ORAL ARGUMENT NOT YET SCHEDULED

No. 20-7114

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

RAMONA MATOS RODRIGUEZ, ET AL.,
Plaintiffs-Appellees,

v.

PAN AMERICAN HEALTH ORGANIZATION, ET AL.,
Defendants-Appellants,

JOAQUIN MOLINA, ALBERTO KLEIMAN, and DOES NO. 1-10,
Defendants.

On Appeal from the United States District Court
for the District of Columbia, Case No. 1:20-cv-00928
(The Honorable James E. Boasberg)

BRIEF OF THE HUMAN TRAFFICKING LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE AND PLAINTIFFS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Rules 26.1 and 28(a)(1) of the Circuit Rules of the United States Court of Appeals for the District of Columbia Circuit, the undersigned counsel for Amicus Curiae certifies the following:

(A) Parties and Amici.

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Defendants-Appellants and the Brief for Plaintiffs-Appellees:

Amicus Curiae: Human Trafficking Legal Center.

The undersigned counsel certifies, to the best of their knowledge and belief, that the Human Trafficking Legal Center is not a corporation and has no parent companies, and that no publicly owned company has a 10% or greater ownership interest in it.

(B) Ruling Under Review.

This is an appeal of the district court's order of November 9, 2020, A162, and its accompanying opinion, A163, reported as *Rodriguez v. Pan American Health Organization*, 502 F. Supp. 3d 200 (D.D.C. 2020).

(C) Related Cases.

This case has not previously been before this Court. Counsel is unaware of any related cases within the meaning of Circuit Rule 28(a)(1)(C).

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GLOSSARY

The Center	Human Trafficking Legal Center
FSIA	Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified at 28 U.S.C. § 1602 et seq.)
IOIA	International Organizations Immunities Act of 1945, Pub. L. No. 79-291, 59 Stat. 669 (codified at 22 U.S.C. § 288 et seq.)
PAHO	Pan American Health Organization
TVPRA	Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, as amended and reauthorized by, *inter alia*, the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044

IDENTITY AND INTERESTS OF THE AMICUS CURIAE[1]

The Human Trafficking Legal Center is a non-profit organization committed to justice for human-trafficking survivors. Since its inception in 2012, the Center has trained more than 4,000 attorneys at top law firms across the United States to handle civil trafficking cases pro bono. The Center has connected more than 300 survivors with pro bono representation and educated more than 20,000 community leaders on victims' rights. The Center advocates for justice for all victims of human trafficking. It has also filed amicus briefs in cases like this one that involve significant legal issues under the Trafficking Victims Protection Act of 2000, as reauthorized and amended several times (collectively, the "TVPRA").[2]

The Center believes that the district court correctly determined that PAHO's acting as a financial intermediary to facilitate Cuba's trafficking of medical personnel in Brazil constitutes "commercial activity" for which PAHO may not assert international-organization immunity. The gravamen of a civil trafficking claim under 18 U.S.C. §§ 1589(b) and 1595(a) is the defendant's knowingly

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), the undersigned certifies that no party authored this brief in part or in whole; no party nor any party's counsel contributed any money to fund this brief; and no person or entity other than the Human Trafficking Legal Center contributed any money to fund this brief.

[2] The Supreme Court has likewise referred to these acts collectively as the "TVPRA." *See Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1939–40 (2021).

benefitting from participating in a venture that the defendant knew or should have known was violating the trafficking laws.

The district court, however, incorrectly suggested that forced labor and trafficking *alone* could not constitute "commercial activity" because it is not the type of activity in which a private business could lawfully engage. A183. The Center has an especially strong interest in seeing the Court call out and disavow such a categorical rule.

The Court should make clear that the "commercial activity" exception under the Foreign Sovereign Immunities Act (FSIA), made applicable to international organizations like PAHO under International Organizations Immunity Act (IOIA), applies to international organizations that engage in or facilitate one country's trafficking of human labor in another country. A categorical rule that human trafficking is never "commercial activity" would give rogue nations carte blanche to use financial intermediaries and international organizations to traffic people into forced labor in other countries.

The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

1. The district court correctly found that, by acting as a financial middleman to facilitate Cuba's trafficking of medical workers in Brazil, the Pan American Health Organization (PAHO) engaged in "commercial activity" that is

not shielded by international-organization immunity. But the court's opinion incorrectly suggested that human trafficking itself is not commercial activity. A182. Although that statement is dictum, PAHO embraces it and argues that "forced labor and trafficking are not 'commercial activity.'" PAHO Br. 24.

This Court should explicitly reject PAHO's claim. First, the FSIA eschews such categorical determinations, defining "commercial activity" as "either a regular course of commercial conduct *or a particular* commercial transaction or act." 28 U.S.C. § 1603(d) (emphasis added). The FSIA's individualized and fact-specific approach disfavors a categorical rule that forced labor and trafficking can never be commercial activity.

Second, the caselaw cited by the district court and repeated by PAHO is neither persuasive nor legally binding on this Court. Importantly, those cases did not address the situation alleged here, where one foreign country traffics workers to another country, using an international organization as the middleman to facilitate the provision of forced labor. A State "waive[s] [its] immunity by conducting commercial activities in foreign states." *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1151 (7th Cir. 2001) (citation omitted). That is what Cuba and PAHO are alleged to have done here.

Third, the fact that the conduct in question is illegal does not negate its commercial character. The fraudulent conduct of Brazil's state-owned oil

company in *EIG* constituted "commercial activity." *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339 (D.C. Cir. 2018). The fraud's unlawfulness did not matter. In fact, this Court in 1994 rejected the Second Circuit's suggestion that unlawfulness alone could negate an activity's commercial character. *See Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 167–68 (D.C. Cir. 1994). The Sixth, Ninth, and Tenth Circuits have since agreed that activity can be "commercial" in nature even when it is illegal.

Fourth, the TVPRA confirms that Congress viewed human trafficking as commercial activity. Congress recognized that eliminating the profitability of human trafficking is essential to rooting it out. Moreover, the TVPRA's extraterritorial reach is anchored in Congress's power to regulate foreign commerce. PAHO's claim that trafficking never amounts to commercial activity conflicts with Congress's finding that trafficking substantially affects foreign commerce.

2. Although the district court erred in suggesting that human trafficking is not commercial activity, the court correctly concluded that PAHO engaged in commercial activity by serving as a financial middleman to enable Cuba's provision of forced labor to Brazil, for which PAHO received millions of dollars in Washington, D.C. This Court held in *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985), that a foreign State engages

in commercial activity when it acts as a financial middleman in the same manner as a bank or private entity, *id.* at 1002, just as PAHO allegedly did here.

PAHO's conduct receiving financial benefits in the United States is also the gravamen of the plaintiffs' claim under the TVPRA. Sections 1595(a) and 1589(b), and the legislative history of the TVPRA, confirm that a suit against those who benefit from trafficking is doctrinally distinct from an action against the perpetrator.

3. Civil liability under § 1595(a) attaches when a defendant who knowingly benefitted from trafficking "knew or should have known" that the perpetrator was engaged in trafficking. In this case, the public-record evidence alone amply demonstrates that PAHO "should have known" that the Mais Médicos program subjected Cuban health care workers to forced labor in Brazil.

4. Failing to apply the TVPRA to international organizations that facilitate one country's provision of forced labor to another country will incentivize continued trafficking that violates international and U.S. law.

Accordingly, the Court should affirm the district court's judgment that PAHO's acting as a financial middleman satisfies the FSIA's commercial-activity definition. And the Court should explicitly reject PAHO's argument that, as a matter of law, forced labor and human trafficking can never be "commercial activity."

ARGUMENT

I. The Court should reject PAHO's categorical assertion that human trafficking is not "commercial activity."

The parties start from common ground. Under the IOIA, international organizations like PAHO generally "enjoy the same immunity from suit . . . as is enjoyed by foreign governments." 22 U.S.C. § 288a(b). But a foreign state is not immune under the FSIA in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state . . . or upon an act outside the . . . United States in connection with a commercial activity of the foreign state elsewhere . . . that . . . causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2); *see Jam v. Int'l Fin. Corp.*, 139 S. Ct. 759, 772 (2019).

The district court's "initial[]" intuition was that "forcing Plaintiffs to work as part of the Mais Médicos program . . . could qualify as commercial activity." A182. But the court suppressed that instinct after concluding (incorrectly) that "the caselaw is unanimous the other way." A182–83.

PAHO has transformed that dictum into a mantra. PAHO now insists as a categorical matter that "forced labor and trafficking are not 'commercial activity'" that could subject an international organization to liability in the United States. PAHO Br. 24.

Not so. PAHO's categorical rule would devastate the effectiveness of the TVPRA and undermine Congress's purpose in enacting it. This Court should hold

that human trafficking can constitute commercial activity and reject any per se rule to the contrary.

A. The FSIA eschews any categorical determination that human trafficking is not "commercial activity."

A categorical rule that forced labor and human trafficking are never "commercial activity" would be inconsistent with the FSIA, which calls for a fact-specific inquiry in each case. The FSIA defines "commercial activity" to mean "either a regular course of commercial conduct *or a particular commercial transaction or act*." 28 U.S.C. § 1603(d) (emphasis added). Because even a single commercial transaction or act could constitute "commercial activity," courts should hesitate before saying that *no* instance of forced labor or human trafficking could ever qualify. Suppose, for instance, that an international organization in Washington, D.C. uses forced labor to provide childcare services as a benefit to its employees, something a private employer might willingly break the law to do. Is the organization immune because forced labor is never "commercial activity"?

Neither PAHO nor its amici offer any limiting principle for the categorical rule they advocate. Accepting it would give foreign States and international organizations a free pass to traffic in forced labor.

B. The caselaw does not support a categorical rule that human trafficking is not commercial activity.

Contrary to the district court's scant survey, the caselaw is not so well-developed or persuasive to support the categorical conclusion that supplying forced labor to another country never amounts to "commercial activity." The district court cited *Lubian*, where an Eleventh Circuit panel ruled that Cuba's trafficking of doctors to work in Venezuela was not "commercial activity." A183 (citing *Lubian v. Republic of Cuba*, 440 F. App'x 866, 868 (11th Cir. 2011)). But *Lubian* is unpublished and is "not considered binding precedent," even in the Eleventh Circuit. 11th Cir. R. 36-2. *Lubian* is not persuasive either, as its reasoning consisted of a single conclusory sentence: "Plaintiffs' underlying claims are for false imprisonment and forced labor—activities related to the exercise of police powers—and are not commercial in nature." 440 F. App'x at 868 (citing *Saudi Arabia v. Nelson*, 507 U.S. 349, 361–62 (1993)).

Lubian, however, failed to discuss whether Cuba's actions to supply medical labor to *another country*—in the same way that a private supplier of labor might operate—constitutes commercial activity. That distinction is crucial. It is Cuba's conduct in the other country that establishes its commercial character. For when states "conduct[] commercial activities in foreign states, their actions are not recognized as sovereign acts and are not accorded immunity under the restrictive theory of immunity." *Sampson v. Fed. Republic of Germany*, 250 F.3d 1145, 1151

(7th Cir. 2001) (quoting Adam C. Belsky, et al., *Comment, Implied Waiver Under the FSIA: A Proposed Exception to Immunity for Violations of Peremptory Norms of International Law*, 77 Cal. L. Rev. 365, 396 (1989)).

That distinction also explains the outcome in *Nelson*, on which *Lubian* relied. The "Saudi Government's wrongful arrest, imprisonment, and torture of Nelson[]"—which happened in Saudi Arabia—"could not qualify as commercial under the restrictive theory" because "[t]he conduct boils down to abuse of the power of its police by the Saudi Government"; "however monstrous such abuse undoubtedly may be, a foreign state's exercise of the power of its police has long been understood for purposes of the restrictive theory as peculiarly sovereign in nature." *Nelson*, 507 U.S. at 361. The Court distinguished that situation from an earlier case, in 1968, in which an agency of Jamaica was denied immunity for having interfered with Jamaican citizens' employment "in the United States." *Id.* at 362 n.5 (citing *Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977* (M. Sandler, D. Vagts, & B. Ristau eds.), in 1977 Digest of United States Practice in International Law 1062–63)).

Just as that Jamaican agency exercised no police power in the United States, Cuba exercises no police power in Brazil, nor do Cuba or Brazil exercise such power in the United States. Cuba's actions in Brazil—facilitated by PAHO—were instead "very much akin to those that might be conducted by a labor union or by a

private employment agency—arranging and servicing an agreement between private employers and employees." *Sovereign Immunity Decisions*, *supra*, at 1063.

For the same reason, the district court and PAHO have wrongly concluded from the "comfort women" case that forced labor and trafficking cannot amount to "commercial activity." *See* A183 & PAHO Br. 39 (citing *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 64 (D.D.C. 2001), *aff'd*, 332 F.3d 679 (D.C. Cir. 2003), *cert. granted, judgment vacated*, 542 U.S. 901 (2004), *and aff'd*, 413 F.3d 45 (D.C. Cir. 2005)). In *Joo*, the district court alone addressed that question, concluding that Japan's operation of "comfort" stations for its soldiers was not commercial activity. 172 F. Supp. 2d at 64. This Court never reached that question. It held initially that the FSIA was not retroactive. 332 F.3d at 681. After the Supreme Court vacated that ruling and remanded for further consideration, 542 U.S. at 901, this Court held that the peace treaty with Japan rendered the case a nonjusticiable political question, 413 F.3d at 46.

The district court's ruling in *Joo*, even on its own terms, does not stand for the broad proposition that trafficking persons into forced labor in another country is not commercial activity. *Joo* was unique: Japan exercised its military powers to take women in "countries occupied by Japan" and "under Japanese control," forcing those women into sexual slavery to serve Japanese soldiers. 172 F. Supp. 2d at 63. Japan used the full resources of the government to do so, and "[s]uch

conduct is not typically engaged in by private players in the market." *Id.* The district court found it "undeniable that prostitution and brothels routinely exist as commercial ventures engaged in by private parties." 172 F. Supp. 2d at 63. The court thus implicitly recognized that the commercial-activity exception could have been satisfied if, instead of enslaving the women to serve its own soldiers, Japan had sold them to brothels in other countries, akin to a private crime syndicate. As noted above, a foreign State's immunity is lost when it engages in commercial activities in another country, *Sampson*, 250 F.3d at 1151, exactly what the plaintiffs claim Cuba and PAHO did here.

Similarly, in *Bao Ge*, the forced labor of prisoners in China "arose out of an alleged abuse of China's police power." *Bao Ge v. Li Peng*, 201 F. Supp. 2d 14, 24 (D.D.C. 2000), *aff'd sub nom. Bao v. Li*, 35 F. App'x 1 (D.C. Cir. 2002). But if China had instead trafficked the plaintiffs into forced labor in other countries, generating revenues as a private actor might have done, that extraterritorial conduct would have amounted to commercial activity.

Finally, the district court and PAHO have both misplaced their reliance on the Ninth Circuit panel's decision in *Unocal*. *See* A183 & PAHO Br. 39 (citing *Doe I v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002), *reh'g en banc granted*, 395 F.3d 978 (D.C. Cir. 2003), *on reh'g en banc sub nom. John Doe I v. Unocal Corp.*, 403 F.3d 708 (9th Cir. 2005)). To start, when the Ninth Circuit granted rehearing

en banc, it vacated the panel opinion, ordering that it "shall not be cited as precedent" in the Ninth Circuit, 395 F.3d at 979, something the district court and PAHO overlooked. In addition, the vacated panel opinion actually rejected the district court's reasoning that Myanmar's use of forced labor for a pipeline project could not be "commercial activity."[3] The panel's conclusion in *Unocal* thus contradicts PAHO's position here.

In short, the handful of cases surveyed by the district court provide no support for the categorical rule that PAHO espouses. This Court should call out the distinction between a case where a foreign State uses its police power to oppress persons within its own territory, and a case—like this one—where the foreign State (and an international organization abetting it) traffics its citizens into forced labor in another country.

C. The fact that conduct is illegal or tortious does not negate its "commercial" character.

One could easily read the district court's opinion to make the commercial-activity inquiry turn on whether the conduct is illegal. The district court said that

[3] *See Unocal*, 395 F.3d at 957 ("The problem with [the district court's] reasoning is that neither *Nelson,* nor other case law, nor the legislative history of § 1605(a)(2) suggest that a foreign state's conduct "*in connection with* a commercial activity" must itself be a commercial activity to fall within the third exception to foreign sovereign immunity."). The panel nonetheless affirmed Myanmar's immunity on the ground that the forced labor at issue there had no "direct effect" in the United States. *Id*. at 958.

"the act of forcing another person to work against their will is not 'the type of action[] by which a private party engages in trade and traffic or commerce.'" A183 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)). The implied rationale is that good, law-abiding corporate citizens would never stoop to using forced labor to run their business. PAHO parrots that idea, claiming that "'using force is the polar opposite of how labor is typically obtained or provided in a marketplace: through a voluntary transaction.'" PAHO Br. 39 (quoting A183).

But that is simply wrong. Forced labor is ubiquitous in the global economy, as Congress found. 22 U.S.C. § 7101(b)(1), (b)(3). And it cannot be that conduct that is otherwise plainly "commercial" is immunized from suit under the FSIA whenever it is illegal or tortious. That suggestion conflicts with this Court's precedent and is contrary to the law in other circuits as well.

In *EIG Energy Fund XIV, L.P. v. Petroleo Brasileiro, S.A.*, 894 F.3d 339 (D.C. Cir. 2018), this Court held that the commercial-activity exception applied to the fraud claims brought against Brazil's state-owned oil company. *Id*. at 349. The fact that fraud is unlawful made no difference.

Even before *EIG*, this Court rejected the notion that illegal conduct can never be commercial in nature. *See Cicippio v. Islamic Republic of Iran*, 30 F.3d 164 (D.C. Cir. 1994). *Cicippio* held that Iran's use of kidnapping to extort

concessions by the United States to unfreeze Iranian assets was not commercial activity, reasoning that "[t]he United States government was acting purely as a sovereign regulator when it froze the assets of Iran and its citizens, and the government of Iran's alleged efforts to release the freeze were likewise peculiarly sovereign." *Id*. at 168. *Cicippio* was careful to reject the idea that the *illegality alone* of kidnapping rendered it non-commercial. The Court declined to follow the Second Circuit's suggestion that a foreign State that engages in criminal activity, like kidnapping and assassination, is not engaged in commercial activity "because a private person could not engage in such activity *lawfully*." *Id.* at 167 (citing *De Letelier v. Republic of Chile*, 748 F.2d 790, 797 (2d Cir. 1984)). *Cicippio* recognized that the Supreme Court's decision in *Nelson* "may well undermine the Second Circuit's categorical approach." *Id*. As the Court noted, "all causes of action can be thought, in some sense, to accuse a defendant of acting unlawfully, and the distinction between tortious and criminal acts is not always clear." *Id.*

At least three other circuits—the Sixth, Ninth, and Tenth—have likewise rejected the argument that the illegality of the defendant's conduct renders the transaction non-commercial in nature. *See Adler v. Fed. Republic of Nigeria*, 219 F.3d 869, 875 (9th Cir. 2000) ("The fact that the contract was for an illegal purpose, and therefore was unenforceable, does nothing to destroy its commercial nature."); *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 816 (6th Cir. 2002)

(same); *Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1217 (10th Cir. 1999) ("Simply because the activities of a 'foreign state' are illegal or . . . 'nefarious,' does not mean those activities can never be commercial in nature or connected with a commercial activity.") (citation omitted). The Tenth Circuit, in fact, relied on *Cicippio* to reach that conclusion. *See Southway*, 198 F.3d at 1217.

Consistent with *EIG* and *Cicippio*—and the rule in other circuits—this Court should reject PAHO's suggestion that the illegal or tortious nature of the conduct, *ipso facto*, renders it "non-commercial."

D. The TVPRA makes clear that human trafficking is commercial activity and that eliminating its profitability is essential to stopping it.

The Court should also reject PAHO's categorical argument because Congress has repeatedly recognized that human trafficking is a commercial venture involving multinational activity, and that combatting trafficking requires attacking its profitability.

When Congress first enacted the law in 2000, it found that trafficking in persons was "the fastest growing source of profits for organized criminal enterprises worldwide." Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(b)(8), 114 Stat. 1464, 1467, codified at 22 U.S.C. § 7101(b)(8). Congress recognized that foreign-State support of trafficking contributed to the scourge, as trafficking in persons "often" was aided "by official

corruption in countries of origin, transit, and destination, thereby threatening the rule of law." *Id.*; *see also* 22 U.S.C. § 7101(b)(16) (trafficking "sometimes" facilitated by "official participation").

The 2000 law established the "policy of the United States not to provide nonhumanitarian, nontrade-related foreign assistance to any government that—(1) does not comply with minimum standards for the elimination of trafficking; and (2) is not making significant efforts to bring itself into compliance with such standards." 22 U.S.C. § 7107(a). Congress created "minimum standards for the elimination of trafficking applicable to the government of a country of origin, transit, or destination." *Id.* § 7106(a). The law also directed the Secretary of State to submit annual "trafficking in persons" reports to Congress identifying those countries falling short of efforts to comply with "minimum standards for the elimination of trafficking." *Id.* § 7107(b)(1).

In urging passage of the 2000 law, Senator Wellstone observed that "profit in the trade can be staggering." 146 Cong. Rec. 22,045 (2000) (statement of Sen. Wellstone). It amounted to "$7 billion annually, only surpassed by that of the illegal arms trade," making human trafficking "a highly profitable, low-risk business venture for some." *Id.*

Congress repeatedly amended the TVPRA thereafter to broaden its reach and attack the profitability of trafficking. In 2003, Congress found that, while the

2000 law enabled "significant progress" in combatting trafficking, nonetheless, "[t]rafficking in persons continues to victimize countless men, women, and children in the United States and abroad." Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 2(1), 117 Stat. 2875. The 2003 law created a private right of action on behalf of victims who are trafficked, codified at 18 U.S.C. § 1595(a). *See* 117 Stat. at 2878. That section provides the vehicle by which the plaintiffs in this case brought their forced-labor claims against PAHO. *See* A124 (Compl. ¶ 135).

In 2008, Congress again broadened the TVPRA's coverage, this time expressly confirming and extending its extraterritorial reach. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 223, 122 Stat. 5044, 5071; *Roe v. Howard*, 917 F.3d 229, 241–43 (4th Cir. 2019). Congress expanded § 1589 to make it unlawful for anyone who "knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in" forced labor "knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by" such means. 18 U.S.C. § 1589(b). *See also* 18 U.S.C. § 1593A (making it unlawful to benefit financially from peonage, slavery, and trafficking in persons). Congress made parallel changes to the civil remedy in § 1595(a), providing that a civil action could be brought by an individual not only

against "the perpetrator," but against "*whoever* knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter." 28 U.S.C. §1595(a) (emphasis added). The terms "perpetrator" and "whoever" include entities as well as natural persons. *See Gonzalez v. CoreCivic, Inc.*, 986 F.3d 536, 538 (5th Cir. 2021); *Barrientos v. CoreCivic, Inc.*, 951 F.3d 1269, 1276–77 (11th Cir. 2020) (same). As of 2020, approximately 70.5% of the lawsuits brought by trafficking victims under the TVPRA named corporate or organizational defendants. *See* Rebekah R. Carey, *Federal Human Trafficking Civil Litigation: 2020 Data Update* 18 & fig. 12, The Human Trafficking Legal Center (July 2021), https://tinyurl.com/ychdxp7a.

The 2008 law also added § 1596, which provides that, "[i]n addition to any domestic or extra-territorial jurisdiction otherwise provided by law, the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense)" under various anti-trafficking provisions, including §§ 1589 and 1590 at issue here, as long as the "alleged offender"—like PAHO—"is present in the United States." 18 U.S.C. § 1596(a)(2). "[B]y conferring 'extra-territorial jurisdiction over any offense . . . under' the TVPRA, § 1596 permits private parties to pursue a civil remedy under the TVPRA for extraterritorial violations." *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184,

204 (5th Cir. 2017); *Howard*, 917 F.3d at 241–43 (same). The 2008 amendments thus established "some powerful new legal tools, including increasing the jurisdiction of the courts" and "punishing those who profit from trafficked labor." 154 Cong. Rec. 10,454 (2008) (statement of Sen. Biden).

E. PAHO's argument conflicts with Congress's reliance on the Foreign Commerce Clause to enact the TVPRA.

Finally, PAHO's argument that human trafficking is not "commercial activity" would conflict with Congress's reliance on the Foreign Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as the basis for enacting the TVPRA and conferring extraterritorial jurisdiction on federal courts. Congress found that "[t]rafficking in persons substantially affects interstate and foreign commerce." 22 U.S.C. § 7101(b)(12). The TVPRA's extraterritorial jurisdiction is constitutional precisely because trafficking activities "have a 'substantial effect' on foreign commerce." *United States v. Baston*, 818 F.3d 651, 668 (11th Cir. 2016). It would be difficult to square Congress's finding that human trafficking substantially affects foreign commerce with the notion that trafficking is not "commercial activity" under the FSIA.[4]

[4] Notably, the Federal Acquisition Regulations also support treating forced labor as commercial activity, restricting federal contractors from using forced labor to cut corners. *See* 48 C.F.R. § 52.222-50(b) (2020); 71 Fed. Reg. 20,301 (Apr. 19, 2006) ("The United States believes that its contractors can help combat trafficking in persons.").

II. The district court correctly determined that the gravamen of the TVPRA claim here is the financial benefit to the person or entity that indirectly facilitates human trafficking, as PAHO allegedly did in this case.

Putting aside whether human trafficking *alone* can constitute commercial activity, PAHO's serving as a financial middleman to facilitate Cuba's labor trafficking in Brazil *is* commercial activity for which PAHO does not have immunity. Plaintiffs' principal trafficking claim is based on PAHO's *benefitting financially* from being "the creator, manager, and enforcer of the enterprise through which Cuba shipped medical professionals to Brazil under conditions constituting human trafficking under international law and U.S. law." A71 (Compl. ¶ 18). "[T]he Mais Medicos–related agreements into which PAHO entered 'called for Brazil to make payment to PAHO's Citibank account in Washington, D.C. . . . .'" A176 (quoting Compl. ¶ 18). "Pursuant to those agreements, PAHO acted as a conduit for over $1.5 billion and retained 5%, or $75 million, for itself 'in fees.'" *Id.* (quoting Compl. ¶ 18).

Courts impose liability under the TVPRA in analogous contexts against those who knowingly benefit from human trafficking. For instance, a motel owner is liable if he receives rent payments knowing that his rooms are being used for sex trafficking. *Ricchio v. McLean*, 853 F.3d 553, 555–56 (1st Cir. 2017) (Souter, J.). And a law firm is liable to the victim if the firm receives attorney fees for having

knowingly enabled the perpetrator to structure its legal arrangements to facilitate human trafficking. *Bistline v. Parker*, 918 F.3d 849, 876 (10th Cir. 2019).

The district court properly recognized that the "gravamen" of the claim here is "PAHO's moving of money, for a fee, between Cuba and Brazil." A176. "PAHO's alleged behavior as a knowing money middleman is . . . at 'the core' of Plaintiffs' second TVPRA claim—it is conduct that, 'if proven, would entitle [Plaintiffs] to relief under [their] theory of the case.'" *Id.* (quoting *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 34 (2015)).

That conclusion is compelled by *Transamerican Steamship Corp. v. Somali Democratic Republic*, 767 F.2d 998 (D.C. Cir. 1985), which PAHO and its amici fail to cite. *Transamerican* held that a foreign State engages in commercial activity when it acts as a financial middleman in the same way as a bank or private entity could have done. *Id.* at 1002. Such conduct is commercial in nature even when the actor claims to have had a sovereign purpose, such as "promot[ing] friendly relations" with another country. *Id*. A putative governmental purpose cannot negate the commercial nature of the transaction. After all, the FSIA bars reliance on the "purpose" of the activity, looking instead to the "nature" of the activity. 28 U.S.C. § 1603(d); *Nelson*, 507 U.S. at 358.

A claim against a defendant who indirectly facilitates trafficking by knowingly benefitting from it differs materially from a claim against the

perpetrator. Congress heard testimony in 2000 about the need to "create the tools to prosecute those who knowingly profit from" forced labor, including those who are "economic beneficiar[ies]" of forced labor. *International Trafficking in Women and Children: Hearing Before the Subcomm. on Near E. & S. Asian Aff. of the S. Comm. on Foreign Rel.*, 106th Cong. 78 (2000) (statement of William R. Yeomans, Chief of Staff, Civil Rights Division, Dep't of Justice). But Congress declined in the 2000 law to impose liability on beneficiaries out of concern that such liability might sweep too broadly. *See* H.R. Rep. No. 106-939, at 101–02 (2000). Congress's "'understanding of the problem evolved,'" however, "through years of studying 'how to best craft a response.'" *Nestlé*, 141 S. Ct. at 1940 (citation omitted). Then, in 2008, Congress specifically criminalized conduct by which a defendant knowingly benefits from trafficking, 18 U.S.C. § 1589(b), creating a "private right of action" in § 1595(a) against defendants "involved indirectly" in conduct that violates the trafficking laws. *Nestlé*, 141 S. Ct. at 1939.

Imposing liability on those who knowingly benefit from trafficking is a form of accessory liability that promises "an improved law of torts, better able to provide justice for private victims of crime and tort." Nathan I. Combs, *Civil Aiding and Abetting Liability*, 58 Vand. L. Rev. 241, 246 (2019). As this Circuit recognized nearly forty years ago, accessory liability can serve "as a supplement to the criminal justice process and possibly as a deterrent to criminal activity."

Halberstam v. Welch, 705 F.2d 472, 490 (D.C. Cir. 1983). To be sure, "when Congress creates a private cause of action, aiding and abetting liability is not included in that cause of action unless Congress speaks to it explicitly." *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 277 (D.C. Cir. 2018). But the 2008 amendment satisfies that clear-statement requirement by expressly imposing liability on those who knowingly benefit from their participation in a venture that they "knew or should have known has engaged in" trafficking. 18 U.S.C. §§ 1589(b), 1595(a).

In short, the district court's "gravamen" analysis was spot-on: "Plaintiffs' 1589(b) claim turns on separate and separately wrongful conduct, distinct from any acts that could form the basis of a claim against Cuba or Brazil, by a defendant other than Cuba or Brazil—to wit, PAHO's procurement of a financial benefit from knowing participation in the allegedly exploitative Mais Medicos program." A178–79.

III. The allegation is well founded that PAHO should have known that Cuba was trafficking doctors for profit in other countries.

The Center cannot speak to the unpublished cables that the Cuban doctors cite as evidence of PAHO's knowledge that the Mais Médicos program subjected them to forced labor. Appellees' Br. 4. During the period 2013–2018, however, the *public-record* evidence alone shows that PAHO "should have known," 18 U.S.C. § 1595(a), that the financial benefits it received constituted the proceeds of

human trafficking. That evidentiary trail begins well before Cuba sent the plaintiffs to work in Brazil.

In May 2006, the State Department reported that Cuba interfered with the freedom of medical professionals to obtain exit permits and imposed an "unpublished" policy that required three to five years of service in their profession before traveling abroad. *See* 2 Department of State, *Country Reports on Human Rights Practices for 2005*, 2369 (May 2006), https://tinyurl.com/hhynh7st. The government reportedly abused medical professionals to whom it denied exit permits, banning them from practicing medicine and subjecting them to arbitrary punishment. *Id.* In August 2006, the Department of Homeland Security announced the Cuban Medical Professional Parole (CMPP) Program, which allowed doctors and other health professionals sent by the Cuban Government to work or study in third countries to parole into the United States. *See* U.S. Citizen and Immigration Services, *Cuban Medical Professional Parole (CMPP) Program* (2017), https://tinyurl.com/4e7ue528.

By 2007, the World Politics Review reported on Cuba's "long tradition of sending doctors . . . to treat the poor overseas" under forced-labor conditions. Mike Ceaser, *Cuban Doctors Abroad Helped to Defect by New U.S. Visa Policy*, World Politics Review (Aug. 1, 2007), https://tinyurl.com/a9w5hkjh. The article quoted a U.S. Government spokesman who said that Cuban medical professionals

worked in "servitude" in such countries, having been "forced against their free will to serve outside of Cuba." *Id*.

The Secretary of State's annual Trafficking in Persons report—which since 2003 has listed Cuba as one of the worst offenders—began in 2010 to report on forced-labor conditions in Cuba's overseas medical missions. *See* Department of State, *Trafficking in Persons Report* 126 (2010), https://tinyurl.com/2a928w4k; Department of State, *Trafficking in Persons Report* 137 (2011), https://tinyurl.com/yvwp84dx (same).

The Wall Street Journal reported in 2011 that Cuba had been "sending medical 'brigades' to foreign countries since 1973" in order "to earn hard currency," estimated to be as much as $8 billion a year. Joel Millman, *New Prize in Cold War: Cuban Doctors*, Wall St. J. (Jan. 15, 2011), https://tinyurl.com/wkyp34vs. It quoted a U.S. government spokesman who described "Cuba's policy of sending doctors and other health workers abroad as 'state-sponsored human trafficking,'" detailing how Cuban doctors "work directly for health authorities in other countries and have no say in their assignments, salaries, hours or work conditions." *Id.* Cuba reportedly executed that policy by doing exactly what the plaintiffs allege here: extracting "direct payment either from a host government or an international aid group." *Id.* And just as the

plaintiffs claim in this case, the article reported that "[i]ndividual Cuban doctors are paid only a portion of what Cuba collects." *Id*.

Shortly after Mais Médicos launched in 2013, Reuters reported that the Cuban doctors sent to Brazil received "only a fraction" of what Brazil paid for the program; the bulk of the money, then estimated to be "some $225 million a year," went to the Cuban government. *See* Anthony Boadle, *Cuban doctors tend to Brazil's poor, giving Rousseff a boost*, Reuters (Dec. 1, 2013), https://tinyurl.com/2r2srwy6. A Brazilian congressman observed: "[w]e abolished slavery long ago but this looks awfully similar." *Id*.

Similar reports abounded from the State Department during the years plaintiffs worked in Brazil. The Department noted in 2015 that "[a]llegations of forced or coerced labor in foreign medical missions persisted, although the government denied these allegations." Department of State, *Country Reports on Human Rights Practices for 2015: Cuba Human Rights Report* 27 (2016), https://tinyurl.com/jufavm32. That year's Trafficking in Persons Report cited claims of "substandard working conditions" for overseas doctors and claims "that Cuban authorities coerced participants to remain in the program, including by allegedly withholding their passports, restricting their movement, or threatening to revoke their medical licenses or retaliate against their family members in Cuba if participants leave the program." Department of State, *Trafficking in Persons*

Report 135 (2015), https://tinyurl.com/2czrkhcy. Similar findings were repeated in the reports for 2016, 2017, and 2018.[5]

Members of Congress and mainstream media sounded the alarm as well:

- Congressman Diaz-Balart likened Cuba's practice "to slave labor," condemning Cuba for "leas[ing] human beings to foreign investors and governments.'" William E. Gibson, *Cuban doctors flee foreign missions to Florida*, South Florida Sun Sentinel (Oct. 5, 2014), https://tinyurl.com/2metjmxd;
- The Wall Street Journal called it a "slave trade" and "human-trafficking racket." Mary Anastasia O'Grady, *Cuba's Slave Trade in Doctors; Havana earns almost $8 billion a year off the backs of the health workers it sends to poor countries*, Wall St. J. (Oct. 22, 2014), https://tinyurl.com/7ns3p22b;
- Reuters described the doctors' "harsh working conditions." Jeff Mason & Daniel Trotta, *U.S. considers ending program that lures Cuban doctors to defect*, Reuters (Jan. 8, 2016), https://tinyurl.com/y5rax84a; and

[5] *See* Department of State, *Trafficking in Persons Report* 158 (2018), https://tinyurl.com/ktb4t24; Department of State, *Trafficking in Persons Report* 144–45 (2017), https://tinyurl.com/am8ekvwc; Department of State, *Trafficking in Persons Report* 146–47 (2016), https://tinyurl.com/2kduhe7x.

- Forbes quoted one Cuban doctor who lamented: "We are the highest qualified slave-labor force in the world." Paul Roderick Gregory, *Barack Obama Extols Cuba's Slave-Labor Medical Care*, Forbes (Apr. 5, 2016), https://tinyurl.com/cczv6sy3.

In short, the public-record evidence alone supports the plaintiffs' claim that PAHO was benefitting financially "from participation in a venture which [PAHO] knew or *should have known*," 18 U.S.C. § 1595(a) (emphasis added), was engaged in forced labor and human trafficking.

IV. Shielding international organizations from liability will facilitate more human trafficking and hobble the TVPRA.

Courts should not block victims from obtaining justice through civil suits against those who financially benefit through knowing participation in ventures that rely on forced labor and human trafficking. Doing so will only incentivize corrupt governments and officials to continue their use of financial middlemen and international organizations to traffic in forced labor.

To date, Cuba and its facilitators not only have gotten away with it—they have doubled down. As Secretary Blinken recently stated, "[f]or the 10th year in a row, the [Trafficking in Persons] report documents how the Cuban Government has profited from exploitative overseas medical missions." Department of State, *Secretary Antony J. Blinken at the 2021 Trafficking in Persons Report Launch Ceremony* (July 1, 2021), https://tinyurl.com/37zpyxa3. "They send doctors and

other medical personnel abroad, fail to inform them of the terms of their contracts, confiscate their documents and salaries, [and] threaten them and their family members when they try to leave." *Id.* This year's report lists Cuba as one of eleven foreign "governments with a documented 'policy or pattern'" of human-trafficking violations, which include "trafficking in government-funded programs" and "forced labor in government-affiliated medical services." Department of State, *Trafficking in Persons Report* 46 (2021), https://tinyurl.com/evnf5shv. The Cuban government has "collected $6 billion to $8 billion annually from its . . . foreign medical missions program" alone. *Id*. at 199–200.

The State Department's current description of forced-labor conditions in Cuba's overseas medical missions is as detailed as ever. *Id*. at 199. Worse, it warns that the Cuban government has "capitalized on the [covid-19] pandemic by increasing the number and size of medical missions[,] . . . refus[ing] to improve the program's transparency or address labor violations and trafficking crimes despite persistent allegations from observers, former participants, and foreign governments of Cuban officials' involvement in abuses." *Id*. at 197–98.

Imposing liability on those who aid and abet forced labor—and who knowingly benefit from it—is essential not only to compensate victims, but to fulfill the TVPRA's promise to remove the financial incentive to traffic in humans. Rogue nations cannot be expected to stop human trafficking on their own. But the

prospect of damages liability under the TVPRA will at least make financial middlemen and international organizations think twice before helping such countries profit from peddling forced labor to other countries.

CONCLUSION

The Court should affirm the judgment of the district court. And the Court should expressly reject PAHO's claim that human trafficking—as a matter of law—is not "commercial activity" under the Foreign Sovereign Immunities Act of 1976.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify that:

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CERTIFICATE OF SERVICE

I certify that on August 2, 2021, I filed this brief with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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