[ORAL ARGUMENT NOT YET SCHEDULED]

NO. 22-7104

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

Issouf COUBALY, et al.,

Plaintiffs-Appellants,

v.

CARGILL, INC., et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Columbia, Case No.: 1:21-cv-00386-DLF

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Cir. R. 28(a)(1), amici curiae certify as follows:

A. Parties and Amici

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

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B. Rulings Under Review

The rulings under review are listed in the Brief for Plaintiffs-Appellants.

C. Related Cases

Amici curiae are not aware of this case having been previously before this Court or any other court, or of any pending related cases.

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STATUTES AND REGULATIONS AT ISSUE

All applicable statutes, etc., are contained in the Brief for Plaintiffs-Appellants.

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae are twelve law professors who are legal experts in an array of legal fields, including constitutional law, administrative law, national security law, and international law and human rights. They teach and have written extensively on these subjects. While they pursue a wide variety of legal interests, they share a deep commitment to the rule of law, respect for human rights, and accountability for perpetrators and redress for victims.

Amici also share a strong interest in the proper interpretation of Article III standing, which impacts every area of law. *Amici* believe that a proper interpretation of Article III's "fairly traceable" requirement is necessary to preserve victims' access to justice and Congress's ability to regulate harmful actors. *Amici* seek to provide the Court with an additional perspective on the Article III standing issue presented by this appeal, informed by their legal expertise across many different areas of the law—all of which could be impacted by the overly narrow interpretation of Article III standing adopted by the court below. They believe this submission will assist the Court in its deliberations.

[1] All parties participating in this appeal have consented to the filing of this brief. No counsel for a party to this appeal authored this brief in whole or in part, and no counsel for a party, party itself, or any person other than the amici curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

A description of each *amicus curiae* follows[2]: **William J. Aceves** is the Dean Steven R. Smith Professor of Law at California Western School of Law. Professor Aceves has authored numerous articles and has written or edited several books, including LESSONS AND LEGACIES OF THE WAR ON TERROR (2012), THE LAW OF CONSULAR ACCESS (2010), and THE ANATOMY OF TORTURE (2007). He is a member of the American Law Institute. Professor Aceves has appeared before the Inter-American Commission on Human Rights, the U.N. Special Rapporteur on Migrants, and the U.S. Commission on Civil Rights.

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[2] Affiliations are only provided for information purposes.

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INTRODUCTION

Congress enacted the Trafficking Victims Protection Reauthorization Act (TVPRA) to "combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims." Pub. L. No. 106–386, § 102(a), 114 Stat. 1488 (2000). In the TVPRA's 2008 reauthorization, Congress recognized the "dark side of globalization" and the "dangerous abuse of the increasingly interconnected nature of the international economic system," H.R. Rep. No. 110-430, at 33 (2007), and amended the TVPRA's civil liability provision to give victims of forced labor trafficking the right to sue "whoever knowingly benefits, financially or by receiving anything of value from participation in a venture" engaged in unlawful trafficking or forced labor practices. 18 U.S.C. § 1595(a).

Plaintiffs in this case, former child slaves that were trafficked and forced to work on cocoa bean farms in Côte d'Ivoire, allege that the major cocoa corporation defendants knowingly benefited from participation in a cocoa supply chain venture "to provide them[selves] with the benefit of cheap cocoa they know or certainly should know is harvested by forced and/or trafficked child labor." JA 89. This is precisely the type of lawsuit Congress envisioned when it expanded liability under the TVPRA to encompass "venture liability."

Nonetheless, the district court dismissed plaintiffs' lawsuit, prior to any discovery, on the grounds that plaintiffs failed to establish that their injuries were fairly traceable to defendants' conduct. Instead of considering whether the complaint alleges that defendants participated in and benefited from a venture that injured plaintiffs, the court rejected that theory of liability as insufficient to satisfy Article III. In doing so, the district court imposed a standard for causation much higher than Article III requires and stripped Congress of its power to articulate chains of causation that will give rise to a case or controversy.

Borrowing from theories of proximate cause under tort law, the district court reasoned that the causal chain must be direct, not dependent on any third-party intermediaries, and certain. But Article III requires no such thing. This Court and others have held that Article III's "fairly traceable" element is satisfied so long as plaintiffs allege that the wrongful conduct contributes, even if indirectly, to plaintiffs' injuries. Court have also recognized that where, as here, the causal chain is difficult to trace, it is enough that defendants' wrongful conduct contributes to the same kind of harm that plaintiffs suffered.

The district court further erred in dismissing the TVPRA joint venture liability scheme as irrelevant to the Article III standing analysis. This Court has repeatedly recognized that while Article III standing is an independent constitutional requirement, courts can and should take into consideration Congress' judgment

regarding causal relationships, which is often rooted in a fact-intensive, complex policy analysis. Yet here, the district court ignored Congress's determination, evidenced by the 2008 amendment to the TVPRA, that large corporations that participate in and benefit from unlawful ventures under § 1595(a) contribute to the very harms of forced child labor and trafficking that plaintiffs suffered.

Finally, the district court's approach to Article III's fairly traceable requirement threatens to gut countless other secondary liability schemes established by Congress, including the Sherman Antitrust Act, the Comprehensive Environmental Response, Compensation, and Liability Act, the Clean Water Act, and the Anti-Terrorism Act, among others. By imposing a higher standard for Article III causation than many statutes require, the district court's analysis threatens to strip Congress of its ability to legislate in response to complex policy problems, threatening the separation of powers that is at the core of Article III standing.

ARGUMENT

I. The district court's interpretation of Article III's "fairly traceable" requirement is wrong as a matter of law.

The district court imposed a tort-like standard for causation that is far more demanding than Article III's "fairly traceable" requirement. Specifically, the district court wrongly required a direct chain of causation that is not dependent on the actions of third parties; required a level of certainty in the causal chain that Article III does not call for; and failed to take into account Congress's determination, in

passing the TVPRA, that participation in a joint venture, as defined in § 1595(a), contributes to forced child labor.

A. Article III does not require that defendants' wrongful conduct be the most direct cause of plaintiffs' injuries.

The district court wrongly assumed that the chain of causation is too speculative and tenuous to establish Article III standing because it is not "direct" and "involve[s] the actions of independent third parties." JA 118. But "Article III standing does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries; it requires only that those injuries be 'fairly traceable' to the defendant." *Attias v. Carefirst, Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017), *cert. denied*, 138 S. Ct. 981 (2018).

An injury may be "fairly traceable" where, for example, "the alleged injury flows not directly from the challenged . . . action, but rather from independent actions of third parties" whose actions were "motivat[ed]" by the challenged conduct. *See Tozzi v. U.S. Dep't of Health & Hum. Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001); *see also Ctr. for Energy & Econ. Dev. v. E.P.A.*, 398 F.3d 653, 658 (D.C. Cir. 2005) (same); *Competitive Enter. Inst. v. Fed. Commc'ns Comm'n*, 970 F.3d 372, 381 (D.C. Cir. 2020) (listing cases where courts found Article III standing when causation depended on the conduct of a third party).

An indirect causal chain is especially appropriate when a complaint alleges a conspiracy or joint venture. "Plaintiffs need only allege . . . that they have suffered

damages *as a result of the conspiracy* in which defendants participated" and need not "explicitly identif[y]" "each defendant's relationship with a plaintiff." *Oxbow Carbon & Mins. LLC v. Union Pac. R.R. Co.*, 81 F. Supp. 3d 1, 7 (D.D.C. 2015) (emphasis added).

A fairly traceable requirement that only requires defendant's conduct to contribute, even indirectly, to plaintiff's injury is also consistent with Article III's redressability requirement. A plaintiff's injury is redressable so long as "the court's decision would reduce 'to some extent' plaintiffs' risk of additional injury." *Carter v. Fleming*, 879 F.3d 132, 138 (4th Cir. 2018); *see also Massachusetts v. E.P.A.*, 549 U.S. 497, 526 (2007) (finding redressability is satisfied where "risk of catastrophic harm" could be "reduced to some extent if petitioners received the relief they seek"). If a plaintiff's injury need only be redressed to some extent, then it makes sense that defendant's conduct need only play some role, even an indirect role, in causing plaintiff's injury.

Thus, an indirect causal chain or the existence of intermediaries in defendants' supply chain does not preclude Article III standing. So long as plaintiffs allege—as they do here—that defendants participated in or contributed to an unlawful venture which injured plaintiffs, they have satisfied Article III's causation requirement. *Cf. Oxbow Carbon*, 81 F. Supp. 3d at 7 (only requiring plaintiffs to allege they suffered damages "as a result of the conspiracy in which defendants participated").

B. Article III does not require a precisely articulated causal chain.

The district court also erred by requiring plaintiffs to establish, prior to any discovery, that defendants purchased cocoa from the very same cocoa farms that plaintiffs were forced to work on. The court determined that without specific facts establishing that link there is "uncertainty in the chain of causation sufficient to defeat standing." JA 118 (internal citation omitted). In doing so, the district court imposed a standard of certainty for causation that Article III does not require. While an Article III *injury* must be actual or "certainly impending," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 410 (2013), Article III's "fairly traceable" element does not require plaintiffs to "show to a scientific certainty that defendant's [conduct], and defendant's [conduct] alone, caused the precise harm suffered by the plaintiffs." *Save Our Cmty. v. U.S. E.P.A.*, 971 F.2d 1155, 1161 (5th Cir. 1992). To satisfy the "fairly traceable" requirement, plaintiffs must allege facts that suggest "it is substantially probable, but not certain" that defendants' challenged conduct "created a demonstratable risk, or caused a demonstratable increase in an existing risk" of injury to at least one plaintiff. *Rai v. Biden*, 567 F. Supp. 3d 180, 192 (D.D.C. 2021). In other words, plaintiffs need only allege that it is substantially probable that there is *some* nexus—some increased risk of, or contribution to—the kind of injury that plaintiffs suffered. They need not show, as the district court required, that it is

substantially probable that defendant's conduct is the proximate cause or but-for cause of plaintiffs' injuries.

This principle is best illustrated in environmental cases where courts routinely find Article III causation even when plaintiffs cannot prove that it was defendants' pollution, in particular, that injured the plaintiffs. In those cases, it's enough to allege that defendants' unlawful pollution contributes to the *kind of injury* that plaintiffs suffered. *See, e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 161 (4th Cir. 2000) (en banc) ("[r]ather than pinpointing the origins of particular molecules, a plaintiff must merely show that a defendant discharges a pollutant that causes or contributes to the kinds of injuries alleged in the specific geographic area of concern" to satisfy Article III); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 557 (5th Cir. 1996) (similarly requiring only a geographical nexus and that "the pollutant causes or contributes to the kinds of injuries alleged by the plaintiffs"); *Pub. Interest Research Grp. of N.J., Inc. v. Powell Duffryn Terminals Inc.*, 913 F.2d 64, 72 (3d Cir. 1990) (same); *see also Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 180-182 (2000) (finding citizen-suit plaintiffs had constitutional standing to challenge 489 Clean Water Act permit violations that occurred between 1987 and 1995 without requiring plaintiffs to connect their injuries to specific unlawful discharges).

The facts of this case are no different. Plaintiffs allege in detail that defendants are knowingly profiting from and perpetuating child slave labor on cocoa farms—the very kind of harm plaintiffs suffered. *See* JA 89. Plaintiffs also allege that supply chains, much like pollution, are hard to track. *See* JA 89-93. Indeed, defendants intentionally source their cocoa through untraceable channels where forced child labor and trafficking occur on a widespread basis. *See* JA 41. And just like plaintiffs in the environmental cases cited above, plaintiffs here have alleged a strong geographical nexus, stating that defendants purchased much of their beans from farms in Côte d'Ivoire—the same area where plaintiffs were forced to work on cocoa farms. *See* JA 3, 43, 56, 79, 82. The fact that plaintiffs cannot with complete certainty trace beans used by defendants to a specific Côte d'Ivoire farm where plaintiffs worked is of no consequence to the Article III standing analysis.

And even if such facts were necessary to establish Article III standing, plaintiffs should be given an opportunity to conduct discovery regarding defendants' supply chain connections to particular Côte d'Ivoire farms. Such information may very well be in defendants' possession. The district court found the complaint's allegations regarding the relationship between the cocoa farms that plaintiffs worked on and defendants' conduct to be too "general," *see* JA 116-17, but "on a motion to dismiss we presume that general allegations embrace those specific facts that are

necessary to support the claim." *Osborn v. Visa Inc.*, 797 F.3d 1057, 1063-64 (D.C. Cir. 2015).

Furthermore, even if defendants never purchased cocoa beans from the particular Côte d'Ivoire cocoa farms that plaintiffs were forced to work on as children, there is still Article III causation because the complaint alleges that defendants "are not merely purchasers or users of cocoa from Côte D'Ivoire; they are the architects and defenders of the cocoa production system of Côte D'Ivoire." JA 89. Not only did defendants provide financial support, training, and technological innovation to cocoa farms using child slave labor in Côte d'Ivoire, but they created and led an organization designed to delay and curtail meaningful reforms. JA 89-92. In other words, the complaint alleges that defendants contributed to the child slave labor venture as a whole, which, in turn, injured plaintiffs. And that is all Article III's causation element requires.

To hold otherwise is "to raise the standing hurdle higher than the necessary showing for success on the merits." *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. at 181. "[T]he fairly-traceable inquiry is much more forgiving that the merits-based, tort-causation inquiry." *Webb as next friend of K.S. v. Smith*, 936 F.3d 808, 814 (8th Cir. 2019). Indeed, this Court has "never applied a 'tort' standard of causation to the question of traceability." *Tozzi*, 271 F.3d at 308. Thus, contrary to the district court's analysis, an injury may be "fairly traceable" to unlawful conduct even when the

causal chain is somewhat speculative, and especially when, as here, defendants purposefully obscure the causal chain to create uncertainty and evade liability.

C. Article III causation should not be assessed in a vacuum, without regard to the underlying statutory scheme.

Finally, the district court erred by giving no consideration to the standard of liability under the TVPRA when assessing whether plaintiffs' injuries are "fairly traceable" to defendants' wrongful conduct. Relying on the Supreme Court's recent decision in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the district court stated that Congress cannot do away with the constitutional causation requirement and that, therefore, liability under the TVPRA is a distinct, unrelated issue. JA 119. The court was partly correct. Article III does impose a minimal constitutional requirement that the injury be "fairly traceable" to the defendants' conduct, and Congress cannot simply legislate that requirement out of existence. But Congress, in enacting statutory schemes, *can* inform the heavily policy-laden question of when an injury is sufficiently traceable to another's conduct such that the person should be held liable. The Supreme Court has held that "Congress has the power to . . . articulate chains of causation that will give rise to a case or controversy where none existed before" and that Congress's judgment is "instructive and important." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016), as revised (May 24, 2016) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 580 (1992) (Kennedy, J., concurring in part)); *see*

also Laidlaw Envtl. Servs., 528 U.S. at 185 (deferring to Congress's determination that civil penalties would deter future violations in assessing Article III standing).

This Court has likewise recognized that while Congress may not create standing on its own, "it can provide legislative assessments which courts can credit in making standing determinations." *Nat'l Wildlife Fed'n v. Hodel*, 839 F.2d 694, 708 (D.C. Cir. 1988), *rev'd on other grounds sub nom Nat'l Wildlife Fed'n v. Lujan*, 928 F.2d 453 (D.C. Cir. 1991); *see also In re Idaho Conservation League*, 811 F.3d 502, 510 (D.C. Cir. 2016) (court may consider "congressional and agency assessments" in assessing theory of causation for Article III standing); *Autolog v. Regan*, 731 F.2d 25, 26, 31 (D.C. Cir. 1984) (noting "we must give great weight to this congressional finding in our standing inquiry"); *Int'l Ladies Garment Workers Union v. Donovan*, 722 F.2d 795, 811-12 (D.C. Cir. 1983) (reasoning that because "Congress passed the Act partly to provide redress to employers from unfair competition, the suggestion that effective enforcement of the Act will not have this effect directly contravenes the congressional judgment underlying the Act"); *Animal Welfare Institute v. Kreps*, 561 F.2d 1002, 1010 (D.C. Cir. 1977) (concluding that "Congress, in enacting the MMPA, established as a matter of law the requisite causal relationship between American importing practices and South African sealing practices.").

Nothing in *TransUnion* changes the Supreme Court's or this Court's longstanding holding that Congress may articulate chains of causation for purposes of Article III standing. *TransUnion* was about what constitutes a concrete injury—a separate element of Article III standing. The word "causation" does not appear anywhere in the 53-page decision. And even if it did, this Court is bound by the Supreme Court's explicit holding in *Spokeo* and *Laidlaw* that Congress' legislative determinations can inform a court's analysis of Article III causation. "[T]he Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

Unlike identifying an injury, identifying causal links often requires significant fact finding and a deep understanding of complex subject areas like economic theory, sociology, international relations, or physics or chemistry. For example, in *Center for Auto Safety v. Thomas II*, Article III causation turned on the impact fuel economy credits were having on automobile manufacturers and the availability of fuel-efficient cars. *See* 847 F.2d 843, 855–56 & n. 15 (D.C. Cir. 1988) (Wald, C.J.), *reh'g granted and opinion vacated on other grounds,* 856 F.2d 1557 (D.C. Cir. 1988). Similarly, in *Autolog v. Regan*, this Court, in finding Article III causation, deferred to Congress' finding that "exclusion of foreign-flag shippers will prompt domestic shippers to exploit existing markets." 731 F.2d at 31.

The fact intensive nature of a causation inquiry requires that courts consider Congress' legislative findings and statutory standards of liability. As Chief Judge Wald explained in *Center for Auto Safety*, the issue is not whether "Congress [can] abrogate the Art. III minima . . . . [i]t is rather whether, in appraising the likely impact of a complex economic regulatory scheme, the federal judiciary should override congressional factfinding and substitute its own predictions." 847 F.2d at 856. And this Court has already answered that question, recognizing "as a matter of comity, it is unseemly for a federal court to ignore such legislative opinion." *Dellums v. U.S. Nuclear Regul. Comm'n*, 863 F.2d 968, 978 (D.C. Cir. 1988).

Below, the district court cast aside the underlying legislative scheme as irrelevant to the standing analysis. *See* JA 119. But in enacting amendments to the TVPRA that establish joint venture liability, Congress recognized the "emerging and dangerous abuse of the increasingly interconnected nature of the international economic system" and implemented "domestic measures to prevent unscrupulous labor recruiters from exploiting foreign workers." H.R. Rep. No. 110-430, at 33-34 (2007). In other words, Congress found that the interconnected web of the international economic system enabled corporations to benefit from human trafficking and that it was these larger ventures, not just the direct employers of forced laborers, that were contributing to the exploitation of 12.3 million individuals who are trafficked annually. *Id.* The law created joint venture liability to "continue

to make the laws banning human trafficking more effective and meaningful," and thereby recognized a causal relationship between participation in such unlawful ventures and the harm victims of trafficking and forced labor suffer. 154 Cong. Rec. S10886-01, S10886, 2008 WL 5169970. That congressional judgment deserves consideration and deference, yet the district court expressly dismissed it as irrelevant to the standing analysis.

* * *

In sum, this Court should reject the district court's standing analysis because neither direct nor certain causal chains are necessary to satisfy Article III's fairly traceable requirement, and the district court failed to consider Congress' finding that participation in unlawful joint ventures under § 1595(a) contributes to forced child labor.

II. The district court's interpretation of "fairly traceable" would gut longstanding statutes, threatening the separation of powers.

The district court's high standard for Article III causation threatens to undercut a number of statutory schemes with secondary liability structures that are critical to protecting the economy, the environment, and even our national security. This section highlights just a few of those statutes to demonstrate how the district court's approach to Article III standing would undermine longstanding federal statutes and deny Congress the ability to do its job.

The first example is the Sherman Anti-Trust Act, which makes it illegal to engage in a conspiracy to restrain trade. In cases brought under this statute, courts do not require plaintiffs to establish a direct causal relationship between each defendant's unlawful activity and the harm plaintiffs suffered. For example, in *Oxbow Carbon & Mins. LLC v. Union Pac. R.R. Co.*, companies that mined, sold, and shipped coal and petroleum coke brought a Section 1 action against railroad operators, alleging they engaged in anticompetitive conduct by fixing prices above competitive levels through uniform fuel surcharge and allocating certain markets to each other. 81 F. Supp. 3d at 5-6. Defendants moved to dismiss for lack of standing because while the amended complaint stated that plaintiffs paid fuel surcharges they would not have paid absent the conspiracy, the complaint failed to allege to *whom* plaintiffs paid those surcharges. *Id.* at 7. The district court rejected this argument, explaining that because defendants were "jointly and severally liable under Section 1 for any injury suffered by plaintiffs," they "need not identify, at this stage, to which co-conspirator they paid fuel surcharges." *Id.* The court rejected the notion that "each defendant's relationship with a plaintiff be explicitly identified" and concluded that "plaintiffs need only allege, as they have in the amended complaint, that they suffered damages as a result of the conspiracy in which defendants participated." *Id.*; *see also Sanner v. Bd. of Trade of City of Chi.*, 62 F.3d 918, 925 (7th Cir. 1995) (requiring only that defendants' conduct "played some role in setting prices" that

plaintiff paid); *Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 480 (7th Cir. 2002) (same).

Likewise, here, even though plaintiffs cannot yet directly connect each defendant to a particular cocoa farm in Côte d'Ivoire that plaintiffs worked on, plaintiffs *have* alleged that they suffered harm from a joint venture that defendants participated in. If the standard for Article III causation is raised to preclude TVPRA joint venture liability, it may also preclude conspiracy liability under the Sherman Act, a longstanding federal law that is critical to protecting interstate commerce and competition in the marketplace.

Environmental protection statutes are also at stake. For example, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) authorizes both governmental and private parties to recover from responsible parties the costs incurred in cleaning up and responding to the release or threatened release of hazardous substances. 42 U.S.C. §§ 9607, 9611. "[T]he language of the statute does not require the [plaintiff] to prove as part of its prima facie case that the defendant caused any harm to the environment." *United States v. Hercules, Inc.*, 247 F.3d 706, 716 (8th Cir. 2001). So long as the defendant qualifies as a responsible party under the statute, "it is enough that response costs resulted from 'a' release or threatened release—not necessarily the defendant's release or threatened release." *Id.* "The argument that the [plaintiff] must prove a direct causal

link between the incurrence of response costs and an actual release caused by a particular defendant has been rejected by 'virtually every court' that has directly considered the issue." *Id.* at 716 n.8 (citing *United States v. Alcan Aluminum Corp.*, 964 F.2d 252, 265 (3d Cir. 1992) (citing cases)). It is well-settled that "the [plaintiff] need not trace or 'fingerprint' a defendant's wastes in order to recover under CERCLA." *Id.* at 716.

If the district court's interpretation of Article III causation prevails, statutory schemes like CERCLA may not be constitutionally enforceable. The district court below required plaintiffs to trace the forced labor of a particular plaintiff to a particular defendant, even though defendants intentionally obscured supply chains and they all participated in an unlawful venture that contributed to the forced labor plaintiffs suffered. If a similar approach were applied to actions brought under CERCLA's strict liability scheme, it would impede the ability of government and private individuals to recover response costs, undermining the statute's objective of ensuring a prompt and effective response to the release of harmful hazardous waste.

Similarly, in enacting the Clean Water Act, Congress "instituted a regime of strict liability for illegal pollution discharges." *Gaston Copper Recycling Corp.*, 204 F.3d at 151. Courts have held that there is no need to trace the pollution from the defendant's facility through specific waterways to the plaintiff. *Id.* at 155. It is enough to allege that defendant "exceeds its discharge permit limits for chemicals

that cause the types of injuries [plaintiff] alleges" and that "[plaintiff's] lake lies within the range of that discharge." *Id.* at 162. "No court has required additional proof of causation in such a case." *Id.* To hold otherwise "encroaches on congressional authority by erecting barriers to standing so high as to frustrate citizen enforcement of the Clean Water Act." *Id.* at 151. "While Article III sets the minimum requirements for standing, Congress is entitled to impose more exacting standing requirements for the vindication of federal statutory rights if it wishes." *Id.* at 162.

Beyond environmental statutes, the district court's interpretation of Article III causation could also weaken enforcement of the Anti-Terrorism Act (ATA), as amended by the Justice Against Sponsors of Terrorism Act (JASTA). 18 U.S.C. § 2333. The Act "authorizes victims of terrorism to recover against anyone shown to have played a primary (direct) or secondary (aiding-and-abetting) role." *Atchley v. AstraZeneca UK Ltd.*, 22 F.4th 204, 214 (D.C. Cir. 2022). In an ATA action, the "defendant need not be generally aware of its role in the specific act that caused the plaintiff's injury; instead, it must be generally aware of its role in an overall illegal activity from which the act that caused the plaintiff's injury was foreseeable." *Atchley*, 22 F.4th at 220. Nor need there be a direct link between the support provided to a terrorist organization and a particular attack that injured the plaintiff.[3] *See, e.g.*

[3] The district court cited to *Bernstein v. Kerry*, 962 F. Supp. 2d 122, 129 (D.D.C. 2013) as evidence that a direct chain of causation is required. But first, the standing analysis in that case rested primarily on plaintiff's failure to establish that

Kaplan v. Lebanese Canadian Bank, SAL, 999 F.3d 842, 855 (2d Cir. 2021) (explaining that "Congress[] instruct[ed] that JASTA is to be read broadly and to reach persons who aid and abet international terrorism 'directly or indirectly'"). Any provision of fungible resources to a terrorist organization qualifies as aiding and abetting under the statute because it "allows it to grow, recruit and pay members, and obtain weapons and other equipment." *Atchley* at 227. In other words, a defendant is liable under the ATA if it in any way contributes to the "joint venture" that is a terrorist organization and that venture then injures the plaintiff.

This is no different than the liability scheme under the TVPRA, which holds defendants liable for participating in a joint venture which in turn injured plaintiffs. If that causal connection does not satisfy Article III causation in the TVPRA context, it is not clear why it would satisfy Article III in a case brought under the Anti-Terrorism Act, or many other statutes with civil aiding-and-abetting liability. *See Reynolds v. Higginbottom*, No. 19-CV-5613, 2022 WL 864537, at *14 (N.D. Ill. Mar. 23, 2022) (collecting similar statutes to the ATA with civil aiding-and-abetting

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there was a certainly impending injury. *Id.* (relying on the lack of a certainly impending *injury* in its analysis on causation). No such uncertainty exists here where plaintiffs were all already injured by forced child labor practices.

Second, *Bernstein* was brought under a different, earlier law—not the ATA as amended by JASTA. The fact that the D.C. Circuit later, in cases like *Atchley*, *does* find Article III standing despite indirect causal chains demonstrates how Congress's legislative findings and established liability schemes inform courts' assessments of causation in fact under Article III.

liability, including "the Packers and Stockyards Act, the Internal Revenue Code, the National Bank Act, the Federal Reserve Act, and the Commodity Exchange Act."). By raising the threshold for Article III standing to preclude secondary liability structures, such as venture, aiding-and-abetting, or joint-and-several liability, the district court's approach would gut numerous federal statutory schemes.

Such an approach strips Congress of the power to articulate chains of causation and create legally enforceable rights—or, in other words, to legislate. If a statutory right cannot be enforced in Court, it is no right at all. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (holding that "where there is a legal right, there is also a legal remedy") (quoting 3 William Blackstone, Commentaries *23). Thus, if courts raise the standard of Article III causation to preclude certain secondary liability statutory schemes, they will strip Congress of its power to craft legal remedies for harms that arise out of collective, diffuse, or otherwise hard-to-track causal chains. Congress will be denied the ability to legislate in response to complex policy problems in ways that advance and protect the public interest.

CONCLUSION

For the reasons above, this Court should reverse the district court and hold that plaintiffs have alleged facts sufficient to establish Article III standing.

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Respectfully submitted,

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Certificate of Service

I certify that on November 21, 2022, this amicus brief in support of plaintiffs-appellants was served on all parties or their counsel through the CM/ECF system.

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Certificate of Compliance

Pursuant to Rule 32(g)(1) that this amicus brief complies with the type-volume limitation under Rule 29(a)(5) because this brief contains 5,930 words. This brief complies with the typeface and type style requirements because it has been prepared in Microsoft Word using 14-point Times New Roman font.

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