No. 19-416

In The
Supreme Court of the United States

NESTLÉ USA, INC.,

Petitioner,

v.

JOHN DOE I, *et al.*,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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BRIEF OF THE GRANT & EISENHOFER ESG INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICUS CURIAE*

The Grant & Eisenhofer ESG Institute ("ESG Institute") is an independent and nonprofit organization dedicated to promoting global thought leadership and an advocacy group focused on legal considerations surrounding environmental, social and governance issues in institutional investing. The ESG Institute is governed by its Co-Directors, with the guidance of an Advisory Board consisting of prominent members of the corporate governance and investor rights community.[1] The ESG Institute has an interest in ensuring that corporations can be found liable for violations of customary international law under the Alien Tort Statute, 28 U.S.C. § 1350, for both public policy and investor protection reasons.

The Alien Tort Statute has become an important tool to protect against environmental, social and governance abuses committed by both individuals and corporations. In the cases at bar, Petitioners seek to shield domestic corporations from liability under the Alien Tort Statute. If this result is achieved, a valuable deterrent to corporate wrongdoing would be eviscerated, and investors in those companies would thereby be

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than *amicus curiae* made a monetary contribution to the preparation or submission of this brief. Counsel for the parties have consented to the filing of this brief. *See* Blanket Consent filed by Respondents, John Doe I, et al. (Aug. 26, 2020) (Docket No. 27); Blanket Consent filed by Petitioner, Nestlé USA, Inc. (Aug. 27, 2020) (Docket No. 28).

harmed. The ESG Institute submits this brief in support of Respondents, and on behalf of investors and investment managers committed to fostering ESG principles in investing. The ESG Institute supports international legal frameworks, including the Alien Tort Statute, to protect human rights and to preserve the environment.

INTRODUCTION AND SUMMARY OF ARGUMENT

During the past decade, and the past three years in particular, investor interest in responsible or sustainable investing has risen exponentially. These investment strategies premise investment decisions on a company's track record in metrics associated with good corporate citizenship. Now commonly referred to as the "ESG" investment strategy (standing for "environmental, social and governance"), investors who entrust their funds in socially responsible enterprises have experienced superior returns over those investors who choose methods that seek solely to maximize profits. Recent studies conclude that ESG investors fare better than those who invest in companies that sacrifice long-term gains for short-term profits, with no regard for the toll on the environment or human rights.

As the number of ESG-focused investors has risen dramatically, the type of information that investors find "material" has evolved, as evidenced by investor sell-offs following news of ESG transgressions, which results in significant investor losses. Thus, investors

have sold stock when they learn of companies flouting environmental or employee safety rules, for example, or of company cultures that permit rampant sexual harassment. Traditional investor protections such as the federal securities law regime have proven ineffective and unpredictable in helping these investors recover losses suffered at the hands of a company committing an ESG transgression.

Investors seeking to engage in ESG investing have an interest in ensuring that the Alien Tort Statute be fortified as a viable tool for holding domestic companies liable when they enable human rights abuses overseas. Potential Alien Tort Statute liability would incentivize companies to ensure that responsible and humane practices permeate all facets of their operations, and would thus remove some of the speculation surrounding investment decisions in light of current disclosure obligations. The threat of liability under the Alien Tort Statute would go far to ensure that companies take every measure possible to eradicate forced and child labor in their supply chains, thereby providing a safeguard to investors in all U.S. companies.

ARGUMENT

I. THE NUMBER OF ESG INVESTORS HAS GROWN EXPONENTIALLY IN RECENT YEARS

Investors who focus on ESG strategies seek to fund companies whose environmental, social and governance policies align with or further goals championed by those who promote the welfare of the environment and the betterment of humanity. A fundamental practice these investors employ is to fund companies that elevate their environmental, social and governance policies to the level usually reserved for traditional financial metrics like revenues, profits, and shareholder returns. The ESG umbrella includes a broad range of topics such as climate change, forced and child labor, workplace diversity, sexual harassment, employee welfare and product safety.

The concept of responsible investing is not new; rather it dates back at least fifty years. In 1971, the United States Court of Appeals for the District of Columbia addressed investor attempts to procure corporate disclosures concerning companies' efforts to address issues of the civil rights movement and their impacts on the environment.[2] The Natural Resources Defense Council ("NRDC") and the Project on Corporate Responsibility ("PCR")[3] had proposed a new SEC

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[2] *Nat. Res. Def. Council, Inc. v. Sec. & Exch. Comm'n*, 606 F.2d 1031, 1036 (D.C. Cir. 1979).

[3] The court described NRDC and the PCR as "organizations dedicated to inducing more responsive attitudes among American

rule that would require expanded corporate disclosures on these issues, which were becoming increasingly important to the populace.[4] Corporations opposed these additional disclosures; in fact "hundreds of corporations submitted comments opposing the disclosure proposals on the ground that the cost of gathering the required information would be inordinately high, that ***shareholders were not seriously interested in the information*** and that the benefits would be small."[5] Investors' perceived lack of interest in a company's record on social and environmental concerns was one reason the Court declined to impose robust disclosures concerning these topics.[6]

The landscape is far different today, as ESG investors pour staggeringly large amounts of funds into strategies focusing on ESG goals. Although reports of the exact amount of assets invested in ESG-oriented investments vary, the numbers are well in the trillions, with one report stating that "[t]he value of global assets applying environmental, social and governance data to drive investment decisions has almost doubled over four years, and more than tripled over eight years, to $40.5 trillion in 2020."[7] These figures are expected

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corporations towards the problems of environmental degradation and inequality of employment opportunity." *Id.* at 1036.

[4] *Id.* at 1039.

[5] *Id.* at 1038 (emphasis added).

[6] *Id.* at 1038-1040.

[7] Sophie Baker, *Global ESG-Data Driven Assets Hit $40.5 Trillion*, Pensions & Investments (July 2, 2020), https://www.pionline.com/esg/global-esg-data-driven-assets-hit-405-trillion; *see also* Sean Collins and Kristen Sullivan, *Advancing*

only to increase. Morgan Stanley's Institute for Sustainable Investing has reported that nearly all millennials – 95% – have a demonstrated interest in ESG investing.[8] Indeed, Morgan Stanley has opined that "ESG" will be "the defining acronym of the next decade."[9]

The global coronavirus pandemic has accelerated investors' drive towards ESG funds. According to the *Financial Times*, funds that "emphasize" ESG factors "have surged in popularity, as investors look to boost their returns and push companies to become better corporate citizens. As of July 30, 2020, ESG-themed EFTs had pulled in a record-setting $38 billion in new money for the year and topped $100 billion in total assets for the first time."[10]

Environmental, Social and Governance Investing, Deloitte (Feb. 20, 2020), https://www2.deloitte.com/content/dam/Deloitte/nl/Documents/risk/deloitte-nl-risk-deloitte-insights-advancing-esg-investing.pdf (citing $14.1 trillion of sustainable investing assets in Europe and $12 trillion in the United States).

[8] *Morgan Stanley Survey Finds Investor Enthusiasm for Sustainable Investing at an All-Time High*, Morgan Stanley (Sept. 12, 2019), https://www.morganstanley.com/press-releases/morgan-stanley-survey-finds-investor-enthusiasm-for-sustainable-.

[9] Pippa Stevens, *Move over 'FAANG,' the Next Decade of Investing will Be Defined by 'ESG,' says Morgan Stanley*, CNBC (Aug. 20, 2020), https://www.cnbc.com/2020/08/20/move-over-faang-the-next-decade-of-investing-will-be-defined-by-esg-says-morgan-stanley.html.

[10] Ben Hernandez, *Pandemic Catapults ESG into the Investing Spotlight*, ETF Trends (Sept. 17, 2020), https://www.etftrends.com/esg-channel/pandemic-catapults-esg-into-the-investing-spotlight/ (citing Billy Nauman, *ESG Surges as Investors Search for Better*

Companies recognize investors' concerns and interests, and some have announced broad-brush goals to adhere to ESG values. In 2019, the CEOs of more than 180 major companies shined a spotlight on ESG investing when they agreed that they would commit to "deliver value to all stakeholders." This group, called the "Business Roundtable," was chaired by Jamie Dimon, the CEO of JPMorgan Chase.[11] The members of the Business Roundtable issued a "Statement on the Purpose of a Corporation," and recognized that many constituencies play vital roles in the success of a corporation. Thus, they committed to:

- "Meet[] or exceed[] customer expectations";
- "Compensat[e] [employees] fairly and provid[e] important benefits. . . . [F]oster diversity and inclusion, dignity and respect";
- "Deal[] fairly and ethically with [their] suppliers," and "serv[e] as good partners to the other companies, large and small, that help [them] meet [their] missions";

Corporate Citizens, Financial Times (Sept. 13, 2020), https://www.ft.com/content/20f6c929-2fbf-47d5-973c-8c18607fc604).

[11] *Business Roundtable Redefined the Purpose of a Corporation to Promote 'An Economy That Serves All Americans'*, Business Roundtable (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans.

- "Support[ ] the communities in which [they] work. . . . [R]espect the people in [their] communities and protect the environment by embracing sustainable practices across [their] businesses"; and
- "Generat[e] long-term value for shareholders."[12]

In another high profile example, Larry Fink, Chairman and CEO of Blackrock, the world's largest investment firm with more than $7 trillion assets under management, published a letter in January 2019 stating that "[p]rofits are in no way inconsistent with purpose – in fact, profits and purpose are inextricably linked."[13] Fink observed that "[a]s wealth shifts and investing preferences change, environmental, social, and governance issues will be increasingly material to corporate valuations."[14]

ESG-minded investors are not only concerned with ensuring that their investment choices align with their ethical and moral codes, although that certainly

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[12] *Statement on the Purpose of a Corporation*, Business Roundtable, https://opportunity.businessroundtable.org/wp-content/uploads/2020/09/BRT-Statement-on-the-Purpose-of-a-Corporation-September-2020.pdf.

[13] Aisha I. Saad & Diane Strauss, *The New "Reasonable Investor" and Changing Frontiers of Materiality: Increasing Investor Reliance on ESG Disclosures and Implications for Securities Litigation*, 17:2 Berkeley Bus. L.J. 391, 407-408 (2020) (citing Larry Fink, Larry Fink's 2019 Letter To CEOs, Profit & Purpose, BLACKROCK (2019), https://www.blackrock.com/americas-offshore/2019-larry-fink-ceo-letter).

[14] *Id.*

can be one factor. Rather, ESG-focused investment strategies often achieve superior financial results for their investors. Many studies have shown that sustainable investing leads to higher returns. For example, one study, conducted by researchers at Harvard Business School and Northwestern University, reviewed the performance of 2,000 U.S. companies over 21 years, and concluded that companies that focused on improving their ESG metrics "significantly outperformed" those that did not.[15] In addition, as markets were tumbling during the early stages of the pandemic, the stock prices of companies that followed ESG guidelines declined less than those of their competitors.[16] Thus, from a pure profitability standpoint, investors often find that they do better when they focus on ESG-friendly investments.

There is no dispute that responsible and sustainable investment strategies, while initially relegated to the fringes and reserved for moral do-gooders, have become a mainstream approach for investors across the board who are seeking to maximize their returns and minimize harmful effects to the environment and to humanity. Protecting interests shared by ESG investors through mechanisms such as corporate Alien Tort Statute liability is a worthy goal.

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[15] George Serafeim, *Social-Impact Efforts That Create Real Value*, Harv. Bus. Rev. 98, No. 5 (Sept.-Oct. 2020) 38-48.

[16] *Id.*

II. INVESTORS SUFFER LOSSES FOLLOWING DISCLOSURE OF ESG TRANSGRESSIONS

A. Standards of Materiality Have Evolved

Under the U.S. securities law regime, issuers are required to disclose to potential investors information that is "material." This Court first defined materiality in *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976), holding that "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *See also Basic Inc. v. Levinson*, 485 U.S. 224, 233 (1998) (affirming that "materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information").

The concept of the "reasonable investor", while objective, necessarily changes and develops over time as investors place importance on different facets of a company's operations, results and conduct. As one commentator observed,

> The changing attributes of a reasonable investor usher in an expanded view of the type and content of disclosures that such investors deem material to their decisions to invest in, engage with, or divest from particular companies. If, as the securities doctrine maintains, material information is that which is important to a reasonable investor, then the observed trends, which depart from shareholder demographics and behavior of the past decades, suggest a corresponding need to change

> the scope of disclosures considered legally material.[17]

What a "reasonable investor" might find important in deciding whether to make an investment has evolved during the nearly ninety years since the federal securities disclosure regime has existed. Today, there is little question that investors are increasingly interested in learning a company's record on environmental, social and governance issues before they invest. But a lack of uniform standards has left them guessing. Attempting to alleviate investor frustration, major rating agencies have launched a host of ESG scorecards, including Thomson Reuters Corporate Responsibility Indices, Calvert Responsible Index Series, FTSE4Good Index Series, Dow Jones Sustainability Indices, MSCI ESG Indexes, and Morningstar Global Sustainability Index Family.[18] However, these are not uniform, and it is unclear what standards they impose on the investments they include. Thus, investors' choices are made without fulsome information on companies' ESG records, and they are blindsided when news of a company's ESG transgressions are publicized, often driving down the price of the stock. Potential Alien Tort Statute liability for the underlying offensive conduct would be one additional safeguard for investors.

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[17] Saad & Strauss, *supra* note 11, at 412.

[18] *Id.* at 406.

B. Investor Selloffs Frequently Follow Disclosures of ESG Transgressions

Investors lacking the information they consider important about ESG-related issues at the outset of an investment often learn the truth the hard way, after they have invested, when news of significant ESG-based transgressions is published. Because investors do care so much about their investments' ESG policies, such news often leads to massive sell-offs of stock, driving down the price and causing significant investor losses. There are several recent examples of this, spanning an array of ESG investment components.

To begin, investors seek to avoid companies that maim the environment. For example, in 2015, the U.S. Environmental Protection Agency discovered that nearly 500,000 diesel cars manufactured by Volkswagen were emitting up to 40 times more toxic fumes than regulations permit.[19] In September 2015, Volkswagen admitted that it had rigged its diesel emissions testing. By January 2016, the price of Volkswagen shares had declined by nearly one-third.[20] Likewise, BP, which had portrayed itself publicly as a responsible corporate citizen, watched its stock price plummet following the disastrous oil spill in 2010, particularly since BP had

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[19] Gwyn Topham, et al., *The Volkswagen Emissions Scandal Explained*, The Guardian (Sept. 23, 2015), https://www.theguardian.com/business/ng-interactive/2015/sep/23/volkswagen-emissions-scandal-explained-diesel-cars.

[20] *Volkswagen Faces Shareholder Claims over Emissions Scandal*, CNBC (Jan. 18, 2016), https://www.cnbc.com/2016/01/18/volkswagen-faces-shareholder-claims-over-emissions-scandal.html.

perpetuated a culture that "had consistently neglected worker safety and environmental standards," presenting a "dismal safety record."[21]

Companies that flout employee safety norms have also been punished by investors for their misconduct. Vale, a Brazilian iron ore manufacturing company, saw its stock price plummet when its disregard for worker safety resulted in tragedy. Its Fundão dam had collapsed in November 2015, and Vale publicly committed itself to improving measures designed to ensure its workers' safety. However, on January 25, 2019, another of its dams, located in Brumadinho, collapsed, causing the deaths of 300 mining workers. Investors reacted swiftly, as the price of Vale's ADRs dropped by 18% on the news.[22]

Furthermore, when allegations of sexual harassment (often considered a component of the "social" aspect of ESG investing) at the workplace became commonplace as part of the #metoo movement, several publicly traded companies were punished when it was revealed that their top executives had behaved inappropriately. For example, the stock price of Guess, Inc.

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[21] *Id.* at 984.

[22] Paula Laier, *Vale Stock Plunges After Brazil Disaster; $19 Billion in Market Value Lost*, Reuters (Jan. 28, 2019), https://uk.reuters.com/article/us-vale-sa-disaster-stocks-idUKKCN1PM1JP; Dom Phillips, *Brazil Dam Collapse: 10 Bodies Found and Hundreds Missing*, The Guardian (Jan. 26, 2019), https://www.theguardian.com/world/2019/jan/25/brazil-dam-collapse-news-latest-mining-disaster-brumadinho.

dropped by 18% on February 1, 2018, when Kate Upton came forward with allegations against Paul Marciano, the company's co-founder and former CEO.[23] A year later, when on January 28, 2019 Guess announced that Mr. Marciano would remain employed at the company as its "Chief Creative Officer," the stock price declined steeply.[24] In another prominent #metoo example, Wynn Resorts Ltd. watched its stock price plummet by 15% when the *Wall Street Journal* published an investigative piece detailing allegations of sexual harassment and other misconduct by Steve Wynn, the company's former chairman and CEO.[25]

Some courts have acknowledged that investors consider information concerning a company's ESG policies important to their investment decisions. In *In re Signet Jewelers Limited Securities Litigation*, 389 F. Supp. 3d 221, 227 (S.D.N.Y. 2019), the court sustained allegations of securities fraud stemming around a company's alleged gender discrimination, which drove down the price of its stock by 8.4%, holding that

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[23] Jackie Wattles and Chris Isidore, *Guess Stock Plummets After Kate Upton Accuses Exec of Harassment*, CNN Business (Feb. 1, 2018), https://money.cnn.com/2018/02/01/investing/guess-stock-kate-upton/index.html.

[24] Daphne Howland, *Paul Marciano Stays at Guess*, Retail Dive (Jan. 29, 2019), https://www.retaildive.com/news/paul-marciano-stays-at-guess/547090/.

[25] Alexandra Berzon, et al., *Dozens of People Recount Pattern of Sexual Misconduct by Las Vegas Mogul Steve Wynn*, The Wall Street Journal (Jan. 27, 2018), https://www.wsj.com/articles/dozens-of-people-recount-pattern-of-sexual-misconduct-by-las-vegas-mogul-steve-wynn-1516985953.

it misled investors by publicizing its Code of Conduct, which denounced the very behavior that was occurring. The court rejected defendants' arguments that the statements were immaterial "puffery."

Likewise, in *Edgar v. Anadarko Petroleum Corp.*, C.A. No. 17–1372, 2018 WL 3032573 (S.D. Tex. June 19, 2018), the court sustained allegations that Anadarko misled its investors by stating that it was instituting remediation efforts to improve the safety of its drilling operations, when in fact it had cut its budget and staff in light of falling oil prices. Thus, statements in its "Health, Safety and Environment Fact sheets," that the company was "work[ing] to ensure that all of our activities are conducted to meet or surpass applicable health, safety and environmental laws, regulations and international standards," were actionable under the federal securities laws. *Id.* at *4.

There is no serious debate that certain conduct (and related public statements) falling within the realm of ESG factors and considerations have become "material" to mainstream investors. But because of the materiality of that information, investors also face greater risk of loss when news of ESG transgressions surfaces. Corporate accountability through Alien Tort Statute liability, which would deter such transgressions, would go far to protect investors against the risk of loss.

C. Investors Are Also Harmed by Reputational Damages That Result from ESG Transgressions

Companies that commit ESG transgressions expose themselves to enormous risks of reputational damages, which can cause consumers to flee to other products, business partners to sever ties, and even top personnel to exit. In fact, they have admitted as much. The Hershey Company, which like Nestlé and Cargill, has also been accused of incorporating West African slave and child labor in its cocoa supply chain,[26] warns its investors:

> Our Company's reputation or brand image might be impacted as a result of issues or concerns relating to . . . human and workplace rights, and other environmental social or governance matters, which in turn could negatively impact our operating results. . . . [N]egative publicity related to our environmental, social or governance practices could . . . impact our reputation with customers, consumers, suppliers and vendors.[27]

Reputational damages resulting from ESG violations hurt companies' bottom lines, and indeed may be partially responsible for the investor sell-offs discussed

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[26] *Hershey Lawsuit (re child labour in Côte d'Ivoire)*, Business & Human Rights Resource Centre, June 18, 2020), https://www.business-humanrights.org/en/latest-news/hershey-lawsuit-re-child-labour-in-c%C3%B4te-divoire/.

[27] The Hershey Company, Annual Report (Form-10-K) (May 12, 2020).

above. Profitability sags, and share prices decline. Yet these risks to the reputation – and resulting stock sell-offs – have not sufficiently deterred companies such as Nestlé and Cargill from aiding and abetting human rights abuses overseas. Corporate accountability through the Alien Tort Statute would create a stronger incentive for companies to respect human rights abroad, which would save investors from the harm caused by reputational damages.

III. CORPORATE LIABILITY UNDER THE ALIEN TORT STATUTE WOULD BENEFIT INVESTORS

A. Voluntary Efforts to Enhance ESG Compliance Have Been Ineffective

Efforts at voluntary compliance with ESG goals which have no meaningful consequences have failed, proving the need for legal corporate accountability. Some commentators have observed that "[t]he failure to recognize corporate criminal liability for grave human rights violations limits corporate responsibility. Businesses argue that they are not bound by international criminal law that is aimed at individuals or international human rights law aimed at states."[28] Half-hearted corporate promises to "do better" to achieve environmental or social goals have been referred to as "whitewashing" and "greenwashing,"

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[28] Leigh A. Payne, Gabriel Pereira, *Corporate Complicity in International Human Rights Violations*, 12 Ann. Rev. Law Soc. Sci. 63 at 69 (2016).

alluding to the fact that they are meant to appease ESG-minded investors but do not actually require any compliance.[29] Thus, the "existing mechanisms," to encourage corporations to act responsibly, including voluntary standards promulgated by non-governmental organizations such as the United Nations, The International Labor Organization, the Organization for Economic Cooperation and Development, and the International Organization for Standardization, "lack effectiveness."[30]

The Harkin-Engel Protocol – which relates directly to the cocoa industry at issue in *Nestlé* – illustrates this point all too well. In 2001, the eight largest actors in the cocoa industry, including Nestlé, signed the protocol, promising to eliminate the "worst forms of child labor" and forced labor on West African cocoa farms.[31] The Protocol set milestone deadlines in 2005, 2008 and 2010 – all of which came and went with no discernible progress.[32] According to a 2015 U.S.

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[29] Bruce Watson, *The Troubling Evolution of Corporate Greenwashing*, The Guardian (Aug. 20, 2016, 10:00 am), https://www.theguardian.com/sustainable-business/2016/aug/20/greenwashing-environmentalism-lies-companies; *see also* Dan Pontefract, *Faking Corporate Social Responsibility Does Not Fool Employees*, Forbes (Sept. 24, 2016), https://www.forbes.com/sites/danpontefract/2016/09/24/faking-corporate-social-responsibility-does-not-fool-employees/#65bc6eea7994.

[30] Galit A. Sarfaty, *Human Rights Meets Securities Regulation*, 54 Va. J. Int'l L. 97, 100 (Symposium 2013).

[31] *The Harkin-Engel Protocol*, Slave Free Chocolate, http://www.slavefreechocolate.org/harkin-engel-protocol.

[32] *See Protocol for the Growing and Processing of Cocoa Beans and Their Derivative Products in a Manner that Complies*

Department of Labor Report, more than 2 million children still labor on West African cocoa farms under dangerous conditions.[33] Nestlé, Mars and Hershey are still unable to guarantee that their chocolate supply chains are devoid of child and slave labor.[34] In 2019, the *Washington Post* documented that these practices were ongoing, and reported that "in few industries, experts say, is the evidence of objectionable practices so clear, the industry's pledges to reform so ambitious and the breaching of those promises so obvious."[35] On October 19, 2020, the *Washington Post* reported that "child labor is on the rise" in the West African cocoa industry, and that more than one million children still labor on cocoa farms.[36] In fact, child labor has *increased* from 31 percent to 45 percent, during the 2008-2019 period.[37] Many blame the lack of incentives on the industry's failure to end the abuses: "We haven't eradicated child

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with ILO Convention 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labor, Chocolate Manufacturers Association (2001).

[33] *2015 Findings on the Worst Forms of Child Labor*, Bureau of International Labor Affairs (2015), https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2015/tda2015.pdf.

[34] Peter Whoriskey and Rachel Siegel, *Cocoa's Child Laborers*, Washington Post (June 5, 2019), https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/.

[35] *Id.*

[36] Peter Whoriskey, *U.S. report: Much of the world's chocolate supply relies on more than 1 million child workers*, Washington Post (Oct. 19, 2020), https://www.washingtonpost.com/business/2020/10/19/million-child-laborers-chocolate-supply/.

[37] *Id.*

labor because no one has been forced to. What has been the consequence . . . for not meeting the goals? How many fines did they face? How many prison sentences? None. There has been zero consequence."[38]

B. The U.S. Securities Laws Do Not Adequately Protect Investors from ESG Transgressions

ESG-minded investors currently cannot rely on the federal securities laws to hold companies accountable for misrepresentations relating to ESG-related conduct. Although, as noted in Section II.B., *supra*, some courts have found statements concerning a company's ethics or moral code of conduct to be actionable under the federal securities regime, there are significant hurdles to achieving recovery, and more often, investors have failed. For example, in *Bondali v. Yum! Brands, Inc.*, 620 F. App'x 483, 490 (6th Cir. 2015), the court dismissed claims that the defendant company had made false statements regarding risks to product safety even though its livestock products had tested positive for drug and antibiotic residues, and its food standards and safety protocols had proven ineffective. Similarly, in *Singh v. Cigna Corp.*, 918 F.3d 57, 63-64 (2d Cir. 2019), the court dismissed claims focused on breaches of the company's ethical code, holding that the related statements were mere "puffery."

Many investors have fared no better when seeking recourse for losses occurring after news that a

[38] *Id.*

company has harmed the environment. For example, in *In re Plains All Am. Pipeline, L.P. Sec. Litig.*, 307 F. Supp. 3d 583, 625 (S.D. Tex. 2018), an oil company could not be held liable under the federal securities laws for false statements concerning its inadequate response to a devastating oil spill. Finally, in *People v. Exxon Mobil Corp.*, 65 Misc.3d 1233(A) (N.Y. Sup. Dec. 10, 2019), a high profile case brought by New York's attorney general against Exxon under the Martin Act (New York's securities anti-fraud statute) following a full trial on the merits, the court found that Exxon did not mislead investors for statements concerning risks related to greenhouse gas emissions restrictions.

The above are just a handful of examples demonstrating the courts' reluctance to acknowledge the materiality of a company's ESG track record to investors. Investors, therefore, have limited avenues of recourse following news of a company's transgressions.

C. The Alien Tort Statute Would Enhance Corporate Accountability and Provide Benefits to ESG-Minded Investors

This Court recognized the importance of corporate accountability when, in 1909, it held that providing corporate "immunity from all punishment . . . would virtually take away the only means of effectually controlling the subject-matter and correcting the abuses

aimed at."[39] There is undeniably a link between corporate behavior and the incentives that the legal regime create for them. Faced with the potential for substantial corporate liability, companies would likely alter their conduct to ensure compliance with the laws. Thus, the possibility that companies could be held accountable under the Alien Tort Statute for aiding and abetting human rights abuses overseas would encourage them to take more decisive and effective steps to ensure that their supply chains are free from child and forced labor.

Tort law evolved under a theory of deterrence. In the case of the Alien Tort Statute and corporate accountability, this deterrent would help curb the temptation of companies to place short-term profits ahead of long-term sustainability and take advantage of weak legal systems in foreign countries. The threat of liability under the Alien Tort Statute would incentivize companies to place long-term sustainability ahead of short-term profits, and would weed out bad actors who might otherwise steer the corporation down a path of international criminal conduct. Shareholders would indisputably benefit from a company that is legally compliant. Conversely, foreclosing ATS liability would signal to corporations that it is acceptable to facilitate human rights abuses occurring overseas. Inevitably,

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[39] *New York Cent. & H.R.R. Co. v. United States*, 212 U.S. 481, 495-96 (1909).

their participation in this egregious conduct would surface, harming those who entrusted their funds to these companies.

CONCLUSION

Potential corporate liability under the Alien Tort Statute for human rights abuses, environmental harm, and other ESG transgressions committed abroad would encourage publicly-traded U.S. corporations to elevate their standards and adhere to ESG goals. Investors focused on ESG strategies, and indeed all investors, would benefit by knowing that a powerful deterrent remains in place to ensure that companies act responsibly and ethically. Thus, the ESG Institute urges this Court to affirm the decision of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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