No. 18-55041

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEO RATHA, SEM KOSAL, SOPHEA BUN, YEM BAN, NOL NAKRY, PHAN SOPHEA, AND SOK SANG,

Plaintiffs-Appellants,

v.

PHATTHANA SEAFOOD CO., LTD., S.S. FROZEN FOOD CO., LTD., RUBICON RESOURCES, LLC., WALES AND CO. UNIVERSE, LTD.,

Defendants-Appellees.

Appeal from the U.S. District Court for the Central District of California, No. 2:16-cv-04271-JFW

BRIEF OF FREEDOM NETWORK USA, THE HUMAN TRAFFICKING LEGAL CENTER, PUBLIC COUNSEL, THE HUMAN TRAFFICKING CLINIC AT THE UNIVERSITY OF ARKANSAS SCHOOL OF LAW, THE CIVIL LITIGATION AND ADVOCACY CLINIC AT THE UNIVERSITY OF ARKANSAS SCHOOL OF LAW, PROFESSOR JANIE CHUANG, AND PROFESSOR DAVID ABRAMOWITZ AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

According to Federal Rule of Appellate Procedure 26.1, Freedom Network USA certifies that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

The Human Trafficking Legal Center certifies that it has no parent corporation and that no publicly held corporation owns ten percent or more of its stock.

Public Counsel also certifies that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

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INTEREST OF *AMICI CURIAE*[1]

Human trafficking survivors are entitled to redress for their suffering and exploitation under this nation's broad anti-trafficking laws. Congress enacted expansive anti-trafficking laws to encompass the wide net of perpetrators required to create and maintain a trafficking scheme and responsible for the continuing abuse and exploitation of trafficking victims. Those victims are exploited and abused not just because of their primary perpetrator, but because of people willfully aiding or knowingly profiting from the central scheme. The district court here judicially narrowed the laws intended to provide a remedy for those victims by imposing barriers to relief that Congress did not.

Because just restitution for human trafficking offenses requires recovery against those who benefit or gain from this "contemporary manifestation of slavery," *see Ditullio v. Boehm*, 662 F.3d 1091, 1094 (9th Cir. 2011), in 2008 Congress created a secondary civil liability regime. *See* 18 U.S.C. § 1595(a) (authorizing civil action against "whoever knowingly benefits" from an underlying human trafficking

[1] All parties have consented to the filing of this *amicus* brief.

violation). But the district court's decision here eviscerates that regime by narrowly defining who can be a victim and what constitutes participation in a venture for purposes of the statute. That holding eliminates relief not just for the specific trafficking victims here, but for trafficking victims more broadly.

Because that decision was wrong, Freedom Network USA, The Human Trafficking Legal Center, Public Counsel, The Human Trafficking Clinic at the University of Arkansas School of Law, The Civil Litigation and Advocacy Clinic at the University of Arkansas School of Law, Professor Janie Chuang, and Professor David Abramowitz respectfully submit this brief as *amici curiae* in support of plaintiffs.

Freedom Network USA (FNUSA) is the largest alliance of human trafficking advocates in the United States. Its fifty-six members work directly with human trafficking survivors in over thirty cities, providing comprehensive legal and social services, including representation in civil legal cases. In total, its members serve over 1,000 trafficking survivors per year, over 75% of whom are foreign national survivors. FNUSA provides decision makers, legislators, and other stakeholders

with the expertise and tools to make a positive and permanent impact in the lives of all survivors. FNUSA provides training and advocacy to increase understanding of the wide array of human trafficking cases in the United States, and the many forms of force, fraud, and coercion used by traffickers. FNUSA has an interest in ensuring that the United States legal system reduces trafficking survivors' retraumatization, and improves access to justice.

The Human Trafficking Legal Center is a non-profit organization that empowers trafficking survivors to seek justice. Since its inception in 2012, the Human Trafficking Legal Center has trained more than 3,400 attorneys at top law firms across the country to handle civil trafficking cases pro bono, connected more than 260 individuals with pro bono representation, and educated over 16,000 community leaders on trafficking victims' rights. The Human Trafficking Legal Center advocates for justice for all victims of human trafficking.

Public Counsel, based in Los Angeles, California, is the nation's largest not-for-profit law firm specializing in delivering pro bono legal services to vulnerable populations. Through a pro bono model that leverages the talents of thousands of attorney and law student

volunteers, Public Counsel annually assists more than 30,000 families, children, and nonprofit organizations, and addresses systemic poverty, civil rights violations, and human rights work through impact litigation and policy advocacy. Public Counsel's Immigrants' Rights Project provides pro bono placement and direct representation to immigrants fleeing persecution and violence—including survivors of human trafficking. Public Counsel has a strong interest in ensuring that survivors of human trafficking, regardless of their immigration status, are protected under the law and receive adequate redress.

The Human Trafficking Clinic at the University of Arkansas School of Law (HTC) provides advocacy projects to its clients—local and national nonprofit organizations seeking to increase their capacity to confront and prevent human trafficking. HTC has conducted legal research and analyzed a wide variety of human trafficking related topics, trained our clients' staff on how to identify and address human trafficking, and created educational materials on human trafficking for judges, attorneys, first responders and community members. HTC has an interest in ensuring that the law is properly interpreted and applied

in a manner that most effectively addresses and eradicates human trafficking.

The Civil Litigation and Advocacy Clinic at the University of Arkansas School of Law (CLAC) represents low-income clients seeking to enforce their rights in a variety of civil matters, but primarily in the area of labor exploitation. Since it began representing low-wage workers in 2012, CLAC has recovered tens of thousands of dollars in unpaid wages for its clients. CLAC has an interest in ensuring that all workers have redress in court when their rights are violated.

Janie Chuang is a Professor of Law at American University Washington College of Law. Professor Chuang teaches and writes about issues relating to human trafficking, labor migration, and global governance.

David Abramowitz is a Professor and former Chief Counsel for the Committee on Foreign Affairs of the U.S. House of Representatives.

CERTIFICATE OF AUTHORSHIP

Under Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party contributed money intended to fund the preparation or submission of this brief. No one other than *amici*, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

BACKGROUND

A. Human Trafficking Is A Problem Trapping Millions Of People And Generating Billions Of Dollars In Illegal Profits From Their Exploitation

Labor trafficking "exists in formal and informal labor markets of both lawful and illicit industries, affecting skilled and unskilled workers from a spectrum of educational backgrounds." U.S. Dep't of State, *Trafficking In Persons Report* 13 (July 2015) ("*State Trafficking Report*").[2] "Although human trafficking is found in many trades, the risk is more pronounced in industries that rely upon low-skilled or unskilled labor," including jobs "often filled by socially marginalized groups including migrants, people with disabilities, or minorities." *Id.* at 14. Traffickers can and do "target vulnerable workers anywhere to fill labor shortages everywhere along a supply chain." *Id.* at 13.

The sheer pervasiveness of labor trafficking is evident in the numbers. The International Labour Organization estimates that in 2016, 24.9 million people were trapped in forced labor situations. International Labour Organization, *Global Estimate of Modern Slavery:*

[2] Available electronically at https://www.state.gov/documents/organization/245365.pdf (last accessed June 1, 2018).

Forced Labour and Forced Marriage 9 (2017).[3] Over 16 million of these people were exploited in the private sector, and half of them were in debt bondage. *Id.* at 10.

That exploitation is extraordinarily profitable: It's estimated that the total illegal profits obtained from the use of forced labor worldwide amount to over $150 billion per year. International Labour Organization, *Profits and Poverty: The Economics of Forced Labour* 13 (2014).[4] Those profits provide a substantial incentive for those who knowingly benefit from that exploitation to do nothing to stop it.

B. Congress Acts To Prevent Human Trafficking

In 2000, Congress passed the Trafficking Victims Protection Act ("TVPA")—the first comprehensive piece of U.S. legislation aimed at prosecuting and preventing human trafficking, including labor trafficking. In the decades following, Congress has repeatedly broadened the scope of the TVPA through multiple reauthorizations to address this "dark side of globalization." H.R. Rep. 110-430, at 33–34

[3] Available electronically at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf (last accessed June 1, 2018).

[4] Available electronically at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf (last accessed June 1, 2018).

(2007). The 2008 Trafficking Victims Protection Reauthorization Act ("TVPRA") was praised by legislators on both aisles as the culmination of a decade's work "to ramp up our country's efforts to prevent trafficking, protect victims, and prosecute perpetrators." *See*, *e.g.*, 153 Cong. Rec. H14087, H14113 (Dec. 4, 2007) (statement of Cong. John Lee); *id.* at H14121 (statement of Cong. Steve Pearce) (This amendment "will help us stop this terrible trade, give victims the ability to be free and face their accusers, and help America shine our light around the world").

The TVPRA aims to eradicate human trafficking violations through expansive criminal and civil remedies. Accordingly, it creates grounds for relief that are based on principles of secondary liability, and that provide victims with a direct remedy against those who knowingly benefitted from their exploitation. Such civil claims have the potential to hold accountable both perpetrators of human trafficking and those who knowingly benefit from it. In doing so, Congress understood that making human trafficking less profitable would shrink the industry because traffickers are aided by people who profit from the abuse, and who therefore do nothing to stop that abuse. The legislative intent of

the 2008 TVPRA is to stop this flow of money and thus to eliminate the incentive to turn a blind eye to exploitation.

C. This Case Is Typical of Human Trafficking Cases

This case illustrates both the problem of human trafficking and the reasons why Congress chose to adopt a broad strategy for countering it. Defendant Phatthana, a Thai seafood processing company, lured Plaintiffs, rural Cambodian villagers, to Thailand with false promises of a better life. When Plaintiffs arrived, the reality was very different. After convincing Plaintiffs to mortgage their homes and farms in Cambodia, Phatthana charged Plaintiffs unexpected, extortionate fees for their journey, paid them far less than promised, and charged them for housing that was supposed to be free. Phatthana also held Plaintiffs' work permits and threatened them with arrest if they left the factory without those permits. Plaintiffs had even more reason to fear because they watched police frequently visit the factory and heard about workers who were arrested. With no papers and crushing debt, Plaintiffs had no choice but to continue working in Phatthana's factory.

Phatthana was not the only one who participated in, and benefitted from, Plaintiffs' exploitation. According to extensive evidence, two U.S. corporations, Rubicon and Wales, also played a crucial role. For years, Rubicon and Wales worked closely with Phatthana to market and sell its shrimp in the United States. During this time, Rubicon visited Phatthana's factories in Thailand many times, to supervise quality control and to manage all aspects of marketing, sale, and import into the United States. Similarly, Wales coordinated with Phatthana's factories and assisted in fulfilling orders, ensuring the sales were fulfilled, inspected, and completed.

Defendants do not dispute that they "were alerted to" the well-known and well-publicized problem of debt bondage, forced labor, and human trafficking of migrants from Cambodia to the Thai seafood processing industry. Defendants heard about these issues from personal whistleblowers, customers, and employees, not to mention widely circulated reports from the U.S. State Department, NGOs, industry groups, and the media. But Defendants did nothing, content instead to continue profiting off the backs of forced laborers.

ARGUMENT

The district court here denied particularly vulnerable victims—undocumented workers—potential relief under the TVPRA. In so doing, the district court misinterpreted the TVPRA in two fundamental ways. *First*, the district court erroneously held that Phatthana was not liable under the TVPRA because Plaintiffs "had entered Thailand illegally" and were not "able to leave Phatthana and seek other employment," regardless of any coercive tactics.[5] ER30. But by dismissing Plaintiffs' claims on this ground, the district court criminalized the victims in direct contravention of the TVPRA. *Second*, the district court improperly curtailed the TVPRA's expansive reach by holding that Rubicon and Wales did not "participate" in a venture because they did not directly "operate or manage" the trafficking operation. ER53. But the words "operate" and "manage" are nowhere to be found in 18 U.S.C. § 1595(a)—the district court read them (wrongly) into the statutory provision. This Court should not read into the statute what Congress has not written.

[5] The district court also found that it lacked subject-matter jurisdiction over Phatthana. ER24–30.

The district court's ruling does not simply affect the victims in this particular case, but sharply curtails relief for trafficking victims more generally. Plaintiffs' claims are precisely the type of claims TVPRA is intended to (and does) encompass, and the victims deserve the opportunity to hold their traffickers accountable in front of a jury. This Court should reverse the district court's order granting summary judgment in favor of Defendants.

I. The District Court's Ruling Criminalizes Victims of Trafficking In Direct Contravention Of The TVPRA

The TVPRA was meant to protect victims of all backgrounds and circumstances, regardless of legal status. The TVPRA's express findings, legislative history, and civil remedies provision make clear that the Act should protect, not punish, victims of human trafficking. In this case, the district court did precisely what Congress expressly said it could not—it refused to allow Plaintiffs' TVPRA claims to go to a jury because Plaintiffs "had entered Thailand illegally." ER30. The absence of legal documentation makes trafficking victims more vulnerable to exploitation by traffickers and less likely to report those who exploit them. But if allowed to stand, this decision would deny

some of the most vulnerable victims of human trafficking the remedy that Congress granted them.

A. Congress Intended The TVPRA To Protect All Victims Of Trafficking, Regardless Of Their Legal Status

At the heart of the TVPRA is Congress's unwavering commitment to protecting victims of human trafficking, regardless of their immigration status. "To deter international trafficking and bring its perpetrators to justice," Congress recognized that the United States must "protect[] rather than punish[] the victims of such offenses." 22 U.S.C. § 7101(b)(24). Congress intended the TVPRA to remedy the shortcomings of "[e]xisting law," which not only "fail[ed] to protect victims of trafficking," but "repeatedly punished [them] more harshly than the traffickers themselves" because "victims are often illegal immigrants." *Id.* § 7101(b)(17). Accordingly, Congress made it abundantly clear that "victims of severe forms of trafficking" should *not* be punished for unlawful acts committed as a direct result of being trafficked, "such as using false documents, entering the country without documentation, or working without documentation." *Id.* § 7101(b)(19).

To show it meant what it said, Congress extended broad support to victims of human trafficking. Under the TVPRA, trafficking victims

may receive government benefits, 22 U.S.C. § 7105(b)(1)(A), temporary housing, *id.* § 7105(c)(1)(A), and medical care, *id.* § 7105(c)(1)(B). And, recognizing the special vulnerability of undocumented victims, Congress also provided two pathways for legal status in the United States. First, victims of human trafficking are eligible for three-year temporary visas, at the end of which they may apply for permanent legal status. 8 U.S.C. § 1101(a)(15)(T). Second, victims may receive a temporary legal status known as "continued presence," which allows witnesses to stay in the country during a trafficking prosecution. 22 U.S.C. § 7105(c)(3). This immigration relief responds to—and is predicated upon—the fact that the trafficking victims are without legal documentation.

This victim-centered approach permeates every element of the TVPRA. For instance, Congress adopted broad definitions of forced labor and coercion, intending "to address the increasingly subtle methods of traffickers who place their victims in modern-day slavery, such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire

consequences by means other than overt violence." H.R. Conf. Rep. No. 106-939, at 101 (2000).

Specifically, the TVPRA broadly defines labor trafficking as: "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery." 22 U.S.C. § 7102(9)(B). "Coercion" is also broadly defined as "(A) threats of serious harm to or physical restraint against any person; (B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or (C) the abuse or threatened abuse of the legal process." *Id.* § 7102(3). And "[s]erious harm" includes not only physical harm, but also financial, reputational, or psychological harm. 18 U.S.C. § 1589(c)(2).

This comprehensive view of coercion is echoed in the specific definitions of forced labor and involuntary servitude. Forced labor includes "whoever knowingly provides or obtains the labor or services of a person . . . by means of the abuse or threatened abuse of law or legal process; or . . . 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." 18 U.S.C. § 1589(a). Likewise, "involuntary servitude" reaches "a condition of servitude induced by means of . . . any scheme, plan, or pattern intended to cause a person to believe that, if the person did not enter into or continue in such condition, that person or another person would suffer serious harm or physical restraint; or . . . the abuse or threatened abuse of the legal process." 22 U.S.C. § 7102(6).

In these provisions, Congress recognized—and codified—that psychological abuse and nonviolent coercion can create an environment of fear and intimidation that may prevent a worker from leaving an exploitive work situation.

At the same time, Congress also recognized "a previously unrecognized class of undocumented workers." *See* Kathleen Kim, *The Coercion of Trafficked Workers*, 96 Iowa L. Rev. 409, 415 (2011). The TVPRA's broad definition of coercion acknowledges that certain "known objective conditions" could make a victim "especially vulnerable to pressure" to continue working—in particular, the victim's immigration

status and the threat of deportation. *See Shukla v. Sharma*, No. 07-cv-2972, 2009 WL 10690810, *10 (E.D.N.Y. Aug. 21, 2009) (citing *United States v. Bradley*, 390 F.3d 145, 153 (1st Cir. 2004), *vacated on Booker grounds by* 545 U.S. 1101 (2005)). Indeed, it is well known that undocumented persons "with little education and few language skills" are prime targets of human traffickers. *See* Christopher A. Wray, Assistant Att'y Gen., Criminal Div., *Remarks to the National Conference on Domestic Trafficking and Prostitution* 2 (July 17, 2004). As the Seventh Circuit has recognized, undocumented workers are "the most vulnerable of the broader group . . . forced into labor." *United States v. Calimlim*, 538 F.3d 706, 717 (7th Cir. 2008). The TVPRA is intended to protect these victims, and punish those who exploit them by taking advantage of their immigration status. But the district court's decision flips that intent on its head, effectively punishing the victims and protecting their exploiters.

B. Plaintiffs Are Particularly Vulnerable Victims Who Should Be Protected, Not Punished, Under The TVPRA

This is a classic case of the "subtle" methods of coercion that Congress intended to address and eradicate through the TVPRA. It is

undisputed that Plaintiffs had little education, ER198; ER242; ER273, and had never been to Thailand before being lured there by Phatthana, ER163; ER287; ER303. Plaintiffs testified that they left Cambodia because Phatthana promised them jobs and assured them that their immigration status would not be a problem. ER255; ER205; ER214; ER251–53; ER294–95; ER316; ER341; ER510.

Once Plaintiffs arrived in Thailand, however, their "reality was very different." *See United States v. Rivera*, 799 F.3d 180, 183 (2d Cir. 2015). Plaintiffs testified—and Phatthana does not dispute—that Phatthana held their work permits and refused to return them, even when Plaintiffs asked to leave. ER223; ER246; ER292–93; ER305; ER340–41; ER524; ER552–53; ER833. Phatthana also admits that it told Plaintiffs they would be arrested if they left the factory without those permits. ER2149; *see also* ER222; ER239. These threats were particularly credible given the routine visits to the factory by Thai police, who arrested workers who escaped. ER204–05; ER2146. Without these permits and with their undocumented status in Thailand, Plaintiffs had no "exit option." *See Calimlim*, 538 F.3d at 712. If they wished to avoid the serious harm of arrest and deportation,

they had no choice but to stay and work inside the factory. *See United States v. Alzanki*, 54 F.3d 994, 1000 (1st Cir. 1995) (holding that a plaintiff has established involuntary servitude "when an individual, through an actual or threatened use of physical or legal coercion, intentionally causes the oppressed person reasonably to believe, given her 'special vulnerabilities,' that she has no alternative but to remain in involuntary service for a time").

The district court acknowledged that Plaintiffs could not leave the factory. It also acknowledged that Plaintiffs were forced to continue working at Phatthana "exclusively," given their immigration status. ER30.

But instead of viewing this evidence in the light most favorable to Plaintiffs—as the district court was required to do at summary judgment—the court absolved Phatthana of all wrongdoing and placed the blame squarely on the Plaintiffs. *See Shukla*, 2009 WL 10690810, at *12 (holding that Plaintiff's testimony that he was shown videos of September 11, 2001 and told that he would be mistreated if defendants revealed to authorities his undocumented statute was sufficient to show psychological coercion at the summary judgment stage). Specifically,

the court held that "even assuming Phatthana refused to return [Plaintiffs' work] documents, they would not have been able to leave Phatthana and seek other employment. Moreover, [Plaintiffs] were prevented from traveling freely throughout Thailand and returning to Cambodia because they had entered Thailand illegally and not because their documents may have been withheld." ER30. By focusing only on Plaintiffs' immigration status, the court erred in ignoring the extensive evidence that Phatthana exploited that status.

That is contrary to the express purpose of the TVPRA and the many cases interpreting it. *See, e.g., Rivera*, 799 F.3d at 183–87 (affirming conviction where, among other things, defendant lured undocumented people to the United States with the promise of a decent salary and free transportation to work as waitresses, but then "threatened the victims with violence and deportation if they spoke to the authorities or quit"); *United States v. Dann*, 652 F.3d 1160, 1172 (9th Cir. 2011) (holding that a reasonable jury could have concluded that a defendant who held a worker's papers and threatened to send the worker back to Peru intended to keep that worker in fear of serious immigration consequences); *United States v. Farrell*, 563 F.3d 364, 376

(8th Cir. 2009) (noting that defendants kept workers' passports and immigration documents and "[r]ealistically, without these documents, the workers were required to remain in the command, if not the employment, of the [defendants]"); *Calimlim*, 538 F.3d at 713 (upholding jury verdict because the evidence showed that defendants, who held an undocumented worker's passport, gave vague warnings that someone might report her to the authorities, and falsely said that they were the only ones who could lawfully employ her, "intentionally manipulated the situation so that [the victim] would feel compelled to remain"); *United States v. Veerapol*, 312 F.3d 1128, 1132 (9th Cir. 2002) (recognizing that "threatening . . . an immigrant with deportation could constitute the threat of legal coercion that induces involuntary servitude, even though such a threat made to an adult citizen of normal intelligence would be too implausible to produce involuntary servitude." (quoting *United States v. Kozminski*, 487 U.S. 931, 948 (1988)).

The district court further erred by ignoring the extensive evidence that Phatthana also exploited Plaintiffs' indebtedness. On Phattana's advice, Plaintiffs took out significant loans on their homes and farms in Cambodia to finance their trip to Thailand, ER210; ER259, where they

believed, based on Phattana's promises, that they would be paid well and given benefits, such as free housing. ER205; ER212; ER214; ER251–53; ER294; ER294–95; ER316; ER341; ER510. But when Plaintiffs arrived, Phatthana charged additional fees, paid them less than promised, and required them to pay for their housing and other equipment. ER142; ER186; ER303–04; ER314–17; ER522–23; ER547. Construed in the light most favorable to Plaintiffs, this evidence shows that Phatthana embarked on a scheme to recruit vulnerable workers.

The district court was wrong to disregard this evidence. "The most prevalent form of labor trafficking today is bonded labor, where a trafficker exploits a victim's ignorance about debt." *See* Laura Ezell, Note, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 Vand. L. Rev. 499, 506 (2016); *see also State Trafficking Report* at 15 ("Debt manipulation is one of the main methods by which workers can be exploited."). And courts have consistently found that this type of financial harm is "serious harm" under the TVPRA. *See, e.g*, *David v. Signal Int'l, LLC*, 37 F. Supp. 3d 822, 832 (E.D. La. 2014) (holding at the motion to dismiss stage, "[c]ourts have found that

threats of being in debt and being unable to repay those debts constitutes 'serious harm' . . . ."); *Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1146 (C.D. Cal. 2011) (allegations that defendants charged high upfront costs to participate in a teaching program and then demanded additional sums to continue with the program suggested that Plaintiffs "had to work for Defendants[] so that they would be able to repay the massive debt they incurred due to Defendants' fraud").

Phatthana exploited the four other Plaintiffs' financial situations in the same way. Tellingly, Phatthana did not move for summary judgment on those Plaintiffs' claims. Instead, Phatthana only moved for summary judgment as to the three Plaintiffs who lacked passports. The district court's opinion granting that motion is antithetical to everything Congress intended in enacting the TVPRA.

C. The District Court's Ruling Effectively Denies Relief To All Trafficking Victims Who Are Undocumented

The ramifications of the district court's decision extend far beyond the victims in this particular case. Under the court's analysis, any undocumented worker trapped by labor trafficking would be barred from recovery under the TVPRA because that worker's status, by

definition, necessarily prevents him or her from leaving or working elsewhere in the country legally. *See* ER30. Not only is this result directly contrary to Congress's explicit intent in the TVPRA, *see supra* 14–18, it will also have devastating consequences for trafficking victims.

As discussed above, "[u]ndocumented and irregular migrants who are smuggled into a destination country are particularly vulnerable to exploitation, due to many . . . factors . . ., including poverty, irregular status, isolation, language barriers, debt, and lack of proper identity papers." *See* Rohit Malpani, International Labour Organization, *Legal Aspects of Trafficking for Forced Labour Purposes in Europe* 34 (April 2006).[6] This vulnerability is exacerbated by the fact that it is very difficult for victims of forced labor to seek legal redress, especially if they are undocumented. *See id.* at 34–37. That absence of legal documentation makes them both more vulnerable to exploitation and less likely to report that exploitation to law enforcement.

[6] Available electronically at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_082021.pdf (last accessed June 1, 2018).

Congress meant to tear down barriers to legal relief in the TVPRA, which encourages undocumented victims of human trafficking to serve as private attorneys general. *See* Kathleen Kim, *The Trafficked Worker As Private Attorney General: A Model for Enforcing the Civil Rights of Undocumented Workers*, 1 U. Chi. Legal F. 247, 251–52 (2009) ("[A]s private attorneys general, who may secure immigration status, trafficked plaintiffs represent a class of immigrant workers who are not merely objects of immigration enforcement, but who are agents of enforcement of civil rights violations in the workplace."); *see also supra* at 14–18 (summarizing the TVPRA's commitment to victims of human trafficking).

But the district court's decision effectively nullifies this part of the TVPRA, denying relief to not just the victims in this case, but to any undocumented person trapped by human trafficking, based simply on his or her immigration status. Instead of protecting trafficking victims, this decision reinforces employers' ability to exploit the vulnerability of undocumented workers by threatening deportation if they do not continue working, often for very little money and in poor conditions.

Indeed, adopting the district court's analysis would leave thousands, if not millions, of victims without relief. In the United States alone, it is estimated that the majority of victims of human trafficking (69%) are unauthorized by the time they are able to escape. *See* Colleen Owens et al., Urban Institute, *Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States* 124 (Oct. 2014).[7] And this number is likely much higher, given the difficulty in accurately counting victims of human trafficking. *See* Sheldon X. Zhang et al., *Looking for a Hidden Population: Trafficking of Migrant Laborers in San Diego County* 4–5, 15–17 (2012) (concluding that "[l]abor trafficking . . . appears to be rampant among unauthorized Spanish-speaking migrant workers in San Diego County").[8]

Under the district court's decision, these victims and others like them around the world would be barred from seeking relief under the

[7] Available electronically at https://www.urban.org/ sites/default/files/publication/33821/413249-Understanding-the-Organization-Operation-and-Victimization-Process-of-Labor-Trafficking-in-the-United-States.PDF (last accessed June 1, 2018).

[8] Available electronically at https://www.ncjrs.gov/pdffiles1/nij/grants/240223.pdf (last accessed June 1, 2018).

TVPRA. This Court should reverse and remand because the TVPRA extends to protect all victims of human trafficking regardless of a victim's legal status.

II. The District Court's Interpretation Of "Participate In A Venture" Improperly Curtails The TVPRA's Reach

The errors outlined above are not the only ones calling out for correction by this Court. The district court once again read a limitation into the statute that Congress did not include.

A. The District Court Improperly Held That "Participation" Requires Active Operation or Management

Recognizing that trafficking yields billions in profits each year, "giving traffickers increasing resources to avoid punishment," Congress sought to impose an economic deterrent on the lucrative trafficking business. H.R. Rep. 110-430, at 33–34. Thus, in 2008, Congress authorized the imposition of civil penalties against any person or corporation who "knowingly benefits, financially or by receiving anything of value from participation in a venture" that has violated the TVPRA sections against peonage, slavery, and trafficking. 18 U.S.C. § 1595(a). This amendment "expand[ed] the reach of prosecutions beyond slave-holders and those who directly recruit, harbor, transport,

provide, or obtain victims to all those up the chain of command or ancillary to it who may profit from the venture." Polaris, *The William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008: Summary of Important Provisions* 7 (2008).[9]

The district court's decision in this case dangerously curtails this amended statute's scope. The court granted summary judgment to Rubicon and Wales because they did not take "some action to operate or manage" the trafficking, "such as directing or participating in Phatthana's labor recruitment, Phatthana's employment practices, or the working conditions at Phatthana's Songkhla factory." ER53–54. But the words "operate" and "manage" are nowhere in § 1595(a). Rather, Congress plainly said that anyone who simply "participate[s] in a venture" is liable. 18 U.S.C. § 1595(a).

Unlike "operate" and "manage," "participate" is a "term[] and concept[] of breadth that require[s] only that an individual take 'some part in' an activity, or help it to occur in some way." *See Negusie v Holder*, 555 U.S. 511, 544 (2009) (citation omitted). "Venture" is

[9] Available electronically at http://www.markwynn.com /trafficking/the-william-wilberforce-trafficking-victims-protection-reauthorization-act-of-2008.pdf (last accessed June 1, 2018).

similarly broad. As the district court recognized, the term venture is generally defined as "'an undertaking that involves risk' . . . , typically associated with 'a speculative commercial enterprise.'" ER53 (quoting Black's Law Dictionary); *see also* Merriam-Webster Dictionary (2016) (defining "venture" as "an undertaking involving chance, risk, or danger," especially "a speculative business enterprise").

Had Congress intended "participation in a venture" to really mean "operate or manage," it would have said so. Instead, recognizing that corporations at all levels of supply chains play a role in perpetuating human trafficking, Congress broadly targeted anyone who knew or should have known that it was benefitting from trafficked labor, even if the labor trafficking violation occurred abroad or was perpetuated by a separate legal entity in the corporation's supply chain. 18 U.S.C. §§ 1595(a), 1596; *see also Kiobel v. Royal Dutch Petrol. Co.*, 569 U.S. 108, 124–25 (2013) (courts have jurisdiction under the Alien Tort Statute if the claims "touch and concern the territory of the United States").

Similarly, courts have interpreted the TVPRA's participation requirement broadly. For example, the First Circuit held that motel

owners who allegedly rented a room to a trafficker were participating in a venture under both § 1591 and § 1589(b). *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017). And a district court in this Circuit recognized that the TVPRA makes "clear that civil liability extends to both active participants and passive beneficiaries of TVPA violations." *Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, No. 10-1172-AG, 2011 WL 13153190, *11 (C.D. Cal. May 12, 2011).

But instead of applying the plain language of § 1595(a) as Congress intended, the district court improperly imported the "operate or manage" test from the Racketeer Influenced and Corrupt Organizations Act ("RICO") case law, severely restricting the statute's reach. ER53 (citing *Bistline v. Jeffs*, No. 2:16-cv-788, 2017 WL 108039 (D. Utah Jan. 11, 2017)). Unlike the TVPRA's "participation in a venture" language, RICO requires participation "*in the conduct of [an] enterprise's affairs*." *Reves v. Ernst & Young*, 507 U.S. 170, 179 (1993) (emphasis added). Because the word "conduct . . . require[s] some degree of direction," participation in the context of RICO requires "some part in directing those affairs." *Id.* In contrast, § 1595(a) does not

include the word "conduct" and therefore does not require "some degree of direction." *Id.*

In any event, RICO is not an appropriate analogy. Congress was not trying to replicate RICO with the TVPRA. In fact, liability for "operating or managing" a trafficking enterprise already existed because Congress had separately added human trafficking and forced labor as predicate acts under RICO. Congress explicitly passed the TVPRA to broaden the scope of liability beyond the actual perpetrators of the crimes and to fill the gaps left by existing laws, including RICO. *See* 22 U.S.C. §§ 7101(b)(14), (17); Ezell, *supra*, at 516 (Congress passed the 2008 TVPRA in part because existing laws were "unable to reach beyond the supplier that actually perpetrates the crime to the corporation that derives financial benefit from its supplier's illegal actions"); Naomi Jiyoung Bang, *Justice for Victims of Human Trafficking and Forced Labor: Why Current Theories of Corporate Liability Do Not Work,* 43 U. MEM. L. REV. 1047, 1074 (2013) ("[T]he use of RICO to prove liability in cases involving corporate liability in the global supply trafficking context has been difficult, time consuming, [] expensive. . . . [and] not easy.").

Here, Plaintiffs put forth extensive evidence showing that Rubicon and Wales were participants in the venture for purposes of the TVPRA—in other words, they had "some part" in the business enterprise. *See Negusie*, 555 U.S. at 544; *Ricchio*, 853 F.3d at 556. Rubicon was formed in 1999 as a joint venture to market and sell seafood to customers in the United States, and Wales is its member. Both corporations worked closely with Phatthana to market and sell its shrimp, including on-site visits to its factories and arranging for training of staff. *See, e.g.*, ER788; ER1225–26; ER1265–67; ER1276–80; ER1281–83; ER1356. Rubicon was also heavily involved in Phatthana's operations, including employment. ER438–39; ER1267; ER1285; ER1322. When allegations broke that Phatthana engaged in forced labor, both Rubicon and Wales mounted a campaign to "defuse the story." ER1293–99; ER1374; *see also* ER557–58; ER1290; ER1300–03; ER1325. This is more than enough to establish for summary judgment purposes that Rubicon and Wales had "some part" in the venture.

There is also sufficient evidence that Rubicon and Wales attempted to benefit from participating in this venture. A corporation is liable under the TVPRA if it attempts to "benefit[], financially, or by

receiving anything of value" from its participation in a venture. 18 U.S.C. §§ 1589(b), 1594; *see also Ricchio*, 853 F.3d at 557–58 (attempt to violate § 1589 states a claim under the TVPRA). Here, it is undisputed that Rubicon attempted to sell Phattana's shrimp, processed with forced labor, to Walmart's Sam's Club. ER957; ER1284; ER1548. Although Walmart ultimately refused because of Phatthana's forced labor practices, Rubicon pressed Walmart to accept the delivery. ER1284; ER1548.

The district court rejected this undisputed evidence of attempt because the sale only involved fourteen containers of seafood. ER55. But there is no material limit on what constitutes a benefit from participation in a venture. Indeed, the TVPRA explicitly states that "anything of value" counts as a benefit. *See* 18 U.S.C. § 1589(b). By improperly imposing an arbitrary threshold, the district court further narrowed the reach of the TVPRA and compounded its error.

B. The District Court's Decision Encourages Corporations To Turn A Blind Eye To Human Trafficking

By requiring that defendants "operate" or "manage" the human trafficking, instead of simply "participate in the venture," the district

court insulated actors like Rubicon and Wales who contribute to the scourge of human trafficking. Under the court's analysis, corporations in the middle and end of supply chains can receive immunity for any TVPRA violation so long as they simply refrain from active "management." Indeed, under that analysis, they can know about the exploitation, they can benefit from it, they can even participate in it, all without consequence, so long as they do not operate or manage the trafficking. As discussed above, this holding conflicts with the TVPRA's plain language and dramatically curtails its intended reach.

The decision will also undercut corporate incentives to find and eradicate human trafficking in supply chains. As Congress has recognized, corporations are unlikely to take the steps needed to root out human trafficking in supply chains without threat of legal sanction, because the profits to be gained from such enterprises are so high—reaching into the billions. H.R. Rep. 110-430, at 33–34. By extending immunity to any actor who avoids active management, but still participates in and benefits from a venture involving human trafficking, the district court's decision encourages corporations to turn a blind eye toward human trafficking in their supply chains. Indeed, it gives

corporations a reason to be lax in their monitoring and enforcement of compliance with legal labor practices, an effort that corporations are already disinclined to undertake because it involves significant time and resources. *See* Ezell, *supra*, at 508–09. Likewise, corporations will be motivated to assist human trafficking enterprises in any way short of active management—such as extending financial support, providing resources and advice, including on employment practices, and assisting in marketing and sales. As a result, many corporate actors who benefit from and financially sustain human trafficking operations will be able to evade TVPRA liability and continue to profit from the work of modern day slaves. This Court should reject such a reading of the TVPRA as inconsistent with both the plain language of the Act, and the congressional intent behind it.

CONCLUSION

This Court should reverse the district court's grant of summary judgment.

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6453 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word Century Schoolbook 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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