No. 19-632

IN THE

Supreme Court of the United States

WILLIAM P. BARR, ATTORNEY GENERAL,
Petitioner,

v.

ARACELY MARINELARENA,
Respondent.

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

BRIEF FOR THE RESPONDENT

Andrew Knapp
SOUTHWESTERN LAW SCHOOL
3050 Wilshire Blvd.
Los Angeles, CA 90010

Thomas M. Bondy
Benjamin P. Chagnon
Monica Haymond
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Brian P. Goldman
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700
brian.goldman@orrick.com

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Counsel for Petitioner

QUESTION PRESENTED

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

The question presented, which is also presented in *Pereida v. Barr*, No. 19-438, is: Whether a criminal conviction bars a noncitizen from applying for relief from removal when the record of conviction is merely ambiguous as to whether it corresponds to an offense listed in the Immigration and Nationality Act.

RELATED PROCEEDINGS

Marinelarena v. Barr, No. 14-72003 (9th Cir.)
(opinion and judgment issued July 18, 2019)

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Regulations

STATEMENT

1. Noncitizens may be ordered removed from the United States if they have not been lawfully admitted or have been convicted of certain crimes. 8 U.S.C. § 1227(a)(1)(B), (a)(2). "Ordinarily, when a noncitizen is found to be deportable on one of these grounds, he may ask the Attorney General for certain forms of discretionary relief from removal," including asylum and cancellation of removal. *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013). To apply for relief from removal, however, a noncitizen must meet certain eligibility requirements. Nonpermanent residents are ineligible for such relief if they have been convicted of certain crimes, including a "crime involving moral turpitude," or a crime "relating to a controlled substance" as defined in the federal drug schedules. *See* 8 U.S.C. § 1229b(b)(1)(C) (incorporating §§ 1182(a)(2)(A)(i), 1227(a)(2)(B)(i)).

To determine whether a state conviction meets the definition of an offense described in the Immigration and National Act (INA), such as a controlled substance offense, courts apply the "categorical approach." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015). This approach has a "long pedigree in our Nation's immigration law." *Moncrieffe*, 569 U.S. at 191 (noting it has applied since 1913). It "looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior," and compares the

elements of that offense with the federal definition. *Mellouli*, 135 S. Ct. at 1986.[1]

A state offense is a "categorical" match only if it includes all the elements of the federally defined offense. *Descamps v. United States*, 570 U.S. 254, 261 (2013). If the state statute criminalizes any conduct that falls beyond the federal definition, then the statute is "overbroad" and not a categorical match. But a conviction under the statute can still yield immigration consequences if the state statute is "divisible," meaning that it "list[s] elements in the alternative, and thereby define[s] multiple crimes," at least one of which falls within the scope of the federal definition. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). For these "divisible" statutes, courts look to "a limited class of documents ... to determine what crime, with what elements, a defendant was convicted of" in order to "compare that crime, as the categorical approach commands, with the relevant generic offense." *Id.* This "modified" variant of the categorical approach is merely "a tool for implementing the categorical approach." *Descamps*, 570 U.S. at 262. The object is the same—determining whether the crime of conviction necessarily meets "'all the elements of [the] generic [definition].'" *Id.* at 261-62 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

---

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

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

A separate section of the INA, which does not specifically address the analysis of prior convictions, provides that, "[i]n general," an "alien applying for relief or protection from removal has the burden of proof to establish that the alien ... satisfies the applicable eligibility requirements." 8 U.S.C. § 1229a(c)(4)(A)(i). A related regulation similarly imposes a burden on noncitizens to establish their eligibility for relief from removal. 8 C.F.R. § 1240.8(d).

2. Respondent Aracely Marinelarena is a 50-year-old native and citizen of Mexico. Certified Administrative Record (C.A.R.) 200-01. She moved to the United States with her husband and her son nearly 30 years ago. C.A.R. 183. She and her husband also have two U.S.-citizen children. *Id.* In 2000, Ms. Marinelarena reentered the country on a 6-month visitor's visa. C.A.R. 333.

In 2007, the government charged Ms. Marinelarena as removable for remaining in the United States longer than permitted. Pet. App. 84a; *see* 8 U.S.C. § 1227(a)(1)(B). She conceded she was removable, but she applied for cancellation of removal, citing the exceptional and extremely unusual hardship her removal would cause her two U.S.-citizen children. Pet. App. 84a; C.A.R. 181-91, 332-39; *see* 8 U.S.C. § 1229b(b)(1)(D).

3. An immigration judge (IJ) denied Ms. Marinelarena's application for cancellation of removal. Pet. App. 83a-86a. Ms. Marinelarena's eligibility for cancellation of removal turned on the effect of two prior convictions. First, in 2000, she pleaded no contest to a charge of false personation of another, a misdemeanor under California Penal Code § 529. C.A.R. 117. Second, in 2007, she pleaded guilty to violating California Penal Code § 182(a)(1) for conspiring to sell and transport a controlled substance in violation of California Health and Safety Code § 11352.[2] C.A.R. 215. A state court expunged both convictions under California Penal Code § 1203.4. Pet. App. 4a.[3]

The IJ concluded that she "failed to meet her burden of proof that she is eligible for cancellation" because she had not shown that she was *not* "convicted" of a crime "relating to a controlled substance" listed

---

[2] A second count charged her with the sale, transport, or offer to sell a controlled substance, heroin, in violation of California Health and Safety Code § 11352. C.A.R. 150. She was not convicted of that charge. Pet. App. 27a; C.A.R. 380.

[3] The relevant statutory provisions are reproduced at Pet. App. 116a-119a.

in the federal drug schedules. Pet. App. 85a; 8 U.S.C. § 1229b(b)(1)(C). The IJ thought that the conspiracy conviction established a disqualifying controlled substance offense involving "heroin," because that substance was named in the overt acts alleged in the state criminal complaint. Pet. App. 85a; *see* C.A.R. 137-38 (describing overt acts). The IJ also noted that her conviction for false personation may also count as a "crime involving moral turpitude," making her ineligible for relief. Pet. App. 85a; 8 U.S.C. § 1229b(b)(1)(C) (incorporating § 1227(a)(2)(A)(i)). Although the convictions had been expunged, the IJ held that the expungement did not "remove[ ]" the conviction's effect "for [i]mmigration purposes." Pet. App. 85a.

4. The Board of Immigration Appeals (BIA) dismissed Ms. Marinelarena's appeal. Pet. App. 79a-82a. The BIA observed that "[t]he [immigrant] has the burden of establishing cancellation of removal eligibility." Pet. App. 80a. The BIA focused exclusively on whether Ms. Marinelarena had met her burden to show that her conspiracy conviction was not a conviction for a controlled-substance offense. Pet. App. 80a-81a. It first concluded that a conviction under California Penal Code § 182(a)(1) is divisible as to the object crime of the conspiracy. Pet. App. 80a. After concluding that the criminal complaint established that the object of the conspiracy was to violate California Health and Safety Code § 11352, the BIA then addressed whether that target offense was itself divisible by controlled substance, Pet. App. 80a-81a—a necessary inquiry because the California drug schedules include some substances that the federal schedules do not.

Relying on *Mielewcyzk v. Holder*, 575 F.3d 992 (9th Cir. 2009), the BIA concluded that § 11352 is divisible with respect to individual controlled substances. Pet. App. 80a-81a. The BIA therefore required Ms. Marinelarena to show that "she was not convicted of conspiring to commit a disqualifying controlled substance offense." Pet. App. 80a-81a. Unlike the IJ, the BIA did not rely on the alleged overt acts to conclude that Ms. Marinelarena had been convicted of an offense relating to heroin. The BIA instead held that Ms. Marinelarena "ha[d] not submitted any evidence establishing that her conspiracy conviction was *not* for a disqualifying controlled substance offense." Pet. App. 81a (emphasis added). Accordingly, the BIA held that she had not met her burden to establish eligibility for cancellation. Pet. App. 81a.

5. A divided panel of the Ninth Circuit denied Ms. Marinelarena's petition for review. Pet. App. 52a-72a. The panel majority first concluded, under the categorical approach, that California Penal Code § 182(a)(1) is broader than the definition of a federal controlled substance offense because the statute penalizes "*any* criminal conspiracy, whether or not it relates to a controlled substance." Pet. App. 58a (emphasis in original). The panel then held that the statute is divisible twice over: California Penal Code § 182(a)(1) is divisible as to the "target crime" of the conspiracy, and the target offense here, California Health & Safety Code § 11352, is divisible as to each controlled substance on the relevant California drug schedule. Pet. App. 59a, 61a. Because it deemed the statute divisible, the panel applied the modified categorical approach to "examine the specifics of [her] conviction." Pet. App. 61a.

Unlike the IJ, the panel majority determined that the criminal complaint was "inconclusive" as to the controlled substance involved in her conviction because the conspiracy count to which she pleaded guilty did not "identify the particular controlled substance." *Id.* Nevertheless, the panel denied Ms. Marinelarena's petition for review because, under *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012), "she bears the burden of proof to show that her conviction did *not* relate to a federally controlled substance." Pet. App. 62a (emphasis in original). Because on this "inconclusive record" she could not meet her burden, the panel held that she was ineligible for relief. *Id.*

Judge Tashima dissented. Pet. App. 72a-78a. He noted that "[u]nder *Moncrieffe*," 569 U.S. at 190-91, "the ambiguity in the record as to Marinelarena's offense of conviction means that she has *not* committed an offense disqualifying her from relief." Pet. App. 72a (emphasis in original). *Moncrieffe*, Judge Tashima explained, therefore had abrogated *Young* and required that Ms. Marinelarena be deemed eligible for relief. Pet. App. 74a-78a.

6. The Ninth Circuit reheard the case en banc and granted the petition for review. Pet. App. 1a-26a.

The en banc majority (Judge Tashima, joined by Chief Judge Thomas and Judges Fletcher, Berzon, Bybee, M. Smith, Watford, and Friedland) agreed that § 182(a)(1) is overbroad. Pet. App. 9a. The court then "assum[ed] that § 182(a)(1) is divisible both as to the predicate crime underlying the conspiracy (here, § 11352) and as to the controlled substance element of

§ 11352." Pet. App. 9a. Applying the modified categorical approach, the court agreed with the three-judge panel that "the record is inconclusive" as to the controlled substance involved in the conspiracy conviction. Pet. App. 9a-11a. The criminal complaint "references a specific controlled substance, heroin," but her "guilty plea could have rested on an overt act that did not relate to heroin." Pet. App. 9-10a. So the court could not "assume her conviction was predicated on an act involving a federal controlled substance." Pet. App. 10a.

The en banc court recognized that its prior decision in *Young* was incompatible with *Moncrieffe*, 569 U.S. at 189-90, and *Descamps*, 570 U.S. at 263-64. Pet. App. 10a-11a. In *Moncrieffe*, this Court rejected the government's argument that the petitioner had committed a "felony punishable under the [Controlled Substances Act]," when the record was ambiguous as to whether the substance would "'necessarily' prescribe felony punishment for that conduct." Pet. App. 13a-14a (emphasis omitted). That logic was "irreconcilable" with *Young*'s rule, which required noncitizens to overcome an ambiguous record to demonstrate eligibility for relief. Pet. App. 14a. The en banc court explained that "*Moncrieffe* holds the opposite: If the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes." *Id.* (emphasis in original). So, "[u]nder *Moncrieffe*, ambiguity in the record as to a petitioner's offense of conviction means that the petitioner has *not* been convicted of an offense disqualifying her from relief." Pet. App. 11a. (emphasis in original).

The court rejected the government's arguments to the contrary. First, it held that there was no distinction between whether the petitioner was removable—at issue in *Moncrieffe*—and whether the petitioner was eligible for cancellation of removal. Pet. App. 15a. *Moncrieffe* itself held "that the categorical 'analysis is the same in both [the removal and cancellation of removal] contexts.'" Pet. App. 14a (emphasis omitted) (quoting *Moncrieffe*, 569 U.S. at 191 n.4). Nor did the INA's burden on noncitizens to prove their eligibility for relief from removal require a different result: That burden of proof, the court held, "has no bearing on the conclusion reached in *Moncrieffe*, because the key question in the categorical approach ... addresses a question of law." Pet. App. 15a; *see also* Pet. App. 16a-18a. That question—"whether the record of conviction *necessarily* established the elements of the disqualifying federal offense"—"is a legal question with a yes or no answer." Pet. App. 17a (emphasis added). It "requires no factual finding and is therefore unaffected by statutory 'burdens of proof.'" Pet. App. 15a.

The court also rejected the government's argument that there is a "predicate factual question" in the modified categorical approach that *Moncrieffe* had "no bearing on"—a step in which the court reviews conviction documents to determine "the version of the offense" at issue. Pet. App. 17a-18a. The court concluded that the modified categorical approach entails no such predicate inquiry. *Id.* Rather, "the categorical and modified categorical approaches are two aspects of the same analysis," such that the "relevant inquiry in both" types of "cases is the same": examination of what is "*necessarily* established by [the] conviction." Pet. App. 17a-19a, 21a. In other words, the "modified

categorical approach is 'a tool for implementing the categorical approach.'" Pet. App. 18a (quoting *Descamps*, 570 U.S. at 262). Accordingly, the en banc court overruled *Young*, and held that "an ambiguous record of conviction does not demonstrate that a petitioner was convicted of a disqualifying federal offense." Pet. App. 2a, 11a.

The en banc court noted, however, that the BIA did not address whether all the relevant documents shedding light on Ms. Marinelarena's conviction had been produced to the immigration court. Pet. App. 24a. The court chose not to address whether the generic INA burden-of-proof provision applied to the production of criminal records, and remanded that question to the BIA to address in the first instance. Pet. App. 24a-25a.

Judge Ikuta, joined by Judges Graber and Rawlinson, dissented. Pet. App. 26a-51a. She agreed with the original panel decision and would have held that a noncitizen "seeking relief from removal must show that they were not convicted of a state offense that would disqualify them from cancellation of removal, and will lose if they cannot do so because the record is inconclusive." Pet. App. 31a (citation omitted).

ARGUMENT

The government notes (Pet. 9-10) that this case raises the same question presented in *Pereida v. Barr*, No. 19-438—a case that the decision below acknowledged and rejected. *See* Pet. App. 12a n.6 (citing *Pereida v. Barr*, 916 F.3d 1128 (8th Cir. 2019)). The

government requests that the Court hold this petition pending the disposition in *Pereida* and then to dispose of this case as appropriate. Pet. 10. Because the Court has since granted certiorari in *Pereida*, respondent agrees that this petition should be held and then disposed of as appropriate in light of the disposition in *Pereida*.

The government identifies no independent reasons why certiorari is warranted in this case. Indeed, while the government has acknowledged that "*Pereida* provides a suitable vehicle for the Court to resolve" the question presented in these cases, Pet. 9, this case would be an exceedingly poor alternative vehicle for doing so. The Ninth Circuit reached the question presented only by assuming without deciding two "threshold issues that could independently" lead to the same outcome and thus would "render advisory or academic [this Court's] consideration." *Medellin v. Dretke*, 544 U.S. 660, 664 (2005).

First, the court of appeals assumed that the California conspiracy statute, California Penal Code § 182(a)(1), is divisible not only with respect to object crimes (e.g., conspiracy to violate California Health & Safety Code § 11352), but also subcrimes within that object crime (e.g., conspiracy to commit a heroin offense under § 11352). *See* Pet. App. 9a. That assumption was a necessary predicate to the holding below because the modified categorical approach would not apply at all if Ms. Marinelarena's conviction were under an indivisible statute; the statute would simply be overbroad and categorically *not* a controlled substance offense. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). But whether the statute is divisible

was hotly disputed below. *See* Pet'r Supp. En Banc Br. 4-5; Gov't Supp. En Banc Br. 11-12. And the better reading of California law is that California Penal Code § 182(a)(1) is *not* divisible into conspiracies to commit a drug offense involving a specific drug—which is why the conspiracy count in Ms. Marinelarena's charging document did not charge a particular substance in the first place. *See, e.g.*, *People v. Jasso*, 48 Cal. Rptr. 3d 697, 698, 701, 703-04 (Ct. App. 2006) (noting that California prosecutors charge conspiracies to traffic in multiple drugs as a *single* crime with a *single* punishment). Ms. Marinelarena would be entitled to defend the judgment below on this California-statute-specific alternative threshold ground.

Second, the court of appeals also assumed without deciding that Ms. Marinelarena's conviction could be disqualifying even though it had been vacated and dismissed under California's expungement provision. *See* Pet. App. 25a; C.A.R. 215-16; Cal. Penal Code § 1203.4. The INA defines "conviction" as a "formal judgment of guilt of the alien entered by a court." 8 U.S.C. § 1101(a)(48)(A). The Attorney General has interpreted that provision to discount the effect of state expungements on *rehabilitative* grounds. *See In re Salazar-Regino*, 23 I. & N. Dec. 223, 234 (BIA 2002); *see also In re Marroquin-Garcia*, 23 I. & N. Dec. 705, 713-14 (A.G. 2005). Yet the BIA has also held that convictions vacated for *procedural or substantive* reasons do *not* count as convictions for immigration purposes. *In re Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, 465 F.3d 263 (2006); *see Nath v. Gonzales*, 467 F.3d 1185, 1188-89 (9th Cir. 2006). There is "no basis in the statutory text" to read "conviction" to include some offenses as to which

courts later granted post-conviction relief but not others. *Cf. Pereira v. Sessions*, 138 S. Ct. 2105, 2116 (2018). The BIA therefore erred in treating Ms. Marinelarena's since-vacated conviction as a "conviction" under the INA. This independent reason why the outcome below was correct would similarly make this a poor vehicle for resolving the question presented.

CONCLUSION

The petition should be held pending *Pereida v. Barr*, No. 19-438, and then disposed of as appropriate in light of the final disposition in that case.

Respectfully submitted,

Andrew Knapp
SOUTHWESTERN LAW SCHOOL
3050 Wilshire Blvd.
Los Angeles, CA 90010

Thomas M. Bondy
Benjamin P. Chagnon
Monica Haymond
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

Brian P. Goldman
Counsel of Record
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700
brian.goldman@orrick.com

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

December 23, 2019