

## American University Washington College of Law

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February, 2020

Brief of Nat'l Assoc. of Crim. Defense Attorney &  
Nat'l Assoc. of Fed'l Defenders as Amicus Curiae,  
Pereida v. Barr, No. 19-438 (U.S.) (Feb. 2020).

Jenny Roberts

No. 19-438

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IN THE  
**Supreme Court of the United States**

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CLEMENTE AVELINO PEREIDA,  
*Petitioner,*

*v.*

WILLIAM P. BARR, ATTORNEY GENERAL,  
*Respondent.*

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ON WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

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**BRIEF FOR AMICI CURIAE  
NATIONAL ASSOCIATION OF CRIMINAL  
DEFENSE LAWYERS & NATIONAL  
ASSOCIATION OF FEDERAL DEFENDERS  
IN SUPPORT OF PETITIONER**

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### **INTEREST OF AMICI CURIAE<sup>1</sup>**

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

The National Association of Federal Defenders (NAFD), formed in 1995, is a nationwide, nonprofit, volunteer organization whose membership comprises attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, federal defenders represent

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<sup>1</sup> Pursuant to Rule 37.3(a), all parties have provided written consent to the filing of this brief. Pursuant to Rule 37.6, amici affirm that no counsel for any party authored this brief in whole or in part and that no entity or person, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

tens of thousands of indigent criminal defendants in federal court.

Amici and their members have decades of experience representing criminal defendants in state and federal court. Through these representations, amici have become intimately familiar with state and local criminal recordkeeping practices. Amici have observed how these recordkeeping practices substantially impact noncitizens' ability to obtain and present prior criminal records in removal proceedings. Moreover, because amici's members have a constitutional obligation to advise their clients about the immigration consequences of a guilty plea, they have an interest in judicial rules affecting those consequences. *See generally Padilla v. Kentucky*, 559 U.S. 356 (2010). Amici therefore have particular expertise and interest in the issues presented in this case.

### SUMMARY OF ARGUMENT

Under the Eighth Circuit's rule, a noncitizen's eligibility to apply for relief from removal hinges on state and local recordkeeping practices. The core question under the modified categorical approach is whether the documents comprising a noncitizen's record of conviction, as defined in *Shepard v. United States*, 544 U.S. 13 (2005), reveal that the noncitizen necessarily has been convicted of a crime that disqualifies her from applying for relief under the Immigration and Nationality Act (INA), 8 U.S.C. §§ 1101 *et seq.* But noncitizens have no control over whether the *Shepard* documents will contain the information necessary to answer that question, or whether those documents still exist, if they ever existed in the first place. State and local jurisdictions vary tremendously in whether and how they make and preserve records and whether and how they conduct

guilty plea colloquies in criminal cases, particularly for misdemeanor convictions. Thus, under the Eighth Circuit's approach, two noncitizens convicted of the same divisible misdemeanor offense in different counties in the same state could face different immigration outcomes depending on the completeness of the *Shepard* documents from their criminal cases. One could be found ineligible for cancellation of removal simply because the county in which she was convicted failed to create or keep records showing that her misdemeanor was not a disqualifying conviction, while the other, armed with conclusive documentation, could receive discretionary relief.

In this brief, amici demonstrate that the Eighth Circuit's approach causes inconsistent and potentially unjust immigration outcomes. Amici have thousands of members who represent criminal defendants in state and federal courts in every U.S. jurisdiction. Their experiences confirm that if the Court adopts the Eighth Circuit's rule, discrepancies and inadequacies in state and local recordkeeping practices would give rise to severe and arbitrary disparities in the ability of a noncitizen to obtain relief from removal. Moreover, the rule would undermine amici's members' ability to specifically structure guilty pleas to avoid drastic immigration consequences. For example, counsel's advice to a client under *Padilla* could be rendered incorrect years later should that jurisdiction of conviction destroy the record of the client's plea.

Part I shows that states and localities differ substantially in whether they create and keep records that would allow immigration authorities and courts to determine whether a noncitizen necessarily has been convicted of a disqualifying offense. Part II illustrates that, because of these inadequate local recordkeeping

practices, and because immigration proceedings often take place long after the state-court conviction, immigration authorities and courts are frequently confronted with ambiguous records of conviction. Under the Eighth Circuit’s approach, a noncitizen is disadvantaged by this failing, even though it is plainly outside her control. The Court should reject this approach and adopt the rule embraced by the First, Second, Third, and Ninth Circuits that an ambiguous record of conviction does not bar eligibility for relief from removal.

## **ARGUMENT**

### **I. CRIMINAL COURT RECORDS OF CONVICTION ARE OFTEN AMBIGUOUS, PARTICULARLY IN MISDEMEANOR CASES**

Court records of conviction are all too often ambiguous with respect to the specific subsection or prong of conviction. As amici’s experience shows, court record-keeping practices vary widely by jurisdiction, particularly in the context of misdemeanor convictions. Many types of misdemeanor convictions and other low-level violations can operate to bar relief from removal. As here, noncitizens can be barred from seeking cancellation of removal based on convictions for crimes involving moral turpitude, 8 U.S.C. § 1229b(b)(1)(C), which include minor misdemeanors and other low-level offenses. Similarly, “aggravated felonies,” which for the purposes of immigration law include crimes classified as misdemeanors under state law, bar asylum and cancellation of removal even for lawful permanent residents. *See Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011); *Gattem v. Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005).

Faulting a noncitizen for the incompleteness of the records documenting her conviction will preclude discretionary relief where it is otherwise warranted. Moreover, such a rule is at odds with the purposes of the categorical approach and the reality of plea bargaining that considers the defendant’s immigration consequences.

The Court has reaffirmed, time and again, that the primary purpose of the categorical approach is to ensure that “noncitizens ... ‘convicted of’ the same offense” obtain the same result in the immigration courts.<sup>2</sup> *Moncrieffe v. Holder*, 569 U.S. 184, 201 (2013); *see also Mathis v. United States*, 136 S. Ct. 2243, 2251-2252 (2016); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986-1987 (2015); *Descamps v. United States*, 570 U.S. 254, 261-263 (2013). And yet, the rule adopted by the Eighth Circuit below would ensure exactly the opposite: Noncitizens convicted of the same offense will receive different outcomes based on the vagaries of state and local recordkeeping practices that operate entirely outside of the noncitizen’s control. The Eighth Circuit held that a noncitizen cannot discharge her burden to prove eligibility for discretionary relief where her rec-

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<sup>2</sup> These same goals underlie the use of the categorical approach outside the immigration context, such as in the application of sentencing enhancements under the Armed Career Criminal Act, *see, e.g., Descamps v. United States*, 570 U.S. 254, 263 (2013) (describing the “central feature” of the categorical approach as “a focus on the elements, rather than the facts, of a crime”), or in the application of the safety valve under 18 U.S.C. § 3553(f), *see, e.g., United States v. Hicks*, 2019 WL 3292132, at \*2 (E.D. Tenn. July 22, 2019). *See also Taylor v. United States*, 495 U.S. 575, 600 (1990) (explaining that the categorical approach looks “only to the statutory definitions of the prior offenses, and not the particular facts underlying those convictions”).

ord of conviction is ambiguous. *Pereida v. Barr*, 916 F.3d 1128, 1130 (8th Cir. 2019). This rule impermissibly ignores the reality that records of criminal convictions often are not created, are frequently incomplete where they are created, and are often destroyed before immigration proceedings commence.

The creation and maintenance of criminal case records is far from uniform across the country. According to the Department of Justice, the nation’s state-level criminal history databases contained records relating to over 110 million individual offenders as of December 31, 2016.<sup>3</sup> But our nation does not have a unitary criminal legal system that encompasses all of these 110 million individuals, nor does it have only 52 statewide or territorial systems. Rather, conviction records—which are often generated at the municipal or county level—come from thousands of local jurisdictions.

Problems with nonuniformity in recordkeeping practices are particularly acute in misdemeanor cases, as evidenced by the record in Mr. Pereida’s case. While some states have unified court systems, other states “maintain a dizzying array of local institutions that process misdemeanors, including municipal courts, summary courts, magistrate courts, justice courts, and mayor courts, each maintained by a different jurisdiction, often with its own separate municipal code.” Alexandra Natapoff, *Punishment Without Crime* 39-40 (2018). And because recordkeeping in the lowest-level criminal courts tends to receive the least amount of care, noncitizens with the most minor criminal convictions would, incongruously, be hurt the most by the

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<sup>3</sup> See DOJ, Bureau of Justice Statistics, *Survey of State Criminal History Information Systems* 2 (2016), <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf>.

Eighth Circuit’s rule. This turns the policy behind this portion of the INA—excluding noncitizens *most* likely to pose a threat to public safety—on its head. Arbitrary bureaucratic differences across criminal courts or individual judicial personnel should not determine a matter so fundamentally important and life-altering as deportation.

Based on amici’s experience with misdemeanor cases, state and local courts often fail to reliably record misdemeanor convictions. Where state and local courts do create reliable records, those records often fail to specify the statutory subsection or factual basis underlying a plea. Finally, whatever full or partial information a record might contain may be destroyed under statutory authority or local practice long before any immigration proceedings commence.

**A. In Many Lower Criminal Courts, Misdemeanor Convictions Are Not “On the Record”**

Many states have no requirement that a misdemeanor guilty plea in a lower criminal court be on the record such that the so-called *Shepard* documents needed for the modified categorical approach simply will not exist. *See generally Shepard v. United States*, 544 U.S. 13, 14, 16 (2005) (limiting the documents courts generally may consider to charging documents, written plea agreements, plea colloquies, “explicit factual findings by the judge to which the defendant assented,” and jury instructions). In the absence of codified procedures, a state, county, municipality, individual clerk, or judge may not record adequately, or at all, the specifics of an individual’s conviction.

When a guilty plea takes place in a court with no court reporter or other method of recording, there is no



recording of the plea colloquy. For example, in Missouri state courts, the court reporter must “[r]ecord accurately all court proceedings in connection with the plea,” but only when a defendant pleads guilty to a felony. Mo. S. Ct. R. 24.03(a). There is no requirement under state law that a record be made for misdemeanor pleas. Accordingly, Missouri city and county municipal proceedings other than trials are neither audio recorded nor memorialized by a court reporter. *See* Affidavit of Raymond R. Bolourtchi, Esq. ¶ 8.<sup>4</sup> Moreover, if a *felony* case advances to one of the larger Missouri Circuit Courts for trial, and a defendant subsequently enters a plea to a misdemeanor instead of a felony, the Circuit Judge ordinarily will not conduct that misdemeanor plea colloquy “on the record.” *Id.* ¶ 18. Similarly, in New Mexico, many misdemeanor cases begin and end in lower courts that are not “of record.” *See* N.M. Stat. Ann. §§ 35-1-1, 34-8A-2, 34-8A-6(E); Affidavit of Kari Converse, Esq. ¶ 6. And in Virginia, the District Courts with jurisdiction over misdemeanor cases are also “courts not of record.” Va. Code §§ 16.1-69.6 *et seq.* But even in Virginia’s Circuit Courts, to which misdemeanor cases may be appealed as of right and which *are* “court[s] of record,” *id.* §§ 17.1-100 *et seq.*, there is still no court reporter unless a defendant pays for her own reporter. *See* Affidavit of Bryan T. Kennedy, Esq. ¶ 5; Affidavit of Nina J. Ginsberg, Esq. ¶ 7.

This lack of recorded transcripts for misdemeanor plea colloquies is a common theme across multiple ju-

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<sup>4</sup> Amici have gathered 12 affidavits from private practitioners, public defenders, and prosecutors to add additional insight into how recordkeeping practices vary throughout the country. Amici have included a full list of these affiants. App. 1a. Original hard copies of these affidavits are on file with counsel for amici.

risdictions. In Iowa, defendants can plead guilty to misdemeanors, including serious or aggravated misdemeanors, without a colloquy. *See* Iowa R. Crim. P. 2.8(b)(5), 2.63. In South Dakota, “[a] verbatim record of the proceeding at which a defendant enters a plea to a misdemeanor need not be taken” unless expressly requested. S.D. Codified Laws § 23A-7-15. Notably, this rule applies even though the defendant’s attorney may enter a plea of guilty for her without her physical presence. *Id.* § 23A-7-5; *see also* Mo. S. Ct. R. 31.03(a) (allowing the parties to waive the defendant’s presence for misdemeanor guilty pleas in Missouri courts); Bolourtchi Aff. ¶ 15. And in Texas courts, misdemeanor pleas often take place “off the record” because no court reporter is assigned to cover misdemeanor dockets. *See* Natapoff, *Misdemeanors*, 85 S. Cal. L. Rev. 1313, 1348 (2012).

Practitioners throughout the nation’s many local courts also bear witness to the fact that misdemeanor pleas often go unrecorded. In North Dakota, for example, the 90 municipal courts with jurisdiction over criminal violations of city ordinances are not courts of record. There are no court reporters, no audio or video recorders, and if records of proceedings do exist, they are usually limited to the incomplete notes taken by municipal judges or their staff. *See* Affidavit of Mark A. Friese, Esq. ¶¶ 16-17. These examples of unrecorded misdemeanor proceedings reveal the arbitrary and inconsistent outcomes that can result from the Eighth Circuit’s rule. When misdemeanor pleas take place off the record, there is simply no ability to obtain transcripts of plea colloquies for use in immigration proceedings.

**B. Misdemeanor Records Often Omit Key Information About The Conviction**

Even when misdemeanor plea records *are* created, they are often inadequate because they fail to specify the statutory subsection or the factual basis for the plea. States vary widely in what information they require to be included in criminal case records, particularly in the misdemeanor context.

In practice, even jurisdictions that use written plea forms do not consistently record any specific information about the nature of a misdemeanor conviction. In Montgomery County, Maryland, misdemeanor plea forms generally omit the particular subsection of conviction, as does the judge accepting the guilty plea. *See* Affidavit of Roberto Martinez, Esq. ¶ 4. In Virginia’s District Courts (which are courts “not of record,” *see supra* p. 8), the plea forms used “almost never include the facts required to support the defendant’s plea of guilty.” Ginsberg Aff. ¶ 10. The judge will enter the findings of the court on a form printed on the back of the arrest warrant, and, “[u]nless specifically requested by the parties no facts underlying the conviction are reflected on the form.” *Id.* ¶ 11; *see also* Kennedy Aff. ¶ 10. In Los Angeles County, California, local criminal practice is to use a written plea form and to indicate that the defendant “stipulate[d] to a factual basis”—that is, the defendant agreed that facts exist that meet the elements without specifying those facts or elements and without admitting to the specific facts contained in the charging instrument. Affidavit of E. Katharine Tinto, Esq. ¶ 13. In such cases, no record of the elements or conduct—written or oral—is ever made. *See id.*

In jurisdictions that do not use written plea forms, or that use them unpredictably in practice, the specific subsection or factual basis for a guilty plea is also rarely recorded. In New Mexico misdemeanor courts, even in the rare instances in which court proceedings are recorded, the most common practice is to “stipulate to the factual basis” rather than to state the factual basis for the plea. *See* Converse Aff. ¶ 6. The same is true in Missouri, where pleas in city and county courts do not contain a factual basis. *See* Bolourchi Aff. ¶ 20. In Philadelphia, defendants do not fill out a written plea agreement, and judges and lawyers are unlikely to orally reference the relevant subsection of conviction for offenses involving more than one section. *See* Affidavit of Rebecca Hufstader, Esq. ¶ 4. As a result, criminal dockets in Philadelphia rarely include the specific subsection to which a defendant pleaded guilty. *See* Affidavit of Caleb Arnold, Esq. ¶ 4. In Rhode Island, misdemeanors are commonly prosecuted on the basis of a complaint drafted by a police officer that frequently cites “an entire statute without delineating a particular subsection.” Affidavit of Andrew Horwitz, Esq. ¶¶ 3-4. When the defendant pleads guilty—often proceeding without counsel—there is generally no discussion of or reference to a specific statutory subsection or the factual basis of the plea. *See id.* ¶ 8. And in North Dakota, most municipal prosecutions are based on general charging, making it impossible to determine the subsection under which a defendant has pleaded or been found guilty. *See* Frieze Aff. ¶ 15.

Additionally, even within jurisdictions, recording practices differ and often introduce inaccuracies. In New Jersey, for example, misdemeanors are often violations of local laws, and each municipal court has a different method of recordkeeping. *See* Affidavit of Mi-

chael Noriega, Esq. ¶ 6. Accordingly, dispositions are recorded on different documents subject to different requirements regarding the information they must contain. *See id.* And even when the relevant documents can be located, the final disposition may not be clear from the face of the document. In New Jersey municipal courts, one common practice is for municipal judges to resolve misdemeanor pleas by making a handwritten shorthand notation of the plea on the complaint. *See* Affidavit of John S. Furlong, Esq. ¶ 17. These handwritten notations are often illegible, so it is not always possible to decipher whether a defendant has pleaded to the charged offense. *See id.* Similarly, in Virginia, if a charge is amended by a plea agreement, a judge generally handwrites the amended code section on the warrant (which serves as the charging document). *See* Kennedy Aff. ¶¶ 10, 12. Even when the judge notes the right code section, identifies the right subsection, and checks the right boxes—none of which is sure to happen—the clerk’s office is left to decipher the judge’s handwriting and often enters incorrect information in the order of conviction. *See id.* ¶ 14. The Virginia appellate courts have recognized these troubling issues in recordkeeping practices. *See, e.g., Rose v. Commonwealth*, 578 S.E.2d 758, 761 (Va. 2003) (holding that the Commonwealth had not met its burden because the judge had not marked any of the relevant boxes); *Razzaq v. Commonwealth*, 2004 WL 555440, at \*1 (Va. Ct. App. Mar. 23, 2004) (unpublished) (noting that “[n]one of the[] blanks or boxes w[ere] filled” in the “preprinted portion of the summons/order” for the defendant’s conviction for petit larceny).<sup>5</sup>

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<sup>5</sup> Most misdemeanor litigants, especially those who are non-English speakers, do not have the ability or the wherewithal to

Across many states and localities, the records of misdemeanor pleas often do not include the statutory subsection or factual basis underlying the conviction. Consistent with *Moncrieffe*, a conviction should only bar relief under the modified categorical approach when the record necessarily demonstrates a disqualifying conviction. The Eighth Circuit's rule turns this on its head and subjects noncitizens to deportation based solely on shoddy recordkeeping that happened years earlier and was entirely outside their control.

**C. Even Where Misdemeanor Records Once Existed, They May Have Been Destroyed Or May Be Otherwise Inaccessible**

Finally, even if a record of a noncitizen's misdemeanor conviction that specifies the statutory subsection or factual basis of conviction has been created, the noncitizen may be unable to access that record.<sup>6</sup> Noncitizens frequently face removal proceedings many years after the conclusion of a criminal matter. *See, e.g., Thomas v. Attorney Gen.*, 625 F.3d 134, 136-137 (3d Cir. 2010) (DHS initiated removal 11 years after noncitizen's first guilty plea and nine years after his second);

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check their order, follow up with the clerk's office to correct it, and, in the absence of any transcript or other record, convince the judge that his order was incorrect. *See Kennedy Aff.* ¶¶ 15-16; *Furlong Aff.* ¶¶ 36-37; *see also* Immigration Orgs. Amicus Br. 13-18.

<sup>6</sup> Even with respect to transcripts created in felony trials, one 50-state survey showed extensive issues with the accessibility and accuracy of these documents. *See Cheit, The Elusive Record: On Researching High-Profile 1980s Child Sexual Abuse Cases*, 28 Just. Sys. J. 79, 86-88, 91 (2007) <https://www.ncsc.org/~media/Files/PDF/Publications/Justice%20System%20Journal/The%20Elusive%20Record.ashx>.

*Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 498-499 (7th Cir. 2008) (DHS initiated removal over 11 years after conviction); *Kuhali v. Reno*, 266 F.3d 93, 98 (2d Cir. 2001) (DHS initiated removal nearly 19 years after plea). Yet many jurisdictions destroy criminal case records after only a few years. These record retention policies effectively bar many noncitizens from seeking relief from removal.

For example, Alabama destroys most misdemeanor records five years after the date of disposition.<sup>7</sup> In California, misdemeanor records may be destroyed after five years, or after two years for certain marijuana offenses.<sup>8</sup> Other records, such as court reporter’s notes in both felony and misdemeanor cases, may be destroyed after ten years. *See* Cal. Gov’t Code § 69955(e). In Kentucky, the files for most misdemeanors are destroyed after five years.<sup>9</sup> Michigan district courts are

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<sup>7</sup> Memorandum of Sue Bell Cobb, Chief Justice, Supreme Court of Alabama, *Revised Records Retention Schedule 2* (Apr. 7, 2009), <http://www.alacourt.gov/PR/2009%20RECORDS%20RETENTION%20SCHEDULE.PDF>.

<sup>8</sup> *See* Cal. Gov’t Code § 68152(c)(7)-(8); California Judicial Council, *Trial Court Records Manual* 97 (rev. Jan. 1, 2019), <http://www.courts.ca.gov/documents/trial-court-records-manual.pdf>. In Los Angeles County Superior Courts, despite destroying the actual court file for most older misdemeanor cases, the court retains “minutes” of court proceedings. However, the minutes are not a verbatim transcription; rather, they are a summary. *See* Tinto Aff. ¶ 11.

<sup>9</sup> Kentucky Court of Justice, *Records Retention Schedule 3* (July 12, 2010), <https://kdla.ky.gov/records/recretenationschedules/Documents/State%20Records%20Schedules/kycojircuit-district1978-present.pdf> (noting exceptions for records of convictions on “enhanceable charges,” convictions that are eligible for sex offender registration, and convictions that are disqualifying for charitable

instructed to destroy criminal case files six years after the date of disposition.<sup>10</sup> Hawaii permits destruction of complaints and orders in district court criminal cases just two years after judgment is entered.<sup>11</sup> New Mexico requires retention of lower court misdemeanor case files, except for “DUI or domestic violence cases,” for only *one year* after the defendant is convicted and sentenced. N.M. Code R. § 1.21.2.613. Montana, Minnesota, North Dakota, and Tennessee permit the destruction of certain felony and misdemeanor case records after ten years.<sup>12</sup> In Virginia, clerks are required to destroy the records of most misdemeanor cases after ten

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gaming and other regulatory issues, and describing various conditions that must be fulfilled before record destruction).

<sup>10</sup> State of Michigan, *Retention and Disposal Schedule, General Schedule #13-District Courts*, Item No. 13.004C (2018), [https://www.michigan.gov/documents/dtmb/RMS\\_GS13\\_573186\\_7.pdf](https://www.michigan.gov/documents/dtmb/RMS_GS13_573186_7.pdf).

<sup>11</sup> Supreme Court of Hawaii, *Retention Schedule for the District Courts* 1-2 (Apr. 11, 2013), [http://www.courts.state.hi.us/docs/sct\\_various\\_orders/order48.pdf](http://www.courts.state.hi.us/docs/sct_various_orders/order48.pdf).

<sup>12</sup> *Montana Local Government Retention Schedule No. 10* 8-9 (2013) (all misdemeanors not related to domestic violence, driving while intoxicated, privacy in communication, stalking, or theft), [https://sos.mt.gov/Portals/142/Records/forms/Local\\_Schedule10.pdf](https://sos.mt.gov/Portals/142/Records/forms/Local_Schedule10.pdf); *Minnesota, District Court Retention Schedule* 13 (June 1, 2018) (all non-traffic misdemeanors not related to domestic violence, except gross misdemeanors and certain driving while intoxicated misdemeanors), [http://www.mncourts.gov/mncourtsgov/media/scao\\_library/MN-District-Court-Record-Retention-Schedule.pdf](http://www.mncourts.gov/mncourtsgov/media/scao_library/MN-District-Court-Record-Retention-Schedule.pdf); *North Dakota, Court Records Retention Schedule, No. 500409* (eff. July 1, 2019), <https://www.ndcourts.gov/legal-resources/rules/ndsuptadminr/19/records-retention-schedule-courts> (pleadings charging a misdemeanor or the appeal of a municipal misdemeanor conviction, other than “DUI offenses,” “protective order violations,” and certain sex offenses cases); Tenn. Code Ann. § 18-1-202 (“records, dockets, books, ledgers and other documents” in “all cases that have been finally disposed of”).



years. Va. Code § 16.1-69.55. In Rhode Island, where “[m]any misdemeanors are resolved with a disposition called a ‘filing,’” all court records are automatically destroyed at the conclusion of the filing period. *See* Horwitz Aff. ¶ 13.

Moreover, even where records are kept and accessible in theory, noncitizens cannot always obtain them. Some clerks require individuals to pick up records in person, and if a noncitizen is in immigration detention and uncounseled, she may be unable to access needed records. *See, e.g.*, Ginsberg Aff. ¶ 9 (describing how parties must physically go to the clerk’s office in Virginia to view criminal files); Martinez Aff. ¶ 5 (describing how parties must “appear in-person at the clerk’s office to file an Inspection of Records form and pay for certified true-test copies” of documents related to a record of conviction). Detainees are transferred frequently between detention centers, further limiting their ability to obtain records.<sup>13</sup> The practical difficulties faced by noncitizens in requesting and receiving their criminal records only intensifies the unfairness of requiring them to bear the burden of producing records relevant to their eligibility for relief from removal. *See* Immigration Orgs. Amicus Br. 13-18.

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<sup>13</sup> In fiscal year 2015, about 60% of adult detainees experienced at least one transfer. *See* Ryo & Peacock, *A National Study of Immigration Detention in the United States*, 92 S. Cal. L. Rev. 1, 51 (2018). Between 1998 and 2010, 46% of detainees were moved multiple times. *See* Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* 17 (2011), <http://www.hrw.org/sites/default/files/reports/us0611webwcover.pdf>. Detainees are frequently moved to detention centers a long distance from their state of residence or conviction, their families, and their legal counsel. *See* Ryo & Peacock, 92 S. Cal. L. Rev. at 29, 52.

## II. BECAUSE CRIMINAL RECORDS ARE OFTEN AMBIGUOUS, THE EIGHTH CIRCUIT’S APPROACH LEADS TO INCONSISTENT IMMIGRATION OUTCOMES

Because state records of conviction are often incomplete, destroyed, or never created, noncitizens are often unable to show—many years after the fact—the specific subsection or prong of the statute underlying an earlier conviction. Indeed, the Court has identified the morass of state recordkeeping practices as a key reason for using the categorical approach in the immigration courts. In *Moncrieffe*, the Court squarely rejected the government’s proposal that a noncitizen be called upon to make a factual showing that her conviction was not for an “aggravated felony.” *See* 569 U.S. at 200-201. The Court explained that the government’s approach would be both impractical and unfair because it is unlikely that state court records will adequately note the basis for the conviction. *Id.* at 202-203; *see also United States v. Davis*, 139 S. Ct. 2319, 2344 (2019) (Kavanaugh, J., dissenting) (explaining that “[t]he factual statements that are contained in those documents” making up a record of conviction “are often ‘prone to error[]’” and that “[t]he categorical approach avoids the unfairness of allowing inaccuracies to ‘come back to haunt the defendant many years down the road’” (quoting *Mathis*, 136 S. Ct. at 2252, 2253)); *Descamps*, 570 U.S. at 270 (recognizing that state documents underlying a conviction “will often be uncertain” and that “the statements of fact in them may be downright wrong”); *Johnson v. United States*, 559 U.S. 133, 145 (2010) (noting that the “absence of records will often frustrate application of the modified categorical approach”); *Shepard*, 544 U.S. at 36-37 (O’Connor, J., dissenting) (explaining the arbitrariness of sentences that depend on whether “States’ record retention policies happen to

preserve the musty ‘written plea agreement[s]’ and recordings of ‘plea colloqu[ies]’ ancillary to long-past convictions”).<sup>14</sup>

The Eighth Circuit’s approach has the same effect as the government’s proposal that this Court rejected in *Moncrieffe*: It effectively presumes the *greatest* of the acts criminalized and requires noncitizens to scour dated records—that may no longer exist, if they ever existed at all—to try to show that they were convicted of a lesser, non-disqualifying offense. *Cf. Moncrieffe*, 569 U.S. at 190-191 (“[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.” (original alterations omitted) (emphasis added) (quoting *Johnson*, 559 U.S. at 137)). As a result, a county clerk office’s administrative practices or a single judge’s guilty plea colloquy practice (or lack thereof) effectively determines whether a particular noncitizen

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<sup>14</sup> The government has similarly recognized that state and local records of conviction may not contain enough information to discern the precise portion of a statute under which a defendant was convicted. *See, e.g.,* Gov’t Merits Br. 45, *Voisine v. United States*, No. 14-10154 (U.S. Jan. 19, 2016) (“But even where [a] statute is divisible in theory, the modified categorical approach may often be unavailable in practice. State and local court charging documents typically track statutory language and do not specify which mens rea is at issue, as was the case for each of the petitioners. Moreover, records from closed misdemeanor cases are often unavailable or incomplete.” (internal citation omitted)); Gov’t Merits Br. 28-29, *Shepard v. United States*, No. 03-9168 (U.S. Oct. 8, 2005) (“As the court of appeals concluded, an absolute bar on considering complaint applications and incorporated police reports would make the use of prior convictions based on guilty pleas ... hinge on the happenstance of state court record-keeping practices.” (quotation marks omitted)); 544 U.S. at 22 (citing relevant portion of the Government’s brief).

will be eligible to apply for cancellation of removal. Congress could not have intended these results when it predicated deportation “on convictions, not conduct.” *Mellouli*, 135 S. Ct. at 1986 (quoting Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1701, 1746 (2011)).

The Eighth Circuit’s approach also undermines defense attorneys’ ability to advise their clients about the later immigration consequences of a plea, as constitutionally required. See *Padilla v. Kentucky*, 559 U.S. 356, 373-374 (2010). This 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.’” *Id.* at 368 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)). But the Eighth Circuit’s rule will greatly hamper a noncitizen defendant’s ability “‘to anticipate the immigration consequences of guilty pleas in criminal court,’ and to enter “‘safe harbor” guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions.’” *Mellouli*, 135 S. Ct. at 1987. Indeed, under the rule, even if an attorney accurately advised their client at the time of the plea that their conviction did not carry collateral immigration consequences, the loss or destruction of that plea allocution years later may render that noncitizen ineligible for relief from deportation. See Immigration Law Profs. Amicus Br. 21-22.

A brief survey of decisions from the courts of appeals confronting ambiguous records of conviction shows the prevalence of this dilemma and the varied outcomes it has yielded. The Ninth Circuit has repeatedly held that a number of provisions under California’s Health and Safety Code are overbroad and divisible.

See, e.g., *United States v. Murillo-Alvarado*, 876 F.3d 1022, 1027 (9th Cir. 2017) (holding that Cal. Health & Safety Code § 11351 is divisible); *United States v. Barragan*, 871 F.3d 689, 714-715 (9th Cir. 2017) (same, with reference to § 11379); *United States v. Ocampo-Estrada*, 873 F.3d 661, 668 (9th Cir. 2017) (same, with reference to § 11378); *United States v. Martinez-Lopez*, 864 F.3d 1034, 1041 (9th Cir. 2017) (same, with reference to § 11352); *Coronado v. Holder*, 759 F.3d 977, 984-985 (9th Cir. 2014) (same, with reference to § 11377).<sup>15</sup> Decisions applying the modified categorical approach to these statutory provisions reveal that whether a controlled substance is specified in the record of conviction is a matter of chance, determined only by the happenstance of local recordkeeping practices.

For example, in *Avila v. Holder*, 454 F. App'x 618 (9th Cir. 2011), the petitioner had been convicted under California Health & Safety Code § 11352. *Id.* at 619. It was not clear from the available *Shepard* materials whether the petitioner had pleaded guilty to sale or transportation of a *federal* controlled substance. *Id.* at 620. As the court explained, “the plea agreement and minute order [were] silent as to the nature of the controlled substance” underlying Avila’s conviction. *Id.*

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<sup>15</sup> As the Ninth Circuit explained in *Martinez-Lopez*, these provisions of California’s Health & Safety Code are overbroad and divisible because: (1) They criminalize conduct and controlled substances beyond those defined as federal offenses under the Controlled Substances Act; and (2) “defendants are routinely subjected to multiple convictions under a single statute for a single act as it relates to multiple controlled substances.” 864 F.3d at 1038, 1040. Under this Court’s decision in *Mathis*, courts must therefore apply the modified categorical approach to determine whether noncitizens were convicted of crimes that qualified as “controlled substance” offenses under the INA. *Id.* at 1040-1041 (citing *Mathis*, 136 S. Ct. at 2256).

Similarly, in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), *overruled by Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc), the petitioner had been convicted under California Health & Safety Code § 11352(a). *Id.* at 980. In *Young*, the applicable *Shepard* documents in the petitioner’s record of conviction were the complaint, information, and “a printout of the Superior Court of California’s electronic docket sheet for Young’s case.” *Young v. Holder*, 634 F.3d 1014, 1020 (9th Cir. 2011) (panel opinion). The electronic docket contained no findings of fact by the judge nor any stipulation of facts by Young. *Id.* The only *Shepard* document providing any hint at all about the controlled substance underlying the offense was the criminal information, which merely recited the language of § 11352(a) (including charging in the conjunctive) and added the phrase “COCAINE BASE.” *Id.*

The inadequate records of conviction in *Avila* and *Young* are not outliers. In immigration cases dealing with predicate convictions under the illicit substance provisions in California’s Health & Safety Code §§ 11351 *et seq.*, the Ninth Circuit is regularly faced with state records that do not make clear whether a noncitizen’s conviction qualifies as either a “controlled substance offense” or an “aggravated felony” under the INA. *See, e.g., Marinelarena*, 930 F.3d at 1054 (conspiracy to violate § 11352); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1079 (9th Cir. 2007) (conviction under § 11377); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1129-1130 (9th Cir. 2007) (conviction under § 11379); *Duran-Jurado v. Keisler*, 250 F. App’x 213, 215 (9th Cir. 2007) (conviction under § 11352); *Fajugon-Hurquilla v. Gonzales*, 175 F. App’x 832, 833 (9th Cir. 2006) (conviction under § 11352). Courts outside of the Ninth Circuit have also struggled with records that do

not reveal the specific provision under which a defendant has been convicted when they have pleaded guilty to a drug offense. *See, e.g., Thomas*, 625 F.3d at 144-147 (finding that the records of two separate convictions under N.Y. Penal Law § 221.40 were inconclusive).

Nor are the problems generated by ambiguous records of conviction limited to drug offenses. For example, in *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009), the petitioner was convicted under Colorado’s misdemeanor assault statute, Colo. Rev. Stat. § 18-3-204, which criminalizes “knowing[]” or “reckless[]” assault. 584 F.3d at 1289; Colo. Rev. Stat. § 18-3-204(1)(a). Because only “knowing” assault qualifies as a “crime involving moral turpitude” under the INA, the Tenth Circuit held that § 18-3-204 was divisible. 584 F.3d at 1289.

In applying the modified categorical approach, however, the Tenth Circuit found itself in the same position as the Ninth Circuit with respect to the California illicit substance statutes: The record of conviction did not contain enough information to determine whether the petitioner had been convicted of an offense that disqualified him from applying for relief from removal. In *Garcia*, the only relevant *Shepard* document was the petitioner’s guilty plea, but the plea “was entered on a poorly translated Spanish form, which failed to specify whether he was pleading guilty to *knowingly* causing bodily injury or doing so only *recklessly*.” 584 F.3d at 1289. Like the Eighth Circuit in Mr. Pereida’s case, the court in *Garcia* acknowledged that the petitioner was “not to blame for the ambiguity surrounding his criminal conviction[.]” *Id.* at 1290. Nevertheless, adopting the same approach as the Eighth Circuit, the court held that the petitioner’s inconclusive record ren-

dered him ineligible for cancellation of removal. *Id.* *Garcia* therefore highlights the arbitrariness of the Eighth Circuit’s approach: Because of a mistranslated document and the state court’s failure to retain any other documents related to his misdemeanor conviction, the petitioner was denied the opportunity to even seek discretionary relief from removal.

Finally, the facts of *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), present another prime example of how inadequate state recordkeeping practices can have an outsized impact on a noncitizen’s ultimate immigration determination under the Eighth Circuit’s approach. In *Salem*, the petitioner had been convicted under a Virginia petit larceny statute. *Id.* at 114. The statute was divisible because “it criminalized both wrongful and fraudulent takings of property.” *Id.* Only fraudulent takings qualified as a disqualifying “aggravated felony,” but the record of conviction failed to show whether Salem’s taking was fraudulent or merely wrongful. *Id.* Salem had entered a guilty plea pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and the prosecutor’s proffer of facts in support of the plea “reflected that Salem pulled into a gas station, pumped \$23.01 worth of gasoline into his car, and then drove away without paying for it.” *Salem*, 647 F.3d at 113 n.2. No other documents in the record gave any indication as to whether Salem had been convicted of fraud or theft. *Id.* at 114. Because the state court records failed to specify the precise portion of the statute under which Salem was convicted, and because the court in *Salem* adopted the same rule as the Eighth Circuit, Salem was ineligible for cancellation of removal. *Id.* at 120.

As *Salem*, *Garcia*, and the Ninth Circuit’s experience with California’s Health and Safety Code demonstrate, inadequate state and local recordkeeping prac-



tices consistently generate records of conviction that do not contain enough information to determine whether a noncitizen has been convicted of a predicate offense under the INA. And amici's members' firsthand experience with incomplete state and local records also proves that this is a widespread phenomenon spanning jurisdictions.

When noncitizens are faulted for the paucity of these records, it creates a system in which immigration outcomes are tied to the bureaucratic decisions of county clerks' offices and the idiosyncrasies of courts' guilty plea processes. Such a system is wholly inconsistent with the categorical approach, which seeks to guarantee that "all defendants whose convictions establish the same facts ... be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 569 U.S. at 205 n.11. Amici therefore ask the Court to reject the Eighth Circuit's approach.

### CONCLUSION

For the foregoing reasons, the judgment below should be reversed.

Respectfully submitted.

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