No. 19-438

IN THE

# Supreme Court of the United States

CLEMENTE AVELINO PEREIDA,
*Petitioner*,

*v.*

WILLIAM P. BARR, ATTORNEY GENERAL,
*Respondent*.

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

## BRIEF FOR PETITIONER


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## QUESTION PRESENTED

A noncitizen may not apply for relief from 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 the "conviction *necessarily* establishe[s]" all elements of the potentially corresponding federal offense. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

The question presented is:

Whether a criminal conviction bars a noncitizen from applying for relief from removal when state criminal records are merely ambiguous as to whether the conviction corresponds to an offense listed in the Immigration and Nationality Act.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 916 F.3d 1128. The decisions of the Board of Immigration Appeals (Pet. App. 11a-19a) and immigration judge (Pet. App. 20a-30a) are unreported.

## JURISDICTION

The Eighth Circuit entered judgment on March 1, 2019, Pet. App. 1a, and denied a timely petition for rehearing on July 2, 2019, Pet. App. 31a. A timely petition for writ of certiorari was filed on September 30, 2019, and granted on December 18, 2019. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Immigration and Nationality Act, immigration regulations, and Nebraska Revised Statutes are reprinted in an appendix to this brief. *See* App., *infra*, 10a-22a.

## STATEMENT

### A. The Immigration and Nationality Act and the Categorical Approach

1. The Immigration and Nationality Act, 8 U.S.C. § 1101 *et seq.*, provides a highly structured process for removing noncitizens from the United States. The government initiates a removal proceeding by charging an individual with a ground of inadmissibility or deportability listed in § 1182(a) or § 1227(a), respectively. *See* §§ 1229, 1229a(a)(2). Under those

provisions, a noncitizen may be ordered removed if, for example, he is present without having been lawfully admitted (and thus is "inadmissible" despite being physically present) or has overstayed a visa (and thus is now "deportable"). §§ 1182(a)(6)(A)(i), 1227(a)(1)(B). He can also can be ordered removed if he has been "convicted of" certain enumerated crimes, including "crime[s] involving moral turpitude," §§ 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i); controlled substances offenses, §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B); and aggravated felonies, § 1227(a)(2)(A)(iii).

A finding of removability does not always mean definite removal from the country, though. Generally, noncitizens may still "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).

The INA establishes specific eligibility requirements for each form of relief from removal. *E.g.*, § 1158 (asylum); § 1229b(a) (cancellation of removal for lawful permanent residents); § 1229b(b) (cancellation for nonpermanent residents). Relevant here, a nonpermanent resident is eligible to seek cancellation if he has been physically present in United States for 10 years, he is of "good moral character," and his removal would result in "exceptional and extremely unusual hardship" to a "spouse, parent, or child" who is a U.S. citizen or lawful permanent resident. § 1229b(b)(1)(A), (B), (D). "In 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" such as these.

8 U.S.C. § 1229a(c)(4)(A); *see also* 8 C.F.R. § 1240.8(d) (similar).

As with removability, prior convictions also have consequences for relief: The fourth eligibility requirement for a nonpermanent resident seeking cancellation is that he "has not been convicted of" one of the enumerated criminal offenses that might make him removable in the first place. § 1229b(b)(1)(C) (citing §§ 1182(a)(2), 1227(a)(2), (a)(3)). Accordingly, an immigration judge (IJ) must often consider—at either the removal phase, or the relief-from-removal phase, or both—whether a noncitizen's prior conviction was for one of the offenses listed in the INA.

Finally, if the IJ determines that the noncitizen is eligible for a form of relief from removal, the IJ then exercises his or her discretion to grant or deny that relief. *See* 8 U.S.C. § 1229b(a)-(b); 8 C.F.R. § 1240.20(a) (cancellation); 8 U.S.C. § 1158(b)(1)(A); 8 C.F.R. § 1208.14(a) (asylum).

2. To determine whether a prior state conviction counts as a disqualifying offense under federal law, adjudicators use what is known as the "categorial approach." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015). Under this method, courts "look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the 'generic' federal definition of a corresponding" offense listed in the INA. *Moncrieffe*, 569 U.S. at 190 (internal quotation marks omitted); *see Mellouli*, 135 S. Ct. at 1986; *Descamps v. United States*, 570 U.S. 254, 261 (2013). A prior conviction is a categorical match with an

enumerated federal offense only if "its *elements* are the same as, or narrower than, those of the [federal] offense." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Otherwise, the state statute is "overbroad" and does not trigger federal consequences. *Descamps*, 570 U.S. at 276. This categorical approach stems from Congress's specification of "conviction, not conduct, as the trigger for immigration consequences." *Mellouli*, 135 S. Ct. at 1986. And because "'[c]onviction' is 'the relevant statutory hook'" in both the removal and relief-from-removal phases, the "analysis is the same in both contexts." *Moncrieffe*, 569 U.S. at 191 & n.4.

For a potential crime involving moral turpitude (CIMT) specifically, a court looks to see if a conviction under a state statute necessarily establishes the "two essential elements" of a CIMT as defined by decades of immigration law: "a culpable mental state and reprehensible conduct." *Matter of Ortega-Lopez*, 26 I. & N. Dec. 99, 100 (BIA 2013); *see also Matter of Silva-Trevino*, 26 I. & N. Dec. 550, 553 n.3 (AG 2015); *Matter of S-*, 2 I. & N. Dec. 353, 357 (BIA 1945). The requisite mental state often takes the form of an "intent to defraud." *Jordan v. De George*, 341 U.S. 223, 228, 232 (1951). So, if a conviction is for a state offense whose elements include a reprehensible act and an intent to defraud, then it would be a categorical match and count as a CIMT for immigration purposes.

Since the Ellis Island era, however, courts have understood that if the statute of conviction does not require proof of those elements, then the prior offense is not "necessarily" "immoral" and cannot be a disqualifying CIMT. *United States ex rel. Guarino v. Uhl*,

107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.); *United States ex rel. Mylius v. Uhl*, 210 F. 860, 862-63 (2d Cir. 1914). Because Congress focused on "convictions," the noncitizen's actual conduct is "'quite irrelevant.'" *Moncrieffe*, 569 U.S. at 190 (quoting *Guarino*, 107 F.2d at 400). An "alien cannot be deported because in the particular instance his conduct was immoral" if his statute of conviction does not categorically establish a CIMT. *United States ex rel. Robinson v. Day*, 51 F.2d 1022, 1022-23 (2d Cir. 1931) (L. Hand, J.); *Guarino*, 107 F.2d at 400 (same).

Because the question under the categorical approach is what the "conviction *necessarily* involved," 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." *Moncrieffe*, 569 U.S. at 190-91 (emphasis added) (brackets omitted) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

One "qualification" to this presumption, *Moncrieffe*, 569 U.S. at 191, is what is known as the "modified" categorical approach. Under that variant, "when a prior conviction is for violating a so-called 'divisible statute'"—meaning one that "sets out one or more elements of the offense in the alternative"—then courts may "consult a limited class of documents … to determine which alternative formed the basis of the defendant's prior conviction," and then compare those elements "with the elements of the generic crime." *Descamps*, 570 U.S. at 257. That limited set of documents—referred to as the "record of conviction," or the "*Shepard* documents"—comprises "the indictment,

jury instructions, or plea agreement and colloquy." *Mathis*, 136 S. Ct. at 2249 (citing *Shepard v. United States*, 544 U.S. 13, 26 (2005)). Those are the only materials that could satisfy the categorical approach's "demand for certainty" that a conviction was actually for every element of the federally defined offense. *Shepard*, 544 U.S. at 21.

Under either version, courts forgo a cumbersome factual inquiry—taking evidence and hearing testimony about what an old conviction involved—and instead perform a simpler legal one. They ask whether the "record of conviction of the predicate offense *necessarily* establishes" that the "particular offense the noncitizen was convicted of" corresponds to an offense enumerated in the INA. *Moncrieffe*, 569 U.S. at 190-91, 197-98 (emphasis added). If not, then the conviction is *not* a categorical match and does not trigger federal consequences.

### B. Factual Background

Petitioner Clemente Avelino Pereida was born and raised in Mexico. Pet. App. 3a. He has lived in the United States for nearly 25 years, more than half his life. Pet. App. 3a. He and his wife have three children. Pet. App. 3a; Certified Administrative Record (C.A.R.) 125, 127. One is a U.S. citizen; another, who came with Mr. Pereida to the United States as a young child, has received protection under the Deferred Action for Childhood Arrivals policy. 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).

In 2009, Mr. Pereida was arrested by local authorities and later charged with "criminal attempt," a misdemeanor under Nebraska law. Pet. App. 2a; App., *infra*, 7a-9a (complaint);[1] *see* Neb. Rev. Stat. § 28-201 (2008). The county attorney alleged that Mr. Pereida "intentionally engage[d] in conduct which … constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of CRIMINAL IMPERSONATION," Neb. Rev. Stat. § 28-608 (2008).[2] App., *infra*, 7a. The criminal complaint then recited each subsection of the criminal impersonation statute nearly verbatim, without specifying which one Mr. Pereida was attempting to violate. App., *infra*, 7a-8a. That statute covers everything from "[c]arr[ying] on any … occupation without … authorization required by law," to full-fledged identity theft ("[a]ccess[ing] … the financial resources of another through the use of a personal identification document"). § 28-608(1)(c), (d)(ii) (2008). The only fact the county attorney alleged was that Mr. Pereida had "use[d] a fraudulent Social Security card to obtain employment at National Service Company of Iowa," the cleaning company where he worked. App., *infra*, 8a.

Mr. Pereida pleaded no contest to the misdemeanor attempt charge. App., *infra*, 3a. The state court found him guilty, fined him $100, and imposed

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[1] The appendix to this brief contains the pertinent documents from Mr. Pereida's record of conviction. App., *infra*, 1a-9a.

[2] Nebraska's criminal impersonation statute has since been amended and moved to Neb. Rev. Stat. § 28-638. *See* Pet. App. 2a n.1.

no sentence of incarceration. App., *infra*, 3a-4a (journal entry and order).

### C. Proceedings Below

1. Following Mr. Pereida's arrest and release by Nebraska authorities, federal immigration officers detained him and charged him as removable because he was never lawfully admitted to the United States. Pet. App. 3a, 20a-21a; *see* C.A.R. 487, 492. Mr. Pereida conceded that he was removable. Pet. App. 3a, 12a, 21a; *see* C.A.R. 104. But he applied for cancellation of removal to ask the government to spare his U.S.-citizen son both the "extreme and unusual mental stress" and emotional "toll" of losing his father, and the additional hardship the son would face if he (and the other members of his family) were forced to live without the family's primary breadwinner. C.A.R. 295, 301; *see* Pet. App. 3a, 12a; C.A.R. 104, 124-31, 168-76, 291-324.

Mr. Pereida informed the immigration judge of his pending Nebraska criminal case, and the IJ continued the removal proceedings. C.A.R. 104-05. Once the conviction was final, the government moved to pretermit Mr. Pereida's cancellation application on the ground that his conviction constituted a CIMT that made him ineligible for relief under 8 U.S.C. § 1229b(b)(1)(C). Pet. App. 21a.

2. The IJ agreed and held Mr. Pereida ineligible to seek cancellation. Pet. App. 20a-30a.

The IJ first explained that a conviction for attempting to commit an offense that is a CIMT is itself

a CIMT. Pet. App. 24a-25a; *see* § 1182(a)(2)(A)(i)(I). So the analysis turned on whether a violation of the Nebraska criminal impersonation statute is a CIMT. The IJ agreed with Mr. Pereida that a violation of Neb. Rev. Stat. § 28-608 is not *categorically* a CIMT because at least one way of violating it—subsection (c)—does not involve any mens rea element, and therefore would not establish the requisite "vicious motive or corrupt mind." Pet. App. 26a-27a; *see* § 28-608(1)(c) (proscribing "[c]arr[ying] on any profession, business, or any other occupation without a license, certificate, or other authorization required by law"). Because the IJ thought that subsections (a), (b), and (d) defined separate crimes that "contain[] as a necessary element the intent to defraud, deceive, or harm," Pet. App. 26a, he examined the record of Mr. Pereida's conviction "to determine whether [Mr. Pereida] was convicted under subsection (a), (b), or (d), rendering his offense a CIMT, or under subsection (c)." Pet. App. 27a.[3]

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[3] Although it does not bear on the question presented, we note that the IJ incorrectly stated that subsection (c) is the only prong of the Nebraska statute that does not require intent to defraud. Subsection (a) prohibits an individual from "[a]ssum[ing] a false identity and do[ing] an act in his or her assumed character with intent [i] to gain a pecuniary benefit for himself, herself, or another *or* [ii] to deceive or harm another." Neb. Rev. Stat. § 28-608(1)(a) (2008) (emphasis added). Because someone can violate subsection (a) by harboring an intent only to benefit "himself," rather than "to deceive or harm another," a conviction under that subsection does not necessarily involve moral turpitude either. The BIA and the Eighth Circuit repeated this error when no party corrected it. Pet. App. 7a, 14a-15a. For present purposes, though, it is immaterial whether the statute contains

Based on the "course of conduct" alleged in Mr. Pereida's criminal complaint, the IJ posited that Mr. Pereida must not have been "convicted of attempting … subsection (c)." Pet. App. 27a; *see* App., *infra*, 7a-8a. Thus, the conviction was under "subsection (a), (b), or (d), any of which involves moral turpitude." Pet. App. 27a. And because the conviction qualified as a CIMT, the IJ reasoned, it "constitutes a mandatory bar to" cancellation of removal. Pet. App. 29a.

3. The BIA dismissed Mr. Pereida's administrative appeal on alternative grounds. Pet. App. 11a-19a.

Like the IJ, the BIA determined that § 28-608 was overbroad because subsection (c) is not a CIMT. Pet. App. 14a-15a. So, like the IJ, the BIA looked to the record of conviction to determine Mr. Pereida's "actual crime of conviction." Pet. App. 16a. The BIA disagreed with the IJ, however, that the record of conviction affirmatively established a CIMT: Mere allegations in a criminal complaint are not dispositive, *see Descamps*, 570 U.S. at 270, and the "entry order does not specify the particular subsection of the substantive statute [Mr. Pereida] was ultimately convicted of violating." Pet. App. 17a; App., *infra*, 3a-4a.

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

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just one prong that does not constitute a CIMT, or instead two. As is now undisputed, the statute sweeps too broadly to be a categorical CIMT either way, and the record of conviction does not clarify which prong Mr. Pereida was attempting to violate.

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, he had "not carried his burden of proving that his conviction is not [a] CIMT." Pet. App. 17a.

4. The Eighth Circuit denied Mr. Pereida's petition for review. Pet. App. 1a-10a.

Like the BIA, the court concluded that Nebraska's criminal impersonation statute is overbroad and divisible, and that Mr. Pereida's conviction record was inconclusive. Pet. App. 7a-8a. 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. 9a. Because "it is not possible to ascertain which subsection formed the basis for Pereida's conviction," the court 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 ineligible for relief from removal. Pet. App. 8a.

5. This Court granted certiorari. Mr. Pereida remains at liberty with his family in Nebraska.

## SUMMARY OF ARGUMENT

Petitioner's conviction for "attempted criminal impersonation" does not bar him from discretionary relief from removal because his record of conviction "necessarily" establishes only a non-morally

turpitudinous offense. Evidentiary burdens of proof do not affect that categorical analysis.

I. The INA subjects noncitizens to mandatory deportation based on a past conviction only when their convictions were "necessarily" for a disqualifying offense. All that a prior conviction necessarily involves is "the minimum conduct criminalized by the state statute." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). So courts applying the categorical approach must "presume that the conviction rested upon nothing more than the least of the acts criminalized" by the statute, and then determine whether even those acts are encompassed by the generic federal offense. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015). That presumption can be rebutted under the modified categorial approach if the record of conviction *necessarily* establishes—i.e., shows to a "legal 'certainty'"—that the noncitizen *was* convicted of some more serious alternative element that is a categorical match with the federal offense. *Mathis v. United States*, 136 S. Ct. 2243, 2255 n.6 (2016). But where, as here, the record of conviction does not *necessarily* establish a more serious offense, then the default presumption remains unrebutted, and the conviction stands only for the least criminal acts that could sustain it. Mr. Pereida's misdemeanor attempt conviction therefore should not have barred the Attorney General from even considering whether to grant him relief from removal.

II. A. The Eighth Circuit and the government agree that an ambiguous conviction record ordinarily would not lead to immigration consequences, but they say that this case is different because the INA places the burden of proof on noncitizens to establish

eligibility for cancellation of removal. Burdens of proof, however, apply to only factual questions that are resolved through weighing testimony and other evidence. Most eligibility criteria for cancellation involve such facts (e.g., physical presence in the country for 10 years), but not the analysis of a past conviction under the categorical approach. The approach involves a "legal question" that always yields a yes or no answer: Either "a conviction *necessarily* establishe[s]" the elements of a disqualifying offense, or it does not. *Mellouli*, 135 S. Ct. at 1987. So burdens of proof never have a role to play, which is why this Court's categorical approach cases have never turned on them, whether the burden was on the government or on the noncitizen.

B. The analysis is no different when courts apply the categorical approach to a divisible statute. The modified categorical approach permits consideration of the record of conviction in such cases, and the record *may* show that the conviction necessarily establishes something more than the minimum conduct criminalized by the state statute. But when the record does not, the conviction does not *necessarily* establish the elements of the federally defined offense. The conviction therefore *is not* a disqualifying offense.

The government asserts that the modified categorical approach involves a threshold "factual" step to which a burden of proof can apply. That contradicts everything this Court has said about the modified approach: It is a limited "tool" whose "focus" remains on the law, "rather than the facts." *Descamps v. United States*, 570 U.S. 254, 263 (2013). And it serves only to help answer whether "a defendant was *legally*

convicted of a certain offense." *Mathis*, 136 S. Ct. at 2248, 2255 n.6 (emphasis added). Indeed, this Court has emphasized that the modified analysis *must* be legal, not factual, or else it would run afoul of the Sixth Amendment in sentencing cases.

C. Beyond the basic irrelevance of burdens of proof to the categorical approach, the Eighth Circuit's position also finds no support in the text, context, or history of the INA. Where Congress wishes to depart from the usual operation of the categorical approach, it has done so clearly. It did not do so in the burden of proof statute. Additionally, the neighboring provisions that Congress added at the same time—explaining how a noncitizen must sustain his burden with credible testimony and corroborating evidence—underscore that the burden of proof applies to the factual aspects of a noncitizen's relief application, not the evaluation of prior convictions under the categorical approach. Congress also expressly overrode two presumptions that had applied to other aspects of applications for relief, but it said nothing about displacing the longstanding presumption that a conviction stands only for the least that it necessarily establishes.

D. The Eighth Circuit's position would also create the kinds of practical difficulties and unfairness that the categorical approach is meant to avoid. The categorical approach is underinclusive by design. It permits mandatory deportation only when a court is certain that a noncitizen has been convicted of an offense requiring that harsh consequence. This Court has emphasized that an underinclusive result poses little practical difficulty because relief from removal

is ultimately discretionary, so the Attorney General may deny relief to noncitizens whose actual conduct was the more serious sort. The Eighth Circuit's rule, in contrast, would be dramatically overinclusive—while offering no corresponding failsafe. People convicted under the non-disqualifying prongs of state statutes would have no way to show their eligibility for relief when the "absence of records" years after a conviction renders the "application of the modified categorical approach" inconclusive, or when conviction records never specified the basis for the conviction in the first place. *Johnson v. United States*, 559 U.S. 133, 145 (2010). Congress did not put noncitizens to the task of proving the unprovable or pin their fates on the fortuity of state and local recordkeeping practices. The Eighth Circuit's rule should be rejected.

## ARGUMENT

### I. A Merely Ambiguous Conviction Does Not Trigger Immigration Consequences Under The Categorical Approach.

Mr. Pereida's conviction makes him ineligible for cancellation of removal only if it counts as a crime involving moral turpitude under federal immigration law. Because the record of Mr. Pereida's conviction does not establish that he was "necessarily" convicted of a morally turpitudinous version of "attempted criminal impersonation," the conviction is not a disqualifying offense.

### A. A conviction is not disqualifying unless the record of conviction "necessarily" establishes all the elements of a corresponding federal offense.

The INA renders noncitizens ineligible for cancellation of removal if they have been "convicted of" certain offenses. 8 U.S.C. § 1229b(b)(1)(C). "Congress' specification of conviction, not conduct, as the trigger for immigration consequences" is significant. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015). It requires courts to "focus[] on the legal question of what a conviction *necessarily* established," *id.* at 1987, "not what acts [the noncitizen] committed," *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

The emphasis on what a conviction "necessarily" established reflects the categorical approach's "demand for certainty." *Shepard v. United States*, 544 U.S. 13, 21 (2005). The federal consequences attached to past convictions are often "harsh": "mandatory deportation" under the INA, *Moncrieffe*, 569 U.S. at 187, 200, or a 15-year mandatory minimum sentence under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). So Congress demanded that they be imposed "based only on a legal 'certainty'" that a person was formally convicted of an offense deserving of those consequences. *Mathis*, 136 S. Ct. at 2255 & n.6.

All that a conviction "necessarily involve[s]" is the "minimum conduct criminalized by the state statute." *Moncrieffe*, 569 U.S. at 190-91. Courts applying the categorical approach therefore "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.*; *see also Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (same). This "focus[] on the legal question of what a conviction *necessarily* established" has "a long pedigree in our Nation's immigration law." *Mellouli*, 135 S. Ct. at 1986-87; *see United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.) (determining what a conviction "'necessarily'" establishes by examining the least criminal conduct punished by the statute); *Matter of P-*, 3 I. & N. Dec. 56, 59 (BIA 1947) (collecting similar cases); *Matter of M-*, 2 I. & N. Dec. 721, 723 (BIA 1946).

The upshot is that, when the statute of conviction sweeps in more conduct than the relevant federal offense (i.e., when it is "overbroad"), the conviction is "presum[ptively]" *not* disqualifying. *Moncrieffe*, 569 U.S. at 190-91. That presumption is rebuttable, though. *Id.* at 191. When a statute is divisible, and the "record of conviction of the predicate offense necessarily establishes" that the "particular offense the noncitizen was convicted of" *was* one of the more serious statutory alternatives—one that does correspond to the federally defined offense—then the least-acts-criminalized presumption will be rebutted and the conviction will have immigration consequences. *Id.* at 190-91, 197-98; *see also Mellouli*, 135 S. Ct. at 1986 & n.4 (same).

Where the record of conviction does *not* establish that the conviction necessarily rested on a particular prong of a divisible statute, however, then nothing rebuts the default presumption. Any remaining "[a]mbiguity on this point means that the conviction did not

'necessarily' involve facts that correspond to [the relevant federal] offense." *Moncrieffe*, 569 U.S. at 194-95. "Under the categorical approach, then, [the noncitizen] was not convicted of [the disqualifying offense]." *Id.* at 195; *see also Johnson v. United States*, 559 U.S. 133, 137, 145 (2010).

### B. Mr. Pereida's conviction is ambiguous, so it does not "necessarily" establish a disqualifying crime involving moral turpitude.

Applying that rule here, Mr. Pereida's misdemeanor attempt conviction is not a disqualifying offense that bars him from requesting mercy from the government.

It is undisputed that Mr. Pereida's statute of conviction is overbroad because at least one prong does not include any element of intent to defraud or harm another. *See supra* at 9-11, 9 n.3; Gov't Cert. Br. 11; Pet. App. 7a. That culpable mental state is a required element for a non-violent offense like this to constitute a CIMT under federal immigration law. *See supra* at 4. And because a conviction under this statute does not *necessarily* establish that element, it presumptively is not a "conviction" for a CIMT.

Nothing in the "record of conviction" here "necessarily establishes" otherwise. *Moncrieffe*, 569 U.S. at 197-98. Everyone agrees that the record of this misdemeanor conviction does not specify which statutory prong gave rise to Mr. Pereida's conviction. Gov't Cert. Br. 9; Pet. App. 8a, 17a; App., *infra*, 1a-9a. Mr. Pereida was charged with attempting to violate all

four prongs in the alternative. So the charging document simply reflects that one "or" another of the four alternative statutory elements—some morally turpitudinous, some not—was at issue. App., *infra*, 7a-9a. And the resulting judgment shows only a plea of no contest and a finding of guilt as to the charged count. App., *infra*, 3a-4a. The only "legal 'certainty'" about the conviction, *Mathis*, 136 S. Ct. at 2255 n.6, then, is that it stands for the "minimum conduct criminalized by the state statute," *Moncrieffe*, 569 U.S. at 191. And that is not a CIMT.

The conviction therefore does not count as a CIMT for immigration purposes. Mr. Pereida should have been permitted to proceed to a hearing on his application for cancellation of removal, where he could make his case for discretionary relief.

## II. The INA's Burden Of Proof Provisions Do Not Bear On The Categorical Analysis.

For all the reasons just stated, it is common ground here that an ambiguous conviction like this would not count as a predicate offense if that question arose in an ACCA case or in the first phase of removal proceedings, when the question is whether a noncitizen is removable. The Eighth Circuit and the government say that the opposite must be true in a relief-from-removal case, however, because the INA provides that 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); *see* Pet. App. 8a; Gov't Cert. Br. 9. In their view, this burden of proof

inverts the normal operation of the categorical approach.

But a burden of proof resolves uncertainty as to questions of fact. It has no relevance to "legal question[s]" like "what a conviction *necessarily* established." *Mellouli*, 135 S. Ct. at 1987. The categorical approach always answers that question definitively, so there is never any work for a burden of proof to do. § II.A. The result is the same when the "modified" version of the categorical approach is applied to divisible statutes, because the ultimate question remains the same; the modified categorical approach involves no "factual" step. § II.B. Nothing in the text, structure, or history of § 1229a(c)(4)(A) suggests that Congress sought to abrogate the categorical approach's demand for certainty in this narrow context. § II.C. Rather, the Eighth Circuit's rule would create a host of problems for immigration judges, courts, and noncitizens that Congress could not have intended. § II.D.

### A. Burdens of proof do not affect the operation of the categorical approach.

#### 1. Burdens of proof resolve uncertain factual questions only.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004). Under its ordinary meaning, a "burden of proof," 8 U.S.C. § 1229a(c)(4)(A), is a rule that dictates "who must persuade the [factfinder] in its favor to

prevail" on "a factual conclusion." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 100 n.4 (2011); *see also Black's Law Dictionary* 244 (11th ed. 2019) ("A party's duty to prove a disputed assertion or charge"). It goes hand in hand with the "standard of proof," which prescribes "how difficult it will be for the party bearing the burden of persuasion to convince the [factfinder] of the facts in its favor." *Microsoft*, 564 U.S. at 100 n.4.

As such, these rules "appl[y] to questions of fact and not to questions of law." *Microsoft*, 564 U.S. at 114 (Breyer, J., concurring); *see also Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668, 1679 (2019) ("evidentiary standards, such as 'preponderance of the evidence' or 'clear and convincing evidence'" do not apply where "the critical question [is] not … a matter of fact for a jury but … a matter of law for the judge to decide"); *id.* at 1685 (Alito, J., concurring in the judgment) (same); 2 McCormick on Evidence § 336 (8th ed. 2020) (explaining that the burden of proof is relevant only to "the trier of fact"); 22 C. Wright & A. Miller, Federal Practice and Procedure § 5162.1 (2d ed. 1992 and Supp. 2019) ("[T]he law of burdens of proof and presumptions tell the judge and lawyers which litigant has to plead and prove material facts.").

A question of fact is one going to "who did what, when or where, how or why." *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 966 (2018). And it is answered through the traditional tools of judicial factfinding: "weigh[ing] evidence, [and] mak[ing] credibility judgments." *Id.* at 967. So, the party with the burden of proof has "the duty of proving" the "essential facts" to answer such questions,

using testimony and other evidence that the fact-finder then weighs under the relevant "standard of proof." *Woodby v. INS*, 385 U.S. 276, 284 (1966).

Most inquiries relevant to applications for relief from removal involve such questions of fact. And § 1229a(c)(4)(B) plainly places the burden on noncitizens to establish them. Mr. Pereida, for example, submitted hundreds of pages of evidence to demonstrate that he "has been physically present in the United States for a continuous period of not less than 10 years," § 1229b(b)(1)(A), "has been a person of good moral character during such period," § 1229b(b)(1)(B), and that his "removal would result in exceptional and extremely unusual hardship to [his] … child, who is a citizen of the United States," § 1229b(b)(1)(D). *See* C.A.R. 104, 124-31, 168-91, 205-70, 272-447. He, his children, and others also were prepared to testify to these details at his hearing. *See* C.A.R. 197-98. The burden of proof governs each of these criteria, which could be subject to dispute or doubt. *See, e.g.*, *Sanchez-Velasco v. Holder*, 593 F.3d 733, 734-35, 737 (8th Cir. 2010) (noncitizen failed to demonstrate 10 years of physical presence where he could not "corroborate his testimony that he had entered the U.S. in 1996").

### 2. The categorical approach involves no uncertain question of fact, which is why burdens of proof have not played a role in this Court's cases.

The analysis of past convictions is different. Whether an individual's "conviction *necessarily* established" a disqualifying offense is a "legal question." *Mellouli*, 135 S. Ct. at 1987. It is answered by a formal

approach "intended to limi[t] the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense." *Id.* at 1986 (quoting Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1688, 1690 (2011)). The analysis entails an "elements-based inquiry" about the statute of conviction, not an "evidence-based one." *Descamps*, 570 U.S. at 266-67.

As a result, an immigration judge evaluating a past conviction does not "preside[] over the presentation of evidence," "hear[] … witnesses," or "take[] a raft of case-specific historical facts" and "balance[] them one against another." *Village at Lakeridge*, 138 S. Ct. at 968. This Court has specifically forbidden that: "[O]ur Nation's overburdened immigration courts" may not "entertain and weigh testimony" about past offenses or otherwise "relitigat[e] … past convictions in minitrials conducted long after the fact." *Moncrieffe*, 569 U.S. at 200-01; *see also United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914) ("[I]mmigration officers … do not act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude."). So the burden of proof that governs those factfinding exercises has no role to play either.

Just as important, the categorical approach always yields a definitive answer to the binary question it poses: A conviction either *necessarily* establishes all elements of a disqualifying federal offense, or it *necessarily* establishes something less. Because the categorical approach builds in a substantive rule for

resolving ambiguity—a conviction presumptively rests on only the minimum conduct necessary for a conviction—there is never a tie for a burden of proof to break.

It is no surprise, then, that this Court's categorical approach cases have never hinged on who bore the burden of proof. Many cases arose in contexts where the government bears the burden, like sentencing (e.g., *Johnson*, *Descamps*, *Mathis*) and removability (e.g., *Mellouli*, *Esquivel-Quintana*). But the government did not lose those cases because of its burden of proof. It lost because the conviction records in each case did not necessarily establish the elements of corresponding generic offenses, and thus failed to satisfy the categorical approach's "demand for certainty." *Mathis*, 136 S. Ct. at 2249, 2257. Indeed, a "demand for certainty" far *exceeds* the burden on the government in such cases.[4] The requirement in each case that a conviction "necessarily" establish certain elements in order to have federal consequences came from the structure of the categorical approach, independent of the government's burden of proof.

The same has been true in cases where the noncitizen bore the burden of proof. *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), was a cancellation of removal case, like this one. The "record of conviction contain[ed] no finding of the fact" that the noncitizen's

[4] The government's burden to establish removability in immigration cases is by "clear and convincing evidence." *See* 8 U.S.C. § 1229a(c)(3)(A). The government's burden to establish a fact that increases a mandatory sentence is "beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 111 (2013).

drug conviction was a recidivist offense—the critical fact that would have made his conviction an "aggravated felony" and barred him from seeking cancellation. *Id.* at 573, 576-77. But that gap in the conviction record did not inure to his detriment, even though he bore the burden of proof, and even though he plainly was, in fact, a recidivist drug offender. Instead, that gap meant that "Carachuri-Rosendo was not actually 'convicted[]'" of a recidivist offense. *Id.* at 577.

*Moncrieffe* also addressed relief from removal. It was undisputed that the noncitizen's marijuana conviction was a removable drug offense. 569 U.S. at 204. So the question before this Court—whether the conviction was also an aggravated felony—mattered only because it affected whether he "may seek relief from removal such as asylum or cancellation of removal [for lawful permanent residents]." *Id.* The Court recognized that, because the noncitizen's "[a]mbigu[ous] … conviction did not 'necessarily' involve facts that correspond" to an aggravated felony, he "ha[d] been found *not* to be an aggravated felon"—and thus he *could* apply for relief from removal. *Id.* at 194-95, 204. Ambiguity about the conviction did not cut one way with respect to removability (where the government bears the burden) and the other way with respect to relief (where the noncitizen does). The Court did not, for example, presume that the conviction involved the *greatest* acts criminalized when it came to relief. Rather, the Court emphasized that the "analysis is the same in both contexts." *Id.* at 191 n.4.

The decision below cannot be squared with these cases. The Eighth Circuit held that "ambiguity surrounding [Mr. Pereida's] criminal conviction"

amounted to a failure to satisfy his burden of proof. Pet. App. 8a. But, as just explained, burdens of proof do not bear one way or the other on the categorical approach because that approach prescribes its own rule for resolving any ambiguity: "Ambiguity … means that the conviction did not 'necessarily' involve facts that correspond to [a disqualifying] offense," and not "necessarily" establishing a disqualifying offense means that the noncitizen "was not convicted" of such an offense. *Moncrieffe*, 569 U.S. at 194-95. So, under the governing analysis, Mr. Pereida "has not been *convicted*" of a CIMT; that is all the INA requires. § 1229b(b)(1)(C) (emphasis added).

### B. Applying the categorical approach to a divisible statute does not depend on any burden of proof either.

The government does not dispute that the question at the heart of the categorical approach—"[w]hether a conviction 'necessarily established' conduct that is encompassed by the federal generic offense"—is a "purely legal question." Gov't Cert. Br. 11-12. Nor does it argue that "the INA's allocation of the burden of proof" affects that ultimate question. *Id.*

What makes this case different, in the government's view, is the *modified* categorical approach. According to the government, that variant mandates a threshold "step": using conviction documents to determine "what crime … a defendant was convicted of." Gov't Cert. Br. 12. "And *that* question," the government says, "is a factual one to which the INA's allocation of the burden of proof applies." *Id.*

Both parts of the government's argument are wrong: The modified categorical approach answers the same question as the categorical approach, and it involves no question of fact. For all the same reasons that the INA's burden of proof provisions do not affect the categorical approach as applied to indivisible statutes of conviction, they do not affect the approach as applied to divisible statutes either.

### 1. The modified categorical approach answers the same binary question as the categorical approach.

"The modified approach … acts not as an exception, but instead as a tool" to "help[] implement the categorical approach." *Descamps*, 570 U.S. at 263. So the government errs in suggesting that the modified approach involves a standalone "step" that operates outside of (and differently from) the categorical approach. The analysis of a divisible statute instead begins, as always, with its text and a legal presumption that the conviction rests on the least of the acts criminalized by that statute. *Moncrieffe*, 569 U.S. at 190-91. As explained above (at 17-18), the modified approach can then rebut that presumption, but only if "the record of conviction of the predicate offense *necessarily* establishes" a conviction for a more serious version of the crime. *Id.* at 191, 197-98 (emphasis added). If it does not, the presumption holds. *Id.* at 197-98.

In other words, the inquiry does not break down anytime an inconclusive record of conviction renders the modified approach an ineffective "tool." Rather, the inquiry simply proceeds on the default

presumption that the conviction was for the "minimum conduct criminalized by the state statute," *Moncrieffe*, 569 U.S. at 191, because that is the only "legal 'certainty'" about the conviction, *Mathis*, 136 S. Ct. at 2255 n.6.

*Johnson v. United States*, 559 U.S. 133 (2010), confirms as much. *Johnson* considered whether a Florida battery conviction qualified as a "violent felony" predicate offense under the ACCA. *Id.* at 137. The Florida battery statute was divisible into three alternative elements, the most minor of which was mere offensive touching. *Id.* at 136-37; *see Mathis*, 136 S. Ct. at 2255. Because "nothing in the record of Johnson's … battery conviction permitted the District Court to conclude that it rested upon anything more than the *least of these acts*"—the offensive-touching prong of the divisible statute—this Court had to address whether even that offense counted as a "violent felony." *Johnson*, 559 U.S. at 137 (emphasis added) (citing *Shepard*, 544 U.S. at 26 (plurality opinion)). *Johnson* shows that the least-acts-criminalized presumption applies precisely when the "absence of records" renders the "application of the modified categorical approach" inconclusive. *Id.* at 145.[5]

[5] Although *Johnson* arose under the ACCA, *Moncrieffe* adopted its least-acts-criminalized presumption under the INA. *See* 569 U.S. at 190-91. And the categorical approach applies identically in both contexts more generally. *See Esquivel-Quintana*, 137 S. Ct. at 1567-68. Indeed, *Johnson* itself acknowledged that its holding would "make it more difficult to remove" noncitizens under an analogous provision of the INA, because even though court records might sometimes clarify whether a battery

The problem with the government's position is it assumes that the "which prong?" question *must* be answered in every case before a court can assess what a conviction "necessarily" establishes. But reaching a definitive result under the modified categorical approach has never been necessary to answering the categorical approach's bottom-line question. As *Johnson* shows, when the record of conviction does not clarify which alternative element in a divisible statute gave rise to a conviction, the only element "necessarily" established by the conviction is the least criminal alternative, and the analysis proceeds from there.

So, an inconclusive conviction record may mean that "uncertainty remains as to what [the noncitizen] actually *did* to violate" the statute, but "uncertainty on that score doesn't matter." *Almanza-Arenas v. Lynch*, 815 F.3d 469, 489 (9th Cir. 2016) (en banc) (Watford, J., concurring in the judgment). All that ultimately "matters … is whether [the noncitizen's] conviction *necessarily* established" every element of the disqualifying offense. *Id*. And that "is a legal question with a yes or no answer" whose "resolution is unaffected by which party bears the burden of proof." *Id.*; *see supra* at 22-26.

Think of it this way: There can never be a 40% or 60% chance that a conviction was "necessarily" for the federally defined offense. "[T]he documents either show that the [noncitizen] was convicted of a disqualifying offense under the categorical approach, or they

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was of the violent sort, they often will not. 559 U.S. at 144. This Court accepted that outcome as a "common-enough consequence" of the categorical approach's demand for certainty. *Id.* at 145.

do not." *Marinelarena v. Barr*, 930 F.3d 1039, 1050 (9th Cir. 2019) (en banc). And if they do not, then he was *not* "necessarily" convicted of the disqualifying offense. The "evidence" on *that* question can never be "in equipoise," such that a "preponderance of the evidence" standard would determine the outcome. *Medina v. California*, 505 U.S. 437, 449 (1992); *see* Gov't Cert. Br. 9 (contending that the "preponderance of the evidence" standard in 8 C.F.R. § 1240.8(d) applies here). Again, there is no tiebreaking role for a burden of proof to play.

The categorical approach is hardly unique in supplying a substantive presumption that largely supplants a generally applicable burden of proof. In copyright infringement cases, for example, the plaintiff bears the burden of proving each element of her claim, including that she owns a valid copyright. To satisfy that element, however, she need not introduce evidence, but instead may simply rely on the legal presumption that her registered copyright is valid. *See* 17 U.S.C. § 410(c); *Latimer v. Roaring Toyz, Inc.*, 601 F.3d 1224, 1233 (11th Cir. 2010). So too for trademark infringement. *See* 15 U.S.C. § 1057(b); *Converse, Inc. v. ITC*, 909 F.3d 1110, 1117 (Fed. Cir. 2018).

This dynamic exists at common law as well. For example, a bailor bears the "burden of proof of [showing] negligence" on the part of a bailee. *Nat'l Liab. & Fire Ins. Co. v. R&R Marine, Inc.*, 756 F.3d 825, 830 (5th Cir. 2014). But when the bailor shows that his property "was delivered to the bailee in good condition and damaged while in his possession," then "the court

impose[s]" a rebuttable "presumption of negligence" by the bailee. *Id.*

Indeed, the categorical approach is not even the only example under the INA. The burden of proof provision governing asylum, 8 U.S.C. § 1158(b)(1)(B)(i), is nearly identical to § 1229a(c)(4), and it was enacted at the same time. *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(a), (d), 119 Stat. 231, 302-04. Under § 1158(b)(1)(B)(i), applicants for asylum bear the burden to prove that they are "refugee[s]," a class that includes those with a "well-founded fear of persecution." § 1101(a)(42). An applicant who can demonstrate that he was persecuted in the past, however, benefits from a "regulatory presumption that [he] possesse[s] a well-founded fear of future prosecution." *Singh v. Sessions*, 898 F.3d 518, 521 (5th Cir. 2018) (citing 8 C.F.R. § 1208.13(b)(1)); *see, e.g.*, *Hayrapetyan v. Mukasey*, 534 F.3d 1330, 1335-36, 1338 n.**** (10th Cir. 2008).

Similarly, under 8 U.S.C. § 1481(a), an individual "lose[s] his nationality by voluntarily performing" a relinquishing act (such as swearing allegiance to another country). In any later dispute about nationality, "the burden shall be upon the person or party claiming that such loss occurred, to establish such claim by a preponderance of the evidence." § 1481(b). But, with respect to the "voluntari[ness]" element, the party claiming a loss of nationality may rely on a rebuttable "presum[ption]" that any expatriating act was "done … voluntarily." *Id.*

In each of these situations, the burden of proof does real work as to other elements of the claim—e.g.,

proving that the accused infringer copied the work, that the bailee received the item in good condition, or that past persecution or a relinquishing act occurred—just not with respect to the element governed by a separate legal presumption. The same is true here: Section 1229a(c)(4)(A) imposes a meaningful burden on noncitizens with respect to most parts of their applications for relief from removal, but not the analysis of past convictions under the categorical (or modified categorical) approach. *See supra* at 22-24.

### 2. The modified categorical inquiry is not a "factual" one.

The government's argument that the modified categorical approach involves a distinct "factual" step—and thus is susceptible to a burden of proof—fails for three other reasons as well.

*First*, the government contends that the modified categorical inquiry must be "a factual one" because it "involves examining documents in the evidentiary record." Gov't Cert. Br. 12. But consulting a record of conviction does not transform the approach into a factual one. The analysis involves no credibility judgments or reconciling evidence, but only assessing the *legal* meaning of an undisputed documentary record.

That is why this Court has repeatedly emphasized that, when a court consults record documents under the modified categorical approach, its "focus" must remain on the law, "rather than the facts." *Descamps*, 570 U.S. at 263. When a court examines "what crime, with what elements" formed the basis for the prior conviction, it is not asking a factual

question. *Mathis*, 136 S. Ct. at 2249. It does not aim to discover "what [the] prior factfinder … thought" when it entered its judgment. *Id.* at 2255 n.6. Nor may it ask whether "the adjudicator … ma[d]e [a particular] determination" as a factual matter, *Descamps*, 570 U.S. at 267, or "what the defendant and state judge must have understood as the factual basis of the prior plea," *Shepard*, 544 U.S. at 25 (plurality opinion). Instead, the only "relevant question" is the "legal effect" of the individual's conviction documents—i.e., whether they necessarily establish that "a defendant was *legally* convicted of a certain offense," or not. *Mathis*, 136 S. Ct. at 2248, 2255 n.6.

The analysis is no different from any other context in which courts "constru[e] … written instruments" to discern their legal meaning in order to answer "question[s] solely of law." *Teva Pharm. USA, Inc. v. Sandoz, Inc.*, 135 S. Ct. 831, 837 (2015). Contracts, deeds, patents, and statutes all convey their legal effects in document form. And so, in many cases, answering a legal question will necessarily involve analyzing the legal import of those types of records. *Id.*[6]

Indeed, the same is true of conviction records themselves when courts use them for a distinct purpose under the categorical approach. In determining whether a statute is divisible—whether its statutory

[6] Of course, those contexts can also involve "subsidiary factfinding" about the "technical" meaning the words on a page might take on. *Teva*, 135 S. Ct. at 837-38. But where (as here, and with most criminal records) the meaning of the documents is undisputed, only a question of law remains.

alternatives are elements as opposed to means—courts routinely "peek" at the record of conviction in the case as one example of how state prosecutors treat the statutory terms. *See Mathis*, 136 S. Ct. at 2256-57. Yet there is no dispute that the divisibility question is a purely legal one about whether a statutory term is an actual element of the offense under state law. *Id.* When a court peeks at "the record of a prior conviction" to answer that question, the nature of the question does not change: A court consults the conviction record for "the sole and limited purpose" of understanding the meaning of the state statute, the same as if it were reviewing "authoritative sources of state law." *Id.* at 2256.

Consulting the record of conviction under the modified categorical approach is similarly limited to answering a legal question. The record documents "may be employed only" for the same legal purpose as analyzing the statute itself: "to determine wh[at] 'a jury necessarily had to find'" or a plea necessarily established. *Mathis*, 136 S. Ct. at 2253 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). That is why *Shepard* limited the modified categorical approach to an examination of only those documents that are legally "conclusive." *Shepard*, 544 U.S. at 25 (plurality opinion). Other documents that do not have an undisputed legal effect or meaning, like a police report or mere allegations in a criminal complaint, are off-limits because *they* would have to be weighed and

considered against each other by a factfinder. *See id.* at 20-21, 23 (majority opinion).[7]

*Second*, this Court has repeatedly reminded the government that the modified categorical approach *must not* involve any question of fact, because if it did, the approach would violate the Sixth Amendment. *See Shepard*, 544 U.S. at 22-23 (majority opinion); *id.* at 24-25 (plurality opinion); *Descamps*, 570 U.S. at 267. Anything beyond simply examining the "the conclusive significance of a prior judicial record" risks turning into a factfinding exercise, and thus becoming subject to the Sixth Amendment's guarantee of a "jury's finding of any disputed fact." *Shepard*, 544 U.S. at 25 (plurality opinion); *id.* at 23 n.4 (majority opinion); *see also Mathis*, 136 S. Ct. at 2258-59 (Thomas, J., concurring) (observing that the modified categorical approach already intrudes too far on the province of the jury).[8]

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[7] Like the categorical approach itself, these documentary restrictions have been a feature of immigration law since long before *Shepard*. *See United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757, 759 (2d Cir. 1933) ("[N]either the immigration officials nor the court reviewing their decision may go outside the record of conviction"—i.e., "the charge (indictment), plea, verdict, and sentence.").

[8] Although the Sixth Amendment's jury-trial right does not apply in removal proceedings, the operative statutory term here ("convicted") has both criminal and noncriminal applications under the INA. *See* 8 U.S.C. § 1326(b). And this Court "must interpret the statute consistently, whether [it] encounters its application in a criminal or noncriminal context." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018) (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004)).

*Third*, if the government were correct that the modified categorical approach involved a "factual" determination, then that determination would be unreviewable. The courts of appeals lack jurisdiction to review the BIA's factual findings in cases involving "criminal aliens." 8 U.S.C. § 1252(a)(2)(C)-(D), (b)(4)(B). Yet the courts of appeals have uniformly understood that they may review the agency's application of the modified categorical approach.[9] Indeed, they review those determinations de novo—without any deference to the agency—precisely because assessing the meaning of old conviction records is a purely legal exercise "of the kind that appellate courts" can handle at least as well as the BIA. *Village at Lakeridge*, 138 S. Ct. at 968.[10]

In short, the modified categorical approach is not a "modified factual" one to which a burden of proof applies. *Descamps*, 570 U.S. at 266.

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[9] *See, e.g.*, *Patel v. Holder*, 707 F.3d 77, 79-83 (1st Cir. 2013); *Wala v. Mukasey*, 511 F.3d 102, 105, 109-10 (2d Cir. 2007); *Singh v. Att'y Gen.*, 839 F.3d 273, 282-86 (3d Cir. 2016); *Larios-Reyes v. Lynch*, 843 F.3d 146, 152-55 (4th Cir. 2016); *Flores-Larrazola v. Lynch*, 840 F.3d 234, 237, 239-40 (5th Cir. 2016), *as revised* (Oct. 28, 2016); *Raja v. Sessions*, 900 F.3d 823, 827-29 (6th Cir. 2018); *Lopez v. Lynch*, 810 F.3d 484, 488-90 (7th Cir. 2016); *Olmsted v. Holder*, 588 F.3d 556, 559-60 (8th Cir. 2009); *Cornejo-Villagrana v. Whitaker*, 912 F.3d 479, 482-85 (9th Cir. 2017); *Batrez Gradiz v. Gonzales*, 490 F.3d 1206, 1207, 1210-11 (10th Cir. 2007); *Gordon v. U.S. Att'y Gen.*, 861 F.3d 1314, 1318-20 (11th Cir. 2017).

[10] *See, e.g.*, *Raja*, 900 F.3d at 827-29; *Gordon*, 861 F.3d at 1318-20; *Flores-Larrazola*, 840 F.3d at 237, 239-40; *Patel*, 707 F.3d at 79; *Wala*, 511 F.3d at 105.

### C. The text, context, and history of § 1229a(c)(4)(A) do not support the Eighth Circuit's contrary interpretation.

The government and the Eighth Circuit's reading of § 1229a(c)(4)(A) also finds no support in any usual indicator of statutory meaning—text, statutory context, and history.

***Text.*** As noted above (at 20-22), the ordinary meaning of "burden of proof" is not a concept that applies to legal questions. And § 1229a(c)(4)(A)'s text lacks any indication that Congress meant to alter the categorical approach's legal nature or do away with its usual "demand for certainty' when determining whether [an individual] was convicted of a generic offense." *Mathis*, 136 S. Ct. at 2257. Section 1229a(c)(4)(A) says nothing at all about "convictions"—the term that is the INA's "statutory hook" for the categorical approach. *Moncrieffe*, 569 U.S. at 191. Rather, it says only that "[a]n alien applying for relief or protection from removal has the burden of proof to establish that the alien … satisfies the applicable eligibility requirements." § 1229a(c)(4)(A)(i). That provision is fully compatible with the categorical approach: When an applicant for cancellation shows that his record of conviction does not *necessarily* establish every element of the federal offense, he establishes that he "has not been *convicted* of" an enumerated offense. § 1229b(b)(1)(C) (emphasis added).

By contrast, Congress "well knows how to instruct … judges to" depart from the ordinary operation of the categorical approach when it wishes.

*Mathis*, 136 S. Ct. at 2252. Indeed, "[i]n other statutes, using different language, it has done just that." *Id.* In 8 U.S.C. § 1101(a)(43)(M)(i), for instance, Congress made clear that courts should not apply the categorical approach in determining whether a noncitizen's conviction for "an offense that ... involves fraud or deceit" was one "in which the loss to the victim or victims exceeds $10,000." *See Nijhawan v. Holder*, 557 U.S. 29, 38-39 (2009). The use of "[t]he words 'in which' … refer to the conduct involved '*in*' the commission of the offense of conviction, rather than to the elements *of* the offense." *Id.* at 39. With those words, Congress "call[ed] for a circumstance-specific examination" of the offense rather than "the categorical approach." *Moncrieffe*, 569 U.S. at 202 (citing *Nijhawan*, 557 U.S. at 39). And because *that* is a factual approach, the Court invoked the applicable burden proof. *Nijhawan*, 557 U.S. at 42 ("the Government must show the amount of loss by clear and convincing evidence").[11]

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[11] Other provisions of the INA similarly address conduct rather than convictions, and courts accordingly do not apply the categorical approach to them either. *See, e.g.*, *Nijhawan*, 557 U.S. at 37 (discussing § 1101(a)(43)(P), which defines as an aggravated felony "'an offense' that amounts to 'falsely making, forging, counterfeiting, mutilating, or altering a passport,' … '*except in the case of a first offense for which the alien ... committed the offense for the purpose of assisting... the alien's spouse, child, or parent ... to violate a provision of this chapter*'"); *Hernandez-Zavala v. Lynch*, 806 F.3d 259, 262, 266 (4th Cir. 2015) (§ 1227(a)(2)(E)(i) renders removable "[a]ny alien who … is convicted of a crime of domestic violence" where the crime is "*committed by*," for instance, "a current or former spouse of the [victim]"); *see also United States v. Hayes*, 555 U.S. 415, 421-23

Because § 1229a(c)(4)(A) lacks any comparable terms that signal a break with the ordinary operation of the categorical approach, it should not be understood to do so.

***Statutory context.*** The Court "interpret[s] the relevant words not in a vacuum, but with reference to the statutory context," *Luna Torres v. Lynch*, 136 S. Ct. 1619, 1626 (2016), including "other neighboring provisions," *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017). Section 1229a(c)(4)(A)'s neighboring provisions further indicate that it has nothing to do with the analysis of past convictions.

Start with the immediate next subparagraphs, both of which were added to the INA at the same time as subparagraph (A). *See* REAL ID Act of 2005, Pub. L. No. 109-13, Div. B, § 101(d), 119 Stat. 231, 304-305. Subparagraph (B) explains how the noncitizen can "[s]ustain[]" the "burden" set out in subparagraph (A): He must submit any required "information or documentation in support of [his] application for relief" alongside "testimony [that] is credible, is persuasive, and refers to specific facts sufficient to demonstrate that [he] has satisfied [his] burden of proof." § 1229a(c)(4)(B). The IJ will then "weigh the credible testimony" against "other evidence of record," and decide whether to ask the applicant to "provide evidence which corroborates otherwise credible testimony." *Id.* Subparagraph (C), in turn, explains how an IJ should

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(2009) (explaining why a criminal statute, 18 U.S.C. § 921(a)(33)(A), departs from the categorical approach for similar reasons).

make "[c]redibility determination[s]": by considering the applicant's "demeanor, candor, or responsiveness," and "the consistency of [the applicant's written and oral] statements with other evidence of record," and the like. § 1229a(c)(4)(C).

The REAL ID Act's scheme—(A) imposing a burden of proof, (B) requiring testimony and corroboration to sustain the burden, and (C) prescribing how credibility should be assessed—applies naturally to the many factual questions that a noncitizen will have to answer. *See supra* at 22. But it is an ill fit with the examination of past convictions, where testimony, corroboration, and credibility do not enter the picture. *See supra* at 23-26.

Next, consider the immediately preceding paragraph, § 1229a(c)(3). That paragraph is entitled "Burden on service [i.e., the former Immigration and Naturalization Service] in cases of deportable aliens." § 1229a(c)(3). It expressly addresses "criminal conviction[s]," specifying both the particular types of documents or records that the government may use as "proof of a criminal conviction" and the types of "certification[s]" from state officials that the government must obtain to introduce those documents. § 1229a(c)(3)(B)-(C). Had Congress intended its discussion of the noncitizen's burden of proof in § 1229a(c)(4)(A) to similarly address any issue with prior convictions, it would have used specific language in that provision too.

The "established legal backdrop" that Congress was "operat[ing] against, and rely[ing] on," offers another significant contextual cue. *Luna Torres*, 136 S.

Ct. at 1632. The background rule here is clear: The operation of the categorical approach has been the same for nearly a century. *See supra* at 17. And, most importantly, it has long worked the same even in contexts where the noncitizen bore the burden of proof. In *Mylius*, for example, the court considered the effect of a conviction in a noncitizen's home country on his admissibility to the United States. 210 F. at 862. Then as now, a noncitizen bore the burden of proof to show he may enter the country. *See* Act of Mar. 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084; 8 U.S.C. § 1229a(c)(2)(A). But that burden did not stop the court from crafting a "narrow[] … inquiry" into whether a conviction for the crime "*necessarily* involve[d] moral turpitude." *Mylius*, 210 F. at 862 (emphasis added); *see also* Br. of Immigration Law Professors § I.B. Had Congress intended to alter the uniform, established operation of the categorical approach by enacting a generally applicable burden of proof, it would have had to speak much more clearly.

***History.*** This Court has repeatedly looked to statutory and legislative history to confirm that amendments were not intended to abrogate the categorical approach. *See Shepard*, 544 U.S. at 19; *Descamps*, 570 U.S. at 267-68. Here, nothing in the history of § 1229a(c)(4) indicates that Congress sought to displace the categorical approach's focus on the minimum that a conviction "necessarily" establishes.

The statute's text explains that the REAL ID Act made "Amendments to Federal Laws to Protect Against Terrorist Entry." Pub. L. No. 109-13, Div. B, 119 Stat. 231, 302. The bicameral Conference Report elaborates that Congress enacted the REAL ID Act to

"respond[] to terrorist abuse of our asylum laws by amending the INA to limit fraud." H.R. Conf. Rep. 109-72, at 161 (2005). To that end, Congress added two clauses to the REAL ID Act's new burden of proof provisions specifically to eliminate presumptions (unrelated to convictions) that had benefited applicants for asylum and relief from removal.[12] That is significant because it shows how the REAL ID Act targeted with surgical precision presumptions that Congress was concerned about. Yet the Act said nothing to supersede the longstanding minimum-conduct-criminalized presumption that applies when analyzing what a conviction "necessarily" establishes.

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[12] One clause, applicable only to asylum, puts the burden on applicants to show that a protected ground was "at least one central reason for persecuting the applicant." 8 U.S.C. § 1158(b)(1)(B)(i). Congress understood that this "'central reason' standard will eliminate [a] presumption" that had emerged in asylum case law, which Congress feared had made it easier for terrorists to seek asylum. H.R. Conf. Rep. 109-72, at 163-65. The second clause, applicable to all forms of relief, provides that when an IJ evaluates an applicant's testimony, "[t]here is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal." 8 U.S.C. § 1229a(c)(4)(C); *id.* § 1158(b)(1)(B)(iii) (same for asylum). Congress enacted that provision to "make[] it clear" how presumptions should operate in credibility determinations. H.R. Conf. Rep. 109-72, at 168 (asylum); *id.* at 169 (applying the same new "credibility and corroboration standards" for asylum to "other applications for relief" as well).

### D. The Eighth Circuit's inversion of the categorical approach would produce grave practical difficulties.

Beyond lacking any support in the statute and the time-honored operation of the categorical approach, the Eighth Circuit's reading of § 1229a(c)(4) would also lead to a host of "'daunting' difficulties and inequities" that Congress could not have intended. *Descamps*, 570 U.S. at 270 (quoting *Taylor*, 495 U.S. at 601-02). Its approach would undermine the "efficiency, fairness, and predictability in the administration of immigration law" that "the categorical approach ordinarily works to promote." *Mellouli*, 135 S. Ct. at 1987.

1. To take the archetypal scenario under the modified categorical approach, consider a lawful permanent resident who is charged with violating a divisible statute that proscribes breaking and entering into "a house, a building, a car, or a boat" with intent to commit a felony. *Mathis*, 136 S. Ct. at 2255. He pleads guilty to breaking and entering into a *car*. That is not an aggravated felony "burglary offense" under § 1101(a)(43)(G), because the elements of "ordinary vehicle[]" burglary (as opposed to burglary of occupied vehicles and structures) is not "federal generic 'burglary.'" *United States v. Stitt*, 139 S. Ct. 399, 407 (2018); *see Shepard*, 544 U.S. at 17. But no written plea agreement is drafted, and the court's judgment simply reflects a conviction under the relevant code section.

In removal proceedings years later, the government argues that the "burglary" conviction is an

aggravated felony that subjects him to mandatory deportation. § 1229b(a)(3). His record of conviction is ambiguous, so he cannot *disprove* the possibility that he was convicted of generic burglary. Yet, under the Eighth Circuit's rule, "the fact that [he] 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.

This is no hypothetical problem. As this Court has recognized, "in many cases" conviction records "will be incomplete," and the "absence of records will often frustrate application of the modified categorical approach." *Johnson*, 559 U.S. at 145. State and local courts frequently fail to create the relevant conviction documents in the first place. *See* NACDL Br. § I.A. Even where they do create those records, they routinely fail to specify the precise subsection of a state statute involved in the conviction. *See id.* § I.B. And even where records are created, and do specify a particular subsection, they are often lost or destroyed in the intervening years. *See id.* § I.C.

That is exactly what happened in *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016), the First Circuit's case addressing the question presented here. The noncitizen there "was unable to secure any … documents" that "could clarify under which prong he was convicted" because "the Superior Court of the county where he was convicted does not, in misdemeanor cases, maintain copies of the documents he needed." *Id.* at 530 n.5. The IJ found him ineligible for cancellation of removal on that basis, even while noting that he otherwise had a strong case for relief. *Id.* at 530-32. In this "common-enough" circumstance, *Johnson*,

559 U.S. at 145, the noncitizen is simply out of luck for failing to prove the unprovable.

The government embraces the unfairness of this result, declaring that "assigning" who "loses when there is no evidence on a question or when the answer is simply too difficult to find" is "precisely what a burden of proof is designed to do." Gov't Cert. Br. 12. But the issue in cases like this is not that it is "too difficult" to clarify the details of the past offense; it is that the categorical approach largely *forbids* it.

Unlike litigants who bear a burden of proof in other contexts, the noncitizen could not use any of the tools that one would ordinarily use to try to satisfy his burden. He could not, for example, "submit[] testimony from his lawyer" or "the judge who accepted his plea to ascertain what offense was charged and pleaded to in the state court." *Sauceda*, 819 F.3d at 532. He could not even testify on his own behalf to explain the critical "fact" he needs to get relief. That is because, for good reason, the categorical approach absolutely bars venturing beyond the record of conviction and into time-consuming and uncertain "minitrials conducted long after the fact." *Moncrieffe*, 569 U.S. at 200-01. Instead, the noncitizen would be limited to a narrow range of conviction documents that he neither creates nor maintains.

These strict limitations on the scope of the inquiry make perfect sense when the categorical approach is understood (as it always has been) as a formalized, legal analysis of the minimum that a conviction record "necessarily" establishes. But they are arbitrary and crippling if the analysis instead aims to uncover

the particular *way* the noncitizen violated a state statute years earlier.

The Eighth Circuit's rule would mean that eligibility for humanitarian relief from removal will often turn not on what an individual was actually convicted of, but on the happenstance of state and local record-keeping practices. This kind of random fortuity undermines the categorical approach's goals of "efficiency" and "fairness." *Mellouli*, 135 S. Ct. at 1987. And, as *Sauceda* and this case illustrate, conviction records are particularly likely to be vague, incomplete, or destroyed when they involve less serious crimes like misdemeanors. *See also* NACDL Br. § I.A-C. So the costs of the Eighth Circuit's rule are likely to fall on those most deserving of relief.

Even where the documents are clarifying and do still exist, however, obtaining them is often practically impossible for noncitizens who "are not guaranteed legal representation and are often subject to mandatory detention, § 1226(c)(1)(B), where they have little ability to collect evidence." *See Moncrieffe*, 569 U.S. at 201; Br. of Immigrant Defense Project § I.A.1-2.[13] Additionally, many noncitizens may be

[13] Lack of representation and detention will often make all the difference: "(1) for individuals represented and released or never detained, 74 percent have successful outcomes; (2) for individuals who are unrepresented but released or never detained, 13 percent have successful outcomes; (3) for individuals who are represented but detained, 18 percent have successful outcomes; and (4) for individuals who are unrepresented and detained, 3 percent have successful outcomes." Robert A. Katzmann, *Study Group on Immigrant Representation: The First Decade*, 87 Fordham L. Rev. 485, 495 (2018).

unable to speak English fluently enough to navigate placing records requests to state or local court archives. *Id.* § I.A.3. This burden will be shared by already-overstretched immigration judges, who are obligated to facilitate noncitizens' applications for relief from removal. *See* 8 C.F.R. § 1240.11(a)(2); *Moncrieffe*, 569 U.S. at 201; *see generally* Br. of Former United States Immigration Judges.

2. "Still worse, the [Eighth Circuit's] approach will deprive some defendants of the benefits of their negotiated plea deals." *Descamps*, 570 U.S. at 271. One salutary feature of the categorical approach is that it "enables aliens to anticipate the immigration consequences of guilty pleas in criminal court." *Mellouli*, 135 S. Ct. at 1987. A noncitizen can agree to "enter [a] 'safe harbor' guilty plea[] that do[es] not expose the alien defendant to the risk of immigration sanctions." *Id.* So, to take our hypothetical car burglar again, suppose that he is initially accused of breaking into an occupied camper van but intends to fight the charge at trial. To avoid the burden of trial, the prosecutor offers him a deal to plead guilty to the lesser prong of the statute covering simple car burglary. And to avoid the risk of immigration consequences if he is convicted of the generic burglary charge, the noncitizen agrees to the deal.

Under the Eighth Circuit's rule, if a transcript of the plea colloquy has since been destroyed (or was never created), then he will lose the "benefits of [his] negotiated plea deal[]," even though avoiding that consequence was the entire purpose of forgoing his right to a trial. *Descamps*, 570 U.S. at 271. Indeed, "preserving the [defendant's] right to remain in the

United States may be more important to the [defendant] than any potential jail sentence"—and certainly in cases like Mr. Pereida's, in which a noncitizen pleads guilty to a no-incarceration misdemeanor and so likely focuses *exclusively* on downstream immigration consequences. *Jae Lee v. United States*, 137 S. Ct. 1958, 1968 (2017). This Court has emphasized, repeatedly, that the categorical approach should not be understood to functionally "rewrite" plea bargains in that "unfair" way. *Descamps*, 570 U.S. at 271 (quoting *Taylor*, 495 U.S. at 601-02).

For those same reasons, adopting the Eighth Circuit's rule would open up wide swaths of prior convictions to ineffective-assistance-of-counsel challenges. Noncitizens like our car burglar could argue that his attorney's failure to ensure that the record reflected the particular statutory prong at issue—even if that is not typically recorded in the jurisdiction—violated counsel's duty to mind future immigration consequences in plea proceedings. *See Jae Lee*, 137 S. Ct. at 1968; *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010).

3. What's more, the Eighth Circuit's rule will be overinclusive, treating everyone as if they were convicted of a *more* serious offense under a statute unless they can prove otherwise. That flips the categorical approach on its head.

This Court has emphasized that the approach is "underinclusive" by design, and that "this degree of imperfection" is far preferable to imposing the "harsh consequences" of mandatory deportation on noncitizens who do not deserve it. *Moncrieffe*, 569 U.S. at 187, 205; *see also Johnson*, 559 U.S. at 145. Yet the

Eighth Circuit's overinclusive rule would mean that a merely ambiguous conviction like Mr. Pereida's must be deemed so serious that it strips the Attorney General of authority even to *consider* whether to grant cancellation. There is no failsafe. Relief would be strictly barred "no matter how compelling his case" is on the merits, *Moncrieffe*, 569 U.S. at 187, and even if the offense was in fact a non-morally turpitudinous one, like using a fake social security card to obtain employment (over the table and paying taxes) with no intent to defraud or harm another. *See* Neb. Rev. Stat. § 28-608(1)(a), (c) (2008) (making it unlawful for someone to "[a]ssume[] a false identity and do[] an act in his … assumed character with intent to gain a pecuniary benefit for himself," or to "[c]arr[y] on any … occupation without … authorization required by law").

In contrast, the well-accepted "underinclusive" alternative has essentially no practical consequences. When a conviction is not disqualifying under the categorical approach, that does not mean the noncitizen *must* be granted relief; cancellation of removal is always discretionary. So, if it turns out that an individual with a record like the one here in fact violated the statute in a morally turpitudinous way (say, by impersonating others to raid their bank accounts), that can be accounted for during the discretionary phase of proceedings, when the categorical approach does not apply and everything is fair game. "The Attorney General may, in his discretion, deny relief" based on the circumstances of the offense, "just as he may deny relief if he concludes the negative equities outweigh the positive equities of the noncitizen's case for other reasons." *Moncrieffe*, 569 U.S. at 204.

"As a result, 'to the extent that … reject[ing] … the Government's [view] … may have any practical effect on policing our Nation's borders, it is a limited one.'" *Id.* (quoting *Carachuri-Rosendo*, 560 U.S. at 581).

## CONCLUSION

For the reasons above, the Court should reverse the judgment of the Eighth Circuit.

Respectfully submitted,

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January 28, 2020

**APPENDIX A – RECORD OF NEBRASKA CONVICTION**
**(Certified Administrative Record 162-165)**

Image ID: D00049200C22

**JOURNAL ENTRY AND ORDER**

**IN THE COUNTY COURT OF SALINE COUNTY, NEBRASKA**

**ST V. CLEMENTE A PEREIDA** Printed on 5/06/2011 at 1:28
DOB: 7/09/1971 Room 22C01
Case ID: CR 10 197 Page 1
Citation: Date of Hearing 5/06/2011

**CHARGES (AMENDMENTS/PLEAS/FINDINGS/ FINES/PRESENTENCE/JAIL/DISMISSALS)**

| CHARGE | STATUTE | DESCRIPTION | CLASS | TYPE |
|---|---|---|---|---|
| 01 | 28-201 | Attempt of a class 3A or class 4 felo | 1 | MSD |

**APPEARANCES AND ADVISEMENT**

| | |
|---|---|
| Judge | J. Patrick McArdle |
| Defense Counsel | Monzon,Carlos, |
| Prosecutor | Tad D Eickman |

**TRIAL/MOTION HEARING**

| | |
|---|---|
| Hearing held on: | Hearing-Motion for return of seized property |
| Motion Granted | |

Hon. /s/ J. Patrick McArdle 5/06/2011
J. Patrick McArdle Date

_____ Tape Nos. Digital
Bailiff

CASE FILE COPY JOURNAL ENTRY
AND ORDER

FILED BY
Clerk of the Saline County Court
05/06/2011

Under 8 C.F.R. Section 1003.41(b) or 8 C.F.R. 1003.41(c)(2). I certify and attest that I am an immigration officer and this document:

1. Is a true and correct copy of the original document reviewed or
2. Is a document received electronically from the state's record repository or other court's record repository (circle one).

/s/ Carl Wisehart 8/28/2014
Signature of Immigration Officer Date

U.S. Immigration and Customs Enforcement

**JOURNAL ENTRY AND ORDER**

**IN THE COUNTY COURT OF SALINE COUNTY, NEBRASKA**

**ST V. CLEMENTE A PEREIDA**
DOB: 7/09/1971
Case ID: CR 10 197
Citation:

Printed on 6/14/2010 at 9:37
Room 22C01
Page 1
Date of Hearing 6/14/2010

**CHARGES (AMENDMENTS/PLEAS/FINDINGS/ FINES/PRESENTENCE/JAIL/DISMISSALS)**

| CHARGE | STATUTE | DESCRIPTION | CLASS | TYPE |
|---|---|---|---|---|
| 01 | 28-201 | Attempt of a class 3A or class 4 felo | 1 | MSD |

**Plea: No Contest Found: Guilty Fine: $100.00**

**APPEARANCES AND ADVISEMENT**

| | |
|---|---|
| Judge | J. Patrick McArdle |
| Defendant | CLEMENTE A PEREIDA |
| Defense Counsel | Monzon,Carlos, |
| Prosecutor | Steven J Reisdorff |
| Interpreter | Alex Perez |

**ARRAIGNMENT**

Defendant advised of and waived rights.
Defendant waives jury trial.
Defendant enters above pleas.
Pleas entered knowingly, intelligently, voluntarily, and a factual basis for plea(s) found.
Court finds as shown above.

**SENTENCING**

Defendant was granted allocution and sentence was pronounced by the Court.

Defendant ordered to pay fines as shown above; for a total of $100.00, and all costs of prosecution.

Defendant to pay Court Costs $48.00

**ADDITIONAL ENTRIES OF RECORD**

Defendant is advised as follows: "If you are not a United States citizen you are hereby advised that a conviction of the offense for which you have been charged may have the consequence of removal from the United States, or denial of naturalization pursuant to the laws of the United States."

Hon. /s/ J. Patrick McArdle — 6/14/2010
J. Patrick McArdle — Date

_____ Tape Nos. Digital
Bailiff

CASE FILE COPY — JOURNAL ENTRY AND ORDER

FILED BY
Clerk of the Saline County Court
06/14/2010

IN THE COUNTY COURT OF SALINE COUNTY, NEBRASKA

| | | |
|---|---|---|
| THE STATE OF NEBRASKA, | ) | |
| | ) | |
| Plaintiff, | ) | Case No. CR 10-197 |
| | ) | |
| vs. | ) | |
| | ) | NOTICE OF |
| | ) | HEARING |
| CLEMENTE A. PEREIDA, aka CLEMENTEA PEREIDA | ) | |
| | ) | |
| Defendant. | ) | |

Notice is hereby given that the hearing in the above entitled matter is set for ***JUNE 14, 2010 at 9:00 o'clock a.m.*** in the Saline County Court, First Floor—Room 105, Wilber, Nebraska.

DATED: this 8 day of June, 2010.

THE STATE OF NEBRASKA, Plaintiff

/s/ Tad D. Eickman

Tad D. Eickman NSBA# 15655
Saline County Attorney
310 West Third–P.O. Box 713
Wilber, NE 68465
TEL: (402) 821-2531 FAX: 821-2076

CERTIFICATE OF SERVICE

The undersigned does hereby certify that a true and accurate copy of the foregoing Notice of Hearing was sent to each of the below listed parties by mailing the same in the United States Mail, postage prepaid, on this 8 day of June, 2010.

/s/ Tad D. Eickman
Tad D. Eickman, Saline Co. Attorney

Carlos A. Monzon, Attorney
650 J Street, Ste. 401 - The Mill Towne Bldg
Lincoln, NE 68508

FILED BY THE CLERK
OF THE SALINE COUNTY COURT ON
JUN 08 2010
WILBER, NEBRASKA

IN THE COUNTY COURT OF THE STATE OF NEBRASKA, SALINE COUNTY

| | |
|---|---|
| STATE OF NEBRASKA, ) | CASE# (CR) 10 -197 |
| ) ss. | |
| County of Saline ) | **COMPLAINT** |
| | For: |
| THE STATE OF NEBRASKA, ) | 1. Criminal Attempt |
| Plaintiff, ) | (Criminal |
| vs. ) | Impersonation) |
| CLEMENTE A. PEREIDA, aka ) | R.S. 28-201(1)(b) |
| CLEMENTEA PEREIDA ) | |

The complaint and information of Tad D. Eickman, County Attorney of Saline County aforesaid, made in the name of the State of Nebraska, before me, the undersigned County Judge, within and for said County of Saline, State of Nebraska, this 7th day of June, 2010, who being duly sworn, on oath says, that CLEMENTE A. PEREIDA, aka CLEMENTEA PEREIDA on or about January 1, 2007 to July 22, 2009, in the County of Saline and State of Nebraska, then and there being did then and there

1. On or about January 1, 2007 to July 22, 2009, in the County of Saline and State of Nebraska, then and there being did then and there intentionally engage in conduct which, under the circumstances as he believed them to be, constituted a substantial step in a course of conduct intended to culminate in his commission of the crime of CRIMINAL IMPERSONATION R.S. 28-608, Penalty: Class IV Felony, to-wit: did (a) assume a false identity and did an act in his or her assumed character with intent to gain a

> pecuniary benefit for himself, herself, or another or to deceive or harm another; or (b) pretend to be a representative of some person or organization and did an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself or another and to deceive or harm another; or (c) carry on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or (d) without the authorization or permission of another and with the intent to deceive or harm another: (i) obtain or record personal identification documents or personal identifying information; and (ii) access or attempt to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value, to-wit: did use a fraudulent Social Security card to obtain employment at National Service Company of Iowa, located in rural Crete, Saline County, Nebraska, value $500.00 or more but less than $1500), contrary to R.S. 28-201(1)(b) CRIMINAL ATTEMPT. Penalty: Class I Misdemeanor.

contrary to the form of the Statutes in such cases made and provided, and against the peace and dignity of the State of Nebraska.

STATE OF NEBRASKA, Plaintiff

/s/ Tad D. Eickman
Tad D. Eickman NSBA# 15655
Saline County Attorney
310 West 3rd–P.O. Box 713
Wilber, NE 68465
Tel. (402) 821-2531

Subscribed in my presence and sworn to before me this 8th day of June, 2010.

/s/ Gregory V. Baumann
County Judge/Magistrate

NAME: CLEMENTE A. PEREIDA, aka CLEMENTEA PEREIDA
ADDRESS: [STREET ADDRESS]
Crete, NE 68333
DOB: July 9, 1971
OLN:
OFFICER/DEPUTY: Sgt. K.Uher, SCSO
APPEARANCE DATE: June 14, 2010 at 9:00 a.m.

SALINE COUNTY

FILED BY THE CLERK
OF THE SALINE COUNTY COURT ON
JUN 08 2010
WILBER, NEBRASKA

# APPENDIX B – STATUTORY AND REGULATORY PROVISIONS

## 8 U.S.C. § 1158. Asylum

***

(b) Conditions for granting asylum

(1) In general

***

(B) Burden of proof

(i) In general

The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of section 1101(a)(42)(A) of this title. To establish that the applicant is a refugee within the meaning of such section, the applicant must establish that race, religion, nationality, membership in a particular social group, or political opinion was or will be at least one central reason for persecuting the applicant.

(ii) Sustaining burden

The testimony of the applicant may be sufficient to sustain the applicant's burden without corroboration, but only if the applicant satisfies the trier of fact that the applicant's testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant is a refugee. In determining whether the

applicant has met the applicant's burden, the trier of fact may weigh the credible testimony along with other evidence of record. Where the trier of fact determines that the applicant should provide evidence that corroborates otherwise credible testimony, such evidence must be provided unless the applicant does not have the evidence and cannot reasonably obtain the evidence.

(iii) Credibility determination

Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

***

## 8 U.S.C. § 1182. Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

***

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

(I) a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime, or

(II) a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21),

is inadmissible.

***

## 8 U.S.C. § 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

***

(2) Criminal offenses

(A) General crimes

(i) Crimes of moral turpitude

Any alien who—

(I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 1255(j) of this title) after the date of admission, and

(II) is convicted of a crime for which a sentence of one year or longer may be imposed,

is deportable.

***

## 8 U.S.C. § 1229a. Removal proceedings

***

(c) Decision and burden of proof

***

(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that,

in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction

was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such

evidence must be provided unless the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

***

## 8 U.S.C. § 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

***

**8 C.F.R. § 1240.8. Burdens of proof in removal proceedings**

(a) *Deportable aliens*. A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable as charged.

(b) *Arriving aliens*. In proceedings commenced upon a respondent's arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(c) *Aliens present in the United States without being admitted or paroled*. In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the

respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(d) *Relief from removal*. The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

**Neb. Rev. Stat. § 28-201 (2008).**
**Criminal attempt; conduct; penalties**

(1) A person shall be guilty of an attempt to commit a crime if he or she:

***

(b) Intentionally engages in conduct which, under the circumstances as he or she believes them to be, constitutes a substantial step in a course of conduct intended to culminate in his or her commission of the crime.

***

**Neb. Rev. Stat. § 28-608 (2008).**
**Criminal impersonation; penalty; restitution**

(1) A person commits the crime of criminal impersonation if he or she:

(a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another;

(b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another and to deceive or harm another;

(c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or

(d) Without the authorization or permission of another and with the intent to deceive or harm another:

(i) Obtains or records personal identification documents or personal identifying information; and

(ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

***