

No. 23-303

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

BENZOR SHEM VIDAL,

Plaintiff-Appellee,

v.

ADVANCED CARE STAFFING, LLC,

Defendant-Appellant.

On Appeal from the United States District Court for the Eastern
District of New York, Case No. 1:22-cv-05535-NRM-MMH

**BRIEF OF HUMAN RIGHTS AND LABOR RIGHTS ORGANIZATIONS
AS AMICI CURIAE IN SUPPORT OF PLAINTIFF-APPELLEE**

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IDENTITY AND INTEREST OF AMICI¹

This is a human trafficking case. The plaintiff Benzor Shem Vidal alleges that the defendant Advanced Care Staffing, LLC (“ACS”) forced him into labor in violation of the Trafficking Victims Protection Reauthorization Act (“TVPRA”), among other offenses.² ACS is alleged to have recruited Vidal, a native of the Philippines, to work as a nurse in the United States, using deceptive tactics and causing him to sign an exploitative and illegal contract. This employment contract included threats of exorbitant “damages” owed if Vidal left his employment prior to the three-year contract term. It also contained a forced arbitration clause to resolve disputes, including a provision that required the losing party pay all fees and costs for the proceedings. ACS, as alleged, then used the contract to threaten serious financial harm and expensive arbitration proceedings to force Vidal into continued labor—all in violation of the TVPRA.

What is alleged in this case is not an isolated occurrence. Healthcare facilities frequently rely on foreign nurses to fill staffing shortages, resulting in a

¹ The parties consent to the filing of this brief. 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.

² *Amici* refer to the Trafficking Victims Protection Act of 2000, along with its subsequent reauthorizations and amendments as the “TVPRA,” except where specifically noted otherwise.

significant number of nurses being recruited in the Philippines to work in the United States. These agencies have developed sophisticated schemes that allow them to profit from the forced labor of nurses. At the center of these schemes is a fundamentally exploitative and one-sided employment contract, much like the one at issue in this case. The contracts are used both as a weapon—with their built-in threats of serious financial harm—and as a shield to attempt to avoid any accountability under the TVPRA. Increasingly, these contracts rely on forced arbitration clauses to instill fear and ensure that any disputes will be resolved secretly.

The district court properly found that, even if there had been a clear delegation clause in the contract, arbitration proceedings must be enjoined because there is a likelihood that Vidal will prevail on his claim that the contract violates both federal law, including the TVPRA, and state law. In reaching its decision, the district court recognized the integral role the forced arbitration clause played in furthering the alleged forced labor scheme. Because this case is an important example of the pervasive practice of using employment contracts and forced arbitration clauses to perpetrate violations of the TVPRA, the following organizations submit this brief as *amici*.

Advocating Opportunity (“AO”) is a non-profit legal service provider for clients who have experienced sex and labor trafficking, working primarily in Ohio

and Tennessee. AO's services are delivered using a holistic legal services model and the Resilience Model, a research-based approach to support trafficked and exploited persons as they heal from trauma. AO's primary mission is to end human trafficking and labor exploitation in all its forms, including the contracts at issue in this case.

Annie Smith is a Professor of Law at the University of Arkansas School of Law. She teaches, writes about, and represents clients who have experienced labor exploitation.

Centro de los Derechos del Migrante, Inc. ("CDM", or the Center for Migrant Rights) is a U.S. section 501(c)(3) migrant workers' rights organization with offices in Baltimore, Maryland; Mexico City; and Oaxaca, Mexico. Through litigation, policy advocacy and community education, CDM seeks to ensure access to justice for migrant workers who suffer labor trafficking and other abuses in U.S. employment. CDM frequently works alongside migrant workers who have been required by foreign labor recruiters and/or U.S.-based employers to sign contracts that impose severe financial penalties for an employee's early departure from employment, which too often have the effect of coercing workers into remaining in abusive employment situations. CDM therefore has a significant interest in ensuring that forced arbitration and other abusive contract provisions do not

continue to further forced labor and trafficking schemes in foreign labor recruitment.

Corporate Accountability Lab (“CAL”) is a non-profit organization that uses innovative legal strategies and advocacy to address corporate impunity for human rights violations and environmental abuses.

Freedom Network USA (“FNUSA”), a non-profit corporation, is the largest alliance of human trafficking advocates in the United States. Our 98 members include survivors of human trafficking, researchers, and legal and social service providers working in over 40 cities across the United States. In total, our members serve over 3,000 trafficking survivors per year, including adults and minors, of both sex and labor trafficking. FNUSA was involved in the passage of the TVPA and has been a key advocate in each subsequent Reauthorization. FNUSA and our members have an interest in addressing abuse and exploitation by ensuring that all victims are fully protected and have access to justice. Labor trafficking is a crime of physical and psychological abuse tied to economic exploitation. Ensuring that survivors have prompt access to civil court judgements is critical to meeting the comprehensive needs of survivors.

Global Labor Justice-International Labor Rights Forum (“GLJ-ILR”) works transnationally to advance policies and laws that protect decent work, strengthen workers’ ability to advocate for their rights, and hold corporations accountable for

labor rights violations in their supply chains. GLJ-ILRF works with trade unions, faith-based organizations, and community groups to support workers and their families.

The Human Trafficking Legal Center is a non-profit organization that advocates for justice for survivors of human trafficking and forced labor. The Human Trafficking Legal Center uses U.S. law to hold corporations accountable for forced labor in global supply chains. The organization provides a bridge between skilled pro bono attorneys and trafficking survivors seeking justice, having trained more than 5,000 pro bono attorneys to handle civil, criminal and immigration human trafficking cases. The Center also conducts data-driven research and analysis both of civil trafficking cases and the enforcement of mandatory restitution provisions in federal criminal trafficking cases.

Legal Momentum, the Women's Legal Defense and Education Fund, is a national civil rights organization dedicated to advancing gender equality through the law. For over 50 years, Legal Momentum has worked to advance gender equality through legislation, impact litigation, and education. Since its founding in 1970, Legal Momentum has been at the forefront of efforts to tackle gender discrimination and advance workplace equality and economic justice. Today, our work in this area focuses on eradicating exploitative workplace practices, centering the needs and voices of women who are most vulnerable in our economy,

including women of color, immigrant women, women in lower-wage industries, and survivors of gender-based violence.

The Legal Aid Society is the oldest and largest provider of legal assistance to low-income families and individuals in the United States. The Society operates trial offices in all five boroughs of New York City and provides comprehensive, holistic legal assistance in areas of law of primary concern to low-income clients. The Society's Employment Law Unit represents low-wage workers in employment-related matters such as claims for discrimination, unpaid wages and retaliation for objecting to wage theft or discrimination. The Society also proudly represents survivors of sex and labor trafficking in criminal, civil, and/or immigration matters, and wholeheartedly supports providing justice in all forms to human trafficking survivors.

Loyola Law School's Sunita Jain Anti-Trafficking Initiative ("SJI") guides the next generation of survivor advocates, to enact anti-trafficking law and policy at the local, state, and national levels that grapples with the root causes of human trafficking such as the systemic subordination of people of color, further marginalized by the intersections of gender, gender identity, sexuality, immigration status, national origin, disability, age, religion and/or socioeconomic status. SJI advances anti-trafficking policies informed by the experiences of survivor-clients and other community stakeholders, to overcome the myriad injustices that subvert

trafficking survivors' access to self-determination and empowerment. SJI focuses on non-carceral approaches to justice for trafficking survivors and has supported legislative efforts to protect temporary workers and increase the ability of civil systems to prevent trafficking before it starts and help survivors access justice on their own terms.

The National Employment Law Project (“NELP”) is a non-profit legal organization with over 50 years of experience advocating for the labor and employment rights of underpaid workers. NELP collaborates closely with community-based worker centers, unions, and state policy groups to ensure that all workers are afforded their fundamental rights under state and federal law. NELP has been involved in litigation and policy efforts to address the continued prevalence of forced labor in the United States, and has long campaigned against the corporate abuse of forced arbitration requirements as a way to prevent workers from vindicating their rights.

Oxfam is a development and human rights organization with operations across the globe, including extensive operations in Philippines. As part of its mission to end poverty and inequality, it pushes companies to weed out forced labor in its agribusiness supply chains. Domestically in the United States, Oxfam conducts research and advocates for policies that improve the wellbeing of workers, working families, and their communities. These include policies that

support care workers and unpaid caregivers. Oxfam believes that policies that improve conditions for the most marginalized workers raise standards for all workers, while helping to fight gender, racial, and economic inequality.

The University of Maryland Support, Advocacy, Freedom, and Empowerment (“SAFE”) Center for Human Trafficking Survivors is a direct services, research, and advocacy center. The SAFE Center provides comprehensive and holistic services to sex and labor trafficking survivors, including bilingual legal, social, mental health, economic empowerment, and crisis intervention services. The mission of the SAFE Center is to empower trafficking survivors to heal and reclaim their lives, better support them through research and advocacy, and help prevent human trafficking.

ARGUMENT

Over the course of more than two decades, Congress has created a comprehensive statutory scheme intended to combat the global scourge of human trafficking. Through each and every reauthorization, Congress’s intent has been clear—the TVPRA, and its civil remedy, is an essential tool in providing access to justice for survivors and meaningful accountability to those who seek to profit from the exploitation of others. Yet, staffing and recruitment agencies like ACS have developed elaborate and sophisticated recruitment practices to force nurses into labor while attempting to evade the reach of the TVPRA. Employment

contracts are used as weapons to threaten serious financial harm and abuse of the legal process. Increasingly, these contracts also use forced arbitration clauses not only as a weapon to create fear in nurses who contemplate leaving their employment but also as a shield to subvert the TVPRA and keep their illegal schemes confidential. This abuse of legal process is a clear violation of the TVPRA and must be stopped. Allowing these practices to continue is not only contrary to Congress’s intent and the plain language of the statute but also will do real harm to the fight against human trafficking.

I. Congress Created a Strong Civil Remedy in the TVPRA to Ensure Survivors Like the Plaintiff Have Access to Justice

In 2000, Congress passed the Trafficking Victims Protection Act (then named the Victims of Trafficking and Violence Protection Act)—the first comprehensive piece of U.S. legislation aimed at prosecuting and preventing human trafficking, including labor trafficking. In the decades following, Congress repeatedly broadened the scope of the TVPRA through multiple reauthorizations to address this “dark side of globalization.” H.R. Rep. 110-430, at 33–34 (2007). During this time, Congress held extensive hearings as it sought to understand how to combat the global scope of human trafficking.³ Congress came to understand

³ An in-depth backgrounder on Congress’s efforts was submitted to (and relied upon by) the Supreme Court in *Nestle USA, Inc. v. Doe*, Nos. 19-416, 19-453, by 21 Members of Congress, including the relevant bill sponsors and committee chairs. See Brief of Members of Congress Senator Blumenthal, et al., as Amici Curiae Supporting Respondents, *Nestle USA, Inc. v. Doe*, Nos. 19-416,

the need to provide survivors of forced labor with an avenue to vindicate their rights and be compensated for their suffering. *Id.* at 20–21; *see also Int’l Trafficking in Women and Children: Hearing Before the Subcomm. on Near E. & S. Asian Aff. of the S. Comm. on Foreign Rel.*, 106th Cong. 56, at 15 (2000) (statement of Hon. Frank E. Loy).

Congress designed the TVPRA to be an expansive tool with a strong civil remedy and, with each reauthorization, has broadened its scope. The original statute, enacted in 2000, defined and expanded criminal penalties for human trafficking, forced labor, and other modern-slavery practices at the federal level. *See* Victims of Trafficking and Violence Protection Act of 2000, Div. A., Pub. L. No. 106-386, 114 Stat. 1464. Just three years later, Congress created a civil remedy that was coextensive with certain criminal predicates in the statute, including forced labor. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875.

Congress acted once again in 2008 to expand criminal and civil liability under 18 U.S.C. § 1595. Congress amended the statute in recognition of the transnational nature of human trafficking and expanded liability to those who knowingly benefit from participation in a venture involved in forced labor and

19-453, 2020 WL 6322316 (Oct. 21, 2020) (hereinafter, “*Nestle Members Br.*”); *see also Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1940 (2021) (Thomas, J., citing *Nestle Members Br.* at 9, 13).

human trafficking. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044; *see also Nestle Members Br.* at 24–25. Congress also added 18 U.S.C. § 1596, which provides extraterritorial jurisdiction for violations of the TVPRA. *Id.* Notably, these expansions to the civil remedy grew from Congress’s concern over the fact that “so few civil lawsuits” had been filed under the TVPRA. *See Nestle Members Br.* at 25–26 (quoting *Legal Options to Stop Human Trafficking: Hearing Before the Subcomm. on Human Rights & the Law of the S. Comm. on the Judiciary*, 110th Cong. 18 (2007) (statement of Sen. Durbin)).

Contrary to ACS’s suggestion, *see Appellant Br.* 42, the conduct at issue in this case—the use of serious threats of financial harm and abuse of the legal process to hold individuals in forced labor—is precisely the conduct that Congress sought to reach in the TVPRA.⁴ As the district court recognized, the “plain terms” of the statute indicate that “one objective of the TVPA is to ensure that workers will not be coerced into remaining in their jobs because they reasonably fear a threat of serious harm—including ‘financial’ harm—if they leave.” *Vidal v. Advanced Care Staffing, LLC*, No. 22 Civ. 05535, 2023 U.S. Dist. LEXIS 59411,

⁴ It can be of no surprise that ACS does not even mention the TVPRA in its opening brief until page forty-two. *See Appellant Br.* 42. Its forced labor scheme relied on using forced arbitration to avoid ever being held to account for its alleged violations of the TVPRA.

at *37 (E.D.N.Y. Apr. 4, 2023); *see also Paguirigan v. Prompt Nursing Employment Agency LLC*, 286 F. Supp. 3d 430, 439 (E.D.N.Y. 2017) (“[T]he fundamental purpose of § 1589 is to reach cases of servitude achieved through nonviolent coercion – namely serious harm, the threat of serious harm, *or* the abuse or threatened abuse of legal process.”); House Foreign Affairs Committee: Subcommittee on Global Health, Human Rights and International Organization, Written Testimony of Martina Vandenberg, May 12, 2023 (“Nursing shortages in the United States should not give rise to abusive conditions for foreign nurses. Contracts with abscondment fees, no matter the euphemism used to mask the abuse, must end.”). Thus, the district court correctly identified that the very existence of the arbitration clause likely could create a threat of financial harm significant enough to violate the TVPRA. *Vidal*, 2023 U.S. Dist. LEXIS 59411, at *45 (“[W]ould such an employee—even one who believed he had valid arguments that the dispute was not arbitrable or that the agreement was unenforceable—have reasonably concluded that the risk of incurring potentially thousands of dollars in fees and costs just to litigate these threshold questions was too great, such that he felt compelled to remain in that job for the remainder of the contract term?”)

II. Recruitment Agencies Have Developed Sophisticated Schemes to Traffic Nurses into Forced Labor and Evade Accountability Under the TVPRA

Despite Congress’s efforts to create an expansive tool in the TVPRA, recruitment and staffing agencies have developed forced labor schemes that target

Filipino nurses and seek to evade liability. For decades, the United States has benefitted from using Filipino nurses and medical staff to fill nursing shortages. *See* Emlyn Medalla, *Made for Export: How U.S. and Philippine Policies Commodify and Traffick Filipino Nurses*, 26 CUNY L. Rev. 139, 140 (2023); *see also* Paulina Cachero, *From AIDS to COVID-19, America's Medical System Has a Long History of Relying on Filipino Nurses to Fight on the Frontlines*, TIME (May 30, 2021), <https://time.com/6051754/history-filipino-nurses-us/>. Since the 1960s, more than 150,000 Filipino nurses have migrated to the United States, and in 2019, one out of 20 registered nurses in the United States had been trained in the Philippines. *See* Cachero, *supra*.

A. Recruitment Agencies Have Used Bait-And-Switch Tactics to Isolate Nurses in the United States and Force Them into Labor in Abusive and Unsafe Conditions

Over the last two decades, a private industry has developed to recruit Filipino nurses. These international recruiting agencies use exploitative practices to recruit and then trap the nurses in forced labor. *See* Medalla, *supra*, at 151-152. Many healthcare employers use third-party recruiting agencies, based in the United States or in the Philippines, to facilitate the nurses' placement, arrange salary and assist with the immigration process. *See id.* (citing S. Jenny Van, *Lost in Translation: The United States-Philippines Nurse Migration Problem Redefined*, 31 U. LA Verne L. Rev. 451-458 (2010)).

Many of these recruiting and staffing agencies take advantage of young, vulnerable nursing graduates, who wish to emigrate and work in a high-resource country. These agencies lure the nurses into contracts with false representations of good working conditions and benefits and promising opportunity and higher pay. *See Van, supra*, at 466 (internal citation omitted); *see also* Mireille Kingma, *Nurse Migration and the Global Health Care Economy*, 9 *Pol’y Pol. & Nursing Prac.* 328, 331 (2008)); *see also*, Cachero, *supra*. There is little oversight of the recruitment and staffing agencies, which can result in an unchecked power to exploit and traffic Filipinos nurses. *See* Medalla, *supra*, at 152 (citing Josh Eidelson, *Nurses Who Faced Lawsuits for Quitting Are Fighting Back*, Bloomberg (Feb. 2, 2022), <https://perma.cc/F34Q-2U92>; Van, *supra*, 477.).

Many of these agencies use exploitative labor contracts that lock nurses into jobs. The nurses cannot leave their positions without risking financial ruin. *See* Aurora Almendral, *A Hidden System of Exploitation Underpins US Hospitals’ Employment of Foreign Nurses*, Type Investigations/Quartz (Oct. 2, 2023), <https://www.typeinvestigations.org/investigation/2023/10/02/international-nurse-recruitment-exploitation/>. Nurses trapped by these contracts face an incredibly difficult choice between continuing to work in dangerous conditions—and risk losing their nursing licenses—or paying thousands of dollars in fees akin to debt bondage. *See* Shannon Pettypiece, *Trapped at work: Immigrant health care*

workers can face harsh working conditions and \$100,000 lawsuits for quitting, NBC News, (June 4, 2023, 3:00 AM),

<https://www.nbcnews.com/politics/economics/trapped-work-immigrant-health-care-workers-can-face-harsh-working-cond-rcna83979>. When nurses have

attempted to leave their jobs, agencies have frequently brought legal action. Faced

with these litigation attacks, nurses have often been forced to pay exorbitant

damages to their employers just to be able to leave an untenable situation, such as

the threat of more than \$20,000 in this case. *See id.* These legal actions cause a

chilling effect among other nurses, who feel forced to continue working for fear of

the serious financial harm and complex litigation that would face them if they left.

B. TVPRA Cases Involving Nurses Continue to Increase But Represent Only a Fraction of the Scope of the Problem

Simply put, recruiting and staffing agencies have created schemes to trap Filipino nurses in forced labor, profiting handsomely from the nurses' exploitation. These schemes represent violations of the TVPRA, and cases involving similar allegations in the medical field continue to rise. In 2022, the Human Trafficking Legal Center published a report analyzing all cases brought under the TVPRA's civil provisions, from the civil provision's enactment in 2003 through December 31, 2021. Merrick M. Black, *Using Civil Litigation to Combat Human Trafficking: Federal Human Trafficking Civil Litigation*, ("Human Trafficking Civil Litigation: 2021 Data Update"), The Human Trafficking Legal Center (December 2022). "Of

the 37 cases that alleged labor trafficking in 2021, a significant proportion of cases involved Filipino healthcare workers who alleged that labor recruiters trafficked them to the United States for forced labor in the nursing field.” *Id.* at 6. While medical cases only constituted 5.4 percent of all forced labor cases filed since 2003, in 2021, medical cases grew to ten percent of all cases filed. *Compare id.* at 8, Figure C, *with* 16, Figure 6. Notably, in 2021, cases alleging forced labor in the medical field “topped the list of labor trafficking cases[.]” *Id.* at 6.

Cases filed in the federal courts reveal a troubling—and familiar—scheme on the part of the defendants. The plaintiffs are fraudulently induced into signing egregious and one-sided contracts, often through bait-and-switch tactics. The plaintiffs, who have often already invested significant time and financial resources into the employment opportunity, have little option but to sign or suffer serious financial harm. The contracts contain exorbitant penalty provisions often in excess of \$20,000, if the nurse decides to leave the contract before the end of the multi-year term. Once employed, the nurses frequently find that many of the promised employment conditions are simply untrue. Most troubling, nurses are often placed in situations with dangerously high patient-to-nurse ratios, putting the nurses in an impossible situation that can jeopardize their license. *See Vidal*, 2023 U.S. Dist. LEXIS 59411, at *38 (collecting cases).

In court, defendants have repeatedly sought to use the employment contract as a shield to avoid any liability. ACS has adopted that tactic here. These attempts have been repeatedly rejected. “Courts around the country, including many in this Circuit, have held that contracts such as this—in which immigrant workers are threatened with severe financial penalties if they leave their employment before the end of their contract term—can violate the TVPA.” *Vidal*, 2023 U.S. Dist. LEXIS 59411, at *38. As the district court found in *Carmen v. Health Carousel, LLC*, “the TVPA makes it illegal for a company like Health Carousel to leverage serious financial pressure or threats of inappropriate legal action against Carmen in a way that would press a reasonable nurse in her position into its service.” No. 20 Civ. 313, 2021 U.S. Dist. LEXIS 113324, at *15 (S.D. Ohio Jun. 17, 2021); *see also Paguirigan v. Prompt Nursing Empl. Agency LLC*, No. 17 Civ. 1302, U.S. Dist. LEXIS 165587, at *53-55 (E.D.N.Y. Sept. 23, 2019) (holding that \$25,000 in liquidated damages for breach of an employment contract violated the TVPRA); *Baldia v. RN Express Staffing Registry LLC*, 633 F. Supp. 3d 693, 708-709 (S.D.N.Y. 2022) (determining that the plaintiff sufficiently alleged serious harm under the TVPRA by the inclusion of a \$33,320 liquidated damages provision in the contract); *Javier v. Beck*, No. 13 Civ. 2926, 2014 U.S. Dist. LEXIS 95594, at *17-18 (S.D.N.Y. Jul. 3, 2014) (finding that the complaint plausibly alleged

“serious harm” under the TVPRA where liquidated damages amount “represented six months’ gross wages”).

Despite these court rulings, recruiting and staffing agencies have successfully used the contract as a weapon *outside of court*. While a number of forced labor cases have been brought on behalf of nurses from the Philippines, the unfortunate truth is that these cases reflect just a fraction of those subjected to coercive and abusive conditions. *See e.g., Almendral, supra; Eidelson, supra.* The contract terms, including forced arbitration clauses, act not only to deter nurses from leaving their employment but also to convince them that, if they leave, they will be required to pay significant sums.

III. Employers Increasingly Use the Expensive and Confidential Arbitration Process to Perpetuate Forced Labor Schemes and Avoid Liability under the TVPRA

Forced arbitration proceedings are increasingly used by employers to evade liability under the TVPRA. While arbitration is intended to provide “efficient, streamlined procedures” for dispute resolution that are both inexpensive and accessible, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011), it is instead being used as a weapon. Expensive and confidential arbitration proceedings provide employers with a two-fold benefit. First, the threat of such expensive proceedings can be used to compel individuals into continued forced labor. Second, if the individual leaves the employment, the employers can use the

confidential and secretive nature of the proceedings to conceal the full scope of their abuse and exploitation of the workers.

Given the significant advantages of compelling arbitration proceedings, it can be of little surprise that staffing and recruiting agencies have begun using these complex and secretive proceedings as part of their forced labor schemes. Over the past two decades, U.S. employers have increasingly used forced arbitration provisions in labor contracts to recruit foreign workers, requiring the parties to submit any disputes to a private, binding dispute resolution process with limited judicial review. *See* Annie Smith, *Imposing Injustice: The Prospect of Mandatory Arbitration for Guest Workers*, 40 N.Y.U. Rev. L. & Soc. Change 375, 379 (2016), (citing Janna Giesbrecht-McKee, *The Fairness Problem: Mandatory Arbitration in Employment Contracts*, 50 Willamette L. Rev. 259, 261-65 (2014)); *see also* *Magtoles v. United Staffing Registry, Inc.*, No. 21 Civ. 1850, 2022 U.S. Dist. LEXIS 93924, at *14 (E.D.N.Y. May 25, 2022) (noting that the U.S. based nurse staffing agency has been using arbitration clauses in their foreign worker contracts since late 2019).

Mandatory arbitration clauses allow employers to force workers to resolve their disputes individually and privately and give up their right to bring individual, class or collective actions in court. *See* Khorri Atkinson, *Labor Department Sets Arbitration Clauses as Enforcement Target*, Bloomberg Law (May 24, 2023),

<https://news.bloomberglaw.com/daily-labor-report/labor-department-sets-arbitration-clauses-as-enforcement-target>. These clauses create an access to justice issue, as forced arbitration can be extremely costly from the perspective of middle and low-wage workers. *See* Smith, *supra*, at 407; *see also* Seema Nanda, *Mandatory Arbitration Won't Stop Us from Enforcing the Law*, United States Dep't of Labor Blog (Mar. 20, 2023), <https://blog.dol.gov/2023/03/20/mandatory-arbitration-wont-stop-us-from-enforcing-the-law>. This ultimately creates a chilling effect, forcing individuals to continue working out of fear of severe legal and financial consequences.

While some assert that arbitration provisions are merely the product of the parties' freedom to contract, often there is a lack of meaningful choice due to the disparate bargaining power between the employer and employee. This concern is especially true for a foreign-born employee who may not understand the consequences of committing to arbitration. *See* Smith, *supra*, at 402-403; *see also* *Magtoles v. United Staffing Registry, Inc.*, No. 21 Civ. 1850, 2021 U.S. Dist. LEXIS 248070, at *11 (E.D.N.Y Dec. 30, 2021) (internal citations omitted) (“A foreign citizen recruited to a job opportunity in this country may not have a deep (or any) understanding of the legal system or their rights under that system.”).

In this case, the New York State Office of Attorney General, Labor Bureau (“OAG”) sent a letter to the American Arbitration Association (“AAA”) on

January 4, 2023, expressing in detail its belief that the arbitration provisions in ACS's contracts were oppressive and exploitative and "compel forced labor." *Vidal v. Advanced Care Staffing, LLC*, No. 22 Civ. 5535, Dkt. No 23, Motion for Preliminary Injunction, Exhibit 20 at 1. The OAG explained how enforcing arbitration clauses like the provisions in the contract in this case would allow AAA's "arbitration program to be used as a tool by employers to further labor trafficking." *Id.* at 3.

The U.S. Department of Labor has also recognized that many staffing agencies use mandatory arbitration provisions to subvert workers' rights and, as a result, is targeting such provisions in court. *See Atkinson, supra.; see also, Nanda, supra.* As part of the Department of Labor's concern for the rights of these workers, it recently sued ACS for alleged violations under the Fair Labor and Standards Act relating to mandatory arbitration provisions within its employment contracts. *See Su v. Advanced Care Staffing, LLC, et al.*, No. 23 Civ. 02119 (E.D.N.Y. July 20, 2023), Dkt. 19, Amended Complaint. This lawsuit highlights the Department of Labor's growing concern over illegally weaponizing mandatory arbitration provisions against foreign laborers. *See Leah Shepherd, DOL Targets Illegal Provisions in Arbitration Agreements*, (April 3, 2023), SHRM, <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/dol-targets-illegal-provisions-arbitration.aspx>.

The concerns of the U.S. Department of Labor and the OAG are made plain in the instant case. ACS, as alleged, has used the arbitration clause to further its forced labor scheme—both to threaten significant financial harm and to threaten abuse of legal process. *Baldia*, 633 F. Supp. 3d at 709 (“[T]hreats of litigation can [] amount to a threatened abuse of the law or legal process.”) (internal quotations omitted). ACS first utilized the fear and cost of a foreign legal process to attempt to force Vidal to continue to work in dangerous conditions that could jeopardize patient safety and his license. When Vidal indicated a desire to leave his employment, ACS sent a threatening letter making plain the serious financial harm that Vidal would suffer if he decided to leave. A-278-79 (threatening Vidal that ACS would “present evidence demonstrating that its damages are at least \$20,000 (not counting attorney’s fees and costs that would be incurred in the arbitration).”). The district court, recognizing ACS’s alleged weaponization of the arbitration proceedings, correctly found that the “threat of uncapped arbitration costs and attorneys’ fees associated with adjudicating even threshold issues of arbitrability constitute threats of ‘serious harm’ in violation of the TVPA.” *Vidal*, 2023 U.S. Dist. LEXIS 59411, at *46.

IV. Upholding the Arbitration Provision Subverts the TVPRA and Encourages the Continued Forced Labor of Nurses

Staffing and recruitment agencies, like ACS, have been actively bringing legal actions to collect “damages” against nurses who have left their employment

contracts early. The agencies understand that far beyond whatever money they may collect from an individual nurse, these legal actions send a message to all other similarly situated nurses. By initiating an action against Vidal, as ACS did here, it threatened significant financial harm to Vidal and signaled to all other nurses working under ACS contracts that, if they seek to leave the unsafe and untenable employment conditions prior to the end of their contract, they too will face significant financial harm. These actions make plain that the threat of serious financial harm is not an empty threat. The instant action against Vidal is therefore an integral part of ACS's much larger forced labor scheme.

A recent district court case in the Second Circuit demonstrates the immediacy of this concern. In *Paguirigan*, after the plaintiff left her employment, the defendant “sued [the] plaintiff and two other Filipino nurses to enforce the \$25,000 liquidated damages provision in their contracts and for \$250,000 from each for tortious interference with contract and prospective business relations, and an additional \$250,000 from each in punitive damages.” 2019 U.S. Dist. LEXIS 165587, at *8-9. The plaintiff presented additional evidence of the defendants’ pattern and practice of initiating similar legal actions against Filipino nurses. *Id.* at *9. Between 2006 and 2008, the defendants brought a series of lawsuits against more than 30 Filipino nurses. *Id.* at *10-11.

The defendants did not stop, though, at simply bringing civil lawsuits. After ten nurses left their employment, the recruiting agency informed the New York State Education Department (“Education Department”) of the nurses’ resignation, alleging that the nurses had abandoned their patients by simultaneously resigning without adequate notice. *Id.* at *9-10. After the Education Department conducted an investigation and decided not to take any action, two of the defendants in *Paguirigan* then went to the Suffolk County District Attorney in an attempt to have the nurses criminally prosecuted. *Id.* A grand jury indicted the nurses and their attorney for conspiracy to endanger the welfare of a child and the welfare of a physically disabled person, but a New York state appellate court threw out the case finding that it violated the nurses’ Thirteenth Amendment rights. *See Matter of Vinluan v. Doyle*, 873 N.Y.S.2d 72, 82 (App. Div. 2d Dep’t 2009) (“[T]he speculative possibility that the nurses’ conduct could have harmed the pediatric patients” does not justify “abridging the nurses’ Thirteenth Amendment rights by criminalizing their resignations from the service of their private employer.”).

The defendants ultimately reached a settlement with the class in *Paguirigan*, agreeing to pay \$3,211,305.06. *Paguirigan v. Prompt Nursing Emp’t Agency LLC*, No. 17 Civ. 1302, 2022 U.S. Dist. LEXIS 186823, at *26-27 (E.D.N.Y. Apr. 7, 2022). Despite this legal victory, this case stands as a troubling example of the extreme tactics—abuse of the legal system, threats of financial harm, criminal

prosecution— used to force nurses into labor. *Paguirigan* and related cases show that health care recruiters and staffing agencies have developed a pattern and practice of using the legal system as a weapon to force individuals into labor. Here, the ACS scheme is a textbook example of this manipulation. *See Su v. Advanced Care Staffing, LLC, et al.*, No. 23 Civ. 02119, Dkt. 19, Amended Complaint. Allowing ACS to weaponize the forced arbitration clause would provide impunity to ACS for holding Vidal in forced labor and enable ACS's forced labor scheme more broadly. The district court recognized the abhorrent nature of this scheme, and its decision to enjoin the arbitration should be affirmed.

CONCLUSION

The district court rightly recognized that the arbitration should be enjoined in this case because, even if there was a clear delegation clause in the employment contract, Vidal is likely to prevail in establishing that this clause violates the TVPRA and other federal and state laws. The district court's decision should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7)(B), and 29(a)(5) I hereby certify that this brief contains 5,686 words, excluding the parts of the brief exempted by Rule 32(f), as established by the word count of the computer program used for preparation of this brief.

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 14-point size Times New Roman font.

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