ORAL ARGUMENT SCHEDULED FOR DECEMBER 8, 2022

Case No.: 21-7135

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JOHN DOE 1, *et al.*,
Plaintiffs-Appellants,

v.

APPLE INC., *et al.*,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia, Civil Action No. 19-cv-03737 (CJN)

PLAINTIFFS-APPELLANTS' REPLY BRIEF

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I. SUMMARY OF ARGUMENT

Appellees Apple, Alphabet, Microsoft, and Tesla filed their Response Brief ("Response") attempting to defend the District Court's dismissal of Appellants' claims under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595 *et. seq*., and their common law claims. The Response does ***not*** address that each of the District Court's six legal rulings was erroneous as a matter of law.

In addition to applying erroneous legal standards, "in dismissing the complaint, the District Court inappropriately discredited significant allegations on which Plaintiffs' claims relied, failing to treat the complaint in the light most favorable to the Plaintiffs, and to draw reasonable inferences in the Plaintiffs' favor, as required with respect to a motion to dismiss under Rule 12(b)." *Christine Asia Co. v. Ma*, 718 F. App'x 20, 23 (2d Cir. 2017).

With respect to the gateway issue for the TVPRA, whether there was a "venture" under section 1595(a), the District Court erred by using an unprecedented definition of "venture." Appellees fail to acknowledge that the District Court's erroneous definition, derived from two dictionaries, conflicts with all other federal courts. Like the District Court, Appellees also improperly disregard the allegations and then argue for alternative factual conclusions.

In arguing that Appellants lacked Article III standing to sue because their injuries are not "fairly traceable" to Appellees, Appellees fail to credit Appellants' factual allegations showing that Appellees were in a venture with the mining companies that directly injured Appellants, and that their injuries were fairly traceable to that venture. Appellees attack Appellants' venture allegations as insufficient and irrelevant, but both the Supreme Court and this Circuit have made clear that in assessing standing, the District Court must assume a plaintiff's claims are meritorious. If the District Court had properly accepted as true Appellants' venture theory, or at least their factual allegations, Appellees, as co-venturers, would be jointly and severally liable for Appellants' injuries that were fairly traceable to the venture.

Appellees treat the issue of extraterritorial jurisdiction of TVPRA civil claims as a close question and gloss over that the District Court is the first federal court to rule that section 1596(a)'s extension of extraterritorial jurisdiction does not apply to civil claims. The District Court's outlier decision is wrong as a matter of law.

Regarding the District Court's ruling that Appellants failed to state a claim that they were subjected to forced labor under section 1589, Appellees fail in their search for ambiguity in the District Court's explicit and erroneous ruling that forced labor claims are determined exclusively by whether Appellants began work

voluntarily, regardless of whether they were later coerced to continue working, and required physical coercion. Both of these requirements conflict with the language of section 1589 and years of federal precedent. The District Court also failed to credit Appellants' factual allegations in dismissing the forced labor and trafficking claims.

Finally, Appellees again dispute Appellants' factual allegations regarding whether Appellees were in a venture with their mining companies and argue Appellants' common law claims fail because Appellees did not have sufficient connection to Appellants' injuries.

Appellees deny they could be held accountable for the horrible injuries and gruesome deaths of the child miners before the Court. But that question was resolved with the 2008 enactment of section 1595(a) creating beneficiary liability for co-venturers. See Appellants' Opening Brief ("OB") at 2-4, 11-12 (discussing scope of 2008 amendments adding beneficiary liability).

Appellants' claims are well within the text, legislative history, and purpose of the TVPRA, and are consistent with the great weight of federal jurisprudence applying the TVPRA. The District Court's unprecedented dismissal decision effectively repeals the TVPRA and must be reversed.

II. ARGUMENT

A. The District Court Erred in Finding Appellees Were Not in a "Venture" Within TVPRA § 1595(a).

TVPRA section 1595(a) allows a civil claim to be brought against any person who "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 [trafficking or forced labor]." 18 U.S.C. § 1595(a)(emphasis added). The District Court addressed only whether Appellees were in a "venture." *See* JA 117-19.[1]

The District Court was the first federal court to use dictionaries as its sole authority when interpreting the meaning of "venture" within TVPRA section 1595(a). *See* JA 117-118 and OB 13-17. The Court in *Doe #1 v. Red Roof Inns, Inc.*, 21 F.4th 714 (11th Cir. 2021), subsequently referred to dictionaries to define "venture," but as discussed below, unlike the District Court, that Court's *application* of its venture definition referred to and was consistent with the great weight of authority.

A significant number of federal courts, including the Courts of Appeal for the First and Tenth Circuits, used a parallel TVPRA sex trafficking provision that defines "venture" as "any group of two or more individuals associated in fact,

[1] See note 7, *infra*, for discussion of the "participation" issue.

whether or not a legal entity." 18 U.S.C. § 1591(e)(6). *See* OB at 14-15. The Human Trafficking Institute, which has extensive experience seeking enforcement of TVPRA claims, urges acceptance of this definition of venture as it presents a functional definition that should be read consistently throughout the TVPRA. *See* Amicus Brief of Human Trafficking Institute ("HTI Amicus"), 6-9.

Without addressing the reasoning of the federal courts that have adopted this definition of "venture," Appellees reject this approach arguing that section 1591(e) restricts that definition for use "***only*** '[i]n this section.'" Response at 31 (quoting section 1591(e); emphasis added). Appellees' argument depends entirely on their sly insertion of the word "***only***," which is **not** present in the statutory language. The actual language is:

> (e) In this section: . . .
> (6) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

18 U.S.C. § 1591(e)(6). There is no inclusion of "only" that would prevent this definition from informing other TVPRA provisions using the word "venture," as numerous federal courts have done.

Further, there is a well-recognized presumption of statutory construction "that Congress uses the same term consistently in different statutes." *Nat'l Treasury Employees Union v. Chertoff*, 452 F.3d 839, 857 (D.C. Cir. 2006). "When Congress uses the same language in two statutes having similar purposes,

particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). Here, both sections 1591(e)(6) and 1595(a) were enacted including the word "venture" in the same TVPRA statutory scheme. It is highly doubtful that Congress intended for "venture" to have a different meaning between two provisions of the same law.

In addition, the District Court cited *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Assoc.*, 141 S. Ct. 2172 (2021), noting that it requires that "venture" be defined "by the context of the surrounding statutory text." JA 117. However, the District Court failed to follow this interpretative rule in using dictionaries and ignoring the text of the TVPRA's statutory scheme. OB, 14-15; HTI Amicus, 6-7.

After their misleading insertion of "only" to restrict section 1591(e)(6), Appellees then argue that the two Circuit decisions Appellants cite for application of this definition of "venture" to section 1595(a) merely refer to the definition "in passing." Response at 31, n. 5. Quite the contrary, in *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017), the First Circuit referred to *and applied* section 1591(e)(6)'s definition of "venture" in a section 1595(a) case. Likewise, in *Bistline v. Parker*, 918 F.3d 849, 873 (10th Cir. 2019), the Tenth Circuit, following *Ricchio's* lead, referenced *and applied* the 1591(e)(6) definition of "venture." *See*

also, HTI Amicus at 9; AOB at 15 (both collecting section 1595(a) cases applying 1591(e)(6)'s definition of "venture").

Even if section 1591(e)(6) has no relevance to the definition of "venture" in section 1595(a), the District Court's alternative of a narrow definition from a dictionary is not appropriate to serve the text and remedial purpose of the TVPRA. Other federal courts, finding the criminal provision too narrow, instead assess whether "***[i]n the absence of a direct association***, [whether there was] . . . ***a continuous business relationship . . . such that it would appear that the trafficker and the hotels have established a pattern of conduct or could be said to have a tacit agreement***." *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 970 (S.D. Ohio 2019) (emphasis added). Numerous other courts have followed *Wyndham Hotel*'s lead and applied this broader standard. OB at 16-17 (collecting cases).

Appellees reject this broader test asserting that there is "no authority" for it and characterizing the cases cited by Appellants as merely section 1591 cases. Response at 32. This is untrue; every case cited by Appellants for the *Wyndham Hotels* test was brought as a civil claim under section 1595(a), and the issue was the definition of "venture" under that section. OB, 16-17. For example, the *Wyndham Hotels* court itself rejected the knowledge requirement of section 1591(e)(4)'s "participation in a venture" definition since the civil liability

provision at issue, section 1595(a), required only a "should have known" standard. 425 F. Supp. 3d at 969-70. [2]

It is Appellees that lack authority for tossing the many well-reasoned decisions defining "venture" as either an "association in fact" or a "tacit understanding" informed by a continuous business relationship[3] and advocating for the District Court's first-of-its-kind dictionary definition of "commercial enterprise." JA, 118. The Court in *Red Roof Inns* also referred to two dictionaries in defining "venture" as "a common undertaking or enterprise involving risk and potential profit," 21 F.4th at 724-25, but *in application*, the decision was consistent with the great weight of authority in terms of what conduct would establish a "venture." Indeed, the *Red Roof Inns* Court cited *Ricchio* with approval stating:

> we think our reasoning is consistent with the disposition there. In *Ricchio*, the plaintiff sued the owner and live-in operators of a hotel where she was held hostage and sexually abused. *Id.* at 556. The First Circuit held that the plaintiff had plausibly alleged that the operators association with the plaintiff's sex trafficker was a "venture" because her abuser "had prior commercial dealings with the [operators], which the parties wished to reinstate for profit." *Id.* at 555. Considering these dealings, the plaintiff also plausibly alleged that, by renting a room to the abuser, the operators were "associating with him in an effort to force [the plaintiff] to serve their

[2] The Eleventh Circuit likewise concluded that section 1591(e)(6)'s definition of venture was too narrow with its higher scienter requirement for criminal liability. *Red Roof Inns, Inc.*, 21 F.4th at 724.

[3] In application, the two widely-accepted tests are virtually identical as federal courts applying the "associated in fact" language of section 1591(e)(6) nearly always revert to looking at whether there was a tacit agreement and/or a continuous business relationship. *See* OB at 16-17.

> business objective." *Id.* We agree that these kinds of allegations would establish a hotel operator's participation in a venture with a sex trafficker.

21 F.4th at 725-26. This application is functionally equivalent to the test applied by *Wyndham Hotels* in requiring a continuous business relationship with some association with the sex trafficking venture's business by the hotel operator.

In sharp contrast, the District Court's application of its "commercial enterprise" definition erroneously required some type of formal agreement to establish a venture, and was silent on the impact of a prior business relationship. *See* JA 117-19. The District Court stands alone in using the word "commercial," which connotes a formal agreement. Nothing in the TVPRA limits its scope to "commercial" ventures, and there are numerous possible types of trafficking ventures that would not normally be considered "commercial." *See* HTI Amicus at 7-9.

After improperly rejecting Appellants' allegations as inadequate for failing to establish a "commercial enterprise," the Court noted Appellants had one allegation that came close to alleging a "commercial enterprise" between Tesla and Glencore if they had "finalized an agreement." JA 119, n. 4 (quoting FAC ¶ 30).[4] This confirms the District Court required a formal agreement to establish a

[4] Appellants conceded that this one "formal agreement" was after they had suffered their injuries, JA 150-51, but cited this as an example of the strengthening of the ongoing relationship between Tesla and Glencore, its main cobalt supplier.

"venture." Such a requirement conflicts with the text and purpose of the 2008 amendments to section 1595(a), which "ma[de] it easier for victims of trafficking violations to bring civil suits" to include co-venturers who merely benefit from participation in a venture. *Plaintiff A v. Schair*, No. 2:11-cv-00145-WCO, 2014 WL 12495639, at *3 (N.D. Ga. Sept. 9, 2014)(quoting section 1595(a)).

Requiring a formal agreement between venturers engaged in criminal activity severely restricts section 1595(a) and ignores that most traffickers are not going to put evidence of their illegal conduct in writing. If the District Court's decision is upheld, traffickers will know they can make their criminal enterprises venture-proof under the TVPRA merely by avoiding formal agreements.

Realizing that a "formal agreement" standard is indefensible, Appellees momentarily distance themselves from this requirement. Response at 30-31.[5] Several pages later, however, Appellees fault Appellants' venture allegations, saying the "complaint alleges only a single agreement between any Defendant and any supplier of Congolese cobalt." *Id*. at 39.

The District Court's outlier standard is erroneous. The common thread of the possible "venture" tests from every other federal court is an association in fact that can be demonstrated through a continuous business relationship that is the product

[5] Appellees assert that the Court in *Red Roof Inns* did not require a formal agreement, Response at 30-31, a fact Appellants agree with, but that does not cure that the District Court required one.

of a tacit understanding or some other indication of an association. Appellants' allegations, taken as true and given the benefit of all reasonable inferences, establish that Appellees were in a venture with the mining companies that supply them with cobalt. While not necessary for Appellees' venture liability for the acts of their mining companies, Appellees were also in a venture with each other.

With respect to Appellees' venture relationships with the specific mining companies that supplied them cobalt, Appellants alleged there was a tacit agreement or an association in fact between each of the Appellees and one or more of the three main cobalt mining companies.[6] *See* OB at 18 (listing specific relationships).

These relationships were continuous and long term. Going back to at least 2016, Appellees were obtaining their cobalt from the notorious mining companies Glencore and Huayou and were getting grilled by the press and Amnesty International about what they were doing to prevent known child labor at these mines. *See* OB, 18-19. In 2019, when Appellants' counsel interviewed the injured

[6] Appellees' assertion that this is a "new" venture theory linking each tech company to their specific suppliers of cobalt, Response at 14, 37-38, 41, is objectively false. As the discussion that follows establishes, the Complaint certainly made detailed allegations establishing these direct relationships. Further, these direct relationships were central to Appellants' position in their Opposition to the Motion to Dismiss. *See* ECF 38 at 12-14.

child miners, Appellees were using the same cobalt suppliers they were using in 2016. *See* FAC ¶¶ 73,77,80,82,85.

Across those ***three or more years***, Appellees were not receiving their cobalt from their mining companies Glencore and Huayou for free; Appellees must have had an agreement with their cobalt suppliers – whether formal, informal, or tacit – to supply cobalt in exchange for payment. Indeed, Appellees' various supply chain disclosure forms identify their cobalt suppliers as Glencore and/or Huayou, not a cobalt refiner. JA 141. The existence of some form of association is a reasonable inference to be drawn from these long-term arrangements. In addition, Appellees have asserted to the public, regulators, and the District Court that they have binding policies preventing child labor throughout their supply chains, which would include the cobalt mines in DRC. *See* ECF No. 33-1 at 4,6,23. They cite to these policies on their respective websites, *see id*. at 6, n.2, and they asserted to the District Court that "***Defendants' policies prohibit*** certain unlawful labor practices, including the use of ***child labor***, ***at any tier of the supply chain and require regular supplier audits to evaluate compliance***." *Id*. at 6 (emphasis added). They assured this Court that these policies are in place at the mining companies. Response at 8,9,23,24,42,43.

In discussing their policies, Appellees note Appellants reference them in their Complaint and lament they are not given credit for making an effort to stop

child labor in the cobalt mines. *See id*. at 8-9, 24, 42-43. But Appellants did not cite the policies for a debate over whether Appellees are doing enough to stop child labor; Appellees' assertion of their right to police child labor in the mines from which they source cobalt reinforces they have some form of agreement with their cobalt mines to comply with these policies. Amnesty International's research confirms this; after interviewing the major tech companies sourcing DRC cobalt, Amnesty observed "[m]any of these companies stated that they have a zero tolerance policy when it comes to child labour in their supply chains. Some of these companies refer to contractual requirements that they impose on direct suppliers to ensure that they adhere to these types of prohibitions." FAC ¶ 117. Indeed, Apple asserted that upon learning of child labor at one of its cobalt suppliers, Huayou, it conducted an audit. *Id*. ¶ 105. In 2020, Huayou announced it would no longer use child labor because its customers demanded it. *Id*. ¶ 106.

Appellants alleged that Appellees have been in a continuous business relationship with their supplier cobalt mines since before 2016. Appellants have also alleged there is some form of association or agreement between Appellees and their cobalt mines to provide the basis for enforcing the "zero tolerance" policies that Appellees claim to have that reach these cobalt mines. Unless the District Court's ruling is correct that Appellants must allege, at the pleading stage and pre-discovery, that they have evidence of formal agreements between Appellees and

their cobalt mines, Appellants' Complaint has plausible allegations of a venture between each of the Appellees and their cobalt suppliers.

Appellants also alleged an overarching venture between Appellees to take a more direct role and protect their access to DRC cobalt by misleading consumers and regulators about the extent of illegal child labor in cobalt mining. Specifically, Appellants alleged Appellees collaborated to require Glencore and Huayou to join the Fair Cobalt Alliance to mislead the public and protect their cobalt supply chains. Appellees also collaborated within the venture to fund a bogus model mining project with PACT to be shown to the public as a marker of progress. OB at 21-22.

The District Court failed to credit these allegations, JA at 117, n.3, and Appellees ignored them, falsely asserting that Appellants did not raise this issue in their Opening Brief. Response at 34, n.6. While this overarching venture is unnecessary for the Appellees to be in a venture with their cobalt suppliers, it is plausibly alleged and shows a more direct role by Appellees in the venture's dirty business.

* * *

Appellees respond to the cobalt supply chain venture allegations with a litany of factual arguments improper in the context of a motion to dismiss. Appellees lead with the objectively false assertion that the Complaint does not

allege "Defendant-and-purveyor ventures." Response, 38. The allegations discussed above link every Appellee tech company with their specific cobalt suppliers. OB, 17-19.

Appellees then assert that the Complaint does not allege they bought cobalt from Glencore; there are "mining operators like Kamoto Copper Company [that] procure cobalt." Response at 39. Based on their extensive research, Appellants specifically alleged that Kamoto Copper Company (and the other specific mines at issue) is "owned and controlled by Glencore," *see e.g.*, FAC ¶¶ 30,32,34,38, which the tech companies do purchase cobalt from.

Relatedly, Appellees speculate about the complexities of the cobalt supply chains, and the various labor brokers, cobalt brokers, mining operators, and refiners that could conceivably be involved. Response, 35, 40, 46. If there was a specific person who was involved in their injuries, Appellants identified him as being within the identified venture. For example, several of the injured child miners identified "Ismail" as the person who recruited them and directed their work. *See, e.g.*, FAC ¶¶ 36,42,44, 50,59,61. The Complaint makes clear that Ismail was working at Glencore mines, *see id.*, and was therefore an agent or employee of Glencore, a key member of the venture.

More fundamentally, as Appellants stressed to the District Court, Appellees' various supply chain disclosure reports indicate that they obtain their cobalt from

Glencore or Huayou, for example, and ***not*** some refiner. JA 141. In any event, a motion to dismiss is not the place for Appellees to assert competing facts to those alleged in the Complaint regarding their cobalt sources. *Doe v. Princeton Univ.*, 30 F.4th 335, 342 (3d Cir. 2022) ("The proper place to resolve factual disputes is not on a motion to dismiss, but on a motion for summary judgment."). Nor is it the place for Appellees to advocate for any alternative venture theory. As this Court held in *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015), "a complaint survives a motion to dismiss even '[i]f there are two alternative explanations, one advanced by [the] defendant and the other advanced by [the] plaintiff, both of which are plausible.'" *Id*. at 1129 (quoting *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir.2011)).

Finally, Appellees weave throughout their Response their fundamental position: they claim to be mere innocent purchasers of cobalt and have absolutely no responsibility for the conditions in the mines of their cobalt suppliers. *See, e.g.*, Response at 2,36,41. They claim to be no different than a "mobile-phone purchaser" in terms of being in a venture with their cobalt suppliers. *Id*. at 37. And most vociferously, they assert that Appellants offer no limiting principle to their "global-supply-chain theory." *Id*. at 36-37.

As they informed the District Court, JA 137, Appellants' limiting principle is clear – the terms of section 1595(a) determine the scope of TVPRA civil

liability: any person who "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 [trafficking or forced labor]." 18 U.S.C. § 1595(a) (emphasis added).

As Appellants demonstrated herein, whether with a tacit, informal, or formal agreement, Appellees each joined and participated in[7] a long-term business relationship with the mining companies that supplied them with cobalt, which constituted a "venture." While not at issue on this appeal, Appellees plainly "knew or should have known" their cobalt suppliers were using forced or trafficked child labor. *See* ECF 38, 4-9.

A mere mobile-phone purchaser, who may know or should have known of forced child labor in cobalt mining, has not entered into any agreement with (or even met with) the cobalt mines that are abusing the child miners. Under no stretch

[7] The District Court did not rule on what "participation in" the venture means. OB at 13, n.6. Appellees acknowledged the limited ruling, Response at 27, n.3, but inexplicably cite several dictionaries to probe the meaning of "participation." *Id*. at 28-29. Federal courts are virtually unanimous in agreeing that no overt act of participation in the wrongful act is required as this would negate the "should have known language" of section 1595(a). Instead, "participation in" can be established vicariously through a person being in and supporting a venture that they knew or should have known was engaged in violations of the TVPRA. *See* ECF No. 38 (Opposition to Motion to Dismiss), at 14-17. If the Court finds there is a "venture" in this case, Appellees certainly participated in it through years of financial support to their cobalt suppliers, tacit acceptance of forced child labor, and efforts to protect the supply chain venture from public scrutiny. *Id*.

could such a consumer be in a "venture" with the cobalt mines. For the same reason, neither is the retailer of such phones possibly in a venture with any cobalt mine. Because of the "venture" requirement, the universe of co-venturers is limited to the major tech companies, such as Appellees, that directly associate with the cobalt mining companies and are in an ongoing business relationship with them despite having knowledge of forced or trafficked child labor working in the mines.

Appellees' attempt at fear-mongering with the specter of floodgates of cases was decisively answered by one court: "***speculative concerns about opening the floodgates for other kinds of corporate liability…[are] untethered to the statutory language itself***." *A.C. v. Red Roof Inns, Inc*., No. 19-cv-4965, 2020 U.S. Dist. LEXIS 106012, at *11-13 (S.D. Ohio June 16, 2020)(emphasis added). Again, that is the answer – Appellees' speculative horrors if this Court fairly interprets the TVPRA will not come to pass; only persons who participate in a "venture" with those who violate the TVPRA would be in danger of facing liability under the TVPRA. And they should be, as Congress intended.

B. Appellants Had Article III Standing to Sue Since Appellees Were in a "Venture" with their Cobalt Suppliers.

Appellants demonstrated they had standing to sue Appellees for damages, OB, 25-26, and to obtain injunctive relief. OB, 26-27. As Appellants demonstrated in the preceding section and OB, 11-25, they properly alleged Appellees were in a

"venture" with the cobalt mines that injured or killed the child miners. ***Appellants' injuries are thus "fairly traceable" to the "venture***," and Appellees, as co-venturers, are jointly and severally liable for the injuries. OB, 25-26.

The District Court denied standing by explicitly holding "the 'venture' Plaintiffs allege is really no 'venture' at all." JA, 109. In finding there was no "venture" the District Court, as noted above, applied a legally erroneous definition and failed to credit Appellants' factual allegations. *Id*., 109-111. Appellees appear to deny that the District Court's ruling on standing was dependent on its finding there was no venture, Response, 21-22, but their Response assumes it was and merely re-argues that they were not in a venture relationship with their mining companies. *Id*., 22-24.

When assessing standing, Appellants' substantive claim of venture liability should have been assumed to be meritorious. *See, e.g., Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd sub nom*., *District of Columbia v. Heller*, 554 U.S. 570 (2008). The District Court did not assume the merits of the claims and also failed to take Appellants' venture allegations as true. Either way, the denial of standing was based on an erroneous finding that there was no venture.

C. The District Court Erred in Being the First Federal Court to Conclude that Section 1596(a) Does Not Extend Civil TVPRA Claims Extraterritorially.

Appellees declined to address that the District Court was the first, and remains the only, court to rule that section 1596(a) does not extend *civil* TVPRA claims extraterritorially post-2008 amendments. *See* OB, 28-30; Amicus Curiae Brief of Legal Scholars With Expertise in Extraterritoriality and Transnational Litigation ("Legal Scholars Brief"), 13-16 (both collecting cases). In doing so, the District Court ignored the central tenant of *RJR Nabisco v. European Community*, 579 U.S. 325, 338 (2016), that a statute extends extraterritorially if there is a "textual clue" to support doing so, and section 1596(a) certainly does. *See* Legal Scholars Brief, 9-11.

Ignoring the TVPRA's text and, again consulting a dictionary, the District Court erroneously concluded that the word "offense" in section 1596(a) referred only to criminal claims so that civil claims brought under it are not extraterritorial. JA, 125-26. Appellees merely restate the District Court's analysis but do not directly rebut the specific textual arguments made by Appellants or the Legal Scholars Brief. *See* Response, 55-60.[8] The District Court's dictionary-based limitation of "offense" to criminal violations has no support in the statutory text.

[8] An amicus brief filed by the U.S. Chamber of Commerce and other business organizations ("Chamber Brief") argues that a stricter rule of interpretation should apply to causes of action like section 1595(a) because they

As Appellants previously established, OB, 30-32, section 1596(a) expressly extends extraterritorial jurisdiction over any "offense" of the six it lists, including sections 1589 (forced labor) and 1590 (trafficking), the basis for Appellants' claims. Section 1595(a) in turn provides a civil remedy to any "individual who is a victim of a violation." It therefore makes no difference whether the claim is civil or criminal because any violation of those offenses is extended extraterritorially. Any violation of section 1589's prohibition of "forced labor," for example, must satisfy the substantive elements of the "offense" detailed in that section. The elements of any substantive violation do not change if the case is civil versus criminal; the nature of the "offense" is identical.

The sole distinction the statutory scheme makes between civil and criminal cases is "[a]ny ***civil action*** filed under this section shall be stayed during the pendency of any ***criminal action*** arising out of the same occurrence in which the

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are more likely to cause international friction. *Id.* at 14-15. But the Supreme Court has never suggested that a different presumption applies to causes of action than to other provisions. William S. Dodge, *Does the TVPRA Apply Extraterritorially? Thoughts on the U.S. Chamber of Commerce Amicus Brief in Doe v. Apple*, Transnational Litigation Blog (Oct. 20, 2022), https://tlblog.org/does-the-tvpra-apply-extraterritorially/. The Chamber also points to the causes of action in the Anti-Terrorism Act and Torture Victim Protection Act as examples of causes of action that clearly apply extraterritorially, Chamber Brief at 9-10, but upon inspection, those provisions provide no clearer indication than the TVPRA's civil remedy. Dodge, *supra*. Moreover, the specific foreign policy issues, Chamber Brief at 14-15, and political and business policy concerns, *id*. at 25, 26, 32, that the Chamber Brief attempts to introduce were not raised by any parties and are not before the Court.

claimant is the victim." 18 U.S.C. § 1595(b)(1) (emphasis added). Thus, Congress recognized that the criminal and civil "offenses" have identical elements and are based on identical substantive provisions and can arise out of identical facts, distinguished the two types of cases with specific criminal vs. civil descriptors, and prioritized criminal cases. If Congress could make this distinction, it surely would have made the same distinction if it intended only criminal violations to extend extraterritorially. Thus, step one of the *RJR Nabisco* test is satisfied because of the strong textual indication of extraterritorial jurisdiction. *See* OB, 28-33; Legal Scholars Brief, 10-21.

There is likewise no textual support for the District Court's assertion, repeated by Appellees, Response, 57, that Congress could have added section 1595 to the provisions extended extraterritorially by section 1596(a). JA, 124. Section 1596(a) extended such jurisdiction to offenses, not causes of action. Section 1595(a) provides a civil cause of action for TVPRA offenses, six of which are predicate offenses that were extended extraterritorially by section 1596(a). *See* OB, 31-32; Legal Scholars Brief, 15-16, n. 3.

Congress enacted both section 1596(a) and section 1595(a) in the same title of the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, §§ 221, 223(a), 122 Stat. 5044. This supports that the decision to both extend the six predicate offenses extraterritorially and to establish

a civil cause of action that included the six extraterritorial predicates in the same bill was a deliberate, structural choice that did not require any additional language to accomplish what the simple statutory scheme already had.

Even if this direct textual indication is insufficient to extend Appellants' civil claims extraterritorially, section 1595(a) contains an affirmative indication of extraterritorial application because it incorporates extraterritorial predicates. *See* OB, 33. As the Supreme Court reasoned in *RJR Nabisco*, "[t]he most obvious textual clue is that RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct." 579 U.S. at 338. Applying this analysis to the TVPRA, the Fourth Circuit found section 1595(a) "reflects congressional intent that it applies extraterritorially to the extent that a plaintiff seeks redress for a predicate offense that is itself extraterritorial." *Roe v. Howard*, 917 F.3d 229, 242 (4th Cir. 2019)(internal quotations omitted).[9]

Appellants here seek civil redress under section 1595(a) for the offenses of forced labor and trafficking, two of the six predicate acts made extraterritorial by section 1596(a). For a detailed analysis that these claims are extraterritorial because section 1595(a) incorporates extraterritorial predicates, see Legal Scholars

[9] Appellees attempt to limit *Roe* because the foreign violations were on U.S. territory, Response, 61-62, but the essence of the Fourth Circuit's analysis was a faithful application of the *RJR Nabisco* language to identify predicate acts under the TVPRA that were extraterritorial in scope. *See Roe*, 917 F.3d at 243-45.

Brief, 13-16. This conclusion is strongly reinforced by an examination of the structure and legislative history of section 1595. *Id*., 17-21. The District Court did not in engage in *any* predicate acts assessment in its erroneous decision. *See* JA, 124-25; Legal Scholars Brief, 15-16.

While not necessary in this case because step one of the *RJR Nabisco* test is satisfied, Appellants also satisfy step two because the "focus" of section 1595(a)'s inclusion of beneficiary liability is domestic. OB 33-34. The very essence of the 2008 amendments was to expand section 1595(a) to include beneficiary liability. OB, 11-12. The District Court's erroneous conclusion that the focus of the TVPRA is where the injuries occurred, despite acknowledging that the "benefit prong" "focuses on benefits that accrue to the parties," JA 127, conflicts with the reasoning of *RJR Nabisco* and a recent decision of this Court holding that "gravamen" of a TVPRA claim is benefiting from forced labor. *Rodriguez v. Pan Am. Health Org*., 29 F.4th 706, 716 (D.C. Cir. 2022).[10] Further, it disregards the text of the TVPRA. Legal Scholars Brief, 21-24.

The District Court's erroneous ruling that civil claims brought under the TVPRA are not extraterritorial severely restricts the scope of the TVPRA and, if

[10] Appellees' attempt to distinguish *Rodriguez* fails because Appellees likewise "took actions" to create their benefits in the United States by participating for years in a venture with their cobalt mines that provided them with cheap cobalt mined by children and increased their domestic profits. Response, 64, n.9.

upheld, will deprive many victims of its remedies. Congress expanded the remedial provisions of the TVPRA with each round of amendments; the District Court's outlier decision undoes much of that progress. Accordingly, the District Court's decision must be reversed.

D. The District Court Erred in Resolving Facts on a Motion to Dismiss and in Applying an Erroneous Legal Standard in Concluding that Appellants Were Not Subjected to Forced Labor.

Appellants demonstrated that the District Court erred in resolving on a motion to dismiss key issues of a forced labor claim that are inherently factual, including reasonableness, coercion, and intent, all without fully crediting their allegations or giving them the benefit of all reasonable inferences. OB, 36-39. Appellees virtually ignore this independent basis for reversing the District Court's ruling. *See* Response, 52. As the young, starving, and illiterate child miners were especially vulnerable, these factual issues of their specific situations should have been taken seriously. *See* Amicus Curiae Brief of International Legal Scholars (on Forced Labor Issues)("Forced Labor Amicus"), 17-22.

In addition, Appellants demonstrated that, as a matter of law, the District Court applied an erroneous legal standard to determine whether Appellants were subjected to "forced labor." OB, 39-51. The District Court explicitly and unambiguously stated its test:

> Section 1589 (a)(2) does not criminalize the hiring of people desperate for money; it criminalizes **physical coercion** in the act of **soliciting** the work itself. Plaintiffs plead no facts suggesting that they **were physically forced** to seek work in the mines.

JA, 121 (emphasis added). Both the focus on hiring conditions, regardless of whether the children were later coerced to continue working, and requiring physical coercion are wrong as a matter of law. OB, 39-51; Forced Labor Amicus, 5-10 (coercion can occur at any time, not just in hiring), 10-16 (physical coercion is not required).

Appellees try to create ambiguity to mask this legally erroneous standard, but there is simply no denying the standard applied by the District Court was erroneous. Contrary to Appellees' argument, Response, 50, the various individual labor brokers, guards and other direct perpetrators are treated by the Complaint as agents or employees of the cobalt mines that Appellees were in a venture with. *See, e.g.*, FAC ¶¶ 36,42,44, 50,59,61.

While not an issue on this appeal, contrary to Appellees' assertion, Response, 50, there is no question that they "knew or should have known" that their cobalt mine co-venturers were using forced child labor. *See* ECF 38, 4-9. Appellees' string of improper factual arguments cannot cure that the District Court applied an erroneous legal standard.

E. The District Court Erred in Concluding that Appellants Failed to State a Claim for Trafficking.

Appellants demonstrated that their claim under section 1590(a) of the TVPRA for trafficking, virtually ignored by Appellees below and by the District Court, *see* JA 123, was adequately alleged. OB, 51-52. Appellees inaccurately assert that Appellants did not raise that "recruitment" alone was sufficient for a trafficking claim below and therefore waived it. Response, 52-53. Appellants certainly did assert that illegal recruitment was sufficient to state a claim. *See* ECF No. 38, at 32-33. Appellants' argument on appeal that they do not also need to show they were forced to work after their illegal recruitment, OB, 51-52, was in response to the District Court's erroneous ruling that they did. JA 123. This added hurdle is wrong as a matter of law, and Appellants otherwise alleged a valid trafficking claim. OB, 52.

F. The District Court Erred in Dismissing Appellants' Claims for Unjust Enrichment, Negligent Supervision, and Intentional Infliction of Emotional Distress Based on the Court's Erroneous Finding that Appellees Were Not in a "Venture" With Their Cobalt Suppliers.

The District Court dismissed Appellants' common law claims solely based on the Court's erroneous conclusion that Appellees were not in a "venture" with their cobalt suppliers and, therefore, had no legal connection to or responsibility for Appellants' injuries incurred while mining cobalt. JA 128-30. If as demonstrated in section II.A, *supra*, Appellees *were* in a venture with the direct

perpetrators of these common law torts, the cobalt mines that supply them, then the connection is sufficient to hold Appellees jointly and severally liable for their injuries attributable to the venture. OB, 53-54.

III. CONCLUSION

The District Court's six rulings in this case conflict with significant federal jurisprudence and ignore the text, purpose, and legislative history of the TVPRA. The decision should be reversed in all respects to avoid the effective repeal of this important remedial statute that protects victims, often children, of trafficking and forced labor.

Respectfully submitted on this 11th day of November 2022,

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CERTIFICATE OF COMPLIANCE FOR APPELLANTS' OPENING BRIEF

Pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(B)(ii), I certify that Plaintiffs-Appellants' Reply Brief complies with applicable page and word limits in that it has a text typeface of 14 points and contains 6,467 words, less than the 6,500 words permitted.

Dated: November 11, 2022

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CERTIFICATE OF SERVICE

I hereby certify that, on November 11, 2022, I electronically filed the foregoing with the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send a notice of filing to all registered users, including counsel for all parties.

Date: November 11, 2022

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