ORAL ARGUMENT NOT YET SCHEDULED

No. 22-30412

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SERVANDO PARAON CALICDAN,
Plaintiff-Appellant,

v.

M D NIGERIA LLC, ET AL.,
Defendants-Appellees,

On Appeal from the United States District Court
for the Western District of Louisiana, Case No. 6:21-cv-3283
(The Honorable Terry A. Doughty)

BRIEF OF THE HUMAN TRAFFICKING LEGAL CENTER AND DOCTOR LAURA-LEIGH CAMERON-DOW AS AMICUS CURIAE IN SUPPORT OF REVERSAL AND PLAINTIFF-APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

As required by Federal Rules of Appellate Procedure 26.1(a) and 5th Cir. Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of 5th Cir. Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of the United States Court of Appeals for the Fifth Circuit may evaluate possible disqualification or recusal.

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CORPORATE DISCLOSURE STATEMENT

The Human Trafficking Legal Center is a not-for-profit organization. It has no parent corporation, does not issue stock, and no publicly held corporation owns any portion of the Human Trafficking Legal Center.

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IDENTITY AND INTERESTS OF THE AMICUS CURIAE[1]

This is a human trafficking case. The plaintiff Servando Paraon Calicdan alleges that the defendants forced him into labor in violation of the Trafficking Victims Protection Reauthorization Act ("TVPRA"), among other offenses.[2] Specifically, Calicdan has alleged that the defendants recruited him using fraud and coercion. The defendants then subjected him to forced labor, debt bondage, and threats of deportation, all in violation of federal law. As part of this scheme, the defendants abused maritime and Philippines laws to obtain a worker under the fraudulent guise that he would be employed as a seafarer. But the defendants never intended that Calicdan would work on ships. Rather, the defendants employed fraudulent and coercive tactics to traffic Calicdan to a shipyard in Louisiana, where he was forced to do dangerous work under conditions of forced labor.

The defendants now seek to use their fraud as a shield to avoid any real accountability. The district court erroneously found that Calicdan was a seafarer

[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] *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.

and, therefore, bound by the contractual clause forcing him to submit to arbitration within the Philippines. This ruling disregarded material inconsistencies and misrepresentations regarding the identity of the vessel on which Calicdan was intended to work. Far from being administrative errors that could be easily cast aside, these factual disparities, when viewed in the context of maritime law and the totality of the factual allegations, are evidence of the defendants' fraudulent behavior. Put simply, the defendants manipulated the seafarer contracts to perpetuate a scheme that included a fraud on the U.S. government and human trafficking of a Filipino worker.

The district court's errors will deprive Calicdan of any meaningful access to remedy as contemplated under the TVPRA. Because the district court's ruling failed to consider the insidious role that human trafficking played in this case and failed to recognize the significance of the misrepresentations regarding the vessel identification, Dr. Cameron-Dow and the Human Trafficking Legal Center respectfully submit this brief as *amicus curiae* in support of the plaintiff, Calicdan.

Dr. Cameron-Dow is an Assistant Professor at Bond University in Gold Coast, Australia. She is an expert in maritime law and seafarer rights and has extensive litigation experience at two national Australian law firms in personal injury claims focusing on workers, including merchant seamen, suffering asbestos-related illnesses. Dr. Cameron-Dow has 14 years' experience lecturing primarily

in Contract Law and Property Law and has presented at conferences on ship recycling and climate change. Her thesis, *To Basel or Not to Basel: Holding Ship Owners Liable Under International Law for Harm Caused by Exposure to Asbestos During Ship Recycling*, delves into the complex regulatory schemes and international conventions impacting seafarer rights.[3]

The Human Trafficking Legal Center is a non-profit organization that advocates for justice for victims of human trafficking and forced labor. Since its inception in 2012, the Center has trained more than 5,000 attorneys at top law firms across the United States to handle civil trafficking cases pro bono. The Center has connected more than 480 survivors with pro bono representation and educated more than 38,000 community leaders on victims' rights. The organization maintains a database of all civil human trafficking cases filed in the federal courts under 18 U.S.C. § 1595. The Center, drawing from this data set, has filed amicus briefs in cases like this one that involve significant legal issues involving forced labor and the application of the TVPRA.

The parties have consented to the filing of this brief.

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[3] Dr. Laura-Leigh Cameron-Dow, *To Basel or Not to Basel: Holding Ship Owners Liable Under International Law for Harm Caused by Exposure to Asbestos During Ship Recycling* ("To Basel or Not to Basel"), available at https://bridges.monash.edu/articles/thesis/To_Basel_or_Not_to_Basel_Holding_Ship_Owners_Liable_Under_Current_International_Law_for_Harm_Caused_by_Exposure_to_Asbestos_During_Ship_Recycling/12127701.

ARGUMENT

This case is before the Court on the narrow issue of mandatory arbitration. *Amici* seek to assist the Court by placing this case into the broader context of human trafficking, forced labor and maritime law.

I. The defendants engaged in wide-ranging fraud to facilitate a human trafficking and forced labor conspiracy.

The facts in this case, laden with fraud, present a typical forced labor fact pattern. Traffickers routinely use fraud to recruit workers into forced labor in the United States. Once the workers arrive, as in this case, they often face false imprisonment (ROA.270), threats of deportation (ROA.271), debt bondage (ROA.267), wage theft (ROA.268) and illegal deductions from their paychecks (ROA.268-69). Fraud is often a necessary predicate to human trafficking crimes. Indeed, the federal statutory definition of "severe forms of human trafficking" includes an explicit reference to fraud. *See* 22 U.S.C. § 7102(11) (defining the term "severe forms of trafficking in persons"' to include "recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, *fraud*, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery") (emphasis added).

In particular, visa fraud frequently features prominently in human trafficking conspiracies. In 2021, the Human Trafficking Legal Center published a report analyzing all civil cases brought under the TVPRA's civil provision, 18 U.S.C. § 1595, since it went into effect in 2003. Rebekah R. Carey, *Federal Human Trafficking Civil Litigation: 2020 Data Update, The Human Trafficking Legal Center* ("Human Trafficking Civil Litigation: 2020 Data Update"), at 11, fig. 5, available at https://htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-Data-Update-2020_FINAL.pdf. Of the 458 civil cases filed under the TVPRA, nearly 52 percent, or 237 cases, involved the use of visas.

The allegations of fraud in this case—so lightly dismissed as mere scrivener's errors by the district court—must be viewed in this context. The defendants in this case were engaged in a human trafficking scheme. They never intended for Calicdan to work on vessels at sea.[4] By recruiting Calicdan under false pretenses and misusing his work visa, the defendants knew that Calicdan would be vulnerable to trafficking. The district court erred when it failed to

[4] Trafficking of Filipino workers into the United States is a significant problem. The Human Trafficking Legal Center's 2020 Data Update found that the Philippines, tied with Mexico, was the country of origin most likely seen in human trafficking cases brought under 18 U.S.C. § 1595 (other than U.S. citizens). *Human Trafficking Civil Litigation: 2020 Data Update* at 17, fig. 10. Sixty-one of 458, or 13 percent, of all civil trafficking cases filed since 2003 have included a plaintiff from the Philippines. *Id.*

recognize that the defendants' repeated misrepresentations with respect to the identity of the vessel were evidence of the human trafficking scheme.

II. The defendants' misstatements in the contracts with Calicdan and the Manning Agreement were material.

The district court, in adopting the report and recommendation in its entirety, erroneously found that Calicdan was a seafarer, which triggers the mandatory arbitration clause in a contract that Calicdan has alleged he could not read. ROA.265. The district court failed to consider the defendants' multiple misidentifications of the vessels on which Calicdan and others were intended to work. Viewed in the context of maritime law, it is clear that these errors were not administrative but evidence of fraud in order to exploit various legal and regulatory schemes to obtain overseas workers and visas for those workers under false pretenses.

The district court incorrectly narrowed the question presented to whether "the grounding of the vessel invalidates the contract and arbitration provisions therein." ROA.1623. In reaching this conclusion, the district court accepted as true the defendants' claims that but for the "Covid-19 pandemic and decline in the oil and gas industry, the Sovereign, with Plaintiff and crew aboard, would have travelled to offshore Nigeria." *Id.* Putting aside the fact that these claims are contradicted by undisputed facts—namely, the very contracts deemed operable were from March 10, 2019, August 30, 2019 and September 30, 2019, all well

before the global pandemic—the district court failed to recognize the gravamen of the false information regarding the identity of the vessel to which Calicdan was purported to be assigned. *See* ROA.1621-22. Had the district court considered these factors in the context of maritime law, it would have found that there were, at a minimum, sufficient factual allegations to support a finding that the defendants never intended for Calicdan to be a seafarer but rather induced him to sign a fraudulent contract.

A. The International Maritime Organization ("IMO") created a scheme that mandates a unique identifying number for every vessel.

When a worker is employed at sea, they are contracted to carry out their tasks on a specific vessel. Unlike land-based workers, workers at sea are not usually working within a specific jurisdiction but are more commonly located in international waters. Thus, there are often multiple jurisdictions at play when a worker is employed at sea. Given the complexity and transient nature of vessels and the seafarers that work on those vessels, a regulatory regime that is uniformly accepted through all relevant jurisdictions is necessary to enforce an acceptable minimum standard of workers' safety, rights, obligations and all the other facets of a normal employment environment. This regulatory regime consists of multiple international conventions overseen by the International Maritime Organization ("IMO"). *See* Int'l Maritime Org., *Brief History of the IMO*,

https://www.imo.org/en/About/HistoryOfIMO/Pages/Default.aspx (last visited October 18, 2022).

The applicable governing laws and regulations are tied to the identity of the specific vessel on which seafarers are employed. Because a vessel's name and flag state can be changed through a simple transfer registration process, the IMO created a ship identification number scheme ("IMO number"), in which each vessel is provided a unique identifying number. Int'l Maritime Org, *IMO Identification Number Schemes*, Resolution A.1117(30) (Dec. 6, 2017) https://www.imo.org/en/OurWork/IIIS/Pages/IMO-Identification-Number-Schemes.aspx (last visited October 18, 2022). IMO numbers are intended to enhance "maritime safety and pollution prevention and to facilitate the prevention of maritime fraud." *Id.*

The International Convention for the Safety of Life at Sea of 1974 (hereinafter, "SOLAS"), a maritime treaty with approximately 164 member states, including the U.S. and the Philippines, requires that every ship have an IMO number. SOLAS, Ch. XI-1, Reg. 3, ¶ 2. Once allocated, this number remains assigned to the vessel for life, regardless of how many times it changes names, owners, operators or flag states. *Id.* ("The individual number of a ship remains unchanged during the entire life of the ship, even in case of change of flag, name, ownership or type.") The IMO number enables efficient tracking of the vessel's

history and underpins the system of inspections, surveys, and certificates mandated under multiple international regulatory regimes, including SOLAS, as well as labor and employment regulations governing seafarers. *See* Int'l Register of Shipping, *Why IMO number Is Important for Vessels?*, https://intlreg.org/2019/12/27/why-imo-number-is-important-for-vessels/ (last visited October 18, 2022).

The IMO number is of such import that SOLAS provides specific requirements for where it must be displayed on a ship, SOLAS, Ch. XI-1, Reg. 3, ¶ 4 ("The ship's identification number shall be permanently marked . . . in a visible place either on the stern of the ship or on either side of the hull, amidships port and starboard, above the deepest assigned load line or either side of the superstructure, port and starboard or on the front of the superstructure or, in the case of passenger ships, on a horizontal surface visible from the air . . . ."), as well as the color and size of the display, in order to ensure that it is clearly visible, *id.* at ¶¶ 5.1-5.2 (requiring that the IMO number be displayed in "a contrasting color" and be "not less that 200 mm in height").

B. Classification societies are responsible for ensuring the safety and compliance of vessels and rely on the IMO number to maintain accurate information.

Every vessel is required to be registered with a classification society. The classification society is responsible for determining the vessel's construction and maintenance conditions for its proposed purpose. SOLAS, Ch. I, Reg 6. Although

historically the goal of classification was to certify the quality of a ship, the aim of the societies now is to create a system for safeguarding the environment and life and property at sea. Det Norske Veritas, *Rules for Classification of Ships: Introduction to Ship Classification* (January 2003) Part B 100. The societies do this by verifying that a ship complies with the structural and equipment standards and procedures relevant to its purpose against rules which are established by the classification society. *Id*.

Every vessel is registered to a specific classification society, and that society conducts physical inspections and issues certificates to verify that the vessel is "in class," i.e., certified as seaworthy and in compliance with the classification society's rules. A vessel cannot go to sea, operate commercially or obtain insurance without the relevant certificates, *see* Cameron-Dow, *To Basel or Not to Basel*, at 160, which must be available on board for examination at all times, SOLAS, Ch. I, Reg 16. If a vessel is being built, repaired, newly outfitted or brought back into active service after being laid up, the requirements to make it seaworthy are dictated by the classification society with which it is registered, which will have to issue the certificates before it can set sail again. SOLAS, Ch. II-2, Reg 3. All certificates are issued using the IMO number and must be maintained on board the vessel. *See* Int'l Maritime Org., MSC/Circ.1142 - MEPC/Circ.425 (December 20, 2004) (noting "the benefits of marking ships'

plans, manuals and other documents with the IMO ship identification number for maritime safety and security, and marine environment protection purposes"). Thus, a comprehensive history of a vessel, including its prior inspections and its designated class, can only be obtained by using the IMO number.

C. Given the significance of the IMO numbers, the defendants' misrepresentations in the contracts are clear evidence of their fraudulent scheme.

As discussed above, IMO numbers are mandatory, SOLAS Chapter XI-1, Reg. 3, ¶ 2, as they are intended to enhance "maritime safety and pollution prevention and to facilitate the prevention of maritime fraud," Int'l Maritime Org., Resolution A.1117(30) at 3. Since the classification societies utilize the IMO number on all certification and inspection records, the safety, purpose and compliance records for a vessel can only be obtained through the IMO number.

In the instant case, the defendants used an inaccurate IMO number in the contracts with Calicdan and then repeatedly made misrepresentations regarding that false information. ROA.792, 810, 972-87. By failing to provide an accurate IMO number, the defendants knew or should have known that they were not only violating the law but also masking Calicdan's true employment. Notably, the defendants still have not provided an accurate IMO number for the "Sovereign" or the unidentified drydocked barge that Calicdan was living and working on in Louisiana. *See* ROA.270. Nor do these errors seem accidental. If the defendants

had provided an accurate IMO number (or numbers, given that the defendants had Calicdan working on multiple vessels in the shipyard), a review of relevant classification society documents would have clearly demonstrated that the vessels were not seaworthy, and Calicdan was never employed to be and could not be considered a seafarer.[5]

D. The IMO number is of particular significance in light of the Philippines Labor Code.

The Philippines Labor Code mandates that hiring of Filipino workers for overseas employment be conducted through the Overseas Employment Development Board, and all matters involving Filipino seamen for overseas employment are governed by the National Seamen Board. Philippines Executive Order No. 797 created the Philippine Overseas Employment Administration ("POEA") to assume the functions of both Boards and the overseas employment functions of the Bureau of Employment Services ("BES"). Philippines Executive Order No. 797, sec 4 (1983).

[5] A review of the publicly available website, MarineTraffic.com, shows that IMO number 8751174 is still associated with a drill ship named, "Lone Star." *See* MarineTraffic.com, https://www.marinetraffic.com/en/ais/details/ships/shipid:899946/mmsi:-8751174/imo:8751174/vessel:LONE_STAR_202 (last visited October 18, 2022). In contrast, a search for the name "Sovereign" produces a number of different vessels, none of which appear to be the vessel on which Calicdan purportedly was assigned to work. Thus, at a minimum, this Court should reverse and remand this case for additional discovery.

The POEA imposed several requirements for the employment of Filipino workers overseas, *see* POEA Rules and Regulations Governing Overseas Employment ("POEA Overseas Regs"), including specific requirements for the employment of seafarers, *see* POEA Rules and Regulations Governing the Recruitment and Employment of Seafarers ("POEA Seafarer Regs"). In order to be a seafarer, a worker must be employed "on board a seagoing ship navigating the foreign seas." POEA Seafarer Regs, Part I, Rule II(38). The IMO number allows the POEA to determine whether the vessel on which the worker is to be employed is, in fact, a qualifying seagoing ship. *See* POEA Seafarer Regs, Part III, Rule I, Section 2(c). Companies recruiting seafarers must be licensed as a manning agency, and, if the worker is employed through a manning agency, there must be an agreement between the principal of an enrolled vessel and the licensed manning agency with respect to the employment of ship personnel. POEA Overseas Regs, Book I, Rule II(x)-(w). Any vessel on which the worker is contracted to work must be an enrolled vessel. *Id.* In order for a worker's documents to be processed, the POEA must be provided with an individual employment contract and for seafarers, valid seamen service record book (SSRB) and seafarer's registration card (SRC). POEA Overseas Regs, Book III, Rule II, Section 2(b).

The regulations make plain that if a worker is employed as a seafarer, then, under Philippines legislation, the worker must be hired through a manning agency

to work on a specifically identified seagoing vessel. POEA Seafarer Regs, Part III, Rule 1, Section 2(c). Here, the defendant Megadrill entered into a Manning Agreement with Jebsens Marine, Inc., a licensed manning agency. ROA.764-89. Jebsens is licensed in the Philippines to enter into manning agreements to provide ship personnel to work on enrolled vessels. The 2014 Manning Agreement between Jebsens and the defendant Megadrill defines the "vessels" as the "MONARCH (ex Noble Lester Pettus)."[6] ROA.764-89. It does not provide an IMO number. On March 19, 2019, Calicdan entered into an employment contract with Jebsens as the agent for the defendant Megadrill, in which Calicdan was to work on the "Offshore Supply Vessel" named Sovereign with IMO number 8751174. ROA.792. Once again, this IMO number corresponds to a completely different vessel, Lone Star 202. ROA.972-81. This IMO number is also distinct

[6] Notably, according to publicly available records, the Monarch is classified as a "Jackup Platform." *See* BalticsShipping.com, https://www.balticshipping.com/vessel/imo/8754255 (last visited October 14, 2022). A jackup platform is a floating barge that has movable legs attached to the hull. It does not have an engine and has no self-propulsion capabilities. As this Court held in *Baker v. Dir., Office of Workers' Comp. Programs*, a floating structure is not a vessel where it has "no means of self-propulsion [and] has no steering mechanism or rudder." 834 F.3d 542 (5th Cir. 2016). Thus, even the original Manning Agreement was misleading in that it identified a "jackup platform" as the vessel where the seafarers would be employed. The Monarch also does not meet the definition of ship as defined through international law: (1) at sea; (2) capable of self-directed self-propulsion; and (3) in operation as determined with reference to the classification societies' notation system. Cameron-Dow, *To Basel or Not to Basel*, at 145.

from the vessel, the Monarch, identified in the Manning Agreement. The POEA regulations require specific information regarding the employment of the seafarer, including the IMO number of the vessel, in order to determine that a worker will, in fact, be employed as a seafarer. But the Manning Agreement indicates that Calicdan will be employed on the Monarch, the contracts indicate that Calicdan will be employed on the Sovereign (or the Lone Start 202, per the IMO number), and in reality, Calicdan was working in a shipyard.

The facts, as alleged by Calicdan, demonstrate that the defendants misrepresented key information – the identity of the vessel on which Calicdan would be employed – in order to take advantage of the employment regulations for seafarers, knowing that they had no intention for Calicdan to work as a seafarer. The defendants' use of fraudulent misrepresentations to recruit a foreign worker, and then hold that worker in forced labor, is a far too common practice. *See e.g.*, *United States v. Kalu*, 791 F.3d 1194, 1197 (10th Cir. 2015) (affirming the conviction of the defendant for forced labor, where the defendant "recruited foreign nationals to come to the United States for specialized nursing employment, required them to work as non-specialized laborers in nursing homes, retained a portion of their wages for personal profit, and threatened them with deportation and financial ruin if they did not comply with his demands" and "misrepresented the terms of their employment to the government to obtain visas and bring the

foreign nationals into the country"); *United States v. Patricio et al.*, No. 21-CR-09 (LGW)(BWC) (N.D. Ga. 2021) (charging defendants with falsely obtaining H-2A visas for foreign workers who, once in the United States, were subjected to forced labor).

The defendants were engaged in a human trafficking scheme. They should not be permitted to use their fraudulent acts in furtherance of that scheme as a shield from any accountability.

CONCLUSION

The Court should reverse the district court's decision granting the defendants' motion to compel arbitration.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because this brief contains 3,620 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), according to the count of Microsoft Word.

2. 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) because it has been prepared in 14-point Times New Roman font, a proportionately spaced typeface.

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CERTIFICATE OF SERVICE

I certify that on October 19, 2022, 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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