ORAL ARGUMENT NOT YET SCHEDULED

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 LEGAL SCHOLARS WITH EXPERTISE IN EXTRATERRITORIALITY AND TRANSNATIONAL LITIGATION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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August 15, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), counsel for Amici Legal Scholars certifies as follows:

A. Parties and Amici

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

> George A. Bermann, Hannah L. Buxbaum, Zachary D. Clopton, Anthony J. Colagenlo, John F. Coyle, William S. Dodge, Maggie Gardner, Jennifer M. Green, Ralf Michaels, Aaron D. Simowitz, Carlos M. Vázquez, and Christopher A. Whytock

B. Rulings Under Review.

References to the rulings at issue appear in the Brief for Plaintiffs-Appellants.

C. Related Cases.

This case has not previously been before this court, and counsel is unaware of any related cases.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

*Authorities upon which we chiefly rely are marked with asteriks.

Legislative Materials

Other Authorities

GLOSSARY

RICO ..... Racketeer Influenced by Corrupt Organizations Act, 18 U.S.C §§ 1961-1968

TVPRA..... Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, as amended and reauthorized by, *inter alia*, the Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875, Trafficking Victims Protection Act Reauthorization of 2005, Pub. L. No. 109-164, 119 Stat. 3558, and the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044

I. INTEREST OF AMICI[1]

Amici are legal scholars with expertise in extraterritoriality and transnational litigation who have strong interest in the proper application of the presumption against extraterritoriality. Amici believe the district court erred when it became the first federal court to find that the Trafficking Victims Protection Reauthorization Act's civil remedy does not extend to extraterritorial conduct, a holding in conflict with the Supreme Court's jurisprudence on this question.

George A. Bermann is the Jean Monnet Professor of European Union Law, Walter Gellhorn Professor of Law, and Director of the Center for International Commercial and Investment Arbitration at Columbia Law School. He served as Chief Reporter for the American Law Institute's Restatement of the U.S. Law of International Commercial and Investor-State Arbitration (Proposed Final Draft 2019).

[1] Counsel for Amici authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, no party or party's counsel contributed money to fund the preparation or submission of this brief, and no person other than the amici curiae or their counsel contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(e).

Counsel for all parties to this appeal have consented to the filing of this brief. *See* D.C. Cir. R. 29(a)(2).

Hannah L. Buxbaum is Professor of Law and John E. Schiller Chair at the Indiana University Maurer School of Law. She is the U.S. member of the Curatorium of the Hague Academy of International Law and served as Adviser for the American Law Institute's Restatement (Fourth) of the Foreign Relations Law of the United States (2018). Her publications include a co-edited volume entitled *Extraterritoriality* (Brill Publishers 2022).

Zachary D. Clopton is a Professor of Law at Northwestern Pritzker School of Law and a member of the American Law Institute. He is the author, among other articles, of *Replacing the Presumption Against Extraterritoriality*, 94 B.U. L. Rev. 1 (2014).

Anthony J. Colangelo is the Robert G. Story Distinguished Faculty Fellow and Professor of Law at Southern Methodist University Dedman School of Law. He is the author, among other publications, of *A Unified Approach to Extraterritoriality*, 97 Va. L. Rev. 1019 (2011), and *What is Extraterritorial Jurisdiction?* 99 Cornell L. Rev. 1303 (2014).

John F. Coyle is the Reef C. Ivey II Distinguished Professor at the University of North Carolina School of Law. He is an advisor to the American Law Institute's Restatement (Third) of Conflict of Laws and the author of more than a dozen articles in the field of private international law.

William S. Dodge is Martin Luther King, Jr. Professor of Law and John D. Ayer Chair in Business Law at the University of California, Davis, School of Law. He served as Counselor on International Law to the Legal Adviser at the U.S. Department of State from 2011 to 2012 and as Co-Reporter for the American Law Institute's Restatement (Fourth) of Foreign Relations Law from 2012 to 2018. He is the author, among other articles, of *The New Presumption Against Extraterritoriality*, 133 Harv. L. Rev. 1582 (2020).

Maggie Gardner is a Professor of Law at Cornell Law School. Her publications on transnational litigation include *Deferring to Foreign Courts*, 169 U. Penn. L. Rev. 2291 (2021), and *Abstention at the Border*, 105 U. Va. L. Rev. 63 (2019).

Jennifer M. Green is a Clinical Professor of Law and Director of the University of Minnesota Human Rights Litigation and Advocacy Clinic. She has over two decades of experience as a litigator and has authored or co-authored numerous publications on civil litigation including *International Human Rights Litigation in U.S. Courts* (2d ed. 2008) (co-author) and *Closing the Accountability Gap in Corporate Supply Chains for Violations of the Trafficking Victims Protection Act*, Bus. & Hum. Rts J. (Cambridge University, 2021).

Ralf Michaels is Director of the Max Planck Institute for Comparative and International Private Law in Hamburg and Chair in Global Law at Queen Mary

University, London. Prior to this, he was, for seventeen years, a professor at Duke University School of Law. He is a member of the American Law Institute and served as advisor to the Restatement (Fourth) of Foreign Relations Law from 2012 to 2018. He currently serves as advisor to the Restatement (Third) of Conflict of Laws.

Aaron D. Simowitz is an Associate Professor of Law at Willamette University College of Law and an Affiliated Scholar at the Classical Liberal Institute at New York University. His publications on the extraterritorial application of U.S. law include *The Extraterritoriality Formalisms*, 51 Conn. L. Rev. 375 (2019) and *RJR Nabisco and the Reach of U.S. Law*, 17 Yearbook of Private International Law, Volume 217-31 (Swiss Institute of Comparative Law 2017).

Carlos M. Vázquez is the Scott K. Ginsburg Professor of Law at Georgetown University Law Center and co-director of the Center for Transnational Legal Studies. He was an Adviser to the Restatement (Fourth) of Foreign Relations Law (2018). He has written extensively about extraterritoriality and conflict of laws. He is the co-author of *Conflict of Laws: Cases and Materials* (8th ed. 2020) (with Lea Brilmayer, Jack L. Goldsmith, and Erin O'Hara O'Connor), and his articles have appeared in the *Columbia Law Review*, the *Harvard Law Review*, and the *Yale Law Journal* among other journals.

Christopher A. Whytock is Vice Dean and Professor of Law and Political Science at the University of California, Irvine School of Law, where he teaches and studies transnational litigation and conflict of laws. He is an Associate Reporter for the American Law Institute's Restatement (Third) of Conflict of Laws and a Member of the U.S. State Department Advisory Committee on Private International Law. He previously served as an Adviser on the Restatement (Fourth) of Foreign Relations Law (2018).

Amici have no personal interest in the outcome of this case but write to share their professional views regarding the need for this Court to correct the district court's error in interpreting the TVPRA's extraterritorial application. To counsels' knowledge, no other proposed amicus brief addresses the legal issue presented in this brief. This brief is submitted solely to aid the Court in its evaluation of the TVPRA's text and scope, in particular the statute's clear affirmative indication that the civil remedy applies to extraterritorial predicate acts. Because Amici's analysis differs from the Plaintiffs' arguments, and Amici take no position on the issues raised by the other proposed amicus briefs or on the sufficiency of the allegations in the Complaint, a separate brief is necessary for its presentation to this Court. Pursuant to Circuit Rule 29(d), Amici certify that filing a single amicus brief would therefore be impracticable and would inhibit the Court's full appraisal of the issues before it.

II. BACKGROUND

Congress first enacted the Trafficking Victims Protection Act in 2000 and has expanded and strengthened the statute through successive reauthorizations. Through the last four presidential administrations and on a bipartisan basis, Congress has pursued an aggressive, multifaceted strategy to eliminate the worldwide scourge of modern-day slavery. *See Various Bills and Resolutions: Hearing Before the H. Comm. on Foreign Affs.*, 110th Cong. 128 (2007) (statement of Rep. Smith) (Trafficking "is one of those issues where there has been no gap between us on either side of the aisle. It has united conservatives, moderates, and liberals in a grand fight to combat the scourge of modern-day slavery."). The TVPRA is an interlocking statutory scheme that defines a series of trafficking offenses and imposes civil liability for violations of those offenses.

The original statute was enacted in 2000. *See* Victims of Trafficking and Violence Protection Act of 2000, Div. A., Pub. L. No. 106-386, 114 Stat. 1464. Codified primarily in Chapter 77, Title 18, the statute defined the crimes of forced labor and trafficking. *See, e.g.*, 18 U.S.C. §§ 1589, 1590.

In 2003, Congress reauthorized and amended the TVPRA. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. 108-193, 117 Stat. 2875. Congress added a private civil action coterminous with the specific criminal prohibitions established by the TVPRA. *Id.* § 4(a)(4)(A), 117 Stat. at 2878. Thus,

as of 2004, the TVPRA provided victims of those criminal violations with a civil remedy that directly incorporated and is coextensive with the predicate criminal prohibitions.

Congress reauthorized the TVPRA again in 2005 and 2008. *See* Trafficking Victims Protection Act Reauthorization of 2005, Pub. L. No. 109-164, 119 Stat. 3558; William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. In both reauthorizations, Congress expanded the extraterritorial jurisdiction of the statute. First, Congress extended extraterritorial jurisdiction over trafficking offenses committed by persons (including contractors) "employed by or accompanying the Federal Government outside the United States." TVPRA of 2005, 119 Stat. at 3562. Later, Congress extended extraterritorial jurisdiction over six specified trafficking offenses when committed by a United States national, a lawfully admitted alien, or a person present in the United States, whether or not the person was employed by the United States government. TVPRA of 2008, § 223(a), 122 Stat. at 5071.

These amendments, broadening the reach of the TVPRA, were developed through decades of Congressional hearings. An extensive backgrounder on Congress's efforts was submitted to (and relied upon by) the Supreme Court in *Doe v. Nestle* by 21 Members of Congress, including the relevant bill sponsors and committee chairs. *See Brief of Members of Congress Sen. Blumenthal, Rep. Smith*

et al., as Amici Curiae Supporting Respondents, 2020 WL 6322316, *Nestlé USA, Inc. v. John Doe I, et al.*, 141 S. Ct. 1931 (2021) (Nos. 19-416 & 19-453). The extensive legislative history of the TVPRA makes plain that, as Congress's understanding of human trafficking and its global scope continued to develop, so did the tools it enacted to fight against it.

For example, at an early hearing, a representative of the State Department explained that the origins of trafficking "are economic," describing girls lured from villages and forced into domestic servitude or carpet weaving and that "the suffering of boys was evident from their mangled bodies, their growth stunted, spines bent almost in half from the oppressive weights they were forced to carry in the construction industry until they were rescued." *International Trafficking in Women and Children: Hearing Before the Subcomm. on Near E. and S. Asian Affs. of the Subcomm. on Foreign Rel.* 106th Cong. 10-11 (2000) (Statement of Hon. Frank Loy, Undersec'y of State for Glob. Affs., Dep't of State). Undersecretary Loy advocated providing a civil remedy: "[t]o expand the possibility of redress, trafficked victims should be able to bring private civil lawsuits against traffickers." *Id*. at 15.

The subsequent amendments, including the addition of a civil cause of action, beneficiary liability, and extraterritorial jurisdiction, are a direct result of Congress's understanding of the transnational nature of human trafficking and its

intent to create effective tools to combat this scourge. The civil-remedy provision has been used by child victims of sex tourism by Americans abroad, survivors of domestic servitude by U.S. diplomats stationed overseas, and laborers ensnared in debt bondage working for U.S. government contractors.

III. ARGUMENT

A. The Presumption Against Extraterritoriality

As Plaintiffs point out, the district court is the first to hold that Congress's extension of extraterritorial jurisdiction in the TVPRA does not extend to civil actions. Aplt. Br. at 2. In so doing, the district court ignored the analysis that the Supreme Court itself conducted in *RJR Nabisco v. European Community*, 579 U.S. 325 (2016). A proper application of the Supreme Court's two-step analysis shows, as other courts have held, that the TVPRA contains a clear, textual indication that the civil remedy applies to foreign conduct to the extent that the predicates alleged in a particular case themselves apply extraterritorially. The TVPRA civil remedy does so for the same reason the Supreme Court found that RICO § 1962 had extraterritorial application. *See RJR Nabisco*, 579 U.S. at 338-41. As the Supreme Court explained in *RJR Nabisco*, "the most obvious textual clue" is that the relevant statute includes "a number of predicates that plainly apply to at least some foreign conduct." *Id.* at 338; *see also Roe v. Howard*, 917 F.3d 229, 241 (4th Cir. 2019).

The presumption against extraterritoriality is a "canon of construction . . . rather than a limit upon Congress's power to legislate." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 255 (2010); *see also, e.g.*, *Foley Bros. v. Filardo*, 336 U.S. 281, 284 (1949). It is not required by international law: states indisputably have jurisdiction to prescribe law with respect to the conduct of their nationals outside their territory or on matters of universal concern. Restatement (Fourth) of Foreign Relations Law §§ 410, 413 (Am. Law Inst. 2018); *see also U.S. v. Baston*, 818 F.3d 651, 670 (11th Cir. 2016). Particularly in the context of human trafficking – a violation of international law that often involves cross-border conduct – it is clear from the text, structure, and purpose of the statute that Congress intended the TVPRA civil remedy to apply to extraterritorial conduct.

B. The Two-Step Framework Established by the Supreme Court

To determine if a statute applies extraterritorially, courts use a two-step inquiry. *RJR Nabisco*, 579 U.S. at 325.

At the first step, the court must determine whether the statute gives a clear affirmative indication that it applies extraterritorially. *RJR Nabisco*, 579 U.S. at 337; *Morrison*, 561 U.S. at 255. The Supreme Court has repeatedly emphasized that this requirement is not a "clear statement rule." *See RJR Nabisco*, 579 US. at 340 ("an express statement of extraterritoriality is not essential"); *Morrison*, 561 U.S. at 265 (statute need not state "this law applies abroad"). To the contrary, the

Supreme Court has emphasized that "[a]ssuredly context can be consulted as well." *RJR Nabisco*, 579 U.S. at 340; *Morrison*, 561 U.S. at 265; *Foley*, 336 U.S. at 286 (consulting legislative history).

If the statute does not present a clear affirmative indication that it applies extraterritorially, a court moves on to step two. *RJR Nabisco*, 579 U.S. at 337. At step two, courts look to the statute's "focus": "If the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *Id*. It is unnecessary to reach step two if the court finds the statute applies extraterritorially at step one. *Id*. at 337, 342.

Here, step one of the two-step framework is satisfied because, as with RICO § 1962, TVPRA § 1595 directly incorporates extraterritorial predicate crimes. Thus, it is unnecessary to reach step two. But to the extent the Court proceeds to step two and considers the "focus" of the benefit prong, the focus is plainly on "benefitting." Where the benefit is obtained in the United States, the application of the statute is not extraterritorial at all.

C. Application of the Two-Step Framework to the TVPRA: The Presumption Is Rebutted at Step One

Most recently, the Supreme Court applied the two-step analysis to RICO, 18 U.S.C. § 1961 *et seq.*, a statute that is entirely silent on extraterritoriality. *RJR Nabisco*, 579 U.S. at 340. Congress enacted RICO to combat racketeering. The

subsections of RICO § 1962 prohibit certain conduct related to a "pattern of racketeering." A pattern of racketeering is defined in 18 U.S.C. § 1961(5) as at least two of the acts listed in § 1961(1), which references other statutes (*e.g.*, 18 U.S.C. § 201, bribery). Some of the predicate offenses apply to foreign conduct; others do not. *RJR Nabisco*, 579 U.S. at 338. Nonetheless, the Supreme Court found the presumption against extraterritoriality to be rebutted at step one. *Id.*; *see also* William S. Dodge, *The Presumption Against Extraterritoriality in Two Steps*, 110 AJIL Unbound 45 (2016).

The Supreme Court found that "the most obvious textual clue is that RICO defines racketeering activity to include a number of predicates that plainly apply to at least some foreign conduct" and held that "Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity – but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially." *RJR Nabisco*, 579 U.S. at 338-39. Although § 1962 was itself silent on extraterritorial reach, the Supreme Court nonetheless found that the presumption of extraterritoriality was rebutted by the incorporation of extraterritorial predicates. *RJR Nabisco*, 579 U.S. at 338; *see also id.* ("[A] violation of § 1962 could be premised on a pattern of killing Americans abroad in violation of § 2332(a) – a predicate that all agree applies extraterritorially …").

1. The TVPRA Is Expressly Extraterritorial

TVPRA § 1595, like RICO § 1962, incorporates predicate acts, but its predicates are limited to the offenses in Chapter 77 (peonage, slavery and trafficking in persons offenses). *See* 18 U.S.C. § 1595.[2] The TVPRA provides victims of those criminal violations with a civil remedy that directly incorporates and is coextensive with the predicate criminal prohibitions.

As was the case with the RICO predicate offenses, Congress made some, but not all, of the TVPRA predicate offenses extraterritorial. 18 U.S.C. §1596 expressly extends extraterritorial jurisdiction over six TVPRA offenses (18 U.S.C. §§ 1581, 1583, 1584, 1589, 1590 and 1591) when committed by a U.S. national, including a corporation. A different provision, 18 U.S.C. § 3271, extends extraterritorial jurisdiction over all of the Chapter 77 offenses when committed outside the United States by an employee of the U.S. government, including a contractor.

After evaluating the TVPRA's text and structure, both the Fourth and Fifth Circuits found the presumption against extraterritoriality to be rebutted at step one of the two-part test. Both Courts of Appeal held, as in *RJR Nabisco*, that the

[2] Originally, § 1595 provided a remedy only for violations of 18 U.S.C. §§ 1589, 1590, or 1591, but it has since been amended to provide a remedy for all violations of Chapter 77, Title 18. *Compare* Pub. L. 108–193, § 4(a)(4)(A), Dec. 19, 2003, 117 Stat. 2878 *with* Pub. L. 110–457, title II, § 221(2), Dec. 23, 2008, 122 Stat. 5067.

TVPRA civil remedy contains a clear affirmative indication of extraterritorial application because it incorporates extraterritorial predicates. *Howard*, 917 F.3d at 242 ("Applying this rule to the TVPA, we are satisfied that § 1595 reflects congressional intent that it applies extraterritorially to the extent that a plaintiff seeks redress for a predicate offense 'that is itself extraterritorial.'"); *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 204 (5th Cir. 2017); ("[B]y conferring 'extraterritorial jurisdiction over any offense … under' the TVPRA, § 1596 permits private parties to pursue a civil remedy under the TVPRA for extraterritorial violations"); *see also C.T. v. Red Roof Inns,* 2021 WL 2942483, at *8 (S.D. Ohio 2021); *Abafita v. Aldukhan*, 2019 WL6735148, at *5 (S.D.N.Y 2019) (a civil claim under the TVPRA can be brought for extraterritorial violations: "the TVPRA has extraterritorial effect"); *cf. Plaintiff A v. Schair*, 2014 WL 12495639, at *6 (N.D. Ga. 2014) (plaintiffs trafficked in Brazil could salvage their civil claim "if section 1596 could be retroactively applied."). The Eleventh Circuit similarly looked to the predicate act structure of the TVPRA when it held that "Congress has the power to require international sex traffickers to pay restitution to their victims even when the sex trafficking occurs exclusively in another country." *Baston*, 818 F.3d at 671. No court, until the district court here, has reached the opposite conclusion.

As the Fourth Circuit explained,

> Applying the first step of the *RJR Nabisco* inquiry, we are satisfied that § 1595 of the TVPA evinces a "clear indication of extraterritorial effect," … Of crucial importance, § 1595 directly incorporates predicate offenses that govern foreign conduct, providing strong textual evidence of its extraterritorial effect when applied to those predicates. …
>
> Many of the predicate offenses proscribed by chapter 77 apply extraterritorially, either expressly or by way of other provisions delineating their extraterritorial application. *See, e.g.*, 18 U.S.C. § 1585 (prohibiting, inter alia, seizure of persons "on any foreign shore" with "intent to make that person a slave"). Thus, pursuant to *RJR Nabisco*, "Congress's incorporation" of such "extraterritorial predicates" into § 1595 "gives a clear, affirmative indication" that § 1595 provides a civil remedy for the foreign conduct that is prohibited by chapter 77.

Howard, 917 F.3d at 241-42 (internal citations omitted). The textual signal is even more direct here than it was in RICO because both the civil remedy that incorporated the predicate offenses and the express statement of extraterritorial jurisdiction over those same predicate offenses appear in the same Chapter of the U.S. Code, in consecutive code provisions.

The district court erred because it did not undertake this analysis at all. Indeed, the district court largely ignored the predicate act structure of the TVPRA and concluded that Congress should have amended the statute to include a more express statement of extraterritoriality. JA124.[3] But this reasoning was squarely

[3] It would make no sense, as the district court suggested, to "include" § 1595 in the list of predicate offenses in § 1596. Section 1596 extends extraterritorial

rejected by the Supreme Court. *See RJR Nabisco*, 579 U.S. at 340 (defendant wrongly "resists the conclusion" that incorporation of extraterritorial predicates rebuts the presumption). The defendant in *RJR Nabisco* argued that the presumption was not rebutted because "'RICO itself' does not refer to extraterritorial application; only the underlying predicates do." *Id*. Like the RICO defendant, the district court here employed the same reasoning. JA124. But the Supreme Court rejected this approach. *RJR Nabisco*, 579 U.S. at 340. Because the district court failed to conduct the appropriate analysis and rested on reasoning rejected by the Supreme Court, the holding below should be reversed.[4]

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jurisdiction over specified offenses when committed by a U.S. national. Section 3271 (which the district court entirely overlooked) does the same for a broader list of offenses when committed by a U.S. government employee. Section 1595 authorizes victims to bring a civil action for violations of those offenses. It would have been illogical to add § 1595 to § 1596's list of predicate offenses because § 1595 does not define the underlying violation, it provides a civil remedy for offenses that are defined elsewhere. Moreover, because § 1595 *already* provided a civil remedy that was coextensive with the TVPRA's predicate criminal provisions, it would have been redundant to include § 1595 in § 1596. Logically, all that Congress needed to do to extend § 1595's civil remedy extraterritorially was to change the extraterritorial scope of the criminal offenses to which it referred.

[4] Below, Defendants relied on *RJR Nabisco's* holding that, unlike § 1962, the RICO civil cause of action in § 1964 did not rebut the presumption. But that holding turned on textual limitations in RICO's civil cause of action that are not present here.

The Supreme Court held that RICO § 1964 did not reach extraterritorial conduct because in contrast to § 1962, § 1964 was not coextensive with the extraterritorial predicate statutes: Congress had limited its scope by excluding

2. TVPRA Context, Purpose, and History Provide an Additional Clear Expression of Congressional Intent

Although additional analysis is unnecessary in light of the clear affirmative indication of extraterritorial application provided by the text and structure of the TVPRA, further indication that Congress did not legislate with just domestic concerns in mind comes from the context, purpose, and history of the statute. The Fourth Circuit evaluated this context and held that "[t]his is, in short, a situation in which Congress was clearly concerned with international rather than purely domestic matters." *Howard*, 917 F.3d at 242; *see also id*. (noting that the TVPRA's "stated purpose and accompanying congressional findings demonstrate Congress enacted it to address the problem of human trafficking 'throughout the world'" and that "Congress has consistently amended the TVPA to reach and

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certain claims and limiting compensable injuries. *See RJR Nabisco*, 579 U.S. at 350 ("Congress signaled that the civil remedy is not coextensive with § 1962's substantive prohibitions."); *Howard*, 917 F.3d at 243 (distinguishing § 1962 from § 1964: because "Justice Alito emphasized that the text of §1964(c) limited its application to certain types of injuries" and concluding "In that regard, § 1595 of the TVPA resembles § 1962 of RICO rather than the circumscribed text of § 1964(c)"); *see also* Hannah L. Buxbaum, *Extraterritoriality in the Public and Private Enforcement of U.S. Regulatory Law*, in Private International Law: Contemporary Challenges and Continuing Relevance 236, 244-48 (Franco Ferrari & Diego P. Fernández Arroyo eds., 2019) (comparing provisions with different scope limitations); Dodge, *supra* at 48. The TVPRA's civil remedy, by contrast, is coextensive with its substantive predicate offenses, and Congress has only expanded, not contracted, its scope. The district court did not address this textual distinction.

proscribe additional categories of foreign conduct," which reinforces the conclusion that limiting TVPRA's scope "risks frustrating its animating purpose" (internal citations omitted)).

Congressional findings, statements by bill sponsors, years of Congressional hearings and the amendment history of the statute all demonstrate that Congress intended to create an effective and robust statutory scheme to combat what has emerged as "the dark side of globalization." H.R. Rep. No. 101-430, Pt. 1, at 33 (2007); *see also, e.g.*, Pub. L. 106-386 § 102(b)1-3, 5, 8, 12, 21-22 (2000) (findings emphasize that trafficking is a "growing transnational crime," "trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law," and "is a matter of pressing international concern"); 154 Cong. Rec. S10886 (daily ed. Dec. 10, 2008) (statement by Senator Leahy: "Nowhere on earth should it be acceptable to deceive, abuse, and force a person into a life of enslavement."). One of the chief sponsors of the TVPRA, Representative Chris Smith, describes the law as "numerous mutually reinforcing provisions" that have "helped transform the way governments and the private sector around the world respond to human trafficking." 149 Cong. Rec. H10284 (daily ed. Nov. 4, 2003); 151 Cong. Rec. H11574 (daily ed. Dec. 14, 2005) (statement of Rep. Smith); 154 Cong. Rec. H10902 (daily ed. Dec. 10, 2008) (statement of Rep. Smith).

Congress repeatedly broadened the scope of the TVPRA through multiple reauthorizations. *Supra* Part II. With each reauthorization, Congress has expanded, not constricted, the scope of the TVPRA. *See, e.g.*, 154 Cong. Rec. S4799-800 (daily ed. May 22, 2008) (statement of Sen. Biden) (on introduction of TVPRA reauthorization by Senators Biden and Brownback: "we establish some powerful new legal tools, including increasing the jurisdiction of the courts" to include "any trafficking case … even if the conduct occurred in a different country"). During this time, Congress held extensive hearings as it sought to understand how to combat the global scope of human trafficking. In a 2007 hearing, for example, Monsignor Franklyn Casale told the House Committee on Foreign Affairs about how forced labor in the Brazilian charcoal industry contributes to American steel production and how garments sold in the United States are made by workers held in slave-like conditions in Jordan. *Taking Action to Eliminate Modern Day Slavery: Hearing Before the H. Foreign Affs. Comm.*, 110th Cong. 38 (2007) (statement of Rev. Msgr. Franklyn Casale, President, St. Thomas Univ.). Another witness at that hearing reported on Kenyan children "forced to work on tea plantations that export products to the United States" and Burmese immigrants forced to work in a Thai plant processing shrimp for export to the United States. *Id.* at 12 (statement of Barbara Shailor, Dir., Int'l Dep't, AFL-CIO). *See also, e.g., Legal Options to Stop Human Trafficking: Hearing Before*

the Subcomm. on Human Rights & the Law of the S. Comm. on the Judiciary, 110th Cong. 13 (2007) (statement of Holly J. Burkhalter, V.P. for Gov't Rel., Int'l Justice Mission) (testifying that United States Trade Representative had not been effective at preventing importation of goods made from forced labor).

Given the legislative history and the plain language of the statute, it can be no surprise that 21 members of Congress, including the relevant committee chairs and bill sponsors, filed an amicus brief before the Supreme Court in which they repeatedly and explicitly stated that extraterritorial jurisdiction applies to both the TVPRA criminal and civil actions. *See* Br. of Members of Congress Senator Blumenthal, et al. at 6 ("The TVPRA also provides victims of human trafficking and forced labor a private cause of action coextensive with its criminal provisions. It applies extraterritorially as long as a defendant is an American citizen or resident, or is present in the United States."); *id.* at 24-25 ("In 2008, Congress also clarified that the TVPRA was intended to reach extraterritorial conduct. The new § 1596 specified that '[i]n addition to any domestic or extra-territorial jurisdiction otherwise provided by law,' federal courts have jurisdiction to hear criminal and civil allegations of extra-territorial forced labor and other TVPRA violations …."); *id.* at 32-33 ("[T]he TVPRA, including its private right of action, applies to extraterritorial conduct provided that a defendant is a U.S. national or permanent resident, or is present in the United States."). Moreover, Congress is well aware

courts have interpreted the TVPRA civil remedy as extending to extraterritorial conduct, as Congress intended. *Id*. at 6, 24-25, 32-33; *see also The Global Challenge of Forced Labor in Supply Chains: Strengthening Enforcement and Protecting Workers: Hearing Before the Comm. on Ways and Means Subcomm. on Trade*, 117th Cong. 13 (2021) (Statement of Charity Ryerson) (hearing testimony regarding the extraterritorial application of the civil provisions of the TVPRA and the need to enact similar amendments to the Alien Tort Statute).

D. Step Two: The "Focus" of this Case Is Domestic

If a court finds a clear indication of extraterritoriality at step one, as it should here, the analysis ends. The statute applies as Congress indicated. If a court finds no clear indication of extraterritoriality at step one, the court takes the second step of the two-part test and determines "whether the case involves a domestic application of the statute, and we do this by looking at the statute's 'focus.'" *RJR Nabsico*, 579 U.S. at 337. Even if this court proceeds to the second step, the application of the TVPRA in this case is domestic because the focus of § 1595's benefit prong is located within the United States.

Congress included in the TVPRA a cause of action that provides victims with a direct remedy against those who knowingly benefit from their exploitation.

That provision appears in 18 U.S.C. §§ 1589(b) (forced labor),[5] 1593A (benefitting financially from peonage, slavery and trafficking in persons), and 1595(a) (civil remedy). Congress intended to provide victims with a separate remedy against those who profit from their exploitation that is independent of the cause of action against the direct perpetrators who recruit workers or supervise their labor.[6]

The district court agreed with the Plaintiffs that the TVPRA "benefit prong" "focuses on benefits that accrue to the parties." JA127. The benefit in this case accrued to U.S. companies in the United States. Because conduct relevant to the focus of this provision in the United States, this case involves an entirely domestic application of the statute. But the district court erroneously concluded that even if the focus is on the benefit in the United States, a suit cannot be maintained if the physical injuries to the Plaintiffs occurred elsewhere. The district court again departed from the Supreme Court's analysis, overlooked a recent ruling by this Court, and, as noted above, misread the text of the TVPRA.

[5] The district court's statement that the TVPRA does not "create a new violation merely for benefitting from other violations" (JA127) apparently overlooked this provision.

[6] For background on this provision, see Brief for Senator Menendez, Senator Marco Rubio et al, as Amicus Curiae in support of Plaintiffs-Appellees and Affirmance, 2021 WL 3403786, *Rodriguez, et al., v. Pan American Health Organization*, 29 F.4th 706 (D.C Cir. 2022).

The Supreme Court rejected the argument that all of the conduct in a given case must be in the United States, holding that "if the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." *RJR Nabisco*, 579 U.S. at 337.

This Court made the same observation, albeit in a different context, when it held that the gravamen of a "benefit prong" claim was in the United States, even when the forced labor took place overseas:

> The physicians allege that PAHO committed a financial crime in the U.S., *see* 18 U.S.C. § 1589(b), and press the corresponding civil claim, *see* 18 U.S.C. § 1595(a) …. The "financial benefit" that violates § 1589(b) is itself "wrongful conduct" and occurred in the United States, … Apart from the wrongful conduct PAHO allegedly participated in abroad, the physicians also allege wrongful conduct that occurred entirely within the U.S.

Rodriguez v. Pan Am. Health Org., 29 F.4th 706, 716 (D.C. Cir. 2022) (internal quotation omitted).

The "benefit prong" extends liability to "whoever knowingly benefits financially or by receiving anything of value," from participation in a venture engaged in violations of Chapter 77. When that benefit is in the United States, application of that provision of the statute is a domestic application, even if the underlying forced labor took place overseas. The district court's holding that the benefit prong is inapplicable if a victim is injured overseas would severely limit the

efficacy of the TVPRA, is contrary to the text of the statute, undermines Congressional intent, and should be reversed.

IV. CONCLUSION

This Court should reverse the district court's holding that Section 1595 of the TVPRA does not reach extraterritorial conduct.

Dated: August 15, 2022

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing document complies with the type-volume limitation of Fed. R. App. P. 29(a)(5), that briefs of amicus curiae not exceed 6,500 words, because it contains 5,575 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This word count was made by use of the word count feature of Microsoft Word, which is the word-processing program used to prepare the document. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font.

Dated: August 15, 2022

/s/ Agnieszka M. Fryszman
Agnieszka M. Fryszman

CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2022, I caused the forgoing to be served via CM/ECF electronic delivery on all counsel of record.

Dated: August 15, 2022

/s/ Agnieszka M. Fryszman
Agnieszka M. Fryszman

STATUTORY ADDENDUM

Except for the following, all applicable statutes, etc., are contained in the Brief for Plaintiffs-Appellants:

18 U.S.C. § 1581

§ 1581. Peonage; obstructing enforcement

Effective: October 28, 2000

(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).

18 U.S.C. § 1583

§ 1583. Enticement into slavery

Effective: December 21, 2018

(a) Whoever--
(1) kidnaps or carries away any other person, with the intent that such other person be sold into involuntary servitude, or held as a slave;
(2) entices, persuades, or induces any other person to go on board any vessel or to any other place with the intent that he or she may be made or held as a slave, or sent out of the country to be so made or held; or
(3) obstructs, or attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be fined under this title, imprisoned not more than 30 years, or both.
(b) Whoever violates this section shall be fined under this title, imprisoned for any term of years or for life, or both if--
(1) the violation results in the death of the victim; or
(2) the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, an attempt to commit aggravated sexual abuse, or an attempt to kill.

18 U.S.C. § 1584

§ 1584. Sale into involuntary servitude

Effective: December 23, 2008

(a) Whoever knowingly and willfully holds to involuntary servitude or sells into any condition of involuntary servitude, any other person for any term, or brings within the United States any person so held, 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, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties described in subsection (a).

18 U.S.C. § 1961
§ 1961. Definitions
Effective: June 25, 2022

As used in this chapter--
(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 932 (relating to straw purchasing), section 933 (relating to trafficking in firearms), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1351 (relating to fraud in foreign labor contracting), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of naturalization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons).,[1] sections 1831 and 1832 (relating to economic espionage and theft of trade secrets), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of

illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), sections 175-178 (relating to biological weapons), sections 229-229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;
(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;
(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;
(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;
(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;
(9) "documentary material" includes any book, paper, document, record, recording, or other material; and
(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

18 U.S.C. § 1962
§ 1962. Prohibited activities
Effective: October 15, 1970

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.
(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.
(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

18 U.S.C. § 1964

§ 1964. Civil remedies

Effective: October 15, 1970

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee, except that no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of section 1962. The exception contained in the preceding sentence does not apply to an action against any person that is criminally convicted in connection with the fraud, in which case the statute of limitations shall start to run on the date on which the conviction becomes final.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

18 U.S.C. § 3271

§ 3271. Trafficking in persons offenses committed by persons employed by or accompanying the Federal Government outside the United States

Effective: January 10, 2006

(a) Whoever, while employed by or accompanying the Federal Government outside the United States, engages in conduct outside the United States that would constitute an offense under chapter 77 or 117 of this title if the conduct had been engaged in within the United States or within the special maritime and territorial jurisdiction of the United States shall be punished as provided for that offense.
(b) No prosecution may be commenced against a person under this section if a foreign government, in accordance with jurisdiction recognized by the United States, has prosecuted or is prosecuting such person for the conduct constituting such offense, except upon the approval of the Attorney General or the Deputy Attorney General (or a person acting in either such capacity), which function of approval may not be delegated.