No. 09-72489

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTONIO VASQUEZ
Petitioner,

v.

LORETTA E. LYNCH, Attorney General,
Respondent.

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

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN AMERICANS ADVANCING JUSTICE-ASIAN LAW CAUCUS, CENTRO LEGAL DE LA RAZA, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, DETENTION WATCH NETWORK, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, HEARTLAND ALLIANCE'S NATIONAL IMMIGRANT JUSTICE CENTER, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NORTHWEST IMMIGRANT RIGHTS PROJECT, PUBLIC COUNSEL, AND U.C. DAVIS IMMIGRATION LAW CLINIC IN SUPPORT OF PETITIONER

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), amici curiae Immigrant Defense Project, American Immigration Lawyers Association, Asian Americans Advancing Justice-Asian Law Caucus, Centro Legal de la Raza, Community Legal Services in East Palo Alto, Detention Watch Network, Florence Immigrant and Refugee Rights Project, Heartland Alliance's National Immigrant Justice Center, Immigrant Legal Resource Center, National Immigration Law Center, National Immigration Project of the National Lawyers Guild, Northwest Immigrant Rights Project, Public Counsel, and U.C. Davis School of Law Immigration Law Clinic state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above.

Pursuant to Fed. R. App. P. 29(c)(5), amici curiae state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than amici curiae and their counsel contributed money that was intended to fund preparing or submitting the brief.

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INTEREST OF AMICI

Amici are organizations with expertise in the interrelationship of criminal and immigration law and organizations who provide direct removal-defense assistance to noncitizens.[1] 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 nearly a century. This case is of critical interest to amici because the analysis used by this Court to assess the immigration consequences of convictions fundamentally affects due process in the immigration and criminal systems.

SUMMARY OF ARGUMENT

Because the statute of Petitioner's conviction is divisible, the Court must apply the modified categorical approach to determine whether Petitioner has been convicted under a disqualifying prong of the statute. The reviewable record of conviction is ambiguous on that point.[2] Under *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), that ambiguity would have

[1] More information about individual amici is included in the motion for leave to file this brief.

[2] Petitioner contends—and Amici agree—that the Court must exclude the "Probation and Sentence" document and the I-877 Record of Sworn Statement from the record of conviction. The remaining documents in the record of conviction—which Petitioner admits are reviewable under the modified categorical approach—are the information, the complaint, and an electronic docket document.

automatically barred Petitioner from seeking discretionary relief from removal. But, as the Court should now recognize, the Supreme Court effectively overruled *Young* in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).

The Court may "reject [a] prior opinion of this Court as having been effectively overruled" based on an intervening inconsistent Supreme Court decision when the decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). *See also United States v. Lindsey*, 634 F.3d 541 (9th Cir. 2011) (three-judge panel rejecting prior en banc decision based on intervening Supreme Court precedent).

Moncrieffe is clearly irreconcilable with *Young* in at least two respects. First, *Young* relied heavily on the fact that the noncitizen, and not the government, bears the burden of proving eligibility for relief from removal. As a result, *Young* created a rule that a conviction under a divisible statute should be presumed to be disqualifying, unless the noncitizen proves otherwise. *See Young*, 697 F.3d at 988 (citing 8 C.F.R. § 1240.8(d)). But *Moncrieffe* established the opposite legal presumption. *Moncrieffe* clarified that, to determine a prior conviction's immigration consequences—both whether the noncitizen is removable and, as here, whether the conviction

bars relief—the inquiry under the categorical approach is whether "a conviction of the state offense '"necessarily" involved . . . facts equating to the generic [disqualifying] federal offense.'" *Moncrieffe*, 133 S. Ct. at 1684-85 (internal citation and brackets omitted). Because the focus is on what the conviction "necessarily" involved, *Moncrieffe* established (contrary to *Young*) a legal presumption that "the conviction 'rested upon nothing more than the *least* of the acts' criminalized." 133 S. Ct. at 1684 (emphasis added). The inquiry is a "purely legal determination," that operates independently of and "is unaffected by which party bears the burden of proof." *Almanza-Arenas*, 2016 WL 766753, at *15 (Watford, J., concurring).

When the record of conviction is merely ambiguous, the prior conviction does not "*necessarily* involve facts that correspond" to a disqualifying offense and the noncitizen is "not convicted of a [disqualifying offense]," as a matter of law. *Moncrieffe*, 133 S. Ct. at 1687 (emphasis added). The Supreme Court underscored this point in *Descamps v. United States*, making clear that the modified categorical approach is not a "modified factual" approach requiring any "evidence-based" inquiry, but rather just "a tool for implementing the categorical approach." 133 S. Ct. 2276, 2287, 2284 (2013) (emphasis added).

Second, *Young* is clearly irreconcilable with *Moncrieffe* in another respect. While acknowledging that "some aliens will surely face challenges" in attempting to locate state court records showing that they lack a disqualifying conviction, *Young* concluded "that result is not so absurd that Congress could not have intended it." *Young*, 697 F.3d at 989. *Young* forces noncitizens like Petitioner to prove a negative—the lack of a disqualifying conviction—on the basis of a limited universe of official court records, the content or existence of which is beyond their control. *Moncrieffe,* however, has since undercut this rationale by reasoning that whether state court records are likely to exist bears on how the categorical rule should be applied. The Supreme Court explained that "[t]he categorical approach was designed to avoid" precisely the sort of "'potential unfairness'" in which "two noncitizens, each 'convicted of' the same offense, might obtain different aggravated felony determinations depending on *what evidence remains available . . .*" *Moncrieffe*, 133 S. Ct. at 1690 (emphasis added).[3]

[3] *Young* has had a broad-ranging and devastating impact in the many contexts where prior convictions may limit noncitizens' eligibility for relief from removal, lawful permanent resident status, or naturalization. *See, e.g.*, 8 U.S.C. § 1229b(a) (cancellation of removal for permanent residents); 8 U.S.C. § 1229b(b)(1) (cancellation of removal for nonpermanent residents); 8 U.S.C. § 1229b(b)(2) (cancellation of removal for nonpermanent residents who have been battered); 8 U.S.C. §§ 1158, 1158(b)(2)(B)(i) (aggravated felony bar to asylum); 8 U.S.C. §§ 1255(a), 1182(a)(2) (adjustment of status for relatives of permanent residents and

A decision recognizing that *Moncrieffe* effectively overruled *Young* would not require immigration adjudicators to grant the applications of individuals with ambiguous convictions. Rather, 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 other eligibility criteria, and also to persuade immigration adjudicators to grant relief as a matter of discretion. *See Moncrieffe*, 133 S. Ct. at 1692. Any doubts raised by an ambiguous record of conviction could properly be considered in that discretionary phase, but a conviction with an ambiguous record should not suffice to prevent all consideration of an application in the first place.

The Court should therefore hold that *Moncrieffe* effectively overruled *Young*. A panel of this Court has already reached this conclusion in *Almanza-Arenas v. Holder*, but the Court subsequently granted en banc review in that case and resolved it on other grounds.[4] 771 F.3d 1184, 1193

U.S. citizens); 8 U.S.C. §§ 1255(*l*)(1)(B), 1255(h)(2)(B) (adjustment of status for trafficking victims and juveniles granted special immigrant juvenile status); 8 U.S.C. § 1427(a)(3) (naturalization).

[4] The Court withdrew the panel opinion and issued a decision that had no occasion to reach the question presented here because it resolved the case in favor of the petitioner on an alternative ground. *See Almanza-Arenas*, 2016 WL 766753, at *2 n.6. Similarly, another panel of this Court has expressly noted, but found unnecessary to decide, the question "whether *Young* is

(9th Cir. 2014) [hereinafter "*Almanza* Panel Op."], *withdrawn and superseded on other grounds en banc*, ___ F.3d ____, 2016 WL 766753 (9th Cir. Feb. 29, 2016) (en banc). The Court should now reaffirm the *Almanza* panel decision and hold that Petitioner is not barred from relief on an ambiguous record of conviction.

ARGUMENT

I. *Young*'s Understanding Of The INA's Burden Of Proof Provision Is Clearly Irreconcilable With The Supreme Court's Intervening Decision In *Moncrieffe*.

A. Under *Moncrieffe*, an ambiguous record of conviction means the noncitizen was not "convicted of" a disqualifying offense as a matter of law.

Petitioner's eligibility for relief turns on whether he has been "convicted of" a disqualifying offense. 8 U.S.C. § 1229b(a)(3). As *Moncrieffe* and *Descamps* explained, a court's determination of a conviction's elements is legal in nature. This is true under the categorical approach, and contrary to *Young*, it is equally true under the modified categorical variant. If the elements of a noncitizen's conviction (as revealed by the statute and the limited record of conviction) do not match the elements of the disqualifying generic offense, then as a matter of law, the noncitizen has not been convicted of that offense, whatever his actual

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incompatible with *Moncrieffe*." *Rendon v. Holder*, 764 F.3d 1077, 1083 n.6 (9th Cir. 2014), *reh'g en banc denied*, 782 F.3d 466 (9th Cir. 2015).

conduct might have been.

In *Moncrieffe* and subsequent decisions, the Supreme Court has explained that the key word in the application of the categorical rule is "necessarily." Given the statute's focus on "what offense the noncitizen was 'convicted' of, not what acts he committed," courts apply a categorical approach to determine "if a conviction of the state offense '"necessarily" involved . . . facts equating to the generic federal offense.'" *Moncrieffe*, 133 S. Ct. at 1684-85 (internal citation and brackets omitted). "Because [courts] examine what the state conviction *necessarily* involved, not the facts underlying the case, [courts] must *presume* that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 1684 (emphasis added; brackets omitted); *see also Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (categorical rule asks "the legal question of what a conviction *necessarily* established"); *Descamps*, 133 S. Ct. at 2284 ("[A] conviction based on a guilty plea can qualify as [a generic offense] only if the defendant '*necessarily* admitted [the] elements of the generic offense.'") (emphasis added).[5]

[5] This presumption "has a long pedigree in our Nation's immigration law." *Moncrieffe*, 133 S. Ct. at 1685; *see, e.g.*, *United States ex rel. Guarino v. Uhl*, 107 F.3d 399, 400 (2d Cir. 1939) (L. Hand, J.) (determining what a

When a statute is divisible into separate crimes, *Moncrieffe*'s least-acts-criminalized presumption may be rebutted under the modified categorical approach. But the presumption is only rebutted if the "record of conviction . . . *necessarily* establishes" that the "particular offense the noncitizen was convicted of" corresponds to a disqualifying offense. *Moncrieffe*, 133 S. Ct. at 1684, 1688 (emphasis added); *see Descamps*, 133 S. Ct. at 2281-84. When, as here, the record of conviction is ambiguous, the least-acts-criminalized presumption is not displaced, and the conviction does carry immigration consequences under the modified categorical approach. Ambiguity "means that the conviction did not 'necessarily' involve facts that correspond to a [federal] offense," and the noncitizen "was *not* convicted of [the disqualifying offense]," as a matter of law. *Id.* at 1687 (emphasis added); *see Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008). Judge Watford recently explained this point: "It's true . . . that uncertainty remains as to what [the noncitizen] actually *did* to violate [the state statute] . . . . But uncertainty on that score doesn't matter. What matters here is whether [the noncitizen's] conviction *necessarily* established . . . the fact required to render the offense a [disqualifying] crime." *Almanza-Arenas*, 2016 WL 766753, at *15 (Watford, J., concurring).

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conviction "'necessarily'" establishes by examining the least criminal conduct); *Matter of P-*, 3 I. & N. Dec. 56, 59 (BIA 1948) (collecting cases).

Here, the record of conviction does not reveal whether the elements of the conviction at issue correspond to a disqualifying offense or not. The conviction therefore does not *necessarily* establish a disqualifying offense, and, under *Moncrieffe*, must be presumed to rest on the least criminal acts. Petitioner thus was not "convicted of" a disqualifying offense as a matter of law.

B. *Young* is clearly irreconcilable with *Moncrieffe*'s focus on whether a prior conviction "necessarily" involved the elements of a disqualifying offense.

As a panel of this Court previously recognized, *Young* is clearly irreconcilable with *Moncrieffe*. *See generally Almanza* Panel Op., 771 F.3d at 1193-94; *see also Almanza-Arenas*, 2016 WL 766753 at *14-15 (Watford., J., concurring). *Young* incorrectly treated the application of the modified categorical rule as a *factual* question, as to which a burden of proof would matter. This contradicts *Moncrieffe*'s instruction that, to demonstrate that he was not convicted of a disqualifying offense, all Petitioner had to answer was the *legal* question: whether his conviction "necessarily" entailed the elements of the disqualifying offense.[6] *See id.* at 1193 (citing and

[6] In an unpublished decision, the Board of Immigration Appeals ("BIA") itself adopted this correct understanding of *Moncrieffe*. *See In re E-H-*, AXXXXXX689, at 2 (BIA May 20, 2015) (attached in Addendum) ("Where the statute involved, as here, is divisible, and the record of conviction is ambiguous or inconclusive regarding which element the respondent was

quoting *Moncrieffe*, 133 S. Ct. at 1687). And it is irreconcilable with *Descamps*, which abrogated earlier decisions of this Court that treated the "modified categorical" approach as a "modified factual" inquiry. *Descamps*, 133 S. Ct. at 2287 (abrogating *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (2011) (en banc) (per curiam)).

Young relied chiefly on 8 C.F.R. § 1240.8(d), which places on noncitizens "the burden of establishing that he or she is eligible for any requested benefit," such as cancellation, and "proving by a preponderance of the evidence that [a possible ground for denial of a benefit] does not apply." *See also* 8 U.S.C. § 1229a(c)(4). That burden applies to the many *factual* questions of eligibility a noncitizen often has to establish.[7] *See generally*

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convicted under, the conviction does not necessarily involve facts that correspond to an aggravated felony. As such, we find that the respondent has met his burden to show that his conviction . . . does not constitute an aggravated felony and does not bar him from eligibility for cancellation of removal.").

[7] *See, e.g.*, 8 U.S.C. § 1229b(b)(1)(A), (D) (applicant for cancellation of removal must show continuous physical presence in the U.S. for 10 years and the "exceptional and extremely unusual hardship" that would befall his qualifying relatives); 8 U.S.C. § 1158(b)(1)(B) (applicant for asylum must show likelihood he will be persecuted because of a protected trait); 8 U.S.C. § 1229b(c) (noncitizen is barred from relief if he "engaged" in, rather than was convicted of, numerous types of unlawful activity under § 1227(a)(4)(A)(ii), including criminal activity which endangers public safety or national security or terrorist activities under §§ 1182(a)(3), 1227(a)(4)(B)); 8 U.S.C. § 1158(b)(2)(A) (asylum barred where there are reasonable grounds to believe the noncitizen is a danger to the security of the United States, or serious reasons for believing he "committed" a serious

2 McCormick on Evidence § 339 (7th ed. 2013) (reflecting common understanding that the "preponderance of the evidence" standard applies to *factual* inquiries).

But the burden of proof does not matter when an issue turns on a question of law. *See United States v. Norbury*, 492 F.3d 1012, 1014 n.2 (9th Cir. 2007) (burden to establish a prior conviction was "irrelevant" to legal question "whether a dismissed conviction qualifies as a prior conviction"); *United States v. Seschillie*, 310 F.3d 1208, 1215 (9th Cir. 2002) ("Because 'harmless error analysis is a purely legal question which lies outside the realm of fact-finding,' we ordinarily 'dispense with burdens of proof and presumptions[.]'"). In determining whether a conviction qualifies as a generic offense, a court is simply applying the law to a finite record—the statute and a limited set of documents in the record of conviction. That is not the type of determination that the allocation of the burden can affect. *See Almanza-Arenas*, 2016 WL 766753, at *15 (Watford, J., concurring) (Whether a prior conviction is necessarily a disqualifying offense "is a legal question with a yes or no answer . . . [whose] resolution is unaffected by

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political crime); 8 U.S.C. § 1255(c) (adjustment of status barred where the noncitizen was employed while unauthorized, or continues in or accepts unauthorized employment prior to filing application). In addition, burdens of proof may be relevant when employing a "circumstance-specific" inquiry to analyze whether a prior conviction is disqualifying, as in *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009). That is not the case here.

which party bears the burden of proof.").

Moncrieffe, for example, addressed both removal and cancellation. But it did not hold that the burden of proof (on the government as to removal, and on the noncitizen as to cancellation) had any role to play in this legal inquiry. Instead, the Supreme Court held expressly, "[o]ur analysis is the same in both contexts." *Moncrieffe*, 133 S. Ct. at 1685 n.4. And the Court demonstrated as much. Mr. Moncrieffe was removable whether or not his conviction was an aggravated felony. As the Court explained, treating it as an aggravated felony would matter only because then he could not apply for discretionary relief from removal. *Id.* at 1682, 1692. To that end, *Moncrieffe* held that, "having been found not to be an aggravated felon" for removal purposes, "the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the *other* eligibility criteria." *Id.* at 1692 (emphasis added). The Court then cited the eligibility criteria for cancellation in 8 U.S.C. § 1229b(a)(1)-(2), but *not* the "not . . . convicted of any aggravated felony" criterion in § 1229b(a)(3). *Moncrieffe*, 133 S. Ct. at 1692. That conclusion reflects the Court's understanding that analyzing the conviction again for cancellation purposes would have been redundant; "[the] analysis is the same in both contexts," notwithstanding the different

burdens. *Id.* at 1685 n.4.[8]

Young's outcome is flatly inconsistent with *Moncrieffe*. Under *Young*, an ambiguous record of conviction *would not* result in a disqualifying conviction for removability purposes, yet it then *would* result in a disqualifying federal offense for purposes of relief from removal. There is no reason to think that Congress—which used the same term, "convicted," throughout the Immigration and Nationality Act—intended for the same offense to simultaneously count for one purpose but not the other.

Moncrieffe thus undercuts *Young*'s reasoning that when the record is inconclusive, "the evidence about the nature of the conviction is in equipoise," such that the party bearing the burden must lose. *Id.* As

[8] Were there any doubt on this score, it would be dispelled by the Court's actions immediately following *Moncrieffe* and *Mellouli*: vacating and remanding similar cases arising from denials of relief from removal, and doing so over the government's objections that the burden of proof in the relief context should make a difference. *Compare Madrigal-Barcenas v. Lynch*, 135 S. Ct. 2828 (2015) (mem.) (vacating and remanding in light of *Mellouli*), *with* Brief for the United States in Opposition, *Madrigal-Barcenas v. Holder*, No. 13-697, 2014 WL 1760333, at 9-10, 13 (U.S. May 2, 2014) (arguing that the circuit split resolved in *Mellouli* was not presented because, unlike in the cases giving rise to the split, the "petitioner bore the burden of establishing that his . . . offense was not a conviction for a crime related to a federally controlled substance"); *compare Garcia v. Holder*, 133 S. Ct. 2019 (2013) (mem.) (vacating and remanding in light of *Moncrieffe*), *with* Brief for the Respondent in Opposition, *Garcia v. Holder*, No. 11-79, 2011 WL 5548739, at 2, 7-8, 15-16 (U.S. Nov. 14, 2011) (emphasizing the noncitizen's burden of proof). *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam) (criteria for grant, vacate, and remand orders).

Moncrieffe recognizes, when the record does not establish a conviction for a generic offense, the "evidence" is not "in equipoise"; there is not, say a 40% or 60% chance that the conviction was for a generic offense. There is zero chance: because the conviction fails to *necessarily* establish the elements of the disqualifying offense, the conviction does not qualify, as a matter of law. The allocation of the burden is irrelevant.

No doubt, presuming that a conviction rests on the least culpable conduct means that some noncitizens' offenses will not automatically disqualify them from relief from removal. As the Supreme Court has recognized, "in many cases state and local records from [past] convictions will be incomplete," and the "absence of records will often frustrate application of the modified categorical approach." *Johnson v. United States*, 559 U.S. 133, 145 (2010). But that "common-enough consequence" was no reason to make it easier to treat convictions as predicate offenses in *Johnson*, *id*., whose approach *Moncrieffe* expressly adopted, 133 S. Ct. at 1684. Nor is it here—especially where a grant of relief is ultimately discretionary. *See id.* at 1692 ("[T]o the extent that our rejection of the Government's broad [rule] may have any practical effect on policing our Nation's borders, it is a limited one.").

C. Recognizing that *Moncrieffe* has effectively overruled *Young* would accord with the agency's own reading of the applicable regulations and the structure of removal proceedings.

The reading of the statute that is consistent with *Moncrieffe* and *Descamps*—under which the burden of proof is not relevant to the application of the modified categorical approach—accords with the BIA's interpretation of the regulatory provision at issue, 8 C.F.R. § 1240.8(d). That section states that, only once the "evidence indicates" that a mandatory bar to relief "may apply" does a noncitizen bear the burden of showing that the mandatory bar does not apply. Applying § 1240.8(d), the BIA has held in the context of other mandatory bars to relief that the noncitizen's burden is not triggered unless the government provides prima facie evidence "indicating" that a bar applies. *Matter of A-G-G-*, 25 I. & N. Dec. 486, 501 (BIA 2011); *see also Matter of S-K-*, 23 I. & N. Dec. 936, 939 (BIA 2006) (before any "burden of proof . . . shift[s]" to the noncitizen as to the persecutor bar to asylum, the government must first "satisf[y] its burden of establishing that the evidence 'indicate[s]' that [this] bar applie[s]"); *Haghighatpour v. Holder*, 446 F. App'x 27 (9th Cir. 2011) (applying *A-G-G-* holding).

The government cannot rely on speculation to make a prima facie showing that a bar may apply under § 1240.8(d). The government must instead submit evidence that a bar to, for example, firm resettlement, may

apply,[9] which "may include evidence of refugee status, a passport, a travel document, or other evidence indicative of permanent residence." *A-G-G-*, 26 I. & N. Dec. at 501-02. Only then is the noncitizen required to prove (to a 51% certainty) that she was not actually firmly resettled in that country.

Section 1240.8(d) applies in the same way here. *Cf. Clark v. Martinez*, 543 U.S. 371 (2005) (statutory language must be interpreted similarly across different contexts in which it applies). It is not enough for the government simply to show that a noncitizen was convicted under a divisible statute containing a disqualifying alternative element, and then to speculate that he might have been convicted of the disqualifying element. To make its prima facie case, the government must provide a record of conviction indicating that the conviction actually involved the disqualifying element in the noncitizen's case.[10] This is because the categorical approach asks a binary legal question: was the noncitizen convicted of a disqualifying offense or not? The record can only "indicate" that a disqualifying offense exists if it shows that it does in the noncitizen's case.

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[9] A noncitizen is ineligible for asylum if he "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi).

[10] Where, however, there is a genuine *evidentiary* dispute regarding the record of conviction, such as whether it was properly authenticated or whether the documents in the record had later been superseded or the judgment had since been vacated, the showing required for a prima facie case may be different and the noncitizen may counter with evidence addressing the factual dispute.

The burden shifting of § 1240.8(d) accords with the statutorily defined structure of removal proceedings, which occur in two phases. In cases involving prior convictions, the issue in the first phase is typically whether a noncitizen is removable based on the conviction. In the second phase, noncitizens who are found removable present their case for relief, such as cancellation of removal or asylum. It makes sense that, by this phase, the immigration regulations assume that the government will have already produced criminal records as "evidence indicat[ing]" that a noncitizen is subject to a disqualifying conviction. *See* 8 C.F.R. § 1240.8(d). When the record of conviction is ambiguous and does not establish removability based on a prior conviction, the conviction also should not bar the noncitizen from eligibility for relief from removal. *See Moncrieffe*, 133 S. Ct. at 1692 (if the government fails to meet its burden to show removability based on a disqualifying conviction, "the noncitizen may seek relief from removal . . . assuming he satisfies the other eligibility criteria.").

Of course, the government is not required to charge a conviction as a ground of removability to raise the conviction as a bar to eligibility for relief. But if the statute and regulations were read to place the burden of production on the noncitizen (contrary to 8 C.F.R. § 1240.8(d)), then whenever the government chooses not to charge a conviction at the

removability stage, relief eligibility would arbitrarily "rest on the happenstance of an immigration official's charging decision." *See Judulang v. Holder*, 132 S. Ct. 476, 486 (2011).

Because *Young* compels precisely the opposite result, it is "clearly irreconcilable" with *Moncrieffe*.[11]

[11] No published circuit court decision squarely addresses whether, after *Moncrieffe*, a noncitizen should be barred from relief from removal when applying the modified categorical approach to an ambiguous record of a past conviction. Last year, the First Circuit held that noncitizens are barred from relief in such circumstances, but that court recently vacated its opinion upon the grant of rehearing. *See Sauceda v. Lynch*, No 14-2042, 2016 WL 760293 (1st Cir. Feb. 3, 2016), *vacating* 804 F.3d 101 (1st Cir. 2015). Before *Moncrieffe*, the First, Second and Third Circuits had issued decisions under which a noncitizen prevailed on establishing eligibility when the record of a prior conviction was ambiguous. *See Thomas v. Att'y Gen.*, 625 F.3d 134, 146-48 (3d Cir. 2010); *Scarlett v. U.S. Dep't of Homeland Sec.*, 311 F. App'x 385, 386-87 (2d Cir. 2009); *Martinez v. Mukasey*, 551 F.3d 113, 121-22 (2d Cir. 2008); *Berhe v. Gonzales*, 464 F.3d 74, 85 (1st Cir. 2006). Two of those circuits have issued post-*Moncrieffe* decisions in which the noncitizen prevailed on an ambiguous record. *See Villanueva v. Holder*, 784 F.3d 51, 54 (1st Cir. 2015); *Johnson v. Att'y Gen.*, 605 F. App'x 138, 141-42 (3d Cir. 2015). Circuit decisions to the contrary predate *Moncrieffe*. *See Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011). The Third, Fifth, and Seventh Circuits have issued decisions discussing *Moncrieffe* in the burden of proof context, but none of these decisions squarely addresses the issue presented in this case regarding the analysis of ambiguous records of conviction under the modified categorical approach. *See Le v. Lynch*, ___ F.3d ___, 2016 WL 723298, at *6 n.5 (5th Cir. Feb. 23, 2016); *Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014); *Syblis v. Attorney General*, 763 F.3d 348, 357 n.12 (3d Cir. 2014).

II. Contrary To *Young*, *Moncrieffe* Considered Whether Criminal Records Are Likely To Exist In Determining How To Apply The Categorical Rule.

Moncrieffe rejected a fundamental premise of *Young* by considering what records are necessarily created as part of an underlying criminal proceeding when deciding the immigration consequences of a conviction. *See* 133 S. Ct. at 1692. *Moncrieffe* explained that, unless a statute of a prior conviction is divisible, an immigration court cannot look to the record of conviction to clarify what the conviction necessarily involved. *See* 133 S. Ct. at 1684-85. This is in part because such records may not exist: "there is no reason to believe that state courts will regularly or uniformly admit evidence going to facts . . . that are irrelevant to the offense charged." *See id.* at 1692.

In contrast to *Moncrieffe*, *Young* concluded that the availability of records is irrelevant, *see* 697 F.3d at 989, and therefore imposed an impossible burden on noncitizens: to obtain criminal records that prove a negative—that they were not convicted of a disqualifying offense—even when such records may not exist. As *Moncrieffe* recognized, state courts may not regularly record which portion of a divisible statute formed the basis for a conviction. If courts do happen to record such information, they may have a practice of destroying records for old or expunged convictions. *See Johnson*, 559 U.S. at 145 ("[I]n many cases state and local records from

[past] convictions will be incomplete.").[12] Even when records exist, courts may impose additional requirements, such as that requestors name with specificity the exact criminal documents sought (e.g., indictment, plea colloquy), include case numbers and filing dates, and submit fees by credit card or check.[13]

Young's holding that a noncitizen must find conclusive records places significant, often insurmountable, burdens on noncitizens in removal proceedings, 45% of whom are unrepresented,[14] 37% of whom are detained,[15] and 85% of whom cannot proceed in English.[16] The rule from *Young* is particularly harsh for detained noncitizens, who face innumerable

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[12] *See*, *e.g.*, Records Control Schedule 3, Retention Schedule for the District Courts, Supreme Court of Hawaii (Apr. 11, 2013), *available at www.courts.state.hi.us/docs/sct_various_orders/order48.pdf* (last visited Mar. 2, 2016) (Hawaii district court records are destroyed after two years); Cal. Gov't Code §§ 68152(c)(7) & (c)(8) (2014) (California records for misdemeanor convictions are retained for five years, and for certain marijuana offenses, only two years).

[13] *See*, *e.g.*, Records Management Division, Superior Court of California, San Mateo County, *available at* http://www.sanmateocourt.org/court_divisions/criminal/request_by_mail.php (last visited Mar. 2, 2016); Criminal Case Records, Superior Court of California, Santa Clara County, *available at* http://www.scscourt.org/self_help/criminal/viewing_crim_records.shtml#criminal_copy (last visited Mar. 2, 2016).

[14] *See* Department of Justice, FY 2014 Statistical Yearbook F1, Fig. 10, *available at* http://www.justice.gov/eoir/statistical-year-book ("EOIR Statistical Yearbook") (last visited Mar. 2, 2016).

[15] EOIR Statistical Yearbook, at G1, Fig. 11.

[16] EOIR Statistical Yearbook, at E1, Fig. 9.

barriers to requesting state court records of prior convictions, including extremely limited access to the Internet, telephones, and mail (such as "postcard-only" policies that prohibit them from sending or receiving envelopes).[17] *See Moncrieffe*, 133 S. Ct. at 1690 (citing Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 5-10 (2008), to observe that noncitizens, especially those who are detained, "have little ability to collect evidence").

Young is irreconcilable with *Moncrieffe*'s reasoning, which recognizes that the accident of state-court recordkeeping should not determine the outcome under the categorical analysis. *See Almanza* Panel Op., 771 F.3d at 1194.

[17] *See, e.g.*, Amnesty International, *Jailed Without Justice: Immigration Detention in the USA* 35 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (last visited Mar. 2, 2016); National Immigration Law Center, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers* 26-30 (2009), *available at* https://www.nilc.org/wp-content/uploads/2015/11/A-Broken-System-2009-07.pdf (last visited Mar. 2, 2016). *See also Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068 (D. Or. 2013) (lawsuit challenging postcard-only policy in St. Helens, Oregon); Prison Policy Initiative, *Return to Sender: Postcard-only Mail Policies in Jail* 2 (2013), *available at* http://static.prisonpolicy.org/postcards/Return-to-sender-report.pdf (last visited Mar. 2, 2016).

CONCLUSION

For the foregoing reasons, the Court should hold that *Moncrieffe* effectively overruled *Young*.

Date: March 15, 2016

Respectfully submitted,

/s/ Jayashri Srikantiah

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,148 words.

Dated: March 15, 2016

/s/Jayashri Srikantiah
JAYASHRI SRIKANTIAH
Counsel for Amici

APPENDIX

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Campbell, Kristina Michelle
UDC School of Law Immigration Clinic
4200 Connecticut Avenue
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DHS/ICE Office of Chief Counsel - ATL
180 Spring Street, Suite 332
Atlanta, GA 30303

Name: H[redacted], E[redacted]

A [redacted]-689

Date of this notice: 5/20/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Pauley, Roger
Wendtland, Linda S.

schwarzA
Userteam: Docket

File: [redacted] 689 - Atlanta, GA

Date: MAY 20 2015

In re: E[redacted] H[redacted] a.k.a. [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kristina M. Campbell, Esquire

ON BEHALF OF DHS: Gene P. Hamilton
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] - Convicted of two or more crimes involving moral turpitude

APPLICATION: Cancellation of removal

The Department of Homeland Security ("DHS") has appealed from an Immigration Judge's May 13, 2014, decision granting the respondent cancellation of removal pursuant to section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a).[1] The respondent has filed a brief on appeal. The appeal will be dismissed.

The respondent, a native and citizen of Bosnia-Herzegovina, was admitted to the United States as a lawful permanent resident. On August 17, 2009, he pleaded guilty to theft by shoplifting in violation of section 16-8-14 of the Georgia Code and was sentenced to 12 months in prison. On November 23, 2009, the respondent pleaded guilty to pedestrian under the influence in violation of Ga. Code § 40-6-95 and underage possession of alcohol in violation of Ga. Code § 3-3-23. The respondent also has convictions for obstruction of a law enforcement officer, driving under the influence, aggravated assault, and public drunkenness.

The DHS argues on appeal that the respondent is not eligible for cancellation of removal because he has not met his burden of showing that his conviction for theft by shoplifting is not an

[1] On October 27, 2014, we returned this case to the Immigration Judge because the record did not include a separate oral or written Immigration Judge decision. The Immigration Judge subsequently prepared a written decision dated December 3, 2014, which was served on the parties on December 4, 2014. Hereinafter, references to the Immigration Judge's decision relate to the written decision issued in December 2014.

aggravated felony theft offense. *See* section 240(c)(4)(A)(i) of the Act; 8 C.F.R. § 1240.8(d). The Immigration Judge held that the statute of conviction, which sets forth alternative mens rea of intent to appropriate and intent to deprive is divisible. *See Ramos v. U.S. Att'y General*, 709 F.3d 1066, 1070 (11th Cir. 2013) (holding that Ga. Code § 16-8-14, theft by shoplifting, is divisible and not categorically an aggravated felony). Thus, the Immigration Judge conducted a modified categorical approach to determine whether the record of conviction shows which element of the statute the respondent's conviction falls under (I.J. at 3-4). The Immigration Judge determined that the charging document accuses the respondent of "unlawfully intentionally conceal[ing] and tak[ing] possession of . . . goods and merchandise being the property of Walmart, in violation of O.C.G.A. 16-8-14(a)(1)" (I.J. at 4). Because there is no indication that the respondent committed the crime with intent to deprive, the Immigration Judge found that the respondent's conviction does not fall into the element of the statute that qualifies as an aggravated felony and that he is eligible for cancellation of removal (I.J. at 3-4).

We agree with the Immigration Judge that the respondent has met his burden of showing that his conviction for theft by shoplifting is not an aggravated felony barring him from eligibility for cancellation of removal. In this case, the record of conviction is inconclusive whether the respondent was convicted under the element of theft by shoplifting requiring a mens rea of intent to deprive the owner of possession of the merchandise, which would constitute an aggravated felony theft offense. *See Ramos v. U.S. Att'y General, supra*, at 1070-71. Under *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1687 (2013), to qualify as an aggravated felony, a conviction for the predicate offense must necessarily establish all of the elements of the generic offense. Where the statute involved, as here, is divisible, and the record of conviction is ambiguous or inconclusive regarding which element the respondent was convicted under, the conviction does not necessarily involve facts that correspond to an aggravated felony. As such, we find that the respondent has met his burden to show that his conviction for theft by shoplifting does not constitute an aggravated felony and does not bar him from eligibility for cancellation of removal.

The DHS also argues that the respondent's conviction for aggravated assault in violation of O.C.G.A. § 16-5-21 constitutes a crime of violence aggravated felony under section 101(a)(43)(F) of the Act. The respondent argues on appeal that the conviction does not amount to a "crime of violence" as defined in 18 U.S.C. § 16 because the record of conviction is silent as to whether it involves either: (1) the use, attempted use, or threatened use of physical force against the person or property of another; or (2) a substantial risk that physical force would be used against a person or property.

As the DHS argues, the Immigration Judge decided that the respondent's conviction is not an aggravated felony because his sentence was for 90 days to be served in confinement followed by 4 years 9 months to be served on probation, which he indicated does not constitute a term of imprisonment of at least 1 year required under section 101(a)(43)(F) of the Act (Tr. at 19-20, 24-25). We agree with the Immigration Judge. The respondent's sentence was 90 days of imprisonment followed by 4 years and 9 months of probation, not 12 months of incarceration. Thus, his conviction does not constitute an aggravated felony because he did not receive a "term of imprisonment" of at least one year. *See, e.g., United States v. Guzman-Bera*, 216 F.3d 1019, 1021 (11th Cir. 2000).

The Immigration Judge granted the respondent cancellation of removal in the exercise of discretion. He found the respondent's testimony regarding remorse for his convictions to be credible. In addition, he found that the respondent's testimony about his past and the changes he will make in the future weighs in favor of granting relief. Further, the Immigration Judge cited the respondent's residence in the United States since 2000 when he was 10 years old, his employment history, payment of taxes, United States citizen parents and other close family members who are supportive, and the fact that he has not had a conviction for over 2 years (I.J.at 4-5).

The DHS argues on appeal that the respondent's long term residence and family ties in the United States do not outweigh his arrest record, his lack of acceptance of responsibility for his actions, his prior marijuana use, and his admission that he violated the terms of his probation in August 2012 by smoking marijuana (Tr. at 91).

The "clearly erroneous" standard for reviewing the Immigration Judge's assessment of a witness's credibility is "significantly deferential," *see Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 623 (1993), and therefore this Board is precluded from reversing the Immigration Judge's findings of fact simply because we are convinced that we would have decided the case or weighed the evidence differently. *Anderson v. City of Bessemer City, North Carolina*, 470 U.S. 564, 573-74 (1985). Indeed, where there are two permissible views of the evidence, the Immigration Judge's choice between them cannot be deemed clearly erroneous. *Id.* Moreover, great deference should be paid to findings regarding the credibility of witnesses because of the fact finder's observational advantages. *Id.* Thus, while a reasonable Immigration Judge could certainly have weighed the evidence differently with regard to the respondent's rehabilitation and remorse, the DHS has not established that the Immigration Judge's positive credibility determination in that regard was based on an impermissible view of the evidence. Accordingly, we will defer to the Immigration Judge's findings.

The respondent has also adduced a number of significant equities, including his family connection to United States citizens, his presence in this country for 15 years, and his employment history. Moreover, the Immigration Judge found that the respondent has support from his parents and siblings and a fiancée (I.J. at 5).

The respondent's criminal record is of very serious concern to us. However, taking into account the Immigration Judge's positive credibility findings, we find no clear error in the factual determinations underlying the Immigration Judge's favorable exercise of discretion, and we conclude upon de novo review that such discretion was correctly exercised given the findings of fact, to which we must defer on appeal. Thus, the DHS's appeal will be dismissed, and the record will be remanded for required background and security investigations..

Accordingly, the following orders are entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the

opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

File: [redacted] 89 – Atlanta, GA

Date: MAY 20 2015

In re: [redacted] H[redacted] a.k.a. Edin Edo Hindic

DISSENTING OPINION: Roger A. Pauley

The majority opinion is at odds with the overwhelming weight of authority in finding that an alien meets his or her burden of proof that a conviction does not bar the alien from eligibility for relief by demonstrating an inconclusive record. *See, e.g., Mondragon v. Holder*, 706 F.3d 535, 545 (4th Cir. 2013)("an inconclusive record of conviction ... is insufficient to meet an alien's burden of demonstrating eligibility for cancellation of removal"). The majority rely on *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), but nothing in that decision addresses the issue of who prevails in the event of an inconclusive record of conviction where the alien has the burden to show eligibility for relief. *Moncrieffe* indeed involved removability, not eligibility for relief, and did not even involve a divisible statute. *See Garcia v. Holder*, 756 F.3d 839, 846-50 (Garza, J. concurring)(finding that the alien failed to meet his burden of proof for eligibility for relief through an inconclusive record with regard to an aggravated felony and distinguishing *Moncrieffe* as involving removability where the government has the burden of proof). Under the regulations, aliens clearly have the burden of proof to establish eligibility for relief. 8 C.F.R. § 1240.8(d).

The Eleventh Circuit appears never to have precedentially decided the question at issue here. *See Omoregbee v. U.S. Atty. Gen.*, 323 Fed. Appx. 820 (11th Cir. 2009). In the absence of controlling circuit authority, the majority fundamentally err in not following the regulation at 1240.8(d) and binding Board precedent. *Matter of Almanza*, 24 I&N Dec. 774 (BIA 2009).[1]

I therefore respectfully dissent.

Roger A. Pauley
BOARD MEMBER

[1] I also strongly disagree with the majority's favorable exercise of discretion, given the respondent's significant criminal history.

CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2016, the foregoing document

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN AMERICANS ADVANCING JUSTICE-ASIAN LAW CAUCUS, CENTRO LEGAL DE LA RAZA COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, DETENTION WATCH NETWORK, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, HEARTLAND ALLIANCE'S NATIONAL IMMIGRANT JUSTICE CENTER, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NORTHWEST IMMIGRANT RIGHTS PROJECT, PUBLIC COUNSEL, AND U.C. DAVIS IMMIGRATION LAW CLINIC
IN SUPPORT OF PETITIONER'S PETITION FOR REVIEW

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/s/Jayashri Srikantiah

JAYASHRI SRIKANTIAH
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