**No. 22-2072**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE THIRD CIRCUIT**

Jose German Santos,

Petitioner,

v.

Attorney General of the United States,

Respondent.

On Petition for Review from a Final Decision of the
Board of Immigration Appeals
Agency File No. A 058-197-843

# BRIEF OF CAPITAL AREA IMMIGRANTS' RIGHTS COALITION AS AMICUS CURIAE SUPPORTING APPELLANT AND REVERSAL

Eleni R. Bakst
Capital Area Immigrants' Rights (CAIR) Coalition
1 North Charles Street
Suite 2305
Baltimore, MD 21202
(202) 870-5636
Eleni@caircoalition.org

Jim Davy
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579
jimdavy@allriselaw.org

Counsel for Amicus Curiae

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## CORPORATE DISCLOSURE STATEMENT

CAIR Coalition is a nonprofit organization. It has no parent corporation, and no publicly held corporation owns any portion it.

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## INTERESTS OF THE AMICUS CURIAE[1]

The Capital Area Immigrants' Rights Coalition ("CAIR Coalition") is a nonprofit legal services organization that provides legal services to indigent noncitizens detained by the U.S. Department of Homeland Security ("DHS"). CAIR Coalition provides legal rights presentations, conducts pro se workshops, secures pro bono legal counsel, and offers in-house pro bono legal advice and representation to detained individuals in removal proceedings.

CAIR Coalition has an interest in the outcome of this case because it directly bears upon CAIR Coalition's mission to advance the rights and dignity of all immigrants, particularly those who are at risk of immigration detention and removal. *Amicus* seeks to provide the Court with important context regarding the Board of Immigration Appeals' erroneous application of the categorical approach, as well as the Board's overreliance on unreliable police reports in making high-stakes decisions about people's lives. This Court's ruling will affect how *Amicus* counsels detained noncitizens, their families, and their attorneys on the risks of deportation and the potential immigration consequences of certain offenses.

[1] *Amicus* files this brief with the consent of the Parties. It was prepared entirely by *Amicus* and its counsel, and neither Party or their counsel contributed money or other funding for this brief.

## SUMMARY OF ARGUMENT

This case represents an example of an error the Board of Immigration Appeals makes regularly. Despite repeated Supreme Court affirmances that federal adjudicators must defer to authoritative state court holdings about aspects of those states' underlying state criminal law, the Board often—as here—substitutes its own judgment about that underlying law on the way to finding someone removable or ineligible for certain forms of relief. Those misapplications of the categorical approach amount to reversible error, and indeed, this Court frequently reverses the Board for committing just that type of error. In underscoring the need to reverse the error here, *Amicus* urges the Court to consider the serious harm visited upon immigrants, families, and communities by the Board's repeated errors of this type.

Here, the categorical approach dictates reversal. Underlying Commonwealth law treats the identity of a controlled substance as a means rather than an element, the opposite of how the Board treated it here. Where the identity of a substance is not submitted to a jury for proof, and indeed, as here, where state precedent specifically refers to it as having no significance, it cannot map onto federal law as the Board suggests. It is a means, not an element.

Finally, the Board reached its erroneous result partly by making an adverse credibility determination against Mr. German Santos based upon a solitary, possibly incorrect police report. In light of the legal error, this Court should reverse regardless. But in *Amicus*'s experience, the Board's uncritical deference to police reports ignores substantial evidence as to the unreliability of such reports, and contributes to numerous errors. This Court should consider that context in this case.

## ARGUMENT

### I. Despite clear guidance from the Supreme Court and the Courts of Appeal, the Board regularly fails to defer to state law, with devastating effect on people's lives.

In this case, the Board of Immigration Appeals ("Board") incorrectly applied the categorical approach in considering the removability of Mr. German Santos. In *Amicus*'s experience, Mr. German Santos is no outlier. The Board regularly makes such errors when considering underlying state criminal statutes. As a matter of practice, the Board continues to make these errors even despite Supreme Court guidance about the categorical approach, and repeated reversals of its own decisions by the Courts of Appeal. As a matter of substance, those errors amount to an inappropriate intrusion into state criminal justice matters, which the Supreme Court has cautioned the federal government against undertaking. This Court and its sister Circuits must regularly correct those errors in appeals from Board decisions, but for a population of often-uncounseled immigrants, not all errors get corrected. And for those immigrants, and even for counseled immigrants, the consequences of the Board misapplying the law can be devastating. This Court should consider that context as it addresses the circumstances of Mr. German Santos' case.

First, the Board regularly makes errors by misapplying the categorical approach, often substituting its own view of the law in the place of clear state precedent on the same subject. It has done this despite decades-old and recently-reinforced Supreme Court precedent that consistently emphasizes deference to states in applying the categorical approach, as to the analysis of both categorical overbreadth and divisibility. *See e.g.*, *Johnson v. United States*, 559 U.S. 133, 138 (2000) (federal courts

and agencies are "bound by [state courts'] interpretation of state law, including [their] determination of the elements"); *see also Mathis v. United States*, 579 U.S. 500, 517 (2016). Supreme Court precedent thus explains why the Board's approach here is wrong. When agency adjudicators and the Board incorrectly identify (for example) means as elements, that error ultimately "repurpose[s] [the categorical approach] as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense." *Mathis*, 579 U.S. at 513-14. The Board's generalized search for convictions that could hypothetically support removability on some set of facts is simply not appropriate.

But the Board has failed to defer to state law in numerous cases, resulting in frequent reversals by this Court. *See, e.g.*, *Cabeda v. Att'y Gen.*, 971 F.3d 165, 174 n.9 (3d Cir. 2020) (reversing the Board to hold that Cabeda's offense was not an aggravated felony because of authoritative Pennsylvania state law on divisibility and overbreadth); *Hillocks v. Att'y Gen.*, 934 F.3d 332 (3d Cir. 2019) (reversing the Board to hold that Hillocks' conviction was not divisible and not an aggravated felony because of authoritative Pennsylvania law); *Chang-Cruz v. Att'y Gen.*, 659 Fed. App'x 114, 117-18 (3d Cir. 2016) (not precedential) (reversing the Board to hold that Chang-Cruz's offense was not an aggravated felony because New Jersey state law suggests that "distribution and dispensing" are alternative means, rather than elements). The Board continues to make the same errors—always in the same direction, erring on the side of treating more state law crimes as supporting removal—despite this Court's repeated, clear reversals. *See e.g.*, *Larios v. Att'y Gen.*, 978 F.3d 62, 68 (3d Cir. 2020)

("In view of the numerous disjunctives, we look to state law to see whether these are alternative elements delineating separate offenses, or merely alternative means to commit one offense."); *Salmoran v. Att'y Gen.*, 909 F.3d 73, 77-78 (3d Cir. 2018) (reversing the Board); *Singh v. Ashcroft*, 383 F.3d 144, 151 (3d Cir. 2004) (same).

Second, and related, the Board's errors run directly counter to Supreme Court guidance about the categorical approach. The Supreme Court has specifically cautioned federal agencies from substituting their own judgment for that of a state on the subject of that state's own laws. "[P]reventing and dealing with crime is much more the business of the States than it is of the Federal Government . . . and that we should not lightly . . . intrude upon the administration of justice by the individual States." *Patterson v. New York*, 432 U.S. 197, 201 (1977); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). In *Taylor v. United States* itself, the seminal categorical approach case, the Supreme Court rejected a uniform definition of "burglary" for purposes of sentencing enhancements drawn from the common law. 495 U.S. 575, 593-99 (1990). It did so because of its recognition that states had diverged from both the common law definition, and from each other, resulting in substantially different definitions of the same term depending on the jurisdiction. *Id.* Instead, it demanded deference to the states' own definitions of their own criminal statutes, rather than simply imposing a federal definition. The Court has repeatedly reemphasized that principle, including across contexts. *See, e.g.*, *Montana v. Wyoming*, 563 U.S. 368, 377 n.5 (2011) (internal citation omitted) (describing State courts as "the final arbiter[s] of what is state law."); *West v. American Telephone & Telegraph Co.*, 311 U.S. 223, 237 (1940) ("[I]t is the duty of [federal courts] in every case to ascertain from all the available

data what the state law is and apply it rather than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law.'"). As noted, this Court has recognized that requirement for deference when reversing the Board, often specifically noting the Board's lack of relative competence to make such determinations. *E.g. Singh*, 383 F.3d at 151 ("[T]he interpretation and exposition of criminal law is a task outside the BIA's sphere of special competence."); *Salmoran*, 909 F.3d at 77-78 ("we owe no deference to the BIA's interpretation of a state criminal statute, which does not entail the BIA's special expertise").

Third, these repeated failures by the Board come at an enormous cost to immigrants. The Board's mistakes have devastating impacts on respondents in removal proceedings and on communities. The weight of these consequences is partly why the Supreme Court imposed the burden to establish deportability on the Department of Homeland Security in the first place. *See e.g.*, *Woodby v. INS*, 385 U.S. 276, 286 (1966) ("The immediate hardship of deportation is often greater than that inflicted by denaturalization . . . And many resident [noncitizens] have lived in this country longer and established stronger family, social, and economic ties here than some who have become naturalized citizens."); *see also Dimaya v. Sessions*, 138 S. Ct. 1204, 1209 (2018) ("this Court has reiterated that deportation is a particularly severe penalty, which may be of greater concern to a convicted noncitizen than any potential jail sentence.") (cleaned up). Despite this, *Amicus*—which represents hundreds of immigrants annually as a legal services provider—regularly sees devastating impacts on clients, their families, and their communities because of misapplication of the categorical approach by IJs and the Board. These impacts include, often,

unnecessary, wrongful, and prolonged detention, as well as the myriad hardships associated with that. But it also often suffuses error into litigation of removability, with a lower burden on the Government. These anonymized* client examples demonstrate this:

> Michael*, a current CAIR Coalition client, is a lawful permanent resident from Bosnia and Herzegovina, and has been detained at the Moshannon Valley Processing Center for over four months. Michael entered the United States 21 years ago as a refugee and has serious trauma-related mental health issues. DHS charged Michael as deportable due to a controlled substance offense. Michael's attorney filed a motion to terminate, arguing that DHS failed to provide sufficient evidence of the specific controlled substance Michael was convicted of possessing, and therefore failed to meet its burden. In denying the motion to terminate, however, the IJ did not conduct any legal analysis into the sufficiency of DHS's documents or controlling state law, instead simply concluding that the statute of offense was a categorical match. As a result of the IJ failing to hold DHS to its burden and misapplying the categorical approach, Michael faces months more in detention where his mental health worsens each day.
>
> Richard*, a current CAIR Coalition client, has been a lawful permanent resident for 20 years, since he came to the U.S. from Jamaica when he was only 10 years old. Prior to his current detention at the Moshannon Valley Processing Center, Richard lived in Virginia with his fiancé and young U.S. citizen children. DHS first charged Richard as deportable under INA § 237(a)(2)(A)(iii) for an offense involving fraud or deceit in which the loss to the victim exceeded $10,000. Richard's attorney filed a motion to terminate, demonstrating that DHS had not met its burden as the loss to the victim did not exceed $10,000. The IJ granted the motion to terminate. DHS appealed this termination to the Board and filed a motion to remand, stating it planned to file additional charges of removability, even though it had full information about Richard's offenses at the time of the initial charging document. The Board remanded and DHS charged Richard as removable under INA § 237(a)(2)(A)(ii) for having been convicted of two or more crimes involving moral turpitude not arising out of a single scheme of criminal misconduct, but only listed one conviction there, rather than two. DHS later filed an additional charge, alleging a controlled substance offense. Richard's attorney again filed a motion to terminate, arguing, first, the insufficiency of DHS's evidence, and second, that Richard's conviction

> was not a CIMT or a controlled substance offense. That time, the IJ denied the motion to terminate, ignoring authoritative state case law showing that the state offense was not a categorical match to the federal offense. As a result of the IJ's failure to adhere to state law, and DHS's failure to charge immigrants efficiently or with sufficient evidence, Richard has been detained for over four months away from his family.

The risk of serious harm to immigrants is not distributed equally, either. These clients of *Amicus* suffered those harms despite representation. But the majority of immigrants do not have counsel at all. *See, e.g.*, Ingrid v. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. PENN. L. REV. 1, 2 (Dec. 2015) (finding that 37% of all immigrants, and just 14% of detained immigrants, had legal counsel). Uncounseled immigrants not only face higher rates of detention, *see id.*, with all the associated harms, but they also have much less ability to understand and make arguments about the categorical approach. As a result, uncounseled immigrants can rarely challenge IJs' and the Board's failure to defer to state law in complex applications of the categorical approach, which results in countless unlawful deportations. Continuing to require IJs and the Board to adhere to state law in applying the categorical approach ensures a minimal layer of protection for all immigrants, their families, and their communities. This Court should reverse.

## II. The Board's divisibility analysis in this case makes exactly that error, ignoring authoritative state law which holds that the identity of the controlled substance is not an element of the offense.

The Board made the same error in this case that it makes repeatedly in other cases. It ignored authoritative and controlling state law to improperly conclude that Pennsylvania's possession with intent to deliver ("PWID") statute is divisible. *Matter*

*of German Santos*, 28 I&N Dec. 552, 559 (BIA 2022). The Board erred for several reasons. First, in determining whether statutory alternatives are elements or means, federal adjudicators must adhere to definitive state court precedent, if it exists. Here, authoritative state precedent does exist, and it has recently changed to hold that the identity of the substance is a means rather than an element. Second, in attempting to ignore this authoritative holding, the Board mischaracterized both state and federal precedent. It mischaracterized the holding of recent state court precedent, other changes to Commonwealth law, and federal law directing the analysis. Ultimately, the Pennsylvania PWID statute at issue here is divisible by schedule, not identity, and so the identity of the controlled substance at issue is not an element of the PWID offense.

First, the Board cannot conduct its analysis in a vacuum. It must analyze divisibility by first considering "whether a state court decision definitively answers the question." *Mathis*, 579 U.S. at 517. "When a ruling of that kind exists, a [federal] judge need only follow what it says." *Id.* at 518. In its own analysis, this Court has previously discussed underlying Commonwealth law on this issue. In *United States v. Abbott*, for example, this Court relied on the Pennsylvania Superior Court's ruling in *Commonwealth v. Swavely*, 554 A.2d 946 (Pa. Super. Ct. 1989), to hold that the particular drug at issue is an element, rather than a means, of the offense under 35 Pa. C.S. § 780-113(a)(30). *Abbott*, 748 F.3d 154, 159 n.4 (3d Cir. 2014); *see also Larios*, 978 F.3d at 68. But since *Abbott*, intervening Pennsylvania state court decisions have abrogated *Swavely*, necessitating a reanalysis that the Board simply did not undertake.

More than two decades after *Swavely*, the Pennsylvania Superior Court held definitively that the identity of a controlled substance is *not* an element of the Pennsylvania offense for possession with intent to deliver a controlled substance. *Commonwealth v. Beatty*, 227 A.3d 1277, 1285 (Pa. Super. Ct. 2020); *see also Commonwealth v. Ramsey*, 214 A.3d 274, 278 (Pa. Super. Ct. 2020). "[T]he specific identity of the controlled substance is not an element of the offense," but rather, "only relevant for gradation and penalties based on the relevant schedule." *Beatty*, 227 A.3d at 1285; *see also Ramsey*, 214 A.3d at 278 ("[T]here is nothing in the plain language of section 780-113(a)(30) that states that the particular drug delivered is an element of the offense—all that is required is that a controlled substance is delivered."). The language of the *Beatty* decision demonstrates that the applicable state definition of "element" is in line with the federal definition, contrary to the Board's conclusion.

Second, to avoid this outcome, the Board mischaracterized relevant law. While the Board at least acknowledged the Superior Court's holding in *Beatty* that the identity of a controlled substance is not an element of the offense, it nevertheless inexplicably disregarded it. The Board concluded that because *Beatty*'s definition of "element" was different than the federal definition, *Beatty* was not dispositive. The Board described *Beatty*'s holding as "simply summari[zing] Pennsylvania's definitional statute, which defines the '[e]lements of an offense." *Matter of German Santos*, 28 I&N at 556. But that's wrong; *Beatty* never cites or mentions the statutory definition of "element," instead defining "element" as something that must be found beyond a reasonable doubt to establish guilt. *Beatty*, 227 A.3d at 1283. In turn, that definition of "element" is based on how the Pennsylvania Supreme Court defines the word. *See e.g.*,

*Commonwealth v. Williams*, 650 A.2d 420 (Pa. 1994); *Commonwealth v. Rhodes*, 510 A.2d 1217, 1218 (Pa. 1986). So in finding the offense statute divisible by the identity of the controlled substance, the Board ignored authoritative Pennsylvania Supreme Court precedent on what an "element" is under Pennsylvania law.

The Board error owes in part to its mistaken description of *Beatty*'s holding as "not new." This is incorrect. Prior Pennsylvania statutes imposed mandatory minimum sentences for offenses based on the identity of the controlled substance involved, but only required proof of the identity of the controlled substance by a preponderance of the evidence. *See e.g.*, 18 Pa. C.S. § 7508(a)(1)(i). But in *Alleyne v. United States*, the Supreme Court held that "[a]ny fact that, by law, increases the penalty for a crime is an 'element' that must be submitted to a jury and found beyond a reasonable doubt." 570 U.S. 99, 103 (2013); *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding that any fact that increases the punishment for a crime beyond the statutorily prescribed maximum must be found by an adjudicator beyond a reasonable doubt). Following *Alleyne*, Commonwealth appellate courts changed course. A series of Pennsylvania cases found prior sentencing statutes that imposed mandatory minimums based on facts found only by a preponderance of the evidence (as opposed to beyond a reasonable doubt) unconstitutional. *See e.g.*, *Commonwealth v. Hopkins*, 117 A.3d 247 (Pa. 2015); *Commonwealth v. DiMatteo*, 177 A.3d 182, 191 (Pa. 2018) (holding that 18 Pa. C.S. § 7508, "Drug trafficking sentences and penalties," unconstitutionally created mandatory minimum sentences depending on the identity of the controlled substance involved). Subsequently, the Pennsylvania legislature moved sentencing for PWID from 18 Pa. C.S. § 7508 to 35 Pa. C.S. § 780-113(f), which

provides for different punishments based on schedule, rather than the identity of the specific controlled substance. Thus, the identity of a controlled substance involved in a PWID conviction no longer alters sentencing possibilities under the statute and is therefore no longer an element. Instead, the schedule under which a drug falls under, rather than the identity of the controlled substance, is relevant for sentencing.[2] 35 Pa. C.S. § 780-113(f).

The Board's error also owes in part to mistakes of federal law. The Board cited to *Apprendi* for the proposition that any "facts that increase the prescribed range of penalties to which a criminal defendant is exposed" are elements of the crime, but it ignored the remainder of the Court's holding. *Matter of German Santos*, 28 I&N at 555 (citing *Apprendi*, 530 U.S. at 490). *Apprendi* holds that only facts proven beyond a reasonable doubt can be elements of a crime. The Supreme Court has repeatedly emphasized that. "[T]he only facts the court can be sure the jury . . . found [beyond a reasonable doubt] are those constituting elements of the offense." *Descamps v. United States*, 570 U.S. 254, 269-70 (2013); *Mathis*, 579 U.S. at 504 ("Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction."). In Pennsylvania, the identity of a controlled substance is not submitted to a jury to establish beyond a reasonable doubt. *Beatty* itself confirms this; that Court upheld a PWID conviction despite uncertainty over the identity of

[2] While the sentencing statute is primarily divided by schedule, it does isolate certain controlled substances not relevant here, including phencyclidine, methamphetamine, coca leaves, and marijuana in excess of 1,000 pounds. But the Legislature demonstrating that difference—and that it could have treated Mr. German Santos' offense differently—only underscores the Board's error here.

the drug because "[w]hether that substance is heroin or heroin with fentanyl is of no moment." *See* 227 A.3d at 1284. So if the Board had faithfully applied *Apprendi* and its progeny, it would have recognized that the identity of the substance could not be an element.

Ultimately, the Board erroneously failed to recognize that Pennsylvania's PWID statute is divisible by schedule, rather than the identity of the controlled substance. There are five possible penalty subsections if a person is convicted under the PWID statute, requiring different criminal sentences or monetary penalties depending on the schedule, not identity, of the drug involved. 35 Pa. C.S. § 780-113(f)(1-4). So long as the prosecution establishes that a defendant possessed with intent to deliver a substance falling under the relevant schedule, the specific identity of the controlled substance involved is entirely irrelevant. The *Beatty* Court specifically rejected the idea that specific identity of the drug at issue mattered at all, writing that "the fact that the substance was heroin with fentanyl, not solely heroin, is of no significance for purposes of establishing the elements of the statute. Heroin and fentanyl are both controlled substances." 227 A.3d at 1285. The identity of the controlled substance "is only relevant for gradation and penalties *based on the relevant schedule*." *Id*. (emphasis added). Put another way, the statutory penalty does not change so long as the actual substance falls within the relevant schedule. The identity of the substance is not an "element" of the offense.

## III. The Board's heavy reliance on police reports contributed to the error here, and this Court should not endorse the Board's uncritical deference to those reports.

If this Court believes that Mr. German Santos is removable, the Board still violated his due process rights because of its near-sole reliance on an uncorroborated police report in order to make an adverse credibility determination against Mr. German Santos. Petitioner argues that these reports often incorporate hearsay and, in light of substantial evidence contradicting this report, the reliance amounted to a denial of due process here, *see* Opening Br. at 44-48, and that's surely right. But *Amicus*'s experience in representing thousands of similarly-situated people is that IJs and the Board frequently rely on uncorroborated—or even, as here, factually controverted—police reports in making adverse credibility determinations about petitioners. That reliance flies in the face of both the increasing recognition that such reports often lack real value, and the increasing legal recognition that people should not have even acquitted conduct held against them—to say nothing of *uncharged* conduct. Under the circumstances, this Court should not only reject the Board's reliance on uncorroborated police reports in Mr. German Santos's case, but should confirm, as the Fourth Circuit has, that IJs and the Board cannot blindly defer to police reports.

Police reports are often not reliable and should not be treated with the level of deference evinced by IJs and the Board. This reflects not only in *Amicus*'s experience, but increasing recognition by governments, courts, scholars, and others that police officers and other law enforcement officials sometimes do not write down or testify to accurate information. This is true across contexts, including in situations where

police may have no incentives to including incorrect information in their reports, as well as in situations where clear self-interest drives active fabrication. Regardless, however, the problem remains. People's increasing recognition of this problem reflects several recent developments, including but not limited to the increased availability of body-worn camera evidence that contradicts them, the use of public records to locate other evidence that contradicts reports or testimony, and district attorney offices offering more transparency about their own officers' trustworthiness and/or exclusion as potential trial witnesses because of issues with dishonesty.

### A. Police reports are often not reliable because of unintentional misstatements and intentional fabrications, and have serious effects on people.

First, simply put, police reports are often unreliable. To be clear, the unreliability of a given police report does not necessarily owe to fabrication by officers. Police reports often lack accurate information of all sorts, including even information where police have no incentive whatsoever to fabricate. For instance, empirical studies have determined that police reports generally lack unreliable data concerning crash and injury severity. Police tend to overstate the severity of injuries; "in particular, 49% of the drivers coded by police as having incapacitating injuries actually had sustained no more than minor injuries." Charles M. Farmer, *Reliability of police-reported information for determining crash and injury severity*, Traffic Injury Prevention, 4:1 (Mar. 2003).[3] As another example, police reports often also contain inaccurate information about the health or background of decedents, which contributes to

[3] *Available at*: https://www.tandfonline.com/doi/abs/10.1080/15389580309855

inaccurate post-mortem reports. Johanes Rødbro Busch & Jytte Banner, *Reliability of police reports when assessing health information at the forensic post-mortem examination-using schizophrenia as a model*, International Journal of Legal Medicine, 134 (July 3, 2019).[4] These studies attribute the inaccuracies in situations like these—where police lack an obvious incentive to lie—to "time constraints and lack of resources." *Reliability of police-reported information*, at 38. But regardless of the underlying reason, the fact remains that reports often lack accuracy on even basic factual questions.

Police reports are also unreliable in situations where officers have a more obvious incentive to include inaccurate information. For example, police reports often include specific lies intended to provide post hoc justifications for uses of force—either that a person posed some kind of threat, or minimizing the amount or type of force used. Harmeet Kaur, *Videos often contradict what police say in reports. Here's why some officers continue to lie*, CNN (June 6, 2020).[5] Indeed, "self-preservation" and "to justify an action," whether a use of "force or a questionable arrest," are among the most common causes of intentional misstatements in police reports. *Id.*; *see also* The Gainesville Sun Editorial Board, *Police shouldn't hide body cam footage from the public*, Gainesville Sun (June 14, 2021) (observing that "[w]hen law enforcement officers use deadly force, the story initially told about their actions doesn't always

[4] *Available at*: https://pubmed.ncbi.nlm.nih.gov/31270603/

[5] *Available at*: https://www.cnn.com/2020/06/06/us/police-reports-lying-videos-misconduct-trnd/index.html

match the reality of what happened" and collecting cases);[6] *see also* Emma Stein & Arpan Lobo, *Grand Rapids police release video of officer fatally shooting Patrick Lyoya*, Detroit Free Press (Apr. 13, 2022).[7] But to be clear: those incentives hold in circumstances where officers need not justify force of any kind. *See Videos often contradict what police say in reports*, *supra* (describing force as only a factor in about a quarter of reviewed circumstances where video contradicted police reports). Often, its far more mundane: "police officers provided false written statements, and in depositions, the arresting officers gave false testimony," simply as part of "arresting people even when there was convincing evidence that they were innocent." Michelle Alexander, *Why Police Lie Under Oath*, THE NEW YORK TIMES (Feb. 2, 2013) (quoting a letter written by "the chief of arraignments for the Bronx district attorney").

Indeed, if anything, police unions and departments acknowledge the propensity of officers to insert intentional inaccuracies into police reports, and have sought policies to minimize possible consequences for doing so. Police officials and accountability watchdogs have repeatedly sparred over whether officers should get to review body camera footage prior to writing a police report. *See, e.g.*, Kathy Pezdek, *Should Cops Get to Review the Video Before They Report?,* The Marshall Project (Aug. 13, 2015).[8]

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[6] *Available at*: https://www.gainesville.com/story/opinion/2021/06/12/police-body-cam-footage-should-not-hide-gainesville-editorial/7604756002/

[7] *Available at*: https://www.freep.com/story/news/local/michigan/2022/04/13/grand-rapids-police-shooting-video-patrick-lyoya/7304984001/

[8] *Available at*: https://www.themarshallproject.org/2015/08/13/should-cops-get-to-review-the-video-before-they-report

Ostensibly, officers getting to review video prior to writing reports would ensure more accurate reports. *See id.* But doing so would limit any independent evidentiary value of an officer's own reporting, *see id.*, and separately, "it enables lying" because it "allows the officer to lie more effectively, and in ways that the video evidence won't contradict." Jay Stanley & Peter Bibring, *Should Officers Be Permitted to View Body Camera Footage Before Writing Their Reports?*, ACLU (Jan. 13, 2015).[9] This issue continues to provoke widespread debate among policymakers and communities. *See* Zellie Thomas, *Cops shouldn't be able to view body-cam video before writing reports*, New Jersey Monitor (Jan. 10, 2022).[10]

Regardless, widespread inaccuracies in police reports have real effects for people. That includes possibly inaccurate post-mortems, *see Reliability of police reports when assessing health*, *supra*, and possibly inaccurate information about car accidents being sent to insurance companies and other third parties. *See Reliability of police-reported information*, *supra*. But it also includes more serious danger to people's liberty and, as here, immigration status. For many people, police lies or inaccuracies in police reports and testimony do not get corrected until long after the fact—after they've served years in prison, suffered immigration consequences, or both. *See* Tom Jackman, *As prosecutors take larger role in reversing wrongful convictions, Philadelphia DA exonerates 10 men wrongfully imprisoned for murder*, The

[9] *Available at*: https://www.aclu.org/news/free-future/should-officers-be-permitted-view-body-camera-footage-writing-their-reports

[10] *Available at*: https://newjerseymonitor.com/2022/01/10/n-j-cops-shouldnt-be-able-to-view-body-cam-footage/

Washington Post (Nov. 12, 2019). For comparatively luckier others, prosecutors drop charges after video or other evidence contradicted police reports that gave rise to those charges. *See, e.g.*, Chris Nakamato, *Serious charges dismissed after written report doesn't match body cam footage*, WBRZ (Aug. 24, 2018).[11] And the scale of the problem—wrongful convictions, unsupported charges, or other restrictions on liberty based upon police reports even just by officers documented to have lied—is potentially enormous. *See* Hurubie Meko, *188 Convictions Tied to Discredited N.Y.P.D. Officers Are Tossed Out*, THE NEW YORK TIMES (Nov. 17, 2022) (describing "over 1,110 convictions" connected to just eight officers, and only subject to review because those eight officers were "convicted on an array of charges, including perjury").[12]

Worse still, departments perpetuate the problem of inaccurate police reports by leaving officers they know have lied in position to write more police reports in the future. The clearest version of this problem occurs when officers continue to make arrests and write reports after even a *court* has deemed them non-credible. *See* Robert Lewis & Noah Veltman, The Hard Truth About Cops Who Lie, WNYC News (Oct. 13, 2015) (describing 2,700 arrests by 54 officers *after* courts had deemed them non-credible).[13] But many officers never reach that level of official repudiation, and continue to write reports and make arrests—albeit often for a different department—after solely internal findings do not lead to discipline and may simply result in that

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[11] *Available at*: https://www.wbrz.com/news/serious-charges-dismissed-after-written-report-doesn-t-match-body-cam-footage

[12] *Available at*: https://www.nytimes.com/2022/11/17/nyregion/manhattan-da-convictions-nypd-officers.html

[13] *Available at*: https://www.wnyc.org/story/hard-truth-about-cops-who-lie/.

person finding a different job. *See* William H. Freivogel and Paul Wagman, *Wandering cops shuffle departments, abusing citizens*, Associated Press (Apr. 28, 2021). This often owes to internal investigation and disciplinary procedures. *See* Stephen Rushin & Atticus DeProspo, *Interrogating Police Officers*, 87 GEO. WASH. L. REV. 3 (May 2019) (discussing state laws and collective bargaining agreements).[14] But whether negotiated for or not, the lack of accountability that drives the problem of inaccurate police reports and inaccurate testimony not only undermines trust in police, but also bothers police themselves, who observe the disconnect between misconduct (including lying) and consequences. *See* Cynthia Conti-Cook, *A New Balance: Weighing Harms of Hiding Police Misconduct Information from the Public*, 22 CUNY L. REV. 148, 166 (2019) (discussing officers' inability to compare instances of officers' discipline to assess discrimination or proportion).

### B. People increasingly acknowledge this unreliability because of recent developments in law and policy.

Scholars, officials, courts, and others are increasingly recognizing this unreliability of police reports. This owes to several factors.

First—as foreshadowed in the discussion of police incentives to lie—is the increased availability of body camera footage. Indeed, as this Court has recognized in confirming a First Amendment right to film the police, the "increase in the observation, recording, and sharing of police activity has contributed greatly to our national discussion of proper policing." *Fields v. City of Phila.*, 862 F.3d 353, 358 (3d

[14] *Available at*: https://www.gwlr.org/wp-content/uploads/2019/06/87-Geo.-Wash.-L.-Rev.-646.pdf

Cir. 2017). But the increased availability of body camera footage and its frequent divergence from both the content of written police reports and public statements by officials after high profile incidents has had a clear effect. Distrust between communities and law enforcement has substantially increased in recent years. *See* Aimee Ortiz, *Confidence in Police is at a Record Low, Gallup Finds*, THE N.Y. TIMES (Aug. 12, 2020) (finding in the first time in 27 years, the majority of American adults do not trust the police,).[15] The United States itself recently attributed this to, among other factors, increased availability of cell phone and body camera footage and high profile incidents of law enforcement officers killing unarmed civilians. *See* President's Task Force on 21st Century Policing, *Final Report of the President's Task Force on 21st Century Policing*, Office of Community Oriented Policing Services (May 2015).[16]

Second, people increasingly recognize unreliability of written police reports because of dogged work by investigative journalists and others to obtain public records and check them for accuracy. This includes, for example, work that demonstrated how widespread the problem of police lying is, revealing repeated discipline for false statements during internal investigations that defied any accountability after the fact. *See* Jan Ransom, *In N.Y.C. Jail System, Guards Often Lie About Excessive Force*, The N.Y. Times, Apr. 24, 2021 (quoting a city councilman

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[15] *Available at*: https://www.nytimes.com/2020/08/12/us/gallup-poll-police.html

[16] *Available at*: https://d3n8a8pro7vhmx.cloudfront.net/nacole/pages/115/attachments/original/1570474092/President-Barack-Obama-Task-Force-on-21st-Century-Policing-Final-Report-min.pdf?1570474092.

saying that discipline data "highlights how broken this process is and a need to make real efforts to reform it.").[17] It also includes work that has demonstrated how durable the problem is, revealing how individual officers dismissed from one department for misconduct, including lying in reports or under oath, get new jobs elsewhere. *See Wandering cops shuffle departments, supra*, (noting that officers hired after prior dismissals for misconduct, including lying, "are subsequently fired and subjected to 'moral character' complaints at elevated rates").

Third, some law enforcement agencies have shared more information with the public, voluntarily or otherwise, in service of accountability to the public on issues of officer lying and misconduct. This attitude shift owes partly to federal recommendations during the 2010s, *see* President's Task Force at 1 ("Law enforcement agencies should also establish a culture of transparency and accountability to build public trust and legitimacy"), and to federal consent decrees that sought to rebuild trust in law enforcement by implementing greater transparency and other police changes. *See* Sunita Patel, *Toward Democratic Police Reform: A Vision for "Community Engagement" Provisions in DOJ Consent Decrees*, 51 WAKE FOREST L. REV. 793, 802 (2016). Some elected District Attorneys, including those self-identifying as criminal justice reform DAs, have also increasingly "voluntarily made public" body camera footage and other information in service of accountability. Ryan Briggs, *Why Is It Still So Hard To See Police Bodycam Footage*

[17] *Available at*: https://www.nytimes.com/2021/04/24/nyregion/rikers-guards-lie-nyc-jails.html.

*In Pennsylvania?*, WHYY (May 29, 2021) (contrasting voluntary disclosure in Philadelphia with other parts of the Commonwealth).[18] Voluntarily or otherwise, however, this Court itself has acknowledged that transparency about lying in police reports or engaging in other civil rights violations can "spur[] action at all levels of government to address police misconduct and to protect civil rights." *Fields*, 862 F.3d at 360 (internal quotations omitted).

Under the circumstances, this amounts to a basis for reversal on due process grounds even if this Court does not disturb the Board's misapplication of the categorical approach. Here, the IJ fully accepted a flawed police report and rejected Mr. German Santos as non-credible on that basis alone, and the Board upheld the IJ without questioning the police report or even discussing it. For the reasons discussed by Mr. German Santos and in light of additional context about the unreliability of police reports—especially uncorroborated police reports—this Court should reverse, and reject that practice.

## CONCLUSION

The Board failed to defer to authoritative state law that dictated a contrary conclusion: that Mr. German Santos was non-removable. It did this despite clear, repeated pronouncements of the law by the Supreme Court and this Court, requiring just that such deference to state law. On top of that, it offered far too much deference to a factually controverted police report. This Court should reverse, and in doing so, confirm the shift in underlying Commonwealth law on means versus elements.

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[18] *Available at*: https://www.wesa.fm/courts-justice/2021-05-29/why-is-it-still-so-hard-to-see-police-bodycam-footage-in-pennsylvania

Respectfully submitted,

/s/ Jim Davy

Jim Davy
ALL RISE TRIAL & APPELLATE
P.O. Box 15216
Philadelphia, PA 19125
(215) 792-3579
jimdavy@allriselaw.org

Eleni R. Bakst
Capital Area Immigrants' Rights (CAIR) Coalition
1 North Charles Street
Suite 2305
Baltimore, MD 21202
(202) 870-5636
Eleni@caircoalition.org

Counsel for Amicus Curiae

Dec. 2, 2022

## CERTIFICATE OF COMPLIANCE

In accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that:

(i) I am a member in good standing of the Bar of the Third Circuit;

(ii) this brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 6,222 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B);

(iii) this brief complies with the typeface requirements of Rule 32(a)(5) and the type-style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 16.66.1, set in Century Schoolbook 12-point type;

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/s/ Jim Davy

Jim Davy

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I certify that on Dec. 2, 2022, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

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Jim Davy