No. 18-558

IN THE

Supreme Court of the United States

MIRIAM GUTIERREZ,

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 SIXTH CIRCUIT

REPLY BRIEF FOR PETITIONER

Alicia J. Triche
TRICHE IMMIGRATION APPEALS
119 South Main Street, Suite 500
Memphis, TN 38103

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 lawful permanent resident can obtain relief from removal only if she "has not been convicted of any aggravated felony," 8 U.S.C. § 1229b(a)(3), that she bears the burden of making that showing, and that the categorical approach governs whether a conviction is an aggravated felony. But we disagree over what it means for a noncitizen to show she "has not been convicted" of an aggravated felony: Is it enough to show that her record of conviction does not *necessarily* establish the elements of the aggravated felony, because the categorical approach starts from a legal presumption that convictions rest on the least of the acts criminalized? Or must she go one step further and prove that she *was* convicted under a nondisqualifying prong of the statute of conviction?

The courts of appeals have resolved this question both ways. The First, Second, and Third Circuits take our approach: "Although an alien must show that he has not been convicted of an aggravated felony, he can do so merely by showing that … the minimum conduct for which he was convicted was not an aggravated felony." *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) (internal punctuation omitted). 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 Sixth Circuit's understanding of the categorical approach, and Ms. Gutierrez plainly would have prevailed had her case arisen in the Northeast. Only this Court can resolve this entrenched split, which has "broad-ranging implications for noncitizens across the country" seeking relief like asylum and cancellation of removal. Br. of Amicus Curiae Immigrant Defense Project 4, *Lucio-Rayos v. Sessions*, No. 18-64.

Besides arguing at length about the merits—which is no reason to let the split persist—the only reason the government offers to deny the petition is that Ms. Gutierrez might ultimately be denied relief during further immigration proceedings. But the issues the government raises are downstream questions the agency would decide in the first instance on remand. Neither poses any threshold obstacle to this Court's review of the question presented, and Ms. Gutierrez is likely to ultimately prevail on them anyway.

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

The Sixth Circuit acknowledged that its "sister circuits are divided" on the question "which side may claim the benefit of the record's ambiguity." Pet. App.

9a & n.5 (internal punctuation omitted). Six other circuits have described this division as well. *Francisco v. Att'y Gen.*, 884 F.3d 1120, 1134 n.37 (11th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 573, 582 (10th Cir. 2017), *petition for cert. filed*, No. 18-64 (U.S. July 9, 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*, 819 F.3d at 532 n.10; *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011). *Accord* Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook* 341-42 (16th ed. 2018).

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

Now, however, the government insists that the Sixth Circuit's rule "does not conflict with" other circuits' after all. Opp. 10, 16. It argues that the First, Second, and Third Circuit cases either did not address the question presented or are distinguishable. Opp. 16-20. These arguments lack merit.

Start with the case the government addresses last: *Sauceda*, which the Sixth Circuit identified as contradictory, *see* Pet. App. 10a-13a, and which the government previously recognized creates a conflict here, Stay Opp. 5. 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. 19-20 (citing *Sauceda*, 819 F.3d at 531-32).

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 either by the government at the outset of proceedings (as it generally does, *see* 8 U.S.C. § 1229a(c)(3)), or by the noncitizen. *Contra* Opp. 19-20. 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 Mr. "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 failed to meet his burden, even though no other records of his conviction still existed. *See* Opp. 15-16. The government argued there (as here) that an inconclusive record *never* suffices to establish eligibility for relief—even if the ambiguity is beyond the noncitizen's control—and that Mr. Sauceda's petition for review should have been denied because "there is still uncertainty as to whether Peralta Sauceda, in fact, pleaded guilty to a [disqualifying offense]." *Sauceda*, 819 F.3d at 532. Had Mr. Sauceda been in the Sixth Circuit, his inconclusive record would mean that he, like Ms. Gutierrez, would

be barred from seeking relief. Pet. App. 19a. The First and Sixth Circuits' positions are simply irreconcilable.

Second, contrary to the government's suggestion, the record in this case is no less "complete" than the record in *Sauceda*. Opp. 9, 20; *see also* Pet. App. 13a. The *Sauceda* record contained only a "criminal complaint and the judgment reflecting [the petitioner's] guilty plea," but lacked plea documents that might have "clarif[ied] under which prong he was convicted." 819 F.3d at 530 n.5, 531. So too here: The record of conviction includes a sentencing order and a plea agreement, but, as in *Sauceda*, other documents are missing, including a charging document and plea colloquy. Pet. App. 14a.

The government simply speculates that such documents might have been available because Ms. Gutierrez's "plea agreement indicated she had read" the indictment. Opp. 9, 20 & n.9. Of course, some charging document *once* existed, but there is nothing "puzzling," Opp. 9, about a charging document going missing years later, even if the noncitizen once viewed it prior to incarceration. Pet. 23-24; *see Johnson v. United States*, 559 U.S. 133, 145 (2010). Nor did the IJ ever ask Ms. Gutierrez to "proffer[] [an] explanation for [this] gap." Opp. 20. Under *Sauceda*, she would have prevailed.

She would have won in the Second and Third Circuits too. The government argues that *Martinez* did not decide the question presented. But it points (Opp. 18) only to a preliminary holding that the Second Cir-

cuit addressed *before* turning to the question presented here: 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. 18-19. 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.

Scarlett v. U.S. Department of Homeland Security, 311 F. App'x 385 (2d Cir. 2009), then applied *Martinez* under the modified categorical approach. It 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. She need not prove she actually *was* convicted of the nondisqualifying version. The government's only mention of *Scarlett* (Opp. 18 n.8) is nonresponsive.

The government's characterization of the Third Circuit's opinion in *Thomas* (Opp. 16) is similarly mistaken. As the government notes, *Thomas* first resolved a threshold question whether police reports are conviction records. But then, having determined that the admissible records were "silent," the court reached the question presented here, holding that the convictions did not bar Thomas from seeking cancellation of removal. *Thomas v. Att'y Gen.*, 625 F.3d 134, 147-48 (3d Cir. 2010). *Thomas* did not reach that re-

sult "without analysis." Opp. 17. 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. 625 F.3d at 148.

Johnson v. Attorney General, 605 F. App'x 138, 141-44 (3d Cir. 2015), confirms this. Because the record of conviction was insufficient to "determine whether Johnson's criminal offense qualifies as an aggravated felony," the Third Circuit had to "assume Johnson's conduct was the bare minimum necessary to trigger the statute" and thus the conviction was not an aggravated felony that barred his asylum application. *Id.* at 142. The government's response (Opp. 17 n.7) points to a separate portion of *Johnson* (Part V, not Part III) dealing with an entirely different question about whether the noncitizen's conviction, "*even if not an aggravated felony*, could nonetheless be a particularly serious crime." *Id.* at 145 (emphasis added). That analysis is not governed by the categorical approach, *see Denis v. Att'y Gen.*, 633 F.3d 201, 214-15 (3d Cir. 2011), and thus was unrelated to *Johnson*'s resolution of the categorical-approach question presented here.

II. The Government's Vehicle Objections Are Misplaced.

A. The government does not dispute that the IJ, BIA, and Sixth Circuit all resolved the question presented, nor does it deny that the question was "the sole issue in dispute" below. Pet. App. 9a.

The government instead maintains that review is inappropriate because the agency might eventually deny Ms. Gutierrez relief based on some alternative ground that the BIA never reached. Opp. 21-22. But this Court regularly grants certiorari to resolve circuit conflicts regarding *eligibility* to apply for relief from removal, even though it is always possible that the noncitizen will ultimately be denied relief on remand. *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105 (2018) (cancellation); *Judulang v. Holder*, 565 U.S. 42 (2011) (relief under former INA § 212(c)); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (cancellation). Indeed, this Court granted certiorari in *Pereira* despite the government raising a virtually identical "vehicle" objection. Br. in Opp. 9, 19-20 (No. 17-459).

Meanwhile, in *Holder v. Martinez Gutierrez*, 566 U.S. 583 (2012), the *government* successfully sought certiorari on a question concerning eligibility for cancellation of removal. The respondents had argued that review was unwarranted because IJs can always deny relief at the discretionary stage of the inquiry. The government rightly countered that that downstream possibility does not negate the need for a uniform interpretation of a threshold eligibility requirement. Cert. Reply Br. 10-11 (Nos. 10-1542, 10-1543) (citing *Judulang* and *Carachuri-Rosendo* as examples).

B. In any event, the government's dire predictions about Ms. Gutierrez's cancellation application are misplaced.

First, the government notes that the IJ determined, in the alternative, that Ms. Gutierrez's separate conviction for credit-card forgery was

categorically a disqualifying aggravated-felony forgery offense. Opp. 21. But the BIA never reached that issue, *see* Pet. 25 n.11, so its order denying relief could not be affirmed on that alternative ground. *SEC v. Chenery Corp.*, 318 U.S. 80, 87-88 (1943). And on remand to the agency, Ms. Gutierrez would renew her argument (C.A.R. 21-27, 435-39) that the IJ was wrong: Va. Code Ann. § 18.2-193 is not categorically a forgery offense because subsections (1)(b) and (1)(c) do not involve making a false document, as generic forgery requires. *See, e.g.*, *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 874-77 (9th Cir. 2008); 3 Wayne R. LaFave, *Substantive Criminal Law* §19.7(j)(5) (2d ed. 2003).

Second, the government maintains that review would be inappropriate even if Ms. Gutierrez is found eligible for cancellation because she has "provide[d] no reason" she "would warrant discretionary relief from removal" in light of her criminal history. Opp. 21-22. But, as the government noted in *Martinez Gutierrez*, "[a]n immigration judge cannot … simply deny an application based on the nature of the alien's criminal conviction. Rather, the immigration judge must consider … 'all favorable and unfavorable factors bearing on a petitioner's application for [discretionary] relief.'" Cert. Reply Br. 10 (Nos. 10-1542, 10-1543); *see In re C-V-T-*, 22 I. & N. Dec. 7, 11-12 (B.I.A. 1998). Here, Ms. Gutierrez's 40 years of residence in this country, close ties to her U.S.-citizen daughters and grandchildren, and her medical challenges as she has grown older will weigh heavily in favor of relief when the agency considers this question in the first instance. *See* Pet. 1, 25-26.

In short, prevailing on the question presented would be outcome-determinative in this case: It would lead directly to vacatur of the BIA's final removal order and allow Ms. Gutierrez to continue pressing her case for relief before the agency. That is all the relief a court could *ever* provide on review of the BIA's denial of an application for cancellation of removal.

III. The Sixth Circuit's Decision Is Wrong.

The government argues at length (Opp. 11-16) that the Sixth Circuit correctly resolved the merits. That is no reason for this Court to leave in place an entrenched and acknowledged conflict. The government is 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. 13-14; *see* Pet. 26-27. But instead of 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. 15.

This Court's cases say the opposite. The modified categorical inquiry 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 v.*

Holder says, it starts with the presumption that the conviction rests on the least of the acts criminalized. 569 U.S. 184, 190-91 (2012). That presumption can then be *rebutted* if the record of conviction reveals "which particular offense the noncitizen was convicted of." *Id.* But the presumption holds—and a noncitizen meets her burden—unless "the record of conviction of the predicate offense *necessarily* establishes" a disqualifying offense. *Id.* at 197-98 (emphasis added).[1]

For the same reason, the government is also wrong that the modified categorical approach involves a distinct factual inquiry that the categorical approach does not. *Descamps* specifically *rejected* the argument that the modified categorical analysis uniquely allows for an "evidence-based" inquiry. 570 U.S. at 266-67. That the inquiry "involves examining documents" in the conviction record does not transform it into a factual one, Opp. 15; the analysis involves no credibility judgments or reconciling

[1] The government resists our explanation (Pet. 32-33) that *Johnson*, 559 U.S. at 145, establishes as much. It contends that the *Johnson* passage we cited reflects only "the district court's analysis, not this Court's." Opp. 14 n.6 (citing *Johnson*, 559 U.S. at 136-37). But *Moncrieffe* adopted precisely that passage. *See* 569 U.S. at 191. And this Court has expressly recognized that *Johnson* analyzed a divisible state statute under the modified categorical approach. *Descamps v. United States*, 570 U.S. 254, 263-64 & n.2 (2013). That "*Johnson* arose in the criminal sentencing context," Opp. 14 n.6, is immaterial because the categorical approach is identical in both contexts. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567-68 (2017).

evidence, but only assessing the *legal* meaning of an undisputed documentary record.

B. As for the impossible burden the Sixth Circuit's rule often places on noncitizens seeking humanitarian relief, Pet. 34-35, the government embraces the unfairness of its rule, declaring that "assigning … consequences" is "what a burden of proof is designed to do," Opp. 15. Yet it cites *no* other context in which establishing eligibility for important benefits requires proving a negative 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. Even a noncitizen's own testimony is off limits. 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. 16. But 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,

Alicia J. Triche
TRICHE IMMIGRATION APPEALS
119 South Main Street, Suite 500
Memphis, TN 38103

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

December 18, 2018