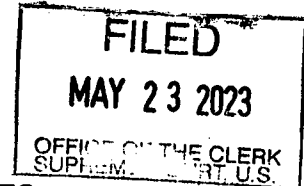


No. 22-7685

ORIGINAL

\_\_\_\_\_  
IN THE

SUPREME COURT OF THE UNITED STATES



\_\_\_\_\_  
SATISH KARTAN

— PETITIONER

(Your Name)

VS.

UNITED STATES OF AMERICA

— RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

NINTH CIRCUIT COURT OF APPEALS

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

SATISH KARTAN

(Your Name)

FCI BIG SPRING  
1900 SIMLER AVE

(Address)

BIG SPRING, TX-79720

(City, State, Zip Code)

N/A

(Phone Number)

## QUESTIONS PRESENTED

I. Whether the district court violated Kartan's right to testify and the subsequent prosecutor's comments, "These defendants don't like answering questions... you know that from... your observations," after Kartan testified for more than a day and was coerced to withdraw his testimony by conceding in front of the jury that 'Kartan is refusing to answer questions,' is not naturally and necessarily commenting on Kartan's silence. The court below erred in conflict with this Court's opinion in Rock v. Arkansas, 483 U.S. 44 (1987) and Griffin v. California, 380 U.S. 609 (1965).

II. Whether the mechanistic exclusion of exculpatory evidence of 'Sting' calls to prospective nannies, where Kartan repeatedly warned about the difficulty of the job, the long on-call hours and the chores — the evidence that is central to the claim of innocence for conspiracy, forced labor and fraud counts — deprived Barai and Kartan's basic right to present a defense in conflict with this Court's opinion in Crane v. Kentucky, 108 S.Ct. 2142 (1986). And whether the admittance of hearsay testimony of a non-testifying nanny, in combination, deprived Barai and Kartan a fair trial in conflict with this Court's opinion in Chambers v. Mississippi, 93 S.Ct. 1038 (1973).

III. Whether the four disjunctively structured subsections of the forced labor statute, 18 U.S.C. § 1589(a), are elements or means. Without fully considering the breadth of the statute, different mens rea requirements, different degrees of culpability (violent and nonviolent nature, commercial and domestic source), different proof and conduct requirements, the case law explicitly referring the individual subsections as 'element' and the case law referring a particular subsection(s) to the exclusion of others, the court below erred, on this issue of first impression, in concluding that the alternatives are means, in conflict with this Court's opinion in Mathis v. United States, 579 U.S. 518 (2016).

IV. Whether the combined effect of at least eight serious trial errors may give rise to due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal. The court below did not rule on the cumulative Error argument raised by Barai and

Kartan. Barai and Kartan reminded the court below that it did not rule on the cumulative Error argument, in a rehearing petition, which was summarily denied in conflict with this court's opinion in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), Chambers v. Mississippi, 410 U.S. 284 (1973), Knulewitch v. United States, 336 U.S. 440 (1949), and Brecht v. Abrahamson, 507 U.S. 619 (1993).

V. Whether an employee, Thapa, a US resident with a working cell phone and with friends and family an hour away, who works for an employer (Kartan) for 2 days and claims that during her egress, the employer repeatedly asked her to get out but also claims that employer threatened to call the police, can claim half an hour of forced labor.

VI. Whether an employer can violate forced labor statute if the free will of the employee to quit and work for another employer was not overcome. The court below erred, without this Court's guidance for more than three decades, since its 1988 decision in United States v. Kozminski, 487 U.S. 931. TVPA expanded this Court's holding in Kozminski to include psychological coercion but it did not disturb this Court's holding in Kozminski that an employer's free will to quit and work for another employer has to overcome to consider that labor as involuntary. Consistent with this Court's concern in Kozminski about the arbitrary interpretation of psychological coercion, various courts are conflicted in their interpretation and approach with the forced labor statute, federalizing local employee-employer squabbles into forced labor violations.

VII. Whether the court below erred in presuming the grossly excessive 16-year sentence each, imposed on Barai and Kartan, exceeding the sentence imposed in all other forced labor cases that are more egregious in both severity and duration (here the total duration of labor is 44 days — Thapa worked for 2 days and Thamma for 42 days and they walked out voluntarily), as procedurally and substantively reasonable, in conflict with this Court's opinion in Grall v. United States, 552 U.S. 38 (2007) and Rita v. United States, 551 U.S. 338 (2007), even though the facts of this case most favorable to the Government do not come close to resemble the mildest form of forced labor.

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## APPENDIX A

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App.01

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## OPINIONS BELOW

The opinion of the United States court of appeals is reported at *United States v. Barai*, 55 F.4th 1245 (Dec. 20, 2022) and 2022 U.S. App. LEXIS 35114, 20-10318, 20-10347 (Dec. 20, 2022) (unpublished).

## JURISDICTION

The court of appeals judgment was entered on December 20, 2022. A timely petition for rehearing was denied on March 6, 2023. The jurisdiction of this court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Const. Amdmt. V, VI, and XIII

18 U.S.C. § 1351

18 U.S.C. § 1589

18 U.S.C. § 1591

18 U.S.C. § 1594

18 U.S.C. § 3553

## STATEMENT OF THE CASE

### A. Introduction

Satish Kartan and his wife, Sharmistha Barai, hired a succession of nannies to assist with childcare and housework. Kartan repeatedly warned prospective nannies about long on-call hours (6AM to midnight) and that it is a "tough job" and about the difficulty of feeding his baby. C.A. App. 8-ER-2247-51. Barai and Kartan took many affirmative actions inconsistent with the goals of the conspiracy to commit forced labor. Even though the free will of the nannies to quit and work for another employer was not overcome, jury convicted Barai and Kartan for conspiracy to commit forced labor, two forced labor counts (Thamma and Thapa) and convicted Kartan for fraud count.

In United States v. Dann, 652 F.3d 1160, 1169, a seminal forced labor case in the Ninth circuit, the court below upheld the defendant's conviction after it engaged in a deep, meaningful examination of intent and scienter. However, here, court below could not perform this analysis because there was insufficient evidence in this case and the court below summarily disposed substantial arguments in an unpublished memorandum and marked it to be not used as a precedent because this is not a forced labor case.

None of the nannies even insinuated that they were afraid to quit the employment or leave the house. None of them said that they felt any harm would befall them if they left. They all walked out the first time they tried - Thapa walked out in 2 days and Thamma in 42 days and they always had an exit option. All circuits make sure that the employee did not have an exit option before affirming forced labor convictions, here 9th circuit erred in not doing so.

The trial was infected with at least eight serious errors, violating due process rights, as it rendered the defense far less persuasive and had substantial and injurious effect on jury's verdict. These errors include violation of Kartan's right to testify, improper comment on Kartan's withdrawn testimony, failing to give a 'NO prejudicial inference for Barai' instruction after Kartan's withdrawal, improper admittance of hearsay testimony of non-testifying nanny, improper admittance of hearsay testimony that God caused Barai's serious accident to avenge bad behavior, improper admittance of an E-mail from Barai that she hit her husband, and the district court's refusal to give a unanimity instruction as to specific subsection of the forced labor statute. The grossly excessive 16-year sentence was procedurally and substantively unreasonable.

## B. Statement of Facts

### 1. Defendants and their Home.

Satish Kartan and Sharmistha Barai resided in a gated subdivision in Stockton, California. C.A.App. 5-ER-1165; 4-ER-734-35; 9-ER-2230. While an access device was required to open the street gate for vehicles, additional vehicles commonly followed without an access device. C.A.App. 6-ER-1322, 1326-27. The two pedestrian gates were always open. The subdivision exits were unrestricted, for vehicles and pedestrians. *Id.*

### 2. Testifying Nannies

The government called three nannies who worked for the family to testify; Prabhavathi Gouri (not named in a substantive count), Rathnam Thamma (Count Two), and Puspanjali Thapa (Count Four). The government immunized Gouri and Thamma, who made false and inconsistent statements to law enforcement and violated immigration laws. C.A.App. 3-ER-474-76; 3-ER-610, 678.

#### a. Thamma

Thamma worked in the Kartan-Barai household for 42 days from July 19<sup>th</sup>, 2016 to August 31, 2016. C.A.App. 3-ER-610, 635. She submitted a fraudulent visa application and planned to lie to the custom officials on entry. C.A.App. 3-ER-576, 623-29. Thamma owned a house in India. C.A.App. 3-ER-574. She admitted she paid \$7,000 for fraudulent documents, which stated that she intended to visit a non-existent daughter in New Jersey, 3-ER-626-27. She obtained this fraudulent visa before contacting Kartan. C.A.App. 3-ER-575, 623-28.

On August 31, 2016, Thamma decided to leave because she no longer wanted to work for Barai and Kartan, "I'm not able to do that work. I decided... I wanted to go away from this house." C.A.App. 3-ER-670. What Thamma did NOT say is that she was afraid to quit the employment or leave the house. When asked why she picked that date to walk out, she said because Barai was expecting to deliver a baby next week. Thamma walked to a neighbor's house, and the neighbors, who spoke no Telugu, called the police for assistance. C.A.App. 3-ER-611, 935.

Even though Kartan provided his cell phone to Thamma to call her family, C.A.App. 8-ER-2042-46, FER-3-4 (logging over 50 calls in 42 days), she did not

disclose this to the investigators, C.A.App. 6-ER-1510. Instead, she told the investigators that she could only use Kartan's phone once per week for two minutes to call her husband, C.A.App. 4-ER-705. Kartan's attorney forwarded the phone call logs to prosecution a day before Thamma testified. Next day, Thamma admitted making multiple calls to her family almost every day. 4-ER-699,704-05.

Thamma also told the investigators that Kartan's front door was deadbolted from outside. Agents testified that there was never any deadbolt. C.A.App. 6-ER-1501,1503.

A day before Thamma testified, prosecution gave immunity to Thamma for her past false statements. C.A.App. 3-ER-610, 678-80. However, at trial, Thamma again made false statements and perjured herself by claiming that Barai and Kartan did not let her sit on the sofa. C.A.App. 4-ER-719-20. Defense showed a picture of Thamma sitting on sofa. C.A.App. 7-ER-1627, FER-5.

Thamma's husband, brother, sister-in-law, two brothers, and a sister in New Jersey all knew she was at Kartan's house, C.A.App. 4-ER-698-99, and she called them regularly using Kartan's phone. C.A.App. 8-ER-2042-46. She also mingled freely with guests during social functions at Kartan's house. C.A.App. 6-ER-1337-38; 7-ER-1627, FER-5.

Thamma alleged that her hands were burned 3 or 4 days before she walked to a neighbor's house on August 31, 2016. C.A.App. 3-ER-654-55. These neighbors, siblings, Joan and Valentina Nunez testified that Thamma only complained about Kartan ("Bad man") and did not complain whatsoever about the woman (Barai). Having never mentioned in the initial interviews leading up to the trial (2 and a half years), C.A.App. 4-ER-938-39, both siblings, confabulated at trial that Thamma made hand gestures over their stove, saying "Bad man", indicating Kartan burned Thamma's hands. C.A.App. 4-ER-934; 4-ER-957. However, neither siblings testified to seeing any injury to Thamma's hands.

When the neighbors called the police, officer Harpreet Shoker showed up. He testified that Thamma said that "Kartan" burned her hands and struck her face multiple times and that Thamma didn't complain anything whatsoever against his wife, Barai. C.A.App. 4-ER-755.

Police took Thamma to the Stockton Police department and made her wait in the holding room, which was being recorded. In this video recording, Thamma can be seen repeatedly lacing her fingers together and clasping her hands, without any wincing, when officers are not in the room. At 7:18 into the recording, Thamma is tapping her fingers on the table. Bates 00244-8/31/2016 video

police call the federal agents and Thamma again alleges that Kartan burned her hands. C.A.App. 7-ER-1474. On the same day (August 31, 2016), federal agents took Thamma to an Emergency room. C.A.App. 6-ER-1473. The treating physician, Dr. Alfaro, a government witness, testified that if Thamma were to just show her hands, he would not call it a burn. C.A.App. 4-ER-784, 798-99, i.e., he just wrote down "Questionable First and Second degree burns" because Thamma told him that her hands were burned. He testified that he observed no blisters (second degree burn) or ulcers on Thamma's hands. C.A.App. 4-ER-783. The ER treated her for Dermatitis (Eczema) and prescribed a cream that is contra-indicated for burns. C.A.App. 5-ER-1300. This cream has a warning "Do not use it for burn".

The next day, on September 1, 2016, federal agents question Thamma in video interviews "It looks like long term type of issues" and ask Thamma about soaps, detergents or bleaches might have caused her hands to be dry and cracked (dermatitis) and Thamma replies, "I don't know" Bates 00248, video 0008.MTS at 13:34. In these video interviews, Thamma repeats more than 20 times that Kartan pushed her hands into the stove and she pulled her hands back when she felt the heat (not the flame), C.A.App. 2-ER-204, Bates 00248, video 0008.MTS at 6:36, and that Barai was not in the room during this alleged incident. C.A.App. 3-ER-665.

In August 31, 2016 video interview with federal agents, Thamma said that Kartan took her to the kitchen, turned on the stove and pushed her hands down, Bates 00244, video at 45:14. In September 1, 2016 interview, Thamma said that while she was in the kitchen, Kartan snuck up on her and pushed her hands down Bates 00248, video at 4:35.

After maintaining for years her allegation that Kartan burned her hands, Thamma changed her story few days before the trial, that it was Barai, not Kartan, who pushed her hands into the stove, C.A.App. 3-ER-653; 6-ER-1519-20.

Defense showed video and pictures of Thamma's hands taken 3 weeks prior to the alleged burn, C.A.App. 9-ER-2244-45, which show her hands to be in the same condition as the photos purporting to document the "injury". C.A.App. 9-ER-2231-41. This showed that her hands were never burned.

Dr. Pinco Maguina, a burn specialist, opined at trial that Thamma had not sustained a burn injury and the medical records were not consistent with her hands having been pushed into a flame, C.A.App. 5-ER-1236, 1270. The burn

specialist that Thamma's hands had no redness, blisters, open wounds or dead skin. C.A.App. 5-ER-1269.

While Dr. Maguina was opining that Thamma's hands were not burned, Judge England mouthed the word "NO" and smirked and kept shaking his head left and right for at least 20 seconds. None of the defense attorneys objected for the record that the judge is expressing his bias to the jury. See Appendix A, where Kartan's attorney Mark Reichel corroborated that Judge England showed his bias. Judge England also 'looked up and thanked God' after he read the jury note that found Barai and Kartan guilty.

Both the ER Doctor, Dr. Alfaro and the burn specialist, Dr. Maguina said that Thamma's hands were not burned and they further corroborated that since Thamma was diabetic, which slows down the healing of wounds, any burn symptoms would have showed up during Thamma's ER visit, if her hands were actually burned. C.A.App. 4-ER-785, 5-ER-1295. Thamma gave an evasive testimony about her evolving burn allegation. C.A.App. 3-ER-653-695.

Thamma testified that Barai never spoke to her, "She never spoke. She never spoke." C.A.App. 3-ER-642-43. Thamma only speaks Telugu language. C.A.App. 3-ER-642. Thamma admitted that she could not even understand which language Barai was speaking, "At that time, I did not know whether it was Hindi or English" C.A.App. 3-ER-585.

Prosecution tried to elicit the allegation that Barai hit Thamma on the mouth, "Q. Was there a time where Sharmistha [Barai], Satish's [Kartan's] wife, thought you were speaking back to her? A. To give back answer, I don't know the language. If she wants, she would tell Satish [Kartan] and Satish [Kartan] would tell me." C.A.App. 4-ER-603. Later prosecution asks a leading question, "Can you tell me what happened when she hit you in (sic) your mouth? A. I would put my clothes to dry in the morning. When I went to get them and put it inside, that's where there was a big argument, and at that time she hit me on my mouth." C.A.App. 4-ER-605.

Thamma alleged an anecdote of elaborate verbal threat by Barai, "Get up, do the job, this is my house. I will kill you and put you in the garbage. You came to my house so you have to work" C.A.App. 3-ER-592-93. Thamma alleged this threat for the first time just a few days before the trial, but she never mentioned it over the preceding three years during the multiple interviews with the agents. C.A.App. 6-ER-1496.

What Thamma did NOT say is that she was afraid to leave the house or quit the employment. What Thamma did not say is that she believed any harm would befall her if she left. She said she "decided" to walk out.

## (b) Thapa

Thapa, a US permanent resident with family in the United States, worked at the Barai-Kartan residence for 2 days, from the night of September 4<sup>th</sup> through the morning of September 7, 2016, C.A.App. 4-ER-808,885, "one day at night and then three days, so about -- then I went that day [third day]. So about 9:00 or 10:00 I left". C.A.App. 4-ER-866.

Thapa speaks Nepali, "some Hindi" and "not much" English. C.A.App. 4-ER-803. Over defense objection, she testified at trial via a Hindi interpreter. C.A.App. 4-ER-804.

Thapa's husband was in Police. C.A.App. 4-ER-871. She was receiving pension. C.A.App. 4-ER-872. She owned farm lands in Nepal. C.A.App. 4-ER-872-873. She had a son nearby in the Bay area, a daughter in Arizona and a cell phone with her that she used. C.A.App. 4-ER-867,870,894.

Thapa had a green card and was already living in San Jose when she learned of a job at Barai-Kartan household via a mutual acquaintance named "Sam" (Shashi Adhikari, who also testified). C.A.App. 4-ER-805-06. Prior to Thapa, Sam's aunt Shobha Pandey worked for Barai-Kartan and didn't say anything bad about Barai or Kartan. C.A.App. 6-ER-1430-31. Thapa admitted that Sam gave a full description of the job before she started working for Kartan. C.A.App. 4-ER-873-74. Sam testified that he told Thapa that the job entailed both baby and household work before she started working. C.A.App. 6-ER-1433-34. Thapa perjured herself at trial by claiming that Kartan only told her about work, C.A.App. 4-ER-807,889-90, and reluctantly conceded that she agreed to do household work too, after being reminded about her Grand Jury statement.

Thapa admitted that before she started working for Kartan, she told Kartan over the phone that she will try and work for 3 or 4 days and if she doesn't like, she will quit. C.A.App. 4-ER-888. Thapa testified that she worked for 2 days and she felt sick the third day (she reiterated this 4 times). C.A.App. 4-ER-818,827,925-26. Thapa admitted that she left the morning of the third day. C.A.App. 4-ER-866. Thapa told the Grand Jury that she left Barai-Kartan's employment and wanted to leave it because Barai was pregnant. C.A.App. 4-ER-922.

On the second day, Thapa called Sam and told him that her relatives are going to pick her up the next morning and asked for Kartan's house address. Sam conveyed this message to Kartan and requested Kartan to let Thapa stay for the night, "Can she [Thapa] stay for the night, she's got a ride tomorrow?" and Kartan agreed. C.A.App. 6-ER-1442-43. Kartan gave his house address to Sam, who forwarded that address to the ride (Thapa's nephew), which picked up Thapa the next morning. C.A.App. 6-ER-1431,1435-36.

Thapa claimed that Kartan refused to give address and gave a wrong address. Sam refuted it and testified that Kartan gave the correct address. C.A.App. 6-ER-1431

And Sam tried to explain. Thapa's misunderstanding, because he kept typing in English, and she [Thapa] doesn't understand, I guess the address." C.A.App. 6-ER-1431. Thapa admitted that she had problem communicating with Barai and Kartan, saying that she knows only "some Hindi" C.A.App. 4-ER-803 and that she didn't speak much with Barai and Kartan. Prosecution insisted "Q. But when you did speak with the defendants, was it in Hindi? A. You know, yes, like Hindi, like broken", C.A.App. 4-ER-837, "I don't know how to speak Hindi too much" C.A.App. 4-ER-893. Thapa said, "I don't know what they were talking to each other, they probably were calling me names... I didn't understand anything, which language..." Bates 06819, 120101-001.MP3 at 1:11:08.

Kartan told all nannies, "it's a tough job... it's not an easy job... mornings 6am to midnight, so it's a tough job so that's why we're also paying handsomely..." C.A.App. 9-ER-2248; see also 9-ER-2250 ("so our work is ... all seven days, from morning 6am to midnight").

Previously Thapa admitted, "Sam said work is until 12AM in the night." Bates 06819, 120101-001.MP3 at 7:00. However, she said at trial, "he [Kartan] said not much work" C.A.App. 4-ER-807.

Federal agents found a note with Kartan's correct address in Thapa's purse, which she said she brought it with her from San Jose to Kartan's house. C.A.App. 4-ER-899-900, 908. At trial, Thapa perjured herself by denying the documented fact (by FBI agents) that agents found Kartan's correct address in Thapa's purse. C.A.App. 4-ER-914-15. Previously, in 9/15/2016 interview, Thapa said, "yes. I had that correct address when I was at the house" Bates 06819-Audio 120101-001.MP3 at 24:50.

In the middle of the trial, a day before Thapa testified, government interviews Thapa, where she makes a brand new allegation that sometimes defendants would "come close" to her, "as if they are going to beat her." C.A.App. 4-ER-823-24. She never mentioned this in prior years of interviews including the Grand Jury.

Thapa testified that she went out of the house when "[defendants] they were upstairs" C.A.App. 4-ER-821. She also said that she didn't know how to open the door. C.A.App. 4-ER-881-82. Thapa also said that she would "take the child and walked around outside" and next moment said, "No. Didn't come out at all. Never came out." C.A.App. 4-ER-881.

Thapa admitted "[Defendants] They would sleep all day" Bates 06819 120101-001.MP3 at 53:50, "I was making so many calls..." at 1:04:50, "She [Barai] told me go ahead and eat first" at 56:25. "If they [defendants] were nice, then I would do even more work" C.A.App. 4-ER-922. "If they behaved nicely, then I would be staying" C.A.App. 4-ER-922.

## REASONS FOR GRANTING THE PETITION

I. The court below erred in finding Kartan's withdrawal of testimony as 'knowing and voluntary' and prosecutor's closing comment as not 'naturally and necessarily' commenting on Kartan's withdrawn testimony.

A. The district court violated Kartan's right to testify.

In Rock v. Arkansas, 483 U.S. 44, 51 (1987), this Court said that the right to testify is essential to V Amendment's due process of law in a fair adversary process. This right is also found in the compulsory process clause of the sixth Amendment - the right to call witnesses in his favor, the defendant being the most important witness himself. See Rock v. Arkansas, 483 U.S. 44 at 52 (1987).

The district court repeatedly prevented Kartan from providing complete answers on cross-examination. For example, when the prosecutor asked, "You also used the scripted phrase, 'Cordial and very friendly...?'" Kartan responded, "It's not scripted, sir. It's the truth." The district court eliding the pejorative characterizations embedded in the question, instructed Kartan, "The question was: did you say that today." C.A. App. 8-ER-1953.<sup>1</sup>

After several such admonishments that Kartan provide "yes/no" answers to questions, the district court and the defense counsel negotiated an agreement, in which Kartan would decline to answer further questions and his testimony would be stricken. C.A. App. 8-ER-2037-41.

In response to district court's question whether Kartan is refusing to answer any further questions, Kartan said, "Sir, I was not allowed to speak the truth..." C.A. App. 8-ER-2037. (The context leading up to this juncture, where the district court dismissed jury multiple times to admonish Kartan, makes it pellucidly clear that Kartan was coerced to withdraw his testimony). Defense counsel cut off Kartan, directing him to answer

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<sup>1</sup> C.A. App. refers to the joint Appendix submitted to the court below (Ninth Circuit Court of Appeals)

"yes or no?" C.A. App. 8-ER-2037. Kartan answered "yes" reluctantly. The district court itself noted Kartan's reluctance, "you waited five or six seconds before you said, begrudgingly, 'yes'" C.A. App. 8-ER-2038.

Without fully considering the context leading up to Kartan's untenable position that coerced him to waive his right to testify, the court below erred in concluding that Kartan's withdrawal of testimony was 'knowing and voluntary' because "Kartan was merely objecting to the wording of district court's question". The court below ignored that Kartan took issue with the content of district court's question whether Kartan is "refusing to answer questions" as Kartan stated, "Because yesterday sir, the wording was we [court and the attorneys] collectively decided to stop this witness from appearing..." C.A. App. 8-ER-2039. It is obvious from the content of the question that Kartan proposed, that he was compelled to withdraw his testimony.

B. The prosecution improperly commented on the withdrawal of Kartan's testimony.

This Court has said that it does not comport with due process to permit the prosecution during trial to call attention to [the defendant's] silence. See Doyle v. Ohio, 426 U.S. 610, 619 (1976).

After the unprecedented striking of Kartan's testimony (a day's worth), the government's closing undermined the delicate agreement.

When the parties and the court agreed to strike Kartan's testimony, the district court instructed the jury "to not consider and/or discuss any of this testimony during any of the deliberations to occur or have happened from this point forward. You are to consider the fact, in essence, that Kartan did not testify in this trial." C.A. App. 8-ER-2040-41. Consistent with this instruction, the government did "not request [ ] some adverse

inference," and the parties agreed that "the attorney[s] cannot make any arguments based on that." C.A. App. 8-ER-1990-91.

Despite the clear agreement and contrary to the district court's express instruction, the government improperly commented:

"These defendants don't like answering questions. You know that from what the victims told you about how they responded when questioned. In addition to your observations"

C.A. App. 8-ER-2091.

No argument of contextualization can mitigate the fact that this comment was directed at Kartan's non-testimony (or more precisely, the invitation that jurors draw an adverse inference from Kartan's testimony, his involuntary decision to terminate it, and the Court's order striking the testimony), which violated due process and requires reversal.

The court below erred in concluding that this comment is not "naturally and necessarily" understood as commenting on Kartan's withdrawal. Even the district court expressed its concern about Kartan's stricken testimony, "This is trying to ring the Liberty Bell for the last hour and and trying to say you didn't hear it." C.A. App. 8-ER-1991.

The prosecutor's comments "expressly and explicitly" understood as commenting on Kartan's withdrawal as the only "observations" by jurors to which the prosecutor could have been referring were of Kartan's stricken testimony, which could be reasonably expected to be at the forefront of jury's mind.

This Court will not be able to surmise the extent of prejudicial impact of these comments, on either Barai or Kartan, that the jury might have drawn from each others' testimonies and the Kartan's withdrawal, given the fact that the district court refused to give "no adverse inference against Barai" instruction aptly requested by Barai's counsel. C.A. App. 8-ER-2007-09. What the jury may infer, given no help from the court is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another. Griffin v. California, 380 US 609, 614 (1965).

III. In conflict with this Court's opinion, the court below erred in excluding exculpatory evidence of "sting" recordings and improperly admitted hearsay of a non-testifying nanny, to a neighbor. These erroneous evidentiary rulings, in combination, denied the right to a fair trial under V and VI Amendments.

A. Erroneous exclusions of exculpatory "sting" recordings.

The district court erred in excluding as "hearsay," exculpatory recordings of two "sting" calls between Kartan and undercover agents posing as prospective nannies.

[...] Due process includes a right to "'a meaningful opportunity to present a complete defense.'" Crane v. Kentucky, 476 U.S. 683, 690, 90 L Ed 2d 636, 106 S.Ct. 2142 (1986). That constitutional right is violated by the exclusion of probative admissible evidence.

Within the period and scope of the charged conspiracy, and very close in time to the calls with "victim" nannies, Kartan told the undercover callers, "it's a tough job... it's not an easy job... mornings 6am to midnight, so it's a tough job so that's why we are paying handsomely..." C.A.App. 9-ER-2248; see also C.A.App. 9-ER-2250 ("so our work is... all seven days, from morning 6am to midnight"); C.A.App. 2247 ("run around the baby for a couple of hours, trying to feed her..."); C.A.App. 2251 ("you have to feed the baby, you know feeding is not easy...")

The sting calls plainly were not hearsay, because they were not offered to show the truth of the matter asserted. See Fed.R.Evid. 801(c)(2). Instead, they were offered (a) to establish the representations themselves, which were the substantive crime, and (b) to prove that Kartan never intended to deceive or trick the nannies. The statements were non-hearsay, offered as circumstantial evidence of Kartan's state of mind. See United States v. Arteaga, 117 F.3d 388, 397 (9<sup>th</sup> cir. 1997); see also

United States v. Giles, 246 F.3d 966, 974 (7<sup>th</sup> cir. 2001) (exculpatory recorded conversation admissible to show defendant's state of mind).

The district court erroneously excluded the calls as "hearsay," because they were exculpatory rather than inculpatory. C.A. App. 7-ER-1803 (government arguing, "when offered by the defendant, his own statements are self-serving hearsay that do not overcome any recognized exception"); C.A. App. 7-ER-1807 ("I find it is hearsay. I don't find that there is an exception for that, and it will not be admitted"); C.A. App. 8-ER-2032 (denying admission because "this [a defendant offering his own statements] was [not] an exception to the hearsay rule"). That clear error was an abuse of discretion. See United States v. Pacquette, 557 Fed. Appx. 933, 936-37 (11<sup>th</sup> cir. 2014) ("[by] excluding Pacquette's statement merely because it was exculpatory, the [judge] applied an incorrect legal standard and reached an erroneous result. Therefore the judge abused his discretion"); Giles, 246 F.3d at 974 (court should have admitted exculpatory recorded conversation offered to show defendant's state of mind).

Not only did the calls disprove any fraud, they also demonstrate that there was no intent to deceive or cheat by misrepresentation nor there was an intent to conspire to commit forced labor. These sting calls were critical to the defendants' defense. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Chambers v. Mississippi, 410 US 284, 302, 35 LEd2d 297, 43 S. Ct 1038 (1973).

As the defense attorney explained to the district court, "This has extreme reliability in that it is an undercover call made by the case agent

to Mr. Kartan, who clearly has no idea it's an undercover phone call, who goes on in great detail explaining everything..." C.A.App. 7-ER-1804; "it violates due process to have a case where the Government puts on several days of testimony and a variety of nannies saying they were misled about the job duties, and then to have the Government make an undercover call to Mr. Kartan where he goes at great length about all of the job duties... it violates due process and the right to a fair trial to not allow it in." C.A.App. 7-ER-1805. Defense attorney renewed his motion to admit the sting calls but the district court denied it. C.A.App. 8-ER-2029-32.

Without quoting any authority, the court below erred by perfunctorily dismissing it, "... the district court did not abuse its discretion in excluding as hearsay Kartan's statements made during "sting" calls with undercover agents posing as nannies. The statements were hearsay that did not fall under any exception to the hearsay rule..."

Even if the recorded calls were hearsay, they were admissible as evidence of Kartan's then existing state of mind, intent, motive or plan, Fed.R.Evid. 803(3), or under the residual exception to the hearsay rule, Fed.R.Evid. 807.

In Crane v. Kentucky, 476 US 683, at 690-91, this Court has said, "In the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and "survive the crucible of meaningful adversarial testing." United States v. Cronin, 466 US 648, 656, 80 L Ed 2d 657, 104 S Ct 2039 (1984). See also Washington v. Texas, 388 U.S. 14, 22-23, 18 L Ed 2d 1019, 87 S Ct 1920."

Here, the government failed to provide any valid reason to exclude sting calls as they were highly probative and reliable and were corroborated by the government agents who testified that Barai and Kartan did not lie in any of their advertisements. C.A.App. 5-ER-1082. In addition, the fact that Kartan was open with prospective nannies about long on-call hours (6am to midnight), refutes the assertion that Kartan intended to use sleep deprivation as a tactic to coerce labor.

## B. Erroneous Admission of prejudicial Hearsay of a Non-Testifying Nanny

Lakshmi, a non-testifying nanny, not the subject of substantive count, worked in the Barai-Kartan household during the summer of 2015. She had been in the United States before at least two times. C.A. App. 5-ER-1091-92. She had a master's in English. C.A. App. 5-ER-1058. She retained possession of her passport and ticket. C.A. App. 5-ER-1152-53. She visited the neighbors (Saifuddin's) often, C.A. App. 5-ER-1150, and they became friendly. C.A. App. 5-ER-1131-34. The government presented no evidence about the circumstances of Lakshmi's arrival at, work in, or departure from Barai-Kartan household. However, there was evidence to disprove any insinuation of forced labor as Kartan modified Lakshmi's ticket so that she could fly home early. C.A. App. 6-ER-1097-98.

The improper admission, over defense objection, of purported "excited utterances" of a non-testifying nanny, Lakshmi, to a neighbor was particularly prejudicial because it was the only allegation of violence by Kartan.

A statement qualifies as an excited utterance if three factors exist: First, there must be some occurrence, startling enough to produce this nervous excitement and render the utterance spontaneous and unreflecting. Second, the utterance must have been before there had been time to contrive and misrepresent, i.e., while the nervous excitement may be supposed still to dominate and the reflective powers to be yet in abeyance. Third, the utterance must relate to the circumstances of the occurrence preceding it. United States v. Alarcon-Simi, 300 F.3d 1172, 1176 (9<sup>th</sup> Cir. 2002)

Statements that Lakshmi made, while Barai and Kartan were away for a three-day period, 2-ER-314-15, could not possibly satisfy the Alarcon-Simi criteria. Saifuddin's testimony revealed the "excited utterance"

exception was completely inapplicable.

Q..... So I'm going to ask did she ever describe an incident when she was upset about something that happened on the stairs?

A. Yeah. There was something that happened that either she was pushed on the stairs -

[Kartan Counsel]: objection, Your Honor, as to hearsay and Confrontation clause.

[Barai Counsel]: Foundation.

THE COURT: Overruled on the objection that you've given, but I think there needs to be more foundation. So I'll sustain on the foundation.

Q. [PROSECUTOR]: Was Lakshmi upset when she told you what had happened on the stairs?

A. Yes. She was angry.

Q. How could you tell? What did she look like? How was her voice?

A. She cried. That's all. She cried.

Q. Did she tell you while she was crying?

A. She told me that - it was either she was pushed or she was pulled down on the stairs. So she was upset with that.

[Kartan Counsel]: Objection. Hearsay. Your Honor.

THE COURT: Overruled.

Q. [PROSECUTOR]: Who did Lakshmi tell you pushed or pulled her down the stairs?

A. The gentleman - the gentleman who - I don't remember his name, but the picture that you showed me [Kartan]:

[Kartan Counsel]: Same objection, Your Honor.

THE COURT: All she said was that she was excited at the time. So I'm going to overrule your objection once again. That's the proper foundation under the circumstances to be an exception to the hearsay rule that you're claiming.

Q. And what else did she tell you about what had happened on the stairs?

A. She said her name is Lakshmi, which means a goddess, and she says anybody who does this to the goddess will suffer. And "This is what they are doing to me, and I'm very upset, and God will give

them revenge," and, you know, stuff like that. In anger, she would say those things. That "This is wrong treatment," and just crying and saying those things.

Q. Is there a Hindi god (sic) named Lakshmi?

A. From what she told me.

Q. And she was angry at the time that had been mistreated on the stairs?

A. Yes.

C.A.App.5-ER-1135-38.

Because Lakshmi's statements did not qualify as "excited utterances," their admission violated Kartan's constitutional right to confrontation. The district court erroneously applied the exception simply because Lakshmi was "excited" or "upset". The Ninth Circuit has held, however, "[j]ust because a subject is or appears to be upset offers no guarantee that he has not taken time to consider the matter. The subject may be upset precisely because he's had time to reflect, or he may feign emotional distress in a calculated effort to appear more credible." Winzer v. Hall, 494 F.3d 1192, 1200 (9<sup>th</sup> Cir. 2007) (emphasis in original).

Moreover, by the prosecution's own account, at the time Lakshmi allegedly spoke to Saifuddin, Kartan and his family had been away for days, C.A.App. 2-ER-314-15, and there was no evidence whether she was still under the stress of actual traumatic event at the time. Further, according to Saifuddin, Lakshmi made the statement not in distress but in anger (leavened with superstitious musings about a supposed curse), precludes an excited utterance finding. See, e.g., Boyd v. City of Oakland, 458 F. Supp. 2d 1015, 1031 (N.D. Cal. 2006) (noting declarant's anger "provided a motive to lie" and even "ten-minute lapse of time between the end of the alleged incident and the statement allowed sufficient time for... thought and fabrication").

The court below erred in ruling, "4. Assuming without deciding that the district court abused its discretion in admitting as an excited utterance the hearsay statement of a nontestifying victim, any error was harmless."

The Ninth Circuit's ruling that "hearsay statement of Lakshmi was harmless," is belied by the prosecution's emphasis on the "stairs" testimony in closing as the only evidence of violence by Kartan to prove the "force" element and to corroborate the subjective assertions of "fear" by all of the nannies. C.A.App. 8-ER-2083 (closing argument describing Lakshmi's statement under heading, "Indications of use of physical force").

This hearsay evidence was highly prejudicial to Kartan and tainted the verdict not only on the conspiracy charge but on the substantive forced labor counts as well because the prosecution expressly relied upon it to establish his over-arching intent and behavior. C.A.App. 7-ER-1584 (citing, *inter alia*, Lakshmi's statements as evidence of a "pattern, a modus operandi"); C.A.App. 7-ER-1585 (arguing that substantive forced labor counts "are disposed of fairly easily once the conspiracy is found").

The court below erred that "The hearsay statement was only relevant to the conspiracy charge, for which the government presented overwhelming evidence..."

The court below listed irrelevant laundry list of evidence losing sight of Kartan's core point that this hearsay statement was the only allegation of physical violence by Kartan and "may well have contributed to the convictions, and we certainly cannot say that we are convinced beyond a reasonable doubt that it did not contribute..." United States v. Vargas, 933 F.2d 701, 710 (9th cir. 1991).

### C. Erroneous Admission of Testimony Invoking God's Authority

This Court has disapproved of an argument tending to transfer jury's sense of responsibility to a higher court. See Caldwell v. Mississippi, 472 U.S. 320, 330-34, 86 L. Ed. 231, 105 S. Ct. 2633 (1985).

Over defense's objection, the district court allowed the hearsay testimony by the neighbor, Afshan Saifuddin, to introduce opinions about smiting of Barai by God. C.A.App. 5-ER-1138. The neighbor Afshan testified: "The wife got into an accident the very same day, and their car was completely destroyed. And when she came again, she mentioned, 'See, this is what happened. And this what they

did to me, and this what God did to them." C.A. App. 5-ER-1139. According to Afhsan, Lakshmi believed that Her name was God - was after a Goddess; so she said she had proved." C.A. App. 5-ER-1139.

This was highly prejudicial, calculated to appeal to the prejudices of the jury, as the jury's decision is to be based upon the evidence presented at trial and the legal instructions given by the court. See Chandler v. Florida, 449 U.S. 560, 574, 66 L. Ed. 2d 740, 101 S. Ct. 802 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant laws.")

#### D. Erroneous Admission of Hearsay Email

Additional hearsay testimony was also prejudicial because the jury heard that Barai has hit her husband. See United States v. Johnson, 27 F.3d 1186, 1193 (6th Cir. 1994). Even though the e-mail by Barai meant that she would pat her husband so that he would stop joking, it was taken out of context. The district court refused to instruct the jury pursuant to Federal Rules of Evidence, Rule 404, C.A. App. 8-ER-2025. The evidence could "lure the factfinder into declaring guilt on a ground different from proof specific to the offense[s] charged." Old Chief v. United States, 519 U.S. 172.

The court below erred in ruling that it was admissible for impeachment purposes and cited United States v. Gray, 967 F.2d 322, 328 (9th Cir. 1992), but it overlooked the fact that in Gray, the district court admitted the evidence with a limiting instruction "only for the purposes of cross-examining Mr. Gray regarding his personal credibility and his state of mind and is to be considered by the jury only for that purpose." Id. Unlike Gray, here, the district court failed to give a limiting instruction.

III. Failure to give a unanimity instruction concerning the forced labor counts is in conflict with this Court's opinion.

Barai and Kartan requested an instruction that, to convict, the jury must be unanimous as to specific subsection(s) of the forced labor statute, 18 U.S.C. §1589(a), for which it found any violation. The district court rejected the request. C.A. App. 8-ER-2024.

[A] jury in a federal criminal case cannot convict unless it unanimously finds that the Government has proved each element. Richardson v. United States, 523 U.S. 813, 817, 143 L Ed 2d 985, 119 S.Ct. 1707 (1999).

Prior to the decision below, no circuit has decided "whether the means of coercion in §1589 should be treated as elements of a forced labor offense, requiring a jury's unanimous agreement as to which means of coercion were employed." United States v. Bello, 503 Fed. Appx. 910, 915-16 (11<sup>th</sup> Cir. 2013).

#### A. Statute's Text and Structure

§1589 lists four distinct categories of "means" disjunctively grouped into separate subsections:

Whoever knowingly provides or obtains the labor or services of a person by any one of, or by any combination of, the following means—

- (1) by means of force, threats of force, physical restraint, or threats of physical restraint to that person or another person;
- (2) by means of serious harm or threats of serious harm to that person or another person;
- (3) by means of the abuse or threatened abuse of law or legal process; or
- (4) by means of any scheme, plan or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint,

shall be punished as provided in subsection (d).

18 U.S.C. §1589(a). Each subsection sets forth an alternative "element," a constituent part of a crime's legal definition that "the prosecution

must prove to sustain a conviction." Mathis v. United States, 136 S.Ct. 2243, 2248 (2016). The jury need not agree about means, properly defined as "brute facts," on the "real-world things" underlying each element. *Id.* "Where, for example, an element" of forced labor "is force or threat of force, some jurors might conclude that the defendant used a knife to create the threat; others might conclude he used a gun." Richardson, 526 U.S. at 817. "But that disagreement - a disagreement about means - would not matter so long as all 12 jurors unanimously concluded that the Government had proved the necessary related element, namely that the defendant had threatened force," *id.*, rather than some other, unrelated element such as threatening abuse of legal process.

Mathis directs us to look at other textual clues: if the alternatives are "illustrative examples" the alternatives are means. Mathis, 579 U.S. at 518. Here, each subsection of forced labor statute further limits the definition of the statute by disjunctively listing types of coercion and are not illustrative examples or brute facts or acts of perpetrating a crime. The statute uses no prefatory terms like "includes" or "such as" to indicate that the listed alternatives are illustrative examples.

## B. Different Mens Rea Requirements

Even though the court below conceded that 1589(a)(3) and (a)(4) incorporate additional scienter requirements, it erred by dismissing the significance of different mens rea requirements by each alternative subsection, indicating that they are separate offenses and thus are elements and not means, in conflict with this Court's opinion in Richardson v. United States, 526 U.S. 813, 836-37 (1999), where this court has said that alternate means of fulfilling an element "must reasonably reflect notions of equivalent blameworthiness or culpability, whereas a difference in their perceived degrees of culpability would be a reason to conclude that they identified different offenses altogether." Schad v. Arizona, 501 U.S. 624, 643, 111 S.Ct. 2491 (1991).

"The inclusion of different sets of mens rea elements is strong evidence that Texas robbery statute is divisible," involving a difference in elements rather than means. Martin v. Kline, No. 19-15605, 2021 U.S. App. LEXIS 37934, 2021 WL6102175, at \*1 (9<sup>th</sup> Cir. Dec. 22, 2021) (unpublished); see also United States v. Granret, 24 F. 4<sup>th</sup> 485, 489 (5<sup>th</sup> Cir. 2022) (reasoning that the statutory components in Texas' robbery statute constitute elements in part because of the different mental states for robbery-by-injury and robbery-by-threat); United States v. Wehmhoefer, 835 F. App'x 208, 211 (9<sup>th</sup> Cir. 2020) (unpublished) (finding robbery under Texas law divisible and stating that "[d]iffering mens rea requirements are a hallmark of divisibility").

In addition to 1589(a)(3) and (a)(4), (a)(2), which is defined as "by means of serious harm or threats of serious harm to that person or another person". The term 'serious harm' is a term of art and incorporates scienter as per the definition in §1589(c)(2):

The term "serious harm" means any harm, whether physical or nonphysical, including psychological, financial, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

Thus, 1589(a)(2), when coupled with the above definition, includes the phrase "to compel...to perform", incorporates scienter similar to the phrase "in order to exert pressure" incorporates scienter into 1589(a)(3) per Ninth Circuit and similar to the phrase "Scheme...intended to cause a person to believe" incorporates scienter into 1589(a)(4) per Seventh Circuit.

In essence, §1589(a)(1) has a mens rea of "knowingly" and the (a)(2), (a)(3) and (a)(4) alternatives have a mens rea of "knowingly, and intentionally".

And the different nature of the four crimes (a)(1) - (a)(4) is further made apparent by their different mental state requirements. For example,

a defendant who physically constraints a victim for forced labor (a)(1) has a different mental state than one who abuses legal process to coerce the victim into forced labor (a)(3). Although the ultimate goal is forced labor, the defendant's intention as to how he will achieve the goal are not singular.

With the passage of § 1589 of the TVPA, enacted after the Kozminski decision, Congress expanded the scope of cases that could be prosecuted to include those involving non-violent coercion. 1589 (a)(1) and (a)(2) are violent coercions and (a)(3) and (a)(4) are non-violent coercions. In fact, Bureau of Prisons, in its Program Statement PS 5162-05 'Categorization of Offenses' categorizes only 1589 (a)(1) and (a)(2) as crimes of violence, further corroborating that these alternative subsections are elements.

The following picture will summarize the key characteristics

§ 1589 (a)

↳ (a)(1) - mens rea of "knowingly", violent coercion

↳ (a)(2) - mens rea of "knowingly, intentionally", violent coercion

↳ (a)(3) - mens rea of "knowingly, intentionally", non-violent coercion

↳ (a)(4) - mens rea of "knowingly, intentionally", non-violent coercion

### C. Different Conduct and Proof

Where there are several alternatives with different levels of risk involved, the Supreme Court has called these statutes "divisible statutes." Descamps v. United States, 133 S. Ct. 2276, 2281, 186 L. Ed. 2d 438 (2013). A statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into the statute may be divided constitutes, by its elements, a violent felony. See Descamps, 133 S. Ct. at 2285.

Here, 1589 (a)(1) and (a)(2) are violent offenses and carry different risk than (a)(3) and (a)(4).

In Chambers v. United States, this Court explained that "[t]he nature of the behavior that likely underlies a statutory phrase matters" to the divisibility analysis, 555 U.S. 122, 126, 129 S. Ct. 687, 172 L. Ed. 2d 484 (2009).

where the behavior underlying one statutory phrase "differs so significantly from the behavior underlying" another, "for ACCA purposes a sentencing court must treat the two as different crimes." *Id.*

For an example of a statute that was divisible because it criminalized two different types of behavior, the Chambers Court considered its previous holding in Shepard v. United States, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005). Shepard involved a Massachusetts burglary statute that "placed within a single, separately numbered statutory section," Chambers, 555 U.S. at 126, the burglary of a "building, ship, vessel or vehicle," *Id.* (quoting Mass. Gen. Laws Ann., ch. 266, § 16 (West 2008)). The Court found this statute to be divisible because the behavior underlying breaking and entering each of the listed premises "differ[ed] so significantly" from one to the other. *Id.* (citing Shepard, 544 U.S. at 16-17).

Likewise, in forced labor statute, because forced labor can be proven by "physical restraint; serious harm; abuse of law; and a scheme", each formulation of crime involves a different type of conduct and should be treated as separate crimes and are thus elements.

#### D. Case Law Explicitly Referring 1589 Alternatives as 'Elements'.

There are at least six cases where the district courts expressly referred the forced labor alternative subsections as 'elements'. See Lesnik v. Se, 374 F. Supp. 3d 923 (E.D. Va. 2019) ("[a]s to both §§ 1589(a)(2) and 1589(a)(3), "multiple jurisdictions have found that the threat of deportation may itself constitute a threat sufficient to satisfy the second and/or third element of [§1589] forced labor." Echon v. Sackett, 2017 U.S. Dist. LEXIS 152992, 2017 WL 4181417, at \*14 (D. Colo. Sept. 20, 2017), report and recommendation adopted, 2017 U.S. Dist. LEXIS 182218, 2017 WL 5013116 (D. Colo. Nov. 1, 2017)).

See also 2021 U.S. Dist. LEXIS 154166 :: De Britto Bucco v. W. Iowa Tech City, 555 F. Supp. 3d 628, 640, No. C21-4001-LTS (August 16, 2021) ("In the

context of H-2B visas, 3 courts have determined that threats of deportation are sufficient to meet the "serious harm" element under either subsection 1589(a)(2) or (4) or "abuse of the legal process" element under subsection 1589(a)(3).

See also 2019 U.S. Dist. LEXIS 198243 :: Chaidez v. Hemphill :: Nov 15, 2019 ("The Pennsylvania statute bars releases that force a victim of trafficking to agree that their conduct was voluntary, 18 Pa. C.S. § 3051(g) and both statutes deem abuse of legal process as an element of trafficking behavior. 18 U.S.C. § 1589(a)(3); 18 P.a.c.s. § 3012(b)(4).")

See also Gilbert v. United States Olympic Comm, 423 F. Supp. 3d 1112, 1136 (Sep. 27, 2019) ("He then applied the elements of a section 1589(a)(2) claim to defendant Steven Lopez's alleged conduct...").

See also United States v. McTague, No. 5:14-cr-055, 2017 U.S. Dist. LEXIS 68598 (April 10, 2017). ("This language in the introduction is similar to the statutory language "force, threats of force, physical restraint, or threats of physical restraint to that person or another person," which comprises an essential element of the charged offenses. 18 U.S.C. § 1589(a)(1).")

See also Campbell v. United States, NO. 16-cv-632, 2018 U.S. DIST LEXIS 242962 (October 9, 2018) ("This evidence matched the elements of the forced labor charge. See § 1589(a)(1);").

#### E. Case Law Referring Certain §1589 Alternatives to the Exclusion of Others

There are numerous forced labor cases where the defendants were charged with certain §1589 alternative subsections to the exclusion of others corroborating that these subsections are elements and not means.

See United States v. Woodard, No. 13-25-5, 2017 U.S. Dist. LEXIS 225423 (Dec. 15, 2017) ("forced human labor in violation of 18 U.S.C. § 1589(a)(1) (count 27);").

See also Burrell v. Lackawanna Recycling Ctr, NO. 3:14-cv-1891, 2021 U.S. DIST. LEXIS 147516 (August 6, 2021) ("The Defendants and The Enterprise engaged in acts and schemes violating the TVPA, 18 U.S.C. § 1589(a)(1).")

See also Macias v. Monterrey Concrete LLC, 2020 U.S. Dist. LEXIS 173171 (Sept. 21, 2020) ("Count 1 of the Plaintiffs' Complaint alleges that the Defendants forced Plaintiffs' labor in violation of 18 U.S.C § 1589(a)(1) of the TVPA."); United States v. Otis, 2021 U.S. App. LEXIS 22894 (Aug. 2, 2021) ("In August 2019, a federal grand jury indicted Otis on four counts of forced labor, in violation of 18 U.S.C § 1589(a)(1), (2) and (4);"; Taneda v. E Baton Rouge Parish Sch. Bd, 2012 U.S. DIST. LEXIS 157725, SA CVID-01172 JAR (MLGX) (Aug. 27, 2012) ("Evidence supported Filipino nationals' claim for violation of 18 U.S.C § 1589(a)(1) of the Trafficking Victims Protection Act (TVPA)..."; Ruelas v. Cty. of Alameda, 519 F. Supp. 3d 636, 648 (Feb. 9, 2021) ("...plaintiffs providing labor for fear that they will be placed in solitary confinement. 18 U.S.C § 1589(a)(1), (a)(4)"); Correto v. United States, 2011 U.S. Dist. LEXIS 120733 (Oct 18, 2011) ("four counts of forced labor, 18 U.S.C § 1589(1), (2)").

In United States v. Dann, 652 F.3d 1160, 1169, 1171 (9<sup>th</sup> cir. 2011), the seminal case in the Ninth Circuit construing the forced labor statute, the government only charged a §1589(a)(4) violation, implicitly confirming §1589(a)'s four alternatives constitute separate crimes with alternative elements and mens rea requirements. Dann at 1169, 1171 (citing United States v. Calimlim, 538 F.3d 706 (7<sup>th</sup> cir. 2008).

#### F. The Decision Below is Inconnect

Defending the district court's refusal to give the requested specific unanimity instruction, the court below insists that separate subsections of the forced labor statute, 18 U.S.C § 1589(a), merely set forth "means" and not "elements," but it fails to acknowledge that the distinction between these concepts, labels notwithstanding, "has confounded the courts for years." Stephen Erlich, Straightforward on its Face but Mindbending in its Application: Juror Concurrence in Criminal Trials, 61 CLEV. ST. L. REV. 791, 792 (2013) (observing that the Supreme Court "failed" to provide "guidance" in its key cases addressing the means/element distinction, Schad v. Arizona and

Richardson v. United States, "resulting in five separate opinions that further muddled the jurisprudential waters").

In its decision, the court below stated "Because in Mickey we found nearly identical language to be means rather than elements, we read the forced labor statute in the same way." United States v. Barai, 55 F. 4th 1245, 1251 (2022). But the language and structure of the sex trafficking statute (§1591) in Mickey are meaningfully different from the forced labor statute here (§1589). Section 1591, at issue in Mickey, "punishes anyone who 'recruits, entices, harbors, transports, provides, obtains, advertises, maintains, patronizes, or solicits by any means a person,' knowing or in reckless disregard of the fact that 'means of force, threats of force, fraud, coercion... or any combination of such means will be used to cause the person to engage in a commercial sex act.'" Mickey, 897 F.3d 1173, 1176 (quoting §1591(a)). In a unitary subsection, the statute enumerates a single set of "means" — various coercive tactics subject to the same mens rea requirement.

But it fails to address the arguments distinguishing that authority and ignores the unique structure of §1589(a), which, instead of a short unitary list of "means," establishes four distinct categories of "means" broken into separate numbered subsections, 3 of which have a more demanding mens rea (a)(2), (a)(3) and (a)(4). In addition, they have different degrees of culpability (violent-(a)(1) & (a)(2) and non-violent-(a)(3) & (a)(4) nature, commercial-(a)(3) and domestic scope), different mental state requirements, different conduct and proof requirements. The court below also ignored the extensive case law explicitly referring the individual subsections as elements and the case law referring certain subsections to the exclusion of others, as expounded in sections A through E above.

The court below also pointed out that "the forced labor statute's alternatives do not carry different punishments... See 18 U.S.C §1589(d)." Barai, 55 F. 4th 1245, 1250-1251 (9th Cir. 2022).

While it is true that forced labor statute does not explicitly define

different punishments for each alternative, §1589(a), does list a disjunctive list of punishments:

whoever violates this section shall be fined under this title, imprisoned not more than 20 years, or both.

However, the forced labor convictions through non-violent coercion (a)(3) & (a)(4) only result in civil penalties, very different from the criminal penalties imposed on violent coercion (a)(1) and (a)(2). In essence, due to the overbroad nature of the forced labor statute, different punishments for the alternatives are implicitly defined.

Moreover, Mathis guides us that different punishment for the alternatives is an indicator of divisibility but the converse is not true. 10<sup>th</sup> & 11<sup>th</sup> circuits recognized this distinction and held statutes whose alternatives carry the same punishment as divisible. See, e.g., Spaho v. United States AG, 837 F.3d 1172, 1177 (11<sup>th</sup> Cir. 2016) (holding Fla. Stat. § 893.13 (1)(a) divisible when the statute provided the same punishment for each alternative). See also United States v. Bouziden, 725 F. App'x 653, 657 (10<sup>th</sup> Cir. 2018) (unpublished).

Finally, the court below concluded that it will decline to conflict with its finding in Mickey, that it is not divisible. Indeed, the court's observation that "Congress enacted both" the sex trafficking statute (§1591) and the forced labor statute (§1589(a)), "as part of the Trafficking Victims Protection Act of 2000 (TVPA)," undermines its argument that courts should analogize the two sections and construe them in the same way. If Congress had intended these disparate statutes to be construed identically, it would have structured them identically.

#### IV. Cumulative Errors Violated Due Process

In their consolidated appeal to the Ninth Circuit, Barai and Kartan's counsel raised the 'cumulative error' argument. See Barai's Opening Brief C.A. Case 20-10318, Doc. 22, p60 and Kartan's opening Brief C.A. Case 20-10347, Doc. 29, p52. The court below failed to rule on this argument. Barai and Kartan filed a *Pro Se* Petition for Rehearing and reminded. "The panel did not rule on the cumulative error argument raised by both Barai and Kartan" See C.A. Case 20-10318, Doc. 89, p4. The court below summarily denied the petition for rehearing.

This Court has clearly established that the combined effect of multiple trial errors may give rise to a due process violation if it renders a trial fundamentally unfair, even where each error considered individually would not require reversal. Donnelly v. DeChristoforo, 416 US 637, at 643; Chambers v. Mississippi, 410 US 284, at 290 n.3, 298, 302-03. Furthermore, the cumulative nature of the challenged evidence does not necessarily render its inclusion (or exclusion) harmless. Krulewitch v. United States, 336 US 440, at 444-45. Rather, the fundamental question in determining whether the combined effect of trial errors violated a defendant's due process rights is whether the errors rendered the criminal defense "far less persuasive," Chambers, 410 US at 294, and thereby had a "substantial and injurious effect or influence" on the jury's verdict, Brecht v. Abrahamson, 507 US 619, at 637 (internal quotations omitted).

As expounded in arguments I, II, and III, *supra*, trial was infected with the following serious errors and the district court either overruled the defense's objection or failed to give a limiting or curative instruction

- (1) The district court violated Kartan's right to testify. Despite Kartan's obvious reluctance to waive his right to testify, the district court did not ascertain that Kartan was abandoning his fundamental right to testify.
- (2) Prosecution improperly commented on Kartan's withdrawn testimony. Defense objected but the judge overruled and did not give any curative instruction
- (3) Barai's counsel requested a 'No Prejudicial Inference for Barai' instruction after Kartan's withdrawal of testimony. The district court refused.

(4) Over defense objection, the district court allowed a hearsay testimony of a non-testifying nanny, Lakshmi, to a neighbor, that Kartan allegedly held Lakshmi by the wrist and pulled or pushed her down the stairs. This hearsay was highly prejudicial as it was the only allegation of physical violence by Kartan. The court below erred by finding this harmless, without deciding this issue. The court below erred in ruling that it is only relevant to the conspiracy charge. This hearsay testimony tainted the verdict on the substantive forced labor counts in addition to the conspiracy charge because the prosecution expressly relied upon it to establish Kartan's over-arching intent and behavior. C.A. App. 7-ER-1584 (citing, *inter alia*, Lakshmi's statements as evidence of a "pattern, a modus operandi"); C.A. App. 7-ER-1585 (arguing that substantive forced labor counts "are disposed of fairly easily once the conspiracy is found").

(5) Over defense objection, the district court allowed hearsay testimony that God caused Barai's serious accident to avenge bad behavior. The court below erred in conflict with this Court's opinion in Caldwell v. Mississippi, 472 U.S. 320, 330-34 (1985), where it disapproved of an argument tending to transfer the jury's sense of responsibility to a higher court. The obvious danger of admitting this testimony invoking God is that jury will give less weight to, or perhaps even disregard, the legal instructions given by the trial judge in favor of the asserted higher law (God's authority). See Chandler v. Florida, 449 U.S. 560, 574, 66 L. Ed. 2d 740, 101 S. Ct. 802 (1981) ("Trial courts must be especially vigilant to guard against any impairment of the defendant's right to a verdict based solely upon the evidence and the relevant law."). The district court did not give any curative instruction.

(6) Over defense objection, the district court admitted Barai's E-mail in which she stated she hit her husband. The court below erred in ruling that it was admissible for impeachment purpose and cited United States v. Gray, 967 F.2d 322, 328 (9<sup>th</sup> Cir. 1992). But the court below erred by overlooking an important fact that in Gray, the district court admitted the evidence with a limiting instruction "only for the purposes of cross-examining Mr. Gray regarding his personal credibility and his state of mind and is to be considered by the jury only for that purpose." *Id.* Unlike Gray, here, the district court did not give any limiting instruction.

(7) The district court improperly excluded the two sting calls from undercover agents posing as prospective nannies. These sting calls were the heart of the defense against the conspiracy, forced labor and the fraud counts as Kantan repeatedly warned the prospective nannies that it was a tough job and explained the difficulty of feeding his baby and the long on-call hours of 6am to midnight, all seven days. The district court erroneously denied the opportunity to present critical evidence relevant to the question whether the defendants had the mental state required ("knowingly") to violate the forced labor statute § 1589.

(8) The district court denied defense request for an unanimity instruction as to specific subsection of forced labor statute. Even if this Court concludes that the alternatives in § 1589 are means, a unanimity instruction was needed as to the means to avoid jury confusion. See United States v. Hendrickson, 822 F.3d 812, 823 (6<sup>th</sup> Cir. 2016). Here, jury confusion leaps from the record as the jury sent a note to the judge informing that they forgot Thapa's testimony but that they already found the defendants guilty for all other counts except the Thapa's count and requested for the transcript of Thapa's testimony to be read to them so that they can decide the verdict for Thapa's forced labor count. Judge denied it and jury found the defendants guilty without remembering her testimony.

As in Chambers, the seminal cumulative error case, the errors in this trial went to the heart of the defense's case and the combined effect of the trial court's multiple errors rendered the defense "far less persuasive than it might have been," Chambers, 410 U.S. at 294, resulting in a "substantial and injurious effect or influence" on the jury's verdict, Brecht, 507 U.S. at 637, which "so infected the trial with unfairness as to make the resulting conviction a denial of due process," Donnelly, 416 U.S. at 643.

V. The Court Below Overlooked the Failed Eviction of Thapa - It was not a Half an Hour of Federal Forced Labor

It is undisputed that Thapa worked for Barai and Kartan for 2 days.

"Q. So you worked for Satish Kartan, the defendant, for four days in 2016?"

"A. One day at night and then three days, so about -- then I went that day. So about 9:00 or 10:00 I left". C.A. App. 4-ER-866.

Thapa left the morning of the third day. It is also undisputed that she told Kartan she wanted to leave the morning of the third day. "Q. When did you

tell Satish [Kartan] that he lied, you wanted to go? A. ... I worked there two days. Then third day I was sick. Then I told them..." C.A. App. 4-ER-818.

It is also undisputed that she felt scared after two days and that is when she left "...after one or two days -- because he was very stern language. Then I started feeling scared." C.A. App. 4-ER-828.

The crux of the prosecution's position is that Thapa had an argument with Kartan on the morning of the third day, while she was waiting for her ride (nephew) to come pick her up and in that argument, Kartan allegedly threatened to call the police and Thapa worked for about half an hour (after the alleged threat to call the police - when the labor allegedly became involuntary) until after her ride arrived.

In its closing argument, prosecution stated, "If a victim says that they want to leave, and a defendant uses one or more of the prohibited means to get them to continue working, even for only half an hour, they have committed forced labor." C.A. App. 8-ER-2080. Although prosecution misstated the law as this statement ignored the element of intent and the scienter and the need for the employee's free will to be overcome, nonetheless, trial record shows that it was Thapa's conscious decision to stay in the house until her ride arrived.

"Q. And what did Satish [Kartan] say or do when you told him someone was coming to get you?"

A. He says go, get out, get out, get out, right now. Then I was scared, and he said right now get out. Because my person was not there." C.A. App. 4-ER-833.

"Q. How much -- how many more hours, approximately, were you in the house after you told him someone was coming to get you?"

A. When I was working in the kitchen little bit in the kitchen and he says, like get out, get out" C.A. App. 4-ER-834.

"Q. And then you left?"

A. I did not go. I mean, I called, and then my nephew. Because there was nobody outside. Then I was inside, and they he just saying go, go, go" C.A. App. 4-ER-925

As the above excerpt of the trial record shows, Kartan did not ask Thapa to keep working (after the alleged threat to call the police) until the ride arrived. To the contrary, Kartan asked Thapa to stop working and get out, even though her ride did not arrive yet. This is a half an hour of failed eviction, not a half an hour of federal forced labor as Thapa herself conceded that Kartan asked her to get out (she reiterated it more than 9 times). C.A.App. 4-ER-831, 833-35, 865-66, 918, 924-25.

Thapa admitted walking to the community gate multiple times. C.A.App. 4-ER-865, 925, where the two side pedestrian gates are always unlocked. 6-ER-1329. Kartan kept asking Thapa to get out saying that she could just walk out of the community through the pedestrian, which have dead door knobs on them and cannot be locked from the inside, C.A.App. 6-ER-1329, but Thapa insisted that she would not go out until her ride arrived.

The court below cited that Kartan didn't give gate code to Thapa. The independent witness-community property manager testified that Kartan himself did not have a gate code. C.A.App. 6-ER-1323.

The delay in the arrival of her ride made Thapa suspect that Kartan might have given wrong address to Sam (Sam flatly refuted it) but the ride eventually arrived at the address provided by Kartan (proving that he provided the correct address) and picked up Thapa. Notably, Thapa felt obligated to the government for declaring her to a victim of "serious form of human trafficking" and providing the benefits, "He [case agent] came to help me. He helped. Helped a lot. Helped a lot." C.A.App. 4-ER-887-88.

Even considering Thapa's erratic and perjured testimony and her hyperbole in favor of the prosecution, there was insufficient evidence that Barai and Kartan committed forced labor as the evidence in this case did not rise to the level of half an hour of federal forced labor, as Thapa herself decided to wait for her ride. Nonetheless, half an hour is an insubstantial or insignificant period of time (even considering her full term of 2 days of employment, it is insignificant or insubstantial)

Thapa admitted she started to feel scared after two days and admitted that she left the morning of the third. In Grand Jury, she admitted that the alleged threat to call the police was made by Kartan after she asked for additional money to pay for Uber. C.A.App. 4-ER-924, even though, Kartan and Sam scheduled Thapa's nephew to pick her up. Nevertheless, this threat had no effect, coming as it did, just before Thapa voluntarily exited the house.

Congress only intended "to address serious trafficking" with federal forced labor statute. United States v. Dann, 652 F.3d 1160, 1170 (9th Cir. 2011).

• VI. The Court Below Err in Not Ascertaining that Free Will of Employee was overcome

The conduct banned by the forced labor statute, 18 U.S.C. §1589, is despicable. However, it draws its legal basis and its distinct limitations from its source: the outlawing of slavery by passage of the Thirteenth Amendment. Conviction under this statute by its source, its wording, and the well-set parameters of federal power, must be limited to conduct that causes, and is intended to cause, laborers to stay and work against their will. Its scope should not be expanded because of alleged conduct harming laborers, however bad the conduct is; if that conduct is not intended to force those laborers to stay and work.

While the federal government might have "a substantial interest in enforcing criminal laws against assassination, terrorism, and acts with the potential to cause mass suffering," Congress does not typically criminalize purely local conduct like the wife's garden-variety assault. *Id* at 2092. United States v. Toriave, 761 F.3d 623, 628 (6<sup>th</sup> Cir. 2014) (citing Bond v. United States, 572 U.S. 844, 863, 134 S. Ct. 2077, 2092 (2014)).

The government did not offer proof to sustain a conviction under 18 U.S.C. §§1589 and 1594, which effectuate the Thirteenth Amendment's prohibition of forced labor. Nannies' free will to quit the employment was never overcome. Nannies made a conscious decision to leave the house without any fear or hesitation that any harm would befall them if they left and they successfully walked out the first time they tried. Nannies in this case always had an exit option. In fact, all nannies specifically testified that they "decided" to walk out of the house, which is defined as "to make a final choice or judgement about (~what to do)" per Merriam-Webster's Collegiate Dictionary, 11<sup>th</sup> Edition, p322. In essence, they freely made a "choice" to leave as their free will was not overcome and is not forced labor.

### A. Involuntary Labor And The Free Will Of The Employee

In Pollock v. Williams, 322 U.S. 4, 64 S. Ct. 792, 88 L Ed 1095 (1944), this Court said "[I]n general the defense against oppressive hours, pay, working conditions or treatment is the right to change employers." 322 U.S. at 18; Does v. The Gap, Inc., 2002 WL 1000068, at \*15 (D.N. Mex. I. May 10, 2002) (dismissing claims for involuntary servitude).

In United States v. Kozminski, 487 US 931, 101 L Ed 2d 788, 108 S Ct 251 (1988), this Court limited the definition of involuntary servitude to physical and legal coercion and expressed concern about the risk of including psychological coercion that would "subject individuals to risk of arbitrary or discriminatory prosecution and conviction" 487 US at 949. This Court's opinion in Pollock and Kozminski have been

masked by the federal forced labor statute, 18 U.S.C. § 589, which was enacted as part of TVPA Act of 2000, but TVPA did not disturb this Court's opinion that free will of an employee must be overcome for his/her labor to be involuntary.

The court below erred in not ascertaining whether the free will of the nannies was overcome. In affirming forced labor convictions, it merely pointed to "Barai threatening to kill Thamma and put her in the garbage" and Kartan "threatened to call police on Thapa."

Firstly, as expounded in 'Statement of Facts', Thamma alleged this brand new allegation few days before trial, but she never mentioned it over preceding 2 years and 5 months during multiple interviews with federal agents. C.A. App. 6-ER-1496.

Secondly, this elaborate verbal threat defies physical realities as Barai could not speak a word of Telugu and Thamma only spoke Telugu. C.A. App. 3-ER-642. Thamma admitted that she could not decipher was speaking Hindi or English. C.A. App. 3-ER-585. Moreover, Thamma testified that Barai never spoke to her. C.A. App. 3-ER-642-43.

Thirdly, even if Barai made this elaborate verbal threat (she did not) and Thamma miraculously understood it (which is impossible), this anecdotal verbal threat did not compel Thamma to stay and her free will to leave the house was not overcome as it is not possible that a single outburst by a 5'2", 125-pound, eight-month pregnant woman (Barai) was "sufficiently serious" or credible to cause Thamma to stay out of fear. To the contrary, it convinced her to leave. C.A. App. 5-ER-593 ("I have to leave this place and go.").

Fourthly, Thamma admitted that she "decided" to walk out. C.A. App. 3-ER-670 ("I'm not able to do that work. I decided... I want to go away from this house."). The word "decide" is defined as "to make a final choice or judgement about ('what to do') per Merriam-Webster's Collegiate Dictionary, 11<sup>th</sup> Edition, p322. In essence, she made a choice to leave as her free will was not overcome and is not forced labor.

Regarding the isolated threat to call police on Thapa before egress, as expounded in argument V, supra, the evidence affirmatively established that it had no effect, coming as it did, just before Thapa voluntarily exited the house.

Every immigrant entering this country is under compulsion to continue working their first job to gain self-sufficiency - it does not mean that the employer who offered the first job to the immigrant is committing forced labor. As this Court has said in Pollock, as long as the employee's will is not overcome, to quit and work for another employer, it is not forced labor.

## **B. Intent of the Employer to Compel Labor.**

There was insufficient evidence to show Barai and Kartan used the prohibited means knowing that doing so would obtain the forced labor or services of their employees. The forced labor statute demands the government prove, beyond a reasonable doubt, that a defendant "knowingly provide[d] or obtain[ed] the labor or service of a person by any one of, or by any combination of," the prohibited means. 18 U.S.C. § 1589(a).

To show that a defendant has "knowledge" to satisfy the scienter requirement of a criminal statute, the government must prove that the defendant "knew the facts that make certain conduct fit the definition of the offense." United States v. Olson, 856 F.3d 1216, 1220 (9<sup>th</sup> Cir. 2017) (quoting Elonis v. United States, 575 U.S. 723, 735 (2015)). For such knowledge to be proven in the context of §1589, the government must show that a defendant knowingly used one of the prohibited means "to coerce the victim to provide labor or services against her will." Muchira v. Al-Rawaf, 850 F.3d 605, 622-23 (4<sup>th</sup> Cir. 2017) (emphasis original) (explaining the nature of the "knowingly" requirement under §1589's analogous civil provisions). For example, the Muchira panel held that the purported victim had not established the knowledge element required for liability despite alleging that the defendants in that case withheld her passport as an "implicit threat of arrest" connected to her employment because the plaintiff could only provide "conclusory and speculative allegations" that fell short of establishing that her fear was reasonable or intentionally caused by the defendants. *Id.* at 623. The defendants also provided for plaintiff to leave when she asked to, and they did not threaten adverse consequences for doing so. *Id.* at 623-24.

Barai and Kartan did not know of any coercive pressure their conduct might have created as they took many affirmative actions inconsistent with the goals of the conspiracy to commit forced labor. Barai and Kartan disclosed the timings, chores, and the difficulty of the job to prospective nannies, repeatedly warning the nannies that it is a tough job. C.A. App. 8-ER-2246-52. Government agents testified that Kartan and Barai did not lie in any of their advertisements. C.A. App. 5-ER-1082. Kartan modified Lakshmi's ticket so that she could fly home early. C.A. App. 6-ER-1097-98.

Even the text messages exchanged between Barai and Kartan shows that they had no intent to commit forced labor as the text messages show Barai and Kartan reminding and corroborating between themselves to disclose the timings, chores and difficulty of the job to their prospective nannies, where Barai is asking Kartan on two different occasions, "Did you tell [the prospective nanny] about the timings?" and Kartan responding "yes." C.A. App. 5-ER-1248, 6-ER-1315, 6-ER-1543-44, Barai making sure that Kartan disclosed the fact that defendants ate bland food (brown rice and no oil). C.A. App. 5-ER-1082, 6-ER-1316.

Nannies used their free will and left when they wanted to go.

VII. The Sentence is Procedurally and Substantively reasonable

The court below perfunctorily said that it is "satisfied" even though it acknowledged that the district court failed to resolve factual disputes and consider arguments, failed to consider the 3553(a) factors, failed to explain why the 16-year sentence was minimally sufficient, and erroneously applied multiple enhancements that significantly increased the applicable Guideline range based on insufficient evidence.

A. The Court Below Erred in Finding that District Court Correctly Calculated the Guidelines.

Due process clause guarantees a defendant the right to be sentenced based on accurate information. United States v. Tucker, 404 U.S. 443, 448-49, 92 S.Ct. 589, 30 L. Ed. 2d 592 (1972).

Here, the court below perfunctorily mentioned that there is clear and convincing evidence that Thamma's had first and second degree burn, overlooking the overwhelming evidence including scientific evidence that her hands were not burned.

The enhancement for serious bodily injury, U.S.S.G. section 2H4.1-(b)(1)(B), as to Thamma, is not supported by the evidence. As expounded in 'Statement of Facts, supra, Thamma's history of false statements to government agents, her perjury and evasive testimony after government gave her immunity for her past false statements, cast substantial doubt on the portions of her testimony that are inconsistent with the account of other nannies. No other Nanny accused physical abuse. The ER doctor said he wouldn't call it a burn if Thamma just presented her hands. However, since Thamma claimed her hands were pushed into flames, the ER doctor wrote down "Questionable first and second degree burns". The burn specialist and the ER doctor both said that her hands did not have any blisters or ulcers. The court below ignored the 'Elephant in the room' - the scientific evidence of video and pictures of Thamma's hands taken three weeks prior to the alleged burn show her hands to be in the same condition as the photos purporting to document the "injury".

Thamma's allegation that somebody pushed her hands into the flames is not reliable because she maintained for 3 years over multiple interviews that it was Kartan who pushed her hands into the flames and specifically mentioned that Barai was not in the room during the alleged incident. Few days before the trial, she changed her story that it was Barai, not Kartan who pushed her hands into the flames.

Even assuming the incident occurred as she testified, her testimony does not establish "serious bodily injury." The definition of "serious bodily injury" is found in Application Note 1(M) of U.S.S.G section 1B1, which states such injury is "injury involving extreme physical pain or protracted impairment of a function of a bodily member, organ, or mental faculty; or requiring medical intervention such as surgery, hospitalization or physical rehabilitation." All of the accounts of Thamma, even if believed, show that her hands at most touched the flames momentarily. She stated prior to trial at least on two occasions that she pulled her hands back when she felt the heat (not the flame). The photos of her hands taken 3 or 4 days after the alleged incident do not show any injury whatsoever (she is diabetic, which slows down healing, as both doctors testified and if her hands were really burned, the symptoms would have shown as a second degree burn takes 2 weeks to heal and first degree burn takes a week to heal for a non-diabetic person and much more longer for a diabetic one like Thamma), much less an injury that likely involved "extreme physical pain" or "protracted impairment." Nor did it "require[] medical intervention such as surgery, hospitalization, or physical rehabilitation." Thamma was taken to the ER after her first police video interview on August 31, 2019. In this video recording, Thamma can be seen tapping on the table with her fingers, repeatedly lacing her fingers and clasping her hands without any wincing, when officers were not in the room. It is obvious from the video and her own conduct during the interview that she did not suffer "serious injury." The next day on September 1, 2019, after ER wrote down "questionable first and second degree burns," the federal agents, in a recorded video interviews kept asking her "it seems like long term type of issues" and asked her about "soaps, detergents or bleaches" that might have caused her hands to be like that (dermatitis). Even the federal agents knew that her hands were not burned. ER prescribed steroid cream contraindicated for burns. Thamma's repeated lies and exaggerations and the fact that she perjured herself at trial, even after the government gave her immunity for her past lies, makes her accusations unreliable. The jury's verdicts do not imply finding of serious bodily injury.

District court also imposed a 4-level upwards adjustment for "use" of stove as a dangerous weapon. The court below overlooked the fact that even if Thamma's testimony regarding the stove incident is accepted, the evidence does not support a finding that the defendants intended to use the stove to inflict bodily injury. Thamma repeatedly stated that defendants' intent was to show Thamma how

to warm her hands, and, as noted above, she said multiple times that she moved her hands back when she felt the heat.

To sentence based on such unreliable evidence would violate due process rights of Barai and Kartan to be sentenced based on reliable evidence. The sentencing judge specifically relied on this unreliable information during sentencing, "when you put someone's hand over a burning flame over a gas stove, what is that?" C.A. App. 1-ER-87-88. Defense objected that the jury's verdicts does not imply a finding of "serious injury" C.A. App. 1-ER-87-88. The court below erred in finding the sentence to be procedurally reasonable.

#### B. The Court Below Erred by Ignoring the Sentencing Disparity (3553 (a)(6)).

In affirming the unduly harsh 16-year sentence, when the facts of this case do not even come close to mildest case of forced labor, this case being outside of the "heartland" of forced labor cases (both in severity and duration), the court below perfunctorily cited, "we recognize that a correctly calculated guidelines sentence will normally not be found unreasonable on appeal. United States v. Carty, 520 F.3d 984, 988 (9<sup>th</sup> Cir. 2008)".

First, as argued in section A, supra, the district court failed to correctly calculate the Guidelines. Even assuming the Guidelines are correctly calculated, the 16-year sentence is in conflict with the same authority the panel cited. As Carty reiterates, "Rita suggests the parties could argue that Guidelines sentence should not apply 'perhaps because (as the Guidelines themselves foresee) the case at hand falls outside the "heartland" to which the Commission intended individual Guidelines to apply, USSC section 5K2.0...' United States v. Carty, 520 F.3d 984, 991 (9<sup>th</sup> Cir. 2008) (en banc) (citing Rita, 127 S. Ct. at 2465) (further elaborating that this charge is to allow departure by sentencing judges and to facilitate "thorough adversarial testing" of sentencing decisions).

Nannies in this case quickly left: Thapa worked for 2 days and Thapa for 42 days. In the published court of appeals cases it is common to find forced labor that lasted in excess of a year, frequently more than two years. (See, e.g., United States v. Murra, 879 F.3d 669, 673-676 (5<sup>th</sup> Cir. 2018) (23 years of forced labor); United States v. Calimlim, 538 F.3d 706, 709 (7<sup>th</sup> Cir. 2008) (19 years of forced labor); United States v. Kaufman, 546 F.3d 1242, 1246 (more than 15 years of forced labor); United States v. Sabhani, 599 F.3d 215, 255 (2<sup>nd</sup> Cir. 2010) (about five years of forced labor); United States v. Callahan, 801 F.3d 606, 616 (6<sup>th</sup> Cir. 2015) (more than two years).

The nature of confinement "tools" in this case were "none" compared to the heartland of published cases. Unlike most cases of forced labor, the defendants did not take and withhold the nannies' passport or other travel documents. See, e.g., Sabhani, 599 F.3d at p.225 (defendants took victim's "passport and other related documents" and kept them until after the victim was no longer working for them); United States v. Dann, 652 F.3d 1160, 1164 (9<sup>th</sup> cir. 2011) (defendant "tore up" victim's return ticket to Peru); Calimlim, 538 F.3d at p.708 (7<sup>th</sup> cir. 2008) (defendant "confiscated" victim's passport).

Even though Barai and Kartan have no criminal history whatsoever, their 16-year sentence is longer than most defendants received in most egregious forced labor cases (in both severity and duration). District court failed to consider whether this sentence was "greater than necessary" to further the purposes of the sentencing statute. 18 U.S.C. § 3553(a).

As this case falls outside of "heartland" of the cases, the district judge's inadequate explanation (or no explanation) also renders the sentence procedurally erroneous. See Rita, 551 U.S. at 357, Gall, 552 U.S. at 52 (noting sentencing judge's obligation "to consider every convicted person as an individual (quotation omitted)); Id. at 55 (noting "the need to avoid unwarranted similarities among [defendants] who [are] not similarly situated" (emphasis removed)).

The court below erred in presuming the harsh 16-year sentence as reasonable in this case, which does not even come close to the mildest form of forced labor. This sentence is grossly excessive, unreasonable, and far greater than that imposed in any other published forced labor cases involving severe form of forced labor. To impose such a sentence would create an unwarranted disparity (3553(a)(6)).

#### CONCLUSION

The petition for a writ of Certiorari should be granted. I declare under the penalty of perjury that the foregoing is true and correct.  
Respectfully submitted on May 23, 2023

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