COME, STAY, AND ENJOY YOUR DAY: SEX TRAFFICKING AND FRANCHISOR LIABILITY UNDER SECTION 1595 OF THE TRAFFICKING VICTIMS PROTECTION REAUTHORIZATION ACT

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Abstract

Commercial sex trafficking continues to be a major national and international issue. In 2000, Congress enacted the Trafficking Victims Protection Act to combat sex trafficking, protect victims, and punish violators through developing international minimum standards and a complex, national legal scheme for bringing human trafficking claims. In 2003, Congress added § 1595, a civil liability statute, which it broadened even further in 2008. However, the statute remained largely unused during its first fifteen years, spawning less than 300 claims, most of which involved forced labor and not sex trafficking. However, victims of sex trafficking are starting to utilize the statute to hold third parties accountable for benefitting from sex trafficking and doing nothing to prevent it.

The hospitality industry plays a unique role in the sex trafficking industry. Hotels are a leading venue for sex trafficking, reporting more incidents than brothels. While many hotel franchisors established policies and training to recognize sex trafficking, hotels and their franchisors continue to benefit from the continued use of their hotel rooms for sex trafficking ventures. However, the implementation of these policies and training could make hotel franchisors vicariously or directly liable for sex trafficking under § 1595. If a hotel franchisor implements a franchise-wide policy and enforces it, the hotel franchisor risks creating an agency relationship regarding sex trafficking, potentially becoming vicariously liable for the negligence of its hotel franchisees. Likewise, if a hotel franchisor implements a policy but fails to ensure its efficient enforcement, the hotel franchisor could be directly liable for neglecting a duty it voluntarily undertook. While § 1595 can be used to hold hotel franchisors' feet to the fire in combatting sex trafficking, this use could also discourage hotel franchisors from taking any actions at all.

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INTRODUCTION

A male guest checks into a hotel with a young woman.[1] He pays for a week-long stay with a prepaid credit card.[2] The young woman avoids eye contact and has little, if any, luggage, and no phone, wallet, or identification.[3] Hotel staff can see that she is visibly injured, with prominent bruising on her body.[4] Although the man pays, only the

1. A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 189–90 (E.D. Pa. 2020).
2. *Id.*
3. *Id.* at 178.
4. *Id.* at 178, 189.

woman proceeds to the room.[5] Each day, as many as six different men enter and leave the room, walking straight through the main lobby twice.[6] Altercations and attacks frequently occur, often loud enough for hotel staff and patrons to hear.[7] When the man and young woman check out, housekeeping enters the room to find broken items, used condoms, and other sex paraphernalia.[8] For two years, at the same three hotels, the same traffickers checked in the same young woman repeatedly with the same results.[9]

A version of this scene plays out in hotels across the United States on a regular basis.[10] Many cases include requests for excessive linens and towels, but include constant declinations for housekeeping.[11] Victims allege that the signs of sex trafficking are clear, yet the hotels take no action.[12] Do hotels have a responsibility to take affirmative action to stop sex trafficking when signs of it appear? Are the hotels civilly liable for their inaction? Are the corporations who own the franchised hotels civilly liable for the inactions of their hotel franchisees? While the answers to the first two questions are most likely yes, the answer to the last question depends on how broadly the courts interpret § 1595 of the Trafficking Victims Protection Reauthorization Act (TVPRA).[13]

Congress enacted the Trafficking Victims Protection Act (TVPA) in 2000[14] to combat human trafficking in the United States.[15] When it was reauthorized in 2003,[16] Congress provided victims with a private right of action against their traffickers.[17] In 2008, Congress expanded the TVPA's civil liability provision even more by reducing the standard of liability to include anyone who knowingly benefited from a venture that they knew

5. *Id.* at 189.

6. *See id.*

7. *Id.* at 189–90.

8. *Id.* at 189.

9. *Id.*

10. *See, e.g.*, M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 962 (S.D. Ohio 2019); Doe #1 v. Red Roof Inns, No. 1:19-cv-03840, 2020 WL 1872335, at *1 (N.D. Ga. Apr. 13, 2020), *aff'd*, 21 F.4th 714 (11th Cir. 2021); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-cv-00656, 2020 WL 4368214, at *1 (N.D. Cal. July 30, 2020); S.J. v. Choice Hotels Int'l, Inc., 473 F. Supp. 3d 147, 150–51 (E.D.N.Y. 2020); S.Y. v. Naples Hotel Co., 476 F. Supp. 3d 1251, 1257 (M.D. Fla. 2020).

11. *See M.A.*, 425 F. Supp. 3d at 962; *S.J.*, 473 F. Supp. 3d at 151; *S.Y.*, 476 F. Supp. 3d at 1257.

12. *See M.A.*, 425 F. Supp. 3d at 962.

13. *See* 18 U.S.C. § 1595.

14. Pub. L. No. 106-386, 114 Stat. 1464 (codified at 18 U.S.C. §§ 1589–1594, 22 U.S.C. §§ 7101–7110, and 22 U.S.C. § 2152d).

15. Gallant Fish, *No Rest for the Wicked: Civil Liability Against Hotels in Cases of Sex Trafficking*, 23 BUFF. HUM. RTS. L. REV. 119, 120 (2016–17).

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

17. 18 U.S.C. § 1595 (providing a civil remedy for human trafficking victims).

or should have known involved sex trafficking.[18] Although this expanded provision has existed for over twelve years, litigation of civil suits against hotel franchisors for sex trafficking that occurred at franchisee sites is occurring for the first time throughout the United States.[19] Courts throughout the country are trying to interpret this rewritten statute and determine its scope.[20] What meets the requirements of (1) "whoever knowingly benefits, financially or by receiving anything of value from," (2) "participation in a venture," and (3) "which that person knew or should have known has engaged in an act in violation of this chapter"?[21] Additionally, there is a question as to the role public policy arguments play in the statute's interpretation. While modern adaptation is acceptable, the counter-majoritarian difficulty cannot be ignored, especially where a broad interpretation of the statute could have a significant impact on well-established federal and state franchise law.

This Note will review the history of the TVPA, suggest the appropriate application of § 1595, and address the implications of the suggested interpretation. Part I will discuss the legislative history and goals of the TVPA as a whole. It will then focus on the plain language of § 1595, compare the language to that of the rest of the TVPA, and suggest a broad reading of the civil liability provision. Part II will argue that the statute should apply to hotel franchisors under both vicarious liability and direct liability theories where a hotel franchisor has established training and policies regarding sex trafficking. Under a vicarious liability claim, the hotel franchisor has likely created an agency relationship by implementing training and policies franchise-wide and did not leave combatting sex trafficking to the hotel franchisee's discretion.[22] Thus, the hotel franchisor's action creates a day-to-day control over combatting sex trafficking, and negligence can be imputed.[23] Under a direct liability claim, the focus shifts to the specific training and policies implemented.[24]

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18. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (codified as amended at 18 U.S.C. § 1595).

19. *See, e.g.*, M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959 (S.D. Ohio 2019); Doe #1 v. Red Roof Inns, No. 1:19-cv-03840, 2020 WL 1872335 (N.D. Ga. Apr. 13, 2020), *aff'd*, 21 F.4th 714 (11th Cir. 2021); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171 (E.D. Pa. 2020); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-cv-00656, 2020 WL 4368214 (N.D. Cal. July 30, 2020); S.J. v. Choice Hotels Int'l, Inc., 473 F. Supp. 3d 147 (E.D.N.Y. 2020); S.Y. v. Naples Hotel Co., 476 F. Supp. 3d 1251 (M.D. Fla. 2020).

20. *See* Doe #3 v. Red Roof Inns, No. 1:19-cv-03843, 2020 WL 4938667, at *1 (N.D. Ga. Apr. 29, 2020), *aff'd*, 21 F.4th 714; *A.B.*, 455 F. Supp. 3d at 174; *see also, e.g.*, *M.A.*, 425 F. Supp. 3d at 964–71 (discussing the scope of the TVPRA and how other courts have interpreted it); *B.M.*, 2020 WL 4368214, at *3–7 (same); *S.J.*, 473 F. Supp. 3d at 152–56 (same); *S.Y.*, 476 F. Supp. 3d at 1255–58 (same).

21. 18 U.S.C. § 1595.

22. *See* discussion *infra* Section II.B.

23. *See* discussion *infra* Section II.B.

24. *See* discussion *infra* Section II.C.

If a court finds the hotel franchisor implemented insufficient training or policies, or inadequately enforced them, that franchisor can be held directly liable.[25]

Since this conclusion is contrary to established franchise law, Part III will discuss the pros and cons of this interpretation. It will evaluate the public benefits and concerns, while also considering the rights and protections of sex trafficking victims and hotel franchisors. Overall, Part III will suggest that, as written, § 1595 turns every possible hotel franchisor action to combat sex trafficking into a negative outcome, thereby discouraging franchisors from taking any action at all.[26] Finally, Part IV will recommend several options for correcting the deficiencies that the broadness of the statute creates.

I. INTERPRETING § 1595

One of the primary purposes of the judiciary is to interpret the statutes Congress has enacted.[27] Courts interpret statutes by applying the ordinary public meaning of the terms that existed at the time of enactment.[28] If the statute is unambiguous, the court applies the ordinary meaning and the court's job is complete.[29] Where ambiguity exists, courts consider legislative history to help determine legislative intent.[30] However, it is important to note that a statute's application is not necessarily limited to the "principal evil"—Congress's primary reason for passing that statute—but often extends to "reasonably comparable evils."[31] While the specific text and the legislature's primary intent are important considerations, unforeseen applications of a statute to new situations do not introduce ambiguity, but instead, demonstrate the scope of the statute.[32]

A. *Legislative History and Goals of the TVPA*

Congress enacted the Trafficking Victims Protection Act of 2000 (TVPA) as part of the Victims of Trafficking and Violence Protection Act of 2000.[33] It was written to respond to the rapidly growing trafficking

25. *See* discussion *infra* Section II.C.

26. *See* discussion *infra* notes 159–63 and accompanying text.

27. *See* U.S. CONST. art. III, § 2, cl. 1.

28. Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1738 (2020).

29. *Id.* at 1749.

30. *Id.*

31. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79 (1998).

32. *Bostock*, 140 S. Ct. at 1749; *see also* District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (implying that the Court interprets and extends constitutional rights to include modern forms that did not exist during the founding).

33. Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 18, 22, 27, 34, and 42 U.S.C.).

industry.[34] The TVPA's purpose was to "combat trafficking in persons[,] . . . ensure just and effective punishment of traffickers, and to protect their victims."[35] The TVPA focused on protecting and assisting victims,[36] both citizens and non-citizens,[37] whether they are in the United States[38]or abroad,[39] while also strengthening the prosecution and punishment of human traffickers.[40] Congress found that existing legislation, in both the United States and in other countries, was insufficient to deter trafficking because there was no comprehensive law addressing the array of offenses in the trafficking scheme.[41] Additionally, official indifference, corruption, and participation in trafficking further impeded deterrence internationally.[42]

Further, Congress recognized trafficking as a "growing transnational crime" involving not only the sex industry but also forced labor.[43] The TVPA created an interagency task force to monitor and combat

34. The TVPA stated that "[t]rafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest growing source of profits for organized criminal enterprises worldwide." *Id.* at 1467.

35. *Id.* at 1466.

36. The TVPA addressed the inadequate services and facilities available to victims for "health care, housing, education, and legal assistance, which safely reintegrate trafficking victims into their home countries." *Id.* at 1468.

37. The TVPA was also concerned with current laws failing to protect foreign victims who, due to their status as illegal immigrants, often received harsher punishments than their traffickers. *Id.* To address this concern, the TVPA carved out an exemption from illegal acts committed "as a direct result of being trafficked" so as not to "inappropriately incarcerate[], fine[], or otherwise penalize[]" victims of trafficking. *Id.*

38. *Id.* at 1475. The TVPA developed assistance programs for victims of trafficking, regardless of their immigration statuses, established grants for "[s]tates, Indian tribes, units of local government, and nonprofit, nongovernmental victims' service organizations to develop, expand, or strengthen victim service programs for victims of trafficking," and implemented training for government personnel. *Id.* at 1475–77.

39. *Id.* at 1474–75 ("The Secretary of State and the Administrator of the United States Agency for International Development, in consultation with appropriate nongovernmental organizations, shall establish and carry out programs and initiatives in foreign countries to assist in the safe integration, reintegration, or resettlement, as appropriate, of victims of trafficking.").

40. *Id.* at 1486 (increasing the maximum sentence for various trafficking offenses from ten to twenty years and providing for life imprisonment in cases where the offender kidnapped, attempted to kidnap, killed, or attempted to kill the victim).

41. *Id.* at 1467. Congress found that current laws and law enforcement did not adequately reflect the gravity of trafficking offenses, stating that "even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment." *Id.* Congress also found the penalties for convicted traffickers were weak because the sentencing guidelines did not reflect the seriousness of the crimes. *Id.*

42. *Id.*

43. *Id.* at 1466. Further, Congress recognized that, while all people are at risk, traffickers primarily target women and children affected by poverty, lack of education, unemployment, and lack of economic opportunities. *Id.*

trafficking and concentrated on the need for international cooperation.[44] Through the development of minimum standards to eliminate human trafficking,[45] the TVPA provided the United States with a way to hold other countries accountable. For example, it established actions to take against non-complying countries.[46] It also amended the Foreign Assistance Act of 1961 to include assistance in drafting laws against trafficking, investigating and prosecuting traffickers, and creating and maintaining programs and facilities for trafficking victims.[47]

In 2003, Congress reauthorized the TVPA, established the civil liability statute,[48] as discussed below in Section I.B., expanded efforts in combatting the international sex trade and tourism, enhanced protection for trafficking victims and their families, and labeled human trafficking a crime under the Racketeer Influenced and Corrupt Organizations Act (RICO).[49] In 2008, Congress enhanced the civil action,[50] established an integrated database within the Human Smuggling and Trafficking Center, created the Presidential Award for Extraordinary Efforts to Combat Trafficking in Persons,[51] and enacted the Child Soldiers Prevention Act of 2008.[52] Most recently, in the 2017 reauthorization,[53] Congress established a requirement for concrete actions[54] to demonstrate meeting

44. *Id.* at 1473–74.

45. *See id.* at 1480–81.

46. *Id.* at 1482. The TVPA established a policy stating that the United States would not "provide nonhumanitarian, nontrade-related foreign assistance to any government" that did not comply with, or did not make significant efforts to comply with, the minimum standards. *Id.*

47. *Id.* at 1481–82.

48. *See* Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4(a)(4)(A), 117 Stat. 2875 (codified at 18 U.S.C. § 1595).

49. *See id.* at 2875–79.

50. William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 221, 122 Stat. 5044, 5067 (codified as amended at 18 U.S.C. § 1595); *see* discussion *infra* Section I.B.

51. The President can award the Presidential Award for Extraordinary Efforts to Combat Trafficking in Persons annually to up to five individuals or organizations for extraordinary efforts in combatting trafficking in persons. § 109, 122 Stat. at 5051. Individuals can be United States citizens or foreign nationals. *Id.* Organizations include United States organizations or foreign nongovernmental organizations. *Id.*

52. Congress determined that the United States "should condemn the conscription, forced recruitment, or use of children by governments, paramilitaries, or other organizations" as part of combatting human trafficking and ending the abuse of human rights. *Id.* at 5088. The Act states that the United States will neither provide assistance to countries that recruit or use child soldiers, nor direct commercial sales licenses for issuance of military equipment. *Id.* at 5089.

53. Trafficking Victims Protection Reauthorization Act of 2017, Pub. L. No. 115-427, 132 Stat. 5503 (codified at 6 U.S.C. § 7105b, 18 U.S.C. § 1595A, 22 U.S.C. § 7105b, and scattered sections of 34 U.S.C.).

54. Concrete actions "demonstrate increased efforts by the government of a country to meet the minimum standards for the elimination of trafficking" and include enforcement actions, active investigations and prosecutions, convictions, training, and implementations of programs to prevent trafficking. *Id.* at 5503.

the minimum standards, enhanced the actions taken against countries not meeting the minimum standards, and required increased communications between the Secretary of State and other countries about efforts for combatting human trafficking.[55] Each reauthorization attempted to enhance combatting human trafficking domestically and internationally, while also enhancing protection for victims and punishments for traffickers and other violators.

B. *Legislative History and Goals of § 1595*

In 2003, during the first reauthorization of the TVPA of 2000, Congress added § 1595 to enhance the protections for victims of human trafficking.[56] The statute stated that a person "who is a victim of a violation of section 1589, 1590, or 1591 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 fees."[57] Unfortunately, victims rarely utilized the new civil claim.[58] While Congress was not clear about its expectations or intent in implementing § 1595, the significantly low number of claims brought indicated Congress's goals were likely not met.[59]

In 2008, Congress enhanced the civil action by striking "of section 1589, 1590, or 1591" and adding: "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" after "perpetrator."[60] This expansion may have been an attempt to respond to the insignificant number of claims by making the civil remedy more available and viable for victims. The 2008 reauthorization also added a statute of limitations to the civil action of ten years from the date the cause of action occurred, or, if the victim was a minor at the time, ten years from the date that the victim turns eighteen.[61] Adding a statute of limitations effectively limits the claims that can be brought, which could signal that Congress attempted to broaden the range of potential defendants without opening the floodgates. Expanding the reach while adding a limitation makes sense to control the vast number of claims now available for victims to make.

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55. *See id.* at 5505–07.

56. Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 4, 117 Stat. 2875, 2878 (codified at 18 U.S.C. § 1595(a)), *amended by* William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, § 221, 122 Stat. 5044, 5067 (codified as amended at 18 U.S.C. § 1595(a)).

57. *Id.*

58. 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, 1668 (2007).

59. *Id.*

60. § 221, 122 Stat. at 5067.

61. *Id.* (codified at 18 U.S.C. § 1595(c)).

When Congress struck "of section 1589, 1590, or 1591" and added "or whoever" after "perpetrator," it intentionally broadened the scope of § 1595 so victims could hold a broad range of individuals—not just the victim's trafficker—civilly liable for the trafficking endured.[62] Additionally, when Congress amended § 1595, it could have modeled the standard of notice after the long-established criminal statute in § 1591, which requires actual notice.[63] Instead, utilizing the "knew or should have known" standard of constructive notice indicates that Congress intended to further broaden the scope of liable defendants.[64] Thus, Congress applied the "knew or should have known" standard to provide the victim with a lower bar to reach instead of requiring them to prove a defendant had actual notice.

C. *Standards for Meeting the Statutory Elements of § 1595*

Prior to the current cases under judicial review, no case law existed for defining § 1595's reference to (1) "whoever knowingly benefits, financially or by receiving anything of value from" (2) "participation in a venture" (3) "which that person knew or should have known has engaged in an act in violation of this chapter."[65] Courts are trying to determine the standards for satisfying these elements by looking to other sections of the TVPRA and the language of similar cases. The results, currently only at the district level with the exception of one recent appellate court decision,[66] have varied by jurisdiction.[67] Additionally, evaluating these elements' application to specific hotels rather than an entire hotel franchise challenges the recognized relationship between franchisor and franchisee. Part III will discuss the concerns and benefits when breaching the franchisor–franchisee relationship regarding sex trafficking civil liability.[68]

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62. M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 964 (S.D. Ohio 2019).

63. *See* 18 U.S.C. § 1591(a). The language of § 1595 nearly matches the language of § 1591 except for the level of notice required. *See* 18 U.S.C. § 1595.

64. Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

65. 18 U.S.C. § 1595; *see* Sandra Elizabeth Kowalski, *Holding Internet Advertising Providers Accountable for Sex Trafficking: Impediments to Criminal Prosecution and a Proposed Response*, 27 B.U. PUB. INT. L.J. 99, 120 (2018).

66. *See* Doe #1 v. Red Roof Inns, Inc., 21 F.4th 714, 723–26 (11th Cir. 2021).

67. *See, e.g.*, *M.A.*, 425 F. Supp. 3d 959; Doe #1 v. Red Roof Inns, No. 1:19-cv-03840, 2020 WL 1872335 (N.D. Ga. Apr. 13, 2020), *aff'd*, 21 F.4th 714; A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171 (E.D. Pa. 2020); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-cv-00656, 2020 WL 4368214 (N.D. Cal. July 30, 2020); S.J. v. Choice Hotels Int'l, Inc., 473 F. Supp. 147 (E.D.N.Y. 2020); S.Y. v. Naples Hotel Co., 476 F. Supp. 3d 1251 (M.D. Fla. 2020).

68. *See* discussion *infra* Part III.

1. Knowingly Benefits

Aside from the trafficker, "whoever knowingly benefits, financially or by receiving anything of value from" a sex trafficking venture could be civilly liable under § 1595.[69] Defendants to claims arising under § 1595 argue that, in order to prove a party "knowingly benefitted," the plaintiff must prove that the trafficker provided the benefit to the defendant in order to facilitate the trafficking.[70] However, while some cases reflect this view,[71] others have found that defendants benefitted merely from collecting payment regardless of the defendants' participation in any sex trafficking venture.[72]

In claims against hotel franchisees or hotel franchisors, the question is whether money received to rent and utilize a hotel room for trafficking constitutes a financial benefit.[73] Of the cases that specifically addressed this element, most held that receiving payment from the trafficker for the hotel room was enough to satisfy the "knowingly benefit" element.[74] However, the argument that hotel franchisees received a financial benefit for the specific room rented is stronger than the claim that the hotel franchisor, who receives a percentage of a hotel franchisee's overall profits but does not exercise control over its business, financially benefitted from that particular rental.[75] The hotel franchisor's gross profit includes, but is not exclusively, the revenue room rentals generate.[76]

2. Participation in a Venture

It is well-established under criminal statutes that the element of participation generally requires an "overt act" in furtherance of a crime.[77] However, courts have determined that applying the criminal standard to a civil claim defeats the purpose of utilizing the lower standard of

69. 18 U.S.C. § 1595(a).

70. *M.A.*, 425 F. Supp. 3d at 964.

71. *See, e.g.*, Geiss v. Weinstein Co. Holdings, LLC, 383 F. Supp. 3d 156, 169 (S.D.N.Y. 2019).

72. *See, e.g.*, Gilbert v. U.S. Olympic Comm., 423 F. Supp. 3d 1112, 1137–38 (D. Colo. 2019).

73. *See M.A.*, 425 F. Supp. 3d at 965; A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 190–91 (E.D. Pa. 2020); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-cv-00656, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020); S.Y. v. Naples Hotel Co., 476 F. Supp. 3d 1251, 1257 (M.D. Fla. 2020).

74. *See M.A.*, 425 F. Supp. 3d at 965; *A.B.*, 455 F. Supp. 3d at 191; *B.M.*, 2020 WL 4368214, at *4; *S.Y.*, 476 F. Supp. 3d at 1257.

75. *See* S.J. v. Choice Hotels Int'l, Inc., 471 F. Supp. 3d 147, 151, 154, 156 (E.D.N.Y. 2020); J.C. v. Choice Hotels Int'l, Inc., No. 20-cv-00155, 2020 WL 3035794, at *1 (N.D. Cal. June 5, 2020).

76. *See S.J.*, 471 F. Supp. 3d at 150–51.

77. *See, e.g.*, United States v. Ayfare, 632 F. App'x 272, 286 (6th Cir. 2016).

constructive notice that Congress provided in § 1595.[78] A venture is an undertaking involving risk.[79] While unclear, the legislative history of the TVPA and § 1595 indicate that Congress attempted to create a civil claim with lower standards than those required under the criminal statute.[80] Therefore, many courts have rejected defendants' arguments that actual participation is required to satisfy the "participation in a venture" element.[81]

While it is its own distinct element, the "knew or should have known" element greatly affects "participation in a venture." While many courts disagree on the level of mens rea required to constitute participation,[82] few courts have found that general knowledge that sex trafficking is prevalent in the hospitality industry is enough.[83] However, some courts accept a hotel franchisor's general knowledge that sex trafficking occurred at some of their hotel franchisees.[84] Other courts require specific evidence of sex trafficking at their franchisees' hotels for the specific participation alleged.[85] However, the question of whether mens rea should play a role in determining participation, or further, any role at all in a civil claim remains.

The arguments that franchisors meet the participation element stem from the repeated rentals of rooms to traffickers when key indicators are present.[86] In most cases, traffickers continuously use the same hotels to

78. *See M.A.*, 425 F. Supp. 3d at 968–69; *J.C.*, 2020 WL 3035794, at *1 n.1; *A.B.*, 455 F. Supp. 3d at 191.

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

80. *See supra* Section I.B.

81. *See, e.g.*, *M.A.*, 425 F. Supp. 3d at 971; *J.C.*, 2020 WL 3035794, at *1 n.1; *S.J.*, 473 F. Supp. 3d at 153; S.Y. v. Naples Hotel Co., 476 F. Supp. 3d 1251, 1256 (M.D. Fla. 2020).

82. While courts may disagree, the specific facts of each case play a major role in the determination. Stating that a defendant's mens rea is not met in a particular case does not necessarily indicate what would satisfy the requirement.

83. *See M.A.*, 425 F. Supp. 3d at 973; *S.J.*, 473 F. Supp. 3d at 154; *S.Y.*, 476 F. Supp. 3d at 1259.

84. *See* J.C. v. Choice Hotels Int'l, Inc., No. 20-cv-00155, 2020 WL 6318707, at *6 (N.D. Cal. Oct. 28, 2020) (holding that a franchisor could be directly liable when it had a system in place to monitor for illegal activity including human trafficking).

85. H.G. v. Inter-Continental Hotels Corp., 489 F. Supp. 3d 697, 705 (E.D. Mich. 2020); *S.J.*, 473 F. Supp. 3d at 154.

86. *See supra* text accompanying notes 1–11. In *A.B. v. Marriott International, Inc.*, the same traffickers repeatedly utilized the same three hotels for years without any interference from the hotel staff. 455 F. Supp. 3d 171, 189 (E.D. Pa. 2020). Although beyond the scope of this Note, if hotel franchisors provided policies and training about sex trafficking and its indicators, why did no one report any suspicion? Consider if the hotel staff possibly made reports that the hotel franchisee owner or hotel franchisor subsequently disregarded. Consider also if the training implemented was so ineffective that none of the hotel staff knew how or what to report.

carry out the sex trafficking.[87] Traffickers usually pay in cash and often ask for a room near an exit.[88] Sometimes they have a silent young woman with them and she may show some signs of abuse.[89] Regardless, the staff provides the room.[90] While no one can expect the front desk staff to remember every guest, even if some check in more frequently than others, paying in cash is uncommon enough that it may give rise to knowing participation. However, the uniform answer to whether the liability for the action (or inaction) of the hotel franchisee's staff, who continue to rent the rooms, extends from the hotel franchisee to the hotel franchisor remains undetermined.[91]

3. Knew or Should Have Known

Finally, the most controversial element of § 1595 is the "knew or should have known" standard. When Congress amended § 1595, it could have modeled the standard of notice after the long-established criminal statute in § 1591, which requires actual notice.[92] Instead, by utilizing the "knew or should have known" standard of constructive notice, Congress indicated that its intent was to broaden the scope of liable defendants.[93] In each case, the plaintiff alleges specific facts that occurred at specific hotels, similar to the examples given in the introduction such as payment in cash, deteriorating physical appearance of the plaintiff, asking for

87. *J.C.*, 2020 WL 6318707, at *5; *A.B.*, 455 F. Supp. 3d at 189; *see H.G.*, 489 F. Supp. 3d at 700; *see also M.A.*, 425 F. Supp. 3d at 970 (noting that the hotel repeatedly rented rooms to the same sex traffickers).

88. *See M.A.*, 425 F. Supp. 3d at 962; *S.Y.*, 476 F. Supp. 3d at 1257; *H.G.*, 489 F. Supp. 3d at 706; *S.J.*, 473 F. Supp. 3d at 151; *J.C.*, 2020 WL 6318707, at *5.

89. *See M.A.*, 425 F. Supp. 3d at 962; *S.J.*, 473 F. Supp. 3d at 151; *J.C.*, 2020 WL 6318707, at *5.

90. *See M.A.*, 425 F. Supp. 3d at 962; *S.J.*, 473 F. Supp. 3d at 150–51; *J.C.*, 2020 WL 6318707, at *5.

91. *See M.A.*, 425 F. Supp. 3d at 972 (holding that the hotel franchisor could be liable for sex trafficking based on a theory of vicarious liability); Doe #1 v. Red Roof Inns, Inc., No. 1:19-cv-03840, 2020 WL 1872335, at *3 (N.D. Ga. Apr. 13, 2020) (holding that the hotel franchisor could not be liable for sex trafficking because it did not interact with the plaintiff herself), *aff'd*, 21 F.4th 714 (11th Cir. 2021); *A.B.*, 455 F. Supp. 3d at 196 (holding that the hotel franchisor could be liable based on a principal-agent theory of liability); B.M. v. Wyndham Hotels & Resorts, Inc., No. 20-cv-00656, 2020 WL 4368214, at *4 (N.D. Cal. July 30, 2020) (rejecting a direct franchisor theory of liability, but accepting an agency theory of liability); *S.J.*, 473 F. Supp. 3d at 156 (rejecting a theory of vicarious liability unless the hotel franchisor has nearly complete control over the day-to-day operations of the hotel franchisee); *S.Y.*, 476 F. Supp. 3d at 1258 (accepting a vicarious liability theory).

92. *See* 18 U.S.C. § 1591(a).

93. 18 U.S.C. § 1595; Russello v. United States, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration in original) (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (5th Cir. 1972))).

excessive linens, and having male visitors daily.[94] In addition to those facts, plaintiffs claim that hotel franchisors breach their duties to guests by failing to implement and enforce policies to help combat human trafficking, such as providing mandatory training on the signs of sex trafficking, despite knowing the prevalence of sex trafficking within the hospitality industry.[95]

Whether the facts alleged in each case and against each defendant are sufficient to meet the "knew or should have known" standard at the motion-to-dismiss stage is evaluated on a sliding scale.[96] On one end are cases where the evidence indicates a continuous agreement between a hotel and trafficker for the trafficking being done,[97] and on the other end are cases where only a few incidents occurred during a long period of time.[98] Some courts have found that "failure to implement policies sufficient to combat a known problem in one's operations can rise to the level of willful blindness or negligence."[99] Therefore, at least for the purposes of stating a claim that can survive dismissal,[100] it is enough for a plaintiff to allege that defendants failed to implement policies to help prevent sex trafficking where defendants had general notice of the prevalence of sex trafficking in the hospitality industry, when coupled with facts specific to the plaintiff's own trafficking.[101] However, other courts have held that a plaintiff must claim that defendants knew or should have known about the "*particular* sex-trafficking venture in which the defendant[s are] alleged to have participated."[102]

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94. *See supra* text accompanying notes 1–11.

95. *E.g.*, *M.A.*, 425 F. Supp. 3d at 967.

96. *Id.* at 966.

97. *See* Ricchio v. McLean, 853 F.3d 553, 555–56 (1st Cir. 2017) (stating that allegations of a high-five, a discussion about "getting . . . thing[s] going again," and claims of a hotel owner showing "indifference to [the victim's] obvious physical deterioration" constituted at least reckless disregard for the nature of the venture under § 1595).

98. *See* Lawson v. Rubin, No. 17-cv-6404, 2018 WL 2012869, at *13–14 (E.D.N.Y. Apr. 29, 2018) (holding that two incidents in six years were not enough to put a lessor of a condo on notice of sex trafficking occurring in a leased condo).

99. *M.A.*, 425 F. Supp. 3d at 968.

100. *See* FED. R. CIV. P. 12(b)(6) (allowing a defendant to assert the plaintiff's failure to state a claim by motion); Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) (holding that legal conclusions may be used in a claim, but they must be supported by factual allegations to survive a motion to dismiss); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (holding that to survive a motion to dismiss, a complaint must state a plausible, but not necessarily probable, claim for relief).

101. *M.A.*, 425 F. Supp. 3d at 968.

102. H.G. v. Inter-Continental Hotels Corp., 489 F. Supp. 3d 697, 707 (E.D. Mich. 2020); *see also* S.J. v. Choice Hotels Int'l, Inc., 473 F. Supp. 3d. 147, 154 (E.D.N.Y. 2020) ("[K]nowledge or willful blindness of a general sex trafficking problem in low-budget lodgings does not satisfy the *mens rea* requirements of the TVPRA.").

II. HOLDING HOTEL FRANCHISORS CIVILLY LIABLE

While these facts are sufficient for a specific hotel franchisee's liability, is the extension to hotel franchisors acceptable?[103] Is payment for a room enough to find that a hotel franchisor "knowingly benefitted"?[104] While an overt act is not required for the hotel franchisee to "participate" based on the constructive notice standard, should that extend to hotel franchisors who do not have daily interactions with their hotel franchisees?[105]

A. *Common Law of Agency*

Generally, the intention of federal statutes is to have uniform application throughout the nation.[106] This means that, to determine agency, courts should consider the federal common law of agency and not apply the agency laws of the particular state.[107] To determine the federal common law of agency, courts traditionally consider the *Restatement of Agency*.[108] Agency is defined as a fiduciary relationship arising when a principal "manifests assent" to an agent, where "the agent

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103. Extending liability could take two potential forms, imputing liability vicariously through establishing an agency relationship or assigning liability directly for a hotel franchisor neglecting its voluntary duty. *See infra* Sections II.B, II.C.

104. A hotel franchisee is required to pay a franchise fee to conduct business under a hotel franchisor's brand based on a percentage of the hotel's turnover. Christine Ravanat, *Hotel Business Explained: What Is the Difference Between a Franchise and Management Agreement?*, TOP HOTEL NEWS (Mar. 22, 2019), https://tophotel.news/hotel-business-explained-what-is-the-difference-between-a-franchise-and-management-agreement/ [https://perma.cc/FBU7-KZQZ]. Hotel franchisees also pay mandatory services fees, including "marketing and sales fees, distribution and loyalty fees, IT fees, hotel quality control and brand compliance audits fees." *Id.* Fees based on the percentage of the hotel's turnover make a stronger connection to knowingly benefitting from payment for a room than set franchise fees.

105. *See* H.H. v. G6 Hosp., LLC, No. 2:19-CV-755, 2019 WL 6682152, at *3 (S.D. Ohio Dec. 6, 2019) (stating that online reviews should have alerted a hotel chain to the prevalence of sex trafficking at its properties and therefore that hotel chain had constructive knowledge for the purposes of § 1595(a) liability).

106. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740 (1989) (citing Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989)).

107. Cilecek v. Inova Health Sys. Servs., 115 F.3d 256, 260 (4th Cir. 1997). Whether federal or state franchise law should apply poses its own concerns and is beyond the scope of this Note. However, considering the strong international aspect of sex trafficking, the federal law of agency might be a more appropriate application. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102(12), 114 Stat. 1464, 1467 (codified at 22 U.S.C. § 7101(b)(12)) ("Trafficking in persons substantially affects interstate and foreign commerce."); *see also* United States v. Kimbell Foods, 440 U.S. 715, 726 (1979) (holding that federal law governs the priority of liens arising out of federal lending programs); Boyle v. United Techs. Corp., 487 U.S. 500, 507, 509 (1988) (holding that federal policy replaces state common law when it comes to holding an independent contractor liable for design defects while working on a federal defense contract).

108. *Cilecek*, 115 F.3d at 260.

shall act on the principal's behalf and subject to the principal's control, and when the agent manifests assent or otherwise consents so to act."[109]

Traditionally, the agency relationship test depended on the level of control a franchisor exerted over the daily operations of its franchisees.[110] However, courts have narrowed this test to look at the specific claim and determine whether the franchisor had control over the "daily conduct or operation of the particular 'instrumentality' or aspect of the franchisee's business that is alleged to have caused the harm."[111] An agency relationship likely applies to incidents of sex trafficking where training and policies are implemented franchise-wide and are not left to the hotel franchisee's discretion.[112] However, for most hotel franchisors, this recognition and movement towards implementing policies and training against human trafficking mostly developed over the past decade.[113] This movement may give rise to issues in cases of trafficking that occurred prior to the hotel franchisor taking an active role in combatting sex trafficking.

B. *Franchisor Vicarious Liability*

Vicarious liability, often used interchangeably with respondeat superior, allows for the tortious acts of a franchisee to be imputed to the franchisor when the franchisee is acting as an agent of the franchisor.[114] There is an important distinction between this argument—where a plaintiff does not allege that the franchisor was negligent—and the direct liability argument—where the plaintiff alleges that the franchisor itself was negligent.[115] This vicarious liability argument requires the finding that the franchisee was negligent in order to impute negligence onto the franchisor.[116] To make this imputation, there must be an agency relationship between the franchisor and franchisee.[117]

Determining agency has been highly contested in franchisor–franchisee relationships. While many courts have found that no agency

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109. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

110. Jay Hewitt, *Franchisor Direct Liability*, 30 FRANCHISE L.J. 35, 37 (2010).

111. *Id.* (quoting Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 340 (Wis. 2004)); *see also* Lomeli v. Jackson Hewitt, Inc., No. 2:17-cv-02899, 2018 WL 1010268, at *7 (C.D. Cal. Feb. 20, 2018) (implying that a franchisor could be vicariously liable for its franchisees where the instrumentality of the alleged harm stemmed from franchisor-controlled training).

112. *See infra* Section II.C.

113. *See* Giovanna L.C. Cavagnaro, Sex Trafficking: The Hospitality Industry's Role and Responsibility 75–83 (May 2017) (B.S. thesis, Cornell University).

114. *See* RESTATEMENT (THIRD) OF AGENCY § 2.04 (AM. L. INST. 2006) (noting that employers are liable for employees' torts if they are committed within the scope of the employment relationship).

115. Hewitt, *supra* note 110, at 35.

116. *Id.*

117. *See id.*

relationship exists between a franchisor and franchisee,[118] many courts have also found that a genuine dispute of material fact existed and that summary judgment based on the absence of an agency relationship was not warranted.[119] The existence of an agency relationship is usually a question for the trier of fact.[120] The general lack of cases following the denial of a franchisor's motion for summary judgment indicates that many of these franchisors settle before a ruling can be issued on the merits regarding franchisor liability.[121]

In an effort to prove the agency relationship, many of the pending pleadings attempt to provide several examples of how the franchisor

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118. *See, e.g.*, Mobil Oil Corp. v. Bransford, 648 So. 2d 119, 120 (Fla. 1995) ("In today's world, it is well understood that the mere use of franchise logos and related advertisements does not necessarily indicate that the franchisor has actual or apparent control over any substantial aspect of the franchisee's business or employment decisions."); Kerl v. Dennis Rasmussen, Inc., 682 N.W.2d 328, 342 (Wis. 2004) ("[T]he quality, marketing, and operational standards and inspection and termination rights commonly included in franchise agreements do not establish the close supervisory control or right of control over a franchisee necessary to support imposing vicarious liability against the franchisor . . . ."); Summit Auto. Grp., LLC v. Clark, 681 S.E.2d 681, 687 (Ga. Ct. App. 2009) ("[A] franchisor does not become liable for the acts of its franchisee merely because of the franchisor/franchisee relationship."); Karnauskas v. Columbia Sussex Corp., No. 09-cv-7104, 2012 WL 234377, at *3 (S.D.N.Y. Jan. 24, 2012) (citing case law from throughout the United States and stating that franchisors may be liable for injuries occurring at their franchisees' locations if the franchisor "has considerable day-to-day control over the specific instrumentality that is alleged to have caused the harm"); N.T. v. Taco Bell Corp., 411 F. Supp. 3d 1192, 1196–97 (D. Kan. 2019) (citing cases throughout the United States and stating that liability "requires a finding that a franchisor retained control over the particular aspect of the business that caused harm before a franchisor will be found liable").

119. *See* Crinkley v. Holiday Inns, Inc., 844 F.2d 156, 167 (4th Cir. 1988) (holding that even though the evidence was "marginal[,] . . . it sufficed under the applicable substantive principles to raise a jury issue"); Gizzi v. Texaco, Inc., 437 F.2d 308, 310 (3d Cir. 1971) (stating that "[w]hile the evidence on behalf of appellants by no means amounted to an overwhelming case of liability . . . reasonable men could differ regarding it and that the issue should have been determined by the jury"); *see also* Billops v. Magness Constr. Co., 391 A.2d 196, 199 (Del. 1978) (holding that "[m]aterial issues of fact appearing . . . the Superior Court incorrectly granted summary judgment in favor of the franchisor defendants"); Orlando Exec. Park v. P.D.R., 402 So. 2d 442, 451 (Fla. Dist. Ct. App. 1981) (holding that a plaintiff's belief that plaintiff was dealing with Howard Johnson "coupled with the evidence of the extensive efforts of HJ to market a uniform product" was sufficient to present a question of fact to a jury).

120. *See* Bradbury v. Phillips Petrol. Co., 815 F.2d 1356, 1361 (10th Cir. 1987) (stating that "the relationship of principal and agent is ordinarily a question of fact and a finding on the issue is binding on appeal if it is supported by substantial evidence or not clearly erroneous" (citing Mitton v. Granite State Fire Ins. Co., 196 F.2d 988, 990 (10th Cir. 1952))); Villazon v. Prudential Health Care Plan, 843 So. 2d 842, 853 (Fla. 2003) ("The existence of an agency relationship is normally one for the trier of fact to decide" (citing Orlando Exec. Park, Inc. v. Robbins, 433 So. 2d 491, 494 (Fla. 1983))).

121. *See, e.g.*, *Billops*, 391 A.2d at 199 (holding that "[m]aterial issues of fact appearing . . . the Superior Court incorrectly granted summary judgment in favor of the franchisor defendants").

controls day-to-day operations.[122] These examples include using online booking and rewards programs, setting employee pay, standardizing training for employees, and conducting regular inspections of franchisees to ensure compliance with mandated standards.[123] As discussed *supra*, these examples may not be necessary at all if the instrumentality test is applied and a narrow agency relationship is determined specifically in regards to sex trafficking incidents.[124]

C. *Franchisor Direct Liability*

Under the theory of direct liability, a plaintiff alleges that the hotel franchisor itself acted negligently and is therefore liable for the sex trafficking that occurred at its franchisee hotels.[125] This claim is independent of the hotel franchisee and, as such, does not require any determination as to whether the hotel franchisee was negligent.[126] Direct liability applies in situations where the franchisor owes a duty to the plaintiff.[127] Although Section II.B. likely helps establish the agency theory, it also potentially indicates a voluntary undertaking that establishes a duty to protect against sex trafficking.[128] When a franchisor voluntarily undertakes a duty to protect third parties, and then performs that duty negligently, the franchisor is liable for any injuries sustained.[129] Specifically, some hotel franchisors have policies in place that require reporting of suspected sex trafficking issues by their hotel franchisees, making it plausible that the hotel franchisee reported incidents of sex trafficking up to the hotel franchisor.[130] If these reports are made, the

122. *See* M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 972 (S.D. Ohio 2019); H.G. v. Inter-Continental Hotels Corp., 489 F. Supp. 3d 697, 701 (E.D. Mich. 2020); A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d 171, 177 (E.D. Pa. 2020); J.C. v. Choice Hotels Int'l, Inc., No. 20-cv-00155, 2020 WL 6318707, at *5, *9 (N.D. Cal. Oct. 28, 2020); S.J. v. Choice Hotels Int'l, Inc., 473 F. Supp. 3d 147, 151–52 (E.D.N.Y. 2020).

123. *See M.A.*, 425 F. Supp. 3d at 972; *H.G.*, 489 F. Supp. 3d at 701; *A.B.*, 455 F. Supp. 3d at 177; *J.C.*, 2020 WL 6318707, at *5, *9; *S.J.*, 473 F. Supp. 3d at 151–52.

124. *See supra* text accompanying notes 110–12.

125. *See* Hewitt, *supra* note 110, at 36.

126. *Id.*

127. *See id.* at 36, 40.

128. *See supra* Sections II.A, II.B; *see also* Hewitt, *supra* note 110, at 40 (explaining that a common argument for plaintiffs against defendant-franchisors is that the franchisor "voluntarily undertook" a franchisee's duty by controlling a particular aspect of the franchisee's operation).

129. *See* Decker v. Domino's Pizza, 644 N.E.2d 515, 519–20 (Ill. App. Ct. 1994) ("Regardless of whether defendant initially had a duty to protect plaintiff against the criminal acts of third parties, defendant voluntarily undertook to establish a security program to deter robbery and to protect its employees . . . . Accordingly, defendant had the duty to exercise reasonable care in the performance of its duty, and liability could be imposed upon defendant for the negligent performance of the duty it voluntarily undertook.").

130. J.C. v. Choice Hotels Int'l, Inc., No. 20-cv-00155, 2020 WL 6318707, at *5–7 (N.D. Cal. Oct. 28, 2020).

hotel franchisor either knew or should have known that sex trafficking was occurring, and therefore direct liability could apply.[131] Conflicting public policy views, discussed *infra*, create a significant dispute as to the effectiveness of this application.[132]

III. PUBLIC BENEFITS AND CONCERNS OF ALTERING FRANCHISE LAW

A broad reading and application of § 1595 calls the franchisor–franchisee relationship into question and could have vast repercussions throughout all types of franchise relationships and laws.[133] However, courts could limit this expansion by applying it narrowly to industries, such as the hospitality industry, where a direct link to sex trafficking occurrences exists.

A. *The Hospitality Industry and Sex Trafficking*

Importantly, hotels are the leading venue for sex trafficking occurrences, having more reported incidents than brothels.[134] Most, if not all, hotel franchisors are aware of this, but does this fact create a legal obligation for the hotel franchisor to take affirmative actions to combat the issue? If hotel franchisors have a duty to take affirmative actions, how far does that duty go? While it is unclear if hotel franchisors have such a duty, most have implemented some form of policy or training to help identify incidents of sex trafficking in efforts to combat its prevalence in the hospitality industry.[135] In fact, many of the claims brought under § 1595 allege that the hotel franchisors did not enforce the policies or training, or provided inadequate policies or training, indicating that there was some type of policy or training in place to begin with.[136] If the hospitality industry is creating its own standard via hotel franchisors implementing policies to help prevent sex trafficking, have they voluntarily undertaken the duty?[137] Further, do the hotel franchisors now

131. *Id.*

132. *See* discussion *infra* Sections III.B.1, III.B.2.

133. Whether federal or state franchise law should apply poses its own concerns and is beyond the scope of this Note. However, considering the strong international aspect of sex trafficking, federal law of agency might be a more appropriate application.

134. *See Human Trafficking in the Hospitality Industry: What Industry Participants Should Do to Protect Themselves and Their Customers*, JONES DAY (May 2019), https://www.jonesday.com/en/insights/2019/05/human-trafficking-in-the-hospitality-industry [https://perma.cc/L6BM-L35Z]; *National Human Trafficking Hotline Data Report*, NAT'L HUM. TRAFFICKING HOTLINE 5 (Dec. 2021), https://humantraffickinghotline.org/sites/default/files/National Report For 2020.pdf [https://perma.cc/2YGD-26CX].

135. *See* A.B. v. Marriott Int'l, Inc., 455 F. Supp. 3d. 171, 199 (E.D. Pa. 2020); *J.C.*, 2020 WL 6318707, at *6–7; S.J. v. Choice Hotels Int'l, Inc., 473 F. Supp. 3d 147, 151 (E.D.N.Y. 2020).

136. M.A. v. Wyndham Hotels & Resorts, Inc., 425 F. Supp. 3d 959, 962, 967 (S.D. Ohio 2019); *A.B.*, 455 F. Supp. 3d at 177.

137. *See* Hewitt, *supra* note 110, at 40.

have a responsibility to ensure the policies are effective and enforced by franchisees?[138]

In an effort to combat the prevalence of sex trafficking in the hospitality industry, hotel franchisors have developed and implemented many policies and training programs.[139] For example, some hotel franchisors have developed corporate human rights policies and/or trained their hotel franchisees on the importance of recognizing and reporting human trafficking.[140] Others provide presentations on human trafficking and how to help prevent it annually, if not more frequently.[141] Besides awareness training, many hotel franchisors also require compliance training.[142] In addition to implementing their own policies and trainings, over one hundred large hotel franchisors have signed the Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism (The Code),[143] including Hilton Worldwide, Hyatt Hotels Corporation, Marriott International, Inc., IHG, Red Roof Inns, and Wyndham Resorts & Hotels.[144] Further, some of these hotel franchisors established or helped fund several foundations dedicated to human trafficking issues and victims.[145]

B. *Anticipated Changes to Established Franchisor-Franchisee Relationship*

When it comes to determining liability, the franchisor–franchisee relationship faces tension and dilemma. Franchisors, who have major brand names to protect, impose policies and regulations on their

138. *See, e.g.*, Lomeli v. Jackson Hewitt, Inc., No. 2:17-cv-02899, 2018 WL 1010268, at *7 (C.D. Cal. Feb. 20, 2018) (implying that a franchisor could be vicariously liable for its franchisees where the instrumentality of the alleged harm stemmed from franchisor-controlled training).

139. *See* Cavagnaro, *supra* note 113, at 74–89 (explaining various hotel policies and training program regarding trafficking).

140. *See id.* at 74.

141. *See id.* at 76.

142. *See id.* at 78.

143. The Code is a multi-stakeholder initiative with the mission to provide awareness and tools and support to the tourism industry to prevent the sexual exploitation of children, including prostitution and pornography, the production of online child abuse material, and the sale and trafficking of children in all its forms. *What Is the Code?*, THECODE.ORG, http://www.thecode.org/about/ [https://perma.cc/F3RC-ZNZV]. Since many offenders utilize hotel facilities to commit these crimes, The Code specifically works with the hospitality industry in the fight to end these offenses.

144. *See Our Members*, THECODE.ORG, https://thecode.org/ourmembers/ [https://perma.cc/22T3-RQ2A] (describing the various industry partners of The Code and their anti-trafficking initiatives).

145. *See* Cavagnaro, *supra* note 113, at 75, 77, 81; *see also* Rachel Rothberg, Note, *Risky Business: Holding Hotels Accountable for Sex Trafficking*, 38 YALE L. & POL'Y REV. 265, 306–08 (2019) (describing the policies and procedures of various hotel franchises to protect against sex trafficking).

franchisees to maintain the company's standards and reputation.[146] However, if the franchisor's regulation is too intrusive and crosses over into the realm of daily operations, the franchisor risks subjecting itself to vicarious liability for its franchisee's negligence.[147]

The Defense Research Institute (DRI) suggests that companies utilize the "EAR method"—educate, activate, and report—in order to defend against, and hopefully prevent, third-party liability claims.[148] Here, to "educate" means to ensure that hotel franchisors and their hotel franchisees are aware of the different types of trafficking, the signs and key indicators of trafficking, and the local, state, and federal laws about trafficking.[149] DRI asserts that most states have imposed laws and ordinances requiring companies to "conduct trafficking awareness trainings, post trafficking awareness signs, and report instances of trafficking that occur on their premises to local authorities."[150] Next, hotel franchisors should "activate" policies, designed to combat sex trafficking, as required by law and as recommended by organizations.[151] While DRI suggests that implementing these policies and procedures will minimize a franchisor's exposure to civil liability, one should consider whether imposing such policies might indicate a closer hold on the daily operations of franchisees, exposing the franchisor more than if they did nothing. Finally, proper reporting of suspected cases of sex trafficking reduces the likelihood of traffickers utilizing the hotel franchisor's franchise locations.[152] The downside is that too many reports of sex trafficking, especially those that are unwarranted, could negatively impact the hotel franchisor's reputation and potentially open them and their hotel franchisees up to nuisance claims.[153]

1. Implications of a Broad Interpretation

On its face, implementing policies and funding foundations to combat sex trafficking appears admirable. However, the overall intentions of these actions may be less so. Joining The Code, establishing foundations, and implementing policies all provide good publicity for global corporations in the hospitality industry, but is the effectiveness ever evaluated? Holding hotel franchisors vicariously or directly liable

146. *See* Robert W. Emerson, *Franchisee Independence: Still Awaiting Customer Recognition*, 15 N.Y.U. J.L. & BUS. 287, 289–90 (2019).

147. *Id.* at 290.

148. Marisa A. Trasatti & Zachary A. Miller, *EDUCATE, ACTIVATE, REPORT Limiting Labor and Human-Trafficking Civil Liability for Businesses*, FOR THE DEF., Mar. 2020, at 29, 30.

149. *Id.*

150. *Id.*

151. *See id.*

152. *See id.*

153. *See id.*

essentially encourages effectiveness because it forces hotel franchisors to truly enforce the policies they claim to have implemented. It holds hotel franchisors accountable for the prevalence of sex trafficking in their specific and unique industry.

Further, merely holding hotel franchisees liable is not enough for several reasons. While many will think that a plaintiff seeking to hold a franchisor liable is just looking for the deepest pockets, that view does not consider the big picture. Sex trafficking is prevalent throughout the hospitality industry,[154] and for every hotel franchisee that closes, multiple others may open. This means that even if one hotel franchisee is held accountable, multiple others might not be held to the standard. The purpose of the statute continues to not be met. This is further illustrated by the fact that the same defendants are subject to suits across the country. These defendants, such as Hilton and Wyndham, see sex trafficking issues throughout their hotel franchisees and have the power to implement change.

However, the economy cannot ignore the additional costs of business that this approach would incur. The ability to hold hotel franchisors civilly liable for the actions, or inactions, of their hotel franchisees regarding sex trafficking would increase insurance premiums[155] and create the need for more intrusive and demanding control over hotel franchisees. When the cost of doing business increases, companies disseminate those costs to the consumers.

2. Consequences of a Narrow Interpretation

Congress intentionally broadened the reach of § 1595 in 2008.[156] While Congress did not specifically state the goal of this extension, courts can infer that Congress's goal was to increase the number of defendants that could potentially be civilly liable. Since the overall intent of the TVPA and its subsequent reauthorizations is to combat human trafficking, to ensure just and effective punishment, and to protect victims,[157] it follows that adding a civil liability statute, and subsequently expanding it, should not allow for a narrow reading of the statute. A narrow reading would allow for claims against specific hotel franchisees,

154. *See supra* Section III.A.

155. One scholar suggests "a public-private regulatory regime where commercial insurers use their market power to shape the hospitality industry's response to sex trafficking" instead of using a legal approach. Rothberg, *supra* note 145, at 269. This solution is beyond the scope of this Note, but it is worth mentioning that a solution of that nature would likely pass on costs to consumers.

156. *See supra* text accompanying notes 60–64.

157. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 102, 114 Stat. 1464, 1466 (2000) (describing the TVPA as an effort to combat trafficking in persons).

but there is a question as to whether that is enough.[158] Hotel franchisors, who benefit from their hotels around the world, cannot be held accountable with a narrow application. A narrow reading, in most cases, will not provide an adequate civil remedy—if any—contrary to the intent of § 1595's implementation. Still, allowing vicarious and direct liability claims against hotel franchisors could disincentivize hotel franchisors from attempting to minimize and/or prevent sex trafficking at all. Therefore, a balance between holding hotel franchisors accountable while still maintaining their protection from liability must be established.

IV. CORRECTING DISCREPANCIES CREATED THROUGH A BROAD READING OF § 1595

To avoid liability, franchisors must ensure that they do not exert too much control over day-to-day operations or completely assume responsibility over a particular aspect of their franchisees.[159] Accordingly, if hotel franchisors implement and enforce franchise-wide policies and training on sex trafficking, courts could hold hotel franchisors vicariously liable for incidents involving sex trafficking at their franchisee hotels.[160] Further, where hotel franchisors implement these policies and trainings, courts could construe those efforts as hotel franchisors undertaking a duty to combat sex trafficking to make the hotel franchisors directly liable if they do not enforce those policies and trainings and ensure their effectiveness.[161] Basically, if a hotel franchisor wants to help combat sex trafficking through policies and training, it must open itself to liability no matter what. If the hotel franchisor implements policies and training but attempts not to exert too much control, the programs implemented may be ineffective or unenforced, creating direct liability.[162] If the hotel franchisor ensures the effectiveness and enforcement of the policies and training instituted, the hotel franchisor has likely exerted sufficient control to create an agency relationship, making the hotel franchisor vicariously liable.[163]

158. Claims against independent franchisees pose their own issues of potential insolvency and concerns of effectiveness. Increasing insurance premiums for franchisees would also create a similar problem as it would for franchisors.

159. *See* Hewitt, *supra* note 110, at 37.

160. *See* Lomeli v. Jackson Hewitt, Inc., No. 2:17-cv-02899, 2018 WL 1010268, at *7 (C.D. Cal. Feb. 20, 2018) (implying that a franchisor could be vicariously liable for its franchisees where the instrumentality of the alleged harm stemmed from franchisor-controlled training).

161. *See* Decker v. Domino's Pizza, 644 N.E.2d 515, 519–20 (Ill. App. Ct. 1994); *see also* Hewitt, *supra* note 110, at 40 (discussing the balance between implementing policies to deter sex trafficking and avoiding liability).

162. *See Decker*, 644 N.E.2d at 519–20; *see also* Hewitt, *supra* note 110, at 40 (discussing the balance between implementing policies to deter sex trafficking and avoiding liability).

163. *See Lomeli*, 2018 WL 1010268, at *7.

A. *Safe Harbor for Franchisors Making Sufficient Efforts*

Imposing liability on hotel franchisors who take affirmative actions to prevent sex trafficking may create such a large disincentive that good publicity is no longer enough to encourage the hotel franchisors to act. Since the hospitality industry plays such a major role in sex trafficking,[164] the TVPRA should create a space for the hospitality industry to assist in the fight. While § 1595 itself does not create a duty for hotel franchisors, it creates risks for those hotel franchisors who choose to act.[165] Similar to the minimum standards for nations created in the TVPA for combatting trafficking in persons, the TVPRA, or similar legislation, could establish minimum standards for unique industries, such as the hospitality industry, that play a major role in human trafficking. Courts would hold defendants who fail to meet those standards civilly liable while those who do meet (or are sufficiently trying to meet) the standards would be protected from unjust liability. This would prevent a hotel franchisor from being vicariously or directly liable for an individual hotel franchisee's failure to follow the hotel franchisor's policies to address sex trafficking. Therefore, traditional franchise law would remain unchanged.

Without a defined set of minimum standards, courts will not be able to determine whether a hotel franchisor has taken adequate steps to ensure that its policies and trainings are effective, or that its hotel franchisees are implementing its policies effectively. Because sex trafficking claims—whether civil or criminal—are extremely fact-specific, courts cannot reliably determine a defendant's liability without clear minimum standards. Courts need Congress to create a safe harbor for hotel franchisors who are actively trying to combat the prevalence of sex trafficking in the hospitality industry, so courts are not forced to penalize the good while trying to hold other hotel franchisors' feet to the fire to ensure compliance under the TVPRA.

B. *Expansion of Liability Strictly for Hospitality Industry and Sex Trafficking Incidents*

Human trafficking extends far beyond the realms of sex trafficking and the hospitality industry.[166] International supply chain corporations consistently benefit from cheap, forced labor.[167] Similar to hotel franchisors hiding behind the independency of their hotel franchisees,

164. *See* discussion *supra* Section III.A.

165. *See supra* text accompanying notes 159–63.

166. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464, 1466 (2000) (stating that the goal of the TVPA is to protect against not only sex trafficking but also labor trafficking, slavery, and involuntary servitude).

167. Laura Ezell, Note, *Human Trafficking in Multinational Supply Chains: A Corporate Director's Fiduciary Duty to Monitor and Eliminate Human Trafficking Violations*, 69 VAND. L. REV. 499, 507–08 (2016).

these United-States-based corporations avoid liability by creating a legal separation between the corporation and its foreign suppliers as independent contractors.[168] The difficult, attenuated argument for holding hotel franchisors accountable for sex trafficking at their franchisee hotels runs parallel to holding corporations liable for forced labor at their suppliers' facilities.[169] While the relationship between a corporation and its suppliers is outside the scope of this Note, it is important to recognize a key difference.[170] A multinational corporation lacks control over its supplier and is typically at the end of the supply chain, making it harder to establish sufficient corporate control[171] than in the more direct relationship between a franchisor and franchisee.

The broadening of § 1595, without specifically identifying who defendants could be, signals that Congress intended a wider use of the civil liability statute.[172] A broad ruling could open the floodgates for litigation against corporations in supply chains and many other areas,[173] which may be warranted, but is not necessary.[174] A narrow case-by-case ruling, unique to hotel franchisors and their distinctive role in sex trafficking, aids the TVPRA in accomplishing its goals without completely changing well-established franchise and agency laws.

CONCLUSION

From its enactment in October 2003 through October 2018 (fifteen years), trafficking victims brought only 299 cases under § 1595 for all forms of trafficking.[175] Until 2009, all such cases involved only

168. *Id.* at 516–17.

169. *Id.* at 517.

170. This Note does not address whether victims can use the TVPRA for claims against multinational corporations.

171. *Id.* at 516–17.

172. *See supra* text accompanying notes 60–64.

173. For another example, see Ian Urbina, *"Sea Slaves": The Human Misery that Feeds Pets and Livestock*, N.Y. TIMES (July 27, 2015), https://www.nytimes.com/2015/07/27/world/outlaw-ocean-thailand-fishing-sea-slaves-pets.html [https://perma.cc/2JWC-TAJS]; *see also* Martina E. Vandenberg, *Ending Impunity, Securing Justice: Using Strategic Litigation to Combat Modern-Day Slavery and Human Trafficking*, HUM. TRAFFICKING PRO BONO LEGAL CTR. & THE FREEDOM FUND 4 (2015), https://www.htlegalcenter.org/wp-content/uploads/Ending-impunity-securing-justice.pdf [https://perma.cc/X3BB-L28Q].

174. Forced labor and the role of multinational corporations in combatting human trafficking should be considered and evaluated under the TVPRA (as suggested by Laura Ezell). *See* Ezell, *supra* note 167, at 508–09. However, it is a separate evaluation from the distinct evaluation of the hospitality industry and sex trafficking and, thus, outside the scope of this Note.

175. Alexandra F. Levy, *Federal Human Trafficking Civil Litigation: 15 Years of the Private Right of Action*, HUM. TRAFFICKING PRO BONO LEGAL CTR. 6 (2018), https://www.htlegalcenter.org/wp-content/uploads/Federal-Human-Trafficking-Civil-Litigation-1.pdf [https://perma.cc/7KQL-RVER].

allegations of forced labor.[176] In 2009, a victim brought the first civil case involving allegations of sex trafficking.[177] Cases involving sex trafficking remained a very small percentage of the civil cases brought[178] until the recent litigation that emerged against hotel franchisors in 2019. Cases such as *Ricchio v. McLean* opened the door for the movement towards holding third parties civilly liable for sex trafficking.[179] This new wave of cases against hotel franchisors is an opportunity to enhance protection for victims of human trafficking, a primary goal of every version of the TVPA since its original enactment in 2000.[180]

176. *Id.* at 11.

177. *Id.*

178. From 2009 through 2017, only twenty-one cases involved allegations of sex trafficking. *See id.*

179. *See id.* at 22.

180. *See* Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000) (stating that the goal of the TVPA is to protect against not only sex trafficking but also labor trafficking, slavery, and involuntary servitude); Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003) (noting that due to continued struggles to prosecute such trafficking, more research is needed to be effective); William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, Pub. L. No. 110-457, 122 Stat. 5044 (2008) (authorizing enhanced protections for victims).