No. 16-775ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ANDERSON NEIL RICHARDS, AKA ANDERSON RICHARDS

Petitioner,

v.

LORETTA E. LYNCH, Attorney General,

Respondent.

On Petition For Review of a Decision of the Board of Immigration Appeals
Agency No. A 038-738-677 (DETAINED)

BRIEF OF *AMICI CURIAE* BROOKLYN DEFENDER SERVICES, QUEENS LAW ASSOCIATES, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, THE BRONX DEFENDERS, ESSEX COUNTY PUBLIC DEFENDER'S OFFICE, MONROE COUNTY PUBLIC DEFENDER'S OFFICE, AND IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER AND IN SUPPORT OF GRANTING THE PETITION FOR REVIEW

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INTEREST OF *AMICI CURIAE*[1]

The public defender *amici curiae* are non-profit and governmental organizations that provide free criminal defense to indigent clients in New York State pursuant to the Supreme Court's mandate in *Gideon v. Wainwright*, 372 U.S. 335 (1963). They have represented hundreds of individuals charged with violating N.Y. Penal Law § 260.10(1). *Amicus curiae* Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that provides expert legal advice, publications, and training on the immigration consequences of criminal convictions, with a particular focus on New York State offenses. IDP appears regularly as *amicus curiae* before the federal courts regarding the application of the categorical approach to determining the immigration consequences of criminal convictions, including, most recently, in *Mathis v. United States*, 136 S. Ct. 2243 (2016).[2]

Because *amici* public defenders represent many defendants charged with violating § 260.10(1) who plead guilty to § 260.10(1) charges, and whose cases therefore never result in reported decisions, *amici* can help provide the Court with a more comprehensive understanding of how § 260.10(1) is applied on the ground,

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amici curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.
[2] For more information about *amici*, please refer to the individual statements of interest in Exhibit 11 of the Appendix.

an issue critical to the Court's decision in this case as it considers the decision of the Board of Immigration Appeals ("BIA" or "Board") in *Matter of Mendoza Osorio*, 26 I. & N. Dec. 703 (BIA 2016). *See infra* § I. *Amici* have a further interest in the Board's proper application of the Supreme Court's realistic probability test for determining the reach of a criminal statute. *See infra* § II.

Finally, *amici* have an obligation to inform clients of the immigration consequences of a guilty plea. *See Padilla v. Kentucky*, 130 S. Ct. 1473 (2010). As described in more detail below, *see infra* § III, a decision by this Court that § 260.10(1) is categorically a "crime of child abuse" would significantly impact *amici*'s work because many § 260.10(1) cases involve relatively minor conduct that, with a guilty plea, would not even require probation, let alone jail time. Nevertheless, if § 260.10(1) is categorically a "crime of child abuse," it will be nearly impossible for any non-citizen to plead guilty and many cases will then need to go to trial. *See infra* §§ II.B., III.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Matter of Mendoza Osorio*, the BIA held in a published decision that conviction under New York's misdemeanor child endangerment statute, N.Y. Penal Law § 260.10(1), is categorically a crime of child abuse for immigration purposes. 26 I. & N. Dec. at 712. In reaching this conclusion, the Board refused to consider documentary evidence of prosecutions under § 260.10(1) that illustrate

the experience of *amici* public defenders that § 260.10(1) is applied and charged extremely broadly—far beyond either any common understanding of "child abuse" or the Board's definition of child abuse announced in *Matter of Soram*, 25 I. & N. Dec. 378 (BIA 2010).

In the attached Appendix, *amici* have included a slate of misdemeanor informations, *see* N.Y. Crim. Proc. Law § 100.10(1), from cases charging extremely minor conduct against which *amici* regularly defend charges under § 260.10(1): conduct as trivial as leaving a sleeping child at home alone for 15 minutes while getting groceries for dinner, *see People v. Reyes*, 872 N.Y.S.2d 692 (Crim. Ct. 2008), driving with a suspended license with a child in the car, *see* App. Ex. 1, and leaving a nine-year-old and a sleeping-five-year-old in a car for ten minutes while going into a store, *see* App. Ex. 7. These charging documents accurately reflect the least-acts-criminalized by New York State under § 260.10(1)—conduct that *Soram* does not sweep into the "crime of child abuse" provision of the Immigration and Nationality Act ("INA").

As explained further below in Part I, the Board in *Mendoza Osorio* misidentified the range of conduct criminalized and prosecuted under § 260.10(1). *See infra* § I. *Amici*'s familiarity with the statutory text of §260.10(1), judicial interpretations of § 260.10(1), and daily experience defending against § 260.10(1) charges in New York State courts reveal that the Board has misidentified the

minimum conduct prosecuted under § 260.10(1) and erroneously concluded that § 260.10(1) is categorically a deportable crime of child abuse. *See infra* § I.

As explained further below in Part II, the robust body of jurisprudence from the Supreme Court and Courts of Appeals on the categorical approach and its realistic probability test—which the Board largely ignored in *Mendoza Osorio*—confirm that the Board has misidentified the least-acts-criminalized under § 260.10(1) by applying a flawed and erroneous methodology that undermines the categorical approach. *See infra* § II.A. The decision to ignore documentary proof of State prosecutions under § 260.10(1) misapprehends how State criminal courts function with respect to misdemeanor prosecutions, and incorrectly assumes that State prosecutors regularly bring frivolous charges for conduct that falls outside the scope of the penal law. *See infra* § II.B. If allowed to stand, the Board's misinterpretation of the realistic probability standard in *Mendoza Osorio* will more broadly infect application of the categorical approach and lead to the imposition of immigration and federal sentencing consequences based on convictions under statutes that criminalize non-generic conduct.

Finally, in Part III *amici* explain that *Mendoza Osorio* will dramatically alter the path of § 260.10(1) prosecutions against noncitizen defendants. *See infra* § III. Under *Mendoza Osorio*, no noncitizen can safely plead guilty to § 260.10(1), which will have a substantial impact on the functioning of New York State courts,

as nearly every single conviction under § 260.10(1) resolves by plea agreement. *See infra* § III.

ARGUMENT

I. Amici's Experience Is That The Minimum Conduct New York State Prosecutes and Criminalizes Under § 260.10(1) Is Conduct That Presents A Minimal Risk Of Harm To Children And Does Not Amount To A "Crime Of Child Abuse" As Defined In *Matter Of Soram*

The BIA's 2012 decision in *Matter of Soram* extended the definition of a deportable "crime of child abuse" under 8 U.S.C. § 1227(a)(2)(E)(i) to reach child endangerment offenses that result in no actual harm to a child. 25 I. & N. Dec. 378, 381 (BIA 2010). The determination depends on the "risk of harm … required by any given State statute," *id*. at 381-83,[3] and the inquiry is under the categorical approach. *Cf. Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013).

The Board's conclusion in *Mendoza Osorio* that § 260.10(1) reaches only "serious, potentially harmful conduct" 26 I. & N. Dec. at 709, n.6, that falls within the ambit of *Soram* and 8 U.S.C. § 1227(a)(2)(E)(i) is incorrect, and the

[3] Although this Court has decided that the BIA is due deference in its construction of "crime of child abuse" because that phrase is "entirely a creature of the INA," *Florez v. Holder*, 779 F.3d 207, 211 (2d Cir. 2015), *cert. denied sub nom. Florez v. Lynch*, 136 S. Ct. 1450 (2016), the agency's construction of a State's criminal statute is entitled to no such deference. *Kuhali v. Reno*, 266 F.3d 93, 102 (2d Cir. 2001) ("[W]e owe no deference to the Board in its interpretation of criminal statutes that it does not administer." (citing *INS v. Aguirre–Aguirre*, 526 U.S. 415, 424 (1999); *Chevron U.S.A. Inc. v. Natural Resources Def. Council, Inc.*, 467 U.S. 837, 842 (1984)). Furthermore, *amici* agree with the Petitioner that this Court's decision in *Florez* is incorrect and that this Court should refuse to defer to the BIA's decision in *Soram.* Brief for Petitioner at 46 n.10.

methodology it employed to reach this result is flawed. Contrary to the Board's erroneous conclusion, New York State permits prosecution under § 260.10(1) where the likelihood of harm to children is extremely low, and where the potential harm itself is minor and broadly defined. Had the Board properly evaluated § 260.10(1)'s statutory text, the reported decisions interpreting § 260.10(1), and the documentary proof of prosecutions under § 260.10(1), the Board would have reached the correct conclusion that the least-acts-criminalized under § 260.10(1) do qualify as a crime of child abuse for immigration purposes.

A. On Its Face, The Text Of § 260.10(1) Encompasses Conduct That Poses Minimal Risk Of Harm To Children, And Harm That Is Slight.

The text of § 260.10(1) punishes "acts … likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old." N.Y. Penal Law § 260.10(1). New York State courts have concluded that the State legislature intended the phrase "moral welfare" to apply to a broad range of "dangers." *People v. Bergerson,* 271 N.Y.S.2d 236, 238 (Crim. Ct. 1966). This includes conduct like offering three cigarettes to a 14 year-old, *People v. Cardona*, 973 N.Y.S.2d 915 (Crim. Ct. 2013), and conduct that is not directed at children but merely happens in their presence. *See People v. Alvarez,* 860 N.Y.S.2d 745, 749 (Crim. Ct. 2008) (concluding that "engaging in criminal activity while children are present is likely to endanger their physical, mental or moral welfare"). *See also*

App. Ex. 1 (driving with a suspended license with a child in the car); App. Ex. 2 (smoking marijuana in a park where children happen to be present); App. Ex. 4 (shoplifting from a grocery store with a child present).

The New York Court of Appeals interprets the statutory term "likely" in this context to include actions that create only the "potential for harm to a child." *People v. Johnson*, 95 N.Y.2d 368, 372 (2000). In keeping with *Johnson*, the lower courts apply the statutory term "likely" as encompassing any criminal activity, no matter how minor, where a child happens to be present. *See, e.g.*, *Alvarez*, 860 N.Y.S.2d at 749. In New York, a parent can be prosecuted for endangerment on the theory that shoplifting from a store is "likely" to harm the "mental or moral welfare" of her two-month-old son. *See* App. Ex. 6. An adult can also be prosecuted for endangerment in New York for leaving a sleeping child home alone for 15 minutes because a court could "imagine many other ways that a young child or infant left alone" might suffer harm. *People v. Reyes*, 872 N.Y.S.2d 692, 692 (Crim. Ct. 2008).

B. New York State Courts And Prosecutors Embrace § 260.10(1)'s Broad Text.

In *amici*'s experience, New York State police and prosecutors are very aggressive in bringing § 260.10(1) charges, a practice facilitated and enabled by the statute's broad text and permissive judicial interpretations. The State often brings charges based on innocent parenting mistakes, or adds a § 260.10(1) charge

to other minor criminal charges simply because a child happened to be present. In the attached Appendix *amici* provide ten sample prosecutorial documents charging § 260.10(1) for assorted conduct that falls far below the threshold risk of harm to children set in *Soram.* In each of these cases, the defendant was represented by *amici* or their colleagues in the New York State defense bar. These documents demonstrate just how broadly § 260.10(1) is applied on the ground. The factual circumstances charged include:

- A charge against a woman who drove with a suspended license with her four-year-old child in the car. Ex. 1. There was no allegation in the charging document that the suspension of her license affected how the woman drove. (The criminal offense of driving with a suspended license carries a maximum penalty of 30 days' imprisonment. *See* N.Y. Veh. & Traffic Law § 511(1)).
- Several cases involving people committing minor criminal acts in public near children to whom they were not related. For instance, in one case a defendant smoked marijuana in a park that happened to have children present (he did not know the children). Ex. 2. (Possession of a small amount of marijuana is explicitly excluded as a ground of removability elsewhere in the INA. *See, e.g.*, 8 U.S.C. §§ 1227(a)(2)(B)(i) (marijuana exception to controlled substance deportability), 1255(h)(2)(B)

(marijuana exception to ineligibility for adjustment of status for abused minors)). In another case, a man who likely suffered from mental illness swung his backpack and knocked things off shelves and counters. Ex. 3. One of the items may have hit a nine-year old girl, who was visiting the store, in the leg. *Id.* In a similar case, an individual was charged after yelling and knocking items off a shelf in the presence of two children. Ex. 10.

- Several cases involving parents shoplifting with their children present, including a woman shoplifting from a grocery store and a woman shoplifting from a clothing store with a two-month-old child. Exs. 4, 5, 6. According to the charging document in the latter case, the mother's shoplifting was "likely injurious to the mental and moral welfare of her two month old son." Ex 5.
- Several cases involving parents leaving their children alone for brief periods of time. For instance in one case, a woman left her nine-year-old and sleeping five-year-old in a car for ten minutes while she went into a store. Ex. 7. In another case a woman left her ten- and four-year-old children at home alone for an unknown amount of time. Ex. 8. In a similar case, a man left his six- and nine-year-old children at home alone for an unknown amount of time. Ex. 9.

The examples in the Appendix typify § 260.10(1)'s expansive reach. Statewide data on § 260.10(1) prosecutions released by the New York Division of Criminal Justice Services (hereinafter "DCJS § 260.10(1) Statistics") confirm that the New York State courts treat § 260.10(1) offenses with notable leniency. From 2000 to 2015, fewer than 20% of convictions under § 260.10(1) arising from misdemeanor informations resulted in *any* imprisonment; 43% of convictions led to only fines or probation; over 35% of convictions resulted in a sentence of a conditional discharge (a sentence that, by law, requires a finding that "neither the public interest nor the ends of justice would be served by a sentence of imprisonment" or even probation, N.Y. Penal Law § 65.05(1)). *See* DCJS § 260.10(1) Statistics, *available at* http://www.immdefense.org/new-york-state-data-child-endangerment-arrests-prosecutions/ (last visited Sept. 27, 2016). These statistics, as well as the prosecutorial documents in the Appendix, reflect *amici*'s experience that charges under § 260.10(1) often involve a truly minimal threat of harm to children, and moderate "harm." Such conduct does not amount to a crime of child abuse.

II. The Board of Immigration Appeals' Misconstruction Of The Categorical Approach's Realistic Probability Test In *Mendoza Osorio* Has Led It To Misidentify The Minimum Conduct Prosecuted Under § 260.10(1)

The Board's decision to refuse to consider evidence beyond reported dispositions undermines the categorical approach and violates its long history of affirmation and development by the federal courts. This perversion of the realistic

probability test not only led the Board to misidentify the least-acts-criminalized under § 260.10(1) (the statute of conviction at issue in that case and in the Petitioner's case), but will have a substantial spillover effect by causing the same flawed application of the categorical approach where immigration adjudicators and federal courts apply the realistic probability test to other State statutes of conviction.[4]

The Board's decision fails to understand that the Supreme Court created the realistic probability test only to prevent the use of pure hypotheticals in the application of the categorical approach. The arbitrary decision to ignore documentary proof of State police and prosecutors prosecuting and criminalizing huge swaths of conduct under a penal law provision betrays the underpinnings of

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[4] In the immigration context alone, the application of the categorical approach—and, correspondingly, the need to identify the least-acts-criminalized—is ubiquitous. It affects all "conviction"-based grounds of deportability and inadmissibility, and consequently dictates removability and eligibility for immigration benefits for enormous categories of noncitizens, including: deportability and inadmissibility for lawful permanent residents, asylees, and refugees, *see* 8 U.S.C. 1227(a)(2), 1182(a)(2); eligibility for cancellation of removal for lawful permanent residents, nonpermanent residents, and nonpermanent residents who have been battered (*see* 8 U.S.C. 1229b(a), (b)(1)-(2); eligibility for asylum (*see* 8 U.S.C. §§ 1158, 1158(b)(2)(B)(i)); eligibility for protected status under the Violence Against Women Act (*see* 8 U.S.C. §§ 1154(a)(1)(B)(ii)(II)(bb), 1101(f); eligibility for adjustment of status for trafficking victims and juveniles granted special immigrant juvenile status (see 8 U.S.C. §§ 1255(l)(1)(B), 1255(h)(2)); and eligibility for naturalization (see 8 U.S.C. § 1427(a)(3)). The Board's interpretation of the realistic probability test in *Mendoza Osorio* will have a sweeping impact on immigrant communities, as it will subject many more immigrants to categorical bars to relief eligibility and, consequently, mandatory deportation.

the categorical approach itself by subjecting individuals to immigration consequences and enhanced federal sentences for conduct of which they were not necessarily convicted. The realistic probability standard is a facet of the categorical approach, and as such the BIA's decision in *Mendoza Osorio* receives no deference from the federal courts. *Matter of Chairez-Castrejon*, 354 I. & N. Dec. 349, 354 (BIA 2014). This Court should reverse the BIA's decision in *Mendoza Osorio*.

A. The Categorical Approach's Realistic Probability Test Has A Specific Function: To Guard Against The Use Of Purely Hypothetical Conduct In Identifying The Minimum Conduct Prosecuted Under The Penal Law.

i. The categorical approach protects against unfairness to individuals in the immigration and criminal justice systems.

For decades, courts have applied the categorical approach to determine whether a state criminal offense triggers "conviction"-based immigration or federal sentencing consequences. *See Mathis v. United States.*, 136 S. Ct. 2243, 2247, 2251, 2255 n.6 (2016); *Moncrieffe*, 133 S. Ct. at 1685. The categorical approach is necessary to prevent "unfairness to defendants" in the immigration and criminal justice systems. *Mathis*, 136 S. Ct. at 2253. *See also Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

In recent years, the Supreme Court has had numerous opportunities to clarify the contours of the categorical approach and to explain its "constitutional,

statutory, and equitable" underpinnings. *Mathis*, 136 S. Ct. at 2256.[5] Under the categorical approach and its modified variant, the immigration adjudicator or federal sentencing judge "presume[s] that the" noncitizen or federal defendant's conviction ""rested upon [nothing] more than the least of th[e] acts criminalized"" under the prior statute of conviction. *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (alterations in original).

ii. The categorical approach requires the adjudicator to identify the least-acts-criminalized under the statute of conviction; the realistic probability test is part of that inquiry.

To conduct the categorical inquiry, the immigration adjudicator or federal sentencing judge must first identify the generic definition of the immigration or sentencing provision. *See Descamps*, 133 S. Ct. at 2282. For example, the generic definition of a deportable conviction "relating to a controlled substance" under 8 U.S.C. § 1227(a)(2)(B)(i) is provided by a cross-referenced federal statute, 21 U.S.C. § 802.[6]

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[5] *See also, e.g.*, *Descamps v. United States*, 133 S. Ct. 2243 (2013); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Shepard v. United States*, 544 U.S. 13 (2005); *Taylor v. United States*, 495 U.S. 575 (1990).

[6] The generic definition of a burglary aggravated felony under immigration and federal sentencing laws, *see* 8 U.S.C. §§ 1101(a)(43)(G), 1227(a)(2)(A)(iii), was imposed by the Supreme Court in *Taylor*, and is based on the Court's review of "the criminal codes of most States." *See Taylor*, 495 U.S. at 598.

The court next identifies the minimum conduct (least-acts-criminalized) punishable under the State statute of conviction, and "compare[s] the elements of the crime of conviction with the elements of the" generic offense. *Mathis*, 136 S. Ct. at 2247. "[T]he prior crime qualifies as a … predicate [offense] if, but only if, its elements are the same as, or narrower than, those of the generic offense." *Id.* at 2248. "[B]ut if the crime of conviction covers any more conduct than the generic offense, then it is not" a predicate offense, "even if the defendant's actual conduct (*i.e.*, the facts of the crime) fits with the generic offense's boundaries." *Id.*

To identify the least-acts-criminalized, the adjudicator first looks to the text of the criminal statute of conviction. *See, e.g.*, *Mellouli*, 135 S. Ct. at 1988 (citing sections of Kansas's penal law to identify the minimum conduct punishable under a Kansas drug paraphernalia statute as "at least nine substances" not controlled under federal law). *See also, e.g.*, *Mathis*, 136 S. Ct. at 2250 (citing Iowa Code § 702.12 (2013) to find that "Iowa's burglary statute … covers more conduct than generic burglary does"); *Descamps*, 133 S. Ct. at 2282 (citing Cal. Penal Code Ann. § 459 (West 2010) to identify the minimum conduct punishable under a California burglary law, and finding it to be broader than generic burglary). The Courts of Appeals apply the categorical approach in just this way. *See, e.g.*, *Whyte v. Lynch*, 807 F.3d 463, 467 (1st Cir. 2015); *Chavez-Solis v. Lynch*, 809 F.3d 1004,

1009-10 (9th Cir. 2015) (citing *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)).[7]

Where the text of the statute of conviction is not dispositive as to the least-acts-criminalized, the categorical approach instructs courts to consult state case law that may offer interpretation of the statutory language. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1686 ("[W]e know … that "distribution" [under Georgia law] does not require remuneration, *see, e.g.*, *Hadden v. State*, 181 Ga.App. 628, 628-629, 353 S.E.2d 532, 533-534 (1987).") The intention remains to accurately understand the range of behavior a criminal statute encompasses.

iii. The Supreme Court developed the realistic probability test in *Gonzales v. Duenas-Alvarez* only to prevent the use of pure hypotheticals in identifying the minimum conduct prosecuted under the penal law at issue.

In seeking to establish the least-acts-criminalized under a California vehicle theft statute that includes aiding and abetting vehicle theft, the noncitizen in *Gonzales v. Duenas-Alvarez* cited to "several California cases in order to prove his point." 549 U.S. 183, 191 (2007). The Supreme Court found that the criminal statute's text and the cases cited did not "show that California's [aiding and abetting] law is somehow" different from the generic definition. *Id.*

[7] *See also Ramos v. U.S. Atty. Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013); *Jean-Louis v. Attorney General of the U.S.*, 582 F.3d 462, 481 & n.23 (3d Cir. 2009); *Mendieta-Robles v. Gonzales*, 226 F.App'x 564, 572-73 (6th Cir. 2007) (unpublished).

"At oral argument, Duenas-Alvarez's counsel suggested" hypothetical conduct that he believed *could* be prosecuted under California's aiding and abetting doctrine: " that California's doctrine, for example, might hold an individual who wrongly brought liquor for an underage drinker criminally responsible for that young drinker's later (unforeseen) reckless driving." *Id.* (citing Tr. of Oral Arg. 44). "[T]he hypothetical conduct asserted … was not clearly a violation of California law," *Jean-Louis*, 582 F.3d at 481, and Duenas-Alvarez's counsel offered no documentary evidence whatsoever to suggest that California had ever used the aiding and abetting doctrine to prosecute this kind of conduct. In this context, the Supreme Court wrote:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of *legal imagination* to a state statute's language. It requires a realistic probability, *not a theoretical possibility*, that the State would apply its statute to conduct that falls outside the generic definition of a crime.

Gonzales, 549 U.S. at 193 (emphasis added). In subsequent decisions, the Supreme Court and Courts of Appeals have recognized the context in which the realistic probability test emerged and have, accordingly, applied it faithfully. *See Moncrieffe*, 133 S. Ct. at 1684-85 (quoting *Gonzales*, 549 U.S. at 193) ("[O]ur focus on the minimum conduct criminalized by the state statute is not an invitation to apply "legal imagination" to the state offense."). The BIA, by contrast, on the issue in the Petitioner's case, has not. *See Matter of Mendoza Osorio*, 26 I. & N.

Dec. 703 (BIA 2016). Its position on the realistic probability test cannot be reconciled with the precedents of the Supreme Court or the Courts of Appeals, including this Court.

In *United States v. Hill*, __ F.3d __, 2016 WL 4120667 (2d Cir. Aug. 3, 2016), this Court described the realistic probability standard as preventing the use of "legal imagination" and "flights of fancy" under the categorical approach. *Id.* at *10-11. The Court used the word "hypothetical" nine times to describe the conduct that Hill suggested as the least-acts-criminalized under the Hobbes Act. *Id.* at *13, 14, 16, 17, 18. These "hypotheticals" included "pour[ing] chocolate syrup on [a victim's] passport" as a means of putting the victim "in fear of injury to his property through non-forceful means," *id.* at *13 (quoting Hill Supp. Br. 29). Like Duenas-Alvarez, Hill could not point to the text of his statute of conviction (the Hobbes Act) or to reported dispositions offering interpretation of the statute's text, nor could he provide documentary proof of police or prosecutorial action under the Hobbes Act for conduct outside of the generic definition of a crime of violence. *See* Hill Supp. Br. 29.

The First Circuit,in *Whyte v. Lynch*, rejected the government's overreaching position regarding the realistic probability test and found the least-acts-criminalized under an assault statute did not categorically match the generic definition of a crime of violence. The court ruled that courts should not "rely *solely*

on their "legal imagination" in positing what minimum conduct could hypothetically support a conviction under the law." 807 F.3d at 467 (quoting *Gonzales*, 549 U.S. at 193) (emphasis added). In *Whyte*, where the statutory text and State court case law did not clarify the least-acts-criminalized and Whyte could "point to no [state] case in which … conviction was sustained" for non-generic conduct, the court disagreed with the government's position that "the absence of such a case[,]" *id.* at 467, 469, meant that the state had never prosecuted a defendant for conduct outside the generic crime of violence definition. The court wrote:

> The problem with [the government's] argument is that while finding a case on point can be telling, not finding a case on point is much less so. This logic applies with particular force because prosecutions in Connecticut for assault have apparently not generated available records or other evidence that might allow us to infer from mere observation or survey the elements of the offense in practice[,]

id. at 469, and found that "Common sense … suggests there exists a "realistic probability" that [the state] can punish conduct" outside the generic definition of a federal crime of violence." *Whyte*, 807 F.3d at 467, 469 (quoting *Gonzales*, 549 U.S. at 193, and citing *Chrzanoski v. Ashcroft*, 327 F.3d 188, 196 (2d Cir. 2003)). *See also Moncrieffe*, 133 S. Ct. at 1690 (recognizing that the unavailability of criminal record documents is relevant to the categorical inquiry, and that noncitizens in removal proceedings "have little ability to collect evidence" to

defeat removability) (citing Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 5-10 (2008)).[8]

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[8] The Third, Fourth, Ninth, and Eleventh Circuits have likewise rejected the government's overreaching positions on the realistic probability standard. In *Jean-Louis*, the Third Circuit found "proof of actual application of the statute of conviction to the conduct asserted … unnecessary" because the "elements" of the statute of conviction were "clear" that Pennsylvania had "the ability … to prosecute a defendant" for conduct outside the generic definition. 582 F.3d at 471, 481. The court "view[ed] the situation … as sufficiently different from that of *Duenas-Alvarez*." *Id.* at 481. In *United States v. Aparicio-Soria*, the Fourth Circuit wrote:

> [T]he Government's argument misses the point of the categorical approach and "wrenches the Supreme Court's language in *Duenas-Alvarez* from its context." We do not need to hypothesize about whether there is a "realistic probability" that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; we know that they can because the state's highest court has said so.

740 F.3d 152, 157 (4th Cir. 2014) (quoting *United States v. Torres-Miguel*, 701 F.3d 165, 170 (4th Cir.2012)). In *Chavez-Solis*, the Ninth Circuit ruled held similarly:

> The government argues that Chavez-Solis has failed to show a realistic probability," but "[w] e have explained that "if a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime."

804 F.3d at 1009-10 (quoting *Grisel*, 488 F.3d at 850) (internal quotation omitted). The court nonetheless went on to find a realistic probability of prosecution for non-generic conduct by citing to a California state court case where the defendant's

In *Mendoza Osorio*, the Board had before it documentary evidence of New York State police and prosecutors arresting, charging, and prosecuting defendants based on conduct alleged to endanger the welfare of children under § 260.10(1), but the Board refused to consider these documents in seeking to identify the least-acts-criminalized. 26 I. & N. Dec. at 707, n.4. Relying on *Duenas-Alvarez* and *Moncrieffe*, the Board found that the noncitizen in *Mendoza Osorio* had failed to show "a "realistic probability" that section 260.10(1) would successfully be applied to conduct falling outside" the generic "definition of child abuse or neglect." 26 I. & N. Dec. at 712 (quoting *Moncrieffe*, 133 S. Ct. at 1693).

By disregarding documentary evidence of arrest and prosecution as an indication of a criminal statute's breadth, the Board has taken *Duenas-Alvarez*'s realistic probability standard entirely out of "context[,]" *Aparicio-Soria*, 740 F.3d at 157, and impermissibly undermined the categorical approach. Documentary

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conviction had been overturned on appeal. *See id.* at 1010. *Contra Mendoza Osorio*, 26 I. & N. Dec. at 707, n.3 & n.4. The Eleventh Circuit, in *Ramos*, wrote:

> "Here, the Government argues that, under *Duenas-Alvarez*, Ramos must show that Georgia would use the Georgia statute to prosecute conduct falling outside the generic definition…. But *Duenas-Alvarez* does not require this showing when the statutory language itself, rather than "the application of legal imagination" to that language, creates the "realistic probability that a state would apply the statute to conduct beyond the generic definition."

709 F.3d at 1071-72.

evidence—charging documents, police reports, newspaper stories documenting arrests and prosecutions, press releases documenting arrests and prosecutions—are the farthest thing from "legal imagination" or "creative reasoning." *Ramos*, 709 F.3d at 1071-72. They are actual, tangible examples of the "State … apply[ing] its statute[,]" *Gonzales*, 549 U.S. at 193, and "actually prosecut[ing] the … offense" in the non-generic manner. *Moncrieffe*, 133 S. Ct. at 1693. The Board's decision in *Mendoza Osorio* finds no grounding in any of the Supreme Court's jurisprudence on the categorical approach or the statutory schemes to which the categorical approach is applied. If permitted to stand, it will unfairly lead to the imposition of immigration consequences and enhanced federal sentences under criminal statutes that are used to prosecute non-generic conduct, and consequently violate the Court's "three grounds"—"statutory, constitutional, and practical"—for adhering to the categorical approach time and again. *Descamps*, 133 S. Ct. at 2286 n.3, 2287.

B. Charging Documents Generated By A State District Attorney's Office Answer The Supreme Court-Directed Inquiry As To What Range Of Conduct The States Prosecute And Criminalize Under Their Penal Laws

Reported decisions do not accurately reflect the range of conduct prosecuted under the penal law, particularly for misdemeanor offenses where the vast majority of convictions resolve by plea agreement rather than by trial. *See Missouri v. Frye*,

132 S. Ct. 1399, 1407 (2012) (stating that 94% of state convictions are the result of guilty pleas); *accord Lafler v. Cooper*, 132 S. Ct. 1376, 1381 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

In New York City, for example, fewer than 0.2% of individuals charged with a misdemeanor went to trial in 2011.Office of the Chief Clerk of New York City Criminal Court, *Criminal Court of the City of N.Y. Annual Report 2011* 16 (2011), *available at*

http://www.courts.state.ny.us/courts/nyc/criminal/AnnualReport2011.pdf (last visited Sept. 27, 2016). In New York State, the rate of conviction by plea hovers between 99 and 100% for many of the most commonly charged misdemeanor offenses.[9] In 2015, for example, the guilty plea rate for the two most commonly charged misdemeanor drug possession statutes—N.Y. Penal Law ("NYPL") §§ 220.03 (criminal possession of a controlled substance in the 7th degree) and 221.10 (criminal possession of marijuana in the 5th degrees)—was 99.9%. *See* DCJS Misdemeanor Statistics. For criminal mischief in the fourth degree, NYPL § 145.00, only one of the 5,887 people convicted in 2015 was convicted at trial. *Id.* For prostitution, NYPL § 230.00, and loitering for the purpose of engaging in a

[9] This data was published as a result of a request for information filed by the Immigrant Defense Project, and is available at http://www.immdefense.org/new-york-state-data-misdemeanor-arrests-prosecutions/ (last visited Sept. 28, 2016) [hereinafter "DCJS Misdemeanor Statistics"].

prostitution offense, NYPL § 240.37, the number of individuals convicted at trial was zero. *Id.* And for § 260.10(1), 99% of convictions arising from misdemeanor informations from 2000 to 2015 resolved by plea agreement. *See* DCJS § 260.10(1) Statistics.

The consequence is that reported dispositions reflect only a tiny percentage of misdemeanor prosecutions. Where a case resolves by plea agreement, no written decision need issue from the trial court, and so a reported decision will issue only if the individual is granted appellate review. But the right to appellate review is largely forfeited in the plea bargaining process. *See People v Hansen*, 95 N.Y.2d 227, 230 (2000) (a guilty plea results in a forfeiture of the right to appellate review of any nonjurisdictional defects in the proceedings). In fact, misdemeanors are estimated to account for nearly 80% of the caseload in state criminal courts[10], but only seven percent of the cases disposed of in intermediate appellate courts.[11] By looking exclusively at reported dispositions and excluding all other evidence from review, such as charging instruments that often result in plea convictions that are

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[10] Robert C. LaFountain et al., Court Statistics Project, *Examining the Work of State Courts: An Analysis of 2008 State Court Caseloads* 47 (2010), *available at* http://www.courtstatistics.org/~/media/Microsites/Files/CSP/EWSC-2008-Online.ashx (last visited Sept. 27, 2016).

[11] Nicole L. Waters et al., U.S. Dept. of Justice, *Criminal Appeals in State Courts* (Sept. 2015), *available at* http://bjs.gov/content/pub/pdf/casc.pdf (last visited Sept. 27, 2016).

not appealed, the BIA arrived at a skewed view of the conduct criminalized under § 260.10(1).

Furthermore, by opting to entirely ignore a body of charging documents that illuminate how §260.10(1) is actually prosecuted on the ground, the BIA not only willfully blinded itself to the reality of misdemeanor practice in New York State, but cynically assumed that the documents themselves reflect bad faith prosecutions by the district attorneys who prepared them and filed them with the courts.[12] The BIA's assumption of bad faith on the part of prosecutors contradicts the "presumption of regularity" the Supreme Court has extended to prosecutor's charging decisions. *United States v. Sanchez*, 517 F.3d 651, 671 (2d Cir. 2008) (quoting *United States v. Armstrong*, 517 U.S. 456, 464 (1997)). Barring "clear evidence to the contrary, courts presume that [prosecutors] have properly

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[12] The District Attorney's Office is central to the preparation of a charging document:

> [A]n Assistant District Attorney in the Complaint Room … reviews the facts with the arresting officer and sometimes with … witnesses. The ADA will then determine the sufficiency of the evidence to support the charges originally brought by the police, determine the final charges, and draft the complaint upon which the defendant will be prosecuted….. In some instances, after evaluating the evidence, the District Attorney's Office will decline to prosecute a case."

The New York County District Attorney's Office, *Criminal Justice System: How It Works*, *available at* http://manhattanda.org/criminal-justice-system-how-it-works?s=37 (last visited Oct. 1, 2016).

discharged their official duties." *Id.* This presumption is built on a bedrock of legal and ethical standards that guide the initial charging decisions of prosecutors.

Although *amici* act as adversaries to prosecutors, we recognize that they, like us, are bound by the duty to seek justice. Prosecutors may be advocates but they also have a duty to the sovereign "whose interest, therefore, in a criminal prosecution is not that it shall win the case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 86 (1935). This duty is enshrined in ethics standards for prosecutors. According to the *ABA Criminal Justice Prosecution Function Standards*, the primary responsibility of prosecutors is "to seek justice, which can only be achieved by the representation and presentation of the truth."[13]

Similarly, the Model Rules of Professional Conduct note that a prosecutor differs from the usual advocate because of her "responsibility of a minister of justice and not simply that of an advocate."[14] Forty-nine states, including New York, have adopted the ABA's Model Rules of Professional Conduct.[15] Ethical

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[13] American Bar Association, *ABA Criminal Justice Prosecution Function Standards*, § 1-1.1 (1993), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf (last visited Oct. 1, 2016).
[14] American Bar Association, *Model Rules of Professional Conduct*, R 3.8 cmt. (2007), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Oct.1, 2016).
[15] *See State Adoption of the ABA Model Rules of Professional Conduct, available at* http://www.americanbar.org/groups/professional_responsibility/publications/model

rules require that a prosecutor only file criminal charges if she "reasonably believes that the charges are supported by probable cause, that admissible evidence will be sufficient to support conviction beyond a reasonable doubt, and that the decision to charge is in interest of justice." American Bar Association, *ABA Criminal Justice Prosecution Function Standards*, § 3-4.3 (1993), *available* at http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/prosecution_defense_function.authcheckdam.pdf (last visited Oct. 1, 2016). The commentary to the ABA standards on initiating charges emphasizes that the charging standard is not just that there be probable cause, but a "reasonable belief that the charges can be substantiated by admissible evidence at trial." *Id.*

Recognizing the gravity of the initial charging decision, state and national ethics standards for prosecutors place a special emphasis on the need for District Attorney Offices to adopt formal screening procedures before initiating charges. The ABA Prosecution Function Standards mandates that prosecutors "establish standards and procedures for evaluating complaints to determine whether formal criminal proceedings should be instituted." American Bar Association, *ABA Criminal Justice Prosecution Function Standards*, § 3-4.2 (1993), *available at* http://www.americanbar.org/groups/criminal_justice/standards/ProsecutionFunctio

_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Sept. 30, 2016). In New York, Rule 3.8 is codified at Title 22, Part 1200 of the New York Code of Rules and Regulations. N.Y. Comp. Codes R. & Regs. tit. 22, § 1200.0, R. 3.8.

nFourthEdition.html (last visited Oct. 1, 2016). *See also* District Attorneys Association of the State of New York, "The Right Thing: Ethical Guidelines for Prosecutors" (2015) (noting the importance of "initial screening process for charges or indictments" and "ongoing review" of charges by supervising attorneys).

The BIA justifies its decision to entirely ignore charging documents on the theory that the documents themselves do not present a "realistic probability" that a defendant could be "convicted" for conduct violating section § 260.10(1). This conclusion is not only out of step with existing Supreme Court precedent, but reflects a misguided view of how misdemeanor offenses are actually prosecuted in New York State. As *amici*'s experience indicate and statistics on statewide prosecutions illustrate, police and prosecutors routinely charge individuals under § 260.10(1) for conduct that presents only a minimal risk of harm to children. And such charges often result in plea convictions that are not appealed. By ignoring charging documents, the BIA clings to a view of the criminal justice system that is divorced from reality.

III. Holding That § 260.10(1) Is Categorically A Crime Of Child Abuse Unnecessarily Interferes With Prosecution And Defense Of § 260.10(1) Cases

Given the breadth of the conduct covered by § 260.10(1), New York courts unsurprisingly treat § 260.10(1) convictions leniently. *See* DCJS § 260.10(1)

Statistics. Given that, it is in many defendants' interests, when charged with § 260.10(1) based on minor conduct, to simply plead guilty and move on with their lives. *See supra* § III.A. Indeed, *over 99%* of § 260.10(1) convictions arising out of misdemeanor informations since 2000 resulted from guilty pleas. *See* DCJS § 260.10(1) statistics.

Holding that § 260.10(1) is categorically a "crime of child abuse" would make such a guilty plea impossible for most non-citizens and result in many cases going to trial. Whereas a misdemeanor conviction and a conditional discharge is punishment many can accept, permanent exile from the United States is not—especially when the defendant has U.S.-citizen children. And the consequences can be even graver than becoming removable: for many non-citizens, pleading guilty to an offense deemed a crime of child abuse means surrendering eligibility for "cancellation of removal"—the safety valve intended to protect immigrants with U.S.-citizen children, spouses, or parents.[16] *See* 8 U.S.C. § 1229b(b)(1)(C) (cross-referencing 8 U.S.C. § 1227(a)(2)).

As the Supreme Court has instructed, attorneys such as *amici* must advise their non-citizen clients of these immigration consequences of a guilty plea. *See Padilla v. Kentucky*, 130 S. Ct. 1473 (2010); *see also Mellouli*, 135 S. Ct. at 1987. Non-

[16] An immigrant convicted of a "crime of child abuse" is also ineligible for cancellation of removal under the "battered spouse or child" provisions of the Violence Against Women Act. *See* 8 U.S.C. 1229b(b)(2)(A)(iv).

citizen defendants will therefore be well aware that, to retain any hope of remaining in this country, they must stand trial. Preventing these often-trivial cases from being resolved at the plea stage would needlessly waste state resources on cases that could otherwise be resolved simply and fairly.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this Court to reverse the Board's decision in *Mendoza Osorio* and grant the petition for review.

Dated: October 3, 2016

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Second Circuit Rule 32, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,978 words.

Dated: October 1, 2016

/s/Andrew Wachtenheim
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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), amici curiae state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above.

Pursuant to Fed. R. App. P. 29(c)(5), amici curiae state that no counsel for the party authored the subsequently-filed amicus brief or this motion in whole or in part, and no party, party's counsel, or person or entity other than amicus curiae and its counsel contributed money that was intended to fund preparing or submitting the motion or brief.

CERTIFICATE OF SERVICE

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I, Andrew Wachtenheim, hereby certify that I electronically filed the foregoing document and referenced brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on October 3, 2016.

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