No. 16-3145ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

GERARD PATRICK MATTHEWS

Petitioner,

v.

JEFFERSON B. SESSIONS III, Attorney General,

Respondent.

On Petition For Review of a Decision of the Board of Immigration Appeals
Agency No. A [redacted]

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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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 5

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* 5

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 6

B. New York State Courts And Prosecutors Embrace § 260.10(1)'s Broad Text 7

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) 11

A. The Categorical Approach's Realistic Probability Test Has A Specific Function: To Guard Against The Use Of Purely Hypothetical Conduct In Indentifying The Minimum Conduct Prosecuted Under The Penal Law 12

i. The categorical approach protects against unfairness to individuals in the immigration and criminal justice system 12

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 13

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 16

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 22

III. Holding That § 260.10(1) Is Categorically A Crime Of Child Abuse Unnecessarily Interferes With Prosecution And Defense Of § 260.10(1) Cases 28

CONCLUSION 29

CERTIFICATE OF COMPLIANCE

CORPORATE DISCLOSURE STATEMENT

CERTIFICATE OF SERVICE

APPENDIX

TABLE OF AUTHORITIES

Page(s)

CASES

Berger v. United States,
295 U.S. 78, 86 (1935) 25

Carachuri-Rosendo v. Holder,
130 S. Ct. 2577 (2010) 13

Chavez-Solis v. Lynch,
809 F.3d 1004 (9th Cir. 2015) 15, 20

Chrzanoski v. Ashcroft,
327 F.3d 188 (2d Cir. 2003) 19

Descamps v. United States,
133 S. Ct. 2243 (2013) 13, 15, 22

Esquivel-Quintana v. Sessions,
137 S. Ct. 1562 (2017) 3

Florez v. Holder,
779 F.3d 207 (2d Cir. 2015) 3

Gideon v. Wainwright,
372 U.S. 335 (1963) 1

Gonzales v. Duenas-Alvarez,
549 U.S. 183 (2007) .... *passim*

Hadden v. State, 181 Ga.App. 628, 353 S.E.2d 532 (1987) 15

Harbin v. Sessions,
860 F.3d 58 (2d Cir. 2017) 15

Jean-Louis v. Attorney General of the U.S.,
582 F.3d 462 (3d Cir. 2009) 15, 16, 19

Johnson v. United States,
559 U.S. 133 (2010) 13

Lafler v. Cooper,
132 S. Ct. 1376 (2012) 22

Lopez v. Gonzales,
549 U.S. 47 (2006) 13

Mathis v. United States,
136 S. Ct. 2243 (2016) 1, 12, 13, 14

Matter of Chairez-Castrejon,
354 I. & N. Dec. 349 (BIA 2014)...12

Matter of Mendoza Osorio,
26 I. & N. Dec. 703 (BIA 2016).. *passim*

Matter of Soram,
25 I. & N. Dec. 378 (BIA 2010) 3, 5, 6

Mellouli v. Lynch,
135 S. Ct. 1980 (2015) 13, 14, 29

Mendieta-Robles v. Gonzales,
226 F.App’x 564 (6th Cir. 2007)...15

Missouri v. Frye,
132 S. Ct. 1399 (2012) 22

Moncrieffe v. Holder,
569 U.S. 184 (2013) .... *passim*

Padilla v. Kentucky,
130 S. Ct. 1473 (2010) 2, 28

People v. Alvarez,
860 N.Y.S.2d 745 (Crim. Ct. 2008) 7

People v. Bergerson,
271 N.Y.S.2d 236 (Crim. Ct. 1966) 6

People v. Cardona,
973 N.Y.S.2d 915 (Crim. Ct. 2013) 6

People v Hansen,
95 N.Y.2d 227 (2000)..23

People v. Johnson,
95 N.Y.2d 368 (2000)..7

People v. Reyes,
872 N.Y.S.2d 692 (Crim. Ct. 2008) 3, 7

Ramos v. U.S. Atty. Gen.,
709 F.3d 1066 (11th Cir. 2013)... 15, 20, 21

Shepard v. United States,
544 U.S. 13 (2005) 13

Taylor v. United States,
495 U.S. 575 (1990) 13, 14

United States v. Aparicio-Soria,
740 F.3d 152, 157 (4th Cir. 2014)... 19, 20, 21

United States v. Armstrong,
517 U.S. 456, 464 (1997) 25

United States v. Castillo-Rivera,
853 F.3d 218 (5th Cir. 2017) (en banc)..15

United States v. Grisel,
488 F.3d 844 (9th Cir. 2007) (en banc)... 15, 20

United States v. Hill,
832 F.3d 135 (2d Cir. 2016) 17

United States v. Sanchez,

517 F.3d 651 (2d Cir. 2008) 25

United States v. Salmons,
873 F.3d 446 (4th Cir. 2017) 15

United States v. Titties,
852 F.3d 1258 (10th Cir. 2017) 15

United States v. Torres-Miguel,
701 F.3d 165 (4th Cir. 2012) 20

Whyte v. Lynch,
807 F.3d 463, 467 (1st Cir. 2015) 15, 18, 19

STATUTES

8 U.S.C. § 1101(a)(43)(G) 14

8 U.S.C. § 1101(f) 11

8 U.S.C. § 1182(a)(2) 11

8 U.S.C. § 1154(a)(1)(B)(ii)(II)(bb) 11

8 U.S.C. § 1158(b)(2)(B)(i) 11

8 U.S.C. § 1227(a)(2) 11, 29

8 U.S.C. § 1227(a)(2)(A)(iii) 14

8 U.S.C. § 1227(a)(2)(B)(i) 9, 14

8 U.S.C. § 1227(a)(2)(E)(i) 3, 5, 6

8 U.S.C. 1229b(a) 11

8 U.S.C. 1229b(b)(1) 11, 29

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8 U.S.C. § 1255(h)(2)9, 11

8 U.S.C. § 1255(l)(1)(B) 11

8 U.S.C. § 1427(a)(3)...11

21 U.S.C. § 802 14

Cal. Penal Code Ann. § 459 (West 2010) 15

Iowa Code § 702.12 (2013) 14

N.Y. Crim. Proc. Law § 100.10(1) 3

N.Y. Penal Law § 65.05(1) 10

N.Y. Penal Law § 145.00...23

N.Y. Penal Law § 221.10...23

N.Y. Penal Law § 220.03...23

N.Y. Penal Law § 230.00...23

N.Y. Penal Law § 240.37...23

N.Y. Penal Law § 260.10(1) .... *passim*

N.Y. Veh. & Traffic Law § 511(1) 8

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New York State Data on Child Endangerment Arrests and Prosecutions, *available at* http://www.immdefense.org/new-york-state-data-child-endangerment -arrests-prosecutions/ (last visited Nov. 21, 2017).................... 10, 23, 28

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Supplemental Brief for Petitioner, *United States v. Hill*, 832 F.3d 135 (2d Cir. 2016) 17, 18

Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 5-10 (2008)....................19

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responsibility/publications/model_rules_of_professional_conduct/
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http://manhattanda.org/criminal-justice-system-how-it-works?s=37
(last visited Nov. 21, 2017) 25

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

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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.

a more comprehensive understanding of how § 260.10(1) is applied on the ground, an issue critical to the central holding of the decision of the Board of Immigration Appeals ("BIA" or "Board") in *Matter of Mendoza Osorio*, 26 I. & N. Dec. 703 (BIA 2016), that the least-acts-criminalized under § 260.10(1) are categorically crimes of child abuse. *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).[3]

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

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[3] *Amici* agree with the Petitioner that the statutory text of the deportability provision for crimes of child abuse at 8 U.S.C. § 1227(a)(2)(E)(i) forecloses the BIA's expansive interpretation in *Matter of Soram* to reach broad child endangerment provisions like § 260.10(1), and that this Court's previous decision in *Florez v. Holder*, 779 F.3d 207, 211 (2d Cir. 2015), is no longer binding because it conflicts with the Supreme Court's recent decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). *See* Brief for Petitioner, § I. *Amici* submit this brief to assist the Court in correcting the BIA's flawed application of the categorical approach in *Matter of Mendoza-Osorio*, and incorrect conclusions with respect to the range of conduct penalized under § 260.10(1).

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, and the inquiry is under the categorical approach. *Cf. Moncrieffe v. Holder*, 569 U.S. 184, 191 (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 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 Nov. 17, 2017). 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]

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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

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 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,

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many more immigrants to categorical bars to relief eligibility and, consequently, mandatory deportation.

2251, 2255 n.6 (2016); *Moncrieffe*, 569 U.S. at 191. 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*, 569 U.S. at 190-91 (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

[5] *See also, e.g.*, *Descamps v. United States*, 133 S. Ct. 2243 (2013); *Moncrieffe v. Holder*, 569 U.S. 184 (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).

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]

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

[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.

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, including this Court, apply the categorical approach in just this way. *See Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017); *U.S. v. Salmons*, 873 F.3d 446, 448-49 (4th Cir. 2017); *U.S. v. Titties*, 852 F.3d 1258, 1274-75 (10th Cir. 2017); *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)); *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). *But see U.S. v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc).

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*, 569 U.S. at 194 (“[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.*

"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*, 569 U.S. at 191 (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*, 832 F.3d 135 (2d Cir. 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 139-140. 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 141, 142, 143. 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 141 (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*, 569 U.S. at 201 (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)).[7]

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[7] 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

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-

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> 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 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.

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 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*, 569 U.S. at 206. 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 Nov. 17, 2017). In New York State, the rate of conviction by plea hovers between 99 and 100% for many of the most commonly charged misdemeanor

offenses.[8] 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 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

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[8] 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 Nov. 17, 2017) [hereinafter "DCJS Misdemeanor Statistics"].

of any nonjurisdictional defects in the proceedings). In fact, misdemeanors are estimated to account for nearly 80% of the caseload in state criminal courts[9], but only seven percent of the cases disposed of in intermediate appellate courts.[10] 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 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.[11] The

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[9] 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 Nov. 17, 2017).

[10] 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 Nov. 17, 2017).

[11] 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

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 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*

> 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 Nov. 17, 2017).

Standards, the primary responsibility of prosecutors is "to seek justice, which can only be achieved by the representation and presentation of the truth."[12]

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."[13] Forty-nine states, including New York, have adopted the ABA's Model Rules of Professional Conduct.[14] Ethical 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_standa

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[12] 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 Nov. 17, 2017).

[13] 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 Nov.17, 2017).

[14] *See State Adoption of the ABA Model Rules of Professional Conduct, available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Nov. 17, 2017). 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.

rds/prosecution_defense_function.authcheckdam.pdf (last visited Nov. 17, 2017). 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/ProsecutionFunctionFourthEdition.html (last visited Nov. 17, 2017). *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.[15] *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-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.

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[15] 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).

Dated: November 21, 2017

Respectfully submitted,
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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 6,981 words.

Dated: November 21, 2017

/s/Andrew Wachtenheim
ANDREW WACHTENHEIM
Counsel for Amici

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

When All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number 16-3145-ag

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 November 21, 2017.

I certify that all participants in the case that require service are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: November 21, 2017
New York, NY

/s/ Andrew Wachtenheim
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Counsel for Amici Curiae

APPENDIX

EXHIBITS 1-10:
Examples of § 260.10(1) Charges

EXHIBIT 11:
Statements of Interest of *Amici Curiae*

Exhibit 1

State of New York
Local Criminal Court

County of Essex
Town of Westport

The People of the State of New York

INFORMATION

-vs.-

[redacted] **Defendant**
DOB 01/05/1983

ACCUSATION

BE IT KNOWN THAT, by this Information. I Deputy William Allen, as the complainant herein, stationed at the Essex County Sheriff's Department, accuses [redacted] the above named defendant, with having committed the (Class A) MISDEMEANOR offense of ENDANGERING THE WELFARE OF A CHILD in violation of section 260.10 subdivision 01 of the Penal Law of the State of New York.

That on or about the 03 day of October, 2014 at about 15:03 in the town of Westport the defendant did intentionally, knowingly, and unlawfully commit the offense of ENDANGERING THE WELFARE OF A CHILD.

FACTS

A person is guilty of endangering the welfare of a child when he knowingly acts in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old.

TO WIT: The above defendant, [redacted] at the aforesaid time and date at State Route 22, Westport, Essex County, New York did Drive a 2005 Ford Focus knowing her license was suspended with her 4 year old (06-18-2010)daughter in the vehicle. All contrary to the provisions of the statute in such case made and provided.

The above allegations of fact are made by the complainant herein on direct knowledge and/or with the sources of complainant's information and the grounds for belief being the attached supporting depositions of.

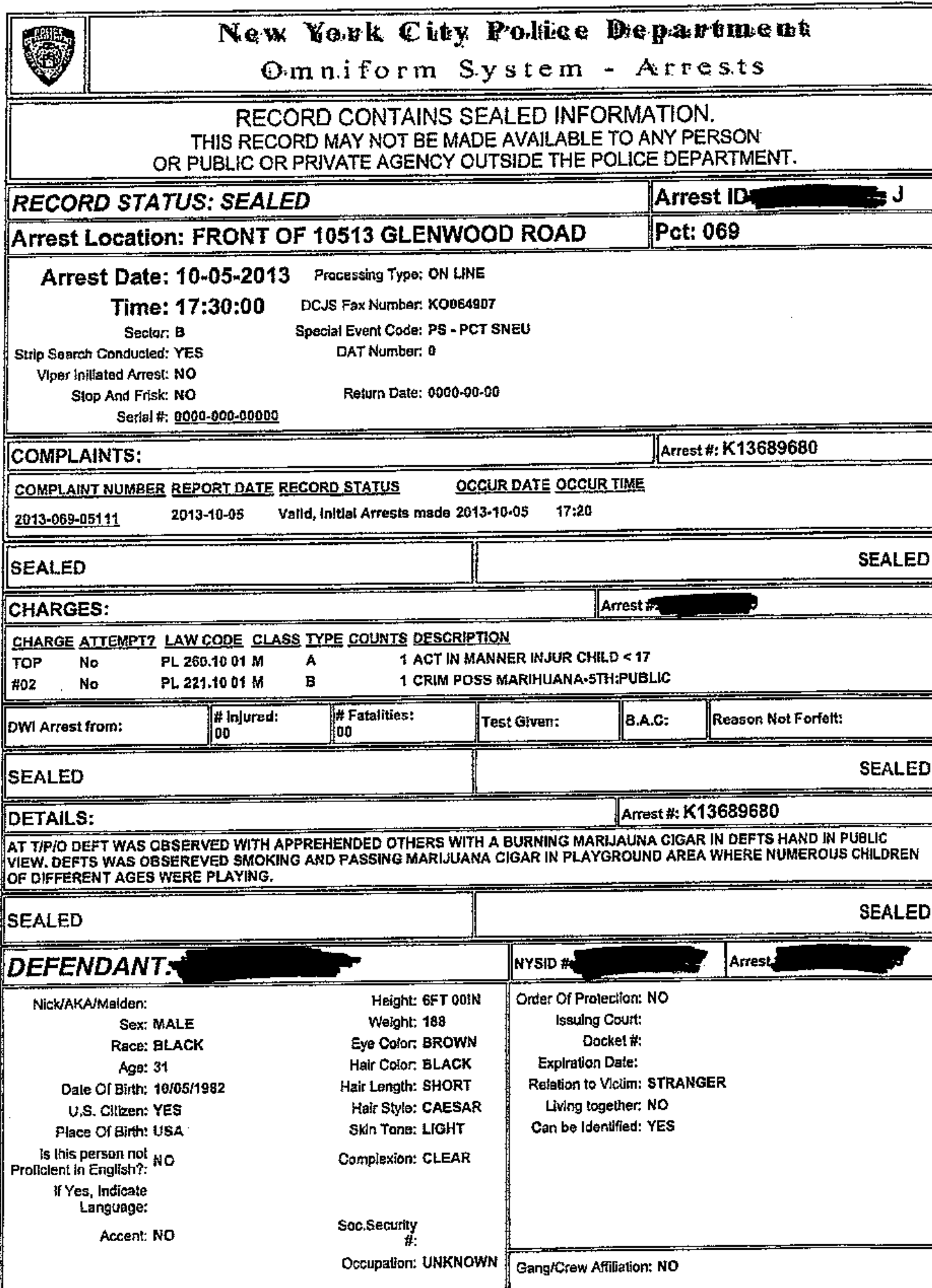
NOTICE

In a written instrument, any person who knowingly makes a false statement which such person does not believe to be true has committed a crime under the laws of the State of New York punishable as a class A Misdemeanor.

Affirmed under penalty of perjury
this 03 day of October 2014.
-or-
Subscribed and Sworn to before me
this day of 20 .

Deputy William Allen [signature]
Complainant
Deputy William Allen

Exhibit 4



New York City Police Department

Omniform System - Arrests

RECORD CONTAINS SEALED INFORMATION.
THIS RECORD MAY NOT BE MADE AVAILABLE TO ANY PERSON
OR PUBLIC OR PRIVATE AGENCY OUTSIDE THE POLICE DEPARTMENT.

RECORD STATUS: SEALED | Arrest ID: [redacted] J

Arrest Location: FRONT OF 10513 GLENWOOD ROAD | Pct: 069

Arrest Date: 10-05-2013
Time: 17:30:00
Sector: B
Strip Search Conducted: YES
Viper Initiated Arrest: NO
Stop And Frisk: NO
Serial #: 0000-000-00000

Processing Type: ON LINE
DCJS Fax Number: KO064907
Special Event Code: PS - PCT SNEU
DAT Number: 0
Return Date: 0000-00-00

COMPLAINTS: | Arrest #: K13689680

COMPLAINT NUMBER	REPORT DATE	RECORD STATUS	OCCUR DATE	OCCUR TIME
2013-069-05111	2013-10-05	Valid, Initial Arrests made	2013-10-05	17:20

SEALED | SEALED

CHARGES: | Arrest #: [redacted]

CHARGE	ATTEMPT?	LAW CODE	CLASS	TYPE	COUNTS	DESCRIPTION
TOP	No	PL 260.10 01	M	A	1	ACT IN MANNER INJUR CHILD < 17
#02	No	PL 221.10 01	M	B	1	CRIM POSS MARIHUANA-5TH:PUBLIC

DWI Arrest from:	# Injured:	# Fatalities:	Test Given:	B.A.C:	Reason Not Forfeit:
	00	00			

SEALED | SEALED

DETAILS: | Arrest #: K13689680

AT T/P/O DEFT WAS OBSERVED WITH APPREHENDED OTHERS WITH A BURNING MARIJAUNA CIGAR IN DEFTS HAND IN PUBLIC VIEW. DEFTS WAS OBSEREVED SMOKING AND PASSING MARIJUANA CIGAR IN PLAYGROUND AREA WHERE NUMEROUS CHILDREN OF DIFFERENT AGES WERE PLAYING.

SEALED | SEALED

DEFENDANT: [redacted] | NYSID #: [redacted] | Arrest: [redacted]

Nick/AKA/Maiden:
Sex: MALE
Race: BLACK
Age: 31
Date Of Birth: 10/05/1982
U.S. Citizen: YES
Place Of Birth: USA
Is this person not Proficient in English?: NO
If Yes, Indicate Language:
Accent: NO

Height: 6FT 00IN
Weight: 188
Eye Color: BROWN
Hair Color: BLACK
Hair Length: SHORT
Hair Style: CAESAR
Skin Tone: LIGHT
Complexion: CLEAR
Soc.Security #:
Occupation: UNKNOWN

Order Of Protection: NO
Issuing Court:
Docket #:
Expiration Date:
Relation to Victim: STRANGER
Living together: NO
Can be Identified: YES

Gang/Crew Affiliation: NO

D1

Identification ID: NYS DMV Non-Driver Photo Identification
Identification #: 881413906
Physical Condition: APPARENTLY NORMAL
Lic/Permit Type:
Drug Used: MARIJUANA/HASHISH
Lic/Permit No:

Name:
Identifiers:

LOCATION	ADDRESS	CITY	STATE/CNTRY	ZIP	APT/ROOM	PCT
HOME-PERMANENT	[redacted]					069

Phone # and E-Mail Address:

N.Y.C.H.A. Resident: YES N.Y.C. Housing Employee: NO On Duty: NO
Development: BREUKELEN N.Y.C. Transit Employee: NO

Physical Force: NONE

Gun:
Weapon Used/Possessed: NONE
Non-Firearm Weapon:
Other Weapon Description:
Make:
Color:
Caliber:
Type:
Discharged: NO
Recovered:
Serial Number Defaced:
Serial Number:

Used Transit System: NO
Station Entered:
Time Entered:
Metro Card Type:
Metro Card Used/Poses:
Card #:

CRIME DATA	DETAILS
MODUS OPERANDI	UNKNOWN
ACTIONS TOWARD VICTIM	UNK
CLOTHING	ACCESSORIES - SHORTS - BLACK
CLOTHING	FOOTWEAR - SNEAKERS - WHITE
CLOTHING	OUTERWEAR - T-SHIRT OR TANK TOP - WHITE
CLOTHING	HEADGEAR - UNK - UNKNOWN COLOR
CHARACTERISTICS	UNKNOWN
BODY MARKS	-UNKNOWN
BODY MARKS	ARM -TATOO WITH PICTURE ONLY - DESCRIBE:SPIDER
IMPERSONATION	UNKNOWN

SEALED SEALED

JUVENILE DATA:

Arrest #: K13689680

Juvenile Offender:
Number Of Priors: 0
School Attending:
Mother's Maiden Name:
Relative Notified:
Name:
Phone Called:
Time Notified:
Personal Recog:

SEALED SEALED

ASSOCIATED ARRESTS:

Arrest #: [redacted]

ARREST ID	COMPLAINT #
[redacted]	

SEALED	SEALED

DEFENDANTS CALLS:	Arrest #[redacted]

CALL #	NUMBER DIALED	NAME CALLED
1	--	REFUSED

SEALED	SEALED

INVOICES:	Arrest #[redacted]

INVOICE#	COMMAND	PROPERTY TYPE	VALUE
3000280798	069	MARIJUANA/HASHISH	UNKNOWN

SEALED	SEALED

ARRESTING OFFICER: POM PHILOGEN BREVILLE	Arrest #: K13689680

Tax Number: 940974
Other ID (non-NYPD): 940974
Shield: 3121
Department: NYPD
Command: 069

On Duty: YES
In Uniform: YES
Squad: NS
Chart: 36
Primary Assignment:

Force Used: NO
Type:
Reason:
Officer Injured: NO

SEALED	SEALED

	Tax #:	Command:	Agency:
Arresting Officer Name: POM BREVILLE, PHILOGEN	940974	069	NYPD
Supervisor Approving: SGT BADILLO ABRAHA	936162	069	NYPD
Report Entered by: POM BREVILLE, PHIL	940974	069	NYPD

END OF ARREST REPORT
K13689680

Exhibit 5

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-against-

[redacted],

Defendant.

MISDEMEANOR

Police Officer Rosa Olivo, Shield 31835 of the 19th Precinct, states as follows:

The defendant is charged with:

1	PL 260.10(1)	Endangering the Welfare of a Child (defendant #1: 1 count)
2	PL 110/120.00(1)	Attempted Assault in the Third Degree (defendant #1: 1 count)
3	PL 110/145.00(1)	Attempted Criminal Mischief in the Fourth Degree (defendant #1: 1 count)
4	PL 240.20(1)	Disorderly Conduct (defendant #1: 1 count)
5	PL 240.26(1)	Harassment in the Second Degree (defendant #1: 1 count)

On or about September 28, 2013 at about 5:18 P.M., at [redacted] in the County and State of New York, the defendant knowingly acted in a manner likely to be injurious to the physical, mental, and moral welfare of a child less than seventeen years old; the defendant, with intent to cause physical injury to another person, attempted to cause such injury to another person; the defendant attempted to intentionally damage the property of another while having no right to do so and no reasonable grounds to believe that he had such a right; the defendant, with intent to cause public inconvenience, annoyance and alarm and recklessly creating a risk thereof, engaged in fighting and in violent, tumultuous and threatening behavior; the defendant, with intent to harass, annoy and alarm another, subjected that person to physical contact and attempted and threatened to do the same.

The factual basis for these charges are as follows:

I am informed by [redacted], who is a store manager at [redacted] at the above location, that she observed the defendant yell and swing his backpack around hitting two cash registers in the store and knock various items off the cash register station. I am further informed by [redacted] that the defendant not only hit but also knocked one of the cash registers entirely off its register station and on to the ground.

2529566

CRIMINAL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

-against-

[REDACTED],

Defendant.

MISDEMEANOR

I am further informed by [REDACTED] that she is a custodian of the registers and the defendant did not have permission or authority to hit them or damage them. [REDACTED] also informs me that the location is a store open to the public and had customers in the store at the time of the above incident.

I am informed by [REDACTED], of an address known to the District Attorney's Office, that she was sitting with her nine year old daughter, [REDACTED], next to the cash registers. I am further informed by Ms. [REDACTED] that she observed the defendant knock various items over and that, following this, she observed her daughter started crying and had a red mark on her right hip. Ms. [REDACTED] also informs me that during the commotion described above, she was struck with something, causing redness and red welt on her back.

False statements made in this written instrument are punishable as a class A misdemeanor pursuant to section 210.45 of the Penal Law, and as other crimes.

Police Officer Rosa Olivo

09/28/13 Date

2230 hrs Time

Exhibit 6

State of New York | County of Monroe | Town of Greece

The People of the State of New York
against

[redacted] — Defendant | 5 — DOB

INFORMATION
Endangering the Welfare of a Child
New York State Penal Law
Section 260.10 Sub 1
Class A Misdemeanor

THAT Officer John Fogarty Of the Town of Greece Police Department

By this **INFORMATION**, makes written accusation as follows:

THAT Rachael ... Of

did, at or about 11:19 ☐ AM ☒ PM Date: 07/02/2014

at: 3701 Mt. Read Bl., Town of Greece, New York did commit the offense of Endangering the Welfare of a Child, a **Class A Misdemeanor**, in violation of **Section 260.10 Sub** 1 of the New York State Penal Law.

COUNT ONE: A person is guilty of endangering the welfare of a child when:

☒ **Sub 1:** knowingly act in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health; and/or

☐ **Sub 2:** being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten, three and seven of the family court act.

Additionally, said child, 3 children listed below (DOB) - was endangered by the defendant as described below.

The facts upon which this **INFORMATION** is based are as follows;

On or about the above date and time, at the above location, the aforesaid defendant did:

3 Counts: On the above date and time, the defendant commited the crime of Petit Larceny at the Wegmans located at [redacted] while she was with her 3 children, [redacted] ([redacted]2006), and [redacted] ([redacted]2008), [redacted] Jr. ([redacted]07), [redacted]

ALL CONTRARY TO THE PROVISIONS OF THE STATUTE IN SUCH CASE MADE AND PROVIDED.

WHEREFORE, the **Deponent** requests that the **Defendant** be dealt with in accordance with law.

Any applicable depositions and/or certified records are attached hereto and made part of this **Information**

***VERIFICATION BY SUBSCRIPTION & NOTICE, NYS PENAL LAW SECTION 210.45** It is a Class A Misdemeanor under the laws of the State of New York, for a person, in and by a written instrument, to knowingly make a false statement, or to make a statement which such person does not believe to be true.*

CR# 14-041017

ARRAIGNMENT DATE: 07/03/2014

AFFIRMED UNDER PENALTY OF PERJURY THIS:

2nd **DAY OF** July, 2014

DEPONENT

Please take notice that the People intend to offer at the trial of the defendant(s):

☐ Evidence of a statement by the defendant made to a public servant: ☐ oral ☐ written (see attached)

Time: Date: Place:

☐ Testimony identifying the defendant as the person who committed the offense charged, to be given by a witness who has previously identified the defendant as such.

Time: Date: Place:

Exhibit 7

State of New York | County of Monroe | Town of Greece

The People of the State of New York
against

[redacted] ____ ____
Defendant DOB

INFORMATION
Endangering the Welfare of a Child
New York State Penal Law
Section 260.10 Sub 1
Class A Misdemeanor

THAT Daniel McLaughlin Of the Greece Police Department

By this **INFORMATION**, makes written accusation as follows:

THAT [redacted] Of ____________

did, at or about 6:30 ☐ AM ☒ PM Date: 8/22/2014

at: 100 Elm Ridge Center Dr, Town of Greece, New York did commit the offense of Endangering the Welfare of a Child, a Class A Misdemeanor, in violation of Section 260.10 Sub 1 of the New York State Penal Law.

COUNT ONE: A person is guilty of endangering the welfare of a child when:

☒ **Sub 1:** knowingly act in a manner likely to be injurious to the physical, mental or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health; and/or

☐ **Sub 2:** being a parent, guardian or other person legally charged with the care or custody of a child less than eighteen years old, he fails or refuses to exercise reasonable diligence in the control of such child to prevent him from becoming an "abused child," a "neglected child," a "juvenile delinquent" or a "person in need of supervision," as those terms are defined in articles ten, three and seven of the family court act.

Additionally, said child, [redacted] (DOB) 6/9/14 was endangered by the defendant as described below.

The facts upon which this **INFORMATION** is based are as follows;
On or about the above date and time, at the above location, the aforesaid defendant did:

Commit the crime of petit larceny while she had her two month old son in her presence. Such act is likely injurious to the mental and moral welfare of her two month old son.

ALL CONTRARY TO THE PROVISIONS OF THE STATUTE IN SUCH CASE MADE AND PROVIDED.
WHEREFORE, the **Deponent** requests that the **Defendant** be dealt with in accordance with law.
Any applicable depositions and/or certified records are attached hereto and made part of this **Information**

VERIFICATION BY SUBSCRIPTION & NOTICE, NYS PENAL LAW SECTION 210.45 It is a Class A Misdemeanor under the laws of the State of New York, for a person, in and by a written instrument, to knowingly make a false statement, or to make a statement which such person does not believe to be true.

CR# 14-052844

ARRAIGNMENT DATE: ____________

AFFIRMED UNDER PENALTY OF PERJURY THIS:

22 DAY OF August, 2014

Dan McLaughlin
DEPONENT

Please take notice that the People intend to offer at the trial of the defendant(s):

☐ Evidence of a statement by the defendant made to a public servant: ☐ oral ☐ written (see attached)
Time: Date: Place:

☐ Testimony identifying the defendant as the person who committed the offense charged, to be given by a witness who has previously identified the defendant as such.
Time: Date: Place:

Exhibit 8

ENDANGERING THE WELFARE OF A CHILD

CR# 14-19762

TOWN OF WEBSTER
TOWN COURT
INFORMATION/COMPLAINT

STATE OF NEW YORK
COUNTY OF MONROE
TOWN OF WEBSTER

THE PEOPLE OF THE STATE OF NEW YORK V. DEFENDANT(S)

[redacted] 233 East Spruce St E. Rochester NY 14445

NAME ADDRESS

NAME ADDRESS

Your complainant, Ofc. D. Pietrantoni being duly sworn, deposes and states that I work at the premises known as Webster Police Dept in the Town of Webster, State of New York

That on the 11 day of August 20 14 at approximately 4:29 pm at the premises known as 925 Holt Rd in the Town of Webster, State of New York, I accuse said defendant(s) Desiree M. Ricci of intentionally, committing the class A misdemeanor of ENDANGERING THE WELFARE OF A CHILD in violation of Section 260.10 subd(s) 1 of the Penal Law of the State of New York. The factual basis for the above being UPON PERSONAL KNOWLEDGE or UPON INFORMATION AND BELIEF as follows:

COMPLAINANT STATES THAT ON OR ABOUT THE ABOVE LISTED DATE, TIME AND PLACE THE DEFENDANT(S)
While the defendant was exiting Kohl's Department Store with stolen merchandise, the defendant was also acting as the guardian of [redacted]'s child; [redacted], date of birth 6/4/2011. The defendant [redacted] was walking out of the store holding the hand of [redacted] in and in possession of stolen property.

That by the above actions the defendant(s) did knowingly act in a manner likely to be injurious to the physical, mental or moral welfare of a child.
Verification by subscription and notice pursuant to CPL Section 100.30 subd. 1, para. d.
***NOTICE: FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW OF THE STATE OF NEW YORK, this** 11 **day of** August , **20** 14

x Ofc. D. Pi[signature]

☐ Attached is a statement made by the defendant(s) to a public servant.
☐ This information based on the supporting deposition(s) of: __________

REV 11/97

Exhibit 9

STATE OF NEW YORK
COUNTY OF MONROE
TOWN OF IRONDEQUOIT
ROCHESTER, NEW YORK

DOMESTIC OFFENSE
CR # 14-45767
INFORMATION/BELIEF

THE PEOPLE OF THE STATE OF NEW YORK
Vs.

D.O.B.:

NEW YORK STATE PENAL LAW
CHARGE: Endanger the Welfare of a Child
SECTION: 260.10 Sub 1
CLASS: A Misdemeanor
****Two Counts****

Be it known, by this information/belief, that Officer Kelly Kreiser and Officer Joseph Coon as the complainants herein, accuses Jessica , the above named defendant, with having committed the offense of Endangering the welfare of a child in violation of section 260.10 sub 1 of the New York State Penal Law on September 20, 2014 at approximately 8:15 PM while at 2255 E Ridge Rd in the Town of Irondequoit, County of Monroe, State of New York.

A person is guilty of Endangering the welfare of a child when he knowingly acts in a manner likely to be injurious to the physical, mental, or moral welfare of a child less than seventeen years old or directs or authorizes such child to engage in an occupation involving a substantial risk of danger to his life or health.

The facts upon which this case is based are as follows:

The above named defendant did at the aforesaid time and place knowingly leave her two children, .DOB 04/06/2005 and DOB 10/13/2008 in her 2001 Buick Le Sabre bearing State of New York Registration in the parking lot of 2255 E Ridge Rd. Said defendant left the two front windows of the vehicle rolled down, with the keys in the ignition while she was inside of the Rainbow Store for approximately ten minutes. Said defendant was parked in a parking space approximately 150 feet from the storefront and could not easily see the vehicle from inside of the store. Your complainants did speak with , who told your complainants that he was nine years old and his brother, who was asleep in the rear passenger seat was five years old. Your complainants were with the children for approximately ten minutes before said defendant came out of the store.

These allegations are based upon an investigation conducted by your complainants in their official capacity as an Irondequoit Police Officers, and the oral admissions made by the defendant.

Verification of this instrument is made pursuant to Sec 100.30 (d) of the NYS Criminal Procedure Law, and I am aware that knowingly making a false written statement is a Class A Misdemeanor pursuant to Section 210.45 of the NYS Penal Law

Date: September 20, 2014 Complainants:

Officer Kelly Kreiser

Officer Joseph Coon

Exhibit :

STATE OF NEW YORK
COUNTY OF MONROE
ROCHESTER CITY COURT

Rochester Police Department
Supporting Deposition
RPD 1270

CR# 14-260103
PAGE 1 OF 1

IN THE MATTER OF DEFENDANTS/RESPONDENTS LISTED BELOW:

1. [redacted] — DEFENDANT'S/RESPONDENT'S NAME — DEFENDANT'S/RESPONDENT'S ADDRESS
2. DEFENDANT'S/RESPONDENT'S NAME — DEFENDANT'S/RESPONDENT'S ADDRESS
3. DEFENDANT'S/RESPONDENT'S NAME — DEFENDANT'S/RESPONDENT'S ADDRESS

CHARGED WITH ALLEGED OFFENSES, TO WIT:

[redacted] — DEPONENT'S NAME
70 YOA / / — DATE OF BIRTH
435 E. Henrietta RD 753-6952 — DEPONENT'S ADDRESS AND PHONE NUMBER

DEPONENT DEPOSES AND SAYS:

my name's [redacted], I'm 70 years of age and I'm a CPS employee. On Sunday 9/28/14, I was investigating a case at 318 Epworth st where the above defendant was residing with her 2 children. When I arrived at the location I found 2 children there one born in 2004 another in 2010 alone, I asked the oldest where his mother was and he gave me a phone # which I called and reached her. She was uncooperative and refused to answer any questions as to why the children were left alone and refused to let me in to see if the residence was clean and see if there was any food in the home. I feel these children are in danger and not in a caring environment and feel the situation endangers child welfare. I would like to see the mother arrested for endangering the welfare.

NOTICE: FALSE STATEMENTS MADE HEREIN ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE NEW YORK STATE PENAL LAW.

[signature] 9/28/14
DEPONENT'S SIGNATURE — DATE

[signature] 9/28/14
WITNESS SIGNATURE — DATE

RPD 1270 REV. 02/03

Exhibit 9

CRIMINAL COURT OF THE CITY OF NEW YORK
PART APAR COUNTY OF KINGS

STATE OF NEW YORK
COUNTY OF KINGS

THE PEOPLE OF THE STATE OF NEW YORK

V

ASSISTANT DISTRICT ATTORNEY JAYHOUN REZAI OF THE KINGS COUNTY DISTRICT ATTORNEY'S OFFICE SAYS THAT ON OR ABOUT 2016 AT APPROXIMATELY 05:40 PM AT COUNTY OF KINGS, STATE OF NEW YORK,

THE DEFENDANT COMMITTED THE OFFENSE(S) OF:

PL 260.10(1) ENDANGERING THE WELFARE OF A CHILD (DQO) (2 COUNTS)

IN THAT THE DEFENDANT DID:

KNOWINGLY ACT IN A MANNER LIKELY TO BE INJURIOUS TO THE PHYSICAL, MENTAL OR MORAL WELFARE OF A CHILD LESS THAN SEVENTEEN YEARS OLD OR DIRECT OR AUTHORIZE SUCH CHILD TO ENGAGE IN AN OCCUPATION INVOLVING A SUBSTANTIAL RISK OF DANGER TO HIS OR HER LIFE OR HEALTH.

THE SOURCE OF DEPONENT'S INFORMATION AND THE GROUNDS FOR DEPONENT'S BELIEF ARE AS FOLLOWS:

THE DEPONENT IS INFORMED BY Y, A CHILD PROTECTIVE SPECIALIST FOR THE ADMINISTRATION OF CHILDREN'S SERVICES THAT, AT THE ABOVE TIME AND PLACE, THE INFORMANT OBSERVED AND AT THE ABOVE LOCATION ALONE AND WITHOUT ADULT SUPERVISION OR ACCESS TO A TELEPHONE.

THE DEPONENT IS FURTHER INFORMED BY THE INFORMANT THAT, BASED UPON SIZE AND STATURE, IN THAT WAS APPROXIMATELY 56 INCHES TALL AND WEARING CHILDREN'S CLOTHING, WAS APPROXIMATELY NINE YEARS OLD.

THE DEPONENT IS FURTHER INFORMED BY THE INFORMANT THAT, BASED UPON SIZE AND STATURE, IN THAT WAS APPROXIMATELY 44 INCHES TALL AND WEARING CHILDREN'S CLOTHING, WAS APPROXIMATELY SIX YEARS OLD.

FALSE STATEMENTS MADE IN THIS DOCUMENT ARE PUNISHABLE AS A CLASS A MISDEMEANOR PURSUANT TO SECTION 210.45 OF THE PENAL LAW.

03-08-2016

DATE SIGNATURE

3/8/2016 5:19:58 PM

Exhibit 10

Docket Number______________

CITY OF BUFFALO

COUNTY OF ERIE STATE OF NEW YORK

CD #:15-[redacted]

The People of the State of New York

vs.

[redacted] BUSH DOB: [redacted]

[redacted] COLFAX AV

BUFFALO, NY 14215

INFORMATION / COMPLAINT

I, **Police Officer TOMMY CHAMPION**, a police officer herein, accuse [redacted] **L. BUSH**, the DEFENDANT of this action, and charge that on or about Tuesday, October 13, 2015 at [redacted] KENSINGTON AV in the CITY OF BUFFALO, County of ERIE, at about 08:06 AM, said DEFENDANT did commit the offense of:

ENDANGERING THE WELFARE OF A CHILD

a class A MISDEMEANOR contrary to the provisions of section **260.10, subsection(s)** 01 of the Penal Law of the State of New York.

THE SAID DEFENDANT, AT THE AFORESAID TIME AND PLACE, DID KNOWINGLY ACT IN A MANNER LIKELY TO BE INJURIOUS TO THE PHYSICAL, MENTAL OR MORAL WELFARE OF CHILDREN LESS THAN SEVENTEEN YEARS OLD OR DIRECTED OR AUTHORIZED SUCH CHILD TO ENGAGE IN AN OCCUPATION INVOLVING A SUBSTANTIAL RISK OF DANGER TO HIS LIFE OR HEALTH. In that the defendant did, while at [redacted] Kensington, yell and scream and did knock items off of the shelves in the presence of two minor children who were with her.

jlm

ALL CONTRARY TO THE PROVISIONS OF THE STATUTE IN SUCH CASES MADE AND PROVIDED. THE ABOVE ALLEGATIONS OF FACT ARE MADE BY THE COMPLAINANT HEREIN ON INFORMATION AND BELIEF WITH THE SOURCE OF THE COMPLAINANT'S INFORMATION AND THE GROUNDS FOR HIS BELIEF BEING THE DIRECT KNOWLDEGE OF [redacted] OTTMAN.

Therefore, the complainant requests that said defendant be dealt with according to the provisions of the Criminal Procedure Law, and according to law.

NOTICE

(Penal Law, Section 210.45)

It is a crime, punishable as a Class A Misdemeanor under the Laws of the State of New York, for a person, in a written instrument, to knowingly make a false statement, or to make a statement which such person does not believe to be true.

Complainant

Subscribed and sworn to me this
31st of August, 2016

Exhibit 11

THE BRONX DEFENDERS

Amicus **The Bronx Defenders** provides innovative, holistic, and client-centered criminal defense, removal defense, family defense, social work support and other civil legal services and advocacy to indigent Bronx residents. Founded in 1997, it represents over 35,000 individuals each year and reaches hundreds more through outreach programs and community legal education. The Bronx Defenders has been nationally recognized as a pioneer and leader in holistic representation, focusing on addressing the underlying issues that bring clients into contact with the criminal justice system and continuing to assist clients long after their criminal case is over. The Bronx Defenders has advised its noncitizen clients of the immigration consequences of criminal charges and contemplated dispositions since long before the Supreme Court recognized the Sixth Amendment obligation of defense counsel to do so. The Bronx Defenders also represents immigrants accused or convicted of crimes in removal proceedings and in applications for immigration benefits. It therefore has an urgent and direct interest in the proper classification of New York penal offenses under the immigration laws.

BROOKLYN DEFENDER SERVICES

Amicus **Brooklyn Defender Services (“BDS”)** represents more than 40,000 indigent Brooklyn residents every year in criminal, family, and immigration-related proceedings. Our mission is to serve people without the economic means to

hire an attorney. Founded in 1996, BDS has grown into one of the largest providers of criminal defense, family defense, and immigration legal services in New York State. Our criminal and family defense attorneys routinely represent clients charged under New York Penal Law § 260.10(1), endangering the welfare of a child. Our immigration attorneys regularly advise our noncitizen clients about the potential immigration consequences of § 260.10(1) convictions on deportability and eligibility for lawful status and other immigration benefits. Given our position in the legal services community in Kings County, we have a particular interest in a fair and correct application of § 260.10(1) in immigration proceedings, and also unique insight into how this statute is utilized by law enforcement officers and prosecutors against our clients.

ESSEX CONUNTY PUBLIC DEFENDER'S OFFICE

Amicus **Essex County Public Defender's Office** is a governmental indigent criminal defense provider in Essex County, New York. We represent individuals facing criminal charges before all courts in the county. Essex County is within close proximity to the U.S.-Canadian border and a bulk of its landmass is within—what what U.S. Customs and Border Patrol ("Border Patrol") labels—the "zone of security," which extends inward for 100 miles from any external boundary. Essex County is a frequent host to Border Patrol checkpoints on Interstate 87 South, in the Town of North Hudson. Additionally, the tourism and hospitality industry of

Essex County employs a large number of seasonal noncitizen workers. As such, our attorneys are routinely called upon to advise noncitizen defendants about the immigration consequences of arrests and convictions. Our experiences with the criminal justice system show that much of the conduct prosecuted under New York's misdemeanor child endangerment statute, New York Penal Law § 260.10(1), is not child abuse. We have a keen interest in clarifying this so that we can accurately advise our immigrant clients charged under this statute.

IMMIGRANT DEFENSE PROJECT

Amicus **Immigrant Defense Project ("IDP")** is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is the author and publisher of the treatise, *Representing Immigrant Defendants in New York* (5th ed, 2011), and frequently appears as *amicus curiae* before New York State courts regarding immigration and criminal issues specific to New York law (*e.g.*, *People v. Baret*, 23 N.Y.3d 777 (N.Y. 2014); *People v. Peque*, 22 N.Y.3d 168 (N.Y. 2013) (cited in *Peque*, 22 N.Y.3d at 23, 25 n.4)) and before the U.S. Supreme Court and Courts of Appeals regarding the application of the categorical approach in immigration adjudications (*e.g.*, *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Padilla v. Kentucky*, 555

U.S. 1169 (2010); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008)). IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges.

MONROE COUNTY PUBLIC DEFENDER'S OFFICE

Amicus **Monroe County Public Defender's Office** represents defendants in nearly all types of criminal matters (violations, misdemeanors, and non-violent and violent felony offenses), from arraignment on through plea, trial, and direct appeal. We also represent litigants in Family Court. The County of Monroe is located in western New York and has a population in excess of 700,000. The County includes the City of Rochester, the third largest city in New York. We have two attorneys trained by the New York State Defenders Association to advise our immigrant clients about the potential immigration consequences of guilty pleas. Over the years we have defended a multitude of clients, including immigrant clients, charged under New York Penal Law § 260.10(1), endangering the welfare of a child. We have experience with the use of this statute by local police and prosecutors. We also have a significant interest in accurately advising our immigrant clients about how pleas under this statute can impact immigration status.

NEIGHBORHOOD DEFENDER SERVICE OF HARLEM

Amicus **Neighborhood Defender Service of Harlem ("NDS")** was founded in 1990 to represent residents of Northern Manhattan facing charges in New York County criminal courts. We represent 10,000 criminal defendants annually, including a significant number of noncitizens requiring specific advice about the immigration consequences of criminal pleas and other dispositions. Our immigration attorneys also represent noncitizen individuals in deportation and other immigration-related proceedings. NDS advocates also represent parents facing abuse and neglect charges in New York City family court. We have a significant interest in clarifying how child endangerment cases are prosecuted against our clients.

QUEENS LAW ASSOCIATES

Amicus **Queens Law Associates ("QLA")** is a public-private criminal defense provider in Queens County, New York. We represent individuals facing criminal charges in criminal and supreme courts in Queens, County. Our immigration attorneys advise noncitizen defendants about immigration consequences of arrests and convictions. They also represent noncitizens in deportation proceedings and immigration appeals. Our office works with one of the most diverse client populations in the United States; the 2010 U.S. Census found that 45% of Queens County residents are foreign-born. We have a significant

interest in clarifying that much of the conduct prosecuted under New York's misdemeanor child endangerment statute, New York Penal Law § 260.10(1), is not child abuse.