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A Haven for Traffickers: How the United States Provides a Legal Safe Haven for Businesses That Rely on Forced Labor in the International Supply Chain

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A Haven for Traffickers: How the United States Provides a Legal Safe Haven for Businesses That Rely on Forced Labor in the International Supply Chain

Ramona Lampley*

ABSTRACT

Congress enacted the Trafficking Victims Protection Act ("TVPRA" or "Act") in 2000, which, through its amendments, gives victims of human trafficking, including forced labor or slave labor, a private right of action against those who knowingly benefit from the abusive labor practices perpetrated on them. Even though slave labor, particularly child labor, is a perceived evil in the foreign supply chains of many domestic companies, courts appear uncomfortable with the some of the civil-liability provisions of the TVPRA. This Article examines recent cases brought under the TVPRA, and how, in some cases, courts have eviscerated the private right of action for these foreign victims. This Article also analyzes how some of these recent interpretations do not comport with prior precedent or legislative intent and attempts to offer an explanation as to the judicial discomfort with victim-based claims for

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damages under this Act.

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I. INTRODUCTION

Assume a company operating in the United States relies on international suppliers of goods for the products it makes.[1] It regularly engages with the same suppliers, and it publicly reports that those suppliers potentially engage in child labor or even, in some industries, forced labor.[2] Yet it benefits from the U.S. market for these products.[3] To what extent should the domestic

1. *See* MARS, INC., COCOA FOR GENERATIONS: 2021 ANNUAL REPORT (2021), https://www.mars.com/sites/g/files/jydpyr316/files/2023-05/CocoaForGenerations_2021_download.pdf ("We are challenging ourselves and the entire sector to evolve and adopt approaches that deliver greater impact where it matters most—in cocoa farming communities across Latin America, West Africa and Southeast Asia."); NESTLÉ, CREATING SHARED VALUE AND SUSTAINABILITY REPORT 2021 (2021), https://www.nestle.com/sites/default/files/2022-03/creating-shared-value-sustainability-report-2021-en.pdf (discussing the global reach and implications of all the various operations within the Nestlé company from a sustainability perspective). Reference to the chocolate companies and industry knowledge of labor abuses in the supply chain in footnotes 1–4 is intended to be illustrative of current corporate awareness and public response. For a thorough discussion of industries with documented labor abuses in their international supply chain see *infra* notes 13-20 and accompanying text.

2. *How is Nestlé Tackling Child Labor Risk?*, NESTLÉ, https://www.nestleusa.com/ask-nestle/nestle-child-labor-cocoa-supply-chain (last visited Oct. 1, 2023) ("In West Africa, most child labor involves children supporting their parents on farms, so we prioritize family and community engagement. We remain dedicated to helping end child labor in the cocoa industry."); *Protecting Children Action Plan*, MARS, INC., https://www.mars.com/about/policies-and-practices/protecting-children-action-plan (last visited Oct. 1, 2023) ("Our [s]trategic [a]pproach to [p]rotecting [c]hildren in [c]ocoa [f]arming [c]ommunities sets out how we identify, prevent and mitigate human rights issues—with a focus on child and forced labor in our extended cocoa supply chain—through implementing human rights due diligence processes as well as community-based investments that help tackle the root causes of these complex issues."); *Child Labor Monitoring and Remediation*, HERSHEY CO., https://www.thehersheycompany.com/en_us/home/sustainability/sustainability-focus-areas/cocoa/child-labor-monitoring-and-remediation-system.html (last visited Oct. 1, 2023) (differentiating child labor from forced labor and stating, "[i]n cocoa-growing communities, child labor is a complex issue resulting from a mix of poverty, cultural norms and misunderstandings about what constitutes appropriate farm work for children."); *Child Labor in the Production of Cocoa*, U.S. DEP'T LAB. BUREAU INT'L LAB. AFFS., https://www.dol.gov/agencies/ilab/our-work/child-forced-labor-trafficking/child-labor-cocoa (last visited Oct. 1, 2023) ("Côte d'Ivoire and Ghana, together, produce nearly 60% of the world's cocoa each year, but the latest estimates found that 1.56 million children are engaged in child labor on cocoa farms in these two countries."); *see also* Peter Whoriskey, *U.S. Report: Much of the World's Chocolate Supply Relies on More Than 1 Million Child Workers*, WASH. POST (Oct. 19, 2020, 12:13 PM), https://www.washingtonpost.com/business/2020/10/19/million-child-laborers-chocolate-supply/ ("The world's chocolate companies depend on cocoa produced with the aid of more than 1 million West African child laborers, according to a new report sponsored by the Labor Department. The findings represent a remarkable failure by leading chocolate companies to fulfill a long-standing promise to eradicate the practice from their supply chains.").

3. *See* Craig Kielburger, *Supply, Demand, and Child Labor: How Businesses and Nonprofits Can Get Kids out of Factories*, FORBES (June 12, 2019),

(U.S.) company be liable to the victims of forced labor employed by the suppliers to whom the company pays for goods?[4] To what extent should U.S. law penalize international trade that permits forced labor or child-forced labor in foreign supply chains?[5]

None, say our U.S. courts, which have recently eviscerated statutory causes of action passed by Congress with the intent of making companies civilly liable when they knowingly benefit, or attempt to benefit, from coerced labor by imposing heightened requirements not traditionally imposed on domestic litigants to bar these causes of action.[6]

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https://www.forbes.com/sites/forbesnonprofitcouncil/2019/06/12/supply-demand-and-child-labor-how-businesses-and-nonprofits-can-get-kids-out-of-factories/ (stating that "[c]heap labor reduces overhead, consumer costs and profit margins. But now, savvy companies, from clothing manufacturers to chocolate makers, are driving ethical supply chains to meet consumer demands for social responsibility."). This Article focuses on victim-driven litigation, but litigation against domestic companies due to abusive labor practices in the supply chain has also been consumer driven and investor driven. *See, e.g.*, Ramona L. Lampley, *Mitigating Risk, Eradicating Slavery*, 68 AM. UNIV. L. REV. 1707 (2019) (analyzing consumer- and victim-based cases); Rachel Chambers, *Litigating Corporate Human Rights Information*, 60 AM. BUS. L.J. 111 (2023) (assessing consumer- and investor-based litigation based on ethical supply chain practices).

4. *See* 18 U.S.C. § 1595(a) (2018) ("An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees."). This language was reconsidered in 2022 by the 117th Congress and was made even stronger by adding "or attempts or conspires to benefit" after "whoever knowingly benefits." Abolish Trafficking Reauthorization Act of 2022, Pub. L. No. 117–347, § 102, 136 Stat. 6200 (2023) (codified as amended at 18 U.S.C.A. § 1595(a) (West 2023)); *see also* 18 U.S.C.A. § 1595(a) (West 2023) (including the current statutory language).

5. *E.g.*, *What is Forced Labour, Modern Slavery and Human Trafficking?*, INT'L LAB. ORG., https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm#:~:text=According%20to%20the%20ILO%20Forced,offered%20himself%20or%20herself%20voluntarily.%22 (last visited Sept. 19. 2023) (defining forced labor as "work that is performed involuntarily and under menace of any penalty"). The Trafficking Victims Protection Act offers a more detailed statutory definition of forced labor. *See infra* note 30 and accompanying text. Child labor, as explained by the International Labour Organization (ILO), "is often defined as work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development." *What is Child Labour*, INT'L LAB. ORG., https://www.ilo.org/ipec/facts/lang--en/index.htm (last visited Sept. 19, 2023). As Hershey delineates in its report, child labor is distinct from forced labor. *Child Labor Monitoring and Remediation*, HERSHEY CO., https://www.thehersheycompany.com/en_us/home/sustainability/sustainability-focus-areas/cocoa/child-labor-monitoring-and-remediation-system.html (last visited Sept. 19, 2023); *see also* sources cited *supra* note 3 and accompanying text. Not all forms of child labor are a violation of the Trafficking Victims Protection Act, which covers only forced labor, not child labor, as a separate category. *See* 18 U.S.C. § 1589 (defining forced labor).

6. *See* Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1175, 1180 (9th Cir. 2022); Doe I v. Apple

In a spate of recent cases, U.S. courts have blocked complaint after complaint brought by victims of human trafficking in the international supply chain.[7] Courts minced the Trafficking Victims Protection Act ("TVPRA" or "Act")—previously thought to be the road to recovery for these victims[8]—by implementing incorrect analyses for personal jurisdiction or heightened burdens to determine if a company "knowingly benefits" from forced labor.[9] Further, one federal district court imposed a new barrier on victims seeking recovery in the notorious cobalt mining cases, invoking a constitutional standard for standing not supported by precedent, which is now used to block these victim-recovery cases.[10] And even still, federal courts have stripped the congressional intent of the extraterritorial expansion of the TVPRA by limiting it to criminal offenses, and thus out of bounds for those victims seeking civil damages through the Act's congressionally-given private right of action.[11] The lack of public regulation in international labor abuses is one factor that led the ABA Working Group to Prevent Humanitarian Abuses in the International Supply Chain to write and promote Model Contract Clauses that U.S. companies could use to warrant against use of forced labor in their international supply agreements.[12]

Inc., No. 1:19-cv-03737, 2021 WL 5774224, at *7–8 (D.C. Cir. Nov. 2, 2021); Coubaly v. Cargill, Inc., No. 21-cv-386, 2022 WL 2315509, at *5–6 (D.C. Cir. June 28, 2022).

7. *Ratha*, 35 F.4th at 1164; *Doe I*, 2021 WL 5774224, at *1; *Coubaly*, 2022 WL 2315509, at *1.

8. Lampley, *supra* note 3, at 1738; *see also* Lindsey Roberson & Johanna Lee, *The Road to Recovery After* Nestlé*: Exploring the TVPA as a Promising Tool for Corporate Accountability*, 6 COLUM. HUM. RTS. L. REV. ONLINE 1, 21 (2021), https://hrlr.law.columbia.edu/files/2021/11/11_9-Nestle-HRLR-Online.pdf (concluding the Trafficking Victims Protection Act is a "promising option" for "foreign victims of forced labor seeking redress" from multinational corporations).

9. *See infra* Section IV.C.

10. *Doe I*, 2021 WL 5774224, at *1; *see, e.g.*, Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173 (D.D.C. 2022).

11. *See, e.g.*, *Doe I*, 2021 WL 5774224, at *10 (explaining that "[t]he TVPRA is a group of criminal statutes"); Brief for Members of Congress Representative Nadler et al. as Amici Curiae Supporting Plaintiffs-Appellants, Ratha v. Rubicon Resources, LLC, 35 F.4th 1159 (No. 23-55299), at 8–9 (hereinafter "Ratha Brief for Members of Congress") ("Congress identified the need for the TVPRA to be an expansive tool with a strong civil remedy and has continuously broadened its scope in each and every reauthorization of the statute . . . . Congress also added 18 U.S.C. § 1596, which provides extraterritorial jurisdictions for violations of the TVPRA. *These expansions to the civil remedy provision grew from Congress's concern over the fact that 'so few civil lawsuits' had been filed under the TVPRA.*") (emphasis added).

12. *See generally* David Snyder & Susan Maslow, *Human Rights Protections in International Supply Chains—Protecting Workers and Managing Company Risk: 2018 Report and Model Contract Clauses from the Working Group to Draft Human Rights Protections in International Supply Contracts*, 73 BUS. LAW. 1093 (2018) (suggesting model contract clauses to aid companies in providing

This Article will first provide an overview of the problem of coerced labor in the international supply chain, at least as it has been portrayed in civil filings in domestic courts. The Article will then turn to the basic elements of the TVPRA, with an analysis of why companies, litigants, and suppliers thought it would open the door to liability for domestic purchasers buying goods with tainted supply-chain labor. The Article will analyze the cases that have turned this statutory compilation on its head, ignoring congressional intent and the permissible scope of jurisdictional reach of U.S. law when the entity who knowingly benefits from the conduct is based, and reaps its rewards, in the United States. It concludes that courts, uncomfortable with the extraterritorial reach of the TVPRA, have contorted its purpose and degraded congressional intent.

II. LABOR ABUSES IN THE INTERNATIONAL SUPPLY CHAIN—HOW

legally-effective human rights protections for workers in their international supply chains); David Snyder et al., *Balancing Buyer and Supplier Responsibilities: Model Contract Clauses to Protect Workers in International Supply Chains, Version 2.0*, 77 BUS. LAW. 115 (2021) (explaining the Model Contract Clauses, the additional contract protections they bring to guard against forced labor in the supply chain, and advocating the business case for why companies should adopt them).

PERVASIVE IS THE PROBLEM?

Chocolate.[13] Cobalt.[14] Seafood.[15] Shrimp.[16] Clothing.[17] Disposable Gloves.[18] Each of these industries have faced complaints of forced labor in the international supply chain.[19] For each product, a United States defendant imports the goods, allegedly profiting from the cheap labor.[20] Take, for

13. Coubaly v. Cargill, Inc., No. 21-cv-386, 2022 WL 2315509, at *1 (D.C. Cir. June 28, 2022). For a list of goods produced through forced labor or child labor by country of origin, see U.S. DEP'T OF LABOR, 2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 25 (2022), https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf (noting that child forced labor remains an identified problem as of 2022 for the Ivory coast).

14. *See, e.g.*, *Doe I*, 2021 WL 5774224, at *1; U.S. DEP'T OF LABOR, *supra* note 13, at 17 (highlighting cobalt production concerns for both child and forced labor and noting in the DRC, sometimes entire families are working in the mines). As the Department of Labor recognized in its 2022 report:

> Thousands of children miss school and work in terrible conditions to produce cobalt for lithium-ion batteries, a product which carries a label that simply says, "produced in China." Entire families may work in cobalt mines in the DRC, and when parents are killed by landslides or collapsing mine shafts, children are orphaned with no option but to continue working. Both adults and children are also trafficked to work in eastern DRC "artisanal" mines, where much of the abusive labor conditions occur.

U.S. DEP'T OF LABOR, *supra* note 13, at 17.

15. *See, e.g.*, Wirth v. Mars Inc., No. SA CV 15-1470-DOC, 2016 WL 471234, at *1 (C.D. Cal. Feb. 5, 2016); U.S. DEP'T OF LABOR, *supra* note 13, at 25 (noting countries with seafood and forced labor concerns).

16. *See, e.g.*, Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1164 (9th Cir. 2022); U.S. DEP'T OF LABOR, *supra* note 13, at 28 (noting that, as of 2022, Thailand remains on the Labor Department's list because of shrimp).

17. *See, e.g.*, Rahaman v. J.C. Penney Corp., No. N15C-07-174 MMJ, 2016 WL 2616375, at *1 (Del. Super. Ct. May 4, 2016); *see also* Nat'l Consumers League v. Wal-Mart, Inc., No. 2015 CA 007731 B, 2016 WL 4080541 (D.C. Super. Ct. July 22, 2016); U.S. DEP'T OF LABOR, *supra* note 13, at 24 (noting the Labor Department identifies Bangladesh as a source of clothing produced by child labor and that garments, in general, are products of forced labor as of 2022).

18. Complaint at 26, Mia v. Kimberly Clark Co., No. 3:19-CV-000723-L-KSC, 2022 WL 3226542 (D.D.C. Aug. 9, 2022); U.S. DEP'T OF LABOR, *supra* note 13, at 14 (noting that as of 2020 the Labor Department added rubber glove production to the watch list for forced labor concerns in manufacturing).

19. U.S. DEP'T OF LABOR, *supra* note 13, at 41, 35, 24.

20. *See, e.g.*, Complaint at 2, Walker v. Nestlé, Inc., No. 3:19-cv-00723, 2021 WL 1195983 (S.D. Cal. Mar. 30, 2021); Complaint at 1, Tomasella v. Nestlé, Inc., 364 F. Supp. 3d. 26 (D. Mass 2019) (No. 1:18-CV-10269); Complaint at 1, Tomasella v. Hershey Co., 962 F.3d 60 (1st Cir. 2020) (No. 1:18-CV-10360); Complaint at 1, Tomasella v. Mars, Inc., 962 F.3d 60 (1st Cir. 2020) (No. 1:18-CV-10359); Hodsdon v. Mars, Inc., 162 F. Supp. 3d 1016 (N.D. Cal. 2016) (No. 15-cv-04450-RS), *appeal filed*, No. 16-15444 (9th Cir. Mar. 16, 2016) (No. 16-15444); McCoy v. Nestlé, Inc., 173 F. Supp. 3d 954 (N.D. Cal. 2016) (No. 15-cv-04451-JCS), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016). This Article is primarily concerned with victim-based lawsuits. In each of the cases discussed in this

instance, the Ninth Circuit Court of Appeals's commentary on the use of child slave labor in the cocoa supply chain from the Ivory Coast:

> The use of child slave labor in the Ivory Coast is a humanitarian tragedy. Studies by International Labour Organization, UNICEF, the Department of State, and numerous other organizations have confirmed that thousands of children are forced to work without pay in the Ivorian economy. Besides the obvious moral implications, this widespread use of child slavery contributes to poverty in the Ivory Coast, degrades its victims by treating them as commodities, and causes long-term mental and physical trauma.[21]

Then, evaluate the statements by U.S. District Court Judge Carl Nichols:

> Modern electronics, including the lithium-ion batteries in Defendants' products, require cobalt. But in some circumstances cobalt is mined using child labor, which can be dangerous and deadly. Each Plaintiff or a family member allegedly suffered a terrible injury or loss of life mining cobalt in the Democratic Republic of the Congo. Plaintiffs seek to represent a class of similar child laborers in this suit against the Defendants for alleged violations of the Trafficking Victims Protection Reauthorization Act, 18 U.S.C. §§ 1581 et seq., as well as various state-law causes of action.
>
> While Plaintiffs' Amended Complaint describes tragic events, it suffers from several flaws. Plaintiffs must have standing to bring their claims, but here they do not: the harm they allege is not traceable to any Defendant. Plaintiffs have also failed to adequately plead a

Article, the corporate defendants have defended contesting jurisdiction, standing, and denying the extraterritorial reach of the TVPRA's civil remedy provision. But consumer lawsuits, including class actions, over deceptive marketing regarding forced labor in the supply chain are multiple. *See, e.g.*, Complaint at 2, *Walker*, 2021 WL 1195983 (No. 3:19-cv-00723); Complaint at 1, *Tomasella v. Nestlé, Inc.*, 364 F. Supp. 3d. 26 (No. 1:18-CV-10269); Complaint at 1, *Tomasella v. Hershey Co.*, 962 F.3d 60 (No. 1:18-CV-10360); Complaint at 1, *Tomasella v. Mars, Inc.*, 962 F.3d 60 (No. 1:18-CV-10359); *Hodsdon*,162 F. Supp. 3d 1016 (No. 15-cv-04450-RS); *McCoy*, 173 F. Supp. 3d 954 (No. 16-15794); Dana v. Hershey Co., 180 F. Supp. 3d 652 (N.D. Cal. 2016), *appeal filed*, No. 16-15794 (9th Cir. Apr. 29, 2016). The Ninth Circuit affirmed the dismissal of the California chocolate cases in *Hodsdon* and *Wirth*. *See* Hodson v. Mars, Inc., 891 F.3d 857, 868 (9th Cir. 2018); Wirth v. Mars, Inc., 730 Fed. App'x 468, 469 (9th Cir. 2018); *see also* Sud v. Costco Wholesale Corp., 731 Fed. App'x 719, 721 (N.D. Cal. 2016); Barber v. Nestlé, Inc., 730 Fed. App'x 464, 465 (9th Cir. 2018).

21. Doe I v. Nestle, Inc., 766 F.3d 1013, 1016–17 (9th Cir. 2014).

> violation of the TVPRA or any of the common-law torts they pursue. And even then, it is not obvious that the civil-remedy portion of the TVPRA applies extraterritorially—a fatal fact, as the alleged violations took place far from this country's shores. The Court will thus grant Defendants' Joint Motion to Dismiss, ECF No. 33, grant Dell's Motion to Dismiss for Lack of Jurisdiction, ECF No. 32, and deny Defendant Alphabet, Inc.'s, Motion to Dismiss, ECF No. 34, as moot.[22]

The court did not venture to assume, at this motion to dismiss stage, that the defendants would contest the factual allegations of child mining in the cobalt supply chain.[23] U.S.-based corporate retailers have had government reports for years that abusive labor practices present difficulties in their supply chains.[24] Further, they predict that domestic law will do very little to hold them liable to the workers from whose injuries, blood, losses, and deprivation they may profit.[25] For example, the U.S. Chamber of Commerce has taken this position:

> [A]ddressing forced labor in global supply chains involves difficult policy choices and trade-offs that are best weighed by the elected branches, not courts acting on their own. The unfortunate reality is that forced labor is a significant problem in global supply chains, and that fact not only leads to serious harms but also to considerable policy challenges. Congress and the Executive Branch are engaged in ongoing efforts to address the problem of forced labor, and courts should not strain to read statutes like the Trafficking Act expansively in order to fill perceived gaps in their legislative and regulatory actions.[26]

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22. Doe I v. Apple Inc., No. 1:19-cv-03737, 2021 WL 5774224, at *1 (D.C. Cir. Nov. 2, 2021).

23. *Id.*

24. U.S. DEP'T OF LABOR, *supra* note 13, at 24, 25. The Department of Labor publishes an annual list of goods produced by child labor or forced labor, including country of origin and product. *Id.* at 24. These industries appear in this report. *Id.* at 24–25. *See also* Ratha Brief for Members of Congress, *supra* note 11, at 7 ("Forced labor and trafficking flourish because they are highly profitable activities—generating more than $150 billion in profits annually . . . .").

25. *See, e.g.*, Nestlé, Inc. v. Doe, 141 S. Ct. 1931, 1940 (2021); Rahaman v. J.C. Penney Corp., No. N15C-07-174 MMJ, 2016 WL 2616375, at *1 (Del. Super. Ct. May 4, 2016); Doe I v. Wal-Mart Stores, Inc., 572 F.3d 677, 685 (9th Cir. 2009).

26. Brief for U.S. Chamber of Com. et al. as Amici Curiae Supporting Respondent, at 25, Doe I v.

This Article takes the position that the elected branches have weighed the options and decided to impose civil corporate liability against companies that attempt to knowingly benefit from forced labor in their business ventures.[27]

III. THE TVPRA'S BASIC FRAMEWORK AND EXTRATERRITORIAL REACH

When Congress enacted the Trafficking Victims Protection Act in 2000, it did so with a stated purpose and key findings. The purpose of the TVPRA is to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims."[28] Among the multitude of key findings giving rise to the Act, the TVPRA enacted, as its findings, that:

> (24) Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses. The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.
>
> . . .
>
> (23) The United States and the international community agree that

---

Apple et al, 2022 WL 9332858 (D.C. Cir. Oct. 14, 2022) (No. 21-7135) [hereinafter "Trade-Industry Alliance Groups"]; *see also* Brief for U.S. Chamber of Com. as Amicus Curiae Supporting Defendants-Appellees, Coubaly v. Cargill, Inc., No. 22-7104 (filed D.C. Cir. Nov. 21, 2022), 2023 WL 346284 [hereinafter "Brief for Chamber of Commerce"].

27. *See, e.g.*, Ratha Brief for Members of Congress, *supra* note 11, at 12–15 (tracking the purpose of the TVPRA and each amendment, with the conclusion that, "Congress always intended for the civil remedy to be coextensive with the criminal predicates in the TVPRA.").

28. 22 U.S.C. § 7101(a).

> trafficking in persons involves grave violations of human rights and is a matter of pressing international concern. The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports . . . .
>
> . . .
>
> (16) In some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking.
>
> . . .
>
> (3) Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.[29]

These findings illustrate that Congress considered the act of human trafficking, including forced labor, an offense, even generally an international crime, while recognizing that many nations, including the United States, may not actually criminalize the predicate conduct.

Section 1589 defines "forced labor" as:

> (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—
>
> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process;

29. *Id.* § 7101(b)(3)–(24).

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 . . . .[30]

The criminal penalties for a forced labor violation include a criminal sentence of up to twenty years, or up to life for more aggravated offences.[31]

To be sure, the TVPRA brings within in its scope not only the direct perpetrators of the forced labor, but those who knowingly benefit financially by participation in a forced labor "venture":

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30. 18 U.S.C. § 1589. The provision, set forth in its entirety, is:

> (a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—
>
> (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
>
> (2) by means of serious harm or threats of serious harm to that person or another person;
>
> (3) by means of the abuse or threatened abuse of law or legal process; 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).
>
> (b) Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).
>
> (c) In this section:
>
> (1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.
>
> (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.
>
> (d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

Id.

31. *Id.* § 1589(d).

> Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a) [enumerating acts of forced labor], knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means . . . .[32]

The TVPRA criminalizes other conduct, such as child sex trafficking,[33] trafficking or engaging in forced labor, slavery, involuntary servitude or peonage,[34] and possession or destruction of passports or government documents in furtherance of those acts.[35] The key provision that would concern most domestic companies that have known forced labor in the supply chain should be Section 1589. That Section, set forth above, makes it a criminal act to knowingly benefit financially from participation in a venture engaged in forced labor, if that participation was in knowing or reckless disregard of the fact that the venture had engaged in the unlawful act.[36]

But the TVPRA does not stop there; it provides a private right of action for civil recovery. The TVPRA provides victims of these acts a civil remedy, stating:

> (a) An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.[37]

Congress again amended Section 1595, effective 2023, to make it even broader, including, "whoever knowingly benefits, or attempts or conspires to benefit," in the Abolish Trafficking Reauthorization Act of 2022. [38]

32. *Id.* § 1589(b).
33. *Id.* § 1591.
34. *Id.* § 1590.
35. *Id.* § 1592.
36. *Id.* § 1589.
37. 18 U.S.C. § 1595(a) (2018).
38. Abolish Trafficking Reauthorization Act of 2022, Pub. L. No. 117–347, § 102, 136 Stat. 6200

In 2008, Congress amended the TVPRA to give it an extraterritorial application. Section 1596, titled "Additional jurisdiction in certain trafficking offenses" states:

> In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if—
>
> (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or
>
> (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.[39]

One of the enumerated predicates for jurisdiction under Section 1596 is Section 1589, which, set forth above, makes actionable mere benefit, instead of active procurement of forced labor.[40] In the TVPRA's 2008 reauthorization, Congress recognized the "dark side of globalization" and the "dangerous abuse of the increasingly interconnected nature of the international economic system."[41]

One has to be careful in analyzing each specific potential defendant under the TVPRA.[42] For a defendant that is unquestionably in the United States, one need not trouble with the extraterritorial scope.[43] For example, if a major retailer in the United States sources ingredients from a supplier employing known forced labor, a court need not ascertain whether Section 1596's

(2023) (codified as amended at 18 U.S.C.A. § 1595(a) (West 2023)) (emphasis added). President Biden signed the amendment into law effective January 5, 2023. This amendment would have been important for the *Ratha* victims, as discussed below, *infra* notes 70-78 and accompanying text.

39. 18 U.S.C. § 1596 (2008).

40. *See id.*; *see also* 18 U.S.C. § 1589.

41. H.R. Rep No. 110–430, at 33 (2007); *see also* Brief for Law Professors as Amici Curiae in Support of Plaintiffs-Appellants and Reversal, at 24, Coubaly v. Cargill, Inc., No. 22-7104 (filed D.C. Cir. Nov. 21, 2022) [hereinafter "Brief for Law Professors"].

42. *See infra* note 46.

43. *See* 18 U.S.C. § 1596 (establishing that under the TVPRA, U.S. courts maintain jurisdiction over domestic defendants as is ordinarily provided by law).

extraterritorial reach is satisfied.[44] All the plaintiff need show is that the defendant "knowingly benefit[ted], or attempt[ed] or conspire[ed] to benefit, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter."[45]

For nondomestic defendants, the express grant of extraterritorial application means that, at least facially, the TVPRA should not face the same extraterritorial obstacles in holding domestic entities liable for profiting from reckless disregard of forced labor practices in a foreign country as did the Alien Tort Statute (ATS), which was limited in its extraterritorial reach.[46] At first, courts hinted at a willingness to entertain victim-led suits brought under the TVPRA's private right of action coupled with extraterritorial reach.[47] For example, in one of the first cases to assert a victim's private right of action under the TVPRA, *Ratha v. Phatthana Seafood Co.*,[48] the court distinguished the plaintiffs' TVPRA claims from the their ATS claims, denying the defendants' motion to dismiss the TVPRA claims.[49] The district court held: "Congress has clearly indicated that it intends the TVPRA . . . to be a unified statutory scheme of interlocking provisions that provides extraterritorial jurisdiction over specific predicate offenses and further expressly provides for restitution and a civil remedy whenever a court in the United States has that jurisdiction."[50] In rejecting the defendants' argument that the extraterritorial grant applies only to criminal conduct, the court noted that argument has been

44. *Id.* (establishing that the courts of the United States have extraterritorial jurisdiction if an alleged offender is present in the United States).

45. 18 U.S.C.A. § 1595(a) (West 2023); *cf.* G.G. v. Salesforce.com, Inc., 76 F.4th 544, 559 (7th Cir. 2023).

46. Lampley, *supra* note 3, at 1729 ("But jurisdiction under the ATS is virtually closed to claimants seeking to recover for foreign acts that occurred under foreign soil, or those seeking to recover against foreign corporations."); *see, e.g.*, Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013) (involving foreign acts on foreign soil); Jesner v. Arab Bank, PLC, 138 S. Ct. 1386, 1408 (2018) (involving a foreign corporation).

47. *See* Lampley, *supra* note 3, at 1729; Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1164 (9th Cir. 2022) (stating the plaintiffs accused the defendants of trafficking and brought their claims under the TVPRA); Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 190 (5th Cir. 2017) (introducing the plaintiffs' causes of action under the ATS and TVPRA).

48. No. CV 16-4271-JFW (ASX), 2016 WL 11020222, at *8 (C.D. Cal. Nov. 9, 2016). For a complete discussion of the facts underlying *Ratha* and the district court's opinion, *see* Lampley, *supra* note 3, 1737–38.

49. *Ratha*, 2016 WL 11020222, at *8 (denying the defendants' motion to dismiss with respect to the TVPRA claims but granting the defendants' motion with respect to the ATS claim).

50. *Id.* at *5.

"overwhelmingly rejected by the courts."[51]

The purpose of the TVPRA coupled with the express extraterritorial grant led many academics and international human rights advocates to conclude that the TVPRA was the most promising statutory avenue for holding corporations responsible for labor abuses in their supply chains.[52] Despite this promise, recent cases demonstrate that the federal courts have eviscerated the congressional intent of the TVPRA.[53] This insulates domestic corporations from liability when they financially support forced labor by purchasing from suppliers or intermediaries with known forced labor practices in other countries, and provides an incentive to live in a zone of willful ignorance as to how and by whom the products are cultivated.[54]

IV. CONTORTING THE TVPRA

A. Ratha v. Phatthana—*A Perplexing Misunderstanding of Minimum Contacts*

The Ninth Circuit gutted the TVPRA and its extraterritorial application in *Ratha v. Phatthana*. Lawyers, academics, and human rights advocates watched this case closely in its early stages to see how or if the court would treat the TVPRA claims differently from the ATS claims.[55] Prior to congressional enactment of the TVPRA, victims of slave labor or child labor in the

51. *Id.* at *6; *see, e.g.*, Aguilera v. Aegis Commc'ns Grp., 72 F. Supp. 3d 975, 979 (W.D. Mo. 2014) (denying motion to dismiss where the plaintiff was seeking TVPRA civil remedy for forced labor in India); Doe v. Howard, No. 1:11-cv-1105, 2012 WL 383487, at *2 (E.D. Va. Sept. 4, 2012) (entering default judgment for the plaintiff and allowing remedy pursuant to Section 1595 for trafficking in Yemen and Japan); Adhikari v. Daoud & Partners, 697 F. Supp. 2d 674, 683 (S.D. Tex. 2009) (applying civil remedies).

52. *See* Lampley, *supra* note 3, at 1738–39. (discussing the TVPRA statute and noting the Act can result in criminal and civil penalties); Roberson & Lee, *supra* note 8, at 21 (concluding the Trafficking Victims Protection Act is a "promising option" for "foreign victims of forced labor seeking redress" from multinational corporations).

53. *See* discussion *infra* Section IV.A (describing how the Ninth Circuit's jurisdictional limitation gutted the TVPRA's scope).

54. *See, e.g.*, Ratha Brief for Members of Congress, *supra* note 11, at 11 ("Without holding entities such as Rubicon accountable, U.S. consumers will unwittingly become purchasers of goods made with forced labor. Moreover, legitimate, law-abiding U.S. businesses may be driven out of the market because they simply cannot compete with the low prices of goods made with forced labor.").

55. *See, e.g.*, *Ratha v. Phatthana Seafood Co.*, CTR. FOR JUST. & ACCOUNTABILITY, https://cja.org/what-we-do/litigation/amicus-briefs/ratha-v-phatthana-seafood-co/ (last visited Sept. 20, 2023).

international supply chain would bring their clams under the ATS, but those claims ultimately had little chance of success.[56] The *Ratha* plaintiffs were Cambodian seafood factory workers.[57] They alleged they were promised good jobs in exchange for payment of recruitment fees.[58] But once they crossed the border into Thailand, factory managers confiscated their passports.[59] They were paid less than promised and had fees deducted for housing, fees, and other charges.[60] They alleged they worked long hours and were packed into unsanitary and crowded housing.[61] When the villagers tried to return home, they could not get their passports back.[62] Some workers could not make enough money after working six days a week to afford food and were forced to eat seafood that had washed up on the beach.[63] Those who returned home allegedly faced more extreme poverty for losing the land they had put up as collateral to fund their travel.[64]

They brought TVPRA and ATS claims against four defendants: Thai seafood suppliers Phatthana Seafood Co. ("Phatthana") and S.S. Frozen Food Co. ("SSF"), United States seafood distributor Rubicon Resources, LLC ("Rubicon"), which allegedly distributes seafood as part of a single enterprise for Phatthana, and Wales & Co. Universe Ltd. ("Wales"), a Thai company registered to do business in California.[65]

Although the district court held that the plaintiffs' TVPRA claims would survive the defendants' motion to dismiss, it ultimately granted the defendants

56. *See, e.g.*, Doe I v. Nestlé, Inc., 766 F.3d 1013 (9th Cir. 2014), *cert. denied*, 136 S. Ct. 798 (2016); Lampley, *supra* note 3, at 1729–32 (discussing the Supreme Court's decision in *Doe I* and the result when the case was remanded); Roberson & Lee, *supra* note 8, at 30–32 (providing a historical perspective of human rights litigation under the ATS and how the Supreme Court's decision in *Nestlé* effectively cut off those claims). In *Nestlé v. Doe*, the Supreme Court held that the principle against extraterritorial application precluded victim-based ATS claims based on acts that happened on foreign land by foreign entities. 141 S. Ct. 1931, 1937–40 (2021).

57. Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2016 WL 11020222, at *1 (C.D. Cal. Nov. 9, 2016) (describing how the Cambodian nationals were recruited to work in defendants' seafood factories).

58. *Id.* at *1–2.

59. *Id.* at *1.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. Complaint at 2, Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2016 WL 11020222 (C.D. Cal. Nov. 9, 2016) (No. 2:16-cv-04271).

65. *Id.* at 9–11.

summary judgment.[66] Section 1596 of the TVPRA—the extraterritorial jurisdiction provision set forth above—requires that the offender be either a national of the United States, an alien lawfully admitted in the United States, or "present in" the United States.[67]

The court granted summary judgment in favor of SSF, a family-owned Thai corporation with no U.S. address or employees, and Phatthana Seafood, the Thai corporation that owned the factory at which the plaintiffs worked, because they were not "present in" the United States.[68] The court found no evidence that the non-U.S. entity, Phatthana, was the alter ego of Rubicon, the U.S. defendant, and no evidence that Rubicon and SSF formed an integrated enterprise.[69] In contrast, defendants Rubicon and Wales had a domestic presence.[70] However, the district court granted summary judgment to those defendants, finding that they did not knowingly participate in or benefit from human trafficking.[71] The plaintiffs then appealed to the Ninth Circuit.[72] The Ninth Circuit affirmed the grant of summary judgment as to all defendants, and the United States Supreme Court denied the petition for writ of certiorari on December 5, 2022.[73] As of the date of this publication, the plaintiffs sought to reopen the case, based on the Congressional Technical Amendment to Section 1595 of the TVPRA's civil remedy provision to include "attempts . . . to benefit."[74] The plaintiffs argued that pursuant to Federal Rule of Civil Procedure 60(b)(6)—which provides relief from a final judgment when there is

66. *See Ratha*, 2016 WL 11020222, at *8 (denying motion to dismiss for Plaintiffs' TVRPA claims and granting motion to dismiss for Plaintiffs' ATS claim); Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2017 WL 8292174, at *6 (C.D. Cal Dec. 21, 2017) (granting Rubicon's and Wales's motion for summary judgment); Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2017 WL 8292391, at *6 (C.D. Cal. Dec. 21, 2017) (granting SSF's motion for summary judgment); Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2017 WL 8292922, at *8 (C.D. Cal. Dec. 21, 2017) (granting Phatthana's motion for summary judgment).

67. 18 U.S.C. § 1596.

68. *Ratha*, 2017 WL 8292391, at *6; *Ratha*, 2017 WL 8292922, at *4.

69. *Ratha*, 2017 WL 8292922, at *4 n.4, 5, 8 (holding that the plaintiffs failed to present evidence during summary judgment that Phatthana actually violated the TVRPA); *Ratha*, 2017 WL 8292391, at *5.

70. *Ratha*, 2017 WL 8293174, at *4.

71. *Id.* at *8.

72. Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1159 (9th Cir. 2022).

73. Ratha v. Phatthana Seafood Co., 35 F.4th 1159 (9th Cir. 2022), *cert. denied*, 142 S. Ct. 491 (2022).

74. Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2023 WL 2762044, at *2 (C.D. Cal. Mar. 3, 2023).

"any other reason that justifies relief"—extraordinary circumstances exist justifying vacating the judgment and reopening the case.[75] Specifically, the plaintiffs asserted that extraordinary circumstances exist because the amendment retroactively clarifies previously existing authority to bring suit against those who attempt to benefit from forced labor.[76] The district court denied the motion, and the plaintiff's motion is currently on appeal to the Ninth Circuit Court of Appeals.[77] Several members of Congress filed an *amicus brief* explaining the history and interpretation of the TVPRA, and encouraging the Ninth Circuit to grant the plaintiff's motion to reopen.[78]

First, let's ascertain what the Ninth Circuit got right. The court correctly separated the defendants between those domiciled in the United States (Rubicon and Wales) and those with no apparent physical U.S. presence, but who supplied to U.S. businesses (Phatthana and SSF).[79]

The plaintiffs had to invoke the extraterritorial reach of Section 1596 to pursue the claims against the defendants who were not domiciled in the United States—i.e., the foreign defendants Phatthana and SSF.[80] This means the plaintiffs had to establish that the two foreign defendants were "present in" the United States.[81] The plaintiffs argued three main theories that Phatthana and SSF were "present in" the United States:[82] (1) "presence in" under § 1596 equates to the minimum contacts test for specific personal jurisdiction under the Due Process Clause of the Fourteenth Amendment;[83] (2) alternatively, that

75. FED. R. CIV. P. 60(b)(6); *see also Ratha*, 2023 WL 2762044, at *3.

76. *Ratha*, 2023 WL 2762044, at *3.

77. *Id.* at *5; *see also id.*, *appeal docketed*, No. 23-55299 (9th Cir. Apr. 3, 2023); Ratha Brief for Members of Congress, *supra* note 11, at 14 ("After this Court's ruling [affirming summary judgment] on attempt liability, Congress acted immediately in response, adding the precise language that this Court had claimed was missing, and adding the specific language—'Technical and Clarifying"—that makes clear Congress's intent to clarify a misinterpretation by a single court of the plain language of the statute.").

78. *See* Ratha Brief for Members of Congress, *supra* note 11, at 5–14.

79. Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1167 (9th Cir. 2022).

80. *Id.* at 1169.

81. 18 U.S.C. § 1596; *Ratha*, 35 F.4th at 1169.

82. *Ratha*, 35 F.4th at 1169. The plaintiffs argued that SSF was an alter ego of Phatthana because they were engaged in an integrated enterprise, imputing Phatthana's contacts to SSF. *Id.* at 1169 n.7.

83. *Id.* at 1169. The plaintiffs actually argued that Section 1596 "is understood to mean universal jurisdiction." *Id.* (citation omitted). "'Universal jurisdiction' applies to 'certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking aircraft, genocide, war crimes, and perhaps certain acts of terrorism.'" *Id.* at 1169 n.8 (quoting RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (AM. LAW INST. 1987)).

the defendants were present in the United States by their participation with Rubicon, a U.S. defendant, as a joint venture;[84] and (3) that Rubicon was Phatthana's agent, establishing U.S. presence.[85]

Equating "presence in" under Section 1596 with the minimum contacts test for personal jurisdiction has a logical basis. First, to assert civil liability over a nonresident defendant, the court would require personal jurisdiction.[86] Second, the entire concept of exertion of personal jurisdiction over the nonresident defendant through the minimum contacts test is based on the defendant's targeted acts and its contacts with the forum states as sufficient to establish "presence" when physical presence is lacking.[87] The Ninth Circuit correctly delineated the difference between specific and general jurisdiction and held there was no plausible theory of general jurisdiction because Phatthana and SSF were not incorporated in the United States and did not maintain their principal place of business here.[88]

But here is the problem: the Ninth Circuit imposed a much higher standard to establish minimum contacts (as a proxy for presence) than that imposed by the Supreme Court in the forty-two years since *World-Wide Volkswagen v. Woodson*.[89] To establish specific jurisdiction, the Court has continued to finesse the test for minimum contacts to require (1) targeted activity to the forum states and (2) a nexus, or a connection between those contacts and the claim giving rise to the action.[90]

84. *Id.* at 1173.

85. *Id.* at 1172.

86. Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1024 (2021); *see* J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 879–80 (2011); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

87. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) ("[D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice.").

88. *Ratha*, 35 F.4th at 1172; *Ford Motor Co.*, 141 S. Ct. at 1024. *But see* Mallory v. Norfolk S. Ry. Co., 143 S. Ct. 2028, 2039–41 (2023) (exercising personal jurisdiction over a nonresident defendant when defendant registered in Pennsylvania to do business in the state and agreed to answer any suit against it in Pennsylvania).

89. *World-Wide Volkswagen Corp.*, 444 U.S. at 286.

90. *Ford Motor Co.*, 141 S. Ct. at 1024–25 (summarizing precedent that states the requirements for specific jurisdiction); Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty., 582 U.S. 255, 264 (2017) (summarizing precedent that states the requirements for specific jurisdiction); *Nicastro*, 564 U.S at 881–82 (summarizing precedent that states the requirement for specific jurisdiction). The *Ford* Court summarized the test for specific jurisdiction as: "The defendant, we have said, must take 'some act by which it purposefully avails itself of the privilege of conducting activities within the

But in *Ratha*, the Ninth Circuit used the *Calder* effects test—a test to determine whether a nonresident defendant has caused an intentional tort in the jurisdiction—to determine presence.[91] The *Calder* effects test imposes a higher standard than that required to demonstrate presence by minimum contacts. Instead, the Ninth Circuit's test required "the defendant must have '(1) committed an intentional act, (2) expressly aimed at the forum state, (3) causing harm that the defendant knows is likely to be suffered in the forum state.'"[92] To be clear, none of the Supreme Court's recent specific jurisdiction decisions hinge on knowledge of the likelihood of harm in the forum, or the intent to cause harm in the forum. The Ninth Circuit went on to erroneously hold that Phatthana was not "present in" the United States—despite evidence of repeat tainted seafood sales to domestic entities—because the plaintiffs "produced no evidence suggesting that those sales caused 'harm that Phatthana knew was likely to be suffered in the' United States."[93] Here is a summary of the court's minimum contacts analysis for nonresident defendant Phatthana:

> [Plaintiffs] primarily point to Rubicon's order of fourteen containers of shrimp from Phatthana's Songkhla factory for distribution in the United States to Walmart. *Walmart ultimately rejected that shipment because it had concerns about working conditions in the Thai factory, and Rubicon returned the shrimp to Thailand.* Plaintiffs also point to deposition testimony, emails, and a public database to suggest Phatthana sold shrimp to buyers in the United States through importers other than Rubicon, but those documents generally do not specify any

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forum State.'" *Ford Motor Co.,* 141 S. Ct. at 1024–25 (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). "The contacts must be the defendant's own choice and not 'random, isolated, or fortuitous.'" *Id.* at 1025 (quoting Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 774 (1984)). "They must show that the defendant deliberately 'reached out beyond' its home—by, for example, 'exploiting a market' in the forum State or by entering a contractual relationship centered there." *Id.* (quoting Walden v. Fiore, 571 U.S. 277, 285 (2014)). "The plaintiff's claims, we have often stated, 'must arise out of or relate to the defendant's contacts' with the forum." *Id.* (quoting *Bristol-Myers*, 582 U.S. at 264). "Or put just a bit differently, there must be an affiliation between the forum and the underlying controversy, principally, an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation." *Id.* (quoting *Bristol-Myers*, 582 U.S. at 262) (internal quotation marks and alterations omitted).

91. *Ratha*, 35 F.4th at 1171–72; Calder v. Jones, 465 U.S. 783, 789–90 (1984).

92. *Ratha*, 35 F.4th at 1171–72 (quoting Dole Food Co. v. Watts, 303 F.3d 1104, 1111 (9th Cir. 2002)).

93. *Id.* at 1172.

> particular sales, the dates of such sales, or the factories of origin.
>
> Assuming Phatthana's attempt to sell shrimp to Walmart, and some other sales to entities in the United States, constituted intentional acts expressly aimed at the United States, Plaintiffs have produced no evidence suggesting that those sales caused "harm that Phatthana knew was likely to be suffered in the" United States. Plaintiffs' evidence thus does not show that Phatthana or S.S. Frozen purposefully directed their activities to the United States in the sense required to establish specific personal jurisdiction over a personal injury claim.[94]

The Ninth Circuit concluded that "even if Phatthana's sales to the United States were more extensive than Plaintiffs' evidence suggests," its logic still stood "because a larger sales footprint in the United States would not change the fact that the harm caused by Defendants' alleged TVPRA violations was not suffered in the United States."[95] The Ninth Circuit employed the incorrect analysis for establishing presence through targeted activity to the forum state, and incorrectly assumed that the TVPRA's extraterritorial reach would necessitate harm in the United States.

The premise of the TVPRA assumes that many acts of human trafficking, including coerced labor, will take place outside the United States.[96] This is why Congress enacted the extraterritorial provision in Section 1596.[97] Section 1596, by its plain language, requires only presence in the United States.[98] It does not require that harm be suffered in the United States, nor would this bear out logically, because if the predicate harm occurred in the United States the statute would not need extraterritorial ambit. Nor does Section 1596 require intent to cause harm in the United States, and it does not require physical presence— the first two elements address physical presence; therefore, "presence in" must mean something more than physical presence.[99] The

94. *Id.* (citations omitted) (emphasis added).

95. *Id.* at 1172 n.13.

96. 154 CONG. REC. S100886-01 (Dec. 10, 2008) (statement of Sen. Patrick J. Leahy) ("This bill enhances protections to the victims of these terrible crimes . . . . [Human] trafficking is a modern-day form of slavery, involving victims who are forced, defrauded, or coerced into sexual or labor exploitation. These practices continue to victimize hundreds of thousands around the world.").

97. 18 U.S.C. § 1596.

98. *Id.*

99. Montclair v. Ramsdell, 107 U.S. 147, 152 (1883) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies

nonresident defendants did ship product to California and expected payment for this product.[100] That means they targeted activity to the United Sates and California. The suppliers, knowing their product would be paid for by American retailers, purposefully availed themselves of this jurisdiction's market and laws. Moreover, the alleged victims' forced labor in producing the product is inextricably intertwined with their damages for this abusive labor practice and the shipment of the product to the United States.

Assuming the plaintiffs had evidence that Phatthana intended to sell seafood to United States companies, that is certainly the type of evidence that has historically been viewed as targeted activity to the forum state.[101] The next question, under the test for specific jurisdiction, is how close is the nexus between the contacts and the claim.[102] If the plaintiffs had evidence that the nonresident defendants attempted to sell (even unsuccessfully) seafood tainted with coerced labor (a predicate violation), then those contacts have a close relationship to the claim for civil remedies for forced labor, and should satisfy "presence in" as Congress intended it under the extraterritorial scope of Section 1596.[103]

B. *Presence as "Joint Venture"*

The plaintiffs also argued that "presence in" under Section 1596 could be satisfied because Phatthana was involved in a joint venture with domestic defendant Rubicon to market and sell shrimp in the United States.[104] For some unknown reason, the Ninth Circuit applied California law to determine whether a joint venture can be a proxy for "presence" in this federal statute conferring extraterritorial reach.[105] It is not clear why the Ninth Circuit held

that the legislature was ignorant of the meaning of the language it employed.").

100. *Ratha*, 35 F.4th at 1166.

101. *See* Ford Motor Co. v. Mont. Eighth Judicial Dist. Ct., 141 S. Ct. 1017, 1024 (2021); J. McIntyre Machinery, Ltd. v. Nicastro, 564 U.S. 873, 879–80 (2011); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297–98 (1980).

102. *Ford Motor Co.*, 141 S. Ct. at 1025 ("The plaintiff's claims, we have often stated, 'must arise out of or relate to the defendant's contacts' with the forum.") (quoting Bristol-Myers Squibb Co. v. Super. Ct. of Cal., S.F. Cnty., 582 U.S. 255, 264 (2017)).

103. *Id.* at 1028.

104. *Ratha*, 35 F.4th at 1173.

105. *Id.* ("To establish a joint venture under California law, Plaintiffs must show 'an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control.'") (quoting Connor v. Great W. Sav. & Loan Ass'n, 447 P.2d 609, 615 (Cal. 1968)).

that Phatthana was not engaged in a joint venture with domestic defendant Rubicon. Essentially, it seems from the opinion that the Ninth Circuit imposed an element of profit sharing or joint control in order for a joint venture to establish presence.[106] But the plaintiffs did present evidence that Rubicon, a United States-based company, was involved in a joint venture between Brian Wynn (CEO of Rubicon), Thailand Fishery Cold Storage Public Co. (of which Phatthana was a subgroup), Wales, and P&M Holding Co.[107] The plaintiffs also produced filings before the Commerce Department showing that Phatthana was "integrated into the Rubicon Group business structure."[108] Perplexingly, the court held that "[a]t most, these filings confirm that there is a joint venture relationship between the entities named as members of Rubicon Resources in the Rubicon joint venture agreement and that there is some relationship between at least one of those entities and Phatthana."[109] Ultimately, the court held that in the absence of evidence of profit or loss sharing, a joint venture, for purposes of presence in the United States, did not exist.[110] It is not clear why the Ninth Circuit read into Section 1596 a requirement that a nonresident defendant share in the profit or loss of a related business entity with whom it repeatedly engages in sales transactions to establish presence for the extraterritorial scope of a TVPRA violation, particularly in light of the extensive findings by Congress in enacting this statutory regime.

Finally, the plaintiffs argued that Rubicon was the agent of Phatthana to attempt to establish physical presence.[111] Unfortunately, the evidence did not show that Phatthana could direct or control Rubicon; instead, it appeared from the court's discussion of the record that Phatthana was more like a subsidiary of Rubicon, acting at the direction and control of Rubicon (the U.S.-based entity).[112] Thus, the Ninth Circuit affirmed the grant of summary judgment to the foreign defendants because they were not present in the United States as

106. *Id.*
107. *Id.*
108. *Id.* at 1173–74.
109. *Id.* at 1174.
110. *See id.* at 1166.
111. *See id.* at 1172.
112. *Id.* at 1173 ("Plaintiffs contend[ed] that Rubicon's marketing activities, on-site visits to Phatthana's factories, management of the importation and shipping of Phatthana products, and management of customer relations establish[ed] an agency relationship between Rubicon and Phatthana."). That argument may be true, but it is more likely that Phatthana was the agent of Rubicon, rather than vice versa, since Rubicon, the domestic entity, appeared to be the party manifesting control. *Id.*

provided by the extraterritorial grant.[113]

C. *The Ninth Circuit's Grant of Summary Judgment to the Domestic Defendants in* Ratha.

The Ninth Circuit also granted summary judgment to the United States-based defendants in *Ratha* (Rubicon and Wales).[114] But the circuit court opinion is perhaps most notable for what it did not address. First, the court did not address the extraterritorial grant of the TVPRA for these domestic defendants, contrary to the district court in *Doe I v. Apple Inc.*, discussed below.[115] This is because the TVPRA applies to entities in the United States, and all plaintiffs need show is a knowing benefit, in a venture, that it knows or should know is violating the TVPRA.[116] The court also did not address the definition of "venture," which was a significant limiting factor in *Doe*.[117] Instead, the court granted summary judgment to the defendants because (1) plaintiffs failed to provide sufficient evidence that defendant Rubicon "benefitted" from the acts of the foreign defendants;[118] and (2) the plaintiffs failed to present sufficient evidence that defendant Wales "knew or should have known" that its supplier (Phatthana) was "engaged in alleged violations of the TVPRA when it received a benefit from the alleged venture."[119] Both evaluations of the

113. *Id.* at 1175 ("Plaintiffs have not raised a triable issue that Phatthana and S.S. Frozen were 'present in the United States,' as required by 18 U.S.C. § 1596(a)(2), and thus they have not established that their § 1595 claims against these Defendants involve a permissible extraterritorial application of the TVPRA. We therefore affirm the district court's entry of summary judgment in favor of Phatthana and S.S. Frozen.").

114. *Id.* at 1176, 1180 ("We therefore affirm the district court's grant of summary judgment in Rubicon's favor. . . . [W]e affirm the district court's summary judgment in favor of Wales.").

115. No. 1:19-cv-03737 (CJN), 2021 WL 5774224 (D.C. Cir. Nov. 2, 2021); *see infra* notes 198–203, 206–10.

116. 18 U. S.C. § 1595 (2018).

117. Section 1591 (sex trafficking) defines "participation in a venture" as "knowingly assisting, supporting, or facilitating a violation of subsection 1591(a)(1)." 18 U.S.C. § 1591(e)(4). Additionally, "venture" "means any group of two or more individuals associated in fact, whether or not a legal entity." *Id.* at § 1591(e)(6). In *G.G. v. Salesforce.com, Inc.*, the Seventh Circuit did not adopt the definition of participation in a venture set forth in Section 1591, but instead held that participation in venture under the civil liability provision should not require more than a criminal prosecution. 76 F.4th 544, 559 (7th Cir. 2023). In other words, the Seventh Circuit held that "assisting, supporting, or facilitating" a venture would suffice. *Id.*

118. *Ratha*, 35 F.4th at 1175. Although, one queries whether the Ninth Circuit or district court viewed the evidence in a light most favorable to the nonmoving party, as they must on motion for summary judgment. FED. R. CIV. P. 56.

119. *Ratha*, 35 F.4th at 1175.

plaintiffs' evidence provide insight for future cases.

1. A "Knowing Benefit"

The elements for civil damages against a domestic defendant under Section 1595 of the TVPRA are (1) "knowingly benefitted," (2) "from participation," (3) "in a venture (in this case with Phatthana)," (3) "which they knew or should have known was engaged in conduct that violated the TVPRA" (here, allegedly, forced labor).[120] The plaintiffs presented evidence that Rubicon (domestic defendant) benefitted from its relationship with Phatthana (foreign supplier) by producing "materials stating that 'Rubicon has [thirteen] factories,'" including the Phatthana factory, "that are 100% owned and captive to Rubicon Resources."[121] The court implausibly emphasized that these materials, undated, rested on Rubicon's marketing role, as opposed to its ownership or production role.[122] According to the Ninth Circuit, "these materials [were] insufficient for a reasonable jury to infer that Rubicon benefitted from its alleged marketing of Phatthana's products."[123]

The plaintiffs also argued that Rubicon gained a competitive advantage through its relationship with Phatthana to show "knowing benefit."[124] The plaintiffs argued that "'declarations from Louisiana shrimpers attesting to the competitive advantage and the impact on American industry' of the Thai shrimp industry" demonstrated this benefit.[125] The court did not find this argument persuasive: "But these general statements from American shrimpers about international market conditions do not suggest that Rubicon benefitted from its alleged venture with Phatthana. Therefore, we find the declarations

120. *Id.* at 1175. With the 2023 amendment, these elements would include, in element one, "whoever knowingly benefits, or *attempts or conspires to benefit,* financially or by receiving anything of value . . . ." (emphasis added). 18 U.S.C.A. § 1595(a) (West 2023). In an analogous case involving sex trafficking, the Seventh Circuit held the elements are "(1) a venture has engaged in an act in violation of Section 1591, (2) the defendant knew or should have known the venture had violated Section 1591, (3) the defendant participated in that venture, and (4) the defendant knowingly benefited [or attempted to benefit] from its participation." *Salesforce.com, Inc.*, 76 F.4th at 553, *denial of rehearing en banc*, 84 F. 4th 711 (7th Cir. 2023) (contrasting participant liability from perpetrator liability).

121. *Ratha*, 35 F.4th at 1175.

122. *Id.* Again, at summary judgment, the facts alleged must be viewed in a light most favorable to the nonmoving party. FED. R. CIV. P. 56.

123. *Ratha*, 35 F.4th at 1175.

124. *Id.* at 1176.

125. *Id.*

insufficient to present a genuine dispute of material fact."[126]

The plaintiffs also argued that an attempt to benefit would satisfy Section 1595's "knowing benefit" element.[127] The court, of course, disagreed:

> The text of § 1595 [did] not [, at the time,] extend liability to those who *attempt* to benefit from a perpetrator's TVPRA violation. And we cannot read the word "attempt" into the "knowingly benefits" portion of § 1595 without violating "a fundamental principle of statutory interpretation that 'absent provisions cannot be supplied by the courts.'"[128]

Keep in mind that the shrimp actually produced with coerced labor in this case were never proven to have been sold in the United States.[129]

What is questionable about the Ninth Circuit's ruling is its attempt to equate knowing benefit with ownership or control. On January 5, 2023, President Biden signed the Abolish Trafficking Reauthorization Act, which amended the private right of action under which the plaintiffs asserted claims against Rubicon and Wales to make express what the plaintiffs argued was implicit, by adding "attempts or conspires to benefit" language to the predicate language.[130] Given the significance of this change to the liability against the domestic defendants, the plaintiffs filed a motion for relief from judgment under Federal Rule of Civil Procedure 60(b)(6).[131] The district court rejected this motion, finding that the plaintiffs had not shown the "extraordinary circumstances" that would justify reopening the judgement.[132] The district court

126. *Id.*

127. *Id.*

128. *Id.* (citing Rotkiske v. Klemm, 140 S. Ct. 355, 360–61 (2019)).

129. *Id.* at 1172, 1176.

130. 18 U.S.C.A. § 1595(a) (West 2023). The entire provision now provides:

> An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, or attempts or conspires to benefit, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

Id.; *see Ratha*, 35 F.4th at 1176 (stating "[h]ad Congress intended to create civil liability under § 1595 for attempts to benefit, we can reasonably conclude that it would have done so in express terms."); *see also* 18 U.S.C. § 1595(a) (2018) (providing prior language).

131. Ratha v. Phattana Seafood Co., No. CV 16- 4271, 2023 WL 2762044, at *1 (C.D. Cal. Mar. 3, 2023).

132. *Id.* at *3 ("In considering whether there are extraordinary circumstances justifying reopening

relied heavily on its finding, in the grant of summary judgment, that "(1) there was no evidence demonstrating that Rubicon knowingly participated in a human trafficking venture;" and "(2) there was no evidence that Rubicon knew or should have known about Phatthana's alleged human trafficking."[133] The district court also held that the 2023 amendment was a substantive change of law, rather than a clarifying change in law that should apply retroactively.[134] The plaintiffs certainly have a persuasive argument, given that the amendment was titled by Congress as a "Technical and Clarifying Update to Civil Remedy," yet the court ultimately held that this latest change "attached new legal burdens" and hence, is a substantive change which should not be applied retroactively.[135] Not surprisingly, at the time of this article's publication, the plaintiffs have appealed the denial of relief from judgment to the Ninth Circuit Court of Appeals.[136] Several members of Congress filed an *amicus brief* explaining the history and interpretation of the TVPRA, and encouraging the Ninth Circuit to grant the plaintiff's motion to reopen.[137]

2. "Knew or Should Have Known" (Wales)

The sum of the plaintiffs' evidence against domestic defendant Wales was that the company admitted that on February 23, 2012, it "became aware of a news article published in the Phnom Penh Post detailing allegations from Plaintiff Ratha's whistleblower report."[138]

The plaintiffs argued Wales had knowledge before this report due to the receipt of "'industry-specific, country-specific, and Defendant-specific information sufficient to put any reasonable party on notice' that labor abuses were occurring at the Songkhla factory 'well before' the allegations in Ratha's whistleblower report were published in February 2012."[139] They pointed to "reports and articles about labor abuses generally in Thailand, as well as their

the Judg[]ment entered in favor of Rubicon based on a change in the law, the Court concludes that the applicable factors weigh heavily against granting Plaintiffs' Motion . . . .").

133. *Id.* at *4.

134. *Id.*

135. *Id.*

136. *See generally* Ratha v. Rubicon Resources, LLC, No. 23-55299 (9th Cir. Apr. 3, 2023) (showing relevant appeals filing).

137. *See* Ratha Brief for Members of Congress, *supra* note 11, at 5–14.

138. Ratha v. Phattana Seafood Co., 35 F.4th 1159, 1176 (9th Cir. 2022).

139. *Id.* at 1177.

retained experts' reports, to substantiate their claims."[140] Again, failing to view the evidence presented in a light most favorable to the nonmoving party, the court held the evidence insufficient and granted summary judgment.[141] The court assumed a negligence standard for "knew or should have known," and perplexingly held:

> Assuming § 1595 imposes a negligence standard, Plaintiffs' evidence suggests, at most, that Wales should have known of labor abuses in the Thai shrimp industry *generally*. Sweeping generalities about the Thai shrimp industry are too attenuated to support an inference that Wales knew or should have known of the specifically alleged TVPRA violations at the Songkhla factory between 2010 and 2012.[142]

In sum, the plaintiffs presented the following evidence of Wales's willful ignorance in the face of reports of labor trafficking in the Thai seafood industry:

An expert report that opined from 2010–2012, that "Wales was 'on notice in 2010 . . . that . . . the seafood industry in Thailand was considered a "hot spot" for human trafficking in all its forms.'"[143] Other expert reports noted:

> [T]hat Rubicon's senior management "can be assumed to have been fully aware of how prevalent were labor practices such as are alleged at Songkhla," and that Phatthana would have "routinely shared information with Rubicon on production issues and labor matters including those involving migrant workers would inevitably be part of that information." The report also lists several ways in which audits of the Songkhla factory in 2011 and 2012 did not meet certain standards, but never opines that such audits were even necessary under the circumstances or that a business's failure to conduct such audits would be negligent.[144]

Another expert report opined "that the lack of 'provisions on forced labor'

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140. *Id.*
141. *Id.* at 1178–80 (summarizing the court's findings that the reports, articles, and experts' reports were insufficient to establish Wales knew or should have known of Phatthana's "alleged labor abuses").
142. *Id.* at 1177.
143. *Id.* at 1179.
144. *Id.*

in purchase orders from Rubicon and Wales 'fell short of industry standards at the time' and that Rubicon 'did not meet industry standards' in its audits and investigations."[145] But, according to the court, the report did "not offer any factual basis for its conclusory statements about 'industry standards.' It therefore fails to raise a genuine issue of material fact."[146]

The only "benefit" domestic defendant Wales obtained from activity after February 23, 2012, was a potential payment for inspection services.[147] Thus, the court held that no knowing benefit accrued to Wales after it had knowledge of the labor trafficking.[148]

V. THE ANNIHILATION CONTINUES—*DOE I V. APPLE*

While *Ratha v. Phatthana* is the one of the very few cases so far in which a federal court of appeals has analyzed the amended TVPRA, there are more turbulent waters (I mean, let's face it, cyclones) ahead for victims of forced labor. In *Doe I v. Apple Inc.*,[149] the United States District Court for the District of Columbia eviscerated the TVPRA, dismissing the claims on multiple counts and providing thin precedent for blocking other victim-based claims.[150]

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145. *Id.*

146. *Id.*

147. *Id.* at 1180.

148. *Id.*

149. No. 1:19-cv-03737 (CJN), 2021 WL 5774224 (D.D.C. Nov. 2, 2021).

150. *Id.* The damage *Doe* committed to TVPRA claims, and the congressional intent of those claims, is not overstated, as the plaintiffs wrote in their appeal to the United States Court of Appeals for the District of Columbia Circuit:

> In an unprecedented ruling, the District Court ignored the TVPRA's text, remedial purpose, and decisions of numerous federal courts to essentially repeal the TVPRA. The Court narrowly defined "venture" to require a formal agreement between Appellees and the mining companies. Using this erroneous definition of "venture," the Court found Appellees had no agreement with or direct relationship to their cobalt suppliers despite specific allegations that each of them had a direct supplier relationship with one or more of the mining companies where Appellants were injured. The Court also used its narrow definition of "venture" to rule the Appellants lacked standing to sue, finding Appellees had no direct connection to the harm caused to Appellants by the mining companies. The District Court then foreclosed most civil TVPRA claims by becoming the first federal court to rule that section 1596 (a)'s grant of extraterritorial jurisdiction did not apply to civil claims.
>
> Further, the Court ignored well-established precedent and became the first federal court to rule that forced labor claims are determined exclusively by whether Appellants began work voluntarily and regardless of whether they were later coerced to work against their will. Finally, the District Court once again relied on its erroneous definition of "venture" to find that Appellants' common law claims failed because Appellees did not have sufficient

The defendants were United States companies who allegedly profited from the plaintiff-victims' child labor: Apple, Alphabet, Microsoft, Dell, and Tesla.[151] The plaintiffs were sixteen alleged child laborers who mined cobalt, a necessary element for lithium-ion batteries that power the billions of modern day electronics used in the United States and worldwide.[152] The plaintiffs sought to represent a class of similar child laborers against defendants Apple, Alphabet, Microsoft, Dell, and Tesla for alleged violations of the TVPRA, as well as other state law claims.[153] Their stories, recounted as alleged by the district court, are indescribably tragic. They detail the deaths and severe injuries of child laborers due to the collapse of mining and pit tunnels, paralysis from falling into tunnels, amputations from field work, and being shot by the armed guards for whom they worked.[154] The children asserted class claims under the TVPRA and state law claims for unjust enrichment, negligent supervision, and intentional infliction of emotional distress.[155] They sought civil damages and:

> [A]n order requiring Defendants to create a fund to pay for medical care for the proposed class, conduct medical monitoring for all class members who were exposed to cobalt, and to "clean up the environmental impacts caused by Defendants' use of suppliers for cobalt that failed to take any steps to protect the environment where they were mining for cobalt."[156]

A. *The District Court Applied a Heightened Standing Framework to the Plaintiffs' Claims*

The district court held that none of the plaintiffs had standing to bring their federal statutory causes of action, because, according to the court, the

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connection to the injuries. The District Court's decision essentially repeals the TVPRA.
Opening Brief for Plaintiffs-Appellants at 1–2, Doe I v. Apple Inc., 2022 WL 3154237 (D.C. Cir. Dec. 2, 2021) (No. 21-7135).

151. *Doe I*, 2021 WL 5774224, at *2 (noting that the "end purchasers of the refined cobalt," which included Apple, Alphabet, Microsoft, Dell, and Tesla, were named as defendants in the suit).

152. *Id.* at *2–4 (describing the sixteen plaintiffs in the suit).

153. *Id.* at *1.

154. *Id.* at *2–4.

155. *Id.* at *4.

156. *Id.* (quoting First Amended Complaint at ¶ 139(i), Doe I v. Apple Inc., No. 1:19-cv-03737 (CJN), 2021 WL 5774224 (D.D.C. Nov. 2, 2021)).

plaintiffs could not show a causal connection between their injury and the defendants' conduct.[157] This was wrong. The TVPRA creates a statutory violation allowing a victim of labor trafficking to recover against a defendant who "knowingly benefits, financially or by receiving anything of value from participation in a [labor trafficking] venture which that person knew or should have known has engaged in an act in violation of this chapter."[158] Under the TVPRA, the causal connection is the financial benefit taken by participating in a venture the person knew or should have known has engaged in a human trafficking violation.[159] By imposing a heightened standard of direct causal connection never required by the Supreme Court, the *Doe I* court denied the protection Congress has afforded to forced labor victims under the TVPRA. Unfortunately, through this decision, this court paved the way to use standing as an illusory obstacle to victim-based TVPRA claims.[160]

Article III standing is a requirement for federal court jurisdiction.[161] Generally, the Supreme Court has told us standing requires an "injury in fact," which is "an invasion of a legally protected interest" that is both "concrete and particularized" and "actual or imminent" (as opposed to "conjectural or hypothetical").[162] "Second, there must be a causal connection between the injury and the conduct complained of."[163] Finally, the injury must be capable of being "redressed by a favorable decision of the court."[164] Without dispute, the plaintiffs had allegedly suffered serious, cognizable physical injury, and without question, court-ordered damages for those injuries along with

157. *Id.* at *6–7.

158. 18 U.S.C. § 1595(a) (2018); *see also* 18 U.S.C.A. § 1595(a) (West 2023) (adding "or attempts or conspires to benefit" to the statute).

159. *See* 18 U.S.C. § 1595(a) (2018); *see also* Gallant Fish, *No Rest for the Wicked: Civil Liability Against Hotels in Cases of Sex Trafficking*, 23 BUFF. HUM. RTS. L. REV. 119, 138 (2011) (noting that the "provision opened the door for liability against facilitators who did not directly traffic the victim, but benefited from what the facilitator should have known was a trafficking venture").

160. *See, e.g.*, Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173, 180–81 (D.D.C. 2022) (dismissing a TVPRA claim by applying the standing conclusions from *Doe I*).

161. Raines v. Byrd, 521 U.S. 811, 818 (1997) ("Under Article III, § 2, of the Constitution, federal courts have jurisdiction over this dispute between appellants and appellees only if it is a 'case' or 'controversy.'"); *see also* John G. Roberts, *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1220 (1993) (explaining that federal courts must test a plaintiff's standing).

162. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (quoting Whitmore v. Arkansas, 495 U.S. 149, 155 (1990)).

163. Doe I v. Apple Inc., No. 1:19-cv-03737 (CJN), 2021 WL 5774224, at *6 (D.D.C. Nov. 2, 2021) (citing *Lujan*, 504 U.S. at 560–61).

164. *Id.*

equitable relief is the prototypical type of damages a court may order for physical injury and that contemplated by the private right of action under the TVPRA.[165] However, the defendants argued, and the court agreed, that there was no causal connection between the defendants' actions and the plaintiffs' injuries.[166] You see, none of the plaintiffs were directly employed by the corporate U.S. defendants.[167] Instead, in the cobalt mining industry, many intermediaries are at play, including artisanal miners, who then supply cobalt to companies who, in the supply chain, provide U.S. companies with the material to make the products that make millions in profit.[168] The district court held that because the plaintiffs had not alleged the defendants directly employed them and did not own or operate any of the mining sites at which they worked, the plaintiffs lacked the causal connection to their injuries.[169] Because, as is typically the case in supply chain atrocities, the plaintiffs alleged that their deaths and injuries occurred at the hands of third-party suppliers and on mines not owned by the defendants, the court held that the plaintiffs lacked the causal connection to their injuries, and thus, had no Article III standing.[170]

Of course, that logic fails to give credence to Section 1595's private right of action against a defendant who "knowingly benefits, or attempts or conspires to benefit . . . from participation in a venture which that person knew or should have known has engaged in" human trafficking.[171] The plaintiffs argued as much at the motion to dismiss/pleading stage, in which all factual allegations are to be presumed as true.[172] However, instead of presuming the truth of the plaintiffs' factual allegations regarding the venture, the district

165. 18 U.S.C.A. § 1595 (West 2023).

166. *Doe I*, 2021 WL 5774224, at *7.

167. *Id.* at *6 (explaining that none of the plaintiffs alleged they were employed by defendants or that defendants owned any mining sites where the plaintiffs worked).

168. *See id.* at *1–2 (describing the supply chain of cobalt, including artisan miners and large-scale producers whose cobalt often "gets mixed throughout the supply chain" and then sold to larger distributors); *see also* Jocelyn Z. Zuckerman, *For Your Phone and EV, a Cobalt Supply Chain to a Hell on Earth*, YALE ENV'T 360 (Mar. 30, 2023), https://e360.yale.edu/features/siddharth-kara-cobalt-mining-labor-congo (explaining how artisanal miners sell everything they dig to intermediaries who then sell to formal mining companies).

169. *Doe I*, 2021 WL 5774224, at *6–7.

170. *Id.*

171. 18 U.S.C.A. § 1595(a) (West 2023).

172. *Doe I*, 2021 WL 5774224, at *5–6 (explaining that the court must treat the complaint's allegations as true and that the plaintiffs argued the defendants were in a venture with the mining companies); *see also* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("[A] court must accept as true all of the allegations contained in a complaint . . . .").

court, at the pleading stage, held that the plaintiffs had not adequately pled the existence of a business venture by the defendants.[173] According to the court:

> In any event, the "venture" Plaintiffs allege is really no "venture" at all: Defendants participate in what Plaintiffs themselves describe as the global "cobalt supply chain." But Plaintiffs have pleaded no facts showing that every individual in the entire global supply chain—let alone one or more of the Defendants—controlled the mines or conditions that led to Plaintiffs' injuries. Instead, they fault Defendants for purchasing cobalt generally, propping up demand for the metal in the process. *See, e.g.*, Compl. ¶ 19 ("Defendants are knowingly participating in, supporting, and providing the essential market for cobalt that has caused the explosion of production by young children."); *id.* ¶ 66 (defining the class as certain children who worked "while under the age of 18 at an 'artisanal' cobalt mine in the Lualaba Province of DRC that supplied cobalt to any of the Defendants"); *id.* ¶ 100 ("Based on prior allegations, Defendants Apple, Alphabet, Dell, Microsoft, and Tesla certainly had knowledge that the cobalt they purchase from these companies is produced by global outlaws that think nothing of selling DRC cobalt mined by seriously exploited children."); *id.* ¶ 111 ("Defendants Apple, Alphabet, Dell, Microsoft, and Tesla are all buying DRC cobalt . . . .").[174]

In sum, the court implicitly held that "venture" under the TVPRA and hence, the "causal connection" element of standing, necessitate that the defendants control the mines or directly control the victim-laborers—a standard that contradicts the plain language of Section 1595 of the TVPRA.[175]

This all-encompassing blockade to the child laborers' claims under the TVPRA was devastating, of course, but it was even more devastating because (1) the erroneous "but for" cause the court required for standing has never

173. *Doe I*, 2021 WL 5774224, at *6.

174. *Id.*

175. *Id.* at *8 ("At the very least, Plaintiffs would need to allege specific facts laying out each Defendants' role in this protracted causal chain."). *But see* G.G. v. Salesforce.com, Inc., 76 F.4th 544, 559 (7th Cir. 2023) ("[A] plaintiff may sufficiently allege such 'culpable assistance' by showing 'a continuous business relationship' between the participant and the trafficker. Where the participant provides assistance, support, or facilitation to the trafficker through such a 'continuous business relationship,' a court or jury may infer that the participant and trafficker have a 'tacit agreement' that is sufficient for 'participation' under Section 1595.").

been articulated by the Supreme Court (and the district court cites no precedent requiring "but for" causation),[176] and (2) the *Doe* court effectively stripped the "knowing benefit" language from the TVPRA's private right of action by imposing a requirement that defendants direct or control the offenders, or own the property on which the injury occurred.[177] That this opinion has been relied on to block other TVPRA claims by alleged victims of human trafficking at the pleading stage, before any discovery is taken, is even more troubling.[178]

The district court's assessment of standing in *Doe* is so troubling (in that it imposes a "but for" causation standard) that twelve constitutional law scholars filed an amicus brief in *Coubaly v. Cargill*, a related case on appeal to the D.C. Circuit, which relied on *Doe's* standing analysis to dismiss the victim-based claims filed against domestic U.S. chocolate manufacturers.[179] As these law professors elucidate, Article III jurisprudence on standing "does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries; it requires only that those injuries be 'fairly traceable' to the defendant."[180] As discussed above, this amicus brief argues, based on precedent, that "[a]n indirect causal chain is especially appropriate when a complaint alleges a conspiracy or joint venture," as the plaintiffs did in *Doe*, *Coubaly*, and even *Ratha*.[181]

176. Brief for Law Professors, *supra* note 41, at 7 ("[T]he district court imposed a standard for causation much higher than Article III requires and stripped Congress of its power to articulate chains of causation that will give rise to a case or controversy.").

177. *Id.*

178. *See, e.g.*, Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173, 180–82 (D.D.C. 2022).

179. Brief for Law Professors, *supra* note 41.

180. *Id.* at 9 (quoting Attias v. Carefirst, Inc., 865 F.3d 620, 629 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018)).

181. *Id.* The amicus brief analogizes, correctly, allegations of human trafficking in the indirect supply chain to environmental cases in which courts routinely find Article III standing even where the plaintiffs cannot directly prove the defendants' pollution caused their injuries. *Id.* at 12. In those cases, it is sufficient that the "defendants' unlawful pollution contributes to the *kind of injury* that plaintiffs suffered." *Id.* Here, the connection is even less tenuous because plaintiffs allege that the defendants benefitted financially based on knowledge or reckless indifference to their coerced labor. *Id.* at 13. Even more specifically, the plaintiffs in *Coubaly*, the chocolate cases, allege that the defendants "are not merely purchasers or users of cocoa from Côte D'Ivoire; they are the architects and defenders of the cocoa production system of Côte D'Ivoire." *Id.* at 14 (quoting Amended Complaint at 89, Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173 (D.D.C. 2022). "Not only did defendants provide financial support, training, and technological innovation to cocoa farms using child slave labor in Côte d'Ivoire, but they created and led an organization designed to delay and curtail meaningful reforms." *Id.* Thus, this is not a case of indirect causation; rather, in *Coubaly*, the plaintiffs allege direct causation and control. *Id.*

The Supreme Court has recognized Article III standing on much more tenuous lines of causal connection in prior cases. For example, in *Massachusetts v. EPA*,[182] the Court held that Massachusetts had standing to seek judicial review of an EPA order declining to adopt greenhouse gas regulations.[183] There, the EPA challenged standing, arguing, in part, that its decision not to regulate greenhouse gases was an insignificant contribution to the state's alleged injuries, and that there was no "realistic possibility" that the relief Massachusetts sought would "remedy their injuries" or "mitigate global climate change."[184] But, the Court held that the EPA's argument rested "on the erroneous assumption that a small incremental step, because it is incremental, can never be attacked in a federal judicial forum."[185] The Court went on to hold that Massachusetts had standing, notwithstanding the tangential causal connection: "While it may be true that regulating motor-vehicle emissions will not by itself *reverse* global warming, it by no means follows that we lack jurisdiction to decide whether EPA has a duty to take steps to *slow* or *reduce* it."[186] The controlling precedent of *Massachusetts v. EPA* rejects a "but for" causation theory to establish Article III standing.

B. The Assessment of "Venture" Under Section 1595

In rejecting the causal connection for standing, the *Doe* court summarily held that the plaintiffs had not adequately alleged the U.S.-based defendants were involved in a business venture under the TVPRA.[187] This is significant because if involved in a "venture," then all that plaintiffs would need to allege

182. 549 U.S. 497 (2007).

183. *Id.* at 526.

184. *Id.* at 523–24.

185. *Id.* at 524.

186. *Id.* at 525. The Court also observed the importance of a congressionally-mandated procedural right in Massachusetts: "[A] litigant to whom Congress has 'accorded a procedural right to protect his concrete interests, . . . can assert that right without meeting all the normal standards for redressability and immediacy.'" *Id.* at 517–18. "When a litigant is vested with a procedural right, that litigant has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Id.* at 518. Here, Congress gave victims of international forced labor the private right of action for civil damages. *See* 18. U.S.C. § 1595(a) (2018). While that is not precisely the same as a right to contest an agency decision, the rationale of the *Massachusetts v. EPA* Court deferring to a congressional grant of a procedural right and not imposing a strict standing requirement applies equally here. 549 U.S. at 517–18.

187. Doe I v. Apple Inc., No. 1:19-cv-03737 (CJN), 2021 WL 5774224, at *10–11 (D.C.C. Nov. 2, 2021).

(and prove) under Section 1595 is that the U.S.-based defendants knowingly benefitted (or now, attempted to benefit) from that venture, and they knew or should have known the perpetrators were involved in a human trafficking violation. According to the court, the "immediate problem" with the plaintiff's claim is that "a 'global supply chain' is not a venture."[188]

Section 1595 does not define "venture." Thus, the court looked to definitions of the terms in dictionaries of common use.[189] Webster's New International Dictionary defines the term as "an undertaking involving chance, risk or danger, . . . esp[ecially]: a business enterprise of speculative nature," or "something at hazard in a speculative venture."[190] Similarly, according to the court, Black's Law Dictionary defines venture as, "[a]n undertaking that involves risk[,] esp., a speculative commercial enterprise."[191] Thus, the court held that the "string tying the two together is . . . commercial enterprise."[192] It is not entirely clear that Congress intended "venture" to mean "commercial enterprise." Certainly, Congress knew of the concept of commercial enterprise in 2008, and yet, Congress intentionally did not adopt that term. It is also not the sole thread tying the definitions of venture together; both definitions refer to an undertaking, and one that contemplates chance or risk. An agreement to purchase materials from a supplier is an undertaking; it is a contract that involves duties (typically to pay). And every purchase agreement inherently involves chance, if not risk; there is the chance of nonfulfillment, the chance of market volatility, and the chance of breach of national and international law. By focusing on commercial enterprise, as opposed to an undertaking, the *Doe* court placed heightened requirements on the concept of venture not present in the plain language of Section 1595 and implicitly refuted by Congress's rejection of those words. The *Doe* court's interpretation of venture is also squarely at odds with the congressional findings, recognizing the international marketplace and the difficulty of holding foreign suppliers liable under their host country's law in enacting the TVPRA.

The *Doe* court required allegations of a commercial enterprise between the known perpetrators of the child labor abuses and the domestic U.S. defendants, and then held the plaintiffs had failed to adequately plead a

188. *Id.* at *10.

189. *Id.* at *11.

190. *Id.* (emphasis omitted) (quoting *Venture*, WEBSTER'S NEW INT'L DICTIONARY (3d ed. 2002)) (internal citations omitted).

191. *Id.* (quoting *Venture*, BLACK'S LAW DICTIONARY (8th ed. 2004) (internal citations omitted).

192. *Id.*

commercial enterprise.[193] The plaintiffs had alleged that suppliers Glencore and Unicore were "partners" in supplying the defendants with cobalt, but the court held that only implicated Glencore and Unicore in a cobalt-gathering venture, stating "[i]t does not tie . . . Defendants in this litigation."[194] According to the court, "[t]he closest the Plaintiffs get to doing so is in asserting that 'all of these companies were formally locked in a "venture" that was established to mine cobalt under horrific conditions using young children to perform hazardous labor.'"[195] But the court dismissively held that allegation was a legal conclusion not entitled to the presumption of truth that factual allegations receive at the motion to dismiss phase.[196] Had the court instead focused on the unifying concept of "venture" as an undertaking involving chance, the allegations that defendants routinely purchased cobalt from suppliers they knew, or should have known, engaged in horrifying child labor, even child slavery practices, should have satisfied the element of venture under the TVPRA, and thus satisfied the causal connection for standing.

The *Doe* court's assessment of standing imposing a requirement that defendants control the victims or the supervisors who caused their injuries is a frustration because it poses an undue barrier to federal courts for victims to whom Congress intended to give financial redress. However, one could overcome this standing barrier by filing the federal TVPRA claims in state courts that have personal jurisdiction over the defendants and do not carry the same Article III restrictions for standing. But even more problematically, the *Doe* court seemed focused on eviscerating the private right of action for TVPRA victims against domestic entities who knowingly profit by contracting with, and paying suppliers whom they know (or should know) violate the law.

C. *Why Stop There? How the Doe Court Eviscerated the TVPRA*

In analyzing *Doe I v. Apple*, one gets the sense that this court intended to dismantle any private right of action against a domestic entity shielded by the international supply chain. The court went on to hold that Section 1595 of the TVPRA does not apply extraterritorially.[197] But here, there was no need for

193. *Id.*

194. *Id.*

195. *Id.*; *see also* First Amended Complaint at ¶¶ 104–08, Doe I v. Apple Inc., No 1:19-cv-03737 (CJN), 2021 WL 5774224 (D.D.C. Nov. 2, 2021).

196. *Doe I*, 2021 WL 5774224, at *11.

197. *Id.* at *14–16.

the TVPRA to apply extraterritorially because the defendants were undeniably present in the U.S. (as U.S.-based entities) and allegedly knowingly benefitted from the TVPRA violations in the United States.[198] The extraterritorial reach of the TVPRA, codified in Section 1596, is only necessary to invoke against foreign defendants, as was the case against the non-U.S. defendants in Ratha v. Phatthana.[199] This misplaced focal point suggests that the district court did not fully assess the merits of a TVPRA claim against a domestic defendant, even if the actual physical abuse or forced labor occurred in a different country.[200] For domestic defendants who "knowingly benefit" through "participation in a venture," there is no extraterritorial reach because the violation is the benefit, which takes place on domestic ground (even if the labor abuse occurred elsewhere). To put this in context, assume a U.S. corporation funded and profited from an international sex-trafficking industry, but none of the forced sex acts took place in the United States. Yet, the company funded the sex-trafficking operation in other nations and profited from it. No one would facially argue that the TVPRA's extraterritorial reach need even be implicated, because the company engaged in, and knowingly benefitted from, the violations in the United States.

But the *Doe* court coarsely dismissed this argument without possibly exploring its broader implications. The court held that the benefit could not be separated from the predicate violation.[201] The court summed it up by stating:

> Plaintiffs do not (and cannot) contest that their injuries, along with the underlying TVPRA violations that they allege, occurred anywhere other than in the DRC. Thus, seeking to hold Defendants liable for the TVPRA violations would amount to an extraterritorial application of § 1595. Because Congress did not authorize that, their claims must fail.[202]

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198. First Amended Complaint at ¶¶ 72–86, Doe I v. Apple Inc., No. 1:19-cv-03737 (CJN), 2021 WL 5774224 (D.D.C. Nov. 2, 2021) (outlining how each defendant is a U.S.-based entity and how they allegedly knowingly benefit from forced child labor). *Cf.* Doe I v. Cisco Systems, Inc., 73 F.4th 700, 737–39 (9th Cir. 2023) (allowing ATS claims to move forward based on allegations that a defendant's conduct occurred *in the United States*).

199. *See* Ratha v. Phattana Seafood Co., 35 F.4th 1159, 1165–66 (9th Cir. 2022) (explaining extraterritorial provision of the TVPRA and naming the non-U.S. defendants in the case).

200. *Doe I*, 2021 WL 5774224, at *16.

201. *Id.* (holding that the plaintiffs' argument was too narrow and that the TVPRA did not create a violate for benefitting from other violations).

202. *Id.*

As explained above, that logic does not hold water when a domestic entity knowingly benefits from an act of human trafficking, even if the predicate violation occurred outside the United States' geographic reach. To adopt that holding would insulate U.S. companies from human trafficking abuses as long as they shield themselves by hiring an intermediary to engage in the forced labor, or slave labor, on foreign soil.[203] One hardly thinks, given the international purpose of the TVPRA, that this was Congress's intent. Additionally, this rationale fails to recognize the plethora of tort cases brought by plaintiffs in U.S. courts each year involving injuries on foreign soil. The question is always one of jurisdiction and due process. But, here, there is no question that the defendants are subject to jurisdiction in at least one, if not two, courts of general jurisdiction: their place of incorporation, principal place of business, or both.[204]

Further, the *Doe* court suggested that the TVPRA's extraterritorial reach is limited to criminal offenses, not for civil liability.[205] The court focused on the term "offenses" used in Section 1596 (the extraterritoriality provision) and reasoned that the term offense typically suggests criminal conduct.[206] But even the 2004 edition of Black's Law Dictionary defines offense as "[a] violation of the law."[207] The court also inferred the limitation of the extraterritorial reach of Section 1596 to criminal offenses by looking to the remaining portions of that provision, which speak to limiting prosecutions in other countries.[208] Thus, the court held that Section 1596's extraterritorial reach did not extend to civil actions.[209]

The scope of Section 1596 is something the courts should resolve; however, the legislative history suggests that Congress has continuously amended the TVPRA to broaden the civil remedy provision to be coextensive with criminal liability.[210] Twenty-one members of Congress filed an amicus brief

203. *See id.* (holding that only perpetrators or those who engage in a violation can be held liable, so U.S. companies cannot be liable if another company is the one who actually engages in the violation).

204. *See, e.g.*, Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (general, or all-purpose jurisdiction, exists in a corporation's place of incorporation and principal place of business); BNSF Ry. Co. v. Tyrell, 581 U.S. 402, 413–14 (2017) (discussing general, or all-purpose, jurisdiction).

205. *Doe I*, 2021 WL 5774224, at *15.

206. *Id.*

207. *Offense*, BLACK'S LAW DICTIONARY (8th ed. 2004); *see also Doe I*, 2021 WL 5774224, at *15.

208. *Doe I*, 2021 WL 5774224, at *15.

209. *Id.* at *16.

210. Brief for Members of Congress Senator Blumenthal, Representative Smith, et al. as Amici Curiae Supporting Respondents, Nestlé USA, Inc. v. Doe , 141 S. Ct. 1931 (2021) (Nos. 19-416, 19-

in *Nestlé v. Doe* to explain the history and intent of the TVPRA.[211] They firmly write that the extraterritorial provision was intended to include civil liability under Section 1595:

> *Second,* the TVPRA, *including its private right of action*, applies to extraterritorial conduct provided that a defendant is a U.S. national or permanent resident, or is present in the United States. In recognizing Respondents' ATS claim, the Court of Appeals applied *Kiobel's* "touch and concern" test and held Respondents must show that Petitioners aided and abetted the overseas violations through domestic conduct. By contrast, the TVPRA contains no such limitation. It expressly provides "the courts of the United States have extra-territorial jurisdiction" over all TVPRA violations, without any requirement that the offending conduct itself occur in the territorial United States when, as noted above, a defendant is a U.S. national, permanent resident, or present in the United States.[212]

VI. ASSESSING THE JUDICIAL HOSTILITY TO VICTIM-BASED TVPRA CLAIMS FOR DAMAGES

When Congress enacted the TVPRA, it unequivocally stated that it knew human trafficking was a transnational issue.[213] Congress stated that it intended the TVPRA to apply even when host countries were recalcitrant to

453), at 31–34 (hereinafter "Nestlé Brief for Members of Congress"). The Congresspeople went on to affirm that the TVPRA intends to provide "broad civil liability" "coterminous with the TVPRA's criminal provisions." *Id.* at 33–34. The amicus brief written by these members of Congress unequivocally states that the TVPRA, with its extraterritorial reach and civil remedy provision, "authorizes civil actions similar to the claims" brought in *Doe v. Nestle*, which are directly analogous to the claims at issue here. *Id.* at 26. Unfortunately, the *Doe* plaintiff's claims predated these important amendments to the TVPRA, thus they relied on the Alien Tort Statute as, what would be, an unsuccessful path to recovery. Nestle USA, Inc. v. Doe, 141 S. Ct. 1931, 1940 (2021) ("Respondents attempt to brush aside these concerns by suggesting that their allegations about decades-old conduct could satisfy the TVPRA if Congress had enacted that law earlier. This observation simply proves the point. Congress chose not to write a retroactive statute.").

211. Nestlé Brief for Members of Congress, *supra* note 210.

212. *Id.* at 32–33 (emphasis added).

213. *See supra* Part III; *see also* 22 U.S.C. § 7101(b)(24) ("The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.").

police human rights abuses, and that it intended to give victims of human trafficking the tools to remediate the wrongs against them.[214] Given the congressional intent to apply the TVPRA internationally, even when host countries are willfully ignorant or obstinate to deter coerced labor,[215] one questions why the courts have recently treated TVPRA victim-based claims with hostility. One reason is that victim-based claims for forced labor or human trafficking on foreign soil typically were foreclosed under the ATS.[216] In *Nestlé USA, Inc. v. Doe*, the United States Supreme Court held that the principle against extraterritorial application precluded victim-based ATS claims based on acts that happened on foreign land by foreign entities.[217] As the Supreme Court explained, "[e]ven if we resolved all these [ATS] disputes in respondents' favor, their complaint would impermissibly seek extraterritorial application of the ATS. Nearly all the conduct that they say aided and abetted forced labor—providing training, fertilizer, tools, and cash to overseas farms—occurred in Ivory Coast."[218] But courts have been quick to see that TVPRA claims are very different from ATS claims because Congress expressly stated the provisions that should have extraterritorial reach.[219] For example, in the early

214. *See* supra Part III; *see also* 22 U.S.C. § 7101(b)(3) ("Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.").

215. 22 U.S.C. § 7101(b)(16) ("In some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking.").

216. *See, e.g.*, Lampley, *supra* note 3; Section IV.A. (detailing the historical treatment of victim-based claims under the ATS and the problems posed by the presumption against extraterritoriality); Roberson & Lee, *supra* note 8, at 30–32 (providing a historical perspective of human rights litigation under the ATS and how the Supreme Court's decision in *Nestlé* effectively cut off those claims); *see also* Adhikari v. Daoud & Partners, 95 F. Supp. 3d 1013, 1017–21 (S.D. Tex. 2015) (dismissing victim-based ATS claims but distinguishing the TVPRA claims due to the express grant of extraterritorial reach). The *Nestlé* plaintiffs' claims predated the 2008 amendment to expressly grant extraterritorial reach to the TVPRA, which is most likely why they did not assert TVPRA claims. *See* Roberson & Lee, *supra* note 8, at 22 (discussing how the extraterritorial amendment in 2008 would have eliminated issues presented in the case).

217. 141 S. Ct. 1931, 1936–37 (2021).

218. *Id.*

219. *See* Ratha v. Phatthana Seafood Co., No. CV 16-4271-JFW (ASx), 2016 WL 11020222, at *5 (C.D. Cal. Nov. 9, 2016); *see also* Adhikari v. Kellogg Brown & Root, Inc., 845 F.3d 184, 204 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 134 (2017) ("Prior to § 1596, a private party could not maintain a civil cause of action under the TVPRA for forced labor or human trafficking that occurred overseas. . . . After § 1596's enactment, a TVPRA defendant in a civil suit could no longer rely on a previously available defense: the presumption against extraterritoriality."). The Fifth Circuit held that the *Adhikari* plaintiffs could not state a claim under the TVPRA because the events occurred prior to the 2008 extraterritorial grant added to the TVPRA and because it did not have retroactive effect. *Id.* at 204–

stages of *Ratha v. Phattana*, in denying the defendants' Rule 12(b)(6) motions to dismiss, the district court held:

> With respect to the TVPRA's extraterritorial jurisdiction, Congress's intent is clear. The original version of the 2008 reauthorization of the TVPRA did not contain an extraterritoriality provision. However, Congress added the jurisdictional expansion to the bill before it was passed and shortly after two courts considering TVPRA civil suits held the provisions were not extraterritorial. Thus, Congress has clearly indicated that it intends the TVPRA, unlike statutory schemes that are silent on extraterritorial jurisdiction, to be a unified statutory scheme of interlocking provisions that provides extraterritorial jurisdiction over specific predicate offenses and further expressly provides for restitution and a civil remedy whenever a court in the United States has that jurisdiction.[220]

Additionally, Congress's recent amendment broadening the scope of Section 1595 to include those who "attempt[] or conspire[] to benefit, financially or [otherwise]" demonstrates that Congress intends the TVPRA to have a broad reach.[221]

The Supreme Court's presumption against extraterritorial application, particularly in the ATS arena, most likely presents a caution flag for courts. But its approach is misguided for two reasons: (1) when a domestic defendant "knowingly benefits . . . from participation in a venture [they] knew or should have known" is involved in human trafficking (regardless of location), the TVPRA provides a private right of action without resort to extraterritorial application, and (2) for foreign defendants over whom the court has personal jurisdiction consistent with the Due Process Clause of the Fourteenth Amendment, Congress has granted an explicit extraterritorial reach.[222]

The position of the United States Chamber of Commerce, the Global Business Alliance, the National Foreign Trade Council, and the United States Council for International Business in their amicus filings in *Doe* and in

06.

220. *Ratha*, 2016 WL 11020222, at *5.

221. Abolish Trafficking Reauthorization Act of 2022, Pub. L. No. 117-347, 136 Stat. 6199, 6200 (2023) (codified as amended at 18 U.S.C.A. §1595(a) (West 2023)); *see also supra* notes 4, 38, and accompanying text.

222. *Ratha*, 2016 WL 11020222, at *4; *Adhikari*, 845 F.3d at 204.

Coubaly is telling.[223] These trade-industry alliance groups advocate the position that the TVPRA's civil remedy provision, Section 1595, should not be applied extraterritorially, despite the express extraterritorial grant in Section 1596.[224] They argue that because the civil remedy grant is not explicit in the extraterritorial grant, the civil remedy provision should not apply extraterritorially.[225] But that argument is illusory, because Section 1596 covers predicate offenses of human trafficking, which may give rise to a civil penalty under Section 1595.[226] It makes little sense for Congress to expressly include a remedy provision in a statute governing the extraterritorial jurisdiction of predicate conduct. The concern of the Chamber of Commerce and the other trade-industry alliance groups is based on the real fear of having to pay civil damages for known coerced labor in their supply chains. As they state in their briefs:

> Numerous U.S. companies have been, and continue to be, defendants in lawsuits predicated on expansive theories of extraterritoriality based on their dealings in foreign markets. These suits often last a decade or more, imposing substantial legal and reputational costs on U.S. companies that transact business overseas. The Supreme

223. Brief for Trade-Industry Alliance Groups, *supra* note 26, at 9; Brief for Chamber of Commerce, *supra* note 26, at 14–22.

224. Brief for Trade-Industry Alliance Groups, *supra* note 26, at 9; Brief for Chamber of Commerce, *supra* note 26, at 14–22. For reference, § 1596 provides:

> a) In General.—In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591 if—
>
> (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or
>
> (2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.
>
> (b) Limitation on Prosecutions of Offenses Prosecuted in Other Countries.—
>
> No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.

18 U.S.C. §1596.

225. Brief for Trade-Industry Alliance Groups, *supra* note 26, at 10–11; Brief for Chamber of Commerce, *supra* note 26, at 14–22.

226. *See* 18 U.S.C.A. § 1595 (West 2023); 18 U.S.C. § 1596 (2008).

> Court's limiting instructions in its recent extraterritoriality cases helped stem the tide of these suits but regrettably failed to ensure the swift dismissal of some long-running suits or to fully deter new suits.[227]

The problem for the Chamber of Commerce and amici trade groups is that the predicate conduct for U.S.-based companies may actually occur in the United States, thus no extraterritorial reach is necessary, and as for foreign defendants, congressional intent is clear.[228] Human trafficking is an international offense that some countries refuse to prosecute.[229] Holding perpetrators and facilitators liable, both civilly and criminally, for this conduct that occurs abroad when the defendant is present in the United States is the intent of Section 1596 (the extraterritorial grant).[230] The amici argue, that "congressional concern was focused first and foremost on trafficking and its victims, not on those who purportedly benefit on the margins."[231] While this may be true, Congress's consistent broadening of the scope of those who purportedly benefit or even attempt to benefit on the margins demonstrates that Congress is very much concerned with those who financially facilitate forced trafficking through a venture .[232]

The amici attempt to argue that Section 1595 has an extraterritorial reach because it grants a private right of action to a "victim" of human trafficking.[233] But that superficial analysis ignores that Section 1595 allows victims to sue

227. Brief for Trade-Industry Alliance Groups, *supra* note 26, at 2.

228. *See* Daimler AG v. Bauman, 571 U.S. 117, 137 (2014) (discussing general jurisdiction for companies in the United States); 18 U.S.C. § 1596 (outlining how Congress clearly wanted foreign defendants to fall within extraterritorial jurisdiction).

229. *See* 22 U.S.C. § 7101(b)(16) ("In some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking.").

230. 18 U.S.C. § 1596(a)(2) (outlining how the statute is meant to apply to any offense that occurs while the defendant is in the United States).

231. Brief for Trade-Industry Alliance Groups, *supra* note 26, at 21. *But see* Ratha Brief for Members of Congress, *supra* note 11, at 11 ("[A]s alleged, Rubicon was created as a vehicle to sell shrimp manufactured at a discount with forced labor into the U.S. markets for significant profits. This venture . . . is precisely the type of conduct Congress sought to make actionable.").

232. Abolish Trafficking Reauthorization Act of 2022 (codified as amended at 18 U.S.C.A. §1595(a) (West 2023)); Brief for Chamber of Commerce, *supra* note 26, at 26–27 (admitting that Congress intended to focus on those who benefit on the margins by consistently broadening the scope of those who benefit).

233. Brief for Trade-Industry Alliance Groups, *supra* note 26, at 20–21 (explaining that there must be a victim with a specific injury in order to invoke the TVPRA).

defendants who have "knowingly benefit[ed], or attempt[ed] or conspire[d] to benefit, financially or by receiving anything of value from participation in a venture in which that person knew or should have known has engaged in . . . a violation of this chapter."[234] The Act is forming the basis of liability; the Act is defining who can be sued for civil remedy—i.e., those who knowingly benefit, attempt or conspire to benefit, financially by participation in a venture.[235] If a domestic company benefited or attempted to benefit from a venture involving human trafficking in the supply chain, it has no defense under Section 1595 that the actual trafficking occurred on foreign soil. Indeed, Congress knew this when it stated the purpose of the TVPRA is making trafficking a "transnational crime," and that "[i]n some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking."[236]

VII. CONCLUSION

In a spate of recent cases, victim-based claims under the TVPRA have met judicial skepticism, ranging from dismissing claims on a heightened analysis of federal court standing, to engaging in a contorted application of minimum contacts analysis not supported by current precedent.[237] While the United States courts cannot be the arbiter for all human rights abuses in foreign countries, Congress intended victims of human trafficking, including child labor and slave labor, to have a private right of action against domestic corporations that profit from their labor with knowing disregard to the acts of their suppliers in the international supply chain.[238] More critical analysis of the TVPRA's purpose and statutory language, and more advocacy, along with congressional clarity, is needed to incentivize United States corporations to increase their remediation efforts to prevent labor abuses from their suppliers and, when necessary, to stop sourcing from suppliers whom they know or should know to be engaged in these human rights abuses.

234. 18 U.S.C.A. § 1595(a) (West 2023).

235. *Id.*

236. 22 U.S.C. §§ 7101(b)(16), 7101(b)(24).

237. *See* cases discussed *supra* Parts IV–V (discussing cases that courts dismissed on various grounds, ranging from standing to a lack of jurisdiction).

238. 18 U.S.C.A. § 1595(a) (West 2023) (stating the statute offers victims the ability to file a civil action against a perpetrator who knew or should have known that it engaged in human trafficking).