THE YALE LAW JOURNAL

NIKKO PRICE

Better Together? The Peril and Promise of Aggregate Litigation for Trafficked Workers

ABSTRACT. This Note proposes a new litigation strategy for vindicating the rights of trafficked workers. It argues that class actions, an increasingly popular mechanism for holding traffickers liable, are insufficient. Through an original analysis of federal class actions predicated on the Trafficking Victims Protection Act (TVPA), I show that courts are reluctant to certify classes of trafficked workers and that class actions too often fail. As an alternative to class actions, this Note suggests that state attorneys general invoke their common-law parens patriae power to bring suits against traffickers under the TVPA. This strategy would preserve many benefits of the aggregate-litigation model while sidestepping the challenging procedural terrain of the modern class action.

AUTHOR. Yale Law School, J.D. expected 2020. I am deeply grateful to James E. Tierney, Peter Brann, Terri Gerstein, Jane Flanagan, Burt Johnson, Judge Virginia M. Kendall, Ambassador Luis C.deBaca, and Jordan Dannenberg for their valuable comments and support. Thanks also to Mary Charlotte Carroll and the editors of the *Yale Law Journal* for reading many drafts and offering terrific suggestions. All errors are my own.

NOTE CONTENTS

INTRODUCTION

Sabulal Vijayan bet everything on America. The thirty-nine-year-old father of two from Kerala—a state on India's southwest coast—sold his family's possessions,[1] mortgaged his house and land, and paid fifteen thousand dollars to labor recruiters who promised him permanent residency in the United States.[2] Instead, he found himself living and working in "slave-like conditions" on Mississippi's Gulf Coast.[3] When Vijayan started speaking out, the company threatened him with deportation.[4] Out of options and unwilling to "go back home . . . [w]ith empty hands," he attempted to take his life.[5]

Vijayan is one of nearly six hundred skilled metalworkers brought to the United States by Signal International.[6] Following Hurricane Katrina, the marine oil-rig company and subcontractor to defense giant Northrup Grumman received lucrative contracts to rebuild the Gulf's oil infrastructure.[7] Signal promised workers like Vijayan good jobs and "permanent lifetime settlement" in the United States.[8] Some workers paid as much as twenty-five thousand dollars to Signal's labor recruiters for the opportunity to work in the company's shipyards in Mississippi and Texas.[9] But the workers arrived in the United States to find isolated labor camps surrounded by chain-link fences and patrolled by private guards.[10] One worker recalled twenty-four men sharing a single twelve-foot-by-

1. *Indian Men in US 'Slave' Protest*, BBC (Mar. 27, 2008), http://news.bbc.co.uk/2/hi/south_asia/7316130.stm [https://perma.cc/D4W6-CHFV].

2. Ann M. Simmons, *Guest Workers' Prospects Dim*, L.A. TIMES (Mar. 14, 2007, 12:00 AM), https://www.latimes.com/archives/la-xpm-2007-mar-14-na-workers14-story.html [https://perma.cc/2FU3-HL7V].

3. *Indian Men in US 'Slave' Protest*, *supra* note 1.

4. Christine Van Dusen, *Peonage in New Orleans*, PROGRESSIVE, Aug. 2008, at 33.

5. *Id.*

6. Sixth Amended Complaint at 2, David v. Signal Int'l, LLC, 37 F. Supp. 3d 822 (E.D. La. 2014) (No. 08-cv-1220); Julia Preston, *Suit Points to Guest Worker Program Flaws*, N.Y. TIMES (Feb. 1, 2010), https://www.nytimes.com/2010/02/02/us/02immig.html [https://perma.cc/A2BR-DDVU].

7. *See* Stephanie Hanes, *An Epic Legal Battle Pays off for Trafficked Workers*, CHRISTIAN SCI. MONITOR (Dec. 7, 2015), https://www.csmonitor.com/USA/Justice/2015/1207/An-epic-legal-battle-pays-off-for-trafficked-workers [https://perma.cc/8EAF-RBS5]; Preston, *supra* note 6.

8. Complaint and Jury Demand at 3, Achari v. Signal Int'l, LLC, No. 13-cv-06218 (S.D. Miss. Oct. 13, 2013) [hereinafter *Achari* Complaint].

9. *Id.* at 2-3.

10. *Id.* at 22.

eighteen-foot room in the labor camp at Signal's shipyard.[11] Conditions were so squalid that one supervisor noted, "Our Indians have been dropping with sickness like flies."[12] Yet Signal deducted more than a thousand dollars a month from workers' paychecks for room and board.[13] And instead of green cards, the men received temporary H-2B guest-worker visas, which typically expire after nine months.[14] Worse still, if the workers quit, they would lose their visas, forcing them back to India with less money in their pockets than when they left.[15]

This double bind is what led Vijayan to attempt to end his life in a bunkhouse bathroom.[16] He ultimately survived and later set out with nearly one hundred other men from Signal's labor camps on a nine-day journey to Washington, D.C., where they began a month-long hunger strike, pleading for the U.S. Department of Justice (DOJ) to prosecute Signal and grant the men asylum in America.[17] But DOJ refused.[18] No criminal charges were ever brought against Signal International or the recruiters who deceived the men into leaving their homes half a world away. Instead, the workers endeavored to do it themselves.

---

11. *See* David Bacon, *Black and Brown Together*, AM. PROSPECT (Feb. 21, 2008), https://prospect.org/features/black-brown-together [https://perma.cc/QM86-QXK3].

12. Rachel Luban, *Louisiana's Labor Camps*, IN THESE TIMES, Apr. 2015, at 10; *see also* Simmons, *supra* note 2 (quoting Vijayan as saying workers "were like pigs in a cage").

13. *Achari* Complaint, *supra* note 8, at 23-25.

14. *See id.* at 16-18; Daniel Costa, *Frequently Asked Questions About the H-2B Temporary Foreign Worker Program*, ECON. POL'Y INST. (June 2, 2016), https://www.epi.org/publication/frequently-asked-questions-about-the-h-2b-temporary-foreign-worker-program [https://perma.cc/YZ2N-Q7XJ] ("Migrant workers who are issued an H-2B visa can be employed for up to nine months, but their employment period may be extended for up to three years, or their visa may be initially certified for up to three years if it is considered a 'one-time occurrence.'").

15. *Achari* Complaint, *supra* note 8, at 23-25; Simmons, *supra* note 2.

16. Simmons, *supra* note 2 (quoting Vijayan as saying he "cannot go back to India because [he] cannot pay [his] debt"); *see* Van Dusen, *supra* note 4.

17. Allison Graham, *Free at Last: Post-Katrina New Orleans and the Future of Conspiracy*, 44 J. AM. STUD. 601, 602 (2010); Julia Preston, *Workers on Hunger Strike Say They Were Misled on Visas*, N.Y. TIMES (June 7, 2008), https://www.nytimes.com/2008/06/07/washington/07immig.html [https://perma.cc/N88H-8QEW]. On H-2B visas—employer-sponsored, short-term visas—the men lost their immigration status when they walked off the shipyards. H-2B guest workers cannot switch employers. *See* Costa, *supra* note 14.

18. *See* Sabulal Vijayan, *Workers' Statement on Suspending Hunger Strike—'We Have Only Begun to Fight'*, NEW ORLEANS WORKERS' CTR. FOR RACIAL JUST. (June 11, 2008), https://nowcrj.org/2008/06/11/workers-statement-on-suspending-hunger-strike [https://perma.cc/6CPT-DZCX] ("We expected the DOJ to follow the laws that Congress has enacted to protect people like us. We demanded what the US law demands: that survivors of human trafficking be given the legal protections necessary to pursue justice without fear. But the DOJ ignored us. They refused to act on our behalf.").

In March 2008, they filed a complaint in federal court, alleging, among other claims, violations of recently enacted federal laws that prohibit trafficking humans for their labor.[19] The case, *David v. Signal International, LLC*,[20] was the largest human-trafficking lawsuit in the history of the United States.

For our purposes, though, the size of the suit is less important than the form it took. Vijayan and the other men sued Signal not as individual plaintiffs but as a class. It was one of the first labor-trafficking class actions in the country,[21] making use of a 2003 law that created a private right of action for trafficking victims.[22] Since the law's passage, trafficking class actions alleging TVPA claims have grown increasingly popular.[23]

Yet, more than two decades after the Signal workers filed their complaint in the U.S. District Court for the Eastern District of Louisiana, we still know next to nothing about whether class actions are generally an effective tool for trafficked workers.[24] For Vijayan and the Signal workers, at least, it was not. The district court ultimately denied their motion for class certification, leaving the men no choice but to file a dozen independent suits against the company.[25] It took more than seven years for the plaintiffs to obtain any sort of justice for the physical and psychological terror they endured.[26] And while the putative class

19. Complaint at 11, David v. Signal Int'l, LLC, 257 F.R.D. 114 (E.D. La. 2009) (No. 08-cv-01220).

20. 257 F.R.D. 114 (E.D. La. 2009).

21. *See infra* Appendix.

22. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a), 117 Stat. 2875, 2878 (codified as amended at 18 U.S.C § 1595 (2018)).

23. *See* discussion *infra* Section II.C.2.

24. To my knowledge, only a single law review has published a piece focusing on class actions for trafficking victims, but the author endorses class actions without engaging in an empirical analysis of their success. *See* Renee M. Knudsen, Note, *From Second Class to Certified Class: Using Class-Action Lawsuits to Combat Human Trafficking*, 28 REGENT U. L. REV. 137, 155-57 (2015).

25. David v. Signal Int'l, LLC, No. 08-cv-1220, 2012 U.S. Dist. LEXIS 114247, at *7 (E.D. La. Jan. 3, 2012) (denying the motion to certify class). In an unprecedented move, twelve major law firms and the Southern Poverty Law Center joined forces to litigate the individual cases. Michael D. Goldhaber, *The Slave Next Door*, AM. LAW. (Aug. 2015), https://www.kilpatricktownsend.com/-/media/Files/In-The-News/AmLawSignal-Kilpatrick.ashx [https://perma.cc/Z4GZ-A64A]. Obviously, this is not a case strategy that can be regularly employed. One lawyer who worked on the *Signal* cases reflected this sentiment: "It would be awesome if we could mount that type of army of lawyers every time a class is decertified. But I'm not sure every nonprofit has the resources to do it. I don't think that can be the solution." *Id.*

26. *See* Beth Ethier, *Alabama Company Admits Locking Katrina Workers in Squalid Camps, Settles for $20 Million*, SLATE (July 15, 2015, 8:21 AM), https://slate.com/news-and-politics/2015/07

that the district court declined to certify contained nearly six hundred plaintiffs, these nonclass suits included fewer than three hundred.[27] Nearly half the workers lost access to the courts.

All these years later, it is fruitful to ask whether the failure of the class action against Signal portended a troubled future for labor-trafficking class actions more generally, or whether it was a minor deviation from an otherwise encouraging trend.[28] Do class actions serve as "a viable option and valuable deterrent to combating the magnitude of [trafficking] in the twenty-first century,"[29] as one commentator has argued? If not, what options remain? To answer these questions, this Note undertakes an original empirical analysis of putative class actions brought by trafficked workers, assessing the frequency with which courts certify classes asserting TVPA claims. The Note concludes that, although workers in recent years have begun using the class action with increased frequency, courts have largely been reluctant to certify classes.[30] In this respect, then, the case against Signal was not an anomaly but a warning.

Faced with this discouraging evaluation of the labor-trafficking class action, I propose an alternative litigation strategy. This strategy, too, asserts strength in numbers, but it sidesteps the procedural hurdles inherent in class certification. The strategy I suggest calls on states to bring suits on behalf of workers. I argue that state attorneys general should make use of their common-law parens patriae power to vindicate the rights of trafficking victims. Although a number of state attorneys general have recently begun focusing their attention on workers'

/signal-international-lawsuit-settlement-guest-workers-for-katrina-rebuilding-were-deceived-locked-into-crowded-camps.html [https://perma.cc/RV2S-48FD].

27. *See* Michael Lipkin, *Indian Guest Workers Win $14M in Signal Trafficking Case*, LAW360 (Feb. 18, 2015, 10:20 P.M.), https://www.law360.com/articles/622848/indian-guest-workers-win-14m-in-signal-trafficking-case [https://perma.cc/RAV4-5AAE].

28. My focus on labor trafficking is deliberate. While much attention is paid by police and prosecutors to sex trafficking and trafficking of minors, labor trafficking is often ignored. See *infra* notes 193-194 and accompanying discussion. This is especially distressing since most instances of trafficking worldwide are actually related to labor, not sex. *Trafficking in Persons Report*, U.S. DEP'T STATE 8 (June 2010), https://2009-2017.state.gov/documents/organization/142979.pdf [https://perma.cc/8FL8-68WY] ("The majority of human trafficking in the world takes the form of forced labor. The [International Labour Organization] estimates that for every trafficking victim subjected to forced prostitution, nine people are forced to work."). Nonetheless, labor-trafficking victims are left without an effective avenue of redress through the criminal-justice system. See discussion *infra* Section I.A for a look at the wildly disparate prosecutions for sex trafficking as opposed to labor trafficking at both the federal and the state level. It is for this reason that the civil remedy figures prominently in my discussion of labor trafficking. It is often victims' only choice.

29. *See* Knudsen, *supra* note 24, at 157.

30. *See infra* Appendix.

rights,[31] none have yet brought civil trafficking claims against employers who exploit their workers. Instead, state attorneys general bring traditional labor- and employment-law claims. This Note seeks to highlight a missed opportunity. As state attorneys general begin advocating for the rights of workers in earnest, they should embrace perhaps the most important tool the law provides to that end: the parens patriae suit. Because criminal prosecutions are rare, and large class actions often unsuccessful, a broad invocation of the parens patriae power by state attorneys general might not only be the best option for workers; in many cases, it might also be their only option.

The Note proceeds as follows: Part I briefly outlines the scope of the labor-trafficking problem in the United States today and then looks at the civil right of action enshrined in the TVPA in 2003. Part II examines the current strategies to combat trafficking. The first strategy, criminal prosecutions, has been rarely employed at both the federal and state level. Individual civil claims, too, seem to hold little promise. As a last resort, trafficking victims are increasingly turning to class actions. I undertake an empirical study to determine whether this new strategy is sound. Concluding that it likely is not, I examine in Part III why state attorneys general have not stepped into the breach and show what they leave on the table by failing to bring TVPA claims. Finally, Part IV introduces the alternative litigation strategy, arguing that aggregate action initiated at the state level through the parens patriae power could prove more fruitful than private class actions. Such a strategy can vindicate the collective rights of trafficked workers while avoiding the precarious procedural terrain of the modern class action.

I. FORCED LABOR AND THE BATTLES TO STOP IT

The labor trafficking problem is vast and varied. Here, I examine its scope, the victims most affected by it, and the illegal profits that perpetuate it. Then, I explore the recent and, to date, only federal law specifically targeted at human trafficking and discuss the issues that prompted Congress to act. I conclude this Part with a brief examination of the 2003 amendment to that law granting victims a private right of action.

31. *See infra* notes 196-197 and accompanying text.

A. Labor Trafficking and Its Victims

Scholars estimate that more than four hundred thousand workers in the United States are forced to work against their will.[32] But not all labor trafficking is as conspicuous as in the Signal case. One need not be locked in a trailer within a gated camp to be trafficked. Other forms of trafficking involve subtler methods of control such as withholding or falsifying workers' documents, extortion, physical and psychological manipulation, and threats or use of force against family members.[33] Traffickers often take advantage of their victims' tenuous immigration status, threatening revocation of visas or deportation.[34] Additionally, the vast majority of trafficked workers suffer some degree of civil labor exploitation, including wage theft or illegal deductions, and are generally paid below minimum wage.[35] While the specific method of trafficking varies across cases, trafficking cases tend to have force, fraud, or coercion in common.[36]

The faces of labor trafficking are as varied as its forms. Most trafficking victims are immigrants, and more than seventy percent arrive in the United States on lawful visas.[37] Many enter the country on H-2 visas, the so-called "guest worker" program that brought the Signal workers to the Gulf Coast.[38] Despite common promises to the contrary, guest workers are not on a path to citizenship: when their work visas expire, they must leave the country.[39] Conditions for guest workers are so bad that the Southern Poverty Law Center has called the guest

32. *Global Slavery Index 2018*, WALK FREE FOUND. 78 (2018), https://downloads.globalslaveryindex.org/ephemeral/GSI-2018_FNL_190828_CO_DIGITAL_P-1571961899.pdf [https://perma.cc/V3Q9-STSH]. Specific estimates are exceedingly difficult to generate and vary widely; one Johns Hopkins study suggests that more than one million workers in the United States labor under conditions of coercion. *See* David France et al., *Slavery's New Face*, NEWSWEEK, Dec. 18, 2000, at 60, 61.

33. Colleen Owens et al., *Understanding the Organization, Operation, and Victimization Process of Labor Trafficking in the United States*, URB. INST. 201 (Oct. 2014), https://www.urban.org/sites/default/files/publication/33821/413249-Understanding-the-Organization-Operation-and-Victimization-Process-of-Labor-Trafficking-in-the-United-States.pdf [https://perma.cc/XAH8-UH6D].

34. *Id.* at 89.

35. *Id.* at 80.

36. *See* 18 U.S.C. § 1591 (2018).

37. Owens et al., *supra* note 33, at 24.

38. *See supra* note 14 and accompanying text.

39. *See* Costa, *supra* note 14.

worker program "a modern-day system of indentured servitude."[40] To make matters worse, by the time trafficking victims receive or seek help, they are usually not authorized to remain in the United States.[41]

Trafficking is everywhere. Nearly every industry is affected, but most labor-trafficking victims work in agriculture, domestic service, construction, food service, and hospitality.[42] Victims generally hail from Latin America and Asia, with Mexican, Indian, Filipino, and Thai immigrants comprising the majority of trafficking victims, according to one recent study.[43] Human trafficking is so pervasive because it is profitable. The second-largest and fastest-growing criminal enterprise in the world,[44] global trafficking generates about $150 billion in illegal profits annually, $51 billion from labor trafficking.[45] It is a problem of startling proportions—and it is growing worse.[46]

B. The TVPA: Silver Bullet or Pipe Dream?

For more than two centuries, trafficking humans was not expressly illegal in the United States.[47] Instead, prosecutors used a patchwork of other ancillary

40. *Close to Slavery: Guestworker Programs in the United States*, S. POVERTY L. CTR. 2 (2013), https://www.splcenter.org/sites/default/files/d6_legacy_files/downloads/publication/SPLC-Close-to-Slavery-2013.pdf [https://perma.cc/D3SJ-N8E6].

41. Owens et al., *supra* note 33, at VII ("Despite 71 percent of our sample arriving in the United States for work on a visa, by the time victims escaped and were connected to service providers, 69 percent were unauthorized.").

42. *Id.* at 4.

43. *Id.* at 26. Not all trafficking victims are foreign-born. For example, U.S. citizens (predominantly teens and young adults from marginalized communities) are often targeted by traveling sales crews. *The Typology of Modern Slavery: Defining Sex and Labor Trafficking in the United States*, POLARIS 28 (2017), https://polarisproject.org/sites/default/files/Polaris-Typology-of-Modern-Slavery.pdf [https://perma.cc/Q6GN-SBR8].

44. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 18 U.S.C.) ("Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest growing source of profits for organized criminal enterprises worldwide.").

45. *Profits and Poverty: The Economics of Forced Labour*, INT'L LABOUR ORG. 13 (2014), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_243391.pdf [https://perma.cc/C4SG-B3CQ].

46. *Rising Human Trafficking Takes on 'Horrific Dimensions': Almost a Third of Victims Are Children*, U.N. NEWS (Jan. 7, 2019), https://news.un.org/en/story/2019/01/1029912 [https://perma.cc/SB47-RMPK].

47. *See* Mohamed Y. Mattar, *Interpreting Judicial Interpretations of the Criminal Statutes of the Trafficking Victims Protection Act: Ten Years Later*, 19 AM. U. J. GENDER SOC. POL'Y & L. 1247, 1250 (2011).

laws to combat the problem.[48] A number of high-profile cases in the 1990s, coupled with a controversial Supreme Court decision limiting the reach of the laws against involuntary servitude,[49] began to show the inadequacy of this improvised response. One 1995 case involved seventy-two men and women from Thailand who were lured by false promises to work in a garment factory in a Los Angeles suburb.[50] There, they were locked in a compound—some for up to seven years—surrounded by razor wire and patrolled by armed guards.[51] They were forced to work up to eighteen hours a day, seven days a week, for less than sixty cents an hour.[52]

When authorities finally raided the compound, they did not rescue the workers. Instead, the U.S. government detained them.[53] Immigration and Naturalization Services, which suspected the immigrants of being in the country illegally, arrested and transported them to detention centers.[54] It was only after a heated

48. For instance, in one prominent case, prosecutors brought kidnapping, criminal conspiracy, involuntary servitude, and immigration claims against an employer who locked dozens of immigrants in a guarded compound. Press Release, U.S. Dep't of Justice, Ten Thai Nationals Indicted on New Charges of Slavery and Kidnapping (Nov. 9, 1995), https://www.justice.gov/archive/opa/pr/Pre_96/November95/577.txt.html [https://perma.cc/DS4E-TTSL].

49. In *United States v. Kozminski*, 487 U.S. 931 (1988), the Supreme Court narrowly interpreted the pre-TVPA forced-labor statutes to criminalize only the use or threatened use of physical or legal coercion. Purely "psychological coercion"—a tool used frequently by traffickers—was not sufficient. *Id.* at 944. Congress lamented that the Court "exclude[d] other conduct that can have the same purpose and effect." Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1467 (codified as amended in scattered sections of 18 U.S.C.). The TVPA expanded on the narrow definition enunciated by the Court to also include this other conduct. *Id.*

50. Patrick J. McDonnell & Maki Becker, *7 Plead Guilty in Sweatshop Slavery Case*, L.A. TIMES (Feb. 10, 1996, 12:00 AM), https://www.latimes.com/archives/la-xpm-1996-02-10-mn-34318-story.html [https://perma.cc/YRY9-R9S2].

51. *Id.*

52. William Branigin, *Sweatshop Instead of Paradise*, WASH. POST (Sept 10. 1995), https://www.washingtonpost.com/archive/politics/1995/09/10/sweatshop-instead-of-paradise/7a3bebc2-6a31-4621-a37c-d285ffa26bbf [https://perma.cc/KS4Z-42Y4].

53. Hector Gonzalez, *Once-Enslaved Garment Workers Continue Fight*, PASADENA STAR-NEWS (Aug. 2, 2010, 5:01 AM), http://thaicdc.org/cms/assets/Uploads/human-trafficking/Garment-Workers-Continue-to-FightGonzalezSGVT8.02.2010.pdf [https://perma.cc/JBA2-HHE2].

54. *Id.*

legal fight that the workers were released on bond.[55] But the threat of deportation still loomed.[56] This case is often credited with convincing lawmakers that new laws were needed—to both prosecute traffickers and protect victims.[57]

In 2000, Congress passed,[58] and President Clinton signed,[59] the TVPA.[60] The Act established the new crime of human trafficking and sought to give prosecutors the tools they needed to charge perpetrators.[61] Importantly, the Act also provided protections and immigration relief to trafficking victims and established special visas to allow them to stay in the country.[62] The Act's mandate is broad, prohibiting "the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery."[63] Under the statute, any worker held against his or her

---

55. *Id.*

56. Barry Fatland, *Garment Bosses' Slave Shop Revealed; Workers Still Face Deportation Threat*, MILITANT (Sept. 4, 1995), http://www.hartford-hwp.com/archives/45b/135.html [https://perma.cc/LD64-CGKT] (noting that standard INS procedure at the time was to "deport material witnesses after they give their testimony").

57. *See, e.g.*, Leslie Berestein Rojas, *El Monte Sweatshop Slavery Case Still Resonates 20 Years Later*, SCPR (July 31, 2015), https://www.scpr.org/news/2015/07/31/53458/el-monte-sweatshop-slavery-case-still-resonates-20 [https://perma.cc/4MKP-GGN9] (noting that the case "led US officials to create a special visa for victims of human trafficking"); Andrea Crossan, *How a Sweatshop Raid in an LA Suburb Changed the American Garment Industry*, PRI (Dec. 5, 2017, 4:45 P.M.), https://www.pri.org/stories/2017-12-05/how-sweatshop-raid-la-suburb-changed-american-garment-industry [https://perma.cc/ER68-FJFT] ("[The] case also changed the law regarding human trafficking. A federal law that was a result of the El Monte case finally passed in 2000.").

58. Only one member of Congress voted against the bill in either house. 146 CONG. REC. S10,228 (daily ed. Oct. 11, 2000); 146 CONG. REC. H9,047-48 (daily ed. Oct. 6, 2000); Kelly E. Hyland, *Protecting Human Victims of Trafficking: An American Framework*, 16 BERKELEY WOMEN'S L.J. 29, 61 (2001).

59. U.S. DEP'T JUSTICE, REPORT ON THE TENTH ANNIVERSARY OF THE TRAFFICKING VICTIMS PROTECTION ACT 4 (2010), https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/tvpaanniversaryreport.pdf [https://perma.cc/2JVQ-HZ28].

60. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1466 (codified as amended in scattered sections of 18 U.S.C.).

61. 22 U.S.C. § 7101 (2018) ("The purposes of this chapter are to combat trafficking in persons, . . . to ensure just and effective punishment of traffickers, and to protect their victims.").

62. *See* discussion *infra* Section III.C.

63. 22 U.S.C. § 7102(11)(B) (2018). The forced labor provisions, codified at 18 U.S.C. § 1589, prohibit

> knowingly provid[ing] or obtain[ing] the labor or services of a person . . . (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person; (2) by means of serious harm or threats of serious

will—through force, threats, or other coercion—is a victim of labor trafficking, even if that worker never crosses state or national borders.[64] In the years following the TVPA's passage, all fifty states also enacted their own versions of the law.[65]

Although heralded as an historic step in the fight against trafficking, critics pointed to a number of flaws in the TVPA.[66] The evidence soon validated their critiques. In the wake of the Act's passage, it became apparent that, while the number of trafficked persons was steeply increasing, the number of traffickers held accountable was not.[67] Three years after Congress passed the TVPA, it attempted to mitigate the Act's prosecutorial shortcomings by creating a private civil right of action for trafficking victims, codified at 18 U.S.C. § 1595(a).[68] The enactment of Section 1595 was monumental. For the first time in American history, every single victim of trafficking would have a civil remedy in a court of law.

> harm to that person or another person; (3) by means of the abuse or threatened abuse of law or legal process; or (4) by means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

18 U.S.C. § 1589(a) (2018).

64. A worker does not need to be physically transported to invoke the protections of the TVPA. Labor *trafficking* (which does not require movement) is an offense separate and apart from labor *smuggling* (which does). *See* Samuel Vincent Jones, *Human Trafficking Victim Identification: Should Consent Matter?*, 45 IND. L. REV. 483, 493 (2012).

65. *Human Trafficking State Laws*, NAT'L CONF. ST. LEGISLATURES, https://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx [https://perma.cc/R6US-PU4U]. While this Note focuses predominantly on the federal antitrafficking law, some states have enacted even stronger laws with more robust protections for victims and fewer obstacles for prosecutors. *See, e.g.*, MASS. GEN. LAWS ch. 265, § 51 (2019).

66. *See, e.g.*, Jennifer M. Chacón, *Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking*, 74 FORDHAM L. REV. 2977, 2993 (2006) (characterizing the TVPA as implementing only "incremental changes" in existing federal law).

67. See *infra* Section II.A for a discussion of the vanishingly small number of federal and state trafficking prosecutions.

68. *See* 18 U.S.C. § 1595(a) (2018) ("An individual who is a victim of a violation 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."). Prior to this amendment, trafficked workers largely lacked a private right of action. Various laws that addressed forced labor, including the Peonage Act of 1867, 42 U.S.C. § 1994 (2018), and the Thirteenth Amendment, U.S. CONST. amend. XIII, did not generally allow private rights of action, and courts refused to divine them from the text. *See* Kathleen Kim & Kusia Hreshchyshyn, *Human Trafficking Private Right of Action: Civil Rights for Trafficked Persons in the United States*, 16 HASTINGS WOMEN'S L.J. 1, 26-29 (2004) (explaining that courts typically held implied rights of action unnecessary in light of state tort laws providing equivalent remedies).

It is all the more curious, then, that for years after the enactment of Section 1595, trafficked workers barely made use of the new right they received. One study found that only eighteen labor-trafficking claims were filed in the four years following the amendment.[69] A number of factors likely contributed to the relative neglect of the civil cause of action. It is possible, for instance, that few workers knew it existed.[70] Moreover, workers may have been too fearful to bring suit. Filing a civil action requires self-identifying as a victim, becoming a part of the public record, appearing before a judge, and potentially facing retaliation from employers.[71] It also means outing oneself to immigration authorities.[72] Additionally, the incentive structures of the private bar might have hampered civil suits: cash-strapped legal-aid organizations and private plaintiffs' lawyers working on a contingent-fee basis may have found an untested civil action with little chance of a sizable recovery an unattractive endeavor.[73] Finally, language barriers and general unfamiliarity with the complex set of laws governing trafficking were almost certainly at play—and continue to be.[74] These barriers might be less daunting, however, if victims joined their claims together.[75] That is precisely what they did.

---

69. Jennifer S. Nam, Note, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1671 (2007) ("[A] search for U.S. district court complaints alleging claims under section 1595 produced somewhat dismal results as well, uncovering only eighteen complaints pleading for relief under section 1595's civil remedy.").

70. *See id.* at 1689-90.

71. Indeed, fear is a tool frequently used by traffickers to maintain control over victims. One victim noted: "Many of my friends told me that they received death threats—[traffickers] would kill their father, their mother—if they didn't want to pay or work." Leila Miller, *Why Labor Trafficking Is So Hard to Track*, PBS (Apr. 24, 2018), https://www.pbs.org/wgbh/frontline/article/why-labor-trafficking-is-so-hard-to-track [https://perma.cc/W89M-TZH2].

72. For a discussion of the very real danger that immigrant workers face when they report to authorities, see *infra* note 224 and accompanying discussion.

73. See *infra* note 166 and accompanying text for a discussion of how dimly many courts perceive the prospect of success for plaintiffs pursuing non-class lawsuits.

74. *Labor Trafficking in the U.S.: A Closer Look at Temporary Work Visas*, POLARIS (Oct. 2015) https://polarisproject.org/wp-content/uploads/2015/10/Labor-Trafficking-in-the-US_A-Closer-Look-at-Temporary-Work-Visas.pdf [https://perma.cc/P24-YXKF] ("Victims face many barriers accessing help . . . . They may not speak English. They may not know where they are, because they have been moved frequently. They are often not allowed to communicate with family or friends . . . . Even with [the State Department's education efforts], which ambitiously tr[y] to communicate complex labor laws across visa categories to a linguistically diverse audience with huge variations in literacy and education levels, confusion over worker rights and protections remains.").

75. Indeed, some courts have recognized that class adjudication is sometimes the only civil option available to victims. In one of the cases listed in the Appendix, the court found that denying

II. CURRENT STRATEGIES TO COMBAT TRAFFICKING

In the pages that follow, I explore the uncharted territory of the trafficking class action, one of the more peculiar developments in modern litigation. To understand why victims who are trafficked for their labor are turning to a litigation tool often associated with injured consumers and angry shareholders,[76] it is necessary to first explore their alternatives. The class action has become a central component of the antitrafficking regime because victims have few other places to turn. In this Part, I explore these other places. I first look to prosecutors. As we shall see, at both the federal and state level, criminal charges are rare, and convictions even rarer. Next, I explore two civil alternatives: the Fair Labor Standards Act and the Racketeer Influenced and Corrupt Organizations Act. I show that these tools are largely inadequate to combat the trafficking problem. Finally, we arrive at the TVPA class action, an increasingly popular tool for large groups of victims trafficked together. I undertake an original empirical analysis of its effectiveness, which shows that only a handful of classes have been certified since Congress created the civil right of action in 2003.

A. Prosecutions

The prosecutor looms large in the enforcement scheme that Congress envisioned in the TVPA. The Act was intended to strengthen prosecutors by providing them with new criminal provisions and enhanced penalties.[77] Despite these efforts, however, prosecutions of traffickers are vanishingly rare, at both the fed-

certification of the putative class would leave the plaintiffs "without effective strength to bring their opponents into court at all." Menocal v. GEO Grp., 320 F.R.D. 258, 268 (D. Colo. 2017) (quoting Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997)). It was "unlikely" the putative class members would be able to file the claims individually since they "reside in countries around the world, lack English proficiency, and have little knowledge of the legal system in the United States." *Id.*

76. *See* Janet Cooper Alexander, An Introduction to Class Action Procedure in the United States 3-5 (June 21, 2000) (unpublished manuscript), http://www.law.duke.edu/grouplit/papers/classactionalexander.pdf [https://perma.cc/B64Z-EWXV] (listing consumer and shareholder class actions as two of the most typical and noting that "[t]he paradigm of a [23](b)(3) class action is a case involving many small claims on behalf of consumers of a mass-produced product").

77. *See supra* note 61 and accompanying text.

eral and state level. In 2018, the DOJ initiated 230 human-trafficking prosecutions.[78] Of this total, only seventeen "involved predominantly" labor trafficking.[79] The situation is no better at the state level. Since Washington passed the country's first state statute criminalizing trafficking in 2003,[80] at least 2,700 trafficking defendants nationwide have been charged.[81] State prosecutors have secured convictions against about 440 in that sixteen-year period.[82] But labor trafficking prosecutions are a small fraction of that total. One study of criminal cases between 2003 and 2012 found only eleven prosecutions for labor trafficking.[83] Another study that focused on a random sample of 254 state trafficking cases found no prosecutions at all for labor trafficking.[84]

Looking at these numbers, one might assume that sex trafficking is more pervasive than labor trafficking. Quite the contrary. The International Labour Organization estimates that "for every trafficking victim subjected to forced prostitution, nine people are forced to work."[85] So it is especially distressing that labor-trafficking prosecutions pale in comparison to those of sex trafficking, especially since Congress specifically intended to empower prosecutors. It also means labor-trafficking victims must turn elsewhere.

---

78. TRAFFICKING IN PERSONS REPORT, U.S. DEP'T STATE 485 (June 2019), https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf [https://perma.cc/YJ9J-JDCR] ("DOJ initiated a total of 230 federal human trafficking prosecutions in FY 2018, a significant decrease from 282 in FY 2017, and charged 386 defendants, a significant decrease from 553 in FY 2017. Of these prosecutions, 213 involved predominantly sex trafficking and 17 involved predominantly labor trafficking . . . .").

79. *Id.*

80. Office of Crime Victim's Advocacy, State of Washington, *The Report of the Washington State Work Group on Human Trafficking*, DEP'T CMTY., TRADE & ECON. DEV. 2 (Dec. 2005), http://www.commerce.wa.gov/wp-content/uploads/2018/05/OCVA-HT-2005-Task-Force-Report.pdf [https://perma.cc/24XJ-YTZP].

81. Philip Marcelo, *State Prosecutors Struggle with Human Trafficking Cases*, ASSOCIATED PRESS (May 26, 2019), https://apnews.com/a27f0cb72b4a48ca96f9b8249480d579 [https://perma.cc/BYZ2-7UHT]. This includes prosecutions for sex and labor trafficking.

82. *Id.*

83. Vanessa Bouche et al., *Identifying Effective Counter-Trafficking Programs and Practices in the U.S.: Legislative, Legal, and Public Opinion Strategies That Work*, U.S. DEP'T JUST. 24 (Jan. 2016), https://www.ncjrs.gov/pdffiles1/nij/grants/249670.pdf [https://perma.cc/6EE9-4A3G].

84. Amy Farrell et al., *The Prosecution of State-Level Human Trafficking Cases in the United States*, 2016 ANTI-TRAFFICKING REV. 48, 50-51.

85. *Trafficking in Persons Report,* supra note 28, at 8 ("Recent studies show the majority of human trafficking in the world takes the form of forced labor. The [International Labour Organization] estimates that for every trafficking victim subjected to forced prostitution, nine people are forced to work.").

B. Alternative Civil Claims

Two places to which trafficked workers typically turn are the Fair Labor Standards Act (FLSA) and the Racketeer Influenced and Corrupt Organizations Act (RICO). However, these laws are often unfit for the task of taking down traffickers.

1. The FLSA and State Employment Law

Trafficking victims — and exploited workers in general — often file wage-and-hour claims, either through state employment law or under the FLSA.[86] The FLSA imposes "minimum-wage, overtime, and record-keeping requirements on covered employers."[87] Like Rule 23 class actions, the FLSA's collective-action provision allows for the adjudication of claims brought by similarly situated plaintiffs.[88] The FLSA collective action, however, is much less challenging for plaintiffs to bring than a Rule 23 class action.[89]

---

86. *See, e.g.*, Class Action Complaint for Damages, Chen v. GEO Grp., 287 F. Supp. 3d 1158 (W.D. Wash. 2017) (No. 17-cv-05678); Complaint - Class Action, Cordova v. R&A Oysters, Inc., No. 14-cv-00462 (S.D. Ala. Oct. 8, 2014); Complaint, Gregory v. Stewart's Shops Corp., No. 14-cv-00033 (N.D.N.Y. Jan. 9, 2014); Complaint & Demand for Jury Trial, Murray v. Altendorf Transp., Inc, No. 10-cv-00103 (D.N.D. Oct. 28, 2010).

87. Note, *Counteracting the Bias: The Department of Labor's Unique Opportunity to Combat Human Trafficking*, 126 HARV. L. REV. 1012, 1024 (2013); *see* 29 U.S.C. §§ 201-219 (2018).

88. 29 U.S.C. § 216(b) (2018).

89. There are a few reasons for this. First, the FLSA collective action is binding only on individual employees who affirmatively opt in to the action. *Id.* Under a Rule 23 class action, all employees, regardless of consent, are bound by the judgment. This difference means that courts presiding over FLSA actions generally have to worry less about binding unwilling parties, making them less hesitant to certify classes. Courts certified 196 FLSA collective actions in 2018 and denied only fifty-two. *See infra* note 136.

Second, unlike the rigorous procedures required by Rule 23, most courts use a different and less discerning two-step inquiry for FLSA collective-action certifications. *See, e.g.*, Gandy v. RWLS, LLC, 308 F. Supp. 3d 1220, 1226 (D.N.M. 2018) (describing this "two-tiered" approach and noting that it is "followed by a majority of federal courts"); Trezvant v. Fid. Emp'r. Servs. Corp., 434 F. Supp. 2d 40, 43 (D. Mass. 2006) (describing the two-tiered approach); *see also* Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 318 (2005) ("Most courts hold that the certification standards in [FLSA collective-action] cases are less exacting than those in FRCP 23 actions in that [FLSA collective-action] plaintiffs need *not* demonstrate numerosity, commonality, typicality, adequacy of representation, predominance and superiority in order to obtain the right to proceed on a class basis.").

But FLSA suits are simply too small a fix for too big a problem. All an FLSA suit demands is payment for lost wages.[90] A victory for a plaintiff therefore does not typically affect a trafficker's bottom line. Burt Johnson, general counsel of one of the largest carpenters' unions in the Midwest and a leading advocate for workers' rights, explained to me that pursuing claims through civil employment law often leaves workers with "cents on the dollar."[91] Despite his years of concerted effort to make workers in his state whole, he has come to realize that "recovery of the overall wages owed to workers . . . [is] such a drop in the bucket that [advocates are] never able to . . . really bend that cost curve; it's still profitable for a company to [exploit workers]."[92] He emphasized "how broken our civil labor law is to fight this problem. It isn't enough—it hasn't been enough for a long time. It has not . . . been effective."[93]

Awards under the FLSA are often a drop in the bucket because the law does not allow for punitive damages or compensatory damages other than back pay.[94] The result, according to Craig Becker and Paul Strauss, is that "damage awards in FLSA actions, particularly those brought on behalf of low-wage workers, do not represent a significant deterrent to violating the law."[95] If the FLSA is not a significant deterrent to ordinary employers, then it surely is not a deterrent to traffickers. Trafficking is a multibillion-dollar business and one of the most lucrative criminal enterprises in the world.[96] Forcing traffickers to cough up lost wages is like asking them for their pocket change.

During the first step, the standard for certification requires only "a modest factual showing" that the plaintiffs are similarly situated to the other employees they seek to notify of the action. Zaniewski v. PRRC Inc., 848 F. Supp. 2d 213, 222 (D. Conn. 2012).

Following discovery, the court employs a slightly stricter test to determine whether the filing plaintiff(s) and the other collective-action members are "similarly situated" to certify the collective action. Thiessen v. Gen. Elec. Capital Corp., 267 F.3d 1095, 1102 (10th Cir. 2001). But this inquiry does not include Rule 23(a)'s four-part test for typicality, numerosity, commonality, or adequacy of representation and therefore also sidesteps Rule 23(b)'s secondary test to determine an appropriate category for the action. *See* Lampe & Rossman, *supra*, at 318.

90. The FLSA provides that a successful employee is typically entitled to "liquidated damages," which consist of double the amount of unpaid back wages. 29 U.S.C. § 216(b) (2018).

91. Telephone Interview with Burt Johnson, Gen. Counsel, N. Cent. Sts. Reg'l Council of Carpenters (July 30, 2019) (on file with the author) [hereinafter Johnson Interview].

92. *Id.*

93. *Id.*

94. Craig Becker & Paul Strauss, *Representing Low-Wage Workers in the Absence of a Class: The Peculiar Case of Section 16 of the Fair Labor Standards Act and the Underenforcement of Minimum Labor Standards*, 92 MINN. L. REV. 1317, 1332 (2008).

95. *Id.*

96. *See* discussion *supra* Section I.A.

2. RICO

RICO[97] might prove more effective than traditional employment law claims. Indeed, some commentators have recommended that prosecutors and workers bring civil RICO claims against their traffickers.[98] RICO, enacted in 1970, attempts to combat organized crime by imposing both criminal and civil liability on corrupt organizations.[99] Plaintiffs can establish a civil RICO violation by demonstrating an injury caused by a pattern of racketeering activity. This requires a showing of at least two predicate acts (i.e., earlier offenses, such as extortion or blackmail) by the organization.[100] Civil RICO claims might be particularly well suited for use against labor traffickers because employers often make false promises to workers at the time of recruitment that could constitute predicate acts of mail and wire fraud.[101] Plaintiffs might also be able to successfully allege predicate acts by showing that employers used threats to induce fear—especially common in labor-trafficking cases[102]—thereby giving rise to an extortion claim.[103]

---

97. 18 U.S.C. §§ 1961-1968 (2018).

98. *See, e.g.*, Kendal Nicole Smith, Note, *Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery*, 18 GEO. MASON L. REV. 759, 762 (2011) ("RICO has effectively punished various types of analogous organized criminal behavior and, thus, is likely to succeed in prosecuting human-trafficking cases.").

99. *See* GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 1-5 (2d ed. 2000).

100. 18 U.S.C. §§ 1961(1), 1962(c), 1964(c) (2018). Notably, a violation of the TVPA is a predicate act under RICO. *Id.* § 1961(1).

101. *See, e.g.*, Magnifico v. Villanueva, 783 F. Supp. 2d 1217 (S.D. Fla. 2011). In the *Signal* case, labor recruiters told workers they would receive "permanent lifetime settlement" in the United States, only to find out they would in fact receive temporary guest-worker visas. *Achari* Complaint, *supra* note 8, at 3.

102. *See* Spring Miller & Stacie Jonas, *Using Anti-Trafficking Laws to Advance Workers' Rights*, SHRIVER CTR. ON POVERTY L. (May 2015), https://www.povertylaw.org/clearinghouse/articles/trafficking [https://perma.cc/4BM6-XP46].

103. The plaintiffs in *Nunag-Tañedo v. East Baton Rouge Parish School Board*, listed in the Appendix, successfully pleaded civil RICO claims under this theory. First Amended Complaint, Nunag-Tañedo v. E. Baton Rouge Par. Sch. Bd., 790 F. Supp. 2d 1134 (C.D. Cal. 2010) (No. 10-cv-01172); *see* Nunag-Tañedo v. E. Baton Rouge Par. Sch. Bd., 790 F. Supp. 2d 1134, 1150-51 (C.D. Cal. 2011). The U.S. Code defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." 18 U.S.C. § 1951(b)(2) (2018).

But it is doubtful that many courts would be receptive.[104] Civil RICO claims are exceedingly complex and notoriously difficult to bring,[105] and to make matters worse, the Supreme Court recently limited the reach of civil RICO by construing its proximate-cause requirement "to preclude claims in which the alleged racketeering activity is not the direct cause of the plaintiff's injury."[106] The Court took issue with claims that allege "[m]ultiple steps"—especially the intervening acts of "third and even fourth parties"—that "separate the alleged fraud and the asserted injury."[107] This is a disquieting development for trafficked workers, who are often recruited by third-party contractors.[108] Congress recognized this vicarious liability problem in 2008 when it amended the TVPA to allow workers to bring lawsuits not only against those who directly harmed them but also against anyone who knowingly benefitted financially from their labor.[109] RICO, by contrast, does not recognize liability for these third parties.

Finally, civil RICO claims might fail because judges are generally skeptical of them. Decried by courts as "the most misused statutes in the federal corpus of

104. For instance, the court in the *Signal* case denied a RICO class. David v. Signal Int'l, LLC, No. 08-cv-1220, 2012 U.S. Dist. LEXIS 114247, at *7 (E.D. La. Jan. 3, 2012) (denying the motion to certify class).

105. Jane Flanagan, the former Workplace Rights Bureau Chief at the Illinois Attorney General's Office, told me that her office was generally hesitant about bringing civil RICO claims because they are "just really hard and complicated." Telephone Interview with Jane Flanagan, former Workplace Rights Bureau Chief, Ill. Attorney Gen.'s Office (Aug. 2, 2019) [hereinafter Flanagan Interview]; *see* Peter J. Henning, *RICO Lawsuits Are Tempting, But Tread Lightly*, N.Y. TIMES (Jan. 16, 2018), https://www.nytimes.com/2018/01/16/business/dealbook/harvey-weinstein-rico.html [https://perma.cc/AT39-VZS2]("Unfortunately for plaintiffs, there are onerous requirements for the complaint to show that there is enough evidence to allow the lawsuit to move forward as a RICO case. Judges take a dim view of efforts to turn what look like ordinary state law claims into federal cases by claiming a RICO violation. For that reason, RICO cases often don't survive the pleading stage.").

106. H. Holden Brooks et al., *United States: Supreme Court Limits Reach of RICO, Redefines Proximate Cause Requirement*, MONDAQ (Feb. 17, 2010), http://www.mondaq.com/Article/94080 [https://perma.cc/G2XP-EXQN]; *see* Hemi Grp., LLC v. City of New York, 559 U.S. 1, 3 (2010).

107. *Id.* at 3, 15.

108. Owens et al., *supra* note 33, at 44.

109. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 222(b)(1), 122 Stat. 5044, 5068-70 (codified as amended at 18 U.S.C. §§ 1589(b), 1593A, 1595(a) (2018)).

law,"[110] some have charged that civil RICO plaintiffs often have a "jackpot mentality."[111] Other courts have referred to them as "the litigation equivalent of a thermonuclear device."[112] To this end, some judges have warned that they "must be wary of putative civil RICO claims."[113] This is to say that, despite the actual merits of a trafficking victim's civil RICO claims, courts might approach them with a heightened level of skepticism.[114]

C. The Trafficking Class Action

This leaves us with the class action, premised on the idea that trafficking victims might have better luck holding their traffickers accountable if they file joint claims under Section 1595 of the TVPA. This move has gained traction in recent years, with the labor-trafficking class action becoming a popular avenue of redress for victims.[115] Whether that is something to celebrate is the subject of this Section.

1. Reinterpreting Rule 23

At its core, the class action aggregates claims of similarly situated plaintiffs. It provides an incentive for plaintiffs to sue[116] while protecting defendants from inconsistent obligations.[117] If a group of plaintiffs would like to proceed as a

---

110. Spoto v. Herkimer Cty. Tr., No. 99-cv-1476, 2000 U.S. Dist. LEXIS 6057, at *3 (N.D.N.Y. Apr. 27, 2000); *see also* Mark Aquilio, *The Supreme Court Limits Civil RICO Claims*, 3 AM. SOC'Y BUS. & BEHAV. SCI. E-J. 1-2 (2007) (discussing courts' views of civil RICO claims).

111. Aquilio, *supra* note 110, at 1 ("Since a plaintiff's claim brought as a civil RICO claim will result in treble damages, plaintiff[s] often attempt to bring their claim under the ambit of RICO. The judiciary is aware of this 'jackpot mentality' and for years has been confronted with standing challenges to civil RICO claims.").

112. Goldfine v. Sichenzia, 118 F. Supp. 2d 392, 394 (S.D.N.Y. 2000) (quoting Schmidt v. Fleet Bank, 16 F. Supp. 2d 340, 346 (S.D.N.Y. 1998)).

113. W. 79th St. Corp. v. Congregation Kahl Minchas Chinuch, No. 03-cv-8606, 2004 U.S. Dist. LEXIS 19501, at *17 (S.D.N.Y. Sept. 29, 2004).

114. Although a thorough analysis of civil RICO actions filed by trafficked laborers is beyond the scope of this Note, it might prove a particularly fruitful avenue for future scholarship.

115. *See* discussion *infra* Section II.C.2.

116. *See, e.g.*, Tyler W. Hill, *Financing the Class: Strengthening the Class Action Through Third-Party Investment*, 125 YALE L.J. 487, 487 (2015) ("The class action lawsuit . . . facilitates collective action where individual action would be financially or administratively infeasible . . . .").

117. FED. R. CIV. P. 23(b)(1)(A); *see* DAVID W. LOUISELL & GEOFFREY C. HAZARD, PLEADING AND PROCEDURE: STATE AND FEDERAL 719 (1962) ("The felt necessity for a class action is greatest

class, they must first satisfy Rule 23 of the Federal Rules of Civil Procedure. The rule is rigorous,[118] but for many years, class actions were nonetheless available to plaintiffs who pursued them.[119] In the 1960s and 1970s, plaintiffs filed, and courts certified, so many class actions that some scholars predicted they would change the courts forever.[120] But the Supreme Court soon began closing the courthouse doors to classes of injured plaintiffs.[121] In a spate of decisions over the past two decades, the Court fundamentally altered its interpretation of Rule

when the courts are called upon to order or sanction the alteration of the status quo in circumstances such that a large number of persons are in a position to call on a single person to alter the status quo, or to complain if it is altered, and the possibility exists that [the] actor might be called upon to act in inconsistent ways."); *see also* Note, *Conflicts in Class Actions and Protection of Absent Class Members*, 91 YALE L.J. 590, 591 (1982) ("If there are antagonisms among class members or between the named representative and the class, the judge is obliged either to deny class status or to attempt a reconciliation of the disparate interests."). In *West v. Randall*, 29 F. Cas. 718, 721 (C.C.D.R.I. 1820) (No. 17,424), the first federal class action in the United States, Justice Story wrote, "It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be."

118. FED. R. CIV. P. 23(a)-(b). A district court must find that the putative class satisfies the numerosity, commonality, typicality, and adequacy of representation requirements of Rule 23(a). In other words, "(1) the number of class members renders it impracticable to join them in the action; (2) the class members' claims share common questions of law or fact; (3) the claims or defenses of the proposed class representatives are typical of those for the rest of the class; and (4) the proposed class representatives will adequately protect the interests of the entire class." Henry C. "Hank" Johnson, *Class Action Reform: Closing the Courthouse Doors on Victims, One Lawsuit at a Time*, 2 U. PA. J.L. & PUB. AFF. 11, 13 (2017). The district court must then determine whether the putative class falls into any of the three categories enumerated in Rule 23(b): the limited fund class of Rule 23(b)(1), the injunctive or declaratory relief class of Rule 23(b)(2), and the damages class of Rule 23(b)(3).

119. *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL 26, 33-34 (1986) (describing the golden era of class-action litigation following the promulgation of the 1966 class-action rule).

120. *See* Linda S. Mullenix, *Aggregate Litigation and the Death of Democratic Dispute Resolution*, 107 NW. U. L. REV. 511, 518-19 (2013) ("Between 1966 and the mid-1970s, federal courts were transformed by the influx of massive class action cases seeking remediation for alleged violations of various constitutional, federal, and state laws.").

121. *See* Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 623 (2012) ("Class actions are on the ropes. Courts in recent years have ramped up the standards governing the certification of damages classes and created new standing requirements for consumer class actions.").

23.[122] In *Amchem Products, Inc. v. Windsor*[123] and *Ortiz v. Fibreboard Corp.*,[124] the Court narrowed the scope of the Rule 23(b)(3) predominance inquiry and made it harder for plaintiffs to achieve recovery through class-action settlements.[125] In *Wal-Mart Stores, Inc. v. Dukes*,[126] the Court articulated a highly restrictive standard for the commonality requirement of Rule 23(a). That same Term, the Court broadly validated arbitration provisions that contain class-action waivers in *AT&T Mobility LLC v. Concepcion*.[127] And in 2018, the Court dealt another blow to workers when it validated, in a five-to-four decision, class-action waivers in employment contracts that contain binding arbitration agreements.[128] The Court's recent decisions threaten to foreclose the class action for a vast swath of potential plaintiffs.

These changes in the Court's interpretation of Rule 23 are important for our understanding of the class action's role as a tool against trafficking. In fact, as I will show, the increasingly high bar for class certification could not have come at a worse time for victims. At precisely the same moment at which the Signal workers were turning to the class action to hold their company accountable, the Court was raising the procedural bar for vindicating their substantive rights.

---

122. *See generally* John C. Coffee Jr. & Stefan Paulovic, *Class Certification: Developments over the Last Five Years 2002-2007*, *in* 8 CLASS ACTION LITIGATION 2008: PROSECUTION AND DEFENSE STRATEGIES 195-96 (2007) ("[F]or better or worse, it is today clear that the tide has turned against class certification, and new barriers have arisen across a variety of contexts where formerly class certification had seemed automatic.").

123. 521 U.S. 591 (1997).

124. 527 U.S. 815, 865 (1999).

125. *See* Robert G. Bone, *The Misguided Search for Class Unity*, 82 GEO. WASH. L. REV. 651, 678-79 (2014) ("The Court's predominance analysis is particularly striking. Most authorities before *Amchem* read predominance as a proxy for the judicial economy and decisional consistency benefits from class treatment . . . . [T]he *Amchem* Court took predominance in a completely different direction. It read predominance as a measure of class cohesion and treated cohesion as a condition for the legitimacy of representative litigation . . . ."); Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 819 (2010) (finding "almost no mass tort class action[]" settlements in the years studied).

126. 564 U.S. 338 (2011).

127. 563 U.S. 333, 352 (2011).

128. Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1619 (2018). More than fifty-six percent of private-sector, non-union employees—or 60.1 million Americans—are subject to mandatory arbitration agreements, most of whom are in low-paying jobs. Alexander J.S. Colvin, *The Growing Use of Mandatory Arbitration*, ECON. POL'Y INST. 2 (Apr. 6, 2018), https://www.epi.org/files/pdf/144131.pdf [https://perma.cc/6UDW-RNYL]. More than thirty percent of these arbitration agreements also include class-action waivers. *Id.*

2. *Empirical Analysis*

In retrospect, the suit against Signal marked something of a turning point in federal labor-trafficking litigation. Before 2008, when the *Signal* class action was filed, workers had brought only two TVPA class actions against alleged traffickers.[129] Yet — as the Appendix demonstrates — by 2019, forty such actions had been filed.[130] TVPA class claims against traffickers, also known as Section 1595 claims, are more popular than ever. It seems natural, then, to ask whether the class action is in fact an effective tool for trafficked workers.

Surprisingly, no scholar, to my knowledge, has attempted to grapple with this question. Only a single law review appears to have published anything — a note in 2015 — that discusses the class-action remedy for trafficked workers.[131] In this Section, I attempt to provide an initial diagnosis of the effectiveness of trafficking class actions by studying every action filed in or removed to federal court since the enactment of the civil-remedy provision in 2003.[132] The results of this analysis should be a warning to victims and advocates against putting all their eggs in the class-action basket.

---

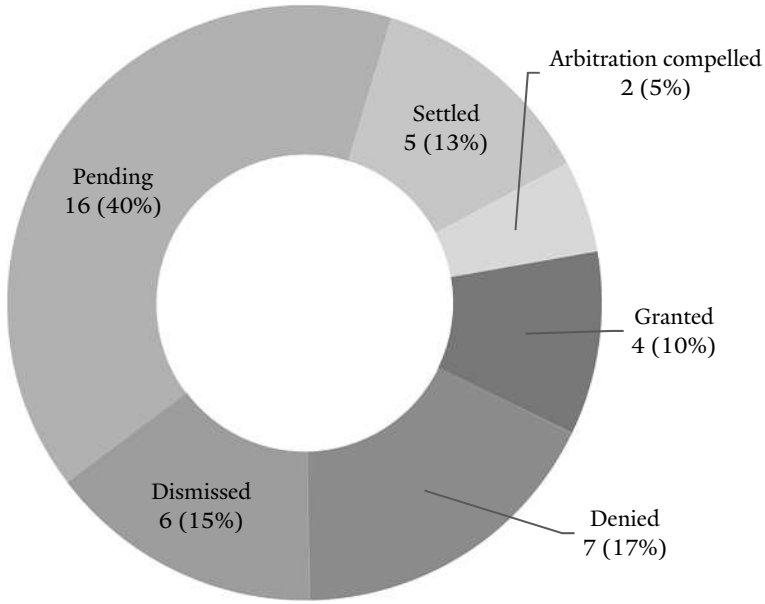
129. Second Amended Complaint, H. v. Garcia-Botello, No. 02-cv-00523 (W.D.N.Y. Oct. 27, 2006); Class Action Complaint for Injunctive Relief and Damages, Roe v. Bridgestone Corp., 492 F. Supp. 2d 988 (S.D. Ind. 2007) (No. 06-cv-00627) (originally filed in the Central District of California); *see infra* Appendix.

130. *See infra* Appendix.

131. Knudsen, *supra* note 24.

132. To assess whether the TVPA class action has been effective at securing judgments for labor-trafficking victims, I conducted a comprehensive search of the electronic dockets provided by Bloomberg Law, Westlaw, and LexisNexis. This search included a careful analysis of every forced-labor class-action complaint filed in federal district courts between 2003 and August 2019. I isolated complaints using keyword searches for "TVPA," "Trafficking Victims Protection Act," "1595," "1589," "forced labor," "traffick!," "class action," "class," and their variations. I then cross-referenced my search with a database of all human-trafficking litigation maintained by the Human Trafficking Legal Center, which provided me with four additional class actions that my initial search failed to find. Finally, I examined the counts in each complaint and eliminated those not related to labor trafficking.

FIGURE 1.
DISPOSITION OF TVPA CLASS ACTIONS (2003-2019)



In the years since Congress enacted the private right of action in 2003, labor trafficking victims have filed forty class actions alleging TVPA claims in federal courts across the United States.[133] Of those forty actions, district courts have certified only four classes of plaintiffs. Seven class actions resulted in denial of class certification. Five cases settled before the trial court ruled on certification, six were dismissed, and two were compelled to arbitrate.[134] Sixteen more certifications are currently pending (at the time of writing). That there are so many

133. See *infra* Appendix for a detailed list of § 1595 class actions. The Appendix lists, in order of filing year, each complaint filed, the court in which it was filed, the date on which it was filed, and its docket number. The middle columns show whether the district court certified the TVPA class, the case's disposition (at time of writing), and the provisions of the TVPA allegedly violated.

134. Because these arbitration agreements contain class-action waivers, which require plaintiffs to dismiss their class claims, compelling arbitration is effectively equivalent to denying certification.

certifications still pending shows that victims are increasingly turning to the class action.[135]

To understand why courts have been so reluctant to certify classes of labor-trafficking victims,[136] I examined district court orders ruling on certification for the seven denied classes. This examination reveals that while class certification has become more difficult for plaintiffs in general, it has become especially so for plaintiffs asserting Section 1595 claims. One of the chief hurdles in this regard is Rule 23's predominance inquiry, which *Amchem* made more stringent.[137] Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members" of the class.[138] The *Amchem* Court, in a break with precedent, read this to require that a putative class be "sufficiently cohesive" to warrant class adjudication, a standard it considered "far more demanding" than other parts of the rule.[139] This change in the Court's interpretation often proves fatal to classes of trafficked laborers.

Because liability under the TVPA attaches only when the worker did not consent to his or her labor conditions, some courts have found that Rule 23(b)(3) requires a subjective assessment of the facts. In *David v. Signal International*,[140] for instance, the district court reasoned that "[t]he question in a forced labor case is not whether any reasonable person who finds himself in the victim's situation would have felt trapped by his circumstances," but whether the defendant's "coercive conduct was such that it could overcome the will of the victim so as to make him render his labor *involuntar*[*il*]*y*."[141] Citing *Amchem* for the proposition

135. *See infra* Appendix.

136. That so few putative TVPA classes have been certified is particularly troubling when we consider them in relation to the number of putative classes certified under other labor and employment laws. Workers bringing wage-and-hour collective-action claims under the FLSA, for instance, received certification in 79% of cases in 2018: out of 248 FLSA collective actions filed, 196 certifications were granted at the first stage, and only 52 were denied. Gerald L. Maatman, Jr., *15th Annual Workplace Class Action Litigation Report*, SEYFARTH SHAW LLP 21 (2019), https://www.seyfarth.com/dir_docs/publications/2019_WCAR_Chapters_1-2.pdf [https://perma.cc/ND39-WM56]. In 2017, courts certified 73%. *Id.* Workers filing class claims under the Employee Retirement Income Security Act (ERISA) were similarly successful, receiving class certification in 11 of 17 cases (65%) in 2018, and 17 of 22 cases (77%) in 2017. *Id.* at 11. By contrast, only about 10% of TVPA class actions have been certified. *See infra* Appendix.

137. *See* Bone, *supra* note 125, at 678-82.

138. FED. R. CIV. P. 23(b)(3).

139. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 623-24 (1997); *see* Bone, *supra* note 125, at 678-82.

140. No. 08-cv-1220, 2012 U.S. Dist. LEXIS 114247 (E.D. La. Jan. 3, 2012).

141. *Id.* at *77.

that a class must be "sufficiently cohesive" to satisfy the predominance requirement,[142] the court found that individual questions of fact predominated over common questions applicable to the class.[143] It held that the class therefore failed the predominance inquiry.[144] The district courts in *Panwar v. Access Therapies, Inc.*[145] and *Brantley v. Handi-House Manufacturing Co.*[146] reached similar conclusions, holding that the TVPA consent requirement is subjective, and therefore questions of law or fact common to the members of the proposed classes did not predominate over questions affecting only individual class members.

Of course, in the four cases in which trafficked workers successfully obtained class certification, the courts found that questions of law or fact common to the members *did* predominate. This is because, contrary to the court in *Signal*, these courts read the TVPA consent requirement to be objective, rather than subjective.[147] This is probably the correct interpretation. Section 1589 states, in pertinent part: "The term 'serious harm' means any harm . . . that is sufficiently serious, under all the surrounding circumstances, to compel a *reasonable person* of the same background and in the same circumstances to perform . . . services in order to avoid incurring that harm."[148] The courts that granted class certification

---

142. *Id.* at *59.

143. *Id.* at *79.

144. *Id.* ("[T]his Court is persuaded that individual issues with respect to coercion and consent will predominate Plaintiffs' § 1589 forced labor claims. . . . Plaintiffs cannot satisfy the predominance requirement of Rule 23(b)(3) even though common issues are present in their forced labor claims. The motion to certify is therefore DENIED as to the § 1589 forced labor claims.").

145. No. 12-cv-00619, 2015 U.S. Dist. LEXIS 7584, at *11, *15-16 (S.D. Ind. Jan. 22, 2015) ("Plaintiffs' TVPA claims necessarily depend upon the infliction or threat of serious harm . . . . It would be impossible to determine whether potential liability under the promissory note would have deterred each employee from terminating his or her employment without an individualized assessment of each employee's subjective beliefs about his or her promissory note.").

146. No. 17-cv-89, 2018 BL 267167, at *3-4 (S.D. Ga. July 27, 2018) ("[A] class should not be certified if the court must engage in individualized determinations of disputed fact in order to ascertain a person's membership. . . . Thus, to preserve Defendants' due process rights, the Court would need to engage in a series of mini-trials . . . .").

147. The court in *Menocal* slightly differed from the other three courts in that it found the TVPA to have incorporated both an objective *and* subjective test. Menocal v. GEO Grp., 320 F.R.D. 258, 266-67 (D. Colo. 2017) ("I find the analysis in *David* to be persuasive in that the forced labor statute does contain both an objective and a subjective component."). Nonetheless, the court concluded that because the members of the putative class were so similar—they were all inmates in an immigration detention center managed by the defendant and were forced to work under the same exact policies—an inference of commonality was permitted. *Id.* at 267.

148. 18 U.S.C. § 1589(c)(2) (2018) (emphasis added).

read this language to eschew the need for individualized determinations of consent. For example, in *Paguirigan v. Prompt Nursing Employment Agency, L.L.C.*,[149] the court found that "[t]he TVPA's explicit statutory language makes clear that a 'reasonable person' standard applies in determining whether a particular harm . . . is sufficiently serious to compel an individual to continue performing labor or services."[150] Accordingly, the court rejected the defendant's contention that "adjudication of plaintiff's claims would require an individualized consideration of each putative class member."[151] Instead, the court reasoned, "The question is not whether each individual felt compelled to continue her employment as a result of defendants' conduct, but whether a reasonable person of the same background and in the same circumstances would find that conduct a threat of serious harm sufficient to compel continued work."[152] The courts in *Nunag-Tañedo*,[153] *Menocal*,[154] and *Rosas*[155] quoted the same language from the statute and reached the same ultimate conclusions.

These courts felt comfortable applying an objective test because of how similar the class plaintiffs were. For example, in *Menocal*,[156] the putative class members were all inmates in an immigration detention center run by the defendant. Each putative class member was subject to the same policies and performed exactly the same duties at the direction of the center's guards, which allowed the *Menocal* class to satisfy the 23(b)(3) predominance inquiry. "The nature of detention is unique," the court wrote in its order granting certification, "in that it

149. No. 17-cv-1302, 2018 U.S. Dist. LEXIS 156331 (E.D.N.Y. Sept. 11, 2018).

150. *Id.* at *21.

151. *Id.*

152. *Id.* at *22.

153. Nunag-Tañedo v. E. Baton Rouge Par. Sch. Bd., No. 10-cv-01172, 2011 U.S. Dist. LEXIS 152329, at *21 (C.D. Cal. Dec. 12, 2011) ("Because the analysis of claimed TVPA inquiry will focus on the Defendants' intent with respect to any threats made against Plaintiffs, and on a reasonable person's perception of those threats, the TVPA inquiry will not turn on, or require, individualized determinations. Thus, the inquiry will not look at how each Plaintiff perceived the Defendants' actions or whether he or she subjectively felt compelled to work. Instead, the inquiry will look at the Defendants' actions and assess how a reasonable person from the Plaintiffs' background would respond to those actions.").

154. Menocal v. GEO Grp., 320 F.R.D. 258, 266-67 (D. Colo. 2017).

155. Rosas v. Sarbanand Farms, LLC, 329 F.R.D. 671, 689 (W.D. Wash. 2018) ("Contrary to Defendants' assertions that individual inquiries will be necessary to determine whether individual members perceived Growers' statements as threats, the inquiry under the statute focuses on whether a reasonable person in the same circumstances would be compelled to continue to work.").

156. 320 F.R.D. 258, 265 (D. Colo. 2017), *aff'd*, 882 F.3d 905 (10th Cir. 2018), *cert. denied*, 139 S. Ct. 143 (2018).

allows the detainer to almost fully control the experience of the detainee."[157] In each of the other three cases in which courts granted certification,[158] the class members had such similar backgrounds, circumstances of recruitment, and work conditions that the courts found it appropriate to apply a reasonable person standard. In *Nunag-Tañedo*, the court found that "because the class members share a large number of common attributes . . . they share the 'same background' and 'same circumstances,' allowing the fact finder to use a common 'reasonable person' standard for all class members."[159] Similarly, in *Paguirigan*, the court concluded that the plaintiffs "ha[d] entirely cohesive backgrounds" because they were "recruited in the same manner, paid the same fees, signed the same contracts, worked in the same state, and were subject to the same working conditions."[160] It therefore applied the reasonable person standard.[161] Where these factors are not present, courts generally apply a subjective test and deny class certification.[162]

That courts have been so unwilling to certify classes is critical. The ruling on class certification is *the* central moment in the class action's life; typically, the case is "won or lost at the certification stage."[163] A defendant is often unwilling to

---

157. *Id.*

158. Paguirigan v. Prompt Nursing Emp't Agency, LLC, No. 17-cv-1302, 2018 WL 4347799 (E.D.N.Y. Sept. 12, 2018); *Rosas*, 329 F.R.D. 671; *Nunag-Tañedo*, 2011 U.S. Dist. LEXIS 152329.

159. *Nunag-Tañedo*, 2011 U.S. Dist. LEXIS 152329, at *21-22.

160. *Paguirigan*, 2018 WL 4347799, at *8 (quoting Panwar v. Access Therapies, Inc., No. 12-cv-00619, 2015 U.S. Dist. LEXIS 7584, at *16 (S.D. Ind. Jan. 22, 2015)).

161. *Id.* at *22.

162. *See*, *e.g.*, *Panwar*, 2015 U.S. Dist. LEXIS 7584, at *16-17 ("[T]he California district court certified the class in *Nunag–Tañedo* on the basis of finding that the class members were all Filipino and were 'recruited in the same manner, paid the same fees, signed the same contracts, worked in the same state, and were subject to the same working conditions.' The threat of harm was essentially the same for all plaintiffs. That is not the case here, where the employees were recruited from various countries, the terms of the contracts were different, the promissory note amounts were different, employees did not all work in the same state, and they did not have the same working conditions . . . . Thus, it would not be appropriate to apply a 'reasonable person' standard to determine whether the Defendants' varying actions constituted a threat of harm for each proposed class member." (quoting *Nunag-Tañedo*, 2011 U.S. Dist. LEXIS 152329, at *6)); *see also* Baricuatro v. Indus. Pers. & Mgmt. Servs., No. 11-cv-2777, 2013 U.S. Dist. LEXIS 163821, at *65-66 (E.D. La. Nov. 18, 2013) (finding that coercion against plaintiffs was "particularized and isolated" and that they therefore failed to satisfy the 23(b)(2) requirement of alleged pattern or practices "consist[ing] of a uniform policy allegedly applied against the plaintiffs, not simply diverse acts in various circumstances" (quoting Bolin v. Sears, Roebuck & Co., 231 F.3d 970, 975 (5th Cir. 2000))).

163. *Recurring Issues in Consumer and Business Class Action Litigation in Texas*, 33 TEX. TECH L. REV. 971, 994 (2002) ("It is conventional wisdom that class action litigation is often won or lost at

"bet the company" in a trial against a class of plaintiffs that has survived the rigorous mandates of Rule 23.[164] Instead, defendants seek to settle—with much less leverage than they had before the court certified the class.[165] If class certification is denied, plaintiffs often give up or accept greatly reduced settlements—unwilling or unable to litigate separate suits against an often well-heeled defendant.[166] In fact, some courts have developed an entire doctrine based on the fact that the denial of class certification sounds the "death knell" of the litigation.[167]

If class actions, criminal prosecutions, and other civil laws are not viable tools of redress, then where should victims of trafficking turn? Part III will attempt to find an effective remedy, not in the class claims of plaintiffs or in the indictments of prosecutors, but in the aggregated action of state attorneys general.

III. A MISSED OPPORTUNITY

As we have seen, the civil right of action enshrined in the TVPA in 2003 was intended to increase the number of parties permitted to enforce it.[168] As we shall soon see, however, one particularly important party has declined Congress's invitation. In this Part, I examine why state attorneys general have seemingly neglected the TVPA and explain why this neglect matters. This Part proceeds in three Sections. First, I offer a case study of one state attorney general's response to trafficking in her state to illustrate the traditional approach. Next, I attempt

the certification stage—certification of a class can lead to a substantial settlement, while denial of certification greatly reduces a plaintiff's incentive to pursue the lawsuit.").

164. Kohen v. Pac. Inv. Mgmt. Co. LLC, 571 F.3d 672, 678 (7th Cir. 2009) ("When the potential liability created by a lawsuit is very great, even though the probability that the plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good.").

165. *E.g.*, Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 259 F.3d 154, 167-68 n.8 (3d Cir. 2001) (discussing how class certification can impose on defendants a "hydraulic pressure to settle"); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996) ("[T]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.").

166. *Cf.* Coopers & Lybrand v. Livesay, 437 U.S. 463, 469-70 (1978) ("[W]ithout the incentive of a possible group recovery the individual plaintiff may find it economically imprudent to pursue his lawsuit to a final judgment and then seek appellate review of an adverse class determination.").

167. *See id.* at 469. Although severely limited by the Supreme Court, the "death knell" rule in some circuits allowed for interlocutory appeals of class-certification orders. This was based on the theory that denial of certification essentially marked the end of the litigation by "inducing [the] plaintiff to abandon the litigation" out of "economic prudence." *Id.* at 471.

168. *See supra* note 68 and accompanying text.

to explain why some state attorneys general seem to use every tool at their disposal to protect exploited workers — except the TVPA. Finally, I explain how state attorneys general, by filing claims under the TVPA, could achieve sizable damage awards and provide victims with important safeguards they currently lack.

A. Forced Labor in the Land of Lincoln

The Chicago suburb of Elk Grove Village was built by business. Home to the largest industrial park in the United States,[169] it boasts six square miles of space for nearly six thousand businesses.[170] Directly across the street from the park, at its northeast end, sits a red-brick restaurant with an entrance flanked by two stone gargoyles. Until recently, more than a dozen Mexican workers washed dishes there and cleaned the floors.[171] When they finished their shifts, the workers were driven to an apartment nearby, where they lived four or five men to a room.[172] Most slept on mattresses retrieved from dumpsters in "[r]ooms . . . infested with bed bugs, rats, or other vermin."[173] This was the dark underbelly of the businesses that built Elk Grove.

The men were "desperately poor" Mexican immigrants recruited by employment agencies in Chicago.[174] They promised the workers good jobs, free food and housing, and new opportunity in the state's business community.[175] Instead, the men ended up working twelve- to fourteen-hour days with no meal breaks and made as little as $3.50 an hour.[176] The "free housing" they were promised turned out to be that infested apartment.[177] Supervisors regularly subjected them to emotional abuse, discrimination, and on many occasions, physical beatings.[178] The workers also sustained injuries on the job, sometimes slicing their

---

169. *International Aerospace Leader Chooses Elk Grove Village as New Hub for US Operations*, ELK GROVE VILLAGE, ILL. (July 1, 2019, 10:00 AM), https://www.elkgrove.org/Home/Components/News/News/4783/31 [https://perma.cc/8LRZ-U4K7].

170. *Id.*

171. Complaint at 15, Illinois *ex rel.* Madigan v. Xing Ying Emp't Agency, No. 15-cv-10235, 2018 WL 1397427 (N.D. Ill. Mar. 20, 2018).

172. *Id.* at 16.

173. *Id.*

174. *Id.* at 9.

175. *Id.*

176. *Id.* at 3.

177. *Id.* at 10.

178. *Id.* at 11.

hands on kitchen knives or cutting machines.[179] But their employer instructed them to keep working and threatened to fire them if they refused.[180]

In 2016, Illinois Attorney General Lisa Madigan sued the employer and the agencies that recruited the workers.[181] The ten separate counts listed in the forty-page complaint alleged violations of a number of federal wage and hour laws, antidiscrimination laws, state minimum-wage laws, the Illinois Human Rights Act, and the Illinois One Day Rest in Seven Act.[182] This is typical of any litigation: plaintiffs often bring as many claims as possible to maximize recovery and ensure that something sticks. What is notable here is not the number of claims Madigan brought, but the claims she omitted. There were no charges brought under the TVPA.

Madigan's team was not alone in omitting a trafficking claim. As my research suggests, and as interviews with practitioners substantiate,[183] no state attorneys general have invoked the TVPA in a civil labor-trafficking case since it was signed by President Clinton two decades ago. The Act seems to be largely neglected by those with the power to enforce it.

B. A Curious Neglect

That state attorneys general largely ignore the TVPA is strange. After all, some of the claims they *do* bring allege conduct that the Act also contemplates and condemns. In Elk Grove, for instance, the restaurant owners not only failed to pay the minimum wage but also physically beat and psychologically abused their employees.[184] The employment agencies also made false promises about wages and living and working conditions – similar to the false promises made by the agencies in the *Signal* case. These abuses are precisely the sort of "force, fraud, or coercion" that the TVPA expressly prohibits.[185]

In fact, Madigan's office agreed. Jane Flanagan, who handled the Elk Grove case as the Illinois Attorney General's Workplace Rights Bureau Chief, did consider pursuing trafficking claims against the restaurant owners and recruiters, because she and her team "felt that the conduct was much more egregious than

179. *Id.* at 15.

180. *Id.*

181. *Id.* at 5.

182. *Id.* at 17-33.

183. *See infra* notes 189-193 and accompanying text.

184. Complaint, *supra* note 171, at 11.

185. 22 U.S.C. § 7102(11)(B) (2018).

typical wage-hour conduct."[186] Flanagan told me that "the facts [in the Elk Grove case] really were far closer to true trafficking . . . [so] pleading it as just a wage-hour and discrimination case in some ways felt less satisfying than calling it what it was, which felt like trafficking."[187] Yet she and her team ultimately decided not to pursue a trafficking claim.[188]

Their decision was not unusual. Terri Gerstein, the former Bureau Chief of the New York Attorney General's Labor Bureau, told me that despite her more than thirteen years at the office, many of which she spent at the helm of the leading labor bureau in the country, she was not aware of any civil labor-trafficking cases brought by state attorneys general.[189] Although her office, in partnership with the organized crime task force, did pursue sex traffickers, they did not use the trafficking laws to pursue perpetrators of forced labor.[190] Similarly, although Flanagan's office brought a number of wage-and-hour theft claims against employers in Illinois, she recalled that they did not bring labor-trafficking claims against these employers.[191] While she, like Gerstein, noted that some state attorneys general do pursue sex-trafficking charges, Flanagan knew of no office that has pursued the same charges for labor traffickers using federal law.[192] This is in

186. Flanagan Interview, *supra* note 105.

187. *Id.*

188. Flanagan explained that she and her team were not sure whether the language of the TVPA or the Illinois antitrafficking statute allows for organizations or the government to bring claims on victims' behalf. *Id.* As I argue in Section IV.B, it does. *See infra* note 253 and accompanying text. But Congress should also amend the language to make the grant of jurisdiction explicit. I argue state legislatures should follow Illinois's lead and do the same. *See infra* note 281 and accompanying text.

This is not to discount the important work done by Flanagan and her team. Few offices of attorneys general have done more to fight for immigrant workers' rights. In the Elk Grove case, they successfully shut down the employment agencies and reached a consent decree that secured backpay for the workers, with some receiving over $12,000. Press Release, Ill. Attorney Gen., Attorney General Madigan Shuts Down Employment Agency Charged with Abuse of Immigrant Workers (Oct. 10, 2018), http://www.illinoisattorneygeneral.gov/pressroom/2018_10/20181010.html [https://perma.cc/9ERX-QPAX]. My point, rather, is simply that trafficking claims would secure additional and more robust damages and protections for victims.

189. Telephone Interview with Terri Gerstein, former Labor Bureau Chief, N.Y. Attorney Gen.'s Office (Apr. 29, 2019) (on file with author) [hereinafter Gerstein Interview].

190. *See id.* ("I'm not aware of anyone using the trafficking statutes to go after . . . basic low-wage worker exploitation.").

191. Flanagan Interview, *supra* note 105.

192. *Id.* Flanagan qualified her statement by noting that some offices may have pursued charges under state law, though not federal. *Id.* She also explained that in Illinois, unlike New York,

line with general trends across the country. Although sex trafficking is often a popular issue across party lines, labor trafficking tends to be left on the backburner—if it is there at all.[193] James Tierney, the former Attorney General of Maine, called labor trafficking cases the "forgotten stepsibling" of sex trafficking.[194] While federal prosecutors and state and local officials dedicate time and resources to bringing sex traffickers to justice, they do not pay the same sort of attention to labor traffickers.[195]

What explains this omission by state attorneys general? Gerstein has at least two theories. First, involvement by state attorneys general in labor issues more broadly is a relatively recent phenomenon. Until about five years ago, only a small number of state attorneys general—California, Massachusetts, and New York—enforced workers' rights.[196] Other offices are just starting to follow this example.[197] Second, Gerstein supposes that it likely comes down to a general lack

---

the state attorney general's criminal authority is extremely limited, and so the Illinois attorney general's office does not bring criminal sex-trafficking cases. *Id.*

193. *See supra* notes 83-84 and accompanying discussion. Between 2011 and 2015, 8,314 suspects were referred to U.S. attorneys for human-trafficking offenses, nearly 5,000 of whom were accused of predominantly sex-related trafficking. Only 331 suspects were referred for predominantly labor-related trafficking. Mark Motivans & Howard N. Snyder, *Federal Prosecution of Human-Trafficking Cases*, U.S. DEP'T JUST. (June 2018), https://www.bjs.gov/content/pub/pdf/fphtc15.pdf [https://perma.cc/DR6E-P4X2]; *see also How Does Labor Trafficking Occur in U.S. Communities and What Becomes of the Victims?*, NAT'L INST. JUST. (Aug. 31, 2016), https://nij.ojp.gov/topics/articles/how-does-labor-trafficking-occur-us-communities-and-what-becomes-victims [https://perma.cc/7VS9-JCG9] ("By and large, labor trafficking investigations were not prioritized by local or federal law enforcement. Survivors mostly escaped on their own and lived for several months or years before being connected to a specialized service provider.").

194. Interview with James Tierney, former Me. Attorney Gen., in New Haven, Conn. (Apr. 22, 2019) (on file with author).

195. *See supra* note 193.

196. Gerstein Interview, *supra* note 189.

197. The Illinois Attorney General's Office established its Workplace Rights Bureau in 2015, and the Pennsylvania and District of Columbia attorneys general followed suit in 2017. *Combating Wage Theft: The Critical Role of Wage and Hour Enforcement, Hearing Before the H. Comm. on Appropriations, Subcomm. on Labor, Health & Human Servs., Educ., & Related Agencies*, 116th Cong. 2 (2019) (statement of Hon. Kwame Raoul, Att'y Gen. of Illinois) ("In 2015 my predecessor, Attorney General Lisa Madigan, founded the Workplace Rights Bureau within the Attorney General's Office."); Press Release, Office of Attorney Gen., Commonwealth of Pa., Attorney General Shapiro to Trump Administration: Let Workers Keep Tips They Earned (Feb. 5, 2018), https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-shapiro-to-trump-administration-let-workers-keep-tips-they-earned [https://perma.cc/AA3H-PWMJ]; Press Release, Office of Attorney Gen., D.C., Attorney General Racine to Enforce Workers' Rights Laws Against Abusive Employers (Oct. 24, 2017), https://

of knowledge. State attorneys general might not be aware that this is a useful tool for them, and they might not know how the rights and benefits that the TVPA confers differ from traditional employment laws.[198] They might ask, as Gerstein does, "What does it get me that my usual tools do not?"[199]

This is an important question. If the TVPA's protections and benefits were the same as, or fundamentally similar to, those provided under the traditional employment and wage-and-hour laws, then the fact that state attorneys general have neglected to invoke it would not be a missed opportunity at all.

C. Benefits of the TVPA

The TVPA offers a number of benefits and protections for trafficked workers that go beyond those of traditional employment law. First, damages provided under the TVPA are broader and more robust than those provided under state employment laws or the FLSA. Victims who sue under the TVPA are entitled to mandatory restitution for "the full amount of [their] losses."[200] Importantly, this includes punitive damages, which are not available under the FLSA and are generally unavailable or capped under state employment law.[201] Courts that considered this issue have held that damages provided under the TVPA should, as a matter of principle, be more robust than those provided under traditional employment law. For instance, the Tenth Circuit, in holding that forced-labor victims should be compensated at a significantly higher rate than they would be under the FLSA, stated that "[l]imiting TVPA victims to the FLSA remedy would *inappropriately* afford criminals engaged in such egregious practices the

oag.dc.gov/release/attorney-general-racine-enforce-workers-rights [https://perma.cc/EQ2M-P545].

In 2018, New Jersey's attorney general established the Affirmative Civil Rights and Labor Enforcement Section, and in 2019, Michigan's attorney general established a Payroll Fraud Enforcement Unit. Press Release, Dep't of Attorney Gen., Mich., Nessel: Payroll Fraud Charges in the Works (July 2, 2019), https://www.michigan.gov/ag/0,4534,7-359-92297_47203-501080--,00.html [https://perma.cc/2WK3-MLLD]; Press Release, Office of Attorney Gen., N.J., Attorney General Grewal Appoints Rachel Wainer Apter Director of New Jersey Division on Civil Rights (Sept. 20, 2018), https://nj.gov/oag/newsreleases18/pr20180920b.html [https://perma.cc/747S-RGAC].

198. Gerstein Interview, *supra* note 189.

199. *Id.*

200. 18 U.S.C. § 1593(a)-(b)(1) (2018).

201. *See* Becker & Strauss, *supra* note 94, and accompanying discussion. For an example of a state-law cap in the employment context, see *Luri v. Republic Servs.*, 953 N.E.2d 859 (Ohio Ct. App. 2011), in which the court found that caps apply to a retaliatory-discharge action brought under state law.

benefit of the lowest-common-denominator minimum wage set for legitimate employers."[202] The court further held, as courts routinely do,[203] that victims under the TVPA should be entitled to an array of damages for noneconomic harm, particularly harm related "to the squalid, restricted, and threatening working/living conditions imposed on TVPA victims."[204]

Second, the TVPA has a more generous statute of limitations than the FLSA and traditional employment laws. While the FLSA and Title VII provide statutes of limitations of about two years, and those in most state employment, contract, and tort laws generally range from two to five years, the TVPA provides for a ten-year statute of limitations.[205] Moreover, the trafficking laws are not riddled with the same exemptions and exceptions that characterize federal wage-and-hour laws.[206]

Third, trafficking claims carry a certain expressive value largely absent in traditional employment law, meaning that claims brought under the TVPA better capture the severity of the actual offenses committed by labor traffickers. For example, all an FLSA or state employment-law claim alleges is that an employer was out of compliance with specific statutes requiring certain wages and overtime for employees. These claims do not allege that the employer subjected workers to coerced labor, violating their dignity and stripping them of their agency. From an expressive standpoint, then, the message that these traditional claims send perpetrators is grossly inadequate.[207] By contrast, a TVPA claim

---

202. Francisco v. Susano, 525 F. App'x 828, 835 (10th Cir. 2013).

203. *See, e.g.*, Doe v. Howard, No. 11-cv-1105, 2012 WL 3834867, at *4 (E.D. Va. Sept. 4, 2012) (granting an award of $500 per day for emotional distress from forced labor in addition to punitive damages and wage restitution); Shukla v. Sharma, No. 07-cv-2972, 2012 WL 481796, at *15 (E.D.N.Y. Feb. 14, 2012) (upholding a compensatory-damages award of $800 per day and a one-million-dollar punitive damages award for violations of the TVPA); Gurung v. Malhotra, 851 F. Supp. 2d 583, 595 (S.D.N.Y. 2012) (awarding $500,000 in damages for emotional distress resulting from forced labor and $300,000 in punitive damages).

204. *Francisco*, 535 F. App'x at 835. *See also Doe*, 2012 WL 3834867, at *4 (awarding, and discussing several prior cases that awarded, substantial emotional-distress damages for TVPA violations); Canal v. Dann, No. 09-cv-03366, 2010 WL 3491136, at *4 (N.D. Cal. Sept. 2, 2010) (awarding equal compensatory and punitive damages).

205. *See* Miller & Jonas, *supra* note 102.

206. *Id.*

207. In the criminal context, commentators have long criticized prosecutors for perpetuating a mismatch between charges brought and crimes committed. *See, e.g.*, Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 585-86 (2005) ("There is a strong *social* interest in nonpretextual prosecution . . . . When a murderer is brought to justice for murder rather than for tax eva-

communicates a more adequate message to lawbreakers. As the Tenth Circuit stated:

> [T]he TVPA is intended to remedy conduct condemned as outrageous, involving significant violations not only of labor standards but fundamental health and personal rights as well . . . . The forced labor addressed by the TVPA is a categorically different wrong, involving work extracted from victims by the illegal and coercive means specified in the statute.[208]

This helps to explain why courts are generally willing to provide broad and robust punitive damages for victims under the TVPA. The Ninth Circuit, for instance, has held that punitive damages are available under the TVPA in part because the conduct contemplated by Congress is "both intentional and outrageous."[209] This is a stronger message than simply ordering an employer to compensate its employees for lost wages.

In some cases, trafficking claims also carry a social stigma that can hurt traffickers' businesses. Johnson, the union general counsel, explained that general contractors in the Midwest tend not to "even bat an eye" when hiring a subcontractor with a history of wage-and-hour-theft.[210] But when the same contractors discover that a subcontractor has been involved in labor trafficking, they "want nothing to do with it."[211] Suddenly, they are "part of the solution," seeking to ensure that they avoid companies even peripherally associated with trafficking workers.[212]

Finally, and perhaps most importantly, the TVPA provides a particular set of protections for trafficked workers in the realm of immigration. Commentators

---

sion, voters learn some important things about their community and about the justice system . . . . When a prosecutor gets a conviction . . . for an unrelated lesser crime than the one that motivated the investigation, the signals are muddied. They may disappear altogether.").

208. *Francisco*, 535 F. App'x at 835; *see also* Carazani v. Zegarra, 972 F. Supp. 2d 1, 27 (D.D.C. 2013) (awarding punitive damages of $543,041.28 under the TVPA in part because "the crime of forced labor and trafficking is particularly depraved"). A State Department report called punitive and compensatory damages "critical to restoring a victim's dignity, helping them gain power back from their exploiters who took advantage of their hope for a better life . . . . It is a way to ensure that victims receive access to justice." U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 18 (2009), https://2009-2017.state.gov/documents/organization/123357.pdf [https://perma.cc/97V4-AG2R].

209. Ditullio v. Boehm, 662 F.3d 1091, 1098 (9th Cir. 2011).

210. Johnson Interview, *supra* note 91.

211. *Id.*

212. *Id.* ("[Contractors] act very concerned . . . or they just don't give a shit [about traditional labor law violations] . . . . [But the trafficking charge] scared them. That scared them.").

generally consider these provisions "among the strongest worker protections in the statute."[213] These provisions take on a special relevance given that many vulnerable low-wage workers are noncitizens.[214] Among these provisions are the two special visa programs for noncitizen victims of trafficking, the T visa and the U visa, which can provide recipients with a path toward permanent residency and citizenship.[215] Eligibility for a U visa typically requires cooperation with law enforcement in criminal proceedings,[216] but some courts have also made visas available in civil trafficking cases.[217]

T-visa recipients must be victims of trafficking, be present in the United States due to that trafficking, and be likely to "suffer extreme hardship involving unusual and severe harm upon removal."[218] The government's determination of harm upon removal considers "[t]he impact of the loss of access to the United States courts and the criminal justice system for purposes . . . [of] criminal and civil redress for acts of trafficking in persons, criminal prosecution, restitution, and protection."[219] In other words, trafficking victims who are parties to or otherwise assisted by ongoing civil actions against their traffickers might be eligible for immigration status because removal might well constitute loss of access to the courts.

U visas are available to victims of a broader range of offenses. However, unlike T visas, the U visa requires that applicants obtain a signed certificate of cooperation from a law-enforcement agency[220] and demonstrate that they have

---

213. Miller & Jonas, *supra* note 102.

214. *See* Randy Capps & Michael Fix, *Trends in the Low-Wage Immigrant Labor Force, 2000-2005*, URBAN INST. 3 (Mar. 2007), https://www.urban.org/sites/default/files/publication/46381/411426-Trends-in-the-Low-Wage-Immigrant-Labor-Force---.PDF [https://perma.cc/QAN2-CMKT] ("[U]nauthorized immigrants were nearly a tenth (9 percent) of low-wage workers and almost a quarter (23 percent) of lower-skilled workers. Their share of lower-skilled workers rose by 5 percentage points between 2000 and 2005. In 2005, there were a total of 6.4 million unauthorized immigrant workers, and half of all lower-skilled immigrant workers (3.1 million) were unauthorized.").

215. *Id.*

216. 8 C.F.R. § 214.14(b)(3) (2019).

217. *See, e.g.*, Villegas v. Metro. Gov't of Nashville, 907 F. Supp. 2d 907, 914 (M.D. Tenn. 2012) (granting a U visa to the plaintiff in a civil case); Garcia v. Audubon Cmtys. Mgmt., L.L.C., No. 08-cv-1291, 2008 WL 1774584, at *3 (E.D. La. Apr. 15, 2008) ("[T]he Court notes that on-going criminal investigation may not be necessary to certify a U-Visa application because the regulations contemplate the future helpfulness of the applicant[] . . . .").

218. 8 U.S.C. § 1101(T)(IV) (2018).

219. 8 C.F.R. § 214.11(i)(2)(iv) (2019).

220. *U Visa Law Enforcement Resource Guide for Federal, State, Local, Tribal and Territorial Law Enforcement, Prosecutors, Judges, and Other Government Agencies*, U.S. DEP'T HOMELAND SEC.

suffered "substantial physical or mental abuse" as a result of having been a victim of criminal activity.[221] While T visas, like U visas, are capped, they have never come close to reaching their maximum allowance.[222] U visas, on the other hand, have.[223]

These visas are especially important today. Over the past two years, the Trump Administration has ramped up efforts to deport undocumented immigrants, causing a fear of deportation that chills workers' ability to speak out.[224] In one 2017 case, U.S. Immigration and Customs Enforcement (ICE) arrested an undocumented worker after he filed a workers' compensation claim.[225] This is a problem with a long history. A recent report found that at least 125 workers in Florida over the past fourteen years have been arrested after being injured in the workplace.[226] At least one in four of those arrested was subsequently detained by

17 (2019), https://www.uscis.gov/sites/default/files/USCIS/Humanitarian/U_Visa_Law_Enforcement_Resource_Guide.pdf [https://perma.cc/JLZ2-LVWG].

221. 8 U.S.C § 1101(U)(1) (2018).

222. Melissa Gira Grant, *It Is Now Even Harder for Trafficking Survivors to Get Visas*, APPEAL (Aug. 22, 2018), https://theappeal.org/it-is-now-even-harder-for-trafficking-survivors-to-get-visas [https://perma.cc/9KGC-8YYE] ("When Congress passed the Trafficking Victims Protection Act of 2000, it restricted the number of T visas to be issued each year to 5,000. The cap has never come close to being met. Though more and more people have applied for the visas, in the last 10 years the number of applications submitted has exceeded 1,000 per year only twice.").

223. *See* Sara Ramey, *Eliminating the U Visa Cap Will Help Catch Criminals*, THE HILL (Feb. 14, 2018, 11:45 AM), https://thehill.com/opinion/immigration/373808-eliminating-the-u-visa-cap-will-help-catch-criminals [https://perma.cc/JP45-GW6Q] (explaining that Congress has authorized 10,000 U visas per year, but as of September 2017, there were 110,511 pending applications, a wait time of about eleven years).

224. *See* Ellen Wulfhorst, *U.S. Immigration Crackdown Undermines Fight to End Human Trafficking—Expert*, REUTERS (Apr. 25, 2017, 12:02 AM), https://www.reuters.com/article/trafficking-conference-immigration-idUSL1N1HS1T2 [https://perma.cc/HN8D-4Z8X].

225. Shannon Dooling, *An ICE Arrest After a Workers' Comp Meeting Has Lawyers Questioning If It Was Retaliation*, WBUR NEWS (May 17, 2017, 10:50 AM), https://www.wbur.org/news/2017/05/17/ice-arrest-workers-comp [https://perma.cc/4FMH-X67X]. In another earlier case, ICE arrested an undocumented immigrant, on the courthouse steps, before he could file a workers' compensation claim. His employer stood nearby, taunting him, saying: "Now Edgar, I'm sending you back to Mexico . . . I have no use for you now" and "Edgar, Adios!" Rebecca Smith, Ana Avendaño & Julie Martínez Ortega, *ICED OUT: How Immigration Enforcement Has Interfered with Workers' Rights*, AFL-CIO 28 (Oct. 2009), https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1020&context=laborunions [https://perma.cc/9CCB-5JDY].

226. Michael Grabell & Howard Berkes, *They Got Hurt at Work. Then They Got Deported*, PROPUBLICA (Aug. 16, 2017, 5:00 AM EST), https://www.propublica.org/article/they-got-hurt-at-work-then-they-got-deported [https://perma.cc/7JYG-2APE].

ICE or deported.[227] This makes the TVPA's protections for noncitizen workers and its strong confidentiality provisions,[228] which traditional labor and employment laws typically lack, especially salient.

It is clear that the TVPA confers on trafficking victims rights and benefits not typically available in the realm of traditional employment law. In the next Part, I explore how an old—and once largely forgotten—doctrine might provide an avenue for vindicating these rights.

IV. THE PROPOSED STRATEGY

A. The Parens Patriae Power

Like the class action, the parens patriae power finds its roots in English common law.[229] Latin for "parent of the country," it allows the state to act on behalf of its citizens to seek injunctive relief or damages.[230] A state brings a parens patriae suit for a claim that belongs exclusively to the state or, alternatively, it sues in a representative capacity on behalf of its residents.[231] The defining feature of the parens patriae suit is that "the state itself is the plaintiff," invoking its traditional role as conservator of its citizens.[232] The parens patriae power, which largely fell out of favor for much of the twentieth century,[233] enjoyed a renaissance in the 1990s, when state attorneys general began filing high-dollar suits

227. *Id.*

228. *See, e.g.*, U.S. Immigration & Customs Enf't, *Continued Presence: Temporary Immigration Status for Victims of Human Trafficking*, U.S. DEP'T HOMELAND SEC. (Aug. 2010), www.ice.gov/doclib/human-trafficking/pdf/continued-presence.pdf [https://perma.cc/B3UY-N7HM] ("Because of the sensitivity and confidentiality protections afforded trafficking victims, [continued presence] applications are subject to several levels of review within the submitting federal agency before the application is received by the [Law Enforcement Parole Branch].").

229. Jack Ratliff, Parens Patriae*: An Overview*, 74 TUL. L. REV. 1847, 1850 (2000).

230. *See id.* at 1847-48.

231. Margaret S. Thomas, Parens Patriae *and the States' Historic Police Power*, 69 SMU L. REV. 759, 762 (2016).

232. *Id.*

233. *Id.* ("Prior to [the 1990s], parens patriae suits had been lightly utilized in antitrust and environmental pollution suits.").

against the tobacco industry and lead paint manufacturers, among others.[234] Today, the parens patriae power is central in combatting deceptive advertising, protecting consumers, and enforcing antitrust laws.[235]

States assert their parens patriae power under either the common law or a federal or state statute that authorizes its use.[236] At common law, parens patriae standing attaches where the state asserts its "quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general."[237] Standing does not attach when the state is merely a "nominal party" acting on behalf of a private interest.[238] This quasi-sovereign interest in health

---

234. *Id.*; *see also* Ratliff, *supra* note 229, at 1847 ("The success of the tobacco litigation has stimulated new initiatives respecting guns, lead paint, and, most recently, health maintenance organizations.").

235. For example, in one highly publicized recent case, state attorneys general acting as parens patriae sued three large book publishers and Apple for conspiring to fix the cost of e-books, securing a settlement worth more than $166 million with the publishers and $400 million with Apple. *See* Andrew Albanese, *Publishers Have Paid $166 Million to Settle E-Book Claims*, PUBLISHERS WKLY. (July 24, 2013), https://www.publishersweekly.com/pw/by-topic/digital/content-and-e-books/article/58412-publishers-have-paid-166-million-to-settle-e-book-claims.html [https://perma.cc/2QL7-QYLB]; James R. Hood, *Appeals Court Upholds $400 Million E-Book Price-Fixing Settlement with Apple*, CONSUMER AFFS. (June 30, 2015), https://www.consumeraffairs.com/news/appeals-court-upholds-400-million-e-book-price-fixing-settlement-with-apple-063015.html [https://perma.cc/G36M-EVTV].

Apple argued that the state parens patriae actions were similar to class actions and should therefore be subject to Rule 23 procedures. The district court rejected this argument: "It is also not true, as Apple contends, that . . . this action is indistinguishable from a class action. As explained above, the States are suing not merely to vindicate the rights of their injured citizens, but also for relief from the injury to their quasi-sovereign interests in the welfare of their economies." Texas v. Penguin Grp. (USA) Inc. (*In re* Elec. Books Antitrust Litig.), 14 F. Supp. 3d 525, 536 n.4 (S.D.N.Y. 2014).

236. Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 492-93 (2012). A small minority of state attorneys general, such as those in Arizona, Connecticut, New Mexico, Washington, and Wisconsin, do not have any common-law power. *See* Justin G. Davids, Note, *State Attorneys General and the Client-Attorney Relationship: Establishing the Power to Sue State Officers*, 38 COLUM. J.L. & SOC. PROBS. 365, 372 n.32 (2005). To bring trafficking claims there, state attorneys general would need to invoke a statute explicitly granting them that authority. If Congress amends the TVPA or if states amend their antitrafficking laws to explicitly grant state attorneys general enforcement power, as Illinois did, they would have the ability to bring trafficking claims without needing to invoke their common-law authority. *See infra* note 281 and accompanying discussion.

237. Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel* Barez, 458 U.S. 592, 602, 607 (1982); *see also id.* ("[T]he State must articulate an interest apart from the interests of particular private parties, i.e., the State must be more than a nominal party.").

238. *Id.* at 607.

and well-being generally extends to protecting private interests when those interests affect a "sufficiently substantial segment" of a state's population.[239] Thus, the operative issue in common-law parens patriae litigation is the scope of the alleged injury.[240] The Supreme Court has held that the factfinder must assess not only injury to the plaintiffs but also "the indirect effects [of the alleged harm]."[241] The Court has not specified,[242] and courts generally do not seek to specify, the necessary proportion of citizens involved in a given case for a parens patriae action to lie,[243] but it is clear that the affected population need not account for all of the state's residents, or even a majority of them. Indeed, courts have routinely found direct injury to a small number of citizens—in many cases fewer than ten—sufficient to support a parens patriae action.[244]

Thus, the scope of the parens patriae power is broad. But to determine whether it would be an effective tool for trafficking victims, we need to examine whether the TVPA would allow state attorneys general to invoke it.

---

239. *See id.* ("The Court has not attempted to draw any definitive limits on the proportion of the population of the State that must be adversely affected by the challenged behavior. Although more must be alleged than injury to an identifiable group of individual residents, the indirect effects of the injury must be considered as well in determining whether the State has alleged injury to a sufficiently substantial segment of its population.").

240. *Id.*

241. *Id.*

242. *Id.*

243. New York v. Peter & John's Pump House, Inc., 914 F. Supp. 809, 812 (N.D.N.Y. 1996) ("There is no numerical talisman to establish *parens patriae* standing."); People *ex rel.* Vacco v. Mid Hudson Med. Grp., P.C., 877 F. Supp. 143, 148 (S.D.N.Y. 1995) ("[T]he raw number of individuals directly involved does not determine whether the State has 'alleged injury to a sufficiently substantial segment of its population.'" (quoting *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607)).

244. *See, e.g.*, New York v. 11 Cornwell Co., 695 F.2d 34, 39-40 (2d Cir. 1982) (holding that direct injury to fewer than twelve citizens institutionalized in a state facility was sufficient to support parens patriae authority where other citizens living in state institutions would also be affected), *vacated on other grounds*, 718 F.2d 22 (2d Cir. 1983) (en banc); Illinois v. SDS W. Corp., 640 F. Supp. 2d 1047, 1050-51 (C.D. Ill. 2009) (allowing exercise of parens patriae authority although "only 250 Illinois consumers were directly injured"); *Mid Hudson Med. Grp., P.C.*, 877 F. Supp. at 147-48 (allowing a state parens patriae suit after identifying only one victim because the state's entire hearing-impaired population could be affected and seven to ten hearing-impaired patients were also being denied interpretive services by the defendant clinic); Support Ministries for Persons with AIDS, Inc. v. Vill. of Waterford, 799 F. Supp. 272, 277-79 (N.D.N.Y. 1992) (allowing state parens patriae action in a case alleging injury to fifteen victims but in which similarly situated persons might be similarly affected in the future).

B. Parens Patriae Authority Under the TVPA

Whether a state is permitted to enforce a federal statute typically turns on congressional intent.[245] In this Section, I explore whether Section 1595 permits parens patriae suits.[246] I argue that it implicitly does. But to resolve any ambiguity, I suggest that Congress nonetheless amend Section 1595 to explicitly incorporate this power. State legislatures should do the same, following the lead of states such as Illinois, which recently amended its antitrafficking law to allow for government officials and other organizations to bring trafficking claims on victims' behalf.[247]

1. Statutory Interpretation of the Parens Patriae Power

The parens patriae power, while expansive, is not unlimited. States have no inherent authority to enforce federal statutes.[248] But Congress may explicitly or implicitly grant such authority.[249] Where the grant of authority is not explicit, as is the case with the TVPA,[250] courts generally hold that states can nonetheless sue in their parens patriae capacity[251] as long as Congress implicitly intended

---

245. *See infra* notes 249-257 and accompanying text.

246. As mentioned, I am focused primarily on the TVPA here, but state attorneys general can also bring claims under their state antitrafficking statutes, where those statutes permit them. *See supra* note 65. By doing so, they would avoid the federal standing problems I examine in this Section.

247. *See infra* note 281.

248. *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 708 (2011).

249. *See* Connecticut v. Physicians Health Servs. of Conn., Inc., 287 F.3d 110, 121 (2d Cir. 2002) ("[W]e do not of course intend to imply that states may only sue in their *parens patriae* capacity when a statute specifically provides for suits by states. '[S]tates have frequently been allowed to sue in *parens patriae* to . . . enforce federal statutes that . . . do not specifically provide standing for state attorney[s] general[].'" (quoting *Mid Hudson Med. Grp., P.C.*, 877 F. Supp. at 146)); *see also* Gilles & Friedman, *supra* note 121, at 662-63 (noting that federal statutes may explicitly or implicitly restrict the ability of state attorneys general to bring lawsuits).

250. 18 U.S.C. § 1595(a) (2018). The civil remedy provision grants authority to "[a]n individual who is a victim of a violation of this chapter." *Id. But see infra* text accompanying notes 260-266 (discussing the 2018 amendment to the provision permitting state attorneys general as parens patriae to sue sex traffickers of minors).

251. *See, e.g.*, Commonwealth v. Bull HN Info. Sys., 16 F. Supp. 2d 90, 103 (D. Mass. 1998) ("[T]here is nothing unusual about a state seeking enforcement of federal laws that do not specifically provide for state enforcement."); *Mid Hudson Med. Grp., P.C.*, 877 F. Supp. at 146 (permitting the New York State Attorney General to sue as parens patriae to enforce the Americans with Disabilities Act and citing a number of cases in which states brought parens patriae actions to enforce federal law).

them to do so.[252] To determine congressional intent, courts typically examine the scope of the civil-remedy provision of the statute in question.[253] Specifically, they attempt to decipher whether the provision provides a broad grant of power to any individual injured, or whether it grants authority only to specifically enumerated parties.[254] Where the grant of authority is broad—allowing suits by nonspecific "individuals" or "persons" for instance—courts have allowed attorneys general to sue as parens patriae.[255] They have done so under the theory that Congress's grant of power to individuals necessarily encompasses their legal representatives.[256] In contrast, where the civil-remedy provision is limited to specified parties and where state attorneys general are not among them, courts have

252. Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 260-66 (1972) (interpreting congressional intent to determine whether a state had parens patriae standing to sue); Connecticut v. Health Net, Inc., 383 F.3d 1258, 1262 (11th Cir. 2004) ("When a state sues in *parens patriae* to enforce a federal statute, it must demonstrate that, in enacting the statute, Congress clearly intended that the states be able to bring actions in that capacity."); *Physicians Health Servs. of Conn., Inc.*, 287 F.3d at 120 ("When determining whether a state has *parens patriae* standing under a federal statute, we ask if Congress intended to allow for such standing.").

253. *See Physicians Health Servs. of Conn., Inc.*, 287 F.3d at 121 ("'[T]he federal statutes under which states have been granted *parens patriae* standing all contain broad civil enforcement provisions' that 'permit suit by any "person" that is "injured" or aggrieved.' [The civil enforcement provision] of ERISA, by contrast, carefully limits the parties who may seek relief." (quoting Connecticut v. Physicians Health Servs. of Conn., Inc., 103 F. Supp. 2d 495, 509 (D. Conn. 2000))); EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 197 (E.D.N.Y. 2003) (allowing the New York State Attorney General, as parens patriae, to bring a Title VII claim because the civil enforcement provision of the statute allows for civil suits by any "person claiming to be aggrieved").

254. *See Physicians Health Servs. of Conn., Inc.*, 287 F.3d at 112; *Fed. Express Corp.*, 268 F. Supp. 2d at 197.

255. For examples of federal statutes with broad civil remedy provisions under which courts have allowed attorneys general to sue as parens patriae, see 42 U.S.C. § 1983 (2018), which allows suits by "any citizen" or "other person"; *id.* § 1985, which allows suits by "any person or class of persons . . . so injured or deprived"; *id.* § 12117(a), which allows suits by "any person alleging discrimination on the basis of disability"; *id.* § 12133, which states the same; *id.* § 12188, which allows suits by "any person who is being subjected to discrimination on the basis of disability" or "who has reasonable grounds for believing that such person is about to be subjected to discrimination"; and *id.* § 3613(a)(1)(A), which allows suits by "an aggrieved person."

256. *See, e.g.*, *Bull HN Info. Sys.*, 16 F. Supp. 2d at 103 (holding that the state attorney general can sue as parens patriae to enforce the federal Age Discrimination in Employment Act, which allows for suits by a "person aggrieved," because the attorney general "is a 'legal representative' of the people of the Commonwealth for the purposes of this action"); Minnesota v. Standard Oil Co., 568 F. Supp. 556, 565 (D. Minn. 1983) (permitting the state attorney general to sue as parens patriae under a federal statute that allowed suits by "any person" because "in a *parens patriae* action, the state becomes, in effect, the embodiment of its citizens," meaning that "[a] harm to the individual citizens becomes an injury to the state, and the state in turn

been reluctant to grant parens patriae standing.[257] With regard to the TVPA, Section 1595 provides that "[a]n individual who is a victim of a violation of this chapter may bring a civil action."[258] It does not enumerate specific parties or limit the class of individuals at all. It is a broad grant of authority to any and every victim affected. Courts would therefore likely find that parens patriae suits are implicitly incorporated.[259]

Notably, Congress amended the statute in 2018 to allow state attorneys general to bring parens patriae actions under the provision of the Act dealing with sex trafficking of minors.[260] Following the logic of the *expressio unius* canon of statutory interpretation, which suggests that "the specification of one thing is the exclusion of another,"[261] some might argue that this amendment is evidence that parens patriae suits predicated on forced labor claims are forbidden. In other words, because the statute expressly permits one type of parens patriae claim, all other parens patriae claims must be prohibited. However, Congress included a savings clause in the 2018 amendment that explicitly disclaims limiting or preempting any civil claims or criminal prosecutions under federal or state law.[262] Congress's declaration of intent is especially important, given that the

becomes the plaintiff."); *see also* Lemos, *supra* note 248, at 710 (listing examples of statutes with broad private rights of action but no explicit grant of authority to states to sue).

257. *See, e.g.*, *Physicians Health Servs. of Conn., Inc.*, 103 F. Supp. 2d at 510 (denying the state attorney general's parens patriae claim under ERISA because the civil-remedy provision of the statute specifically lists eleven parties that are permitted to bring suit, and the attorney general was not among them), *aff'd*, 287 F.3d 110 (2d Cir. 2002).

258. 18 U.S.C. § 1595(a) (2018). The full provision reads as follows: "An individual who is a victim of a violation of this chapter may bring a civil action against the perpetrator (or whoever knowingly benefits, financially or by receiving anything of value from participation in a venture which that person knew or should have known has engaged in an act in violation of this chapter) in an appropriate district court of the United States and may recover damages and reasonable attorneys fees." *Id.*

259. *See supra* note 256.

260. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 6(a), 132 Stat. 1253, 1255 (2018) (codified at 18 U.S.C. § 1595(d) (2018)) ("In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates section 1591, the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.").

261. Richard Primus, *The Limits of Enumeration*, 124 YALE L.J. 576, 636 (2014). This comes from the Latin phrase "*expressio unius est exclusio alterius*." *Id.*

262. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017 § 7 (codified as amended at 47 U.S.C. § 230 (2018)) ("Nothing in this Act or the amendments made by this Act shall be construed to limit or preempt any civil action or criminal prosecution under Federal law or State law (including State statutory law and State common law) filed before or

expressio unius canon is context dependent.[263] When interpreting statutes, the Supreme Court has held that "the enumeration of one case . . . exclude[s] another [only if] it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it."[264] The items not mentioned must be "excluded by deliberate choice, not inadvertence."[265] Therefore, "the canon can be overcome by 'contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion.'"[266] Such contrary indications are present here.

2. *Legislative and Purposive Support for the Parens Patriae Power*

The legislative history and purpose of the 2018 amendment confirm that Congress did not intend to "signal any exclusion" by specifically enumerating parens patriae claims for online sex trafficking.[267] The amendment was part of a bipartisan bill—the Allow States and Victims to Fight Online Sex Trafficking Act of 2017[268]—designed to close a loophole in the Communications Decency Act of 1996[269] that had effectively immunized online web hosts from civil liability arising out of the actions of their users. Congress intended the amendment to only address this narrow issue of civil liability on the internet, allowing prosecutors to crack down on websites that served as hubs for online sex traffickers.[270] The Communications Decency Act explicitly forbade state attorneys general from bringing actions against web hosts, and the 2018 amendment's sole purpose was

after the day before the date of enactment of this Act that was not limited or preempted by section 230 of the Communications Act of 1934 (47 U.S.C. 230), as such section was in effect on the day before the date of enactment of this Act.").

263. *See* Marx v. Gen. Revenue Corp., 568 U.S. 371, 381 (2013) ("The force of any negative implication . . . depends on context.").

264. Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

265. *Id.*

266. *Marx*, 568 U.S. at 381 (quoting United States v. Vonn, 535 U.S. 55, 65 (2002)).

267. *Id.*

268. Pub. L. No. 115-164, 132 Stat. 1253 (2018) (codified as amended in scattered sections of 18 and 47 U.S.C.).

269. Pub. L. No. 104-104, tit. V, 110 Stat. 133 (codified as amended in scattered sections of 18 and 47 U.S.C.).

270. *See* Allow States and Victims to Fight Online Sex Trafficking Act of 2017 § 2(1) (codified at 18 U.S.C. § 1595(d) (2018)) ("[T]he Communications Decency Act of 1996 was never intended to provide legal protection to websites that unlawfully promote and facilitate prostitution and websites that facilitate traffickers in advertising the sale of unlawful sex acts with sex trafficking victims . . . .").

to address this loophole[271]—a loophole that forty-nine state attorneys general had petitioned Congress to close.[272] Congress did not intend to limit parens patriae actions in other contexts and, in fact, sought to enhance, rather than restrain, the enforcement power of prosecutors.[273]

We can also look to the statutory purpose to locate the power to bring parens patriae suits under the TVPA. In a 2016 case concerning the False Claims Act, the Supreme Court addressed how to apply the *expressio unius* canon to questions of statutory interpretation while bearing in mind a statute's broader purpose, holding that it would "make little sense to adopt a rigid interpretation of [a] provision" that would "undermine the very governmental interests that the . . . provision is meant to protect."[274] Congress passed the TVPA to "combat trafficking in persons" and "to ensure just and effective punishment of traffickers."[275] It would "make little sense" here to restrain attorneys general from attempting to

271. 164 CONG. REC. S1,851 (daily ed. Mar. 21, 2018) (statement of Sen. Blumenthal) ("This bill would clarify section 230 of the Communications Decency Act, which was never intended to give websites a free pass to aid and abet sex trafficking . . . . The purpose of our measure, very simply, is to give survivors their day in court. Right now, the courtroom doors are barred to them . . . . It would also open avenues of prosecution to law enforcement where they are currently roadblocked.").

272. *See* Letter from Nat'l Ass'n of Att'ys Gen. to Senate Subcomm. on Commc'ns (Aug. 16, 2017), https://atg.sd.gov/docs/CDA%20Final%20Letter.pdf [https://perma.cc/KD47-2ZLB] ("In 2013, Attorneys General from 49 states and territories wrote to Congress, informing it that some courts have interpreted the Communications Decency Act of 1996 ('CDA') to render state and local authorities unable to take action against companies that actively profit from the promotion and facilitation of sex trafficking and crimes against children. Unfortunately, nearly four years later, this problem persists and these criminal profiteers often continue to operate with impunity.").

273. *See* 164 CONG. REC. H1,303 (daily ed. Feb. 27, 2018) (statement of Rep. Lee) ("This amendment is needed in order to give enhanced powers to State attorneys general that they can provide the extra litigation leverage for individuals who are impacted in a devastating manner."); *id.* at S1,852 (daily ed. Mar. 21, 2018) (statement of Sen. Heitkamp) ("We are here today on the cusp of passing a bill that will provide victims a real opportunity to seek justice and recover damages from websites that profited from their pain of being sold for sex, while also providing new tools to prosecutors, including my former colleagues, the State attorneys general, to go after these sites and their owners."); *id.* at S1,864 (statement of Sen. Sullivan) ("We have begun to change this issue of resources to go after the perpetrators of these heinous crimes in a much better way by allowing State attorneys general and State district attorneys to actually prosecute these crimes, even though they are Federal crimes. We are doing something in the law that says: We need more prosecutors, we need more investigators, and we need more resources. Let's unleash those in the States to help us address this growing problem throughout our country.").

274. State Farm Fire & Cas. Co. v. United States *ex rel*. Rigsby, 137 S. Ct. 436, 443 (2016).

275. Trafficking Victims Protection Act of 2000, Pub. L. No. 106-386, § 102(a), 114 Stat. 1466 (codified as amended at 22 U.S.C. § 7101(a) (2018)).

enforce and effectuate the purposes of the Act.[276] In fact, Luis C.deBaca, one of the principal drafters of the Act, told me that he and his fellow drafters believed state attorneys general would not be so restrained.[277] He explained that they intended state attorneys general to bring claims under Section 1595 and that during the legislative process it did not occur to the various stakeholders that state claims would be excluded.[278] They thought the issue was obvious.[279] Any standing challenge alleging that the TVPA is unfriendly to parens patriae actions, therefore, faces an uphill battle.[280]

Regardless, Congress can easily resolve any doubt by simply adding five words to the statute. Just as it added language to allow for parens patriae claims under Section 1591, Congress should do the same to explicitly allow parens patriae claims to be brought under all sections of the statute. The amended Section 1595(d) should read as follows, with new language in italics:

> In any case in which the attorney general of a State has reason to believe that an interest of the residents of that State has been or is threatened or adversely affected by any person who violates *the provisions of this chapter,*

---

276. *State Farm Fire & Cas. Co.*, 137 S. Ct. at 443. Courts in other contexts have allowed parens patriae standing where such standing would comport with the purposes of the statute. *See, e.g.*, EEOC v. Fed. Express Corp., 268 F. Supp. 2d 192, 198 (E.D.N.Y. 2003) ("Reading [the enforcement provision of Title VII] to allow for *parens patriae* standing also comports with the remedial purposes of Title VII. Congress passed Title VII with the intention of eradicating employment discrimination from the national economy.").

277. Interview with Luis C.deBaca, former Ambassador-at-Large to Monitor and Combat Trafficking in Persons, U.S. Dep't of State, in New Haven, Conn. (Nov. 8, 2019) (on file with author).

278. *Id.*

279. *Id.*

280. Additionally, many state attorneys general routinely use their parens patriae authority in the employment context. In fact, in the Elk Grove case discussed in Part III, *supra*, the Illinois Attorney General's Office asserted its parens patriae interest "in the well-being of Illinois residents—both physical and economic." First Amended Complaint at 5, People *ex rel.* Madigan v. Xing Ying Emp't Agency, No. 15-cv-10235, 2018 WL 1397427 (N.D. Ill. Mar. 20, 2018). Furthermore, Flanagan reported that her office used parens patriae litigation frequently; for example, they asserted a parens patriae challenge to the overuse of illegal noncompete clauses in the state. Flanagan Interview, *supra* note 105. The leading Supreme Court case legitimating parens patriae actions also related to employment. *See* Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592 (1982). Puerto Rico filed suit against employers for failing to hire qualified Puerto Rican migrant farmworkers, subjecting native workers to worse working conditions than those temporary foreign workers were exposed to, and improperly terminating their employment. *Id.* at 597-98. Extending the power of attorneys general to also embrace trafficked workers is therefore not far removed from the status quo.

> the attorney general of the State, as parens patriae, may bring a civil action against such person on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

Amending the statute in this way comports with legislative intent and would simply make explicit what Congress likely thought was self-evident.[281]

If I am right to argue that the parens patriae power is already available under the TVPA, without further amendment, the next question is whether trafficking affects a "sufficiently substantial segment of [a state's] population."[282] The answer is surely yes. Trafficking has widely distributed harms—affecting not only trafficked workers but also other workers within the same industries. Businesses that traffic can pay their workers less or nothing at all, thereby depressing the wages of other workers or entirely shutting them out of the workforce.[283] Trafficked labor also undercuts the bargaining power of workers, allowing employers greater control over their employees' hours and wages.[284] For instance, it is dif-

---

281. State legislatures should do the same and amend the language of their states' antitrafficking laws. Illinois, in fact, has already done so, following advocacy by the attorney general's office. *See* Flanagan Interview, *supra* note 105. The legislature added the following section to the state's law: "A legal guardian, agent of the victim, court appointee, or, with the express written consent of the victim, organization that represents the interests of or serves victims may bring a cause of action on behalf of a victim. An action may also be brought by a government entity responsible for enforcing the laws of this State." 740 ILL. COMP. STAT. ANN. 128/15(a-1) (West 2019).

282. *Alfred L. Snapp & Son, Inc.*, 458 U.S. at 607. The *Snapp* Court, as mentioned, also requires that a state be more than a "nominal party" and that it express a "quasi-sovereign interest in the health and well-being . . . of its residents." *Id.* These requirements are easy to satisfy here. By suing under the TVPA, a state attorney general is acting not on behalf of purely private interests, but is vindicating the rights of all trafficked workers and workers generally within its state. *See* Elizabeth M. Wheaton et al., *Economics of Human Trafficking*, 48 INT'L MIGRATION 114, 132 (2010) (describing the effects of human trafficking on the community). A state clearly has an interest in protecting its residents from being forced to work against their will. Such conduct clearly implicates "the health and well-being" of its residents.

283. Wheaton et al., *supra* note 282, at 128 ("The low cost of illegal immigrant labour and trafficked labour in such enterprises as agriculture and construction tends to depress wages for legal immigrants as well as for citizen labourers.").

284. *See* Johannes Koettl, *Human Trafficking, Modern Day Slavery, and Economic Exploitation*, WORLD BANK SOC. PROT. & LABOR, 8 (May 2009), http://documents.worldbank.org/curated/en/208471468174880847/pdf/498020NWP0SP0d10Box341969B01PUBLIC1.pdf [https://perma.cc/K2TJ-ZTTB] ("Monopsonistic labor markets occur when employers face an inelastic labor supply and, as a consequence, enjoy superior bargaining power vis-à-vis workers. Theoretically, in a perfectly competitive labor market, the employer is a price taker on wages, so that the employer's decision to hire or not to hire workers has no effect on wages. If employers enjoy monopsony power, though, they can afford to take into account how the wage

ficult for workers to organize against employers in an industry in which employers can simply compel other laborers to do the work instead. Given these widespread harms, labor trafficking easily satisfies the legal requirement of affecting a sufficiently substantial segment of a state's population.[285]

Thus, it should be clear that Section 1595, as it currently stands, allows state attorneys general to bring parens patriae claims against traffickers. Congress's grant of authority, I have argued, is implicit in the text and purpose of the Act, and the conduct at issue plainly satisfies the Supreme Court's criteria for common-law standing. But why, exactly, should trafficking victims care about the parens patriae suit?

C. Benefits of the Proposed Strategy

Parens patriae actions are functionally similar to private class actions.[286] Both types of actions allege injury to a group of people and seek to vindicate the rights of that group through aggregated litigation.[287] Like class actions, parens patriae suits adjudicate the rights of individuals who play a less direct role in the bringing or trying of the case. But parens patriae actions benefit from important differences. For one, they are not subject to the increasingly restrictive demands of Rule 23.[288] They are also immune to challenges of forced arbitration, which

---

of the marginal worker—the 'last' worker the employer hires—affects the wages paid to all other workers." (footnote omitted)).

285. *See* sources cited *supra* note 244.

286. *See* Patrick Hayden, Comment, *Parens Patriae, the Class Action Fairness Act, and the Path Forward: The Implications of* Mississippi ex rel. Hood v. AU Optronics Corp., 124 YALE L.J. 563, 563 (2014) ("As [the Class Action Fairness Act (CAFA)] has channeled more class actions and other aggregated claims into the federal courts, the state attorneys general have more frequently brought parens patriae actions in state court—and, in some cases, those actions have looked increasingly like the class actions that CAFA seemed to target."). Although parens patriae confers standing, it does not itself give rise to a cause of action. To this end, states traditionally couple their parens patriae authority with any number of common-law or statutory claims.

287. *See* Edward Brunet, *Improving Class Action Efficiency by Expanded Use of* Parens Patriae *Suits and Intervention*, 74 TUL. L. REV. 1919, 1922 (2000) ("The nature of these suits is to achieve broad compensation, to deter wrongful conduct by one or more defendants, and to focus on injuries to a large set of state citizens.").

288. Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161, 173-74 (2014) (rejecting defendant's argument that Mississippi's parens patriae suit was "similar to a class action" because the state was the only named plaintiff, and unanimously holding that parens patriae suits would therefore not be subject to Rule 23 procedures and the Class Action Fairness Act); Texas v. Penguin Grp. (USA) Inc. (*In re* Elec. Books Antitrust Litig.), 14 F. Supp. 3d 525, 535 (S.D.N.Y. 2014) (holding in an antitrust case that "parens patriae actions are not class actions"

sometimes prevent plaintiffs from pursuing aggregate litigation.[289] And, perhaps most importantly, they do not rely on individual victims of trafficking—with limited understanding of the complex laws that protect them[290]—to initiate the cases themselves.

Parens patriae actions also help resolve some of the collective-action problems inherent in class actions. For example, as the cases cited in the Appendix and the following discussion suggest, defendants sometimes seek to settle class actions with individual plaintiffs, thereby avoiding trial or discovery while also insulating themselves from future liability.[291] These settlements, especially premature settlements, can create serious consequences for victims by preventing courts from granting victims' visa applications. This is precisely what happened in at least one case,[292] where two victims filed a motion for U visas *after* the class plaintiffs already settled their claims with the defendants. The judge had previously granted U visas to a number of other plaintiffs in the case. The settlement changed that. The judge noted that the settlement prevented her from granting the visas because she had not "adjudicated [either man's] status as . . . a victim of trafficking and forced labor,"[293] especially given that a term of the

and are therefore "not subject to the procedures set forth in Rule 23 that apply to class actions."); *see* Gilles & Friedman, *supra* note 121, at 660.

289. Courts compelled arbitration in two cases listed in the Appendix. Zendon v. Grandison Mgmt., Inc., No. 18-cv-04545, slip op. at 1 (E.D.N.Y. Dec. 7, 2018); Downer v. Royal Caribbean Cruises, Ltd., No. 11-cv-21948, 2012 WL 1866288, at *1 (S.D. Fla. May 31, 2012), *aff'd sub nom.* Brown v. Royal Caribbean Cruises, Ltd., 549 F. App'x 861 (11th Cir. 2013). This danger would be absent in the parens patriae context. No contractual obligation between employer and employee can purport to constrain the state itself from redressing widely distributed harms to its citizens.

290. *See supra* note 74 and accompanying text.

291. *See* Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717, 765-66 (2005) ("A settlement in a class action binds all the members of the class, just as a judgment would, even though absent class members never manifest the sort of individual consent or agreement that contract law would ordinarily require . . . . Settlement agreements almost always contain some form of release, . . . [which is] the contractual version of claim preclusion: an agreement not to assert specified claims against one's adversary in any future proceeding.").

292. Garcia v. Audubon Cmtys. Mgmt., L.L.C., No. 08-cv-1291, 2008 WL 1774584 (E.D. La. Mar. 17, 2008).

293. Letter from Hon. Helen G. Berrigan, Judge, E.D. La., to Marco Balducci (Sept. 19, 2014) (on file with author).

settlement agreement stipulated that the defendants would not admit to trafficking.[294] She therefore denied their motions for certification.[295] This problem of premature settlement would likely be absent in the parens patriae context because there are no individual plaintiffs with whom to settle; there is only the state.[296]

Parens patriae suits hold certain advantages over criminal prosecutions as well. One of the reasons prosecutions are so rare[297] is the heightened standard of proof for criminal convictions.[298] While civil plaintiffs merely need to prove their cases by a preponderance of the evidence, prosecutors must convince a judge or jury that a defendant is guilty beyond a reasonable doubt.[299] The problem is that "human trafficking cases are notoriously difficult to prove beyond a reasonable doubt."[300] One prosecutor commenting on why so few prosecutions have been brought against traffickers explained that "often these cases are very shrouded . . . . [T]hey're difficult cases just by the nature of the events of the

294. *Id.*

295. *Id.* ("Thus, I have no basis—adjudicative or otherwise—for certifying that [the applicants] were in fact the victims of trafficking and forced labor.").

296. Of course, the state might seek to settle claims sooner rather than later if the offer is attractive enough. But, since the case is coordinated by a central government official with a duty to safeguard its residents, rather than by a single plaintiff or her lawyer motivated by their own financial gain, one would expect the attorney general's office to ensure that all plaintiffs are protected before accepting a settlement agreement.

297. *See* discussion *supra* Section II.A.

298. *See* Amy Farrell et al., *Identifying Challenges to Improve the Investigation and Prosecution of State and Local Human Trafficking Cases*, NE. U. & URB. INST. 206 (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/238795.pdf [https://perma.cc/UX5D-98TS] ("[A prosecutor] needs to be convinced that they have enough evidence to prosecute before he will sign off on an indictment. It isn't just probable cause; it is having evidence beyond a reasonable doubt. This calculus changes depending on the facts of the case.") (quoting a prosecutor).

299. United States v. Regan, 232 U.S. 37, 49 (1914) ("The rule of evidence requiring proof beyond a reasonable doubt is generally applicable only in strictly criminal proceedings. It is founded upon the reason that a greater degree of probability should be required as a ground of judgment in criminal cases, which affect life or liberty, than may safely be adopted in cases where civil rights only are ascertained . . . . And in such actions . . . the general rule applicable to civil suits prevails, that proof by a reasonable preponderance of the evidence is sufficient." (quoting Roberge v. Burnham, 124 Mass. 277, 278 (1878))).

300. Kimberly Mehlman-Orozco & William Snyder, *Robert Kraft Spa Scandal: Sex Trafficking Is Hard to Prove, That Doesn't Mean It's a Lie*, USA TODAY (Apr. 4, 2019, 7:00 AM), https://www.usatoday.com/story/opinion/2019/04/04/robert-kraft-lawyers-sex-trafficking-conviction-difficult-column/3325857002 [https://perma.cc/85X9-BGP9]; *see* Farrell et al., *supra* note 298 (discussing the many problems that make proof beyond a reasonable doubt difficult in trafficking cases).

crime."[301] Another prosecutor, whose office has not brought a single trafficking case, explained that he would need to satisfy "a very high evidentiary standard to prove it up."[302] Because of that concern, he explained that he "really wouldn't want to touch it."[303] This anxiety over evidentiary burdens is absent in the parens patriae context. An attorney general need only prove that the defendant more likely than not engaged in trafficking.

This lighter burden is made lighter still by the different procedural rules that govern civil suits. The full panoply of constitutional rights and protections that pertain to criminal proceedings do not apply in the civil context.[304] For example, a civil defendant does not have the right to confront witnesses, and a court is free to draw adverse inferences from a defendant's refusal to testify.[305] The government can also appeal adverse civil decisions because there are no double jeopardy concerns.[306] Moreover, the court may grant summary judgment in civil cases.[307] Parens patriae suits thus alleviate the fear voiced by prosecutors that bringing a trafficking case could simply be too hard.

The parens patriae power also brings more bodies into the enforcement arena.[308] And these are not just any bodies; they are lawyers with the zeal and mandate to protect the public.[309] This expansion of enforcement to the offices of

---

301. Farrell et al., *supra* note 298, at 113 (quoting a prosecutor).

302. *Id.* at 146 (quoting a prosecutor).

303. *Id.*

304. United States v. Ward, 448 U.S. 242, 248 (1980) ("The distinction between a civil penalty and a criminal penalty is of some constitutional import. The Self-Incrimination Clause of the Fifth Amendment, for example, is expressly limited to 'any criminal case.' Similarly, the protections provided by the Sixth Amendment are available only in 'criminal prosecutions.' Other constitutional protections, while not explicitly limited to one context or the other, have been so limited by decision of this Court.").

305. Mitchell v. United States, 526 U.S. 314, 328 (1999).

306. Helvering v. Mitchell, 303 U.S. 391, 402 (1938).

307. FED. R. CIV. P. 56.

308. Congress has recognized the utility in numbers. When debating the 2018 amendment allowing for parens patriae actions against online web hosts who facilitated trafficking of minors, members of Congress argued that the new law would bring more resources to bear on the problem. *See* 164 CONG. REC. S1,865 (daily ed. Mar. 21, 2018) (statement of Sen. Sullivan) ("We are bringing the resources in these kind[s] of cases. That is an important innovation in the development of the bill that we are voting on today. Just like in the previous legislation, State attorneys general can now bring these cases. If we pass this law today, that will mean more resources, more investigators, and more prosecutors for the perpetrators of these heinous crimes.").

309. *See* Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 270 (5th Cir. 1976) (quoting State *ex rel.* Att'y Gen. v. Gleason, 12 Fla. 90, 112 (1869)) ("The Attorney-General is the attorney and

state attorneys general is particularly important in the fight against a problem as pervasive as labor trafficking. It touches every single state in the country[310] and affects "both rural and urban areas . . . , with victims who are both U.S. citizens and migrant workers of any gender, race, and sexual orientation."[311] But cracking down on labor trafficking today is often difficult because investigators simply cannot identify or establish contact with victims.[312] Bringing state attorneys general into the fold can exponentially expand these efforts: not only can attorneys general direct law enforcement to conduct investigations, but they can also conduct investigations themselves. This is possible because many offices of state attorneys general maintain in-house, full-time, and experienced investigators.[313]

These numerical advantages are amplified by the capacity of state attorneys general to leverage the capital resources and expertise of the private bar and public-interest lawyers.[314] State attorneys general routinely retain outside lawyers on complex cases, entering into contingent-fee arrangements in which outside counsel fronts the costs of investigation and litigation.[315] The rest of the reward

legal guardian of the people . . . . [A]nd it is his duty to use means most effectual to the enforcement of the laws, and the protection of the people, whenever directed by the proper authority, or when occasion arises . . . .").

310. *Hotline Statistics*, NAT'L HUM. TRAFFICKING HOTLINE, https://humantraffickinghotline.org/states [https://perma.cc/W7EE-QZXQ].

311. Dominique Roe-Sepowitz et al., *A Four-Year Analysis of Labor Trafficking Cases in the United States: Exploring Characteristics and Labor Trafficking Patterns*, ARIZ. ST. U. ii (Feb. 2018), https://socialwork.asu.edu/sites/default/files/stir/v9_national_labor_trafficking_study.pdf [https://perma.cc/BH3U-J7Y9].

312. Amy Farrell et al., *Capturing Human Trafficking Victimization Through Crime Reporting*, NAT'L INST. JUST. 1 (2019), https://www.ncjrs.gov/pdffiles1/nij/grants/252520.pdf [https://perma.cc/4P58-4F39] ("In the sites studied, law enforcement personnel struggled to identify human trafficking cases . . . . The identification of labor trafficking victims was particularly difficult, and in some cases non-existent for both law enforcement and service providers.").

313. Chris Toth, *Criminal Justice*, *in* STATE ATTORNEYS GENERAL POWERS AND RESPONSIBILITIES 313 (Emily Myers ed., 2013). For example, the Nevada Attorney General's office has approximately forty investigators in their Reno, Carson City, and Las Vegas offices who "are distributed amongst the various units in the offices and have full arrest power and peace-officer status." *Id.*

314. Offices of state attorneys general with well-developed labor units and sufficient manpower and resources need not contract with private lawyers at all. Gerstein notes that, during her time as Director of the New York Attorney General's Labor Bureau, her office never contracted with private counsel. Gerstein Interview, *supra* note 189.

315. *See* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 4 (2000).

goes to the state, which in turn distributes funds to compensate the injured parties and other stakeholders.[316] Examples of this model of public-private collaboration at the state level abound, from the famous tobacco litigation of the 1990s[317] to the vitamins litigation in the early 2000s[318] and the massive suits against lead-paint manufacturers,[319] Microsoft,[320] and health-maintenance organizations.[321]

State attorneys general also partner with outside lawyers on more traditional legal-aid work. For example, the Massachusetts Attorney General's Office partnered with a legal-services organization in Boston in 2018 to help represent low-income victims of wage theft and individuals in debt-collection cases.[322] In their first eighteen months, the partnership assisted victims in 44 wage-theft cases and 487 consumer-debt cases, securing more than $640,000 in debt relief and $24,626 in stolen wages.[323] In the trafficking context, state attorneys general can similarly contract with outside lawyers, who can assist in investigating and litigating cases—all under the supervision, in the name, and on behalf of the state.[324]

---

316. For an example of this arrangement, see State v. Lead Indus. Ass'n, 898 A.2d 1234, 1235 n.4 (R.I. 2006), which sets out the terms of the Rhode Island Attorney General's retainer agreement with outside counsel in the state's lead paint litigation.

317. *See* sources cited *supra* note 234.

318. *See* JOHN M. CONNOR, GLOBAL PRICE FIXING 409 (2007) (explaining that "[t]he only recourse in federal courts for indirect buyers injured by price fixing conspiracies is for the attorney general of their state to bring a *parens patriae* case for them" and describing "a settlement between the Big Six vitamin makers and 24 attorneys general").

319. For example, in one lead-paint case in Rhode Island, State Attorney General Sheldon Whitehouse hired a private plaintiffs' firm and filed suit against lead-paint companies including Sherwin-Williams, NL Industries, and Millennium Holdings. Lead Indus. Ass'n, 951 A.2d 428 (R.I. 2008). Attorney General Whitehouse set the parameters for the collaboration, requiring that the private attorneys front all legal fees. *See Lead Indus. Ass'n*, 898 A.2d at 1235 n.4 (listing the terms of the retainer agreement). He also set a contingent fee structure such that private counsel would receive 16.7% of any award, with the rest of the award going to the state and those who suffered from exposure to lead paint. *Id.*

320. *See* Erichson, *supra* note 315, at 4.

321. *See* Ratliff, *supra* note 230, at 1848.

322. *LSC Awards Pro Bono Innovation Grants to Assist Low-Income Americans*, LEGAL SERV. CORP. (Aug. 15, 2019), https://www.lsc.gov/media-center/press-releases/2019/lsc-awards-pro-bono-innovation-grants-assist-low-income-americans [https://perma.cc/5TR2-TLFF].

323. *Id.*

324. Courts have broadly validated the contingency-fee arrangement between state attorneys general and outside attorneys. As long as the office of the attorney general "retains absolute and total control over all critical decision-making," the practice is generally immune from chal-

Currently, traffickers have little to fear. Criminal prosecutions are exceedingly rare,[325] and private class actions are too often frustrated by the procedural barriers of Rule 23.[326] Of the suits that are filed, most are simply not considered newsworthy. The parens patriae power can change that. As Burt Johnson put it,

> When the A[ttorney] G[eneral] issues their press release and holds a press conference, that gets covered—period . . . . It's a fight to get earned media if you're in the private bar . . . you're not going to just send out a press release and get every media outlet in town there. But if you're the A[ttorney] G[eneral], you will.[327]

The prospect of hearing your name mentioned on the six o'clock news might be a valuable deterrent indeed.

Using the parens patriae power to bring TVPA claims becomes especially crucial when we consider that some state attorneys general lack the authority to bring claims on behalf of workers. California, for instance, places sole enforcement power for the state's employment laws in the state labor department.[328] The California Attorney General, though, has managed to largely sidestep this constitutional problem by bringing claims on behalf of workers under the state's unfair-competition laws.[329] In states that follow a similar scheme, the TVPA option might likewise provide another avenue of redress for state attorneys general. Because the TVPA is a federal trafficking statute—not a state employment law—it can be broadly enforced, regardless of what any particular state statute commands. This can dramatically enhance enforcement and protection of workers'

---

lenge. *Lead Indus. Ass'n*, 951 A.2d at 475 (emphasis omitted) ("[T]here is nothing unconstitutional or illegal or inappropriate in a contractual relationship whereby the Attorney General hires outside attorneys on a contingent fee basis to assist in the litigation of certain non-criminal matters. Indeed, it is our view that the ability of the Attorney General to enter into such contractual relationships may well, in some circumstances, lead to results that will be beneficial to society—results which otherwise might not have been attainable." (emphasis omitted) (footnote omitted)).

325. *See* Roe-Sepowitz et al., *supra* note 311, at iii, 6 (finding that just twenty states documented arrests for labor trafficking between 2013 and 2016, and only 125 traffickers were arrested in total).

326. *See infra* Appendix.

327. Johnson Interview, *supra* note 91.

328. Peter Romer-Friedman, *Eliot Spitzer Meets Mother Jones: How State Attorneys General Can Enforce State Wage and Hour Laws*, 39 COLUM. J.L. & SOC. PROBS. 495, 516 (2006).

329. *See* Gerstein Interview, *supra* note 189; *see also* Press Release, Cal. Att'y Gen., Brown Sues Farm Labor Contractor for Worker Safety and Wage Law Violations (Mar. 10, 2010), https://oag.ca.gov/news/press-releases/brown-sues-farm-labor-contractor-worker-safety-and-wage-law-violations [https://perma.cc/HD57-FPSF].

rights in the states that currently forbid their attorney general's involvement in this important arena.

Using the TVPA as a civil tool against traffickers is also important because many state attorneys general lack the power to prosecute human-trafficking cases. In at least twelve states, state attorneys general are either forbidden from prosecuting human-trafficking cases specifically or lack criminal powers generally.[330] Two of these states, Illinois and Washington, reported some of the highest numbers of human-trafficking victims in the country.[331] In these states, it makes little sense to eject the attorney general from the enforcement arena. Parens patriae suits brought under the TVPA provide attorneys general with the power to come back in.[332]

CONCLUSION

Hundreds of thousands—potentially millions—of workers in the United States today are trafficked for their labor.[333] Yet recent attempts to vindicate the rights of victims and crack down on traffickers have largely proved unavailing. Although Congress passed the TVPA in 2000, police and prosecutors have brought successful prosecutions against only a small segment of perpetrators.[334] Following the 2003 enactment of a private right of action in the TVPA, victims began

330. Philip Marcelo, *State Prosecutors Struggle with Human Trafficking Cases*, ASSOCIATED PRESS (May 26, 2019), https://apnews.com/a27focb72b4a48ca96f9b8249480d579 [https://perma.cc/2GZH-88EQ].

331. *Hotline Statistics*, *supra* note 310.

332. Aggregate actions brought by state attorneys general in partnership with legal-services organizations can also help bypass a 1996 federal law that prohibits many legal-aid organizations from litigating class actions. The law specifically targets any organization that receives grant funding from the Legal Services Corporation (LSC). *About Statutory Restrictions on LSC-Funded Programs*, LEGAL SERV. CORP. (2020), https://www.lsc.gov/about-statutory-restrictions-lsc-funded-programs [https://perma.cc/9MAN-P7YK]; *see also The GOP Plot to Destroy Legal Aid*, MOTHER JONES (Feb. 14, 2011), https://www.motherjones.com/politics/2011/02/gop-slashes-legal-aid-funds [https://perma.cc/M3Q6-FG9H] (quoting Rebekah Diller ("Many times, particularly when you have consumer fraud and widespread systemic problems, the best way to get at that is with a class action. . . . But because of the restrictions, most of the law offices that help low-income people can't do that.")). As the largest single funder of civil legal aid in the country, LSC's class-action prohibition means that more than eight hundred of the country's most important legal-aid offices are unavailable to low-income plaintiffs attempting to pursue class claims. *Id.* By bringing these legal-aid lawyers into parens patriae suits, state attorneys general can provide a resource to trafficking victims that the law has thus far withheld.

333. *See supra* note 32 and accompanying text.

334. *See* discussion *supra* Section II.A.

seeking justice for themselves, increasingly through the class action. Unfortunately, these efforts, too, have often failed.

To remedy the problems inherent in TVPA class actions, this Note has argued that state attorneys general should expand the scope of their litigation beyond traditional labor- and employment-law claims to bring representative suits against labor traffickers. By making unprecedented use of their parens patriae power, this move would allow states to vindicate the rights of their residents without the procedural hurdles of a private class action. To avoid the administrative costs and capacity problems inherent in vesting power in yet another governmental entity, I have argued that state attorneys general can leverage the power of the private bar and the expertise of public-interest lawyers. By bringing these outside attorneys into the fold, states would reach more victims, avoid prohibitive spending, and provide stronger deterrents against labor trafficking.

Labor trafficking is seldom a solitary affair. Workers languish with others similarly situated. Like the six hundred men trapped in Signal's labor camps, they live together, work together, and suffer together. But procedural hurdles have thus far obstructed victims from going to court together. The parens patriae power can change that. It must change that.

APPENDIX

TABLE A1.
FEDERAL CLASS ACTIONS PLEADING TVPA CLAIMS (2002-2019)

	Class Certification . . .			Case . . .			
Case Name[335]	**Denied**	**Granted**	**Pending**	**Settled Before Class Cert. Ruling**	**Dismissed**	**Compelled into Arbitration**	**Alleged TVPA Violation(s) and Claim(s)**
Roe v. Bridgestone Corp., No. 06-cv-00627 (C.D. Cal. Apr. 19, 2006)					*		18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1595
H. v. Garcia-Botello, No. 02-cv-00523 (W.D.N.Y. Oct. 27, 2006)	*						18 U.S.C. § 1589
David v. Signal International LLC, No. 08-cv-01220 (E.D. La. Mar. 7, 2008)	*						18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1592(a) 18 U.S.C. § 1594(a) 18 U.S.C. § 1595
Garcia v. Audubon Communities Management, LLC, No. 08-cv-01291 (E.D. La. Mar. 17, 2008)				*			18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1594(a) 18 U.S.C. § 1595(a)
Headley v. Church of Scientology International, No. 09-cv-03987 (C.D. Cal. May 19, 2009)					*		18 U.S.C. § 1589 18 U.S.C. § 1593 18 U.S.C. § 1595

335. The date associated with each case refers to the filing asserting TVPA claims.

Van Dusen v. Swift Transportation Co., No. 10-cv-00899 (S.D.N.Y. Mar. 24, 2010)				⋆			18 U.S.C. § 1589 18 U.S.C. § 1595
Nunag-Tañedo v. East Baton Rouge Parish School Board, No. 10-cv-01172 (C.D. Cal. Aug. 5, 2010		⋆					18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1592 18 U.S.C. § 1594(a)
Brown v. Royal Caribbean, No. 11-cv-21948 (S.D. Fla. May 27, 2011)						⋆	18 U.S.C. § 1595
Antigo v. Lombardi, No. 14-cv-00079 (S.D. Miss. Oct. 28, 2011)					⋆[336]		18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1592 18 U.S.C. § 1594
Baricuatro v. Industrial Personnel & Management Services, Inc., No. 11-02777 (E.D. La. Nov. 08, 2011)	⋆						18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1592 18 U.S.C. § 1594(a) 18 U.S.C. § 1595
Amerineni v. Maruthi Technologies LLC, No. 11-cv-03548 (N.D. Tex. Dec 22, 2011)					⋆		18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1595
Smith v. Bulls-Hit Ranch & Farm, Inc., No. 12-cv-00449 (M.D. Fla. Apr. 23, 2012)				⋆			18 U.S.C. § 1589 18 U.S.C. § 1595
Panwar v. Access Therapies, Inc., No. 12-cv-0619 (S.D. Ind. May 25, 2012)	⋆						18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1595

336. After failure by plaintiffs to file a motion to certify the class, the court severed the plaintiffs because "the transactions and occurrences which give rise to their purported claims are predominantly individualized and will require individualized proof, both as to liability and damages." Following other delays in filing by plaintiffs, the court dismissed the case sua sponte. Technically, this is a dismissal, but the reasons for the court's dismissal appear to be class-based.

Castellanos v. Worldwide Distribution Systems USA L.L.C., No. 14-cv-12609 (E.D. Mich. July 02, 2014)	*						18 U.S.C. § 1589 18 U.S.C. § 1595
Menocal v. GEO Grp., No. 14-cv-02887 (D. Colo. Oct. 22, 2014)		*					18 U.S.C. § 1589 18 U.S.C. § 1593 18 U.S.C. § 1595
Saiyed v. Archon, Inc., No. 14-cv-06862 (E.D.N.Y. Nov. 21, 2014)			*				18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1595
Jenkins v. City of Jennings, No. 15-cv-00252 (E.D. Mo. Feb. 8, 2015)				*			18 U.S.C. § 1589 18 U.S.C. § 1593A 18 U.S.C. § 1595
McCullough v. City of Montgomery, No. 15-cv-00463 (M.D. Ala. July 1, 2015)				*			18 U.S.C. § 1589 18 U.S.C. § 1593A 18 U.S.C. § 1595
Hawkins v. Man Tech International Corp., No. 15-cv-02105 (D.D.C. Dec. 4, 2015)			*				18 U.S.C. § 1589 18 U.S.C. § 1592 18 U.S.C. § 1593 18 U.S.C. § 1595
Ibarra v. GEO Grp., No. 16-cv-00055 (S.D. Ga. July 12, 2016)					*		18 U.S.C. § 1589 18 U.S.C. § 1593 18 U.S.C. § 1595
Quintanilla Vasquez v. Libre by Nexus, Inc., No. 17-cv-00755 (N.D. Cal. Feb. 15, 2017)			*				18 U.S.C. § 1589
Paguirigan v. Prompt Nursing Employment Agency LLC, No. 17-cv-01302 (E.D.N.Y. Mar. 7, 2017)		*					18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1594 18 U.S.C. § 1595
Owino v. CoreCivic, Inc., No. 17-cv-01112 (S.D. Cal. May 31, 2017)			*				18 U.S.C. § 1589 18 U.S.C. § 1593 18 U.S.C. § 1595

Brantley v. Handi-House Mfg. Co., No. 17-cv-00089 (S.D. Ga. June 29, 2017)	*						18 U.S.C. § 1593A 18 U.S.C. § 1595
Casilao v. Hotelmacher LLC, No. 17-cv-00800 (W.D. Okla. July 26, 2017)			*				18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1593A 18 U.S.C. § 1594 18 U.S.C. § 1595
Copeland v. C.A.A.I.R., No. 17-cv-00564 (N.D. Okla. Oct. 10, 2017)			*				18 U.S.C. § 1589
Carter v. Paschall Truck Lines, Inc., No. 18-cv-00041 (E.D. Pa. Oct. 11, 2017)			*				18 U.S.C. § 1589 18 U.S.C. $ 1595
Norrid v. D.A.R.P., Inc., No. 17-cv-00401 (E.D. Okla. Nov. 01, 2017)					*		18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1593A 18 U.S.C. § 1594 18 U.S.C. § 1595
United States *ex rel.* Lesnik v. Eisenmann SE, No. 16-cv-01120 (N.D. Cal. Nov. 17, 2017)					*		18 U.S.C. § 1589 18 U.S.C. § 1595
Novoa v. GEO Grp., No. 17-cv-02514 (C.D. Cal. Dec. 19, 2017)			*				18 U.S.C. § 1589(a) 18 U.S.C. § 1594(a)
Gonzalez v. CoreCivic, Inc., No. 17-cv-02573 (S.D. Cal. Dec 27, 2017)			*				18 U.S.C. § 1589(a) 18 U.S.C. § 1594(a)
Figgs v. GEO Grp., No. 18-cv-00089 (S.D. Ind. Jan. 11, 2018)			*				18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1595
Rosas v. Sarbanand Farms, LLC, No. 18-cv-00112 (W.D. Wash. Jan. 25, 2018)		*					18 U.S.C. § 1589 18 U.S.C. § 1595(a)

Gonzalez v. CoreCivic, Inc., No. 18-cv-00169 (W.D. Tex. Feb. 22, 2018)			*				18 U.S.C. § 1589 18 U.S.C. § 1593 18 U.S.C. § 1595(a)
Barrientos v. CoreCivic, Inc., No. 18-cv-00070 (M.D. Ga. Apr. 17, 2018)			*				18 U.S.C. § 1589 18 U.S.C. § 1594(a) 18 U.S.C. § 1595
Gilbert v. Lopez, No. 18-cv-00981 (D. Colo. May 4, 2018)			*				18 U.S.C. § 1589 18 U.S.C. § 1595(a)
Francis v. Apex USA, Inc., No. 18-cv-00583 (W.D. Okla. June 15, 2018)			*				18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1593A 18 U.S.C. § 1594 18 U.S.C. § 1595
Pryor v. USA Diving, Inc., No. 18-cv-02113 (S.D. Ind. July 11, 2018)			*				18 U.S.C. § 1589(a) 18 U.S.C. § 1590(a) 18 U.S.C. § 1595(a)
Zendon v. Grandison Management, Inc., No. 18-cv-04545 (E.D.N.Y. Aug. 11, 2018)			*				18 U.S.C. § 1589 18 U.S.C. § 1590 18 U.S.C. § 1594(b) 18 U.S.C. § 1595
Matos Rodriguez v. Pan American Health Org., No. 18-cv-24995 (S.D. Fla. Nov. 30, 2018)						*	18 U.S.C. § 1589 18 U.S.C. § 1590
Total	**6**	**4**	**16**	**5**	**7**	**2**	