U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Office of the Chief Clerk

December 20, 2021

Katherine Evans
Immigrant Rights Clinic
Duke University School of Law
210 Science Dr., Box 90360
Durham, NC 27708

Re: A093-494-593 – Maitland, Keible
Request to Appear and Amicus Brief in Amicus Invitation No. 21-30-09

Dear Amici and Parties:

The Board of Immigration Appeals received on December 1, 2021, your request to file amicus curiae brief and the brief itself in the above referenced case currently pending at the Board.

Your brief has been accepted and placed in the record of proceedings. We thank you for your participation in this matter. However, please note that the acceptance of your brief does not signify that the Board will rely on its contents or analysis, nor does it guarantee that the authors of your brief will be specifically recognized in the Board's decision.

If the respondent, or the Department of Homeland Security wishes to file a response to the amicus brief, it is due no later than **January 10, 2021**. A copy of the reply brief should be filed directly with the Board, along with proof of service on opposing counsel. Please see Chapter 4.6(h) and 4.7(a)(ii) of the Board's Practice Manual.

Respectfully,

McKayla Bobiski

McKayla Bobiski
Information Management Team

Enclosure

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Chief Clerk
5107 Leesburg Pike, Suite 2000
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December 20, 2021

Katherine Evans
Immigrant Rights Clinic
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Durham, NC 27708

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Enclosure

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals
Office of the Chief Clerk
5107 Leesburg Pike, Suite 2000
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November 10, 2021

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Durham, NC 27708

Jayashri Srikantiah
Immigrants' Rights Clinic
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94303

Re: Amicus Invitation No. 21-30-09

Dear Amici:

The Board of Immigration Appeals received on November 2, 2021, your request for extension of time in which to file your amicus curiae brief. Your request is hereby granted as follows:

Your brief and two copies should be submitted to the Board, no later than **December 1, 2021.** In addition please attach a copy of this letter to the front of your brief. Please note: No further extensions will be considered. The Board is also hereby increasing the page limit for the Amicus briefs to 30 pages.

Respectfully,

McKayla Bobitski

McKayla Bobitski
Appeals Examiner
Information Management Team

cc: James T. Dehn, Chief
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December 1, 2021

Amicus Clerk
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

Re: Amicus Invitation No. 21-30-09

Dear Sir or Madam:

Enclosed for filing please find the following documents in the above referenced matter:

- Letter granting additional time and pages limit for the amicus brief.
- Request to Appear as Amici Curiae and Brief of Immigration Law Scholars as Amici Curiae in Support of the Respondent.
- Two copies of the above

Please contact me at evans@law.duke.edu or 919-613-7036 with any questions.

Sincerely,

Katherine Evans

cc: Department of Homeland Security-Office of the Chief Counsel; Benjamin R. Winograd, Immigrant & Refugee Appellate Center, LLC; Rosina Stambaugh, The Law Office of Rosina Stambaugh

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

In re:	)
Amicus Invitation No. 21-30-09	)

REQUEST TO APPEAR AS *AMICI CURIAE* AND BRIEF OF IMMIGRATION LAW SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

REQUEST TO APPEAR AS AMICI CURIAE

In response to the Board's Amicus Invitation No. 21-30-09, the law professors listed in the appendix to the attached proposed brief of *amici curiae* respectfully request permission from the Board to appear as *amici* in the above-captioned matter. The Board may grant permission to appear, on a case-by-case basis, if it serves the public interest. 8 C.F.R. § 1292.1(d).

Proposed *amici curiae* are 65 professors of law who specialize in immigration law, including its intersection with administrative and criminal law. *Amici* have an interest in the Board of Immigration Appeals (BIA)'s proper application of the "categorical approach," which has served as a bedrock principle of immigration adjudications involving criminal convictions for over a century. They have submitted numerous amicus briefs on behalf of law professors for the U.S. Courts of Appeals and the Supreme Court on issues related to deportability and eligibility for relief from removal. In addition, the Supreme Court has cited *amici*'s scholarly work in explaining the origins and operation of the categorical approach in immigration cases. *Moncrieffe v. Holder*, 569 U.S. 184, 191, 201 (2013) (citing immigration law professors' *amici* brief and *amici* scholarship); *Mellouli v. Lynch*, 575 U.S. 798 (2015) (citing *amici* scholarship).

Proposed *amici* have extensive experience with issues related to the categorical approach and its proper interpretation. The questions presented in this amicus invitation are drafted in a way that misunderstands the central role of the term "conviction" in the immigration laws and how it affects what record documents are appropriate sources for determining the nature of a conviction. The questions further misunderstand the treatment of applications for relief from persecution in the immigration laws and overstate the issues decided in *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021). As framed, the questions threaten to upend crucial safeguards in the immigration law for accommodating disparate state laws within a federal system of deportation laws. Proposed *amici* respectfully request leave to appear as *amici curiae* and file the following brief.

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SUMMARY OF ARGUMENT

The BIA asks *amici* to address whether documents covered by INA § 240(c)(3)(B) can be consulted under the modified categorical approach, whether the contents of a transcript from a sentencing hearing or sentencing modification hearing can be used to identify which offense within a divisible statute the noncitizen was convicted of, and whether an inconclusive record precludes eligibility for asylum and withholding of removal. The answer to each of the three questions presented is no.

The categorical approach has long governed the determination of whether an offense, by its nature, triggers immigration consequences. This approach was first developed in the federal courts more than a century ago and was adopted shortly thereafter by the BIA. Rooted in Congress's choice to tie immigration consequences to convictions and not conduct, adjudicators must confine their analysis to what the state conviction necessarily involved, as defined by its elements. Where a criminal statute punishes more than one crime, an adjudicator may look to the record of conviction to discern whether it specifies the relevant crime under the modified categorical approach. The focus of the categorical and modified categorical inquiries remain the same: to determine if the minimum conduct necessarily established by conviction matches the offense defined in the relevant federal immigration law. Examination of the underlying acts committed is not permitted under either approach.

Section 240(c)(3)(B) plays no role in the operation of the categorical and modified categorical approaches. The statute merely codified a pre-existing regulation adopted to address record sharing practices mandated by the Immigration Act of 1996 and to clarify the admissibility of these records. The history and text of the regulation and the subsequent statute make clear that these rules govern the admissibility of certain records as evidence of the existence of a conviction but do not govern the determination of the nature of that conviction.

Accordingly, federal courts and the agency have distinguished between documents that are admissible for the fact of a conviction and documents that can be consulted to determine whether that conviction triggers immigration consequences.

The Supreme Court in *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), reaffirmed the categorical and modified categorical approaches as they have been traditionally applied in both the immigration and criminal contexts. Just as the categorical approach dates back more than a century, so too does adjudicators' reliance on the record of conviction to apply the modified categorical approach. Long before the Supreme Court's decisions in *Shepard v. United States*, 544 U.S. 13 (2005), and *Taylor v. United States*, 495 U.S. 575 (1990), federal courts and the agency have confined their inquiry to the reliable documents that make up the record of conviction in order to determine inherent nature of an offense. *Pereida* does not hold that those documents, which are outside the record of conviction but described in INA § 240(c)(3)(B), can be consulted as part of the modified categorical approach. Rather, it affirms the modified categorical approach as described by *Shepard*, including its reliance on the record of conviction.

Pereida is also inapposite to the appropriate burden on the respondent. First, the respondent in this case sought persecution based relief which is governed by a distinct statutory scheme that was not at issue in *Pereida*. Second, even as to the types of cancellation relief at issue in *Pereida*, *Pereida*'s dicta regarding inconclusive records in other cases must be read in harmony with the Board's decision in *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009). *Matter of Almanza* appropriately looks to whether the Immigration Judge has made a reasonable request of the respondent for records and whether the respondent has provided an explanation for not providing records. This framework should govern resolution of whether the respondent met their burden here.

ARGUMENT

I. THE CATEGORICAL APPROACH, WHICH APPLIES WHEREVER THE INA USES THE TERM "CONVICTION," IS A LONGSTANDING RULE REQUIRING RELIABLE RECORDS OF A CONVICTION AND GOVERNS THE RESPONSE TO ALL THREE QUESTIONS

The Amicus questions all relate to how immigration adjudicators should evaluate whether an individual has been convicted of an offense and how that conviction fits into the immigration law's provisions for removal and eligibility for relief. The answers to the questions necessarily depend on the long history of how immigration law determines what a person has been convicted of and how that conviction fits into the categories for removal and relief eligibility.

For over a century, immigration adjudicators have applied a categorical approach to determine whether a person has been "convicted" of an offense triggering immigration consequences. *Moncrieffe v. Holder*, 569 U.S. at 191; *Mellouli v. Lynch*, 575 U.S. at 805; *see also* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (describing the historical development and recent application of the categorical approach in immigration law and collecting cases). This approach, grounded in Congress's requirement that noncitizens be "convicted" of certain types of offenses to face certain immigration consequences has been affirmed by case after case and repeatedly reenacted by Congress since it first specified a conviction requirement in the statute in 1875. The categorical approach first developed in the context of conviction-based exclusion grounds, where noncitizens bore the burden of proof. Following the landmark exclusion case, *United States ex rel. Mylius v. Uhl*, 203 F. 153 (S.D.N.Y. 1913), *aff'd*, 210 F.860 (2d Cir. 1914), federal courts and the agency have consistently applied the categorical approach across all conviction-based consequences in federal immigration law irrespective of burden.

Because Congress predicated deportability and other immigration consequences "on convictions, not conduct, the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior." *Mellouli*, 575 U.S. at 805 (citation and quotation marks omitted). Immigration officials must therefore "examine what the state conviction necessarily involved, not the facts underlying the case." *Moncrieffe*, 569 U.S. at 190. In analyzing the statute, adjudicators "must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 190-91 (alteration in original) (citation and quotation marks omitted). If the state conviction involves a statute "that contain[s] several different crimes, each described separately," then the adjudicator "may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or some comparable judicial record of the factual basis for the plea." *Id.* at 191 (citation and quotation marks omitted). This analysis of the record of conviction, described in now as the "modified" categorical approach, is merely a tool to apply the categorical approach and not an invitation to examine the underlying facts. *Mellouli*, 575 U.S. at 805 n.4.

By strictly limiting the analysis to the minimum conduct required to sustain the conviction, the categorical approach was developed to avoid what would be a fraught inquiry into the underlying facts of each individual conviction. *See, e.g.*, *Mylius*, 201 F. at 863; *Moncrieffe*, 569 U.S. at 200-05. The categorical approach instead directs immigration adjudicators to rely on the criminal court adjudication. In doing so, the categorical approach helps ensure the predictable, uniform, and just administration of federal immigration law in determining deportability, inadmissibility, and eligibility for relief from deportation. *See* Jennifer

Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 265-74 (2012) (describing the principles underlying the categorical approach); Das, 86 N.Y.U. L. REV. at 1725-46 (same); Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1032-34 (2008) (same).

The categorical approach and its modified variant, as applied for more than a century, dictate the answer to each of the questions presented. First, only those documents courts have traditionally recognized as sufficiently reliable to comprise the record of conviction can be consulted under the modified categorical approach. Second, a transcript from a sentencing hearing is not one of those documents and is not the proper subject of analysis under the modified categorical approach, as the language of INA § 240(c)(3)(B) confirms. And third, *Pereida* did not supplant the categorical approach or the Board's precedent decision in *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), on the proper allocation of responsibility for completing the immigration court record about the record of conviction. Moreover, the statute governing a noncitizen's eligibility for asylum and withholding is distinct and was not addressed in *Pereida*.

II. INA § 240(c)(3)(B) PERTAINS ONLY TO ADMISSIBILITY OF EVIDENCE TO ESTABLISH THE FACT OF CONVICTION AND THE SENTENCE, BUT NOT TO DETERMINE THE NATURE OF THE CONVICTION.

The Board asks whether documents covered by INA § 240(c)(3)(B) can be consulted in order to determine which version of a divisible statute a noncitizen has been convicted of under the modified categorical approach. The history and context of section 240(c)(3)(B), as well as the statutory language itself, demonstrate that the documents described in the statute but that are outside the record of conviction, are admissible for the limited purpose of establishing the existence of a conviction and its corresponding sentence. Federal court and administrative

precedent confirm this purpose and distinguish between documents admissible for the fact of conviction and documents that demonstrate the conviction was for a removable offense.

A. The History and Context of INA § 240(c)(3)(B) Demonstrates Its Limited Purpose.

The history of INA § 240(c)(3)(B) makes clear that it serves a limited role of expanding the types of documents that can be admitted into evidence to show that a conviction exists. This history shows that INA § 240(c)(3)(B) largely adopts the language of a regulation that was expressly limited to the admissibility of documents and by its terms restricts the purpose of documents outside the record of conviction to proving the existence of a conviction rather than its nature. Section 240(c)(3)(B) therefore has no independent role to play in determining whether an individual is deportable. That determination remains the province of the categorical approach.

INA § 240(c)(3)(B) appears in the section of the INA that discusses the burden on the Department of Homeland Security (DHS) to establish that a noncitizen who has been admitted to the United States is deportable. Numerous grounds of deportability, in turn, rely on the existence of an underlying conviction, the corresponding sentence, and the nature of the offense.[1]

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[1] *See, e.g.*, INA §§ 237(a)(2)(A)(i) (rendering deportable certain noncitizens with convictions for crimes involving moral turpitude for which a sentence of one year or longer may be imposed), 237(a)(2)(A)(ii) (multiple convictions for crimes involving moral turpitude regardless of sentence), 237(a)(2)(B)(i) (convictions for controlled substance offenses under state, federal, or foreign law regardless of sentence), 237(a)(2)(C) (convictions for certain firearms offenses regardless of sentence), 237(a)(2)(D)(i) (convicted of offenses relating to espionage, sabotage, treason and sedition for which a term of imprisonment of five or more years may be imposed). A conviction for an aggravated felony also renders a noncitizen deportable. INA § 237(a)(2)(A)(iii). The term aggravated felony is also often defined by the nature of the offense as well as the sentence. INA §§ 101(a)(43)(F) (including a crime of violence for which the term of imprisonment is at least one year), 101(a)(43)(G) (theft or burglary offense for which the term of imprisonment is more than one year), 101(a)(43)(J) (certain racketeering or gambling offenses for which a sentence of 1 year of imprisonment or more may be imposed), 101(a)(43)(P) (certain federal document fraud offenses for with the term of imprisonment is at least 12 months), 101(a)(43)(S) (offenses relating to obstruction of justice for which the term of imprisonment is at least 1 year).

Consistent with the range of deportable crimes defined in the INA, DHS's burden to establish that a noncitizen is rendered deportable by a prior conviction requires proof of the fact of conviction and, in many cases, the sentence. The fact of conviction then serves as the basis for the categorical or modified categorical analysis to determine whether the nature of the offense matches one or more of the generic deportability grounds. INA § 240(c)(3)(B) adopts a regulation that describes the evidence that is admissible to establish the existence of a conviction and the sentence. At the same time, the statute, as well as the regulation it succeeded, limit the purpose for which these documents are admissible to only the basic facts concerning the conviction's existence.

Congress added section 240(c)(3)(B) to the INA in 1996 as part of the Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA). Pub. L. 104–208, § 304, 110 Stat. 3009 (Sept. 30, 1996). The statutory language tracks the text of an immigration regulation adopted three years earlier in response to requirements Congress created in the Immigration Act of 1990, Pub. L. 101-649, 104 Stat. 4978 (1990) (IMMACT). *Compare* INA § 240(c)(3)(B) *with* 58 FR 38952-01, 38953 (1993). When proposing the regulation, then Attorney General William Barr explained that IMMACT required States that receive federal grants to provide certified records of conviction for noncitizens to the INS without charging a fee. 57 FR 60740-01, 60740 (1992). Because the type of records States provided to the INS to comply with this mandate varied, the proposed rule "expand[ed] the types of documents and records admissible to prove a criminal conviction" in immigration court. *Id.* In addition to the judgment and conviction record, and plea, verdict, and sentence record, "docket entry records, court transcripts, and minutes of court proceedings will be admissible if [they] evidence[] a criminal conviction." *Id.* The rule also included a catch-all provision that states, "Any other evidence that reasonably indicates the

existence of a criminal conviction may be admissible as evidence thereof." *Id.* at 60741. To ease the admission of documents transmitted under IMMACT, the proposed rule provided for electronic transmission and certification. *Id.* at 60740. The DOJ clarified that "*the proposed rule speaks to admissibility only*" and that if a record "is not dispositive of the deportation or exclusion ground or of the underlying issue, the Immigration Judge may require the submission of additional evidence." *Id.* (emphasis added).

The final rule retained the same list of documents but adjusted the description of the State officials who could certify the records, the type of acceptable document repositories, and the means of certification to ensure admissibility of the documents States were transmitting under IMMACT. 58 FR 38952-01, 38953 (1993). The DOJ reiterated that "*the rule speaks to admissibility only*" and that the INS may have to introduce additional evidence "to prove the underlying issue of deportability." *Id.* (emphasis added). Accordingly, DOJ changed the title of the rule from "Record of Conviction" to "Evidence of Criminal Conviction" to "more accurately reflect the content of the rule." *Id.* The regulation remains in effect with the same categories of documents designated as admissible and including the separate catch-all provision. 8 C.F.R. § 1003.41 (redesignated from 8 C.F.R. § 3.41 (68 FR 9824)).

Congress retained the same list of documents and means of electronic submission when it incorporated the regulatory provision into the INA. INA § 240(c)(3)(B), (C). The statutory text makes clear that the categories of documents not transmitted or prepared directly by a court or state official under the terms of the statute must also be official records. INA § 240(c)(3)(B)(i), (ii), and (iv). Congress added a provision permitting the admission of a document attesting to a conviction if it is maintained by an official of a state or federal penal institution and is the basis of custody. INA § 240(c)(3)(B)(vii). It did not adopt the broader catch-all category from the

regulation. Following the revised title of the regulation, Congress titled the section "Proof of convictions." *Cf. Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018) ("Although section headings cannot limit the plain meaning of a statutory text, they supply cues as to what Congress intended." (citations and quotation marks omitted)). In the accompanying Conference Report, Congress also adopted the rule's limited purpose, explaining that section 240(c) "clarifies the types of evidence of criminal convictions that are *admissible* in immigration proceedings." H.R. REP. NO. 104-828, at 212 (1996) (Conf. Rep.) (emphasis added).

The location of the statute, statements of congressional intent, and the regulatory history that informed the adoption of INA § 240(c)(3)(B) confirm that the statute's purpose is to specify the types of documents that can be admitted as evidence of the fact of a prior conviction and no more. Whether the nature of the conviction satisfies a ground of deportability remains a separate question.

B. The Statutory Text Reflects the Limited Purpose of the Documents Outside the Record of Conviction.

In accordance with the purpose of the regulation and the statement of congressional intent, the language in section 240(c)(3)(B) provides that documents outside the record of conviction are admissible but circumscribes their use to the basic facts of the conviction. Indeed, the statutory text of section 240(c)(3)(B) limits the use of a sentencing transcript—the subject of the second Amicus question—to establishing "the existence of the conviction" by its own terms.

Section 240(c)(3)(B) lists seven types of documents that are admissible in removal proceedings. The first two types refer to the official record of the judgment and conviction, and the official record of the plea, verdict, and sentence. INA §§ 240(c)(3)(B)(i), (ii). These subsections describe the record of conviction. *Moncrieffe*, 569 U.S. at 191; *Matter of Ghunaim,* 15 I&N Dec. 269, 270 (BIA 1975) (including charge or indictment, plea, judgment or verdict,

and sentence in "record of conviction"). Accordingly, the statute does not limit the purpose of the records described the first two subsections of the statute. The remaining types of documents involve documents outside the record of conviction. Here, the statute specifies that they are admissible only for "the existence of the conviction," INA § 240(c)(3)(B)(iii), (iv), (v), (vi); to "attest[] to the conviction," INA § 240(c)(3)(B)(vii); or to summarize the basic facts of the conviction. INA § 240(c)(3)(B)(v) (including a document from a state repository that specifies what the conviction was for, its date, and the sentence).

The statutory language distinguishes between record of conviction documents and other types of documents the state might produce in response to IMMACT's mandate. Only the *official* record of the judgment and conviction or the *official* record of the plea, verdict, and sentence are not restricted in their use. The remaining records are admissible only as evidence of the facts concerning the existence of a conviction.

C. Courts Have Recognized the Limited Purpose of Section 240(c)(3)(B) and Congress Has Adopted That Interpretation.

Courts have distinguished between the admissibility of a document under INA § 240(c)(3)(B) as evidence of the fact of a conviction and its use to show the conviction was for a removable offense. The First Circuit clearly delineated those documents that are admissible to show the existence of conviction from those documents that can establish the nature of the conviction. In *Conteh v. Gonzales*, the government submitted a pre-sentence investigation report as proof the conviction was for an aggravated felony. 461 F.3d 45, 59 (1st Cir. 2006). The court explained that "[o]ther than for its possible use to prove the *existence* of a conviction, *see* 8 U.S.C. § 1229a(c)(3)(B)(vi), such a report simply is not a part of the formal record of conviction." *Conteh*, 461 F.3d at 59 (citing *Shepard*, 544 U.S. at 20-23) (emphasis in original). The same is true of the corresponding regulation according to the court. *Id.* at 58 ("[T]he

regulation's catch-all provision authorizes the admission of evidence for the sole purpose of proving 'the *existence* of a criminal conviction,' 8 C.F.R. § 1003.41(d) (emphasis supplied); it does not authorize the admission of evidence for the purpose of proving the facts underlying the offense of conviction."). Following the First Circuit's decision in *Conteh*, the Third Circuit agreed that the documents listed in INA § 240(c)(3)(B) and its regulatory corollary are admissible "for the sole purpose of *proving the existence of a conviction*." *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 n.17 (3d Cir. 2009) (emphasis added).

The Second Circuit has also distinguished between the admissibility of a record and its sufficiency to establish deportability. Like the First Circuit, the Second Circuit reviewed the admissibility of a pre-sentence report (PSR) as a separate question from its use to establish deportability. *Dickson v. Ashcroft*, 346 F.3d 44, 53 (2d Cir. 2003). It rejected the use of the PSR to determine which portion of a divisible statute the noncitizen was convicted of, reasoning that even if the PSR were admissible under INA § 240(c)(3)(B) and the corresponding regulation, it could be used only to show the "existence of a conviction." *Id.* That court subsequently examined the regulation's catch-all provision (not present in the statute) along with the Attorney General's discussion of the differing degrees of reliability of admissible documents. The court concluded that a police report was admissible under the catch-all provision but that it was not sufficiently reliable to prove that the noncitizen was deportable. *Francis v. Gonzales*, 442 F.3d 131, 141-144 (2d Cir. 2006); *see also Barradas v. Holder*, 582 F.3d 754, 762-765 (7th Cir. 2009) (relying on a record of conviction document for the nature of the offense and documents outside the record of conviction for its existence). The Ninth Circuit has similarly affirmed the admissibility of a RAP sheet under the regulation's catch-all provision to prove the existence of a conviction, *Singh v. Holder*, 638 F.3d 1196, 1210 (9th Cir. 2011), while rejecting its use to

establish removability under the modified categorical approach, *Lozano-Arredondo v. Sessions*, 866 F.3d 1082, 1087-88 (9th Cir. 2017).

The Board has recognized the purpose of the statute and corresponding regulation as restricted to the admissibility of documents "used to prove the *existence* of a *conviction*." *Matter of J.R. Velasquez*, 25 I&N Dec. 680, 683 n.6, 686 (BIA 2012) (emphasis in original) (citing *Barradas*, 582 F.3d 574, and *Francis*, 442 F.3d 121). Like the federal courts, the Board has distinguished between documents that are admissible to prove the fact of conviction under the statute and regulation, and documents that are sufficient to establish that the conviction is a removable one. *J.R. Velasquez,* 25 I&N Dec. at 687 (remanding for the IJ to determine whether the nature of the offense rendered the noncitizen removable if the existence of the conviction was established with admissible documents); *see also Matter of Madrigal-Calvo*, 21 I&N Dec. 323, 325-326 (BIA 1996) (describing the documents in the record of conviction separately from documents admissible under the regulation).

In the face of these federal court and administrative interpretations, Congress left unaltered the language limiting the purpose for which documents outside the record of conviction may be used in its subsequent amendments of the INA. *See, e.g.*, Homeland Security Act of 2002, Pub. L. 107-296, 116 Stat. 2135; Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. 110-53, 121 Stat. 266; Child Soldiers Accountability Act of 2008, Pub. L. 110-340 122 Stat. 3735. Consequently, INA § 240(c)(3)(B) governs only the admissibility of documents to show the fact of a conviction. The statute is irrelevant to the analysis of the nature of that conviction. *See Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

III. THE CATEGORICAL AND MODIFIED CATEGORICAL APPROACH DETERMINE THE NATURE OF THE CONVICTION AND ARE LIMITED TO RECORD OF CONVICTION DOCUMENTS.

While INA § 240(c)(3)(B) governs the documents that can be admitted to show the fact of a prior conviction, the categorical approach determines its nature. Only by employing the categorical approach and its modified version can an immigration official determine whether a conviction is for a removable offense, such as a crime involving moral turpitude, an aggravated felony, a controlled substance or firearms offense, or a crime of domestic violence. Because the modified categorical approach operates only to assist the categorical analysis, it requires sufficiently reliable records of conviction on which to base that determination. Section 240(c)(3)(B) does not alter or expand the operation of the categorical approach, which predates the adoption of the statute by more than 80 years and remains governing Supreme Court precedent.

A. The Categorical and Modified Categorical Approach Are Part of a Single Legal Inquiry that Courts Have Applied For Over a Century and that *Pereida* Reaffirmed.

The "categorical approach has a long pedigree in our Nation's immigration law." *Moncrieffe*, 569 U.S. at 191 (citing Das, 86 N.Y.U. L. REV. at 1688–1702, 1749–1752). *Pereida* affirmed the categorical and modified categorical approach as the Supreme Court has applied it in both the criminal and immigration contexts. *Pereida*, 141 S. Ct at 762 (citing *Taylor*, 495 U.S. at 600 and *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (citing *Johnson v. United States,* 559 U.S. 133, 137 (2010) and *Moncrieffe,* 569 U.S. at 191); *Gonzales v. Duenas–Alvarez,* 549 U.S. 183, 186 (2007) (applying the categorical approach set forth in *Taylor* to the INA).

Courts developed the categorical approach in order to determine the application of Congress's exclusion grounds that were predicated on convictions. Conviction bars first

appeared in immigration law in 1875. Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477 (excluding individuals "who are undergoing a sentence for conviction in their own country of felonious crimes"); *see also* Act of Mar. 3 1892, ch. 551 § 1, 26 Stat. 1084, 1084 (excluding "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude"). The landmark case on the categorical approach is *United States ex rel. Mylius v. Uhl. See Moncrieffe*, 569 U.S. at 191 (citing *Mylius*, 210 F. at 862). The district court in *Mylius* concluded that the immigration officials erred by not confining their review to the "inherent nature" of the statutory offense, which "depends upon that which must be shown to establish [the noncitizen's] guilt." 203 F. at 154, *aff'd* 210 F. 860. The court acknowledged that the approach may result in under-inclusiveness, but stressed that this risk must yield to principles of fairness and uniformity, stating that "testimony is seldom available and to consider it in one case and not in another is to depart from uniformity of treatment." *Id.* at 153.

The Second Circuit affirmed the decision and underscored the connection between Congress's use of the term "conviction" and the need for courts to focus on the inherent nature of the offense, not the underlying facts. The court held that Congress did not intend for immigration officers to "act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude." *Mylius*, 210 F. at 863. Instead, "this question must be determined from the judgment of conviction." *Id.*

Judge Learned Hand relied on *Mylius* in determining the application of conviction-based grounds of deportation and solidified courts' use of the minimum conduct test. In *United States ex rel. Guarino v. Uhl*, Judge Hand looked to "whether all crimes which [the petitioner] may intend are 'necessarily' or 'inherently,' immoral" and concluded they were not. 107 F.2d 399, 400 (2d Cir. 1939). Though the evidence of the circumstances surrounding the commission of the

offense indicated morally turpitudinous intent, Judge Hand held that "[deportation] officials may not consider the particular conduct for which the alien has been convicted; indeed this is a necessary corollary of the doctrine itself." *Id.*; *see also United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931) (Hand, J.).

These early deportation cases also adopted what is now referred to as the "modified" categorical approach. In 1933, the Second Circuit assessed whether a noncitizen's prior conviction for second degree assault under New York law necessarily involved moral turpitude. *United States ex rel. Zaffrano v. Corsi*, 63 F.2d 757 (2d Cir. 1933). The state offense defined second degree assault through five subdivisions, only some of which inherently involved moral turpitude. The court held that immigration officials could look to "the charge (indictment), plea, verdict, and sentence" to determine "the specific criminal charge of which the alien is found guilty and for which he is sentenced." *Id.* at 759. The court further held that the inquiry was limited solely to this "record of conviction" and that "[t]he evidence upon which the verdict was rendered may not be considered." *Id.* It explained: "If an indictment contains several counts, one charging a crime involving moral turpitude and others not, the record of conviction would, of course, have to show conviction and sentence on the first count to justify deportation." *Id.*

The Board adopted the categorical approach soon after its formation and applied it to all contexts in which Congress predicated immigration consequences on a prior conviction. *See Matter of S* -, 2 I&N Dec. 353, 355-62 (BIA, A.G. 1945). *Matter of P* -, 3 I&N Dec. 56, 59 (BIA 1947) (holding that "the crime must *by its very nature and at its minimum, as defined by statute,* involve an evil intent before a finding of moral turpitude would be justified" (emphasis added)); *see also Matter of R* -, 4 I&N Dec 176, 178-79 (BIA 1950). Likewise, in evaluating deportation charges the Board explained that "the definition of the crime must be taken at its minimum . . .

inasmuch as an administrative body must follow definite standards, apply general rules, and refrain from going behind the record of conviction." *Matter of B* -, 4 I&N Dec. 493, 496 (BIA 1951) *modified on other grounds by Matter of Franklin*, 20 I&N Dec 867 (BIA 1994).

The Board has applied the same approach to determining whether a noncitizen is disqualified from relief based on a prior conviction. *Matter of M* -, 2 I&N Dec. 196 (BIA 1944) (looking to text of criminal statute); *Matter of C* -, 2 I&N Dec. 220 (BIA 1944) (considering what a prosecutor must necessarily prove to obtain a conviction); *Matter of P* -, 6 I&N Dec. 788, 790 (BIA 1955) (denying eligibility for suspension of deportation based on definition of state manslaughter crime); *Matter of Marchena*, 12 I&N Dec. 355, 356-57 (BIA 1967) ("In determining whether a crime involved moral turpitude, the definition of a crime must be taken at its minimum."); *Matter of Zangwill*, 18 I&N Dec. 22, 28 (BIA 1981) (finding eligibility for adjustment of status because state statute did not require proof of intent to defraud).

The Supreme Court in *Pereida* reaffirmed the categorical and modified categorical approach as applied in criminal and immigration contexts. The majority explained that the Supreme Court first discussed the categorical approach in the criminal context but that it had also applied the categorical approach to the INA. 141 S. Ct. at 762. Accordingly, the *Pereida* Court stated, "a court does not consider the facts of an individual's crime as he actually committed it. Instead, a court asks only whether an individual's crime of conviction necessarily—or categorically—triggers a particular consequence under federal law." *Id.* The Court again grounded the approach in Congress's use of the term conviction: "The categorical approach is required, we have said, because the language found in statutes like the INA provision before us don't task courts with examining whether an individual's *actions* meet a federal standard like

'moral turpitude' but only whether the individual 'has . . . been convicted of an *offense*' that does so." *Id.* (emphasis in original) (quoting INA § 240A(b)(1)(C)).

The Court also reaffirmed the modified categorical approach as it has been applied in the criminal and immigration contexts. Because Mr. Pereida's statute of conviction lists "multiple, stand-alone offenses, some of which trigger consequences under federal law, and others of which do not," the statute is divisible by those alternative crimes. The Court explained that "[t]o determine exactly which offense in a divisible statute an individual has committed . . . we have said[] judges may consult 'a limited class of documents (for example the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of.'" *Id.* at 763 (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2249, 2256 (2016)). The *Pereida* Court neither disturbed nor amended the operation of the categorical and modified categorical approach.

For more than a century, federal court and administrative adjudicators have employed the categorical approach based on the choice by Congress to tie immigration consequences to convictions not conduct. *See United States v. Hayes*, 555 U.S. 415, 424-25 (2009) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well."). *Pereida* follows this history and affirms the categorical and modified categorical approach as traditionally applied.

B. The Modified Categorical Approach Requires Reliable Records of Conviction to Determine the "Inherent Nature" of the Offense.

The modified categorical approach is simply one stage in a singular legal inquiry to determine nature of the offense the noncitizen was necessarily convicted of. The modified "counterpart" of the categorical approach "serves a limited function: It helps effectuate the

categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Descamps v. United States*, 570 U.S. 254, 260 (2013); *see also Mathis*, 136 S. Ct. at 2256. As the Court explained, "[t]he modified approach thus acts not as an exception, but instead as a tool. It retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime. And it preserves the categorical approach's basic method: comparing those elements with the generic offense's." *Descamps*, 570 U.S. at 263. "[T]he modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute." *Id.*; *see also Mathis*, 136 S. Ct. at 2253.

In both the immigration and criminal contexts, the Supreme Court has limited the analysis under the modified categorical approach to only those documents that provide a reliable basis for deciding which crime, in a statute listing multiple crimes, the person was convicted of. *See, e.g.*, *Mathis*, 136 S. Ct. at 2249 (citing *Shepard,* 544 U.S. at 26). These documents include the indictment, jury instructions, or plea agreement and colloquy or "'some comparable judicial record' of the factual basis for the plea." *Nijhawan v. Holder*, 557 U.S. 29, 35 (2009) (quoting *Shepard*, 544 U.S. at 26); *Moncrieffe*, 569 U.S. at 191. The class of documents which courts can consult is limited to only those "records of prior conviction" that reliably establish "what crime, with what elements, a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249, 2256 (citing *Shepard* and *Taylor*). *Moncrieffe*, 569 U.S. at 197 (describing categorical analysis based on the "the record of conviction"). As the Court in *Shepard* explained, only those "conclusive records made or used in adjudicating guilt" can satisfy "*Taylor*'s demand for certainty when identifying" whether a conviction "necessarily" establishes "a generic offense." *Shepard*, 544 U.S. at 21.

Even before the Supreme Court described the records that can serve as a basis for the

categorical and modified categorical approach in *Shepard*, the Board and federal courts have looked to this same set of documents when applying immigration laws predicated on convictions. In its earliest precedential case on the categorical approach, the Board stated that "where the statute includes within its scope offenses which do and some of which do not involve moral turpitude . . . the *record of conviction, i.e., the indictment (complaint or information), plea, verdict and sentence* is examined to ascertain therefrom under which divisible portion of the statute the conviction was had." *Matter of S -*, 2 I&N Dec. at 357 (emphasis added); *see also Matter of T -*, 3 I&N Dec. 641, 642 (BIA 1949) (stating that "the nature of the crime is conclusively established by the record of conviction"). As the Board has long recognized, "it is the nature of the crime as defined by statute and interpreted by the courts and as limited and described by the record of conviction which determines whether an alien falls within the reach of [deportability] law." *Madrigal-Calvo*, 21 I&N Dec. at 325-326 (citing agency and federal court precedent confirming the role and contents of the record of conviction). Federal courts have likewise limited the modified categorical analysis to the record of conviction long before *Taylor* and *Shepard*. *See, e.g.*, *Tillinghast v. Edmead*, 31 F.2d 81, 84 (1st Cir. 1929); *United States ex rel. Giglio v. Neelly*, 208 F.2d 337, 340-42 (7th Cir. 1953); *Wadman v. INS*, 329 F.2d 812, 814 (9th Cir. 1954).

Accordingly, for decades Board precedent has rejected reliance on documents outside the record of conviction in order to establish removability under a divisible statute. In *Matter of Cassisi*, the Board was confronted with a divisible statute in which some of the acts covered involved moral turpitude and others did not. 10 I&N Dec. 136, 137 (BIA 1963). It rejected the trial attorney's position that the Board could rely on "the remarks of the State's Attorney to the court at the time of sentencing" because they appear outside the record of conviction "which

includes the charge (information or indictment), plea, verdict and sentence." *Id.* Because those documents do "not throw any light upon the nature of the crime committed" the noncitizen was not deportable. *Id.* (citing the Second Circuit's precedent in *Mylius*, *Robinson Day*, and *Zaffarano*); *see also Matter of Pichardo-Sufren*, 21 I&N Dec. 330, 335 (BIA 1996) (rejecting reliance on testimony in removal proceeding and confining analysis to record of conviction documents to determine the nature of the offense); *Matter of Teixeira*, 21 I&N Dec. 316, 319-320 (BIA 1996) (distinguishing between record of conviction documents and other documents that are admissible under the regulation and stating that "the established case law hold[s] that one looks to the record of conviction to determine the nature of a conviction").

The requirement that immigration adjudicators focus on only those documents classified as the record of conviction when applying the modified categorical approach dates back to the advent of the categorical approach itself. These documents are distinct from other evidence of conviction because they alone are sufficiently reliable to show what the conviction was necessarily for. Thus, courts and immigration officials must confine the inquiry into the nature of the offense to these reliable and conclusive records.

C. The Court in *Pereida* Did Not Alter the Permissible Use of the Documents Listed in INA § 240(c)(3)(B) for Purposes of the Modified Categorical Approach.

When discussing the modified categorical approach, the Court in *Pereida* reaffirmed that only a "limited class of documents" can be consulted for this inquiry. 141 S. Ct. at 763. Citing the Court's decision in *Mathis*, *Pereida* identifies the record of conviction—"the indictment, jury instructions, or plea agreement and colloquy"— as documents within that limited class. *Id.* *Pereida*'s speculation that other documents might be available under the modified categorical approach appears only in dicta.

While *Pereida* suggests that the documents listed in section 240(c)(3)(B) might be used to show which offense in a divisible statute the noncitizen was convicted for, the Court was not provided with the statute's purpose to relax authentication requirements and clarify their admissibility to prove the existence of a conviction. Nor did the Court address the explicit limitations Congress included for those documents outside the record of conviction. The opinion simply does not contend with the statutory language that confines their admissibility to the basic facts concerning the existence of a conviction. *Pereida*, 141 S. Ct. at 767. These omissions arise because the Court's discussion of INA § 240(c)(3)(B) appears only in dicta, as part of its response to the concerns raised by the dissent. *Id.* at 766-67. Limiting its discussion of the statute to issues that "might arise in *other* cases," the Court raises the statute as a possible solution. *Id.* at 766 (emphasis in original). This discussion of the possible meaning of section 240(c)(3)(B) was not part of the holding, as the Court acknowledges, and does not disturb binding precedent on the categorical and modified categorical approach. As the Court has explained when rejecting a statement it made in a prior case, it will not follow a statement that "is pure dictum" because the language was not an issue, "the point before us now was not then fully argued; we did not canvas the considerations we have here set forth[;]. . . it is dictum contained in a rebuttal to a counterargument; [a]nd it is *unnecessary* dictum even in that respect." *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013) (emphasis in original). By contrast, the Court in *Pereida* notes that record-keeping problems, which could affect the completeness of the record of conviction, did not "attend *this* case." *Pereida*, 141 S. Ct. at 766 (emphasis in original).

Under *Pereida*, determining the nature of a conviction remains a legal inquiry that is focused on the minimum conduct required for conviction. This is true regardless of whether the

statute is divisible. *Pereida* further maintains the requirement that courts consult only a limited class of reliable documents to conduct the modified categorical analysis.

The history and text of the INA § 240(c)(3)(B) combined with *Pereida*'s discussion of the modified categorical approach dictate the answers to the first two Amicus questions. As to question one: Only those documents that courts have decided are sufficiently reliable to make up the record of conviction can serve as the basis for the modified categorical approach. The answer to the second question follows from the first: Because a transcript from a sentencing hearing is not a sufficiently reliable document through which to identify the basis of conviction and its admissibility is limited to show the existence of a conviction by the statute's own terms, it cannot be consulted as part of the modified categorical approach. Any other answer to these questions would violate the purpose and language of the statute, upend a century of settled law, and contradict the operation of the categorical and modified categorical approach as reaffirmed by *Pereida*.

IV. *PEREIDA* DOES NOT BEAR ON CONVICTION-BASED BARS TO ASYLUM AND WITHHOLDING, WHICH ARE GOVERNED BY INA §§ 208 AND 241, AND FOR OTHER RELIEF DOES NOT SUPPLANT THE FRAMEWORK OF *MATTER OF ALMANZA*

In *Pereida*, the Supreme Court considered a limited question: whether a noncitizen who admittedly had not produced the full record of his criminal case, bore any burden with respect to conviction-based bars to non-LPR cancellation under INA 240A(b). In answering this question, the Supreme Court did not consider burdens with respect to conviction-based bars to other forms of relief, such as asylum and withholding of removal. It also had no occasion to consider the more refined burden framework set out by the Board in *Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009), since the petitioner's position was that burdens had "no role to play" in determining

whether his conviction barred relief.[2] For these reasons, *Pereida* has nothing to do with the specific issue presented in this case of persecution claims, and to the extent it might be relevant to other claims for relief, should be read in harmony with *Matter of Almanza.*

The INA contains very specific rules for bars to asylum and withholding of removal. Unlike other forms of relief, these bars are framed in terms of determinations by the Attorney General instead of as eligibility requirements for the noncitizen. INA § 208(b)(1)(B) sets out the burden for an asylum seeker. This provision speaks solely in terms of establishing the criteria for a refugee under the Act. The bars to relief based on a past conviction are not part of establishing eligibility. Instead, they are framed in terms of individuals who the Attorney General "determines" are barred. *See* INA § 208(b)(2). Nothing in this statutory framework speaks to the burden on the noncitizen with respect to possible bars to relief. Similarly, the statutory provision for withholding of removal bars relief where the Attorney General "decides" that a bar applies. *See* INA § 241(b)(3)(2). Once again, the statute does not address any burden on the noncitizen with respect to possible bars.

With respect to cancellation of removal, the relief at issue in *Pereida,* the INA includes eligibility requirements with respect to convictions that could serve as bars to relief. These requirements, under *Pereida*, place a statutory burden on the noncitizen seeking relief. But the key question is the nature of that burden. In particular, is it a burden of production with respect to documents available to the noncitizen, or is it a burden of persuasion that denies access to relief regardless of whether documents are available? This issue was not presented in *Pereida* because the noncitizen in that case refused to seek a remand to produce further documents and took an

[2] *See* Reply Br. for Pet'r, *Pereida v. Barr*, 4, No. 19-438 (U.S. March 30, 2020); *see also id.* at 7 ("no burden of proof ever comes into play").

absolute position that the burden of proof had no role to play as to his eligibility. Indeed, the Supreme Court repeatedly noted Pereida's insistence that he would not offer any further documents regarding his conviction. *Pereida* at 760 ("Mr. Pereida declined to offer any evidence of his own"); 763 (noting that Mr. Pereida "refused to produce any evidence" even after the government introduced evidence; did not seek remand; and at oral argument "even disclaimed any interest in the possibility.") The Court emphasized that Mr. Pereida's criminal case occurred at the same time as his immigration proceedings and that he was well-situated to obtain any relevant documents. *Pereida* at 766 ("Mr. Pereida's immigration proceedings progressed in tandem with his criminal case, so it is hard to imagine how he could have been on better notice about the need to obtain and preserve relevant state court records about his crime.")

The Board, in contrast, has addressed the specific nature of the burden faced by a noncitizen in seeking cancellation of removal relief for which a criminal bar may be in play due to a divisible statute. In *Matter of Almanza*, the Board opined on whether the burden faced by a noncitizen is a burden to produce records (a burden of production) or a burden of persuasion that can dictate denial of relief regardless of the availability of clarifying records. The Board noted that the specific bar to relief at issue in *Almanza* could be resolved by looking at the transcript of the plea proceeding, which is part of the record of conviction. 24 I&N Dec. at 774-75. It also noted that the Immigration Judge had specifically requested that the respondent produce that transcript and that the respondent had failed to do so. *Id.* at 775. The Board concluded that an Immigration Judge can require a noncitizen seeking relief to comply with such requests to produce records. The Board stated that its ruling applied to "these circumstances" after explaining that the respondent had failed to produce the requested documents and gave no reason for failing to do so. *Id.* The Board treated the respondent's obligation as falling under INA

240(c)(4)(B), which specifically authorizes the Immigration Judge to make reasonable requests to the noncitizen regarding documents that would satisfy the noncitizen's burden. *Id.* at 776. *Almanza* thus limited its holding so as not to impose an impossible burden on the noncitizen, but rather a burden to produce documents that are available.

Because the petitioner in *Pereida* refused to entertain the idea that he bore any burden at all with respect to his conviction, the Supreme Court did not receive nuanced briefing on the characteristics of the noncitizen's burden. No party suggested that *Matter of Almanza* was wrongly decided. Counsel for *Pereida* never cited to *Matter of Almanza* or the burden under 240(c)(4)(B) to provide documents reasonably requested by an immigration judge. Meanwhile, the government cited to *Matter of Almanza* with approval. *See* Br. for Resp., *Pereida* v. *Barr*, at 31, No. 19-438 (U.S. Feb. 27, 2020).

Amici recognize that there are passages in *Pereida* that conflate different concepts of burden and those passages comment on facts not before the *Pereida* Court. *See, e.g.*, 141 S. Ct. at 766 (addressing record-keeping issues that might arise in "*other*" cases) (emphasis original). But the Board should be loath to read limitations in its precedents as overturned *sub silentio* in a case in which the Board's precedent was not at issue, was not briefed, and no party advocated overturning the limits embedded in that precedent.

Moreover, departing from the *Matter of Almanza* framework would raise serious questions about equal protection rights of noncitizens seeking to preserve their right to remain in the United States. Unless burdens on noncitizens are properly read as burdens to produce records that are reasonably available, two lawful permanent residents, for example, will be treated differently based on the happenstance of whether the criminal court has maintained the necessary records, with those whose convictions are most remote in time having the greatest

difficulty in establishing eligibility for relief. There is no reason to believe that Congress saw fit to erect such impossible and disparate burdens on a form of equitable relief from removal that has been integral to the statute for decades.

In the case before the Board in this amicus invitation, it is impossible to know from the questions whether the respondent, like the respondent in *Matter of Almanza*, has refused reasonable requests for documents as to form of relief for which the burden properly applies. If so, the burden question is resolved by reading *Matter of Almanza* and *Pereida* together. If not, then perhaps any applications for relief other than asylum and withholding (*see supra* page 23) are best resolved through a remand in which the immigration judge can exercise authority under *Matter of Almanza* to make a reasonable request for any further documents before examining the record to determine the nature of the conviction and whether it operates as a bar to relief.

CONCLUSION

The Board should continue to hold that INA § 240(c)(3)(B) governs the documents that can be admitted in removal proceedings as evidence only of the existence of a conviction. The Board should follow Supreme Court and administrative precedent that limits the documents that can be consulted under the modified categorical approach to only those records of conviction, as described by *Shepard*, that provide a reliable, conclusive, and certain basis for determining the nature of a conviction.

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Benjamin R. Winograd
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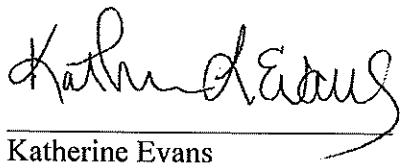
3602 Forest Drive
Alexandria, VA 22302

Date: December 1, 2021



Katherine Evans