

No. 18-55041

In the United States Court of Appeals
for the Ninth Circuit

Keo Ratha, et al.,
Plaintiffs-Appellants

v.

Phatthana Seafoods, Co. Ltd., et al,
Defendants-Appellees.

ON APPEAL FROM THE U.S. COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 18-55041

Hon. Marsha S. Berzon, Ryan D. Nelson, and Bridget S. Bade,
Circuit Judges.

**BRIEF OF HUMAN AND WORKERS' RIGHTS
ORGANIZATIONS AS *AMICI CURIAE* IN SUPPORT OF
PLAINTIFFS-APPELLANTS' PETITION
FOR REHEARING EN BANC**

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CORPORATE DISCLOSURE STATEMENT

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Amnesty International is a not-for-profit organization. It has no parent corporation, it does not issue stock, and no publicly held corporation owns any portion of Amnesty International.

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

The **Justice Defense Fund** (“JDF”) is a not-for-profit organization. It has no parent corporation, does not issue stock, and no publicly held corporation owns any portion of JDF.

The **International Corporate Accountability Roundtable** (“ICAR”) is a fiscally sponsored project of the Tides Foundation, a not-for-profit organization. The Tides Foundation has no parent corporation, it does not issue stock, and no publicly held corporation owns any portion of it.

The **Lantos Foundation for Human Rights & Justice** (“LFHRJ”) is a not-for-profit organization. It has no parent corporation or company, it does not issue stock, and no publicly held corporation or company owns any portion of LFHRJ.

The **Law Office of Mary Joyce Carlson** is a for-profit corporation. It has no parent corporation, it does not issue stock, and no publicly held corporation owns any portion of it.

The **Migrant Workers Rights Network** (“MWRN”) is a not-for-profit organization. It has no parent corporation, it does not issue stock, and no publicly held corporation owns any portion of MWRN.

Oxfam America is a not-for-profit organization. It has no parent corporation, does not issue stock, and no publicly held corporation owns any portion of Oxfam America.

Share (Asia Pacific) Limited (“Liberty Shared”) is a not-for-profit organization. It has no parent corporation, it does not issue stock, and no publicly held corporation owns any portion of Liberty Shared.

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

The **State Enterprises Workers’ Relations Confederation** (“SERC”) is the national labor organization in Thailand. It is a not-for-profit organization. It has

no parent corporation, it does not issue stock, and no publicly held corporation owns any portion of SERC.

The **Uyghur Human Rights Project** (“UHRP”) is a not-for-profit organization. It has no parent corporation, it does not issue stock, and no publicly held corporation owns any portion of UHRP.

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William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044	19

Other Authorities

Amicus Curiae Brief of Solidarity Center, et al in Support of Appellants for Reversal of Order Granting Defendants’ Motion for Summary Judgment, Keo Ratha, et al v. Phatthana Seafoods, Co. Ltd., et al., 26 F.4th 1029 (9th Cir. 2022) (No. 18-55041).....17

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Brief of Freedom Network USA, et al. as Amici Curiae in Support of Plaintiffs-Appellants at 35, Keo Ratha, et al. v. Phatthana Seafoods, Co. Ltd., 26 F.4th 1029 (9th Cir. 2022) (No. 18-55041).....20

Brief of Members of Congress Senator Blumenthal, et al as Amici Curiae Supporting Respondent, Nestlé USA, Inc. v. John Doe I, et al., 141 S. Ct. 1931 (2021) (Nos. 19-416 & 19-453).....19

Directorate General for External Policies of the Union, Parliament of the European Union, *Access to legal remedies for victims of corporate human rights abuses in third countries* (2019)16

Human Trafficking Legal Center, *Importing Freedom: Using the U.S. Tariff Act to Combat Forced Labor in Supply Chains* (2020)11

ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (2017)9

ILO, *Profits and Poverty: The Economics of Forced Labour* (2014)9

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 Hon. William R. Yeomans).....20

Kate Hodal, *Workers claiming they had to sleep with the chickens face Thai court charges*, *The Guardian* (June 6, 2017) (<https://www.theguardian.com/global-development/2017/jun/06/workers-claiming-they-had-to-sleep-with-the-chickens-face-thai-court-charges-burmese-migrants>)18

Office of the High Commissioner for Human Rights, United Nations, *Thailand: UN experts condemn use of defamation laws to silence human rights defender Andy Hall* (May 17, 2018) (<https://www.ohchr.org/en/press-releases/2018/05/thailand-un-experts-condemn-use-defamation-laws-silence-human-rights>)17

Office to Monitor and Combat Trafficking in Persons, U.S. Dept. of State, *2021 Trafficking in Persons Report* (2021)16

Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, 130 Stat. 239 (2016).....10

U.S. Customs and Border Patrol, *CBP Issues Detention Order on Palm Oil Produced with Forced Labor in Malaysia* (Sept. 30, 2020)
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U.S. Customs and Border Patrol, *CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang* (Jan. 13, 2021)
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U.S. Customs and Border Patrol, *CBP Issues Withhold Release Order on Malaysian Glove Producers* (Nov. 4, 2021)
(<https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-malaysian-glove-producers>)13

U.S. Customs and Border Patrol, *Forced Labor* (<https://www.cbp.gov/trade/forced-labor>)10

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INTEREST OF *AMICI CURIAE*

Amnesty International is a worldwide movement of more than ten million people in more than 150 countries and territories working for the respect, protection, and fulfillment of internationally recognized human rights.

Centro de los Derechos del Migrante, Inc. (“CDM”) supports migrant workers to defend and protect their rights as they move between their home communities in Mexico and their workplaces in the United States.

Corporate Accountability Lab (“CAL”) is an independent organization committed to promoting human rights literacy and the realization of human rights through strategic litigation and advocacy.

Freedom Network USA (“FNUSA”) is the largest alliance of advocates against human trafficking in the United States, including ninety-one members that serve more than 2,000 trafficking survivors per year in over forty cities.

Global Labor Justice-International Labor Rights Forum (“GLJ-ILRF”) 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.

Greenpeace USA (“GPUS”) is part of global Greenpeace, a network of independent campaigning organizations that expose global environmental problems and promote solutions that are essential to a green and peaceful future,

including working to expose the nexus of forced labor and environmental destruction pervasive in the commercial fishing industry.

Human Rights Watch (“HRW”) is an independent, nongovernmental human rights organization that monitors and reports on human rights in more than 100 countries around the world, including on labor rights and supply chain issues.

The **Human Trafficking Institute** (“HTI”) works to stop human trafficking at its source by empowering police and prosecutors to stop traffickers.

The **Human Trafficking Legal Center** (“HTLC”) is a non-profit organization that advocates for justice for victims of human trafficking and forced labor and uses U.S. law to hold corporations accountable for forced labor in global supply chains.

The **International Corporate Accountability Roundtable** (“ICAR”) is a coalition of over forty member and partner organizations committed to ending corporate abuse of the people and the planet and preventing corporate wrongdoing.

The **International Lawyers Assisting Workers Network** (“ILAW”), a program of the **Solidarity Center**, is a global network of lawyers and advocates dedicated to the promotion and defense of workers’ rights worldwide, including the elimination of forced labor.

The **Justice Defense Fund** (“JDF”) is a nonprofit organization dedicated to empowering survivors of sex trafficking, child sexual abuse material, and image-

based sexual abuse to pursue justice through sustainable, strategic litigation funding.

The **Lantos Foundation for Human Rights & Justice** (“LFHRJ”) was established to carry on Congressman Tom Lantos’ proud legacy as a leading advocate for American engagement in human rights globally.

The **Law Office of Mary Joyce Carlson** specializes in domestic and international Public & Employment Law, with additional areas of practice in International Business Practices and Human Rights.

The **Migrant Workers Rights Network** (“MWRN”) is a membership-based organization for migrant workers from Myanmar residing and working mainly in Thailand.

Oxfam America is a development and human rights organization with operations across the globe. It pushes companies to weed out forced labor in its agribusiness supply chains, with a particular focus on the seafood sector in Southeast Asia.

Share (Asia Pacific) Limited (“Liberty Shared”) aims to prevent human trafficking through legal advocacy, technological interventions, and strategic collaborations with NGOs, corporations, and financial institutions globally.

State Enterprises Workers' Relations Confederation ("SERC") is a national labor organization in Thailand, with more than 150,000 members. It works on labor protections and rights to create decent work in the workplace.

The **Uyghur Human Rights Project** ("UHRP") is a research-based advocacy organization that promotes the rights of the Uyghurs and other Turkic Muslim peoples in East Turkistan, referred to by the Chinese government as the Xinjiang Uyghur Autonomous Region.

CERTIFICATE OF AUTHORSHIP

Pursuant to Rule 29(a)(2) of the Federal Rule of Appellate Procedures, the *amici curiae* file this brief with the consent of Plaintiffs' and Defendants' counsel. Per Rule 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.

SUMMARY OF ARGUMENT

This Court has held that victims of human trafficking may not prevail in a civil action under the Trafficking Victims Protection Reauthorization Act (“TVPRA”)¹ against those who have attempted to benefit financially, rather than actually benefited, from a human trafficking venture. The Court’s misreading of the statute thwarts victims’ access to justice in cases where the intermediary company in the global supply chain attempted, but failed, to secure a financial benefit for the sale of goods tainted by forced labor. This ruling undermines the U.S. Government’s comprehensive strategy to eliminate human trafficking and impedes remedies for victims of forced labor.

The United States is a global leader in the movement to eradicate human trafficking worldwide. Congress has passed legislation establishing a range of statutory tools to eradicate the multi-billion-dollar business of human trafficking. This comprehensive legal infrastructure includes measures to prohibit goods made from forced labor abroad from entering the U.S. market. This Court’s narrow reading of the TVPRA pits the statute directly at odds with these Congressionally mandated import restrictions. The forced labor import bans—Section 307 of the United States Tariff Act of 1930 (“Tariff Act”),² the Uyghur Forced Labor

¹ Pub. L. No. 110-457, 122 Stat. 5044.

² 19 U.S.C. § 1307.

Prevention Act of 2021 (“UFLPA”), Pub. L. No. 117-78, 135 Stat. 1525, and Countering America’s Adversaries Through Sanctions Act of 2017 (“CAATSA”), Pub. L. No. 115-44, 131 Stat. 886—all block goods from entering the United States. This approach has become an increasingly important tool for discouraging forced labor in global supply chains.

Under these laws, the U.S. Government is mandated to detain all goods made in whole or in part with forced labor from entering the U.S. market. To the extent that U.S. Customs and Border Patrol (“CBP”) successfully enforces Section 307, UFLPA, and CAATSA, goods tainted by forced labor will never result in receipt of payment or any financial benefit. Indeed, with the U.S. Government’s enforcement of these statutes, all efforts to export goods made with forced labor to the United States would end in “attempt.”

This Court’s ruling, which precludes recovery in the case of attempt, will strip victims of forced labor of their right to obtain justice under the TVPRA. They will be blocked from prevailing in a civil suit to recover damages in cases where CBP successfully blocks goods made with forced labor at U.S. ports. In such cases, no relief would be available to those harmed—even from U.S. businesses that participate in supply chains that engage in forced labor—simply because the U.S. Government succeeded in stopping the shipment. Congress did not intend for

robust federal enforcement of forced labor import ban statutes to vitiate victims' rights to a remedy.

Providing victims of forced labor with access to a civil remedy is necessary to hold intermediary companies accountable for attempting to financially benefit from forced labor and eradicate forced labor in the global supply chains. The Court's ruling, however, undermines Congress's intent to hold these companies accountable. In instances where sales of goods tainted by forced labor are prevented due to external forces, such as a CBP detention order or, as here, a decision by Walmart to refuse to accept goods made with forced labor, victims of forced labor will lose access to a remedy. U.S. federal enforcement of Section 307 of the Tariff Act and related statutes should not eviscerate a victim's ability to hold traffickers accountable. This de facto impunity will lead to failure to eliminate human trafficking in the global seafood industry and in all supply chains tainted by forced labor.

ARGUMENT

I. The Court's Interpretation of "Attempt" Disrupts the U.S. Government's Comprehensive Strategy for Tackling Forced Labor Around the World.

Forced labor is a feature, not a bug, in global supply chains. Congress recognized that this scourge must be addressed urgently. According to the International Labor Organization ("ILO"), there are 24.9 million people around the

world trapped in forced labor, 16 million of whom are trafficked in the private sector. ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, at 9 (2017). Estimated to generate \$150 billion in illegal profits every year, forced labor “thrives in the incubator of poverty and vulnerability, low levels of education and literacy, migration and other factors.” ILO, *Profits and Poverty: The Economics of Forced Labour*, at 13 (2014). In response, the U.S. Government has established a comprehensive strategy to combat human trafficking and forced labor. That Congressionally mandated strategy includes interlocking parts: CBP detention orders on goods made with forced labor, civil cases to hold perpetrators accountable, and federal criminal enforcement. The panel decision undoes the choices made by Congress.

If the U.S. Government halts goods at the border, the U.S. Department of Justice should still be able to prosecute for the forced labor tainting those goods. Similarly, a detention order should not preclude a victim from pursuing the civil remedy Congress created in 2003. This Court’s holding disrupts that system.

A. The Government Has Increasingly Sought to Halt Goods Made With Forced Labor from Entering the U.S. Market.

The United States leads the fight to eliminate human trafficking globally. Increasingly, those efforts have focused on import bans. In 2016, Congress amended Section 307 of the Tariff Act of 1930 to streamline robust enforcement,

eliminating a loophole that had undermined enforcement.³ Since that amendment, Section 307 has become a powerful tool to fight forced labor abroad. It permits CBP to issue detention orders (“Withhold Release Orders” or “WROs”) to prevent merchandise produced in whole or in part in a foreign country using forced labor from being imported into the United States. In FY2021 alone, CBP detained 1,469 shipments of goods valued at nearly \$500 million pursuant to the Tariff Act; and in the first quarter of FY2022, it detained 912 shipments of goods. CBP, *Forced Labor* (<https://www.cbp.gov/trade/forced-labor>).

The Tariff Act’s success has led Congress to pass additional laws blocking imports. To address widespread, government-imposed forced labor in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China (“Uyghur Region”), Congress passed the UFLPA in 2021. This statute establishes a “rebuttable presumption” that all goods produced in the Uyghur Region are tainted by forced labor.⁴ Experts anticipate an enormous increase in the number of goods stopped at U.S. ports based on forced labor allegations when the UFLPA enters into effect on June 21, 2022. Similarly, CAATSA, passed in 2017, bans all goods made by North Korean workers from entering the U.S. market.⁵

³ Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, Title IX, § 910(a)(1), 130 Stat. 239 (2016).

⁴ Pub. L. No. 117-78, §3(a), 135 Stat. 1529.

⁵ 22 U.S.C. § 9241a.

Under this Court’s holding, however, forced labor victims who produced goods blocked from entry to the U.S. market would be precluded from civil recovery as the U.S. Government’s refusal to admit the goods under Section 307, UFLPA, or CAATSA would undercut their claims. This carve out for “attempt” has far-reaching and damaging implications. Ironically, it protects some of the worst actors: those who have come to CBP’s attention.

The scope of CPB’s detention orders is vast. The agency has issued WROs against entire product lines from certain countries, such as all cotton and cotton products from Turkmenistan (May 2018), all artisanal gold from the Democratic Republic of Congo (September 2019), all tobacco from Malawi (November 2019), and all cotton products from the Uyghur Region (January 2021). Human Trafficking Legal Center, *Importing Freedom: Using the U.S. Tariff Act to Combat Forced Labor in Supply Chains* (2020). These detention orders target some of the worst offenders for forced labor in the global supply chain. Yet, the Court’s ruling *rewards* these bad actors with impunity from civil suit.

A few examples of CBP’s detention orders provide insight into the devastating impact of this Court’s ruling:

- Palm Oil: In September 2020, CBP issued a detention order for all palm oil produced by FGV, a major producer in Malaysia. Brenda Smith, Executive Assistant Commissioner of CBP’s Office of Trade,

issued a statement: “The use of forced labor in the production of such a ubiquitous product allows companies to profit from the abuse of vulnerable workers. These companies are creating unfair competition for legitimately sourced goods and exposing the public to products that fail to meet ethical standards.” *CBP Issues Detention Order on Palm Oil Produced with Forced Labor in Malaysia* (Sept. 30, 2020) (<https://www.cbp.gov/newsroom/national-media-release/cbp-issues-detention-order-palm-oil-produced-forced-labor-malaysia>). **With the enforcement of this detention order, goods made by FGV cannot enter the United States. This Court’s ruling eliminates the private right of action Congress created for these workers.**

- Rubber Gloves: In November 2021, CBP issued a detention order against disposable gloves produced by Smart Glove. CBP Office of Trade Executive Assistant Commissioner AnnMarie R. Highsmith stated, “There is no place for forced labor in today’s world, particularly in U.S. supply chains. It undermines not only the U.S. economy but our commitment to upholding human rights throughout the world.” *CBP Issues Withhold Release Order on Malaysian Glove Producers* (Nov. 4, 2021) (<https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-malaysian-glove->

producers). **With the enforcement of this detention order, goods made by Smart Glove cannot enter the United States. This Court’s ruling eliminates the private right of action Congress created for these workers.**

- Xinjiang Cotton and Tomatoes: In January 2021, CBP issued a region-wide detention order on products “made by slave labor in Xinjiang.” Acting DHS Deputy Secretary Ken Cuccinelli stated, “DHS will not tolerate forced labor of any kind in U.S. supply chains. We will continue to protect the American people and investigate credible allegations of forced labor, we will prevent goods made by forced labor from entering our country, and we demand the Chinese close their camps and stop their human rights violations.” *CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang* (Jan. 13, 2021) (<https://www.cbp.gov/newsroom/national-media-release/cbp-issues-region-wide-withhold-release-order-products-made-slave>). **With the enforcement of this detention order, cotton and tomatoes cannot enter the United States. This Court’s ruling eliminates the private right of action Congress created for these workers.**

In 2003, Congress passed 18 U.S.C. § 1595 to provide victims of forced labor a civil remedy. This Court has effectively repealed that statute for any victim forced to create goods or merchandise covered by these WROs or any of the 54 WROs currently in effect. CBP, *Withhold Release Orders and Findings List* (<https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings>).

B. The Court’s Misreading of the TVPRA Will Bar Remedy for Victims in Many Forced Labor Cases Identified by the Government.

Congress created import bans—and amended the Tariff Act—against the backdrop of the TVPRA. This Court has effectively ended the TVPRA civil remedy for victims where their traffickers have attempted but failed to penetrate the U.S. market. This Court has disrupted statutes designed to work in concert.

Amici raise these Tariff Act import bans before the Court because the situation here is analogous. In this case, the defendant failed to benefit financially from the victims’ forced labor only because the retailer, Walmart, refused to purchase the tainted goods. Had Walmart not rejected the goods, the defendant would have proceeded with the sale and financially benefited from the victims’ forced labor. Nonetheless, merely because of external circumstances that thwarted the defendant from completing the sale, this Court ruled the TVPRA did not apply. That is not what Congress intended.

With the steady rise of Section 307 Tariff Act detention orders, CAATSA enforcement, and UFLPA enforcement (beginning June 2022), similarly thwarted

attempts to financially benefit from human trafficking will surge. Alarming, this Court's holding will diminish the availability of civil remedy under the TVPRA for more and more victims as the U.S. Government becomes increasingly successful at blocking goods made with forced labor at the border. This ruling creates a safe harbor for the worst offenders: Under the Court's overly restrictive reading of the statute, in cases where CBP stops goods identified as having been made with forced labor at the border, the companies that attempted to sell those goods will not have successfully completed the crime of knowingly benefiting from the forced labor. As a result, victims will have no civil remedy, and companies will have little incentive to modify their behavior. In other words, the very success of the statutory import bans will undercut the TVPRA's legislative purpose of providing civil remedy for victims, making statutes designed to complement one another conflict.

Without access to remedy under the TVPRA, victims will find it extremely difficult to find recourse elsewhere. The Tariff Act does not offer a remedy for victims, nor do the UFLPA or CAATSA. Furthermore, it is often extremely difficult for victims to obtain remedies in their home countries. The text of the TVPRA points out that Congress enacted the TVPRA because it found that "enforcement against traffickers is... hindered by official indifference, by corruption, and sometimes even by official participation in trafficking." 22 U.S.C. § 7101(b)(16). Other factors hindering justice in victims' home countries include

an “underdeveloped justice system, lack of respect for the rule of law, weak enforcement mechanisms, lack of judicial independence...or lack of measures to ensure protection of victims and human rights defenders from intimidation and threats or reprisals.” Directorate General for External Policies of the Union, Parliament of the European Union, *Access to legal remedies for victims of corporate human rights abuses in third countries* 15 (2019).

Assuming Rubicon, a U.S corporate defendant, could be tried in Thailand, there is no reasonable prospect for the victims to obtain effective remedy in Thai courts. It is also highly likely that the safety and security of the victims would be severely compromised if they bring suit in Thailand. The U.S. Department of State placed Thailand on a trafficking “Watchlist” due to the “low number of labor trafficking victims [identified] compared to the scope of the problem....” Office to Monitor and Combat Trafficking in Persons, U.S. Dept. of State, *2021 Trafficking in Persons Report* 471 (2021).⁶ In addition, Thai national labor authorities have

⁶ This is a longstanding problem. *See* expert Report of Ambassador Luis C.deBaca, citing the Trafficking in Persons Report (2014): Overall anti-trafficking law enforcement efforts remained insufficient compared with the size of the problem in Thailand, and corruption at all levels hampered the success of these efforts. Despite frequent media and NGO reports documenting instances of forced labor and debt bondage among foreign migrants in Thailand’s commercial sectors—including the fishing industry—the government demonstrated few efforts to address these trafficking crime...The government did not make sufficient efforts to

been unsuccessful in providing remedy to workers for labor law violations. *Amicus Curiae Brief of Solidarity Center, et al., in Support of Appellants for Reversal of Order Granting Defendants' Motion for Summary Judgment* at 13, Keo Ratha, et al. v. Phatthana Seafoods, Co. Ltd., 26 F.4th 1029 (9th Cir. 2022) (No. 18-55041).

Victims might also be subject to retaliation for bringing legal claims. There have been numerous instances where Thailand's defamation legislation was used by Thai corporations to silence those who reported human rights abuses. U.N. experts have called attention to the growing number of strategic lawsuits against public participation in Thailand, filed by business enterprises seeking to silence legitimate concerns about working conditions in certain industries. Office of the High Commissioner for Human Rights, United Nations, *Thailand: UN experts condemn use of defamation laws to silence human rights defender Andy Hall* (May 17, 2018) (<https://www.ohchr.org/en/press-releases/2018/05/thailand-un-experts-condemn-use-defamation-laws-silence-human-rights>). In one case, victims who sought remedies in Thai courts have themselves faced criminal prosecution. Kate Hodal, *Workers claiming they had to sleep with the chickens face Thai court charges*, *The Guardian* (June 6, 2017) (<https://www.theguardian.com/global->

proactively identify trafficking victims among foreign migrants, who remained at risk of punishment for immigration violations.

development/2017/jun/06/workers-claiming-they-had-to-sleep-with-the-chickens-face-thai-court-charges-burmese-*migrants*).

In establishing the statutory framework to end trafficking, Congress established a civil remedy for victims of forced labor, and the companies before this Court, including a U.S. company doing business in the United States, should not be able to evade those obligations.

II. Remedy is Essential to Provide Access to Justice for Survivors of Human Trafficking.

The impact of the Court's decision on human trafficking victims' access to remedy is highly concerning because remedy is a critical component of ensuring victims with access to justice and is core to the legislative purpose of the TVPRA. Forced labor has a devastating impact on victims, who suffer a variety of long-lasting physical, psychological, social, and financial difficulties after they escape from their trafficking situation.

Since 2000, Congress has instituted a series of amendments to better protect victims: For example, the 2003 reauthorization provided for a civil remedy in section 1595 so that victims can directly sue their traffickers; and the 2008 reauthorization amended section 1595 to extend civil liability to those who benefit from a violation of the TVPRA and added section 1596 to codify extraterritorial jurisdiction. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L.

No. 108-193, 117 Stat. 2875; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

These amendments to the TVPRA illustrate Congress' intent to provide victims with access to remedy against those who knowingly benefit—or knowingly attempt to benefit—from their forced labor, including in cases where the forced labor occurs abroad. *Brief of Members of Congress Senator Blumenthal, et al as Amici Curiae Supporting Respondent* at 20, *Nestlé USA, Inc. v. John Doe I, et al.*, 141 S. Ct. 1931 (2021) (Nos. 19-416 & 19-453); *Brief for Senator Robert Menendez, et al. as Amicus Curiae in Support of Plaintiffs-Appellees and Affirmance* at 4, *Ramona Matos Rodriguez v. Pan American Health Organization*, No. 20-7114 (D.C. Cir. Aug. 3, 2021). In doing so, Congress confirmed that “a knowing beneficiary of and participant in a forced-labor scheme injures the victim of that scheme just as much as any other participant in that venture.” *Id.* (quoting *Rodriguez v. Pan American Health Organization*, 502 F. Supp. 3d 200, 217 (D.D.C. 2020)).

Notably, even where an intermediary company's attempt to benefit financially from forced labor fails because the goods are seized or rejected, the company has already caused real harm to the victims. The intermediary company identified a supplier that it knows relies on forced labor and procured products created by forced labor from that supplier. This Court's ruling will deprive those

victims of any remedy, simply because external forces were successful in blocking the sale of the goods created by their forced labor.

III. The Court’s Decision Will Help Perpetuate Forced Labor in Global Supply Chains.

In amending the TVPRA to expand liability to those who knowingly benefit from a violation of the statute, Congress recognized that the complexity of global supply chains requires holding not only direct perpetrators, but also those who seek to benefit from trafficking, liable. Congress recognized that the law must not “provide a liability shield between the direct oppressor and the economic beneficiary of the slave 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 Hon. William R. Yeomans). “Congress understood that making human trafficking less profitable would shrink the industry and create a significant disincentive targeted at those who had, with impunity, profited from this scourge.” *Brief for Senator Robert Menendez*, at 4. In addition, Congress recognized that the threat of legal sanction is necessary for corporations to take the steps necessary to eliminate human trafficking from their supply chains “because the profits to be gained from such enterprises are so high—reaching into the billions.” *Brief of Freedom Network USA, et al. as Amici Curiae in Support of Plaintiffs-Appellants* at 35, *Keo Ratha, et al. v. Phatthana Seafoods, Co. Ltd.*, 26 F.4th 1029 (9th Cir. 2022) (No. 18-55041).

Holding companies that knowingly attempt to benefit from the sale of goods made with forced labor is essential to eliminate human trafficking in global supply chains because attempt is what creates the market for goods made with forced labor. Intermediary companies continuously try to sell goods made with forced labor and are often successful. Yet, even when companies are unsuccessful due to external forces, such as a rejection by the retailer or an enforced WRO, the companies continue to engage in the sale of goods made with forced labor because the financial benefits outweigh any minimal risks. This practice, in turn, disadvantages ethical businesses with fair labor practices as unscrupulous businesses using forced labor inject low-priced goods into the market and gain a competitive commercial advantage. *See Rodriguez v. Pan American Health Organization*, No. 20-7114, 2022 WL 904850, at *17–18 n.5 (D.C. Cir. Mar. 29, 2022); *see also Brief for Senator Robert Menendez*, at 17.

Without any meaningful consequences, intermediary companies will continue to benefit financially from the sale of goods made with forced labor. When the profits to be made are so high and the risk of being held accountable so low, the cost of attempting to benefit from forced labor is worth it for these companies. Put simply, the ability to hold intermediary companies accountable under the TVPRA, when they knowingly attempt to benefit from the sale of goods made with forced labor, is essential to fighting forced labor in global supply

chains. However, this Court's requirement that companies actually profited from the forced labor of the victims insulates businesses that help fuel human trafficking by creating the market for goods made with forced labor through their attempts to benefit from forced labor.

CONCLUSION

For the foregoing reasons, this Court should grant Plaintiffs-Appellants' motion for rehearing en banc.

Dated: April 21, 2022

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I hereby certify that on April 21, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

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Dated: April 21, 2022

STATEMENT OF RELATED CASES

Counsel for *amici* is unaware of any related cases, as defined in Ninth Circuit Rule 28-2.6.

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