Nos. 09-71415, 10-73715

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL ALMANZA-ARENAS,
Petitioner,
v.

ERIC H. HOLDER, JR., United States Attorney General,
Respondent.

ON PETITIONS FOR REVIEW OF ORDERS OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRANT LEGAL RESOURCE CENTER, AND FEDERAL DEFENDERS OF SAN DIEGO IN SUPPORT OF PETITIONER GABRIEL ALMANZA-ARENAS

JAYASHRI SRIKANTIAH
ALISON KAMHI
Immigrants' Rights Clinic
Mills Legal Clinic
Stanford Law School
559 Nathan Abbott Way
Stanford, CA 94305-8610
Telephone: (650) 724-2442
jsrikantiah@law.stanford.edu

MANUEL VARGAS
ISAAC WHEELER
Immigrant Defense Project
28 W. 39th St., Suite 501
New York, NY 10018
Telephone: (212) 725-6422

May 28, 2013

TABLE OF CONTENTS

STATEMENT OF INTEREST OF AMICI 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. *MONCRIEFFE* OVERRULES *YOUNG* BY CLARIFYING THAT WHETHER A PRIOR CONVICTION CONSTITUTES A BAR TO RELIEF IS A LEGAL QUESTION, AS TO WHICH THE BURDEN OF PROOF IS IRRELEVANT. 5

A. *Moncrieffe* Repeatedly Explained That the Relevant Inquiry Is Whether a Prior Conviction Necessarily Involved Elements of a Disqualifying Crime, a Legal, Not a Factual Question. 5

B. As *Moncrieffe* Recognizes, Contrary to *Young*, the Burden of Proof Is Irrelevant to the Legal Question of Whether a Prior Conviction Constitutes a Bar to Relief. 8

II. CONTRARY TO *YOUNG*, *MONCRIEFFE* EMPHASIZED THE IMPORTANCE OF CONSIDERING WHETHER THE RELEVANT STATE COURT RECORDS ARE LIKELY TO EXIST IN DETERMINING HOW THE CATEGORICAL RULE SHOULD BE APPLIED. 12

CONCLUSION 14

CERTIFICATE OF COMPLAINCE 15

TABLE OF AUTHORITIES

CASES **Page(s)**

ABKCO Indus., Inc. v. Comm'r.,
482 F.2d 150 (3d Cir. 1973) 9

Matter of A-G-G-,
25 I&N Dec. 486 (BIA 2011) 11

Miller v. Gammie,
335 F.3d 889 (9th Cir. 2003) (en banc) 2, 4

Moncrieffe v. Holder,
133 S. Ct. 1678 (2013)...passim

Nijhawan v. Holder,
557 U.S. 29 (2009)..10

Sinotes–Cruz v. Gonzales,
468 F.3d 1190 (9th Cir.2006) 8

United States v. Lindsey,
634 F.3d 541 (9th Cir. 2011) 4

Young v. Holder,
697 F.3d 976 (9th Cir. 2012) (en banc) ....passim

STATUTES

8 U.S.C. 1158(b)(2)(A) 10

8 U.S.C. 1227(a)(4)(A)(ii) 10

8 U.S.C. 1227(a)(4)(B) 10

8 U.S.C. 1229a(c)(3) 7

8 U.S.C. 1229a(c)(4) 7

8 U.S.C. 1229b(c) 10

8 U.S.C. 1255(c) 10

OTHER AUTHORITIES

8 C.F.R. 1240.8(d) 2, 9, 11

1 Clifford S. Fishman & Anne T. McKenna, Jones on Evidence § 3.5 (7th ed. 1992) 8

Detention Watch Network, *Expose and Close Facility Reports* (2012), *available at* http://www.detentionwatchnetwork.org/ExposeAndClose. 14

Immigration Review, *FY 2012 Statistical Year Book* G-1 (2013), *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf. 13

DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), amici curiae Immigrant Defense Project, National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center and Federal Defenders of San Diego state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above, which are nonprofit organizations.

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

STATEMENT OF INTEREST OF AMICI

The Court granted leave for Amicus Immigrant Defense Project to appear as amicus on May 6, 2013 and granted permission for the filing of this brief on May 13, 2013. As set forth in the attached motion, additional amici National Immigration Project of the National Lawyers Guild, Immigrant Legal Resource Center, and Federal Defenders of San Diego request permission to join this brief.

SUMMARY OF ARGUMENT

The Court should hold that *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), overrules *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), as to whether a noncitizen like Mr. Almanza is barred from relief from removal based on a prior conviction when the record of that conviction is inconclusive. A three-judge panel may "reject [a] prior opinion of this Court as having been effectively overruled" based on an intervening inconsistent Supreme Court decision when the decision has "undercut the theory or reasoning underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). *Young* was based on two theories, both of which the Supreme Court undercut in *Moncrieffe*, rendering the two decisions clearly irreconcilable.

First, *Young* placed heavy reliance on the statutory and regulatory provisions generally providing that, if the "evidence indicates" that a bar to relief exists, the noncitizen "shall have the burden of proving by a preponderance of the evidence that such grounds do *not* apply." 697 F.3d at 988 (citing 8 C.F.R. 1240.8(d)). *Moncrieffe* clarified, however, that to determine the immigration consequences of a prior conviction—including whether the noncitizen is removable and whether, as here, the conviction

bars relief—the key inquiry under the categorical approach is whether the conviction necessarily included the elements of a disqualifying offense. This is a legal inquiry to which the burden of proof has no relevance. When the record of conviction is inconclusive, the conviction did not "necessarily involve facts that correspond" to a disqualifying offense and the noncitizen "was not convicted of a [disqualifying offense]" as a matter of law. *Moncrieffe*, 133 S. Ct. at 1687.

Second, while acknowledging that "some aliens will surely face challenges" in attempting to locate state court records showing that they lack a disqualifying conviction when the record is inconclusive, *Young* concluded "that result is not so absurd that Congress could not have intended it." *Young*, 697 F.3d at 989. *Moncrieffe* undercut this rationale, reasoning that whether state court records are likely to exist bears on how the categorical rule should be applied. *See* 133 S. Ct. at 1692. Inconsistently with *Moncrieffe*'s reasoning, *Young* forces noncitizens like Mr. Almanza to prove a negative—the lack of a disqualifying conviction—on the basis of a limited universe of official court records, the content or existence of which is beyond their control.

ARGUMENT

The Court should reexamine and reject *Young* in light of *Moncrieffe* because the two decisions are clearly irreconcilable. This Court has explained that, for a three-judge panel to reject a prior circuit decision based on intervening authority, the issues in the two cases "need not be identical." *Miller*, 335 F.3d at 900. Rather, the key question is whether the "mode of analysis" in *Moncrieffe* "undercuts" the theory or reasoning in *Young* such that the two cases are "clearly irreconcilable." *Id. See also United States v. Lindsey*, 634 F.3d 541 (9th Cir. 2011) (three-judge panel rejecting prior en banc decision based on intervening Supreme Court precedent).

Young is clearly irreconcilable with *Moncrieffe*'s analysis in two critical respects. First, *Moncrieffe* recognizes that the test for whether a conviction bars immigration relief is a legal inquiry that turns on "what the state conviction necessarily involved, not the facts underlying the case." 133 S. Ct. at 1684. This test is at odds with *Young's* conclusion that the noncitizen bears a burden of persuasion with respect to a potential criminal bar: burdens of proof are irrelevant as to legal inquiries. Second, *Young* disregards the Catch-22 that its rule creates by requiring noncitizens to obtain records to prove a negative—that they lack a disqualifying conviction—even though such records may not exist. This requirement is

irreconcilable with *Moncrieffe*'s recognition that whether relevant state court records are likely to exist is critical to the application of the categorical rule.

I. *MONCRIEFFE* OVERRULES *YOUNG* BY CLARIFYING THAT WHETHER A PRIOR CONVICTION CONSTITUTES A BAR TO RELIEF IS A LEGAL QUESTION AS TO WHICH THE BURDEN OF PROOF IS IRRELEVANT.

Young is clearly irreconcilable with *Moncrieffe* because it treated the question of whether a prior conviction constitutes a bar to relief as a factual inquiry. By contrast, *Moncrieffe* treated this question as a legal inquiry regarding what elements the prior conviction necessarily involved. Indeed, *Moncrieffe* did not mention, much less discuss, burdens of proof, and treated the analysis as the same even in different burden of proof contexts. Unlike *Young*, *Moncrieffe*'s analysis accords with the basic evidentiary principle that burdens of proof apply only to factual questions, not legal inquiries. The burden of proof under the statute and regulations relating to bars to relief is only relevant to the numerous contexts in which the applicability of a potential bar hinges on a factual question.

A. *Moncrieffe* Repeatedly Explained That the Relevant Inquiry Is Whether a Prior Conviction Necessarily Involved Elements of a Disqualifying Crime, a Legal, Not a Factual, Question.

Moncrieffe clarified that the immigration consequences of a prior conviction turn on a legal question—what elements the conviction

necessarily involved—with any ambiguity "construed in the noncitizen's favor." 133 S. Ct at 1693. "The reason is that the [Immigration and Nationality Act] asks what offense the noncitizen was 'convicted' of, . . . not what acts he committed." *Id.* at 1685. Consistent with this understanding, *Moncrieffe* determined the consequences of a prior conviction without applying or even mentioning burdens of proof. *Moncrieffe* explicitly stated that the "analysis is the same in both [the removability and relief] contexts," despite the fact that the statutory and regulatory language relating to the burden of proof is different in the two contexts. *Id.* at 1685 n.4.

Moncrieffe repeatedly clarified that the immigration consequences of a prior criminal conviction turn on what elements the conviction "necessarily" involved, a legal inquiry.[1] *See id.* at 1684-88, 1692 (employing the term "necessarily" eight separate times). The Court explained that "[b]ecause we examine what the state conviction necessarily involved . . . we must presume that the conviction rested upon [nothing] more than the least of th[e] acts criminalized." *Id.* at 1684. The Court further reasoned that "[a]mbiguity on this point means that the conviction did not necessarily involve facts that correspond to" a disqualifying offense,

---

[1] Where Congress defines the disqualifying conviction by reference to its potential punishment under federal law, "it may be necessary to take account of federal sentencing factors too." *Id.* at 1681. That qualification has no bearing on this case.

and therefore, the noncitizen “was not convicted” of the disqualifying crime. *Id.* at 1687.

Contrary to *Young*, whether the statute assigns the burden of proof to the government or the noncitizen does not matter to deciding the legal question of what a prior conviction necessarily involved. Either way, a court must presume that the conviction rested upon the least of the acts criminalized. *Moncrieffe* recognized as much, explicitly stating that application of the categorical analysis is the same as to both deportability, where the government bears the burden to show the noncitizen is deportable, 8 U.S.C. 1229a(c)(3), and relief, where the noncitizen bears the burden to show that he satisfies eligibility requirements, 8 U.S.C. 1229a(c)(4). *See* 133 S. Ct. at 1685 n.4.

The inquiry is legal both as to the pure categorical approach—which hinges immigration consequences on the statute of conviction—and the modified categorical approach, which permits consideration of certain reliable criminal records in the limited circumstances when a statute of conviction “contain[s] several different crimes, each described separately.” *See id.* at 1684. As this Court has repeatedly recognized, including in *Young* itself, whether a conviction constitutes a criminal bar under the modified categorical approach is a question of law. *See, e.g.*, 697 F.3d at 981 (“We

review de novo all questions of law, including whether a particular conviction qualifies as an aggravated felony."); *Sinotes–Cruz v. Gonzales,* 468 F.3d 1190, 1194 (9th Cir. 2006). In fact, this Court in *Young* explicitly referred to the determination of the effect of a prior conviction through the modified categorical approach as a "precise legal question*.*" 697 F.3d at 985.

When criminal records fail to conclusively demonstrate a disqualifying conviction, such records fail to establish, as a legal matter, that a disqualifying conviction exists.

B. As *Moncrieffe* Recognizes, Contrary to *Young*, the Burden of Proof Is Irrelevant to the Legal Question of Whether a Prior Conviction Constitutes a Bar to Relief.

Moncrieffe's treatment of the burden of proof as inapplicable to the legal question of whether a conviction constitutes a bar to relief is consistent with generally recognized principles regarding burdens of proof. The burden of proof refers to "the obligation of a party to introduce evidence that persuades the factfinder . . . that a particular proposition or fact is true." 1 Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence* § 3.5 (7th ed. 1992). It has no relevance to questions of law. *See, e.g.*, *Universal Elec. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) (burden of production and persuasion "certainly carries force on any factual

components . . . because facts must be proven via evidence . . . [but] as a practical matter . . . carries no force as to questions of law."); *ABKCO Indus., Inc. v. Comm'r*, 482 F.2d 150, 156 (3d Cir. 1973) ("[I]t may not be proper to refer to 'burden of proof' in reference to the resolution of a question of law.").

Inconsistently with *Moncrieffe*'s treatment of the burden of proof as irrelevant, *Young* placed heavy reliance on the statute and regulations setting forth such burdens. Under the regulation generally applicable to relief from removal, if the "evidence indicates" that a mandatory bar to relief such as an aggravated felony conviction exists, the noncitizen must prove "by a preponderance of the evidence" that the mandatory bar does not apply. 8 C.F.R. 1240.8(d). As argued above, this "preponderance of the evidence" standard applies to factual inquiries—it has no relevance as to the legal question of whether the proffered documents necessarily establish a prior disqualifying conviction.[2]

The statutory and regulatory burden of proof sections are provisions of general applicability that carry force in the numerous contexts where a bar

[2] Similarly, the statutory provision that applies generally to noncitizens seeking relief from removal, 8 U.S.C. 1229a(c)(4), imposes a burden as to certain factual eligibility showings, including, for nonpermanent residents seeking cancellation of removal, continuous physical presence and extreme or unusual hardship to a qualifying relative. *See* 8 U.S.C. 1229b(b).

to relief involves a factual question. For instance, as to cancellation of removal, a noncitizen is barred from relief if he "engaged" in, rather than was convicted of, numerous types of unlawful activity, including criminal activity which endangers public safety or national security, 8 U.S.C. 1227(a)(4)(A)(ii), or terrorist activities under Section 1182(a)(3), 8 U.S.C. 1227(a)(4)(B). *See* 8 U.S.C. 1229b(c). Other forms of relief also hinge mandatory bars on factual questions. *See, e.g.,* 8 U.S.C. 1158(b)(2)(A) (for asylum, whether the noncitizen was firmly resettled in another country prior to arriving in the United States, or there are reasonable grounds to believe he is a danger to the security of the United States, or serious reasons for believing he "committed" a serious political crime); 8 U.S.C. 1255(c) (for adjustment of status, whether the noncitizen was employed while unauthorized, or continues in or accepts unauthorized employment prior to filing application). In addition, burdens of proof may be relevant when a prior disqualifying conviction has a circumstance-specific component, as in *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009).

Moncrieffe's treatment—contrary to *Young*—of the determination of the immigration consequences of a conviction as a legal question, both as to removability and relief, is consistent with the overall statutory framework of removal proceedings, which occur in two phases. In the first phase, the issue

is whether the noncitizen is removable.[3] In the second phase, noncitizens who are found removable present their case for relief, such as cancellation of removal. The immigration regulations assume that, by this phase, the government will have already produced criminal records that could constitute "evidence indicat[ing]" that a noncitizen is subject to a disqualifying conviction. *See* 8 C.F.R. 1240.8(d);[4] *see also Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011) (the government bears the burden under Section 1240.8(d) of making a prima facie showing that a bar to relief exists). Consistently with this statutory structure, *Moncrieffe* explained that, if the government fails to meet its burden to show removability based on a disqualifying conviction, "the noncitizen may seek relief from removal . . . assuming he satisfies the other eligibility criteria." *See* 133 S. Ct. at 1692. Applied here, when the record of conviction is inconclusive and does not

---

[3] Although the government is not required to charge a conviction as a ground of removability in order to raise the conviction as a bar to eligibility for relief, if the statute and regulations were read to place the burden of production on the noncitizen (contrary to 8 C.F.R. 1240.8(d)), whenever the government chooses not to charge a conviction at the removability stage, relief eligibility would impermissibly "rest on the happenstance of an immigration official's charging decision." *See Judulang v. Holder*, 132 S. Ct. 476, 486 (2011).

[4] Section 1240.8(d) applies both to cases in which (as here) the government charges a noncitizen with inadmissibility and cases like *Young* where the government bears the burden of establishing deportability.

establish removability based on a prior conviction, the conviction also does not bar the noncitizen from eligibility for relief from removal.

Because *Young* compels precisely the opposite result, *see* 697 F.3d at 989, 1002 (Ikuta, J., dissenting), it is "clearly irreconcilable" with *Moncrieffe.*

II. CONTRARY TO *YOUNG*, *MONCRIEFFE* EMPHASIZED THE IMPORTANCE OF CONSIDERING WHETHER RELEVANT STATE COURT RECORDS ARE LIKELY TO EXIST IN DETERMINING HOW THE CATEGORICAL RULE SHOULD BE APPLIED.

Moncrieffe rejected a fundamental premise of *Young* by considering what records are necessarily created as part of an underlying criminal proceeding when deciding the immigration consequences of a conviction. *See* 133 S. Ct. at 1692. By contrast, *Young* concluded that the availability of records is irrelevant, *see* 697 F.3d at 989, and therefore imposed an impossible burden on noncitizens, who must somehow attempt to obtain criminal records that prove a negative—that they were not convicted of a disqualifying offense—even when such records do not exist.

Moncrieffe explained that, unless a statute of a prior conviction is divisible, an immigration court cannot look to the record of conviction to clarify what the conviction necessarily involved. *See* 133 S. Ct. at 1684-85. This is in part because such records may not exist: "there is no reason to

believe that state courts will regularly or uniformly admit evidence going to facts . . . that are irrelevant to the offense charged." *See id.* at 1692.

Extending *Moncrieffe*'s mode of analysis to divisible statutes—such as, according to the government, the statute at issue in this case—reveals that *Moncrieffe* undercut *Young*'s decision to disregard the practical impossibility of requiring noncitizens to obtain records that may not regularly or uniformly be maintained by state courts. State courts may not regularly record which portion of a divisible statute formed the basis for a conviction. Even when courts record such information, they may have a practice of destroying records for old or expunged convictions. Whereas *Moncrieffe* recognized the importance of avoiding an outcome where immigration consequences depend on records that may never have been created or no longer exist, *Young* forces noncitizens to attempt to locate records that simply may not exist.

Young's holding that the noncitizen must find conclusive records even if they may not exist places significant, often insurmountable, burdens on noncitizens in removal proceedings, 44% of whom are unrepresented, 36% of whom are detained, and 82.5% of whom are not fluent in English.[5] *Young*

[5] *See* Executive Office of Immigration Review, *FY 2012 Statistical Year Book* G-1, 0-1, F-1 (2013), *available at* http://www.justice.gov/eoir/statspub/fy12syb.pdf.

is particularly harsh on detained noncitizens, who often lack reliable access to telephones, computers, or the Internet.[6]

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

CONCLUSION

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

Date: May 28, 2013

Respectfully submitted,

s/Jayashri Srikantiah

JAYASHRI SRIKANTIAH

Stanford Law School
Immigrants' Rights Clinic
Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610

Counsel for Amici

[6] *See, e.g.*, Detention Watch Network, *Expose and Close Facility Reports* (2012), *available at* http://www.detentionwatchnetwork.org/ExposeAndClose.

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), and Ninth Circuit Rule 32-1, I certify that the attached brief is proportionately spaced, has a typeface of 14 points or more, and contains 2,799 words.

Dated: May 28, 2013

s/Jayashri Srikantiah
JAYASHRI SRIKANTIAH
Counsel for Amici

CERTIFICATE OF SERVICE

I hereby certify that on May 28, 2013, the foregoing document, **BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRANT LEGAL RESOURCE CENTER, AND FEDERAL DEFENDERS OF SAN DIEGO IN SUPPORT OF PETITIONER GABRIEL ALMANZA-ARENAS**, was electronically filed with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Jayashri Srikantiah

JAYASHRI SRIKANTIAH
Counsel for Amici