Case No.: 22-7104

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISSOUF COUBALY, *et al.*,
Plaintiffs-Appellants,

v.

CARGILL INCORPORATED, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court for the District of Columbia, Case No.: 1:21-cv-00386-DLF

PLAINTIFFS-APPELLANTS' OPENING BRIEF

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APPELLANTS' CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(A) **Parties and Amici.**

The following is a list of all parties, intervenors, and amici who have appeared before the district court, and all persons who are parties, intervenors, or amici before this Court:

Plaintiffs-Appellants

1. Issouf Coubaly
2. Sidiki Bamba
3. Tenimba Djamoutene
4. Oudou Ouattara
5. Ousmane Ouattara
6. Issouf Bagayoko
7. Arouna Ballo
8. Mohamed Traore

Defendant-Appellees

1. Nestlé, U.S.A.
2. Cargill, Incorporated
3. Cargill Cocoa
4. Barry Callebaut USA LLC
5. Mars, Incorporated
6. Mars Wrigley Confectionary
7. Olam Americas, Inc.
8. The Hershey Company
9. Mondelēz International, Inc

Appellants are not aware of any other persons who are parties, intervenors, or amici in this Court or the district court.

(B) **Rulings Under Review.**

This appeal is from the Order (ECF No. 44) and Memorandum Opinion (ECF No. 45) of District Court Judge Dabney L. Friedrich entered on June 28, 2022, dismissing the referenced case as a Final Order.

(C) **Related Cases.**

There are no related cases within this Court of Appeals or any other court (whether federal or local) in the District of Columbia.

Respectfully submitted on this 24th day of August 2022,

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I. INTRODUCTION

Appellants are eight Malian nationals who allege undisputed facts of their traumatic experiences being trafficked as children from Mali and then enslaved and forced to perform hazardous work harvesting cocoa in Côte d'Ivoire. Complaint, Joint Appendix ("JA") 1, ¶¶ 127-48. They allege that they worked on plantations that were in a venture with and supplied cocoa to Appellees Nestlé, Cargill, Barry Callebaut, Mars, Olam, Hershey, and Mondelēz, seven multinational conglomerates that dominate all aspects of the world's cocoa production and chocolate sales. *See id*. ¶¶ 24-31, 154. Together, these companies control 70% of cocoa produced in Côte d'Ivoire. *Id*. ¶ 156. Appellants filed their Complaint alleging forced labor and trafficking against Appellees under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595 *et. seq*., and also brought common law claims for unjust enrichment, negligent supervision, and intentional infliction of emotional distress.

The TVPRA is a remedial statute designed to prevent and remedy trafficking and forced labor on a global basis. The statute authorizes civil suits against any person who "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 [forced labor under § 1589 or trafficking under § 1590]." 18 U.S.C. § 1595(a). Appellants' Complaint easily satisfied these elements, and Appellees'

Motion to Dismiss was based almost entirely on an implausible factual argument they improperly made in supporting their Motion. In challenging Appellants' standing to sue and in arguing they are not in a "venture," Appellees claimed they were mere purchasers of cocoa and are no more responsible for trafficked and forced child labor in their cocoa supply chains in Côte d'Ivoire than an innocent child choosing her favorite chocolate bar at the corner store.

Appellees asserted that if *they* could be liable, so could "any manufacturer, retailer, and even consumer—anyone who purchases cocoa or a cocoa-based product knowing of the possibility of unlawful labor conditions on foreign farms that are part of a global supply chain." ECF No. 27-1 (Memorandum in Support of Joint Motion to Dismiss), at 11. It is implausible to compare the liability of Appellees to an average consumer given decades of unmet promises made to the public and regulators by Appellees that they were working to eliminate illegal child labor in *their* cocoa supply chains involving *their* farmers, the very facts supporting that they were in a venture with their cocoa suppliers. Such a competing factual theory by Appellees on their own motion to dismiss should never be considered. As this Court held in *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015), "a complaint survives a motion to dismiss even '[i]f there are two alternative explanations, one advanced by [the] defendant and the

other advanced by [the] plaintiff, both of which are plausible.'" *Id*. at 1129 (quoting *Starr v. Baca,* 652 F.3d 1202, 1216 (9th Cir. 2011)).

Rather than evaluate the sufficiency of Appellants' allegations in stating a claim under Fed. R. Civ. P. 12(b)(6), however, the District Court dismissed the Complaint under Fed. R. Civ. P. 12(b)(1) based on the legally erroneous conclusion that Appellants lacked standing to sue because they failed to show that their injuries were "fairly traceable" to or caused by any of the Appellees. *See* Memorandum Opinion, JA at 115-119. In doing so, the District Court issued an unprecedented decision that, first of all, improperly imposed a more stringent causation requirement for Article III standing than for liability under the TVPRA. In addition, the District Court ignored binding law in this Circuit that in a standing analysis the merits of the underlying claim must be assumed to be meritorious to properly evaluate whether a plaintiff's claim clears the standing hurdle. Instead, the Court found that Appellants' theory of standing – that their injuries were fairly traceable to and caused by the section 1595(a) venture between Appellees and their cocoa suppliers, making the co-venturers, including Appellees, responsible for their injuries – could not be considered in the standing analysis because it was a "merits question." JA at 119.

As Appellants demonstrate herein, consistent with Congressional intent in establishing broad liability for venture beneficiaries in enacting the TVPRA,

virtually all TVPRA cases rely on co-venturer liability to reach parties like Appellees that benefit from an unlawful venture but get their co-venturers to do the dirty work of trafficking and/or enslaving child workers. Congress extended the reach of the TVPRA because of findings that liability for venture beneficiaries was a necessary tool to prevent and remedy trafficking and forced labor in the global economy. Appellants' allegations of venture liability establish both standing and that their claims should ultimately result in TVPRA liability for the Appellees. The District Court's decision creating an insurmountable standing barrier that effectively nullifies the possibility of venture liability in meritorious cases under the TVPRA is clear legal error and must be reversed.

II. STATEMENT OF JURISDICTION

Appellants' Complaint alleged violations of the TVPRA, 18 U.S.C. § 1595 *et. seq*., creating federal question jurisdiction under 28 U.S.C. § 1331. Appellants' Complaint further alleged common law claims based on diversity jurisdiction under 28 U.S.C. § 1332(a)(2). Appellants' common law claims also arise out of the same case or controversy as their federal claims and involve a common nucleus of operative facts, giving the District Court supplemental jurisdiction under 28 U.S.C. § 1367.

The case was dismissed by Final Order on June 28, 2022 (JA at 106), and Appellants filed a timely Notice of Appeal on July 22, 2022 (ECF No. 50). This Court has jurisdiction of this appeal under 28 U.S.C. § 1291.

III. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

The sole issue on appeal is:

Whether the District Court erred in finding that the Plaintiffs/Appellants lacked Article III standing to sue for any of their claims and dismissing all claims based on Fed. R. Civ. P. 12(b)(1).

IV. STATEMENT OF THE CASE

A. Procedural History

The operative Complaint in this case is Appellants' [Corrected] Complaint filed on February 18, 2021. JA at 1. On July 30, 2021, Appellees filed their Joint Motion to Dismiss (ECF No. 27) with a Memorandum in Support (ECF No. 27-1). On September 28, 2021, Appellants filed their Opposition to Joint Motion to Dismiss (ECF No. 33), and on November 19, 2021, Appellees replied (ECF No. 35).

Without holding any hearing, the District Court issued a final order dismissing all of Appellants' claims on June 28, 2022 (JA at 106), along with a Memorandum Opinion (JA at 107). Plaintiffs filed their timely Notice of Appeal on July 22, 2022 (ECF No. 50).

B. Factual Background

While the standing decision at issue on this appeal is a pure question of law, some background facts put the case in context. The eight Appellants, Issouf Coubaly, Sidiki Bamba, Tenimba Djamoutene, Oudou Ouattara, Ousmane Ouattara, Issouf Bagayoko, Arouna Ballo, and Mohamed Traore, are all former enslaved children of Malian origin who were trafficked from Mali and forced to cultivate and harvest cocoa beans on farms in Côte d'Ivoire. Complaint ¶¶ 2, 127-48.

Appellees are seven global cocoa giants that control the world's cocoa market: Nestlé, Cargill, Barry Callebaut, Mars, Olam, Hershey, and Mondelēz. *Id.* ¶¶ 1, 156. As Appellants and many others have documented, these companies have knowingly profited from the forced labor of children, including the eight Appellants, harvesting their cocoa. The factual record is objective and clear; facing legislative and consumer pressure, these companies joined together and successfully converted a pending law that would have regulated cocoa imports

made with child labor to a voluntary initiative called the Harkin-Engel Protocol ("the Protocol").[1] *Id*. ¶ 52. The major chocolate companies, including Appellees, signed the Protocol and admitted their cocoa supply chains used the "worst forms of child labor," specifically including forced child labor. Protocol at 11, Art. 3. They promised to develop by 2005 an industry-wide system of monitoring and certification to assure such child labor was not used in their cocoa production. *Id*. at 3. In signing the Protocol, they admitted the cocoa production system they had established, supported, and benefitted from was fundamentally dependent on child labor. *See, e.g.*, Complaint ¶¶ 49-53.

Rather than fulfill their pledge, the cocoa sector, led by Appellees, *id*. ¶¶ 54, 55, 61, 111, 120, 154-58, did nothing to stop their use of forced child labor and gave themselves ***four*** extensions of time, last claiming in 2019 that they will "reduce by 70%" their use of the "worst forms of child labor" by 2025. *Id*. ¶ 53. Not only did they fail to make progress, but Appellees allowed the situation to get worse for the children. During the 20-plus years since Appellees pledged to end child labor in their cocoa harvesting systems, a University of Chicago study funded by the U.S. Department of Labor found in 2020 the prevalence of forced child

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[1] Available at: https://www.dol.gov/sites/dolgov/files/ILAB/legacy/files/Harkin_Engel_Protocol.pdf

labor in cocoa harvesting has ***increased*** since 2001, and there were 1.58 ***million*** children harvesting cocoa in Côte d'Ivoire and Ghana. *Id.* ¶ 1.

Appellees have been collaborating with each other and within the formal structures of the World Cocoa Foundation they created to present a joint response and mislead the public about the fact that the worst forms of child labor, including forced child labor, remain present, if not common, in their cocoa supply chains. *Id.* ¶¶ 54, 55, 61, 111, 120, 154-58. While pointing to their sham "policies," Appellees continue to profit from the forced labor of children harvesting cocoa for them and denying, at least in court, any responsibility for this acute form of child abuse. *Id.* ¶¶ 1, 39, 53, 55, 70, 71, 82-84, 89, 94, 99, 101, 112, 113, 115, 123-24.

Appellees did not need to ***form*** a venture with their cocoa plantations to traffic and enslave children; they already had that system in place. They instead formed a venture with the cocoa farmers to protect that system and prolong their ability to profit from the worst forms of child labor. They avoided meaningful regulation by misrepresenting to the public and regulators that they would put in place new policies and end their reliance on child labor. *Id.* ¶¶ 22, 45, 49-55, 85, 96, 104, 112-15, 123-24, 154-58. Throughout the 21 years since Appellees signed the Protocol, they have done little to change their system of cocoa production that remains dependent on child labor. *Id.* ¶¶ 39, 50, 54, 55, 70-71, 82-84, 96, 111, 154-58. Instead, Appellees acted collectively within their venture to mislead consumers

and regulators so that they could continue protecting the illegal practices of their co-venturers: the farmers using enslaved children to harvest cocoa for Appellees at prices kept low by slavery. *Id.* ¶¶ 47, 50, 52, 55, 59-61, 67, 69, 82-84, 89, 96, 99, 103, 104, 111-13, 120, 123.

V. STANDARD OF REVIEW

The sole legal issue raised in this appeal, whether Appellants satisfy the requirement for Article III standing to sue, raises an error of law by the District Court in interpreting and applying the standing doctrine and thus is reviewed by this Court de novo. *See Highmark Inc. v. Allcare Health Mgmt. Sys.*, Inc., 572 U.S. 559 (2014); *Price v. District of Columbia*, 792 F.3d 112, 113 (D.C. Cir. 2015).

VI. SUMMARY OF ARGUMENT

The District Court, in an unprecedented decision on Article III standing, held that Appellants lacked standing to sue because Appellee chocolate companies were indirect actors under the TVPRA and therefore did not cause Appellants' injuries. JA at 114-120. Appellees improperly attempted to dispute facts and argued below that they were not in a "venture" with each other or their cocoa plantation suppliers under TVPRA section 1595(a), and Appellants lacked standing to sue them as they could not have caused any injuries attributable to the venture. *See* ECF No. 27-1

(Memorandum in Support of Joint Motion to Dismiss), at 8-11, 14-18. These assertions are entirely implausible given Appellants' detailed allegations linking Appellees in a venture with their cocoa plantations. See section C, *infra*. Further, Appellees' competing factual argument should not be considered in the context of their own motion to dismiss. *See Banneker Ventures, LLC*, 798 F.3d at 1129.

In finding Appellants lacked standing, the District Court did not even reach whether Appellants had adequately alleged Appellees could be liable under the TVPRA as co-venturers and instead erected an insurmountable standing barrier that precluded assessing the merits to evaluate standing. *See* JA at 119-20. In this Circuit, the law is clear that, for standing purposes, a plaintiff's claims ***must be assumed to be meritorious***. *See, e.g.*, *Parker v. District of Columbia*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd sub nom.*, *District of Columbia v. Heller*, 554 U.S. 570 (2008). The District Court did not refer to the *Parker* line of cases and instead dismissed Appellants' assertion that standing in this case depended on the Congressional decision in passing the TVPRA to expand the statute to make beneficiaries of a venture liable with their co-venturers, the direct perpetrators. The District Court's standing roadblock precluded assessing the intended reach of the TVPRA and whether venture liability can establish causation for standing purposes.

The District Court acknowledged that Appellants' standing argument was premised on Appellees being in a venture with their co-venturers that were the direct perpetrators that trafficked and enslaved Appellants, but dismissed this as a "merits question" irrelevant to the standing analysis. JA at 119-20. In other words, the District Court erroneously found the Appellants lacked standing *regardless of* whether Appellees could be held liable under the TVPRA as co-venturers as Congress intended in expanding the statute to reach beneficiaries of a venture's unlawful acts. JA at 119-20. This was fundamentally in error because the standing doctrine cannot be used to erect a higher causation bar than the showing required for merits causation.

Virtually every TVPRA case relies on venture liability to reach parties, such as Appellees here, that support and benefit from the illegal acts of a venture but do not directly participate in trafficking the victims or forcing them to work. Had the District Court assumed the merits of Appellants' venture theory of liability as the *Parker* line of cases requires, or even taken their allegations as true, there should have been no question that Appellants had standing to sue because the 2008 amendments to the TVPRA were intended to reach Appellees as co-venturers and hold them legally responsible for their participation in the venture that enslaved Appellants.

Erroneously taking what should have been a routine avenue to standing off the table, the District Court then asserted without any basis that Appellants sought to dispense with "Article III's constitutional traceability requirement." JA at 119-20. Quite the contrary, Appellants never sought to avoid the causation requirement and instead established that ***Appellants' injuries are "fairly traceable" to the "venture,"*** and because of the text and intended scope of the TVPRA, Congress intended the law to reach Appellees as co-venturers. Not only does venture liability provide a viable path to standing in TVPRA cases, it is also a fundamental principal of law well beyond the TVPRA that aiders and abettors, co-conspirators, and co-venturers share equal responsibility and liability with those they pay to do their dirty work.

Misapplying the Supreme Court's ruling in *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 410 (2013), the District Court erroneously used that case to find that causation was too speculative. JA at 115, 119. The *Clapper* Court addressed whether the "injury-in-fact" requirement for standing was based on a "speculative chain of possibilities." *Id*. at 414. This analysis of *whether* there was any injury has nothing to do with the very different issue here of whether Appellants' undisputable, concrete, and serious injuries, *see* Complaint ¶¶ 127-48, are "fairly traceable" to Appellees' actions as co-venturers. In passing the 2008 amendments to the TVPRA extending the law's reach with section 1595 (a) to co-venturers in

civil cases, Congress acted to close a major gap in the law after determining that those who benefit from a venture engaged in trafficking and forced labor are, along with direct perpetrators, a joint cause of these heinous practices because they support and encourage them. Under the terms of the TVPRA, Appellees, as co-venturers, have the same status with respect to causation as the direct perpetrators of Appellants' injuries and are jointly and severally liable for the injuries regardless of whether they were "direct" actors as erroneously required by the District Court.

The District Court fundamentally erred in misapplying the standing doctrine in a way that precludes access to TVPRA remedies to the very victims of forced labor and trafficking the statute was designed to reach. Co-venturers like Appellees that benefit from the venture's wrongful acts but are not direct participants in the crimes are the precise target of the 2008 amendments to the TVPRA that created beneficiary liability in civil cases.

Even after acknowledging that Appellants alleged Appellees "'are the architects and defenders of the cocoa production system of Côte d'Ivoire,'" JA at 113 (quoting Complaint ¶ 154), the District Court erroneously immunized Appellees from liability despite their clear role as co-venturer beneficiaries that had a significant role in causing Appellants' injuries.

VII. ARGUMENT

Appellants Had Article III Standing to Sue Since Appellees, As Co-Venturers, Were Jointly Responsible Under the TVPRA for Their Venture Causing the Injuries to Appellants.

A. The Article III Standing Requirement.

There is no dispute that Constitutional standing requires that (1) the plaintiff has suffered an injury-in-fact, (2) which is fairly traceable to the challenged action of the defendant, and (3) which may be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Appellees did not dispute nor did the District Court address that Appellants easily satisfied the first and third requirements. Appellants suffered horrible concrete and indisputable injuries as child slaves who were trafficked from Mali to work on cocoa farms in Côte D'Ivoire. *See* Complaint ¶¶ 127-48. These injuries are redressable because when "one private party is injured by another, the injury can be redressed in at least two ways: by awarding compensatory damages or by imposing a sanction on the wrongdoer that will minimize the risk that the harm-causing conduct will be repeated." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 127 (1998).

The District Court's standing assessment was based entirely on the contested second element: traceability or causation. JA at 115. In finding Appellants had failed to establish causation with respect to Appellees, the District Court abused its

judicial authority and erred as a matter of law in unilaterally negating the fundamental beneficiary liability principles of the TVPRA. The District Court legally erred with an analysis that misapplied key Supreme Court precedents and resulted in a decision that, if upheld, would eliminate liability across the board for co-venturers, co-conspirators, and aiders and abettors if they did not have a ***direct*** role in injuring the plaintiff. Not only would this result upend major areas of established legal doctrine, but it would also be in direct conflict with the broad venture liability established by TVPRA section 1595(a) following clear and documented Congressional deliberation, as demonstrated in the next section.

B. The District Court Erred in Finding Appellants Lacked Standing to Sue Appellees When Their Injuries Were "Fairly Traceable" to the Venture Appellees Were Co-Venturers In and that Caused Appellants' Injuries.

Appellants asserted to the District Court what should have been accepted as a routine analysis – they satisfied the contested traceability element because they alleged with specificity that Appellees are in a "venture" with their cocoa suppliers under section 1595(a) of the TVPRA, and all of the co-venturers, including Appellees, caused the injuries suffered by Appellants. *See* ECF No. 33 (Opposition to Motion to Dismiss), at 15-27, 40-43. Venture liability obviates the need for Appellants to demonstrate individualized causation chains for each of the co-

venturers because they are jointly and severally liable for all acts of the venture. *Id.* at 41. The District Court acknowledged Appellants' theory of standing based on causation by the "venture" that Appellees were participants in, but then declined to consider it because "the defendants' liability under the TVPRA or the common law is a merits question." JA at 119.

One of the major accomplishments of the 2008 amendments to the TVPRA was the addition of section 1595(a) which authorizes civil suits against any person who "***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 [forced labor under § 1589 or trafficking under § 1590]." 18 U.S.C. §1595(a) (emphasis added). The legislative history is clear that extending liability to beneficiaries of a venture's unlawful acts was carefully considered and deliberately included by Congress. The benefit "from participation in a venture" language was originally enacted only in the criminal provision of section 1591 of the TVPRA. Congress omitted it from the civil TVPRA sections out of concern that the provision was too broad; the conferees

> agreed not to extend it to persons who benefit financially or otherwise from trafficking out of a concern that such a provision might include within its scope persons, such as stockholders in large companies who have an attenuated financial interest in a legitimate business where a few employees might act in violation of the new statute.[2]

[2] H.R. REP. NO. 106-939, at 101-02 (2000) (Conf. Rep.).

Eight years later, Congress ***reversed this decision*** and expanded the TVPRA in its 2008 amendments, adding section 1595(a) that establishes beneficiary liability in civil cases. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044. As one court observed, Congress created venture liability with section 1595(a) to "make it easier for victims of trafficking violations to bring civil suits" against multiple parties. *Plaintiff A v. Schair,* No. 2:11-CV-00145-WCO, 2014 WL 12495639, at *3 (N.D. Ga. Sept. 9, 2014).

The essence of section 1595(a) is that it establishes liability for mere knowingly benefitting from the wrongful acts of the "venture." *See, e.g.*, *M.A. v. Wyndham Hotels & Resorts, Inc.*, 425 F. Supp. 3d 959, 970 (S.D. Ohio 2019); *Bistline v. Parker*, 918 F.3d 849, 873 (10th Cir. 2019) (noting sections 1589 and 1595(a) do not limit liability under the TVRPA to primary offenders).

While Appellants agree with the District Court that "the defendants' liability under the TVPRA or the common law is a merits question distinct from the constitutional standing requirement," JA at 119, the Court's decision declining to consider the impact of Appellants' venture liability theory of causation under the TVPRA in assessing the "fairly traceable" element of standing was clear error. In declining to consider a venture theory of causation and instead requiring a showing that Appellees were "direct" actors, the Court necessarily imposed a stricter test of

direct causation for standing even though, as Appellants demonstrate in section C below, they easily establish Appellees' substantive liability under TVPRA section 1595(a).

As a fundamental matter, it is error "to raise the standing hurdle higher than the necessary showing for success on the merits." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). "[T]he fairly-traceable inquiry is much more forgiving than the merits-based, tort-causation inquiry." *Webb as next friend of K.S. v. Smith*, 936 F.3d 808, 814 (8th Cir. 2019). Indeed, this Court has "never applied a 'tort' standard of causation to the question of traceability." *Tozzi v. U.S. Dep't of Health & Hum. Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001). The District Court didn't even apply a "tort standard" of causation to the fairly traceable assessment, instead requiring direct causation only, thus eliminating the possibility of venture liability expressly established by Congress in section 1595(a) and common in other areas of tort liability.

The District Court for Massachusetts properly raised the alarm that to dismiss similar TVPRA claims for lack of standing would effectively "eliminate all forms of vicarious liability." *Merriam v. Demoulas*, No. 11-10577-RWZ, 2013 U.S. Dist. LEXIS 77600, at *11 (D. Mass. June 3, 2013). As the *Merriam* court explains, a theory of vicarious liability makes a plaintiff's injury "fairly traceable" to a defendant's wrongdoing:

> To establish standing, a plaintiff must show that his injury is "fairly traceable" to some conduct for which the defendant may be held liable. *Already, LLC. v. Nike, Inc*., 133 S. Ct. 721, 726, 184 L. Ed. 2d 553 (2013) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L. Ed. 2d 556 (1984)). ***But this causation standard does not require that the defendant personally commit the act that harms the plaintiff***. For instance, a plaintiff can have standing to sue a principal for acts committed by his agent. *See Socy' of Holy Transfiguration Monastery v. Gregory*, 689 F.3d 29, 57 (1st Cir. 2012) (citing Restatement (Third) of Agency § 7.04)). Likewise, a plaintiff can have standing to sue one conspirator for harms directly caused by the actions of a co-conspirator. *See Taylor v. Am. Chem. Council*, 576 F.3d 16, 34-35 (1st Cir. 2009). ***In such cases, Article III is satisfied because the plaintiff's injury is fairly traceable to acts for which the defendant may be held liable, even if the defendant did not directly cause or commit those acts. In other words, Article III's causation requirement does not eliminate all forms of vicarious liability.***

Id. at *10-11 (dismissing, ultimately, claims against the defendants that challenged constitutional standing on other grounds) (emphasis added).

Merriam appears to be the only reported TVPRA-specific case confirming what should be the indisputable point that a plaintiff has standing to sue indirect actors because they are expressly liable under the statute that Congress specifically extended with the 2008 amendments to include beneficiary liability for co-venturers. This basic concept is consistent with an unbroken line of cases in other areas routinely finding standing when indirect actors are nonetheless legally liable for the injury to plaintiffs based on vicarious liability. For example, in *Rolan v. Atl. Richfield Co.*, plaintiffs brought cost recovery claims against corporate defendants under the Comprehensive Environmental Response Compensation and Liability

Act (CERCLA). *Rolan v. Atlantic Richfield Co*., No. 1:16-CV-357-TLS, 2017 U.S. Dist. LEXIS 117437, at *6-7 (N.D. Ind. July 26, 2017). The Northern District of Illinois rejected defendants' argument that plaintiffs failed to demonstrate the causation element of standing. The court explained that because CERCLA "imposes joint and several liability upon responsible actors," the plaintiffs "adequately plead causation for purposes of Article III standing" by asserting a claim against defendants even though plaintiffs "allege they were harmed by multiple parties . . .

In a case from this Circuit, *Autolog Corp. v. Regan*, 731 F.2d 25 (D.C. Cir. 1984), the court found standing for a union of seamen to bring a claim against a foreign vessel operator under Section 289 of the coastwise shipping laws. *Id*. at 25. There, the union plaintiff sought an injunction against a foreign vessel operator for its New York to Florida service, alleging a violation of the monopoly guaranteed to American vessels by section 289. *Id.* The union asserted that this violation led to a loss of employment opportunities for the seamen, as U.S.-flagged vessels and crews would otherwise operate this service but for the defendant's capture of the market. *Id*. at 30-31. The court reasoned that the union had standing to challenge this conduct because Section 289 is meant to protect the livelihood of the seamen against foreign competition, and it would be "most plausible" that U.S. companies would move to capture this market if the foreign corporation ended its service. *Id.*

Most significant for the issue at hand, the Court held, "[i]t is here well settled that ***a plaintiff has standing to challenge conduct that indirectly results in injury . . . as long as the injury is fairly traceable to the challenged conduct***," focusing on the plausibility of the chain of causation, rather than the length thereof. *Id.* at 31 (emphasis added) (citing *United States v. SCRAP*, 412 U.S. 166, 688 (1974) and quoting *Public Citizen v. Lockheed Aircraft Corp.*, 565 F.2d 708, 717, n.31 (D.C. Cir. 1977)).

Similarly, in *Miletak v. Allstate Insurance Co*., No. C 06-03778 JW, 2009 U.S. Dist. LEXIS 41583, at *21 (N.D. Cal. May 15, 2009), the district court denied defendant Allstate Indemnity's motion to dismiss, holding that the plaintiff had standing to sue Allstate Indemnity for the injuries caused by another defendant because Allstate Indemnity and the defendant allegedly "acted as joint venturers, agents of each other and as co-conspirators." The court reasoned ***"[Plaintiff's] standing to sue Allstate Indemnity, therefore, is premised on his theory of joint liability***." *Id*. (emphasis added).

In *In re Dicamba Herbicides Litig.*, 359 F. Supp. 3d 711, 718, 720 (E.D. Mo. 2019), the court held that both defendant manufacturers could be held liable for injuries caused by third-party farmers' use of the herbicide dicamba, regardless of which defendant manufactured the specific dicamba used. There, the plaintiff-farmers' crops had been damaged by dicamba "when neighboring farmers planted

genetically modified dicamba-resistant seeds and sprayed that crop with dicamba." *Id.* at 718. The court noted that the actual manufacturer of the dicamba was not part of the causal link, as plaintiffs alleged that the use of the dicamba-resistant seed involved the foreseeable use of dicamba. *Id.* at 720. The court reasoned that because the manufacturers "were in a partnership, joint venture, joint enterprise, or otherwise agreed to share technologies in bringing the Xtend seed and 'new dicamba' to market," they could both be held liable for the damages caused by the third party's use of the seed. *Id.*

In *Mastafa v. Australian Wheat Board*, No. 07 Civ. 7955 (GEL), 2008 U.S. Dist. LEXIS 73305, at *2-5, *8 (S.D.N.Y. Sept. 25, 2008), a case with a seemingly remote chain of causation, the court found sufficient facts to find Article III standing where Iraqi plaintiffs brought claims against defendants for aiding and abetting the Saddam Hussein regime through substantial financial assistance and kickbacks to the regime in connection with the United Nation's Oil-for-Food Program. The plaintiffs were Kurdish women whose husbands were imprisoned, tortured, and killed by the Hussein regime. *Id.* at *4.

The *Mastafa* court found that injuries resulting from the regime's acts were "fairly traceable" to defendants who paid service fees to the Hussein regime, stating: "If defendants aided and abetted the Hussein regime in the commission of human rights abuses that injured plaintiffs, then defendants are responsible for

those acts, not because they caused them, but because the law 'hold[s] the person who aids and abets liable for the tort itself.'" *Id.* at *7, quoting *Hefferman v. Bass*, 467 F.3d 596, 601 (7th Cir. 2006). The court further reasoned that imposing a but-for causation requirement on plaintiffs bringing aiding and abetting claims would significantly undermine this type of vicarious liability in the federal courts. *Id.* at *9.

The court in *Bogart v. City of New York*, 2015 U.S. Dist. LEXIS 113311, at *7, *11 (S.D.N.Y. Aug. 25, 2015), relied upon both *Merriam* and *Mastafa* and ruled that there was Article III standing where the plaintiff sought to hold city officials vicariously liable for the actions of a police officer. City officials had decided to keep a park closed, and when the plaintiff demanded entry to that park, a police officer reached over a barricade and punched her. *Id*. at *7. The court noted that vicarious liability is consistent with Article III standing, and that the questions raised by the plaintiff's claims regarding proximate cause and vicarious liability "are distinct from the jurisdictional inquiry of constitutional standing." *Id*. at *11.

In *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983), this Court's seminal vicarious liability decision, standing was not questioned when this Court found "[t]he District [of Columbia] law recognizes that a person's actions in support of a wrong may make him liable for the tortious injury," and reasoned there is

"vicarious liability for support of wrongful action through knowing substantial aid or encouragement." *Id.* at 479. The Court upheld the judgment against the defendant when she was found to be jointly and severally liable for a death resulting from a burglary conducted by her boyfriend when she served as a secretary and recordkeeper for his criminal activities, and assisted him in disposing of the acquired proceeds. *Id.* at 474-75, 486, 488. This indirect action was sufficient to allow liability.

Uniform case law thus supports the TVPRA-specific ruling in *Merriam* that there is Article III standing to sue an indirect actor who is liable under a statute based on vicarious liability. This is particularly true with respect to the TVPRA because, in adding section 1595(a) in the 2008 amendments, Congress specifically established venture liability for violations of the statute.

The District Court's refusal to consider that venture liability confers standing to sue Appellees based on indirect causation was also in error as this Court has confirmed, "[t]he Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court ***must*** assume arguendo the merits of his or her legal claim." *Parker*, 478 F.3d at 377 (emphasis added). Numerous binding authorities uniformly agree that the viability of the claim on the merits must be assumed when assessing standing. *See, e.g., Warth v. Seldin*, 422 U.S. 490, 501–02 (1975) (assuming validity of legal theory

for purposes of standing analysis); *Campbell v. Clinton*, 203 F.3d 19, 23-24 (D.C. Cir. 2000) ("At the standing stage we must take as correct appellants' claim . . ."); *Estate of Boyland v. USDA*, 913 F.3d 117, 123 (D.C. Cir. 2019) (quoting *Parker* and finding "[f]or purposes of analyzing plaintiffs' standing, we make the requisite assumption that they would prevail on the merits of their claim . . ."); *In re Thornburgh*, 869 F.2d 1503, 1511 (D.C. Cir. 1989) (in assessing whether the relief sought by a plaintiff would be likely to redress the party's injury, the court assumes that a decision on the merits would be favorable and that the requested relief would be granted).

If the District Court had properly assumed the merits of Appellants' venture theory of liability, then the Court would have had to conclude that Appellees faced liability under the TVPRA because they were indirect actors that contributed to causing Appellants' injuries by their "participation in the venture." This showing of indirect causation confers Article III standing. In failing to even consider the "merits question" of venture liability, the District Court did not mention the line of cases so holding and relied instead upon a single inapposite case, *Tax Analysts & Advocates v. Blumenthal*, 566 F.2d 130, 142 (D.C. Cir. 1977). Discussing *Tax Analysts*, the District Court held that "a primary theme in the law of standing is that the question of standing is a matter apart and distinct from the merits of the substantive claims put forth." JA at 119. While the *Tax Analysts* court did not

address, let alone disagree with, the *Parker* line of cases binding in this Circuit, with additional context, it is clear that *Tax Analysts* does not support the District Court's conclusion that it need not consider, let alone assume the merits of, Appellants' substantive claims in assessing standing.

The *Tax Analysts* court described its reasoning for declining to undertake a comprehensive review of the full legislative history of the Internal Revenue Code to determine congressional intent as to the types of injury covered by a particular section of the Code. The court expressed concern that such an inquiry "may lead to a decision on the question of standing based on an assessment of the strength or weakness of the claims being presented." *Tax Analysts*, 566 F.2d at 141-42. The court wanted to avoid this decision, noting that "[i]t is totally acceptable to grant standing to a party to pursue an unsuccessful claim." *Id*. In other words, without mentioning *Parker*, the *Tax Analysts* court agreed that a court should assess standing regardless of the perceived strength of the merits. *Id*.

Here, as required by the *Parker* line of cases, accepting that Appellees were members of a venture with their cocoa suppliers, and should therefore face liability as co-venturers under section 1595(a), would necessarily mean that Appellants have standing to sue Appellees based on indirect causation established by Appellees' role as co-venturers in contributing to Appellants' injuries. If the District Court disagreed that Appellants had properly alleged Appellees were in a

venture, a conclusion that would be hard to reach given the detailed allegations of the Complaint,[3] *see, e.g.*, ¶¶ 54, 55, 61, 111, 120, 154-58 and section C, below, then the proper avenue would have been to dismiss the TVPRA claims for failure to state a claim rather than distort the standing doctrine.

The District Court's erroneous standing decision denies access to the TVPRA for Appellants, victims of trafficking and forced labor, to sue Appellees, the intended TVPRA targets who benefit from a venture that violates the prohibition on forced labor and trafficking. The TVPRA's specific provision for venture liability allows standing to sue all members of a venture, including indirect participants. *See, e.g., Merriam,* 2013 U.S. Dist. LEXIS 77600, at *10-11.

After erroneously declining to assume or even consider the "merits" of venture liability as a basis for establishing indirect causation, the District Court then misapplied two Supreme Court cases in seeking legal support for its decision. The District Court's first erroneous rationale was that "the TVPRA's venture theory of liability cannot relieve plaintiffs of Article III's constitutional traceability requirement." JA at 119-20. The District Court quoted *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021), for the uncontroverted point that Congress '"cannot eliminate the constitutional [traceability] requirement any more than it

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[3] Indeed, the District Court's own review of the Complaint confirms that Appellants had more than sufficient allegations that Appellees were in a venture together with their cocoa plantation suppliers. *See, e.g.,* JA at 107-09, 113, 119.

can 'relieve courts of their responsibility to independently decide whether a plaintiff has suffered a concrete harm under Article III['s]' injury-in-fact requirement."' JA at 119.[4]

This point is inapposite because there is no dispute that Appellants suffered concrete injuries while being trafficked and forced to harvest cocoa, *see* Complaint ¶¶ 127-48, and Appellants absolutely do not dispute that Article III standing requires traceability or causation. As the Supreme Court reasoned in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), while Congress cannot "eliminate" the "causation requirement," it can "articulate chains of causation that will give rise to a case or controversy where none existed before." *Id.* at 341 (quoting *Lujan*, 504 U.S. at 580 (1992) (Kennedy, J., concurring in part and concurring in judgment) (internal quotation marks omitted)); also quoted in *Massachusetts v. E.P.A.*, 549 U.S. 497, 516 (2007).

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[4] In *TransUnion*, the Supreme Court did not address the ***traceability*** requirement at issue in this case, and expressly limited its holding to Article III's "injury-in-fact" requirement. 141 S. Ct. at 2204 ("the question in this case focuses on the Article III requirement that the plaintiff 's injury in fact be 'concrete'"). The Court drew a distinction between an injury-in-law and an injury-in-fact to determine that the harm a plaintiff suffers cannot be limited to a violation of the terms of a statute; the plaintiff must also suffer a concrete injury to their person. The Court stated "[p]hysical or monetary harms readily qualify as concrete injuries under Article III, and various intangible harms—like reputational harms—can also be concrete." *TransUnion LLC,* 141 S Ct. at 2197. Again, there is no dispute in this case that Appellants suffered concrete injuries and Appellees did not contest this issue.

That is certainly the case here where, as noted, Congress amended the TVPRA in 2008 adding section 1595(a) to create a new civil claim based on benefitting from "participation in a venture . . ." 18 U.S.C. § 1595(a). Neither the Appellees nor the District Court even suggested that Congress exceeded its Constitutional limits in passing section 1595(a) and establishing venture liability as a necessary tool to fight trafficking and forced labor in the global economy;[5] the sole issue is whether the venture theory of liability also establishes indirect causation for co-venturers like Appellees who were not direct perpetrators.

As previously established and further demonstrated in section C below, Appellants do not dispute the causation requirement for Article III standing; they satisfied it. Their injuries are fairly traceable to Appellees because the companies were in a "venture" that included their cocoa farmers who trafficked and enslaved Appellants, thus causing their injuries. Appellees, by participating in the venture as co-venturers, contributed to causing those injuries.

While a venture must exist to bring a claim against an individual who is not the direct perpetrator, "there is no requirement that the plaintiff bring a claim against both the perpetrator and whoever knowingly benefits." *Gilbert v. USA*

[5] Indeed, Congressional findings and conclusions leading to legislative solutions are entitled to great deference. *In re Idaho Conservation League*, 811 F.3d 502, 510 (D.C. Cir. 2016) (court may consider "congressional and agency assessments" in assessing theory of causation for Article III standing); *Autolog v. Regan*, 731 F.2d 25, 26, 31 (D.C. Cir. 1984) (noting "we must give great weight to this congressional finding in our standing inquiry.").

Taekwondo, Inc., No. 18-CV-00981-CMA-MEH, 2020 WL 2800748, at *9 (D. Colo. May 29, 2020); *Gilbert v. U.S. Olympic Comm.*, 423 F. Supp. 3d 1112, 1131 (D. Colo. 2019) ("Section 1589(b) does not require a member of a venture to have committed overt acts in furtherance of obtaining forced labor or services in order for that member to be civilly liable."); *Cho v. Chu,* No. 21CIV2297PGGSDA, 2022 WL 4463823, at *3 (S.D.N.Y. Sept. 26, 2022) (noting that "actual participation in the forced labor is not required for civil liability under § 1595"); *Barrientos v. CoreCivic, Inv.*, 951 F.3d 1269, 1277 (11th Cir. 2020) (interpreting "whoever" in Section 1589(a) and 1595(a) to include individuals, corporations, companies, associations, firms, partnerships, societies, and joint stock companies). *See also Nestle USA, Inc. v. Doe*, 141 S.Ct. 1931, 1939 (2021) ("Congress created the present private right of action [under the TVPRA] allowing plaintiffs to sue ***defendants who are involved indirectly with slavery***" (emphasis added)).

The District Court's second rationale for finding Appellants lacked standing due to a failure to show causation is based on another misapplication of a Supreme Court case applying the "injury-in-fact" requirement. The District Court cited *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398 (2013) in holding that the Appellants' claims of causation violated *Clapper*'s prohibition of a "speculative chain of possibilities." JA at 115-17. However, the *Clapper* Court found that the respondents there lacked Article III standing because they failed the "injury-in-

fact" requirement, not the causation (traceability) requirement. As the Court held, "[R]espondents' theory of standing, which relies on a highly attenuated chain of possibilities, does not satisfy the requirement that threatened injury must be certainly impending." 568 U.S. at 410.

The *Clapper* plaintiffs claimed that there was an objectively reasonable likelihood their communications with foreign contacts would be acquired under the Foreign Intelligence Surveillance Act of 1978 (FISA) at some time in the future. The court determined this potential injury was based on multiple layers of speculative possible future events, some dependent on decisions made by independent discretionary bodies. The Supreme Court referred to the "chain of possibilities," stating, "[i]n sum, respondents' speculative chain of possibilities does not establish that injury based on potential future surveillance is certainly impending or is fairly traceable to §1881a." *Id*. at 414.

In sharp contrast, the TVPRA is a statute that creates a cause of action for injuries precisely like those suffered by Appellants, who are victims of trafficking and forced labor practices. Here, there is no issue of what future actions might be made that would lead to harm. The concrete injury to Appellants has already occurred. Appellants, formerly enslaved children, alleged in detail that they suffered concrete injuries traceable to Appellees' conduct as members of the cocoa

venture. *See* Complaint ¶¶ 127-48.[6] Causation is not speculative here because Appellants allege that their injuries were directly caused by and traceable to the "venture" that trafficked them and forced them to harvest cocoa for the benefit of all the co-venturers. *See, e.g.*, Complaint ¶¶ 22, 45, 47, 49-55, 59-61, 67, 69, 82-85, 89, 92, 96, 98, 99, 103-04, 111-15, 120, 123-26, 154-58, 162-64. Appellees, as co-venturers, contributed to causing Appellants' injuries.

The 2008 amendments to the TVPRA were specifically designed to confront modern slavery, as endured by Appellants, which the Congressional drafters referred to as the "dark side of globalization."[7] The modern world is more connected than ever, and this connectedness allows, among other things, companies to offshore supply chains where they can benefit from cheap, free, and

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[6] The District Court's concerns about speculation were rooted in a Supreme Court case discussing whether there was a concrete injury, not whether there was traceability. While not the case here, even in cases where traceability ***is*** speculative, courts have held that a causal link between a plaintiff's injuries and a defendant's actions need not be a "direct" one to confer standing. Article III standing "require[s] no more than a showing that there is a substantial likelihood of causation." *Duke Power Co. v. Carolina Envtl. Study Grp*., 438 U.S. 59, 75 n.20 (1978). Significantly, "even harms that flow indirectly from the action in question can be said to be 'fairly traceable' to that action for standing purposes." *Focus on the Family v. Pinellas Suncoast Transit Auth*., 344 F.3d 1263, 1273 (11th Cir. 2003); *see also Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 260-61 (1977) ("The injury may be indirect, but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions."); *Warth v. Seldin*, 422 U.S. 490, 504 (1974) ("The fact that the harm to petitioners may have resulted indirectly does not in itself preclude standing.").

[7] H.R. REP. NO. 110-430, at 33 (2007).

trafficked labor while also trying to evade the U.S. legal system. Congress understood this when they enacted the TVPRA. In describing the purpose of the legislation the Committee on Foreign Affairs stated "[t]rafficking in Persons represents an emerging and dangerous abuse of the increasingly interconnected nature of the international economic system."[8] They also recognized that "[i]ndividuals are forced to work in agriculture . . . often for no pay or in debt bondage that eliminates any hope of freedom."[9] The TVPRA gives "modern meaning to the Constitution's prohibition against involuntary servitude and comport[s] with the customary treaty law prohibition on slavery and involuntary servitude."[10]

The District Court's decision denying standing to Appellants, formerly enslaved children who are clearly within the protections of the TVPRA, ignores the text of the TVPRA and the express intent of Congress. This judicial nullification of the intended scope of the TVPRA conflicts with the heart of Article III standing: "The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper,* 568 U.S. at 408. Here, in erecting a standing barrier of causation that exceeds the showing required for merits liability, the District

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[8] *Id.*

[9] *Id.* at 34.

[10] *Id.*

Court usurped the express intent of Congress. The District Court judicially negated the TVPRA's specific provision for beneficiary liability for co-venturers who are indirect actors but contributed to causing the injuries at issue.

Standing is the gateway to justice, and many victims of trafficking and modern slavery will be denied access to justice if the District Court's decision is allowed to stand. Based on the Court's erroneous decision, there could be a global sex trafficking conspiracy in Southeast Asia financed by organized crime in the United States, but the U.S.-based crime bosses would escape TVPRA liability as long as they paid someone else to do the dirty work of sex trafficking and to cause the direct injury to each sex trafficking victim.

While Congress was considering the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, named after a man who fought against the African slave trade in the 19th century, one of the co-sponsors, Rep. Chris Smith, stated "[t]rafficking, like germs, infection and disease, thrives in shadowy and murky places. But the contagion slows and even dies when exposed to the light. This legislation brings more light, bright light, to this problem; and it will act as a powerful disinfectant."[11] The District Court's extreme and limiting ruling on standing, if upheld, will keep these abuses in the shadows by granting immunity to all participants in modern slavery schemes except the direct trafficker.

[11] 154 Cong. Rec. H10904 (daily ed. Dec. 10, 2008).

This result is the opposite of explicit Congressional intent in establishing liability for co-venturers who are beneficiaries of modern slavery, like the Appellees in this case.

C. Appellants' Injuries Are Fairly Traceable to Appellees Because They Were Co-Venturers Under the TVPRA, Contributed to Causing Appellants' Injuries, and Are Jointly and Severally Liability for Those Injuries.

The District Court ignored the *Parker* line of cases and declined to consider the impact of Appellees' participation in a "venture" that injured the Appellants on the standing question. JA at 119-20. While the District Court should have assumed the merits of Appellants' claims, there is no question that Appellants' allegations, taken as true, show Appellees were in a "venture" with their cocoa suppliers under the standard of TVPRA section 1595(a). While it is not required to reverse the District Court's erroneous standing decision, it is important to emphasize that Appellants' Complaint establishes statutory liability, including causation, and since the standard for causation standing cannot be a higher bar than for liability, *see, e.g.*, *Friends of the Earth, Inc.* 528 U.S. at 181, this strongly reinforces that Appellants have also met what must be a lower causation standard for standing.

The foundation of Appellees' venture with their cocoa suppliers was their supplier agreements. *See, e.g.*, Complaint ¶¶ 54, 55, 61, 111, 120, 154-58.

Appellees maintain that these supplier agreements gave them, among other purposes, the right to prohibit child labor in the cocoa fields and enforce this prohibition through inspections. *Id.* ¶¶ 39, 53, 55, 70, 71, 82-84, 89, 94, 99, 101, 112, 113, 115, 123-24, 154-56. Appellants dispute whether the Appellees ever exercised the authority over their cocoa suppliers they claimed to have, but this does not negate the direct relationships Appellees had with their cocoa suppliers.

Appellants allege they were all trafficked and enslaved as children because Appellees – acting within their venture and in furtherance of its purpose to protect and prolong the cocoa supply chain system they created that is dependent upon forced child labor – failed to act beginning in 2001 to prevent children, including Appellants, from being exploited by this system. Appellants sustained injuries by being forced to work on plantations that have direct supplier relationships with Appellees, receive Appellees' technical and financial support, and generate cocoa products and profit for Appellees. *See, e.g.*, Complaint ¶¶ 22, 45, 47, 49-55, 59-61, 67, 69, 82-85, 89, 92, 96, 98, 99, 103-04, 111-15, 120, 123-26, 154-58, 162-64. Indeed, the District Court discussed and accepted as true the Appellees' relationships to each other and their cocoa suppliers, *see* JA at 107-09, 119, but disregarded these allegations in the erroneous standing assessment by asserting that "merits questions" are irrelevant to the standing question. *Id.* at 119.

Appellees' direct connection with the cocoa suppliers and control over child labor in the cocoa fields far exceed the legal standard for establishing a "venture" under the TVPRA. For example, in the hotel sex trafficking cases, the hotel chains were in a "venture" without being directly involved in sex trafficking. They were liable because they were in a venture with the actual traffickers and turned a blind eye to the unlawful conduct because they were profiting from it through increased hotel business and amenity sales. *See, e.g.*, *A.B. v. Hilton Worldwide Holdings, Inc.*, No. 19-cv-01992, 2020 WL 5371459, at *6 (D. Or. Sept. 8, 2020); *B.M. v. Wyndham Hotels & Resorts, Inc.*, No. 20-cv-00656, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020); *M.A. v. Wyndham Hotels & Resorts, Inc*., 425 F. Supp. 3d 959, 969-68 (S.D. Ohio 2019); *J.C. v. Choice Hotels Int'l, Inc.*, No. 20-CV-00155-WHO, 2020 WL 3035794, at *1 n. 1 (N.D. Cal. June 5, 2020); *Doe S.W. v. Lorain-Elyria Motel, Inc.*, No. 2:19-CV-1194, 2020 WL 1244192, at *6 (S.D. Ohio Mar. 16, 2020); *S.Y. v. Naples Hotel Co*., 476 F. Supp. 3d 1251, 1256 (M.D. Fl. 2020).

As agreed by all the federal courts reviewing these cases, the sex traffickers were not distant third parties harming the victims; they were in a venture with the hotel chains. The only distinction with this case is that Appellees here actually had an explicit agreement with the cocoa suppliers to supply Appellees with cocoa as

part of their "venture," while knowing that trafficked and forced child labor harvested the cocoa. Complaint ¶¶ 39, 50, 54, 55, 70-71, 82-84, 96, 111, 154-58.

The District Court attempted to distinguish several hotel sex trafficking cases which held that venture liability is sufficient to establish standing by claiming that the plaintiffs in those cases "alleged a ***direct*** link between their injuries and the defendant hotel chains." JA at 120 (emphasis added). However, the causal link that the District Court found to be sufficient in *M.A. v. Wyndham Hotels & Resorts, Inc.*, for example, was based simply on venture liability exactly as should have been done in this case. The court there held that the "[p]laintiff has alleged sufficient facts to show Defendants 'participated in a venture' under § 1595 by alleging that Defendants rented rooms to people it knew or should have known were engaged in sex trafficking." 425 F. Supp. 3d at 971.

In other words, the defendants facilitated sex trafficking by providing their co-venturers, the parties directly carrying out that trafficking, with a resource (the hotel rooms) needed for the illegal acts. Similarly, as previously demonstrated, Appellees knowingly facilitated the use of enslaved child labor by providing their cocoa farmers who enslaved Appellants with technical and financial support that enabled their farming operations and by purchasing on a long-term basis the cocoa produced with the use of child slaves, supporting and incentivizing the continuation of such practices.

Unlike the hotel chains that were linked to sex trafficking through their individual hotel managers that had venture relationships with the sex traffickers, Appellees here have been fully aware for decades of the rampant child labor on the cocoa farms they source from. Complaint ¶¶ 39, 50, 54, 55, 70-71, 82-84, 96, 111, 154-58. Indeed, in 2001, they admitted their supply chains included forced child labor and pledged to end it. *Id*. ¶¶ 52, 54. There is no question that the use of trafficked and forced labor on Appellees' cocoa plantations is open and visible to all.[12]

In any event, searching for a "direct" link from Appellees to the Appellants' injuries is irrelevant to venture liability. The only link required is the relationships that create a "venture," thus establishing venture liability compatible with Article III standing's causation requirement. Indeed, federal courts have almost universally agreed that there need not be direct participation in the unlawful acts of the venture to hold a co-venturer liable because this would void the "should have known" language in the section 1595(a), the TVPRA's civil liability provision. *See, e.g., J.C. v. Choice Hotels Int'l, Inc.*, 2020 WL 3035794, at *1 n.1; *Doe S.W. v. Lorain-*

[12] Peter Whoriskey & Rachel Siegel, *Cocoa's child laborers*, THE WASHINGTON POST (June 5, 2019) ("in few industries, experts say, is the evidence of objectionable practices so clear, the industry's pledges to reform so ambitious and the breaching of those promises so obvious."), available at https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/.

Elyria Motel, Inc., 2020 WL 1244192, at *6; *S.Y. v. Naples Hotel Co.*, 476 F. Supp. 3d at 1256.

The District Court fundamentally erred in deciding the standing issue by disregarding whether Appellees were in a venture with their cocoa suppliers. If they are, as Appellants properly alleged and establish herein, then the co-venturers contributed to causation by participating in the venture and are jointly and severally liable for the acts of the venture. Appellees' venture collectively controlled 70% of the cocoa supply chain in Côte D'Ivoire, Complaint ¶ 156, making it more likely than not that the venture was legally responsible for trafficking and enslaving each of the Plaintiffs. *See, e.g.*, *Almerfedi v. Obama*, 654 F.3d 1, 5 (D.C. Cir. 2011) (The civil preponderance of the evidence standard merely requires the plaintiff "support its position [only] with the greater weight of the evidence.") (quoting *Nutraceutical Corp. v. Von Eschenbach*, 459 F.3d 1033, 1040 (10th Cir. 2006)); *Elliot v. Michael James Inc.*, 507 F.2d 1179, 1184 (D.C. Cir. 1974) ("'it is enough that [plaintiff] introduces evidence from which reasonable men may conclude that it is more probable that the event was caused by the defendant than that it was not'") (*quoting* Prosser, The Law of Torts § 44, pp. 222-223 (2d ed. 1955)).

If upheld, the District Court's reasoning would let every member of a venture operating in violation of the TVPRA off the hook, so long as they were not

the direct perpetrator of a plaintiff's injury, regardless of that member's participation in and benefit from the venture and contribution to causation. Ruling that the Appellants have satisfied the standing doctrine's causation requirement by alleging joint and several liability among Appellees is consistent with the express language of the TVPRA and fulfills the explicit statutory purpose of the TVPRA to extend venture liability to co-venturers that benefit from trafficked or forced child labor, including the Appellees herein.

VIII. CONCLUSION

The District Court's standing ruling would immunize from liability a major group of defendants who, by design, participate in a venture that traffics or enslaves people, but arrange for others to do the dirty work. The 2008 amendments to the TVPRA specifically extended liability in civil cases to parties, like Appellees herein, who participate in and benefit from a venture, but are removed from the direct criminal acts of the venture. If the District Court's ruling is upheld, clever criminal traffickers will never again dirty their own hands and will instead pay others, often safely offshore from U.S. jurisdiction, to kidnap and enslave innocent victims that the TVPRA was designed to protect.

The District Court's decision should be reversed because it is objectively wrong as a matter of law and conflicts with the text and purpose of the TVPRA.

Appellants' venture theory of standing and liability provides them standing to sue Appellees as members of a trafficking and forced labor venture that ensnared Appellants, eight former child slaves who harvested cocoa for Appellees' co-venturers in Côte d'Ivoire.

, including parties not named as defendants in this action" and despite the fact that plaintiffs did not allege that a particular defendant was responsible for "all of the harm they suffered[.]" *Id*. at *12-13 (internal quotation marks omitted).

Respectfully submitted on this 14th day of November 2022,

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ADDENDUM

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Full Text of Relevant Sections of the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1589, 1590, 1595, and 1596.

§ 1589 - Forced labor

(a) Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

(1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;

(2) by means of serious harm or threats of serious harm to that person or another person;

(3) by means of the abuse or threatened abuse of law or legal process; or

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

shall be punished as provided under subsection (d).

(b) Whoever 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 any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).

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

(2) The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious,

under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

(d) Whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both. If death results from a violation of this section, or if the violation includes kidnaping, an attempt to kidnap, aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title, imprisoned for any term of years or life, or both.

§ 1590 - Trafficking with respect to peonage, slavery, involuntary servitude, or forced labor

(a) Whoever knowingly recruits, harbors, transports, provides, or obtains by any means, any person for labor or services in violation of this chapter shall be fined under this title or imprisoned not more than 20 years, or both. If death results from the violation of this section, or if the violation includes kidnapping or an attempt to kidnap, aggravated sexual abuse, or the attempt to commit aggravated sexual abuse, or an attempt to kill, the defendant shall be fined under this title or imprisoned for any term of years or life, or both.
(b) Whoever obstructs, attempts to obstruct, or in any way interferes with or prevents the enforcement of this section, shall be subject to the penalties under subsection (a).

§ 1595 - Civil remedy

(a) 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. (b) (1) Any civil action filed under this section shall be stayed during the pendency of any criminal action arising out of the same occurrence in which the claimant is the victim.

(2) In this subsection, a "criminal action" includes investigation and prosecution and is pending until final adjudication in the trial court.

(c) No action may be maintained under this section unless it is commenced not later than 10 years after the cause of action arose.

§ 1596 - Additional jurisdiction in certain trafficking offenses

(a) In General.— In addition to any domestic or extra-territorial jurisdiction otherwise provided by law, 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— (1) an alleged offender is a national of the United States or an alien lawfully admitted for permanent residence (as those terms are defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)); or

(2) an alleged offender is present in the United States, irrespective of the nationality of the alleged offender.

CERTIFICATE OF COMPLIANCE FOR APPELLANTS' OPENING BRIEF

Pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(B)(i), I certify that Plaintiffs-Appellants' Opening Brief complies with applicable page and word limits in that it has a text typeface of 14 points and contains 9,812 words, less than the 13,000 words permitted.

Dated: November 14, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2022, I electronically filed the foregoing with the United States Court of Appeals for the District of Columbia Circuit by using the CM/ECF system, which will send a notice of filing to all registered users, including counsel for all parties.

Date: November 14, 2022

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