BUILDING A RIGHTS-BASED ECONOMY: A CORPORATE ACCOUNTABILITY AGENDA

DECEMBER 2023

ICAR International Corporate Accountability Roundtable

ABOUT THE AUTHORS

ICAR International Corporate Accountability Roundtable

The International Corporate Accountability Roundtable (ICAR) is a civil society organization that believes in the need for an economy that respects the rights of all people, not just powerful corporations.

We harness the collective power of progressive organizations to push governments to create and enforce rules over corporations that promote human rights and reduce inequality.

Report Authors

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FOREWORD

At the International Corporate Accountability Roundtable (ICAR), we have a founding story.

We were created after a senior Congressional staffer asked a group of organizations, "What does the corporate accountability community want?" It seemed like a straightforward question, but it had no clear answer. Each group in the meeting knew what they wanted, and beyond those in the room, there were many organizations who cared about holding corporations accountable for human rights abuses. However, the varied advocacy efforts of the community had not yet come together to form a coherent and cohesive corporate accountability movement that could speak as to what it—as a collective—wanted. It was time to start building something bigger. This Agenda is an initial attempt to answer the two elements of our founding question. The first is the threshold question of who is the "corporate accountability community?" The second is what does our community want?

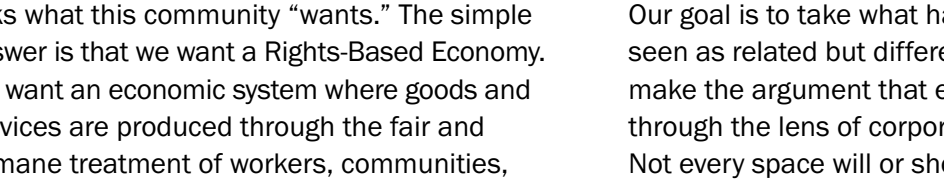
The term "corporate accountability" is used in the Business and Human Rights space as a descriptive term for those who favor robust and binding rules to hold corporations accountable for abuses as opposed to those who favor relying on voluntary standards set by businesses.

But at ICAR, we take the position that "corporate accountability" should be more inclusive than just a term of art in a subset of the human rights world. There are countless movements, organizations, and political figures who are seeking ways to hold corporations accountable for human rights, labor rights, and environmental abuses.

This is because nearly every progressive issue is—at least in part—a corporate accountability issue. Every organization pushing for some form of progressive change faces a set of corporate actors who are willing to spend time, resources, and political capital to maintain the status quo or push things even further in the other direction. Through this Agenda, we offer a vision for how we at ICAR view these sometimes disparate-seeming issues as inherently linked, and how we as a community should understand how successes and failures in one space can impact the ability to make progress on other issues. In short, we argue that the "corporate accountability community" should be conceived of as vast; a robust and powerful set of actors who share a common goal of holding companies accountable for abuses.

The second element of our founding question asks what this community "wants." The simple answer is that we want a Rights-Based Economy. We want an economic system where goods and services are produced through the fair and humane treatment of workers, communities, and the environment. This requires having a political system where corporations are not able to structure their own rules of the game—rules that allow them to gain outsized wealth by avoiding taxes, gaining monopoly power, or cozying up to decision makers, only to then use that power to further distort governmental decision-making. This outsized influence over public institutions allows companies to limit regulation on their activities, including rules that would hold them accountable for abuses. Further, we need to protect and strengthen the system of rights that allows people who want to push for this Rights-Based Economy to speak up without fear of being sued into silence or targeted for physical attack. While there are layers of complexity and nuance, at its core, it is a relatively simple, commonsense vision.

What we are attempting to do here is ambitious. Our goal is to take what had previously been seen as related but different areas of work and make the argument that everything can connect through the lens of corporate accountability. Not every space will or should view this as the primary framework through which to explain their work, but we are arguing that it is a way to conceive of a large community of organizations with a shared and interconnected agenda. We do not expect that we have gotten everything right in this first iteration. The Corporate Accountability Agenda can and should be a living document that adapts as circumstances change, and we commit to updating, refining, and improving this vision. But the heart of the Agenda will remain the same: We must work toward developing and advancing rules that bring us closer to a Rights-Based Economy, and we will only succeed if we do it together.



David McKean, Executive Director

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EXECUTIVE SUMMARY

Corporate power sits at the root of nearly every major human rights issue of our time.

Corporate abuses fuel income inequality, undermine our democracy, and contribute to the continued erosion of our fundamental rights. Big business has successfully built systems that allow companies to consolidate wealth and wield it to their advantage through corporate capture of our public institutions and suppression of speech. The lack of a comprehensive system of effective legal safeguards further allows corporations to operate with relative impunity. This is no accident. Industry's hold over U.S. politics has ensured that enforcement mechanisms remain weak. And the resulting gaps allow big companies to get bigger and tighten their grip on our democracy. To combat corporate impunity, we therefore need a multifaceted approach that places rights-holders at the center—one that both dismantles the systems that prop up corporate power and enacts legal frameworks that can hold corporations accountable. To address the interconnected aspects of corporate accountability, this Agenda is split into three chapters. The first chapter outlines the systems of corporate power that perpetuate exploitation by allowing businesses to accumulate wealth and then leverage that wealth to influence politics and suppress dissent. The second chapter focuses on the traditional "business and human rights" agenda, discussing legal safeguards that could be put in place to hold corporations accountable for abuses and incentivize respect for human rights in global business operations. The third and final chapter outlines the interconnected nature of corporate accountability and calls for a stronger, broader coalition to work together to fight corporate abuse.

Business and Structural Power Agenda

To fight corporate abuses of power, we need to address the ways that corporations are able to accrue power in the first place. And today, our system enables, and even incentivizes corporations to accumulate excess wealth and concentrate their power. For instance, the dominant corporate model structurally incentivizes corporations to maximize profit for their shareholders while excluding those who have the most at stake from the board room. These incentives, combined with gaps in tax and antitrust policy, enable corporations to accrue mammoth levels of wealth, eclipsing that of the average member of the public and fueling ever-increasing inequality. With this wealth, corporations can tip the scales in their favor in U.S. politics. Through campaign financing and meetings behind closed doors, businesses can influence our politicians and warp our legal system away from the interests of the public and perpetuate impunity. These resource inequities and corporate control over public platforms also allow companies to engage in legal harassment of activists who are crucial to identifying

corporate abuses. This suppresses dissent and produces a chilling effect on speech. Addressing these roots of corporate abuse is foundational to corporate accountability and can transform the status quo by creating a more just system that disincentivizes abuses from occurring in the first place.

Business and Human Rights Agenda

But where abuses do occur, advancing corporate accountability also requires establishing systems of enforcement that impose real consequences on harmful corporate behavior and allow victims of corporate abuses to access effective remedies. And crucially, the agency and rights of workers and impacted communities must be central to each of these efforts.

This includes strengthening labor rights and collective bargaining to ensure worker power can counterbalance corporate power and that workers have recourse for violations. Enhancing transparency to bring abuses to light, as well as developing enforceable rules that impose liability and require companies to actively report and manage human rights risks are also key to holding corporations to account. Restricting access to U.S. markets through import controls and procurement regulations can also ensure that companies face financial repercussions for failing to respect human rights in their business operations.

Addressing these roots of corporate abuse is foundational to corporate accountability and can transform the status quo...

Combining structural changes with an effective system of legal safeguards can more comprehensively advance corporate respect for human rights. But what exists now is an incomplete patchwork. We need a comprehensive system of promoting justice in the corporate sphere because without a holistic vision for corporate accountability, it is harder for the community to advance the multiple pieces of corporate accountability with a unified voice.

Building a Broader Coalition

To build a future that works for everyone, we need a stronger, broader coalition working toward corporate accountability that can move us forward. Corporate tyranny impacts everyone. Although this Agenda largely focuses on business and human rights, the issues of corporate power are deeply intertwined with other movements—from labor to climate justice. This is because when corporations can put profit over people without consequence, workers, democracy, and the planet suffer.

This means that to address the varied nature of corporate power, holding businesses accountable for abuses requires advocates across different fields working in tandem to advance corporate accountability. The needed changes are unlikely to move forward with one single piece of legislation, but by working together to progress the movement through coordinated advocacy surrounding multiple pieces of legislation, we can more effectively drive meaningful change.

In compiling the diverse ideas within the business and human rights community through this Agenda, we aim to clarify the community's values and demonstrate the strength of the movement, pressing for much-needed changes in the U.S. corporate accountability regime. If we can organize our collective thinking and advocacy on corporate power and accountability into a shared concept of a unified movement, we can build a larger and stronger coalition that can push for meaningful corporate justice and build a future that ensures our democracy works for everyone.

METHODOLOGY

This Corporate Accountability Agenda was developed over the course of an 18-month period from January 2022 to June 2023.

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The initial draft of the Agenda was developed by ICAR following an eight-month consultation process with practitioners and experts across the corporate accountability space. This initial consultation process included input collected by ICAR through:

- A community survey disseminated via the ICAR Listserv;
- 22 bilateral consultations; and
- Thematic group discussions focused respectively on Corporate Power (Antitrust, Tax, Corporate Governance), Labor Rights, and Access to Remedy.

The initial draft was released to the ICAR community in November 2022 through the ICAR Listserv and then discussed during the ICAR Annual Meeting on November 16, 2022.

Following the Annual Meeting, we opened up the Agenda to a 8-week written comment period from December 9, 2022 to February 3, 2023 soliciting feedback on the initial draft. Organizations were also provided the opportunity to provide feedback over a Zoom consultation.

During this period, ICAR also hosted a narrative consensus-building meeting with ICAR partners to coordinate the narrative messaging of the Agenda.

Based on feedback received from partners during the Annual Meeting, comment period, and narrative consensus building session, ICAR revised the draft Agenda during the Spring of 2023 to incorporate partners' comments.

ICAR would like to thank the following 33 organizations that provided input throughout this process:

- Accountability Counsel
- Action Center on Race and the Economy (ACRE)
- AFL-CIO
- CIEL
- Coalition of Immokalee Workers
- Columbia Center on Sustainable Investment
- Constantine Cannon
- Corporate Accountability Lab
- CREW
- Earthrights International
- End Citizens United
- FACT Coalition
- GLJ-ILRF
- Global Diligence Alliance (GD Alliance)
- Groundwork Collaborative
- Human Rights First
- Human Rights Watch
- Human Trafficking Legal Center
- Impact Investing Alliance
- Johns Hopkins SAIS & Strategy International
- Laudes Foundation
- MSI Integrity
- Oxfam America
- Public Citizen
- Ranking Digital Rights
- Remake
- Rights CoLab
- Roosevelt Institute
- Solidarity Center
- Verite
- Water Protectors Legal Collective
- Wellspring Philanthropic Fund
- WSR Network

Our hope with this document is to bring together the varied lines of corporate accountability work into a coherent narrative framework. Our theory is that if we can organize our collective thinking and advocacy on corporate accountability into a shared concept of a unified movement, we can build a larger and stronger coalition pushing for this Agenda. Organizations should be able to see themselves reflected in the Agenda, and know where and how they fit into a larger community effort.

We plan for this Agenda to serve as a living document that will continue to evolve through a longer process of coalition-building as we continue to advocate with partners for the changes outlined in this Agenda. We hope that this document will be a strong starting point for a forceful coalition around a unified vision for corporate accountability that lays out the key legislative changes that we want to see as a community.

INTRODUCTION

Over the last century, corporations have garnered outsized power on the global stage.

Through political and economic might, corporations have been able to influence policy that allows them to operate with relative impunity. Transnational corporations with intentionally complex, opaque supply chains are able to conceal systematic wage theft, forced labor, and attacks against human rights defenders. At the same time, companies that pay little to nothing in federal income taxes go on to spend hundreds of millions of dollars on lobbying for their interests.[1] And for the last five years, Department of Justice (DOJ) prosecutions against corporations have been at a record low.[2]

The impacts of corporate abuses of power touch every major human rights issue of our time. To fight climate change, racial injustice, and income inequality, and progress justice across all intersections, we must rein in corporate power and transform the structures that perpetuate it. Under the dominant corporate model, companies are incentivized, and even obligated, to act in ways that maximize shareholder profits without considering their wide-ranging impacts while failing to share those returns with workers and communities.

Dismantling these systems of corporate power is necessary to protect our democracy and fight against the erosion of rights led by corporate interests. Not only do corporations contribute to the campaigns of legislators that push laws like voter suppression bills that explicitly undermine democracy, but corporate influence on government also undermines the peoples' trust in the government's ability to represent them. The public recognizes that because of big business's hold on our democracy, legislators will often preference corporate interests over those of the people.[3] The social contract is broken, and it is time to build a political and social system that works for everyone.[4]

Given the outsized role of corporations in society, it is crucial to hold corporations responsible for their actions. Efforts toward corporate accountability have existed in many forms across the last century, but the Business and Human Rights movement as an international human rights effort began to take shape in the 1990s as global markets rapidly began to open up and widespread publicity of egregious corporate abuses spurred public outrage.[5] In 2011, the Human Rights Council adopted the non-binding U.N. Guiding Principles on Business and Human Rights (UNGPs), which are composed of three pillars—the State duty to protect human rights, the corporate responsibility to respect human rights, and the right to remedy. These pillars guide the business and human rights community in their efforts to hold corporations accountable in ways that go beyond voluntary initiatives, and push for the mandatory measures needed to progress human rights.

Corporations are entities whose actions result from the incentives and disincentives provided to them, and the modern corporation is incentivized to maximize profit with minimal constraints. This combination often results in exploitation and the concentration of corporate power. But altering those incentive structures has the potential to alter corporate behavior. Government's role is to protect human rights by placing effective constraints on corporate behavior so that the result is not exploitation, but consistent corporate respect for human rights and accountability where abuses occur. Full corporate accountability requires a system that effectively prevents abuses, holds businesses liable for abuses, and provides remedy to those impacted by those abuses. This system must also be transparent, accessible, and center the needs and agency of workers and those communities most impacted by corporate abuse.

A number of tools exist to fight corporate abuse, but these tools fail to provide a comprehensive system that produces consistent accountability for abuses.

To advance corporate accountability, we can make commonsense expansions to existing constraints on corporate behavior and establish incentives and disincentives that can limit corporate abuse. But we're not in a fair fight, and that's by design. Through lax regulation of monopoly power and corporate tax abuse, corporations are able to accumulate excessive wealth and consolidate power that allows them to control key industries and drive further inequality. And through election spending, lobbying, and the revolving door, corporations are then able to wield that wealth to influence public policy in favor of their interests to perpetuate that power. This massive disparity in resources between large corporations and the public is also exploited by businesses through frivolous lawsuits that aim to chill speech and intimidate individuals who speak out against corporate abuse. This means that in order to hold corporations accountable, not only do we need to build legal safeguards that require transparency and establish liability for abuses, we also must address the systems that allow corporations to amass power and then wield that power over our democracy.

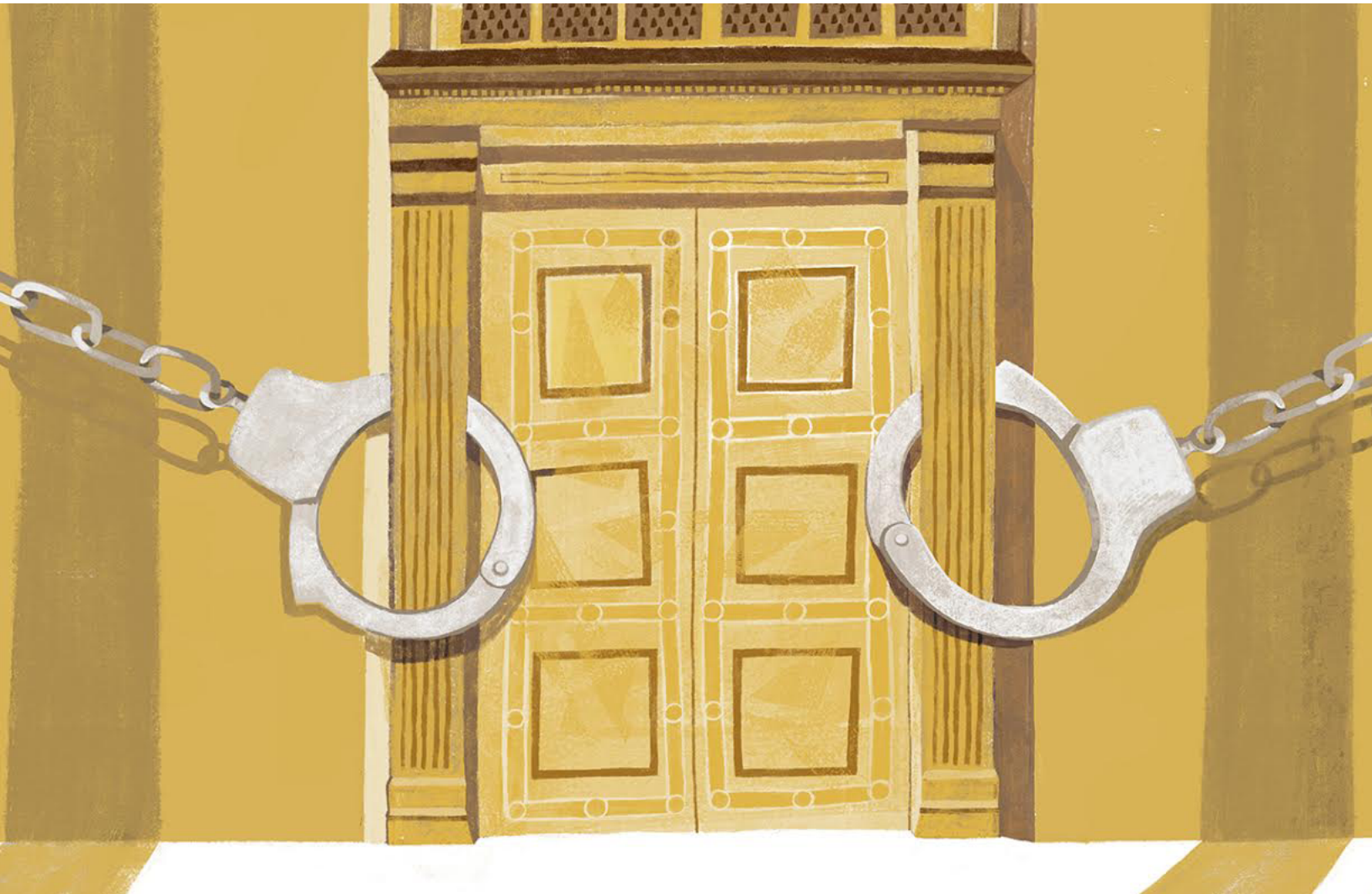
Although the corporate accountability movement in the United States has made some meaningful progress over the last decade, such as the closure of the consumptive demand loophole and the passage of the Uyghur Forced Labor Prevention Act, serious gaps still remain that allow corporations to evade liability. A number of tools exist to fight corporate abuse, but these tools fail to provide a comprehensive system that produces consistent accountability for abuses.

To combat the multifaceted, and structural nature of corporate abuse, the business and human rights community in the United States has developed a diverse set of expertise that spans across multiple fields, including technology, privacy, antitrust, among many others. Other movements addressing labor rights or climate change are also deeply intertwined with corporate accountability. Harnessing the strength of this diverse community requires a unified, coordinated effort. But until now, unlike the labor rights or climate movement, there has been no comprehensive corporate accountability agenda focused on the U.S. published in any one location and no concerted effort to compile the diverse ideas of the business and human rights community. If we can organize our collective thinking on corporate power and accountability into a shared concept of a unified movement, we can build a larger and stronger coalition pushing for this agenda.

Having a comprehensive agenda is crucial given the varied nature of corporate abuse of people and the planet that is perpetuated by the interconnected failures of the American accountability regime. Systems of impunity

allow businesses to accumulate excessive wealth and influence to shield themselves from liability, substantive gaps in the law allow corporations to evade accountability, and barriers to civil society efforts to fill those gaps hinder meaningful progress. And although there are a number of tools that now exist to push back on undue corporate power, they do not form a comprehensive system that addresses the many pieces of corporate accountability. Instead, what exists are a set of disparate tools that are insufficient to fill the gaps.

As a result, coordinated advocacy surrounding key pieces of corporate accountability legislation is more difficult. Without a comprehensive vision, it is harder for the community to advance the numerous moving pieces of corporate accountability with a unified voice. Needed changes are unlikely to move forward with one single piece of legislation, but by working together to progress justice and corporate accountability through coordinated advocacy surrounding multiple pieces of key legislation, we can together reimagine a better future and drive meaningful change.



I: THE BUSINESS AND STRUCTURAL POWER AGENDA

Corporations have successfully built global social and economic structures that allow them to accumulate unchecked power and profit off of exploitative practices with relative impunity.

White supremacy and colonialism have influenced the structure of corporations and our larger economic system today, and that structure continues to perpetuate itself. Indeed, the corporate form itself incentivizes and, in some cases, obligates prioritizing financial gain over social impacts. Workers, who produce the largest value to corporations, are often left out of decision-making processes and do not reap the benefits of the business's success. Corporations frequently fail to seek and receive the free, prior, and informed consent of those communities that are most impacted by their operations. Even more, businesses can grow into behemoths of power through unfair tax and antitrust policies that allow them to accumulate excessive amounts of wealth. And because of lax regulation of corporate engagement in politics, corporations are able to then use that wealth to influence public policy to weaken systems of accountability. This means that in order to advance other aspects of the Corporate Accountability Agenda, we must address the structural barriers that consolidate corporate power and stifle advocacy efforts.

SECTION 1. THE CORPORATE CONSOLIDATION OF POWER

THE STAKES

Over the course of the last century, corporations in the United States have cultivated an economic system that has allowed them to accumulate excessive power in American society and across the globe. This corporate consolidation of power impacts nearly every area of policy and touches even the most routine aspects of our lives–from what housing and medication we can afford to who is taxed and how much. Money that could be reinvested in essential social support programs is instead hoarded and multiplied by companies worth billions of dollars. At the same time, the inherent design of modern corporations incentivizes and, in some cases, mandates prioritizing profit over consideration of the far-reaching social and environmental impacts of their operations. The brunt of these impacts most often falls upon Black, Indigenous, and other communities of color, whose agency and

consent is often ignored, and whose land and resources are often least protected by the law. Although it is essential to improve transparency and establish liability where harm occurs, altering the structure of incentives and disincentives that perpetuate corporate exploitation is key to driving transformational change.

THE GAPS

Challenging the Dominant Corporate Model

Every abuse committed in the course of business, whether in corporate headquarters or on the other side of the globe, stemmed at some point from the decisions of corporate leadership—decisions which are shaped by the incentives and disincentives inherent in the modern corporate structure. Therefore, efforts to progress corporate respect for human rights must address the threshold issue of the corporate form itself. Companies are controlled by a board of directors, management, and shareholders. But the members of corporate leadership are not the ones that face the consequences of their decisions or provide the foundational value to the company by manufacturing or selling its products. This gap in the makeup of corporate decision makers means that the stakeholders who have the greatest interest in these decisions such as workers or impacted communities are left out of the conversation. Rather, corporations have increasingly prioritized shareholder payments over other more socially productive uses of corporate profits.[6] Stock buybacks, where companies repurchase their own stock on the open market exemplify this shareholder primacy approach.[7] These buybacks allow boards to raise share prices by reducing the number of outstanding shares, making each remaining share a larger portion of market value, limiting reinvestment, and raising serious concerns about market manipulation. Moreover, federal securities law's quarterly reporting requirements also incentivize companies to prioritize short-term profits over long-term investments. This encourages businesses to forgo research into sustainable products, invest in their workers, or develop systems to manage human rights and environmental risks.[8]

> Moreover, the dark history of European and American colonialism's symbiotic relationship with big business unfortunately continues to lay embedded in modern corporate practice.

But even if these key stakeholders were included in the conversation, in most cases, boards are legally prohibited from prioritizing societal interests above the financial interests of shareholders. The B-Corps movement has sought to address this issue by baking in social consideration into the corporate structure. The movement pushes for the advancement of the benefit corporation, which requires that the legal corporate entity have "a corporate purpose to create a material positive impact on society and the environment" and expands the fiduciary duties of directors to consider non-financial interests and requires benefit corporations to report on their social and environmental performance against a third-party standard.[9] Companies may also seek to become a Certified B Corp, which are entities that may or may not be incorporated as benefit corporations, but subject themselves to an impact assessment process developed by B Lab, a nonprofit organization. To receive certification, they must meet the minimum requirements of an assessment that measures the business's human rights and environmental impacts and legally expand their corporate responsibilities to include consideration of the interests of workers, community, and the environment. They must also implement an amendment to its articles of incorporation to reincorporate as a benefit corporation or a close equivalent to the maximum extent available under current corporate law.[10] But this is no panacea. Although the B-Corps movement is a step forward in addressing the shortcomings of the corporate form, it does not fully incorporate human rights as outlined in the UNGPs, nor has it been widely used in the largest of corporations or in the industries that have the most egregious

perpetrators like oil or mining.[11] Although benefit corporations have stronger structural allowances for human rights considerations than certified B-Corps, benefit corporations are still merely a solution that permits the consideration of human rights impacts, but does not mandate that the corporation actually consider those impacts or take action accordingly.

Moreover, the dark history of European and American colonialism's symbiotic relationship with big business unfortunately continues to lay embedded in modern corporate practice. Some of the earliest corporations like the British East India Company were formed, in part, to efficiently colonize and extract the resources of Indigenous peoples.[12] Many corporations today, particularly in extractive industries, have unfortunately continued that practice by seeking to operate on and profit off of the resources of Indigenous land without the free, prior and informed consent of the communities who live there.[13] Free, Prior and Informed Consent (FPIC) is a right recognized in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and embedded within the universal right to self-determination.[14] It applies specifically to Indigenous peoples, and recognizes their right to give, withhold, or withdraw consent to a project that may affect them or their territories. The right of FPIC also enables Indigenous people to negotiate the conditions under which a potential project will be designed, implemented, monitored, and evaluated. But while over 100 countries have adopted UNDRIP, the United States originally did not vote in favor of adoption. In 2011, the United States reviewed its position and announced its support of the declaration,[15] but FPIC is still not being adequately enforced or applied. Therefore, any legislation impacting Indigenous communities, including legislation addressing corporate human rights abuses or addressing the corporate form, must include the strongest protections of the right to free prior, and informed consent and the right to self-determination.

These shortcomings mean that corporate decision makers are not set up to consider their far-reaching human rights impacts within the United States and around the world. Instead, they are obligated to make whatever decisions will maximize shareholder profits, without sharing those returns with those who have the greatest stake in those decisions. Changing the systems that uphold corporate power is a difficult task that requires us to reimagine the corporate form and the economic system in which it exists in unconventional ways, including exploring alternative models like worker cooperatives, employee stock ownership plans, steward ownership, or Indigenous community-controlled entities like the Alaska Regional Corporations.[16] Regardless, this reimagining should ensure that workers and other impacted rights-holders are at the center of decision-making and accrue the benefits of a business's operations. These efforts should also be supplemented by robust accountability mechanisms. This includes recognizing Indigenous sovereignty and self-determination at the decision-making level, particularly in decisions regarding land use. Mandating that very large companies obtain a federal charter that requires the inclusion of workers and affected rights-holders on boards and expands fiduciary duties to obligate company directors to consider a broader range of stakeholders—including workers, communities, and customers—could serve as first steps toward this goal. Further, companies that continuously engage in egregious illegal conduct could lose their license to operate. This would impose a strong incentive to alter harmful corporate behavior with permanent consequences for violation.

Addressing the ways in which corporations are structured to maximize profits at the expense of the public interest through the exploitation of workers, communities, and natural resources, is a first step toward achieving accountability. Although ensuring that businesses face consequences when abuses occur is crucial, dismantling the root causes that drive corporate abuses is the key to sustained transformational change. Structural changes and legal safeguards must operate in tandem to create a holistic system of accountability. Corporations are entities that respond to the incentives baked into their legal structure and the economic and

political system in which they operate. Altering those systemic incentives and reimagining alternatives to the dominant corporate model is essential to challenging corporate power and building an economy that works for the people—not just big business.

RECOMMENDATIONS FOR CHALLENGING THE DOMINANT CORPORATE MODEL

Re-evaluate the corporate form in a way that ensures that workers and affected communities are at the center of decision-making and that the benefits of corporate operations accrue to workers and other rights-holders. Some first steps may include:

- Requiring companies of a certain size to obtain a federal charter to allow for more consistent regulation;
- Expanding the fiduciary duties of directors to mandate consideration of a broader range of stakeholders, including workers, communities, and customers;
- Making it possible for companies that continuously engage in egregious illegal conduct should lose their license to operate.

Any legislation impacting Indigenous communities, including legislation addressing corporate human rights abuses or addressing the corporate form, must include the strongest protections of the right to free, prior, and informed consent and the right to self-determination.

Curbing Corporate Accumulation of Wealth and Power

In American politics, wealth is power. And today, because of lax regulation on corporate consolidation and tax policies that allow companies to avoid paying their fair share, big businesses are able to accumulate vast amounts of wealth. The resulting resource inequities provide corporations with a steep advantage in nearly every area of advocacy, allowing companies to influence our politicians to craft laws in favor of private over public interests and stymie efforts toward accountability. Across the board, nearly every industry is dominated by a handful of powerful corporate actors, wielding immense power over our economy.[17] For example, the "Big Four" beef processing companies—Tyson Foods, JBS, Cargill, and Marfrig—control approximately 85 percent of feedlot cattle in the United States.[18] Despite the existence of strong antitrust laws on the books since the late nineteenth century, corporate monopolies continue to consolidate power, becoming mammoth operations with equally mammoth influence. This is made possible, in part, by the proliferation of the consumer welfare standard as a guiding principle of antitrust policy.[19] Historically, antitrust aimed to deconcentrate private power by protecting competition. In both text and intent, the Sherman Antitrust Act of 1890, the primary antitrust law, meant to reduce the power of private interests and protect democracy by promoting competition.[20] This interpretation of antitrust law recognized monopolies as not only bad for consumers, but also as broad threats to the economy as a whole. But in the 1970s and 1980s, a shift in economic thinking led to a strong focus on consumer-facing outcomes as the primary indicator of competition.[21]

This "consumer welfare standard," in practice, means that enforcement agencies will likely only challenge a merger if they can show that it will likely lead to higher prices for consumers.[22] But by this standard, companies like Amazon should be lauded as a prime example of healthy competition.[23] One example of a non-consumer facing practice that tends to consolidate market power is price discrimination, where producers of goods sell to larger companies for one price and smaller companies to a higher price. Although illegal through the Robinson-Patman Act,[24] lack of enforcement of laws against price

discrimination allows big companies to get bigger and squeezes smaller ones out of the market. Other lackluster enforcement of antitrust laws has had the same effect, allowing corporations to become behemoth conglomerates and amass unprecedented amounts of wealth and control over powerful industries that impact our everyday lives. The problem with the consumer welfare standard is that it fails to consider the broader consequences of corporate consolidation—on workers, on the environment, on democracy, and on the market as a whole. To effectively employ our laws meant to fight monopoly power, we must strengthen antitrust enforcement and return to the understanding that the consolidation of private interests not only harms consumers but can devastate the health of the whole economy.

Another way that corporations are able to accrue excessive wealth is through favorable tax policies. In 2020, at least 70 public corporations made over $1 billion in global profits, but paid less than 15% of those profits in taxes—with some even paying nothing or receiving net tax refunds from the U.S. government.[25]

...lack of enforcement of laws against price discrimination allows big companies to get bigger and squeezes smaller ones out of the market.

Corporations have rigged tax policy in the United States so that the tax code grants corporations economic advantages that the average individual never sees. To avoid paying taxes on global income, multinational corporations can exploit the tax code by utilizing foreign subsidiary companies or spinoff corporations incorporated in tax haven countries.[26] This allows the U.S.-based company to finance investment, transfer assets, and borrow money from itself. Corporations may also postpone paying taxes indefinitely until foreign profits are "brought back" to the U.S. in the form of dividends or other shareholder payments through a concept called deferral. Corporations can take advantage of these deferrals through the "active financing exemption," which allows U.S. companies to defer paying taxes on the foreign-made investment-related income of a subsidiary, despite the general ban on deferral for "passive income."

These gaps have fueled the dramatic increase in inequality. Not only does this allow the largest corporations to accumulate excessive wealth, but it deprives the public from receiving the benefits of what those tax dollars could have done through infrastructure, education, or social support programs. This exacerbates inequalities by allowing the rich to get richer and ensuring programs meant to improve the lives of the lower and middle class stay underfunded or are never funded in the first place. To ensure that companies pay their fair share, imposing a minimum effective tax rate of 15% on companies could create consistency across the board. Moreover, taxing the excess profits of large firms at a high rate would minimize the incentive for ever-increasing profits that often leads to companies underpaying employees or engaging in other harmful practices like price gouging. Public country-by-country reporting of corporate tax payments could also ensure transparency regarding corporate tax practices.

Limiting corporations' ability to accrue excess wealth is key to curbing corporate power. Not only does it allow companies to wield control over the economy and the basic necessities of life, it provides companies with the ability to then use that wealth to sway our politics in their favor. This stalls progress and halts legislation that would hold them accountable. In order to establish effective legal safeguards promoting corporate respect for human rights, we must first even the playing field to ensure that the power in our economy and democracy is returned to the people.

RECOMMENDATIONS FOR CURBING CORPORATE ACCUMULATION OF WEALTH

Strengthen antitrust policy and limit monopoly power by:

- Moving away from the consumer welfare standard and recognizing additional indicia of market power such as the ability to exclude competitors, the ability to price or wage discriminate, and the ability to restrict output, among others.
- Introducing legislation to rein in price gouging, including by addressing the drug patent system.
- Directing agencies to ramp up enforcement of existing antitrust laws like the Sherman Act, Clayton Act, and the Robinson-Patman Act.

Ensure corporations pay their fair share in taxes by:

- Closing loopholes in the U.S. tax code that allow corporations to evade taxation.
- Imposing a minimum effective tax rate on companies of a certain size.
- Taxing excess profits and reinvest that money in programs for the public interest.
- Requiring public country-by-country reporting to improve international tax transparency.

SECTION 2. FIGHTING CORPORATE CAPTURE

THE STAKES

Corporate capture of our public institutions is one of the biggest threats to democracy and is a significant barrier to advancing corporate accountability. People don't elect the CEOs of Amazon, Facebook, Tyson, and Exxon, but these companies wield tremendous political power that is currently dwarfing the influence of most Americans. The deep resource inequities between corporations and the average member of the public allows corporations to use that wealth to overshadow the will of the public. By donating to political campaigns and employing scores of lobbyists, corporations can continue to rig the system in their favor. When corporations have outsized influence over legislative and regulatory bodies, courts, and elections, they can successfully evade accountability by shaping public policy in ways that prioritize profit over the interests of the people. And because a lot of these tactics take place behind closed doors, it is difficult to know the full extent of corporate influence over our democracy or hold lawmakers who are subject to corporate interests accountable. The results of corporate capture are devastating.[27] For instance, important environmental protections have been gutted to benefit the fossil fuel industry and key labor protections have been reversed to allow companies to reap benefits at workers' expense. In order for the people to regain power in American politics and have a chance at enacting laws that hold corporations accountable, it is imperative that we monitor and push back against the corporate capture of our democratic institutions.

THE GAPS

Corporations secure influence over the government by spending money to influence the outcome of elections. Although corporations are prohibited from contributing directly to federal candidates, political parties, and traditional political action committees (PACs), there are many ways that corporations and their allies can place weight on the scale in their favor. Although corporations cannot donate directly to traditional PACs, corporations can create and

operate traditional PACs, which are then funded by certain company employees and shareholders and permitted to donate directly to candidates to advance the corporation's interests.[28] Labor unions and other groups can also do this, but business PACs have historically dominated the space, accounting for 73 percent of total PAC giving in the 2020 cycle.[29]

But since the Supreme Court's ruling in Citizens United v. Federal Election Commission,[30] corporations and the wealthy individuals connected to them now have a constitutional right to spend an unlimited amount of money influencing elections through so-called "independent" expenditures.[31] Under Citizens United, corporations can not only cut massive checks to Super PACs, they can also fully conceal their political spending from the public and their own shareholders by funneling it through "dark money" groups like trade associations, other 501(c) nonprofits, and Limited Liability Corporations. The fact that Congress and the states are constitutionally prohibited from placing any limits on outside spending by corporations and wealthy individuals is a fundamental problem within our campaign finance system that allows corporations to exert undue influence over our democracy that often overshadows the will of the people.

There are significant gaps in our current laws that enable corporate interests to exploit the revolving door as a tool to influence public policy.

Corporations and industry groups can also exert significant influence over the federal government by lobbying Congress and the executive branch—and they have put substantial resources towards these efforts. For example, from 1998 through 2020 businesses spent $54.5 billion on lobbying the federal government and employed 415,628 lobbyists. According to the Center for American Progress (CAP), "business and industry far outstrip any other source of lobbying at a ratio of 34 to 1."[32] While transparency is the main way to address corporate lobbying, there are weaknesses in the Lobbying Disclosure Act of 1995 (LDA), the main law governing the practice of lobbying, that allow much lobbying activity to go unreported.[33] For example, thresholds for registration are far too high and lobbying disclosure laws do not adequately cover the behind-the-scenes work that supports lobbying campaigns like strategic advising, allowing a large portion of lobbying work to escape regulation. The LDA also does not require registrants to provide sufficient information about what specific laws and policies they lobby on or the positions taken on behalf of a particular client. Indirect lobbying through trade associations, business chambers, and other groups that do not have to disclose their donors allows corporations to further hide their lobbying efforts. Lobbyists themselves can obtain significant leverage by participating in campaign fundraising (e.g., through bundling, hosting fundraisers) for the members of Congress that they also lobby. To hold corporations and our lawmakers accountable for their decisions, we must demand more transparency over corporate lobbying efforts.

The revolving door is another mechanism through which corporate interests influence government decision-making. When government officials accept lucrative private sector positions in industry or as lobbyists (known as the traditional revolving door), their insider knowledge and connections can be harnessed to advance the interests of corporate clients and unfairly benefit their new employer in federal procurement processes, legislative and regulatory policy development, and enforcement. The other side of the revolving door is when corporate executives and business lobbyists secure key posts in government, which is known as the reverse revolving door.

There are significant gaps in our current laws that enable corporate interests to exploit the revolving door as a tool to influence public policy. For example, corporate incentive payments to encourage employees to enter government service are not currently prohibited. Moreover, current laws related to the revolving door often focus on addressing post-employment

restrictions and largely ignore individuals entering government. But even so, post-employment cooling-off periods are far too short and only prohibit a very narrow category of activity, leaving former federal officials free to engage in a wide-range of "behind-the-scenes" lobbying work and strategic consulting. Government ethics rules are also insufficient. Even while in office, Congress members are exempt from many ethics rules, including financial conflicts of interest rules.[34]

And when it comes to the Executive Branch, conflicts of interest requirements do not currently cover the financial interests of former employers or clients. Additionally, former executive-branch officials can lobby Congress immediately after leaving government, and vice versa. Corporate capture poses a massive barrier to any advocacy efforts for corporate accountability. So long as corporations are able to use their economic power to rig the system in their favor, advocates face an uphill battle.

RECOMMENDATIONS FOR FIGHTING CORPORATE CAPTURE

Pass the Freedom to Vote Act to ensure that our government works for us by ending the use of dark money and reducing the influence of big money in politics. The Freedom to Vote Act would help address the issue of corporate political spending to influence the outcome of elections in a number of ways, including by:

- Shining a light on corporate political spending and dark money, for example, by closing loopholes that have allowed industry associations, LLCs, and other "dark money" groups to keep their donors secret and to cloak the true source of funds spent by other groups like Super PACs.
- Strengthening disclosure and disclaimer requirements for political advertisements to ensure the public knows who is behind the ads they see.
- Tightening restrictions on Super PAC – Candidate coordination, including by creating a new category of coordinated spenders.
- Enhancing the administration of campaign finance laws by strengthening the Federal Election Commission's enforcement process.
- Empowering small donors to help counter the influence of corporate dollars in our elections by establishing a voluntary small-donor financing program for House candidates.

Pass a Constitutional amendment, such as the Democracy for All Amendment, to overturn Citizens United v. FEC and give the power in elections back to the people, not big business.

Bar lawmakers from accepting campaign contributions from entities under the jurisdiction of their committees to minimize perverse incentives in legislation by preventing conflicts of interest.

Ban lobbyists from fundraising for federal candidates to reduce the leverage that lobbyists have over our elected officials.

- Lobbyists should be prohibited from fundraising for candidates or members of Congress that they lobby, and conversely, individuals engaged in fundraising for candidates or members of Congress should be prohibited from lobbying them.
- The type of fundraising that should be covered includes "bundling," hosting or underwriting fundraising events, or soliciting donations, among other activities.

Amend the Federal Election Campaign Act of 1971 to prohibit for-profit corporations from establishing or operating political action committees (PACs) (see, e.g., S.3528 - Ban Corporate PACs Act).

RECOMMENDATIONS FOR FIGHTING CORPORATE CAPTURE (continued)

Strengthen federal lobbying disclosure requirements to unveil the corporate interests influencing legislators behind closed doors by:

- Amending reporting thresholds to broaden the scope of who is required to register.
- Requiring lobbyists to report more specific information about what they lobby on.
- Increasing transparency of strategic lobbying services.
- Improving useability of lobbying information through unique identification numbers.

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- Improving useability of lobbying information through unique identification numbers.

Expand and strengthen revolving door provisions to prevent conflicts of interest and restrain former government officials from exploiting their influence for corporate gain by:

- Ensuring that all post-employment cooling-off periods last for a minimum of two years, but ideally longer.
- Ensuring that all congressional staff and executive employees are banned from lobbying their former office or agency during the cooling-off period.
- Expanding cooling-off periods for elected officials and very senior executive branch officials to prohibit them from lobbying any part of the federal government for a set period of time after they leave office.
- Requiring officials leaving government service to enter into a binding revolving door exit plan and to report periodically on compliance.

Expand the definition of lobbying to include “behind the scenes” work to ensure that those activities do not escape regulation.

Increase transparency around industry association & business chamber membership to prevent corporations from hiding their efforts to influence government decision-makers.

SECTION 3. CORPORATE SUPPRESSION OF CIVIC SPACE

THE STAKES

In a democracy, people who speak out against injustice should not face retribution. We all have the right to speak freely on issues of public concern, and this right is even more essential when criticizing those in power. Corporations have immense resources at their disposal, and they often use those resources to stifle criticism and obscure the existence of abuses through violence and harassment against whistleblowers, activists, and other human rights defenders (HRDs). But it's more difficult to craft effective policies if those most impacted by corporate action are unable to expose what abuses are occurring and how. One way that companies silence critics is through leveraging the judicial system to bully activists. Intentionally exploiting the imbalance of resources between big corporations and individuals, some companies file frivolous lawsuits, often referred to as Strategic Lawsuits Against Public Participation (SLAPPs), that the individual does not have the resources to defend in court in order to pressure them into silence. Black and Indigenous human rights defenders, who are most impacted by corporate abuses, and are often those most likely to speak out, are also most at risk of facing these attacks on their free speech and are more likely to be treated poorly when exercising these rights. Moreover, protesters of corporate offenses, especially offenses of extractive industries, are also subject to excessive penalties and often criminalized for exercising their constitutional rights. These tactics create a chilling effect on speech and undermine our democracy. To advance corporate accountability, people, especially those most impacted by corporate abuse, must be free to expose corporate abuses without fear of retaliation.

THE GAPS

Around the globe, human rights defenders consistently face violence and intimidation for speaking out against corporate abuses of people and the planet. In 2022, the Business and Human Rights Resource Centre (BHRRC) tracked 555 attacks against human rights defenders globally, including intimidation, threats, forced disappearances, and killings. Nearly half of those attacks tracked by BHRRC came in the form of judicial harassment.[35] Steep resource inequities and gaps in protections for free speech allow corporations to leverage the legal system to harass individuals speaking out against injustice.

SLAPPs are one of the ways that corporations abuse the law to bully human rights defenders. SLAPPs are a type of lawsuit filed by corporations that exploits the lack of resources of the individual to target journalists, activists, and other human rights defenders, disguising themselves as ordinary civil lawsuits to silence dissent.[36] Although a judge may ultimately dismiss a SLAPP as frivolous, even meritless cases can drag on for years and drain a defendant's resources through costly litigation. In many cases, the companies that file SLAPPs hope that the lawsuit will end in a settlement that muzzles the individual's rights to future speech as well. Companies and individuals file hundreds of SLAPPs each year in state and federal courts, chilling speech and silencing important voices in our democracy.[37] Currently, 32 states and the District of Columbia have anti-SLAPP statutes, but their strength and scope vary widely.[38] This inconsistency across federal and state courts opens the door to forum shopping, where corporations can bring their cases in locations where anti-SLAPP laws are weak, and there is currently no federal anti-SLAPP statute in place that could provide consistent protection.

Steep resource inequities and gaps in protections for free speech allow corporations to leverage the legal system to harass individuals speaking out against injustice.

In addition to SLAPP suits, a number of laws across the United States criminalize protesters exercising their right to assembly by expanding the definition of "riot" or "terrorism" or prohibiting protests in key areas.[39] For example, so-called "critical infrastructure" laws stifle speech by raising the penalties for participating in protests near spaces deemed "critical infrastructure." These bills may expand the definition of critical infrastructure to include oil and gas pipelines or related facilities, or impose excessive penalties for minor offenses like trespassing or causing even minor "damage" to designated areas.[40] Because the types of projects protected by these laws are also often those that pose a high risk to natural resources and Indigenous rights, these laws result in the targeting of human rights and environmental defenders who may be peacefully protesting the oil or gas company's harmful business operations.[41] While protecting critical infrastructure is a legitimate government interest, these steep penalties combined with overly broad language target activists[42] and discourage people from exercising their constitutionally protected rights. Other laws weaken the freedom of assembly by labeling some protestors as terrorists for exercising their rights, allowing the government to justify increased criminal penalties, surveillance and policing.[43] Tech companies also sometimes play a role in suppressing speech by collecting data on protest participants and selling it to law enforcement or failing to combat damaging misinformation related to the assembly on their platforms.[44]

SLAPPs, critical infrastructure laws, and unjust labeling of peaceful protesters contribute to the continued chilling of speech. We must close these gaps if we want to continue to expose corporate abuse and ensure the future of our people and our planet.

RECOMMENDATIONS FOR PROTECTING CIVIC SPACE

Pass a federal anti-SLAPP statute that:

- Protects SLAPP victims by allowing courts to rapidly identify and dismiss these attacks in order to stop the suit from dragging on and draining the resources of the defendant.
- Punishes those who file SLAPPs by requiring them to pay the legal fees of their target.
- Deters future SLAPPs by imposing consequences on SLAPP filers and minimizing the efficacy of this tactic.

Address the underlying resource inequities that allow corporations to use civil lawsuits as tools to silence critics by:

- Passing legislation that increases lobbying transparency and undermines the revolving door that allows corporations to push for these laws (see above section on corporate capture).
- Eliminating barriers to accessing pro and low bono legal services.

Hold lawyers accountable for using abusive tactics by:

- Enhancing Rule 11 sanctions to more effectively address lawyers who file SLAPP suits.[45]

End the practice of criminalizing protected speech:

- Congress should direct the U.S. government to take steps to ensure its law enforcement and security agencies do not perpetuate misinformation about social and environmental activists.
- Ensure that human rights defenders exercising constitutionally protected rights are not included in overly broad definitions of criminal activity.

Establish new limitations on the existing broad immunity for foreign persons and entities.

Amend the exclusionary pleading standards that currently function as major obstacles to corporate accountability.

Enact measures to prevent anti-SLAPP legislation becoming tort reform in disguise.

Rein in the power of the tech industry and protect the rights to privacy and free speech by:

- Regulating social media platforms that fail to address the incitement of violence and harassment of HRDs on their sites.
- Mandating privacy protections and ending the collection and sale of personal data without the express consent of the user.
- Regulating how social media sites are suspended in conflict.
- Instituting whistleblower protections and incentives.
- Increasing scrutiny on company categorization of independent contractors (vs. employees).
- Prohibiting patent owners from assigning rights away via employment agreements unless employees have been employed for a certain number of years or receive separate and substantial compensation.
- Mandating supply chain transparency, including for precious metals used in devices, in addition to other human rights due diligence requirements.
- Instituting mandatory safeguards against hacking.

II: THE BUSINESS AND HUMAN RIGHTS AGENDA

Advancing corporate accountability requires addressing the systemic roots of corporate abuse, dismantling barriers to advocacy, and enacting legal safeguards that prevent, punish, and remediate harm.

The business and human rights movement, which emerged in the 1990s in response to high-profile corporate abuses, began to develop ideas for legal systems that could regulate corporate behavior and ensure that the rights of workers and communities are respected in business operations and beyond. It became clear that voluntary measures on their own were insufficient and mandatory regulation of corporate behavior was necessary to effect change. In order to effectively regulate corporate actors, the government must require businesses to disclose key information about their supply chains and human rights risks that can inform enforcement of laws prohibiting corporate abuse. These enforcement mechanisms must include systems of liability that can compel human rights due diligence, impose civil and criminal liability, provide remedy to victims of abuses, and prohibit violators from accessing U.S. markets. Although what exists now are patchwork systems that have left gaps in accountability, implementing these legal safeguards plays a key role in moving toward more consistent and comprehensive corporate accountability. No one measure can fully achieve corporate accountability on its own, but each piece is necessary to advance the whole.

SECTION 1. TRANSPARENCY

THE STAKES

Although transparency alone is often insufficient to improve corporate respect for human rights, when combined with liability and other enforcement measures, it can play a key role in advancing corporate accountability. By informing investors, consumers, civil society organizations, or governments of potential human rights or environmental abuses within company operations, transparency can empower these stakeholders to hold businesses accountable. This makes disclosure an important component of an effective accountability framework. In the context of SEC disclosures, if public companies have to report on their human rights and

environmental risks, everyone has the ability to hold them accountable, including their shareholders who, in theory, can exact swift financial consequences. Transparency is also sometimes necessary to effective enforcement of other liability mechanisms. For example, the current lack of disclosure of supply chain data poses a significant barrier to enforcing Section 307 of the Tariff Act,[46] as it deprives Customs and Border Protection (CBP) and others of the information needed to identify shipments of goods potentially linked to forced labor. In light of this, the government must take concrete actions to enhance transparency, disclosure, and reporting—which can together serve to strengthen accountability as a whole.

THE GAPS

The United States possesses a number of tools that enhance transparency of corporate supply chains and human rights risks. However, these tools fail to provide sufficient information for effective accountability. For example, Section 307 of the Tariff Act is considered a generally successful tool for incentivizing companies to refrain from engaging in forced or child labor by prohibiting the import of goods produced through those abuses. To enforce the Act, CBP may issue a withhold release order (WRO) when information "reasonably but not conclusively" indicates that a good produced with forced labor "is being, or is likely to be, imported" into the United States.[47] CBP may also issue a finding when the Commissioner of CBP determines that the merchandise is subject to Section 307.[48] Products subject to WROs or findings are detained by CBP. But in order to meet the burden of proof required to take action, CBP needs detailed information regarding the supply chains of companies seeking to import goods into the United States. Moreover, public access to this corporate supply chain reporting is paramount. CBP frequently relies on CSOs to identify entities engaging in prohibited labor practices and public access to supply chain data would facilitate the work of organizations submitting WRO petitions as well as those seeking to file civil complaints under the TVPRA. Yet, companies are not generally required to disclose that crucial information to the government or to the public, weakening their ability to enforce the Tariff Act.

...public access to this corporate supply chain reporting is paramount.

The United States does require some limited disclosure of supply chain information,[49] but these programs are relatively narrow in scope, focusing on specific industries or regions. For example, Section 1502 of the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act requires all companies listed with the Securities and Exchange Commission (SEC) to disclose whether their products contain certain minerals sourced from the Democratic Republic of the Congo or neighboring countries.[50] For the fishing industry, the Seafood Import Monitoring Program (SIMP) requires importers to report certain supply chain data for some species of fish as a condition of import, including information regarding where the fish was caught and what vessel was used. SIMP also requires importers to retain chain-of-custody information for all imports of covered species, documenting each step of the supply chain from the water to the port.[51] This improves traceability and provides CBP with key information on the source of seafood.

In 2021, President Biden signed the Uyghur Forced Labor Prevention Act (UFLPA), which creates a presumption that goods made in whole or in part in China's Xinjiang Uyghur Autonomous Region (XUAR) cannot be imported into the United States. CBP may issue an exception if the importer provides "clear and convincing evidence" that the goods in question are not linked to forced labor, fully responds to all CBP requests for information, and can demonstrate that it has fully complied with CBP guidance.[52] Additionally, guidance issued by CBP provides detailed instructions to companies on how companies can conduct human rights due diligence and supply chain tracing sufficient to demonstrate that either goods were not sourced from the XUAR, or,

if they are from the XUAR, that they were not produced with forced labor.[53] Although the UFLPA is generally limited to addressing Uyghur forced labor, it is a significant step forward in improving supply chain transparency by requiring a wide range of companies across industries to disclose more detailed supply chain information.

Enhancing transparency is key to providing needed information for effective accountability measures. To fight human rights abuses in corporate supply chains, we must close existing gaps in supply chain data to support and strengthen enforcement of Section 307 of the Tariff Act and the Uyghur Forced Labor Prevention Act (UFLPA). This could be done by drawing from the existing Seafood Import Monitoring Program (SIMP) model. In particular, it could require importers to provide detailed, comprehensive disclosure of supply chain information, regardless of country of origin, including the name and address of every entity and every facility involved in the production process, including in the harvesting, mining, and processing of raw material. If an importer fails to report this data or the data is false, the goods may be denied entry and the entity should be subject to penalty. Similarly, importers could be required to maintain chain-of-custody information and documentation, and this documentation could be subject to audit, which could lead to penalties to the entity for noncompliance or false or missing documentation. While initially these requirements could apply to high-risk products under the UFLPA, ultimately CBP should require comprehensive disclosure of supply chain information from all importers.

Enhancing transparency is key to providing needed information for effective accountability measures. To fight human rights abuses in corporate supply chains, we must close existing gaps...

It is important to also ensure that this data is made publicly available. Public disclosure of this data would facilitate the work of NGOs, journalists, and others who help identify instances of forced labor in U.S. supply chains. This is key to supporting enforcement because CBP largely relies on data and allegations from outside entities, including non-governmental organizations (NGOs) and the media, to identify cases of suspected forced labor among U.S. imports.[54]

SEC disclosures can also play a role in enhancing transparency and supporting corporate accountability. The SEC was established by the Securities Act of 1933 and the Securities Exchange Act of 1934[55] to promote the public interest by protecting investors, facilitating capital formation, and maintaining fair, orderly, and efficient markets.[56] Under U.S. securities law, public companies are required to disclose certain information outlined in Regulation S-K in public filings to the SEC, including a description of the business, risk factors, pending legal proceedings, and mine safety information where applicable.[57] Additionally, shareholders have the authority to demand disclosures beyond those required under Regulation S-K by using their power to bring resolutions during the proxy solicitation process for annual shareholders meetings. Issuers are only required to disclose information that is "material" to investors' or shareholders' decision-making processes in accurately valuing securities and determining whether to buy or sell securities. They are also required to disclose material information necessary to ensure that required disclosures are not misleading. A fact is considered material if "there is a substantial likelihood that a reasonable investor would consider it important" and would have viewed the information "as having significantly altered the 'total mix' of information made available."[58]

In recent years, human rights-related risks have become increasingly significant to market participants, including investors, particularly for the younger generation.[59] This is unsurprising considering that human rights issues directly and indirectly impact corporate performance through additional costs, delays in production,

and reputational damage. There is also evidence that systemic risks like inequality impact the whole portfolio, and therefore are of greater concern than risks to individual assets, which are diminished through portfolio diversification.[60]

Some limited sources of specific human rights disclosures do exist, but they are scarce. For example, the Dodd-Frank Act,[61] Foreign Corrupt Practices Act, and some interpretive guidance for disclosures related to climate change and to cyber-security information do either require disclosure of human rights matters or direct companies to disclose some socially relevant information. Additionally, some companies, recognizing the interest of market participants in this information, have voluntarily disclosed human rights data. In other cases, shareholders have exercised their ability to demand additional disclosures to request human rights-related information.[62] But relying on voluntary disclosures results in inconsistent and incomplete reporting.[63] For effective protection of all stakeholders, the SEC must require additional specific human rights disclosures on key issues like Indigenous rights, labor rights, political spending, and other human rights risks and impacts. The SEC must also ensure that company disclosure on human capital extends to contract/hourly workers and supply chain workers, and is broken down by gender, sexual orientation, race/ethnicity, and disability and that senior executives' pay disclosure standards extend to both public and private companies.

Supply chain transparency is a necessary component of corporate accountability. Although it is insufficient on its own, when it works together with other accountability measures by bringing abuses to light, it can be a crucial tool for enforcement. Enhancing transparency helps to ensure that enforcement agencies, NGOs, and impacted communities have the information they need to impose consequences on corporate violations and seek effective remedy. To hold corporations accountable, not only do we need to limit companies' ability to consolidate power, but we also need to provide avenues for all stakeholders to impose consequences on corporate offenses.

RECOMMENDATIONS TO ENHANCE TRANSPARENCY

SUPPLY CHAIN TRANSPARENCY

Close existing gaps in supply chain data to support and strengthen enforcement of the Uyghur Forced Labor Prevention Act (UFLPA) and Section 307 of the Tariff Act. This could be done by drawing from the existing Seafood Import Monitoring Program (SIMP) model. In particular:

- Require importers to provide detailed, comprehensive disclosure of supply chain information, regardless of country of origin, including the name and address of every entity and every facility involved in the production process, including in the harvesting, mining, and processing of raw material. If an importer fails to report this data or the data is false, the goods may be denied entry and the entity should be subject to penalty.
- Similarly, importers should be required to maintain chain-of-custody information and documentation, and this documentation could be subject to audit, which could lead to penalties to the entity for noncompliance or false or missing documentation. While initially these requirements could apply to high-risk products under the UFLPA, ultimately Congress should direct CBP to require comprehensive disclosure of supply chain information from all importers.
- Improve upon the SIMP model by ensuring supply chain data is made publicly available.

RECOMMENDATIONS TO ENHANCE TRANSPARENCY (continued)

SEC DISCLOSURES

Direct the SEC to require companies to report on human rights risks and impacts through securities filings, and enforce existing reporting requirements using gender disaggregated data. To ensure that investors have the information they need to fully assess a company's preparedness to manage their risks, a human rights and environmental due diligence disclosure rule is needed.

Direct the SEC to develop a disclosure rule requiring companies to provide information on the actual and potential consequences to Indigenous peoples and local communities of a registrant's regular business operations, climate mitigation efforts, or transition activities, including:

- Human rights violations;
- Violations of Indigenous rights, tribal land rights, or FPIC;
- Threats to livelihood and community resilience due to land use change, deforestation, loss of arable land, and competition for water resources;
- Damages to public health and worker safety due to toxic chemical, air, and water pollution or inadequate safety precautions; and
- Disruption of local economies and work dislocation.

Ensure that company disclosure on human capital extends to contract workers, hourly workers, and supply chain workers beyond tier 1, and is broken down by gender, sexual orientation, race/ethnicity, and disability (where data is available).

Direct the SEC to extend senior executives' pay disclosure standards to both public and private companies.

Direct the SEC to require companies to report on ESG disclosure metrics such as:

- Company's tax practices;
- Political lobbying practices;
- Gender and race disaggregated data;
- Stock repurchases; and
- Climate change.

These metrics should be comparable, measurable, and time-bound.

Direct the SEC to adopt a rule mandating the publication of country-by-country reports of key financial information by multinational corporations.

SECTION 2. ENFORCEMENT THROUGH LIABILITY

Accountability requires that businesses are held responsible for their role in human rights abuses. As outlined in the UNGPs, this requires that victims have access to effective remedies and that governments ensure corporations face consequences when they engage in harmful practices. At the same time, workers and impacted individuals and communities must be central to these efforts. But in the United States, victims' access to remedy for corporate offenses in U.S. courts has steadily narrowed. Victims face immense barriers in engaging in civil litigation, the primary avenue for remedy in the United States, and the Supreme Court has increasingly favored corporate rights over those of people impacted by abuse. The U.S. government has also generally failed to prosecute corporate human rights abuses or enact mandatory measures to regulate corporate behavior.

But these voluntary efforts on their own have failed to meaningfully improve corporate respect for human rights.

Instead, over the last two decades, the U.S. government's approach to corporate accountability has largely relied on voluntary corporate initiatives.[64] These initiatives included voluntary standards and verification schemes, company supply chain codes of conduct, and multistakeholder initiatives.[65] But these voluntary efforts on their own have failed to meaningfully improve corporate respect for human rights. Instead, the voluntarism model has allowed companies to continue to safeguard their interests in the design and governance of these mechanisms, creating weak systems of remedy with little consequence to companies for even the most serious violations.[66] Corporate abuse continues to run rampant, not only within the United States, but across the globe, with many global violations committed by corporations with a close connection to the United States.[67]

Addressing the root causes and incentives that lead to corporate abuses is a necessary first step to impacting corporate behavior. And to hold businesses accountable for human rights abuses, the United States must be willing to enact comprehensive mandatory measures that not only shed light on corporate harms, but also actually regulate corporate action.

These measures must stem from a rightsholder-centered position that prevents and punishes harm committed and provides access to effective remedy. As part of the State's duty to protect human rights,[68] corporate accountability requires that the United States go beyond voluntary initiatives and impose liability on business entities that fail to respect human rights.

I. LABOR RIGHTS

THE STAKES

Labor rights are human rights. Workers are some of the most important stakeholders in our economy and no corporate accountability regime could be complete without vigorous protections for worker agency and welfare. No matter how comprehensive, liability mechanisms that are not worker-centered will fall flat because it is workers who often have the most at stake and the collective power to push for change. But although businesses cannot exist without workers, workers continually face human rights abuses stemming from decades-long erosion of labor rights and protections for collective bargaining. Each year, millions of workers face wage theft, with low wage workers who already struggle to make ends meet being disproportionately affected.[69] Dangerous working conditions at warehouses[70] and inadequate precautions against COVID-19 have also compromised the health and safety of workers that undergird U.S. industries. Unions, the traditional safeguard for workers to bargain for better wages and safety precautions, have faced relentless union-busting tactics by large companies like Amazon, Apple, and Google.[71]

But the laws protecting the right to a living wage are under-enforced and exempt some of the nation's most vulnerable workers, such as migrant workers, from their protections.[72] Additionally, the right to association and collective bargaining has been weakened by both legislative changes and corporate union-busting tactics, leaving many workers unable to negotiate higher wages and safer working conditions. The lack of regulatory supervision over guest worker programs also leaves migrant workers at risk of forced labor, unsafe living and working conditions, and wage theft.[73] In the garment sector, workers face violence and unsafe working conditions and are often paid a "piece rate" rather than an hourly wage, resulting in workers being paid wages well below a living wage. At a time where the health and safety of workers is threatened by COVID-19 and rising inflation exacerbates poverty levels, it is crucial to strengthen existing frameworks so that workers' fundamental rights are protected against corporate abuse.

THE GAPS

Although the United States has laws in place that aim to protect labor rights, these laws often fall short because of ineffective enforcement or the exclusion of certain classes of workers from protections. For instance, the Fair Labor Standards Act (FLSA) aims to protect the right to be paid for your labor[74] by establishing federal minimum wage, overtime pay, recordkeeping, and child labor standards.[75] However, it exempts several classes of workers from its minimum wage or overtime pay requirements, including independent contractors[76] and agricultural workers.[77] These exemptions disproportionately impact women and workers of color who make up a greater percentage of these excluded classes.[78] Other weak protections for agricultural workers in the United States across the board make them particularly vulnerable to exploitation. Although the Migrant and Seasonal Agricultural Worker Protection Act (MSPA) requires agricultural employers who recruit, hire, transport, or house seasonal or migrant workers to comply with wage, housing, transportation, disclosure, and recordkeeping standards,[79] under the H-2 visa program, migrant workers are tied to a particular employer for the season, making it difficult for them to leave if they face abusive conditions.[80] Additionally, because the MSPA does not regulate labor recruitment agencies that operate outside of the United States, there is no oversight over exploitative recruitment agencies that saddle many migrant workers with debt that can then be exploited.[81] To ensure that no one is excluded from protection, Congress must revise the

definitions of employee, supervisor, and employer to broaden the scope of individuals covered by the FLSA and expand the FLSA to cover agricultural workers and independent contractors.

The National Labor Relations Act (NLRA) defines the central rights of employees to organize and collectively bargain with their employers through union representation.[82] The act establishes an election procedure where employees can vote to form a union and defines certain unfair labor practices that violate the act, like firing or threatening to fire a worker for seeking union membership.[83] If an employer engages in an unfair labor practice, the employer may be required to rehire the wrongfully fired employee or pay back wages, but no additional financial penalties may be levied against the employer for violations.[84] Additionally, employers are permitted to use tactics like mandatory anti-union meetings, threats of closure, and replacements for workers on strike to discourage union elections.[85] Since the NLRA was enacted, almost all legislative changes to the act and court decisions interpreting the act have weakened unions, and like the FLSA, some of the most vulnerable classes of workers are exempted from these protections.[86] Strengthening the right to organize is central to every other element of worker protection. This includes permitting labor organizations to encourage participation of union members in strikes initiated by employees represented by a different labor organization, allowing collective bargaining agreements to require all employees represented by the bargaining unit to contribute fees to the labor organization for the cost of such representation, expanding the definition of unfair labor practices, and prohibiting employers from taking adverse actions against an employee in response to that employee participating in protected activities. Workers are the foundation of corporate accountability and have the collective power to push for change. Therefore, protecting labor rights, and particularly the right to organize, is fundamental to achieving corporate justice and informs every other aspect of accountability—from civil remedies to transparency to due diligence—and is essential to creating a durable impact.

RECOMMENDATIONS PROMOTING LABOR RIGHTS

Improve protections for garment workers by passing The Fashioning Accountability and Building Real Institutional Change Act (FABRIC Act), which would:

- Amend the FLSA to include:
  - The establishment of a nationwide garment industry registry through the Department of Labor.
  - New requirements which hold fashion brands and retailers alongside manufacturing partners jointly accountable for workplace wage violations to incentivize responsible production.
  - Setting hourly pay in the garment industry and eliminating piece rate pay until the minimum wage is met.
- Incentivize domestic manufacturing by introducing:
  - The establishment of a $40 million Domestic Garment Manufacturing Support Program to supply grants to manufacturers for equipment costs, safety improvements, and training and workforce development.
  - A 30% reshoring tax credit for garment manufacturers who move manufacturing operations to the United States. This credit will be applicable to costs associated with reshoring production.

Strengthen the right to organize by passing the Protect the Right to Organize Act (PRO Act), which would:

- Permit labor organizations to encourage participation of union members in strikes initiated by employees represented by a different labor organization (i.e., secondary strikes).

RECOMMENDATIONS PROMOTING LABOR RIGHTS (continued)

- Prohibit employers from bringing claims against unions that conduct such secondary strikes.
- Allow collective bargaining agreements to require all employees represented by the bargaining unit to contribute fees to the labor organization for the cost of such representation.
- Expand the definition of unfair labor practices to include: Prohibitions against replacement of, or discrimination against, workers who participate in strikes and requiring or coercing employees to attend employer meetings designed to discourage union membership and prohibits employers from entering into agreements with employees under which employees waive the right to pursue or join collective or class-action litigation.
- Prohibit employers from taking adverse action against an employee, including employees with management responsibilities, in response to that employee participating in protected activities related to the enforcement of the prohibitions against unfair labor practices.
- Provide employees with the ability to vote in such elections remotely by telephone or the internet.
- Modify the protections against unfair labor practices that result in serious economic harm.
- Establish penalties and permits injunctive relief against entities that fail to comply with National Labor Relations Board orders.

Ensure all workers are included in key labor protections.

- Revise the definitions of employee, supervisor, and employer to broaden the scope of individuals covered by the FLSA.
- Expand the FLSA to cover agricultural workers and independent contractors.
- Expand the FLSA "hot goods" provisions to encompass international supply chain workers.

Ensure that there are no "safe harbors" in all legislation impacting labor rights.

Develop an effective remedy for labor abuses, which must include:

- A timeline that provides swift response, including economic penalties against the violator;
- Transparency to see what the remedy has been for a violation;
- Worker involvement in defining what the remedy looks like;
- In addition to injunctive relief, the remedy should include financial punishment that may include denial of market access.

Create meaningful incentives for corporations to join worker-driven social responsibility initiatives. The principles of worker-driven social responsibility are:

- Labor rights initiatives must be worker-driven.
- Obligations for global corporations must be binding and enforceable.
- Consequences for non-compliant suppliers must be mandatory.
- Gains for workers must be measurable and timely.
- Verification of workplace compliance must be rigorous and independent.

RECOMMENDATIONS PROMOTING LABOR RIGHTS (continued)

Ensure that all migrant and immigrant workers who face violations in the workplace have access to various forms of immigration relief, including T and U Visas, parole, continued presence, retroactive grants, work authorization and deferred action. This would include:

- Ensuring H-2 temporary visa workers should be able to port their visa to another employer, be paroled into the country, and access the various forms of immigration relief described above
- Directing relevant agencies to regulating recruitment agencies of migrant workers in the United States.

Recognize the third-party beneficiary rights of supply chain workers, as implied benefiting parties to buyer/supplier contracts that contain a code of conduct or other regulations of worker safety, health, wage and hour standards, and rights.

Impose duties on imported goods made in violation of local wage and hours laws.

II. CIVIL REMEDY

THE STAKES

While companies continue to profit off of serious human rights violations, workers and other rights-holders face the brunt of the consequences. And those people impacted by corporate abuse are entitled to a remedy—a right explicitly affirmed in Pillar III of the UNGPs.[87] Civil private rights of action for abuses play an essential role in ensuring that those who are directly impacted by corporate wrongdoings are at the center of accountability, complementing government enforcement mechanisms and due diligence regimes in incentivizing respect for human rights. Without serious consequences for human rights violations, corporations learn that they can continue to exploit vulnerable communities with impunity. But more importantly, victims of human rights abuses deserve to be compensated and made whole from the harm done. But victims of human rights abuses face enormous barriers to seeking remedy in the United States and around the world. Corruption, risk of retaliation, cost of litigation, and weak regulatory frameworks all play a role in limiting access to remedy.[88] And as U.S. corporations have expanded their reach around the world, over the years, victims of global abuses have begun to file suit in U.S. courts. But over the last decade, the United States Supreme Court has slowly closed the door on these types of suits, allowing corporations to act with impunity and leaving victims with little avenue for justice. To protect this essential right to remedy, the U.S. must take substantial steps to strengthen existing avenues for recourse and create new and comprehensive tools for victims to seek justice.

THE GAPS

Although mechanisms exist that allow victims of corporate human rights abuses to sue, they fail to provide a reliable and comprehensive system for accessing remedy. For example, The Alien Tort Statute (ATS) allows non-citizens to sue defendants subject to jurisdiction in the United States for money damages in federal court for violations of international law.[89] This law was seldomly used until 1980, when a federal appellate court held that the statute permitted a civil suit against a foreign official for violation of human rights abroad.[90] This led to a modestly successful series of cases suing corporations involved in violations of international law.

But in 2013, the Supreme Court decided Kiobel v. Royal Dutch Petroleum Co., applying a presumption against extraterritoriality to the ATS.[91] Since then, the Supreme Court has

continued to narrow the application of the ATS.[92] But the final blow came in 2021 when the Supreme Court decided Nestlé v. Doe, which declined to apply the statute extraterritorially, determining that the domestic connection is insufficient where the corporate misconduct that occurred in the United States amounted only to "general corporate decision-making."[93] Some on the Court also signaled that the statute could only be applied to the torts already identified, severely limiting its utility. Now, after Nestlé, the once promising ATS provides little avenue to hold corporations accountable for human rights abuses abroad, and the Supreme Court has made clear that further attempts to file suit will likely prove futile.

Another tool that has seen more success than the ATS is the TVPRA. Passed by Congress in 2013, the TVPRA added a civil cause of action for victims of slavery, forced labor, and human trafficking against anyone, including corporations, who knowingly benefits from such violations.[94] The TVPRA applies extraterritorially and is generally considered an effective human rights tool for victims, but because it only applies to slavery, forced labor and trafficking, victims do not have the ability to sue for other types of human rights violations like torture or extrajudicial killings.

Certain procedural limitations also create significant obstacles for a victim's ability to access U.S. courts. For instance, where courts were previously able to assert personal jurisdiction over foreign corporations that do substantial business in the United States, in the 2010s, the Supreme Court began to narrow the circumstances under which it could exercise its jurisdiction over these corporations.[95] The doctrine of *forum non conveniens*, which permits U.S. courts to decline to hear cases where another forum may be better suited to hear the claim, also poses a barrier to suits against transnational corporations. Practically, the doctrine allows courts to dismiss human rights cases against foreign corporations, despite the reality that these cases are often filed by victims as a last resort where they could not safely access justice in their home country, meaning victims are often denied any remedy at all.[96]

Additionally, although ensuring that there are effective legal avenues for addressing corporate abuses is essential to protecting the right to remedy, more corporate actors should also be required to have non-judicial grievance mechanisms to address harms. These mechanisms may serve as a more accessible alternative to courts or could be used in conjunction with court remedies and include requirements that mitigate some of the potential shortcomings of these types of complementary mechanisms.

For victims of human rights abuses to have an effective remedy for a wide range of abuses, we must develop a mechanism with extraterritorial application that permits victims abroad to sue corporations that includes a comprehensive list of causes of action. This may come in the form of amending the ATS to make it explicitly applicable to cases involving corporate harms abroad or by developing a new private right of action that incorporates language from the more successful TVPRA to create a more comprehensive remedy. As we work toward a more just system that disincentives corporate abuse, the ability for victims to seek justice for violations of their fundamental human rights is paramount to affirming the rights and dignity of those directly impacted by corporate abuses.

RECOMMENDATIONS FOR STRENGTHENING CIVIL REMEDY

Ensure that victims of human rights abuses are able to bring civil lawsuits in U.S. courts against U.S. corporations and foreign corporations that have a significant presence or property in the United States. This may come in the form of amending the ATS to make it explicitly applicable to cases involving corporate harms abroad or by developing a new private right of action that incorporates language from the more successful TVPRA to create a more comprehensive remedy. In either case, an effective private right of action should:

RECOMMENDATIONS FOR STRENGTHENING CIVIL REMEDY (continued)

General

- Prioritize worker and impacted community agency in the process of developing a private right of action and in the remedy itself.
- Include worker-driven social responsibility incentives.
- Grant visas for plaintiffs and witnesses who bring human rights torts cases to U.S. courts.
- Include a fast-tracked process for retaliation against whistleblowers.

Procedure

- Establish a reasonable statute of limitations for the harm that is not dependent on foreign law, and apply no statute of limitation for violations of customary international law.
- Stop *forum non conveniens* from serving as a barrier to suit because these cases are often brought as a last resort.
- Ensure transparency and expedited discovery.
- Allow standing for worker and human rights organizations, trade unions, victims and victim's families, community and representative class actions to sue.
- Shift the test for parent company liability for actions by subsidiaries from one based on knowledge and control to one based on benefit.

Application and Reach

- Include explicit extraterritorial jurisdiction.
- Include a non-exhaustive but detailed list of violations that includes aiding and abetting.
- Impose liability for abuses committed by a corporation's subsidiaries, suppliers, and agents overseas.
- Apply strict liability throughout the supply chain.
- Extend liability to include corporations who play a role through "command responsibility" and "aiding and abetting".

Remedy

- Allow for the full range of damages.
- Include an obligation to participate in transitional justice processes including an opportunity for victims to participate in designing the remedy.
- Permit court support of non-traditional remedies.
- Utilize civil forfeiture to seize the property of foreign corporations that is traceable to human rights abuses outside the United States, and which is found in the United States and use these assets to help provide victims of those abuses with remedies.
- Allow specific performance of FPIC as a possible remedy.

III. MANDATORY HUMAN RIGHTS DUE DILIGENCE

THE STAKES

Workers throughout global value chains and the communities in which they reside continue to face serious human rights abuses that are shrouded by the intentionally complex, opaque value chains of transnational corporations.[97] As markets have become more globalized over the last century, transnational corporations have developed systems of suppliers, contractors, subcontractors, and informal sector workers that obscure the realities of the corporate chain, allowing corporations that operate in U.S. markets to engage in and benefit from injurious conduct around the world.[98]

Garment workers face systematic wage theft,[99] sexual harassment,[100] and dangerous working conditions[101] while fast fashion companies continue to reap massive profits. Mining companies are notorious for exploiting the land on which they operate, making it unsafe for the communities that live there through environmental hazards, abusive security forces, or other oppressive practices.[102] And particularly in extractive industries, corporations continue to engage in land grabs from Indigenous communities with shallow "consultations" that fail to get the free, prior, and informed consent of the community, if a consultation occurs at all.[103]

Enacting human rights due diligence is a crucial means of not only active prevention but providing real consequences for violations.

The complex operations of transnational businesses often allow corporations to wash their hands of offenses committed, despite the fact that these same multinational companies not only continue to profit off of these abuses, but also perpetuate them by driving suppliers to produce goods faster and at lower costs.[104] Companies do have the ability to prevent human rights abuses from occurring in their global operations but have failed to do so, and have often lobbied against laws aimed at addressing these issues. In the United States, corporations are generally not required to conduct due diligence by tracking and preventing abuses that occur in their operations and are able to evade liability when they do occur. To achieve corporate accountability, corporations must be forced to address the abuses across their value chains and be held to account through a comprehensive system that prevents and punishes harm and puts effective restraints on corporate behavior. Enacting human rights due diligence is a crucial means of not only active prevention but providing real consequences for violations.

THE GAPS

The Disclosure Model is Insufficient

Early in the development of the Business and Human Rights movement, disclosure and transparency regimes appeared to offer a potentially effective avenue for corporate accountability, particularly in response to the proliferation of human rights abuses across supply chains.[105] If the public, including consumers and investors, were informed of harmful corporate practices, they could impose social and financial pressure on corporations to change their behavior. Civil society organizations working to advance human rights had built successful name-and-shame campaigns against governments engaging in human rights abuses and, in theory, a similar tactic could work against corporations.

But these attempts at implementing the disclosure model alone were largely unsuccessful.[106] This is because, generally, the disclosure model on its own fails to prevent and impose liability on the underlying violations, allowing them to occur so long as they are properly reported by the corporate entity. Moreover, focusing on transparency alone as the solution to corporate harm can divert attention away from core structural reforms.[107] Disclosure laws, when combined with liability do have a role to play in advancing corporate accountability by informing investors, consumers, CSOs, or governments of potential human rights abuses

within company operations. This knowledge can, in turn, inform further action by stakeholders and additional advocacy efforts. But disclosure alone is a limited tool that fails to provide the same level of efficacy as true due diligence legislation, with an even more limited impact on rights-holders. Instead, to achieve effective accountability, governments must move beyond transparency by also compelling companies to prevent and address harms. Countries throughout Europe, including France, Norway, Germany, and the Netherlands have already passed legislation to this effect,[108] and it is time for the United States to follow suit.

The U.N. Guiding Principles on Business and Human Rights recognize that business enterprises have a responsibility to respect human rights and that in order to do so they should undertake due diligence measures.[109] The UN Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises (UNWG or the Working Group) has made clear that due diligence is key to fulfilling a corporation's responsibilities under Pillar I and Pillar II of the Guiding Principles.[110] This "human rights due diligence" (HRDD) refers to an "ongoing risk management process" that business enterprises should undertake to "identify, prevent, mitigate and account for how they address potential and actual impacts on human rights caused by or contributed to through their own activities, or directly linked to their operations, products or services by their business relationships."[111] It includes four key steps: assessing actual and potential human rights impacts; integrating and acting on the findings; tracking responses; and communicating about how impacts are addressed.

However, the UNGPs are not legally binding, and voluntary corporate social responsibility schemes have generally failed to produce meaningful change,[112] instead, often hiding corporate abuse.[113] In fact, of the 230 companies evaluated by Corporate Human Rights Benchmark in 2020, nearly half failed to show any evidence of identifying or mitigating human rights issues in their supply chains.[114]

The UNGPs affirm that while corporations have a duty to respect human rights, States have a duty to protect against human rights abuses within their jurisdiction by taking appropriate steps to prevent, investigate, punish, and redress those abuses. This includes enacting effective legislation and regulation, as well as policies and other measures. To meet this duty, States cannot solely rely on voluntary measures, and should utilize a "smart mix" of voluntary incentives and mandatory measures to ensure that legal and political structures are in place for the state to effectively prevent and address corporate harms.

Status of mHRDD in the United States

In the National Action Plan on Responsible Business Conduct in 2015,[115] the United States pledged its commitment to human rights due diligence. Although some laws exist that require limited due diligence in certain circumstances and serve as good steps toward accountability, they fall short of creating a comprehensive U.S. due diligence regime.

For instance, government contractors and their agents are prohibited from engaging in the trafficking of persons or using forced labor in the performance of the contract.[116] Contractors are further required to maintain a compliance plan that includes procedures to prevent agents from engaging in trafficking of persons and institute a mechanism for employees to report non-compliant practices.[117] The Dodd-Frank Act Section 1502 also imposes a requirement on certain companies to conduct a country of origin inquiry to determine whether any of its minerals originated in the covered countries or are from scrap or recycled sources and report its findings. If the inquiry determines that there is reason to believe that the minerals may have originated in the covered countries and are not from recycled or scrap materials, the company is required to conduct due diligence and file a report.[118] Guidance issued by the SEC under the rule requires companies to publish annual reports on the steps taken to exercise due diligence and to have those reports independently audited.

Section 307 of the Tariff Act, which prohibits goods made wholly or in part using forced or child labor from entering the United States, may also provide some incentive to conduct due diligence.[119] In 2021, Congress passed the UFLPA which strengthened the Tariff Act's ability to prevent goods produced in the XUAR from entering the United States.[120] It establishes a rebuttable presumption that goods mined, produced, or manufactured wholly or in part in the XUAR or by an entity on the UFLPA Entity List are prohibited from U.S. importation under section 307 of the Tariff Act. An importer may overcome this presumption and receive an exception from CBP if it can demonstrate by clear and convincing evidence that the goods in question were not produced wholly or in part by forced labor, fully respond to all CBP requests for information about goods under CBP review, and demonstrate that it has fully complied with the guidance issued by DHS, including due diligence, effective supply chain tracing, and supply chain management measures.

...the government must enact comprehensive due diligence legislation with broad enough applicability to effectively prevent and redress harm.

These measures impose some due diligence requirements and incentives that serve as useful corporate accountability tools. However, these efforts are limited, generally only applying to certain high-risk sectors and covering a limited number of violations. To appropriately address the full range of corporate abuse and fulfill the United States's commitment to due diligence, the government must enact comprehensive due diligence legislation with broad enough applicability to effectively prevent and redress harm.

A Model for Human Rights Due Diligence in the United States Based on the FCPA

If the United States aims to follow through on its commitment to human rights due diligence, it needs to develop a system that is mandatory, applies globally, does not rely on a check-box approach, and provides no safe harbor through third party certification. Effective human rights due diligence legislation should impose liability not only where a corporation fails to properly conduct due diligence, but any time a violation occurs, whether or not due diligence is conducted. One model, based on the Foreign Corrupt Practices Act (FCPA),[121] would prohibit companies that are based in the United States or publicly traded on U.S. exchanges from engaging in human rights abuses around the globe. It would also require companies to undertake processes to identify and mitigate the risks of human rights abuses across their value chains. This legislation would empower the DOJ and the SEC to investigate allegations of abuse and, in cases where violations are found, assess fines or pursue criminal charges against corporate actors.

The FCPA has worked for decades to stymie systemic bribery and corruption and its model could be used to do the same for human rights abuses. The law has two main provisions: the first prohibits the bribery of foreign officials for a business purpose, and the second directs publicly traded companies to accurately account for all their assets and liabilities. The second provision requires covered entities to keep accurate and reasonably detailed books and records, and also implement internal controls to ensure all transactions are properly authorized. The internal controls provision requires covered entities to create a system of internal accounting controls to ensure the accuracy of their books and records, and that all transactions and access to assets are properly authorized.

In this way, the FCPA works a lot like human rights due diligence—requiring corporations to keep accurate accounts of their activities, develop processes for preventing violations, and imposing liability when violations occur. An FCPA for Human Rights would create a similar framework which would prohibit companies from violating certain human rights in the course of business, require companies to institute a due diligence system to prevent any such violations from occurring, and draft regular reports on their compliance.

Application and Reach. Key to any effective due diligence model, an FCPA for Human Rights would have a global reach—applying to domestic corporations and individuals, public foreign corporations that trade on U.S. exchanges, and other persons or entities acting from within the United States or its territories. Also essential is its application across the corporate chain and throughout the corporate ladder, covering the same classes of entities as the FCPA regarding their bribery prohibitions: 'issuers' (including publicly traded companies); 'domestic concerns' (including U.S. nationals and residents) and 'other people', including non-U.S. nationals who work to advance a bribery scheme while in U.S. territory. Additionally, ancillary individuals to any of the covered entities may be held liable, including officers, directors, employees, agents, and even stockholders acting on behalf of an entity. These requirements should also ideally apply to large companies as well as small and medium-sized enterprises.

The social audit methodology is severely limited and often ill-equipped to recognize the hidden coercion or exploitative recruiting practices...

Accounting Directives. Like the FCPA, an FCPA for Human Rights would impose a flexible model for establishing a system of compliance and due diligence to verify that the corporation has not violated any human rights in its course of business. Although there are no specific controls a company must employ to be in compliance with the FCPA, the DOJ has a series of topics it considers relevant in assessing whether, and to what extent, a company's compliance program was effective.[122] The FCPA for Human Rights' due diligence equivalent would be broken down into many of the same categories including risk assessment, management of third-party relationships, preventative measures, timely, documented investigative responses, and continued monitoring of the program itself.[123] Like the FCPA, the scale of these systems under an FCPA for Human Rights would be proportional to the company's size and means.

Liability and Scope of Violations. Human rights due diligence legislation should impose liability not only where a corporation fails to properly conduct due diligence, but any time a violation occurs, whether or not due diligence is conducted. This liability should cover a broad range of violations based on "all internationally recognized human rights and environmental standards" as much as politically feasible.[124] These would include not only crimes like murder and kidnapping, but federal crimes related to forced labor and trafficking, as well as sexual abuse and torture. Violations would also extend to internationally recognized crimes like genocide and other crimes against humanity, as well as environmental abuses. Importantly, this type of legislation should also include as violations conduct not in compliance with the fundamental rights enumerated in the ILO 1998 Declaration on Fundamental Principles and Rights at Work. It should also provide for both civil and criminal liability, sanctioning not only any illegal acts of covered persons but also any who knowingly benefit as a result of a relationship within the issuer's supply chain that has come about as a result of a violation of human rights.

This type of legislation should also eliminate safe harbors created by language requiring "established business relationships" for liability and apply joint and several liability for violations. Human rights due diligence legislation should also recognize workers as implied third-party beneficiaries to buyer and supplier contracts and codes of conduct.

Verification of Compliance. Any effective due diligence regime cannot merely rely on social audits or certification schemes for compliance verification. We have known for years now that third party certification schemes often fail to protect human rights.[125] The social audit methodology is severely limited and often ill-equipped to recognize the hidden coercion or exploitative recruiting practices like hidden recruitment fees that might indicate forced labor or other human rights abuses. Insufficient worker interviews often conducted at the workplace where workers might fear

retaliation and language barriers also add to the difficulty of identifying abusive conditions. Most audits also often last no more than a few days, leaving insufficient time to build rapport with workers and conduct the type of in-depth review that would be better suited to identify abuses, such as through off-site interviews and additional time to corroborate claims. This means that audits often merely provide a snapshot of conditions at the time and place of the audit, which can be easily manipulated by the employer, particularly where audits are announced in advance. Conflicts of interest and attempts by suppliers to hide adverse findings also muddy the waters when attempting to make accurate assessments of working conditions.[126] This limited methodology is further incentivized through financial pressures to conduct audits more quickly and with fewer auditors to drive costs down.

Remediation & Grievance Mechanisms. With the increase in legislation requiring effective grievance mechanisms, or "complaints mechanisms," there is opportunity to demand qualitative disclosures on grievances received and addressed to ensure not only that companies are accurately reporting their human rights impacts, but also that companies are responding to discrete due diligence concerns and improving due diligence based on lessons learned from complaints. Additionally, National Contact Points of the OECD Due Diligence Guidelines should be able to document and report on their cases, where pertinent, in order to root company reports in the actual experience of communities impacted by the company's activities.

RECOMMENDATIONS FOR PROMOTING MANDATORY HUMAN RIGHTS DUE DILIGENCE

Pass a mandatory human rights due diligence bill based on the FCPA that prohibits companies from violating certain human rights in their course of business and require companies to institute a due diligence system to prevent any such violations from occurring, drafting regular reports on their compliance. This model should:

- Apply to domestic corporations and individuals, public foreign corporations that trade on U.S. exchanges, and other persons or entities acting from within the United States or its territories.
- Apply across the corporate chain and throughout the corporate ladder, covering the same classes of entities as the FCPA regarding their bribery prohibitions.
- Include a due diligence equivalent that would be broken down into many of the same categories as the FCPA, including risk assessment; management of third-party relationships; preventative measures; timely, documented investigative responses; and continued monitoring of the program itself.
- Impose liability not only where a corporation fails to properly conduct due diligence, but any time a violation occurs, whether or not due diligence is conducted. This liability should cover a broad range of violations based on "all internationally recognized human rights and environmental standards" as much as possible.
- Provide for both civil and criminal liability.

Any American due diligence model would need to recognize the limited efficacy of social audits and third party certification and cannot allow them to serve as a safe harbor for corporate human rights violators.

- To fully follow through on this commitment, the United States must adopt legislation that requires corporations to assess and address human rights and environmental abuses across the value chain with effective methods of compliance verification that do not merely rely on the current model of social audits.

IV. CRIMINAL LIABILITY FOR ABUSES

THE STAKES

Accountability for corporate actors who commit or are complicit in the commission of crimes linked to human rights abuses is few and far between. Corporate crimes occur in many different contexts across the globe—from the murder of environmental defenders to human trafficking. Companies and financial institutions have even propped up governments and armed groups that go on to commit gross human rights violations.[127] The State's duties to protect human rights and ensure remedy require them to investigate allegations of violations and hold perpetrators accountable. But for the last five years, DOJ prosecutions against corporations have been at a record low.[128] The failure of governments to meet their obligations and enforce the law sends the message that these big companies are above it, and serious gaps remain in the existing accountability mechanisms, particularly for corporate crimes with the biggest consequences overseas. Criminal liability and effective government enforcement bolsters accountability by utilizing the government's resources toward protecting the rights of the people, and communicates that these companies are not above the law.

THE GAPS

A number of federal statutes address human rights-related crimes. For instance, violations of Section 307 of the Tariff Act, which prohibits the importation of goods produced in whole or in part with forced labor, can result in seizure, forfeiture and other civil or criminal penalties. Additionally, the Trafficking Victims Protection Reauthorization Act (TVPRA) imposes federal criminal liability on businesses for benefitting from participation in a venture that engaged in trafficking or forced labor, including use of forced labor in their foreign supply chains. The Anti-Terrorism Act also imposes liability on businesses that provide financial support to designated terrorist organizations. Genocide, war crimes, piracy, and the recruitment of child soldiers are also all criminal acts under U.S. law.[129]

Some parts of the U.S. sanctions regime specifically target individuals and companies involved in human rights violations. For instance, the Global Magnitsky Human Rights Accountability Act (GLOMAG), in conjunction with other sanctions legislation and regulations, authorizes civil and criminal penalties for individuals and companies that do business with foreign persons designated by the United States as being involved in the violation of human rights. However, the imposition of sanctions is ultimately a political decision impacted by the State's diplomatic interests. Moreover, there is no accessible and transparent process to accept and investigate complaints of serious human rights abuses, and sanctions cannot be applied to U.S. corporations.

Although the United States has other federal criminal statutes in the area of human rights that apply extraterritorially, and which could be invoked against businesses, particularly related to genocide, torture, and war crimes, prosecutions against businesses for these human rights crimes remain rare and often do not result in compensation to victims.[130] Moreover, the scope of authorities provided to DOJ is limited and does not extend to some of the most common human rights abuses committed by corporations. Despite the fact that corporate crime costs victims over 10 times more than street-level crime per year,[131] corporate offenses often go unpunished. When enforcement authorities do go after corporate actors, the lack of a unified authority on corporate enforcement data, particularly when corporate crime occurs in multiple jurisdictions, can allow repeated offenders to go unnoticed. Therefore, to improve enforcement and ensure accurate and consistent information regarding corporate crimes, DOJ should publish an annual report on corporate offenses just as they do for other types of crime. This, combined with strengthening enforcement authorities to ensure that human rights abuses most often committed by companies are criminalized and able to be prosecuted will help to ensure that the State is able to meet its obligations in protecting human rights.

RECOMMENDATIONS TO STRENGTHEN CRIMINAL LIABILITY

Amend the federal penal code to include crimes against humanity as defined by the Rome statute and conform U.S. criminal law to the 1949 Geneva Conventions.

- Language should mirror the Rome statute so that definitions of the substantive crimes should criminalize the same scope of activities as those laid out by the Rome statute.
- The gravity requirement definitional to CAH should read "widespread or systematic" rather than "widespread and systematic" to ensure that the provision does not further raise the already high threshold.
- Operate under principles of universal, or some form of present-in jurisdiction. If this is not politically feasible, the statute must still apply extraterritorially in some capacity.
- Explicitly include liability for corporate persons.
- Integrate superior responsibility, for example, as formulated by the Military Commissions Act of 2006.

Pass an FCPA-like human rights statute that imposes criminal liability on corporations for human rights violations, including offenses that are most frequently committed by businesses.

Direct agencies like the DOJ to strengthen enforcement of the TVPRA.

Introduce legislation allowing the prosecution of financial support of human rights violations.

- Extend the same level of liability and criminal penalties for financing terrorism to financing human rights abuses and atrocity crimes.

Utilize the U.S. sanctions regime to promote corporate accountability.

- The U.S. government can and should use existing authorities under the Global Magnitsky Act, Executive Order 13818, and the International Emergency Economic Powers Act to sanction corporations, block property associated with abuses, deny visas to corporate executives, and ban imports of products where serious human rights abuses contributed to their production.
- The government should also invest in outreach around this program, so that civil society organizations working directly with victims of human rights abuses at the grassroots level are better aware of the program and the process for submitting evidence of abuses to sanctions officials.
- To the extent that these sanctions programs result in fines or confiscated property, the government should ensure that these are made available to victims of the underlying abuses who have not had access to remedies.
- Utilize the Section 7031c visa program meant to prevent foreign government officials from entering the US to prevent corporate officers who violate human rights from entering the United States.

Require DOJ to publish an annual report on corporate crimes.

SECTION 3: ENFORCEMENT THROUGH MARKET ACCESS

I. INTRODUCTION

As one of the world's largest economies, the United States wields immense influence over global markets, allowing the government the opportunity to play a significant role in incentivizing corporate respect for human rights. By regulating access to U.S. markets, including through its own purchasing policies, the government can promote human rights by rewarding fair play and punishing illicit activity, while imposing clear financial costs on companies engaging in human rights violations. If a company cannot access a substantial portion of the market, it results in substantial missed profits. Therefore, the market power of the United States presents a powerful tool to combat human rights abuses in the United States and around the globe. It is crucial that these tools are wielded strategically in order to achieve systemic change in global supply chains. When used in conjunction with limits on corporate power, systems of liability, and due diligence mechanisms, it can serve as a key piece of a comprehensive system of corporate justice.

II. IMPORT CONTROLS

THE STAKES

Section 307 of the Tariff Act leverages the power of the American economy by restricting access to U.S. markets from corporate entities that engage in forced labor or child labor. Considering the prevalence of these abuses in global corporate supply chains, this tool holds immense potential to drive real impact in the fight against corporate human rights abuses. Through enforcement of the Act, the government can create financial incentives for corporations to alter their business practices and promote human rights. Moreover, the public listing of importers who have been found to be engaging in abuses can also impose reputational damage to the company and support other efforts for accountability like civil remedies. And at least in some cases, enforcement through import controls has been successful in actually changing corporate behavior.[132] Although Section 307 of the Tariff Act is only one tool within the larger strategy to progress corporate accountability, when utilized to its full potential, it can play a part in driving real impacts on corporate behavior.

THE GAPS

U.S. law prohibits companies from importing goods produced "wholly or in part" with forced labor into U.S. Markets.[133] Section 307 of the Tariff Act defines forced labor as "all work or service which is exacted from any person under the menace of penalty for which he does not offer himself voluntarily."[134] This provision is implemented by CBP which may issue a WRO when information reasonably indicates that a good was produced with forced labor.[135] CBP may also issue a finding and enact civil penalties for violators.[136] Products subject to WROs or findings are detained by CBP and are prohibited from entering into U.S. commerce. However, companies can re-export the products subject to WROs and sell them in other markets.

The Uyghur Forced Labor Prevention Act (UFLPA), which went into effect in 2022, expands on the Tariff Act by creating a presumption that goods made in whole or in part in China's northwest Xinjiang region, or produced by entities in China linked to forced labor, cannot be imported into the United States. Companies may rebut the presumption by providing "clear and convincing evidence" that goods are not linked to forced labor. Guidance issued by CBP[137] and the U.S. government strategy provides detailed instructions to companies on how to conduct human rights due diligence and supply chain tracing sufficient to prove that either goods were not sourced, in whole or in part, from the XUAR, or, if they are from the XUAR, that they were not produced with forced labor.

Although the Tariff Act is a powerful tool, expanding the range of violations and addressing limitations on enforcement could substantially improve its efficacy. As it stands, the Tariff Act only covers forced labor, which includes

indentured, trafficked, forced child labor, and prison labor. Considering the recent success of this tool, the government could further promote corporate respect for other human rights by expanding import controls to also address other labor violations and human rights abuses.

Moreover, because import controls rely on their ability to exclude goods from the market and impose financial consequences on human rights violators, it is critical that goods denied entry into the U.S. market cannot simply be re-exported to neighboring markets in Canada, Mexico, or the EU. The United States-Mexico-Canada Agreement ("USMCA") requires the parties to take measures to prohibit the importation of goods produced by forced labor. In connection with the USMCA, a Canadian forced labor import ban took effect on July 1, 2020 through an amendment to the Customs Tariff. The EU also recently proposed a regulation where economic operators would be prohibited from placing or making available on the EU market products that are made with forced labor. These global efforts assist in ensuring that goods denied by CBP are not just sold into our neighbors' markets.

However, this effort must also consider the limited capacity of CBP and potential repercussions for workers and communities. This is because the WRO is a blunt instrument. Although CBP can leverage WROs in a way that is worker-centered, such as by pushing remediation to workers as a condition of re-entry, it is not required.[138] This means that a WRO may result in consequences that worsen the situations of workers—for instance, through mass layoffs—where it is not accompanied by worker-centered incentives. Therefore, any effort to expand the ban beyond forced labor should carefully consider these consequences and others, including the strain on resources that an expanded ban would cause for CBP and the negative impact that would have on implementation of the current and expanded ban. Any expansion of the Tariff Act should balance these potential repercussions with the utility of the expansion.

Moreover, CBP frequently relies on CSOs to identify companies engaging in prohibited labor practices through the WRO petition process. However the lack of transparency surrounding WROs and the petition process limits the efficacy of Section 307. For instance, CBP does not consistently provide petitioners a response on the merits of petitions submitted or regular updates on the status of the review. Upon the issuing of a WRO, it also publishes little information as to the exact class of goods to be detained, the names of the exporter, or the time of detention. And when WROs are modified or terminated, petitioners are provided with little to no information and are not given the opportunity to corroborate the commitments of the importer.[139]

Increased utilization of civil penalties could also fill gaps in enforcement. Because WROs only target foreign producers and facilities, domestic importers often go unpunished. However, domestic importers can be subject to civil penalties and fines, which can put U.S. companies on notice of abuses in their supply networks and incentivize improved respect for human rights. These fines could then be placed in a reparation fund for victims that could support remediation efforts. The Tariff Act is a strong, but imperfect tool that could be sharpened to increase its efficacy and limit its unintended consequences. Strengthening enforcement and expanding the range of violations could allow the U.S. to better leverage its market to advance human rights.

RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY THROUGH IMPORT CONTROLS

Require full supply chain mapping and disclosure, see Section on Transparency for more details.

Consider expanding Section 307 of the Tariff Act to cover a wider range of abuses, including additional labor violations, and other types of human rights abuses.

- Consider potential impacts of expanded ban on communities dependent on certain goods and CBPs enforcement capacity.

Require including worker-centered incentives in enforcement actions, for example, by requiring remediation to workers from violators subject to a WRO.

Increase transparency in the WRO petition process by:

- Providing petitioners a response on the merits of petitions submitted and/or providing petitioners with regular updates on the status of the review.
- Providing more detailed information upon the issuance of a WRO including as the exact class of goods to be detained, the name of the exporter, and/or the producer of those goods and their address.
- Permitting petitioners and workers with the opportunity to corroborate the commitments of companies that may lead to the modification or termination of a WRO.

Direct enforcement agencies to increase the strategic utilization of civil penalties to ensure that U.S. importers cannot act with impunity.

III. PROCUREMENT

THE STAKES

As the largest single purchaser in the global economy, the federal government is uniquely positioned to leverage its purchasing power to drive business respect for human rights and advance corporate accountability.[140] Like other mega purchasers, the federal government procures through global supply chains that are complex, opaque, and often rife with human rights abuses. Unsurprisingly, U.S. government contractors and subcontractors have been linked to a range of human rights violations, from health and safety risks in garment factories to forced labor in the fishing industry.[141] U.S. privatization of penal institutions and security forces also serve as particularly egregious examples of the negative human rights impacts of U.S. contracting. While the federal government has taken steps to address human rights issues in its supply chains in recent years, in general, human rights considerations are not currently integrated into the federal procurement process in a meaningful way. Instead, the current federal procurement framework often rewards contractors who can offer the lowest price, regardless of how they operate or treat their workers.[142]

THE GAPS

Federal procurement law is consolidated and codified in the Federal Acquisition Regulation (FAR), a long and complex regulation which applies to all agencies. Currently, federal contracting prioritizes lowest price or "best value" (depending on the type of contract) as a determinative factor in awarding bids and does not generally take into consideration bidders' human rights records or their capacity to manage human rights in their value chains (i.e., conducting human rights due diligence).[143] This creates perverse incentives and rewards bidders that can underprice the competition because they or their subcontractors violate the rights of their workers.[144] In addition to the lack of human rights screening for bidders, there is no explicit contractual obligation for federal contractors to conduct human rights due diligence during contract performance. That said, there are some human rights protections that apply in narrow circumstances; however, there are many gaps in protection.

First, existing efforts to address human rights risks in federal procurement only cover a narrow set of human rights, leaving significant gaps in protection. Ideally, governments should require contractors and subcontractors to comply with core international human rights standards and domestic law in the country of production.[145] However, current federal procurement policy falls short of this, opting for a piecemeal approach that only covers scattered human rights abuses. While some requirements in the current procurement system cover a broader set of human rights (namely related to discrimination, wages, health, and safety), these only apply to work performed within the United States, leaving workers abroad unprotected.[146] For example, The Walsh-Healey Public Contracts Act requires federal contracts for supplies above $10,000 to include stipulations that require contractors to conform to standards regarding minimum wages, maximum hours, child labor, and safe working conditions.[147]

When it comes to addressing human rights in global supply chains, the FAR exclusively focuses on human trafficking and forced labor. Current federal procurement policy prohibits agencies from purchasing goods produced using forced or indentured child labor.[148] To this end, when procuring goods above a "micro-purchase threshold," the FAR requires contracting personnel to check if the good being solicited is on the Department of Labor's List of Goods Produced by Forced or Indentured Child Labor. If it is, the contracting officer must notify bidders and, prior to contract award, the apparent contractor must certify that it either (a) will not source from countries listed as high risk, or (b) has made a good faith effort to determine whether the good was produced with forced child labor, and based on those efforts is unaware of any such use of forced child labor.[149]

The FAR also prohibits all contractors and subcontractors, including their employees and agents, from engaging human trafficking, which is defined to include forced labor and certain trafficking-related activities, such as charging recruitment fees.[150] Under the FAR, agencies are required to insert a specific clause in all solicitations and contracts that establishes this prohibition and requires additional steps.[151] Additional contractual requirements apply to certain contracts performed abroad. Specifically, contractors are required to prepare and implement a compliance plan for any portion of a contract or subcontract that: "(1) Is for supplies, other than commercially available off-the-shelf items, to be acquired outside the United States, or services to be performed outside the United States; and (2) Has an estimated value that exceeds $550,000."[152] These compliance plans must include, among other things, "procedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in" trafficking in persons and trafficking related activities, and procedures "to monitor, detect, and terminate any agents, subcontracts, or subcontract employees that have engaged in such activities."[153] When this requirement applies, contractors must certify before contract award, and annually during the contract period, that they have implemented the compliance plan.[154]

The progress on trafficking and forced labor is commendable. Yet, human rights abusers do not limit themselves to one category of abuse at a time. In its trade agreements, tariff preferences, and foreign assistance programs, the United States has already expanded the scope of human rights protection to extend beyond trafficking to include internationally recognized labor standards.[155] U.S. procurement lags behind these policies, and, in fact, procurement will undermine those policies until it catches up with an equivalent scope of protection for human rights.[156]

Second, in addition to being narrow in scope, the existing human rights provisions in the FAR are subject to significant exemptions and carveouts that limit their reach and undermine their efficacy. For example, under the forced child labor provision, the certification pertains only to fabrication of an "end product" (e.g., apparel) and not the components of a product (e.g., cotton fabrics), even when there is evidence that components might be produced with forced child labor.[157] When it comes to the provision on human trafficking, one particularly glaring gap is that the compliance plan and certification requirement does not apply to purchases of 'commercially available off-the-shelf' (COTS) items, which is defined as any item available to the general public that is sold to the government without being modified.[158] This significantly limits the reach and undermines the efficacy of the compliance plan and certification requirement, as exempting COTS results in the exclusion of "vast amounts of procurement from high-risk sectors with troubling human and labor rights violation records, including technology, apparel, agriculture, seafood, and meat."[159]

Third, existing human rights provisions rely on contractor self-reporting and there is a general lack of independent monitoring. Virtually no proactive contract performance monitoring in relation to human rights is undertaken by or on behalf of the United States federal government.160 Both the human trafficking and forced child labor provisions rely on contractor self-reporting and self-certification, rather than focusing on obtaining compliance information from workers, their trade unions (when present), and civil society organizations based in regions where factories and suppliers are located.[161] As emphasized by the International Labor Rights Forum, there is no substitute for obtaining "compliance data from workers through bottom-up reporting, not top-down certifications."[162]

Further complicating monitoring efforts, the federal government does not currently have access to key supply chain data that is essential to revealing human rights abuses in the government's supply chain. Transparency is essential for accountability and is a prerequisite for independent monitoring of any government's supply chains. Recognizing this, in 2006, Congress passed the Federal

Funding Accountability and Transparency Act (Transparency Act), which requires that all recipients of federal funds exceeding $25,000 disclose the country and address where the work is performed for both contractors and their subcontractors (including vendors).[163] Senate cosponsors were explicit that the Transparency Act's objective was to disclose all subcontracts, and the agencies implementing the Transparency Act acknowledge that its "reporting requirements flow down to all subcontracts, regardless of tier."[164] Unfortunately, this law has yet to be fully implemented.[165]

Finally, contracting officers do not have sufficient resources or training for effective implementation of human rights requirements. Closing key gaps in the current procurement framework will only be effective if they are robustly implemented by agencies and contracting officers. With shrinking resources to monitor contractors, contracting officers do not currently have the capacity to effectively implement pre-award human rights measures or to effectively monitor post-award contract obligations to respect human rights.[166] While the federal government has put out some written guidance related to human rights in public procurement, this alone is insufficient without a mechanism to provide real-time support to contracting officers. While the federal government has taken steps in the right direction, there is much more that can be done to make use of this unprecedented leverage.

RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY THROUGH PROCUREMENT

Require bidders to disclose violations of labor standards and human rights or acts of criminal negligence, especially if they have repeated and serious violations.

Employ the standard of contractor responsibility to evaluate contractors' human rights records and to exclude a contractor if it lacks necessary operational controls and safety programs to address the risk of human rights impacts.

Pass a clarifying amendment to the Federal Funding Accountability and Transparency Act of 2006 that reiterates that full implementation of the Act requires the disclosure on USAspending.gov of all subcontracts and vendors at all tiers, subject only to the de minimis limitations in the Transparency Act.

- This amendment should be drafted to ensure that the OMB reforms FAR 52.204-10 to require reporting beyond the first-tier subcontract awards and removes the rule's exclusion of long-term vendor agreements for materials or supplies, consistent with the language of the Act.

Ensure that agencies and contracting officers have the resources and expertise needed to effectively implement, monitor, and enforce human rights related procurement requirements.

- This should include creating and resourcing a central body to support procurement officials at all federal agencies with the task of evaluating human rights related risks and compliance with key FAR regulations.
- This Bureau should be housed in DOL and resourced appropriately to provide standardized guidelines for requesting compliance plans, evaluating past labor violations as risk factors for trafficking and labor exploitation, providing training for federal contracting workforce, and providing real-time technical assistance and review of compliance plans for other federal agencies.

Remove exemptions from the Walsh-Healey Public Contracts Act (PCA), making the law applicable to items available in the open market, perishables and agricultural products, and the carriage of freight and personnel.

RECOMMENDATIONS TO PROMOTE ACCOUNTABILITY THROUGH PROCUREMENT (continued)

- In addition, apply the act beyond prime contractors to a variety of subcontractors fulfilling a government contract, and phase out the exemption that limits the PCA to domestic procurement contracts in order to make the Act applicable to items produced outside of the United States, Puerto Rico, the Virgin Islands, or the District of Columbia.

Expand the scope of human rights protections in government supply chains beyond human trafficking and forced child labor to include internationally recognized labor standards.

- Provide full protection of human rights, including the prohibition of discrimination, the right to life, with a particular emphasis on human rights defenders, especially women or indigenous people, the right to dignity, the right to privacy, freedom of association, and the prohibition of all child labor.

Reform federal procurement standards to hold corporations accountable for non-compliance with domestic law in the country of production.

Require all federal contractors to conduct robust, gender-responsive human rights due diligence (HRDD) processes, in alignment with the United Nations Guiding Principles on Business and Human Rights (UNGPs).

Reform existing human trafficking provisions to ensure that all requirements apply to commercially available off-the-shelf items (COTS) as, currently, the rule's compliance plan requirement applies to supplies, other than COTS, acquired outside the United States or services to be performed outside the United States and that have an estimated value that exceeds $500,000.

Create new mechanisms for bottom-up enforcement of requirements, for instance by recognizing workers as implied third-party beneficiaries in buyer/supplier contracts that incorporate codes of conduct or are subject to federal procurement regulations mandating certain labor and environmental practices.

Eliminate the use of private prisons and detention centers while increasing transparency and oversight by:

- Eliminating contracts with for-profit prison companies and detention centers.
- Expanding transparency requirements that subject private prison companies to the same level of scrutiny as public run facilities.
- Ending the practice of incarcerating people far from home.
- Eliminating the federal bed quota for immigration detention.

III: BUILDING A STRONGER, BROADER COALITION FOR CORPORATE ACCOUNTABILITY

The above chapters outline the multitude of ways that unchecked corporate power results in the exploitation of workers, communities, and the planet.

This Agenda also detailed the varied lines of work needed to further corporate accountability across diverse, interrelated issues. This means that to build a future that works for everyone, we need a stronger, broader coalition working toward corporate accountability that can move us forward.

For over a century, big business has wielded unprecedented influence over society.[167] Now, companies have the power to impact the lives of everyday people around the world. Corporations are entities that respond to the incentives and disincentives of our system, and under our current system, corporations are structurally incentivized to maximize profit for shareholders and minimize constraints on achieving that goal. And in some cases, they have as many rights as people, yet fewer obligations. But when you combine a goal of unrestrained profit maximization plus political impunity, the system inevitably produces exploitation. It is therefore unsurprising that companies have a role in nearly every type of environmental, labor, and human rights violation.

Corporate tyranny impacts everyone. Although this Agenda largely focuses on business and human rights, the issues of corporate power are deeply intertwined with other movements—from labor to climate justice. This is because when corporations can put profit over people without consequence, workers, democracy, and the planet suffer.

The labor movement has the clearest connection to corporate accountability because it is workers that often have the most at stake. Corporate impunity for engaging in union-busting tactics suffocates workers' rights to freedom of association and tramples on essential protections for workers. Corporate prioritization of shareholder profits above all else deprives workers of living wages, decent working conditions, and a say in their own labor. This also means that corporations are less likely to reinvest those profits in long-term research that could build a more sustainable future.

When big companies consolidate to get even bigger, they can control the markets for medicine and housing, leaving these basic necessities out of reach. Women workers, workers of color, and migrant workers not only face the brunt of these corporate failures, but are also, in some cases, targeted for exploitation and excluded from key protections.

The planet faces the consequences of unchecked corporate power too. Mining, logging, and drilling not only can displace and endanger local communities, but they also contribute significantly to pollution and accelerate the devastating impacts of climate change. The unmitigated drive for profit allowed oil companies like Exxon to downplay their role in global warming, despite clear warnings from their own researchers.[168] Even less obviously polluting sectors, like the fashion industry, produce 10% of all humanity's carbon emissions and operate as the second-largest consumer of the world's water supply.[169] This means that the climate movement has a strong interest in promoting corporate accountability too.

The entrenchment of private sector influence in U.S. politics expands the reach of corporate power exponentially. When corporations are able to wield their immense wealth to influence politics, governments turn their back on the public interest and erode an already precarious democracy. Not only does this leverage mean that corporate interests can weaken regulations meant to keep corporate power at bay, it also means that corporations can manipulate all kinds of legislation from education to gender equity to law enforcement. This includes lobbying against student loan forgiveness,[170] contributing to the campaigns of anti-LGBT legislators,[171] or utilizing revolving door tactics to bolster the private prison industry and perpetuate mass incarceration.[172] This corporate capture of our politics poses a massive barrier to fair public advocacy across nearly all issues, making this a problem that impacts everyone.

Given the outsized role that companies play in society, it's crucial that corporations be held responsible for their actions. Corporate power touches nearly every sector of our lives. To create a better system, we need to level the playing field across the varied pillars that uphold corporate power. If we can expand existing constraints on corporate behavior in common sense ways and add strong, effective legal safeguards that can hold corporations accountable, we can change the structural incentives perpetuating abuse. We need to recalibrate our economic system so that it incorporates and incentivizes respect for human rights.

But we are not in a fair fight when it comes to reining in corporate abuse because corporations are so powerful–and that's no accident. This means we need a democracy that empowers the people, not corporations. To do that, the voices of workers and those impacted by corporate abuse cannot be drowned out by the outsized influence of corporate interests through excessive political spending, shrouded lobbying practices, and the revolving door.

We also need a government that is willing to place reasonable checks on corporate power and limit the ways that businesses get so powerful in the first place, including by limiting corporate consolidation and making big businesses pay their fair share in taxes. Government's role is to put constraints on corporations so that the outcome of corporate behavior is not exploitation and abuse. Rethinking the structural incentives that perpetuate corporate abuse like shareholder primacy, short-termism, and prohibitions on consideration of the public interest in decision-making is also key to limiting the growth of corporate power.

Rather, we need an economy that places workers and impacted communities at the center, where workers not only can survive, but can thrive. This means workers, not just shareholders, should have a voice in corporate governance and see the benefits of their labor. Strong protections for the right to freedom of association and enforcement of those protections are also key to ensuring safe and dignified working conditions where workers can receive fair, living wages.

Moreover, to ensure full corporate accountability across companies' often shrouded global operations, we need to enact strong, and effective legal safeguards like the FCPA for Human Rights that ensure corporations can be held liable for abuses committed and face real consequences for their actions. These safeguards should also mandate full corporate disclosure of the supply chain and the active due diligence toward the prevention and mitigation of harm.

Finally, ensuring that those impacted by corporate abuse both in the United States and abroad have access to effective remedy is imperative to creating a just system.

Corporate interests have been consistently pushing their own agenda—and with relative success. Over the last century, we have seen the slow erosion of the right to unionize, the de-regulation of corporate operations, and the unchecked consolidation of corporate political power.

But to build a rights-based economy that works for everyone, we need a strong, coordinated effort across the varied progressive movements that recognizes our shared interests in holding corporations accountable and stemming corporate power. We hope that this Agenda serves as a starting point for forging a stronger, broader coalition that can propel us toward a better future that empowers workers, families, and impacted communities and builds a more just democracy.

CONCLUSION

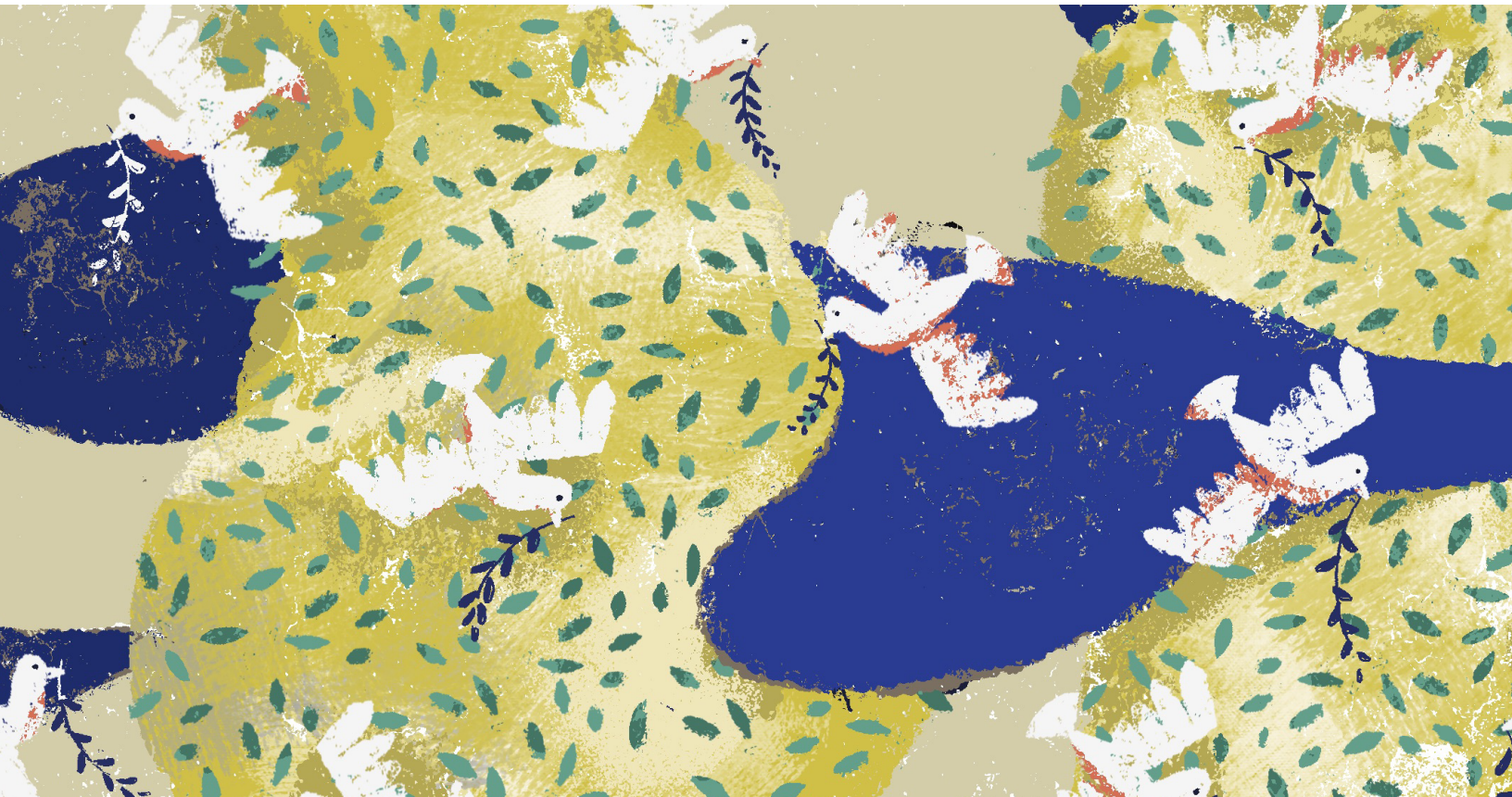
Corporate power sits at the root of nearly every major human rights issue of our time.

Corporate abuses of power fuel income inequality, undermine our democracy, and contribute to the continued erosion of our fundamental rights. Corporations are structurally incentivized to maximize profit for their shareholders above all else while excluding those who have the most at stake from the board room. These incentives combined with significant gaps in tax and antitrust policy allow corporations to accrue mammoth levels of wealth and power, eclipsing that of the average member of the public and fueling ever-increasing inequality. And with this wealth, corporations can tip the scales in their favor—meaning that we're not in a fair fight. Through campaign financing and meetings behind closed doors, big business is able to influence our politicians and warp our democracy and legal system against the interests of the public. These resource inequities and corporate control over public platforms also allow companies to engage in the legal harassment of activists and whistleblowers who are crucial to identifying corporate abuses. This suppresses dissent and produces a chilling effect on speech. Addressing these root causes of corporate abuse is foundational to corporate accountability and challenging these systems works to transform the status quo by creating a more just system that disincentivizes abuses from occurring in the first place.

But where abuses do occur, advancing corporate accountability also requires establishing systems of enforcement that impose real consequences on harmful corporate behavior and allow victims of corporate abuses to access effective remedies. This includes enhancing corporate transparency, which, although insufficient on its own, can help to bring abuses to light. Additionally, developing legal safeguards that require companies to actively report and manage human rights risks and impose both civil and criminal liability where violations occur are key to holding corporations to account. Restricting access to U.S. markets can also ensure that companies face financial repercussions for failing to respect human rights in their business operations. And crucially, the agency and rights of workers and impacted communities must be central in all of these efforts.

Corporate accountability requires preventing and punishing corporate harm in meaningful ways while centering rights-holders and the victims of corporate abuse. This multifaceted nature of corporate abuse requires a multifaceted approach to combat it. Although corporations aim to maximize profit with minimal constraints, they are entities whose actions respond to the incentives and disincentives provided to them. And by changing these incentives, we can influence corporate behavior. Holding businesses accountable for abuses requires advocates across different fields working in tandem to build a more just future. What exists now is an incomplete patchwork, but we need a comprehensive system of promoting justice in the corporate sphere. Without a holistic vision for corporate accountability, it is harder for the community to advance the numerous moving pieces of corporate accountability with a unified voice. All of the needed changes are unlikely to move forward with one single piece of legislation, but by working together to progress the movement through coordinated advocacy surrounding multiple pieces of key legislation, we can more effectively drive meaningful change.

In compiling the diverse ideas within the business and human rights community, we can demonstrate the strength of the movement and press for much-needed changes in the U.S. corporate accountability regime. In bringing together the varied lines of corporate accountability work into a coherent narrative framework, we hope that the U.S. Corporate Accountability Agenda will become a tool for advocacy across the corporate accountability movement, and one that explicitly places the interests of impacted communities at the forefront and recognizes the intersectional impacts of corporate human rights violations. If we can organize our collective thinking and advocacy on corporate power and accountability into a shared concept of a unified movement, we can build a larger and stronger coalition that can push for meaningful corporate justice and build a future that ensures our economy works for everyone.



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[142] Isabelle Glimcher, Purchasing Power: How the U.S. Government Can Use Federal Procurement to Uphold Human Rights, NYU Stern Center for Business and Human Rights, Sept. 2020, https://static1.squarespace.com/static/5b6df958f8370af3217d4178/t/5f650a6660f7cf302c693e37/1600457319457/NYU+Purchasing+Power_FINAL2+SEP+15+ONLINE.pdf.

[143] Stumberg et al., *supra* note 140 at 29–33; "Shadow" National Baseline Assessment (NBA) of Current Implementation of Business and Human Rights Frameworks: Pillar I, ICAR, 115–116, Mar. 2015, https://icar.ngo/wp-content/uploads/2021/07/ICAR-Shadow-U.S.-NBA-Pillar-I.pdf [hereinafter ICAR NBA Pillar I].

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[147] 41 U.S.C. § 65; PL 74-846; 49 Stat. 2036; ICAR NBA Pillar I, *supra* note 143 at 111.

[148] FAR 22.1503, https://www.acquisition.gov/far/subpart-22.15

[149] FAR 22.1503, https://www.acquisition.gov/far/subpart-22.15; FAR 52.222-18 Certification Regarding Knowledge of Child Labor for Listed End Products, https://www.acquisition.gov/far/52.222-18.

[150] 48 C.F.R. Subpart 22.1703 (Policy), https://www.acquisition.gov/far/subpart-22.17. (Specifically, they are prohibited from "engaging in severe forms of trafficking in persons; using forced labor in the performance of the contract; procuring commercial sex acts; denying employees access to their identity or immigration documents; using misleading or fraudulent recruitment practices and/or using recruiters that do not comply with local labor laws of the country in which recruitment takes place; charging recruitment fees; failing to provide or pay for the cost of return transportation; providing or arranging housing that does not meet host country housing and safety standards (if applicable); and failing to provide employment documents in writing if required to do so by law or contract.)

[151] 48 C.F.R. Subpart 22.1705 (Solicitation provision and contract clause), https://www.acquisition.gov/far/subpart-22.17; The contract clause is FAR 52.222-50 Combating Trafficking in Persons, https://www.acquisition.gov/far/52.222-50 (Pursuant to this clause, all contractors and subcontractors are required to: take action against employees, agents, or subcontractors that violate the prohibition (up to and including termination) ; notify employees about the prohibited activities and the actions that could be taken against them for violations ; notify the agency immediately of "any credible information it receives from any source" alleging "a Contractor employee, subcontractor, subcontractor employee, or their agent has engaged in conduct that violates" the prohibition, and any actions taken by the Contractor in response ; and fully cooperate with government audits and investigations.)

[152] 48 C.F.R. Subpart 22.1701 (Applicability) & Subpart 22.1703(c), https://www.acquisition.gov/far/subpart-22.17; FAR 52.222-50 (h) (Compliance Plan), https://www.acquisition.gov/far/52.222-50.

[153] FAR 52.222-50 (h)(3) (Compliance Plan), https://www.acquisition.gov/far/52.222-50. (FAR 52.222-50 (h)(3)lays out the minimum elements for Compliance plans, specifying that they must include: an awareness program to inform employees about prohibited activities and the consequences for violations; a process for employees to report potential violations without fear of retaliation; a recruitment and wage plan that only permits the use of recruitment companies with trained employees, prohibits charging recruitment fees, and ensures that wages meet applicable host-country legal requirements (or explains variance); and a housing plan that ensures housing meets host-country housing and safety standards (if applicable). Compliance plans must also include "procedures to prevent agents and subcontractors at any tier and at any dollar value from engaging in" trafficking in persons and trafficking related activities and [procedures] "to monitor, detect, and terminate any agents, subcontracts, or subcontract employees that have engaged in such activities.")

[154] 48 C.F.R. Subpart 22.1703(c), https://www.acquisition.gov/far/subpart-22.17. (They must also certify that "after conducting due diligence, to the best of their knowledge, (1) neither it [the contractor], nor its agents or subcontractors, has engaged in any of the prohibited activities; or (2) if violations have been found, they have been addressed appropriately. Additionally, contractors are required to post the "relevant contents" of the compliance plan at the workplace and on the contractor's website, and to provide the compliance plan to the contracting officer on request.)

[155] ICAR, Submission for U.S. National Action Plan on Responsible Business Conduct regarding Federal Procurement Policy (Sept. 2015), on file with author [hereinafter ICAR NAP Submission]; Stumberg et al., *supra* note 140 at 25.

[156] ICAR NAP Submission, *supra* note 155; Stumberg et al., *supra* note 140 at 25.

[157] FAR 22.1503(b)-(c), https://www.acquisition.gov/far/subpart-22.15. *See* also Miriam Amanze & Ama Eyo, Strengthening the Prohibition on Forced or Indentured Child Labor in Government Contracts: A Critical Analysis of FAR Subpart 22.15, 52 Public Contract Law Journal 343, 358–359 (Spring 2023), https://oro.open.ac.uk/83600/3/83600VOR.pdf.

[158] Federal Acquisition Regulation (FAR), 48 CFR 2.101 (Definitions, "Commercial item," and "Commercially available off-the-shelf-item (COTS)), https://www.acquisition.gov/far/part-2#FAR_2_101.

[159] Glimcher, *supra* note 142 at 5.

[160] Survey of 20 Jurisdictions, *supra* note 146.

[161] Protecting Human Rights through Government Procurement, *supra* note 145; Glimcher, *supra* note 142.

[162] Protecting Human Rights through Government Procurement, *supra* note 145.

[163] ICAR NBA Pillar I, *supra* note 143 at 111–112 (The Transparency Act applies to commercial items and to contracts performed and products produced both domestically and outside the United States.)

[164] 75 Fed. Reg. 39414, 39415, Federal Acquisition Regulation; FAR Case 2008–039, Reporting Executive Compensation and First-Tier Subcontract Awards (July 8, 2010).

[165] ICAR NBA Pillar I, *supra* note 143 at 111 (Despite Congress's intent, the OMB has limited the reporting requirement for subcontracts only to the first-tier subcontract awards and has excluded long-term vendor agreements for materials or supplies.).

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