry's extensive cooperative efforts to end child labor as evidence of petitioners' alleged aiding and abetting. That illogical and unjust holding will have immediate and far-reaching consequences. It will undermine the cooperative framework that the political branches have selected to address the problem of child labor, replacing the policy of constructive engagement with a system of ad hoc private adjudication. It will discourage investment in West Africa and worsen living conditions for cocoa-farming families, exacerbating the very human-rights challenges for which respondents seek redress.

Because of their commitment to improving conditions in the cocoa sector, amici have a substantial interest in the issues presented in this case.

SUMMARY OF ARGUMENT

As petitioners have correctly explained, the decision of the court of appeals is erroneous, and it creates or contributes to three different circuit conflicts by recognizing a cause of action under the ATS (1) against corporations, (2) based on a theory that they aided and abetted allegedly wrongful conduct occurring entirely outside the territorial jurisdiction of the United States, and (3) without a plausible allegation that they had the purpose of furthering those wrongs. The decision is likely to worsen, not improve, the problem of abusive labor practices in the developing world. It warrants this Court's review and correction.

The court of appeals faulted petitioners for their efforts to develop what it described as "a voluntary mechanism through which the chocolate industry would police itself" in seeking to end abusive labor practices. Pet. App. 20a. That mechanism, known as the Harkin-Engel Protocol, represents a coordinated effort in which the cocoa industry has worked cooperatively with the Department of Labor, with foreign governments, and with nongovernmental organizations to improve conditions on West African cocoa farms, to create better educational opportunities for children, and to eliminate abusive labor practices. As a result of the coordinated efforts of all stakeholders, the Harkin-Engel Protocol has resulted in significant progress toward more responsible and sustainable cocoa farming.

Despite the judgment of the political branches that constructive engagement and public-private partnership

are the best ways to eliminate abusive labor practices, the broad aiding-and-abetting standard adopted by the court of appeals creates a threat of liability for any company that chooses to do business in a country with an imperfect human-rights record. Even though the court of appeals remanded to allow the district court to consider the extraterritoriality issue in this case, the aiding-and-abetting standard it announced will have immediate effects on the behavior of potential ATS defendants.

Those effects will be almost uniformly bad because of an especially pernicious aspect of the court of appeals' decision: it allows plaintiffs to use a defendant's efforts to *prevent* human-rights abuses as a basis for imposing liability. As evidence of "control"—and therefore aiding and abetting—the court emphasized that petitioners offer assistance and training to West African cocoa farmers, including "training in * * * appropriate labor practices." Pet. App. 4a. To companies such as amici's members—as well as to companies in other industries—the message is clear: do not try to work alongside the government to improve conditions in developing countries; the safer course is simply to avoid doing business anywhere human-rights violations occur. The effect of the decision will be to undermine the foreign-policy choices of the political branches, to impede economic development, and to make it more difficult to solve the problem of child labor. To prevent those results, this Court's intervention is needed now.

ARGUMENT

A. The political branches have chosen to combat child labor in West African agriculture through engagement and public-private partnership

This case involves allegations of forced labor on West African cocoa farms. One of respondents' claims—and a key component of the court of appeals' theory of aiding-and-abetting liability—is that the cocoa industry successfully lobbied for a regulatory regime that "guaranteed the continued use of the cheapest labor available to produce [cocoa]—that of child slaves." Pet. App. 20a (brackets in original). Just the opposite is true. The cocoa industry has worked cooperatively with the United States Government, with foreign governments, and with nongovernmental organizations in a multifaceted effort to end abusive labor practices. The industry's engagement has led to significant progress toward eliminating such practices in cocoa farming.

1. Cocoa is produced on family farms in West Africa

Cocoa is derived from the seeds of the cacao tree, *Theobroma cacao*. See generally Robin Dand, *The International Cocoa Trade* 20-58 (2d ed. 1999). The seeds, or beans, grow in pods that ripen at different times and must therefore be cut from the tree individually to be harvested. *Id.* at 51-52. Once the pods are cut from the tree, they are hacked open, usually with a machete, after which the beans are fermented and then dried by being placed in the sun while being manually stirred. *Id.* at 52-55. Cocoa farming is a labor-intensive process that cannot readily be mechanized. *Id.* at 51-52; see also G.A.R. Wood & R.A. Lass, *Cocoa* 261 (4th ed. 1985).

Although the cacao tree is native to the Americas, a substantial majority of the world's cocoa production now comes from West Africa, with the largest producers being Cote d'Ivoire and Ghana. Dand 68; see also International Cocoa Initiative, *Cocoa Farming: An Overview* 6, http://tinyurl.com/CocoaFarming (*Cocoa Farming*). In West Africa, cocoa is grown primarily on family farms. The farms tend to be very small, with an average size of less than ten acres, and there are more than 1.5 million such farms in West Africa. *Id.* at 8; Paul C. Rosenthal & Anne E. Hawkins, *Applying the Law of Child Labor in Agricultural Supply Chains: A Realistic Approach*, 21 U.C. Davis J. Int'l L. & Pol'y 157, 177-178 (2015). Family cocoa farms are vital to the economies of West African countries. In Cote d'Ivoire, for example, cocoa constitutes the largest export product. Central Intelligence Agency, *World Factbook: Cote d'Ivoire* (Oct. 6, 2015).

Unfortunately, the use of child labor is a problem that remains prevalent on family farms throughout the developing world. See International Programme on the Elimination of Child Labour, International Labour Office, *IPEC Action Against Child Labour 2012-2013: Progress and Future Priorities* 49 (2014) ("More than 98 million children—59 per cent of all those in child labour—are engaged in child labour in agriculture, most of which is unpaid work in family farms, operations and businesses."). Most of that labor is seasonal, with children employed "full-time as part of a family unit during the harvest and seeding seasons, but irregularly or on a part-time basis during the remainder of the year." 2 Bureau of International Labor Affairs, U.S. Department of Labor, *By the Sweat and Toil of Children: The Use of*

Child Labor in U.S. Agricultural Imports & Forced and Bonded Child Labor 21-22 (1995); see *id.* at 22 (noting that "[m]any of these children attend school when they are not working"). Cocoa is no exception; as in many rural communities, children in West Africa commonly help out on their family cocoa farms. *Cocoa Farming* 8.

2. The Harkin-Engel Protocol seeks to eliminate abusive labor practices in cocoa farming

Congress and the Executive Branch have taken many steps to attend to the problem of abusive labor practices in the developing world. Their efforts have focused particularly on the worst forms of child labor, which are defined by an international convention to include "forced or compulsory" labor as well as labor that "is likely to harm the health, safety or morals of children." Convention (No. 182) Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, art. 3, June 17, 1999, 2133 U.N.T.S. 161.

In 2001, the West African cocoa sector came under increased scrutiny after media reports revealed incidents of child trafficking and other labor abuses in cocoa farming. See, *e.g.*, Sudarsan Raghavan & Sumana Chatterjee, *A Slave-Labor Force of Youths Keeps Chocolate Flowing West*, Phila. Inquirer, June 24, 2001, at A1. Reports of forced labor prompted Representative Eliot Engel to introduce an amendment to the Department of Agriculture appropriations bill allocating $250,000 "for the 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).

The FDA objected that a labeling program would be "unrealistic and impossible to obtain." 148 Cong. Rec. 370 (2002) (statement of Sen. Harkin). Specifically, the nature of cocoa production would make it impossible for any company to certify the source of its cocoa beans. In Cote d'Ivoire, for example, the farm-to-port supply chain involves a complex system of intermediaries. Middlemen go from farm to farm collecting beans and combining them into larger loads that they sell to distributors, who in turn sell to cocoa processing companies. Rosenthal & Hawkins 177-178; Dand 102. Because of that long, multilayered supply chain, identifying the origin of particular beans would be extremely difficult for either the distributor or the processor, much less a regulator.

The Engel amendment passed the House, but it was not introduced in the Senate. 148 Cong. Rec. at 370 (statement of Sen. Harkin). As an alternative to a labeling program, Representative Engel and the amendment's lead Senate proponent, Senator Tom Harkin, opted instead to pursue a comprehensive approach marshalling the resources and cooperation of the chocolate industry, the United States Government, and the governments of West African countries to end child labor.

The foundation for that approach was laid in 2001 with the announcement of the Harkin-Engel Protocol, which sets forth specific steps to eliminate the worst forms of child labor in the cocoa sectors of Ghana and Cote d'Ivoire. Those steps include (1) making a public statement of need and plan of action; (2) establishing a multi-sectorial advisory group with responsibility for investigating labor practices in West Africa; (3) issuing a joint statement on child labor witnessed by the International Labour Organization (ILO), an agency of the

United Nations; (4) agreeing to a memorandum of cooperation binding major stakeholders to exchange information and cooperate to enforce internationally agreed standards to eliminate the worst forms of child labor; (5) establishing a joint foundation to oversee and sustain efforts to eliminate child labor; and (6) creating credible standards of public certification of cocoa free of the worst forms of child labor. 148 Cong. Rec. at 371-372 (statement of Sen. Harkin) (setting out the text of the Protocol).

The Protocol represents one of the first instances of an industry agreeing to self-regulation on an international human-rights issue. It recognizes that eliminating abusive labor practices in cocoa farming "is possible only through partnership among the major stakeholders: governments, global industry, * * * cocoa producers, organized labor, non-governmental organizations, and consumers." 148 Cong. Rec. at 371 (statement of Sen. Harkin). Reflecting that commitment to collaboration, the Protocol was signed by eight of the world's largest chocolate companies and, as witnesses, by representatives of the ILO and various labor and human-rights organizations, by the Ivorian ambassador to the United States, and by members of Congress, including Representative Engel and Senator Harkin. *Ibid.* On the Senate floor, Senator Harkin described the Protocol as "unprecedented" and a "breakthrough," and he praised the "child labor problem-solving process it has set in motion" as a "worthy model [for] other industries." *Ibid.*

3. The Department of Labor has implemented the Harkin-Engel Protocol

The cocoa industry completed the first five steps of the Protocol within the initial deadlines and made signif-

icant progress in addressing the causes of abusive child labor practices in Cote d'Ivoire and Ghana. See generally Congressional Research Service, *Child Labor in West African Cocoa Production: Issues and U.S. Policy* 13-15 (2005). Under the Protocol, the industry created the International Cocoa Initiative (ICI), a non-profit foundation that has been operating since 2002 to oversee and sustain efforts to eliminate the worst forms of child labor in the growing and processing of cocoa beans and their derivative products. International Cocoa Initiative, *About Us*, http://www.cocoainitiative.org/en/about-us/about-us. Since its founding, ICI has supported thousands of community-development projects in Cote d'Ivoire and Ghana, benefiting more than 1 million people and expanding access to education for 50,000 children. *Ibid.*

At the same time, however, child labor in West Africa remained a serious problem because of poverty, low global cocoa prices, limited access to educational opportunities, and political instability. Erika George, *Incorporating Rights: Child Labor in African Agriculture and the Challenge of Changing Practices in the Cocoa Industry*, 21 U.C. Davis J. Int'l L. & Pol'y 59, 63-64 (2014). In 2002, for example, a civil war broke out in Cote d'Ivoire, splitting the country in two. Bureau of Democracy, Human Rights, and Labor, U.S. Department of State, *2006 Country Reports on Human Rights Practices: Côte d'Ivoire* (Mar. 6, 2007). The civil war further compounded the challenge of addressing child labor and contributed to delayed implementation of the Harkin-Engel Protocol's sixth goal—an industry-wide certification system.

The political branches have repeatedly reaffirmed their commitment to the Harkin-Engel Protocol as a framework for accountability and action to address child labor in the West African cocoa sectors. In 2006, recognizing the continued importance of the Protocol, the Department of Labor contracted with Tulane University to oversee its implementation. See School of Public Health and Tropical Medicine, Tulane University, *Final Report: 2013/14 Survey Research on Child Labor In West African Cocoa Growing Areas* 5 n.1 (2015). In 2008, Congress established the Consultative Group to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products. Food, Conservation, and Energy Act of 2008, § 3205, Pub. L. No. 110-246, 122 Stat. 1838. The Group developed—and the Department of Agriculture adopted—a set of recommendations for importers to follow in production, processing, and distribution. *Consultative Group to Eliminate the Use of Child Labor and Forced Labor in Imported Agricultural Products*, 76 Fed. Reg. 20,305 (Apr. 12, 2011). The guidelines emphasized the importance of coordination and communication among all stakeholders, including suppliers, workers, traders, middlemen, and civil-society groups. *Ibid.* They recommended that companies "engage with governments, international organizations, and/or local communities to promote the provision of social safety nets that prevent child and forced labor and provide services to victims and persons at risk." *Id.* at 20,307. The cocoa and chocolate industry has adopted those guidelines in coordination with governments and public partners.

Then, in 2010, the Ghanaian and Ivorian governments, the Department of Labor, and the NCA signed a Declaration of Joint Action to Support the Implementation of

the Harkin-Engel Protocol. U.S. Department of Labor, *Declaration of Joint Action to Support Implementation of the Harkin-Engel Protocol* (Sept. 13, 2010), http://tinyurl.com/GhanaDeclaration. Senator Harkin, Representative Engel, and the ILO signed the Declaration as witnesses. The Declaration reaffirmed the signatories' commitment to the Protocol and to an accompanying "Framework of Action" to further implement it. U.S. Department of Labor, *Framework of Action to Support Implementation of the Harkin-Engel Protocol*, http://tinyurl.com/CocoaFramework (Framework).

The Framework set 2020 as the target year to reduce the worst forms of child labor in the cocoa sector in Cote d'Ivoire and Ghana by 70%. Framework 1. To achieve that goal, the Framework identified five areas in which signatories would support new or expanded initiatives: (1) removal of children from the worst forms of child labor and provision of remediation services; (2) prevention of the worst forms of child labor through increased access to schooling and training; (3) promotion of sustainable livelihoods for cocoa-growing households; (4) establishment of community-based labor monitoring systems; and (5) continuation of nationally representative child labor surveys. *Ibid.* Echoing the Protocol's emphasis on public-private partnerships, the Framework identifies a variety of "key stakeholders," including producer governments, the international chocolate and cocoa industry, and civil-society organizations. *Id.* at 2. Both industry groups and the Department of Labor made financial commitments to support the Framework. *Id.* at 2-3. Recognizing the importance of coordination among stakeholders, the signatories also agreed to create the Child Labor Cocoa Coordinating Group to ensure that

projects are coordinated and reflect community needs. *Id.* at 6-7.

4. The industry has made significant progress in eradicating child labor

Since the Framework was established in 2010, the Department of Labor has observed "significant advancement" by Cote d'Ivoire towards its goal of reducing the worst forms of child labor by 70% within 10 years. Bureau of International Labor Affairs, U.S. Department of Labor, *Côte d'Ivoire: 2014 Findings on the Worst Forms of Child Labor*, http://www.dol.gov/ilab/reports/child-labor/cote_divoire.htm; see also Bureau of International Labor Affairs, U.S. Department of Labor, *Ghana: 2014 Findings on the Worst Forms of Child Labor*, http://www.dol.gov/ilab/reports/child-labor/ghana.htm (finding "moderate advancement" in Ghana). Both the Department of Labor and the industry have exceeded their financial commitments under the Declaration; in the past five years, the industry has committed more than $10 million toward Framework activities. See Bureau of International Labor Affairs, U.S. Department of Labor, *Financial Commitments Under the Declaration*, http://www.dol.gov/ilab/issues/child-labor/cocoa/funding.htm. For example, individual companies have funded projects to build schools, train teachers, and strengthen the capacity of local governments to combat the worst forms of child labor. See *ibid.* (providing examples of such initiatives). More broadly, companies have invested in developing energy, water, and communications infrastructure in cocoa-growing communities. *Ibid.* In addition, the International Cocoa Initiative's Sustainable Tree Crops Program has reached 76,000 farm families, teaching

them how to improve their crop yields, gain information on HIV/AIDS and malaria prevention, and understand the appropriate role of children on the farm. *Cocoa Farming* 22.

WCF and its member companies and partners have also invested hundreds of millions of dollars in cocoa sustainability, working to provide farmers with the skills they need to operate safer and more productive farms and to improve the communities in which they live. With its CocoaAction initiative, begun in 2014, the WCF has embarked on an ambitious, far-reaching program to promote cocoa sustainability and strengthen communities through coordination and meaningful partnerships among governments, cocoa farmers, and the cocoa industry. See World Cocoa Foundation, *CocoaAction Progress Report* (Mar. 2015), http://tinyurl.com/CocoaAction. In addition to directly supporting improved labor practices, CocoaAction has also provided training in modern agricultural techniques, such as soil management and the appropriate use of fertilizer. *Ibid.* By improving farming sustainability and promoting economic development, these and other investments are helping to eliminate the conditions that contribute to the use of child labor.

B. The decision below will undermine efforts to combat human-rights abuses

1. The court of appeals' expansive decision will invite ATS litigation

The decision below creates a broad and unprecedented standard of liability for aiding and abetting violations of international law. Both the Second Circuit and the Fourth Circuit have held that "the *mens rea* standard

for aiding and abetting liability in ATS actions is purpose rather than knowledge alone." *Presbyterian Church of Sudan* v. *Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009), cert. denied, 562 U.S. 946 (2010); accord *Aziz* v. *Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011) ("[F]or liability to attach under the ATS for aiding and abetting a violation of international law, a defendant must provide substantial assistance with the purpose of facilitating the alleged violation."). The court of appeals purported not to resolve that issue in this case, stating that "we need not decide whether a purpose or knowledge standard applies" because "the plaintiffs' allegations satisfy the more stringent purpose standard." Pet. App. 18a. As the dissenting judges recognized, however, the standard the court actually applied cannot be reconciled with that of the Second and Fourth Circuits. *Id.* at 37a (Rawlinson, J., concurring in part and dissenting in part) ("The majority seeks to distinguish *Aziz* and *Talisman*, but no principled distinction can be made."); *id.* at 242a (Bea, J., dissenting from the denial of rehearing en banc) ("[T]he panel majority's claim to have adopted the Second and Fourth Circuit's analysis is simply incorrect.").

The court of appeals found evidence of purpose in respondents' allegations "that a myopic focus on profit over human welfare drove the defendants to act with the purpose of obtaining the cheapest cocoa possible, even if it meant facilitating child slavery." Pet. App. 21a. Such a conclusory allegation—essentially, that a desire to purchase a commodity cheaply shows a purpose to facilitate violations of international law that might lower the cost of the commodity—is not sufficient to survive a motion to dismiss under the standard prescribed in *Ash-*

croft v. *Iqbal*, 556 U.S. 662 (2009). Similar allegations could be made in the case of almost any transaction involving a party that may have engaged in violations of international law. Indeed, as petitioners explain (Pet. 17-18), similar allegations were made in *Aziz* and *Talisman Energy*. In holding such allegations to be sufficient here, the court of appeals effectively did away with the purpose requirement.

The court of appeals' decision will have immediate and significant effects. Potential ATS defendants can take little comfort from the fact that the details of the court's extraterritoriality test—which the court itself characterized as "amorphous"—remain to be articulated on remand. Pet. App. 27a. For one thing, the court made clear that even the attenuated connection between the events at issue in this case and the United States might well be sufficient for liability. *Ibid.* ("[W]e are unable to conclude that amendment would be futile."). For another, even ATS lawsuits that are ultimately unsuccessful can impose heavy burdens on defendants. Defense costs can be especially high in ATS lawsuits, owing to the complexity of the issues and the need to obtain discovery from foreign sources. Given the nature of the allegations involved, an ATS lawsuit can inflict serious reputational harm on defendants, even if the case is ultimately determined to lack merit. And such litigation can take years to resolve. See, *e.g.*, *Doe* v. *Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005) (resolving ATS case initially filed nine years earlier). Under the rule applied by the court of appeals, ATS cases will be impossible to dispose of at the pleading stage as long as the plaintiff can allege that abusive labor practices occur in a foreign country from which a defendant imports commodities. Those

cases will continue to make effective vehicles for extracting settlements from corporate defendants. 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) (characterizing ATS lawsuit as a "vehicle to coerce a settlement"), aff'd for lack of quorum, 553 U.S. 1028 (2008).

The decision below will have nationwide effects because it will make the Ninth Circuit a uniquely attractive forum for litigants wishing to sue corporations based on human-rights abuses that allegedly occur upstream in their supply chains. The court of appeals' holding that a corporation can be a defendant in an ATS case contributes to another circuit conflict, see Pet. 34-36, and establishing personal jurisdiction and venue in a district within the Ninth Circuit poses little obstacle in cases where the defendant is a large United States corporation. Nearly all such corporations have sufficient contacts with California or another State within the Ninth Circuit. 28 U.S.C. 1391(d) (for purposes of venue, a corporate defendant is deemed to reside in any district in a State in which its contacts are sufficient to subject it to personal jurisdiction); see, *e.g.*, *Wiwa* v. *Royal Dutch Petroleum Co.*, 226 F.3d 88, 94-99 (2d Cir. 2000) (affirming district court's ruling that corporations were subject to personal jurisdiction in New York), cert. denied, 532 U.S. 941 (2001); *Genocide Victims of Krajina* v. *L-3 Servs., Inc.*, 804 F. Supp. 2d 814, 819-822 (N.D. Ill. 2011) (finding personal jurisdiction in Illinois in ATS case).

2. The decision below punishes companies for trying to eliminate abusive labor practices

The prospect of ATS litigation will discourage companies such as amici's members from doing business in any country with a checkered human-rights record, a category that unfortunately includes much of the developing world. As the government has previously explained, the threat of ATS actions against corporations operating abroad creates "uncertainty for those operating in countries where abuses might occur," and thus has "a deterrent effect on the free flow of trade and investment." Gov't Br. at 20, *American Isuzu Motors, Inc.* v. *Ntsebeza*, 553 U.S. 1028 (2008) (No. 07-919). For that reason, as Judge Bea recognized, the expansive rule of liability announced by the court of appeals effectively "allows a single plaintiff's civil action to effect an embargo of trade with foreign nations." Pet. App. 234a-235a (Bea, J., dissenting from the denial of rehearing en banc); see *Talisman Energy*, 582 F.3d at 264 ("[I]f ATS liability could be established by knowledge of * * * abuses coupled only with such commercial activities as resource development, the statute would operate as a vehicle for private parties to impose embargos or international sanctions through civil actions in United States courts.").

Discouraging commercial engagement in the developing world is bad enough, but the decision below is even more harmful because it punishes companies for their efforts to eliminate abusive labor practices. In other words, the court of appeals has "infer[ed] *pro-slavery* purpose from *antislavery* activity." Pet. App. 242a n.11 (Bea, J., dissenting from the denial of rehearing en banc).

For example, the court of appeals deemed petitioners' "lobbying efforts" in support of the Harkin-Engel Protocol to be evidence of an improper purpose of "guarantee[ing] the continued use of * * * child slaves." Pet. App. 20a. Even setting aside the significant First Amendment problems with relying on efforts to petition the government as a basis for imposing liability (see Pet. 19 n.3), that reasoning fundamentally misunderstands the role of the Protocol as a step toward the elimination of the worst forms of child labor. What Senator Harkin viewed as a "breakthrough" and a "worthy model that is transferable to other industries," 148 Cong. Rec. at 371, and what both the Department of Labor and the Ivorian government have committed their resources to implementing, the court of appeals apparently views as a form of misconduct that should be suppressed.

Similarly, the court of appeals emphasized petitioners' purported "control over the Ivory Coast cocoa market" as somehow "support[ing] the allegation that the defendants acted with the purpose to facilitate slavery." Pet. App. 19a. As evidence of "control," the court noted that petitioners "offer both financial assistance and technical farming assistance designed to support cocoa agriculture," including "training in growing techniques, fermentation techniques, farm maintenance, and *appropriate labor practices*." *Id.* at 4a (emphasis added). In other words, under the court of appeals' test, efforts to promote sustainable, responsible farming—and to discourage abusive labor practices—will make companies more, not less, vulnerable to lawsuits. Those efforts, of course, are exactly what the industry promised in the 2010 Framework of Action, with the full support of the Department of Labor and the Ghanaian and Ivorian gov-

ernments. See Framework 3-4. By punishing cocoa purchasers for their undeniable efforts to stop abusive labor practices, the decision below will discourage other industries from pursuing similar programs.

3. Discouraging engagement with developing countries will hamper efforts to promote human rights

Because it discourages trade and engagement with developing countries, the decision below will harm the people of those nations. Free trade and private investment by the United States has been a major factor in facilitating economic growth in developing nations, including in sub-Saharan Africa. See *U.S.-Africa Trade Relations: Creating a Platform for Economic Growth: Joint Hearing Before the H. Comm. on Energy and Commerce and the H. Comm. on Foreign Affairs*, 111th Cong. 4-9 (2009) (statement of Florizelle B. Liser, Ass't U.S. Trade Rep. for Africa). Economic growth in turn promotes the development of stable and democratic political institutions and respect for human rights. Conversely, by cutting off a critical source of income, boycotts may exacerbate the conditions that lead to abusive labor practices in the first place. See, *e.g.*, Kaushik Basu, *Compacts, Conventions, and Codes: Initiatives for Higher International Labor Standards*, 34 Cornell Int'l L.J. 487, 494 (2001) ("[P]roduct boycott[s] * * * drive bad practices, such as the use of child labor, from the export sector of developing countries to the indigenous sectors where conditions are often worse.").

The cocoa industry provides a model for constructive engagement by Western companies in the developing world. For 14 years, the political branches have sought to curb the worst forms of child labor in West African

cocoa farming through coordination, cooperation, and engagement with all stakeholders, including the industry, the Ivorian and Ghanaian governments, the ILO, nongovernmental organizations, and local communities. The government and industry have invested millions of dollars and devoted time and energy to crafting an engagement policy premised on the idea that improving living standards and providing assistance in responsible, sustainable agricultural techniques are the best ways to eliminate abusive labor practices.

That policy could be unraveled—and similar efforts in other industries could be stymied—by an effective judge-made embargo on West African–sourced chocolate and by a rule that singles out for punishment those companies that attempt to train their suppliers in "appropriate labor practices." Pet. App. 4a. The court of appeals' expansion of ATS liability thus has "potential implications for the foreign relations of the United States" that "should make courts particularly wary." *Sosa* v. *Alvarez-Machain*, 542 U.S. 692, 727 (2004). This Court's intervention is urgently needed before the unfortunate implications of that decision are felt in the developing world.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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