No.

IN THE

Supreme Court of the United States

CLEMENTE AVELINO PEREIDA,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A noncitizen may not apply for relief from deportation, including asylum and cancellation of removal, if he has been convicted of a disqualifying offense listed 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 does not carry immigration consequences unless it "necessarily" establishes all elements of the potentially corresponding federal offense. *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013).

Accordingly, four courts of appeals hold that a state conviction does not bar relief from removal if the state-court record is merely ambiguous as to whether the conviction involved the elements of the corresponding federal offense. In their view, ambiguity means the conviction does not "necessarily" establish the elements of the federal offense. Four other courts of appeals—including the Eighth Circuit below—take the opposite view. They hold that a merely ambiguous conviction is nonetheless disqualifying because 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.

RELATED PROCEEDINGS

Pereida v. Barr, No. 17-3377 (8th Cir.) (opinion and judgment issued Mar. 1, 2019)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Statutes

Regulations

Other Authorities

INTRODUCTION

Petitioner Clemente Avelino Pereida came to the United States from Mexico nearly 25 years ago. He was not lawfully admitted to the United States, so, in his deportation proceeding, he conceded he is removable. But he applied for cancellation of removal because of the "exceptional and extremely unusual hardship" his removal would cause his U.S.-citizen child. 8 U.S.C. § 1229b(b)(1)(D).

Mr. Pereida's eligibility for cancellation turned on whether his prior Nebraska conviction for "attempted criminal impersonation"—a misdemeanor for which the only punishment he received was a $100 fine—disqualified him. If the conviction counted as a "crime involving moral turpitude" (CIMT) under federal immigration law, then it would not only render Mr. Pereida deportable, but also bar him from this form of discretionary relief from removal. 8 U.S.C. § 1229b(b)(1)(C); *see also* §§ 1182(a)(2), 1227(a)(2).

The Eighth Circuit held that Mr. Pereida was ineligible for cancellation because he had not negated the possibility that his conviction could qualify as a CIMT. The Eighth Circuit agreed with Mr. Pereida that not all convictions under the Nebraska criminal statute count as CIMTs as defined by federal law, because at least one prong of the statute does not require proof of fraudulent intent. The court also agreed that the record of Mr. Pereida's conviction did not show that he *was* convicted under one of the disqualifying prongs of the statute; it was simply inconclusive in that regard. The court nevertheless held that Mr. Pereida was barred from seeking cancellation of

removal because he had not affirmatively proven that he was *not* convicted under a disqualifying prong. The court cited provisions of the Immigration and Nationality Act (INA) and immigration regulations that place a generally applicable burden of proof on noncitizens to establish their eligibility for relief from removal. 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d). It believed that this *evidentiary* burden was relevant to—and dispositive of—the *legal* analysis of an ambiguous record of conviction under the so-called "modified categorical approach."

As seven courts of appeals have openly acknowledged, the circuits are divided on the question presented. The First, Second, Third, and Ninth Circuits have reached the opposite conclusion from the Eighth Circuit: They hold that a conviction does not automatically bar relief from removal when the record of conviction is inconclusive. In their view, a merely ambiguous record cannot overcome the legal presumption that a "conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (brackets omitted). The Fourth, Sixth, and Tenth Circuits agree with the Eighth Circuit that an ambiguous record of conviction is *always* disqualifying because it does not disprove the possibility that the offense falls within the federal definition of a disqualifying offense. Under that rule, an ambiguous record bars a noncitizen from any opportunity even to argue that he merits relief from removal.

This Court's intervention is necessary. The immigration laws must have the same meaning throughout the country. The question presented will also

continue to recur. In the short time since this question was last presented to this Court a year ago, two more circuits have weighed in, reaching opposite conclusions. So the split will not resolve itself.

This case also presents an ideal vehicle to resolve the conflict. The question presented was "the heart of the matter in this particular case" and was squarely addressed below. Pet. App. 7a-8a. And the vehicle problems cited by the government in last year's petitions are not present here.

Moreover, the Eighth Circuit's opinion is wrong. As the First, Third, and Ninth Circuits have recognized, the conclusion that an ambiguous record cannot bar relief from removal follows directly from this Court's decision in *Moncrieffe*. Under *Moncrieffe*, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." 569 U.S. at 190-91 (brackets omitted). That presumption is rebutted only if the "record of conviction of the predicate offense *necessarily* establishes" the elements of the narrower disqualifying offense defined by federal law. *Id.* at 197-98 (emphasis added). 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.

In short, the Eighth Circuit's approach flips the categorical approach on its head. Rather than presuming a conviction rests on the *least* of the acts criminalized, the Eighth Circuit's rule presumes it rests on the *more* serious acts criminalized unless the noncitizen can show otherwise—using only limited

conviction records that may no longer exist and may never have clarified the basis for the conviction in the first place. That rule often requires noncitizens to prove the unprovable, pinning their fates on the fortuity of state recordkeeping practices.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The decision of the Eighth Circuit is reported at 916 F.3d 1128 and reproduced at Pet. App. 1a-10a. The order denying rehearing en banc is reproduced at Pet. App. 31a-32a. The decisions of the Board of Immigration Appeals and Immigration Judge are unreported and reproduced at Pet. App. 11a-19a and 20a-30a, respectively.

JURISDICTION

The Eighth Circuit entered judgment on March 1, 2019, Pet. App. 1a, and denied a timely petition for rehearing en banc on July 2, 2019, Pet. App. 31a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the INA addressing crimes involving moral turpitude, 8 U.S.C. §§ 1182(a)(2)(A)(i), 1227(a)(2)(A)(i); 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. 33a-34a, 35a, 36a, and 37a-38a, respectively. The regulation relating to burdens of proof on

applications for relief from removal, 8 C.F.R. § 1240.8(d), is reproduced at Pet. App. 39a-40a. The Nebraska provisions addressing attempt, Neb. Rev. Stat. § 28-201 (2008), and criminal impersonation, Neb. Rev. Stat. § 28-608 (2008), are reproduced at Pet. App. 41a-42a, and 43a-44a, respectively.

STATEMENT

1. Noncitizens may be ordered removed from the United States if they have not been lawfully admitted or have been convicted of certain crimes. 8 U.S.C. § 1227(a)(1)(B), (a)(2). "Ordinarily, when a noncitizen is found to be deportable on one of these grounds, he may ask the Attorney General for certain forms of discretionary relief from removal," including asylum and cancellation of removal. *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013). To apply for relief from removal, however, a noncitizen must meet certain eligibility requirements. Both lawful permanent residents and nonpermanent residents are ineligible for asylum and cancellation if they have been convicted of an aggravated felony. 8 U.S.C. § 1158(b)(2)(A)(ii), (b)(2)(B)(i) (asylum); 8 U.S.C. § 1229b(a)(3), (b)(1)(C) (cancellation of removal). Nonpermanent residents are also ineligible for cancellation if they have been convicted of one of several other categories of lower-level crimes, including, as relevant here, "a crime involving moral turpitude [CIMT]." 8 U.S.C. § 1182(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i). *See* 8 U.S.C. § 1229b(b)(1)(C).

To determine whether a state conviction meets the definition of an offense described in the INA, such as a CIMT, courts apply the "categorical approach."

Mellouli v. Lynch, 135 S. Ct. 1980, 1986 (2015). This approach has a "long pedigree in our Nation's immigration law." *Moncrieffe*, 569 U.S. at 191 (noting it has applied since 1913). It "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. *Mellouli*, 135 S. Ct. at 1986.[1]

A state offense is a "categorical" match only if it includes all the elements of the federally defined offense. *Descamps v. United States*, 570 U.S. 254, 261 (2013). If the state statute criminalizes any conduct that falls beyond the federal definition, then the statute is "overbroad" and not a categorical match. But a conviction under the statute can still yield immigration consequences if the state statute is "divisible," meaning that it "list[s] elements in the alternative, and thereby define[s] multiple crimes," at least one of which falls within the scope of the federal definition. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). For these "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 "compar[ing] that crime, as the categorical approach commands, with the relevant generic offense." *Id.* This "modified" variant of the categorical approach is

[1] 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 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 necessarily 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 (brackets omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). That is because the categorical approach looks to "what the state conviction necessarily involved, not the facts underlying the case." *Id.* "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 section of the INA, which does not specifically 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).

2. Petitioner Clemente Avelino Pereida is a 48-year-old native and citizen of Mexico. Pet. App. 3a. He has lived in the United States for nearly 25 years. Pet.

App. 3a. He has a wife and three children, all of whom reside in the United States. Pet. App. 3a; Certified Administrative Record (C.A.R.) 125, 127. One of his children is a U.S. citizen and another is a Deferred Action for Childhood Arrivals recipient. C.A.R. 115, 127. To provide for his family, Mr. Pereida has worked difficult jobs in construction and cleaning. Pet. App. 3a; C.A.R. 126; *see* C.A.R. 178-91, 362-445 (tax returns going back to 2001).

3. The government charged Mr. Pereida as removable for being unlawfully present in the United States. Pet. App. 3a. Mr. Pereida conceded removability but applied for cancellation of removal to spare his U.S.-citizen son the extraordinary hardship he (and other members of his family) would face if the family were forced to live without their father and primary breadwinner. Pet. App. 3a, 12a; C.A.R. 104, 124-31. Mr. Pereida's eligibility for cancellation turned on whether he had been convicted of a "crime involving moral turpitude." 8 U.S.C. § 1229b(b)(1)(C); *see* § 1182(a)(2)(A)(i)(I).

An immigration judge (IJ) concluded that Mr. Pereida's misdemeanor conviction for attempted criminal impersonation under Neb. Rev. Stat. §§ 28-201 & 28-608 (2008) counted as a CIMT.[2] The IJ therefore could not even consider Mr. Pereida's application for relief from removal. Pet. App. 25a-30a. That conviction arose from Mr. Pereida's plea of no

[2] Convictions for attempt to commit CIMTs are treated as CIMTs. 8 U.S.C. § 1182(a)(2)(A)(i)(I).

contest to the misdemeanor attempt charge; he received no jail time and was required to pay only a $100 fine. C.A.R. 162-65.

The IJ agreed with Mr. Pereida that a violation of § 28-608 is not *categorically* a CIMT because, to meet the federal CIMT definition, a crime must "involve[] a reprehensible act accompanied by some degree of scienter." Pet. App. 22a. Whereas some Nebraska criminal impersonation offenses are CIMTs because they "contain[] as a necessary element the intent to defraud, deceive, or harm," one subsection of the Nebraska statute, subsection (c), requires no such intent. Pet. App. 26a-27a.

The IJ therefore examined the conviction under the modified categorical approach. Pet. App. 27a. The IJ concluded that the "course of conduct" alleged in the criminal complaint would have involved criminal intent, and thus Mr. Pereida must not have been "convicted of attempting … subsection (c)," and thus the conviction was a CIMT. Pet. App. 27a; *see also* C.A.R. 165.

4. The Board of Immigration Appeals (BIA) dismissed Mr. Pereida's appeal. Pet. App. 18a. Like the IJ, it determined that § 28-608 was overbroad because subsection (c) is not a CIMT. Pet. App. 14a-15a. It then went on to conclude that § 28-608 was divisible. Pet. App. 15a. In its application of the modified categorical approach, however, the BIA disagreed with the IJ's conclusion that the record of conviction affirmatively established a CIMT, because mere allegations in a criminal complaint cannot be considered,

and the conviction record "does not specify the particular subsection of the substantive statute [Mr. Pereida] was ultimately convicted of violating." Pet. App. 17a.

The BIA nonetheless held that Mr. Pereida was ineligible for relief. Pet. App. 17a. It noted that "[i]n the context of relief for removal, the respondent bears the burden of proving that his particular conviction does not bar relief." Pet. App. 17a. Because the record of conviction did not specify which subsection of § 28-608 Mr. Pereida attempted to violate, the BIA ruled that Mr. Pereida had "not carried his burden of proving that his conviction is not CIMT." Pet. App. 17a.

5. The Eighth Circuit denied Mr. Pereida's petition for review. Pet. App. 10a. It first concluded that Nebraska's criminal impersonation statute is overbroad and divisible. Pet. App. 7a. The modified categorical approach therefore applied. The Eighth Circuit then turned to "the heart of the matter in this particular case," which was the impact of the Court's inability "to discern the subsection of § 28-608 under which Pereida was convicted." Pet. App. 7a-8a.

Relying on its prior decision in *Andrade-Zamora v. Lynch*, 814 F.3d 945, 949 (8th Cir. 2016), the court noted that "[w]hile the government bears the burden to prove the alien is deportable or removable, it is the alien's burden under the INA to prove he is eligible for cancellation of removal." Pet. App. 8a-9a. Because "it is not possible to ascertain which subsection formed the basis for Pereida's conviction," the Eighth

Circuit held that Mr. Pereida must "bear[] the adverse consequences of this inconclusive record." Pet. App. 2a. Accordingly, even though Mr. Pereida was "not to blame for the ambiguity surrounding his criminal conviction," the court held that the ambiguity rendered him legally ineligible for relief from removal. Pet. App. 8a.

6. The Eighth Circuit denied rehearing en banc. Pet. App. 31a. Mr. Pereida is currently at liberty and remains at home in Nebraska.

REASONS FOR GRANTING THE PETITION

I. There Is An Acknowledged And Deep Conflict On The Question Presented.

The circuits are deeply divided on the question whether an ambiguous record of conviction renders a noncitizen ineligible for discretionary relief from removal. The First, Second, Third, and Ninth Circuits hold that it does not: Those courts presume that a conviction under a divisible statute rests on the minimum conduct necessary to sustain the conviction, and therefore hold that an ambiguous record of conviction does not "necessarily" establish the elements of the narrower federal definition of a crime. But the Fourth, Sixth, Eighth, and Tenth Circuits hold that, because a noncitizen generally bears a burden of proving his eligibility for relief from removal, courts must treat ambiguous convictions as *dis*qualifying unless the noncitizen affirmatively proves that the conviction involved a nondisqualifying prong of the statute.

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

In *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016), as here, the noncitizen was convicted under a divisible state statute, but the record of conviction did not reveal whether he was convicted of a prong of the statute that would correspond to an offense listed in the INA. *Id.* at 531. The court held that *Moncrieffe* "dictates the outcome" where conviction records are ambiguous: 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.* (internal quotation marks and brackets omitted) (quoting *Moncrieffe*, 569 U.S. at 190-91). That least-acts-criminalized presumption can be "rebut[ted]" by using the modified categorical approach if the record establishes that the elements involved in the conviction necessarily match the federal offense. *Id.* (citing *Moncrieffe*, 569 U.S. at 191). But where the record documents "shed no light on the nature of the offense," 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. *Id.* at 531-32.

The First Circuit expressly rejected contrary decisions from other courts—including the Tenth Circuit, whose rule the Eighth Circuit adopted here. *Id.* at 532 n.10; *see* Pet. App. 8a-9a; *infra* 17. 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 noncitizen's *evidentiary* 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.

More recently, the en banc Ninth Circuit sided with the First Circuit. *See Marinelarena v. Barr*, 930 F.3d 1039, 1047 & n.6, 1048 n.7 (9th Cir. 2019) (en banc). The court held that, "[u]nder *Moncrieffe*, ambiguity in the record as to a petitioner's offense of conviction means that the petitioner has *not* been convicted of an offense disqualifying her from relief." *Id.* at 1047. That is because "the categorical approach, and by extension the modified categorical approach," is "focused on whether a petitioner was 'necessarily' convicted of a disqualifying offense." *Id.* at 1049 (quoting *Moncrieffe*, 569 U.S. at 190-91). So, if "the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes." *Id.* at 1048.

The Ninth Circuit expressly "declin[ed] to follow the Tenth, Sixth, and Eighth Circuits." *Id.* at 1047 n.6. The Ninth Circuit majority and dissent both addressed the Eighth Circuit's decision in this case specifically. *Id.*; *see also id.* at 1056-57, 1061 n.13 (Ikuta, J., dissenting). Like the First Circuit, the Ninth Cir-

cuit rejected these other courts' reliance on the noncitizen's burden of proof, because the analysis of prior convictions "poses a fundamentally legal question," which is "unaffected by statutory burdens of proof." *Id.* at 1049 (majority op.). Whether "the record of conviction necessarily establishe[s] the elements of the disqualifying federal offense 'is a legal question with a yes or no answer'"; the conviction documents "either show that the petitioner was convicted of a disqualifying offense …, or they do not." *Id.* at 1049-50.[3]

Even before *Moncrieffe* formalized the least-acts-criminalized presumption, the Second and Third Circuits had reached the same conclusion. In *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), another cancellation case, the Second Circuit rejected the government's reliance on the noncitizen's burden of proof and instead applied the traditional categorical approach to analyze a past conviction. *Id.* at 121-22. The court reasoned that a noncitizen satisfies his statutory "burden of proving that he is eligible for cancellation relief" by "showing that the minimum conduct for which he was convicted was not [disqualifying]." *Id* at 122. 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; *see also Scarlett v. U.S. Dep't of Homeland Sec.*, 311 F. App'x

[3] The Ninth Circuit had previously taken the other side of the split in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc). *Marinelarena* overruled that decision. 930 F.3d at 1042.

385, 386-87 (2d Cir. 2009) (applying *Martinez* in a case involving the modified categorical approach).

The Third Circuit has similarly held that a merely ambiguous record of a prior conviction does not preclude eligibility for relief from removal. In *Thomas v. Attorney General*, 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" record of conviction was "silent regarding the factual basis for the guilty pleas," the court could not "conclusively determine that Thomas actually admitted" to conduct that constituted a more serious drug offense that would render him ineligible for relief from removal. *Id.* at 146-47. Rather, it was "equally plausible that Thomas's admission of guilt under [the state statute] was to conduct which would *not* constitute" the more serious offense. *Id.* at 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 *Moncrieffe*, the Third Circuit reaffirmed its view in a modified-categorical-approach case. *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.[4]

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[4] The decision below suggested the Third Circuit took the opposite position in *Syblis v. Attorney General*, 763 F.3d 348 (3d Cir. 2014). *See* Pet. App. 9a. But *Syblis* applied a circumstance-specific inquiry that required examination of the actual conduct

In sum, four circuits share the view that, under the modified categorical approach, a merely ambiguous record of a prior conviction does not bar eligibility for relief from removal. And, as the First, Second, and Ninth Circuits have specifically explained, the immigration laws' burden-of-proof provisions do not bear on the purely legal, categorical analysis of what a conviction "necessarily" establishes.

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

The decision below, in contrast, holds that an ambiguous record of conviction *is* legally disqualifying. The Eighth Circuit explained that Mr. Pereida must "bear[] the adverse consequences of this inconclusive record" because it is his "burden to establish his eligibility for cancellation of removal." Pet. App. 2a. In the Eighth Circuit's view, "the fact that Pereida is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief." Pet. App. 8a.

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and facts of a prior criminal offense—a special context in which "the categorical approach does not apply." 763 F.3d at 356; *see supra* 6 n.1. *Syblis* distinguished the Third Circuit's earlier decision in *Thomas* on exactly this ground. 763 F.3d at 357 n.12. The Third Circuit has since applied its earlier cases—not *Syblis*—where, as here, the modified categorical approach governs. *See Johnson*, 605 F. App'x at 141-42. Moreover, *Syblis* rests on a premise (that the categorical approach does not govern the analysis of controlled-substances offenses, 763 F.3d at 356) that has since been abrogated by *Mellouli* (which holds that the categorical approach does apply in that context), as the Third Circuit recently recognized. *See Hillocks v. Att'y Gen.*, 934 F.3d 332, 345 (3d Cir. 2019).

So the ambiguity means that "Pereida cannot establish that he was eligible for cancellation for removal." Pet. App. 2a.

The Eighth Circuit embraced the Tenth Circuit's rationale in *Lucio-Rayos v. Sessions*, 875 F.3d 573, 581-82 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 865 (2019) (No. 18-64). *See* Pet. App. 9a. *Lucio-Rayos* held that *Moncrieffe*'s least-acts-criminalized presumption does not govern the question whether an ambiguous record of conviction disqualifies a noncitizen from seeking relief from removal. The Tenth Circuit stated that where "it is unclear from [a noncitizen's] record of conviction whether he committed a [disqualifying crime], … he has not proven eligibility for cancellation of removal" because a noncitizen bears the "burden of establishing that he or she is eligible for any requested benefit or privilege." *Lucio-Rayos*, 875 F.3d at 581, 584 (quoting *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009)). Disagreeing with the First Circuit, the Tenth Circuit reasoned that *Moncrieffe* does not govern cases involving relief from removal or the modified categorical approach. *Id.* at 582-84.

The Sixth Circuit similarly followed the Tenth Circuit in *Gutierrez v. Sessions*, 887 F.3d 770 (6th Cir. 2018), *cert. denied*, 139 S. Ct. 863 (2019) (No. 18-558). The court held that where "the record of conviction is inconclusive as to whether the state offense matched the generic definition of a federal statute, the petitioner [for relief from removal] fails to meet her burden." *Id.* at 779. The court acknowledged that the "circuits are divided" on the question, *id.* at 775 & n.5, and then sided with the Tenth Circuit (while rejecting

the First Circuit's holding in *Sauceda*) because it believed that *Moncrieffe*'s least-acts-criminalized presumption is inapplicable. *Id.* 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) (No. 11-206), 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 has continued to apply its rule even after *Moncrieffe*. *See Romero v. Barr*, 755 F. App'x 327, 328 (4th Cir. 2019), *pet. for cert. filed*, No. 19-___ (filed concurrently with this petition on Sept. 30, 2019).

In dicta, the Seventh Circuit has suggested that it too would "agree" with these "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 shares the same view. *See Matter of Almanza-Arenas*, 24 I. & N. Dec. 771, 774-76 (BIA 2009). It continues to apply that rule in the Fifth and Eleventh Circuits—the only circuits with immigra-

tion courts that have not yet weighed in on the conflict.[5] *See, e.g.*, *In re Moreira*, No. AXXX-XX9-380, 2013 WL 4041244, at *2 (BIA July 29, 2013) (11th Cir.).

C. The conflict is square and intractable.

The conflict is thus square, with courts on both sides considering and rejecting each other's views. Seven courts of appeals have now expressly acknowledged the division. *See Marinelarena*, 930 F.3d at 1047 n.6 ("The Circuits are split on this issue."); *id.* at 1056-57 & nn.5-7 (Ikuta, J., dissenting) (discussing the "circuit split"); *Francisco*, 884 F.3d at 1134 n.37 ("The circuits have split on this issue."); *Gutierrez*, 887 F.3d at 775 (noting its "sister circuits are divided"); *Lucio-Rayos*, 875 F.3d at 582; *Gomez-Perez*, 829 F.3d at 326 & n.1; *Sauceda*, 819 F.3d at 532 n.10; *Salem*, 647 F.3d at 116; *accord* Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 341-42 (16th ed. 2018).

This division is also intractable. In the year since this Court denied certiorari in *Lucio-Rayos* and *Gutierrez*, the split has only deepened. The Eighth Circuit in this case adopted the government's view,

[5] The Fifth and Eleventh Circuits have acknowledged the question presented but have reserved judgment on it thus far. *See Francisco v. Att'y Gen.*, 884 F.3d 1120, 1134 n.37 (11th Cir. 2018); *Gomez-Perez v. Lynch*, 829 F.3d 323, 326 & n.1 (5th Cir. 2016); *Le v. Lynch*¸ 819 F.3d 98, 107 n.5 (5th Cir. 2016).

while the Ninth Circuit—which hears 56% of all immigration appeals[6]—switched sides to adopt our view. The circuits are now deadlocked at four on each side. And there is no chance this conflict resolves itself. The Fourth, Sixth, Eighth, and Tenth Circuits all recently denied direct requests to reconsider their positions en banc,[7] while the First and Ninth Circuits reached their conflicting views only after they granted rehearing and *rejected* the other circuits' holdings.[8] Only this Court's intervention can restore the uniformity of the Nation's immigration law that the Constitution mandates. U.S. Const., art. I, § 8, cl. 4.

Moreover, cases on both sides involve scenarios just like this one, where the narrow set of records that courts may consult simply does not reveal the basis of an old state conviction, and the question is whether the noncitizen's inability to prove a negative under the categorical approach prevents him from proceeding with an application for relief. The government has previously argued, however, that *Sauceda* is sui gen-

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[6] Administrative Office of the U.S. Courts, *U.S. Courts of Appeals – Judicial Business 2018*, https://www.uscourts.gov/statistics-reports/us-courts-appeals-judicial-business-2018 (last visited Sept. 26, 2019).

[7] *See* Pet. App. 31a; Order Denying Reh'g, *Romero v. Barr*, No. 18-1551 (4th Cir. Jun. 4, 2019); Order Denying Reh'g, *Gutierrez v. Sessions*, No. 17-3749 (6th Cir. Aug. 20, 2018); Order Denying Reh'g, *Lucio-Rayos v. Sessions*, No. 15-9584 (10th Cir. Mar. 9, 2018).

[8] *See Sauceda*, 819 F.3d at 529 (on panel rehearing by three of that court's six active judges); *Marinelarena*, 930 F.3d at 1046-47.

eris because there the record of conviction was "complete." Br. in Opp. 17-18, *Lucio-Rayos v. Whitaker*, No. 18-64 (U.S. Nov. 9, 2018); Br. in Opp. 19-20, *Gutierrez v. Whitaker*, No. 18-558 (U.S. Dec. 12, 2018). It has suggested that *Sauceda* is therefore distinguishable from cases like this, where the decision below noted that there is not "any indication that [Mr. Pereida's] record is complete." Pet. App. 8a. But when the First Circuit called the record in *Sauceda* "complete," it was describing a record *identical* to this one: The record there contained only "the criminal complaint and the judgment reflecting [the petitioner's] guilty plea," but lacked a plea colloquy or plea agreement that might have "clarif[ied] under which prong he was convicted." 819 F.3d at 530 nn.5-6, 531. Here, the exact same documents are present: The record contains a criminal complaint and judgment, but not a plea transcript or colloquy. C.A.R. 162-65.

In any event, *Sauceda* no longer stands alone. In the Ninth Circuit's recent en banc case, the record also did not contain a plea agreement or plea transcript. *Marinelarena*, 930 F.3d at 1046. So there was a question about "whether all relevant and available documents have been produced." *Id.* at 1050. The court squarely rejected the government's argument that an incomplete record affects the analysis of the question presented, however, because that issue relates to a distinct burden of production rather than the noncitizen's burden of proof. *Id.* at 1050, 1053. Nor have the Second or Third Circuits suggested that all conviction records must be present before their rule applies.

The upshot is that, in four circuits, when a record of conviction *as it exists in immigration court* is inconclusive, like Mr. Pereida's, then the conviction is not legally disqualifying under the modified categorical approach. Yet in the four other circuits, an inconclusive record *never* suffices to establish eligibility for relief—even if no other documents exist and the noncitizen "is not to blame for the ambiguity surrounding his criminal conviction." Pet. App. 8a; *see Lucio-Rayos*, 875 F.3d at 582 (same); *Salem*, 647 F.3d at 116 (same).

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). 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). Yet while a misdemeanor conviction for attempted criminal impersonation prevented Mr. Pereida from even being heard on his claim for relief in immigration court in Nebraska, a noncitizen with a past conviction under the very same Nebraska statute would be eligible to seek cancellation in immigration courts in Massachusetts or California.

Worse still, 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 California, where an ambiguous conviction would not

be disqualifying, could well be transferred to a facility and placed into removal proceedings in Minnesota, where it would.[9] This circuit conflict is untenable.

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, including asylum, cancellation of removal, and relief for battered spouses under the Violence Against Women Act. *See* 8 U.S.C. §§ 1158(b)(2)(B)(i), 1229b(a)(3), 1229b(b)(1)(C), 1229b(b)(2)(A)(iv); *see also* 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(h)(2)(B), (*l*)(1)(B) (adjustment of status for juveniles granted special immigrant juvenile status and for trafficking victims); 8 U.S.C. § 1427(a)(3) (naturalization); *see Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010) ("conviction" is the "relevant statutory hook" for the categorical approach). Because immigration courts look to past convictions as a threshold step to pretermit applications for relief, and because many conviction records are unclear, the question presented will often be enormously consequential.

And it is not uncommon for conviction records to be missing or inconclusive. This Court has long understood that "in many cases state and local records … will be incomplete," and that this "common-

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[9] *See* Libby Rainey, *ICE transfers immigrants held in detention around the country to keep beds filled*, Denver Post (Sept. 17, 2017), https://tinyurl.com/y7tq3rl2.

enough" occurrence "will often frustrate application of the modified categorical approach." *Johnson*, 559 U.S. at 145. 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. Nebraska, for example, permits destruction of certain case files after 15 years.[10] Minnesota and North Dakota authorize disposal of certain records after 10 years.[11] The problem is not limited to the Eighth Circuit: California courts retain records for misdemeanor convictions for five years, and only two years for certain marijuana offenses. Cal. Gov't Code § 68152(c)(7)-(8). North Carolina courts do not even

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[10] Nebraska Records Management Division, *Schedule 18: County Courts* 5 (approved Jan. 3, 2018), https://tinyurl.com/y3swl6vo.

[11] Minnesota Judicial Branch, Courts Services Division, *District Court Retention Schedule* 13 (May 23, 2018), https://tinyurl.com/y2wbqquq; North Dakota Courts, *Record Retention Schedule – Courts* (effective July 1, 2019), https://tinyurl.com/y2myxh34.

create a transcript or a recording of most misdemeanor proceedings.[12]

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 the Third Circuit's leading case on this question, for example, were 12 and 13 years old—"dated, to say the least." *Thomas*, 625 F.3d at 144. So, whether the details of prior convictions were never recorded in the first place or whether they were lost to time, inconclusive records of conviction are commonplace. And, everywhere outside the First, Second, Third, and Ninth Circuits, that fortuity could entirely bar noncitizens from seeking relief from removal.

III. This Case Is An Ideal Vehicle To Resolve The Conflict.

This case presents an ideal vehicle to resolve this conflict. Notably, it lacks the vehicle flaws that the government emphasized in *Lucio-Rayos* and *Gutierrez*. *See Lucio-Rayos* Br. in Opp. 18-20 (No. 18-64); *Gutierrez* Br. in Opp. 20-22 (No. 18-558).

The question presented was the dispositive issue below. There was "no disagreement among the parties or each of the reviewing courts to-date" that the Nebraska criminal impersonation statute is overbroad. Pet. App. 7a. It was also undisputed that the record of

[12] North Carolina Administrative Office of the Courts, *The North Carolina Judicial System* 27-28 (2008 ed.), https://tinyurl.com/ycqc2n9v.

conviction did not indicate "the subsection of the statute under which Pereida was convicted." Pet. App. 8a. So the question presented was "the heart of the matter in this particular case." Pet. App. 7a-8a. The BIA and Eighth Circuit each held that the ambiguity in Mr. Pereida's conviction rendered it legally disqualifying *solely* because Mr. Pereida could not negate the possibility that his conviction arose under the disqualifying prongs of the Nebraska criminal impersonation statute. Pet. App. 2a-3a, 8a-10a, 17a.

In *Lucio-Rayos*, in contrast, the government argued that "the question presented may not be dispositive" because the "government would be free to defend the judgment" on "[t]he BIA's principal ground of decision," which was that the state statute of conviction was not overbroad in the first place. Br. in Opp. 18-20. And in *Gutierrez*, the government argued that "resolution of the question presented" would not be dispositive because the IJ relied on multiple alternative convictions (in addition to the conviction analyzed by the BIA and Sixth Circuit) to find Ms. Gutierrez ineligible for cancellation. Br. in Opp. 21. Neither objection applies here.

The question presented is also very likely to determine the ultimate outcome of Mr. Pereida's application for relief. Because it is undisputed that Mr. Pereida'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. Mr. Pereida meets all the other threshold eligibility criteria for cancellation, *see* 8 U.S.C. § 1229b(b)(1), and he is likely to succeed on that application because he presents a compelling

case for cancellation of removal: His only criminal conviction is this misdemeanor attempt offense for which he served no time in prison, C.A.R. 115, 162-63, 207; he has a long and productive work history; he has paid taxes consistently; and he provides essential support for his family of five. *Supra* 8-9. In *Gutierrez*, in contrast, the government argued that Ms. Gutierrez's "lengthy conviction record dating back to at least 1996, including multiple felony convictions" meant that it was unlikely she would "warrant discretionary relief from removal" on remand even were she to prevail before this Court. Br. in Opp. 21-22.

This case also presents a highly representative context to resolve the question presented. It involves precisely the sort of plea to a low-level offense for which courts most often do not create precise records revealing which prong or sub-prong of a divisible statute gave rise to a conviction. So this case perfectly exemplifies how a noncitizen's fate may depend on the existence of records he neither creates nor maintains.

Finally, unlike *Lucio-Rayos*, in which Justice Gorsuch was recused, a full Court would be able to decide this case. *See* 139 S. Ct. 865; 875 F.3d at 575 n.1 (noting that, prior to his elevation to this Court, then-Judge Gorsuch "participated in the oral argument but not in the decision in this case").

IV. The Decision Below Is Incorrect.

A. The Eighth Circuit's position is incompatible with this Court's recent categorical approach cases. Mr. Pereida's eligibility for cancellation turns on whether he has been "*convicted* of" a CIMT. 8 U.S.C.

§ 1229b(b)(1)(C) (emphasis added); *see also* §§ 1182(a)(2), 1227(a)(2). 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." 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.* (emphasis added) (brackets omitted); *see also, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (same). That is, the categorical approach asks "the legal question of what a conviction *necessarily* established." *Mellouli*, 135 S. Ct. at 1987. Under this Court's cases, then, when a state statute sweeps in conduct that extends beyond the federal definition, a conviction under that statute presumptively is not disqualifying.

This least-acts-criminalized presumption may be rebutted using the modified categorical approach. *See Moncrieffe*, 569 U.S. at 191 (citing the approach as a "qualification" to the presumption). But the presumption is rebutted 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. *Id.* 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); *see Marinelarena*, 930 F.3d at 1047-48; *Sauceda*, 819 F.3d at 532.

Here, Mr. Pereida's conviction leaves ambiguous whether it included the element of intent to defraud, deceive, or cause harm. That element would be required for this type of offense to constitute a CIMT under federal immigration law. *See* Pet. App. 26a; *Jordan v. De George*, 341 U.S. 223, 232 (1951). Because the conviction does not *necessarily* establish a CIMT, by default it does not count as a "conviction" for a CIMT, and so Mr. Pereida should have been permitted to proceed with his application for cancellation of removal.

The Eighth Circuit disagreed because the immigration laws place the burden of proof on noncitizens. Pet. App. 8a-9a. But that burden affects only *factual* questions of eligibility. *Sauceda*, 819 F.3d at 534.[13] For example, Mr. Pereida had to—and did—marshal evidence that his removal would cause his U.S.-citizen son exceptional and extremely unusual hardship. 8 U.S.C. § 1229b(b)(1)(D); *see, e.g.*, C.A.R. 124, 197-98,

[13] 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).

291-301. 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"); *Marinelarena*, 930 F.3d at 1049.

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); *see also Marinelarena*, 930 F.3d at 1049 (same). That means that the burden of proof "does not come into play." *Sauceda*, 819 F.3d at 534.

Think of it this way: After inspecting the "uncontested documents in the record," "nothing remains inconclusive" about whether the prior conviction is disqualifying; the conviction documents "either show that the petitioner was convicted of a disqualifying offense …, or they do not." *Marinelarena*, 930 F.3d at 1049-50. And if "the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes." *Id.* at 1048. Thus, this "legal query requires no factual finding and is therefore unaffected by statutory 'burdens of proof.'" *Id.* at 1049.

In short, the Eighth Circuit's rule improperly reverses *Moncrieffe*'s legal presumption. It requires courts to assume a conviction rests on a *more* serious act criminalized by a divisible statute, unless a noncitizen can affirmatively prove that his conviction

was based on a lesser, nondisqualifying prong. Pet. App. 8a-9a.

B. The decision below (at Pet. App. 9a) endorsed the Tenth Circuit's reasoning in *Lucio-Rayos*, which distinguished *Moncrieffe* on two grounds. Neither withstands scrutiny.

First, the Tenth Circuit concluded that *Moncrieffe*'s least-acts-criminalized presumption applies only to determining removability, not eligibility for cancellation of removal. *Lucio-Rayos*, 875 F.3d at 582-83. But *Moncrieffe* held that the analysis of a prior conviction operates the "same in both [the removal and cancellation] contexts," because the categorical analysis in both the removal and cancellation statutes flow from the same term, "convicted." 569 U.S. at 191 n.4.

Moncrieffe itself involved both removal and cancellation. The question presented in *Moncrieffe* was whether a drug conviction like Mr. Moncrieffe's counted as an aggravated felony. But there was no dispute that his drug conviction was at least a crime "relating to a controlled substance," which was enough to render him removable. *See id.* at 204 (citing 8 U.S.C. § 1227(a)(2)(B)(i)). Whether the conviction was also an aggravated felony mattered *only* because, if it was, he could not apply for discretionary relief from removal. Both the majority and Justice Alito's dissent emphasized as much. *Id.* at 187, 204; *see also id.* at 211 (Alito, J., dissenting) (recognizing that the Court's "holding" was that the noncitizen was "eligible for cancellation of removal"). And the courts on our side of the split have recognized the same. *See*

Marinelarena, 930 F.3d at 1048 (explaining that limiting *Moncrieffe*'s analysis to the removal stage of proceedings "would have led to an exceedingly odd result in *Moncrieffe* itself" because "Moncrieffe would have been not removable as an aggravated felon, as the Court held, yet, based on the same conviction, would be ineligible for asylum or cancellation of removal, also alluded to in the opinion"); *Sauceda*, 819 F.3d at 533-34.

Second, the Tenth Circuit distinguished *Moncrieffe* as applying only the categorical approach without reaching the modified categorical step. *Lucio-Rayos*, 875 F.3d at 583; *accord Gutierrez*, 887 F.3d at 776-77. As the First and Ninth Circuits correctly observed, however, any argument "that *Moncrieffe* is inapplicable because it focused on the categorical approach, not the modified categorical approach," is "preclude[d]" by *Descamps*, which clarifies that "[t]he modified categorical approach is not a wholly distinct inquiry." *Sauceda*, 819 F.3d at 534 (citing *Descamps*, 570 U.S. at 263); *see also Marinelarena*, 930 F.3d at 1050. It "preserves the categorical approach's basic method," *Marinelarena*, 930 F.3d at 1050 (quoting *Descamps*, 570 U.S. at 263), and it is merely "a tool" to "help[] implement the categorical approach." *Sauceda*, 819 F.3d at 534 (quoting *Descamps*, 570 U.S. at 263). Indeed, *Moncrieffe*'s least-acts-criminalized presumption focuses the analysis on the least criminal prong of a divisible statute precisely when the "absence of records" renders the "application of the modified categorical approach" inconclusive. *Johnson*, 559 U.S. at 145; *see id.* at 136-37 (applying the presumption to a divisible statute).

C. The Eighth Circuit's rule is inconsistent with *Moncrieffe* in another respect: It risks placing an impossible burden on the noncitizen seeking relief. Under the Eighth Circuit's rule, the noncitizen is simply out of luck when conviction records that he neither creates nor maintains either do not contain clarifying details or no longer exist. But *Moncrieffe* explained that "[t]he categorical approach was designed to avoid" just the sort of "potential unfairness" that arises when "two noncitizens, each 'convicted of' the same offense, might obtain different [disqualifying-offense] determinations depending on what evidence remains available." 569 U.S. at 201.

Here, for example, Mr. Pereida could not have "submitted testimony from his lawyer" or "the judge who accepted his plea to ascertain what offense was charged and pleaded to in the state court"—subsection (c) or a different subsection—assuming anyone could even remember the details years later. *Sauceda*, 819 F.3d at 532. The categorical and modified categorical approaches prohibit such "minitrials," because after-the-fact testimony is not among the narrow range of official conviction records (the "*Shepard* documents") that courts may look to in determining the basis for a conviction. *Moncrieffe*, 569 U.S. at 191, 200-01.

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 *Shepard* documents that may no longer exist, and, 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

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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