Sample Argument for Michigan Circuit Court, Family Division
Immigration Status and the Best-Interests Factors

The following pages contain sample briefing designed for a Michigan Circuit Court, Family Division to support the argument that immigration status should not be considered in a custody or parenting time determination where the best interest standard is being applied. Advocates should tailor this document as they see fit, based on their expansive knowledge of the particular preferences of the judge in their case. Whenever possible, a motion in limine should be made to preclude entry of evidence or consideration of the immigration status of either parent, which is the relief sought here. Otherwise, this sample language could be used in a trial brief. However, advocates should include alternative forms of relief when they believe that is a more realistic strategy. We encourage advocates to include as many arguments as possible in their trial briefing so that the issues they raise are preserved for appeal. At several points along the way, this sample language contains bracketed sentences [ ] suggesting that advocates tailor the writing to their own cases. Before finalizing, we recommend doing a control + F search for "[" to be sure the briefing is fully tailored to your case and any irrelevant language is removed.

If advocates anticipate that a particular judge is likely to be especially skeptical about these arguments, attorneys may choose to call a local immigration attorney as an expert to describe the various agencies, applications, and processes that are at issue. MCEDSV is also available for consultation on this issue and advocates should feel free to contact Elly Jordan, Staff Attorney, at ejordan@mcedsv.org or (517) 347-7000 ex.10 with questions. Further, the National Immigrant Women's Advocacy Program is available for technical assistance on this issue at (202) 274-4457 and has developed two helpful resources that could also be helpful to advocates (hyperlinked below):

(1) An outline on how to handle immigration in custody cases; and
(2) A detailed chapter on the subject, complete with case strategy recommendations.

I. Introduction

The relationship that children have with their parents is one of the cornerstones in the foundation of their lives. That is why courts have long held that the "right to parent one's children is 'essential to the orderly pursuit of happiness by free men' . . . and is 'perhaps the oldest of the fundamental liberty interests.'" *In re Sanders*, 495 Mich 394, 409; 852 NW2d 524 (2014) (quoting *Meyer v Nebraska*, 262 US 390, 399–400 (1923); *Troxel v Granville*, 530 US 57, 65 (2000) (opinion by O'Connor, J.)). The crucial connection between a parent and child is not created by any court, but "stems from the emotional attachments that derive from the intimacy of daily association" between child and parent. *Id.* (quoting *Smith v Org of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977). Because it is day-to-day closeness that counts in constructing a parent-child bond, all parents "have a significant interest in the companionship, care, custody, and management of their children . . . ." *Id.* (quoting *In re JK*, 468 Mich 202, 210; 661 NW2d 216 (2003)).

These fundamental bonds between parent and child transcend borders and immigration status. In general, parents are parents, regardless of status, and their children need them. But sometimes courts lose sight of that when one parent is an immigrant. See David B. Thronson & Hon. Frank P. Sullivan, *Family Courts & Immigration Status*, 63 JUV & FAM COURT J 1 (2012). The family court is the one place where the children's best interests predominate over all other factors—even if they are ignored by the immigration or criminal courts. In applying the best-interests factors, this Court must not forget the centrality of fostering the emotional attachments that bond parent and child. *See Sanders*, 495 Mich at 409. This Court should consider the issues the most affect children's best interests, such as parents' respective affection, closeness, and their inclination to prioritize the children's wellbeing over all else.

When considering what is best for children, their parents' immigration status has little probative value and can be extremely prejudicial. [use if domestic violence case: Indeed, the ABA expressly recommends that immigration status not be considered in cases like this one where domestic violence is at issue, because abusive partners are known to use family court proceedings and the specter of deportation to further victimize their spouses.] For the reasons that follow, [Plaintiff or Defendant] asks that this Court not consider immigration status in its review of the best interests of the children.

II. Immigration status has little probative value for any best-interests factor.

Michigan parents who lack authorized immigration status regularly form and maintain stable and loving environments for their children. To begin with, the Court should understand that individuals who lack authorized immigration status may not be able to easily obtain citizenship through their own action, and thus unauthorized status is not an indication of any lack of diligence on the parent's part. Moreover, the potential that any particular immigrant will face deportation is remote. Unfortunately, the unfounded assumption that a household headed by an unauthorized immigrant is any less stable than one headed by a citizen is often given outsized importance. *Hupp v Rosales*, 2013 Ill App (4th) 130433-U, ¶ 26 (Sept 25, 2013).

A. Immigrant parents may lack authorization through little fault of their own.

There are many misconceptions about immigration status due to the complexity of this area of law. *Drax v Reno*, 338 F.3d 98, 99 (2d Cir 2003) (referring to immigration law as "a maze of hyper-technical statutes and regulations"). One common myth is that individuals who lack authorized immigration status have been somehow dilatory in not simply "becoming citizens." In truth, there are few mechanisms by which an individual can come to the United States through authorized channels. For instance, there is virtually no path to legal immigration

status and citizenship for an individual who does not possess extraordinary genius, an advanced degree, or a close relative who is a citizen or permanent resident. See generally 8 USC § 1153. But once an individual enters the United States without authorization and remains for more than six months, there are substantial barriers to seeking any authorized status. 8 USC § 1182(a)(9). In fact, it often the inaction of the citizen or permanent resident partner that keeps their spouses undocumented, as immigration processes require that they petition for the immigrant spouse. See generally 8 USC § 1153. These obstacles prevent many dedicated parents from obtaining authorized immigration status, and so this Court should not use lack of authorized immigration status as a heuristic for inaction.

B. Unauthorized immigrants can provide stability to their families.

Despite the difficulty of obtaining authorized status, "the chances are minuscule that any particular illegal alien will be apprehended and placed in removal proceedings." *Hupp v Rosales*, 2013 Ill App (4th) 130433-U at ¶ 26; see also Kerry Abrams, *Immigration Status and the Best Interests of the Child Standard*, 14 Va J Soc Pol'y & L 87, 93 (2006); David B. Thronson, *Of Borders and Best Interests: Examining the Experiences of Undocumented Immigrants in U.S. Family Courts*, 11 Tex Hisp JL & Pol'y 45, 65–66 (2005). In fact, based on Immigration and Customs Enforcement ("ICE") statistics from fiscal year 2015, only 235,551 out of an estimated eleven million[1] unauthorized immigrants were removed, translating to a two percent chance that any specific unauthorized immigrant would be deported. *Tracking*

[1] This estimate of the overall unauthorized immigrant population is widely agreed upon. *Unauthorized Immigrant Population Profiles*, MIGRATION POLICY INSTITUTE, http://www.migrationpolicy.org/programs/us-immigration-policy-program-data-hub/unauthorized-immigrant-population-profiles. Approximately 97,000 unauthorized immigrants reside in Michigan. *Id.*

Immigration & Customs Enforcement Removals, TRAN REC ACCESS CLEARINGHOUSE, http://trac.syr.edu/phptools/immigration/remove/ (last viewed March 31, 2017).

It is particularly unlikely that an immigrant who has been in the United States for many years without a criminal record will be apprehended and removed.[2] Only about thirty four percent[3] of removals are initiated against individuals who are apprehended in the interior of the United States. *Id.* The ICE statistics further show that less than one percent[4] of interior removals took place against an individual who had no criminal conviction. *Id.* Even taking into consideration common convictions including illegal entry, illegal re-entry, or traffic offenses, such background issues account for only about twelve percent[5] of interior removals. *Id.* [Include if your client is female.] In addition, only about ten percent[6] of those immigrants removed were female. *Id.* Despite widespread fear of deportation, these statistics illustrate the relatively minimal risk of removal that a female, unauthorized immigrant in the interior of the United States who has no criminal record would face.

Recent efforts to step-up deportations are unlikely to significantly alter the status quo described above, particularly for residents of Michigan. Increased resources are being dedicated to immigration enforcement, but that increase is largely focused on the southern border and on select cities that have been flagged for having high populations of unauthorized immigrants with criminal charges like New York and Los Angeles. Julia Edwards Ainsley, *Immigration Judges Headed to 12 U.S. Cities to Speed Deportations*, REUTERS, March 18, 2017,

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[2] Advocates are encouraged to carefully consider their client's personal circumstances before using this language.

[3] 81,362 interior out of 23,551 total removals for fiscal year 2015.

[4] 5,808 interior removals where removed individual had no conviction compared to 81,362 total interior removals.

[5] 10,357 removals with those criminal convictions compared to 81,362 interior removals.

[6] 23,938 out of 235,551 total removals.

http://www.reuters.com/article/us-usa-immigration-judges-exclusive-idUSKBN16O2S6.

Various economists and policy analysts have estimated that a mass deportation of all unauthorized immigrants would take at least 20 years to accomplish and would cost at least $114 billion. *What Would it Cost to Deport 11.3 Million Unauthorized Immigrants*, CENTER FOR AMERICAN PROGRESS, Aug. 18, 2015 https://www.americanprogress.org/issues/immigration/news/2015/08/18/119474/what-would-it-cost-to-deport-11-3-million-unauthorized-immigrants/ (quoting the American Action Forum). But even the most ambitious proposed budget for fiscal year 2018 would add less than $6 billion to the federal budget to remove noncitizens. *2018 Blueprint*, WHITE HOUSE, https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/2018_blueprint.pdf (accessed April 7, 2017). Furthermore, even if a particular immigrant were to be apprehended by ICE, that individual must generally be placed in removal proceedings and have an opportunity to request bond in accordance with due process. 8 USC §§ 1229; 1240. During the removal proceedings, a noncitizen may argue that he or she is eligible for immigration relief, such as cancellation of removal, asylum, or withholding of removal.[7] 8 USC § 1240(c)(4). The Detroit Immigration Court currently has an average case duration of 760 days. *Court Backlog*, TRANS REC CLEARINGHOUSE, http://trac.syr.edu/phptools/immigration/court_backlog/ (accessed April 7, 2017).

[7] If it appears your client may be eligible for immigration relief, then add an explanation about that form of relief and the status of his or her application. Advocates should also be prepared to cross examine the spouse about whether they ever petitioned for your client and use this line of questioning to expose further abuse. Finally, if a spouse initially petitioned for your client, there is likely an affidavit of support that they signed promising to support your client until they become a citizen. Advocates are encouraged to consider seeking enforcement of such agreements.

[Only consider using this section if your client is female]. An example may help illustrate: in U.S. society, men are significantly more likely than women to be taken away from their children by being imprisoned. In fact, 93% of inmates are male across the United States. *Inmate Gender Statistics*, BUREAU OF PRISONS, https://www.bop.gov/about/statistics/statistics_inmate_gender.jsp (accessed April 7, 2017). Yet courts generally do not use a man's greater theoretical likelihood of incarceration as a rationale for denying his children access to him or for placing custody with someone else. See Abrams, *supra*, at 93 (2006). Likewise, any argument that a parent who lacks authorized immigration status is less worthy of custody or parenting time on account of his or her likelihood of removal is hopelessly speculative.[8]

All of this suggests that, despite increased efforts to remove more unauthorized immigrants, there is no reason to believe that any particular unauthorized immigrant present in Michigan is more likely to be rapidly taken from his or her family. Ultimately, a parent's immigration status is not properly considered to affect best-interest factor (d), having to do with the stability of the home environment. MCL722.23(d).

It is also improper to consider immigration status in reference to factor (c), which has to do with "capacity and disposition" to provide food, clothing, medical care, and other material needs. MCL 722.23(c). To begin with, the best-interests determination is not susceptible to broad generalities, and should be made with careful consideration given to the specifics of a case and the individual characteristics of each parent. As the Michigan Court of Appeals has

[8] Any client who has unauthorized immigration status should have a plan in place for what will happen in the event he or she is apprehended by ICE. If you client has such plans, it may be wise to include a description of those plans here. The argument being that, even if the nightmare scenario were to occur, and your client was apprehended and quickly removed, there would be no serious instability in the child's protection because a solid plan is already in place.

explained, the "determination is much more difficult than merely tallying runs, hits, and errors in box score fashion following a baseball game . . . ." *Lustig v Lustig*, 99 Mich App 716, 731, 299 NW2d 375, 382 (1980); see also *Ewers v Navarro*, 2012-CA-001654-ME, 2013 WL 2450162, at *2 (Ky Ct App June 7, 2013) (noting that immigration status was not a dispositive issue because the family court had broad discretion to consider what was best for children). For instance, while immigration status could correlate with lower income, it is much more probative to consider the parent in question's income and earning potential, along with their willingness to use their income to support their children, rather than assuming that immigration status will mean he or she cannot provide for the child.

III. Relying on immigration status can be prejudicial and may open the door to bias.

There are several problematic patterns that may arise where a parent's immigration status is used against them in a custody or parenting time dispute. Often, immigration status is assumed to have bearing on several of the factors, and so courts run the risk of double- or triple-counting it as a negative for that parent even though it is merely one aspect of their circumstance. Indeed, immigration status could become a means by which courts indirectly seek to punish parents instead of remaining focused on the children. In more extreme cases where courts regularly refer to immigration status in a manner which ultimately benefits parents of a particular national origin or gender, such courts risk creating a pattern that runs afoul of equal protection.

A person's immigration status is just one aspect of who he or she is, and likely has little to do with the relationship between parent and child. To be sure, love and affection do not pass through customs to get their passports stamped. Nonetheless, double counting of immigration status as a negative can quickly occur by listing it as influencing various best-interests factors. For instance, one court ended up citing immigration status for every factor even though it

admitted that the mother's immigration status was not relevant "except insofar as it has affected her ability to obtain transportation and employment." *In re Interest of Aaron D*, 691 NW 2d 164, 167 (S Ct Neb 2005). This practice compounds the initial error of assigning probative value to immigration status where it has none; it unfairly weights the inquiry against the immigrant parent.

The "best-interests" standard is about what is best for the children, not what is best for the parents, and determinations about parenting time and custody should not be used to punish parental behavior. See, *e.g.*, *Fletcher v Fletcher*, 447 Mich 871, 888; 526 NW2d 889 (1994). Even so, that is precisely what happens when courts consider unauthorized immigration status in the context of the best-interests factors. Abrams, *supra*, at 97. For example, one Georgia judge told a father that he "had a problem with his INS situation" and that the father would have to "resolve" that issue before he could have custody of his child. *In re MM*, 587 SE 2d 825, 831 (Ga App 2003). Using the consideration of immigration status as a back door to punish immigrant parents is an unfortunate departure from the family court's task of putting the children's best interests first.

Parents' fundamental liberty interest in the companionship of their children pertains to "persons," which encompasses citizens and aliens alike. *Troxel*, 530 US at 65 (2000). Considering the fundamental nature of this right, courts must be especially vigilant for unconstitutional interferences. *Id.* When a facially neutral statute, like the best-interests factors, is applied in a lopsided fashion to limit the rights of an individual, such enforcement may give rise to a pattern that would violate equal protection. *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); see also *Spurlock v Fox*, 716 F3d 383, 401 (6th Cir. 2013). Such uneven enforcement may exist where parents who are of a particular national origin, race, or gender are

systematically kept from full care, companionship, and custody of their children without a valid reason. Given the fundamental nature of the parental relationship and the remoteness that any particular immigrant is going to be picked up and removed, use of a parent's immigration status as part of the best-interests analysis raises the specter of such discrimination.

This Court should avoid the pitfall of allowing immigration status to obfuscate its view of the best interests of the child. When other courts have allowed this factor to govern decisions, the results have been tragic. For instance, in the Michigan Court of Appeals Case, *Matter of B and J*, 279 Mich App 12 (2008), the Department of Human Services reported the couple to ICE and "virtually assur[ed] the creation of a ground for termination of parental rights." *Id.* Though the family court called this "morally repugnant," it continued to exercise jurisdiction over the children, resulting in a *de facto* termination of parental rights when the parents were deported without their minor children. *Id.* at 17. The appellate court found clear error, holding that the children's best interests were served by being unified with their parents' immigration status. *Id.* at 19. What is remarkable about *Matter of B and J* is that the family court noted the moral repugnance of separating children from otherwise fit parents due to immigration status, but still allowed this misleading factor to guide its decision. This Court should avoid falling into the same trap.

[Advocates may only want to use the following section if there have already been allegations of possible parental kidnapping.]

IV. Consideration of Immigration Status Should be Limited to Well-Grounded Allegations of Likelihood of International Flight.

The only circumstance in which the Michigan Court of Appeals has overtly upheld reliance on a parent's immigration status was where concern was expressed that the parent may try to leave the jurisdiction with the child. *Abdel-Rahman v. Abdel-Rahman*, No. 187959, 1996

WL 33362252, at *3 (Mich. Ct. App. July 23, 1996) (considering only whether the trial court erred in not including reasoning regarding all best-interests factors in a visitation dispute). In the unpublished *Abdel-Rahman* decision, the court reviewed a supervised visitation order for a father who was apparently already in removal proceedings. *Id.* In fact, commentators have suggested that this circumstance is the only type of situation in which immigration status is likely to be highly probative and unlikely to be used for prejudicial reasons. See Abrams, *supra,* at 89.

That said, raising the possibility of parental kidnapping in no way inoculates the use of immigration status from impropriety, and courts must be leery of trumped-up allegations. A court should go beyond conjecture and engage in a principled analysis of whether such an allegation is well founded. Generally, a parent alleging that the other parent will flee must prove that there are valid warning signs relating to parental abduction, such as not having any strong ties to the United States or home state of the child; engaging in planning activities such as quitting a job, selling a home, or securing a passport for the child close in time to separation. See *A Family Resource Guide on Int' Parental Kidnapping*, U.S. DEPT' OF JUSTICE, 5 (2007), available at http://www.missingkids.com/en_US/publications/PDF2A.pdf. An allegation of planned parental kidnapping has federal, state, and international criminal implications. MCL 750.350a (making such conduct a state felony); 42 USC 663. Indeed, where an allegation of intent to kidnap is made against the great weight of evidence that a parent has ties to the local community, fears return to his or her home country, or has never expressed or implied any intent to take the child out of the country, sanctions for improper purpose may be appropriate. See MCR 2.114(D),(E) (deeming sanctions such as attorney's fees appropriate where a party submits pleadings that are designed to harass or when a pleading "well grounded in fact" and "warranted").

[Incorporate the following section if your client is the victim of domestic violence.]

V. Consideration of the Immigration Status of a Victim of Domestic Violence is Particularly Damaging and Misleading.

In recent decades, the American Bar Association's ("ABA") and the United States Congress have joined a chorus of commentators to confirm what shelters and counselors have seen first-hand: immigration status is used as a weapon by domestic abusers. See, *eg, Viskup v Viskup*, 291 Ga 103, 105, 727 S.E.2d 97, 100 (2012) (noting that father had to be held in contempt of court for sending misleading notes to ICE regarding his former spouse's immigration status). As a result, the ABA recommends that courts not consider it in making custody determinations. Congress responded to this victimization by creating provisions that provide some domestic violence survivors access to immigration relief. As a result, the victim of domestic violence may be eligible to obtain stable immigration status and an abuser who is a permanent resident may be at greater risk of removal.

Abusers regularly use immigration status to further victimize their intimate partners. See *eg*, Mary Anne Dutton et al, *Characteristics of Help-Seeking Behaviors, Resources and Service Needs of Battered Immigrant Latinas: Legal and Policy Implications*, 7 GEO J POVERTY L & POL'Y 245, 293 (2000). Immigration-related abuse might include: threats of deportation, threats to turn her into USCIS if she tells anyone about the abuse, refusal to file or threats to withdraw immigration papers for the victim or her children, or threats to raise her immigration status in a custody, protection order or divorce case. Leslye E. Orloff & Janice V. Kaguyutan, *Offering a Helping Hand: Legal Protections for Battered Immigrant Women: A History of Legislative Responses*, 10 AM U J GENDER SOC POL'Y & L 95, 98-99 (2002). Such abuse is closely tied with

other serious and harmful forms of emotional abuse such as isolation, intimidation, economic, and employment-related abuse. Giselle Aguilar Hass *et al*., *Lifetime Prevalence of Violence Against Latina Immigrants: Legal and Policy Implications*, in DOMESTIC VIOLENCE: GLOBAL PERSPECTIVES, 103-13 (2000).

C. The ABA recommends that family courts exclude all evidence of immigration status in domestic violence cases.

The ABA's Center on Children and the Law warned courts about the dangers for children when family courts allow information about immigration status to interfere with a genuine focus on the best-interest-of-the-child determinations. Soraya Fata et. al., *Custody of Children in Mixed-Status Families: Preventing the Misunderstanding and Misuse of Immigration Status in State-Court Custody Proceedings*, 47 Fam. L.Q. 191, 194–95 (2013). The ABA report found that consideration of immigration status "exacerbates the level of violence in abusive relationships when batterers use *the threat of deportation* and *control of information about legal status and the legal system* to lock their spouses and children in violent relationships . . . ." Howard Davidson, ABA COMMISSION ON CHILDREN AND THE LAW, IMPACT OF DOMESTIC VIOLENCE ON CHILDREN: A REPORT TO THE PRESIDENT OF THE AMERICAN BAR ASSOCIATION (Aug. 1994), available at http:// niwaplibrary.wcl.american.edu/reference/additional-materials/research-reports-and-data/immigrant-families-and-children/The-Impact-of-Domestic-Violence-on-Children.pdf/view. Indeed, "[b]atterers whose victims are immigrant parents use threats of deportation to avoid criminal prosecution for battering and to shift the focus of family court proceedings away from their violent acts." *Id.*

The ABA did not mince words when describing the devastating effect this can have when family courts consider immigration status as a negative: "When the judicial system condones these tactics, children suffer . . . ." *Id.* Thus, the ABA recommended that "parties should not be

able to raise, and courts should not consider, immigration status of domestic violence victims and their children in civil protection order, custody, divorce or child support proceedings." *Id.*

D. Congress has highlighted the unique plight of immigrant survivors of domestic violence.

The United States Congress gave credence to the particularly grave concerns of immigrant victims of domestic violence over twenty years ago when it enacted the Violence Against Women Act ("VAWA"). H.R. REP. NO. 103-395, at 26-27 (1993). Congress recognized that then-existing immigration laws fostered the abuse of immigrants by placing their ability to gain permanent lawful status in the complete control of the abuser—their citizen or lawful permanent resident spouse. *Id.* In 2000, Congress significantly expanded VAWA's immigration protections to improve VAWA self-petitioning and cancellation of removal protections, and to offer immigration relief for the first time to immigrant victims of domestic violence whose abusers may not be citizens or lawful permanent residents and who may not be married to their abusers. Violence Against Women Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified in scattered sections of 8, 18, 20, 28, 42 and 44 U.S.C.) (2000).

[If your client is seeking immigration relief based on the abuse, then add this paragraph.] As a result of these changes, many immigrant victims who come before courts in custody, divorce, or protection order cases in which custody is an issue will qualify for VAWA self-petitions, VAWA relief from deportation (cancellation of removal) or will qualify for the new crime-victim (U-visa) protections. [Add the type of relief that your client is seeking and the status of that request. Include the processing time report from USCIS as an exhibit, which you can access here.]

[If the opposing party in your case happens to also be a noncitizen, and your client has not been charged with domestic violence, then you can consider including this.] In fact,

Congress also stepped up efforts to deport abusers by making crimes of domestic violence, stalking, and child abuse deportable offenses. 8 USC § 1237(a)(2)(E). Section 1227 makes deportable any person who has been convicted of an act of violence against a current or former spouse, among other crimes. A conviction for the purposes of § 1227 includes participation in deferred proceedings under MCL § 769.4a. This means that a lawful permanent resident or green card holder is subject to removal if he or she has any conviction or deferred proceeding for domestic violence in Michigan—regardless of how long the abuser has been in the United States or what ties he or she has to this country. This Court should not be misled by the fact that [Plaintiff or Defendant] is a green card holder. That fact does not make [him or her] immune from removal.

It is crucial for family courts to follow the lead of the ABA and Congress by not allowing abusers to raise a victim's immigration status in the context of the best-interests determination. Instead, courts should recognize that an abuser's attempt to raise the other parent's immigration status in court is evidence of on-going abuse. When the justice system allows the victim's immigration status to be raised as a factor in any case, the abuse is compounded because immigrant victims of domestic violence are discouraged from seeking protection and from cooperating in criminal prosecutions of their abusers. Ultimately, consideration of a parent's immigration status is contrary to the best interests of the children because it has little probative value, is highly prejudicial, and turns the court into a mechanism for further abuse.

VI. Conclusion and Request for Relief

Accordingly, [Plaintiff or Defendant] respectfully requests that this honorable court order that all evidence regarding the immigration status of either party be excluded from consideration in these proceedings.