

ORAL ARGUMENT NOT YET SCHEDULED

No. 21-7135

**IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

DOE, ET AL.,*Plaintiffs-Appellants,***v.****APPLE INC.,***Defendants-Appellees.*

**On Appeal from the
United States District Court for the District of Columbia
The Honorable Carl J. Nichols
Civil Action No. 1:19-cv-03737 (CJN)**

**BRIEF OF INTERNATIONAL LEGAL SCHOLARS AS *AMICI CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND SEEKING REVERSAL**

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

I. PARTIES AND *AMICI*

Except for any *amici* who has not yet entered an appearance in this case as of the filing of the Brief for Appellants, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Brief for Appellants.

II. RULING UNDER REVIEW

Reference to the ruling under review appears in the Brief for Appellants.

III. RELATED CASES

Reference to any related cases pending before this Court appears in the Brief for Appellants.

Dated: August 15, 2022

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the *Amici* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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**CONSENT TO FILE
AND SEPARATE BRIEFING STATEMENT**

Pursuant to D.C. Circuit Rule 29(b), undersigned counsel for *Amici* represent that counsel for all parties have been sent notice of the filing of this brief. Plaintiffs-Appellants and Defendants-Appellees consent to the filing of this brief.

Pursuant to D.C. Circuit Rule 29(d), undersigned counsel for *Amici* certify that a separate brief is necessary. *Amici* are legal experts in the fields of international law and human rights. They teach and have written extensively on these subjects. While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law, respect for human rights, and the principles of accountability for perpetrators and redress for victims.

Amici recognize the prevalence and profound consequences of human trafficking and forced labor. They also recognize that children are frequently victims of these international crimes. They believe that the conduct alleged in this case, if true, would constitute violations of the prohibitions on forced labor and human trafficking as well as the heightened protections afforded to children under international law. *Amici* are concerned that these issues were not addressed in any manner in the district court's decision. Furthermore, *Amici* are not aware of any other group that is addressing these issues. Accordingly, *Amici* would like to provide the Court with an additional perspective on these issues informed by

international law and U.S. treaty obligations. They believe this submission is necessary and will assist the Court in its deliberations.

Dated: August 15, 2022

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GLOSSARY

Bureau of International Labor Affairs (ILAB)

Democratic Republic of the Congo (DRC)

International Labour Organization (ILO)

Trafficking Victims Protection Act (TVPA)

Trafficking Victims Protection Reauthorization Act (TVPRA)

United Nations (U.N.)

United Nations Children's Fund (UNICEF)

United Nations Office on Drugs and Crime (UNDOC)

STATUTES AND REGULATIONS

All applicable statutes and regulations are reproduced in Plaintiffs-Appellants' Brief.

INTEREST OF *AMICI CURIAE*

Pursuant to Fed. R. App. P. 29, *Amici* respectfully submit this brief in support of Plaintiffs-Appellants.¹ Both parties have consented to the filing of this brief.

Amici are legal experts in the fields of international law and human rights.² They teach and have written extensively on these subjects. While they pursue a wide variety of legal interests, they all share a deep commitment to the rule of law, respect for human rights, and the principles of accountability for perpetrators and redress for victims. *Amici* recognize the prevalence and profound consequences of human trafficking and forced labor. They also recognize that children are frequent victims of these international crimes. *Amici* would like to provide the Court with an additional perspective on these issues informed by international law. They believe this submission will assist the Court in its deliberations.

¹ Pursuant to Fed. R. App. P. 29(a), *Amici* state that no counsel for a party authored this brief in whole or in part, and no person other than amici curiae or its counsel made a monetary contribution to its preparation or submission.

² A list of the *Amici* appears in the Addendum.

SUMMARY OF ARGUMENT

This case is about forced labor and human trafficking, and the Defendants-Appellees' complicity in these pernicious practices. Plaintiffs-Appellants are eleven children and the legal representatives of five children who were victims of forced labor and trafficking in the Democratic Republic of the Congo (hereinafter "DRC").³ They brought suit under the Trafficking Victims Protection Reauthorization Act (hereinafter "TVPRA"), 18 U.S.C. §§ 1581 *et seq.* In their complaint, the Plaintiffs-Appellants alleged they were forced to work as children in cobalt mines in the DRC. First Amended Complaint, *Doe v. Apple* (No. 1:19-cv-03737), 2021 WL 5774224, at 5. This work is extremely dangerous, and both injury and death are common.⁴ Plaintiffs-Appellants alleged they were forced to work long hours under dangerous conditions. *Id.* at 6–7, 24–29, 31, 34. Some children died performing this work. *Id.* at 25, 34, 53. They were often underpaid or

³ The abuse of children through forced labor in the Democratic Republic of the Congo has been recognized and denounced by the United States government as well as the United Nations. *See generally* U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, H.R. AND LAB., 2021 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES: DEMOCRATIC REPUBLIC OF THE CONGO (2021), <https://www.state.gov/reports/2021-country-reports-on-human-rights-practices/democratic-republic-of-the-congo/>; UNICEF, FEAR AND FLIGHT, AN UPROOTED GENERATION OF CHILDREN AT RISK IN DEMOCRATIC REPUBLIC OF CONGO (2021).

⁴ The use of child labor in the cobalt mining industry is well-documented. *See generally* Nicholas Niarchos, *The Dark Side of Congo's Cobalt Rush*, THE NEW YORKER (May 24, 2021), <https://www.newyorker.com/magazine/2021/05/31/the-dark-side-of-congos-cobalt-rush>.

not paid for their work. *Id.* at 6–7, 24–29, 31, 34. When they did receive compensation, it was a bare subsistence wage. *Id.* Significantly, several of the Plaintiffs-Appellants were notified they would be fired if they did not accept their dangerous work conditions. *Id.* at 38–39, 41–43. They were also notified they would be unable to work at other mines in the area if they protested their work conditions. *Id.* Several children who attempted to negotiate better working conditions were attacked and injured. *Id.* at 43.

Despite such extraordinary allegations of threats and violence directed at children, the district court dismissed the lawsuit. *Doe v. Apple*, No. 1:19-cv-03737, 2021 WL 5774224, at *18 (D.D.C. Nov. 2, 2021). The district court held the Plaintiffs-Appellants had failed to establish they were victims of forced labor because they were not coerced into working by means of serious physical harm or threats of serious physical harm. *Id.* at *12–*13.

As *Amici* explain, international law contains a robust framework to address the scourge of forced labor and human trafficking. Indeed, the TVPRA incorporates many of these international norms into U.S. law. *See* Trafficking Victims Protection Reauthorization Act, Pub. L. 108-193, 117 Stat. 2875 (2003). Because the district court failed to consider these international norms in its analysis, its decision should be reversed for three reasons.

First, the district court failed to recognize that coercion can occur at any stage in the employment relationship. It can occur in the initial recruitment of the victim *as well as* in forcing them to remain at work. Second, the district court failed to recognize that coercion can take many forms. Of course, physical harm or threats of physical harm reflect the quintessential examples of coercion. However, coercion need not be physical in nature. There are subtler forms of coercion, including the underpayment or non-payment of wages, threats of dismissal, fraud, and deception.

Third, the district court failed to acknowledge the unique and vulnerable status of children. International law affords special protections to children. In fact, forced labor is recognized as an example of a severe form of child labor. Work that is likely to harm the health or safety of children is also recognized as a severe form of child labor. These acts represent the very harms that the TVPRA is meant to address and redress.

ARGUMENT

Few international norms are more established than the prohibitions against forced labor and human trafficking. *See generally* REVISITING THE LAW AND GOVERNANCE OF TRAFFICKING, FORCED LABOR, AND MODERN SLAVERY (Prabha Kotiswaran ed. 2018); ANNE T. GALLAGHER, THE INTERNATIONAL LAW OF HUMAN TRAFFICKING (2010); FRANZISKA HUMBERT, THE CHALLENGE OF CHILD LABOUR IN

INTERNATIONAL LAW (2010). As set forth in numerous treaties and countless statements of international bodies, these are related yet distinct norms.⁵

I. IN CASES OF FORCED LABOR, COERCION CAN OCCUR AT ANY STAGE IN THE EMPLOYMENT RELATIONSHIP AND CAN BE ESTABLISHED THROUGH A VARIETY OF ACTS OR OMISSIONS

For decades, the international community has sought to prohibit forced labor. In 1930, for example, the Convention Concerning Forced or Compulsory Labour was adopted. Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55 (hereinafter “Forced or Compulsory Labor Convention”). The treaty now has 180 member states. Forced labor is defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” *Id.* art. 2(1). Member states agree “to suppress the use of forced or compulsory labour in all its forms within the shortest possible period.” *Id.* art. 1(1). The 1957 Convention Concerning the Abolition of Forced Labour reaffirmed the provisions of the 1930 Convention as member states undertook to suppress any form of forced or compulsory labor. Convention Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291. *See generally* INT’L LABOUR ORG., GENERAL SURVEY CONCERNING THE FORCED LABOUR CONVENTION, 1930 (No. 29), AND THE ABOLITION OF FORCED

⁵ The prohibition against forced labor is also recognized in core human rights instruments. *See, e.g.*, International Covenant on Civil and Political Rights art. 8 Dec. 16, 1966, 999 U.N.T.S. 171; G.A. Res. 217 (III)A, Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at art. 4 (1948).

LABOUR CONVENTION, 1957 (No. 105) (2007). These obligations were again reaffirmed and extended in the 2014 Protocol to the Forced Labour Convention. Protocol of 2014 to the Forced Labour Convention, June 11, 2014, 53 I.L.M. 1227 (2014) (hereinafter “Forced Labour Protocol”).

Under international law, the definition of forced labor has three elements. First, there must be some work or service provided or sought to be provided. Second, the work or service must be extracted under some form of coercion, penalty, deception, or fraud. Third, the work or service is performed involuntarily. There are no additional requirements. Forced labor can arise in the initial recruitment of the victim *as well as* in forcing them to remain at work.

The International Labour Organization (hereinafter “ILO”) is universally recognized as the authoritative international body responsible for developing labor standards and monitoring labor practices worldwide.⁶ On several occasions, the ILO has described how work or service may be considered forced labor if it is extracted through some form of coercion or penalty. Significantly, coercion or penalties need not be in the form of penal sanctions. INT’L LABOUR ORG., A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS

⁶ See generally DANIEL MAUL, THE INTERNATIONAL LABOUR ORGANIZATION: 100 YEARS OF GLOBAL SOCIAL POLICY (2019). There are 187 member states in the ILO, including the United States.

AT WORK 5 (2005) (hereinafter “ILO GLOBAL ALLIANCE REPORT”). Moreover, they need not be physical in nature or lead to bodily injury. Coercion can occur through a variety of actions. These can include: financial penalties; threats to denounce victims to the police or immigration authorities; non-payment of wages; dismissal or threats of dismissal; restriction of basic rights; and confiscation of identity papers. *Id.* at 5–6. *See also* INT’L LABOUR ORG., GUIDELINES CONCERNING THE MEASUREMENT OF FORCED LABOUR 2 (2018) (hereinafter “ILO GUIDELINES”) (“Elements of coercion may include, inter alia, threats or violence against workers or workers’ families and relatives, or close associates; restrictions on workers’ movement; debt bondage or manipulation of debt; withholding of wages or other promised benefits; withholding of valuable documents (such as identity documents or residence permits); and abuse of workers’ vulnerability through the denial of rights or privileges, threats of dismissal or deportation.”).

The ILO has also described how work or service may be considered forced labor if it is extracted through deception or fraud. ILO GLOBAL ALLIANCE REPORT, *supra*, at 6. There are many distinct forms of deception, including “situations where the worker must perform a job of different nature from that specified during recruitment, . . . [and] work for longer period of time than agreed” ILO GUIDELINES, *supra*, at 2. In such cases, the victim’s consent is irrelevant. According to the ILO, “[i]nitial consent may be considered irrelevant when

deception or fraud has been used to obtain it.” ILO GLOBAL ALLIANCE REPORT, *supra*, at 6.

The ILO has clarified that the element of consent must be assessed at every stage of the employment relationship. Forced labor may occur when deception, fraud, or coercion has been used to *obtain* an individual’s work or service. *Id.* at 6. Forced labor may also occur when deception, fraud, or coercion are used to *maintain* an individual’s work or service. *Id.*

Determining whether forced labor is present requires a fact-intensive analysis. The ILO has identified eleven distinct indicators of forced labor. These indicators offer evidence to the possible existence of forced labor: abuse of vulnerability; deception; restriction of movement; isolation; physical and sexual violence; intimidation and threats; retention of identity documents; withholding of wages; debt bondage; abusive working and living conditions; and excessive overtime. INT’L LABOUR ORG., ILO INDICATORS OF FORCED LABOUR 2 (2012) (hereinafter “ILO FORCED LABOUR INDICATORS”). However, not all indicators are required to established forced labor; a single indicator may be sufficient.⁷

⁷ The ILO states that “[t]he presence of a single indicator in a given situation may in some cases imply the existence of forced labour. However, in other cases you may need to look for several indicators which, taken together, point to a forced labour case.” ILO FORCED LABOUR INDICATORS, *supra*, at 2.

For example, restriction of movement is a common indicator of forced labor. *Id.* at 8. The retention of identity documents is another indication of forced labor because it offers a form of control and coercion over workers and their freedom of movement. *Id.* at 16. In such cases, a worker may not be able to obtain another job, access essential services, or leave the country. The impact of such acts is exacerbated when workers are isolated from the general public and have limited contact with their families and friends. *Id.* at 10.

Finally, the prohibition against forced labor does not require that acts of forced labor be “severe.”⁸ By its terms, the Forced or Compulsory Labor Convention applies to “the use of forced or compulsory labour *in all its forms.*” Forced or Compulsory Labor Convention, *supra*, art. 1(1) (emphasis added). The Convention adds that “the term *forced or compulsory labour* shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.” (emphasis in original). *Id.* art. 2(1). Neither the Convention Concerning the Abolition of Forced Labour nor the Forced Labour Protocol contain a requirement that forced labor be “severe.” Indeed, the Forced Labour Protocol makes multiple references of its applicability to “all forms” of forced labor. *See* Forced Labour Protocol, *supra*, art.

⁸ However, international law does recognize that forced labor as well as certain types of hazardous work constitute the most severe forms of child labor. *See infra* Part III. This designation creates heightened obligations on states.

5 (“Members shall cooperate with each other to ensure the prevention and elimination of *all forms* of forced or compulsory labour.”) (emphasis added).

On several occasions, the ILO has referenced physical brutality and the loss of life in the most severe cases of forced labor. *See, e.g.*, INT’L LABOUR ORG. & WALK FREE FOUNDATION, GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE 34 (2017). However, this does not imply that forced labor requires a minimum degree of severity. In fact, the ILO has intentionally defined forced labour in broad terms. *See generally* INTER-PARLIAMENTARY UNION & INT’L LABOUR OFF., ELIMINATING FORCED LABOUR: HANDBOOK FOR PARLIAMENTARIANS NO. 30 (2019) (hereinafter “PARLIAMENTARIAN’S HANDBOOK”). The definition of forced labor applies to “any individual.” *Id.* at 19. It applies to “all work or service.” *Id.* And, “the menace of any penalty” is sufficient. *Id.* In sum, there is simply no distinction between levels of severity in forced labor. *See generally* S.J. Rombouts, *The International Diffusion of Fundamental Labour Standards*, 50 COL. HUM. RTS. L. REV. 78 (2019).

II. IN CASES OF HUMAN TRAFFICKING, COERCION CAN OCCUR AT ANY STAGE IN THE EMPLOYMENT RELATIONSHIP AND CAN BE ESTABLISHED THROUGH A VARIETY OF ACTS OR OMISSIONS

The prohibition against human trafficking is distinct from, but closely related to, the prohibition against forced labor. PARLIAMENTARIAN’S HANDBOOK,

supra, at 23. In addition, the terms “human trafficking” and “trafficking in persons” are often used as umbrella terms to capture a range of practices. BRIDGETTE CARR ET AL., HUMAN TRAFFICKING LAW AND POLICY 135–37 (2014). The prohibition against human trafficking applies to the recruiter, broker, or transporter *as well as* to the individual or entity involved in forcing someone to remain at work. GALLAGHER, *supra*, at 30, 47.

In 2000, the Protocol to Prevent, Suppress, and Punish Trafficking in Persons was adopted by the international community to address human trafficking.⁹ Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Nov. 15, 2000, 2237 U.N.T.S. 319 (hereinafter “Trafficking Protocol”).¹⁰ The Trafficking Protocol has three goals: “(a) to prevent and combat trafficking in persons, paying particular attention to women and children; (b) to protect and assist the victims of such trafficking, with full respect for their human rights; and (c) to promote cooperation among States Parties in order to meet those objectives.” *Id.* art. 2. The Trafficking Protocol defines trafficking in persons as:

[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of

⁹ See also Forced Labour Protocol, *supra*, preamb (the “measures referred to in this Protocol shall include specific action against trafficking in persons for the purposes of forced or compulsory labour.”).

¹⁰ The Trafficking Protocol is also referred to as the Palermo Protocol.

payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.¹¹

Id. art. 3(a).

A key element to human trafficking involves exploitation. The Trafficking Protocol defines exploitation to include, at a minimum, “forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs; . . .” *Id.* This list is not exhaustive, however, and other forms of exploitation may be subject to prohibition. U.N. OFFICE ON DRUGS AND CRIME, ISSUE PAPER: THE CONCEPT OF “EXPLOITATION” IN THE TRAFFICKING IN PERSONS PROTOCOL 40 (2015) (hereinafter “UNDOC EXPLOITATION PAPER”). The *travaux préparatoires* to the Trafficking Protocol reveal a clear desire to address a broad array of exploitative actions. The forms of exploitation set forth in the Trafficking Protocol were not meant to be an exhaustive list. GALLAGHER, *supra*, at 34–42; UNDOC EXPLOITATION PAPER, *supra*, at 25. Rather, the drafters of the treaty sought to ensure “maximum breadth of coverage” for assessing exploitation.

Another key element to human trafficking involves the lack of consent. The Trafficking Protocol recognizes that traffickers use many different methodologies

¹¹ According to the U.N. Office on Drugs and Crime, “[t]he reference to the words ‘abuse of a position of vulnerability’ is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.” U.N. OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOL THERETO 169 (2004) (citation omitted).

to acquire control over victims, including threats, force, abduction, fraud, deception, or abuse of power. Trafficking Protocol, *supra*, art. 3(a). In addition, traffickers often leverage their authority or the vulnerability of victims to acquire control. *Id.* The Trafficking Protocol indicates that the consent of a trafficking victim is irrelevant where there is any threat or use of force or other forms of coercion, fraud, or deception. *Id.* art. 3(b). GALLAGHER, *supra*, at 31–33.

The International Labour Organization has offered a broad approach for gauging consent and coercion in the realm of human trafficking.¹² Temporally, the element of coercion can be assessed at any point in the employment relationship. INT’L LABOUR ORG., THE COST OF COERCION REPORT 6 (2009). In this respect, “the ILO has affirmed that this is to be understood as meaning that the person either became engaged in the activity against their free will or, once engaged, found that he or she could not leave the job with a reasonable period of notice, and without forgoing payment or other entitlements.” UNDOC EXPLOITATION PAPER, *supra*, at 31.

The ILO has recognized that consent is no defense in cases of human trafficking. INT’L LABOUR ORG., HUMAN TRAFFICKING AND FORCED LABOUR EXPLOITATION: GUIDELINES FOR LEGISLATION AND LAW ENFORCEMENT 22 (2005).

¹² The ILO has identified numerous indicators of trafficking, including deceptive recruitment, coercive recruitment, recruitment by abuse of vulnerability, as well as indicators of exploitation. *See* INT’L LABOUR OFF., OPERATIONAL INDICATORS OF TRAFFICKING IN HUMAN BEINGS (2009).

In other words, it is not possible to consent to trafficking. U.N. OFF. HIGH COMM'R HUM. RTS., FACT SHEET NO. 36: HUMAN RIGHTS AND HUMAN TRAFFICKING 3 (2014) (hereinafter "UNHCHR FACT SHEET NO. 36"). Thus, "[o]nce it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence."¹³ U.N. OFFICE ON DRUGS AND CRIME, LEGISLATIVE GUIDES FOR THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME AND THE PROTOCOLS THERETO 270 (2004) (hereinafter "UNDOC LEGISLATIVE GUIDES"); U.N. OFFICE ON DRUGS AND CRIME, THE INTERNATIONAL LEGAL DEFINITION OF TRAFFICKING IN PERSONS 10 (2018) ("The legal invalidity of consent obtained through coercion and fraud appears to have been consistently recognized and upheld in all major legal systems.").

The United States signed the Trafficking Protocol in 2000.¹⁴ That same year, Congress adopted the Trafficking Victims Protection Act (hereinafter "TVPA") to prevent human trafficking, to protect victims, and to punish perpetrators.¹⁵ Trafficking Victims Protection Act of 2000, Pub. L. 106-386, 114 Stat. 1466

¹³ Consent is also irrelevant when the victims are children. *See* U.N. General Assembly, Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children, 4, U.N. Doc. A/69/269 (Aug. 6, 2014) (noting that the means used to gain a victim's consent is irrelevant when the victims are children).

¹⁴ The United States ratified the Trafficking Protocol in 2005.

¹⁵ For a recent analysis of the TVPA and subsequent reauthorizations, see Julie Dahlstrom, *Trafficking to the Rescue?*, 54 U.C. DAVIS L. REV. 1 (2020).

(2000). Pursuant to the TVPA, the U.S. Department of State began issuing annual reports examining international compliance with the prohibition against human trafficking. These reports provide valuable insights into the prohibition against trafficking and how it is addressed under international law. In its 2014 *TRAFFICKING IN PERSONS REPORT*, for example, the State Department described the many ways in which human trafficking occurs.

Vulnerable individuals may be aware of, and initially agree to, poor working conditions or the basic duties of the job that underlies their exploitation. Victims may sign contracts and thereby initially agree to work for a certain employer, but later find that they were deceived and cannot leave the job because of threats against their families or overwhelming debts owed to the recruitment agency that arranged the employment.

U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 35* (2014) (hereinafter "2014 *TRAFFICKING REPORT*").

In its 2015 *TRAFFICKING IN PERSONS REPORT*, the State Department highlighted several ways in which human trafficking victims are subjected to coercion, fraud, and duress. This begins in the recruitment process. For example, contract fraud is a common occurrence. According to the State Department, "[c]ontract fraud occurs when a worker enters into an agreement with a labor broker, either orally or in writing, and finds upon arrival that the conditions of employment have materially changed." U.S. DEP'T OF STATE, *TRAFFICKING IN PERSONS REPORT 17* (2015) (hereinafter "2015 *TRAFFICKING REPORT*"). *See also*

INT’L LABOUR ORG., REGULATING LABOUR RECRUITMENT TO PREVENT HUMAN TRAFFICKING AND TO FOSTER FAIR MIGRATION (2015).

This broad approach for assessing human trafficking—both in defining human trafficking and assessing its constituent elements—was reinforced in the most recent TRAFFICKING IN PERSONS REPORT. *See* U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT (2022) (hereinafter “2022 TRAFFICKING REPORT”). Citing to both U.S. and international law, the TRAFFICKING IN PERSONS REPORT emphasizes that human trafficking is described in many ways and encompasses a variety of acts. The terms “human trafficking” and “trafficking in persons” are interchangeable umbrella terms. *Id.* at 31. Their core features, however, are similar.

According to the State Department, the lack of consent is an essential feature in human trafficking. Even if a victim initially consented to providing labor or services, human trafficking may still occur. *Id.* at 34. “The trafficker’s exploitative scheme is what matters, not a victim’s prior consent or ability to meaningfully consent thereafter.” *Id.* In turn, coercion can be established through threats of force, debt manipulation, withholding of pay, confiscation of identity documents, psychological coercion, reputational harm, or threats to other people. *Id.* at 34–35. And, children are uniquely vulnerable. *Id.* at 33.

III. BOTH FORCED LABOR AND WORK THAT IS LIKELY TO HARM THE HEALTH OR SAFETY OF CHILDREN ARE RECOGNIZED AS SEVERE FORMS OF CHILD LABOR.

Because of their unique and vulnerable status, international law affords special protections to children, particularly with respect to forced labor and human trafficking. *See generally* U.S. DEP'T OF LABOR, BUREAU OF INT'L LABOR AFF., 2020 FINDINGS ON THE WORST FORMS OF CHILD LABOR (2020) (hereinafter "ILAB 2020 REPORT"); INT'L LABOUR ORG. & UNICEF, CHILD LABOUR: GLOBAL ESTIMATES 2020, TRENDS AND THE ROAD FORWARD (2020); U.N. OFF. ON DRUGS AND CRIME, GLOBAL REPORT ON TRAFFICKING IN PERSONS (2020); HOLLY CULLEN, THE ROLE OF INTERNATIONAL LAW IN THE ELIMINATION OF CHILD LABOR (2007).

Several international legal instruments that address forced labor and human trafficking incorporate special protections for children.¹⁶ For example, the Trafficking Protocol states "[t]he recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means set forth in" Article 3(a). Trafficking Protocol, *supra*, art. 3(c) (emphasis added). In other words, the manner in which an exploited child is brought into such work is irrelevant. ILO GUIDELINES, *supra*, at 4 ("When the victim is a minor, the means are irrelevant.").

¹⁶ *See also* Convention on the Rights of the Child art. 32(1) Nov. 20, 1989, 1577 U.N.T.S. 3 (1989); Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography art. 3(1) May 25, 2000, 2171 U.N.T.S. 227.

While international law imposes various restrictions on child labor, it offers specific protections against “the most severe forms of child labor.”¹⁷ This prohibition was codified in the Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (hereinafter “Worst Forms of Child Labour Convention”) in 1999.¹⁸ Worst Forms of Child Labour Convention (ILO No. 182), June 17, 1999, 2133 U.N.T.S. 161 (1999); *see generally* CHILD LABOUR IN A GLOBALIZED WORLD: A LEGAL ANALYSIS OF ILO ACTION (Giuseppe Nesi, Luca Nogler, & Marco Pertile eds., 2008); Michael J. Dennis, *The ILO Convention on the Worst Forms of Child Labor*, 93 AM. J. INT’L L. 943 (1999). This treaty has been ratified by 187 countries, including the United States, which represents universal ratification by

¹⁷ Under both U.S. law and international law, there are narrow circumstances when it is lawful for children to engage in work. In general, children may work a few hours a day in light work. However, they may never engage in work that is classified as a worst form of child labor. ILAB 2020 REPORT, *supra*, at 68.

¹⁸ The Minimum Age Convention requires States to consider whether certain work is appropriate for children. Convention Concerning Minimum Age for Admission to Employment art. 3(1) June 26, 1973 1015 U.N.T.S. 297 (“The minimum age for admission to any type of employment or work which by its nature or the circumstances in which it is carried out is likely to jeopardise the health, safety or morals of young persons shall not be less than 18 years.”).

every member of the International Labour Organization.¹⁹ The treaty defines “the most severe forms of child labour” in broad terms.

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Worst Forms of Child Labour Convention, *supra*, art. 3.

To determine the type of work that may fall within the provisions of Article 3(d), the Worst Forms of Child Labour Convention references the 1999 Worst Forms of Child Labour Recommendation issued by the International Labour Organization. *Id.* art. 4(1). This ILO Recommendation was adopted in tandem with the Convention and supplements its provisions. Worst Forms of Child Labour Recommendation 1999 (No. 190) (hereinafter “ILO Recommendation No. 190”), *available at* <https://www.ilo.org/public/english/standards/relm/ilc/ilc87/com-chir.htm>. In determining whether work falls within the restrictions of Article 3(d),

¹⁹ The Worst Forms of Child Labour Convention was the first ILO Convention to receive universal ratification and was also the most rapidly ratified ILO convention in history.

the ILO Recommendation indicates that consideration should be given, *inter alia*, to:

- (a) work which exposes children to physical, psychological or sexual abuse;
- (b) work underground, under water, at dangerous heights or in confined spaces;
- (c) work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads;
- (d) work in an unhealthy environment which may, for example, expose children to hazardous substances, agents or processes, or to temperatures, noise levels, or vibrations damaging to their health;
- (e) work under particularly difficult conditions such as work for long hours or during the night or work where the child is unreasonably confined to the premises of the employer.

Id. art. 3.

Following the unanimous approval of the U.S. Senate, the United States ratified the Worst Forms of Child Labour Convention in 1999. In the Trade and Development Act of 2000, the United States codified its obligations to prevent and punish the worst forms of child labor. Trade and Development Act, at § 412, Pub. L. 106-200, 114 Stat. 298 (2000). The Act's definition of the worst forms of child labor is identical to the definition contained in the Worst Forms of Child Labour Convention. *Id.* § 412(b). In addition, the Act requires the U.S. Department of Labor to prepare an annual report addressing compliance by recipients of U.S. aid with their "international commitments to eliminate the worst forms of child labor." *Id.* § 412(c). These reports have been prepared for over 20 years.

In its 2020 annual report, the Department of Labor acknowledged that millions of children undergo forced labor around the world. ILAB 2020 REPORT, *supra*, at 2–3. The 2020 report recognized that financial pressure often leads to child labor, including its worst forms. *Id.* at 5. As families struggle financially, “[c]hildren in this heartbreaking scenario are often driven to hazardous and exploitative work to help sustain their families’ efforts to survive.” *Id.* at 9. Lack of access to education and social programs also contributes to child labor. *Id.* at 5. In addition, “unscrupulous employers operating in the informal sector” often lure children “into unregulated jobs.” *Id.* at 9. While these factors may explain the prevalence of the worst forms of child labor, they cannot justify it.

Under international law, subjecting children to the most severe forms of child labour constitutes a strict liability offense. When the victim is a child, the manner in which they were brought into a situation involving the most severe forms of child labour is irrelevant. When the victim is a child, their consent is irrelevant. International law creates an absolute and non-derogable obligation on States “to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.” Worst Forms of Child Labour Convention, *supra*, art. 1. States are further obligated to establish civil, criminal, and administrative penalties as a matter of urgency to combat the worst forms of child labour. ILO Recommendation No. 190, *supra*, ¶¶ 12–14.

There is simply no question that the harms alleged by the Plaintiffs-Appellants constitute the worst forms of child labor recognized under international law. They alleged they were forced to work as children under extremely dangerous conditions. First Amended Complaint, *supra*, at 24–29, 31, 34. Some were injured performing this work; others were killed. *Id.* at 6–7, 25, 34, 53. Children who challenged their treatment were threatened or even killed. *Id.* at 38–39, 41–43. These are the precise harms that international law has long condemned and the TVPRA was meant to address. *See Roe v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 1022 (S.D. Ind. 2007) (“It would not require great ‘judicial creativity’ to find that even paid labor of very young children in these heavy and hazardous jobs would violate international norms.”).

IV. THE PROVISIONS OF THE TVPRA, INCLUDING 18 U.S.C. §§ 1589 AND 1590, MUST BE READ IN LIGHT OF INTERNATIONAL LAW

Finally, the provisions of the TVPRA must be read in light of international law. This is a basic principle of U.S. law. *See The Paquete Habana*, 175 U.S. 677 (1900); *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Indeed, this Circuit has long recognized the significance of international law and the need to apply duly ratified treaties. *See, e.g., Usoyan v. Republic of Turkey*, 6 F.4th 31, 40–42 (D.C. Cir. 2021); *Owner-Operator Indep. Drivers Ass’n, Inc. v. U.S. Dep’t of Transp.*, 724 F.3d 230, 234–36 (D.C. Cir. 2013). In cases involving forced labor and human trafficking, therefore, the TVPRA must be interpreted in a manner

consistent with the U.S. signature and subsequent ratification of the Trafficking Protocol. In cases involving the worst forms of child labor, the TVPRA must be interpreted in a manner consistent with the U.S. signature and subsequent ratification of the Worst Forms of Child Labour Convention.

It was the failure to consider international law that resulted in the district court's strained reading of the conditions and requirements for establishing forced labor under 18 U.S.C. §1589.²⁰ Contrary to the district court's opinion, coercion can occur at any stage in the employment relationship. The Trafficking Protocol is clear on this point. Trafficking Protocol, *supra*, art. 3(a). It can occur in the initial recruitment of the victim *as well as* in forcing them to remain at work. ILO COST OF COERCION REPORT, *supra*, at 6; ILO GLOBAL ALLIANCE REPORT, *supra*, at 5–6; UNDOC EXPLOITATION PAPER, *supra*, at 31. The district court also erred by failing to recognize that coercion can take many forms. ILO GUIDELINES, *supra*, at 2; ILO FORCED LABOUR INDICATORS, *supra*, at 2. Of course, physical harm or threats of physical harm reflect the quintessential examples of coercion. However, coercion need not be physical in nature. There are subtler forms of coercion, including the underpayment or non-payment of wages, threats of dismissal, fraud, or deception. ILO GLOBAL ALLIANCE REPORT, *supra*, at 5–6.

²⁰ Because the district court found that the Plaintiffs-Appellants had failed to establish forced labor under 18 U.S.C. § 1589, it summarily dismissed their claims of trafficking under 18 U.S.C. § 1590.

Finally, the district court failed to acknowledge the Plaintiffs-Appellants' unique and vulnerable status in its decision. International law affords special protections to children. Trafficking Protocol, *supra*, art. 3(c); Worst Forms of Child Labour Convention, *supra*, art. 3. Forced labor is recognized as an example of a severe form of child labor. *Id.* art. 3(a). Work that is likely to harm the health or safety of children is also recognized as a severe form of child labor. *Id.* art. 3(d). In these cases, the manner in which a child was brought into a situation involving the most severe forms of child labour is irrelevant. Trafficking Protocol, *supra*, art. 3(c); ILO GUIDELINES, *supra*, at 4. Protecting children from such harms is a priority in international law. HUMBERT, *supra*, at 102; GALLAGHER, *supra*, at 427–30; Deepa Rishikesh, *The Worst Forms of Child Labour, in* CHILD LABOUR IN A GLOBALIZED WORLD: A LEGAL ANALYSIS OF ILO ACTION 83, 84 (Giuseppe Nesi et al. eds., 2008).

CONCLUSION

The district court failed to incorporate core principles of international law into its analysis of the TVPRA. For the foregoing reasons, this Court should reverse the lower court's decision.

Dated: August 15, 2022

Respectfully submitted,

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ADDENDUM

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g) and D.C. Cir. R. 32(e)(1), this brief was prepared using Microsoft Word and is proportionally spaced, with a 14-point Times New Roman font, and contains 6,383 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I certify the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.

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