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Via CM/ECF
Marcia M. Waldron, Clerk
United States Court of Appeals for the Third Circuit
21400 U.S. Courthouse
601 Market Street
Philadelphia, PA 19106

Re: Letter Brief of Proposed Amicus Immigrant Defense Project
Syblis v. Attorney General, No. 11-4478

Dear Ms. Waldron,

Proposed amicus Immigrant Defense Project (IDP) respectfully submits this letter brief after oral argument in the above-captioned case, to address the Court's concerns at argument regarding the effect of 8 U.S.C. § 1229a(c)(4)(A)(i), which provides that a noncitizen like Mr. Syblis bears "the burden of proof" to establish eligibility for relief from removal. As explained below, under the analysis of this Court and the Supreme Court, the question of whether an individual like Mr. Syblis is ineligible for relief based on a prior conviction is a legal inquiry as to which the burden of proof has no relevance. *See Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Thomas v. Atty. Gen.*, 625 F.3d 134 (3d Cir. 2010). Given that the record of conviction here is inconclusive as to whether the substance at issue in Mr. Syblis's prior conviction was a federally controlled substance, Mr. Syblis is not barred from relief as a matter of law. [1]

[1] The Court need only reach this issue if it concludes that the statute of conviction, Va. Code Ann. 54.1-3466, "relat[es] to" a controlled substance. *See Rojas v. Atty. Gen.*, 728 F.3d 203, 218 (3d Cir. 2013) (en banc) (discussing *Borrome v. Atty. Gen.*, 687 F.3d 150 (3d Cir. 2012)).

Proposed amicus IDP is a national non-profit organization with expertise in the interrelationship of criminal and immigration law.[2] IDP has served as amicus in cases raising the burden of proof issue in other circuits, including the Ninth and Fourth Circuits. *See*, *e.g.*, *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Mondragon v. Holder*, 706 F.3d 535 (4th Cir. 2013). Most recently, the Ninth Circuit permitted post-argument briefing from Amicus regarding whether the Supreme Court's decision in *Moncrieffe* overruled that Court's prior decision regarding eligibility burden of proof in *Young v. Holder*. *See* Order, *Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715 (May 13, 2013) (9th Cir.).

1. Under *Moncrieffe*—and consistent with *Thomas*—the determination of whether a noncitizen's record necessarily indicates a disqualifying conviction is a legal question. In *Moncrieffe*, the Supreme Court clarified that when considering a record of conviction to decide the immigration consequences of a past conviction, the key inquiry is whether that record *necessarily* demonstrates a disqualifying conviction. "The reason is that the [Immigration and Nationality Act] asks what offense the noncitizen was 'convicted' of, . . . not what acts he committed." *Id.* at 1685. *Moncrieffe* repeatedly clarified that the immigration consequences of a prior criminal conviction turn on what elements the conviction "necessarily" involved, a legal inquiry.[3] *See id.* at 1684-88, 1692 (employing the term "necessarily" eight separate times). The Court explained that "[b]ecause we examine what the state conviction necessarily involved . . . we must *presume* that the conviction rested upon [nothing] more than the least of th[e] acts criminalized." *Id.* at 1684 (emphasis added). The Court reasoned that "[a]mbiguity on this point means that the conviction did not necessarily involve facts that correspond to" a disqualifying offense, and therefore, the noncitizen "was not convicted" of the disqualifying crime. *Id.* at 1687.

Consistent with *Moncrieffe*, this Court in *Thomas* concluded that, when the record of conviction—encompassing only certain reliable documents such as the plea colloquy or plea transcript—fails to indicate that a noncitizen was necessarily convicted of an offense that disqualifies him from relief, the

[2] More information about Amicus is included in the motion for leave to file this brief.

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

noncitizen was not so convicted for immigration purposes. *See Thomas*, 625 F.3d at 148 (concluding that, "in the absence of judicial records to establish" a disqualifying conviction, the noncitizen was eligible for cancellation of removal, a form of discretionary immigration relief). Under *Thomas* and *Moncrieffe*, when the record of conviction fails to conclusively demonstrate a disqualifying conviction, the record cannot establish, as a legal matter, that such a conviction exists.

Whether the statute assigns the burden of proof to the government or the noncitizen does not matter to deciding the legal question of what a prior conviction necessarily involved. *See Thomas*, 625 F.3d at 147-148 (holding that, when the record of conviction is inconclusive, the noncitizen's prior conviction does not disqualify him from immigration relief). *See also Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) (rejecting government's argument based on the noncitizen's burden of proving eligibility for relief from removal as impermissibly requiring that the noncitizen has to show not only that he does not have a conviction falling within the criminal bar, but also that the particular conduct that led to his conviction would not qualify under the bar); *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006). Either way, a court must presume that the conviction rested upon the least of the acts criminalized. *Moncrieffe* recognized as much, noting that "conviction" is "the relevant statutory hook," *see* 133 S. Ct. at 1685, and explicitly stating that the analysis for determining whether a noncitizen has been "convicted" of a barring crime is the same as to both deportability, where the government bears the burden to show the noncitizen is deportable, 8 U.S.C. 1229a(c)(3), and relief, where the noncitizen bears the burden to show that he satisfies eligibility requirements, 8 U.S.C. 1229a(c)(4). *See* 133 S. Ct. at 1685 n.4 (the "analysis is the same in both [the removability and relief] contexts").

Rojas v. Atty. Gen. is consistent with the *Thomas*-*Moncrieffe* framework. 728 F.3d 203 (3d Cir. 2013) (en banc). In *Rojas*, this Court explained that, to determine whether a state conviction triggers the removal ground for offenses "relating to" a controlled substance, the categorical approach does not apply. Nevertheless, like *Moncrieffe and Thomas*, *Rojas* remains focused on the statutory requirement of a "conviction." *See id.* at 219 (holding that the "common theme that unites the categorical approach and the 'relating to' cases [is] the rule that the existence of a conviction is established not by reference to the underlying facts of a case but by reference to the underlying statute [of conviction]."). Thus, courts must examine the record of conviction to decide whether a federally controlled substance was involved. *Id.* at 219-20 ("we see no

reason why the existence of a federally controlled substance cannot be . . . established" through reliance "on the so-called *Taylor-Shepard* documents"). And courts must not relitigate the underlying facts. *Id.* at 216 ("Our holding is not an invitation to inquire into or relitigate the circumstances underlying every drug conviction—the existence of a federally controlled substance will be established in the same way as the existence of the conviction itself is normally established."). *Moncrieffe* clarifies how courts should interpret the conviction requirement in cases such as the present one, which are governed by *Rojas.* When, as here (and in *Rojas),* the record of conviction is inconclusive as to the controlled substance at issue, the conviction did not "necessarily involve facts that correspond" to a disqualifying offense and the noncitizen "was not convicted of a [disqualifying offense]" as a matter of law. *Moncrieffe,* 133 S. Ct. at 1687.

2. The statutory and regulatory burden of proof provisions are not relevant here because relief eligibility turns on a question of law. The government misunderstands 8 C.F.R. § 1240.8(d), which states that, if the "evidence indicates" that a mandatory bar to relief exists, the noncitizen must prove "by a preponderance of the evidence" that the mandatory bar does not apply.[4] Inconsistently with *Thomas*, the government seeks to apply this "preponderance of the evidence" standard—which applies to factual inquiries—to determine whether the proffered documents from the record of conviction necessarily establish a prior disqualifying conviction, a legal question.

The burden of proof refers to "the obligation of a party to introduce evidence that persuades the factfinder . . . that a particular proposition or fact is true." 1 Clifford S. Fishman & Anne T. McKenna, *Jones on Evidence* § 3.5 (7th ed. 1992). It has no relevance to questions of law. *See, e.g.*, *Universal Elec. Inc. v. United States*, 112 F.3d 488, 492 (Fed. Cir. 1997) (burden of production or burden of persuasion "certainly carries force on any factual components . . . because facts must be proven via evidence . . . [but] as a practical matter . . . carries no force as to questions of law."); *ABKCO Indus., Inc. v. Comm'r*, 482 F.2d 150, 156 (3d Cir. 1973) ("[I]t may not be proper to refer to 'burden of proof' in reference to the resolution of a question of law.").

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

3. The statutory and regulatory burden of proof provisions are provisions of general applicability that pertain to many contexts in which eligibility for immigration relief turns on factual questions. The burden of proof sections applicable to Mr. Syblis—8 U.S.C. § 1229a(c)(4) and 8 C.F.R. § 1240.8(d)—are not somehow rendered pointless because they are not necessary for resolution of Mr. Syblis's case. Rather, those sections are provisions of general applicability that carry force in the numerous contexts where a bar to relief involves a factual question. For instance, as to cancellation of removal, a noncitizen is barred from relief if he "engaged" in, rather than was convicted of, numerous types of unlawful activity, including criminal activity which endangers public safety or national security, 8 U.S.C. § 1227(a)(4)(A)(ii), or terrorist activities under 8 U.S.C. § 1182(a)(3), 8 U.S.C. §1227(a)(4)(B). *See* 8 U.S.C. § 1229b(c). Other forms of relief also hinge mandatory bars on factual questions. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(A) (for asylum, whether the noncitizen was firmly resettled in another country prior to arriving in the United States, there are reasonable grounds to believe he is a danger to the security of the United States, or serious reasons for believing he "committed" a serious political crime); 8 U.S.C. § 1255(c) (for adjustment of status, whether the noncitizen was employed while unauthorized, or continues in or accepts unauthorized employment prior to filing application); 8 U.S.C. § 1229b(b) (for nonpermanent residents seeking cancellation of removal, continuous physical presence and extreme or unusual hardship to a qualifying relative). In addition, burdens of proof may be relevant when a prior disqualifying conviction has a circumstance-specific component, as in *Nijhawan v. Holder*, 557 U.S 29, 36 (2009).

4. *Moncrieffe* Abrogated the Fourth, Ninth, and Tenth Circuit Decisions in *Young*, *Mondragon*, and *Garcia*. In *Moncrieffe*, the Supreme Court abrogated the Fourth, Ninth, and Tenth Circuit decisions relating to burden of proof. *Moncrieffe* clarified that the correct inquiry is whether the record of conviction necessarily indicates a disqualifying conviction for immigration purposes. *Moncrieffe*, 133 S.Ct. at 1684-88, 1692. That inquiry is legal in nature, and does not turn on the burden of proof. The Supreme Court specifically stated that the analysis as to immigration consequences is the same in the relief and removability contexts, even though the burden of proof is on the government as to removability, and the noncitizen as to relief. *See id.* at 1685 n.4. Not surprisingly, after *Moncrieffe*, the Ninth Circuit ordered briefing on whether *Moncrieffe* overruled *Young*, that Court's prior decision regarding burdens of proof in the relief context. *See* Order, *Almanza-Arenas v. Holder*, Nos. 09-

71415, 10-73715 (Apr. 30, 2013) (9th Cir.). The Ninth Circuit's decision on this question is pending.

5. The government's contentions regarding the burden of proof are inconsistent with the Board of Immigration Appeals' (BIA's) own interpretation of 8 C.F.R. § 1240.8(d), the regulatory provision assertedly at issue in the present case. Under *Matter of A-G-G*, the government must make a prima facie showing that the "evidence indicat[es]" that a mandatory bar to relief may apply in order to trigger an immigration judge's consideration of the bar. 25 I.&N. Dec. 486, 501 (BIA 2011). Although *A-G-G* considered a different context and form of relief,[5] the BIA interpreted 8 C.F.R. § 1240.8(d), the same regulatory provision that governs the present case.[6] That section provides: "[i]f the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply." Thus, even assuming that 8 C.F.R. § 1240.8(d) were relevant to whether a bar to relief that turns on a question of law applies, under *A-G-G*, the government here must make a prima facie showing that Mr. Syblis's prior conviction was for a disqualifying offense to show that the "evidence indicates" that such an offense exists. Only then may an immigration judge decide whether the conviction bars relief.

Applying *Moncrieffe*, in order for the government to satisfy its prima facie standard, it must demonstrate—by submitting documents from the record of conviction—that Mr. Syblis's controlled substance offense necessarily involved a federally controlled substance. *See Moncrieffe*, 133 S.Ct. at 1687. When, as here, the record of conviction is inconclusive, the government has not made the requisite prima facie showing of ineligibility, as set forth in *A-G-G*.

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[5] *A-G-G* considered the firm resettlement bar to asylum, under which a noncitizen is ineligible for asylum if she "was firmly resettled in another country prior to arriving in the United States." 8 U.S.C. § 1158(b)(2)(A)(vi). *A-G-G* established that the government must make a prima facie showing in order to show that such a bar applies.

[6] It would be impermissible to interpret the regulation differently solely based on the fact that its application involves a different type of relief from removal. *See Quezada-Bucio v. Ridge*, 317 F. Supp. 2d 1221, 1230 (W.D. Wash. 2004) (explaining that where the language is the same, the rules of statutory construction require the same interpretation).

6. The government's rule would force noncitizens like Mr. Syblis to prove a negative—the lack of a disqualifying conviction—on the basis of a limited universe of official court records, the content or existence of which is beyond their control. The government's position would impose an impossible burden on immigrants who merit relief: to produce records that do not exist or that may be unavailable. As in Mr. Syblis's case, the government's assertion of ineligibility for relief can turn on conviction records that simply do not exist. For example, the Virginia General District Courts, which have jurisdiction of misdemeanor charges, such as those in this case, are not courts of record under Virginia law and regularly produce no record of the charges, trial or plea, conviction, and sentence beyond an "executed warrant of arrest." *United States v. White*, 606 F.3d 144, 146 (4th Cir. 2010).

Even if more detailed conviction records are created at the time of a noncitizen's conviction, they may no longer exist years later, when the noncitizen's eligibility for relief arises in immigration court. Virginia—the state where Mr. Syblis suffered his conviction—routinely destroys most criminal records ten years after final disposition.[7] In New Jersey municipal courts, criminal records including complaints and summonses are by policy destroyed between three and fifteen years after disposition, depending on the nature of the criminal charge. *See* New Jersey State Judiciary, Records Retention Schedule (Municipal Courts), at 1, 3, *available at* http://www.judiciary.state.nj.us/recmgt/rs22.pdf. Similarly, in certain lower criminal courts in Pennsylvania, criminal complaints, dockets, and other records are retained for only three to seven years from final disposition. *See* Supreme Court of Pennsylvania, Administrative Office of Pennsylvania Courts, Record Retention & Disposition Schedule with Guidelines, at 15, *available at* http://courts.phila.gov/pdf/record_retention_schedule.pdf.

Even in cases where detailed, admissible records were created and are preserved, the government's position that the noncitizen must find conclusive records places significant, often insurmountable, burdens on noncitizens in removal proceedings, 44% of whom are unrepresented, 36% of whom are

[7] *See Virginia General District Court Manual,* Chapter 6- Records Retention, Destruction and Expungement, at 6-6, *available at* http://www.courts.state.va.us/courtadmin/aoc/djs/resources/manuals/gdman/chapter_6.pdf.

detained, and 82.5% of whom are not fluent in English.[8] The government's position here is particularly harsh for detained noncitizens, who likely lack reliable access to telephones, computers, or the Internet, even when access is necessary to obtain records.[9]

The solution to the unfairness of Mr. Syblis's situation, and that of other similarly situated immigrants, is to reaffirm this Court's correct legal holding in *Thomas*: an inconclusive record of conviction does not establish that a criminal bar to relief applies because a finding of a "conviction" barring relief is then simply not supported by the record.

Respectfully submitted,

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

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