[NOT YET SCHEDULED FOR ORAL ARGUMENT]

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.

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE GLOBAL BUSINESS ALLIANCE, THE NATIONAL FOREIGN TRADE COUNCIL, AND THE UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28(a)(1)

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

1. Janie Chuang
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3. Aaron Fellmeth
4. Dina Francesca Haynes
5. Bert Lockwood
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21. Carlos M. Vázquez
22. Christopher A. Whytock
23. The Human Trafficking Institute
24. The Chamber of Commerce of the United States of America
25. The Global Business Alliance
26. The National Foreign Trade Council
27. The United States Council for International Business

B. Ruling Under Review. An accurate reference to the ruling at issue appears in the Brief for Defendants-Appellees.

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

/s/ John B. Bellinger, III
John B. Bellinger, III

DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 28(a), undersigned counsel certifies:

Amicus the Chamber of Commerce of the United States of America ("Chamber") is a nonprofit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent company, and no publicly held company has a 10% or greater ownership interest in the Chamber.

Amicus the Global Business Alliance is a nonprofit corporation, tax-exempt organization incorporated in Delaware. The Global Business Alliance has no parent company, and no publicly held company has a 10% or greater ownership interest in the Global Business Alliance.

Amicus the National Foreign Trade Council is a nonprofit, tax-exempt organization incorporated in New York. The National Foreign Trade Council has no parent company, and no publicly held company has a 10% or greater ownership interest in the National Foreign Trade Council.

Amicus the United States Council for International Business is a nonprofit, tax-exempt organization incorporated in New York. The

United States Council for International Business has no parent company, and no publicly held company has a 10% or greater ownership interest in the United States Council for International Business.

/s/ John B. Bellinger, III
John B. Bellinger, III

STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

All parties have consented to the filing of this *amicus* brief.

Pursuant to Circuit Rule 29(d), *amici* certify that a separate brief is necessary to provide the unique perspective of members of the broader business community, which Plaintiffs' sweeping theory of liability directly affects. *Amici* have participated in more than a dozen cases related to issues of extraterritoriality in the federal courts, and *amici*'s extensive experience gives them a unique perspective to offer this Court.

Since *amici* are not aware of any other *amicus* brief addressing these issues, they certify pursuant to Circuit Rule 29(d) that joinder in a single brief with other *amici* would be impracticable.

/s/ John B. Bellinger, III
John B. Bellinger, III

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

No counsel for any party authored this brief in whole or in part and no entity or person, aside from the *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

/s/ John B. Bellinger, III
John B. Bellinger, III

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GLOSSARY

RICO	Racketeer Influenced and Corrupt Organizations Act
Trafficking Act	Trafficking Victims Protection Reauthorization Act

IDENTITY AND INTEREST OF *AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts.

The Global Business Alliance is the only trade association exclusively comprised of international companies with operations in the United States. The Alliance promotes and defends an open economy that welcomes international companies to invest in America, which leads to more jobs, growth, and benefits for American communities.

The National Foreign Trade Council is the premier business association advancing trade and tax policies that support access to the global marketplace. Founded in 1914, the National Foreign Trade Council promotes an open, rules-based global economy on behalf of a diverse membership of U.S.-based businesses.

The United States Council for International Business promotes open markets, competitiveness and innovation, sustainable development, and corporate responsibility, supported by international engagement and regulatory coherence. Its members include global companies and professional services firms. As the U.S. affiliate of the International Chamber of Commerce, Business at the Organisation for Economic Co-operation and Development, and the International Organization of Employers, it provides business views to policy makers and regulatory authorities worldwide and works to facilitate international trade and investment.

Amici have a substantial interest in the issues presented in this case. Numerous U.S. companies have been, and continue to be, defendants in lawsuits predicated on expansive theories of extraterritoriality based on their dealings in foreign markets. These suits often last a decade or more, imposing substantial legal and reputational costs on U.S. companies that transact business overseas. The Supreme Court's limiting instructions in its recent extraterritoriality cases helped stem the tide of these suits but regrettably failed to ensure the swift dismissal of some long-running suits or to fully deter new suits. *Amici* can offer a helpful perspective on the issue before the Court: whether the Trafficking

Victims Protection Reauthorization Act ("Trafficking Act") authorizes U.S. courts to regulate the serious, global problems of forced labor and human trafficking by holding downstream purchasers civilly liable for alleged conduct at the far end of the global supply chain.

STATUTES AND REGULATIONS

All pertinent materials are contained in the addendum to the Brief for Plaintiffs-Appellants.

ARGUMENT

The district court correctly applied the presumption against extra-territoriality to hold that Section 1595(a) of the Trafficking Act—which permits victims of forced labor and other forms of trafficking to bring civil suit—does not apply to forced labor and injuries that allegedly occurred in the Democratic Republic of the Congo, not in the United States.

Plaintiffs ask this Court to stretch Section 1595(a) of the Trafficking Act in a manner that is inconsistent with its text and structure in order to create civil liability for the problems of forced labor and human trafficking in global supply chains. But Plaintiffs fail to appreciate how much those problems call for complex, multi-faceted solutions; how much those solutions have different and complicated trade-offs; and how much

Congress, the Executive Branch, and private industry are already deeply engaged in addressing these issues. *Amici* are committed to the goal of eliminating involuntary labor worldwide. That goal is best achieved by allowing Congress and the Executive Branch to continue their work addressing the issue, cognizant of the many foreign policy challenges it poses. This Court should affirm the district court's decision.

I. Plaintiffs' Claims Are Impermissibly Extraterritorial

A. Congress Did Not Give Extraterritorial Effect to Section 1595 of the Trafficking Act

Plaintiffs' claims under the Trafficking Act's civil cause of action encounter a threshold obstacle: Section 1595 does not apply extraterritorially. U.S. law "governs domestically but does not rule the world," *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007), and "federal laws [are] construed to have only domestic application" unless there is "clearly expressed congressional intent to the contrary," *RJR Nabisco v. European Cmty.*, 579 U.S. 325, 335 (2016). To overcome that presumption, the statute must give "a clear, affirmative indication that it applies

extraterritorially." *Id.* at 337. As the district court correctly held, Section 1595 gives no such indication.

The text, structure, and history of the Trafficking Act all confirm that Congress did not extend Section 1595 extraterritorially. Faced with the absence of *any* indication that Congress intended to make Section 1595 extraterritorial—let alone the "clear, affirmative indication" that *RJR Nabisco* requires, 579 U.S. at 337—Plaintiffs attempt to rewrite both the statute and caselaw, relying on out-of-circuit decisions that deal primarily with issues far afield from the claims in this case. Plaintiffs ignore controlling principles from the Supreme Court's recent extraterritoriality jurisprudence, failing even to mention *RJR Nabisco* or *Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108 (2013). Properly applied, these principles make clear that the Trafficking Act's civil cause of action does not apply extraterritorially and that Plaintiffs' claims may proceed only if they involve a "permissible domestic application" of the statute, which they do not. *RJR Nabisco*, 579 U.S. at 335–38 (citation omitted).

1. Congress Knows How to Extend Statutes Extraterritorially, and There Is No "Clear, Affirmative Indication" That It Intended to Do So Here

The analysis of whether a statute applies extraterritorially begins with its text. Section 1595, which is titled "Civil remedy," provides:

> 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).

Section 1595(a) says nothing about extraterritorial application, and Plaintiffs do not contend—nor could they—that its text rebuts the presumption against extraterritoriality. Rather, they point to a separate provision of the Trafficking Act, Section 1596(a), which extends extraterritorial jurisdiction to "any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591," provided that the alleged offender is a U.S. national, a U.S. permanent resident, or present in the United States. Obviously, Section 1596(a) does not list Section 1595(a) as a provision that applies extraterritorially. To get around this problem, Plaintiffs attempt to bootstrap Section 1595 into this list by arguing that because their Section 1595 claims are based on predicate acts "included in the list of offenses that are extended

extraterritorially by section 1596(a) . . . [t]he text of section 1596(a) indicates that the [Trafficking Act] extends extraterritorially" to those claims. Opening Brief at 32.

The district court and Defendants discuss at length the flaws in Plaintiffs' reasoning, including that Section 1596(a) relates only to *criminal* offenses, not civil liability, and excludes Section 1595 from the list of provisions to which it applies. JA123–26 (MTD Order); Response Brief at 55–60. *Amici* will not repeat those arguments here, but a few points warrant additional discussion.

First, when a statute contains both substantive prohibitions and a private right of action, "the presumption against extraterritoriality must be applied separately to both." *RJR Nabisco*, 579 U.S. at 350. Plaintiffs do not even cite *RJR Nabisco*, let alone discuss this controlling principle. In *RJR Nabisco*, the Court considered the extraterritorial application of various provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), including its criminal liability provision at 18 U.S.C. § 1962, its civil liability provision at 18 U.S.C. § 1964(c), and specific predicate offenses identified in 18 U.S.C. § 1961. With respect to the substantive prohibitions, the Court explained that "the statute defines

'racketeering activity' to encompass dozens of state and federal offenses, known in RICO parlance as predicates," and that certain predicates "plainly apply to at least some foreign conduct." *RJR Nabisco*, 579 U.S. at 329–30, 337. The Court further explained 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." *Id.* at 339.

The Court then considered RICO's private right of action, which, like Section 1595 of the Trafficking Act, authorizes civil claims based on certain "violation[s]" of the statute. *Compare* 18 U.S.C. § 1964(c) (permitting "[a]ny person injured in his business or property by reason of a violation of section 1962" to sue), *with* 18 U.S.C. § 1595(a) (authorizing a civil action by "a victim of a violation of this chapter"). Notwithstanding its conclusion that RICO's substantive prohibitions could apply to foreign conduct, the Court separately applied the presumption against extraterritoriality to RICO's private right of action and concluded that it has no extraterritorial application—even when the civil claims are based on the

same predicates that would support extraterritorial criminal liability under Section 1962. *RJR Nabisco*, 579 U.S. at 346–54.

In reaching this conclusion, the Court emphasized that the extraterritoriality analysis for a statute's substantive prohibitions cannot simply be transferred to its private right of action. "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, and here it is absent." *Id.* at 350. Here, Plaintiffs offer nothing more than what the Court squarely rejected in the RICO context. They argue that a private right of action (Section 1595) necessarily reaches abroad because the underlying law (the predicates at Sections 1589 and 1590) governs conduct in foreign countries (via Section 1596(a)'s grant of extraterritorial jurisdiction over certain "offense[s]"). But, as Defendants have explained, Section 1596(a) relates to extraterritorial jurisdiction over enumerated *criminal* offenses, Response Brief at 57–58, and Plaintiffs "d[o] not identify anything in [Section 1595(a)] that shows the statute reaches foreign injuries," *RJR Nabisco*, 579 U.S. at 350.

Second, when Congress wants to provide a civil cause of action for foreign conduct, it knows how to do so—and the kinds of language it

ordinarily uses are absent here. Consider two prominent examples: the civil remedy provisions of the Anti-Terrorism Act, 18 U.S.C. § 2333(a), and the Torture Victim Protection Act, 28 U.S.C. § 1350 note. The Anti-Terrorism Act establishes a private right of action against certain persons for injury arising from an act of "international terrorism," which it defines, in part, as activities that "occur primarily outside the territorial jurisdiction of the United States" or "transcend national boundaries." 18 U.S.C. § 2333(a); *see* 18 U.S.C. § 2331(1). The Torture Victim Protection Act establishes a cause of action against individuals who engage in torture or extrajudicial killing "under actual or apparent authority, or color of law, of any foreign nation," provided that the claimant has "exhausted adequate and available remedies in the place in which the conduct giving rise to the claim occurred." 28 U.S.C. § 1350 note.

These examples stand in stark contrast to Section 1595, which says nothing about foreign conduct or extraterritorial reach. It is a matter for Congress, not the courts, to determine whether the Trafficking Act should apply to extraterritorial civil claims and to amend the statute if needed, *see infra* Section II.A—and, as Section 1596(a) reflects, Congress

knows how to make the Trafficking Act extraterritorial when it so chooses.

2. Plaintiffs Rely on Out-of-Circuit Case Law That Does Not Support Their Position

Plaintiffs and their amici cite a handful of out-of-circuit cases to support their reading of the statute. These cases primarily address different legal questions and fact patterns, and they do not advance the analysis here.

Despite the fact that *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017), considered only whether Section 1596 applies retroactively, Plaintiffs scour it for favorable snippets and present it as the leading out-of-circuit authority, arguing that "[a]ll other reported cases either follow *Adhikari* or reach the same conclusion." Opening Brief at 29. These "reported cases" consist of four decisions. Two are unpublished district court decisions that simply follow *Adhikari* in addressing retroactivity. *See Abafita v. Aldukhan*, No. 1:16-cv-06072, 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); *Plaintiff A v. Schair*, No. 2:11-cv-00145, 2014 WL 12495639, at *6 (N.D. Ga. Sept. 9, 2014). Another is a district court decision that predates *RJR Nabisco*

and addressed whether a prior version of the statute covered victims trafficked into the United States. *Aguilera v. Aegis Commc'ns Grp., LLC*, 72 F. Supp. 3d 975, 978–79 (W.D. Mo. 2014). The last is *Ratha v. Phattana Seafood Co.*, 26 F.4th 1029, 1036–37 (9th Cir. 2022), a case in which, by Plaintiffs' own description, "the Ninth Circuit assumed without deciding" the extraterritoriality issue. Opening Brief at 29. None of these decisions offers insight into the proper construction of Section 1595, let alone provides a rule of decision that would aid the Court here.

Amici Legal Scholars point to two additional cases, but they are equally inapposite. In *United States v. Baston*, the Eleventh Circuit reviewed the conviction of an international sex trafficker and determined 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." 818 F.3d 651, 656, 671 (11th Cir. 2016). And in *C.T. v. Red Roof Inns, Inc.*, a case involving sex trafficking at U.S. hotels, the question was "[w]hether Section 1596 of the TVPRA authorizes nationwide services of process." No. 19-cv-5384, 2021 WL 2942483, at *8 (S.D. Ohio July 1, 2021). Neither case involved an effort to apply the Trafficking Act's civil cause of action extraterritorially.

Plaintiffs also invoke the Fourth Circuit's decision in *Roe v. Howard*, but that decision cannot be squared with *RJR Nabisco*. *See* Opening Brief at 33 (citing 917 F.3d 229 (4th Cir. 2019)). *Roe* held, contrary to *Adhikari*, that Section 1595 applied extraterritorially before the enactment of Section 1596(a). *Id.* at 239. The plaintiff, a former housekeeper for the defendant, had sued her former employer under the Trafficking Act for the employer's role in sexual abuse that she experienced while living in housing provided by the U.S. Embassy in Yemen. *Id.* at 233. Relying on the portion of *RJR Nabisco* that analyzed RICO's *substantive* prohibitions, the Fourth Circuit held that the Trafficking Act's *civil* cause of action applies extraterritorially because, "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." *Id.* at 242.

As *RJR Nabisco* repeatedly emphasized, however, the analyses of a statute's substantive prohibitions and civil-liability provision are distinct, and extraterritorial civil liability raises concerns that are specific to private lawsuits. *See, e.g.*, 579 U.S. at 346 ("Irrespective of any extraterritorial application of § 1962, we conclude that § 1964(c) does not

overcome the presumption against extraterritoriality."); *id.* ("[The logic of *Kiobel*] requires that we separately apply the presumption against extraterritoriality to RICO's cause of action despite our conclusion that the presumption has been overcome with respect to RICO's substantive prohibitions."). Indeed, the Supreme Court in *RJR Nabisco* expressly *rejected* the Second Circuit's rationale that "a RICO plaintiff may sue for foreign injury that was caused by the violation of a predicate statute that applies extraterritorially, just as a substantive RICO violation may be based on extraterritorial predicates." *Id.* at 350. The Court explained that this reasoning "fails to appreciate that the presumption against extraterritoriality must be applied separately to both RICO's substantive prohibitions and its private right of action." *Id.*

The Supreme Court grounded its decision regarding RICO's private right of action in a long line of precedents addressing the potential for private lawsuits to cause "international friction" by seeking to regulate conduct abroad. *See id.* at 346–49. Neither Plaintiffs nor the *Roe* court mention that consideration, despite the centrality of this concept in the Supreme Court's extraterritoriality jurisprudence. For instance, the Supreme Court has explained that because private rights of action are not

subject to "the check imposed by prosecutorial discretion," *id.* at 346 (quoting *Sosa v. Alvarez-Machain*, 542 U.S. 692, 727 (2004)), they create a potential for international friction that goes "beyond that presented by merely applying U.S. substantive law to that foreign conduct," *id.* at 346–47. In other words, private lawsuits carry a unique and heightened risk of generating international controversy.

As was the case in *Kiobel* and *RJR Nabisco*, "[a]llowing recovery for foreign injuries" in a civil Trafficking Act action presents a "danger of international friction." *Id.* at 348. This conclusion does not mean that Congress is foreclosed from authorizing such suits; rather, it means that courts may not "recogniz[e] foreign-injury claims without clear direction from Congress." *Id.* Because Congress has given no such "clear direction" with respect to claims brought under Section 1595, this Court must proceed to the second step of the extraterritoriality analysis: whether Plaintiffs' claims involve a permissible domestic application of the statute.

B. Plaintiffs' Case Does Not Involve a Domestic Application of Section 1595(a) of the Trafficking Act

If a statute does not apply extraterritorially, "plaintiffs must establish that 'the conduct relevant to the statute's focus occurred in the United States.'" *Nestle USA, Inc. v. Doe*, 141 S. Ct. 1931, 1936 (2021)

(quoting *RJR Nabisco*, 579 U.S. at 337). If plaintiffs can do so, then the case will "involve[] a permissible domestic application" of the statute. *RJR Nabisco*, 579 U.S. at 337. But "it is a rare case of prohibited extra-territorial application that lacks *all* contact with the territory of the United States," and "the 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." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 266 (2010). Cases will thus involve an "impermissible extraterritorial application" if "the conduct relevant to the focus occurred in a foreign country." *RJR Nabisco*, 579 U.S. at 337.

Plaintiffs in this case have failed to grapple with the methodology set out by the Supreme Court for determining a statutory provision's focus. Applying that methodology makes clear that Plaintiffs' suit is impermissibly extraterritorial, and none of Plaintiffs' or their *amici*'s arguments to the contrary are persuasive.

1. A Statutory Provision's "Focus" Is the Specific Conduct It Regulates or the Specific Injury It Seeks to Prevent

Courts determine the "focus" of a statute by identifying "'the objects of the statute's solicitude,' or what it is 'that the statute seeks to regulate'

or protect." *Spanski Enters, Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 913 (D.C. Cir. 2018). That "focus" inquiry will generally lead to the conclusion that a statutory provision's "focus" is either the specific conduct that the provision regulates, or the specific injury that the provision aims to prevent.

Consider the Supreme Court's analysis in *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010), which this Court has previously held up as a "model[]" of that inquiry. *Spanski Enterprises*, 83 F.3d at 913. In *Morrison*, several foreign investors had sued an Australian company for violating Section 10(b) of the Securities Exchange Act of 1934, which prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of certain kinds of securities. 561 U.S. at 262 (quoting 15 U.S.C. § 78j(b)). According to the foreign investors, that provision was "focused" on where the deception originated, so it did not matter that the Australian company had never listed its securities on an American exchange.

The Supreme Court disagreed. It began its analysis with the text of the relevant statute, noting that "Section 10(b) 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)). Given the limitation imposed by that language, the Court held that "the focus of the Exchange Act is not upon the place where the deception originated, but upon purchases and sales of securities in the United States." *Id.* at 266. Section 10(b)'s text made clear that "purchase-and-sale transactions" are the "transactions that the statute seeks to 'regulate,'" and that "parties or prospective parties to those transactions" are the parties "that the statute seeks to 'protec[t].'" *Id.* at 267 (citations omitted).

Several other statutory factors confirmed that "focus." First, the *Morrison* Court noted that the Exchange Act's prologue "set[] forth as its object '. . . the regulation of securities exchanges,'" and that the securities exchanges in question were all undoubtedly domestic. *Id.* Second, the Court also looked at other provisions and contemporary statutes, all of which demonstrated "[t]he same focus on domestic transactions." *Id.* at 268. Third, the Court emphasized that regulating foreign exchanges would create a high "probability of incompatibility with the applicable laws of other countries" and thereby risk "conflicts with foreign laws and procedures." *Id.* at 269 (citation omitted). Since the presumption against

extraterritoriality aims to avoid such conflicts, the Court concluded that Congress was unlikely to have been "focusing" in Section 10(b) on transactions on foreign exchanges. *Id.*

Outside of *Morrison*, the Supreme Court has suggested that when it comes to provisions establishing causes of action, the "focus" of congressional concern will typically be the injuries suffered by the potential plaintiff. In *RJR Nabisco*, for example, the Court analyzed the "focus" of 18 U.S.C. § 1964(c), which as noted grants a civil cause of action to "[a]ny person injured in his business or property by reason of a violation of" the racketeering provisions of the RICO Act. Zeroing in on the "any person injured" language, *RJR Nabisco* concluded that Section 1964(c)'s "focus" was on the injury itself, and that "[a] private RICO plaintiff therefore must allege and prove a *domestic* injury to its business or property." 579 U.S. at 346.

2. Plaintiffs Base Their Suit on Foreign Conduct and Foreign Injuries

Sometimes, it can be difficult to tell whether a statutory provision is "focused" on the specific conduct that it regulates (as with Section 10(b) in *Morrison*), or instead on the specific injury that it seeks to prevent (as with Section 1964(c) in *RJR Nabisco*). In this case, however, neither kind

of "focus" would make the application of Section 1595(a) domestic, as both the relevant conduct and the relevant injuries occurred abroad.

Section 1595(a) grants a civil cause of action to "[a]n individual who is a victim of a violation of this chapter." Plaintiffs brought suit under this provision and alleged that they were victims of violations of prohibitions on forced labor in Sections 1589 and 1590. *See* Opening Brief at 6, 30, 32, 34, 35 & n. 15, 51–52. As Section 1595(a)'s language makes clear, the conduct targeted is accordingly the "violation of this chapter," not the "benefit[ting], financially or by receiving anything of value from participation in a venture," which merely defines against whom suit can be brought. Here, the relevant "violation of this chapter"—forced labor—allegedly occurred in the Democratic Republic of the Congo, not in the United States.

Section 1595(a)'s text also confirms that the specific harm the provision seeks to prevent is the injury to the "victim of a violation of this chapter." Just as *RJR Nabisco* concluded that Section 1964(c)'s language about injury meant that a private RICO plaintiff must show "a *domestic* injury to its business or property," 579 U.S. at 346, Section 1595(a)'s language about "victims" suggests that private plaintiffs must show that

they were victimized in the United States. Here, however, Plaintiffs allege injuries that occurred exclusively in the Democratic Republic of the Congo.

Other statutory factors confirm that the specific conduct Section 1595(a) regulates is the underlying offense, and that the specific injury to be prevented is forced labor and other kinds of trafficking. First, the name of the relevant statute—the Trafficking Victims Protection Reauthorization Act—confirms that congressional concern was focused first and foremost on trafficking and its victims, not on those who purportedly benefit on the margins. That same concern is evident throughout the Act's purposes and findings: "The purposes of this chapter are to combat trafficking in persons . . . , to ensure just and effective punishment of traffickers, and to protect their victims." 22 U.S.C. § 7101(a). Second, other provisions of the law, including the overwhelming majority of the violations that Section 1595 makes actionable, are also focused on "[f]orced labor," 18 U.S.C. § 1589, "[s]ex trafficking of children or by force, fraud, or coercion," *id.* § 1591, and "[t]rafficking with respect to peonage, slavery, involuntary servitude, or forced labor," *id.* § 1590. Third, if private plaintiffs could sue those who allegedly benefit in the United States from

forced labor abroad in the global supply chain, that would risk exactly the kind of "conflicts with foreign laws and procedures" that the presumption against extraterritoriality is meant to avoid. *Morrison*, 561 U.S. at 269 (citation omitted). Allowing Plaintiffs to avoid the presumption against Section 1595(a)'s extraterritorial application simply by suing American companies like defendants here would circumvent Congress's conscious decision to allow only the U.S. government—not private plaintiffs—to bring legal action against forced labor and trafficking abroad.

Every aspect of Section 1595(a) thus makes plain that the provision's "focus" is either on the underlying offense or on the victims' injury. Here, that makes Plaintiffs' suit impermissibly extraterritorial.

3. Plaintiffs' and *Amici*'s Countervailing Arguments Are Unpersuasive

Plaintiffs argue only that "[t]he focus of the prohibition on 'benefitting, financially or by receiving anything of value' is on the benefitting, not on the other conduct." Opening Brief at 34. But that argument's premise is both wrong and inconsistent with Plaintiffs' arguments elsewhere in their brief. Contrary to Plaintiffs' suggestion, Section 1595(a) contains no "prohibition on 'benefitting'" at all, as Plaintiffs admit earlier in their brief when they stress that Section 1595(a) "was merely intended

to define who could sue whom, while the substantive 'offenses' that can be subject to a civil suit include sections 1589 (forced labor) and 1590 (trafficking)." *Id.* at 32. Since Section 1595(a) does not prohibit "benefitting," that cannot be the focus of the provision.

Amici Legal Scholars take a different approach and argue instead that the district court's analysis was inconsistent with this Court's recent decision in *Rodriguez v. Pan Am. Health Org.*, 29 F.4th 706, 710 (D.C. Cir. 2022).[1] *Rodriguez* did not analyze the presumption against extraterritoriality; instead, it was concerned with the defendant's immunity under the commercial-activity exception to immunity in the Foreign Sovereign Immunities Act. *See id.* at 712–17. *Amici* suggest that *Rodriguez*'s "gravamen" analysis is somehow analogous to the "focus" test, but they cite no caselaw and provide no explanation as to why a test applicable only to that Act would be relevant in this case.

If *Rodriguez* is relevant at all, it is only to emphasize why Plaintiffs' suit is impermissibly extraterritorial. In *Rodriguez*, the plaintiffs sued

[1] *Amici* chide the district court for "overlook[ing]" *Rodriguez*, Br. of Legal Scholars with Expertise in Extraterritoriality and Transnational Litigation as *Amici Curiae* at 22, but the district court issued its memorandum opinion on November 2, 2021, almost five months before *Rodriguez* was decided (on March 29, 2022).

for a violation of Section 1589(b), which directly punishes "[w]hoever knowingly benefits, financially or by receiving anything of value, from participation in a [forced labor] venture." Based on that prohibition, this Court concluded that the "gravamen" of the plaintiffs' suit was "the alleged financial activity itself, [which] gives rise to a cause of action." *Rodriguez*, 29 F.4th at 716. Here, by contrast, Plaintiffs are *not* suing for a violation of Section 1589(b), which is never cited in their complaint and has not been identified as a basis for their suit anywhere in their briefing. Plaintiffs are instead relying on similar "benefitting" language in Section 1595(a) to sue for alleged violations of Section 1589(a) (forced labor) and Section 1590 (trafficking). *See* Opening Brief at 6, 30, 32, 34, 35 & n. 15, 51–52. So to the extent that the "gravamen" and "focus" inquiries are analogous, *Rodriguez* suggests that the "focus" of a Section 1595(a) suit will be on the alleged underlying offenses, which in this case are forced labor and trafficking that occurred abroad.

Since Section 1595(a) does not apply extraterritorially, and since the "focus" of Section 1595(a) is either on the underlying violation or where that violation caused an injury, Plaintiffs' case is impermissibly extraterritorial and must be dismissed.

II. Courts Should Exercise Caution to Avoid Stretching the Trafficking Act Beyond What Congress Intended

A. Congress and the Executive Are Responsible for Making Policy Decisions to Address Forced Labor

No party disputes that forced labor, and human trafficking more broadly, are serious issues that need to be addressed. But addressing forced labor in global supply chains involves difficult policy choices and trade-offs that are best weighed by the elected branches, not courts acting on their own. The unfortunate reality is that forced labor is a significant problem in global supply chains, and that fact not only leads to serious harms but also to considerable policy challenges. Congress and the Executive Branch are engaged in ongoing efforts to address the problem of forced labor, and courts should not strain to read statutes like the Trafficking Act expansively in order to fill perceived gaps in their legislative and regulatory actions.

1. Several of Plaintiffs' positions raise a danger of foreign-relations problems and counsel deference to the political branches to properly balance the competing interests and considerations.

Consider what it means to "participat[e] in a venture" under Section 1595(a). Both the district court and Defendants have explained why

that phrase cannot encompass every possible downstream purchaser of a good who may be merely aware of potential violations further up the global supply chain. But Plaintiffs nonetheless encourage this Court to define "venture" beyond what its plain meaning can support.

Plaintiffs' theory would enlist courts in the drawing of policy-based lines within complex, global supply chains that affect nearly every member of society. The steps from coffee bean to coffee cup, cotton plant to cotton shirt, involve numerous independent actors engaged in economic exchange. Under Plaintiffs' theory, it is difficult to determine where anything *other* than a "common undertaking or enterprise involving risk and potential profit" begins and ends. *Doe #1 v. Red Roof Inns*, 21 F.4th 714, 725 (11th Cir. 2021).

Saying that the global community as a whole must address the harms associated with forced labor does not mean that Congress provided for each actor in the global community to be held liable in court for those harms. Determining the number of steps that warrant extending liability to supply-chain actors not within the common meaning of the term "venture" is thus a fundamental policy choice best suited for the elected

branches and their decades of experience in targeting forced labor practices.

Extending the territorial reach of Section 1595 involves similarly complicated policy issues. As explained *supra*, the presumption against extraterritoriality recognizes the delicate foreign policy considerations inherent in determining whether a law will have extraterritorial reach. Where, as here, a statutory provision lacks the "clearly expressed congressional intent" that the presumption requires, the judiciary should not try to independently balance those considerations in Congress's stead.

2. Congress and the Executive Branch not only should be in the driver's seat in implementing solutions to address forced labor, they *have been* in the driver's seat. The Trafficking Act is not a static statute. Congress has continuously expanded the remedies available to victims of human trafficking through the Act's many reauthorizations. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. 108–193, § 4(a)(4)(A), 117 Stat. 2875, 2878 (incorporating private right of action for damages); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, §§ 221–22, 122 Stat. 5044, 5067–71 (broadening scope of criminal and civil liability); Frederick

Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Pub. L. No. 115–425, § 133(a), 132 Stat. 5472, 5481–82 (charging the Secretary of Labor and the Bureau of International Labor Affairs with identifying "goods that are produced with inputs that are produced with forced labor or child labor"). As these reauthorizations make clear, Congress is actively monitoring and frequently adjusting its approach to combatting forced labor.

Congress and the Executive Branch have also been active in addressing forced labor in ways other than the provision of legal remedies. One way to address forced labor is through the practice of downstream tracing, or "the process of tracing goods from raw materials through manufacturers to final customers." U.S. Dep't of Labor, *2022 List of Goods Produced by Child Labor or Forced Labor* 42 (2022), https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf. At its best, downstream tracing promotes due diligence and accountability throughout supply chains and provides industry with the information necessary to identify and combat supply-chain issues. *Id.* In 2020, the U.S. Department of Labor's Bureau of International Labor Affairs accordingly "funded two $4 million cooperative agreements

[with private organizations] to increase the downstream tracing of goods made by child labor and forced labor [in cotton and garment supply chains]." *Id.* Similar funding has been devoted to downstream tracing within industries that utilize cobalt resources. *See* U.S. Dep't of Just., *Attorney General's Annual Report to Congress on U.S. Government Activities to Combat Trafficking in Persons: Fiscal Year 2020*, at xii (2021); RCS Global Group, *Cobalt Supply Chain Mapping Report* (2022), https://bit.ly/3g5Exqc. The Department of Labor, for example, has funded a cobalt traceability pilot that includes even artisanal and small-scale mining. *See* RCS Global Group, *supra*, at 10–11.

Furthermore, the Executive Branch has worked to foster public-private coalitions that can increase private-sector accountability effectively. For example, the U.S. Department of Labor's Bureau of International Labor Affairs participates in the Global Battery Alliance's Cobalt Action Partnership, which works across industry sectors and governments to establish "transparent, verifiable[,] and responsible cobalt value chains" through the development of best practices and minimum standards for artisanal and small-scale mining. Global Battery Alliance, *Global Battery Alliance Cobalt Action Partnership Overview* 1 (2020),

https://bit.ly/3McS6jz; *see* Dep't of Labor, *supra*, at 36. The Democratic Republic of the Congo's Minister of Mines joined the Partnership in 2020. *See DRC Minister of Mines Joins Cobalt Action Partnership*, UNICEF (Dec. 23, 2020), https://uni.cf/3TlKSvT. Through initiatives like the Cobalt Action Partnership, the Executive Branch plays a key role in working with foreign governments and private stakeholders to institute industry standards to which companies can be held formally liable. *See also* U.S. Dep't of Homeland Sec., *Strategy to Combat Human Trafficking, the Importation of Goods Produced with Forced Labor, and Child Sexual Exploitation* 22 (2020), https://bit.ly/3fPFbbf (charging DHS with "encourag[ing] international adoption and enforcement of reciprocal safeguards that combat forced labor[] and obtain[ing] agreements to support investigation and verification of forced labor allegations").

Amici and their members are well-positioned to contribute to such efforts. For example, through public-private partnerships and deeper collaboration with governments, the business community can help drive adoption of technologies to enhance mapping of high-risk supply chains and improve due-diligence mechanisms. *See* U.S. Chamber of Com. & Counter Human Trafficking Compliance Sols., *Ask the Expert: Michael*

Billet, CHTCS J., 2009, at 7–8, https://bit.ly/3Vp2HMt. Governments should work with industry to address key governance issues in mineral sectors and increase accountability for local actors to promote ethical procurement of critical commodities, particularly as countries pursue energy transitions.

For over twenty years, Congress and the Executive Branch have been carefully crafting and refining a comprehensive, multifaceted approach to forced labor. This Court does not need to get ahead of Congress by extending the Trafficking Act's civil cause of action extraterritorially or stretching the meaning of "venture" beyond its ordinary meaning.

B. Industry-Led Efforts Should Be Encouraged, not Punished

Industry leaders have undertaken significant initiatives to combat human trafficking in recent years. *See* U.S. Chamber of Com., *Leading By Example* (2020), https://bit.ly/3g2XycS. With the U.S. government's backing, technology companies have been able to institute contractual requirements in certain cases to ensure that direct suppliers do not themselves engage in forced-labor practices and also impose ethical sourcing requirements on their suppliers. *See Responsible Sourcing Tool: Sample Code of Conduct*, https://bit.ly/3ynY6QP; *Responsible Sourcing Tool:*

Sample Supplier Agreement, https://bit.ly/3yuAp9p. Other industry leaders are combatting forced labor through emerging technologies designed to "provide traceability, authenticity, and verification, to help map supply chains." U.S. Chamber of Com. & Counter Human Trafficking Compliance Sols., *supra*, at 9. As Plaintiffs themselves acknowledge, such efforts have resulted in tangible change. *See* Opening Brief at 21.

These efforts should be encouraged, not punished. Plaintiffs argue that efforts to ensure ethical sourcing in supply chains like those outlined above establish that technology companies have "control" over their suppliers that is sufficient to give rise to a "venture." *See* Opening Brief at 20–23. Courts should decline this invitation to weaponize industry leaders' voluntary, government-endorsed, good-faith efforts to ensure that their supply chains are free of forced labor. Imposing liability in the manner Plaintiffs urge would create perverse incentives, deterring companies from trying to address the very supply-chain issues that Plaintiffs raise, and potentially even causing companies to cease beneficial foreign economic activity. *See* World Econ. F., *Making Mining Safe and Fair: Artisanal Cobalt Extraction in the Democratic Republic of the Congo* 6 (2020) (noting that mineral extraction constitutes 90% of the Democratic

Republic of the Congo's exports, and that more than two million Congolese rely on artisanal small-scale mining for their livelihood); *id.* ("From a human rights perspective, curtailing mining activities in the DRC would severely harm the local population."). Reading the Trafficking Act as Plaintiffs urge would transform steps to address forced labor into legal liability—a development antithetical to the shared mission of remedying global supply-chain concerns.

CONCLUSION

For the foregoing reasons and the reasons set forth in the Brief of Defendants-Appellees, this Court should affirm the judgment below.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE/

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,499 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that 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 the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on October 14, 2022, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

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