

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA**

UNITED STATES OF AMERICA)	Case No. 4:09-cr-21, 22, 23,
)	24, 25, 26, 28 and 29
v.)	
)	Judge Mattice
LUCIANA MORENO-LOPEZ;)	
MARIA RAMIREZ-MENDOZA;)	
FLORA RIVERA-PABLO;)	
TERESA AYALA-ROSALES;)	
CIRILO CASTILLO-AMARO;)	
MARIA R. CERVANTES-CANO;)	
SARAI CONTRERAS-MARTINEZ; and)	
MERCEDES GOMEZ-EUGENIO)	

**BRIEF OF AMICI PROFESSOR FRAN ANSLEY, PROFESSOR JEFFREY HIRSCH, PROFESSOR
KARLA MCKANDERS, PROFESSOR ANGELA D. MORRISON, PROFESSOR LETICIA M.
SAUCEDO, THE NATIONAL NETWORK TO END VIOLENCE AGAINST IMMIGRANT
WOMEN, TENNESSEE IMMIGRANT & REFUGEE RIGHTS COALITION, TENNESSEE
JUSTICE FOR OUR NEIGHBORS, & WORKER INTERFAITH NETWORK**

The parties, Professors Fran Ansley, Jeffrey Hirsch, Karla McKanders, Angela D. Morrison, Leticia M. Saucedo, and The National Network to End Violence Against Immigrant Women, Tennessee Immigrant & Refugee Rights Coalition, Tennessee Justice for Our Neighbors, and Worker Interfaith Network, submit this amicus curiae brief to the Court to describe the expansive nature of the protections afforded certain noncitizen crime victims in immigration law. The parties seek to provide the Court with an understanding of the U visa-enabling statute’s background and purpose, to emphasize that it is essential that victims of crimes be able to come forward without being then targeted for criminal prosecution, and to describe how sentencing crime victims for pleas related

to the underlying criminal activity of which they are victims contravenes Congressional intent and the policy of the Department of Justice (DOJ) and several executive agencies, including the Department of Homeland Security (DHS), to protect this particular category of noncitizen crime victims. The defendants in this case have assisted in the enforcement of several laws. Without the workers' initiative to report these crimes, authorities would not have been able to investigate and prosecute the very criminal activity Congress targeted. The parties urge the Court to exercise leniency in sentencing defendants in this case, who are such crime victims.

Interest of Parties

Fran Ansley

Fran Ansley is a Distinguished Professor of Law Emeritus at the University of Tennessee College of Law in Knoxville, Tennessee. Much of her research has focused on the law governing employment in low-wage sectors of the labor market, and on documenting the life experiences of low-wage workers. As immigrants have come to make up an increasing portion of the low-wage workforce in the state, her research interests have grown to include immigrants and the intersections of immigration law, labor and employment law, and criminal justice.

Professor Ansley's investigations have revealed an epidemic of employer law-breaking in immigrant-heavy workplaces. Through interviews and direct observation she has repeatedly learned that immigrants who lack legal authorization to work are extremely reluctant to approach law enforcement or to seek legal relief even from criminal misconduct at the hands of their employers, because they fear they will be turned over to immigration authorities or will themselves be subjected to criminal

prosecution if they do so. Her research indicates a continued growth in unscrupulous employer practices that victimize workers and exert unfair and unwholesome pressure on competing businesses that do not engage in such law-breaking. She has heard from authorities tasked with enforcing both state and federal labor standards that they find it difficult, sometimes impossible, to find unauthorized immigrants willing to initiate complaints against employers.

Professor Ansley has come to believe that the divide thus being opened between the immigrant community and law enforcement authorities constitutes a serious social and legal problem that erodes labor standards, encourages criminal abuse of unauthorized immigrant workers, and cripples law enforcement in precisely the kinds of workplaces where criminal behavior by employers is most likely to occur. She is convinced of the acute need for law enforcement tools that are capable of providing reliable protection to immigrant victims of criminal misconduct by employers, and she sees the U visa and the T visa as two such tools. For the foregoing reasons she believes the court's response to the unjust and ill-advised prosecution in the instant case has broad significance -- not only for the individual workers whose principled stand triggered such swift retaliation, but for the ability of law enforcement authorities to discover, investigate, punish and prevent criminal misconduct by employers in general.

Professor Jeffrey Hirsch

Professor Jeffrey Hirsch is a Professor of Law at the University of Tennessee College of Law in Knoxville, Tennessee. He researches and teaches in the areas of Labor, Employment, and Employment Discrimination Law, including a forthcoming book on Employment Discrimination law. In addition to the immigration issues raised by

other signatories to this brief, he is particularly concerned about the negative effects that this prosecution will have on the ability of agencies such as Equal Employment Opportunity Commission to investigate and to prosecute violations of our labor, employment, and employment discriminations laws.

Karla McKanders

Professor Karla McKanders is a Professor of Law at the University of Tennessee College of Law in Knoxville, Tennessee. She researches in the areas of immigration, asylum and civil rights law. She teaches Refugee Law and Policy and in the Advocacy Clinic where, under her supervision, students represent clients applying for U Visas and other forms of immigration relief in the State of Tennessee before the Memphis Immigration Court and the Department of Homeland Security. Among her writings she has explored the constitutionality of recent state and local laws targeting immigrants as well as the legal connections between past discriminatory laws and current state and local immigrant legislation. She has also co-authored with other immigration professors an extensive report on proposed reforms to the immigration system. Professor McKanders is concerned with the prosecution of the Defendants in the consolidated case because the outcome of this case will undoubtedly affect her clients and the work in which her students engage in the Advocacy Clinic.

Angela D. Morrison

Angela D. Morrison is a former trial attorney for the United States Equal Employment Opportunity Commission and currently is the legal director of the Nevada Immigrant Resource Project at the William S. Boyd School of Law, UNLV. One of the Project's major programs has been to assist immigrant victims of crime and provide

training and support to community partners, including local law enforcement agencies, government service-providers, and non-governmental organizations. The Project worked with local law enforcement and other agencies, and community advocates to establish a Law Enforcement Certification Protocol. Related to this, the Project provides training to local police officers regarding U visas, T visas, and best practices regarding noncitizen victims of crime.

Leticia M. Saucedo

Professor Leticia Saucedo is a professor of law at the William S. Boyd School of Law, University of Nevada, Las Vegas. She teaches and researches in the areas of immigration law and labor and employment law. The immigration clinic at Boyd School of Law, of which Professor Saucedo is the co-director, has successfully prosecuted over fifty U visa applications since its inception in 2004. She has been studying the U visa program as a researcher and scholar since the Department of Homeland Security (DHS) issued the program's regulations in 2007. She has written a law review article outlining the purpose of the U visa provisions in the statute, and the law enforcement objectives that prompted the promulgation of the U visa and its companion, the T visa.

The National Network to End Violence Against Immigrant Women

The National Network to End Violence Against Immigrant Women ("The Network") is a coalition of domestic-violence survivors, immigrant women, advocates, activists, lawyers, educators and other professionals working together to end domestic abuse of immigrant women. The Network was founded in 1992. It is co-chaired by the Family Violence Prevention Fund, the Legal Momentum Immigrant Women's Project, and the ASISTA Immigration Assistance Project. Together, these organizations use their

special expertise to provide technical assistance, training, and advocacy to their communities. The Network significantly contributed to the passage of the 1994 VAWA and has since continued to enhance the legal remedies available to immigrant survivors. Through a collaborative approach, the Network has made great progress in assuring that non-citizen victims of domestic violence, sexual assault, and trafficking are able to flee abuse, survive domestic violence crimes, and receive assistance.

ASISTA Immigration Assistance Project (“ASISTA”), founded in 2004, provides comprehensive, cutting-edge technical assistance regarding immigration and domestic violence. ASISTA seeks to enhance immigrant women’s security, independence and full participation in society by promoting integrated holistic approaches and educating those whose actions and attitudes affect immigrant women who experience violence. In addition to serving as a clearinghouse for immigration law technical assistance, ASISTA staff train civil and criminal judges and system personnel in best practices for working with immigrant survivors of violence. ASISTA works closely with Department of Homeland Security (DHS) personnel to ensure they implement the law as Congress intended, and coordinates litigation to correct misapplications of the law by the Executive Office of Immigration Review (EOIR). Together with the National Network to End Violence Against Immigrant Women and DHS, ASISTA contributed a section on VAWA to EOIR’s 2005 training video for all immigration judges.

The Family Violence Prevention Fund (“FVVPF”) is a non-profit tax exempt organization founded in 1980. The FVVPF is a national organization based in San Francisco. It focuses on domestic violence education, prevention and public policy reform. Throughout its history, the FVVPF has pioneered prevention strategies for justice,

public education, and health care. The FVPPF's Battered Women's Rights Project expands access to legal assistance and culturally appropriate services for all women, including battered immigrant women. The FVPPF was instrumental in developing the 1994 VAWA and has since worked to educate health care providers, police, judges, employers and others regarding domestic violence. In addition, the FVPPF has provided training and technical assistance to domestic violence shelters, legal assistance workers and other service providers on issues facing battered immigrant women.

Legal Momentum is the nation's oldest legal defense and education fund dedicated to advancing the rights of all women and girls. For 39 years, Legal Momentum has made historic contributions through public policy advocacy and litigation to secure personal and economic security for women. Its Immigrant Women Program is a national expert on the rights and services available under immigration, family, public benefits, and language access laws for immigrant victims of domestic violence, sexual assault, human trafficking and other violence. IWP shares this expertise through training, comprehensive publications, and technical assistance for lawyers, advocates, justice, and health care professionals nationwide. As co-chair of the National Network to End Violence Against Immigrant Women, Legal Momentum led the efforts to craft and assist in implementation of the immigration protections in the Violence Against Women Acts ("VAWA") of 1994, 2000 and 2005, the Trafficking Victims Protection Acts (TVPA) of 2000 and 2008 and other federal laws including public benefits access for immigrant victims and access to federally supported services necessary to protect life and safety.

The Network was instrumental in crafting the U-visa statute and leads administrative advocacy efforts with regard to its implementation. As such, it worked

with Congress to create the U visa and now works closely with Department of Homeland Security (DHS) personnel to ensure it is implemented as Congress intended. The Network co-chair organizations write extensively on the U visa and train, judges, advocates and attorneys on best practices in its implementation. In particular, for the past five years amici organizations have focused on training law enforcement on how to use the U visa as a tool for reaching, serving and protecting their most vulnerable community members: undocumented victims of crimes.

Tennessee Immigrant and Refugee Rights Coalition

The Tennessee Immigrant and Refugee Rights Coalition (TIRRC) is a nonpartisan domestic nonprofit organization with its principal office in Nashville, Davidson County, Tennessee. TIRRC has individual and organizational members throughout Tennessee. TIRRC's mission is to empower immigrants and refugees throughout the state to develop a unified voice, defend their own rights, and create an atmosphere in which they are recognized as positive contributors to the state. TIRRC works to defend the rights of all workers, and protect foreign-born workers from exploitation due to language ability, national origin and citizenship status.

Tennessee Justice for Our Neighbors

Tennessee Justice for Our Neighbors (TnJFON) is a not-for-profit immigration legal services organization based in Nashville, Tennessee and is a project of the United Methodist Church both locally and nationally. TnJFON has a full-time attorney on staff handling a variety of immigration legal matters for low income individuals. TnJFON has represented over 60 Tennesseans victimized by crime in their U-visa applicants in the past two years, along with derivative applications for all of those crime victims' eligible

family members. The organization is directed by Katherine Dix Esquivel, who is a graduate of Harvard Law School, served as a law clerk in U.S. District Court of the Eastern District of Virginia and in the U.S. Court of Appeals for the Sixth Circuit (for the Honorable Martha Craig Daughtrey), and worked as a legal aid attorney with Legal Aid of the District of Columbia and later with Southern Migrant Legal Services. TnJFON's full-time attorney Adrienne Schlichtemier is a graduate of the Vanderbilt Law School. TnJFON also has a part-time paralegal on staff.

Worker Interfaith Network

Worker Interfaith Network (WIN) is a non-profit organization based in Memphis, Tennessee. WIN is a coalition of members of the faith and labor communities who seek justice in the workplace. WIN's members engage in advocacy and organizing to win concrete victories with low-wage workers. Its members write letters, hold prayer vigils, meet with business owners and elected officials, and use other methods to help make sure that working conditions are fair and safe. An underlying principle of WIN's mission is that every person has God-given dignity that must be respected in the workplace. WIN's members may not agree on every issue or doctrine, but all religions teach that God desires justice, especially for people who are poor. One of WIN's primary concerns is employer law-breaking in Memphis workplaces, including instances of wage theft and violations of health and safety rules. In November 2009, WIN organized a public hearing on the problem of wage theft. WIN believes that the U visa is a law enforcement tool of crucial importance to the task of encouraging more unauthorized migrants to step out of the shadows and bring criminal misconduct to light.

Factual Background¹

The defendants in the consolidated case before the court all worked for Durrett Cheese Sales, Inc., in Manchester, Tennessee. All of the defendants are nationals of Mexico. Some of the defendants are members of the Mexican indigenous community known as the Mixteco community. The employer targeted immigrants for employment, and the line jobs were held almost exclusively by noncitizens. The company maintained a hostile work environment in which it was permitted to call workers “stupid Indians” and “donkeys.” The company failed to pay its workers, including the defendants, their hourly salary, sometimes for weeks at a time, and eventually declared bankruptcy. The company used various coercive tactics to convince the workers to continue working, including threats that they would receive their pay for work already performed only if they continued working for the company or increased their production, and by issuing bad checks to workers which forced the workers to return to work in the hopes of receiving valid paychecks. While in bankruptcy proceedings as a debtor in possession, the company continued to deny its workers their hourly salary. The line workers seemed to be the only ones who were consistently denied their lawful wages for weeks on end.

In October 2007, having worked for several weeks without getting paid and after patiently waiting through numerous empty promises that they would finally receive overdue paychecks, the defendants refused to return to work. Instead, they engaged in a peaceful work stoppage to demand their unpaid wages. In response, the company

¹ Additional factual detail is available in Resp. of Defs. Moreno-Lopez, Ramirez-Mendoza, Rivera-Pablo, Ayala-Rosales, Castillo-Amaro, Cervantes-Cano, & Contreras-Martinez to Issues Raised at Mar. 8 Sentencing Hr’g & to Government’s Supplemental Sentencing Mem., Doc. 34, consolidated Case No. 4:09-cr-21, May 19, 2010; in Exs. 1 through 3 attached thereto; in Def. Sarai Contreras-Martinez’s Supplemental Mem., Doc. 34, Case No. 4:09-cr-28, Mar. 8, 2010; in Exs. 1 through 5 attached thereto; in Def. Sarai Contreras-Martinez’s Sentencing Mem., Doc. 29, Case No. 4:09-cr-28, Jan. 24, 2010; in the indictments of Defs.; and in other documents on the record that Amici have reviewed.

immediately fired them, called the sheriff's office to report them for trespass and then gave the sheriff's officers documentation to prove they were deportable. The company then requested that the Sheriff's office report the workers to Immigration and Customs Enforcement (ICE). Although the county's district attorney dropped all charges within 24 hours of the defendants' arrests on trespassing charges, the Sheriff turned the workers over to ICE. The workers filed claims against their employer for Fair Labor Standards Act violations, retaliation, wage theft, Title VII violations, and several common law claims including malicious prosecution.

In the process of investigating the defendants' employment discrimination claims, the Equal Employment Opportunity Commission (EEOC) discovered facts that prompted an investigation into whether the employer's treatment of Defendants constituted extortion. The EEOC investigated, in part, whether the company coerced the workers into labor by manipulating their undocumented status and desperation to receive long overdue wages for hours they had already worked. The immigrant workers cooperated with the EEOC in detection and investigation of extortion and the EEOC signed law enforcement certifications (LECs) for the immigrant workers. The workers submitted these LECs, together with evidence about the extortion and evidence of having suffered substantial mental or physical abuse to DHS, and DHS adjudicated the case and granted the workers U visas having found the workers to be victims of the U visa enumerated crime of extortion.

After the Sherriff turned over the workers to ICE , the workers fully cooperated with ICE investigations into their employer's unlawful activities. ICE interviewed the workers and referred them to the U.S. Attorney for possible human trafficking

prosecutions against the employer. The U.S. Attorney's office declined to determine whether the workers were victims of human trafficking. Instead of indicting the employer on human trafficking charges, the federal U.S. Attorney's office in Chattanooga, Tennessee indicted the workers charging them with fraud crimes for using false social security numbers to obtain their jobs. The indictment ultimately charged the defendant workers in this case with Social Security Fraud (42 U.S.C. § 408(a)(7)); False Statements (18 U.S.C. § 1001); and Use of False Identification Document (18 U.S.C. § 1546(b)(2)). One of the noncitizen workers was also charged with Possession of False Government Documents (18 U.S.C. § 1028(a)(6)).

After they were charged and before they pled guilty, the workers were granted U visas by DHS. The U.S. Attorney declined to dismiss the charges against the defendants, even though other executive agencies, including DHS and the EEOC, had determined they were victims of crimes related to extortion, severe labor exploitation and/or human trafficking.

At the same time that the U.S. Attorney indicted the workers for various fraud crimes, the office investigated and eventually prosecuted Shanna Ramirez, one of the Company's low level supervisors, for fraud crimes related to the hiring of undocumented workers. The indictment alleged that Ms. Ramirez conspired to hire the workers knowing that they had no proper documentation, and that she fraudulently misrepresented information about the workers.

Legal Argument

The government's prosecution of this case undermines the overall goals of protection and humanitarian assistance for noncitizen victims of certain crimes enumerated in the

immigration statute. The U visa offers needed protection to individual crime victims and communicates to other noncitizen crime victims that the government will protect those who come forward to help in crime investigation or prosecution. This category of noncitizens is limited in number. Noncitizen victims of severe labor exploitation that include extortion and/or other U-visa listed crimes, such as the employees before the Court, are eligible for the protections provided by the U nonimmigrant status protections that were created for all victims, male or female, in the Violence Against Women Act,² or, in some instances, by T nonimmigrant status provisions of the Trafficking Victims Protection Act.³ Here, federal prosecutors could and should have prosecuted the employer for crimes that were human trafficking crimes under federal human trafficking statutes. Nonetheless, the victims did obtain U nonimmigrant status, which the government should have considered before pressing charges against the victims. Because the government failed to properly exercise discretion in prosecuting these cases, the amici urge the Court to consider the purposes and goals of U and T visa provisions in its sentencing determinations in these cases.

I. U Nonimmigrant Status is Limited to Those Whom DHS Has Determined That Designated Agencies Have Found to be Victims of Certain Enumerated Crimes; Who Suffer Substantial Mental or Physical Abuse; and Who Are or Have Been Helpful or Are Willing to be Helpful in Their Investigation.

Congress authorized the U visa in the Victims of Trafficking and Violence Protection Act of 2000, to protect and incentivize noncitizen victims of certain crimes who were afraid to come forward to help investigate or prosecute the crimes. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464

² Violence Against Women Act Section 1513 of the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000)

³ Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (Oct. 28, 2000)

(Oct. 28, 2000). Congress's dual goals of targeting certain crimes and providing humanitarian relief to helpful victims are fulfilled in part through the issuance of temporary visas that offer victims legal status when they have suffered substantial abuse and when they have information and are helpful or are willing to be helpful to designated agencies, including law enforcement agencies, in the detection, investigation or prosecution of crimes. A U visa holder is entitled to four years of nonimmigrant legal status in the United States. I.N.A. § 214(p)(6); 8 U.S.C. § 1184(p)(6). Congress considered the help and protection of victims so essential that, unlike many other nonimmigrant categories, the U visa holder can adjust status to that of a lawful permanent resident three years after receiving the U visa provided they meet certain criteria. I.N.A. § 245(m); 8 U.S.C. § 1255(m). U nonimmigrant status is, in part, a recognition by Congress that a category of noncitizens is so vulnerable that it deserves protection in the form of legal status and a path to citizenship.

The eligibility requirements for U nonimmigrant status are strict, and therefore, limit the program even further. To be granted a U visa, DHS must determine that the applicant has proven that he/she is a victim of an enumerated crime; that he/she suffered substantial mental or physical abuse as a result of having been a victim of an enumerated crime; that he/she possesses information concerning enumerated criminal activity; and that he/she has been helpful, is being helpful, or is likely to be helpful to a federal, state, or local law enforcement official, to a federal, state or local prosecutor, to a federal or state judge, to the Department of Homeland Security, or to other federal, state, or local authorities investigating or prosecuting an enumerated crime. I.N.A. § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III).

A noncitizen crime victim who has suffered substantial physical or mental abuse as a result of being a victim, and who possesses information about the criminal activity must be, have been, or likely to be, helpful in the investigation or prosecution of one of the enumerated crimes. I.N.A. § 101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III). An agency or official designated by the statute or its regulations signs a law enforcement certification (LEC) certifying that the crime victim/applicant has been, is, or is likely to be, helpful in the investigation or prosecution of one of the enumerated crimes. I.N.A. § 214(p)(1); 8 U.S.C. § 1184(p)(1). The agency itself does not have to be a criminal law enforcement agency; the regulations list child protective services agencies, for example, and other civil law enforcement agencies as able to sign LECs. 8 C.F.R. § 214.14. The crime itself does not have to result in a successful prosecution, or even in a prosecution at all. Congress intended this expansive view of possible outcomes because it wanted to address the climate of fear that exists within a population that has traditionally been afraid to trust law enforcement agencies.

The LEC must be signed by “a federal, state or local law enforcement official, prosecutor, judge, or other federal, state, or local authority investigating” one or more of the enumerated crimes or similar criminal activity. I.N.A. § 214(p)(1); 8 U.S.C. § 1184(p)(1). The regulations name the head of the certifying agency or a designated official as the appropriate person to sign the LEC. 8 C.F.R. § 214.14(a)(3). In other words, the statute contemplated internal agency processes for issuing LECs that scrutinize the eligibility of the crime and the willingness of the victim to help in its investigation before an LEC is issued. Even then, the U.S. Citizenship and Immigration Services (USCIS), the agency responsible for issuing U visas, must determine that the

victim meets the eligibility requirements, including that the victim suffered substantial harm. I.N.A. § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U). U visas are further limited to yearly cap of 10,000 visas. I.N.A § 214(p)(2)(A); 8 U.S.C. § 1184(p)(2)(A). As is evident from these requirements, the U visa was created, in part, to aid certifying agencies in their attempts to serve an immigrant community that has traditionally been fearful of involvement with the law enforcement community.

The purpose of the underlying statute is not to create a blanket amnesty or to legalize everyone who claims victim status. The Act's Congressional purpose is demonstrated in three aspects of the enabling legislation and its history: (1) the U visa as a tool for law enforcement; (2) the U visa as humanitarian relief for those who are helpful to law enforcement; and (3) the U visa as protection for workers who suffer crimes in the workplace.

1. The U Visa as a Tool for Law Enforcement

A major constituency supporting the creation of U nonimmigrant status was and is law enforcement at local, state and federal levels. The Act states U nonimmigrant status was created to:

strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes described in section 101(a)(15)(U)(iii) of the Immigration and Nationality Act committed against aliens, while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States. This visa will encourage law enforcement officials to better serve immigrant crime victims and to prosecute crimes committed against aliens.

Pub. L. No. 106-386 § 1513(a)(2)(A); 8 U.S.C. § 1101.

The purpose of the statute focuses on the victimization of helpful witnesses:

Creating a new nonimmigrant visa classification will facilitate the reporting of crimes to law enforcement officials by trafficked, exploited, victimized, and abused aliens who are not in lawful immigration status. It also gives law enforcement officials a means to regularize the status of cooperating individuals during investigations or prosecutions.

Pub. L. No. 106-386 § 1513(a)(2)(B).

The statute lists a set of enumerated crimes for which victims who suffer substantial physical or mental abuse could seek nonimmigrant legal status. They include the following crimes, or similar criminal activity:

rape; torture; trafficking; incest; domestic violence; sexual assault; abusive sexual contact; prostitution; sexual exploitation; female genital mutilation; being held hostage; peonage; involuntary servitude; slave trade; kidnapping; abduction; unlawful criminal restraint; false imprisonment; blackmail; extortion; manslaughter; murder; felonious assault; witness tampering; obstruction of justice; perjury; or attempt, conspiracy, or solicitation to commit any of the above mentioned crimes.

I.N.A. §101(a)(15)(U)(iii); 8 U.S.C. §1101(a)(15)(U)(iii).

2. The U Visa as Humanitarian Relief for Those Who are Helpful to Law Enforcement

The U visa provisions of the statute carve out a category of noncitizens that are, in a sense, exempted from the general immigration enforcement goals of the Immigration and Nationality Act. The U visa provides relief for noncitizens who may have entered the country without authorization but who are nonetheless protected under immigration law due to their victimization.

So expansive were the protection goals of Congress that it waived all grounds of inadmissibility for U visa recipients, including all criminal grounds, except for Nazi affiliations, genocide or terrorist activities. I.N.A. § 212(d)(14); 8 U.S.C. § 1182(d)(14). The broad waiver provision for U nonimmigrant crime victims indicates the extent to which Congress sought to protect U visa recipient crime victims. Congress gave DHS

discretion to determine who should receive waivers. In this particular case, DHS used its discretion to waive grounds of inadmissibility in order to grant U visa status to the employees due to the extortion and labor exploitation they experienced and the cooperation they provided to the EEOC in its investigation.

3. The U Visa Protects Workers who Suffer Crimes in the Workplace

Several of the U statutes enumerated crimes, such as indentured servitude, trafficking and peonage, relate specifically to crimes against workers. Others, such as those relating to sexual assault, being held against one's will, or being forced to work through extortion, often take place in the workplace, especially when the workers are undocumented. The U regulations specifically mention EEOC and the U.S. Department of Labor (hereinafter "DOL") among the authorized certifiers for U visas. 8 CFR § 214.14(a)(2). Both the EEOC⁴ and DOL⁵ have issued guidelines for assisting cooperating crime victims with law enforcement certifications based on crimes that occur in the workplace. Both agencies recognize in their guidelines that such protections are necessary to provide immigrants the assurances they need to report criminal misconduct by employers.

The U regulations broadly define the parameters of an investigation or prosecution, stating that the clause "investigation or prosecution" means "the detection or investigation of a qualifying crime or criminal activity," in addition to, and separate from, "the prosecution, conviction, or sentencing of the perpetrator of the qualifying crime or criminal activity." 8 C.F.R. § 214.14(a)(5). This distinction in the definition is important

⁴ EEOC, Memorandum, EEOC Procedures for U Nonimmigrant Classification Certification (July 3, 2008) (available at www.asistahelp.org).

⁵ DOL, News Release, U.S. Labor Department to Exercise Authority to Certify Applications for U Visas (available at www.asistahelp.org).

because it recognizes the Congressional intent of the statutory language regarding providing help “to other Federal, State, or local authorities investigating or prosecuting criminal activity.” I.N.A. § (101(a)(15)(U)(i)(III); 8 U.S.C. § 1101(a)(15)(U)(i)(III). Congress wanted the U-visa be a tool that an agency such as the EEOC, which does not have explicit criminal prosecutorial powers, can use to investigate what would be considered a crime or criminal activity, even if no formal criminal prosecution power exists in the agency.

The EEOC has civil investigative authority over cases that overlap with the crimes enumerated in the U visa provisions. The EEOC’s investigative jurisdiction over workplace discrimination and harassment, for example, means that the EEOC has jurisdiction over workplace sexual harassment investigations that could involve the enumerated crimes of rape, sexual assault, sexual exploitation, or abusive sexual contact. The EEOC may also investigate discrimination claims that involve involuntary servitude, peonage, trafficking, obstruction of justice, or, as is the case here, extortion. Accordingly, in this case the EEOC was well placed to find that the defendants were victims of qualifying criminal activity, namely, extortion. The defendants in this case are exactly the kind of victims Congress intended to protect.

II. Violence Against Women Act of 2000, TVPA of 2000 and the TVPRA of 2008 Provide Specific Protection from Prosecution for Victims and Should Have Been Applied in This Case

The government’s prosecution of these cases not only undermines the legislative purpose of the TVPA, it conflicts with DOJ’s own policy goals. The government failed to charge the Company for engaging in unlawful coercive labor practices. The government then prosecuted the employees –the victims of the coercive labor practices –

for fraud-related crimes, despite the express exemption of such victims from prosecution if the government had instead investigated the Company's criminal activities and brought trafficking charges against the Company. 18 U.S.C. § 1592(b).

As part of the statutory scheme that created the U nonimmigrant visa, Congress also enacted other measures to protect victims of forced labor and unlawful employment practices, and to encourage the prosecution of individuals who coerced victims to provide forced labor. Pub. L. 106-386, Trafficking Victims Protection Act of 2000 ("TVPA of 2000"). Through the enactment of the TVPA of 2000, Congress sought, in part, to punish traffickers and protect victims. TVPA of 2000, Sec. 102 (2000), 22 U.S.C. § 7101. To effect this, Congress included key provisions to "address the increasingly subtle methods of traffickers" by enacting criminal penalties for individuals who engage in forced labor practices. H.R. Rep. No. 106-939, at 101 (2000) (referring to 18 U.S.C. § 1589 (2000)).

As a result, the TVPA of 2000 provided that:

Whoever knowingly provides or obtains the labor or services of a person—

(1) by threats of serious harm to, or physical restraint against, that person or another person;

(2) by means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint; or

(3) by means of the abuse or threatened abuse of law or the legal process,

shall be fined under this title or imprisoned not more than 20 years, or both. . . .

18 U.S.C. § 1589 (2000). Furthermore, Congress intended that this provision "be construed with respect to the individual circumstances of victims that are relevant in

determining whether a particular type or certain degree of harm or coercion is sufficient to maintain or obtain a victim's labor or services, including the age and background of the victims." H.R. Rep. No. 106-939, at 101 (2000) (Conf. Rep.). Congress also recognized that individuals may engage in "wrongful conduct with respect to immigration and identification documents in the course of a violation of [one of the other criminal provisions of the TVPA] . . . to maintain the labor or services of another, knowing that such person is a victim of severe forms of trafficking." *Id.* at 102. Accordingly, the TVPA of 2000 also made individuals criminally liable who engaged in unlawful conduct with respect to documents to maintain labor services.⁶

In keeping with the TVPA of 2000's overall goal of simultaneously encouraging just prosecutions of traffickers and protecting victims of trafficking, the TVPA of 2000 also exempted from criminal liability victims of trafficking who engage in unlawful conduct with respect to documents when that conduct is incident to the trafficking:

[Criminal liability] does not apply to the conduct of a person who is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000, if that conduct is caused by, or incident to, that trafficking.

18 U.S.C. § 1592(b) (2000).

⁶ The TVPA of 2000 provides:

- (a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person—
- (1) in the course of a violation of section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a);
 - (2) with intent to violate section 1581, 1583, 1584, 1589, 1590, or 1591; or
 - (3) to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking in persons, as defined in section 103 of the Trafficking Victims Protection Act of 2000; shall be fined under this title or imprisoned for not more than 5 years, or both.

18 U.S.C. § 1592(a) (2000).

In 2008, Congress amended the criminal provisions of the TVPA of 2000, through the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008 (“TVPRA of 2008”). Congress explicitly sought to create conspiracy liability for the criminal violations set forth in the TVPA of 2000, and to clarify the terms “coercion” and “abuse or threatened abuse of law or legal process.” 154 Cong. Rec. H10904 (daily ed. Dec. 10, 2008). Congress “contemplate[d] that these refinements will streamline the jury’s consideration in cases involving coercion and will more fully capture the imbalance of power between trafficker and victim.” *Id.* Consequently, Congress amended 18 U.S.C. § 1589.⁷ Moreover, the term “serious harm” was broadened to “refer to nonviolent and psychological coercion, including but not limited to isolation, denial of sleep and punishments, or preying on mental illness, infirmity, drug use or addictions (whether pre-existing or developed by the trafficker).” *Id.* The legislative history

⁷ The statute provided for the following (amended language in italics):

(a) Whoever knowingly provides or obtains the labor or services of a person *by any one of, or by any combination of, the following means—*

(1) *by means of force, threats of force, physical restraint, or threats of physical restraint 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, shall be punished as provided under subsection (d).*

(b) *Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in the providing or obtaining of labor or services by any of the means described in subsection (a), knowing or in reckless disregard of the fact that the venture has engaged in the providing or obtaining of labor or services by any of such means, shall be punished as provided in subsection (d).*

(c) *In this section:*

(1) *The term “abuse or threatened abuse of law or legal process” means the use or threatened use of a law or legal process, whether administrative, civil, criminal, in any manner or for any purpose for which the law was not designed, in order to exert pressure on another person to cause that person to take some action or refrain from taking some action.*

(2) *The term “serious harm” means any harm, whether physical or nonphysical, including psychological, financial, or reputational 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 or continue performing labor or services in order to avoid incurring the harm.*

18 U.S.C. § 1589 (2008).

indicates that any use of coercion by the Employer based on undocumented status makes the Employer criminally liable regardless of whether it created the situation or defendants did. 154 Cong. Rec. H10904 (daily ed. Dec. 10, 2008). Congress also extended conspiracy liability for violations of 18 U.S.C. § 1592 (2008) (unlawful conduct with respect to documents),⁸ while maintaining exemption for criminal liability for victims of such conduct. 18 U.S.C. § 1592(b).

A. The Government's Harsh Treatment of the Victims and Lenient Treatment of the Perpetrators Contravene Statutory Language, Congressional Purpose, and the Department of Justice's Law Enforcement Policy

The government's position in this case and related cases undermines the legislative goals and purposes of the VAWA 2000, TVPA of 2000 and TVPRA of 2008 and conflicts with DOJ's own policy goals in two respects: the government's failure to charge correctly the defendants' employer for engaging in unlawful coercive labor practices, and the government's criminal prosecution of defendants and other victims of the coercive labor practices for unlawful conduct with respect to documents, despite the express exemption of victims from prosecution as set forth in 18 U.S.C. § 1592(b).

Forced labor is of particular concern to Congress and to DOJ. Here, the Company's conduct fits within the definitions of forced labor as set forth in 18 U.S.C. §§ 1589(a)-(b) and 1592(a). Such conduct was the type of conduct contemplated by Congress when it expanded the definition of "by means of the abuse or threatened abuse

⁸ The new provision provides:

Whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in any act in violation of section . . . , 1592, . . . knowing or in reckless disregard of the fact that the venture has engaged in such violation, shall be fined under this title or imprisoned in the same manner as a completed violation of such section.
18 U.S.C. § 1593A (2008).

of law or legal process,” to mean “the use or threatened use of a law or legal process, . . . to exert pressure on another person to cause that person to take some action or refrain from taking some action.” 18 U.S.C. § 1589(c)(1). The Company’s conduct was intended to exploit the defendants’ labor by exerting pressure on the defendants to continue working without pay and to not complain about their mistreatment or lack of pay. When the employees did assert their basic legal rights to be paid for their work and to be free from mistreatment, the company called the police on the workers and arranged to have them detained by ICE. Instead of complying with its legislative mandate and following DOJ’s enunciated policy of prosecuting coercive labor practices, the government charged the defendants’ low level supervisor and the defendants –who had cooperated fully with and were helpful to the government investigations –with various identity theft statutes, and refused to charge the Company with violations of the trafficking statute or any related crimes.

Further, 18 U.S.C. § 1589(2) makes clear that the harm caused by the employer’s exploitative labor practices includes the type of harm caused here, that is, exploiting defendants’ labor as a result of the Company’s knowledge that defendants were undocumented. *See* 18 U.S.C. § 1589(2) (“serious harm means any harm, whether physical or nonphysical, including psychological, financial . . . that is sufficiently serious under all the circumstances to compel a reasonable person of the same background and circumstances to perform or continue to perform labor . . . in order to avoid incurring the harm.”). Indeed, here, the Company actively took advantage of that status when it reported the defendants to the local sheriff and requested referral to ICE, after they asserted their legal rights against the Company’s unlawful and coercive labor practices.

The government also should have charged the Company and its agents with violating 18 U.S.C. § 1592(a) because it used the purported government identification of the defendants in the course of violating 18 U.S.C. § 1589. Instead, the government charged the Company's low level supervisor, Shanna Dee Ramirez, with, among other things, violating 18 U.S.C. §§ 1028(a)(7) which criminalizes fraud and related activity in connection with identification documents.⁹ However, the TVPA of 2000 and TVPRA of 2008, provide the means to prosecute such conduct in the context of forced labor and that is through charges brought under 18 U.S.C. § 1589(a). To fully effectuate public policy, then, the government should have charged the Company and its agents with violating the trafficking statute. The government's failure to charge properly the real perpetrators in this case violates the intent of Congress and DOJ's own policies to engage in just prosecutions of traffickers. The government's decision not to prosecute sends a message to the immigrant community that noncitizens cannot trust the government to step forward with evidence of human trafficking. If the government had properly charged the Company with human trafficking violations, the defendants in this case would certainly

⁹ The Indictment alleged Ms. Ramirez violated 18 U.S.C. §§ 371 (aiding and abetting social security fraud in violation of Title 42, United States Code, §408(a)(7)); 1028(a)(7) (aiding and abetting the use of false means of identification); and 1028A(1) (aiding and abetting aggravated identity theft); and 18 U.S.C. § 1623(a) (perjury before the grand jury). The identity theft charges, in particular, cover conduct that is almost identical to the conduct described in 18 U.S.C. § 1589(a):

knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person with the intent to commit, or to aid or abet, or in connection with, any unlawful activity that constitutes a violation of Federal law, or that constitutes a felony under any applicable State or local law . . .

18 U.S.C. §1028(a)(7). Compare this with 18 U.S.C. § 1589(a) which provides:

(a) Whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person—

(1) in the course of a violation of section 1581, 1583, 1584, 1589, 1590, 1591, or 1594(a)

. . .

18 U.S.C. § 1589(a)(1).

not have been charged or pleaded guilty to the offenses for which they now face sentencing.

B. Prosecution of Victims for Document Crimes Undermines the Government's Ability to Enforce Anti-Trafficking and Other Basic Labor Laws

The government also failed to act in the interests of justice when it charged the defendants, the victims of the criminal activity, with a criminal violation under identity theft statutes. This undermines the intent of Congress to “protect [the] victims” and “to capture the imbalance of power between trafficker and victim” in forced labor situations. As demonstrated above, this concept was encapsulated in the TVPA of 2000 and TVPRA of 2008, in a number of ways. Most importantly, Congress carved out an exception from criminal liability for victims who engage in unlawful conduct with respect to documents incident to trafficking. *See* 18 U.S.C. § 1592(b). Here, there is no question that the defendants were victims of coercive labor practices by the Company as demonstrated by the defendants' receipt of a U nonimmigrant visa as a result of the coercive labor practices. Yet, the government chose to prosecute the defendants instead of complying with Congressional intent and public policy regarding victims of trafficking. Indeed, the government pursued these prosecutions despite the fact that defendants fully cooperated with law enforcement and offered substantial information regarding their employer's unlawful activities. In doing so, the government has failed to serve the interests of justice and the Court should exercise its discretion in favor of leniency towards the defendants, whether in overturning their convictions or in exercising favorable discretion in fashioning their sentences.

III. Judicial Discretion Requires Leniency in Sentencing in the Absence of Proper Prosecutorial Discretion in This Case

Amici contend that the government's prosecution of the defendants in this case undermines the will of Congress, thwarting its goal of encouraging undocumented victims of crimes to access justice. We ask that the court rectify this by exercising discretion favorably in sentencing.

Prosecutorial discretion should have dictated no prosecution of these defendants in the interest of justice. Moreover, prosecutorial discretion should have been guided by the policy objectives underlying the specific protections for noncitizen victims of crime in U and T visa protections.

A. Prosecutorial Discretion Should Have Dictated No Prosecution in the Interest of Justice

Prosecutors have a duty to see that justice is accomplished. National District Attorneys Association, *National Prosecution Standards* § 1.1 (2d ed. 1991). They should not simply act as partisans, but instead ensure that justice is served, which may mean declining to prosecute when that end will best serve justice. The U.S. Supreme Court recently affirmed that noncitizens have a Sixth Amendment right to know the immigration consequences of criminal pleas. Padilla v. Kentucky, 130 S.Ct. 1473 (March 2010) and noted that knowledge of immigration consequences would allow both prosecutors and defense counsel to bargain plea agreements more creatively to avoid the harsh consequences of deportation. Indeed, prosecutors are trained to consider consequences such as those in the immigration arena when negotiating pleas. U.S. Dep't of Justice, *United States Attorneys Manual, Principles of Federal Prosecution*, § 9-27.420(A) (1997) (in determining whether to enter into a plea agreement, "the attorney for the government should weigh *all relevant considerations*, including . . . [t]he probable sentence *or other consequences* if the defendant is convicted") (emphases added).

In the immigration context, prosecutors have a duty to heed not just the individual consequences in a case, but also the particular goals of relevant immigration policy. In cases involving victims of crimes whom Congress is attempting to encourage to access justice, prosecutors should evaluate how their attempts to charge and incarcerate such victims will undermine this crucial national goal. When two other federal agencies—EEOC and USCIS—worked together to protect noncitizen victims of crimes, Amici contend that a decision to prosecute such victims undermines our national goals and is an abuse of prosecutorial discretion. In a democracy, the appropriate route for challenging a law with which a prosecutor disagrees is to share his views with Congress, not thwart it through use of his prosecutorial powers.

B. Prosecutorial Discretion Should Have Been Guided by the Policy Objective Surrounding U Visa Protections

There are four policy objectives supporting the exercise of discretion against prosecuting the defendants here: (1) immigration policy objectives; (2) agency competency; (3) prosecutorial discretion in identity theft cases, and (4) resource allocation and deterrence.

1. Immigration policy objectives

U and T visas help meet law enforcement needs and were developed specifically to help law enforcement work more effectively in immigrant communities by protecting victims. U visas offer relief from removal for those who are victims and who otherwise, in some instances, might be ineligible for immigration relief because of criminal convictions. I.N.A. § 212(d)(14); 8 U.S.C. § 1182(d)(14). Both U and T nonimmigrant status allow the Attorney General (or the DHS Secretary) to waive all grounds of inadmissibility except grounds of inadmissibility based on Nazi affiliation, genocide or

terrorist activity. This means that even those convicted of crimes can successfully seek waivers and be admitted as nonimmigrants. The existence of the waivers indicates that Congress intended to ensure that victims of certain crimes who were, are, or are willing to be helpful can come forward with information to law enforcement with no repercussions. This is so even though other parts of the statute call for criminalization of acts like unlawful entry. I.N.A. § 275; 8 U.S.C. § 1325. In the case of U and T visas, the law enforcement goal of proper and effective enforcement of certain enumerated crimes in the immigrant community is one of the stated rationales for the existence of the visas. Any government act that impedes the ability of immigrants to come forward contravenes the law enforcement goals underlying these visas.

2. Agency competence

Agency competence is an important factor in weighing whether it makes sense for an agency to implement secondary goals, like immigration-related goals, within its ambit of activities. Here, the question is whether the government should implement general immigration enforcement and removal objectives through the criminal justice system. The government should have considered the overall goal of immigration-related criminal violations and determined whether they were met here. In this case, the U nonimmigrant visa provision identifies a specific category of noncitizens –helpful crime victims –who should not be targeted for immigration enforcement even though they may have entered the country illegally. Convicting and/or sentencing victims for fraud offenses after they step forward to help the criminal justice system contravenes Congress’s purpose to protect and provide humanitarian assistance to certain crime victims. Instead of encouraging undocumented victims of crimes to access the justice system, it sends a

message to such victims that they will be punished for doing so. Amici contend that if a law enforcement official disagrees with Congress' goal of encouraging undocumented or noncitizen victims to access justice, he should communicate his disagreement with Congress, and not use his power to undermine the law.

3. Prosecutorial Discretion and Criminal Enforcement of Identity Theft Statutes

Congress implemented identity theft and related fraud statutes not as part of an overall immigration enforcement regime, but rather as a general set of laws meant to curb activities related to and stemming from identity theft. See e.g., 42 U.S.C. § 408 et. seq. Some indication of this is provided in the social security fraud statute, which exempts the use of a social security number by certain immigrants from the definition of fraud. 42 U.S.C. § 408(e)(1). When identity theft was considered for false use of social security numbers for employment after the last immigration overhaul in 1986, Congress exempted the false use of a social security number for obtaining work from the ambit of the social security fraud statute. 42 U.S.C. § 408(e)(1). The government's use of fraud statutes in this case, where the defendants stepped forward to challenge labor-related crimes undermines both labor law and arguably, the intent of the fraud statutes themselves. In the absence of proper prosecutorial discretion the Court should consider the spirit of the underlying offenses and exercise leniency in sentencing noncitizens who are also crime victims when the prosecution of the offense and the victim status of the defendants are so intertwined.

4. Resource Allocation and Deterrence

In a system of limited resources, prosecutorial discretion should consider resource allocation in determining whether to proceed with social security fraud or

identity theft prosecutions when the defendants are also crime victims eligible for U visas. If the intent of the government is to remove noncitizens or deter unlawful immigration through the criminal system (rather than through the immigration removal system), the government must consider whether the defendants are, in fact, removable. In the case of U visa holders, immigration authorities have waived the grounds of inadmissibility before granting U visa nonimmigrant status. See I.N.A. § 214(d)(14); 8 U.S.C. § 1182(d)(14). Even if immigration authorities had not yet granted U visa status, a noncitizen has the right to seek relief from removal in a removal proceeding by proving prima facie U visa eligibility. I.N.A. § 237(d); 8 U.S.C. § 1227(d); 8 C.F.R. § 214.14(c)(1). In fact, the immigration court judge terminated the removal proceedings of the defendants in this case once their U visas were granted. Use of prosecutorial resources –including the attempted use of a summary stipulated removal provision –to attempt to remove noncitizens through the criminal justice system is a waste of resources because U visa holders like the defendants have a remedy for relief from removal. INA § 101(a)(15)(U); 8 U.S.C. § 1101(a)(15)(U). It also arguably violates the due process rights of a category of noncitizens who have a right to access and seek relief. The government’s prosecution of this case sends the message that this US Attorney will not support the law Congress created for victims, and therefore undocumented victims challenging crimes in the workplace do so at their own peril. Amici ask this Court to ensure such a “chilling effect” does not result from this case.

Conclusion

Amici ask this court to exercise its discretion by imposing a sentence that both reflects the nonviolent nature of the crimes and the national goals embodied in the U visa.

We respectfully suggest that this is the only conclusion to this case that serves justice. This brief is intended to provide background information about the immigration laws affecting crime and human trafficking victims, and to explain Congress's intent to protect such victims from the type of prosecution activity that occurred in this particular case. These factors, and Congressional intent, should be considered in determining that a lengthy sentence, if not the decision to prosecute this set of cases in its entirety, is inappropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2010, a copy of the foregoing document was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

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