No. 21-6380

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

José Ramón PEGUERO VASQUEZ,
A 062-775-224
Petitioner,

v.

Merrick B. GARLAND,
United States Attorney General,
Respondent.

ON PETITION FOR REVIEW FROM THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

MOTION OF PROPOSED AMICI CURIAE NEW YORK DEFENDER ORGANIZATIONS AND KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC FOR LEAVE TO FILE AMICUS BRIEF

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INTRODUCTION

Pursuant to Fed. R. App. P. 29(a)(3), Proposed Amici Curiae, Brooklyn Defender Services, the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, a component of Yeshiva University, The Bronx Defenders, and The Legal Aid Society, request leave to file the accompanying brief in support of José Ramón Peguero Vasquez's, petition for review of a final order of the Board of Immigration Appeals ("BIA"). *See* Ex. A (Proposed Brief of Amici Curiae). Petitioner consents to the filing of the brief; counsel for Respondent does not oppose this motion.

IDENTITY AND INTEREST OF PROPOSED AMICI CURIAE

Proposed Amici Curiae Brooklyn Defender Services, the Kathryn O. Greenberg Immigration Justice Clinic, The Bronx Defenders, and The Legal Aid Society ("Amici"), are nonprofit organizations that represent noncitizens convicted of criminal offenses in various proceedings before immigration courts, the BIA, and federal courts. Brooklyn Defender Services ("BDS") is one of the largest public defense offices in New York State, representing nearly 30,000 low-income individuals each year in criminal, family, civil, and immigration proceedings, and providing interdisciplinary legal and social services. A significant portion of the people that BDS represents are immigrants. Since 2009, BDS has counseled or represented more than 15,000 people in immigration matters including deportation defense, affirmative applications, and advisals, as well as immigration consequence consultations in Brooklyn's criminal court system.

The Kathryn O. Greenberg Immigration Justice Clinic is a nonprofit law school clinic dedicated to providing quality representation for indigent immigrants facing deportation and supporting advocacy work by and on behalf of immigrant communities. As part of this work, the Clinic both represents noncitizens facing immigration consequences on account of criminal convictions. The Clinic also regularly conducts research and advocacy on issues affecting noncitizens who are subject to immigration consequences through exposure with the criminal legal system.

The Bronx Defenders is a nonprofit provider of 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. It represents individuals in over 20,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project at the Varick Street Immigration Court and represents non-detained immigrants in removal proceedings. The Bronx Defenders' representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the BIA, petitions for review, and federal district court litigation and appeals.

The Legal Aid Society is the nation's oldest and largest not-for-profit provider of legal services to low-income clients. Its Immigration Law Unit (the "ILU") is a

recognized leader in the delivery of free, comprehensive and high-caliber legal services to low-income non-citizens in New York City and surrounding counties. Since its inception, the ILU has committed to representing non-citizens with criminal records and has deep expertise in the intersection of the criminal justice and immigration systems. The ILU represents hundreds of non-citizen clients with convictions that are affected by New York Penal Law ("N.Y.P.L.") § 70.15.

Given their work, Amici have experience and expertise in issues at the intersection of immigration and criminal law. Amici also have a direct interest and unique contributions to make in this case by providing this Court with critical background information and context about the primary authority erroneously relied upon in the BIA's decision with respect to the retroactivity of N.Y.P.L. § 70.15.

ARGUMENT

Because Amici collectively regularly represent noncitizens facing immigration consequences on account of criminal convictions before the Executive Office for Immigration Review and federal courts, they have significant experience and expertise in the intersection of criminal and immigration law and a direct interest in ensuring that the BIA does not erroneously refuse to recognize the retroactive the retroactive application of N.Y.P.L. § 70.15 for immigration purposes.

Amici respectfully seek leave to submit the accompanying brief to shed further light on the primary authority erroneously relied upon in the BIA's decision under

review. A straightforward analysis in *McNeill v. United States*, 563 U.S. 816 (2011), does not support the BIA's refusal to give effect to N.Y.P.L. § 70.15—an explicitly *retroactive* maximum sentence reduction law, which by its plain terms "shall apply to all persons who are sentenced *before*, on or after" its effective date. N.Y.P.L. § 70.15(1-a)(b) (emphasis added). In *McNeill*, the United States Supreme Court declined to give retroactive effect in the federal sentencing enhancement context to a *prospective* state maximum sentence reduction, which was passed subsequently to McNeill's state convictions. *McNeill*, 563 U.S. at 825. However, the Court expressly carved out from its holding in *McNeill* and the Government's conceded that the outcome would have been different if the state law was *explicitly* retroactively.

Nevertheless, in *Matter of Velasquez-Rios*, 27 I. & N. Dec. 470 (B.I.A. 2018), the BIA glossed over this critical distinction and erroneously relied on *McNeill* and its progeny, *United States v. Diaz*, 838 F.3d 968 (9th Cir. 2016), holding that a state retroactive maximum sentence reduction will not be given effect under the Immigration and Nationality Act ("INA").

McNeill is inapposite to the instant case because: (1) unlike the North Carolina statute at issue in *McNeill*, N.Y.P.L. § 70.15 is retroactive, and (2) it analyzed federal enhancement consequences under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 922(g), not immigration consequences under the INA. Accordingly, Amici respectfully urge this Court to correct the BIA's erroneous interpretation of *McNeill* and

its progeny and recognize N.Y.P.L. § 70.15's retroactive effect under the INA. To the extent this Court finds *McNeill* instructive, it should follow the reasoning unanimously employed by all district courts in this Circuit to apply the *McNeill* carve-out in the federal sentencing enhancement context and recognize N.Y.P.L. § 70.15's retroactive effect under the INA.

CONCLUSION

For the foregoing reasons, Amici respectfully request the Court's permission to file the accompanying brief.

Respectfully submitted,

Dated: March 15, 2022

/s/ Mauricio E. Noroña

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CERTIFICATE OF COMPLIANCE

I, Mauricio Noroña, hereby certify that this motion complies with the type-volume limitations of Fed. R. App. P. 27(d) because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), this document contains 983 words, as determined by the word-count function of Microsoft Word Version 16.58.

I further certify that this motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared using Microsoft Word Version 16.58, is proportionately spaced, and has a typeface of 14-point.

Dated: March 15, 2022

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CERTIFICATE OF SERVICE

I, Mauricio E. Noroña, hereby certify that I electronically filed the foregoing Motion of Proposed Amici Curiae New York Defender Organizations and Kathryn O. Greenberg Immigration Justice Clinic for Leave to File Amicus Brief and attached Brief of New York Defender Organizations and Kathryn O. Greenberg Immigration Justice Clinic by using the appellate ACMS system on March 15, 2022. I further certify that participants in the case are registered ACMS users and will be served the appellate ACMS system.

Dated: March 15, 2022

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EXHIBIT A

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ON PETITION FOR REVIEW FROM THE DECISION OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF NEW YORK DEFENDER ORGANIZATIONS AND KATHRYN O. GREENBERG IMMIGRATION JUSTICE CLINIC AS AMICI CURIAE IN SUPPORT OF PETITIONER

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CORPORATE DISCLOSURE STATEMENT
PURSUANT TO FED. R. APP. P. 26.1

I, Mauricio E. Noroña, counsel for Amici, hereby certify that Brooklyn Defender Services, the Kathryn O. Greenberg Immigration Justice Clinic at the Benjamin N. Cardozo School of Law, a component of Yeshiva University, The Bronx Defenders, and The Legal Aid Society, are nonprofit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

Dated: March 15, 2022

/s/ Mauricio E. Noroña

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INTEREST OF AMICI CURIAE[1]

Amici Curiae Brooklyn Defender Services, the Kathryn O. Greenberg Immigration Justice Clinic, The Bronx Defenders, and The Legal Aid Society ("Amici"), are nonprofit organizations that represent noncitizens convicted of criminal offenses in various proceedings before immigration courts, the Board of Immigration Appeals ("BIA"), and federal courts. Given their work, Amici have experience and expertise in issues at the intersection of immigration and criminal law. They also have a direct interest and unique contributions to make in this case by providing this Court with critical background information and context about the primary authority erroneously relied upon in the BIA's decision with respect to the retroactivity of New York Penal Law ("N.Y.P.L.") § 70.15.

INTRODUCTION

Amici agree with Mr. Peguero Vasquez that the BIA impermissibly erred by declining to give effect to N.Y.P.L. § 70.15 under the Immigration and Nationality Act ("INA"). This brief focuses on one consequential error in the underlying BIA decision, specifically, the BIA's fundamental misunderstanding of the United States Supreme

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), Amici state that no party's counsel authored the brief in whole or in part; that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and that no person other than Amici and their counsel contributed money that was intended to fund preparing or submitting the brief.

Court's decision in *McNeill v. United States*, 563 U.S. 816 (2011). The analysis *infra* demonstrates that, far from dictating the conclusions reached by the BIA in the instant case and in *Matter of Velasquez-Rios*, 27 I. & N. Dec. 470 (B.I.A. 2018), the *McNeill* holding suggests the exact opposite result.

Endorsement of the BIA's erroneous reading of *McNeill* will have a disastrous impact for individuals facing disproportionate immigration consequences for misdemeanor convictions and could have similar consequences for individuals facing federal sentencing enhancements on account of state offenses for which the maximum sentence exposure has been retroactively reduced. Accordingly, Amici respectfully urge this Court to correct the BIA's flawed interpretation and reliance on *McNeill* and its progeny, *United States v. Diaz*, 838 F.3d 968 (9th Cir. 2016), and recognize N.Y.P.L. § 70.15's retroactive effect under the INA.

SUMMARY OF ARGUMENT

The Supreme Court's holding in *McNeill* does not support the BIA's refusal to give effect to N.Y.P.L. § 70.15—an explicitly *retroactive* maximum sentence reduction law, which by its plain terms "shall apply to all persons who are sentenced *before*, on or after" its effective date. § 70.15(1-a)(b) (emphasis added). In *McNeill*, the Court declined to give retroactive effect in the federal sentencing enhancement context to a *prospective* state maximum sentence reduction, which was passed after McNeill's state convictions. 563 U.S. at 818, 825. While the dispositive difference between the state sentencing

reduction statute at issue in *McNeill* and the statute at issue in these proceedings is clear on its face, this Court need not speculate regarding the import of that difference because: (1) the Supreme Court was explicit about carving out retroactive sentencing reductions from its holding, 563 U.S. at 825 n.1, and (2) the Government in *McNeill* conceded the outcome would have been different if the state law was retroactive, Brief for United States at 18–19 n.5, *McNeill*, (No. 10–5258), 2011 WL 1294503, at *18 n.5.

Nevertheless, in *Matter of Velasquez-Rios* the BIA glossed over this critical distinction and erroneously relied on *McNeill* and its progeny when it held a state's retroactive maximum sentence reduction will not be given effect under the INA. *Matter of Velasquez-Rios*, 27 I. & N. Dec. 470. In the instant proceedings, the BIA carried forward this error when it relied exclusively on *Matter of Velasquez-Rios* to conclude that N.Y.P.L. § 70.15's retroactive maximum sentence reduction does not alter the sentence length under the INA.

At a minimum, *McNeill* is inapposite to the instant case because: (1) unlike the North Carolina statute at issue in *McNeill*, N.Y.P.L. § 70.15 is retroactive, and (2) the Supreme Court's conclusion in *McNeill* that Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), required a "backward-looking" inquiry flowed from the specific language of ACCA, which focuses on "whether a '*previous* convictio[n]' was for a serious drug offense." *McNeill*, 563 U.S. at 820 (emphasis added). However, the crime involving moral turpitude ("CIMT") provision of the INA at issue here does have any similar language triggering such a "backward-looking" inquiry. *See* 8 U.S.C. §

1227(a)(2)(A)(i)(II) (directing inquiry into whether a noncitizen "is convicted of a crime for which a sentence of one year or longer may be imposed").

To the extent *McNeill* bears upon the effect of N.Y.P.L. § 70.15 on Mr. Peguero Vasquez's conviction in the instant proceedings, the Supreme Court's analysis and the Government's concession in *McNeill* that the outcome would have been different if the state law had been retroactive, support recognition of explicitly retroactive state maximum sentence reductions such as N.Y.P.L. § 70.15—a view endorsed by every district court in this Circuit to have confronted this issue.

ARGUMENT

I. The Supreme Court's Holding in *McNeill v. United States*—that Prospective Changes to State Sentencing Laws Will Not Be Given Retroactive Effect for Federal Sentencing Purposes Under ACCA—Expressly Carves Out Situations Where the State Makes Its Law Retroactive.

In *McNeill v. United States*, the Supreme Court considered whether a prospective reduction of the maximum sentence for a crime under North Carolina law should alter the impact of a state conviction that predated such reduction, for purposes of assessing a federal sentencing enhancement under ACCA. 563 U.S. 816. The determination in *McNeill*—that "the plain text of ACCA requires a federal sentencing court to consult the maximum sentence applicable to a defendant's previous drug offense at the time of his conviction for that offense," *id.* at 820—does not support an immigration court's refusal to recognize an *explicitly retroactive* state maximum sentence reduction. The state

law in *McNeill*, in direct contrast to N.Y.P.L. § 70.15, was explicit that the maximum sentence reduction was not applicable to crimes committed before the reduction. *Id.* at 819. *Compare* 1993 N.C. Sess. Laws, ch. 538, § 56 (as modified by Extra Session 1994 N.C. Sess. Laws, ch. 24, § 14(b)) ("This act becomes effective October 1, 1994, and applies only to offenses *occurring on or after that date*.") (emphasis added) *with* N.Y.P.L. § 70.15(1-a)(b) (directing that the maximum sentencing reduction "shall apply to all persons who are sentenced *before*, on or after" its effective date) (emphasis added). Indeed, the Supreme Court recognized this clear distinction when it remarked that its holding "d[id] not address whether or under what circumstances a federal court could consider the effect of" a retroactive state sentencing reduction since *McNeill* did "not concern a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *McNeill*, 563 U.S. at 825 n.1 (hereinafter "*McNeill* carve-out").

The facts and sentencing laws at issue in *McNeill* contain crucial differences compared with the instant case. In 1992, McNeill pleaded guilty to four North Carolina drug offenses for sale of cocaine, and one drug offense for possession of cocaine with intent to sell—each of which carried a maximum ten-year sentence under state law at the time of commission and conviction. *Id.* at 824. Then, in 1995, McNeill pleaded guilty to one count of possession of cocaine with intent to sell under North Carolina law for an offense committed in September 1994. *Id.* By 1995, the state had reduced the

maximum sentence applicable to possession of cocaine with intent to sell to 30 months. *Id.* at 817. However, the state legislature specifically clarified that the law "becomes effective October 1, 1994, and *applies only to offenses occurring on or after that date*." 1993 N.C. Sess. Laws, ch. 538, § 56, *modified by* Extra Session 1994 N.C. Sess. Laws, ch. 24, § 14(b) (emphasis added). Therefore, McNeill's September 1994 offense, just like his 1992 offenses, carried a ten-year maximum sentence under North Carolina law. *McNeill*, 563 U.S. at 824.

Over a decade later, in August 2008, McNeill pleaded guilty to two federal offenses. *Id.* at 817. Facing a sentencing enhancement under ACCA for his prior state convictions, McNeill argued that because North Carolina had reduced the maximum penalty applicable to the statutes under which he was convicted to less than ten years, none of his six state drug offenses were for a "serious drug offense," which is defined by federal law as those carrying a "maximum term of imprisonment of ten years or more." *McNeill*, 563 U.S. at 818 (quoting 18 U.S.C. § 924(e)(2)(A)(ii)). McNeill did not claim the reductions applied to his convictions under state law, nor could he; instead, he argued that ACCA requires sentencing courts to look at current state law maximum penalty, not the penalty applicable to the convictions that form the basis of a sentencing enhancement. *See id.* at 818–19. The district court rejected this argument, the Court of Appeals for the Fourth Circuit affirmed, and the Supreme Court granted certiorari. *Id.*

In a decision that focused on the specific statutory text in ACCA, the Court rejected McNeill's argument. *Id.* at 820–22. The Court reasoned that under the plain

text of the statute, ACCA's requirement that a federal sentencing court "determine whether a '*previous* convictio[n]' was for a serious drug offense," is a "backward-looking question" that calls for consultation of "the law that applied at the time of that conviction." *Id.* at 820 (emphasis added). Critically, however, even under its reading of ACCA, the Court expressly carved out from its holding "a situation in which a State subsequently lowers the maximum penalty applicable to an offense and makes that reduction available to defendants previously convicted and sentenced for that offense." *Id.* at 825 n.1.

Indeed, the Government in *McNeill* conceded the fundamental distinction between that situation and the one before the Court, stating:

> Of course, if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction.

Brief for United States at 18–19 n.5, *McNeill*, (No. 10–5258), 2011 WL 1294503, at *18 n.5; *see also* Brief of Nat'l Ass'n of Crim. Def. Law's & Fam. Against Mandatory Minimums at 16–17, *McNeill*, 2011 WL 805232, at *16–17 ("Under the Government's approach, if a sentence revision reducing the maximum to less than ten years is made retroactive, then the ACCA sentencing court must apply the sentence revision to the defendant's offense and find that the offense is not 'serious' under state law. If the sentence revision is not retroactive, then the ACCA court applies the maximum in place at the time of the predicate offense."). Noting the Government's position, the Court

declined to "address whether or under what circumstances a federal court could consider the effect of" a retroactive state maximum sentence reduction. *McNeill*, 563 U.S. at 825 n.1.

The Court's reasoning suggests why it would view such a situation differently. The Court expressed discomfort with retroactively recognizing, under ACCA, North Carolina's prospective state maximum sentence reduction, finding it "hard to accept" that an individual's actual sentence—McNeill was sentenced to ten years—could exceed the relevant maximum term prescribed by law. *Id.* at 821 ("Although North Carolina courts actually sentenced him to 10 years in prison for his drug offenses, McNeill now contends that the 'maximum term of imprisonment' for those offenses is 30 or 38 months."). The same, of course, cannot be said about N.Y.P.L. § 70.15. Not only does N.Y.P.L. § 70.15 retroactively reduce the *maximum* applicable sentence for relevant misdemeanors, *id.* § 70.15(1-a)(b), but it also, "by operation of law," reduces all *actual* one-year sentences for such misdemeanors to 364 days, *id.* § 70.15(1-a)(c). Accordingly, the practical concerns that animated the Court's refusal to give retroactive effect to the state law in *McNeill* are simply not present in the instant proceedings.

In summary, in *McNeill*, the Court declined to consult a state sentencing reduction that was explicitly not retroactively tailored for the purposes of evaluating whether a "previous conviction" constituted a "serious drug offense" under ACCA. 563 U.S. at 824. The Court's conclusion turned on its interpretation of ACCA—not an issue in Mr. Peguero Vasquez's case—as applied to a circumstance where a state

chooses not to apply its sentence reduction retroactively—unlike N.Y.P.L. § 70.15. Critically, even though the Court determined that ACCA calls for a "backward-looking" inquiry, it explicitly carved out an exception for statutes like N.Y.P.L. § 70.15, where the state legislature made its maximum sentencing reduction expressly retroactive. Importantly, as discussed in Section III *infra*, every district court decision in the Second Circuit to have considered this issue has correctly recognized the effect of retroactive state maximum sentence exposure reductions, citing the Court's carve-out in *McNeill* and the Government's concession that the outcome in *McNeill* would have been different if the state law was retroactive.

II. The BIA's Decision in *Matter of Velasquez-Rios* Fundamentally Misinterprets and Misapplies *McNeill*, Is Erroneous, and Should Not be Upheld by This Court.

In refusing to recognize the retroactive impact of N.Y.P.L. § 70.15 in the instant case, the BIA relies exclusively on its precedential holding in *Matter of Velasquez-Rios*. *See In Re Peguero Vasquez*, A 062-775-224, 2 (B.I.A. June 21, 2021). *Matter of Velasquez-Rios*, in turn, asserts "support" for such refusal "in Federal court precedent;" namely, *McNeill* and its Ninth Circuit progeny. 27 I. & N. at 473–74. However, the BIA's conclusory adoption of *McNeill's* "backward-looking" inquiry in *Matter of Velasquez-Rios* completely fails to address—much less apply—the *McNeill* carve-out, and it glosses over the Court's threshold statutory interpretation of ACCA as presenting a "backward-looking" question—which is not the case for the CIMT provision at issue here, 8 U.S.C. §

1227(a)(2)(A)(i)(II). Since the BIA exclusively relies on *Matter of Velasquez-Rios* to reject the retroactive application of N.Y.PL. § 70.15 in the decision below, a detailed analysis of *Matter of Velasquez-Rios* and how it fundamentally misinterprets and misapplies *McNeill* is warranted.

The noncitizen in *Matter of Velasquez-Rios* was convicted under section 475(a) of the California Penal Code for possession of a forged instrument and sentenced to twelve days of incarceration. 27 I. & N. Dec. at 470–71. The maximum sentence for his offense at the time of both his conviction and his removal proceedings was 365 days, and thus "the Immigration Judge found that his offense was a crime involving moral turpitude 'for which a sentence of one year or longer may be imposed.'" *Id.* (citing 8 U.S.C. § 1227(a)(2)(A)(i)). After the noncitizen appealed that decision, but before the BIA decided his appeal, the California legislature enacted section 18.5 of the California Penal Code, which *prospectively* provided that "[e]very offense prescribed by any law of the state to be punishable by imprisonment . . . to or not exceeding one year shall be punishable by imprisonment in a county jail for a period no to exceed 364 days." Cal. Penal Code § 18.5 (West 2016), *amended by* Cal. Penal Code § 18.5(a) (West 2018). The BIA reached the same conclusion as the Immigration Judge and dismissed the noncitizen's appeal. *Matter of Velasquez-Rios*, 27 I. & N. Dec. at 471. Notably, in so holding, the BIA specifically "noted that section 18.5 did not become effective until after [the noncitizen] had been convicted and that *nothing indicated the provision had retroactive effect.*" *Id.* (emphases added). The noncitizen petitioned for review. *Id.*

While his petition for review was pending, the California state legislature amended section 18.5(a) to "apply retroactively" to "[e]very offense . . . whether or not the case was final before January 1, 2015." Cal. Penal Code § 18.5(a) (West 2018). Thereafter, upon the Government's request, the case was remanded to allow the BIA to consider the impact of the new retroactive provision. *Matter of Velasquez-Rios*, 27 I. & N. at 471. If the BIA recognized the retroactive effect of California's maximum sentencing reduction, the noncitizen would no longer have been removable because a "sentence of one year or longer" could not be imposed for his conviction. *See* 8 U.S.C. § 1227(a)(2)(A)(i)(II).

On remand, despite previously noting the import of the state law's lack of retroactivity, the BIA held that California's section 18.5(a) had no effect on "the applicability of [8 U.S.C. § 1227(a)(2)(A)(i)(II)] to a past conviction for a crime involving moral turpitude 'for which a sentence of one year of longer may be imposed.'" *Matter of Velasquez-Rios*, 27 I. & N. at 474. The BIA asserted support for this seemingly irreconcilable turnabout "in Federal court precedent," citing exclusively to *McNeill* and *Diaz*.[2] *Id.* at 473–74. Indeed, the BIA's analysis mirrored *McNeill's* "backward-looking"

[2] *Diaz* involved a California state law that allowed "previously-convicted defendants to petition the court for a 'recall of sentence,' which, if granted, would effectively reclassify their qualifying felonies as misdemeanors." *Diaz*, 838 F.2d at 971 (citing Cal. Penal Code § 1170.18(a)). After successfully petitioning in 2014 to have his 1996 conviction so reclassified, the individual in *Diaz* argued that his conviction could no longer count as a felony conviction for sentencing enhancement purposes under 21 U.S.C. § 841. *Id.* 838 F.2d at 972. Section 841 imposes a mandatory life sentence "after two or more

inquiry. *Compare McNeill*, 563 U.S. at 820 ("The plain text of ACCA requires a federal sentencing court to consult the maximum sentence appliable to a defendant's previous drug offense at the time of his conviction for that offense . . . . The only way to answer this backward-looking question is to consult the law that applied at the time of that conviction.") *with Matter of Velasquez-Rios*, 27 I. & N. at 473 ("By its plain terms, that provision is concerned with whether a[] [noncitizen] has been convicted of a crime involving moral turpitude for which a sentence of 1 year or longer '*may be imposed.*' In other words, it calls for a backward-looking inquiry into the maximum possible sentence the [noncitizen] *could have received* for his offense *at the time of his conviction*.") (emphasis in original). The BIA noted that "[t]he logic embodied in *McNeill* and *Diaz* applie[d] with equal force to" California's retroactive statute, going on to note that "[w]e must use Federal law, rather than State law, to determine the immigration consequences of the respondent's California conviction." *Matter of Velasquez-Rios*, 27 I. & N. at 474 (citing *Diaz*, 838 F.3d at 972).

The BIA is, of course, correct that immigration consequences turn, in the first instance at least, on federal law, not state law. But this self-evident conclusion merely begs the question of whether the INA—which, by design, makes immigration consequences contingent on state convictions and the maximum sentence the state

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prior convictions for a felony drug offense have become final." 21 U.S.C. § 841(b)(1)(A). The Ninth Circuit disagreed, holding that California's "actions—taken long after [the individual's] state conviction became 'final'—have no bearing on whether § 841's requirements are satisfied." *Diaz*, 838 F.2d at 972.

applies thereto—gives effect to changes a state makes to such maximum sentences that are explicitly applicable to such convictions. 8 U.S.C. § 1227(a)(2)(A) (establishing removal grounds based on, *inter alia*, certain state convictions with maximum sentences of one year or more), *id.* § 1229a(c)(3) (enumerating state records that establish proof of convictions and sentence in the context of deportability). The BIA fails to grapple with this question and its conclusory adoption of *McNeill's* "backward-looking" inquiry is fundamentally flawed and should not be upheld for at least two reasons.

First, the BIA's conclusory adoption of *McNeill's* "backward-looking" inquiry wholly fails to confront—much less apply—the Court's express carve-out for retroactive state laws. *See Matter of Velasquez-Rios*, 27 I. & N. at 472. The *McNeill* carve-out was a significant issue for all parties in *Matter of Velasquez-Rios*: (1) The BIA expressly referenced it in its decision, *see id.* at 474 n.8; (2) it also noted in its earlier dismissal that the 2016 version of the California law was not retroactive, *id.* at 471; and (3) the Government sought a remand once California made its law retroactive "to allow [the BIA] to consider the impact of" this provision, *id.* at 471. Despite its express awareness of the issue, the explicit purpose of the remand, and the case presenting the exact scenario envisioned by the Court's carve-out, the BIA offers *no* analysis or support for nevertheless adopting *McNeill's* "backward-looking" inquiry.

The BIA's reliance on *Diaz* does not provide additional support for the BIA's erroneous application of the *McNeill* "backward-looking" inquiry to an explicitly retroactive sentence for two reasons. First, the retroactive scope of the California law

at issue in *Diaz* was not necessarily clear. 838 F.2d at 974–75. In fact, the Ninth Circuit questioned whether "even California would apply Proposition 47 retroactively in a sentence enhancement case," *id.* 838 F.2d at 974, noting the state law's express provision "that '[n]othing in this and related sections is intended to diminish or abrogate the finality of judgments in any case not falling within the purview of this act,'" *id.* (citing Cal. Penal Code § 1170.18(n)). And, to the extent the Ninth Circuit considered, in *dicta*, a scenario where the California law did apply its law retroactively for sentencing purposes, it failed to even reference, much less justify, why it would bypass the Court's express carve-out for such a scenario, *Diaz*, 838 F.2d at 975, despite otherwise adopting *McNeill's* "backward-looking" inquiry, *id.* at 973 ("Like the ACCA provision at issue in *McNeill*, § 841 is a 'backward-looking,' inquiry.") (internal citations omitted).

Second, it is a fundamental principle of statutory construction that "in all statutory construction cases, we begin with 'the language itself [and] the specific context in which that language is used.'" *McNeill*, 563 U.S. at 819 (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997)). And since *McNeill* and *Diaz* each interpret a federal sentencing enhancement statute—not the removal provision under the INA at issue in this case or in *Matter of Velasquez-Rios*—their statutory analysis does not answer whether immigration law recognizes explicitly retroactive state maximum sentence reductions. Critically, the ACCA provision at issue in *McNeill* differs from the INA provision here because ACCA "requires the [sentencing] court to determine whether a '*previous*

conviction' was for a serious drug offense," *McNeill*, 563 U.S. at 820 (emphasis added),[3] whereas the applicable INA provision does not contain similar "backward-looking" language. Instead, the CIMT removability provision at issue here is focused only on whether a noncitizen "*is convicted* of a crime for which a sentence of one year or longer *may be imposed*." 8 U.S.C. § 1227(a)(2)(A)(i)(II) (emphases added). Like in ACCA, Congress has signaled inquiry for the *historical fact* of an event elsewhere in the INA. For example, ineligibility for waiver under 8 U.S.C. § 1182(h), is triggered when a noncitizen "who has *previously* been admitted to the United States as a[] [noncitizen] lawfully admitted for permanent residence if either since the date of such admission the [noncitizen] has been convicted of an aggravated felony." 8 U.S.C. § 1182(h) (emphasis added). In *Dobrova v. Holder*, this Court determined that "[u]se of 'previously'" in [8 U.S.C. § 1182(h)] clarifies that the statute does not apply only to [noncitizens] who *were and are still admitted* as LPRs, but also to those who were *at some earlier time* admitted as LPRs." 607 F.3d 297, 302 (2d Cir. 2010). The noncitizen argued that since his 2001 admission—his most recent following his deportation in 1989—was not as a lawful permanent resident ("LPR"), he was eligible for an 8 U.S.C. § 1182(h) waiver, despite having been *previously* admitted as an LPR in 1983. *Id.* at 302. Underscoring how the term "previously" impacts analysis of subsequent events, this Court noted that

[3] The Controlled Substances Act at issue in *Diaz* similarly prescribes a sentencing enhancement "after two or more *prior* convictions for a felony drug offense *have become final*." 21 U.S.C. § 841(b)(1)(A) (emphases added).

"[a]lthough Dobrova, after his deportation, was no longer an LPR, his deportation and change of status did not alter that he was *previously* lawfully admitted as such." *Id.* (emphasis in original). Like it did in ACCA and 8 U.S.C. § 1182(h), Congress could have chosen to trigger an inquiry into the historical fact of a conviction with a possible sentence of one year or longer in the CIMT removability provision at 8 U.S.C. § 1227(a)(2)(A)(i)(II) as well. It did not.

The BIA's refusal to give retroactive effect to N.Y.P.L. § 70.15 in Mr. Peguero Vasquez's case hinges exclusively on its flawed decision in *Matter of Velasquez-Rios*, which is, in turn, supported by the BIA's flawed reliance on *McNeill* and progeny. The BIA employed *McNeill's* "backward-looking" inquiry wholly ignoring the Supreme Court's express carve-out for retroactive state laws and without accounting for critical statutory differences between ACCA and the INA. This is a reversible error.

III. Relying on the *McNeill* Carve Out, District Courts in this Circuit Have Unanimously Given Effect to State Statutes that Retroactively Reduce Maximum Sentences.

To the extent this Court finds *McNeill* instructive, it should follow the reasoning unanimously employed by all district courts in the Second Circuit to apply the *McNeill* carve-out in the federal sentencing enhancement context and recognize N.Y.P.L. § 70.15's retroactive effect under the INA.

While this Court has repeatedly acknowledged the *McNeill* carve-out, it has not yet had an opportunity to address it squarely. *See e.g.*, *United States v. Wallace*, 937 F.3d

130, 143 (2d Cir. 2018) (declining to address argument regarding *McNeill* carve out because it would not alter the outcome); *Rivera v. United States*, 716 F.3d 685, 690 (2d Cir. 2013) (finding that the *McNeill* carve out was inapposite because the maximum sentence reduction relied on by the individual applied prospectively); *Saxon v. United States*, 695 Fed. App'x 616, 620–21 (2d Cir. 2017) (refusing to reach the merits of Saxon's *McNeill* carve out argument after determining his counsel was not ineffective, on other grounds, in failing to raise it).

Nevertheless, *all* district courts in the Second Circuit to have considered the applicability of the *McNeill* carve-out in various situations involving the explicitly retroactive sentence reductions of New York's Drug Law Reform Act of 2009 ("2009 DLRA"), have rejected the type of overly simplistic misapplication of *McNeill's* "backward-looking" inquiry employed in *Matter of Velasquez-Rios*. *See* N.Y. C.P.L. § 440.46. In *United States. v. Cabello*, the government argued *McNeill* directed that the maximum sentence of twenty-five years that was applicable at the time of Cabello's 1994 class-B felony conviction for criminal possession of a controlled substance—and not the maximum sentence of nine years retroactively prescribed by the 2009 DLRA—was controlling for the purposes of assessing whether his conviction was for a "serious drug offense" under ACCA. 401 F. Supp. 3d 362, 364 (E.D.N.Y. 2019). However, noting that "New York has unequivocally chosen to punish first-time class-B-felony drug offenses like Cabello's, whether committed today or in the past, with less than 10 years' imprisonment," the district court determined that "[s]uch convictions are

therefore not serious drug offenses for the purpose of the ACCA enhancement." *Id.* at 366.

Similarly, in *United States v. Calix*, the individual moved to dismiss a count of his indictment that alleged he was subject to an ACCA enhancement, arguing that for ACCA purposes, the maximum prison term for his 2000 Class-B drug felony conviction should be nine years under the 2009 DLRA, instead of the twenty-year maximum term prescribed by law at the time of his 2000 offense. 2014 WL 2084098, at *12 (S.D.N.Y. 2014). The district court granted the motion to dismiss, noting that "[i]n light of the 2009 DLRA's generally retroactive nature with respect to Class B drug felony offenses . . . Calix's 2000 conviction does not qualify as a 'serious drug offense' for ACCA enhanced sentencing purposes." *Id.* at *15 (citing 18 U.S.C. § 924(e)).

Finally, in *United States v. Jackson*, facing the possibility of an ACCA sentence enhancement for three previous Class B felony drug convictions under New York law, the individual sought a pretrial ruling, arguing that the 2009 DLRA's nine-year maximum sentence—not the twenty-five-year maximum exposure that applied at the time of his state convictions—applied. 2013 WL 4744828, at *1, *3 (S.D.N.Y. 2013). The district court agreed, finding that following the 2009 DLRA, "Jackson's convictions do not trigger the ACCA's sentence enhancements." *Id.* at *6.

While they all involve different procedural postures, three principles are apparent in these cases. First, the courts in this Circuit recognize the import of the *McNeill* carve-out and reject the application of *McNeill's* "backward-looking" inquiry where the state

has chosen to reduce applicable maximum sentences retroactively. *See Calix*, 2014 WL 2084098, at *13 ("Here, unlike the North Carolina statutes that the *McNeill* Court considered, in enacting the 2009 DLRA, New York lowered the maximum sentence for Class B felony drug offenses and made that reduction available to defendants previously convicted. The *McNeill* Court did not specifically address this situation.") (internal citations omitted); *Jackson*, 2013 WL 4744828, at *3 (same); *Cabello*, 401 F. Supp. 3d at 364–65 (same). Second, the courts in this Circuit highlight the government's understanding of the *McNeill* carve-out as a concession properly recognizing the validity of such retroactive reductions. *See Calix*, 2014 WL 2084098, at *13 (noting that "in *McNeill*, the Government conceded that 'if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction.'") (citing Brief for United States at 18–19 n.5, *McNeill*, (No. 10–5258), 2011 WL 1294503, at *18 n.5); *Jackson*, 2013 WL 4744828, at *3 (same); *Cabello*, 401 F. Supp. 3d at 365 n.2 ("This is not to say that the Government fails to acknowledge the limits of *McNeill's* holding. In a footnote to its submission, the Government recognizes this express carve-out in *McNeill* . . . and instead urges the Court to consider *McNeill* as 'guidance.' However, the Government's argument fails to adequately address the application of *McNeill's* carve-out to the facts of this case."). Third, the courts in this Circuit rely on a central principle from *United States v. Rodriquez*, 553 U.S. 377, 388 (2008), wherein the Court

highlighted Congress's choice to defer to state legislators' judgments in determining a sentence length. *Calix*, 2014 WL 2084098, at *13 (citing *Rodriguez*); *Jackson*, 2013 WL 4744828, at *3 (same); *Cabello*, 401 F. Supp. 3d at 366 (same).

Thus, whenever district courts in this Circuit have confronted the explicit carve-out made in *McNeill*, they have unanimously rejected the "backward-looking" inquiry and recognized the impact of state retroactive maximum sentence reductions for federal sentencing enhancement purposes. While at a minimum, *McNeill* and *Diaz* are inapposite to Mr. Peguero Vasquez's case, to the extent *McNeill* informs *Matter of Velasquez-Rios* and the instant case, the analysis of the aforementioned district court decisions in the Second Circuit suggests the opposite result.

CONCLUSION

For the reasons stated above, Amici respectfully urge this Court to find the BIA committed reversible error by refusing to recognize the retroactive application of N.Y.P.L. § 70.15, exclusively relying on *Matter of Velasquez-Rios*, which, in turn, is supported on a profound misunderstanding of *McNeill* and its progeny. To the extent *McNeill* provides guidance, Amici urge this Court to apply N.Y.P.L. § 70.15's reduction retroactively to the inquiry posed by 8 U.S.C. § 1227(a)(2)(A)(i)(II). This conclusion is warranted by the Supreme Court's explicit carve out of retroactive changes to state sentences in *McNeill*, the Government's concession of the import of such a scenario in that case, the statutory text of the INA, and the interpretation by district courts in this

Circuit of the *McNeill* carve-out while analyzing another New York state sentence reduction that is explicitly retroactive.

Respectfully submitted,

Dated: March 15, 2022

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CERTIFICATE OF COMPLIANCE

I, Mauricio E. Noroña, hereby certify that: this brief complies with the type-volume limitation of the Second Circuit Local Rule 29.1(c), because, excluding the parts of the motion exempted by Fed. R. App. P. 32(f), this document contains 5,337 words as determined by the word-count function of Microsoft Word Version 16.58.

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared using Microsoft Word Version 16.58, is proportionately spaced, and has a typeface of 14-point.

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