No. 15-35738, 15-35739

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

J. E. F.M., a minor, by and through his Next Friend, Bob Ekblad, et al.,

Plaintiffs-Appellees,

v.

LORETTA E. LYNCH, Attorney General, et al.,

Defendants-Appellants.

On Appeal from the United States Court District Court
for the Western District of Washington
No. 2:14-cv-01026 (Hon. Thomas S. Zilly)

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF A PETITION FOR REHEARING AND REHEARING EN BANC

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Amicus Curiae the American Bar Association ("ABA") respectfully submits this brief in support of the petition for rehearing and rehearing *en banc*.[1]

IDENTITY AND INTEREST OF *AMICUS CURIAE*

The ABA is a voluntary, national membership organization of legal professionals. With over 400,000 members from every U.S. state and territory, including prosecutors, public defenders, private lawyers, legislators, judges, law professors, law students, and others, it is the largest voluntary professional membership organization in the United States.[2] ABA entities holding particular interests in the issues raised by this case include (a) the Commission on Immigration, which has directed the ABA's efforts to ensure fair treatment and full due process rights for immigrants and refugees since 2002, and (b) the Working Group on Unaccompanied Minor Immigrants, which was created in 2014 to mobilize pro bono lawyers to represent and secure due process for the influx of

[1] The ABA files this brief pursuant to Circuit Rule 29-2 as all parties have consented to its filing. The ABA certifies that no counsel for a party authored this brief in whole or in part and that no person or entity other than *amicus*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No inference should be drawn that any member of the ABA's Judicial Division Council participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Central American youth who otherwise would appear alone in immigration hearings.[3]

For over 35 years, the ABA has advocated for the right to counsel for immigrants and refugees. For example, in the early 1980s, the ABA first began opposing legislative initiatives to limit the right to counsel in asylum and removal proceedings, ABA House of Delegates Recommendation 120A (adopted Feb. 1983), and adopting specific policies[4] and standards calling for effective legal representation for immigrant children. In 2001, the ABA adopted a policy that "supports the appointment of counsel at government expense for unaccompanied children for all stages of immigration processes and proceedings." ABA House of Delegates Recommendation 106A (adopted Feb. 2001).[5] In 2004, it adopted standards providing that an unaccompanied child "has the right to have an Attorney represent him in any formal proceedings or other matter in which a decision will be made which will affect his immigration status" and that "an

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[3] Other ABA entities, including the Standing Committee on Pro Bono and Public Service, the Center on Children and the Law, the Commission on Youth at Risk, and the Commission on Hispanic Legal Rights and Responsibilities, also have long-standing interests in standards and policies concerning immigrant children.

[4] ABA Recommendations become policy only after approval by vote of the ABA House of Delegates, which is composed of representatives from states, territories, state and local bar associations, affiliated organizations, ABA sections, divisions and members, and the Attorney General of the United States, among others.

[5] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2001_my_106a.authcheckdam.pdf.

Attorney shall be appointed for the Child, at public expense if necessary." COMM'N ON IMMIGRATION, AM. BAR ASS'N, STANDARDS FOR THE CUSTODY, PLACEMENT AND CARE; LEGAL REPRESENTATION; AND ADJUDICATION OF UNACCOMPANIED ALIEN CHILDREN IN THE UNITED STATES, Ch. III-H (2004).[6]

Recent ABA policy urges prompt screening of unaccompanied children, noting their "'particular vulnerability' . . . as an abused and otherwise victimized population." ABA House of Delegates Resolution 103D, Report at 4 (adopted Aug. 2011).[7] And, last year, the ABA adopted a resolution supporting the appointment of counsel for unaccompanied children and urging immigration courts not to conduct any hearings before children have had the opportunity to consult with counsel. ABA House of Delegates Resolution 113 (adopted Feb. 2015).[8]

In addition to decades of policy work, the ABA offers a valuable perspective because many of its members and staff have extensive, direct experience as counsel in immigration court and administrative appeals. Drawing on the substantial research and debate underlying its policies and the extensive experience of its members, the ABA believes that, in arriving at its jurisdictional decision, the

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[6] *Available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/Immigrant_Standards.authcheckdam.pdf.

[7] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2011_am_103d.authcheckdam.pdf.

[8] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2015_hod_midyear_meeting_113.authcheckdam.docx.

panel mistakenly viewed certain removal hearing "protections" as adequate substitutes for counsel for immigrant children. The ABA believes that these safeguards do not and cannot displace the critical role of counsel nor guarantee consistent, meaningful judicial review of immigrant children's various claims.

SUMMARY OF ARGUMENT

Plaintiffs here are particularly vulnerable litigants. They are children who seek appointed counsel to represent them in adversarial immigration removal proceedings that may have life or death consequences. With agency immigration judges powerless to guarantee their representation, the children sought relief in federal district court. While the district court held that the law permitted it to adjudicate the appointed counsel claims, the panel held that a claim-channeling provision jurisdictionally forecloses any district court involvement and that each child can raise his or her claim only on an individual appeal to a circuit court of appeals and only after entry of a final order of removal.

The ABA believes that the ultimate question presented by this case – i.e., whether immigrant children have a right to appointed counsel – is inextricably intertwined with the panel's jurisdictional ruling. Without representation, immigrant children face proceedings that "largely mirror criminal trials," where they must assume duties traditionally expected of attorneys:

> [They] must identify, corroborate, and argue complex claims before a presiding judge. They must master a complex area of the law. They

> must develop and argue factually and legally complex claims for relief. They must contest the government's charge, introduce evidence, and put on witnesses. They must compete against opposing government counsel, knowing that an adverse decision will result in their [ ] banishment and, in some cases, significant peril.

ABA House of Delegates Resolution 107A, Report at 5 (adopted Feb. 13, 2006).[9] As discussed in Section II below, the procedural safeguards cited by the panel do not adequately mitigate the harm faced by immigrant children – including those allowed to bring pillows and toys into the courtroom in light of their immaturity and related limitations[10] – who shoulder these immense responsibilities in immigration court. Moreover, as explained in Section III below, the panel opinion does not account at all for the next phase of the process before the Board of Immigration Appeals ("BIA"), where there are no such protections. As a result, the likelihood that an unrepresented child could successfully navigate (a) an appeal to the BIA and (b) filing a Petition for Review ("PFR") is remote at best.[11] Thus, the result of the panel's decision is the impermissible "practical equivalent of a

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[9] *Available at* http://www.americanbar.org/content/dam/aba/directories/policy/2006_my_107a.authcheckdam.pdf.

[10] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW, U.S. DEP'T OF JUSTICE, IMMIGRATION COURT PRACTICE MANUAL ("ICPM") Ch. 4.22(d), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2016/12/02/practice_manual.pdf.

[11] An unrepresented child who *prevails* before the immigration court may nevertheless have to navigate the procedural complexities of the next phase, since the government has the right to appeal the immigration judge's decision. *See* 8 C.F.R. § 1003.3(a); *see also* ICPM Ch. 4.16(h).

total denial of judicial review." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 497 (1991).

ARGUMENT

I. LEGAL REPRESENTATION BENEFITS IMMIGRANT CHILDREN, THE GOVERNMENT, AND THE ADMINISTRATION OF JUSTICE

The ABA has long recognized that effective legal representation is vital to ensuring due process for children in immigration proceedings. ABA studies and reports[12] incorporate research demonstrating conclusively that the single most important factor affecting the outcome of an immigration case is the appearance of counsel for the immigrant.

It is easy to recognize that virtually all unrepresented immigrants are disadvantaged in removal proceedings due to their ignorance of legal procedure and general lack of fluency in English. For unrepresented children in particular, who lack the intellectual faculties, experience, and resources of adults, the deck is

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[12] *See* COMM'N ON IMMIGRATION, AM. BAR ASS'N, REFORMING THE IMMIGRATION SYSTEM: PROPOSALS TO PROMOTE INDEPENDENCE, FAIRNESS, EFFICIENCY, AND PROFESSIONALISM IN THE ADJUDICATION OF REMOVAL PROCEEDINGS 5-3 (2010), *available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/full_report_part4.authcheckdam.pdf ("Reform Report") (*citing* Jaya Ramji-Nogales et al., *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 340-41 (2007)); *see also* COMM'N ON IMMIGRATION, AM. BAR ASS'N, A HUMANITARIAN CALL TO ACTION: UNACCOMPANIED CHILDREN IN REMOVAL PROCEEDINGS 9 (June 3, 2015), *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/UACSstatement.authcheckdam.pdf ("73% of represented children were granted the right to remain in the United States as compared to 15% of unrepresented children").

stacked even further against them in identifying avenues of relief, marshalling evidence, adhering to mandatory deadlines and procedures, presenting their cases in chief, refuting any government arguments, and ultimately prevailing. Without a lawyer, immigrant children with legitimate claims for relief do not have a fair chance of obtaining a favorable outcome.

Beyond the above, legal representation benefits the system overall by: (a) increasing efficiency, thereby reducing the costs of immigration proceedings (by, i.e., improving appearance rates in court, reducing the number of requests for continuances, and reducing the length of time in custody for certain children) and (b) ensuring that viable claims for relief are advanced and others are not, that the proper legal standards are applied, and that decisions turn on the full merits of the claims, all of which reinforce the legitimacy of immigration proceedings. *See* ABA House of Delegates Resolution 113, Report at 3-5; ABA House of Delegates Resolution 107A, Report at 8.

II. IMMIGRATION COURT PROTECTIONS DO NOT ADEQUATELY SAFEGUARD THE RIGHTS OF CHILDREN

Given the obstacles that *pro se* immigrants face, even the Executive Office for Immigration Review ("EOIR") itself recommends that everyone in removal proceedings obtain legal representation. ICPM Ch. 2.2(a). These obstacles, while substantial for nearly all immigrants, often can be insurmountable for children. To begin with, the manual containing the procedural rules is in English and available

online only, and the rules themselves are highly technical. Documents not filed or served properly or within specified deadlines may be rejected, and such technical errors can be the basis for denial of relief. *See* ICPM Ch. 3.1(a)-(d), 3.2, App'x D, App'x J.[13] Even if an unrepresented child managed to file the necessary papers in a timely manner, he would remain severely disadvantaged at trial because unfamiliarity with courtroom procedures would prejudice his ability to identify and present fact and expert witnesses, cross-examine witnesses, and object to other government evidence. *Id.* Ch. 4.16(f).

In answer to these and similar concerns, the panel apparently relied on certain "special protections" – such as the responsibilities of immigration judges ("IJs") and the possibility of third-party non-lawyers acting in the interest of unrepresented children – in formulating its interpretation of the claim-channeling provision. *J. E. F.M. v. Lynch*, 837 F.3d 1026, 1033, 1037 (9th Cir. 2016) ("Panel Decision"). In the ABA's experience, the protections outlined by the panel do not ensure meaningful judicial review.

First, the panel focused only on the appointed counsel issue and reasoned that a constitutional claim can be considered on a PFR even if the child never

[13] For example, the failure to (a) properly hole punch a document or to paginate multiple exhibits consecutively could lead to the exclusion of evidence and (b) separately notify DHS counsel, the Immigration Court, and the BIA (if applicable) of a change of address could result in the inability to receive vital correspondence including hearing notices and decisions triggering appeal deadlines. ICPM Ch. 2.2(c), 3.3.

raised or preserved the claim in the administrative proceeding. *Id.* at 1038. The focus on this avenue for preserving constitutional claims ignores the reality that other claims of immigrant children would escape meaningful judicial review under the claim-channeling statute. *See, e.g., Tall v. Mukasey*, 517 F.3d 1115, 1120 (9th Cir. 2008) (finding failure to exhaust where petitioner "did not give the BIA an opportunity to consider and remedy . . . procedural errors").

Second, the panel's view of the safeguards places much of the burden of protecting children's rights on the IJs, who are duty-bound to act as impartial adjudicators.[14] Beyond that neutrality obligation, it is unrealistic to expect or assume that IJs can step in to act on each child's behalf, given heavy dockets that sometimes require them to "address 50 to 70 cases on a three- to four-hour time

[14] EXECUTIVE OFFICE FOR IMMIGRATION REVIEW & NAT'L ASS'N OF IMMIGRATION JUDGES, ETHICS & PROFESSIONALISM GUIDE FOR IMMIGRATION JUDGES 2 (2011), *available at* https://www.justice.gov/sites/default/files/eoir/legacy/2013/05/23/EthicsandProfessionalismGuideforIJs.pdf (citing 5 C.F.R. § 2635.101(b)(8)); *see also* Br. of Former Federal Immigr. Judges in Supp. of Pls.-Appellees and In Support of Partial Affirm. at 8 (Feb 14, 2016), ECF 31-1 ("IJ Amici Br."). There is concern that IJs already have conflicting roles, given their appointment by the Attorney General. Reform Report at 2-9, 6-5 ("DOJ has taken the view that immigration judges are merely staff attorneys of the Department . . . required to comply with the rules of conduct applicable to DOJ attorneys, rather than the rules of judicial conduct."); *see also* Denise Noonan Slavin & Dana Leigh Marks, *Conflicting Roles of Immigration Judges: Do You Want Your Case Heard by a "Government Attorney" or by a "Judge"?*, 16 BENDER'S IMMIGR. BULL. 1785, 1786 (2011).

frame." *See* IJ Amici Br. at 4, 7-8.[15] Those statistics demonstrate that, as a practical matter, IJs lack time to "probe the record" (Panel Decision at 1036) to identify possible bases for relief. By way of comparison, in the ABA's experience, attorneys spend on average 50 hours per case representing unaccompanied minors. Reform Report at 5-16. Given these numbers, it is unsurprising that represented children are nearly *five times* more likely to obtain a favorable outcome in their proceedings than are unrepresented children. IJ Amici Br. at 22.

Third, the possibility of representation by a "reputable individual," a parent, or legal guardian is not an adequate substitute for counsel in removal proceedings.[16] Even when a child can find a non-family "reputable individual" willing to assist him, the court might not allow the person to proceed.[17] And, similarly, a willing parent or guardian, if one exists, may represent the child only if the adult "clearly informs the Immigration Court of their relationship" and receives

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[15] The time pressures are so intense that the President of the National Association of Immigration Judges repeatedly has compared adjudicating asylum cases to hearing death penalty cases in traffic court. *See, e.g., Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law of the H. Comm. on the Judiciary*, 111th Cong. 55 (2010) (statement of Hon. Dana Leigh Marks, President, National Association of Immigration Judges).

[16] The panel held that parents of accompanied children are capable of making a right-to-counsel claim for the child. Panel Decision at 1038.

[17] A reputable non-family individual may appear on behalf of an immigrant child only if she correctly files both a declaration stating that she has received "no direct or indirect remuneration" and a notice of appearance, and then is "officially recognized by the Immigration Court." ICPM Ch. 2.9(a).

authorization to proceed. ICPM Ch. 2.8. Acquiring these authorizations and communicating with the court can be challenging, especially for non-English speakers, and it is inconceivable that most of these lay individuals would be able to adequately understand, process, or assist with "[t]he proliferation of immigration laws and regulations [that] has aptly been called a labyrinth that only a lawyer could navigate." *Biwot v. Gonzales*, 403 F.3d 1094, 1098 (9th Cir. 2005).[18]

Fourth, the Friend-of-the-Court ("FOTC") models relied on by the panel (Panel Decision at 1037) are of limited utility. Although authorized by EOIR,[19] these programs are not universal. Moreover, even in jurisdictions that have them, the FOTC's role is, as the panel acknowledged, limited to non-representational assistance (Panel Decision at 1037), and the extent of the FOTC's participation is "entirely within the court's discretion" (EOIR Friend Memo at 1 (citing *In re Estate of Ohlhauser*, 101 N.W.2d 827, 829 (S.D. 1960))). An FOTC may try to protect the rights of a child if the IJ allows it, but, unlike counsel, an FOTC cannot

[18] Further, the third party could have a conflict of interest. For example, a parent might not want to assist a child in making a status claim based on abuse or neglect by a parent or domestic violence at the hands of another family member.

[19] Memorandum from Brian M. O'Leary, Chief Immigration Judge, Executive Office for Immigration Review, U.S. Dep't of Justice, to All Immigration Judges, The Friend of the Court Model for Unaccompanied Minors in Immigration Proceedings (Sept. 10, 2014) ("EOIR Friend Memo"), *available at* http://www.americanbar.org/content/dam/aba/administrative/immigration/UACFriendCtOct2014.authcheckdam.pdf.

file pleadings or motions, reserve an exception to any ruling of the court, exercise or waive rights, or prosecute an appeal. *Id.*

The ABA submits that this patchwork of "special protections" does little to ensure that immigrant children have adequate means to identify and pursue legitimate claims for relief from removal, and, as such, these protections are inadequate substitutes for individual legal counsel.

III. THE PANEL DECISION DOES NOT ACCOUNT FOR THE OBSTACLES TO OBTAINING MEANINGFUL JUDICIAL REVIEW PRESENTED BY BIA AND PFR REQUIREMENTS

The panel's opinion did not address the separate, additional barriers to review presented in the BIA administrative appeal process, which, pursuant to 8 U.S.C. § 1252(d)(1), must occur before a claim is ripe for judicial review through a PFR. *See Brown v. Holder*, 763 F.3d 1141, 1146 (9th Cir. 2014). Moreover, with few exceptions (such as the constitutional question allowance noted by the panel (Panel Decision at 1031)), the failure to exhaust administrative remedies includes the failure to present claims in the administrative forum below. *Alvarado v. Holder*, 759 F.3d 1121, 1127 n.5 (9th Cir. 2014).

Prior briefing in this case described many of the hurdles an unrepresented child would face in pursuing her case before the BIA. IJ Amici Br. at 13. It bears emphasis that – to avoid rejection or dismissal of the appeal – all of the documents must be completed in English, timely filed, and properly served on government

counsel. 8 C.F.R. §§ 1003.2(g)(1), 1003.33; *see also* IJ Amici Br. at 14; Executive Office for Immigration Review, U.S. Dep't of Justice, Board of Immigration Appeals Practice Manual ("BIAPM") Ch. 3.1(c), 3.3. Even if an unrepresented child somehow managed to meet all of the BIA filing requirements, she still would face daunting challenges. Most significantly, she would have only 21 days after receiving the hearing transcript to file a brief. BIAPM Ch. 4.7(a)(i) and App'x F.[20] The brief, which must be in English with citations to law and the record, is so critical that the BIA informs parties that "[a] well-written brief is in any party's best interest and is therefore of great importance to the [BIA]." *Id*. at Ch. 4.6(b). Long-standing ABA policy recognizes these difficulties by urging appointed counsel for children, and, notably, the BIA Practice Manual itself urges all appellants to obtain representation. *Id.* at Ch. 2.2(a).

The hurdles to meaningful judicial review do not end once the BIA issues its decision. The immigrant child, still unrepresented, must figure out how to file a PFR. BIA decisions denying immigrants relief provide no information about the right to appeal, the time limit for filing a PFR, or the relevant circuit court in which any PFR must be filed. Reform Report at 4-17.[21]

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[20] A single extension of 21 days is available, but only if a number of procedural requirements are met. *Id.* at Ch. 4.7(c).

[21] Out of the 13 different courts of appeal, the court with jurisdiction over the PFR is the one with jurisdiction over the immigration court where the IJ completed proceedings. *Id*. at 4-17 and n.138 (citing 8 U.S.C. § 1252(b)(2)). This can prove

Complicating matters further, a child has only 30 days from the date of the BIA's administrative order to file a PFR. 8 U.S.C. § 1252(b)(1); FED. R. APP. P. 26(a); *see also* Reform Report at 4-16. The deadline is mandatory and jurisdictional, with equitable tolling rarely available. Reform Report at 4-16. The deadline does not account for any delays in the issuance or mailing of the decision by the BIA, for any actual delays delivering the decision to the child (*id*. at 4-17), or for the time necessary for the child to mail or deliver the PFR to the court of appeals. *See Sheviakov v. INS*, 237 F.3d 1144, 1146-47 (9th Cir. 2001). As the ABA has noted,

> the 30-day deadline for filing a [PFR] can have harsh consequences. It also frustrates review because of the exigencies of removal. . . . 30 days is simply insufficient for petitioners who may be in detention or are without counsel. . . . Difficulties with language and in obtaining representation to file the appeal render a 30-day period far too short.

Reform Report at 4-17; *see also* ABA House of Delegates Recommendation 114D (adopted Feb. 2010).[22]

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difficult to determine because some immigration courts conduct hearings by televideo, where the child and IJ are in different locations. Memorandum from the Office of the Chief Immigration Judge, Executive Office for Immigration Review, U.S. Dep't of Justice, to All Assistant Chief Immigration Judges, Hearings Conducted through Telephone and Video Conference (Aug. 18, 2004), *available at* https://www.justice.gov/sites/default/files/eoir/legacy/2004/08/25/04-06.pdf.

[22] *Available at* http://www.americanbar.org/content/dam/aba/migrated/Immigration/PublicDocuments/114D.authcheckdam.pdf.

Any *pro se* child, even one with adult assistance, could be defeated by the complex requirements for exhausting an administrative appeal and filing a PFR. This reality, combined with the difficulties in developing an adequate record without counsel, prevents consistent, meaningful judicial review of immigrant children's claims.

CONCLUSION

Due to the complexities of proceeding *pro se* before an IJ and exhausting administrative remedies at the BIA before filing a PFR, the panel's decision creates a grave risk that most immigrant children will be unable to obtain meaningful access to judicial review of their various legal claims. For this reason and because of the ABA's long-standing advocacy for recognition of the right to counsel for immigrant children, the ABA urges this Court to grant the petition for rehearing and rehearing *en banc*.

December 15, 2016

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CERTIFICATE OF COMPLIANCE WITH FEDERAL RULES OF APPELLATE PROCEDURE 32(a), 29(c), AND 29(d)

I hereby certify that this brief complies with the requirements of Federal Rules of Appellate Procedure 32(a) and 29(c) because it has been prepared in 14-point Times New Roman, a proportionally spaced font.

I further certify that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B) and 29(d), and Circuit Rule 29-2(c)(2) because it contains 4,615 words, excluding the parts of the brief exempted under Rule 32(f), according to the count of Microsoft Word.

/s/ Linda A. Klein
Linda A. Klein

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I further certify that I will cause an original and seven copies of this brief to be filed with the Court at the directive of the Clerk of the Court.

The participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Linda A. Klein
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