[NOT YET SCHEDULED FOR ORAL ARGUMENT]

No. 22-7104

In the United States Court of Appeals for the District of Columbia Circuit

ISSOUF COUBALY, *et al.*,

Plaintiffs-Appellants,

v.

CARGILL, INC., *et al.*,

Defendants-Appellees.

BRIEF OF *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF-DEFENDANTS-APPELLEES

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

A. Parties and Amici. Except for the *amicus* filing this brief, all parties, intervenors, and *amici* appearing before the district court and in this Court are listed in the Briefs for Plaintiffs-Appellants and Defendants-Appellees.

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

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

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

DISCLOSURE STATEMENT PURSUANT TO CIRCUIT RULE 26.1

Pursuant to Federal Rule of Appellate Procedure 26.1 and D.C. Circuit Rules 26.1 and 29(b), undersigned counsel certifies:

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

/s/ John B. Bellinger III
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STATEMENT REGARDING CONSENT TO FILE AND SEPARATE BRIEFING

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

Pursuant to Circuit Rule 29(d), *amicus* certifies that a separate brief is necessary to provide the unique perspective of members of the broader business community, which Plaintiffs' sweeping theory of liability directly affects.

Since *amicus* is not aware of any other *amicus* brief addressing these issues, it certifies pursuant to Cir. Rule 29(d) that joinder in a single brief with other *amici* would be impracticable.

/s/ John B. Bellinger, III
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STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

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

/s/ John B. Bellinger, III
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IDENTITY AND INTEREST OF *AMICUS CURIAE*

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

The Chamber has a substantial interest in the issues presented in this case. Numerous U.S. companies have been, and continue to be, defendants in lawsuits predicated on meritless and expansive theories of liability and extraterritoriality based on their dealings in foreign markets. These suits often last a decade or more, imposing substantial legal and reputational costs on U.S. companies that transact business overseas.

STATUTES AND REGULATIONS

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

ARGUMENT

Plaintiffs seek to hold Defendants liable merely for being purchasers of cocoa at the far end of a sprawling, ill-defined, transnational supply chain, which Plaintiffs attempt to rebrand as a "venture" under the Trafficking Act. *See* 18 U.S.C. § 1595(a). The Chamber, whose members include companies and professional organizations with operations and business activities around the world, submits this brief to address three issues.

First, as Defendants explain, generalized allegations about purchasing a commodity from a global supply chain are not sufficient to establish either the causation element of standing or "participation in a venture" under the Trafficking Act. The Chamber writes separately to expand upon two points: (1) Congress cannot alter bedrock Article III standing requirements, and nothing in the Trafficking Act suggests that Congress intended to override background legal principles in creating a cause of action under Section 1595(a); and (2) the complaint fails to account for the role of independent intermediaries and other third parties in the supply of cocoa from Côte d'Ivoire.

Second, Plaintiffs' claims—which are based on alleged human trafficking and forced labor perpetrated by foreign actors in Côte d'Ivoire and Mali—must be dismissed because the Trafficking Act's civil cause of action, 18 U.S.C. § 1595, does not apply extraterritorially.

Finally, the Court should decline Plaintiffs' invitation to stretch the Trafficking Act beyond what Congress intended, including by authorizing suits against the far downstream purchasers of a commodity simply because—despite good-faith efforts by industry participants—forced labor has not been fully eradicated in a foreign market. The Chamber, Defendants, and Plaintiffs share the goal of eliminating involuntary labor worldwide. That goal is best achieved by encouraging industry-led efforts to improve conditions throughout the supply chain—not, as Plaintiffs suggest, by treating such efforts as an admission of liability under the Trafficking Act if they are anything less than 100 percent successful.

I. Plaintiffs Cannot Establish Either Standing or "Participation in a Venture" Through Their Allegations That Defendants Are Downstream Purchasers of Cocoa in a Supply Chain Broken by Independent Intermediaries

A. Congress Did Not Override Basic Standing Principles in Enacting the Trafficking Act

Article III standing is an "'essential' … predicate" for the exercise of federal court jurisdiction. *Fla. Audubon Soc'y v. Bentsen*, 94 F.3d 658, 663 (D.C. Cir. 1996) (en banc) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Parties invoking federal jurisdiction must "clearly … allege facts demonstrating" that they have (1) "suffered an injury in fact"; (2) "that is fairly traceable to the challenged conduct of the defendant" (known as the "fairly traceable" requirement of Article III causation); and (3) "that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). The dispute on appeal relates to "causation—a fairly traceable connection between the plaintiff's injury and the complained-of conduct of the defendant." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998).

Under Plaintiffs' theory, *an entire industry* is a "venture" under the Trafficking Act, and remote purchasers of a commodity may be held liable for the conduct of actors at the far opposite end of the global supply chain,

regardless of whether there is any causal connection between their conduct and a plaintiff's injuries. *See, e.g.*, JA87 (referring to a "cocoa venture … comprised of the Defendants as well as other major cocoa producers"); *id.* at 89 ("The Cocoa Supply Chain Is a 'Venture'"); *id.* ("The Defendant companies formed, operate and control a cocoa supply chain 'venture.'"). The district court rightly rejected this astounding proposition.

Specifically, the district court held that "plaintiffs cannot show causation for three reasons." JA115. First, the complaint fails to allege the required causal connection between each Plaintiff and each Defendant, and Plaintiffs may not circumvent this requirement by "establish[ing] standing at the industry level." *Id.* at 115–16. Second, by failing to explain the role of intermediaries in the supply chain, the complaint alleges a causal chain that is contingent on speculative inferences and assumptions, which defeats standing. *Id.* at 117–19. Third, contrary to Plaintiffs' argument that the complaint need only utter the words "participation in a venture" to establish Article III standing, the Trafficking Act's "venture theory of liability cannot relieve plaintiffs of Article III's constitutional causation requirement." *Id.* at 115.

Plaintiffs barely address points one and two, focusing instead on their "venture" theory of Article III causation. Though Plaintiffs attempt to cast this theory as a "routine analysis" and a mere elaboration of the "fairly traceable" standard, Pls.' Br. 15, 29, it represents a dramatic break with well-settled standing principles. Under Plaintiffs' proposed test, a court need only consider whether the complaint tries to assert that a defendant "participat[ed] in a venture" for purposes of the Trafficking Act. *Id.* If so, Plaintiffs claim, the injuries are *ipso facto* fairly traceable to the defendant, regardless of whether there is any actual causal connection between the plaintiff's injury and defendant's conduct. *Id.* Here, for example, Plaintiffs assert that they have established traceability "because the companies were in a 'venture' that included their cocoa farmers who trafficked and enslaved [Plaintiffs], thus causing their injuries." *Id.* at 29; *see* JA89.

But Congress cannot alter bedrock Article III standing requirements, and even if it could, nothing in the Trafficking Act suggests that Congress intended to depart radically from background legal principles when it added the civil cause of action at Section 1595(a). Congress legislates against settled background principles, and those principles apply

unless they are "expressly negated." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (quoting *Bennett v. Spear*, 520 U.S. 154, 163 (1997)); *see also Paroline v. United States*, 572 U.S. 434, 446 (2014). Here, Section 1595 makes no mention of standing, and it certainly is not "evident" that, for purposes of Article III standing, Congress intended to displace long-established principles of causation and traceability in favor of an amorphous "participation in a venture" standard.

Even if Congress *had* wanted to alter the traceability requirement for claims brought under Section 1595(a), Plaintiffs overestimate its authority to do so. It is true, of course, that Congress "may create new forms of liability" and "has plenary power over the remedies available in federal court," and in that sense it "can … create or eliminate standing." JA119 & n.3. But Congress "cannot eliminate the constitutional causation requirement any more than it 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." *Id.* at 119 (alteration in original) (quoting *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2205 (2021)).

Plaintiffs and their *amici* insist that adopting the district court's approach will "strip[] Congress of its power to articulate chains of causation that will give rise to a case or controversy." Law Profs.' Br. 7. But that claim is false, and it gets the relevant constitutional interests exactly backwards. Congress can, of course, create or modify a cause of action's *merits* requirements—defining its substantive elements—to loosen traditional causation rules and articulate new chains of causation that previously would not have given rise to a claim. *See Spokeo*, 578 U.S. at 341. And such a claim will give rise to a justiciable case or controversy if it satisfies Article III's constitutional rules limiting federal-court *jurisdiction*. But however Congress exercises its Article I power to define a claim's elements, *Spokeo* and *TransUnion* make clear that injuries and chains of causation must *exist in fact*—and must resemble the types of injuries and causal chains "that ha[ve] traditionally been regarded as providing a basis for a lawsuit in English or American courts"—before they may be "elevat[ed]" to Article III status. *Id.*; *see also TransUnion*, 141 S. Ct. at 2205 ("Article III grants federal courts the power to redress harms that defendants cause plaintiffs, not a freewheeling power to hold

defendants accountable for legal infractions." (quoting *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329, 332 (7th Cir. 2019))).

Article III requires courts to faithfully apply the "case or controversy" requirement regardless of the merits or nature of the suit, and Congress's mere creation of a cause of action cannot displace the "irreducible constitutional minimum of standing." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Far from undermining Congress's intent in enacting Section 1595(a), requiring an independent factual showing of Article III causation will help weed out meritless claims and ensure that the Trafficking Act remains an effective tool for plaintiffs who actually *can* link their injuries to a defendant's conduct.

B. The Complaint Fails to Account for Intermediaries and Other Third Parties in the Cocoa Supply Chain

Plaintiffs allege a sprawling, amorphous, transnational supply chain "venture" encompassing all persons worldwide involved in buying or selling Ivorian cocoa. But "a 'global supply chain' is not a venture," *Doe I v. Apple Inc.*, No. 19-cv-03737, 2021 WL 5774224, at *10–11 (D.D.C. Nov. 2, 2021), *appeal pending*, No. 21-7135 (D.C. Cir. Dec. 2, 2021), and Plaintiffs fail to allege critical details about the venture's purported

participants, including "what role intermediaries played in the supply chain," JA117.

The complaint acknowledges the involvement of multiple intermediaries and third parties in the supply chain—including the "persons who trafficked [Plaintiffs] into Côte d'Ivoire" and "the owners of farms on which they were enslaved"—but Plaintiffs fail to adequately describe their roles or explain why their activities do not disrupt the causal chain. JA9. The complaint also refers to "local buyers," characterizing those actors as "employees and/or agents of the Defendants" without alleging any facts in support. *Id.* And the complaint does not even attempt to address the role of Côte d'Ivoire itself, obscuring its role as a critical intermediary in the Ivorian cocoa trade.

By failing to explain the role of third parties in the supply chain, the complaint falls short of establishing either Article III causation or "participation in a venture." It is well-established that "an injury will not be 'fairly traceable' to the defendant's challenged conduct … where the injury depends not only on that conduct, but on independent intervening or additional causal factors." *Fulani v. Brady*, 935 F.2d 1324, 1329 (D.C. Cir. 1991). Here, the complaint is devoid of allegations regarding the

"acts and motives" of the relevant third parties, including the farmers, traffickers, local buyers, and Côte d'Ivoire itself. Likewise, with respect to the pleading standard for "participation in a venture," Plaintiffs have not even attempted to describe the workings of the purported "venture," let alone alleged facts to establish that Defendants "participat[ed]" in that venture and "knew or should have known" that it "ha[d] engaged in an act in violation of" the Trafficking Act. 18 U.S.C. § 1595(a). Instead, Plaintiffs define the "venture" as an entire industry.

Plaintiffs' failure to account for the role of Côte d'Ivoire is illustrative of these larger pleading deficiencies. Although the complaint barely mentions the Government of Côte d'Ivoire, it plays an integral (if partial) role in a decentralized cocoa supply chain comprised of a wide range of actors with differing interests. Among other measures, Côte d'Ivoire has established a "Coffee and Cocoa Council" to regulate the country's cocoa industry, including by determining each season which companies and co-operatives are authorized to buy and export cocoa, *see* Ange Aboa, *Ivory Coast Authorises 102 Companies to Export Cocoa and Coffee in 2022/23*, Reuters (Sept. 13, 2022), https://bit.ly/3XqltDp, and by negotiating and selling cocoa export contracts to those approved companies, including

some of the defendants in this case, *see* Ange Aboa, *Ivory Coast Sells 2023-2024 Cocoa Contracts with Higher Premium*, Reuters (Sept. 12, 2022), https://bit.ly/3QC3QhD. The Council also has partnered with the Government of Ghana to impose a premium for cocoa purchased from either country. *See* Emiko Terazono, *Choc Tactics: Ghana and Ivory Coast Plot "OPEC for Cocoa"*, Fin. Times (July 19, 2019), https://bit.ly/3GZzvqe.

Côte d'Ivoire itself owns many cocoa farms, *see* Br. of the United States as *Amicus Curiae* 19, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (U.S. Nestlé Br.), and it employs an ever-growing roster of labor inspectors to ensure that conditions on all cocoa farms comply with its labor laws, *see* U.S. Dep't of Lab. Bureau of Int'l Lab. Affs., 2021 Findings on the Worst Forms of Child Labor: Côte d'Ivoire (2021), https://bit.ly/3vZ1HDs. Côte d'Ivoire also has entered into numerous public-private partnerships—including with the Government of the United States, as described below—to address everything from how to ensure an adequate standard of living for cocoa farmers to how to monitor and remediate child labor. *See* Br. of the World Cocoa Foundation et al. as *Amici Curiae* 10–11, 13–15, 19, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931

(2021). In 2021, for example, the Ivorian government drafted a new National Sustainable Cocoa Strategy to Fight Deforestation, Child Labor, and Low Farmer Incomes in the cocoa sector, and that initiative joins a long list of the country's other serious efforts to eliminate the worst forms of child labor. *See* Bureau of Int'l Lab. Affs., 2021 Findings.

The Complaint mentions none of these facts. Instead, it ignores the Government's important role in the Ivorian cocoa trade and attempts to cast Defendants—a group of U.S.-based companies—as the sole controllers of an entire country's key industry. *See* JA23 ("Since the 1990s, Côte d'Ivoire cocoa production has been controlled by these companies."). Of course, the Complaint does not and cannot allege that Defendants control the actions of a foreign government, let alone the many disparate actors involved in the global supply chain for Ivorian cocoa.

In short, the complaint fails to adequately account for the roles of the relevant farmers and traffickers, Côte d'Ivoire itself, and other third parties in the cocoa supply chain, and that omission is fatal to Plaintiffs' attempt to establish causation or "participation in a venture."

II. Plaintiffs' Claims Are Impermissibly Extraterritorial

Plaintiffs' claims under the Trafficking Act's civil cause of action encounter another threshold obstacle: Section 1595 does not apply extraterritorially. U.S. law "governs domestically but does not rule the world," *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007), and "federal laws [are] construed to have only domestic application" unless there is "clearly expressed congressional intent to the contrary," *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 335 (2016). To overcome that presumption, the statute must give "a clear, affirmative indication that it applies extraterritorially." *Id.* at 337. Section 1595 gives no such indication, and Plaintiffs' claims do not qualify as a "domestic application" of the statute. *Id.*

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

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

> An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees.

18 U.S.C. § 1595(a).[1]

Section 1595(a) says nothing about extraterritorial application, and in their briefing below, Plaintiffs never contended that its text rebuts the presumption against extraterritoriality. Rather, they pointed to a separate provision of the Trafficking Act, Section 1596(a), which extends extraterritorial jurisdiction under certain circumstances to "any offense (or any attempt or conspiracy to commit an offense) under section 1581, 1583, 1584, 1589, 1590, or 1591." *See* JA8–9. Obviously, Section 1595(a) does not appear on that list as a provision that applies extraterritorially. To get around this problem, Plaintiffs argued below that because their Section 1595 claims are based on substantive predicate acts that are included in Section 1596(a)'s list of offenses, they may bring suit over extraterritorial conduct under Section 1595. *See* Pls.' Opp. to Mot. to Dismiss at 30–32, *Coubaly v. Cargill*, No. 21-CV-386 (D.D.C.), ECF No. 33..

Plaintiffs' reasoning is flawed. To start, when a statute contains both substantive prohibitions and a private right of action, "the presumption against extraterritoriality must be applied separately to both." *RJR*

[1] All citations to 18 U.S.C. § 1595(a) are to the statute in place at the time that Plaintiffs filed their Complaint.

Nabisco, 579 U.S. at 350. Plaintiffs never so much as cited *RJR Nabisco* below, let alone discussed this controlling principle.

In *RJR Nabisco*, the Court considered the extraterritorial application of various provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), including its criminal liability provision at 18 U.S.C. § 1962, its civil liability provision at 18 U.S.C. § 1964(c), and specific predicate offenses identified in 18 U.S.C. § 1961. With respect to the substantive prohibitions, the Court explained that "[t]he statute defines 'racketeering activity' to encompass dozens of state and federal offenses, known in RICO parlance as predicates," *RJR Nabisco*, 579 U.S. at 329–30, and that certain predicates "plainly apply to at least some foreign conduct," *id.* at 338. The Court further explained that "Congress's incorporation of these (and other) extraterritorial predicates into RICO gives a clear, affirmative indication that § 1962 applies to foreign racketeering activity—but only to the extent that the predicates alleged in a particular case themselves apply extraterritorially." *Id.* at 339.

The Court then considered RICO's private right of action, which, like Section 1595 of the Trafficking Act, authorizes civil claims based on certain "violation[s]" of the statute. *Compare* 18 U.S.C. § 1964(c), *with*

18 U.S.C. § 1595(a). Notwithstanding its conclusion that some of RICO's substantive prohibitions could apply to foreign conduct, the Court separately applied the presumption against extraterritoriality to RICO's private right of action and concluded that it has no extraterritorial application—even when the civil claims are based on the same predicates that would support extraterritorial criminal liability under Section 1962. *RJR Nabisco*, 579 U.S. at 346–54. In reaching this conclusion, the Court emphasized that the extraterritoriality analysis for a statute's substantive prohibitions cannot simply be transferred to its private right of action. "It is not enough to say that a private right of action must reach abroad because the underlying law governs conduct in foreign countries. Something more is needed, and here it is absent." *Id.* at 350.

There is good reason to treat private rights of action separately for purposes of the extraterritoriality analysis. Extraterritorial suits threaten to "embroil[] courts in difficult and politically sensitive disputes." *See* U.S. *Nestlé* Br. at 15. When the government pursues extraterritorial lawsuits, Executive oversight and prosecutorial discretion can be trusted to minimize interference with the United States' foreign policy goals. Not so with private rights of action, which operate outside the

oversight of the Executive and are not subject to prosecutorial discretion. *See id.* at 18. Private suits, therefore, have a unique capacity to cause friction with foreign nations and undermine the Nation's foreign policy—especially in this case, given the Ivorian government's extensive involvement in its own cocoa sector. *See, e.g.*, *Doe v. Nestlé*, 788 F.3d 946, 947–48 (9th Cir. 2015) (Bea, J., dissenting from denial of rehearing en banc), *rev'd sub nom. Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021). It makes perfect sense, then, that Congress would authorize extraterritorial *prosecutions*, while restricting *private civil* enforcement to domestic applications.

Below, Plaintiffs offered nothing more than the reasoning that the Court squarely rejected in the RICO context. They argued that a private right of action (Section 1595) necessarily reaches abroad because the underlying law (the predicates at Sections 1589 and 1590) governs conduct in foreign countries (via Section 1596(a)'s grant of extraterritorial jurisdiction over certain "offense[s]"). *See* Pls.' Opp. to Mot. to Dismiss 30–33. But Plaintiffs "did not identify anything in [Section 1595(a) specifically] that shows that the statute reaches foreign injuries." *RJR Nabisco*, 579 U.S. at 350.

Furthermore, Section 1596(a) relates only to *criminal* offenses, not civil liability. *See, e.g.*, *Doe I*, 2021 WL 5774224, at *15. Section 1596 is titled "Additional jurisdiction in certain trafficking *offenses*," 18 U.S.C. § 1596 (emphasis added), and it extends "extra-territorial jurisdiction over any *offense* (or any attempt or conspiracy to commit *an offense*)" to the aforementioned sections of the Act, which are all criminal provisions, *id.* § 1596(a) (emphases added). The word "offense" is used exclusively in Title 18 "to refer to crimes." *Kellogg Brown & Root Servs., Inc. v. United States ex rel. Carter*, 575 U.S. 650, 658 (2015); *see also id.* at 658–59. Section 1596(a) thus extends the Trafficking Act extraterritorially only in *criminal* cases, and Plaintiffs cannot rely upon it to bring their civil claim.

Below, Plaintiffs cited a handful of out-of-circuit cases to support their reading of the statute. Those cases primarily addressed different legal questions and fact patterns, and they do not advance the analysis here. For example, the question of extraterritoriality was never before the court in *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184 (5th Cir. 2017), where the parties "d[id] not dispute that the [creation of § 1596] enable[d] federal courts to entertain a private party's civil suit

that alleges extraterritorial violations of the [Trafficking Act]." *Id.* at 200. Plaintiffs also cited two unpublished district court decisions that simply followed *Adhikari* in addressing the separate question of retroactivity. *See Abafita v. Aldukhan*, No. 1:16-cv-06072, 2019 WL 6735148, at *5 (S.D.N.Y. Apr. 4, 2019), *report and recommendation adopted*, 2019 WL 4409472 (S.D.N.Y. Sept. 16, 2019); *Plaintiff A v. Schair*, No. 2:11-cv-00145, 2014 WL 12495639, at *6 (N.D. Ga. Sept. 9, 2014). Finally, Plaintiffs cited a district court decision that predates *RJR Nabisco* and addressed whether a prior version of the statute covered victims trafficked into the United States. *Aguilera v. Aegis Commc'ns Grp., LLC*, 72 F. Supp. 3d 975, 978–79 (W.D. Mo. 2014). None of these decisions is relevant to the proper construction of Section 1595, let alone provides a rule of decision that would aid the Court here.

Below, Plaintiffs notably did not mention the Fourth Circuit's decision in *Roe v. Howard*, and for good reason. *Roe* held, contrary to *Adhikari*, that Section 1595 applied extraterritorially before the enactment of Section 1596(a). 917 F.3d 229, 239 (4th Cir. 2019). Relying on the portion of *RJR Nabisco* that analyzed RICO's *substantive* prohibitions, the Fourth Circuit held that the Trafficking Act's *civil* cause of action applies

extraterritorially because, "even absent an express statement of extraterritoriality, a statute may apply to foreign conduct insofar as it clearly and directly incorporates a predicate statutory provision that applies extraterritorially." *Id.* at 242.

As *RJR Nabisco* repeatedly emphasized, however, the analyses of a statute's substantive prohibitions and civil-liability provision are distinct, and extraterritorial civil liability raises concerns that are specific to private lawsuits. *See, e.g.*, 579 U.S. at 346. Indeed, the Supreme Court in *RJR Nabisco* expressly *rejected* the rationale that "a RICO plaintiff may sue for foreign injury that was caused by the violation of a predicate statute that applies extraterritorially, just as a substantive RICO violation may be based on extraterritorial predicates." *Id.* at 350. The Court explained that this reasoning "fails to appreciate that the presumption against extraterritoriality must be applied separately to both RICO's substantive prohibitions and its private right of action." *Id.*

Roe cannot be squared with this reasoning, and because there is no other clear indication of extraterritoriality with respect to claims brought under Section 1595, this Court must proceed to the second step of the

extraterritoriality analysis: whether Plaintiffs' claims involve a permissible domestic application of the statute.

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

If a statute does not apply extraterritorially, "plaintiffs must establish that 'the conduct relevant to the statute's focus occurred in the United States.'" *Nestlé USA*, 141 S. Ct. at 1936 (quoting *RJR Nabisco*, 579 U.S. at 337). Courts determine the "focus" of a statute by identifying "'the objects of the statute's solicitude,' or what it is 'that the statute seeks to regulate' or protect." *Spanski Enters., Inc. v. Telewizja Polska, S.A.*, 883 F.3d 904, 913 (D.C. Cir. 2018). A statutory provision's "focus" will thus typically be either the specific conduct the provision regulates, *see Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 266–67 (2010), or the specific injury the provision aims to prevent, *see RJR Nabisco*, 579 U.S. at 346. Neither kind of "focus" would make the application of Section 1595(a) domestic in this case, as both the relevant conduct and the relevant injuries occurred abroad.

Section 1595(a) grants a civil cause of action to "[a]n individual who is a victim of a violation of this chapter." Plaintiffs brought suit under this provision and alleged that they were victims of violations of

prohibitions on forced labor in Sections 1589 and 1590. As Section 1595(a)'s language makes clear, the conduct targeted is accordingly the "violation of this chapter," not the "benefit[ting], financially or by receiving anything of value from participation in a venture," which merely defines against whom suit can be brought. Here, the relevant "violation of this chapter"—forced labor—allegedly occurred in Mali and Côte d'Ivoire, not in the United States.

Section 1595(a)'s text also confirms that the specific harm the provision seeks to prevent is the injury to the "victim of a violation of this chapter." Just as *RJR Nabisco* concluded that Section 1964(c)'s language about injury meant that a private RICO plaintiff must show "a *domestic* injury to its business or property," 579 U.S. at 346, Section 1595(a)'s language about "victims" suggests that private plaintiffs must show that they were victimized in the United States. Here, however, Plaintiffs allege injuries that occurred in Mali and Côte d'Ivoire.

Below, Plaintiffs argued only that "[t]he focus of the prohibition on 'benefitting, financially or by receiving anything of value' is on the benefitting, not on the other conduct." Pls.' Opp. to Mot. to Dismiss 32. But that argument's premise is wrong: Section 1595(a) contains no

"prohibition on 'benefitting'" at all, as it merely creates a civil cause of action based on substantive predicates elsewhere in the Trafficking Act.

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

III. Courts Should Not Stretch the Trafficking Act Beyond What Congress Intended or Impose Liability Based on Industry-Led Anti-Trafficking Efforts

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

Forced labor, and human trafficking more broadly, are serious issues that many companies are actively addressing through independent efforts and public-private partnerships. *See infra* 26–30. But government regulation of forced labor in global supply chains involves difficult policy choices and trade-offs that are best weighed by the elected branches, not courts acting on their own. The unfortunate reality is that forced labor is a significant problem in global supply chains, and that fact not only leads to serious harms but also to considerable policy challenges for the U.S. government. Congress and the Executive Branch are engaged in ongoing efforts to address the problem of forced labor abroad, including on cocoa farms, and courts should not strain to read statutes

like the Trafficking Act expansively to fill perceived gaps in their legislative and regulatory actions.

1. Several of Plaintiffs' positions raise a danger of interfering with competing foreign relations interests and considerations that the political branches are best-positioned to properly balance. Consider what it means to "participat[e] in a venture" under Section 1595(a). Defendants have explained why that phrase cannot encompass every possible downstream purchaser of a good alleged to have been aware of potential violations further up the global supply chain. But Plaintiffs nonetheless encourage this Court to stretch "venture" beyond what its plain meaning can support.

Plaintiffs' theory would enlist courts in the drawing of policy-based lines within complex, global supply chains that affect nearly every member of society. The steps from cocoa bean to chocolate bar, coffee bean to coffee cup involve numerous independent actors engaged in economic exchange. Under Plaintiffs' "venture" theory, *each* of those actors would be subject to venture liability.

Saying that the global community as a whole must address the harms associated with forced labor does not mean that Congress wanted

each actor in the global community to be held liable in court for those harms. Determining whether to extend supply-chain liability far beyond the common meaning of the term "venture" thus embodies a fundamental policy choice best determined by the elected branches and their decades of experience in targeting forced labor practices.

Extending the territorial reach of Section 1595 involves similarly complicated policy issues. As noted above, the presumption against extraterritoriality recognizes the delicate foreign policy considerations inherent in determining whether a law will be given extraterritorial reach. Where, as here, a statutory provision lacks the "clearly expressed congressional intent" that the presumption requires, *RJR Nabisco*, 579 U.S. at 335, the judiciary should not try to independently balance those considerations in Congress's stead.

2. Congress, the Executive Branch, and Côte d'Ivoire itself have been active in addressing these issues. For example, Congress has continuously expanded the remedies available to victims of human trafficking through the Trafficking Act's many reauthorizations. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. 108–193, § 4(a)(4)(A), 117 Stat. 2875, 2878 (incorporating private right of action for

damages); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110–457, §§ 221–22, 122 Stat. 5044, 5067–71 (broadening scope of criminal and civil liability); Frederick Douglass Trafficking Victims Prevention and Protection Reauthorization Act of 2018, Pub. L. No. 115–425, § 133(a), 132 Stat. 5472, 5481–82 (charging the Secretary of Labor and the Bureau of International Labor Affairs with identifying "goods that are produced with inputs that are produced with forced labor or child labor"); Abolish Trafficking Reauthorization Act of 2022, Pub. L. No. 117–347, § 102 (broadening scope of civil liability to include anyone who "attempts or conspires to benefit" from a violation of Section 1595(a)).

Congress and the Executive Branch have also been active in addressing forced labor in ways other than the provision of legal remedies. For over two decades, the political branches have demonstrated their commitment to addressing forced and child labor through the Harkin-Engel Protocol, an "unprecedented framework agreement," 148 Cong. Rec. 370 (2002) (statement of Sen. Harkin), that addresses forced and child labor in West African cocoa supply chains through coordinated governmental and nongovernmental stakeholder action, *see* Chocolate Mfrs.

Ass'n, Protocol for the Growing and Processing of Cocoa Beans and their Derivative Products 1 (2001), https://bit.ly/3CzOQes. Congressman Eliot Engel, one of the Protocol's sponsors, initially proposed an appropriations rider allocating $250,000 to the U.S. Food and Drug Administration "to develop labeling requirements indicating that no child slave labor was used in the growing and harvesting of cocoa." 147 Cong. Rec. 12,269 (2001) (statement of Rep. Engel). When the agency explained that such a program was "unrealistic and impossible to attain," 148 Cong. Rec. 370 (2002) (statement of Sen. Harkin), government and industry leaders developed the Protocol as a commitment to and a means of effectuating a "credible, public certification system of industry-wide global standards" intended to ensure that cocoa products "have been produced without any of the worst forms of child labor," *id.* In the years following its passage, the Protocol's sponsors recognized it as having "been a positive and important catalyst for change, driving a number of important achievements." Joint Statement from U.S. Senator Tom Harkin, Representative Eliot Engel, and the Chocolate and Cocoa Industry on the Implementation of the Harkin-Engel Protocol (June 16, 2008), https://bit.ly/3jZtII2.

The U.S. government reaffirmed its commitment to the Protocol in 2010 when it joined industry leaders and the governments of Ghana and Côte d'Ivoire in signing a Declaration of Joint Action to Support the Implementation of the Harkin-Engel Protocol. Declaration of Joint Action to Support Implementation of the Harkin-Engel Protocol (Sept. 13, 2010), https://bit.ly/3IAVKUE. In conjunction with the Declaration, industry and government leaders committed to a "Framework of Action" to "support the further implementation and realization of" the Protocol's goals by providing for new and expanded initiatives to address forced and child labor in Côte d'Ivoire, including through data collection and supply-chain monitoring. Framework of Action to Support Implementation of the Harkin-Engel Protocol 1 (2010), https://bit.ly/3vS6Mgv; *see id.* at 3–4.

These new and expanded initiatives resulted in significant investment in combating forced labor on cocoa farms. Since 2010, the Department of Labor has devoted nearly $30 million to projects that address child labor in cocoa production in Côte d'Ivoire, *see* Child Labor Cocoa Coordinating Grp., CLCCG Report: 2010–2020 Efforts to Reduce Child Labor in Cocoa 51–64 (2021), https://bit.ly/3GAiFN8, and industry actors

have contributed approximately $225 million to efforts to further Protocol goals and priorities, *see id.* at 2.

Amicus and its members are well-positioned to contribute to and complement these efforts. For example, through public-private partnerships and deeper collaboration with governments, the business community helps drive adoption of technologies to enhance mapping of high-risk supply chains and improve due-diligence mechanisms. *See generally* U.S. Chamber of Com. & United Way Ctr. to Combat Human Trafficking, Trust by Performance: Uniting Business and Philanthropy Against Trafficking (2022), https://bit.ly/3QNjp6l. Governments should work with industry to address key governance issues in the cocoa industry and increase accountability for local actors to promote ethical procurement.

For over 20 years, Congress and the Executive Branch have been carefully crafting and refining a comprehensive, multifaceted approach to forced labor on cocoa farms centered on voluntary public-private partnerships. This Court does not need to get ahead of Congress by stretching Article III standing beyond its proper bounds or extending the Trafficking Act's civil cause of action extraterritorially.

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

Industry leaders have also undertaken significant industry-wide initiatives to combat human trafficking on cocoa farms. The International Cocoa Initiative—which draws together industry partners, local communities, governments, and international organizations—has helped protect children in Côte d'Ivoire and Ghana through supply-chain monitoring and management and community development efforts. Int'l Cocoa Initiative Found., ICI Strategy: 2021–2026, at 10 (2020), https://bit.ly/3XnyoWB. And the World Cocoa Foundation—which represents more than 100 companies in the cocoa supply chain and 85 percent of the global market—is working in collaboration with the International Cocoa Initiative to integrate forced-labor risk processes into industry policies, systems, and operations. *See* World Cocoa Found., WCF Strategy: Pathway to Sustainable Cocoa 4 (2020), https://bit.ly/3GXIfNz.

These efforts have had real impacts on the prevalence of child labor in the cocoa industry. While "a University of Chicago study funded by the U.S. Department of Labor found in 2020 the prevalence of forced child labor in cocoa harvesting has increased since 2001," Pls.' Br. 7–8, that same study also found that "[m]ultiple interventions in a community led

to a statistically significant reduction in the prevalence of child labor and hazardous child labor in cocoa production," NORC, NORC Final Report: Assessing Progress in Reducing Child Labor in Cocoa Production in Côte d'Ivoire and Ghana 27 (2020), https://bit.ly/3IHI1vh. In particular, "[h]ouseholds in treatment communities were 25 percentage points less likely to have at least one child engaged in child labor and 28 percentage points less likely to have at least one child engaged in hazardous child labor than the households from comparison communities." *Id.* And, for seven of the past ten years, the Department of Labor has categorized Côte d'Ivoire as having made "significant advancement in efforts to eliminate the worst forms of child labor," the Department's highest designation for a nation's progress in this area. *Child Labor and Forced Labor Reports: Côte d'Ivoire*, U.S. Dep't of Labor, https://bit.ly/3D32mra.

These efforts should be encouraged, not punished. Plaintiffs argue that efforts to ensure ethical sourcing in supply chains like those outlined above establish that companies have enough "control" over their suppliers to give rise to a "venture" subject to the Trafficking Act. *See* Pls.' Br. 35–39. Courts should decline this invitation to weaponize industry

leaders' government-endorsed, voluntary, good-faith efforts to ensure that their supply chains are free of forced labor.

Adopting Plaintiffs' theories would pressure companies to cease their anti-trafficking initiatives and potentially withdraw from foreign markets entirely, to the detriment of local economies and the workers within them. *See Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018) (plurality opinion); U.S. *Nestlé* Br. at 17. Imposing liability in the manner Plaintiffs urge would create perverse incentives, deterring companies from trying to address the very supply-chain issues that Plaintiffs raise, and potentially even causing companies to cease beneficial foreign economic activity. *See Nestlé*, 141 S. Ct. at 1939 ("Companies or individuals may be less likely to engage in intergovernmental efforts [such as the Harkin-Engel Protocol] if they fear those activities will subject them to private suits.").

Reading the Trafficking Act as Plaintiffs urge would transform steps taken to address forced labor into legal liability—a development antithetical to the shared mission of remedying global supply-chain concerns. This Court should deny that invitation.

CONCLUSION

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

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because it contains 6,493 words, excluding the parts exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1). I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because the brief was prepared in 14-point Century Schoolbook font using Microsoft Word.

/s/ John B. Bellinger, III
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CERTIFICATE OF SERVICE

I hereby certify, pursuant to Fed. R. App. P. 25(d) and Cir. R. 25, that on January 20, 2023, the foregoing brief was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notification to the attorneys of record in this matter who are registered with the Court's CM/ECF system.

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