No. 11-702

IN THE
Supreme Court of the United States

ADRIAN MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

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

BRIEF *AMICI CURIAE* OF NATIONAL IMMIGRANT JUSTICE CENTER, AMERICANS FOR IMMIGRANT JUSTICE, NORTHWEST IMMIGRANT RIGHTS PROJECT, AND FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT IN SUPPORT OF PETITIONER

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The National Immigrant Justice Center ("NIJC"), Americans for Immigrant Justice ("AI Justice"), Northwest Immigrant Rights Project ("NWIRP"), and the Florence Immigrant and Refugee Rights Project ("FIRRP") respectfully submit this brief as *Amici Curiae* in support of petitioner.[1]

INTEREST OF *AMICI CURIAE*

Amici NIJC, AI Justice, NWIRP, and FIRRP are immigration-focused organizations with substantial interest in the Court's resolution of this case.

Amicus NIJC is a Chicago-based non-profit organization, accredited since 1980 by the Board of Immigration Appeals ("BIA") to provide representation to individuals in removal proceedings. Through its staff of attorneys and paralegals and a network of over 1,000 *pro bono* attorneys, NIJC provides free or low-cost legal services to immigrants, including detainees. Together with area law school clinics, NIJC conducts and coordinates "Know Your Rights" presentations and individual legal consultations annually for more than 4,000 detainees at six county jails in Illinois, Wisconsin, and Kentucky.

Amicus AI Justice, formerly Florida Immigrant Advocacy Center, is a non-profit law firm dedicated to protecting and promoting the basic human rights of immigrants. Since its founding in 1996, AI Justice

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[1] All parties have consented in writing to the filing of this *Amici Curiae* brief. Counsel for *Amici* are putting them on file with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici Curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

has served the most vulnerable immigrant populations through free direct services, federal court litigation, impact advocacy, and education. AI Justice's detention attorneys regularly visit immigration detention centers in south Florida, provide "Know Your Rights" presentations to detainees, and monitor conditions of facilities (both federal and local) that detain immigrants throughout Florida. AI Justice's attorneys directly represent detained individuals before immigration and appellate courts, including those whose cases are affected by the issues presented here.

Amicus NWIRP is a non-profit legal organization dedicated to the defense and advancement of the legal rights of immigrants in the United States with respect to their immigrant status. NWIRP provides direct representation to low-income immigrants in removal proceedings and before the federal courts. NWIRP also provides representation, workshops, and legal advice to low-income immigrants in detention.

Amicus FIRRP provides free legal services to over 10,000 immigrants, refugees, and U.S. citizens a year detained in Arizona by Immigration and Customs Enforcement ("ICE"). Through its "Know Your Rights" presentations, workshops, legal representation, and targeted services, FIRRP regularly identifies and assists persons who are held in detention while pursuing meritorious claims before an immigration judge, the BIA, and the Ninth Circuit Court of Appeals.

As preeminent organizations in the immigration litigation field, *Amici* share a significant interest in ensuring the immigration consequences of criminal

Convictions are comprehensible, reasonable, predictable, and knowable to immigrant defendants and their counsel. As a result of their work, *Amici* are well-positioned to speak to the nature of immigration court procedures, particularly procedures that affect detainees. To aid the Court's analysis of a question germane to the immigration court system, *Amici* offer specific experiences of our staff and volunteers who live in this system each day observing its mechanics and functions.

SUMMARY OF ARGUMENT

The Court is faced with two choices in evaluating whether a predicate marijuana distribution "conviction" is a felony: (1) the traditional categorical approach applied in immigration cases for almost a century, in which a court need only conduct a legal analysis of the elements of the crime and need not review the specific facts of the individual crime, or (2) the novel non-categorical approach advocated by Respondent here, which requires time-intensive hearings to determine facts relating to an individual's past misconduct – assuming such facts are even available. Based upon their extensive experience at all levels of immigration proceedings, *Amici* urge this Court to maintain the categorical approach. Only the categorical approach is practical and workable; indeed, it is critical to the just and efficient administration of the immigration court system.

The practical hurdles that individuals like Moncrieffe would face if required to gather, produce, and effectively re-litigate the facts underlying a prior

incident are virtually insurmountable. Individuals in Moncrieffe's situation generally are subject to mandatory detention for the entire course of proceedings. Detainees are not appointed counsel, so the vast majority are forced to proceed *pro se*. Detainees have limited ability to place or receive telephone calls and no access to fax, email, or internet. Even the slower postal service option is frustrated by transfers of detainees between and among facilities with no forwarding of mail and often loss of materials. And detainees are commonly held in remote locations, making in-person communications difficult. For detainees with little or no English proficiency and little or no education, these obstacles are all but impossible to overcome.

Respondent's proposed fact-intensive inquiry also would burden an already overloaded immigration court system. Immigration judges facing backlogged dockets are reluctant to continue cases to allow immigrant litigants more time to gather records, despite the high hurdles detainees face in securing needed documents. The system relies on immigration judges to advise *pro se* detainees of potential forms of relief available. Yet, under the novel non-categorical framework, the immigration judge could not adequately advise the *pro se* detainee without an unfair and impractical mini-trial and re-litigation of the underlying facts.

By contrast, the traditional categorical approach is one familiar to immigration judges. It can be applied uniformly, fairly, and with far greater efficiency than Respondent's proposed new system would permit.

The Court should adhere to the categorical approach and rule for the Petitioner.

ARGUMENT

I. INDIVIDUALS LIKE MONCRIEFFE ARE POORLY POSITIONED TO ENGAGE IN FACT DISPUTES REGARDING PRIOR CONVICTIONS.

A. *People removable for controlled substance offenses and most criminal convictions are subject to mandatory detention.*

Federal law mandates the detention of most individuals charged with removability on criminal grounds. *See,* 8 U.S.C. § 1226(c); *see also, Demore v. Kim*, 538 U.S. 510 (2003) (upholding mandatory detention during removal proceedings where immigrant conceded removability). Mandatory detention is not limited to felonies or aggravated felonies; individuals charged as controlled substance offenders, including misdemeanor offenders, are subject to mandatory detention as well. 8 U.S.C. § 1226(c)(1)(B).[2]

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[2] The expansion of mandatory detention has led to a massive increase in the number of individuals held in the custody of the ICE branch of the Department of Homeland Security for the duration of their removal proceedings. More than 363,000 immigrants were detained during removal proceedings in 2010. *See* U.S. Dep't of Homeland Security, Office of Immigration, *Statistics, Immigration Enforcement Actions: 2010,* at 4, (2011),

Even when a immigrant has a plausible argument that she does not fit within the categories triggering mandatory detention, BIA precedent forbids release, even on bond, unless the immigrant can convince an immigration judge that the government is "substantially unlikely to prevail" on the removability charge. *Matter of Joseph*, 22 I. & N. Dec. 799, 806-807 (BIA 1999). This often means that the immigrant will remain detained unless and until the immigration judge finds the charges not sustained. *Id.* at 807.

Under the BIA's current test, a detained immigrant like Moncrieffe would need to produce factual evidence in order to prove that her past conduct corresponded to the federal misdemeanor provision codified at 21 U.S.C.§ 841(b)(4). *See, Matter of Aruna*, 24 I. & N. Dec. 452 (BIA 2008); *Matter of Castro Rodriguez*, 25 I. & N. Dec. 698 (BIA 2012). However, the fact of her detention makes it unlikely that she will be able to obtain factual evidence relating to long-past offenses. Thus the practical and fundamental flaw with Respondent's test presents a classic "Catch 22": a detainee cannot be released unless she produces evidence to support her arguments; but she cannot find evidence to support her arguments unless she is released.

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http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf.

B. *The vast majority of immigration detainees are unrepresented.*

Individuals detained during removal proceedings have a statutory right to representation "at no expense to the government." 8 U.S.C. § 1362. The BIA has interpreted the statute to mean that the government will not appoint counsel, no matter what the circumstances. *Matter of Gutierrez*, 16 I. & N. Dec. 226, 228-29 (BIA 1977). As a result, most immigrants lack counsel.

Private representation can be costly. Immigrants often are of modest means and thus unable to retain private counsel. *See,* Capps, Fix, Passel, & Perez-Lopez, *A Profile of the Low-Wage Immigrant Workforce* (last visited Jun. 28, 2012), http://www.urban.org/publications/310880.html (reporting that that nearly half of immigrants earn less than 200 percent of the minimum wage). The few free immigration legal service providers, such as *Amici*, can represent only a small percentage of detainees; nearly 85 percent of detainees are not represented by counsel. *See, Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA,* at 30-32 (2009), http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

Thus, without the benefit of counsel, 886,000 immigrants faced the prospect of removal in the five-year period ending in 2010. *See, Executive Office for Immigration Review, FY 2010 Statistical Year Book, G1, Figure 9* (2011),

http://www.justice.gov/eoir/statspub/fy10syb.pdf (showing number of unrepresented individuals in immigration court for previous five years).

Without counsel, detainees are unable to locate and present evidence that may be critical to the issue of removability. Unrepresented immigrants often lack an adequate understanding of the legal standards at issue in their cases and are unable to develop an appropriate factual record. *See,* Appleseed, *Assembly Line Injustice*, Ch. 8, p. 29, (last visited Jun. 26, 2012), http://www.appleseednetwork.org/Portals/0/Documents/Publications/Chapter%208.pdf.[3]

C. *Conditions within the immigration detention system prevent adequate self-representation.*

Effective *pro se* representation is nearly impossible for detained individuals. Multiple institutional obstacles hinder detainees from engaging in the factual investigations that would be needed to prevail under Respondent's proposed rule. Communication barriers, remote facilities, and frequent transfers frustrate the efforts of even the most capable detainee to prove her case.

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[3] Appleseed is a nonprofit network of 17 public interest justice centers in the US and Mexico that aims to promote social and economic justice, protect the rights of the under-represented, and resolve injustice through systemic reform. Information about the organizations research and publications can be found at www. appleseednetwork.org.

ICE uses a plethora of facilities to detain immigrants; each of these facilities is run differently, and detainees are transferred frequently between them. ICE currently houses its detainees in more than 250 local, state, and federal facilities. Nearly 67 percent of ICE detainees are housed in local or state facilities, 17 percent in contract detention facilities, 13 percent in ICE-owned facilities (service processing centers), and 3 percent in federal Bureau of Prisons facilities. *Immig. & Customs Enforcement, "Fact Sheet: Detention Management* (November 10, 2011), http://www.ice.gov/news/library/factsheets/detention-mgmt.htm. Each facility has distinct procedures for detainee communications.

These circumstances make communication with the outside world extremely difficult for detainees. Indeed, the only constant is their difficulty in communicating with anyone at all.

1. *Placing a telephone call*

Detainees seeking to gather factual evidence related to a past arrest need to place phone calls to courts, law enforcement agencies, and prior criminal defense counsel. Yet detainees must run a gauntlet to make phone calls. They often are unable to track down the relevant telephone numbers for distant court records departments, police stations, or attorneys. Detainees unable to pay for phone calls are not permitted to call prior defense counsel or potential witnesses at government expense. *See, 2011 Operations Manual ICE Performance-Based National Detention Standards* (hereinafter

"PBNDS"), 5.6 (Telephone Access) at 4-5, (Dec. 2, 2008), http://www.ice.gov/detention-standards/2011/. In the extremely limited circumstances in which ICE permits free phone calls, such as to contact a government office, ICE standards require that detainees complete a form and wait for often overburdened facility staff to complete the request. Even detainees able to pay face obstacles in placing calls due to problems with phone functionality in detention facilities. *See generally, Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities; Other Deficiencies Did Not Show a Pattern of Compliance*, at 16, (Jul. 2007), http://www.gao.gov/assets/270/263327.pdf.

2. *Receiving a telephone call*

Inability to receive phone calls presents another major problem for detainees seeking to marshal evidence showing that they are not removable as charged. Often the court official, law enforcement officer, or attorney whom the detainee called may be unavailable. A particular clerk may be out for the day, or a busy defense attorney may be in court or in a client meeting. In normal life, the solution is simple: the caller leaves a message and the recipient returns the phone call at a later point. This is rarely an option for detainees. On any given day, approximately 78 percent of detainees (more than 25,000) are in facilities that prohibit attorneys from scheduling calls with their clients. *See*, *e.g.*, Nat'l Immigrant Just. Cntr., *Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention*

Facilities Jeopardizes a Fair Day in Court, at 4-5, 9, (2010), https://www.immigrantjustice.org. The detention system thus exacerbates the difficulties that *pro se* individuals would face in attempting to re-litigate complicated and often distant incidents.

3. *Facsimile and email*

Common alternatives to phone communication – namely, fax and email communications – are not available options for detainees. *Cf.,* PBNDS 5.1 (Correspondence and Other Mail), at 282. Detainees currently have no access to the internet. *Cf.,* PBNDS 5.6 (Telephone Access), at 305.

4. *Communication by post*

Communication by post – although more available to detainees than phones, fax machines, or internet – is a time-consuming and frequently unsuccessful alternative. The most common problem with postal communications is that detainees in removal proceedings face tight deadlines. Even assuming optimal rates of delivery, the normal delays inherent in mailing request forms and case files back and forth often would leave detainees unable to obtain evidence quickly enough for use at trial.

5. *Transfers in immigration detention*

In addition to the problems created by natural slowness of mail service, postal communication is frustrated because ICE detainees are transferred frequently and unpredictably between immigration detention facilities. ICE detention standards do not provide for forwarding of mail from transferring facilities. *See,* PBNDS, 5.1 (Correspondence and Other Mail); PBNDS, 7.4 (Detainee Transfers).

The absence of a mail forwarding requirement has a dire impact on detainees. In 2009, more than half of detainees were transferred at least once, and between 1998 and 2010, 46 percent of all detainees were moved multiple times. *See, Human Rights Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States*, at 14, 17 (2011), http://www.hrw.org/sites/default/files/reports/us0611webwcover_0.pdf. One detainee was reportedly transferred 66 times. *Id.* at 17. Detainees contesting removal and seeking relief generally are held longer than detainees who do not contest their removal, and the chances of transfer increase as detention time lengthens. *Id.* at 25-26.

With no mail forwarding, detainee mail is commonly returned or lost as a result of these transfers. Even when a detainee is fortunate enough to receive requested records, such records commonly become lost or inaccessible after transfer to a new facility because personal property is rarely transferred with detainees. *See,* Karen Tumlin,

Linton Joaquin, & Ranjana Natarajan, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers*, at 41-42, 70, (2009), http://www.nilc.org/document.html?id=9.

6. *Remote facilities*

The aforementioned problems with mail, phone, or more modern communication methods cannot be avoided through in-person communication with family and friends because immigration detention facilities are commonly located in remote areas far from a detainee's home, family, or court of conviction.[4] *See,* Dora Schriro, *Immigration Detention Overview and Recommendations*, at 23-24, (Oct. 6, 2009), http://www.ice.gov/doclib/about/offices/odpp/pdf/ice-detention-rpt.pdf.

The structural barriers identified above frustrate the efforts of even the most determined and capable

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[4] The Agency's venue rules do not require that proceedings be brought in a district where the immigrant resides or was arrested; Department of Homeland Security may initiate removal proceedings anywhere in the country. *See,* 8 C.F.R. § 1003.14; *see also, Gandarillas-Zambrana v. Board of Immigration Appeals*, 44 F.3d 1251, 1256 (4th Cir. 1995). For instance, an immigrant might be placed in removal proceedings on return from travel abroad. *See*, *e.g.*, *Vartelas v. Holder*, 132 S.Ct. 1479, 1485 (2012). If inspectors at an airport far from home believed the immigrant to be deportable, the agency would likely detain her at a facility near to that airport rather than transporting her to a facility close to friends and family.

pro se litigants. The result is that the majority of detainees in the vast immigration detention system have no realistic ability to secure documentation or other evidence to support a factual claim like the one at issue in this case.

D. *Language barriers and limited education levels magnify procedural hurdles to obtaining case records.*

Many detainees face additional and immense obstacles to obtaining case records by virtue of limited English-language skills and limited educational levels. Surveys indicate that approximately 83 percent of immigrants in removal proceedings are not fluent in English. *See, Executive Office for Immigration Review, FY 2010 Statistical Year Book, F-1, Figure 8,* (2011), (illustrating percentage of immigration court proceedings conducted in languages other than English).

Nearly half of immigrants have not completed high school. *Educational Attainment in the United States: 2009*, (Feb. 2012), http://www.census.gov/prod/2012pubs/p20-566.pdf (finding percentage of foreign-born Hispanics who had completed at least high school was 48 percent). Indeed, a substantial number have had no schooling at all, and may be functionally illiterate. *See,* Elizabeth Grieco, *Educational Attainment of the Foreign Born in the United States*, (July 2004), http://www.migrationinformation.org/feature/display.cfm?ID=234 (finding that 1.4 million foreign born individuals over age 24 had completed no schooling,

including over 11% of foreign-born individuals from Mexico).

E. *Bureaucratic and logistical obstacles to locating and accessing case records.*

Even English-speaking detainees with the ability to communicate freely with the outside world face great obstacles in requesting case records. Such detainees still must locate the correct records department, find the correct request form, and determine the accepted means of payment. They also must know the specific names of the criminal court documents they wish to request and, depending on the jurisdiction, may need additional information about the documents themselves (e.g., internal court index number, filing date, and names of parties). *See e.g.*, Monroe County Clerk, *Court and Land Records*, http://www.monroecounty.gov/clerk-records.php (last visited Mar. 1, 2012). Different jurisdictions house records in different departments, and detainees may be unable to determine whom to contact to make records requests and the procedures necessary to make those requests. *Compare* Superior Court of California, San Mateo County, Records Management, *Request Copies by Mail*, http://www.sanmateocourt.org/court_divisions/records_management/request_by_mail.php (last visited Mar. 1, 2012) (requiring one to contact the Superior Court by mail for a records request), with Monroe County Clerk, Court and Land Records (requiring one to contact the County Clerk by mail, phone, or fax for a records request).

Even when *pro se* detainees are able to properly identify both the necessary records and the proper recipients of requests, payment for records presents yet another hurdle. Records departments often charge for the time it takes to search for records, for each page copied, and for certification of records. *See*, *e.g.*, Superior Court of California, San Mateo County, *Records Management Fees*, http://www.sanmateocourt.org/court_divisions/records_management/fees.php (last visited Jun. 26, 2012). Many state court records departments accept only checks or credit cards rather than cash or money orders (which forms of payment are more available to detainees and their families). *See*, *e.g.*, Monroe County Clerk, Court and Land Records.

Each of these obstacles reinforces the others in a tragic feedback loop. An individual not fluent in English may misunderstand what she needs to send to a records department, resulting in a form being returned for minor procedural problems, such as improper form of payment. Because most exchanges must occur by mail due to inaccessibility of phone, fax, and email communication in detention centers, and because of frequent detainee transfers, exchanges result in weeks if not months of delay in immigration court cases. Compounding the problem, the immigration court may choose at any point to proceed to trial on removability notwithstanding a detainee's inability to obtain records necessary to their defense.

F. *Detainees face expedited proceedings where continuances are discretionary and limited.*

Immigration courts feel pressure to rapidly complete matters in detained cases. The immigration court system has "case completion goals" which call for most detained cases not involving asylum to be completed within 120 days. *See*, Government Accountability Office, *Executive Office for Immigration Review: Caseload Performance Reporting Needs Improvement, GAO-06-771,* at 21, (August 2006), http://www.gao.gov/assets/260/251155.pdf. Immigration judges are "evaluated" in part based on their success in meeting those goals. *Id.* at 20. Thus, continuance requests are frequently denied because the case has gone on too long. *See*, *e.g.*, *Hashmi v. Attorney General of the United States*, 531 F.3d 256, 260 (3d Cir. 2008) (considering case in which immigration judge denied motion for continuance "based solely on concerns about the amount of time required to resolve Hashmi's case"); *Badwan v. Gonzales*, 494 F.3d 566, 569-70 (6th Cir. 2007) (considering appeal from immigration judge's denial of motion for continuance because of "the case completion rules of the Court, and the Court's directive to complete cases," explaining that "we're under severe constraints in terms of making certain that cases are handled in an expeditious manner").

The case of *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010), graphically illustrates the process facing detainees whose cases turn on factual matters requiring investigation. Dent attempted to secure documents necessary to prove his U.S. citizenship. Dent – a fluent English-speaker – was lucky. He wrote a letter from his Arizona jail to the Arkansas attorney who had handled his adoption 20 years earlier, and the attorney responded. *Id.* at 369. That attorney was able to send him various documents tending to prove his citizenship; but a fire had destroyed his adopted mother's birth certificate (the attorney was attempting to locate her passport instead). *Id.* Despite his English proficiency and attorney assistance, Dent was unable to gather factual evidence quickly enough for the immigration court. The immigration judge declined to grant further continuances, and ordered removal, reasoning that Dent might be able to obtain proof of his citizenship once deported to Honduras. *Id.* at 369-70. Perversely, unbeknownst to Dent, the proof of his citizenship was in the government attorney's file the entire time.

In *Amici*'s extensive experience practicing before diverse immigration courts, the circumstances of Dent's case are tragically typical. Indeed, in *Amici*'s advisals to *pro se* individuals and reviews of transcripts of *pro se* removal hearings, immigration judges commonly deny continuances requested by detainees seeking additional time to prepare their case.

II. FACT-INTENSIVE TRIALS BURDEN BOTH THE IMMIGRATION COURT SYSTEM AND DETAINEES, AND LACK THE EFFICIENCY, UNIFORMITY AND JUSTICE OF THE CATEGORICAL APPROACH.

The novel non-categorical approach urged by Respondent requires a presentation of specific facts of sometimes very old incidents by immigrants for whom federal law mandates detention but not counsel. 8 U.S.C. § 1226(c). This lengthens detentions and delays cases. For individuals like Moncrieffe, permitting a non-categorical approach to determine whether a immigrant's marijuana conviction would correspond to a federal misdemeanor will place undue burdens on immigration judges and extend detention. This creates an unworkable system for both immigration courts and detainees.

A. *The non-categorical approach would burden an already overtaxed immigration court system.*

Immigration judges play an active role in removal proceedings. They not only direct proceedings and accept filings, but they are required to advise immigrants of potential forms of relief. 8 C.F.R. § 1240.11(a)(2). Each immigration judge handles more than 1,200 cases per year, with the assistance of only one law clerk for every four judges. *See,* American

Bar Association, *Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases, Executive Summary*, ES-28 (2010), http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf.

The American Bar Association reports that the "enormous expansion of immigration enforcement activity and resources has not been matched by a commensurate increase in resources for the adjudication of immigration cases. As a result, the adjudication system has been overwhelmed by the increasing caseload, and it has been extremely challenging to adjudicate cases fairly." *Id.* at ES-5, ES-19-20 ("immigration courts complete more than 280,000 proceedings each year — an average of 1,243 proceedings per year for each immigration judge"). The fact that the courts are overburdened triggers other adjudicative problems that also serve to undermine fairness. *See,* Appleseed, *Assembly Line Injustice,* Ch. 2 p. 10 (May 2009).

Given their backlogs, immigration judges are obliged to adjudicate removal proceedings quickly. *See*, *Id*. As a result, immigration judges take "less than two hours on average to review each case file, conduct a hearing and render a decision." *Id.*

The categorical inquiry is a purely legal determination that immigration judges already routinely make on behalf of *pro se* litigants. The categorical analysis applied in the context of this case allows a fair, efficient, and predictable practice through which immigration judges can make aggravated felony determinations by inquiring into

the elements of a criminal statute, informed when appropriate and necessary by reference to "a narrow, specified set of documents that are part of the record of conviction." *Nicanor-Romero v. Mukasey*, 523 F.3d 992, 1007 (9th Cir. 2008) (quoting *Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004).

By contrast, Respondent's proposed framework would exact enormous costs on an already overburdened immigration bench and backlogged court system. In effect, immigration judges would be forced to choose among the lesser of two evils: (1) deny requests for continuances necessary to permit detained *pro se* litigants the opportunity to marshal facts to defend their cases, thus maintaining docket efficiency at the expense of accuracy, uniformity, and just results – likely triggering appeals – or (2) grant repeated continuances to permit detainees a fair opportunity to prove their cases, at the expense of docket management and uniformity across cases. Whatever the choice, Respondent's system would undermine the workings of the immigration court system. A rule that undermines the system for adjudication of removal cases directly affects the individuals who must be judged by that system.

B. *The proposed non-categorical approach would be fundamentally unfair to detainees.*

Applying a non-categorical approach would create an unworkable system in which immigrants face a grave deprivation of liberty – one this Court has described as the "loss 'of all that makes life worth

living.'" *Knauer v. United States*, 328 U.S. 654, 659 (1946) (citation omitted). This is because the non-categorical approach requires a factual trial in a court that lacks the procedural protections necessary to ensure a fair hearing. Unrepresented immigrants, lacking an adequate understanding of the legal standards at issue in their cases and often detained without resources for legal and factual investigation, will be unable to develop an appropriate factual record effectively or efficiently. *See, Smith v. Hooey*, 393 U.S. 374, 380 (1969) ("Confined in a prison, perhaps far from the place where the offense . . . allegedly took place, [a prisoner's] ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired").

Respondent's approach would unrealistically force detainees to litigate complex factual issues related to events that many times would have occurred years or even decades in the past. *See, Barker v. Wingo*, 407 U.S. 514, 532 (1972) (holding, in the context of the Sixth Amendment, that "the inability of a defendant adequately to prepare his case [as a result of long delays] skews the fairness of the entire system" – a fundamental fairness concern that also sounds in the Fifth Amendment's due process clause).[5]

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[5] Even if the records were accessible to detained *pro se* immigrants, many criminal proceedings involving low-level marijuana charges would not include any evidence pertaining to quantity or remuneration because those are not elements of the offense under state laws. *See, Amicus* Brief for the Center on the Administration of Criminal Law, 7-14. What is more, the state court would not commonly resolve any factual disagreements once a plea of guilty or *nolo contendere* was entered. The plea need not reflect reality; courts uphold pleas

The combination of lack of representation and inability to investigate evidence while detained will be fundamentally unfair to immigrants if this Court permits aggravated felony adjudications to be transformed into fact-intensive retrials of past criminal convictions; a system in which adjudication of the case depends on development of a factual record will inevitably result in unwarranted findings of removability or ineligibility for relief for *pro se* individuals.

C. *The categorical approach would create uniformity and accuracy in adjudication of immigration court cases.*

Amici's experience shows that the traditional categorical approach better advances the goals of uniformity and accurate adjudication. To the extent that the categorical test might be under-inclusive of

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even to non-existent offenses. *See*, *e.g.*, *Dale v. Holder*, 610 F.3d 294 (5th Cir. 2010) (involving plea to attempted recklessness, a legal impossibility). An individual may plead guilty or *nolo contendere* despite having a plausible defense, which benefits the criminal justice system; the *quid pro quo* is that the defendant pleads guilty to a limited set of charges and may obtain a lower sentence. *See, Missouri v. Frye*, 132 S.Ct. 1399, 1407 (2012). Under Respondent's approach, immigration courts would treat the immigrant's plea as foreclosing any argument against guilt – giving the prosecution the benefit of the guilty plea – but would decline to give the immigrant the benefit of the deal (which would require the immigration court to treat them as guilty of only the minimal conduct necessary to support the plea). *Cf., Matter of Fortis*, 14 I & N Dec. 576, 577 (BIA 1974); with *Aruna*, 24 I. & N. Dec. at 455-57.

certain fact scenarios, the discretionary standards for relief eligibility take into account the seriousness of the actual offense. *See, Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1999). Serious offenses make it more difficult to show rehabilitation; and a showing of rehabilitation is generally required before immigration judges exercise positive discretion in cases. *Id.* at 12. In short, even if the categorical test would permit a small number of people to be considered eligible for discretionary relief where the conduct underlying their convictions might in fact have fit within the aggravated felony category, the costs to the system would be limited because undeserving applicants will be weeded out in the immigration judges' exercise of discretion.

The costs to the system from the rule advanced by Respondent would be significant. Those system costs would be passed on to already overburdened courts and to detainees like Moncrieffe, who would suffer longer periods of detention. That alone would be problematic. The effect of an aggravated felony finding is to require removal without exception, barring immigration judges from considering a one-time exercise of mercy for longtime residents of the United States, and their U.S. citizen family members. Respondent's novel approach is misguided and deeply flawed. The Court should reject it.

CONCLUSION

For the foregoing reasons, *Amici Curiae* National Immigrant Justice Center and Americans for Immigrant Justice respectfully urge the Court to reverse the decision below.

Respectfully submitted,

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