

Oral Argument Scheduled for April 25, 2022

No. 21-5219

In the United States Court of Appeals
for the District of Columbia Circuit

CHANGJI ESQUEL TEXTILE CO. LTD., *et al.*,
Plaintiffs-Appellants

v.

GINA RAIMONDO, *et al.*,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Case No. 1:21-CV-01798-RBW
HON. REGGIE B. WALTON

**BRIEF OF GLOBAL LABOR JUSTICE - INTERNATIONAL LABOR
RIGHTS FORUM, HUMAN TRAFFICKING LEGAL CENTER, AND
UYGHUR HUMAN RIGHTS PROJECT AS *AMICI CURIAE* IN SUPPORT
OF DEFENDANTS-APPELLEES AND AFFIRMANCE**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel certifies as follows:

- A. Parties and Amici. Except for *amici curiae* Global Labor Justice-International Labor Rights Forum, Human Trafficking Legal Center, and the Uyghur Human Rights Project, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Plaintiffs-Appellants.
- B. Rulings Under Review. References to the rulings under review appear in the Brief for Plaintiffs-Appellants.
- C. Related Cases. All cases of which counsel is aware are listed in the brief for Plaintiffs-Appellants.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* Global Labor Justice-International Labor Rights Forum (“GLJ-ILRF”) hereby submits the following corporate disclosure statement: GLJ-ILRF is a not-for-profit organization. It has no parent corporations, it does not issue stock, and no publicly held corporation owns any portion of GLJ-ILRF.

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* Human Trafficking Legal Center hereby submits the following corporate disclosure statement: Human Trafficking Legal Center is a not-for-profit organization. It has no parent corporations, it does not issue stock, and no publicly held corporation owns any portion of Human Trafficking Legal Center.

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rule 26.1, *amicus curiae* Uyghur Human Rights Project hereby submits the following corporate disclosure statement: Uyghur Human Rights Project is a not-for-profit organization. It has no parent corporations, it does not issue stock, and no publicly held corporation owns any portion of Uyghur Human Rights Project.

RULE 29 STATEMENT

Pursuant to Federal Rule of Appellate Procedure 29 and D.C. Circuit Rule 29, *amici curiae* state as follows: Defendants-Appellees do not oppose either

amici's filing of a brief or *amici*'s request for a one-week extension. As for Plaintiffs-Appellants, their position is as follows:

Plaintiffs-Appellants informed undersigned counsel before the February 24, 2022 deadline that they would consent to any timely filed amicus brief but would oppose this motion to the extent the brief is filed after the deadline, given the impending March 10, 2022 deadline for Plaintiffs-Appellants' reply brief.

Amici curiae respectfully submit that allowing the brief as filed on March 3, 2022 will not prejudice the parties' ability to respond or otherwise require altering the Court's calendar.

No counsel for any party to this appeal has authored this Amicus Brief, in whole or in part, nor has any party to this appeal or their respective counsel contributed money to fund the preparation or submission of this Brief. No entity or person, other than GLJ-ILRF, Human Trafficking Legal Center, and the Uyghur Human Rights Project, has contributed funds to cover the costs of the preparation and submission of this Brief.

Pursuant to D.C. Circuit Rule 29(d), counsel hereby certifies that a separate amicus brief is necessary because of the specialized nature of GLJ-ILRF's, Human Trafficking Legal Center's, and the Uyghur Human Rights Project's perspective and expertise with respect to the public interest in government enforcement of laws and policies that prohibit forced labor and human trafficking including laws and

policies prohibiting goods manufactured outside the United States with forced labor from entering U.S. markets. *Amici curiae*'s expertise extends to the impact on U.S workers and consumers of forced labor practices in global supply chains, including those constituting part of mass-scale human rights violations against the ethnic Turkic and/or Muslim populations in the Uyghur Region of the People's Republic of China.

GLOSSARY

Changji Esquel	Changji Esquel Textile Co. Ltd.
Esquel Textile	The Esquel Group of companies, including Esquel Apparel, Inc.
Global Labor Justice-International Labor Rights Forum	GLJ-ILRF
PRC	People’s Republic of China
Reform Act	Export Control Reform Act of 2018
Uyghur Human Rights Project	UHRP
Uyghur Region	Xinjiang Uyghur Autonomous Region of the People’s Republic of China
WRO	Withhold Release Order
Xinjiang Production and Construction Corps	XPCC

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STATEMENT OF INTEREST

GLJ-ILRF is a non-governmental organization that works transnationally to advance policies and laws that protect decent work; to strengthen workers' ability to advocate for their rights; and to hold corporations accountable for labor rights violations in their supply chains. GLJ-ILRF works with trade unions, faith-based organizations, and community groups to support workers and their families.

GLJ-ILRF has an interest in advocating for the enforcement of laws and policies that prohibit forced labor and human trafficking in the United States and around the world, including laws prohibiting goods manufactured outside the United States with forced labor from entering U.S. markets. The relief requested by Plaintiffs-Appellants would impair the government's ability to execute its program of holding corporations accountable for their complicity in forced labor practices and would, contrary to *amici curiae's* interest, permit the financial exploitation of human rights violations against the ethnic Turkic and/or Muslim populations in the Uyghur Region of the People's Republic of China. GLJ-ILRF was one of the organizations that petitioned U.S. Customs and Border Patrol to issue a regional Withhold Release Order prohibiting the import of all cotton and cotton products, including yarn, fabric, textiles, and apparel produced in whole or in part in the Uyghur Region.¹

Amicus Curiae Human Trafficking Legal Center advocates for justice for trafficking survivors and accountability for traffickers around the globe. The organization provides a bridge between skilled pro bono attorneys and trafficking survivors seeking justice for forced labor. Since the organization was founded in 2012, the Human Trafficking Legal Center has trained more than 5,000 attorneys to handle civil, criminal, and immigration human trafficking cases. The organization has obtained multiple T-visas for survivors of trafficking, as well as significant civil judgments and criminal restitution in federal cases. The organization provides extensive technical assistance to pro bono attorneys litigating trafficking civil cases in U.S. federal courts.

The Human Trafficking Legal Center has also done extensive work under the Tariff Act to block goods tainted with forced labor from entering U.S. markets. The organization published a guide on Section 307 the Tariff Act of 1930, *Importing Freedom: Using the U.S. Tariff Act to Combat Forced Labor in Global Supply Chains*. The Human Trafficking Legal Center participated in the coalition of non-governmental organization that filed the original petition to U.S. Customs and Border Protection in 2020 requesting a ban on all cotton from Xinjiang.

¹ The petition is available at <https://enduyghurforcedlabour.org/wp-content/uploads/sites/44/Section-1307-Petition-Xinjiang-August-28-2020-2-table.pdf>.

Amicus curiae the Uyghur Human Rights Project (“UHRP”) is a 501(c)3 nonprofit organization based in Washington, DC. UHRP promotes the rights of the Uyghurs and other Turkic Muslim peoples in East Turkistan, referred to by the Chinese government as the Xinjiang Uyghur Autonomous Region, through research-based advocacy. UHRP publishes reports and analysis, in English and Chinese, to defend Uyghurs’ civil, political, social, cultural, and economic rights according to international human rights standards. UHRP also submits reports and policy recommendations to governments and multilateral bodies like the UN and EU. UHRP has released more than 90 reports and briefings on the human rights situation of Uyghurs since 2004.

The Uyghur Human Rights Project has an interest in advocating for the enforcement of laws and policies that prohibit forced labor and human trafficking in the United States and around the world, including laws prohibiting goods manufactured outside the United States with forced labor from entering U.S. markets. The relief requested by Plaintiffs-Appellants would impair the government’s ability to execute its program of holding corporations accountable for their complicity in forced labor practices and would, contrary to *amicus curiae*’s interest, permit the financial exploitation of human rights violations against the ethnic Turkic and/or Muslim populations in the Xinjiang region of the People’s Republic of China.

ARGUMENT

The district court correctly denied Plaintiffs-Appellants' motion for preliminary injunction, finding that the Export Control Reform Act of 2018 ("Reform Act") authorized the End-User Review Committee's designation of Changji Esquel Textile Co. Ltd. ("Changji Esquel") to the "Entity List" for its involvement in forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China ("Uyghur Region"). In the view of *amici curiae*, the Defendants-Appellees (hereinafter "Government") were well within their authority to add Changji Esquel, a subsidiary of multinational garment company Esquel Apparel, Inc. ("Esquel Textile"), to the Entity List for human rights reasons. The challenged action was authorized by the text of the Reform Act and fulfills the statute's legislative purpose, namely, advancing such foreign policy interests as the promotion of human rights.

The Government is implementing a comprehensive range of policy tools to combat forced labor globally and prevent goods produced with forced labor from entering U.S. commerce to uphold fundamental values of human dignity and fair trade.² It has used these tools to implement a comprehensive strategy to combat the forced labor and atrocity crimes determined by the U.S. Department of State to be

² *FACT SHEET: New U.S. Government Actions on Forced Labor in Xinjiang*, THE WHITE HOUSE (June 24, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/24/fact-sheet-new-u-s-government-actions-on-forced-labor-in-xinjiang/>.

crimes against humanity constituting genocide.³ These abuses include, “imprisonment, torture, rape, forced sterilization, and persecution, including through forced labor and the imposition of draconian restrictions on freedom of religion or belief, freedom of expression, and freedom of movement.”⁴ The designation of Changji Esquel under the Export Administration Regulations (“EAR”) comprises but one part of the strategy to combat forced labor and other abuses.

For example, besides the U.S. Department of Commerce’s addition of more than 50 People’s Republic of China (“PRC”) entities to the Entity List, the U.S. Customs and Border Protection issued 11 WROs to prohibit the importation into the U.S. of goods made with forced labor in the Uyghur Region; the U.S. Department of Labor updated its “List of Goods Produced by Child Labor or Forced Labor” in 2020 to include goods made with forced labor in the PRC;⁵ the U.S. Department of the Treasury has imposed sanctions targeting specific

³ Michael R. Pompeo, *Press Statement: Determination of the Secretary of State on Atrocities in Xinjiang*, U.S. DEPARTMENT OF STATE (Jan. 21, 2021), <https://2017-2021.state.gov/determination-of-the-secretary-of-state-on-atrocities-in-xinjiang/index.html>.

⁴ *Xinjiang Supply Chain Business Advisory*, U.S. DEPARTMENT OF STATE, 2 (July 13, 2021), <https://www.state.gov/wp-content/uploads/2021/07/Xinjiang-Business-Advisory-13July2021-1.pdf>.

⁵ *2020 List of Goods Produced by Child Labor or Forced Labor*, U.S. DEPARTMENT OF LABOR (2020), https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2019/2020_TVPRAListOnlineFinal.pdf.

government officials or affiliated entities for their connection to grave human rights violations in the Uyghur Region; and Congress enacted the Uyghur Forced Labor Prevention Act, which creates a rebuttable presumption that all goods produced in whole or in part in the Uyghur Region are produced with forced labor and barred from entry into the United States, was signed into law in December 2021.⁶ In addition, the Government issued an updated Xinjiang Supply Chain Business Advisory in July 2021 “to highlight the heightened risks for businesses with supply chain and investment links to Xinjiang, given the entities complicit in forced labor and other human rights abuses there and throughout China” and warning that “businesses and individuals that do not exit supply chains, ventures, and/or investments connected to Xinjiang could run a high risk of violating U.S. law.”⁷

This comprehensive set of policies to combat forced labor abroad and prevent goods tainted with forced labor from reaching the American consumer, of which the Reform Act is a part, reveals that the Government has not arbitrarily or unfairly singled out Changji Esquel. Rather, Changji Esquel’s designation forms a part of the Government’s multifaceted human rights policy approach to end forced

⁶ Uyghur Forced Labor Prevention Act of Dec. 23, 2021, Pub. L. No. 117–78, 135 Stat. 1525, <https://www.govinfo.gov/content/pkg/PLAW-117publ78/pdf/PLAW-117publ78.pdf>.

⁷ U.S. Department of State, *supra* note 3.

labor imposed by the PRC on Uyghurs and other Turkic and/or Muslims peoples in the Uyghur Region, where Changji Esquel operates a spinning mill.

Although there is credible reporting linking forced labor to various industries, including consumer electronics, processed tomatoes, pharmaceuticals, and polysilicon used in solar panels, there is a strong and clear nexus between forced labor in the Uyghur Region, where Esquel Textile operates the Changji Esquel spinning mill, and the global garment industry that is Esquel Textile's primary business. The Uyghur Region produces about 85 percent of all cotton grown in China, which comprises approximately 20 percent of the global cotton supply.⁸ The region is also home to significant value-added production, including spinning, dyeing, textile, and garment production factories. Yarn and fabric from these factories are used in apparel and home goods manufacturing across China and exported to garment factories across the world. Forced labor of Uyghurs and other Turkic and/or Muslims taints every tier of the cotton supply chain in the Uyghur Region, from farm to finished goods. According to some estimates, up to one in five cotton garments in the global apparel market are tainted with forced labor from the Uyghur Region.⁹

⁸ John Sudworth, *China's 'tainted' cotton*, BBC NEWS (last accessed March 3, 2022), <https://www.bbc.co.uk/news/extra/nz0g306v8c/china-tainted-cotton>.

⁹ Annie Kelly, *'Virtually entire' fashion industry complicit in Uighur forced labour, say rights groups*, GUARDIAN (July 23, 2020),

As for Esquel Textile’s claim that it is a socially responsible company, the fact is that it is suing to block the Government’s efforts to combat forced labor indicates the opposite. Meanwhile, there is no evidence that it has ever directed *any* advocacy at the government of the PRC over *that* government’s *use* and *condoning* of forced labor. While Esquel Textile certainly has the legal right to petition this Court for relief, its highly selective, self-serving advocacy means that it has forfeited the moral claim to social responsibility.

Esquel Textile is unlikely to succeed on the merits and should not be granted a preliminary injunction. Thus, *amici curiae* urge this Court to uphold the district court’s decision to deny Esquel Textile’s request for a preliminary injunction. Yet, even if all four preliminary injunction factors are reviewed *de novo*, the same result should follow. Esquel Textile cannot establish facts sufficient to show that the irreparable harm, the public interest, and the balance of equities factors favor its case. Esquel Textile has not illustrated economic harms that surpasses the high bar required to demonstrate they are irreparable. Further, Esquel Textile has not shown that any harm it *has* suffered, including reputational harm, is the result of the Government’s actions, as opposed to its own decision to maintain operations in the Uyghur Region in the face of overwhelming evidence linking the cotton industry to forced labor and grave human rights violations. The public interest and the balance

<https://www.theguardian.com/global-development/2020/jul/23/virtually-entire-fashion-industry-complicit-in-uyghur-forced-labour-say-rights-groups-china>.

of equities weigh heavily in favor of the Government. The public interest disfavors the injunction, as it would impede the Government’s efforts to prevent goods made with forced labor from entering U.S. markets and to take concerted policy actions to end the forced labor of Uyghurs. Further, significant evidence-based research, investigations by national and global media, and statements by civil society organizations all demonstrate that Esquel Textile’s business is implicated in facilitating the practice of forced labor in the Uyghur Region, a core component of atrocity crimes amounting to genocide.¹⁰

I. The District Court Correctly Denied Esquel Textile’s Motion for a Preliminary Injunction Because the Multinational Garment Company Is Unlikely to Succeed on the Merits.

“A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The district court correctly denied Esquel Textile’s motion for a

¹⁰ The United States is a signatory to the Convention on the Prevention and Punishment of the Crime of Genocide to prevent and punish actions of genocide in war and in peacetime. *See Genocide Timeline*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/genocide-timeline>.

preliminary injunction because they could not demonstrate that they are likely to succeed on the merits.

A. Esquel Textile Fails to Meet the Extraordinarily High Bar for *Ultra Vires* Review.

Esquel Textile cannot satisfy the demanding standard applicable to their *ultra vires* claim. This Court has held that *ultra vires* review “is intended to be of extremely limited scope,” “represent[ing] a more difficult course ... than would review under the APA.” *Am. Clinical Lab. Ass’n v. Azar*, 931 F.3d 1195, 1204 (D.C. Cir. 2019) (quoting *Trudeau v. Fed. Trade Comm’n*, 456 F.3d 178, 190 (D.C. Cir. 2006)). Relief on *ultra vires* review is only appropriate in cases of “extreme agency error.” *DCH Reg’l Med. Ctr. v. Azar*, 925 F.3d 503, 509 (D.C. Cir. 2019). No relief is available on an *ultra vires* claim for “[g]arden-variety errors of law or fact.” *Griffith v. Fed. Labor Rels. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988). To warrant relief on *ultra vires* review, the agency’s error must be “patently a misconstruction of the Act”; or the agency must have “disregarded a specific and unambiguous statutory directive” or “violated some specific command” of a statute. *Id.* Where the agency’s interpretation is “a colorable one,” although perhaps “not the only possible construction of the statutory language,” *ultra vires* review leaves agency action undisturbed. *Id.* at 494.

Here, the Government’s “colorable” interpretation of the Reform Act, supported by canons of statutory interpretation and the Act’s legislative history,

makes the *ultra vires* claim unavailing. The plain meaning of the statute gives the government authority to add foreign persons to the Entity List for human rights reasons, as illustrated by Section 4811(2)(d)¹¹ and Section 4812(b)(7).¹²

Meanwhile, Plaintiffs’ use of the canon of statutory interpretation *expressio unius* to interpret the list of activities described in Section 4813(a)(2) as exhaustive is mistaken.¹³ Not only does Congress routinely leave questions unresolved to delegate authority to an agency, Congress also explicitly limited the Secretary’s scope of authority in carrying out the Reform Act where it intended to¹⁴ and included a catch-all provision to grant the Secretary broad authority to carry out the Reform Act.¹⁵ The legislative history of the Reform Act described in Defendants-

¹¹ 50 U.S.C. § 4811(2)(d) permits export controls “[t]o carry out the foreign policy of the United States, including the protection of human rights and the promotion of democracy.”

¹² 50 U.S.C. § 4812(b)(7) broadly authorizes enforcement through various means, including “lists of foreign persons who threaten the national security or foreign policy of the United States.”

¹³ These include “(i) the proliferation of weapons of mass destruction or of conventional weapons; (ii) the acquisition of destabilizing numbers or types of conventional weapons; (iii) acts of terrorism; (iv) military programs that could pose a threat to the security of the United States or its allies; or (v) activities undertaken specifically to cause significant interference with or disruption of critical infrastructure.”

¹⁴ *See* 50 U.S.C. § 4811(11) (“The authority under this subchapter may be exercised only in furtherance of all of the objectives set forth in paragraphs (1) through (10).”).

¹⁵ *See* 50 U.S.C. § 4813(a)(16) (“In carrying out this subchapter on behalf of the President, the Secretary, in consultation with the Secretary of State, the Secretary of Defense, the Secretary of Energy, and the heads of other Federal agencies as

Appellees’ brief also illustrates how Congress intended to continue the well-established practice of listing entities for human rights reasons at the time they enacted the Reform Act in 2018. Defendants-Appellees’ Br. at 20-22. Therefore, *amici curiae* support the Government’s position and the district court’s denial of the preliminary injunction. *Id.* at 22–33.

B. The District Court Need Not Have Considered the Remaining Preliminary Injunction Factors.

The district court properly denied Esquel Textile’s motion for a preliminary injunction after finding that the firm was not likely to succeed on the merits. This Court has repeatedly confirmed that failure to prove a likelihood of success on the merits is sufficient grounds to deny an injunction under *Winter v. Natural Resources Defense Council*. 555 U.S. 7 (2008). *In re Akers*, 487 B.R. 326 (D.D.C. 2012) (“Whichever way *Winter* is read, it is clear that a failure to show a likelihood of success on the merits is alone sufficient to defeat a preliminary injunction motion.”); *see also Greater N. Orleans Fair Hous. Action Ctr. v. U.S. Dep’t of Hous. & Urb. Dev.*, 639 F.3d 1078, 1089 (D.C. Cir. 2011); *Arkansas Dairy Co-op. Ass’n, Inc. v. U.S. Dept. of Agr.*, 573 F.3d 815 (D.C. Cir. 2009). The district court’s decision to deny the motion after finding against Esquel Textile on the first factor was therefore in accord with applicable law.

appropriate, shall...undertake any other action as is necessary to carry out this subchapter that is not otherwise prohibited by law.”)

II. Analysis of Irreparable Harm, the Public Interest, and the Balance of the Equities Confirms the District Court’s Decision.

Should this Court review all four elements of the preliminary injunction test *de novo*, the motion should still be denied because the remaining three elements—irreparable harm, balance of the equities, and the public interest—disfavor the issuance of an injunction. Esquel Textile’s economic harms are not irreparable, nor can it show that the public interest and the equities tip in its favor.

A. Esquel Textile Shows No Irreparable Harm.

Esquel Textile’s motion for preliminary injunction should be denied because they fail to show that they “would suffer irreparable harm in the absence of preliminary relief.” *Winter*, 555 U.S. at 23. The injury must be “both certain and great, and “of such *imminence* that there is a ‘clear and present’ need for equitable relief,” and is “beyond remediation.” *Sabino Canyon Tours, Inc. v. USDA Forest Serv.*, 298 F. Supp. 3d 60, 75 (D.D.C. 2018) (quoting *Chaplaincy of Full Gospel Churches v. England*, 454 F.3d 290, 297 (D.C. Cir. 2006)). “[M]onetary loss may constitute irreparable harm only where the loss threatens the very existence of the movant’s business.” *ConverDyn v. Moniz*, 68 F. Supp. 3d 34, 46 (D.D.C. 2014) (quoting *Wis. Gas Co. v. Fed. Energy Regul. Comm’n*, 758 F.2d 669, 674 (D.C. Cir. 1985)).

Esquel Textile has not shown harms of a magnitude sufficient to threaten the existence of a business of its size. Esquel Textile contends that it has suffered irreparable harm because it must comply with “a license requirement for all exports, reexports, and transfers (in-country) to [Changji Esquel] of items subject to the EAR,” it has suffered “immediate and drastic reputational damage,” lost “hundreds of millions of dollars in revenue” as “numerous customers [cut] off their business with Esquel,” experienced “disruptions in its supply chain,” had “hardships in securing financing,” and was “forced to close its factories in Mauritius.” Plaintiffs-Appellants Br. 22–24. However, in light of Esquel Textile’s scale, the firm cannot be said to have established that the very existence of its business was threatened. Esquel Textile, which has supplied major brands like Tommy Hilfiger, Patagonia, and Nike, is one of the world’s largest garment producers¹⁶ and the largest producer of woven shirts, producing 100 million annually.¹⁷ Esquel Textile is a multinational company with “over 35,00 employees globally,” “multiple facilities and strategically located merchandising offices,”

¹⁶ Peggy Sito, *Esquel Group, garment supplier to Tommy Hilfiger and Nike, says it’s seeking to overturn US sanction on its Xinjiang plant*, SOUTH CHINA MORNING POST (July 21, 2020), <https://www.scmp.com/business/article/3094073/esquel-group-garment-supplier-tommy-hilfiger-and-nike-says-its-seeking>.

¹⁷ *Hong Kong’s Esquel Sues U.S. Over China Blacklist Inclusion*, Bloomberg News (July 7, 2021), <https://www.bloomberg.com/news/articles/2021-07-06/hong-kong-s-esquel-sues-u-s-over-inclusion-on-china-blacklist>.

including “manufacturing facilities located in China, Sri Lanka and Vietnam, and merchandising offices servicing markets worldwide.”¹⁸

Esquel Textile’s continued access to U.S. markets undercuts its claim that the designation threatens the existence of its business operations. While Esquel Textile’s statements may indicate that the firm has been completely severed from U.S. commerce, the firm has found ways to continue operations in the United States despite the claimed effect of the designation. Since Changji Esquel’s addition to the Entity List, an Esquel Textile subsidiary registered in Guangdong, which sources from Esquel Textile’s Uyghur Region cotton spinning factories, has been found to have continued producing apparel for export to brands and retailers in the United States.¹⁹

- i. *The Harms Esquel Textile Claims Arise from Their Own Voluntary Actions and the Voluntary Actions of Third Parties, Not the Government’s Action.*

Esquel Textile’s claim of irreparable harm must fail on the additional ground that it has failed to prove that its harms are attributable to the actions it challenges,

¹⁸ *Global Presence*, ESQUEL GROUP (last accessed March 1, 2022), <https://www.esquel.com/Global-Presence>.

¹⁹ Alison Killing & Megha Rajagopalan, *Hugo Boss And Other Big Brands Vowed To Steer Clear Of Forced Labor In China — But These Shipping Records Raise Questions*, BUZZFEED NEWS (Jan. 13, 2022), https://www.buzzfeednews.com/article/alison_killing/xinjiang-forced-labor-hugo-boss-esquel.

rather than Esquel Textile's own voluntary actions and those of third parties not before the Court. *Sabino Canyon Tours, Inc.*, 298 F. Supp. 3d at 75.

To the extent that Esquel Textile complains of reputational harm, the company blames the Government for the product of its own actions. Esquel Textile incurred its reputation harms by its voluntary choice to continue operations in the Uyghur Region amidst a genocide and massive, systematic, government-imposed forced labor, awareness of which continues to grow.

The voluntary refusal of third parties to do business with Esquel Textile may well be attributable to Esquel Textile's own decision to continue operations in the Uyghur Region rather than the challenged action. In short, the fact that Esquel Textile conducted business in the Uyghur Region was sufficient grounds for many customers to terminate their business relationship with Esquel Textile, the Entity List designation aside.²⁰ Concern among companies and importers about forced labor and other human rights violations against Uyghurs and other Turkic and/or Muslim peoples in the Uyghur Region was already widespread prior to Esquel Textile's designation in July 2020. Major brands and retailers began to cut ties with suppliers that have operations or business relationships in the Uyghur Region in late 2019 and early 2020, as evidence of massive forced labor of Uyghurs and

²⁰ See, e.g., *Statement on Xinjiang*, NIKE (last accessed Feb. 17, 2022), <https://purpose.nike.com/statement-on-xinjiang>. Nike states that it does not have a relationship with CJE or any of Plaintiffs-Appellants' facilities in Xinjiang, refuting an earlier report that it sourced products from Esquel.

other ethnic groups in the production of cotton, textile products, and garments came to light. In July 2020, around the same time as the designation, the Coalition to End Forced Labor in the Uyghur Region, representing more than 400 civil society organizations around the world, issued a Call to Action on brands and retailers in the apparel and textile sector to cut all ties with producers operating or with business relationships in the Uyghur Region and to stop sourcing any cotton products produced there.²¹

Additionally, Esquel Textile's claimed harms arise from Government actions other than the designation challenged here. In July 2020—the same month as Changji Esquel's designation on the Entity List—the Departments of State, Treasury, Commerce, and Homeland Security issued the Xinjiang Supply Chain Business Advisory, which warned businesses of supply chain risks if they conduct operations in the Uyghur Region due to the widespread prevalence of forced labor in the region and advised the implementation of human rights-related due diligence policies and procedures.²² In July 2021, this business advisory was updated with a

²¹ *Call to action on human rights abuses in the Xinjiang Uyghur Autonomous Region*, END UYGHUR FORCED LABOR (Oct. 2021), <https://enduyghurforcedlabour.org/call-to-action/>.

²² *Risks and Considerations for Businesses with Supply Chain Exposure to Entities Engaged in Forced Labor and other Human Rights Abuses in Xinjiang*, DEPARTMENT OF STATE, DEPARTMENT OF THE TREASURY, DEPARTMENT OF COMMERCE & DEPARTMENT OF HOMELAND SECURITY (July 1, 2020), https://www.state.gov/wp-content/uploads/2020/07/Xinjiang-Supply-Chain-Business-Advisory_FINAL_For-508-508.pdf.

“starker” message, including a “warning to terminate business relationships where mitigation is not possible.”²³ Other influential actions recently taken by the Government include the WROs issued by U.S. Customs and Border Protection on November 30, 2020, banning the importation of all cotton and cotton products made by Xinjiang Production and Construction Corps (“XPCC”) and the subsequent WRO on all cotton and cotton products originating from the Uyghur Region.²⁴ The publication of this WRO likely contributed to Esquel Textile’s loss of business relationships. Overall, the Government’s recognition of massive forced labor as a component of human rights violations that constitute crimes against humanity and genocide, has only mounted since Esquel Textile’s designation on the Entity List in July 2020,²⁵ further undermining their claim that the designation caused them irreparable harm.

Considering that Esquel Textile’s economic harms have not threatened the existence of their business and the high likelihood that other factors besides their

²³ U.S. Department of State, *supra* note 3; *see also* U.S. Releases Updated Business Advisory on Xinjiang Human Rights Risk, COVINGTON (July 15, 2021), <https://www.cov.com/en/news-and-insights/insights/2021/07/us-releases-updated-business-advisory-on-xinjiang-human-rights-risk>.

²⁴ *CBP Issues Detention Order on Cotton Products Made by Xinjiang Production and Construction Corps Using Prison Labor*, U.S. CUSTOMS AND BORDER PROTECTION (Dec. 2, 2020), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-cotton-products-made-xinjiang-production>.

²⁵ *Chinese Persecution of the Uyghurs*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM (last accessed Feb. 22, 2022), <https://www.ushmm.org/genocide-prevention/countries/china/case-study/current-risks/chinese-persecution-of-the-uyghurs>.

designation on the Entity List have caused their harms, *amici curiae* believe that Esquel Textile failed to show irreparable harm. Therefore, this court should uphold the denial of the motion for a preliminary injunction.

B. Denial of Esquel Textile’s Motion for a Preliminary Injunction is in the Public Interest.

“In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.” *Winter*, 555 U.S. at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). The requested injunction would significantly impair the public interest in effective enforcement of U.S. foreign policy, namely the promotion of the human rights of those suffering from the Uyghur genocide.

The public interest in the promotion of human rights is well-established in U.S. law. This public interest finds recognition in the U.S. Constitution, the Civil Rights Act of 1964, and various international human rights treaties ratified by the Government.²⁶ The nation’s commitment to ending forced labor at home and abroad run equally deep in the law. The Thirteenth Amendment of the U.S.

²⁶ These include the International Covenant on Civil and Political Rights; International Convention on the Elimination of All Forms of Racial Discrimination; and Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. *See* Office of the High Commissioner for Human Rights, *UN Treaty Body Database: Ratification Status for United States of America*, UNITED NATIONS HUMAN RIGHTS TREATY BODIES (last accessed Feb. 18, 2022), https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=187&Lang=EN.

Constitution aside, the principle that ending forced labor—at home and abroad—is in the public interest is expressed by the United States-Mexico-Canada Agreement,²⁷ the U.S. Tariff Act of 1930,²⁸ and the Trafficking Victims Protection Act.²⁹

However, the Government’s ability to carry out the public interest by excluding products of forced labor from the domestic market and promoting human rights would be significantly impaired if the relief requested by Esquel Textile is granted. “[I]t is clear that issuing a preliminary injunction at this stage would throw the present system of regulations into disarray.” *Emily’s List v. Fed. Election Comm’n*, 362 F. Supp. 2d 43, 58–59 (D.D.C.), *aff’d*, 170 F. App’x 719 (D.C. Cir. 2005). For example, one policy that would be impacted is the aforementioned WRO issued against all cotton and cotton products made by the XPCC. Another is the Uyghur Forced Labor Prevention Act, which was passed in December 2021. This law prohibits import of any goods from the Uyghur Region that are made by convict labor, forced labor, or indentured labor under penal sanctions and imposes sanctions on those responsible for human rights violations in the region. A preliminary injunction would harm the public interest by

²⁷ Article 23.6 requires each Party to “prohibit the importation of goods into its territory from other sources produced in whole or in part by forced or compulsory labor, including forced or compulsory child labor”

²⁸ 19 U.S.C. § 1307 bans the importation of all goods made abroad with forced labor.

²⁹ 18 U.S.C. § 1589 outlaws forced labor.

challenging this coherent scheme of executive policies that give force to the Government's commitment to promoting human rights and discouraging forced labor worldwide.

Esquel Textile claims that removing Changji Esquel from the Entity List would “promote the public interest in human rights, the environment, and anti-corruption.” Plaintiffs-Appellants Br. 61. Esquel Textile argues it “is a global leader in sustainable manufacturing and socially responsible business operations,” *id.* at 21, and that restoration of their operations will support its “ability to serve as a leader in corporate sustainability and socially responsible business practices,” in addition to practices of nondiscriminatory, high-quality employment “in the underdeveloped parts of the world in which [Esquel Textile] operates—*i.e.*, rural parts of Sri Lanka, Vietnam, and China.” *Id.* Despite this assertion, Esquel Textile offers no evidence to explain how restoration of its operations in a region under pervasive PRC surveillance and restrictions, where credible supply chain and social compliance auditing is impossible, and where Uyghurs are subjected to forced labor and grave human rights violations, would be socially responsible, particularly when so many other global corporations have come to the opposite conclusion.

Due to the restrictions on information in the Uyghur Region, Esquel Textile's evidence of its social leadership—namely, audits and certifications—are

unpersuasive. Esquel Textile’s assertion that it is the subject of frequent “independent third-party audits” offers nothing to distance them from the practice of forced labor in the Uyghur Region, as credible labor audits rely on the ability of workers to report on labor conditions to auditors without fear of reprisal; yet, this is impossible in the Uyghur Region given the PRC Government’s program of surveillance and monitoring of Uyghur workers.³⁰ In September 2020, five prominent international labor auditing firms announced that they could no longer audit corporate supply chains in the Uyghur Region because the PRC Government’s control and repression made it too difficult to determine whether factories are using forced labor.³¹ Therefore, Esquel Textile does not—and plausibly cannot—claim that their cotton supply chain is free from forced labor.

Esquel Textile’s claim to social leadership cannot be squared with their actual operations in the Uyghur Region. They offer no evidence to explain how their continued operations in the Uyghur Region amid ongoing government-

³⁰ See Dr. Darren Byler, *How companies profit from forced labor in Xinjiang, The Xinjiang Data Project* (last accessed Feb. 22, 2022), <https://xjdp.aspi.org.au/explainers/how-companies-profit-from-forced-labour-in-xinjiang/>; see also “*Break Their Lineage, Break Their Roots*”: *China’s Crimes against Humanity Targeting Uyghurs and Other Turkic Muslims*, HUMAN RIGHTS WATCH (April 19, 2021), <https://www.hrw.org/report/2021/04/19/break-their-lineage-break-their-roots/chinas-crimes-against-humanity-targeting>.

³¹ Eva Xiao, *Auditors to Stop Inspecting Factories in China’s Xinjiang Despite Forced-Labor Concerns*, *Wall Street Journal* (Sept. 21, 2020), <https://www.wsj.com/articles/auditors-say-they-no-longer-will-inspect-labor-conditions-at-xinjiang-factories-11600697706>.

imposed forced labor and other atrocity crimes with clear links to cotton harvesting,³² processing, and garment production³³ can be considered “socially responsible.” Nor do they offer any evidence that they have ever called for an end to forced labor before the PRC government.

On the contrary, publicly available information indicates that Esquel Textile’s operations are intimately bound up with the very forced labor programs U.S. statute law seeks to abolish. Changji Esquel, a spinning mill that processes ginned cotton into cotton yarn, used for fabric production, likely sources cotton grown in the Uyghur Region, which produces 85% of cotton in China. Uyghur Region cotton is prohibited from import into to the U.S. because it is produced with forced labor. Esquel Textile is a former business partner to the XPCC, a paramilitary colonial organization whose official mission is to increase the Han population of the Uyghur Region, and is subject to four different U.S. sanctions

³² See Dr. Adrian Zenz, *Coercive Labor and Forced Displacement in Xinjiang’s Cross-Regional Labor Transfer Program: A Process-Oriented Evaluation*, JAMESTOWN FOUNDATION (Mar. 2021), https://jamestown.org/wp-content/uploads/2021/12/Coercive-Labor-and-Forced-Displacement-in-Xinjiangs-Cross-Regional-Labor-Transfers-A-Process-Oriented-Evaluation_Updated-December-2021.pdf?x90712; see also Dr. Adrian Zenz, *Coercive Labor in Xinjiang: Labor Transfer and the Mobilization of Ethnic Minorities to Pick Cotton*, CENTER FOR GLOBAL POLICY (Dec. 2020), <https://newlinesinstitute.org/wp-content/uploads/2020/12/20201214-PB-China-Zenz-1.pdf>.

³³ Laura T. Murphy, et al., *Laundering Cotton: How Xinjiang Cotton is Obscured in International Supply Chains*, SHEFFIELD HALLAM UNIVERSITY HELENA KENNEDY CENTRE (Nov. 2021), <https://acrobat.adobe.com/link/track?uri=urn:aaid:scds:US:e38ce54f-684d-4d55-8e62-ddc7ea20d9c9>.

regimes for human rights violations. In addition to dominating cotton production in the Uyghur Region, the XPCC operates prisons and internment camps where Uyghurs and other Turkic and/or Muslims are arbitrarily detained and subjected to political “re-education.” In addition to its Changji Esquel spinning operation in the Uyghur Region, Esquel Textile held a stake in a 2,700 hectare cotton farm joint venture with this company until at least April 2021, just two months prior to its designation.³⁴ In July 2020, the Office of Foreign Assets Control of the U.S. Department of the Treasury imposed sanctions on the XPCC pursuant to the Global Magnitsky Act.³⁵ A few months later, U.S. Customs and Border Protection issued the WRO on all cotton and cotton products produced by the company.³⁶

Considering the inability to exclude the use of forced labor in Changji Esquel’s supply chains, due to the inability to conduct credible audits and the high likelihood that Changji Esquel sources cotton grown in the Uyghur Region known to be produced with forced labor, granting the request for a preliminary injunction would run contrary to the public interest to support government efforts to defend

³⁴ Ryan McMorrow & Christian Shepherd, *Western clothing brands buy from group facing US Xinjiang sanctions*, FINANCIAL TIMES (July 21, 2020), <https://www.ft.com/content/8af6e15b-acf1-46de-9098-440f9ef3f137>.

³⁵ *Treasury Sanctions Chinese Entity and Officials Pursuant to Global Magnitsky Human Rights Executive Order*, U.S. DEPARTMENT OF THE TREASURY (July 31, 2020), <https://home.treasury.gov/news/press-releases/sm1073>.

³⁶ *CBP Issues Detention Order on Cotton Products Made by Xinjiang Production and Construction Corps Using Prison Labor*, U.S. CUSTOMS AND BORDER PROTECTION (Dec. 2, 2020), <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-cotton-products-made-xinjiang-production>.

human rights and prohibit the entry of goods made with forced labor from entering U.S. markets as a means to discourage practices of forced labor worldwide.

C. The Balance of Equities Tips in the Government’s Favor.

In considering the balance of equities, the court determines “whether the movant’s substantial injury outweighs the threatened harm to the party whom they seek to enjoin.”³⁷ Specifically, the court “weighs the irreparable harm that the moving party would endure without the protection of the preliminary injunction against any irreparable harm the nonmoving party would suffer if the court were to grant the requested relief, as well as harms to the public or public interest.”³⁸ In this case, the harm to Esquel Textile is financial loss, whereas the harm to the Government is the inability to carry out the public interest of protecting human rights and ending forced labor worldwide. The harm suffered by Esquel Textile, which can hardly be considered irreparable, is certainly outweighed by the human rights crisis in the Uyghur Region. The balance of equities thus clearly tips in favor of the Government.

³⁷ Lonnie E. Griffith, Jr., et al., CYCLOPEDIA OF FEDERAL PROC. § 73:45 (3d ed. 2022).

³⁸ *Id.*

CONCLUSION

For the foregoing reasons, the Court should affirm the district court's denial of a preliminary injunction.

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I hereby certify, pursuant to Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), that the Brief of Amici Curiae Global Labor Justice - International Labor Rights Forum, Human Trafficking Legal Center, and the Uyghur Human Rights Project in Support of Defendants-Appellees and Affirmance is proportionally spaced, has a typeface of 14 points, and contains 5,742 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(e)(1).

March 3, 2022

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be electronically served on counsel for all parties in the appeal and filed using the appellate CM/ECF system. All participants in the appeal are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

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