No. 19-438

In The
Supreme Court of the United States

CLEMENTE AVELINO PEREIDA,

Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Amici curiae are 56 professors of law who specialize in immigration law, including its intersection with administrative and criminal law. *Amici* have an interest in this Court's consideration of the historical development and proper application of the "categorical approach," which has served as a bedrock principle of immigration adjudications involving criminal convictions for over a century, including cases in which the noncitizen has borne the burden of proof. This Court has cited *amici* in previous categorical approach cases. *Moncrieffe v. Holder*, 569 U.S. 184, 191, 201 (2013) (citing immigration law professors' *amici* brief and *amici* scholarship); *Mellouli v. Lynch*, 575 U.S. 798, 135 S. Ct. 1980, 1986-87 (2015) (citing *amici* scholarship).

Amici submit this brief to provide the Court with the history and principles behind the categorical approach and to illustrate how the government's novel position leads to the harms that the categorical approach is designed to avoid. The names, titles, and institutional affiliations (for identification purposes only) of *amici* are listed in an Appendix.[1]

[1] Pursuant to Rule 37, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief.

SUMMARY OF ARGUMENT

For over a century, immigration adjudicators have applied a categorical approach to determine whether a person has been "convicted" of an offense triggering immigration consequences. This approach, grounded in Congress's requirement that noncitizens be "convicted" of certain types of offenses to face specified grounds of deportability, inadmissibility, or bars to relief, has been affirmed by case after case and repeatedly reenacted by Congress since it first specified a conviction requirement in the statute in 1875. It first developed in the context of conviction-based grounds exclusion, where noncitizens bore the burden of proof. Following the landmark exclusion case, *United States ex rel. Mylius v. Uhl*, 203 F. 152 (S.D.N.Y. 1913), *aff'd*, 210 F. 860 (2d Cir. 1914), federal courts and the agency have consistently applied the categorical approach across all conviction-based consequences in federal immigration law irrespective of burden.

The categorical approach requires immigration adjudicators to determine the immigration consequences of a conviction based solely on the minimum conduct that is necessarily established by the conviction under the applicable criminal statute, not the underlying facts. Where a criminal statute punishes more than one crime, an adjudicator may look to the record of conviction to discern whether it specifies the relevant crime. The focus of the inquiry remains the same, to determine if the minimum conduct that is necessarily established by the conviction triggers adverse immigration consequences. The examination of the

record of conviction has, in modern times, been labeled as the "modified" categorical approach.

Rather than understanding the modified categorical approach to represent one of several stages in a singular legal inquiry, the government uses it as a springboard into a factual inquiry. As such, the Government argues, the burden of proof matters. Where the burden of proof lies with the noncitizen, as in the relief eligibility context, the government essentially argues that ambiguity as to the offense of conviction within a multi-offense criminal statute means that the noncitizen can be deemed "convicted" of the *maximum* conduct covered by the statute—the inverse of how the categorical approach is supposed to work. The same would hold under the government's position for all adverse, conviction-based immigration consequences where the immigrant bears the burden of proof: ineligibility for immigration status, admission to the U.S., naturalization and mandatory detention. It does not matter, the government claims, that the immigration adjudicator cannot conclude as a matter of law that the individual was *necessarily* convicted of an offense that triggers such a bar, only that the individual was unable to disprove the negative.

The government's position invites the very disuniformity, arbitrariness, and fundamental unfairness that the categorical approach is designed to avoid. It flies in the face of a century of case law that has consistently applied the categorical approach as a legal inquiry in a variety of contexts, including ones in which the immigrant bears the burden of proof. It

undermines Congress's choice to rely on convictions, and not conduct or other factual bases, as the categorical trigger for specific adverse immigration consequences.

This brief is organized in two parts. Part I describes the century of jurisprudence affirming Congress's choice of a categorical approach for the assessment of convictions by immigration adjudicators across contexts, focusing in particular on the development of the categorical approach in cases where the noncitizen bore the burden of overcoming conviction-based grounds of exclusion or bars to relief. It describes the consistent application of the approach as a legal inquiry into the minimum conduct necessarily underlying a conviction, not a factual inquiry that turns on burden allocation. Part II explains the critical role that this approach plays in ensuring uniformity, predictability, and fairness in the assessment of convictions in the immigration context. It illustrates how the government's approach turns the categorical approach on its head, undermining the principles underlying the approach for over a century.

ARGUMENT

I. The Categorical Approach Is A Legal Inquiry That Courts Have Applied Consistently For Over A Century, Irrespective Of The Burden Of Proof.

A. The categorical approach is a legal inquiry that focuses solely on the minimum conduct necessarily required for a conviction.

The categorical approach is a legal inquiry into the consequences of criminal convictions that requires an analysis of the statutory offense, and prohibits consideration of the facts. Its origins in the immigration context go back a century, and it has applied in criminal sentencing law as well. "Because Congress predicated deportation 'on convictions, not conduct' the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior." *Mellouli v. Lynch*, 575 U.S. 798, 135 S. Ct 1980, 1986 (2015). Immigration officials must therefore "examine what the state conviction necessarily involved, not the facts underlying the case." *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). In analyzing the statute, "we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 190-91.

The categorical approach refines this legal inquiry where a statute is "divisible." If the state conviction involves a statute "that contain[s] several different

crimes, each described separately" then the adjudicator "may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or 'some comparable judicial record' of the factual basis for the plea." *Id.*

This analysis of record materials, described in modern terms as the "modified" categorical approach, is not an invitation to examine the underlying facts of the offense. *Mellouli*, 135 S. Ct. at 1986 n.4 (describing the modified categorical approach and explaining that "[o]ff limits to the adjudicator, however, is any inquiry into the particular facts of the case"). Instead, "the modified approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Descamps v. United States*, 570 U.S. 254, 260 (2013); *see also Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). Applying the modified categorical approach, the adjudicator may consult the record to shed light on "which particular offense the noncitizen was convicted of" when assessing the conviction for its adverse immigration consequences. *Mellouli*, 135 S. Ct. at 1986 n.4 (quoting *Moncrieffe*, 569 U.S. at 191).

The categorical approach allows for the possibility that, despite these steps, aspects of the noncitizen's conviction will remain "opaque." *Descamps*, 570 U.S. at 260. In *Moncrieffe*, this Court addressed ambiguity

regarding an indivisible provision of a criminal statute. In *Moncrieffe*, the issue turned on whether the offense corresponded to a felony or misdemeanor under the Controlled Substance Act ("CSA"). The Court explained the adjudicator need only answer whether the person was *necessarily* convicted of conduct corresponding to the federal immigration provision:

> Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.

Moncrieffe, 569 U.S. at 194-95.

This conclusion is not limited to the assessment of an indivisible portion of statute. To the contrary, at all stages of the categorical approach, the question is whether a person has *necessarily* been convicted of an offense that triggers the adverse immigration consequence. *See id.*; *see also Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) ("Although an alien must show that he has not been convicted of an aggravated felony, he can do so merely by showing that he has not been *convicted* of such a crime. And . . . under the categorical approach, a showing that the minimum conduct for which he was convicted was not an aggravated felony suffices to do this."). The stages of the categorical approach—including the divisibility analysis at issue

here—are all in aid of the adjudicator addressing that singular legal question.

B. Throughout its history, the categorical approach has been applied to assess the immigration consequences of convictions irrespective of which party carries the burden of proof.

The categorical approach (and its modified version) have been applied in the immigration context for over a century. *Moncrieffe*, 569 U.S. at 191; *Mellouli*, 135 S. Ct. at 1986; *see also* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011) (describing the historical development and recent application of the categorical approach in immigration law and collecting cases). Federal cases adopting the categorical approach trace from 1913 to present, and Congress has continued to predicate certain adverse immigration consequences on convictions rather than conduct. *See United States v. Hayes*, 555 U.S. 415, 424-25 (2009) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well.") (citations and internal quotations omitted); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978). Many of the cases applying the categorical approach have arisen in contexts where noncitizens bear the burden of proof.

The application of the categorical approach has not, however, varied based on the allocation of burden. To the contrary, the categorical approach was first developed in a context where noncitizens bore the burden of proof, and has been applied interchangeably across contexts, irrespective of burden.

1. Conviction bars originated in exclusion cases in which the noncitizen bears the burden of proof, and the categorical approach has applied interchangeably in cases of exclusion and deportation.

Conviction bars first appeared in the context of exclusion laws, which prevented immigrants from entering the U.S. *See*, *e.g.*, Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477 (excluding "persons who are undergoing a sentence for conviction in their own country of felonious crimes"); Act of Mar. 3, 1891, ch. 551 § 1, 26 Stat. 1084, 1084 (excluding "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude"). These grounds of exclusion traditionally placed the burden of proof on the immigrant. For example, when Congress first introduced a conviction-based bar for crimes involving moral turpitude in 1891, it specified that anyone "convicted of a felony or other infamous crime or misdemeanor involving moral turpitude" shall be excluded "unless it is affirmatively and satisfactorily shown on special inquiry that such person does not belong to one of the . . . excluded classes." *Id*.

It was in the context of exclusion that courts first began to develop the categorical approach. The landmark case on the categorical approach, referenced by this Court in *Moncrieffe*, 569 U.S. at 191, is *United States ex rel. Mylius v. Uhl*. In *Mylius*, a noncitizen challenged his exclusion from the United States and detention on the basis of his prior conviction for criminal libel in England. 203 F. 152, 153 (S.D.N.Y. 1913). Immigration officials had concluded that the petitioner had been "convicted" of an offense "involving moral turpitude" by reviewing reports of the trial and the underlying facts that gave rise to his conviction. *Id.* Judge Noyes, writing for the federal district court in the Southern District of New York, concluded that the immigration officials erred by not confining their review to the "inherent nature" of the statutory offense of criminal libel, which "depends upon that which *must be shown* to establish [the noncitizen's] guilt." *Id.* at 154 (emphasis added). Under this inquiry, the court held that libel did not necessarily involve moral turpitude, for libel convictions could be obtained where defendants violated the statute without intent or knowledge. *Id.* It did not matter that libel could cover conduct that was base or depraved, only whether it necessarily did so. *Id.*

Judge Noyes acknowledged that, under this approach, some immigrants with convictions may be admitted to the U.S. even though the testimony and evidence underlying their convictions points to turpitudinous conduct. But such is the price of a uniform standard. As Judge Noyes observed, "testimony is

seldom available and to consider it in one case and not in another is to depart from uniformity of treatment." *Id.* at 153.

The Second Circuit affirmed, holding that Congress did not intend for immigration officers to "act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude. . . . this question must be determined from the judgment of conviction." *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914). While recognizing "the extreme brutality" of the libel on the facts, the Court observed that it was "dealing with laws designed to exclude from this country those whose records abroad are such as to warrant the inference that they are depraved and will continue to belong to the criminal classes." *Id*. at 862. Rather than rely on a factual inquiry, the Court concluded that, "[i]n construing these laws we should proceed on broad general lines, considering all persons as equal before the law." *Id.* The petitioner could not be excluded by virtue of his conviction unless the minimum conduct proscribed by his offense demonstrated moral turpitude, and that was the end of the inquiry.

Mylius would prove to be the seminal case explicating the categorical approach for all conviction-based immigration provisions. Das, 86 N.Y.U. L. REV. at 1690-92. Judge Learned Hand relied upon it in a series of cases arising in the deportation context, making no distinction based on burden of proof. *See United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939).

In *Guarino*, Judge Hand addressed the issue of whether a conviction for possession of a "jimmy," a common burglary tool, with intent to commit a crime was properly classified as a crime involving moral turpitude. 107 F.2d at 400. Judge Hand focused the inquiry upon "whether all crimes which [the petitioner] may intend are 'necessarily,' or 'inherently,' immoral." *Id.* Judge Hand observed that the statute of conviction covered conduct that could be "no more than a youthful prank" born of "curiosity, or a love of mischief." *Id.* Focused upon this minimum level of conduct, Judge Hand stated that "it would be to the last degree pedantic to hold that [the conviction] involved moral turpitude and to visit upon it the dreadful penalty of banishment." *Id.* While acknowledging that "other circumstances [made] it highly unlikely that this alien had possession of the jimmy for [a] relatively innocent purpose," Judge Hand nevertheless honored the minimum conduct test, holding that "[deportation] officials may not consider the particular conduct for which the alien has been convicted; and indeed this is a necessary corollary of the doctrine itself." *Id.*; *see also United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931) (Hand, J.).

These early deportation cases also adopted what is now referred to as the "modified" categorical approach when the noncitizen was convicted under a divisible statute. In a 1933 case, the Second Circuit assessed whether a noncitizen's prior conviction for second degree assault under New York law necessarily involved moral turpitude. *United States ex rel.*

Zaffarano v. Corsi, 63 F.2d 757 (2d Cir. 1933). Finding that the state offense defined second degree assault through five subdivisions, only some of which inherently involved moral turpitude, the court held that immigration officials could look to "the charge (indictment), plea, verdict, and sentence" to determine "the specific criminal charge of which the alien is found guilty and for which he is sentenced." *Id.* at 759. The court further held that the inquiry was limited solely to this "record of conviction," permitting immigration adjudicators to determine only which subsection gave rise to the noncitizen's conviction. *Id.* at 757. The court reaffirmed the minimum conduct test, holding that "[t]he evidence upon which the verdict was rendered may not be considered." *Id.* at 759. On rehearing, the court stated: "If an indictment contains several counts, one charging a crime involving moral turpitude and others not, the record of conviction would, of course, have to show conviction and sentence on the first count to justify deportation." *Id.* at 759. It therefore concluded that the noncitizen was not deportable.

No distinction was made in this early case law on the basis of burden. In both the exclusion and deportation contexts, the same categorical approach was applied. Indeed, when the Attorney General was first asked to opine about the proper approach to the assessment of convictions, he adopted the categorical approach in cases of exclusion. In *Immigration Laws—Offenses Involving Moral Turpitude*, 37 Op. Atty. Gen. 293 (1933), Attorney General Cummings responded to an inquiry by the State Department for guidance on

how their consular officers should address criminal grounds of exclusion. Attorney General Cummings quoted from Judge Noyes's opinion in *Mylius* to provide the standard for assessing convictions based on the conduct necessarily prohibited by the statute, rather than a factual inquiry into the acts underlying the offense. *Id*. at 295.

The Board of Immigration Appeals too adopted the categorical approach soon after its formation. *See Matter of S* –, 2 I&N Dec. 353 (BIA, A.G. 1945); *see also Matter of B* –, 4 I&N Dec. 493, 496 (BIA 1951) ("[T]he definition of the crime must be taken at its minimum . . . in a situation where the statute includes crimes which involve moral turpitude as well as crimes which do not inasmuch as an administrative body must follow definite standards, apply general rules, and refrain from going behind the record of conviction.") (modified on other grounds by *Matter of Franklin*, 20 I&N Dec. 867 (BIA 1994)).

Like federal courts, the BIA applied the same legal inquiry under the categorical approach in the exclusion context. *See*, *e.g.*, *Matter of P* –, 3 I&N Dec. 56, 59 (BIA 1947) (applying the categorical approach to assess whether Canadian conviction rendered individual inadmissible to the U.S., holding that the "crime must by its very nature and at its minimum, as defined by statute, involve an evil intent before a finding of moral turpitude would be justified"); *Matter of R* –, 4 I&N Dec. 176, 178-79 (BIA 1950) (applying categorical approach to address whether individual was inadmissible based on German tax conviction, and holding that

because "intent to defraud is not an element of the offense" the individual has not been convicted of a crime involving moral turpitude).

2. The categorical approach for analyzing convictions was well established before Congress introduced forms of relief with criminal bars and has long formed the basis for evaluating the applicability of criminal bars to relief without regard to the burden of proof.

The categorical approach was well established by the time Congress first introduced forms of relief with criminal bars based on a past conviction. The first forms of relief from deportation did not include criminal bars. *See* 6 Charles Gordon & Harry Nathan Rosenfield, *Immigration Law and Procedure* (1959) §§ 7.1(a), 7.3(a) (describing administrative practices of voluntary departure and preexamination beginning in 1935); *Matter of L* –, 1 I&N Dec. 1 (BIA 1940) (Seventh Proviso of the Immigration Act of 1917 authorized waiver of grounds of inadmissibility for crime involving moral turpitude for returning lawful resident and nunc pro tunc relief for noncitizens in removal proceedings).

In 1940, Congress enacted the Alien Registration Act of 1940, which greatly expanded grounds of deportation. Alien Registration Act, 54 Stat. 670, 670-73 (1940). Along with these expanded deportation grounds, Congress created relief in the form of suspension of

deportation for deportable noncitizens, regardless of their status. The new suspension remedy included bars based on criminal convictions. *Id.*, § 20; *see also* Gordon, § 7.9. Congress also created express statutory authority for voluntary departure, but added criminal bars to that relief. *Id*., § 7.2; *see generally* President's Commission on Immigration and Naturalization, Whom We Shall Welcome 208 (1953). Under the 1940 Act, the bars to both suspension and voluntary departure relief included a conviction of a "crime involving moral turpitude." 54 Stat. at 671-73 (cross-referencing section 19(a) of the Immigration Act of 1917, as amended).

The criminal bars enacted in 1940 came after more than two decades of established application of the categorical approach in both exclusion and deportation contexts and without regard to the burden of proof for those proceedings. Accordingly, as with exclusion, the BIA turned to the categorical approach to assess whether a conviction fit the ground for disqualification from relief, irrespective of the burden of proof. *Matter of M* –, 2 I&N Dec. 196 (BIA 1944) (looking to text of criminal statute to assess whether crime involved moral turpitude and concluding that noncitizen was eligible for suspension and voluntary departure and warranted voluntary departure as a matter of discretion); *Matter of C* –, 2 I&N Dec. 220 (BIA 1944) (considering what a prosecutor must prove to determine whether crime involved moral turpitude and finding that noncitizen was eligible for and should receive suspension of deportation).

In 1952, Congress once again altered the criminal bars for voluntary departure and suspension of deportation. Immigration Act of 1952, 66 Stat. 163, § 244. It also introduced a definition of good moral character with bars based on a conviction of a crime involving moral turpitude within a specified period. *Id.* § 101(f). Later statutes amended these bars and introduced new forms of relief. Most importantly, in 1958, Congress authorized adjustment of status, a form of relief that allows persons to regularize their status based on eligibility for a visa and therefore requires evaluation of whether the individual is barred based on criminal grounds of inadmissibility. *See* Act to Amend Section 245 of the Immigration and Nationality Act, and for Other Purposes, 72 Stat. 699, 699 (1958).

As Congress has added and revised forms of relief and bars to relief, the BIA continued to evaluate criminal bars based on a conviction by applying the categorical approach regardless of the burden of proof. *See*, *e.g., Matter of Zangwill*, 18 I&N Dec. 22, 28 (BIA 1981) (finding eligibility for adjustment of status because Florida statute of conviction for passing worthless checks did not require proof of intent to defraud); *Matter of Marchena*, 12 I&N Dec. 355, 356-57 (BIA 1967) (applying categorical approach to address whether applicant for adjustment of status was inadmissible and holding, in the context of a divisible statute and an ambiguous record, that "[i]n determining whether a crime involved moral turpitude, the definition of a crime must be taken at its minimum" and that where the "record does not establish" inadmissibility, the

applicant was eligible for discretionary relief); *Matter of P* –, 6 I&N Dec. 788, 790 (BIA 1955) (denying eligibility for suspension based on definition of state manslaughter crime and stating that the Board "ha[s] no authority to look behind the record to the circumstances surrounding the commission of a crime").

Historically, the BIA has applied this same categorical approach in relief eligibility cases when the record is incomplete. *See*, *e.g.*, *Matter of S* –, 6 I&N Dec. 769, 770 (BIA 1955) (finding that on incomplete record, voluntary departure could not be denied due to conviction for possession of burglary tools, but denying relief on other grounds); *see also Matter of S* –, 6 I&N Dec. 692, 696 (BIA, A.G. 1955) (where noncitizen disclosed criminal history but "the file . . . does not contain records of convictions," granting relief without applying criminal bars). Absent a record of conviction that establishes a bar to eligibility, the cases proceeded to the merits to determine whether or not to award relief.

* * *

Over the years, the categorical approach has become firmly rooted in immigration adjudication across contexts, wherever Congress chose to predicate consequences on "convicted" conduct. Das, 86 N.Y.U. L. REV. at 1669 (describing and collecting cases). Several of the landmark categorical approach cases arose in the context of exclusion where the noncitizen bears the burden of proof, and nothing in this or subsequent history suggests that the application of the categorical approach in any conviction-based context, including

inadmissibility, deportability or eligibility for relief, varies depending on the burden of proof.

II. The Government's Position Turns The Categorical Approach On Its Head And Results In The Very Harms That The Categorical Approach Is Designed To Avoid In The Immigration Context.

The government ignores the long and consistent history underlying the categorical approach, and asserts that the modified categorical approach is a factual inquiry whose outcome turns on the burden of proof. This is wrong and undermines the very purpose of the categorical approach.

By strictly limiting the analysis to the minimum conduct required to sustain the conviction, the categorical approach was developed to avoid what would be a fraught inquiry into the underlying facts of each individual conviction. As courts and the agency have long noted, immigration adjudicators act in an administrative capacity and are ill-equipped to conduct mini-trials into the factual basis of a past criminal conviction. *See*, *e.g.*, *Mylius*, 210 F. at 863; *Matter of Pichardo-Sufren*, 21 I&N Dec. 330, 335-36 (BIA 1996) (holding that a factual inquiry into the conduct underlying a conviction "is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence" and that "the harm to the system induced by the

consideration of such extrinsic evidence far outweighs the beneficial effect of allowing it to form the evidentiary basis of a finding of deportability"). The categorical approach prohibits such an inquiry and directs immigration adjudicators to rely on the criminal court adjudication.

By doing so, the categorical approach helps ensure the predictable, uniform, and just administration of federal immigration law in determining deportability, inadmissibility and eligibility for relief from deportation. These principles have influenced the development of the categorical approach in the immigration context and continue to underscore its importance today. *See* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 265-74 (2012) (describing the principles underlying the categorical approach); Das, 86 N.Y.U. L. REV. at 1725-46 (same); Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1032-34 (2008) (same).

Several of these rationales have an important constitutional dimension. In light of *Padilla v. Kentucky*, for example, the categorical approach plays a critical role in ensuring that defense attorneys meet their Sixth Amendment obligations to advise noncitizen defendants about the immigration consequences of criminal convictions. 559 U.S. 356, 359 (2010); *see also* Das, 86 N.Y.U. L. REV. at 1743-45 (discussing the role of the categorical approach in ensuring compliance with

Padilla); Koh, 26 GEO. IMMIGR. L.J. at 298 (same). As this Court held in *Padilla*, "deportation . . . is intimately related to the criminal process." 559 U.S. at 365; *see also I.N.S. v. St. Cyr*, 533 U.S. 289, 322 (2001) ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). By pegging immigration consequences to the conviction, the categorical approach enables defense counsel to advise noncitizen defendants about the consequences of a given plea and gives defendants notice of those consequences. *See Padilla*, 559 U.S. at 368; *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1111 (9th Cir. 2011) (departing from categorical approach "would make a mockery of the affirmative obligation that criminal defense attorneys have to advise their non-citizen clients of the potential immigration consequences of accepting a plea bargain"); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 482 (3d Cir. 2009) (finding that categorical approach's minimum conduct test "has provided predictability, enabling aliens better to understand the immigration consequences of a particular conviction").

By contrast, turning any part of the categorical approach into a factual inquiry that turns on burden allocation upsets the settled expectations and threatens noncitizens with severe, unanticipated consequences. Criminal records are often incomplete or unavailable to individuals, particularly when many years have passed since the conviction or where the case involved minor charges. A defense attorney may accurately

advise their client at the time of their plea that their conviction does not carry adverse immigration consequences and ensure that the plea allocution is immigration-safe, but when that individual faces deportation ten or twenty years later, that plea allocution may no longer be available if it had been properly recorded at all. Under the government's position, that individual's inadmissibility or eligibility for relief from deportation may turn entirely on circumstances outside of his or her control. The categorical approach was designed to prevent these unintended and arbitrary consequences.

In the same vein, the categorical approach also ensures uniformity in immigration adjudications, another rationale with constitutional underpinnings. *See* U.S. Const. Art. I, § 8, cl. 4 ("Congress shall have Power . . . To establish a *uniform* Rule of Naturalization") (emphasis added); *see*, *e.g.*, *Bustamante-Barrera v. Gonzalez*, 447 F.3d 388, 399 (5th Cir. 2006) (citing "overarching constitutional interest in uniformity of federal immigration and naturalization laws"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (stating that "the policy favoring uniformity in the immigration context is rooted in the Constitution"). From the earliest cases, courts and the agency have recognized that the uniform application of immigration law demands that the assessment of prior convictions be consistent for noncitizens *vis-à-vis* other noncitizens convicted of the same offense. *See*, *e.g.*, *Mylius*, 210 F. at 863 ("It would be manifestly unjust . . . to exclude one person and admit another where both were convicted of [the same

offense], because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offence than in the latter."); *Matter of R –*, 6 I&N Dec. 444, 448 n.2 (BIA 1954) ("The [categorical] rule set forth . . . prevents the situation occurring where two people convicted under the same specific law are given different treatment because one indictment may contain a fuller or different description of the same act than the other indictment; and makes for uniform administration of law.").

Under the government's position, individuals convicted of the same offense would be treated differently solely because one might have access to a record that the other does not. The fortuity of whether a noncitizen may be able to obtain a decades-old plea allocution, for example, varies across substantively identical cases, such that noncitizens convicted under the same statute may receive dramatically different treatment under this approach. Detained and unrepresented immigrants will be particularly disadvantaged, as will asylum-seekers fleeing persecution in countries with few if any documents at all. Given the varied adversarial and nonadversarial contexts in which conviction-based consequences arise in the immigration system, the categorical approach plays a particularly critical role in ensuring the uniform application of law. *See* Das, 86 N.Y.U. L. REV. at 1734-37 (discussing how conviction assessments are made by immigration judges and front-line immigration officers alike). The consistent application of the categorical approach regardless of

burden preserves the norms of predictability and uniformity discussed above.

The categorical approach also protects immigrants from facing disuniform outcomes based on immigration officials' charging decisions. Deportation proceedings follow a two-step process. The first step is to determine removability. In some cases, the government must present a ground of deportability, in which the government bears the burden, *see* 8 U.S.C. § 1229a(c)(3)(A). The second step—in which the non-citizen always bears the burden, *see* 8 U.S.C. § 1229a(c)(4)(A)—is to determine whether he or she is eligible for, and merits, discretionary relief from deportation. In the context of lawful permanent residents with drug convictions, the government can establish a ground of deportability under either 8 U.S.C. § 1227(a)(2)(B)(i) ("convicted of" controlled substance offense) or 8 U.S.C. § 1227(a)(2)(A)(iii) ("convicted of" aggravated felony). The latter ground is also a bar to eligibility for discretionary relief. *See* 8 U.S.C. § 1229b(a)(3) (to be eligible for cancellation, noncitizen must "not [have] been convicted of any aggravated felony").

If the categorical approach were cast aside, and the outcome of an inquiry into what a noncitizen was "convicted of" varied depending on whose responsibility it was to carry the burden of proof, the government could simply charge the noncitizen with a controlled substance offense at the deportability stage and aver that the noncitizen has to disprove the aggravated felony at the relief stage. This departure from the established analysis thus would impose a "layer of

arbitrariness" to immigration proceedings, for a noncitizen's relief eligibility would "hang[ ] on the fortuity of an individual official's decision" to charge or not to charge an aggravated felony at the removal stage. *See Judulang v. Holder*, 565 U.S. 42, 57-58 (2011).

Congress's continued choice to predicate various immigration consequences on whether a noncitizen has been "convicted" of an aggravated felony in both the removal and relief eligibility context—regardless of burden—demonstrates the continued applicability of the categorical approach in both contexts. *See Fajardo v. Att'y Gen.*, 659 F.3d 1303, 1309 (11th Cir. 2011) ("Had there been congressional disagreement with the courts' interpretation of the word 'conviction,' Congress could easily have removed the term 'convicted' from . . . the INA during any one of the *forty times* the statute has been amended since 1952.") (citing 8 U.S.C. § 1182 (historical notes)) (emphasis added); *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008) ("[W]e must presume that Congress was familiar with [the history of the categorical approach] when it made [a new ground of removal] depend on a 'conviction.' ").

Based on these principles and other norms, courts and the agency have long applied the categorical approach in the immigration context. These rationales continue to inform the important role that the categorical approach plays in the immigration adjudicative system today, and should not vary based on the allocation of burden of proof.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reject the government's position and reaffirm the application of the categorical approach to the inquiry in this case.

Respectfully submitted,

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