No. 18-55041

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEO RATHA; SEM KOSAL; SOPHEA BUN; YEM BAN; NOL NAKRY; PHAN SOPHEA; AND SOK SANG,

Plaintiffs-Appellants,

v.

PHATTHANA SEAFOOD CO., LTD.; S.S. FROZEN FOOD CO., LTD.; RUBICON RESOURCES, LLC; WALES AND CO. UNIVERSE LTD.,

Defendants-Appellees.

On Appeal from the District Court for the Central District of California, Honorable John F. Walter Presiding, Case No. 2:16-CV-04271-JFW

BRIEF OF AMICUS CURIAE THE CENTER FOR JUSTICE & ACCOUNTABILITY IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

This brief is submitted amicus curiae pursuant to Federal Rule of Appellate Procedure 29 and Ninth Circuit Rule 29-2, in support of Appellants' Petition for Rehearing and Rehearing En Banc.

The Center for Justice & Accountability (CJA or Amicus Curiae) is an international human rights organization dedicated to accountability for torture and other human rights abuses worldwide, including human trafficking, crimes against humanity, war crimes, and genocide. Amicus curiae submits this brief to vindicate the public interest in ensuring that the Trafficking Victims Protection Reauthorization Act (TVPRA)—and the critical tool of extraterritorial jurisdiction it adopts—are properly construed to permit the United States to honor its international commitments to combat human trafficking whenever offenders are present for business in the U.S. market.

CJA appeared amicus curiae before the Panel arguing *inter alia* that the District Court's physical presence requirement erroneously restricted the TVPRA's jurisdictional grant, defeating Congress's remedial goal of combatting human trafficking and undermining this nation's international commitment to deny safe harbor to human traffickers in the U.S. marketplace.

No counsel for a party authored this brief in whole or in part and none of the parties or their counsel, or any other person or entity other than amicus curiae, its

members, or its counsel made a monetary contribution intended to fund its preparation or submission. All parties to this appeal have consented to the filing of this brief.

ISSUE

Is a defendant who is present in the United States for personal jurisdiction also present in the United States for subject matter jurisdiction under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), 18 U.S.C. § 1596(a)(2)?

ARGUMENT

I. Rehearing En Banc Is Required To Clarify That "Present In" Subject Matter Jurisdiction Under the TVPRA Is Co-Extensive with the Minimum Contacts Test for Personal Jurisdiction.

The federal statute at the heart of this appeal—the Trafficking Victims Protection Reauthorization Act (hereinafter "TVPRA")—is one of the principal weapons in the fight against the scourge of human trafficking in the United States, explicitly authorizing civil lawsuits against traffickers and those who knowingly benefit from trafficking. In both criminal and civil cases under the statute, subject matter jurisdiction over specified offenses is proper if "an alleged offender is *present in* the United States, irrespective of the nationality of the alleged offender." 18 U.S.C. § 1596(a)(2) (emphasis added). Contrary to the District Court's decision, a defendant is "present in the United States" under the TVPRA when it is "present

in the United States" for purposes of personal jurisdiction under the Due Process Clause of the Constitution.

The Panel merely assumed, without deciding, that the District Court's disposition requiring defendant's physical presence in the United States was wrong but ruled against the Appellants on other grounds. Appellants' pending motion for rehearing and rehearing en banc demonstrates with specificity how the Panel's ruling is inconsistent with both the language and history of the TVPRA, as well as with decisions of the Supreme Court and other Circuit Courts of Appeals. CJA appears amicus curiae in support of those submissions and to stress independently that the Panel's decision creates an ambiguity where none exists in the statute. Left uncorrected by the Circuit en banc, the Panel's unforced error will have far-reaching consequences for those fighting traffickers and potentially undermine jurisdiction under a variety of statutes that address some of the most serious international crimes.

A. The Panel Created a Pernicious Ambiguity in the Statute by Merely Assuming Without Deciding that Minimum Contacts Is the Correct Test for "Present In" Jurisdiction.

The issue of the TVPRA's extraterritorial reach was fully briefed and argued before the Panel, especially the meaning of the statutory provision establishing subject matter jurisdiction over those persons "present in" the United States. The issue was ripe for disposition on its merits and critical to ongoing litigation under

the statute and cognate statutory provisions. But the Panel decided not to rule on the issue, opting instead merely to assume that the minimum contacts test for personal jurisdiction was coextensive with the statutory "present in" test for subject matter jurisdiction.

The issue is simply too important to handle in so cavalier a way, because it creates ambiguity in the law where none exists. The text of § 1596(a)(2)—with its reference only to "presen[ce] in the United States"—does not support the imposition of a physical presence requirement as a precondition for subject matter jurisdiction. In stark contrast to other federal statutes, the TVPRA contains no express requirement that a defendant be "physically present" in the United States.[1] Indeed, Congress specifically required physical presence elsewhere *in the same statute* that gave courts extraterritorial jurisdiction over trafficking offenses: the

[1] *See, e.g.*, Radiation Exposure Compensation Act, Pub. L. 101–426, 104 Stat. 920 (1990) (referring to "[a]ny individual who was *physically present* in the affected area"); Prevent All Cigarette Trafficking Act of 2009, Pub. L. 111-154, 124 Stat. 1087 (2010) (defining the term "delivery sale" as "any sale of cigarettes … to a consumer if … the seller is … not in the *physical presence* of the buyer when the request for purchase or order is made"); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act), Pub. L. 107–56, 115 Stat. 272 (2001) (prohibiting U.S. correspondent accounts with any foreign bank "that does not have a *physical presence* in any country"); Ryan Haight Online Pharmacy Consumer Protection Act of 2008, Pub. L. 110–425, 122 Stat. 4820 (2008) (specifying that certain medical evaluations be "conducted with the patient in the *physical presence* of the practitioner") (emphasis added in each case).

William Wilberforce Act of 2008, Pub. L. 110-457, 122 Stat. 5044 (2008) (codified as amended in scattered sections of 8, 18, 22, and 34 U.S.C.). In one section, the Act created jurisdiction whenever the "offender is present in the United States." *Id.* § 223(a) (codified at 18 U.S.C. § 1596(a)(2)). In another, it amended section 101(a)(15)(T)(i)(II) of the Immigration and Nationality Act to require "*physical presence*" in the United States, on account of trafficking, as a prerequisite for establishing or adjusting immigration status. *Id.* § 201(a)(1)(C) (codified at 8 U.S.C. § 1101(a)(15)(T)(i)(II)) (emphasis added). Congress obviously knows what language to use when physical presence is required to establish a claim, a prohibition, or an entitlement, and it did not use any of that language in section 223(a). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)).

It is equally beyond dispute that a corporation's "presence in" a jurisdiction depends on a showing of sufficient minimum contacts within the jurisdiction to satisfy due process. *See, e.g.*, *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-17 (1945); *Martinez v. Aero Caribbean*, 764 F.3d 1062, 1068 (9th Cir. 2014). Since *International Shoe*, of course, corporate activities other than through a "corporate

agent," 326 U.S. at 317, have been assessed under the Due Process Clause, including other forms of "purposeful availment" of the privilege of doing business in a particular jurisdiction. *See, e.g.*, *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295-99 (1980); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474-78 (1985). Although personal jurisdiction in transnational cases has undergone some refinement over the last decade, the Supreme Court has never found personal jurisdiction lacking over a corporate defendant when the plaintiffs' claims arise directly from that defendant's intentional and substantial in-state contacts. *See, e.g.*, *Daimler AG v. Bauman*, 571 U.S. 117 (2014); *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873 (2011). It is true that the "specially-affiliating nexus" required in *Bauman* and *McIntyre* has displaced the outer reaches of general jurisdiction, but nothing in this case turns on general jurisdiction. To the contrary, on the face of their Complaint, Plaintiffs allege that Defendant Phatthana Seafood Co. purposefully availed itself of the privileges of conducting business in California and the United States and that its claims arise specifically out of those business activities. In fact, the Complaint paints a picture of a cross-border chain of transactions that exploited trafficked labor in Thailand to bring product into the United States at market-distorting prices and in violation of U.S. laws and regulations. Perhaps it is not surprising that no defendant even bothered to object to the exercise of personal jurisdiction in this case.

The Panel's decision simply to assume, without deciding, what the statute plainly requires short-circuits the proper disposition of the issue on the merits, which invites additional, unnecessary, and potentially harmful litigation.

B. The Consequences of Leaving the Panel's Decision in Place Are Potentially Dire, Defeating the Remedial Purpose Behind Congress's Unambiguous Decision To Give the TVPRA Extraterritorial Effect and Undermining the United States' Commitments Under International Law.

Combatting human trafficking is "among the highest priorities of the United States." 149 Cong. Rec. 158 (2003). Congress has repeatedly expanded the criminal, civil, and diplomatic tools available to the United States through mutually reinforcing provisions premised on the "3P paradigm": Prosecution, Prevention, and Protection. Off. To Monitor & Combat Trafficking in Pers., U.S. Dep't of State, *The 3Ps: Prosecution, Protection, and Prevention* (2019), https://www.state.gov/wp-content/uploads/2019/07/2019-TIP_FS1-3Ps-Lo-Res.pdf. One vital tool in that effort is application of the statutory regime to transnational and extraterritorial conduct consistent with constitutional standards of personal jurisdiction.

That of course is precisely what the William Wilberforce Act of 2008 does. There, Congress gave the Chapter 77 trafficking offenses the most expansive basis for extraterritorial jurisdiction found in the U.S. Code: subject matter jurisdiction exists whenever the "alleged offender is present in the United States, irrespective

of the nationality of the alleged offender." Pub. L. No. 110–457, § 223, 112 Stat. 5044 (2008). This provision has survived constitutional challenge, including under the Fifth Amendment's Due Process clause with respect to a foreign citizen accused of running a multinational trafficking enterprise. *United States v. Baston*, 818 F.3d 651, 669 (11th Cir. 2016).

The civil remedy for human trafficking—which enables victims to seek actual damages, punitive damages, attorneys' fees, and other litigation costs—coupled with the TVPRA's mandatory restitution provisions—which entitle victims to receive the value of their labor (18 U.S.C. § 1593)—signal Congress's express intent to eliminate human trafficking by attacking the lucrative financial incentives inherent to human trafficking and the illicit profits that can be earned from the practice. *See Ditullio v. Boehm*, 662 F.3d 1091, 1098 (9th Cir. 2011) (finding that the [TVPRA] permits recovery of punitive damages because it "creates a cause of action for tortious conduct that is ordinarily intentional and outrageous … [and] is consistent with Congress' purposes in enacting the [TVPRA], which include increased protection for victims of trafficking and punishment of traffickers.").

The legislative history makes clear that Congress understood the criminal element of the big business that is human trafficking. "Trafficking is the fastest growing source of profits for organized criminal enterprises worldwide. Profits

from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. Trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law." 22 U.S.C. § 7101(b)(8). Civil remedies not only contribute towards making victims financially whole. They also help ensure that trafficking crimes are not profitable for any perpetrator, wherever they operate.

The exercise of "present in" jurisdiction enables the United States to enforce international law prohibitions on human trafficking that are in force across the globe. The empowering combination of "present in" jurisdiction and the provision of civil remedies is fully consistent with the main multilateral treaty against human trafficking, namely the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime ("Palermo Protocol"), Nov. 15, 2000, 2237 U.N.T.S. 343. The Palermo Protocol explicitly requires each signatory to "ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered." Palermo Protocol, art. 6(6). The United States ratified this treaty in 2005, making it the Supreme Law of the Land under Article VI of the Constitution.

By declining to resolve the reach of "present in" jurisdiction in unmistakable substantive terms, the Panel's decision potentially undermines "present in" jurisdiction in a suite of other federal criminal statutes designed to enforce international norms and deny safe haven to offenders. Many international crimes codified in Title 18 of the U.S. Code employ the same "present in" jurisdictional formula, or language that is substantially similar, along with other jurisdictional bases.[2] For example, "present in" jurisdiction was included in amendments to the genocide statute at the request of the Department of Justice in order to close a loophole in the law and deny safe haven to perpetrators of genocide in the United States. See Human Rights Enforcement Act of 2009, 18 U.S.C. § 1091. The suite of U.S. terrorism statutes employs analogous language, allowing for the assertion of jurisdiction over perpetrators "found in" the United States.[3]

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[2] See, e.g., 18 U.S.C. § 1091(e)(2)(D) (providing for jurisdiction over the crime of genocide if, inter alia, an alleged offender is "present in the United States"); 18 U.S.C. § 1651 (allowing for jurisdiction over whoever commits piracy "and is afterwards brought into or found in the United States"); 18 U.S.C. § 2340A(b) (providing for jurisdiction over torture if "the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender"); 18 U.S.C. § 2442(c)(3) (same for the recruitment or use of child soldiers).

[3] See, e.g., 18 U.S.C. § 37 (jurisdiction exists over acts of violence at international airports if "the offender is later found in the United States"); 18 U.S.C. § 1116(c)(3) (allowing for jurisdiction over individuals alleged to have murdered foreign officials or internationally protected persons who are "afterwards found in the United States"); 18 U.S.C. § 1201 (same for the kidnapping of an internationally protected person); 18 U.S.C. § 2332f(b)(2)(C) (terrorist bombings);

To be sure, for all of these criminal statutes, including the TVPRA, Federal Rule of Criminal Procedure 43 and the Sixth Amendment to the Constitution require the physical presence of a natural-person defendant "at every trial stage." Fed. R. Crim. P. 43. But the same is not true for corporate defendants: the Federal Rules explicitly require no physical presence if the "defendant is an organization represented by counsel who is present." *Id.* Thus, with respect to corporate defendants, there is perfect symmetry between the forms of presence required in the criminal setting by Rule 43 and those required in the civil setting under the minimum contacts analysis of the Fifth and Fourteenth Amendments.

In these statutes, as in the TVPRA, the provision of "present in" jurisdiction operates to implement the United States' international commitments to end impunity for crimes of global concern. To limit the scope of "present in" jurisdiction, as the District Court did, by imposing a physical presence requirement would risk limiting the United States' ability to prosecute or hold civilly liable offenders who are within the personal jurisdiction of our federal courts. And

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18 U.S.C. § 2332i (acts of nuclear terrorism); 18 U.S.C. § 2280 (violence against maritime navigation); and 49 U.S.C. § 46502(b)(2)(C) (aircraft piracy). A full expression of this principle is found in 18 U.S.C. § 2339B(d)(1)(C), which criminalizes the provision of material support or resources to a designated foreign terrorist organization and provides for extraterritorial jurisdiction if, inter alia, "after the conduct required for the offense occurs an offender is brought into or found in the United States, even if the conduct required for the offense occurs outside the United States."

simply assuming a contrary position, as the Panel did—while less clearly erroneous—creates its own mischief by injecting an opening for misinterpretation where none exists under the statute. This Court—acting en banc—should adopt a simple, predictable rule: a defendant who is present for personal jurisdiction is also present for subject matter jurisdiction under the TVPRA.

CONCLUSION

For the foregoing reasons, amicus curiae urges this Court to grant the Appellants' Petition for Rehearing and Rehearing En Banc and hold decisively that the scope of "present in" subject matter jurisdiction under 18 U.S.C. § 1596(a)(2) is co-extensive with the minimum contacts test for personal jurisdiction under the Due Process Clause of the Fifth Amendment.

Dated: April 21, 2022

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