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**UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL**

In the Matter of:

L-A-B-R- et al.,

Respondents.

**BRIEF BY *AMICI CURIAE* ASISTA IMMIGRATION ASSISTANCE,
ASIAN PACIFIC INSTITUTE ON GENDER-BASED VIOLENCE,
CASA DE ESPERANZA, FREEDOM NETWORK USA, FUTURES WITHOUT
VIOLENCE, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE,
NATIONAL COALITION AGAINST DOMESTIC VIOLENCE,
SANCTUARY FOR FAMILIES, TAHIRIH JUSTICE CENTER, AND
WASHINGTON STATE COALITION AGAINST DOMESTIC VIOLENCE**

TABLE OF CONTENTS

	<i>Page</i>
TABLE OF AUTHORITIES	i
INTERESTS OF AMICI CURIAE	1
INTRODUCTION	6
SUMMARY OF ARGUMENT	10
ARGUMENT	10
1. Although “good cause” cannot be defined precisely or universally, <i>Hashmi</i> and <i>Sanchez-Sosa</i> articulate appropriate, useful standards for assessing it in the context of continuances for pending U visas, T visas, or VAWA self-petitions	10
A. Good cause for a continuance depends on the facts and circumstances presented	10
B. <i>Hashmi</i> and <i>Sanchez-Sosa</i> identify pertinent, situation-specific factors and correctly balance them	11
2. DHS’s proposed universal standard would undermine VAWA and harm public safety in the United States	14
A. DHS’s proposed standard invites immigration judges to abuse or exceed their discretion in removal proceedings involving immigrant crime survivors.....	14
(1) <i>Immediate availability requirement</i>	15
(2) <i>Exceptional-circumstances requirement</i>	16
B. Requiring EOIR to prematurely deport immigrant crime survivors undermines VAWA’s law-enforcement goals, and makes communities in the United States less safe	18
C. Deporting eligible victims is inconsistent with Congress’s statutory scheme	21
3. DHS’s “expanded factors” test wastes government resources	23
CONCLUSION.....	24
CERTIFICATE OF SERVICE	25

TABLE OF AUTHORITIES

	<u>Page</u>
 Cases	
<i>Baires v. I.N.S.</i> 856 F.2d 89 (9th Cir. 1988)	11
<i>Landis v. N. Am. Co.</i> 299 U.S. 248 (1936)	10
<i>Matter of Garcia</i> 16 I&N Dec. 653 (BIA 1978)	11
<i>Matter of Arthur</i> 20 I&N Dec. 475 (BIA 1992)	11
<i>Matter of Patel / Sunilkumar Ramabhal Patel</i> A205 131 752 (BIA June 3, 2016) (unpublished)	17
<i>Matter of Rajah</i> 25 I&N Dec. 127 (BIA 2009)	12
<i>Matter of Sanchez Sosa</i> 25 I&N Dec. 807 (BIA 2012)	<i>passim</i>
<i>Matter of Hashmi</i> 24 I&N Dec. 785 (2009)	<i>passim</i>
<i>Rajah v. Mukasey</i> 544 F.3d 449 (2d Cir. 2008)	11
 Rules, Statutes, Etc.	
8 C.F.R. 214.11(b)	22
8 C.F.R. 214.11(d)	22
8 C.F.R. 214.14(b)	13
8 C.F.R. 214.14(b)(1)	13
8 C.F.R. 214.14(c)(1)	17, 22
8 C.F.R. § 1003.29	11

8 C.F.R. § 1240.6.....	11
6 U.S.C. 271(b)	8, 22
8 U.S.C. § 1101 (a)(15)(T)	8
8 U.S.C. 1101(a)(15)(T)(II)	22
8 U.S.C. § 1101(a)(15)(U).....	8
8 U.S.C. § 1101(b)(4)	10
1994 Violence Against Women Act	2, 7
Section 101(a)(15)(U)(i)(I)	13
Trafficking Victims Protection Act	4, 20
Victims of Trafficking and Violence Prevention Act of 2000	3
Violence Against Women Act (VAWA)	<i>passim</i>
Violence Against Women Act of 2000.....	8

Publications, Miscellaneous, Etc.

2017 Advocate and Legal Service Survey Regarding Immigrant Survivors" The Asian Pacific Institute on Gender-Based Violence (APIGBV), ASISTA, Casa de Esperanza: National Latin@ Network, National Alliance to End Sexual Violence (NAESV), National Domestic Violence Hotline (NDVH), National Network to End Domestic Violence (NNEDV), and Tahirih Justice Center.....	20
http://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf	
Brooke A. Lewis, <i>HPD Chief Announces Decrease in Hispanics Reporting Rape and Violent Crimes Compared to Last Year</i> , Houston Chronicle (April 6, 2017)	20
http://www.chron.com/news/houston-texas/houston/article/HPD-chief-announces-decrease-in-Hispanics-11053829.php	
Dan Satterburg, "Crackdown on Immigrants Undermines Public Safety" Seattle Times (March 24, 2017)	21
http://www.seattletimes.com/opinion/crackdown-on-immigrants-undermines-public-safety/	

Citizenship and Immigration Service Ombudsman.....	8
“Annual Report 2017” (June 29, 2017) https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017_0.pdf	
Department of Homeland Security, U and T Visa Law Enforcement Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies	8, 9
https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf	
Diana Cheng, MD & Isabelle L. Horon, PhD, <i>Intimate-Partner Homicide Among Pregnant and Postpartum Women</i> , <i>Obstetrics & Gynecology</i> : June 2010 - Volume 115 - Issue 6.....	6
https://journals.lww.com/greenjournal/Fulltext/2010/06000/Intimate_Partner_Homicide_Among_Pregnant_and.13.aspx	
FBI, <i>2015 Crime Clock Statistics</i>	6
https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/resource-pages/crime-clock	
James Queally, <i>Fearing deportation, many domestic violence victims are steering clear of police and courts</i> , <i>Los Angeles Times</i> (October 9, 2017)	20
http://www.latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html	
Lindsey Bever, <i>Hispanics “are going further into the shadows” amid chilling immigration debate, police say</i> , <i>Washington Post</i> (May 12, 2017)	19
https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/?utm_term=.7c4236a13d4d	
National Coalition Against Domestic Violence, <i>Domestic Violence</i>	6, 19
https://ncadv.org/statistics	
<i>Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims</i> , <i>Police Chief Magazine</i>	7, 18, 19
http://www.policechiefmagazine.org/overcoming-fear-building-trust-immigrant-communities	
Rachel E. Morgan, Ph.D. & Grace Kena, U.S. Department of Justice, <i>Criminal victimization, 2016</i> (NCJ 251150, December 2017)	6
https://www.bjs.gov/content/pub/pdf/cv16.pdf	
U.S. Citizenship and Immigration Services Processing Times	9, 15
https://egov.uscis.gov/processing-times/#mainContent	
Violence Policy Center, <i>When Men Murder Women</i> , September 2017	6
http://www.vpc.org/studies/wmmw2017.pdf	

<i>http://library.niwap.org/wp-content/uploads/2015/VAWA_Leg-History_Final-6-17-15-SJI.pdf</i> <i>citing H.Rept</i>	7
<i>http://padv.org/</i>	6
<i>https://www.dhs.gov/sites/default/files/publications/</i> <i>DHS%20Annual%20Report%202017_0.pdf</i>	8
<i>http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2017/</i> <i>debate_2017_junaug.pdf</i>	18
<i>https://www.speakcdn.com/assets/2497/</i> <i>domestic_violence_and_physical_abuse_ncadv.pdf</i>	6

INTERESTS OF AMICI CURIAE

Amici are nonprofit organizations that serve and advocate on behalf of immigrant survivors of domestic violence, sexual assault, other forms of gender-based violence and human trafficking. Amici have expertise in immigration matters that affect immigrant crime survivors, and in the complex array of issues and challenges that those survivors face. Based on their experience, Amici are acutely aware that fear of deportation often prevents undocumented crime survivors—and their lawfully present friends and relatives—from coming forward and reporting those crimes to the police. Likewise, Amici understand that abusive partners, perpetrators of sexual assault, traffickers, or other abusers often exploit victims' lack of immigration status or dependent immigration status as a way to inflict further abuse and to keep victims silent. In this way, fear of deportation leaves immigrant survivors of gender-based violence even more vulnerable to abuse. Amici have seen first-hand how immigration protections like U visas, T visas, and Violence Against Women Act (VAWA) self-petitions—which allow survivors to petition for lawful status—can sever abusers' and traffickers' control over undocumented victims, and empower victims to seek protection and justice.

The proper standard for evaluating continuances has an enormous impact on the populations that Amici serve, many of whom are eligible to apply for U visas, T visas, or VAWA relief. For survivors in removal proceedings, continuances can mean the difference between meaningful access to these protections, and immense hardship. For immigrant survivors more generally, meaningful access to immigration relief can mean the difference between calling the police and helping law enforcement to convict a criminal, and suffering further violence in the shadows. That distinction is, quite literally, of vital importance here.

Amici curiae are the following:

ASISTA Immigration Assistance worked with Congress to create and expand routes to secure immigration status for survivors of domestic violence, sexual assault, and other crimes, which were incorporated into the 1994 Violence Against Women Act and its progeny. ASISTA also trains and provides technical support to local law enforcement officials, civil and criminal court judges, domestic violence and sexual assault advocates, legal services, and non-profit, pro bono, and private attorneys working with immigrant crime survivors. ASISTA has previously filed amicus briefs to the Supreme Court and to the Second, Seventh, Eighth, and Ninth Circuits.

The **Asian Pacific Institute on Gender-Based Violence** is a national resource center on domestic violence, trafficking, and other forms of gender-based violence in Asian and Pacific Islander communities, including domestic violence dynamics in refugee zones. The institute serves a national network of advocates and community-based service programs that work with Asian and Pacific Islander survivors, and is a leader on providing analysis on critical issues facing victims in the Asian and Pacific Islander community. The institute aims to strengthen advocacy, change systems, and prevent gender violence through community transformation.

Casa de Esperanza was founded in 1982 in Minnesota to provide emergency shelter for women and children experiencing domestic violence. In 2009, Casa de Esperanza launched the National Latin@ Network for Healthy Families and Communities, which is a national resource center focused on preventing and addressing domestic violence, sexual assault, and other forms of gender-based violence, with a primary focus on Latino and immigrant communities. The National Latin@ Network provides national expertise on research, training and technical assistance, and policy advocacy and also serves on the Steering Committee of the National Task Force to End Sexual and Domestic Violence.

Freedom Network USA (FNUSA) is the largest alliance of human trafficking advocates in the United States. Our 57 organizational and individual members work directly with human trafficking survivors in over 30 cities, providing comprehensive legal and social services, including representation in immigration cases. In total, our members serve over 2,000 trafficking survivors per year, over two-thirds of whom are foreign national survivors. Through our national effort, FNUSA increases awareness of human trafficking and provides decision makers, legislators and other stakeholders with the expertise and tools to make a positive and permanent impact in the lives of all survivors. FNUSA has been involved in the passage of the original Trafficking Victims Protection Act of 2000, as well as each subsequent reauthorization. FNUSA provides training and technical assistance to law enforcement, judges, and service providers in the US to increase the identification of victims and expand their access to immigration relief and other services and support. Foreign national trafficking survivors present in the US may be granted Continued Presence, T Visas, U Visas, asylum, SIJS, TPS or any other form of immigration relief. Many are referred for removal before they are identified as trafficking survivors, often due to the actions of the traffickers who are trying to silence their victims with deportation. An immigration system that is responsive to the needs of trafficking survivors, allows survivors time for recovery from their trauma, and does not impose undue burdens on survivors, will also most successfully support law enforcement in their ability to investigate and prosecute traffickers.

Futures Without Violence (“FUTURES”) formerly the Family Violence Prevention Fund, is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world. FUTURES mobilizes concerned individuals; children’s, women’s, and civil rights groups; allied professionals; and other social justice organizations to end violence through public education and prevention campaigns, public

policy reform, training and technical assistance, and programming designed to support better outcomes for women and children experiencing or exposed to violence. FUTURES joins with the other amici because it has a long-standing commitment to supporting the rights and interests of women and children who are victims of crime regardless of their immigration, citizenship, or residency status. FUTURES co-founded and co-chaired the National Network to End Violence Against Immigrant Women working to help service providers, survivors, law enforcement, and judges understand how best to work collaboratively to bring justice and safety to immigrant victims of violence. Using this knowledge, FUTURES helped draft legislative recommendations that were ultimately included in the Violence Against Women Act and the Trafficking Victims Protection Act to assist immigrant victims of violence. FUTURES co-chairs the Coalition to End Violence Against Women and Girls Globally, partnering with other national organizations to reduce sexual and domestic violence against women and children.

The **National Alliance to End Sexual Violence** (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 rape crisis centers working to end sexual violence and support survivors. The rape crisis centers in NAESV's network see every day the widespread and devastating impacts of sexual assault upon survivors, especially those in immigrant communities. We oppose any impediments to survivors feeling safe to come forward, receive services, and seek justice.

The **National Coalition Against Domestic Violence** ("NCADV") provides a voice to victims and survivors of domestic violence. It strives to foster a society in which there is zero tolerance for domestic violence by influencing public policy, increasing public awareness of the impact of domestic violence, and providing programs and education that drive that change.

Sanctuary for Families (“Sanctuary”) is New York State’s largest dedicated service provider and advocate for survivors of domestic violence, human trafficking, and related forms of gender violence. Each year, Sanctuary provides legal, clinical, shelter, and economic empowerment services to approximately 15,000 survivors. Sanctuary’s Immigration Intervention Project provides free legal assistance and direct representation to thousands of immigrant survivors every year in a broad range of humanitarian immigration matters, including asylum, special rule cancellation of removal, Special Immigrant Juvenile Status, Violence Against Women Act self-petitions, and petitions for U and T nonimmigrant status. In addition, Sanctuary provides training on domestic violence and trafficking to community advocates, *pro bono* attorneys, law students, service providers, and the judiciary, and plays a leading role in advocating for legislative and public policy changes that further the rights and protections afforded to survivors and their children.

Tahirih Justice Center (“Tahirih”) is a national non-profit that has served courageous individuals fleeing gender-based human rights abuses since 1997. Through direct services, policy advocacy, and training and education, Tahirih protects immigrant women and girls and promotes a world where they can enjoy equality and live in safety and dignity. Tahirih serves immigrant women and girls who have rejected violence, but face incredible obstacles to justice, including language barriers, lack of resources, and a complex immigration system.

The **Washington State Coalition Against Domestic Violence** (WSCADV) is the federally-recognized membership organization of non-profit domestic violence programs in Washington State. Founded by domestic violence survivors and their allies in 1990, WSCADV’s mission is to mobilize and support member programs and allies to end domestic violence through

advocacy and action for social change. WSCADV has long advocated for laws, policies, and practices that promote safety and justice for all domestic violence survivors.

INTRODUCTION

Of every three women murdered in the United States, one is killed by an intimate partner.¹ One in three women in the United States will suffer physical violence at the hands of an intimate partner in her lifetime,² one in seven will be severely injured by it,³ and a woman is at least 14 times more likely to be murdered by a man she knows than by a man who is a stranger.⁴ In fact, spouses are the leading cause of death for pregnant women in the United States.⁵ There is a reported rape every 4.2 minutes,⁶ and one in five women will be raped in her lifetime.⁷ Every nine seconds a woman is beaten,⁸ and women in the United States experience an estimated 323,450 sexual assaults a year.⁹

Immigrant populations are particularly vulnerable to crimes like domestic violence, sexual assault, and human trafficking, in part because people who fear deportation are less likely to report

¹ https://www.speakcdn.com/assets/2497/domestic_violence_and_physical_abuse_ncadv.pdf.

² *Id.*

³ *Id.*

⁴ Violence Policy Center, *When Men Murder Women*, September 2017, available at, <http://www.vpc.org/studies/wmmw2017.pdf>.

⁵ Diana Cheng, MD & Isabelle L. Horon, PhD, *Intimate-Partner Homicide Among Pregnant and Postpartum Women*, *Obstetrics & Gynecology*: June 2010 - Volume 115 - Issue 6 - p 1181-1186, https://journals.lww.com/greenjournal/Fulltext/2010/06000/Intimate_Partner_Homicide_Among_Pregnant_and.13.aspx

⁶ FBI, *2015 Crime Clock Statistics*, available at <https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/resource-pages/crime-clock>.

⁷ National Coalition Against Domestic Violence, *Domestic Violence*, available at <https://ncadv.org/statistics>.

⁸ See <http://padv.org/>.

⁹ Rachel E. Morgan, Ph.D. & Grace Kena, U.S. Department of Justice, Criminal victimization, 2016 (NCJ 251150, December 2017) p. 5, available at <https://www.bjs.gov/content/pub/pdf/cv16.pdf>.

abuse.¹⁰ Compounding this, experts explain, is that abusers of undocumented people are likely to prey on that same fear: “[o]ne of the most intimidating tools abusers and traffickers of undocumented immigrants use is the threat of deportation. Abusers and other criminals use it to maintain control over their victims and to prevent them from reporting crimes to the police.”¹¹ Put another way, it is not uncommon for immigrants, even lawfully-present ones, to be apprehensive about reaching out to law enforcement, for fear that turning to law enforcement to report crimes, or engaging with the police as they investigate, will lead to adverse immigration consequences.¹² Serial abusers have simply figured out ways to weaponize those anxieties: “if you leave me, I’ll report you to the immigration authorities, and you’ll never see the children again.”¹³

Because threats and fears of deportation are so powerful, it is not surprising that Congress’s efforts to deter and punish violent crimes against immigrant women include pathways to secure legal status. Since 1994, Congress has recognized that violence against women—including immigrant women—is an epidemic in the United States, and has taken important steps to combat it. Under the 1994 Violence Against Women Act (VAWA), Congress created provisions that allowed battered immigrant women to “self-petition” for legal status, without relying on their abusers as it recognized that “a battered spouse may be deterred from taking action to protect himself or herself, such as filing a protection order, filing criminal charges or calling the police, because of the threat or fear of deportation.”¹⁴ And six years later, Congress not only reauthorized

¹⁰ See *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, Police Chief Magazine, available at <http://www.policchiefmagazine.org/overcoming-fear-building-trust-immigrant-communities>.

¹¹ *Id.*

¹² See *id.*

¹³ *Id.*

¹⁴ http://library.niwap.org/wp-content/uploads/2015/VAWA_Leg-History_Final-6-17-15-SJI.pdf citing H.Rept. 103-395 at 26-27.

and reinforced VAWA's protections for battered immigrant women,¹⁵ but also created two new forms of immigration relief for immigrant crime survivors, U and T nonimmigrant status, more commonly known as the U visa and T visa.¹⁶ Each of these visas has its own set of carefully-crafted statutory criteria, but both offer temporary protections from deportation to qualifying immigrant crime survivors, as an incentive to cooperate with law enforcement in the detection, investigation, and prosecution of violent crimes.¹⁷

Yet immigration judges have no authority to adjudicate these visas. Instead, Congress has delegated that authority exclusively to the United States Citizenship and Immigration Service (USCIS),¹⁸ which typically receives tens of thousands of applications for U visas, T visas, and/or VAWA self-petitions every year.¹⁹ Because these cases involve confidential and sensitive matters, USCIS consolidated the adjudication of these cases at a single service center in Vermont, using a specialized, highly trained team.²⁰ Given the high volume of cases, the meticulous statutory requirements, and the limited USCIS resources available for adjudication of cases, accurate adjudication can mean long processing times, and a frequent back log of applicants.²¹ For most

¹⁵ Violence Against Women Act of 2000.

¹⁶ Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464-1548 (2000).

¹⁷ See 8 U.S.C. § 1101(a)(15)(U) (2006) (legislating eligibility requirements for U visa); 8 U.S.C. § 1101 (a)(15)(T) (T visa).

¹⁸ 6 U.S.C. 271(b).

¹⁹ Department of Homeland Security, U and T Visa Law Enforcement Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies, p. 5, *available at* https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf

²⁰ There is also a smaller U visa adjudication team at the Nebraska Service Center, which has received extensive specialized training.

²¹ Last year, the CIS Ombudsman reported that there were just 60 adjudicators in the U visa unit. Citizenship and Immigration Service Ombudsman. "Annual Report 2017" (June 29, 2017) at 56. Available at: https://www.dhs.gov/sites/default/files/publications/DHS%20Annual%20Report%202017_0.pdf

people, it can take months to prepare a VAWA self-petition, or file a U or T visa application, and anywhere from one to three years for USCIS to review it.²² And U visa applicants, if approved, will spend years on a waitlist for one of the 10,000 visas available annually.²³

If an undocumented survivor is placed in removal proceedings, therefore, she may find herself in need of a continuance. Consider Ms. Y: For more than five years, Ms. Y, a Korean national, was sold for sex by her traffickers throughout the eastern United States, until she was arrested in a police raid of the massage parlor where she was being trafficked and charged with prostitution. Ms. Y was placed in removal proceedings as a result of this arrest, and charged with deportability. She applied for a T visa. Over the course of months, Ms. Y cooperated with authorities in investigating and ultimately prosecuting the group that had trafficked her and *tens* of other women. When Ms. Y appeared before the immigration court, her defense against removal was her potential eligibility for a T visa, but USCIS would have needed over a year to decide her application. So Ms. Y requested a continuance. The immigration judge ended up granting three continuances (totaling over a year and a half) in Ms. Y's case, and as a result she was able to pursue her T visa application. Those continuances gave Ms. Y hope that she could obtain protection in the United States, and empowered her to overcome her fears of retaliation by her traffickers to help criminal authorities prosecute them.

²² See U.S. Citizenship and Immigration Services Processing Times, *available at* <https://egov.uscis.gov/processing-times/#mainContent>. For U visa applications, USCIS may take longer than three years to start its review.

²³ See Department of Homeland Security, U and T Visa Law Enforcement Guide for Federal, State, Local, Tribal, and Territorial Law Enforcement, Prosecutors, Judges and Other Government Agencies, p. 5, *available at* https://www.dhs.gov/sites/default/files/publications/U-and-T-Visa-Law-Enforcement-Resource%20Guide_1.4.16.pdf (describing conditional approval).

SUMMARY OF ARGUMENT

For the last 40 years, the Board has consistently held that “good cause” for a continuance depends on context, including, among other things, the purposes of—and processes for securing—the type of visa in issue. This tailored, totality-of-the-circumstances approach reflects Congress’s intentions, and balances the government’s sometimes-competing interests in promoting efficiency and protecting due process. Although not one of the three underlying cases in this referral involved a pending U visa, T visa, or VAWA self-petition, DHS now urges the Attorney General to override these settled principles, by adopting a blanket framework for evaluating *all* continuances of *any* kind, including continuances sought by survivors to pursue immigration protections that Congress has created for them.

This approach, besides being legally incorrect, would have catastrophic consequences for immigrant crime survivors and public safety. Therefore, Amici respectfully ask the Attorney General to reject it.

ARGUMENT

1. The existing framework for granting continuances is most appropriate in the context of survivor-respondents.

As discussed below, although “good cause” cannot be defined precisely or universally, *Hashmi* and *Sanchez-Sosa* articulate appropriate, useful standards for assessing it in the context of continuances for pending U visas, T visas, or VAWA self-petitions.

A. Good cause for a continuance depends on the facts and circumstances presented.

Immigration judges, like other judges, have inherent power to manage their dockets, and thus to inherent authority to stay proceedings.²⁴ On top of this, the INA’s implementing

²⁴ 8 U.S.C. § 1101(b)(4) (2017) (defining an immigration judge as “an administrative *judge* . . . qualified to conduct specified classes of proceedings”) (emphasis added); *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936) (explaining

regulations give immigration judges broad discretionary authority to grant continuances “for good cause shown.”²⁵

The exact contours of this discretion, however, depend on context. As the Board explained in *Matter of Hashmi*, “we have defined the parameters of ‘good cause’ in different ways depending on the facts and circumstances presented.”²⁶ Hence, when a continuance is requested to give the respondent more time to gather evidence, immigration judges consider one set of factors, and when a continuance is requested for the adjudication of a family visa petition, they consider another.²⁷ Similarly, an appellate court cannot review an immigration judge’s decision to grant or deny a continuance “through the application of bright-line rules; it must be resolved on a case by case basis according to the facts and circumstances of each case.”²⁸

B. *Hashmi* and *Sanchez-Sosa* identify pertinent, situation-specific factors and correctly balance them.

In the context of a continuance to await the resolution of a visa petition, the Board has consistently held that “discretion should, as a general rule, be favorably exercised where a *prima facie* approvable visa petition and adjustment application have been submitted in the course of a deportation hearing or upon a motion to reopen.”²⁹ This approach acknowledges that not all visa

that, “power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket”)

²⁵ 8 C.F.R. §§ 1003.29 and 1240.6.

²⁶ *Matter of Hashmi*, 24 I&N Dec. 785, 788 (2009).

²⁷ *See id.*

²⁸ *Baires v. I.N.S.*, 856 F.2d 89, 91 (9th Cir. 1988); see also, *Rajah v. Mukasey*, 544 F.3d 449, 450 (2d Cir. 2008) (“We cannot adequately consider whether the agency abused its discretion in denying petitioner’s request for a continuance in the case before us in the absence of standards that reflect the various situations of those seeking such continuances.”).

²⁹ *Hashmi*, 25 I&N Dec. at 788 (quoting *Matter of Garcia*, 16 I&N Dec. 653 (BIA 1978), *modified on other grounds*, *Matter of Arthur*, 20 I&N Dec. 475 (BIA 1992)).

petitions are meritorious, but also recognizes that a meritorious application equates to a substantial claim to immigration relief.

In this light, the Board in *Hashmi* articulated a framework for analyzing good cause for a continuance to await USCIS's adjudication of a pending family-based visa petition. The Board directed judges to consider the DHS's response to the motion, whether the underlying visa petition was prima facie approvable, the reason for the continuance, and other procedural factors, but to pay particular attention to the viability of the underlying visa petition.³⁰ By focusing their inquiry on the petition's likelihood of success, *Hashmi* explained, immigration judges balance the "inherent tension between the conflicting needs to bring finality to the removal proceedings and to give the respondent an opportunity to apply for relief," especially where the respondent may be eligible for it.³¹

Since then, the Board has ably adapted *Hashmi*'s approach to continuances to pursue visas in other contexts. In *Matter of Rajah*, for example, the Board extended the *Hashmi* factors to continuances to pursue an employment visa, with additional consideration for different procedural steps involved.³² And in *Matter of Sanchez Sosa*, the Board applied the *Hashmi* test to a continuance to await the USCIS's adjudication of a U visa.³³ In *Sanchez Sosa*, the Board explained that three of the *Hashmi* factors "relate to the U visa in particular: (1) the DHS's response to the motion; (2) whether the underlying visa petition is prima facie approvable; and (3) the reason for

³⁰ *Hashmi*, 25 I&N Dec. at 790-91.

³¹ *See id.* at 787.

³² 25 I&N Dec. 127, 129-30 (BIA 2009).

³³ 25 I&N Dec. 807, 812 (BIA 2012).

the continuance and other procedural factors.”³⁴ As with *Hashmi*, the primary focus of the good-cause inquiry in *Sanchez-Sosa* is the viability of the underlying visa petition.³⁵

Under this rubric, if the DHS opposes the continuance, the judge must examine the likelihood of the success of the visa petition, meaning the survivor’s prima facie eligibility for the U visa. To evaluate a survivor’s prima facie eligibility, the judge must consider whether the survivor can meet the U visa detailed statutory and regulatory requirements. Thus, the judge must examine whether the survivor suffered “substantial physical or mental abuse” as a victim of a qualifying criminal activity,³⁶ and consider the nature of the injury inflicted, the duration of the harm, and the severity of the perpetrator’s conduct.³⁷ Similarly, the judge may consider documentary evidence that would be submitted to support the petition.³⁸

If those criteria are met, the judge may proceed to evaluate whether the survivor has relevant information, and has been, is being, or will be helpful to authorities investigating or prosecuting a qualifying crime.³⁹ Here too, the judge’s inquiry consider whether the survivor can meet exacting statutory requirements, including the requirement to obtain a certification by law enforcement to confirm the survivor’s cooperation.⁴⁰ Finally, assuming that these exhaustive requirements can be met, the judge may take into account prior continuances and other procedural factors.⁴¹

³⁴ *Id.*

³⁵ 25 I&N Dec. at 815.

³⁶ *Matter of Sanchez Sosa*, 25 I&N Dec. 807, 813 (BIA 2012); Section 101(a)(15)(U)(i)(I)

³⁷ 8 C.F.R. 214.14(b)(1).

³⁸ *Id.*

³⁹ 8 C.F.R. 214.14(b).

⁴⁰ 8 U.S.C. § 1184, INA § 214(p)(1).

⁴¹ *Matter of Sanchez Sosa*, 25 I&N Dec. at 815.

In this way, the good cause analysis under *Hashmi* and *Sanchez Sosa* closely trails Congressional intent. Because the U visa requirements are inherently hard to meet, this approach not only upholds Congress's purposes (to provide immigration relief to those who qualify), but also serves as a natural check against "unnecessary continuances."

Although the Board has not yet had occasion to formally adopt standards for evaluating continuances for T visa applications or VAWA self-petitions, the logic of *Hashmi* and *Sanchez Sosa* would apply equally in those situations. Doing so would give judges clear guidance based on the relevant statutes and regulations themselves, promote Congress's purposes in creating those forms of relief, and appropriately weigh the survivor's and government's interests. No new standard is required.

2. DHS's proposed universal standard would undermine VAWA and harm public safety in the United States.

A. DHS's proposed standard invites immigration judges to abuse or exceed their discretion in removal proceedings involving immigrant crime survivors.

Despite paying lip service to *Hashmi*, DHS's proposed universal framework in its brief for Matter of L-A-B-R- departs from it significantly, by shifting the focus of the inquiry from the underlying petition's approvability to its timing. This approach is misguided in at least two ways. First, DHS's proposed immediate-availability requirement amounts to an arbitrary cut off in the context of continuances to await the USCIS's adjudication of a U visa, T visa, or VAWA self-petition. Second, DHS's proposed exceptional-circumstances arbitrarily distinguishes between equally eligible applicants based solely on the timing of their application.

(1) *Immediate availability requirement.*

DHS seeks to engraft a blanket immediate-availability requirement onto the good-cause test.⁴² This is problematic for at least four reasons.

First, a bright-line rule of this sort is anathema to the flexibility that good cause requires.⁴³

Second, applying it in the context of continuances for U visas, T visas, and VAWA petitions ignores the practical realities of acquiring those forms of relief. For example, the current processing time for U visas is 42 months to 54.5 months.⁴⁴ Only 10,000 U visas may issue annually, and USCIS consistently receives more than that each year. So even if approved, these visas tend to have a back log of years.⁴⁵ Given these processing times and backlog, DHS's immediacy requirement would amount to a bright-line rule that continuances are never, or almost never, available to immigrant survivors of gender-based violence to pursue U visa relief.

Third, cases are clear that delays not attributable to the respondent weigh in favor of a continuance,⁴⁶ and applicants have no control whatsoever over the time it takes to process their applications. As with U visas, T visas and VAWA self-petitions can take more than a year to adjudicate. The current processing time for T visas is 10 months to 13 months,⁴⁷ while VAWA self-petitions can take 15 to 19 months to process.⁴⁸ So while it is true that backlog and processing

⁴² DHS Br. on Cert. to the A.G. p. 24 ("Aliens pursuing a visa that is not immediately available should not be granted continuances merely to await visa availability in the United States.");

⁴³ See *Hashmi*, 25 I&N Dec. at 789.

⁴⁴ U.S. Citizenship and Immigration Services Processing Times, *available at* <https://egov.uscis.gov/processing-times/#mainContent>

⁴⁵ U.S. Citizenship and Immigration Services Processing Times, *available at* <https://egov.uscis.gov/processing-times/#mainContent>

⁴⁶ See, e.g., *Hashmi*, 25 I&N Dec. at 793; *Sanchez-Sosa*, 25 I&N Dec. at 814.

⁴⁷ U.S. Citizenship and Immigration Services Processing Times, *available at* <https://egov.uscis.gov/processing-times/#mainContent>

⁴⁸ U.S. Citizenship and Immigration Services Processing Times, *available at* <https://egov.uscis.gov/processing-times/#mainContent>

delays may mean longer or multiple continuances, it hardly follows that applicants like Ms. Y should be penalized for it. Rather, a set timeline cannot account for the various groups that are covered by all of the various adjudicatory processes.

Fourth, denying a continuance based solely on case-completion goals is, in and of itself, an abuse of discretion.⁴⁹ Since DHS's proposed time limitation is not tethered to any factor relevant to these types of continuances, it invites judges to deny continuances based solely on case-completion requirements—DHS's apparent objective in proposing this test.⁵⁰ For this reason alone, it would be unworkable in the context of applications for U visas, T visas, and VAWA self-petitions.

(2) *Exceptional-circumstances requirement.*

DHS's proposed exceptional-circumstances requirement is similarly problematic. Here, DHS seeks to constrain the good-cause test by imposing an out-and-out heightened proof requirement based on nothing more than a visa application's timing.⁵¹ For survivors who are eligible to apply for a U visa, T visa, or VAWA self-petition, this restriction is problematic in at least two ways.

First, many undocumented crime survivors, who may spend years living in the shadows, may not know that they qualify for special immigration protections—or that such things even exist—until they faced with deportation proceedings and consult a lawyer. There is nothing in the law to imply that Congress intended to make immigration relief easier or harder to come by for immigrant crime survivors who are in removal proceedings. In effect, DHS has already

⁴⁹ See *Hashmi*, 24 I. & N. Dec. at 787.

⁵⁰ See DHS Br. on Cert. to the A.G. p. 1-2; p. 16.

⁵¹ DHS Br. on Cert. to the A.G. p. 21; See also, p. 37 (arguing that mere fact that an attempt to obtain immigration relief took place at the beginning of removal proceedings is a “negative factor”).

acknowledged this, by creating procedures that outline the process for U visa applicants in removal.⁵² Moreover, the statute suggests that the opposite is true: there is no statute of limitations for a U visa. There is no reason to think that the survivor's ongoing cooperation with law enforcement is any less valuable at that time, that the perpetrator's criminal activity is any less serious, or that would-be future victims are in any less harm.

To this end, consider Ms. X: Ms. X, her husband and her son, nationals of Israel, were all placed in removal proceedings after being defrauded by a notary who alleged that he was a licensed attorney and filed for immigration status for the family improperly. As their cases were denied, the family was placed in removal proceedings. As their removal case proceeded, the family was distraught to discover that their 12 year old son had been the subject of repeated sexual abuse by their Rabbi who, unbeknownst to them at the time, had raped young Orthodox boys throughout the area. The family wanted to get justice for their son, and to take a predator off the street, but they were also deeply concerned that they would face retribution from other families in their tight-knit Orthodox community in Israel for reporting the Rabbi. The family cooperated with the District Attorney's Office in order prosecute the Rabbi for his crimes. The immigration judge granted continuances to allow them to deal with their difficult circumstances, and allowed them over two years of continuances to await adjudication of their U visa petitions. As a result, the family was able to help hold the Rabbi accountable, and keep other children safe from sexual abuse.

Similarly, some undocumented immigrants do not become crime victims until after their deportation proceedings start. In *Matter of Patel*, for example, the respondent was assaulted just two weeks before his deportation hearing, and was cooperating with the investigation.⁵³ The

⁵² 8 CFR 214.14(c)(1).

⁵³ *Sunilkumar Ramabhal Patel*, A205 131 752 (BIA June 3, 2016) (unpublished).

respondent sought a continuance to file a U visa application, and Board correctly held that he was entitled to a meaningful opportunity to apply for this relief.⁵⁴ Just as Congress did not create different levels of protection based on the timing of an application, it made no such distinction based on the timing of the qualifying crime. Thus, DHS's proposed standard again invites immigration judges to draw an arbitrary line that Congress did not make.

B. Requiring EOIR to prematurely deport immigrant crime survivors undermines VAWA's law-enforcement goals, and makes communities in the United States less safe.

Depriving immigrant crime survivors of meaningful access immigration protections specifically created for them would have a chilling effect on the reporting of crime—precisely the opposite of what Congress intended. A chilling effect on reporting crimes, in turn, would have deleterious effects on victims, law enforcement, and public safety.

Since VAWA 2000, the U visa's impact for law enforcement has been pronounced. The San Francisco Police Department (SFPD) notes that the trust of the police continues even after a victim receives a U visa. SFPD reported several times in which U visa holders were victimized again and promptly reported it to the police, regardless of the outcome of their original case.⁵⁵ Given this, it is easy to see why one police chief described the U visa as “an invaluable vehicle” to prevent crime, save lives, and hold violent offenders accountable.⁵⁶

It follows that restricting access to immigration protections for crime survivors would have deleterious effects on public safety. Fear to report domestic violence in immigrant communities may keep victims in the shadows for a variety of reasons. To begin with, the dynamics of abusive

⁵⁴ *Id.*

⁵⁵ http://www.policeforum.org/assets/docs/Subject_to_Debate/Debate2017/debate_2017_junaug.pdf

⁵⁶ *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, Police Chief Magazine, available at <http://www.policechiefmagazine.org/overcoming-fear-building-trust-immigrant-communities>.

relationships may cause victims to protect their abusers from the criminal justice system, especially if they are unable to legally work: the abuser's incarceration could leave the victim financially vulnerable, or a single parent. Moreover, abusers with legal status can leverage victims' lack of immigration status against them, to discourage them from reporting the abuse. And on top of everything else, when children are involved, an undocumented parent may face an impossible dilemma: enduring abuse, or getting deported and leaving children in the custody of a violent parent.

Because domestic violence has a high recidivism rate, fear of deportation will almost certainly lead to further abuse. Indeed, as one prosecutor explained, “[t]he reason police chiefs are so concerned is that an unreported domestic violence case can become a reported homicide if police are not alerted.”⁵⁷ Moreover, a study of intimate partner homicides found that 20% of victims were not the intimate partners themselves, but family members, friends, neighbors, persons who intervened, law enforcement responders, or bystanders.⁵⁸ Indeed, as one police chief aptly observed, “[a]mong the lives saved [by U visas] are the lives of men and women of law enforcement who are in harm's way when they repeatedly respond to violent crimes committed by the same offender,”⁵⁹ as domestic abusers tend to do.⁶⁰

Chilling effects on reporting are already evident. Since the beginning of 2017, the LAPD reported that the “sexual assaults reported by Latinos in Los Angeles have dropped 25 percent,

⁵⁷ Lindsey Bever, *Hispanics “are going further into the shadows” amid chilling immigration debate, police say*, Washington Post (May 12, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/05/12/immigration-debate-might-be-having-a-chilling-effect-on-crime-reporting-in-hispanic-communities-police-say/?utm_term=.7c4236a13d4d.

⁵⁸ See <https://ncadv.org/statistics>.

⁵⁹ *Overcoming Fear and Building Trust with Immigrant Communities and Crime Victims*, Police Chief Magazine, available at <http://www.policchiefmagazine.org/overcoming-fear-building-trust-immigrant-communities>.

⁶⁰ See *id.*

and domestic violence reports by Latinos have decreased by 10 percent compared to the same period last year.”⁶¹ The Denver City Attorney reported that their office had to dismiss four separate domestic violence prosecutions because the undocumented victims were afraid to continue with the case for fear of deportation.” The Houston Police Department reported similar findings, indicating the number of Hispanics reporting rape is down 42.8 percent from last year.⁶² Houston Police Chief Art Acevedo stressed that that government agencies should enforce immigration laws “in a manner that does not have a chilling effect on victims of violent crimes coming forward regardless of their immigration status.”⁶³ In communities across the country, victim advocates report significant reluctance from victims of domestic violence and sexual assault in immigrant communities to seek help from the police and from the courts due to fears of deportation.⁶⁴

Deporting victims who come forward to report crimes would undermine the mission of law enforcement efforts to keep communities safe, and significantly erode the bipartisan protections created by Congress under VAWA, the Trafficking Victims Protection Act, and its

⁶¹ James Queally, *Fearing deportation, many domestic violence victims are steering clear of police and courts*, Los Angeles Times (October 9, 2017). Available at: <http://www.latimes.com/local/lanow/la-me-ln-undocumented-crime-reporting-20171009-story.html>.

⁶² Brooke A. Lewis, *HPD Chief Announces Decrease in Hispanics Reporting Rape and Violent Crimes Compared to Last Year*, Houston Chronicle (April 6, 2017). Available at <http://www.chron.com/news/houston-texas/houston/article/HPD-chief-announces-decrease-in-Hispanics-11053829.php>.

⁶³ *Id.*

⁶⁴ 2017 Advocate and Legal Service Survey Regarding Immigrant Survivors" The Asian Pacific Institute on Gender-Based Violence (APIGBV), ASISTA, Casa de Esperanza: National Latin@ Network, National Alliance to End Sexual Violence (NAESV), National Domestic Violence Hotline (NDVH), National Network to End Domestic Violence (NNEDV), and Tahirih Justice Center. Survey results available at: <http://www.tahirih.org/wp-content/uploads/2017/05/2017-Advocate-and-Legal-Service-Survey-Key-Findings.pdf>

reauthorizations. As a practical matter, the ability of victims to help law enforcement investigate and prosecute crimes is significantly reduced if they are in another country. Further, deportation itself can be a significant trauma that impacts victim's ability to cooperate effectively. And it makes every other abuser's threat of deportation credible. Those abusers, moreover, will continue to harm their victims. To borrow another prosecutor's words, "[w]hen victims of crime are afraid to trust police and the courts, the only winners are violent people."⁶⁵

C. Deporting eligible victims is inconsistent with Congress's statutory scheme.

Because Congress intended to protect immigrant victims of domestic violence, human trafficking, and sexual assault, the statutory scheme anticipates that victims who are eligible for immigration protections will remain in the United States, where they have access to the support systems and counseling they need.

As Senator Kennedy explained, ensuring that victims are not ripped from those supports while they await relief was a driving force behind VAWA 2000:

Donna, a national of Ethiopia, fled to the U.S. in 1992 after her father, a member of a prominent political party, was murdered. In 1994, Donna met Saul, a lawful permanent resident and native of Ethiopia. They married and moved to Saul's home in Massachusetts. Two years later, Saul began drinking heavily and gradually became physically and verbally abusive. The abuse escalated and Donna was forced to flee from their home. She moved in with close family friends who helped her seek counseling. She also filed a petition for permanent residence under provisions of the Violence Against Women Act. Unfortunately, with the elimination of 245(i), the only way for Donna to obtain her green card is to return to Ethiopia, the country where her father was murdered. The possibility of returning there terrifies her. This legislation will enable her to obtain her green card here, where she has the support and protection of family and access to the domestic violence counseling she needs.⁶⁶

⁶⁵ Dan Satterburg, "Crackdown on Immigrants Undermines Public Safety" *Seattle Times* (March 24, 2017). Available at: <http://www.seattletimes.com/opinion/crackdown-on-immigrants-undermines-public-safety/>.

⁶⁶ 146 Cong. Rec. S10170 (2000).

Congress has given USCIS the authority to adjudicate immigrant visa petitions, naturalization petitions, asylum and refugee applications, and other cases at immigration service centers⁶⁷. Congress has also given USCIS exclusive authority over certain types of matters such as VAWA self-petitions, U nonimmigrant status visas and T nonimmigrant status visas for victims of crime and human trafficking⁶⁸. USCIS further delegated the evaluation of these cases to the Humanitarian Unit at the Vermont Service Center (and then later Nebraska Service Center developed a small U visa unit as well). Adjudicators at these divisions receive intense and specialized training to enable them to effectively address the complexities and sensitivities of these applications. Interference by another agency in the processing of these visas can be highly prejudicial and harmful to the victim of a crime. For example, if EOIR were to remove trafficking victims while their visa petitions are pending, it would prevent them from establishing eligibility for T visa status since applicants must be physically present in the United States.⁶⁹

Removal of victims of domestic violence entitled to VAWA relief could cause considerable hardship for these victims, as they may be separated from critical support networks, lose access to legal protections and procedures related to their abuse (e.g. as a witness in a criminal proceeding or seeking custody of children), exacerbate trauma from victimization, create the risk of retaliation by the abuser's friends or family, lack medical, social and mental health services, as well as create significant barriers to applying from abroad, as they must show that they were attempting to apply for relief as a VAWA petition requires an individual to show that they were subjected to abuse in

⁶⁷ 6 U.S.C. 271(b)

⁶⁸ 8 C.F.R. 214.14(c)(1) (USCIS has sole jurisdiction over all petitions for U nonimmigrant status); 8 C.F.R. 214.11(b), (d) (noting that only USCIS may classify a non-citizen as a T-1 nonimmigrant).

⁶⁹ 8 U.S.C. 1101(a)(15)(T)(II).

the United States.⁷⁰ Causing additional hardship for VAWA self-petitioners undermines Congressional goals in establishing VAWA, goals which included making it easier for victims of domestic violence to avoid having to rely on their abusers for the ability to stay in the United States; encouraging reporting of these crimes; and protecting spouses and their children from continued abuse.

The adjudication of U visa, T visa, and VAWA self-petition decisions were put solely in the discretion of USCIS. Decisions by USCIS and other agencies created with Congressional mandates have a significant effect on removal proceedings conducted by Immigration Judges and many of these decisions, if not most of them, cannot be made by other agencies. Placing time constraints on these adjudicatory processes via a decision in the Immigration Court without an evaluation that addresses and considers the specific statutory requirements of each visa including the need to take into account varying processing times; wait lists; and other factors outside of the immigrant's control improperly interferes with decisions those other agencies are required to make.

3. DHS's "expanded factors" test wastes government resources.

If an individual is deported before USCIS can adjudicate their visa or petition, and later receives legal resident status pursuant to a U Visa or VAWA petition, they must then reapply to enter the United States. This process requires expending additional resources following the unnecessarily expedited Immigration Court proceeding, which results in decreased efficacy as a whole. In other words, not only does deporting victims contravene VAWA and inflict immense individual and public safety harm, premature deportation wastes resources on unnecessary removal proceeding, unnecessary removal, and costs associated with reapplication.

⁷⁰ 8 U.S.C. 1154(a)(1)(A)(v)(I) (providing that an applicant outside the U.S. must show that her spouse is an employee of the U.S. government or a member of the uniformed services, or subjected the applicant or their child to battery or extreme cruelty qualifying abuse "in the United States").

CONCLUSION

All immigrants, including immigrant survivors of human trafficking, domestic violence, sexual assault, and other forms of gender-based violence, deserve an immigration system that is administered reasonably, and in accord with statutory requirements. Amici are aware that political winds change, and that the Attorney General has the discretion to shape policy. But Constitutional principles remain constant: only Congress has the power to legislate, and Due Process demands that Congress's laws be administered in a manner that is fair. In the matter under review, DHS asks the Attorney General to endorse a set of requirements that would not only upend a duly enacted statute, and but also inject an impermissible degree of arbitrariness and uncertainty into the immigration law. Amici respectfully ask the Attorney General to reject DHS's proposed framework, and uphold the Constitution.

Dated: May 1, 2018

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CERTIFICATE OF SERVICE

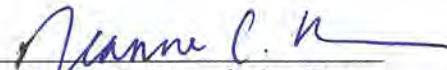
I hereby certify that today, May 1, 2018, I delivered a true and correct copy of the foregoing Brief of Amici Curiae via USPS Priority Mail to:

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