VENTURE LIABILITY: THE KEY TO UNLOCKING CORPORATE COMPLICITY IN SUPPLY CHAIN FORCED LABOR

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INTRODUCTION

In recent decades, technological advancements have accelerated the pace of globalization by reducing the costs and barriers to international trade.[1] This trend has encouraged corporations to "shift to a global sourcing model, allowing them to take advantage of lower costs for labor and materials, land, and other factors."[2] But it is becoming increasingly apparent that these lower labor costs are too often accomplished through the use of forced labor in developing countries where

1. *See* IMF, *Globalization: A Brief Overview*, IMF: Issues Briefs (May 2008), https://www.imf.org/external/np/exr/ib/2008/053008.htm; *see also* STEVEN A. ALTMAN & CAROLINE R. BASTIAN, DHL GLOBAL CONNECTEDNESS INDEX 2021 UPDATE 10 (2021), https://www.dhl.com/content/dam/dhl/global/dhl-spotlight/documents/pdf/2021-gci-update-report.pdf.

2. Willy Shih, *Is It Time to Rethink Globalized Supply Chains?*, MIT SLOAN MGMT. REV. (Mar. 19, 2020), https://sloanreview.mit.edu/article/is-it-time-to-rethink-globalized-supply-chains/ [https://perma.cc/7EK6-QXPY].

exploitive practices occur far away from the corporations and consumers they serve.[3] Whether most people realize it or not, forced labor pervades the lives of billions of consumers. It has been detected in the supply chains of everything from chocolate[4] to clothes[5] and smartphones.[6] In 2022, it was estimated that as many as "27.6 million people are engaged in forced labor."[7]

Recognizing the severity of the issue and the significant role that U.S. and multinational corporations play, Congress has taken some key steps in recent years to combat this global phenomenon. The newly passed Uyghur Forced Labor Prevention Act is the latest example.[8] In no uncertain terms, Congress expressed its strong will "to lead the international community in ending forced labor practices wherever such practices occur through all means available."[9] This Article focuses on another piece of federal legislation, the U.S. Trafficking Victims Protection Reauthorization Act (TVPRA), which was first enacted as the Victims of Trafficking and Violence Protection Act (TVPA) in 2000[10] and most recently reauthorized in 2008.[11]

The TVPRA has the potential to serve as a robust tool against forced labor in supply chains. It targets two important aspects of the "remote labor" model that allows corporations to profit from forced labor practices in their supply chains. First, corporations take advantage of weak labor laws and enforcement in certain

3. *See* INT'L LAB. ORG., ORG. FOR ECON. COOP. & DEV., INT'L ORG. FOR MIGRATION & UNITED NATIONS CHILD. FUND, ENDING CHILD LABOUR, FORCED LABOUR, AND HUMAN TRAFFICKING IN GLOBAL SUPPLY CHAINS 26 (2019) [hereinafter ENDING CHILD LABOUR], https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---ipec/documents/publication/wcms_716930.pdf ("Severe cost and price pressures can lead suppliers to lower labour costs in a manner that increases the risk of child labour, forced labour and human trafficking. In the face of these pressures, supplier firms may seek to lower labour costs through underpaying workers [.]"); *see also* BUREAU OF INT'L LAB. AFFS., U.S. DEP'T OF LAB., 2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR 24–29 (2022) [hereinafter 2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR], https://www.dol.gov/sites/dolgov/files/ILAB/child_labor_reports/tda2021/2022-TVPRA-List-of-Goods-v3.pdf.

4. *See* CAROL OFF, BITTER CHOCOLATE: INVESTIGATING THE DARK SIDE OF THE WORLD'S MOST SEDUCTIVE SWEET (2006).

5. *See* Elizabeth Paton, *A Close Look at a Fashion Supply Chain Is Not Pretty*, N.Y. TIMES (July 28, 2020), https://www.nytimes.com/2020/07/28/style/malaysia-forced-labor-garment-workers.html [https://perma.cc/VY28-PJFP].

6. *See Is My Phone Powered by Child Labor?*, AMNESTY INT'L, https://www.amnesty.org/en/latest/campaigns/2016/06/drc-cobalt-child-labour/ [https://perma.cc/82H5-86L7] (last visited Mar. 8, 2023).

7. 2022 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR, *supra* note 3, at 3.

8. Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525 (2021).

9. *Id.* § 1(2).

10. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464.

11. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044.

foreign jurisdictions.[12] The TVPRA addresses this gap by granting exterritorial jurisdiction to federal courts for forced labor violations that occur abroad.[13] Second, offshoring labor allows corporations further downstream on the supply chain to benefit from forced labor without directly perpetrating it.[14] This Article argues that the TVPRA can address this issue with its novel secondary liability mechanism—a new theory of complicity that holds corporations accountable despite the lack of explicit conduct directly linking them to the forced labor.[15]

Under existing theories of complicity, corporations escape liability because they are usually not the direct perpetrators of forced labor.[16] Despite the fact that corporations create demand for and profit from forced labor, it is an almost insurmountable challenge to pin any blame on them simply based on theories of "agency" or "aiding and abetting" liability.[17] The introduction of "venture liability" via Congress's reauthorization of the TVPRA in 2008, however, provides an opportunity to eliminate those deficiencies.[18]

Venture liability is a novel theory of secondary liability that holds parties liable for "knowingly benefiting from participating in a venture which has engaged in forced labor."[19] This can effectively prevent U.S. corporations from using their remoteness from forced labor practices as a shield against liability because venture participation is not necessarily confined to those who directly further the culpable act. In fact, as this Article will demonstrate, venture liability allows for a holistic examination of the power and incentive dynamics within supply chains (as opposed to a narrow focus on specific acts). It also enables plaintiffs to efficiently target actors that can comprehensively address the system-wide issue of forced labor.

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12. *See* Denis G. Arnold & Norman E. Bowie, *Sweatshops and Respect for Persons*, 13 BUS. ETHICS Q. 221, 221 (2003) ("[M]any of the labor practices in question … are tolerated by corrupt or repressive political regimes.").

13. 18 U.S.C. § 1596(a) ("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 . . . .").

14. *See* Naomi Jiyoung Bang, *Unmasking the Charade of the Global Supply Contract: A Novel Theory of Corporate Liability in Human Trafficking and Forced Labor Cases*, 35 HOUS. J. INT'L L. 255, 257 (2013) ("Corporations . . . easily avoid accountability given the extraterritorial location of the suppliers, and the appearance of 'arm's length' contracts with their suppliers.").

15. 18 U.S.C. § 1589(b).

16. *See* Bang, *supra* note 14, at 272–75 (explaining the limitations of each of the existing theories of secondary liability for holding corporations accountable).

17. *Id.*

18. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(b)(3), 122 Stat. 5044, at 5068 (codified at 18 U.S.C. § 1589(b)).

19. 18 U.S.C. § 1589(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).").

But just how broadly can "venture liability" be applied? To uncover its intended meaning under the TVPRA and its application to the supply chain context, Part I of this Article will review how courts have interpreted the relevant statutory language—namely what it means to "participate in a venture." Part II will argue that, by using this novel term, Congress intended to create a new form of secondary liability. It will also specify the scope of that liability. Part III will propose a two-step framework that courts should adopt when determining whether a corporation should be deemed to have "participated in a venture." This proposed framework offers a disciplined tool to deter the most systemically influential beneficiaries of forced labor.

I.
A SURVEY OF TVPRA FORCED LABOR VENTURE LIABILITY CASES

The TVPRA was first enacted in 2000 (then referred to as the TVPA) to combat human trafficking and was amended several times. The most recent 2008 amendment included the creation of § 1589(b)—the venture liability provision for forced labor violations under the TVPRA.[20] The breadth of the relevant language ("participated in a venture") and lack of analogue in other statutes have led courts to adopt various analytical approaches to interpret the TVPRA. Because it is a relatively new statute, no unified test has yet emerged to determine what counts as venture liability. Some courts have turned to the Black's Law Dictionary definition of "venture" to inform their analysis, while other courts have relied on the definition of "venture" specific to other sections of the TVPRA. This Part explores the case law developing different interpretations of "venture." Part III of this Article will then demonstrate that the former approach allows for results that are more consistent with congressional intent.

One of the first cases to meaningfully interpret the "participated in a venture" language in the forced labor context was *Ricchio v. McLean*.[21] In the case, the First Circuit borrowed the definition of venture from the TVPRA's sex trafficking provision, which defines venture as "any group of two or more individuals associated in fact, whether or not a legal entity."[22] The plaintiff in the case, Lisa Ricchio, was kept in a motel for several days against her will by the principal perpetrator and defendant, Clark McLean.[23] He "physically and sexually abused [her], repeatedly rap[ed] her, starv[ed] and drugg[ed] her, and [left] her visibly haggard and bruised," to "groom[] her for service as" a sex worker.[24] The motel where the crimes took place was operated by the Patels, the venture liability defendants, with whom McLean had "prior commercial dealings."[25] The Patels were allegedly

20. *See id.*
21. 853 F.3d 553 (1st Cir. 2017).
22. 18 U.S.C. § 1591(e)(6).
23. *Ricchio*, 853 F.3d at 555.
24. *Id.*
25. *Id.*

aware of what McLean was doing to Ricchio because they observed him forcing her back to the room and witnessed her "obvious physical deterioration."[26] But they ignored her pleas for help and even expressed their desire to reinstate those "prior commercial dealings" by high-fiving McLean and "speaking about 'getting this thing going again.'"[27] The district court dismissed Ricchio's claims against the Patels, but the First Circuit reversed on appeal.[28] The court held that "[t]he defendants' association with McLean was a 'venture,' that is, a 'group of two or more individuals associated in fact.'"[29]

Two years later, in *Bistline v. Parker*, the Tenth Circuit adopted the same definition of "venture" as the First Circuit Court in *Ricchio*.[30] Plaintiffs were members of the Fundamentalist Church of Jesus Christ of Latter-Day Saints who were manipulated by the organization's leader and principal perpetrator, Warren Jeffs, into forced labor.[31] They also sued Jeffs' lawyers under § 1589(b), alleging that they "create[d] a legal framework that would shield [Jeffs] from the legal ramifications of child rape, forced labor, extortion[.]"[32] The district court dismissed the venture liability claim against the lawyers by characterizing the relevant "venture" narrowly, holding that the plaintiffs had "failed to adequately plead that Defendants '*participat[ed]* in a venture' to provide or obtain that labor."[33] But the Tenth Circuit reversed the holding on appeal, emphasizing the attorneys' involvement in a "scheme" with Jeffs and determining that they were also venture participants because their actions enabled his conduct.[34]

Then came *Gilbert v. United States Olympic Committee*, a pivotal case in which the Colorado district court adopted a magistrate judge's recommendation that the United States Olympic Committee ("USOC") and USA Taekwondo, Inc. ("USAT") could be held liable as venture participants.[35] In contrast to the *Ricchio* and *Bistline* courts, the magistrate judge who first heard *Gilbert* applied the Black's Law Dictionary definition of "venture": "An undertaking that involves risk; esp., a speculative commercial enterprise."[36] The court innovatively made use of the concept of "risk" found within the dictionary definition of a "venture"

26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 556.
30. Bistline v. Parker, 918 F.3d 849, 873 (10th Cir. 2019).
31. *Id.* at 854, 870–71.
32. *Id.*
33. Bistline v. Jeffs, No. 2:16-CV-788 TS, 2017 WL 108039, at *10 (D. Utah Jan. 11, 2017).
34. Bistline v. Parker, 918 F.3d at 874–76 ("In this case, plaintiffs allege facts supporting their claims that defendants were well aware of the crimes being committed against plaintiffs, did nothing to expose these atrocities, tacitly approved of the conduct by constructing a scheme for the purpose of enabling it, and benefitted for years from plaintiffs' payments of a considerable amount of attorney fees.").
35. 423 F. Supp. 3d 1112, 1139 (D. Colo. 2019).
36. Gilbert v. U.S. Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 1058194, at *12 (D. Colo. Mar. 6, 2019).

to delineate a fairly broad test under which any commercial relationship involving risk could be found to constitute a venture.[37] The plaintiffs were female taekwondo athletes who were sexually abused by Jean Lopez, "head coach of the USAT team at the 2004, 2008, 2012, and 2016 Olympics," and his brother Steven Lopez, "a well-known athlete on the taekwondo team who won gold medals at the 2000 and 2004 games."[38] The plaintiffs alleged that they complained to both the USOC and USAT but were ignored because the brothers generated "medals and money" for the organizations.[39] The court concluded the "allegations plausibly establish that the relationship between Steven Lopez and USAT is a venture" because "Olympic athletes and coaches are involved in a commercial industry."[40] It further reasoned that every participant in that commercial industry, including the USOC and USAT, assumed risk.[41] As will be discussed in Part III, this decision demonstrates how courts can apply facts to the language of § 1589(b) by examining the relationships, incentives, and power structure of a given industry.

In *Lesnik v. Eisenmann SE*, the Northern District of California also recognized commercial relationships as ventures.[42] The court allowed venture liability claims to proceed against Tesla and its contractor Eisenmann based on their business relationship with subcontractor, Vuzem, which had exploited workers who were in the United States on B-1 visas. The plaintiffs alleged that they "were paid far below minimum wage[,]" "forced to work extreme hours," housed in "poor living conditions," and that Vuzem "threatened to withhold pay [and] . . . threatened to withhold visas and immigration status."[43] The court noted that Tesla and Eisenmann "entered into an agreement under which Eisenmann would establish a paint shop at Tesla's facility," and met with Vuzem to "sign[] a subsequent agreement under which Eisenmann would employ Vuzem as a subcontractor to assist the construction of the paint shop."[44] The court concluded that both companies had "participat[ed] in a venture that violated § 1589, because Vuzem's actions were committed to fulfill a contract signed with Tesla and Eisenmann."[45] Thus, the court held that the subcontractor relationship was enough to be deemed a "venture" without any conduct on Tesla's part directly in relation to the forced labor.[46]

Although not directly related to forced labor under § 1589(b), two sets of sex trafficking cases brought under § 1591 have also impacted the development of venture liability theory in general. First, the Sixth Circuit, in *United States v. Afyare*, interpreted "venture," as used in § 1591(a)(2), narrowly to mean "sex

37. *Id.* at *9–12, *15.
38. *Id*. at *2.
39. *Id.* at *3–4.
40. *Id.* at *15.
41. *Id*.
42. *See* Lesnik v. Eisenmann SE, 374 F. Supp. 3d 923, 953 (N.D. Cal. 2019).
43. *Id.* at 934.
44. *Id.* at 953.
45. *Id.*
46. *Id.*

trafficking venture."[47] As will be further examined in Part II.C, defendants often cite to this case (involving another section of the TVPRA) to argue that only those that directly engaged in furthering the underlying conduct should be held liable.

More than three years later, however, the Southern District Court of Ohio decided *M.A. v. Wyndham Hotels & Resorts, Inc.*, which directly pushed back on extending *Afyare* beyond § 1591(a)(2).[48] *Wyndham* started off a string of similar cases throughout 2020 and 2021 against hotel chains for their role as venture participants in circumstances resembling the fact pattern in *Ricchio*—where victims[49] were held in hotel rooms against their will for weeks or months and trafficked for sex.[50] All the hotel defendants were sued under venture liability in § 1595(a), which provides a civil remedy for victims of TVPRA violations. This second set of cases is notable because four different circuits explicitly cross-referenced each other, agreeing that venture liability under the TVPRA should be construed more broadly than existing secondary liability theories.[51]

To date, only a limited number of cases have been decided on the scope of venture liability for purposes of the TVPRA. The cases outlined in this Part form almost the entirety of that universe. They are valuable because they inform an emerging plausible standard on what counts as "participating in a venture." They comprise analytical approaches that have been used by courts to date, providing the basis for a proposed framework, as well as offering a variety of fact patterns and relationships to illuminate the nuances and reach of the standard as intended by Congress. Furthermore, even though not all the cases directly involve supply-chain forced labor, they each reveal (either on its own or by comparison) an aspect of venture liability that is informative in the supply-chain context. Accordingly, these cases will be referenced throughout this Article to demonstrate that the proposed interpretation of venture liability discussed in Part III is not only rooted in the law, but also solves the real-world practicalities of supply-chain forced labor.

47. 632 Fed. App'x. 272 (6th Cir. 2016).

48. 425 F. Supp. 3d 959 (S.D. Ohio 2019).

49. This Article uses the term "victim" instead of "survivor" to reflect language used in the relevant judicial opinions as well as statutory language of the TVPRA.

50. *See, e.g.*, H.H. v. G6 Hosp., LLC, No. 2:19-CV-755, 2019 WL 6682152 (S.D. Ohio Dec. 6, 2019); Doe S.W. v. Lorain-Elyria Motel, Inc., No. 2:19-CV-1194, 2020 WL 1244192 (S.D. Ohio Mar. 16, 2020); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171 (E.D. Pa. 2020); J.C. v. Choice Hotels Int'l, Inc., No. 20-CV-00155-WHO, 2020 WL 3035794 (N.D. Cal. June 5, 2020); A.C. v. Red Roof Inns, Inc., No. 2:19-CV-4965, 2020 WL 3256261 (S.D. Ohio June 16, 2020); A.B. v. Hilton Worldwide Holdings, Inc., 484 F. Supp. 3d 921 (D. Or. 2020); E.S. v. Best Western Int'l, Inc., 510 F. Supp. 3d 420 (N.D. Tex. 2021); J.L. v. Best Western Int'l, Inc., 521 F. Supp. 3d 1048 (D. Colo. 2021).

51. *See, e.g.*, J.L. v. Best Western Int'l, Inc., 521 F. Supp. 3d at 1062 (citing to Fifth and Sixth Circuit opinions); A.B. v. Hilton Worldwide Holdings, Inc., 484 F. Supp. 3d at 937 (citing to a Sixth Circuit opinion); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d at 183–86 (analyzing and adopting interpretations in opinions by the Sixth and Ninth Circuits).

II.
WHAT IS REQUIRED TO ESTABLISH FORCED LABOR VENTURE LIABILITY UNDER THE TVPRA?

A. What Congress Intended

Following the creation of the forced labor offense as part of the enactment of the TVPA in 2000,[52] Congress steadily extended liability under the statute through various amendments.[53] These amendments include: the creation of a private right of action by victims of trafficking against their traffickers in 2003;[54] the explicit inclusion of non-physical coercion[55] and the extraterritorial application of certain underlying offenses in 2008;[56] as well as the creation of a cause of action against anyone who knowingly benefits from participating in a venture that has engaged in forced labor violations[57]—the subject of this Article. Providing a glimpse into the rationale behind the trend, the note to legislation reauthorizing the TVPA in 2003 said that, although the United States "made significant progress in investigating and prosecuting acts of trafficking and in responding to the needs of victims of trafficking in the United States and abroad …, victims of trafficking have faced unintended obstacles in the process of securing needed assistance[.]"[58] Throughout the TVPRA's relatively short history, Congress has thus endeavored to improve its effectiveness in providing relief for forced labor victims by repeatedly signaling its breadth. But legislation itself provides few clues as to how each element of the statute should be interpreted in practical terms.

Courts have struggled to apply the venture liability element, specifically, because the term "participation in a venture" is not defined in the statute itself and has not been used in any other statute to establish secondary liability. If Congress

52. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 112(a)(2), 114 Stat. 1464, at 1486–87 ("§ 1589 Forced labor: Whoever knowingly provides or obtains the labor or services of a person— (1) by threats of serious harm to, or physical restraint against, that person or another person; (2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or (3) by means of the abuse or threatened abuse of law or the legal process, shall be fined under this title or imprisoned not more than 20 years, or both.").

53. *See* Briana Beltran, *The Hidden "Benefits" of the Trafficking Victims Protection Act's Expanded Provisions for Temporary Foreign Workers*, 41 BERKELEY J. EMP. & LAB. L. 229, 243–54 (2020).

54. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A) 117 Stat. 2875, at 2878 ("An individual who is a victim of a violation of section 1589 [forced labor], 1590 [trafficking with respect to peonage, slavery, involuntary servitude, or forced labor], or 1591 [sex trafficking of children or by force, fraud, or coercion] of this chapter may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorney's fees.").

55. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(b)(3), 122 Stat. 5044, at 5068–69 (codified at 18 U.S.C. § 1589(c)(2)).

56. *Id.* § 223 (codified at 18 U.S.C. § 1596(a)(1)).

57. *See* 18 U.S.C. § 1589(b).

58. Trafficking Victims Protection Reauthorization Act of 2003 § 2.

had used any of the existing terms of secondary liability such as "agency"[59] or "aiding and abetting,"[60] those well-established theories would clearly apply. For example, if Congress had intended secondary liability to reach other actors through agency principles, it would have used language such as "acting for" or "employed by" to require a showing of the principal's control or authority over the agent.[61] Statutes extending secondary liability under aiding and abetting—which requires conduct that assists or facilitates the underlying act—are even more explicit as they include the terms "aid" and "abet."[62] Here, however, Congress chose to introduce a novel term. It is reasonable to infer that with this new language Congress intended for courts to apply a different approach for establishing secondary liability.[63]

While the exact extent of that "different approach" is still in flux, many circuits agree that the language "participate in a venture" lends itself to a broad interpretation. The recent spate of court opinions on hotel sex trafficking cases discussed above all held that § 1595(a)—which provides the private right of civil action for TVPRA offenses and for which the same "participation in a venture" language was enacted at the same time as § 1589(b)[64]—is "plain and unambiguous, and . . . contain[s] expansive language that the courts should interpret broadly."[65] More specifically, these same cases explicitly held that "participation

59. "*Agency.* A relationship that arises when one person (a principal) manifests assent to another (an agent) that the agent will act on the principal's behalf, subject to the principal's control, and the agent manifests assent or otherwise consents to do so. An agent's actions have legal consequences for the principal when the agent acts within the scope of the agent's actual authority or with apparent authority, or the principal later ratifies the agent's action." *Agency*, BLACK'S LAW DICTIONARY (11th ed. 2019).

60. "*Aiding-and-abetting liability*. Civil or, more typically, criminal liability imposed on one who assists in or facilitates the commission of an act that results in harm or loss, or who otherwise promotes the act's accomplishment." *Liability*, BLACK'S LAW DICTIONARY (11th ed. 2019).

61. *See, e.g.*, 7 U.S.C. § 2139 ("When construing or enforcing the provisions of this chapter, the act, omission, or failure of any person *acting for or employed by* a research facility . . . shall be deemed the act, omission, or failure of such [principal], as well as of such person.") (emphasis added).

62. *See, e.g.*, 7 U.S.C. § 25(a)(1) ("Any person . . . who willfully *aids, abets*, counsels, induces, or procures the commission of a violation of this chapter shall be liable for actual damages . . .") (emphasis added); 12 U.S.C. § 504(h) ("For purposes of this section, the term "violate" include any action . . . for or toward causing, bringing about, participating in, counseling, or *aiding or abetting* a violation.") (emphasis added).

63. *See* Dragon Cement Co. v. United States, 244 F.2d 513, 516 (1st Cir. 1957) (holding that Congress intended a new definition of a term by introducing for the first time "key language which had not theretofore appeared either in the statute or in the regulations thereunder"); *see also* Coubaly v. Cargill, Inc., No. 21-CV-386 (DLF), 2022 WL 2315509, at *6 (D.D.C. June 28, 2022) (referring to § 1589(b) venture liability as a "new form[] of liability").

64. *See* Erlenbaugh v. United States, 409 U.S. 239, 244 (1972) ("The rule [of in pari materia] is but a logical extension of the principle that individual sections of a single statute should be construed together . . . . Given this underlying assumption, the rule's application certainly makes the most sense when the statutes were enacted by the same legislative body at the same time." (footnote omitted) (citation omitted)).

65. A.B. v. Hilton Worldwide Holdings, Inc., 484 F. Supp. 3d 921, 935 (D. Or. 2020); *see also* A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 189 (E.D. Pa. 2020).

in a venture" does not require the performance of an "'overt act' that furthers the sex trafficking aspect of the venture."[66] A consensus is building among courts that venture liability under either § 1589(b) or § 1595(a) is broader than existing theories of secondary liability such as "agency"[67] or "aiding and abetting."[68] Such an interpretation is seemingly in step with Congress's intent to strengthen the TVPRA with each amendment.

Legislative history indicates, however, that Congress—while intending for the overall reach of TVPRA to be broad—was also wary of venture liability language being interpreted in a way that would overextend liability. When the TVPA was first enacted in 2000, the "benefit from participation in a venture" language only applied to § 1591 as 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."[69] The language was subsequently added to § 1589 in 2008,[70] perhaps indicating that Congress had gained confidence that venture liability would not be construed overly broadly as it had initially feared, or had decided that the necessity of having venture liability for forced labor outweighed the costs. But since Congress's original concerns stem from the general principle that provisions should not be construed in a way that could lead to the absurd result of implicating an unlimited number of parties as potential defendants, they should still be reflected in any interpretation of the statute.[71] Such discipline in interpretation is crucial in establishing the provision's legitimacy, durability, and effectiveness in combating forced labor.

To meet the objectives of the TVPRA while addressing congressional concerns, this Article strives to offer an interpretation of venture liability that is sufficiently inclusive but not overly broad: presenting venture liability in the forced labor context as a new theory of secondary liability that can reach previously immune bad actors without also implicating all remotely associated parties.

66. M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 968 (S.D. Ohio 2019) (quoting United States v. Afyare, 632 F. App'x 272, 286 (6th Cir. 2016)); *see also* A.B. v. Hilton Worldwide Holdings, Inc., 484 F. Supp. 3d at 937 ("Plaintiff therefore is not required to allege actual knowledge of a sex trafficking venture or the performance of an overt act in order to sufficiently plead the 'participation in a venture' element of her § 1595 claim.").

67. *See Agency*, BLACK'S LAW DICTIONARY, *supra* note 59 (defining "agency").

68. *See Liability*, BLACK'S LAW DICTIONARY, *supra* note 60 (defining "aiding-and-abetting liability").

69. H.R. REP. NO. 106-939, at 101–02 (2000) (Conf. Rep.).

70. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044, 5068 (amending the language of § 1589).

71. *See, e.g.*, Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (stating that the law should not admit "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class").

B. Unlike "RICO Enterprises," "Ventures" May Comprise Routine Commercial Relationships

Before delving into what venture liability entails, it is worthwhile to first clarify what it does not entail. Defendants have attempted to analogize "venture" to the concept of "enterprise" in the Racketeer Influenced and Corrupt Organizations Act (RICO), arguing that "venture" should be limited in the same way that courts have limited RICO "enterprise."[72] They argue that, because courts have held that "'normal commercial relationship[s]' involving the purchase and sale of . . . good[s] do not qualify as 'enterprise[s]'" under RICO, supply chains cannot be "ventures" under TVPRA.[73] However, as this Part will demonstrate, TVPRA "ventures" are distinct from RICO enterprises and do extend to supply chains.

The first obvious flaw in defendants' argument is that it fails to account for Congress's decision to use a new term: "venture" versus "enterprise."[74] It also ignores the context of the respective statutes and how Congress chose to limit each concept. To understand how they differ, it is necessary to understand the fundamental distinction between the purpose for finding a "venture" in a TVPRA claim and "enterprise" in a RICO claim. "Venture" is a complicity concept that is used to establish secondary liability of a third party.[75] "Enterprise" as used in § 1962(c), on the other hand, does not establish liability for any additional actors; instead, it is viewed as a vehicle that facilitates or amplifies an already criminal act.[76] A defendant found to have participated in a RICO enterprise faces an additional charge for the crime of conspiracy (and its associated damages), instead of facing criminal liability through complicity.[77] This distinction is reflected in the framing of each of the statutes: § 1589(b) focuses on the mens rea and actus reus of the

72. *See, e.g.*, Memorandum of Points & Auths. in Support of Defendants' Joint Motion to Dismiss at 16–17, Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173 (D.D.C. 2022) (No. 1:21-CV-00386-DLF) (mentioning "RICO cases" as an "analogous context" to TVPRA cases); Appellees' Answering Brief at 53 n.51, Ratha v. Phatthana Seafood Co., 26 F.4th 1029 (9th Cir. 2022) (No. 18-55041) (approvingly citing a case that "borrow[s] from RICO case law").

73. Memorandum of Points & Auths. in Support of Defendants' Joint Motion to Dismiss, *supra* note 72, at 16–17 (quoting UFCW Unions & Emps. Midwest Health Benefits Fund v. Walgreen Co., 719 F.3d 849, 855 (7th Cir. 2013)).

74. *See* Plaintiffs' Opposition to Defendants' Motion to Dismiss at 19 n.5, Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173 (D.D.C. 2022) (No. 1:21-CV-00386-DLF) ("Implicitly acknowledging that the TVPRA 'venture' cases Plaintiffs' rely upon are insurmountable for them, Defendants ignore them and instead cite RICO cases in which alleged 'enterprises,' not 'ventures,' were held to be too broad."); Appellants' Reply Brief at 16 n.5, Ratha v. Phatthana Seafood Co., 26 F.4th 1029 (9th Cir. 2022) (No. 18-55041) ("Defendants conceded that 'the language in the RICO and TVPRA statutes is not identical' . . . but offer no basis for reading the very different text to mean the same thing.").

75. *See supra* note 19 and accompanying text.

76. 18 U.S.C. § 1962(c) ("It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.").

77. *See* Lesnik v. Eisenmann SE, 374 F. Supp. 3d 923, 960 (N.D. Cal. 2019) (noting that "the alleged racketeering activity committed by each alleged participant of the enterprise [must be] set forth in detail" for a court to find "the existence of a RICO enterprise").

venture participant to establish the existence of culpability;[78] § 1962(c), on the other hand, assumes that a "pattern of [criminal] activity" has already been established and is concerned with whether the defendant associated with the enterprise through those criminal activities.[79]

Accordingly, the respective statutes also adopt different approaches to cabin liability. Section 1589(b) limits its reach by requiring venture participants to have "knowingly benefit[ed]" from the venture, whereas § 1962(c) does not have a knowledge element. It would make little sense in the § 1962(c) context to impose a similar mens rea element on third party enterprise participants who otherwise do not feature in the statute. Instead, courts have indirectly infused a "knowledge" requirement into the definition of "enterprise" by refusing to recognize "routine commercial relationships" as "enterprises."[80] In the RICO context, and as explained in *Gomez v. Guthy-Renker, LLC*, this bar is designed to avoid finding enterprises when racketeers have conducted fraudulent affairs "*completely unbeknownst*" to ordinary commercial service providers.[81] Courts are understandably wary of awarding "treble damages" to plaintiffs simply because the racketeer engaged in everyday commercial transactions with unaware vendors.[82]

But § 1589(b) tackles this need by accounting for participants' knowledge separately. Even if a normal commercial supplier or buyer counts as a venture participant, it will not be held liable unless it also knew of and benefited from the forced labor. Thus, the concern that "'millions of entities and individuals' [would potentially be subjected] to civil and criminal liability"[83] is unfounded in the TVPRA forced labor context. Unlike for RICO enterprises, courts need not—and should not—try to tackle the "knowledge" element by indiscriminately excluding commercial relationships from the definition of "venture." Doing so would distort how each element of § 1589(b) was intended to function.

At least one court has already refuted the proposition that commercial relationships cannot be "ventures" because they cannot be RICO "enterprises."[84] On similar facts as in *Gomez*—involving a supplier-buyer relationship—the *Lesnik* court refused to recognize a commercial relationship as a RICO enterprise, but at

78. 18 U.S.C. § 1589(b) ("Whoever knowingly benefits . . . from participation in a venture . . . .").

79. 18 U.S.C. § 1962(c) ("It shall be unlawful for any person employed by or associated with any enterprise . . . to conduct or participate . . . in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.").

80. Gomez v. Guthy-Renker, LLC, No. EDCV 14-01425 JGB, 2015 WL 4270042, at *8 (C.D. Cal. July 13, 2015); *see also* UFCW Unions & Emps. Midwest Health Benefits Fund v. Walgreen Co., 719 F.3d 849, 855 (7th Cir. 2013) (holding that a "normal commercial relationship" does not qualify as an "enterprise").

81. *Gomez*, 2015 WL 4270042, at *5.

82. *Id.* at *5–6, *8.

83. Memorandum of Points & Auths. in Support of Defendants' Joint Motion to Dismiss, *supra* note 72, at 16.

84. *See* Lesnik v. Eisenmann SE, 374 F. Supp. 3d 923, 935 (N.D. Cal. 2019).

the same time held that defendants "participat[ed] in a venture."[85] According to the court, hiring workers to meet contractual commitments was "not adequate [to] allege the existence of an enterprise" because courts have "overwhelmingly rejected attempts to characterize routine commercial relationships as RICO enterprises."[86] But the same actions made pursuant to a contract were nevertheless "sufficient to show that [defendants] . . . participat[ed] in a venture."[87]

Congress did intend to place certain limits on what constitutes a "venture."[88] Part III below proposes a framework to apply those intended limits. But while "venture" should not be a "nebulous, open-ended" concept,[89] it is also clear that Congress never intended it to be limited in the same way as RICO "enterprises." The language, purpose, and function of each of the concepts and statutes are too different to merit similar treatment.

C. "Participation in a Venture" Does Not Require Conduct That Furthers the Forced Labor

The plain language of the TVPRA forced labor statute conveys the congressional intent that "aiding and abetting" is not the standard to be used for establishing venture liability.[90] However, "downstream defendants," or defendants that are supplied by forced labor perpetrators, continue to argue that "venture" refers specifically to the act of using forced labor[91] and that "participation" requires "specific conduct that furthers" the forced labor activity by citing to *Afyare*.[92] These defendants are particularly fervent proponents of this theory because its adoption would release them from any potential liability. While the "specific conduct that

85. *Id.* at 953, 960.

86. *Id.* at 959.

87. *Id.* at 953.

88. *See supra* Part II.A.

89. Memorandum of Points & Auths. in Support of Defendants' Joint Motion to Dismiss, *supra* note 72, at 16 (citing Vulcan Golf, LLC v. Google Inc., 552 F. Supp. 2d 752, 785 (N.D. Ill. 2008)).

90. *See supra* Part II.A.

91. *See, e.g.*, Defendant U.S. Olympic Comm.'s Reply in Support of Motion to Dismiss at 3, Gilbert v. U.S. Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 1058194 (D. Colo. Mar. 6, 2019), 2018 WL 10604184; Appellees' Answering Brief, *supra* note 72, at 14 ("[A] defendant has to actively participate in a human trafficking venture.").

92. *See, e.g.*, Gilbert v. U.S. Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 1058194 (D. Colo. Mar. 6, 2019), at *11 ("[T]he element of 'participation[]' . . . requires allegations of 'specific conduct that further[s]' the purported forced labor venture." (alterations in original) (quoting Defendant U.S. Olympic Committee's Reply in Support of Motion to Dismiss at 3, *Gilbert*, 2019 WL 1058194 (No. 1:18-CV-00981-CMA-MEH))); *see, e.g.*, Appellees' Answering Brief, *supra* note 72, at 54 ("'[P]articipation' in [principal perpetrator]'s alleged 'venture to utilize forced labor' requires engaging in acts that further the completion of the crime of forced labor, such as directing [principal perpetrator]'s recruitment and employment practices."); Memorandum of Points and Auths. in Support of Defendants' Joint Motion to Dismiss at 19–20, Doe I v. Apple, Inc., No. 1:19-CV-03737 (CJN), 2021 WL 5774224 (D.D.C. Nov. 2, 2021) (citing *Afyare* to argue that "unlawful 'participation' in a TVPRA venture requires that the defendant have actively taken part in some aspect of the underlying violation").

furthered"[93] the forced labor can easily be identified for principal perpetrators and their suppliers, the same is not true for downstream corporations that source from them. This lack of identifiable conduct makes it difficult to pin liability on defendants under an extension of the *Afyare* approach.

Categorically excluding downstream defendants by adopting the *Afyare* approach, however, is clearly not what Congress intended.[94] In many cases, downstream defendants can be equally, if not more, culpable than upstream defendants because they enable and incentivize the use of forced labor through their participation in the supply chain. To let them off the hook while their upstream counterparts are held liable, simply because of their downstream position on the supply chain, would be an arbitrary distinction and go against equitable principles.

Fortunately, some courts have actively resisted adopting such a narrow interpretation as the standard. The *Gilbert* court explicitly refused to extend the *Afyare* definition of "venture" to § 1589(b), noting that no court had ever endorsed a definition requiring specific conduct.[95] The court also reasoned that such an interpretation would effectively require plaintiffs to allege that defendants engaged in conduct that would also make them liable as the principal under § 1589(a), rendering § 1589(b) redundant.[96] Citing the "cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant," the court declined to adopt defendants' proposed definition.[97]

Similarly, the *Lesnik* court held that a principal perpetrator's actions "committed to fulfill a contract" with a downstream defendant would be enough to show that the latter "participat[ed] in a venture."[98] In the case, the subcontracting agreement did not directly contemplate forced labor.[99] But the court held that it constituted a venture for purposes of § 1589(b).[100] Significantly, the court did not require any conduct at all on the part of defendant Tesla. It was enough that a contract existed between the principal perpetrator and the defendant, and the *principal perpetrators* committed actions in furtherance of that contract.[101]

Downstream defendants, however, continue to insist that *Afyare* is the correct approach, perhaps emboldened by the *Ricchio* and *Bistline* decisions because, unlike the defendants in *Gilbert* or *Lesnik*, the defendants in *Ricchio* and *Bistline* engaged in identifiable conduct that furthered the underlying forced labor. But this incongruity between *Ricchio*/*Bistline* versus *Gilbert*/*Lesnik* can be reconciled by recognizing that whether specific conduct comes into play is determined by

93. Gilbert v. U.S. Olympic Committee, 423 F. Supp. 3d 1112, 1138 (D. Colo. 2019*).*
94. *See supra* Part II.A.
95. *Gilbert*, 2019 WL 1058194, at *10–11.
96. *Id.* at *11.
97. *Id.* (quoting Kungys v. United States, 485 U.S. 759, 778 (1988)).
98. Lesnik v. Eisenmann SE, 374 F. Supp. 3d 923, 952–53 (N.D. Cal. 2019).
99. *See id.* at 933.
100. *Id.* at 953.
101. *Id.*

defendants' relative positions on the supply chain. A finding of specific conduct will be relevant for upstream defendants but not for downstream defendants.

Examining the relationships in *Lesnik* helps explain how a downstream defendant may not have engaged in specific conduct furthering the forced labor yet can still be found liable for having participated in a venture using forced labor. The defendant in *Lesnik* was a "buyer" in relation to the principal perpetrator (i.e., a downstream defendant).[102] In such cases, the principal perpetrator's conduct as the supplier determines whether a culpable venture (i.e., a venture that engages in forced labor) exists. This is established independent of any conduct by the buyer. As the court explained in *Lesnik*, once a venture's culpability is thus established, the buyer becomes a participant to that venture simply by transacting with the other participants.[103] No specific conduct in relation to the forced labor is required on its part.

Conversely, cases like *Ricchio* and *Bistline* require proof of forced labor conduct to establish liability. These cases involve defendants that were "suppliers" of the forced labor conduct (i.e., upstream defendants).[104] As in *Lesnik*, the existence of a venture rests on the conduct of the supplier. But in this scenario, because the defendant is the supplier, conduct by the defendant in furtherance of the contract with the principal perpetrator (buyer) becomes necessary to establishing a venture. Here, the defendant must have enabled the principal perpetrator's use of forced labor for a venture between the two parties to exist.

This distinction between downstream and upstream defendants explains the outcomes in *Ricchio* and *Bistline* without necessitating a universal specific conduct requirement. In the course of establishing a venture, the courts in *Ricchio* and *Bistline* were able to establish upstream defendants' conduct that enabled the principal perpetrators' use of forced labor.[105] Defendants confuse this to mean that plaintiffs must prove that defendants' conduct furthered the forced labor in all

102. Vuzem (principal perpetrator) was the subcontractor of Eisenmann (defendant), which in turn was a general contractor providing services to Tesla (defendant). *Id.* at 952–53.

103. *Id.*

104. In *Ricchio*, the Patels (defendants) provided motel services to McLean (principal perpetrator). Ricchio v. McLean, 853 F.3d 553, 555 (1st Cir. 2017). In *Bistline*, attorneys (defendants) provided legal services to Jeffs (principal perpetrator). Bistline v. Parker, 918 F.3d 849, 856 (10th Cir. 2019).

105. *Ricchio*, 853 F.3d at 556 ("[T]he Patels . . . knowingly benefited, that is, 'received something of value,' . . . through *renting space in which* McLean obtained, among other things, forced sexual labor or services from Ricchio."); *Bistline*, 918 F.3d at 874 ("[D]efendants were responsible for creating the intricate scheme that both *enabled* forced labor and *allowed* the threats which enforced that labor to be effective[.]").

cases.[106] However, just because such facts were necessary to establish venture liability in those two cases, does not mean it is a requirement in all circumstances. Establishing the defendant's conduct is only necessary in cases where the defendant is upstream in relation to the principal perpetrator.

Gilbert and *Lesnik* are instrumental in helping us understand just how broad the dimensions of venture liability are because they delineate the outer bounds of venture liability.[107] Additionally, *Lesnik* highlights the difference between venture liability and other secondary liability theories. Without any "specific conduct that further[ed]"[108] the forced labor, defendant Tesla would not have been held liable under traditional secondary liability theories. The fact that the company was nevertheless found liable based on venture liability demonstrates the expansiveness of what it means to "participate in a venture." And this approach appears to be consistent with Congress's intention. As argued above, Congress would have simply resorted to well-established secondary liability language such as "aiding and abetting"[109] or "agency"[110] with much more extensive interpretive histories if it did not intend to establish a more expansive system of secondary liability.[111]

There is also a clear policy reason why Congress would have wanted the TVPRA to reach defendants like Tesla. Although companies like Tesla do not directly involve themselves in the conduct of forced labor, they are part of the wider system that profits from it. Furthermore, their position of power within the supply chain means that they create demand for, and have the ability to put an end to, the use of forced labor. Venture liability tips the incentive scales for such parties. The specter of liability pushes them to stop forced labor in the supply chain,

106. *See, e.g.*, Appellees' Answering Brief, *supra* note 72, at 55 n.53 (attempting to distinguish from the facts in *Ricchio* by arguing that "[o]wning the venue in which forced sex occurred . . . is a far cry from [defendants'] situation"); Memorandum of Points and Auths. in Support of Defendants' Joint Motion to Dismiss, *supra* note 92, at 19–20 ("For example, in *Bistline v. Parker*, the Tenth Circuit held that lawyers who intentionally crafted and enforced legal documents with the objective of enabling leaders of the Fundamentalist LDS church to engage in child sex abuse and slavery and of concealing those activities 'participated' in a venture by 'creating the intricate scheme that both enabled forced labor and allowed the threats which enforced that labor to be effective.' . . . Applying these principles, Plaintiffs' TVPRA claims fail because they do not and cannot allege that by purchasing components containing cobalt far downstream in the supply chain, Defendants themselves 'engaged in some aspect of the [TVPRA violation].'").

107. *See infra* Part III.

108. *See* Gilbert v. U.S. Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 1058194, at *12 (D. Colo. Mar. 6, 2019).

109. *See Liability*, BLACK'S LAW DICTIONARY, *supra* note 60.

110. *See Agency*, BLACK'S LAW DICTIONARY, *supra* note 59.

111. *See* Dragon Cement Co. v. United States, 244 F.2d 513, 516 (1st Cir. 1957).

rather than turning a blind eye to it. Venture liability is an efficient and necessary tactic to help address the system-wide problem of forced labor.[112]

Practically speaking, *Lesnik* is also a useful case to analogize to when making § 1589(b) claims against downstream corporate defendants. Forced labor conduct by the subcontractor in furtherance of its contract with Tesla was enough to establish that Tesla "participated in the venture." The same should be true for corporate buyer defendants that have supply chain arrangements with farms or factories engaged in forced labor. The statute does not require any further conduct by the defendants in relation to the forced labor.

D. Stockholders, Consumers, and Other Parties That Merely "Know" and "Benefit" from the Forced Labor Should Not Be Deemed to Have "Participated in the Venture"

Another source of confusion as to what venture liability entails stems from courts' commingling of the three prongs in § 1589(b): (1) "knowledge," or the requirement that a venture participant knew about forced labor being used in the venture; (2) "benefit," or the requirement that a venture participant benefited from the forced labor; and (3) "participation," the requirement that a venture participant participated in the venture.[113] Perhaps because of the broad language of the statute and the absence of clear precedents, many courts have conflated the "participation" prong with either the "benefits" or "knowledge" prongs of the provision.[114] For example, the *Ricchio* court pointed to the fact that defendant benefited from the venture as evidence of participation;[115] the *Lesnik* court combined the "benefits" and "participation" prongs into one indistinguishable analysis;[116] and the *Bistline* court also relied heavily on facts relating to defendants' knowledge of and

112. *See* ENDING CHILD LABOUR, *supra* 3, at 9–13 ("These results make clear that efforts against child labour in global supply chains will be inadequate if they do not extend beyond immediate suppliers, that is, downstream suppliers closer to final production, and also cover actors in preceding tiers of supply chains . . . In view of these results, it is worth recalling that one of the tenets of international responsible business conduct . . . is that businesses have a responsibility to address adverse impacts that their activities may cause, including all their supply chains and business relationships.").

113. 18 U.S.C. § 1589(b).

114. *See* Beltran, *supra* note 53, at 262.

115. Ricchio v. McLean, 853 F.3d 553, 555 (1st Cir. 2017) ("It is likewise inferable that the Patels understood that in receiving money as rent for the quarters where McLean was mistreating Ricchio, they were associating with him in an effort to force Ricchio to serve their business objective.").

116. Lesnik v. Eisenmann SE, 374 F. Supp. 3d 923, 952–53 (N.D. Cal. 2019) ("[R]egarding any financial benefit, Tesla and Eisenmann . . . entered into an agreement under which Eisenmann would establish a paint shop at Tesla's facility . . . Vuzem, Eisenmann, and Tesla met and signed a subsequent agreement under which Eisenmann would employ Vuzem as a subcontractor to assist the construction of the paint shop . . . [T]hese allegations are sufficient to show that Eisenmann and Tesla benefitted 'financially' or by 'receiving anything of value' from participating in a venture that violated § 1589[.]").

benefit from the underlying forced labor to establish "participation."[117] But given the statutory interpretation doctrine that each word or phrase in a statute should be interpreted to have its own meaning,[118] such an approach is clearly less than desirable. While there certainly may be some overlap between the elements, the mere existence of "benefit" or "knowledge" alone should not be deemed sufficient to satisfy § 1589(b). That would cause the term "participation" to be redundant and could lead to absurd results—namely, being unable to distinguish between multitudes of consumers or stockholders who simply knew of and benefited from the forced labor from those who play a meaningful role in its perpetration.

The ramifications of applying such an unwieldy interpretation of § 1589(b) become more apparent in the supply chain context. Using the chocolate industry as an example, end-consumers of chocolate "benefit" from cocoa that is made cheaper by using forced labor. Additionally, as the use of child labor in the West African cocoa industry has come under increasing international scrutiny, it has also received more media coverage.[119] Consumers that are aware of this issue may meet the "knowledge" requirement. Should these consumers then be deemed to have "participated in the venture" of the cocoa supply chain?[120]

As discussed above, Congress voiced concerns about extending liability to stockholders when it first enacted the TVPA.[121] Although stockholders are the owners of corporate entities, there are multitudes of them at any given time. Furthermore, the frequency with which stocks trade hands would be problematic if

117. Bistline v. Parker, 918 F.3d 849, 876 (10th Cir. 2019) ("[D]efendants were well aware of the crimes being committed against plaintiffs, did nothing to expose these atrocities, tacitly approved of the conduct by constructing a scheme for the purpose of enabling it, and benefited for years from plaintiffs' payments of a considerable amount of attorney fees. These combined allegations create a reasonable inference that defendants were participating in a venture[.]").

118. *See* Walters v. Metro. Educ. Enters., Inc., 519 U.S. 202, 209 (1997) ("Statutes must be interpreted, if possible, to give each word some operative effect.").

119. *See, e.g.*, Peter Whoriskey & Rachel Seigel, *Cocoa's Child Laborers*, WASH. POST (June 5, 2019), https://www.washingtonpost.com/graphics/2019/business/hershey-nestle-mars-chocolate-child-labor-west-africa/?utm_term=.6cb753bcb6f8) [https://perma.cc/C8JA-97EL]; Leanne de Bassompierre, Isis Almeida & Marvin G Perez, *$100-Billion Chocolate Industry Still Plagued by Child Labor*, BLOOMBERG (Oct. 19, 2020, 11:37 AM), https://www.bloomberg.com/news/articles/2020-10-19/child-labor-worsened-on-west-african-cocoa-farms-study-shows [https://perma.cc/ZWL6-AR2V].

120. The potential for liability being extended to consumers is a key ramification defendants raise to discredit broader interpretations of participation. *See, e.g.*, Memorandum of Points and Auths. in Support of Defendants' Joint Motion to Dismiss at 18–19, Doe I v. Apple, Inc., No. 1:19-CV-03737 (CJN), 2021 WL 5774224 (D.D.C. Nov. 2, 2021) ("The plain meaning of the word 'venture' under the TVPRA . . . requires more than simply being a part of a global supply chain. Indeed, if the law were otherwise, any manufacturer or consumer of products that contain cobalt . . . would be part of an unlawful 'venture' and subject to potential enforcement, including potential criminal enforcement."); Memorandum of Points and Auths. in Support of Defendants' Joint Motion to Dismiss at 11, Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173 (D.D.C. 2022) (No. 1:21-cv-00386-DLF) ("Plaintiffs' theory would extend to 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.").

121. H.R. REP. NO. 106-939, at 101–02 (2000) (Conf. Rep.).

liability were extended to all those who at any point held stock during the period when forced labor was used. Similarly, the consumers that could potentially be held liable are virtually unlimited. Anyone who at any point during the forced labor period purchased the product or consumed the service would have to be included. It is reasonable to infer that Congress's concerns regarding extending liability to stockholders would similarly apply to consumers. This reflects a general concern that the statute should not be construed so broadly as to lead to absurd results.[122]

In light of such concerns, courts should delineate the definition of "participation" in a way that allows for the exclusion of such parties (passive stockholders or consumers) in a principled manner. The next Part lays out a framework that endeavors to respect the precedential power of existing case law, while ensuring the statute is cabined appropriately as was intended by Congress.

III.
A PROPOSED FRAMEWORK FOR TVPRA FORCED LABOR VENTURE LIABILITY

This Article has demonstrated that there is a logically consistent explanation to reconcile the conflicting decisions on venture liability with Congress's intent. Courts, however, are still far from reaching consensus on what constitutes a "venture." For example, the *Ricchio* and *Bistline* courts use the § 1591(e)(6) definition of "venture" ("any group of two or more individuals associated in fact, whether or not a legal entity"),[123] while the *Gilbert* court relies on the Black's Law Dictionary definition ("an undertaking that involves risk; esp., a speculative commercial enterprise").[124] As discussed above, courts have also struggled to define "participation," with some courts conflating the participation analysis with "benefit" and "knowledge."[125] The *Gilbert* court uniquely defined "participation" as "assuming risk" in a venture—a natural complement to its definition of "venture" as "an undertaking that involves risk."[126]

On a textual level, the language of the TVPRA lends itself towards a broad interpretation.[127] As noted above, however, the challenge lies in tailoring the interpretation to reflect congressional intent. Venture liability needs to be construed in a way that is not only broader than "aiding and abetting," but also cabined appropriately to avoid absurd results such as extending liability to passive

122. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931).

123. Ricchio v. McLean, 853 F.3d 553, 556 (1st Cir. 2017); Bistline v. Parker, 918 F.3d 849, 873 (10th Cir. 2019).

124. Gilbert v. U.S. Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 1058194, at *12 (D. Colo. Mar. 6, 2019).

125. *See supra* Part II.D.

126. *Gilbert*, 2019 WL 1058194, at *15.

127. *See, e.g.*, Negusie v. Holder, 555 U.S. 511, 544 (2009) (Thomas, J., dissenting) (explaining that the Court has interpreted participate as a "term[] and concept[] of breadth" (quoting Russello v. United States, 464 U.S. 16, 21–22 (1983))).

stockholders or consumers.[128] This Part will demonstrate that the *Gilbert* court's approach of using the concept of "risk" meets those objectives. It also provides the basis for a framework that deploys venture liability in a way that efficiently deters forced labor in the system.

A. "Ventures" Are "Undertakings That Involve Risk," and "Ventures That Engage in Forced Labor" Are "Undertakings to Profit from Forced Labor Consumption"

After recognizing that courts are split between using the § 1591 definition of "venture" versus the Black's Law Dictionary definition, the *Gilbert* court persuasively argued for the latter. It reasoned that using the former definition was not appropriate because § 1591 explicitly restricts its definition of "venture" to "*this* section."[129] This argument was also approvingly referenced and adopted by the above-mentioned hotel sex trafficking court opinions.[130]

The § 1591 definition—which includes "*any* group of . . . individuals associated in fact"—is also textually too nebulous to apply in the forced labor context.[131] Directly transposing it to § 1589 ignores the context of § 1591, where the broad definition of "venture" is accompanied by a restrictive definition of "participation" that is specific to § 1591.[132] Adopting as broad as possible a definition of "venture" may appear to lower the threshold for holding defendants liable. The potential to capture additional defendants beyond the scope of the framework proposed in this Article may be alluring to plaintiffs. But without some means of restraint—a limiting principle to facilitate grounded and consistent application of the statute—the § 1591 definition is practically infeasible for purposes of interpreting § 1589. Especially in the supply chain context, application of such an amorphous standard would mean that any party along the relevant supply chain (including consumers) could be "associated in fact,"[133] which could lead to unlimited potential defendants.

The ideal mechanism for defining a venture would need to be able to reach all along the supply chain (both upstream and downstream) but in a selective manner. As a starting point, each supply chain could be delineated in terms of its end-product. But as defendants rightly point out, this would be too broad to define a

128. *See supra* Part II.C.

129. *Gilbert*, 2019 WL 1058194, at *10.

130. *See* M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 969 (S.D. Ohio 2019); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 184–85 (E.D. Pa. 2020); A.B. v. Hilton Worldwide Holdings, Inc., 484 F. Supp. 3d 921, 937 (D. Or. 2020); J.L. v. Best Western Int'l, Inc., 521 F. Supp. 3d 1048, 1062 (D. Colo. 2021).

131. 18 U.S.C. § 1591(e)(6) ("The term "venture" means any group of two or more individuals associated in fact, whether or not a legal entity.").

132. 18 U.S.C. § 1591(e)(4) (2018) ("The term 'participation in a venture' means knowingly assisting, supporting, or facilitating a violation of subsection (a)(1).").

133. 18 U.S.C. § 1591(e)(6).

single venture.[134] "Venture," for purposes of § 1589(b), should only capture parts of the supply chain that are meaningfully related to the forced labor. The challenge, then, is to find the common denominator that ties these supply chain participants in a single venture. The remainder of this Part will argue that the Black's Law Dictionary definition provides that common denominator as well as the basis for a disciplined, yet highly inclusive approach to interpreting § 1589(b).

The *Gilbert* court again provides a useful starting point by applying the Black's Law Dictionary definition of "venture." In holding the institutional defendants liable under the venture theory, the court explained that the Olympic athlete industry is an "undertaking that involves risk" as it is "constantly infused and commingled with money, contracts, and terms."[135] But just from this simple holding, it is difficult to make out what about "risk" led the court to the conclusion that the Olympic Taekwondo athlete industry was a venture that engaged in forced labor. In order to understand the significance of "risk" in establishing a venture—particularly in relation to the fact that it engages in forced labor—it would be helpful to understand what exactly "risk" entails.

Revisiting Black's Law Dictionary's definition of "venture" is informative as it elaborates on what it means by "an undertaking involving risk" by adding "esp., a speculative commercial enterprise."[136] Additionally, under the term "risk," Black's Law Dictionary specifies twelve different kinds of risk of which "speculative risk" is one.[137] "Speculative risk" is defined as "a risk that can result in either a loss or a gain."[138] This accords with the fundamental mechanism of any profit-seeking activity: investment of money or other resources that are exposed to potential losses in return for the chance to make a profit.[139]

The following examples of "ventures" illustrate the link between "speculative risk" and "profit motive." Farms invest in land and machinery so that the seed and fertilizer (input) will yield crops (output) they can sell. This can be characterized as taking on speculative risk because it is uncertain whether the crops will yield enough to make the investments worth it (i.e., make a profit). Similarly, factories invest in buildings and machinery in order to transform raw materials (input) into products (output). In the service industry, hotels invest in buildings and their brand in order to provide various services (input) in one package that comes with lodging (output). These requisite investments are commonly referred to as "capital" in the

134. *See supra* text accompanying note 120.

135. Gilbert v. U.S. Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 1058194, at *15 (D. Colo. Mar. 6, 2019).

136. *Venture*, BLACK'S LAW DICTIONARY (11th ed. 2019).

137. *See Risk*, BLACK'S LAW DICTIONARY (11th ed. 2019).

138. *Id.*

139. *See, e.g.*, EUGENE F. FAMA, FOUNDATIONS OF FINANCE 361 (1976); John Y. Campbell, *Understanding Risk and Return*, 104 J. POL. ECON. 298 (1996).

context of corporate forms of ventures.[140] But the same principle applies to any form of endeavor: there are potential returns to be made if, and only if, investors or entrepreneurs make investments and take on risk.[141] That means any undertaking where an actor invests money with the purpose to make returns or profits—necessarily—must also be an "undertaking that involves risk."

While, as established above, any profit-seeking undertaking where actors invest capital upfront is a "venture," there can be different formulations of ventures that use forced labor depending on how they seek to profit from it. Labor is the process of transforming human capital into something of tangible value.[142] The simplest form of a profit-seeking undertaking that engages in forced labor would be an enterprise that profits from the extraction of that value—which we will refer to as the "forced labor extraction venture."[143] Examples include farms or factories that directly profit from using forced labor to harvest crops or manufacture goods cheaply. This is the narrowest formulation of a "venture engaged in forced labor" as it only implicates the activities of the principal perpetrator. When defendants insist on adopting the *Afyare* approach and argue that the "venture" must be a "forced labor venture," this is the formulation they are referring to—that only direct perpetrators can comprise a venture that engages in forced labor.[144] But a forced labor extraction venture is not the only possible formulation of a venture that engages in forced labor.

Another potentially profitable undertaking using forced labor is the transformation of the extracted value into consumable form. This type of venture that engages in forced labor extends further along the supply chain. The above example of harvested crops can help illustrate this type of venture. Buyers of the harvested crops can further profit by processing them into consumable goods like flour or bread and distributing those goods for consumer purchase. In fact, the profit potential of the latter often surpasses the profit made from "forced labor extraction."

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140. *See, e.g.*, 11 WILLIAM MEADE FLETCHER ET AL., FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 5079 (perm. ed., rev. vol. 2003); RICHARD A. BOOTH, FINANCING THE CORPORATION 2 (2022).

141. *See supra* text accompanying note 139.

142. *See* 9 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 144–45 (Waltraud Falk, Hanna Behrend, Marion Duparré, Hella Hahn & Frank Zschaler eds., De Gruyter Akademie Forschung 1990) (1887) ("By labour-power or capacity for labour is to be understood the aggregate of those mental and physical capabilities existing in a human being, which he exercises whenever he produces a use-value of any description."); *see also* Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 20 (1995) ("[Products liability] emphasizes the presence of human labor in a product. [Products liability is] consistent with observations that Karl Marx made in his early writings. Products liability implicitly recognizes proletarian labor, acknowledges that labor is embedded in products[.]").

143. *See InfoStories: Deceptive Recruitment and Coercion*, INT'L LAB. ORG., https://www.ilo.org/infostories/en-GB/Stories/Forced-Labour/Deceptive-Recruitment-and-Coercion#what-is-forced-labour [https://perma.cc/8D74-F3F2] (last visited April 23, 2023) ("The term forced labour covers a wide variety of coercive practices where work is extracted from individuals under the threat of penalty . . . . [E]nterprises that use forced labour generate vast untaxed profits.").

144. *See supra* text accompanying note 92.

This is partly because there may be many value-adding steps involved in the conversion process all the way to consumption. To illustrate, cocoa farmers first extract value from forced labor by deploying essentially free labor to harvest cocoa beans. But there is a much bigger enterprise waiting on the other side involving manufacturing, marketing, logistics, and retail that profits from the transformation of cocoa beans harvested by slave labor into readily consumable chocolate.[145] Lower labor costs are linked to cheaper cocoa prices, which in turn directly impact downstream profit margins.[146] And the sheer size of this industry is enough to prove the massive profit potential of investing into that process. This "forced labor consumption venture" is arguably the more relevant formulation of a "venture engaged in forced labor." It necessitates an understanding of the whole picture—the market dynamics that drive down cocoa prices and ultimately cause child labor.

This is not to say that "forced labor extraction" is the wrong formulation. It is simply a small part of the bigger "forced labor consumption venture." But "forced labor extraction" is rarely a point of contention, as discussed in Part II. The critical issue is whether there is a principled approach for additionally holding downstream defendants liable as venture participants. The "forced labor consumption" formulation of a venture demonstrates that a sufficiently broad, yet logically coherent, view of venture can be applied to effectively hold those parties to account.

B. "Participants" Are Those Who Assume Risk and Are Able to Disrupt the Venture of Forced Labor Consumption

1. "Skin in the Game" Test

The *Gilbert* court furnished the concept of "forced labor consumption" venture as a formulation of venture that includes not only the principle perpetrator but downstream buyers as well.[147] It also provided the basis for a test to determine which parties "participated" in the "venture of forced labor consumption" depending on how their interests were aligned with the venture.[148] As this Part will demonstrate, this approach fulfills congressional intent by excluding consumers

145. *See infra* note 184.

146. *See* Chloe Taylor, *'It's Difficult to Feed Our Families': Volatile Cocoa Prices Are Pushing West African Farmers Further into Poverty*, CNBC (Nov. 2, 2021), https://www.cnbc.com/2021/11/02/volatile-cocoa-prices-are-pushing-african-farmers-further-into-poverty.html [https://perma.cc/THS2-XRJG]; Reuters Staff, *BRIEF-Lower Cocoa Prices Will Help Profit Margins in 2018-CFO Mondelez*, REUTERS (Jan. 31, 2018), https://www.reuters.com/article/brief-lower-cocoa-prices-will-help-profi/brief-lower-cocoa-prices-will-help-profit-margins-in-2018-cfo-mondelez-idINFWN1PQ1G4 [https://perma.cc/4BVK-WQ4N]; Jeff Gelski, *Cocoa Bean Prices Drag Down Barry Callebaut Profit*, FOOD BUS. NEWS (Nov. 4, 2015), https://www.foodbusinessnews.net/articles/5293-cocoa-bean-prices-drag-down-barry-callebaut-profit [https://perma.cc/M5G5-HUCD].

147. *See supra* Part III.A.

148. Gilbert v. U.S. Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 1058194, at *15 (D. Colo. Mar. 6, 2019).

from the definition of venture participant, while maintaining the broad reach of venture.[149]

The court in *Gilbert* held that the Olympic athlete industry is a "venture" and that athletes like the defendant Steven Lopez "assume risk in [that] venture."[150] They "take the risk of competing to obtain the direct funding and health insurance that can accompany a spot on Team USA, not to mention the endorsements that may follow."[151] Institutions such as the USOC and USAT "assume risk" because they "invest in an athlete with the risk that he or she may not generate the corporate sponsorships that serve as part of their funding."[152] The court makes clear that parties "participate" by "assuming risk," and they "assume risk" by aligning their interests with the success (or failure) of the venture.

Being aligned with the success of the venture, or having "skin in the game," is synonymous with "assuming risk" because of how risk drives incentives. If parties invest resources in a speculative undertaking in the hopes of generating a profit,[153] then they assume risk in that venture. Such parties' interests are aligned with the success of the venture because they have committed money or other resources to it. By investing in the venture, they place themselves in a position to gain if the venture succeeds, but also to lose if the venture fails. Absent strong regulation and enforcement against forced labor, these parties have an incentive to continue dealing with fellow venture participants and tacitly accept their use of forced labor. By turning a blind eye, they have much to gain in the form of fatter margins and better returns on their investments. Doing otherwise would depress margins and could jeopardize their investment in the venture.[154]

It makes sense, then, that Congress would want to hold such parties accountable through venture liability. It inclines those parties to think twice before investing in a venture that seeks to make a profit from forced labor consumption.[155] Holding such parties liable through venture liability requires recognition that forced labor is not only the result of a single perpetrator's greed, but also the result of the investment and incentive structure of an entire system (or venture).[156]

149. *See supra* Part II.D.

150. *Gilbert*, 2019 WL 1058194, at *15.

151. *Id.* Following the court's logic, the victims and other athletes on the team who knew what was going on must also be deemed venture participants under this first "skin in the game" test. But Part II.B.2. will demonstrate how such "participants" can be filtered out by the second "bargaining power" test as they did not have the ability to stop the forced labor activity.

152. *Gilbert*, 2019 WL 1058194 at *15.

153. *See supra* Part III.A.

154. *See* sources cited *supra* note 146.

155. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176 (1968) ("The [Economic Model of Deterrence] follows the economists' usual analysis of choice and assumes that a person commits an offense if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities.").

156. *See* ENDING CHILD LABOUR, *supra* 3.

Casting the liability net to cover these parties is consistent with Congress's commitment to root out forced labor and holistically tackle this systemic problem.[157]

When courts determine whether a party "assumed risk" in the venture or not, they should recognize that the relevant "investment" may not necessarily be a financial investment. In fact, time, effort and opportunity cost spent on developing relationships with other venture participants is perhaps a more common—albeit less obvious—indication of whether a party assumed risk in that venture.[158] For example, a party's vested interest in the venture could stem from its reliance on a long-term contract with another participant: it incurs the opportunity cost of not contracting with other potential counterparties and relies on that specific party to perform. This demonstrates that entering into contracts is a form of risk assumption because parties pay the cost of having to rely on their counterparty over other alternatives (i.e., opportunity cost or detrimental reliance) in return for the benefits of the contract (e.g., lower negotiated prices, stable supply/demand).[159]

A more subtle form of contractual reliance would be two participants entering into repeat transactions. While the absence of an explicit contract makes it trickier to argue that there was reliance, it is well established in contract law that contracts can be implied from repeat transactions because of the implicit understanding that develops between the parties.[160] In such instances of repeat transactions without an explicit contract, a case-by-case analysis would be required to determine whether there was potential benefit to be gained from repeating transactions with the same counterparty, and whether there was reliance. But this would not require

157. *See supra* note 9 and accompanying text.

158. *See* Gilbert v. U.S. Olympic Comm., No. 18-CV-00981-CMA-MEH, 2019 WL 1058194, at *15 (D. Colo. Mar. 6, 2019) ("[B]oth parties assume risk in this enterprise. The athlete takes the risk of competing to obtain the direct funding and health insurance that can accompany a spot on Team USA, not to mention the endorsements that may follow. The institutions invest in an athlete with the risk that he or she may not generate the corporate sponsorships that serve as part of their funding.").

159. *See* Charles J. Goetz & Robert E. Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1266–67 (1980) ("Normally, advance knowledge of a future transfer will increase the benefit to the promisee because he can more perfectly adapt his consumption decisions to the impending change in wealth . . . . Because of the revisions in plans, the individual can achieve a higher intertemporal level of satisfaction than if the wealth were transferred without any advance notice. Such adaptive gain from the information embodied in a promise may appropriately be termed 'beneficial reliance.' The problem occurs, however, when the transfer foretold by the promise is not actually performed. In this case, the information conveyed by the promise turns out to have been misleading and the promise's induced adaptation in behavior makes him worse off than he would have been without the expectation of a future benefit. Losses incurred by ill-premised adaptive behavior are commonly termed 'detrimental reliance.'").

160. *See* RESTATEMENT (SECOND) OF CONTRACTS § 223 (AM. L. INST. 1981) ("A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 69(1) (AM. L. INST. 1981) ("Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance . . . . Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.").

anything beyond the scope of what courts already determine under existing contracts jurisprudence.

In *Gilbert*, USOC and USAT assumed risk in the venture involving the Lopez brothers because they chose them over other contenders to represent Team USA and relied on them to bring home results (e.g. medals, corporate sponsorships). In *Lesnik*, Tesla incurred the opportunity cost associated with entering into a subcontracting relationship with Vuzem over the term of the paint shop construction. And in *Bistline*, the attorneys invested their time and legal skills to develop a long-term attorney-client relationship with organization leader Jeffs instead of other potential clients and relied on that relationship for continued business and a stable source of income.[161] A similar reliance relationship is harder to spot at first for *Ricchio* and the recent hotel sex trafficking cases. Hotels are usually thought of as catering to travelers or visitors to the area and not as having to rely on any one particular lodger. This is perhaps the reason why the courts in these cases emphasized that repeated and/or long-term stays by the traffickers was a key fact in determining that the hotels were venture participants.[162] By turning a blind-eye to the sex trafficking occurring on their premises and continuing to let out their rooms for that purpose, the hotels made a choice to nurture a long-term relationship with the sex industry of their area. This choice entailed the risk of disenfranchising other potential patrons, but also offered the benefit of a more reliable and stable source of continued income.[163]

Consumers do not qualify as venture participants under this test. Ordinary consumers do not place themselves in a position to rely on the success of the venture, and therefore, should not be held liable. Putting aside the problem of extending liability to potentially countless individuals, these parties are also not implicated to the same degree in the venture because they are not as interested in the outcome. While it is true that they may reap some of the benefit of a successful venture (consumption at lower prices), they do not lose anything when the venture fails—they can simply switch to an alternative product or service without any

161. *Gilbert*, 2019 WL 1058194, at *4; Lesnik v. Eisenmann SE, 374 F. Supp. 3d 923, 953 (N.D. Cal. 2019); Bistline v. Parker, 918 F.3d 849, 874–75 (10th Cir. 2019).

162. *See, e.g.*, M.A. v. Wyndham, 425 F. Supp. 3d 959, 970 (S.D. Ohio 2019) ("In the absence of a direct association, Plaintiff must allege at least a showing of a continuous business relationship between the trafficker and the hotels such that it would appear that the trafficker and the hotels have established a pattern of conduct or could be said to have a tacit agreement."); A.B. v. Marriott, 455 F. Supp. 3d 171, 193–94 (E.D. Pa. 2020).

163. *See, e.g.*, A.B. v. Marriott, 455 F. Supp 3d at 190–91 ("Marriott . . . continued to rent rooms to A.B.'s traffickers and received financial benefit from sex trafficking by 'develop[ing] and maintain[ing] business models that attract and foster the commercial sex market for traffickers and buyers alike'; 'enjoys the steady stream of income that sex traffickers bring to their hotels'; 'financially benefits from its ongoing reputation for privacy, discretion, and the facilitation of commercial sex . . . .'").

investment lost.[164] This relatively neutral position indicates that consumers are far less incentivized to ensure the ongoing success of the venture.

2. "Bargaining Power" Test

As demonstrated, the "skin in the game" test reveals the incentive structure within the venture and identifies the parties that have a vested interest in the continued use of forced labor. But not all of these parties cause the forced labor to occur or have the ability to stop it. This Part will propose an additional test that further narrows down the pool of supply chain participants to those that have enough bargaining power against their co-participants to effect change.[165]

Distinguishing such parties through the bargaining power test is important for cases involving downstream defendants. In the absence of any specific conduct that furthered the forced labor for these defendants, the test ensures that those found liable meet the constitutional requirements of causation and redressability.[166] Upstream defendants that directly facilitated principal perpetrators by supplying them need not be put through this test as there are already clearly identifiable conducts that link them to the forced labor.

The D.C. District Court recently handed down two decisions that discussed the "participation in a venture" language in the supply chain context involving downstream defendants. Both required a showing of causation.[167] The *Coubaly* court explicitly based the need to show causation in the constitutional requirement of Article III.[168] The *Apple* court similarly pointed out, in dismissing the case, that plaintiffs had "pleaded no facts showing that . . . [d]efendants controlled the mines or conditions that led to [p]laintiffs' injuries."[169] These cases demonstrate the need for a fact-based analysis to distinguish between supply chain participants that create conditions causing forced labor to occur from supply chain participants that do not hold that power.

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164. Unlike the time and effort spent by businesses to nurture repeat customers, consumer loyalty to a certain product does not count as an investment as there is nothing of meaningful value depending on the consumer's decision to repeat purchase. Loyalty points are considered *de minimis* for purposes of this argument.

165. The United Nations Office of the High Commissioner refers to this ability as "leverage." U.N. OFF. HIGH COMM'R FOR HUM. RTS., GUIDING PRINCIPLES ON BUSINESS AND HUMAN RIGHTS 21–22 (2011) ("Leverage is considered to exist where the enterprise has the ability to effect change in the wrongful practices of an entity that causes a harm . . . If the business enterprise has leverage to prevent or mitigate the adverse impact, it should exercise it.").

166. *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992) ("[T]he irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an 'injury in fact' . . . Second, there must be a causal connection between the injury and the conduct complained of . . . Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'").

167. *See* Coubaly v. Cargill, Inc., No. 21-CV-386 (DLF), 2022 WL 2315509 (D.D.C. June 28, 2022); Doe I v. Apple Inc., No. 19-CV-03737 (CJN), 2021 WL 5774224 (D.D.C. Nov. 2, 2021).

168. *Coubaly*, 2022 WL 2315509, at *6 ("[A]lthough Congress may create new forms of liability, it cannot eliminate the constitutional causation requirement.").

169. *Apple*, 2021 WL 5774224, at *6.

The bargaining power test provides a solution by examining the relationships between supply chain participants. It asks which parties have the requisite power to dictate terms and make demands that reverberate throughout the entire supply chain. Such parties would effectively be the "supply chain leaders." Conversely, supply chain participants that do not have the power to dictate terms are "supply chain followers": they have no choice but to accept conditions as they are handed to them. It is easy to see how weeding out supply chain leaders from the mere followers addresses the problem of redressability. Once it is demonstrated that these parties have the ability to enforce policies prohibiting the use of forced labor on their fellow supply chain participants, it follows that holding them liable for violations will give them the incentive to actually exercise their power to bring an end to forced labor. To fulfill constitutional requirements of redressability, therefore, only supply chain leaders should be considered to have participated in the venture for purposes of § 1589(b).

Identifying only supply chain leaders to be venture participants in the downstream defendant context also addresses the causation requirement. Forced labor is caused by prices being too low to support legal wages.[170] Price levels, in turn, are determined by the interaction of supply and demand in a well-functioning ("perfectly competitive") market.[171] However, a variety of factors can break down this equilibrium and result in market failure and price distortions.[172] The form of market failure caused by just a few downstream participants dominating the supply chain is referred to as an "oligopsony."[173] In an oligopsony, "the concentration of demand in just a few parties gives each substantial power over the sellers and can effectively keep prices down."[174] This provides the causal link between supply chain leaders and low prices/forced labor. Although downstream supply chain leaders may not be the sole determiner of prices, or perhaps even the "but-for" cause of forced labor, they are at least a substantial factor in setting the low prices of products,[175] which in turn is a direct cause of forced labor.

The bargaining power test is a fact intensive inquiry as it requires a detailed examination of the structure and relationships within the venture. The aim of this inquiry is to unveil each party's relative bargaining position within the venture to identify those that exercise substantial power over other participants. Ultimately,

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170. *See* ENDING CHILD LABOUR, *supra* note 3; *see also* Taylor, *supra* note 146.

171. *See* Irena Asmundson, *Supply and Demand: Why Markets Tick*, IMF: FIN. & DEV., https://www.imf.org/en/Publications/fandd/issues/Series/Back-to-Basics/Supply-and-Demand (last visited July 25, 2023).

172. *See Market Failure: What It Is in Economics, Common Types, and Causes*, INVESTOPEDIA, https://www.investopedia.com/terms/m/marketfailure.asp [https://perma.cc/8GMQ-FHRF] (last visited June 21, 2023).

173. *See Oligopsony*, INVESTOPEDIA, https://www.investopedia.com/terms/o/oligopsony.asp [https://perma.cc/78UB-GTUY] (last visited June 21, 2023).

174. *Id.*

175. *See Substantial-Cause Test*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The principle that causation exists when the defendant's conduct is an important or significant contributor to the plaintiff's injuries.").

the party in question should have enough power to dictate and enforce labor policies within the supply chain and be able to influence prices either on its own or as part of a powerful group. Determining factors include how critical that party's or its counterparty's role is in the venture, how easily a party can be replaced by its suppliers or buyers, how much of the party's business a counterparty accounts for, and how concentrated or fragmented the market is either on the supply or demand side.[176]

Passive investors of venture participants are the prime example of parties that assume risk, but nevertheless are not participants in the venture. They are typically highly fragmented as a class and do not have the ability to dictate business decisions or disrupt the venture without collective action, which in itself is difficult to organize.[177] Thus, investors assume risk in the venture in the most classic sense by investing money, but they do not individually have the power to influence prices or policies regarding forced labor.[178] The analysis may be different when power is concentrated in the hands of controlling or majority shareholders who are more likely to hold some sway over how the company is managed. But such cases are rare especially with listed companies[179] and would have to be judged considering the circumstances of each case.

The USOC and USAT in *Gilbert* clearly meet the "bargaining power" test. They monopolize the process for selecting Team USA for Taekwondo,[180] while the Lopez brothers were just two out of possibly hundreds of talented Taekwondo athletes. Even without actually replacing the brothers, simply confronting them with disciplinary measures backed by the threat to throw them off Team USA could have been enough to put an end to their sexual exploitation of other athletes. In *Lesnik*, Tesla's bargaining power also dominated that of Vuzem's given its

176. The "Porter's Five Forces Model" provides a useful tool to analyze the relative bargaining power of an entity within its industry. *See* Michael E. Porter, *How Competitive Forces Shape Strategy*, HARV. BUS. REV., Mar.–Apr. 1979.

177. Shareholders usually need to engage in the arduous task of proxy battles to effect any meaningful change in management. *Proxy Fight: Definition, Causes, What Happens, and Example*, INVESTOPEDIA, https://www.investopedia.com/terms/p/proxyfight.asp [https://perma.cc/ES4Q-P3U2] (last visited Nov. 14, 2022).

178. Resistance against recent investor led ESG initiatives, even when initiated by large asset managers like Blackrock and Vanguard, demonstrates the difficulty of investors imposing their wishes on company management. *See* Diane-Laure Arjaliès & Tima Bansal, *ESG Backlash in the US: What Implications for Corporations and Investors?*, FIN. TIMES (June 11, 2023), https://www.ft.com/content/3f064321-138c-4c65-bbb9-6abcc92adead [https://perma.cc/A525-G6HF].

179. As of 2019, "controlled companies" (as opposed to companies with dispersed ownership) made up only 3.6 percent of the S&P 500. *CEO Ownership, Corporate Governance, and Company Performance*, ISS INSIGHTS (May 10, 2019), https://insights.issgovernance.com/posts/ceo-ownership-corporate-governance-and-company-performance/ [https://perma.cc/653M-BPSY].

180. *Gilbert*, 2019 WL 1058194, at *1 ("USOC is the federally chartered institution that exercises 'exclusive jurisdiction' over 'all matters pertaining to United States participation in the Olympic Games' . . . USAT is the [national governing body] recognized by the USOC to govern the United States' participation in taekwondo.").

brand power and market position in the automobile industry compared to the relatively low-skilled and replaceable nature of Vuzem's services.[181]

It is worth mentioning that neither court in *Gilbert* nor *Lesnik* explicitly conducted such analyses in their opinions. This is most likely because each of the ventures involved were relatively small in scale, and so causation was never in question. Nevertheless, the bargaining power test becomes a necessary tool when dealing with forced labor used in large and complex industries because it helps courts weed out parties that caused the forced labor from numerous supply chain participants that are often interrelated in a convoluted web. It also ensures that the true instigators of forced labor will no longer be able to hide behind scale and complexity to escape liability.

In sum, venture participants are parties that are motivated to ensure the venture succeeds by virtue of their investment in it, and enjoy strong bargaining positions relative to other participants, which gives them the ability to either cause or disrupt the use of forced labor. These parties are the most efficient targets for deterring forced labor in the system because they are the major drivers of demand for forced labor, they have the incentive to keep it going, and they also have the means to disrupt it.

C. Determining Who Count as "Participants"

The proposed standard described above can be summarized into a two-step test. "Participants" of a "venture engaged in forced labor" are those that:

1. assume risk in the undertaking to profit from forced labor consumption;

and, in the case of downstream defendants, additionally

2. enjoy enough bargaining power in relation to other participants to enable them to meaningfully impact operation of the venture.[182]

The following examples serve to demonstrate how the test can be applied in different scenarios as well as highlight in practical terms the critical points that determine the outcome.

Perhaps the most notorious contemporary case of forced labor in the corporate supply chain is the use of child slaves to harvest cocoa beans in West Africa.[183] The global chocolate industry is a huge business, estimated to be worth more than US$114 billion in 2019 and expected to grow to US$136 billion by 2027,[184] and

181. In 2016, when the complaint was first filed, Tesla had a year-end market capitalization of $34 billion, while Vuzem was only one of "an array of subcontractors." *Market Capitalization of Tesla*, COMPANIESMARKETCAP, https://companiesmarketcap.com/tesla/marketcap/ [https://perma.cc/2VRF-HFYF] (last visited Feb. 14, 2023); *Lesnik*, 374 F. Supp. 3d at 933–34.

182. *See supra* Part III.B.

183. *See* OFF, *supra* note 4.

184. *Chocolate Confectionary Market Size, Share & COVID Impact Analysis, by Type, Category, and Regional Forecast*, 2020–2027, FORTUNE BUS. INSIGHTS (2020) [hereinafter *Chocolate Confectionary Market Size*], https://www.fortunebusinessinsights.com/industry-reports/chocolate-confectionery-market-100539 [https://perma.cc/4ZSB-C9GP].

it is currently dominated by just a handful of multinational corporations.[185] Plaintiffs in *Coubaly v. Cargill, Inc.*, who were child slaves on cocoa farms, named these corporations as defendants under § 1589(b).[186] But in granting the defendants' motion to dismiss, the D.C. District Court held that plaintiffs did not adequately plead that defendants participated in a venture engaging in the forced labor as they did not meet the "constitutional causation requirement."[187] On appeal, plaintiffs should be able to fulfill the causation requirement by presenting facts relevant to the bargaining power test.[188]

Applying the first of the two-step test, there is no question that these corporations assume risk in the venture of manufacturing and selling chocolate from cocoa beans harvested by enslaved children. These corporations invest heavily in cocoa processing factories, efficient distribution channels, and their brands in order to maximize their margins from the sale of chocolate.[189] They therefore have a significant vested interest in cocoa prices being kept low.

The second step is also easily met. A few multinational corporations dominate the global chocolate industry,[190] whereas cocoa farming is spread out over many different farms—each relatively small in size and in many cases family-operated.[191] This market structure indicates that the corporations have outsized bargaining power over the farms.[192] Each farm is replaceable from the corporations' standpoint, but the farms cannot afford to lose business with corporations that account for 100% of their sales thanks to exclusive sales agreements.[193] The fact that there are only a few corporations also makes it easier for them to coordinate

185. As of 2019, the top five companies collectively accounted for 88% of global chocolate market share. *See id.*; *see also* FRIEDEL HÜTZ-ADAMS, DEUTSCHE GESELLSCHAFT FÜR INTERNATIONALE ZUSAMMENARBEIT (GIZ) GMBH, PRICING IN THE COCOA VALUE CHAIN – CAUSES AND EFFECTS 6 (2018), https://suedwind-institut.de/files/Suedwind/Publikationen/2018/2018-13%20Pricing%20in%20the%20cocoa%20value%20chain%20%E2%80%93%20causes%20and%20effects.pdf.

186. Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173, 177–79 (D.D.C. 2022).

187. *Id.* at 182–83.

188. *See supra* Part III.B.2.

189. *See, e.g.*, NESTLÉ, ANNUAL REVIEW 2021 at 52, 64 (2021), https://www.nestle.com/sites/default/files/2022-03/2021-annual-review-en.pdf [https://perma.cc/Y9MU-NWMM].

190. *See Chocolate Confectionary Market Size*, *supra* note 184; HÜTZ-ADAMS, *supra* note 185.

191. *See* HÜTZ-ADAMS, *supra* note 185; *see also Cocoa Growing*, MONDELĒZ INT'L, https://www.cocoalife.org/in-the-cocoa-origins [https://perma.cc/E6ZH-ZSDZ] (last visited Nov. 14, 2022) ("90% of the world's cocoa beans are harvested on small, family-run farms with less than two hectares of land and an average yield of just 600-800 kg per year.").

192. *See* HÜTZ-ADAMS, *supra* note 185, at 11.

193. *See* Class Complaint at 26, Coubaly v. Cargill, Inc., 610 F. Supp. 3d 173 (D.D.C. 2022) (No. 1:21-CV-00386) ("Defendants were able to obtain an ongoing, cheap supply of cocoa by maintaining exclusive supplier/buyer relationships with local farms and/or farmer cooperatives in Cote d'Ivoire.").

their collective interest through forums like the World Cocoa Foundation[194] and compound their bargaining power even further through lobbying efforts or by coordinating their business decisions. Comparatively, the large number of cocoa farmers makes it difficult for them to organize.[195] Moreover, given the notoriety of forced labor in the cocoa industry, there is mounting research that concludes that these multinational corporations are at least partly responsible for, if not one of the main causes of unsustainably low prices.[196] The constitutional requirements of causation and redressability are comfortably met in holding them liable as venture participants under § 1589(b).

On the other hand, retailers that sell chocolates to consumers (e.g., Wal-Mart, Costco) may escape venture liability. In any grocery store, there is shelf space dedicated to chocolate products. Presumably, those retailers have assumed risk by entering into purchasing agreements with chocolate companies to fill those shelves. But they do not enjoy the same bargaining power that would allow them to meaningfully disrupt the chocolate industry. Although consolidation of the retail industry in recent years has led to increased bargaining power of retailers, chocolate manufacturers are still considered to hold the bulk of pricing power.[197] A single retailing company would probably not able to dictate the terms of how chocolate is made; its sternest ultimatum—refusing to stock its shelves with slave-labor chocolate—would likely only create a minor dint in the chocolate companies' entire global sales.

The same would likely apply to all the peripheral services that support the main chocolate manufacturing business such as marketing companies, auditors, and shipping companies. These companies all assume risk because they repeatedly contract with the chocolate companies. However, just like the retailers, they each do not have the bargaining power to influence how the chocolate industry operates.

The analysis changes entirely regarding the above retailing companies when they purchase generic goods or produce. The fishing and processing of shrimp

194. *See id.* at 29–30 ("All of the Defendants are leaders of the . . . WCF's [(World Cocoa Foundation)] 'CocoaAction Plan' . . . . [T]he CocoaAction Plan purports to include a monitoring system, the Child Labor Monitoring and Remediation System (CLMRS), to ensure that there are no children working on Defendants' cocoa plantations . . . . [T]he CocoaAction Plan and the CLMRS are ineffective. Defendants know them to be so and purposefully set them up to be narrow and uncomprehensive.").

195. *See* HÜTZ-ADAMS, *supra* note 185, at 8.

196. *See, e.g.*, *id*. at 11; Cornelia Staritz, Bernhard Tröster, Jan Grumiller & Felix Maile, *Price-Setting Power in Global Value Chains: The Cases of Price Stabilisation in the Cocoa Sectors in Côte d'Ivoire and Ghana*, THE EUR. J. OF DEV. RES. (June 23, 2022) at 24–25.

197. *See* Staritz, *supra* note 196, at 10.

sold by major grocery chains, for example, uses forced labor.[198] In the shrimp industry, the retailing companies have superior bargaining power over the factories that process the shrimp. This is because there are likely many shrimp suppliers globally all vying for access to the lucrative U.S. market, but only a few large grocery chains that dominate a highly concentrated market.[199] In *Ratha v. Phatthana Seafood Co., Ltd.*—which implicated this same kind of shrimp venture—the venture liability defendants were not retailers but agents aggregating and promoting Thai shrimp for sale in the U.S. market.[200] Nonetheless, the same analysis applies as there are multiple shrimp factories, and the agents were in a unique position to offer access to the U.S. market through their established channels, and therefore could likely apply downward pressure on prices in order to improve their margins.[201]

Thus far, all the examples have turned on the second step of whether the parties have enough bargaining power. A recent case involving PPE (personal protective equipment) gloves made with forced labor provides a useful example to demonstrate how step one can also determine whether a party is a participant or not.[202] Due to the onset of COVID-19 in 2020, hospitals were faced with a sudden need for vast amounts of PPE equipment.[203] Some of that equipment—such as latex gloves—was sourced from factories in Malaysia that used forced labor.[204]

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198. *See generally* Annie Kelly, *Thai Seafood: Are the Prawns on Your Plate Still Fished by Slaves?* GUARDIAN (Jan. 23, 2018), https://www.theguardian.com/global-development/2018/jan/23/thai-seafood-industry-report-trafficking-rights-abuses [https://perma.cc/XR7Q-QCQY]; Margie Mason, Robin McDowell, Esther Htusan & Martha Mendoza, *Shrimp Sold by Global Supermarkets Is Peeled by Slave Labourers in Thailand*, GUARDIAN (Dec. 14, 2015), https://www.theguardian.com/global-development/2015/dec/14/shrimp-sold-by-global-supermarkets-is-peeled-by-slave-labourers-in-thailand [https://perma.cc/J72H-TD32].

199. *See* Nina Lakhani et al., *Revealed: The True Extent of America's Food Monopolies, and Who Pays the Price*, GUARDIAN (July 14, 2021), https://www.theguardian.com/environment/ng-interactive/2021/jul/14/food-monopoly-meals-profits-data-investigation [https://perma.cc/6J59-R8U6].

200. Ratha v. Phatthana Seafood Co., 35 F.4th 1159, 1177, 1180 (9th Cir. 2022) (holding that Plaintiffs presented insufficient evidence to create a triable issue on whether Defendants knowingly benefitted). The court did not analyze whether defendants participated in a venture. *Id.*

201. *See* Appellants' Opening Brief at 11, Ratha v. Phatthana Seafood Co., Ltd., 35 F.4th 1159 (9th Cir. 2022) (No. 2:16-CV-04271-JFW) ("[Defendant] obtained and retained large [U.S. supermarket chain] customers by marketing the combined volume and steady supply of its Thai partners . . . ."); *id.* at 41("[Defendant] marketed itself as possessing 13 factories 'that are 100% owned and captive to [Defendant]' and listed [principal perpetrator]'s factory as one of those captive factories.").

202. *See, e.g.*, *Shortage of Personal Protective Equipment Endangering Health Workers Worldwide*, WHO (Mar. 3, 2020) [hereinafter *Shortage of Personal Protective*], https://www.who.int/news/item/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide#:~:text=The%20World%20Health%20Organization%20has,coronavirus%20and%20other%20infectious%20diseases [https://perma.cc/NSK4-G9EU].

203. *Id.*

204. *See, e.g.*, Liz Lee, *U.S. Customs Says Forced Labour Used at Malaysia's Top Glove, To Seize Gloves*, REUTERS (Mar. 29, 2021), https://www.reuters.com/world/asia-pacific/us-customs-determines-forced-labour-malaysias-top-glove-seize-gloves-2021-03-30/ [https://perma.cc/88TV-8WU4].

Whether those hospitals participated in the venture that sought to profit from that forced labor largely depends on the nature of the purchase. If they had bought the gloves as a one-off transaction to meet the sudden demand, then they are more akin to consumers who do not rely on the success of the venture. However, if the purchasing agreement is longer term or they repeatedly purchase from the same supplier, they begin to look more like venture participants because they are paying the opportunity cost of excluding other suppliers by favoring that particular supplier. In the latter scenario, the hospitals have a vested interest in the low-cost production of those gloves because they rely on the ongoing supply from that supplier.

Even without closely examining the details of each relationship, however, it is clear that hospitals would likely not meet the requirements of step two. There are a large number of hospitals in the United States, not to mention innumerous private practices, with no evidence of an oligopsony that has any meaningful influence over the price of medical gloves.[205] In fact, at the onset of the COVID pandemic suppliers likely held most of the bargaining power, with hospitals more than willing to pay a premium on medical gloves given the shortage at the time.[206] Even during normal times, the medical glove market likely functions close to a perfectly competitive market where price is determined by a relatively even balance of power between a large number of suppliers of these generic goods and a large number of buyers.[207] This instance of forced labor, therefore, appears to have stemmed from glove manufacturers attempting to opportunistically maximize their margins during the COVID pandemic, rather than from any downstream buyers.

CONCLUSION

The combination of globalization with corporations' insatiable demand for ever higher margins continues to aggravate the problem of forced labor in global supply chains.[208] Multinational corporations often hold the key to bringing about meaningful change to that dynamic.[209] But thus far there has been almost no incentive for them to do so as they only stand to gain by maintaining the status quo and continuing to benefit from low prices.

The TVPRA with its novel theory of venture liability provides an invaluable tool to change that incentive calculation for participants of supply chains that engage in forced labor. The breadth of its language overcomes hurdles faced by other theories of complicity utilized in the past to tackle the same issue. It extends to

205. There was a total of 6,129 hospitals in the U.S. as of 2023. AM. HOSP. ASS'N, FAST FACTS ON U.S. HOSPITALS (2023), https://www.aha.org/statistics/fast-facts-us-hospitals [https://perma.cc/VS3P-MTP4].

206. *See Shortage of Personal Protective*, *supra* note 202.

207. *See* Asmundson, *supra* note 171.

208. *See* ENDING CHILD LABOUR, *supra* note 3.

209. *See supra* Part III.B.2.

downstream corporate actors that previously escaped liability despite their outsized role in the global phenomenon. No longer can such parties point to their lack of direct conduct to push the blame and avoid responsibility.

Neither should advocates be discouraged by the lack of precedent specifically relating to supply chains. Venture liability may still be in its infancy, but the recent flurry of litigation and courts' interpretation of the "participation in a venture" language has so far been encouraging. They have demonstrated that, with tests such as the framework proposed by this Article, the forced labor venture liability provision of the TVPRA can be deployed in a disciplined manner. Corporations that have the ability to stop forced labor practices, but yet do nothing about it because of their vested interest in the status quo, can be specifically targeted. And forced labor venture liability can be found without overextending liability to consumers, passive investors, or any of the other minor supply chain participants. Recent developments, therefore, have positive implications for the favorable application of venture liability in the supply chain context.