No. 16-3480

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MOHAMMED HASSAN FAIZAL KHALID

Petitioner,

v.

JEFFERSON B. SESSONS, III, Attorney General,

Respondent.

On Petition For Review of a Decision of the Board of Immigration Appeals
Agency No. A [redacted] (Non-Detained)

BRIEF OF *AMICI CURIAE* CENTER FOR FAMILY REPRESENTATION, HER JUSTICE, SANCTUARY FOR FAMILIES, THE DOOR'S LEGAL SERVICES CENTER, COLUMBIA LAW SCHOOL IMMIGRANTS' RIGHTS CLINIC, IMMIGRANT RIGHTS CLINIC AT NYU SCHOOL OF LAW, KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC AT BENJAMIN N. CARDOZO SCHOOL OF LAW, BROOKLYN DEFENDER SERVICES, MONROE COUNTY PUBLIC DEFENDER'S OFFICE, NEIGHBORHOOD DEFENDER SERVICE OF HARLEM, NEW YORK COUNTY DEFENDER SERVICES, THE BRONX DEFENDERS, THE LEGAL AID SOCIETY, CENTER FOR CONSTITUTIONAL RIGHTS, IMMIGRANT DEFENSE PROJECT, AND PROFESSORS CHRIS GOTTLIEB, KIM TAYLOR-THOMPSON, MARTIN GUGGENHEIM, MICHAEL WISHNIE, RANDY HERTZ, AND TONY THOMPSON IN SUPPORT OF PETITIONER AND IN SUPPORT OF GRANTING THE PETITION FOR REVIEW

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors, immigrants' rights groups, and legal services organizations that represent adults and children who are physically separated from their families for months and years because of criminal charges, deportation proceedings, and child welfare system involvement. Our clients experience pre-trial incarnation and post-disposition imprisonment as defendants in criminal and family court; detention by U.S. Immigration Enforcement or the Office of Refugee Resettlement, often without judicial review, as they go through deportation proceedings; and foster care placement and other separation as they go through abuse, neglect, custody, and visitation proceedings before the family courts. Though these periods of temporary separation come with no change to the legal relationship between a parent and child, the Board of Immigration Appeals ("BIA") has nevertheless decided, erroneously, that Congress intended to deny U.S. citizenship to lawful permanent resident youth who are separated from their parents under these circumstances. The BIA's interpretation is incorrect, and interferes with well-established constitutional rights of parents and children.

Every year, thousands of parents and children nationwide are forcibly separated for periods of time due to criminal incarceration, immigration and juvenile detention, and child welfare system involvement. They include lawful

[1] For more information about *amici*¸ please refer to the individual statements of interest in the Appendix.

permanent resident youth who might derive U.S. citizenship through a parent under the derivative citizenship statute, 8 U.S.C. §1431 [hereinafter "§1431" or "the derivative citizenship statute"]. In the Petitioner's case, the BIA held that "legal custody" and "physical custody" are separate elements of the derivative citizenship statute, and that a green card holder who is a minor and otherwise eligible to derive citizenship through a parent cannot do so merely because they temporarily do not live under the same roof, even where that forced, temporary separation comes with no modification whatsoever to their legal or personal relationship.

Amici agree with the Petitioner's principal arguments that §1431's plain language unambiguously forecloses the government's interpreting "legal" and "physical" custody as separate elements, and that "legal and physical custody" is a unitary concept that is not affected by a temporary separation where there has been no judgment or adjudication of a change in the relationship between a parent and child. We write separately to ensure that the Court understands that if it nevertheless finds the derivative citizenship statute ambiguous on this point, the rules of statutory interpretation—specifically, the doctrine of constitutional avoidance and the rule of lenity—foreclose the government's interpretation in favor of the interpretation offered by the Petitioner and *amici*. The BIA's construction would have an impermissible effect on constitutionally-protected

parental rights and, because an alternative interpretation that passes constitutional muster exists, cannot stand.

SUMMARY OF ARGUMENT

Amici agree with the Petitioner that the plain language meaning of the term "legal and physical custody" in the derivative citizenship statute, 8 U.S.C. §1431, unambiguously forecloses the BIA's interpretation. Should this Court nevertheless find the statute ambiguous, this Court must apply relevant rules of statutory interpretation to resolve the ambiguity, and must conclude that the BIA's interpretation is incorrect and unauthorized by the statute. The doctrine of constitutional avoidance mandates that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *Jones v. United States*, 529 U.S. 848, 857 (2000) (internal citations and quotation marks omitted). In this instance, the BIA's interpretation abrogates constitutionally established rights that sit at the heart of the relationships between children and parents. By finding that a period of involuntary, temporary separation that, as the BIA itself acknowledges, does nothing whatsoever to alter the legal relationship between a child and parent, nonetheless precludes the derivation of citizenship as Congress intended, the BIA tramples the rights of children and parents experiencing incarceration, detention, and foster care placement. Given

that a more reasonable, alternative interpretation of the statute exists, it must be construed in this way to avoid unconstitutional application.

The rule of lenity likewise forecloses the BIA's interpretation. This time-honored rule requires that ambiguities in a statute that has criminal application be construed to narrow its punitive reach. This is true for solely criminal statutes, and statutes that have dual civil and criminal application—"hybrid" statutes—like the INA, including the very provision at issue here, §1431. If, after applying all other rules of statutory construction this Court nevertheless finds the derivative citizenship statute remains ambiguous, it must apply the last-resort rule of lenity to construe the statute as authorizing rather than restricting derivative citizenship.

STANDARD OF REVIEW

This Court reviews issues of citizenship *de novo*, and not under the deference framework of *Chevron, U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984). *See* 8 U.S.C. §1252(b)(5)(A); *Morales-Santana v. Lynch*, 804 F.3d 520, 525 (2d Cir. 2015) (*reversed in part on other grounds sub nom Sessions v. Morales-Santana*, __ U.S. __, 2017WL2507339 (2017)).

ARGUMENT

I. EVERY YEAR, INCARCERATION, JUVENILE DETENTION, IMMIGRATION DETENTION, AND FOSTER CARE PLACEMENT IMPOSE TEMPORARY PERIODS OF SEPARATION ON THOUSANDS OF FAMILIES ACROSS THE UNITED STATES

A. Thousands of Families Every Year Face Forced, Temporary Separation, with No Legal Change to the Relationship Between Family Members

In the adult criminal justice system, on average the United States holds 731,300 people in a county or city jail every day; annually, 10.9 million people are admitted into a jail.[2] In 2016, in New York City alone there were 61,000 admissions into Department of Corrections custody.[3] Of these admissions, 75% (45,750 people) were unable to pay bail or remanded, and consequently faced some length of pre-trial incarceration.[4] In the child welfare system, recent statistics show more than 400,000 children annually in foster care, with 240,000 children entering the foster care system every year.[5] The average time spent in foster care—

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[2] Office of Justice Programs, U.S. Dept. of Justice, *Jail Inmates in 2015* 1 (Dec. 2016), *available at* https://www.bjs.gov/content/pub/pdf/ji15.pdf (last visited June 23, 2017).

[3] Office of Criminal Justice, The City of New York, *Justice Brief: The Jail Population, Recent declines and opportunities for further reductions* 14 (2016) [hereinafter "City of New York *Justice Brief*"], *available at* https://www1.nyc.gov/assets/criminaljustice/downloads/pdfs/justice_brief_jailpopulation.pdf (last visited June 23, 2017).

[4] *Id.* at 11.

[5] Administration for Children and Families, U.S. Dept. of Health and Human Services, 23 *The AFCARS Report* 1, *available at*

which includes families who reunify and families who do not—is 20 months.[6] In the juvenile justice system, in 2014, there were 5,066 juveniles detained in New York State.[7] In Connecticut, as of June 2017 there are 572 juveniles (including 246 who are un-sentenced) detained in Connecticut's primary facility for housing sentenced inmates under the age of 21.[8] In Connecticut, the average juvenile sentence for boys adjudicated as delinquent and committed to the Department of Children and Family Services is eight months.[9] In the immigration system, in 2016 the federal government detained 352,882 people.[10] These thousands of individuals

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https://www.acf.hhs.gov/sites/default/files/cb/afcarsreport23.pdf (last visited June 23, 2017).

[6] *Id.* at 2.

[7] New York State Division of Criminal Justice Services, Office of Justice Research and Performance, *Statewide Juvenile Justice Indicators* (last updated July 2016), *available at* http://www.criminaljustice.ny.gov/crimnet/ojsa/jj-reports/jj-indicators-2010-2015.pdf (last visited June 23, 2017).

[8] Connecticut Department of Correction, *Research Legal Status within Correctional Facilities: Population Confined June 1, 2017* [hereinafter "Connecticut Correctional Facilities Research"], *available at* http://www.ct.gov/doc/lib/doc/PDF/MonthlyStat/Stat201706.pdf (last visited June 23, 2017).

[9] Jacqueline Rabe Thomas, The CT Mirror, *The state of Connecticut juvenile incarceration in 17 charts* (Sept. 30, 2015), *available at* https://ctmirror.org/2015/09/30/juvenile-justice-in-ct-in-17-charts/ (last visited June 23, 2017); Connecticut Department of Children and Family Services, *Connecticut Juvenile Training School*, *available at* http://www.ct.gov/dcf/cwp/view.asp?a=4606&q=539022 (last visited June 23, 2017).

[10] U.S. Immigration and Customs Enforcement, *DHS releases end of fiscal year 2016 statistics*, *available at* https://www.ice.gov/news/releases/dhs-releases-end-fiscal-year-2016-statistics (last visited June 23, 2017).

and families include LPR minors who will not derive citizenship through their parents under the BIA's interpretation of the derivative citizenship statute.

For these young people, a State court judge's decision to set bail or order other pre-trial custody, to order juvenile detention, or to place a child in foster care will determine whether they are citizens of the United States. For families experiencing immigration detention, derivative citizenship will depend on the government's unilateral decision to detain individuals for months, sometimes years, without the opportunity for third-party review or judicial oversight. *Cf. Diop v. Att'y Gen. of the United States*, 656 F.3d 221, 226 (3d Cir. 2011) (ICE detaining a man for 1072 days without an independent custody determination hearing). Such an outcome would be arbitrary and capricious and a violation of due process, particularly where the "interest" at issue is as "weighty" as citizenship status. *Landon v. Plasencia*, 459 U.S. 21, 35 (1982). The "history of the laws governing the derivative naturalization of children demonstrates clearly that Congress intended … to preserve the family unit and to keep families intact." *Nwozuzu v. Holder*, 726 F.3d 323, 329 (2d Cir. 2013).

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Where a serious consequence like the deprivation of citizenship is at issue

and the factors under consideration in the determinative proceeding speak only to an ancillary matter, this core requirement of due process is not fulfilled because the hearing is not "meaningful." *Matthews*, 424 U.S. at 333. *See infra* §I.C.

Moreover, the BIA's rule would lead to arbitrary results: a person "appearing before one official may suffer deportation, while an identically situated [person] appearing before another may" have his "right to stay in this country" recognized. *Judulang v. Holder*, 545 U.S. 42, 58 (2011). A person's citizenship status cannot be "dependent on circumstances so capricious and fortuitous[,]" *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947), or decided by "sport of chance." *Judulang*, 545 U.S. at 58 (internal quotation omitted). That is what the "'arbitrary and capricious' standard is designed to thwart." *Id.*

B. Systemically-Created, Forced, Temporary Separation Has a Hugely Disproportionate Impact on Black and Latino Families

In the adult criminal justice system, in 2016 88% of the New York City jail population was Black or Latino, even though Black and Latino people account for approximately 54% of the city's population.[11] In Connecticut, Black people are

[11] City of New York *Justice Brief, supra* note 2, at 12; City of New York Dept. of Correction, *Population Demographics Report*, *available at* https://www1.nyc.gov/assets/doc/downloads/pdf/FY17_1st_QUARTER_2016_demog.pdf (last visited June 23, 2017).

10% of the state population but 41% of the prison and jail population.[12] Nationally, in 2015 Black people accounted for 35% of the local jail population but 13.3% of the general population.[13]

In the child welfare system, the racial disparities are no less shocking. In New York City, 13.9 per 1,000 Black children are in foster care, 6.1 per 1,000 Latino children, and 1.1 per 1,000 White children.[14] In Connecticut, 60% of children in foster care are Black or Latino, while 25% of the state's child population is Black or Latino.[15] Nationally, Native American children are the most overrepresented in the child welfare system.[16]

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[12] Prison Policy Initiative, *Connecticut Profile: Racial and ethnic disparities in prison and jails* (Dec. 2016), *available at* https://www.prisonpolicy.org/graphs/disparities2010/CT_racial_disparities_2010.html (last visited June 23, 2017).

[13] Office of Justice Programs, U.S. Dept. of Justice, *Jail Inmates in 2015* 4 (Dec. 2016), *available at* https://www.bjs.gov/content/pub/pdf/ji15.pdf (last visited June 23, 2017); United States Census Bureau, *QuickFacts: United States* (2015), *available at* https://www.census.gov/quickfacts/table/PST045216/00 (last visited June 23, 2017).

[14] Office of Children & Family Services, New York State, *The OCFS Initiative to Address Racial Disproportionality in Child Welfare and Juvenile Justice* 30 (Jan. 19, 2011), *available at* https://www.nycourts.gov/ip/casa/training/ocfs-disproportionality.pdf (June 23, 2017).

[15] Foster Care, *Facts about Children in Foster Care in Connecticut, available at* http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/fact-sheets/CT-Facts-FCM08.pdf (last visited June 23, 2017).

[16] Administration for Children and Families, U.S. Dept. of Health and Human Services, *ACYF/Recent Deomographic Trends in Foster Care* 2 (Sept. 2013), *available at* https://www.acf.hhs.gov/sites/default/files/cb/data_brief_foster_care_trends1.pdf (last visited June 23, 2017).

In the juvenile justice system, Black children in New York are seven times more likely than White children to be arrested and referred to juvenile court and three times more likely to spend time in secure detention pre-adjudication.[17] In Vermont, compared to White children, Black children are two times more likely to be arrested and referred to juvenile court and almost three times more likely to spend time in secure detention pre-adjudication.[18] And in Connecticut, compared to White children, Black children are five times more likely to be arrested and referred to juvenile court and two times more likely to spend time in secure detention pre-adjudication.[19] In New York, compared to White children, Latino children are two times more likely to be arrested and referred to juvenile court and almost three times more likely to spend time in secure detention pre-adjudication.[20] In Connecticut, Latino children are two times more likely to be arrested and referred to juvenile court and to spend time in secure detention pre-adjudication.[21] Out of the 572 juveniles in Connecticut's main juvenile correctional facility, 303 (53%) are Black, 165 (29%) are Latino, and 103 (18%) are White.[22] Making up about 12% of the population 10-17 years old, Black children are five times more

[17] Rabe Thomas, *supra* note 8.
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] *Id.*
[22] *See* Connecticut Correctional Facilities Research, *supra* note 7.

likely to be arrested.[23] In Vermont's largest county, youth of color are sent to detention and the courts at higher rates than White youth.[24]

The inevitable effect of the Board's rule will be the disproportionate deprivation of derivative citizenship to Black and Latino families. The disparities in rates of forced, temporary separation between White, Black, and Latino families is startling. "[T]he Due Process Clause of the Fifth Amendment contains an equal protection component prohibiting the United States from invidiously discriminating between individuals or groups." *Washington v. Davis*, 446 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)). That the BIA has chosen an interpretation of the statute that will so flagrantly discriminate based on race should give this Court deep concern. *Cf. M.L.B. v. S.L.J.*, 519 U.S. 102, 115 (1996).

C. The Statutory Factors That Determine Forced, Temporary Separation Do Not Include a Parent's Legal and Physical Custody

In the contexts of adult criminal bail proceedings, juvenile pre-trial detention proceedings, immigration detention, and child welfare system involvement, the statutory factors that determine whether there will be a period of forced, temporary

[23] Rabe Thomas, *supra* note 8.
[24] Vermont Department for Children and Families, *Report to Vermont Governor Phil Scott* 4 (Jan. 2017), *available at* http://legislature.vermont.gov/assets/Legislative-Reports/2017-CFCPP-Annual-Report-2017.01.17.pdf (last visited June 23, 2017).

separation do not have anything to do with changing the legal and physical custody status and family relationship elements of derivative citizenship. The only statutory consideration under **New York**'s adult criminal bail statute is the "degree of control or restriction that is necessary to secure [the defendant's] court attendance[.]" N.Y. Crim. Proc. Law §510.30(2)(a) (McKinney 2017). The statute directs judges to consider a range of factors in making this determination, notably excluding anything that would have bearing on an issue of derivative citizenship. *See id.* §510.30(2)(a)(i)-(ix) (requiring the judge to consider, *inter alia*, character, reputation, habits and mental condition; employment and financial resources; the weight of the evidence against the defendant). Even where the criminal matter under adjudication involves a family relationship, the bail factors do not expand to include anything that has bearing on derivative citizenship. *See id.* §510.30(2)(a)(vii) (enumerating the additional factors).

In **Connecticut**, the only statutory bail consideration is the ability of the restriction to "reasonably ensure the appearance of the arrested person in court[.]" Conn. Gen. Stat. §54-64a(1) (West). *See also id.* §54-64(a)(2) (enumerating the factors the judge may consider which, like New York's, do not include issues that relate to derivative citizenship). And as in New York, the additional factors that may be reviewed in family offense cases do not expand to include issues that have bearing on derivative citizenship. *See id.* §54-64(b)(1)-(2). In **Vermont**, the only

statutory consideration is the ability of the restriction to "reasonably ensure the appearance of the person[.]" Vt. Stat. Ann. tit. 13, §7554(a)(1) (West). The specific factors subject to review are not related to issues affecting derivative citizenship. *See id.* §7554(b).

The same is true in juvenile proceedings in these three states: the statutory factors that permit pre-trial detention include nothing that can be construed as impacting the parent-child relationship, let alone derivative citizenship. *See* N.Y. Fam. Ct. Act §320.5(3)(a); Conn. Gen. Stat. §46b-133(c) (West); Vt. Stat. Ann. tit. 13, §7554(j) (West). In the immigration context, the BIA's position is that the only factors relevant to a custody determination are if the individual presents a danger to persons or property, is a threat to national security, or poses a risk of flight. *Matter of Guerra*, 24 I. & N. Dec. 37, 38 (BIA 2006) (*citing Matter of Adeniji*, 22 I. & N. Dec. 1102 (BIA 1999)).

In the child welfare context, the factors affecting a family court determination on whether to temporarily remove a child from a home do not include changing the legal and physical custody status and family relationship elements of derivative citizenship. In **New York**, §1028(a) of the Family Court Act contemplates only "imminent risk to the child's life or health[.]" N.Y. Fam. Ct. Act §1028(a). **Connecticut** similarly considers only illness, injury, and physical danger, *see* Conn. Gen. Stat. §46b-129(b), as does **Vermont**. *See* Vt. Stat. Ann. tit.

33, §5308(a) (West). The legal relationship between the parent and child is not adjudicated at this stage of the family court proceeding, and yet the BIA would have this temporary custody determination dictate a minor's citizenship status.

As discussed *supra*, the Supreme Court requires "the opportunity to be heard at a meaningful time and in a meaningful manner" for a government decision to comply with the Due Process Clause. *Matthews*, 424 U.S. at 333 (internal quotation omitted). It is implicit in this requirement that the hearing be on issues germane or determinative of the outcome. Here, that condition is not met, as the BIA would have it that the question of whether a minor who holds a green card derives citizenship through his or her parent is decided at a hearing that contemplates neither the legal relationship between the parent and child nor the derivative citizenship statute itself. The Supreme Court has expressed "little doubt that the Due Process Clause would be offended if a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness." *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978). The BIA's interpretation violates this very principle.

II. TO AVOID VIOLATING ESTABLISHED CONSTITUTIONAL RIGHTS THAT BEAR ON THE RELATIONSHIP BETWEEN PARENTS AND CHILDREN, THE STATUTORY TERM "LEGAL AND PHYSICAL CUSTODY" CANNOT BE READ TO BE DEFEATED BY A PERIOD OF FORCED, TEMPORARY SEPARATION

A. The BIA's Reading of the Statutory Term "Legal and Physical Custody" Impinges on the Relationship Between Parents and Children That Is Protected by the Constitution's Due Process Clause

The BIA's parsing of the derivative citizenship statute to include two separate requirements—a legal custody requirement and a physical custody requirement—is not only incorrect, but also will have effects on families experiencing forced, temporary separation that are not only life-altering but also violate constitutional due process rights. Moreover, the BIA's reading of the statute, which purports to recognize the sanctity of the parent-child relationship, perversely intrudes on that very relationship by attaching outsized significance to the fact that, for many different, often involuntary reasons that have nothing to do with legal and physical custody status, parents and children sometimes do not live under the same roof. It infringes on rights the Supreme Court has recognized, across time and across circumstances, as constitutionally protected.

In a number of cases spanning nearly 100 years, the Supreme Court has recognized the importance of the relationship between parents and children, and found the rights of parents with respect to their children's upbringing to be entrenched in the Constitution itself, most particularly in the Due Process Clause. "Choices about … family life, and the upbringing of children are among [the] rights th[e] Court has ranked as 'of basic importance in our society,' … rights sheltered by the Constitution against … unwarranted usurpation, disregard, or

disrespect." *M.L.B.*, 519 U.S. at 117 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 376 (1971)) (collecting cases). Most relevant to the constitutional rights at issues in the Board's parsing of the statutory term "legal and physical custody" is the Supreme Court's decision in *Santosky v. Kramer*, 455 U.S. 745 (1982). In *Santosky*, the Court considered the constitutionality of the standard for terminating parental rights under the New York Family Court Act. *Id.* at 747-48. Central to the Court's holding was its proclamation that the "fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they lost temporary custody of the child to the State." *Id.* at 753. Moreover, in evaluating the standard for terminating parental rights required by the Due Process Clause, the Court balanced, *inter alia*, the interests of the natural parents against the governmental interests in the wellbeing of the child and fiscally efficient proceedings, and found that the Constitution rendered the Family Court Act constitutionally deficient. *Id.* at 758-59, 761, 766 (citing *Matthews*, 424 U.S. at 335). *Santosky* provides support for the notion that a natural parent retains physical custody of a child notwithstanding the temporary separation imposed by placement in foster care or a state institution. *See id.* at 749.

But this Nation's acknowledgment of the constitutionally protected rights that exist between parents and their children did not begin or end with *Santosky*. In 1925, the Court found that parents and guardians have a constitutional right to

direct the upbringing and education of the children under their control. *See Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925). In a string of subsequent decisions, the Court recognized the constitutional rights that families enjoy. *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 639-40, 651 (1974) ("This Court has long recognized that freedom of person choice in matters of … family life is one of the liberties protected by the Due Process Clause."); *Moore v. East Cleveland*, 431 U.S. 494, 495-96, 503 (1977) ("U.S. Supreme Court decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in U.S. history and tradition."); *Quilloin*, 434 U.S. at 255.

The "right" to remain with "immediate family" is "a right that ranks high among the interests of the individual." *Landon*, 459 U.S. at 34 (citing *Moore*, 431 U.S. at 499, 503-504; *Stanley v. Illinois*, 405 U.S. 645, 651 (1972)). If found ambiguous, the derivative citizenship statute must be read to preserve these rights of parents and children.

B. The Canon of Constitutional Avoidance Forecloses the BIA's Reading of the Statutory Term "Legal and Physical Custody"

"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, [the court's] duty is to adopt the latter." *Jones*, 529 U.S. at

857 (internal citations and quotation marks omitted). This "'tool for choosing between competing plausible interpretations of a statutory text'" is known generally as the doctrine of constitutional avoidance. *U.S. v. Martinez*, 525 F.3d 211, 215-16 (2d Cir. 2008) (quoting *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005)). It is an "elementary rule[,]" *DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988), that "recognizes that Congress, like this Court, is bound by and swears by an oath to uphold the Constitution. The courts will therefore not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Valenzuela-Gallardo v. Lynch*, 818 F.3d 808, 817 (9th Cir. 2016). *See also Lora v. Shanahan*, 804 F.3d 601, 607 (2d Cir. 2015) (quoting *Zadvydas v. Davis*, 533 U.S. 678, 682, 690 (2001)) (construing an immigration detention statute to "avoid significant constitutional concerns" that lie "'at the heart of the liberty that [the Due Process] Clause protects'").

If this Court finds the derivative citizenship statute ambiguous, it must construe the statute to foreclose the BIA's interpretation in order to avoid unconstitutional application. The BIA's decision to treat legal custody and physical custody as separate elements of derivative citizenship, rather than to treat "legal and physical custody" as a unitary concept as the statutory text demands is not only incorrect, but will significantly intrude on established constitutional rights

protecting families. The racially discriminatory effect of the Board's interpretation, and the due process problems implicit in conditioning citizenship on hearings where the relationship between a parent and child is not at issue, together further mandate application of the doctrine of constitutional avoidance to adopt the reading of the derivative citizenship statute proposed by the Petitioner and *amici*.

III. THE RULE OF LENITY LIKEWISE FORECLOSES THE BIA'S INTERPRETATION OF THE STATUTORY TERM "LEGAL AND PHYSICAL CUSTODY"

The INA has myriad provisions that have criminal application. *See*, *e.g.*, 8 U.S.C. §1327 (criminal violation to assist an inadmissible alien); *id.* §1253(a)(1) (criminal violation for failing to depart pursuant to an order of removal). *id.* §§ 1101(a)(43), 1326 (conviction for an aggravated felony creates a statutorily mandated sentencing enhancement for defendants convicted of illegal reentry). Embedded across these criminal provisions are the terms "alien" and "citizen," whose meanings are affected by the interpretation of §1431. The criminal provisions of the INA are almost universally defined by some absence of U.S. citizenship. Like the statutes at issue in The Supreme Court's decisions in *United Sates v. Thompson/Center Arms Co.*, 504 U.S. 505 (1992) (plurality opinion), and *FCC v. ABC*, 347 U.S. 284 (1954), *see infra*, its ambiguities must be resolved to narrow the statute's punitive reach. In this instance: read to permit the conferral of citizenship, rather than to preclude it.

If, after applying the doctrine of constitutional avoidance and the other rules of statutory construction to the derivative citizenship statute the Court nevertheless finds it ambiguous, the Court must apply the criminal rule of lenity and find that the BIA's interpretation is foreclosed. The rule of lenity mandates that where there is ambiguity in a criminal statute, the ambiguity must be resolved in favor of the criminal defendant by narrowing punitive reach of the statute. *See United States v. Bass*, 404 U.S. 336, 347 (1971). It is a "time-honored" rule of statutory interpretation. *Crandon v. United States*, 494 U.S. 152, 158 (1990). The rule applies also to resolving ambiguities in "hybrid" statutes—those that carry both civil and criminal applications—like the INA. This is because the Supreme Court recognizes a unitary-meaning principle: a statutory provision that has both civil and criminal applications carries a single, unitary meaning. *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004). The derivative citizenship provision in §1431 is the quintessential hybrid statute: one that equally dictates both civil and criminal outcomes.

The rule of lenity is the last rule applied to ascertain the meaning of an ambiguous statute. In the context of federal court review of an agency decision, it means that it is applied on *de novo* review, and not within the deference framework of *Chevron*. In an immigration case, it requires that any lingering ambiguity in the immigration statute be resolved in the immigrant's favor.

The Supreme Court's seminal immigration adjudication decision in *Leocal* reflects its overarching recognition of a unitary-meaning principle that requires that there be only interpretation of a hybrid statute like the INA. *See, e.g.*, *Thompson/Center Arms Co.*, 504 U.S. at 518 n.10; *FCC*, 347 U.S. at 296. *See also Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 16 (2011); *Clark*, 543 U.S. at 380; *Scheidler v. Nat'l Org. for Women, Inc.*, 537 U.S. 393, 408-09 (2003). In *Thompson*, the Court construed the National Firearms Act, a "tax statute" the Court was examining in a "civil setting" but that also has "criminal applications." *Thompson/Center Arms Co.*, 504 U.S. at 517. In *FCC*, the Court wrote, in the context of a civil case, that "[t]here cannot be one construction for the Federal Communications Commission and another for the Department of Justice." 347 U.S. at 296. *See also, e.g.*, *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1027-28 (6th Cir. 2016) (Sutton, J. dissenting in part and concurring in part) (*overruled on other grounds sub nom Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017)) ("Time, time, and time again, the Court has confirmed that the one-interpretation rule means that the criminal-law construction of the statute (with the rule of lenity) prevails over the civil-law construction of it."). Disregarding this uniform-meaning principle would render the statute a "chameleon, its meaning subject to change" depending on the circumstances. *Clark*, 543 U.S. at 382.

CONCLUSION

In the Petitioner's case, the BIA inaccurately interpreted the derivative citizenship provision of the INA, 8 U.S.C. §1431, to withhold derivative citizenship from lawful permanent resident youth in families experiencing periods of forced, temporary separation. This is not only is an incorrect interpretation of the statutory text but, even if the text were deemed ambiguous, fails to apply the doctrine of constitutional avoidance and the rules of lenity, and must be rejected.

Respectfully submitted,

Dated: June 24, 2017

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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 4,859 words.

Dated: June 24, 2017

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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

I, Andrew Wachtenheim, hereby certify that I electronically filed the foregoing brief and appendix 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 June 24, 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: June 24, 2017
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