PEREIDA V. WILKINSON: NON-CITIZEN QUALIFICATION FOR DISCRETIONARY DEPORTATION RELIEF AND THE APPLICATION OF THE CATEGORICAL APPROACH

Chuck Alcock[1]

I. INTRODUCTION

Under the 1952 Immigration and Nationality Act, a nonpermanent resident non-citizen can seek discretionary relief of a lawful removal order when they prove: (1) they have been present in the United States for at least ten years; (2) they have been a person of good moral character; (3) they have not been convicted of certain criminal offenses; and (4) their removal would impose an "exceptional and extremely unusual hardship on a close relative who is either a citizen or permanent resident of the United States."[2] The "convicted of certain criminal offenses" prong includes, crimes involving moral turpitude and crimes in violation of, or a conspiracy or attempt to violate, any law or regulation relating to a controlled substance.[3] A court's determination on whether Congress intended particular federal, state, or local offenses to fall within "crimes of moral turpitude" is complex.[4] Since 1914, federal courts have resolved this issue with a categorical analysis of criminal convictions. [5] This analysis examines the nature of the crime of conviction, as defined by statute.[6] Not infrequently, however, a single criminal statute will list multiple, stand-alone offenses,

---

[1] Juris Doctor Candidate, University of Denver Sturm College of Law. B.A., Indiana University Bloomington. I thank Professor Ian Farrell of the University of Denver Sturm College of Law for his supportive and extensive feedback throughout the development of this case comment. I also thank DENVER LAW REVIEW, Volume 99 Editor in Chief Carolyn Welter and Senior Forum Editor Ellen Blatt for their support during the publication process. Finally, I extend my thanks to all American immigrants for their infusion of culture, perspective, and grace to our nation. May the American legal system support all in her borders striving to prosper.

[2] 8 U.S.C. § 1229a(c)(4); 8 U.S.C. § 1229b(b)(1); Pereida v. Wilkinson, 141 S. Ct. 754, 759 (2021).

[3] 8 U.S.C. § 1182(a)(2)(A)(i).

[4] Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1673 (2011).

[5] U.S. v. Uhl, 203 F. 860, 861 (2d Cir. 1914); Das, *supra* at 1691-92.

[6] Pichardo-Sufren, 21 I. & N. Dec. 330, 335 (B.I.A. 1996); Das, *supra* at 1674.

some of which are crimes of moral turpitude and others of which are not.[7] To analyze these divisible statutes, courts employ a modified categorical analysis, permitting consultation with the record of conviction to determine if it reveals which specific offense was violated by the non-citizen, and if so, whether that offense is a crime of moral turpitude.[8]

This case comment will show that the Supreme Court's recent immigration case, *Pereida v. Wilkinson*,[9] furthers a flawed departure from over a century of immigration law precedent applying the categorical analysis framework.[10] *Pereida* held that a non-resident, having failed to prove that he had not been convicted of a disqualifying crime of moral turpitude, was ineligible to seek to cancel a lawful removal order. *Pereida* was wrongly decided because it treats the question of whether a conviction under a divisible statute as a factual question that a non-citizen seeking cancellation of removal bears the burden to prove. This approach is a departure from the modified categorical approach--namely whether the conviction under the specific offense was necessarily for a crime involving moral turpitude—employed in the Court's precedents.[11]

II. BACKGROUND

The United States Congress first legislated non-citizen removability based on criminal convictions in 1891.[12] The Immigration Act provided that "[p]ersons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude" were subject to removal.[13] The term "convicted" limits the power of immigration officials and courts from trying facts in removal proceedings.[14] This Congressional language was interpreted by courts as allowing analysis solely on a record of conviction, as evidenced in the 1914 Second Circuit decision of *United States v. Uhl*,[15] rather than an analysis of whether the specific facts of the case involved

---

[7] 141 S. Ct. 754 at 763.
[8] Philip L. Torrey, *Unpacking the Rise in Crimmigration Cases at the Supreme Court*, 44 HARBINGER 109, 113 (2020).
[9] 141 S. Ct. 754 at 767.
[10] Das, *supra* at 1702.
[11] *See generally* 141 S. Ct. 754.
[12] Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084; Das, *supra* at 1689.
[13] § 1, 26 Stat. at 1084.
[14] Das, *supra* at 1689-90.
[15] 203 F. 860 (2d Cir. 1914); Laura Jean Eichten, Comment, *A Felony, I Presume? 21 USC § 841(B)'s Mitigating Provision and the Categorical Approach in Immigration Proceedings*, 79 U. CHI. L. REV. 1093, 1099 (2012).

moral turpitude. This first application of the categorical approach, instead of a factual approach was justified by: (1) immigration officers' roles as administrators, not judges of fact; (2) avoidance of adjudicative inefficiencies stemming from courts' in-depth inquiries into the precise facts of past convictions; and (3) justice.[16] The categorical approach avoids unjust legal advantages for non-citizens previously convicted in less-involved trials with less evidence; non-citizens additionally lack control over what is recorded or preserved by a state court that may be processing tens of misdemeanor pleas per day.[17] In modern contexts, *Uhl* continues to be cited to support the use of the categorical approach in immigration proceedings.[18]

The categorical approach is a two-step process: (1) determining the elements of the crime as defined in the relevant statute; and (2) deciding if the statute of conviction necessarily requires those elements to have been proved in the criminal's previous proceeding.[19] In 1933, Attorney General Homer Stille Cummings issued a decision on the methodology for determining whether a non-citizen's conviction constitutes an offense involving moral turpitude, supporting both the categorical approach and the *Uhl* reasoning for its application.[20] The Board of Immigration Appeals ("BIA") was created within the Department of Justice by Congress in 1940, and confirmed the categorical approach on crimes of moral turpitude as a settled judicial principle in 1945.[21]

The BIA simultaneously adopted the modified categorical approach regarding moral turpitude for divisible statutes.[22] When examining a divisible statute, an adjudicator can look at the record of conviction, including "the indictment (complaint or information), plea, verdict, and sentence," to ascertain under which divisible portion of the statute the non-citizen was convicted and whether the offense in that portion, specifically, was morally tupitudinous.[23] If that crime "as defined … does not inherently

---

[16] Eichten, *supra* at 1099-1100.
[17] Transcript of Oral Argument at 8-9, Pereida v. Barr, 140 S. Ct. 1102 (2020) (No. 19-438); Eichten, *supra* at 1100.
[18] Eichten, *supra* at 1099.
[19] *Id.*
[20] 37 Op. Att'y Gen. 293, 293-95 (1933); Das, *supra* at 1695-96.
[21] S—, 2 I. & N. Dec. 353, 357 (A.G. 1945) (citations omitted); Das, *supra* at 1696-97.
[22] 2 I. & N. Dec. 353 at 357; Das, *supra* at 1697.
[23] *Id.*

or in its essence involve moral turpitude" then the non-citizen is not guilty of such a crime.[24]

In 1952, the Immigration and Nationality Act expanded the criminal grounds for removal beyond moral turpitude.[25] With crimes of moral turpitude and the newer grounds, the Department of Justice and courts consistently justified and used the categorical approach as previously articulated in the immigration context until 1990.[26] That year, in a case notably not involving immigration law and not involving moral turpitude, the Supreme Court first articulated the basis for a categorical analysis of criminal convictions in *Taylor v. United States*.[27] The Court applied the categorical approach to determine whether a crime was a "violent felony" under 28 U.S.C. § 922(g)(1) and provided three principal rationales for determining whether a categorical or factual approach is required in the criminal context: (1) the statutory language; (2) legislative intent; and (3) practical difficulties and potential unfairness.[28] In *Taylor*, the Armed Career Criminal Act statutory language of "previous convictions" was not language of merely committing those offenses regardless of conviction; this justified the employment of the categorical approach.[29] Regarding legislative intent, the *Taylor* Court noted that the legislation and legislative history concerned predicate offenses rather than discussions of fact-finding.[30] The Court also referenced the practical difficulty of fact-finding the potential unfairness should this fact-finding reveal a crime greater than any pleaded offense.[31]

This method for determining whether an offense is a "violent crime" under the Armed Career Criminal Act has since been the basis of debate over whether to employ a categorical analysis to determine whether an offense is a crime of "moral turpitude" under the Immigration and Nationality Act.[32] Both Acts include the same "previous convictions"

---

[24] *Id.*
[25] 3 Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.); Das, *supra* at 1698.
[26] Taylor v. U,S,, 495 U.S. 575 (1990); Das, *supra* at 1699-1702.
[27] 495 U.S. 575; Das, *supra* at 1702.
[28] Das, *supra* at 1705.
[29] 18 U.S.C. § 924(e)(1) (2006); 495 U.S. 575 at 600; Das, *supra* at 1705.
[30] 495 U.S. 575 at 601; Das, *supra* at 1705-06.
[31] 495 U.S. 575 at 601-02; Das, *supra* at 1706.
[32] Das, *supra* at 1707.

language and have parallel legislative histories.[33] The fact-finding and justice rationales articulated in *Uhl* persist in the debate as well, rationalizing the categorical approach in Immigration and Nationality Act analyses under *Taylor*.[34] Some courts have applied the criminal-context *Taylor* holding into immigration decisions directly without discussion, while others have analyzed the *Taylor* application with the aforementioned rationales in great detail.[35]

Starting in 2007, the Board of Immigration Appeals used *Taylor* to justify factual, rather than categorical, analyses to classify various crimes as, for example, fraudulent or deceitful, although never as crimes of moral turpitude.[36] However, in 2008, Attorney General Michael B. Mukasey issued a precedential decision in *Matter of Silva-Trevino* permitting a circumstance-specific factual inquiry as a third step in categorical analysis for crimes involving moral turpitude.[37] Where the record of conviction is inconclusive as to whether a non-citizen has been convicted of a crime of moral turpitude, "judges may, to the extent [deemed] necessary and appropriate, consider evidence beyond the formal record of conviction."[38] This affirmed a Seventh Circuit holding from 2008 that immigration courts may go beyond the record of conviction in moral turpitude immigration cases.[39] Thus, courts have justification to go beyond the scope of the formal record of conviction when determining which stand-alone offense within a divisible statute a non-citizen was previously convicted of and whether that stand-alone offense was a crime of moral turpitude.[40] A conflict exists as to whether this third step collapses categorical analysis into factual analysis by removing the record-of-conviction limiting feature that distinguishes the

---

[33] Das, *supra* at 1709; *see, e.g.*, §§ U.S.C. 924(e)(1), 1182(a)(2), 1226(c)(1), 1227(a)(2) (establishing, respectively, criminal grounds of ACCA inadmissibility, INA inadmissibility, INA mandatory detention, and INA deportability).

[34] Eichten, *supra* at 1099-1100.

[35] Das, *supra* at 1709-11; *see, e.g.*, Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2006) (analyzing the applicability of *Taylor* with equal force in the immigration context); Dulal-Whiteway v. Dep't of Homeland Sec., 501 F.3d 116 (2d Cir. 2007) (analyzing the applicability of *Taylor* with equal force in the immigration context).

[36] Das, *supra* at 1711-13; *see, e.g.*, Babaisakov, 24 I. & N. Dec. 306 (B.I.A. 2007) (discussing categorical analysis applicability to the INA's fraud or deceit aggravated felony provision).

[37] Silva-Trevino, 24 I. & N. Dec. 687, 689-90 (A.G. 2008); Das, *supra* at 1714.

[38] *Id.*

[39] Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008); Das, *supra* at 1713.

[40] 141 S. Ct. 754 at 763; 521 F.3d 737 at 743; Das, *supra* at 1713.

analysis from a factual approach, or whether this step is necessary under a categorical approach "to resolve accurately the moral turpitude question."[41]

Courts have since dealt with this conflict. In 2009, the Ninth Circuit held that reliance on plea transcripts to determine a morally tupitudinous.[42] These transcripts were beyond the formal record, in accordance with *Matter of Silva-Trevino*.[43] Yet, in 2011, the Eleventh Circuit stated that the Bureau of Immigration Affairs and an Immigration Judge "erred by considering evidence beyond the record… to determine [whether a non-citizen] had been convicted of a crime of moral turpitude."[44] These differing outcomes highlight the core of the modified categorical approach conflict in the immigration context: must courts rely on the 2008 Attorney General decision or on the long-standing legal precedence of the categorical approach?

This question has been reframed by Professor Sheldon A. Evans. The question is, more generally, should the legal system apply the same rule to all cases or apply similar sanctions in similar cases?[45] On one hand, the categorical approach was conceived to apply consistently irrespective of inconstancy in state law.[46] The analysis, therefore, inherently yields disparate sanctions for similar acts.[47] It is perceptually unjust for the geography of a crime to have a dramatic effect on subsequent sanctions.[48] The intersection of this legal debate and immigration law became more pronounced during the previous decade with the establishment of discretionary deportation relief.

In 2016, the Eighth Circuit established that a non-citizen bears the burden of proof that he was not convicted of an offense that would disqualify him from cancellation of lawful removal.[49] A non-citizen facing a lawful removal order may ask the Attorney General to cancel that order at his discretion, limited by Congress's command that no more than 4,000

---

[41] 24 I. & N. Dec. at 690, 704; Das, *supra* at 1714; *see* Marmolejo-Camps v. Holder, 558 F.3d 903 at 912-13 (9th Cir. 2009).
[42] *See generally* 558 F.3d 903.
[43] 558 F.3d 903 at 906.
[44] Fajardo v. U.S. Atty. Gen., 659 F.3d 1303 at 1311 (2011).
[45] Sheldon A. Evans, *Categorical Nonuniformity*, 120 Colum. Law Rev. 1771, 1800-08.
[46] *Id.* at 1802-03.
[47] *Id.* at 1803.
[48] *Id.* at 1808.
[49] Andrade-Zamora v. Lynch, 814 F.3d 945 at 948.

removal orders may be cancelled each year.[50] Eligibility for this request is governed by the Immigration and Nationality Act, and the requestor must not have been convicted of a crime of moral turpitude, among other requirements.[51]

III. PEREIDA V. WILKINSON

Clemente Avelino Pereida is a citizen of Mexico who entered the United States unlawfully in approximately 1995, and the government secured a lawful order directing his removal.[52] On August 3, 2009, the Department of Homeland Security issued a Notice to Appear charging Pereida with removability.[53] A father of three American citizen children, Pereida may meet two of four Immigration and Nationality Act eligibility requirements for discretionary relief from removal: (1) he has been present in the United States for at least ten years; and (4) his removal may impose an "exceptional and extremely unusual hardship on a close relative who is either a citizen or permanent resident of the United States." No court has ruled on these specific requirements.[54] Courts have ruled on Pereida's eligibility on the third prong, conviction for a crime involving moral turpitude, which impacts his eligibility on the second prong, "good moral character."[55]

Pereida was issued the Notice to Appear due to his conviction for attempted criminal impersonation under Nebraska law, to which he pled no contest.[56] Pereida admitted the factual allegations in the Notice to Appear and conceded the charge of removability.[57] In March 2011, Pereida filed an application for Cancellation of Removal and Adjustment of Status pursuant to 8 U.S.C. § 1229b(b)(1).[58] The Department of Homeland Security filed a Motion to Pretermit Pereida's application in August 2014 on the grounds that he had been convicted of a crime of moral turpitude.[59] An Immigration

---

[50] U.S.C. §§ 1229a(c)(4), 1229b(b)(1), 1229b(e).
[51] U.S.C. §§ 1229b(b)1, 1229a(c)(4).
[52] 141 S. Ct. 754 at 758; Pereida v. Barr, 916 F.3d 1128, 1130 (8th Cir. 2019).
[53] 916 F.3d 1128 at 1130.
[54] 141 S. Ct. 754 at 761; 916 F.3d 1128 at 1130.
[55] 141 S. Ct. 754 at 761 ("Ambiguity about a conviction for a crime involving moral turpitude would seem to defeat an assertion of 'good moral character'"); *see generally* 141 S. Ct. 754.
[56] Neb. Rev. Stat. § 28-608; 916 F.3d 1128 at 1130-31.
[57] 916 F.3d 1128 at 1130.
[58] 8 U.S.C. § 1229b(b)(1); 916 F.3d 1128 at 1130.
[59] 916 F.3d 1128 at 1130.

Judge held that Neb. Rev. Stat. § 28-608 is divisible, and three of four subsections qualified as crimes of moral turpitude because each contained, as a necessary element, the intent to defraud or deceive.[60] The statute reads, in part:

> Under Nebraska law, a person commits criminal impersonation if he:
>
> (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit . . . or to deceive or harm another;
>
> (b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit . . . and to deceive or harm another;
>
> (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or
>
> (d) Without the authorization . . . of another and with the intent to deceive or harm another: (i) Obtains or records . . . personal identifying information; and (ii) Accesses or attempts to access the financial resources of another through the use of . . . personal identifying information for the purpose of obtaining credit, money . . . or any other thing of value.[61]

The Immigration Judge and, subsequently, the Board of Immigration Appeals found no record as to which subsection of the statute Pereida was ultimately convicted of violating, ending both modified categorical analyses and affirming the motion to pretermit.[62] The Supreme Court later held that subsections (a), (b), and (d) indicated crimes of moral turpitude, a view implicitly shared by the Immigration Judge, Board of Immigration Appeals, and Eighth Circuit.[63]

---

[60] 916 F.3d 1128 at 1130-31.
[61] § 28-608.
[62] 916 F.3d 1128 at 1130.
[63] 141 S. Ct. 754 at 760; *see generally* 916 F.3d 1128 (holding that three subsection under Neb. Rev. Stat. § 28-608. qualified as crime of moral turpitude).

Pereida petitioned for review of the Board of Immigration Appeals decision in the Eighth Circuit Court of Appeals.[64] The Court stated "[c]rimes involving moral turpitude have been held to require conduct 'that is inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or society in general."[65] "Crimes involving the intent to deceive or defraud are generally considered to involve moral turpitude."[66] The Eighth Circuit held that the subsection under which Pereida was convicted is undiscernible.[67] Under the Immigration and Nationality Act, the non-citizen bears "the burden of proof to establish that [he] satisfies the applicable eligibility requirements" for cancellation of removal.[68] The court denied Pereida's petition for review, holding that the lack of indication to the subsection of the statute under which Pereida was convicted in the incomplete available record of conviction, neither relieves him of nor fulfills his obligation to prove eligibility for discretionary relief under circuit precedent. The court reached this conclusion despite the fact that the incomplete record was no fault of Pereida's.[69]

On further appeal, the Supreme Court similarly rejected Pereida's argument.[70] The Court held that Pereida's eligibility for discretionary relief required him to show that he had not been convicted of a crime involving moral turpitude.[71] Justice Gorsuch delivered the opinion of the Court, and the lingering uncertainty about whether Pereida was convicted of a crime of moral turpitude was held to be enough to defeat his application for relief.[72] The Court applied the modified categorical approach when examining the divisible Nebraska statute, utilizing a factual inquiry but concluding that Pereida had not proven he violated the non-morally turpitudinous subsection (c).[73] Pereida had not produced any evidence about his crime of conviction before the Immigration Judge and therefore failed to carry his burden of showing that he was not convicted of a crime involving moral turpitude.[74]

---

[64] 916 F.3d 1128 at 1130.
[65] 916 F.3d 1128 at 1131 (quoting Lateef v. Dep't of Homeland Sec., 592 F.3d 926, 929 (8th Cir. 2010)).
[66] 916 F.3d 1128 at 1131-32 (quoting 592 F.3d 926 at 929).
[67] 916 F.3d 1128 at 1132.
[68] *Id.* (quoting U.S.C. § 1229a(c)(4)(A)(i)).
[69] 916 F.3d 1128 at 1133-33; 814 F.3d 945 at 948.
[70] 141 S. Ct. 754 at 757.
[71] *Id.*; 8 U.S.C. §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i), 1229b(b)(1)(C).
[72] 141 S. Ct. 754 at 757, 761.
[73] *Id.* at 762-63.
[74] *Id.* at 763.

The opinion harkens to *Taylor*, stating that, within the categorical approach, determining what crime the previous conviction was for is a question of fact.[75]

Three Justices dissented to this affirmation of the Eighth Circuit holding, with an additional Justice taking no part in the consideration or decision.[76] Justice Breyer presented the dissent, stating the majority's emphasis on Pereida's burden of proof and factual, rather than categorical, analysis was incorrect.[77] A court should simply ask, "[g]iven the fact of Mr. Pereida's conviction, was it necessarily for a crime involving moral turpitude?"[78] This categorical analysis is supported by *Taylor*, meeting all three requirements to initiate said approach.[79] The majority's use of a factual analysis, separate from the precedential categorical approach, is feared to result in precisely the practical difficulties and unfairness that Congress intended to avoid by adopting the categorical approach.[80] Permitting this factual inquiry may: (1) allow parties to introduce a wide range of evidence to establish the crime of conviction, undermining judicial and administrative efficiency; (2) unfairly and unpredictably deprive some non-citizens of the benefits of their negotiated plea deals; and (3) risks hinging eligibility for relief from removal on the varied charging practices of state prosecutors.[81] More importantly, it is illogical to disregard the core feature of the modified categorical approach, consultation solely to the record of conviction, in this case.[82] The dissent views Pereida's prior conviction as not necessarily a crime involving moral turpitude under a straight-forward application of the modified categorical approach, thereby permitting his eligibility for application for discretionary deportation relief.[83]

IV. ANALYSIS

The Court incorrectly decided *Pereida* for three primary reasons.[84] First, the majority's ruling furthers a trend in immigration law of ignoring the purpose and principals of the categorical approach. Second, the majority

---

[75] *Id.*; 495 U.S. 575 at 600.
[76] 141 S. Ct. 754 at 767.
[77] *Id.* at 773.
[78] *Id.* at 774.
[79] *Id.*; 495 U.S. 575 at 600.
[80] 141 S. Ct. 754 at 775.
[81] *Id.* at 775-76.
[82] *Id.* at 777.
[83] *Id.*
[84] *See generally* 141 S. Ct. 754.

placed an improperly high burden of proof on Pereida. Finally, the Court misapplied the modified categorical analysis.

The Court's ignoring of categorical approach purposes and principals is examined first. The Court did not utilize the post-2008 standard that immigration courts may go beyond the record of conviction in moral turpitude immigration cases.[85] However, its use of a factual analysis implies its willingness to hear evidence presented by Pereida beyond the record of conviction.[86] This hypothetical additional evidence would serve the Court's factual approach as to which subsection of the Nebraska statute Pereida was convicted of, rather than acting as the post-2008 third step in categorical analysis for crimes involving moral turpitude.[87] The majority's use of a factual analysis not only undermines the goals of the categorical approach and violates categorical approach precedent,[88] but ignores the Immigration and Nationality Act language that "whether a [non-citizen's] crime is one of moral turpitude is determined by the statutes and record of conviction rather than the [non-citizen's] specific act."[89]

Quite simply, when a categorical analysis applies, immigration adjudicators may not consider extrinsic evidence beyond the record of conviction.[90] This comment takes the arduous position of not only challenging a Supreme Court holding but also challenging the 2008 Attorney General precedential decision in *Matter of Silva-Trevino*, permitting a circumstance-specific factual inquiry as a third step in categorical analysis for crimes involving moral turpitude.[91] Although not explicitly referenced by the majority, this 2008 decision extended the possible information used

---

[85] Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008); Das, *supra* at 1713; *see generally* 141 S. Ct. 754.
[86] *See generally* 141 S. Ct. 754.
[87] Silva-Trevino, 24 I. & N. Dec. 687, 689-90 (A.G. 2008); Das, *supra* at 1714; *see generally* 141 S. Ct. 754.
[88] 495 U.S. 575 at 776-77.
[89] Immigration and Nationality Act, § 237(a)(2)(A)(i), as amended, 8 U.S.C.A. § 1227(a)(2)(A)(i), *What constitutes "crime involving moral turpitude" within meaning of § 212(a)(9) and 241(a)(4) of Immigration and Nationality Act (8 U.S.C.A. § 1182(a)(9), 1251(a)(4)), and similar predecessor statutes providing for exclusion or deportation of aliens convicted of such crime*, 23 A.L.R. Fed. 480.
[90] Das, *supra* at 1674; 21 I. & N. Dec. at 335.
[91] 24 I. & N. Dec. 687 at 689-90; Das, *supra* at 1714.

in a categorical analysis, allowing the Court to challenge the record of conviction's ambiguity as justification for Pereida's eligibility.[92]

Both the 2008 decision and the Court's rationale in *Pereida* undermine the original principals of the categorical approach: (1) immigration officers' roles as administrators, not judges of fact; (2) avoidance of adjudicative inefficiencies stemming from courts' in-depth inquiries into the precise facts of past convictions; and (3) justice.[93]

The majority held that a variety of records and attestations shall be taken as proof of a prior conviction, and Pereida provided none of this to prove he was convicted under section (c).[94] Records may not be part of the original conviction process, and attestations are even less likely to be so. These categories of records certainly qualify as extrinsic evidence beyond the record of conviction. [95] The majority presumed these facts would hurt Pereida, rationalizing their absence.[96] However, the categorical approach concept prohibits this evidence whether the underlying facts help or hurt the non-citizen.[97] The Court's analysis on this topic undermines the categorical approach principal that immigration officers are administrators, not judges of fact.[98] The opinion reads that, had Pereida provided non-litigated evidence that he was convicted of subsection (c), the Court would have ruled that he was eligible for discretionary relief.[99] Although beneficial to Pereida, the Court would be improperly acting as a judge of fact in the categorical approach context.[100] Given this evidence was never provided, the Court acted as an indirectfact-finder in *Pereida*.[101]

The Court, acting as a judge of fact, additionally failed to avoid adjudicative inefficiencies stemming from in-depth inquiries into the precise facts of past convictions.[102] Non-citizens have no control over what is recorded or preserved by a state court.[103] This motivates the categorical

---

[92] *Id.*; *see generally* 141 S. Ct. 754.
[93] Eichten, *supra* at 1099-1100.
[94] 141 S. Ct. 754 at 767.
[95] Das, *supra* at 1674; 21 I. & N. Dec. at 335.
[96] 141 S. Ct. 754 at 767.
[97] Das, *supra* at 1674.
[98] Eichten, *supra* at 1099-1100; *see generally* 141 S. Ct. 754.
[99] 141 S. Ct. 754 at 767.
[100] *See generally* Eichten, *supra* at 1099-1100.
[101] *See generally* 141 S. Ct. 754 at 767.
[102] *See generally Id.*; Eichten, *supra* at 1099-1100.
[103] Transcript of Oral Argument at 8-9, 140 S. Ct. 1102; Eichten, *supra* at 1100.

approach's principal of limiting inefficiencies.[104] As happened in *Pereida*, information necessary to determine which particular subsection of a statute was violated can reasonably be absent as the result of a plea or even time.[105] For example, the Supreme Court was holding a case stemming from a 1985 conviction during the same session as *Pereida*.[106] The Court's willingness to serve as a judge of fact inherently requires discovery for immigration courts ruling on the applicability of a divisible statute with a factually unclear conviction. Allowing testimony to the specifics of each individual crime in a multi-tiered statute invites a trial-within-a-trial that is a disservice to the entire immigration court system.[107]

Most crucially, the majority opinion in *Pereida* undermines the justice principal of the categorical approach.[108] The Supreme Court has held that the immigration penalties, like removal in *Pereida*, are so intimately related to the criminal court process that defense attorneys have a constitutional duty to advise non-citizens of the immigration consequences of their guilty pleas.[109] Deportation is a highly severe penalty. Non-citizens may be more concerned with this possibility than a potential jail sentence or other criminal sanction.[110] If charged under a divisible statute, relying on categorical approach precedent, it may be advisable for a non-citizen to plead guilty and limit the evidence introduced to improve the non-citizen's likelihood of pursuing discretionary deportation relief.[111] The Court implied concern with this potentially nefarious strategy. [112] The categorical approach operates independent of this legal strategy motivation, however.[113]

Although this is a portion of the justice principal, the categorical approach more importantly produces nationwide uniformity.[114] In *Uhl*, the Court stated:

---

[104] Eichten, *supra* at 1099-1100.
[105] Transcript of Oral Argument at 8-9, 140 S. Ct. 1102; *see generally* 141 S. Ct. 754.
[106] Transcript of Oral Argument at 8, 140 S. Ct. 1102.
[107] Transcript of Oral Argument at 24, 140 S. Ct. 1102.
[108] Eichten, *supra* at 1099-1100; *see generally* 141 S. Ct. 754 at 767.
[109] Padilla v. Kentucky, 130 S. Ct. 1473, 1478, 1482, 1486 (2010); Das, *supra* at 1671.
[110] 130 S. Ct. 1473 at 1483 (citing I.N.S. v. St. Cyr, 533 U.S. 289, 322-23 (2001)); Das, *supra* at 1671.
[111] 141 S. Ct. 754 at 771 (" ... efforts to uncover which of several crimes was 'really' at issue can force litigation that the guilty plea avoided.").
[112] *See generally* 141 S. Ct. 754 at 767.
[113] Das, *supra* at 1674.
[114] Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1771 (2020).

> [T]he law must be uniformly administered. It would be manifestly unjust so to construe [a] statute as to exclude one person and admit another where both were convicted of criminal libel, because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offencethan in the latter.[115]

The holding in *Pereida* allows this sort of unjust testimonial distinction to occur in future cases, limiting the justice that the categorical approach was designed to protect.[116]

It may be argued that the very principals that the categorical approach was founded upon are best served with a factual approach. Any state-to-federal sanctioning statute that relies so heavily on state criminal elements will struggle to achieve justice and true nationwide uniformity.[117] There is an inherent incompatibility between an elements-based categorical approach and this nationwide uniformity.[118] Courts imposing federal sanctions are trapped by the different technicalities and vagaries of state law.[119] However, attempting to escape this trap with a factual approach creates new problems. Mini-trials within the immigration court system are inefficient and alter courts' roles from administrators to judges of fact. [120]

Furthermore, the majority opinion in *Pereida* placed an improper burden of proof on Pereida. If the majority applied the categorical approach properly, there would have been no factual analysis or dispute in *Pereida* for any burden of proof to resolve.[121] The sole factual dispute is the fact of a prior of conviction, which precipitates the categorical analysis.[122] In fact, the Government acknowledged at argument that, if this case were just a

---

[115] 210 F. 860 at 863; Das, *supra* at 1691.
[116] *Id.*; *see generally* 141 S. Ct. 754 at 767.
[117] Evans, *supra* at 1775.
[118] *Id.*
[119] *Id.* at 1776; *see* Wayne A. Logan, Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights, 51 WM. & MARY L. REV. 143, 145–47 (2009) [hereinafter Logan, Contingent Constitutionalism] (discussing the national nonuniformity of federal constitutional rights in criminal procedure due to differences in state law); see also Letter from James Madison to Thomas Jefferson (Oct. 24, 1787), in The Founders' Constitution 644, 646 (Phillip B. Kurland & Ralph Lerner eds., 1987) (stating that "mutability" of state laws represented a "serious evil").
[120] Transcript of Oral Argument at 24, 140 S. Ct. 1102.
[121] 141 S. Ct. 773.
[122] *Id.*

categorical approach case, any burden of proof analysis does not apply.[123] Yet, the majority utilized a factual, burden of proof analysis within the categorical approach framework.[124]

However, in 2016, the Eighth Circuit established that a non-citizen bears the burden of proof that he was not convicted of an offense that would disqualify him from cancellation of lawful removal.[125] This analysis must remain within the categorical framework. Pereida can and did properly rely on this approach to meet the burden of proof and to show that he has not been convicted of a disqualifying offense.[126] For decades, the statutory term "convicted" has been understood to require a categorical approach under which a past offense will not lead to mandatory removal or an enhanced sentence unless the record of conviction establishes every element of a federal predicate offense to a legal certainty.[127] Therefore, the presumption is that a conviction under the Nebraska statute stands for nothing more than subsection (c).[128] There is no residual ambiguity for the burden of proof to resolve, as this assumption always governs a categorical analysis.[129] The majority, therefore, properly placed the burden of proof with Pereida, yet he clearly met this burden.[130]

Finally, the categorical approach remained improperly applied without this burden of proof analysis. The categorical approach determines whether a previous state law conviction sufficiently matches the elements of the federal statutory counterpart that justifies imposing deportation for non-citizens.[131] Here, Pereida's state law conviction was determined by the majority to sufficiently match the elements of the Immigration and Nationality Act in part.[132] According to the majority and dissent, subsections (a), (b), and (d) indicated crimes of moral turpitude.[133] Therefore, the modified categorical approach was properly used to determine whether Pereida was convicted of subsection (c), and, if found to be the case, Pereida

---

[123] Transcript of Oral Argument at 53, 140 S. Ct. 1102.
[124] *See generally* 141 S. Ct. 754.
[125] 814 F.3d 945 at 948.
[126] Transcript of Oral Argument at 3, 140 S. Ct. 1102.
[127] *Id.* at 3-4.
[128] *Id.* at 4; Neb. Rev. Stat. § 28-608.
[129] Transcript of Oral Argument at 5, 140 S. Ct. 1102.
[130] *See generally* 141 S. Ct. 754.
[131] Sheldon A. Evans, *Categorical Nonuniformity*, 120 COLUM. L. REV. 1771, 1771 (2020).
[132] 141 S. Ct. 754 at 763.
[133] *Id.* at 760; *see generally* 916 F.3d 1128 (holding that three subsection under Neb. Rev. Stat. § 28-608. qualified as crime of moral turpitude).

would be eligible to seek discretionary relief for deportation.[134] It is the application of this modified categorical approach where the majority erred.

The 2008 *Matter of Silva-Trevino* decision, permitting a circumstance-specific factual inquiry as a third step in categorical analysis for crimes involving moral turpitude is challenged by this comment but precedential in the Court's decision.[135] The Court held that the modified categorical approach applied and required Pereida to provide evidence that he was convicted under subsection (c) under the new, third categorical approach prong; "judges may, to the extent [deemed] necessary and appropriate, consider evidence beyond the formal record of conviction."[136] However, following the aforementioned burden of proof analysis, Pereida had no obligation to provide further "evidence beyond the formal record."[137] The majority found nothing in the traditional formal record of conviction or the newly allowed evidence beyond that record which indicated the subsection which Pereida was convicted of.[138] The resulting proper categorical presumption is that Pereida's conviction stands for nothing more than subsection (c).[139] The majority held differently largely based on a burden of proof analysis, which was incorrect even under the new, post-2008 categorical approach standard.[140]

V. CONCLUSION

With the *Pereida* decision, the Supreme Court continued the federal court trend of undermining the principals of the categorical approach in the immigration context. The 2008 modification to the categorical analysis standard in the immigration context was an unnecessary adjustment that is the foundation for the *Pereida* analysis. However, even in that context, the *Pereida* decision inaccurately applied the modified categorical approach. Non-citizen Pereida met his burden of proof in the categorical approach, and the court should have ruled accordingly. Instead, the court relied on a flawed analysis of the burden of proof to determine that Pereida was ineligible for discretionary relief of removal. The resulting situation is further erosion of well-reasoned and widely applied categorical analysis in

---

[134] 141 S. Ct. 754 at 762-63.
[135] Silva-Trevino, 24 I. & N. Dec. 687, 689-90 (A.G. 2008); Das, *supra* at 1714.
[136] *Id.*; *see generally* 141 S. Ct. 754.
[137] *Id.*
[138] 141 S. Ct. 754 at 763.
[139] *Id.* at 4; Neb. Rev. Stat. § 28-608.
[140] *See generally* 141 S. Ct. 754.

the immigration context which was crucial to efficiency and justice in Immigration and Nationality Act cases for decades.