

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

JACKSON NJAI NDUNGU,

Petitioner,

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA,

Respondent.

On Appeal of a Decision of the Board of Immigration Appeals
Agency No. A 0589-942-954

**BRIEF FOR AMERICAN IMMIGRATION LAWYERS ASSOCIATION,
NATIONALITIES SERVICE CENTER, HEARTLAND ALLIANCE'S
NATIONAL IMMIGRANT JUSTICE CENTER, IMMIGRANT DEFENSE
PROJECT, AND NATIONAL IMMIGRATION PROJECT OF THE
NATIONAL LAWYERS GUILD AS AMICI CURIAE
IN SUPPORT OF PETITIONER AND REVERSAL**

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**CORPORATE DISCLOSURE STATEMENT AND
STATEMENT OF FINANCIAL INTEREST**

Pursuant to Fed. R. App. P. 26.1 and Third Circuit LAR 26.1, the undersigned counsel for amici curiae American Immigration Lawyers Association, Nationalities Service Center, Heartland Alliance's National Immigrant Justice Center, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild state that amici have no parent company, subsidiary, or affiliate, and issue no stock.

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STATEMENT OF INTEREST

Amici curiae the American Immigration Lawyers Association, the Nationalities Service Center, Heartland Alliance's National Immigrant Justice Center, Immigrant Defense Project, and National Immigration Project of the National Lawyers Guild are immigration legal organizations that hold deep expertise in doctrinal immigration law, the categorical approach, and the functioning of the immigration system. As organizations that represent and advise noncitizens convicted under state criminal laws, amici have an interest in the fair and correct interpretation of the laws governing immigration and removal. Amici respectfully submit that their expertise and experience can assist this Court to adjudicate this case in a manner that is faithful to federal immigration law and maximizes fairness to Petitioner and similarly situated noncitizens.

INTRODUCTION

Over a century ago, federal courts and agencies began applying a categorical approach in immigration cases to advance the goals of “efficiency, fairness, and predictability in the administration of immigration law.” *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015); *Hillocks v. Attorney General*, 934 F.3d 332, 338 (3d Cir. 2019). The approach focuses on the plain text of statutes, rather than fact-intensive inquiries into conduct. This Court follows the Supreme Court’s directive by applying the categorical approach in this manner that “promotes judicial and administrative efficiency” and maximizes due process protections for noncitizens. *Moncrieffe v. Holder*, 569 U.S. 184, 200-201 (2013); *see Salmoran v. Attorney General*, 909 F.3d 73, 82 (3d Cir. 2018).

Now, though, this Court is considering changing course, seeking briefing on whether it should revisit its prior holdings and implement a requirement that “the concept of ‘realistic probability of prosecution’ should be a consideration each time the court applies the categorical approach.” ECF No. 59. But if this Court has frustrations with the categorical approach, an expanded reasonable probability requirement will not fix them; it will create others.

Amici submit this brief to highlight for the Court the problems posed by a universal realistic probability requirement, and to urge the Court to adhere to a textualist approach to statutory analysis that prevents unfair, unauthorized, severe

immigration consequences. In Section I, amici briefly discuss the Supreme Court’s categorical approach cases that foreclose importing a realistic probability requirement to statutes that are facially overbroad. In Section II, amici discuss the severe practical impediments that noncitizens will face in satisfying a realistic probability requirement if applied in all cases.

ARGUMENT

I. THE THIRD CIRCUIT’S EXISTING INTERPRETATION OF THE REALISTIC PROBABILITY REQUIREMENT IS CONSISTENT WITH A CENTURY OF PRECEDENT

A. The Categorical Approach Requires Consideration Of Statutes, Not Conduct

Courts have applied the categorical approach to determine whether a noncitizen’s conviction can be classified as a crime triggering removability since shortly after Congress passed immigration laws providing for removability based on convictions. *See Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1689-1692 (2011). For instance, in 1913, a federal court held that immigration authorities erred when they determined a noncitizen to be removable based on their view that trial reports of his criminal libel conviction indicated that his acts constituted a “crime of moral turpitude.” The court reasoned that moral turpitude “impl[ied] personal depravity or baseness,” and while “there may be cases in which the facts will show upon the part of the libeler a malignity of purpose and

depravity of disposition,” it was nonetheless “unnecessary to establish such purpose or disposition to make out the crime of criminal libel.” *United States ex rel. Mylius v. Uhl*, 203 F. 152, 153-155 (S.D.N.Y. 1913), *aff’d*, 210 F. 860 (2d Cir. 1914).

Thus, for over a century, where the government chooses to prove removability or preterm relief on the basis of a noncitizen’s conviction, courts have applied the categorical approach. *Moncrieffe*, 569 U.S. at 190. Rooted in the text of the Immigration and Nationality Act (INA), which “asks what offense the noncitizen was ‘convicted’ of, not what acts he committed,” *id.* at 191 (citation omitted), the categorical approach demands that courts “examine what the state conviction necessarily involved, not the facts underlying the case,” and “must presume that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized,” *id.* at 190-191 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). Courts “then determine whether even those acts are encompassed by the generic federal offense,” and the statutes are therefore a categorical match. *Id.*

B. The Realistic Probability Inquiry Ensures Only That Application Of The Categorical Approach Is Not Based On “Legal Imagination”

The realistic probability inquiry has its roots in two Supreme Court opinions: *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007) and *Moncrieffe v.*

Holder, 569 U.S. 184 (2013). Both decisions authorize application of realistic probability only in specific circumstances, and never when the elements of conviction are categorically broader than those of the removability provision at issue.

Duenas-Alvarez concerned a noncitizen who had been convicted of violating a state statute that the Court found to be facially coextensive with a generic federal offense, but which the noncitizen nonetheless argued reached broader conduct. 549 U.S. at 190-192. The Court rejected this argument, explaining that “to find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute’s language.” *Id.* at 193. Instead, a litigant must show “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” *Id.*

In *Moncrieffe*, the Court repeated the “legal imagination” concept, stating, “our focus on the minimum conduct criminalized by the state statute is not an invitation to apply ‘legal imagination’ to the state offense; there must be ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.’” 569 U.S. at 191 (quoting *Duenas-Alvarez*, 549 U.S. at 193). The Court concluded that the Georgia marijuana statute at issue was categorically overbroad, noting that Georgia state

courts interpreted the statute's elements to cover the social sharing of small quantities of marijuana. *Id.* at 194.

Later in *Moncrieffe*, the Court discussed realistic probability in dicta to address a hypothetical from the Solicitor General concerning a firearms provision—not the controlled substances removability provision at issue in the case. Even though *Moncrieffe* concerned the drug trafficking aggravated felony provision, the Solicitor General had argued that convictions under state firearm statutes that lacked an antique firearm exception (as the federal statute had) risked being found overbroad under the approach advanced by the noncitizen's counsel. The Court rejected that concern, noting that a litigant would still have to show realistic probability by “demonstrat[ing] that the State actually prosecutes the relevant offense in cases involving antique firearms.” 569 U.S. at 206.

This dicta in *Moncrieffe* provides no instruction or support for the erosion of this Court's categorical approach precedent. It does not discuss any specific state statute of conviction and says nothing about a statute that is facially overbroad or whose elements have been found to cover overbroad conduct by a state court. The Solicitor General's hypothetical imagined a state statute that was *silent* on whether a definition of firearms reached non-functioning antique firearms, not a statute whose plain text included such firearms or which a state court interpreted to include such firearms. 569 U.S. at 206. Thus, the Court's dicta said nothing about

considering realistic probability in the context of a facially overbroad statute. In all events, because this dicta did not even concern the removability provision before the Court in *Moncrieffe*, and the Supreme Court’s decisions should be read in light of the facts before the Court, this Court need not (and, for reasons discussed below, should not) follow it. *See, e.g., St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993) (“[I]t [is] generally undesirable, where holdings of the Court are not at issue, to dissect the sentences of the United States Reports as though they were the United States Code.”).

The Court’s subsequent categorical approach precedents all recognize overbreadth where a state statute of conviction is facially overbroad and require no further realistic probability showing. *See, e.g., Mellouli*, 575 U.S. at 801-802, 809-811, 813 (finding Kansas’s drug schedules overbroad based on statutory text); *Pereida*, 141 S. Ct. 754, 762-763 (2021) (finding Nebraska statute overbroad based on statutory text); *Mathis v. United States*, 579 U.S. 500, 509-514 (2016) (same, with respect to Iowa burglary statute); *Descamps v. United States*, 570 U.S. 254, 264-265 (2013) (same, with respect to California burglary statute).

This Court has taken precisely this approach, explaining that where “the elements of the crime of conviction are not the same as the elements of the generic federal offense,” “[t]he Supreme Court has never conducted a ‘realistic probability’ inquiry,” and “the ‘realistic probability’ language is simply not meant to apply.”

Singh v. Attorney General, 839 F.3d 273, 286 n.10 (3d Cir. 2016). Most other circuits agree that “[t]he realistic probability test is obviated” where the state statute “on its face extends to conduct beyond the definition of the corresponding federal offense.” *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018); *see also Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017); *Gonzalez v. Wilkinson*, 990 F.3d 654, 656 (8th Cir. 2021); *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020); *United States v. Cantu*, 964 F.3d 924, 934 (10th Cir. 2020); *Aspilaire v. Attorney General*, 992 F.3d 1248, 1255 (11th Cir. 2021).

The Fifth Circuit’s contrary approach, *see United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc), is irreconcilable with controlling Supreme Court precedent and was decided in a fractured en banc opinion over vigorous dissent. *See id.* at 237-243 (Dennis, J., dissenting, joined by Stewart, C.J., Smith, J., Prado, J., and Graves, J.). Since the decision issued, it has been extremely destructive in immigration cases (and federal criminal cases) subject to the Fifth Circuit’s jurisdiction. It has caused unlawful deportations, denials of humanitarian relief, denials of naturalization, and civil detention based on statutes with overbroad elements. *Contra Woodby v. INS*, 385 U.S. 276, 286 (1966) (noting that due process requires grounds for deportation be proven by clear and convincing evidence). Amici respectfully urge that this Court should avoid these same outcomes for the noncitizens within this Circuit.

II. APPLYING A REALISTIC PROBABILITY REQUIREMENT IN EVERY CASE CREATES THE VERY DUE PROCESS PROBLEMS THE CATEGORICAL APPROACH WAS IMPLEMENTED TO AVOID

The Supreme Court has explained that the rationale behind the categorical approach is to “promote efficiency, fairness, and predictability in the administration of immigration law.” *Mellouli*, 575 U.S. at 806. Requiring a showing of realistic probability of prosecution in every case—including cases involving clearly overbroad elements—undermines the efficiency of the immigration and judicial system by requiring immigration judges, the BIA, and Circuit Court panels to sift through state court materials in support of a proposition that is already evident from the plain text of the statute. In *Moncrieffe*, the Supreme Court found that similarly onerous factfinding was inconsistent with the INA’s text and purpose, and should not be thrust on “our Nation’s overburdened immigration courts.” 569 U.S. at 200; *see also Dulal-Whiteway v. U.S. Dep’t of Homeland Sec.*, 501 F.3d 116, 132 (2d Cir. 2007) (noting that “the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions”); *Jean-Louis v. Attorney General*, 582 F.3d 462, 479 (3d Cir. 2009) (upholding a strict categorical approach and touting its importance for “[a]dministrative efficiency and ease of application ... in the immigration context”). In addition to these and other serious efficiency concerns, a realistic

probability requirement expanded to overbroad statutes would create significant fairness problems within the immigration system.

First, as discussed further below, *see infra* Section II.A., most noncitizens in the immigration detention and removal system within this Circuit are unrepresented and functioning on outrageously fast timelines. Because of numerous barriers to obtaining evidence that might satisfy an expanded realistic probability requirement, many of these individuals will be unable to do so and will be deported based on convictions that do not properly authorize removal.

Second, realistic probability evidence is frequently destroyed, or even if existent, virtually impossible to access. States routinely destroy the kinds of evidence that can be used to satisfy realistic probability. *See* Section II.B. Even where such evidence might exist, the barriers to obtaining it for many noncitizens and even for litigators are often insurmountable. An expanded realistic probability requirement would also lead to inconsistent outcomes across otherwise similar immigration cases. In addition to the drastic differences in access to evidence for represented noncitizens as compared to *pro se* noncitizens, there would also be different categorical approach outcomes based on accessibility of documents rather than substantive differences in a statute of conviction. Noncitizens convicted of violating virtually identical statutes in different states would face different immigration outcomes based purely on state-specific record-keeping practices or

municipality-specific charging and plea practices. There is also significant risk that an expanded realistic probability requirement will lead to inconsistent results over time, as noncitizens convicted of violating new state statutes are significantly less likely to be able to show proof of actual prosecution than noncitizens accused of violating the same statute years later—for the first person prosecuted under a new statute, such a showing would be impossible.

These concerns with an expanded realistic probability requirement are not abstract. An overview of how removal proceedings are conducted in this Circuit demonstrates just how difficult—if not impossible—it would be for noncitizens in removal proceedings to meet an expanded realistic probability requirement, such as the standard the Fifth Circuit has adopted.

A. Noncitizens Lack The Time And Counsel Required To Satisfy An Expanded Realistic Probability Requirement

An expanded realistic probability requirement that applies to statutes with clearly overbroad elements would in many instances be impossible to satisfy because of the pace and structure of removal proceedings. A short overview of the removal process is instructive. Removal proceedings are initiated by the Department of Homeland Security (DHS) by filing a Notice to Appear (NTA) with an immigration court. 8 U.S.C. § 1229(a)(1). Where DHS charges a noncitizen as removable based on an alleged conviction, DHS must make a factual allegation in

the NTA about the statute of conviction and sentence, and a legal allegation about the charged ground of removability in the INA.

The first hearing to occur in a removal proceeding is a Master Calendar Hearing (MCH). At the MCH, a noncitizen must admit or deny the factual allegations and legal charges in the NTA, and present any arguments that they are not removable or not barred from relief. The MCH is therefore the first time that arguments about the application of the categorical approach are made, and if this Court were to require consideration of realistic probability to overbroad statutes, it is ostensibly also the time when such evidence would have to be presented. After hearing arguments, the presiding immigration judge (IJ) can either determine at the MCH that a conviction makes the noncitizen removable or set a briefing schedule for the noncitizen to submit written arguments in support of termination or relief eligibility.

For detained noncitizens, whether represented or not, this process occurs on a rapid timeline. At the Elizabeth Immigration Court, which has jurisdiction over detainees in Pennsylvania and New Jersey, the current average time between the filing of an NTA and the final adjudication is 95 days.¹ But the segment of the

¹ Transactional Records Access Clearinghouse, Syracuse University, *Immigration Court Backlog* (June 2024), <https://trac.syr.edu/phptools/immigration/backlog/>.

removal proceedings in which categorical analysis occurs is much shorter, as arguments against removability must be raised at the first MCH or after a short continuance. *See* Immigration Court Practice Manual §4.15(g) (noting that IJs may grant one continuance to allow noncitizens to seek legal representation, but at the next hearing, IJs may opt to proceed even if the noncitizen is still not represented). Thus, because of this statutorily mandated structure and pace of removal proceedings, to terminate removal proceedings or establish relief eligibility, noncitizens would have to compile realistic probability evidence and arguments within just a few weeks, if not days, or risk losing their chance to do so.

Because there is no right to government provided counsel in removal proceedings, *see* 8 U.S.C. § 1229a(b)(4)(A), most noncitizens must meet these difficult deadlines while proceeding *pro se*. As of June 2024, 70% of all noncitizens and 62% of detained noncitizens nationally are unrepresented.² Rates of representation have remained relatively constant over time. *See* Eagly & Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Penn. L. Rev. 1, 16, 32 (2015) (study drawn from data from 2007-2012 found only 37 percent of all noncitizens, and only 14 percent of detained noncitizens, were represented in

² Vera Institute, *Immigration Court Legal Representation Dashboard* (May 2024), <https://www.vera.org/ending-mass-incarceration/reducing-incarceration/detention-of-immigrants/advancing-universal-representation-initiative/immigration-court-legal-representation-dashboard>.

their removal cases). Among pending deportation cases in Pennsylvania today, 60 percent of noncitizens are unrepresented.³

Many factors can limit a detained noncitizen's ability to retain counsel, including financial constraints and language barriers, as well as detention itself. Detained individuals cannot physically go to a legal office or otherwise easily contact an attorney to represent them. At Moshannon Valley Processing Center, detainees do not have free phone calls. While detainees can call a limited list of *pro bono* providers at no cost, the government-provided list they are given has only general office phone numbers, and there is no way for detainees to receive calls back. Listed providers have extremely limited capacity, so most noncitizens who rely only on this list will not receive counsel. In contrast, DHS is always represented in removal proceedings by counsel from the Office of the Principal Legal Advisor, which has over 1,300 attorneys.⁴ Thus, in the vast majority of removal cases, unrepresented noncitizens are left to litigate complex categorical approach arguments against experienced, well-funded DHS lawyers. To augment this imbalance by importing an additional evidentiary realistic probability

³ See Vera Institute, *Immigration Court Legal Representation Dashboard*, *supra* n.2.

⁴ See U.S. Immigration and Customs Enforcement, *Office of the Principal Legal Advisor*, <https://www.ice.gov/opla> (visited Aug. 8, 2024).

component into the categorical analysis in every case would functionally nullify noncitizens' already diminished ability to contest removability and bars to relief.

B. Noncitizens Lack Access To Criminal Court Documents And Evidence

There are significant structural barriers to obtaining documentary evidence while in immigration detention. These include drastically inadequate legal research resources, and things as basic as an inability to reliably receive mail, which together would make an expanded realistic probability standard functionally impossible to satisfy.

Undersigned counsel Margaret Kopel represents noncitizens at Moshannon Valley Processing Center, the largest immigration detention center in the Northeast, which currently detains about 1,800 noncitizens whom DHS seeks to remove. Counsel's client H.K. worked in the Moshannon law library for several months in 2023. He reported that detainees were allowed five hours of library time per week, but each housing block was brought to the library only once per week, so all five hours had to take place on the same day. The library had about seven computers with access to Lexis, but no other websites. Even if they understood what court records to search for, noncitizens could not access court document websites. The one law librarian spoke only English, so even if detainees could access court websites, the many non-English speaking detainees would never be able to complete the required research.

C. Even If Noncitizens Had The Ability To Search For Relevant State Court Records, Very Few Records Are Actually Available

In many cases, state court systems do not even generate the kinds of evidence and written decisions that could establish realistic probability, and even where such evidence may have existed at some point it is routinely destroyed and therefore inaccessible. An expanded realistic probability requirement that noncitizens present evidence of other prosecutions under state statutes presupposes that evidence of state prosecutions is actually available. For many state statutes, that is not the case. Even assuming a *pro se* noncitizen has access to a commercial database like Westlaw, publicly available state trial-level records are scarce. Given that “[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas,” *Missouri v. Frye*, 566 U.S. 134, 143 (2012), in most cases, there are no relevant public records at all. When a prosecution resolves by plea agreement, no written decision need issue from the trial court, and relevant appellate decisions will exist only in the unlikely event that the defendant did not forfeit the right to appellate review through the plea-bargaining process. Thus, publicly reported decisions discussing criminal statutes will likely say little about actual prosecution practices and, if anything, present a skewed view of the conduct prosecuted.

Even if state court criminal records were available at one time, that does not mean they will be available at the time of a noncitizen’s removal proceedings.

Court systems regularly destroy criminal court records, making it impossible to obtain older evidence that could support a realistic probability argument. This is true in every state within this Circuit.

1. New Jersey

Retention of records within New Jersey varies widely. For example, while criminal records for some serious convictions must be retained for 50 years, complaints disposed of by the Municipal or Superior Courts by plea only need to be retained for 6 years. Criminal court case files containing indictments, judgments of convictions, and post-conviction relief files, are destroyed after five years. Certain family court case files are destroyed after only two years. Municipal Court records, including court reporter notes, audio, videotapes and all corresponding tape logs, are destroyed after five years.⁵ Municipal Court criminal complaints may be destroyed after six years. Family Court minutes are destroyed after periodic review, with no set dates. Even where documents have not yet been destroyed, criminal court records can only be obtained by request to the court clerk or administrator and are only available in the form in which they are maintained,⁶ making these records inaccessible to detained and unrepresented noncitizens.

⁵ State of New Jersey Records Retention Schedule, Court Reporting Schedule Directive #3-01, Series No. 07-01-00 through 07-07-00 (Mar. 16, 2001), <https://reviewdrupal.njcourts.gov/sites/default/files/rs07.pdf>.

⁶ New Jersey Rules of Court 1:38-10, 1:38-13, Public Access to Court Records and Administrative Records (eff. Feb. 23, 2024), <https://>

2. Delaware

Delaware's court records retention schedules are not publicly available on the Delaware judiciary's website, but amici received copies following a direct call with the Delaware Public Archives. Delaware's Justice of the Peace Courts retain criminal case dockets at the courthouse for three years and then transfer them to the state archives where they are retained for an additional 57 years. In the Court of Common Pleas, court reporter notes and audio recordings are retained for a year at the originating court, then transferred to the State Records Center for nine years, then destroyed. Even where documents may still exist at a court, a requester may only "inspect or ... obtain copies of original versions of records that are open to the public" by going in-person to "the location where such records are kept during regular working hours."⁷ Certain courts have additional requirements. For example, Family Court files, which are only retained onsite for three years, "must be reviewed in the presence of a Family Court staff person" in order "to prevent tampering with files." Again, detained and unrepresented noncitizens have no ability to obtain such records.

www.njcourts.gov/attorneys/rules-of-court?id=1:38&search=public-access-court-records-and-administrative-records§ion=All.

⁷ Administrative Directive 2001-1, *Policy on Public Access to the Court of Common Pleas Judicial Records* at 4-5 (eff. Sept. 1, 2001), <http://courts.delaware.gov/help/docs/ccp-policy.pdf>.

3. Pennsylvania

Pennsylvania's Unified Judicial System has a case search portal, which includes general docket and case disposition information, but does not provide access to court documents or transcripts.⁸ Retention requirements for Pennsylvania records vary across systems and levels. For example, according to the Guidelines for Pittsburgh and Philadelphia Municipal Courts, files must only be kept for three years after final disposition.⁹ Public records in Philadelphia can only be requested through a specific form, but there is no deadline for when the court system must respond.

D. The Realistic Probability Inquiry In Action

In most cases, noncitizens will lack the resources necessary to satisfy an expanded realistic probability requirement, given lack of access to counsel. But even in cases where noncitizens are represented by diligent counsel, applying the realistic probability standard to overbroad statutes is unworkable and leads to unfair results.

The experience of AILA New Jersey member Derek DeCosmo and his client Mr. Nunez is illuminating. Mr. Nunez spent seven years in removal proceedings in

⁸ See Unified Judicial System of Pennsylvania, *Public Records Policies* (eff. Jan. 1, 2022), <http://www.pacourts.us/public-record-policies>.

⁹ Supreme Court of Pennsylvania, *Record Retention & Disposition Schedule with Guidelines* (Jan. 2014), <http://www.pacourts.us/assets/files/setting-850/file-173.pdf#search=%22retention%20schedule%22>.

a New Jersey immigration court as DHS and the IJs in his case sought to import a realistic probability requirement to a statute of conviction whose elements were plainly overbroad, in clear violation of this Circuit's precedent. Mr. Nunez has been a lawful permanent resident of the United States since 1980. In 1993, he was convicted under a New Jersey firearms statute that covers weapons that are legal under federal law, specifically, air, spring, and elastic-powered weapons that shoot ammunition smaller than three-eighths of an inch in diameter. *See* N.J.S.A. §§ 2C:39-3D, 2C:39-1(f). The U.S. District Court for the District of New Jersey has found that this statute reaches conduct that is broader than federal law. *See Coalition of New Jersey Sportsmen v. Florio*, 744 F. Supp. 602, 605-606 (D.N.J. 1990). Mr. Nunez was given a two-year probationary sentence, which he successfully completed.

More than twenty years after his conviction, in 2017, DHS issued a NTA alleging that Mr. Nunez's 1993 conviction was a removable firearms offense under 8 U.S.C. § 1227(a)(2)(C). From 2017 to 2024, three different IJs handled Mr. Nunez's case, and Mr. DeCosmo filed three separate motions to terminate removal proceedings, arguing at every point that his client was not removable because the New Jersey statute is broader than the federal removability provision, that binding precedent rendered the realistic probability requirement inapplicable, and that even if the immigration court were to consider realistic probability, it was satisfied

because of evidence that Mr. DeCosmo obtained and filed with the immigration court. Mr. DeCosmo obtained sworn declarations from New Jersey prosecutors and criminal defense lawyers attesting to actual cases where New Jersey prosecuted and obtained convictions under New Jersey weapons statutes for conduct broader than the federal firearm definition. These documents were available to Mr. DeCosmo because he is an attorney, and because he practices criminal law in the jurisdiction where Mr. Nunez was convicted and therefore had access to documents and attorneys available to provide these attestations. A detained, unrepresented noncitizen would have no access to such evidence. Even an attorney practicing in another jurisdiction would face enormous hurdles to obtaining such evidence.

Nonetheless, in 2017, an IJ denied the first motion to terminate, holding that Mr. Nunez had not shown realistic probability. The case was then transferred to a different IJ who said he would require proof of prosecution and successful conviction in order to find realistic probability was established. Mr. DeCosmo filed an Indictment and Judgment of Conviction from his own case files that showed conviction for overbroad conduct, which again, was only available to him because he had represented the individual in that case. The documents were not otherwise publicly available, despite serving as further proof that the elements of

the New Jersey statute are overbroad. DHS continued to argue that even this evidence could not establish realistic probability.

Mr. Nunez's case then sat unadjudicated for three years until it was transferred to a third IJ, who terminated removal proceedings and rejected DHS's arguments to import a realistic probability requirement into categorical analysis of plainly overbroad statutes. Mr. Nunez's case reflects the unfair and unwieldy nature of the realistic probability requirement that DHS and some immigration adjudicators seek to import into categorical analysis of statutes that are clearly overbroad.

It is unclear how the vast majority of represented noncitizens, or *any* pro se noncitizen could have met this burden. Even if those noncitizens could somehow access New Jersey E-Courts, charging documents like indictments and judgments of convictions (JOCs) are not available to non-attorneys. Even for noncitizens represented by counsel who may have access to tools like E-Courts, charging documents and JOCs are usually restricted to the defense attorney, prosecuting attorney and court staff.

III. IF THIS COURT WERE TO DECIDE THAT THE REALISTIC PROBABILITY INQUIRY SHOULD BE APPLIED IN EACH CASE, IT SHOULD NOT REQUIRE EVIDENCE OF ACTUAL CONVICTIONS

For the reasons discussed above, this Court should not require consideration of realistic probability when a statute is facially overbroad. But if this Court were

to adopt such a rule, it should at the very least make clear that a showing of actual conviction is not required. The Board's contrary rule, *see Matter of Mendoza Osorio*, 26 I. & N. Dec. 703 (BIA 2016), requiring evidence of a "successful prosecution" to show realistic probability, *id.* at 707 n.4, is irreconcilable with the Supreme Court's language in *Duenas-Alvarez* and *Moncrieffe*. In *Duenas-Alvarez*, the Court spoke only of a realistic probability "that *the State would apply its statute to conduct that falls outside the generic definition of a crime.*" 549 U.S. at 193 (emphasis added). And in *Moncrieffe*, the Court said that "[t]o defeat the categorical comparison," "a noncitizen would have to demonstrate *that the State actually prosecutes the relevant offense.*" 569 U.S. at 206 (emphasis added). If anything, both cases contemplated consideration of only attempted prosecutions, not actual convictions. Deciding otherwise would also leave noncitizens an almost impossible task because, as discussed above, the vast majority of cases are resolved by plea agreement rather than by trial.

CONCLUSION

For these reasons, the Court should not require consideration of the realistic probability of prosecution in each case in which the Court applies the categorical approach.

Respectfully submitted.

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am counsel of record and a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

/s/ Alan E. Schoenfeld

ALAN E. SCHOENFELD

August 8, 2024

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Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i).

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/s/ Alan E. Schoenfeld

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August 8, 2024

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I hereby certify that on this 8th day of August, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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