UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

DAMIAN ANDREW SYBLIS, Petitioner v. ATTORNEY GENERAL OF THE UNITED STATES, Respondent.	)	No. 11-4478

MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF PETITIONER DAMIAN ANDREW SYBLIS'S PETITION FOR REHEARING

Proposed amicus the Immigrant Defense Project ("IDP") requests leave to file the brief as amicus curiae in support of Petitioner Damian Andrew Syblis's petition for rehearing attached at Exhibit A. *See* Fed. R. App. P. 27, 29. Counsel for the Petitioner has consented to this motion. Counsel for the Respondent takes no position as to this motion.

Proposed amicus IDP is one of the nation's leading non-profit organizations with specialized expertise in the interrelationship of criminal and immigration law. IDP specializes in advising and training criminal defense and immigration lawyers

nationwide, as well as immigrants themselves, on issues involving the immigration consequences of criminal convictions.

IDP has appeared as amicus curiae earlier in this case, as well as in numerous other cases in this Court and the Supreme Court regarding immigration consequences of prior criminal convictions. *See, e.g.*, Brief of Amici Curiae IDP et al. in Support of Petitioner in *Mellouli v. Holder*, Dkt. No. 13-1034 (*cert. granted* June 30, 2014); Brief of Amici Curiae IDP et al. in Support of Petitioner in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); Brief of Amici Curiae IDP et al. in Support of Petitioner in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); Brief of Amici Curiae IDP et al. in support of Petitioner in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009); Brief of Amici Curiae IDP et al. in Support of Petitioner in *Lopez v. Gonzalez*, 549 U.S. 47 (2006); Brief of Amici Curiae New York State Defenders Association (including IDP) et al. in Support of Petitioner in *Leocal v. Ashcroft*, 543 U.S. 1 (2004); Brief of Amici Curiae IDP et al. in *Desrosiers v. Hendricks* (3rd Cir.) (No. 12-2053); Brief of Amici Curiae IDP et al. in *Sylvain v. Atty. Gen.* (3rd Cir.) (No. 11-3357); Brief of Amici Curiae New York State Defenders Association (including IDP) et al. in *Ponnapula v. Ashcroft* (3rd Cir.) (No. 03-1255).

Amicus and counsel for amicus have a particular longstanding interest in the specific issue raised by this appeal—the effect of a burden of proof provision in the

immigration criminal removal context—and has addressed this issue as amicus curiae in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Mondragon v. Holder*, 706 F.3d 535 (4th Cir. 2013); *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014); *Syblis v. Atty. Gen.*, 763 F.3d 348 (3d Cir. 2014); and *Almanza-Arenas v. Holder*, __F.3d__, 2014 WL 5801416 (9th Cir. Nov. 10, 2014). Amicus and counsel have also authored a practice advisory about the burden of proof in removal proceedings. *See* http://immigrantdefenseproject.org/wp-content/uploads/2012/05/IDP-Practice-Advisory-Cancellation-Burden-of-Proof-Revised-5-4-12-FINAL.pdf. Finally, counsel for amicus was part of the team representing the petitioner before the Supreme Court last year in *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013).

The grounds for this motion are the following:

1. Proposed amicus IDP offers this brief to urge the Court to grant Petitioner's request for rehearing to hold this case in abeyance pending the Supreme Court's decision next year in *Mellouli v. Holder*, or in the alternative, to modify its decision to avoid conflict with precedent decisions in this Circuit issued before and after the decision in this case regarding the application of the burden of proof to cases that do not involve the strict or modified categorical approach.

2. *Mellouli v. Holder*, like this case, involves the question of whether a state drug paraphernalia offense may be deemed a violation of a law "relating to a

controlled substance (as defined in section 802 of Title 21)" even when the state offense may relate to substances not included in the 21 U.S.C. § 802 federal "controlled substance" definition. In deciding this question, the Supreme Court will discuss whether the categorical approach applies to the controlled substance removability grounds, a fundamental issue in this case. *See Syblis v. Att'y Gen.*, 763 F.3d 348, 355 (3d Cir. 2014); *see also Rojas v. Att'y Gen.*, 728 F.3d 203, 215 (3d Cir. 2013). What the Supreme Court says in *Mellouli* will have direct bearing on the decision issued in this case, and whether a noncitizen with an inconclusive record of conviction for a prior drug offense can demonstrate eligibility for relief from removal. Furthermore, the decision in *Mellouli* will speak to the conflict between the Court's decision in this case and this Circuit's precedential decisions in *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010) and *Hernandez-Cruz v. Att'y Gen.*, 764 F.3d 281 (3d Cir. 2014) because it will address whether the burden of proof provisions apply in cases that are subject to categorical analysis. To avoid intra-circuit conflict on this question of the burden of proof, this Court should await the Supreme Court's guidance in *Mellouli* before issuing a decision in this case.

3. In the alternative, this Court should modify its current decision to expressly indicate that the burden of proof provisions apply to a noncitizen in the relief eligibility context only where neither the formal nor modified categorical

approach applies to deciding whether a prior offense falls within one of the criminal deportability or inadmissibility grounds. This Court's decisions in *Thomas* and *Hernandez-Cruz* make clear that the burden of proof provisions do not apply where the categorical approach applies. If this Court does not modify the language in its decision in this case to correct this internal tension regarding the categorical vs. non-categorical case distinction, this decision will create an intra-circuit conflict on this question of the burden of proof.

As amicus counsel in *Mellouli v. Holder* and *Almanza-Arenas v. Holder*, IDP is particularly attuned to the substantive overlap between the issues at play in those cases and this case. The Supreme Court's decision in *Mellouli* will have inevitable impact—potentially substantial impact—on the decision issued in *Syblis*, as well as the deepening circuit split on the applicability of the burden of proof provisions to noncitizens seeking to establish eligibility for relief from removal, prior criminal offenses notwithstanding. *Compare Almanza-Arenas v. Holder*, __F.3d__, 2014 WL 5801416 (9th Cir. Nov. 10, 2014) (declining to apply the burden of proof to a noncitizen seeking relief in a categorical approach case); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008) (same); *Hernandez-Cruz v. Att'y Gen.*, 764 F.3d 281 (3d Cir. 2014) (same); *with Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011) (applying the burden of proof to a noncitizen seeking relief in a

categorical approach case ; *Garcia v. Holder*, 548 F.3d 1288, 1290 (10th Cir. 2009) (same).

Counsel for amicus has informed counsel for the parties of the intended filing of this Motion. Counsel for the Petitioner, Ryan Muennich, has informed counsel for Amicus that the Petitioner consents to this Motion. Counsel for Respondent, Anthony Nicastro, has informed counsel for Amicus that the Respondent takes no position on this Motion. Amicus is represented *pro bono* by undersigned counsel.

For the foregoing reasons, proposed Amicus respectfully moves the Court for permission to file the concurrently-filed brief attached at Exhibit A in support of Petitioner's petition for rehearing.

Dated: November 18, 2014

Respectfully submitted,

__/s/_____

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), amicus curiae the Immigrant Defense Project states that no publicly held corporation owns 10% or more of the stock of any of the parties listed above, which is a nonprofit organization.

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

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number 11-4478

I, Nancy Morawetz, hereby certify that I electronically filed the foregoing document and referenced brief with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on November 18, 2014.

I certify that all participants in the case that require service are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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New York, NY

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EXHIBIT A:

BRIEF OF AMICUS CURIAE IMMIGRANT DEFENSE PROJECT IN SUPPORT OF PETITIONER DAMIAN ANDREW SYBLIS'S PETITION FOR REHEARING

No. 11-4478

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Damian Andrew Syblis

Petitioner,

v.

Attorney General of the United States,

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 DAMIAN ANDREW SYBLIS'S PETITION FOR REHEARING

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Pursuant to Fed. R. App. P. 29(c)(5), amicus curiae states 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 amicus curiae and its counsel contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION AND STATEMENT OF INTEREST OF AMICUS

Proposed amicus Immigrant Defense Project ("IDP") respectfully submits this brief in support of rehearing in this case in order to support the petitioner's request that this Court hold final resolution of this case in abeyance pending the Supreme Court's decision in the directly relevant case of *Mellouli v. Holder*, Dkt. No. 13-1034, to be argued by the Supreme Court in January 2015. Alternatively, amicus requests that this Court make a small modification in its opinion in this case in order to avoid conflict with other Third Circuit precedent decisions issued both before and after the decision in this case.

Proposed amicus IDP is one of the nation's leading non-profit organizations with specialized expertise in the interrelationship of criminal and immigration law. IDP advises and trains criminal defense and immigration lawyers nationwide, as well as immigrants themselves, on issues involving the immigration consequences of criminal convictions. 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 already appeared as amicus in this case and in several cases before the Courts of Appeals and Supreme Court regarding the application of the criminal grounds of removability, and specifically about the application of the

burden of proof provisions to cases involving eligibility from relief from removal and prior criminal offenses.

ARGUMENT

I. THIS COURT SHOULD HOLD FINAL RESOLUTION OF THIS CASE IN ABEYANCE PENDING THE SUPREME COURT'S DECISION IN THE DIRECTLY RELEVANT CASE OF *MELLOULI V. HOLDER*

The Supreme Court will hear argument the week of January 12, 2015 in *Mellouli v. Holder*, a case that like this case involves the question of whether a state drug paraphernalia offense may be deemed a violation of law "relating to a controlled substance (as defined in section 802 of Title 21)" even when the state offense may relate to substances not included in the federal "controlled substance" definition at 21 U.S.C. § 802.[1] In the process of resolving this question, the

[1] Specifically, the Supreme Court granted certiorari on the following "Question Presented":

> Under 8 U.S.C. § 1227(a)(2)(B)(i), a noncitizen may be removed if he has been convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21) ...." Regarding removal based on a state conviction for possessing drug paraphernalia, the circuits are split on whether the paraphernalia must be related to a substance listed in Section 802 of Title 21, the Controlled Substances Act.
>
> To trigger deportability under 8 U.S.C. § 1227(a)(2)(B)(i), must the government prove the connection between a drug

Supreme Court will need to address the appropriate methodology for determining whether one has been convicted of such a controlled substance violation, *i.e.*, whether the strict and modified categorical approach applies. If the Supreme Court determines that the strict and modified categorical approach applies, a critical underpinning of this Court's opinion in this case will be erased.

In this case, the Court determined that the categorical approach does not apply. *See Syblis v. Att'y Gen.*, 763 F.3d 348, 355 (3d Cir. 2014) (citing *Rojas v. Att'y Gen.*, 728 F.3d 203, 215 (3d Cir. 2013) as stating that the formal categorical approach does not apply to a "relating to" inquiry."); *id.* at 356 ("We have already determined above that the categorical approach does not apply in the case before us today."). This conclusion was critical to the decision to find that Mr. Syblis did not meet his relief eligibility burden of proof with an inconclusive record of conviction. This is because the Court's conclusion that the categorical approach does not apply in this case allowed the Court to distinguish its own precedent, *Thomas v. Att'y Gen.,* 625 F.3d 134 (3d Cir. 2010), in which this Court held the opposite, *i.e.*, that a conviction could *not* be deemed to fall into a criminal classification barring eligibility for relief where the record of conviction was

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> paraphernalia conviction and a substance listed in section 802 of the Controlled Substances Act?

See "Question Presented" in *Mellouli v. Holder*, posted at http://www.supremecourt.gov/qp/13-01034qp.pdf.

inconclusive. *Id.* at 148. This Court stated in its opinion here: "In *Thomas*, our inquiry required resort to the categorical approach, which we have expressly rejected here." *Syblis*, 763 F.3d at 357, n.12. This Court's expressly distinguishing *Thomas* from *Syblis* on this basis is necessary to maintaining uniformity and coherence within this Circuit's jurisprudence on the burden of proof question in the context of criminal deportability and inadmissibility, and eligibility for discretionary relief.

In contrast, the Eighth Circuit in *Mellouli*, as this Court recognized in *Rojas*, applied the categorical approach to the "relating to" inquiry in the controlled substance context. *Rojas*, 728 F.3d at 228, n.18. Whatever the Supreme Court decides on the specific question presented in *Mellouli*—what the Supreme Court states about the appropriate methodology for determining whether an offense may be deemed a violation of law "relating to a controlled substance (as defined in section 802 of Title 21)"—will be directly relevant to the question of whether the Court's decision in this case is or is not in direct conflict with prior Third Circuit precedent in *Thomas*. It is thus apparent that the issues before the Court in *Mellouli* are germane to this Court's decision in the instant case. Consequently, this Court should hold final resolution of this case until the Supreme Court has issued its decision in *Mellouli*.

The Supreme Court's grant of certiorari in *Mellouli* will settle this thread of disagreement among the circuit courts surrounding the appropriate methodology for analyzing a controlled substance removability ground, and whether this Circuit is correct in rejecting the categorical approach as not the proper methodology. *See Rojas*, 728 F.3d at 228, n.18 (stating that the categorical approach is not the proper methodology for the controlled substance deportability ground); *Syblis*, 763 F.3d at 357, n. 7-8 (same, and extending the rationale to the controlled substance inadmissibility ground). It makes no difference that *Mellouli* emerges in the context of a noncitizen's deportability, 719 F.3d 995, 996 (8th Cir. 2013), *cert. granted*, 82 U.S.L.W. 3540 (U.S. June 30, 2014) (No. 13-1034), whereas the instant case emerges through a noncitizen's application for discretionary relief from removal and addresses a noncitizen's inadmissibility under a controlled substance ground. *See Syblis*, 763 F.3d at 350-51. The issues presented in *Mellouli* reach beyond the controlled substance ground of deportability and implicate the parallel ground of inadmissibility and provisions regarding criminal disqualification from relief from removal. This is apparent chiefly for the following reasons.

First, the Supreme Court itself has made clear that the methodology does not differ according to whether a criminal classification question arises in the deportability or relief eligibility context. In *Moncrieffe v. Holder*, the Supreme

Court found that "[o]ur analysis is the same in both" the context of deportability and the context of relief from removal. 133 S. Ct. 1678, 1685, n.4 (2013); *see also Almanza-Arenas v. Holder*, __ F.3d __, 2014 WL 5801416, *6 (9th Cir. Nov. 10, 2014).

Second, the Supreme Court's holding in abeyance of the certiorari petition in a related case, *Madrigal-Barcenas v. Holder*, Dkt. No. 13-697, suggests that the Court anticipates its decision in *Mellouli* will dictate outcomes for noncitizens contesting deportability and inadmissibility, and also for noncitizens seeking to establish eligibility for discretionary relief. The immigration agencies and Ninth Circuit found the noncitizen in *Madrigal-Barcenas* ineligible for cancellation of removal under 8 U.S.C. § 1229b(b)(1) (cancellation of removal for certain *nonpermanent* residents) because of a state paraphernalia offense that triggered the removability provisions at 8 U.S.C. § 1227(a)(2)(B)(i) (controlled substance deportability) and 8 U.S.C. § 1182(a)(2)(B)(i) (controlled substance inadmissibility). *See Madrigal-Barcenas v. Holder*, 507 Fed.App'x 716 (9th Cir. 2013), *pet. for reh'g denied* (July 29, 2013), *cert. pet. filed* (Dec. 6, 2013, No. 13-697). Madrigal-Barcenas sought review of the Ninth Circuit's decision and petitioned for certiorari in December 2013, *see id.*, approximately three months before the noncitizen in *Mellouli*. *See* "Proceedings and Orders" in *Mellouli v. Holder*, posted at

http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-1034.htm. The Court granted certiorari in *Mellouli* in June 2014, *see id.*, and has proceeded to full briefing and scheduled oral argument for January 2015. To date, the Court has held the certiorari petition in *Madrigal-Barcenas* in abeyance presumably pending decision in *Mellouli*. *See* "Proceedings and Orders" in *Madrigal-Barcenas v. Holder*, posted at http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/13-697.htm.

Finally, this Court itself has announced its perspective that the controlled substance grounds of deportability and inadmissibility are "substantively identical." *Syblis*, 763 F.3d at 357, n.7. Even if the Court's decision in *Mellouli* is narrowly tailored to the controlled substance ground of *deportability*, under this Circuit's reasoning the decision will still dictate the outcome in the instant case. It is all but inevitable that the Court's decision in *Mellouli* will have direct bearing on the decision issued in this case. For this reason, this Court should await decision in *Mellouli* before issuing its mandate in this case.

II. IN THE ALTERNATIVE, IN ORDER TO AVOID CONFLICT WITH OTHER THIRD CIRCUIT PRECEDENT DECISIONS ISSUED BOTH BEFORE AND AFTER THE DECISION IN THIS CASE, THIS COURT SHOULD CLARIFY THAT ITS IMPOSED LIMITATION ON A NONCITIZEN'S ABILITY TO SATISFY HIS BURDEN OF PROOF IN THE RELIEF ELIGIBILITY CONTEXT IS LIMITED TO CASES THAT DO NOT INVOLVE APPLICATION OF THE STRICT OR MODIFIED CATEGORICAL APPROACH

The language in this Court's decision in this case is internally inconsistent with respect to the applicability of the burden of proof provisions to a noncitizen's ability to demonstrate he is not criminally barred from seeking relief from removal. To avoid conflict with this Circuit's own decisions in *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010) and *Hernandez-Cruz v. Att'y Gen.*, 764 F.3d 281 (3d Cir. 2014), this Court should clarify that the burden of proof provisions apply to the noncitizen in this case because this case does not involve application of the categorical approach. Accordingly, this Court should modify its decision in this case to make explicit that the burden of proof provisions apply to Syblis because this Court is not undertaking categorical analysis, and also to reflect that that this decision does not, in fact, align with other circuit court decisions that applied the burden of proof provisions in cases that *did* involve categorical analysis.

To distinguish its decision in this case from its prior decision in *Thomas,* this Court identified *Thomas* as a case that involved application of the categorical approach. *See Syblis,* 763 F.3d at 357, n.12. This distinction brings this Court's decision in *Syblis* into step with this Circuit's jurisprudence on the burden of proof question in *Thomas* and *Hernandez-Cruz,* both of which apply the categorical approach and not the burden of proof provisions. However, at the same time, this Court's opinion in *Syblis* overtly aligns itself with decisions in other circuits that involved application of the categorical approach and yet applied the burden of

proof provisions. *Syblis*, 763 F.3d at 357. It is this language regarding the *Syblis* decision's relationship to other circuit decisions on the burden of proof that is untenable, as it creates discord within this Circuit's own jurisprudence which is otherwise internally coherent.

This Circuit consistently in its published decisions declines to apply the burden of proof provisions in the relief eligibility context when employing categorical analysis, and applied those same provisions in *Syblis* only when stepping outside of strict or modified categorical analysis. In *Thomas*, issued before *Syblis*, this Circuit applied the "formal categorical approach," 625 F.3d at 142, to a New York State marijuana sale statute and found the noncitizen eligible to apply for discretionary relief despite a record of conviction that was inconclusive on the specific element that determined whether the conviction was an aggravated felony. *Id.* at 148. The *Thomas* court concluded the noncitizen's "convictions…[did] not constitute drug trafficking crimes that qualify as aggravated felonies…and remand[ed] for further proceedings," *i.e.*, for the noncitizen to apply for relief from removal. *Thomas*, 625 F.3d at 148. Similarly, in *Hernandez-Cruz*, issued after *Syblis*, this Circuit applied the "categorical approach to determine whether a conviction constitutes a CIMT," 764 F.3d at 285 (citing *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 465-66 (3d Cir. 2009)), that would render an undocumented noncitizen ineligible from applying for relief

in the form of cancellation of removal for certain nonpermanent residents. 8 U.S.C. § 1229b(b)(1)(C). As in *Moncrieffe*, the analysis focused exclusively on "the least of the acts criminalized" under the statute of conviction, and otherwise ignored the contents of the individual noncitizen's record of conviction. *Hernandez-Cruz*, 764 F.3d at 283 ("Applying the categorical approach, we conclude that the least culpable conduct criminalized under Pennsylvania's…statute does not implicate moral turpitude."); *see also Almanza-Arenas v. Holder*, __ F.3d __, 2014 WL 5801416, *6 (9th Cir. Nov. 10, 2014) (quoting *Moncrieffe*, 133 S.Ct. at 1684). The Court found the offense, under the strict categorical approach, was not a CIMT and therefore did not criminally disqualify the noncitizen from applying for relief. *See Hernandez-Cruz*, 764 F.3d at 287. As in *Thomas*, the Court did not apply the burden of proof provisions, further enforcing this Circuit's perspective that those provisions are not applicable in cases that involve categorical analysis.

The language in the opinion in this case in which the Court states that "we…align our case law with that of the Fourth, Ninth, Seventh, and Tenth Circuits," to the extent that the case law of these other circuits extends this court's application of the burden of proof provisions to categorical approach cases, contraverts this Circuit's body of case law. As distinguished from this Circuit's decisions in *Thomas* and *Hernandez-Cruz*, the Fourth and Tenth Circuits *do*, and the Ninth Circuit at the time of the issuance of *Syblis did*, apply the burden of proof

provisions in cases where the categorical approach applies. *See Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011); *Garcia v. Holder*, 548 F.3d 1288, 1290 (10th Cir. 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc). In fact, this Circuit's case law regarding the burden of proof provisions in the relief eligibility context was consistent at the time only with that of the Seventh Circuit. *See Sanchez v. Holder*, 757 F.3d 712, 722, n.6 (7th Cir. 2014), which similarly to *Syblis*, applied the burden of proof provisions in a case that was not subject to any version of the categorical approach. 757 F.3d at 718 (applying the "third step" of the *Silva-Trevino* analysis to determine if a conviction is a CIMT disqualifying a noncitizen from applying for discretionary relief).

Moreover, the Ninth Circuit has recently withdrawn from its position in *Young v. Holder* that the burden of proof provisions are determinative in cases where the categorical approach is applied. *See Almanza-Arenas v. Holder*, __ F.3d __, 2014 WL 5801416, *6 (9th Cir. Nov. 10, 2014). Thus, to the extent this Court relied on the prior Ninth Circuit's decision in *Young v. Holder* to reach its opinion about the applicability of burden of proof provisions in the relief eligibility context here, that decision has now been withdrawn in relevant part, providing an additional reason for this Court to modify its opinion in this case. *Almanza-Arenas v. Holder*, __ F.3d __, 2014 WL 5801416, *6 (9th Cir. Nov. 10, 2014)

To prevent unnecessary conflict with existing precedent in this Circuit, as well as with the new Ninth Circuit decision in *Almanza-Arenas v. Holder*, this Court should amend the language in its opinion in this case to clarify that the Court is not aligning its case with other circuits' case law that has applied a noncitizen burden of proof in the categorical approach context in a way that is inconsistent with Third Circuit precedent, and instead make clear that the opinion does not reach the question of the effect of a noncitizen burden of proof in a case where the categorical approach does apply. To do so, amicus respectfully suggests that the Court amend the language of the first full paragraph at page 357 of the opinion to delete the last three sentences of that paragraph and substitute the following text following the citation "*See Garcia*, 584 F.3d at 1290.":

> Since the categorical approach does not apply to the case before us today, however, we need not reach the question addressed by the Second Circuit of the effect of the noncitizen's burden of proof in a case where the categorical approach applies. We now hold that an inconclusive record of conviction does not satisfy a noncitizen's burden of demonstrating eligibility for relief from removal in a case in which the formal categorical approach does not apply.

Refining the language in the Court's opinion in this case thus will "secure and maintain uniformity of [this] court's decisions" on the burden of proof question and stave off intra-circuit conflict. FRAP 35(b)(1)(A).

CONCLUSION

For the foregoing reasons, this Court should grant Mr. Syblis's Petition for Rehearing and hold this case pending the Supreme Court's impending decision in *Mellouli v. Holder* or, at a minimum, clarify that its holding regarding the noncitizen's burden of proof is limited to cases that do not involve application of the categorical approach.

Date: November 18, 2014
New York, NY

/s

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS (PURSUANT TO RULE 32(a)(7))

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/(s) Nancy Morawetz, Attorney for Amicus Curiae, Immigrant Defense Project

Dated: November 18, 2014

CERTIFICATE OF SERVICE

When All Case Participants are Registered for the Appellate CM/ECF System

U.S. Court of Appeals Docket Number 11-4478

I, Nancy Morawetz, hereby certify that I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on November 18, 2014.

I certify that all participants in the case that require service are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: November 18, 2014
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ANTIVIRUS CERTIFICATION

I hereby certify that Microsoft Security Essentials, version 1.189.119.0, a virus detection program, was run on this file on November 18, 2014, and that no virus was detected.

Date: November 18, 2014
New York, NY

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