Case No. 16-3707

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

John Doe,
Petitioner

v.

Jeff B. Sessions,
Attorney General of the United States,
Respondent

On Petition for Review of an Order of the Board of Immigration Appeals

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BRIEF OF *AMICI CURIAE* CATHOLIC LEGAL IMMIGRATION NETWORK, INC., AND PUBLIC COUNSEL IN SUPPORT OF PETITIONER AND REQUESTING REVERSAL

Bradley Jenkins
Catholic Legal Immigration
Network, Inc.
8757 Georgia Avenue, Suite 850
Silver Spring, MD 20910
(301)565-4820
bjenkins@cliniclegal.org

Counsel for amici curiae

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CORPORATE DISCLOSURE STATEMENT

The Catholic Legal Immigration Network, Inc., and Public Counsel do not have parent corporations and no public corporation owns 10% or more of stock in either organization.

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STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae Public Counsel and the Catholic Legal Immigration Network, Inc., (CLINIC) are nonprofit immigration legal services organizations who frequently represent immigrant children and youth in asylum proceedings before the immigration court, the asylum office, the Board of Immigration Appeals, and the federal courts. Pursuant to Fed. R. App. P. 29(a), *Amici* respectfully submit this brief to provide this court with a framework, drawn from their experience working with young asylum-seekers, to decide the important issue presented in this case: whether an offense committed by a child can constitute a "serious nonpolitical crime," preventing an applicant from seeking asylum or withholding of removal and permitting her deportation even if she validly fears persecution. 8 U.S.C. §§ 1158(b)(2)(iii); 1231(b)(3)(B)(iii).

No party or its counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting the brief. No person other than *amici* contributed money that was intended to fund preparing or submitting this brief.

ARGUMENT

The Immigration and Nationality Act prevents the Attorney General from granting asylum or withholding of removal where "there are serious reasons for believing that the alien has committed a serious nonpolitical crime prior to arrival in the United States." 8 U.S.C. §§ 1158(b)(2)(iii); 1231(b)(3)(B)(iii). This petition for review confronts this court with two questions concerning Congress's use of the word "crime" in this statute. First, the court must consider the circumstances under which offenses committed by juveniles are "crimes" and not delinquencies. The Board's failure to even acknowledge its longstanding precedent that delinquencies are not crimes requires this court to remand on this question. Second, the court must determine whether an applicant for asylum may raise, and attempt to prove, common law defenses to criminal liability, including duress, in order to defeat an allegation that the applicant has committed a "crime." The answer to this question must be yes.

I. The Board's decision is only entitled to *Skidmore* deference and is not persuasive.

The level of deference owed by a reviewing court to an unpublished decision of the Board of Immigration Appeals is an open issue in this Circuit. *See Estrada-Rodriguez v. Lynch*, 825 F.3d 397, 404 (8th Cir. 2016) (citing *Godinez-Arroyo v. Mukasey*, 540 F.3d 848, 851 (8th Cir. 2008)) (declining to decide the issue). However, decisions of the Supreme Court and every other court of appeals persuasively suggest that this court should to defer to the agency's construction of this statute only to the extent that it is persuasive.

When a statute's command is clear, a court must give effect to the unambiguously expressed intent of Congress. *Chevron USA, Inc. v. Natural Resources Defense Council Inc.,* 467 U.S. 837, 842-43 (1984). If a statute is silent or ambiguous with respect to a specific issue, the question for the court is *generally* whether the agency's interpretation is based on a permissible construction of the statute. *Id.* at 843. However, the Supreme Court has conditioned an agency's invocation of *Chevron* deference on the presence of two prerequisites. First, Congress must "delegate[ ] authority to the

agency generally to make rules carrying the force of law ...." *United States v. Mead Corp.*, 533 U.S. 218, 226-227 (2001). *Amici* do not question that there was a valid Congressional delegation of interpretive authority to the Attorney General, and his designee, the Board of Immigration Appeals, to provide *Chevron*-eligible interpretations of the asylum statute through adjudication. *See, e.g.*, *Arellano-Garcia v. Gonzales*, 429 F.3d 1183, 1186-87 (8th Cir. 2005) (deferring to the Attorney General's construction of the phrase "lawfully admitted for permanent residence" as defined by 8 U.S.C. § 1101(a)(20)). However, while the Supreme Court in *Mead* resolved that case on the Congressional delegation element, its express holding announces a second requirement: "the agency interpretation claiming deference was promulgated *in the exercise of*" the Congressionally delegated authority to make rules carrying the force of law. *Mead*, 553 U.S. at 227 (emphasis added). In other words, in order to receive *Chevron* deference, the agency action claiming deference in a federal court must *expressly* purport to carry the force of law in relation to subsequent actions taken by the agency. If the agency's action is not entitled to *Chevron* deference,

a court applies the less deferential framework derived from *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

Unpublished Board decisions do not purport to carry the force of law, and, therefore, are not entitled to *Chevron* deference. The agency's own regulations expressly state that a Board decision serves as precedent in subsequent cases involving the same issue, *i.e.* carries the force of law, only when a majority of the permanent Board members vote to so designate the decision. 8 C.F.R. § 1003.1(g). Further, the Board specifically admonishes the parties who appear before it not to unnecessarily cite to its unpublished cases "because these decisions are not controlling in any other case." Board of Immigration Appeals, *Board of Immigration Appeals Practice Manual* J-2 (2017), *available at* https://www.justice.gov/sites/default/files/pages/attachments/2017/02/03/biapracticemanualfy2017.pdf.

Further, every other court of appeals has held that nonprecedential agency adjudications are only afforded *Skidmore* deference. *See River Street Donuts, LLC v. Napolitano*, 558 F.3d 111, 116 (1st Cir. 2009) ("Some Circuits including this one have

applied the *Skidmore* standard when examining non-precedential agency decisions.") (citations omitted); *Mei Juan Zheng v. Holder*, 672 F.3d 178, 184 (2d Cir. 2012) (quoting *Rotimi v. Gonzales*, 473 F.3d 55, 57 (2d Cir. 2007)) ("Because there is no indication that the BIA's nonprecedential opinions are 'promulgated under its authority to make rules carrying the force of law, we do not accord [them] *Chevron* deference.'"); *Mahn v. Att'y Gen.*, 767 F.3d 170, 173 (3d Cir. 2014) ("We join our sister circuits in concluding that unpublished, single-member BIA decisions are not entitled to *Chevron* deference."); *Amos v. Lynch*, 790 F.3d 512, 518 (4th Cir. 2015) ("However, the principles of *Chevron* deference are not applicable to the Board's decision in Amos's case because, although issued by a three-judge panel of the BIA, it was an unpublished decision that does not carry precedential weight."); *Dhuka v. Holder*, 716 F.3d 149, 156 (5th Cir. 2013) ("We conclude that a non-precedential opinion of the BIA does not, due to the terms of the regulation itself, bind third parties and is not entitled to *Chevron* deference."); *Ruiz-Del-Cid v. Holder*, 765 F.3d 635, 639 (6th Cir. 2014) (holding that *Skidmore* deference applies to the BIA's

nonprecedential single-member decisions); *Arobelidze v. Holder*, 653 F.3d 513, 520 (7th Cir. 2011) ("Today we hold that non-precedential Board decisions that do not rely on binding Board precedent are not afforded *Chevron* deference."); *Garcia-Quintero v. Gonzales*, 455 F.3d 1006, 1009 (9th Cir. 2006) ("[W]e hold that the BIA's unpublished non-precedential decision does not merit *Chevron* deference."); *Carpio v. Holder*, 592 F.3d 1091, 1098 (10th Cir. 2010) ("Because the BIA's decision does not carry the force of law, we must examine the BIA's decision in Mr. Colmenares's case under the framework set forth in *Skidmore*.") (internal citations and quotations omitted); *Quinchia v. U.S. Att'y Gen.*, 552 F.3d 1255, 1258 (11th Cir. 2008) ("We have not addressed the issue of whether we afford *Chevron* deference to a non-precedential decision issued by a single member of the BIA that does not rely on existing BIA or federal court precedent. We join the Second and Ninth Circuits in holding that *Chevron* deference is not appropriate in such circumstances."). According *Chevron* deference to the Board's decision in this case would cause an unnecessary circuit split, and is contrary to the reasoning in *Mead*.

Applying *Skidmore* deference to the Board's decision in this case produces no deference because it bears none of the hallmarks of a power to persuade. The weight to be given an agency adjudication under *Skidmore* depends upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." 323 U.S. at 140. As further described below, the Board's holding regarding the delinquency/crime distinction wholly ignores the Board's own binding precedent and tautologically characterizes the Petitioner's actions as "criminal conduct" without endeavoring to adjudicate whether they were criminal, as opposed to delinquent, in nature. Likewise, the Board's holding that duress is not a defense to the serious nonpolitical crime bar is limited to a bare assertion that the plain language of the statute does not provide for a duress exception, combined with the observation that there is no binding case law establishing such an exception. (There is no binding case law *foreclosing* a duress defense, either.) These holdings are

summary, illogical, and inconsistent with prior pronouncements by the Board. They provide nothing to which this court should defer.

II. This court's decision in *Chay-Velasquez v. Ashcroft* does not provide an answer to the issues raised by this petition.

This court has previously applied the serious nonpolitical crime bar to a minor. In *Chay-Velasquez v. Ashcroft*, this court noted that the petitioner in that case was a minor when he endangered the public and committed violent acts out of proportion to any political aspect of his conduct. 367 F.3d 751, 755 (8th Cir. 2004). However, the *Chay-Velasquez* court made this observation in the context of weighing whether the petitioner's actions were sufficiently "serious" and "nonpolitical."[1] *See id.* The parties in *Chay-Velasquez* do not appear to have raised, and the court certainly did not address, whether the statute's use of the word "crime" excludes acts that are delinquent in nature or whether the

[1] *Amici* also agree with Petitioner's argument, not limited to Congress's choice of the word "crime," that the full text of "serious nonpolitical crime," its context within the Immigration and Nationality Act, and the treaty sources from which the bar was drawn indicate that Congress did not intend the bar to apply to the coerced acts of children. Pet'r's Br. at 22-32.

word "crime" permits the presentation of defenses to criminal liability. *See generally id.* In short, the *Chay-Velasquez* court was only called upon to interpret the words "serious" and "nonpolitical," where this case requires the court to interpret the word "crime." Accordingly, *Chay-Velasquez* provides no guidance in this case, and the court must proceed to adjudicate the issue on the merits. *See United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37-38 (1952) (holding that a decision is not a binding precedent on a point not raised in the briefs or argument nor raised in the opinion of the court); *Brecht v. Abrahamson*, 507 U.S. 619, 630-31 (1993) (declining to apply *stare decisis* where the court has "never squarely addressed the issue"); *accord Passmore v. Astrue*, 533 F.3d 658, 660 (8th Cir. 2008) (same).

III. Juvenile offenses cannot constitute serious nonpolitical crimes unless they would constitute adult crimes, and not acts of juvenile delinquency, under United States standards.

The Board attempts to dismiss Petitioner's claim that his misconduct was not criminal, but rather delinquent, by observing that the serious nonpolitical crime bar does not require a conviction

and that his misconduct was serious.[2] A.R. 4. This rationale ignores Petitioner's claim, fails to confront over seventy years of administrative precedent, and cannot stand.

The Board has repeatedly held that "juvenile delinquency proceedings are not criminal proceedings, that acts of juvenile delinquency are not crimes, and that findings of juvenile delinquency are not convictions for immigration purposes." *Matter of Devison*, 22 I. & N. Dec. 1362, 1365 (B.I.A. 2001) (collecting cases). While the Board has yet to apply its precedents in this area in the context of the serious nonpolitical crime bar, the principle that "acts of juvenile delinquency are not crimes" must apply with the same force to this section of the statute that it does when construing other sections of the Immigration and Nationality Act that employ the word "crime". *See Ratzlaf v. United States*, 510 U.S.

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[2] The Board also held that this claim is waived. A.R. 4. *Amici* agree with Petitioner the Board misapplied its waiver rule. *Cf. Pinos-Gonzalez v. Mukasey*, 519 F.3d 436, 440 (8th Cir. 2008) (holding that "[w]here the agency *properly* applies its own waiver rule", the court lacks jurisdiction over the merits of the claim) (emphasis added). In this case, the government invoked the serious nonpolitical crime bar, and Petitioner's counsel objected, citing both Petitioner's age and the defense of duress. A.R. 228-29, 407-08, 37-40. This is sufficient to preserve the issue for appeal.

135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

The Board has long applied this distinction between delinquent and criminal acts to foreign convictions. *See*, *e.g.*, *Matter of O'N-*, 2 I. & N. Dec. 319 (B.I.A., A.G. 1945); *Matter of Ramirez-Rivero*, 18 I. & N. Dec. 135 (B.I.A. 1981); *Matter of De La Nues*, 18 I. & N. Dec. 140 (B.I.A. 1981). Concerned that many foreign countries might view merely delinquent conduct as being criminal in nature, the Board, as well as the Attorney General, have looked to "United States standards," as embodied in the Federal Juvenile Delinquency Act (FJDA) to determine whether a foreign conviction is a delinquency or a crime. *Ramirez-Rivero*, 18 I. & N. Dec. at 137; *see also O'N-*, 2 I. & N. Dec. at 322-23 (emphasizing the importance of prevailing standards in the United States).

In 1981, in the companion cases of *Matter of Ramirez-Rivero* and *Matter of De La Nues*, the Board expressly set out a methodology for determining whether a foreign adult criminal adjudication is a crime or delinquency. Looking to the FJDA, the Board first considers whether the applicant would be minimally

eligible for adult prosecution under federal law's age and offense type requirements.[3] *Ramirez-Romero*, 18 I. & N. Dec. at 137-38. Where there is a foreign adjudication of guilt, the Board has looked to whether the applicant was actually treated as a juvenile under a system of treatment comparable to the one established by Congress in the FJDA.[4] *De La Nues*, 18 I. & N. Dec. at 143-45. To date, the

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[3] Under current law, the age creating eligibility for adult transfer is fifteen, except for a very limited class of homicides, assaults, and violent firearms offenses. 18 U.S.C. § 5032, fourth paragraph. If the juvenile's age exceeded the relevant threshold at the time of the delinquent act, the juvenile may only be proceeded against as an adult if the act is: (1) a felony that is a crime of violence; (2) an offense described in 21 U.S.C. § 841 (relating to drug trafficking); (3) an offense described in 21 U.S.C. §§ 952(a); 959 (relating to the import or export of controlled substances); or (4) an offense described in 18 U.S.C. §§ 922(x). 18 U.S.C. § 5032, fourth paragraph. If these age and offense type criteria are met, the government must then show that the transfer for adult prosecution is in the "interest of justice" under several statutory factors. 18 U.S.C. § 5032, fourth and fifth paragraphs.

[4] In *De La Nues*, the Board required "under the circumstances" of that case that the applicant "show that he was in fact dealt with as a juvenile delinquent in Cuba, and not as an adult criminal, under a system of treatment comparable to that established by Congress with the enactment of the FJDA." 18 I. & N. Dec. at 144. However, the "circumstances" noted by the Board included the fact that the applicant in that case had an adult conviction in Cuba. *Id.* at 143. As the Board correctly (if incompletely) noted in this case, the application of the serious nonpolitical crime bar does not require a conviction. *See, e.g.*, *Matter of E-A-*, 26 I. & N. Dec. 1, 2 (B.I.A. 2012). Petitioner's claim requires the Board to decide in the first instance

Board has not determined how to apply these principles where the relevant provision of United States immigration law does not require a conviction.[5]

Here, the Board made no mention of United States standards or any of its precedents distinguishing criminal from delinquent acts. The Board has inadequately considered the applicability of its own apparently apposite precedents, and the correct remedy is for this court to remand to the agency for additional investigation or explanation. *See Gonzales v. Thomas*, 547 U.S. 183, 184, 186 (2006) (per curiam) (requiring remand, instead of reversal, where the

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how to best harmonize the *Ramirez-Rivero*/*De La Nues* rule with the circumstances of this case, where there is no foreign conviction to serve as a proxy for how the applicant would be treated in the United Sates. *See Sandoval v. Holder*, 641 F.3d 982, 983 (8th Cir. 2011) (holding that because "it is better to light a candle than curse the darkness, and the Board must articulate a sufficient basis for its decision to enable appellate review," remand with instructions to clarify was required).

[5] In another case currently pending before the Board, *amici* have proposed that the agency's "United States standards" doctrine requires an immigration judge to determine whether, if the offense would have been prosecuted in federal court, transfer for adult prosecution would be in the interest of justice under the standards promulgated by 18 U.S.C. § 5032. *See* Brief of *Amici Curiae* Public Counsel and Catholic Legal Immigration Network, Inc., *In re: C. H.-C.*, A 208-145-702 (B.I.A. Nov. 23, 2016). The agency should be permitted to consider such a solution on remand.

Board inadequately considered its precedents regarding whether "family" was a particular social group); *INS v. Ventura*, 537 U.S. 12, 16 (2002).

IV. Even if juvenile criminal conduct is considered a crime, it should not be considered a serious nonpolitical crime if committed by a child under duress.

In addition to triggering the Board's longstanding distinction between crimes and delinquent acts, the use of the word "crime" in text of the serious nonpolitical crime bar requires the Board to recognize common law defenses[6] to criminal liability, including duress. "When Congress began to enact federal criminal statutes, it presumptively intended for those offenses to be subject to [the defense of duress]." *Dixon v. United States*, 548 U.S. 1, 19 (2006) (Alito, J., concurring); *see also id. at* 12 (majority opinion) (holding that courts must look to the context of a statute and implement

[6] The parties have often referred to this claim as a duress "exception" to the serious nonpolitical crime bar. The term "exception" is somewhat of a misnomer. Because *amici* contend that the ability of an asylum applicant to prove duress as a means to defeat the invocation of the serious nonpolitical crime bar turns on the statute's use of the word "crime," we believe that it is more accurate to say that duress is a "defense" to the invocation of the bar.

common law defenses as Congress "may have contemplated" them); *Matter of M-H-Z-*, 26 I. & N. Dec. 757, 762-64 (B.I.A. 2016) (holding that the specific context of the "material support bar," 8 U.S.C. § 1182(a)(3)(B), which includes Congress's express provision of a waiver process, was "an indication that the omission of [other] ameliorative provisions … was intentional."). This defense is not only implied in criminal statutes, but also in civil statutes expressly invoking principles of criminal liability. Regardless of whether a statutory provision is located in the criminal code, "Congress is understood to legislate against a background of common-law adjudicatory principles." *Astoria Fed. Sav. & Loan Assn. v. Solimino*, 501 U.S. 104, 108 (1991) (citations omitted).

Duress is a well-established principle in criminal law, and duress relieves the actor from criminal responsibility by excusing the criminal conduct. Arnolds and Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil,* 65 J. CRIM. L. & C. 289, 290 (1974). The courts are not unanimous regarding the precise elements of duress, but courts have generally found duress present when there was (1) an immediate threat of

death or serious bodily injury; (2) a well-grounded fear that the threat will be carried out; and (3) a lack of a reasonable opportunity to escape the threatened harm.[7] *United States v. Shapiro*, 669 F.2d 593, 596 (9th Cir.1982); *Lyden v. Howerton*, 783 F.2d 1554, 1557 (11th Cir. 1986). Duress, in essence, is committing a crime to save one's life.

The serious nonpolitical crime bar, by its express terms, requires the conduct to have been "criminal" in nature. *See Matter of E-A-*, 26 I&N Dec. 1, 2 (BIA 2012). By using the word "crime," Congress invoked principles of criminal liability. This choice of words, standing alone, affirms the presumption that Congress wished to preserve the availability of common law defenses to

[7] This standard is substantially identical to several elements of an asylum claim, *i.e.* harm sufficiently severe to constitute persecution, an objectively well-founded fear of persecution, and the lack of a safe and reasonable location of internal relocation. *See* 8 CFR § 1208.13; *United States v. Dagnachew*, 808 F. Supp. 1517, 1522 (D. Colo. 1992) (allowing a defense of duress to a charge of escape from an immigration detention facility where the defendant had a well-founded fear of persecution). Indeed, *amici* anticipate that the factual scenarios in which an asylum applicant presents a duress defense to the serious nonpolitical crime bar will often involve a claim in which the same facts establish both the duress defense and that the applicant has a well-founded fear of persecution.

criminal liability, including duress, to the application of the serious nonpolitical crime bar.

In addition to ignoring indications that Congress contemplated a duress defense to the serious nonpolitical crime bar, the Board erred in holding that the plain language of the statute does not provide for a duress defense and implying that judicial silence on the matter supports this conclusion. In considering whether duress was a defense to a similar statutory provision, *i.e.* the "persecutor bar," 8 U.S.C. §§ 1158(b)(2)(A)(i); 1231(b)(3)(B)(i), the Supreme Court expressly rejected the government's argument that the statute's silence on the matter resolved the issue as a matter of the plain language of the statute. *Negusie v. Holder*, 555 U.S. 511, 518 (2009) ("The silence is not conclusive."). Indeed, Petitioner is in a stronger position than the petitioner in *Negusie* because the serious nonpolitical crime statute is *not* silent. The operative terms of the persecutor bar do not invoke concepts of criminal liability; the bar applies where the applicant "ordered, incited, assisted, or otherwise participated in the persecution of any other person …" 8 U.S.C. §§ 1158(b)(2)(A)(i); 1231(b)(3)(B)(i). In

contrast, the serious nonpolitical crime bar expressly requires that there are serious reasons to believe the applicant "has committed a … crime." 8 U.S.C. §§ 1158(b)(2)(A)(iii); 1231(b)(3)(B)(iii). The alleged statutory and judicial silence on the existence of a duress defense was the sole reason given by the Board to support its conclusion that such a defense does not exist. A.R. 3-4. The government may not supply additional rationales to defend the Board's decision in a *post hoc* fashion. *Mouawad v. Gonzales*, 485 F.3d 405, 413, 414 (8th Cir. 2007) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)).

Further, duress has long been recognized as an affirmative defense to various administrative and criminal charges with immigration implications. *See, e.g., Lyden v. Howerton*, 783 F.2d 1554 (11th Cir.1986) (allowing duress defense against 8 U.S.C. § 1323 assessed fines and confiscation during the 1980 Mariel boatlift from Cuba); *United States v. Dagnachew*, 808 F. Supp. 1517 (D. Colo. 1992) (accepting duress defense against 18 U.S.C. § 751(a) charge of escape from facility of legacy Immigration and Naturalization Service if harm is deportation, there is showing of

persecution or personal harm awaiting defendant if he or she is deported, and there is showing of no reasonable legal alternative to escape); *United States v. Ortega-Mendoza*, 981 F. Supp. 694 (D.D.C. 1997) (holding that a threat to life in the native country due to abandonment of military service and political affiliations constituted coercion and duress that supported downward departure on sentence for unlawful re-entry into United States following felony conviction and deportation).

Because the serious nonpolitical crime bar unquestionably implicates criminal conduct, the respondent should be afforded the opportunity to present a defense of duress.

CONCLUSION

For the foregoing reasons, *amici* respectfully urge this court to hold that a juvenile offense does not trigger the serious nonpolitical crime bar unless it independently meets the definition of a "crime," which requires an analysis regarding whether the offense was a delinquency under United States standards and consideration of defenses to criminal liability, including duress. Remand is required.

Respectfully submitted,

Dated: March 7, 2017 /s/

Bradley Jenkins
Catholic Legal Immigration Network, Inc.
8757 Georgia Ave., Ste. 850
Silver Spring, MD 20910
(301) 565-4820
bjenkins@cliniclegal.org

Counsel for *amici curiae*

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2017, I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: March 7, 2017

/s/

Bradley Jenkins
Catholic Legal Immigration Network, Inc.
8757 Georgia Avenue, Suite 850
Silver Spring, MD 20910
(301)565-4820
bjenkins@cliniclegal.org

Counsel for amici curiae

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/s/

Bradley Jenkins
Catholic Legal Immigration Network, Inc.
8757 Georgia Avenue, Suite 850
Silver Spring, MD 20910
bjenkins@cliniclegal.org

Counsel for amici curiae

Dated: March 7, 2017