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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government's brief makes clear that the parties' dispute is not about the meaning of the immigration laws' burden of proof provisions, but instead about the operation of the modified categorical approach. There is no disagreement that a noncitizen applying for relief from removal "has the burden of proof to establish" that he "satisfies the applicable eligibility requirements," 8 U.S.C. § 1229a(c)(4)(A), including that he "has not been convicted of an offense" listed in the INA, § 1229b(b)(1)(C). The question is just what it means to have been "convicted of an offense" for federal purposes, and thus how a noncitizen may show that a past state conviction does not rise to that level.

The categorical approach and its modified variant answer that question. They provide that a state conviction is not a "conviction" for immigration purposes unless "the record of conviction of the predicate offense *necessarily* establishes" the elements of the federally defined offense. *Moncrieffe v. Holder*, 569 U.S. 184, 197-98 (2013) (emphasis added). And they make clear that a conviction *necessarily* establishes only the "minimum conduct criminalized by the state statute," unless the record of conviction reveals something more with certainty. *Id.* at 191; Pet. Br. 15-19. So a noncitizen demonstrates that he "has not been *convicted* of" an enumerated offense, § 1229b(b)(1)(C) (emphasis added), when the record shows only that he was convicted under an overbroad statute and does not specify which prong formed the basis for his conviction; under the least-acts-criminalized presumption, such a conviction does not correspond to a federal

predicate offense. He need not go the additional step of "prov[ing] that his conviction *was* for a version of the offense that is not disqualifying," Gov't Br. 14 (emphasis added).

The government's contrary view turns on its assertion that the least-acts-criminalized presumption does *not* apply to the modified portion of the categorical approach. It says that determining which prong of a divisible statute a noncitizen was convicted of is instead a factual question with no presumptive answer, so uncertainty on that score must be resolved by background burdens of proof. But the Court's cases say precisely the opposite, and the government outright ignores the case that most clearly proves our point, *Johnson v. United States*, 559 U.S. 133 (2010). *Infra* § I.A. The government's vision of the modified categorical approach also departs sharply from the decades-old first principles of the categorical approach. *Infra* § I.B. And the government's defense of its rule on practical grounds does not withstand scrutiny. Where relief is ultimately in the government's discretion anyway, there is no reason to think that Congress intended an approach that would make eligibility for humanitarian relief turn on the happenstance of state and local recordkeeping practices. *Infra* § II.

ARGUMENT

I. The Government's View Is Inconsistent With This Court's Cases And The First Principles Of The Categorical Approach.

A. The least-acts-criminalized presumption governs all aspects of the categorical approach and leaves no work for a burden of proof to do.

1. Much is common ground here. The government does not dispute three key premises of our argument:

First, courts analyzing a potential predicate offense under the categorical approach must presume that the "conviction 'rested upon nothing more than the least of the acts' criminalized," because that is all the "conviction necessarily involved." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013). *See* Pet. Br. 16-17; Gov't Br. 32-34, 36.

Second, a presumption that provides a default answer to a question "supplants a generally applicable burden of proof" by leaving no ambiguity for a burden of proof to resolve. Pet. Br. 30-32.

Third—putting those propositions together—wherever the least-acts-criminalized presumption applies, it operates the same regardless of who bears the burden of proof. Gov't Br. 35-38; *see* Pet. Br. 23-26.

Accordingly, because the government agrees that the least-acts-criminalized presumption applies to *in*divisible statutes, it concedes that "an overbroad indivisible crime is not disqualifying" when a noncitizen

applies for relief from removal, even though he bears the burden of proof. Gov't Br. 36. The government does not argue, for example, that the presumption and the burden of proof are inversely related, such that a conviction would be presumed to rest on the *greatest* acts criminalized any time the noncitizen bears the burden of proof. *See* Gov't Br. 35-36; *see also* Pet. Br. 25 (citing *Moncrieffe*, 569 U.S. at 194-95, 204); Pet. Br. 41 (citing *United States ex rel. Mylius v. Uhl*, 210 F. 860, 862 (2d Cir. 1914) (exclusion case)).

2. The government parts ways with us on only a narrower, threshold question: whether the least-acts-criminalized presumption applies to the modified portion of the categorical approach—i.e., the step of assessing which alternative prong of a divisible statute gave rise to a conviction. If (as we say) the presumption applies to the whole categorical analysis, then background burdens of proof have no role to play with the modified portion, just as everyone agrees they do not in the pure categorical approach. If (as the government says) "the least-acts presumption is irrelevant" to the "antecedent inquiry of which crime under a divisible statute the defendant was convicted of committing," then the presumption does not resolve any ambiguity on that question, but "the burden of proof can and does." Gov't Br. 27, 34-35, 38. Virtually everything the government says hinges on this one contention.

So the dispute is not whether 8 U.S.C. § 1229a(c)(4) or 8 C.F.R. § 1240.8(d) contain any "unstated exception" for criminal convictions, nor whether we are seeking to "shift the burden of proof … from the alien to the government." Gov't Br.

17, 41. Rather, it is just whether the modified categorical approach is a "meaningfully different" analysis from the ordinary categorical approach, such that burdens of proof affect the former even though they undisputedly do not affect the latter. Gov't Br. 35.

The government is wrong to divorce the categorical and modified categorical approaches and treat them as fundamentally different inquiries. As we demonstrated (Br. 27-29), the least-acts-criminalized presumption governs every aspect of the analysis, including the "which prong" question under the modified categorical approach. That is just how this Court applied the presumption in *Johnson v. United States*, 559 U.S. 133 (2010)—the case that defined the presumption in the first place. *Johnson* required the Court to consider whether a state battery conviction corresponded to a "violent felony" under the Armed Career Criminal Act. *Id.* at 137. The state statute was divisible into three different battery crimes. *Id.* at 136-37; *see Descamps v. United States*, 570 U.S. 254, 264 n.2 (2013) (recognizing that *Johnson* "rested on the explicit premise that the [state statute] 'contain[ed] statutory phrases that cover several different ... crimes'"). But "nothing in the record of Johnson's … battery conviction" clarified *which* statutory prong he was convicted of. *Johnson*, 559 U.S. at 136-37. So the Court presumed that his conviction "rested upon" only "the least of these acts"—i.e., the lowest-level alternative crime under the statute. *Id.* at 137. And it then went on to see whether even that crime satisfied the definition of a federal "violent felony." *Id.* at 137-42.

The government hazards no response at all to *Johnson*. But *Johnson* defeats the government's

argument. The government says, for example, that the "least-acts presumption applies only … to classify an *already-identified* crime under the categorical approach." Gov't Br. 33 (emphasis added). It posits that when a record of conviction does *not* identify a specific statutory prong, an "adjudicator is no more able to discern" the meaning of the conviction "than if the judgment had specified no particular statute of conviction at all." Gov't Br. 27; *see also id.* at 24. It therefore insists, over and over, that the comparison of elements under the categorical approach simply "cannot" proceed "without first identifying *which* crime" under the statute an individual "was convicted of committing." Gov't Br. 36; *see also id.* at 24, 34. *Johnson* proves otherwise. It applied the least-acts-criminalized presumption, so that the categorical analysis could proceed, precisely when the "absence of records" specifying a particular statutory prong meant that the specific crime could *not* be identified under "the modified categorical approach." 559 U.S. at 145.

Moncrieffe likewise refutes the government's position. It explained that the presumption holds even for a conviction under a "state statute[] that contain[s] several different crimes"—i.e., in precisely the circumstance when the government says it cannot—*unless* the record of conviction makes clear "which particular offense the noncitizen was convicted of." 569 U.S. at 191. That is, a clear answer to the "which prong" inquiry may *overcome* the baseline presumption that a conviction establishes only the "minimum conduct criminalized by the state statute." *Id.* But identifying one specific statutory prong is not a *necessary* "antecedent" step, as the government says (Br. 34-35).

As a result, where a conviction record leaves ambiguous "what crime, with what elements" gave rise to a particular conviction under a statute, *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016), the categorical inquiry does not grind to a halt. Instead, *Johnson* and *Moncrieffe* prescribe a default rule: Presume the least, because the most minor prong of the statute is all that that conviction "necessarily" establishes. *Moncrieffe*, 569 U.S. at 190-91. That allows the adjudicator to move ahead with comparing the elements of that crime with those of the federal offense. *Id.* And because the least-acts-criminalized presumption has already resolved the "[a]mbiguity," no burden of proof ever comes into play—which is why no such burden features in any of this Court's categorical or modified categorical approach cases. *Id.* at 194-95; *see also* Pet. Br. 23-24, 26.

3. The government suggests that *Moncrieffe*, along with *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), and *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), instead support its view. It notes that those decisions did not rely on the least-acts-criminalized presumption to resolve uncertainty as to "what crime" was at issue; instead they "invoked that presumption to determine the legal scope and significance … of past convictions for crimes that had already been identified." Gov't Br. 35. But the fact that the presumption applies in that instance, too, does not mean that it applies *only* there. As the government recognizes, "[i]n each" of those cases, "no serious question existed" as to "what crime" was at issue, so the Court had no occasion to apply the presumption to that question. *Id.* But *Moncrieffe*, at least, described how the presumption would be applied in that

circumstance—just as it was in *Johnson*, where the "which prong" question *was* addressed. *See Moncrieffe*, 569 U.S. at 190-91.

Similarly beside the point is the government's observation that a noncitizen convicted under a divisible statute "must have been convicted of one of [the] distinct crimes" contained within, for he "cannot be convicted of a divisible statute in its entirety" just as he "could not be convicted of violating Title 18 of the United States Code." Gov't Br. 23, 36. That is true enough. But no one is arguing otherwise. The question is just how a court treats a conviction when the record does not specify which particular crime a noncitizen was convicted of. And while a conviction record reciting only "Title 18" is fanciful, records identifying only a particular criminal code section—but no specific prong within that statute—are "common[]," *Johnson*, 559 U.S. at 145. As the government told the Court in *Johnson*, in many states "charging documents generally track the language of the statute" without specifying particular statutory prongs. U.S. Br. at 42, *Johnson v. United States*, No. 08-6925 (U.S. Aug. 7, 2009). That is the case here. *See* Pet. Br. App. 7a-8a (C.A.R. 165).

4. Our argument that the least-acts-criminalized presumption governs the entire analysis holds regardless of whether the "which prong" question is viewed as a question of law or a question of fact (*see* Pet. Br. 26-27); presumptions operate on questions of fact too, and they can be used to satisfy generally applicable burdens of proof. *See, e.g.*, 2 McCormick on Evidence § 344 (8th ed. 2020); Fed. R. Evid. 301. We note, however, that if that question is purely legal,

then that is further reason why it cannot be subject to a burden of proof. *See* Pet. Br. 20-22. Indeed, the government does not dispute that "a 'purely legal inquiry'" is not affected by a burden of proof, Gov't Br. 37-38; it just says that the "which prong" question is factual. But the only reason it offers for why that is so is that the inquiry is "record-specific" and "relies on documentary evidence." Gov't Br. 38-39. That fails to answer our explanation that an inquiry is not "factual" just because it involves consulting records. Pet. Br. 32-35. Nor does the government dispute that the BIA's application of the modified categorical approach is judicially reviewable—and indeed, reviewed de novo—just like any "question of law." Pet. Br. 36; *cf. Guerrero-Lasprilla v. Barr*, No. 18-776 (Mar. 23, 2020), slip op. 4-5.

B. The government's argument flouts the first principles of the categorical approach.

The government's position is also incompatible with the categorical approach's first principles.

1. Courts "must presume that [a] conviction 'rested upon nothing more than the least of the acts'" that could support it "[b]ecause" the categorical and modified categorical approaches focus on "what [a] state conviction *necessarily* involved." *Moncrieffe*, 569 U.S. at 190-91 (emphasis added); *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.) (examining what a conviction "'necessarily'" established by looking to the least criminal conduct punished by the statute). That focus reflects a "demand for certainty" about the meaning of past

convictions before they will be allowed to restrict individuals' liberty for a second time, in sentencing or immigration proceedings years or decades later. *Mathis*, 136 S. Ct. at 2257. Insistence "on a legal 'certainty'" about prior convictions has animated the categorical approach "from the Court's earliest decisions." *Id.* at 2255 n.6.

The government does not dispute that the demand for certainty always requires presuming the least acts that could satisfy a given statutory element when it is identified. *See* Gov't Br. 32-35; Pet. Br. 16-17. But the government argues that no such certainty is needed when the relevant statutory alternative is not identified. There is no basis for driving a wedge between the two, though. The only thing that is "certain[]" about what a past conviction stands for—all that it "'necessarily' involved"—is the least of the acts that could have resulted in it. *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion); *Moncrieffe*, 569 U.S. at 190-91. That is true whether a court is faced with an indivisible statute or a divisible one; the "minimum conduct criminalized by the state statute" is the same whether it has just one set of elements or encompasses multiple alternatives. *Moncrieffe*, 569 U.S. at 191.

This Court's cases confirm that the demand for certainty is not cabined to cases where the specific statutory alternative is *already identified*. In *Shepard*, for instance, the Court invoked the "demand for certainty" in prescribing which record materials may be consulted *to identify* the statutory prong under the modified categorical approach (jury instructions and plea agreements, yes; police reports, no). 544 U.S. at

21-22. In *Mathis*, the Court explained that the "demand for certainty when determining whether a[n individual] was convicted of" a certain offense meant that statutory alternatives could be treated as elements, rather than means, only if the record materials "plainly" indicate the former. 136 S. Ct. at 2257 (internal quotation marks omitted). Those cases make clear that the need for "certainty" broadly anchors the entire analysis of prior convictions, not just the ultimate comparison of elements. And because a past conviction is not a "conviction" under the INA unless it establishes the elements of the federal offense with certainty, a background burden of proof does not bear on the analysis. *See* Pet. Br. 24.

2. The categorical approach's demand for certainty also highlights another oddity with the government's position. The government says that 8 C.F.R. § 1240.8(d)'s "preponderance of the evidence" standard governs the "which prong" inquiry under the modified categorical approach. Gov't Br. 20, 41-42. So, in the government's view, "[t]he alien … must show it is 'more likely than not' that he was convicted of a nondisqualifying version of the offense." Gov't Br. 26 (internal citation omitted). But the government never explains how that standard is supposed to operate in this context, where "certainty" is the watchword. And this Court has already rejected every conceivable approach that would make the inquiry a probabilistic one.

An immigration judge may not, for example, ask whether it is more likely than not that the conduct alleged in a charging document (e.g., using a fake social security card to obtain employment) would have

been prosecuted under one of the non-disqualifying prongs of the criminal statute (e.g., "[c]arr[ying] on any … occupation without … authorization required by law," Neb. Rev. Stat. § 28-608(1)(c) (2008)); that would run afoul of the prohibition on looking to the alleged facts underlying the offense. *See Descamps*, 570 U.S. at 268, 270. Nor could an IJ take testimony about which statutory prong an individual pleaded guilty to years before; that would contravene the prohibition on unreliable "minitrials" about the prior offense "conducted long after the fact." *Moncrieffe*, 569 U.S. at 200-01; *Mylius*, 210 F. at 863; Pet. Br. 23, 40. An IJ similarly could not weigh clues in some conviction documents against others; the question of which prong formed the basis of a past conviction must be answered "free from any inconsistent, competing evidence." *Shepard*, 544 U.S. at 21-23; *id.* at 25 (plurality opinion).[1] Nor could an IJ try to gauge which statutory alternative is most often prosecuted in the jurisdiction, and treat that as the one that was more likely than not at issue in the specific case; that would just revive the "ordinary case" inquiry that the Court recently found unworkable. *Johnson v. United States*, 135 S. Ct. 2551, 2557 (2015).

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[1] The government suggests that we take issue with the "'strict limitations' … on the types of documents that may be considered to identify the offense of conviction." Gov't Br. 45-46. Not at all. Those well-established limitations make good sense, for all the reasons we described (Pet. Br. 45) and the government says. Our point is simply that those limitations confirm that the modified categorical approach is a narrow inquiry into the least that a conviction "necessarily" establishes, not an independent factual inquiry that *must* resolve which statutory prong was involved in each case.

The "preponderance of the evidence" standard has no work to do precisely because there is no place in the categorical approach, including its modified portion, for a freewheeling exercise in "weigh[ing]" competing evidence to see if a party has met its burden of proof. 2 McCormick on Evidence § 339 (8th ed. 2020) (preponderance of the evidence); *see* Pet. Br. 29-30.

3. Eliminating the demand for certainty from one stage of the categorical approach would also unduly complicate the analysis. Our approach answers the "which prong" question the same way all questions under the categorical approach are answered: If "the record of conviction of the predicate offense *necessarily* establishes" the elements of the federally defined offense, then the conviction counts; if not, then not. *Moncrieffe*, 569 U.S. at 197-98 (emphasis added).

In contrast, the government would replace that single question, rooted in a constant presumption, with a three-part decision tree: If "(A) a conviction [is] under an indivisible statute that is overbroad relative to the relevant generic offense," then apply the standard least-acts-criminalized presumption; if "(B) a conviction [is] under a divisible statute that covers multiple crimes, some but not all of which are disqualifying, where the record does not indicate which crime formed the basis of the conviction," then apply the relevant burden of proof to resolve the "which prong" question; and if (C) "the defendant was convicted under a divisible statute but the least acts criminalized by the elements of every crime the statute covers would (or would not) be disqualifying," then do *not* "conduct a threshold inquiry into which specific version of the offense the defendant was convicted of

committing," but instead revert to applying the standard least-acts-criminalized presumption. Gov't Br. 33 n.2, 35.

That cumbersome approach is unwarranted, and nothing in this Court's cases or the categorical approach's underlying justifications support deviating from the usual "demand for certainty" in this one, narrow context. The regime the government envisions would also confuse the analysis of past convictions—and eviscerate the categorical approach's promise of "predictability in the administration of immigration law," *Mellouli*, 135 S. Ct. at 1986-87—by having the very same conviction simultaneously not count as a CIMT at the removal phase (where the government bears the burden of proof) and then count as one at the relief phase (where the noncitizen does).

4. Last, the government's treatment of the "which prong" question as a factual question that sits outside the categorical approach's presumptions cannot be squared with the approach's separate Sixth Amendment underpinnings.[2] The government stresses that the "which prong" inquiry must be a factual one because this Court has referred to the "*fact* that the defendant had been convicted" of an offense. Gov't Br. 38 (emphasis added). But the Court's cases make clear that the moniker was not intended literally. A

[2] Those concerns apply equally to the treatment of a past "conviction" under the INA because the categorical approach also governs criminal proceedings under the INA (*see* 8 U.S.C. § 1326(b)), and the government does not dispute that the categorical approach must operate the same in both its criminal and noncriminal applications. *See* Pet. Br. 35 & n.8.

determination that an individual has a prior conviction for a certain offense is exempt from the Sixth Amendment's jury-trial guarantee, which applies to all other facts that increase a mandatory sentence. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). That is because, unlike any other fact, the "fact" of a prior conviction can always be known with "certainty," *id.* at 488—i.e., "conclusive[ly]" from "a prior judicial record," *Shepard*, 544 U.S. at 24-25 (plurality opinion). The Court has often signaled this differentiating feature of prior convictions by placing the "fact" label in scare quotes, *Apprendi*, 530 U.S. at 488, and attaching modifiers like "mere" or "simple" to the "fact" of a prior conviction, *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Mathis*, 136 S. Ct. at 2252.

The least-acts-criminalized presumption is the only reason the modified categorical approach squares with *Apprendi* at all: It guarantees that the "which prong" question is determined with "certainty," by requiring courts to treat convictions as standing for no more than what they "'necessarily' involved"—i.e., the least of the acts established by the record of conviction. *Shepard*, 544 U.S. at 24-25 (plurality opinion). Where that record shows only a statutory section but no subsection, then (as in *Johnson*) the modified categorical approach says that the individual has only been "convicted" of the least criminal prong.

5. Ultimately, the government's insistence that the modified categorical approach's "which prong" question is "meaningfully different" and governed by "separate inquiries and … principles," Gov't Br. 35, is just the latest effort to expand the modified

categorical approach into a much broader, distinct inquiry. This Court has twice rejected such arguments, instead holding fast to the view that the modified categorical approach "acts not as an exception, but instead as a tool" that "merely helps implement the categorical approach." *Descamps*, 570 U.S. at 263. And the analysis's "central feature" and "basic method" remain constant, whether a statute is divisible or not. *Id.*; *Mathis*, 136 S. Ct. at 2253-54 & n.4. The Court should reject this reimagining of the modified categorical approach as well.

II. The Government's Arguments Regarding Practical Difficulties Lack Merit.

Our brief explained (Br. 43-50) how the government's rule would yield grave practical difficulties for both immigration courts and noncitizens—particularly individuals who are convicted of low-level misdemeanors like Mr. Pereida's "attempted criminal impersonation" offense. *See also* NACDL Br. 7-16; Br. of Immigration Law Professors 21-23. The government does not dispute our illustration of how its rule will often deprive noncitizens of the benefit of their plea bargains (Pet. Br. 47-48) and deny humanitarian relief from removal to individuals who have not committed a disqualifying offense, based on the happenstance of state and local recordkeeping practices (Pet. Br. 43-46). Instead, it offers three defenses for those results.

A. First, the government says that the modified categorical approach presents both sides with the challenge of having to prove the unprovable, because when "documents that clarify the basis of a conviction

are lost or never generated," it always means "one party or the other … will not prevail." Gov't Br. 46. So, the government asserts, our rule would just mean that the government would suffer "those problems" instead. Gov't Br. 46.

But, as the Court has twice reminded the government, the consequences of "those problems" are not remotely the same both ways. *See* Pet. Br. 49-50 (citing *Moncrieffe*, 569 U.S. at 204, and *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010)). The government does not *lose* when a conviction cannot be treated as a mandatory bar to relief, *contra* Gov't Br. 46, because the government ultimately makes the (judicially unreviewable) discretionary decision whether to grant relief as a matter of executive grace.

In contrast, under the government's rule, when a noncitizen is convicted under a non-disqualifying prong of a statute, he is nevertheless *guaranteed* to be removed from the country if conviction records were never created or have been lost to time. The Attorney General would be barred from even considering whether to grant him discretionary relief on the facts of his case. *See* Pet. Br. 48-49. The government offers no reason to think that "Congress's considered judgment," Gov't Br. 46, included the "absurd" and "inherent[ly] unfair[]" result of denying humanitarian relief simply because a noncitizen cannot prove a negative using only documents that he neither creates nor maintains. *Young v. Holder*, 697 F.3d 976, 993 (9th Cir. 2012) (en banc) (Ikuta, J., concurring in part and dissenting in part), *overruled by Marinelarena v. Barr*, 930 F.3d 1039, 1042 (9th Cir. 2019) (en banc).

B. Second, the government questions whether ambiguity in conviction records is actually beyond the noncitizen's control. It suggests that "the alien … has a strong incentive to ensure that relevant records (such as a plea-colloquy transcript) are created and retained in the first place." Gov't Br. 46-47; *see also id*. at 31 (same).

The problem is not one of incentive, however, but ability: State and local courts often do not record the particulars of a conviction as a matter of course, especially in cases involving misdemeanors. *See* NACDL Br. 7-13; Pet. Br. 44-46. And, contrary to the government's suggestions (Br. 31, 46-47), noncitizens have little ability to force them to do otherwise. NACDL Br. 7-13. Here, for example, the government notes that an "online-docket printout … states that '[t]he parties ha[d] agreed to a plea bargain,'" and it wonders why "petitioner did not submit a plea agreement or colloquy in his removal proceedings before the IJ." Gov't Br. 30-31 (quoting C.A.R. 210). But there was no written plea agreement—only an oral one, as is common in Nebraska criminal practice. That is why the "online-docket printout" reflects no filing of a plea agreement. And, more generally, it is not uncommon for misdemeanor pleas to be taken "off the record," or "without a colloquy" entirely. NACDL Br. 7-9.

Both the Court and the government have acknowledged these realities. In *Shepard* itself, the "record [wa]s silent on the generic element" because there was "no plea agreement or recorded colloquy in which Shepard admitted the generic fact." 544 U.S. at 25. And in *Johnson*, the Court recognized that it is "common[]" that "state and local records" will be

"incomplete," such that the modified categorical approach comes up empty. 559 U.S. at 136-37, 145. The government has cautioned the Court about this real-world dynamic as well: "[R]ecords from closed misdemeanor cases are often … incomplete." U.S. Br. at 45, *Voisine v. United States*, No. 14-10154 (U.S. Jan. 19, 2016). "And plea colloquies, which are not always transcribed or otherwise available, may reflect ... only that the defendant pleaded guilty to the offense as charged in the information or indictment," without specifying a statutory prong. U.S. Br. at 43, *Johnson v. United States*, No. 08-6925 (U.S. Aug. 7, 2009).

C. Third, the government says that a different scenario is more concerning—one in which clarifying records *were* created, and remain available, but reveal that a conviction was under a disqualifying prong. In that case, the government fears, our rule "w[ould] encourage aliens to withhold and conceal evidence." Gov't Br. 47 (quoting *Marinelarena*, 930 F.3d at 1065 (Ikuta, J., dissenting)); *see also* Gov't Br. 31. But any whiff of "conceal[ing] evidence" could be grounds to deny relief at the discretionary phase, when an immigration judge decides if an eligible noncitizen *should* be granted relief. And there is a high likelihood that such concealment would be detected, as the government must conduct its own criminal-records check anytime a noncitizen applies for relief from removal. *See infra* at 20-22. Moreover, at the discretionary phase, the IJ is not limited to the categorical approach and may consider any other evidence of criminal conduct. *See Moncrieffe*, 569 U.S. at 204; Pet. Br. 49. So concealing *Shepard* documents is unlikely to be a common practice, and certainly not a successful one.

The government's concern is also misplaced for a more fundamental reason: It incorrectly assumes that noncitizens have an obligation to produce conviction documents in the first place—i.e., that noncitizens bear not only the burden of proof but also the burden of production. Gov't Br. 30-31.

The government conflates "two distinct concepts"—the burden of persuasion and the burden of production—that do not automatically travel together. *Dir., Office of Workers' Compensation Programs v. Greenwich Collieries*, 512 U.S. 267, 272, 275-76 (1994). When Congress uses "the term 'burden of proof,'" as it did in § 1229a(c)(4)(A), it is understood "to mean the burden of persuasion" only. *Greenwich Collieries*, 512 U.S. at 272, 275-76. With respect to "the burden of production or the burden of going forward with the evidence," *id.* at 274, however, other features of the statute make clear that Congress intended *that* burden to lie with the government.

Section 1229a(c) describes the "[b]urden on [the] Service" (i.e., the government), as including the introduction of documents that "the Service" and "Service official[s]" could receive "from a State or court" to use as "proof of … criminal conviction[s]." 8 U.S.C. § 1229a(c)(3)(B)-(C). Importantly, that obligation applies "[i]n any proceeding" under the INA. *Id.*[3]

[3] We do not disagree with the government that § 1229a(c)(3)(B)'s list of permissible documents applies globally. *See* Gov't Br. 42-43. Our point is that Congress's decision to provide guidance only to "Service official[s]" (and not noncitizens) about how to submit certain conviction records suggests that Congress expected the government to be the one producing

Immigration regulations likewise require the government "to initiate … law enforcement … investigations or examinations concerning the alien or beneficiaries promptly" following "any application for immigration relief filed in the proceedings," including cancellation of removal. 8 C.F.R. § 1003.47(b)(5), (e); *see* Br. of Immigrant Defense Project 22-23, 25-26. It must therefore search criminal records to "determine whether an alien in proceedings has been convicted of any disqualifying crime." Background and Security Investigations in Proceedings Before Immigration Judges and the Board of Immigration Appeals, 70 Fed. Reg. 4743, 4743 (Jan. 31, 2005).[4]

That scheme is consistent with 8 C.F.R. § 1240.8(d), which, as the government acknowledges, the statutory burden-of-proof provision meant to codify. Gov't Br. 5-6. That regulation assumes that the government will *initially* produce relevant documents and then, only "[i]f the evidence" submitted by the

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conviction records in "any proceeding" in immigration court. § 1229a(c)(3)(C).

[4] That the government always seeks out such records from state authorities is an additional reason the burden of *production* properly rests with the government. "The relative ease with which the opposing parties can gather evidence is a familiar consideration in allocating the burden of production." *Cooper v. Harris*, 137 S. Ct. 1455, 1491 (2017) (Alito, J., concurring in the judgment in part and dissenting in part); *see Matter of Vivas*, 16 I. & N. Dec. 68, 70 (BIA 1977). As between noncitizens (who are often detained and unrepresented), and the government (which cooperates with state counterparts to obtain the records anyway), the government is better positioned to gather those records. *See Moncrieffe*, 569 U.S. at 201; *Marinelarena*, 930 F.3d at 1053 n.10; Br. of Immigrant Defense Project 11-18, 22-23, 25-26.

government "indicates that one or more" bars to relief "may apply," 8 C.F.R. § 1240.8(d), does "the burden of proof … shift[] to the [noncitizen] to show by a preponderance of the evidence that the bar is inapplicable." *In re S-K-*, 23 I. & N. Dec. 936, 939 (BIA 2006). Said otherwise, although the noncitizen bears the burden of persuasion, the government bears the "initial burden" to "secure and produce direct evidence" that some ground of ineligibility applies. *Matter of A-G-G-*, 25 I. & N. Dec. 486, 501 (BIA 2011).[5]

The upshot is that if, after examining the applicant's criminal background, the government believes that he has been convicted of an offense that would disqualify him from relief, it will raise the issue to the IJ by moving to pretermit the application for relief. And that is exactly what happened here. The government obtained and submitted the conviction records to the immigration court. *See* Pet. Br. App. 2a (C.A.R. 162) (certificate of Immigration and Customs

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[5] The government suggests that § 1229a(c)(4)(B) places the burden of producing conviction documents on noncitizens because it mandates that an applicant "comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief." Gov't Br. 30. But the application form that Mr. Pereida completed imposed no obligation to produce conviction documents. All it required was that Mr. Pereida "'give a brief description of each offense including the name and location of the offense, date of conviction, [and] any penalty imposed.'" C.A.R. 128; *see* Executive Office for Immigration Review, U.S. Dep't of Justice, Form EOIR-42B, *Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents* (Rev. Oct. 2008), http://cdn.ca9.uscourts.gov/datastore/library/2013/02/26/Young_eoir42b.pdf. Mr. Pereida complied with that instruction. *See* C.A.R. 104, 128, 204-18.

Enforcement officer who obtained the records); C.A.R. 161 ("DHS Filing" of "Conviction Records" in immigration court); Gov't Br. 9. It then moved to pretermit Mr. Pereida's application on the ground that the offense constituted a disqualifying CIMT. *See* Pet. App. 21a; C.A.R. 150-59.

This makes perfect sense. To prove that he "has not been convicted of an offense" listed in the INA, 8 U.S.C. § 1229b(b)(1)(C), a noncitizen need not show the *absence* of conviction records in every jurisdiction from Autauga County, Alabama, to Weston County, Wyoming. Rather, the government puts the issue in play by producing the records it believes establish a disqualifying offense—and because the government seeks out those records, there is nothing for the noncitizen to "conceal." The noncitizen then bears the burden of showing that the conviction is not disqualifying—but, for all the reasons already explained, that exercise usually involves making only a legal argument about the conviction, given the nature of the categorical inquiry and its governing presumption. And if, at the end of that inquiry, "the record of conviction of the predicate offense" has not "*necessarily* establishe[d]" a disqualifying offense, *Moncrieffe*, 569 U.S. at 197-98 (emphasis added), then the noncitizen "has not been *convicted* of" a disqualifying offense, as a matter of law. § 1229b(b)(1)(C) (emphasis added). He may then proceed with his application for relief, which the Attorney General may grant or deny as he sees fit.

CONCLUSION

The Court should reverse the judgment of the Eighth Circuit.

Respectfully submitted,

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