No. 16-3922ag

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CLEMENT OBEYA

Petitioner,

v.

JEFFERSON B. SESSIONS III, U.S. ATTORNEY GENERAL,

Respondent.

On Petition For Review of a Decision of the Board of Immigration Appeals

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BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER AND IN SUPPORT OF GRANTING THE PETITION FOR REVIEW

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INTEREST OF *AMICI CURIAE*[1]

Founded in 1997, *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 to immigrants, criminal defense lawyers, and immigration lawyers throughout the United States. The New York State Office of Indigent Legal Services contracts IDP to provide expert legal advice to public defenders and other assigned counsel representing noncitizen defendants in New York State in order to help them meet their constitutional duty to inform noncitizen clients of the immigration consequences of a guilty plea or other conviction. *See generally Padilla v. Kentucky*, 559 U.S. 356 (2010) (requiring criminal defense counsel to advice noncitizen defendants on the immigration consequences of disposition). Through our network of attorney and community support hotlines, IDP also provides support to individuals facing removal proceedings or other adverse immigration consequences based on past criminal convictions. IDP regularly consults with immigrants, criminal defense lawyers, and immigration lawyers about the immigration consequences of conviction under New York Penal Law ("N.Y.P.L.") § 155.25, the misdemeanor petit larceny offense at issue in the Petitioner's case.

[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 *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

As an organization that advises defense lawyers and noncitizens about the immigration consequences of criminal dispositions, IDP has a significant interest in the proper resolution of the two questions presented in this case: whether a larceny statute that includes non-permanent takings may be categorically deemed a crime involving moral turpitude ("CIMT") for immigration purposes, and whether a new expanded standard for CIMT determinations established through agency adjudication may be applied retroactively. The Court's resolution of these questions has the potential to dramatically affect the proper functioning and fairness of the criminal justice and immigration systems in New York State and throughout the United States. Most particularly, resolution of the second question impacts the reliability of advice provided to noncitizens accused of crimes at the time that they make critical, generally irrevocable choices in their criminal proceedings such as whether to plead guilty to a charged crime.

IDP also appears regularly as *amicus curiae* before the U.S. Supreme Court, Courts of Appeals, and Board of Immigration Appeals ("BIA" or "agency") on issues germane to this case, including application of the categorical approach in immigration adjudications, *see, e.g. Mathis v. United States*, 136 S. Ct. 2243 (2016); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), and retroactivity in immigration adjudications, particularly with respect to retroactive application of immigration laws to past criminal

convictions. *See, e.g.*, *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). *See also* Brief of Amici Curiae American Immigration Lawyers Association & IDP et al. submitted in response to BIA Amicus Invitation No. 17-01-05 (BIA 2017) (specifically addressing the question of whether application of a new CIMT standard set forth in a BIA case adjudicative decision is "impermissibly retroactive" to convictions for acts committed prior to the publication of the BIA decision). IDP respectfully submits this brief to assist the Court with resolving the important questions presented in the Petitioner's case.

INTRODUCTION[2]

For decades, the Board of Immigration Appeals ("BIA" or "agency") has determined that a larceny offense constitutes a crime involving moral turpitude ("CIMT") only when a permanent taking is intended. *See Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847, 849 (BIA 2016) ("From the Board's earliest days

[2] *Amicus curiae* IDP respectfully refers the Court to the Petitioner's opening brief for the procedural history and standard of review. Most relevant to the questions IDP seeks to address in this brief, the Petitioner was convicted in 2008 under New York's misdemeanor petit larceny statute, N.Y.P.L. § 155.25, which the BIA found to constitute a CIMT in 2012. *See* Brief for Petitioner, Statement of the Case § II. On petition for review, this Court vacated the BIA's decision and remanded the Petitioner's case with instructions that the agency consider whether § 155.25 categorically constitutes a CIMT theft offense. *Id.* In 2016, the BIA simultaneously issued *Matter of Diaz-Lizarraga*, 26 I. & N. Dec. 847 (BIA 2016) and *Matter of Obeya*, 26 I. & N. Dec. 856 (BIA 2016), reversing decades of its own precedent and finding that the generic definition of a CIMT theft offense does not require an intent to permanently deprive and that the minimum conduct punishable under § 155.25 falls within this new definition of a CIMT theft offense. *See id.* § III.

we have held that a theft offense categorically involves moral turpitude if—and only if—it is committed with the intent to permanently deprive an owner of property.") Immigrants have relied on this settled principled for decades in agreeing to plead guilty to certain larceny offenses in resolving criminal charges. Nevertheless, after this Court remanded the Petitioner's case to the BIA to consider whether conviction under N.Y.P.L. § 155.25 could be categorically deemed a CIMT under the BIA's case law requiring permanent taking intent, *see Obeya v. Holder*, 572 F. App'x 34 (2d Cir. 2014), the BIA abruptly abandoned its decades of precedent to find that such a larceny offense may be categorically deemed a CIMT even when the offense does not require that a permanent taking be intended. *See Matter of Obeya* (hereinafter "*Obeya II*"), 26 I. & N. Dec. 856 (BIA 2016) (citing its simultaneously issued decision in *Diaz-Lizarraga*, 26 I. & N. Dec. at 852-53, wherein the BIA stated that it was "updating" its prior jurisprudence to hold that a theft offense may be found to categorically involve moral turpitude "despite the fact that it does not require the accused to intend a literally permanent taking").

As explained in Part I of this brief, IDP agrees with Petitioner that the misdemeanor petit larceny conviction at issue in his case does not categorically involve moral turpitude. *See infra* Argument § I. However, as explained in Part II of this brief, should the Court find that this misdemeanor conviction may be

categorically deemed a CIMT under the BIA's new expanded standard announced on November 16, 2016, IDP respectfully submits this brief to assist the Court in resolving the important question of whether the application of this new standard, abandoning decades of prior precedent, is impermissibly retroactive with respect to convictions for acts committed before the BIA announced the new standard. *See infra* Argument § II. This question of the permissible retroactivity of new agency adjudicative rules is a recurring one and likely to increase in importance in coming years as the immigration agency takes on new leadership intent on broadening the reach of the nation's deportation laws.

SUMMARY OF ARGUMENT

IDP agrees with the Petitioner that the conviction at issue in his case, a New York misdemeanor conviction for petit larceny under N.Y.P.L. § 155.25, is not categorically a CIMT. As well-explained by the Petitioner in his brief, the least-acts-criminalized under this statute do not involve moral turpitude because they do not require permanent taking intent as required under the BIA's former standard which had been in place for decades at the time the Petitioner pleaded guilty under § 155.25 in 2008. Nor do the least-acts-criminalized meet the BIA's new expanded standard set forth just this past November 16, 2016 in *Matter of Diaz-Lizarraga* on the very same day in which the BIA issued its decision in *Obeya II*, as they do not

require either an intent to permanently deprive or a substantial erosion of property rights.

However, should this Court nevertheless find that the misdemeanor petit larceny conviction at issue in this case may be categorically deemed a CIMT under the BIA's new expanded standard, the Court, for the reasons set forth in Petitioner's brief and further elaborated on in this brief, should find that the agency may not retroactively apply its new standard to acts committed prior to the BIA's November 16, 2016 issuance of its new CIMT standard. The Supreme Court and Courts of Appeals strongly disfavor retroactive application of new laws, including in the immigration adjudicative rulemaking context. Several Courts of Appeals recognize a presumption against retroactivity in cases of adjudicative rulemaking. The factors the federal courts consider in determining the impermissibility of retroactive application would not rebut that presumption in the Petitioner's case. Thus, if this Court finds that a conviction under § 155.25 may be categorically deemed a CIMT under the new BIA standard, this Court must then recognize and adopt the presumption against retroactivity in adjudicative rulemaking and find the presumption unrebutted in the Petitioner's case.

ARGUMENT

I. A CONVICTION FOR NEW YORK PETIT LARCENY MAY NOT BE CATEGORICALLY DEEMED A CIMT UNDER EITHER THE BIA'S FORMER OR NEW EXPANDED CIMT STANDARDS

For more than a century, courts have applied the categorical approach when deciding whether a conviction constitutes a CIMT for immigration purposes. *See, e.g.*, *United States ex rel. Mylius v. Uhl*, 203 F. 152 (S.D.N.Y. 1913), *aff'd* 210 F. 860 (2d Cir. 1914); *United States ex rel. Robinson v. Day*, 51 F.2d 1022 (2d Cir. 1931). The BIA formally adopted this position in 2016 in *Matter of Silva-Trevino III*, 26 I. & N. Dec. 826, 830 (BIA 2016). Under the categorical approach, the adjudicator compares "the elements of the crime of conviction" with the elements of the "generic offense" in the immigration laws (*i.e.*, the generic definition of a CIMT). *Mathis*, 136 S. Ct. at 2247-48. If the elements of the statute of conviction "are the same as, or narrower than, those of the generic offense," the conviction is categorically an immigration law offense. *Id.* at 2248. "But if the [statute] of conviction covers any more conduct than the generic offense, then it is" *not* an immigration law offense. *Id.* Under the categorical approach, the particulars of the noncitizen's conduct are never subject to review. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). There is a presumption that the noncitizen's "conviction rested upon nothing more than the least of the acts criminalized." *Id.* (internal quotation and brackets omitted).

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*, 135 S. Ct. at 1987. It ensures that a noncitizen will never suffer the

"particularly severe penalty" of deportation, *Padilla*, 559 U.S. at 365 (internal quotation omitted), absent "certainty" that he was "convicted" of an offense that authorizes deportation. *Mathis*, 136 S. Ct. at 2257 (internal quotation omitted). 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. *Id.* at 2256.[3]

To conduct the categorical inquiry, the immigration adjudicator must first identify the generic definition of the immigration provision. *See Descamps*, 133 S. Ct. at 2282. 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.*

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

For decades prior to 2016, the case law from the BIA and the Office of the Attorney General established its position that the generic definition of a theft CIMT does not include larceny offenses that do not require permanent taking intent. *See Matter of Grazley*, 14 I. &. N Dec. 330, 333 (BIA 1973) ("theft is considered to involve moral turpitude only when a permanent taking is intended"); *In re R-*, 2 I. & N. Dec. 819, 828 (BIA 1947) (noting that "[i]t is settled law that the offense of taking property temporarily does not involve moral turpitude" and referencing an earlier Attorney General decision that held that "whether the crime of theft . . . involved moral turpitude" turned on "whether the intention was to deprive the owner of possession permanently"). *See also Matter of V-Z-S-*, 22 I. & N. Dec. 1338, 1350 n.12 (BIA 2000) (recognizing BIA precedent that, to be a CIMT as opposed to an aggravated felony "theft" offense, a larceny offense must "include the turpitudinous element of intent to permanently deprive"). This Court has recognized this longstanding BIA precedent. *Wala v. Mukasey*, 511 F.3d 102, 106 (2d Cir. 2007) (Sotomayor, J.) (quoting *Grazley*, 14 I. & N. Dec. at 333) ("Under BIA precedent . . . not all larcenies are CIMTs. The BIA has held that '[o]rdinarily, a conviction for theft is considered to involve moral turpitude only when a permanent taking is intended.'")

Amicus curiae IDP agrees with the Petitioner that the least-acts-criminalized under the New York petit larceny statute do not fall within the generic definition of

a theft CIMT under either the BIA's former standard or its new standard announced in 2016 in *Diaz-Lizarraga*, even should the new standard be given any weight given its abandonment of longstanding agency precedent. *See Good Samaritan Hospital v. Shala*, 508 U.S. 402, 417 (1993) ("The consistency of an agency's position is a factor in assessing the weight that position is due."); *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska,* 451 U.S. 259, 273 (1981)). The least-acts-criminalized do not require as an element, an intent to permanently deprive the property owner, which is required for a conviction to constitute a CIMT theft offense under the BIA's pre-2016 case law. *See* Brief for Petitioner, Argument § III.A (discussing New York statutory law and case law). Nor do the least-acts-criminalized meet even the BIA's new expanded CIMT standard set forth in 2016 in *Diaz-Lizarraga*, as they do "not require a showing that a permanent deprivation or substantial erosion of property rights was intended." *Obeya II*, 26 I. & N. Dec. at 860. *See* Brief for Petitioner, Argument § III.A, B. Therefore, a conviction under this New York statute may not be categorically deemed a CIMT.

II. IF THE COURT FINDS THAT A NEW YORK PETIT LARCENY CONVICTION MAY BE CATEGORICALLY DEEMED A CIMT UNDER THE BIA'S NEW EXPANDED CIMT STANDARD, THIS NEW STANDARD MAY NOT BE APPLIED RETROACTIVELY

Should the Court nevertheless find that a New York misdemeanor petit larceny conviction may be categorically deemed a CIMT under the BIA's new expanded standard set forth in *Matter of Diaz-Lizarraga*, the Court must not allow the agency to apply its decision retroactively to convictions entered prior to November 16, 2016, the date the BIA issued *Diaz-Lizarraga* and *Obeya II*. The Petitioner is one of thousands of immigrants who, prior to 2016, faced charges under § 155.25 and decided whether to plead guilty or negotiate an alternative disposition.[4] The "unfairness" of retroactive application of a new legal standard to these individuals would be "significant and manifest." *St. Cyr*, 533 U.S. at 323.

The Supreme Court and federal Courts of Appeals strongly disfavor retroactivity, including in the immigration context. This disfavoring of retroactivity extends not only to legislative rulemaking but also to agency adjudicative rulemaking—the mode of rulemaking the BIA employed in the Petitioner's case. Several Courts of Appeals have adopted a formal presumption against retroactive application of agency rules. Applying this presumption, these courts then consider a collection of factors and decide whether they rebut the presumption in an

[4] In the five years preceding the BIA's decisions in *Diaz-Lizarraga* and *Obeya II*, New York State charged more than 285,000 people under § 155.25. *See* Immigrant Defense Project, *New York State Data on Misdemeanor Arrests and Prosecutions*, *available at* http://www.immdefense.org/new-york-state-data-misdemeanor-arrests-prosecutions/ (last visited May 9, 2017). Approximately 160,000 were convicted. *Id.* Over 99% of those convictions were by guilty plea. *Id.* Of those convicted, nearly two thirds received no jail sentence. *Id.*

individual's case and therefore permit retroactive application. *Amicus curiae* IDP urges this Court to join its sister Circuits in adopting this presumption against retroactive application of agency rules, and to find the presumption unrebutted in the Petitioner's case. These factors do not otherwise authorize retroactive application of *Diaz-Lizarraga* to larceny convictions entered prior its date of issuance in 2016.

A. The Supreme Court And The Courts Of Appeals Disfavor Retroactive Application Of New Rules Established Through Agency Adjudication Because Of Unfairness That Often Results

"Retroactivity is not favored in the law." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). This principle pervades immigration jurisprudence. *See, e.g.*, *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). *See also Velasquez-Garcia v. Holder*, 760 F.3d 571, 579 (7th Cir. 2014) (Wood, C.J.) (citing Supreme Court precedent in *St. Cyr* and *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421 (1987), to describe a judicial "reluctance to impose rules retroactively" in "the immigration context"). The Supreme Court has written that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994). "[T]he principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal human appeal." *Id.*

The federal courts describe retroactivity as "'attach[ing] new legal consequences to events completed before [the] enactment.'" *Velasquez-Garcia*, 760 F.3d at 579 (quoting *Landgraf,* 511 U.S. at 270). Whether retroactive application of a new rule is allowable must "be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Velasquez-Garcia*, 760 F.3d at 579 (internal quotations omitted). The federal courts are vigilant about protecting against the "retroactive effect" of "a legal rule," *id.*: application that "takes away or impairs vested rights acquired under existing laws, or creates new obligations, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Soc'y for Propagation of Gospel v. Wheeler,* 22 F.Cas. 756, 767 (C.C.D.N.H. 1814) (Story, J.) (cited in *St. Cyr*, 533 U.S. at 321).

"The appropriate standard for determining whether a legal rule may be applied retroactively depends on the source of the rule." *Velasquez-Garcia*, 760 F.3d at 579. For legislatively enacted rules, "courts presume that a rule lacks retroactive effect 'absent clear congressional intent favoring such a result.'" *Id.* (quoting *Landgraf,* 511 U.S. at 280). *See also Vartelas,* 566 U.S. at 273. For judicially enacted rules, the courts presume the rule takes "full retroactive effect." *Harper v. Va. Dep't of Tax*, 509 U.S. 86, 97 (1993). Agency adjudications "are presumed not to have retroactive effect" because they are "legislative and quasi-

legislative," *Velasquez-Garcia*, 760 F.3d at 579, a presumption this Court should recognize and adopt. The Tenth Circuit has joined the Seventh in expressly adopting this view:

> [T]he more an agency acts like a legislator—announcing new rules of general applicability—the closer it comes to the norm of legislation and the stronger the case becomes for limiting application of the agency's decision to future conduct. The presumption of prospectivity attaches to Congress's own work unless it plainly indicates an intention to act retroactively. *That same presumption, we think, should attach when Congress's delegates seek to exercise delegated legislative policymaking authority: their rules too should be presumed prospective in operation unless Congress has clearly authorized retroactive application.*

De Niz Robles v. Lynch, 803 F.3d 1165, 1172 (10th Cir. 2015) (Gorsuch, J.) (emphasis added). This Court has indicated that it favors this approach: "[T]he gravitational pull of … constitutional norms—the rights of fair notice and effective assistance of counsel—may provide a reason not to apply, retroactively, new agency rules that establish deportation as a consequence of certain crimes." *Lugo v. Holder*, 783 F.3d 119, 122 (2d Cir. 2015). In the context of rulemaking "through adjudicatory action, retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." *Miguel-Miguel v. Gonzales*, 500 F.3d 941, 951 (9th Cir. 2007) (citing *Heckler v. Cmty. Health Servs. of Crawford County, Inc.,* 467 U.S. 51, 60 n. 12 (1984); *SEC v. Chenery Corp.,* 332 U.S. 194, 203 (1947)). The Supreme Court

required this protection in *St. Cyr* out of concern that a legislative or quasi-legislative body's "responsivity [*sic*] to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals." *St. Cyr*, 533 U.S. at 315. The federal courts offer no deference to the agency's decision of whether retroactive application is permitted. *See Velasquez-Garcia*, 760 F.3d at 578-79 (citing *St. Cyr*, 533 U.S. at 320 n.45); *Retail, Wholesale and Department Store Union, AFL–CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).

B. The Factors The Federal Courts Consider In Deciding Whether Retroactive Application Of An Agency Rule Is Permissible Preclude Retroactivity In This Case

The Courts of Appeals, including this Court, have "fleshed out" a "test" of "five non-exhaustive factors for determining when an agency" may rebut the presumption against "retroactive application of an adjudicatory decision." *Miguel-Miguel*, 500 F.3d at 951. The majority of Courts of Appeals and this Court apply the test originally created by the D.C. Circuit in the seminal *Retail, Wholesale and Department Store Union, AFL–CIO v. NLRB* case:

1) whether the case is one of first impression,
2) whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law,
3) the extent to which the party against whom the new rule is applied relied on the former rule,
4) the degree of the burden which a retroactive order places on a party, and

5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.

466 F.2d 380 (D.C. Cir. 1972). *See also Lugo*, 783 F.3d at 121 (citing *N.L.R.B. v. Oakes Mach. Corp.*, 897 F.2d 84, 90 (2d Cir. 1990)); *De Niz Robles v. Lynch*, 303 F.3d 1165 (10th Cir. 2015); *Velasquez-Garcia v. Holder*, 760 F.3d 571, 581 (7th Cir. 2014); *Miguel-Miguel*, 500 F.3d at 951; *McDonald v. Watt*, 653 F.2d 1035, 1042 (5th Cir. 1981). "Like most such unweighted multi-factor lists, this one serves best as a heuristic; no one consideration trumps the others." *Velasquez-Garcia*, 760 F.3d at 581. "[T]he totality of the circumstances are to be taken into account in order to strike a just balance." *Retail, Wholesale*, 466 F.2d at 392.

An agency must reach an extraordinarily high bar to overcome the presumption against retroactivity, given the profound unfairness in imposing immigration consequences on people under rules that did not previously exist. As a review of the *Retail, Wholesale* factors show, and as this Court has indicated, that bar is not met here and retroactivity is not permitted.

1. The question of whether conviction of a theft offense such as New York petit larceny may be categorically deemed a CIMT is not a question of first impression

The first *Retail,Wholesale* factor asks whether the question is one of first impression. The question addressed in *Matter of Diaz-Lizarraga*—whether conviction of a larceny offense that does not require permanent taking intent may be categorically deemed a CIMT—is not a question of first impression. The

immigration agencies have dealt with this issue for decades, and long ago determined theft and larceny offenses may not be categorically deemed a CIMT absent a requirement of intent to take permanently. *See supra* § I (citing and discussing *Grazley*, 14 I. & N. Dec. at 333; *In re R-*, 2 I. &. N. Dec. at 828). In *Lugo*, this Court considered this first factor in a context nearly identical to the Petitioner's case. There this Court considered the BIA's change in position on whether federal misprision of a felony is categorically a CIMT. *See Lugo*, 783 F.3d at 120. The BIA and Office of the Attorney General both issued decisions on the question, finding the offense to be categorically *not* a CIMT. *See Id.* at 120 (internal citations omitted). The BIA then reversed course in 2006, finding the conviction to be categorically a CIMT. *See id.* In deciding whether the BIA's new decision could be applied retroactively to past convictions, this Court found that this first factor "clearly" weighed against retroactive application of the agency's new position. *See id.* at 121. As the circumstances here are virtually indistinguishable, this Court should reach the same conclusion in this case.

2. ***Diaz-Lizarraga* was an abrupt departure from the BIA's well-established precedents going back over seven decades**

The second factor asks "whether the new rule presents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area." *Lugo*, 783 F.3d at 121. For decades, the BIA has determined that a larceny offense constitutes a CIMT only when a permanent taking is intended. *See supra* §

I. The BIA itself acknowledges its longstanding precedents on this question: "From the Board's earliest days we have held that a theft offense categorically involves moral turpitude if—and only if—it is committed with the intent to permanently deprive an owner of property." *Diaz-Lizarraga*, 26 I. & N. Dec. at 849. Where agency precedential decisions have directly addressed the legal question at issue—as is the case here—there has been a *per se* showing that the question is "settled," and any change in position by the agency is an "abrupt departure." *Lugo*, 783 F.3d at 121.

3. In resolving criminal charges to mitigate immigration consequences, noncitizens have long-relied on the agency position that larceny offenses that reach non-permanent takings may not be categorically deemed CIMTs

"The third [factor] examines the extent to which the party against whom the new rule is applied may have relied on the former rule." *Velasquez-Garcia*, 760 F.3d at 582. "Importantly, the critical question is not whether a party actually relied on the old law, but whether such reliance would have been reasonable." *Id.* (citing *Vartelas,* 566 U.S. 257 at 273). As the above discussion of the first two factors demonstrates, it was well-settled law prior to last year that larceny convictions that reached takings without intent to permanently deprive may not be categorically deemed a CIMT. *See* § II.B.1, 2, *supra*. Furthermore, widely distributed reference texts consulted by criminal and immigration practitioners in advising noncitizens expressly characterize the BIA's case law prior to 2016 as

holding that convictions that do not require an intent to permanently deprive are not CIMT theft offenses. *See, e.g.*, Norton Tooby & Joseph Justin Rollin, *Safe Havens: How to Identify and Construct Non-Deportable Convictions* 741 (2005) ("Offenses that do not require, as an essential element, an intent to permanently deprive the owner of property are not classified as theft crimes involving moral turpitude."); Norton Tooby & Jennifer Norton, *Crimes Involving Moral Turpitude: The Complete Guide* 288-89 (2002) (emphasis original) ("Offenses that do not involve intent to permanently deprive the owner of the property are **NOT** classified as theft crimes involving moral turpitude.")

Thus, reliance on that law by noncitizens who gave up their right to trial and pled guilty to such larceny offenses prior to last year would have been reasonable and must be presumed where there was an "existing rule[] limiting deportation at the time [the noncitizen] pled guilty." *Lugo*, 783 F.3d at 122. *See also Nunez-Reyes v. Holder*, 646 F.3d 684, 696 (9th Cir. 2011) (en banc) (citing *St. Cyr*, 533 U.S. at 323 n. 50) ("Even if the defendant were not initially aware of" dispositive case law, "competent defense counsel … would have advised him [or her] concerning the [decision's] importance.").

This Court has asked the BIA to state its position on the question of "whether a defendant should automatically be assumed to have relied on existing rules limiting deportation at the time she pled guilty to a crime where that guilty

plea, because of a change in rules, subsequently becomes a basis for deporting her." *Lugo*, 783 F.3d at 122. In issuing this instruction to the BIA, the Court cited to *St. Cyr*'s statement that "[t]here can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St.* Cyr, 533 U.S. at 322.

This Court should adopt a rule where "a defendant [is] automatically … assumed to have relied on existing rules limiting deportation at the time she pled guilty to a crime." *Lugo*, 783 F.3d at 122. Otherwise, in many cases the immigration agency "would [have] effectively … hoodwink[ed] aliens into waiving their constitutional rights on the promise of no legal consequences and, then, to hold retroactively that their convictions actually carried with them the particularly severe penalty of removal." *Nunez-Reyes*, 646 F.3d at 693 (internal quotation omitted). "The potential for unfairness in … retroactive application" would be "significant." *Id.* (citing *St. Cyr*, 533 U.S. at 323). Indeed, the Ninth Circuit has articulated the "reasonable assumption that Congress" did not "intend" this. *Id.* at 694. "[M]any alien defendants … plead … guilty and waive … their constitutional rights with a wholly uninformed understanding of the consequences of their plea[,]" and "[n]othing in the statute or its history, purpose, or effect suggests that Congress intended adverse immigration consequences for those whose waiver of constitutional rights turned out to be so ill-informed." *Id.*

It would be "contrary to familiar considerations of fair notice, reasonable reliance, and settled expectations to" deprive a noncitizen of the "possibility of relief" where a prosecutor has "received the benefit of" a plea agreement that was "likely facilitated by the" noncitizen's belief in … continued eligibility for … relief." *St. Cyr*, 533 U.S. at 323.

4. As this Court recognized in *Lugo*, the burden a retroactive order would place on noncitizens in the Petitioner's circumstances would be massive

In *Lugo*, this Court described "the degree of burden" of "removal from the United States, with life-changing consequences" as "massive." 738 F.3d 121. The Supreme Court has also "long recognized the obvious hardship imposed by removal." *Velasquez-Garcia*, 760 F.3d at 584. *See also Padilla*, 559 U.S. at 365 (quoting *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893)) ("We have long recognized that deportation is a particularly severe "penalty."") The court in *Padilla* described "deportation" as a ""drastic measure."" *Padilla*, 559 U.S. at 360 (quoting *Fong Haw Tan v. Phelan,* 333 U.S. 6, 10 (1948)). In *Vartelas*, the Court again "recognized the severity of [the] sanction" of deportation. 566 U.S. 257 at 268.

And as the Court is well-aware, categorizing a conviction as a crime involving moral turpitude widely impacts vulnerability to deportation for whole categories of immigrants. If the Court concludes that the misdemeanor petit

larceny conviction at issue in this case may be categorically a CIMT and applies that position retroactive to convictions entered prior to 2016, the Court's decision will render lawful permanent residents deportable, and in some instances ineligible for cancellation of removal (*see* 8 U.S.C. §§ 1227(a)(2)(A)(i)-(ii), 1229b(a)(2), 1229b(d)(1)(b)); render parents, spouses, and children of U.S. citizens and lawful permanent residents ineligible for cancellation of removal, including individuals who have been battered (*see* INA §§ 1229b(b)(1)(C), 1229b(b)(2)(A)(iv)); render family members of U.S. citizens ineligible for adjustment of status without a discretionary waiver (*see* INA §§ 1182(a)(2)(A)(i)(I)); and prevent longtime lawful permanent residents from traveling abroad without facing removal proceedings when they attempt to return to their lives in the United States (*see id.*). "[T]hat burden is immense." *Velasquez-Garcia*, 760 F.3d at 584. *Accord Miguel–Miguel,* 500 F.3d at 952 ("[D]eportation alone is a substantial burden that weighs against retroactive application of an agency adjudication.").

5. The statutory interest in retroactive application of *Diaz-Lizarraga* is negligible, particularly when compared to the reliance of noncitizens on prior BIA precedents in seeking to continue their established lives in the United States

The statutory interest in enforcing the INA's CIMT provisions would be "substantially served by prospective application." *Miguel-Miguel*, 500 F.3d at 952. "[C]ourts have not infrequently declined to enforce administrative orders when in their view the inequity of retroactive application has not been counterbalanced by

sufficiently significant statutory interests." *Retail, Wholesale*, 466 F.2d at 390 (collecting cases from the First, Sixth, and Eighth Circuits). Here there is no sufficiently significant statutory interest to mitigate the unfairness of applying *Diaz-Lizarraga* retroactively.

This Court has likewise established a high bar for an agency to demonstrate a statutory interest justifies retroactive application to conduct that previously violated no rule. The Court has permitted the National Labor Relations Board to apply a new rule retroactively to help avoid "tremendous instability," *W.P.I.X., Inc. v. N.L.R.B.*, 870 F.2d 858, 867 (2d Cir. 1989)), and where the new rule "stems from" the relevant statute's "central concerns." *Ewing v. N.L.R.B.*, 861 F.2d 353, 362 (2d Cir. 1988). It cannot plausibly be contended that prospective application of *Diaz-Lizarraga* would create instability of any kind, or that the BIA's holding in this case that New York misdemeanor petit larceny may be categorically deemed a CIMT stems from the INA's central concerns. In an immigration case in many ways similar to the petitioner's, the Ninth Circuit found no sufficient statutory interest in the INA for retroactively applying an altered methodology for determining whether a drug offense is a "particularly serious crime" for purposes of barring withholding of removal. *Miguel-Miguel*, 500 F.3d at 950-51. Under this Court's case law, the outcome here should be the same.

CONCLUSION

The Court should reverse the agency and find that a New York petit larceny conviction may not be categorically deemed a CIMT. However, should the Court not do so based on the new expanded CIMT standard announced by the agency last year in *Matter of Diaz-Lizarraga*, it should find that the agency may not retroactively apply the new standard announced in *Diaz-Lizarraga* to convictions for acts committed before the BIA issued that decision.

DATED this 9th day of May, 2017.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32 and Second Circuit Local Rule 32, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,788 words.

Dated: May 9, 2017

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DISCLOSURE STATEMENT

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

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

CERTIFICATE OF SERVICE

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U.S. Court of Appeals Docket Number 16-3922-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 May 9, 2017.

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Date: May 9, 2017
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