No. 08-108

In The Supreme Court of the United States

IGNACIO FLORES-FIGUEROA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICI CURIAE* ADVOCATES FOR HUMAN RIGHTS, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, ASIAN LAW CAUCUS, ASISTA, CATHOLIC LEGAL IMMIGRATION NETWORK, INC., DECORAH AREA FAITH COALITION, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, FLORIDA IMMIGRANT ADVOCACY CENTER, IMMIGRANT DEFENSE PROJECT OF THE NEW YORK STATE DEFENDERS ASSOCIATION, IMMIGRANT LAW CENTER OF MINNESOTA, LATINOJUSTICE PRLDEF, LUTHER COLLEGE OFFICE FOR COLLEGE MINISTRIES, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, INC., NORTH CAROLINA JUSTICE CENTER, POLITICAL ASYLUM/IMMIGRATION REPRESENTATION PROJECT, POSTVILLE RELIEF EFFORT BASED OUT OF ST. BRIDGET'S CATHOLIC CHURCH HISPANIC MINISTRY, AND WASHINGTON DEFENDER ASSOCIATION IMMIGRATION PROJECT IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici are organizations whose members, constituents, and clients are facing the real-world consequences of stretching the crime of aggravated identity theft to reach immigrant workers using false identification for employment purposes without knowledge that the identification belonged to another person. We are concerned that the crime of aggravated identity theft has been transformed, contrary to congressional intent, from an additional two-year sentence for people who knowingly use others' identities to steal money and otherwise cause harm into an inflexible instrument that targets immigrant workers and ignores established distinctions about culpability, harm, and equities.

Amici Decorah Area Faith Coalition, Luther College Office for College Ministries, and the Postville Relief Effort based out of St. Bridget's Catholic Church Hispanic Ministry have seen the consequences of an overbroad reading of 18 U.S.C. § 1028A firsthand. These local faith-based groups coordinated relief efforts following the workplace raid in Postville, Iowa, and provided direct services to immigrants

[1] *Amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), *amici curiae* have filed the letters of consent with the Clerk of the Court.

impacted by the unbridled application of aggravated identity theft charges.

Amici Advocates for Human Rights, American Immigration Lawyers Association, Asian American Legal Defense and Education Fund, Asian Law Caucus, ASISTA, Catholic Legal Immigration Network, Inc., Florence Immigrant and Refugee Rights Project, Florida Immigrant Advocacy Center, Immigrant Defense Project of the New York State Defenders Association, Immigrant Law Center of Minnesota, LatinoJustice PRLDEF, National Immigrant Justice Center, National Immigration Law Center, National Immigration Project of the National Lawyers Guild, Inc., North Carolina Justice Center, Political Asylum/Immigration Representation Project, and Washington Defender Association Immigration Project are local and national organizations that engage in advocacy, direct services, education, outreach, and impact litigation to protect the civil rights of immigrants. These groups have met with and counseled immigrants following workplace raids, provided legal services for the families and communities adversely impacted, and observed the threat to their members, constituents, and clients.

We are all concerned that Respondent's expansion of aggravated identity theft perverts congressional intent in the realms of both criminal and immigration law. Not only has the Respondent's reading resulted in the incarceration of immigrants who are not actually guilty of committing aggravated identity theft, it has in practice closed the door to

immigrants' legitimate claims to relief from removal under the immigration law. But for the Respondent's misreading of 18 U.S.C. § 1028A, some of our clients, members, and constituents might have successfully obtained lawful status in the United States.

SUMMARY OF ARGUMENT

The workplace immigration raid conducted by the Department of Homeland Security's Immigration and Customs Enforcement (ICE) at the Agriprocessors meatpacking plant in Postville, Iowa, demonstrated the practical effects of failing to require knowledge of the defining element of 18 U.S.C. § 1028A – whether the identification at issue is "of another person." In Postville, the crime of aggravated identity theft, which carries a two-year mandatory sentence on top of punishment for underlying crimes, was stretched to reach immigrant workers with low levels of culpability. The Eighth Circuit's reading produced arbitrary results. These arbitrary results were not necessary, as Congress's false document scheme provides for independent and flexible punishment when immigrants knowingly use false documents. By extending the charge of aggravated identity theft beyond its intended bounds, the Eighth Circuit's reading of 18 U.S.C. § 1028A contravened the bedrock criminal law principle that punishment should be calibrated to culpability.

Respondent's interpretation of 18 U.S.C. § 1028A has widespread practical implications for many immigrant workers. The one-size-fits-all approach to punishment based on the Eighth Circuit's reading of 18 U.S.C. § 1028A circumvents the way in which immigration law traditionally treats an immigrant's crime, culpability, and equities. Congress designed the immigration regime to balance an immigrant's equities with previous wrongdoing. An overbroad reading of the aggravated identity theft statute sidesteps Congress's immigration regime and prevents immigrant defendants from seeking relief otherwise available.

The Court should therefore limit its interpretation of the knowledge requirement in 18 U.S.C. § 1028A to reinforce the link between culpability and punishment.

BACKGROUND

THE WORKPLACE IMMIGRATION RAID IN POSTVILLE, IOWA, SHOWED HOW AN OVERBROAD INTERPRETATION OF 18 U.S.C. § 1028A OPERATES IN PRACTICE

On March 28, 2008, in *United States v. Mendoza-Gonzalez*, the Eighth Circuit decided that a defendant need not know that the identification he was using belonged to another person to be convicted of the

crime of aggravated identity theft under 18 U.S.C. § 1028A(a)(1).[2] Less than two months later, in Postville, Iowa, the Department of Homeland Security's Immigration and Customs Enforcement (ICE) premised the largest single-site workplace immigration raid in U.S. history[3] upon criminal charges relying on the Eighth Circuit's newly minted interpretation.

The unprecedented, widespread application of the aggravated identity theft statute in Postville presents a compelling case study of what occurs when courts do not require that a guilty mind correspond to key elements of serious crimes. In Postville, the plea arrangement reached with hundreds of immigrant workers exemplifies the consequences of such a reading.

On May 12, 2008, 900 ICE agents arrested 389 immigrant workers at the Agriprocessors kosher meatpacking plant in Postville, Iowa, for using Social Security or alien registration numbers that did not

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[2] *United States v. Mendoza-Gonzalez*, 520 F.3d 912 (8th Cir. 2008) *petition for cert. filed* (U.S. July 15, 2008) (No. 08-5316).

[3] *See* Julia Preston, *270 Illegal Immigrants Sent to Prison in Federal Push*, N.Y. TIMES, May 24, 2008, at A1. Since the Postville raid, ICE conducted a raid resulting in an even greater number of immigration detentions in a circuit that has not issued a ruling on 18 U.S.C. § 1028A's knowledge requirement. Postville remains record-breaking in terms of the number of immigrants charged with criminal offenses. Adam Nossiter, *Nearly 600 Were Arrested in Factory Raid, Officials Say*, N.Y. TIMES, Aug. 27, 2008, at A16.

belong to them.[4] Most of the workers arrested were undocumented immigrants from Guatemala and Mexico.[5] The typical Agriprocessors worker purchased false documents to obtain employment, often at the suggestion of Agriprocessors management.[6] The principal charge brought against 270 of these workers was not just ordinary document *fraud* – an offense for which both civil and criminal sanctions have long existed – but rather the extraordinary charge of aggravated identity *theft*.[7] All 270 of the workers who were charged with aggravated identity theft pled guilty to lesser false document charges and received sentences ranging from five months to a year and one day.[8]

The distinguishing characteristics of aggravated identity theft profoundly influenced the sequence of events in the Postville raid. Ordinary document crimes, such as unlawful use of a Social Security number (42 U.S.C. § 408(a)) and possession or use of

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[4] Spencer Hsu, *Immigration Raid Jars a Small Town*, WASHINGTON POST, May 18, 2008, at A01.

[5] Of the 389 Agriprocessors employees arrested, 290 were from Guatemala, 93 from Mexico, four from Ukraine, and two from Israel. *Id.*

[6] Second Superseding Indictment at 1, United States v. Agriprocessors, Inc., No. CR-08-1324 (N.D. Iowa Nov. 20, 2008); NATIONAL IMMIGRANT JUSTICE CENTER, DEFENDING HUMAN RIGHTS & DUE PROCESS 3 (2009) [hereinafter *NIJC Report*], *available at* http://www.immigrantjustice.org/resources/policy/nijcpolicybrief.

[7] *See* Preston, *supra* note 3.

[8] *Id.*

a false identification document (18 U.S.C. § 1546(a)), carry flexible sentences with no mandatory minimum; these charges result in a baseline sentence of zero to six months imprisonment for first-time offenders under the Sentencing Guidelines.[9] In contrast, aggravated identity theft carries a mandatory two-year sentence that must be served on top of sentences for underlying crimes.[10] Charging the workers with aggravated identity theft on top of ordinary document crimes thus anchored negotiations at a much higher baseline of punishment than would have resulted from charges for ordinary false document offenses alone.

Aggravated identity theft is distinct from ordinary document crimes primarily in that 18 U.S.C. § 1028A(a)(1) requires that the identification at issue is "of another person."[11] In *Mendoza-Gonzalez,* the Eighth Circuit established that the government need not consider whether the defendant had a guilty mind with respect to this defining element.[12] Under the

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[9] Peter Moyers, *Butchering Statutes: The Postville Raid and the Misinterpretation of Federal Law*, 32 SEATTLE UNIV. L. REV. (forthcoming Apr. 2009), *available at* http://ssrn.com/abstract=1306747.

[10] 18 U.S.C. § 1028A(a)-(b) (2006).

[11] In contrast with 18 U.S.C. § 1028A(a)(1), false document charges such as 42 U.S.C. § 408(a)(7) and 18 U.S.C. § 1546 simply require falsity.

[12] *United States v. Mendoza-Gonzalez*, 520 F.3d 912, 915 (8th Cir. 2008), *petition for cert. filed* (U.S. July 15, 2008) (No. 08-5316).

Eighth Circuit's sweeping reading, the risk of conviction was high and the length of punishment was certain for many Postville workers, making giving up their right to trial and pleading guilty much more compelling.

The reality of the cases processed in Postville contradicts the claim that the immigrant workers possessed the knowledge that identity theft requires. In Postville, only one out of 983 Social Security Numbers from Agriprocessors' "no match" letters in 2007 corresponded to a reported case of a stolen identity.[13]

The Eighth Circuit's interpretation, the statute's rigid potential sentence, and the reality of detention in anticipation of trial set the stage for a large number of convictions with sentences of imprisonment and judicial orders of deportation that circumvented immigration remedies. The standard plea arrangement for those charged with aggravated identity theft consisted of a five-month sentence pursuant to a guilty plea to 18 U.S.C. § 1546(a), three years of supervised release, and a stipulated judicial removal

[13] Moyers, *supra* note 9, at 11 (citing *In re John Doe et al.*, case no. 08-MJ-110-JSS, docket no. 1-3 (N.D. Iowa May 9, 2008) at ¶ 89). The Internal Revenue Service annually sends employers "no-match" letters identifying any employees whose combination of name and number do not correspond to the information on file with the agency. Social Security Administration – Overview of Social Security Employer No-Match Letters Process, http://www.ssa.gov/legislation/nomatch2.htm (last visited December 11, 2008).

order that waived all rights to individualized immigration proceedings and consideration of forms of relief.[14]

ARGUMENT

I. POSTVILLE DEMONSTRATED HOW FAILING TO REQUIRE KNOWLEDGE OF A DEFINING ELEMENT OF 18 U.S.C. § 1028A DESTROYS THE LINK BETWEEN PUNISHMENT AND CULPABILITY

Following the ICE raid in Postville, Iowa, individuals with the same culpability received different sentences based solely on whether the Social Security or alien registration numbers they used belonged to a real person. Conversely, individuals using false Social Security or alien registration numbers for employment purposes were charged with the same crime of aggravated identity theft as those who truly committed identity theft, despite a lesser degree of culpability. These incongruous practical results – which Congress could not have intended – counsel for an interpretation of 18 U.S.C. § 1028A that preserves the critical connection between individual culpability and punishment.

[14] *See, e.g.*, Plea Agreement for Thelma Zamol-Yool at 2-4, *United States v. Zamol-Yool*, No. 08-1306 (N.D. Iowa May 18, 2008).

A. Evidence Shows that Large Numbers of Agriprocessors Workers Did Not Know That They Were Using Another Person's Identity Information

The knowledge that most Agriprocessors workers possessed was not sufficient to satisfy the element that distinguishes aggravated identity theft from ordinary false document crimes. Immigrant workers arrested in the Postville raid had varying levels of sophistication and awareness about the Social Security system.[15] Despite their differences, most were similarly situated with respect to the legal question at issue: Evidence shows that large numbers of immigrant workers arrested did not know that the Social Security or alien registration number they had submitted to their employer belonged to another person.

In many cases, immigrant workers in Postville who were using false documents did not even know the significance of a Social Security or alien registration number. About three-quarters of the 389 workers arrested were Guatemalan; many of indigenous descent.[16] Many could not read or write and had an

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[15] *NIJC Report*, *supra* note 6, at 1-3.

[16] Hsu, *supra* note 4; *Immigration Raids: Postville and Beyond: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. 6 (2008) (statement of Dr. Erik Camayd-Freixas, Professor of Modern Languages, Florida International University) [hereinafter Camayd-Freixas] *available at* http://judiciary.house.gov/hearings/pdf/Camayd-Freixas080724.pdf; David Bacon, *Railroading Immigrants*, THE NATION, Oct. 6, 2008, at 20, 21.

elementary school education or less.[17] For some, working at Agriprocessors was their first experience with the formalities of employment in the United States.[18] Interpreter Dr. Erik Camayd-Freixas indicated that over half (five of nine) of the immigrants for whom he translated did not know what a Social Security or alien registration number was when questioned by their attorney.[19] Attorney Sonia Parras Konrad reported that some of her clients not only did not know what a Social Security number was, they mistakenly believed that they were legally present in the United States.[20]

Other immigrant workers arrested in the Postville raid knew that they were using false documents, but did not know that the ID belonged to someone else. News reports of the Postville raid repeatedly cited workers who disclaimed any knowledge that the numbers they had submitted to Agriprocessors belonged to other people.

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[17] Moyers, *supra* note 9, at 28 (citing interview with Alfred Willett, CJA Panel Defense Attorney); Camayd-Freixas, *supra* note 16, at 2. A large number of the indigenous Guatemalans did not speak much English or Spanish. Bacon, *supra* note 16, at 21.

[18] *See* Camayd-Freixas, *supra* note 16, at 10.

[19] *NIJC Report*, *supra* note 6, at 1.

[20] Parras Konrad reported that two of her clients were escorted across the border by coyotes, who told them that government-issued papers demanding their appearance at an immigration hearing were "permisos" or work-authorization documents. Unable to read the documents, the women believed that the papers authorized a temporary stay. *Id.* at 3.

- A mother of four from Mexico, worked at Agriprocessors for three years before her arrest. CNN reported: "She says she was given a 'Social Security number that they [Agriprocessors] invented for me.' Asked who made it, [she] says, 'I don't know. I never knew.' "[21]

- After attending a support group meeting of immigrant women in Postville, Monica Rohr of the Associated Press recounted: "All speak of the same concerns. . . . They do not understand why federal officials are pressing criminal identity theft charges against many of the detained immigrants, who say they did not know they were buying stolen information."[22]

- Nobel Peace Prize-winner Rigoberta Menchu visited St. Bridget's Church in Postville, which ministered to immigrant families impacted by the raid. Tony Leys of the *Des Moines Register* wrote: "[Menchu] heard a woman in the audience decry the fact that hundreds of workers were imprisoned for five months on charges of identity theft. The woman said the immigrants did not know the false papers they bought contained Social

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[21] Wayne Drash, *Priest: 'Nobody Can Tell Me to Shut Up'*, CNN.COM, Oct. 16, 2008, http://edition.cnn.com/2008/US/10/15/postville.priest/index.html.

[22] Monica Rhor, *A Small Town Struggles after Immigration Raid*, USATODAY.COM, Aug. 16, 2008, http://www.usatoday.com/money/economy/2008-08-16-1697371147_x.htm.

> Security numbers that actually belonged to other people."[23]

A recent article examining the legal basis for the Postville raid cites interviews with criminal defense attorneys that corroborate the workers' accounts.[24]

Charges brought against Agriprocessors managers after the raid support employees' claims that they were unaware of the origin of the Social Security or alien registration numbers. As of November 20, 2008, five Agriprocessors managers had been indicted for, *inter alia*, conspiracy to commit document fraud, aiding and abetting document fraud, and six counts of aiding and abetting aggravated identity theft.[25] The defendants allegedly directed employees to procure false documents and loaned employees money to purchase new documents.[26] Agriprocessors management allegedly even bought documents directly from counterfeiters and then charged employees for the cost.[27] Counsel for detainees arrested in Postville also alleged in civil proceedings that Agriprocessors played a significant role in procuring false documents

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[23] Tony Leys, *World Notes Postville Suffering, Nobel Winner Tells Immigrants*, DES MOINES REGISTER, Nov. 9, 2008, at 1B.

[24] Moyers, *supra* note 9, at 33.

[25] Second Superseding Indictment at 1, *United States v. Agriprocessors, Inc.*, No. CR-08-1324 (N.D. Iowa Nov. 20, 2008).

[26] *Id.* at 4-8.

[27] *Id.*

for employees.[28] The active role of these intermediaries, if proven true, makes an inference that all of the workers knew the nature and origins of the numbers they were using even less plausible.

B. In Postville, Punishment Turned Upon a Factor Beyond a Defendant's Control, Namely, Whether a Number Happened to be Real or Fake

The punishment meted out in Postville did not correspond to immigrant workers' culpability, but rather the arbitrary fact of whether the Social Security number they utilized actually corresponded to a real person.[29] The majority of the approximately 300 employees who faced criminal charges were initially charged with aggravated identity theft for using documents that contained real Social Security or alien registration numbers.[30] The remaining workers who were using unassigned numbers could not plausibly be charged with aggravated identity theft, even under the Eighth Circuit's expansive reading.

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[28] Trish Mehaffey, *Postville Immigrants File Suit, Claim Abuse*, CEDAR RAPIDS GAZETTE ONLINE, May 15, 2008, *available at* http://www.gazetteonline.com/apps/pbcs.dll/article?AID=/20080515/NEWS/949618896/1006/news.

[29] Judge Friedman at the District Court for the District of Columbia underscored the arbitrary nature of the government's reading during oral argument in *United States v. Villanueva-Sotelo*. *United States v. Villanueva-Sotelo*, 515 F.3d 1234, 1237 (D.C. Cir. 2008) (citing Hr'g Tr. at 15 (Apr. 4, 2007)).

[30] *See* Preston, *supra* note 3.

The immigrant workers fortunate enough not to be swept into the Eighth Circuit's misreading of 18 U.S.C. § 1028A were instead charged with either 18 U.S.C. § 1546(a) or other ordinary false document offenses with flexible sentencing regimes and no mandatory minimum sentence.[31] Prosecutors typically offered those charged with 18 U.S.C. § 1546(a) five years of probation, in contrast to the five-month prison sentence offered to those whose numbers happened to be assigned to another person.[32] Presumably, prosecutors recognized the probability that a judge would sentence a first-time offender using a number for employment purposes to a term of imprisonment, if not probation, substantially shorter than the two-year mandatory minimum dictated by 18 U.S.C. § 1028A based on such a person's culpability.

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[31] *See, e.g.*, Information for Angela Noemi Lastor-Gomez, *United States v. Lastor-Gomez*, No. 08-1141 (N.D. Iowa May 19, 2008); Moyers *supra* note 9, at 25.

[32] *See, e.g.*, Plea Agreement for Angela Noemi Lastor-Gomez, *United States v. Lastor-Gomez*, No. 08-1131 (N.D. Iowa May 13, 2008).

C. The Erroneous Interpretation of 18 U.S.C. § 1028a Resulted in No Differentiation Between Immigrants Using False Identification for Employment Purposes and People Who Have Truly Committed Identity Theft

According to the government's interpretation, 18 U.S.C. § 1028A mandates the same two-year minimum sentence for both someone who *knowingly* used another's identity and an undocumented immigrant using a false document for employment *without knowledge* that it belonged to someone else. Congress could not have intended to impose the same mandatory scheme on defendants with such differing levels of culpability.

Legislative history reveals that Congress designed 18 U.S.C. § 1028A to target people who knowingly used the identity of another in the commission of predicate crimes. The D.C. Circuit in *U.S. v. Villanueva-Sotelo* found that the legislative history contained not a single example in which a defendant would be guilty of aggravated identity theft without knowing that the identification belonged to another person.[33] Examples abounded, however, of people with knowledge: people who stole credit card and other data from their place of employment, which was then used to create false identification cards;[34] imposters

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[33] 515 F.3d at 1245.

[34] H.R. Rep. No. 108-528, at 5 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779, 781.

who assumed the identities of others to obtain loans and lines of credit;[35] and people who used the information of acquaintances to obtain government benefits.[36]

The facts surrounding the workers charged with aggravated identity theft in Postville contrast sharply with those of genuine identity thieves. In Postville, there was no reasonable inference that many workers knew that the identification they were using belonged to another person. In contrast, in other prosecutions, one could easily infer knowledge from the facts of the case. For example, a couple in their early twenties pled guilty to multiple counts of aggravated identity theft after stealing the identities of about 50 friends and neighbors and using their identities to travel lavishly. The total bill for their escapades reached $116,000.[37] Similarly, a California man who operated several tax preparation businesses pled guilty to aggravated identity theft after stealing the identity of one of his clients and assuming it to file a fraudulent tax return.[38] In both of these classic identity theft

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[35] H.R. Rep. No. 108-528, at 6 (2004), *reprinted in* 2004 U.S.C.C.A.N. 779, 782.

[36] *Id.*

[37] Joseph A. Slobodzian, *Ex-Penn Student Sentenced in "Bonnie and Clyde" Identity-Theft Swindles*, PHILADELPHIA INQUIRER, Nov. 15, 2008, at A01.

[38] Press Release, United States Attorney's Office for the Central District of California, *Tax Preparer Guilty in Several Fraudulent Schemes, Including Identity Theft, that Led to*

(Continued on following page)

scenarios, the defendants clearly knew that they were abusing the identity of another person.

D. These Arbitrary Results are Unnecessary Because Congress Already Provides Independent And Flexible Punishment for the Knowing Possession and Use of False Documents

The arbitrary results that follow from an overly broad reading of 18 U.S.C. § 1028A are not necessary. Congress already provides for significant civil and criminal sanctions for knowing possession and use of false documents. The question before the court is simply whether it is appropriate to stretch aggravated identity theft's two-year mandatory sentence to reach immigrant workers' use of false documents when they do not know that the documents belonged to another person.

The knowledge of falsity that some Agriprocessors workers possessed could have been adequate for the government to prove violations of ordinary false document offenses. The Immigration and Nationality Act imposes civil penalties for knowingly making, using, possessing, or obtaining a false document for the purpose of satisfying any requirement under the immigration law.[39] In addition, 42 U.S.C.

Millions in Losses (Mar. 24, 2008), *available at* http://www.usdoj.gov/usao/cac/pressroom/pr2008/031.html.

[39] 8 U.S.C. § 1324c(a) (2006).

§ 408(a)(7)(B) criminalizes the unlawful use of a Social Security number and 18 U.S.C. § 1546 criminalizes the possession or use of a false identification document. Neither of the criminal offenses requires that a number or document belong to another person.

- 18 U.S.C. § 1546(a) requires that the accused know the document at issue "to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false statement, or to have been otherwise procured by fraud or unlawfully obtained."
- 18 U.S.C. § 1546(b) requires knowledge "that the document was not issued lawfully for the use of the possessor" or "that the document is false."
- 42 U.S.C. § 408(a)(7)(B) requires that the accused, "with intent to deceive, falsely represents a number" when in fact it does not belong to him.

These ordinary false document charges are more flexible than aggravated identity theft. Both 42 U.S.C. § 408(a)(7)(B) and 18 U.S.C. § 1546 allow for flexibility in sentencing, so that individuals will be punished according to their levels of culpability. For example, the Sentencing Guidelines recommend that a defendant with no criminal history and no prior orders of removal should receive a sentence between zero and six months for a charge under

either statute.[40] In contrast, aggravated identity theft's two-year mandatory minimum sentence cannot be adjusted to reflect individual circumstances.

While more flexible than aggravated identity theft, ordinary false document charges can be serious when the facts warrant significant punishment. Both 42 U.S.C. § 408(a)(7)(B) and 18 U.S.C. § 1546(b) carry a maximum sentence of five years. Depending on the circumstances of the crime, 18 U.S.C. § 1546(a) specifies a maximum sentence of 10-25 years. These serious yet more flexible charges allow the punishment to correspond to culpability. For example, some convicted under 42 U.S.C. § 408(a)(7)(B) would face a longer sentence under the Sentencing Guidelines for factors such as using a Social Security number to open and charge large amounts to credit cards.[41]

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[40] Moyers, *supra* note 9, at 26 ("The Sentencing Guidelines provide that a violation of 42 U.S.C. § 408(a) is governed by USSG § 2B1.1 and that a violation of 18 U.S.C. § 1546(a) is governed by USSG § 2L2.2. U.S. SENTENCING GUIDELINES appx. A (2007). The base offense level under USSG § 2B1.1 for a violation of § 408(a) is six. USSG § 2B1.1. . . . The base offense level under USSG § 2L2.1 for a violation of § 1546(a), if not made for profit, is eight. USSG § 2L2.1(a)-(b).").

[41] Loss to the victim can result in increasing additions to the base offense level corresponding to the amount of the loss. For example, using a false Social Security number to obtain credit cards and charge more than $30,000 to them merits a six-level increase from the base offense set in the Sentencing Guidelines. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(1)(D) (2008).

II. A ONE-SIZE-FITS-ALL APPROACH TO PUNISHMENT BASED ON THE EIGHTH CIRCUIT'S READING OF 18 U.S.C. § 1028A FRUSTRATES CONGRESS'S STANDARD TREATMENT OF IMMIGRATION CONSEQUENCES OF FALSE DOCUMENT OFFENSES

The Court should discern Congress's intent vis-à-vis 18 U.S.C. § 1028A in light of its overarching approach to false document offenses in the immigration law. A one-size-fits-all approach to punishment for workers whose false documents happen to correspond to a real person conflicts with Congress's immigration regime for evaluating the appropriate consequences for false document offenses. Congress's immigration regime recognizes that every immigrant who is removable should not necessarily be removed. The immigration laws are therefore nuanced to strike a balance between an individual's equities and prior transgressions. An overbroad reading of 18 U.S.C. § 1028A frustrates this scheme by leveraging judicial removal orders that completely bypass the immigration regime.

Broadly speaking, whether an individual immigrant will actually be removed is a three-step process. First, an immigration judge must determine whether an immigrant is removable. Second, the judge must determine whether the immigrant is statutorily eligible for various forms of relief. Third, if eligible, the judge must determine whether the individual

applying for relief merits a favorable exercise of discretion.

The usual methodology employed in immigration proceedings contrasts sharply with the one-size-fits-all approach that follows from the Eighth Circuit's reading of 18 U.S.C. § 1028A. As was illustrated in Postville, such a reading completely evades immigration distinctions and serves as a predicate to judicial deportation orders that ignore distinctions among workers and preclude consideration for all forms of relief.

The immigration system treats false document offenses seriously, but it distinguishes between offenses both in determining removability and eligibility for appropriate relief. Under the standard immigration methodology, an immigration judge would still have asked whether an immigrant convicted of a false document offense was statutorily eligible for relief and whether she merited a favorable exercise of discretion.

A. Congress's Immigration Regime Employs a Complex Classification System that Distinguishes Between Different Kinds of Document Offenses

Congress's immigration scheme does not treat all false document offenses equally. The law considers the circumstances of the offense, the length of the sentence, and the harm to a victim (if any) to

determine the immigration consequences of a particular offense.

Immigration law categorizes document offenses based on (1) whether the offense may be labeled as one involving moral turpitude;[42] (2) whether the offense may be labeled as an aggravated felony;[43] and (3) whether the offense is an act of general misrepresentation of a false claim of citizenship.[44] The inclusion of a particular false document offense in any one of these categories will determine, in part, its collateral immigration consequences.

In determining whether a particular false document offense is a crime involving moral turpitude, the intent required by the statute at issue is paramount.[45]

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[42] Conviction of an offense characterized as a crime of moral turpitude may render an immigrant inadmissible under 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2006) or deportable under 8 U.S.C. § 1227(a)(2)(A)(i) (2006).

[43] Conviction of an offense characterized as an aggravated felony may render an immigrant deportable under 8 U.S.C. § 1227(a)(2)(A)(iii). The law defines aggravated felonies at 8 U.S.C. § 1101(a)(43) (2006).

[44] General misrepresentation and falsely claiming citizenship are two offenses that could render an immigrant inadmissible. 8 U.S.C. § 1182(a)(6)(C).

[45] *See Notash v. Gonzales*, 427 F.3d 693, 698-700 (9th Cir. 2005) (attempted entry of goods into the United States by means of a false statement is not a crime involving moral turpitude if an intent to defraud was not an essential element of the offense); *Matter of Franklin*, 20 I. & N. Dec. 867 (BIA 1994) (involuntary manslaughter conviction is a crime of moral turpitude if an element of the crime had the requisite *mens rea*).

Courts have defined moral turpitude as involving conduct "that shocks the public conscience as being inherently base, vile, or depraved, contrary to the rules of morality and the duties owed between man and man, either one's fellow man or society in general."[46] The BIA has found that some document offenses involve moral turpitude, whereas others do not.[47] In addition, in reviewing the BIA's determinations, Courts of Appeals have reached different conclusions about whether particular false document offenses constitute crimes involving moral turpitude.[48]

Congress set out detailed statutory requirements to determine whether a particular crime qualifies as an "aggravated felony." Several provisions of the INA's aggravated felony definition could apply to false document offenses.[49] These provisions reference fraud offenses where the loss to the victim exceeds $10,000,[50] theft offenses for which the term of imprisonment is

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[46] *Medina v. United States*, 259 F.3d 220, 227 (4th Cir. 2001) (citing *Matter of Danesh*, 19 I. & N. Dec. 669, 670 (BIA 1988)).

[47] *Matter of Serna*, 20 I. & N. Dec. 579, 583-86 (BIA 1992) (a conviction under 18 U.S.C. § 1546 for possession of a false document with knowledge of its altered nature but without its use does not qualify as a crime involving moral turpitude).

[48] *Compare Beltran-Tirado v. INS*, 213 F.3d 1179, 1186 (9th Cir. 2000) (holding that a 42 U.S.C. § 408(a)(7) conviction is not a crime involving moral turpitude) *with Hyder v. Keisler,* 506 F.3d 388, 393 (5th Cir. 2007) (reaching the opposite conclusion).

[49] *See* 8 U.S.C. § 1101(a)(43)(G), (M), (P) (2006).

[50] 8 U.S.C. § 1101(a)(43)(M).

one year or more,[51] and specified false document offenses (*e.g.*, 18 U.S.C. § 1546(a)) accompanied by a sentence of at least twelve months.[52] These statutory definitions set out specific inquiries regarding the length of the sentence, the amount of harm, and the elements of the offenses that must be considered in relation to a particular conviction.

The INA also distinguishes between false document offenses involving general misrepresentations in the procurement of immigration documents and false claims of citizenship.[53] The law draws a line between fraudulently or willfully misrepresenting a material fact and falsely representing oneself to be a citizen of the United States.[54]

B. Congress's Immigration Regime Creates Paths to Relief from Removal that Consider Both the Classification of Offenses and Individual Equities

The existence of various forms of relief from removal, and their nuanced treatment of false document offenses, contradicts the idea that Congress intended immigrant workers without knowledge to be treated uniformly under 18 U.S.C. § 1028A. To preserve family unity, address humanitarian needs, and

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[51] 8 U.S.C. § 1101(a)(43)(G).

[52] 8 U.S.C. § 1101(a)(43)(P).

[53] 8 U.S.C. § 1182(a)(6)(C)(i)-(ii) (2006).

[54] *Id.*

protect victims of serious crimes, Congress created forms of relief from removal. Each form of relief balances the nature and seriousness of certain criminal transgressions with the equities of each individual's circumstances and actions. The forms of relief include cancellation of removal, the U-visa, asylum, voluntary departure, and adjustment of status.

- **Cancellation of removal**

Congress designed cancellation of removal to prevent the removal of immigrants with long-standing ties to the United States and allow them to adjust their status to that of lawful permanent residents.[55] To be eligible for cancellation of removal, an immigrant without prior legal status must meet several threshold requirements, including ten years of continuous presence in the United States, good moral character, an absence of convictions for listed criminal offenses, and a showing that removal would result in "exceptional and unusual hardship" to listed family members.[56] A person with a false document offense not classified as a crime involving moral turpitude or aggravated felony would be eligible for cancellation of removal.[57] An immigration judge exercises discretion in determining whether to cancel removal.

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[55] 8 U.S.C. § 1229b(b)(1) (2006).

[56] 8 U.S.C. § 1229b(b)(1)(A)-(D).

[57] 8 U.S.C. § 1229b(b)(1)(C).

- **U-visa**

The immigration law also offers relief to victims of specified crimes in the form of a U-visa. Immigrant victims of rape, trafficking, sexual assault, abusive sexual contact, and other specified crimes are eligible for a U-visa if they have suffered substantial physical or mental abuse as a result of the victimization, possess information concerning the crime, are willing to cooperate with law enforcement officials or prosecutors in investigating or prosecuting the crime.[58] A false document conviction does not prevent an otherwise-eligible immigrant from obtaining a U-visa.[59] After obtaining a U-visa, an immigrant receives three years of temporary legal status after which she will be able to apply to adjust her status to lawful permanent resident if doing so would promote family unity, serve humanitarian purposes, or otherwise serve the public interest.[60] The Attorney General has the discretion to weigh these equities and determine whether adjustment of status for a U-visa holder would properly serve these objectives.[61] U-visas may have been

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[58] 8 U.S.C. § 1101(a)(15)(U)(i)-(iii) (2006).

[59] The Department of Homeland Security has stated that immigrants who have committed a crime other than the one under investigation or prosecution for which the U-visa is sought remain eligible for the visa. New Classification for Victims of Criminal Activity; Eligibility for "U" Nonimmigrant Status, 72 Fed. Reg. 53014, 53018 (proposed Sept. 17, 2007) (to be codified at 8 C.F.R. pt. 103, 212, 214, 248, 274a and 299).

[60] 8 U.S.C. § 1255(m)(1)(A) (2006).

[61] 8 U.S.C. § 1255(m)(1).

especially helpful to Agriprocessors employees in Postville given the allegations of sexual abuse and child labor offenses allegedly perpetrated by the plant's management.[62]

- **Asylum**

The immigration law offers asylum to immigrants who would face persecution in their home country. To be eligible for asylum, an immigrant must have a credible fear of persecution in their country of origin on the basis of race, religion, nationality, social group, or political affiliation.[63] Immigrants convicted of offenses that are classified as aggravated felonies are disqualified from consideration for relief.[64] However, immigrants convicted of document offenses falling outside of the aggravated felony definition would still be eligible.

- **Voluntary departure**

Voluntary departure allows immigrants to leave the country with greater flexibility for future reentry.[65]

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[62] *NIJC Report*, *supra* note 6, at 2-3; Julia Preston, *Child Labor Charges Are Sought Against Kosher Meat Plant in Iowa*, N.Y. TIMES, Aug. 6, 2008, at A15.

[63] 8 U.S.C. § 1158(b)(1)(A) (2006) (referencing 8 U.S.C. § 1101(a)(42)(A)).

[64] 8 U.S.C. § 1158(b)(2)(B)(i).

[65] *See* 8 U.S.C. § 1229c. Flexibility in future reentry options is one of the key benefits of voluntary departure. An immigrant

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Immigrants ordered removed face ten to twenty-year bars to reentry.[66] In contrast, individuals who depart voluntarily face fewer obstacles should a legal path to immigration become available.[67] A false document conviction would not preclude an immigrant from successfully seeking voluntary departure unless the particular offense was classified as an aggravated felony.[68] Voluntary departure may have been an especially attractive option to immigrant workers in Postville because many had U.S. citizen children and may have wanted flexible reentry options.[69]

- **Adjustment of status**

The immigration law offers some relief to an immigrant who is seeking an adjustment in immigration

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granted this form of relief also "avoids extended detention pending completion of travel arrangements; is allowed to choose when to depart (subject to certain constraints); and can select the country of destination." *Dada v. Mukasey*, 128 S. Ct. 2307 (2008).

[66] When an immigrant is removed pursuant to a judicial removal order, 8 U.S.C. § 1182(a)(9)(A)(ii) (2006) provides that he is barred from seeking readmission for ten years, or 20 years in the case of a second or subsequent removal or an aggravated felony.

[67] In contrast to the statutory bars in 8 U.S.C. § 1182(a)(9)(A)(ii), those awarded voluntary departure must overcome only the shorter bars contained in 8 U.S.C. § 1182(a)(9)(B)(i) which are more easily waived under 8 U.S.C. § 1182(a)(9)(B)(v).

[68] 8 U.S.C. § 1229c(a)(1) (2006).

[69] Camayd-Freixas, *supra* note 16, at 8.

status and is the spouse, son, or daughter of a U.S. citizen or lawful permanent resident.[70] While general misrepresentation and falsely claiming citizenship would render an immigrant inadmissible,[71] the law provides a waiver of the former offense if extreme hardship would result from refusal of admission.[72] An immigrant who has been convicted of general misrepresentation, but not falsely claiming citizenship, would be eligible for a waiver.[73] The Attorney General may exercise discretion in determining whether to issue the waiver.[74]

These are just some of the forms of relief that represent Congress's policy of balancing equities against past wrongdoing.

C. Congress Could Not Plausibly Have Intended a One-Size-Fits-All Approach to 18 U.S.C. § 1028A Given Its Careful Consideration to the Same Matters in its Immigration Regime

As Postville demonstrated, the Eighth Circuit's reading of 18 U.S.C. § 1028A led to results that were completely contrary to Congress's immigration law. Immigrant workers in Postville who possessed false

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[70] 8 U.S.C. § 1255 (2006).

[71] 8 U.S.C. § 1182(a)(6)(C) (2006).

[72] 8 U.S.C. § 1182(i).

[73] *Id.*

[74] 8 U.S.C. § 1182(i)(1).

documents that bore real Social Security numbers faced a mandatory two-year sentence under the Eighth Circuit's broad reading of 18 U.S.C. § 1028A. This serious sentence created the leverage for prison sentences and judicial deportation orders that bypassed the immigration system. This one-size-fits-all approach, premised on the arbitrary fact of whether a Social Security or alien registration number matched that of a real person, ignored culpability, equities, and seriousness of harm, all of which would have been considered by the immigration law's treatment of the same underlying conduct. Congress could not have intended 18 U.S.C. § 1028A to lead to results so at odds with its longstanding approach to false document offenses under the immigration law.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the decision from the United States Court of Appeals from the Eighth Circuit be reversed.

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December 2008