No. 14-72003

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELY MARINELARENA,
Petitioner,
v.
JEFFERSON B. SESSIONS,
Respondent.

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

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN AMERICANS ADVANCING JUSTICE-ASIAN LAW CAUCUS, COMMUNITY LEGAL SERVICES IN EAST PALO ALTO, DETENTION WATCH NETWORK, FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT, HEARTLAND ALLIANCE'S NATIONAL IMMIGRANT JUSTICE CENTER, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL IMMIGRATION LAW CENTER, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NORTHWEST IMMIGRANT RIGHTS PROJECT, PUBLIC COUNSEL, AND U.C. DAVIS IMMIGRATION LAW CLINIC IN SUPPORT OF PETITIONER
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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), amici curiae Immigrant Defense Project, American Immigration Lawyers Association, Asian Americans Advancing Justice-Asian Law Caucus, Community Legal Services in East Palo Alto, Detention Watch Network, Florence Immigrant and Refugee Rights Project, Heartland Alliance's National Immigrant Justice Center, Immigrant Legal Resource Center, National Association of Criminal Defense Lawyers, National Immigration Law Center, National Immigration Project of the National Lawyers Guild, Northwest Immigrant Rights Project, Public Counsel, and U.C. Davis School of Law Immigration Law Clinic 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(a)(4)(E), 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.

All parties have consented to the filing of this brief, as required by Fed. R. App. P. 29(a)(3) and Ninth Cir. Rule 29-2(a).

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INTEREST OF AMICI

Amici include organizations with expertise in the interrelationship of criminal and immigration law and organizations providing direct immigration representation to noncitizens. 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. Amici have seen individuals deported, and families separated, because of the Court's harsh rule in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc). Since the Supreme Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), amici have submitted multiple briefs to this Court in support of noncitizens ordered removed by the Board of Immigration Appeals ("BIA") under *Young*, arguing that *Young* is fundamentally at odds with *Moncrieffe*. *See*, *e.g.*, *Antonio v. Sessions*, No. 13-71256 (9th Cir.) (brief submitted Aug. 5, 2016); *Lopez-Villa v. Sessions*, No. 11-73518 (9th Cir.) (brief submitted Mar. 23, 2016); *Vasquez v. Sessions*, No. 09-72489 (9th Cir.) (brief submitted Mar. 15, 2016); *Villavicencio v. Sessions*, 879 F.3d 941 (9th Cir. 2018) (brief submitted Oct. 31, 2016). The Court's decision in this case will determine the ability of many of these and similarly-situated noncitizens to seek forms of discretionary relief from

removal and other immigration benefits that will determine their ability to stay in this country with their families and communities.[1]

SUMMARY OF ARGUMENT

Amici agree with Petitioner that *Moncrieffe v. Holder*, 569 U.S. 184 (2013), abrogates *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), on the issue of whether a noncitizen is ineligible for relief from removal based on a prior conviction when the record of that conviction is ambiguous. The modified categorical approach presents solely a question of law; the noncitizen's burden of proving relief eligibility is irrelevant to the inquiry. *See Almanza-Arenas v. Lynch*, 815 F.3d 469, 489 (9th Cir. 2016) (en banc) (Watford, J., concurring). Amici also agree with Petitioner that, under the government's own regulations, before a conviction can operate as a bar to relief, the government bears the initial burden to produce conviction records that demonstrate a disqualifying offense. *See* 8 C.F.R. § 1240.8(d).

Amici submit this brief to raise two additional points based on our experience with immigration cases that turn on criminal law dispositions. First, the government's proposed rule—adopted by this Court in *Young*—undermines the categorical approach's long-recognized purpose. As the Supreme Court made clear

[1] A full list and description of amici is included in the Addendum filed with this brief.

in *Moncrieffe*, the categorical rule exists to produce fair, consistent, and efficient outcomes when courts determine the immigration consequences of a prior criminal conviction. But under *Young*, noncitizens convicted of the same crime face different relief eligibility outcomes based solely on arbitrary factors such as the existence or availability of past criminal record documents. State courts vary widely in what criminal record documents they create in the first place and how quickly they destroy records once created. *Young* also ignores the fact that noncitizens face far greater impediments to obtaining and submitting conviction records than the Department of Homeland Security ("DHS"). For example, many noncitizens facing removal proceedings are detained, lack access to counsel, or are not fluent in English. To avoid the arbitrary and unfair consequences of *Young*, the Court should hold that an ambiguous record of conviction does not bar a noncitizen from establishing threshold eligibility for relief from removal.

Second, a decision by this Court to maintain the rule in *Young* will unfairly harm noncitizens in a wide variety of immigration circumstances. *Young* impacts not only noncitizens in removal proceedings presided over by immigration judges, but also noncitizens seeking relief through non-adversarial paper determinations by non-lawyer administrative adjudicators. In both contexts, *Young* affects noncitizens' eligibility for many forms of relief from removal and immigration benefits that Congress has built into the Immigration and Nationality Act ("INA"),

including cancellation of removal for lawful permanent residents and for noncitizens who have resided in the United States for many years and who have U.S. citizen and lawful permanent resident family members, *see* 8 U.S.C. §§ 1229b(a)(3), (b)(1)(C); Violence Against Women Act cancellation of removal, *see* 8 U.S.C. §§ 1229b(b)(2)(A)(i)(I)-(II), 1229b(b)(2)(A)(iv); withholding of removal, *see* 8 U.S.C. § 1231(b)(3)(A), (b)(3)(B)(ii); asylum, *see* 8 U.S.C. §§ 1158(b)(2)(A)(i), 1158(b)(2)(B)(i); waiver of criminal inadmissibility for adjustment of status, *see* 8 U.S.C. § 1182(h); naturalization, *see* 8 U.S.C. §§ 1101(f)(8), 1427(a)(3); and voluntary departure, *see* 8 U.S.C. § 1229c(a)(1). In all of these contexts, the *Young* rule unfairly bars noncitizens from relief that is based on long duration of residence, family ties, fear of persecution, or victimization.

A decision recognizing that *Moncrieffe* abrogates *Young* would not require immigration judges or other immigration examiners in non-adversarial contexts to grant all applications for relief and immigration benefits. Rather, as was the case in *Moncrieffe* itself, 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 persuade immigration judges and other examiners to grant the applications as a matter of discretion. *Moncrieffe*, 569 U.S. at 204. *See also Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010) (noting, in case of noncitizen not subject to mandatory bar to

cancellation, "[a]ny relief he may obtain depends upon the discretion of the Attorney General").

Amici urge the Court to hold that, when the statute of conviction is divisible, an ambiguous record of conviction—one that does not necessarily establish a conviction for a disqualifying offense—does not bar noncitizens from eligibility for relief from removal or other immigration benefits.

ARGUMENT

I. *Young* Diverges From the Rationale for the Categorical Approach, Produces Inconsistent Immigration Outcomes, and Undercuts Due Process Considerations.

Courts have applied the categorical rule for over a century because it is an efficient and consistent way of adjudicating the immigration consequences of earlier criminal convictions. *Young* departs from this established history. Under *Young*, whether or not a noncitizen faces deportation turns on the happenstance of state court record keeping. A noncitizen is barred from relief under *Young* if a state criminal court failed to create certain records, and if the court destroyed those records after creating them. To avoid the arbitrary and unfair results from this approach, the Court should reverse *Young*.

A. *Young* Frustrates the Underlying Purpose of the Categorical Approach: To Ensure Efficiency and Predictability in Immigration Outcomes.

The Supreme Court has clarified that the rationale behind the categorical approach is to "promote efficiency, fairness, and predictability in the administration of immigration laws." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015). *Young* runs contrary to this rationale by causing inconsistent results in two ways. First, noncitizens convicted of the same crime can face different relief eligibility outcomes based solely on arbitrary factors such as the existence or availability of criminal records. Second, the same conviction can result in a finding that a noncitizen is not removable based on a particular conviction, but also that she is barred from relief from removal based on the same conviction.

The Supreme Court has explained that the categorical approach was designed to "ensure[] that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 569 U.S. at 205 n.11 By pegging immigration consequences to "convictions," Congress sought to avoid the "potential unfairness" of having "two noncitizens, each 'convicted of' the same offense, . . . obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge." *Id.* at 201. *See also infra* Section

I.B. (describing variability with creation and maintenance of state criminal records).

The Supreme Court's reasoning relied on the long history of the categorical approach, which illustrates that the approach was designed to promote fairness, efficiency, and predictability. In the landmark 1914 decision *United States ex rel. Mylius v. Uhl*, the Second Circuit clarified that in assessing an individual's conviction under the immigration statute, immigration officers "do not act as judges of the facts to determine . . . whether the crime of which the immigrant is convicted does or does not involve moral turpitude." 210 F. 860, 863 (2d Cir. 1914). Judge Learned Hand adopted this reasoning in a series of decisions in the 1930s. *See*, *e.g.*, *United States ex rel. Guarino v. Uhl,* 107 F.2d 399, 400 (2d Cir. 1939); *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1023 (2d Cir. 1931). Following these decisions, the BIA too expressed a longstanding concern that determinations resulting in deportation be based not on alleged facts but rather on what was necessarily established by the prior conviction. *See, e.g., Matter of B-*, 1 I. & N. Dec. 52, 58 (AG 1941); *Matter of B-*, 5 I. & N. Dec. 538, 540 (BIA 1953); *Matter of M-*, 2 I. & N. Dec. 525, 526 (BIA 1946).

The categorical rule's history also demonstrates that a given conviction should have the same consequence both in assessing removability (when the government has the burden of proof) and in determining eligibility for relief from

removal (when the noncitizen bears the burden of proof). Courts have long applied the categorical rule in the same way regardless of whether the noncitizen or the government bore the burden of proof. The Second Circuit's decision in *Mylius*, for instance, arose from a noncitizen's challenge to his exclusion from the United States, a context in which the noncitizen generally bears the burden of proof. *Mylius*, 210 F. at 863. The Second Circuit used similar language as the Supreme Court later used in *Moncrieffe* in concluding that "[i]t would be manifestly unjust so to construe the statute as to exclude one person and admit another where both were convicted" of the same crime. *Id.* at 863. The federal immigration agency adopted the same position in early exclusion cases, regardless of the placement of the burden on the noncitizen. *See*, *e.g.*, *Attorney General Op.*, 37 Op. Att'y Gen. 293, 294-95 (1933); *Matter of T-*, 2 I. & N. Dec. 22, 22 (BIA 1944); *Matter of P-*, 3 I. & N. Dec. 56 (BIA 1947). The Attorney General reasoned then that any other rule would "depart from uniformity of treatment. . . . where two aliens are shown to have been convicted of the same kind of crime." *Attorney General Op.*, 37 Op. Att'y Gen. at 295 (citing *Mylius*, 210 F. at 863).

The *Young* rule creates the "potential unfairness," *Moncrieffe*, 569 U.S. at 201 (citations omitted), that the Supreme Court and the long history of the categorical rule caution against. A record of conviction that is insufficient to

support removability can nonetheless be sufficient to support a finding of ineligibility for relief from removal.

The Court should abrogate *Young* and establish a rule, consistent with *Moncrieffe*, requiring that a conviction of the same crime have the same consequence in the removability and relief contexts. This accords with the two-phase structure Congress created for removal proceedings. In cases involving prior convictions, the issue in the first phase is typically whether the government has submitted records showing that a noncitizen is removable based on the conviction. In the second phase, a noncitizen who was found removable presents a case for relief. *Moncrieffe* clarified that the application of the modified categorical approach involves the same legal analysis in both stages of the removal process. 569 U.S. at 191 n.4. By reversing *Young*, this Court would ensure, consistent with *Moncrieffe*, that a conviction has the same effect during both the removability and relief stages. In addition to faithfully following *Moncrieffe*, this would promote fairness and efficiency in removal proceedings and prevent the arbitrary result where DHS's decision of whether to charge removability based on a conviction determines whether a noncitizen is deported or not. *Cf. Judulang v. Holder*, 565 U.S. 42, 57 (2011) (the ultimate outcome in a noncitizen's removal proceeding should not "rest on the happenstance of an immigration official's charging decision").

Finally, the *Young* rule, under which the same conviction has different consequences depending on whether a noncitizen is contesting removability or applying for relief, complicates a defense attorney's ability to advise his client about the later immigration consequences of a plea. Defense attorneys must determine the immigration consequences of a plea to satisfy their constitutional obligation to provide effective representation to clients. *See Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010); *see also U.S. v. Rodriguez-Vega*, 797 F.3d 781, 786 (9th Cir. 2015) (finding that counsel's performance was constitutionally ineffective because the attorney failed to advise his client that her conviction rendered her removal a "virtual certainty"). The Supreme Court has recognized that "'preserving the possibility of' discretionary relief from deportation.' . . . 'would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.'" *Padilla*, 559 U.S. at 368 (quoting *I.N.S. v. St. Cyr*, 533 U.S. 289, 323 (2001)). But a defense attorney cannot provide reliable advice about the immigration effect of a criminal conviction if—as required now by *Young*—the same conviction may result in different outcomes depending on whether the government charges the offense as a basis for deportability or relief ineligibility.

B. *Young* Bars Noncitizens From Relief Even When Courts Do Not Regularly Maintain the Necessary Records or When Records Have Been Destroyed.

Amici have found, in representing noncitizens in this Circuit and across the country, that criminal court documents, which *Young* requires for a noncitizen to be eligible for relief, are often unavailable because of state record keeping practices. Particularly in misdemeanor cases, which are notorious for their cursory and unreliable nature, criminal courts vary widely as to what documents they produce and create. Even if the records existed at some point, they may have been destroyed by the time removal proceedings take place. Amici regularly represent noncitizens in removal proceedings years or even decades after the conclusion of a criminal matter. *See, e.g.*, *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008) (DHS brought charges over 11 years after conviction); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (DHS initiated proceedings nearly 19 years after plea). Under *Moncrieffe*, the absence of conviction record documents indicating whether a given conviction is disqualifying means that the conviction is not "necessarily" disqualifying for both removability and relief eligibility purposes. *See Moncrieffe*, 569 U.S. at 190 (holding that courts can only look to what a conviction "necessarily involved").

1. Criminal Records, Especially in Cases Involving Lower-Level Offenses Are Often Poorly Created and Maintained.

The prior criminal records that *Young* requires are often not created, and even if they are, are poorly maintained. This is particularly true in misdemeanor or other low-level offense cases, where record-keeping is notoriously unreliable. This means that, under *Young*, a noncitizen can face ineligibility for relief based on the poor quality of misdemeanor or other criminal recordkeeping, and not an actual adjudication of what was established by the conviction.

Many types of misdemeanor convictions and violations can operate to bar relief from removal. For example, noncitizens can be barred from seeking relief based on crimes involving moral turpitude, *see*, *e.g.,* 8 U.S.C. § 1229b(b)(1)(C), which include minor misdemeanors and violations. Similarly, a misdemeanor conviction under state law can constitute an aggravated felony under the INA, barring relief from, *inter alia*, cancellation of removal and asylum. *See Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011) (whether a state classifies an offense as a misdemeanor is irrelevant to determining whether it is an aggravated felony); *Gattem v. Gonzales*, 412 F.3d 758, 761 (7th Cir. 2005) ("Gattem's conviction, although for a misdemeanor offense, could nonetheless qualify as an aggravated felony for purposes of the INA."). Adjudicators regularly find common misdemeanor offenses to be aggravated felonies under the INA. *See*, *e.g.*, *Matter of Aruna*, 24 I. & N. Dec. 452 (BIA 2008) (conspiracy to distribute marijuana);

United States v. Alvarez-Gutierrez, 394 F.3d 1241, 1245 (9th Cir. 2005) (holding that a misdemeanor under state law can be an aggravated felony conviction). *See also* Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. Rev. 1696, 1699 & n.14 (1989).[2]

Misdemeanor proceedings, which sometimes occur in municipal courts, are notoriously informal; courts often do not have reliable procedures for creating or maintaining records. Misdemeanor courts are "[w]idely derided as 'assembly line,' 'cattle herding,' and 'McJustice'" because they "rush hundreds of cases through en mass." Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 Vanderbilt L. Rev. 1055, 1064 (2015) (citation omitted). In some states, "some of the judges in these courts are not lawyers." Robert C. Boruchowitz et al., Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts 11 (2009).[3] And while the Supreme Court has held that persons accused of misdemeanors have a right to court-appointed counsel, *see Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972), "a significant percentage of defendants in misdemeanor

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[2] The BIA takes the position that non-criminal state dispositions can nonetheless constitute convictions for immigration purposes. *See In re Eslamizar*, 23 I. & N. Dec. 684, 686 (BIA 2004) (finding an Oregon "violation adjudication" to "qualif[y] as a valid criminal conviction for immigration purposes").

[3] *Available at* https://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf (last visited Jun. 27, 2018).

courts never receive a lawyer to represent them." Boruchowitz et al., *supra* at 14. It is not a surprise, then, that misdemeanor courts often do not generate reliable records. *See*, *e.g.*, *Sauceda v. Lynch*, 819 F.3d 526, 530 n.5 (1st Cir. 2016) (noting that noncitizen was unable to obtain necessary criminal records because "the Superior Court of the county where [the noncitizen] was convicted does not, in misdemeanor cases, maintain copies of the documents he needed"). Some courts that hear misdemeanors "do not record proceedings (no audio, no court reporter, no video, and no record at all)." Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. Rev. 101, 137 (forthcoming 2018).[4] *See also, e.g.*, *United States v. White*, 606 F.3d 144, 146 (4th Cir. 2010) (In Virginia, for instance, the only record created for a criminal adjudication in "[g]eneral district court" is "the executed warrant of arrest as executed by the trial judge.").

Unless the Court revisits *Young*, whether or not a noncitizen like Ms. Marinelarena is deported may turn on the unreliability of poorly-created, informally maintained criminal court records.

2. Criminal Courts Routinely Destroy Criminal Records, Creating Unfair and Inconsistent Immigration Outcomes.

Even when criminal courts create records, they may routinely destroy them, rendering the record of conviction ambiguous. This may even be the case when the

[4] *Available at* http://www.bu.edu/bulawreview/files/2018/06/ROBERTS.pdf (last visited Jun. 27, 2018).

adjudication of a noncitizen's particular conviction did not match a disqualifying offense.

Courts in **California**, for example, permit the destruction of misdemeanor drug offense records after five years.[5] Certain other criminal records, such as plea transcripts are destroyed as "a matter of course after ten years." *People v. Dubon*,108 Cal. Rptr. 2d 914, 917 (Cal. Ct. App. 2001). *See also* Cal. Gov. Code § 69955(e) (providing that court reporter notes can be destroyed after ten years). The records retention schedules in **Montana** permit the destruction of certain felony and misdemeanor case records (which includes all complaints, pleadings, minutes, orders, and judgments) ten years after the case closes.[6] **Hawaii** permits destruction of complaints and orders in criminal cases after two years.[7]

Arizona has a system of courts of limited jurisdiction, called "justice courts" that have jurisdiction over certain felonies and all misdemeanors.[8] In these justice courts, the destruction of certain records is permitted three years after discharge or

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[5] California Judicial Council, Trial Court Records Manual 93, *available at* http://www.courts.ca.gov/documents/trial-court-records-manual.pdf (last visited Jun. 27, 2018).
[6] Montana Local Government Retention Schedule No. 10, at 8-9, *available at* https://sos.mt.gov/Portals/142/Records/forms/Local_Schedule10.pdf (last visited Jun. 27, 2018).
[7] 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 Jun. 27, 2018).
[8] Arizona Judicial Branch, Justice Courts, http://www.azcourts.gov/AZ-Courts/Justice-Courts (last visited Jun. 27, 2018).

transmittal to superior court.[9] The destruction of misdemeanor records transferred to superior court is permitted ten years after final adjudication and completion of sentence.[10] In all levels of criminal actions, **Idaho** Court Administrative Rules provide for the destruction of stenographic records and tapes five years from the date of the hearing.[11] In **Washington,** certain courts of limited jurisdiction, which adjudicate misdemeanors, destroy criminal records three years after final disposition.[12] In **Oregon**, certain misdemeanor records, including plea agreements, may be destroyed three years after the case is closed; others may be destroyed after ten years.[13]

And individuals who face removal proceedings in this Circuit based on a conviction they suffered elsewhere in the country—a common occurence—often fare no better as to state records. *Cf. Mellouli*, 135 S. Ct. at 1985 (immigration

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[9] Arizona Code of Judicial Administration, Section 4-302: Records Retention and Disposition Schedule 8, *available at* https://www.azlibrary.gov/sites/default/files/limited_jurisdiction_courts.pdf (last visited Jun. 27, 2018).
[10] *Id.*
[11] Idaho Court Admin. R. 38 (Minimum Standards for Preservation, Destruction, or Disposition of Trial Court Records—Criminal Actions and Infractions), *available at* https://isc.idaho.gov/icar38 (last visited Jun. 27, 2018).
[12] Office of the Secretary of State, District and Municipal Court Records Retention Schedule 13, *available at* https://www.sos.wa.gov/_assets/archives/district%20and%20municipal%20court%20rrs%20ver%206.0%20rev.pdf (last visited Jun. 27, 2018).
[13] Oregon State Trial Court Records Section 2.2—Case Files 15-16, *available at* http://www.courts.oregon.gov/rules/Other%20Rules/Section_2.2_Case_Files.pdf (last visited Jun. 27, 2018).

judge sitting in the Eighth Circuit adjudicated proceedings involving a Kansas conviction).

Because of asymmetries in record preservation requirements across states in the Ninth Circuit and nationwide, a noncitizen convicted of essentially the same crime might face significantly different immigration consequences depending on criminal court document retention policies and practices in the state in which she was convicted. *Compare* California Health & Safety Code § 11377 (possession of methamphetamine, charged as a misdemeanor whose records may be destroyed after five years) *with* Washington RCW 69.50.4013(2) (possession of controlled substance, including methamphetamine, may be charged as a felony whose records must never be destroyed[14]).

Arbitrary distinctions across different courts' record destruction practices should not determine relief eligibility. This Court should hold that *Moncrieffe* abrogates *Young*.

[14] *See* Office of the Secretary of State, County Clerks and Superior Court Records Retention Schedule 10, *available at* https://www.sos.wa.gov/_assets/archives/recordsmanagement/county%20clerks%20and%20superior%20court%20records%20rs%20ver%207.0.pdf (last visited Jun. 27, 2018).

C. The Government Is in a Far Superior Position to Obtain Records than Noncitizens, Who Are Often Detained, Unrepresented, and Non-English Speaking.

In removal proceedings, the government—not the noncitizen—should bear the initial burden of producing records indicating a bar to relief, consistent with the requirements of 8 C.F.R. § 1240.8(d). *See* Pet. Br. 22-23. Most noncitizens are not represented by counsel and are not fluent in English. Many are detained by the government during the course of their proceedings. Still others must overcome difficulties associated with mental illness, past trauma, persecution, or other forms of violence. Any decision by this Court that would place the initial burden on noncitizens to produce conviction records would ignore not only the government's own regulatory language, but also the harsh realities that noncitizens face in removal proceedings. The government is in a far better position to obtain any available criminal records, as recognized by the government's own regulation and how it has interpreted it. *See* 8 C.F.R. § 1240.8(d); *Matter of A-G-G-,* 25 I. & N. Dec. 486, 501 (BIA 2011).

1. Most Noncitizens Do Not Have Attorneys.

A noncitizen in removal proceedings is not entitled to an attorney unless she can afford to pay for one or find someone to represent her for free. *See* 8 U.S.C. § 1229a(b)(4)(A). Most noncitizens are not represented by counsel: according to data drawn from 2007 to 2012, only 37 percent of all noncitizens secured legal

representation in their removal cases. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 16 (2015). Only 14 percent of detained noncitizens have legal counsel. *Id.* at 32. *See*, *e.g.*, *Antonio v. Sessions*, No. 13-71256 (9th Cir.) (amici submitted brief on Aug. 5, 2016, in the case of a noncitizen who was unrepresented in his proceedings before the immigration agency).

In contrast to noncitizens, DHS is always represented in removal proceedings by counsel from the Office of the Principal Legal Advisor, which has over 1,100 attorneys and 350 support personnel. *See* Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement, *available at* https://www.ice.gov/opla (last visited Jun. 27, 2018). As representatives of the federal government, DHS attorneys are particularly well positioned to obtain records from state and local government entities. *Cf.* George Joseph, *Where ICE Already Has Direct Lines To Law-Enforcement Databases With Immigrant Data*, National Public Radio (May 12, 2017) (noting that DHS officials can search electronically for information from nearly one thousand law enforcement agencies across the country).

Not surprisingly, unrepresented noncitizens fare poorly when litigating against a government agency that is always represented by attorneys. A noncitizen who is fortunate enough to obtain legal representation dramatically increases his

odds of avoiding removal. Similarly situated noncitizens are fifteen times more likely to seek relief and five-and-a-half times more likely to obtain relief when represented by counsel. Eagly & Shafer, *supra* at 49-51. In amici's experience, this is due in large part to the inability of unrepresented immigrants to obtain relevant documents, including criminal records.

One military veteran who faced removal proceedings alone, while detained, and without counsel described the challenges as follows:

> The United States has been my home for 20 years. When I was a young child, I came to the United States as a lawful permanent resident with my family. I graduated high school with honors. . . . I am a U.S. war veteran . . . [A]fter I made some wrong decisions in my life, I was convicted for possessing with intent to distribute a small amount of cocaine and possessing a firearm. ICE placed me in removal proceedings and told me that I was in mandatory detention without eligibility for bond. . . . Unable to work while detained, I had no money to hire a private attorney. . . . I had no option but to fight my case by myself while I was detained, against a trained government attorney. . . . I lost my case.[15]

The Court should overrule *Young* so that detained, pro se noncitizens are not rendered ineligible for relief simply because of their inability to obtain counsel who can help them obtain criminal records.

[15] Saba Ahmed et al., *The Human Cost of IIRIRA—Stories From Individuals Impacted by the Immigration Detention System*, 5 J. Migration & Human Security 194, 198-201 (2017).

2. Noncitizens in Detention Face Virtually Insurmountable Barriers to Obtaining Their Criminal Records.

Detainees in removal proceedings face innumerable additional barriers to obtaining criminal records. Noncitizens are held in prison-like facilities in cells and behind barbed wire fences, and they face significant restrictions on visitation, movement, and external communication.[16]

Detainees are subject to phone, Internet, and mail restrictions that make it difficult—if not impossible—to place calls to clerks' offices, print records request forms, and conduct other communication necessary to obtain records.[17] Some facilities have "postcard-only" policies that do not permit detainees to receive or send mail in envelopes.[18] Even in facilities without these policies, detainees may not have the checkbook or credit card required to pay for records.[19] Given these

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[16] *See, e.g.,* Complaint, *Southern Poverty Law Center v. United States Department of Homeland Security, et al.*, No. 1:18-cv-00760 (D.D.C Apr. 4, 2018); Amnesty International, Jailed Without Justice: Immigration Detention in the USA 29-43 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (last visited Jun. 27, 2018).

[17] *See, e.g.,* Order Granting Class Certification, *Lyon v. United States Immigration and Customs Enforcement*, No. C-13-58780-EMC (N.D. Cal. Apr. 16, 2014) (complaint alleges detainees "cannot complete calls . . . to offices that use 'voicemail trees'"); Amnesty International, *Jailed Without Justice*, *supra* note 16, at 26-30.

[18] *See Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068 (D. Or. 2013); Prison Policy Initiative, *Return to Sender: Postcard-only Mail Policies in Jail* (2013), *available at* http://static.prisonpolicy.org/postcards/Return-to-sender-report.pdf (last visited Jun. 27, 2018).

[19] *See, e.g.,* How to Request a Criminal Record, The Superior Court of California: San Francisco County, *available at*

realities, it is difficult to imagine how noncitizen detainees—the overwhelming majority of whom lack lawyers—could obtain criminal records.[20]

In the unlikely event that a detainee is able to mail a request with appropriate payment, he may be transferred to another facility before the records arrive, or the records may not travel with him when he is transferred.[21] In our experience, noncitizens are often transferred to faraway detention facilities during the pendency of their removal proceedings. DHS may initiate removal proceedings anywhere in the country, 8 C.F.R. § 1003.14, regardless of where a noncitizen resides, and an immigration court may only transfer venue if the noncitizen

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https://www.sfsuperiorcourt.org/divisions/criminal/obtain-criminal-records (last visited Jun. 27, 2018) (noting that the cost of records is $0.50 per page and requiring payment via check); Copies of Records, Clerk of the Superior Court of Maricopa County, *available at* http://clerkofcourt.maricopa.gov/copies.asp#mail (last visited Jun. 27, 2018) (requiring payment by either money order, debit or credit card).

[20] Noncitizens may face additional challenges when attempting to obtain sealed or expunged records; courts may require additional paperwork and may only release records to the noncitizen in person (which is an impossibility if he is detained). *See*, *e.g.* Mi. Code Crim. Proc. 762.14 (pertaining to Michigan's Holmes Youthful Trainee Act).

[21] *See, e.g., Sasso v. Milhollan*, 735 F. Supp. 1045, 1047 (S.D. Fla. 1990) (noting that detainee transferred to El Paso facility even though evidence in his case was located in Florida); *see also* Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States* (2011), *available at* https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united (last visited Jun. 27, 2018).

demonstrates good cause, *see* 8 C.F.R. § 1003.20(b), a standard that in practice is difficult for detained noncitizens to meet.

3. Noncitizens Who Are Not Fluent in English Experience Additional Barriers in Obtaining Records.

The devastating consequences of the *Young* rule are even more pronounced for noncitizens who are not fluent in English. The 90 percent of noncitizens who cannot proceed in English while in removal proceedings[22] face additional barriers in obtaining prior records. State and county court websites with information about requesting records are almost always in English, which is also often the only language spoken by court clerks. Especially if she is detained, it is hard to conceive of how a noncitizen not proficient in English could negotiate the records request process (even if she were able somehow to obtain access to phones or the Internet).

4. Mentally Ill Detainees Face Even More Difficulties in Obtaining Records.

Noncitizens with mental illness and other disabilities may not be able to request criminal records, whether they are detained or not. Tens of thousands of noncitizens with mental disabilities are estimated to face removal each year. *See* Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental*

[22] Department of Justice, Executive Office for Immigration Review, FY 2016 Statistics Yearbook E1, *available at* https://www.justice.gov/eoir/page/file/fysb16/download (last visited Jun. 27, 2018).

Competence in Removal Proceedings, 65 Hastings L. J. 929, 936-37 (2014) ("[U]p to 60,000 detained individuals with some type of mental illness face deportation each year"). Amici have represented such individuals, who suffer from cognitive delays, schizophrenia, bipolar disorder, or post-traumatic stress disorder. *Id*. at 936. Mentally ill people struggle to participate in their cases.[23] A requirement that they somehow obtain criminal court records is unrealistic and cruel.

* * *

The Court should reject *Young* as incompatible with basic fairness. The Court should not penalize noncitizens by rendering them ineligible for relief based on their inability to obtain conviction records. Noncitizens face numerous overwhelming challenges in trying to request and obtain criminal court records that may not even exist. The government is in a far better position to obtain such records and should bear the initial burden to produce the records, as the government's own regulations recognize.

[23] *See generally* Human Rights Watch, *Deportation by Default: Mental Disability, Unfair Hearings, and Indefinite Detention in the U.S. Immigration System* (2010), *available at* https://www.hrw.org/report/2010/07/25/deportation-default/mental-disability-unfair-hearings-and-indefinite-detention-us (last visited Jun. 27, 2018).

II. *Young*'s Divergence from the Categorical Approach Unfairly Affects Noncitizens in a Wide Variety of Immigration Adjudications, Both Adversarial and Non-Adversarial.

Young has affected noncitizens in a wide variety of proceedings involving eligibility for relief from removal and immigration benefits, both immigration court removal proceedings and non-adversarial contexts with even less of a possibility of a fair adjudication of an inquiry consistent with the categorical approach.

In immigration courts, this Court's decision will impact noncitizens applying for many types of relief that require the noncitizen to bear the burden of proving the absence of a disqualifying conviction. These forms of relief include: cancellation of removal for lawful permanent residents, *see* 8 U.S.C. § 1229b(a); cancellation of removal for nonpermanent residents, *see* 8 U.S.C. § 1229b(b) (incorporating 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)); Violence Against Women Act cancellation of removal for nonpermanent residents, *see* 8 U.S.C. §§ 1229b(b)(2)(A)(i)(I)-(II), 1229b(b)(2)(A)(iv); withholding of removal, for which aggravated felonies resulting in an aggregate imprisonment term of at least five years is a bar as a particularly serious crime, *see* 8 U.S.C. § 1231(b)(3)(A), (b)(3)(B)(ii); asylum, *see* 8 U.S.C. §1158(b)(2)(B)(i); and voluntary departure, *see* 8 U.S.C. § 1229c(a)(1).

This Court's decision will also have a significant impact on noncitizens in a variety of high-volume non-adversarial contexts involving non-independent agency examiners. A sub-agency of the Department of Homeland Security, U.S. Citizenship and Immigration Services ("USCIS"), adjudicates hundreds of thousands of applications for waivers, adjustments, and naturalizations in remote facilities through a paper-only, non-adversarial process. *See* USCIS Adjustment of Status Form I-485 Performance Data (Fiscal Year 2018, 1st Qtr)[24] (USCIS adjudicated over 180,000 adjustment applications in a recent three-month period). Noncitizens bear the burden of proof to demonstrate that a prior conviction is not a bar to eligibility for waivers, adjustment, and naturalization, so USCIS' decisions may involve cursory examination of a prior record of conviction to determine whether it is disqualifying. *See*, *e.g.*, 8 C.F.R. §§ 245a.18(c)(2). USCIS officials decide bars to asylum (because an aggravated felony conviction is a bar to asylum under 8 U.S.C. § 1158(b)(2)(B)(i)) and to protected status under the Violence Against Women Act (VAWA) (because relief such as self-petitioning under VAWA incorporates the criminal bars related to aggravated felony convictions, controlled substances offenses, and crimes involving moral turpitude through its

[24] *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Family-Based/I485_performancedata_fy2018_qtr1.pdf (last visited Jun. 27, 2018).

good moral character requirement, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb), subject to a narrow waiver). In addition, under the Trafficking Victims Protection Reauthorization Act ("TVPRA"), USCIS officials must assess whether trafficking victims seeking to adjust their status have proven good moral character. 8 U.S.C. § 1255(l)(1)(b). The TVPRA also requires USCIS officials to determine whether youths applying for Special Immigrant Juvenile Status (which would allow for an adjustment of status to lawful permanent residence) are barred from eligibility due to having been convicted of inadmissible offenses (subject to a narrow waiver). 8 U.S.C. § 1255(h)(2)(B). Even beyond these applications for changes or adjustments to status, noncitizens bear the burden of proving that a prior conviction does not disqualify them from naturalization. 8 U.S.C. §§ 1101(f)(8), 1427(a)(3). *See also* 8 C.F.R. § 316.10(b)(1)(ii) (applicant will be found to be lacking good moral character if convicted of an aggravated felony on or after Nov. 29, 1990). USCIS officers adjudicate a high volume of such applications: USCIS received over 178,000 naturalization applications in just one three-month period in 2018.[25]

In short, the Court's decision in this case will have a broad ranging impact on noncitizens. This ranges from noncitizens in removal proceedings to those

[25] USCIS Military and Non-Military Naturalization Form N-400 Performance Data (Fiscal Year 2018, 1st Qtr), *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400_performancedata_fy2018_qtr1.pdf (last visited Jun. 27, 2018).

applying for relief in non-adversarial contexts with even less of a possibility of a full and fair adjudication of an inquiry consistent with the categorical approach. The Court should reverse *Young* and instead adhere to Supreme Court precedent making clear that the categorical approach's legal inquiry is unaffected by any burden of proof provision.

CONCLUSION

For the foregoing reasons, the Court should hold that *Moncrieffe* abrogated *Young*.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 29-2(c)(3), I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 6,023 words.

Dated: June 29, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on June 29, 2018, the foregoing document

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