IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
CASE NO: 18-55041

KEO RATHA, ET AL,
PLAINTIFFS AND APPELLANTS

v.

PHATTHANA SEAFOODS, CO. LTD., ET AL
DEFENDANTS AND APPELLEES

Appeal from U.S. District Court for the Central District of California,
No. 16-cv-04271-JFW-AS

AMICUS CURIAE BRIEF OF SOLIDARITY CENTER, INTERNATIONAL LABOR RIGHTS FORUM, WORKER RIGHTS CONSORTIUM, CENTRO DE LOS DERECHOS DEL MIGRANTE, INTERNATIONAL LABOR RECRUITMENT WORKING GROUP, AND EARTHRIGHTS INTERNATIONAL IN SUPPORT OF APPELLANTS FOR REVERSAL OF ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGEMENT

FILED WITH CONSENT OF ALL PARTIES

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INTERESTS OF AMICI CURIAE

The Solidarity Center is a non-governmental labor rights organization dedicated to the promotion of workers' rights worldwide, including the elimination of trafficking in persons for the exaction of forced labor. International Labor Rights Forum is a human rights organization that advances dignity and justice for workers in the global economy. The Worker Rights Consortium is an independent labor rights monitoring organization whose affiliates include more than 190 universities and colleges in the U.S., Canada and the UK. Its mission includes protecting workers in global supply chains from forced labor, human trafficking and other labor and human rights abuses. The Centro de los Derechos del Migrante is a migrant workers' rights non-profit organization that seeks to improve the working conditions of low-wage workers throughout the U.S. and remove borders as barriers to access to justice. The International Labor Recruitment Working Group (ILRWG) is a coalition of nearly thirty workers' rights and anti-trafficking organizations that seeks to eliminate abuses of temporary foreign workers and promote transparency in foreign labor recruiting. EarthRights International is a 501(c)(3) nonprofit human rights and environmental organization that works to promote corporate accountability in U.S. courts and worldwide, including through multinational supply chains, and has filed *amicus* briefs in other lawsuits involving human rights abuses in supply chains.

Pursuant to Rule 29(a)(2) of the Federal Rule of Appellate Procedures, the amici file this brief with the consent of all parties. Per Rule 29(a)(4), no counsel for any party has participated in the authoring of this document, in whole or in part; no party or party's counsel contributed any money that was intended to fund preparation or submission of the brief; and no person, other than amici curiae, their members and their counsel, contributed money that was intended to fund preparation or submission of the brief.

SUMMARY OF ARGUMENT

The U.S. District Court for the Central District of California erred in granting Defendants' Motion for Summary Judgment on December 21, 2017. First, the Court misinterpreted §1595(a) of the Trafficking Victims Protection Reauthorization Act, 18 U.S.C. §§ 1581-1597 (TVPRA) to require Plaintiffs to have pled material facts concerning Defendants' active participation in a venture to traffic Plaintiffs from Cambodia to Thailand for the purpose of exacting forced labor in the seafood processing plants at issue. There is simply no such requirement under 18 U.S.C. §1595(a). In 2008, the TVPRA was amended to extend civil liability to those who "knowingly benefit" from the trafficking of persons in their supply chains. *See* 18 U.S.C. §1595(a). It is clear from the text, the context and purpose that the amendment was meant to expand liability beyond those who directly participated in the trafficking. The amendment also reflects an understanding of the operation of

global supply chains, which are highly complex networks of business relationships, and that holding persons or enterprises accountable at the top end of those supply chains under existing legal theories was (and continues to be) extremely difficult. The amendment to § 1595(a) of the TVPRA gave trafficking victims a new tool to hold persons liable regardless as to whether they can be shown to have caused or contributed to that violation.

Second, the amendment to § 1595(a) of the TVPRA was meant to incentivize U.S.-based entities to carry out due diligence to ensure that the goods that they procure and then sell in the U.S. market are not the fruit of trafficking in persons. For years, reports of widespread human trafficking in Thailand generally and in the Thai seafood industry specifically have been publicly available. The institutional weakness of Thai labor inspection and enforcement has also been well documented, including in the seafood industry. And, there is abundant literature that infrequent industry audits of the kind relied on by defendants are ill suited to actually detect worker rights violations beyond the most visibly obvious – such as health and safety violations. That defendants relied on notoriously poor means of detecting worker rights violations in their supply chain, when they should have been well aware of their inherent limitations, does not allow them now to argue now that they were ignorant of the facts. The fact that a "tainted" shipment of shrimp was returned once the trafficking was publicized worldwide is further evidence of liability.

If the Order by the U.S. District Court for the Central District of California were to stand, it would strike a major blow to global efforts against trafficking in persons by eliminating one of the few effective means to combat trafficking and would eliminate an important incentive to business enterprises to ensure that such heinous conduct does not continue.

ARGUMENT

I. THE DISTRICT COURT DOES NOT APPRECIATE THE OPERATION OF GLOBAL SUPPLY CHAINS

The modalities of global production have evolved significantly in recent decades. In the past, multinational enterprises (MNEs) established wholly-owned subsidiaries overseas in order to access (cheaper) sources of labor and, often, local consumer markets. *See*, ILO, *Decent Work in Global Supply Chains*, 6 (2016).[1] The goods were produced by the subsidiary's workforce, which it supervised, and exported the goods in intra-firm trade to the parent company for sale in the home market or at times in other regional or international markets. *Id.* In the 1980s, with technological advances in telecommunications and investments in infrastructure and transportation, developing countries started to develop their own export-oriented industries. To do so, they offered incentives to attract more investment, including

[1] The International Labor Organization (ILO) is a specialized agency of the United Nations which sets labor standards globally and develops policies and programs to promote decent work.

setting up low-cost export processing zones. *Id.* MNEs began to shift from investing in their own production capacity to outsourcing that production to locally-based manufacturers and then purchasing those goods through commercial relationships. *Id.* at 6-7. Today, a dominant mode of global production is one led by a lead firm, *e.g.* a consumer brand, which sells the end-product to the consumer. The lead firm itself no longer produces anything, but rather coordinates the production of branded goods through a network of contracts that contain terms including price, product specifications, quality assurances, and in some cases labor standards. *Id.* at 5.

In this shift to buyer-driven global production, MNEs gained significant market leverage by being able to pit companies and countries against each other in intense global competition on price and volume. MNEs can and do shift orders between suppliers and indeed between countries in search of lowest costs – among other factors. At the supplier level, the purchasing practices of the MNE, including intense price pressures and demands for rapid turn-around times, has encouraged local suppliers already on a tight margin to suppress workers' rights to keep wages low, to hire workers through third-party labor contractors, or to subcontract parts of their production to smaller firms where wages and working conditions were even worse. *Id.* at 7.

As the ILO explained,

> Although a global buyer may own few, if any, of the factories producing its sourced products, the sheer volume of its purchases grants

> it substantial bargaining power in an asymmetrical market relationship where the buyer can negotiate prices and specify what, how, when, where and by whom the goods it sells are produced. In a cascade of subcontracting relationships, supplier firms may seek to extract further price concessions from their own suppliers and subcontractors down the supply chain. In order to respond to the threefold demands for low costs, high quality and speedy delivery, subcontractors often adopt highly flexible production and work patterns, including informality, piece-rate production, home-based work and non-standard forms of employment. *Id.* at 11.

At the same time, national labor authorities have been unsuccessful in preventing labor rights abuses in enterprises linked to global supply chains or in sanctioning employers/providing a remedy to workers once the labor law is violated. In many countries (including Thailand), labor administration and labor inspection are severely understaffed, and inspectors are not provided the resources necessary to perform their work, including basics such as transportation and computers. *See*, ILO, *Workplace Compliance in Global Supply Chains*, 8 (2017). Labor ministries receive a small fraction of the national budget and nowhere close to what is necessary to create a culture of compliance. The low pay and priority afforded such jobs also create incentives for corruption. *See* ILO, *The Global Challenges of Labour Inspection*, Labour Education 2005/3-4, Nos 140-141, VII (2005). ("If a government assigns low status to labour inspection, if the inspectorate is understaffed and undertrained and the inspectors' own employment conditions are deplorable, then they will not be in a position to carry out their tasks properly. And they will easily fall prey to corruption.").

In some cases, local suppliers or their subcontractors, directly or through labor brokers, engage in forced labor as a means of lowering their costs. *See* ILO, *Workplace Compliance in Global Supply Chains*, 22 (2017). Indeed, the ILO has found that the majority of forced labor worldwide takes place in the private economy – including in enterprises participating in global supply chains. *See* ILO, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, 54 (2017). The ILO estimated that in 2016 alone, 16 million people were victims of forced labor by private actors. *Id.* at 10. These victims experienced multiple forms of coercion, including debt bondage,[2] to prevent them from being able to remove themselves from forced labor situations. *Id.* at 10. The use of forced labor is highly profitable, with victims of forced labor exploitation generating roughly $51 billion per year. *See* ILO, *Profits and Poverty: The Economics of Forced Labor*, 13 (2014). This heinous practice is allowed to thrive due to government inaction at the local level and failures of corporate governance by MNEs. This is in fact what happened in the case of the Thai shrimp industry, as explained in Section III.

In the 1990s, as a result of pressure from labor and consumer groups, MNEs adopted various forms of self-regulation including corporate codes of conduct. These codes were included in contracts between the buyer and supplier, requiring

[2] Debt bondage is a form of forced labor in which a person's labor is demanded as means of repaying a loan, trapping the individual into working for little or no pay until the debt is repaid.

the latter to comply with a set of minimum labor standards and to allow for compliance audits. These workplace audits, which are typically conducted by the firm itself, a third-party auditing firm retained by the firm or the supplier, or through an industry-funded multi-stakeholder initiative, have been plagued by problems including lack of competence, slipshod methods and conflicts of interest.[3] As a result, these programs have been unable to encourage compliance with labor rights or to remediate violations when they occur.[4] Indeed, as authorities in this field have stated, "there is a growing consensus, at least among social scientists, that codes of conduct and auditing programs have failed to eliminate, or perhaps even substantially reduce, incidents of labor violations in global supply chains." *See* Mark Anner, Jennifer Bair & Jeremy Blasi, *Towards Joint Liability in Supply Chains: Addressing the Root Causes of Labor Violations in International Subcontracting Networks*, 35 Comp. Lab. L. & Pol'y J. 1, 5 (2013).

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[3] *See, e.g.*, Stephanie Clifford and Steven Greenhouse, *Fast and Flawed Inspections of Factories Abroad*, NYTimes, Sept. 2, 2013.

[4] For example, a fire in 2012 claimed the lives of nearly 300 workers of the Ali Enterprises garment factory in Pakistan which had previously been "certified" by multiple industry initiatives as compliant with their codes of conduct. *See* Declan Walsh and Steven Greenhouse, NYTimes, *Certified as Safe, a Factory in Karachi Still Quickly Burned*, Dec. 2, 2012. Weeks later, the Tazreen garment factory in Bangladesh, which had also been repeatedly inspected by private auditors, caught fire killing 112. While the auditor had detected violations, it did not recommend closure of the factory. *See* Steve Henn, National Public Radio, *Factory Audits and Safety Don't Always Go Hand In Hand*, May 1, 2013.

Subsequently, guidelines including the 2011 UN Guiding Principles on Business and Human Rights, were developed to indicate the responsibilities of business enterprises for the violations which may take place in their supply chains, including forced labor. *See* Special Representative of the Secretary-General, *Report on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, by John Ruggie, U.N. Doc. A/HRC/17/31 (March 21, 2011). All enterprises are expected to respect human rights, and Principle 13 explains that this requires them to "avoid causing or contributing to adverse human rights impacts through their own activities" and "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts." *Id*. at 14. Additional measures, such as the OECD's Guidelines for Multinational Enterprises, recently amended in light of the UN Guiding Principles, similarly articulate the responsibilities of MNEs and provide a forum whereby "complainants" can submit claims of human rights violations and seek a remedy – an opportunity to engage with the MNE involved and to seek a mediated resolution. OECD, *OECD Guidelines for Multinational Enterprises* (2011). However, these guidelines are nonbinding and MNEs have no legal obligation to participate in any of these complaints processes.

II. THE TVPA WAS AMENDED BY THE TVPRA OF 2008 IN ORDER TO OVERCOME OBSTACLES TO LIABILITY IN SUPPLY CHAINS

A. THE LEGISLATIVE HISTORY CLEARLY INDICATES THAT CONGRESS INTENDED TO REACH THE CONDUCT HERE

MNEs may be linked to trafficking in persons for forced labor through the business relationships in their supply chains and in some cases may contribute to it through their purchasing practices. However, "[p]rior to initial passage of the Trafficking Victims Protection Act of 2000, no domestic legal regime was well-suited to criminalize and create liability for labor trafficking occurring abroad or to hold multinational corporations accountable if they benefitted from, but did not directly commit, human rights violations." Laura Ezell, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 Vand. L. Rev. 499, 501 (2016). Litigants seeking to hold MNEs responsible for trafficking violations caused by their business relationships would have had to rely on theories of vicarious liability or joint employment, which are limited and extremely difficult to use. Were a foreign supplier to engage in trafficking for forced labor, a plaintiff would need to establish sufficient corporate control or authority to establish an agency relationship and then establish the culpability of the agent in a distant country – a very difficult task. *See* Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*,

35 Hous. J. Int'l L. 255, 272-277 (2013). Thus, in most cases, unless a lead firm in a supply chain was directly involved in trafficking, it could avoid civil or criminal liability.

Testifying before the Senate Foreign Relations Committee in 2000, then-Chief of Staff of the Civil Rights Division of the Dep't of Justice, William Yeomans, explained that the then-proposed Trafficking Victims Protection Act of 2000 was necessary "to create the tools to prosecute those who knowingly profit from the forced labor of persons held in unlawfully exploited labor conditions. Present criminal law does not reach, for example, farm labor contractors and other types of employment relationships that provide a liability shield between the direct oppressor and the economic beneficiary of slave labor." *International Trafficking in Women and Children: Hearing Before the Subcomm. on Near Eastern and South Asian Affairs of the S. Comm. on Foreign Relations*, 106th Cong. 78 (2000). (statement of William Yeomans, Chief of Staff, Civil Rights Div., U.S. Dep't. of Justice). In his written testimony, Mr. Yeomans explained further that "In order to combat criminal worker exploitation, it is necessary to punish those who knowingly benefit or profit from slavery or use contractors, intermediaries, and others to do their bidding." *Id.* at 80. Though his example concerns domestic actors, the logic is identical in the context of global supply chains.

The gap that Mr. Yeomans identified in the Trafficking Victims Protection Act of 2000 was filled with the passage of the TVPRA of 2008. *See* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, 18 U.S.C. §§ 1581-1597, § 1595(a) [hereinafter "TVPRA of 2008"]. The 2008 reauthorization was passed with the relationship between trafficking, forced labor and the global supply chain clearly in mind. As the Background and Purpose for the Legislation of the bill stated, "Trafficking in Persons represents an emerging and dangerous abuse of the increasingly interconnected nature of the international economic system. In this sense, it has often been referred to as 'the dark side of globalization.'" H.R. REP. NO. 110-430, at 33 (2007). The U.S. Congress included this new language to "enhance[] the civil action by providing that an action is also available against any person who knowingly benefits from trafficking." H.R. REP. NO. 110-430, at 55 (2007). Following the amended reauthorization, a firm could be held liable for financial benefit accrued from business relationships, including those abroad, where the corporation knew or should have known that the other party employed trafficked labor. As such, "[t]he language of the 2008 TVPRA eclipses the need for complicated legal theories of vicarious liability or joint employment to hold corporations accountable for actions of their suppliers[.]" *Ezell*, 69 Vand. L. Rev. at 528.

It is important to underscore that members of Congress, on a bipartisan basis, have regularly emphasized the global nature of the problem of labor trafficking overseas and the importance of the U.S. taking leadership to tackle the problem. For example, in 2004, then-Chairman of the Subcommittee on Human Rights and Wellness of the U. S. House Committee on Government Reform, Rep. Dan Burton (R-IN), explained,

> Trafficking in persons is a highly profitable subset of organized crime accounting for an estimated $13 billion in revenues every year to the global economy[.] Because of the enormous profitability of this industry, slave holders will stop at nothing to traffic as many slaves as possible by tricking and victimizing innocent people into lives of servitude by preying on the most economically disadvantaged members of society. As soon as victims are deprived of the opportunity to return to their homes, they are forced into domestic servitude, sweatshop labor, prostitution and other types of compulsory labor. *Trafficking in Persons: The Federal Government's Approach to Eradicate this Worldwide Problem: Hearing Before the Subcomm. on Human Rights and Wellness of the H. Comm. on Gov't Reform*, 108th Cong. 2 (2004). (statement of Rep. Dan Burton, Chairman, H. Comm. on Gov't Reform).

In 2010, Rep. Howard Berman (D-CA), then Chairman of the House Committee on Foreign Affairs again urged continued efforts to combat labor trafficking, explaining,

> Trafficking encompasses many types of exploitative activities, including sex trafficking, slavery, forced labor, peonage, debt bondage, involuntary domestic servitude, and making children into soldiers…. We have reauthorized the Trafficking Victims Protection Act several times and, in the process made the act much more effective in protecting the most vulnerable and punishing the guilty…. But trafficking remains a persistent problem, and many challenges remain—both at home and

> abroad—as we look to the next decade of anti-trafficking efforts. *Out of the Shadows: The Global Fight Against Human Trafficking: Hearing Before the H. Comm. on Foreign Affairs*, 111th Cong. 1-2 (2010). (statement of Rep. Howard Berman, Chairman, H. Comm. on Foreign Affairs).

B. THE DISTRICT COURT ERRED IN INCORPORATING A RICO STANDARD, NAMELY THAT A PARTY MUST "OPERATE OR MANAGE" SOME PART OF A VENTURE'S CRIMINAL ACTIVITY TO HAVE "PARTICIPATED IN A VENTURE" UNDER THE TVPRA OF 2008

The U.S. District Court for the Central District of California erred in holding that Plaintiffs must have plead material facts establishing not only that U.S. Defendants were in a business relationship with the Thai Defendants, but that U.S. Defendants "operated and managed" a venture for the purpose of trafficking for forced labor. The "operation or management" test, derived from RICO, is wholly inappropriate for determining liability under the TVPRA because (1) the "operation or management" test contradicts the TVPRA's plain text; (2) the "operation or management" test ignores that Congress added the TVPRA's "knowing beneficiary" language specifically to impose liability on those who benefit from, but do not commit or aid and abet, trafficking crimes; and (3) using the "operation or management" test would render the TVPRA's civil remedy meaningless in the context of global supply chains.

1. RICO's "operation or management" test contradicts the TVPRA's plain text

RICO's "operation or management" test contradicts the TVPRA's plain text because the TVPRA does not include the language in RICO from which the test derives. Court's derived the "operation or management" test from § 1962(c) of RICO, which imposes liability on anyone that "conducts, or participate[s] . . . in the conduct" of an enterprise that commits crimes under RICO. *See Reves v. Ernst & Young*, 507 U.S. 170, 178-79 (1993). The Supreme Court, in interpreting the "conducts, or participate . . . in the conduct" of an enterprise language, distinguished between participating in an enterprise, conducting an enterprise, and participating in the *conduct* of an enterprise. *Id.* at 179 ("Once we understand the word "conduct" to require some degree of direction and the word "participate" to require some part in that direction, the meaning of § 1962(c) comes into focus."). The court reasoned that participation in an enterprise means merely being a part of an enterprise in some way, while participation in the conduct of an enterprise means taking part in *conducting* the enterprise—with conducting meaning to operate or manage. *Id.* Thus, it is from the word "conduct" in "conduct, or participate . . . in the conduct" of an enterprise that RICO's "operation or management" test is derived. The word conduct, however, was not included in § 1595 of the TVPRA. Rather, the TVPRA merely requires "*participation in a venture*,"—not conducting a venture, nor

participation in the conduct of a venture—in order for a party to be liable. 18 U.S.C. § 1595(a). Because the TVPRA omits the very word from which RICO's "operation or management" test derives, the plain text of the statute requires that liability under the TVPRA be broader than under RICO's "operation or management" limit.

2. *The "operation or management" test also ignores that Congress added the TVPRA's "knowing beneficiary" language specifically to impose liability on those who benefit from, but do not commit or aid and abet, trafficking crimes.*

Congress added the TVPRA's "knowing beneficiary" language specifically to impose liability on those who knowingly benefit from, but do not commit or aid and abet, trafficking crimes. In 2008, the "knowing beneficiary" language was added to the TVPRA in two places, the criminal statute for forced labor, 18 U.S.C. § 1589(b), and the civil remedy, 18 U.S.C. § 1595. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. 110-457, §§ 221(2), 222(3) (2008).

With respect to the criminal provision, prior law, set out in 18 U.S.C. § 1589, punished, first, anyone who "knowingly provides or obtains [forced] labor or services." But prior law, when read in conjunction with the criminal code's general aiding and abetting statute, 18 U.S.C. § 2, *also* punished anyone who was an *accomplice* to someone who provided or obtained forced labor—that is anyone who "aid[ed], abet[ted] … induce[d] or procure[d]" a violation of 18 U.S.C. § 1589.

Aiding and abetting principles expand criminal liability beyond the individual who physically commits a substantive offense, reaching anyone who "(1) takes an affirmative act in furtherance of that offense, (2) with the intent of facilitating the offense's commission." *Rosemond v. United States*, 134 S. Ct. 1240, 1245 (2014). Applying these principles in *Bozza v. United States*, 330 U.S. 160 (1947), the Supreme Court upheld a conviction for aiding and abetting the evasion of liquor taxes because the defendant "actively help[ed] to *operate* a secret distillery," knowing the business was set up to violate Government revenue laws. *Id.* at 165 (emphasis added).

Nevertheless, aiding and abetting principles are *not* generally understood as extending far enough to reach those whose connection to a criminal offense only involves transacting business with the perpetrator from the outside, even when the person transacting business knows or suspects the perpetrator's criminal intent. *See, e.g.*, *United States v. Giavonetti*, 919 F.2d 1223, 1227 (7th Cir. 1990) ("it is not the law that every time a seller sells something that he knows will be used for an illegal purpose he is guilty of aiding and abetting"); *see also Rosemond*, 134 S. Ct. at 1249 n. 8 (noting that the Supreme Court's aiding and abetting jurisprudence has not addressed cases involving "defendants who incidentally facilitate a criminal venture rather than actively participate in it," such as a case involving "the

owner of a gun store who sells a firearm to a criminal, knowing but not caring how the gun will be used.").

Against this backdrop, the meaning of the TVPRA's 2008 expansion of criminal liability comes into sharper focus. Whereas the pre-2008 version of § 1589, as noted, punished only a person or entity who "knowingly provides or obtains [forced] labor or services," the 2008 amendment added a new subsection (b), which punishes "[w]hoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by [force] … knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by … such means." Under prior law, as we have seen, the aiding and abetting principles applicable to the entire United States criminal code, including § 1589, already would have punished a person who went beyond transacting business with a company known to illegally employer forced labor and actually *participated in the operation or management* of such a company. That is the lesson of the *Bozza* decision discussed *supra.* Thus, the new "knowingly benefits" subsection added to § 1589 in 2008 must go beyond expressing traditional aiding and abetting principles in order to avoid rendering the 2008 amendment superfluous. And, naturally read, that new subsection *does* go beyond those principles by extending liability to those who, without assisting the operation

or management of the particular business directly engaged in employing forced labor, nevertheless knowingly participate in, and knowingly profit from, the broader venture of trafficking in goods produced through forced labor at the bottom of a supply chain, where they know, or are in reckless disregard of, the fact that forced labor was indeed used to produce those goods.

Because the 2008 amendment to the *criminal* provision addressing forced labor cannot properly be limited in the manner suggested by the District Court to require a showing of actual participation in the management or operation of the company directly engaged in employing forced labor, it is a straightforward matter that the 2008 amendment to the *civil* provision directly at issue here also cannot be so limited. That is because the amendment to the civil provision, set out in 18 U.S.C. § 1595(a), adopts *verbatim* the "knowingly benefits" language from the criminal provision. *Compare* 18 U.S.C. § 1595(a) (extending civil liability to "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 such in a forced-labor offense) *with* 18 U.S.C. § 1589 (b) (extending criminal liability to "[w]hoever knowingly benefits, financially or by receiving anything of value, from participation in a venture" which that person knew or recklessly disregarded was engaged in a forced-labor offense). *See also Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1723 (2017) (noting a "usual

presumption that identical words used in different parts of the same statute carry the same meaning").

Moreover, the 2008 amendments were passed with an eye toward the relationship between trafficking, forced labor and the global supply chain. *See* H.R. Rep. No. 110-430 at 33 ("Trafficking in persons represents an emerging and dangerous abuse of the increasingly interconnected nature of the international economic system. In this sense, it has often been referred to as the dark side of globalization.") (internal citations omitted). For example, the amendments included extending the reach of the TVPRA's jurisdiction to crimes committed abroad by US-based companies. TVPRA of 2008 § 223(a) (codified at 18 U.S.C. § 1596). That broader jurisdictional reach reinforces the proposition that Congress was seeking to make American firms, which typically were not actually committing their own forced-labor violations overseas but rather knowingly benefiting from foreign firms' violations, accountable for their conduct as knowing beneficiaries. So too does the legislative history specifically addressing the new "knowing beneficiary" language added to both the criminal and civil provisions. H.R. Rep. No. 110-430 at 55 (noting the new language "enhances the civil action by providing that an action is also available against any person who knowingly benefits from trafficking."). That legislative history is not consistent with the District Court's view that only persons

who assist in the actual operation or management of a company that engages in forced-labor violations can be held responsible.

3. Using RICO's "operation or management" test would render the TVPRA's civil remedy meaningless in the context of global supply chains

Using RICO's "operation or management" test would render the TVPRA's civil remedy meaningless in the context of global supply chains. RICO's "operation or management" test was developed by courts to focus liability on those most responsible for organized crime: the leadership of criminal organizations. However, because of differences in how criminal organizations and supply chains operate, if used in the supply-chain context, it would do the opposite—insulating those most responsible for forced labor from liability.

Section 1962(c) of RICO, from which the "operation or management" test derives, was designed to prohibit the operation of a criminal enterprises, or legitimate enterprises through a pattern of criminal activity. *See, e.g.*, *Reves*, 507 U.S. at 180-83; Gerard E. Lynch, *RICO: The Crime of Being a Criminal*, 87 Colum. L. Rev. 661, 672 (1987). The initial purpose of the "operation and management" test was to differentiate between organized crime and petty crime in order to focus RICO liability on those most responsible for organized crime—the leaders of criminal enterprises. *Reves*, 507 U.S. at 182-83 ("It is clear . . . that Congress did not intend RICO to extend beyond the acquisition or operation of an enterprise."). It was later applied to insulate from liability those who, for non-criminal reasons, associated

with criminal enterprises or businesses infiltrated by organized crime. *U.S. v. Oreto*, 37 F.3d 739, 750 (1st Cir. 1994), *cert. denied*, 513 U.S. 1177 (1995).

As the legislative history of RICO notes, organized crime has "structures as complex as . . . any large corporation, subject to laws more rigidly enforced than those of . . . government, . . . [a]n entity with particular members, a defined hierarchy, and even an official name." *See* Lynch, 87 Colum. L. Rev. at 667-68. As the cases cited by the lower court's order demonstrate, this also makes sense under the TVPRA where the "venture" at issue is a criminal enterprise. In *Bistline v. Jeffs*, the court used the "operation or management" test to find that the lawyer for a largely criminal venture that engaged in forced labor could not be held liable merely for providing legal assistance to the venture. Case No. 2:16–CV–788 TS, 2017 WL 108039 at 28-29 (D. Utah Jan. 11, 2017). In *U.S. v. Afyare*, the court applied the test to hold that a defendant's mere association—little more than riding in a car together—with gang members that engaged in sex trafficking could not lead to criminal liability for sex trafficking. 632 Fed. Appx. 272, 279, 286 (6th Cir. 2016). Accordingly, such cases often also involved RICO claims, because RICO allows criminal ventures to be held liable for violations of the TVPRA.

However, lead firms arrange and structure supply chains through the exercise of disproportionate bargaining power in otherwise arms' length transactions. As such, RICO's "operation or management" test would produce the opposite of its

intended effect. Rather than focus liability on the leadership of a venture for the crimes that venture commits, it would effectively insulate lead firms from ever being held liable for the crimes committed by the supply chains they create. This would render the TVPRA's civil remedy meaningless in the context of global supply chains. This is certainly not the result that the drafters of the TVPRA had intended.

III. DEFENDANTS SHOULD HAVE KNOWN OF THE EXTREME RISK OF TRAFFICKING IN PERSONS FOR FORCED LABOR

Thailand has long been notorious for trafficking in persons in the commercial fish and shrimp industry. The issue was raised in the U.S. Government's premier publication on the matter, the U.S. Dep't of State's Trafficking in Persons Report, starting in 2006 and in every subsequent report.[5] Since 2008, the U.S. Dep't of Labor has also warned of the prevalence of forced labor or child labor in the shrimp industry, and Thai shrimp still remains on its list of goods made with forced or child labor.[6]

In addition to official sources, all available on the internet, human rights and labor rights NGOs have published reports since 2008 detailing forced labor and other abuses in the very areas from which Defendants sourced shrimp. Among the first of

[5] The complete collection of the U.S. Dep't of State's Trafficking in Persons Reports are available online at https://www.state.gov/j/tip/rls/tiprpt/

[6] The reports of the U.S. Dep't of Labor, International Labor Affairs Bureau concerning child labor and forced labor in Thailand are available online at https://www.dol.gov/agencies/ilab/resources/reports/child-labor/thailand

these was the *The True Cost of Shrimp*, which in great detail explained the process by which workers were trafficked for forced labor into Thailand in the commercial seafood industry. *See* Solidarity Center, *The True Cost of Shrimp* (2008). That report explained that Thai and Burmese labor brokers, complicit authorities, and employers were involved in a complex system to traffic workers into Thailand. *Id.* at 21. It is a problem that also affected the entire industry, as the authors found that, "Though international business partnerships are constantly changing, labor exploitation in the shrimp industry is clearly pervasive and touches every organization involved." *Id.* at 8. The report also explained that workers caught up in trafficking lacked meaningful legal recourse. This is due to corruption of local authorities, who are sometimes complicit in trafficking, and courts that allow cases to be delayed indefinitely. *Id.* at 24.

The report garnered significant attention by national media upon release, *see, e.g.*, CNN, *Report Alleges Abuse in Asia Shrimp Industry*, April 23, 2008,[7] and led then-Senator Mary Landrieu to call for an embargo on the import of Thai shrimp based on the report's findings. *See*, Associated Press, *Report: Abuse Plagues Foreign Shrimp Ops*, April 29, 2008 (reporting that Senator Landrieu "asked President Bush to immediately embargo imports of processed shrimp from Thailand

[7] See also, Paul Eckert, Reuters, *Shrimp Industry Blasted for Modern-Day Slavery*, April 23, 2008; Bo Petersen, *The True Cost of Shrimp*, The Post and Courier, April 25, 2008.

and Bangladesh"). The report also provoked immediate responses from the U.S. and Thai shrimp industry–usually downplaying the extent of the problem. *See, e.g.*, IntraFish Media, *ACC Disputes Lack of Enforcement Claim,* April 28, 2008.

This report was followed by others by human rights organizations, confirming the findings. In 2010, Human Rights Watch issued a lengthy report on labor exploitation in Thailand, including forced labor in the seafood industry. *See* Human Rights Watch, *From the Tiger to the Crocodile: Abuse of Migrant Workers in Thailand* (2010). In 2012, the ILO-IPEC launched a program, "Combating the Worst Forms of Child Labour in Shrimp and Seafood Processing Areas in Thailand" to survey primary processing facilities in Samut Sakhon to find ways to best address the problem. It would have been impossible to have been a major importer of shrimp from Thailand and not be aware of the serious risks.

Defendants claim that they took adequate measures to ensure their suppliers were not using forced labor by engaging third party auditors. As explained above, while some audits are better than others, there is a near consensus that such audits fail to meaningfully detect labor violations. And, as Defendants acknowledge, even in the face of extremely high risks of forced labor, they never once visited the processing plants to check for themselves.

IV. CONCLUSION

For all of the aforementioned reasons, Amici respectfully submit that the December 21, 2017 Order of the U.S. District Court for the Central District of California granting Defendants' Motion for Summary Judgement should be reversed and remanded for further consideration.

DATED: June 1, 2018

Respectfully submitted,

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s/ Eli Naduris-Weissman
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 28(a)(10) and 32(a)(7)(C), I hereby certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,125 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), per the computer program used to prepare the Brief. 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 this brief was prepared in a proportionally spaced typeface using Microsoft Word, 14 point, Times New Roman typeface.

Dated: June 1, 2018

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9th Circuit Case Number(s) 18-55041

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