SCHEDULED FOR ORAL ARGUMENT ON DECEMBER 10, 2002

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-7169

HWANG GEUM JOO ET AL., *Plaintiff-Appellant,*

—v.—

JAPAN, *Defendant-Appellee.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF AMICI CURIAE ASKIN ET AL. IN SUPPORT OF PLAINTIFF-APPELLANTS HWANG GEUM JOO ET AL. AND REVERSAL OF THE DISTRICT COURT'S DECISION

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August 28, 2002 ***Attorneys for Amici Curiae***

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES PURSUANT TO CIRCUIT RULE 28

Parties And Amici Curiae

All parties appearing in this Court are listed in the Brief for *Hwang Geum Joo, et al. v. Japan*.

Amici Curiae are:

Kelly Dawn Askin is Director of the International Criminal Justice Institute, an organization working with international and domestic justice initiatives, including gender justice, worldwide. A former fellow at the Carr Center for Human Rights Policy at the Harvard University Kennedy School of Government, she has served as a legal consultant and advisor to several U.N. and other international bodies or agencies, including the International Criminal Tribunal for the former Yugoslavia.

Michael Bazyler is Professor of Law at Whittier Law School. He teaches courses in the Holocaust and the Law, International Business Transactions and International Law. He has extensive experience in human rights litigation in U.S. courts and is a leading authority on the redress of World War II wrongs.

Citizens' Fund for Redress of World War II Victims in Asia and Pacific is a Japanese organization founded in 1995 that provides legal, financial and moral support for war victims in Korea, Taiwan, the Philippines, and Indonesia.

Anthony D'Amato is the Judd and Mary Morris Leighton Professor of Law at the Northwestern University School of Law. He teaches courses in International Law, International Human Rights, and Justice. He has litigated human rights cases around the world, including before the International Criminal Tribunal for the former Yugoslavia and the European Court of Human Rights.

The Federation of Korea Trade Unions was founded in 1946 and has organized one million workers affiliated with 28 industrial federations. The Federation is a governing body member of the International Confederation of Free Trade Unions ("ICFTU") and of the International Labor Organization ("ILO"), and has fought against human and labor rights abuses in domestic, regional, and international communities.

The Global Alliance for Preserving the History of World War II in Asia is a world-wide federation of over 40 grassroots organizations whose mission is to obtain a full accounting for the Asia-Pacific War and obtain justice for the victims of Japan's war crimes and crimes against humanity.

Paul L. Hoffman is a member of the International Executive Committee of Amnesty International and former Chair of the Board of Amnesty International - USA. He has taught classes in International Human Rights at Oxford University, Stanford Law School, and the University of Southern California.

The House of Sharing, established in 1992 through private funds from Buddhists and Korean nationals, is a residence for former "comfort women." The complex also houses the History Museum of Military Sexual Slavery, the first human rights museum that deals with issues pertaining to military sexual slavery.

The International Campaign for Redress is a Japanese organization that works to raise social awareness of the war victims in Japan.

The Korean Council for the Women Drafted for Military Sexual Slavery by Japan is a coalition of 37 organizations and individuals working on women's rights, religious issues and other social issues headquartered in Seoul, Korea. The Council works to bring international attention to the plight of the victims of Japan's military sexual slavery. For example, the Council

co-sponsored the Women's International War Crimes Tribunal on Japan's Military Sexual Slavery in 2000. The Council is also involved in activities such as searching for surviving victims, providing services and support for the victims, and public education and outreach activities. For 10 years, the Council has held a weekly protest demonstration in front of the Japanese Embassy in Seoul, Korea.

The Korean Teachers and Educational Workers Union was established in 1989 and has approximately 100,000 members. The Union has actively fought against Japan's distortion of history, including but not limited to the history of the "comfort women," in its history textbooks.

The Lawyers' and Citizens' Association for Post War Judicial Implementation is a Japanese organization that works to provide legal remedies, both in the legislature and in the judicial system, for wartime wrongs.

The Network for Redress of War Victims of Japan was established in 1993 to provide information and ideas on redress issues to lawyers, journalists, and scholars.

Burt Neuborne is John Norton Pomeroy Professor of Law at the New York University School of Law and Legal Director of the Brennan Center for Justice. He has over 30 years experience as one of the nation's foremost civil liberties litigators.

The New York Coalition on Comfort Women Issues ("NYCOCWI") seeks justice for "comfort women." NYCOCWI also provides care and support for former "comfort women" in the New York region.

The Taegu Citizens' Forum for Halmoni was established by the Taegu Women's Association, professors, attorneys, doctors, students and other civilians in 1997 to support former "comfort women." The Taegu Citizens' Forum has been actively seeking an apology and compensation from the Japanese government, as well as punishment of those responsible.

The Taipei Women's Rescue Foundation ("TRWF") is an organization based in Taiwan. Its mission is to assist victims of gender specific violence and it focuses on rescuing young women from forced prostitution, serving Taiwanese "comfort women," and helping battered women. TRWF assists surviving "comfort women" in pursuing compensation and provides counseling and medical treatment for the women.

Professor Etsuro Totsuka is a professor at Kobe University of Japan who supports redress for former "comfort women" victimized by Imperial Japan.

The Washington Coalition for Comfort Women Issues, Inc. ("WCCW") was founded in 1992 to pursue justice for the "comfort women." WCCW is engaged in lobbying and educational efforts to raise public awareness of the plight of former "comfort women," and to redress the inhumanity suffered by "comfort women." WCCW has members who are potential class members.

By motions filed on August 21, 2002 and August 28, 2002, 14 individuals and organizations moved for leave to appear on this brief as *amici curiae.* This Court has not yet ruled on those motions. Movant-*amici curiae* are:

The Asian Law Caucus, Inc. ("ALC"), established in 1972, is the country's oldest civil rights and public interest legal organization serving the Asian Pacific American community. ALC represents primarily low-income, monolingual or limited English speaking Asian Pacific Americans in the areas of employment/labor, immigration, housing/community development, senior rights, welfare benefits and civil rights.

The Center for Constitutional Rights ("CCR") is a non-profit legal and educational organization dedicated to protecting and advancing the rights guaranteed by the U.S. Constitution and the Universal Declaration of Human Rights. CCR uses litigation proactively to

advance the law in a positive direction, to empower poor communities and communities of color, to guarantee the rights of those with the fewest protections and least access to legal resources, to train the next generation of constitutional and human rights attorneys, and to strengthen the broader movement for constitutional and human rights protection.

The Center for Justice & Accountability ("CJA") works to stop torture and other serious human rights abuses around the world by helping survivors hold their perpetrators accountable. Launched in 1998 with initial support from Amnesty International USA and the United Nations Voluntary Fund for Victims of Torture, CJA offers survivors of human rights abuses and their families an integrated approach in their quest for justice that combines legal, medical, psycho-social and other services.

Professor Roger S. Clark is the Board of Governors Professor at the Rutgers University School of Law in Camden, New Jersey. He is a former member of the United Nations Committee on Crime Prevention and Control ("CCPC"), and has written numerous articles and books on international human rights issues.

Professor Melissa Crow is a Practitioner-in-Residence in the International Human Rights Law Clinic at the Washington College of Law.

Professor Tina Dolgolpol is a Senior Lecturer in Law at The Flinders University of South Australia. She has worked with the Women's Caucus for Gender Justice on the Statute for the International Criminal Court as well as the Rules of Procedure and Elements of Crimes. She acted as a Chief Prosecutor in the Women's International War Crimes Tribunal For the Trial of Japan's Military Sexual Slavery. She is also the co-author of the influential International Commission of Jurists report on the plight of former "comfort women."

Equality Now is an international human rights organization founded in 1992 to work for the protection and promotion of women's rights. Sex trafficking is among the many forms of sex discrimination of concern to Equality Now. Equality Now has undertaken numerous initiatives focusing on sex trafficking, including several which concern Japan and the efforts of "comfort women" specifically to obtain redress from the Government of Japan, as well as work on the Trafficking Victims Protection Act of 2000 and the U.N. Protocol on Trafficking. In 2001, Equality Now established The Lawyers Alliance for Women (LAW) Project, in an effort to support lawyers around the world who are using the law to promote equality rights for women.

The International Labor Rights Fund ("ILRF") is an advocacy organization dedicated to achieving just and humane treatment for workers worldwide. ILRF is committed to overcoming the problems of child labor, forced labor, and other abusive labor practices.

The International Women's Human Rights Law Clinic ("IWHR") combines education, advocacy, and scholarship to advance international women's human rights. IWHR works in international contexts, as well as on building international human rights jurisprudence and culture in the United States.

The National Asian Pacific American Women's Forum ("NAPAWF") unites diverse communities of women in advocacy, education and support efforts in the following areas: (1) addressing violence against women; (2) immigrant and refugee efforts; (3) civil rights; and (4) educational access. Founded in 1996, the group has eight regional chapters in Atlanta, Los Angeles, Detroit, Minneapolis/St. Paul, New York, San Francisco, Seattle, and Washington, D.C.

Nancy Kelly, Esq. is an international human rights lawyer with the Refugee Law Center in Boston, Massachusetts.

Jane G. Rocamora is an international human rights lawyer with the Harvard Immigration and Refugee Clinic.

John Willshire-Carrera, Esq. is an international human rights lawyer with the Refugee Law Center in Boston, Massachusetts.

The Women's Law Project is a Pennsylvania-based organization committed to abolishing discrimination and injustice and securing freedom and dignity for women.

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INTEREST OF AMICI CURIAE

Amici curiae are groups and individuals interested in helping women obtain redress for harms suffered as involuntary participants in the illicit sex trafficking trade, a trade that has long existed in countries all over the world but that took particularly pernicious form in territories occupied by Japan during World War II. *Amici* have filed this brief to provide the Court with additional information and arguments in support of reversal. *Amici curiae* and movant-*amici curiae* are listed in the Certificate as to Parties and Rulings Pursuant to Circuit Rule 28.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal concerns whether Japan is immune from suit for its sexual enslavement of women and girls during World War II. The District Court erroneously dismissed the suit under Fed. R. Civ. P. 12(b)(1) and 12(b)(6) on the grounds that Japan was shielded by sovereign immunity.[1] Under the Foreign Sovereign Immunities Act ("FSIA"), however, the Japanese government is *not* entitled to immunity for acts "in connection with a commercial activity." 28 U.S.C. § 1605(a)(2). The District Court erred in ruling that Japan's enslavement of women to perform sexual services was conduct "not typically engaged in by private players in the market" and therefore did not fall within the commercial activity exception. *Hwang Geum Joo v. Japan*, 172 F. Supp. 2d 52, 63 (D.D.C. 2001). As *amici* explain below, private parties enslaved women for sexual exploitation in the decades before and during World War II, and continue to do so

[1] *Amici* agree with Appellants that the District Court also erred in dismissing the case on political question grounds. Congress made the initial discretionary policy determination – when suits against foreign governments should be allowed – and codified that determination in the FSIA, which was designed "to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to 'assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process.'" *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) (citation omitted). Application of the political question

today. Indeed, the "comfort women" system operated by the Japanese government during World War II was an outgrowth of the pre-existing private market for sexual services in Japan, a private market which also relied on the coercion of un-consenting women. As this Court has held, the commercial activities exception should not be construed in a way that allows the "purpose of the statute [to] be frustrated by the machinations of a rogue government that in effect leases its immunity to a private party." *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1172 (D.C. Cir. 1994). The District Court should not have dismissed Appellants' complaint for failure to satisfy the commercial activities exception to the FSIA.

In addition, *amici* seek to provide this Court with additional information on the extent to which its recognition of immunity for violations of *jus cogens* norms is no longer in step with contemporary international law and practice. In the past few years, there has been a collective effort by the international community and domestic courts to enforce international law. Recent legal developments rejecting past and present immunity for the most serious international crimes provide an additional basis for abrogating Japan's immunity from suit.

ARGUMENT

I. JAPAN IS NOT ENTITLED TO SOVEREIGN IMMUNITY FOR TRAFFICKING IN SEX SLAVES BECAUSE SUCH TRAFFICKING CONSTITUTES A "COMMERCIAL ACTIVITY" UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT, 28 U.S.C. § 1605(A)(2).

The District Court erred in holding that Japan was entitled as a matter of law to sovereign immunity for operating a system of sexual slavery during World War II. The acquisition, marketing and sale of children and women as sexual slaves by Imperial Japan falls within the meaning of the "commercial activity" exception to the Foreign Sovereign Immunities Act, 28

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doctrine to a suit that falls within the FSIA thus violates, rather than advances, separation of powers.

U.S.C. § 1605(a)(2).[2] While perhaps larger in scale than the private sex trade at that time, Japan's "comfort women" system was not fundamentally different in kind from the activities carried on by private commercial actors throughout the 20th century. Like Japan's wartime "comfort system," the private sex trafficking industry is also highly organized and involves the coordinated procurement and transfer of women across national borders. Like private participants in the sex trafficking trade, Japan chose particular types of women for sexual exploitation, set prices for their services, and estimated their useful service life, all with an eye toward satisfying market demand. The District Court therefore erred in holding that the "comfort women" system could not fall within the commercial activity exception because it involved "conduct not typically engaged in by private players in the market." *Hwang Geum Joo*, 172 F. Supp. 2d at 63.

A. Japan is not entitled to immunity for its trafficking in sex slaves because the nature of its conduct was the same as that of private participants in the sex trafficking trade.

Under the FSIA, a foreign state is not entitled to immunity for "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere" where "that act causes a direct effect in the United States."[3] 28 U.S.C. § 1605(a)(2).

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[2] *Amici* have not separately briefed the question of whether the FSIA applies to conduct prior to 1952. This issue of the applicability of the FSIA is addressed in the Appellants' brief. As the District Court correctly noted, U.S. Supreme Court and D.C. Circuit precedents support application of the Act here. *Hwang Geum Joo*, 172 F. Supp. 2d at 57-58; *Princz*, 26 F.3d at 1170-71.

[3] Because the District Court decided the "comfort" system was not a commercial activity, it did not reach the question whether it had "a direct effect in the United States." If this Court determines that the "comfort women" system was a "commercial activity," the District Court would be obliged to consider the "direct effect" issue on remand. *See Janini v. Kuwait Univ.*, 43 F.3d 1534, 1537 (D.C. Cir. 1995) (reversing the lower court's erroneous dismissal of the case on grounds that the allegations did not constitute a commercial activity and remanding to District Court to decide whether the "direct effect" requirement was satisfied).

The District Court properly recognized that the relevant inquiry was whether private commercial actors engage in the same type of conduct. *Hwang Geum Joo*, 172 F. Supp. 2d at 63. The District Court erred, however, in its determination that Japan's conduct was fundamentally different from the conduct of private operators of commercial brothels. *Id.*

The "comfort women" system grew out of Japan's pre-existing system of private brothels, which had relied on involuntary labor for decades. In the pre-World War II era, private actors in Japan engaged in robust trade of women and girls deceived or kidnapped into sexual servitude. An early private precursor to the "comfort women" system was a domestic system of "officially condoned" prostitution and brothels operated by *ronin*, masterless or unemployed samurai. These privately run facilities frequently featured "girls and young women sold into sexual servitude by parents desperate for cash," or tricked into sexual slavery by the promise of a nonsexual job. Karen Colligan-Taylor, *Translator's Introduction* to Yamazaki Tomoko, *Sandakan Brothel No. 8: An Episode in the History of Lower-Class Japanese Women*, at xvi, xxi. (Karen Colligan-Taylor, trans., 1999). This system spread overseas with Japanese colonial and commercial expansion in the pre-war years. Many women and girls were forced to become *karayuki-san*, the Japanese term for prostitutes that worked abroad. Colligan-Taylor, at xvii, xxii (noting role of kidnapping and deception in sex markets); Shimuzu Hiroshi & Hirakawa Hitoshi, *Japan and Singapore in the World Economy* 20 (1999) (describing sale of women into sexual slavery).

The coercion of women to serve as sex slaves in Japan, both before and during World War II, is hardly an aberration. Private actors all over the world have long made a lucrative business out of sex trafficking. As early as the 1900s, for example, Americans condemned the practice of "white slavery," the term then used to signify "the forced prostitution of white women

and girls by trick, narcotics, and coercion." Frederick K. Grittner, *White Slavery: Myth, Ideology, and American Law* 3 (1990). This concern over the interstate and international transportation of women for sexual slavery culminated in the passage of the Mann Act in 1910. *See* White Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825, 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424). The sex trafficking business had achieved worldwide dimensions by 1927, when the League of Nations reported that "[m]any hundreds of young women and girls—some of them very young—are transported each year from one country to another for purposes of prostitution." *Reported in* U.N. Dep't of Int'l Economics & Social Affairs, *Study on Traffic in Persons and Prostitution* at 4, U.N. Doc. ST/SOA/SD.8 (1959).

Japan's wartime system of sexual slavery was no different in character from the private sex trafficking trade. The "comfort stations" were run like businesses. Like private sex traffickers, the Japanese government procured and priced women according to market demand for particular ages and ethnicities. S*ee* Compl. ¶ 55; Center for Research and Documentation of Japan's War Responsibility, *First Report on the Issue of Japan's Military "Comfort Women" – Historical and Legal Study on the Issue of "Military Comfort Women,"* 51, 54, 56 (1994). The government carefully calculated how much use could be obtained from each woman and trained accounting officers in the efficient allocation of women as supplies. Yoshiaki Yoshimi, *Comfort Women: Sexual Slavery in the Japanese Military During World War* II, 61-66 (Suzanne O'Brien trans., 2000). For example, an army accounting officer, Shikanai Nobutaka, described his studies in an interview:

> [W]e estimated the endurance of the women rounded up in local areas and the rates at which they would wear out. We analyzed which women were strong or weak in those areas, and then had to go so far as to determine "how long they would be in use" from the time soldiers entered the rooms until they left—how many minutes for commissioned officers, how many minutes for noncommissioned officers, how many minutes for soldiers . . . . We set different

prices for different ranks and prices for overstaying.

Yoshimi, *supra*, at 60-1.

Soldiers had to pay for using the services of the "comfort women," and at least a portion of the revenue was taken by the military, *see id.*, with the remainder often going to private entrepreneurs who assisted the government in running the "comfort stations" and procuring the women. Compl. ¶ 55. The Japanese government thus not only engaged in conduct similar to commercial actors, it sought the aid and cooperation of those actors and emulated their business methodology. Indeed, the Japanese government's activities so resembled the activities of commercial actors that, as recently as 1990, the Japanese government claimed that the "comfort women" system had not been the work of the government at all, but rather of private entrepreneurs and war profiteers. Compl. ¶ 68. This attempt to shift the blame to private actors is tantamount to an admission by the Japanese government that the system involved activity of the sort in which private actors engage.

Despite the fact that private actors have long done what the Japanese government did – force or trick women into sexual servitude – the District Court found that "Japan's operation of 'comfort stations' was not a commercial activity within the meaning of the FSIA." *Hwang Geum Joo,* 172 F. Supp. 2d at 64. In this the District Court erred.

In part, the District Court appeared to believe that the conduct of the Japanese government fell outside the commercial activity exception to the FSIA because it occurred in the "context" of the Japanese war effort, and was intended for the benefit of Japanese soldiers. *See Hwang Geum Joo*, 172 F. Supp. 2d at 64. The FSIA, however, provides that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or

particular transaction or act, rather than by reference to its purpose." 28 U.S.C. § 1603(d). As the Supreme Court has explained:

> [T]he question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in 'trade and traffic or commerce.'

Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 614 (1992) (citation omitted). Under *Weltover*, the fact that a government engages in commercial activity to further a sovereign objective – including military conquest – does not take its conduct outside the scope of the commercial activity exception: "[A] contract to buy army boots or even bullets is a 'commercial' activity, because private parties can similarly use sales contracts to acquire goods." *Weltover*, 504 U.S. at 614-15. Contrary to the District Court's decision, therefore, it is irrelevant that the purpose or "context" of the "comfort women" system was to advance the war effort by providing a safe and convenient sexual outlet for Japanese soldiers, rather than simply to generate profits.[4] *See id.* at 617 (holding that "it is irrelevant *why* Argentina participated in the bond market"); *Saudi Arabia v. Nelson*, 507 U.S. 349, 360 (1993) ("[W]hether a state acts 'in the manner of' a private party is a question of behavior, not motivation").

The District Court also distinguished the Japanese government's "comfort women" system from commercial activity because it required the vast resources which were at the government's disposal. *Hwang Geum Joo*, 172 F. Supp. 2d at 63. But the "comfort women" system required those resources only because of the *size* of the operation, not because the

[4] In addition to contradicting the express statutory command that "nature" of the conduct rather than its "purpose" determines whether it is commercial, 28 U.S.C. §1603(d), holding that an activity is "noncommercial" whenever motivated by governmental policy objectives would render the commercial activity exception a nullity, since a government almost always has some sovereign objective when it acts, even as a participant in the market.

operation was fundamentally sovereign in nature. As the Seventh Circuit noted in one FSIA case, the scale of a transaction does not determine its commercial nature:

> [I]t is irrelevant that no private person has ever purchased a million pairs of army boots, or a million tons of cement, in a single transaction. The important question is whether private parties purchase cement or boots, which they clearly do.

Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 580 (7th Cir. 1989). The question thus is not whether any single private individual could run a sex ring involving over 200,000 women, *see* Compl. ¶ 47, but whether the Japanese army's coordinating and maintaining role was different in any important way from the role played by private actors in running smaller-scale operations.

Apart from the size and purpose of the operation, it is clear that the actions of the Japanese government were no different than the activities of many private actors in the sex trade. Brothels, as the District Court acknowledged, "routinely exist as commercial ventures engaged in by private parties." *Hwang Geum Joo*, 172 F. Supp. 2d at 63. The recruitment of women to work in facilities through force and deception, too, routinely exists in commercial ventures, as *amici* described above and at pp. 11-12, *infra*. Indeed, as one scholar noted, "the majority [of "comfort women"] were deceived or kidnapped in the same manner as were young Japanese women who became *karayuki-san* in earlier decades." Colligan-Taylor, *supra*, at xxv. That kidnapping and deception is illegal, moreover, does not render the activity non-commercial. As this Court has observed, "the illegal character of the alleged acts are irrelevant in judging their commercial character." *Cicippio v. Islamic Republic of Iran*, 30 F.3d 164, 168 (D.C. Cir. 1994). There is no rational reason for believing that Congress would have intended to afford *greater* immunity to

foreign states when they engage in illicit commerce (such as selling women, children and drugs) as compared to when they engage in lawful commerce.

Just as contracting to buy bullets is a commercial activity because government and private actors alike procure goods by contract, *Weltover*, 504 U.S. at 614-15, obtaining women for use in the sex trafficking trade by force and coercion is a commercial activity because governments and private actors alike engage in this activity. Scope and purpose aside, the Japanese government engaged in the same commercial activity that has occurred in other nations throughout history. The District Court erred in holding that the techniques of abduction and trafficking used by Japan distinguished its acts from those of private parties.

B. The District Court erroneously likened trafficking in sex slaves by Japan to the abusive police arrest at issue in *Nelson* and the hostage-taking at issue in *Ciccippio*.

The District Court incorrectly based its decision on *Saudi Arabia v. Nelson* and *Cicippio v. Islamic Republic of Iran,* which concerned facts inapposite to the regularized pattern of sex trafficking in this case. In *Nelson*, the Supreme Court held that the Saudi government's arrest and torture of an employee at a government hospital was an exercise of the police power, a function that it deemed peculiarly sovereign rather than commercial in nature. *Nelson*, 507 U.S. at 362. The alleged commercial activity was the recruitment in the United States of the plaintiff to enter into an employment contract in Saudi Arabia. But the lawsuit in *Nelson* was not based upon this commercial activity (*i.e.*, it was not a suit on that contract), but was instead based upon the subsequent actions of agents of the Saudi government in arresting and torturing the plaintiff. The only nexus between that conduct and the commercial contract was the fact that the contract brought the plaintiff to Saudi Arabia, placing him in the circumstances that led to his arrest. This

is a far cry from the present case, where the commercial acts themselves — Japan's illegal trafficking in women to be hired out as sex slaves — form the basis for the claim.[5]

Moreover, *Nelson* involved a different prong of the FSIA commercial activity exception than that at issue here. *Nelson* was brought under the FSIA exception for cases in which "the action is *based upon* a commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2) (emph. added). Appellants in this case have sued under another prong of the exception, which only requires that they prove that the acts on which they are suing occurred "*in connection with*" a commercial activity. *Id.* (emph. added). Appellants' claims therefore need not be based wholly upon the most commercial aspects of the Japanese government's conduct, so long as the acts of which they complain have a connection with the commercial aspects of the conduct, which they clearly do. Indeed, the commercial acts in this case are inextricably connected with the unlawful actions.

The facts of *Cicippio* are also distinguishable. In *Cicippio*, the lawsuit was based on a terrorist act of hostage-taking, in which ransom was demanded. The *Cicippio* Court emphasized that the request for ransom must be taken in the context of the underlying act; a murder, for example, is not commercial just because the murderer is paid. *Cicippio*, 30 F.3d at 168. The demand for ransom, taken in context with the act of hostage-taking simply was not akin to any

[5] Indeed, the Thirteenth Amendment arguably constrains U.S. courts from recognizing management and maintenance of sexual servitude as a government function. *See* U.S. Const. art. XIII ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction."). *See also* Mary De Ming Fan, Comment, *The Fallacy of the Sovereign Prerogative to Set De Minimis Liability Rules for Sexual Slavery*, 27 Yale J. Int'l L. 395, 417-20 (2002); Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 Yale L.J. 791, 796-803 (1993).

course of conduct regularly pursued by private actors in the marketplace. There is no kidnapping market, but a market does exist for women forced into sexual servitude.

C. The District Court's ruling threatens to frustrate the purposes of the FSIA and to undermine modern efforts to combat the trafficking in persons.

The District Court's ruling that wide-scale sexual enslavement is fundamentally non-commercial in nature threatens to frustrate the purposes of the FSIA and to undermine modern efforts to combat trafficking in persons. Several years ago, when this Court was asked to consider Germany's liability for Nazi-era slave labor, it expressly declined to rule on the question whether the Nazi regime's practice of farming out captives to work for industrial concerns constituted a commercial activity, noting that it was a close question and warning that the Court should avoid an interpretation of the FSIA that would allow the "purpose of the statute [to] be frustrated by the machinations of a rogue government that in effect leases its immunity to a private party." *Princz*, 26 F.3d at 1172. The District Court's ruling in the instant case threatens to do exactly that, providing immunity to modern governments that cooperate in trafficking in women for sexual slavery as well as to private profiteers that work under the cloak of governmental authority.

Evidence confirms the enduring commercial character of the sex trafficking trade, and highlights the potential danger of the District Court's ruling that immunity attaches to government-run sex trafficking. Trafficking in women for sexual exploitation today remains a lucrative transnational business. Congress recently found that "[a]t least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. . . . Many of these persons are trafficked into the international sex trade, often by force, fraud, or coercion." Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b). The International Labor Organization reported that the sex trade amounted to between 2 and 14 percent of the

gross domestic product in countries of Southeast Asia. *ILO Eyeing the Flesh Trade Now?*, Business Times (Malaysia), Aug. 20, 1998, at 4. And modern sex traffickers continue to use the time-tested methods of kidnapping and deception to obtain sex workers, who are then kept in bondage by force. *See* U.S. Dep't of State, *Victims of Trafficking and Violence Protection Act 2000, Trafficking In Persons Report* 1 (2002); A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, 39 Va. J. Int'l L. 322-24 (1999).

Moreover, there is evidence that some contemporary governments collaborate with private actors in facilitating sex trafficking and slavery. *See* Amy O'Neill Richard, U.S. Dep't. of State, Center for the Study of Intelligence*, International Trafficking in Women to the United States: A Contemporary Manifestation of Slavery and Organized Crime* 1-2 (1999) *available at* http://www.odci.gov/csi/monograph/women/trafficking.pdf (describing bribery of public officials by sex traffickers); Human Rights Watch, Women's Rights Project, *The Human Rights Watch Global Report on Women's Human Rights* 196, 199 (1995) *available at* http://www.hrw.org/about/projects/womrep/ (describing the involvement of Thai and Indian government officials in sex trafficking). The District Court's ruling in this case would render such governments dangerously immune from liability, and allow them effectively to "lease their immunity" to private actors operating within their borders.

The District Court ruled that Japan's "comfort women" system was inherently "sovereign" and "non-commercial," despite the fact that it grew out of and closely resembled private commercial sex trafficking to such a degree that the government attempted to blame private actors for the system. Under the District Court's analysis, other instances of sex trafficking and slavery could likewise be deemed "peculiarly sovereign" whenever the

government plays a pivotal coordinating role in the system. Allowing foreign governments to shield the lucrative sex trafficking trade in this way would thwart the purposes of the FSIA, as well as of other federal laws aimed at combating sex trafficking and sexual slavery. *See, e.g.,* Trafficking Victims Protection Act of 2000, 22 U.S.C. § 7101(b). To avoid this result, the Court should clarify that wide-scale sex trafficking and sexual enslavement can constitute commercial activities under the FSIA for which a government is not immune from suit.

II. CHANGED CIRCUMSTANCES UNDERMINE THIS COURT'S PRIOR RULING THAT NATIONS THAT COMMIT JUS COGENS VIOLATIONS ARE ENTITLED TO SOVEREIGN IMMUNITY.

Under the FSIA, a state can also be sued if it has "waived its immunity either explicitly or by implication." 28 U.S.C. § 1605(a)(1). *Amici* assert that Japan implicitly waived its immunity by committing violations of international law so grave and obvious that Japan must have anticipated that they would not be treated as legitimate acts of state and thus could subject it to suit in national or international courts.

In 1994, this Court considered a similar argument in a lawsuit against Germany for Nazi-era crimes, but held that Germany's violation of such fundamental or "*jus cogens*" norms of international law was not an implicit waiver of immunity. *See Princz*, 26 F.3d at 1166. As an initial matter, *amici* believe that *Princz* is distinguishable on its facts. The Court in *Princz* focused on the lack of evidence that Germany *intentionally* (albeit implicitly) waived its immunity to suit by committing *jus cogens* violations. *Princz*, 26 F.3d at 1174. The instant case is different insofar as Japan had signed a treaty not only prohibiting the trafficking in women and children, but also expressly committing signatories "to take all measures to discover and prosecute persons who are engaged in the traffic." International Convention for the Suppression of the Traffic in Women and Children, September 30, 1921 (ratified by Japan in 1925). The situation is thus comparable to *Ex Parte Pinochet*, where the British House of Lords found that

former Chilean president Augusto Pinochet was not entitled to sovereign immunity as a head of state because Chile had signed the Torture Convention, which similarly required signatories to prevent torture. Because of this treaty provision, the House of Lords reasoned, Pinochet must have known that his actions could trigger prosecution and liability. *See* Judgment*, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, 2 W.L.R. 827 (March 24, 1999); *cf. Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 442-43 (1989) (suggesting that a treaty not only sets substantive standards for conduct, but also creates a cause of action to enforce those standards, which might be read to implicitly waive sovereign immunity). Further proof that Japan was on notice that its actions violated international law is the 1919 War Crimes Commission report, which concluded that rape and "enforced prostitution" committed by Axis war criminals during World War I were subject to prosecution.[6] Accordingly, *amici* assert that, even under the *Princz* decision, Japan is not entitled to immunity because the terms of the trafficking treaty and the 1919 War Crimes Commission report expressly put it on notice that such conduct could give rise to liability. Clearly both its signature on the 1921 treaty and its subsequent violation of that treaty constituted an implicit waiver of sovereign immunity.

In addition, in the eight years since *Princz* was decided, a variety of events make clear that *jus cogens* violations are not entitled to immunity under international law. *Amici* consequently urge this Court, if it does not believe *Princz* is distinguishable, to hold that *Princz* is no longer good law in light of intervening developments and to overrule that decision *en banc*. *See LaShawn A. v. Barry*, 87 F.3d 1389, 1395 (D.C. Cir.1996) (*en banc*) (prior panel decision

[6] Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, *Report Presented to the Preliminary Peace Conference*, March 29, 1919, *reprinted in* 14 Am. J. Int'l L. 95, 115 (1920).

may be reversed by the full Court sitting *en banc* or through the more informal *Irons* footnote procedure).

Jus cogens norms are those "accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted." *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 714 (9th Cir. 1992) (quoting Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 332, 8 ILM 679). *Jus cogens* norms enjoy the highest status within customary international law, insofar as they are unconditionally binding on all nations and cannot be preempted by treaty. *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997); *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F. 2d 929 (D.C. Cir. 1988). Violations of *jus cogens* cannot be considered sovereign acts because they are always unlawful, and thus the violator is "not . . . entitled to the immunity afforded by international law." *Siderman*, 965 F.2d at 718.

Japan's conduct in World War II – trafficking in women for purposes of sexual slavery, rape, and torture – was manifestly illegal and violated *jus cogens* norms at the time it occurred. *See, e.g., International Criminal Law* (M. Cherif Bassiouni ed., 2nd ed., 1999) (describing historical development of crimes such as torture, slavery, rape, war crimes, and crimes against humanity); Women's International War Crimes Tribunal for the Trial of Japan's Military Sexual Slavery, Judgment, Dec. 4, 2001, *as corr.* Jan. 31, 2002. That Japan knew that these acts were grave crimes that could give rise to legal liability is also reflected in the judgments of the post-World War II trials and in Japan's acceptance of the terms of the Potsdam Declaration.[7] And as the tribunal at Nuremberg held in rejecting the defendants' claims that their prosecution violated the rule against *ex post facto* laws, what the Axis powers had done was so obviously evil that "in

[7] Potsdam Declaration, July 26, 1945 (*see* http://www.isop.ucla.edu/eas/documents/

such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished." *In re Goering*, 13 Ann. Dig. 203, 208 (Nuremberg, Int'l Mil. Trib. 1946).

International criminal law developed in large part as a result of the trials held in Nuremberg and Tokyo after World War II to prosecute Axis leaders for crimes against peace, crimes against humanity, and war crimes.[8] During the next 50 years, slow but sure progress was made in affirming the necessity of instituting international criminal and international humanitarian law regimes that could contribute to efforts to secure international peace, security, and stability. *See, e.g.*, *International Criminal Law* (M. Cherif Bassiouni ed., 2nd ed. 1999). The promulgation of additional treaties explicitly prohibiting such crimes as slavery, genocide, trafficking, and torture, left no doubt that the international community considered these crimes amongst the most serious concern to the international community as a whole.[9]

Although the conduct was expressly prohibited, between the post-World War II trials and the 1990s, enforcement of international law was sporadic. Moreover, even during the World War II trials and continuing until the mid-1990s, prosecution of gender-related crimes committed in the context of war or mass violence was virtually non-existent, despite the fact that such acts were clearly illegal. *See e.g.*, Kelly Dawn Askin, *War Crimes Against Women: Prosecution in*

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potsdam.htm).

[8] Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284; Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, 4 Bevans 21, as amended April 26, 1946, 4 Bevans 27.

[9] *See e.g.*, Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Mar. 21, 1950, 96 U.N.T.S. 271; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. res. 39/46, annex 39 U.N. GAOR Supp. No. 51 at 197, U.N. Doc. A/39/51 (1984); Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 266 U.N.T.S. 3, 18 U.S.T. 3201.

International War Crimes Tribunals (1997) (reviewing laws prohibiting wartime rape and analyzing how the post World War II trials could have prosecuted the crimes more rigorously had there had been political will to do so).

In 1993, however, the trend of ignoring these crimes reversed, with the United Nations and the United States leading the charge in establishing mechanisms for prosecuting serious violations of international law, including gender-related crimes. In 1993 and 1994 respectively, the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR) were established by the United Nations.[10] Subsequently, cooperation between national and international legal institutions resulted in the establishment of judicial bodies in East Timor and Sierra Leone to prosecute crimes against humanity and war crimes.[11] Other international courts have also recently been established or considered, most notably the permanent International Criminal Court (ICC).[12] In contrast to the World War II trials, which gave short shrift to gender-related crimes, the need for redressing sex crimes has been recognized by each of these new courts, both in their authorizing statutes and in their case law. *See e.g.*, *Akayesu* Trial Chamber Judgment, ICTR-96-4, Sept. 2, 1998 (recognizing rape and sexual violence as crimes against

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[10] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), and *see* U.N. SCOR, 3175th mtg., U.N. Doc. S/RES/808 (1993) and U.N. SCOR, 3217th mtg., U.N. Doc. S/RES/827 (1993); Statute of the International Criminal Tribunal for Rwanda, U.N. SCOR, 3453rd mtg., U.N. Doc. S/RES/955, annex (1994).

[11] *See*, U.N. SCOR, 4057th mtg., U.N. Doc. S/RES/1272 (1999) (establishing the United Nations Transitional Administration in East Timor), UNTAET Regulations No. 2000/15, June 6, 2000 (UNTAET/REG/2000/15) (establishing the Panels with Jurisdiction over Serious Criminal Offences in East Timor); U.N. SCOR, 4168th mtg., U.N. Doc. S/RES/1315 (2000) (Security Council requesting the Secretary-General to negotiate an agreement with the government of Sierra Leone to create an independent Special Court), Office of the Attorney General and Ministry of Justice, Special Court Task Force, Statute for the Special Court, Jan. 16, 2002, at http://www.specialcourt.org/documents/Statute.html.

[12] Rome Statute of the ICC, U.N. Doc. A/CONF/183/9, July 17, 1998.

humanity and instruments of genocide); *Furundžija* Trial Chamber Judgement, ICTY-95-17/1, Dec. 10, 1998 (recognizing rape as a war crime and a form of torture); *Čelebići* Trial Chamber Judgement, ICTY-96-21, Nov. 16, 1998 (*Prosecutor v. Delalić et al*.) (recognizing rape as gender based discrimination constituting torture); *Kunarac* Trial Chamber Judgment, ICTY-96-23/1, Feb. 22, 2001 (recognizing rape and enslavement as crimes against humanity, implicitly constituting sexual slavery); *Kvočka* Trial Chamber Judgment, ICTY-98-30/1, Nov. 2, 2001 (recognizing rape and other forms of sexual violence as a means of persecution).

Increased enforcement efforts have not been limited to international endeavors. Domestic courts have also amplified their efforts to provide civil and criminal remedies.[13] The *Pinochet* case in the United Kingdom, for example, demonstrates that national courts no longer grant former Heads of State blanket immunity for *jus cogens* violations. *See* Judgment*, Regina v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, 2 W.L.R. 827 (March, 24 1999) (acknowledging that crimes such as torture can never be regarded as legitimate acts of state and thus, there can be no immunity from the crimes). Belgium's prosecution of individuals for their involvement in the Rwandan genocide exemplifies the new trend towards national criminal prosecutions for genocide and war crimes under the principle of universal jurisdiction. *See* Marlise Simons, *Mother Superior Guilty in Rwanda Killings*, New York Times, June 9, 2001); *see also, e.g.,* The Princeton Principles on Universal Jurisdiction (2001).

The U.S. has had a long-standing commitment to opening its courts to claims for violations of international law, as reflected by the Alien Tort Claims Act, 28 U.S.C. § 1350. In

[13] Many other justice initiatives, including Truth and Reconciliation Commissions, also demonstrate the recent trend to end impunity. *See* Priscilla Hayner, *Unspeakable Truths: Confronting State Terror and Atrocity* (2001).

the 1990s, Congress strengthened that commitment by passing the Torture Victim Protection Act of 1991, 28 U.S.C. § 1350 and by amending the Foreign Sovereign Immunities Act to remove immunity from state sponsors of terrorism. *See* 28 U.S.C. § 1605(a)(7). The increasingly successful use of such legislation in U.S. courts demonstrates that the attitudinal change regarding the imperative to enforce *jus cogens* violations is not limited to international efforts. *See e.g., Kadic v. Karadžić*, 74 F.3d 377 (2d Cir. 1996); *see also* lawsuits brought by the Center for Justice and Accountability, http://www.cja.org and the Center for Constitutional Rights, http://www.ccr-ny.org/programs/intnlhumanrights.asp.

The enforcement initiatives of the 1990s signal the acknowledgement that war crimes and crimes against humanity, including rape, slavery, and torture, constitute a threat to international peace and security and must be prosecuted in order to contribute to lasting peace and reconciliation, to provide justice, and to promote and protect the rule of law.[14] Most efforts have had strong U.S. support and leadership, indicative of the U.S.'s commitment to punish gross violations of human rights and the most serious international crimes.[15] (The lone international judicial justice initiative not supported by the United States, though strongly supported by much

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[14] Indeed, the need and increasingly the duty of nations to prevent and punish violations by individuals and states has gained credence in recent years. *See e.g.*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 53rd Sess., U.N. Doc. A/56/10, Ch. IV.E.1, Nov. 2001.

[15] *See* U.S. Support for the United Nations: Engagement, Innovation and Renewal, Fact Sheet, http://www.un.int/usa/fact9.html (the U.S. is the "largest contributor" to the ICTY/R, Cambodia and Sierra Leone justice endeavors); U.N. SCOR, 4422nd and 4423rd mtgs., S/RES/1379 (2001) (the Security Council urging member states to "put an end to impunity, prosecute those responsible for genocide, crimes against humanity, war crimes, and other egregious crimes"); Pierre-Richard Prosper, U.S. Ambassador at Large for War Crimes Issues, *Rewards for Justice: Fugitives from the ICTR*, (July 29, 2002), http://www.state.gov/s/wci/rls/rm/2002/12279.htm ("The United States remains committed to bringing perpetrators of genocide, war crimes, and crimes against humanity to justice. Working together we will promote peace and bring stability to the Democratic Republic of Congo.")

of the international community, is the International Criminal Court.[16] The U.S. was originally a primary sponsor of the ICC, although that Court is not currently supported by the U.S. principally because of fears that U.S. citizens will be unjustly targeted and prosecuted,[17] concerns that are not dispositive in this case.)

The new enforcement regime which began in the 1990s was fortified by the government's response to international crimes committed in the United States on September 11, 2001. Since September 11, 2001, the U.S. government has repeatedly and unequivocally demonstrated its view that nations that engage in crimes in violation of international law have no inherent immunity. *See, e.g.,* Press Release, President Unveils 'Most Wanted' Terrorists, Oct. 10, 2001, ("[A]s a nation of good folks, we're going to hunt them down, and we're going to find them, and we will bring them to justice…. We will bring those who harbor [terrorists], who hide them, who feed them, who encourage them, to justice".), available at http://www.whitehouse.gov/news/releases/2001/10/20011010-3.html; Press Release, President Discusses War on Terrorism, Nov. 8, 2001, ("I have called our military into action to hunt down the members of the al Qaeda organization who murdered innocent Americans. I gave fair warning to the government that harbors them in Afghanistan. The Taliban made a choice to continue hiding terrorists, and now they are paying a price."), available at http://www.whitehouse.gov/news/releases/2001/11/200111108-13.html.

In conclusion, the past eight years have witnessed an explosive development in efforts to enforce international criminal law and reverse the impunity afforded for the most serious past,

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[16] *The Rome Statue of the ICC* was signed on July 17, 1998 by 120 countries. It has since been ratified by 77 countries. *See* http://www.un.org/icc.

[17] *See e.g.*, Remarks of David Scheffer, U.S. Ambassador at Large for War Crimes Issues, Washington DC, *Evolution of US Policy Toward the International Criminal Court*, (Sept. 14, 2000), *at* http://www.state.gov/documents/organizations/7095.doc.

present, and future crimes, including many gender-related crimes. *Amici* therefore urge this Court to reconsider its ruling that a nation can enjoy immunity for *jus cogens* crimes, and hold that Japan waived its immunity from suit by establishing an obviously criminal system of rape, sexual slavery and torture during World War II.

CONCLUSION

For the reasons set forth above, this Court should reverse the District Court's decision and remand the case for trial on the claims brought by plaintiff-appellants Hwang Geum Joo et al.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO FED. R. APP. P. 32(A)(7)(C)

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that the foregoing Brief of *Amici Curiae* in Support of Plaintiff-Appellants Hwang Geum Joo et al. and Reversal of the District Court's Decision is proportionately spaced, has a typeface at least 11 points in height, and contains 6,999 +-words, excluding the table of contents, table of authorities, statement with respect to oral argument, and certificates of counsel (as measured by the word count of the word-processing program used to prepare the Brief).

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CERTIFICATE OF SERVICE

I, David A. Handzo, hereby certify that on August 28, 2002, I caused two copies of the foregoing Brief of *Amici Curiae* in Support of Plaintiff-Appellants Hwang Geum Joo et al. to be served by U.S. mail, postage prepaid, on:

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