No. 15-9584

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JUAN ALBERTO LUCIO-RAYOS
Petitioner,

v.

LORETTA E. LYNCH, United States Attorney General,
Respondent.

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

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, DETENTION WATCH NETWORK, ROCKY MOUNTAIN IMMIGRANT ADVOCACY NETWORK, COLORADO LAWYERS COMMITTEE, NEW MEXICO CRIMINAL DEFENSE LAWYERS ASSOCIATION, UTAH ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, PROFESSORS CHRISTOPHER LASCH, NOAH B. NOVOGRODSKY, & VIOLETA CHAPIN IN SUPPORT OF PETITIONER'S PETITION FOR REVIEW

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), amici curiae Immigrant Defense Project, National Immigration Project of the National Lawyers Guild, American Immigration Lawyers Association, Detention Watch Network, Rocky Mountain Immigrant Advocacy Network, Colorado Lawyers Committee, New Mexico Criminal Defense Lawyers Association, Utah Association of Criminal Defense Lawyers, and Professors Christopher Lasch, Noah B. Novogrodsky, and Violeta Chapin state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above.

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF AMICI

Amici include organizations with expertise in the interrelationship of criminal and immigration law and organizations providing direct removal-defense assistance to noncitizens.[1] Amici have a strong interest in assuring that rules governing classification of criminal convictions are fair and accord with longstanding precedent on which immigrants, their lawyers, and the courts have relied for nearly a century. This case is of critical interest to Amici because the analysis used by this Court to assess the immigration consequences of convictions fundamentally affects due process in the immigration and criminal systems.

SUMMARY OF ARGUMENT

This case raises multiple important issues relating to proper application of the categorical approach, including whether the statute of conviction at issue is overly broad such that the conviction cannot be categorically deemed a crime involving moral turpitude. Petitioner and Amici both urge the Court to hold that a conviction under the Colorado ordinance reaches conduct that is not morally turpitudinous. If the Court so holds, and further concludes that the statute of conviction is divisible, the Court will be required to apply the modified categorical approach to

[1] More information about individual amici is included in the motion for leave to file this brief.

determine whether Petitioner has been convicted of an offense that disqualifies him from applying for cancellation of removal. The Court should hold that *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), overrules *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009), as to whether a noncitizen like Petitioner is barred from relief from removal based on a prior conviction when the record of that conviction is ambiguous.

A three-judge panel can overturn the decision of another panel of this Court when the Supreme Court issues an intervening decision that "contradicts or invalidates [the] prior [panel's] analysis." *United States v. Brooks*, 751 F.3d 1204, 1210 (10th Cir. 2014) (emphasis omitted) (holding that this Court's prior panel opinion must be overturned because the intervening Supreme Court decision in *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010), contradicted the analysis in the prior panel's opinion, even though *Carachuri-Rosendo* was not even "directly on point.").

As panels of the First and Ninth Circuits have recognized, *Moncrieffe* overruled decisions like *Garcia* and the Ninth Circuit's similar pre-*Moncrieffe* precedent in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc). *Garcia*'s holding that a record of conviction that is ambiguous as to whether the offense corresponds to a disqualifying offense nonetheless operates to bar eligibility for immigration relief is "irreconcilable with

Moncrieffe." *Almanza-Arenas v. Holder*, 771 F.3d 1184, 1193 (9th Cir. 2014) [hereinafter *Almanza* Panel Op.] *withdrawn and superseded on other grounds en banc*, 815 F.3d 469 (9th Cir. 2016) (en banc). *See also Almanza-Arenas v. Lynch*, 815 F.3d 469, 489 (9th Cir. 2016) (en banc) [hereinafter *Almanza* En Banc Op.] (Watford, J., concurring)[2] (finding that the Ninth Circuit's "decision in *Young* [is] fundamentally incompatible with the categorical approach, especially after *Descamps* and *Moncrieffe* clarified the elements-focused nature of the inquiry"); *Sauceda v. Lynch*, 819 F.3d 526, 529 (1st Cir. 2016).

Moncrieffe clarified that, to determine the immigration consequences of a prior conviction—including whether the noncitizen is removable and whether, as here, the conviction bars relief—the inquiry under the categorical approach is whether "a conviction of the state offense '"necessarily" involved . . . facts equating to the generic [disqualifying] federal offense.'" *Moncrieffe*, 133 S. Ct. at 1684 (internal citation and brackets omitted); *see Sauceda*, 819 F.3d at 531 (citing *Moncrieffe*, 133 S. Ct. at 1684). This is a "purely legal determination" regarding the elements of

[2] The Ninth Circuit withdrew the panel opinion and granted rehearing en banc in *Almanza-Arenas*, subsequently issuing a decision that had no occasion to reach the question presented here because it resolved the case in favor of the petitioner on an alternative ground. *See Almanza* En Banc Op., 815 F.3d at 474 n.6.

the offense, so "its resolution is unaffected by which party bears the burden of proof." *Almanza* En Banc Op., 815 F.3d at 489 (Watford, J., concurring). *See also Sauceda*, 819 F.3d at 533-34 (quoting *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015)). In *Sauceda*, the First Circuit abandoned its initial precedent opinion in the case and relied on *Moncrieffe* to hold that a noncitizen is not barred from eligibility for relief from removal on an ambiguous record. *See Sauceda*, 819 F.3d at 529, 531-32.

Consistent with the First Circuit's opinion, *Moncrieffe* undercut *Garcia*'s holding, which relied heavily on the fact that the noncitizen, and not the government, bears the burden of proving eligibility for relief from removal. *See Garcia*, 584 F.3d at 1289-90 (citing 8 C.F.R. 1240.8(d)). *See also id.* at 1290 ("The fact that Mr. [Garcia] is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief."). Under *Moncrieffe*, regardless of who bears the burden of proof, when—as here—the record of conviction is ambiguous, the prior conviction did not "*necessarily* involve facts that correspond" to a disqualifying offense and the noncitizen "was not convicted of a [disqualifying offense]" as a matter of law. *Moncrieffe*, 133 S. Ct. at 1687 (emphasis added). The Supreme Court subsequently underscored this point in *Descamps*, making clear that the modified categorical approach

is *not* a "modified factual" approach requiring any "evidence-based" inquiry, but rather just "a tool for implementing the categorical approach." *Descamps v. United States*, 133 S. Ct. 2276, 2284, 2287 (2013) (emphasis added).

Moncrieffe contradicts the analysis in *Garcia* in another respect as well. While acknowledging that Mr. Garcia's "guilty plea … was entered on a poorly translated Spanish form, which failed to specify" the offense for which he was convicted, the Court in *Garcia* concluded that "[t]he fact that Mr. [Garcia] is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief" and that consequently "he ha[d] not proven eligibility for cancellation of removal" and other relief. *Garcia*, 584 F.3d at 1289-90. *Garcia* forces noncitizens like Petitioner to prove a negative—the lack of a disqualifying conviction—on the basis of a limited universe of official court records, the content or existence of which is beyond their control.

Moncrieffe, however, has since contradicted this rationale by reasoning that whether state court records are likely to exist bears on how the categorical rule should be applied. The Court explained that "[t]he categorical approach was designed to avoid" precisely the sort of "'potential unfairness'" in which "two noncitizens, each 'convicted of' the same offense, might obtain different [crime involving moral turpitude]

determinations depending on *what evidence remains available . . . .*" *Moncrieffe*, 133 S. Ct. at 1690 (emphasis added) (internal citation omitted); *see Almanza* Panel Op., 771 F.3d at 1194 (citing and quoting *Moncrieffe*, 133 S.Ct. at 1690).[3]

A decision that *Moncrieffe* effectively overruled *Garcia* would not require immigration judges to grant the applications of individuals requesting these forms of relief. Rather, it would remove a mandatory bar in cases where the record does not necessarily demonstrate a prior disqualifying conviction. Noncitizens would still be required to satisfy the other eligibility criteria, and also to persuade immigration judges to grant relief as a matter of discretion. *See Moncrieffe*, 133 S. Ct. at 1692. Any doubts raised by an ambiguous record of conviction could properly be considered in that discretionary phase, but a conviction with an ambiguous

[3] *Garcia* has had a broad-ranging and devastating impact in the many contexts where prior convictions may limit noncitizens' eligibility for relief from removal, lawful permanent resident status, or naturalization. *See, e.g.*, 8 U.S.C. § 1229b(a) (cancellation of removal for permanent residents); 8 U.S.C. § 1229b(b)(1) (cancellation of removal for nonpermanent residents); 8 U.S.C. § 1229b(b)(2) (cancellation of removal for nonpermanent residents who have been battered); 8 U.S.C. §§ 1158, 1158(b)(2)(B)(i) (aggravated felony bar to asylum); 8 U.S.C. §§ 1255(a), 1182(a)(2) (adjustment of status for relatives of permanent residents and U.S. citizens); 8 U.S.C. §§ 1255(l)(1)(B), 1255(h)(2)(B) (adjustment of status for trafficking victims and juveniles granted special immigrant juvenile status); 8 U.S.C. § 1427(a)(3) (naturalization).

record should not suffice to prevent all consideration of an application in the first place.

ARGUMENT

I. When the Record of Conviction Is Ambiguous, a Noncitizen Has Not Been Convicted of a Disqualifying Offense as a Matter of Law.

Moncrieffe contradicts the analysis in *Garcia* because *Garcia* treated the question of whether a prior conviction constitutes a bar to relief as a factual inquiry. By contrast, as the First Circuit has recently held, *Moncrieffe* treated this question as a legal inquiry regarding what elements the prior conviction necessarily involved. *See Sauceda*, 819 F.3d at 534. Under *Moncrieffe*'s reasoning, but contrary to *Garcia*, when, as here, the record of conviction is ambiguous, Petitioner was not necessarily convicted of a disqualifying offense as a matter of law.

A. Under *Moncrieffe,* When the Record of Conviction Is Ambiguous, a Noncitizen Was Not Convicted of a Disqualifying Offense.

Petitioner's eligibility for relief turns on whether he has been *convicted* of a disqualifying offense. *See* 8 U.S.C. § 1229b(b). *Moncrieffe* and *Descamps* clarified that a court's determination of a conviction's elements is legal in nature. *See Sauceda*, 819 F.3d at 532, 534. This is true under the categorical approach, where the court is simply construing a

statute. And, contrary to *Garcia*, it is equally true under the modified categorical variant: *See Sauceda*, 819 F.3d at 533 (framing the modified categorical approach as "an essentially objective, legal assessment of court documents"). If the elements of a noncitizen's conviction (as revealed by the statute and the limited record of conviction) do not match the elements of the disqualifying offense, then as a matter of law, the noncitizen has not been convicted of that offense, whatever his actual conduct might have been.

In *Moncrieffe* and subsequent decisions, the Supreme Court has explained that the key word in the application of the categorical rule is "necessarily." Given the statute's focus on "what offense the noncitizen was 'convicted' of, not what acts he committed," courts apply a categorical approach to determine "if a conviction of the state offense '"necessarily" involved . . . facts equating to the generic federal offense.'" *Moncrieffe*, 133 S. Ct. at 1684-85 (internal citation and brackets omitted). "Because [courts] examine what the state conviction *necessarily* involved, not the facts underlying the case, [courts] must *presume* that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 1684 (emphasis added; brackets omitted); *see also Mellouli*, 135 S. Ct. at 1987 (categorical rule asks "the legal question of what a conviction

necessarily established"); *Descamps*, 133 S. Ct. at 2284 ("[A] conviction based on a guilty plea can qualify as [a generic offense] only if the defendant 'necessarily admitted [the] elements of the generic offense.'").

When a statute is divisible into separate crimes, this least-acts-criminalized presumption may be rebutted under the modified categorical approach, but *only if* the "record of conviction of the predicate offense *necessarily* establishes" that the "particular offense the noncitizen was convicted of" is the narrower offense corresponding to a federal crime. *Moncrieffe*, 133 S. Ct. at 1684, 1688 (emphasis added); *see Descamps*, 133 S. Ct. at 2281-84. *See also Sauceda*, 819 F.3d at 531-32 (citing *Moncrieffe*, 133 S. Ct. at 1684). If the record does not *necessarily* establish as much, the least-acts-criminalized presumption is not displaced. And "[a]mbiguity" regarding the nature of a noncitizen's offense "means that the conviction did not 'necessarily' involve facts that correspond to a [federal] offense." *Moncrieffe*, 133 S. Ct. at 1687. As Judge Watford recently explained, "It's true . . . that uncertainty remains as to what [the noncitizen] actually *did* to violate [the state statute] . . . . But uncertainty on that score doesn't matter. What matters here is whether [the noncitizen's] conviction *necessarily* established . . . the fact required to render the offense a [disqualifying] crime." *Almanza* En Banc Op., 815 F.3d at 489 (Watford, J., concurring);

accord Sauceda, 819 F.3d at 532. When, as here, the record is merely ambiguous, the conviction does not meet that high bar. Under *Moncrieffe*, when a record of conviction is ambiguous, the noncitizen "was not *convicted* of [the federal offense]," as a matter of law. 133 S. Ct. at 1686 (emphasis added).

Here, the record of conviction does not reveal whether the elements of the Colorado ordinance correspond to a disqualifying offense or not. The conviction therefore does not *necessarily* establish a disqualifying offense, and, under *Moncrieffe*, must be presumed to rest on the least criminal acts. Applying *Moncrieffe*, Petitioner was not convicted of a disqualifying offense and is eligible for relief.

B. *Moncrieffe*'s Focus on Whether a Prior Conviction *Necessarily* Involved the Elements of a Disqualifying Offense Contradicts the Analysis in *Garcia*.

Garcia incorrectly treated the application of the modified categorical rule as a *factual* question, as to which a burden of proof would matter. This contradicts *Moncrieffe*'s instruction that, to demonstrate that he was not convicted of a disqualifying offense, all Petitioner had to answer was the *legal* question: whether his conviction "necessarily" entailed the elements of

the disqualifying offense.[4] *See Sauceda*, 819 F.3d at 533-34 (citing and quoting *Mellouli*, 135 S. Ct. at 1987). And it is irreconcilable with *Descamps*, which abrogated earlier decisions of the Courts of Appeals that treated the "modified categorical" approach as a "modified factual" inquiry. *Descamps*, 133 S. Ct. at 2287.

Garcia relied chiefly on 8 C.F.R. § 1240.8(d), which places on noncitizens "the burden of establishing that he or she is eligible for any requested benefit," such as cancellation, and "proving by a preponderance of the evidence that [a possible ground for denial of a benefit] does not apply." That burden applies to *factual* questions of eligibility. *See generally* 2 McCormick on Evidence § 339 (7th ed. 2013) (reflecting common understanding that the "preponderance of the evidence" standard applies to *factual* inquiries). But the burden of proof does not matter when an issue turns on a question of law. *See*, *e.g.*, *ABC Rentals of San Antonio, Inc. v. C.I.R.*, 142 F.3d 1200, 1203 (10th Cir. 1998) (where a case "present[s] a

[4] In an unpublished decision, the BIA itself adopted this correct understanding of *Moncrieffe*. *See In re E-H-*, AXXXXXX689, at 2 (BIA May 20, 2015) (unpublished) (attached in Addendum) ("Where the statute involved, as here, is divisible, and the record of conviction is ambiguous or inconclusive regarding which element the respondent was convicted under, the conviction does not necessarily involve facts that correspond to an aggravated felony. As such, we find that the respondent has met his burden to show that his conviction . . . does not constitute an aggravated felony and does not bar him from eligibility for cancellation of removal.").

mixed question of law and fact in which the legal issues predominate," contention that one party "had a burden of proof" was "incorrect[]"). *See also, e.g.*, *Riether v. U.S.*, 919 F. Supp. 2d 1140, 1147-48 (D.N.M. 2012) (finding the burden of proof "irrelevant" in a taxpayer refund suit, as the "only questions involved [were] legal questions"). In determining whether a conviction qualifies as a generic offense, a court is simply applying the law to a finite record—the statute and a limited set of documents in the record of conviction. *See Descamps*, 133 S. Ct. at 2283-84 (citing *Taylor v. United States*, 495 U.S. 575, 600, 602 (1990); *Shepard v. United States*, 544 U.S. 13, 17, 26 (2005)). That is not the type of determination that the allocation of the burden can affect. *See Sauceda*, 819 F.3d at 534; *Almanza* En Banc Op., 815 F.3d at 489 (Watford, J., concurring) (Whether a prior conviction is necessarily a disqualifying offense "is a legal question with a yes or no answer . . . [whose] resolution is unaffected by which party bears the burden of proof.").

Moncrieffe, for example, addressed both removal and cancellation. But it did not hold that the burden of proof (on the government as to removal, and on the noncitizen as to cancellation) had any role to play in this legal inquiry. On the contrary, as the First Circuit recognized in *Sauceda*, the *Moncrieffe* Court held expressly, "[o]ur analysis is the same in both

contexts." *Moncrieffe*, 133 S. Ct. at 1685 n.4. *See Sauceda*, 819 F.3d at 534 (citing and quoting *Moncrieffe*, 133 S. Ct. at 1685 n.4). And the Court demonstrated as much. Mr. Moncrieffe was removable whether or not his conviction was an aggravated felony; as the Court explained, treating it as an aggravated felony would matter only because then he could not apply for discretionary relief from removal. *Id.* at 1682, 1692. To that end, *Moncrieffe* held that, "having been found not to be an aggravated felon" for removal purposes, "the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the *other* eligibility criteria." *Id.* at 1692 (emphasis added). The Court then cited the eligibility criteria for cancellation in 8 U.S.C. § 1229b(a)(1)-(2), but *not* the "not . . . convicted of any aggravated felony" criterion in § 1229b(a)(3). *Moncrieffe*, 133 S. Ct. at 1692. That conclusion reflects the Court's understanding, as the First Circuit held in *Sauceda*, that analyzing the conviction again for cancellation purposes would have been redundant; "[the] analysis is the same in both contexts," notwithstanding the different burdens. *Moncrieffe*, 133 S. Ct. at 1685 n.4. *See Sauceda*, 819 F.3d at 534 (citing and quoting *Moncrieffe*, 133 S. Ct. at 1685 n.4, and identifying that both the "analysis" and the "underlying statutory language" is the same in both the removal and cancellation of removal contexts).

Garcia's outcome is flatly inconsistent with *Moncrieffe*. Under *Garcia*, an ambiguous record of conviction *would not* result in a disqualifying federal offense for removal purposes, yet it then *would* result in a disqualifying federal offense for purposes of relief from removal. There is no reason to think that Congress—which used the same term, "convicted," throughout the Immigration and Nationality Act—intended for the same offense to simultaneously count for one purpose but not the other. *See Sauceda*, 819 F.3d at 534 ("[W]hat the [*Moncrieffe*] Court made clear was that the term 'convicted of' has a formal, legal definition . . . and that definition is uniform as between the removal and cancellation of removal provisions.") (quoting *Moncrieffe*, 133 S. Ct. at 1685).

Moncrieffe thus contradicts *Garcia*'s reasoning that when the record is inconclusive, the party bearing the burden must lose. *Garcia*, 584 F.3d at 1289-90. As *Moncrieffe* recognizes, when the record does not establish a conviction for a generic offense, the evidence is not in equipoise; there is not, say a 40% or 60% chance that the conviction was for a generic offense. There is zero chance: because the conviction fails to *necessarily* establish the elements of the disqualifying offense, the conviction *does not* qualify, as a matter of law. The allocation of the burden is irrelevant.

None of this renders useless the general rule that when a noncitizen applies for relief from removal and "the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the [noncitizen] shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. § 1240.8(d); *see also* 8 U.S.C. § 1229a(c)(4). The statutory and regulatory burden of proof sections are provisions of general applicability that carry force in the numerous contexts where a bar to relief involves a factual question. For instance, as to cancellation of removal, a noncitizen is barred from relief if he "engaged" in, rather than was convicted of, numerous types of unlawful activity, including criminal activity which endangers public safety or national security, 8 U.S.C. § 1227(a)(4)(A)(ii), or terrorist activities under 8 U.S.C. §§ 1182(a)(3), 1227(a)(4)(B). *See* 8 U.S.C. § 1229b(c). Other forms of relief also hinge mandatory bars on factual questions. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A) (for asylum, whether the noncitizen was firmly resettled in another country prior to arriving in the United States, or 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).[5]

Under the statute and regulation, the noncitizen will also bear the burden of proving facts showing entitlement to cancellation, like years of presence in the country and hardship to family members. *See*, *e.g.*, *Sauceda*, 819 F.3d at 530, n.3. But as to a purely legal eligibility criterion, an evidentiary burden of proof has no role to play.

C. Applying *Moncrieffe* to Overrule *Garcia* Would Accord With the Agency's Own Reading of the Applicable Regulations and the Structure of Removal Proceedings.

The reading of the statute that is consistent with *Moncrieffe* and *Descamps*—under which the burden of proof is not relevant to the application of the modified categorical approach—accords with the BIA's interpretation of the regulatory provision at issue, 8 C.F.R. § 1240.8(d). Section 1240.8(d) states that, only once the "evidence indicates" that a mandatory bar to relief "may apply" does a noncitizen bear the burden of showing that the mandatory bar does not apply. The BIA has held in the context of the firm resettlement bar to asylum[6] (where 8 C.F.R. § 1240.8(d)

[5] In addition, burdens of proof may be relevant when a prior disqualifying conviction is analyzed under a circumstance-specific inquiry, as in *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009). That is not the case here.

[6] A noncitizen is ineligible for asylum if she "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi).

also applies), that the noncitizen's burden is not triggered unless the government provides prima facie evidence "indicating" that a bar applies. *Matter of A-G-G-*, 25 I. & N. Dec. 486, 501 (BIA 2011). Thus, for example, if the government submits evidence indicating the possibility of firm resettlement—that "may include evidence of refugee status, a passport, a travel document, or other evidence indicative of permanent residence," *id.* at 501-02—the noncitizen must then prove (to a 51% certainty) that she was not actually firmly resettled in that country.

By contrast, in the present case, the government cannot meet its initial showing under § 1240.8(d) until it provides evidence indicating that the conviction is for a disqualifying offense. This is because the modified categorical rule asks a binary legal question: Is Petitioner's prior conviction "necessarily" a crime involving moral turpitude or not? The "evidence" can only "indicate" that the prior conviction is a crime involving moral turpitude if it *necessarily* demonstrates that it is. By contrast, where there is an evidentiary dispute (such as whether the record of conviction is properly authenticated), the showing required for a prima facie case may be different and the noncitizen may counter with evidence addressing the factual dispute. The prima facie showing required by § 1240.8(d) also applies with full force in the numerous contexts of other bars to relief that raise factual questions.

See supra Section I.B (identifying contexts where application of § 1240.8(d) requires resolution of factual questions).

Decisions from the BIA and the Courts of Appeals are consistent with this understanding. In *A-G-G-*, the BIA held that, to trigger a mandatory bar to relief from removal for the purposes of 8 C.F.R. § 1240.8(d)—there, the firm resettlement bar—the government must first make a prima facie showing that the bar may apply. 25 I.&N. Dec. at 501; *see also Matter of Acosta*, 19 I. & N. Dec. 211, 219 n.4 (BIA 1985), *overruled on other grounds by Matter of Mogharrabi*, 19 I. & N. Dec. 439 (BIA 1987) (clarifying that persecutor bar to asylum may apply "only if the evidence raises the issue."); *Criollo v. Lynch*, __ F. App'x __, 2016 WL 1296966, *1 (9th Cir. Apr. 4, 2016) (unpublished) (shifting the burden to the noncitizen to prove the persecutor bar to asylum did not apply *only* once the "evidence indicate[d]" that he was involved in persecution on account of political opinion). Although *A-G-G-* considered a different context and form of relief, the BIA interpreted 8 C.F.R. § 1240.8(d), the same regulatory provision that governs the present case. *Cf. Clark v. Martinez*, 543 U.S. 371 (2005) (statutory language must be interpreted in the same way across different contexts in which it applies). The framework from *A-G-G-* has since been applied by the Courts of Appeals. *See, e.g.*, *Haghighatpour v. Holder*, 446 F.

App'x 27 (9th Cir. July 27, 2011) (unpublished) (applying *A-G-G-* holding); *Naizghi v. Lynch*, 623 F. App'x 53 (4th Cir. Sept. 10, 2015) (unpublished) (same); *Hanna v. Holder*, 740 F.3d 379 (6th Cir. 2014) (same). Under these decisions and the language of 8 C.F.R. § 1240.8(d), the government here must make a prima facie showing that Petitioner's prior conviction was for a disqualifying offense; it has failed to do so because the record of that conviction does not conclusively "indicate" a disqualifying offense.

A-G-G- and the appellate decisions applying it accord with the statutorily defined structure of removal proceedings, which occur in two phases. In cases involving prior convictions, the issue in the first phase is typically whether a noncitizen is removable based on the conviction. In the second phase, noncitizens who are found removable present their case for relief, such as cancellation of removal or asylum. It makes sense that, by this phase, the immigration regulations assume that the government will have already produced criminal records as "evidence indicat[ing]" that a noncitizen is subject to a disqualifying conviction. *See* 8 C.F.R. § 1240.8(d). When the record of conviction is ambiguous and does not establish removability based on a prior conviction, the conviction also should not bar the noncitizen from eligibility for relief from removal. *See Moncrieffe*, 133 S. Ct. at 1692 (If the government fails to meet its burden to show

removability based on a disqualifying conviction, "the noncitizen may seek relief from removal . . . assuming he satisfies the other eligibility criteria."). Although the government is not required to charge a conviction as a ground of removability to raise the conviction as a bar to eligibility for relief, if the statute and regulations were read to place the burden of production on the noncitizen (contrary to 8 C.F.R. § 1240.8(d)) whenever the government chooses not to charge a conviction at the removability stage, relief eligibility would arbitrarily "rest on the happenstance of an immigration official's charging decision." *See Judulang v. Holder*, 132 S. Ct. 476, 486 (2011).

Because *Garcia* compels precisely the opposite result, it is contradicted by *Moncrieffe*.[7]

[7] In *Almanza-Arenas*, a panel of the Ninth Circuit issued an initial opinion, after *Moncrieffe*, finding its precedent decision in *Young* "irreconcilable with *Moncrieffe*." *Almanza-Arenas*, 771 F.3d at 1193.The Ninth Circuit withdrew the panel opinion and granted rehearing en banc, subsequently issuing a decision that had no occasion to reach the burden of proof question presented here because it resolved the case in favor of the petitioner on an alternative ground. *See Almanza-Arenas*, 815 F.3d at 474 n.6. Judge Watford filed a concurring opinion nonetheless finding *Young* "fundamentally incompatible with the categorical approach . . . after *Moncrieffe* and *Descamps*." *Id.* at 489 (Watford, J., concurring). The First Circuit's decision in *Sauceda* is now the only published circuit court decision, since *Moncrieffe*, to squarely address whether a noncitizen should be barred from relief from removal when applying the modified categorical approach to an ambiguous record of a past conviction. Before *Moncrieffe*, the Second and Third Circuits had issued decisions under which a noncitizen prevailed on establishing eligibility when the record of a prior conviction was ambiguous. *See Thomas v. Att'y Gen.*, 625 F.3d 134, 146-48 (3d Cir. 2010); *Martinez v.*

II. Contrary to *Garcia*, *Moncrieffe* Considered Whether Criminal Records Are Likely to Exist in Determining How to Apply the Categorical Rule.

Moncrieffe rejected a fundamental premise of *Garcia* by considering what records are necessarily created as part of an underlying criminal proceeding when deciding the immigration consequences of a conviction. *See Moncrieffe*, 133 S. Ct. at 1692. *Moncrieffe* explained that, unless a statute of a prior conviction is divisible, an immigration court cannot look to the record of conviction to clarify what the conviction necessarily involved. *See* 133 S. Ct. at 1684-85. This is in part because such records may not exist: "[T]here is no reason to believe that state courts will regularly or uniformly

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Mukasey, 551 F.3d 113 (2d Cir. 2008). The Third Circuit has issued a post-*Moncrieffe* decision in which the noncitizen prevailed on an ambiguous record. *See Johnson v. Att'y Gen.*, 605 F. App'x 138, 141-42 (3d Cir. June 26, 2015) (unpublished). Circuit decisions to the contrary predate *Moncrieffe*. *See Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011). The Third, Fifth, and Seventh Circuits have issued decisions discussing *Moncrieffe* in the burden of proof context, but none of these decisions squarely addresses the issue presented in this case regarding the analysis of ambiguous records of conviction under the modified categorical approach. *See Le v. Lynch*, 819 F.3d 98, 107 n.5 (5th Cir. 2016); *Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014); *Syblis v. Attorney General*, 763 F.3d 348 (3d Cir. 2014). This Court recently extended the petitioner's time to file a petition for rehearing and rehearing en banc in *Martinez Garcia v. Lynch*, __ F. App'x __, 2016 WL 1696928 (10th Cir. Apr. 28, 2016) (unpublished), a case which may present the issue of the noncitizen's eligibility for cancellation of removal on an ambiguous record of conviction examined under the modified categorical approach. *See* Order of the Court, *Martinez Garcia v. Lynch*, No. 15-9564, (10th Cir. May 18, 2016).

admit evidence going to facts . . . that are irrelevant to the offense charged." *Id.* at 1692.

In contrast to *Moncrieffe*, *Garcia* concluded that the availability of records is irrelevant, *see* 584 F.3d at 1289-90, and therefore imposed an impossible burden on noncitizens: to obtain criminal records that prove a negative—that they were not convicted of a disqualifying offense—even when such records may not exist. As *Moncrieffe* recognized, state courts may not regularly record which portion of a divisible statute formed the basis for a conviction. If courts do happen to record such information, they may have a practice of destroying records for old or expunged convictions, as demonstrated by state court recordkeeping practices within this Circuit. For example, Colorado authorizes the destruction of "Petty Offense Case Files" "2 years from filing date," certain categories of "Misdemeanor Case Files" "4 years from filing date," and court reporter notes for cases prosecuted in county court after two years.[8] Oklahoma authorizes the destruction of court reporters' notes ten years from the date of the proceeding, *see* Okla. St. Ann. tit. 20 § 1006 (1997), misdemeanor records after one or five years depending on circumstances, *see id.* §§ 1002,

[8] Colorado Records Retention Manual, Colorado Judicial Branch, *available at* https://www.courts.state.co.us/Administration/Program.cfm?Program=6 (last visited June 7, 2016).

1005(A)(6)(a)-(b), and felony records after one, ten, or 50 years depending on circumstances. *See id.* § 1005(A)(5)(a)-(c).[9]

Individuals who face removal proceedings in this Circuit based on a conviction they suffered elsewhere in the country fare no better as to state records. *Cf. Mellouli*, 135 S. Ct. at 1985 (immigration judge sitting in the Eighth Circuit adjudicated removal proceedings involving a Kansas conviction). In Virginia, for example, the only record created for criminal adjudication in "[g]eneral district court" is "the executed warrant of arrest as executed by the trial judge." *United States v. White*, 606 F.3d 144, 146 (4th Cir. 2010). North Carolina courts do not create a transcript or a recording of misdemeanor proceedings.[10] Hawaii authorizes destruction of criminal records from district and circuit court prosecutions.[11] Even when records

[9] The Oklahoma statute further provides that for both misdemeanor and felony convictions, "[n]othing shall prohibit . . . entering an order for the destruction of records prior to the time limits enumerated in this subsection for good cause shown." Okla. St. Ann. tit. 20 § 1005(A).

[10] North Carolina Administrative Office of the Courts, The North Carolina Judicial System 27-28 (2008 ed.), *available at* http://www.nccourts.org/citizens/publications/documents/judicialsystem.pdf (last visited June 6, 2016).

[11] Supreme Court of Hawaii, Retention Schedule for the District Courts, *available at* http://www.courts.state.hi.us/docs/sct_various_orders/order48.pdf (last visited June 8, 2016); Supreme Court of Hawaii, Retention Schedule for the Circuit Courts, *available at* http://www.courts.state.hi.us/docs/sct_various_orders/order47.pdf (last visited June 8, 2016).

exist, courts may impose additional requirements, such as that requestors name with specificity the exact criminal documents sought (e.g., indictment, plea colloquy), include case numbers and filing dates, and submit fees by credit card or check.[12]

Garcia's holding that a noncitizen must find conclusive records places significant, often insurmountable, burdens on noncitizens in removal proceedings, 45% of whom are unrepresented,[13] 37% of whom are detained,[14] and 85% of whom cannot proceed in English.[15] The rule from *Garcia* is particularly harsh for detained noncitizens, who face innumerable barriers to requesting state court records of prior convictions, including extremely limited access to the Internet, telephones, and mail (such as "postcard-only" policies that prohibit them from sending or receiving

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[12] *See*, *e.g.*, State of New Mexico Bernalillo County Second Judicial District, Frequently Asked Questions – Court Reporters/Monitors, *available at* http://seconddistrictcourt.nmcourts.gov/index.php?option=com_content&view=article&id=225&Itemid=719 (last visited June 8, 2016) (transcript request form must be submitted by fax and must include name of judge, case number and case type, case caption, and date of proceedings; requesting party must submit name and telephone number for contact person and will then receive the name and telephone number of court reporter).

[13] *See* Department of Justice, FY 2014 Statistical Yearbook F1, Fig. 10, *available at* http://www.justice.gov/eoir/statistical-year-book ("EOIR Statistical Yearbook").

[14] EOIR Statistical Yearbook, at G1, Fig. 11.

[15] EOIR Statistical Yearbook, at E1, Fig. 9.

envelopes).[16] *See Moncrieffe*, 133 S. Ct. at 1690 (citing Katzmann, *The Legal Profession and the Unmet Needs of the Immigrant Poor*, 21 Geo. J. Legal Ethics 3, 5-10 (2008), to observe that noncitizens, especially those who are detained, "have little ability to collect evidence").

Garcia is irreconcilable with *Moncrieffe*'s reasoning, which recognizes that the accident of state court recordkeeping should not determine the outcome under the categorical analysis.

CONCLUSION

For the foregoing reasons, the Court should hold that *Moncrieffe* effectively overruled *Garcia*.

[16] *See, e.g.*, Amnesty International, *Jailed Without Justice: Immigration Detention in the USA* 35 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (last visited June 6, 2016); National Immigration Law Center, *A Broken System: Confidential Reports Reveal Failures in U.S. Immigration Detention Centers* 26-30 (2009), *available at* http://www.nilc.org/wp-content/uploads/2016/02/A-Broken-System-2009-07.pdf (last visited June 6, 2016). *See also Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068 (D. Or. 2013) (lawsuit challenging postcard-only policy in St. Helens, Oregon); Prison Policy Initiative, *Return to Sender: Postcard-only Mail Policies in Jail* 2 (2013), *available at* http://static.prisonpolicy.org/postcards/Return-to-sender-report.pdf (last visited June 6, 2016).

Date: June 14, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Tenth Circuit Rule 32, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 5,867 words.

Dated: June 14, 2016

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CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that the attached brief, motion, declaration, and addendum, which have been submitted digitally, have been scanned for viruses with the most recent version of a commercial virus scanning program, Microsoft Security Essentials, last updated on June 13, 2016, and according to the program are free of viruses.

/s/Andrew Wachtenheim

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I hereby certify that on June 14, 2016, the attached document:

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