ORAL ARGUMENT NOT YET SCHEDULED

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' REPLY BRIEF

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I. INTRODUCTION

Appellees' Response Brief ("Response") is based on an objectively false premise. They make the incredible factual assertion that they are mere remote purchasers of cocoa and, as such, could not possibly be in a venture with their cocoa suppliers under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1595 *et. seq*. They blame Appellants' "vision of open-ended venture liability" in creating the constitutional standing issue. Response at 35. This baseless assertion collides directly with Appellants' factual allegations showing that, rather than disowning their co-venturer cocoa plantation partners as they do before this Court, Appellees have admitted there is forced child labor in their cocoa supply chains and assured regulators and consumers that they were working closely with their cocoa plantations to end their reliance on child labor. *See* Opening Brief ("OB") at 6-9, 35-41. Indeed, the District Court accepted as true the Appellees' relationships with their cocoa suppliers, and that these suppliers use trafficked and forced child labor. *See* JA at 107-10. The Court inexplicably disregarded these allegations in asserting that "merits questions" are irrelevant to the standing issue. *Id*. at 119.

A mere consumer of chocolate has no relationship with cocoa plantations in Cote D'Ivoire and could never be in a venture with them that caused Appellants' injuries. Contrary to Appellees' fearmongering (Response at 35), the language of

section 1595(a) prevents "open-ended venture liability" and holds accountable only parties like Appellees who are "participants in a venture."

This case does not present a complex standing issue. Unlike distant consumers of chocolate, Appellees have direct relationships with their cocoa suppliers that utilize forced labor, making them co-venturers, and they substantially assisted their suppliers in ways that contributed to Appellants' injuries. Appellees dispute this and claim they are mere purchasers of cocoa with no relationship to the farmers producing the cocoa they purchase.

A motion to dismiss is not the place for Appellees to assert competing facts to those alleged in the Complaint regarding their relationships with their cocoa plantations. *Doe v. Princeton Univ.*, 30 F.4th 335, 342 (3d Cir. 2022) ("The proper place to resolve factual disputes is not on a motion to dismiss, but on a motion for summary judgment."). Nor is it the place for Appellees to advocate for any alternative factual theory regarding their relationships with their cocoa suppliers. 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)).

Here, there is no viable alternative theory, but even if there was, Appellants' plausible allegations prevail at this stage of the proceedings. Appellants have standing because their injuries are "fairly traceable" to the "venture," comprised of the cocoa plantations that procured the Appellants as trafficked children and forced them to harvest cocoa, as well as Appellees, who are liable as participants in the "venture" that caused Appellants' injuries. Appellees' improper denial of Appellants' factual allegations notwithstanding, the law is clear that all co-venturers, whether direct actors or indirect beneficiaries like Appellees, caused Appellants' injuries through their joint participation in the venture.

II. SUMMARY OF ARGUMENT

The District Court dismissed this case based solely on its improper legal conclusion that Appellants lacked standing because their injuries were not "fairly traceable" to Appellees. In defending this decision, Appellees' Response attempts to create false complexity when this case is actually quite simple. Buried in a single reference in the Response (at 27), Appellees mention joint and several liability only once while quoting Appellants' allegations. Appellees fail to engage in this case's central issue that with respect to Appellants' claims for forced labor and trafficking, section 1595(a) of the TVPRA establishes a specific standard for

"venture" liability.[1] Any party is liable 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). Thus, if as Appellants alleged, Appellees are venture beneficiaries under section 1595(a), they are liable as co-venturers with their cocoa suppliers based on joint and several liability. Appellants satisfied the causation requirement because they established that ***Appellants' injuries are "fairly traceable" to the "venture,"*** and as demonstrated by the clear text and legislative history of the TVPRA, Congress intended the law to reach indirect actors such as Appellees because they are participants in a "venture" that caused Appellants' injuries.

Venture liability also provides a path to standing for Appellants' common law claims. Aiders and abettors, co-conspirators, and co-venturers share equal responsibility and liability with the direct actors they collude with who have directly caused harm.

The establishment of venture liability provides Appellants standing to sue Appellees under section 1595(a). The District Court fundamentally erred in acknowledging that Appellants' standing argument was premised on Appellees

[1]Appellees' liability for Appellants' common law claims based on joint and several liability is discussed in section III.C.3, *infra*.

being in a venture with their co-venturers that were the direct perpetrators that trafficked and enslaved Appellants, but dismissing this as a "merits question" irrelevant to the standing analysis. JA at 119-20. This was error because the standing doctrine cannot be used to erect a causation bar that nullifies joint and several liability and prevents assessment of merits liability.

While Appellees assert the District Court did not erroneously restrict causation to direct actors, they implicitly adopt this error in devoting much of their argument to claiming that Appellants failed to link their injuries directly to any of the specific Appellees. Appellants' actual allegations, not Appellees improper distortion of them on a motion to dismiss, demonstrate their injuries were directly caused by cocoa plantation owners and agents that are in a venture relationship with Appellees.

Appellees also mirror the District Court and assert that Appellants lack standing because they fail to account for the role of "intermediaries" in causing their injuries. As Appellants' actual allegations make clear, these "intermediaries," cocoa farmers and their agents, are in a venture with Appellees, making Appellees jointly and severally liable for their unlawful acts.

The District Court's decision that Appellants lacked standing to sue did not separately address whether they had standing to seek injunctive relief. Appellees

nonetheless raise the issue for initial consideration by this Court. Appellants demonstrate they do have a viable legal basis for seeking injunctive relief.

Appellees raise several other issues that the District Court did not reach concerning whether Appellants' Complaint states a claim for relief. Appellees seek initial resolution by this Court on appeal. As per this Court's normal practice, these issues should be reviewed in the first instance by the District Court on remand. Appellants will nonetheless briefly demonstrate that their Complaint states a Claim for relief under the TVPRA and their common law claims are viable as well.

III. ARGUMENT

A. 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.

The District Court's standing assessment was based entirely on the contested second element, traceability or causation. JA at 115. As Appellants demonstrated (OB at 15-35), they satisfy the contested traceability element if, as they alleged, Appellees are in a "venture" with their cocoa suppliers under section 1595(a) of the TVPRA. Appellants' injuries are "fairly traceable" to the "venture," comprised of the plantation owners and their agents that procured the Appellants as trafficked children and forced them to harvest cocoa, as well as Appellees, who, though

indirect actors, are liable as participants in and beneficiaries of the "venture." *See* 18 U.S.C. § 1595(a).[2]

The 2008 amendments to the TVPRA specifically established beneficiary liability for indirect actors by adding 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 based on findings that supporting acts by such beneficiaries contributed to forced labor and trafficking.

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, but 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

[2] This precise standing question is also at issue in *Doe I* v. *Apple Inc.*, Case No.: 21-7135 (D.C. Cir.; argued December 8, 2022).

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).

Thus, the very purpose of section 1595(a) was to make clear that all co-venturers, including indirect actors like Appellees who benefit from participation in the venture and contribute to causation, are jointly and severally liable for injuries that are fairly traceable to the "venture." The essence of section 1595(a) is that it establishes liability for merely 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).

Beneficiary liability for Appellees, co-venturers in a venture that caused the injuries to Appellants, establishes both causation for standing purposes as well as statutory liability. The District Court erroneously declined to consider the impact of co-venturer liability on standing, finding that "the defendants' liability under the TVPRA or the common law is a merits question distinct from the constitutional standing requirement." JA at 119. While that is certainly true, the District Court erred in failing to consider that a demonstration of indirect liability can serve to establish standing causation for indirect actors.

Appellants cited a long line of cases finding that if joint and several liability is established on the merits of a claim based on joint venture, co-conspirator, aiding and abetting or some other form of vicarious liability, this also establishes causation for standing purposes against any indirect actor in such a relationship with the direct actor. OB 18-24. Appellees purport to "distinguish" these cases by merely agreeing that those courts, unlike the District Court, correctly found injuries "fairly traceable" to the defendants' activities based on indirect liability principles. Response at 28-30. For example, in "distinguishing" *Autolog Corp. v. Regan*, 731 F.2d 25 (D.C. Cir. 1984) (Response at 30, n.4), Appellees acknowledge the Court found the conduct at issue "fairly traceable to the challenged conduct," but neglected to mention that the Court also found "a plaintiff has standing to challenge conduct that indirectly results in injury . . ." 731 F.2d at 31.[3]

What should be a non-controversial proposition that indirect actors share vicarious liability with direct actors causing harm was most clearly articulated by

[3] Appellees also purport to distinguish *Halberstam v. Welch*, 705 F.2d 472 (D.C. Cir. 1983) and *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), by asserting that the indirect actors in those cases had provided "substantial assistance" to the direct perpetrators. Response at 29-30. While Appellants here merely need to meet section 1595 (a)'s standard of beneficiary participation in a venture, they do allege that Appellees provided significant support to their cocoa plantations, including cash, supplies, training, and exclusive buyer agreements. Complaint ¶ 51.

the Court in *Merriam v. Demoulas*, No. 11-10577-RWZ, 2013 U.S. Dist. LEXIS 77600 (D. Mass. June 3, 2013),[4] which explained that the

> causation standard does not require that the defendant personally commit the act that harms the plaintiff. . . . In such [indirect liability] 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.[5]

To ignore, as the District Court did, that potential co-venturer liability under TVPRA section 1595(a) satisfies causation for standing purposes necessarily means the District Court erred in "rais[ing] 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). *See* OB at 18.

Appellees ignore this line of cases, but the law is clear "the 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

[4] In OB at 19, Appellants erroneously described *Merriam* as a TVPRA case when it is based on ERISA. *See* 2013 U.S. Dist. LEXIS 77600 at *2. Appellees dismiss this case on that basis, Response at 28, n. 3, but the fundamental legal principle that vicarious liability can establish causation for standing purposes remains true regardless of which statutory scheme is at issue.

[5] See OB at 19 for a more complete quote.

traceability." *Tozzi v. U.S. Dep't of Health & Hum. Servs.*, 271 F.3d 301, 308 (D.C. Cir. 2001). *See also*, *Amici Curiae* Brief of Law Professors ("Professors Brief") at 15-24 (standing issue cannot be assessed in a vacuum; it must be viewed in the context of liability). Using the standing doctrine to restrict statutory liability creates a separation of powers issue as the District Court effectively negated the Congressional decision to extend TVPRA civil liability to venture beneficiaries. *See id*. at 19-25.

The District Court did not even apply a "tort standard" of causation to the fairly traceable assessment, instead requiring direct causation only, *see* JA 115-16, thus eliminating the possibility of venture liability expressly established by Congress in section 1595(a) and common in other areas of tort liability.

Illustrating that causation for standing purposes is a lower threshold than for statutory tort liability, after finding that causation for standing was satisfied because "vicarious liability" made "one fiduciary liable for the actions of another," 2013 U.S. Dist. LEXIS 77600 at *12, the *Merriam* Court went on to find that plaintiffs there, while they demonstrated causation for standing purposes, failed to establish statutory liability. *Id.* at *13-21.

The District Court effectively eliminated this routine route to standing and, rather than address that a viable venture theory establishing Appellees' joint and several liability could satisfy the causation requirement, offered three reasons for

denying standing. JA at 115. As Appellants demonstrated, the District Court misapplied Supreme Court precedent in its reasoning and none of the three rationales justified a denial of standing. *See* OB at 27-35.

Appellees likewise declined to engage on the actual issue of indirect causation based on co-venturer liability and instead attempt to defend the District Court's reasoning. First, Appellees dispute how the merits issue of whether there is a "venture" should be addressed within a standing assessment and then improperly argue factually that there is no venture. Response 30-35. Second, in a circular twist, Appellees argue that the District Court did not limit the causation assessment to whether Appellees were directly responsible for Appellants injuries, and then proceed to argue that Appellees were not directly responsible. *Id*. at 17,19-22,26-30. Finally, Appellees argue the District Court was correct that Appellants' venture theory of causation does not account for the actions of "intermediaries" in the forced labor and trafficking process, resulting in a speculative chain of causation. *Id*. at 23-25. Each of these arguments fails if Appellants' venture theory of causation is assessed as the Complaint alleges and the law requires.

1. Appellees Mischaracterize Appellants' Position on the Relationship Between Merits Allegations And Standing, and Incorrectly Assert that Appellants' Venture Liability Argument Avoids the Constitutional Standing Requirement.

Appellees present a caricature of Appellants' position on the relationship between merits allegations and an assessment of standing. *See* Response at 30.

This relationship goes to the heart of demonstrating the District Court's fundamental error in holding that Appellants lack standing to sue *regardless of* their showing of co-venturer liability on the merits. *See* JA at 115-16.

In declining to even consider the merits in assessing standing, the District Court asserted 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 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.[6]

This point is inapposite because, as previously established (OB at 6-9, 35-41) and further demonstrated herein, Appellants do not dispute the causation requirement for Article III standing; they satisfy it. Their injuries are fairly traceable to Appellees because the companies participated in a "venture" that included their cocoa farmers who trafficked and enslaved Appellants. Appellees, by participating in the venture as co-venturers, are jointly and severally liable for those injuries.

[6] There is no dispute that Appellants suffered concrete injuries while being trafficked and forced to harvest cocoa. *See* Complaint ¶¶ 127-48.

Appellants' showing of causation based on venture liability created by the 2008 amendments to section 1595(a) is consistent with the Supreme Court's reasoning in *Spokeo, Inc. v. Robins*, 578 U.S. 330 (2016), that 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 (quotations omitted). Neither the Appellees nor the District Court have 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. Appellants' satisfaction of this Constitutionally-sound merits standard of causation also confers standing.

As Appellants demonstrated (OB at 10, 24-26), 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). In declining to consider the merits, the District Court did not refer to the *Parker* line of cases. *See* JA at 119-20. Appellees attempt to limit *Parker*, Response at 34-35, but as *Parker* stated, "[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." 478 F.3d at 377 (citations and quotations omitted).

Appellees' reliance on *Estate of Boyland v. USDA*, 913 F.3d 117 (D.C. Cir. 2019) to distinguish *Parker* is curious to say the least since *Boyland* quotes *Parker* with approval: '"when considering whether a plaintiff has Article III standing, a federal court must assume, *arguendo*, the merits of his or her legal claim." *Id*. at 123 (citations omitted). *Boyland* went on to find that, even assuming plaintiffs' legal challenge to be meritorious, they lacked standing because "their injury is ***not redressable*** because they lack live credit discrimination claims to present there." *Id*. at 124 (emphasis added).[7]

Contrary to Appellees' mischaracterization of Appellants' argument, *Boyland* demonstrates that application of *Parker*'s requirement to assume the validity of the merits in assessing standing does not "automatically" confer standing. Response at 30. And, to be clear, it is not the "Plaintiff's view" that courts should assume the merits of a claim in assessing standing, *id.*; it is binding law in this Circuit.

With respect to causation for standing purposes, it is unlikely that there would be a case where a merits claim of indirect liability based on co-venturer status is assumed meritorious based on *Parker* and it would not result in a finding

[7] Appellees also attempt to limit *Parker* with reliance on *Taylor v. F.D.I.C.*, 132 F.3d 753, 767 (D.C. Cir. 1997). Response at 34. However, *Taylor* predates *Parker*, and the *Parker* Court distinguished its "unique situation." 478 F.3d at 378, n.2. *Parker*, not *Taylor*, remains good law.

there is causation for standing purposes. However, as the *Merriam* Court illustrates, in cases where causation is found to confer standing, if the merits claim is then assessed for failure to state a claim, a case can be dismissed on that basis. *See* 2013 U.S. Dist. LEXIS 77600 at *13-21. Thus, assuming the merits of statutory causation for a standing assessment does not *automatically* result in a finding of a meritorious statutory claim. This is consistent with the law in this Circuit previously addressed that the law does not allow for imposing a standing bar for causation more stringent than for a merits claim. This also provides the necessary defense to TVPRA claims that ultimately do not meet the requirements of section 1595(a).

Appellees purport to agree that if there is a properly alleged TVPRA venture claim that identifies "a sufficient causal connection between the defendant's conduct and the plaintiff 's injury that is analogous to the forms of vicarious and indirect liability traditionally recognized as providing a basis for a lawsuit in American courts" then a causal connection will not be difficult to identify. Response at 35 (quotation omitted). Appellants did demonstrate that co-venturer liability is a basic tenant of tort liability. *See* OB at 18-24. That is not the dispute here. Rather, Appellees dispute that they are participants in a venture with their cocoa suppliers. Response at 35. They take the incredible position that merely

"purchasing a commodity sourced from a country where problematic labor conditions persist" does not place them in a venture with their cocoa suppliers. *Id*.

Whether there is a "venture" is indeed the issue, and it is a merits question, not a legitimate challenge to standing when Appellants have alleged plausible facts showing that, unlike mere purchasers of cocoa, Appellees have been in a long-term venture with their cocoa plantations, which are the direct perpetrators of trafficking and forced labor of children, including Appellants. *See* OB at 6-9, 35-41 and section III.A.3, *infra*.

2. Section 1595 (a) Venture Liability Is Not Limited to Direct Actors Who Injured Appellants.

Implicitly acknowledging that if the District Court limited section 1595(a) venture liability to direct actors this would be legal error, Appellees attempt to demonstrate that the District Court did not impose such a restriction. Response at 27-30. However, they merely emphasize the Court ***did*** require direct causation because there is no avoiding the District Court's explicit language requiring Appellants to trace their injuries directly to each Appellee. The District Court held that "plaintiffs must establish causation separately for each defendant." JA at 115-16. This limitation of standing to direct causation was clear error. *See* Professors Brief at 9-10. '

The District Court's error of requiring direct causation for TVPRA liability is particularly glaring because TVPRA section 1589(b) makes any party a ***direct***

violator of the forced labor provision who "knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of [forced labor]." Thus, Appellees as co-venturers, face direct liability regardless of whether they are direct actors.

In purporting to distinguish the hotel sex trafficking cases which found venture liability sufficient to establish standing, the District Court asserted that the plaintiffs in those cases "alleged a ***direct*** link between their injuries and the defendant hotel chains." JA at 120 (emphasis added). As Appellants previously demonstrated, OB at 37-40, the hotels in the sex trafficking cases were indirect actors and their liability was based entirely on their benefitting from participation in a venture.

The District Court's entire analysis is premised on erroneously requiring Appellants to show that each Appellee directly caused their injuries and explicitly disregarding the question of whether Appellees participated in a venture with their cocoa suppliers, who directly caused the injuries. Properly viewed as a venture liability case, Appellants alleged Appellees, as co-venturers, contributed to causation by participating in the venture and are jointly and severally liable for the acts of the venture. *See, e.g.*, *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.").

As previously established, 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 Appellants. *See* OB at 40.[8] Causation need only be "fairly traceable," not precisely determined, at the motion to dismiss. *See* Professors Brief at 11-14. With this showing that causation is more likely than not, each member of the venture,

[8] Appellees seek to counter this basic tort principle by citing to "market share" or "bulk supply" cases, Response at 21-22, but this is not a market share case as it is not seeking to establish market penetration of a harmful product. This case presents a simple example of using statistical evidence to prove that Appellees, as co-venturers, controlled at least 70% of the cocoa suppliers in Cote D'Ivoire, who were also in the venture with Appellees, making it more likely than not that Appellants were harmed by cocoa suppliers in the venture. Such statistical evidence is widely accepted as circumstantial evidence of causation. *See, e.g.*, *Milam v. State Farm Mut. Auto. Ins. Co*., 972 F.2d 166, 170 (7th Cir. 1992) ("[T]estimony and other forms of 'direct' evidence have no categorical epistemological claim to precedence over circumstantial or even explicitly statistical evidence."); *Ashland v. Ling-Temco-Vought,Inc*., 711 F.2d 1431, 1439-40 (9th Cir. 1983)(in determining an aviation accident's cause, it was permissible to consider circumstantial evidence, such as statistics, suggesting the most frequent causes of such accidents); *Chapman v. American Cyanamid Co.*, 861 F.2d 1515, 1517-20 (11th Cir. 1988) (finding plaintiff had sufficient evidence to link their son's injury to defendant's vaccine, given that most or all of the vaccines in the doctor's office when and where plaintiffs' son was given a shot were defendant's); *Mayfield v. KeethGas Co.*, 81 N.M.313 (N.M. Ct. App.1970) (finding that doctor's opinion as to cause of death, based on statistics that arteriosclerosis accounts for at least sixty to eighty percent of sudden cardiac deaths, "is not speculative but is substantial evidence"). Further, questions of sufficiency of evidence are not properly addressed on a Motion to Dismiss.

including Appellees, could be found jointly and severally liable for Appellants' injuries regardless of whether they are direct or indirect actors. *See 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).

3. The "Intermediaries" Involved in Trafficking Appellants and Forcing them to Work are Members of the Venture with Appellees.

The District Court misapplied the Supreme Court's ruling in *Clapper v. Amnesty Int'l, USA*, 568 U.S. 398, 410 (2013), finding that the existence of "intermediaries" in the chain of causation made the link to Appellees too speculative.[9] JA at 115. *See also*, Response at 23-25 (echoing the District Court's concerns about speculation). The District Court itself speculates about the existence and role of "intermediaries" in the supply chain, *see* JA 116-119, but the Complaint makes clear that all necessary participants in the trafficking and forced labor scheme are members of the venture.

Appellees are in a venture with the plantations that supply them with cocoa on a regular basis as per direct supplier agreements, and most significant for

[9] 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' concrete injuries, *see* Complaint ¶¶ 127-48, are "fairly traceable" to Appellees' actions as co-venturers.

causation purposes, provide support and assistance to these plantations. *See, e.g.*, Complaint ¶¶ 54, 55, 61, 111, 120, 154-58. According to Appellees, 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. Appellees provide technical and financial support to their cocoa plantations that allow them to keep operating and using forced child labor. *Id*. ¶¶ 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. These direct relationships with their cocoa plantations form a venture between Appellees and their plantations. While not necessary to form a venture, these supplier relationships that provide the plantations with their essential needs give Appellees the control or influence that District Court found lacking. *See* JA at 116.

With Appellees' knowledge, the owners and agents of the cocoa plantations in a venture with Appellees procured trafficked children and forced them to work on the plantations. *See, e.g.*, *id*. ¶¶ 10-17, 46-51, 58, 62, 65, 68, 72, 80, 84, 92, 101, 107, 117, 124, 127-48, 151, 155, 157, 161-64, 169. While in some cases "labor brokers" assisted the venture's plantations in obtaining trafficked child labor, *id*. ¶ 166, each venture plantation that "harbors" or "obtains" trafficked children directly violates the trafficking statute, 18 U.S.C. § 1590(a), and directly violates the forced labor provision, *id*. § 1589(a)(1), by using "force, threats of force, physical

restraint, or threats of physical restraint to that person or another person" to obtain the labor of the trafficked children. Further, as previously noted, each Appellee is a ***direct*** violator of the forced labor provision because of its membership in and benefit from the venture. *Id.* § 1589(b).

The forced labor and trafficking allegations include all major participants in the venture, including Appellees and the specific plantations that supply them cocoa. While the District Court is correct that the cocoa plantations are "non-parties" (JA 117-18), Appellants need not sue each and every member of the venture. A venture must exist to bring a claim against a co-venturer who is not the direct perpetrator, but "there is no requirement that the plaintiff bring a claim against both the perpetrator and whoever knowingly benefits." *Gilbert v. USA Taekwondo, Inc.*, No. 18-CV-00981-CMA-MEH, 2020 WL 2800748, at *9 (D. Colo. May 29, 2020). Further, focusing on Appellees as the Defendants does not alter that all co-venturers, including them, are jointly and severally liable for the acts of the venture. See section III.A.2, *supra*.

B. Appellants Have Standing to Seek to Injunctive Relief.

Appellees argue that even if there is standing to sue for damages, Appellants lack standing to obtain injunctive relief because, as former child slaves, they are not in danger of future harm. Response at 35-37. This issue was not addressed by

the District Court, but Appellants fully briefed the issue below and they demonstrated that there is case law supporting their efforts to enjoin the ongoing use of trafficked and forced child labor by Appellees' venture. *See* Opposition to Motion to Dismiss, ECF No. 33, at 43-45, which Appellants incorporate by reference as if fully set forth herein.

Appellees add the incredible argument that enjoining them will have no impact on their co-venturers, their supplier cocoa plantations. Response at 36-37. This assertion conflicts directly with Appellees' assurances to the public and regulators that they are using their control and influence through their supplier agreements to work with their cocoa farmers to end their use of child labor. *See, e.g.*, Complaint ¶¶ 39, 53-55, 61, 70-71, 82-84, 89, 94, 99, 101, 111-15, 120, 123-24, 154-58. Under Appellees' self-serving view, an injunction could never issue against their forced labor scheme because enslaved children would have no access to justice, but once free, they are no longer being injured and are barred from preventing ongoing injury to others. An injunction is precisely what is needed to require Appellees to do what they have long promised the public and regulators they would do.

As discussed in the section immediately below, this issue should be remanded to the District Court for a decision in the first instance. If this Court elects to address standing for injunctive relief, Appellants urge the Court to allow

them to seek this available remedy to prevent the abuse of more innocent children in cocoa harvesting.

C. Appellants' TVPRA and Common Law Claims State a Claim for Relief.

Appellees raise several complex substantive issues as alternative grounds for dismissal that were not addressed by the District Court. Response 37-56. Appellants urge the Court to follow its normal practice and decline to decide issues raised by Appellees on appeal but not yet addressed by the District Court. For example, in *DeBrew v. Atwood*, 792 F.3d 118 (D.C. Cir. 2015), this Court held that '"[b]ecause the district court did not reach this argument, 'we will follow our usual (although hardly universal) practice of declining to address arguments unaddressed by the district court' and leave it to the district court on remand to consider this issue in the first instance." *Id*. at 129 (quoting *Pollack v. Hogan*, 703 F.3d 117, 121 (D.C. Cir. 2012)).

The case for declining review of the new issues raised on appeal by Appellees is particularly compelling here. The Appellees attempt to raise issues previously briefed and argued before this court in *Doe I. v. Apple Inc.*, Case No.: 21-7135 (D.C. Cir.; argued December 8, 2022).[10] In addition to the standing

[10] Counsel for Appellants herein is also counsel for Appellants in *Apple*, and many of the counsel for Appellees in this case also represent the *Apple* Appellees.

question, these include the definition of participation in a "venture," whether the TVPRA is extraterritorial, and the parameters of stating a claim for Appellants' common law claims. It is likely that this Court will decide those issues before there is a remand in this case, which would properly allow the District Court to have the benefit of the *Apple* Court's rulings in addressing these issues in the first instance.

In addition, Appellees didn't just raise new issues in their Response; they devoted 20 pages to them, nearly the length allotted to Appellants' entire Reply. Appellants should not be required with the limited pages of a Reply Brief to fully address these new issues. These new issues should first be addressed by the District Court, but Appellants will nonetheless briefly respond herein.

1. Appellants Have Stated a Claim Under the TVPRA.

Appellees argue at length that Appellants have failed to establish that Appellees were "participants in a venture" within the scope of TVPRA section 1595(a). Response at 38-50. Appellants have, in the context of their standing argument, included factual allegations showing that Appellees were in a venture with their cocoa plantations. *See* OB at 6-9, 35-41 and section III.A.3, *supra*. The legal issues were fully briefed below, ECF No. 33, at 15-29, and the legal standards for evaluating the scope of the "participation in a venture" language of section 1595(a) were a major issue in the *Apple* appeal, which should provide legal

clarity when the decision is issued. *See Doe I v. Apple Inc.*, Doc. Nos. 1958086 (Opening Brief), at 11-15; 1973339 (Reply Brief), at 4-18.[11] Upon full consideration of the law and the facts, there should be no doubt Appellants have stated a claim that Appellees are participants in a "venture" with their cocoa suppliers that trafficked and forced children to work harvesting cocoa.

2. The TVPRA is Extraterritorial.

Appellees rely heavily on the lower court's unprecedented decision in *Doe I v. Apple Inc.*, the first and only federal court to hold that the TVPRA is not extraterritorial. Response at 51-52. This issue was fully briefed and argued in the *Apple* appeal, where Appellants there demonstrated that the TVPRA is explicitly extraterritorial and also that the "focus" of the statute is domestic. *See Doe I v. Apple Inc.*, Doc. Nos. 1958086 (Opening Brief), at 28-34; 1973339 (Reply Brief), at 20-25. In addition, an *Amicus Curiae* Brief of Legal Scholars With Expertise in Extraterritoriality and Transnational Litigation, Doc. No. 1959402, focused exclusively on demonstrating that the TVPRA is extraterritorial. This Court will certainly resolve this issue in *Apple*, and the great weight of authority supports extraterritorial application of the TVPRA.

[11] All of the Appellate briefs in *Apple*, including the *amici curiae* briefs, are also available at https://www.internationalrightsadvocates.org/cases/cobalt.

3. Appellants Have Properly Alleged Viable Common Law Claims.

Appellees assert that Appellants forfeited their common law claims because they did not specifically argue they had standing to bring these claims. Response at 52-53. In support, Appellees incorrectly claim there is only a single reference to these claims in the OB at 1. Response at 52.

The District Court's standing analysis was not specific to the TVPRA claims and instead addressed standing with respect to both the TVPRA and common law claims. *See, e.g.*, JA at 119 ("defendants' liability under the TVPRA or the common law is a merits question distinct from the constitutional standing requirement."). Appellants agreed with this treatment, OB at 17, and then on several occasions discussed the standard for joint liability under common law doctrines of aiding and abetting, conspiracy, and joint venture. *See, e.g.*, *id*. at 12, 15. Appellants' position remains that if Appellees were jointly and severally liable as TVPRA co-venturers, this vicarious liability would extend to them for the common law claims as well.

As to the timeliness of the claims and that they state a claim for relief, *see* ECF No. 33, at 33-40, which fully briefed those issues below and is incorporated herein by reference. These issues were also addressed in the *Apple* appeal. *See Doe I v. Apple Inc.*, Doc. Nos. 1958086 (Opening Brief), at 53-54; 1973339 (Reply Brief), at 27-28.

IV. CONCLUSION

For the reasons stated in Appellants' Opening Brief and in this Reply, the District Court's unsupportable denial of standing to Appellants must be reversed. If upheld, the ruling would immunize from liability parties who as co-venturers, aiders and abettors, or co-conspirators share liability with direct perpetrators, but manage to avoid direct participation in the unlawful activity. This would upend fundamental principles of law that have long recognized the non-controversial position that such indirect actors are jointly and severally liable along with the direct perpetrators.

This Court should, as per normal practice, decline to address the new issues raised by Appellees on appeal.

Respectfully submitted on this 13th day of February 2023,

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CERTIFICATE OF COMPLIANCE FOR APPELLANTS' OPENING BRIEF

Pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(B)(ii), 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 6,481words, less than the 6,500 words permitted.

Dated: February 13, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2023, 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: February 13, 2023

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