No. 18-____

IN THE

Supreme Court of the United States

JUAN ALBERTO LUCIO-RAYOS,
Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

James S. Lamb
CHAN LAW FIRM
1900 Grant Street,
Suite 750
Denver, CO 80203

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

E. Joshua Rosenkranz
Counsel of Record
Brian P. Goldman
Aaron W. Scherzer
Cynthia B. Stein
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

QUESTION PRESENTED

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

Three courts of appeals hold that a state conviction therefore does not bar relief from removal if the state-court record is merely ambiguous as to whether the conviction involved the elements of the generic federal offense. In their view, ambiguity means the conviction does not "necessarily" establish the elements of the federal offense. Four courts of appeals—including the Tenth Circuit below—take the opposite view. They hold that a merely ambiguous conviction is nevertheless disqualifying because, in general, the immigration laws place an evidentiary burden of proof on noncitizens to establish eligibility for relief.

The question presented is:

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

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INTRODUCTION

Petitioner Juan Lucio-Rayos entered the United States 21 years ago and has resided here ever since. He has conceded that he is removable because he was not lawfully admitted to the country. But he applied for cancellation of removal because of the "exceptional and extremely unusual hardship" his removal would cause his U.S.-citizen wife, a U.S. Army veteran who suffers from serious medical conditions.

The Tenth Circuit held that Mr. Lucio-Rayos was ineligible for cancellation of removal because he pleaded guilty to a single municipal petty-theft offense in Westminster, Colorado, municipal court. The complaint indicates the petty theft involved $75 worth of property. Pet. App. 42a. The Tenth Circuit first agreed with Mr. Lucio-Rayos that not all convictions under the municipal petty-theft ordinance satisfy the elements of a "crime involving moral turpitude" (CIMT) as defined by federal law, because one prong of the ordinance criminalizes only temporary deprivations of property. The ordinance is therefore not "categorically" a CIMT under this Court's "categorical approach."

The court then proceeded to the "modified" version of the categorical approach, which looks to a limited class of documents to determine whether the particular statutory alternative the defendant was convicted of corresponds to the disqualifying federal offense. But the record of Mr. Lucio-Rayos's conviction does not establish which prong of the petty-theft ordinance gave rise to his conviction. Ordinarily, that would mean that the conviction does not count as a

predicate offense under the modified categorical approach either. But the Tenth Circuit nevertheless held he was barred from seeking cancellation of removal because the Immigration and Nationality Act (INA) and an immigration regulation place a generally applicable burden of proof on noncitizens to establish their eligibility for relief from removal. 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d). The court thought this evidentiary burden was relevant to and dispositive of the application of the modified categorical approach where the record of conviction is ambiguous.

The Tenth Circuit acknowledged that "[o]ther circuits are divided" on this question. Pet. App. 19a. The First, Second, and Third Circuits hold that a conviction does not automatically bar relief from removal when the modified categorical approach is inconclusive because a merely ambiguous record cannot overcome the legal presumption that a conviction rests on the least of the acts criminalized. But the Fourth, Sixth, and Ninth Circuits agree with the Tenth Circuit that an ambiguous record of conviction is always disqualifying because it does not disprove the possibility that the offense would have met the federal definition of a disqualifying offense. Under that rule, an ambiguous record bars a noncitizen from any opportunity to even argue that he merits a discretionary grant of relief from removal.

This Court's intervention is necessary. This split is untenable: The immigration laws must have the same meaning throughout the country, especially because the government may choose the forum where it

initiates removal proceedings. The question presented will also continue to recur. Immigration courts routinely rely on merely ambiguous records to find noncitizens ineligible for relief from removal.

This is an ideal vehicle to resolve the question. State courts often do not record which portion of a divisible statute formed the basis for a conviction, as is the case here. Even where courts do record that information, they frequently destroy records after a few years—particularly records of misdemeanor and petty offenses like Mr. Lucio-Rayos's. So this case exemplifies how the Tenth Circuit's rule requires noncitizens to prove the unprovable and pins their fate on the fortuity of state recordkeeping practices.

Moreover, the Tenth Circuit's opinion is wrong. As the First and Third Circuits have explicitly recognized, the conclusion that an ambiguous record does not bar relief from removal follows directly from this Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013). Under *Moncrieffe*, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Id.* at 190-91. That presumption is rebutted only if the elements of the narrower disqualifying offense "necessarily" were found or admitted. *Id.* at 192. But mere "[a]mbiguity" with respect to a prior conviction "means that the conviction did not 'necessarily' involve" the elements of a federal offense, and thus is not disqualifying. *Id.* at 194-95.

The Tenth Circuit's approach flips the categorical approach on its head. Rather than presuming a conviction rests on the *least* of the acts criminalized, the

Tenth Circuit's rule presumes it rests on the *most* of the acts criminalized unless the noncitizen can show otherwise using only limited conviction records. That rule often places an insurmountable burden on noncitizens and invites arbitrary results. And it cannot be squared with this Court's analysis in *Moncrieffe*.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The decision of the Tenth Circuit is reported at 875 F.3d 573 and reproduced at Pet. App. 1a-24a. The order denying rehearing en banc is reproduced at Pet. App. 50a-51a. The decisions of the Board of Immigration Appeals and Immigration Judge are unreported and reproduced at Pet. App. 25a-33a and 34a-49a, respectively.

JURISDICTION

The Tenth Circuit entered judgment on November 14, 2017, Pet. App. 1a, and denied a petition for rehearing en banc on March 9, 2018, Pet. App. 50a. On May 23, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including July 9, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Immigration and Nationality Act addressing crimes involving moral turpitude, 8 U.S.C. §§ 1182(a)(2)(A)(i)(I) & 1227(a)(2)(A)(i); establishing the burden for proving eligibility for relief

from removal, 8 U.S.C. § 1229a(c)(4)(A); and governing cancellation of removal for certain permanent and nonpermanent residents, 8 U.S.C. § 1229b(a), (b)(1), are reproduced at Pet. App. 52a-53a, 54a, 55a, and 56a-57a, respectively. The regulation relating to burdens of proof in relief from removal applications, 8 C.F.R. § 1240.8(d), is reproduced at Pet. App. 58a-59a. The Westminster, Colorado, municipal theft ordinance, Westminster Municipal Code § 6-3-1(A), is reproduced at Pet. App. 60a-61a.

STATEMENT OF THE CASE

1. A noncitizen found to be removable from the United States may apply for discretionary relief, including cancellation of removal, provided he meets certain eligibility requirements. Both lawful permanent residents and nonpermanent residents are ineligible if they have been convicted of an aggravated felony. 8 U.S.C. § 1229b(a)(3), (b)(1)(C). Nonpermanent residents are also ineligible for cancellation if they have been convicted of one of several other categories of lower-level crimes, including, as relevant here, "a crime involving moral turpitude [CIMT]," 8 U.S.C. § 1182(a)(2)(A)(i)(I); 8 U.S.C. § 1227(a)(2)(A)(i). *See* 8 U.S.C. § 1229b(b)(1)(C).

To determine whether a state conviction meets the definition of an offense described in the INA, courts traditionally apply the "categorical approach." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015).[1] This

[1] The Court has recognized an exception to the categorical approach where the plain text of the INA requires an inquiry

approach "looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior," and compares the elements of that offense with the federal definition. *Id.* A state offense is a "categorical" match only if includes all the elements of the federally defined disqualifying offense. *Descamps v. United States*, 570 U.S. 254, 261 (2013).

If the state offense criminalizes conduct that falls outside the federal definition, then a conviction can yield immigration consequences only if the state statute is "divisible." A statute is divisible if it "list[s] elements in the alternative, and thereby define[s] multiple crimes," some of which fall within the scope of the federal definition. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). For "divisible" statutes, courts take an additional step: They look to "a limited class of documents … to determine what crime, with what elements, a defendant was convicted of" before proceeding to "compare that crime, as the categorical approach commands, with the relevant generic offense." *Id.* This "modified" variant of the categorical approach is merely "a tool for implementing the categorical approach." *Descamps*, 570 U.S. at 262. The object is the same—determining whether the crime of conviction meets "all the elements of [the] generic [definition]." *Id.* at 261-62 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)).

Courts analyzing a prior conviction "must presume that the conviction 'rested upon nothing more

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into "the specific circumstances in which a crime was committed," as in *Nijhawan v. Holder*, 557 U.S. 29, 38 (2009). That limited exception to the categorical approach is not at issue here.

than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 569 U.S. at 190-91 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)) (brackets omitted); *see also, e.g.*, *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 n.1 (2018); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017); *Mellouli*, 135 S. Ct. at 1986. That is because the categorical approach looks to "what the state conviction necessarily involved, not the facts underlying the case." *Moncrieffe*, 569 U.S. at 190-91. "By focusing on the legal question of what a conviction *necessarily* established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 135 S. Ct. at 1987.

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

2. Juan Lucio-Rayos is a native and citizen of Mexico. Pet. App. 4a. He has lived in the United States for 21 years. Certified Administrative Record (C.A.R.) 44, 533. He has a long and productive history of working as a painter and paying taxes. C.A.R. 219, 244, 273-97, 442. His wife, Bessie Edwards, is a U.S. citizen and a U.S. Army veteran. C.A.R. 247, 256, 261,

341. Mrs. Edwards suffers from several medical conditions, including severe vision problems, as well as high blood pressure, asthma, and fibromyalgia. C.A.R. 223-29. She is unable to work or drive and requires daily assistance from Mr. Lucio-Rayos. C.A.R. 299, 301, 314, 340-45. Mrs. Edwards's health problems make it impossible for her to relocate to Mexico, and her husband's removal would deprive her of the essential support he provides. C.A.R. 226-29, 242-43, 341-42.

3. In September 2009, Mr. Lucio-Rayos was charged in Westminster, Colorado, municipal court with violating a local petty-theft ordinance, Westminster Municipal Code § 6-3-1(A). The charging document indicated the theft involved property worth $75 at a local J.C. Penney. Pet. App. 42a; C.A.R. 550. He pleaded guilty and was fined $200. C.A.R. 552. He was also sentenced to three months of unsupervised probation, with instructions that he attend a "petty theft class," which he completed. Pet. App. 42a; C.A.R. 552, 554.

4. In 2010, the Department of Homeland Security placed Mr. Lucio-Rayos in removal proceedings for being a noncitizen who was not lawfully admitted into the country. *See* 8 U.S.C. § 1182(a)(6)(A)(i); Pet. App. 35a. Mr. Lucio-Rayos conceded his removability and applied for cancellation of removal. Pet. App. 35a-36a; C.A.R. 441-450. As grounds for his cancellation application, he cited the "exceptional and extremely unusual hardship" that his removal would cause his disabled wife. *See* 8 U.S.C. § 1229b(b)(1); C.A.R. 532.

5. The Immigration Judge (IJ) held that she could not even consider Mr. Lucio-Rayos's application for cancellation because the municipal petty-theft offense—his only criminal conviction—was an absolute bar to eligibility. Pet. App. 43a-44a. The IJ first determined that the municipal "ordinance is not categorically a CIMT." Pet. App. 40a. The IJ recognized that, while many theft offenses are CIMTs, "the perpetrator must intend to permanently take the thing of value from its rightful owner" for a theft conviction to count as a CIMT. Pet. App. 40a. Turning to the Westminster ordinance, she observed that one subsection of the ordinance (subsection (4)) does not require that an individual intend to permanently deprive the owner of the property, but rather requires only that he "[d]emand[] any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person," Westminster Municipal Code § 6-3-1(A). Pet. App. 39a.

The IJ then found the ordinance divisible, and therefore proceeded to analyze it under the modified categorical approach. Pet. App. 41a. The IJ noted that Mr. Lucio-Rayos's record of conviction was inconclusive as to which prong of the municipal ordinance formed the basis for the conviction, because the municipal court documents did not specify any particular subsection of the ordinance. Pet. App. 40a, 42a. She then applied Tenth Circuit precedent holding that when "the record is inconclusive" as to whether a state crime qualifies as a predicate offense, the noncitizen is "disqualified from receiving discretionary relief" because he has failed to satisfy his evidentiary burden of proof. Pet. App. 42a-43a (quoting *Garcia v. Holder*,

584 F.3d 1288, 1289 (10th Cir. 2009)). That is, because the conviction documents did not definitively demonstrate that Mr. Lucio-Rayos *was* convicted under subsection (4), she found Mr. Lucio-Rayos had failed to prove that he was *not* convicted of a CIMT. Pet. App. 43a.

6. The Board of Immigration Appeals (BIA) affirmed, although its reasoning differed slightly. Pet. App. 25a-26a. In the BIA's view, "the entirety of the Westminster Ordinance requires the intent to deprive another permanently of the use or benefit of his property as an element," so the conviction was categorically a CIMT. Pet. App. 30a. But the BIA also held in the alternative that if the modified categorical approach applied, the IJ correctly held that Mr. Lucio-Rayos did not meet his burden to provide "sufficient evidence establishing that he was not convicted of a [CIMT]," as required under Tenth Circuit law. Pet. App. 28a n.3.

7. A two-judge panel of the Tenth Circuit denied Mr. Lucio-Rayos's petition for review.[2] Pet. App. 3a-4a. The court first agreed with Mr. Lucio-Rayos that the ordinance is not categorically a CIMT because subsection (4) does not require intent to permanently deprive. Pet. App. 11a-14a.[3] Like the IJ, the court

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[2] Then-Judge Gorsuch participated in oral argument but was elevated before the panel issued its opinion. Pet. App. 3a n.1.

[3] The court noted that the BIA had recently expanded the definition of a CIMT as applied to theft offenses. But it explained that the "new definition … does not apply retroactively here to Lucio-Rayos's case because a revised rule adopted by the BIA in the exercise of its delegated legislative policymaking authority is presumed to apply prospectively only to cases initiated after

then held that the ordinance is divisible and therefore applied the modified categorical approach. Pet. App. 15a-16a.

The Tenth Circuit emphasized that "it is undisputed that none of the documents in the record indicates under what provision Lucio-Rayos was convicted," and thus the modified categorical approach came up inconclusive. Pet. App. 16a. The court also recognized that "[o]ther circuits are divided as to whether [the least-acts-criminalized presumption in] *Moncrieffe* applies to the circumstances at issue here." Pet. App. 19a. But the Tenth Circuit had previously held that, because the noncitizen bears the "burden of establishing that he or she is eligible for any requested benefit or privilege," he must "prove the absence of any impediment to discretionary relief." *Garcia*, 584 F.3d at 1289-90 (quoting 8 C.F.R. § 1240.8(d)). According to *Garcia*, an ambiguous record does not satisfy that burden, and "[t]he fact that

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its issuance." Pet. App. 10a (citing *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1145-46 & n.1 (10th Cir. 2016)). The ordinance was therefore overbroad under the applicable CIMT definition, and it was undisputed that the record of conviction was inconclusive, Pet. App. 16a, so the question presented was dispositive.

Mr. Lucio-Rayos also argued in the Tenth Circuit that subsection (2) of the Ordinance, in addition to subsection (4), did not meet the definition of a CIMT. The Tenth Circuit deemed that argument unexhausted. Pet. App. 12a n.9. Mr. Lucio-Rayos does not contest that failure-to-exhaust determination here. That does not bear on the question presented either because, whether a statute is overbroad in one way (subsection (4)) or two (subsections (2) and (4)), it is overbroad, and the record of conviction does not identify what subsection Mr. Lucio-Rayos was convicted under. Pet. App. 16a.

[the noncitizen] is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief." *Id.* at 1290.

Responding to Mr. Lucio-Rayos's argument that *Garcia* is inconsistent with this Court's more recent decision in *Moncrieffe*, the Tenth Circuit determined that it could not "say that *Moncrieffe* 'indisputeabl[y]' overruled *Garcia*," because, in its view, *Moncrieffe* involved the categorical approach (not the modified categorical approach) and a determination of removability (not relief from removal). Pet. App. 20a-22a. So the court concluded that *Garcia* remained binding. Pet. App. 22a. The Tenth Circuit then denied Mr. Lucio-Rayos's request that the court rehear the case en banc to reconsider *Garcia*. Pet. App. 51a.

8. The Tenth Circuit stayed Mr. Lucio-Rayos's removal from the United States pending the consideration and disposition of this petition. He remains at home in Colorado with his wife.

REASONS FOR GRANTING THE WRIT

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

As the Tenth Circuit acknowledged, "[o]ther circuits are divided" on the question whether an ambiguous record of conviction is enough to bar a noncitizen from even applying for discretionary relief from removal. Pet. App. 19a. The First, Second, and Third Circuits hold that it is not: Those courts presume that

a conviction under a divisible statute rests on the minimum conduct necessary to sustain the conviction, and therefore an ambiguous record of conviction does not "necessarily" establish the elements of the narrower federal definition of a crime. But the Fourth, Sixth, Ninth, and Tenth Circuits disagree. They have concluded that, because a noncitizen generally bears a burden of proving his eligibility for relief from removal, courts must treat ambiguous convictions as *dis*qualifying unless the noncitizen affirmatively proves that the conviction involved a nondisqualifying prong of the statute.

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

In *Sauceda v. Lynch*, 819 F.3d 526 (1st Cir. 2016), as here, the noncitizen was convicted under a divisible state statute but the record of conviction did not reveal whether he was convicted under a prong that would correspond to an offense listed in the INA. *Id.* at 531. The court held that *Moncrieffe* "dictates the outcome" in such circumstances: The conviction does not bar the individual from applying for relief from removal. *Id.* Under *Moncrieffe*, courts "must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 531 (quoting *Moncrieffe*, 569 U.S. at 190-91) (internal quotation marks and brackets omitted). That least-acts-criminalized presumption can be "rebut[ted]" by using the modified categorical approach, *id.* at 531 (citing *Moncrieffe*, 569 U.S. at 191), because the record might establish that

the alternative element involved in the conviction was one that does match the federal offense. But where the record documents "shed no light on the nature of the offense or conviction," such that a court "cannot identify the prong of the divisible … statute under which [a noncitizen] was convicted," then nothing rebuts the presumption that the conviction is not disqualifying. *Sauceda*, 819 F.3d at 531-32.

The First Circuit expressly rejected contrary decisions of the Fourth, Ninth, and Tenth Circuits. *Id.* at 532 n.10; *see infra* 17-19. Those courts relied on a noncitizen's burden to prove eligibility for immigration relief. But, the First Circuit explained, "the categorical approach—with the help of its modified version—answers the purely 'legal question of what a conviction necessarily established.'" *Sauceda*, 819 F.3d at 533-34 (quoting *Mellouli*, 135 S. Ct. at 1987). So the petitioner's *factual* burden of proof "does not come into play" in determining whether, "as a matter of law," the state conviction necessarily is a disqualifying federal offense. *Id.* at 532, 534. Because the petitioner's burden does not affect that analysis, the court reasoned, *Moncrieffe*'s presumption applies with equal force in the cancellation context. *Id.* at 534 (citing *Moncrieffe*'s statement that the analysis "is the same in both [the removability and relief] contexts," 569 U.S. at 191 n.4).

The First Circuit also rejected the government's argument that *Moncrieffe*'s least-acts-criminalized presumption applies only to categorical-approach cases, and not modified-categorical-approach ones: "The modified categorical approach is not a wholly distinct inquiry[,]" but rather is a "tool" that "merely

helps implement the categorical approach." *Id.* (quoting *Descamps*, 570 U.S. at 263).

The Second Circuit has reached the same conclusion. In *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), another cancellation case, the court rejected the government's reliance on the noncitizen's burden of proof and instead applied the ordinary approach to analyzing a past conviction. *Id.* at 122. The court reasoned that a noncitizen meets his burden "merely by showing that he has not been *convicted* of [a disqualifying] crime." *Id.* It clarified that "a showing that the minimum conduct for which he was convicted was not [a disqualifying offense] suffices to do this." *Id.* A contrary rule would undermine "[t]he very basis of the categorical approach," which "is that the *sole* ground for determining whether an immigrant was convicted of [a disqualifying offense] is the minimum criminal conduct necessary to sustain a conviction under a given statute." *Id.* at 121.

The Second Circuit then applied that rule with full force in a case involving the modified categorical approach. *See Scarlett v. U.S. Dep't of Homeland Sec.*, 311 F. App'x 385, 386-87 (2d Cir. 2009) (citing *Martinez*, 551 F.3d at 121-22). *Scarlett* considered "an alien's burden to prove his eligibility for cancellation relief," applied the "modified-categorical approach" to a "divisible" statute, and concluded that because the record of conviction did not conclusively establish a federal offense, it did not render the noncitizen ineligible. *Id.*

The Third Circuit has similarly held that a merely ambiguous record of a prior conviction does

not suffice to preclude eligibility for relief from removal. In *Thomas v. Att'y Gen.*, 625 F.3d 134 (3d Cir. 2010), the petitioner twice pleaded guilty to a divisible controlled-substances offense. *Id.* at 137-38. Because the "sparse" records of conviction were "silent regarding the factual basis for the guilty pleas," the court could not "conclusively determine that Thomas actually admitted" to conduct that constituted a federal felony; it was "equally plausible that Thomas's admission of guilt under [the state statute] was to conduct which would *not* constitute a hypothetical federal felony." *Id.* at 144, 147. Accordingly, the court explained, under the categorical and modified categorical approaches, there was no basis to conclude that Thomas was convicted of a crime that met the definition of the disqualifying federal offense. *Id.* at 148.

Following this Court's decision in *Moncrieffe*, the Third Circuit reaffirmed its view in a modified categorical approach case, concluding that where no conviction document "provides any facts indicating [the petitioner] was convicted of an offense that would be an aggravated felony under federal law," the least-acts-criminalized presumption was not displaced and the conviction did not bar an application for asylum relief. *Johnson v. Att'y Gen.*, 605 F. App'x 138, 141-42 (3d Cir. 2015). As the court put it, "*Moncrieffe* did not change our existing precedent—it confirmed it." *Id.* at 143.[4]

[4] The decision below suggested the Third Circuit took the opposite position in *Syblis v. Attorney General*, 763 F.3d 348 (3d

In sum, three circuits share the view that, under the modified categorical approach, a merely ambiguous record of a prior conviction does not automatically preclude eligibility for relief from removal.

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

The decision below, in contrast, holds that an ambiguous record of conviction *is* disqualifying. The court relied on its pre-*Moncrieffe* decision in *Garcia*, which held that where "it is unclear from [a noncitizen's] record of conviction whether he committed a CIMT, … he has not proven eligibility for cancellation of removal" because a noncitizen bears the "burden of establishing that he or she is eligible for any requested benefit or privilege." *Garcia*, 584 F.3d at 1290. Disagreeing with the First Circuit, the Tenth Circuit reasoned that *Moncrieffe* did not "indisputeabl[y]" overrule that circuit precedent because *Moncrieffe* involved a question of removability—where the government bears the burden of proof—not

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Cir. 2014). *See* Pet. App. 19a n.15. But *Syblis* applied a circumstance-specific inquiry that required examination of the actual conduct and facts of a prior criminal offense—a special context in which "the categorical approach does not apply." 763 F.3d at 356; *see supra* 5 n.1. *Syblis* distinguished the Third Circuit's earlier decision in *Thomas* on exactly this ground. 763 F.3d at 357 n.12. The Third Circuit has since applied its earlier cases—not *Syblis*—where, as here, the modified categorical approach governs. *See Johnson*, 605 F. App'x at 141-42.

eligibility for relief, and applied the categorical approach rather than its modified counterpart. *See supra* 10-11.[5]

The Sixth Circuit recently joined the Tenth Circuit in *Gutierrez v. Sessions*, 887 F.3d 770 (6th Cir. 2018). The court held that "where a petitioner for relief under the INA was convicted under an overbroad and divisible statute, and the record of conviction is inconclusive as to whether the state offense matched the generic definition of a federal statute, the petitioner fails to meet her burden." *Id.* at 779. Acknowledging that "our sister circuits are divided" on the question, *id.* at 775 & n.5, the court sided with the Tenth Circuit because it was likewise of the view that *Moncrieffe*'s least-acts-criminalized presumption is inapplicable both to eligibility for cancellation of removal and to divisible statutes analyzed under the modified categorical approach. 887 F.3d at 776-77.

The Fourth Circuit has also held that an inconclusive record of conviction bars relief from removal. In *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), *cert. denied*, 565 U.S. 1110 (2012), the court adopted the Tenth Circuit's conclusion in *Garcia* and held that "any lingering uncertainty that remains after consideration of the conviction record necessarily inures to the detriment" of the noncitizen seeking cancellation

[5] The court also observed that in *Sauceda*, it was undisputed that the record of conviction was "complete" and yet still inconclusive. Pet. App. 18a n.14. But the court did not suggest that this case was any different. Nor has the government disputed that the record of Mr. Lucio-Rayos's conviction is complete as well.

because of the noncitizen's burden of proof. *Id.* at 114. The Fourth Circuit continues to apply the rule in *Salem* even after *Moncrieffe*. *See Cruzaldovinos v. Holder*, 539 F. App'x 225, 227 (4th Cir. 2013).

The Ninth Circuit, too, took this view in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc). In a fractured en banc opinion, a majority of six judges agreed that a noncitizen seeking cancellation of removal cannot "establish the absence of a predicate crime … with an inconclusive record." *Id.* at 989; *id.* at 992 n.1 (Ikuta, J., concurring in part and dissenting in part). So the rule in the Ninth Circuit is the same as in the Fourth, Sixth, and Tenth Circuits. *See, e.g.*, *Sauceda*, 819 F.3d at 532 n.10.[6]

The Fifth and Seventh Circuits have suggested in dicta that they would agree with the Fourth, Ninth, and Tenth Circuits (and now with the Sixth Circuit as well). Like the Tenth Circuit, the Fifth Circuit has stated that "*Moncrieffe* … does not control" in cases

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[6] After *Moncrieffe*, one panel of the Ninth Circuit held that *Moncrieffe* abrogated *Young*. *See Almanza-Arenas v. Holder*, 771 F.3d 1184, 1193 (9th Cir. 2014). But the court granted rehearing en banc, and the en banc court resolved the case on different grounds, so *Young*'s status remained an open question. *See Almanza-Arenas v. Lynch*, 815 F.3d 469, 474 n.6 (9th Cir. 2016) (en banc). More recently, a different Ninth Circuit panel held that *Young* survives *Moncrieffe*, squarely rejecting *Sauceda*. *See Marinelarena v. Sessions*, 869 F.3d 780, 788-790 (9th Cir. 2017). But the Ninth Circuit has now ordered that case heard en banc too. *Marinelarena v. Sessions*, 886 F.3d 737 (9th Cir. 2018). So, once again, *Young* remains controlling in the Ninth Circuit. The pending en banc proceedings could only deepen the post-*Moncrieffe* split if the Ninth Circuit switches sides by overruling *Young*.

that "concern[] eligibility for relief from removal and not removal itself." *Le v. Lynch*, 819 F.3d 98, 107 (5th Cir. 2016). But the Fifth Circuit has expressly reserved the question presented here. *See id.* at 107 n.5; *Gomez-Perez v. Lynch*, 829 F.3d 323, 326 & n.1 (5th Cir. 2016). The Seventh Circuit too has noted that it "agree[d] with "the Fourth, the Ninth, and the Tenth Circuits…. that if the analysis has run its course and the answer is still unclear [whether a conviction meets the definition of a listed offense], the alien loses by default," but it ruled for the noncitizen on different grounds in that case. *Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014).

The BIA also shares the same view. *See Matter of Almanza-Arenas*, 24 I. & N. Dec. 771, 774-76 (BIA 2009). It continues to apply that rule wherever it is not foreclosed by circuit law. *See, e.g.*, *In re Rodriguez-Moreno*, No. A201-072-781, 2017 WL 2376471, at *2 (BIA Apr. 24, 2017) (8th Cir.).

* * *

The conflict is thus direct and explicit, with courts on both sides expressly rejecting each others' views. The government has acknowledged the split as well. *See* Gov't C.A. Opp. to Pet. for Reh'g 1, 13.

The division is also intractable. Further percolation in light of this Court's most recent cases won't resolve it: Even since *Moncrieffe* and *Descamps* clarified the categorical and modified categorical approaches, courts have split three (Fourth, Sixth, and Tenth Circuits) to two (First and Third Circuits). Indeed, the split has only deepened in the six years since

certiorari was sought in *Salem*, when the government acknowledged the "inconsistency among the courts of appeals" but assured the Court that review would be "premature." Br. in Opp. at 10, 12, *Salem v. Holder*, 565 U.S. 1110 (2012) (No. 11-206). Rehearing en banc won't resolve it either: The Tenth Circuit denied a petition for rehearing en banc here that directly asked the court to revisit its position. Pet. App. 50a-51a. And the First Circuit reached its conflicting position when three of that court's six active judges granted panel rehearing to *reject* other circuits' holdings. *Sauceda*, 819 F.3d at 529. Only this Court's intervention can restore the uniformity of the nation's immigration law that the Constitution mandates.

II. The Question Presented Is Important And Recurring.

The stakes of deportation are "high and momentous," *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); it is "the equivalent of banishment or exile," *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (citation omitted). Deportation thus "cannot be made a sport of chance" that turns on the circuit in which a removal proceeding takes place. *Judulang v. Holder*, 565 U.S. 42, 58-59 (2011) (internal quotation marks omitted). Yet while a conviction under Westminster, Colorado's petty-theft ordinance prohibited Mr. Lucio-Rayos from seeking cancellation in removal proceedings in immigration court in Colorado, a noncitizen with an equivalent conviction under an ordinance in, say, Westminster, Massachusetts, could seek cancellation in immigration court in Massachusetts.

Further, because the venue for removal proceedings is in the government's control, *see* 8 C.F.R. §§ 1003.14(a), 1003.20(a), a noncitizen detained in Massachusetts, where an ambiguous conviction would not be disqualifying, could well be transferred to a facility and placed into removal proceedings in Colorado, where it would.[7]

This issue also recurs regularly, both in court (as the many recent cases in the split illustrate) and even more commonly in proceedings before immigration judges, the BIA, and frontline immigration adjudicators. It affects every immigration benefit that a past conviction could preclude. *See, e.g.*, 8 U.S.C. § 1158(b)(2)(B)(i) (asylum); 8 U.S.C. § 1229b(a)(3) (cancellation of removal for permanent residents); 8 U.S.C. § 1229b(b)(1)(C) (cancellation of removal for nonpermanent residents); 8 U.S.C. § 1229b(b)(2)(A)(iv) (cancellation of removal for nonpermanent residents who have been battered); 8 U.S.C. §§ 1255(a), 1182(a)(2)(A)(i) (adjustment of status for relatives of permanent residents and U.S. citizens); 8 U.S.C. §§ 1255(*l*)(1)(B), 1255(h)(2)(B) (adjustment of status for trafficking victims and juveniles granted special immigrant juvenile status); 8 U.S.C. § 1427(a)(3) (naturalization). Because immigration courts look to past convictions as a threshold step to pretermit applications for relief, and because many conviction records are unclear, the effect of an

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

uncertain record of conviction will often be an enormously consequential question.

And it is not uncommon that a record of conviction will be missing or inconclusive. This Court has long understood and accepted that "in many cases state and local records … will be incomplete." *Johnson*, 559 U.S. at 145. This "common-enough" occurrence "will often frustrate application of the modified categorical approach." *Id.* Indeed, records are particularly likely to be devoid of detail in the plea context, where the particular prong of a statute giving rise to a conviction need not be specified if it does not affect the agreed-upon sentence. *Cf. Descamps*, 570 U.S. at 270-71 (observing that defendants are unlikely to "irk the prosecutor or court by squabbling about superfluous [details]").

Where courts do happen to record more detailed information, they may have a practice of destroying records after a few years, especially for minor convictions. Colorado, for example, allows courts to destroy certain categories of "Misdemeanor Case Files" just "4 years from the year of filing," and court reporter notes for cases prosecuted in county court after two years.[8] Oklahoma authorizes destruction of misdemeanor records after five years. *See* Okla. Stat. tit. 20, §§ 1002, 1005(A)(6)(b). The problem is not limited to the Tenth Circuit: California courts, for example, retain records for misdemeanor convictions for five years, and for certain marijuana offenses, only two. Cal. Gov't Code § 68152(c)(7)-(8). North Carolina

[8] Colorado Judicial Branch, *Record Retention Manual* (Mar. 22, 2017), https://tinyurl.com/ybdz5s62.

courts do not even create a transcript or a recording of most misdemeanor proceedings.[9]

These short retention periods matter because convictions that are years or even decades old are often raised as potential bars to relief from removal. The convictions in the main Third Circuit case, for example, were 12 and 13 years old—"dated, to say the least." *Thomas*, 625 F.3d at 144; *see also Kuhali v. Reno*, 266 F.3d 93, 98 (2d Cir. 2001) (DHS initiated proceedings nearly 19 years after plea). So, whether details of prior convictions were never recorded in the first place or they were lost to time, uncertain records of conviction are commonplace. And, everywhere outside the First, Second, and Third Circuits, that fortuity will have a significant impact on the availability of relief.

III. This Case Is A Clean And Representative Vehicle To Resolve The Conflict.

This case presents an ideal vehicle to resolve this conflict. The question is squarely presented: The Immigration Judge, BIA, and Tenth Circuit each held, based on longstanding Tenth Circuit precedent, that Mr. Lucio-Rayos's ambiguous conviction was disqualifying. They reasoned that the INA's burden-of-proof provision required him to negate the possibility that his conviction arose under the disqualifying prongs of

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

the petty-theft ordinance. Pet. App. 16a-22a, 28a n.3, 42a-43a.

The question presented was also the dispositive issue below. The Tenth Circuit's holding that Mr. Lucio-Rayos is ineligible to seek cancellation of removal rested solely on its conclusion that an inconclusive record of conviction fails to show a noncitizen was not convicted of a disqualifying offense. "[I]t is undisputed" that the documents in the record do not identify which of the four divisible subsections of the ordinance gave rise to Mr. Lucio-Rayos's conviction. Pet. App. 16a.[10]

And the question presented is outcome determinative. Because it is undisputed that Mr. Lucio-Rayos's record of conviction is inconclusive, a ruling that ambiguous convictions fail to satisfy the modified categorical approach would mean that his conviction is not disqualifying. Moreover, Mr. Lucio-Rayos meets all the other threshold eligibility criteria for cancellation, *see* 8 U.S.C. § 1229b(b)(1), and he is likely to succeed on that application because he presents a compelling case for discretionary relief: He has only one, minor conviction (this municipal petty-theft offense), C.A.R. 244, he has a long and productive work

[10] Although the government argued below that the Westminster ordinance is categorically a CIMT, the Tenth Circuit rightly rejected that argument as both (a) contrary to the plain terms of the ordinance, which is divisible into three prongs that expressly require that the victim is permanently deprived of his property and a fourth that does not, and (b) contrary to Colorado Supreme Court precedent and jury instructions pertaining to an "almost identically worded" Colorado theft statute that is divisible. Pet. App. 12a-14a.

history as a painter with his family's business, *supra* 7, and he provides essential care for his wife, a U.S. citizen and military veteran who suffers from serious medical problems, *supra* 7-8.

This case also presents a highly representative context to resolve the question presented. It involves precisely the sort of low-level offense for which courts most often do not create precise records that would reveal which prong or sub-prong of a divisible statute gave rise to a conviction (and, as noted, these problems may be especially acute in the plea context). And records of misdemeanor and petty offenses like this one are the least likely to be retained for long. *See supra* 23-24. So this case perfectly exemplifies how a noncitizen's fate may depend on the existence of records he neither creates nor maintains.

IV. The Decision Below Is Incorrect.

A. The Tenth Circuit's position is incompatible with *Moncrieffe*, as well as *Descamps* and *Mellouli*. Mr. Lucio-Rayos's eligibility for cancellation turns on whether he has been "*convicted* of" a CIMT. 8 U.S.C. § 1229b(b)(1)(C) (emphasis added). As *Moncrieffe* held, the inquiry into "what offense the noncitizen was 'convicted' of" requires courts to examine whether "a conviction of the state offense 'necessarily' involved ... facts equating to the generic federal offense." *Moncrieffe*, 569 U.S. at 190-91 (brackets omitted).

The key word is "necessarily." "Because [courts] examine what the state conviction *necessarily* involved, not the facts underlying the case, [courts]

must *presume* that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 190-91 (emphasis added) (brackets omitted); *see also Esquivel-Quintana*, 137 S. Ct. at 1568 (same). That is, the categorical approach asks "the legal question of what a conviction necessarily established." *Mellouli*, 135 S. Ct. at 1987. Under *Moncrieffe* and *Mellouli*, then, when a state statute sweeps in conduct that exceeds the federal definition, a conviction under that statute presumptively is not disqualifying.

This least-acts-criminalized presumption may be rebutted by using the modified categorical approach, but only if the "record of conviction of the predicate offense *necessarily* establishes" that the "particular offense the noncitizen was convicted of" was the narrower offense corresponding to a disqualifying crime. *Moncrieffe*, 569 U.S. at 190-91, 197-98 (emphasis added). If the record does not *necessarily* establish as much, the least-acts-criminalized presumption is not displaced. Accordingly, "[a]mbiguity" about the nature of a conviction "means that the conviction did not 'necessarily' involve facts that correspond to [the disqualifying offense category]," and so the noncitizen "was not *convicted* of [the disqualifying offense]," as a matter of law. *Id.* at 194-95 (emphasis added). Here, Mr. Lucio-Rayos's conviction is ambiguous as to whether it included the element of intent to permanently deprive. Because the conviction does not *necessarily* establish a CIMT, by default it does not count as a "conviction" for a CIMT.

The Tenth Circuit held that a noncitizen with an inconclusive record of conviction is ineligible even to apply for cancellation of removal because the immigration laws place a generally applicable burden on noncitizens to prove their eligibility for immigration relief. Pet. App. 17a-19a. But that burden applies to *factual* questions of eligibility.[11] Mr. Lucio-Rayos, for example, had to marshal evidence that his U.S.-citizen wife would suffer exceptional and extremely unusual hardship if he were deported. This burden of proof, however, does not apply to legal questions. *See, e.g.*, *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring) (an "evidentiary standard of proof applies to questions of fact and not to questions of law"); *California ex rel. Cooper v. Mitchell Bros.' Santa Ana Theater*, 454 U.S. 90, 92-93 (1981) ("The purpose of a standard of proof is 'to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of *factual* conclusions for a particular type of adjudication.'") (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring) (emphasis added)).

In applying the modified categorical approach, a court "answers the purely 'legal question of what a conviction necessarily established.'" *Sauceda*, 819 F.3d at 534 (quoting *Mellouli*, 135 S. Ct. at 1987). That means that the burden of proof "does not come into play." *Id.* Judge Watford's concurring opinion in *Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir.

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[11] This is consistent with the common understanding that the "preponderance of the evidence" standard, referred to in 8 C.F.R. § 1240.8(d), applies to factual inquiries. *See generally* 2 McCormick on Evidence § 339 (7th ed. 2016).

2015) (en banc), adapted to the facts here, explains why:

> It's true, as the government notes, that uncertainty remains as to what [Mr. Lucio-Rayos] actually *did* to violate [the petty-theft ordinance]. He may have acted with the intent to permanently deprive the victim of [its property], or he may have intended only a temporary deprivation—we don't know. But uncertainty on that score doesn't matter. What matters here is whether [Mr. Lucio-Rayos's] conviction *necessarily* established that he acted with the intent to permanently deprive the owner of [its property], the fact required to render the offense a crime involving moral turpitude. That is a legal question with a yes or no answer, *see Mellouli*, 135 S. Ct. at 1986-87, and here the answer is no: [Mr. Lucio-Rayos's] conviction *necessarily* established only that he [committed the minimum conduct criminalized by the ordinance]. The record is not inconclusive in that regard, and because this issue involves a purely legal determination (rather than a factual determination, as *Young* wrongly held), its resolution is unaffected by which party bears the burden of proof. As a legal matter, [Mr. Lucio-Rayos's] conviction does not qualify as a conviction for a crime involving moral turpitude.

Id. at 489.

The effect of the Tenth Circuit's rule is to require that a conviction be assumed to rest on the *most* serious of the acts criminalized by a divisible statute, unless a noncitizen can affirmatively prove that his conviction was based on a prong of a divisible statute that would not correspond to a CIMT. *See* Pet. App. 17a-19a. That conclusion turns this Court's reasoning upside down and improperly reverses *Moncrieffe*'s legal presumption.

Moreover, under the Tenth Circuit's rule, an ambiguous conviction like Mr. Lucio-Rayos's *would not* count as a CIMT at the removal stage of proceedings, where the government bears the burden of proof, yet it *would* count as a CIMT at the relief stage, where the noncitizen bears the burden. That outcome is flatly inconsistent with *Moncrieffe*'s holding that the analysis of a prior conviction operates the "same in both [the removal and cancellation] contexts," 569 U.S. at 191 n.4. And there is no reason to think that Congress—which used the same term, "conviction," in the INA's removal and relief provisions—intended to create a sort of Schrödinger's-cat predicate offense.

B. The Tenth Circuit gave two reasons for distinguishing *Moncrieffe*. Neither withstands scrutiny.

First, the Tenth Circuit concluded that *Moncrieffe*'s least-acts-criminalized presumption applies only to determining removability, not eligibility for cancellation of removal. Pet. App. 20a-21a; *accord Gutierrez*, 887 F.3d at 776. But *Moncrieffe* addressed both removal and cancellation. Indeed, there was no dispute that Mr. Moncrieffe's drug conviction ren-

dered him removable as a controlled-substance offender, whether or not the conviction was also an aggravated felony. The question this Court resolved—whether a conviction like Mr. Moncrieffe's counted as an "aggravated felony"—mattered only because, if it did, he could not apply for discretionary relief from removal. *Moncrieffe*, 569 U.S. at 187, 204; *see also id.* at 211 (Alito, J., dissenting) (correctly recognizing that the Court's "holding" was that the noncitizen was "eligible for cancellation of removal"). That is why the Court held that a noncitizen, "having been found not to be an aggravated felon" for removal purposes, "may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the *other* eligibility criteria." *Id.* at 204 (majority op.) (emphasis added) (citing the criteria in 8 U.S.C. § 1229b(a)(1)-(2), but *not* the "not … convicted of any aggravated felony" criterion in § 1229b(a)(3)). Analyzing the conviction a second time for cancellation purposes would be redundant (and analyzing it differently would make no sense). *See also Johnson*, 605 F. App'x at 144 (explaining that the critical consequence in *Moncrieffe* was that "the government's failure to establish that a noncitizen was convicted of an aggravated felony meant … that the noncitizen was not barred from discretionary relief" on that ground).[12]

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[12] Moreover, this Court "granted certiorari [in *Moncrieffe*] to resolve a conflict" that had arisen in both the removal and relief from removal contexts. 569 U.S. at 189-90 & n.3 (citing *Garcia v. Holder*, 638 F.3d 511, 513 (6th Cir. 2011), and *Martinez*, 551 F.3d 113, which both concerned noncitizens seeking cancellation of removal). *Moncrieffe* resolved the relief cases as well as the removal cases. *See Garcia v. Holder*, 569 U.S. 956 (2013) (granting, vacating, and remanding in light of *Moncrieffe*).

Second, the Tenth Circuit distinguished *Moncrieffe* as applying only the categorical approach without reaching the modified categorical step. Pet. App. 21a-22a; *accord Gutierrez*, 887 F.3d at 776-77. As the First Circuit correctly observed, however, any argument "that *Moncrieffe* is inapplicable because it focused on the categorical approach, not the modified categorical approach," is "preclude[d]" by *Descamps*, which clarifies that "[t]he modified categorical approach is not a wholly distinct inquiry." *Sauceda*, 819 F.3d at 534 (citing *Descamps*, 570 U.S. at 263). Instead, it is merely "a tool" to "help[] implement the categorical approach." *Id.* (quoting *Descamps*, 570 U.S. at 263). The purpose is the same: to determine what a conviction under a given statute establishes "*as a legal matter*." *Mathis*, 136 S. Ct. at 2255 n.6.

Moncrieffe provides that the modified categorical approach may be used to rebut the least-acts-criminalized presumption. *Moncrieffe*, 569 U.S. at 191 (citing the approach as a "qualification" to the presumption). But, as *Moncrieffe* explained in discussing the modified categorical approach, the presumption is rebutted only if the "record of conviction of the predicate offense *necessarily* establishes" that the "particular offense the noncitizen was convicted of" was the more severe, disqualifying offense. *Id.* at 190-91, 197-98 (emphasis added); *see also Descamps*, 570 U.S. at 260-64. If the record of conviction is ambiguous, "the unrebutted *Moncrieffe* presumption applies, and, as a matter of law," the conviction is not disqualifying. *Sauceda*, 819 F.3d at 532.

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

Here, for example, Mr. Lucio-Rayos could not have "submitted testimony from his lawyer" or "the judge who accepted his plea to ascertain what offense was charged and pleaded to in the state court"—subsection (4), or a different subsection—assuming anyone could even remember the details of a years-old municipal petty-theft offense. *Sauceda*, 819 F.3d at 532. The categorical and modified categorical approaches prohibit such "minitrials," because after-the-fact testimony is not among the narrow range of official conviction records (the "*Shepard* documents") that courts may look to in determining the basis for a conviction. *Moncrieffe*, 569 U.S. at 191.

Congress did not intend to make applicants for relief from removal prove the unprovable by requiring them to establish the basis of their conviction using only *Shepard* documents that may no longer exist, and that, if they do exist, may not answer the ques-

tion. Instead, as always under the modified categorical approach, unless the conviction record conclusively establishes a disqualifying offense, the offense is presumptively *not* disqualifying.

CONCLUSION

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

Respectfully submitted,

James S. Lamb
CHAN LAW FIRM
1900 Grant Street,
Suite 750
Denver, CO 80203

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

E. Joshua Rosenkranz
Counsel of Record
Brian P. Goldman
Aaron W. Scherzer
Cynthia B. Stein
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

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