No. 13-2653

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREDY ARNOLDO SANCHEZ

Petitioner,

v.

ERIC H. HOLDER, United States Attorney General,

Respondent.

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

BRIEF OF AMICUS CURIAE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER FREDY SANCHEZ'S PETITION FOR REHEARING

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CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 13-2653

Short Caption: Sanchez v. Holder

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

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Immigrant Defense Project

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

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(3) If the party or amicus is a corporation:

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Attorney's Printed Name: Jayashri Srikantiah

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

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Attorney's Signature: /s/ Lisa Weissman-Ward Date: September 2, 2014

Attorney's Printed Name: Lisa Weissman-Ward

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INTEREST OF AMICUS

Amicus Immigrant Defense Project (IDP) is a national non-profit organization with expertise in the interrelationship of criminal and immigration law.[2] IDP has 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. IDP has served as amicus in cases from other circuits raising the question of whether a noncitizen should be barred from immigration relief based on a past criminal conviction, even when the record of conviction is inconclusive. *See*, *e.g.*, *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Mondragon v. Holder*, 706 F.3d 535 (4th Cir. 2013); *Syblis v. Atty. Gen.*, __ F.3d__, No. 11-4478, 2014 WL 4056557 (3rd Cir. Aug. 18, 2014). In addition, the Ninth Circuit permitted post-argument briefing from Amicus regarding whether the Supreme Court's decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), overruled that Court's prior decision regarding eligibility for immigration relief in cases with a prior, inconclusive criminal record in *Young v. Holder*. *See* Order, *Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715 (May 13, 2013) (9th Cir.).

[2] More information about amicus is included in the motion for leave to file this brief.

SUMMARY OF ARGUMENT

Amicus respectfully requests that this Court either delete footnote six or modify and clarify footnote six to reflect that its applicability is limited to the context at issue in this case—the third step[3] of the test set forth by *Matter of Silva-Trevino,* 24 I & N. Dec. 687 (A.G. 2008)—and postpone consideration of its applicability outside that context until the Court has a case directly confronting that distinct issue.

Footnote six, in its current state, is not necessary to this Court's holding because it relates to recently abrogated cases concerning a burden of proof analysis upheld in a different context. The cases referenced in footnote six—*Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc)*, *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), and *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009)—all centered around application of the categorical and modified categorical approach. The Supreme Court has abrogated those decisions in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). The Court explained in *Moncrieffe* that, when deciding the immigration consequences of a prior criminal conviction through application of the modified categorical rule, courts should consider only a key legal question: did the

[3] This third step involves the "consider[ation] [of] evidence beyond the record of conviction, 'if doing so is necessary and appropriate to ensure proper application of the INA's moral turpitude provision.'" *Sanchez v. Holder,* No. 13-2653, __ F.3d __, 2014 WL 3329186, at *4 (7th Cir. Jul. 9, 2014) (*citing Matter of Silva Trevino*, 24 I &. N. at 699).

prior conviction "necessarily involve facts that correspond" to a disqualifying offense. *Id* at 1681. It does not matter who bears the burden of proof—the government or the noncitizen—because the modified categorical approach is not a factual inquiry to which burdens of proof may be appropriately applied. *See Moncrieffe v. Holder,* 133 S. Ct. at 1685 n.4.

The abrogated decisions cited by this Court in footnote six—*Young*, *Salem*, and *Garcia*—are not necessary to its analysis. As this Court's footnote itself points out, none of those decisions engaged in the factual inquiry involved in Step 3 of the *Silva-Trevino* analysis, to which burdens of proof may be applied. In fact, the Fourth Circuit and the Ninth Circuit have explicitly rejected such an analysis (*Prudencio v. Holder,* 669 F.3d 472 (4th Cir. 2012); *Olivas-Motta v. Holder*, 746 F.3d 907 (9th Cir. 2013)) and, as this Court noted, the Tenth Circuit has declined to embrace the *Silva-Trevino* Step 3 framework at this time. *Sanchez v. Holder,* No. 13-2653, __ F.3d __, 2014 WL 3329186, at *4.

Because footnote six of this Court's opinion relies on abrogated case law that examines the burden of proof question in an entirely different context, the footnote is not necessary to this Court's holding and should be deleted.

In the alternative, amicus respectfully requests that this Court amend the footnote's first sentence and its last two sentences. Amicus suggests replacing the first clause of the first sentence of the footnote, which currently reads "For this

reason, our understanding of 8 C.F.R. § 1280.8(d)'s operation is consistent with our sister circuit's decision . . . " with the following text:

"We note our sister circuit's decisions…."

Amicus also suggests replacing the last two sentences, which currently read "Thus, we, the Fourth, the Ninth, and the Tenth Circuits all agree . . . " with the following text:

> "However, in this case, we need not resolve how an inconclusive record impacts a case where the standard two step categorical and modified categorical approach apply. Under Step 3 of the *Silva-Trevino* framework, a respondent who presents an inconclusive record of conviction may lose by default under 8 C.F.R. § 1240.8(d). In our case, the Board did not go through the full *Silva-Trevino* analysis, and thus it is not yet evident whether Sanchez loses by default."

The proposed footnote would clarify that an inconclusive record may be insufficient to meet a respondent's burden of proof where the inquiry is a factual one, which is what Step 3 of the *Silva-Trevino* framework calls for under Seventh Circuit precedent. *See, e.g., Ali v. Mukasey*, 521 F.3d 737 (7th Cir. 2008). The proposed language would also postpone this Court's examination of the effect of *Moncrieffe* on earlier modified categorical rule decisions relating to the burden of proof until a future case that squarely presents the issue.

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ARGUMENT

I. This Court Should Delete or Amend Footnote Six of the Opinion Because the Categorical Rule Cases Cited in the Footnote Were Abrogated by the Supreme Court in *Moncrieffe v. Holder*.

Footnote six should be deleted, or modified as suggested above, because it relies on the decisions from the Fourth (*Salem v. Holder)*, Ninth (*Young v. Holder*) and Tenth (*Garcia v. Holder)* Circuits that the Supreme Court has since abrogated in *Moncrieffe*. Contrary to the cited decisions, *Moncrieffe* clarified that, to determine the immigration consequence of a prior criminal conviction, immigration judges must engage in a legal inquiry. In the case of a divisible statute—under which some crimes carry immigration consequences, and others do not, and where the Court is limited to a categorical and modified categorical analysis—judges must decide whether a noncitizen's record of conviction necessarily indicates a disqualifying conviction for immigration purposes. *Moncrieffe*, 133 S.Ct. at 1684-88, 1692. Because that inquiry is legal, and not factual, it does not matter whether the noncitizen bears the burden of proof or not. Consistent with this understanding, the Supreme Court specifically stated that the analysis as to immigration consequences is the same in the relief and removability contexts, even though the burden of proof is on the government as to removability, and the noncitizen as to relief. *See id*. at 1685 n.4. Not

surprisingly, after *Moncrieffe*, the Ninth Circuit ordered briefing on whether *Moncrieffe* overruled *Young*, that Court's prior decision regarding burdens of proof in the relief context. *See* Order, *Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715 (Apr. 30, 2013) (9th Cir.). The Ninth Circuit's decision on this question is pending. *See also Rendon v. Holder*, No. 10-72239, __ F.3d __, 2014 WL 4115930, at *2 n.6 (9th Cir. Aug. 22, 2014). The Ninth Circuit is not alone in reconsidering earlier burden of proof decisions based on *Moncrieffe*. *See, e.g., Mohamed v. Holder*, No. 13-2027 (4th Cir.).

In *Moncrieffe*, the Supreme Court clarified that when considering a record of conviction to decide the immigration consequences of a past conviction, the key inquiry is whether that record necessarily demonstrates a disqualifying conviction. "The reason is that the [Immigration and Nationality Act] asks what offense the noncitizen was 'convicted' of, . . . not what acts he committed." *Moncrieffe v. Holder*, 133 S.Ct. at 1685. *Moncrieffe* repeatedly stated that the immigration consequences of a prior criminal conviction turn on what elements the conviction "necessarily" involved, a legal inquiry. *See id*. 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 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. *Id.* at 1687. Under *Moncrieffe*, when the record of conviction fails to conclusively demonstrate a disqualifying conviction, the record cannot establish, as a legal matter, that such a conviction exists.

Whether the statute assigns the burden of proof to the government or the noncitizen does not matter to deciding the legal question of what a prior conviction necessarily involved. *See Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) (rejecting government's argument based on the noncitizen's burden of proving eligibility for relief from removal as impermissibly requiring that the noncitizen has to show not only that he does not have a conviction falling within the criminal bar, but also that the particular conduct that led to his conviction would not qualify under the bar); *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006); *Thomas v. Holder,* 625 F.3d 134, 147-148 (3rd. Cir. 2010). Either way, a court must presume that the conviction rested upon the least of the acts criminalized. *Moncrieffe* recognized as much, noting that "conviction" is "the relevant statutory hook," *see Moncrieffe v. Holder*, 133 S. Ct. at 1685, and explicitly stating

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

Moncrieffe abrogated *Young*, *Salem*, and *Garcia* because those decisions incorrectly held that a noncitizen is barred from relief from removal based on a prior conviction even when the record of that conviction is inconclusive. Under *Moncrieffe*, an inconclusive prior record means that the noncitizen was not necessarily convicted of a disqualifying conviction as a matter of law. Regardless of who bears the burden of proof, the conviction cannot disqualify the noncitizen from relief. [4]

Because the citations relied upon by this Court in footnote six have been abrogated by the Supreme Court, amicus respectfully requests that this

[4] The Third Circuit's recently issued decision in *Syblis* v. *Atty Gen*. No. 11-4478, __ F.3d __, 2014 Wl 4056557 (3rd Cir. Aug. 18, 2014), is not to the contrary. *Syblis* did not mention, much less discuss, *Moncrieffe*. This may be because the *Syblis* court made clear that its decision did not involve the application of the categorical or modified categorical approach. *See id.* at *5-6. Prior to *Syblis*, another panel of the Third Circuit applied the modified categorical approach to hold that when the noncitizen's record of conviction was not conclusive, he was not barred from immigration relief despite his conviction. *See Thomas v. Holder*, 625 F.3d at 147-148.

Court delete or amend footnote 6 with the language suggested above. Amicus respectfully suggests that this Court address *Moncrieffe* and its effects on the burden of proof analysis in a future case that squarely raises the issue.

II. This Court Should Delete or Amend Footnote Six to Clarify that the Immigration Burden of Proof Provision Applies Here Because the Analysis is Factual in Nature and Leave for Another Day Its Applicability in the Categorical Rule Legal Analysis Context.

This Court need not reach the question of whether *Moncrieffe* applies to legal inquiries such as the application of the modified categorical approach because this case involves the factual inquiry of Step 3 of the *Silva-Trevino* analysis. While the burden of proof does not matter for legal inquiries, it is relevant and applicable to Step 3 of *Silva-Trevino* and a range of other contexts involving factual questions as to eligibility for immigration relief.

The immigration burden of proof sections—8 U.S.C. § 1229a(c)(4) and 8 C.F.R. § 1240.8(d)—apply to a broad range of factual inquiries, including Step 3 under the *Silva-Trevino* analysis that this Circuit employs. When this Court evaluates (pursuant to Step 3 of *Silva-Trevino*) evidence outside of the standard record of conviction for purposes of determining whether a particular crime is a crime of moral turpitude, it is engaged in a factual inquiry. As such, the regulatory and statutory burden of proof

provisions may come into play. Other examples of factual inquiries where the burden of proof provisions are applicable include: 8 U.S.C. § 1229b(c) (where a cancellation of removal applicant 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)); 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); 8 U.S.C. § 1229b(b) (for nonpermanent residents seeking cancellation of removal, continuous physical presence and extreme or unusual hardship to a qualifying relative). In addition, burdens of proof may be relevant when a prior disqualifying conviction has a circumstance-specific component, as in *Nijhawan v. Holder*, 557 U.S 29, 36 (2009).

Footnote six should be deleted or modified—per the suggested language above—to clarify that the immigration burden of proof provisions

apply because Step 3 of *Silva-Trevino* is a factual analysis that can involve various non-record types of evidence including, for example, affidavits.

Amicus respectfully suggests that if this Court wishes to engage in an analysis of the burden of proof issue in the categorical rule context (outside the scope of the Step 3 *Silva-Trevino* framework at issue in this case), it do so in a case that directly confronts the issue and with the benefit of full relevant briefing and discussion.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Sanchez's Petition for Rehearing for the purposes of deleting or amending footnote 6.

Dated: September 2, 2014

Respectfully submitted,

_____/s/_____

Jayashri Srikantiah
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*Admission pending

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/(s) Jayashri Srikantiah, Attorney for Amicus Curiae, Immigrant Defense Project
Dated: September 2, 2014

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Date: September 2, 2014 ___/s/_____

Stanford, CA

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