No. 17-3749

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MIRIAM GUTIERREZ,
Petitioner,

v.

JEFFERSON B. SESSIONS,
Respondent.

On Petition for Review of an Order of
the Board of Immigration Appeals

BRIEF OF AMICI CURIAE IMMIGRANT DEFENSE PROJECT, DETENTION WATCH NETWORK, HEARTLAND ALLIANCE'S NATIONAL IMMIGRANT JUSTICE CENTER, IMMIGRANT LEGAL RESOURCE CENTER, NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, NATIONAL IMMIGRATION LAW CENTER, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF PETITIONER'S PETITION FOR REHEARING AND REHEARING EN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 17-3749 Case Name: Gutierrez v. Sessions

Name of counsel: Jayashri Srikantiah

Pursuant to 6th Cir. R. 26.1, Amici IDP, DWN, NIJC, ILRC, NACDL, NILC, and NIP-NLG
Name of Party
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on July 5, 2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Jayashri Srikantiah

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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INTEREST OF AMICI

Amici include organizations with expertise in the interrelationship of criminal and immigration law and organizations that provide direct client representation in immigration proceedings. 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.

DISCLOSURE STATEMENT PURSUANT TO F.R.A.P. 29(A)(4)(E)

Pursuant to Fed. R. App. P. 26.1 and 29(a)(4)(A), amici curiae Immigrant Defense Project, Detention Watch Network, Heartland Alliance's National Immigrant Justice Center, Immigrant Legal Resource Center, National Association of Criminal Defense Lawyers, National Immigration Law Center, and National Immigration Project of the National Lawyers Guild state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than amici curiae and their counsel contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Amici urge the Court to grant rehearing or rehearing en banc because the panel's decision is at odds with *Moncrieffe v. Holder*, 569 U.S. 184 (2013). Amici agree with Ms. Gutierrez that when the record of a prior conviction under a divisible statute is ambiguous, the conviction should not bar eligibility for relief from removal.

Amici submit this brief to raise three additional points. First, the panel's decision unfairly bases relief eligibility on the happenstance of whether a prior criminal court creates or maintains the records necessary to disprove a disqualifying conviction. The noncitizen has no control over these criminal court practices but, under the panel's decision, could face ineligibility for relief because of them. Second, the panel's decision ignores that noncitizens—who are often without counsel and detained—face far greater impediments to obtaining and submitting the required conviction records than the Department of Homeland Security (DHS). Third, the panel's decision has a broad impact: it operates to categorically bar relief for asylum-seekers, victims of crime, and those—like Ms. Gutierrez—with longstanding residence and deep family ties in this country.

ARGUMENT

I. The Panel's Decision Bars Noncitizens From Relief Even When Courts Do Not Regularly Create the Necessary Criminal Records or When Records Have Been Destroyed.

The Supreme Court has explained that "[t]he categorical approach was designed to ensure that noncitizens convicted of the same offenses under state law

'will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 569 U.S. at 205 n.11 (citations omitted). By pegging immigration consequences to "convictions," Congress sought to avoid the "potential unfairness" of having "two noncitizens, each 'convicted of' the same offense, . . . obtain different [relief eligibility] determinations depending on what evidence remains available or how it is perceived by an individual immigration judge." *Id.* at 201. But the panel's decision creates this exact unfairness, by basing relief eligibility on what documents are available from a prior conviction.

The panel's decision is unfair in another way as well. Under the decision, a conviction operates in diametrically opposite ways in the same removal hearing. During the initial phase of removal proceedings, if the record of conviction is ambiguous, the government would not be able to meet its burden of proving removability: the ambiguous record means the conviction is not a match for an a removable offense enumerated in the Immigration and Nationality Act (INA). But, under the panel's decision, with the same ambiguous record, the very same conviction would be found to match the INA removability offense during the subsequent relief phase of proceedings, when the noncitizen bears the burden of proof.[1]

[1] Under the panel's decision, the government can choose not to charge an offense at the removability stage, but it can still operate as a bar at the relief stage of proceedings. *Cf. Judulang v. Holder*, 132 S. Ct. 476, 486 (2011) (ultimate outcome in a noncitizen's removal proceeding should not "rest on the happenstance of an immigration official's charging decision.").

A. Criminal Records, Especially in Cases Involving Lower-Level Offenses Are Often Poorly Created and Maintained.

The prior criminal records that the panel decision requires are often not created, and even if they are, are poorly maintained. This is particularly true in misdemeanor and other low-level offense cases, where record-keeping is notoriously unreliable.

Many types of misdemeanor convictions can operate to bar relief from removal. Noncitizens can be barred from seeking relief based on crimes involving moral turpitude, *see*, *e.g.,* 8 U.S.C. § 1229b(b)(1)(C), which include minor misdemeanors. Similarly, 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); *United States v. Alvarez-Gutierrez*, 394 F.3d 1241, 1245 (9th Cir. 2005).

Misdemeanor proceedings, which sometimes occur in municipal courts, are notoriously informal; courts often do not have reliable procedures for creating records. 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 Vanderbilt 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).[2] And "a significant percentage of defendants in misdemeanor courts never receive a lawyer to represent them." *Id.* at 14. It is not a surprise, then, that misdemeanor courts often do not generate reliable records. *See*, *e.g.*, *Sauceda v. Lynch*, 819 F.3d 526, 530 n.5 (1st Cir. 2016) ("the Superior Court of the county where [the noncitizen] was convicted does not, in 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. 101, 137 (forthcoming 2018).[3] *See also, e.g.*, *United States v. White*, 606 F.3d 144, 146 (4th Cir. 2010) (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.").

B. Criminal Courts Routinely Destroy Criminal Records, Creating Unfair and Inconsistent Immigration Outcomes.

Even when criminal courts create records, they may routinely destroy the records, rendering the record of conviction ambiguous even when a noncitizen's particular conviction did not match a disqualifying offense. This has a particularly deleterious effect on noncitizens facing removal proceedings that DHS initiates

[2] *Available at* https://www.opensocietyfoundations.org/sites/default/files/misdemeanor_20090401.pdf (last visited Jun. 27, 2018).

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

months or years after criminal cases end. *See Negrete-Rodriguez v. Mukasey*, 518 F.3d 497 (7th Cir. 2008) (11 years after conviction); *Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (nearly 19 years after plea).

In Kentucky, for instance, courts destroy misdemeanor records after five years.[4] Michigan courts destroy certain misdemeanor records after six years.[5] In Tennessee, court clerks are authorized to dispose of many criminal records after ten years.[6] Certain Ohio criminal records are retained for only five years.[7] And because DHS may initiate removal proceedings anywhere in the country, courts in this Circuit routinely consider cases—like the present case—where a bar to relief eligibility turns on a conviction from a state outside the Circuit. *See* 8 C.F.R. § 1003.14 (DHS may initiate removal proceedings anywhere in the country, regardless of where a noncitizen resides).

The Court should grant rehearing to ensure that arbitrary distinctions across different state courts' record-keeping practices do not determine relief eligibility.

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[4] Kentucky Court of Justice, Records Retention Schedule 3 (Jul. 12, 2010), *available at* https://kdla.ky.gov/records/recretentionschedules/Documents/State%20Records%20Schedules/kycojcircuit-district1978-present.pdf (last visited Jun. 28, 2018).
[5] State of Michigan, Retention and Disposal Schedule, General Schedule #13-District Courts, *available at* State of Michigan, Retention and Disposal Schedule, General Schedule #13-District Courts (last visited Jun. 28, 2018).
[6] Tenn. Code Ann. § 18-1-202.
[7] Rule 26.05, Rules of Superintendence for the Courts of Ohio, *available at* https://www.supremecourt.ohio.gov/LegalResources/Rules/superintendence/Superintendence.pdf#Rule26,Rule (last visited Jun. 28, 2018).

II. The Panel's Decision Fails to Recognize That the Government Is in a Far Superior Position to Obtain Records than Noncitizens, Who Are Often Detained, Unrepresented, and Non-English Speaking.

The rule set forth by the Panel ignores that the government is far more capable of producing criminal records necessary to disprove a disqualifying conviction than the typical noncitizen. *See* 8 C.F.R. § 1240.8(d); *Matter of A-G-G-,* 25 I. & N. Dec. 486, 501 (BIA 2011).

A. Most Noncitizens Do Not Have Attorneys.

The panel's decision will have a particularly harmful effect on the overwhelming majority of noncitizens in removal proceedings who are not represented by counsel. A noncitizen in removal proceedings is not entitled to an attorney unless she can afford to pay for one or find someone to represent her for free. *See* 8 U.S.C. § 1229a(b)(4)(A). From 2007 to 2012, only 37 percent of all noncitizens (and 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 (2015).

By contrast, DHS is always represented in removal proceedings by counsel from the Office of the Principal Legal Advisor, which has over 1,100 attorneys and 350 support personnel. *See* Office of the Principal Legal Advisor, U.S. Immigration and Customs Enforcement, *available at* https://www.ice.gov/opla (last visited Jun. 28, 2018). DHS attorneys are well positioned to obtain records from state and local government entities. *Cf.* George Joseph, *Where ICE Already Has Direct Lines To Law-*

Enforcement Databases With Immigrant Data, National Public Radio (May 12, 2017) (DHS officials can search electronically from nearly one thousand law enforcement agency databases).

Not surprisingly, unrepresented noncitizens fare poorly when litigating against a government agency that is always represented by attorneys. Similarly situated noncitizens with counsel are fifteen times more likely to seek relief and five-and-a-half times more likely to obtain relief than their unrepresented counterparts. Eagly & Shafer, *supra* at 49-51. In amici's experience, this is due in part to the inability of unrepresented immigrants to obtain relevant documents, including criminal records.

B. Noncitizens in Detention Face Virtually Insurmountable Barriers to Obtaining Their Criminal Records.

The panel's decision places an almost impossible burden on those noncitizens who are detained pending their removal proceedings. These noncitizens are held in prison-like facilities in cells and behind barbed wire fences, and they face significant restrictions on visitation, movement, and external communication.[8]

Detainees are subject to phone, Internet, and mail restrictions that make it difficult—if not impossible—to place calls to clerks' offices, print records request

[8] *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 Jun. 28, 2018).

forms, and conduct other communication necessary to obtain records.[9] Some facilities have "postcard-only" policies that do not permit detainees to receive or send mail in envelopes.[10] Even in facilities without these policies, detainees may not have the checkbook or credit card required to pay for records.[11] Given these realities, it is difficult to imagine how noncitizen detainees—the overwhelming majority of whom lack lawyers—could obtain criminal records.

In the unlikely event that a detainee is able to mail a request with appropriate payment, he may be transferred to another facility before the records arrive, or the records may not travel with him when he is transferred. *See, e.g., Sasso v. Milhollan*, 735 F. Supp. 1045 (S.D. Fla. 1990) (detainee transferred to El Paso even though evidence in his case located in Florida).

C. Noncitizens Who Are Not Fluent in English Experience Additional Barriers in Obtaining Records.

The consequences of the panel's decision are even more pronounced for noncitizens who are not fluent in English. Ninety percent of noncitizens cannot

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[9] *See, e.g.,* Order Granting Class Certification, *Lyon v. United States Immigration and Customs Enforcement*, No. C-13-58780-EMC (N.D. Cal. Apr. 16, 2014); Amnesty International, *Jailed Without Justice*, *supra* note 7, at 26-30.

[10] *See Prison Legal News v. Columbia County*, 942 F. Supp. 2d 1068 (D. Or. 2013); Prison Policy Initiative, *Return to Sender: Postcard-only Mail Policies in Jail* (2013), *available at* http://static.prisonpolicy.org/postcards/Return-to-sender-report.pdf (last visited Jun. 28, 2018).

[11] *See, e.g.,* Kentucky Court of Justice, Criminal Record Reports, *available at* https://courts.ky.gov/aoc/criminalrecordreports/Pages/default.aspx (last visited Jun. 28, 2018) (in Kentucky, mail requests must be accompanied by check or money order).

proceed in English while in removal proceedings.[12] But state and county court websites with information about requesting records are almost always in English, which is also often the only language spoken by court clerks. Especially if she is detained and unrepresented, it is hard to conceive of how a noncitizen not proficient in English could negotiate the records request process (even if she were able somehow to obtain access to phones or the Internet).

D. Mentally Ill Detainees Face Even More Difficulties in Obtaining Records.

The panel's decision overlooks the reality of noncitizens with mental illnesses and other disabilities, who may not be able to request criminal records, whether they are detained or not. 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). Amici have assisted many such individuals, who suffer from cognitive delays, schizophrenia, bipolar disorder, or post-traumatic stress disorder. *Id.* at 936. It is unrealistic and cruel to expect them to obtain their criminal court records.

* * *

The panel decision overlooks the numerous challenges noncitizens face in trying to request and obtain criminal court records that may not even exist.

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[12] 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 Jun. 28, 2018).

III. The Panel's Decision Affects Noncitizens in a Wide Variety of Immigration Adjudications, Both Adversarial and Non-Adversarial.

The panel's decision will negatively impact noncitizens applying for many types of relief that require the noncitizen to bear the burden of proving the absence of a disqualifying conviction. These forms of relief include: cancellation of removal for lawful permanent residents, *see* 8 U.S.C. § 1229b(a); cancellation of removal for nonpermanent residents, *see* 8 U.S.C. § 1229b(b) (incorporating 8 U.S.C. §§ 1182(a)(2), 1227(a)(2)); 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 in certain circumstances, *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).

This panel's decision will also have a broad impact on noncitizens in a variety of high-volume non-adversarial contexts. A sub-agency of the Department of Homeland Security, U.S. Citizenship and Immigration Services (USCIS), adjudicates hundreds of thousands of applications for waivers, adjustments, and naturalizations in remote facilities through a paper-only, non-adversarial process. *See*, *e.g.*, USCIS Adjustment of Status Form I-485 Performance Data (Fiscal Year 2018, 1st Qtr)[13] (USCIS adjudicated over 180,000 adjustment applications in a recent three-month

[13] *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 Jun. 27, 2018).

period). Noncitizens bear the burden of proof to demonstrate that a prior conviction is not a bar to eligibility for waivers, adjustment, and naturalization, so USCIS officials—who are often not lawyers—must also look to a prior record of conviction to determine whether the conviction is disqualifying. *See*, *e.g.*, 8 U.S.C. § 1158(b)(2)(B)(i) (asylum); 8 U.S.C. § 1154(a)(1)(A)(iii)(II)(bb) (Violence Against Women Act self-petitions); 8 U.S.C. § 1255(l)(1)(b) (adjustment for trafficking victims); 8 U.S.C. § 1255(h)(2)(B) (adjustment for Special Immigrant Juvenile Status recipients); 8 U.S.C. §§ 1101(f)(8), 1427(a)(3) (naturalization).

CONCLUSION

Amici urge the Court to grant rehearing or rehearing en banc.

Date: July 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 29(b)(4) because this brief contains 2,599 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Date: July 5, 2018

/s/ Jayashri Srikantiah
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