07-1893

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

BASHE ABDI YOUSUF, AZIZ MOHAMED DERIA (IN HIS CAPACITY AS PERSONAL REPRESENTATIVE OF THE ESTATES OF MOHAMED DERIA ALI, MUSTAFA MOHAMED DERIA, JAMES DOE I AND JAMES DOE II), JOHN DOE I, JANE DOE, AND JOHN DOE II,
Plaintiffs-Appellants,

– v. –

MOHAMED ALI SAMANTAR,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

BRIEF OF UNITED STATES MEMBER OF CONGRESS AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF THE PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S DECISION

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December 7, 2007

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STATEMENT OF INTEREST

This brief of *amici curiae* is respectfully submitted pursuant to Federal Rule of Appellate Procedure 29 in support of the Petitioners-Appellants. All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a). Amici are a Member of Congress and professors of law who support the Torture Victim Protection Act (TVPA), 28 U.S.C. § 1350 note (2000).[1] The issues raised in this appeal concern the applicability of the Foreign Sovereign Immunities Act (FSIA) to persons accused of a crime under the TVPA. The amici are interested in showing that FSIA immunity does not act as a jurisdictional bar for TVPA claims.

To that end, the amici seek to inform the Court of the non-applicability of the FSIA immunity provisions to the TVPA and to clarify that, in passing the TVPA, Congress specifically recognized that sovereign immunity would normally provide no protection from a TVPA claim. The legislative history amply supports this understanding of the TVPA's applicability, rendering the District Court's recognition of a jurisdictional bar in error.

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[1] Congresswoman Sheila Jackson Lee (Texas); Penny Andrew (CUNY); Arturo Carrillo (George Washington); Rhonda Copelon (CUNY); Martin Flaherty (Fordham); Doug Ford (Virginia); Deena Hurwitz (Virginia); Sital Kalantry (Cornell); Jenny Martinez (Stanford); Jennifer Moore (New Mexico); George Rutherglen (Virginia); Stephen Vladeck (American); Deborah Weissman (North Carolina). School affiliations are given for identification purposes only. A more complete listing of the amici appears in the Addendum to this brief.

SUMMARY OF ARGUMENT

The District Court in *Yousuf v. Samantar*, No. 1:04cv1360, 2007 U.S. Dist. LEXIS 56227 (E.D. Va. Aug. 1, 2007), incorrectly interpreted the Foreign Sovereign Immunities Act (FSIA) as creating a jurisdictional bar to a claim under the Torture Victim Protection Act (TVPA). In enacting the TVPA, Congress intended to provide a remedy for victims of torture and extrajudicial killing by allowing actions in United States courts against responsible individuals who come to this country. Through the TVPA, Congress recognized that torture and extrajudicial killing are per se *ultra vires* because they are violations of the Law of Nations and *jus cogens* norms. The FSIA does not confer immunity upon former foreign officials who committed torture and extrajudicial killing, because these acts fall outside the scope of their legal authority and, thus, are never sovereign acts. Congress did not invest in passing the TVPA only to have it nullified by the FSIA. Indeed, Congress understood that the FSIA would not normally apply in situations where violations of *jus cogens* norms are alleged. To find otherwise would gut the TVPA of its primary purpose of providing redress to victims of torture, and is fundamentally contrary to Congressional intent.

ARGUMENT

I. THE DISTRICT COURT'S INTERPRETATION OF THE FSIA JURISDICTIONAL BAR CONTRADICTS CONGRESSIONAL INTENT IN PASSING THE TVPA.

In enacting the Torture Victim Protection Act ("TVPA"),[2] Congress intended to provide victims of torture and extrajudicial killing with redress against former foreign government officials in civil courts. To construe the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602-11 (2000), as a jurisdictional bar to the application of the TVPA is contrary to Congress' intent to provide redress for acts that are by definition beyond the power of any government to condone. Indeed, extending FSIA immunity to former foreign government officials responsible for torture and extrajudicial killing will render the TVPA incapable of achieving its legislative purposes.

A. Congress Intended the TVPA to Deny Safe Haven in the United States and Provide Redress for Victims.

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[2] The TVPA provides that:

> An individual who, under actual or apparent authority, or color of law, of any foreign nation
>
> (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
>
> (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.

"The Torture Victim Protection Act of 1991," 28 U.S.C. § 1350 note, PL 102-256 (1992).

The TVPA was meant to have both symbolic and practical effect. The Act not only provides a stern warning and deterrent to would-be torturers; it also serves notice to individuals who actually engage in gross human rights violations. The TVPA informs such violators that they will not find shelter in this country, and may be held accountable in appropriate proceedings. Through the TVPA, the United States expressly condemns torture as a flagrant violation of the Law of Nations.

Congress enacted the TVPA to prevent torturers from finding refuge in the United States. Representative Gus Yatron of Pennsylvania, along with Representatives Peter Rodino and Jim Leach, first introduced the bill to the House of Representatives in 1986. In a hearing before the House Committee on Foreign Affairs, Representative Yatron (chairman of the subcommittee) said that,

> [t]orture poses a pervasive threat to the well-being of humankind. We must take a strong stand against this practice. Thousands of people are brutalized daily. They have no way of fighting for themselves. At least we can insure through H.R. 1417 that in the United States, the individuals who have tortured will be held accountable....

Hearing and Markup Before the Comm. on Foreign Affairs and its Subcomm. on Human Rights and International Organizations of the House of Representatives, 100th Cong., 2d Sess. on H.R. 1417 at 1 (1988). The TVPA "puts torturers on notice that they will find no safe haven in the United States. Torturers may be sued

under the bill if they seek the protection of our shores." 137 Cong. Rec. H11244 (1991) (statement of Rep. Mazzoli).[3]

The TVPA was intended to provide a practical remedy to victims and survivors of torture who often have no other way to seek justice. Congress recognized that victims of these types of crimes may be unable to achieve redress in the countries where the abuse took place.

> The countries that encourage torture and killing are generally the least likely to be able to adjudicate victims' claims fairly. The torturer who becomes subject to the jurisdiction of our courts must not be shielded by the lack of remedies in the very country that encourages his action.

135 Cong. Rec. 22717 (1989) (statement of Rep. Leach).

Through the TVPA, victims of brutal violations of human rights can be afforded some measure of justice, however small in comparison to the abuses they have suffered. The Act was "designed to provide tangible results—a cause of action for damages for violation of the law of nations condemning torture and extrajudicial killing." 132 Cong. Rec. 12949 (1986) (statement of Sen. Specter) In addition to the possibility of financial compensation, victims have 'their day in court,' a significant if symbolic measure of democracy that affords them a sense of redress and closure.

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[3] This is also consistent with U.S. immigration law. A non-citizen entering the U.S. who has committed, ordered, incited, assisted or otherwise participated in acts of torture or extrajudicial killings is inadmissible. Immigration and Nationality Act, 8 U.S.C. § 1182 (2006).

B. Congress Intended That the FSIA Would Not Bar Claims Against Former Government Officials Who Commit Torture and Extrajudicial Killing Under the Color of Law, Yet Outside the Scope of Their Lawful Authority.

The extensive legislative history surrounding the enactment of the TVPA reveals that Congress did not intend for FSIA immunity to extend to perpetrators of torture or extrajudicial killing.

> The legislation uses the term "individual" to make crystal clear that foreign states or their entities cannot be sued under this bill under any circumstances: only individuals may be sued. Consequently, the TVPA is not meant to override the [FSIA] of 1976, which renders foreign governments immune from suits in U.S. courts, *except in certain instances . . . . [T]he committee does not intend these immunities [sovereign, diplomatic, and head of state] to provide former officials with a defense to a lawsuit brought under this legislation.*

S. Rep. No. 102-249, at 7-8 (emphasis added). This language distinguishes between immunity for governments that perpetrate or condone human rights abuses, and immunity for government officials.

While the term "individual" focuses the attention of the TVPA on acts by specific former government officials rather than the sovereign state, Congress further specified the kinds of acts covered by the statute by including the term "color of law." 28 U.S.C. § 1350 note. With the addition of this term, "purely private criminal acts by individuals or nongovernmental organizations" are excluded from coverage. S. Rep. No. 102-249, at *8 (1991); *See Doe I v. Islamic Salvation Front*, 993 F. Supp 3, 9 (D.D.C. 1998) (quoting H.R. Rep. No. 102-367,

at 5 (1991), *as reprinted in* 1992 U.S.C.C.A.N. 84, 87) ("[T]he TVPA contains explicit language requiring state action. The legislative history clearly indicates that '[t]he bill does not attempt to deal with torture or killing by purely private groups.'").

Congress' use of the term "color of law" is evidence of a definitional distinction between acts that might be classified as sovereign (and therefore shielded) and those committed by officials but nonetheless outside sovereign power. This reading is buttressed by the legislative history where Congress specifically referenced courts' interpretations of 42 U.S.C. § 1983 (1996) in construing "color of law." H.R. Rep. No. 102-367, at 5; S. Rep. No 102-249, at 8. Our courts have repeatedly found color of law to be evidence of *misuse* of power, drawing a distinction between truly sovereign acts and violations of the law committed under a false cloak of sovereign authority. *See, United States v. Classic* 313 U.S. 299, 326 (1941); *Williams v. United States* 341 U.S. 97, 99 (1951); *Scott v. Vandiver* 476 F.2d 238, 241 (4th Cir. 1973); *West v. Atkins*, 487 U.S. 42, 49 (1988); *United States v. Causey*, 185 F.3d 407, 415 (5th Cir. 1999); *Honaker v. Smith* 256 F.3d 477, 484 (7th Cir. 2001); *Mentavlos v. Anderson*, 241 F.3d 301, 321 (4th Cir. 2001); *Anderson v. Warner,* 451 F.3d 1063, 1068 (9th Cir. 2006). What is more, notably absent from the text and legislative history of the FSIA is any reference to the individual as an agent or instrumentality of the state.

> As a general matter, entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R.Rep. 94-1487 (1976), at 15-16, *as reprinted in* 1976 U.S.C.C.A.N 6604.

The legislative history of the TVPA shows that Congress considers torture and extrajudicial killing to be fundamentally non-sovereign acts. S. Rep No. 102-249, at 8 (recognizing that "all states are officially opposed to torture and extrajudicial killing. . ."). With the FSIA, Congress explicitly codified the division between public and private acts, commonly called the restrictive principle of sovereign immunity, recognizing immunity in cases based on a foreign state's public acts (*jure imperii*), but not in cases based on private acts (*jure gestionis*). H.R. Rep. No. 94-1487, at 7 (1976). *Jure imperii* (sovereign immunity) cannot be invoked to shield a state official (let alone a *former* official) who acts under color of law but perpetrates an illegitimate sovereign act such as torture. It is this group of persons that the TVPA is designed to hold to account. In such a case, the official acting under color of law, appears to be in a position to invoke *jure imperii*. However, the official's authority is nothing more than an illusion, and he is *de facto* acting in *jure gestionis* (private capacity). The TVPA still applies to such an

official, because he has acted under color of law, but immunity is not available to him.

Similarly, when a state violates a *jus cogens* norm by encouraging, practicing or condoning torture or extrajudicial killing, it is not acting within its legitimate sovereign capacity, and is without immunity. Thus grounded in general principles of international law, the FSIA cannot function as a bar to the TVPA, which deals with violations of *jus cogens* norms (torture and extrajudicial killing) by persons acting under color of law.

An allegation of personal motivation is not necessary to avoid an FSIA jurisdictional bar to TVPA claims. Torture, by definition, requires state action. It is never a private act. A defendant's personal motivation or individual reasons for acting are irrelevant for the purposes of a TVPA claim. Indeed, in these cases it is *essential* to sue the defendant in his capacity as a former official, in order to satisfy the TVPA's color of law requirement.

II. RESTRICTING THE JURISDICTIONAL REACH OF THE TVPA TO AN ENUMERATED EXCEPTION UNDER THE FSIA WILL VIRTUALLY RENDER THE TVPA A NULLITY, CONTRARY TO CONGRESSIONAL INTENT.

1. The FSIA's grant of sovereign immunity to foreign states and organs of those states is subject to certain enumerated exceptions.[4] This list of methods for expressly or impliedly waiving sovereign immunity is not meant to be exhaustive. H.R. Rep. No . 1487, 94th Cong., 2d Sess. 18 (1976), as *reprinted in* 1976 U.S.C.C.A.N. 6604, 6617). Here, the District Court interpreted the FSIA as requiring that one of the enumerated exceptions to sovereign immunity must apply for a TVPA claim to go forward. Congress did not intend such a result. Such a narrow interpretation excludes a wide swath of potential TVPA claimants that Congress clearly intended to have access to U.S. courts.

Congress intended survivors of torture to use the TVPA to find a remedy in United States courts. Congress recognized that torture is universally held to be a *jus cogens* norm. Nearly every nation recognizes that official torture and summary execution violate accepted standards of law and decency. "The universal consensus condemning these practices has assumed the status of customary international law." S. Rep. 102-249 at 3 (1991); *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 732 (2004) ("Among the rights universally proclaimed by all nations . . . is the right to be free of physical torture.").

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[4] These include waiver of immunity, 28 U.S.C. § 1605(a)(1); commercial disputes, 28 U.S.C. § 1605(a)(2); situations involving property within the U.S., 28 U.S.C. § 1605(a)(3) and (4); torts committed within the U.S., 28. U.S.C. § 1605(a)(5); and certain situations where states are sponsors of terrorism, 28 U.S.C. § 1605(a)(7).

Congress was fully aware of the issues surrounding the availability of sovereign immunity when it passed the TVPA, which codifies the decision of the Second Circuit in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980).

> After finding that torture has been condemned and renounced as an instrument of official policy by virtually all countries of the world, Chief Judge Irving R. Kaufman [presiding over the *Filartiga* case in the Second Circuit] further held that customary international law provides individuals with the right to be free from torture by government officials. Consequently, section 1350 gave Federal courts jurisdiction over allegations of torture since torture violates the "law of nations".

S. Rep. 102-249 at 4 (1991).[5] The Senate explained that the TVPA was needed to clarify and reinforce the Alien Tort Claims Act and leave no room for ambiguity or doubt regarding the basis for suits that can be brought in U.S. federal courts. *Id.*

Moreover, this understanding of what lawfully constitutes a sovereign act is explicit in the legislative history of the TVPA. Considering the scope of liability, and in particular the apparent conflict between the TVPA's reach to the conduct of individuals and its requirement that such conduct have been committed under the apparent authority of a state, Congress expressly addressed the doctrine of state

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[5] The Senate Report quotes the Second Circuit decision:

> Among the rights universally proclaimed by all nations***is the right to be free of physical torture. Indeed for the purposes of civil liability, the torturer has become—like the pirate and slave trader before him—*hostis humani generis*, an enemy of all mankind. Our holding today, giving effect to a jurisdictional provision enacted by our First Congress, is a small but important step in the fulfillment of the ageless dream to free all people from brutal violence.

S. Rep. 102-249 at 4 (1991).

sovereign immunity by emphasizing that under the TVPA only individuals may be sued. It recognized that the TVPA was "not meant to override the Foreign Sovereign Immunities Act (FSIA) of 1976." S. Rep. 102-249 at 7 (1991). Indeed, Congress noted that, "the committee does not intend [FSIA, head of state and diplomatic] immunities to provide former officials with a defense to a lawsuit brought under this legislation." Id. at 8. Though Congress conceded that there may be some extraordinary circumstances under which a former official may avoid liability by proving some agency relationship with a state and having the state admit knowledge or authorization of the acts in question, such an evasion of liability would be rare. Id. at 8. "It is precisely because no state officially condones torture or extrajudicial killings that the Senate in its ratification of the Torture Convention made clear that official sanctions of a state could not possibly include acts of torture." Id. at note 15.[6]

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[6] Nor did the Senate intend the "act of state" doctrine to provide a shield from lawsuit for former officials.

> In *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964), the Supreme Court held that the "act of state" doctrine is meant to prevent U.S. courts from sitting in judgment of the official public acts of a sovereign foreign government. Since this doctrine applies only to "public" acts, and no state commits torture as a matter of public policy, this doctrine cannot shield former officials from liability under this legislation.

Id. at 8.

In sum, Congress did not intend for the FSIA to conflict with the application of the TVPA. Restricting the application of the TVPA to one of the enumerated exceptions to sovereign immunity essentially limits redress to situations where the foreign state has waived its immunity. Indeed, if this interpretation is used, all former officials of entrenched and violent regimes that are not "state sponsors of terror" would be immunized against the TVPA, as these regimes would rarely voluntarily waive immunity.

2. Congress passed the TVPA with the intent of holding individual former foreign officials to account for illegitimate actions taken under color of law, though it recognized that the FSIA could provide immunity to some former officials.

> To avoid liability by invoking the FSIA, a former official would have to prove an agency relationship with the state, which would require the state to "admit some knowledge or authorization of relevant acts." *28 U.S.C. 1603(b)*. Because all states are officially opposed to torture and extrajudicial killing, however, the FSIA should normally provide no defense to an action taken under the TVPA against a former official.

S. Rep. No. 102-249, at 8.

In saying that "the FSIA should *normally* provide no defense to [a TVPA action]," S. Rep. No. 102-249, at 8 (emphasis added), Congress merely acknowledged that, while a hypothetical situation could exist where the foreign state's ratification would trigger immunity, it would be extremely unusual under

these circumstances (i.e., torture and extrajudicial killing), because all states are opposed to torture and extrajudicial killing.

The District Court failed to apply the plain implication of the second sentence of the above-quoted statement from the Senate Report – that all states oppose, and therefore cannot endorse, torture. The District Court's reasoning ignores the fundamental principle that violations of *jus cogens* norms may never be considered official acts, and fails to adequately explain why this specific situation is so abnormal as to override Congress' understanding that FSIA immunity does not apply to a TVPA claim. Otherwise, the result is perverse: officials belonging to irresponsible regimes willing to ratify heinous actions may thereby escape accountability under the TVPA.

Congress' view of norms of customary international legal norms are very clear in the TVPA legislative history: "no state officially condones torture or extrajudicial killings," and "few such acts, if any, would fall under the rubric of 'official actions' taken in the course of an official's duties." S. Rep. No. 102-249, at 3 and 8. This understanding of customary international law with regard to torture and extrajudicial killings demonstrates that Congress could not have intended the FSIA to act as a jurisdictional bar to claims against individual former foreign government officials. Since a state cannot ever claim that torture is an official action, an official who commits such a crime under color of authority is barred

from claiming sovereign immunity. To allow the FSIA to bar a torture claim would undermine the logic behind the enactment of the TVPA as a whole, and is fundamentally contrary to Congressional intent.

3. In passing the FSIA, Congress was particularly cognizant of the need to alleviate diplomatic pressures on the executive.

> A principal purpose of [the FSIA] is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. The Department of State would be freed from pressures from foreign governments to recognize their immunity from suit and from any adverse consequences resulting from an unwillingness of the Department to support that immunity. As was brought out in the hearings on the bill, U.S. immunity practice would conform to the practice in virtually every other country-- where sovereign immunity decisions are made exclusively by the courts and not by a foreign affairs agency.

H.R. Rep. No. 94-1487, at 7. Thus, it is evident that Congress intended to relieve the executive from diplomatic pressures for the whole gamut of FSIA determinations and rest with the courts the responsibility of determining whether the act at issue is public or private. As discussed above, torture (as defined by the TVPA) is never a private act since color of law is a required element. Sovereign immunity is not available to an official accused of torture, because such an action is always outside the scope of lawful sovereign authority. The FSIA recognizes that courts are most properly suited to make assessments of the scope of sovereign

power and, as such, the opinion of the Department of State should not be controlling.

The District Court cites President's George H.W. Bush's signing statement in support of its conclusion that the FSIA bars the TVPA action. *Yousuf*, 2007 U.S. Dist. LEXIS 56227, at *39-40 (citing 1992 U.S.C.C.A.N. 91 (1992)). However, the presidential signing statement that accompanies the TVPA is not binding authority, and it should not be afforded the same weight as the rest of the Act's legislative history. In his statement, President Bush raised concerns that the TVPA could be abused if cases brought under it are ill-founded or politically motivated. He suggested that such cases could embroil the United States in international disputes to which the nation is otherwise not connected, and overburden the judicial system. However, such concerns are overblown, since the judiciary is not only able to competently determine if a case has a proper cause of action; it is legislatively mandated to do so. What is more, despite President Bush's concerns, he nonetheless signed the TVPA into law as Congress had envisioned it.

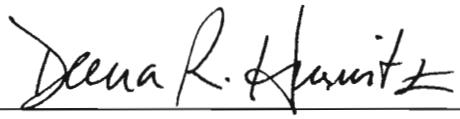
CONCLUSION

It would be a manifest injustice to deny an individual access for violations of his or her fundamental human rights, especially where Congress has passed an Act with the express intention of providing those remedies. The FSIA contains

exceptions allowing for suits against foreign governments, such as suits regarding commercial activity, 28 U.S.C. § 1605(a)(2); rights in property taken in violation of international law, Id. at § 1605(a)(3); and even, under certain circumstances, for victims of traffic accidents. Id. at § 1605(a)(5); H.R.Rep 94-1487 at *21. The FSIA does not apply to acts by former foreign officials accused of torture and extrajudicial killing. It would be unconscionable to deny a victim of torture or extrajudicial killing redress in U.S. courts.

The decision below should be reversed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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BRIEF OF UNITED STATES MEMBER OF CONGRESS AND LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL OF THE DISTRICT COURT'S DECISION

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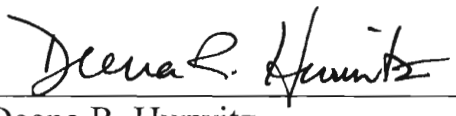

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Defendant-Appellee

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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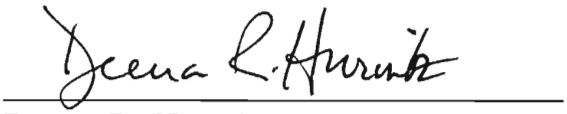

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