No. 18-64

IN THE

Supreme Court of the United States

JUAN ALBERTO LUCIO-RAYOS,

Petitioner,

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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
Cynthia B. Stein
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

Both parties agree that a noncitizen can obtain relief from removal only if he "has not been convicted" of a disqualifying offense, 8 U.S.C. § 1229b(b)(1)(C), and that he bears the burden of making that showing. But we disagree over what it means for a noncitizen to show he "has not been convicted" of a disqualifying offense: Is it enough to show that his record of conviction does not *necessarily* establish the elements of the disqualifying offense, because the categorical approach presumes convictions rest on the least of the acts criminalized? Or must he go one step further and affirmatively prove that he *was* convicted under a nondisqualifying prong of the statute of conviction?

The courts of appeals have resolved this dispute both ways. The First, Second, and Third Circuits take our approach: "Although an alien must show that he has not been convicted of [a disqualifying offense], he can do so merely by showing that … the minimum conduct for which he was convicted was not [the disqualifying offense]." *Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008). The question is not which prong of a divisible statute "in fact" gave rise to the conviction; "[r]ather, the question is whether, as a matter of law," the record of conviction "rebut[s] the presumption" that "the conviction rested upon nothing more than the least of the acts criminalized." *Sauceda v. Lynch*, 819 F.3d 526, 531-32 (1st Cir. 2016). The Fourth, Sixth, Ninth, and Tenth Circuits take the opposite approach.

Seven circuits have expressly noted this conflict. So has the government—repeatedly. Its newfound

view that these decisions can be reconciled does not withstand scrutiny. The noncitizens in the First, Second, and Third Circuit cases plainly would have lost under the government's and Tenth Circuit's understanding of the categorical approach, and Mr. Lucio-Rayos plainly would have prevailed had his case arisen in the Northeast.

Only this Court can resolve this entrenched circuit split, which has "broad-ranging implications for noncitizens across the country" seeking relief like asylum and cancellation of removal. Immigrant Defense Project (IDP) Br. 4. Besides arguing at length about the merits—which is no reason to let the split persist—the main reason the government offers to deny the petition is what it calls a threshold question of Colorado law that the Tenth Circuit correctly resolved *against* the government. But under this Court's practice, it would have no need or cause to revisit the regional circuit's interpretation of state law, which was clearly correct in any event.

The petition should be granted.

I. Seven Circuits, And The Government Itself, Have Acknowledged That Courts Are Divided On The Question Presented.

The decision below recognized that the "circuits are divided as to whether [the least-acts-criminalized presumption in] *Moncrieffe* [*v. Holder*, 569 U.S. 184 (2013),] applies to the circumstances at issue here." Pet. App. 19a. Even more recently, the Sixth Circuit acknowledged that "our sister circuits are divided" on the question "which side may claim the benefit of the

record's ambiguity." *Gutierrez v. Sessions*, 887 F.3d 770, 775 & n.5 (6th Cir. 2018), *petition for cert. filed*, No. 18-558 (U.S. Oct. 19, 2018).

Five other circuits have noted the division as well. *Francisco v. Att'y Gen.*, 884 F.3d 1120, 1134 n.37 (11th Cir. 2018); *Marinelarena v. Sessions*, 869 F.3d 780, 789-90 (9th Cir. 2017), *reh'g en banc granted*, 886 F.3d 737 (9th Cir. 2018); *Gomez-Perez v. Lynch*, 829 F.3d 323, 326 & n.1 (5th Cir. 2016); *Sauceda v. Lynch*, 819 F.3d 526, 532 n.10 (1st Cir. 2016); *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011).

So has the leading immigration-law treatise. Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 341-42 (16th ed. 2018).

Until its brief in opposition, the government also repeatedly acknowledged the existence of a split—including *in this case*, when it observed below, "[Mr. Lucio-Rayos] is correct that there is a conflict." Opp. to Pet. for Reh'g 13-15, *Lucio-Rayos v. Sessions*, No. 15-9584 (10th Cir. Feb. 23, 2018) ("Reh'g Opp."); *see also, e.g.*, Opp. to Mot. for Stay 5, *Gutierrez v. Sessions*, No. 17-3749 (6th Cir. May 29, 2018).

Now, however, the government insists that the Tenth Circuit's rule "does not conflict with" other circuits' after all. Opp. 9, 14. It argues that the First, Second, and Third Circuit cases either did not address the question presented or are distinguishable. Opp. 14-18. These arguments lack merit.

Start with the case the government addresses last: the First Circuit's decision in *Sauceda*, which the

Tenth Circuit identified as conflicting with its position, *see* Pet. App. 19a, and which the government previously recognized creates a conflict here, Reh'g Opp. 15. The government now argues that the case is distinguishable because "the court expressly conditioned its holding" on the fact that it "had before it all of the existing conviction records," which the government suggests might not be the case here. Opp. 17-18 (quoting *Sauceda*, 819 F.3d at 532).

The government is wrong on both counts. First, *Sauceda*'s holding does not turn on *why* the record was inconclusive—whether because potentially clarifying conviction records were never created, had since been destroyed, or were available but not obtained by the government in removal proceedings (as it generally does, *see* 8 U.S.C. § 1229a(c)(3)(A)-(B)) or by the noncitizen. *Contra* Opp. 17-18. Instead, the First Circuit squarely answers "no" to the question presented: An inconclusive record means the *Moncrieffe* presumption "cannot be rebutted," and thus the reason "Peralta Sauceda was not convicted of a 'crime of domestic violence'" was because "the unrebutted *Moncrieffe* presumption applies." *Sauceda*, 819 F.3d at 531-32.

Indeed, under the government's rule, Mr. Sauceda would have lost, regardless of why his record of conviction was inconclusive or whether other records existed. The government argued there (as here) that an inconclusive record of conviction *never* suffices to establish eligibility for relief and that Mr. Sauceda's petition for review should have been denied because "there is still uncertainty as to whether Per-

alta Sauceda, in fact, pleaded guilty to a [disqualifying offense]." *Id*. at 532. Had Mr. Sauceda been in the Tenth Circuit, his inconclusive record would mean that he, just like Mr. Lucio-Rayos, was barred from seeking relief. Pet. App. 21a-22a. In the government's view, that clarifying documents never existed or were now unavailable should still have meant Mr. Sauceda failed to meet his burden of proof, because whether the noncitizen is "to blame for the ambiguity" is immaterial. Pet. App. 18a; *see* Opp. 14. The First and Tenth Circuits' positions are simply irreconcilable, as both courts have acknowledged.

Second, contrary to the government's suggestion, the record in this case is no less "complete" than the record in *Sauceda*, which was also missing documents that might have been illuminating. Opp. 18. The *Sauceda* record contained only a "criminal complaint and the judgment reflecting [the petitioner's] guilty plea," but lacked a plea colloquy or a plea agreement that might have "clarif[ied] under which prong he was convicted." 819 F.3d at 530 nn.5-6, 531. So too here: The record of this municipal court petty-theft offense contains multiple charging and sentencing documents, but, like in *Sauceda*, there is no plea colloquy or plea agreement. Pet. App. 41a-43a. Even now, however, the government does not actually contend that those documents were available. Opp. 18. Under *Sauceda*, Mr. Lucio-Rayos would have prevailed.

He would have won in the Second and Third Circuits too. The government argues that *Martinez*, the lead Second Circuit case, did not decide the question presented. It maintains that *Martinez* addressed only whether the court could look "beyond the elements of

the state conviction," to the underlying facts of the case, to determine whether a noncitizen's conduct qualified as an aggravated felony. Opp. 16. The Second Circuit did decide that question but then, having determined that it could not look beyond the record of conviction, turned to the question presented here, which the government ignores: whether the inconclusive record of conviction sufficed to establish eligibility for relief. The court answered yes—a noncitizen meets his "burden of proving that he is eligible for cancellation relief … merely by showing that he has not been *convicted* of [a disqualifying] crime." 551 F.3d at 122; *cf.* Opp. 17. Like *Sauceda*, *Martinez* holds that showing that "the minimum conduct" supported by the record of conviction "was not [a disqualifying offense] suffices to do this," because of the operation of the categorical approach. 551 F.3d at 122.

The Second Circuit's decision in *Scarlett v. U.S. Department of Homeland Security*, 311 F. App'x 385 (2d Cir. 2009), confirms this. Applying the modified categorical approach, *Scarlett* held that where the record documents did not rule out the nondisqualifying version of a crime, the noncitizen "[can]not be found ineligible as a matter of law for cancellation of removal." *Id.* at 387-88. He need not go the extra step required by the other circuits of showing that he actually *was* convicted of some particular nondisqualifying version. The government's only mention of *Scarlett* (Opp. 16 n.4) is nonresponsive.

The government's argument that the Third Circuit's opinion in *Thomas* "cannot be read as deciding the question presented" fares no better. Opp. 15. As the government notes, *Thomas* first resolved a

threshold question whether police reports are conviction records. But then, having determined that the admissible conviction records were "silent" as to whether Mr. Thomas's convictions were for disqualifying offenses, the court reached the question presented here and held that the convictions did not bar him from seeking cancellation of removal. *Thomas v. Att'y Gen.*, 625 F.3d 134, 147-48 (3d Cir. 2010). *Thomas* did not reach that result "without analysis." Opp. 15. Rather, the court explained that "the absence of judicial records to establish" that the conviction would constitute a drug-trafficking aggravated felony meant the court had to "conclude that Thomas's misdemeanor convictions … were not drug trafficking" aggravated felonies, as a matter of law. *Thomas*, 625 F.3d at 148.

Johnson v. Attorney General, 605 F. App'x 138, 141-44 (3d Cir. 2015), confirms *Thomas*'s approach. The government asserts (at 15 n.3) that *Johnson* addressed removability, not eligibility for relief from removal, but that is just wrong. The only question resolved in *Johnson* was whether Mr. Johnson's "state drug conviction was an aggravated felony rendering him statutorily ineligible for asylum." 605 F. App'x at 139-40, 142. The Third Circuit held that Mr. Johnson was "in the position of the noncitizen contemplated in *Moncrieffe*": Because the court had to "assume Johnson's conduct was the bare minimum necessary to trigger the statute," his conviction did not *necessarily* meet the elements of an aggravated felony, and thus he was "*not* an aggravated felon barred from discretionary relief from removal." *Id.* at 142-45 (emphasis added).

II. The Government's Vehicle Objections Are Misplaced.

As we explained (Pet. 24-26), this is a clean and representative vehicle to resolve the conflict. The government does not dispute that the Immigration Judge, BIA, and Tenth Circuit all addressed the question presented, and it does not deny that the question was dispositive in the court of appeals. Nor does it contest that Mr. Lucio-Rayos meets the other eligibility criteria for cancellation and will likely succeed on that application if his municipal conviction is no bar, given the hardship to his disabled U.S.-citizen wife. *See* Pet. 25-26.

The government simply disagrees with the Tenth Circuit's determination of the elements of the Westminster offense, and thus that the ordinance is not a categorical CIMT. Opp. 19. But it has not cross-petitioned on that question, and it acknowledges that question is not certworthy. Opp. 20. There would be no need or reason for this Court to second-guess the Tenth Circuit's interpretation of Colorado law. This Court ordinarily defers to courts of appeals' determinations of state law and departs from their holdings only "where the lower court's construction was 'clearly wrong' or 'plain error.'" *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1149-50 (2017). And the Tenth Circuit's holding is plainly correct on this point. Subsections (1)-(3) of Westminster Municipal Code § 6-3-1(A) expressly require proof of a permanent deprivation, but subsection (4) does not, so the clear inference is that intent to permanently deprive is not an element of subsection (4). Pet. App. 60a. The same is true for the nearly identical Colorado statute.

Pet. App. 13a. The government has never cited any case holding that intent to permanently deprive is an element of the fourth subsection of either statute.[1] So this Court would have no cause to "question" the Tenth Circuit's interpretation of Colorado law. *Pembaur v. City of Cincinnati*, 475 U.S. 469, 484 & n.13 (1986).

Nor is any "realistic probability" inquiry necessary to determine whether the ordinance reaches conduct beyond generic theft, Opp. 19-20, because "the [ordinance] specifically says so." *United States v. O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017).

III. The Tenth Circuit's Decision Is Wrong.

The government spends much of its opposition (at 9-14) arguing why the Tenth Circuit correctly resolved the merits. That is no reason for this Court to leave in place an entrenched and acknowledged conflict. The government's arguments are mistaken in any event.

A. The government agrees with the basic premises of our argument: The categorical approach and its modified variant address a "legal question of what a conviction *necessarily* established," *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015), an analysis that requires a legal "presum[ption] that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized," Opp. 11-12; *see* Pet. 26-27. But instead of

[1] As the Tenth Circuit recognized (Pet. App. 13a-14a & n.10), *People v. Sharp*, 104 P.3d 252 (Colo. App. 2004), is inapposite because it did not address this subsection.

following this reasoning to its natural conclusion, the government argues that the modified categorical approach includes an initial step—using conviction documents to determine "what crime … a defendant was convicted of"—that is a *factual* question with no presumptive answer. Opp. 13.

This Court's cases say the opposite. *Johnson*—the very case whose least-acts-criminalized language *Moncrieffe* formalized as a presumption, 569 U.S. at 190-91—analyzed a divisible Florida battery statute with three alternative elements, the most minor of which was mere offensive touching. *Johnson v. United States*, 559 U.S. 133, 136-37 (2010). Because "nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the *least of these acts*"—the offensive-touching prong of the divisible statute—the Court had to address whether that particular offense counted as a "violent felony" under federal law. *Id.* at 137 (emphasis added). That is, the least-acts-criminalized presumption focuses the analysis on the least criminal prong of a divisible statute *precisely when* the "absence of records" renders the "application of the modified categorical approach" inconclusive. *Id.* at 145.

The modified categorical inquiry therefore does not start from a blank slate, such that the first step would be to identify the prong of the given divisible statute. Instead, as *Moncrieffe* says, it starts with the presumption that the conviction rests on the least of the acts criminalized, and then that presumption can be *rebutted* if the record of conviction reveals "which particular offense the noncitizen was convicted of."

See 569 U.S. at 190-91. But the presumption holds—and a noncitizen meets his burden—unless "the record of conviction of the predicate offense *necessarily* establishes" a disqualifying offense. *Id.* at 197-98 (emphasis added). In this way, the modified categorical approach operates within, not outside, the least-acts-criminalized presumption. *Contra* Opp. 12.

For the same reason, the government is also wrong that the modified categorical approach involves a separate factual question that the categorical approach does not. *Descamps v. United States* specifically *rejected* the argument that the modified categorical analysis differs in kind from the categorical approach, such that it could permit an "evidence-based" inquiry. 570 U.S. 254, 266-67 (2013). Whether a "conviction *necessarily* established" the elements of the disqualifying offense is "a legal question with a yes or no answer" because "the conviction is deemed to rest on only the least of the acts criminalized" absent a record of conviction showing otherwise. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 488-89 (9th Cir. 2015) (en banc) (Watford, J., concurring). That the inquiry "involves sifting through documents" in the conviction record does not transform it into a factual one, Opp. 13; the analysis involves no credibility judgments or reconciling conflicting evidence, but only assessing the *legal* meaning of an undisputed documentary record in light of the categorical approach's presumption.

B. The government hazards no real response to the impossible burden the Tenth Circuit's rule often places on noncitizens seeking humanitarian relief.

Pet. 33-34; IDP Br. 13-22. Instead, it embraces the unfairness of its rule, declaring that "assigning … consequences" is "what a burden of proof is designed to do." Opp. 14. Yet it cites *no* other context in which eligibility for important benefits may be shown using only a narrow range of documents that the applicant neither creates nor maintains and that "in many cases … will be incomplete" or impossible to obtain. *Johnson*, 559 U.S. at 145; *see* IDP Br. 13-22. Noncitizens may not rely on any other reliable evidence—not even their own testimony—to establish the basis for their conviction. *See Moncrieffe*, 569 U.S. at 200-01. That circumscribed approach makes sense if the analysis is a formalized, legal inquiry into what a conviction "necessarily" establishes, but not if it is a factual inquiry into the particular *way* a noncitizen violated a state statute years earlier.

The government says that Congress sought to "ensure[] that aliens do not benefit from withholding available evidence." Opp. 14. But there would be no benefit to obfuscating. Any whiff of "withholding available evidence" could be grounds to deny relief at the discretionary phase of relief proceedings, when an IJ decides if an eligible noncitizen *should* be granted relief. *See Moncrieffe*, 569 U.S. at 204. So this imaginary concern does not justify often requiring noncitizens to prove the unprovable.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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

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

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