

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

**BRIEF OF SMALL AND MID-SIZE COCOA AND
CHOCOLATE COMPANIES AS *AMICI CURIAE*
IN SUPPORT OF RESPONDENTS**

CHARITY RYERSON

COUNSEL OF RECORD

ALICIA BRUDNEY

CORPORATE ACCOUNTABILITY LAB

6214 N. GLENWOOD AVENUE

CHICAGO, IL 60660

(773) 346-5545

CHARITY@CORPACCOUNTABILITYLAB.ORG

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INTEREST OF *AMICI CURIAE*¹

Amici curiae are eighteen cocoa bean wholesalers and chocolate companies that source slave-free cocoa beans. Together, these companies have many decades of experience working in the chocolate sector.

UNCOMMON CACAO is a wholesaler of cocoa beans and a certified Benefit Corporation based in Berkeley, California. It utilizes a Transparent Trade model to source high quality cocoa for bean to bar chocolate makers. It currently sources from smallholder farmers across nine countries in Latin America and Africa and supplies cocoa to over 250 bean to bar makers globally. Uncommon's purpose is to build authentic Transparent Trade relationships across the cocoa supply chain to create long-term stability and success for all.

THEO CHOCOLATE is a Seattle-based company that has been making high-quality chocolate from scratch—from cocoa bean to chocolate bar—since 2006. Over the past fifteen years, Theo Chocolate has sourced beans from farms in ten countries in Central America, South America, and Africa. By sourcing organic and fair trade certified cocoa beans from farmers in the Democratic Republic of Congo and Peru, Theo invites

¹ This brief is filed with the consent of all parties. Respondents filed with the Court letters providing blanket consent. Petitioners Nestlé USA, Inc. also filed with the Court letters providing blanket consent. Cargill, Inc. provided written consent. No counsel for any party authored this brief in whole or in part, nor did any party or other person make a monetary contribution to the brief.

everyone to discover how they make this world better through chocolate.

MERIDIAN CACAO is a specialty cocoa importer based in Portland, Oregon. Meridian strives to foster prosperous farming communities by providing quality-driven farmers and farm groups with meaningful, direct market access. Meridian believes in transparency in all aspects of the supply chain. It partners with farmers and farm groups who not only foster best practices environmentally and socially, but who also redefine those principles. Meridian sources from the Dominican Republic, Ecuador, Fiji, India, Madagascar, Peru, Sierra Leone, Tanzania, Trinidad and Tobago, and Vietnam.

ALTER ECO has been sourcing organic cocoa beans from fair trade cooperatives of farmers in Bolivia, Peru, Ecuador, and the Dominican Republic since its inception in 2005. Alter Eco has established transparent, long-term, and direct partnerships with cocoa growers, paying them a fair price and following fair trade principles that include respect for human dignity and labor. Alter Eco is currently working with Ecuadorian farmers to implement a new environmentally friendly way to grow cocoa called dynamic agroforestry. This method will provide additional income from diverse crops for the cocoa farmers and strengthen their food sovereignty.

GOODNOW FARMS CHOCOLATE is a single-origin chocolate producer that has won fifty national and international awards since launching in 2016. Its cocoa beans are sourced primarily from Latin America, before being processed into single-origin bars. Goodnow Farms visits each farm from which it sources, in part to ensure producers and farmers are engaged in fair

and equitable labor practices. The company also invests in communities and infrastructure to improve cocoa quality, allowing farmers to receive higher prices. Goodnow Farms negotiates prices directly with farmers at origin and typically pays between two and four times the commodity cocoa price.

ASKINOSIE CHOCOLATE is a Missouri-based small-batch, bean to bar chocolate company. Askinosie has pioneered direct trade and profit-sharing with cocoa farmers in Tanzania, Ecuador, and the Philippines. With seventeen employees, Askinosie has provided over a million school lunches to malnourished children in Tanzania and the Philippines, without any donations. Its Chocolate University program engages children in the community, inspiring in them a belief that business can be a force for good in the world.

MARAÑÓN CHOCOLATE is a U.S.-based wholesaler that supplies chocolate makers in twenty-four countries. Marañón exclusively sources Pure Nacional cocoa beans from four hundred farmers in northern Peru through its Peruvian sister company, Marañón Cacao, and a long-term partnership with the cocoa grower's cooperative in Peru's Marañón Canyon. Marañón Chocolate is dedicated to improving cocoa farmers' lives through fair and equitable for-profit trade and to saving the heirloom fine flavor Pure Nacional variety of cocoa through direct trade and above market pricing.

KOKOA KAMILI is a Tanzanian-based privately-owned company that sources cocoa from over 4,000 smallholder farmers in the Kilombero Valley, where its operations are based. Kokoa Kamili believes in the power of using business to effect sustainable economic development. By producing a high-quality

cocoa bean for sale to the premium market, Kokoa Kamili is able to pay their farmer partners far above the market price for cocoa beans. Kokoa Kamili beans are used by chocolate makers in over 30 countries.

ENLIVEN INTERNATIONAL is a Minnesota-based company established to create a sustainable model that fosters mutual benefit for small shareholder farmers of cocoa in Nicaragua and artisan chocolate makers. Enliven leverages profits from the wholesale sale of cocoa to invest in social projects selected by the community of farmers for the benefit of the local region. Enliven focuses its efforts on ensuring that the individuals involved in growing and processing the cocoa have as much opportunity to benefit from that investment as the other parties in the supply chain.

DARK FOREST CHOCOLATE is a bean to bar chocolate maker located in Lancaster, New York. Dark Forest's business model is based on the premise that consumers want to know the origin of their food. Dark Forest buys only from suppliers that provide supply chain transparency and verification, such as Uncommon Cacao and Buena Nota Imports.

DWAAR CHOCOLATE is a woman-owned chocolate company located in the Metro Detroit area, with origins in India. Dwaar Chocolate has a simple philosophy: produce quality chocolate without compromising on human and resource values. As a company, Dwaar Chocolate believes that an appreciation of the raw product is as important as the delicious chocolate product. Dwaar Chocolate sources directly and works with suppliers who work directly with farmers.

FIREFLY CHOCOLATE specializes in bean to cup ceremonial drinking chocolate. Firefly sources organic cocoa grown by partners in Belize, Colombia, Ecuador, Guatemala, and Tanzania. Firefly transforms the organic cocoa beans into 100% ceremonial cocoa discs without sweetener at its bean to bar factory in Sonoma County, California. Firefly believes that cocoa is about relationship and provides online education for customers to learn about the cocoa supply chain and growing practices.

INDI CHOCOLATE is a Seattle-based and woman-owned bean to bar chocolate maker. indi chocolate supports transparency in the cocoa supply chain and sources cocoa through direct trade, with occasional purchases from wholesalers that source slave-free cocoa. indi chocolate cares deeply about cocoa farm workers as well as about the social, economic, and environmental sustainability of the cocoa it sources. indi chocolate works with Slave-Free Chocolate and the Campaign for Sustainable Chocolate to educate consumers about making more sustainable chocolate choices.

ISLAND SHARKS CHOCOLATE is a Hawaii-based chocolate company that primarily sources Hawaiian-grown cocoa. Island Sharks Chocolate wants to create a thriving Hawaiian-based cocoa sector that can compete in the U.S. market. It is dedicated to producing delicious chocolate and growing the Hawaiian cocoa sector in a way that is fair and equitable for all stakeholders.

RIVER SEA CHOCOLATES is a bean to bar chocolate company based in the Washington, D.C. area. River Sea aims to create a buyer relationship that is mutually beneficial for all parties. Social and en-

vironmental impacts shape every aspect of its products and supply chain, from the beans to the wrapper. Partnering with small-scale cultivars who use sustainable farming methods, River Sea promotes a more equitable value chain in the Amazon Rainforest and the Caribbean.

XOCOLATL SMALL BATCH CHOCOLATE is an Atlanta-based chocolate manufacturer and retailer that focuses on introducing customers to chocolate made of high-quality, flavorful cocoa sourced transparently and produced sustainably. Founded in 2013, Xocolatl sources all its cocoa beans either directly from farmers and farmer cooperatives or through social enterprises which work directly with producers and share their financials transparently. Xocolatl sources from Tanzania, Uganda, Peru, Nicaragua, and Costa Rica.

ALOHA FEELS was formed in 2017 in Hawaii and aims to highlight the value and work of the farmers behind chocolate. Aloha Feels grows its own cocoa in Hawaii and buys cocoa from other Hawaiian farms. The company's goal is to provide education and opportunities to farmers, to grow an interest in the cocoa industry, and to present the farmers' work and value to buyers. Aloha Feels donates 10% of its revenue to organizations that work to end slavery in the cocoa industry.

SWEET IMPACT CHOCOLATES is a Wisconsin-based company that began with the simple belief that chocolate should not be the cause of suffering in children. Sweet Impact Chocolates uses only chocolate that comes from suppliers who use no forced or child labor. The company provides information on the current state of human rights violations within the cocoa industry and cares for the environment by using

creative options for crafting and packaging its products. Sweet Impact Chocolate donates 10% of sales to NGOs that work with women and children who are most at risk of trafficking and exploitation.

Amici have a direct interest in the case because they are at a competitive disadvantage to Petitioners due to Petitioners' use of cocoa produced with forced child labor. Amici pay higher prices for the cocoa they purchase, reflecting the actual cost of production, and they invest in robust transparency and due diligence to ensure compliance with international human rights law and standards. These costs are internalized and passed on to consumers, making it difficult for them to compete in the market with companies that source cheap cocoa produced with forced child labor. The Ninth Circuit's decision helps to level the playing field by incentivizing all companies to play by the same rules and to incur similar production costs, consistent with using only legal forms of labor. If the Ninth Circuit's decision is overturned, amici will be at a further disadvantage to multinational chocolate companies like Petitioners.



SUMMARY OF ARGUMENT

Amici, as slave-free cocoa and chocolate companies, are at a competitive disadvantage to companies that source cheap cocoa produced with forced child labor. The higher production costs associated with compliance with international human rights norms require amici to sell their chocolate at higher prices. Petitioners'

forced labor-produced cocoa undercuts slave-free chocolate companies.

The Ninth Circuit's decision creates a level playing field for all companies, including those, like amici, that source slave-free cocoa. Petitioners have even recognized that a system in which companies can source cocoa produced with forced labor creates an uneven playing field and have advocated for more equitable laws in other contexts.

While Petitioners suggest that child trafficking in their supply chains is beyond their control, *see* Nestlé Br. 33, amici demonstrate this is not the case. To ensure that their supply chains are free of forced child labor, slave-free cocoa bean and chocolate companies employ several proven strategies to reduce supply chain risks. These include transparency down to the farm level, paying above Farm Gate and conventional market prices for cocoa, conducting due diligence through farmer relationships, and sourcing from low-risk environments.

The Harkin-Engel Protocol has not reduced child labor in West Africa. Two decades after the Harkin-Engel Protocol was signed, children continue to be trafficked into Côte d'Ivoire and subjected to forced labor on cocoa farms that produce cocoa for Petitioners and other multinational companies. Peter Whoriskey & Rachel Siegel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), <https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/>. As recently as 2018, 30,000 forced laborers were reported in Côte d'Ivoire and Ghana, an area smaller than Texas. Elke de Buhr & Elise Gordon, Tulane Univ. & Walk Free Found., *Bitter Sweets: Prevalence of Forced Labour & Child*

Labour in the Cocoa Sectors of Cote d'Ivoire & Ghana 10 (2018), available at https://cocoainitiative.org/wp-content/uploads/2018/10/Cocoa-Report_181004_V15-FNL_digital.pdf.

The Ninth Circuit's decision does not undermine the Harkin-Engel Protocol, but rather complements it. The political branches intended the Harkin-Engel Protocol to be one of many tools to fight child labor in the West African cocoa industry—not to shield an entire industry that had known human rights abuses from liability for an indefinite period of time. Since passing the Harkin-Engel Protocol, Congress has passed statutes that directly address forced labor. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), 18 U.S.C. §§ 1589, 1595, 1596; Trade Facilitation and Trade Enforcement Act of 2015, 19 U.S.C. §§ 1307. These statutes, as well as the Alien Tort Statute (ATS), are additional and complementary to the Harkin-Engel Protocol, and create legal consequences for importing forced labor-produced goods.

Finally, the Ninth Circuit's decision will not deter sustainable Foreign Direct Investment (FDI). While foreign investment is a key element of development for many countries, a rights-based approach is necessary to ensure that FDI has a long-term positive impact for the populations of developing nations, including marginalized workers and farmers. FDI that leads to human trafficking and forced child labor fails to improve living conditions for affected communities.



ARGUMENT

I. **AMICI ARE AT A COMPETITIVE DISADVANTAGE TO COMPANIES THAT SOURCE COCOA PRODUCED WITH FORCED AND TRAFFICKED CHILD LABOR.**

A. **Slave-Free Cocoa and Chocolate Companies Like Amici Cannot Compete with Petitioners Because Amici Have Higher Production Costs.**

Petitioners are concerned that the Ninth Circuit’s decision would “place U.S. firms at a competitive disadvantage compared to companies in countries without an ATS analogue.” Nestlé Br. 33. But eliminating corporate and aiding and abetting liability under the ATS would put other U.S. cocoa and chocolate companies—those that only source slave-free cocoa—at a competitive disadvantage to companies like Petitioners. Until all cocoa and chocolate companies are incentivized to comply with international human rights norms, companies that source cocoa produced with forced child labor will have an unfair advantage over companies like amici that do not violate the law.

The low prices that industry players like Cargill and Nestlé pay for cocoa lead to numerous abuses within supply chains, from deforestation to forced child labor. *See infra* Part III. Each October, the Ivorian government sets the Farm Gate price—the guaranteed price that cocoa farmers receive for their cocoa annually.² *Oomes et al., supra*, at 42, 97. While

² Other cocoa-growing countries, including Ghana, Nigeria, Cameroon, and Indonesia, also set Farm Gate prices. *See generally* Nienke Oomes et al., *Market Concentration and Price*

the government sets the Farm Gate price as a legal minimum. Companies can (and many do) pay more.

A 2016 report by True Price and IDH calculated the amount that cocoa farmers would need to receive if companies complied with social and environmental norms and those costs were incorporated into the consumer price. At the time, the price of cocoa beans in Côte d’Ivoire was €1.35 (\$1.59 USD) per kilogram.³ IDH & True Price, *The True Price of Cocoa from Ivory Coast 3* (2016), available at https://issuu.com/idhsustainabletradeinitiative/docs/tp_cocoa_7.2__complete__web. The researchers determined that the external costs amounted to €5.75 (\$6.79 USD) per kilogram, for a total “true price” of €7.10 (\$8.38 USD) per kilogram, or four times the Farm Gate price of cocoa in Côte d’Ivoire in 2016. *Id.* The vast majority of this price gap was attributed to underpayment of workers and under-earning of family workers, deforestation and land degradation, and reliance on child labor and forced child labor. *Id.*

By externalizing their costs, Petitioners benefit financially from buying cocoa that is produced with

Formation in the Global Cocoa Value Chain 42, 97 (2016), available at <https://www.kit.nl/wp-content/uploads/2020/02/Price-formation-Market-Concentration-and-Price-Formation-in-the-Global-Cocoa-Value-Chain.pdf>.

³ Both Côte d’Ivoire and Ghana raised the Farm Gate price—the price the government sets each year—for the 2020/21 cocoa season by 28%. See *UPDATE 1-Ghana Raises 2021/21 Cocoa Farmgate Price by 28%*, REUTERS (Sept. 24, 2020, 12:22 PM), <https://www.reuters.com/article/cocoa-ghana/update-1-ghana-raises-2020-21-cocoa-farmgate-price-by-28-idUSL5N2GL5J1>. However, this price increase will not cover the true price of production.

forced labor. Companies that comply with international human rights norms face unfair competition from these companies, as they have higher production costs from paying higher prices for cocoa, establishing transparency and traceability for the beans they buy, and implementing effective due diligence systems—actions that together ensure that their supply chains are slave-free. Since higher production costs require companies to sell their chocolate at higher prices, cheaper cocoa produced with forced labor distorts the market and undercuts amici’s ability to compete.

B. The Ninth Circuit’s Decision Creates a Level Playing Field for All Companies.

Corporate liability for egregious human rights violations incentivizes companies to implement supply chain transparency and legitimate due diligence programs. Liability under the ATS means that bad actors can be held accountable for violating human rights—and that they cannot undercut the market by sourcing cheap cocoa produced with forced child labor.

Amici have invested time, money, and effort to establish transparent supply chains and create effective due diligence structures. Amici’s efforts sharply contrast with the many ineffective programs in this sector that have failed to have any measurable impact. Liability for companies that fail to ensure legal production of goods functions as a counterweight to the “race to the bottom” that has characterized the cocoa trade.

The ATS fills an important gap, deterring unscrupulous businesses from profiting from illegal labor, and benefiting those companies that protect the rights of supply chain workers and farmers.

C. Big Chocolate Companies, Including Nestlé and Cargill, Have Called for a More Level Playing Field.

Outside the United States, Nestlé and Cargill have joined other chocolate companies in calling for more regulation to create a level playing field. Nestlé supports human rights due diligence regulations for companies in the European Union (EU) while it decries the ATS as too burdensome in the U.S. Peter Whoriskey, *Chocolate Companies Ask for a Taste of Government Regulation*, WASH. POST (Dec. 31, 2019, 1:05 PM), <https://www.washingtonpost.com/business/2019/12/31/chocolate-companies-ask-taste-government-regulation/>. Similarly, Cargill is on record supporting the Dutch Child Labor Due Diligence Act. Tony's Chocolonely et al., *Een wet zorgplicht kinderarbeid, pakt kinderarbeid serieus aan*, available at <https://tinyurl.com/y5mlp96g>.

Companies like Nestlé, Mars, Mondelez, and Barry Callebaut have argued in favor of such “due diligence” legislation because it

is necessary in order to achieve sector-wide change; to create a level playing field and consistency for companies operating in the sector; to identify the actions necessary to remove unsustainable practices; and to hold all actors accountable for any failure to apply due diligence in their supply chain, consistent with international standards, to identify and address adverse impacts on human rights and the environment. It would benefit producer countries by reinforcing their efforts to improve governance and establish a sustainable cocoa sector for the long term.

Barry Callebaut et al., *Joint Position Paper on the EU's Policy and Regulatory Approach to Cocoa 2* (Dec. 2, 2019), available at <https://www.voicenetwork.eu/wp-content/uploads/2019/12/Joint-position-paper-on-the-EUs-policy-and-regulatory-approach-to-cocoa.pdf>.

Chocolate companies, including Nestlé, have recognized that a system in which companies can source cocoa produced with forced labor creates loopholes for those companies that do not wish to play by the rules. In their view, an EU due diligence law “would eliminate free riders and close loopholes, ensuring a level playing field for all companies.” *Id.* Petitioners admit that regulation of extraterritorial corporate actions is not the specter they make it out to be; in fact, they concede that it creates a more level playing field for all companies in the industry. Amici agree that there is currently an unfair playing field. Like the EU law Nestlé supports, legal liability under domestic statutes is essential to creating a level playing field for companies doing business in the United States.

II. AMICI’S SUPPLY CHAIN PRACTICES DEMONSTRATE THAT SUSTAINABLE SOURCING IS POSSIBLE FOR ANY COMPANY, EVEN IN COUNTRIES WITH SIGNIFICANT HUMAN RIGHTS RISK FACTORS.

Amici’s success as slave-free chocolate companies demonstrates that sourcing cocoa not produced with forced child labor is possible, even if less profitable than Petitioners’ business models. Petitioners have argued that liability under the ATS will mean that “any company doing business from the United States with Ivorian cocoa farmers is subject to an ATS suit

because every such company will make financial decisions regarding and engage in some supervision of their Ivorian counterparties.” Nestlé Br. 33. Petitioners assume that every company sourcing cocoa from countries with poor human rights enforcement sources cocoa tainted by forced child labor. This is false. There are hundreds of chocolate companies, including amici, that source cocoa that is not produced even in part with forced child labor. Amici ensure slave-free production despite sourcing primarily from countries where compliance with international human rights norms is poor.

Like Petitioners, amici have made commitments to ensure their supply chains are free of forced child labor. Unlike Petitioners, amici use effective business models to ensure compliance with these commitments.

Corporate interventions to ensure compliance with international law in global supply chains should be risk-based, “meaning that the actions companies take to address harm should be commensurate with, and prioritized in accordance with, its severity and likelihood.” Int’l Labour Org. et al., *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains* 59 (2019), available at <http://mneguide.lines.oecd.org/Ending-child-labour-forced-labour-and-human-trafficking-in-global-supply-chains.pdf>. Following that principle, amici employ several proven strategies to reduce supply chain risks, with modifications based on the level of human rights risk in a particular region. While it may be necessary to employ all of these strategies in the West African context because of the significantly higher risk, two or three may achieve the same impact in a lower-risk environment.

A. Transparency

Supply chain transparency is both a bedrock of responsible business conduct and an emerging legal norm. *See, e.g.*, Modern Slavery Act 2015, c. 30 (UK); Modern Slavery Act 2018 (Cth) (Austl.); California Transparency in Supply Chains Act of 2010, Cal. Civ. Code § 1714.43 (Deering 2020). The mainstream business model for cocoa production involves opaque and untraceable supply chains, with cocoa beans aggregated at every link along the chain. This makes it impossible to connect a particular product with a particular farm. Farm-level transparency has been a core tenant of most amici's businesses since their inception, allowing consumers and regulators to link specific farms to particular buyers.

For example, amicus Uncommon Cacao, a wholesaler, uses a "Transparent Trade" model. Uncommon Cacao, *Transparent Trade*, <https://www.uncommoncacao.com/transparenttrade> (last visited Oct. 18, 2020). This is defined as verifiable, published pricing for all transactions related to each cocoa purchase, including the price paid to the farmer at the Farm Gate. *Id.* Uncommon publicly identifies every supply chain partner down to the farm level and provides the average price paid to each farm each year. *Id.* Uncommon shows that transparency is scalable: it provides this level of transparency for over 5,400 smallholder farmers in nine countries: Belize, Bolivia, Colombia, Dominican Republic, Ecuador, Ghana, Guatemala, Haiti, and Uganda. Uncommon Cacao, *Our Uncommon Partners*, <https://www.uncommoncacao.com/view-all> (last visited Oct. 18, 2020). As a result of this transparency, companies seeking to avoid supply chain abuses, including amici Firefly Chocolate and

Dark Forest Chocolate, have relied on intermediaries like Uncommon.⁴

B. Paying a Higher Price

The low price paid by Petitioners is a key driver of abuses in the sector. *See* discussion *supra* Section I.A. Recognizing that poverty elevates the risk of serious abuses like forced child labor, amici pay above market prices to farmers, regardless of the prices set by cocoa marketing boards, and many publish what they pay.

For example, in 2019, exporters working with Uncommon Cacao were paid an average of 111% over the New York commodity market price, and farmers selling to those exporters for Uncommon Cacao earned an average of 81% over the average published Farm Gate price for the 2019–2020 season in Ghana and Côte d’Ivoire. Similarly, Marañón Chocolate pays cocoa farmers an average of 42% above any other sales option they have; Askinosie pays an average of 57% above Farm Gate prices, Askinosie Chocolate, *Transparency Report 3* (2019), *available at* <https://askinosie.com/media/wysiwyg/Transparency-Report-110119.pdf>; Theo Chocolate paid 44% above the conventional market price and 14% above the Fairtrade price for its cocoa, Theo Chocolate, *Impact Report 7* (2019), *available at* <https://theochocolate.com/impact-report>; Xocolatl and Firefly pay double the average

⁴ Some companies have publicly available information about their sourcing practices. However, other companies have not made this information public. If not cited, the information in this section comes directly from the company.

commodity price; and Goodnow Farms pays two to four times the commodity price.

By paying farmers a price that reflects the cost of production, farmers are not forced to rely on illegal forms of labor to survive.

C. Conducting Due Diligence Through Direct Farmer Relationships

To ensure that their supply chains are free of exploitative labor practices, many amici develop direct relationships with every farmer from which they buy, just as one might with business partners in other industries. These relationships provide opportunities for education, technical support, auditing, and developing relationships of mutual accountability.

For example, Askinosie trades directly with farmers in Ecuador, Tanzania, and the Philippines; Xocolatl sources all its cocoa beans either directly from farmers and farmer cooperatives or through social enterprises which work directly with producers and share their financials transparently; and Marañón Chocolate trades directly with a farmer's cooperative in northern Peru's Marañón Canyon.

By purchasing directly or through trusted intermediaries, due diligence can be built into the business relationship from the outset, and buyers can identify and address problems as they arise. These relationships also offer opportunities for profit-and power-sharing, which support long-term economic stability and sustainable development.

Askinosie, for example, engages in profit-sharing and financial transparency with every farm from which it sources. Askinosie visits farmers in each

country of origin at least once a year and enters written contracts with farmers to ensure a stable business relationship. Askinosie also works with farmers on post-harvest, organic, intercropping and fermentation practices. Askinosie Chocolate, *Direct Trade*, <https://askinosie.com/learn/direct-trade> (last visited Oct. 18, 2020).

Similarly, Marañon Chocolate has handed post-harvest processing of the beans to the farmers producing its cocoa, and helped to finance a purpose-built cocoa processing facility, owned, managed, and staffed by the grower's cooperative. This type of intervention creates lasting economic stability for farmers, reducing overall human rights risks.

D. Low-Risk Environments

Finally, while amici believe in the importance of foreign investment, an alternate option is sourcing from locations where the human rights risks are more limited. This is a particularly attractive option for companies that lack the capacity to conduct the level of due diligence required in higher-risk environments, or for companies looking to support cocoa production in locations nearer to chocolate consumers.

Amicus Island Sharks Chocolate buys primarily Hawaiian-grown cocoa, at \$13–14 per pound, directly from a local fermenter. Over 75% of Island Sharks' chocolate is produced with Hawaiian-based cocoa, although it supplements it with cocoa from a sustainable importer, amicus Meridian Cacao. Similarly, amicus Aloha Feels sells chocolate bars that primarily contain the company's beans grown in Hawaii, as well as beans from surrounding farms.

These examples suggest that slave-free sourcing is possible where there is transparency, meaningful due diligence, and when companies pay higher prices for cocoa. Amici have gone to great lengths to ensure compliance with international law and the U.N. Guiding Principles on Business and Human Rights, and they have constructed their business models around sustainable and legal sourcing.

III. THE HARKIN-ENGEL PROTOCOL HAS FAILED TO DECREASE THE INCIDENCE OF CHILD LABOR AND FORCED CHILD LABOR IN THE WEST AFRICAN COCOA SECTOR.

A. Twenty Years After the Harkin-Engel Protocol Was Passed, Child Labor Has Increased in the West African Cocoa Industry.

The Harkin-Engel Protocol is a voluntary agreement signed by key chocolate and cocoa industry representatives and chocolate companies to combat child labor in cocoa growing communities in Ghana and Côte d'Ivoire. *See* Chocolate Mfrs. Ass'n, *Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products In a Manner that Complies with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor* (2001), available at https://cocoainitiative.org/wp-content/uploads/2016/10/Harkin_Engel_Protocol.pdf [hereinafter Harkin-Engel Protocol]. The road to this agreement was far from simple. In the late 1990s and early 2000s, a campaign to pressure companies to stop using child labor and to pay adult workers a living wage culminated in an attempt by the House of Representatives to introduce legislation that would ban cocoa harvested with child

labor from being imported into the United States. See Tiaji Salaam-Blyther et al., *Child Labor in West African Cocoa Production: Issues and U.S. Policy 1* (2005), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/RL32990.pdf>.

In response, major cocoa companies and the Chocolate Manufacturers Association, a trade group that represented U.S. chocolate producers, hired two former Senate majority leaders to lobby lawmakers against the bill. See Kemi Mustapha, *Taste of Child Labor Not So Sweet: A Critique of Regulatory Approaches to Combating Child Labor Abuses by the U.S. Chocolate Industry*, 87 WASH. U. L. REV. 1163, 1167 (2010). Eventually, representatives from the cocoa industry, three members of Congress, the ILO, and other private groups negotiated the Harkin-Engel Protocol. See Harkin-Engel Protocol, *supra*.

The original Harkin-Engel Protocol consisted of a Key Action Plan and Steps designed to eliminate the worst forms of child labor in the cocoa industry by July 2005. *Id.* at 2. These steps included releasing an action plan to end child labor in the cocoa industry, forming multi-sectoral advisory groups, and creating a “binding memorandum of cooperation among the major stakeholders that establishes a joint program of research, information exchange, and action.” *Id.*

Unfortunately, despite fulfilling some of these steps, the July 2005 deadline came and went with little to no decrease in the use of child labor in the cocoa industry. See Salaam-Blyther, *supra*, at 1. That same year, cocoa industry leaders admitted that the goals would not be “fully met” by the 2005 deadline, but assured Senator Harkin and Representative Engel that they were “committed to achieving a

certification system . . . within three years.” *Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel and the Chocolate/Cocoa Industry on Efforts to Address the Worst Forms of Child Labor in Cocoa Growing* 1 (July 1, 2005), available at <http://www.cacao.gouv.ci/commun/documents/jointstatementSenateurTomHarkin.pdf>.

Then, in 2008, cocoa industry leaders again extended their self-imposed deadline by two years. *Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel and the Chocolate and Cocoa Industry on the Implementation of the Harkin-Engel Protocol*, CSR WIRE (June 16, 2008), <https://tinyurl.com/y6qr4dbh>. In 2010, the chocolate industry again delayed the implementation date, this time until 2020, and also changed the goal to reducing child labor by only 70%, instead of eradicating it. *Framework of Action to Support Implementation of the Harkin-Engel Protocol* 1 (Sept. 13, 2010), available at https://cocoainitiative.org/wp-content/uploads/2016/10/Cocoa_Framework_of_Action_9-12-10_Final-1-1.pdf. In July 2018, the cocoa industry admitted it was unable to make either the 2020 or the newer 2025 goal. Tim McCoy, *2018 Child Labor Cocoa Coordinating Group 8th Annual Meeting Remarks*, WORLD COCOA FOUND. (Aug. 21, 2018), <https://www.worldcocoafoundation.org/blog/2018-child-labor-cocoa-coordinating-group-8th-annual-meeting-remarks/>.

The Harkin-Engel Protocol has not reduced the number of child laborers in the West African cocoa sector. The most recent Department of Labor report, released in October 2020, found the following: “Comparison of trends over time indicate that despite the efforts made by the governments, Industry, and other

key stakeholders in combating child labor and hazardous child labor during the past 10 years, the child labor and hazardous child labor prevalence rates did not go down.” NORC, *NORC Final Report: Assessing Progress in Reducing Child Labor in Cocoa Production in Cocoa Growing Areas of Côte d’Ivoire and Ghana* 12 (Oct. 2020), available at https://www.norc.org/PDFs/Cocoa%20Report/NORC%202020%20Cocoa%20Report_English.pdf [hereinafter NORC Report].

In fact, the researchers found that 1.56 million children are still engaged in child labor in the West African cocoa sector (790,000 children in Côte d’Ivoire and 770,000 in Ghana). *Id.* at 10. The prevalence of child labor in agricultural households in the Ivorian and Ghanaian cocoa sectors actually rose 14 percentage points over ten years, from 31% in 2008/09 to 45% in 2018/19, and the prevalence rate of hazardous child labor increased 13%, from 30% in 2008/09 to 43% in 2018/19. *Id.* at 12. Over 90% of children working in the cocoa sector are involved in at least one form of hazardous child labor. *Id.* at 75.

Notably, as the prevalence of child labor in the cocoa sector in Ghana and Côte d’Ivoire was increasing, *the prevalence of child labor in agricultural households outside the cocoa sector decreased from 29% to 20%*. *Id.* at 15. These numbers demonstrate that voluntary initiatives like the Harkin-Engel Protocol have failed to address the use of child labor in the West African cocoa industry.

B. Despite the Harkin-Engel Protocol, Children Continue to Be Trafficked into Côte d'Ivoire and Subjected to Forced Labor on Cocoa Farms.

In addition to endemic child labor, there is clear documentation of trafficked and forced child labor in the Ivorian cocoa sector. The Department of Labor's 2020 List of Goods Produced by Child Labor or Forced Labor includes cocoa from Côte d'Ivoire, listing it as produced with both child labor and forced labor. Dep't of Labor, *2020 List of Goods Produced by Child Labor or Forced Labor* 21, available at https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/2020_TVPRP_List_Online_Final.pdf.

Numerous reports have documented the pervasive and ongoing use of forced and trafficked child labor in harvesting and processing cocoa in Côte d'Ivoire. The U.S. Department of Labor and U.S. State Department have both reported on the trafficking of children and forced child labor in the Ivorian cocoa sector. *See, e.g.*, U.S. Dep't of Labor, Bureau of Int'l Labor Affairs, *2018 Findings on the Worst Forms of Child Labor: Côte d'Ivoire*, available at https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2018/Cote%20d%27Ivoire.pdf; U.S. Dep't of State, Bureau of Democracy, Human Rights, & Labor, *Cote d'Ivoire 2018 Human Rights Report*, available at <https://ci.usembassy.gov/wp-content/uploads/sites/29/Cote-dIvoire-HRR-2018-English.pdf>. Additionally, the Child Labor Cocoa Coordinating Group Annual Report provides clear evidence of forced child labor in the cocoa industry. *2018 CLCCG Annual Report*, CLCCG, available at <https://cocoainitiative.org/wp-content/uploads/2019/10/CLCCG2018AnnualReport.pdf>.

Civil society groups, academics, and news reports have also reported and documented such abuses for years. *See, e.g.*, de Buhr & Gordon, *supra*; IDH & True Price, *supra*; Antonie Fountain & Friedel Huetz-Adams, *Cocoa Barometer 2018*, at 3, available at <https://www.voicenetwork.eu/wp-content/uploads/2019/07/2018-Cocoa-Barometer.pdf>; Tim Adams, *From Bean to Bar in Ivory Coast, a Country Built on Cocoa*, THE GUARDIAN (Feb. 24, 2019), <https://www.theguardian.com/global-development/2019/feb/24/ivory-coast-cocoa-farmers-fairtrade-fortnight-women-farmers-trade-justice>. While the number of trafficked and forced child laborers in Côte d'Ivoire remains unknown, it is clear that it pervades the entire cocoa supply chain.

The details of the trafficking phenomenon have been documented recently by international journalists. In January 2020, *Bloomberg* reported that a raid in Côte d'Ivoire had rescued 137 children from human traffickers. Leanne de Bassompierre, *Ivory Coast Rescues 137 Children in Raid on Traffickers*, BLOOMBERG (Jan. 13, 2020, 12:19 PM), <https://www.bloomberg.com/news/articles/2020-01-13/top-cocoa-grower-rescues-137-children-in-raid-on-traffickers>. In 2019, the *Washington Post* reported that children from Mali and Burkina Faso are still trafficked into Côte d'Ivoire to work on farms. *See* Whoriskey & Siegel, *supra*. The article also provided evidence of internal trafficking of children and reported that children between the ages of ten and eighteen are lured by promises of money or other gifts to travel to work on cocoa farms. *Id.* These children often perform the worst forms of child labor, using machetes and dangerous pesticides, often without pay. *Id.*; *see also* Corp. Accountability Lab & IR Advocates, Petition to

U.S. Custom & Border Protection to exclude cocoa produced in Cote D'Ivoire manufactured with forced or trafficked child labor under 19 C.F.R. § 12.42 (Feb. 12, 2020), *available at* <https://tinyurl.com/rjxw6mk> [hereinafter Corp. Accountability Lab & IRAdvocates CBP Petition].

While there is clear evidence of trafficking and forced child labor, people are often hesitant to speak about these issues, making it difficult to collect data on the prevalence of child labor and forced child labor. Both children and adults often deny that child labor exists in any form and often claim that the children working on a farm are all family members. *See* Corp. Accountability Lab & IRAdvocates CBP Petition, *supra*, at 5. Children are often scared to speak and in some cases are prohibited from doing so. A 2016 report by Mondelēz and Embode explained: “It was felt that children were well aware of the sensitivities around talking about working on cocoa farms. In one community, the focus group discussion was observed (and intervened upon) by a group of adults, potentially making it difficult for children to express themselves openly.” *See, e.g.*, Aarti Kapoor, Embode, *Children at the Heart: Assessment of Child Labour and Child Slavery in Côte d’Ivoire’s Cocoa Sector and Recommendations to Mondelēz International* 10 (2016), https://www.cocoalife.org/~/_media/CocoaLife/Files/pdf/Library/FULL_REPORT_Cote_Ivoire_Mondelez_Embode_ChildrenattheHeart.pdf. Despite these challenges, Petitioners are aware that forced child labor remains an issue in Côte d’Ivoire and taints much of the cocoa sold by Nestlé USA and Cargill.

Despite the difficulties in gathering data on forced laborers, it has been estimated that there are

at least 30,000 forced laborers in West Africa, de Buhr & Gordon, *supra*, at 28–29, including 16,000 children who are being forced to work on cocoa farms by people who are not their parents—and the real number is probably much higher. Whoriskey & Siegel, *supra*; Verité, *Assessment of Forced Labor Risk in the Cocoa Sector of Côte d’Ivoire* 5 (2019), available at <https://www.verite.org/wp-content/uploads/2019/02/Verite-Report-Forced-Labor-in-Cocoa-in-CDI.pdf> (“Given the hidden nature of much human trafficking and forced labor, it is also possible that levels may be significantly higher within isolated pockets in the sector.”). While amici curiae WCF, et al. suggests that 16,000 forced child laborers is an insignificant number, WCF et al. Amicus Br. 7, the combined land mass of Cote d’Ivoire and Ghana is smaller than Texas. If it were discovered that 16,000 children were enslaved in Texas, it would constitute a human rights crisis. Even one trafficked child is too many.

Nestlé admitted as recently as 2019 that the low number of forced labor cases that it has identified on its own farms “does not mean that forced labor does not exist—it may be that we are not good enough at identifying it.” Nestlé Cocoa Plan, *Tackling Child Labor: 2019 Report* 24, available at <https://www.nestle.com/sites/default/files/2019-12/nestle-tackling-child-labor-report-2019-en.pdf>. Additionally, reports from the Fair Labor Association (FLA) on Nestlé’s supply chain found evidence of forced child labor as recently as 2017. *See e.g.*, Fair Labor Ass’n, *Independent External Monitoring of Nestlé’s Cocoa Supply Chain in Côte d’Ivoire: 2016* (2017), available at https://www.fairlabor.org/sites/default/files/documents/reports/october_2017_nestle_executive_summary.pdf.

C. The Harkin-Engel Protocol Is a Voluntary Initiative That Does Not Preclude Legal Liability for Child Trafficking and Forced Child Labor Under the Alien Tort Statute.

The Ninth Circuit’s decision does not undermine the Harkin-Engel Protocol, but rather complements it. Petitioners and amici curiae suggest that the Harkin-Engel Protocol establishes a ceiling for activities to combat forced child labor, rather than a floor. *See, e.g.*, WCF et al. Amicus Br. 5–6 (“the political branches *already* have given considerable thought to the best means for advancing our nation’s interest in combatting the use of the worst forms of child labor on overseas cocoa farms [in the Harkin-Engel Protocol], and it is not through litigation”); *see also* Cargill Br. 39–40; Nestlé Br. 32–33. The idea that a voluntary protocol could completely shield an entire industry from liability for egregious human rights abuses, and for an indefinite period of time, is absurd and concerning to companies, like amici, who seek to ensure slave-free cocoa production. This complete protection of the cocoa industry would undermine Congress’s intent in passing other statutes that create liability for such harms. Moreover, this position would eliminate liability for all victims of corporate human rights abuse overseas, not just child trafficking victims in the cocoa sector—including in industries that have no regulation, voluntary or otherwise.

Petitioners are correct that “[t]he political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” *Jesner v. Arab Bank, PLC*, 138 S.Ct. 1386, 1403 (2018). Congress and the executive branch supported the Harkin-Engel Protocol as one of a variety of tools used

to fight forced child labor and child labor in the West African cocoa industry. However, as a voluntary initiative, the Harkin-Engel Protocol is non-binding. It is not a statute, rule, or guideline. It is a memorandum, signed by the Chocolate Manufacturers' Association and the World Cocoa Foundation and witnessed by the International Labor Organization, three members of Congress, and other trade groups. Harkin-Engel Protocol, *supra*. It is simply a promise by chocolate companies—that they have failed to keep—to eradicate child labor in the cocoa sector.

As a voluntary initiative, the Protocol does not preclude anyone—including the U.S. government, the Ivorian and Ghanaian governments, or civil society—from also working to eradicate child labor. In fact, the political branches have taken additional steps by passing two statutes since 2001 that explicitly address incidences of forced labor that occur outside the United States: the Trafficking Victims Protection Reauthorization Act and Section 307 of the Tariff Act of 1930. 18 U.S.C. §§ 1589, 1595, 1596; 19 U.S.C. §§ 1307.

In 2008, three years after the initial deadline for the Harkin-Engel Protocol had passed, Congress passed the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (TVPRA), which broadened the definition of forced labor, 18 U.S.C. § 1589, expanded jurisdiction extraterritorially, § 1596, and created a civil cause of action against anyone who “knowingly benefits,” including financially, from forced labor, § 1595. Contrary to Petitioners’ suggestion, Congress has demonstrated a clear commitment to ensuring that those who benefit from forced labor will

be held accountable and that the voluntary Harkin-Engel Protocol is not the sole governmental response.

Additionally, in 2016 the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) went into effect. Pub. L. 114-125, 130 Stat. 122 (2016). Under Section 1307, Customs and Border Protection (CBP) has the power to stop the importation of all goods produced with forced labor, including forced child labor.⁵ 19 U.S.C. § 1307. Nowhere in either statute did Congress carve out an exception for the West African cocoa industry. With no explicit carve-out, it can be assumed that Congress intended for these statutes to apply to incidences of forced labor such as those in the West African cocoa sector.

Rather than be content with the Harkin-Engel Protocol, the political branches have taken steps to pass statutes that regulate extraterritorial occurrences of forced labor in other, complementary ways. Petitioners' argument that there should be no corporate liability for human rights violations in the cocoa sector as a result of the Harkin-Engel Protocol would apply with equal force to the application of Section 1307 and the TVPRA to the cocoa industry. Congress did not write the TVPRA or the TFTEA with special carve-outs for one industry, and it is absurd to suggest that such an exception should be inferred based upon the existence of a voluntary protocol, especially one that has failed.

⁵ In February 2020, a petition was submitted to Customs and Border Protection that provided evidence of ongoing forced child labor in the Ivorian cocoa industry. *See* Corp. Accountability Lab & IRAdvocates CBP Petition, *supra*.

IV. THE NINTH CIRCUIT'S DECISION WILL NOT DETER FOREIGN DIRECT INVESTMENT (FDI) THAT RESPECTS HUMAN RIGHTS AND LEADS TO DEVELOPMENT.

The Ninth Circuit's decision will not discourage corporations from investing in developing countries, including in countries with poor human rights records. Amici agree with the plurality in *Jesner v. Arab Bank, PLC* that “active corporate investment” in developing countries “contributes to the economic development that so often is an essential foundation for human rights.” 138 S.Ct. 1386, 1406 (2018) (plurality opinion). At the same time, amici believe that investment should lift individuals out of poverty, which can happen only if supply chains are monitored to ensure that no children are working under conditions of forced labor.

While FDI can lead to economic development and human rights advancement, it is not investment of capital alone that makes a positive impact—it is also operating in rights-respecting ways. FDI that fails to respect human rights norms will not improve living conditions, but will exacerbate poverty and inequalities, resulting in abuses like trafficking and forced child labor, as in the case at bar. *See* Coal. for Human Rights in Dev., *Development and Investment in Africa* 1 (2017), available at https://rightsindevelopment.org/wp-content/uploads/2017/12/Development_and_Investment_in_Africa_OCT2017.pdf. Petitioners have reaped large profits from their investments in Côte d'Ivoire, but those profits have come at the expense of children subjected to forced labor.

Amici WCF, et al. takes this one step further, arguing that the Ninth Circuit's decision would even *discourage* companies from engaging in activities to improve farmer incomes, raise awareness about child

labor, support access to quality education, and empower women. WCF et al. Amicus Br. 19–20. To the contrary, meaningful interventions, such as those described above, *see supra* Section II.A, would reduce the incidence of child trafficking, thus reducing liability for companies engaged in those activities.

Amici are committed to sustainable and slave-free business models because they believe this is the only way that FDI can lead to development and improve human rights. Deterrents, like the possibility of liability for committing human rights abuses, help FDI deliver the net benefits that investors promise.



CONCLUSION

For these reasons, we respectfully request that the Court affirm the Ninth Circuit's decision and remand the case for further proceedings.

Respectfully submitted,

CHARITY RYERSON

COUNSEL OF RECORD

ALICIA BRUDNEY

CORPORATE ACCOUNTABILITY LAB

6214 N. GLENWOOD AVENUE

CHICAGO, IL 60660

(773) 346-5545

CHARITY.RYERSON@CORPACCOUNTABILITYLAB.ORG

COUNSEL FOR AMICI CURIAE

OCTOBER 21, 2020

APPENDIX

Amici consist of the following cocoa and chocolate companies:

Aloha Feels
Hakalau, HI

Alter Eco
San Francisco, CA

Askinosie Chocolate
Springfield, MO

Dark Forest Chocolate
Lancaster, NY

Dwaar Chocolate
West Bloomfield, MI

Enliven Cacao
Hugo, MN

Firefly Chocolate
Windsor, CA

Goodnow Farms Chocolate
Sudbury, MA

indi chocolate
Seattle, WA

Island Sharks Chocolate
Hilo, HI

Kokoa Kamili

Mbingu, Morogoro Region, Tanzania

Marañon Chocolate

Carson City, NV

Meridian Cacao

Portland, OR

River-Sea Chocolates

Chantilly, VA

Sweet Impact Chocolate

Kenosha, WI

Theo Chocolate

Seattle, WA

Uncommon Cacao

Berkeley, CA

Xocolatl Small Batch Chocolate

Atlanta, GA