No. 19-438

In the Supreme Court of the United States

CLEMENTE AVELINO PEREIDA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, an alien who has been convicted of certain offenses, including a "crime involving moral turpitude," is statutorily ineligible for discretionary cancellation of removal. 8 U.S.C. 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i); see 8 U.S.C. 1229b(b)(1)(C). In determining an alien's eligibility for cancellation of removal or any other "relief or protection from removal," the alien bears the burden of proof to establish that he "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i). The question presented is:

Whether an alien satisfies his burden of proof where the record establishes that he has been convicted under a statute defining multiple crimes, at least some of which would constitute disqualifying offenses, but it is inconclusive as to which crime formed the basis of the alien's conviction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation: Page

Miscellaneous:

In the Supreme Court of the United States

No. 19-438

CLEMENTE AVELINO PEREIDA, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 916 F.3d 1128. The decisions of the Board of Immigration Appeals (Pet. App. 11a-19a) and the immigration judge (Pet. App. 20a-30a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 1, 2019. A petition for rehearing was denied on July 2, 2019 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on September 30, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General has the discretion to cancel the removal of an alien who is inadmissible or deportable, but meets certain statutory criteria

for such relief. 8 U.S.C. 1229b. To be statutorily eligible for cancellation of removal, an alien who is not a lawful permanent resident must: (1) have been "physically present in the United States for a continuous period" of at least ten years; (2) have been "a person of good moral character" during that period; (3) have "not been convicted" of any of the disqualifying offenses described in Sections 1182(a)(2), 1227(a)(2), or 1227(a)(3) of the INA; and (4) establish that removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(A)-(D). The disqualifying offenses for non-lawful permanent resident aliens include a "crime involving moral turpitude." 8 U.S.C. 1182(a)(2)(A)(i)(I), 1227(a)(2)(A)(i).

An alien seeking cancellation of removal, or any other form of relief from removal, "has the burden of proof to establish" that he "satisfies the[se] applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i); see 8 C.F.R. 1240.8(d). Accordingly, when the evidence indicates that the alien "may" have been convicted of a disqualifying offense, governing regulations provide that "the alien shall have the burden of proving by a preponderance of the evidence" that he has not been convicted of such a crime. 8 C.F.R. 1240.8(d).

2. a. According to the immigration judge (IJ), petitioner, a native and citizen of Mexico, unlawfully entered the United States on an unknown date. Pet. App. 21a.[1] In August 2009, the Department of Homeland Security served him with a Notice to Appear, charging him

---

[1] Petitioner's application for cancellation of removal states that he entered the United States in 1995. Administrative Record 125; see Pet. App. 3a.

with removability as an alien present in the United States without having been admitted or paroled. *Id.* at 3a; see Administrative Record (A.R.) 487-488. Petitioner conceded the charge of removability, but sought relief in the form of cancellation of removal. Pet. App. 3a; A.R. 104. At the same time, he also informed the IJ of a pending state criminal case against him that could potentially affect his eligibility for that relief. A.R. 104. In light of the pending case, the IJ continued petitioner's removal proceedings. A.R. 104-105.

On June 14, 2010, petitioner was convicted in the state proceedings of attempted criminal impersonation, in violation of Neb. Rev. Stat. §§ 28-201 and 28-608 (2008). Pet. App. 2a & n.1; A.R. 162-163 (journal entry and order); A.R. 165 (complaint). At the time, Section 28-608(1) provided that a "person commits the crime of criminal impersonation if he":

> (a) Assumes a false identity and does an act in his or her assumed character with intent to gain a pecuniary benefit for himself, herself, or another or to deceive or harm another;
>
> (b) Pretends to be a representative of some person or organization and does an act in his or her pretended capacity with the intent to gain a pecuniary benefit for himself, herself, or another and to deceive or harm another;
>
> (c) Carries on any profession, business, or any other occupation without a license, certificate, or other authorization required by law; or
>
> (d) Without the authorization or permission of another and with the intent to deceive or harm another:

> (i) Obtains or records personal identification documents or personal identifying information; and
>
> (ii) Accesses or attempts to access the financial resources of another through the use of a personal identification document or personal identifying information for the purpose of obtaining credit, money, goods, services, or any other thing of value.

Neb. Rev. Stat. § 28-608(1) (2008). Section 28-201 prohibited attempting such a crime. Neb. Rev. Stat. § 28-201 (2008). The complaint in petitioner's state criminal case alleged that he "use[d] a fraudulent Social Security card to obtain employment." A.R. 165; see Pet. App. 27a. Petitioner pleaded no contest to the charge. Pet. App. 2a, 24a; see A.R. 162-163.

b. Following the state conviction, the IJ pretermitted petitioner's application for cancellation of removal. Pet. App. 20a-30a.

Applying the categorical approach, see *Descamps* v. *United States*, 570 U.S. 254, 263-264 (2013), the IJ first determined that Section 28-608 did not categorically qualify as a crime involving moral turpitude. Pet. App. 23a, 25a-27a. The IJ reasoned that a conviction under subsection (a), (b), or (d) of the statute *would* qualify as a crime involving moral turpitude, because "each subsection contain[ed] as a necessary element the intent to defraud, deceive, or harm," and "reflect[ed] a sufficiently depraved state of mind to render a conviction * * * morally turpitudinous." *Id.* at 26a-27a. But the IJ concluded that a violation of subsection (c)—which applies to the carrying on of a profession, business, or other occupation without a license—would not so qual-

ify, because the subsection "contain[ed] no *mens rea* requirement" and did "not require a vicious motive or corrupt mind." *Id.* at 27a.

Proceeding to the modified categorical approach, the IJ observed that the state-law complaint charged petitioner with the "fraudulent [use of a] Social Security card to obtain employment." Pet. App. 27a. On that basis, the IJ concluded that petitioner was not convicted of an attempt to carry on a business without a license under subsection (c) of Section 28-608(1), and therefore was "necessarily convicted under subsection (a), (b), or (d), any of which involves moral turpitude." *Ibid.* The IJ thus found that petitioner had been convicted of a crime involving moral turpitude that rendered him statutorily ineligible for cancellation of removal. *Id.* at 28a-29a.

c. The Board of Immigration Appeals dismissed petitioner's administrative appeal. Pet. App. 11a-19a.

The Board agreed with the IJ that only subsections (a), (b), and (d) of Section 28-608(1) defined crimes involving moral turpitude, because only "th[o]se subsections contain as a necessary element the intent to defraud or deceive," and it thus agreed that the statute did not categorically qualify as a disqualifying offense. Pet. App. 14a-15a. The Board then proceeded to apply the modified categorical approach. Unlike the IJ, however, the Board concluded that the record of conviction was inconclusive as to the subsection of the statute that petitioner was convicted of violating. *Id.* at 17a. While the "complaint charge[d] [petitioner] of using a fraudulent social security card to obtain employment, which would seem to support a finding that the crime underlying [his] attempt offense involved fraud or deceit," the Board noted that the journal entry and order reflecting his conviction "does not specify the particular subsection of

the substantive statute [petitioner] was ultimately convicted of." *Ibid.*

The Board nevertheless agreed that petitioner was statutorily ineligible for cancellation of removal. "In the context of relief [from] removal," the Board explained, the alien "bears the burden of proving that his particular conviction does not bar relief." Pet. App. 17a. Because the record did not establish that petitioner was *not* convicted of a crime involving moral turpitude, the Board determined that petitioner had failed to meet his burden of proving his eligibility for cancellation of removal. *Ibid.*

3. The court of appeals denied a petition for review. Pet. App. 1a-10a.

Like the IJ and the Board, the court of appeals concluded that Section 28-608(1) was not categorically a crime involving moral turpitude because subsection (c) does not contain as a necessary element the intent to deceive. Pet. App. 7a. But the court determined that the statute was divisible. *Ibid.* Accordingly, applying the modified categorical approach, the court proceeded to consider under which subsection of the statute petitioner was convicted. *Id.* at 7a-8a (citing *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016)). Like the Board, the court determined that the record was inconclusive on that question. *Id.* at 8a.

The court of appeals then addressed the consequences of its determination that the record was inconclusive. The court explained that, "under the INA, the alien bears 'the burden of proof to establish that [he] satisfies the applicable eligibility requirements' for cancellation of removal, including that he was not 'convicted of an offense' that would disqualify him from cancella-

tion of removal.'" Pet. App. 8a (citations omitted; brackets in original). And the court reiterated that, "[o]n this record, without more, or without any indication that the record is complete, as is," the court was "unable to make the requisite determination" for petitioner to meet that burden. *Ibid.* Indeed, the court added, "[e]ven assuming a complete record [wa]s before [it], the fact that [petitioner] is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief." *Ibid.* Accordingly, the court found petitioner ineligible for cancellation of removal and denied the petition for review. *Id.* at 10a.

The court of appeals subsequently denied a petition for rehearing en banc, without noted dissent. Pet. App. 31a-32a.

DISCUSSION

The majority of the courts of appeals to have considered the question, including the court of appeals in this case, have correctly held that an alien has not carried his burden of proving his statutory eligibility for cancellation of removal when the record is inconclusive as to whether he has been convicted of a disqualifying offense. The en banc Ninth Circuit, however, has recently reached a contrary conclusion. *Marinelarena* v. *Barr*, 930 F.3d 1039, 1042, 1048 (2019). This Court's review is warranted to resolve the circuit conflict on an important legal question and to further the uniform administration of the federal immigration laws.

1. a. In determining whether a prior conviction constitutes an offense that would disqualify an alien from eligibility for cancellation of removal, the categorical approach generally applies. See *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986-1987 (2015). Under that approach,

the IJ "look[s] 'not to the facts of the particular prior case,'" but whether the "'crime of conviction' categorically fits within the 'generic' federal definition of a corresponding" offense. *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013) (citation omitted). A crime of conviction is a categorical match with the generic federal offense if "the elements of the crime of conviction sufficiently match the elements of [the] generic [offense], while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). In other words, the previous conviction, as a legal matter, must have "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Moncrieffe*, 569 U.S. at 190 (citation omitted; brackets in original).

When the statute defining the alien's previous crime of conviction "sets out a single (or 'indivisible') set of elements to define a single crime," application of the categorical approach requires only a comparison of that single crime's elements with the federal generic offense. *Mathis*, 136 S. Ct. at 2248. Where the statute defines "multiple crimes," however, the analysis is "more complicated." *Id.* at 2249. In those circumstances, the so-called "modified categorical approach" is applied. *Ibid.* That approach proceeds in two steps. As described in *Mathis*, the court in a criminal case first "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Ibid.*; see *Descamps* v. *United States*, 570 U.S. 254, 265 (2013) (explaining that the documents assist the court in "determin[ing] which of the statutory offenses * * * formed the basis of the defendant's conviction"). "The court can then compare that crime, as

the categorical approach commands, with the relevant generic offense." *Mathis*, 136 S. Ct. at 2249.

As noted, in immigration proceedings, the INA places on the alien "the burden of proof to establish" that he "satisfies the applicable eligibility requirements," 8 U.S.C. 1229a(c)(4)(A)(i), for cancellation of removal, including that he has not been convicted of a disqualifying crime, 8 U.S.C. 1229b(b)(1)(C); see 8 C.F.R. 1240.8(d) (establishing the burden of proof as "a preponderance of the evidence"). The application of that burden of proof to the modified categorical analysis in this case is straightforward. It is common ground here that the evidence establishes that petitioner was convicted of attempting one of the several offenses defined by Section 28-608. See Pet. 1. Petitioner does not dispute that a conviction for attempting several of the crimes defined by Section 28-608 would disqualify petitioner from receiving cancellation of removal. Cf. Pet. 8 n.2. The Board and court of appeals concluded, however, and petitioner agrees, that the conviction records submitted to the immigration court concerning petitioner's 2010 conviction are inconclusive as to whether his conviction was for attempting one of those disqualifying offenses. See Pet. 26. Petitioner has therefore failed to carry his burden of establishing that he was *not* convicted of a disqualifying offense, and thus the court of appeals correctly determined that he is statutorily ineligible for cancellation of removal.

b. Petitioner contends (Pet. 28-29) that the court of appeals' decision is contrary to the "least-acts-criminalized presumption" that he ascribes to this Court's analysis in *Moncrieffe* and *Mellouli*. In *Moncrieffe*, this Court explained that because, under the categorical ap-

proach, courts "examine what the state conviction necessarily involved, not the facts underlying the case, [they] must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." 569 U.S. at 190-191 (citation omitted; second and third sets of brackets in original); see *Mellouli*, 135 S. Ct. at 1986 (same); see also *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017) (same). Petitioner argues that the same presumption should apply here.

But *Moncrieffe*, *Mellouli*, and *Esquivel-Quintana* addressed a different stage of the categorical approach in different circumstances. In *Esquivel-Quintana* and *Mellouli*, the statute of conviction was indivisible (or at least no one argued to the contrary), and therefore defined only a single crime. See *Esquivel-Quintana*, 137 S. Ct. at 1568 n.1; *Mellouli*, 135 S. Ct. at 1986 n.4. In *Moncrieffe*, although the Georgia statute defined multiple offenses, the Court "kn[e]w from [the alien's] plea agreement" which of those offenses he was convicted of. 569 U.S. at 192. There was no serious question in any of those cases as to "the actual crime of which the alien was convicted." *Esquivel-Quintana*, 137 S. Ct. at 1568 n.1. The question the Court addressed in those cases was whether that crime categorically matched the generic federal offense. The Court applied the least-acts presumption to answer "the legal question," *Mellouli*, 135 S. Ct. at 1987, of what criminal conduct (or acts) the conviction "necessarily involved," before asking "whether even those acts are encompassed by the generic federal offense," *Moncrieffe*, 569 U.S. at 190-191.

This case is different. Here, there is no dispute that the Nebraska statute under which petitioner was convicted is divisible, and therefore defines multiple crimes. Cf. Pet. 27. There also is no dispute in this Court that at least some of those crimes categorically match the generic federal offense (a "crime involving moral turpitude")—*i.e.*, a conviction for one of these crimes "necessarily involve[s]," *Moncrieffe*, 569 U.S. at 190, acts that are encompassed by that generic offense. Cf. Pet. 29. The only question under the modified categorical approach here is the factual one of whether "the actual crime of which the alien was convicted" was one of those crimes. *Esquivel-Quintana*, 137 S. Ct. at 1568 n.1. Neither *Esquivel-Quintana*, *Moncrieffe*, nor *Mellouli* speaks to that question. But the INA's burden-of-proof provision does, and the failure of the record to establish that the offense petitioner was convicted of did not fall under one of those subsections of Section 28-608 that constitutes a crime of moral turpitude requires the conclusion that petitioner did not carry his burden of proving that he was eligible for cancellation of removal.[2]

Petitioner argues that the burden of proof imposed by the statute applies only to "*factual* questions of eligibility," not to the "purely 'legal question of what a conviction necessarily established.'" Pet. 29-30 (citations

---

[2] *Johnson* v. *United States*, 559 U.S. 133 (2010), is not to the contrary. Although petitioner suggests (Pet. 32) that *Johnson* applied the least-acts presumption to a conviction under a divisible statute, the portion of the opinion petitioner cites is a description of the district court's analysis, not this Court's. See 559 U.S. at 136-137. In any event, because *Johnson* arose in the criminal sentencing context, not an application for cancellation of removal under the INA, the Court had no occasion to consider the effect of the INA's burden-of-proof provision on the categorical or modified categorical approach.

omitted). But, again, that "purely legal question" is not at issue here. Whether a conviction "necessarily established" conduct that is encompassed by the federal generic offense is just another way of asking whether the elements of the crime of conviction sufficiently match the elements of the generic offense. That is the question answered at the *second* step of the modified categorical approach. This case turns on the *first* step, which asks "what crime * * * a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. And *that* question, which involves examining documents in the evidentiary record, is a factual one to which the INA's allocation of the burden of proof applies. See Pet. App. 8a-9a; see also *Le* v. *Lynch*, 819 F.3d 98, 105 (5th Cir. 2016) ("When an alien's prior conviction is at issue, the offense of conviction itself is a factual determination, not a legal one.") (citation and internal quotation marks omitted).

Finally, petitioner contends (Pet. 33-34) that the court of appeals' decision creates an unwarranted risk that the alien will bear the adverse consequences when conviction records are missing or are inconclusive. But assigning the consequences of an insufficient evidentiary record is precisely what a burden of proof is designed to do. See *Black's Law Dictionary* 236 (10th ed. 2014) (defining "burden of proof" as "a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find"). By assigning the burden to the alien, Congress ensured that aliens do not benefit from withholding available evidence that would shed light on which offense an alien was previously convicted of.

2. The question presented implicates a circuit conflict. The majority of the courts of appeals to have consid-

ered the question have held that, when the record of conviction is inconclusive, an alien has not carried his burden of showing he has not been convicted of a disqualifying offense for purposes of cancellation of removal or other relief from removal. See Pet. App. 8a-9a; see also *Gutierrez* v. *Sessions*, 887 F.3d 770, 779 (6th Cir. 2018) ("We therefore hold 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."), cert. denied, 139 S. Ct. 863 (2019); *Lucio-Rayos* v. *Sessions*, 875 F.3d 573, 584 (10th Cir. 2017) ("[B]ecause it is unclear from [the alien's] record of conviction whether he committed a [crime involving moral turpitude], we conclude he has not proven eligibility for cancellation of removal.") (citation omitted), cert. denied, 139 S. Ct. 865 (2019); *Salem* v. *Holder*, 647 F.3d 111, 116 (4th Cir. 2011) ("Presentation of an inconclusive record of conviction is insufficient to meet a noncitizen's burden of demonstrating eligibility, because it fails to establish that it is more likely than not that he was not convicted of an aggravated felony."), cert. denied, 565 U.S. 1110 (2012).[3]

---

[3] In *Thomas* v. *Attorney General of the United States*, 625 F.3d 134 (3d Cir. 2010), the Board found that the record affirmatively established that the alien had been convicted of aggravated felonies, not that it was inconclusive. *Id.* at 144. The Third Circuit's analysis focused on whether the Board's evaluation of the relevant documents was correct. See *id.* at 141-148. And in *Martinez* v. *Mukasey*, 551 F.3d 113 (2008), the Second Circuit explained that the INA did not "require[] any alien seeking cancellation of removal to prove the facts of his crime to the [Board]," only "that he has not been *convicted* of [a disqualifying] crime." *Id.* at 122. The court did not address whether an alien has carried that burden when the record

The en banc Ninth Circuit, however, recently reached a contrary conclusion. See *Marinelarena*, 930 F.3d at 1048 ("If the record does *not* conclusively establish that the noncitizen was convicted of the elements of the generic offense, then she was *not* convicted of the offense for purposes of the immigration statutes."). In addition, the First Circuit has held that where all existing conviction documents have been proffered, any remaining ambiguity regarding the offense of conviction should be resolved in favor of eligibility for relief. *Sauceda* v. *Lynch*, 819 F.3d 526, 531-532 (2016); contra Pet. App. 8a ("Even assuming a complete record is before us, the fact that [petitioner] is not to blame for the ambiguity surrounding his criminal conviction does not relieve him of his obligation to prove eligibility for discretionary relief.").

The question presented is important to the uniform administration of the INA and warrants this Court's resolution. The circuit conflict is entrenched. The Ninth Circuit's recent decision was issued by an en banc panel of that court. See *Marinelarena*, 930 F.3d at 1039. Meanwhile, three other circuits have recently declined to revisit their decisions en banc. See 6/4/19 Order at 1, *Romero* v. *Barr*, 755 Fed. Appx. 327 (4th Cir. 2019), petition for cert. pending, No. 19-434 (filed Sept. 30, 2019) (No. 18-1551); 8/20/18 Order at 1, *Gutierrez*, *supra* (No. 17-3749); 3/9/18 Order at 1, *Lucio-Rayos*, *supra* (No. 15-9584). And this case is a suitable vehicle for the Court to resolve the question presented. The question was necessary to the court of appeals' determination that petitioner is ineligible for cancellation of removal, and it is the only question presented in the petition for a writ of certiorari. See Pet. App. 8a-9a. Because this

---

does not establish the subdivision of a divisible statute under which he was convicted.

case presents a significant legal question on which the courts of appeals are divided, and provides a suitable vehicle for resolving that disagreement, this Court's review is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOSEPH H. HUNT
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
PATRICK J. GLEN
Attorneys

NOVEMBER 2019