

Nos. 16-70130, 17-73272

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JOEL EMPLEO SILVA,  
*Petitioner,*

v.

WILLIAM P. BARR,  
United States Attorney General,  
*Respondent.*

On Petition for En Banc Rehearing of Decision  
of the Board of Immigration Appeals

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**BRIEF OF *AMICI CURIAE* FLORENCE IMMIGRANT & REFUGEE  
RIGHTS PROJECT AND IMMIGRANT DEFENSE PROJECT  
IN SUPPORT OF PETITIONER'S  
PETITION FOR REHEARING EN BANC**

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## **INTEREST OF AMICI CURIAE**

The Florence Immigrant & Refugee Rights Project (“Florence Project”) provides free legal and social services to immigrant men, women, and children detained in immigration custody in Arizona. In 2019, approximately 10,000 detained people facing removal charges received a Florence Project orientation on immigration law and procedure. Florence Project staff also provide legal trainings to defense attorneys throughout Arizona on the immigration consequences of criminal convictions. In any given year we see hundreds of non-citizens who face out-sized consequences, in the form of detention—often without a right to bond—and removal as a result of minor criminal convictions like petty theft and shoplifting.

The Immigrant Defense Project (“IDP”) is a non-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws triggering removal and relief from removal.

This case is of critical interest to Amici because the categorization of petty theft as a “crime involving moral turpitude” has an enormous impact on noncitizens in removal proceedings and noncitizens seeking immigration relief.<sup>1</sup>

## **INTRODUCTION**

In 1769, William Blackstone argued that it was perfectly just to execute an offender convicted of stealing “a handkerchief, or other trifle, privately from one’s person.” Simon Dedeo, *When Theft Was Worse Than Murder*, Nautilus (Apr. 24, 2014), <http://nautil.us/issue/12/feedback/when-theft-was-worse-than-murder>.

Today, this judgment is cruelly outdated. A quarter-millennium after that comment, public opinion has abandoned Blackstone’s moral intuition.

No longer is petty theft the type of base, vile, and depraved act worthy of severe punishment or deportation. Petty theft is a common, if regrettable, part of modern life for many Americans. In fact, as many as one in eleven people in the United States shoplift every year. Nat’l Ass’n For Shoplifting Prevention, *The Shoplifting Problem in The Nation*, <https://www.shopliftingprevention.org/the-shoplifting-problem/>. Indeed, public opinion data and changed criminal policies

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<sup>1</sup> Counsel for petitioner and respondent consent to the timely filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), neither party’s counsel authored this brief in whole or in part, and neither party’s counsel contributed money intended to fund the preparation or submission of this brief. Only counsel for Amici contributed to the preparation and submission of this brief.



concerning petty theft demonstrate that many Americans consider the offense to be minor—often borne out of desperation and poverty rather than malicious intent.

Reflecting these shifting public attitudes and norms, law enforcement agencies and state legislatures alike have recently declined to make the stringent prosecution of petty theft crimes a priority. These policies have reduced the burden on both the criminal justice system and on communities across the country, especially low-income communities and communities of color, who bore the brunt of the old enforcement regime. This Court’s rulings that petty theft offenses qualify as “crimes involving moral turpitude” warranting deportation, thus reflect an antiquated opinion about the nature of petty theft and are at odds with contemporary social norms.

## **ARGUMENT**

### **I. OFFENSES THAT QUALIFY AS “CRIMES INVOLVING MORAL TURPITUDE” MUST REFLECT EVOLVING SOCIAL NORMS.**

A “crime involving moral turpitude” (“CIMT”), which may trigger deportation or bar immigration relief, is nebulously defined as an offense that is “inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general.” *Matter of Silva-Trevino*, 26 I. & N. Dec. 826, 833 (BIA 2016) (citation omitted); *see also Robles-Urrea v. Holder*, 678 F.3d 702, 708 (9th Cir. 2012) (“[T]he BIA properly recites the definition of a crime involving moral turpitude—noting that such a crime must

be ‘inherently base, vile, or depraved.’”). An offense that involves moral turpitude also requires a “deviance from . . . contemporary morality,” *In Re Lopez-Meza*, 22 I. & N. Dec. 1188, 1196 (BIA 1999), or conduct that “shocks the public conscience,” *Matter of Short*, 3125 I. & N. Dec. 136, 139 (BIA 1989).

This Court has further held that a CIMT “involves grave acts of baseness or depravity, such that its commission ‘offend[s] the most fundamental values of society.’” *Robles-Urrea*, 673 F.3d at 705 (quoting *Navarro–Lopez v. Gonzales*, 503 F.3d 1063, 1074–75 (9th Cir. 2007) (en banc) (Reinhardt, J., concurring for the majority), overruled on other grounds by *United States v. Aguila–Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc)). In short, a crime involves moral turpitude only when it so viciously and abhorrently violates society’s collective values and understanding of morality.

Courts are consequently forced to constantly evaluate and re-categorize offenses as CIMTs to reflect evolving societal norms. For example, “at various times, the BIA and other courts have labeled morally turpitudinous such offenses as consensual oral sex, consensual anal sodomy, and ‘overt and public homosexual activity.’” *Nunez v. Holder*, 594 F.3d 1124, 1132 (9th Cir. 2010) (citations omitted). As contemporary values evolved, however, courts began to recognize that acts like sodomy are not crimes involving moral turpitude. *See Chavez-Alvarez v. Attorney Gen. United States*, 850 F.3d 583, 590 (3d Cir. 2017). In another

example, the Iowa Supreme Court once reasoned that poisoning a neighbor's cow demonstrated "more moral turpitude" than "crimes of a higher legal grade." *Burton v. Burton*, 3 Greene 316, 318 (1851). That court reasoned that while some circumstances excuse homicide, "no circumstances can possibly extenuate the moral turpitude of that wretch who will poison his neighbor's horse or cow." *Id.* While that holding is at odds with *modern* ethical conceptions, it was "an accurate reflection of cultural norms" at the time. Julia Ann Simon-Kerr, *Moral Turpitude*, 2012 Utah L. Rev. 1001, 1018 (2012).

Today, petty theft is not a CIMT because it is not the type of offense that is so base, vile, and depraved that it shocks the public conscience. This Court need look no further than public opinion, evolving state criminal law policies, and law enforcement priorities to see that petty theft is a minor offense that should no longer be considered a CIMT and therefore trigger deportation. Regardless of whether petty theft was at one time a CIMT, it is clear now that it is not an "inherently base, vile, or depraved" offense.

## **II. PETTY THEFT OFFENSES ARE LARGELY THE RESULT OF SYSTEMIC PROBLEMS SUCH AS POVERTY AND ADDICTION—NOT MALICIOUS INTENT.**

The BIA has held that "the essence" of moral turpitude "is an evil or malicious intent." *In re Flores*, 17 I. & N. Dec. 225, 227 (BIA 1980). This Court has similarly upheld an emphasis on evil intent. See *Latter-Singh v. Holder*, 668

F.3d 1156, 1161 (9th Cir. 2012). Nearly ninety years ago, the First Circuit held that petit larceny was a crime involving moral turpitude. *Tillinghast v. Edmead* 31 F.2d 81, 83 (1st Cir. 1929). But in a strongly worded dissent, Judge Anderson presciently recognized that the offense included patently non-turpitudinous behavior, such as “a mother stealing a bottle of milk for her hungry child,” and therefore argued that the “logical conclusion” of the majority’s holding was “monstrous.” *Id.* at 84 (Anderson, J., dissenting). Multiple studies and experts have since confirmed Judge Anderson’s intuition: petty theft offenses are not usually the result of malice but of material circumstances including poverty, addiction, and mental illness.

**A. Petty Theft is a Crime of Poverty.**

Contemporary morals compel a recognition that petty theft is often the result of poverty—the housing, food, and other insecurities that come with it—and not an evil intent to harm another. Categorically defining petty theft as a CIMT serves to further criminalize and stigmatize those living in poverty, who may steal to feed themselves or their families. In multiple studies, petty theft is most frequently correlated with poverty. For example, a 1984 study found low income as a significant contributing factor for 72% of chronic shoplifters, and a study in 1986 found that 63% of shoplifters were economically disadvantaged. *See* Therese

Krasnovsky and Robert C. Lane, *Shoplifting: A Review of the Literature*, 3 Aggression and Violent Behavior 219, 226 (1998).

Even prosecutors and law enforcement officers have begun to recognize that petty theft offenses are often committed out of necessity and not worthy of prosecution. For example, in Dallas County, Texas, the district attorney's office recently decided not to prosecute cases proven to be food theft for necessity. According to the district attorney, "study after study shows that when we arrest, jail and convict people for non-violent crimes committed out of necessity, we only prevent that person from gaining the stability necessary to lead a law-abiding life." He further argued that "criminalizing poverty is counter-productive for our community's health and safety." Gary Stoller, *Stealing Food When You're Hungry. Should It Be a Crime?*, Hunter College New York City Food Policy Center (2019), <https://www.nycfoodpolicy.org/stealing-food-when-youre-hungry-should-it-be-a-crime/>.

#### **B. Petty Theft is a Crime of Addiction.**

Many petty theft offenses are perpetrated by people suffering from mental illness, including addiction and substance use disorder. In fact, criminal sentencing courts have used mental illness as a mitigating circumstance in petty theft cases. For example, after a defendant was sentenced to eleven months in jail for stealing from a department store, a Tennessee Appellate court found that her "numerous

shoplifting incidents” and criminal record was not an aggravating factor, but rather evidence of the defendant’s kleptomania and therefore a mitigating factor. *State v. Downey*, No. 03C01-9611-CR-00416, 1997 Tenn. Crim. App. LEXIS 1015, at \*13-14 (Crim. App. Oct. 9, 1997). The court further held that incarceration was thus inappropriate and ordered a term of probation. *Id.* at \*14.

Many instances of petty theft are perpetrated by people under the influence of drugs or in search of money to buy drugs. The primary cause of these offenses, then, is not the evil intent to take property from another but the drive to feed an uncontrolled addiction. See Jennifer C. Karberg and Doris J. James, *Substance Dependence, Abuse, and Treatment of Jail Inmates, 2002*, Bureau of Justice Statistics, 7 (2005) (“In 2002, 16% of convicted jail inmates said they committed their offense to get money for drugs.”). Although addiction may not have been considered a mitigating factor for criminal sentencing courts, there is now an understanding that addiction is a mental illness. Indeed, a recent survey found that fifty-three percent of the public viewed addiction as a *medical problem*. The Associated Press-NORC Center for Public Affairs Research, *Americans Recognize Growing Problem of Opioid Addiction* (2018), [https://apnorc.org/wp-content/uploads/2020/02/APNORC\\_Opioids\\_Report\\_2018.pdf](https://apnorc.org/wp-content/uploads/2020/02/APNORC_Opioids_Report_2018.pdf).

Studies also suggest that addiction intervention and treatment can play a key role in reducing property related crime. See Kathryn E. McCollister and Michael T.

French, *The relative contribution of outcome domains in the total economic benefit of addiction interventions: a review of first findings*, 98 *Addiction* 1647, 1647–59 (2003) (arguing that substance abuse treatment can reduce criminality); *see also* L.A. Marsh, *The efficacy of methadone maintenance interventions in reducing illicit opiate use, HIV risk behavior and criminality: a meta-analysis*, 93 *Addiction* 515, 537 (1998) (discussing impact of methadone treatment on property-related crimes). These studies illustrate that many petty theft offenses are driven not by malicious intent but by untreated mental illness.

Contemporary understandings of petty theft offenses therefore demonstrate that it no longer can reasonably be considered a CIMT. It does not “shock the public conscience” and it is not “inherently base, vile, and depraved.” Petty theft is a minor, commonly committed offense that more likely reflects a systemic problems related to poverty and addiction.

### **III. PUBLIC SURVEYS AND BALLOT INITIATIVES DEMONSTRATE THAT SOCIETY DOES NOT CONSIDER PETTY THEFT TO BE AN “INHERENTLY BASE, VILE, AND DEPRAVED” OFFENSE.**

In recent years, the American public has overwhelmingly recognized petty theft as a minor offense that should not be a high priority for law enforcement. In one particularly notable nationwide study, an overwhelming majority of individuals preferred community service and probation to prison time for petty theft offenders—particularly in light of prison overcrowding concerns. Francis T.

Cullen et al., *Public Opinion About Punishment and Corrections*, 27 *Crime and Justice* 1, 37–38 (2000). Other studies have likewise repeatedly shown that the public, including some crime victims, support lighter penalties for petty theft offenses and classify petty theft as a low-level crime. *See e.g.*, Paul H. Robinson, *Report on Offense Grading in Pennsylvania*, Univ. of Penn. Public Law and Legal Theory Research Paper Series 1, 7 (2009) (discussing public perceptions of various types of theft); Paul H. Robinson, *Report on Offense Grading in New Jersey*, Univ. of Penn. Public Law and Legal Theory Research Paper Series 2, 16 (2011) (grading petty theft as a two out of a possible seven offense in terms of severity); U.S. Dept. of Justice: Bureau of Statistics, *National Survey of Crime Severity*, 47 (1985), available at <https://www.bjs.gov/content/pub/pdf/nscs.pdf> (grading petty theft offenses at the lower end of the study’s 70-point scale); Alliance for Safety and Justice, *Crime Victims Speak: Florida Victims’ Views on Safety and Justice*, 6 (2018), available at [https://allianceforsafetyandjustice.org/wpcontent/uploads/2018/02/ASJ\\_FloridaCrimeSurvivorBrief-online.pdf](https://allianceforsafetyandjustice.org/wpcontent/uploads/2018/02/ASJ_FloridaCrimeSurvivorBrief-online.pdf) (hereinafter “Alliance for Safety and Justice”) (“Overwhelmingly, victims support policy changes that . . . reduce the use of prison for less serious crimes such as drug possession and petty theft.”).

Many individuals increasingly support initiatives to end incarceration as a punishment for petty theft charges not only to reduce prison overcrowding, but to



improve the likelihood of successful reintegration into society of offenders. Surveys demonstrate that many individuals, including crime victims, support raising state felony theft threshold amounts—the dollar value of stolen goods that can result in a felony charge instead of a misdemeanor. *See* Alliance for Safety and Justice at 6 (finding that 66% of Floridian crime victims support requiring misdemeanor charges instead of felony charges for theft of an amount less than \$1500); *see also* MassInc, *Voters Embrace Change to Make Massachusetts a Leader in Common Sense Criminal Justice Reform* (2015), <https://massinc.org/wp-content/uploads/2017/05/MPGCJReformWeb.pdf> (finding that 60% of Massachusetts voters support raising the felony theft threshold from \$250 to \$1500 dollars so that petty theft does not result in a long-lasting criminal record). The surveys therefore reflect a public that views petty theft is a minor offense supports updated criminal statutes to reflect that common understanding.

In some states, including California and Oklahoma, voters have adopted ballot initiatives that raise the threshold for felony theft and prevent petty theft offenders from a potentially life-long criminal record and its myriad of consequences. *See* Californians for Safety and Justice, *Breaking the Cycle of Low-Level Crime: Public Safety Innovations During an Era of Change*, 6 (2015), [https://safeandjust.org/wp-content/uploads/StoppingLowLevelCrimeBrief\\_7.10.15.pdf](https://safeandjust.org/wp-content/uploads/StoppingLowLevelCrimeBrief_7.10.15.pdf) (hereinafter “Californians for Safety

and Justice”); *see also* Ryan Gentzler, *SQ170 Is Already Reshaping Oklahoma’s Criminal Justice System*, Oklahoma Policy Institute (May 2, 2019), <https://okpolicy.org/sq-780-already-reshaping-oklahomas-justice-system/>. These policies reflect a voting public that considers only the most egregious of theft offenses to warrant felony punishment. In fact, these ballot initiatives specifically cite a desire to curb the harmful effects of mass incarceration and to focus limited resources on more serious crimes. Cal. Sec’y of State, *Prop 47 Criminal Sentences. Misdemeanor Penalties. Initiative Statute.*, 1 (2014), available at <https://vig.cdn.sos.ca.gov/2014/general/pdf/proposition-47-arguments-rebuttals.pdf> (arguing that California law enforcement should focus on “violent and serious crime while providing new funding for education and crime prevention programs”); Oklahoma Sec’y of State, *Amending Okla. Statutes titles 63, 21, and 59*, 1 (2016), available at <https://www.sos.ok.gov/documents/questions/780.pdf> (arguing that Oklahoma should “stop wasting taxpayer money on keeping people who commit low-level offenses behind bars for years”).

Public opinion surveys and the successful passage of ballot initiatives show that the public clearly does not consider petty theft to be an offense that is “inherently base, vile and depraved.” Instead, Americans largely see petty theft as a minor and have expressed their desire to divert limited law enforcement funding toward more serious offenses.

#### **IV. STATE LEGISLATURES AND LOCAL LAW ENFORCEMENT AGENCIES HAVE ADOPTED POLICIES TO MITIGATE THE CONSEQUENCES OF PETTY THEFT OFFENSES.**

Reflecting evolving norms and public opinion, state legislatures and law enforcement agencies have taken additional steps to reduce the consequences for petty theft offenses by implementing diversionary programs and alternatives to traditional prosecution. *See* Jake Horowitz and Monica Fuhrmann, *States Can Safely Raise Their Felony Theft Thresholds, Research Shows*, Pew Research (May 22, 2018), <https://www.pewtrusts.org/en/research-and-analysis/articles/2018/05/22/states-can-safely-raise-their-felony-theft-thresholds-research-shows>. Altogether, thirty-nine states and the District of Columbia have adopted policies that broaden the legal definition of petty theft by raising the felony theft threshold to curb severe consequences like incarceration.<sup>2</sup> Petty theft in these jurisdictions is treated like a minor offense that does not result in significant jail time. *Id.*

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<sup>2</sup> Those states include: Alaska, Arizona, Alabama, Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, Nevada, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wyoming. Jake Horowitz and Monica Fuhrmann, *States Can Safely Raise Their Felony Theft Thresholds, Research Shows*, Pew Research (May 22, 2018).

Some states, like California, have also lowered penalties for property crimes, including petty theft, thereby easing the strain on overstretched justice systems. Prosecutors increasingly allow perpetrators of petty theft to defer any final adjudication of guilt as long as they pay a fine or participate in rehabilitation programs. *See* Californians for Safety and Justice at 17; *see also* Douglas B. Marlowe, *Integrating Substance Abuse Treatment and Criminal Justice Supervision*, 2 Sci. Pract. Perspect. 4, 12 (2003) (discussing jurisdictions' use of deferred entry of judgement for several low-level crimes, including petty theft).

Los Angeles has taken an even more proactive approach. In 2014, Los Angeles City Attorney Mike Feuer launched the Neighborhood Justice Program, in which first-time petty theft perpetrators can avoid traditional prosecution by agreeing to appear in front of a panel of three local residents, a facilitator and, if appropriate, the victim of the crime. *See* Californians for Safety and Justice at 18. Instead of a conviction, the panel provides recommendations that the perpetrator has two months to complete. *Id.*

Notably, policymakers, including prosecutors, governors, and legislators, often suggest that petty theft offenses should not consume limited state resources in the prosecution of the offense or incarceration of perpetrators because of the minor nature of the offense. *See, e.g.,* Paul Hammel, *3 prison reform bills aimed at easing overcrowding win first approval*, Omaha World-Herald (April 15, 2015),

[https://omaha.com/state-and-regional/3-prison-reform-bills-aimed-at-easing-overcrowding-win-1st-round-approval/article\\_95f34706-8d6d-5592-9fcc-5292e2c69296.html](https://omaha.com/state-and-regional/3-prison-reform-bills-aimed-at-easing-overcrowding-win-1st-round-approval/article_95f34706-8d6d-5592-9fcc-5292e2c69296.html) (discussing Nebraska’s Legislative Bill 605, which raised the threshold for felony theft); Steve Schmadeke, *Top Cook County prosecutor raising bar for charging shoplifters with felony*, Chicago Tribune (December 15, 2016), <https://www.chicagotribune.com/news/breaking/ct-kim-foxx-retail-theft-1215-20161214-story.html>, (quoting a spokeswoman for Cook County State’s Attorney Kim Knox stating that the threshold was raised in order to “prioritize limited resources”); Jerzy Shedlock, *Alaska Gov. Walker signs crime reform bill into law*, Anchorage Daily News (July 14, 2016), <https://www.adn.com/politics/2016/07/11/alaska-gov-walker-signs-crime-reform-bill-into-law/> (citing Alaska lawmakers’ concerns over “unsustainable” growth of prison population as a reason for bill’s passage). These collective reforms illustrate that policymakers are determined to conserve limited state resources by deemphasizing petty theft in their punitive schemes.<sup>3</sup>

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<sup>3</sup> Notably, these policies can have a perverse impact on those facing possible deportation as a result of petty theft convictions. In states like Arizona, individuals charged with certain offenses, including petty theft, that do not face incarceration as a punishment are not entitled to appointed counsel. Ariz. R. Crim. P. 6.1(b). Therefore, noncitizens charged with such offenses may not have counsel. Consequently, they may not receive advice about the immigration consequences of those charges, which is required to be provided by criminal defense counsel pursuant to the Supreme Court’s decision in *Padilla v. Kentucky*, 599 U.S. 356,

## **V. THE ENFORCEMENT OF PETTY THEFT OFFENSES IS DISPROPORTIONATELY FOCUSED ON COMMUNITIES OF COLOR.**

Even when law enforcement organizations recognize petty theft offenses as minor, the enforcement of such offenses disproportionately impacts communities of color. “Racial profiling—equating race with crime and using it in lieu of probable cause—is so deeply woven into the fabric of American society that it is everywhere.” George E. Schreer, et. al, “*Shopping While Black*”: *Examining Racial Discrimination in a Retail Setting*, 39 *Journal of Applied Social Psychology* 1432, 1432 (2009) (quoting ACLU lawyer Reginald Shuford).

One common example of racial profiling results in what has been termed “shopping while black.” *Id.* People of color are frequently treated with suspicion—they are followed, scrutinized on video surveillance, and improperly stopped for shoplifting. *See* Anne-Marie G. Harris, et. al, *Courting Customers: Assessing Consumer Racial Profiling and Other Marketplace Discrimination*, 24 *Journal of Public Policy & Marketing* 163, 160 (2005). For example, in a class-action suit against the department store Macy’s, the complaint revealed that people of color were disproportionately targeted for shoplifting at certain stores. *Id.* (“[I]n certain Macy’s stores, people of color make up more than 90% of the people grabbed for

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356 (2010). Many noncitizens then plead guilty believing they will face minor punishment, but are instead subject to dire consequences, including deportation.

alleged shoplifting.” (quoting *Simmons-Thomas v. Macy's East, Inc.* (2003), No. 03-CV2003, p. 2)).

Targeted policing and surveillance for petty theft offenses leads to disproportionately high arrest rates of people of color. In 2012, Black people accounted for twenty-nine percent of property crime arrests. Nazgol Ghandnoosh, *Race and Punishment: Racial Perceptions of Crime and Support for Punitive Policies*, The Sentencing Project (2014), available at <https://www.sentencingproject.org/publications/race-and-punishment-racial-perceptions-of-crime-and-support-for-punitive-policies/> (“[T]he criminal justice system does not simply mirror these differences in crime rates—it exacerbates them through codified policies and individual discretion.”). In 2017, Black people accounted for 29.1 percent of all larceny-theft arrests. Federal Bureau of Investigation, *Crime in the United States 2017*, <https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-43>.

The disparity in arrests is even starker in certain localities. When adjusted for population size, a Black woman in Michigan is three times more likely to be arrested for shoplifting compared to a white woman, and Black males are 3.5 times more likely to be arrested as compared to white males. Julie Mack, *A crime where women predominate and 5 other facts about shoplifting in Michigan*, M Live (December 4, 2015), <https://www.mlive.com/news/kalamazoo/2015/12/>

a\_crime\_where\_women\_predominat.html. Arrests for petty theft offenses, therefore, may better capture the reality of racial profiling practices than individuals with a malicious intent to steal.

### **CONCLUSION**

For the foregoing reasons, Amici respectfully request that this Court grant the petition for rehearing en banc.

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Respectfully submitted,

/s/ Philip L. Torrey

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CRIMMIGRATION CLINIC

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## **CERTIFICATE OF COMPLIANCE**

On October 19, 2020, I certify that: Pursuant to Fed. R. App. P. 32(a)(4)–(6), (7)(C), and Fed. R. App. P. 32(d), as well as Circuit Rule 29-2(a), (c)(2), and (e)(1), the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 3,702 words, exclusive of the table of contents, table of authorities, and certificates of counsel, which does not exceed the 4,200 word-limit for an amicus brief in support of a petition for rehearing en banc.

Dated: October 19, 2020

/s/ Philip L. Torrey  
Philip L. Torrey

**CERTIFICATE OF SERVICE**

I, Philip L. Torrey, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: October 19, 2020

/s/ Philip L. Torrey \_\_\_\_\_  
Philip L. Torrey