No. 11-702

IN THE

Supreme Court of the United States

ADRIAN MONCRIEFFE, PETITIONER,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES, RESPONDENT.

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

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Board of Immigration Appeals and Decisions

Attorney General Decisions

Statutes

Other Authorities

STATEMENT OF INTEREST

Amici curiae are 83 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. *Amici* submit this brief to provide the Court with the history and principles behind the categorical approach in the immigration context and to illustrate how Respondent's 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]

SUMMARY OF ARGUMENT

For over a century—well before this Court issued its decisions in *Taylor v. United States*, 495 U.S. 575 (1990) and *Shepard v. United States*, 544 U.S. 13 (2005) (applying a categorical approach to analyze prior convictions for federal criminal sentence enhancement purposes)—immigration adjudicators have applied a categorical approach to

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[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. Letters of consent have been filed with the Clerk of the Court.

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 removal 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. This 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.

Respondent's position is at fundamental odds with this long-established approach in immigration cases. Under Respondent's position, noncitizens convicted under criminal statutes that require no more than the social sharing of a small quantity of marijuana would be labeled "drug trafficking" aggravated felons. The consequences of this label are severe; as a bar to discretionary relief from removal, it deprives immigration adjudicators of the power to consider favorable equities, humanitarian concerns, and the public interest. Respondent's position, if adopted, has the potential to subsume low-level marijuana offenses across the country, nearly all of which explicitly lack a direct commercial or trafficking basis.

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. It explains the critical role that this approach plays in ensuring uniformity, predictability, and fairness in the assessment of convictions in the

immigration context. Part II illustrates how Respondent's approach turns the categorical approach on its head, with the result that minor non-trafficking marijuana offenses are labeled as drug trafficking aggravated felonies, depriving noncitizens of eligibility for relief from removal.

ARGUMENT

I. RESPONDENT'S POSITION CONFLICTS WITH THE CATEGORICAL APPROACH, AS APPLIED BY COURTS AND AGENCY OFFICIALS IN IMMIGRATION CASES FOR OVER A CENTURY.

Courts and the agency have long applied a categorical approach in determining whether a criminal disposition leads to immigration consequences that are based on "conviction" of an offense. Under the categorical approach, immigration adjudicators may consider only the minimum conduct proscribed by the statute of conviction in determining the immigration consequences of the past conviction.

In recent years, this Court has applied a categorical approach in cases arising in both the criminal sentencing and immigration contexts. In *Taylor* and *Shepard*, the Court applied a categorical approach to determine if a prior conviction triggered federal sentencing enhancements. Similarly, the Court has applied a categorical approach in a number of immigration cases predicated on past convictions. *See Carachuri-Rosendo v. Holder*, __ U.S. __, 130 S. Ct. 2577 (2010) (applying categorical approach to determine if second drug possession conviction

qualified as aggravated felony); *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007) (applying categorical approach to determine if theft conviction qualified as theft aggravated felony); *see also Lopez v. Gonzalez*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

These recent cases reinforce the applicability of the categorical approach in this case. However, the categorical approach in the immigration context did not begin with these cases. Nor were its rationales imported from or confined to the criminal sentencing context. Rather, as illustrated by a century of precedent, the categorical approach emerged independently to address Congress's statutory scheme and its compelling concerns unique to the administrative immigration context.

Rather than address the long-settled origins of the categorical approach in immigration law, Respondent proffers a new version of the approach that turns it on its head. *See infra* Part II (analyzing Respondent's position in depth). Instead of looking to the minimum conduct proscribed by the statute in marijuana cases, Respondent seeks to have immigration adjudicators assume the maximum conduct that could be punished in these cases, even in the absence of such findings by the criminal court. *See* BIO 10-11, 13; *see also Moncrieffe v. Holder*, 662 F.3d 387, 392 (5th Cir. 2011). Respondent attempts to cure the fundamental unfairness in its position by permitting immigration adjudicators to make factual findings beyond the record of conviction. *See Matter of Castro-Rodriguez*, 25 I. & N. Dec. 698 (B.I.A. 2012) (placing the burden on a noncitizen to prove he or she was not convicted of an aggravated felony "by any probative evidence, including evidence outside of the

record of conviction"). This approach—presuming a conviction to be equivalent to a conviction of the maximum conduct that the statute could conceivably cover and requiring a mini-trial on the underlying facts to counteract the obvious unfairness thus created—goes against the core principles behind the categorical approach in the immigration context.

This section of the brief outlines the principles behind the categorical approach and describes their proper application in the immigration context. Part I.A describes the century of jurisprudence requiring a categorical approach to determine the minimum conduct proscribed by a criminal conviction in the immigration context. Part I.B describes the underlying rationales that have long informed the categorical approach. Part I.C clarifies the consistent application of the categorical approach in contexts involving different burdens of proof.

A. The categorical approach has long required courts and agency officials to assess the minimum conduct proscribed under a criminal statute in order to determine whether an individual was necessarily "convicted" of a given offense.

The categorical approach has been applied in the immigration context for over a century. It is relied upon by front-line immigration officers and immigration judges every day to decide thousands of claims regarding conviction-based grounds of removability and bars to status or relief from removal. Congress, aware of the streamlined administrative nature of these adjudications, has

repeatedly required that immigration officials and courts rely only on what is established by the conviction itself, i.e., the minimum conduct established by the criminal court's adjudication of the case based on the criminal statute. This test is well-established in case law interpreting Congress's conviction requirement, which Congress has repeatedly utilized when adding certain grounds of removal and bars to status or relief in federal immigration law. *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.") (citation omitted); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

From the beginning, Congress has premised specific immigration consequences on *convictions*. *See* 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"). Congress chose language requiring a conviction to trigger some immigration consequences, while prescribing a conduct-based standard for others. *Compare id. with* Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900 ("[A]ny alien woman or girl . . . *practicing* prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported").

In examining Congress's use of the "convicted" language in early federal immigration cases, courts concluded that Congress intended to limit the authority of immigration adjudicators to determine consequences based on the conviction rather than the underlying conduct. One of the first cases discussing this requirement is *United States ex rel. Mylius v. Uhl*, in which a noncitizen challenged his detention and exclusion from the United States on the basis of a 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 what *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.* 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).

This reading of the statute was further reinforced by Judge Learned Hand in a series of cases. In *United States ex rel. Guarino v. Uhl*, 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 399, 400 (2d Cir. 1939). 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.* As Judge Hand noted in another case, the doctrine cut both ways because "[neither] the immigration officials, nor we, may consider the circumstances under which the crime was in fact committed. When by its definition it does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral. Conversely, when it does, no evidence is competent that he was in fact blameless." *United States ex rel.*

Robinson v. Day, 51 F.2d 1022, 1022-23 (2d Cir. 1931).

The categorical approach was also applied in cases in which a noncitizen had been convicted under a so-called "divisible" statute—one with separately enumerated offenses, only some of which necessarily trigger specific immigration consequences. In such cases, courts permitted immigration adjudicators to examine the official record of conviction—not as an inquiry into the facts underlying the conviction, but rather for the limited purpose of determining which branch of the statute served as the basis for the noncitizen's conviction. This test—which courts later termed a "modified categorical approach"—was applied in the seminal case *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933). The Second Circuit assessed whether a noncitizen's prior conviction for second degree assault under New York law necessarily involved moral turpitude. *Id.* 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.

The reasoning of these early federal court decisions was also adopted by the Attorney General and the Board of Immigration Appeals ("B.I.A.") soon after its formation. *See Op. of Hon. Cummings*, 37 Op. Atty Gen. 293 (A.G. 1933) (applying a categorical approach to convictions); *see also Matter of S--,* 2 I. & N. Dec. 353 (B.I.A., A.G. 1945) (same). In doing so, both the Attorney General and the B.I.A. have looked to the minimum conduct necessary under a conviction to determine deportation or exclusion consequences. *See, e.g.*, *Matter of B--*, 4 I. & N. Dec. 493, 496 (B.I.A. 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."); *Matter of P--*, 3 I. & N. Dec. 56, 59 (B.I.A. 1948) ("[A] crime must by its very nature and at its minimum, as defined by the statute, involve an evil intent before a finding of moral turpitude would be justified.").

The categorical approach has remained the dominant inquiry in immigration cases, whether the provision relates to conviction of a crime involving moral turpitude or to conviction of a more recently added provision, such as the aggravated felony ground that was added to the immigration statute in 1988. *See*, *e.g.*, *Amouzadeh v. Winfrey*, 467 F.3d 451, 455 (5th Cir. 2006) ("Under the categorical approach, we read the statute at its minimum, taking into account the minimum criminal conduct necessary to sustain a conviction under the statute.") (internal quotation and citation omitted); *Joseph v. Att'y Gen.*, 465 F.3d 123, 128 (3d Cir. 2006) (stating that "only

the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant" to whether that conviction qualifies as an aggravated felony) (internal quotation and citation omitted); *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (employing the categorical approach to evaluate whether conviction qualified as an aggravated felony, stating that "the singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant.") (internal quotation and citation omitted); *Matter of Espinoza-Gonzalez*, 22 I. & N. Dec. 889, 902-03 (B.I.A. 1999) (employing the categorical approach to aggravated felony ground, stating that "[i]t is longstanding Board practice to construe a respondent's offense according to the minimum conduct necessary to sustain a conviction . . . [I]t is not what the respondent did, but the crime of which he was convicted, determined by the record of conviction, that is dispositive.");[2] *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)

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[2] The Attorney General recently departed in part from the categorical approach for crimes involving moral turpitude in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008). A majority of federal circuits have rejected *Silva-Trevino* as contrary to Congressional intent requiring a categorical approach. *See Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Fajardo v. Att'y Gen.,* 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Att'y Gen.,* 582 F.3d 462 (3d Cir. 2009); *but see Bobadilla v. Holder*, No. 11-1590, --- F.3d ---, 2012 WL 1914068 (8th Cir. May 29, 2012); *Mata-Guerrero v. Holder,* 627 F.3d 256 (7th Cir. 2010).

(describing the historical development and recent application of the categorical approach in immigration law and collecting cases).

B. As its long history demonstrates, the categorical approach is an essential rule in ensuring the fair, predictable, and uniform administration of immigration law.

By strictly limiting the analysis to the minimum conduct required to sustain the conviction, the categorical approach avoids 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 facts underlying a past criminal conviction. *See, e.g.*, *Mylius*, 210 F. at 863; *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 335-36 (B.I.A. 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. 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. -- (forthcoming 2012) (manuscript at 39-44), *available at* http://ssrn.com/abstract=2046839 (analyzing rationales for the categorical approach in the immigration context)); Das, *supra*, 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 noncitizens defendants about the immigration consequences of criminal convictions. *See id.*, __ U.S. __, 130 S.Ct. 1473, 1477 (2010); *see also* Das, *supra*, 1743-45 (discussing the role of the categorical approach in ensuring compliance with *Padilla*); Koh, *supra*, at 43 (same). As this Court held in *Padilla*, "deportation . . . is intimately related to the criminal process." 130 S.Ct. at 1481; *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 rather than the underlying conduct, 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*, 130 S.Ct. at 1477; *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*, 582 F.3d at 482 (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, probing the facts underlying these convictions undermines settled expectations and threatens noncitizens with severe, unanticipated consequences. Whether such nonessential facts appear in the criminal record is often completely haphazard, and reliance upon those facts would place noncitizens convicted of the same offense on an unequal footing solely based on the luck of the available factual narrative, with little notice of such consequences. *See* Sharpless, *supra*, at 1031 ("Immigration judges who later rely on [nonessential] facts to determine the nature of the conviction deprive noncitizens of notice regarding the immigration consequences of convictions."). Even if applied prospectively, such an approach would require defense counsel to anticipate and explain a wide array of deportation risks arising from nonessential facts that might serve as the basis for a later immigration adjudication, dramatically changing the calculus for plea agreements. *See* Das, *supra*, at 1742-44. Immigrant defendants may

increasingly elect to go to trial, and thereby place additional pressures upon overburdened criminal courts. *See id.* at 1745. Moreover, trials themselves may also expand in complexity, as noncitizen defendants are forced to contest ancillary factual findings that, while irrelevant to a determination of guilt, may prove critical in immigration court.[3] *See id.* The categorical approach prevents these unintended consequences and ensures that only the findings necessarily adjudicated by the criminal tribunal become the basis for that conviction's immigration consequences.

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 law"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3rd 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

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[3] Moreover, it may be impossible for a noncitizen to contest nonessential facts alleged in a criminal prosecution. *See United States v. Aguila-Montes de Oca*, 655 F.3d 915, 962 (9th Cir. 2011) (Berzon, J., concurring) (observing that even "'overwhelming evidence' to dispute an alleged non-elemental fact" may be of little help to a criminal defendant because presentation of such evidence "would have been a waste of time and probably excluded as irrelevant") (citations omitted).

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 of the former case showed a more aggravated offense than in the latter."); *Matter of R--*, 6 I. & N. Dec. 444, 448 n.2 (B.I.A. 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"). Inquiry into the underlying facts of each conviction is incompatible with uniform assessment. Such an inquiry purports to bring additional information to bear on the case, but instead introduces nonessential facts. The fortuity of whether such facts may appear in the record varies across substantively identical cases, such that noncitizens convicted under the same statute may receive dramatically different treatment under this approach. *See* Sharpless, *supra*, at 1032. Moreover, given the varied adversarial and nonadversarial contexts in which conviction-based consequences arise in the immigration system, the categorical approach play a particularly critical role in ensuring the uniform application of law. *See* Das, *supra*, at 1734-37 (discussing how conviction assessments are made by immigration judges and front-line immigration officers alike).

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.

C. Throughout its history, the application of the categorical approach has not varied based on burdens of proof.

These rationales also help explain why the application of the categorical approach does not vary based on the burden of proof. While the party carrying the burden of proof varies across contexts in immigration law, *compare* 8 U.S.C. § 1229a(c)(3)(A) (government bears burden to prove basis for deportability), *with* 8 U.S.C. § 1229a(c)(2)(A) (noncitizen bears burden to prove admissibility) *and* 8 U.S.C. § 1229a(c)(4)(A) (noncitizen bears burden to prove eligibility for cancellation from removal), application of the categorical approach is a legal, rather than factual, inquiry. While it sometimes calls for reference to the record of conviction, this is solely for the purpose of determining which portion of the statute gave rise to the noncitizen's conviction. The outcome therefore does not turn on burdens of proof; either the conviction is for an offense that is an aggravated felony or it is not. *See 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.").

Indeed, in contexts where the noncitizen bears the burden of proof, courts have long applied the strict categorical approach. For example, the Second Circuit's landmark opinion in *Mylius* arose out of a noncitizen's challenge to his exclusion from the United States—a context in which the noncitizen generally bears the burden of proof. *Mylius*, 210 F. at 863. The federal immigration agency has adopted this same stance in subsequent exclusion cases, irrespective of the placement of the burden on the noncitizen. *See, e.g.*, *Attorney General Op.,* 37 Op. Att'y Gen. 293, 294-95 (1933); *Matter of T--*, 2 I. & N. Dec. 22, 22 (B.I.A. 1944); *Matter of P--*, 3 I. & N. Dec. 56 (B.I.A. 1947).

Moreover, the consistent application of the categorical approach regardless of burden preserves the norms of predictability and uniformity discussed above, *supra* Part I.B. Deportation proceedings follow a two-step process. The first step—in which the government bears the burden, *see* 8 U.S.C. § 1229a(c)(3)(A)—is to determine deportability. The second step—in which the noncitizen 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 felon").

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, *see* Part II.B (explaining Respondent's view), 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*, __ U.S. __, 132 S.Ct. 476, 486 (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 (B.I.A. 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.'"); *see also supra* Part I.A.

II. RESPONDENT'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.

Under federal immigration law, noncitizens who have been "convicted" of an aggravated felony are subject to deportability and bars to relief from removal. 8 U.S.C. §§ 1227(a)(2)(A)(iii); 1229b(a)(3). This category includes convictions for "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c) defines "drug trafficking crime" as "any felony punishable under the Controlled Substances Act" ("CSA"). A prior state conviction is a drug trafficking aggravated felony if the state offense "is punishable as a federal felony." *Lopez*, 549 U.S. at 60. The CSA punishes marijuana distribution offenses as either a felony or a misdemeanor. The lowest level federal felony covers the distribution of "less than 50 kilograms of marihuana . . . except as provided in paragraph [] 4." 21 U.S.C. § 841(b)(1)(D). Paragraph 4 states that those "distributing a small amount of marihuana for no remuneration *shall* be treated as provided" in 18 U.S.C. § 844, the misdemeanor simple possession provision of the CSA. 21 U.S.C. § 841(b)(1)(D) (emphasis added). A hard line is therefore drawn in the CSA itself between felony and misdemeanor distribution of marijuana delineated by the quantity of marijuana involved and the presence or absence of remuneration.

Nonetheless, under Respondent's approach, *all* state marijuana distribution offenses, including those that may involve the federal misdemeanor equivalent of distribution of "a small amount of marihuana for no remuneration," are presumptively drug trafficking aggravated felonies. *See Moncrieffe*, 662 F.3d at 392 (requiring immigration adjudicators to assume the maximum conduct that could be punished in these cases, "[e]ven if . . . [the conviction] could cover conduct that would be considered a misdemeanor" under 21 U.S.C. § 841(b)(4)). To cure the due process problems posed by such an approach, Respondent would permit immigration adjudicators to make factual findings beyond the record of conviction, and place the burden of disproving the aggravated felony on the noncitizen. *See Castro-Rodriguez*, 25 I. & N. at 702.

This part illustrates the flaws inherent in Respondent's position through the use of case examples. Part II.A explains how Respondent's analysis of low-level marijuana distribution convictions expands the drug trafficking aggravated felony label beyond its intended limits. Part II.B explains how Respondent's insistence upon factual mini-trials imposes new and unsustainable burdens upon both noncitizens and the immigration system. Part II.C explains how Respondent's approach strips immigration adjudicators of congressionally authorized discretion and requires mandatory deportation for minor convictions.

A. Under Respondent's position, minor non-trafficking marijuana offenses are deemed "drug trafficking aggravated felonies."

Respondent arrives at a position that treats minor non-trafficking marijuana offenses as "drug trafficking aggravated felonies" by importing a rigid "elements" analysis that arose in the *Apprendi* criminal sentencing enhancement context and is poorly suited to immigration law. In criminal sentencing enhancement cases, "elements" constitute findings that must be proven to a jury in order to convict for a given offense. *Apprendi v. New Jersey*, 530 U.S. 466, 477-78 (1989). According to Respondent, a prior state conviction is properly classified as an aggravated felony where the elements of the state offense appear to match the elements of the CSA felony offense—even where the state offense also proscribes conduct that by definition falls within the requirements of the CSA misdemeanor. BIO 7.

Respondent forces this analysis upon the immigration context. Relying upon cases holding that federal prosecutors need only prove the knowing distribution of, or possession with intent to distribute, a quantity of marijuana to secure a felony conviction in federal court, Respondent argues that all offenses that may conceivably cover these *Apprendi* elements constitute drug trafficking aggravated felonies. BIO 7; *see also Moncrieffe*, 662 F.3d at 392. Reasoning that neither remuneration nor a small amount of marijuana is an *Apprendi* element of the federal criminal offense, Respondent dismisses the misdemeanor provision in section

841(b)(4) as a "mitigating exception" that "is irrelevant in using a 'categorical approach' to identify . . . CSA felonies." *See* BIO 9; *Moncrieffe*, 662 F.3d at 392 (treating felony sentencing as the "default," and finding misdemeanor provision to be non-elemental exception). As a result, all marijuana distribution convictions, irrespective of whether or not they involved the transfer of a small amount for no remuneration, constitute drug trafficking aggravated felonies.

This *Apprendi*-style approach runs counter to the longstanding application of the categorical approach and has already been rejected by the Court in *Carachuri-Rosendo*. *See* 130 S. Ct. at 2582 n.3, 2583 (applying the categorical approach to determine whether a state offense meets the requirements of a federal recidivist possession felony under the CSA, irrespective of whether recidivism is defined as a sentencing factor rather than an element). The relevant question under the categorical approach in the immigration context is whether the state conviction, at its minimum, requires the findings necessary to establish the relevant conviction-based immigration penalty in federal law. *See supra* Point I.A. In the instant case, a state conviction qualifies as a drug trafficking aggravated felony only if it "proscribes conduct punishable as a felony" under the CSA. *See Lopez*, 549 U.S. at 60; 8 U.S.C. § 1101(a)(43)(B). Congress explicitly drew a felony-misdemeanor line in the CSA wherein the distribution of a small amount of marijuana for no remuneration "shall be treated" as a misdemeanor. 21 U.S.C. § 841(b)(4). Thus, under the categorical approach, a state offense that proscribes conduct that may involve the distribution of a small amount of

marijuana for no remuneration (i.e., the federal misdemeanor category) cannot categorically be deemed an aggravated felony. *Cf. Carachuri-Rosendo*, 130 S. Ct. at 2582 n.3, 2583 (holding that where the state offense involved no adjudication of recidivism in criminal court, offense may not be deemed an aggravated felony). Nevertheless, Respondent ignores the misdemeanor provisions of the CSA and presumes that a noncitizen's prior conduct is the *maximum*—always punishable as a federal felony—even though numerous state offenses may involve the mere social sharing of marijuana and are punished as misdemeanor or lesser offenses. *See, e.g.*, Alaska Stat. § 11.71.050(a)(1); D.C. Code § 48-094.01(a)(2)(B); Haw. Rev. Stat. Ann. § 712-1248(1)(d); 720 Ill. Comp. Stat. Ann. 550/5(a)-(b); Ind. Code Ann. § 35-49-4-10(a); Ky. Rev. Stat. Ann. § 218A.1421(2)(a); Me. Rev. Stat. Ann. tit. 17-A, § 1106(1-A)(D); Mich. Comp. Laws Ann. § 333.7410(7); N.Y. Penal Law § 221.40; 35 Pa. Stat. Ann. § 780-113(a)(1); S.D. Codified Laws § 22-42-7; Tenn. Code Ann. § 39-17-418; Va. Code Ann. § 18.2-248.1.

The results in this situation are predictably problematic—noncitizens convicted of minor non-trafficking marijuana convictions are transformed into drug trafficking aggravated felons. **Tam Duy Pham** was admitted to the United States as a refugee from Vietnam in 1998 at the age of fourteen, becoming a lawful permanent resident in 2001. Pham Immigration Judge ("IJ") Decision at 1 (on file with *amici*). On September 15, 2004, Mr. Pham pled guilty to conspiracy to commit misdemeanor "sale, *gift*, distribution or possession with intent to sell, *give* or distribute" less than one-half ounce of marijuana. *Id.* at 2 (quoting Va. Code Ann. § 18.2-248.1) (emphasis

added). He received a twelve-month suspended sentence and was placed on probation. *Id.* at 1. DHS initiated removal proceedings in 2010, charging him with a drug trafficking aggravated felony. *Id.*

Despite the low-level nature of the offense, which explicitly covers the nonremunerative gift of less than a half ounce of marijuana, the Immigration Judge and the Board of Immigration Appeals both sustained the aggravated felony charge, and the BIA erroneously held that it was Mr. Pham "who must prove the additional facts (*i.e.*, the absence of remuneration)." *Id.* at 2. In a cursory opinion, the Fourth Circuit affirmed, and Mr. Pham was removed to Vietnam shortly thereafter. *See Pham v. Holder*, 442 Fed.Appx 62 (4th Cir. 2011).

Benedicto Rendon, an LPR born in Mexico, was convicted in 1997 of Kan. Stat. Ann. § 65-4163(a), possession with intent to sell marijuana. *Rendon v. Mukasey*, 520 F.3d 967, 970-71 (9th Cir. 2008). DHS initiated removal proceedings in 2005, charging Mr. Rendon with a controlled substance violation. *Id.* at 971. Both the BIA and the Ninth Circuit concluded that Mr. Rendon's 1997 conviction was a drug trafficking aggravated felony that barred access to cancellation, asylum, and withholding of removal relief. *Id.* at 975. Commercial trafficking was read into Mr. Rendon's 1997 conviction because the record of conviction contained the words "intent to *sell*." *Id.* However, this analysis was contrary to the minimum conduct analysis because "sales" in Kansas law includes "barter, exchange or gift." *Kansas v. Donaldson*, 279 Kan. 694, 715 (2005) (quoting *Kansas v. Griffith*, 221 Kan. 83, 84 (1976)). Mr. Rendon's conviction therefore covered possession with intent to share marijuana without remuneration.

B. Under Respondent's position, agency officials and immigration courts must engage in mini-trials of the alleged facts behind a conviction.

Taken to the extreme, Respondent's position provides no opportunity or notice for the noncitizen to be heard on the very factors (remuneration and quantity) presumed to turn his or her state marijuana conviction into a drug trafficking aggravated felony. For this reason, Respondent has attempted to cure this due process problem by permitting immigration adjudicators to make these determinations in the first instance. *See* BIO 13-14 (citing *Castro-Rodriguez* and conceding that a noncitizen can "defeat an aggravated-felony finding" if he or she can "prove in immigration court that his prior conviction involved only a small amount of marijuana for no remuneration."). Extrapolating from federal criminal court holdings that have placed the burden upon the criminal defendant to prove the applicability of the misdemeanor provision in 21 U.S.C. § 841(b)(4), Respondent argues that the same burden falls upon noncitizens in immigration proceedings, who would be forced to prove affirmatively that their state conviction involved no remuneration and a small amount of marijuana. *See* BIO 11, 13; *Moncrieffe*, 662 F.3d at 392 ("Even if [Petitioner's conviction] could cover conduct that would be considered a misdemeanor under § 841(b)(4), [Petitioner] bore the burden to prove that he was convicted of only misdemeanor conduct.").

Respondent's position and its importation of criminal law burden-shifting into the immigration

context are untenable. In a federal prosecution for marijuana distribution, defendants are provided with: (1) notice that they are facing possible conviction of a drug trafficking crime—i.e. distribution of a non-small amount of marijuana and/or transfer for remuneration; and (2) an explicit opportunity to contest any felony-level allegations and establish the nonremunerative transfer of a small amount of marijuana. However, in the vast majority of state prosecutions, noncitizens charged with marijuana distribution will have neither notice that they face conviction for a drug trafficking crime, nor an opportunity to contest trafficking allegations during the original criminal proceedings, where findings on quantity or remuneration are not necessary for conviction or sentencing. *See supra* Part I.B.

Contrary to Respondent's arguments, the B.I.A.'s analysis in *Castro-Rodriguez* does not solve these due process problems. BIO 14. *Castro-Rodriguez* held that a state marijuana distribution conviction, "because its elements correspond to the elements of the Federal felony," presumptively qualifies as a drug trafficking aggravated felony. 25 I. & N. at 701. *Castro-Rodriguez* then held that it was the noncitizen's burden to prove the application of section 841(b)(4) and went a step further—requiring a "circumstance-specific" inquiry beyond the bounds of the record of conviction. *Id.* at 702. The BIA authorized inquiry into "any probative evidence, including evidence outside the record of conviction such as police and laboratory reports." *Id.*

The application of such a test compels the mini-trials and disuniformity that courts, the agency, and Congress have long sought to avoid in the

immigration context. *See* Part I.B. First, such mini-trials will necessarily require extensive and complex inquiry into the factual circumstances of prior convictions that could be years or even decades old. To prevail under Respondent's approach and "prove" that a prior conviction involved only the transfer of a small amount of marijuana for no remuneration, noncitizens will be forced to contest old allegations, many of which were wholly inconsequential to the original criminal proceedings. Noncitizens will be forced to track down far-flung lab and police reports that were never part of the original criminal proceedings or the record of conviction. They will need to present competing expert witnesses to challenge old evidence. Noncitizens will also need to subpoena witnesses from the original criminal case such as law enforcement officers, an exceedingly difficult proposition given the traditional reluctance and limited authority of immigration adjudicators to compel witnesses to appear. *See* Das, *supra*, at 1728. These new requirements complicate immigration proceedings and create delays, all while forcing immigration adjudicators to confront issues outside of their expertise. *See id.* at 1728, 1738-41; Koh, *supra*, at 39-40 (noting extraordinarily high caseloads of immigration adjudicators and additional strains that would be imposed by mini-trials).

These difficulties are compounded by the fact that noncitizens convicted of controlled substance offenses are often subjected by the Department of Homeland Security to mandatory detention without the possibility of bond. 8 U.S.C. § 1226(c)(1)(B). The vast majority of these noncitizens will go through their immigration proceedings without legal representation. *See, e.g.*, Mark Noferi, *Cascading*

Constitutional Deprivation: The Right to Appointed Counsel for Mandatorily Detained Immigrants Pending Removal Proceedings, 18 MICH. J. OF RACE & L. -- (forthcoming 2012) (manuscript at 26), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id =2 062952 (noting that 84% of detained noncitizens were unrepresented in 2010).

As shown by the case examples below, mini-trials will necessarily involve extensive and complex factual inquiry that both immigration adjudicators and noncitizens are poorly equipped to handle. **Vladimir Perez Santana**, a longtime LPR from the Dominican Republic, was convicted in 2010 of possession of marijuana with intent to distribute under Massachusetts law, which requires no findings on quantity or remuneration. [4] *Matter of Perez Santana*, 2012 WL 1705634 *1 (B.I.A. 2012). During Mr. Perez Santana's removal proceedings, the Immigration Judge applied Respondent's approach, disregarding the clear minimum conduct and undertaking a factual inquiry into the conduct underlying Mr. Perez Santana's conviction. *Id.* at *2. Specifically, the Immigration Judge relied upon otherwise unsubstantiated claims made in a state police report,[5] which alleged that "the marijuana in

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[4] *See Massachusetts v. Keefner*, 461 Mass. 507, 514-515 (2012) (holding that state prosecution under Mass. Gen. Laws Ann. ch. 94C § 32C(a) "is not limited solely to situations where the 'distribut[ion]' involves a sale").

[5] Courts and immigration adjudicators have long held police reports to be unreliable for purposes of the categorical approach. *See Shepard*, 544 U.S. at 20-23 (barring sentencing court from considering police report and complaint application, which extended "beyond conclusive records made or used in adjudicating guilt"); *Matter of Teixeira*, 21 I. & N. 316, 320

[Mr. Perez Santana's] possession was wrapped in separate bags." *Id.* at *1. On the basis of this ancillary fact, which was of no consequence to Mr. Perez Santana's innocence or guilt under the state statute and which he had no reason to contest during the criminal proceedings, the Immigration Judge ruled that he was guilty of a drug trafficking aggravated felony. *Id.*

The *Castro-Rodriguez* decision itself raises doubts regarding the practical application of its approach—in particular how noncitizens can sufficiently meet their burden to prove the application of the "mitigating exception." **Wilmer Rodrigo Castro-Rodriguez**, an LPR from Bolivia, was convicted in 2010 of misdemeanor possession with intent to give or distribute less than one-half ounce of marijuana under Virginia law.[6] 25 I. & N. at 698-99. He was sentenced to twelve months of imprisonment, with eleven months suspended. *Id.* at 699. Placed in removal proceedings, Mr. Castro-Rodriguez demonstrated to the satisfaction of the Immigration Judge—who credited Mr. Castro-Rodriguez's testimony regarding the factual circumstances of his conviction—that he intended to distribute a small amount of marijuana for no remuneration. *Id.* at 704.

Despite Mr. Castro-Rodriguez's credited testimony and the clear factual findings made by the

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(B.I.A. 1996) ("The arrest report typically will not tell us what charges the prosecution chose to pursue, nor which of those charges actually resulted in a 'conviction.'").

[6] *See* Va. Code Ann. § 18.2-248.1(a)(1) (covering offenses that include the nonremunerative "gift" of up to one-half ounce of marijuana).

Immigration Judge, the BIA reversed and remanded for "additional fact-finding." *Id.* at 704. Apparently unconvinced by Mr. Castro-Rodriguez's testimony, the BIA provided little guidance demonstrating how noncitizens would purportedly meet their burden before an immigration adjudicator.

Even where noncitizens successfully "prove" their way out of a drug trafficking aggravated felony finding, the inevitable delays impose severe hardships, and the outcome may be based on the fortuity of legal representation or other factors not available to all noncitizens. **J-D-** arrived from Haiti as a lawful permanent resident in 1994 at the age of one. J. Dollar Letter (on file with *amici*). As a high school sophomore in 2009, J-D- pled *nolo contendere* to possession of marijuana with intent to sell or deliver under Florida law, when he was arrested for attempting to give, for no remuneration, 1.1 grams of marijuana to a friend.[7] *Id.* J-D- turned his life around after this incident and went on to graduate from high school, earning a college scholarship.

Despite the fact that, on its face, J-D-'s conviction was for an offense that neither specifies the quantity of marijuana nor requires the presence of remuneration, and represented precisely the gratuitous sharing penalized as a federal misdemeanor, the Immigration Judge applied the approach offered by Respondent, and held that it was J-D-'s burden to establish the applicability of the federal misdemeanor exception. *Id.* Through

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[7] Fla. Stat. Ann. § 893.13(1)(a) (requiring no specific quantity of marijuana or findings of remuneration for conviction); *Florida v. Mena*, 471 So.2d 1297, 1299 (Fla. 3d DCA 1985) (noting that sale and delivery were distinct).

counsel—and an additional *five months* of proceedings during which J-D- remained detained—J-D- was able to obtain and produce his original arrest report, his plea colloquy from the conviction, as well as a government crime laboratory report that explicitly detailed the quantity of marijuana involved. *Id.* The Immigration Judge concluded that he was eligible for relief and eventually granted cancellation of removal in light of his significant equities. However, due to the extension of his hearings and his continued detention, he was unable to enroll in college by the date required. The scholarship offer expired and J-D- is now unable to attend. *Id.* The proceedings on his eligibility for relief bore little resemblance to the streamlined inquiry that the categorical approach was meant to ensure.

C. Under Respondent's position, noncitizens that would otherwise merit relief from removal are mandatorily deported.

As noted above, *see supra* Part I.C, an aggravated felony finding forecloses an immigration adjudicator from considering relief from removal, even where the individual's positive equities, evidence of rehabilitation, and humanitarian, family unity or non-refoulment interests would merit favorable discretion. *See, e.g.*, 8 U.S.C. §§ 1158(b)(2)(B)(i) (barring asylum without regard to persecution risk if convicted of an aggravated felony); 1229b(a)(3) (barring cancellation of removal without regard to the noncitizen's positive equities and rehabilitation if convicted of an aggravated felony).

Respondent's position, requiring a drug trafficking aggravated felony finding even for minor nonremunerative transfers of marijuana, strips immigration judges of a critical discretionary tool and results in the mandatory deportation of noncitizens for whom relief would serve compelling humanitarian and public interest purposes.

J.S.M. is a longtime LPR from Mexico who first arrived in the U.S. at the age of seven. IJ Decision at 3 (on file with *amici*). Both of J.S.M's parent's are LPRs, and he has ten United States citizen or LPR siblings that reside in the United States. *Id.* J.S.M. married his U.S. citizen wife Judy in 1999, and is the sole father figure to two U.S. citizen step-sons, ages twenty-one and eighteen, as well as his U.S. citizen biological son, who is twelve. *Id.* at 4.

In 1997, J.S.M. pled guilty to the unlawful manufacture, delivery, or possession with intent to manufacture or deliver marijuana under Washington law, which requires no finding of quantity or remuneration, and was sentenced to four months of jail and work release.[8] *Id.* at 14. The record of conviction, including the plea agreement, stemming from this offense stated only that J.S.M. "unlawfully delivered marijuana to another person" and made no mention of quantity or remuneration.

Detained and placed in removal proceedings in 2010, the Immigration Judge adopted the position Respondent has presented here, and found J.S.M.'s

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[8] Wash. Rev. Code § 69.50.401(a) (requiring no minimum quantity of marijuana and no findings of remuneration); *see Washington v. McGinley*, 18 P.2d 30, 33 (Wash. Ct. App. 1977) ("deliver" understood to be "a broader category than sale").

1997 conviction to be a drug trafficking aggravated felony that barred him from consideration for cancellation relief. *Id.* at 15. However, the Immigration Judge stated explicitly that J.S.M. "merited a favorable exercise of discretion *had he been eligible*" because he "has been a good provider for his family and has been a good father to his children as well as a loving husband. He has spent significant time with his children doing activities such as fishing, camping, and going to movies. He has taught his children to love and care for each other. He and his wife are best friends. [He] helps his mother financially and talks to her every day. In addition, [his] father suffers from serious health problems as a result of a stroke." *Id.* at 19-20 (emphasis added). The BIA affirmed the Immigration Judge's aggravated felony finding, and J.S.M.'s case is now pending before the Ninth Circuit, where he continues to seek the opportunity to apply for cancellation.

A drug trafficking aggravated felony finding also bars access to asylum for noncitizens whose freedom, health, and even lives are jeopardized in their country of origin. **Belito Garcia** and his family fled persecution and civil war in his birthplace of Angola, making their way through refugee camps before arriving in the United States as lawful permanent residents in 1982. *Garcia v. Att'y Gen.*, No. 05-2786 (3d Cir.), Petitioner's Brief at 12. Mr. Garcia made a life here—both of his parents naturalized and he married a U.S. citizen with whom he had a U.S. citizen son. *Id.* In 1996, Mr. Garcia pled *nolo contendere* to two counts of possession with intent to distribute marijuana under Pennsylvania law, and was sentenced to a total of one year of

probation. [9] *Id.*, Respondent's Brief at 5. This conviction, which requires no findings of quantity or remuneration, was deemed an aggravated felony based on underlying *factual* allegations made in a police officer's criminal complaint, none of which were substantiated in the record of conviction or present in any plea colloquy or plea agreement before the courts. *Garcia v. Att'y Gen.*, 462 F.3d 287, 289, 290, 293-94 (3d Cir. 2006). As a result, Mr. Garcia's application for asylum was pretermitted despite the persecution he likely faces in Angola. *Id.*

In contrast, Immigration Judges that apply the proper categorical approach have been able to exercise discretion in deciding to grant relief to noncitizens. **P.M.** came to the United States from Haiti in 1971 as an LPR at the age of three and has a large U.S. citizen family. IJ Decision at 3 (on file with *amici*). Twenty-five years ago, in 1986, P.M. was convicted twice for misdemeanor sale of marijuana under New York law.[10] P.M. was placed in removal proceedings in 2011 and was charged with being a drug trafficking aggravated felon. *Id.* at 2. Applying a categorical approach, the Immigration Judge went forward with relief. *Id.* at 10. Finding that P.M.'s

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[9] 35 Pa. Stat. Ann. § 780-113(a)(30) (covering, at minimum, possession with intent to distribute a small amount of marijuana for no remuneration).

[10] N.Y. Penal Law § 221.40 (covering, at minimum, the nonremunerative transfer of a small amount of marijuana); *Martinez*, 551 F.3d at 119 (holding that section 221.40 convictions were categorically not aggravated felonies because the minimum conduct is "precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor").

convictions "[did] not outweigh the many positive factors in his case, such as his extremely long residence, strong family ties, and the serious hardship he will face if deported to Haiti," the Immigration Judge held that P.M. "deserve[d] a second chance to remain in the U.S." and granted cancellation. Had Respondent's approach been applied, the Immigration Judge would have been stripped of her authority to grant cancellation of removal unless P.M. was able to prove that his twenty-five-year old misdemeanor convictions did not involve remuneration.

CONCLUSION

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

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