No. 19-438

In The Supreme Court of the United States

CLEMENTE AVELINO PEREIDA,

Petitioner,

v.

WILLIAM P. BARR,
Attorney General of the United States,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF IMMIGRANT DEFENSE PROJECT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, THE NATIONAL IMMIGRANT JUSTICE CENTER, IMMIGRANT LEGAL RESOURCE CENTER, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are organizations that provide specialized advice to immigrants and lawyers on the interrelationship of criminal and immigration law. Amici have a strong interest in assuring that rules governing classification of criminal convictions are fair and accord with longstanding precedent on which immigrants, their lawyers, and the courts have relied for over a century. Amici have participated in numerous cases in the First, Fourth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals (including the case below) regarding the question presented in this case: whether a conviction bars a noncitizen from eligibility for discretionary immigration relief when the record of conviction is ambiguous and does not necessarily establish a disqualifying offense. Amici have also submitted briefs to the Court in numerous cases involving the immigration consequences of criminal convictions. *See*, *e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Vartelas v. Holder*, 566 U.S. 257 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez*

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), timely notice was provided to counsel of record for all parties, and all parties have consented to the filing of this brief.

v. Gonzales, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289 (2001).

Immigrant Defense Project (IDP) is a not-for-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 that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted amicus curiae briefs in several cases before courts of appeals on ambiguous records of conviction and the application of burden of proof provisions to the legal determination of whether a conviction disqualifies a noncitizen from applying for relief from removal.

American Immigration Lawyers Association (AILA) is a national organization comprised of more than 15,000 lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to promote reforms in the laws; to facilitate the administration of justice; and to elevate the standard of integrity, honor, and courtesy of those appearing in representative capacity in immigration, nationality and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office

for Immigration Review, as well as before the United States District Courts, Courts of Appeals, and Supreme Court, often on a *pro bono* basis. In this capacity, many of AILA's constituent lawyer-members represent foreign nationals who will be significantly affected by this case.

The **National Immigrant Justice Center** (NIJC), a program of the Heartland Alliance, is a nonprofit organization providing legal education and representation to more than 10,000 low-income immigrants annually. NIJC represents and counsels asylum seekers, refugees, detained immigrant adults, children, and families, and other noncitizens facing removal and family separation. NIJC appears frequently before the immigration courts to defend noncitizens from removal, including in cases where a noncitizen has been previously convicted of offenses. Through its work, NIJC seeks to promote human rights and access to justice for immigrants, refugees, and asylum seekers nationwide.

Immigrant Legal Resource Center (ILRC) is a national nonprofit resource center whose mission is to work with and educate immigrants, community organizations, and the legal sector to continue to build a democratic society that values diversity and the rights of all people. The ILRC has a direct interest in this case, because it advocates for greater rights for noncitizens accused or convicted of crimes, and each year provides assistance to hundreds of attorneys nationally who represent noncitizens in criminal courts, removal

proceedings, and applications for naturalization and other immigration benefits.

National Immigration Project of the National Lawyers Guild (National Immigration Project) is a nonprofit membership organization of immigration attorneys, legal workers, jailhouse lawyers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides technical assistance to the bench and bar, litigates on behalf of noncitizens as amici curiae in the federal courts, hosts continuing legal education seminars on the rights of noncitizens, and is the author of numerous practice advisories as well as *Immigration Law and Crimes* and three other treatises published by Thomson West. Through its membership network and its litigation, the National Immigration Project is acutely aware of the problems faced by noncitizens who have had criminal justice contacts and seek to establish eligibility for relief from removal or for lawful status.

* * * * *

Amici have seen countless individuals deported, and families separated, because of the unjust and unfair relief-eligibility outcomes caused by decisions like the Eighth Circuit's decision below. The Court's decision in this case will determine the ability of many asylum seekers, longtime permanent residents, victims of crime, and other noncitizens to seek vital forms of discretionary relief from removal and

other immigration benefits that will determine their ability to stay in this country with their families and communities. Amici have a strong interest in helping ensure that the Court's decision in this case is properly informed and consistent with the Court's longstanding precedent.

SUMMARY OF THE ARGUMENT

To determine whether a conviction of an offense triggers a bar to relief from removal, the categorical rule and its modified categorical variant ask whether the conviction *necessarily* corresponds to a ground for disqualification from relief. Amici agree with Mr. Pereida that this is a legal question, as to which burdens of proof are irrelevant. The Court has repeatedly recognized that, when either the categorical or modified categorical rule applies, judges examine the criminal record of a past conviction and determine whether it necessarily demonstrates the existence of a conviction triggering immigration or sentencing consequences. *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) ("a state offense is a categorical match with a generic federal offense only if a conviction of the state offense 'necessarily' involved facts equating to the generic . . . offense") (citations and quotations omitted); *Kawashima v. Holder*, 565 U.S. 478, 487 (2012) (holding that statute of conviction corresponds to aggravated felony ground because it "necessarily entails fraud or deceit."); *Shepard v. United States*, 544 U.S. 13, 24 (2005) (observing that the modified categorical

rule asks whether "a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to generic [offense]"). This has been the rule for over a century in immigration adjudications in the federal courts and before the agency. *See generally* Br. for Immigration Law Profs. as Amici Curiae. If, as in Mr. Pereida's case, the record of conviction is ambiguous, that record cannot demonstrate that the noncitizen was *necessarily* convicted of a disqualifying offense as a matter of law.

In the circuits where this is the rule, Amici have seen immigration outcomes consistent with the longstanding purpose of the categorical rule to "promote efficiency, fairness, and predictability in the administration of immigration laws." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015). The rule "ensures that all defendants whose convictions establish the same facts will be treated consistently." *Moncrieffe*, 569 U.S. at 205 n.11. If prior criminal record documents were never created or no longer exist, the result is the same throughout a noncitizen's removal proceeding: the conviction neither provides a basis for removability nor bars relief. It does not matter who bears the burden of proof as to removability or to relief because each determination turns on a legal question.

By contrast, under the Eighth Circuit's decision below, noncitizens convicted of the same crime face different relief eligibility outcomes based solely on arbitrary factors such as the existence or availability of relevant criminal record documents or the type of conviction information (or lack thereof) in those records.

See generally Br. for Amici Curiae Nat'l Assoc. of Criminal Defense Lawyers et al. Perversely, non-citizens with minor misdemeanor convictions may suffer the harshest consequences under the Eighth Circuit's rule. In misdemeanor cases like Mr. Pereida's, some state and local courts never create records of conviction. *See id.* § I.A. Even when courts create records, they may never record critical information, *see id.* § I.B, or they may destroy the records before removal proceedings commence. *See id.* § I.C. And, as this brief will show, most noncitizens in removal proceedings are without counsel, detained, or otherwise unable to obtain criminal record documents even if they were created and have not since been destroyed.

By reversing the Eighth Circuit's decision, the Court would ensure that a conviction has the same effect during both the removability and relief stages, consistent with *Moncrieffe*. This would promote fairness and efficiency in removal proceedings and prevent deportation determinations from arbitrarily turning on the Department of Homeland Security's (DHS's) decision of whether to charge removability based on a conviction or instead to wait to raise the conviction until the relief phase. *Cf. Judulang v. Holder*, 565 U.S. 42, 57 (2011) (the ultimate outcome in a noncitizen's removal proceeding should not "rest on the happenstance of an immigration official's charging decision").

This brief makes two points in support of reversal, drawing from Amici's extensive experience representing and advising noncitizens in removal proceedings. **First**, the Eighth Circuit's rule has an extremely harsh

and unjust impact on noncitizens in removal proceedings, the majority of whom are detained, without counsel, and lacking in English proficiency. These barriers make it difficult, if not impossible, for many noncitizens to obtain prior criminal record documents even when they exist. *See Moncrieffe*, 569 U.S. at 201 (recognizing that noncitizens "have little ability to collect evidence" about prior criminal cases because they are "not guaranteed legal representation and are often subjected to mandatory detention" because of past convictions). By contrast, the government—with all of the resources of DHS and other federal enforcement agencies—is in a far better position to obtain a noncitizen's criminal record documents. By forcing noncitizens to obtain criminal records when DHS has far greater access to such records, the Eighth Circuit's rule eschews longstanding evidentiary principles. The rule also ignores the structure of removal proceedings, under which DHS will almost certainly have already produced any available records prior to adjudication of a noncitizen's eligibility for relief.

Second, the Court's decision in this case will have a wide-ranging impact in the many contexts beyond Mr. Pereida's circumstances where a prior conviction operates as a bar to relief, including relief from removal for lawful permanent residents with deep ties to this country and for individuals fleeing persecution. The Court's decision will also impact noncitizens in a variety of high-volume non-adversarial adjudications involving decision-making by non-lawyer DHS officials.

ARGUMENT

I. THE GOVERNMENT'S PROPOSED DEVIATION FROM THE CATEGORICAL APPROACH UNFAIRLY PENALIZES NONCITIZENS WHO ARE OFTEN DETAINED, UNREPRESENTED, AND HAVE LIMITED ENGLISH PROFICIENCY.

The Eighth Circuit's rule would bar noncitizens from relief based on a prior conviction, even when the record of that conviction is ambiguous as to whether it necessarily matches a disqualifying immigration ground. That is not the rule that the Court has set forth in *Moncrieffe* and other categorical rule cases. Instead, the Court has held that, when the modified categorical rule applies, courts examine the record of a prior conviction to answer a legal question: does the record *necessarily* show that the conviction corresponds to a ground of disqualification? *See Moncrieffe*, 569 U.S. at 190 ("a state offense is a categorical match with a generic federal offense only if a conviction of the state offense 'necessarily' involved facts equating to the generic . . . offense") (citations and quotations omitted). When, as in Mr. Pereida's case, the record of a past conviction is ambiguous, it cannot *necessarily* correspond to a disqualifying offense.

The Eighth Circuit's decision unfairly puts noncitizens—who are often unrepresented, detained, and limited in their English proficiency—in the impossible position of obtaining records that may no longer exist. This contravenes the fairness and uniformity rationales for the categorical approach. *See Moncrieffe*, 569

U.S. at 205 n.11. The Eighth Circuit's rule also ignores longstanding evidentiary principles by forcing noncitizens to obtain records (that might not even exist) when the government has a far greater ability to access such records. And the rule is inconsistent with the regulatory structure of removal proceedings under which the government will have almost certainly produced any records that exist prior to any adjudication of relief eligibility.

A. The Eighth Circuit's Decision Requiring Noncitizens to Obtain Criminal Record Documents Ignores the Fairness Rationales Underlying the Categorical Approach.

Unless the Court reverses the Eighth Circuit's decision, noncitizens in removal proceedings will face the often insurmountable requirement of locating and submitting old criminal record documents that may not even exist. Such a requirement ignores the harsh realities that noncitizens face in removal proceedings. Most noncitizens are not represented by counsel. Many noncitizens—especially those who are in proceedings because of past convictions—are detained by the government during the course of their proceedings. Most noncitizens facing removal are not proficient in English. Still others must overcome difficulties associated with mental illness, past trauma, persecution, or other forms of violence. A requirement that these individuals somehow find prior criminal record documents, assuming those documents even exist, is unfair and contrary to the rationale underlying the categorical approach.

1. Most Noncitizens Are Not Represented by Counsel.

The Eighth's Circuit's rule has a particularly harsh effect on the majority of noncitizens who are unrepresented while fighting their removal. Unless the Court reverses the Eighth Circuit, these individuals would be required to obtain prior criminal record documents, assuming the documents exist, without the help of counsel.

A noncitizen in removal proceedings is not entitled to an attorney unless she can afford to pay for one or can find someone to represent her for free. 8 U.S.C. § 1229a(b)(4)(A). Most noncitizens are not represented by counsel. Sixty-three percent of noncitizens in deportation proceedings lack representation.[2] Detained immigrants are even less likely to have a lawyer: according to one study, only 14 percent of detained noncitizens are represented by counsel.[3]

By contrast, DHS is always represented in removal proceedings by counsel from the Office of the Principal Legal Advisor, which has over 1,100 attorneys and 350 support personnel.[4] As representatives of the federal government, DHS attorneys are particularly well

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[2] Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 Fordham L. Rev. 485, 486 (2018).

[3] Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 33 (2015).

[4] *See* Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement, https://www.ice.gov/opla (last visited Jan. 24, 2020).

positioned to obtain records from state and local government entities, including the courts that are generally the custodians of criminal record documents. DHS attorneys enjoy access to the FBI's Next Generation Identification database, state and regional criminal justice databases, prison records, and informal channels of communication with local law enforcement officials.[5] DHS attorneys regularly obtain such records prior to initiating removal proceedings. *See infra* Section I.B.

One military veteran who faced removal proceedings alone, while detained, and without counsel described the challenges as follows:

> The United States has been my home for 20 years. When I was a young child, I came to the United States as a lawful permanent resident with my family. I graduated high school with honors. . . . I am a U.S. war veteran . . . [A]fter I made some wrong decisions in my life, I was convicted for possessing with intent to distribute a small amount of cocaine and possessing a firearm. ICE placed me in removal proceedings and told me that I was in mandatory detention without eligibility for bond. . . .

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[5] Nat'l Immigr. Law Center, Untangling the Immigration Enforcement Web: Basic Information for Advocates About Databases and Information-Sharing Among Federal, State, and Local Agencies, at 3 (Sept. 2017), https://www.nilc.org/wp-content/uploads/2017/09/Untangling-Immigration-Enforcement-Web-2017-09.pdf. *See also* Geoffrey Heeren, *Shattering the One-Way Mirror: Discovery in Immigration Court*, 79 Brooklyn L. Rev. 1569, 1570 (2014) (describing DHS's "extraordinary advantage" in gathering information in immigration cases).

> Unable to work while detained, I had no money to hire a private attorney. . . . I had no option but to fight my case by myself while I was detained, against a trained government attorney. . . . I lost my case. . . . [T]he government deported me to a place where I knew no one."[6]

2. Many Noncitizens With Past Criminal Convictions Are Detained and Face Additional Barriers to Obtaining Their Criminal Record Documents.

The challenges imposed by the Eighth Circuit's rule are far worse for noncitizens whom ICE detains during their removal proceedings. Annually, ICE detains more than 350,000 noncitizens in over 200 facilities nationwide.[7] ICE detained almost 50,000 noncitizens on a given day in 2019, of which 36 percent, or over 17,000 detainees, had criminal convictions.[8] ICE subjects some of these individuals to mandatory detention under 8 U.S.C. § 1226(c), sometimes on the basis of misdemeanor or other minor offenses. *See* 8

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[6] Saba Ahmed et al., *The Human Cost of IIRIRA—Stories From Individuals Impacted by the Immigration Detention System*, 5 J. Migration & Human Security 194, 199-201 (2017).

[7] Emily Ryo & Ian Peacock, *A National Study of Immigration Detention in the United States*, 92 S. Cal. L. Rev. 1, 17 (2018).

[8] Transactional Records Access Clearinghouse, Syracuse University, Growth in ICE Detention Fueled by Immigrants With No Criminal Conviction (Nov. 2019), https://trac.syr.edu/immigration/reports/583/.

U.S.C. § 1226(c)(1)(B); *Jennings v. Rodriguez*, 138 S. Ct. 830, 846-47 (2018) (interpreting Section 1226(c)).

Detained noncitizens face innumerable additional barriers to obtaining criminal record documents, even beyond the challenges they face in doing so without counsel, as all but fourteen percent of them do.[9] When ICE detains a noncitizen, it holds him in prison-like facilities, in cells and behind barbed-wire fences.[10] Noncitizen detainees wear prison uniforms, cannot leave their cells or the facility without permission, and must endure constant surveillance.[11] They are subject to discipline and face significant restrictions on contact with the outside world.[12]

Detainees are subject to phone, Internet, and mail restrictions that make it difficult—if not impossible—

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[9] Eagly & Shafer, *supra* note 3, at 33.

[10] *See*, *e.g.*, The Southern Poverty Law Ctr. & Americans for Immigr. Justice, Prison by Any Other Name: A Report on South Florida Detention Facilities, at 5 (2019), https://www.splcenter.org/sites/default/files/cjr_fla_detention_report-final_1.pdf ("Immigrant incarceration is, in many ways, indistinguishable from prison. . . . [and] includes wearing prison uniforms, going outside only if and when the facility permits, and enduring up to four 'counts' per day when all movement in the facility is frozen so authorities can count the detained individuals.").

[11] *See id.* at 5-6, 8. *See also* Penn State Law Center for Immigrants' Rights Clinic, Imprisoned Justice: Inside Two Georgia Immigrant Detention Centers, at 26-51 (May 2017), https://pennstatelaw.psu.edu/sites/default/files/pictures/Clinics/Immigrants-Rights/Imprisoned_Justice_Report.pdf (describing conditions of confinement in two Georgia facilities).

[12] Prison by Any Other Name, *supra* note 10, at 17-30 (describing conditions at three Florida detention facilities).

to place calls to clerks' offices, print records request forms, and conduct other communication necessary to obtain records. State and local courts across the country have specific, rigorous, and widely varying requirements for obtaining criminal court record documents, with differences in the methods by which individuals may make requests, methods of payment, the need for in-person requests, the need for written and sometimes notarized authorizations, the need for multiple calls to different offices with different types of records, and whether responsive records will be mailed, emailed, or held for in-person pick up.

Some facilities have "postcard-only" policies that do not permit detainees to receive or send mail in envelopes.[13] Even in facilities without these policies, detainees may not have the checkbook or credit card required to pay for records.[14] Because noncitizens cannot typically earn money while detained, they may not

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[13] *See Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068 (D. Or. 2013); Prison Policy Initiative, Return to Sender: Postcard-only Mail Policies in Jail (2013), http://static.prisonpolicy.org/postcards/Return-to-sender-report.pdf.

[14] *See*, *e.g.*, The Superior Court of California, County of San Francisco, Criminal Record Request Form, https://www.sfsuperiorcourt.org/sites/default/files/images/Criminal%20Records%20Request%20Form_1.pdf?1580440995047 (last visited Jan. 30, 2020) (noting that the cost of records includes a $15 search fee and a copying cost of $0.50 per page and requiring mail payment via check); Criminal Court Clerk, Metropolitan Nashville and Davidson County, Criminal Background Checks, https://ccc.nashville.gov/about-our-services/criminal-background-checks/ (last visited Jan. 25, 2020) (certified copies are $5 per copy and $0.50 per page, and payment is by cashier's check, money order, or credit card).

be able to afford the fees that counties and states impose to obtain criminal record documents.[15]

Detained noncitizens face additional barriers when trying to communicate by phone to obtain records. Detainees must somehow obtain the necessary phone numbers even though they lack access to the Internet, which is where county clerk offices typically list the requirements for obtaining records.[16] Even if a detained noncitizen is able to locate these phone numbers, he faces additional challenges with making the necessary phone calls. A recent study by the California Department of Justice found that detained noncitizens could not make calls to obtain records because "the telephone systems in detention facilities have a 'positive acceptance requirement,'" which means that recipients of a noncitizen's phone calls must press a number to accept a call.[17] The report concluded that "[t]he positive acceptance feature, added to the other obstacles . . . makes it all but impossible for pro se immigration detainees to gather supporting evidence . . . to support

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[15] *See* Cindy S. Wood, *Barriers to Due Process for Indigent Asylum Seekers in Immigration Detention*, 45 Mitchell Hamline L. Rev. 319, 340 (2019) (explaining that the only option available to some indigent detainees is to work for $1 per day, which amounts to 112 hours just to purchase one USB flash drive to securely save legal documents).

[16] *See*, *e.g.*, *supra* note 14 (county website information from San Francisco and Nashville).

[17] California Department of Justice, The California Department of Justice's Review of Immigration Detention in California, at 128 (Feb. 2019), https://oag.ca.gov/sites/all/files/agweb/pdfs/publications/immigration-detention-2019.pdf.

their claims for relief."[18] Given these realities, it is difficult to imagine how detained noncitizens—the overwhelming majority of whom lack lawyers—could obtain criminal record documents.

In the unlikely event that a detained noncitizen is able to make the necessary phone calls and mail a records request with appropriate payment, he may be transferred to another facility before the records arrive, or the records may not travel with him when he is transferred.[19] Noncitizens are often transferred to faraway detention facilities during the pendency of their removal proceedings. A recent report found that

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[18] *Id.* Detainees are typically also unable to receive calls, even assuming a county clerk's office is able to receive the detainee's message and calls back. *See* Nat'l Imm. Justice Ctr., Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court, at 9 (2010), https://www.immigrantjustice.org/sites/default/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023_0.pdf.

[19] *See*, *e.g.*, Peter L. Markowitz, *Barriers to Representation for Detained Immigrants Facing Deportation: Varick Street Detention Facility, A Case Study*, 78 Fordham L. Rev. 541, 559, 570 (2009) (describing interview results indicating that DHS is not complying with its own policy of forwarding detainees' mail following their transfer to another facility); *Sasso v. Milhollan*, 735 F. Supp. 1045, 1047 (S.D. Fla. 1990) (noting that detainee was transferred to El Paso facility even though evidence in his case was located in Florida). *See generally* Human Rights Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States (2011), https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united (describing challenges of transfers for noncitizen detainees).

sixty percent of detainees experience at least one transfer during a given year.[20] The number of transfers increases with detention length, and individuals applying for relief from removal are likely to be detained for longer periods of time.[21] Transfers inhibit detained noncitizens' ability to defend against deportation, including their ability to gather and submit criminal record documents.[22] ICE detention facilities are not required to forward mail,[23] and even the records a detained noncitizen has already obtained are likely to be lost or destroyed because personal property is rarely transferred with detainees.[24]

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[20] *See* Ryo & Peacock, *supra* note 7, at 40.

[21] A Costly Move, *supra* note 19, at 25-26.

[22] Ryo & Peacock, *supra* note 7, at 39 (noting that "transfers can sever the detainees' familial and social contacts (in and outside the facilities where they are held), disrupt the continuity of their medical care and legal representation, and interfere with their efforts to navigate the legal system more generally") (collecting sources).

[23] *See* U.S. Immigration and Customs Enforcement, Performance-Based National Detention Standards 2011, §§ 5.1, 7.4 (rev. 2016), https://www.ice.gov/doclib/detention-standards/2011/pbnds2011r2016.pdf (outlining ICE standards for mail and transfers).

[24] *See* Karen Tumlin et al., A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers, at 41-42, 70 (2009), https://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf.

3. Noncitizens Who Are Not Fluent in English Experience Additional Barriers in Obtaining Records.

The devastating consequences of the Eighth Circuit's rule are even more pronounced for noncitizens who are not fluent in English. Eighty-nine percent of noncitizens (or 162,923 individuals in all) proceeded in a language other than English for immigration court cases completed in Fiscal Year 2018.[25] Individuals with limited English proficiency face additional barriers in obtaining prior records. State and county court websites with information about requesting records are almost always in English. And English is also often the only language spoken by court clerks. If a noncitizen with limited English proficiency is detained, he is especially unlikely to be able to negotiate the records request process. Even if the detainee were able to somehow obtain access to phones or the mail, the records request process can require knowledge of the docket number and filing dates, which a detained noncitizen without English proficiency would have little hope of finding.[26]

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[25] Dep't of Justice, Exec. Office for Immigr. Review, Statistics Yearbook Fiscal Year 2018, at 18, https://www.justice.gov/eoir/file/1198896/download.

[26] *See*, *e.g.*, Monroe County Clerk, Court and Land Records, http://www.monroecounty.gov/clerk-records.php (last visited Jan. 25, 2020) (noting that "[i]t will be helpful in locating a criminal file if you know the index number and year of filing.").

4. Mentally Ill Detainees Face Even More Difficulties in Obtaining Records.

Noncitizens with mental illness and other disabilities may not be able to request criminal record documents, whether they are detained or not. Tens of thousands of noncitizens with mental disabilities are estimated to face removal each year.[27] These individuals suffer from cognitive delays, schizophrenia, bipolar disorder, or post-traumatic stress disorder.[28] Mentally ill people struggle to participate in their cases.[29] A requirement that they somehow obtain criminal court records, assuming those records even exist, is unrealistic and cruel.

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[27] *See* Fatma E. Marouf, *Incompetent But Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 Hastings L.J. 929, 937 (2014) ("[U]p to 60,000 detained individuals with some type of mental illness face deportation each year.").

[28] *Id*. at 936.

[29] *See generally* Human Rights Watch, Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System (2010), https://www.hrw.org/report/2010/07/25/deportation-default/mental-disability-unfair-hearings-and-indefinite-detention-us; Amelia Wilson, Natalie H. Prokop, & Stephanie Robins, *Addressing All Heads of the Hydra: Reframing Safeguards for Mentally Impaired Detainees in Immigration Removal Proceedings*, 39 N.Y.U. Rev. L. & Soc. Change 313, 321-22 (2015) (discussing barriers to justice faced by detainees with mental illness, including inability to pay bond, lack of counsel, and the impossibility of obtaining required evidence).

B. The Eighth Circuit's Decision Is Inconsistent with Basic Evidentiary Principles and the Structure of Removal Proceedings.

1. The Eighth Circuit's Rule Eschews Evidentiary Principles by Effectively Requiring Noncitizens to Obtain Criminal Records—Assuming They Exist—Even Though the Government Has Far Superior Access to Such Records.

The Eighth Circuit's rule is inconsistent with traditional evidentiary principles, which place the responsibility of obtaining records on the party most likely to have access to those records. The Eighth Circuit's rule forces noncitizens—who are often detained, without counsel, and non-English speaking—to seek and obtain prior records even though the government has far greater access to such records, if they exist at all.

Rooted in considerations of fairness, courts ordinarily require that a party produce sources of proof to which they have unique or superior access. *See* 1 C. Mueller & L. Kirkpatrick, Federal Evidence § 3:3 (4th ed. 2019); *see also U.S. v. New York, N.H. & H.R. Co.*, 355 U.S. 253, n.5 (1957). Indeed, "[t]he relative ease with which the opposing parties can gather evidence is a familiar consideration" in considering which party is required to present evidence. *Cooper v. Harris*, 137 S. Ct. 1455, 1491 (2017) (Thomas, J., concurring). The Board of Immigration Appeals has followed this principle in interpreting the Immigration and Nationality

Act (INA), even where the party in a better position to provide the evidence in question did not have the overarching burden of proof. *See*, *e.g.*, *Matter of Vivas*, 16 I. & N. Dec. 68, 70 (BIA 1977) (requiring a noncitizen to provide evidence as to whether he had previously married a U.S. citizen even while the burden of proof as to deportability was on the government because the evidence was much easier for the noncitizen to acquire).

Contravening these well-established principles, the Eighth Circuit's rule unfairly forces detained and unrepresented individuals to try to locate and obtain old criminal records when the government is in a far superior position to acquire them should they exist. U.S. Immigration and Customs Enforcement (ICE), the agency tasked with representing the government in removal proceedings, is well equipped to obtain a noncitizen's conviction records.[30] ICE has a multi-billion-dollar budget, over 20,000 employees, and a developed investigative infrastructure.[31] Beyond substantial internal capacity to investigate prior convictions and obtain records, ICE and its parent agency, DHS, have established channels of information sharing with local, state, and tribal law enforcement partners.[32] ICE and

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[30] *See* Section I.A.1, for a discussion of the extensive investigative resources available to DHS and ICE.

[31] Dep't of Homeland Sec., U.S. Immigr. and Customs Enforcement, Congressional Budget Justification Fiscal Year 2020, at 11 (2019), https://www.dhs.gov/sites/default/files/publications/19_0318_MGMT_CBJ-Immigration-Customs-Enforcement_0.pdf.

[32] For example, ICE operates the Law Enforcement Information Sharing Service (LEIS Service), which "facilitates sharing

DHS routinely use this infrastructure to conduct "a variety of identification, law enforcement, and security investigations . . . to determine whether an alien in proceedings has been convicted of any disqualifying crime." Background and Security Investigation in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743 (Jan. 31, 2005).

In fact, federal regulations require that DHS conduct such investigations *before* an immigration judge may even adjudicate applications for several types of immigration relief including cancellation of removal. 8 C.F.R. § 1003.47(e). So, not only do DHS and ICE have extensive investigatory resources and a network of law enforcement connections across the United States, federal regulations require them to use this expansive capacity to conduct investigations into noncitizens' conviction histories.

The Eighth Circuit's approach unfairly abandons elementary evidentiary principles that generally require the party with superior access to produce

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of information between DHS and external federal, state, local, tribal, and international law enforcement agency partners." U.S. Department of Homeland Security, Privacy Impact Assessment for the Law Enforcement Information Sharing Service, at 1 (2019), https://www.dhs.gov/sites/default/files/publications/privacy-pia-ice-leiss-july2019_0.pdf. *See generally* George Joseph, *Where ICE Already Has Direct Lines to Law-Enforcement Databases with Immigrant Data*, National Public Radio (2019), https://www.npr.org/sections/codeswitch/2017/05/12/479070535/where-ice-already-has-direct-lines-to-law-enforcement-databases-with-immigrant-d.

evidence. It instead favors a rule that requires noncitizens—who are often detained, without counsel, and non-English-speaking—to obtain criminal records, assuming they even exist, in order to prevail on their applications for relief from removal.

2. The Eighth Circuit's Requirement that Noncitizens Obtain and Submit Records Is Inconsistent with the Structure of Removal Proceedings.

The Eighth Circuit's rule ignores the two-part structure of removal proceedings laid out in the INA and governing regulations. Because of this structure, the government will almost certainly have produced any relevant and available criminal records prior to the adjudication of a noncitizen's application for discretionary relief (that is, before an immigration judge would apply the categorical analysis to decide relief eligibility). Yet, even if the records the government produces are ambiguous as to whether a noncitizen was convicted of a predicate offense, the Eighth Circuit's rule harshly penalizes the noncitizen by denying her relief if she fails to produce additional criminal records beyond those accessed by the government.

Removal proceedings "are divided into two phases: (1) determination of the alien's removability; and (2) consideration of applications for discretionary relief." *Matovski v. Gonzalez*, 492 F.3d 722, 727 (6th Cir. 2007); *see also Moncrieffe*, 569 U.S. at 187 ("Ordinarily, *when* a noncitizen is found to be deportable . . . , he may ask

the Attorney General for certain forms of discretionary relief from removal, like asylum . . . and cancellation of removal") (emphasis added). This structure of proceedings is consistent, for instance, with the text of the INA concerning cancellation of removal. Section 1229b provides that "[t]he Attorney General may cancel removal in the case of *an alien who is inadmissible or deportable*." 8 U.S.C. § 1229b(a) (emphasis added); *see also* 8 U.S.C. § 1229b(b)(1). This provision indicates that the noncitizen's removability must be established before she can apply for cancellation of removal. The two-part structure of removal proceedings reflects the logic that noncitizens have no need to apply for relief from removal if they are not removable in the first instance.

Before an immigration judge even reaches the second phase of considering a noncitizen's application for discretionary relief, the government generally will have already produced conviction records at the removability phase. The government often introduces criminal records in the first phase of removal proceedings to establish removability. *See* 8 U.S.C. §§ 1229a(c)(3)(A), (B). In addition, federal regulations require that DHS conduct "identity, law enforcement or security investigations" before immigration judges adjudicate applications for "any form of immigration relief . . . filed in . . . proceedings," including cancellation of removal. 8 C.F.R. §§ 1003.47(a), (b)(5), (e).[33] DHS

[33] *See also* The Office of the Chief Immigration Judge, Executive Office for Immigration Review, Immigration Court Practice Manual, at 72 (2016), https://www.justice.gov/eoir/file/1205666/

conducts these "identification, law enforcement, and security investigations and examinations to determine whether an alien in proceedings has been convicted of any disqualifying crime." 70 Fed. Reg. 4743. Federal regulations further dictate that the Department must complete these "investigations or examinations . . . and advise the immigration judge of the results . . . *on or before the date of a scheduled hearing on any application* for immigration relief." 8 C.F.R. § 1003.47(e) (emphasis added). Such an investigation would likely yield noncitizens' conviction records if they exist, especially because the investigations are at least partially aimed at determining whether noncitizens have "been convicted of any disqualifying crime." 70 Fed. Reg. at 4743. And given that DHS's investigations must be complete before the judge considers any applications for immigration relief, DHS would almost certainly have already acquired these records before the noncitizen made her case for relief.

That the government would have produced conviction records prior to the relief stage of removal proceedings underscores the unfairness of the Eighth Circuit's rule for the noncitizen. Consider a scenario in which after deploying its vast investigative infrastructure to search for a noncitizen's conviction records, the government fails to find any criminal records that establish that a noncitizen was necessarily convicted of a disqualifying offense. Under the Eighth Circuit's

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download ("For certain applications for relief from removal, the Department of Homeland Security (DHS) is required to complete background and security investigations.").

rule, a noncitizen applying for relief would be tasked with somehow acquiring additional criminal records beyond those within the reach of DHS and that also establish that the noncitizen was *not* convicted of the disqualifying offense. If the noncitizen is unable to find such records, the Eighth Circuit's rule would unjustly bar her from obtaining relief.

Under the Eighth Circuit's rule, even if ICE—with its vast investigative resources—fails to find criminal records or produces records that are ambiguous, a noncitizen would be denied relief unless she somehow produced records beyond those available to the government. Such a requirement runs counter to the fairness rationales animating the categorical approach.

II. THE GOVERNMENT'S PROPOSED DEVIATION FROM THE CATEGORICAL APPROACH WOULD UNFAIRLY AFFECT NONCITIZENS IN A WIDE VARIETY OF IMMIGRATION ADJUDICATIONS, INCLUDING NON-ADVERSARIAL PROCEEDINGS.

The Court's decision in this case will affect noncitizens in many proceedings involving eligibility for relief from removal and immigration benefits, both immigration court removal proceedings and non-adversarial agency adjudications with even less of a possibility of a fair adjudication consistent with the categorical approach.

Individuals Fleeing Persecution. The Court's decision in this case will affect noncitizens applying for

persecution-based relief. A conviction of an aggravated felony can operate as a bar to asylum, *see* 8 U.S.C. § 1158(b)(2)(B)(i), as well as to withholding of removal, for which an aggravated felony resulting in an aggregate imprisonment term of at least five years is a bar as a particularly serious crime, *see* 8 U.S.C. § 1231(b)(3)(B)(iv). A conviction may also bar other forms of relief for individuals fleeing persecution, including those who apply for special rule cancellation of removal pursuant to Section 203 of the Nicaraguan and Central American Relief Act (NACARA), Pub L. No. 105-100, 111 Stat. 2160, 2198 (1997).

The government's position will unfairly bar individuals fleeing persecution from being able to pursue such forms of relief. An example is illustrative. In *Mondragon v. Holder*, the Fourth Circuit considered the case of a man who had lived in the United States since 1990 after fleeing El Salvador and obtaining Temporary Protected Status to stay in this country lawfully. 706 F.3d 535 (4th Cir. 2013). Mr. Mondragon had only one conviction, for misdemeanor assault and battery under Section 18.2-57 of the Virginia Code, which occurred more than ten years before he was placed into proceedings. *Id.* at 537-38. The government conceded that the only available record of Mr. Mondragon's old conviction was a two-page document that served as an arrest warrant and record of disposition. *Id.* at 538. That record was ambiguous as to whether the conviction barred relief under a form of cancellation of removal under NACARA. *Id.* at 538. But, applying the rule that the government now asks

this Court to adopt, the Fourth Circuit held that Mr. Mondragon was barred from relief, even though the Fourth Circuit acknowledged he made "a strong claim to fairness." *Id.* at 538-39. If the conviction had not barred Mr. Mondragon from applying for relief, he could have presented the specific facts of his case—including as to rehabilitation from the conviction—and the immigration judge could have made a case-specific determination based on those facts. But under the Fourth Circuit's decision—and the government's position in this case—Mr. Mondragon never had that opportunity.

Longtime Lawful Permanent Residents. The government's proposed rule, under which a noncitizen would be barred from relief based on an ambiguous criminal record, would also preclude eligibility for lawful permanent residents seeking cancellation of removal under 8 U.S.C. § 1229b(a) regardless of the strength of their equities. Take the case of Luis Garcia-Cota, who has been a lawful permanent resident for over 26 years and has four U.S. citizen children.[34] Mr. Garcia-Cota has only one conviction: for sale or transportation of methamphetamine in violation of California Health & Safety Code § 11379(a), to which he pleaded no contest and received a sentence of only probation. *Id.* at 5. An immigration judge initially granted Mr. Garcia-Cota cancellation of removal based on his strong equities, including his deep family ties and his failing health. *Id.* at 7. But DHS appealed, and the BIA

[34] Petition for Initial Hearing En Banc at 4, *Garcia-Cota v. Barr*, No. 15-73190 (9th Cir.) (filed Nov. 9, 2017).

remanded for the immigration judge to apply *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), a now-reversed Ninth Circuit decision similar to the decision below. *See Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2018) (en banc), *petition for cert. docketed sub nom. Barr v. Marinelarena*, No. 19-632 (Nov. 15, 2019). There was no dispute that the record of Mr. Garcia-Cota's conviction was ambiguous as to whether the conviction was for an aggravated felony. But, applying the rule the government seeks in this case, the immigration judge and BIA barred Mr. Garcia-Cota from cancellation regardless of his equities.

Individuals Applying for Other Relief. Even beyond lawful permanent resident cancellation of removal and asylum, the Court's decision in this case will affect individuals applying for other types of relief, including: cancellation of removal for nonpermanent residents (as in Mr. Pereida's case), *see* 8 U.S.C. § 1229b(b) (incorporating 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)); Violence Against Women Act (VAWA) cancellation of removal for nonpermanent residents, *see* 8 U.S.C. §§ 1229b(b)(2)(A)(i)(I)-(II), 1229b(b)(2)(A)(iv); waiver of criminal inadmissibility for adjustment of status, *see* 8 U.S.C. § 1182(h); naturalization, *see* 8 U.S.C. §§ 1101(f)(8), 1427(a)(3); and voluntary departure, *see* 8 U.S.C. § 1229c(a)(1).

Individuals Applying in Non-Adversarial Contexts. The Court's decision will also impact noncitizens in a variety of high-volume, non-adversarial contexts in which DHS line officers who are not lawyers adjudicate noncitizens' discretionary applications. Consular

visa officials, Customs and Border Protection officers, U.S. Citizenship and Immigration Services (USCIS) adjudicators, and ICE agents all review noncitizens' past convictions to decide eligibility for waivers, asylum, adjustment, and naturalization. USCIS officers adjudicate a high volume of such applications: they decided 140,360 adjustment applications and issued 174,645 naturalization grants in the first quarter of 2019 alone.[35] In these routine adjudications, the noncitizen bears the burden of proof to demonstrate that a prior conviction is not a bar to eligibility. Unless the Court reverses the Eighth Circuit's rule, an ambiguous prior record of conviction would operate to bar relief even in these non-adversarial adjudications. *Cf. Vartelas v. Holder*, 566 U.S. 257, 275 (2012) ("the immigration officer at the border" is capable of "check[ing] the alien's records for a conviction[,] [but] [h]e would not call into session a piepowder court to entertain a plea or conduct a trial.").

The naturalization process is illustrative of the limited procedural protections that accompany non-adversarial DHS adjudications. To obtain naturalization, a noncitizen must demonstrate that she was not convicted of an aggravated felony and also that she has good moral character (a determination which turns in part on whether the noncitizen has accrued certain prior convictions). 8 U.S.C. §§ 1101(f), 1427(a)(3). A lawful permanent resident typically applies to

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[35] *See* USCIS Legal Immigration and Adjustment of Status Report FY2019, Quarter 1, Tables 1A & 3, https://www.dhs.gov/immigration-statistics/special-reports/legal-immigration#File_end.

naturalize by mailing in a Form N-400 and supporting documentation to a USCIS processing center.[36] A non-lawyer officer reviews the paper submission and decides whether to schedule the individual for an interview.[37] The officer must decide, as part of this process, whether the noncitizen has been convicted of an offense that would render her ineligible to naturalize. 8 C.F.R. § 335.2. The interview process is often brief and conducted across an office desk. Under the Eighth Circuit's rule, when a noncitizen has a prior conviction with an ambiguous record, the USCIS officer may deny naturalization, even when the record does not necessarily demonstrate a disqualifying offense. And, while a noncitizen has the right to appeal a naturalization denial, 8 U.S.C. § 1447, most applicants for naturalization do not have legal representation and only about 6 percent of individuals appeal after a denial.[38] This means that, under the Eighth Circuit's rule, once USCIS denies naturalization to an otherwise-eligible applicant based on a prior incomplete or ambiguous record, there is little opportunity to correct the error.

DHS officials decide in many other non-adversarial contexts whether prior convictions bar forms of immigration

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[36] *See* U.S. Citizenship and Immigration Services, N-400, Application for Naturalization, https://www.uscis.gov/n-400.

[37] *See generally* U.S. Citizenship and Immigration Services, A Guide to Naturalization (2016), https://www.uscis.gov/sites/default/files/files/article/M-476.pdf.

[38] Immigrant Legal Resource Center, How to Successfully Administratively Appeal Your Naturalization Denial, at 1 (2019), https://www.ilrc.org/sites/default/files/resources/appeal_of_natz_denial_final.pdf.

relief or other immigration benefits. USCIS officials decide bars to asylum (because an aggravated felony conviction is a bar to asylum under 8 U.S.C. § 1158(b)(2)(B)(i)) and to protected status under VAWA (because relief such as self-petitioning under VAWA incorporates the criminal bars related to aggravated felony convictions, controlled substances offenses, and crimes involving moral turpitude through its "good moral character" requirement, subject to a narrow waiver, 8 U.S.C. §§ 1154(a)(1)(A)(iii)(II)(bb), 1101(f)). In addition, under the Trafficking Victims Protection Reauthorization Act (TVPRA), USCIS officials must assess whether trafficking victims seeking to adjust their status have proven good moral character. 8 U.S.C. § 1255(l)(1)(B). The TVPRA also requires USCIS officials to determine whether youths applying for Special Immigrant Juvenile Status (which, if granted, would allow the individual to apply for adjustment of status to lawful permanent residence) are barred from eligibility because they have been convicted of offenses triggering inadmissibility (subject to a narrow waiver). 8 U.S.C. § 1255(h)(2)(B).

These non-adversarial contexts highlight why it is important for the Court to reverse the Eighth Circuit. Especially given the limited procedural protections available to noncitizens in these contexts, DHS should be required to apply a fair rule to decide when a prior conviction bars relief. Consistent with *Moncrieffe*, a conviction should only bar relief when the record of conviction *necessarily* demonstrates that it matches a disqualifying ground under the INA. *See Moncrieffe*,

569 U.S. at 190 (under the categorical rule, the Court "examine[s] what the state conviction necessarily involved, not the facts underlying the case . . . ").

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In both non-adversarial agency adjudications and immigration court proceedings, a decision by the Court reversing the Eighth Circuit would not require the decision-maker to simply grant all applications for relief and immigration benefits. Rather, as was the case in *Moncrieffe*, it would remove a mandatory bar in cases where the record does not necessarily demonstrate a prior disqualifying conviction. Noncitizens would still be required to satisfy "the other eligibility criteria" and to persuade immigration judges and other examiners to grant the applications as a matter of discretion. *Moncrieffe*, 569 U.S. at 204; *see also Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010) (noting, in case of noncitizen not subject to mandatory bar to cancellation, "[a]ny relief he may obtain depends upon the discretion of the Attorney General").

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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