No. 19-438

In the Supreme Court of the United States

CLEMENTE AVELINO PEREIDA,
Petitioner,
v.
WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF FORMER UNITED STATES IMMIGRATION JUDGES AND MEMBERS OF THE BOARD OF IMMIGRATION APPEALS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, former United States Immigration Judges and Members of the Board of Immigration Appeals ("BIA") who have collectively presided over thousands of immigration cases and appeals, submit this brief in support of Mr. Pereida's position. Because they have devoted their legal careers to the fair and efficient administration of immigration law, and many continue to work in the field, *amici* have a continuing interest in the operation of the immigration system. They are concerned that the Government's position is at odds with the proper application of the categorial approach, will lead to inconsistent and potentially unjust outcomes, and will deprive immigration judges of the ability to exercise discretion on the very issues on which they are expert: whether a noncitizen is worthy of an act of executive grace. Accordingly, *amici* submit this brief to provide the Court with the practical perspective of those who have sat on the bench about how removal proceedings operate and how the Government's position would be neither administrable nor fair.

Steven Abrams was an Immigration Judge ("IJ") in New York City from 1997 to 2013. Before his appointment to the bench, he held positions of Special Assistant U.S. Attorney for the Eastern District of New York and Immigration and Naturalization Service

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[1] All parties have consented to the filing of this brief. *See* Sup. Ct. R. 37.3(a). No counsel for either party authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the brief's preparation or submission.

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SUMMARY OF ARGUMENT

This brief presents the view of former IJs and BIA members on an issue of vital importance to the functioning of our immigration system: how requiring IJs to assess inconclusive conviction records to determine whether a prior criminal conviction disqualifies a noncitizen from applying for relief from removal is contrary to longstanding application of the categorical approach, will create further delays in an already overburdened immigration system, and will deprive IJs of their discretionary power.

Mr. Pereida is correct that inconclusive state conviction records cannot satisfy the categorical approach's requirement that the state conviction *necessarily* establishes federal predicate offenses. Affirming this interpretation of the categorical approach will promote the expeditious and fair adjudication of the hundreds of thousands of cases pending in immigration courts.

The Government incorrectly asserts that when the conviction record is inconclusive as to whether a conviction was for a disqualifying offense, a noncitizen does not carry his or her burden of proof to show statutory eligibility for relief. That argument is faulty because it would require IJs to conduct an inquiry, which the Government wrongly argues is governed by the Immigration and Nationality Act's ("INA") burden of proof allocation, focusing on the facts underlying the conviction. Moreover, rather than aid IJs in resolving cases, the Government's position would impede the application of the modified categorical approach by forcing IJs to delay the proceedings. IJs will be forced to wait for the noncitizen to obtain and present criminal records that may not even exist or be obtainable and then examine those criminal records to make factual determinations the categorical approach is meant to avoid. The Government's novel gloss on the modified categorical approach is antithetical to the analysis IJs have employed for decades and would preclude the exercise of discretion essential to the functioning of immigration courts.

Contrary to the Government's contention, the modified categorical approach does not involve a separate factual inquiry. The requisite analysis is a legal one: whether the conviction rests upon nothing more than the minimum conduct necessary for a conviction. Deviating from the categorical approach's sole focus on a direct and uncomplicated comparison between state and federal offenses, as the Government would require, threatens to disturb the uniformity of outcomes in similar circumstances that the categorical approach safeguards. Mr. Pereida's interpretation of

the categorical approach would avoid this undesirable outcome.

For the reasons explained in the balance of this brief, Mr. Pereida's solution is the correct one. Section I provides a real-world overview of how removal proceedings operate, focusing on the typical sequence of immigration court proceedings, how criminal records are introduced and considered, and the limited ability of noncitizens (many of whom are detained during such proceedings) to procure relevant records. Section II discusses the administrability of the categorical approach and its modified variant, highlighting the benefits of the approach, how Mr. Pereida's position is in harmony with the way in which IJs apply the approach to reach just results, and how the Government's interpretation would impede the workings of immigration courts. Finally, Section III explains how the Government's position would curtail IJs' discretionary power to analyze the facts of each case to reach a just result.

ARGUMENT

I. Immigration Courts and the Use of the Categorical Approach

Immigration courts are the exclusive venue for proceedings to remove a noncitizen from the United States. 8 U.S.C. §§ 1229a(a)(1) and (3). The Department of Justice's EOIR operates sixty-three immigration courts. The IJs who preside in those courts are appointed by the Attorney General. *See* 8 C.F.R. § 1003.10(a). Through December 2019, there

were approximately 465 authorized IJs and 1,089,696 pending immigration cases—over 2,300 cases on average for each IJ (assuming all authorized IJs are hearing cases, which is likely not the case).[2]

The INA vests DHS with the exclusive authority to commence removal proceedings. *See Matter of S-O-G & F-D-B*, 27 I. & N. Dec. 462, 465 (A.G. 2018). For over a century, this Court has recognized that removal is "among the severest of punishments" and has stressed the importance of protecting the due process rights of those who face removal. *See, e.g.*, *Fong Yue Ting v. United States*, 149 U.S. 698, 740-41 (1893) ("Every one knows that to be forcibly taken away from home, and family, and friends, and business, and property, and sent across the ocean to a distant land, is punishment, and that oftentimes [sic] most severe and cruel"). Nonetheless, indigent noncitizens in removal proceedings do not have a constitutional or statutory right to counsel, and over sixty percent of noncitizens (many of whom are not proficient in English) proceed

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[2] Executive Office for Immigration Review to Swear in 28 Immigration Judges, Bringing Judge Corps to Highest Level in History, THE UNITED STATES DEPARTMENT OF JUSTICE (Dec. 20, 2019), https://www.justice.gov/opa/pr/executive-office-immigration-review-swear-28-immigration-judges-bringing-judge-corps-highest; Immigration Court Backlog Through December 2019, TRAC Reports, Inc., https://trac.syr.edu/phptools/immigration/court_backlog/. TRAC Reports, Inc. ("TRAC") is a nonpartisan, nonprofit data research center affiliated with the Newhouse School of Public Communications and the Whitman School of Management, both at Syracuse University. TRAC's statistics also show that there is an upward trend in the number of deportation proceedings filed in immigration court, with 68,245 new deportation proceedings filed since October 2019 alone.

on a *pro se* basis, opposed by experienced DHS attorneys.[3]

A. Initiation of Removal Proceedings

DHS initiates removal proceedings by issuing, serving, and filing with the IJ a Notice to Appear ("Notice"). *See, e.g.*, INA § 239; 8 U.S.C. § 1229; 8 C.F.R. § 239.1; 8 C.F.R. § 1003.14(a). The Notice specifies the nature of the proceedings against the noncitizen. Generally, there are three categories of noncitizens who may receive a Notice: (1) an "arriving alien" who has been stopped at a port of entry prior to admittance, (2) a noncitizen who is admitted to the United States by the government but has now been deemed deportable for reasons identified in the Notice, and (3) a noncitizen present in the United States who has not been admitted or paroled by the government. The Notice must inform the noncitizen of the alleged grounds for removal, the noncitizen's right to hire an attorney, the time and place at which the initial Master Calendar Hearing ("MCH") will be held, and the consequences for failing to appear at the MCH. 8 U.S.C. § 1229(a)(1).

B. The Master Calendar Hearing

A noncitizen in a removal proceeding first appears before an IJ at the MCH, which is similar in style to a criminal arraignment. At an MCH, an IJ often hears in quick succession forty to sixty individual cases,

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[3] Ingrid Eagly & Steven Shafer, *Access to Counsel in Immigration Court*, American Immigration Council (Sept. 28, 2016), https://www.americanimmigrationcouncil.org/research/access-counsel-immigration-court.

frequently processing cases in five minutes or less. The purpose of the MCH is to determine if there are any immediate and definitive grounds for removal—and, if not, to advise the noncitizen of his or her rights regarding the removal proceedings, explain the charges and factual allegations in the Notice, set filing deadlines, and identify and narrow the factual and legal issues regarding DHS's requested removal. Failure to attend the first MCH results in the entry of an automatic order of removal against the noncitizen.

During the MCH, the IJ may: (1) receive pleadings, (2) set deadlines for filing applications for relief and submitting briefs, motions, prehearing statements, exhibits, witness lists, and other documents, and (3) schedule a merits hearing to adjudicate contested matters or applications for relief. *See* 8 U.S.C. 1229a(b); 8 C.F.R. § 1240.10.

At the MCH, the noncitizen must admit or deny the charges and factual allegations in the Notice, either conceding or contesting the grounds on which DHS asserts he or she is removable. The IJ will then request that the Government disclose any record relevant to the factual and legal issues, including the noncitizen's eligibility for relief from removal. The Government will later file all documents that support the charges and factual allegations contained in the Notice (*e.g.*, copy of the statute under which the noncitizen was convicted, indictment, and rap sheet). 8 U.S.C. § 1229a(c)(3)(B).

At the end of the MCH, the IJ schedules a merits hearing ("Merits Hearing") if the noncitizen contests the Government's charges of removability or has

pleaded one or more of the statutory bases for relief from removal. Non-detained noncitizens can expect to wait an average of two years for their Merits Hearing because of the backlog of cases.[4] If the noncitizen does not have any basis to challenge removability or assert statutory eligibility for relief, then DHS may move to pretermit (that is, summarily grant its request prior to a Merits Hearing) by written or oral motion.

C. Consideration of Criminal Convictions and the Categorical Approach

During the removal proceedings, if the noncitizen contests the Government's charges of removability, IJs consider any prior criminal convictions of the noncitizen. In order to remove a noncitizen or to find the noncitizen ineligible for relief based on criminal grounds, the noncitizen must have been convicted of a disqualifying offense.[5]

Where the conviction is a state offense, IJs employ the "categorical approach" to determine whether the statutory definition of the state criminal conviction

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[4] *See* Average Time Pending Cases Have Been Waiting in Immigration Courts as of December 2019, TRAC Reports, Inc., https://trac.syr.edu/phptools/immigration/court_backlog/apprep_backlog_avgdays.php.

[5] Under the INA, "with respect to an alien," "conviction" means: a formal judgment of guilt of the noncitizen entered by a court, or, if adjudication of guilt has been withheld, where: (1) a judge or jury has found the noncitizen guilty or the noncitizen has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt; and (2) the judge has ordered some form of punishment, penalty, or restraint on the noncitizen's liberty to be imposed. INA § 101(a)(48); 8 U.S.C. § 1101(a)(48).

matches the corresponding federal offense for which a noncitizen may be removed or found ineligible for relief.[6] In the immigration context, the categorical approach has been used in both removal and relief-from-removal phases. *See Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Moncrieffe*, 133 S. Ct. at 1685 n.4.

The categorical approach mandates that an IJ determine whether a noncitizen's prior criminal conviction renders him or her removable or ineligible to seek relief under the INA by examining whether the elements of the state crime at issue categorically match the elements of the corresponding federal offense. *Taylor*, 495 U.S. at 600-602. A state statute is a categorical match with a federal offense only if the statute's elements are the same as, or narrower than, those of the federal offense. *Descamps*, 570 U.S. at 257. In making that determination, an IJ must presume that the conviction rested upon nothing more than the least of the acts criminalized. *Moncrieffe*, 133 S. Ct. at 1680-81; *Johnson v. United States*, 559 U.S. 133, 137 (2010). Accordingly, this inquiry focuses solely on reviewing the legal question of whether the two offenses match—not on whether the facts of the noncitizen's conduct leading to the conviction fall under

[6] The historical roots of the categorical approach extend to the Second Circuit's decision in *United States ex rel. Mylius v. Uhl*, 210 F. 860 (2d Cir. 1914). Beginning in 1990, this Court issued a series of landmark decisions addressing the categorical approach and its modified variant. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990); *Shepard v. United States*, 544 U.S. 13 (2005); *Descamps v. United States*, 570 U.S. 254 (2013); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). These cases form the bedrock for interpreting and applying the categorical approach.

the federal definition. This Court's chief impetus for adopting the categorical approach was to give meaning to Congress's use of the word "conviction" in the INA, rather than a phrase requiring a more fact-intensive inquiry (like asking whether a noncitizen "committed" a crime); the categorial approach also promotes consistent, and thus predictable, outcomes under state and federal law. *See Moncrieffe*, 133 S. Ct. at 1693 n.11.

If the state statute is both divisible and overbroad (as compared to the federal offense), IJs employ the "modified categorical approach," which entails examining the conviction record's "extra-statutory" documents to determine whether the record of conviction established any precise statutory prong as the basis for the conviction and, if so, whether the conviction "necessarily" matches the equivalent of the defined federal offense.[7] *Descamps*, 570 U.S. at 262-63. The documents an IJ may reference are limited and principally include the charging document, the plea agreement, and the transcript of the plea colloquy. *See Shepard*, 544 U.S. at 16.

There are two distinct problems associated with this limited set of documents. First, the nature of such

[7] A state statute is divisible when it contains different crimes with alternative elements. *See Mathis v. United States*, 136 S. Ct. 2243 (2016). When faced with an alternatively phrased state statute judges should first "determine whether its listed items are elements or means." 136 S. Ct. at 2256. If the statute's language does not resolve the matter, judges may look to the conviction record. Statutes found to contain alternative elements—not means—are divisible and judges may then apply the modified categorical approach.

records varies widely because different localities enter judgments in different ways, the records maintained vary from court to court, some court records may be handwritten, and not all conviction records are kept for long periods of time. Moreover, obtaining records of criminal proceedings is often difficult or impossible—particularly for a noncitizen who is incarcerated or unrepresented (or both), or when the records are old. *See, e.g.*, *Sauceda v. Lynch*, 819 F.3d 526 (2016) (referencing extensive discussions between noncitizen's attorney and IJ regarding difficulty in obtaining certain documents of the underlying conviction record because the Maine Superior Court did not maintain copies of such documents in misdemeanor cases). Even when noncitizens are represented and not detained, obtaining conviction records can be difficult. For example, the administrative record of *Sauceda* recounts how counsel for the noncitizen had his client travel to court multiple times to obtain evidence the IJ demanded, but those records "simply [did] not exist." A.R. at 13-14 (Resp't's Third Br. in Support of Appeal, dated Dec. 12, 2013).

Ultimately, if the IJ cannot determine from an ambiguous record for which crime the noncitizen was "necessarily" convicted, then the conviction is not a categorical match and cannot serve as a bar to relief. That ends the inquiry into whether a criminal conviction automatically renders the noncitizen ineligible for relief, and the IJ need not conduct any further examination on this specific point. *Moncrieffe*, 133 S. Ct. at 1686-87; *see also Cisneros-Perez v. Gonzales*, 451 F.3d 1053, 1059 (9th Cir. 2006) ("Inferences . . . are insufficient under the modified

categorical approach."); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (emphasizing that the modified categorical approach is intended to determine whether the record "unequivocally establishes that the defendant was convicted of the generically defined crime."). Of course, the conviction may be considered in the Merits Hearing.

D. The Merits Hearing

At the Merits Hearing, in addition to satisfying statutory eligibility requirements, a noncitizen must establish that he or she is potentially entitled to relief from removal as a matter of the IJ's discretion. The Merits Hearing is an evidentiary hearing designed to determine whether such relief is warranted. IJs assess a noncitizen's character, standing in his or her community and family, history of behavior, and rehabilitation, as part of balancing all the factors weighing for and against removal. *See Matter of Edwards*, 10 I. & N. Dec. 506 (BIA 1964); *Matter of Marin*, 16 I. & N. Dec. 581, 585 (BIA 1978).

"Due process requires that an applicant receive a full and fair [Merits] hearing which provides a meaningful opportunity to be heard." *Li Hua Lin v. U.S. Dep't of Justice,* 453 F.3d 99, 104–05 (2d Cir. 2006) (internal citation and quotation omitted). These hearings proceed in a trial-like fashion where both parties make opening statements, present evidence, examine witnesses (such as family members whose livelihood depends on the noncitizen's income, colleagues who rely on the noncitizen's contributions at work, close friends who speak to the noncitizen's

character, and neighbors who can vouch for the noncitizen's standing and influence in the community), and offer closing statements. A typical Merits Hearing lasts three to four hours.

The Merits Hearing is intended to be a probing, personal inquiry, and "there is no[] inflexible standard for determining who should be granted discretionary relief, and each case must be judged on its own merits." *Matter of C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998). IJs must balance "the adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented [on] his behalf to determine whether the granting of . . . relief appears in the best interests of this country." *Matter of Marin*, 16 I. & N. Dec. at 584.

The Attorney General, acting with authority delegated from Congress, has entrusted IJs with expansive authority to "exercise their independent judgment and discretion and may take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition of such cases." 8 C.F.R. § 1003.10(b). As a result, IJs may "interrogate, examine and cross-examine the alien and any witnesses." 8 U.S.C. § 1229a(b)(1). When it is a *pro se* noncitizen's Merits Hearing, IJs typically exercise that authority and actively participate in the questioning of the noncitizen and any witnesses. IJs also make credibility determinations based on such factors as "the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or

witness's written and oral statements, . . . and any inaccuracies or falsehoods in such statements." 8 U.S.C. § 1229a(c)(4)(C).

After both sides have presented their cases, and after assessing the record as a whole and weighing the positive and negative considerations in the noncitizen's specific case, the IJ will determine whether "the granting of . . . relief appears in the best interest of this country." *Matter of C-V-T-*, 22 I. & N. Dec. at 11 (internal citation omitted).

II. Administrability of the Categorical Approach

Mr. Pereida's position that an inconclusive record of conviction can never meet the categorical approach's requirement that the match be "necessarily" established (i) accords with IJs' longstanding application of the categorical approach, and (ii) offers an administrable means of handling inconclusive conviction records that fosters judicial efficiency by allowing IJs to proceed more swiftly to the merits of relief petitions.

A. Benefits of the Categorical Approach

The categorical approach aids in efficient and fair adjudication of the enormous number of pending immigration cases in at least three ways.

First, the categorical approach is straightforward and produces consistent results because it is premised on a direct, uncomplicated comparison of the elements of state statutes and corresponding federal offenses. In much the same manner as two pieces of paper can be

put on top of each other to see whether they align, so do IJs identify statutory matches with federal offenses using the categorical approach. *See Bohner v. Burwell*, Civ. A. No. 15-4088, 2016 U.S. Dist. LEXIS 167590, at *28 (E.D. Pa. Dec. 2, 2016) (internal citations omitted) ("The most efficient means of making quick and standardized comparisons of the law is to apply the categorical approach, which focuses on what a conviction *necessarily* established.").

Second, the categorical approach conserves substantial time. The IJ need not grant multiple adjournments while attempts are being made to obtain old conviction records that may not even exist. *See, e.g.*, *Sauceda* A.R. at 13-14 (Resp't's Third Br. in Support of Appeal, dated Dec. 12, 2013) (detailing multiple attempts to obtain additional documents that ultimately did not exist). IJs also need not spend time examining the underlying factual record and trying to resolve potentially competing interpretations of that record because they only have to determine whether the elements of the state statute under which the noncitizen was convicted, as established by the conviction records before the court, categorically match the generic federal offense. Finally, there will be no delay while waiting for the noncitizen to track down former law enforcement officers to testify, gather dusty police and laboratory reports, or shepherd expert witnesses to challenge stale evidence.

Indeed, federal courts throughout the country recognize that the categorical approach has "practical advantages" because of the invariably attendant "difficulties [of] ascertaining the nature of the conduct

underlying a prior conviction that could be decades old." *United States v. Kroll*, 918 F.3d 47, 53 (2d Cir. 2019); *accord United States v. Martinez-Ortega*, 482 F. App'x. 96, 101 (6th Cir. 2012). The categorical approach is practical because it "promotes judicial and administrative efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact." *Moncrieffe*, 133 S. Ct. at 1690. In relieving IJs of the "oppressive administrative burden of scrutinizing the specific conduct giving rise to criminal offenses," the categorical approach not only promotes efficiency, but also avoids the potential unfairness of two different outcomes where two noncitizens have each been convicted of the same offense. *Michel v. INS*, 206 F.3d 253, 264 (2d Cir. 2000).

Third, the categorical approach allows noncitizens to "anticipate the immigration consequences of guilty pleas in criminal court" and to enter "'safe harbor' pleas which do not expose the immigrant to the risk of immigration sanctions." Jennifer L. Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L. J. 257, 307 (2012) (noting that the categorical approach "corrects for certain pervasive asymmetries facing noncitizens"); *accord* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1730 (2011) (discussing noncitizens' inability to anticipate immigration consequences when there are no limits on the factual inquiry). By requiring IJs to "closely examine the required elements, limit factfinding, and hold the government to a high burden

of establishing removability," the robust categorical approach "helps ameliorate the effects of the absence of counsel" for unrepresented noncitizens. Koh, *The Whole Better than the Sum* at 305.

In sum, the categorical approach is properly rooted in Congress' specification of conviction—a question of law and not conduct, which is a question of fact—as the trigger for immigration consequences and is, on account of its straightforward application, well "suited to the realities of the system." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015). It is thus important that, in deciding on the proper way to construe inconclusive records of conviction under the categorical approach, the path chosen does not aggravate "time-consuming legal tangle[s]." *Mathis*, 136 S. Ct. at 2264 (Breyer J., dissenting).

B. Mr. Pereida's Position Is Consistent with the Categorical Approach and an Administrable Means of Construing an Inconclusive Conviction Record

Holding inconclusive records of conviction to be insufficient to render noncitizens ineligible to seek relief from removal is both (i) consistent with a strict interpretation of the categorical approach and (ii) the only administrable avenue given the enormous backlog of pending immigration cases.

1. Mr. Pereida's Position Is Consistent with the Categorical Approach

The categorical approach is predicated on the principle that an individual cannot be said to have been "convicted" of a criminal offense listed in the INA

where ambiguities exist in the underlying criminal conviction. The position that an inconclusive record can never meet the categorical approach's requirement that the conviction be "necessarily" established is consistent with that tenet. Under the categorical approach, a conviction under a state statute whose elements are not squarely within the bounds of the corresponding generic federal offense cannot result in removability or relief ineligibility. The categorical approach rests on the notion that noncitizens should not be deported without an opportunity to seek relief when there is doubt as to whether they have been convicted of an offense warranting deportation—whether the issue is removability or relief ineligibility. For that reason, the natural outcome of the categorical approach—when it is not possible to identify the precise subsection of a divisible, overbroad statute under which a noncitizen was convicted—is that the noncitizen was not "necessarily" convicted of a crime that categorically matches a corresponding federal offense. To posit otherwise, as the Government does, turns the basic premise of the categorical approach on its head.

2. Mr. Pereida's Position Is an Administrable Means of Construing an Inconclusive Conviction Record

Since the *Mylius* decision more than a century ago, judges have recognized the importance of "efficient adjudication" in immigration courts. *See, e.g.*, *Jean-Louis v. Att'y Gen. of U.S.*, 582 F.3d 462, 478-79 (3d Cir. 2009); *Gertsenshteyn v. U.S. Dep't of Justice*, 544 F.3d 137, 146 (2d Cir. 2008); *Tokatly v. Ashcroft*, 371

F.3d 613, 621 (9th Cir. 2004); *see also* Laura Jean Eichten, *A Felony, I Presume? 21 USC § 841(b)'s Mitigating Provision and the Categorical Approach in Immigration Proceedings*, 79 U. CHI. L. REV. 1093, 1099-1101 (2012) (recognizing the significance of the *Mylius* decision in the development of the categorical approach and noting that the *Mylius* court emphasized that the "interest of a uniform and efficient administration of the law" was a rationale that undergirded the categorical approach).

The categorical approach remains "far and away the fairest, most consistent, and most administrable option among alternatives." Amit Jain & Phillip D. Warren, *An Ode to the Categorical Approach*, 67 UCLA L. REV. DISCOURSE 132, 135-36 (2019). This is because, by focusing on a strictly legal analysis, IJs are relieved "from the burden of engaging in individualized factfinding," which would require "hearings, including witness testimony, and the submission and evaluation of evidence." Koh, *The Whole Better than the Sum* at 295. The categorical approach also fosters the "'streamlined adjudication that a deportation hearing is intended to provide'" and "serves uniformity interests . . . which support[] efficiency." *Id.* at 295-96 (citing *In re Pichardo-Sufren*, 21 I. & N. 330, 335 (BIA 1996)).[8]

[8] One study confirmed the workability of the categorical approach by examining recent federal court of appeals' decisions. It found that only "about twelve percent of court of appeals cases confronting the divisibility question after *Mathis* have produced dissents." Alexander G. Peerman, *Parsing Prior Convictions:* Mathis v. United States *and the Means-Element Distinction*, 118 COLUM. L. REV. 171, 193 (2017). This "relatively high level of agreement among court of appeals judges

Mr. Pereida's position is consistent with the categorical approach and adoption of it will further administrability. The Government's position will not.

C. The Government's Position Will Impede Immigration Judges' Application of the Categorical Approach

The Government's position that an inconclusive conviction record should deprive a noncitizen of his or her ability to show eligibility for relief will impede, rather than facilitate, the task IJs face when applying the categorical approach and its modified variant. Three considerations are crucial in this regard.

First, the Government contends that the modified categorical approach requires an IJ to use conviction records to answer the initial question of "what crime . . . a defendant was convicted of," a question it argues is governed by the "INA's allocation of the burden of proof." Gov't Cert. Br. 12. In so doing, the Government imports a hallmark of a factual inquiry—burdens of proof—into the modified categorical approach's legal inquiry that is fundamentally at odds with the approach's administrable and uncomplicated comparison of state and federal offenses. It is, in fact, wholly foreign to the straightforward categorical approach IJs have employed for decades.

Rather than permit IJs to swiftly move to relief eligibility when the record is ambiguous, as a proper

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in divisibility cases reveals that, in most cases, the *Mathis* tools produce consistent and predictable results." *Id.*

interpretation of the categorical approach would allow, the Government's position adds a detour by requiring that IJs depart from the familiar modified categorical approach and conduct a factual-type inquiry to determine "what crime . . . a defendant was convicted of." Gov't Cert. Br. 12. This analytical step will waste the immigration courts' time and resources by burdening IJs with a factual inquiry more properly handled by a criminal court. That burden is particularly onerous because of the pressure the Government's position would place on IJs undertaking the divisibility analysis prescribed by *Mathis*. Under the Government's reading, IJs would need to parse state cases and jury instructions to decide whether the statute of conviction is divisible even when the conviction record is inconclusive because the divisibility question would determine whether the noncitizen is eligible to seek relief. *See Garcia-Morales v. Barr*, __ F. App'x __ (10th Cir. 2019) [2019 WL 6258673] (writing more than 5,000 words analyzing Idaho case law and jury instructions). That extensive analysis is unnecessary under the approach Mr. Pereida advocates. *See Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (assuming statutory divisibility and holding that, even under the modified categorical approach, an inconclusive conviction record is insufficient to show a disqualifying offense).

Second, this Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), vividly illustrated the "multiple entanglements of immigration and criminal law" that have become increasingly evident in our immigration system. Jennifer L. Koh, *Crimmigration Beyond the Headlines: The Board of Immigration Appeals' Quiet*

Expansion of the Meaning of Moral Turpitude, 71 STAN. L. REV. ONLINE 267, 267 (2019). In upholding a noncitizen's right to be informed by counsel of the immigration consequences a guilty plea might entail, this Court recognized that deportation is "intimately related to the criminal process," even though "removal proceedings are civil in nature." *Padilla*, 559 U.S. at 365 (2010).

Adoption of the Government's position would further intertwine immigration proceedings and criminal procedures because it calls for IJs who are not necessarily specialists in criminal law to review criminal records, analyze underlying facts that may be inherently ambiguous, and apply factual inquiry burdens of proof that should instead remain in the domain in which they belong: criminal courts. This additional entanglement would slow proceedings while IJs await criminal records, assuming that they exist, to determine the crime of conviction and whether the requisite burdens of proof have been satisfied.

Third, conviction records come from a wide variety of local and state jurisdictions across the country, and vary in both form and content. Jurisdictions even differ as to what records are created and how and what records are maintained. A record from a court of general criminal jurisdiction in a major metropolitan area will likely differ in many respects from a record from a court of limited jurisdiction in a rural area. The records may also simply consist of mere handwritten scribbles. Under the Government's approach, IJs would have to determine whether these records exist and, if they do, scrutinize them, no matter their age or

content, not just to determine whether a conviction was under a particular statutory subsection matching the general federal offense, but also to answer the more fine-grained threshold question of which crime the noncitizen was convicted and based on what facts. Compelling an IJ to reassess the crime at issue—particularly when the underlying records will be markedly different in both appearance and informational detail, or when they are unavailable—is a step beyond the expressly limited confines of the categorical approach and its modified variant. Given the volume of cases and resource constraints facing IJs, this time could be better spent moving quickly to the discretionary phase of proceedings where appropriate case-by-case determinations can be made, and then moving on to the next case.

Based on these considerations, this Court should not permit the Government to dilute the benefits that a strict interpretation of the categorical approach confers on the immigration system. The Government would weaken the categorical approach "in an attempt to achieve 'better' outcomes" but, in so doing, "ignores the context in which the categorical approach operates." Koh, *The Whole Better than the Sum* at 310.

By contrast, the solution that Mr. Pereida champions is one that will serve the goals of the immigration system. If this Court aims to maintain an "equitable and efficient system," then it must uphold procedures that are "clear cut and easy to follow for both the noncitizens and the immigration system administrators." Eichten, *A Felony, I Presume?*, 79 U. CHI. L. REV. 1093, 1136 (2012). Finding a noncitizen

eligible for relief where the conviction record is inconclusive is such a procedure. Because this rule neatly conforms to the underlying principles of the longstanding categorical approach, it does not make the "law more complicated than it needs to be . . . ." and thus does not keep "noncitizen[s] . . . in limbo for longer than necessary . . . while complicated legal issues are repeatedly appealed." *Id.*

Use of the categorical approach's presumption is the "only means of harmonizing" the "internally incompatible and contradictory standard" under which a noncitizen must prove that he or she was not convicted of a disqualifying offense in order to seek cancellation of removal.[9] Application of the presumption in this case is thus correct from both a legal and policy perspective.

III. The Government's Interpretation of the Modified Categorical Approach Would Change Essential Functions of the Immigration Courts

IJs are vested with certain discretionary powers, including the discretion to grant or deny cancellation of removal even where statutory eligibility is established. *Matter of C-V-T-*, 22 I. & N. Dec. 7 (BIA 1998). Congress entrusted this power to the Attorney General, who in turn has directed IJs to administer it. 8 U.S.C. § 1101(b)(4) (defining IJ to mean "an attorney whom

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[9] Sarah M. Rich, *Escaping Immigration Law's Cancellation Catch: Why an Inconclusive Record of Conviction Satisfies the Preponderance of the Evidence Standard in Cancellation of Removal*, SSRN (July 18, 2013), http://dx.doi.org/10.2139/ssrn.2295784.

the Attorney General appoints as an administrative judge within the [EOIR], qualified to conduct specified classes of proceedings, including [removal proceedings]"). The Government's interpretation of the modified categorical approach would undermine IJs' authority to exercise their discretion and drastically change the way in which immigration courts operate. It divorces the cancellation of removal procedures from the spirit and purpose of immigration proceedings by depriving IJs of their ability to exercise discretion in situations where human complexity necessitates a flexible balancing of the positive and negative aspects of noncitizens' situations. In addition, adoption of the Government's position would improperly and severely disadvantage unrepresented noncitizens who might be unable to address an ambiguous record and rebut that they were convicted of a disqualifying crime.

A. The Government's Interpretation Would Deprive Immigration Judges of the Authority to Exercise Discretion

IJs exercise discretion "according to [their] own understanding and conscience." *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260, 266–67 (1954); *see also* 8 C.F.R. § 1003.10(b). This authority to exercise discretion has been inextricably "woven into the fabric of the [immigration court] system." Daniel Kanstroom, *Surrounding the Hole in the Doughnut: Discretion and Deference in U.S. Immigration Law*, 71 TUL. L. REV. 703, 751-52 (1997). The immigration process relies on IJs making discretionary determinations of relief as "matter[s] of grace" based on the personal narratives of each noncitizen. *Jay v.*

Boyd, 351 U.S. 345, 354 (1956); *see also INS v. St. Cyr*, 533 U.S. 289, 308 (2001). "Discretion is often needed to enable [IJs] to respond creatively to the circumstances of individual cases," and, while IJs' discretion is bound and cannot be arbitrary, it "allows for the operation of expertise and human sensitivity where standards or stringent review might stifle such expression." Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1296 (1972).

IJs can only exercise discretion, however, if they can conduct a full Merits Hearing. During the hearing, IJs usually hear from witnesses and, by statute, assess the credibility and significance of each piece of evidence to decide what weight to give it. 8 U.S.C. § 1229a(c)(4)(C) (IJs may consider "the totality of the circumstances" and a wide range of other relevant factors). Moreover, IJs frequently exercise their discretion to weigh the severity of a noncitizen's past criminal conduct against the noncitizen's complete personal narrative. *See, e.g.*, *Matter of C-V-T-*, 22 I. & N. Dec. 7 (granting relief to noncitizen with a single minor drug offense); *see also In re Sotelo-Sotelo*, 23 I. & N. Dec. 201 (BIA 2001) (denying cancellation of removal, despite the fact that the noncitizen met the minimum statutory requirements for relief, because the serious adverse factor of his involvement in smuggling other noncitizens outweighed the favorable factors).

To exercise their discretion properly, IJs must be given the opportunity to hear from the applicants during Merits Hearings and ask them questions. The

personal narratives of noncitizens seeking cancellation of removal—including, but not limited to, their recounting of their past transgressions—are an important part of the Merits Hearings. Thus, noncitizens usually provide a full picture of their lives in this country. Indeed, an honest recitation of the noncitizen's past difficulties is critical to an IJ's ability to determine credibility, character, and rehabilitation.

The Government, however, seeks to prematurely terminate the IJs' statutory authority to hear from the noncitizen. According to the Government, should a noncitizen be unable to accomplish the often-impossible task of procuring evidence to prove that the conviction was under the particular subsection of the divisible criminal statute that does not necessarily encompass the elements of a disqualifying crime, the Government may then be able to pretermit the Merits Hearing. The Government's unforgiving reading of the categorical approach penalizes the noncitizen for the lack of records—a fault not within the noncitizen's control—by denying the noncitizen a right to be heard by the IJ.

The effect is particularly severe and punitive for unrepresented and detained noncitizens seeking cancellation of removal. Without the guidance of legal counsel to help them navigate the already complex immigration procedures, under the Government's interpretation, unrepresented noncitizens are effectively being asked to possess a sophisticated understanding of criminal law and the ability to seek out and obtain old criminal records that may not exist to determine whether their past state conviction is equivalent to a disqualifying federal crime. Because of

its prejudicial effect on unrepresented noncitizens, the Government's interpretation is inconsistent with the policy goals of immigration courts.

B. Eligibility for Cancellation of Removal Has a Built-In Mechanism for Immigration Judges to Reassess a Noncitizen's Criminal Conduct

Mr. Pereida's interpretation is consistent with the statutory intent and interpretative history of the categorical approach, and it places the significance of ambiguous criminal convictions properly within the broader determination of eligibility for forms of relief such as cancellation of removal. In order for a noncitizen to be eligible for cancellation of removal, the noncitizen, among other things, must be deemed to have been a "person of good moral character." 8 U.S.C. § 1229b(b)(1)(B). This is a discretionary determination that IJs employ as a backstop to deny relief to those noncitizens, who—although they may not have been convicted of one of the disqualifying offenses—are found to "lack [] remorse or rehabilitation" for their past indiscretions. *See, e.g.*, *Perez v. Barr*, 927 F.3d 17 (1st Cir. 2019). Thus, it does not follow that, because an inconclusive record means that a conviction will not be considered a disqualifying crime, the noncitizen will not be deported. Rather, IJs can still use their discretion, as Congress intended, to evaluate whether the conviction and subsequent events should result in the removal of the noncitizen.

The presumption also promotes judicial efficiency by limiting the number of cases that will be taken up on appeal. Appellate courts lack jurisdiction to review IJs'

discretionary decision granting or denying cancellation of removal. 8 U.S.C. § 1252(a)(2)(B)(i); see *also Perez v. Barr*, 927 F.3d at 20 (1st Cir. 2019) (internal quotations and citations removed) ("We lack jurisdiction to review any judgment regarding the granting of relief under 8 U.S.C. § 1229b."). However, a noncitizen who is denied the right to seek discretionary relief by the Government's interpretation of the modified categorical approach may seek appellate review on due process grounds. *Id*. ("although we may not review the discretionary decision that an applicant does not merit the requested relief, we retain jurisdiction with respect to a denial of such relief to 'review . . . constitutional claims or questions of law raised upon a petition for review'") (quoting 8 U.S.C. § 1252(a)(2)(D)). Accordingly, by denying noncitizens the right to even reach the discretionary phase, the Government's interpretation may increase the number of appeals.

CONCLUSION

For the foregoing reasons, respectfully, the judgment of the Eighth Circuit should be reversed.

Respectfully submitted.

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