UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21-7135

John Doe I, *et al.*,

Plaintiffs-Appellees,

v.

Apple Inc., *et al.*,

Defendant-Appellant.

On Appeal from the United States District Court for the District of Columbia,

Case No. 19-cv-03737- CJN,

Before the Honorable Carl J. Nichols

BRIEF OF HUMAN TRAFFICKING INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Human Trafficking Institute ("the Institute") is a nonprofit nonstock corporation. The Institute does not have a parent corporation, and no publicly held corporation owns 10 percent or more of its stock.

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IDENTITY, INTEREST, AND AUTHORITY TO FILE

The Human Trafficking Institute (the "Institute" or "Amicus") exists to ameliorate modern slavery at its source by empowering criminal justice systems to end human trafficking. The Institute's leadership has extensive experience investigating, prosecuting, and training on human trafficking throughout the United States, including briefing and arguing for restitution awards for trafficking victims and addressing legal issues surrounding restitution.

In addition, the Institute created and maintains a comprehensive database of federal human trafficking cases and produces the Federal Human Trafficking Report (the "Report") annually to detail its findings. The Report includes data on restitution awards in federal human trafficking case, which has led the Institute to create a restitution resource handbook to guide attorneys and judges in the process of seeking and awarding restitution in such cases.

The Institute is specially situated to aid in the Court's consideration of the legal questions surrounding the restitution order in this case, and seeks to advise the Court about the importance of civil recovery under the Trafficking Victim Protection Act ("TVPRA") for a wide range of ventures in which defendants may participate and benefit from, and that Congress defined the scope of "venture" comparably, to allow for recovery not only for their victimizers, but those who participate in benefit from ventures that engage in human trafficking and forced

labor. For these reasons, the Institute respectfully requests that the Court accept this *amicus curiae* brief.

The Institute is not aware of any other amicus brief addressing or touching on these issues. As the focus of this amicus brief is a disparate legal issue, and because the brief differs in that it focuses on factual matters such as the nature of trafficking and state of prosecutions, the Institute certifies pursuant to Cir. Rule 29(d) that joinder in a single brief with other amici would be impracticable.

FED. R. APP. P. 29(A)(2) AND 29(4)(E) STATEMENT

All parties in this appeal have consented to the filing of this brief.

This brief was authored and funded solely by the Institute. This brief was not authored, in whole or in part, by a party's counsel in this matter. Furthermore, no party or party's counsel contributed money to fund the preparation or submission of this *amicus curiae* brief, nor did any person outside of the Institute contribute money to fund the preparation or submission of this brief.

ARGUMENT

In October 2000, Congress passed the Trafficking Victims Protection Act, which criminalized human trafficking. 18 U.S.C. § 1581 et seq; Pub. L. No. 106-386, 114 Stat. 1464 (2000). Since then, Congress has repeatedly and uniformly expanded the Act through reauthorizations.

Congress added a civil remedy for victims of forced labor in 2003, and in 2008 added a cause of action under 18 U.S.C. §1595(a) against whoever knowingly benefits from participation in a "venture" which that person knew or should have known has engaged in forced labor. Pub. L. No. 110-457, 122 Stat. 5044 (2008). 18 U.S.C. §1595(a). "Venture" under §1595(a) serves an important purpose, addressing the scourge of human trafficking and forced labor and its many millions of victims, and the complex and interconnected network of persons and entities which makes trafficking possible. *Infra*, § I. As §1595 indicates and numerous courts have found, "venture" means a group of two or more individuals "associated in fact," regardless of whether they are a legal entity – as defined in an accompanying provision, 18 U.S.C. §1591(e)(6). *Infra* § II. An association in fact" is obviously broad, as its plain definition indicates, and as it has been interpreted in other context. *See infra* § III. The district court did not adopt this broad reading, however, and defined "venture" more narrowly, and unclearly as a "commercial enterprise." JA 118. This Court should not adopt the same mistake or reasoning.

I. A Comprehensive View of a "Venture" Is Needed to Deter Trafficking and Forced Labor.

According to the International Labour Office 's most recent report, on any given day in 2016, 25 million people were victims of forced labor. International Labour Office & Walk Free Foundation, *Forced Labor and Forced Marriage* 21 (2017).[1] Forced labor lurks behind many sectors and aspects of life: "on construction sites, in factories, on farms and fishing boats, in other sectors, and in the sex industry," with the fruits of this labor being passing though "seemingly legitimate commercial channels." *Id.* at 22. This exploitation is extraordinarily profitable. Even in 2012, where the number of victims of forced labor was significantly less than in 2016, at 20.9 million persons, the profits from their labor was over $150 billion per year. International Labour Office, *Profits and Poverty: The Economics of Forced Labour* 13 (2014).[2]

Liability is essential for those who knowingly benefit from participating in ventures that have engaged in forced labor and human trafficking. As Congress recognized, such liability dissuades defendants from participating in ventures that have engaged in such conduct. This is equally important regardless of whether the

[1] Available at: *https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_575479.pdf* (last accessed Aug. 13, 2022).

[2] *Available at* https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_243027.pdf (last accessed Aug. 13, 2022).

venture from which they have profited is or is not a "commercial enterprise," or another on that has engaged in human trafficking or forced labor.

Civil liability is, moreover, particularly important. Prosecutors may or may not bring cases and do so at the discretion of a burdened federal government. Civil liability is thus often the only remedy or means of deterrence. This is particularly true with respect to forced labor cases. Forced labor cases represented only 5% of criminal cases in 2020, and 8% in 2021. Feehs & Currier Wheeler, Human Trafficking Institute, *2020 Federal Human Trafficking Report* 17 (2021) [hereinafter "*2020 Report*"];[3]Lane, et al. Human Trafficking Institute, 2021 Federal Human Trafficking Report 2, 15 (2022) [hereinafter "*2021 Report*."].[4] On the other hand, 55% of new civil claims brought under the TVPA were for forced labor in 2020, and 54% in 2021. *2020 Report* at 17; *2021 Report* at 117.

Congress has understood well the scope of human trafficking and forced labor, and the need to combat it with civil liability, repeatedly and consistently expanding the scope of the Trafficking Victims Protection Act to do so. After passing the Act in 2000, in 2003, Congress expanded it to add civil liability. *See* Trafficking Victims

[3] *Available at* https://traffickinginstitute.org/wp-content/uploads/2022/01/2020-Federal-Human-Trafficking-Report-Low-Res.pdf (last accessed Aug. 13, 2022).

[4] *Available at* https://traffickinginstitute.org/wp-content/uploads/2022/06/2021-Federal-Human-Trafficking-Report-Web.pdf (last accessed Aug. 13, 2022).

Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, 2878 (2003). In 2008 Congress further expanded the Act to extend civil not only to perpetrators of forced labor or trafficking, but also to those who benefit from participating in "a venture" which the defendant knew or should have known had engaged in human trafficking or forced labor. Pub. L. No. 110-457, 122 Stat. 5044 (2008); 18 U.S.C. §1595(a).

The district court found that liability under this provision, 18 U.S.C. §1595(a), applies when the venture is a "commercial enterprise," apparently based on the district court's understanding of two dictionary definitions. JA 118. A limited view of "venture" liability such as the district court's – in which defendants are free to participate in and benefit from non-commercial ventures that have engaged in human trafficking and forced labor – is inconsistent with the scope of the broad problem of human trafficking and forced labor, and the concept of venture liability designed to tackle it. As addressed below, a constrained view of venture is inconsistent with the statutory scheme and language and statutory that Congress adopted.

II. A "Venture" is a Group of "Individuals Associated in Fact."

The most appropriate basis for understanding the word "venture" in 18 U.S.C. §1595 comes from the express explanation of the identical term in §1591(e)(6) of the same Chapter, passed shortly before venture liability was added to §1593A and to §1589(b). "There is a presumption that Congress uses the same

term consistently in different statutes." *Nat'l Treasury Emples. Union v. Chertoff*, 452 F.3d 839, 857 (D.C. Cir. 2006). "When Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005). In fact, parallel language is a "'strong indication' that the common term should be construed consistently under each statute." *Chertoff*, 452 F.3d at 858 (citing *Indep. Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 758 n.2 (1989).

18 U.S.C. §1591(e)(6) was passed in 2000, in 18 U.S.C. Chapter 77 (governing liability for "peonage, slavery, and trafficking"). Pub. L. 106–386, div. A, § 112(a)(2), Oct. 28, 2000. §1591 expressly lays out the definition for a venture: any group of two or more individuals "associated in fact, whether or not a legal entity." 18 U.S.C. §1591(e)(6). In a subsequent authorization passed shortly after §1591, Congress added liability for having participated in and benefitted from a "venture" that had engaged in conduct prohibited under Chapter 77 both to the civil penalty in 18 U.S.C. §1595, and to criminal provisions in 18 U.S.C. §1593A and §1589(b). *See* Pub. L. 110–457, title II, §§ 221-22, Dec. 23, 2008.

There is no basis to limit the venture liability added to §1595(a), as the district court did, including limiting it to "commercial enterprises," JA 118, rather than adopting the definition as the term is defined, as associations in fact.

"Venture" is presumptively similar in both statutes, *see, e.g.*, *Smith*, 544 U.S. at 233; *Chertoff*, 371 U.S. App. D.C. at 482, and nothing in the text demands a narrower definition here. In fact, if anything as a civil remedial statute, §1595's use of venture would be construed even *more* broadly than a penal statute such as §1591 – not less, as the district court did. *See, e.g.*, *Peyton v. Rowe*, 391 U.S. 54, 65 (1968) (the scope of remedial statutes should be construed broadly).

There are, moreover a wide variety of ventures that engage in trafficking, forced labor, and violations of 18 U.S.C. Chapter 77. They need not be a "commercial" enterprise, or certainly formal ones. There is no reason to believe that Congress silently mandated immunizing participation in and benefit from a venture that engaged in trafficking solely because the venture was a non-commercial venture. Indeed, in §1595(a), Congress specifically stated that whatever benefit the venture provides – which would obviously include the benefit it was organized to provide, and the reason for the participation – need not have any financial component at all. *See* 18 U.S.C. §1595(a) (creating liability for whoever knowingly benefits "financially *or by receiving anything of value* from participation in a venture . . . " (emphasis added).[5] It would be anomalous to limit

[5] The term "anything of value" is, exactly as the words indicate, extremely broad and is understood to include both tangible and intangible benefits. *See, e.g.*, *United States v. Cook*, 782 F.3d 983, 988 (8th Cir. 2015); *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (citing with approval *Cook*, 782 F.3d at 988).

§1595(a)'s focus to the benefits of commercial ventures, where the statute's concern is expressly not limited to such benefits.

Unsurprisingly, Circuits and other courts considering the matter have repeatedly applied the definition in §1591(e)(6) to other provisions. *See*, *e.g.*, *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017) (Souter, J., by designation) (applying §1591(e)(6) to the definition of venture under §§1589 and 1595); *Bistline v. Parker*, 918 F.3d 849, 873 (10th Cir. 2019); *see also, e.g., United States ex rel. Fadlalla v. DynCorp Int'l, LLC,* Civil Action No. 8:15-cv-01806-PX, 2022 U.S. Dist. LEXIS 41695, at *15 (D. Md. Mar. 9, 2022); *Doe v. Mindgeek USA Inc.*, 558 F. Supp. 3d 828, 837 (C.D. Cal. 2021); *Gilbert v. U.S. Olympic Comm.*, 423 F. Supp. 3d 1112, 1138 (D. Colo. 2019). This Court should do the same, and apply the definition of venture in §1591(e)(6).

III. A "Venture" Is Broad and Not Limited to a Formal "Commercial" Enterprise.

The definition of "venture" under 18 U.S.C. § 1591(e)(6) is broad as the text confirms: it means any group of two or more "individuals associated in fact, whether or not a legal entity." That breadth is, moreover, consistent with the issue the TVPRA confronted, dissuading participation in and gaining benefit from ventures which have engaged in forced labor or trafficking – a need which is not

limited to a "commercial enterprise," whatever the district court meant by that term.[6]

In *United States v. Turkette*, 452 U.S. 576 (1981), the Supreme Court addressed the phrase "individuals associated in fact" as opposed to individuals constituting a legal entity. *Id.* at 581 (citing 18 U.S.C. § 1961(4)). The statute it addressed, 18 U.S.C. § 1961(4), RICO, differs in several respects, though in *Turkette*, the Court took the opportunity to explain the breadth of the phrase "individuals associated in fact" in detail. Given the broad aims of the TVPRA, and the gravity of the situation it addresses, an "association in fact" should be construed at least as broadly here.

As the Supreme Court noted, with such a phrase "[t]here is no restriction . . . embraced by the definition . . . ." *Turkette*, 452 U.S. at 580. An association in fact can obviously be a legitimate or illegitimate one, legal or illegal. *Id.* at 580-81. Nor need there be any sort of formal association between members for an association in fact. *Id.* at 583. The term is on its face broad: it simply means "a group of persons associated together for a common purpose of engaging in a course of conduct." *Id.*

[6] It is not entirely clear what the district court meant by a "commercial enterprise," given it did not explain in detail or refer to any caselaw determining what it meant by "commercial enterprise." JA 187-89.

Such language is capacious, and as it states, involves *any* group of persons associated for a purpose and engaging in a course of conduct. *See, e.g.*, *United States v. Eiland*, 738 F.3d 338, 360 (D.C. Cir. 2013) (finding association in fact for defendants who hoped to profit from distribution of a product where members had various roles in a distribution chain); *United States v. McGill*, 815 F.3d 846, 930-31 (D.C. Cir. 2016) (finding associations in fact can be organized around economic purposes, similar to the shared purpose of profiting from distribution as in *Eiland*; or non-economic purposes, like enhancing reputation of participants); *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1116 (D.C. Cir. 2009) (finding association in fact for drug various manufacturers intending to enjoy sales by deceiving about the true nature of the product). While an association in fact must function as a "continuing unit and remain in existence long enough to pursue a course of conduct," there is significant breadth in that concept: such an association need not even have "a hierarchical structure or a 'chain of command';" members need not even have fixed roles, nor need there be any kind of formal procedure or protocol. *Boyle v. United States*, 556 U.S. 938, 948 (2009). As a textual matter, a phrase such as an association in fact it is "obviously broad." *Id.* at 944. "The term 'any' ensures that the definition has a wide reach," "and the very concept of an association in fact is expansive." *Id.*

The breadth of the definition of venture in § 1591(e)(6) is consistent with the context, purpose, and text in 18 U.S.C. § 1595(a). As addressed above, a limited definition such as the district court's definition of venture – a "commercial enterprise" – is, on the other hand, not consistent with § 1595(a). In adopting that view, the district court did not even attempt to address whether the allegations in the Plaintiffs' complaint satisfy the standard outlined in § 1591(e)(6). *See* JA 117-119. This Court should not make the same mistake, and instead should adopt the broader view of a venture as an association in fact.

Even if the Court did not do so, moreover, the district court's view would still be wrong, applying only its basis for the decision. The district court based its view of a "venture" on the dictionary definition, ignoring the elements addressed above. JA 117-19. But as the district court pointed out, the definition of a venture means some "undertaking" with persons "involving chance" or "risk." JA 117-18 (citing *Venture*, Webster's New Int'l Dictionary, Unabridged 2542 (3d ed. 2002); *Venture*; Black's Law Dictionary 4826 (8th ed. 2004). That is by its plain definition capacious. It does not require any subject matter limitation for the venture or any particular form, such as that the venture be a "commercial." The district court's basis for concluding otherwise was that it had divined "string" between dictionary definitions. JA 118. As each definition cited by the district court explicitly states though, a "commercial" venture is a form of an undertaking

involving risk – a venture may include a business or commercial one, and it very often does. JA 118 citing Webster's New Int'l Dictionary, Unabridged 2542 (3d ed. 2002); *Venture*; Black's Law Dictionary 4826 (8th ed. 2004). But the definition of venture does not demand that reading. *Id.* There is no "string" which indicates otherwise – each definition is identical in noting this. *Id.* Congress could limit the definition to strictly "commercial" ventures or enterprises, but Congress did not. 18 U.S.C. § 1595(a). Nor, for all the reasons addressed above, would a definition limited limiting ventures to commercial enterprises make sense, given the surrounding text in 18 U.S.C. § 1595(a), its focus, the broad view demanded by a remedial statute, or the nature of the problem the benefit liability in § 1595(a) confronts.

CONCLUSION

For the reasons identified above, this Court should reject the district court's analysis apply the broader standard for venture liability under §1591(e)(6), and reverse.

Respectfully Submitted,

August 16, 2022

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document contains 2,958 words excluding the parts of the brief not counted pursuant to Fed. R. App. P. 32(f). This word count was determined through Microsoft Word. This brief was also generated in a proportionally spaced Times New Roman font, in complies with the requirements of Fed. R. App. P. 32(a)(5) and Fed. R. App. P. 32(a)(6).

Dated: August 16, 2022.

/s/ Paul Hoffman
Paul Hoffman

CERTIFICATE OF SERVICE

I hereby certify that on August 16, 2022, I caused the forgoing to be served via CM/ECF electronic delivery on all counsel of record.

Dated: August 16, 2022

/s/ Paul Hoffman
Paul Hoffman

STATUTORY ADDENDUM

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STATUES AND REGULATIONS

Except for the following, all the applicable statutes, etc., are contained in the Opening Brief for Plaintiffs.

18 U.S.C. § 1581 – Peonage; Obstructing Enforcement

(a) Whoever holds or returns any person to a condition of peonage, or arrests any person with the intent of placing him in or returning him to a condition of peonage, shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.

(b) Whoever obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be liable to the penalties prescribed in subsection (a).

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18 U.S.C. § 1591 – Sex Trafficking of Children or By Force, Fraud, or Coercion

(a) Whoever knowingly—

(1) in or affecting interstate or foreign commerce, or within the special maritime and territorial jurisdiction of the United States, recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person; or

(2)benefits, financially or by receiving anything of value, from participation in a venture which has engaged in an act described in violation of paragraph (1),knowing, or, except where the act constituting the violation of paragraph (1) is advertising, in reckless disregard of the fact, that means of force, threats of force, fraud, coercion described in subsection (e)(2), or any combination of such means will be used to cause the person to engage in a commercial sex act, or that the person has not attained the age of 18 years and will be caused to engage in a commercial sex act, shall be punished as provided in subsection (b).

(b) The punishment for an offense under subsection (a) is—

(1)if the offense was effected by means of force, threats of force, fraud, or coercion described in subsection (e)(2), or by any combination of such means, or if the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had not attained the age of 14 years at the time of such offense, by a fine under this title and imprisonment for any term of years not less than 15 or for life; or

(2)if the offense was not so effected, and the person recruited, enticed, harbored, transported, provided, obtained, advertised, patronized, or solicited had attained the age of 14 years but had not attained the age of 18 years at the time of such offense, by a fine under this title and imprisonment for not less than 10 years or for life.

(c) In a prosecution under subsection (a)(1) in which the defendant had a reasonable opportunity to observe the person so recruited, enticed, harbored, transported, provided, obtained, maintained, patronized, or solicited, the Government need not prove that the defendant knew, or recklessly disregarded the fact, that the person had not attained the age of 18 years.

(d) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned for a term not to exceed 25 years, or both.

(e) In this section:

(1) The term "abuse or threatened abuse of law or legal process" means the use or threatened use of a law or legal process, whether administrative, civil, or criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.

(2) The term "coercion" means—

(A) threats of serious harm to or physical restraint against any person;

(B) any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person; or

(C)the abuse or threatened abuse of law or the legal process.

(3) The term "commercial sex act" means any sex act, on account of which anything of value is given to or received by any person.

(4) The term "participation in a venture" means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).

(5) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to

perform or to continue performing commercial sexual activity in order to avoid incurring that harm.

(6) The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.

18 U.S.C. § 1593A – Benefitting Financially from Peonage, Slavery, and Trafficking in Persons.

Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of this chapter, knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.