ORAL ARGUMENT NOT YET SCHEDULED
No. 21-7135

IN THE
United States Court of Appeals for the District of Columbia Circuit

JOHN DOE 1, individually and on behalf of proposed class members, ET AL.,
Plaintiffs-Appellants,

v.

APPLE INC.; ALPHABET INC.; MICROSOFT CORP.; DELL TECHNOLOGIES INC.; TESLA, INC.,
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia, No. 1:19-cv-03737, Hon. Carl J. Nichols

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici. All parties, intervenors, and amici appearing before the district court and in this court are listed in the Brief for Plaintiffs-Appellants.

Dell Technologies Inc. was dismissed for lack of personal jurisdiction, and Plaintiffs have not appealed that ruling. Opening Brief (OB) 7 n.2.

Pursuant to Federal Rule of Appellate Procedure 26.1, Defendants-Appellees state the following:

Apple Inc. has no parent company, and no publicly held corporation owns 10% or more of its stock;

Alphabet Inc. has no parent company, and no publicly held corporation owns 10% or more of its stock;

Microsoft Corp. has no parent company, and no publicly held corporation owns 10% or more of its stock;

Tesla, Inc. has no parent company, and no publicly held corporation owns 10% or more of its stock.

B. Rulings Under Review. Plaintiffs seek review of the November 2, 2021 Memorandum Opinion and the accompanying Order

granting Defendants' motions to dismiss issued by Judge Nichols of the United States District Court for the District of Columbia in Civil Action No. 1:19-cv-03737 (CJN).

C. Related Cases. Counsel is unaware of any related case involving substantially the same parties and the same or similar issues.

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Cases

* Authorities upon which Defendants chiefly rely are marked with asterisks.

Statutes

Rules and Regulations

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GLOSSARY

JA	Joint Appendix
OB	Plaintiffs' Opening Brief
RICO	Racketeering Influenced and Corrupt Organizations Act
Trafficking Act	William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457

INTRODUCTION

In the Trafficking Victims Protection Reauthorization Act, Congress created civil liability for knowingly benefiting from "participation in a venture" that criminally engaged in forced labor or human trafficking. 18 U.S.C. § 1595. Plaintiffs allege that dire economic circumstances in the Democratic Republic of the Congo compelled them to mine cobalt, during which they were injured. The events described in Plaintiffs' allegations are tragic. But they do not support the unprecedented theory that, simply by purchasing products sold at the end of a vast supply chain, consumers like Defendants are liable for "participat[ing] in a venture" with independent actors at the beginning of the supply chain.

Defendants are American technology companies that buy refined cobalt for use in their products. Some of that cobalt is sourced in the Congo. Before any cobalt reaches Defendants, it passes through actors spread across the globe and is combined with cobalt from multiple sources. Under Plaintiffs' theory, everyone who bought or sold cobalt mined in the Congo—a vast industry implicating countless individuals and companies, many in competition with one another—would be

deemed a participant in a "venture" responsible for the injuries of every worker who was subject to wrongful labor practices by any of those independent actors. And Plaintiffs' theory has no coherent stopping point. Taken to its logical conclusion, it would reach the consumers who purchase Defendants' products.

The district court correctly dismissed the complaint. Given the highly attenuated connection between Defendants' purchases and Plaintiffs' injuries, Plaintiffs cannot establish Article III standing. Defendants also did not "participat[e] in a venture" within the meaning of the Act's civil-liability provision; among other reasons, a global supply chain involving many separate actors is not a single "venture." And even if it were, the complaint does not adequately allege that the purported venture engaged in a violation of the Act. The complaint pleads dangerous working conditions arising out of economic necessity, not that the purported venture engaged in "forced labor" within the meaning of the Act. Moreover, nothing in the Act's civil cause of action overcomes the strong presumption against extraterritorial application.

Defendants abhor the conditions described in Plaintiffs' complaint and—as the complaint recognizes—they have fought to address those

conditions. That those efforts have not fully eradicated such practices does not make Defendants liable for Plaintiffs' injuries.

JURISDICTION

Although Plaintiffs invoked 28 U.S.C. §§ 1331, 1332(a)(2), and 1367(a), the district court lacked jurisdiction because Plaintiffs lack standing. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether the district court correctly held that Plaintiffs lack Article III standing because (a) their alleged harms are not traceable to any Defendant and (b) they seek injunctive relief as a means to alter the conduct of third parties.

2. Whether the district court correctly held that Plaintiffs failed to state a claim because the complaint does not adequately allege that (a) Defendants "participat[ed] in a venture" within the meaning of 18 U.S.C. § 1595, or (b) any purported "venture" coerced Plaintiffs' labor in violation of the Act.

3. Whether the district court correctly held that Plaintiffs failed to state a claim because Congress did not clearly provide that the Act's

civil cause of action applies extraterritorially, and this case involves only extraterritorial applications of the statute.

4. Whether the district court correctly held that the attenuated connection between Defendants' alleged actions and Plaintiffs' alleged injuries forecloses Plaintiffs' common-law claims.

STATEMENT OF THE CASE

Statutory background

Congress enacted the Trafficking Victims Protection Reauthorization Act "to combat trafficking in persons," which it found was "increasingly" being "perpetrated by organized, sophisticated criminal enterprises" and "often aided by official corruption in countries of origin, transit, and destination." 22 U.S.C. § 7101(a), (b)(8). Congress thus enhanced criminal penalties for peonage, slavery, involuntary servitude, sex trafficking, and forced labor. Pub. L. No. 106-386, §§ 112(a)-(b), 114 Stat. 1464, 1486-90 (2000) (amending 18 U.S.C. §§ 1581, 1583, and 1584, and codifying §§ 1589-94). It also created a civil cause of action:

> An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person

> knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

18 U.S.C. § 1595(a).

Civil relief is available only when an underlying criminal violation occurred. And it is restricted to claims against (1) the perpetrator, or (2) those who knowingly benefit from participating in a venture that committed a violation, while having actual or constructive knowledge that the venture violated the statute.

Plaintiffs sue five purchasers of refined cobalt far removed from the labor abuses allegedly occurring at cobalt mines

Plaintiffs filed a five-count complaint, amended in June 2020, on behalf of a putative class of child laborers who were allegedly compelled by poverty to work as "artisanal" cobalt miners in the Congo. Joint Appendix (JA) 5. Cobalt mining in the Congo includes both artisanal miners—a large and informal group of people who dig for cobalt without "safety equipment"—and industrial mines operated by larger companies. JA5, 76. According to the complaint, child labor persists in artisanal mining. JA75-76. Plaintiffs allege that Defendants participated in a "venture" that Defendants knew (or should have

known) committed "forced labor" violations prohibited by § 1589, JA67-89, and "trafficking" violations prohibited by § 1590, JA89-90. They also allege common-law unjust enrichment, negligent supervision, and intentional infliction of emotional distress. JA91-94.

As the complaint acknowledges, "approximately two-thirds of the global supply of cobalt" derives from the Congo, and cobalt is a "key component of every rechargeable lithium-ion battery in all of the gadgets made" by "all … tech and electric car companies in the world." JA5. But Plaintiffs did not sue all of those companies. Nor did Plaintiffs sue the people who allegedly recruited them to work in mines, the mine supervisors, the mine operators, the mine owners, or the multiple separate businesses that purchased raw cobalt from various sources, combined it, refined it, and distributed it around the world. Instead, they sued only the five Defendants, who purchase refined cobalt for components of the electronics and cars that they make. And the complaint acknowledges that cobalt from "artisanal sources is inevitably mixed" with cobalt from industrial sources at "various stages in the supply chain." JA75-76.

The complaint's central theory is that Defendants provided "substantial support" to the Congo's "mining system" by purchasing cobalt. JA1-2, 5-6. The complaint alleges no direct connection between Defendants and Plaintiffs, between Defendants and the labor brokers or supervisors who allegedly compelled Plaintiffs' labor, or between Defendants and any other individual or entity who worked at or owned the mines where Plaintiffs allegedly worked. Moreover, neither Defendants (nor anyone with whom Defendants are alleged to be in a venture) are alleged to have caused the conditions that led Plaintiffs to mine cobalt.

Instead, as the complaint alleges, each Plaintiff is separated from each and every Defendant by multiple steps and numerous independent actors. Take, for instance, John Doe 8:

> 1. He allegedly dropped out of school because his family could not afford to pay school fees. JA44. Economic conditions in the Congo are very difficult. JA23-24.
>
> 2. To help support his family, he worked at a mine "operated by Kamoto Copper Company," where he was injured. JA44-45.
>
> 3. Kamoto Copper Company is "owned and controlled by Glencore." JA44.
>
> 4. Glencore sold cobalt to Umicore. *Id.*

5. Umicore "mixe[d] the cobalt mined by children … with other cobalt" and "processe[d]" it. JA61-66, 78.

6. Umicore sold that cobalt to, "among others," Apple, Alphabet, Microsoft, and non-party LG Chem. JA78.

7. LG Chem supplied cobalt to Dell and Tesla. *Id.*

8. Defendants included cobalt in the "lithium-ion batter[ies] used in the electronic devices the[y] manufacture." JA2.

The complaint makes similar allegations about other Plaintiffs, sometimes including alleged conversations Plaintiffs had with individual labor brokers or supervisors. It does not allege that Defendants knew about these individuals or these conversations. *E.g.*, JA28, 33-34, 37-39, 41-43, 47-48, 53-56.

The complaint recognizes that Defendants have worked to promote responsible sourcing. In accordance with guidance from the Organisation for Economic Co-operation and Development, Defendants have established policies and due-diligence practices to eradicate child labor in the international network of their suppliers. JA17-19. The complaint acknowledges that Defendants have designed and supported "programs to ensure children are not working in their cobalt supply chains," but faults Defendants for not having completely ended these

practices. *E.g.*, JA84. Indeed, the complaint asserts that the programs' very existence makes Defendants liable. JA84, 88.

The district court dismisses the amended complaint

In November 2021, the district court dismissed the complaint for multiple reasons.

First, it held that Plaintiffs lack Article III standing because their injuries are not "fairly traceable" to any Defendant's conduct. JA108-12. Plaintiffs do not allege, for instance, that "any Defendant employed any Plaintiff, or that Defendants owned or operated any of the mining sites at which Plaintiffs worked." JA108. Because the alleged "causal chain" between Defendants' downstream cobalt purchases and Plaintiffs' injuries at mines in the Congo "involve[s] the actions of several independent third parties," it is too "tenuous" to establish traceability. JA110. And Plaintiffs' theory—that if Defendants "stopped making products that use cobalt," the intervening companies might have "purchased less" cobalt, "which might have led some of the Plaintiffs to not have been mining"—is pure speculation. JA110-11.

The court also held that Plaintiffs lack standing to seek injunctive relief because they ask only to alter the conduct of absent third parties. JA112.

Second, the court held that Plaintiffs do not plausibly allege that Defendants "participat[ed] in a venture which [they] knew or should have known has" violated the Act. 18 U.S.C. § 1595; JA116-19. The court explained that Plaintiffs' theory encompasses the entire "global supply chain" for cobalt, which "is not a venture" within the meaning of the statute because Plaintiffs fail to allege "a commercial enterprise encompassing the entirety of the cobalt industry." JA117-18. At most, the complaint "implicates Glencore and Umicore in some cobalt-gathering venture" that "does not tie in the Defendants." JA118 (citing JA77-78).

Third, the court held that Plaintiffs do not adequately plead a criminal violation of the Act by the venture, which is a prerequisite to a civil action against a venture participant. JA119-23. The court explained that the complaint does not adequately allege that anyone—let alone the purported venture—coerced Plaintiffs into working "by means of serious harm or threats of serious harm" in violation of § 1589.

JA120-22. Instead, each Plaintiff "alleges a decision to engage in cobalt mining because of economic necessity." JA120. But § 1589 "does not criminalize the hiring of people desperate for money." JA121. For similar reasons, Plaintiffs fail to adequately allege a trafficking violation under § 1590. JA123.

Fourth, the court held that Plaintiffs' statutory claims fail because the Act's civil remedy does not apply extraterritorially. JA123-27. Nothing in the text or structure of the Act gives the "clear, affirmative indication" necessary to rebut the presumption that § 1595 "applies only domestically." JA123 (quoting *Nestlé USA v. Doe*, 141 S. Ct. 1931, 1936 (2021)). And here, Plaintiffs seek "to hold Defendants responsible for overseas conduct." JA126-27.

Fifth, the court dismissed Plaintiffs' common-law claims because they "failed to plead any nonconclusory facts showing" anything more than that Defendants "purchas[ed] a commodity from a supplier." JA128-30.[1]

[1] The court also held that it lacked personal jurisdiction over Dell. JA113-16. Plaintiffs do "not appeal[]" that ruling. OB7 n.2.

The court accordingly dismissed the amended complaint.[2]

STATUTES

Relevant provisions of the Trafficking Act appear in the Addendum.

SUMMARY OF ARGUMENT

1. Plaintiffs lack standing because their injuries are not traceable to Defendants' conduct. The complaint does not allege that Defendants had any direct connection to Plaintiffs. It alleges only that Defendants purchased refined cobalt far removed, and separated by many independent actors, from the mines where Plaintiffs worked. And the complaint admits that (1) every "tech and electric car compan[y] in the world" buys cobalt, JA5; and (2) the "cobalt supply chain from the [Congo]" is not "traceable" because "[c]obalt from numerous both industrial and artisanal sources is inevitably mixed at various stages,"

[2] Plaintiffs did not seek to file a further amended complaint. They never moved to file, and never tendered, a proposed second amended complaint, as the rules require. D.D.C. Local Civ. R. 7(i). Nor did they raise this possibility on appeal, which would have been too late in any event. *City of Harper Woods Emps.' Ret. Sys. v. Olver*, 589 F.3d 1292, 1304 (D.C. Cir. 2009); *Kowal v. MCI Commc'ns*, 16 F.3d 1271, 1280 (D.C. Cir. 1994).

JA75-76. Thus, it is pure speculation whether any Defendant's cobalt purchase played any causal role in any Plaintiff's injury.

Plaintiffs also lack standing to seek injunctive relief. Plaintiffs seek an injunction to change the behavior of absent third parties, such as labor brokers and mining supervisors, whom Defendants do not control. Injunctive relief against Defendants therefore could not redress Plaintiffs' claimed harm.

2a. Plaintiffs fail to state a civil claim under § 1595 because they fail to adequately allege that Defendants "participated" in a "venture." The "phrase 'participation in a venture' requires" that a defendant "took part in a common undertaking or enterprise involving risk and potential profit." *Doe #1 v. Red Roof Inns*, 21 F.4th 714, 725 (11th Cir. 2021). It is implausible that the numerous independent actors in multiple steps of the global cobalt supply chain operated as a single "venture" within the meaning of the statute. Nor does the complaint plausibly allege that Defendants "participat[ed]" in any purported venture; it alleges only that they purchased cobalt far removed from the actors engaged in the initial mining of the cobalt and created policies aimed at stopping problematic labor practices.

On appeal, Plaintiffs abandon the complaint's principal theory that the cobalt supply chain is one single venture, instead arguing that each Defendant is in a *separate* venture with an intermediary cobalt "purveyor[]." OB17. Plaintiffs cannot redraft their complaint on appeal. And their new theory creates new problems. The cobalt purveyors do not themselves operate the mines where Plaintiffs worked or recruit workers for those mines. And according to the complaint, Glencore (the only alleged cobalt purveyor common to all Defendants) does not even sell cobalt to Defendants. Rather, it sells to Umicore, a refiner that combines cobalt from multiple sources before supplying it to Defendants. Plaintiffs never explain how each Defendant can be liable for participating in a supposed discrete venture, if that venture includes neither the direct wrongdoers nor the intervening entity that sells cobalt to Defendants. This new theory likewise makes it impossible to trace Plaintiffs' alleged injuries to Defendants' alleged actions.

2b. The complaint does not state any predicate criminal violation that could support a civil claim under § 1595. First, it does not adequately allege that any venture coerced Plaintiffs to work in violation of § 1589. The economic conditions that allegedly drove

Plaintiffs to mine cobalt are grave. But the complaint does not allege that any supposed venture caused or threatened to cause those conditions. For some Plaintiffs, the complaint alleges that "agents of the cobalt venture" informed them that they had limited employment options. But the complaint pleads no facts plausibly showing threats to "blackball" any Plaintiffs, let alone any indication that Defendants knew or should have known of any such threats.

Second, the complaint does not adequately allege that any venture violated § 1590. Section 1590 prohibits trafficking with respect to forced labor, but Plaintiffs have not adequately alleged that. On appeal, Plaintiffs make a new (and thus forfeited) argument that § 1590 forbids "recruitment with intent to violate section 1589." OB52. Even if Plaintiffs had preserved this theory, the complaint offers no facts to make it plausible.

3. Plaintiffs' statutory claims also must be dismissed because they are impermissibly extraterritorial.

Federal statutes presumptively apply only domestically, and Plaintiffs have not shown that Congress clearly intended to extend § 1595, the Act's civil cause of action, extraterritorially. Section 1595

says nothing about extraterritorial application. And, as the Supreme Court has held in an analogous context, it is legally insufficient that the civil claim requires an underlying criminal violation that may itself have extraterritorial application. The fact that Congress expressly made *other* provisions of the same statute apply extraterritorially confirms that § 1595 does not.

Accordingly, Plaintiffs' claims could survive only if they involved a domestic application of the statute. But the complaint seeks to impose civil liability for injuries allegedly suffered overseas at the hands of foreign actors.

4. Plaintiffs' common-law claims are legally insufficient because, among other reasons, Defendants are so far removed from Plaintiffs' alleged harms.

ARGUMENT

I. The District Court Correctly Held That Plaintiffs Lack Article III Standing.

Plaintiffs confine their standing argument to a brief discussion that largely duplicates their merits argument, OB25-27, whereas the district court properly began by independently evaluating this "irreducible constitutional minimum," JA107-13. To establish standing,

the party invoking federal jurisdiction must "clearly … allege facts demonstrating" that they "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo v. Robins*, 578 U.S. 330, 338 (2016).

The district court found no traceability—the requirement that the defendant's conduct caused the plaintiff's injury. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc). To satisfy this requirement, each Plaintiff must allege that their injury is traceable not to cobalt mining conditions generally, and not to conduct by just any actor in the cobalt supply chain, but to the wrongful conduct of a particular Defendant. *Warth v. Seldin*, 422 U.S. 490, 502 (1975). As the court correctly held, the complaint fails to do so.

A. Plaintiffs' alleged injuries are not fairly traceable to any Defendant's conduct.

1. To satisfy Article III causation, "the injury has to be fairly … traceable to the challenged action of the defendant, and not … the result of the independent action of some third party not before the court." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). "[U]nless the defendant's actions had a 'determinative or

coercive effect' upon the third party, the claimant's quarrel is with the third party, not the defendant." *Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir. 2021) (quoting *Bennett v. Spear*, 520 U.S. 154, 169 (1997)). Thus, courts rarely will "endorse standing theories that rest on speculation about the decisions of independent actors." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 (2013); *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015).

As the district court recognized, Plaintiffs' theories necessarily rest on speculation about third parties because there is no direct connection between any Defendant and any Plaintiff. For example, "Plaintiffs do not allege that any Defendant employed any Plaintiff, or that Defendants owned or operated any of the mining sites at which Plaintiffs worked." JA108. Indeed, "there is not even an allegedly direct connection between Defendants" and those who immediately caused Plaintiffs' injuries. JA110. Rather, the "protracted causal chain" alleged by Plaintiffs flows through the independent actions of multiple third parties, without allegations of coercion, direction, or control by any Defendant. JA113.

In short, Defendants "are end-purchasers of refined cobalt." JA110. And "it takes many analytical leaps to say that the end-purchasers of a fungible metal are responsible for the conditions in which that metal might or might not have been mined, especially when that mining took place thousands of miles away and flowed through many independent companies before reaching Defendants." JA112-13.

That is especially true because, on Plaintiffs' own account, it is "preposterous" to suggest that cobalt purchased by Defendants is "traceable" to any particular mine: "Cobalt from numerous both industrial and artisanal sources is inevitably mixed at various stages in the supply chain," JA75-76, so there is no way to tell whether any particular cobalt comes from a mine using forced labor. And a "speculative chain of possibilities does not establish that [Plaintiffs'] injur[ies]" are "fairly traceable" to Defendants' conduct. *Clapper*, 568 U.S. at 414; *see Bentsen*, 94 F.3d at 670 (no traceability where a "number of speculative links … must hold for the chain to connect the challenged acts to the asserted particularized injury").

Indeed, the complaint does not plausibly allege that Defendants caused Plaintiffs' injuries even in a "narrow 'but for' sense." *Huddy v.*

FCC, 236 F.3d 720, 724 (D.C. Cir. 2001). That is because—as the district court recognized—"[i]t might be true" in theory that if Defendants "stopped making products that use cobalt," they "would have purchased less of the metal from Umicore, which might have purchased less from Glencore, which might have purchased less from" a subsidiary corporation, which might have instructed its buyers "to stop purchasing cobalt from child artisanal miners, which might have led some of the Plaintiffs to not have been mining when their injuries occurred." JA110-11. But even if Defendants stopped purchasing cobalt altogether, other "tech" and "electric car" companies, JA5—many located in other countries—would continue to purchase cobalt. After all, Plaintiffs acknowledge that cobalt is a component of "every rechargeable lithium-ion battery in all of the gadgets made" by "all other tech and electric car companies in the world," and the Congo accounts for two-thirds of the cobalt mined globally. *Id.*

Under these circumstances, there is no standing. "[T]he mere possibility that causation is present is not enough; the presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous that

standing should be denied." *Mideast Sys. & China Civ. Const. Saipan Joint Venture v. Hodel*, 792 F.2d 1172, 1178 (D.C. Cir. 1986).

2. Plaintiffs do not meaningfully address the court's traceability analysis. Instead, they assert that "the District Court based its ruling that Appellants lacked standing entirely on its finding that Appellees were not in a 'venture' with the mining companies that were directly responsible for Appellants' injuries." OB25-26. Then, piggybacking on their merits argument that Defendants *are* "in a 'venture,'" they say Defendants are "jointly responsible" or "jointly and severally liable," assertedly making each Defendant's cobalt purchases a traceable cause of every injury. OB25-26.

As an initial matter, this argument mischaracterizes the district court's standing analysis, which did not turn on the absence of a "venture" under § 1595(a). Rather, the court evaluated the allegations under settled standing doctrine and determined that Plaintiffs failed to trace their injuries to Defendants' alleged actions. JA108-13. Nor are Plaintiffs correct that if they have alleged a statutory "venture," they necessarily would "have standing to sue," OB26. Standing is an independent and irreducible constitutional requirement that a court

must address "before addressing the merits of a case." *Grocery Mfrs. Ass'n v. EPA*, 693 F.3d 169, 179 (D.C. Cir. 2012).

Plaintiffs' vague invocation of "joint responsibility" does not solve their problem. Although some areas of law involve joint responsibility, none would apply to a situation like this, where Defendants are so disconnected from the wrongdoers. Joint and several liability may arise when parties engage in a "tortious act in concert … or pursuant to a common design," or otherwise provide "substantial assistance or encouragement" in the tortious act. Restatement (Second) of Torts § 876; *accord Faison v. Nationwide Mortg. Corp.*, 839 F.2d 680, 685 (D.C. Cir. 1987), cited at OB54; *Prosser and Keeton on The Law of Torts* § 52 (5th ed. 1984). The complaint does not come close to making such an allegation about everyone involved in the Congo's cobalt industry and those who purchase cobalt mined there. Rather, the complaint alleges that Defendants "are end-purchasers of refined cobalt." JA110.

Indeed, any potential connections between Defendants and the actual wrongdoers in this case are markedly weak. Plaintiffs "pleaded no facts showing that every individual in the entire global supply chain—let alone one or more of the Defendants—controlled the mines or

conditions that led to Plaintiffs' injuries." JA109. Not only are there too many steps between Plaintiffs and Defendants to satisfy traceability, *supra* 7-8, the steps in the middle are complex and inconsistent with broad collective responsibility for every individual injury. That is especially true because within the cobalt industry, individuals and entities—including Defendants themselves—compete with one another, making it even more implausible that they are responsible for each other's actions. Plaintiffs have not remotely pleaded the requisite causal connection to satisfy traceability.

Plaintiffs contend that their complaint alleges "direct supplier relationships between Appellees and their cobalt mining companies," OB23, and that "Appellees themselves have asserted they have the right to prohibit the mining companies from using child labor," OB27 (citing JA17-18, 81-82, 87-88). The complaint makes only a single, conclusory allegation of a direct purchasing relationship between any Defendant and a mining company. JA57, 67. And more fundamentally, regarding the supposed "right to prohibit," the cited paragraphs of the complaint allege only that Defendants have voluntarily adopted policies or taken steps to try to reduce the prevalence of cobalt mined through

child labor. Plaintiffs cite no authority for the notion that engaging in salutary and *voluntary* efforts aimed at *preventing* harm caused by third parties creates a traceable injury when those efforts are not wholly successful.

B. Plaintiffs lack standing to seek injunctive relief.

Plaintiffs lack standing to seek injunctive relief because they have not sufficiently alleged that an injunction would redress their injuries.

"[T]raceability and redressability[] 'overlap as two sides of a causation coin.'" *Exhaustless v. FAA*, 931 F.3d 1209, 1212 (D.C. Cir. 2019) (citation omitted). Just as Plaintiffs cannot satisfy causation by pointing to the conduct of third parties, they cannot seek injunctive relief "to change [Defendants'] behavior only as a means to alter the conduct of a third party, not before the court, who is the direct source of" their injuries. *Fulani v. Brady*, 935 F.2d 1324, 1330 (D.C. Cir. 1991) (emphasis omitted); *see Competitive Enter. Inst. v. FCC*, 970 F.3d 372, 381 (D.C. Cir. 2020) (same). That is precisely what Plaintiffs seek to do. They "readily admit[ted]" in the district court that they seek "an injunction to require Defendants to stop the cobalt venture from using forced child labor." JA112. And the requested injunction is especially

ill-suited to redress the alleged harm because, as the complaint alleges, "all other tech and electric car companies in the world" use cobalt. JA5. Plaintiffs offer no reason to believe that enjoining Defendants' conduct would change the global demand for electronics containing components made with cobalt.

Plaintiffs contend that the court's "reasoning derives entirely from its erroneous finding that [Defendants] lacked a sufficient relationship and therefore lacked 'control' over their mining companies to require these 'third parties' to stop their horrific abuse of child miners." OB26-27. But the court instead independently applied Article III standing principles, none of which Plaintiffs dispute. JA108-13. And again, Plaintiffs mischaracterize the complaint, which contains no plausible allegation that Defendants have "the right to prohibit the mining companies from using child labor" or the power to stop it entirely. OB27; *see supra* 23-24.

The most Plaintiffs can say is that "after this case was filed Huayou *claimed* it was going to stop using child labor because its 'customers,' several of Appellees herein, *demanded* it." OB27 (emphases added). This does not plausibly show redressability. The promise of

one actor in the Congo's cobalt industry, which actor does not itself operate any mines, does not make it plausible that Defendants have the legal authority or ability to stop all of the distant third parties that operate mines or recruit workers from engaging in abhorrent conduct.

II. The Complaint Fails To State A Claim For Relief Under The Trafficking Victims Protection Reauthorization Act.

Under the Act, a plaintiff may bring a civil claim only against a perpetrator of a criminal violation of the Act, or someone who (1) "knowingly benefits" (2) "from participation in a venture" (3) if the "person knew or should have known" (4) that the venture "engaged in an act in violation of" the Act. 18 U.S.C. § 1595(a). Plaintiffs do not allege that Defendants themselves perpetrated any violation of the Act. Instead, Plaintiffs allege that Defendants knowingly benefited from participating in a "cobalt supply chain venture"—i.e., that Defendants purchased cobalt mined in the Congo. JA82-83. Plaintiffs contend that this supposed venture violated § 1589, the forced-labor provision, and § 1590, the trafficking provision. JA67-90. The district court correctly held that the complaint fails plausibly to allege that Defendants

"participat[ed] in a venture" within the meaning of § 1595(a), or that any such venture violated the Act. JA116-23.[3]

A. Plaintiffs did not adequately plead that Defendants "participat[ed] in a venture" under § 1595(a).

The complaint alleges a single, overarching global "cobalt supply chain venture" encompassing the innumerable disparate entities involved in mining, transporting, refining, processing, and purchasing cobalt and cobalt-containing components from the Congo. JA74-76. Plaintiffs allege that Defendants participated in this venture by making "purchase[s] from … companies … selling [Congolese] cobalt." JA75. But "participation in a venture" requires more: namely, taking part in a common undertaking involving shared risk and profit, which the complaint does not allege. And the complaint does not allege participation in a venture even under Plaintiffs' proposed definition of that phrase.

[3] The district court did not reach Defendants' additional arguments that the complaint fails plausibly to allege that Defendants "knowingly benefit[ed]" from participation in the purported venture, or "knew or should have known" that the venture "engaged in an act in violation of" the Act against Plaintiffs. 18 U.S.C. § 1595(a).

1. "Participation in a venture" means taking part in a common undertaking involving shared risk and profit.

The Act does not define "participation in a venture" for purposes of § 1595(a). Thus, the term must be "interpreted in accordance with [its] ordinary meaning," *BP America Production v. Burton*, 549 U.S. 84, 91 (2006), beginning with dictionary definitions from "the time of [the statute's] adoption or amendment," *BP v. Mayor & City Council of Baltimore*, 141 S. Ct. 1532, 1537 & n.1 (2021).

The ordinary meaning of "participation" requires active involvement with a common purpose; it is "[t]he act of taking part in something, such as a partnership." *Participation*, Black's Law Dictionary 1141 (7th ed. 1999) (Black's); *see also Participation*, Am. Heritage Dictionary of the English Lang. 1281 (4th ed. 2000) (Am. Heritage) ("The act of taking part or sharing in something"); *Participation*, Oxford English Dictionary 268 (2d ed. 1989) ("A taking part, association, or sharing (with others) in some action or matter"); *see United States v. Papagno*, 639 F.3d 1093, 1098 (D.C. Cir. 2011) (quoting dictionaries and cases to define "participation" consistent with Defendants' position here).

Knowing that something is happening is not enough to establish participation; after all, "observing something is not the same as participating in it." *Red Roof Inns*, 21 F.4th at 727. And if knowledge were enough, § 1595(a)'s requirement that the defendant "knew or should have known" that the venture engaged in conduct violating the Act would be surplusage. Thus, "participating in a venture" must require more than knowledge of a violation. Nor is mere "assistance" the same thing as "participation." "In common parlance, the two terms are not equivalent." *Papagno*, 639 F.3d at 1098. For instance, "[e]ngineers who design soldiers' weapons aid the war effort, but the engineers are not thought to participate in the war; rather, they are said to provide support." *Id.* By the same token, "providing substantial support to th[e] 'artisanal' mining system in the [Congo]," JA6, even if that were adequately alleged, is not equivalent to *participating* in a venture engaged in that mining.

Likewise, participating "in a venture" requires more than a simple connection to or relationship with another person or entity. A "venture" is a "business enterprise involving some risk in expectation of gain." *Venture*, Am. Heritage 1909; *see also Venture*, Black's 1553 ("An

undertaking that involves risk; esp., a speculative commercial enterprise"); *Venture,* Oxford English Dictionary 520 ("An enterprise of a business nature in which there is considerable risk of loss as well as chance of gain; a commercial speculation"). This interpretation accords with common uses of the term, such as a "joint venture": "[a] business undertaking by two or more persons engaged in a single defined project" with "a common purpose" and "shared profits and losses." *Joint Venture*, Black's 843; *see also* OB54 (invoking "hornbook joint venture law"); *supra* 22 (discussing joint liability).

Thus, as the district court explained, "[t]he string tying" together the concept of "participation in a venture" "is the idea of a commercial enterprise." JA118. As the only court of appeals to address the issue has held, the statute "requires" that a defendant "took part in a common undertaking or enterprise involving risk and potential profit." *Red Roof Inns*, 21 F.4th at 725.

Plaintiffs offer several responses. First, they repeatedly argue that the district court inappropriately "requir[ed] a formal contractual relationship." OB14; *see also* OB2, 10, 14. But nothing about the district court's approach, or the Eleventh Circuit's interpretation,

requires any particular formality. *See Red Roof Inns*, 21 F.4th at 726; *id.* at 729 (Jordan, J., concurring).[4]

Second, Plaintiffs point to § 1591, which defines "venture" for purposes of the criminal prohibition on sex trafficking as "any group of two or more individuals associated in fact." 18 U.S.C. § 1591(e)(6); *see* OB14-15. But § 1591(e) states expressly that its definition applies only "[i]n this section," i.e., in § 1591. Thus, "by its plain terms, the definition applies only to the phrase as used in Section 1591," not to the civil-liability provision of § 1595. *Red Roof Inns*, 21 F.4th at 724; *accord A.B. v. Hilton Worldwide Holdings*, 484 F. Supp. 3d 921, 937 (D. Or. 2020) (collecting cases).[5] Section 1591(e)'s limitation is "persuasive

[4] Plaintiffs misstate the district court's legal rule in another way, asserting that the court "required for their 'participation' that [Defendants] actually 'employed' the child miners or 'owned or operated' the mines where the children were injured." OB13 n.6 (citing JA108). Rather, the cited statement is the court's explanation that it would have been sufficient (not necessary) for standing (not "participation in a venture") had Defendants employed Plaintiffs or operated the mine.

[5] Plaintiffs cite two appellate decisions that, they say, found the criminal "definition of 'venture' a useful indicator of the term's scope within the civil context." OB15 & n.7. On the contrary, those decisions cited § 1591(e)(6)'s definition only in passing and did not mention its express limitation or analyze the meaning of "venture" in § 1595. *Ricchio v. McLean*, 853 F.3d 553, 556 (1st Cir. 2017); *Bistline v. Parker*, 918 F.3d 849, 873 (10th Cir. 2019) (following *Ricchio*).

countervailing evidence that Congress meant to adopt" different meanings in different provisions. *HollyFrontier Cheyenne Refining v. Renewable Fuels Ass'n*, 141 S. Ct. 2172, 2177 (2021) (cited at OB14).

Plaintiffs also advance a legal rule that a "venture" requires only "a tacit agreement and/or a continuous business relationship"—a test they say is "virtually identical" to § 1591(e)(6)'s definition. OB16-17. As an initial matter, Plaintiffs never say what they think it means to "*participat[e]*" in a venture, effectively reading that term out of the statute and imposing liability for every commercial agreement or relationship. Absent the requirement of a common undertaking with shared risk and potential profit, a customer buying coffee at the same diner every morning would be viewed as participating in a venture with the diner. Plaintiffs cite no authority supporting their proposed "tacit agreement" definition. Their cited cases all concern the distinct context of sex trafficking under § 1591, which has its own express statutory definition. OB16-17 (citing, *e.g.*, *Doe v. Twitter*, 555 F. Supp. 3d 889, 894 (N.D. Cal. 2021); *S.Y. v. Wyndham Hotels & Resorts*, 521 F. Supp. 3d 1173, 1180 (M.D. Fla. 2021); *M.A. v. Wyndham Hotels & Resorts*, 425 F. Supp. 3d 959, 962 (S.D. Ohio 2019)).

Third, Plaintiffs urge that "participation in a venture" should be interpreted broadly based on a single sentence in which the three-justice plurality in *Nestlé* noted that Congress amended the Act in 2008 to "allow[] plaintiffs to sue defendants who are involved indirectly with slavery." 141 S. Ct. at 1934, 1939. But the fact that liability can be *indirect* does not mean it extends *indefinitely* to those who merely purchase a product at a point far removed from (and without legal authority over) the alleged wrongdoer. Plaintiffs conceded as much in the district court. JA140-41. And that single *Nestlé* sentence, which Plaintiffs plucked from a discussion of "judicially created cause[s] of action," in no way suggests that the plurality thought the allegations there, or allegations like the ones here, would support a claim under the Trafficking Act. 141 S. Ct. at 1939.

2. Purchasing refined cobalt does not constitute "participation in a venture" with every entity that produces and distributes cobalt.

Applying the ordinary meaning of "participation in a venture," Plaintiffs do not plausibly allege that Defendants "took part in a common undertaking or enterprise involving risk and potential profit"

by buying cobalt that was mined in the Congo. *Red Roof Inns*, 21 F.4th at 725.

a. The "venture" pleaded in the complaint is legally insufficient.

The complaint primarily theorizes a single, massive venture: *"The cobalt supply chain* to Defendants … is *a* 'venture' that exists for the purpose of maintaining a steady supply of cheap cobalt that is mined by children," JA74 (emphases added), which Defendants allegedly participated in by making "purchase[s] from … companies … selling [Congolese] cobalt," JA75.[6] As the district court recognized, the "immediate problem" with this theory is that "a 'global supply chain' is not a venture." JA117. Indeed, the complaint elsewhere makes clear that these numerous actors are not working together in a single common undertaking, much less one that has unlawful conduct as its purpose, *see United States v. Afyare*, 632 F. App'x 272, 286-87 (6th Cir.

[6] The complaint also theorized two other large ventures: one between Defendants, Umicore, Glencore, and various Congolese mining companies; and another between Huayou, Congolese mining companies, Apple, Dell, and Microsoft. *See* JA77-81. These marginally narrower theories fail for the same reasons as Plaintiffs' "one venture" theory, and because Plaintiffs forfeited them by not raising them in their opening brief. *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019).

2016). To the contrary, the complaint recognizes a diverse array of actors, including miners (JA5), labor brokers (JA30), mine-operating companies (JA24), cobalt-buying houses (JA76), cobalt refiners (*id.*), and wholesale purchasers of cobalt and cobalt-containing components (JA75).

No one would say that a restaurant that buys straws from a restaurant-supply store is "participating in a straw-manufacturing venture" with the store, the factory that makes the straws, and the wholesale distributor—much less that *every* straw-purchasing restaurant is in a single venture with all factories and distributors. So too here. Far from being a "*common* undertaking or enterprise involving risk and potential profit," this supposed venture includes numerous entities with divergent economic interests, including brokers who sit across the bargaining table from both producers and buyers of cobalt; buyers who compete with each other for the supply of cobalt; and manufacturers of cobalt-using devices (like smartphones and computers) who compete against each other for customer sales. *Red Roof Inns*, 21 F.4th at 725 (emphasis added); *compare Bistline*, 918 F.3d at 875 (finding participation in a venture where defendant lawyers

provided legal services meant to allow a cult leader to continue carrying out the "ritual rape of young girls," such as attempting to convince law enforcement not to "interfere with the marriage of underage girls").

If Plaintiffs prevail on their global-supply-chain theory, then every purchase of Congolese cobalt, even indirect, made with awareness of the general risk of child labor in the region, would generate civil liability under the Act for all market participants. The complaint acknowledges that Defendants are merely the "first group of companies" targeted for suit, JA5 n.2, and it offers no limiting principle. Indeed, Plaintiffs suggest that venture liability encompasses even "stockholders." OB12 (quoting a conference report concerning an earlier version of the statute). Plaintiffs also rely on an amicus brief that some members of Congress filed in *Nestlé* for the proposition that the statute targets "corporate actors who knowingly profit from trafficking in their supply chains." OB3. That is not what the statute says. Section 1595 targets perpetrators and those who "participat[e] in a venture" that violated the Act. In any event, the amicus brief is, at best, "[p]ost-enactment legislative history," which "is not a legitimate tool of statutory interpretation." *Bruesewitz v. Wyeth*, 562 U.S. 223, 242 (2011).

If Defendants are liable because they are purchasers, the same presumably is true of the millions of consumers who purchase Defendants' cobalt-containing electronic devices, many of whom surely are aware of issues in the Congo through the media. When asked about this at oral argument, Plaintiffs said that mobile-phone purchasers would not face liability but could offer no principled reason why not. JA137. Plaintiffs' theory cannot be the law.

None of this diminishes the importance of rooting out troubling labor practices in global supply chains. Indeed, Congress has given the Executive Branch powerful tools to address these complex problems. *See, e.g.*, 50 U.S.C. §§ 1701-07; Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78 (2021) (codified at 22 U.S.C. § 6901 note). But nothing in the text of § 1595 demonstrates that Congress meant to address this problem through civil actions that treat entire industries as "ventures," and hold liable any downstream purchaser as a "participant."

b. Plaintiffs' new venture theory is legally insufficient.

Faced with these obstacles to their sprawling supply-chain theory, Plaintiffs offer a new theory on appeal. Rather than a single,

overarching venture, they now assert that there were numerous smaller ventures—namely, "an agreement between *each* of the five Appellees and *one or more* of the three main purveyors of cobalt mined with forced labor (Glencore, Huayou, and Eurasian Resources Group) to ensure each Appellee a steady supply of cobalt." OB17-18 (emphases altered) (citing JA61-69, 74-75, 80-85); *see* OB19 n.10 (same). This theory fails for multiple reasons.

First, Plaintiffs' appellate arguments are not faithful to the complaint, which does not allege these Defendant-and-purveyor ventures. *See Red Roof Inns*, 21 F.4th at 727 (declining to consider a venture theory raised "for the first time on appeal" that was "incompatible with the allegations in the … complaints"). Moreover, in departing from the complaint's global-supply-chain-venture theory, Plaintiffs conflate various independent actors or ignore them altogether. For instance, Plaintiffs say they alleged that their injuries occurred at mines "operated by Glencore" and Huayou. OB18 n.9. But at most, the complaint alleges that Glencore or Huayou owned other, separate, entities that operated mines. *E.g.*, JA24, 26 (mines operated by Kamoto Copper Company); JA30, 40 (mines operated by Congo Dongfang

Mining). Plaintiffs have therefore not alleged that Defendants were in a venture with the mine operators, much less with the labor brokers who recruited workers to those mines.

Even if Glencore had operated mines, the complaint does not allege that Defendants bought cobalt from Glencore. OB18 (citing JA61, 63-66). Rather, it alleges that (1) mining operators like Kamoto Copper Company procure cobalt; (2) Glencore gets cobalt from various mining operators; (3) Glencore sells the cobalt to Umicore; and (4) Umicore mixes cobalt from multiple sources, refines it, and sells it to Defendants. JA61, 63-66. Plaintiffs' brief does not even mention Umicore.

Nor does it suffice to assert that Defendants were "formally locked in a 'venture'" with cobalt purveyors. JA78. Whatever this conclusory label means, the complaint does not "plead facts that plausibly suggest" that it applies. JA118-19.

The complaint alleges only a single agreement between any Defendant and any supplier of Congolese cobalt. JA25 (alleging that Tesla "finalized an agreement with Glencore to obtain ownership of or exclusive rights to a major portion of its cobalt production in the

[Congo]"). But according to the complaint itself, Tesla did not make that agreement until June 2020, *after* Plaintiffs suffered their injuries. JA75. Plaintiffs thus conceded in the district court that this agreement cannot establish a venture here. JA150-51. The complaint adds that Tesla buys cobalt from Eurasian Resources Group, which purportedly owns a mine where one Plaintiff was injured. JA57, 67. But that conclusory assertion does not establish that Tesla participated in a venture with Eurasian Resources Group.

Second, any venture containing only an individual defendant and one "purveyor of cobalt," such as Glencore, would be legally insufficient. After all, the labor brokers and the mining companies—not the cobalt purveyors—are the only ones alleged to have "engaged in" the underlying violations of the Act. § 1595(a); *see, e.g.*, JA29-31, 38-39, 43, 47-48. Without those entities, Plaintiffs' theory of traceability collapses: Absent a single overarching venture that would tie together the entirety of the global cobalt supply chain, there is not even a colorable basis for suggesting that each Plaintiff's injuries are traceable to each Defendant.

Third, Plaintiffs' new position is legally insufficient because it reduces to a claim that each Defendant participated in a venture by "obtain[ing] its cobalt" from Glencore, Huayou, or Eurasian Resources Group. OB18; *see* JA75 (arguing that Defendants participated in a venture with entities in the Congo by "purchas[ing] from these companies"). The mere purchase of a good is not an "undertaking … involving risk and potential profit," *Red Roof Inns*, 21 F.4th at 725, and therefore does not constitute "participation in a venture." *Accord Alexander v. AmeriPro Funding, Inc.,* 848 F.3d 698, 710 (5th Cir. 2017) ("[A]rms-length transactions in the secondary mortgage market" do not constitute "'participation' whatsoever in [the original] decision to extend credit to" homeowners).

Finally, Plaintiffs' various assertions about Defendants' supposed market power are no basis for liability. For instance, the complaint suggests that Defendants are in a venture with cobalt purveyors because, as large-scale buyers, Defendants could use their market power to exercise indirect control over companies selling Congolese cobalt. *E.g.,* JA82-83. Given the numerous other companies that do and could purchase Congolese cobalt to make electronic devices, this

bare assertion is not plausible. *Cf. Kaufman v. Warner*, 836 F.3d 137, 148 (2d Cir. 2016) ("[W]ithout more specific allegations, an inference of market power is not plausible."). Regardless, a company's purported failure to use any "potential leverage" (JA66) it has to induce changes by other companies elsewhere in the supply chain is not "participation in a venture." As the authorities discussed above make clear, "the word 'participation' connotes activity, and not mere nonfeasance." *In re S. White Transp., Inc.,* 725 F.3d 494, 497 (5th Cir. 2013); *supra* 28-29.

The complaint similarly suggests that Defendants participated in a venture by developing programs and policies to ensure that their supply chains were *free from* unlawful labor practices. *E.g.,* JA17 (Defendants "have joined and supported 'model' mining programs in [the Congo]"); JA17-18 (Defendants "have 'voluntary programs' to *stop themselves* from using prohibited child labor and forced labor in their supply chains"). Even if (as the complaint alleges) those programs have not been fully successful in eradicating such practices, JA81-82, 84, Plaintiffs offer no support for the proposition that trying to *prevent* troubling labor practices can *create* statutory liability. If this were the

law, companies would have perverse incentives to avoid trying to solve the problems that the Act addresses, lest they risk liability by doing so.

3. The complaint does not satisfy Plaintiffs' own proposed standard.

Plaintiffs have not adequately alleged "participation in a venture" even under the legal tests they propose. Plaintiffs propose to import into § 1595 the definition of "venture" from the criminal provision § 1591(e)(6): "any group of two or more individuals associated in fact, whether or not a legal entity." OB14-15. That is not the appropriate test, *see supra* 31-32, and it would not be satisfied here in any event.

Section 1591's definition resembles the definition of "enterprise" from the Racketeering Influenced and Corrupt Organizations Act (RICO): "any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The established meaning of "associated in fact" is "a group of persons associated together for a common purpose of engaging in a course of conduct," *Boyle v. United States*, 556 U.S. 938, 946 (2009)—which is much like the ordinary meaning of "venture" as a "common undertaking," *Red Roof Inns*, 21 F.4th at 724. And, directly relevant here, courts addressing RICO claims "have overwhelmingly rejected attempts to characterize routine

commercial relationships" as an "associat[ion] in fact." *Shaw v. Nissan N. Am.*, 220 F. Supp. 3d 1046, 1053-54 (C.D. Cal. 2016) (quotation marks and citation omitted); *e.g.*, *Zamora v. FIT Int'l Grp.*, 834 F. App'x 622, 625 (2d Cir. 2020) (no association-in-fact; "routine contractual combination for the provision of financial services"); *UFCW Unions & Emp'rs Midwest Health Benefits Fund v. Walgreen Co.*, 719 F.3d 849, 855-56 (7th Cir. 2013) (no association-in-fact; "commercial transaction[s] between a drug manufacturer and pharmacy"). Under this standard, Plaintiffs' allegation—that Defendants' routine commercial purchasing arrangements give rise to venture liability—likewise fails.

Elsewhere, Plaintiffs define "participation in a venture" as "a tacit agreement and/or a continuous business relationship." OB16; *supra* 32. And they claim to have alleged a "much better-defined [venture] than those in" the "hotel/sex trafficking cases." OB23-24. On the contrary, the hotel cases typically involved a direct agreement or relationship between the defendant and the wrongdoer, and an unlawful purpose.

For instance, Plaintiffs contend that *Ricchio v. McLean* favors them, but the Eleventh Circuit in *Red Roof Inns* understood *Ricchio* to

be consistent with its own reasoning, 21 F.4th at 725. In *Ricchio*, motel operators rented a room to a known sex trafficker with whom they "had prior commercial dealings," "high-five[d]" him, and spoke to him about "getting this thing going again" for profit. 853 F.3d at 555. In *M.A.*, similarly, the hotel operators facilitated ongoing sex trafficking by continuing to rent rooms to the trafficker and directly assisting with requests such as giving him "rooms near exits" and an "excessive" amount of "towels and linens." 425 F. Supp. 3d at 962; *see also Doe S.W. v. Lorain-Elyria Motel*, 2020 WL 1244192, at *1 (S.D. Ohio Mar. 16, 2020); *M.L. v. Craigslist*, 2020 WL 5494903, at *1 (W.D. Wash. Sept. 11, 2020) (defendant "contracted" with sex traffickers for them to post ads on the defendant's website and "facilitated … anonymous communications between sex purchasers and traffickers").[7]

Thus, those defendants directly enabled wrongdoing that they knew or should have known about, from which they profited directly, on premises over which they possessed control. That is a paradigmatic

[7] According to Plaintiffs, *Craigslist* involved "no agreement at all." OB24. But *Craigslist* identified a direct contractual relationship between the defendant website and sex traffickers. 2020 WL 5494903, at *1.

situation in which the law recognizes liability for a defendant (the hotel) for participating in the acts of a direct tortfeasor (the sex traffickers). *See* Restatement (Second) of Torts § 877 (recognizing liability for "permit[ting] the other to act upon his premises or with his instrumentalities, knowing or having reason to know that the other is acting or will act tortiously").

Here, by contrast, Plaintiffs do not allege that Defendants had even a tacit agreement with labor brokers or mine operators who engaged in the alleged wrongdoing, much less directly helped them. Plaintiffs have not identified a single case applying venture liability under § 1595(a) where the connection between the defendant and the alleged wrongdoer is so lacking. Plaintiffs' theory would extend liability far beyond the scenario in *Ricchio*; it would render the entire U.S. hotel industry responsible for the injuries of every trafficked victim at any one of hundreds of individual hotels, based simply on receiving profit from rented rooms, general knowledge of the problem of trafficking at hotels, and a failure to prevent each violation through hotel policies. That cannot be and is not the law. *See Red Roof Inns*, 21 F.4th at 729 (Jordan, J., concurring) (plaintiffs could state a claim against

franchisees directly involved in running the hotels, but not franchisors that "do not operate or manage the hotels").

B. Plaintiffs did not adequately plead a predicate violation of the Act.

The complaint also fails to state a criminal violation under either § 1589 or § 1590 that could support civil liability under § 1595.

1. Plaintiffs have not adequately alleged that the venture violated § 1589.

As the district court correctly recognized, Plaintiffs do not allege that Defendants, or any venture in which they purportedly participated, forced Plaintiffs to mine cobalt. JA120-22. Instead, Plaintiffs "engage[d] in cobalt mining because of economic necessity." JA120; *e.g.*, JA23-24, 26, 35-38, 41-42, 56-57. Those circumstances, although tragic, do not state a claim against Defendants.

Plaintiffs rely on § 1589(a)(2) and § 1589(a)(4) (*see* OB35 n.15), which hold liable anyone who "knowingly … obtains" someone's labor

> (2) by means of serious harm or threats of serious harm to that person or another person; [or]
>
> (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

"By means of" means "through the use of," Merriam-Webster's Collegiate Dict. (11th ed. 2006), or "through the instrumentality of," Webster's Third New Int'l Dict. 1399 (1993). Thus, for a defendant to be civilly liable under § 1595(a) for violations of § 1589, the venture must use a specified, forbidden "means" to force a victim to work: imposing or threatening "serious harm," or making the victim believe they or others would suffer serious harm or physical restraint. In short, the focus is on whether the defendant's venture engaged in improper "coercion in the act of soliciting the work itself." JA121.

To that end, courts focus on whether "an employer's conduct was sufficiently serious to coerce the victim to provide labor or services against her will," *Muchira v. Al-Rawaf*, 850 F.3d 605, 618 (4th Cir. 2017), or whether "the employer intended to cause the victim to believe that she would suffer serious harm … if she did not continue to work," *United States v. Dann*, 652 F.3d 1160, 1170 (9th Cir. 2011); *see also United States v. Callahan*, 801 F.3d 606, 619 (6th Cir. 2015) (affirming convictions under § 1589(a) because defendants "compelled" the victim "to perform domestic labor and run errands for [them] by force"). In other words, "the critical inquiry … is whether a person provides those

services free from a defendant's physical or psychological coercion that as a practical matter eliminates the ability to exercise free will or choice." *United States ex rel. Hawkins v. Mantech Int'l*, 2020 WL 435490, at *18 (D.D.C. Jan. 28, 2020) (citation omitted).

As the district court explained, the complaint alleges that Plaintiffs mined cobalt because they faced tragic economic circumstances, not because they were coerced into doing so by mining supervisors or any other employer. JA120 (listing allegations). Plaintiffs' appellate brief now argues that mine supervisors or Presidential Guards "caused [Plaintiffs] to fear [the] 'serious harm'" of starvation "if they stopped working." OB44, 49-50. But, as the district court explained, the complaint alleges only that these individuals reminded Plaintiffs of their existing economic circumstances, not that they "create[d] that exigency or stoke[d] it in any way." JA120-21 & n.5; *see* JA50 ("John Doe 10 feared that if he did not follow Jean-Pi's directions, he would lose his income and he and his family would starve"); JA29, 31, 34, 38-39, 42, 47-48, 50, 52, 55. Taking advantage of the conditions in which Plaintiffs found themselves is appalling. But Plaintiffs allege that they feared starvation, and lacked alternatives,

before becoming miners. *See* OB45; JA5. As the district court noted, Plaintiffs' theory would produce the counterproductive result of "criminaliz[ing] the hiring of people desperate for money." JA121.

Even if any action by individual labor brokers and supervisors did violate § 1589, these were not violations by any "venture" in which Defendants participated. That is because Plaintiffs now claim that Defendants were in ventures only with "purveyors of cobalt," OB16-17, not in a broader venture that included Presidential Guards, the labor brokers who made the alleged coercive statements, or even the mine operators those brokers served. Furthermore, the complaint does not allege Defendants had actual or constructive knowledge of those statements. The allegations therefore fail to meet the requirement that Defendants "knew or should have known" of the violations. § 1595(a).

Were there any ambiguity about this interpretation of § 1589, the rule of lenity resolves it in Defendants' favor. Because § 1589 is a criminal provision, the rule of lenity requires interpreting any ambiguity "in favor of the defendants." *United States v. Cano-Flores*, 796 F.3d 83, 93-94 (D.C. Cir. 2015) (quotation marks omitted). So, even if § 1589 were "ambiguous in the sense of *permitting* [Plaintiffs']

construction," their interpretation cannot prevail. *Id.*; *see also Yellow Bus Lines v. Drivers, Chauffeurs & Helpers Local Union 639*, 913 F.2d 948, 955 (D.C. Cir. 1990) (applying the rule of lenity in a civil suit to a law with "criminal as well as civil penalties").

Plaintiffs' remaining objections fail. First, Plaintiffs argue that the district court "erred as a matter of law in limiting the forced labor/coercion assessment to the circumstances under which the child miners *started* their employment." OB39. To the contrary, the district court discussed coercion that Plaintiffs alleged "at certain points in the mining process" and assessed whether, for example, a supervisor "stoke[d the economic exigency] in any way" during John Doe 10's employment. JA120-21 n.5.

Second, Plaintiffs are incorrect that the district court "requir[ed] 'physical coercion.'" OB39 (emphasis omitted). It mentioned "physical coercion" in two sentences, JA121, but it also acknowledged that the statute defines "serious harm" to include "psychological, financial, or reputational harm." JA119 (quoting § 1589(c)(2)). And the court assessed whether the alleged venture "stoke[d]" Plaintiffs' economic

challenges by, for example, "caus[ing] Plaintiffs to fear starvation." JA122.

Lastly, Plaintiffs are wrong that the district court "improperly resolved the inherently factual questions of the forced labor standard on a motion to dismiss." OB34-39. Claims that have elements of reasonableness or intent still must allege facts sufficient to survive a motion to dismiss. Plaintiffs were required to allege sufficient facts describing forced labor for their claims to move past the pleading stage. Because the complaint fails to do so, the district court properly dismissed the claims.

2. Plaintiffs have not adequately alleged that the venture violated § 1590.

As relevant here, § 1590 makes it a crime to "knowingly recruit[] … any person for labor or services *in violation of*" the Act (emphasis added). Because § 1590 requires a violation of the Act, the district court properly dismissed Plaintiffs' § 1590 claim because they "failed to adequately allege a violation of § 1589." JA123.

Now, Plaintiffs argue for the first time that "a trafficking claim can proceed if there is recruitment with intent to violate section 1589 even if the victim ultimately is not subjected to forced labor." OB52. In

their district-court briefing, Plaintiffs never argued that the § 1590 claim can survive if the § 1589 claim does not. *See* Dkt. 38. This argument therefore is forfeited. *Murthy v. Vilsack*, 609 F.3d 460, 465 (D.C. Cir. 2010).

In any event, there are no plausible allegations that the venture "recruited [Plaintiffs] for forced labor." OB52 (citing JA29-34, 38-43, 47, 50-52, 54, 56). As explained above (at 37-40), Plaintiffs do not argue that the labor brokers are in a venture with Defendants.

Further, the paragraphs that Plaintiffs cite contain only conclusory allegations that, for example, "Ismail looked for children roaming around and put them to work for him" (JA29, 38, 54, 56), or someone "directed" a Plaintiff "to work" (JA50, 52). And even if those allegations sufficed to show an intent to recruit Plaintiffs for forced labor, Plaintiffs' allegations would fail because there still is no allegation that Defendants knew or should have known about those actions. Thus, Plaintiffs cannot meet § 1595's requirement that Defendants "knew or should have known" that the venture engaged in such violations.

III. Plaintiffs' Statutory Claims Are Impermissibly Extraterritorial.

Plaintiffs' claims under the Act fail for the additional reason that they would impermissibly give extraterritorial reach to § 1595, the statute's civil cause of action. "Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco v. European Cmty.*, 579 U.S. 325, 335 (2016). To assess whether this presumption is rebutted, a court must ask whether "the statute gives a clear, affirmative indication that it applies extraterritorially." *Id.* at 337. If not, the claim can proceed only if it "involves a domestic application of the statute." *Id.*

Plaintiffs have not met either requirement. As the district court explained, the Act's text, structure, and history demonstrate that Congress did not extend civil liability under § 1595 extraterritorially—and certainly not with the requisite "clear, affirmative indication." JA123-27. And because "Plaintiffs do not (and cannot) contest that their injuries, along with the underlying [statutory] violations that they allege, occurred anywhere other than in the [Congo]," "their claims must fail." JA127.

A. Congress did not clearly give § 1595 extraterritorial effect.

1. *RJR Nabisco*, which Plaintiffs do not cite, provides the governing framework for analyzing extraterritoriality in the context of a private right of action. That case considered whether RICO has extraterritorial effect. RICO, like the Trafficking Act, contains both substantive criminal prohibitions and a civil cause of action. Under such circumstances, "the presumption against extraterritoriality must be applied separately to both." 579 U.S. at 350. "It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed" to demonstrate that Congress gave the private right of action extraterritorial reach. *Id.* Applying this rule, the Court held that although certain of RICO's substantive criminal prohibitions apply extraterritorially, its civil cause of action does not. *Id.* at 338, 349-54.

The requisite "[s]omething more" is also "absent" from the Trafficking Act's civil cause of action. *Id.* at 350. Congress enacted the Act "to combat trafficking in persons," which it found was being "increasingly perpetrated by organized, sophisticated criminal enterprises." 22 U.S.C. § 7101(a), (b)(8). Congress thus imposed

enhanced penalties for various criminal offenses. *Supra* 4. Some of those criminal provisions are explicitly extraterritorial, *e.g.*, 18 U.S.C. § 1586 ("transportation of slaves from any foreign country or place to another"), and others are given extraterritorial effect through § 1596, which establishes extraterritorial jurisdiction for enumerated criminal offenses under certain circumstances.

But § 1595, which creates the private right of action, is entirely different. As the district court explained, § 1595 "says nothing about extraterritorial application." JA124. Rather, it creates a civil claim for "[a]n individual who is a victim of a violation of this chapter." § 1595(a). It thereby differs from statutes that contain the clear statement necessary to rebut the presumption against extraterritoriality. *See RJR Nabisco*, 579 U.S. at 338 (RICO criminal provisions concerning conduct "outside the United States" apply extraterritorially (quoting 18 U.S.C. § 1957(d)(2))); *see also id.* (citing examples, including 18 U.S.C. § 351(i) ("There is extraterritorial jurisdiction over" assassinations of government officials)); 18 U.S.C. § 1751(k); 18 U.S.C. § 1203(b).

2. Plaintiffs identify no indication of extraterritoriality in § 1595. Instead, they rely (OB30-32) on a separate section, § 1596, which

provides that "the courts of the United States have extra-territorial jurisdiction over any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591," if the "alleged offender" is a U.S. national, a lawful permanent resident, or "present in the United States." 18 U.S.C. § 1596(a). But § 1596 proves the opposite.

Section 1596 lists the provisions that apply extraterritorially—and § 1595 is not on that list. Congress easily could have included § 1595 (or made § 1595 itself explicitly extraterritorial); indeed, as Plaintiffs note, Congress expanded the scope of § 1595 at the same time it enacted § 1596. OB12. And "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *RJR Nabisco*, 579 U.S. at 339 (quoting *Morrison v. Nat'l Australia Bank*, 561 U.S. 247, 265 (2010)).

The omission of § 1595 from the extraterritorial offense list in § 1596(a) is consistent with "the text and structure of § 1596," which "suggest that it was focused on criminal, not civil, applications." JA125. Section 1596 "explicitly grant[ed] extraterritorial application" to only six specific offenses, each of which is a crime. JA124. Section 1596(a)

also repeatedly refers to "offenses," and "[t]he term 'offense' is most commonly used to refer to crimes." *Kellogg Brown & Root Servs. v. United States ex rel. Carter*, 575 U.S. 650, 658 (2015); *see id.* at 659 (although "offense" "appears hundreds of times in Title 18," "the Solicitor General" was unable "to find a single provision" using it "to denote a civil violation"). Plaintiffs' argument—that "there is no indication that the term 'offense' was intended to apply only to criminal actions," OB30—is belied by the ordinary meaning of the term as construed by the Supreme Court.

The rest of § 1596 reinforces its criminal focus. Subsection (b) delimits "Prosecutions of Offenses" under § 1596 and does not mention civil suits. *See also id.* § 1591 (referring to "punishment for an offense"; identifying criminal penalties). This understanding comports with the statute's background, including a congressional report noting that § 1596 "provides jurisdiction … for *prosecution* of certain slavery and trafficking offenses committed abroad." H.R. Rep. No. 110-430, pt. 1, at 51, 55 (2007) (emphasis added).

Plaintiffs say that, because they seek civil relief predicated on violations of §§ 1589 and 1590, and because those criminal provisions

are listed in § 1596(a), § 1596(a) must authorize extraterritorial *civil* claims. OB31-32. But this argument is foreclosed by *RJR Nabisco*, which held that a private civil claim predicated on a criminal violation does *not* automatically apply extraterritorially whenever the underlying criminal provision does. 579 U.S. at 350.

Notably, when Congress did give aspects of the Act extraterritorial reach, it set additional, careful limits. Section 1596 authorizes extraterritorial jurisdiction only when the offender is a U.S. national, a lawful permanent resident, or present in the United States. § 1596(a)(1), (2). And it specifies that certain prosecutions that could create conflict with foreign sovereigns cannot be commenced without the approval of high-ranking DOJ officials. *Id.* § 1596(b). Congress was thus attentive to the fact that "[e]ach of the decisions involved in defining a cause of action based on conduct within the territory of another sovereign carries with it significant foreign policy implications." *RJR Nabisco*, 579 U.S. at 347 (quotation marks and brackets omitted); *id.* at 335-36, 346-49 & n.9. After all, "providing a private civil remedy for foreign conduct creates a potential for international friction" because it lacks "the check imposed by prosecutorial discretion." *Id.* at 346-47.

Here, in fact, Plaintiffs allege that "corrupt government officials" have "fail[ed] to regulate health and safety in the mining sector" and "financially benefit in [the Congo] from forced child labor mining cobalt." JA18-23. This is when "the need to enforce the presumption [against extraterritoriality] is at its apex." *RJR Nabisco*, 579 U.S. at 348.

3. Plaintiffs are not helped by a handful of out-of-circuit cases principally addressing different legal questions. OB28-29.

Plaintiffs focus on *Adhikari v. Kellogg Brown & Root*, which asked whether § 1596 applies retroactively. 845 F.3d 184, 190 (5th Cir. 2017). As the district court noted, the parties in *Adhikari* did not dispute extraterritoriality. JA126 n.8 (quoting 845 F.3d at 200). That is why the key quote—which Plaintiffs reproduce only in part—is not a holding, but a description: "*[Plaintiffs] argue* that § 1596—which explicitly rebuts the presumption against extraterritoriality—applies to their pending lawsuit." 845 F.3d at 200 (emphasis added), quoted at OB28. To the extent any other statements suggest that § 1596 applies extraterritorially, that issue was not subject to adversarial testing,

which may be why *Adhikari* did not even mention *RJR Nabisco* in analyzing this issue.[8]

Plaintiffs also cite *Roe v. Howard*, which held (contrary to *Adhikari*) that § 1595 applied extraterritorially even before 2008. Its theory was that, "even absent an express statement of extraterritoriality, a statute may apply to foreign conduct insofar as it clearly and directly incorporates a predicate statutory provision that applies extraterritorially." 917 F.3d 229, 242 (4th Cir. 2019), cited at OB33. That, however, is exactly what *RJR Nabisco* said "is not enough" to show that a private right of action extends abroad. 579 U.S. at 350; *supra* 55. *Roe* sought to distinguish *RJR Nabisco* on the theory that RICO's civil cause of action was not coextensive with its criminal prohibitions, whereas no such "gap" exists between the civil and

[8] Two of Plaintiffs' other cases are unpublished district-court decisions that followed *Adhikari* in addressing retroactivity. *See Plaintiff A v. Schair*, 2014 WL 12495639, at *6 (N.D. Ga. Sept. 9, 2014); *Abafita v. Aldukhan*, 2019 WL 6735148, at *5 (S.D.N.Y. Apr. 4, 2019), *report and recommendation adopted*, 2019 WL 4409472 (S.D.N.Y. Sept. 16, 2019).

Aguilera v. Aegis Communications Group is even further afield. It addressed whether a prior version of the statute covered only victims trafficked into the United States. 72 F. Supp. 3d 975, 979 (W.D. Mo. 2014); *see* OB29 (so acknowledging).

criminal provisions of the Trafficking Act. 917 F.3d at 243. *RJR Nabisco* did not turn on any such "gap." The Court simply noted that, "[i]f anything," this gap corroborated the lack of extraterritoriality the Court had already found to exist. 579 U.S. at 350. In any event, *Roe*'s holding was "limited in scope" to situations involving U.S. government employees who violate the Trafficking Act while abroad. 917 F.3d at 244. That is not at issue here.

B. This case does not involve a domestic application of § 1595.

Because there is no "clear, affirmative indication" that Congress extended § 1595 extraterritorially, Plaintiffs' claims can proceed only if they involve domestic applications of § 1595. *RJR Nabisco*, 579 U.S. at 337. They do not.

To determine "whether the case involves a domestic application of the statute," courts "look[] to the statute's 'focus.'" *Id.* "[I]f the conduct relevant to the focus occurred in a foreign country, then the case involves an impermissible extraterritorial application regardless of any other conduct that occurred in U.S. territory." *Id.* As multiple courts have recognized, "[t]he 'focus' of the [Act] will naturally fall where the violation occurred." JA126; *accord, e.g.*, *Adhikari v. KBR*, 2017 WL

4237923, at *3 (S.D. Tex. Sept. 25, 2017) (Act's focus is "where the forced labor occurred and to where [the] victims were trafficked" (quotation marks omitted)); *Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 2012 WL 5378742, at *6 (C.D. Cal. Aug. 27, 2012). Plaintiffs do not dispute that their injuries, and the substantive violations they allege, occurred in the Congo. OB28-34; JA127. Thus, "[b]ecause all the relevant conduct regarding those [alleged] violations took place outside the United States," Plaintiffs' claims are impermissibly extraterritorial. *RJR Nabisco*, 579 U.S. at 337 (quotation marks omitted).

Plaintiffs' position—that the "focus" of the Act is where the defendant "benefit[s]" from a violation, OB33-34—is "too narrow." JA127. Section 1595 "does not create a new violation merely for benefitting from other violations." JA127. If it were enough merely to "benefit" in the United States for § 1595 to apply extraterritorially, regardless of where the underlying violations occurred, the presumption against extraterritoriality would be effectively meaningless. *See Morrison*, 561 U.S. at 266 ("[T]he presumption against extraterritorial

application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.").[9]

Contrary to Plaintiffs' argument, *Morrison*—the sole case upon which they rely (at OB33-34)—concluded that the "focus" of the relevant statute was where the underlying violation occurred. 561 U.S. at 267. The Court explained that Section 10(b) of the Securities and Exchange Act "does not punish deceptive conduct, but only deceptive conduct 'in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered.'" *Id.* at 266 (quoting 15 U.S.C. § 78j(b)). Therefore, "[t]hose purchase-and-sale transactions are the objects of the statute's solicitude." *Id.* at 267. Here, similarly, § 1595 imposes liability only for knowingly benefiting from participating in a venture that committed "an act in violation of

[9] *Rodriguez v. Pan American Health Organization*, 29 F.4th 706 (D.C. Cir. 2022), does not hold otherwise. *See* Legal Scholars Br. 23. Set aside that *Rodriguez* concerned the Foreign Sovereign Immunities Act rather than the Trafficking Act. 29 F.4th at 716. There, the "gravamen" of the claim occurred in the United States because the defendant took actions to create the benefit: It "received, forwarded and retained the Mais Médicos money through its Washington, D.C. bank account," *id.*, and used that U.S. account to "act[] as a financial intermediary between Brazil and Cuba," *id.* at 709-10.

this chapter." The "act in violation" is the focus of § 1595, and here those alleged acts undisputedly occurred in the Congo.

IV. The District Court Correctly Dismissed Plaintiffs' Common-Law Claims.

As a last resort, the complaint asserts three state-law torts. JA91-94. In addition to failing for lack of standing, *supra* 16-26, these claims fail because the harms they allege are separated from Defendants by multiple layers of independent actors. Plaintiffs assert that the dismissal of these claims was predicated solely on the district court's finding of no venture, OB53, but the court in fact found multiple defects in Plaintiffs' claims, JA128-30.[10]

A. Plaintiffs' unjust-enrichment claim fails because the complaint alleges only an attenuated connection between Defendants' cobalt purchases and working conditions in distant mines.

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[10] Defendants address these claims under California and Washington law because the complaint alleges those states to be Defendants' principal places of business, and because "Plaintiffs failed to identify what state law governs their claims." JA61, 63-64, 67, 128. In fact, as Defendants argued in the district court, Congolese law applies, under which Plaintiffs admit they cannot prevail. JA19-20. The district court did not need to reach this issue. If this Court determines that Plaintiffs state a common-law claim under the standards addressed here, it should remand for consideration of choice of law.

Unjust enrichment requires that the defendant received a benefit "at the plaintiff's expense." *Young v. Young*, 191 P.3d 1258, 1262 (Wash. 2008); *Peterson v. Cellco P'ship*, 164 Cal. App. 4th 1583, 1593 (2008); Restatement (Third) of Restitution and Unjust Enrichment § 1, cmt. d (Oct. 2019 update). So "enrichment alone will not trigger the doctrine"; the enrichment "must be unjust … as between the two parties to the transaction." *Cox v. O'Brien*, 206 P.3d 682, 688 (Wash. Ct. App. 2009); *Peterson*, 164 Cal. App. 4th at 1593.

Thus, as the district court recognized, JA128, a plaintiff who has a relationship with one party cannot sue a third party for unjust enrichment merely for having benefited from that relationship. *See Doe I v. Wal-Mart Stores*, 572 F.3d 677, 685 (9th Cir. 2009) (emphasizing the "lack of any prior relationship between Plaintiffs and Wal-Mart"); *Campidoglio LLC v. Wells Fargo*, 2012 WL 5844693, at *4 (W.D. Wash. Nov. 19, 2012). Because Plaintiffs allege no relationship with Defendants, their claim fails. *Supra* 6-8; JA75-77.

B. Plaintiffs' negligent-supervision claim fails for similar reasons.

By definition, a negligent-supervision claim involves a duty to supervise; thus, it typically involves a wrongdoer who is the defendant's

employee or agent. *See Alexander v. Cmty. Hosp. of Long Beach*, 46 Cal. App. 5th 238, 253 (2020); *LaPlant v. Snohomish County*, 271 P.3d 254, 256 & n.7 (Wash. Ct. App. 2011). The *sine qua non* of such a claim is day-to-day control. *Evans v. Tacoma Sch. Dist. No. 10*, 380 P.3d 553, 565 (Wash. Ct. App. 2016); *see Doe I*, 572 F.3d at 684 (dismissing California claim; Wal-Mart "exercised minimal or no control over the day-to-day work of Plaintiffs in the suppliers' foreign factories"); *Anderson v. Soap Lake Sch. Dist.*, 423 P.3d 197, 209-10 (Wash. 2018); JA129 (recognizing the need for a "legal obligation to supervise").

Here, "no Defendant employed any Plaintiff, nor any of the people who oversaw them." JA129. There is no allegation that Defendants own or operate the mines that employed Plaintiffs or that they controlled Plaintiffs or the mines. There is not even an allegation that Defendants own *intervening* entities like Glencore, Umicore, or Huayou Cobalt (which do not employ Plaintiffs in any event). Under Plaintiffs' logic, merely purchasing from one actor in a supply chain would create supervisory liability for the employment conditions of every business in the chain. That theory goes "well beyond the recognized limits of

liability and cannot be accepted." *Doe I v. Wal-Mart Stores*, 2007 WL 5975664, at *5 (C.D. Cal. Mar. 30, 2007), *aff'd,* 572 F.3d 677.

C. Plaintiffs' claim for intentional infliction of emotional distress also fails.

The complaint does not plausibly allege that Defendants engaged in "extreme and outrageous conduct" that intentionally or recklessly caused Plaintiffs to suffer severe emotional distress. Restatement (Second) of Torts § 46 (Oct. 2019 update). This demanding standard requires that the defendant's "conduct exceed[ed] all bounds usually tolerated by decent society" and was "of a nature which is *especially calculated to cause*, and does cause, mental distress of a very serious kind." *Ochoa v. Super. Ct.*, 39 Cal. 3d 159, 165 n.5 (1985); *Christian v. Tohmeh*, 366 P.3d 16, 30 (Wash. Ct. App. 2015); *Grimsby v. Samson*, 530 P.2d 291, 295 (Wash. 1975). Purchasing goods in a legal transaction does not meet that exacting standard.

CONCLUSION

For the foregoing reasons, this Court should affirm.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) and D.C. Cir. R. 28(c) because this brief contains 12,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the D.C. Circuit by using the appellate CM/ECF system on October 7, 2022.

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