Nos. 09-71415, 10-73715

BEFORE THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL ALMANZA-ARENAS,

Petitioner,

v.

LORETTA LYNCH, Attorney General,

Respondent.

ON PETITION FOR REVIEW OF ORDERS OF THE BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRANT DEFENSE PROJECT, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, UNIVERSITY OF CALIFORNIA-DAVIS SCHOOL OF LAW IMMIGRATION CLINIC, ET AL.

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I. INTEREST OF THE *AMICI CURIAE*

As stated in the Motion to Appear as Amici Curiae (Dkt 129) and in the Statements of Interest in Appendix A, the amici have a longstanding interest in the correct interpretation and application of immigration law and criminal law to noncitizens. This Court's decision on the burden of proof question presented in this case will impact numerous noncitizens seeking immigration benefits (i.e., seeking lawful status, protected status, or citizenship) or relief from removal. If this Court does not overturn the holding in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*), that improperly applies a burden of proof provision to a question of *law* regarding a noncitizen's prior conviction, many noncitizens—including the significant number who are detained, unrepresented by counsel, do not speak, read, or write in English, or have impaired mental capacity—will be improperly denied lawful status, citizenship, and relief from removal.

II. SUMMARY OF ARGUMENT

This Court's decision three years ago in *Young* was not only contrary to law—as made clear in two Supreme Court decisions issued since *Young*—but has had an unfair impact on immigrants whose cases were adjudicated in the Ninth Circuit. This brief is offered to give the Court the benefit not only of the amici organizations' expertise on the legal questions implicated by the *Young* burden of proof ruling, but also to provide the Court with insights based on the amici

organizations' knowledge of, and experience with, the unfair real world impact of *Young*.

First, the recent Supreme Court decisions in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) and *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), make abundantly clear that the burden of proof analysis in *Young* is incorrect, as these decisions confirm that anytime an immigration consequence is based on "conviction of" a past crime, the key inquiry is whether the record *necessarily* demonstrates a disqualifying conviction. Thus, the government's attempt to argue that a burden of proof provision governing factual inquiries can alter the outcome of the determination of this question of law fails. *See* Argument Point (A).

Second, the text and overall structure of the immigration statute and the governing regulations, as well as standard practices in removal proceedings, appropriately place the burden on the Department of Homeland Security ("DHS" or "the Department") to produce conviction records. It makes sense that the governing statute and regulations place the burden of producing such records on DHS, given the Department's superior ability to obtain conviction records. And, in fact, DHS is required by regulation to perform criminal record checks on applicants for relief and to inform the Immigration Court of the results. It is therefore routine practice for DHS to locate and submit criminal records relating to noncitizens in removal proceedings. *See* Argument Point (B).

Third, *Young's* burden of proof ruling and the government's burden of proof position do not take into account the real world implications and extreme unfairness of requiring noncitizens to produce criminal record documents, especially when they are generally in a far worse position than the Department to locate and obtain such documentation. Many individuals in removal proceedings are unrepresented, detained, or both. Many also are unable to speak, read or write in English or suffer from mental disabilities. Congress could not have intended to bar eligibility for relief for such individuals simply because they are unable to locate, obtain, and submit documents that might clarify ambiguous conviction records. *See* Argument Point (C)(1). In addition, *Young* and the government's position do not take into account that many state and local jurisdictions do not retain records for old convictions or never create complete conviction records in the first place. *See* Argument Point (C)(2).

III. ARGUMENT

Noncitizens seeking relief from removal, lawful status or citizenship generally have the burden of establishing their eligibility under the Immigration and Nationality Act ("INA"). *See, e.g.,* 8 U.S.C. § 1229a(c)(4)(A) (application for relief from removal); 8 U.S.C. § 1229a(c)(2)(A) (application for admission); 8 C.F.R. § 316.2(b) (naturalization). Under this Court's current rule in *Young*, such burden of proof provisions are or could be deemed to make noncitizens (both

lawful permanent residents and undocumented individuals) with an inconclusive record of conviction ineligible for various important forms of relief or lawful status, including the following:

1) cancellation of removal for permanent residents, *see* 8 U.S.C. § 1229b(a);
2) cancellation of removal for nonpermanent residents based on extreme and exceptionally unusual hardship to permanent resident and U.S. citizen children, parents, and spouses, *see* 8 U.S.C. § 1229b(b)(1);
3) cancellation of removal for nonpermanent residents who have been battered by permanent resident or U.S. citizen parents or spouses, *see* 8 U.S.C. § 1229b(b)(2);
4) lawful permanent resident status for relatives of permanent residents and U.S. citizens, *see* 8 U.S.C. §§ 1255(a), 1182(a)(2) (requiring noncitizens to establish admissibility to the United States, including overcoming criminal grounds of inadmissibility);
5) lawful permanent resident status under the Violence Against Women Act ("VAWA") for those who have been battered by permanent resident or U.S. citizen spouses or parents, *see* 8

U.S.C. §§ 1154(a)(1)(B)(iii) (requiring VAWA applicants to demonstrate good moral character), 1101(f) (precluding noncitizens with various convictions from demonstrating good moral character);

6) lawful permanent resident status under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), *see* 8 U.S.C. §§ 1255(l)(1)(B) (requiring trafficking victims to demonstrate good moral character), 1255(h)(2)(B) (special immigrant juveniles are not eligible to adjust status if they trigger criminal grounds of inadmissibility);

7) U.S. citizenship, *see* 8 U.S.C. § 1427(a)(3) (requiring noncitizens to demonstrate good moral character for naturalization).

The Court's decision in *Young* thus has a broad impact on immigration adjudications involving prior criminal convictions. However, this brief will focus in particular on the law and unfair impact of *Young* relating to noncitizens seeking lasting relief in removal proceedings.

A. The Court should overrule *Young* because it is inconsistent with the Supreme Court's subsequent decisions in *Moncrieffe* and *Mellouli*.

Amici agree with Petitioner that the statute in question here, Cal. Veh. Code § 10851(a), is indivisible. Thus, application of the modified categorical approach is

improper and the Petitioner should prevail for that reason alone since the parties agree that the offense of conviction is not categorically a crime involving moral turpitude ("CIMT"). *See* Respondent's Supplemental Brief before the En Banc Panel at 6 ("Gov't Br."). However, in the event that the Court determines that the statute at issue is divisible and applies the modified categorical approach, the Court should overrule *Young* as inconsistent with the subsequent Supreme Court decisions in *Moncrieffe* and *Mellouli*, and find that it is improper for the government to apply a burden of proof provision—which governs only factual inquiries—to find an individual ineligible for relief from removal when the record of conviction is inconclusive.

Under the analysis of the Supreme Court, the question of whether an individual like the Petitioner is ineligible for relief based on a prior conviction is a legal inquiry. The burden of proof provisions relied upon by the government apply only to factual inquiries and have no bearing on the determination of the legal question of what an individual has been "convicted of." The statutory and regulatory burden of proof provisions upon which the government and *Young* court rely do not control the answer to the legal question of whether an individual has been "convicted of" a disqualifying offense.

In *Moncrieffe*, the Court clarified that when considering the immigration consequences of a past conviction, the key inquiry is whether the record

necessarily demonstrates a disqualifying conviction. 133 S. Ct. at 1684-88 (employing the term "necessarily" eight separate times). This focus on what elements the conviction "necessarily" involved is a legal inquiry. *Mellouli*, 135 S. Ct. at 1986 (quoting law review article stating "Congress, by tying immigration penalties to *convictions,* intended to 'limi[t] the immigration adjudicator's assessment of a past criminal conviction to a *legal* analysis of the statutory offense'") (second emphasis added, alteration in original).

Whether the statute assigns the burden of proof to the government or to the noncitizen on factual determinations does not impact this legal question of what a prior conviction necessarily involved. This was made clear when the Court explained that "[b]ecause we examine what the state conviction necessarily involved, not the facts underlying the case, we must *presume* that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized . . . ." *Moncrieffe*, 133 S. Ct. at 1684 (emphasis added, alterations in original); *Mellouli*, 135 S. Ct. at 1986. The Court reasoned that "*[a]mbiguity* on this point means that the conviction did *not* 'necessarily' involve facts that correspond to" a disqualifying offense, and therefore, the noncitizen "was *not* convicted" of the disqualifying crime. *Moncrieffe*, 133 S. Ct. at 1687 (emphasis added). Indeed, the Court stated explicitly that the analysis for determining whether a noncitizen has been "convicted of" a barring crime is the same as to both deportability, where the

government bears the burden to show the noncitizen is deportable, 8 U.S.C. § 1229a(c)(3), and relief eligibility, where the noncitizen bears the burden to show that he or she satisfies eligibility requirements, 8 U.S.C. § 1229a(c)(4). *Moncrieffe*, 133 S. Ct. at 1685 n.4 (the "analysis is the same in both [the removability and relief] contexts").

Nevertheless, the government here argues that the burden of proof provision is relevant in this case because the Petitioner did not submit a transcript of his plea under *People v. West*, 3 Cal. 3d 595, 477 P.2d 409 (Cal. 1970). This is so even though, as the government itself now admits, the Petitioner's *West* plea transcript would not have clarified the ambiguity regarding his conviction. *See* Gov't Br. at 13 ("[Petitioner's] *People v. West* guilty plea did not specify any factual basis for the plea"). Moreover, even if a transcript of a *West* plea were relevant, the Immigration Judge lacked statutory authority to ask the Petitioner to provide it. *See* Petitioner's Supplemental Brief ("Pet. Br.") at 26-27 (discussing *Rosas-Castaneda v. Holder*, 655 F.3d 875, 884-885 (9th Cir. 2011)).

In *Rosas-Castaneda*, the Court applied *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984),[1] and declined to accord

[1] The government's brief claims, incorrectly, that the Court in *Rosas-Castaneda* "did not undertake a *Chevron* analysis of the relevant provisions." Gov't Br. at 15. *Rosas-Castaneda* applied *Chevron* and found that the statute at issue was unambiguous.

deference to the BIA's interpretation of the statute because it found the statutory language unambiguous. 655 F.3d at 885 ("[T]he BIA could not have reasonably concluded that 8 U.S.C. § 1229a(c)(4)(B) extended the scope of the IJ's authority to request evidence corroborating 'otherwise credible testimony' to include judicially noticeable conviction documents. Having determined that there is no statutory ambiguity in 8 U.S.C. § 1229a(c)(4)(A) or (B), we find the BIA's position incorrect, and accord it no deference."). In any event, criminal record documents such as the plea transcript in this case are *not* solely within the noncitizen's possession; indeed, unlike the situation in the cases relied on by the government (see next paragraph), they are not within the noncitizen's possession *at all*. They are records that the noncitizen, often detained and/or unrepresented, has to obtain from a court, often requiring substantial effort and resources not available to those kept in immigration detention or unrepresented by counsel. *See, infra,* Point (C). As importantly, these are records that DHS can far more easily obtain on its own. *See, infra*, Point (B).

Since DHS is in a better position to obtain criminal records, the government need not be so concerned that a ruling in favor of the Petitioner "would allow [him] to pick and choose, to his advantage, the portions of evidence relevant to the determination of his eligibility for relief." Gov't Br. at 18. In fact, the government's position actually creates an incentive for DHS attorneys in

adversarial removal proceedings to submit only a partial record to compel the noncitizen to try to obtain additional documents that it may be impossible for the noncitizen to obtain. *See Young*, 697 F.3d at 991-992 (B. Fletcher, J., dissenting) ("Under the majority's approach, however, the government may produce only minimal state court records sufficient to show that a person is removable on some ground other than conviction for an aggravated felony—for example, conviction for a drug crime. The burden then shifts to the legal permanent resident to prove a negative—that he has not been convicted of an aggravated felony. The government can stand by as the lawful permanent resident attempts to produce further records of conviction, which the government may already have or be able to obtain more easily.") (citation omitted).

In their brief, the government cites to a string of cases as supporting their position that a noncitizen's failure to submit a document like a *West* plea transcript when seeking relief from removal inures to the detriment of the noncitizen. Gov't Br. at 16-18 (citing *Kimm v. Rosenberg*, 363 U.S. 405 (1960); *Jimenez v. Barber*, 252 F.2d 550 (9th Cir. 1958); *Matter of Marques*, 16 I. & N. Dec. 314 (BIA 1977); and *Zapex Corp. v. NLRB*, 621 F.2d 328 (9th Cir. 1980)).

These cases are easily distinguishable and do not support the government's position. In both *Kimm* and *Jimenez*, the applicant refused to answer questions about his prior political affiliation. *Kimm*, 363 U.S. at 406; *Jimenez*, 252 F.2d at

552. And, in *Marques*, the applicant refused to identify the source of $54,000 found in his truck when he was arrested. *See Marques*, 16 I. & N. Dec. at 315. These cases weren't about the *production* of documentary evidence; they were about whether applicants could be compelled to answer questions. This is a power that, unlike the compelled production of documents to corroborate non-testimonial evidence, *is* specifically authorized by the regulations. 8 C.F.R. § 1003.10(b) (empowering immigration judges to "interrogate, examine, and cross-examine aliens and any witnesses"). And the information the applicant declined to give, in each case, was information the Department (formerly the Immigration and Naturalization Service ("INS")) could *not* obtain on its own, in stark contrast to conviction records to which the DHS has ample access. *Zapex Corp.* did involve the production of documentary evidence, but again, unlike here, DHS could not have obtained the evidence on its own.

Moreover, the government ignores the fact that even its own regulation, 8 C.F.R. § 1240.8(d), states that the noncitizen's burden to prove "by a preponderance of the evidence" that a mandatory bar does not apply is triggered *only* if the "evidence indicates" that such a bar may apply. As *Moncrieffe* and *Mellouli* make clear, the evidence simply does not indicate that a disqualifying conviction exists when the record of conviction is inconclusive since an ambiguous

record is presumed, as a matter of law, to relate to the minimum conduct covered by the statute of conviction.

In fact, the government's contentions are inconsistent with the Board of Immigration Appeals' ("BIA") own interpretation of 8 C.F.R. § 1240.8(d). In *Matter of A-G-G*, the BIA found that the Department must make a *prima facie* showing that the "evidence indicat[es]" that a mandatory bar to relief may apply in order to trigger an immigration judge's consideration of the bar. 25 I. & N. Dec. 486, 501 (BIA 2011). Although *A-G-G* considered a different context and form of relief, the BIA interpreted the same regulatory provision at issue here, 8 C.F.R. § 1240.8(d).

This approach is consistent with the statutorily defined structure of removal proceedings, which occur in two phases. In the first phase, the issue is whether the Department has carried its burden to establish removability. Where DHS's case for removal is based on a prior conviction, the specific criminal charge of removability must be lodged. 8 U.S.C. § 1229(a)(1)(C)-(D). In the second phase, noncitizens who were found removable present their case for relief (e.g., applications cancellation of removal, special immigrant juvenile status, adjustment of status). The immigration regulations assume that, by this second phase, DHS 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). Under this

framework, when the record of conviction is inconclusive and cannot establish removability based on a prior conviction, the conviction also does not bar the noncitizen from eligibility for relief from removal.[2] *See Moncrieffe*, 133 S. Ct. at 1692 (if DHS 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.").

The government relies for support for its position largely on decisions from the Fourth, Ninth, and Tenth Circuit Courts of Appeals issued *prior to Moncrieffe*: *Mondragon v. Holder*, 706 F.3d 535 (4th Cir. 2013), *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*), and *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009). The government does not acknowledge that even pre-*Moncrieffe*, several Circuit Courts of Appeals had outright rejected or not followed the government's position. *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010); *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006). Two of the three post-*Moncrieffe* decisions on which the government depends were reached in cases where the Circuit Court was considering a factual inquiry outside

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[2] Although DHS is not required to charge a conviction as a ground of removability in order to raise the conviction as a bar to eligibility for relief, 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)) whenever the Department 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." *Judulang v. Holder*, 132 S. Ct. 476, 486 (2011).

the legal confines of the categorical approach. *See Syblis v. Att'y Gen.*, 763 F.3d 348 (3d Cir. 2014) (stating that categorical approach does not apply to the determination whether a conviction is "relating to a controlled substance" under 8 U.S.C. § 1182(a)(2)(A)(i)(II)); *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014). The third post-*Moncrieffe* case on which the government depends, *Cruzaldovinos v. Holder*, 539 F. App'x 225 (4th Cir. 2013) (unpublished), is unpublished and cites to a pre-*Moncrieffe* decision, *Mondragon v. Holder*, 706 F.3d 535 (4th Cir. 2013), reaffirming another pre-*Moncrieffe* decision, *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011).

In any event, *Moncrieffe* and *Mellouli* have now clarified that the correct inquiry is whether the record of conviction necessarily indicates a disqualifying conviction for immigration purposes. *Moncrieffe*, 133 S. Ct. at 1684-88, 1692; *Mellouli*, 135 S. Ct. at 1986.

B. The text and overall structure of the immigration statute and regulations places the burden on the Department to produce conviction records and DHS is vastly better-positioned than a noncitizen to do so.

Because of the overwhelming contrast between the Department and relief applicants in their respective ability to obtain conviction records *(see, infra*, Point C), it makes sense to place the burden of producing such records on DHS, which is reflected in the requirements of the governing statute and regulations. *See* 8 U.S.C. § 1229a(c)(4)(A); 8 C.F.R. § 1240.8(d). DHS bears the burden of producing

records to show that a conviction-related bar to eligibility may apply. 8 C.F.R. § 1240.8(d). The language of the cancellation eligibility statute, for example, requires that a noncitizen "has *not* been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3) (emphasis added). That language contemplates some initial showing that an aggravated felony conviction may, in fact, exist before the noncitizen's burden of proving that negative is triggered. This initial showing before the noncitizen's burden of persuasion is triggered is precisely what the applicable regulation presumes by speaking of the noncitizen's burden only "[i]f the evidence indicates that" such a "ground[] for mandatory denial . . . may apply . . . ." 8 C.F.R. § 1240.8(d). In fact, 8 U.S.C. § 1229a(c)(4), as amended by the REAL ID Act, was enacted against the backdrop of this regulation, which was referenced in REAL ID's legislative history. *See* H.R. REP. NO. 109-72, at 169 (2005) (Conf. Rep.).

The requirement that the Department bear the burden of production with respect to bars to eligibility like the aggravated felony bar is consistent with procedures for determining eligibility for other forms of relief from removal under the INA. In the asylum context, for instance, where applicants for relief must prove that they are eligible "refugees," defined at 8 U.S.C. § 1101(a)(42), but where relief is barred for persecutors, DHS must make a showing that the asylum-seeker was a persecutor before an immigration judge even considers whether the

persecutor bar precludes relief. 8 C.F.R. § 1208.13(c)(2)(ii) (requiring initial showing that "the evidence indicates" that applicant was a persecutor). As in the cancellation context, the persecutor bar is listed together with other eligibility requirements in the statutory text, but because it is a bar to eligibility, DHS bears the burden of producing evidence that the bar applies. *See, e.g.*, *Matter of Acosta*, 19 I. & N. Dec. 211, 219 n.4 (BIA 1985) ("This provision is one of exclusion, not one of inclusion, and thus requires an alien to prove he did not participate in persecution *only if the evidence raises that issue*.") (emphasis added), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987).

For bars like the aggravated felony bar to cancellation or the persecutor bar to asylum and withholding of removal, the applicable regulations place the burden of production on DHS to show that the "evidence indicates" the bar applies. 8 C.F.R. §§ 1240.8(d) (relief from removal), 1208.13(c)(2)(ii) (asylum), 1208.16(d)(2) (withholding of removal). Courts and the BIA interpreting this very language in the context of asylum applications have concluded that "the [immigration agency] bears the initial burden of producing evidence that indicates that the [mandatory] bar applies . . . ." *Abdille v. Ashcroft*, 242 F.3d 477, 491 (3d

Cir. 2001); *see also Ghashghaee v. INS*, 70 F. App'x. 936, 937 (9th Cir. 2003) (unpublished); *Acosta*, 19 I. & N. Dec. at 219 n.4.[3]

This conclusion applies with equal force to 8 C.F.R. § 1240.8(d) in the cancellation context, in light of its similar wording. *See, e.g., Xu Sheng Gao v. United States Att'y Gen.*, 500 F.3d 93, 103 n.4 (2d Cir. 2007) (applying 8 C.F.R. § 1240.8(d) to an asylum application and noting its similarity in language and analysis to 8 C.F.R. § 1208.13(c)(2)(ii)). Consistent with judicial interpretations of the cancellation and similar regulations, DHS must produce conviction records that indicate the applicability of a criminal bar before the burden shifts to the noncitizen to prove that the bar does not apply.

Putting the burden on DHS is also consistent with the DHS's greater access to criminal record documents. Prosecutors for DHS have extensive access to domestic and international law enforcement databases. *See* U.S. Department of

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[3] The INS (the agency predecessor to DHS) *itself* rejected an interpretation of an earlier asylum regulation that would have allowed the burden to shift on the basis of a "scintilla of evidence," concluding that:

> The correct standard . . . requires a balancing of factors by the adjudicator who must determine whether evidence presented to him *reasonably indicates* the presence of a basis for a mandatory denial before requiring the applicant to meet the burden of refuting it.

Comments to Asylum and Withholding of Deportation Procedures, 53 Fed. Reg. 11300 (April 6, 1988) (emphasis added). 8 C.F.R. § 208.14(b) was the predecessor regulation to current 8 C.F.R. § 1208.13(c)(2)(ii).

Justice, Federal Bureau of Investigation, *Law Enforcement Records Management Systems (RMSs) as They Pertain to FBI Programs and Systems* 10, *available at* https://www.fbi.gov/about-us/cjis/law-enforcement-records-management-system (describing a "major milestone in the information-sharing initiatives between the FBI and the DHS") (last visited August 7, 2015); Secretary Jeh Charles Johnson, U.S. Department of Homeland Security, Memorandum, Nov. 20, 2014, *available at* http://www.dhs.gov/sites/default/files/publications/14_1120_memo_secure_communities.pdf (announcing that ICE will continue to rely on fingerprint-based biometric data submitted during bookings by state and local law enforcement agencies to the Federal Bureau of Investigation for criminal background checks) (last visited August 7, 2015).

In the experience of *amici*, the Department routinely accesses records of arrests, criminal charges, sentences, details of incarceration and probation, and plea and trial dispositions. *See*, *e.g.*, Form I-213, Record of Deportable/Inadmissible Alien, App'x B (showing DHS cross-checked ten law enforcement databases and procured detailed information about pending and resolved criminal charges and sentences imposed). The immigration statute and implementing regulations recognize that the Department is by far the better-positioned party to produce criminal records, and thus structure removal proceedings accordingly.

To initiate most removal proceedings[4] the DHS issues a "Notice to Appear in Removal Proceedings" where they describe the factual allegations and corresponding charges of deportability or inadmissibility. *See* 8 U.S.C. § 1229(a). The DHS prosecutor contemporaneously or subsequently issues a Form I-213, Record of Deportable/Inadmissible Alien, to which they will generally attach any relevant criminal records relating to the noncitizen. *See* 8 U.S.C. § 1229a(c)(3)(B).

Processing criminal background checks and reporting the results to the Immigration Court is a core function of the DHS. All noncitizens detained during removal proceedings and all noncitizens applying for relief from removal (or nearly any immigration benefit) are fingerprinted by the DHS. *See* 8 C.F.R. § 1003.47(c) (requiring all relief applicants to submit biometrics to DHS). DHS is required by regulation to report "any relevant information" obtained from these mandatory security checks, including criminal history information, to the immigration judge. 8 C.F.R. § 1003.47(g). The Immigration Court is barred from granting any application for relief "until after DHS has reported to the immigration judge that the appropriate investigations or examinations have been completed and are current . . . and DHS has reported any relevant information." 8 C.F.R. § 1003.47(g).

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[4] Expedited Removal Proceedings and Reinstatement Proceedings do not require the issuance of a Notice to Appear. *See* 8 U.S.C. §§ 1225(b)(1)(C), 1231(a)(5).

It is in line with the DHS's existing regulatory duties for the DHS to have the burden of obtaining criminal records to prove the existence of a conviction that disqualifies an applicant from eligibility for relief. This is also consistent with longstanding evidentiary rules that place the burden of production on the party with the greater access to records. *See* 2 *McCormick on Evidence* § 337, at 475 (6th ed. 2006). This basic principle is long-recognized by the BIA. *See Matter of Vivas*, 16 I. & N. Dec. 68 (BIA 1977) ("The rule that we are enunciating for this situation is not new to either criminal or civil proceedings. The burden of going forward with evidence can be placed on a party not bearing the burden of proof when the facts are within his particular knowledge or control."). Interpreting the governing regulations to mean otherwise would raise serious fairness and Due Process concerns. *See Zadvydas v. Davis*, 533 U.S. 678, 693-94 (2001) ("the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent").

C. *Young* and the government's burden of proof position bar individuals from relief from removal in unfair and unintended ways.

1. *Young* bars from relief many noncitizens who are detained and unrepresented, or otherwise unable to obtain criminal court records.

Most noncitizens are in a vastly inferior position than DHS to obtain records of convictions and other relevant criminal records. Thirty-seven percent of immigrants in removal proceedings, in total 61,520, were detained by the federal

government during their removal proceedings. Department of Justice, *FY 2014 Statistics Yearbook* 27, Figure 11, *at* http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf (last visited August 7, 2015) ("EOIR Statistics Yearbook"). Forty-five percent of immigrants in removal proceedings, in total 75,570, are not represented by counsel. *Id*. at 26, Figure 10. This figure rises to 84% without counsel for immigrants who are detained. Vera Institute of Justice, *Improving Efficiency and Promoting Justice in the Immigration System: Lessons from the Legal Orientation Program, Report Summary* 1 (May 2008), *available at* http://www.vera.org/sites/default/files/resources/downloads/LOP_Evaluation_May2008_final.pdf (last visited August 7, 2015). More than 85% of noncitizens in removal proceedings cannot proceed in English. EOIR Statistics Yearbook at 24, Figure 9. Approximately 15% of detained noncitizens have a mental illness.[5] A significant number of immigrant detainees suffer from physical conditions requiring medical attention.[6] It is unfair and unworkable to

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[5] Fatma E. Marouf, "Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings" (2014). *Scholarly Works*. Paper 809, at 936-37, *available at* http://scholars.law.unlv.edu/cgi/viewcontent.cgi?article=1832&context=facpub (last visited August 7, 2015).

[6] *See* Int'l Human Rights Clinic, Seattle Univ. Sch. of Law & OneAmerica, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington* 7 (2008), *available at* https://www.weareoneamerica.org/sites/default/files/OneAmerica_Detention_Report.pdf (at one detention center, 75% of those detained reported physical conditions that required medical attention) (last visited August 7, 2015).

expect that these groups of individuals will be able to understand what it is they are supposed to do to obtain records.

This Court has previously acknowledged that even though the noncitizen has the burden of proof regarding factual issues relating to relief eligibility, the government has an obligation to assist pro se applicants "in determining what evidence was relevant and by what means he could prove his claims." *Agyeman v. INS*, 296 F.3d 871, 884 (9th Cir. 2002). Indeed, in *Agyeman*, this Court noted that the applicant "lacked the legal knowledge to discern what evidence was relevant and in what form the evidence could be presented" and accordingly held that where the immigration judge failed to provide sufficient guidance to the petitioner, the result was a violation of due process. 296 F.3d at 884.

For detained individuals—even those who are English-proficient and not mentally or physically debilitated—the prohibitions on regular access to phones, computers, and supplies to correspond with and pay fees to court clerks and other staff in local criminal jurisdictions makes obtaining records nearly impossible. *See Agyeman*, 296 F.3d at 884 ("Sensitivity to what evidence the alien can reasonably be expected to produce is especially critical when the alien is in INS's custody."). Detainees have extremely limited Internet and phone access.[7] Detainees face

[7] *See Lyon v. United States Immigration and Customs Enforcement*, No. C-13-58780-EMC, Order Granting Class Certification, Doc. 31 at 2 (N.D. Cal. April 16, 2014) (noting that complaint alleges that detainees "cannot complete calls to . . .

problems with access to mail, including "postcard-only" mail policies that prohibit them from sending or receiving envelopes.[8]

Immigration detention centers are located remotely (*e.g.*, Eloy, Arizona; Dilley, Texas; Tacoma, Washington) and DHS initiates removal proceedings anywhere in the country, *see* 8 C.F.R. § 1003.14, often far from where the noncitizen lived or where criminal records are located. Accessibility of criminal records is not a relevant factor in a venue determination because it is not deemed good cause. *See* 8 C.F.R. § 1003.20(b); *Matter of Rahman*, 20 I. & N. Dec. 480, 483-485 (BIA 1992) (providing multi-factor test for changes of venue). Additionally, detained noncitizens are transferred frequently between detention

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offices that use 'voicemail trees'"); *see also* Amnesty International, *Jailed Without Justice: Immigration Detention in the USA* 35 (2009), *available at* https://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (last visited August 7, 2015); National Immigration Law Center, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers* 26-30 (2009), *available at* https://nilc.org/document.html?id=9 (last visited August 7, 2015); Int'l Human Rights Clinic, Seattle Univ. Sch. of Law & OneAmerica, *Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington*, 38-39, 60 (2008), *available at* https://www.weareoneamerica.org/sites/default/files/OneAmerica_Detention_Report.pdf (last visited August 7, 2015).

[8] *See*, *e.g.*, *Prison Legal News v. Columbia County*, 942 F. Supp.2d 1068, 1083 (D. Or. 2013) (a lawsuit challenging the postcard-only policy at Columbia County Jail in St. Helens, Oregon, including its application to ICE detainees); *see also* 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 August 7, 2015).

centers, further limiting their ability to access and receive records. In 2009, 52% of detainees were transferred at least once, and between 1998 and 2010, 46% of all detainees were moved multiple times, exacerbating detainees' reliable access to records.[9]

Furthermore, criminal courts are highly variable and idiosyncratic in how they maintain, duplicate, and release conviction records, requiring noncitizens to navigate often complicated procedures that are not consistent from jurisdiction to jurisdiction. Court clerks often require that a request name with specificity the exact criminal documents sought (*e.g.*, indictment, plea colloquy), include internal court index or case numbers, filing dates, names of the parties, and other technical information, and also often restrict the means by which they will accept payment for requests. *See, e.g.,* Monroe County Clerk, *Court and Land Records*, http://www.monroe county.gov/clerk-records.php (mailed requests must include a check) (last visited August 7, 2015); Superior Court of California, San Mateo County, Records Management, http://www.sanmateocourt.org/court_divisions /records_management/request_by_mail.php (court "does not research files" and

[9] *See* Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States* 14, 17 (2011), *available at* https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united (last visited August 6, 2015). *See also* National Immigration Law Center, *supra* n 7, at 41-42, 70.

directing individuals to locate documents using the internet) (last visited August 7, 2015). Court clerks often charge fees to conduct searches and create certified records, which can be prohibitively expensive for indigent detainees and particularly prejudices those with older convictions that might be difficult to locate. *See, e.g.,* Superior Court of California, Santa Clara County, Criminal Case Records, http://www.scscourt.org/self_help/criminal/viewing_crim_records.shtml#sheriff (last visited August 7, 2015) (charging $15 for each search lasting longer than 10 minutes, as well as a per page fee and a surcharge for certified copies). Courts often limit the forms of payment they will accept, *see id.* (only accepting payment by check or credit card) which is a barrier for detainees living in a restricted environment; many detainees do not have credit cards or bank accounts and others will not be able to access them while detained. *Young*'s burden of obtaining conviction records is almost impossible for significant numbers of noncitizens. Because the rule conflicts with the Supreme Court's holdings in *Moncrieffe* and *Mellouli* and creates an unfair and unworkable system, it must be abandoned.

2. Under *Young* noncitizens are barred from relief for the sole reason that criminal courts often do not retain records for old convictions.

Young also violates due process and fairness principles because state rules on retention of criminal records vary significantly[10] and thus under *Young* the legal treatment of noncitizens in immigration proceedings will also vary significantly and randomly. For example, as discussed in greater detail below, records for a marijuana-related misdemeanor conviction in California five years ago may no longer exist today whereas in Hawaii the availability would depend on whether the offense was charged in the district court (destroyed) or circuit court (still available). Those with similar convictions should be treated the same under our immigration laws and should not have the results of their cases dictated by variances in state record-keeping requirements. Congress could not have intended that eligibility for relief from deportation depend on whether state court records happen to be available to prove a negative—that a disqualifying conviction does *not* exist. *See Young*, 697 F.3d at 991 (9th Cir. 2012) (B. Fletcher, J., dissenting).

In Hawaii, to take a closer look, record retention rules are relatively straightforward: criminal records at the *district* court are to be destroyed two years

[10] *See* The National Center for State Courts (NCSC), https://www.ncsc.org/Topics/Technology/Records-Document-Management/State-Links.aspx?cat=Court%20Retention%20Schedules (compiling a list of state court retention rules for 27 states) (last visited August 7, 2015).

from judgment[11] whereas original criminal records at the *circuit* court are retained for five years, followed by either permanent destruction or conversion to microfilm or electronic format.[12]

By contrast, criminal record retention rules in California are more complex than in Hawaii. Section 68152(c) of the California Government Code, concerning criminal proceeding records, sets out 15 subsections. Records for most misdemeanor convictions are retained for five years. *See* Cal. Gov't Code § 68152(c)(7). For certain misdemeanor marijuana offenses, the records are destroyed or redacted two years from the date of conviction. *See* Cal. Gov't Code § 68152(c)(8). Felony cases that were bound over from a former municipal court to the superior court and not already consolidated with the superior court felony case file—in contrast to other felony cases—are retained for 10 years from the disposition of the superior court case. *Id*. As a consequence, eligibility for relief from deportation will be different, for example, for those individuals whose records are older and coming from a jurisdiction in California than for those whose records are newer and coming from Hawaii. This cannot be the system that

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[11] Supreme Court of Hawaii, *Retention Schedule for the District Courts*, April 11, 2013, *available at* http://www.courts.state.hi.us/docs/sct_various_orders/order48.pdf (last visited August 7, 2015).

[12] Supreme Court of Hawaii, *Retention Schedule for the Circuit Courts*, April 11, 2013, *available at* http://www.courts.state.hi.us/docs/sct_various_orders/order47.pdf (last visited August 7, 2015).

Congress envisioned in writing the immigration statute. Record retention and maintenance can even vary by locality within a state. In Alabama, whether exhibits to a criminal case are retained sometimes depends on whether the district attorney and the judge consent to such disposal.[13]

Furthermore, under *Young*, noncitizens are also barred from relief because some jurisdictions never create complete conviction records in the first place. In North Carolina, for example, the state courts do not create any transcript or recording of misdemeanor criminal proceedings.[14] The Virginia General District Courts produce no record of the charges, trial or plea, conviction and sentence beyond an "executed warrant of arrest." *United States v. White*, 606 F.3d 144, 146 (4th Cir. 2010).

The case of Mr. O., a Mexican national seeking cancellation of removal, is illustrative.[15] Mr. O entered the United States without inspection in 1993. In 2000, he pled guilty to violating misdemeanor California Health & Safety Code § 11550

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[13] Supreme Court of Alabama, Revised Records Retention Schedule 13 (April 7, 2009) *available at* http://www.alacourt.gov/PR/2009%20RECORDS%20RETENTION%20SCHEDULE.PDF (last visited August 7, 2015).

[14] North Carolina Administrative Office of the Courts, The North Carolina Judicial System 27-28 (2008 ed.), *available at* http://www.nccourts.org/citizens/publications/documents/judicialsystem.pdf (last visited August 7, 2015).

[15] Information for this case was obtained from immigration lawyers Avantika Shastri and Zachary Nightingale, counsel for Mr. O, notes on file.

for being under the influence of a controlled substance, and was put in a deferred entry of judgment program which he successfully completed. The Superior Court then dismissed his case. More than a decade after his guilty plea, the DHS initiated removal proceedings against Mr. O by issuing him an NTA and charging him as inadmissible for entry without inspection. Mr. O has the requisite ten years of continuous presence in the United States and the likelihood of extreme and exceptionally unusual hardship to his U.S. citizen wife and three children to qualify for cancellation of removal. *See* 8 U.S.C. § 1229b(b)(1)(A), (D).

Mr. O's eligibility will depend on whether his 2000 offense is deemed a controlled substance offense under 8 U.S.C. § 1227(a)(2)(B)(i) or § 1182(a)(2)(A)(i)(II). As the Supreme Court has made completely clear, not all state controlled substances offenses are immigration controlled substance offenses. *Mellouli*, 135 S. Ct. at 1989 (citing *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965)). However, the only remaining record of Mr. O's conviction at the Superior Court is a one-page docket summary of his case, which reflects only that he was convicted of violating the statute in 2000 but contains no mention of any specific controlled substance at issue. Under *Young*, he will not be able to apply for relief from deportation purely because the Superior Court cannot furnish him with any additional conviction records.

A noncitizen's statutory eligibility for relief from removal should not depend on the existence or nonexistence of records in the custody of third parties. This result is particularly perverse because it punishes more severely those who have older convictions and can demonstrate rehabilitation. *Matter of C-V-T*, 22 I. & N. Dec. 7, 12 (BIA 1998) (in cases involving criminal convictions, evidence of rehabilitation "will ordinarily be required" before discretionary relief may be granted).

IV. CONCLUSION.

The Court should overrule *Young* as inconsistent with *Moncrieffe* and *Mellouli* and hold that in cases with an ambiguous record, a noncitizen has not been "convicted of" a disqualifying offense. To hold otherwise would continue to unfairly penalize individuals who will be precluded from establishing eligibility for relief or lawful status due to circumstances entirely beyond their control.

Respectfully submitted this 7th day of August, 2015.

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CERTIFICATE OF SERVICE

I certify that on August 7, 2015 I electronically filed the foregoing with the Clerk for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system. There are no unregistered participants.

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CERTIFICATE OF COMPLIANCE WITH FRAP 32

This brief complies with the type-volume limitation of 9th Circuit Rule 29-2(c)(2) because this brief contains 6,799 words.

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