

# SUPREME COURT OF THE UNITED STATES

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IN THE SUPREME COURT OF THE UNITED STATES

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CLEMENTE AVELINO PEREIDA, )

Petitioner, )

v. )

No. 19-438

WILLIAM P. BARR, ATTORNEY GENERAL, )

Respondent. )  
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Pages: 1 through 67

Place: Washington, D.C.

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v. ) No. 19-438

WILLIAM P. BARR, ATTORNEY GENERAL, )

Respondent. )

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Washington, D.C.

Wednesday, October 14, 2020

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:20 a.m.

APPEARANCES:

BRIAN P. GOLDMAN, ESQUIRE, San Francisco, California;  
on behalf of the Petitioner.

JONATHAN C. BOND, Assistant to the Solicitor General,  
Department of Justice, Washington, D.C.;  
on behalf of the Respondent.

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P R O C E E D I N G S

(11:20 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-438, *Pereida versus Barr*.

Mr. Goldman.

ORAL ARGUMENT OF BRIAN P. GOLDMAN

ON BEHALF OF THE PETITIONER

MR. GOLDMAN: Mr. Chief Justice, and may it please the Court:

There's no dispute that the INA requires an applicant for relief to show that he has not been convicted of a disqualifying offense. The main question here is just whether he can rely on the categorical approach's "least acts" presumption to meet that burden of proof, just as parties may rely on presumptions to satisfy their burdens of proof in many other areas.

He can for two reasons. First, for decades, the statutory term "convicted" has been understood to require a categorical approach under which a past offense won't lead to mandatory removal or an enhanced sentence unless the record of conviction establishes every

1 element of a federal predicate offense to a  
2 legal certainty.

3           So we always presume that a conviction  
4 stands for nothing more than the least that the  
5 record of conviction establishes. And that rule  
6 works the same under the categorical and  
7 modified categorical approaches because courts  
8 can look to the least of the alternative  
9 elements under a divisible statute as this Court  
10 has.

11           Second, Congress didn't disturb that  
12 rule when it enacted a general burden of proof  
13 provision that says nothing about convictions.  
14 And that's not surprising because all we're  
15 talking about is a gatekeeping step. There's  
16 still the discretionary step where the Attorney  
17 General is unbound by the categorical approach  
18 and can make an individualized determination  
19 about who gets relief.

20           So, ultimately, it doesn't matter  
21 whether you think of the modified categorical  
22 approach as raising a question of law or a  
23 question of fact, because it's common for  
24 presumptions to operate on questions of fact  
25 too.

1           And what matters is instead that the  
2     least acts presumption always governs the  
3     analysis, and because it supplies a default  
4     answer, there's never any residual ambiguity for  
5     a burden of proof to resolve.

6           CHIEF JUSTICE ROBERTS: Counsel, I --  
7     I think your friend on the other side might  
8     agree that it doesn't matter so much whether  
9     it's factual or legal -- at least that's not the  
10    underlying reason that you have this -- this  
11    distinction between ACCA and the immigration  
12    statute.

13           Under ACCA, the government has the  
14    burden of showing that the increased sentence is  
15    warranted, so it has to carry the burden of  
16    looking to the least elements approach. But  
17    it's different when you're seeking the benefit  
18    of removal under the immigration case. There,  
19    the person who's seeking -- has the burden of --  
20    that benefit is your client, and, therefore, you  
21    have the burden of showing the most elements  
22    approach for the prior conviction.

23           Why isn't it simply the different  
24    burdens under ACCA and the immigration statute  
25    that account for the fact that in one case --

1 the different burden of going forward? Whether  
2 you're seeking the greater sentence or seeking  
3 the benefit of removal, why doesn't that simply  
4 account for the allocation of the burden of  
5 proof? And it's just incidental that in your  
6 case you have a factual question of whether or  
7 not subsection (c) was the section of conviction  
8 or not?

9 MR. GOLDMAN: So two responses to  
10 that, Mr. Chief Justice.

11 First, the government is not actually  
12 arguing that the least acts presumption and the  
13 burden of proof are opposite ends of a single  
14 spectrum, because the government acknowledges  
15 that even where the non-citizen bears the burden  
16 of proof, the least acts presumption still does  
17 apply at least at the categorical step of the  
18 analysis. So those two aren't inversely related  
19 in the way that Your Honor's question suggests.

20 But also, second, even in contexts  
21 where the government has borne the burden of  
22 proof, that has not been what has animated the  
23 decision under the categorical approach. And,  
24 in fact, the standard that the Court has  
25 adopted, which is this demand for certainty or,

1 I think, synonymously a requirement that the  
2 conviction necessarily establish every element,  
3 goes far beyond the burden of proof that the  
4 government would face at sentencing or to show  
5 removability.

6 CHIEF JUSTICE ROBERTS: Thank you,  
7 counsel.

8 Justice Thomas.

9 JUSTICE THOMAS: Counsel, I'm just a  
10 little confused. I'd like you to help me.

11 Normally, when we have these cases,  
12 say, under ACCA, we are comparing a known crime  
13 of conviction to the generic, say, for example,  
14 burglary definition. Do you agree with that?

15 MR. GOLDMAN: Yes, Your Honor.

16 JUSTICE THOMAS: Now, here, you're  
17 saying that the -- where you're applying it to  
18 establishing the crime of conviction, isn't  
19 there a difference?

20 MR. GOLDMAN: I don't think there's  
21 any difference there. I think Shepard is a good  
22 example of that, as is Johnson, where there --  
23 the -- the uncertainty that existed in those  
24 cases was which prong of the divisible statute,  
25 that was a necessary step in the analysis, to



1 then compare to the federal offense.

2 JUSTICE THOMAS: But, here, you know,  
3 there seems to be an underlying current that  
4 it's somewhat unfair to ask the Petitioner here  
5 to say what he had just been convicted of in the  
6 state courts.

7 Could you explain why you think that  
8 would be unfair? It seemed as though that if I  
9 were just convicted of a crime, I would know  
10 what it was.

11 MR. GOLDMAN: So, sure, two -- two  
12 responses to that, Justice Thomas.

13 First is that this is in some ways the  
14 unusual case that it involves parallel criminal  
15 and immigration proceedings. Oftentimes, these  
16 convictions are invoked years after the fact.

17 And just as one example of that, this  
18 Court right now is holding a case for this one  
19 called Romero. That involves a marijuana  
20 conviction from 1985. So -- so the rule is  
21 going to apply more generally.

22 But, second, even as to a  
23 contemporaneous criminal proceeding, a -- a  
24 non-citizen may have incentives but ultimately  
25 isn't going to have ability to control what is

1 recorded or preserved by the state court that  
2 might be processing 20 misdemeanor pleas in the  
3 course of a single day. And the criminal  
4 defense lawyer's brief details at length why  
5 this is often unclear.

6 JUSTICE THOMAS: Could you explain  
7 once more why -- I understand why in the  
8 criminal cases this would be the government's  
9 burden, because of the, you know, beyond a  
10 reasonable doubt.

11 But this is in a civil context. Why  
12 is it that the -- this is not the Petitioner's  
13 burden?

14 MR. GOLDMAN: So our argument is that  
15 the operation of the categorical approach is not  
16 affected by the burden of proof either way.  
17 So -- so the reason that we presume the least  
18 under the state statute or require necessity  
19 about a conviction is not that the government  
20 bears the burden even when it does. It's that  
21 that is an independent substantive component of  
22 the categorical approach because of its  
23 underlying demand for certainty and ensuring  
24 that there's going to be predictability and  
25 fairness so that people aren't losing the

1 benefit of their plea bargains based on the  
2 fortuity of record-keeping practices years  
3 later.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Breyer.

7 JUSTICE BREYER: No, thank you very  
8 much.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: If I say that your  
11 client was convicted of violating Nebraska  
12 Revised Statute Section 28-608, is that a  
13 factual -- isn't that a factual question?

14 MR. GOLDMAN: So -- so that -- I -- I  
15 think you could call that a factual question,  
16 but that wouldn't change our analysis, because,  
17 again, we think that the least acts presumption  
18 applies even to questions of fact.

19 JUSTICE ALITO: All right. So let me  
20 give you a very simple way of looking at this  
21 case, and you can tell me why this is wrong.

22 Whether or not a person was convicted  
23 of a particular crime is a question of fact.  
24 There's nothing that prevents -- if that fact  
25 has to be proven, there's nothing that prevents

1 Congress in a civil case like this from saying  
2 the burden of proof on that fact is on one party  
3 or the other party.

4 And, here, it's placed it on the  
5 person seeking cancellation of removal. Is  
6 there any obstacle, constitutional obstacle, to  
7 Congress doing that?

8 MR. GOLDMAN: No, there's not a  
9 constitutional obstacle. It's just that's not  
10 what Congress did here.

11 Congress enacted a general burden of  
12 proof provision without doing anything to alter  
13 the reference to convictions as the actual  
14 eligibility criteria.

15 JUSTICE ALITO: So the question --

16 MR. GOLDMAN: And that's where --

17 JUSTICE ALITO: -- is just -- because  
18 my time is limited, excuse me for interrupting.  
19 But the question then is the interpretation of  
20 what Congress meant when it enacted this burden  
21 of proof provision, right?

22 MR. GOLDMAN: Yes. And I think it is  
23 clear from the entirety of the REAL ID Act that  
24 Congress was focused on what you would think of  
25 as questions of fact that would be proven with

1 weighing evidence and making credibility  
2 determinations and taking testimony and the  
3 like. That's the entire focus of the burden of  
4 proof provision.

5 There's no indication --

6 JUSTICE ALITO: Well, where did this  
7 -- what -- what you call the presumption of the  
8 least of the acts criminalized come from? It --  
9 it came from the categorical and modified  
10 categorical approaches. They are called  
11 categorical because they are making a  
12 categorical determination.

13 And take the example of burglary,  
14 which has been central to our cases in this  
15 area. So you have somebody who's convicted of  
16 burglary under, let's say, California law, and  
17 the question is whether that is a conviction for  
18 generic burglary. It -- it is a -- it is a  
19 determination about an entire category of cases;  
20 that is, all of the cases prosecuted and  
21 convicted under the California burglary statute.

22 And it is in that situation where the  
23 court asks -- looks to the least of the acts  
24 criminalized. It asks what is the least thing  
25 that could get somebody convicted of burglary in

1 California. Would that constitute generic  
2 burglary? If the answer to that is no, then it  
3 flunks under the categorical test.

4 But what's involved here is not  
5 categorical at all. It is the determination of  
6 a question of fact, was your client convicted  
7 under subsection (c) or was he not convicted  
8 under subsection (c)?

9 MR. GOLDMAN: So -- so I agree with  
10 everything that you said, Justice Alito, except  
11 that is not the only thing that the categorical  
12 approach does. And I'll try to make this very  
13 brief.

14 But, first, Shepard shows that the  
15 demand for certainty also applies to the which  
16 statutory prong question because it -- the --  
17 the point of that case was that we are going to  
18 demand certainty and only look to legally  
19 conclusive records to determine what -- which  
20 part of the divisible statute it was, and all of  
21 that makes sense --

22 JUSTICE ALITO: Well, as --

23 MR. GOLDMAN: -- because whether --

24 JUSTICE ALITO: -- I mean, as the  
25 Chief Justice pointed out, Shepard and Johnson,

1 the case that you rely on very heavily, were  
2 criminal prosecutions, where the prosecution,  
3 under the Constitution, has the burden of  
4 proving beyond a reasonable doubt that the  
5 person was convicted of a particular offense if  
6 it wants to impose an enhanced sentence based on  
7 that conviction.

8 MR. GOLDMAN: So I -- I --

9 JUSTICE ALITO: That's where the  
10 certainty comes from.

11 MR. GOLDMAN: So I -- I -- I would  
12 just add that this -- this has also been the  
13 rule in the immigration context, the demand for  
14 necessity, for 106 years, including in contexts  
15 involving divisible statutes, like the Zaffarano  
16 case we cite from the Second Circuit and that  
17 the immigration professors cite the Matter of  
18 Marchena case from the BIA in 1967 involving a  
19 context in which the non-citizen bore the burden  
20 of proof.

21 I think all of that tends to show that  
22 the demand for certainty is not a function of  
23 the burden of proof. The demand for certainty  
24 is part of the categorical approach's  
25 requirement that we are not going to treat your

1 offense as a predicate.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Sotomayor.

5 JUSTICE SOTOMAYOR: Mr. Goldman, I  
6 have two different sets of questions. Let me  
7 start with the first, which is, assuming we were  
8 to disagree with you today and rule against you,  
9 would we have any reason to vacate? Are there  
10 any other arguments you could make that your  
11 client wasn't, in fact, convicted of a CIMT?

12 For example, I read the Eighth Circuit  
13 as saying that a sentence of one year or longer  
14 fits the sentencing requirement of not being  
15 more than one year. Did you challenge that  
16 below, that that's wrong?

17 And, secondly, I see the statute here  
18 as requiring harm but not necessarily financial  
19 harm and not necessarily deception harm, could  
20 be emotional harm or even physical harm. And  
21 that wouldn't fit a CIMT.

22 Have those arguments been saved below?

23 MR. GOLDMAN: So -- so those  
24 arguments -- the first argument, Justice  
25 Sotomayor, about the petty offense exception



1 was -- was presented to the Eighth Circuit  
2 and as -- as well as to the BIA, and those  
3 courts rejected those arguments. So I -- I wish  
4 I could say that that were still open, but I  
5 believe that is now foreclosed.

6 Second, with respect to the harm  
7 required, I think the -- the Eighth Circuit's  
8 analysis held that, given ambiguity about which  
9 statutory prong it was, Mr. Pereida must lose by  
10 default. It essentially adopted the  
11 government's rule that we --

12 JUSTICE SOTOMAYOR: All right.

13 MR. GOLDMAN: -- effectively take --

14 JUSTICE SOTOMAYOR: Mr. Goldman, can I  
15 just stop you because there is one last question  
16 I want to ask. I read 1229a(c)(3)(B). In any  
17 proceeding under this chapter, any of the  
18 following documents or records shall constitute  
19 proof of a criminal conviction: an official  
20 record of judgment and conviction, which was  
21 provided here; an official record of plea,  
22 verdict, and sentence, not provided because it  
23 wasn't available, and nobody challenges that it  
24 was available; and, C, a docket entry from court  
25 records that in the -- in the -- indicates the

1 existence of the conviction, that was provided.

2 Doesn't that answer the question of  
3 whether you've met your burden of proof? You've  
4 shown them --

5 MR. GOLDMAN: I -- I think --

6 JUSTICE SOTOMAYOR: -- you've shown  
7 them what you were convicted of, and the  
8 lowest -- there is one CIMT that doesn't apply,  
9 and, hence, under our case law, Johnson and  
10 others, that ambiguity flows to your favor  
11 automatically?

12 MR. GOLDMAN: Yes, that -- that is our  
13 position, Justice Sotomayor, that -- that where  
14 the record -- this is a conviction under an  
15 overbroad statute. So we presume it is not  
16 disqualifying until and unless the record of  
17 conviction necessarily establishes otherwise.  
18 And, here, it does not.

19 JUSTICE SOTOMAYOR: And all of the  
20 record of conviction has been supplied?

21 MR. GOLDMAN: So -- so far as we know,  
22 that's correct, that the government --

23 JUSTICE SOTOMAYOR: So there is --  
24 there is -- on a burden of proof, even if you  
25 have it, you've met it?

1           MR. GOLDMAN: Correct. Yes. And I  
2 would just note that, here, it's the government  
3 who produced the criminal record, as it does in  
4 all of these cases as part of its criminal  
5 history check.

6           JUSTICE SOTOMAYOR: Thank you,  
7 counsel.

8           CHIEF JUSTICE ROBERTS: Justice Kagan.

9           JUSTICE KAGAN: Mr. Goldman, I  
10 understand that you think it doesn't matter  
11 whether the question here is legal or factual,  
12 that you win either way.

13           On -- on the other hand, a lot of the  
14 questions that you've been getting would  
15 disappear if it were legal because even the  
16 government concedes, I believe, that questions  
17 of law are not affected by the burden of proof.

18           So I'm just going to ask you whether  
19 you have an argument that this is a legal  
20 question?

21           MR. GOLDMAN: Yes, and I think that is  
22 the better way to look at it. I just think, as  
23 -- as I've said, it doesn't ultimately matter  
24 where you land on that.

25           JUSTICE KAGAN: Well, tell me why it's

1 the better way, because you've been talking for  
2 a while and you haven't told anybody why it's  
3 the better way to look at it, to say that it's  
4 legal.

5 MR. GOLDMAN: Yeah. So -- so the idea  
6 is that the categorical approach, the entirety  
7 of the approach, is always asking, does a  
8 conviction necessarily establish every element  
9 of the federal offense? And the modified  
10 categorical approach can help you answer that  
11 question yes if it narrows the offense by  
12 revealing a statutory alternative, because then  
13 you are essentially looking at the record of  
14 conviction as a stand-in for the statutory text  
15 itself, much as the Court's opinion in Mathis  
16 describes.

17 So the -- the point is that the only  
18 reason we are looking to records is for the same  
19 reason you look to the text, which is as part of  
20 a legal analysis about the meaning of the  
21 conviction and the elements it involved.

22 JUSTICE KAGAN: Well, I think what the  
23 government would say is that, although the  
24 entire inquiry might be a legal one, there's a  
25 part of the inquiry which simply involves asking

1 what crime were you convicted of? And that  
2 that's a factual one, even though you then go on  
3 to -- even though you then go on to the more  
4 legal inquiry, and even though you decide that  
5 question through the use of entirely legal  
6 documents. I think that that's what the  
7 government would say.

8 So what's the answer to that?

9 MR. GOLDMAN: So -- so the answer  
10 there is that the only reason you are looking at  
11 documents at all to ask which crime is still in  
12 service of the bottom-line legal question. And  
13 so, if the -- if asking that, with that question  
14 about which prong of the statute it was, turns  
15 up empty, as it did in Johnson, then that  
16 doesn't -- that's not a failure of proof.

17 That doesn't mean that the analysis  
18 can never reach the legal inquiry, which is the  
19 government's argument. Instead, the -- the  
20 categorical approach supplies its own rule for  
21 resolving that ambiguity, which is you look to  
22 the least of the alternative elements and make  
23 the categorical comparison from there.

24 JUSTICE KAGAN: Mr. Goldman, a very  
25 different question. If you win, would it be

1 permissible for the attorney general to say  
2 something like, that was a pretty bad crime, and  
3 because it was a pretty bad crime, I won't use  
4 my discretion to cancel your removal?

5 In other words, could -- could the  
6 government basically enact the rule that it is  
7 arguing for on the back end of the process?

8 MR. GOLDMAN: So -- so I think, as a  
9 matter of the INA, it certainly could. The INA  
10 in no way limits the attorney general's  
11 discretion. And what you've described happens  
12 all the time, where the IJ or the BIA will say:  
13 I don't need to undertake the categorical  
14 analysis and go through the complicated  
15 determination of if this is disqualifying or not  
16 because I just know that you are losing as a  
17 matter of discretion because of the severity of  
18 what it seems that you did.

19 If -- if the attorney general were to  
20 try to do that as a regulation, maybe there  
21 would be APA challenges to that, but I don't  
22 think the INA provides any obstacle.

23 JUSTICE KAGAN: Thank you,  
24 Mr. Goldman.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch.

2 JUSTICE GORSUCH: Counsel, I -- I  
3 guess I'm a little stuck on -- on the arguments  
4 you've made but wondering if there's one that  
5 you haven't.

6 To me, it looks like this is probably  
7 a factual question about, a contingent set of  
8 questions about, what happened in a particular  
9 time and place. We're not interpreting any law,  
10 any neutral principle, any generally applicable  
11 provision. I don't see how Johnson helps  
12 because the burden there was on the government  
13 in a criminal case. And so I -- so I'm stuck on  
14 a lot of that, and maybe you can unstick me.

15 And the other thing I'm also stuck on,  
16 just for what it's worth, is the burden in terms  
17 of producing the -- the evidence of a conviction  
18 mentioned in subsection (3) is the burdens on  
19 proving -- the government has while proving  
20 deportability, totally different than subsection  
21 (4), which is applications for relief from  
22 removal or deportability, which then fall on the  
23 immigrant.

24 So that -- that's putting my cards on  
25 the table as what I'm stuck on. What I'm --

1 what I'm hopeful for or want to explore a little  
2 bit is Shepard and why you concede that -- or, I  
3 don't know, maybe you don't -- that there is --  
4 that this is all categorical approach.

5 Justice Breyer in I think it was  
6 Nijhawan -- you can correct my pronunciation,  
7 I'm sure -- said that Shepard, you know, is a --  
8 the categorical approach in the ACCA context may  
9 not always apply in the INA context.

10 And I -- I would have thought that  
11 Mr. Pereida might have argued, forget about the  
12 categorical approach, I can -- I can show on the  
13 facts here and my testimony might establish that  
14 I wasn't using the Social Security card to  
15 obtain benefits or to defraud anybody of  
16 anything but simply to get a job, and,  
17 therefore, it wasn't a crime of moral turpitude.

18 What about that argument? Should we  
19 remand for that? Has that been preserved?  
20 Thoughts?

21 MR. GOLDMAN: Sure, I'll -- I'll start  
22 with the last of those three questions, Justice  
23 Gorsuch.

24 I -- I don't think that that argument  
25 is available anymore after Moncrieffe and the



1 way Moncrieffe distinguished --

2 JUSTICE GORSUCH: Let's suppose I  
3 think it is.

4 MR. GOLDMAN: So -- so I think that it  
5 would still be the wrong way to go because it  
6 would pose -- for -- for all of the reasons the  
7 Court reasoned that it was precluded in  
8 Moncrieffe, I think those are correct, that it  
9 would --

10 JUSTICE GORSUCH: Why -- why would you  
11 -- why would you have a -- an immigrant  
12 hamstrung by this crazy categorical approach  
13 methodology that's nowhere in the statute? Why  
14 -- why should he not be allowed to discharge his  
15 burden by -- by -- by his testimony?

16 MR. GOLDMAN: So -- so I think that --

17 JUSTICE GORSUCH: And then put it on  
18 the government?

19 MR. GOLDMAN: So -- so I think that  
20 would disserve the entire immigration court  
21 system to start inviting that type of  
22 mini-trial, even when it's done for beneficial  
23 purposes, as Your Honor is describing.

24 And I don't think that's any different  
25 than when the Second Circuit addressed exactly

1 that question in the Mylius case in 1914, which  
2 was the genesis of all of this, and saying, if  
3 we allow the immigration officer to go behind  
4 the fact of the conviction and analyze the facts  
5 of the offense, why -- would we then be allowing  
6 the non-citizen to try to prove that even though  
7 he was not nominally convicted of something,  
8 what he actually did was less than that?

9 And I think it -- it undermines all of  
10 the benefits around predictability and  
11 efficiency of -- of this approach and instead --  
12 and, again, all that we're talking about here is  
13 a gatekeeping step. So I think the -- the more  
14 sensible solution is to say that, if a  
15 conviction does not clearly qualify as a  
16 predicate offense, then we do get to --

17 JUSTICE GORSUCH: Thank you, counsel.

18 CHIEF JUSTICE ROBERTS: Justice  
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Thank you, Chief  
21 Justice.

22 And good morning, Mr. Goldman.  
23 There's no perfect solution as I see it here.  
24 There's a situation of uncertainty, and what  
25 that means is either some people who should not

1 be eligible for cancellation of removal will  
2 remain in the country or some people who should  
3 be at least eligible for cancellation of removal  
4 will be removed from the country.

5 And I might choose a different policy  
6 than Congress did about how to resolve that  
7 uncertainty, but Congress put the burden of  
8 establishly -- establishing eligibility for  
9 cancellation of removal on the non-citizen.

10 It's kind of a big picture way that is  
11 raised by this case. Why is that a wrong way to  
12 -- to think about it?

13 MR. GOLDMAN: So -- so the -- the  
14 reason -- and this answers Justice Gorsuch's  
15 first question as well -- is that it is  
16 commonplace for an individual to be able to  
17 invoke a presumption to satisfy a burden of  
18 proof.

19 We give the examples in our brief of  
20 the bailed goods presumption, copyright  
21 validity, and I think most importantly is the  
22 asylum presumption we note at page 31 of our  
23 blue brief, where the REAL ID Act added a  
24 virtually identical burden-of-proof provision  
25 for asylum claims, but that didn't in any way

1 eliminate an asylum applicant's ability to rely  
2 on the presumption that he has a well-founded  
3 fear of future persecution. That had been a  
4 long-standing presumption as well.

5 So I think there is just no tension  
6 between a presumption that favors someone and a  
7 statutory burden of proof that is placed on that  
8 person.

9 JUSTICE KAVANAUGH: And what do you do  
10 with the fact that we're not talking about the  
11 removal itself technically, but we're talking  
12 about cancellation of removal? In other words,  
13 you've already -- the non-citizen's already been  
14 deemed usually or at the same time deemed  
15 removable.

16 And we're talking about something that  
17 would cancel that removable. In that  
18 circumstance, it does seem more logical, I  
19 suppose, or at least one could understand why  
20 Congress made the choice in that circumstance to  
21 put the burden on the non-citizen because of the  
22 cancellation of removal context.

23 So does the context matter there, or  
24 why doesn't it matter?

25 MR. GOLDMAN: So -- so the context

1 matters for most parts of a cancellation  
2 application. And Mr. Pereida put on hundreds of  
3 pages of evidence showing why he deserved  
4 cancellation of removal.

5 But, with respect to this inquiry,  
6 which is governed by a presumption, the burden  
7 doesn't ultimately affect that either way  
8 because there's never leftover ambiguity that a  
9 burden of proof is going to solve. It's just  
10 either the conviction does or doesn't  
11 necessarily establish every element of the  
12 federal offense.

13 And I think, again, because this is  
14 ultimately discretionary relief, that makes  
15 perfect sense, that we're just saying can you  
16 get past that gatekeeping step to the point at  
17 which the IJ can actually consider the  
18 underlying facts of your criminal offense, which  
19 is a much more sensible place to -- to resolve  
20 that.

21 JUSTICE KAVANAUGH: That's a fair  
22 point. Thank you, Mr. Goldman.

23 CHIEF JUSTICE ROBERTS: A minute to  
24 wrap up, Mr. Goldman.

25 MR. GOLDMAN: Thank you, Mr. Chief

1 Justice.

2 It bears remembering that under the  
3 government's rule, someone could plead guilty to  
4 a statutory alternative that is clearly not a  
5 disqualifying crime like subsection (c) here.

6 And he could plainly be deserving of  
7 cancellation or asylum, but, if detailed  
8 conviction records were never prepared or were  
9 destroyed long ago, he would be subject to  
10 mandatory removal. There would be absolutely  
11 nothing that he or the attorney general could  
12 do.

13 And the government just hasn't  
14 explained why Congress would have thought that  
15 it was mandating that drastically overinclusive  
16 result simply by writing a burden-of-proof  
17 provision that says nothing about convictions  
18 but, instead, talks about fact-finding tools  
19 like testimony and corroboration that have long  
20 been irrelevant to the analysis of convictions.  
21 The better answer is that that's not what  
22 Congress did.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,  
25 counsel.

1 Mr. Bond.

2 ORAL ARGUMENT OF JONATHAN C. BOND

3 ON BEHALF OF THE RESPONDENT

4 MR. BOND: Mr. Chief Justice, and may  
5 it please the Court:

6 The statutory text places on an alien  
7 seeking relief from removal the burden of proof  
8 to establish that he satisfies the applicable  
9 steps of the eligibility requirement. That text  
10 answers the question presented.

11 As Petitioner acknowledges in his  
12 reply and again this morning, his burden  
13 includes showing that he does not have a  
14 disqualifying conviction. Petitioner has not  
15 carried that burden, so he is ineligible for  
16 cancellation.

17 Petitioner pleaded guilty to violating  
18 a statute that covers multiple crimes, some of  
19 which are disqualifying. It thus was his burden  
20 to show that he was convicted of a  
21 non-disqualifying crime under that statute.

22 But even though this immigration  
23 proceeding was already ongoing before he pleaded  
24 guilty and his immigration attorney knew of the  
25 potential consequences of a conviction,

1     Petitioner did not submit anything to show the  
2     particular offense of which he was convicted.

3             His position is that the court's  
4     categorical approach precedent excused his  
5     failure of proof and required resolving  
6     ambiguity in the record in his favor. That is  
7     incorrect.

8             Under that precedent, once the  
9     elements of the offense have been identified,  
10    courts then ask, what are the least -- least  
11    acts to satisfy them? But this case concerns  
12    the antecedent question of which set of elements  
13    was the basis of the conviction.

14            The categorical approach and least  
15    acts presumption cannot answer that question. A  
16    court cannot determine the least acts  
17    criminalized without first identifying the  
18    elements. That's what the modified approach is  
19    for. And if the record of conviction is  
20    inconclusive, the party with the burden has not  
21    carried it.

22            Petitioner's approach conflates the  
23    visible and indivisible statutes which this  
24    Court has made clear are distinct, and his rule  
25    that ambiguity should be resolved in the alien's



1 favor contradicts Congress's judgment that an  
2 alien claiming he is ineligible for relief --  
3 claiming he is eligible for relief bears the  
4 burden of proving it.

5 CHIEF JUSTICE ROBERTS: Thank you,  
6 counsel.

7 An issue that's kind of lurking in the  
8 background throughout this case and is certainly  
9 affected by the -- the question of what kind of  
10 determination, is it legal or factual, is the  
11 limitation to the so-called Shepard documents.

12 You're here from the Department of  
13 Justice, so you should know as well as anybody  
14 what the experience of the Department has been  
15 around the country with that limitation.

16 Is it often the case that those  
17 documents -- or how often are those documents  
18 not available? Does it vary from one part of  
19 the country to the other? Do you have  
20 situations where people are coming forward with  
21 documents that seem pretty probative on the  
22 question, but they're excluded because they're  
23 not Shepard documents?

24 What can you tell me about that?

25 MR. BOND: We don't have data at that

1 granular level that tracks why a party is not  
2 deemed eligible for cancellation. We simply  
3 don't have aggregate data that -- that point to  
4 that specific thing.

5           However, I would suggest there's no  
6 reason to expect that an alien who has a  
7 criminal conviction, particularly like one in  
8 this case who was convicted after his  
9 immigration proceeding was ongoing, would not  
10 know his criminal history and he or his attorney  
11 would not be able to -- or not at least know  
12 what documents to look for and where to find  
13 them.

14           By those, they can --

15           CHIEF JUSTICE ROBERTS: Well, he can  
16 know what documents to look for, but the  
17 reality, as I understand it, is that often you  
18 don't have -- these things aren't often papered,  
19 because you've got a lot of, you know, busy --  
20 busy criminal dockets and plea bargains and  
21 other things like that.

22           So the fact that the lawyer knows what  
23 to look for isn't enough. And even if the  
24 lawyer finds something probative, that's not  
25 going to be admissible on the -- on the

1 question.

2 MR. BOND: Well, if it's a Shepard  
3 document, it would be admissible. And I think  
4 the--

5 CHIEF JUSTICE ROBERTS: No, no, I'm  
6 talking about --

7 MR. BOND: -- kind of hypothetical --

8 CHIEF JUSTICE ROBERTS: -- I'm talking  
9 about a situation where it's outside of Shepard.

10 MR. BOND: Sure. And with respect to  
11 the limitation to Shepard documents, as you  
12 know, in Shepard, we are argued for a broader  
13 cast. And in the lower courts, we have argued  
14 under this particular provision for a broader  
15 array of evidentiary materials.

16 That's not at issue here because the  
17 Board rested on Shepard and because there are no  
18 non-Shepard documents at issue in this  
19 particular case.

20 But I would -- to the question of  
21 unavailable records, I would say a couple of  
22 things. In the case of a plea agreement, in the  
23 case where an alien, as in Petitioner's  
24 hypothetical, has pleaded guilty to a particular  
25 version of an offense, he has all the incentive

1 in the world and the ability to memorialize that  
2 agreement in a written document that -- that  
3 reflects that agreement with the prosecutor.

4 In the context where the alien doesn't  
5 personally have those records and tries through  
6 reasonable diligence to obtain them, the  
7 regulation allows him to ask for a subpoena to  
8 get them from the courts. And in the  
9 circumstance --

10 CHIEF JUSTICE ROBERTS: Thank you,  
11 counsel.

12 Justice Thomas.

13 JUSTICE THOMAS: Thank you, Mr. Chief  
14 Justice.

15 Mr. Bond, the -- if I heard  
16 Petitioners right, they -- they don't seem --  
17 Petitioner doesn't seem to see much deference  
18 between the way we would treat this case and the  
19 way we would treat it in the criminal context.

20 What's your reaction to that?

21 MR. BOND: I think they are very  
22 different because of the judgment Congress made  
23 when it expressly placed the burden of proof on  
24 the alien to prove eligibility. That's what  
25 sets this case apart from all of the cases

1       Petitioner cites in the sentencing context.

2                 If you account for the difference in  
3       the burden of proof, though, I think the cases  
4       come to the right or come to the same conclusion  
5       that the party with the burden of proof didn't  
6       carry it.

7                 So, for example, in Taylor, all that  
8       the Court knew as the case came to this Court  
9       was that the defendant had a conviction in  
10      Missouri for Second Degree Burglary, but  
11      Missouri had seven different burglary statutes,  
12      so the case had to be remanded so that the  
13      government, the party that had the burden of  
14      proof, could produce the charging documents, and  
15      it did and the sentence was ultimately affirmed.

16                It's the same kind of circumstance  
17      here. Petitioner bears the burden of proof. He  
18      just didn't carry it by presenting any document  
19      to show which particular version of criminal  
20      impersonation he pleaded guilty to committing.

21                JUSTICE THOMAS: Just a -- a matter of  
22      curiosity, how much discretion do you have -- if  
23      you think, for example, that a petitioner or an  
24      applicant is being evasive, do you -- does the  
25      attorney general have the discretion to -- to

1 simply dismiss or deny his request for  
2 cancellation?

3 MR. BOND: Yes, the IJ could do that  
4 on a case-by-case basis and, yes, in response to  
5 some of the earlier questions, the attorney  
6 general could adopt a regulation that does it  
7 categorically.

8 But I think that's not the right  
9 approach or the right lens to -- to approach  
10 this issue for two reasons.

11 First, as this Court has explained for  
12 a very long time, Congress intended these  
13 eligibility requirements under the predecessor  
14 statute for governing suspension of deportation  
15 and cancellation to be enforced before  
16 discretion comes into the picture.

17 That was true in 1984 and this Court's  
18 decision in *Kintakia*, and it's even more true  
19 after IIRIRA and the REAL ID Act raised the bar  
20 for cancellation eligibility precisely because  
21 they were concerned that discretion was being  
22 exercised too -- too readily and the REAL ID Act  
23 had codified the burden of proof.

24 And the second reason is that  
25 discretion -- dealing with it at the

1 discretionary phase changes the way that this  
2 would be litigated. In a case like this, where  
3 an applicant is demonstrably ineligible and  
4 hasn't carried his burden, the case can be dealt  
5 with at the motion to pretermite stage and no one  
6 needs to spend time or resources litigating the  
7 merits of whether discretion is appropriate.

8 But, if this is dealt with by the IJ  
9 at the discretionary phase, the parties then  
10 litigate the underlying merits and you lose all  
11 of the efficiency of resolving it at the  
12 threshold, where Congress intended it to be  
13 decided.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice  
16 Breyer.

17 JUSTICE BREYER: Well, there is a  
18 virtue in simplicity in the law, and ACCA is  
19 complicated enough, much more than anyone  
20 thought, as is this. So why isn't the simple  
21 thing to do, keeping the law uniform, simple, as  
22 much as it can be, if we read Taylor?

23 And when we read Taylor, here's how  
24 you decide whether a statute that says, in  
25 Section 1342(a), burglary of a car, a house, or

1 a boat, and some are and some are not federal  
2 burglary, and which one was this? Was he  
3 convicted of a boat burglary or a house?

4 And here's what it says to do: You  
5 look at the statute. Well, that doesn't help.  
6 They're all three. Then you look at the  
7 indictment or information. And then you look at  
8 the jury instructions.

9 Now, if those three things, the  
10 statute, the jury instructions, and the -- and  
11 the indictment or information, show that this  
12 was burglary of a house, that it necessarily,  
13 we've said in about 10 cases, is burglary of a  
14 house, the government wins. And if they don't,  
15 the other side wins.

16 Well, with slightly different words  
17 here, slightly different documents do the same  
18 thing. Does the statute forbid that? Of course  
19 not. The statute that you're talking about has  
20 words in it, and those words say that if the  
21 evidence indicates one or more of the grounds  
22 for mandatory denial of relief apply, then the  
23 government wins.

24 So we look at the listed documents, we  
25 see if they do, and that's the end of the case;



1 if they don't necessarily show that, then he's  
2 carried his burden of proof. Whether they show  
3 that or not is a question of law.

4 Now why isn't that the end of this  
5 case?

6 MR. BOND: Two points, Your Honor.

7 First, I agree with the mode of  
8 inquiry that you are describing, that Taylor --  
9 Taylor prescribes looking to what we now call  
10 Shepard documents, with one friendly amendment.  
11 That approach means -- or under that approach,  
12 the party with the burden of proof under the  
13 statute loses when they don't produce those  
14 records. And Congress made a deliberate choice  
15 in the --

16 JUSTICE BREYER: Oh, they did. Isn't  
17 there a statute in this case?

18 MR. BOND: There is a statute, and it  
19 isn't --

20 JUSTICE BREYER: Well, what says he  
21 has to produce any more?

22 MR. BOND: What the statute in this  
23 case provides is that the alien bears the burden  
24 of proving that he -- that he satisfies the  
25 requirements of eligibility. And the regulation

1 that you quoted, this is 8 C.F.R. 1240.8(d),  
2 that regulation works against Petitioner because  
3 what it says is, when the evidence indicates  
4 that any ground of mandatory denial may apply,  
5 the alien must show that it does not apply by a  
6 preponderance.

7 So, in this case, when the alien puts  
8 in his description of his criminal record and  
9 it's clear that he may have a disqualifying  
10 conviction, the regulation is clear that he then  
11 bears the burden of showing that it does not  
12 apply.

13 Now the Shepard framework is perfectly  
14 compatible with that. He simply needs to use  
15 Shepard documents to make that showing. But the  
16 key they're making --

17 JUSTICE BREYER: He did show. He did  
18 show. So that -- that's my basic point. He did  
19 show that he satisfied the applicable  
20 eligibility requirement because the applicable  
21 eligibility requirement is that set of legal  
22 documents in front of the judge does not  
23 necessarily show that it was a crime of moral  
24 turpitude or burglary in the other case.

25 So he met it.

1           MR. BOND: With respect, Your Honor, I  
2 disagree --

3           JUSTICE BREYER: What's wrong --

4           MR. BOND: Yes. He did not -- he did  
5 not show that with those documents. The  
6 necessarily establishes a least acts presumption  
7 the Court has applied applies at the final step  
8 of the categorical analysis once you've  
9 identified the elements.

10           What the documents he presented do not  
11 show is which set of elements he pleaded guilty  
12 to committing. We don't know which set of  
13 elements or which set of facts he necessarily  
14 had to admit. And until he can rule out a  
15 disqualifying conviction, he has not carried his  
16 burden under the statute and regulation.

17           JUSTICE BREYER: Thank you.

18           CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel.

20           Justice Alito.

21           JUSTICE ALITO: In 1229a(c)(4)(A)(i),  
22 when it speaks of burden of proof, is that  
23 burden of production, burden of persuasion, or  
24 both?

25           MR. BOND: It is both. It is the

1 burden of proof that this Court ordinarily  
2 understands to mean the burden of persuasion,  
3 but we think it here subsumes the burden of  
4 production, which is to say Petitioner couldn't  
5 carry his burden of proof in this case without  
6 producing documents or other admissible evidence  
7 that show he was not convicted of a  
8 disqualifying crime.

9 JUSTICE ALITO: But will --

10 MR. BOND: I would add on the --

11 JUSTICE ALITO: -- will the -- will  
12 the government have necessarily been required --  
13 will the government have been required to  
14 provide certain documents relating to the  
15 conviction anyway? If the conviction is the  
16 basis for the determination of removability,  
17 then I guess the answer to that is yes, but I  
18 suppose that's not always so.

19 MR. BOND: That's right, it is not  
20 always the case. It is not the case here.

21 The government did not seek  
22 removability based on a prior conviction. It  
23 was simply because, as Petitioner conceded, he  
24 was in the country without having been admitted.  
25 The conviction came in at the cancellation

1 stage.

2 Now, with respect to what the  
3 government searches for and finds, it's true  
4 that the government performs a simple background  
5 check to find prior criminal activity, but that  
6 produces a report that looks like a rap sheet,  
7 with arrests and convictions at a high level of  
8 generality.

9 It does not provide the kind of  
10 granular information about which prong of a  
11 divisible statute the alien was convicted under.  
12 And it certainly does not result in a complete  
13 set of Shepard documents with which the  
14 government could demonstrate which version of  
15 the offense the alien was convicted of  
16 committing.

17 JUSTICE ALITO: Well, why -- why do  
18 you think --

19 MR. BOND: In a case where the  
20 government --

21 JUSTICE ALITO: -- why do you think  
22 that the Shepard limitations would apply in this  
23 situation? It's one thing for us to say in a  
24 criminal case where the government, the  
25 prosecution has the burden of proving prior

1 convictions beyond a reasonable doubt that we  
2 are going to put a limit on the proof that the  
3 government can rely on to try to discharge that  
4 burden.

5           Whether or not that's -- that was a  
6 good idea, that's what was done, but it's  
7 something else again to say that where the alien  
8 who is seeking cancellation of removal is the  
9 one who will be disadvantaged by the failure of  
10 proof, that person is limited in -- by -- by  
11 Shepard in the documents that can be relied on  
12 to discharge that burden.

13           What -- I don't know why -- why does  
14 that make sense? Why is it fair? And where  
15 would we get the authority to impose that  
16 limitation?

17           MR. BOND: Your Honor, the government  
18 has argued in -- in the past in lower courts,  
19 including in the Young case cited in  
20 Petitioner's reply brief, that in this context,  
21 those limitations should not apply and that the  
22 agency should have the ability to consider a  
23 broader array of documents.

24           Now we haven't made that argument in  
25 this particular case for two reasons, as I was

1 mentioning earlier.

2 First, the Board's decision took  
3 Shepard as given and we're defending the  
4 agency's action on the rationale that it gave.

5 And, second, this isn't a case where  
6 any issue of non-Shepard documents has come up,  
7 at least as the case comes to this Court. No  
8 one is arguing that some non-Shepard document  
9 was presented but not considered or vice versa.

10 So I think the -- the issue is an  
11 important one to leave open for the future, but  
12 it's not one that's implicated in this case.

13 JUSTICE ALITO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice  
15 Sotomayor.

16 JUSTICE SOTOMAYOR: Counsel, Justice  
17 Breyer asked the question basically as I would,  
18 which is I read the regulations, they require  
19 the alien to put forth those documents in his or  
20 her possession. The legal question is, do those  
21 documents show that he's been committed -- he  
22 has committed a CIMT?

23 You're asking the opposite question.  
24 Do those documents show that he has -- hasn't  
25 committed a CAI -- CIMT. But the burden of

1 proof is only by a preponderance of the  
2 evidence. And if he's provided all of the  
3 documents that exist and no one's arguing -- I  
4 don't think you are, because I think you did a  
5 search in this case -- that any more documents  
6 exist, and we have amici that show why they  
7 don't tend to exist, at least with respect to  
8 low-level misdemeanor charges, why the  
9 presumption that -- the legal presumption, it  
10 wasn't a factual presumption; it was a legal  
11 presumption that we made in our prior case  
12 law -- why that doesn't get him past the  
13 preponderance of the evidence standard?

14 That's a very low standard. It's  
15 51 percent. And if there's ambiguity, what does  
16 that have to do with meeting the burden of  
17 proof?

18 MR. BOND: The presumption, the least  
19 acts presumption, simply does not apply to the  
20 antecedent question of which version of the  
21 crime was at issue. The least acts presumption  
22 did not apply in Johnson. The Court's passing  
23 language was describing the district court's  
24 opinion. The least acts presumption did not  
25 apply in Taylor, where the issue otherwise would



1 have come up.

2           The Court has not applied the least  
3 acts presumption beyond the context of  
4 determining what a particular set of elements  
5 requires, what it means, because, to find a  
6 defendant had committed those elements, the jury  
7 need only find the minimum conduct.

8           But to go to your broader question  
9 of --

10           JUSTICE SOTOMAYOR: But what you need  
11 -- but what you need is the Shepard documents  
12 proving that. And if they don't exist, then  
13 you're back to the fact that, as a matter of  
14 law, there's no proof that you committed that  
15 act.

16           Because what you were charged with,  
17 and what the documents show, is the possibility  
18 that you might have, but not that you did. You  
19 have to prove the conviction that you were  
20 convicted of CIMT and, in fact, you weren't.

21           MR. BOND: What the alien's burden is  
22 under the regulation, once you know that he  
23 might have been convicted of the disqualifying  
24 offense, what you know is that he then has the  
25 burden of showing the opposite.

1                   In that sense he has to prove a  
2 negative, but that's exactly what the statutory  
3 eligibility requirement --

4                   JUSTICE SOTOMAYOR: But the  
5 negative -- but the negative, counsel, is very  
6 clear. The negative is, do the records of my  
7 conviction show that I was convicted of CIMT?

8                   The answer is no, they don't show  
9 that. They show that I was convicted legally of  
10 a crime that does not fit, that has subdivisions  
11 or parts of it that don't fit a CIMT.

12                   So that's where I'm having trouble  
13 seeing why that's a factual rather than a legal  
14 question. What do the documents that exist  
15 show?

16                   MR. BOND: They --

17                   JUSTICE SOTOMAYOR: And they show that  
18 as a matter of law, I wasn't convicted of a  
19 CIMT.

20                   MR. BOND: An alien's burden is not to  
21 show that the available records don't show that  
22 he is disqualified. What the burden of proof  
23 requires him to show affirmatively is that he  
24 does not have a disqualifying conviction.

25                   Now, in a case where there simply are

1 no records because he has no criminal history,  
2 his assertion -- his sworn assertion on his  
3 application form that he has no criminal history  
4 could carry that burden.

5 But in a case where he has a  
6 disqualifying conviction or he has a potentially  
7 disqualifying conviction, he must show  
8 affirmatively that it is not disqualifying, not  
9 nearly that the records are silent.

10 That's what the statute and  
11 regulations provide.

12 CHIEF JUSTICE ROBERTS: Justice Kagan.

13 JUSTICE KAGAN: Mr. Bond, if I could  
14 start by asking you about the legal factual  
15 question because I understand that you don't  
16 think a question of law is affected by a burden  
17 of proof. That would be right, right?

18 MR. BOND: Well, I would more -- more  
19 narrowly say that we don't think the least acts  
20 presumption in the categorical approach inquiry  
21 in this case is affected by the burden of proof.

22 JUSTICE KAGAN: Well, okay.

23 MR. BOND: I wouldn't rule out the  
24 burden --

25 JUSTICE KAGAN: So -- but let's just

1 talk about whether this is a legal or a factual  
2 question. You know, you say it's a factual  
3 question because you're asking what was he  
4 convicted of.

5 But let's take an analogy. And I  
6 guess, just first, I mean, let's remember how we  
7 decide that factual question. We decide it by  
8 looking under Shepard to a set of legal  
9 documents.

10 So here's my analogy. Let's say this  
11 is a contract case. And the question was what  
12 did I agree to? Now, in one sense, that's as  
13 much a factual question as this one is.

14 And yet because we look to the  
15 contract, when we look to the contract to  
16 determine what I agreed to, we don't think of it  
17 as a factual question anymore. We think of it  
18 as very much a question of law, we're doing  
19 contract interpretation.

20 Why isn't the same thing true here?

21 MR. BOND: I think the contract  
22 analogy works once you've identified the  
23 elements and you're trying to understand what  
24 they mean, what conduct they require in -- in  
25 this context as a matter of state law.

1                   JUSTICE KAGAN: I honestly don't think  
2 it has anything to do with that, Mr. Bond. I  
3 mean, in the contract, it's -- it's like -- it's  
4 a factual question, what did I agree to. When  
5 we look, because we look to the contract, it --  
6 and that's a legal document, we treat that  
7 question as a question of law.

8                   And so too here. The only question  
9 I'm talking about now is the preliminary one.  
10 What were you convicted of? But because you  
11 look to a set of legal documents, it becomes a  
12 question of law.

13                   And I'll just add to this, Mr. Bond,  
14 that is the way every court in America treats  
15 it. Every Court of Appeals in this country uses  
16 a de novo standard in ACCA cases in order to  
17 review that determination. And for that matter  
18 the BIA uses a de novo standard to review the  
19 IJ's determination.

20                   So all of that we would have to throw  
21 over if all of a sudden we decided that this was  
22 a factual question.

23                   MR. BOND: I think two things, Your  
24 Honor. First, even if you don't think it's a  
25 factual question, it is at a minimum a mixed

1 question, which is equally susceptible of a  
2 burden of proof, like an equitable tolling  
3 question which has factual predicates but  
4 involves applying the legal standard.

5 So in this context what you were  
6 convicted of still would be subject to a burden  
7 of proof.

8 JUSTICE KAGAN: Okay. Let me -- let  
9 me turn to this -- let me turn to your broader  
10 argument -- I'm sorry for cutting you off, Mr.  
11 Bond.

12 You also don't -- you -- you -- you  
13 agree that if this were just a categorical  
14 approach case, the burden of proof wouldn't  
15 apply, right?

16 MR. BOND: That's right. If there was  
17 an individual --

18 JUSTICE KAGAN: Okay.

19 MR. BOND: -- statute --

20 JUSTICE KAGAN: It's a yes or no.  
21 Yes.

22 And as we have said many times, many  
23 times, that the modified categorical approach is  
24 just a tool to implement the categorical  
25 approach. Isn't it?

1           MR. BOND: Yes. By answering an  
2 antecedent question of which set of elements,  
3 which statutory phrase was in a particular case,  
4 the basis of a --

5           JUSTICE KAGAN: Right. So if it's  
6 just a tool to -- because a divisible statute is  
7 opaque, if it's just a tool, the question is why  
8 should our basic approach change?

9           And the basic approach, which somebody  
10 else said, you know, has been applied to ACCA  
11 and immigration cases, the basic approach is to  
12 say, unless we're certain that the crime you  
13 were convicted of has at least the same elements  
14 as the generic offense or as the crime of moral  
15 turpitude category, unless we're certain, you  
16 know, we will not impose the penalty enhancement  
17 or impose the unfavorable immigration treatment.

18           So why should that general approach  
19 all of a sudden change here?

20           MR. BOND: I would say two things.  
21 First, without answering that antecedent  
22 question, if you can't identify which element,  
23 set of elements was at issue, you just can't  
24 perform the categorical analysis of determining  
25 what the least acts are.

1           If you look at this Nebraska statute  
2           on page 8 of our brief, you can't identify which  
3           of these is the least version. They're just  
4           different crimes. You need to isolate it first.

5           So I don't think you get into that  
6           question of applying the categorical approach.  
7           Instead, Congress made the judgment of what the  
8           effect of lack of certainty is, which is if the  
9           alien --

10           JUSTICE KAGAN: Okay. Thank you, Mr.  
11           Bond.

12           CHIEF JUSTICE ROBERTS: Justice  
13           Gorsuch.

14           JUSTICE GORSUCH: Mr. Bond, would you  
15           agree that a great many misdemeanor crimes  
16           across the country have divisible statutes but  
17           are not papered in a way to allow anyone to know  
18           with any certainty which portion of the statute  
19           the -- the defendants are convicted of?

20           MR. BOND: I don't know that  
21           firsthand, but I have no reason to dispute it.

22           JUSTICE GORSUCH: Okay. Well, let --  
23           let's just suppose that's the case. It seems to  
24           me that if we go down the Shepard road here and  
25           say that -- that immigrants are restricted to



1 certain kinds of proof, that -- documents that  
2 they can use to show their eligibility, in a  
3 great many cases where they -- you just have  
4 these divisible misdemeanor statutes, nobody's  
5 going to be able to tell, right?

6 So one of two things is going to  
7 happen. They all lose, right? And I think  
8 that's the position you're asking us to adopt.  
9 Or maybe we should allow them to prove by  
10 whatever means necessary, including by their  
11 sworn statement, whatever credible evidence an  
12 IJ would allow, what actually happened.

13 And in this case, for example, that  
14 Mr. Pereida wasn't using a Social Security card  
15 to defraud anybody of anything, but just to get  
16 a job.

17 What -- what do you say to that?

18 MR. BOND: Well, as I mentioned  
19 earlier, the government has in lower courts  
20 argued for that broader cast unsuccessfully.  
21 It's not implicated here, but we have no  
22 objection to that general approach.

23 But to the first part of your question  
24 of what is the result when those documents  
25 simply don't exist for whatever reason, there is

1 an exception in the INA's burden of production  
2 provision that, although not implicated in this  
3 case, might address hypotheticals like that or  
4 the hypothetical Petitioner ended with.

5 And this is Section 1229a(c)(4)(B) on  
6 page 8A of the appendix to our brief. And what  
7 the final sentence of that provision says is  
8 that if the IJ otherwise finds the alien's  
9 testimony credible but the IJ requests  
10 corroborating information, alien must apply that  
11 corroboration unless he demonstrates that he  
12 doesn't have it and can't reasonably obtain it.

13 Now, the Board in the Almanza-Arenas  
14 case applied that in the context of a prior  
15 conviction and said --

16 JUSTICE GORSUCH: Right. But  
17 that's -- that's all about corroborating his  
18 testimony. But that -- and I admit that's a  
19 possibility but that comes in later, right? I  
20 mean, nothing in the statute, you'd agree with  
21 me, compels Shepard.

22 MR. BOND: I agree with you that  
23 nothing compels Shepard but I don't agree  
24 testimony comes in at a later point. The  
25 starting point for an application is a sworn

1 statement describing the alien's own criminal  
2 history.

3 And at the hearing, the IJ can follow  
4 up with questions of the alien who was present  
5 asking about what was the basis of --

6 JUSTICE GORSUCH: Mr. Bond, you'd  
7 agree with me that -- that he just has to  
8 provide facts that support his application,  
9 right? And it's up to the IJ to determine  
10 whether it's credible and persuasive or perhaps  
11 whether further corroborating evidence would be  
12 necessary, right?

13 MR. BOND: He has to submit supporting  
14 documents with the form that's explicit on the  
15 current form and I think was clear even on the  
16 original form at issue in this case. He does  
17 have to support -- provide supporting --

18 JUSTICE GORSUCH: I'm not talking  
19 about your forms. I'm talking about the statute  
20 --

21 MR. BOND: But there's --

22 JUSTICE GORSUCH: -- right? What's he  
23 required under the statute? Shepard's not  
24 required, right?

25 MR. BOND: We -- we agree with that,

1     although the -- the very statute we're talking  
2     about begins by requiring the alien to follow  
3     the instructions on the form.

4                     So Congress --

5                     JUSTICE GORSUCH: All right. So  
6     let -- let -- let me -- let me turn to another  
7     area entirely. And -- and that is, do we -- do  
8     we have burdens of proof in -- in contract  
9     interpretation cases? And do they sometimes  
10    become questions of fact about what a contract  
11    means?

12                    MR. BOND: A contract interpretation  
13    dispute can certainly turn on questions of fact,  
14    but there can be antecedent questions about is  
15    this document the authentic version, or if  
16    parties are offering competing pieces of paper  
17    saying this is the final document, that can  
18    raise a factual question. And that's the kind  
19    of question we had here. Is this indictment,  
20    for example, the final indictment that was used,  
21    that was charged? Or is this plea agreement  
22    authentic?

23                    Those kinds of factual questions  
24    underlie the question presented here.

25                    JUSTICE GORSUCH: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Kavanaugh.

3 JUSTICE KAVANAUGH: Thank you. And  
4 good afternoon, Mr. Bond.

5 I just want to broaden it out a little  
6 bit here and talk about the context. We're  
7 talking about eligibility for cancellation of  
8 removal, and you want to say that he is  
9 categorically ineligible for cancellation of  
10 removal.

11 Even if you lose here, the executive  
12 branch, correct me if I'm wrong, could still  
13 deny cancellation of removal and remove him; is  
14 that correct?

15 MR. BOND: The -- the executive would  
16 have that discretion, that's correct.

17 JUSTICE KAVANAUGH: Okay. So we're  
18 just talking about categorical ineligibility;  
19 and, therefore, since you would still have the  
20 discretion to deny it, it seems to make sense to  
21 think about how this works in practice.

22 And here, do you consider the facts of  
23 this case typical of the cases where this kind  
24 of issue arises?

25 MR. BOND: I'm not sure which aspect

1 of the facts you mean to be typical, but I think  
2 this is an -- a very unusual case in which the  
3 alien is representing that he can't produce the  
4 documents that show which version of the statute  
5 he pleaded guilty to, even though the  
6 immigration proceeding predated his criminal  
7 conviction, and his immigration attorney told  
8 the IJ, you know, this ongoing criminal  
9 conviction -- or criminal proceeding may affect  
10 his outcome.

11 So I think this case illustrates why  
12 it was sensible for Congress to put the burden  
13 of proof on the alien.

14 And to the discussion --

15 JUSTICE KAVANAUGH: Well, I was  
16 thinking -- I was thinking more that he has  
17 lived here for 25 years in the United States,  
18 has a wife and three kids here, one of whom is a  
19 U.S. citizen, works construction and cleaning,  
20 had a fraudulent Social Security number, which  
21 got him a \$100 fine but no jail time under state  
22 law.

23 You know, that seems a thin read to  
24 make someone categorically ineligible for  
25 cancellation of removal, and the thin read

1 corresponds legally to when you have such --  
2 that kind of offense, it's not surprising, as  
3 Justice Gorsuch says, that the records are going  
4 to be thin as well.

5 And I just want to know how we should  
6 think about that.

7 MR. BOND: So I -- I think about it  
8 this way: Remember, we're only dealing in the  
9 context of aliens who have been found removable,  
10 including in this case for unrelated reasons,  
11 and are seeking special dispensation, what this  
12 Court has analogized to a pardon. And where --

13 JUSTICE KAVANAUGH: But with just --

14 MR. BOND: -- Congress has --

15 JUSTICE KAVANAUGH: I'm -- I'm sorry  
16 to interrupt, but the special dispensation, you  
17 could still deny cancellation of removal.  
18 That's the point I started with and wanted to  
19 underscore.

20 So it's not taking away the executive  
21 branch's ability to deny cancellation of removal  
22 if we rule against you. It's just taking away  
23 the argument that someone in this situation  
24 who's been here for that long with this kind of  
25 offense is categorically ineligible.

1           MR. BOND: I think what it does is  
2           contradict Congress's judgment. Even before  
3           IIRIRA, Congress wanted these eligibility  
4           criteria to be enforced stringently, and after  
5           IIRIRA and the REAL ID Act, there's simply no  
6           doubt that Congress wanted these to be taken  
7           seriously and not reserved -- result as a matter  
8           of the discretion at the merits phase of the  
9           proceeding.

10           And I would add that I think Congress  
11           would, in particular, not have intended this  
12           statute to allow moving to the discretionary  
13           phase with an -- for an alien who had every  
14           opportunity and incentive to create and preserve  
15           the very records that are at issue here.

16           There's no explanation for why those  
17           records weren't presented and created in the  
18           first place when he had every reason and  
19           opportunity to do that.

20           JUSTICE KAVANAUGH: Thank you,  
21           Mr. Bond.

22           CHIEF JUSTICE ROBERTS: A minute to  
23           wrap up, Mr. Bond.

24           MR. BOND: Thank you, Mr. Chief  
25           Justice.



1           Petitioner's basic argument is that  
2 you should start with decisions that put a gloss  
3 on various other statutes and retrofit this  
4 statute to match.

5           We submit that that is backwards. The  
6 Court should start with the governing statutory  
7 text, and, here, that text answers the question  
8 presented by putting the burden of proving  
9 eligibility on the alien, including a lack of  
10 disqualifying convictions.

11           Now, in our view, Congress's judgment  
12 is compatible with this Court's precedent  
13 addressing the categorical and modified  
14 approaches, but if there were any inconsistency  
15 or tension, it should be resolved in favor of  
16 the language Congress enacted to address this  
17 particular issue.

18           The court of appeals' decision should  
19 be affirmed.

20           CHIEF JUSTICE ROBERTS: Thank you,  
21 counsel.

22           Three minutes for rebuttal.

23           REBUTTAL ARGUMENT OF BRIAN P. GOLDMAN

24           ON BEHALF OF THE PETITIONER

25           MR. GOLDMAN: Thank you, Mr. Chief

1 Justice. I'll try to make four points quickly.

2 First, I agree with my friend on the  
3 side that this is an issue of statutory  
4 interpretation. But Congress passed two  
5 provisions. One uses the term "conviction" that  
6 embraces the least acts presumption, which  
7 Congress understood serves the important  
8 functions that we've discussed.

9 Separately, Congress passed a burden  
10 of proof. But the two are not at war. A  
11 non-citizen can satisfy his burden by invoking  
12 the presumption, as is common in the law. And  
13 the REAL ID Act did not suspend a 100-year-old  
14 presumption.

15 Second, Justice Gorsuch asked me in  
16 the opening argument about the burden of  
17 production, and that came up in the last half  
18 hour. And I would just emphasize that the  
19 government produced the documents here. Page 2a  
20 of our blue brief has the certification of the  
21 immigration officer. And that wasn't an act of  
22 generosity here. That is what the government  
23 does in all of these cases, and that is because  
24 it bears the initial burden of production to  
25 show the existence of a conviction that, at

1 least on its face, appears to be disqualifying.

2 Section 1229a(c)(3)(B), which Justice  
3 Gorsuch asked me about, and subparagraph (C) as  
4 well, refer to "in any proceeding under this  
5 chapter." So it's not limited to the context in  
6 which the government is trying to prove  
7 deportability.

8 As for the regulation that my friend  
9 on the other side mentioned, Section 1240.8(d),  
10 the attorney general's own interpretations of  
11 that regulation in the Matter of A-G-G- case and  
12 the Matter of S-K- case that we've cited in our  
13 reply show that that regulation places an  
14 initial burden of production on the government,  
15 not to speculate that a bar may apply but to  
16 actually make out a full prima facie case that  
17 the bar to relief may apply.

18 Third, Mr. Chief Justice, you asked  
19 about some of the practicalities around  
20 memorializing the -- the terms of a plea. And I  
21 didn't hear my friend on the other side give any  
22 answer to how this could work for old  
23 convictions, like the decades-old convictions  
24 that I mentioned, nor did I hear any answer to  
25 how exactly the criminal defendant could force

1 something to be recorded in the many county and  
2 state systems where this is simply checking off  
3 boxes on a computer program or a paper form and  
4 there's no opportunity to comment further.

5 Finally, my friend on the other side  
6 mentioned efficiency concerns around allowing  
7 these cases to be decided at the threshold. And  
8 I would just note that our rule has been in  
9 effect in the First Circuit since 2016, in the  
10 Second Circuit since 2008, and in the Ninth  
11 Circuit for six of the last 13 years.

12 And as in the Nasrallah case last term  
13 when the government made a similar efficiency  
14 argument, it has not substantiated that by  
15 pointing to any actual problems arising in those  
16 circuits.

17 The judgment should be reversed.

18 CHIEF JUSTICE ROBERTS: Thank you,  
19 counsel. The case is submitted.

20 (Whereupon, at 12:24 p.m., the case  
21 was submitted.)

22

23

24

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