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## The Thirteenth Amendment and One Hundred and Fifty Years of Struggle to Criminalize Slavery: A First Amendment Challenge to the Forced Labor Act (18 U.S.C. § 1589)

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## ARTICLE

# THE THIRTEENTH AMENDMENT AND ONE HUNDRED AND FIFTY YEARS OF STRUGGLE TO CRIMINALIZE SLAVERY: A FIRST AMENDMENT CHALLENGE TO THE FORCED LABOR ACT (18 U.S.C. § 1589)

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## I. INTRODUCTION

On January 1, 1863, President Abraham Lincoln issued the Emancipation Proclamation.<sup>1</sup> President Lincoln explained that “all persons held as slaves” within the rebellious states “shall be then, thenceforward, and forever free.”<sup>2</sup> Subsequently, Congress ratified the Thirteenth Amendment.<sup>3</sup> The Thirteenth Amendment prohibited slavery (except for criminals), and Section Two gave Congress the “power to enforce this article by appropriate legislation.”<sup>4</sup> Section Two began the long struggle to criminalize slavery in the United States.<sup>5</sup> This struggle culminated in 18 U.S.C. § 1589 but only after the Supreme Court, in 1988, defined “involuntary servitude” to mean

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1. Proclamation No. 17 (Emancipation Proclamation), 12 Stat. 1268 (Jan. 1, 1863).

2. *Id.*

3. U.S. CONST. amend. XIII; *United States v. Nelson*, 277 F.3d 164, 177 (2d Cir. 2002); Douglas L. Colbert, *Challenging the Challenge: Thirteenth Amendment as a Prohibition Against the Racial Use of Peremptory Challenges*, 76 CORNELL L. REV. 1, 6 n.14 (“The Thirteenth Amendment was introduced in March 1864, but failed to receive the two-thirds vote necessary to forward it to the states for ratification. It was reintroduced in January 1865 and won congressional approval on January 31, 1865, three months prior to General Lee’s surrender at Appomattox Court House on April 9, 1865.”).

4. U.S. CONST. amend. XIII, § 2.

5. *Id.*

the use or threatened use of physical or legal coercion.<sup>6</sup> The Supreme Court's holding specifically found that the phrase "involuntary servitude" did not encompass even untoward psychological or financial pressure.<sup>7</sup> As a result, section 1589—the Congressional response to the Supreme Court's decision—defines "forced labor" (through the definition of "serious harm") so broadly that it infringes on the First Amendment right to association and criminalizes routine relationships—such as an employer and employee, a parent and a child, or a teacher and a student.<sup>8</sup> The breadth of the section 1589's definition of "serious harm" creates a vagueness and overbreadth conflict with the First Amendment's Freedom of Association.<sup>9</sup> But section 1589's twin problems of vagueness and overbreadth are readily resolvable with the addition of an affirmative defense. This proposed affirmative defense would recognize that routine and socially accepted pressures, such as those exerted by a parent to a child or a teacher to a

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6. 18 U.S.C. § 1589(c); *United States v. Kozminski*, 487 U.S. 931, 948 (1988) ("Thus, the language and legislative history of § 1584 both indicate that its reach should be limited to cases involving the compulsion of services by the use or threatened use of physical or legal coercion. Congress chose to use the language of the Thirteenth Amendment in § 1584 and this was the scope of that constitutional provision at the time § 1584 was enacted."); Christopher Carey & Sarahfina Peterson, *Trafficking People with Disabilities: A Legal Analysis*, 26 CARDOZO J. EQUAL RTS. & SOC. JUST. 471, 475 n.30 (2020) ("In this case, a dairy farmer, Kozminski, used threats and psychological coercion to force two intellectually disabled men to work 17-hour days on his property for no pay. . . . A unanimous Court ruled that the Thirteenth Amendment protected only against legal or physical coercion.").

7. *Kozminski*, 487 U.S. at 948.

8. 18 U.S.C. § 1589(c); *United States v. Toviave*, 761 F.3d 623, 624–26 (6th Cir. 2014). Holding contrary to the Government's interpretation of 18 U.S.C. § 1589, the court stated:

Toviave's treatment of the children was reprehensible, it was not forced labor. Three points compel this conclusion. First, forcing children to do household chores cannot be forced labor without reading the statute as making most responsible American parents and guardians into federal criminals. Second, requiring a child to perform those same chores by means of child abuse does not change the nature of the work. And third, if it did, the forced labor statute would federalize the traditionally state-regulated area of child abuse. In short, treating household chores and required homework as forced labor because that conduct was enforced by abuse either turns the forced labor statute into a federal child abuse statute, or renders the requirement of household chores a federal crime.

9. *IDK, Inc. v. Cnty. of Clark*, 836 F.2d 1185, 1199 (9th Cir. 1988) ("It is well established that Freedom of Association is an 'inseparable aspect' of the freedom of speech protected by the First Amendment and the liberty protected by the due process clause of the fourteenth amendment. See *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958). Moreover, 'it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters.' *Id.* The protection of the Constitution extends to association for social as well as political ends.").

student, are not criminal acts. But without the addition of such an affirmative defense, 18 U.S.C. § 1589's definition of "forced labor" is an unconstitutional violation of the First Amendment right to Freedom of Association.

## II. A HISTORY OF CRIMINALIZATION

While the Emancipation Proclamation and later the Thirteenth Amendment formally freed most slaves and prohibited the institution of slavery, the more than one-hundred-year history of sharecropping,<sup>10</sup> peonage,<sup>11</sup> and legalized segregation<sup>12</sup> stifled a meaningful implementation of the Thirteenth Amendment.<sup>13</sup>

In 1872, the Supreme Court, in the famous *Slaughter-House Cases*, explained the tenuous nature of the country after the Civil War.<sup>14</sup> The Court also explained the efforts to impede the promise of the Emancipation Proclamation and the Thirteenth Amendment and wrote:

[N]otwithstanding the formal recognition by [the rebellious] States of the abolition of slavery, the condition of the slave race[,] . . . without further

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10. Michele Goodwin, *The Thirteenth Amendment: Modern Slavery, Capitalism, and Mass Incarceration*, 104 CORNELL L. REV. 899, 934 (2019) ("Moreover, there were virtually no legal protections for newly freed Blacks from labor exploitation, whether they were freed sharecroppers or newly stamped 'convicts.'").

11. In 1905 the Supreme Court defined "peonage" as "a status or condition of compulsory service, based upon the indebtedness of the peon to the master." *Clyatt v. United States*, 197 U.S. 207, 215 (1905).

12. *Plessy v. Ferguson*, 163 U.S. 537, 540, 542–43 (1896) ("This case turns upon the constitutionality of an act of the general assembly of the state of Louisiana, passed in 1890, providing for separate railway carriages for the white and colored races. . . . That it does not conflict with the thirteenth amendment, which abolished slavery and involuntary servitude, except as a punishment for crime, is too clear for argument. . . . A statute which implies merely a legal distinction between the white and colored races—a distinction which is founded in the color of the two races, and which must always exist so long as white men are distinguished from the other race by color—has no tendency to destroy the legal equality of the two races, or re-establish a state of involuntary servitude. Indeed, we do not understand that the thirteenth amendment is strenuously relied upon by the plaintiff in error in this connection.")

13. U.S. CONST., art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight, but a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person."). In 1807, Congress passed a law that prohibited the importation of slaves after 1808—the earliest day allowed by Article I of the Constitution. *See Sundry African Slaves v. Madrazo*, 26 U.S. 110, 119 (1828) (detailing the history of the slave import ban); *The Emily*, 22 U.S. 381, 385 (1824).

14. *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 70 (1872).

protection of the Federal government, [would] be almost as bad as it was before. Among the first acts of legislation adopted by several of the States in the legislative bodies which claimed to be in their normal relations with the Federal government, were laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value, while they had lost the protection which they had received from their former owners from motives both of interest and humanity.<sup>15</sup>

With President Andrew Johnson's ineffectual efforts to "reconstruct" the country following the Civil War<sup>16</sup> and the bevy of state laws that "imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value,"<sup>17</sup> it is unsurprising that, in the decades after the Civil War, there were few meaningful efforts to criminalize slavery within the United States.<sup>18</sup>

In the early-twentieth century, Congress enacted laws that criminalized slavery and went so far as to criminalize outfitting a vessel to participate in the slave trade—but generally the punishment was forfeiture of the vessel or a fine.<sup>19</sup> In 1948, Congress made it a criminal act to enter into a conspiracy "to injure, oppress, threaten, or intimidate any person in any State, Territory, Commonwealth, Possession, or District in the free exercise

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15. *Id.*

16. Xi Wang, *Black Suffrage and the Redefinition of American Freedom, 1860-1870*, 17 *CARDOZO L. REV.* 2153, 2188–89 (1996) ("The faith was soon betrayed when Johnson vetoed the Freedmen's Bureau Bill on February 19, 1866, and the Civil Rights Act of 1866 on March 27, 1866. The Freedmen's Bureau bill extended the tenure of the Freedmen's Bureau and enlarged the Bureau's legal power to establish and protect blacks' civil rights in the South. The Civil Rights bill conferred on all blacks national and state citizenship and guaranteed them a number of crucial civil and economic rights, including the rights to own property, to make contracts, and to sue. The purpose of these two bills was to invalidate the Southern 'Black Codes,' which consisted of numerous restrictions on black freedom that were implemented by the restored Southern states at the end of 1865 under the pretext of maintaining social order. Neither of the two bills touched on black voting rights, yet, constitutionally speaking, they represented a bold and vigorous effort by the Republican Congress to expand the federal government's responsibility in protecting the rights of American citizens. Lyman Trumbull (R-Illinois), author of the two bills and a leader of the moderates in the Senate, conferred with Johnson several times about this legislation and believed he had the President's approval. Moderate Republicans like Rutherford B. Hayes privately wished that Johnson would get back 'into the bosom of the [Republican] family again' by approving these bills. But Johnson branded both bills unconstitutional and unnecessary.").

17. *Slaughter-House Cases*, 83 U.S. at 70.

18. *Clyatt v. United States*, 197 U.S. 207, 215 (1905).

19. 18 U.S.C., 1940 ed., §§ 246–67 (March 4, 1909, ch. 321, § 19, 35 Stat. 1092).

or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same.”<sup>20</sup> And that year Congress passed 18 U.S.C. Section 1584.<sup>21</sup> Section 1584 made it a federal crime to knowingly and willfully hold or sell a person into “involuntary servitude” and imposed a fine of “not more than \$5,000 or imprison[ment of] not more than five years, or both.”<sup>22</sup>

In 1988 the Supreme Court heard *United States v. Kozminski*.<sup>23</sup> In *Kozminski*, the petitioner asked the Court to “determine the meaning of ‘involuntary servitude,’” as that phrase was used in 18 U.S.C. Sections 241 and 1584.<sup>24</sup> Prior to *Kozminski*, the courts had generally held “that involuntary servitude occurred when a person was coerced into laboring for another because of a belief that no viable alternatives existed, or no way was available to avoid continued service or confinement.”<sup>25</sup> But in *Kozminski*, the “Supreme Court ruled that involuntary servitude should be interpreted narrowly, [and limited to instances such as] where the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury or by the use or threat of coercion through law or the legal process.”<sup>26</sup>

Justice O’Connor explained for the majority:

The Kozminskis were convicted under § 241 for conspiracy to interfere with the Thirteenth Amendment guarantee against involuntary servitude. . . . [O]ur task is to ascertain the precise definition of that crime by looking to the scope of the Thirteenth Amendment prohibition of involuntary servitude specified in our prior decisions.<sup>27</sup>

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20. 18 U.S.C. § 241 (1952).

21. *Id.* § 1584.

22. *Id.* This statute was amended to make the penalty twenty years, but as passed in 1948 the penalty was five years. Law of June 25, 1948, ch. 645, § 1, 62 Stat. 773 (current version at 18 U.S.C. § 1584 (2018)).

23. *United States v. Kozminski*, 487 U.S. 931, 934 (1988).

24. *Id.* at 934; Joyce Davis, *Enhanced Earning Capacity/Human Capital: The Reluctance to Call It Property*, 17 WOMEN’S RIGHTS L. REP. 109, 128 (“Prior to the Supreme Court’s decision in *United States v. Kozminski*, it was generally held that involuntary servitude occurred when a person was coerced into laboring for another because of a belief that no viable alternatives existed, or no way was available to avoid continued service or confinement.”) (citations omitted).

25. Davis, *supra* note 24, at 128.

26. Patricia Medige & Catherine Griebel Bowman, *U.S. Anti-Trafficking Policy and the J-1 Visa Program: The State Department’s Challenge from Within*, 7 INTERCULTURAL HUM. RTS. L. REV. 103, 136 n.180 (2012).

27. *Kozminski*, 487 U.S. at 941.

The majority then held that:

While the general spirit of the phrase “involuntary servitude” is easily comprehended, the exact range of conditions it prohibits is harder to define. The express exception of involuntary servitude imposed as a punishment for crime provides some guidance. The fact that the drafters felt it necessary to exclude this situation indicates that they thought involuntary servitude includes at least situations in which the victim is compelled to work by law. Moreover, from the general intent to prohibit conditions “akin to African slavery,” as well as the fact that the Thirteenth Amendment extends beyond state action, we readily can deduce an intent to prohibit compulsion through physical coercion.<sup>28</sup>

The majority explained that “our precedents clearly define a Thirteenth Amendment prohibition of involuntary servitude enforced by the use or threatened use of physical or legal coercion. The guarantee of freedom from involuntary servitude has never been interpreted specifically to prohibit compulsion of labor by other means, such as psychological coercion.”<sup>29</sup>

The Supreme Court rejected the Government’s broader reading of the statute and wrote:

The Government has argued that we should adopt a broad construction of “involuntary servitude,” which would prohibit the compulsion of services by any means that, from the victim’s point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice. Under this interpretation, involuntary servitude would include compulsion through psychological coercion as well as almost any other type of speech or conduct intentionally employed to persuade a reluctant person to work.

This interpretation would appear to criminalize a broad range of day-to-day activity. For example, the Government conceded at oral argument that, under its interpretation, § 241 and § 1584 could be used to punish a parent who coerced an adult son or daughter into working in the family business by threatening withdrawal of affection. It has also been suggested that the Government’s construction would cover a political leader who uses charisma to induce others to work without pay or a religious leader who obtains personal services by means of religious indoctrination. As these hypotheticals suggest, the Government’s interpretation would delegate to prosecutors and

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28. *Id.* at 942 (citing *Butler v. Perry*, 240 U.S. 328, 332–33; U.S. CONST. amend. XIV, § 1).

29. *Id.* at 944.

juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes. It would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction.

Moreover, as the Government would interpret the statutes, the type of coercion prohibited would depend entirely upon the victim's state of mind. Under such a view, the statutes would provide almost no objective indication of the conduct or condition they prohibit, and thus would fail to provide fair notice to ordinary people who are required to conform their conduct to the law. The Government argues that any such difficulties are eliminated by a requirement that the defendant harbor a specific intent to hold the victim in involuntary servitude. But in light of the Government's failure to give any objective content to its construction of the phrase "involuntary servitude," this specific intent requirement amounts to little more than an assurance that the defendant sought to do "an unknowable something."

In short, we agree with Judge Friendly's observation that

"[t]he most ardent believer in civil rights legislation might not think that cause would be advanced by permitting the awful machinery of the criminal law to be brought into play whenever an employee asserts that his will to quit has been subdued by a threat which seriously affects his future welfare but as to which he still has a choice, however painful."

Accordingly, we conclude that Congress did not intend § 1584 to encompass the broad and undefined concept of involuntary servitude urged upon us by the Government.<sup>30</sup>

Thus, *Kozminski* rejected the established-common-law meaning of "involuntary servitude" and instead construed "involuntary servitude" in a way the Court believed was "consistent with the understanding of the Thirteenth Amendment that prevailed at the time of § 1584's enactment."<sup>31</sup> This new definition was far more constrained than the historically accepted meaning.<sup>32</sup>

*Kozminski*'s narrow definition of "involuntary servitude" under the Thirteenth Amendment produced Congressional outrage and public distain and culminated in the Trafficking Victims Protection Act of 2000

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30. *Id.* at 949–50 (alteration in original).

31. *Id.* at 945.

32. *Id.* at 945; *United States v. Dann*, 652 F.3d 1160, 1169 (9th Cir. 2011) ("Kozminski limited the definition of involuntary servitude to 'physical' or 'legal' coercion.").

(TVPA).<sup>33</sup> The TVPA specifically repudiated *Kozminski*'s narrow definition of "involuntary servitude," but the new definition broadened the definition so significantly that it violates the First Amendment right to Freedom of Association.<sup>34</sup>

### III. THE TRAFFICKING VICTIMS PROTECTION ACT OF 2000

In 18 U.S.C. § 1589, the TVPA created the offense of "Forced Labor." This section most directly repudiated *Kozminski*'s narrow definition of "involuntary servitude." Section 1589 undid *Kozminski* by criminalizing

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33. Richard Carelli, *Court Rules for Michigan Farm Family Accused of Enslaving Retarded Men*, AP (June 29, 1988), <https://apnews.com/article/68953e7579aede3c64b3c2217ced7d43> [<https://perma.cc/BE5B-2NVY>] ("The Supreme Court, ruling for a Michigan farm family accused of enslaving two retarded men for more than 10 years, said today that illegal involuntary servitude cannot be imposed through psychological coercion alone. By a 9-0 vote, the justices rejected Reagan administration arguments that the legal definition of involuntary servitude should be broad enough to include psychological coercion. If the court had agreed with federal prosecutors, the broader definition of involuntary servitude - outlawed by the Constitution's 13th Amendment, which abolished slavery and by federal law - could have jeopardized certain cult groups or religious orders that use psychological persuasion to enlist and retain members."); H.R. Conf. Rep. No. 106-939, at 100-01 (2000); William Wilber Force Trafficking Victims Protection Reauthorization Act of 2008, 154 Cong. Rec. H10888, H10904; Victims of Trafficking and Violence Protection Act of 2000, 2000 Enacted H.R. 3244, 106 Enacted H.R. 3244, 114 Stat. 1464, 1467 ("Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through nonviolent coercion. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court found that section 1584 of title 18, United States Code, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect."); Joseph v. Signal Int'l, No. 1:13-CV-324, 2015 WL 1262286, at \*15 (E.D. Tex. 2015) ("Congress, however, expressly repudiated *Kozminski*'s narrow definition of involuntary servitude with the passage of the Victims of Trafficking and Violence Protection Act of 2000. *Kivanuka*, 844 F. Supp. 2d at 115-16 ("*Kozminski* is not controlling, as Congress has specifically addressed the *Kozminski* decision and rejected it as too narrow."). This Act broadened the definition of involuntary servitude to 'include cases in which persons are held in a condition of servitude through nonviolent coercion.' See Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1446, 1467 (codified at 22 U.S.C. § 7101)."); *United States v. Bradley*, 390 F.3d 145, 150 (1st Cir. 2004) ("Adopted in 2000 as part of a broader set of provisions—the Victims of Trafficking and Violence Protection Act of 2000, 114 Stat. 1464—section 1589 was intended expressly to counter *United States v. Kozminski*, 487 U.S. 931, 101 L. Ed. 2d 788, 108 S. Ct. 2751 (1988).").

34. Jennifer M. Chacon, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2999 (2006) ("The TVPA thus codified the broad interpretation of coercion suggested by the language, if not the holding, of *Kozminski* at 18 U.S.C. 1589."); Jennifer A.L. Sheldon-Sherman, *The Missing "P": Prosecution, Prevention, Protection, and Partnership in the Trafficking Victims Protection Act*, 117 PENN ST. L. REV. 443, 451-52 (2012) ("In response to the inadequacies of the existing law in combating modern-day trafficking, and persuaded by the growing anti-trafficking rhetoric around the world, Congress passed, and President Clinton signed into law, the Trafficking Victims Protection Act of 2000.").

labor or services secured by “serious harm” or threats of “serious harm.”<sup>35</sup> It is the definition of “serious harm” that infringes on the First Amendment right to Freedom of Association. The statute defines “serious harm” as:

(2) The term “*serious harm*” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.<sup>36</sup>

This definition repudiates *Kozminski*'s emphasis on physical restraint or threats of legal process and instead includes “any harm,” whether the harm is “physical or nonphysical, including psychological, financial, or reputational harm,” provided that the harm “is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.”<sup>37</sup>

The definition of “serious harm,” while addressing the problems from *Kozminski*'s narrow definition, is overly broad and vague and infringes on the First Amendment right to the Freedom of Association.

#### IV. FIRST AMENDMENT FREEDOM OF ASSOCIATION: VAGUENESS AND OVERBREADTH

##### A. *First Amendment and Constitutional Challenges*

The Supreme Court has routinely explained that “[p]erhaps the most important factor affecting the clarity that the Constitution demands of a law is whether [the law] threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech or of association, a more stringent vagueness test should apply.”<sup>38</sup>

The Fifth Circuit recently explained:

Though not expressly included in the text of the amendment, “[i]mplicit in the right to engage in First Amendment-protected activities is ‘a

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35. 18 U.S.C. § 1589(a)(2), (a)(4), (c)(2) (2012).

36. *Id.* § 1589(c)(2).

37. *Id.*

38. *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).

corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.” The Supreme Court has identified two classes of associations endowed with First Amendment protection: expressive associations and intimate associations.<sup>39</sup>

According to these Courts, the “intimate human relationships” in the second category of protected “associations” “include marriage, the begetting and bearing of children, child rearing and education, and cohabitation with relatives.”<sup>40</sup>

In *Rotary Club of Duarte*, the Supreme Court elaborated on the First Amendment right to Freedom of Association and wrote:

The Court has recognized that the freedom to enter into and carry on certain intimate or private relationships is a fundamental element of liberty protected by the *Bill of Rights*. Such relationships may take various forms, including the most intimate. . . . We have not attempted to mark the precise boundaries of this type of constitutional protection. The intimate relationships to which we have accorded constitutional protection include marriage, . . . the begetting and bearing of children, . . . child rearing and education, . . . and cohabitation with relatives. . . . Of course, we have not held that constitutional protection is restricted to relationships among family members. We have emphasized that the *First Amendment* protects those relationships, including family relationships, that presuppose “deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one’s life.”<sup>41</sup>

Thus, the personal associations that are entitled to First Amendment protection are those that are distinguished by such attributes as a relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and a seclusion from others in critical aspects of the relationship;

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39. *Mote v. Walthall*, 902 F.3d 500, 506 (5th Cir. 2018). *See also* *Dallas v. Stanglin*, 490 U.S. 19, 23–24 (1989) (discussing how an age and hour restriction ordinance for the purpose of preventing “potentially detrimental influences” violates a minor’s First Amendment associational rights); *see also* *IDK, Inc. v. Cnty. of Clark*, 836 F.2d 1185, 1199 (9th Cir. 1988) (“It is well established that freedom of association is an ‘inseparable aspect’ of the freedom of speech protected by the first amendment . . . .” (citing *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958))).

40. *Caleb v. Grier*, 598 F. App’x 227, 237 (5th Cir. 2015) (citing *Bd. of Dirs. of Rotary Int’l v. Rotary Club of Duarte*, 481 U.S. 537, 545 (1987)).

41. *Rotary Club of Duarte*, 481 U.S. at 545 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 619–20 (1984)).

these relationships, such as family relationships, are “distinctively personal aspects of one’s life.”<sup>42</sup> “Conversely, an association lacking these qualities—such as a large business enterprise—is remote from the concerns giving rise to this constitutional protection.”<sup>43</sup>

But courts recognize that the First Amendment right to intimate human relationships exists beyond the family and into the context of a relatively small social club. The Fifth Circuit recognized that even such social clubs are entitled to “enjoy the fullest protection of their right to private association [under the First Amendment]” because:

[T]he Clubs . . . [are] [r]elatively small in size, they seek to maintain an atmosphere in which their members can enjoy the comradery and congeniality of one another. Employing very restrictive guest and admission policies, they seek to remain isolated. In light of the undisputed facts, including the isolated dues payments by a single employer, we conclude, as did the district court, that the Clubs constitute organizations whose location on the spectrum of personal attachments places them near those that are “most intimate.” Accordingly, they enjoy the fullest protection of their right of private association.<sup>44</sup>

## B. *Vagueness and Overbreadth*

### 1. Vagueness

The Fifth Amendment provides that “[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.”<sup>45</sup> Supreme Court precedent establishes that “the Government violates this guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.”<sup>46</sup> The prohibition of vagueness in criminal statutes “is a well-recognized requirement, consonant

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42. *U.S. Jaycees*, 468 U.S. at 619.

43. *Id.*

44. *La. Debating & Literary Ass’n v. City of New Orleans*, 42 F.3d 1483, 1497–98 (5th Cir. 1995).

45. U.S. CONST. amend. V.

46. *United States v. Anderton*, 901 F.3d 278, 283 (5th Cir. 2018) (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983))).

alike with ordinary notions of fair play and the settled rules of law[,]” and a statute that flouts it “violates the first essential of due process.”<sup>47</sup>

“A statutory provision is facially vague when it is plagued with such ‘hopeless indeterminacy’ that it precludes ‘fair notice of the conduct it punishes.’ . . . A facially vague provision is ‘so standardless that it invites arbitrary enforcement.’”<sup>48</sup>

## 2. Overbreadth

In the First Amendment context, the Supreme Court recognizes a “type of facial challenge,” whereby a law may be invalidated as overbroad if “a ‘substantial number’ of its applications are unconstitutional, ‘judged in relation to the statute’s plainly legitimate sweep.’”<sup>49</sup> The doctrine seeks to balance competing social costs.<sup>50</sup> On the one hand, the threat of enforcement of an overbroad law deters people from engaging in a constitutionally protected activity. However, “invalidating a law that in some of its applications is perfectly constitutional—particularly a law

47. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926).

48. *City of El Cenizo v. Texas*, 890 F.3d 164, 190 (5th Cir. 2018). *See also* *CPR for Skid Row v. City of L.A.*, 779 F.3d 1098, 1103 (9th Cir. 2015) (“[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked.”); *see also* Dan L. Burk, *Patents and the First Amendment*, 96 WASH. U. L. REV. 197, 256–57 (2018) (explaining how vagueness invites governmental intrusion on civil liberties).

49. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008); *see also* *United States v. Williams*, 553 U.S. 285, 292–93 (2008) (stating “a statute’s overbreadth [must] be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep.”). The Supreme Court has applied overbreadth to the First Amendment Freedom of Association. *See* *United States v. Robel*, 389 U.S. 258, 262 (1967) (holding a section of the Subversive Activities Control Act unconstitutional under the First Amendment right of association); *Shelton v. Tucker*, 364 U.S. 479, 490 (1960) (invalidating a statute that required teachers to disclose every organization which he or she has associated with over a five-year time frame); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 639 (1984) (upholding an act that compelled an all-men organization to allow women to join as regular members); *Coates v. Cincinnati*, 402 U.S. 611, 619 (1971) (upholding an ordinance that made it a crime for “three persons or more to assemble on any of the sidewalks and there conduct themselves in a manner annoying to persons passing by”); *N.Y. State Club Ass’n v. City of N.Y.*, 487 U.S. 1, 13 (1988) (holding in favor of New York City’s law, which sought to prevent an association from using discriminatory measures for determining membership); *City of Chi. v. Morales*, 527 U.S. 41, 50–51 (1999) (affirming the Illinois Supreme Court’s holding that found a gang loitering ordinance impermissibly vague and therefore unconstitutional because the ordinance did not draw a distinction between innocent conduct and potentially harmful conduct); *United States v. Sineneng-Smith*, \_\_\_ U.S. \_\_\_, 140 S. Ct. 1575, 1584 n.\* (2020).

50. *Virginia v. Hicks*, 539 U.S. 113, 119–20 (2003). *See generally* Richard H. Fallon Jr., *Making Sense of Overbreadth*, 100 YALE L. REV. 853 (1991) (explaining the history and concept of overbreadth).

directed at conduct so antisocial that it has been made criminal—has obvious harmful effects.”<sup>51</sup> To “maintain an appropriate balance,” the Supreme Court requires that a “statute’s overbreadth be *substantial*, not only in an absolute sense but also relative to the statute’s plainly legitimate sweep.”<sup>52</sup>

In 2010, the Supreme Court considered a facial challenge under the First Amendment to 18 U.S.C. § 48, a law designed to criminalize “animal crushing.”<sup>53</sup> According to the Court, this section established a criminal penalty for anyone who:

[K]nowingly “creates, sells, or possesses a depiction of animal cruelty,” if done “for commercial gain” in interstate or foreign commerce. A depiction of “animal cruelty” is defined as one “in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed,” if that conduct violates federal or state law where “the creation, sale, or possession takes place.”<sup>54</sup>

In conducting the analysis, the Court wrote:

We read § 48 to create a criminal prohibition of alarming breadth. To begin with, the text of the statute’s ban on a “depiction of animal cruelty” nowhere requires that the depicted conduct be cruel. That text applies to ‘any . . . depiction’ in which ‘a living animal is intentionally maimed, mutilated, tortured, wounded, or killed.’ ‘[M]aimed, mutilated, [and] tortured’ convey cruelty, but ‘wounded’ or ‘killed’ do not suggest any such limitation.<sup>55</sup>

The Court made a final, important point. In *Stevens*, the government argued—as it might in the face of a challenge to section 1589(c)(2)’s definition of “serious harm”—that it would only prosecute under this act in cases of “‘extreme’ cruelty.”<sup>56</sup> The Court rejected this argument and explained, “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”<sup>57</sup>

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51. *United States v. Williams*, 553 U.S. 285, 292–93 (2008).

52. *Id.* (emphasis in original).

53. 18 U.S.C. § 48 (2019).

54. *United States v. Stevens*, 559 U.S. 460, 465 (2010) (quoting 18 U.S.C. § 48) (alterations in original).

55. *Id.* at 474 (quoting 18 U.S.C. § 48).

56. *Id.* at 480 (quoting 18 U.S.C. § 48).

57. *Id.* (emphasis in original).

V. PROBLEM WITH THE DEFINITION OF “SERIOUS HARM” UNDER THE FIRST AMENDMENT FREEDOM OF ASSOCIATION

A. *Definition of Serious Harm from the Forced Labor Act and First Amendment Implications*

The Forced Labor statute makes an act criminal:

(a) [When a person] knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—” . . .

(2) by means of serious harm or threats of *serious harm* to that person or another person; . . .

or

(4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer *serious harm* or physical restraint, shall be punished as provided under subsection (d). . . .

(c) In this section: . . .

(2) The term “*serious harm*” means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.<sup>58</sup>

Sections 1589(a)(2), (a)(4), and (c)(2) are unconstitutional violations of the First Amendment right to Freedom of Association because the definition of the term “serious harm” is so broad and thus so vague that it encompasses many of most fundamental of human relationships including the right to have a child. Thus the definition of “serious harm,” violates the First Amendment right to Freedom of Association by, for example, requiring a person to choose between not having a child or young person in their home and having a child or young person in their home and raising that child or young person in a responsible way and violating the Forced Labor statute.<sup>59</sup> The definition of “serious harm” would not provide any

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58. 18 U.S.C. § 1589.

59. *See* 18 U.S.C. § 1589(c)(2)(2008) (“[A]ny harm, whether physical or nonphysical . . . sufficiently serious . . . to compel a reasonable person . . . to perform or to continue performing labor

reasonable person with the information to determine whether his conduct in raising a child was illegal.<sup>60</sup>

A statute is facially unconstitutional under the First Amendment (as opposed to other amendments which labor under a different burden) when the statute or regulation “might operate unconstitutionally under some conceivable set of circumstances.”<sup>61</sup>

The Constitution protects choices to enter into and maintain certain intimate human relationships against undue intrusion by the state and as a fundamental element of personal liberty included in the First Amendment.<sup>62</sup> It is this freedom that section 1589’s definition of “serious harm” intrudes upon.

Section 1589(c)(2) defines “serious harm” as:

- any harm,
- whether physical or nonphysical, including psychological, financial, or reputational harm,
- that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.<sup>63</sup>

This expansive definition adopts the Government’s interpretation of the meaning of the phrase “involuntary servitude” from *Kozminski*.<sup>64</sup> The Supreme Court explained the Government’s interpretation of “involuntary servitude” and wrote:

The Government has argued that we should adopt a broad construction of “involuntary servitude,” which would prohibit the compulsion of services by any means that, from the victim’s point of view, either leaves the victim with no tolerable alternative but to serve the defendant or deprives the victim of the power of choice. Under this interpretation, involuntary servitude would

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or services in order to avoid incurring that harm.”) (including any harm which compels a person to continue or begin performing services to be “serious harm”).

60. *See id.* § 1589(a)(2), (a)(4), and (c)(2) (encompassing a broad range of behavior in its definition of “serious harm”) (providing an uncertain standard for its definition of “serious harm”).

61. *United States v. Salerno*, 481 U.S. 739 (1987); 18 U.S.C. § 1589(a)(2), (a)(4), (c)(2).

62. *Dallas v. Stanglin*, 490 U.S. 19, 23 (1989).

63. 18 U.S.C. § 1589(c)(2).

64. *United States v. Kozminski*, 487 U.S. 931, 948 (1988).

include . . . almost any other type of speech or conduct intentionally employed to persuade a reluctant person to work.<sup>65</sup>

The Court then rejected the Government's interpretation of the statute.<sup>66</sup> In rejecting the Government's argument, the Court explained that the Government's interpretation would "criminalize a broad range of day-to-day activity" and "[i]t would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction."<sup>67</sup>

The Supreme Court's reasoning from *Kozminski* applies to the definition of "serious harm," because the definition is so uncertain that it "would include . . . almost any other type of speech or conduct intentionally employed to persuade a reluctant person to work" and because the definition "delegate[s] to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes[.] [This definition also] subject[s] individuals to the risk of arbitrary or discriminatory prosecution and conviction[.]"<sup>68</sup>

Hypothetical situations illustrate the problems with section 1589's definition of "serious harm." Under this definition a person would commit the offense of Forced Labor if:

- A parent who *knowingly* requires his or her five-year old child to clean up Legos that the child has been playing with or risk having the parent pick up the Lego and then "put it away" and not allow the child to play with the Lego for three days, if this coercive act was sufficient to compel a reasonable person of the same background and in the same circumstances as the five-year old to clean up the Legos to avoid the parent taking the Legos for three days. Because the Forced Labor statute permits the prosecution of a parent who knowingly secures the labor of their five-year old child by means of "threats of serious harm," and because the definition of "serious harm" is so vague, *the statute impinges on the hypothetical parents' rights*, in the most intimate of associations, to First Amendment association. And because no parent could raise a child without such coercive efforts, and because as society we encourage

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65. *Id.* at 949.

66. *Id.*

67. *Id.*

68. *Id.*; 18 U.S.C. § 1589(e)(2).

such coercive efforts, the parents would have no reason to believe that their conduct violated the statute;

- A family who hires an au pair to help with childcare, the au pair is poor, and the au pair is from a country where the American Dollar is an especially valued commodity. This au pair does not want to work Saturday or Sunday mornings. But the parents have an unusually active social schedule and they are often out late on Friday and Saturday nights and want childcare in the mornings. If these parents *knowingly* compel the au pair to work these mornings at the risk of being replaced, then these parents could be charged with Forced Labor for knowingly obtaining the labor of the au pair by “threats of serious harm.” Thus, the statute impinges on the hypothetical parents’/employer’s rights, in the most intimate of associations, to First Amendment association if this coercive act would compel a reasonable person of the same background and in the same circumstances as the au pair to perform the demanded labor to avoid losing her job. And because a parent must be able to control when their child will be cared for by an au pair the parents/employer would have no reason to believe that their conduct was criminal law;
- A talented new lawyer who has secured a prestigious clerkship but the judge *knowingly* requires the clerk to stay late and work extended hours or lose her clerkship which would endanger the employee’s reputation if this coercive act would compel a reasonable person of the same background and in the same circumstances as the young lawyer to do the demanded work. In such an instance the judge could be charged with violating the Forced Labor statute. And because a judge must be able to control her docket, the judge would have no reason to believe that her conduct violated any criminal law; and,
- A college professor in a required but small graduate school seminar *knowingly* required a student to read a book and prepare a review on that book or risk receiving a failing grade, if this coercive act would compel a reasonable person of the same background and in the same circumstances as the hapless graduate student to read the book and write the review to avoid receiving a failing grade and being

removed from his or her graduate program ignominiously. Thus, the statute impinges on the hypothetical professor's rights, in the most intimate of associations, to First Amendment association. And because a professor must be able to control the assignments to his or her students the professor would have no reason to believe that her conduct was criminal.

Under any of these hypotheticals, when all of the surrounding circumstances are considered, any reasonable person in these circumstances would be compelled to perform the labor or service to avoid incurring the resulting "harm," whether it is "psychological, financial, or reputational."<sup>69</sup> But the actor who is knowingly using the "threat of serious harm" or actual "serious harm" to secure the labor would not have fair notice that their conduct was criminal because the statute "is plagued with such 'hopeless indeterminacy' that it precludes 'fair notice of the conduct it punishes'" and it "invites arbitrary enforcement."<sup>70</sup>

Further, these hypotheticals are examples of day-to-day activities that are the essence of decisions to enter into and to maintain certain intimate human relationships (have a child, hire help to care for that child, employ an employee in a small office, or to teach a small graduate school seminar) that are secured against intrusion by the state and receive protection as a fundamental element of personal liberty under the First Amendment's protection for Freedom of Association.<sup>71</sup>

Moreover, section (a)(4) dilutes the definition of "serious harm" further because, in section (a)(4), a person can be convicted if he knowingly secures the labor or service of another by:

(4) means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer *serious harm* . . . , [resulting in] punish[ment] as provided under subsection (d).<sup>72</sup>

Such a "pattern" might include an agreement between parents to support each other when one parent disciplines their child appropriately—such as taking away Legos for three days after a child refused to clean up his or her

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69. *Id.*

70. *City of El Cenizo v. Texas*, 890 F.3d 164, 190 (5th Cir. 2018).

71. *Dallas v. Stanglin*, 490 U.S. 19, 23 (1989).

72. 18 U.S.C. § 1589(a)(4).

Legos.<sup>73</sup> But such a “pattern” or “plan” could easily be constructed to apply in a workplace or school.

Under the statutory definition of “serious harm,” the Forced Labor statute intrudes on this First Amendment right to association, particularly the choice to enter into and maintain intimate human relationships.<sup>74</sup> Specifically, the definition of “serious harm” is so vague that no reasonable person who decided to bring a young person into their home (whether through birth, adoption, or even for a temporary stay) would be on notice that their conduct in correcting the young person or in raising that young person violated the “Forced Labor” statute. In its current form, the statute requires parents to decide whether to exclude children or young people from their home and to be safe from violating this statute or whether to have a child or young person and to raise that child or young person in a responsible way and likely violate the Forced Labor act. Further, in any of the hypothetical situations provided *supra*, the Forced Labor statute violates the First Amendment.<sup>75</sup>

The Supreme Court has been reluctant to find statutes that include a scienter requirement unconstitutionally vague.<sup>76</sup> But the usual concern about scienter and vagueness does not apply to this argument. In this instance, the force or coercion used in any of the hypotheticals would have occurred “knowingly.”<sup>77</sup> But none of the hypothetical individuals who compelled the labor would have had the required notice that the knowing demand for the labor or service and the acts that compelled the labor or service would have been illegal. As in *Stevens*, the usual concern about scienter and vagueness does not apply here.<sup>78</sup>

For this reason, 18 U.S.C. § 1589(a)(2), (a)(4), and (c)(2) are unconstitutionally vague.<sup>79</sup>

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73. *Id.*

74. *Id.*

75. *Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 662 (5th Cir. 2006) (“[T]o mount a facial attack] in the First Amendment context, . . . the challenger need only show that a statute or regulation ‘might operate unconstitutionally under some conceivable set of circumstances.’”).

76. *Hoffman Ests. v. Flipside, Hoffman Ests., Inc.* 455 U.S. 489, 499 (1982).

77. *United States v. Stevens*, 559 U.S. 460, 465 (2010).

78. *Id.*

79. *Carmouche*, 449 F.3d at 662.

### 1. Invitation for Arbitrary Enforcement

The statutory definition of “serious harm” also necessitates arbitrary enforcement—as the Supreme Court anticipated in *Kozminski*.<sup>80</sup> In *Kozminski*, the Court hypothesized that the Government’s broad interpretation of the statute would criminalize “a broad range of day-to-day activity.”<sup>81</sup> The Court continued and argued that under the Government’s theory, “§ 1584 could be used to punish a parent who coerced an adult son or daughter into working in the family business by threatening withdrawal of affection.”<sup>82</sup> And the Court concluded:

As these hypotheticals suggest, the Government’s interpretation would delegate to prosecutors and juries the inherently legislative task of determining what type of coercive activities are so morally reprehensible that they should be punished as crimes. It would also subject individuals to the risk of arbitrary or discriminatory prosecution and conviction.<sup>83</sup>

Under the Force Labor Statute, “serious harm” is:

any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.<sup>84</sup>

Under this definition any parent who knowingly conditioned a teenaged child’s ability to participate in some important or significant social activity (such as a homecoming dance) on mowing the grass, helping around the home, assisting with siblings, or even cleaning their own room would likely violate the statute.<sup>85</sup> The parent’s conduct would violate the statute if the requirement that the teenaged child do the “labor” or “service” was “sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid

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80. *United States v. Kozminski*, 487 U.S. 931, 949 (1988).

81. *Id.*

82. *Id.*

83. *Id.*

84. 18 U.S.C. § 1589(c)(2) (2012).

85. *Id.*

incurring that harm.”<sup>86</sup> Yet such parental direction is routine and even encouraged.<sup>87</sup>

There is no case in which a parent was charged with “Forced Labor” for conditioning participation in a significant social event on such a “labor” or “service.” But, as the Supreme Court explained in *Stevens*, “the First Amendment protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.”<sup>88</sup>

Thus, 18 U.S.C. § 1589(a)(2), (a)(4), and (c)(2) are unconstitutionally vague because they invite arbitrary enforcement.

## 2. Overbroad

In the First Amendment context, the Supreme Court recognizes “a second type of facial challenge,” whereby a law may be invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.”<sup>89</sup>

Here the Forced Labor statute relies on a definition of “serious harm” which means

- any harm;
- whether physical or nonphysical, including psychological, financial, or reputational harm; and,
- that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.<sup>90</sup>

The statute includes a scienter requirement, but, as in *Stevens*, the requirement that the act occur “knowingly” does not change the overbreadth analysis.<sup>91</sup>

86. *Id.*

87. *See* United States v. Toviave, 761 F.3d 623, 626 (2014) (“But it has always been true that parents can make their children perform this kind of work.”).

88. United States v. Stevens, 559 U.S. 460, 465 (2010).

89. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008); United States v. Williams, 553 U.S. 285, 292–93 (2008).

90. 18 U.S.C. § 1589(c)(2).

91. *Stevens*, 559 U.S. at 464–65.

Instead, here, as in *Stevens*, the Forced Labor statute “create[s] a criminal prohibition of alarming breadth.”<sup>92</sup> Under this statute, as explained *supra*, a huge variety of constitutionally protected conduct associated with the raising of children, the supervision of employees, the education of children or adults, the rehabilitation of prisoners, the training of aspiring soldiers, etc. all fall within the purview of the criminal aspects of this statute.

For these reasons, 18 U.S.C. § 1589(a)(2), (a)(4), and (c)(2) are overbroad and unconstitutional.

#### B. *Conclusion*

The definition of “serious harm” is both unconstitutionally vague and overbroad. The definition requires citizens to choose between deciding not to make the most basic and fundamental decisions to associate with others—as they are guaranteed the right to do under the First Amendment—or to make these associations and to risk violating the “Forced Labor.” These hapless citizens would violate the statute through deliberate action without the required notice, would risk punishment through arbitrary enforcement of the statute, or would risk punishment for protected activities. For these reasons, 18 U.S.C. § 1589(a)(2), (a)(4), and (c)(2) are vague and overbroad.

### VI. CHALLENGES TO THE DEFINITION OF “SERIOUS HARM”

The constitutionality of section 1589’s definition of “serious harm,” has been challenged in the courts, but the challenges have been uniformly unsuccessful. But, with one exception, the definition has not been challenged as a violation of the First Amendment right to Freedom of Association, with one exception.<sup>93</sup>

#### A. *United States v. Toviave*

In *Toviave*, the Sixth Circuit faced a challenge to the sufficiency of the evidence to support a conviction for “Forced Labor” under section 1589. The Court found the evidence insufficient due to the problems with the definition of “serious harm” and wrote:

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92. *Id.* at 474.

93. The exception is *United States v. Toure*, 965 F.3d 393 (5th Cir. 2020). In *Toure*, the constitutional challenge was brought under the rubric of the First Amendment but was unsuccessful because it was raised for the first time on appeal and did not clear the bar for “plain error.” *Id.* at 400.

Defendant Toviave brought four young relatives from Togo to live with him in Michigan. After they arrived, Toviave made the children cook, clean, and do the laundry. He also occasionally made the children babysit for his girlfriend and relatives. Toviave would beat the children if they misbehaved or failed to follow one of Toviave's many rules. While his actions were deplorable, Toviave did not subject the children to forced labor. The mere fact that Toviave made the children complete chores does not convert Toviave's conduct—what essentially amounts to child abuse—into a federal crime. Toviave's federal forced labor conviction must accordingly be reversed.

Toviave immigrated to the United States from Togo in 2001 and eventually settled in Michigan. In 2006, he contacted Helene Adoboe, a girlfriend (sometimes referred to as his wife) from Togo, and asked that she and four children—Gaelle, Rene, Kwami, and Kossiwa—come and live with him in the United States. Kossiwa is Toviave's younger sister, Gaelle and Rene are Toviave's cousins (although their degree of consanguinity is unclear), and Kwami is Adoboe's nephew. Adoboe and the children managed to enter the United States with false immigration documents. Adoboe initially lived with Toviave, but their relationship quickly soured, and the two separated in 2008.

Toviave apparently demanded absolute obedience from the children and was quick to beat them. Toviave hit the children with his hands, and with plunger sticks, ice scrapers, and broomsticks, often for minor oversights or violations of seemingly arbitrary rules. For example, Gaelle testified that Toviave hit her in the face for using loose-leaf paper rather than a notebook to do her homework, and Kossiwa recounted an incident where Toviave hit her with a broomstick for throwing a utensil in the sink.

The children were responsible for different household chores. Toviave made the children cook, clean, and do the laundry. He also made the children pack up the house when the family moved to a new apartment, serve food to Toviave's guests, iron Toviave's clothes, and clean his van. Toviave also occasionally made the children babysit for the women he was dating, or for his relatives.<sup>94</sup>

*Toviave* concerned a challenge to the sufficiency of the evidence and did not include a challenge to the constitutionality of the forced labor statute.<sup>95</sup> Nevertheless, the Sixth Circuit wrote:

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94. *United States v. Toviave*, 761 F.3d 623, 624 (6th Cir. 2014).

95. *Id.* at 630.

Although Toviave's treatment of the children was reprehensible, it was not forced labor. Three points compel this conclusion. First, forcing children to do household chores cannot be forced labor without reading the statute as making most responsible American parents and guardians into federal criminals. Second, requiring a child to perform those same chores by means of child abuse does not change the nature of the work. And third, if it did, the forced labor statute would federalize the traditionally state-regulated area of child abuse. In short, treating household chores and required homework as forced labor because that conduct was enforced by abuse either turns the forced labor statute into a federal child abuse statute, or renders the requirement of household chores a federal crime.<sup>96</sup>

And the Court provided a hypothetical situation to explain the problem with the government's theory of the case. The Court wrote:

The government's interpretation of 18 U.S.C. § 1589 would make a federal crime of the exercise of these innocuous, widely accepted parental rights. Take a hypothetical parent who requires his child to take out the garbage, make his bed, and mow the lawn. The child is quarrelsome and occasionally refuses to do his chores. In response, the child's parent sternly warns the child, and if the child still refuses, spansks him. The child then goes about doing his chores. There is no principled way to distinguish between that sort of hypothetical labor and what Toviave made the children do in this case. Both the tasks assigned to the child by the hypothetical parent and the duties assigned by Toviave are 'labor' in the economic sense of the word: one could, and people often do, pay employees to perform these types of domestic tasks.<sup>97</sup>

Ultimately, the Court found the evidence insufficient to support a conviction for forced labor and wrote:

The line between required chores and forced labor may be a fine one in some circumstances, but that cannot mean that all household chores are forced labor, with only the discretion of prosecutors protecting thoughtful parents from federal prosecution. The facts of this case fall on the chores side of the line.<sup>98</sup>

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96. *Id.* at 625.

97. *Id.* at 625–26.

98. *Id.* at 630.

Thus, although *Toviave* did not address constitutional arguments, the reasoning illustrates the constitutional infirmity of Section 1589.

#### B. United States v. Calimlim

*Calimlim* is one of the very few cases to address the constitutionality of the Forced Labor statute.<sup>99</sup> In *Calimlim*, two physicians brought an adolescent, Irma Martinez, from the Philippines to work for the family in the United States.<sup>100</sup> When Martinez arrived, the family confiscated her passport and told her that she would have to reimburse them for the cost of her plane ticket.<sup>101</sup> Martinez did not speak English for almost six years after arriving in the United States.<sup>102</sup> The family told Martinez that she was in the country illegally and the Calimlins rarely allowed Martinez to leave the home.<sup>103</sup> Over nineteen years, “[t]he Calimlins allowed Martinez to speak with her family four or five times.”<sup>104</sup> The Calimlins repeatedly told Martinez that if law enforcement agents discovered her that she could be arrested, imprisoned, and deported.<sup>105</sup>

“On September 29, 2004, federal agents, acting on an anonymous tip, executed a search warrant and found a trembling Martinez huddled in the closet of her bedroom.”<sup>106</sup> The Government charged the Calimlins with forced labor and a jury convicted them.<sup>107</sup> The Calimlins challenged their convictions on the basis that the forced labor statute was unconstitutional as applied to them—and not facially.<sup>108</sup> And, importantly, the Calimlins did not argue that the forced labor statute infringed on their First Amendment right to Freedom of Association.<sup>109</sup>

The Seventh Circuit explained that the statute clearly set out the law and that the question of whether the Calimlins threatened Martinez was a jury issue.<sup>110</sup> And the Court concluded that “as applied to the Calimlins’ case

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99. United States v. Calimlim, 538 F.3d 706, 710 (7th Cir. 2008).

100. *Id.* at 708.

101. *Id.*

102. *Id.*

103. *Id.* at 709.

104. *Id.*

105. *Calimlim*, 538 F.3d at 709.

106. *Id.*

107. *Id.*

108. *Id.* at 709–10.

109. *Id.*

110. *Id.* at 713.

§ 1589 is neither vague nor overbroad.”<sup>111</sup> But the deficiency in the Calimlins’ argument is that they failed to address the statute within the context of the First Amendment right to Freedom of Association.

### C. *Other Cases and Conclusion*

Other cases have challenged the constitutionality of the forced labor act, but they have been unsuccessful.<sup>112</sup> These cases failed because they did not raise the constitutional challenge within the context of the First Amendment right to Freedom of Association.<sup>113</sup>

## VII. REMEDY

The importance of criminalizing forced labor is undisputed, but § 1589 prohibits far more than the unconscionable and the abhorrent, and incorporates nearly all human relationships—whether professional, educational, clerical, familial, social, romantic, or platonic. The Congress could readily remedy the constitutional deficiencies by creating an affirmative defense for “the procurement of labor through everyday pressures and demands.” But without the protection of such an affirmative defense, § 1589 is unconstitutionally vague and overbroad.

## VIII. CONCLUSION

The current definition of “serious harm” is likely overbroad and vague and infringes on the First Amendment right to the Freedom of Association. In its current form, the definition of “serious harm,” goes to many of the fundamental (but unequal) relationships that define human existence and culture. The definition of “serious harm” need not revert to the narrow

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111. *Calimlim*, 538 F.3d at 713.

112. *United States v. Wiggins*, No. EP-11-CR-2420-FM, 2013 WL 12196743, at \*2, 2 (W.D. Tex. Mar. 5, 2013) (“The court . . . concludes that the counts invoking Sections 1589 and 1591 are not unconstitutionally vague.”); *United States v. Sou*, No. 09-00345 SOM, 2011 WL 3207265, at \*1, \*5–8 (D. Haw. July 26, 2011); *United States v. Askarkhodjaev*, No. 09-00143-01-CR-W-ODS, 2010 WL 4038783, \*1, \*2–6 (W.D. Mo. Sept. 23, 2010), *adopted by*, No. 09-00143-01-CR-W-ODS, 2010 WL 4038745 (W.D. Mo. Oct. 4, 2010); *see also* *United States v. Garcia*, No. 02-CR-110S-01, 2003 WL 22956917, at \*1, \*2–6 (W.D.N.Y. Dec. 2, 2003).

113. *Wiggins*, 2013 WL 12196743, at \*2; *Sou*, 2011 WL 3207265, at \*5–8; *Askarkhodjaev*, 2010 WL 4038783, at \*2–6, *adopted by*, 2010 WL 4038745 (W.D. Mo. Oct. 4, 2010); *Garcia*, 2003 WL 22956917, at \*2–6. The exception is *Toure*. In *Toure* the constitutional challenge was brought under the rubric of the First Amendment but was unsuccessful because it was raised for the first time on appeal and did not clear the bar for “plain error.” *United States v. Toure*, 965 F.3d 393, 400 (5th Cir. 2020).

definition from *Kozminski*. It should, instead, include an affirmative defense that permits a defendant to show that the pressure or harm that resulted in the charge for forced labor is the type of pressure that is widely accepted and even valued. With this addition, the Forced Labor statute would expand the offense from the narrow definition in *Kozminski* but remain constitutionally sound.