PRELIMINARY STATEMENT AND SUMMARY OF ARGUMENT

In this case, a panel of the Board of Immigration Appeals ("BIA") held that a lawful permanent resident had committed a "crime of violence" as defined in 18 U.S.C. § 16(b). A "crime of violence" constitutes an "aggravated felony" under Section 101(a)(43)(F) of the Immigration and Nationality Act ("INA"), which in turn renders the immigrant deportable. The BIA accordingly ordered petitioner removed from the United States. *See* A 2-4.[1] The BIA's ruling was erroneous—and squarely inconsistent with this Court's precedent—in two distinct respects.

1. The BIA was wrong to hold that unlawful imprisonment in the first degree under N.Y. Penal Law § 135.10 constitutes a "crime of violence" under Section 16(b). Section 16(b) defines a "crime of violence" as a felony offense "that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." Like numerous other courts of appeals, this Court has held, in *Dalton v. Ashcroft*, 257 F.3d 200 (2d Cir. 2001), that the "crime of violence" determination must be made not on the facts of the particular case, but instead on a categorical assessment whether the *minimum* conduct to which the statute may apply involves a substantial risk that physical force against the person or property of another may be

[1] Joint Appendix references are cited herein as "A __."

used. In *Dalton*, the Court held that the New York offense of driving while intoxicated (DWI) did not satisfy that standard, because there are contexts in which one may be convicted of DWI even when there is no risk that force would intentionally be used. The same is true of New York's unlawful imprisonment statute. That statute can be violated by, for example, deception or the transporting of a minor without parental consent—conduct that in no way entails the deliberate use of force.

The BIA further erred in construing unlawful imprisonment as "divisible." Under this Court's precedent, in that narrow class of cases in which a statute explicitly delineates distinct classes of conduct, some of which constitute a "crime of violence" and some of which do not, that statute is "divisible," and the Immigration Judge ("IJ") may look at the record of conviction for the limited purpose of determining whether the defendant was convicted under that statutory subsection as necessarily constitutes a crime of violence. The New York offense of unlawful imprisonment does not fit this profile. Like the statute at issue in *Dalton*, it consists simply of a unitary prohibition, in this case, on restraining another person against his or her will. Because that prohibition may be violated without the deliberate use of force, the statute is not a "crime of violence" under Section 16(b).

2. Even assuming *arguendo* that Section 135.10 were clearly divisible, the BIA committed a critical procedural error in concluding that petitioner's conviction was for a crime of violence. The BIA made this determination *solely* on the basis of the alleged facts of petitioner's case, as described in a presentence report ("PSR"). For a variety of compelling policy justifications, this Court has specifically disallowed the use of PSRs to determine whether a "crime of violence" has been committed. *See Ming Lam Sui v. INS*, 250 F.3d 105, 116-18 (2d Cir. 2001).

Thus, even were the statute properly regarded as divisible, the BIA's ruling must be reversed, for in looking to the underlying facts and relying solely on petitioner's PSR the government failed to establish by "clear, unequivocal, and convincing evidence" that petitioner is deportable as one convicted of a crime of violence. *Matter of Teixeira*, 21 I & N Dec. 316, 321 (BIA 1996) (citing *Woodby v. INS*, 385 U.S. 276, 286 (1966)); *see also* 8 U.S.C. § 1229a(c)(3)(a).

The questions raised here are of critical importance to immigrants and their families. An immigrant who is convicted of an aggravated felony is "deportable," *see* 8 U.S.C. § 1227(a)(2)(A)(iii) (2000), and for certain classes of immigrants such a determination is unchallengeable. In 1996, Congress repealed Section 212(c) of the INA, which permitted lawful permanent residents who were deportable because of certain criminal convictions to apply for discretionary relief from deportation on

the basis of, for example, ties to the United States (including whether he or she, like petitioner, had U.S. citizen children); length of time in this country; and benefit to the community. This equitable relief was routinely granted. *See INS v. St. Cyr*, 533 U.S. 289, 296 & n.5 (2001). The repeal of Section 212(c) now makes lawful permanent residents who are convicted of aggravated felonies categorically *ineligible* for such relief. *See* 8 U.S.C. § 1229(a)(3) (2000). It is therefore vitally important that IJs, the BIA, and reviewing courts carefully and faithfully apply the categorical approach when determining whether a state-law offense constitutes a "crime of violence," and that they adhere to fair and proper procedures in doing so, for erroneous assignation of the aggravated felony label consigns otherwise lawful immigrants to certain expulsion from the United States.

Close scrutiny by appellate courts is particularly important given the streamlined nature of deportation proceedings. The aggravated felony determination is made at a hearing before an IJ, who has no authority to adjudicate guilt or innocence or find facts regarding criminal offenses. Immigrants have no right to counsel at such hearings. For those who undertake an appeal, BIA review is often disappointingly cursory. The responsibility thus devolves upon federal appellate courts to review these decisions searchingly, to ensure that state offenses have been properly classified and particular convictions properly treated. If uncorrected, substantive and procedural errors—such as those in this case—expose

immigrants, including permanent residents of long duration with little connection to their country of origin, to the danger of unwarranted, unchallengeable, and permanent separation from their families.

STATEMENT OF INTEREST

The New York State Defenders Association ("NYSDA") is a non-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and others throughout New York. NYSDA's Public Defense Backup Center provides members with legal research, consultation, publications, and training. Its Immigrant Defense Project focuses on the interplay between criminal and immigration law.

The New York State Association of Criminal Defense Attorneys ("NYSACDL") is a non-profit membership organization of more than 1,100 criminal defense attorneys in New York. Its purpose is to assist, educate, and provide support to the defense bar. NYSACDL has sponsored member trainings on the immigration consequences of criminal convictions.

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit membership corporation of more than 10,000 attorneys and 28,000 affiliate members in all fifty states. NACDL was founded in 1958 to promote study and research in criminal law; disseminate knowledge in the area of criminal

practice; and encourage the integrity, independence, and expertise of defense lawyers.

As part of their practice, *amici* regularly advise immigrant defendants as to whether a guilty plea to, or conviction of, a particular criminal charge would result in an "aggravated felony" conviction within the meaning of the INA. In providing such advice, they necessarily rely on governing Second Circuit law regarding the framework and substance of the aggravated felony analysis.

The legal issues raised in this case directly affect all immigrants charged with crimes that might be considered aggravated felonies, particularly lawful permanent residents, whose ability to seek relief from deportation has been dramatically curtailed. New York State has the second-largest number of lawful permanent residents in the country. This Court's clarification of what constitutes an aggravated felony and the scope of materials that may be considered in making such a determination would assist *amici* in counseling clients as to the likely immigration effects of their decisions in the criminal context. A decision like the one below—which fails to acknowledge, let alone follow, governing Second Circuit law—undermines the reliability of our legal advice.

ARGUMENT

POINT I

The BIA Erred In Holding That Petitioner's Conviction Constituted A "Crime Of Violence" Under 18 U.S.C. § 16(b).

This Court has established an analytic framework that an IJ, BIA, or reviewing court is to use to determine whether a particular offense constitutes a "crime of violence" under 18 U.S.C. § 16(b). The BIA failed to abide by this Court's teachings on that issue, which make clear that the offense of unlawful imprisonment is not a "crime of violence."

A. The "Crime Of Violence" Determination Is A Categorical One.

Section 1227(a)(2)(A)(iii) of Title 8 of the United States Code states that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." The INA provides a long list of alternative definitions for "aggravated felony." *See* 8 U.S.C. § 1101(a)(43)(A)-(U). The sole definition the INS claims is applicable to the offense of conviction in this case—unlawful imprisonment in the first degree, under N.Y. Penal Law § 135.10—is "a crime of violence … for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F).

A "crime of violence," in turn, is defined in 18 U.S.C. § 16 as:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The BIA determined that petitioner's conviction constituted a "crime of violence" under Section 16(b).[2]

This Court has held that the language of Section 16(b) compels an analysis that is focused on whether the *nature* of the state crime, as elucidated by its generic elements, is such that its commission necessarily presents a substantial risk that physical force would be used, irrespective of the factual circumstances surrounding any particular violation. *See Dalton*, 257 F.3d at 204. This well-established analysis is commonly referred to as the "categorical approach." *See Kuhali v. Reno*, 266 F.3d 93, 103 (2d Cir. 2001); *Sui*, 250 F.3d at 116; *Sutherland v. Reno*, 228 F.3d 171,175-77 (2d Cir. 2000); *Michel v. INS*, 206 F.3d 253, 264 (2d Cir. 2000). Under this approach, "the singular circumstances of an individual petitioner's crimes should not be considered"; rather, for an offense to fall within Section 16(b), *any conduct* falling within the specific criminal statute must by its nature inherently satisfy the definition of a "crime of violence." *Dalton*, 257 F.3d

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[2] The BIA did not hold, nor did the INS contend, that petitioner's conviction satisfied Section 16(a), because the "use of physical force," *see* 18 U.S.C. § 16(a), is not an "element" of N.Y. Penal Law § 135.10.

at 204-05 (internal quotations and citation omitted).[3] The categorical approach promotes comity, uniformity, and evenhanded administration of the law, and "relieves the INS of the oppressive administrative burden of scrutinizing the specific conduct giving rise to criminal offenses." *Michel*, 206 F.3d at 264; *see also Kuhali*, 266 F.3d at 103; *cf. Taylor v. United States*, 495 U.S. 575, 601 (1990) (the categorical approach avoids the "practical difficulties and potential unfairness of a factual approach").

Accordingly, the text of the statute of conviction is the first place the IJ or BIA is to look. *See Matter of Pichardo-Sufren*, 21 I&N Dec. 330, 333 (BIA 1996). When it is clear from the face of the statute that an offense either is a "crime of violence" within the meaning of Section 16(b), or that it is not (because the offense can be committed without "involv[ing] a substantial risk that physical force may be used against the person or property of another," 18 U.S.C. § 16(b)), the inquiry must stop with the statute. *See Dalton*, 257 F.3d at 205.

In a narrow class of cases where (1) a criminal statute is facially divisible into distinct categories of conduct and (2) offenses in at least one of these

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[3] Other Courts of Appeals have also adopted the categorical approach. *See, e.g., Chang v. INS*, 307 F.3d 1185 (9th Cir. 2002); *Omar v. INS*, 298 F.3d 710 (8th Cir. 2002); *United States v. Chapa-Garza*, 243 F.3d 921 (5th Cir. 2001); *Tapia-Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *Ramsey v. INS*, 55 F.3d 580 (11th Cir. 1995) (per curiam); *United States v. Winter*, 22 F.3d 15 (1st Cir. 1994); *United States v. Aragon*, 983 F.2d 1306 (4th Cir. 1993).

categories necessarily fall within Section 16(b), then the IJ may look beyond the statute to a limited class of record documents, for the narrow purpose of determining whether the immigrant's criminal conviction falls within a segregable statutory subsection that satisfies Section 16(b). *See Sui*, 250 F.3d at 118; *Sutherland,* 228 F.3d at 177 n.5; *cf. Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 325 (BIA 1996). The purpose of such an inquiry is solely to ascertain which subsection underlay the conviction, not to examine the underlying factual circumstances of the petitioner's crime. *See Sui*, 250 F.3d at 116-18 (the INA renders an alien deportable because of a *conviction* rather than criminal *conduct*); *In re Ramos*, 23 I&N Dec. 336, 340 (BIA 2002) (even as to divisible statutes, "we still do not delve into the underlying facts that may have been presented in the criminal proceeding, but focus instead on the elements of the offense that had to be proven to sustain a conviction").

B. A Conviction Under N.Y. Penal Law § 135.10 Does Not Constitute A Crime of Violence Because It Does Not Necessarily Involve A Substantial Risk Of The Use of Physical Force.

Violation of New York's unlawful imprisonment statute, like violation of the statute at issue in *Dalton*, does not, by its nature, entail "a substantial risk" of the use of "physical force against the person or property of another." Rather, the statute encompasses a significant amount of conduct involving no such risk. Thus, unless (1) the statute is divisible, and (2) it is clear—without recourse to the

purported facts—that petitioner was prosecuted under a discrete component of the statute that itself necessarily satisfies Section 16(b), petitioner's offense, like that in *Dalton*, was not a "crime of violence" under Section 16(b), and his removal proceeding should be terminated. *See Teixeira*, 21 I&N Dec. at 321-22.

In *Dalton*, this Court examined the range of conduct punishable under the New York felony DWI statute in order to determine whether the minimum conduct required for conviction constituted a "crime of violence." 257 F.3d at 205-06. That statute provided that "'[n]o person shall operate a motor vehicle while in an intoxicated condition.'" *Id.* at 205 (citation omitted). The Court noted that New York case law construing the term "operate" established that a person can be convicted of DWI even when there is no risk that force may be used. For example, one can be found guilty of "operating" a motor vehicle while intoxicated even if asleep at the wheel of a car which never moved and whose engine is not running. *Id.* Accordingly, the Court was "at a loss to see how this minimum threshold … satisfies the statutory definitions of an 'aggravated felony' or a 'crime of violence.'" *Id.* at 205-06.

The same is true of Section 135.10. Section 135.10 provides:

> A person is guilty of unlawful imprisonment in the first degree when he restrains another person under circumstances which expose the latter to a risk of serious physical injury.

Much as the term "operate" was defined broadly under the New York caselaw, the term "restrain" is defined broadly in a separate statutory provision, Section 135.00, as follows:

> "Restrain" means to restrict a person's movements intentionally and unlawfully in such manner as to interfere substantially with his liberty by moving him from one place to another, or by confining him either in the place where the restriction commences or in a place to which he has been moved, without consent and with knowledge that the restriction is unlawful. A person is so moved or confined "without consent" when such is accomplished by (a) physical force, intimidation or deception, or (b) any means whatever, including acquiescence of the victim, if he is a child less than sixteen years old or an incompetent person and the parent, guardian or other person or institution having lawful control or custody of him has not acquiesced in the movement or confinement.

This statutory language makes plain that, as in *Dalton*, a person may violate the statute without creating a "substantial risk that physical force" will be used. For example, one may violate Section 135.10 by "intimidation" or "deception." One may also violate Section 135.10 by directing the movement of a minor or incompetent person without the acquiescence of that person's guardian.

Thus, it would be unlawful under the statute to lock someone inside a house where there is a scarce supply of food and water. A divorced parent would violate the statute if he picked up his child after school, without prior approval from the custodial parent, and took the child on any trip that exposed her to a risk of serious

physical injury. The statute also prohibits the use of deception or trickery to "restrain" someone. In *People v. Murphy*, 413 N.Y.S.2d 540, 543 (Sup. Ct. 1977), for example, the state charged officers of a Hare Krishna organization (as well as the organization itself) under Section 135.10 for brainwashing, controlling, and manipulating the "mental processes" of follower-victims. Although those charges were dismissed for pleading deficiencies, the court acknowledged the "numerous and well-documented cases" in which unlawful imprisonment had been "accomplished by 'inveiglement' … or by a 'fraudulent misrepresentation' that could constitute 'deception negating consent.'" *Id.* at 545 (citing, *inter alia*, a New York case in which the victim was induced voluntarily to travel to Panama on the false promise of a job as a governess).

Thus, because not all convictions under Section 135.10 necessarily involve a substantial risk of forcible conduct, petitioner's statute of conviction is not a "crime of violence" under 18 U.S.C. § 16(b).[4] *See Dalton*, 257 F.3d at 205 (concluding that not all DWI violations are by their nature crimes of violence

[4] This conclusion is reinforced by New York's classification of N.Y. Penal Law § 135.10 in its sentencing scheme, under which Section 135.10 is not a violent felony offense. *See* N.Y. Penal Law § 70.02(1)(d) (listing violent felony offenses); *see also* A 100, Letter from Division of Parole, April 11, 2001 ("unlawful imprisonment 1st degree … is not considered a violent felony offense").

"because risk of physical force is not a requisite element of the New York DWI offense," and therefore that the statute in general is not a "crime of violence").

It is no answer that § 135.10 requires that the restraint have "expose[d] the [victim] to a risk of serious physical injury." As this Court clearly stated in *Dalton*, a risk of injury is distinct from the risk of the use of physical force.

> There are many crimes that involve a substantial risk of injury but do not involve the use of force. Crimes of gross negligence or reckless endangerment, such as leaving an infant alone near a pool, involve a risk of injury without the use of force. Statutes criminalizing the use, possession and/or distribution of dangerous drugs and other controlled substances also underscore the fact that some criminal conduct may involve a substantial risk of injury or harm without at the same time involving the use of physical force. Other courts have also recognized the logical fallacy inherent in reasoning that simply because all conduct involving a risk of the use of physical force also involves a risk of injury then the converse must also be true.

257 F.3d at 207; *see also Matter of Sweetser*, 1999 WL 311950 (BIA May 19, 1999).

Because Section 135.10 plainly applies to a wide range of acts falling outside the scope of Section 16(b), petitioner's conviction may be classified as a "crime of violence" only if (1) the statute is clearly divisible into distinct components, at least one of which inherently involves "a substantial risk" of the "use of physical force against the person or property of another," and (2) on the

face of the record of conviction in this case, petitioner's offense falls into that category. Neither is true here.

Like the New York DWI statute, New York's unlawful imprisonment statute is framed as a unitary offense. There are no statutory subsections. It may be violated in a multitude of ways, only some of which may involve the intentional use of force. Thus, as in *Dalton*, it is impossible, on the face of the statute, to differentiate between offenders whose manner of commission presupposes "a substantial risk" of the "use of physical force" and those whose conduct does not.[5]

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[5] Divisibility has been found primarily where the statute, on its face, designates a distinct area of conduct that necessarily satisfies the removability criterion. *See, e.g.*, *Sui*, 250 F.3d at 118 (finding divisible 18 U.S.C. § 513(a), which punishes "[w]hoever makes, utters, or possesses a counterfeited security … with intent to deceive another person," where only "possession" was a removable offense); *Hamdan v. INS*, 98 F.3d 183, 187 (5th Cir. 1996) (if "the statute is divisible into discrete subsections of acts that are and those that are not" removable, a conviction under a removable subsection will sustain deportability); *United States v. Palmer*, 68 F.3d 52, 53 (2d Cir. 1995) (regarding as divisible a statute which prohibits harassment *or* intimidation); *Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933) (finding divisible a statute containing five subdivisions, only some of which involved removable conduct); *Madrigal-Calvo*, 21 I&N Dec. at 325 (construing as divisible a weapons possession statute that itself breaks out several distinct categories of offenses, both removable and nonremovable); *Pichardo-Sufren*, 21 I&N at 334 (same, reversing the IJ finding of removability because the record of conviction did not specify the numbered subdivision under which petitioner had been convicted); *Sweetser*, 1999 WL 311950 (finding divisible a statute penalizing one who "causes" *or* "permits" child abuse, as only the former would necessarily entail a risk of force). Requiring that the statute of conviction demonstrate divisibility on its face is the only workable approach, for IJs should not be asked or expected to delve into the vagaries of state law in search of some theory under which the statute might otherwise be construed as divisible. Such an

The existence of a separate statutory definition of one term within Section 135.10 does not alter this analysis. Section 135.00 offers a broad-ranging definition of "restrain" that encompasses both "moving" and "confining" a person, "without consent and with knowledge that the restriction is unlawful." It goes on to define "without consent" as entailing either physical force, intimidation, or deception; movement or restriction of a minor or incompetent without the acquiescence of the guardian; or any means whatsoever. Within these layers of definition, only the provision specifying "physical force" might, on its face, appear necessarily to satisfy the requirement of Section 16(b). However, even the "physical force" subcomponent of the definition of "restraint" sweeps beyond the confines of Section 16(b). Section 16(b) requires that a substantial risk of physical force be used "against the person or property *of another*" (emphasis added). By contrast, Section 135.10 may be violated where a defendant restrains another by the use of physical force involving the defendant's *own* property. A defendant who, for example, restrains another by jamming shut the door to his own apartment—leaving the victim trapped inside under conditions creating a risk of injury—would violate the statute, but if he does not apply physical force to the person or property of a third party, his conduct falls outside Section 16(b). Thus,

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easily-applied divisibility test will also promote uniformity and fairness throughout the system.

no component of Section 135.10 embraces only conduct that inherently constitutes a "crime of violence."

This Court's decision in *Kuhali* in which removal was sought on the basis of a conviction for firearms offenses, supplies an instructive contrast. The statute of conviction in that case provides that "no defense articles or defense services designated by the President under subsection (a)(1) of this section may be exported or imported without a license." 22 U.S.C. § 2778(b)(2). Subsection (a)(1) provides that the designated defense articles are those identified in a separate set of regulations, which distinctly designate firearms and ammunition as munitions. This Court held Section 2278 to be divisible because, by expressly incorporating the munitions list, the statute effectively divided into discrete components prohibitions on the unlicensed import/export of firearms (a removable offense) and ammunition (a non-removable offense). *See* 266 F.3d at 106. Thus, a conviction pursuant to the firearms category of the munitions list *necessarily* satisfied the requirements of the removal statute, INA § 237(a)(2)(C).

In contrast to the firearms subsection at issue in *Kuhali*, which was no broader than the offense described in the removal statute, the "physical force" component of Section 135.00 (even were it regarded as a discrete sub-offense), like the statute in *Dalton*, sweeps too broadly. For this reason, even a charging document that alleges a violation of the "physical violence" subcomponent of

Section 135.00 does not inherently allege a violation of Section 16(b), and a court may not thereby determine whether the alien's criminal conviction necessarily "falls within a category that would justify removal." *Kuhali*, 266 F.3d at 106.[6] And any analysis of the particular allegations as to *how* physical force was purportedly used in the case at bar would conflict with this Court's clear directive that the categorical inquiry turns on the elements of an offense, not the allegations in a particular case. As the BIA itself has explained, this element-driven inquiry represents "the only workable approach in cases where deportability is premised on the existence of a conviction." *Pichardo-Sufren*, 21 I&N Dec. at 335.

POINT II

It Is Improper To Rely On A Presentence Report To Determine Whether A Conviction Is A "Crime of Violence."

Even assuming *arguendo* that New York's unlawful imprisonment statute were a divisible offense—of which one subset categorically satisfied Section 16(b)—the BIA erred procedurally in determining that petitioner's conviction was a "crime of violence." That is because the IJ and BIA, in making this determination, relied *solely* on a description of petitioner's alleged conduct

[6] *Amici* are not, in any event, aware of any custom of specifying such a subpart of a subdefinition in a charging document or judgment of conviction. Indeed, petitioner's sentence and commitment sheet simply states that he was convicted of violating §135.10. A 72.

contained in a PSR, on the basis of which they concluded that he "apparently forced the mother of his child to partake in a car ride against her will while bound." A 4. This was error.

Under this Court's clear precedent, the BIA was prohibited from looking beyond the elements of the offense to determine whether the conviction was for a "crime of violence," and was specifically forbidden from consulting a PSR for that purpose. The INS must prove deportatibility by clear, convincing, and unequivocal evidence. *See Woodby*, 385 U.S. at 286; 8 U.S.C. § 1229a(c)(3)(A) ("[n]o decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence"). Reliance on a PSR, and particularly on disputed facts in a PSR, falls far short of that standard.

A. A Presentence Report May Not Be Considered In Determining Whether An Immigrant's Conviction Renders Him Deportable.

As discussed above, even when a divisible offense is at issue, the IJ, BIA, and reviewing courts are not to examine the underlying facts of the case in making that determination. Rather, they may consider only the "record of conviction" to determine whether the petitioner was convicted of such subset of that offense as constitutes an aggravated felony. *See Sui*, 250 F.3d at 116-17; *see also Chang v. INS*, 307 F.3d 1185, 1189-90 (9th Cir. 2002). This Court has held that the "record of conviction" includes the following materials: (1) the charging document, *see Sui*, 250 F.3d at 118; *Palmer*, 68 F.3d at 55-56; (2) the plea, *see Zaffarano*, 63 F.2d

at 759; *see also Chang*, 307 F.3d at 1190-91; (3) the verdict or judgment of conviction, *see Kuhali*, 266 F.3d at 106; *Sui*, 250 F.3d at 118; (4) jury instructions, *see Palmer*, 68 F.3d at 55-56; (5) a record of the sentence, *see Zaffarano*, 63 F.2d at 759; and (6) a transcript of a plea colloquy, *see Kuhali*, 266 F.3d at 107; *Palmer*, 68 F.3d at 55-56.[7] Unlike a PSR, each of these documents may reveal the specific offense of which the petitioner was convicted.

In *Sui*, this Court specifically held that a PSR may not be considered in making the aggravated felony determination. In that case, the INS sought to show that the BIA's decision that petitioner had been convicted of an attempt to commit an offense involving fraud or deceit in which the loss to victims exceeded $10,000 (a statutorily defined aggravated felony) was correct, by looking to the facts set out in the PSR. *See* 250 F.3d at 109-10. This Court held that consultation of the PSR would be improper because it would entail "go[ing] behind the offense as it was charged to reach our own determination as to whether the underlying facts amount to one of the enumerated crimes." *Id.* at 117-18 (quoting *Lewis v. INS*, 194 F.3d 539, 543 (4th Cir. 1999)). The Court noted that, because 8 U.S.C. § 1227(a)(2)(A)(iii), which renders immigrants convicted of aggravated felonies

[7] The BIA similarly considers these materials part of the record of conviction. *See Matter of Short*, 20 I&N Dec. 136, 137-38 (BIA 1989) (indictment, plea, verdict, and sentence); *Madrigal-Calvo*, 21 I&N 323 (transcript of plea and sentencing colloquy); *Matter of Mena*, 17 I&N Dec. 38 (BIA 1979).

deportable, speaks in terms of "convictions," not of crimes "committed," the proper focus is the statute of conviction, rather than the defendant's alleged actions. *See Sui*, 250 F.3d at 117. In addition, this Court noted, Congress did not contemplate a fact-finding role for the IJ, BIA, or reviewing courts in determining whether the immigrant had committed an aggravated felony. *See id.* Consideration of a PSR inevitably would lead to precisely the sort of fact-based inquiry that is firmly prohibited.

This Court's decision in *Sui* is controlling here. While *Sui* involved the "attempt" provision of the aggravated felony statute rather than the "crime of violence" provision, the issue of what materials may be considered in making the "aggravated felony" determination is identical.[8] *See United States v. Corona-Sanchez*, 291 F.3d 1201, 1212 (9th Cir. 2002) (en banc) (following *Taylor*, 495 U.S. at 602, to conclude that "a presentence report reciting the facts of the crime is

[8] 8 C.F.R. § 3.41 lists the documents an IJ may consider in determining whether an immigrant's criminal conviction falls within a category that would justify removal. *See Teixeira*, 21 I&N Dec. at 320. PSRs are not listed among them. Among the list of permissible categories of documents is a catch-all provision, Section 3.41(a)(6), which includes: "[a]ny document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction." A PSR is not such a document; as it is written prior to sentencing and thus prior to the final entry of conviction, it does not "indicate[] the existence of a conviction."

insufficient evidence to establish that the defendant pled guilty to" a specific subcategory of conduct when the statute of conviction is overinclusive).

The BIA's consideration of the PSR was particularly prejudicial here because it was the BIA's *only* basis for determining that petitioner's conviction was for a crime of violence. Once the PSR is put to one side, there is literally nothing in the administrative record to support petitioner's order of removal.

B. It Is Important That This Court Reaffirm the Prohibition On The Use Of PSRs In Removal Proceedings.

Regrettably, there has been an increasing number of cases in which IJs and panels of the BIA have improperly consulted PSRs for the purpose of determining whether immigrants' convictions constituted "aggravated felonies." *See, e.g.*, *Jobson v. Ashcroft*, No. 02-4019 (argued September 24, 2002); *Sweetser*, 1999 WL 311950. *Amici* respectfully submit that it is therefore particularly important for this Court to reaffirm its prohibition on the use of PSRs in removal proceedings. The reasons for regarding PSRs as insufficiently relevant or reliable for use in such proceedings are compelling.

First, information contained in PSRs is entirely irrelevant to the question whether an alien's conviction constitutes a removable offense. For example, under New York law, as in most states, the PSR consists of information relating to "circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history,

family situation, economic status, education, and personal habits." N.Y. Crim. Proc. Law § 390.30(1). But this information is irrelevant under the categorical approach, which turns on the elements of conviction, not the asserted underlying factual circumstances of either the crime or the defendant's life. *See Sui*, 250 F.3d at 116-17. Indeed, the BIA has for this reason expressly rejected the use of documents similar to PSRs in making removability determinations.[9]

Furthermore, were IJs permitted to rely on PSRs at deportation hearings, they would almost inevitably be drawn into resolving disputed factual issues underlying the criminal offense.[10] This case supplies an excellent example of the pitfalls of reliance on a PSR in this context. The PSR's description of petitioner's offense essentially paraphrases police and prosecution versions of a factual account provided at an earlier time by the victim, Rolisha Teemer. A 157. But as the administrative record demonstrates, Ms. Teemer, who is now married to the petitioner, subsequently recanted her accusations, stating that she had fabricated details of the offense on account of her jealous suspicion at the time that petitioner

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[9] In *Teixeira*, the BIA, sitting *en banc*, unanimously rejected an IJ's reliance on a police report, for "[g]eneral evidence related to what a respondent has done—as opposed to specific evidence of what he was actually convicted of doing—is not relevant to the issue of deportability under section 241(a)(2)(C) of the Act, because neither an Immigration Judge nor this Board can try or retry the criminal case." 21 I&N Dec. at 320. Notably, the PSR in this case included the probation officer's recitation of facts recounted in police reports. A 102-03.

[10] *Cf. Palmer*, 68 F.3d at 59-60; *Teixeira*, 21 I&N Dec. at 321.

was cheating on her. A 51; 95-98. Permitting the PSR to be considered as a gauge of the nature of petitioner's offense would therefore run a significant risk of turning the deportation hearing into a full-blown trial over the details of his offense.

Indeed, the BIA has warned against consideration of extrinsic evidence of the petitioner's actual conduct for precisely that reason. In a case in which an IJ had ruled the immigrant deportable on the basis of a firearms conviction, the BIA reversed, because the record of conviction did not specify whether he had been convicted under the statutory subsection satisfying the removability criterion. *See Pichardo-Sufren*, 21 I&N Dec. at 335-36. Though the petitioner himself told the IJ that his offense involved a gun (a fact that would establish deportability), the BIA refused to consider that statement, declaring that allowing such evidence would invite the parties

> to present any and all evidence bearing on an alien's conduct leading to the conviction, including possibly the arresting officer's testimony or even the testimony of eyewitnesses who may have been at the scene of the crime. Such an endeavor is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence.…
>
> [If such evidence were allowed] there would be no clear stopping point where the Board could limit the scope of seemingly dispositive but extrinsic evidence bearing on the respondent's deportability. We believe that the harm

> to the system induced by the consideration of such extrinsic evidence far outweighs the beneficial effect of allowing it to form the evidentiary basis of a finding of deportability.

Id. Those same considerations counsel strongly against reliance on the often hotly-disputed facts in a PSR.

Furthermore, as has been widely recognized by courts and commentators, PSRs are not reliable reporters of the facts of a particular case, let alone of the precise statutory basis for a conviction. *See United States v. Charmer Indus., Inc.*, 711 F.2d 1164, 1175 (2d Cir. 1983). First, because there are no applicable evidentiary restrictions, the information included in a PSR often derives from unreliable or unverified sources. *See Hili v. Sciarrotta*, 140 F.3d 210, 216 (2d Cir. 1998) (inclusion of hearsay statements in PSRs is "virtually inevitable," and "the requirement of accurate reporting [what witnesses have related] … may result in the inclusion in the report of statements that are themselves inaccurate") (internal quotations and citation omitted).[11]

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[11] *See also* Timothy Bakken, *The Continued Failure of Modern Law to Create Fairness and Efficiency: The Presentence Investigation Report and Its Effect on Justice*, 40 N.Y.L. Sch. L. Rev. 363, 366 (1996) ("'[A]vailable data on the federal probation officer's workload indicates that little, if any, verification of information is possible.'"); Note, *A Proposal to Ensure Accuracy in Presentence Investigation Reports*, 91 Yale L.J. 1225, 1227 (1982) ("[T]he presentence investigation is generally very broad, unfettered by formal limitations on the types and sources of information that the report may include.").

Second, even where there is a process at sentencing for challenging the factual representations in a PSR, a criminal defendant may have little or no incentive to utilize that process, because, in many cases, resolution of those disputes would have no bearing on his sentence. *See Charmer Indus.*, 711 F.2d at 1175-76; Keith A. Findley and Meredith Ross, *Access, Accuracy and Fairness: The Federal Presentence Investigation Report Under Julian and the Sentencing Guidelines*, 1989 Wis. L. Rev. 837, 874-75 (1989) (a defendant may waive objections to the PSR "when there is a plea bargain and the defendant is expecting an agreed-upon sentence," or because of the perception "that it is unwise to prolong the sentencing hearing, and possibly annoy the sentencing judge, by raising objections"). Or the criminal defense attorney may not be aware of the immigration consequences that could flow from particular allegations in a PSR, and would not necessarily know that—for immigration reasons—it is imperative to litigate their accuracy. And even when the defendant has objected to a portion of a PSR, and even where the sentencing judge may have upheld those objections, that fact may not be reflected in the PSR, which may not have been modified to reflect those rulings. *See id.* at 874-75 (errors may remain permanently embedded in the PSR, potentially dogging defendants in future immigration proceedings).

Third, reliance on a PSR may upset the specific expectations on which an immigrant's guilty plea is premised. In *Chang v. INS*, for example, the Ninth

Circuit vacated a BIA removal order which had relied on the PSR to determine a victim loss amount that exceeded the amount established in the defendant's plea agreement. The court explained:

> [u]nwitting alien defendants might choose to plead guilty to only a minor charge (one that clearly wouldn't count as an aggravated felony) in a multiple count indictment. However, if statements in a PSR may be used without limitation to establish the elements of an aggravated felony conviction, the INS could later rely on information relating to a more serious charge and effect the defendant's removal even though the defendant would have thought justifiably that his agreement with the government to plead guilty to only a minor charge foreclosed any such efforts by the INS.

307 F.3d at 1192. An unsuspecting defendant may plead guilty to a particular charge in the hope of avoiding adverse immigration consequences, only to find the PSR's description of conduct to which she did not admit used against her before the BIA.

Thus, a PSR falls far short of supplying the "reasonable, substantial, and probative evidence" on which the government is required to base a case for removal. 8 U.S.C. § 1229a(c)(3)(A).[12]

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[12] Consideration of the PSR in this case also violated New York Criminal Procedure Law § 390.50(1), which provides that a PSR "may not be made available to any … public … agency except where specifically required or permitted by statute or upon specific authorization of the [sentencing] court." Those conditions do not exist here. *See* A 59. *See also Charmer Indus.*, 711 F.2d at 1170-77 (underscoring confidential nature of PSRs and cautioning against their

CONCLUSION

For the foregoing reasons, this Court should reaffirm both its commitment to the categorical approach and its prohibition on the use of presentence reports in deportation hearings, and accordingly vacate the removal order of the BIA..

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release to third parties); *Soucie v. County of Monroe,* 736 F. Supp. 33, 36-37 (W.D.N.Y. 1990) (juvenile has a constitutional privacy interest in youthful offender report where New York statute restricts its disclosure). *Amici* therefore join petitioner in arguing (Pet. Br. at 20-25) that—apart from the inherent unreliability of PSRs and the dangers their use poses to the categorical approach—the use of the PSR in this case was impermissible because its release to the INS plainly violated state law.