No. 12-2094

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CRUZ CARRASCO-CHAVEZ (A 089-828-685)

Petitioner-Appellant,

v.

ERIC H. HOLDER, JR., United States Attorney General,

Respondent-Appellee.

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

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, MARYLAND OFFICE OF THE PUBLIC DEFENDER, NATIONAL IMMIGRANT JUSTICE CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NORTH CAROLINA ADVOCATES FOR JUSTICE, THE IMMIGRANT AND REFUGEE APPELATE CENTER, LLC, AND PROFS. DEBORAH M. WEISSMAN OF UNIVERSITY OF NORTH CAROLINA SCHOOL OF LAW AND MAUREEN SWEENEY OF UNIVERSITY OF MARYLAND LAW SCHOOL IN SUPPORT OF PETITIONER CRUZ CARRASCO-CHAVEZ'S PETITION FOR REHEARING EN BANC

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), amici curiae the Immigrant Defense Project, the Maryland Office of the Public Defender, the National Immigrant Justice Center, the National Immigration Project of the National Lawyers Guild, the North Carolina Advocates for Justice, the Immigrant and Refugee Appellate Center, LLC and Professors Deborah M. Weissman and Maureen Sweeney, state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above, which are nonprofit organizations, a for-profit law firm, and natural persons.

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 include two national non-profit organizations with expertise in the interrelationship of criminal and immigration law, a state public defender practicing within this Circuit, a regional non-profit organization with expertise in both civil and criminal issues (practicing within this Circuit), a law firm specializing in immigration appeals located within this Circuit, and two law professors teaching within this Circuit.[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

The Court should hear this case en banc to revisit this Court's prior holding in *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), on which the Panel relied. *See Carrasco-Chavez v. Holder*, No. 12-2094, 2013 WL 3069857 (4th Cir. Jun. 20, 2013). *Salem* held that a noncitizen is ineligible for discretionary relief from removal based on a past criminal conviction even where the actual conviction that

[1] More information about individual amici is included in the motion for leave to file this brief. The institutional affiliations of Professors Weissman and Sweeney are listed for identification only.

the noncitizen sustains is not a categorical match to the disqualifying crime and does not conclusively establish that the conviction is one that would bar relief. The panel decision applying *Salem* raises an issue of "exceptional importance" meriting en banc reconsideration, Fed. R. App. P. 35(a)(2), for three principal reasons.

First, *Salem* is at odds with the Supreme Court's recent decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), which clarified that, to decide the immigration consequences of a past conviction, the key inquiry under the categorical approach is whether the conviction necessarily included all the elements of a disqualifying offense. This is a legal question as to which burdens of proof are irrelevant. This is so even as to the modified categorical approach, which applies here because the statute of Mr. Carrasco-Chavez's conviction is divisible. In such cases, once the record of conviction is submitted, the inquiry is legal and, under *Moncrieffe*, turns on whether that record necessarily demonstrates a disqualifying conviction. *Salem* is inconsistent with this understanding: it relied heavily on the applicable burden of proof provision to conclude that a mandatory bar should apply even when the record is inconclusive. The Court should revisit *Salem* to hold that, based on *Moncrieffe*, the burden is of no relevance to whether a noncitizen like Mr. Carrasco-Chavez is ineligible for relief based on a past conviction. Instead, when, as here, the record of conviction is inconclusive, the conviction did not "necessarily involve facts that correspond" to a disqualifying

offense and the noncitizen "was not convicted of a [disqualifying offense]" as a matter of law. *Moncrieffe*, 133 S. Ct. at 1687.[2]

Second, *Salem* is inconsistent with the Board of Immigration Appeals' (BIA's) own interpretation of 8 C.F.R. § 1240.8(d), the regulatory provision at issue in the present case, which governs the applicability of mandatory bars to relief. Under *Matter of A-G-G*, the government 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). To satisfy this standard in Mr. Carrasco-Chavez's case, which involves a divisible statute, the government must provide a record of conviction indicating that he was necessarily convicted of a disqualifying offense. *See Moncrieffe*, 133 S.Ct. at 1687. Contrary to *Salem*, when, as here, the record of conviction is inconclusive, the government has not made the requisite prima facie showing of ineligibility, as set forth in *A-G-G*.

Third, *Salem* is unfair to noncitizens like Mr. Carrasco-Chavez, who were convicted under divisible statutes. Under *Salem*, a noncitizen like Mr. Carrasco-Chavez loses eligibility for relief even where the actual conviction that he sustains is not a categorical match to the disqualifying crime and, as such, does not

[2] To avoid the need for en banc review, the Court may instead grant panel rehearing on grounds that *Moncrieffe* is a "superseding contrary decision of the Supreme Court" that overruled *Salem*. *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005) (citations and quotations omitted).

conclusively establish that the prior conviction is one that would bar relief. *Salem* forces noncitizens like Mr. Carrasco-Chavez 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.

ARGUMENT

I. The Court Should Reverse *Salem* Because It Is Inconsistent With *Moncrieffe*.

Under *Moncrieffe*, when, as here, the record of a noncitizen's prior conviction does not conclusively demonstrate a disqualifying immigration grounds, the conviction neither establishes removability nor bars the noncitizen from relief. The Supreme Court and every federal court of appeals have unequivocally held that where the record of conviction does not conclusively show that a prior conviction fits within an alleged criminal removal ground, the conviction does not establish a noncitizen's removability. *See Moncrieffe*, 133 S.Ct. at 1684 (citing Alina Das, *The Immigration Penalties of Criminal Conviction: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1688-1702, 1749-52 (2011) (collecting federal court and agency cases dating to 1913)). The Supreme Court recently confirmed in *Moncrieffe* that this test also applies in the context of criminal bars to relief from removal, despite the fact that the statutory and regulatory language relating to the burden of proof is different in the two contexts. *Id.* at 1685 n.4 (the "analysis is the same in both [the removability and

relief] contexts"). Consistent with *Moncrieffe*, but contrary to *Salem*, three circuits have held that when the record of conviction is inconclusive as to whether a noncitizen was convicted of a disqualifying offense, the conviction does not bar eligibility for relief. *See Thomas v. Att'y Gen. of U.S.*, 625 F.3d 134, 148 (3d Cir. 2010); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006). Two circuits have ruled otherwise. *See Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc);[3] *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009). But one of these circuits is now considering whether its prior precedent has been overruled by *Moncrieffe*. Order, *Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715 (9th Cir. Apr. 30, 2013) (requesting parties to submit supplemental briefs addressing whether *Moncrieffe* overrules *Young*, 697 F.3d 976).

The en banc Court should revisit *Salem* and hold that when, as here, the record of conviction does not show that a noncitizen was necessarily convicted of all the elements of a disqualifying conviction, he is not barred from eligibility for relief.

[3] Only two members of the *en banc* panel in *Young* agreed with both *Salem* and *Carrasco-Chavez* that relief eligibility can never be shown when the record is complete yet inconclusive; the other nine expressed concerns about the unfairness of this outcome while disagreeing as to the proper solution. *See Young*, 697 F.3d at 990–1003 (Fletcher & Ikuta, JJ., each dissenting in part).

A. The Categorical Approach Applies to Determine Whether Mr. Carrasco-Chavez Has Been Convicted of a Disqualifying Offense.

The Supreme Court expressly clarified in *Moncrieffe* that the categorical rule applies to the determination of whether a prior conviction disqualifies a noncitizen from eligibility for relief from removal. *Moncrieffe*, 133 S.Ct. at 1685 n.4.

Under the categorical approach, an individual has been convicted of a disqualifying offense for immigration purposes when the statute of conviction demonstrates that he necessarily was convicted of all the elements required to establish such an offense. *See Moncrieffe*, 133 S.Ct. at 1684-88; *Prudencio v. Holder*, 669 F.3d 472, 484 (4th Cir. 2012). In a small set of cases, when the statute of conviction is divisible in that it "list[s] potential offense elements in the alternative," a court may consider the record of conviction from the prior case to decide whether an individual necessarily was convicted of a disqualifying offense. *Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013); *Prudencio*, 669 F.3d at 485.[4]

[4] *Salem*'s suggestion that the Supreme Court has expressed "reservation" about application of the categorical rule to immigration cases, 647 F.3d at 119, is unfounded. Although the Supreme Court applied a "circumstance-specific" approach to determine whether a conviction included the $10,000 loss necessary to be deemed an aggravated felony in *Nijhawan v. Holder*, the Court clarified that this circumstance-specific approach does not apply to evaluating "generic crime" categories. 557 U.S. 29, 37 (2009). In determining whether a conviction falls within a "generic crime" category, such as the controlled substance offense category at issue in this case, the traditional categorical approach applies. *Id*. *See also Moncrieffe*, 133 S.Ct. at 1691.

B. The Panel's Decision That Mr. Carrasco-Chavez Did Not Meet His Burden of Proof on an Inconclusive Record Is Contrary to *Moncrieffe* and the Categorical Approach.

Inconsistent with *Moncrieffe* and the longstanding application of the categorical approach, the Panel, in reliance on *Salem*, concluded that Mr. Carrasco-Chavez did not meet his burden of proof even though the record of conviction does not establish that he was convicted of a disqualifying offense. *Salem* relied heavily on generally applicable statutory and regulatory provisions setting forth the burdens of proof as to applications for relief from removal, including 8 C.F.R. § 1240.8(d), which states that, if the "evidence indicates" that a mandatory bar to relief exists, the noncitizen must prove "by a preponderance of the evidence" that the mandatory bar does not apply.[5] *Salem*, however, incorrectly applied this "preponderance of the evidence" standard—which applies to factual inquiries—to determine whether the proffered documents from the record of conviction necessarily establish a prior disqualifying conviction, a legal question.

The burden of proof refers to "the obligation of a party to introduce evidence that persuades the factfinder . . . that a particular proposition or fact is true." 1 Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence* § 3.5 (7th ed. 1992).

[5] Similarly, the statutory provision that applies generally to noncitizens seeking relief from removal, 8 U.S.C. § 1229a(c)(4), imposes a burden as to certain factual eligibility showings, including for example, for nonpermanent residents seeking cancellation of removal, continuous physical presence and extreme or unusual hardship to a qualifying relative. *See* 8 U.S.C. § 1229b(b).

It has no relevance to questions of law. *See, e.g.*, *Universal Elec. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) (burden of production or burden of persuasion "certainly carries force on any factual components . . . because facts must be proven via evidence . . . [but] as a practical matter . . . carries no force as to questions of law."); *ABKCO Indus., Inc. v. Comm'r*, 482 F.2d 150, 156 (3d Cir. 1973) ("[I]t may not be proper to refer to 'burden of proof' in reference to the resolution of a question of law.").

Salem incorrectly applied the statutory and regulatory burdens of proof to determine the immigration consequences of a prior criminal conviction, an inquiry that is legal and not factual in nature.[6] The Supreme Court repeatedly clarified in *Moncrieffe* that the immigration consequences of a prior criminal conviction turn on what elements the conviction "necessarily" involved, a legal inquiry.[7] *Moncrieffe*, 133 S.Ct. at 1684-88, 1692 (employing the term "necessarily" eight separate times). The Court explained that "[b]ecause we examine what the state conviction necessarily involved . . . we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized." *Id.* at 1684. "The reason is that the [Immigration and Nationality Act] asks what offense the

[6] While determining the existence of a conviction is a factual question, examination of the nature of the conviction under the categorical rule is a purely legal inquiry.

[7] Where Congress defines the disqualifying conviction by reference to its potential punishment under federal law, "it may be necessary to take account of federal sentencing factors too." *Id.* at 1681. That qualification has no bearing on this case.

noncitizen was 'convicted' of, . . . not what acts he committed." *Id.* at 1685. Consistent with this understanding, *Moncrieffe* determined the consequences of a prior conviction without applying or even mentioning burdens of proof. Indeed, *Moncrieffe* explicitly stated that application of the categorical analysis 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, where the noncitizen bears the burden to show that he satisfies eligibility requirements, 8 U.S.C. § 1229a(c)(4). *See Moncrieffe,* 133 S. Ct. at 1685 n.4.

The inquiry is legal both as to the pure categorical approach—which hinges immigration consequences on the statute of conviction—and the modified categorical approach, which permits consideration of certain reliable criminal records in the limited circumstances when a statute of conviction "contain[s] several different crimes, each described separately." *See id.* at 1684. Even under the modified categorical approach, the inquiry is a legal question of what the record of conviction reveals as to what elements the state conviction necessarily involved. *See Descamps*, 133 S.Ct. at 2285 (modified categorical approach "retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime."); *Moncrieffe*, 133 S.Ct. at 1687 ("[a]mbiguity . . . 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). This Court has implicitly recognized that the modified categorical approach involves a legal question, characterizing its review of that approach's application in *Salem* as involving a question of law. *Salem*, 647 F.3d 114 n.3*; see also U.S. v. Diaz-Ibarra*, 552 F.3d 343, 347 (4th Cir. 2008).

The fact that the burden of proof provisions are not relevant to the application of the categorical rule does not mean that they are somehow "effectively nullified" as *Salem* feared. 647 F.3d at 116. To the contrary, the burden of proof sections are provisions of general applicability that carry force in the numerous contexts where a bar to relief involves a factual question. For instance, as to cancellation of removal, a noncitizen is barred from relief if he "engaged" in, rather than was convicted of, numerous types of unlawful activity, including criminal activity which endangers public safety or national security, 8 U.S.C. § 1227(a)(4)(A)(ii), or terrorist activities under 8 U.S.C. § 1182(a)(3), 8 U.S.C. §1227(a)(4)(B). *See* 8 U.S.C. § 1229b(c). Other forms of relief also hinge mandatory bars on factual questions. *See, e.g.,* 8 U.S.C. § 1158(b)(2)(A) (for asylum, whether the noncitizen was firmly resettled in another country prior to arriving in the United States, there are reasonable grounds to believe he is a danger to the security of the United States, or serious reasons for believing he "committed" a serious political crime); 8 U.S.C. § 1255(c) (for adjustment of status, whether 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 a prior disqualifying conviction has a circumstance-specific component, as in *Nijhawan*, 557 U.S. at 36.

Contrary to *Salem*, and as *Moncrieffe* now expressly confirms, criminal records that fail to conclusively demonstrate conviction of a disqualifying offense do not establish, as a legal matter, that a disqualifying conviction exists.

II. The BIA's Intervening Decision in *A-G-G* Requires the Court to Revisit and Overrule *Salem*.

The Panel's decision, in reliance on *Salem*, is inconsistent with the BIA's recent decision in *A-G-G*. The BIA held that, to trigger a mandatory bar to relief from removal, the government must make a prima facie showing that the bar may apply. 25 I.&N. Dec. at 501. Although *A-G-G* considered a different context and form of relief,[8] the BIA interpreted 8 C.F.R. § 1240.8(d), the same regulatory provision that governs the present case.[9] That section provides: "[i]f the evidence indicates that one or more of the grounds for mandatory denial of the application

[8] *A-G-G* considered the firm resettlement bar to asylum, under which a noncitizen is ineligible for asylum if she "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi). *A-G-G* established that the government must make a prima facie showing in order to show that such a bar applies.

[9] It would be impermissible to interpret the regulation differently solely based on the fact that its application involves a different type of relief from removal. *See Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004) (explaining that where the language is the same, the rules of statutory construction require the same interpretation).

for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." Under *A-G-G*, the government here must make a prima facie showing that Mr. Carrasco-Chavez's prior conviction was for a disqualifying offense before an immigration judge can decide whether the conviction bars relief.

Applying *Moncrieffe* and the categorical rule, in order for the government to satisfy a prima facie standard, it must demonstrate that, under the categorical rule, the conviction constitutes a bar to relief. It has failed to do so because it has not established that Mr. Carrasco-Chavez was necessarily convicted of a disqualifying offense.[10]

A-G-G is consistent with the statutorily defined structure of removal proceedings, which occur in two phases. In the first phase, the issue is whether the noncitizen is removable based on a prior conviction. In the second phase, noncitizens who are found removable present their case for relief, such as cancellation of removal. The immigration regulations assume that, by this phase, the government will have already produced criminal records as "evidence

[10] Under the analysis in *Moncrieffe*, the application of the categorical rule to the criminal bar to cancellation of removal involves a legal question. When, as here, the statute of conviction is divisible, the government can only make out a prima facie case if it shows that the record of conviction conclusively demonstrates a disqualifying conviction as a matter of law. By contrast, the showing required for a prima facie case may be different in the context of other bars to relief that raise factual questions.

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 inconclusive and cannot establish removability based on a prior conviction, the conviction also does not bar the noncitizen from eligibility for relief from removal.[11] *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.").

III. This Case Demonstrates the Extreme Unfairness of the *Salem* Rule.

The *Salem* rule can impose an impossible burden on immigrants who merit relief: to produce records that do not exist or that may be unavailable. The harsh result of applying *Salem* to a case where no conclusive records exist has troubled this Court. *See Mondragon*, 706 F.3d 538, 540 (4th Cir. 2013) (observing that Petitioner presented an "appealing . . . case" that "makes a strong claim to fairness" but finding *Salem* controlling).

As in Mr. Carrasco-Chavez's case, the government's assertion of ineligibility for relief can turn on conviction records that simply do not exist. In

[11] Although the government 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 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).

North Carolina, where Mr. Carrasco-Chavez suffered his conviction, the state courts do not create any transcript or recording of misdemeanor criminal proceedings.[12] Other state and local courts within this Circuit operate in the same way. For example, the Virginia General District Courts, which have jurisdiction of misdemeanor charges, are not courts of record under Virginia law and 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).

Even if more detailed conviction records are created at the time of a noncitizen's conviction, they may no longer exist years later, when the noncitizen's eligibility for relief arises in immigration court. In Maryland, for example, district courts permit the destruction of criminal court records as little as three years after conviction. Md. Code Ann., Cts. & Jud. Proc. § 16-505(d)(4),(5) (2013). In South Carolina, untranscribed recordings of trial court criminal proceedings may be destroyed five years after the date of the proceedings.[13] Virginia routinely destroys most criminal records ten years after final disposition.[14]

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[12] *See* 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#page=6&zoom=auto,0,537.

[13] South Carolina App. Court R. 607(i), *available at* http://www.sccourts.org/courtReg/displayRule.cfm?ruleID=607.0&subRuleID=&ruleType=APP.

[14] *See Virginia General District Court Manual,* Chapter 6- Records Retention, Destruction and Expungement, at 6-6, *available at* http://www.courts.state.va.us/courtadmin/aoc/djs/resources/manuals/gdman/chapter_6.pdf.

Even in cases where detailed, admissible records were created and are preserved, *Salem*'s holding that the noncitizen must find conclusive records places significant, often insurmountable, burdens on noncitizens in removal proceedings, 44% of whom are unrepresented, 36% of whom are detained, and 82.5% of whom are not fluent in English.[15] *Salem*'s holding is particularly harsh for detained noncitizens, who likely lack reliable access to telephones, computers, or the Internet, even when access is necessary to obtain records.[16]

The solution to the unfairness of Mr. Carrasco-Chavez's situation, and of other similarly situated immigrants, is to reject *Salem* and join the courts that have correctly held that an inconclusive record of conviction does not establish that a criminal bar to relief applies.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Carrasco-Chavez's Petition for Rehearing En Banc.

Dated: August 5, 2013

Respectfully submitted,

/s/
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[15] *See* Executive Office of Immigration Review, *FY 2012 Statistical Year Book* G-1, 0-1, F-1 (2013), *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf.
[16] *See, e.g.*, Detention Watch Network, *Expose and Close Facility Reports* (2012), *available at* http://www.detentionwatchnetwork.org/ExposeAndClose.

CERTIFICATE OF SERVICE

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Stanford, CA

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