No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAFAEL MATA-JIMENEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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LIST OF PARTIES

[X] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

QUESTION PRESENTED FOR REVIEW

A noncitizen may not apply for relief from deportation, like asylum and cancellation of removal, if he has been convicted of a disqualifying offense described in the Immigration and Nationality Act. The categorical approach (including its "modified" variant) governs the analysis of potentially disqualifying convictions. Under that approach, a conviction for a state offense that punishes more conduct than a listed federal offense does not carry immigration consequences unless the conviction "necessarily" establishes all elements of the narrower federal offense. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).

Three courts of appeals hold that a state conviction therefore does not bar relief from removal if the state-court record is merely ambiguous as to whether the conviction involved the elements of the generic federal offense. In their view, ambiguity means the conviction does not "necessarily" establish the elements of the federal offense. Four courts of appeals—including the Ninth Circuit below—take the opposite view. They hold that a merely ambiguous conviction is nevertheless disqualifying because, in general, the immigration laws place an evidentiary burden of proof on noncitizens to establish eligibility for relief.

The question presented is: Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act.

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Petitioner, Rafael Mata-Jimenez, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 30, 2019.

INTRODUCTION

Mr. Mata-Jimenez became a victim of the drug cartels while living in Michoacan, Mexico. Consequently, Mr. Mata-Jimenez fled Mexico and arrived at the San Ysidro Port of Entry on July 5, 2014. Upon arrival, he told the immigration officer he feared for his life and could not return to Mexico. Because Mr. Mata-Jimenez

feared returning to Mexico, he was not expeditiously removed, but instead held in immigration detention pending an asylum interview.

An asylum officer determined Mr. Mata-Jimenez established a credible fear of persecution. At his removal hearing, Mr. Mata-Jimenez conceded he was removable because he was not in possession of a valid entry document. However, the Immigration Judge found Mr. Mata-Jimenez was ineligible for relief because he had an aggravated felony. Notably, the Immigration Judge never cited a particular statute of conviction, admitted any conviction documents, or engaged in any type of categorical analysis. The Immigration Judge ordered Mr. Mata-Jimenez removed to Mexico.

In 2016, Mr. Mata-Jimenez returned to the United States and was charged with a violation of 8 U.S.C. § 1326, Reentry of a Removed Alien. Mr. Mata-Jimenez filed a motion to dismiss the indictment based on the invalidity of the 2015 removal order. The district court denied the motion and Mr. Mata-Jimenez entered a conditional guilty plea which allowed him to appeal the denial of his motion to dismiss.

The Ninth Circuit held that Mr. Mata-Jimenez could not demonstrate prejudice as he had been convicted of Cal. Penal Code § 273.5, an aggravated felony. The Ninth Circuit concluded that because Mr. Mata-Jimenez had been convicted of an aggravated felony, he was not eligible for any type of relief from removal. The Ninth Circuit held this was so, despite the fact that no statutory section of conviction or

judicially noticeable documents were even part of the record of the 2015 renewal hearing.

This Court's intervention is necessary. This split is untenable: the immigration laws must have the same meaning throughout the country, especially because the government may choose the forum where it initiates removal proceedings. The question presented will also continue to recur. Immigration courts routinely rely on merely ambiguous records to find noncitizens ineligible for relief from removal.

This is an ideal vehicle to resolve the question. State courts often do not record which portion of a divisible statute formed the basis for a conviction. Even where courts do record that information, they frequently destroy records after a few years—particularly records of misdemeanor and petty offenses. This case exemplifies how the Ninth Circuit's rule requires noncitizens to prove the unprovable and pins their fate on the fortuity of state recordkeeping practices.

Moreover, the Ninth Circuit's opinion is wrong. As the First and Third Circuits have explicitly recognized, the conclusion that an ambiguous record does not bar relief from removal follows directly from this Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013). Under *Moncrieffe*, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Id.* at 190-91. That presumption is rebutted only if the elements of the narrower disqualifying offense "necessarily" were found or admitted. *Id.* at 192. But mere

"[a]mbiguity" with respect to a prior conviction "means that the conviction did not 'necessarily' involve" the elements of a federal offense, and thus is not disqualifying. *Id.* at 194-95.

The Ninth Circuit's approach flips the categorical approach on its head. Rather than presuming a conviction rests on the least of the acts criminalized, the Ninth Circuit's rule presumes it rests on the most of the acts criminalized, unless the noncitizen can show otherwise using only limited conviction records. That rule often places an insurmountable burden on noncitizens, invites arbitrary results, and cannot be squared with this Court's analysis in *Moncrieffe*.

The petition should be granted.

OPINION BELOW

On January 30, 2019, a panel of the Ninth Circuit issued a Memorandum decision affirming the conviction of petitioner after the district court's denial of his motion to dismiss the indictment charging him with illegal reentry after deportation under 8 U.S.C. § 1326.[1] Petitioner filed a petition for rehearing and hearing en banc. On March 7, 2019, the Ninth Circuit issued an Order denying the petition for rehearing and rehearing en banc.[2]

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[1]A copy of the Memorandum is attached as Appendix A.

[2]A copy of the Order is attached as Appendix B.

JURISDICTION

The Ninth Circuit entered judgment on January 30, 2019, Pet. App. A, and denied a petition for rehearing or rehearing en banc on March 7, 2019, Pet. App. B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Immigration and Nationality Act addressing crimes involving aggravated felonies and particularly serious crimes, 8 U.S.C. §§ 1158(b)(2)(A)(ii), 1182(b)(1)(C), 1227(a)(2)(A)(iii), 1231(b)(3)(B)(iii) ; establishing the burden for proving eligibility for relief from removal, 8 U.S.C. § 1229a(c)(4)(A); and governing cancellation of removal for certain permanent and nonpermanent residents, 8 U.S.C. § 1229b(a), (b)(1), are reproduced at Pet. App. C, D, E, H, F, and G respectively. The regulation relating to burdens of proof in relief from removal applications, 8 C.F.R. § 1240.8(d), is reproduced at Pet. App. I. 8 U.S.C. § 1326 regarding Reentry after Removal is reproduced at Pet. App. J.

STATEMENT OF THE CASE

A noncitizen found to be removable from the United States may apply for discretionary relief, including cancellation of removal, withholding of removal, asylum, and withholding of removal under the Convention Against Torture ("CAT") provided he meets certain eligibility requirements. Certain types of convictions, such as aggravated felony convictions, or particularly serious crimes, can act as a bar to

certain types of relief. To determine whether a state conviction meets the definition of an aggravated felony or particularly serious crime, courts traditionally apply the "categorical approach." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015).[3] This approach "looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior," and compares the elements of that offense with the federal definition. *Id.* A state offense is a "categorical" match only if includes all the elements of the federally defined disqualifying offense. *Descamps v. United States*, 570 U.S. 254, 261 (2013).

If the state offense criminalizes conduct that falls outside the federal definition, then a conviction can yield immigration consequences only if the state statute is "divisible." A statute is divisible if it "list[s] elements in the alternative, and thereby define[s] multiple crimes," some of which fall within the scope of the federal definition. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). For "divisible" statutes, courts take an additional step: they look to "a limited class of documents . . . to determine what crime, with what elements, a defendant was convicted of" before proceeding to "compare that crime, as the categorical approach commands, with the relevant generic offense." *Id.* This "modified" variant of the categorical approach is

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[3] The Court has recognized an exception to the categorical approach where the plain text of the INA requires an inquiry into "the specific circumstances in which a crime was committed," as in *Nijhawan v. Holder*, 557 U.S. 29, 38 (2009). That limited exception to the categorical approach is not at issue here.

merely "a tool for implementing the categorical approach." *Descamps,* 570 U.S. at 262. The object is the same—determining whether the crime of conviction meets "all the elements of [the] generic [definition]." *Id.* at 261-62 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

Courts analyzing a prior conviction "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe,* 569 U.S. at 190-91 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (brackets omitted); see also, e.g., *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 n.1 (2018); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017); *Mellouli*, 135 S. Ct. at 1986. That is because the categorical approach looks to "what the state conviction necessarily involved, not the facts underlying the case." *Moncrieffe*, 569 U.S. at 190-91. "By focusing on the legal question of what a conviction necessarily established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 135 S. Ct. at 1987.

A separate statutory section, which does not address the analysis of prior convictions, provides that, "[i]n general," an "alien applying for relief or protection from removal has the burden of proof to establish that the alien . . . satisfies the applicable eligibility requirements." 8 U.S.C. § 1229a(c)(4)(A). A related immigration

regulation similarly imposes a burden on noncitizens to establish their eligibility for relief from removal. 8 C.F.R. § 1240.8(d).

Mr. Mata-Jimenez lived in Michoacan, Mexico, an area where turf wars between the drug cartels began to rapidly intensify. Ultimately, Mr. Mata-Jimenez became a victim of the cartel and he subsequently left for the United States. When Mr. Mata-Jimenez arrived at the San Ysidro Port of Entry on July 5, 2014, he told the immigration officer he feared for his life and could not return to Mexico. Because Mr. Mata-Jimenez feared returning to Mexico, he was not expeditiously removed, but instead held in immigration detention pending an asylum interview.

On July 6, 2014, immigration served Mr. Mata-Jimenez with a Notice to Appear ("NTA") alleging he was inadmissible under INA 212(a)(7)(A)(i)(II). [CR 21.][4] Several weeks later, an asylum officer conducted a credible fear interview and ultimately determined Mr. Mata-Jimenez demonstrated a "credible fear of persecution." [CR 21.] On October 7, 2014 the court held the initial hearing and Mr. Mata-Jimenez conceded the allegations in the NTA. Mr. Mata-Jimenez submitted his application for asylum and cancellation of removal.

At the inception of the January 27, 2015 hearing, the Service informed the court Mr. Mata-Jimenez had a California prior conviction for controlled substance

[4] CR" refers to the Clerk's Record and "ER" refers to the Excerpt of Record, all of which were filed with the Court of Appeals.

trafficking and the conviction would render him ineligible for asylum, cancellation of removal, withholding or removal, and withholding under CAT. The service did not state under which statute Mr. Mata-Jimenez had been convicted, or provide any documents to the court. The court accepted and lodged a number of documents from Mr. Mata-Jimenez detailing the current conditions relating to the cartel in Michoacan. The IJ inquired as to who Mr. Mata-Jimenez feared would torture him. Mr. Mata-Jimenez explained how he feared members of organized crime such as the Knights Templar. Mr. Mata-Jimenez again reiterated the events leading to his arrival at the border; that he had been ordered to pay a "quota" or weekly tax to organized crime members, that he refused to pay, that he consequently left his job and moved to a new city due to the threats, and that eventually members from organized crime showed up in his new home late at night and he escaped by running out of his house. Mr. Mata-Jimenez feared he would be killed if he returned to Mexico.

The Service asked Mr. Mata-Jimenez if he had been convicted of any crimes in the United States. He replied "yes." The Service did not cite a specific statutory offense and inquired as to what type of drug was involved in his prior offense. Mr. Mata-Jimenez informed the Service he was told by the officers it was methamphetamine. Without citing the location of the conviction or the statutory section, the Service also inquired if he Mr. Mata-Jimenez had a conviction for willful

corporal injury. Mr. Mata-Jimenez replied "yes" and confirmed he received a sentence of five years.

The IJ issued her oral decision. The court found Mr. Mata-Jimenez's application for asylum, withholding of removal, cancellation of removal, and withholding under CAT were all pretermitted due to Mr. Mata-Jimenez's prior criminal history, which included a prior deportation in 1998, a prior conviction in California for kidnapping to which he was "apparently ordered to serve time in state prison" for a sentence of five years, and he had a conviction for "intent of manufacturing methamphetamine" in San Bernardino to which he was sentenced to state prison. In support of these findings, the court cited to Mr. Mata-Jimenez's application for cancellation of removal in which he disclosed this basic information. The court also noted Mr. Mata-Jimenez had the burden of proving by a preponderance of the evidence that the grounds for mandatory denial do not apply. The court denied Mr. Mata-Jimenez relief and ordered him deported to Mexico.

After his deportation, Mr. Mata-Jimenez again returned to the United States and was arrested and charged on September 21, 2016, in a one-count indictment alleging a violation of 8 U.S.C. § 1326(a) and (b), Removed Alien Found in the United States. [CR 11; ER 35.] Mr. Mata-Jimenez moved to dismiss the indictment based on the invalidity of the underlying removal order. [CR 21.] He argued the 2015 removal order was invalid because: 1) the IJ erroneously concluded Mr. Mata-Jimenez suffered

a conviction for a "particularly serious crime" and aggravated felony, despite the complete absence of any reference to a specific statute of conviction or any conviction documents in the record; 2) the IJ erroneously placed the burden of proof on Mr. Mata-Jimenez to demonstrate he had not been convicted of a "particularly serious crime" or aggravated felony; and 3) the IJ denied Mr. Mata-Jimenez the ability to apply for numerous types of relief such as cancellation of removal, withholding of removal, asylum, and withholding of removal under CAT.

The district court denied the motion. [CR 21; ER 27-29, 31.] On October 31, 2017, Mr. Mata-Jimenez entered a conditional plea to the indictment, reserving the right to appeal the denial of his motion to dismiss. [CR 28, 31; ER 19, 21.]

A three-judge panel of the Ninth Circuit affirmed the district court's denial of Mr. Mata-Jimenez's motion to dismiss the indictment. The court held Mr. Mata-Jimenez could not demonstrate prejudice as he had been convicted of Cal. Penal Code § 273.5, an aggravated felony. [App. A.] The court concluded that because Mr. Mata-Jimenez had been convicted of an aggravated felony, he was not eligible for any type of relief from deportation. [App. A.] The panel's decision failed to address Mr. Mata-Jimenez's key contention; that at no time did the Department prove he had been previously convicted of an aggravated felony or a particularly serious crime. Instead, the Department did not ever state a statutory section of conviction or provide any

judicially noticeable documents to establish Mr. Mata-Jimenez was ineligible to apply for certain forms of relief.

The Ninth Circuit also erroneously held that a conviction for an aggravated felony negated any prejudice; when in fact a conviction for an aggravated felony only bars an individual from certain types of relief from removal. Finally, the Ninth Circuit's decision relied on the erroneous premise that an individual in removal proceedings bears both the burden of proof and production as to whether they have a prior criminal conviction which bars them from obtaining relief from removal which cannot be reconciled with this Court's holding in *Moncrieffe v. Holder*, 569 U.S. 184 (2013). The Ninth Circuit then denied Mr. Mata-Jimenez's request that the court grant rehearing or rehear the case en banc to reconsider. [App. B.]

SUMMARY OF ARGUMENT AND REASON TO GRANT THE WRIT

I. THE CIRCUITS ARE DEEPLY DIVIDED ON THE QUESTION PRESENTED.

The Circuits are divided on the question of whether an ambiguous record of conviction is enough to bar a noncitizen from even applying for discretionary relief from removal. The First, Second, and Third Circuits hold that it is not: those courts presume that a conviction under a divisible statute rests on the minimum conduct necessary to sustain the conviction, and therefore an ambiguous record of conviction does not "necessarily" establish the elements of the narrower federal definition of a

crime. But the Fourth, Sixth, Ninth, and Tenth Circuits disagree. They have concluded that, because a noncitizen generally bears a burden of proving his eligibility for relief from removal, courts must treat ambiguous convictions as disqualifying unless the noncitizen affirmatively proves that the conviction involved a nondisqualifying prong of the statute.

A. Three circuits hold that an ambiguous record of conviction does not preclude eligibility for relief from removal.

In *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016), a noncitizen was convicted under a divisible state statute but the record of conviction did not reveal whether he was convicted under a prong that would correspond to an offense listed in the Immigration and Nationality Act ("INA"). *Id.* at 531. The court held that *Moncrieffe* "dictates the outcome" in such circumstances: the conviction does not bar the individual from applying for relief from removal. *Id.* Under *Moncrieffe*, courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 531 (quoting *Moncrieffe*, 569 U.S. at 190-91) (internal quotation marks and brackets omitted).

That least-acts-criminalized presumption can be "rebut[ted]" by using the modified categorical approach, *id.* at 531 (citing *Moncrieffe*, 569 U.S. at 191), because the record might establish that the alternative element involved in the

conviction was one that does match the federal offense. But where the record documents "shed no light on the nature of the offense or conviction," such that a court "cannot identify the prong of the divisible . . . statute under which [a noncitizen] was convicted," then nothing rebuts the presumption that the conviction is not disqualifying. *Sauceda*, 819 F.3d at 531-32.

The First Circuit expressly rejected contrary decisions of the Fourth, Ninth, and Tenth Circuits. *Id.* at 532 n.10; see *infra* 17 to 19. Those courts relied on a noncitizen's burden to prove eligibility for immigration relief. But, the First Circuit explained, "the categorical approach—with the help of its modified version—answers the purely 'legal question of what a conviction necessarily established.'" *Sauceda*, 819 F.3d at 533-34 (quoting *Mellouli*, 135 S. Ct. at 1987). So the petitioner's factual burden of proof "does not come into play" in determining whether, "as a matter of law," the state conviction necessarily is a disqualifying federal offense. *Id.* at 532, 534. Because the petitioner's burden does not affect that analysis, the court reasoned, *Moncrieffe's* presumption applies with equal force in the cancellation context. *Id.* at 534 (citing *Moncrieffe's* statement that the analysis "is the same in both [the removability and relief] contexts," 569 U.S. at 191 n.4). The First Circuit also rejected the government's argument that *Moncrieffe's* least-acts-criminalized presumption applies only to categorical-approach cases, and not modified-categorical-approach ones: "[t]he modified categorical approach is not a wholly

distinct inquiry[,]" but rather is a "tool" that "merely helps implement the categorical approach." *Id.* (quoting *Descamps*, 570 U.S. at 263).

The Second Circuit has reached the same conclusion. In *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), a cancellation of removal case, the court rejected the government's reliance on the noncitizen's burden of proof and instead applied the ordinary approach to analyzing a past conviction. *Id.* at 122. The court reasoned that a noncitizen meets his burden "merely by showing that he has not been convicted of [a disqualifying] crime." *Id.* It clarified that "a showing that the minimum conduct for which he was convicted was not [a disqualifying offense] suffices to do this." *Id.* A contrary rule would undermine "[t]he very basis of the categorical approach," which "is that the sole ground for determining whether an immigrant was convicted of [a disqualifying offense] is the minimum criminal conduct necessary to sustain a conviction under a given statute." *Id.* at 121.

The Second Circuit then applied that rule with full force in a case involving the modified categorical approach. See *Scarlett v. U.S. Dep't of Homeland Sec.*, 311 F. App'x 385, 386-87 (2d Cir. 2009) (citing *Martinez*, 551 F.3d at 121-22). *Scarlett* considered "an alien's burden to prove his eligibility for cancellation relief," applied the "modified-categorical approach" to a "divisible" statute, and concluded that because the record of conviction did not conclusively establish a federal offense, it did not render the noncitizen ineligible. *Id.*

The Third Circuit has similarly held that a merely ambiguous record of a prior conviction does not suffice to preclude eligibility for relief from removal. In *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010), the petitioner twice pleaded guilty to a divisible controlled-substances offense. *Id.* at 137-38. Because the "sparse" records of conviction were "silent regarding the factual basis for the guilty pleas," the court could not "conclusively determine that Thomas actually admitted" to conduct that constituted a federal felony; it was "equally plausible that Thomas's admission of guilt under [the state statute] was to conduct which would not constitute a hypothetical federal felony." *Id.* at 144, 147. Accordingly, the court explained, under the categorical and modified categorical approaches, there was no basis to conclude that Thomas was convicted of a crime that met the definition of the disqualifying federal offense. *Id.* at 148.

Following this Court's decision in *Moncrieffe*, the Third Circuit reaffirmed its view in a modified categorical approach case, concluding that where no conviction document "provides any facts indicating [the petitioner] was convicted of an offense that would be an aggravated felony under federal law," the least-acts-criminalized presumption was not displaced and the conviction did not bar an application for asylum relief. *Johnson v. Att'y Gen.*, 605 F. App'x 138, 141-42 (3d Cir. 2015). As the

court put it, "*Moncrieffe* did not change our existing precedent—it confirmed it." *Id.* at 143.

In sum, three circuits share the view that, under the modified categorical approach, a merely ambiguous record of a prior conviction does not automatically preclude eligibility for relief from removal.

B. Four circuits hold that an ambiguous record bars noncitizens from even applying for relief from removal.

The Sixth Circuit recently joined the Tenth Circuit in *Gutierrez v. Sessions*, 887 F.3d 770 (6th Cir. 2018). The court held that "where a petitioner for relief under the INA was convicted under an overbroad and divisible statute, and the record of conviction is inconclusive as to whether the state offense matched the generic definition of a federal statute, the petitioner fails to meet her burden." *Id.* at 779. Acknowledging that "our sister circuits are divided" on the question, *id.* at 775 & n. 5, the court sided with the Tenth Circuit because it was likewise of the view that *Moncrieffe's* least-acts-criminalized presumption is inapplicable both to eligibility for cancellation of removal and to divisible statutes analyzed under the modified categorical approach. 887 F.3d at 776-77.

The Fourth Circuit has also held that an inconclusive record of conviction bars relief from removal. In *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), cert. denied, 565 U.S. 1110 (2012), the court held that "any lingering uncertainty that remains after

consideration of the conviction record necessarily inures to the detriment" of the noncitizen seeking cancellation because of the noncitizen's burden of proof. *Id.* at 114. The Fourth Circuit continues to apply the rule in *Salem* even after *Moncrieffe*. See *Cruzaldovinos v. Holder*, 539 F. App'x 225, 227 (4th Cir. 2013).

The Ninth Circuit shares the same view. In *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012)(en banc) (overruled on other grounds) a majority of six judges agreed that a noncitizen seeking cancellation of removal cannot "establish the absence of a predicate crime . . . with an inconclusive record." *Id.* at 989; *id.* at 992 n. 1 (Ikuta, J., concurring in part and dissenting in part). So the rule in the Ninth Circuit is the same as in the Fourth, Sixth, and Tenth Circuits. See, e.g., *Sauceda*, 819 F.3d at 532 n.10.[5]

The Fifth and Seventh Circuits have suggested in dicta that they would agree with the Fourth, Ninth, and Tenth Circuits (and now with the Sixth Circuit as well). Like the Tenth Circuit, the Fifth Circuit has stated that "*Moncrieffe* . . . does not control" in cases that "concern[] eligibility for relief from removal and not removal

[5] After *Moncrieffe*, one panel of the Ninth Circuit held that *Moncrieffe* abrogated Young. See *Almanza-Arenas v. Holder*, 771 F.3d 1184, 1193 (9th Cir. 2014). But the court granted rehearing en banc, and the en banc court resolved the case on different grounds, so Young's status remained an open question. See *Almanza-Arenas v. Lynch*, 815 F.3d 469, 474 n.6 (9th Cir. 2016) (en banc). More recently, a different Ninth Circuit panel held that *Young* survives *Moncrieffe*, squarely rejecting *Sauceda*. See *Marinelarena v. Sessions, 869 F.3d 780, 788-790* (9th Cir. 2017). But the Ninth Circuit ordered *Marinelarena* to be heard en banc, and argument was held on September 27, 2018, but an opinion has not yet been issued. *Marinelarena v. Sessions*, 886 F.3d 737 (9th Cir. 2018). So, once again, *Young* remains controlling in the Ninth Circuit. The pending en banc proceedings could only deepen the post-*Moncrieffe* split if the Ninth Circuit switches sides by overruling *Young*.

itself." *Le v. Lynch*, 819 F.3d 98, 107 (5th Cir. 2016). But the Fifth Circuit has expressly reserved the question presented here. See *id.* at 107 n.5; *Gomez-Perez v. Lynch*, 829 F.3d 323, 326 & n.1 (5th Cir. 2016). The Seventh Circuit too has noted that it "agree[d] with "the Fourth, the Ninth, and the Tenth Circuits. . . . that if the analysis has run its course and the answer is still unclear [whether a conviction meets the definition of a listed offense], the alien loses by default," but it ruled for the noncitizen on different grounds in that case. *Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014).

The BIA also shares the same view. See *Matter of Almanza-Arenas*, 24 I. & N. Dec. 771, 774-76 (BIA 2009). It continues to apply that rule wherever it is not foreclosed by circuit law. See, e.g., *In re Rodriguez-Moreno*, No. A201-072-781, 2017 WL 2376471, at *2 (BIA Apr. 24, 2017) (8th Cir.).

The decision below, in contrast, holds that an ambiguous record (or even an absent record) of conviction is disqualifying. The conflict is direct and explicit, with courts on both sides expressly rejecting each others' views. The division is also intractable. Further percolation in light of this Court's most recent cases won't resolve it: even since *Moncrieffe* and *Descamps* clarified the categorical and modified categorical approaches, courts have split three (Fourth, Sixth, and Tenth Circuits) to two (First and Third Circuits). Only this Court's intervention can restore the uniformity of the nation's immigration law that the Constitution mandates.

II. The Question Presented Is Important And Recurring.

The stakes of deportation are "high and momentous," *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); it is "the equivalent of banishment or exile," *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (citation omitted). Deportation thus "cannot be made a sport of chance" that turns on the circuit in which a removal proceeding takes place. *Judulang v. Holder*, 565 U.S. 42, 58-59 (2011) (internal quotation marks omitted). Further, because the venue for removal proceedings is in the government's control, see 8 C.F.R. §§ 1003.14(a), 1003.20(a), a noncitizen detained in Massachusetts, where an ambiguous conviction would not be disqualifying, could well be transferred to a facility and placed into removal proceedings in Colorado, where it would.

This issue also recurs regularly, both in court (as the many recent cases in the split illustrate) and even more commonly in proceedings before immigration judges, the BIA, and frontline immigration adjudicators. It affects every immigration benefit that a past conviction could preclude. See, e.g., 8 U.S.C. § 1158(b)(2)(B)(i) (asylum); 8 U.S.C. § 1229b(a)(3) (cancellation of removal for permanent residents); 8 U.S.C. § 1229b(b)(1)(C) (cancellation of removal for nonpermanent residents); 8 U.S.C. § 1229b(b)(2)(A)(iv) (cancellation of removal for nonpermanent residents who have been battered); 8 U.S.C. §§ 1255(a), 1182(a)(2)(A)(i) (adjustment of status for relatives of permanent residents and U.S. citizens); 8 U.S.C. §§ 1255(l)(1)(B),

1255(h)(2)(B) (adjustment of status for trafficking victims and juveniles granted special immigrant juvenile status); 8 U.S.C. § 1427(a)(3) (naturalization). Because immigration courts look to past convictions as a threshold step to pretermit applications for relief, and because many conviction records are unclear, the effect of an uncertain record of conviction will often be an enormously consequential question.

And it is not uncommon that a record of conviction will be missing or inconclusive. This Court has long understood and accepted that "in many cases state and local records . . . will be incomplete." *Johnson*, 559 U.S. at 145. This "common-enough" occurrence "will often frustrate application of the modified categorical approach." *Id.* Indeed, records are particularly likely to be devoid of detail in the plea context, where the particular prong of a statute giving rise to a conviction need not be specified if it does not affect the agreed-upon sentence. Cf. *Descamps*, 570 U.S. at 270-71 (observing that defendants are unlikely to "irk the prosecutor or court by squabbling about superfluous [details]").

Where courts do happen to record more detailed information, they may have a practice of destroying records after a few years, especially for minor convictions. Colorado, for example, allows courts to destroy certain categories of "Misdemeanor Case Files" just "4 years from the year of filing," and court reporter notes for cases

prosecuted in county court after two years.[6] Oklahoma authorizes destruction of misdemeanor records after five years. See Okla. Stat. tit. 20, §§ 1002, 1005(A)(6)(b). The problem is particularly prevalent in the Ninth Circuit: California courts, for example, retain records for misdemeanor convictions for five years, and for certain marijuana offenses, only two. Cal. Gov't Code § 68152(c)(7)-(8). North Carolina courts do not even create a transcript or a recording of most misdemeanor proceedings.[7]

These short retention periods matter because convictions that are years or even decades old are often raised as potential bars to relief from removal. The convictions in *Thomas*, for example, were 12 and 13 years old—"dated, to say the least." 625 F.3d at 144; see also *Kuhali v. Reno*, 266 F.3d 93, 98 (2d Cir. 2001) (DHS initiated proceedings nearly 19 years after plea). So, whether details of prior convictions were never recorded in the first place or they were lost to time, uncertain records of conviction are commonplace. And, everywhere outside the First, Second, and Third Circuits, that fortuity will have a significant impact on the availability of relief.

[6]Colorado Judicial Branch, Record Retention Manual (Mar. 22, 2017), https://tinyurl.com/ybdz5s62.
[7]North Carolina Administrative Office of the Courts, The North Carolina Judicial System 27-28 (2008 ed.), https://ti- nyurl. com/ycqc2n9v.

III. This Case Is A Clean And Representative Vehicle To Resolve The Conflict.

This case presents an ideal vehicle to resolve this conflict. The question is squarely presented: the Immigration Judge, and the Ninth Circuit each held, based on longstanding Ninth Circuit precedent, that Mr. Mata-Jimenez carried the burden of proving that an ambiguous conviction was disqualifying.

The question presented was also the dispositive issue below. The Ninth Circuit's holding that Mr. Mata-Jimenez's removal, and subsequent conviction was valid, rested solely on its conclusion that Mr. Mata-Jimenez was ineligible for relief from removal, despite an inconclusive record of conviction.

And the question presented is outcome determinative. Because it is undisputed that Mr. Mata-Jimenez's record of conviction is inconclusive, a ruling that ambiguous convictions fail to satisfy the modified categorical approach would mean that his conviction is not disqualifying.

This case also presents a highly representative context to resolve the question presented and exemplifies how a noncitizen's fate may depend on the existence of records he neither creates nor maintains.

IV. The Decision Below Is Incorrect.

The Ninth Circuit's position is incompatible with *Moncrieffe*, as well as *Descamps* and *Mellouli*. Mr. Mata-Jimenez's eligibility for relief turned on whether

he had been convicted of an aggravated felony or a particularly serious crime. As *Moncrieffe* held, the inquiry into "what offense the noncitizen was 'convicted' of" requires courts to examine whether "a conviction of the state offense 'necessarily' involved . . . facts equating to the generic federal offense." *Moncrieffe*, 569 U.S. at 190-91 (brackets omitted).

The key word is "necessarily." "Because [courts] examine what the state conviction necessarily involved, not the facts underlying the case, [courts] must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 190-91 (emphasis added) (brackets omitted); see also *Esquivel-Quintana*, 137 S. Ct. at 1568 (same). That is, the categorical approach asks "the legal question of what a conviction necessarily established." *Mellouli*, 135 S. Ct. at 1987. Under *Moncrieffe* and *Mellouli*, then, when a state statute sweeps in conduct that exceeds the federal definition, a conviction under that statute presumptively is not disqualifying.

This least-acts-criminalized presumption may be rebutted by using the modified categorical approach, but only if the "record of conviction of the predicate offense necessarily establishes" that the "particular offense the noncitizen was convicted of" was the narrower offense corresponding to a disqualifying crime. *Moncrieffe*, 569 U.S. at 190-91, 197-98 (emphasis added). If the record does not

necessarily establish as much, the least-acts-criminalized presumption is not displaced. Accordingly, "[a]mbiguity" about the nature of a conviction "means that the conviction did not 'necessarily' involve facts that correspond to [the disqualifying offense category]," and so the noncitizen "was not convicted of [the disqualifying offense]," as a matter of law. *Id.* at 194-95 (emphasis added). Here, the IJ had no conviction documents, nor any reference to any particular statute of conviction. That evidence, or lack thereof, does not amount to proof of an aggravated felony or particularly serious crime. Moreover, the immigration court and the Ninth Circuit held that a noncitizen with an inconclusive record of conviction is ineligible even to apply for relief because the immigration laws place a generally applicable burden on noncitizens to prove their eligibility for immigration relief. But that burden applies to factual questions of eligibility.[8] This burden of proof, however, does not apply to legal questions. See, e.g., *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring) (an "evidentiary standard of proof applies to questions of fact and not to questions of law"); *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) ("The purpose of a standard of proof is 'to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of

[8]This is consistent with the common understanding that the "preponderance of the evidence" standard, referred to in 8 C.F.R. § 1240.8(d), applies to factual inquiries. See generally *2 McCormick on Evidence* § 339 (7th ed. 2016).

adjudication.'") (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (emphasis added)).

In applying the modified categorical approach, a court "answers the purely 'legal question of what a conviction necessarily established.'" *Sauceda*, 819 F.3d at 534 (quoting *Mellouli*, 135 S. Ct. at 1987). That means that the burden of proof "does not come into play." *Id.* The effect of the Ninth Circuit's rule is to require that a conviction be assumed to rest on the most serious of the acts criminalized by a divisible statute, unless a noncitizen can affirmatively prove that his conviction was based on a prong of a divisible statute that would not correspond to an aggravated felony. That conclusion turns this Court's reasoning upside down and improperly reverses *Moncrieffe*'s legal presumption.

Moreover, under the Ninth Circuit's rule, an ambiguous conviction would not count as an aggravated felony at the removal stage of proceedings, where the government bears the burden of proof, yet it would count as an aggravated felony at the relief stage, where the noncitizen bears the burden. That outcome is flatly inconsistent with *Moncrieffe*'s holding that the analysis of a prior conviction operates the "same in both [the removal and cancellation] contexts," 569 U.S. at 191 n.4. Congress did not intend to make applicants for relief from removal prove the unprovable by requiring them to establish the basis of their conviction using only Shepard documents that may no longer exist, and that, if they do exist, may not

answer the question. Instead, as always under the modified categorical approach, unless the conviction record conclusively establishes a disqualifying offense, the offense is presumptively not disqualifying.

CONCLUSION

For these reasons, Petitioner asks this Court to grant this Petition for Writ of Certiorari.

Respectfully submitted,

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