EXHIBIT A

21-6208

IN THE

United States Court Of Appeals

FOR THE SECOND CIRCUIT

Wayne Patrick DEBIQUE,
Petitioner,

– against –

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

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF OF LEGAL SERVICES PROVIDERS AS PROPOSED AMICI IN SUPPORT OF THE PETITION FOR REHEARING OR REHEARING EN BANC

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Proposed amici curiae, The Bronx Defenders, Brooklyn Defender Services, The Legal Aid Society, and Prisoners' Legal Services of New York, are legal services providers who represent indigent criminal defendants in New York, advise noncitizen clients on the immigration consequences of contemplated plea bargains, and represent noncitizens in immigration court, before the Board of Immigration Appeals ("the Board"), and before this Court.[1]

We respectfully submit this brief to explain how the Board's refusal to adopt a clear definition of "sexual abuse of a minor" when undertaking the categorical approach has harmed our clients. The Board's expansive, standard-less approach fails to provide fair notice of what actions fall within the statute's scope, and undermines—rather than supports—efficiency, fairness, and predictability in criminal and immigration proceedings. It has also facilitated the Board's application of this provision in a manner inconsistent with the text, structure, and history of the Immigration and Nationality Act ("INA"). As a result of the Board's decision in this case, and this Court's deference to it, a teenaged noncitizen may be deemed an "aggravated felon" and banished from the United States based on

[1] Pursuant to Fed. R. App. P. 29(a)(4), amici state that none of amici are corporations, no party counsel authored any part of the brief, and no person or entity other than amici contributed money to prepare or file it.

conduct as minimal as consensually kissing a younger teenager—a result that Congress could not plausibly have intended.

ARGUMENT

I. The categorical approach serves important efficiency and due process interests.

Federal statutes that assign immigration consequences to state criminal convictions are presumed to employ a uniform federal definition of the specified offense. *See Taylor v. United States*, 495 U.S. 575, 590-91 (1990); *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389, 393 (2017). When an adjudicator applies such a statute to determine whether a particular state conviction carries immigration consequences, the adjudicator generally must employ the categorical approach, presuming that the state court conviction "rested upon nothing more than the least of the acts criminalized, and then determining whether even those acts are encompassed by the generic federal offense." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013) (internal quotation marks and brackets omitted).

In the immigration context, the categorical approach is rooted in the statutory text of the INA, which "asks what offense the noncitizen was 'convicted' of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed." *Moncrieffe*, 569 U.S. at 191. The categorical approach serves important policy goals by "promot[ing] efficiency, fairness, and predictability in the administration of

immigration law." *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015). "In particular, the approach enables [noncitizens] to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas that do not expose the [noncitizen] defendant to the risk of immigration sanctions." *Id*. (internal quotation marks and original brackets omitted). The focus on the "least of the acts criminalized" also ensures that a noncitizen is not improperly subject to the devastating consequences that follow an aggravated felony determination, including mandatory detention, 8 U.S.C. § 1226(c), a mandatory removal order, *id.* § 1227(a)(2)(A)(iii), and ineligibility for nearly all forms of relief, *see id.* § 1158(b)(2)(B)(i); *id.* §§ 1229b(a)(3), (b)(1)(C); *id.* § 1229c(a)(1).

II. The categorical inquiry cannot be satisfied where, as here, neither the Board nor the reviewing court have articulated the generic federal offense.

The Board's decisions categorizing potential "sexual abuse of a minor" offenses undermine, rather than facilitate, the interests of "efficiency, fairness, and predictability." *Mellouli*, 575 U.S. at 806. This is because it is common for the Board to deem state offenses "sexual abuse of a minor" aggravated felonies in decisions that "d[o] not establish the elements of the federal offense" or "even explain what federal definition [the Board is] using." *Larios-Reyes v. Lynch*, 843 F.3d 146, 157 (4th Cir. 2016).

In fact, the Board has *never* clearly defined the generic federal offense. In *Matter of Rodriguez-Rodriguez*, the Board rejected the federal criminal provisions at 18 U.S.C. §§ 2242, 2243, and 2246 as "too restrictive." 22 I. & N. Dec. 991, 996 (B.I.A. 1999). The Board gestured toward a standard when it stated that 18 U.S.C. § 3509(a)(8) provides "a useful identification of the forms of sexual abuse," *id*. at 995, but then explained that the statute is only a "guide," not a "definitive standard or definition," *id*. at 996.

In *Matter of Esquivel-Quintana*, 26 I. & N. Dec. 469 (B.I.A. 2015), the Board articulated that a "case-by-case" approach for adjudicating "sexual abuse of a minor" offenses was practical and necessary "given the large number and variety of statutes that are potentially at issue." *Id*. at 477. The Supreme Court, however, rejected the Board's approach, explaining that an adjudicator must determine the generic federal offense using traditional tools of statutory interpretation before comparing the "least of the acts criminalized" under the state statute against the federal offense. *Esquivel-Quintana*, 581 U.S. at 389-91. The Court admonished the Board for "turn[ing] the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted." *Id.* at 393.

Mr. Debique argues that the deference afforded by this Court in *Mugalli v. Ashcroft*, 258 F.3d 52 (2d Cir. 2001), and *Acevedo v. Barr*, 943 F.3d 619 (2d Cir.

2019), are inconsistent with *Esquivel-Quintana*. *See* Pet. 6-9. Amici agree and fully endorse petitioner's arguments.

Amici write separately to explain that this Court's decisions in *Rodriguez v. Barr*, 975 F.3d 188 (2d Cir. 2020), and *Debique* deviate even further from *Esquivel-Quintana*'s holding. In both *Acevedo* and *Mugalli*, this Court deferred to the Board's determination that a sex-related offense was an aggravated felony because it corresponded to an offense referenced in 18 U.S.C. § 3509(a)(8). *See Mugalli*, 258 F.3d at 58-59; *Acevedo*, 943 F.3d at 623-24. By contrast, in *Rodriguez* and *Debique*—where the state offenses fell *outside* the scope of both 18 U.S.C. § 2243 and 18 U.S.C. § 3509(a)(8)—the government did not rely on any standardized definition of the offense.[2]

Yet this Court continued to defer to the Board notwithstanding this omission. In *Rodriguez*, the Court did not cite or develop its own definition of the generic federal offense, and instead explained that it was deferring to the Board's conclusion that "sexual abuse of a minor" was "intended to . . . 'capture the broad spectrum of sexually abusive behavior' and 'encompass the numerous state crimes

[2] In Mr. Debique's case, the Board purported to rely on the definition at 18 U.S.C. § 3509(a)(8), concluding that it categorically fell within that definition. Petitioner's Addendum at 2, ACMS No. 25.1. The government did not defend this reasoning on appeal, however, and the Court acknowledged that N.Y. Penal Law § 130.60(2) falls outside the scope of § 3509(a)(8). Opinion at 13.

that can be viewed as sexual abuse and the diverse types of conduct that would fit within the term as it commonly is used.'" 975 F.3d at 192 (quoting *Rodriguez-Rodriguez*, 22 I. & N. Dec. at 998) (brackets omitted).

The Board repeated the error in Mr. Debique's case, again failing to articulate any plausible definition of the generic offense. Instead, the Board rested its removability determination on *Rodriguez v. Barr*, finding it "directly applicable" to Mr. Debique's case. Petitioner's Addendum at 2. This Court approved, without comparing the state statute to any generic federal definition. Opinion at 8-13.

The Board's reasoning, and this Court's deference to it, cannot be squared with *Esquivel-Quintana*, which rejected the same approach as applied to statutory rape offenses because "[u]nder the Government's preferred approach, there is no 'generic' definition at all." 581 U.S. at 393. The Board's approach also fails to offer fair notice of what actions fall within the statute's scope, raising serious vagueness concerns. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (explaining that "ordinary notions of fair play and the settled rules of law" require that a definition is sufficiently clear enough to provide "'fair notice' of the conduct

a statute proscribes" (quoting *Johnson v. United States*, 576 U.S. 591, 595 (2015)).[3]

III. Under a proper categorical analysis, N.Y. Penal Law § 130.60(2) sweeps beyond any plausible generic definition of "sexual abuse of a minor."

Had the Board or this Court articulated a definition for the generic federal definition, it likely would have addressed the question of whether an age differential between a defendant and a victim is necessary, as the Supreme Court has suggested. *See Esquivel-Quintana*, 581 U.S. at 397 (noting that "[t]he laws of many States and of the Federal Government include a minimum age differential" as an element of statutory rape). And this is an important question in this case, as N.Y. Penal Law § 130.60(2) does not include an explicit "age gap" requirement or "Romeo and Juliet" defense. *Compare* N.Y. Penal Law § 130.55(c) (allowing a defense to sexual abuse in the third degree when "the defendant was less than five years older than such other person"), *with* N.Y. Penal Law § 130.60 (providing no

[3] The Court's decisions also reflect a split with the Third Circuit, which defers to the Board's reliance on 18 U.S.C. §§ 3509(a)(8) as a guide, but has declined to extend this deference if the state offense contains an element not clearly addressed by § 3509(a)(8). *See Cabeda v. Att'y Gen.*, 971 F.3d 165, 173 (3d Cir. 2020) (declining to defer to Board's determination that "sexual abuse of a minor" includes a strict liability offense, noting that "Section 3509(a)(8) does not specify a mens rea requirement, and [the court] cannot defer to a nullity").

such defense).[4] Therefore, the minimum age difference between the defendant and victim is controlled by the age of infancy specified by statute. Although the infancy statute was recently modified under New York's "raise the age" legislation, at the time of the plea in this case, a defendant could be convicted under § 130.60(2) for conduct committed as a sixteen-year-old with an almost-fourteen-year-old partner.[5]

The minimum age differential here—just over two years—is less than that required under the federal criminal statute or most common understandings of the term. 18 U.S.C. § 2243(a) provides that there must be at least a four-year age gap between a defendant and the victim to trigger criminal liability. When Congress enacted the crime "sexual abuse of a minor" in 1986, it concluded that requiring a

[4] Although this brief focuses on the minimal age differential between a defendant and victim, other aspects of the statute render it overbroad, including (i) the expansive definition of "sexual contact" under New York law to include mere kissing, *see* N.Y. Penal Law § 130.00(3); *People v. Rondon*, 579 N.Y.S.2d 319, 320-21 (N.Y. Crim. Ct. 1992); (ii) the fact that N.Y. Penal Law § 130.60(2) is a strict liability crime with respect to the age of the victim, *see* N.Y. Penal Law § 15.20(3) (providing that a mistake as to the victim's age is not a defense unless the statute expressly states that it is); N.Y. Penal Law § 130.60 (containing no mistake-of-age defense); and (iii) the lack of any special relationship between the defendant and the victim.

[5] On the date that Mr. Debique pleaded guilty, August 15, 2019, N.Y. Penal Law § 130.60(2) could be applied to a sixteen-year-old defendant if the conduct was committed 10.5 months prior, and it could be applied to any seventeen year old. *See* S. 2009, Assemb. 3009, Section 106(b), 2017-2018 (N.Y. 2017).

four-year age differential was "important" to exclude non-criminal sexual behavior between young people close in age. H.R. Rep. No. 99-594, at 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6186, 6197. Congress retained this age differential when it amended the statute in 1996. *See* 18 U.S.C. § 2243(a) (1996).

Common sense also supports the finding that the minimum conduct criminalized under N.Y. Penal Law § 130.60(2)—consensual kissing between teenagers, *see supra* at 7-8 & n.4—should not yield the draconian consequences attached to an aggravated felony, including mandatory detention and almost certain banishment. *See Carachuri-Rosendo v. Holder*, 560 U.S. 563, 573-74 (2010) (noting that courts look to the "commonsense conception" of statutory terms to interpret aggravated felony provisions (quoting *Lopez v. Gonzalez*, 549 U.S. 47, 53 (2006)). When the academic year begins in New York City, for example, many freshmen in high school are thirteen years old.[6] Therefore, N.Y. Penal Law § 130.60(2) criminalizes a sixteen- or seventeen-year-old junior or senior kissing an almost-fourteen-year-old freshman. At the time the "sexual abuse of a minor" aggravated felony was added to the INA, popular culture presented these types of

[6] Children in New York City who are four or five when they begin kindergarten will be thirteen or fourteen when they enter ninth grade. *See New Students*, NYC Dep't of Educ., https://www.schools.nyc.gov/enrollment/enrollment-help/new-students (last visited Dec. 15, 2022) (noting that children may start kindergarten in the calendar year that they turn five).

interactions as normalized and non-criminal. *See* Dazed and Confused (Alphaville 1993) (showing romantic relationship between rising freshman Sabrina and rising senior Tony); Goonies (Amblin Entm't 1985) (showing kiss between 13-year-old Mikey and 16-year-old Andy); *see also* Romeo + Juliet (Bazmark Prod. 1996) (Juliet is 13, Romeo is thought to be 17). Generally understood, in both 1996 and today, "the circumstances surrounding sexual contact between two teenagers are far different from those surrounding sexual contact between a young child and a much older adult." *United States v. Kirk*, 111 F.3d 390, 395 n.8 (5th Cir. 1997).

To be sure, the panel in *Debique* declined to "decide whether the generic federal definition of 'sexual abuse of a minor' requires a minimum age differential or particular relationship between the perpetrator and victim." Opinion at 12 n.6 (citing *Esquivel-Quintana*, 137 S. Ct. at 1572, where the Supreme Court declined to address those same questions). But this case is dissimilar from *Esquivel-Quintana*, where the Supreme Court relied only on the victim's age to conclude that a statute was *not* an aggravated felony, and therefore did not need to reach other potential arguments against a categorical match. By concluding that N.Y. Penal Law § 130.60(2) *is* an aggravated felony in a precedential decision, without

undertaking a full categorical analysis, the panel's decision could be read as implicitly foreclosing an age differential or special relationship argument.[7]

And indeed, this is the meaning that the Attorney General has already drawn. In a pending petition for review where the minimum age differential argument was squarely raised, the Department of Justice has argued that *Debique* disposes of the arguments, as it is binding precedent and must control under the Court's "prior precedent rule." *See Garcia Pinach v. Garland*, No. 22-6421, Gov't Br. 17, ACMS 56.1. Although amici do not concede this point, the Attorney General's position nevertheless foreshadows how the Board will likely address the age differential question when considering the issue in the context of N.Y. Penal Law § 130.60(2) and similar statutes.

CONCLUSION

The above considerations warrant rehearing of this case by the panel or *en banc* court.

[7] The above considerations, which were not addressed by the panel, warrant rehearing of this case by the panel or *en banc* court. In the alternative, amici request that the Court withdraw its opinion pending the outcome in other cases that address other aspects of the statute's overbreadth, *see*, *e.g.*, *Garcia Pinach v. Garland*, No. 22-6421 (2d Cir.), in which the petitioner is represented *pro bono* by undersigned counsel, or depublish the panel's *per curiam* opinion and proceed by summary order.

Respectfully submitted,

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Dated: April 19, 2023
New York, NY

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(b)(4) and 29(a)(5), because the brief contains 2588 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). 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 brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

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APPENDIX A:

STATEMENTS OF INTEREST OF AMICI CURIAE

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 30,000 cases each year and reaches hundreds more through outreach programs and community legal education. The Immigration Practice of The Bronx Defenders provides noncitizen clients advice to mitigate the deportation risk of potential pleas and provides removal defense services to detained New Yorkers as part of the New York Immigrant Family Unity Project. The Bronx Defenders' representation extends to affirmative immigration applications, motions to reopen, appeals and motions before the BIA, petitions for review, and federal petitions for writs of habeas corpus.

Brooklyn Defender Services ("BDS") is a public defender organization that represents low-income people in nearly 22,000 criminal, family, civil, and immigration proceedings each year. Since 2009, BDS has counseled more than 16,000 clients in immigration matters, including deportation defense, affirmative applications, advisals, and immigration consequence consultations in Brooklyn's criminal court system. BDS's criminal-immigration specialists protect the rights of immigrant New Yorkers by providing support, expertise, and advice to defense

attorneys across BDS about the specific impact a legal case may have on immigration status. Since 2013, BDS has provided removal defense services through the New York Immigrant Family Unity Project, New York's first-in-the-nation assigned counsel program for detained New Yorkers facing deportation. BDS also litigates immigration cases in U.S. federal courts, including habeas, mandamus, and petitions for review before this Court.

The Legal Aid Society is the nation's oldest and largest not-for-profit provider of legal services to low-income clients. Legal Aid's Immigration Law Unit (the "ILU") is a recognized leader in the delivery of free, comprehensive and high-caliber legal services to low-income immigrants in New York City and surrounding counties. ILU provides critical support for criminal defense attorneys, advising them of the impact of criminal prosecutions on non-citizen clients, including the immigration consequences of pleas. Part of the ILU's work also consists of representing detained individuals in removal proceedings before immigration judges, on appeals to the BIA and the United States Court of Appeals for the Second Circuit, and in habeas proceedings in district courts around the country.

Prisoners' Legal Services of New York ("PLS") is a nonprofit organization that has provided civil legal services for over forty-five years to indigent individuals incarcerated in New York State. As part of the New York Immigrant

Family Unity Project, PLS provides free legal representation to noncitizens incarcerated in New York State prisons facing immigration removal proceedings within the Institutional Hearing Program, in addition to noncitizens held in immigration detention in Albany, Batavia, and Plattsburgh, New York. PLS also provides representation in habeas corpus proceedings to detained immigrants in U.S. district courts and on petitions for review and civil appeals before the U.S. Court of Appeals for the Second Circuit. PLS has a strong interest in promoting fairness and predictability in the administration of immigration law.