No. 18-____

IN THE

Supreme Court of the United States

MIRIAM GUTIERREZ,

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 SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

A noncitizen may not apply for relief from deportation, like asylum and cancellation of removal, if she 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 therefore hold that a state conviction 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 Sixth 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, which is also presented in *Lucio-Rayos v. Sessions*, No. 18-64, 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 Miriam Gutierrez is a 60-year-old native and citizen of Bolivia who has been a lawful permanent resident of the United States for nearly 40 years. She conceded that she is removable because she has twice been convicted of "crimes involving moral turpitude." But she applied for cancellation of removal—discretionary relief that the government may grant as a form of mercy—so that she could stay in the United States with her U.S.-citizen daughters and grandchildren. Because Ms. Gutierrez is a permanent resident, her eligibility for cancellation of removal turns on whether she has been convicted of any "aggravated felony," 8 U.S.C. § 1229b(a)(3)—a narrower category of crimes that not only renders noncitizens deportable but also subjects them to *mandatory* deportation, with no opportunity to even request discretionary relief from removal like asylum or cancellation of removal.

The Sixth Circuit held that Ms. Gutierrez was ineligible for cancellation of removal. It reasoned that she had not negated the possibility that her conviction of two counts of Virginia credit-card theft could qualify as aggravated-felony "theft" offenses. 8 U.S.C. § 1101(a)(43)(G). The Sixth Circuit agreed with Ms. Gutierrez that not all convictions under the Virginia statute are categorically aggravated-felony theft convictions, because at least one prong of the statute does not require proof of an essential element of generic theft: intent to deprive the rightful owner of property. And the record of Ms. Gutierrez's conviction did not show that her conviction *did* arise under one of the other, disqualifying prongs of the statute; it was

simply inconclusive in that regard. The court nevertheless held that Ms. Gutierrez was barred from seeking cancellation of removal because she had not affirmatively proven that she was *not* convicted under a disqualifying prong. The court cited provisions of the Immigration and Nationality Act (INA) and immigration regulations that 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). It believed that this *evidentiary* burden was relevant to—and dispositive of—the application of the modified categorical approach's *legal* analysis of an ambiguous record of conviction.

The Sixth Circuit acknowledged that "our sister circuits are divided" on this question. Pet. App. 9a. Its conclusion conflicts with recent decisions of the First, Second, and Third Circuits, which hold that a conviction does not automatically bar relief from removal when the modified categorical approach is inconclusive. In those courts' view, a merely ambiguous record cannot overcome the legal presumption that a "conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (brackets omitted). But the Fourth, Ninth, and Tenth Circuits agree with the Sixth 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 she 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 examine state court records, but such records often do not indicate which portion of a divisible statute gave rise to a conviction. So the Sixth Circuit's rule will often require noncitizens to prove the unprovable, pinning their fate on the fortuity of state recordkeeping practices.

This case also presents an ideal vehicle to resolve the conflict. The question presented was squarely addressed below, and the Sixth Circuit noted that it was the "sole issue in dispute." Pet. App. 9a.

Moreover, the Sixth 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*. Under *Moncrieffe*, courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." 569 U.S. at 190-91 (brackets omitted). That presumption is rebutted only if the "record of conviction of the predicate offense *necessarily* establishes" the elements of the narrower disqualifying offense defined by federal law. *Id.* at 197-98 (emphasis added). 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 Sixth Circuit's approach flips the categorical approach on its head. Rather than presuming a conviction rests on the *least* of the acts criminalized, the Sixth 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 may no longer exist and may never have clarified the basis for the conviction in the first place. 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 Sixth Circuit is reported at 887 F.3d 770 and reproduced at Pet. App. 1a-19a. The order denying rehearing en banc is reproduced at Pet. App. 65a-66a. The decisions of the Board of Immigration Appeals and Immigration Judge are unreported and reproduced at Pet. App. 20a-27a and 28a-64a, respectively.

JURISDICTION

The Sixth Circuit entered judgment on April 16, 2018, Pet. App. 1a, and denied a timely petition for rehearing en banc on August 20, 2018, Pet. App. 65a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provisions of the Immigration and Nationality Act defining the relevant aggravated felony, "theft

offense," 8 U.S.C. § 1101(a)(43)(G); establishing burdens of proof in removal proceedings, 8 U.S.C. § 1229a(c)(2)-(4); and governing cancellation of removal for certain permanent and nonpermanent residents, 8 U.S.C. § 1229b(a), (b)(1), are reproduced at Pet. App. 67a, 68a-72a, 73a, and 73a-74a, respectively. The regulation relating to burdens of proof in relief from removal proceedings, 8 C.F.R. § 1240.8(d), is reproduced at Pet. App. 75a-76a. The Virginia theft statute, Va. Code § 18.2-192, is reproduced at Pet. App. 77a-78a.

STATEMENT OF THE CASE

1. Noncitizens previously admitted to the United States, including lawful permanent residents, may be ordered removed if they have been convicted of certain crimes. 8 U.S.C. § 1227(a)(2). "Ordinarily, when a noncitizen is found to be deportable on one of these grounds, he may ask the Attorney General for certain forms of discretionary relief from removal, like asylum (if he has a well-founded fear of persecution in his home country) and cancellation of removal (if, among other things, he has been lawfully present in the United States for a number of years). §§ 1158, 1229b. But if a noncitizen has been convicted of one of a narrower set of crimes classified as 'aggravated felonies,' then he is not only deportable, § 1227(a)(2)(A)(iii), but also ineligible for these discretionary forms of relief. *See* §§ 1158(b)(2)(A)(ii), (B)(i); §§ 1229b(a)(3), (b)(1)(C)." *Moncrieffe v. Holder*, 569 U.S. 184, 187 (2013).

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). This 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.* "This categorical approach has a long pedigree in our Nation's immigration law." *Moncrieffe*, 569 U.S. at 191 (noting it has applied since 1913).

A state offense is a "categorical" match only if it includes all the elements of the federally defined disqualifying offense. *Descamps v. United States*, 570 U.S. 254, 261 (2013). If the state statute also criminalizes conduct that falls outside the federal definition, then the statute is "overbroad" and not a categorical match. But a conviction under the statute can still yield immigration consequences if the state statute is "divisible," meaning that it "list[s] elements in the alternative, and thereby define[s] multiple crimes," at least one of which falls 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 necessarily 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 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.[1]

A separate section of the INA, which does not specifically 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).

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

2. Petitioner Miriam Gutierrez is a native and citizen of Bolivia. Pet. App. 2a. She has lived in the United States as a legal permanent resident for 38 years. *Id.* She is the mother of four U.S.-citizen children and eight U.S.-citizen grandchildren, all of whom reside in the United States. Certified Administrative Record (C.A.R.) 98, 147, 152. She has not traveled to Bolivia in over 20 years. C.A.R. 151. Ms. Gutierrez suffers from several serious medical conditions that require ongoing medical care. C.A.R. 253-397.

3. In 2012, the government charged Ms. Gutierrez as removable for having been convicted of two "crimes involving moral turpitude." Pet. App. 3a. Ms. Gutierrez conceded she was removable but applied for cancellation of removal. *Id.* As a lawful permanent resident, her eligibility to request cancellation turned on whether she had been "convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3). As relevant here, the Immigration and Nationality Act (INA) defines an aggravated felony to include a "theft offense … for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G).

The immigration judge (IJ) concluded that Ms. Gutierrez's prior conviction for two counts of credit-card theft under Virginia Code § 18.2-192 counted as an aggravated felony, and that the IJ therefore could not even consider Ms. Gutierrez's application for discretionary relief. Pet. App. 30a-31a, 56a-58a. Ms. Gutierrez had pleaded guilty to these two counts in 2012 and was sentenced to three years of imprisonment, with two years suspended. Pet. App. 21a, 48a.

The IJ agreed with Ms. Gutierrez that a conviction under § 18.2-192 does not fall categorically within the definition of a generic theft offense. Whereas generic theft requires showing an intent to deprive the property's owner of the rights and benefits of ownership, at least one subsection of the Virginia provision—subsection (1)(c)—does not require any such intent.[2] Pet. App. 39a-41a, 56a-58a. It merely criminalizes buying a credit-card or credit-card number from a person other than the issuer.

The IJ concluded that the statute is divisible, however, because each subsection represents a different offense. So the IJ proceeded to examine the conviction under the modified categorical approach. Pet. App. 38a-40a, 51a-56a. But the record of conviction did not specify that the conviction arose under any particular subsection. Pet. App. 54a-55a. Because the conviction documents did not definitively demonstrate that Ms. Gutierrez was convicted under § 18.2-192(1)(c), the IJ held that Ms. Gutierrez had failed to prove that she was *not* convicted of an aggravated felony. Pet. App. 40a-41a.

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[2] Ms. Gutierrez argued below that subsection (1)(a) is also overbroad because it similarly does not require an intent to deprive. Pet'r Op. Br. 17-18, C.A. Dkt. 12; C.A.R. 21, 434; *see Scott v. Commonwealth*, 789 S.E.2d 608, 610 (Va. 2016). The government conceded before the court of appeals that, in light of *Scott*, subsection (1)(a) "may not be [categorically] an aggravated felony theft offense." Gov't Br. 26 n.7, C.A. Dkt. 17. The Sixth Circuit held simply that "the overbreadth of Virginia Code § 18.2-192 vis-à-vis generic theft aggravated felony" was "undisputed," without specifying whether it was relying on subsection (1)(a), subsection (1)(c), or both. Pet. App. 9a.

4. The Board of Immigration Appeals (BIA) agreed. Pet. App. 27a. Like the IJ, it determined that Ms. Gutierrez was required to "prove by a preponderance of the evidence that the [aggravated felony] bar is inapplicable … by producing conviction records indicating that she was charged and pled guilty under section 18.2-192(1)(c) (rather than under subdivisions (1)(a) or (1)(b))." Pet. App. 25a; *see also* Pet. App. 5a-6a. Because the "official conviction documents" in the record "are silent as to the subdivision under which she was convicted," the BIA agreed with the IJ that Ms. Gutierrez was ineligible for cancellation of removal. Pet. App. 25a-27a.

5. The Sixth Circuit denied Ms. Gutierrez's petition for review. Pet. App. 19a. As the court framed the question, "the sole issue in dispute [is] which side may claim the benefit of the record's ambiguity"; there "is no dispute that Gutierrez satisfies the other requirements for relief." Pet. App. 7a n.4, 9a (internal punctuation omitted). The court observed that the question presented is one "of first impression" on which "our sister circuits are divided." Pet. App. 9a. It acknowledged *Moncrieffe*'s holding that a court examining the effect of a state conviction "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized." Pet. App. 10a-11a (quoting 569 U.S. at 190-91). It concluded, however, that *Moncrieffe*'s presumption applies only to determinations of removability, not relief from removal, and only when applying the categorical approach, not the modified categorical approach. Pet. App. 11a-12a, 15a.

6. After the Sixth Circuit issued its opinion, Immigration and Customs Enforcement (ICE) took Ms. Gutierrez into custody and began the process of executing her order of removal. The Sixth Circuit denied Ms. Gutierrez's emergency motion for stay of removal on June 8, 2018. C.A. Dkt. 36. That same day, Ms. Gutierrez filed an emergency application for stay of removal with Justice Kagan, and Justice Kagan ordered a response. *See* No. 17A1361. Rather than respond on the merits, the government offered an assurance to this Court and to Ms. Gutierrez that it "will not take action to remove applicant before the Sixth Circuit resolves the [then-]pending petition for rehearing en banc and this Court resolves any petition for a writ of certiorari and any further proceedings in this case, on the condition that any such petition is filed within 60 days of the court of appeals' disposition of the petition for rehearing en banc." Ltr. from the Solicitor General to the Clerk, No. 17A1361 (July 3, 2018). Ms. Gutierrez therefore withdrew her stay application on July 9, 2018.

7. On August 20, 2018, the Sixth Circuit denied the petition for rehearing en banc. Pet. App. 65a-66a. Ms. Gutierrez files this petition on October 19, 2018—60 days from the court of appeals' order denying rehearing en banc. Ms. Gutierrez is currently at liberty in the United States.

REASONS FOR GRANTING THE WRIT

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

As the decision below acknowledges, the "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. 9a. 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 her 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 bar 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 of the statute 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.* (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.* (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. *Id.*

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 noncitizen'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. (In contrast, the burden of proof *does* bear on the factual questions gov-

erning eligibility, like whether a noncitizen has continuously resided in the U.S. for the requisite period of time. *Id.* at 534; *see* 8 U.S.C. § 1229b(a)(1), (b)(1)(A).) Because the noncitizen's burden does not affect the legal analysis of what a past conviction "necessarily" establishes, the court reasoned, *Moncrieffe*'s presumption applies with equal force in the cancellation context. *Sauceda*, 819 F.3d 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 traditional categorical 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.* And a noncitizen's statutory "burden of proving that he is eligible for cancellation relief" is satisfied by "showing that the minimum conduct for which he was convicted was not an aggravated felony." *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. Attorney General*, 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.[3]

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.

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[3] The decision below suggested the Third Circuit took the opposite position in *Syblis v. Attorney General*, 763 F.3d 348 (3d Cir. 2014). *See* Pet. App. 9a n.5, 16a. 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* 16 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.

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 Sixth Circuit determined 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." Pet. App. 19a. Acknowledging that "our sister circuits are divided" on the question, Pet. App. 9a-10a n.5, the court rejected the First Circuit's holding in *Sauceda* because, in its view, *Moncrieffe*'s least-acts-criminalized presumption is applicable only to questions of removability—where the government bears the burden of proof—not eligibility for relief, and applies only in cases involving the categorical approach rather than its modified counterpart. Pet. App. 10a-16a.[4]

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[4] The court also observed that in *Sauceda*, the record of conviction was "complete" and yet still inconclusive. Pet. App. 13a-14a. And the court suggested that the record here might not be "complete" because some *Shepard* documents were missing. Pet. App. 14a. But the record in *Sauceda* was missing *Shepard* documents as well; the First Circuit emphasized that the record contained only a "criminal complaint and the judgment reflecting [the petitioner's] guilty plea," because those were "the only *Shepard* documents that the State of Maine maintained," but missing in the immigration court were both a plea colloquy and a plea agreement that might have "clarif[ied] under which prong he was convicted." 819 F.3d at 530 nn.5-6, 531. Similarly here, the record of conviction contained a "plea agreement and sentencing order," but no charging document. Pet. App. 14a. In both cases,

The Tenth Circuit has also recently held that *Moncrieffe*'s least-acts-criminalized presumption does not govern the question whether an ambiguous record of conviction disqualifies a noncitizen from seeking relief from removal. In *Lucio-Rayos v. Sessions*, 875 F.3d 573 (10th Cir. 2017), *petition for cert. filed*, No. 18-64 (U.S. July 9, 2018), that court relied on its pre-*Moncrieffe* decision in *Garcia v. Holder*, which held that where "it is unclear from [a noncitizen's] record of conviction whether he committed a [disqualifying crime], … 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," 584 F.3d 1288, 1289-90 (10th Cir. 2009). *See Lucio-Rayos*, 875 F.3d at 581-82. Disagreeing with the First Circuit, the Tenth Circuit reasoned that *Moncrieffe* did not "indisputeabl[y]" overrule that circuit precedent because *Moncrieffe*, in its view, is inapplicable to both eligibility for cancellation of removal and to divisible statutes analyzed under the modified categorical approach. *Id.* at 582-84.

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) (No. 11-206), 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

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the question is the same: whether a conviction is disqualifying when the record of conviction—such as it exists before the immigration court—does not specify which prong of a divisible statute gave rise to the conviction.

inures to the detriment" of the noncitizen seeking cancellation 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.[5]

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

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[5] 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 the First Circuit's position in *Sauceda*. *See Marinelarena v. Sessions*, 869 F.3d 780, 788-90 (9th Cir. 2017). But the Ninth Circuit has now ordered *that* case reheard en banc. *Marinelarena v. Sessions*, 886 F.3d 737 (9th Cir. 2018) (argued and submitted en banc Sept. 27, 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*.

well). The Fifth Circuit has stated that "*Moncrieffe* … does not control" in cases 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).[6]

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 considering and rejecting each other's

[6] The decision below suggests that the Eleventh Circuit is on this side of the split as well. Pet. App. 9a n.5, 18a (citing *Omoregbee v. Att'y Gen.*, 323 F. App'x 820, 826 (11th Cir. 2009)). But, like the Third Circuit's *Syblis* decision, *Omoregbee* involved a provision of the INA that calls for a circumstance-specific approach, not the categorical approach. *See supra* 16 n.1. The Eleventh Circuit has made clear that the question presented here is one that that Circuit has "acknowledged but not yet decided." *Cintron v. Att'y Gen.*, 882 F.3d 1380, 1385 n.6 (11th Cir. 2018).

views. The government has acknowledged the split as well. *See* Opp. to Mot. for Stay of Removal 5, Dkt. 33, *Gutierrez v. Sessions*, No. 17-3749 (6th Cir. May 29, 2018).

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 Sixth Circuit denied a petition for rehearing en banc here that directly asked the court to revisit its position. Pet. App. 65a. And the First Circuit reached its conflicting view when three of that court's six active judges granted panel rehearing to *reject* the 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 Virginia's credit-card theft statute prevented Ms. Gutierrez from even being heard on her claim for cancellation of removal in immigration court in Tennessee, a noncitizen with a conviction under the very same statute would be eligible to 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 Pennsylvania, where an ambiguous conviction would not be disqualifying, could well be transferred to a facility and placed into removal proceedings in Ohio, 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, including asylum, cancellation of removal, and relief for battered spouses under the Violence Against Women Act. *See* 8 U.S.C. §§ 1158(b)(2)(B)(i), 1229b(a)(3), 1229b(b)(1)(C), 1229b(b)(2)(A)(iv); *see also* 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.

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[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.

§§ 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); *see Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010) ("conviction" is the "relevant statutory hook"). 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 uncertain record of conviction will often be an enormously consequential question.

And it is not uncommon that records of conviction will be missing or inconclusive. This Court has long understood that "in many cases state and local records … will be incomplete," and that this "common-enough" occurrence "will often frustrate application of the modified categorical approach." *Johnson*, 559 U.S. at 145. 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. Kentucky and Ohio, for example, permit destruction of certain misdemeanor case files after five

years.[8] Tennessee authorizes disposal of certain records, including recordings of plea colloquies, after ten years.[9] The problem is not limited to the Sixth Circuit: California courts, for example, retain records for misdemeanor convictions for five years, and only two years for certain marijuana offenses. Cal. Gov't Code § 68152(c)(7)-(8). North Carolina courts do not even create a transcript or a recording of most misdemeanor proceedings.[10]

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 Third Circuit's leading case on this question, for example, were 12 and 13 years old—"dated, to say the least." *Thomas*, 625 F.3d at 144; *see also, e.g.*, *Kuhali v. Reno*, 266 F.3d 93, 98 (2d Cir. 2001) (government 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 could entirely bar noncitizens from seeking relief from removal.

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[8] Kentucky Court of Justice, *Records Retention Schedule* 14 (July 12, 2010), https://tinyurl.com/y95cd6br; Ohio Rev. Code §§ 2301.141, 1901.41(A), (B).

[9] Tenn. Code § 18-1-202(a).

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

III. This Case Is An Ideal Vehicle To Resolve The Conflict.

This case presents an ideal vehicle to resolve this conflict. The question is squarely presented: The IJ, BIA, and Sixth Circuit each held that Ms. Gutierrez's ambiguous conviction was disqualifying. Each reasoned that the INA's burden-of-proof provision required her to negate the possibility that her conviction arose under the disqualifying prongs of the Virginia credit-card theft statute, rather than simply demonstrate that her conviction did not "necessarily" establish the elements of the federal aggravated felony. Pet. App. 9a-19a, 25a-27a, 57a-58a. The Sixth Circuit reached that conclusion after grappling directly with other circuits' views.

The question presented was also "the sole issue in dispute" below. Pet. App. 9a. "[T]he overbreadth of Virginia Code § 18.2-192 vis-à-vis generic theft aggravated felony; its divisibility into multiple offenses, at least one of them not matching the generic definition, …; and the inconclusiveness of the record of conviction as to which subsection of § 18.2-192 Gutierrez was convicted under" are all "undisputed" issues. Pet. App. 9a.

The question presented is also very likely to determine the outcome of Ms. Gutierrez's application for relief. As the Sixth Circuit observed, there "is no dispute that Gutierrez satisfies the other requirements for relief." Pet. App. 7a n.4.[11] And given her strong

[11] Before the IJ, the government also argued that a different Virginia conviction—for credit-card forgery, Va. Code § 18.2-

ties to her U.S.-citizen relatives and her ongoing debilitating medical conditions, C.A.R. 225, 476-77, her case for receiving a favorable exercise of the agency's discretion to grant relief is strong. *See In re C-V-T-*, 22 I. & N. Dec. 7, 11 (BIA 1998).

IV. The Decision Below Is Incorrect.

A. The Sixth Circuit's position is incompatible with *Moncrieffe*, as well as *Descamps* and *Mellouli*. Ms. Gutierrez's eligibility for cancellation turns on whether she has been "*convicted* of" an aggravated felony. 8 U.S.C. § 1229b(a)(3) (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.* (emphasis

193—was a disqualifying aggravated felony. But the IJ acknowledged that the record of conviction for that offense was similarly ambiguous as to what prong of the statute formed the basis of the conviction, so the answer to the question presented would resolve that issue as well. Pet. App. 63a. In any event, the BIA rested its denial of cancellation solely on the credit-card "theft" offense. *See* Pet. App. 25a n.1.

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, Ms. Gutierrez's conviction is ambiguous as to whether it included the element of intent to deprive. Because the conviction does not *necessarily* establish an aggravated felony, by default it does not count as a "conviction" of an aggravated felony, and so Ms. Gutierrez should have been permitted to proceed with her application for discretionary relief.

The Sixth 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. 7a. But that burden applies to *factual* questions of eligibility.[12] Ms. Gutierrez, for example, had to marshal evidence that she has "resided in the United States continuously for 7 years." 8 U.S.C. § 1229b(a)(2). 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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[12] 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 [Ms. Gutierrez] actually *did* to violate [the Virginia statute]. [She] may have acted with the intent to … deprive the victim of [its property], or [s]he may [not] have intended [any] … deprivation—we don't know. But uncertainty on that score doesn't matter. What matters here is whether [Ms. Gutierrez's] conviction *necessarily* established that [s]he acted with the intent to … deprive the owner of [its property], the fact required to render the offense [an aggravated felony]. 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: [Ms. Gutierrez's] conviction *necessarily* established only that [s]he [committed the minimum conduct criminalized by the statute]. The record is not inconclusive in that regard, and because this issue involves a purely legal determination (rather than a factual determination, as [the Ninth Circuit's earlier decision in] *Young* wrongly held), its resolution is unaffected by which party bears the burden of proof. As a legal matter, [Ms. Gutierrez's] conviction does not qualify as a conviction for [an aggravated felony].

Id. at 489.

The effect of the Sixth 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 her conviction was based on a prong of a divisible statute that would not correspond to an aggravated felony. *See* Pet. App. 17a-19a. That conclusion improperly reverses *Moncrieffe*'s legal presumption.

Moreover, under the Sixth Circuit's rule, an ambiguous conviction like Ms. Gutierrez's *would not* count as an aggravated felony at the removal stage of proceedings, where the government bears the burden of proof, yet it *would* count as an aggravated felony 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 Sixth Circuit gave two reasons for distinguishing *Moncrieffe*. Neither withstands scrutiny.

First, the Sixth Circuit concluded that *Moncrieffe*'s least-acts-criminalized presumption applies only to determining "removability, not eligibility for relief." Pet. App. 11a-12a; *accord Lucio-Rayos*, 875 F.3d at 582-83. But *Moncrieffe* addressed both removal and cancellation. There was no dispute that Mr. Moncrieffe's drug conviction rendered him removable as a controlled-substances offender, whether or

not the conviction was also an aggravated felony. The question presented in *Moncrieffe*—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, as both the majority and Justice Alito's dissent emphasized. *Moncrieffe*, 569 U.S. at 187, 204; *see also id.* at 211 (Alito, J., dissenting) (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).[13] So the Sixth Circuit was simply wrong to

[13] In addition, 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

say that "'an alien's eligibility for *relief* was not before the Court'" in *Moncrieffe*. Pet. App. 12a (quoting *Le*, 819 F.3d at 107).

Second, the Sixth Circuit distinguished *Moncrieffe* as applying only the categorical approach without reaching the modified categorical step. Pet. App. 12a; *accord Lucio-Rayos*, 875 F.3d at 583. 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.

Moreover, *Moncrieffe* specifically addresses the modified categorical approach. It explains that the modified categorical approach is merely one way to *rebut* the least-acts-criminalized presumption. *Moncrieffe*, 569 U.S. at 191 (citing the approach as a "qualification" to the presumption).

Indeed, *Johnson v. United States*—the case whose least-acts-criminalized language *Moncrieffe* formalized as a presumption, *see* 569 U.S. at 191—was a modified categorical approach case. *Johnson* analyzed

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(2013) (granting, vacating, and remanding in light of *Moncrieffe*).

a divisible Florida battery statute with three alternative elements, the most minor of which was mere offensive touching. 559 U.S. at 136-37. 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 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 Sixth Circuit thus misread *Moncrieffe* when it said that this Court's "opinion addressed neither divisible statutes nor the modified categorical approach." Pet. App. 13a. Rather, *Moncrieffe*'s least-acts-criminalized presumption applies *equally* to the modified categorical approach. And 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. *Moncrieffe*, 569 U.S. 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 Sixth Circuit's rule is inconsistent with *Moncrieffe* in another respect: It risks placing an impossible burden on the noncitizen seeking relief. Under the Sixth Circuit's rule, the noncitizen is simply out of luck when conviction records that she neither creates nor maintains either do not contain clarifying 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, Ms. Gutierrez could not have "submitted testimony from [her] lawyer" or "the judge who accepted [her] plea to ascertain what offense was charged and pleaded to in the state court"—subsection (1)(a), (1)(c), or a different subsection—assuming anyone could even remember the details of a years-old credit-card 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, 200-01.

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,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 17-3749

MIRIAM GUTIERREZ,

Petitioner,

v.

JEFFERSON B. SESSIONS, III,
Attorney General,

Respondent.

On Petition for Review from the Board of Immigration Appeals;
No. A 035 381 061.

Decided and Filed: April 16, 2018

Before: SILER, BATCHELDER and DONALD, Circuit Judges.

COUNSEL

ON BRIEF: Alicia J. Triche, TRICHE IMMIGRATION LAW, Memphis, Tennessee, for Petitioner. Sarah Byrd, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

OPINION

BERNICE BOUIE DONALD, Circuit Judge. Petitioner Miriam Gutierrez ("Gutierrez"), a Lawful Permanent Resident ("LPR"), seeks judicial review of the Board of Immigration Appeals ("BIA") affirmance of the Immigration Judge's ("IJ") denial of her application for cancellation of removal under 8 U.S.C. § 1229b(a), and granting the motion of the Department of Homeland Security ("DHS") to pretermit the application on the grounds that Gutierrez failed to establish that her convictions were not aggravated felonies. An LPR who has been "convicted" of an "aggravated felony" is disqualified from cancellation under § 240A(a)(3) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229b(a)(3). In this appeal, we are called upon to decide, where an alien was convicted under a divisible criminal statute and the record is inconclusive as to whether the conviction was for an aggravated felony, whether such inconclusiveness defeats the alien's eligibility for relief or, rather, should be construed in the alien's favor, thereby establishing eligibility. For the reasons stated herein, we **DENY** the petition and **AFFIRM** the BIA's order.

I

Gutierrez, a native and citizen of Bolivia, has been an LPR since her admission to the United States in 1980. Pertinent to the present appeal, she was convicted in 2012 for two counts of credit card theft in violation of Virginia Code § 18.2-192(1), after entering

a guilty plea.[1] Gutierrez also had prior convictions for petty larceny, Virginia Code § 18.2-96 (in January 2009), and for prescription fraud, Virginia Code § 18.2-258.1 (in March 2012).

In March 2012, DHS initiated removal proceedings against Gutierrez by serving her with a Notice to Appear ("NTA") in Immigration Court. The NTA charged her with removability pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii), based on her convictions for petty larceny and prescription fraud, considered as crimes involving moral turpitude. At an October 2014 hearing, Gutierrez admitted the NTA's allegations and conceded her removability.

Gutierrez applied for cancellation of removal pursuant to 8 U.S.C. § 1229b(a). DHS moved to pretermit Gutierrez's application for relief, based on statutory ineligibility because she had been convicted of an aggravated felony. Specifically, DHS argued that Gutierrez's 2012 credit card theft conviction[2] was

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[1] Gutierrez also pleaded guilty to Virginia credit card forgery. However, the BIA reached its decision based on the Virginia credit card theft convictions; we thus forgo as unnecessary any inquiry into whether the other convictions were for an aggravated felony under 8 U.S.C. § 1101(a)(43)(R).

[2] Under Virginia Code § 18.2-192(1), a person is guilty of credit card theft when:

> (a) He takes, obtains or withholds a credit card or credit card number from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, obtained or withheld, receives the credit card or credit card number with intent to use it or sell it, or to

an aggravated felony theft offense under 8 U.S.C. § 1101(a)(43)(G). DHS noted that Gutierrez had not provided proof that her credit card convictions were not for an aggravated felony. Following a hearing in February 2015, the IJ found that Gutierrez had failed to carry her burden of proving the absence of a disqualifying theft aggravated felony conviction. Therefore, the IJ concluded that Gutierrez was ineligible for relief, and granted DHS' motion to pretermit.

Gutierrez then appealed to the BIA. She did not contest removability; she argued that the Virginia credit card theft statute was overbroad and indivisible and thus "[could] []not serve as [a]

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transfer it to a person other than the issuer or the cardholder; or

(b) He receives a credit card or credit card number that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use, to sell or to transfer the credit card or credit card number to a person other than the issuer or the cardholder; or

(c) He, not being the issuer, sells a credit card or credit card number or buys a credit card or credit card number from a person other than the issuer; or

(d) He, not being the issuer, during any twelve-month period, receives credit cards or credit card numbers issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of § 18.2-194 and subdivision (1) (c) of this section.

predicate offense[]" under 8 U.S.C. § 1101(a)(43)(G).[3] In the alternative, Gutierrez argued that even if the statute were "subject to the modified categorical approach," her inconclusive record of conviction should be construed in her favor.

The BIA "employ[ed] the 'categorical approach'" to determine whether Gutierrez's state conviction qualified as a theft aggravated felony under 8 U.S.C. § 1101(a)(43)(G). At the first step, the BIA found Virginia Code § 18.2-192(1) "overbroad vis-à-vis the 'theft offense' concept" because the statute contained at least one subdivision, (1)(c), under which "a person can be convicted … absent proof of an 'intent to deprive' the rightful owner of the property." At the second step of the analysis, the BIA determined that the section was divisible because its subdivisions "criminalize[d] diverse acts, committed with different mental states." At the third step, given that the evidence showed that the 8 U.S.C. § 1229b(a)(3) "aggravated felony bar 'may apply'" to Gutierrez's application for relief, the BIA applied 8 C.F.R. § 1240.8(d) and required Gutierrez to "prove by a preponderance of the evidence that the bar [was] inapplicable." Gutierrez could meet this burden "by producing conviction records indicating that she was charged and pled guilty under section 18.2-192(1)(c)" rather than under another subdivision. However, the BIA noted that the only conviction-related records

[3] On appeal to this Court, Gutierrez no longer argues that Virginia Code § 18.2-192 is indivisible; rather, she now adopts fully what had been her argument in the alternative, conceding the statute's divisibility.

Gutierrez supplied were "silent as to the subdivision under which she was convicted," and the resulting "inconclusiveness of the conviction record necessarily inure[d]to her detriment." The BIA concluded that Gutierrez was "removable as charged based on her concession, and [was] ineligible for cancellation of removal because she did not prove that she 'has not been convicted of any aggravated felony,' as required by [8 U.S.C. § 1229b(a)(3)]." The BIA dismissed Gutierrez's appeal and granted the DHS motion to pretermit her application. This timely appeal followed.

II

As a threshold matter we note that while 8 U.S.C. § 1252(a)(2)(C) bars our "jurisdiction to review any final order of removal against an alien who is removable by reason of having committed" a crime of moral turpitude, subparagraph (C) does not "preclud[e] review of constitutional claims or questions of law" in a petition for review. *Id.* § 1252(a)(2)(D). We review such claims de novo. *See Trela v. Holder*, 607 F. App'x 527, 531 (6th Cir. 2015). Where the BIA reviews the IJ's decision and issues a separate opinion, rather than summarily affirming the IJ's decision, we review the BIA's decision as the final agency determination. *Khalili v. Holder*, 557 F.3d 429, 435 (6th Cir. 2009) (citing *Morgan v. Keisler*, 507 F.3d 1053, 1057 (6th Cir. 2007)). We review de novo an agency's determinations of questions of law. *Khozhaynova v. Holder*, 641 F.3d 187, 191 (6th Cir. 2011) (citing *Zhao v. Holder*, 569 F.3d 238, 246 (6th Cir. 2009)).

III

A

An "aggravated felony" conviction disqualifies an LPR from cancellation of removal. 8 U.S.C. § 1229b(a)(3).[4] The applicant for relief must demonstrate eligibility. *Id.*, § 1229a(c)(4)(A)(i). Where "grounds for mandatory denial of … relief may apply," the applicant must "prov[e] by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. § 1240.8(d); *see Diaz-Zanatta v. Holder*, 558 F.3d 450, 458 (6th Cir. 2009).

An "aggravated felony" is defined to include "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G). The generic definition of a "theft offense" for purposes of § 1101(a)(43)(G) is a "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007); *Matter of V-Z-S-*, 22 I. & N. Dec. 1338 (BIA 2000).

To determine whether a state statute matches a predicate offense in a federal statutory scheme, courts conduct a three-step inquiry. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *United States v. Ritchey*, 840 F.3d 310, 315-16 (6th Cir. 2016). First,

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[4] There is no dispute that Gutierrez satisfies the other requirements for relief. *See* 8 U.S.C. § 1229b(a)(1)-(2).

the court asks "whether the state law is a categorical match with" the generic federal offense. *Marinelarena v. Sessions*, 869 F.3d 780, 785 (9th Cir. 2017) (citation omitted). Only a statute whose "elements are the same as, or narrower than, those of the generic offense" categorically matches the generic offense. *Descamps v. United States*, 570 U.S. 254, 257 (2013). Such a match ends the inquiry.

Absent a categorical match, the second step asks whether the "overbroad" statute has but "a single … set of elements" and therefore "defines[s] a single crime." *Mathis*, 136 S. Ct. at 2248. A finding that a statute is thus "indivisible" ends the inquiry because "an indivisible, overbroad statute can *never* serve as a predicate offense." *Medina-Lara v. Holder*, 771 F.3d 1106, 1112 (9th Cir. 2014) (citing *Descamps*, 570 U.S. at 265).

In contrast, a "divisible" statute "list[s] elements in the alternative, and thereby define[s] multiple crimes." *Mathis*, 136 S. Ct. at 2249. Such statutes receive "modified categorical" analysis. *Descamps*, 570 U.S. at 257. Therein, the court reviews "a limited class of documents to determine" not the *facts* of the underlying criminal conduct but rather "which of a statute's alternative *elements* formed the basis of the … conviction," *Id.* at 262 (emphases added). The Supreme Court has set forth the relevant documents: the judgment of conviction, the charging document, a written plea agreement, a plea colloquy, or other "comparable judicial record." *Shepard v. United States*, 544 U.S. 13, 26 (2005). The list of permitted *Shepard* documents is limited in order to further the categorical approach's broad goal of preventing

"relitigation of past convictions … long after the fact." *See Moncrieffe v. Holder*, 569 U.S. 184, 200-01 (2013) (citing *Chambers v. United States*, 555 U.S 122, 125 (2009)).

It is undisputed that Gutierrez is removable due to her convictions for crimes of moral turpitude, (Pet'r's Br. at 12-14), and that her eligibility for relief depends on having no "convict[ion] of any aggravated felony," (*id.* at 4-5). Also undisputed are the overbreadth of Virginia Code § 18.2-192 vis-à-vis generic theft aggravated felony; its divisibility into multiple offenses, at least one of them not matching the generic definition, (*id.* at 17-18); and the inconclusiveness of the record of conviction as to which subsection of § 18.2-192 Gutierrez was convicted under, (*id.* at 16). The effect of that inconclusiveness is where the two sides part ways.

B

We turn, then, to the sole issue in dispute: which "side [may] claim[] the benefit of the record's ambiguity." *See Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011) (quoting *Garcia v. Holder*, 584 F.3d 1288, 1289 (10th Cir. 2009)) (alterations in original). On this question, one of first impression for this Court and on which our sister circuits are divided,[5] turns the disposition of this appeal.

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[5] Gutierrez invokes *Sauceda v. Lynch*, 819 F.3d 526, 532 (1st Cir. 2016), and *Martinez v. Mukasey*, 551 F.3d 113, 121-22 (2d Cir. 2008), as the federal appellate decisions supporting her position that, on an inconclusive record of conviction as to a state offense, an applicant for relief from removal has met her burden.

Gutierrez argues that only where a record of conviction "*necessarily demonstrates* that a federal generic offense has occurred," (Reply Br. at 6) (emphasis added), can "the categorical approach be satisfied," (*id*. at 1-2 (citing *Moncrieffe*, 569 U.S. 184; *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015))). She urges that the ambiguity in her record as to which subsection of Virginia Code § 18.2-192 she was convicted under, (Pet'r's Br. at 16), means "there is no disqualifying conviction" and her burden of proof is met, (*id*. at 1 (citing *Sauceda v. Lynch*, 819 F.3d 526, 532 (1st Cir. 2016); *Moncrieffe*, 569 U.S. at 194-95)).

The First Circuit's decision in *Sauceda*, 819 F.3d 526, is one of two that Gutierrez turns to from our sister circuits in support of her position. *Sauceda*, in turn, relies chiefly on *Moncrieffe*, 569 U.S. 184. The *Moncrieffe* Court held: "Because we examine what the state conviction necessarily involved, not the facts underlying the case, *we must presume* that the

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(Pet'r's Br. at 5). On the other side of the ledger, Gutierrez points to decisions from six circuits as standing for the proposition that, in such circumstances, an applicant's burden is not met: *Syblis v. Att'y Gen. of U.S.*, 763 F.3d 348, 355-57 (3d Cir. 2014); *Salem v. Holder*, 647 F.3d 111, 116-20 (4th Cir. 2011); *Le v. Lynch*, 819 F.3d 98, 106-07 (5th Cir. 2016); *Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014); *Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017), *affirming Young v. Holder*, 697 F.3d 976, 988-90 (9th Cir. 2012); and *Garcia v. Holder*, 584 F.3d 1288, 1289-90 (10th Cir. 2009). (Pet'r's Br. at 22). The government points only to the First Circuit's holding in *Sauceda*, 819 F.3d 526, as supporting Gutierrez's position, while invoking on its own side the six decisions cited by Gutierrez as well as *Omoregbee v. U.S. Att'y Gen.*, 323 F. App'x 820, 826 (11th Cir. 2009). (Resp't's Br. at 30-31).

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 190-91 (emphases added) (alterations in original). Gutierrez contends that this "*Moncrieffe* presumption" is controlling in her case. (Pet'r's Br. at 24; Reply Br. at 3-4).

Gutierrez's reliance on *Moncrieffe* is misplaced, for two reasons. First, *Moncrieffe* concerned removability, not eligibility for relief. *Moncrieffe*, 569 U.S. at 189-90; *see also Le v. Lynch*, 819 F.3d 98, 107 (5th Cir. 2016); *Marinelarena*, 869 F.3d at 790. This distinction matters, because the burden of proof differs in each context. Congress gave "the government … the burden of establishing removability by clear and convincing evidence," *Salem*, 647 F.3d at 116 (citing 8 U.S.C. § 1229a(c)(3)(A)), while "the clear text of the statute shifts the burden to the … noncitizen" to show eligibility for relief, *id*. (citing 8 U.S.C. § 1229a(c)(4)(A)(i)); *see Lucio-Rayos v. Sessions*, 875 F.3d 573, 581 (10th Cir. 2017) ("Congress has placed the burden of proving eligibility for relief … squarely on the alien."); *Le*, 819 F.3d at 105.

Nevertheless, the *Sauceda* court gave considerable weight to *Moncrieffe*'s observation "that the … statutory language in the INA" with regard to "convict[ion] … is identical in the removal and cancellation of removal contexts, and so the 'analysis is the same in both contexts.'" *Sauceda*, 819 F.3d at 535 (quoting *Moncrieffe*, 569 U.S. at 191 n.4). The court, however, read too much into that language: *Moncrieffe*'s remark about the "analysis [being] the

same," confined to a footnote, "was dicta because the issue of … an alien's eligibility for *relief* was not before the Court." *Le*, 819 F.3d at 107; *see Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001) (it is appropriate for lower courts to "resort to the text of the statute" rather than to "isolated comment[s]" from Supreme Court opinions because Supreme Court "dicta may be followed if sufficiently persuasive but are not binding" (citation omitted)). More importantly, *Moncrieffe*'s reference to "identical" statutory language concerned the phrase "convicted of any aggravated felony" in 8 U.S.C. § 1229b(a)(3); it cannot be read as somehow equating the statutorily distinct burdens of proof for removability and relief. *See Lucio-Rayos*, 875 F.3d at 583; *Marinelarena*, 869 F.3d at 790. The Congressionally-mandated burden-shifting means that the party carrying the burden of proof is *not* the same in the two contexts. *Salem*, 647 F.3d at 114-15. *Moncrieffe*, therefore, is inapposite.

Moncrieffe fails to support Gutierrez's position for a second reason, as well: the statute of conviction there was indivisible and therefore, unlike the case here, the Court never reached the third step of the analysis, involving the modified categorical approach. 569 U.S. at 190-91. Indeed, *Moncrieffe* cautioned that the "least of th[e] acts criminalized" rule is "not without qualification," proceeding to mark off for different treatment "state statutes that contain several different crimes, each described separately," where "a court may determine which particular offense the noncitizen was guilty of by examining" the *Shepard* documents. *Id*. at 191. In other words, *Moncrieffe* itself placed divisible statutes outside of the "*Moncrieffe* presumption." *Id*.

Enlisting the aid of *Sauceda*, 819 F.3d 526, Gutierrez argues that *Moncrieffe* is nevertheless applicable here. Like Gutierrez, the petitioner in *Sauceda* was convicted under a divisible state statute. 819 F.3d at 529-30. The court concluded that the *Moncrieffe* "presumption … dictate[d] the outcome" for the petitioner. *Id*. at 531. *Sauceda* held that where "it is undisputed that all the *Shepard* documents have been produced and that they shed no light on the nature of the … conviction, the *Moncrieffe* presumption [] stand[s] since it cannot be rebutted." *Id*. at 531-32. *Sauceda* thus reads *Moncrieffe* as creating a presumption that a state conviction was for the "least of the acts" criminalized—a presumption that applies not only to indivisible statutes, but also to divisible ones "if unrebutted by *Shepard* documents." *Id.* at 531-32, 534. As we have just noted, though, the text of *Moncrieffe* gives no warrant for such a broad reading: the opinion addressed neither divisible statutes nor the modified categorical approach, beyond pointing to such statutes as a "qualification" to the "least of th[e] acts criminalized" rule. *Moncrieffe*, 569 U.S. at 191; *see Lucio-Rayos*, 875 F.3d at 583; *Marinelarena*, 869 F.3d at 790.

Sauceda, therefore, does not stand on firm ground because it rests on a questionable reading of *Moncrieffe* as controlling. *See Sauceda*, 819 F.3d at 531, 533-35. In addition, *Sauceda* is distinguishable in that "the complete record of conviction [was] present" there, a fact the court's holding treated as significant: "[S]ince all the *Shepard* documents [had] been produced and the modified categorical approach" could not resolve the ambiguity regarding the statute of conviction, the court applied the *Moncrieffe*

presumption in the petitioner's favor. *Id*. at 532. The court did not, however, address the effects of an incomplete record. Here, in contrast, Gutierrez submitted only her plea agreement and sentencing order, which did not resolve the ambiguity concerning the statute of conviction. This gap is puzzling, especially in view of the plea agreement's reference to Gutierrez "hav[ing] read each of the indictments," discussed them with her attorney, and "understand[ing] each of the charges against [her]." Gutierrez proffers no explanation for the gap, simply stating that she "has submitted all evidence available to her" from the record of conviction. (Pet'r's Br. at 23).

Besides the First Circuit, the only other circuit invoked by Gutierrez as supporting her position regarding the effect of an inconclusive record of conviction in the relief context is the Second Circuit in *Martinez v. Mukasey*, 551 F.3d 113, 118 (2d Cir. 2008). There, the petitioner seeking relief had been "convicted of two [New York] state drug offenses for distribution of a small quantity of marihuana." *Id*. at 115. The issue before the court was whether the convictions matched an aggravated felony under the federal Controlled Substances Act. *Id*. The court subjected the statute to categorical analysis, applying a test comparable to *Moncrieffe*'s "least of the acts" criminalized standard: "in adopting a 'categorical approach[,]' … [we] consider[] … only *the minimum criminal conduct necessary* to sustain a conviction under a given statute." *Id*. at 118 (quoting *Gertsenshteyn v. U.S. Dep't of Justice*, 544 F.3d 137, 143 (2d Cir. 2008)) (emphasis added).

Martinez thus concerned, as did *Moncrieffe*, the application of the categorical approach to a statute treated as indivisible. In a footnote, the court took note of divisible statutes as "a limited exception" to the categorical approach, wherein a court goes beyond the mere statutory elements to consider the record of conviction. *Id*. at 118 n.4. Noting, however, that the parties had given no indication that the record of conviction would support a different result were the modified categorical approach employed, the court "[a]ccordingly" declined to "take [a] position as to whether" the modified categorical approach applied. *Id*. Because *Martinez* does not address the effects of an inconclusive record of conviction under a divisible state statute, it is at best of limited relevance to the present appeal.

Gutierrez also argues that, in requiring her to shoulder the burden of proof as to the nature of her state conviction, the BIA improperly "inject[ed] a factual determination into the categorical approach." (Pet'r's Br. at 22-23). She urges, with respect to eligibility for cancellation of removal under 8 U.S.C. § 1229b(a), that the § 1229b(a)(1)-(2) requirements of "7 years of continuous residence" and "5 years of LPR status" are "factual matters." (*Id*. at 23). The requirement that the LPR "ha[ve] not been convicted of an aggravated felony," she urges in contrast, § 1229b(a)(3), "is a legal question," to which the burden of proof is irrelevant. (Reply Br. at 8).

As the Ninth Circuit aptly points out in *Marinelarena*, however, "[a]lthough the modified categorical approach … involves some strictly legal issues[,] … the inquiry into which part of a divisible

statute underlies the petitioner's crime of conviction is, if not factual, at least a mixed question of law and fact." 869 F.3d at 791 (quoting *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982)). The Supreme Court provides further clarity on this issue, observing that the statutory scheme required courts to look to "*the fact that* the defendant had been convicted of crimes falling within certain categories, and not to *the facts* underlying" those convictions. *Taylor v. United States*, 495 U.S. 575, 600 (1990) (emphases added); *see also Vasquez-Martinez v. Holder*, 564 F.3d 712, 716 (5th Cir. 2009) (holding that the offense of conviction is a factual, not a legal, determination). "Courts cannot arrive at legal conclusions" regarding a prior conviction's effect on eligibility for relief "without considering the underlying facts[;] [o]ur analysis of a noncitizen's burden … assists us in arriving at a legal conclusion." *Syblis v. Att'y Gen. of U.S.*, 763 F.3d 348, 356 n.11 (3d Cir. 2014).

What Gutierrez urges, in effect, is that her burden of proof under 8 U.S.C. § 1229a(c)(4)(A)(i) and 8 C.F.R. § 1240.8(d) with regard to 8 U.S.C. § 1229b(a) eligibility is different for factual matters than it is for legal questions. But treating the "aggravated felony" provision, 8 U.S.C. § 1229b(a)(3), differently from the rest of the § 1229b(a) requirements is something that the plain text of the statute gives us no ground to do. *See Le*, 819 F.3d at 104-05 (noting, and subsequently validating, government's argument that statutory language does not differentiate the § 1229b(a) requirements between those involving factual and legal determinations).

C

Gutierrez asserts that "the categorical approach … has consistently held that an 'inconclusive' record does *not* establish deportability." (Reply Br. at 2). In particular, she contends that "the Supreme Court has held that a state record of conviction must necessarily establish that the generic federal offense has occurred in order for the categorical approach to be satisfied." (*Id*. at 1-2 (citing *Moncrieffe*, 569 U.S. 184; *Mellouli*, 135 S. Ct. 1980)). As noted *supra*, *Moncrieffe* provides scant support to Gutierrez's position because it addressed an indivisible statute. 569 U.S. at 190-91. *Mellouli* is also inapposite, because the record there clearly established under which prong of the divisible state statute the defendant was convicted. *See* 135 S. Ct. at 1983.

That "an 'aggravated felony' is not established by an inconclusive record" in the removal context is, according to Gutierrez, "carved into stone." (Reply Br. at 6). However, she cites no authority in support of that sweeping claim. It seems doubtful that a proposition on which our sister circuits are divided can fairly be described as "carved into stone." Still less so when a strong majority of the circuits—six of eight, by her own tally[6]—to have addressed the issue have reached the contrary conclusion to the one Gutierrez urges on this Court. But Gutierrez fails to address the reasoning of the circuits that have held contrary to

[6] *See supra* note 5. The government's scorecard is slightly different, counting the split as seven to one. *See id*.

her position. The "[c]ourts that have ruled an inconclusive conviction record fails to meet a burden of proof," she contends, "are not persuasive." (Pet'r's Br. at 22). Beyond that bare assertion, Gutierrez offers no further argument.

While "decisions from our sister circuits are not binding, we have repeatedly recognized their persuasive authority." *Bowling Green & Warren Cty. Airport Bd. v. Martin Land Dev. Co.*, 561 F.3d 556, 560 (6th Cir. 2009) (citation omitted). We "routinely look[] to our sister circuits for guidance when we encounter a legal question that we have not previously passed upon," *United States v. Washington*, 584 F.3d 693, 698 (6th Cir. 2009) (quoting *United States v. Houston*, 529 F.3d 743, 762 (6th Cir. 2008)), and we have before adopted the reasoning of the overwhelming majority of our sister circuits on questions of first impression, *id*. at 700. We are persuaded that the view of the Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits best comports with the statutory burden of proof. Once her removability has been demonstrated, for which the government bears the burden of proof, *Salem*, 647 F.3d at 116, it is the applicant for relief who must "prov[e] by a preponderance of the evidence that" potential "grounds for mandatory denial of … relief" in fact "do not apply" in her case, 8 C.F.R. § 1240.8(d); *see also* 8 U.S.C. § 1229a(c)(4)(A)(i) (generally assigning the burden of demonstrating eligibility on the applicant for relief). The BIA decision properly applied the categorical approach, including its modified categorical component, to the facts of Gutierrez's case.

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. Under the applicable statutory standard, and in alignment with the view of a strong majority of our sister circuits to have addressed the issue, Gutierrez has not demonstrated by a preponderance of the evidence that she satisfies the requirements for eligibility for relief.

IV

For the foregoing reasons, we **DENY** the petition for review and **AFFIRM** the BIA's judgment.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A035 381 061 – Memphis, TN

Date: JUN 15, 2017

In re: Miriam GUTIERREZ a.k.a. Miriam Zubriana O'Donoghue a.k.a. Arnez Miriam Zubirana a.k.a. Miriam Zubirana O'Donoghue a.k.a. Miriam Blackwell Miriam a.k.a. Miriam Z. Gutierrez a.k.a. Miriam Blackwell a.k.a. Miriam Zubirana a.k.a. Miriam Zubirana Blackwell a.k.a. Miriam Zubirana de Gutierrez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENT: Sheryl T. Hurst, Esquire

APPLICATION: Cancellation of removal

The respondent appeals from an Immigration Judge's October 12, 2016, decision ordering her removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

The respondent, a native and citizen of Bolivia and a lawful permanent resident of the United States, concedes that she is removable under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(ii), for having been convicted of multiple crimes involving moral turpitude (Exhs. 1, 4; Tr. at 22). The issue on appeal is whether she qualifies for cancellation of removal under section 240A(a) of the Act, 8 U.S.C. § 1229b(a). Upon de novo review, *see* 8 C.F.R. § 1003.1(d)(3)(ii), we conclude that she does not.

Section 240A(a)(3) of the Act requires an applicant for cancellation of removal to prove that she "has not been convicted of any aggravated felony." *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A) (requiring an applicant for relief from removal to prove that she satisfies all eligibility requirements). For the following reasons, we conclude that the respondent has not carried her burden of proof in that regard.

In 2012, the respondent was convicted of two counts of "credit card theft" in violation of section 18.2-192 of the Virginia Code (hereafter "section 18.2-192"), felonies for which she was sentenced to terms of imprisonment of 3 years, with 2 years suspended (Exh. 5, tab 16, at 79-82). Based on this conviction, the Immigration Judge found that the respondent had not proved the absence of a disqualifying "theft offense" aggravated felony conviction under section 101(a)(43)(G) of the Act, 8 U.S.C. § 1101(a)(43)(G). We agree.

For purposes of section 101(a)(43)(G) of the Act, the term "theft offense" refers to a crime that requires the taking of, or exercise of control over, property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership, even if such deprivation is less than total or permanent. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007). To determine whether a particular state crime qualifies as a "theft offense," we employ the categorical approach, under which we ask whether the minimum conduct that has a realistic probability of being prosecuted under the statute of conviction corresponds to (or is encompassed by) the elements of the foregoing generic definition. *Id*. at 185-86, 193.

The statute under which the respondent was convicted, section 18.2-192, has at all relevant times provided as follows, in pertinent part:

> **§ 18.2-192. Credit card theft**
>
> (1) A person is guilty of credit card or credit card number theft when:
>
> > (a) He takes, obtains or withholds a credit card or credit card number from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, obtained or withheld, receives the credit card or credit card number with intent to use it or sell it, or to transfer it to a person other than the issuer or the cardholder; or

> (b) He receives a credit card or credit card number that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use, to sell or to transfer the credit card or credit card number to a person other than the issuer or the cardholder; or
>
> (c) He, not being the issuer, sells a credit card or credit card number or buys a credit card or credit card number from a person other than the issuer; or
>
> (d) He, not being the issuer, during any twelve-month period, receives credit cards or credit card numbers issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of § 18.2-194 and subdivision (1)(c) of this section.

Subdivisions (1)(a) and (1)(b) of this statute define generic theft offenses, but subdivision (1)(c) does not—a person can be convicted under that subdivision absent proof of an "intent to deprive" the rightful owner of the property. *See* Ronald J. Bacigal, "Credit Card Crimes," VA. PRAC. CRIMINAL OFFENSES & DEFENSES C52 (2016) ("If the Commonwealth can prove a purchase or sale of a credit card, and that the seller was not the issuer, both parties have committed [a violation of subdivision (1)(c)]. Because this subsection contains no mental state language at all,

it appears to create a strict liability crime.") Thus, like the Immigration Judge, we conclude that section 18.2-192 is categorically overbroad vis-à-vis the "theft offense" concept.

Because section 18.2-192 is categorically overbroad with respect to the aggravated felony definition, the respondent's conviction cannot disqualify her from cancellation of removal unless the statute is "divisible," so as to permit consideration of the conviction record under the "modified categorical" approach. In removal proceedings, we evaluate the divisibility of criminal statutes by employing the standards set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 133 S. Ct. 2276 (2013). *See Matter of Chairez ("Chairez III")*, 26 I&N Dec. 819 (BIA 2016).

Under *Mathis* and *Descamps*, the divisibility of section 18.2-192 depends upon whether the four subdivisions of subsection (1) define separate offenses with discrete "elements"—i.e., facts that must be proven to the jury, unanimously and beyond a reasonable doubt, in order to convict—or merely an alternative set of "brute facts" about which a Virginia jury could disagree while still rendering a guilty verdict. Our research has identified no Virginia case squarely addressing this question. On their face, however, the four subdivisions of section 18.2-192(1) criminalize diverse acts, committed with different mental states. Under the circumstances, we are satisfied that the statute's four subdivisions define separate crimes, making the statute "divisible."

Because the respondent has been convicted under a statute that is divisible vis-à-vis the "theft offense" definition, the "evidence indicates" that the section 240A(a)(3) aggravated felony bar "may apply" to her, and therefore she must prove by a preponderance of the evidence that the bar is inapplicable. *See* 8 C.F.R. § 1240.8(d); *see also Matter of M-B-C-*, 27 I&N Dec. 31, 36-37 (BIA 2017). The respondent could carry this burden by producing conviction records indicating that she was charged and pled guilty under section 18.2-192(1)(c) (rather than under subdivisions (1)(a) or (1)(b)). No such evidence has been provided, however—on the contrary, the official conviction documents filed as exhibits to the respondent's cancellation of removal application (Exh. 5, tab 16, at 79-82) are silent as to the subdivision under which she was convicted. Because the respondent bears the burden of proof, *see* section 240(c)(4)(A) of the Act, this inconclusiveness of the conviction record necessarily inures to her detriment and prevents her from showing that she qualifies for relief. *See Syblis v. Att'y Gem of U.S.*, 763 F.3d 348, 355-57 (3d Cir. 2014); *Sanchez v. Holder*, 757 F.3d 712, 720 & n.6 (7th Cir. 2014); *Young v. Holder*, 697 F.3d 976, 988-90 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111, 116-20 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288, 1289-90 (10th Cir. 2009); *but see Sauceda v. Lynch*, 819 F.3d 526, 532 (1st Cir. 2016); *Martinez v. Mukasey*, 551 F.3d 113, 121-22 (2d Cir. 2008).[1]

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[1] As the respondent's credit card theft conviction renders her ineligible for cancellation of removal, we find it unnecessary to decide whether her 2012 conviction for credit card forgery, *see*

We therefore reject the respondent's appellate argument that the inconclusiveness of her conviction record actually inures to her benefit. In that respect, she relies heavily on *Almanza-Arenas v. Holder*, 771 F.3d 1184 (9th Cir. 2014), in which two Ninth Circuit judges concluded that the court's en banc decision in *Young v. Holder* had been implicitly abrogated by the Supreme Court's intervening decision in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). The panel decision in *Almanza-Arenas* is no longer precedential, however, because the Ninth Circuit granted a petition to rehear the case en banc, and the subsequent en banc decision did not reach the issue. *See Almanza-Arenas v. Lynch*, 815 F.3d 469 (9th Cir. 2016) (en banc); *Almanza-Arenas v. Lynch*, 785 F.3d 366 (9th Cir. 2015) (granting en banc reh'g); *see also Socop-Gonzalez v. INS*, 272 F.3d 1176, 1186 n.8 (9th Cir. 2001) ("A court's decision to rehear a case en banc effectively means that the original three-judge panel never existed").

To the extent the respondent relies on *Moncrieffe* itself, moreover, we find that decision inapposite. *Moncrieffe* involved an alien who was convicted under a Georgia drug statute that was both overbroad and *indivisible* vis-à-vis the aggravated felony definition. We are in full agreement with the *Moncrieffe* Court's observation that an alien convicted under such a statute would remain eligible for cancellation of removal, *see* 133 S. Ct. at 1692-93, even if the alien's offense *conduct* may have been embraced by the

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VA. CODE ANN. § 18.2-193, was for an aggravated felony under section 101(a)(43)(R) of the Act.

aggravated felony definition. Indeed, we have so held. *See Matter of Chairez,* 26 I&N Dec. at 825 ("For purposes of cancellation of removal, the respondent has carried his burden of proving the absence of any disqualifying aggravated felony conviction because [his statute of conviction] is overbroad and indivisible relative to the definition of an aggravated felony crime of violence under section 101(a)(43)(F) of the Act."). However, the *Moncrieffe* Court had no occasion to address the very different situation presented here, in which an alien is convicted under a statute that is overbroad but *divisible* vis-à-vis the aggravated felony definition. *See id*. at 825 n.7. In cases involving overbroad but divisible statutes, the statute and the regulations unambiguously allocate the risk of an inconclusive record to the applicant for relief, and to interpret *Moncrieffe* as controlling such a situation would in our view be to overread that opinion.

In conclusion, the respondent is removable as charged based on her concession, and is ineligible for cancellation of removal because she did not prove that she "has not been convicted of any aggravated felony," as required by section 240A(a)(3) of the Act. The following order shall be issued.

ORDER: The appeal is dismissed.

/s/ Roger A. Pauley
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
MEMPHIS, TENNESSEE

File: A035-381-061 October 12, 2016

In the Matter of

MIRIAM GUTIERREZ	IN REMOVAL PROCEEDINGS
RESPONDENT	

CHARGES: INA Section 237(a)(2)(A)(ii)—alien who at the time of admission was convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

APPLICATIONS:

ON BEHALF OF RESPONDENT: SHERYL HURST

ON BEHALF OF DHS: RYAN MCGONIGLE

ORAL DECISION OF THE IMMIGRATION JUDGE

INTRODUCTION AND JURISDICTIONAL STATEMENT

The respondent is a female, native and citizen of Bolivia. On or about April 3, 2012, the Department of

Homeland Security filed a Notice to Appear against respondent with the Court. The filing of this charging document commenced proceedings and vested jurisdiction with the Court. 8 C.F.R. 1003.14(a). The Notice to Appear has been marked and admitted into evidence as both Exhibits 1 and 4.

In removal proceedings a Notice to Appear shall be served in person on the alien, or if personal service is not practicable, through service by mail to the alien or the alien's counsel of record. INA Section 239; 8 C.F.R. 1003.13. Respondent appeared before the Court on October 9, 2014 and acknowledged proper service of the Notice to Appear. Based upon respondent's acknowledgement and the certificate of service that is attached to the Notice to Appear, the Court will find that the Notice to Appear has been properly served. Respondent was also afforded 10 days following service of the Notice to Appear prior to appearing before an Immigration Judge as required. In her appearance before the Court respondent also admitted that she is not a citizen or national of the United States, is a native and citizen of Bolivia, and was admitted to the United States near Miami, Florida on January 13, 1980 as a lawful permanent resident. She also admitted that she was on January 27, 2009 convicted in the Fairfax County General District Court for the offense of misdemeanor petty larceny in violation of Virginia Code 18.2-96, was on March 15, 2012 convicted in the Prince William County Circuit Court for the offense of felony prescription fraud, in violation of Virginia Code 18.2-251.1, and that these crimes did not arise out of a single scheme of criminal misconduct. Respondent further conceded that she is removable as charged

under Section 237(a)(2)(A)(ii) as an alien that any time after admission was convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

For aliens who have been admitted to the United States, the Department of Homeland Security must prove by clear and convincing evidence that respondent is subject to removal as charged. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence. INA Section 240(c)(3)(A). Based upon the admissions the respondent and her concessions as to removability, the Court finds that the Department of Homeland Security has established both respondent's alienage and her removability by clear and convincing evidence, therefore, the Court sustains the charge under this section.

Respondent seeks cancellation of removal for certain lawful permanent residents. The Department of Homeland Security made an oral motion to pretermit the application and provided documents at Exhibit 3. The Department also filed a written motion to pretermit which was received by the Court on November 25, 2015 and included both statutes under which the respondent was convicted. Respondent provided her response to the Department of Homeland Security's motion to pretermit which was received by the Court on December 24, 2015. The Court issued its decision on July 27, 2016 which is contained in the record at Exhibit 6. Thereafter and in the interim and before this hearing the Board of Immigration Appeals issued the decision in *Matter of Martin Chairez-Castrejon*; 26 l&N Dec. 819 (BIA

2016). The Court therefore reconsidered the matter under the directions of *Chairez* and issued its decision on this date. That was marked as Exhibit 7. Both decisions are incorporated herein by reference as those set forth at length. Based upon the decisions issued by the Court, the Court finds that the respondent is not eligible for cancellation and therefore granted the Department's motion and pretermitted the application.

The respondent wishes to preserve her appeal and agrees that given the decision of the Court that she has no other form of relief that is available, although the Court does note that she has an I-130 that is pending and would like to proceed on that application if the decision of the Court is not upheld by the Board and or the Circuit. Based upon discussion with counsel at the hearing of today's date, the respondent agreed to proceed with her appeal and the decision is therefore issued as a final decision. The respondent has not sought any other form of relief including voluntary departure and therefore the Court will simply order the respondent removed to Bolivia and allow her to proceed with the appeal.

ORDERS

Based upon the foregoing the following orders will enter:

IT IS HEREBY ORDER that the motion to pretermit the application filed by the Department of Homeland Security be and hereby is granted.

IT IS HEREBY FURTHER ORDER that respondent's application for cancellation of removal for certain lawful permanent residents be and hereby is denied.

IT IS HEREBY FURTHER ORDER that respondent be removed to Bolivia on the charges contained in the Notice to Appear.

Please see the next page for electronic signature

REBECCA L. HOLT
Immigration Judge

//s//

Immigration Judge REBECCA L. HOLT

holtr on February 6, 2017 at 12:47 PM GMT

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
MEMPHIS, TENNESSEE

IN THE MATTER OF	)	**IN REMOVAL**
	)	**PROCEEDINGS**
	)	
GUTIERREZ, Miriam	)	**FILE NO**.:
	)	A035-381-061
Respondent	)	
	)	**DATE**: October 12, 2016

ON BEHALF OF RESPONDENT	**ON BEHALF OF DHS**
Sheryl Hurst, Esq. Hurst Immigration, PLLC 6263 Poplar Avenue, Suite 350 Memphis, TN 38119	William A. Lund, Esq. Assistant Chief Counsel 80 Monroe Ave., Suite 502 Memphis, TN 38103

INTERIM ORDER OF THE IMMIGRATION JUDGE

Respondent was convicted of Credit Card Theft in violation of VA CODE ANN. § 18.2-192 and Credit Card Forgery in violation of VA CODE ANN. § 18.2-193 on April 20, 2012. On February 26, 2015, Respondent filed a Form 42A Application for Cancellation of Removal for Certain Permanent Residents. On November 25, 2015, the Department of Homeland

Security ("the Department") filed a Motion to Pretermit Respondent's application for Cancellation of Removal. Respondent filed her response on December 24, 2015, and the Court issued its decision, granting the Department's Motion to Pretermit, on July 27, 2016.

In its decision, the Court analyzed whether Respondent's convictions under VA CODE ANN. §§ 18.2-192 and 18.2-193 qualified as aggravated felonies, barring her from relief from removal, in the form of Cancellation of Removal. The Department argued that Respondent's conviction under VA CODE ANN. § 18.2-192 qualified as a theft offense under § 101(a)(43)(G) of the Immigration and Nationality Act ("the Act" or "INA"), and her conviction under VA CODE ANN. § 18.2-193 constituted a crime of forgery under INA § 101(a)(43)(R). The Court first analyzed whether each subsection of VA CODE ANN. § 18.2-192 was a categorical match to the generic definition of theft, as VA CODE ANN. § 18.2-192 is itself a divisible statute. The Board of Immigration Appeals ("the Board") previously determined that subsections (a) and (b) were categorical matches. The Court found subsection (d) was a categorical match since its elements were narrower than the generic definition of theft. However, the Court determined that subsection (c) had alternative elements, some, but not all of which, encompass the elements of the generic definition of theft. Therefore, the Court deemed subsection (c) divisible, permitting it to employ the modified categorical approach in order to determine which elements of the statute Respondent was convicted of. An examination of the conviction records submitted in Respondent's case did not indicate the

specific elements of credit card theft that Respondent was convicted under.

As Respondent was applying for Cancellation of Removal, it was her burden to prove that she was eligible for such relief. INA § 240(c)(4)(A). Even under a modified categorical approach, Respondent did not prove under which subsection of the statute she was convicted. Since Respondent could not prove she was not convicted under the subsections of the statute that were categorical matches to the generic definition of theft, Respondent could not prove that she had not been convicted of an aggravated felony, and thus could not prove she was eligible for Cancellation of Removal.

Further, the Court found that VA CODE ANN. § 18.2-193 was itself divisible, and each subsection of this statute was a categorical match to the common law definition of forgery. Thus, Respondent was again unable to meet her burden of showing that she had not been convicted of an aggravated felony, and thus could not demonstrate she was eligible for Cancellation of Removal.

Based on the above analysis, the Court granted the Department's Motion to Pretermit on July 27, 2016. Subsequent to the issuance of this decision, the Board issued a decision on September 28, 2016 further clarifying how to determine whether a criminal statute is divisible. *Matter of Chairez-Castrejon*, 26 I&N Dec. 819 (BIA 2016). In *Matter of Chairez-Castrejon*, the Board analyzed whether the respondent's conviction under UTAH CODE ANN. § 76-10-508.1 qualified as a crime of

violence under 18 U.S.C. § 16(a). When utilizing the categorical approach, the Board drew a clear distinction between "elements" and "facts." The Board explained that when a statute includes conduct that would qualify as a categorical match and conduct outside the scope of the relevant generic standard, a modified categorical approach can only be utilized if the statute is divisible, and a

> "criminal statute is divisible only if it (1) lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of 'elements,' more than one combination of which could support a conviction, and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a 'categorical match' to the relevant generic standard."

Id. at 822 (citing *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013)). In *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Supreme Court reaffirmed *Descamps* and clarified that

> "disjunctive statutory language does not render a criminal statute divisible unless each statutory alternative defines an independent 'element' of the offense, as opposed to a mere 'brute fact' describing various means or methods by which the offense can be committed."

Matter of Chairez-Castrejon, 26 I&N Dec. at 822 (citing *Mathis v. United States*, 136 S. Ct. 2243, 2248

(2016)). Under this direction from the Board and the Supreme Court, this Court will now re-examine the statutes under which Respondent was convicted, to determine whether Respondent was convicted of an aggravated felony, barring her from Cancellation of Removal.

a. Respondent's Credit Card Theft Conviction under VA CODE ANN. § 18.2-192

In relation to VA CODE ANN. § 18.2-192, the Board previously determined that subsections (a) and (b) were categorical matches to the generic definition of theft. Subsection (d) requires "He, not being the issuer, during any twelve-month period, receives credit cards or credit card numbers issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of § 18.2-194 and subdivision (1) (c) of this section." VA CODE ANN. § 18.2-192(1)(d). Subsection (d) is comprised of four distinct elements, all of which must be proven by the prosecution to sustain a conviction: (1) someone other than the issuer, (2) receives credit cards or credit card numbers issued in the names of two or more persons, (3) during any twelve-month period, (4) which he has reason to know were taken or retained under circumstances which constitute a violation of § 18.2-194 and subdivision (1) (c) of this section. *Id.* Since subsection (d) is comprised of elements narrower than the generic definition of theft, this subsection is a categorical match, and therefore a conviction under this subsection would always qualify as a theft under § 101(a)(43)(G) of the Act.

Subsection (c) provides, "He, not being the issuer, sells a credit card or credit card number or buys a credit card or credit card number from a person other than the issuer." VA CODE ANN. § 18.2-192(1)(c). The action of selling a credit card or credit card number as someone other than the issuer qualifies as a "taking" for purposes of credit card theft because it includes exercising control over property without consent of the owner. However, buying a credit card or credit card number from a person other than the issuer does not necessarily constitute a "taking," as required under the generic definition of theft. Thus, subsection (c) has alternative elements, some, but not all of which, encompass the elements of the generic definition of theft, meaning this subsection is not a categorical match to the generic definition of theft. Therefore, the Court employed the modified categorical approach for subsection (c) in its July 27, 2016 decision.

However, the Court must first determine whether subsection (c) is divisible before it utilizes the modified categorical approach. Under the analysis provided in *Matter of Chairez-Castrejon*, the Court now finds that subsection (c) does not list multiple discrete offenses or a single offense by reference to a disjunction sets of elements, and thus is not divisible. Subsection (c) has three distinct parts: (1) someone other than the issuer (2) sells a credit card or credit card number or buys a credit card or credit card number (3) from someone other than the issuer. VA CODE ANN. § 18.2-192(1)(c). A plain meaning reading of the statute reveals that in order to convict, a juror would not need to determine whether the defendant sold a credit card or whether the defendant bought a

credit card. Instead, the jury would need to decide that the defendant either sold or bought a credit card, without specification as to which one. Thus, this part of the statute does not constitute an "element" of the crime's legal definition, because they are not things that the prosecution must prove to sustain a conviction. Since this subsection does not define a single offense by reference to a disjunctive set of elements or list multiple discrete offenses as enumerated alternatives, it is not divisible under *Matter of Chairez-Castrejon*. As subsection (c) is overbroad and indivisible, the Court cannot employ the modified categorical approach to determine whether this subsection qualifies as a theft under INA § 101(a)(43)(G) using conviction records submitted into evidence. Therefore, a conviction under this subsection would not qualify as an aggravated felony. In *Matter of Chairez-Castrejon*, when addressing an overbroad and indivisible subsection within a divisible statute, the Board held "we have no present occasion to decide whether an applicant for cancellation of removal can carry his burden of proving the absence of a disqualifying conviction when the statute of conviction is divisible but the record of conviction is inconclusive." *Matter of Chairez-Castrejon*, 26 I&N Dec. at 825 n.7. Thus, the Court will continue to follow the INA requirement that "[a]n alien applying for relief or protection from removal has the burden of proof to establish that the alien satisfies the applicable eligibility requirements." INA § 240(c)(4)(A).

Since Respondent is applying for relief in the form of Cancellation of Removal, it is her burden to show that she is eligible for such relief. INA § 240(c)(4)(A).

Respondent was unable to prove that she was not convicted under the subsections of the statute that are categorical matches to the generic definition of theft under INA § 101(a)(43)(G). Thus, Respondent was unable to meet her burden of showing that she eligible for Cancellation of Removal for Certain Permanent Residents under INA § 240A(a), and the Department's Motion to Pretermit must be granted.

b. Respondent's Credit Card Forgery Conviction under VA CODE ANN. § 18.2-193

First, subsection (a) provides that a person is guilty of credit card forgery when: with intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely makes or falsely embosses a purported credit card or utters such a credit card. VA CODE ANN. § 18.2-193(a). Subsection (a) can be broken down into three distinct elements: (1) a person or organization providing money, goods, services or anything else of value, or any other person (2) falsely makes or falsely embosses a purported credit card or utters such a credit card (3) with the intent to defraud a purported issuer. *Id.* The Court previously found this subsection to be a categorical match to forgery offenses under § 101(a)(43)(R) of the Act since the only difference between the state statute and the common law definition of forgery is that the Virginia Code is specific to forgery of credit cards, while the common law definition applies to writings of legal significance; additionally, forgery offenses under INA § 101(a)(43)(R) include offenses *relating to* forgery.

Thus, this subsection is a categorical match to forgery offenses under § 101(a)(43)(R) of the Act.

Subsection (b) prohibits "He, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, signs a credit card." VA CODE ANN. § 18.2-193(b). This subsection consists of three separate elements, all of which must be proven by the prosecution to sustain a conviction: (1) an unauthorized individual other than the cardholder (2) signs a credit card (3) with the intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person. *Id*. This subsection is also a categorical match to forgery offenses under § 101(a)(43)(R) of the Act since it includes all of the elements of the common law definition of forgery, except it involves altering a credit card instead of a writing of legal significance.

Finally, subsection (c) establishes that a person is guilty of credit card forgery when "He, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, forges a sales draft or cash advance/withdrawal draft, or uses a credit card number of a card of which he is not the cardholder, or utters, or attempts to employ as true, such forged draft knowing it to be forged." VA CODE ANN. § 18.2-193(c). This subsection can also be separated into distinct elements: (1) an unauthorized individual other than the cardholder (2) forges a sales draft or

cash advance/withdrawal draft, or uses a credit card number of a card of which he is not the cardholder, or utters, or attempts to employ as true, such forged draft knowing it to be forged (3) with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person. *Id*. The second element of this statute requires an *actus reus* of either: forging a sales draft or cash advance/withdrawal, using a credit card number of a card of which he is not the cardholder, or uttering as true such forged draft knowing it is forged. *Id*. Since all of these actions, coupled with the intent to defraud, constitute offenses *relating to* forgery, subsection (c) qualifies as a categorical match to forgery offenses under INA § 101(a)(43)(R).

Since every subsection in Virginia Code § 18.2-193 is a categorical match to the common law definition of forgery, the Court's analysis of this statute from its July 27, 2016 opinion will not be disturbed. Respondent was unable to prove she was not convicted under the subsections of VA CODE ANN. § 18.2-193 that are categorical matches to the generic definition of forgery under § 101(a)(43)(R) of the Act. Thus, Respondent was unable to meet her burden of showing she is eligible for Cancellation of Removal for Certain Permanent Residents under INA § 240A(a), and the Department's Motion to Pretermit must be granted.

The Court will preserve Respondent's October 12, 2016 hearing, for the purpose of determining Respondent's eligibility for Voluntary Departure.

For the foregoing reasons, the following **ORDER** is **HEREBY ENTERED**:

> It is **ORDERED** that Respondent's October 12, 2016 hearing is preserved for the purpose of determining Respondent's eligibility for Voluntary Departure.
>
> Issued on October 12, 2016.
>
> /s/ Rebecca L. Holt
> Honorable Rebecca L. Holt
> Immigration Judge

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
MEMPHIS, TENNESSEE

IN THE MATTER OF	)	**IN REMOVAL**
	)	**PROCEEDINGS**
	)	
GUTIERREZ, Miriam	)	**FILE NO**.:
	)	A035-381-061
Respondent	)	
	)	**DATE**: July 27, 2016

CHARGE: Section 237(a)(2)(A)(ii) of the Act, as amended, in that, at any time after admission, you have been convicted of two crimes involving moral turpitude nor arising out of a single scheme of criminal misconduct.

APPLICATION: The Department of Homeland Security's Motion to Pretermit

ON BEHALF OF RESPONDENT:
Sheryl Hurst, Esq.
Hurst Immigration, PLLC
6263 Poplar Avenue, Suite 350
Memphis, TN 38119

ON BEHALF OF DHS:
William A. Lund, Esq.
Assistant Chief Counsel
80 Monroe Avenue, Suite 502
Memphis, TN 38103

DECISION OF IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

Respondent in this case is Miriam Gutierrez, a native and citizen of Bolivia. On January 13, 1980, Respondent was admitted to the United States near Miami, Florida as a Legal Permanent Resident. Exh. 4. On March 27, 2012, Respondent was personally served with a Notice to Appear (NTA), which charged her as removable under INA § 237(a)(2)(A)(ii) (after admission, convicted of two crimes involving moral turpitude). *Id*. The NTA ordered Respondent to appear before the Arlington Immigration Court on a date and time to be set. *Id*.

On January 31, 2013, Respondent was mailed a Notice of Hearing for a February 27, 2013 hearing. On February 27, 2013, venue was transferred in Respondent's case to the Memphis Immigration Court. Exh. 2. On March 20, 2013, Respondent was mailed a Notice of Hearing, notifying her of her September 5, 2013 Master Calendar hearing. Due to defective service of Respondent's NTA, her Master Calendar hearing was reset for February 13, 2014. On February 13, 2014, the Court granted the Department of Homeland Security's ("the Department") Motion for a Continuance, resetting Respondent's case for March 13, 2014. Upon the Department's oral Motion, Respondent's case was again continued until May 15, 2014. On May 15, 2014, the Department provided the Court with an updated address for Respondent. On that same day Respondent was mailed a Notice of Hearing for a June 12, 2014 Master Calendar hearing. Respondent

appeared *pro se* at her Master Calendar hearing on June 12, 2014, and requested additional time to find an attorney. Respondent was personally served with a Notice of Hearing of her October 9, 2014 Master Calendar hearing. On October 9, 2014, Respondent, through counsel, admitted the allegations and conceded the charge of removability; therefore, the Court sustained the § 237(a)(2)(A)(ii) charge. Also on that date, Respondent's case was reset for February 26, 2015, for the filing of her applications for relief.

At the February 26, 2015 hearing, Respondent filed a Form 42A Application for Cancellation of Removal for Certain Permanent Residents, and Respondent was given notice of her October 12, 2016 hearing. On November 25, 2015, the Department filed a Motion to Pretermit Respondent's application for Cancellation of Removal under INA § 240A(a). Respondent filed a response to the Department's Motion to Pretermit on December 24, 2015. The Court now issues this decision.

II. ANALYSIS

In order to be eligible for Cancellation of Removal for Certain Permanent Residents, an alien must not have been convicted of an aggravated felony. INA § 240A(a)(3). INA § 101(a)(43)(G) provides that an aggravated felony includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year." An aggravated felony also includes "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of

which have been altered for which the term of imprisonment is at least one year." INA § 101(a)(43)(R). Respondent was convicted of Credit Card Theft in violation of Virginia Code 18.2-192 and Credit Card Forgery in violation of Virginia Code 18.2-193 on April 20, 2012. For these crimes, Respondent was sentenced to three years incarceration.

When the Department alleges that a state conviction qualifies as an "aggravated felony" under the INA, the Court must employ the "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). Under this approach, the Court will look "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony. *Taylor v. United States*, 495 U.S. 575, 599-600 (1990). "Generic" means the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison, and the alien's actual conduct is irrelevant. *Moncrieffe*, 133 S. Ct. at 1684.

To determine whether an alien has been convicted of one of the many "generic" criminal offenses that carry certain immigration-related consequences, the Court must apply the framework laid out in *Taylor v. United States*, 495 U.S. 575, 602 (1990). First, the Court employs a categorical-type inquiry that compares the elements of the underlying statute to those of the generic offense at issue. *Moncrieffe v.*

Holder, 133 S. Ct. 1678, 1684 (2013). This is done by examining the statute of conviction "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion." *Begay v. United States*, 553 U.S. 137, 141 (2008); *see Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013) ("The key … is elements, not facts."). If the elements of the statute are the same as, or narrower than, those of the generic offense, the offense is said to "categorical[ly]" constitute the generic offense. *Descamps*, 133 S.Ct. at 2281.

If the statute has alternative elements, some—but not all—of which encompass the elements of the generic offense, the statute is said to be "divisible" and the Court can examine the underlying record of conviction to determine which elements (generic or non-generic) formed the basis of the conviction. *See id*. at 2279. This is known as the modified categorical approach, which can be used "only to determine which alternative element in a divisible statute formed the basis of the [underlying] conviction." *See id*. at 2292-93.

If "the statute of conviction has an overbroad or missing element …, [an alien] convicted under that statute is *never* convicted of the generic crime." *See id*. at 2280 (emphasis added).

a. Respondent's Credit Card Theft Conviction under VA CODE ANN. § 18.2-192

On April 20, 2012, Respondent was convicted of Credit Card Theft under VA CODE ANN. § 18.2-192.

The Court first looks to the statutory language of the offense to determine whether the offense is categorically an aggravated felony. Section 18.2-192 states:

> (1) A person is guilty of credit card or credit card number theft when:
>
> (a) He takes, obtains or withholds a credit card or credit card number from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, obtained or withheld, receives the credit card or credit card number with intent to use it or sell it, or to transfer it to a person other than the issuer or the cardholder; or
>
> (b) He receives a credit card or credit card number that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use, to sell or to transfer the credit card or credit card number to a person other than the issuer or the cardholder; or
>
> (c) He, not being the issuer, sells a credit card or credit card number or buys a credit card or credit card number from a person other than the issuer; or

> (d) He, not being the issuer, during any twelve-month period, receives credit cards or credit card numbers issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of § 18.2-194 and subdivision (1) (c) of this section.
>
> (2) Credit card or credit card number theft is grand larceny and is punishable as provided in § 18.2-95.

VA CODE ANN. § 18.2-192.

The Board of Immigration Appeals ("the Board") has held that VA CODE ANN. § 18.2-192 is itself divisible, therefore the Court will examine whether each subsection of § 18.2-192 is a categorical match to the generic definition of theft. Esmirna Chirstina Hondoy, A 070 436 114 (BIA August 27, 2008).

The Board has previously determined that subsections (a) and (b) under Virginia Code § 18.2-192 categorically match the generic definition of "theft" under § 101(a)(43)(G) of the Act. Fernando Monje-Buitrago, A 074 832 255 (BIA December 22, 2011); *see also* Esmirna Chirstina Hondoy, A 070 436 114 (BIA August 27, 2008). Therefore, the Court will compare the elements of subsections (c) and (d) with the generic definition of "theft."

Subsection (c) requires, "He, not being the issuer, sells a credit card or credit card number or buys a

credit card or credit card number from a person other than the issuer." VA CODE ANN. § 18.2-192(1)(c). As subsection (c) is itself divisible, "comprises multiple, alternative versions of the crime," the Court must determine whether all of the conduct prohibited by this subsection falls within the definition of theft as used in § 101(a)(43)(G) of the Act. *Descamps v. United States*, 133 S. Ct. 2276, 2284 (2013). If the statute has alternative elements, some—but not all—of which encompass the elements of the generic offense, the modified categorical approach may be used to "look beyond the statutory elements" to the charging paper and jury instructions used in a case. *Id.*

The Supreme Court of the United States and the Board have held that a crime is a theft offense within the meaning of § 101(a)(43)(G) of the Act if it consists of "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 183-84 (2007); *see also Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440-41 (BIA 2008).

The Board has previously explained that a "taking" in relation to credit card theft

> is different from other types of theft in that access to the credit card number (and use of the number) is theft even if the credit card holder still retains access to the credit card or number. This is a unique part of credit card theft in that the thief does not have to

> maintain exclusive control over the property in order to have committed theft. This is so because the credit card, or at least the credit card number, can be possessed by more than one person and transactions can be completed simultaneously. Accordingly, the 'taking' aspect of a credit card number is different from a 'taking' with respect to other types of property which can only be possessed by one person at a time such as jewelry.... The fact that the 'taking' is not exclusive does not make it any less of a 'taking' because the thief is still obtaining something that does not belong to him—namely the goods or services he is 'buying' with credit card number but not actually paying for.

Esmirna Chirstina Hondoy, A 070 436 114 (BIA August 27, 2008). The Board has further explained that a "theft" for purposes of § 101(a)(43)(G) of the Act has occurred when "property has been obtained from its owner 'without consent.'" *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 439 (BIA 2008)). The Supreme Court of Virginia has held that "credit card theft is completed where the card or number is unlawfully taken from its rightful owner or is received with knowledge that it has been taken and with the intent to use it, sell it, or transfer it." *Meeks v. Com.*, 274 Va. 798, 803 (2007).

While subsection (c) does not explicitly require a "taking" synonymous with traditional types of theft, the action of selling a credit card or credit card number as someone other than the issuer qualifies as a "taking" for purposes of credit card theft because it

includes exercising control over property without consent of the owner. However, buying a credit card or credit card number from a person other than the issuer does not necessarily constitute a "taking." Thus, subsection (c) has alternative elements, some, but not all of which, encompass the elements of the generic definition of theft.

If the issue cannot be resolved under the categorical approach, the Court would continue on to review the record of conviction, as permitted under the modified categorical approach. *See Matter of Silva-Trevino*, 26 I&N Dec. 550 (A.G. 2015); *Moncrieffe v. Holder*, 133 S.Ct. 1678, 1688 (2013), *Descamps v. United States*, 133 S. Ct. 2276 (2013). The record of conviction includes the charging document, indictment, judgment of conviction, jury instructions, plea, plea transcript, and sentence. *See Matter of Ajami*, 22 I&N Dec. 949, 960 (BIA 1999). However, the record of conviction does not include police reports, *see Matter of Teixeira*, 21 I&N Dec. 316, 319 (BIA 1999), unless they were specifically incorporated into the guilty plea or were admitted by the alien during the criminal proceedings. *Matter of Milian*, 25 I&N Dec. 197 (BIA 2010).

An examination of the conviction records submitted into evidence do not indicate the specific elements of credit card theft that Respondent was convicted under. Respondent even admits that her "record of conviction is inconclusive as to the facts Respondent was convicted under." Respondent's Response to DHS's Motion to Pretermit at 10. Respondent submitted two conviction documents in relation to her Credit Card Theft charge, the first was

the Plea Agreement Memorandum indicating she was pleading guilty to Credit Card Theft, which carried a sentence of "imprisonment in a state correctional facility for not less than one (1) year nor more than twenty (20) years, or confinement in jail for a period not exceeding twelve (12) months or a fine of not more than $2,500, either or both." Respondent's Response to the Department's Motion to Pretermit at Exh. B. Respondent also submitted her sentencing order dated April 20, 2012, indicating she was sentenced to three years incarceration pursuant to a violation of Virginia Code § 18.2-192. Respondent's Application for Cancellation of Removal at Exh. 16, Page 79. However, neither of these documents indicate which subsection of the statute Respondent was convicted under, or the specific elements of Credit Card Theft that led to her conviction.

Subsection (d) requires "He, not being the issuer, during any twelve-month period, receives credit cards or credit card numbers issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of § 18.2-194 and subdivision (1) (c) of this section." VA CODE ANN. § 18.2-192(1)(d). The Board has determined that "obtaining or withholding a credit card without consent could also be viewed as an indirect taking … encompassed by section 101(a)(43)(G) of the Act." *Matter of Garcia-Madruga*, 24 I&N Dec. 436, 441 n.6 (BIA 2008). Thus, receiving a credit card or credit card number having reason to know it was taken or unlawfully retained qualifies as "theft" because it is an indirect taking as it involves obtaining a credit card without consent. Additionally, § 101(a)(43)(G) of

the Act explicitly includes "receipt of stolen property" within the theft offense. However, subsection (d) also includes the more specific requirements of receiving credit cards or numbers issued in the names of *two or more persons* within a *twelve month period*. VA CODE ANN. § 18.2-192(1)(d). Thus, this subsection is narrower than the generic definition of theft, meaning anyone convicted under this subsection is "necessarily … guilty of all the elements of generic [theft]." *Taylor v. United States*, 495 U.S. 575, 599 (1990). If the elements of the statute are the same as, or narrower than, those of the generic offense, the offense is said to "categorical[ly]" constitute the generic offense. *Descamps*, 133 S.Ct. at 2281. Therefore, a conviction under § 18.2-192(1)(d) is a categorical match the generic definition of "theft" under § 101(a)(43)(G) of the Act.

In conclusion, the Board has found that subsections (a) and (b) of VA CODE ANN. § 18.2-192 are categorical matches to the generic definition of "theft" under § 101(a)(43)(G) of the Act. Subsection (c) is divisible as it has alternative elements, some, but not all of which, encompass the elements of the generic definition of theft, requiring a modified categorical approach. Upon review of Respondent's conviction documents, it is unclear under which elements Respondent was convicted. Subsection (d) is narrower than the generic definition of theft, and thus a conviction under this subsection necessarily qualifies as a categorical match to the generic definition of "theft" under § 101(a)(43)(G) of the Act.

Despite these varied outcomes, Respondent has not provided under which subsection she was

convicted. Additionally, an examination of the conviction records submitted into evidence do not indicate under which subsection Respondent was convicted.

Since Respondent is applying for an application for relief in the form of Cancellation of Removal, it is her burden to show that she is eligible for such relief. INA § 240(c)(4)(A) (stating "[a]n alien applying for relief or protection from removal has the burden of proof to establish that the alien satisfies the applicable eligibility requirements."). In *Matter of Almanza-Arenas*, the Board held that an alien who has been convicted of an offense under a divisible criminal statute has the burden to establish that the conviction does not statutorily bar him or her from relief. *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009). In that case, the respondent had been convicted of vehicle theft under § 10851(a) of the California Vehicle Code. *Id.* at 772. After conceding removability, the respondent applied for Cancellation of Removal. *Id.* The Immigration Judge determined that the California statute was divisible because it included the act of joyriding as well as an actual theft offense. In his application, the respondent "failed to provide evidence to prove that his crime was outside the scope of 'theft,' and thus not a crime involving moral turpitude," therefore the Immigration Judge found Respondent failed to establish his eligibility for Cancellation of Removal. *Id.* at 773. The Board upheld the Immigration Judge's ruling, explaining that "the respondent has failed to meet his burden of proof to establish that he was not convicted of a crime involving moral turpitude," and that to "hold otherwise would allow the respondent to pick and

choose, to his advantage, the portions of evidence relevant to the determination of his eligibility for relief." *Id*. at 776.

Similarly, in this case, the Virginia statute Respondent was convicted under includes crimes that have been determined to be aggravated felonies, and crimes that would not qualify as aggravated felonies. Additionally, since Respondent is applying for relief from removal in the form of Cancellation of Removal, it is her burden to prove she is eligible for such relief. INA § 240(c)(4)(A). Even under the modified categorical approach, Respondent was unable to prove she was not convicted under the subsections of the statute the Board has held to be a categorical match to the generic definition of theft under § 101(a)(43)(G) of the Act. Thus, Respondent was unable to meet her burden of showing she eligible for Cancellation of Removal for Certain Permanent Residents under INA § 240A(a), and the Department's Motion to Pretermit must be granted.

b. Respondent's Credit Card Forgery Conviction under VA CODE ANN. § 18.2-193

Although the Court has found Respondent to be ineligible for Cancellation of Removal due to her conviction under Virginia § 18.2-192, the Department argues that her conviction under Virginia Code § 18.2-193 also qualifies as an aggravated felony, barring Respondent from the relief she seeks. Notwithstanding that the decision is issued properly under the Regulations, the Court will evaluate the

balance of the Department's claim for administrative efficiency.

On April 20, 2012, Respondent was convicted of Credit Card Forgery under VA CODE ANN. § 18.2-193. The Court first looks to the statutory language of the offense to determine whether the offense is categorically an aggravated felony. Section 18.2-193 states a person is guilty of credit card forgery when:

> (a) With intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely makes or falsely embosses a purported credit card or utters such a credit card; or
>
> (b) He, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, signs a credit card; or
>
> (c) He, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, forges a sales draft or cash advance/withdrawal draft, or uses a credit card number of a card of which he is not the cardholder, or utters, or attempts to

> employ as true, such forged draft knowing it to be forged.
>
> VA CODE ANN. § 18.2-193.

The common law definition of forgery has three elements: (1) the false making or material alteration (2) with intent to defraud (3) of a writing which, if genuine, might be of legal significance. Jamal Diab A.K.A. Diab Michael, A 044 271 849 (BIA March 12, 2015) (citing *United States v. McGovern*, 661 F.2d 27, 29 (3d Cir. 1981)). In addition to a forgery offense, the INA includes "an offense *relating to* … forgery … for which the term of imprisonment [was] at least one year." INA § 101(a)(43)(R) (emphasis added). The Board has held that when analyzing whether a state statute is a categorical match to forgery offenses under 101(a)(43)(R) of the Act, "it does not appear that Congress intended to limit the application of the 'aggravated felony' definition under § 101(a)(43)(R) of the Act to include *only* 'forgery' offenses as contemplated under the common-law offense of forgery. Rather, the aggravated felony definition encompasses 'offense[s] relating to … forgery.'" Jamal Diab A.K.A. Diab Michael, A 044 271 849 (BIA March 12, 2015).

VA CODE ANN. § 18.2-193 is itself divisible, therefore the Court will examine whether each subsection of § 18.2-193 is a categorical match to the generic definition of forgery. First, subsection (a) requires (1) a person or organization providing money, goods, services or anything else of value, or any other person (2) intent to defraud a purported issuer (3) falsely makes or falsely embosses a

purported credit card or utters such a credit card. VA CODE ANN. § 18.2-193. Consequently, the only difference between the state statute and common law definition of forgery is that the Virginia code is specific to forgery of credit cards, while the common law definition applies to writings of legal significance. Since forgery offenses under 101(a)(43)(R) include offenses *relating to* forgery, § 18.2-193(1)(a) is a categorical match to forgery offenses under 101(a)(43)(R).

Subsection (b) requires (1) he, not being the cardholder or a person authorized by him (2) with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person (3) signs a credit card. Someone other than the cardholder signing a credit card with the intent to defraud the issuer is equivalent to a material alteration. Thus, this subsection is also a categorical match to forgery offenses under § 101(a)(43)(R) of the Act since it includes all of the elements of the common law definition of forgery, except it involves altering a credit card instead of a writing of legal significance. Additionally, as forgery offenses under § 101(a)(43)(R) include offenses *relating to* forgery, § 18.2-193(1)(b) is a categorical match to forgery offenses under 101(a)(43)(R).

However, even if signing a credit card with the intent to defraud the issuer does not amount to a material alteration, subsections (a) and (c) of VA CODE ANN. § 18.2-193 are categorical matches to forgery offenses under 101(a)(43)(R) of the Act. Respondent has not provided under which subsection

she was convicted. Additionally, an examination of the conviction records submitted into evidence do not indicate under which subsection Respondent was convicted. Since Respondent is applying for an application for relief in the form of Cancellation of Removal, it is her burden to show that she is eligible for such relief. INA § 240(c)(4)(A).

Subsection (c) requires (1) he, not being the cardholder or a person authorized by him (2) with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person (3) forges a sales draft or cash advance/withdrawal draft, or uses a credit card number of a card of which he is not the cardholder, or utters, or attempts to employ as true, such forged draft knowing it to be forged. This subsection has the same *mens rea* requirement as the common law definition of forgery, mainly the intent to defraud. The third element requires an *actus reus* of either: forging a sales draft or cash advance/withdrawal, using a credit card number of a card of which he is not the cardholder, or uttering as true such forged draft knowing it is forged. Forging a sales draft or cash advance/withdrawal is equivalent to "the false making or material alteration" element of common law forgery. Additionally, using the credit card number of a card of which he is not the cardholder and uttering as true a forged draft knowing it to be forged, coupled with the intent to defraud, constitute offenses *relating to* forgery. Therefore, subsection (c) qualifies as a categorical match to forgery offenses under 101(a)(43)(R).

In conclusion, subsections (a), (b), and (c) of the VA CODE ANN. § 18.2-193 are categorical matches to the common law definition of forgery. Even if subsection (b) is found not to be a categorical match to the generic definition of forgery, Respondent did not provide under which subsection of VA CODE ANN. § 18.2-193 she was convicted. As Respondent is applying for Cancellation of Removal, it is her burden to prove she is eligible for such relief. INA § 240(c)(4)(A). Even under the modified categorical approach, Respondent was unable to prove she was not convicted under the subsections of the statute that are categorical matches to the generic definition of forgery under § 101(a)(43)(R) of the Act. Thus, Respondent was unable to meet her burden of showing she eligible for Cancellation of Removal for Certain Permanent Residents under INA § 240A(a), and the Department's Motion to Pretermit must be granted.

III. ORDERS

For the foregoing reasons, the following **ORDERS** are **HEREBY ENTERED**:

> It is **HEREBY ORDERED** that the Department of Homeland Security's Motion to Pretermit be **GRANTED**.
>
> It is **FURTHER ORDERED** that Respondent be scheduled for a Master Calendar hearing for the sole purpose of

determining eligibility for voluntary departure.

DATED this 27 day of July, 2016.

/s/ Rebecca L. Holt
Honorable Rebecca L. Holt
Immigration Judge

APPENDIX F

No. 17-3749

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

MIRIAM GUTIERREZ,	)	FILED
	)	Aug 20, 2018
Petitioner,	)	
	)	
v.	)	ORDER
	)	
JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,	)	
	)	
Respondent.	)	
	)	
	)	
	)	

BEFORE: SILER, BATCHELDER and DONALD, Circuit Judges.

The court received a petition for rehearing en banc. The original panel has reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. The petition then was circulated to the full court. No judge has requested a vote on the suggestion for rehearing en banc.

Therefore, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Deborah S. Hunt, Clerk

APPENDIX G

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1101

§ 1101. Definitions

(a) As used in this chapter—

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(43) The term "aggravated felony" means—

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(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

APPENDIX H

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1229a

§ 1229a. Removal proceedings

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(c) Decision and burden of proof

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(2) Burden on alien

In the proceeding the alien has the burden of establishing—

(A) if the alien is an applicant for admission, that the alien is clearly and beyond doubt entitled to be admitted and is not inadmissible under section 1182 of this title; or

(B) by clear and convincing evidence, that the alien is lawfully present in the United States pursuant to a prior admission.

In meeting the burden of proof under subparagraph (B), the alien shall have access to the alien's visa or other entry document, if any, and any other records and documents, not considered by the Attorney General to be confidential, pertaining to the alien's admission or presence in the United States.

(3) Burden on service in cases of deportable aliens

(A) In general

In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

(B) Proof of convictions

In any proceeding under this chapter, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.

(ii) An official record of plea, verdict, and sentence.

(iii) A docket entry from court records that indicates the existence of the conviction.

(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.

(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

(C) Electronic records

In any proceeding under this chapter, any record of conviction or abstract that has been submitted by electronic means to the Service from a State or court shall be admissible as evidence to prove a criminal conviction if it is—

(i) certified by a State official associated with the State's repository of criminal justice records as an official record from its repository or by a court official from the court in which the conviction was entered as an official record from its repository, and

(ii) certified in writing by a Service official as having been received electronically from the State's record repository or the court's record repository.

A certification under clause (i) may be by means of a computer-generated signature and statement of authenticity.

(4) Applications for relief from removal

(A) In general

An alien applying for relief or protection from removal has the burden of proof to establish that the alien—

(i) satisfies the applicable eligibility requirements; and

(ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

(B) Sustaining burden

The applicant must comply with the applicable requirements to submit information or documentation in support of the applicant's application for relief or protection as provided by law or by regulation or in the instructions for the application form. In evaluating the testimony of the applicant or other witness in support of the application, the immigration judge will determine whether or not the testimony is credible, is persuasive, and refers to specific facts sufficient to demonstrate that the applicant has satisfied the applicant's burden of proof. In determining whether the applicant has met such burden, the immigration judge shall weigh the credible testimony along with other evidence of record. Where the immigration judge determines that the applicant should provide evidence which corroborates otherwise credible testimony, such evidence must be provided unless the applicant demonstrates that the applicant does not have the

evidence and cannot reasonably obtain the evidence.

(C) Credibility determination

Considering the totality of the circumstances, and all relevant factors, the immigration judge may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.

APPENDIX I

United States Code
Title 8. Aliens and Nationality

8 U.S.C. § 1229b

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(A) has been physically present in the United States for a continuous period of not less than 10

years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes 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.

APPENDIX J

Code of Federal Regulations
Title 8. Aliens and Nationality

8 C.F.R. § 1240.8

§ 1240.8. Burdens of proof in removal proceedings

(a) *Deportable aliens*. A respondent charged with deportability shall be found to be removable if the Service proves by clear and convincing evidence that the respondent is deportable as charged.

(b) *Arriving aliens*. In proceedings commenced upon a respondent's arrival in the United States or after the revocation or expiration of parole, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(c) *Aliens present in the United States without being admitted or paroled*. In the case of a respondent charged as being in the United States without being admitted or paroled, the Service must first establish the alienage of the respondent. Once alienage has been established, unless the respondent demonstrates by clear and convincing evidence that he or she is lawfully in the United States pursuant to a prior admission, the respondent must prove that he or she is clearly and beyond a doubt entitled to be admitted to the United States and is not inadmissible as charged.

(d) *Relief from removal*. The respondent shall have the burden of establishing that he or she is eligible for any

requested benefit or privilege and that it should be granted in the exercise of discretion. If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.

APPENDIX K

Code of Virginia
Title 18.2. Crimes and Offenses Generally

Virginia Code § 18.2-192

§ 18.2-192. Credit card theft

(1) A person is guilty of credit card or credit card number theft when:

(a) He takes, obtains or withholds a credit card or credit card number from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, obtained or withheld, receives the credit card or credit card number with intent to use it or sell it, or to transfer it to a person other than the issuer or the cardholder; or

(b) He receives a credit card or credit card number that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use, to sell or to transfer the credit card or credit card number to a person other than the issuer or the cardholder; or

(c) He, not being the issuer, sells a credit card or credit card number or buys a credit card or credit card number from a person other than the issuer; or

(d) He, not being the issuer, during any twelve-month period, receives credit cards or credit card numbers issued in the names of two or more persons

which he has reason to know were taken or retained under circumstances which constitute a violation of § 18.2-194 and subdivision (1) (c) of this section.

(2) Credit card or credit card number theft is grand larceny and is punishable as provided in § 18.2-95.