No. 19-35526

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CESAR MARTINEZ-RODRIGUEZ, DALIA PADILLA-LOPEZ, MAYRA MUNOZ-LARA, BRENDA GASTELUM-SIERRA, LESLIE ORTIZ-GARCIA, and RICARDO NERI-CAMACHO,

Plaintiffs-Appellants,

v.

CURTIS GILES, an individual, DAVID FUNK, an individual, FUNK DAIRY, INC., an Idaho corporation, SHOESOLE FARMS, INC., an Idaho corporation, and JOHN DOES 1-10,

Defendants-Appellees.

On Appeal from the United States District Court for the District of Idaho
Case No. 1:17-cv-00001-DCN (The Hon. David C. Nye)

BRIEF OF THE HUMAN TRAFFICKING LEGAL CENTER AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Human Trafficking Legal Center is a non-profit organization. It has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Rules

Legislative Materials

Administrative Materials

Secondary Sources

Miscellaneous

INTEREST OF *AMICUS CURIAE*

The Human Trafficking Legal Center is a non-profit organization dedicated to helping survivors obtain justice. Since its inception in 2012, the 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 victims' rights. The Center advocates for justice for all victims of human trafficking.

The district court's opinion in this case misunderstands and misapplies the Trafficking Victims Protection Act. The published decision, if followed by other courts, will greatly undermine federal legal protections for trafficking victims and provide employers a roadmap to keep victims in forced labor. The Center submits this brief as a friend of the court both to help correct the district court's legal errors and to ensure that the TVPA is applied in accordance with Congress's goal to eradicate human trafficking.

The parties have consented to the filing of this brief.

CERTIFICATE OF AUTHORSHIP

In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), the undersigned certifies that: (i) no counsel for any party authored this brief in whole or in part; (ii) no party nor counsel for any party contributed money to fund the preparation or submission of this brief; and (iii) no one other than *amicus*, its

members, or their counsel contributed money intended to fund the preparation or submission of this brief.

BACKGROUND

"Human trafficking has no boundaries and respects no laws." U.S. Dep't of State, *Trafficking in Persons Report* 13 (July 2015), https://tinyurl.com/yymvrbnz. It "exists in formal and informal labor markets of both lawful and illicit industries, affecting skilled and unskilled workers from a spectrum of educational backgrounds." *Id.* The sheer pervasiveness of labor trafficking is shown in the numbers. The International Labour Organization estimates that, in 2016, 24.9 million people were trapped in forced labor situations. Int'l Labour Org., *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* 9 (2017), https://tinyurl.com/y6qwk6wb. More than 16 million were exploited in the private sector alone. *Id.* at 10.

In 2000, Congress passed the Trafficking Victims Protection Act—the first comprehensive U.S. legislation aimed at prosecuting and preventing human trafficking, including labor trafficking.[1] Although the TVPA initially provided only for criminal enforcement, through reauthorizations to address this "dark side of globalization," H.R. Rep. No. 110-430, at 33–34 (2007), Congress broadened its

[1] *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000).

scope. In 2003, finding that human trafficking "continues to victimize countless men, women, and children in the United States and abroad," Congress created a private right of action—18 U.S.C. § 1595—empowering victims to bring a civil action for damages and attorneys' fees against perpetrators.[2] And in 2008, Congress broadened the definition of "forced labor" in the central provision at issue in this case, 18 U.S.C. § 1589.[3]

Two changes made by the 2008 TVPRA are particularly relevant here. First, Congress clarified the definition of "forced labor" obtained "by means of the abuse or threatened abuse of law or legal process" to mean:

> the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

18 U.S.C. § 1589(c)(1). Second, Congress defined the threat of "serious harm" used to obtain forced labor to mean:

> any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to

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[2] *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, §§ 2, 4(a)(4)(A), 117 Stat. 2875, 2878 (2003).

[3] *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(b)(3), 122 Stat. 5068 (2008) ("TVPRA").

> continue performing labor or services in order to avoid incurring that harm.

Id. §1589(c)(2).

The TVPRA received "bipartisan" praise as the culmination of a decade's work "to ramp up our country's efforts to prevent trafficking, protect victims, and prosecute perpetrators," and to "dramatically increase America's ability to stop trafficking here at home." 153 Cong. Rec. 32019, 32047 (Dec. 4, 2007) (statement of Rep. Jackson-Lee). The amendment was intended to "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." *Id.* at 32056 (statement of Rep. Pearce).

The district court's ruling stands as an obstacle to those important objectives. As shown below, it should be reversed.

ARGUMENT

The district court improperly narrowed the scope of the TVPRA, undermining Congress's efforts to protect trafficking victims. The court committed three fundamental errors. *First*, it failed to consider "all the surrounding circumstances," 18 U.S.C. § 1589(c)(2)—including and especially Plaintiffs' status as immigrants—and how Defendants exploited those circumstances to create a climate of fear to coerce Plaintiffs to work for them. *Second*, the court improperly discounted Defendants' threats to deport Plaintiffs by reasoning that such threats were "simply statements of the law." And *third*, the district court misapplied the law by finding

that Plaintiffs' freedom of movement, and their quitting or being fired, foreclosed their forced-labor claim.

These errors not only led the district court to deprive Plaintiffs of their right to a jury trial, but the published opinion, if followed by other district courts, will hobble the effectiveness of the TVPRA. Adopting the district court's reasoning risks denying relief to countless victims of trafficking, enabling perpetrators to keep victims in forced labor by threatening them with deportation if they don't go along with their traffickers' demands.

I. The facts here are typical of human trafficking and forced-labor cases nationwide.

Despite that Rule 56 required the district court to view "the inferences" to be drawn from the underlying facts "in the light most favorable to" Plaintiffs, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588–88 (1986), the district court refashioned Plaintiffs' forced-labor claims into a run-of-the-mill commercial dispute. The court described this case as involving "just another bad employer," a "tight-wad," or "at the very most [an] employment, contract, or discrimination" case. *Martinez-Rodriguez v. Giles*, 391 F. Supp. 3d 985, 997–98, 1000 (D. Idaho 2019). In doing so, the court has effectively given traffickers an instruction manual for how to abuse workers while evading liability.

The TVPRA broadly defines "coercion" 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.

22 U.S.C. § 7102(3). This comprehensive view of coercion is echoed in the specific definitions of "forced labor" in 18 U.S.C. § 1589. Forced labor includes obtaining

> 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).[4] As noted above, "serious harm" includes "nonphysical" and "financial" harm "that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." 18 U.S.C. § 1589(c)(2). And "abuse or threatened abuse of law or legal process" includes any "threatened use of a law or legal process . . . in any manner or for any purpose for which the law was not designed, in order to

[4] 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(8).

exert pressure on another person to cause that person to take some action or refrain from taking some action." 18 U.S.C. § 1589(c)(1).

As those definitions show, Congress recognized 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. Yet the district court refused to recognize that Plaintiffs provided sufficient evidence of such an environment to entitle them to a jury trial on their forced-labor claims.

Plaintiffs are "six professional veterinarians from Mexico" who were recruited to work as animal scientists at Funk Dairy. *Martinez-Rodriguez*, 391 F. Supp. 3d at 988–89. The *second* most common civil human-trafficking case involves abuse in the agriculture industry. Alexandra F. Levy, *Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action* 13 (Human Trafficking Legal Center, Dec. 2018), https://tinyurl.com/y2tnf4yr. From the moment Plaintiffs arrived in Idaho, the defendants immersed them in a purposefully cultivated climate of fear. Defendants controlled Plaintiffs' lives, persistently changed the terms of their employment, and threatened them with deportation to enforce obedience. Only later was it revealed that Funk Dairy likely recruited Plaintiffs not as skilled animal scientists but because Defendants needed more general laborers following a round of deportations. ECF No. 38-5 at 6–16.

Unlike the district court below, other courts routinely find that such conditions are actionable as forced labor under the TVPRA. *E.g.*, *Casilao v. Hotelmacher LLC*, No. 5:17-cv-00800, at 9–10 (W.D. Okla. Feb. 5, 2019) (defendants paid victims "less than what was promised, assigned them to jobs other than those promised and charged them for housing contrary to representations that housing would be provided at no charge"); *David v. Signal Int'l, LLC*, No. 08-1220, 2014 WL 5489359, at *5–6 (E.D. La. Aug. 13, 2014) (recruitment based on promise of green cards and financial pressure to remain in job); *Aguirre v. Best Care Agency, Inc.*, 961 F. Supp. 2d 427, 443–44 (E.D.N.Y. 2013) (material disputed facts precluded summary judgment where defendants may have used threats of deportation "to force [plaintiff] to remain working for them, for less than the prevailing wage rates"); *Camayo v. John Peroulis & Sons Sheep, Inc.*, Nos. 10-cv-00772 & 11-cv-01132, 2012 WL 4359086, at *5 (D. Colo. Sept. 24, 2012) (finding § 1589 claim stated where "Defendants threatened to have [plaintiffs] sent back to Peru, apparently simply to instill fear and promote compliance"). Indeed, false promises, contract substitution, and deportation threats are common features in such cases. *See, e.g.*, *Aguirre*, 961 F. Supp. 2d at 444 ("The threat of deportation alone may support a claim for forced labor.") (collecting cases); *United States v. Kalu*, 791 F.3d 1194, 1198–99, 1212 (10th Cir. 2015) (upholding § 1589 conviction where professional health care workers were duped into working as unspecialized laborers in nursing

homes and threatened with deportation and financial penalties if they quit); *Nuñag–Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 790 F. Supp. 2d 1134, 1138–39, 1146 (C.D. Cal. 2011) (finding valid § 1589 claim based on deportation threats and financial manipulation of plaintiffs).

The district court not only failed to view the factual inferences in the light most favorable to Plaintiffs, but its reasoning, if accepted, would enable unscrupulous employers to use deportation threats and financial pressures to coerce other unsuspecting victims into forced labor.

II. The district court failed to consider that Plaintiffs' backgrounds and circumstances rendered them vulnerable to trafficking and forced labor.

Congress intended § 1589 of the TVPA "to 'reach cases in which persons are held in a condition of servitude through *nonviolent* coercion.'" *United States v. Dann*, 652 F.3d 1160, 1169 (9th Cir. 2011) (quoting 22 U.S.C. § 7101(b)(13)) (emphasis added); *Muchira v. Al-Rawaf*, 850 F.3d 605, 617 (4th Cir.) (same, following *Dann*), *cert. denied*, 138 S. Ct. 448 (2017). The law was enacted in response to an earlier Supreme Court decision, *United States v. Kozminski*, 487 U.S. 931 (1988), which had "limited the definition of involuntary servitude to 'physical' or 'legal' coercion." *Dann*, 652 F.3d at 1169 (quoting *Kozminski*, 487 U.S. at 952). The TVPA defined "involuntary servitude" and created two new prohibitions on forced labor and trafficking—§§ 1589 and 1590—"to address the increasingly subtle methods of traffickers who . . . restrain their victims without physical violence or

injury." *Kiwanuka v. Bakilana*, 844 F. Supp. 2d 107, 115 (D.D.C. 2012) (quoting H.R. Rep. No. 106–939, at 101 (2000)).

This victim-centered approach is written into the statute. Thus, whether labor is coerced through a threat of "serious harm" must be evaluated "under all the surrounding circumstances" and, in particular, from the perspective of "a reasonable person of the *same background and in the same circumstances*" as the plaintiff. 18 U.S.C. § 1589(c)(2) (emphasis added); *Muchira*, 850 F.3d at 622. Likewise, whether labor is coerced through a "threatened abuse of law or legal process" must be evaluated according to whether it would "exert pressure . . . to cause that person to take some action or refrain from taking some action." *Id*. § 1589(c)(1).

Courts apply a "hybrid" standard to assess whether an employer's conduct was sufficiently serious to induce victims to provide labor or services against their will. *Muchira*, 850 F.3d at 618 (citing *United States v. Rivera*, 799 F.3d 180, 186 (2d Cir. 2015)). This evaluation considers both the "'particular vulnerabilities of a person in the victim's position,'" *id.* (quoting *Rivera*, 799 F.3d at 186), as well as those "'objective conditions that make the victim especially vulnerable to pressure.'" *Id*. (quoting *United States v. Bradley*, 390 F.3d 145, 153 (1st Cir. 2004), *vacated on other grounds*, 545 U.S. 1101 (2005)).

The district court failed to apply the law correctly because it did not give due regard to Plaintiffs' individual background, circumstances, and vulnerabilities.

Plaintiffs arrived in rural Idaho completely dependent on Funk Dairy; they knew no one in the area; most spoke no English; some had no phone, computer, or other means of communication; and they were not allowed to have visitors. *See, e.g.*, E.R. 84 (Munoz-Lara Dep. at 49:12) (doesn't speak English); E.R. 64 (Padilla-Lopez Dep. at 70:23) (same); E.R. 83 (Munoz-Lara Dep. at 44:1–3) ("we were not allowed to have any visitors"); E.R. 58 (Ortiz-Garcia Dep. at 67:16–21) (lacked financial means to keep a phone all the time), 59 (*id.* at 73:14–23) (no visitors allowed); ECF 38-9 at 13 (Martinez-Rodriguez Dep. at 56:2–3) ("I didn't know the area. I didn't know the people. Difficulties with the language."); ECF 38-8 at 13 (Neri-Camacho Dep. at 75:22–23) (cannot read English).

Immigration status is recognized as a factor that makes a person vulnerable to nonphysical coercion. *United States v. Callahan*, 801 F.3d 606, 618 (6th Cir. 2015) (recognizing "unique vulnerabilities of foreign-born victims"); *United States v. Farrell*, 563 F.3d 364, 374 (8th Cir. 2009) ("Furthermore, the coercive nature of the threats is amplified by the workers' 'special vulnerabilities,' which include the fact that the workers were in the United States under temporary-work visas sponsored by the [Defendants]."") (citation omitted).

Considering Plaintiffs' individual background and circumstances—and drawing all inferences in their favor, as required on summary judgment—a reasonable jury could conclude that Plaintiffs were coerced into forced labor.

Accordingly, the district court erred in deciding that disputed factual question and taking it away from the jury.

III. The district court erroneously discounted the coercive effects of deportation threats and failed to evaluate those threats within the totality of circumstances.

Not only did the district court fail to give due regard to Plaintiffs' background and circumstances, it failed to consider the *totality of the circumstances* when evaluating whether a threat of serious harm forced or coerced Plaintiffs into continued, involuntary labor.

The TVPRA was intended to protect victims who are trafficked by methods more subtle than brute force. Courts must look at the entire web of coercion, not pull apart the threads individually to see if each one, standing alone, was sufficiently coercive. *E.g.*, *Farrell*, 563 F.3d at 373 ("[T]he workers subjectively feared the Farrells" and "the workers reasonably believed that their employers were 'powerful people' and could indeed 'hunt them down' if the workers left."); *Lagayan v. Odeh*, 199 F. Supp. 3d 21, 28 (D.D.C. 2016) (finding coercion under § 1589 based on the totality of circumstances, including not allowing plaintiff to go unsupervised and warning her not to talk to other Filipinos); *Lagasan v. Al-Ghasel*, 92 F. Supp. 3d 445, 453 (E.D. Va. 2015) (totality of circumstances included berating plaintiff for speaking with anyone outside the family); *Dlamini v. Babb*, No. 1:13-CV-2699, 2014 WL 5761118, at *6 (N.D. Ga. Nov. 5, 2014) (granting summary judgment for

plaintiff on § 1589 claim where defendant used coercion and fear to hold plaintiff in forced labor).

A. The district court failed to credit Plaintiffs' evidence reflecting a general climate of fear.

The district court ran afoul of the requirement to consider the totality of circumstances confronting Plaintiffs. For example, the court did not consider how "Funk Dairy's financial scheme (of random charges, known and unknown housing and transportation costs, and inconsistent raises or bonuses)" interacted with the plaintiffs' cultural, linguistic, and geographical isolation. *See Martinez-Rodriguez*, 391 F. Supp. 3d at 997 ("Setting aside the question of whether this behavior could even be considered some sort of implied or subtle coercion to retain Plaintiffs' labor, the idea is no different than any other employed person who needs money to survive . . . .").

But such analysis was essential. Indeed, a reasonable jury could find that Defendants created a climate of fear that enabled them to control Plaintiffs. Plaintiffs had no place to live or method of transportation independent of Funk Dairy—they relied to their detriment on the Dairy's false promise of providing housing and transportation. *E.g.*, E.R. 50 (Gastelum-Sierra Dep. at 35–37) (describing arbitrary rent increases); ECF No. 38-9 at 13 (Martinez-Rodriguez Dep. at 55:22–56:5) ("The agreement was that Curtis was going to provide me with a house, with transportation. And given that this wasn't done, I had no way of moving anywhere . . . . [T]he

distance between the ranch and the two closest cities, it was at least a half hour."); ECF No. 38-10 at 9 (Padilla-Lopez Dep. at 48:14–16) ("I didn't have any other option, because I didn't know anybody else. I didn't have money for a deposit . . . ."). As one plaintiff put it: "we didn't know the area. We didn't speak English, and we didn't know who we should go to help us find another house. So then we approached [Defendant Giles] to help us resolve the issue, and that's when he started charging us rent for that house." ECF No. 38-11 at 11 (Ortiz-Garcia Dep. at 47:9–14). The district court overlooked the coercive effect of defendants' financial scheme by failing to evaluate it in the context of Plaintiffs' circumstances.

The district court also erroneously siloed and discounted the oppressive working conditions to which Plaintiffs were subjected. Imposing long hours of difficult work in subpar conditions is a common method by which traffickers control their victims. Plaintiffs here were subjected to 12 hours or more of intense physical labor, six days a week. E.R. 84 (Munoz-Lara Dep. at 46:19–23) ("Q: And did you know the work would be 12 hours a day? A: No. [Curtis Giles] told me that I would work 10 hours a day, and it was optional if I wanted to work 12 hours a day."); *see also* E.R. 68 (Martinez-Rodriguez Dep. at 35:3–6) ("typical workday" was "12 hours" and "[s]ometimes even more"); ECF No. 38-10 at 3 (Padilla-Lopez Dep. at 24:15–16) (did not know "it was going to be 12 mandatory hours"); E.R. 56 (Ortiz-Garcia Dep. at 58:24–59:3) (worked more than 12-hour days, 6-days a week); E.R.

49 (Gastelum-Sierra Dep. at 32:5–10) (was not told that every position required 12-hour shifts).

Defendants also denied Plaintiffs any breaks to use the bathroom or to have lunch or dinner during their 12-hour shifts. E.R. 52 (Gastelum-Sierra Dep. at 55:4–19). Because there were no "portable restrooms," workers who could not hold it in that long would have to "pee in . . . a bucket used to feed the calves." E.R. 52 (*id.* at 55:16–19). Such oppressive conditions contributed to Plaintiffs' inability to leave Funk Dairy's employ. *See* E.R. 74 (Neri-Camacho Dep. at 60:17–22) ("Q. Outside of work hours were you free to travel and go wherever you wanted? A. I needed that time to sleep.").

Yet another typical feature of trafficking cases is present here: denial of proper medical care. Defendants' treatment of plaintiff Ricardo Neri-Camacho stands out. He suffers from diabetes, and Funk Dairy did not allow him breaks to eat, nor could he store or take his insulin at work. E.R. 76 (Neri-Camacho Dep. at 66:1–10) ("Curtis was aware that I had diabetes, and there was too much work, and we didn't have a scheduled lunch or mealtime."). As a result, his health deteriorated. *Id.* The district court minimized Defendants' misconduct as a "lack of sympathy" but concluded that it was not "enough to show a 'force of labor.'" *Martinez Rodriguez*, 391 F. Supp. 3d at 993 n.2. Yet that failed to construe the facts in the light most favorable to Plaintiffs.

What is more, the court failed to appreciate that traffickers frequently deny victims access to adequate medical care as a method to control them. *See, e.g.*, Am. Compl. at ¶¶ 4, 31, 50, *Ramos v. Hoyle*, No. 1:08-cv-21809 (S.D. Fla. Aug. 6, 2008) (defendants refused medical care to trafficking victim with diabetes), ECF No. 17; *Ramos v. Hoyle*, No. 1:08-cv-21809, 2008 WL 5381821, at *4–5 (S.D. Fla. Dec. 19, 2008) (plaintiffs stated a TVPRA claim). Neri-Camacho was not the only Plaintiff to fall victim to this scheme. When other plaintiffs sustained injuries while working, Defendants exercised strict control over their ability to heal, including ordering one plaintiff to work with a fractured finger in spite of the doctor's orders to rest. *E.g.*, E.R. 63 (Padilla-Lopez Dep. at 55–57). Defendant Giles insisted that she do her work because she still "had nine other fingers." E.R. 63 (*id.* at 57:4–5). *Cf. Mazengo v. Mzengi*, No. 07-cv-756, 2007 WL 8026882, at *3 (D.D.C. Dec. 20, 2007) (defendants forced plaintiff to work on the same day she had foot surgery, despite doctor's advice to stay off her feet).

The district court also erred by minimizing Defendants' surveillance and control of the plaintiffs' personal lives, dismissively characterizing such conduct as merely "meddlesome." *Martinez-Rodriguez*, 391 F. Supp. 3d at 994. But Defendants' frightening tactics are typical in trafficking cases. Plaintiffs adduced sufficient evidence for a reasonable jury to conclude that Defendants actively cultivated a climate of fear to coerce them into continued labor.

For instance, Funk Dairy employees regularly entered and searched Plaintiffs' work-provided housing without advance warning or permission. ECF No. 38-12 at 16 (Gastelum-Sierra Dep. at 51). They ordered the female plaintiffs to stay away from men, surveilled their houses to check for male visitors, and monitored one plaintiff's Facebook page. E.R. 83 (Munoz-Lara Dep. at 42); E.R. 59–60 (Ortiz-Garcia Dep. at 70–74); ECF No. 38-12 at 16 (Gastelum-Sierra Dep. at 51–52); E.R. 53 (Gastelum-Sierra Dep. at 58–61). These actions reinforced the control that Defendants wielded over every aspect of Plaintiffs' lives.

The district court brushed aside Plaintiffs' circumstances and the cumulative coercive effect of Funk Dairy's actions by incorrectly relying on *Headley v. Church of Scientology International*, 687 F.3d 1173 (9th Cir. 2012). That case is not remotely comparable. *Headley* involved two former members of the Church of Scientology who claimed that the Church's threat of disassociating with them coerced them into staying and working long hours. *Id*. at 1180. Other courts have correctly recognized that *Headley* is inapposite in forced labor cases, like this one, that involve foreign workers who are coerced to remain in the defendant's employment by threats of deportation and other forms of manipulation. *See Yassin v. AR Enters., LLC*, No. 16-12280, 2017 WL 6625027, *4 (D. Mass. Dec. 28, 2017) (*Headley* "is inapposite because there was no allegation of abuse or threatened abuse of legal process, as is alleged here."). As another court recently put it, *Headley* "is

easily distinguishable because the plaintiffs in that case faced only one potential adverse consequence: excommunication from the Church of Scientology." *United States v. Raniere*, 384 F. Supp. 3d 282, 313 (E.D.N.Y. 2019). And that threat of excommunication "was a 'legitimate warning,' not an improper threat, because 'a church is entitled to stop associating with someone who abandons it . . . ." *Id*.

B. The district court erred by discounting Defendants' threats of deportation.

The district court's most glaring error was in dismissing the threats of deportation.

1. Deportation threats must be evaluated within the greater climate of fear.

Plaintiffs adduced substantial evidence showing that Defendants persistently threatened to deport them as a means to make them toe the line. Defendant Giles "always said that he could return [them] at any moment" and that they "couldn't leave [their] job because he would return [them] to Mexico." E.R. 53 (Gastelum-Sierra Dep. at 60). Funk Dairy threatened Ortiz-Garcia with deportation five or six times, whenever she expressed dissatisfaction with working conditions or to keep her from telling anyone how little she was being paid. E.R. 58 (Ortiz-Garcia Dep. at 68–69). She was "quite afraid of" Defendant Giles because he was a "very aggressive person" and "couldn't control his emotions," and he would threaten to deport her if her employment ended. E.R. 58–59 (*id*. at 69–70).

The district court failed to consider Defendants' threats as part of the overall climate of fear confronting Plaintiffs. Instead, the court minimized those threats as "arguably rude" but "not a true threat of deportation towards Plaintiffs that 'forced' them to labor for Defendants." *Martinez-Rodriguez*, 391 F. Supp. 3d at 997. But here again, the court put its thumb on the scale, weighing the evidence in Defendants' favor, rather than considering Plaintiffs' evidence in the light most favorable to them, as Rule 56 required.

This Court held in *Dann* that implicit threats of deportation when used to make workers "fear deportation" can suffice to support a forced-labor claim. 652 F.3d at 1172, 1178. Indeed, threats of deportation can qualify not only as abuses of the legal process but as threats of serious harm, both of which are actionable under § 1589. Such a threat "clearly falls within the concept and definition of 'abuse of legal process' when 'the alleged objective for such conduct was to intimidate and coerce [Plaintiff] into forced labor.'" *Elat v. Ngoubene*, 993 F. Supp. 2d 497, 523 (D. Md. 2014) (quoting *Antonatos v. Waraich*, No. 1:12-cv-1905, 2013 WL 4523792, at *5 (D.S.C. Aug. 27, 2013) (internal citations omitted) (alteration in original); *see also Nuñag–Tanedo*, 790 F. Supp. 2d at 1146.

The district court below did not address whether the threats qualified as an abuse of legal process; it focused solely on threats of serious harm. But Plaintiffs argued and presented ample evidence that Defendants intended to intimidate and

coerce them into forced labor by abusing the legal process of deportation: for example, threats of deportation were deployed when an employee expressed dissatisfaction with working conditions or missed a day of work. E.R. 58 (Ortiz-Garcia Dep. at 68–69). Immigration enforcement does not exist as a tool for employers to extract more work from their employees; threatening deportation for that purpose clearly abuses the process. *Dann*, 652 F.3d at 1172, 1178; *United States v. Calimlim*, 538 F.3d 706, 713 (7th Cir. 2008) (immigration laws do not aim to help employers retain employees by threats of deportation).

Determining whether Defendants abused the legal process comes down to their state of mind—whether their threats "were directed to an end different from those envisioned by the law." *Id.* The district court held that there was no dispute of material fact as to scienter, but it was able to do so only by resisting inferences favoring Plaintiffs and suggesting that they had to prove some sort of "covert or nefarious scheme," *Martinez-Rodriguez*, 391 F. Supp. 3d at 991–992, a higher burden than required. It was therefore error to grant summary judgment with respect to Defendants' mental state.

Threatening deportation as Defendants did here also qualifies as a threat of "serious harm" under § 1589. As noted earlier, "serious harm" is "any" harm, including "nonphysical" and "financial" harm, that "is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same

background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm." 18 U.S.C. § 1589(c)(2). That is precisely what Plaintiffs described on summary judgment. A reasonable jury could easily find that Defendants' deportation threats were not offered to helpfully explain the scope and limits of their visas, but to cajole them into falling in line and to keep them working long hours.

In fact, threatening deportation goes far beyond reminding Plaintiffs that their visas were tied to their employment. Although Plaintiffs were required to leave the country if their visas lapsed, deportation does not automatically follow. A threat of deportation implies force, legal and possibly physical, with potentially harsh consequences. *See* Black's Law Dictionary 552 (11th ed. 2019) (defining "deportation" as "removing a person to another country; esp., the expulsion or transfer of an alien from a country," noting that many deportees "are barred from ever returning"). Defendant Giles explicitly harnessed the threat of force implicit in deportation when he told one plaintiff who missed a day of work that she "should thank God he didn't deport [her] without [her] belongings, just like that." E.R. 58 (Ortiz-Garcia Dep. at 68–69). The threat of detention and forcible removal was especially threatening to Plaintiff Padilla-Lopez, whose daughter resided with her in Idaho. E.R. 51 (Gastelum-Sierra Dep. at 48:13–20).

Given the climate of fear cultivated by Defendants, each of the Plaintiffs was in a position where a threat of deportation amounted to a threat of serious harm sufficient to, at least for a time, force them to work against their will. The district court erred when it ruled that no reasonable jury could find for Plaintiffs.

2. Deportation threats cannot be dismissed as "simply statements of the law."

Not only did the district court fail to consider the deportation threats in light of the overall climate of fear, it erroneously called them "true statement[s] of law" or "simply statements of the law," and therefore not a proper basis for a TVPRA claim. *Martinez-Rodriguez*, 391 F. Supp. 3d at 992, 995 n.4. That too was error.

The district court wrongly thought that *Headley* required such threats to be characterized merely as "'warnings of adverse but legitimate consequences.'" *Id.* at 992 (quoting *Headley*, 687 F.3d at 1180). But *Headley* teaches that courts "must distinguish between 'improper threats or coercion and permissible warnings of adverse but legitimate consequences.'" 687 F.3d at 1180 (quoting *Bradley*, 390 F.3d at 151. *Headley* involved only "the latter," because a "church is entitled to stop associating with someone who abandons it." *Id*. As this Circuit earlier recognized in *Dann*, by contrast, the "threat [of deportation] alone—to be forced to leave the country—*could* constitute serious harm to an immigrant," such as one "who came to the United States in part to study English and who dreamed of starting a business." 652 F.3d at 1172 (emphasis added). The evidence supported the § 1589 conviction

in *Dann*. *Id*. Similarly, in *United States v. Calimlim*, 538 F.3d at 713, the court of appeals affirmed the defendants' forced-labor convictions for keeping their housekeeper in servitude. The defendants coerced her in part by warning that she had a "precarious position under the immigration laws." *Id*. at 711. The court rejected the defendants' claim that they were simply warning of "legitimate but adverse consequences." *Id*. at 714. Defendants' deportation threats here are even more coercive than those in *Dann* and *Calimlim*, and that evidence was more than sufficient to defeat summary judgment.

Indeed, federal courts throughout the country have found similar threats of deportation sufficient to violate the TVPA. *See Farrell*, 563 F.3d at 375 (rejecting argument that the "possibility of deportation alone was insufficient to provide the requisite compulsion for peonage"); *Ramos v. Hoyle*, 2008 WL 5381821, at *4–5 (rejecting argument that "a threat to Plaintiffs that they would lose their immigration status if they left Defendants' employment was a 'truthful statement and not an abuse of legal process.'"); *Javier v. Beck*, No. 13-cv-2926, 2014 WL 3058456, at *6 (S.D.N.Y. July 3, 2014) (finding threat to withdraw visa application constitutes "serious harm"); *Ruiz v. Fernandez*, 949 F. Supp. 2d 1055, 1077 (E.D. Wa. 2013) ("[T]hreatening deportation can serve as the basis for a TVPRA violation."); *Ramos-Madrigal v. Mendiola Forestry Serv., LLC*, 799 F. Supp. 2d 958, 960 (W.D. Ark. 2011) (rejecting defendant's argument that he "violated no law by merely informing

Plaintiffs that they would be reported to immigration if they left their employment before the end of the contract term"). The district court should have followed that clear guidance here.

IV. The district court fell victim to the myth that trafficking requires barriers to movement.

The district court also erred in finding that the ability of some plaintiffs to live off-site and travel showed that they were not being forced to provide labor or services against their will. *Martinez-Rodriguez*, 391 F. Supp. 3d at 994. That interpretation contradicts both Congressional intent and established case law. Indeed, "[d]uring the years slavery existed in this country, slaves often worked in the fields and went into town with little direct supervision, thereby offering them opportunities to escape. Yet it is beyond argument that the slaves were held in involuntary servitude." *United States v. Bibbs*, 564 F.2d 1165, 1168 (5th Cir. 1977). Liability under the TVPRA likewise cannot be avoided simply because plaintiffs are not kept under "literal lock and key." *Paguirigan v. Prompt Nursing Emp't Agency*, 286 F. Supp. 3d 430, 439 (E.D.N.Y. 2017) (rejecting defense as "absurd" that plaintiff was free to leave because she "had her own residence and phone"); *Mouloki v. Epee*, 262 F. Supp. 3d 684, 690, 701 (N.D. Ill. 2017) (denying summary judgment

despite that plaintiff was free to "come and go from the household" and spend time with acquaintances).[5]

Again, the district court improperly narrowed its focus and failed to evaluate the evidence in light of the totality of the circumstances. "[E]vidence of freedom to come and go would be more probative in a case that did *not* involve threats of deportation or other abuse of legal process." *Yassin*, 2017 WL 6625027, at *3 (emphasis added). In this case, by contrast, such threats were at the core of Defendants' wrongdoing.

V. The district court improperly held that victims who quit or are fired could not have been coerced into forced labor.

Yet another troubling aspect of the district court's opinion is its remarkable comment that "If Funk Dairy was truly forcing Plaintiffs to perform labor, they would not have allowed three Plaintiffs to quit, nor terminated three Plaintiffs themselves." *Martinez-Rodriguez*, 391 F. Supp. 3d at 994. Under that reasoning, traffickers could skirt TVPA liability altogether when victims muster the courage to

[5] Similarly, the fact that some plaintiffs were able to travel within the United States and abroad does not diminish the evidence that Defendants coerced Plaintiffs to work. Courts recognize that psychological coercion has no geographical limit. *United States v. Baston*, 818 F.3d 651, 657–58 (11th Cir. 2016) (upholding trafficking conviction where Australian victim of U.S.-based trafficker traveled to Australia and internationally), *cert. denied*, 137 S. Ct. 850 (2017); *Elat*, 993 F. Supp. 2d at 529-30 (denying summary judgment where defendants left plaintiff home alone on various occasions and plaintiff also traveled with defendants to her home country, stayed on, and later returned to defendants' home in the United States).

finally leave, or when the trafficker capriciously fires the victim from the job. As long as that happens before an indictment is handed up or the victim finds a lawyer to file suit, the trafficker would escape liability. Such an odd notion finds no support in the case law, *see, e.g.*, *Roe v. Howard*, 917 F.3d 229, 237, 247 (4th Cir. 2019) (affirming judgment against trafficker despite that he had "fired her"); *Paguirigan v. Prompt Nursing Emp't Agency*, No. 17-cv-1302, 2019 WL 4647648, at *3 (E.D.N.Y. Sept. 24, 2019) (granting plaintiffs summary judgment on TVPA claims against defendants where guestworker nurses quit due to unsafe working conditions despite a $25,000 liquidated damages penalty provision).[6] This Court should specifically call out and repudiate the district court's reasoning.

And even if the district court had made the same point more diplomatically, it would not warrant summary judgment for Defendants. For "[e]ven assuming that there were points at which the workers could have escaped the [trafficker's] control, a rational jury could have concluded that the workers' employment 'was involuntary for at least *some portion* of [their] stay. And that involuntary portion would suffice to sustain'" liability under the TVPRA. *Farrell*, 563 F.3d at 375 (emphasis added)

[6] Traffickers sometimes fire workers and loudly threaten deportation to intimidate *other* workers who are watching. *E.g.*, 6th Am. Compl. ¶¶ 245, 257, *David v. Signal Int'l, LLC*, No. 2:08-cv-01220 (E.D. La.) (Aug. 5, 2014) (defendants allegedly fired five H-2B workers as a means of intimidating remaining workers), ECF No. 1706.

(quoting *United States v. Djoumessi*, 538 F.3d 547, 552–53 (6th Cir. 2008)); *see also Djoumessi*, 538 F.3d at 552–53 (involuntary servitude may be for "any term").

VI. The Court should correct the district court's misapprehension that the individual defendants' liability depends on piercing the corporate veil.

Finally, this Court should correct the district court's erroneous suggestion in dictum that the corporate form is somehow a defense to forced-labor claims. *See Martinez-Rodriguez*, 391 F. Supp. 3d at 1001 ("Absent a lengthy discussion regarding agency, corporate liability, piercing the corporate veil, and LLC structure, the Court simply notes that Plaintiffs admit they only worked for Funk Dairy during the relevant timeframe . . . ."). That idea betrays a fundamental misunderstanding of the TVPRA. Section 1589 imposes liability on *anyone* who "knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a)." 18 U.S.C. § 1589(b). Congress added that language to broaden liability beyond the traffickers themselves and to deter the business of trafficking, which yields billions in profits each year. H.R. Rep. 110-430, at 33–34.

Thus, proof that defendants other than Funk Dairy knowingly benefited from Plaintiffs' forced labor is sufficient to impose personal liability on them, without regard to any higher, State-law burden to "pierce the corporate veil." *See Ricchio v. McLean*, 853 F.3d 553, 555–57 (1st Cir. 2017) (holding that plaintiff stated a claim against a motel owner who received rent from plaintiff's trafficker in exchange for

using motel room in which the plaintiff was held). In remanding this case for further proceedings, the Court should advise the district court to analyze the question under § 1589(b). Otherwise the district court is likely to commit the error on remand that is telegraphed in its summary-judgment opinion.

CONCLUSION

The Court should reverse and remand.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the undersigned certifies that (1) this document complies with the type-volume limits of Fed. R. App. P. 29(a)(5) and Ninth Circuit Rule 32-1(a) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 6,662 words [less than 7,000 words]; and (2) this document 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point font and Times New Roman type style.

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I certify that on October 3, 2019, I filed this brief with the Clerk of 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 CM/ECF system.

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