

# 09-2525-cv(L)

No. 09-3615-cv (xap)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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VISHRANTHAMMA SWARNA,  
Plaintiff-Appellee-Cross-Appellant,

- against -

BADAR AL-AWADI, and HALAL MUHAMMAD AL-SHAITAN,  
Defendants-Appellants,

and

STATE OF KUWAIT,  
Defendant-Cross-Appellee.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

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**AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION, ASIAN  
AMERICAN LEGAL DEFENSE AND EDUCATION FUND AND 11  
OTHERS IN SUPPORT OF PLAINTIFF-APPELLEE-CROSS-APPELLANT**

(Amici Listed on Inside Cover)

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## INTEREST OF *AMICI CURIAE*

*Amici Curiae* are non-governmental organizations working to combat human trafficking or the abuse of domestic workers by diplomats in the United States.<sup>1</sup> The individual statements of interest for each *amicus* are listed in Appendix A. *Amici* have provided legal and other assistance to hundreds of victims of human trafficking and to dozens of women who were lured to the United States under false promises of well-paid employment and fair treatment by foreign diplomats, only to find themselves trapped in situations of exploitation or forced labor. Some of the *amici* have brought civil suits similar to that of Plaintiff-Appellee-Cross-Appellant (“Swarna”) to enforce the rights of domestic workers exploited by diplomats, and have advocated for reforms to prevent diplomats from engaging in trafficking or exploitation of domestic workers. *Amici* have developed significant expertise regarding abuses experienced by domestic workers employed by diplomats and seek to share that expertise with the Court.

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<sup>1</sup> As required by Circuit Rule 29.1, *amici* disclose that party’s counsel have not authored this brief in whole or in part and that neither a party nor party’s counsel, nor anyone else, contributed money that was intended to fund preparing or submitting this brief.

## SUMMARY OF ARGUMENT

Every branch of the U.S. government and 117 countries have condemned the practice of human trafficking.<sup>2</sup> Yet some diplomats — believing that their diplomatic status shields them against any accountability — intentionally take advantage of their domestic workers’ vulnerabilities and disregard American laws and international agreements and norms by bringing indentured servants into the United States under fraudulent circumstances and holding them against their will.<sup>3</sup>

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<sup>2</sup> See President Barack Obama, Presidential Proclamation – National Slavery and Human Trafficking Prevention Month (Jan. 4, 2010) (“[T]oday, the darkness and inhumanity of enslavement exists. Millions of people worldwide are held in compelled service, as well as thousands within the United States. . . . [W]e acknowledge that forms of slavery still exist in the modern era, and we recommit ourselves to stopping the human traffickers who ply this horrific trade.”); President George W. Bush, Address to the United Nations General Assembly (Sept. 23, 2003) (“Nearly two centuries after the abolition of the transatlantic slave trade, and more than a century after slavery was officially ended in its last strongholds, the trade in human beings for any purpose must not be allowed to thrive in our time.”); Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101 (2000) (“The purposes of this [Act] are to combat trafficking in persons, a contemporary manifestation of slavery whose victims are predominantly women and children, to ensure just and effective punishment of traffickers, and to protect their victims.”); and *United States v. Evans*, 476 F.3d 1176, 1179 (11th Cir. 2007) (“While [Defendant’s] activities may be minor in the national and international market of trafficking children for commercial sex acts, his acts contribute to the market that Congress’ comprehensive scheme seeks to stop.” (internal quotation marks omitted)); United Nations Trafficking Protocol, *available at* [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en).

<sup>3</sup> See, generally, U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-892, HUMAN RIGHTS: U.S. GOVERNMENT’S EFFORTS TO ADDRESS ALLEGED ABUSE OF HOUSEHOLD WORKERS BY FOREIGN DIPLOMATS WITH IMMUNITY COULD BE

This is the very definition of human trafficking.<sup>4</sup> In this case, a former diplomat and his wife (“Individual Defendants”) have attempted to shield their conduct from

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STRENGTHENED (July 2008), *available at* <http://www.gao.gov/new.items/d08892.pdf> (last visited Feb. 8, 2010) (hereinafter GAO REPORT); U.S. Dep’t of State, *Trafficking in Persons Report*, at 15 (2007), *available at* <http://www.state.gov/documents/organization/82902.pdf> (recognizing that some members of diplomatic missions abuse domestic workers brought to the United States from other countries). Exploitation by diplomats of domestic workers is a documented problem in the United States. *See* Ernesto Londono, *Ex-Worker Sues Envoy of Tanzania*, Wash. Post., May 2, 2007, at B1 (reporting that a Tanzanian woman brought to the United States by a diplomat is suing the envoy, alleging he treated her like a slave for more than four years); Colbert I. King, *The Slaves in Our Midst*, Wash. Post, Dec. 23, 2006, at A21 (“many of today’s human traffickers and slavers are diplomats, flaunting U.S. and local laws, under the protective shield of the [State Department’s] interpretation of diplomatic immunity”); Lena Sun, “*Modern-Day Slavery*” Prompts Rescue Efforts: Groups Target Abuse of Foreign Maids, Nannies, Wash. Post, May 3, 2004, at A1 (reporting that a Bangladeshi maid working for a Bahraini diplomat in New York was never paid or allowed to leave the apartment until she was rescued by police; an Indian maid for a diplomat in Potomac, Maryland was physically and mentally abused over a period of eleven months; and an Indonesian domestic servant employed by a diplomat at the United Arab Emirates Embassy in Washington, D.C., was physically abused, threatened with death, and underpaid); and Matt Kelley, *Some Embassy Workers Enslave Domestic Help, Enjoy Immunity*, The New Standard, June 28, 2005, <http://newstandardnews.net/content/index.cfm/items/1985> (detailing the plight of an Indian women who was beaten, raped, and verbally abused for four years in the Manhattan home of a Kuwaiti diplomat; as well as an Indonesian teenager who actually paid an employment agency for the opportunity to be chosen as a domestic servant for a Qatari diplomatic family only to be set to work for twelve to sixteen hours a day, seven days a week).

<sup>4</sup>The U.S. Congress has defined “severe forms of trafficking in persons” as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” Trafficking Victims Protection Act § 7102(8)(B).

judicial scrutiny by claiming diplomatic immunity. Their arguments necessarily fail. First, the Vienna Convention on Diplomatic Relations (“Vienna Convention”) explicitly limits the grant of immunity afforded a diplomat once the diplomat has left their post in a receiving country.<sup>5</sup> For this Court to conclude otherwise would deprive domestic workers who have been exploited by diplomats of the opportunity to ever bring a suit against their former diplomat employers.

Moreover, even if a diplomat retained the same level of immunity after leaving a post, the Vienna Convention contains an important statutory exception to diplomatic immunity. According to Article 31(1)(c) of the Convention, diplomatic immunity does not attach to “action[s] relating to any professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.”<sup>6</sup> Human trafficking is just such an activity. It is a profitable and commercial enterprise that does not relate to any official function of a diplomat in the United States. While previous cases of diplomatic malfeasance have affirmed the assertion of the diplomatic immunity defense, those cases centered on labor disputes. Though *amici* contend that those cases were wrongly decided, *see infra* II(C), to the extent that those prior cases are applicable, the courts’ and the State

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<sup>5</sup> *See* Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 500 U.N.T.S. 95 (“Vienna Convention”), Art. 39; *See* Plaintiff-Appellant-Cross-Appellee’s Brief, Sec. I.

<sup>6</sup> Vienna Convention, art. 31(1)(c).

Department’s interpretations of the commercial activity exception have been too narrow. This case presents a ripe opportunity to affirm the long-standing principle “that slavery or involuntary servitude shall not exist in any part of the United States.”<sup>7</sup> Diplomatic immunity poses no bar to vindicating that principle in this case.

## ARGUMENT

### I. DOMESTIC WORKERS ARE AN EXTREMELY VULNERABLE POPULATION SUSCEPTIBLE TO ABUSE AND EXPLOITATION

Each year, nearly three thousand migrant domestic workers come to the United States to labor in the homes of foreign diplomats.<sup>8</sup> They travel on special A-3 or G-5 visas<sup>9</sup> issued by the United States to the “attendant[s], servant[s], or personal employee[s]”<sup>10</sup> (hereinafter “domestic workers”)<sup>11</sup> of foreign officials

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<sup>7</sup> *The Civil Rights Cases*, 109 U.S. 3, 20 (1883).

<sup>8</sup> GAO REPORT, *supra* note 3, at 7-8.

<sup>9</sup> Domestic workers on A-3 visas are employed by ambassadors, public ministers, diplomat or consular officers and their families, while workers possessing G-5 visas are employed by officers or employees of international organizations or of foreign missions to international organizations and their families. INA § 101(a)(15)(A)(iii), G(v); 8 U.S.C. § 1101(a)(15)(A)(iii), G(v) (2006).

<sup>10</sup> 9 Foreign Affairs Manual (FAM) 41.21 N6.1 (2004), *available at* <http://www.state.gov/documents/organization/87174.pdf>.

<sup>11</sup> “Domestic workers” are individuals employed part-time or full time in a household or private residence that perform any of the following duties: cook, servant, waiter or waitress, butler, nurse, child minder, caretaker for elderly or

representing their governments in Embassies, Consulates, Foreign Missions to International Organizations and within International Organizations (hereinafter “diplomats”).<sup>12</sup> Enforcement of legal protections for household workers in diplomat households is vital because these workers are particularly vulnerable to exploitation. These workers usually come from poor countries,<sup>13</sup> and their demographic make-up, the nature of their work, and the power differential between them and their employers makes them susceptible to abuse and exploitation.

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disabled persons, personal servant, barman or barmaid, chauffeur, porter, gardener, washerman or washerwoman, or guard. U.N. Comm’n on Human Rights, 60th session, *Specific Groups and Individual: Migrant Workers*, ¶ 12, U.N. Doc. E/CN.4/2004/76 (January 12, 2004). According to the International Labor Organization, the work of domestic service employees includes: sweeping or vacuuming; cleaning or washing and waxing floors, doors, windows, furniture and various objects; washing, ironing, and mending bed and table linen and other household linen for personal use; washing dishes; preparing, cooking, and serving meals and drinks; buying food and various articles for domestic use; performing related tasks; and supervising other workers. *Id.* at ¶ 13.

<sup>12</sup> For the purposes of this Brief, the term “diplomat” shall refer to all employers whose domestic workers are eligible for the A-3 or G-5 visa. *See* INA § 101(a)(15)(A)(iii), G(v).

<sup>13</sup> *See* GAO REPORT, *supra* note 3, at 9, Fig. 2.

## **A. Domestic Workers in the General Population of the U.S. Already Experience a High Rate of Exploitation**

A variety of factors make domestic workers vulnerable to exploitation.

They usually lack education,<sup>14</sup> have deep financial obligations,<sup>15</sup> are overwhelmingly female<sup>16</sup> and persons of color,<sup>17</sup> and are increasingly immigrant.<sup>18</sup>

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<sup>14</sup> Workers without a high school degree have significantly higher minimum wage violation rates than those with high school degrees or higher education. ANNETTE BERNHARDT, ET AL., CENTER FOR URBAN ECONOMIC DEVELOPMENT, *BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA'S CITIES* 43 (2009), *available at* [http://nelp.3cdn.net/319982941a5496c741\\_9qm6b92kg.pdf](http://nelp.3cdn.net/319982941a5496c741_9qm6b92kg.pdf) (last visited Feb. 8, 2010) (hereinafter *BROKEN LAWS*).

<sup>15</sup> Thirty-three percent of surveyed domestic workers came to the U.S. because they could not support their families in their home countries. Workers who live in their employers' home (51 percent) were especially likely to have left their home countries due to economic hardship. DOMESTIC WORKERS UNITED & DATACENTER, *HOME IS WHERE THE WORK IS: INSIDE NEW YORK'S DOMESTIC WORK INDUSTRY* 10 (hereinafter *HOME IS WHERE THE WORK IS*) (July 14, 2006), *available at* <http://www.workplaceprojectny.org/DWUReport.pdf> (last visited Feb. 8, 2010).

<sup>16</sup> Thirty percent of surveyed female workers experienced minimum wage violations, compared to 20 % of male workers. *BROKEN LAWS*, *supra* note 14, at 42.

<sup>17</sup> Ninety-three percent of domestic workers in New York are women, and 95 % of domestic workers in New York are people of color. *HOME IS WHERE THE WORK IS*, *supra* note 15, at 2. Nearly a third of Latino workers experience minimum wage violations, compared to 7.8 % of White workers. *BROKEN LAWS*, *supra* note 14, at 42.

<sup>18</sup> Thirty-one percent of foreign-born workers experienced minimum wage violations, nearly twice the rate for U.S.-born workers. *BROKEN LAWS*, *supra* note

Once employed, they usually have no coworkers, leaving them relatively isolated. Their rights to organize are curtailed.<sup>19</sup> They lack the same employment rights as workers in other industries,<sup>20</sup> and they often lack knowledge about federal and state laws and their individual rights.

Unsurprisingly, domestic workers, like other workers in low-wage industries, report a high incidence of economic exploitation, especially domestic workers. More than 40 % of workers in private households reported being paid less than the minimum wage.<sup>21</sup> Child care workers in private households, specifically, had a minimum wage violation rate of 66 %.<sup>22</sup> Nearly 9 out of 10

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14, at 42. Immigrant workers have an 80 % overtime violation rate, compared to 68 % for U.S.-born workers. *Id.* at 45. Seventy-six percent of surveyed domestic workers are not U.S. citizens. HOME IS WHERE THE WORK IS, *supra* note 15, at 10.

<sup>19</sup> 29 U.S.C. § 152(3) (excluding domestic workers from the definition of “employee” for the purposes of the National Labor Relations Act).

<sup>20</sup> *See e.g.*, 29 U.S.C. § 213(b)(21) (excluding live-in domestic workers from overtime protection under the Fair Labor Standards Act); 29 C.F.R. § 1975.6 (excluding domestic workers from protection under the Occupational Safety and Health Act (OSHA)); *Usery v. Lacy*, 628 F.2d 1226, 1229 (9th Cir. 1980) (stating that employers of domestic help are not covered by OSHA standards); 42 U.S.C. § 2000e(b) (limiting the definition of “employer” to a person who has 15 or more employees under the Equal Employment Opportunity Act).

<sup>21</sup> BROKEN LAWS, *supra* note 14, at 30.

<sup>22</sup> *Id.* at 30 & 31, Fig. 4.2 (stating that maids and housekeepers had a violation rate of 29.5 percent).

workers in private households report overtime violations.<sup>23</sup> Child care workers had an overtime violation rate of 90.2 %.<sup>24</sup> A large percentage of domestic workers who worked before or after their scheduled shift were not paid for that part of their working time. Eighty-three percent of workers in private households had off-the-clock violations,<sup>25</sup> and 68.8 % of child care workers had off-the-clock violations.<sup>26</sup>

Moreover, the working conditions of live-in household workers tend to be worse than that of live-out workers. Household workers who reside with their employers report a higher incidence of exploitive treatment. *See e.g., U.S. v. Alzanki*, 54 F.3d 994 (1st Cir. 1995) (affirming conviction of defendant employer of holding domestic worker in condition of involuntary servitude pursuant to 18 U.S.C. §§ 371 & 384).

“Live-in work is generally performed by workers who have no other options. Not only do they tend to be recent immigrants, they are also more likely to have come to the U.S. to escape war, political unrest or natural disaster in their home

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<sup>23</sup> *Id.* at 34.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 35.

<sup>26</sup> *Id.*

countries.”<sup>27</sup> The majority of live-in domestic workers work 58 hours per week, compared to 39 hours per week for live-out workers.<sup>28</sup> Twenty-one percent of live-in domestic workers earn below minimum wage.<sup>29</sup> Three-quarters of live-in domestic workers do not receive overtime pay.<sup>30</sup> A full forty percent of live-in domestic workers that were surveyed stated that they were not paid for their work or not paid on time.<sup>31</sup>

In addition to exploitive treatment, live-in domestic workers report a higher incidence of abusive treatment. Twenty-one percent of all domestic workers, for instance, reported experiencing employer verbal abuse, while 37 % of live-in domestic workers reported their employers threatened, yelled, or called them

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<sup>27</sup> HOME IS WHERE THE WORK IS, *supra* note 15, at 28.

<sup>28</sup> Cathy Ruckelshaus, National Employment Law Project, *Holding the Wage Floor: Enforcement of Wage and Hour Standards for Low-Wage Workers in an Era of Government Inaction and Employer Unaccountability* 6-7 (October 2006), available at <http://www.mobilityagenda.org/holdwage.pdf> (last visited Feb. 8, 2010) (hereinafter *Holding the Wage Floor*).

<sup>29</sup> HOME IS WHERE THE WORK IS, *supra* note 15, at 27.

<sup>30</sup> *Holding the Wage Floor*, *supra* note 28, at 6-7. 12 NYCRR § 138-2.2 (stating that live-in residential employees are entitled to overtime pay for more than 44 hours per week of work).

<sup>31</sup> HOME IS WHERE THE WORK IS, *supra* note 15, at 27.

insulting names.<sup>32</sup> In some instances, domestic workers are victims of assault and battery.<sup>33</sup>

**B. The Vulnerability Factors of Domestic Workers is Exacerbated in Diplomat Households**

These vulnerability factors are compounded for domestic workers, personal employees, and household servants of diplomatic staff. These household employees are often live-in domestic workers, who not only share many of the aforementioned characteristics as domestic workers in the general population but they also have unique legal constraints, are overwhelmingly new arrivals to the U.S., are monolingual or limited-English proficient, and have far less negotiating power vis-à-vis their diplomat employers.

Most notably, federal immigration laws restrict the employment portability of household workers, conditioning their presence in the U.S. on employment by the diplomat employer and the diplomat employer alone. The lack of portability

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<sup>32</sup> *Id.* at 21.

<sup>33</sup> See HUMAN RIGHTS WATCH, HIDDEN IN THE HOME: ABUSE OF DOMESTIC WORKERS WITH SPECIAL VISAS IN THE UNITED STATES 12 (June 2001), *available at* <http://www.hrw.org/legacy/reports/2001/usadom/usadom0501.pdf> (last visited Feb. 8, 2010); *see also* MARGARET HUANG, GLOBAL RIGHTS, DOMESTIC WORKERS' RIGHTS IN THE UNITED STATES: A REPORT PREPARED FOR THE U.N. HUMAN RIGHTS COMMITTEE IN RESPONSE TO THE SECOND AND THIRD PERIODIC REPORT OF THE UNITED STATES, *available at* [http://www.globalrights.org/site/DocServer/Domestic\\_Workers\\_report-\\_FINAL.pdf?docID=5503](http://www.globalrights.org/site/DocServer/Domestic_Workers_report-_FINAL.pdf?docID=5503) (last visited Feb. 8, 2010).

and the issues that arise from unauthorized work in the U.S. raises the specter of exploitation and abuse for workers on A-3 and G-5 visas. This lack of portability leaves domestic workers with A-3 and G-5 visas with the choice to either stay with their employers or return to their countries of origin. Returning to their countries of origin may not be a viable option for a variety of reasons. Finding alternative employment in the U.S. is often not a legal option available to them under current immigration laws. Consequently, if the working conditions are abusive or exploitive, many workers feel that there is no other realistic choice but to endure.

Although they have a duty to abide by U.S. laws, exploitive diplomat employers often intimidate their domestic workers by exaggerating their power under the immigration portability rule.<sup>34</sup> They threaten their household employees that they will be returned to their countries of origin for simply complaining about the working conditions. These threats are often accompanied by threats to call the police or other law enforcement authorities to “deport” or imprison complaining

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<sup>34</sup> See e.g., Memorandum from U.S. Mission to the United Nations (“U.N.”), HC-52-05, 1 (June 9, 2005) (stating “all domestic employees should be paid according to the new prevailing wage” of \$9.86 per hour in the New York City metropolitan area); Diplomatic Note from U.S. Mission to the U.N. New York, HC-125-09, 1 (Oct. 15, 2009) (reminding missions to the U.N. that they must “take any and all measures necessary to ensure that members of their missions employing [domestic] workers respect the laws relating to the treatment to be accorded domestic workers”).

workers. In some instances, coercion gives way to force and the employers physically detain, assault, or otherwise harm workers or their loved ones.

The portability issues that render A-3 and G-5 visa holders vulnerable are similar to those of “guest workers,” who are admitted to the U.S. on H-2A and H-2B visas to engage in agricultural work and unskilled labor on a temporary basis. *See e.g.*, 8 C.F.R. § 214.2(h) (2007) (providing the regulations governing the H-2A and H-2B visa programs and limiting the visa to employment for sponsoring employer); *Centeno-Bernuy v. Perry*, 302 F. Supp. 2d 128, 131 n.2 (W.D.N.Y. 2003) (describing how H-2A workers are only admitted to the U.S. to work for a designated employer and for the duration of the period of employment and how such workers must leave the U.S. when the employment relationship ends); Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 541 (2007) (stating all guest work programs, except the J-1 visa, subject guest workers to deportation upon the loss of work). Guest workers under these visa programs often experience abuse and exploitation because of their analogous portability constraints.<sup>35</sup>

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<sup>35</sup> *See e.g.*, *Catalan v. Vermillion Ranch Ltd. P’ship*, No. 06-CV-01403, 2007 U.S. Dist. LEXIS 567 (D. Colo. Jan. 4, 2007) (involving H-2A plaintiffs with claims, *inter alia*, under the Fair Labor Standards Act and Trafficking Victims Protection Reauthorization Act); *David v. Signal Int’l, LLC*, 257 F.R.D. 114 (E.D.La. Apr. 2, 2009) (involving 500 H-2B guest worker plaintiffs with trafficking and

In addition to the portability issues that exist for A-3 and G-5 visa holders, household employees of diplomatic staff are often monolingual or limited-English proficient, as they often come from the same country of origin as the staff member. This allows employers to further isolate their domestic workers or to mislead them about their rights under federal and state laws. Moreover, domestic workers, especially recently-arrived, foreign-born workers, may lack knowledge about the various forms of emergency assistance available, such as federal and local law enforcement authorities, the Department of State, the Department of Labor, and non-governmental organizations.<sup>36</sup>

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employment claims); *Antonio-Morales v. Bimbo's Best Produce, Inc.*, No. 8:5105 Sec. D, Mag. 2, 2009 U.S. Dist. LEXIS 51833, at \*2 (E.D. La. Apr. 20, 2009) (involving plaintiff H-2A agricultural workers with employment and trafficking claims); Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 541 (2007) (stating: "In addition to the lack of freedom to leave a workplace and the inequality that results from this legal disability, lack of portability adversely impacts the safety and welfare of guest workers."); Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL'Y J. 125, 137 (2009) (describing how the lack of visa portability "intensifies the inequality of bargaining power between the employer and the low-skill migrant worker").

<sup>36</sup> Although there are limitations by which law enforcement can be involved in the affairs of a diplomatic household, a domestic worker has the right to contact the Department of State and other agencies to report violations of her rights.

Furthermore, domestic workers may come from a country that has minimal employment laws, particularly laws that protect household workers.<sup>37</sup> If the U.S. consular officer fails to inform the prospective worker of her rights under federal and state laws,<sup>38</sup> she is far less likely to complain about the working conditions or assert her rights.

Also, the diplomatic staff member may know the location of the domestic workers' family members and loved ones in the worker's origin country.<sup>39</sup> This presents additional safety concerns not only for the household worker herself but also for loved ones overseas. As in the case at bar, employers have used this information as a method of intimidation to coerce their household employees into submission.

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<sup>37</sup> See e.g., HUMAN RIGHTS WATCH, MAID TO ORDER: ENDING ABUSES AGAINST MIGRANT DOMESTIC WORKERS IN SINGAPORE 24-33 (Dec. 6, 2005), available at <http://www.hrw.org/sites/default/files/reports/singapore1205wcover.pdf> (last visited Feb. 8, 2010).

<sup>38</sup> There is evidence that there has been a lack of uniformity and consistency of U.S. consular officers informing A-3 and G-5 applicants of their employment rights. GAO REPORT, *supra* note 3, at 20.

<sup>39</sup> Employers and prospective employees must communicate the terms of employment, visa, and travel arrangements before employees are admitted to the U.S. See Memorandum from U.S. Mission to the U.N. New York, HC-131-04, 1 (Nov. 1, 2004) (requiring prospective employers to offer written employment contracts to domestic employees).

Finally, the power stratification that already exists between employer and employee is exacerbated by the dynamic that the diplomatic staff member is a high-ranking government official on an international scale, while the household worker is a foreign national often with few resources in the United States.<sup>40</sup> The GAO Report states:

[Household] workers may be intimidated by their employers' wealth, political connections, or prominent positions in society.... [Abusive] situations involving foreign diplomats' household workers have a striking power imbalance because workers are often poor, uneducated, and fear retaliation, not only against themselves but also against family members in their home country.

GAO REPORT, *supra* note 8, at 17.

The numerous factors that leave domestic workers, especially those in diplomat households, vulnerable to extreme forms of abuse and exploitation render the need for, and enforcement of, legal protections all the more important. These workers vitally need to be able to enforce their rights on the same terms as other workers in the United States, and diplomatic immunity poses no obstacle for Swarna to do so in the case at bar.

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<sup>40</sup> See GAO REPORT, *supra* note 3, at 17-18.

## **II. FORMER DIPLOMATS CANNOT SHROUD THEMSELVES IN DIPLOMATIC IMMUNITY TO PRECLUDE CIVIL SUITS BY DOMESTIC WORKERS THEY EXPLOITED AND ENSLAVED**

As outlined in Swarna’s brief, the grant of immunity afforded a sitting diplomat stems from Article 31 of the Vienna Convention, while the immunity retained by a diplomat who has left a post flows from Article 39. *See* Swarna’s Brief, sec. I. The level of immunity granted by Article 39 is a much more limited form of immunity than that enjoyed by a sitting diplomat. Not only is this the correct reading of the Vienna Convention, but it provides domestic workers who are exploited and trafficked by diplomats a much needed and limited opportunity to seek a remedy for the human and civil rights violations the domestic worker endured at the hands of their employers. Any suggestion that Article 39 should be interpreted similarly to Article 31 must be rejected, as such interpretation ignores the purpose and language of the Vienna Convention itself. *See id.* Even if this Court finds merit in Individual Defendants’ argument that Article 39 should be interpreted in accordance with Article 31’s jurisprudence, Swarna’s claims are not barred by diplomatic immunity because Individual Defendants engaged in human trafficking, a commercial activity for which they do not enjoy immunity, even under Article 31.

The “commercial activities exception” of Article 31(1)(c) of the Vienna Convention strips immunity from diplomats for civil actions “relating to any

professional or commercial activity exercised by the diplomatic agent in the receiving State outside his official functions.” 23 U.S.T. at 3227. In the present case, Individual Defendants engaged in a commercial activity by trafficking Swarna into the United States and enslaving her. By coercing Swarna’s labor at illegal and substandard wages, Individual Defendants yielded substantial profits from the wage arbitrage in an amount approximating at least \$80,000. *See* Plaintiff’s Brief in Support of Motion for Default Judgment at 34-36, 38-39, *Swarna v. Al-Awadi*, No. 06-CV-4880, Doc. 32 (S.D.NY Aug. 5, 2008). The profitable and commercial nature of Individual Defendants’ acts brings their conduct squarely within the commercial activities exception. Accordingly, Individual Defendants are not immune, on ground of diplomatic immunity, from suit to redress the constitutional and statutory and human rights violations Swarna suffered.

**A. The Act of Human Trafficking is a Commercial Activity Engaged In For Personal Profit.**

Human trafficking is modern-day slavery. Like other forms of slavery, it is a lucrative commercial activity that exploits the poor and vulnerable. The profit-seeking purpose and commercial nature of human trafficking remove Individual Defendants’ conduct from the scope of the Vienna Convention’s immunity for diplomats.

Inapposite to this case are those cases in which defendants have asserted

diplomatic immunity to defeat their former domestic workers' claims solely for violations of wage and hour laws. Courts have dismissed these claims on the theory that the hiring of household help is incidental to the daily life of the diplomat and therefore not commercial for purposes of the exception. *See Gonzalez Paredes v. Vila*, 479 F. Supp. 2d 187 (D.D.C. 2007) (applying diplomatic immunity to claims based on wage and hour violations because the contract for domestic employment was incidental to the daily life of the diplomat and his wife); *Tabion v. Mufti*, 73 F.3d 535 (4th Cir. 1996) (same). Although *Gonzalez* and *Tabion* are inapposite to the present case on multiple grounds, it is important to note that the human trafficking and slavery at issue in this case are inherently commercial activities not incidental to the daily life of a diplomat.

When Individual Defendants trafficked Swarna into the United States, they engaged in a trade or business activity for personal profit. *See Tabion*, 73 F.3d at 537 (interpreting the meaning of “commercial activity” in Article 31(1)(c) of the Vienna Convention as relating “only to trade or business activity engaged in for personal profit”). Congress has defined “severe forms of trafficking in persons” as “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” 22 U.S.C.

§ 7102(8)(B). Trafficking in persons is regularly referred to as a “trade”<sup>41</sup> in slaves, a “business”<sup>42</sup> and an “industry.”<sup>43</sup> Just as African slaves were brought to the United States through vast transportation networks and lucrative commercial and trading schemes, so too today, the transnational trafficking of individual laborers is accomplished through extensive recruitment systems operating to feed a commercial trade in human labor motivated by the quest for personal profit.

Trafficking in persons is not only a trade or business activity, but an extremely profitable one. Indeed, it is one of the most lucrative illicit businesses worldwide, as a criminal industry second only to drug trafficking in its scope.<sup>44</sup> In January 2007, the U.S. House of Representatives noted that “global profits from

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<sup>41</sup> See, e.g., Janice G. Raymond, *Guide to the New U.N. Trafficking Protocol* 1 (2001) (stating that “[t]he Protocol promises to contest the world’s organized crime networks and combat the trade in human beings and transnational prostitution”); Amnesty International, *Trafficking of Persons: Amnesty International Fact Sheet* (describing trafficking as “modern day slave trading”).

<sup>42</sup> See, e.g., Amy O’Neil Richard, *International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* 13 (1999) (stating that “[t]rafficking in women is a new business and source of strength for organized crime”).

<sup>43</sup> See, e.g., *id.* (explaining that “the trafficking in women industry is closely intertwined with other related criminal activities, such as extortion, racketeering, money laundering, bribery of public officials, drug use, document forgery, and gambling”).

<sup>44</sup> Department of Health and Human Services, *Human Trafficking Fact Sheet*, available at [http://www.acf.hhs.gov/trafficking/about/fact\\_human.html](http://www.acf.hhs.gov/trafficking/about/fact_human.html); see also H. Res. 55, 110th Cong. (2007).

trafficked forced labor totals an estimated \$31.6 billion annually.” H. Res. 55, 110th Cong. (2007). According to the Congressional findings of the TVPA, “trafficking is the fastest growing source of profits for organized criminal enterprises worldwide,” and “[p]rofits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide.” 22 U.S.C. § 7101(b)(8). In the TVPA, Congress derived its constitutional authority to regulate trafficking in persons from the Commerce Clause because trafficking “substantially affects interstate and foreign commerce.” 22 U.S.C. § 7101(b)(12); *see Gonzales v. Raich*, 545 U.S. 1 (2005). Congress also found that “[t]rafficking for such purposes as involuntary servitude, peonage, and other forms of forced labor has an impact on the nationwide employment network and labor market.” 22 U.S.C. § 7101(b)(12). Moreover, the prevalence of “profitable businesses and fraud schemes that entail the exploitation of foreign women, such as unlicensed mail order bride companies, maid schemes, and domestic servants” contributes to the expansion and profitability of global trafficking in female domestic workers.<sup>45</sup>

Whether accomplished through vast criminal networks or simply through an individual’s acts to recruit and procure a person’s involuntary labor, trafficking is a

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<sup>45</sup> Richard, *supra* note 42, 27.

trade or business activity that is personally profitable to individual traffickers.<sup>46</sup>

Similar to drug trafficking, trafficking in persons is an easy way for individuals to earn quick and significant amounts of money, in this instance through the illegal exploitation of a person's labor. Trafficking is profitable to individuals involved at every stage of the supply-chain, and most profitable to those individuals at the receiving end of the supply-chain.<sup>47</sup> For example, while labor recruiters may earn a cut from recruitment fees paid by victims of trafficking, the ultimate employer of the worker is the "master trafficker" who "extracts the maximum gains from the entire bargain"<sup>48</sup> by enjoying the fruits of the workers' labor while failing to fully compensate the worker for expended periods of time. In this way, "master

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<sup>46</sup> Trafficking does not require an association with an organized syndicate; indeed traffickers often do not operate in large syndicates, but may operate as a family or individuals. For example, according to a Guide to the U.N. Trafficking Protocol, "husbands and boyfriends of women often recruit, traffic and pimp their female partners into prostitution. They may engage a small group of friends or others to assist in the crime." Janice G. Raymond, *Guide to the New U.N. Trafficking Protocol* 3 (2001).

<sup>47</sup> For example, the United Nations Working Group on Slavery Practices of the U.N. Sub-Commission on the Promotion and Protection of Human Rights stated, in a resolution discussing trafficking in Eastern Europe, that women were "traded" several times on their way to Europe, with prices increasing at each "transaction." Secretary-General, *Report of the Secretary-General on Trafficking in Persons*, at 13, U.N. Doc. E/CN.4/Sub.2/AC.2/2001/4 (May 16, 2001).

<sup>48</sup> *Report on Trafficking in Women and Children in India*, Nat'l Hum. Rights Comm., UNIFEM & Inst. of Soc. Sciences 139 (2003).

traffickers” ensure long-term exploitation with maximum economic gain.<sup>49</sup> Just as slaveholders in the United States profited enormously from the uncompensated labor of their slaves, which led to the rapid expansion of the U.S. economy, diplomats that traffic their personal employees profit substantially from their employees’ involuntary labor, enriching themselves and their families and creating an underclass economy of slave labor in the United States.

In the present case, Individual Defendants imported Swarna from Kuwait for the purpose of imprisoning and enslaving her in the United States to personally benefit and profit from her labor. By failing to pay Swarna the federal minimum wage as required by law and the parties’ employment contract and entrapping her in their homes for nearly four years, Individual Defendants reaped a personal profit in an amount approximating at least \$80,000.<sup>50</sup> See Plaintiff’s Brief in Support of

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<sup>49</sup> See Richard, *supra* note 42, 27.

<sup>50</sup> Courts have long recognized that the money saved by not paying a sum one is obligated to pay is equivalent to a profit. See, e.g., *Jeremiah v. Richardson*, 148 F.3d 17, 20 (1st Cir. 1998) (noting that a bankruptcy trustee “earned approximately \$5,000 per month ‘profit’...only by *not paying* any debt service (i.e., the mortgage), any real estate taxes, or any payments on the Center’s prepetition outstanding obligations”) (emphasis added); *Higgins v. Detroit Educ. Television Found.*, 4 F. Supp. 2d 701, 710 (E.D. Mich. 1998) (noting that the entity “maximized its *profits* by *not paying* any licensing or permission fees” on copyrighted materials) (emphasis added); *United States v. Veksler*, 862 F. Supp. 1337, 1340 (E.D. Pa. 1994) (describing a “daisy chain” scheme in which “the *profit* gained by *not paying* the taxes was divided among the conspirators”) (emphasis added), *aff’d*, 62 F.3d 544 (3d Cir. 1995); *S. New England Tel. Co. v. Dep’t of Pub. Util. Control*, 874 A.2d 776, 783 (Conn. 2005) (warning that a utility

Motion for Default Judgment at 34-36, 38-39, *Swarna v. Al-Awadi*, No. 06-CV-4880, Doc. 32 (S.D.NY Aug. 5, 2008). By forcing Swarna to labor against her will, Individual Defendants engaged in a calculated and deliberate business scheme to profit from Swarna's exploited labor.

**B. Human Trafficking Falls Outside the Scope of a Diplomat's Official Functions and is Not Incidental to a Diplomat's Daily Life.**

The Vienna Convention does not extend diplomatic immunity to commercial activities outside the scope of a diplomat's official functions. Vienna Convention, Art. 31(1)(c). The official functions of a diplomat do not include commercial activities designed to yield a personal profit. *Id.* at Art. 42 ("A diplomatic agent shall not in the receiving State practise for personal profit any professional or commercial activity."). While few courts have considered the scope of a diplomat's official functions, the Fourth Circuit has construed this scope broadly, finding that the commercial activities exception was not intended to apply to contracts for services incidental to the life of a diplomat. *Tabion v. Mufti*, 73 F.3d 535, 537 (4th Cir. 1996). Relying on the United States State Department's interpretation of the commercial activities exception, the *Tabion* court held that "day-to-day living services such as dry cleaning or domestic help" are services "incidental to daily life" and therefore not commercial activities "outside [a  

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should not be permitted "reap windfall *profits*, as a result of *not paying* labor costs") (emphasis added).

diplomat's] official functions" within the meaning of Article 31(1)(c). *Id.* at 538-39. While *amici* believe that *Tabion* was wrongly decided, see *infra* sec. C, even if the improperly restrictive *Tabion* standard were to be applied, the commercial activities of human trafficking and slavery fall outside the official functions of a diplomat even under *Tabion*'s broad interpretation of such functions.<sup>51</sup>

When Individual Defendants engaged in the trafficking of Swarna for their own personal profit, the employment relationship between Individual Defendants and Swarna ceased to be "incidental" to Individual Defendants' management of their daily lives. Trafficking Swarna to this country and profiting from her undercompensated, forced labor are acts not akin to ordinary contracts for "day-to-day living services such as dry cleaning or domestic help." *Tabion*, 73 F. 3d. at 538-39. Nor are Individual Defendants' commercial acts "incidental to the ordinary conduct of life in the receiving State." *Tabion*, 73 F.3d at 538 (quoting

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<sup>51</sup> *Amici*'s argument that a diplomat's trafficking of a domestic worker falls outside their "official functions", as defined by the Vienna Convention, is consistent with an assertion that a diplomat can carry out the enslavement and trafficking of a domestic worker in their official capacity such that their sending country could be liable under the Foreign Sovereign Immunities Act. The relevant inquiry in determining whether an individual was acting in an official capacity for purposes of the Foreign Sovereign Immunity Act focuses on the nature of the individual's alleged actions, as well as whether the individual purports to act as individual, and whether the individuals actions were authorized by the state. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1028 (D.C. Cir. 1997) (citing *Chuidian v. Philippine Nat'l Bank*, 912 F.2d 1095, 1106-07 (9th Cir. 1990)). That analysis is distinct from the one required by this Court to determine if human trafficking is an official function within the meaning of the Vienna Convention.

Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations*, 166-67 (1976)). Indeed, the procurement, transportation, and use of slave labor are far afield from the realm of “everyday transactions” that the *Tabion* court immunized as incidental to the daily life of a diplomat. It would be absurd to cloak Individual Defendants’ acts of trafficking and enslaving Swarna with diplomatic immunity under the theory that such conduct falls within the daily, everyday routine of diplomats and is naturally attendant or incidental to diplomats’ official functions.

Moreover, trafficking and forced labor constitute the types of undiplomatic commercial activity that the Vienna Convention was intended to prohibit. The negotiating and drafting history of the Vienna Convention establish that the term “commercial activity” encompassed those private commercial activities that were “inconsistent” with a diplomat’s position.<sup>52</sup> The commercial activities exception was understood to “enable persons in the receiving State who have professional or business dealings of a non-diplomatic character with a diplomatic agent to have the same recourse against him in the courts as they would have against a non-diplomatic person engaging in similar activities.”<sup>53</sup> The exception thus aimed to

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<sup>52</sup> See U.S. Dep’t of State, Statement of Interest in *Gonzalez Paredes v. Vila* (“Statement of Interest”), No. 06-0059-cv (D.D.C), docket no. 23, at 10-11.

<sup>53</sup> Statement of Interest at 11 (quoting U.S. Department of State, 7 Digest of Int’l Law 406 (Whiteman 1970)).

ensure that when a diplomat engaged in undiplomatic commercial activity for his or her own personal benefit, “the client should be able to obtain a settlement of disputes arising out of the professional or commercial activities. It would be quite improper if a diplomatic agent, **ignoring the restraints which his status ought to have imposed upon him**, could, by claiming immunity, force the client to go abroad in order to have the case settled by a foreign court.”<sup>54</sup>

Human trafficking is a commercial activity that is wholly inconsistent with a diplomat’s position. One hundred and seventeen countries of the world condemn acts of trafficking,<sup>55</sup> and it is a serious violation of law in the United States carrying criminal penalties of up to life in prison. 18 U.S.C. §§ 1589, 1590. Indeed, a diplomat can be declared a *persona non grata* for engaging in trafficking, abuse, or exploitation of a domestic worker, as well as for engaging in other professional or commercial activities outside the scope of their official functions.<sup>56</sup>

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<sup>54</sup> Statement of Interest at 10 (quoting the Diplomatic Intercourse and Immunities: Summary of Observations Received from Governments and Conclusions of the Special Rapporteur, U.N. Doc.A/CN.4.116) (emphasis added).

<sup>55</sup> See Signatories to the U.N. Trafficking Protocol, available at [http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XVIII-12-a&chapter=18&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-12-a&chapter=18&lang=en).

<sup>56</sup> See Statement of Interest at 11; Letter from Robert Moosy, Dir., Human Trafficking Prosecution Unit, Dep’t of Justice, to Claudia Flores, Staff Attorney, Women’s Rights Project, ACLU (Oct. 31, 2007) (on file with ACLU).

When a diplomat keeps a domestic servant as a slave in his house, he deliberately engages in conduct to obtain personal profit by “**ignoring the restraints which his status ought to have imposed upon him,**” just as would be the case if he opened a pizza shop and failed to pay his staff. Such profitable side ventures are decidedly unrelated to a diplomat’s official functions and thus parties aggrieved by such ventures may seek recourse for their economic losses, as they would be if the commercial actor were not a diplomat. The commercial activities exception was specifically intended to protect those individuals that rely in good faith on the promise of fair commercial dealings in exchanges unrelated to a diplomat’s diplomatic obligations. Acts of trafficking are thus within the scope of the commercial activities exception as understood in *Tabion v. Mufti*, 73 F.3d 535, and at the time of the drafting and negotiation of the Vienna Convention.

**C. Though the Court Need Not Reach this Issue, *Tabion* was Wrongly Decided.**

Because Individual Defendants clearly engaged in commercial activity when they trafficked and enslaved Swarna, in contrast to the actions of the *Tabion* defendants, the Court need not reach whether *Tabion* was wrongly decided. However, should the Court undertake such an analysis, it is evident that contractual relationships for goods and services can in some instances constitute commercial activities outside the scope of a diplomat’s functions under the terms of the Vienna Convention. The drafting and negotiating history of the Convention, described in

the Statement of Interest, makes clear that the commercial activities exception, working in conjunction with Article 42 (providing that a “diplomatic agent shall not in the receiving State practice for personal profit any professional or commercial activity”), was intended to apply to conduct that a diplomat engages in for personal profit or remuneration and that is a continuous activity.<sup>57</sup> Contractual relationships for services or goods that support a diplomat’s daily life can be “commercial activities” if they are continuous and personally profitable. By suggesting that contracts for domestic services are categorically outside the scope of the commercial activities exception, *Tabion* wrongly foreclosed inquiry into the continuous and profitable nature of the diplomat’s conduct.

Unlike a diplomat’s contract with a landscaper for monthly services or with a dry cleaner for laundry services, a diplomat’s contractual relationship with a live-in domestic worker is a continuous and, if underpaid, profitable activity.<sup>58</sup> In the case at bar, the Individual Defendants oversaw, supervised, and monitored Swarna’s work and whereabouts in a constant manner, seven days a week, twenty-

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<sup>57</sup> Statement of Interest at 5, 9-10.

<sup>58</sup> Indeed, in many instances, an employment arrangement with a landscaper or the engagement of a dry cleaner for laundry services would not even be memorialized in a written contract, in contrast to the requirement of a written and signed contract between a diplomat and a domestic worker as a precondition for obtaining an A-3 or G-5 visa. This mandatory contract, as well as the visa that it supports, demonstrates both the presumed continuous and commercial nature of the domestic worker engagement.

four hours a day. The Individual Defendants were deliberate and unrelenting in their treatment, and threatened and abused Swarna daily to force her to work harder and to become too fearful to attempt to escape. Their conduct served to severely exploit Swarna and rose to the level of trafficking, involuntary servitude and forced labor, violations that were exacted over a lengthy period of time and in a continuous fashion. As discussed, *supra*, such exploitative conduct was extremely personally profitable and remunerative to Defendants. Although many contractual relationships for goods and services may not constitute “commercial activities” within the terms of the Vienna Convention, some contractual relationships are distinctly continuous and personally profitable, such as severely exploitative relationships with live-in domestic workers. As a result, *Tabion*’s reasoning was improper and should not be followed in this case.

The reasoning of *Tabion*, if applied here, would lead this Court to draw a distinction where one should not exist. *Tabion* suggests that if, for example, a diplomat employer operates a factory sweatshop, he could be sued for his violations of wage and hour laws, but if he subjects a domestic worker in his private home to exploitative sweatshop conditions, he should be immune from suit. Both jobs, however, constitute economic activities aimed at enhancing the profit margin of the employer. The fact that a diplomat who exploits a domestic worker has not established an official business should not be relevant, given that under the

Vienna Convention, the definition of “commercial activities” is focused on whether such activities result in remuneration and are continuous.<sup>59</sup>

To interpret the commercial activities exception as not applicable to the employment relationships between diplomats and their domestic workers, simply because domestic workers labor inside the diplomats’ homes, fails to recognize the economic value of these laborers’ work based on racial and gender stereotypes, and has the effect of discriminating against women and minorities, who constitute the vast majority of individuals performing such labor within the home. In modern society, the employment of live-in maids and childcare providers, far from being “incidental to daily life,” is a privilege for those few who can afford to pay them and provide them with lawful working conditions. Ignoring the economic dimension of these relationships and characterizing them as a natural incident of a diplomat’s day-to-day work harkens back to a time when the work of women and minorities was assumed to be valueless simply because women and minorities performed it.<sup>60</sup> Furthermore, the decision in *Tabion* fails to account for the transformed nature of our modern economy, which is increasingly characterized by

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<sup>59</sup> See Statement of Interest at 9 (quoting Denza) (stating that it is clear, for example, that the speculative activities of a diplomat on the Stock Exchange would come within the commercial activities exception to immunity).

<sup>60</sup> See, e.g., Brief for the Urban Justice Center & Brennan Center for Justice et al. as *Amici Curiae* Supporting Respondent, *Long Island Care at Home, Ltd. v. Coke*, No. 06-593 (U.S. March 2007).

a burgeoning informal workforce. Employers more and more frequently seek ways to avoid government regulation, cut costs, and improve their profits by, for example, shielding workers from official oversight by employing them in their private homes, in clandestine factories, or in the backrooms of restaurants or retail shops. This informal economy is an ever-growing, ever more profitable sector. To ignore such commercial activities as “incidental to daily life” turns a blind eye to the economic impact of this expanding workforce.

### CONCLUSION

For the reasons set forth above and in Plaintiff-Appellee-Cross-Appellant’s brief, the district court’s opinion regarding diplomatic immunity should be affirmed.

Respectfully submitted,



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## Corporate Disclosure Statement

Pursuant to Fed. R. App. P. 26.1, counsel for *amici* submit this corporate disclosure statement:

1. Andolan; American Civil Liberties Union Foundation; Asian American Legal Defense and Education Fund; Break the Chain Campaign; CASA de Maryland; DAMAYAN Migrant Workers Association; Domestic Workers United; Legal Momentum; and Safe Horizon are incorporated nonprofit organizations. They have no parent corporations. They have no stock, and hence no shareholders.
2. Freedom Network National Domestic Workers Alliance; and New York Anti-Trafficking Network are unincorporated nonprofit organizations. They have no parent corporations. They have no stock, and hence no shareholders.
3. Klasko, Rulon, Stock & Seltzer, LLP is an incorporated private law firm. It has no parent corporation. It has no stock, and hence no shareholders.



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## **Certificate of Compliance with Federal Rule of Appellate Procedure 32(a)**

Pursuant to Fed. R. App. P. 32(a)(7)(C)(i), counsel for *amici* certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 28.1(e)(2)(B) because this brief contains 4,905 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.



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## Certificate of Service

I, Aliya Hussain, certify that today, this 16th day of February, 2010, I caused to be filed the original and five true copies of this Amicus Brief of the American Civil Liberties Union, Asian American Legal Defense and Education Fund and 11 Other Organizations in Support of Plaintiff-Appellee-Cross-Appellant. Copies of this Amicus Brief were also served electronically on:

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## Appendix

### STATEMENTS OF INTEREST OF *AMICI CURIAE*

**Andolan**, founded in 1998 in New York City by South Asian domestic workers, is a not-for-profit, membership-based organization that advocates and organizes on behalf of low-wage, immigrant South Asian workers. Andolan's members are primarily domestic workers as well as workers in restaurants and retail stores from Bangladesh, Pakistan, India, Nepal and Sri Lanka. Andolan provides support and resources to the South Asian worker community through a combination of education, peer exchange, community organizing, and litigation. In collaboration with pro bono attorneys, Andolan assists members to file lawsuits against abusive employers. Such cases have included violations of federal and state minimum wage laws, sexual harassment, and assault and false imprisonment. In the past decade, Andolan has organized more than 110 workers in the New York City area and assisted approximately one-third of them to seek redress in cases of workplace abuse and exploitation. Andolan has been involved in thirteen cases of domestic workers employed by diplomats and in 2002 launched a Diplomatic Immunity Campaign to draw public attention to the issue.

The **American Civil Liberties Union Foundation** (ACLU) is a nationwide, non-partisan organization of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU Women's Rights Project, founded in 1972 by Ruth Bader Ginsburg, has been a leader in efforts to eliminate the barriers to women's full equality in American society. The Women's Rights Project believes that in order to truly achieve equality for women, the most vulnerable populations of women – poor women, immigrant women, and women of color – must have access to economic opportunity, free from discrimination and exploitation. The discrimination and exploitation of domestic workers is especially pernicious for immigrant women, who also encounter considerable obstacles to enforcing their rights. Accordingly, the ACLU Women's Rights Project seeks to ensure that the rights of immigrant women workers do not continue to be imperiled and that victims of discrimination and exploitation have access to justice.

The **Asian American Legal Defense and Education Fund** (AALDEF), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF's Anti-Trafficking Initiative addresses the

intersection of immigration, race, class, age, and sex through its representation of sex and labor trafficking survivors.

The Institute for Policy Studies' project **Break the Chain Campaign** (BTCC) seeks to prevent and address the abuse and exploitation of migrant women workers through holistic leadership development, community engagement and survivor-driven outreach and policy advocacy. BTCC is specifically focused on meeting the need for a holistic approach to the rehabilitation, empowerment and acquisition of justice for trafficked and exploited migrant women workers from the African and South Asian communities of the Washington D.C. metropolitan area.

**CASA de Maryland** is a 25-year old non-profit that organizes, advocates for, and provides services to primarily Latino immigrants in Maryland. For eight years, CASA has hosted a domestic worker project through which it has represented scores of domestic workers in cases involving facts ranging from non-payment of wages to involuntary servitude. In that work, CASA has worked closely with the Department of Justice and the U.S. Attorney's office to refer cases for prosecution. Among the domestic workers that CASA organizes are dozens of women whose rights were violated by their employers who claimed diplomatic immunity.

**DAMAYAN Migrant Workers Association** (DAMAYAN) is an independent, grassroots and membership-based workers' organization. We uphold and promote the rights and welfare of Filipino im/migrant workers -- especially women domestic workers. We raise awareness, organize and mobilize around issues of im/migrant workers while challenging the root causes of our forced migration through membership engagement, leadership development, basic health services, legal support and campaigns. The organization led in an international campaign in support of DAMAYAN member Marichu Baoanan -- Justice for Marichu! End Trafficking and Modern-Day Slavery -- that helped to defeat diplomatic immunity in a civil lawsuit against former United Nations Ambassador Lauro Baja. DAMAYAN is a Filipino word which means "helping each other."

**Domestic Workers United** is an organization led by Caribbean, Latina, and African nannies, housekeepers, and elderly caregivers who organize for power, respect, fair labor standards, and to help build a movement for social change. DWU has been leading efforts to amend New York State labor law and ensure the passage of an historic Domestic Workers Bill of Rights that would guarantee basic

benefits and protections to this otherwise excluded workforce. Since 2000, DWU has successfully won over half a million dollars in back wages for abused and exploited workers.

The **Freedom Network** (USA) is a national coalition of anti-trafficking advocates. Established in 2001, Freedom Network (USA) members have provided direct services to, and advocated for the rights of survivors of human trafficking in the United States. The Freedom Network has served over 2,000 survivors from five continents and has assisted clients in approximately fifty percent of the approved T-visas issued to date. Through our annual conference and the Freedom Network Training Institute, we share our expertise as service providers and policy advocates, and we work with government agencies and law enforcement to share resources and information and to formulate a collective strategy to combat trafficking.

**Klasko, Rulon, Stock & Seltzer, LLP** is nationally renowned for providing creative solutions to many of the most complex issues in immigration law to multinational corporations, small businesses, hospitals, universities, research institutions and individual clients. Since 2002, our partners have been active in working with trafficking survivors and in advocating for benefits on their behalf. We are actively involved in the NY Anti-Trafficking Network, co-authored all three editions of the T visa manual, as well as represent trafficked individuals.

**Legal Momentum** (formerly NOW Legal Defense and Education Fund) has worked to advance women's rights for nearly forty years. Legal Momentum advocates in the courts and with federal, state, and local policymakers, as well as with unions and private business, to combat gender discrimination in employment, including improving the workplace protections afforded victims of domestic violence, sexual assault and stalking. Legal Momentum staff also serves as national experts on the issue of human trafficking and has led policy efforts to broaden immigration protections and services for trafficking victims through legislation in the Trafficking Victims Protection Act and subsequent reauthorizations and implementation of these laws. Legal Momentum supports the efforts of victims of trafficking to seek civil redress from those who have sought to exploit them.

The **National Domestic Workers Alliance** is a vehicle to build power nationally as a workforce. NDWA is organizing to improve the living and working conditions of domestic workers; win respect and justice from employers and government for exploited domestic workers; change the racism and sexism that has led to the persistent devaluing of this labor so that dignity of domestic work is honored; end the exclusion of domestic workers from recognition and protection; build a movement of migrant workers to fight the labor displacement and exploitation created by globalization; and continue a brave legacy of resistance by supporting movement-building among domestic workers and other communities and workers in struggle.

The **New York Anti-Trafficking Network** (NYATN) is a group of diverse service providers and advocates in New York dedicated to ending human trafficking and coordinating resources for trafficked persons. It seeks to establish dialogue and discuss service options in a range of cases and enable cross-communication regarding each agency's work with trafficked persons. We provide direct services to trafficked persons; technical assistance to attorneys, case managers, and other service providers who work with trafficked persons; train law enforcement and non-governmental organizations on issues relating to trafficking in persons; outreach in communities to provide resources and information on trafficking in persons; and engage in policy advocacy on these issues.

**Safe Horizon** is the nation's leading victim assistance organization and one of the largest service providers to survivors of trafficking in the country. Safe Horizon has assisted nearly 380 survivors of trafficking to rebuild their lives as well as seek justice through the prosecution of their traffickers. Over 50% of the Anti-Trafficking Program clients were forced into involuntary labor servitude and 20% of our clients have been men. While Safe Horizon is familiar with cases throughout the New York City area, many of our clients were forced to work in Queens and Brooklyn. The traffickers involved in our clients' cases range from small business owners in Queens to foreign diplomats employed by consulates and permanent missions to the United Nations.