No. 18-64

In The Supreme Court of the United States

JUAN ALBERTO LUCIO-RAYOS,

Petitioner,

v.

JEFFERSON B. SESSIONS, III,
ATTORNEY GENERAL,

Respondent.

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

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AND NATIONAL IMMIGRANT JUSTICE CENTER IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are organizations that provide specialized advice to immigrants and lawyers on the interrelationship of criminal and immigration law. Amici have a strong interest in assuring that rules governing classification of criminal convictions are fair and accord with longstanding precedent on which immigrants, their lawyers, and the courts have relied for nearly a century. Amici have participated in numerous cases in the First, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuit Courts of Appeals (including the case below) regarding the question presented in this case: whether a conviction bars a noncitizen from eligibility for relief from removal when the record of conviction is ambiguous and does not necessarily establish a disqualifying offense. *See*, *e.g.*, *Gutierrez v. Sessions*, 887 F.3d 770 (6th Cir. 2018) (pet. for reh'g en banc pending); *Cintron v. U.S. Att'y Gen.*, 882 F.3d 1380 (11th Cir. 2018); *Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017), *pet. for reh'g granted*, 886 F.3d 737 (9th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017); *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Carrasco-Chavez v. Holder*, No. 12-2094 (4th Cir. May 16, 2013). Amici have an interest in Supreme Court intervention and resolution of the issue so that they can

[1] Pursuant to Rule 37.6, no counsel for any party authored this brief in whole or in part and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), timely notice was provided to counsel of record for all parties, and this brief is accompanied by a written consent of all parties.

provide reliable advice on the immigration consequences of a criminal conviction regardless of where a noncitizen is convicted or later placed into removal proceedings.

The Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted amicus curiae briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1652 (2017); *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015); *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001) (citing IDP brief).

The American Immigration Lawyers Association (AILA) is a national association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law

pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. Members of AILA practice regularly before the Department of Homeland Security (DHS) and the Executive Office of Immigration Review (including the Board of Immigration Appeals (BIA) and immigration courts), as well as before United States District Courts, United States Courts of Appeals, and the United States Supreme Court.

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

importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

Amicus National Immigrant Justice Center (NIJC) is a Midwest-based non-profit organization accredited since 1980 by the Board of Immigration Appeals (the "Board" or "BIA") to provide representation to individuals in removal proceedings. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. Through its staff of attorneys and paralegals, and a network of over 1,000 pro bono attorneys, NIJC provides free or low cost legal services to over 10,000 individuals each year. NIJC represents numerous individuals every year who are charged with criminal removability, and advises criminal defense counsel of the likely immigration consequences of criminal convictions.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case has broad-ranging implications for noncitizens across the country who apply for various different forms of relief from removal. Beyond individuals like Mr. Lucio-Rayos (non-permanent residents seeking cancellation of removal), the Court's decision will affect lawful permanent residents with long-standing ties, asylum-seekers, victims of crime and domestic violence, and many others seeking humanitarian relief in immigration court. For all of these

individuals, the Tenth Circuit's rule means that a prior conviction can operate to bar relief eligibility even when the record of that conviction is ambiguous. The question presented also impacts relief eligibility in many non-adversarial contexts in which noncitizens apply to the Department of Homeland Security (DHS) affirmatively for asylum and other forms of relief, and where a prior conviction can also bar relief.

Amici have participated in over twenty cases in the courts of appeals raising the question presented, and believe that this case presents an excellent vehicle for its resolution. Unlike other cases, this case does not require the Court to first determine whether the statute of conviction is divisible in that it "list[s] elements in the alternative . . . thereby defin[ing] multiple crimes." *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). The only question is whether, on an ambiguous record, Mr. Lucio-Rayos's past conviction should be deemed to match one of the disqualifying grounds, even though an adjudicator must presume that his conviction rested upon nothing more than the least of the acts criminalized under *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). According to the Tenth Circuit, on an ambiguous record, the conviction bars relief. An immigration judge cannot even consider the individual circumstances of Mr. Lucio-Rayos's case. If the Court were to reverse the decision below, Mr. Lucio-Rayos's equities—including a long work history and caretaking responsibilities for his U.S. citizen, Army veteran wife—are so strong that he would very likely obtain relief as a discretionary matter. This case also presents

an appropriate vehicle for the Court's review because Mr. Lucio-Rayos's conviction—for the municipal offense of petty theft—is illustrative of the kind of minor conviction that DHS often raises to bar relief in immigration courts or other administrative proceedings across the country.

Unless the Court intervenes, whether or not a noncitizen is barred from relief will turn on the vagaries of state court record-keeping. Many criminal courts in the country fail to create critical records, particularly in low-level cases like that of Mr. Lucio-Rayos, whose conviction was meted out by a municipal court. Even when state courts create records, they may destroy those records as a matter of course. Records often simply do not exist by the time that DHS places an individual into removal proceedings, which may be years after his conviction. But under the Tenth Circuit's rule, the lack of records—and the resulting ambiguous record of conviction—means that the conviction bars relief from removal. The Court should grant the Petition to address this unfair result, which is at odds with the categorical rule's focus on predictability and consistency. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (the categorical rule "focus[es] on the legal question of what a conviction *necessarily* established . . . to promote efficiency, fairness, and predictability in the administration of immigration law.").

The Tenth Circuit's rule has an extremely harsh impact on the majority of noncitizens in removal proceedings who are detained, without counsel, and lacking in English proficiency. Especially for these

noncitizens, who are particularly unable to surmount the obstacles created by difficult-to-obtain or non-existent criminal records, the Court's intervention is critically important.

Amici urge the Court to grant the Petition.

ARGUMENT

I. THE COURT SHOULD INTERVENE TO ESTABLISH A UNIFORM RULE GOVERNING THE MANY CONTEXTS IN WHICH RELIEF ELIGIBILITY TURNS ON A PAST CONVICTION.

Mr. Lucio-Rayos exemplifies the many noncitizens applying for various forms of discretionary relief from removal who face bars based on past convictions. These include individuals like Mr. Lucio-Rayos, who applied for relief in immigration court, and other noncitizens for whom a past conviction may bar relief sought directly from the Department of Homeland Security (DHS).

For all these individuals, relief eligibility depends on geography. In the First, Second, and Third Circuits, an ambiguous record of conviction means that the conviction does not necessarily match a disqualifying ground, and the noncitizen can present discretionary evidence supporting a grant of asylum, cancellation, or another form of discretionary relief. *See Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016); *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010); *Martinez v. Mukasey*,

551 F.3d 113 (2d Cir. 2008). But in the Fourth, Sixth, Ninth, and Tenth Circuits, the same kind of ambiguous record means that the noncitizen is barred from such relief, regardless of his positive equities. *See Gutierrez v. Sessions*, 887 F.3d 770 (6th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), *cert. denied*, 565 U.S. 1110 (2012).

A. The deep circuit split affects noncitizens applying for a range of relief in immigration court. Typically, once DHS establishes that a noncitizen is removable as charged, the noncitizen may apply for relief from removal such as asylum (for those who fear persecution abroad) or cancellation (for those with family and community ties to this country). Before the noncitizen can put on his case to show that an immigration judge should grant say, cancellation, he bears the burden of proof to satisfy applicable eligibility requirements. 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d).

Bars based on past convictions affect not only nonpermanent residents like Mr. Lucio-Rayos, but also lawful permanent residents. Even if they have deep ties to this country, lawful permanent residents can be barred from cancellation of removal based on a past (sometimes minor) conviction. 8 U.S.C. § 1229b(a). *See*, *e.g.*, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (evaluating whether a lawful permanent resident's prior conviction was an aggravated felony barring cancellation of removal).

The question presented in this case also affects numerous other individuals in removal proceedings applying for many other forms of humanitarian relief where a past conviction operates as a bar: cancellation of removal for nonpermanent residents, *see* 8 U.S.C. § 1229b(b)(1); Violence Against Women Act cancellation of removal for nonpermanent residents, *see* 8 U.S.C. §§ 1229b(b)(2)(A)(i)(I)-(II), 1229b(b)(2)(A)(iv); withholding of removal, *see* 8 U.S.C. § 1231(b)(3)(A), (b)(3)(B)(ii); asylum, *see* 8 U.S.C. § 1158(b)(2)(B)(i); and voluntary departure, *see* 8 U.S.C. § 1229c(a)(1).

B. The effect of the Court's decision extends beyond noncitizens in removal proceedings to those applying affirmatively for relief such as asylum, adjustment of status, or a visa number under the Violence Against Women Act. A sub-agency of DHS, U.S. Citizenship and Immigration Services (USCIS), adjudicates hundreds of thousands of such applications through a paper-only, non-adversarial process involving a non-independent adjudicator. *See*, *e.g.*, USCIS, Number of I-485 Applications to Register Permanent Residence or Adjust Status by Category of Admission, Case Status, and USCIS Field Office or Service Center Location (Oct. 1 – Dec. 31, 2017) (in a recent three-month period, USCIS received over 180,000 applications for lawful permanent residence through adjustment of status).[2]

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[2] *Available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Family-Based/I485_performancedata_fy2018_qtr1.pdf (last visited Aug. 4, 2018).

Noncitizens also bear the burden of proof in these non-adversarial contexts. USCIS's decisions may involve cursory examination of a prior record of conviction to determine whether a past conviction is disqualifying. USCIS officials decide bars to asylum (because an aggravated felony conviction is a bar to asylum under 8 U.S.C. § 1158(b)(2)(B)(i)) and to protected status under the Violence Against Women Act (VAWA) (because relief such as self-petitioning under VAWA incorporates the criminal bars related to aggravated felony convictions, controlled substances offenses, and crimes involving moral turpitude through its good moral character requirement, 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb), subject to a narrow waiver). Under the Trafficking Victims Protection Reauthorization Act (TVPRA), USCIS officials must also assess whether trafficking victims seeking to adjust their status have proven good moral character. 8 U.S.C. § 1255(l)(1)(B). In addition, the TVPRA requires USCIS officials to determine whether youths applying for Special Immigrant Juvenile Status (which would allow for an adjustment of status to lawful permanent residence) are barred from eligibility due to having been convicted of inadmissible offenses (subject to a narrow waiver). *See* 8 U.S.C. § 1255(h)(2)(B).

Even beyond these applications for changes to or adjustment of status, USCIS also decides naturalization applications. As part of that process, USCIS officers determine whether a noncitizen has been convicted of an aggravated felony that would bar him from naturalization. 8 U.S.C. §§ 1101(f)(8), 1427(a)(3). *See also*

8 C.F.R. § 316.10(b)(1)(ii) (applicant will be found to be lacking good moral character if convicted of an aggravated felony on or after Nov. 29, 1990). USCIS officers adjudicate a high volume of such applications: USCIS received over 179,000 naturalization applications in just one three-month period in 2017.[3]

C. In all of these contexts, under the rule of the Tenth Circuit (and of the Fourth, Sixth and Ninth Circuits), an ambiguous record of conviction operates as a bar to eligibility for relief. Because it is ambiguous, the record of conviction does not necessarily demonstrate that the conviction matches a disqualifying ground, as the Court's precedent requires. *Moncrieffe v. Holder*, 569 U.S. at 190 (inquiry under the categorical approach is whether a conviction of the state offense "'necessarily' involved . . . facts equating to the generic [disqualifying] federal offense.") (citing and quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005) (brackets omitted). Nonetheless, the Tenth Circuit's rule requires immigration adjudicators to pretermit the noncitizen's application for relief based on the conviction. The noncitizen never has the opportunity to present the discretionary facts of his case for asylum, cancellation, or other humanitarian forms of relief.

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[3] USCIS, Number of Form N-400, Application for Naturalization, by Category of Naturalization, Case Status, and USCIS Field Office Location (Oct. 1 – Dec. 31, 2017), *available at* https://www.uscis.gov/sites/default/files/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/Naturalization%20Data/N400_performancedata_fy2018_qtr1.pdf (last visited Aug. 4, 2018).

D. The Tenth Circuit's rule also makes it difficult for criminal defense attorneys to provide reliable advice to noncitizen defendants because the same conviction may result in different outcomes depending on whether the government charges an offense as a basis for deportability or for relief ineligibility. Defense attorneys must determine the immigration consequences of a plea to satisfy their constitutional obligation to provide effective representation to clients. *See Padilla v. Kentucky*, 559 U.S. 356, 373-74 (2010). The Court has recognized that "'preserving the possibility of' discretionary relief from deportation . . . 'would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.'" *Id.* at 368 (quoting *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)). When applied properly, "the [categorical] approach enables aliens 'to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor' guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli*, 135 S. Ct. at 1987 (citations omitted). But the Tenth Circuit's rule has the opposite effect because an ambiguous record means that a conviction has one consequence for removability and the exact opposite consequence for relief eligibility. *Cf. Judulang v. Holder*, 565 U.S. 42, 57 (2011) (the ultimate outcome in a noncitizen's removal proceeding should not "rest on the happenstance of an immigration official's charging decision").

II. UNLESS THE COURT INTERVENES, RELIEF ELIGIBILITY WILL VARY BASED ON DIFFERENCES AND UNRELIABILITY IN STATE COURT RECORD KEEPING PRACTICES.

The Tenth Circuit's rule—also adopted by the Fourth, Sixth, and Ninth Circuits—runs contrary to the purpose of the categorical approach: "ensur[ing] that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 569 U.S. at 205 n.11. Criminal court documents are often unavailable because of state record keeping practices, as Amici have learned first-hand through our work in criminal and immigration courts throughout the country. Criminal courts vary widely as to what documents they create, and whether (and when) they destroy records once created. Without the Court's intervention, these variations will dictate relief eligibility, and will do so in different ways depending on where DHS chooses to initiate proceedings. This is not what Congress intended when it predicated relief eligibility on the existence of a past conviction. Congress sought to avoid the "potential unfairness" of having "two noncitizens, each 'convicted of' the same offense, . . . obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge." *Id.*

A. Many state courts do not regularly create criminal records, particularly in misdemeanor and other low-level cases.

In Amici's experience, state courts often do not create reliable criminal records in misdemeanor or other low-level offense cases (such as this one), where record-keeping is notoriously unreliable. Under the Tenth Circuit's rule, a noncitizen can face ineligibility for relief based on the poor quality of misdemeanor or other criminal record-keeping, and not an actual adjudication of what was established by the conviction.

Many types of misdemeanor convictions and other low-level violations, such as the one in this case, can operate to bar relief from removal. For example, noncitizens can be barred from seeking cancellation of removal based on convictions for crimes involving moral turpitude, *see*, *e.g.*, 8 U.S.C. § 1229b(b)(1)(C), which include minor misdemeanors or other low-level offenses. Similarly, aggravated felonies for the purposes of immigration law—which are bars to asylum and cancellation of removal even for lawful permanent residents—include crimes classified as misdemeanors under state law. *See Habibi v. Holder*, 673 F.3d 1082, 1088 (9th Cir. 2011) (clarifying that whether a state classifies an offense as a misdemeanor is irrelevant to determining whether it is an aggravated felony); *Gattem v. Gonzales*, 412 F.3d 758, 761 (7th Cir. 2005) (affirming immigration judge holding that "Gattem's conviction, although for a misdemeanor offense, could nonetheless qualify as an aggravated felony for purposes of the INA."). Indeed, immigration adjudicators

regularly find common misdemeanor offenses to be aggravated felonies under the INA. *See*, *e.g.*, *Matter of Aruna*, 24 I. & N. Dec. 452 (BIA 2008) (conspiracy to distribute marijuana).

Records from misdemeanor proceedings and other low-level proceedings are often unavailable because they were never created. Misdemeanor proceedings are notoriously informal. Misdemeanor courts are "[w]idely derided as 'assembly line,' 'cattle herding,' and 'McJustice' " because they "rush hundreds of cases through en mass." Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 Vand. L. Rev. 1055, 1064 (2015) (citation omitted). In some states, "some of the judges in these courts are not lawyers." Robert C. Boruchowitz et al., Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts 11 (2009).[4] And while the Court has held that persons accused of misdemeanors have a right to court-appointed counsel, *see Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972), "a significant percentage of defendants in misdemeanor courts never receive a lawyer to represent them." Boruchowitz, *supra*, at 14.

It is not a surprise, then, that misdemeanor and other low-level courts often do not generate reliable records. *See*, *e.g.*, *Sauceda*, 819 F.3d at 530 n.5 (noting that noncitizen was unable to obtain necessary criminal records because "the Superior Court of the county where [the noncitizen] was convicted does not, in

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[4] *Available at* https://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf (last visited Aug. 4, 2018).

misdemeanor cases, maintain copies of the documents he needed"). Some courts that hear misdemeanors "do not record proceedings (no audio, no court reporter, no video, and no record at all)." Jenny Roberts, *The Innocence Movement and Misdemeanors*, 98 B.U. L. Rev. 779, 815 (forthcoming 2018).[5] In Virginia, for instance, the only record created for a criminal adjudication in "[g]eneral district court" is "the executed warrant of arrest as executed by the trial judge." *United States v. White*, 606 F.3d 144, 146 (4th Cir. 2010).

B. Criminal courts routinely destroy records, creating unfair and inconsistent immigration outcomes under the Tenth Circuit's rule.

Even when criminal courts create records, they may routinely destroy them—in both misdemeanor and felony cases—rendering the record of conviction ambiguous. Amici regularly advise noncitizens facing removal proceedings years or even decades after the conclusion of a criminal matter, when the criminal court may no longer have the relevant records. *See, e.g.*, *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 498-99 (7th Cir. 2008) (DHS brought charges over 11 years after conviction); *Kuhali v. Reno*, 266 F.3d 93, 98 (2d Cir. 2001) (DHS initiated proceedings nearly 19 years after plea). Under the Tenth Circuit's rule, a noncitizen may be barred from relief because of a destroyed record,

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[5] *Available at* http://www.bu.edu/bulawreview/files/2018/06/ROBERTS.pdf (last visited Jun. 27, 2018).

even when the record would have shown he was not convicted of a disqualifying offense.

States across the country have rules permitting the destruction of criminal court records, sometimes only a few years after the end of proceedings. In **Maryland**, for example, district courts permit the destruction of certain criminal court records as little as three years after conviction.[6] **Colorado** authorizes the destruction of certain misdemeanor records four years from "the date of filing."[7] In **Kentucky**, courts destroy certain misdemeanor records after five years.[8] Courts in **California** permit the destruction of misdemeanor drug offense records after five years.[9] **Hawaii** permits destruction of complaints and orders in criminal cases

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[6] District Court of Maryland, Records Retention and Disposal Schedule 4-5, *available at* https://www.courts.state.md.us/sites/default/files/import/district/pdfs/DCRRD-Schedule.pdf (last visited Aug. 4, 2018). Maryland's district courts have jurisdiction over "misdemeanors and certain felonies." Maryland Courts, About District Court, *available at* https://www.courts.state.md.us/district/about (last visited Aug. 5, 2018).

[7] Colorado Judicial Branch, Records Retention Manual 2, *available at* https://www.courts.state.co.us/userfiles/file/Administration/JBITS/Court_Services/Retention%20Manual%202017%20Posting.pdf (last visited Aug. 5, 2018).

[8] Kentucky Court of Justice, Records Retention Schedule 3 (Jul. 12, 2010), *available at* https://kdla.ky.gov/records/recretentionschedules/Documents/State%20Records%20Schedules/kycojcircuitdistrict1978-present.pdf (last visited Aug. 5, 2018).

[9] California Judicial Council, Trial Court Records Manual 93, *available at* http://www.courts.ca.gov/documents/trial-court-records-manual.pdf (last visited Aug. 5, 2018).

after two years.[10] In **Oregon**, certain misdemeanor records, including plea agreements, may be destroyed three years after the case is closed; similar felony records may be destroyed after ten years.[11] **Alabama** authorizes destruction of many misdemeanor case files five years after final disposition.[12]

Because of non-uniformity in record preservation requirements across states nationwide, the Tenth Circuit's rule means that two noncitizens convicted of essentially the same crime might face significantly different immigration consequences depending on criminal court document retention policies and practices. For example, while California permits its courts to destroy criminal records pertaining to certain drug possession offenses, Washington requires its courts to maintain records of similar offenses forever.[13] The

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[10] Supreme Court of Hawaii, Retention Schedule for the District Courts, *available at* http://www.courts.state.hi.us/docs/sct_various_orders/order48.pdf (last visited Aug. 5, 2018).

[11] Oregon Judicial Branch, Oregon State Trial Court Records Section 2.2 – Case Files 15-16, *available at* https://www.courts.oregon.gov/rules/Other%20Rules/Section_2.2_Case_Files.pdf (last visited Aug. 5, 2018).

[12] Memorandum from the Supreme Court of Ala. to Ala. Court of Officials and Personnel 2 (Apr. 7, 2009), *available at* http://tinyurl.com/AlabamaMemorandum (last visited Aug. 5, 2018).

[13] *Compare* California Judicial Council, Trial Court Records Manual 93, *available at* http://www.courts.ca.gov/documents/trial-court-records-manual.pdf (last visited Aug. 5, 2018) (permitting destruction after five years) *with* Office of the Secretary of State, County Clerks and Superior Court Records Retention Schedule 10, *available at* https://www.sos.wa.gov/_assets/archives/recordsmanagement/county%20clerks%20and%20superior%20

Court should intervene to ensure that relief eligibility does not turn on such variations in state court record-keeping.

C. The deep circuit split on the issue means that noncitizens face non-uniform results depending on where DHS chooses to initiate proceedings.

Unless the Court intervenes, noncitizens seeking relief from removal will face different rules depending on the circuit in which DHS initiates removal proceedings. DHS may initiate removal proceedings anywhere in the country, 8 C.F.R. § 1003.14, regardless of where a noncitizen resides, and an immigration court may only transfer venue if the noncitizen demonstrates good cause, *see* 8 C.F.R. § 1003.20(b), a standard that in practice is difficult for detained noncitizens to meet.[14] Individuals may face removal proceedings in one circuit based on a conviction they suffered elsewhere in the country. *See Mellouli*, 135 S. Ct. at 1985

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court%20records%20rs%20ver%207.0.pdf (last visited Aug. 5, 2018) (requiring permanent retention of records).

[14] *See, e.g., Sasso v. Milhollan*, 735 F. Supp. 1045, 1047 (S.D. Fla. 1990) (noting that detainee was transferred to El Paso facility even though evidence in his case was located in Florida); *see generally* Human Rights Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States* (2011), *available at* https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united (last visited Aug. 5, 2018).

(immigration judge sitting in the Eighth Circuit adjudicated proceedings involving a Kansas conviction).

These practices, and the deep circuit split, mean that noncitizens may face entirely different relief eligibility outcomes depending on where DHS pursues its removal case.

III. THE TENTH CIRCUIT'S RULE HAS A PARTICULARLY HARSH AND UNFAIR IMPACT ON NONCITIZENS WHO ARE WITHOUT COUNSEL, DETAINED, AND HAVE LIMITED ENGLISH PROFICIENCY.

Navigating the uncertainty caused by the rule adopted by the Tenth Circuit (as well as the Fourth, Sixth, and Ninth Circuits) is extremely difficult for the many noncitizens in removal proceedings who are not represented by counsel, detained, and/or non-English-speaking. These individuals are particularly unable to surmount the obstacles created by difficult-to-obtain or non-existent criminal records. The Court's intervention is needed to ensure faithful adherence to the categorical rule.

Most noncitizens in removal proceedings are not represented by counsel. *See* 8 U.S.C. § 1229a(b)(4)(A) (noncitizen in removal proceedings not entitled to appointed counsel). According to data drawn from 2007 to 2012, only 37 percent of all noncitizens, and only 14 percent of detained noncitizens, secured legal representation in their removal cases. Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in*

Immigration Court, 164 U. Penn. L. Rev. 1, 16, 32 (2015). Not surprisingly, unrepresented noncitizens fare poorly when litigating against a government agency that is always represented by attorneys. Similarly situated noncitizens are fifteen times more likely to seek relief and five-and-a-half times more likely to obtain relief when represented by counsel. *Id.* at 57.

Detained noncitizens in removal proceedings face additional challenges. They are held in prison-like facilities in cells and behind barbed wire fences, facing significant restrictions on visitation, movement, and external communication.[15] Many of them do not speak English: about 90 percent of noncitizens choose not to proceed in English in their removal proceedings.[16]

One particularly vulnerable population is comprised of noncitizens with mental illnesses and other disabilities. Tens of thousands of noncitizens with mental disabilities are estimated to face removal each year. *See* Fatma E. Marouf, *Incompetent but Deportable: The Case for a Right to Mental Competence in Removal Proceedings*, 65 Hastings L. J. 929, 936-37 (2014) ("[U]p to 60,000 detained individuals with some

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[15] *See, e.g.,* Complaint, *Southern Poverty Law Center v. United States Department of Homeland Security, et al.*, No. 1:18-cv-00760 (D.D.C. Apr. 4, 2018); Amnesty International, Jailed Without Justice: Immigration Detention in the USA 29-43 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf (last visited Aug. 5, 2018).

[16] Department of Justice, Executive Office for Immigration Review, FY 2016 Statistics Yearbook E1, *available at* https://www.justice.gov/eoir/page/file/fysb16/download (last visited Aug. 5, 2018).

type of mental illness face deportation each year."). Amici have advised such individuals, who suffer from cognitive delays, schizophrenia, bipolar disorder, post-traumatic stress disorder and other mental illnesses.

Amici ask the Court to intervene so that these vulnerable individuals in removal proceedings can have their relief eligibility determined by a predictable rule that accords with the categorical approach.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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