No. 17-3749

IN THE
United States Court of Appeals for the Sixth Circuit

MIRIAM GUTIERREZ,
Petitioner,
v.

JEFFERSON B. SESSIONS, III,
United States Attorney General,
Respondent.

On Petition for Review of an Order of the Board of Immigration Appeals

PETITION FOR REHEARING AND REHEARING EN BANC

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

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

Brian P. Goldman
Cynthia B. Stein
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700
brian.goldman@orrick.com

Aaron W. Scherzer
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 W. 52nd Street
New York, NY 10019

Counsel for Petitioner

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RULE 35 STATEMENT

The panel's decision addresses an important and recurring question of immigration law: whether a state-court criminal conviction bars a noncitizen from even applying for immigration relief like asylum and cancellation of removal, where the record of conviction is ambiguous as to which prong of a divisible statute formed the basis for the conviction. The panel acknowledged that "our sister circuits are divided" on that question, slip op. 6, and its conclusion—that the conviction forecloses eligibility for relief—conflicts with recent decisions of the Supreme Court and the First, Second, and Third Circuits. The result here is that an ambiguous state-court conviction for "credit card theft" must be treated as an "aggravated felony" under federal immigration law—a designation that prevents Ms. Gutierrez, a 60-year-old lawful permanent resident of this country, from even attempting to show why she merits a favorable exercise of discretion to remain here with her U.S.-citizen children and grandchildren. Panel rehearing or rehearing en banc is warranted.

The panel's decision cannot be reconciled with *Moncrieffe v. Holder*, 569 U.S. 184 (2013). The panel reasoned that immigration

judges considering applications for relief must assume that convictions analyzed under the modified categorical approach are disqualifying where the record of conviction is ambiguous. *Moncrieffe* clarifies, however, that courts "must presume that the conviction 'rested upon nothing more than the *least* of the acts' criminalized," not the most. 569 U.S. at 190-91 (emphasis added) (citation and brackets omitted). A conviction under an overbroad state statute presumptively is *not* a disqualifying predicate offense. That presumption is overcome only if the conviction "necessarily" establishes that the elements of the narrower federal offense were found or admitted. *Id.* at 192. A record of conviction that is merely ambiguous does not meet that high bar.

The panel reasoned that *Moncrieffe*'s presumption did not apply because, as a general matter, a noncitizen seeking relief from removal bears the burden of proving her eligibility. But, as the First Circuit recognized in *Sauceda v. Lynch*, 819 F.3d 526, 533-34 (1st Cir. 2016), an evidentiary burden applies only to questions of fact, like the length of a noncitizen's continuous residence in the United States, not to questions of law, like whether a state conviction "necessarily" corresponds to a federal offense. Accordingly, *Moncrieffe* held that "[o]ur analysis [of

prior convictions] is the same in both [the removal and cancellation] contexts," notwithstanding that the government bears the burden of proof in one and the noncitizen in the other. 569 U.S. at 191 n.4. Yet under the panel's rule, a single conviction *would not* count as an aggravated felony at the removal stage of proceedings but *would* count as an aggravated felony at the relief stage. This incongruous result conflicts with other circuits' decisions and Supreme Court precedent.

Rehearing is particularly warranted because, in concluding that an ambiguous record is nevertheless disqualifying, the panel opinion principally relied on the Ninth Circuit's panel opinion in *Marinelarena v. Sessions*, 869 F.3d 780 (9th Cir. 2017). But the Ninth Circuit recently granted en banc rehearing there. 886 F.3d 737 (9th Cir. 2018). That development alone warrants rehearing.

The petition should be granted.

STATEMENT OF THE CASE

1. Petitioner Miriam Gutierrez is a 60-year-old native and citizen of Bolivia. AR3, 155. She has been a lawful permanent resident of this country for 38 years, and she has four U.S.-citizen daughters. AR144,

147, 152. Ms. Gutierrez suffers from several serious medical conditions that require ongoing medical care. *See* AR253-397.

2. In 2012, the government charged Ms. Gutierrez as removable for having been convicted of two "crimes involving moral turpitude." Slip op. 2; AR132. Ms. Gutierrez conceded she was removable but applied for cancellation of removal. Slip op. 2; AR133. As a lawful permanent resident, her eligibility for 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) determined that Ms. Gutierrez's convictions for two counts of credit card theft under Virginia Code § 18.2-192 were disqualifying. AR129-30, 237. The IJ correctly explained that a conviction under § 18.2-192 does not fall *categorically* within the definition of a generic theft offense because one subsection of that provision—§ 18.2-192(1)(c)—criminalizes a broader range of conduct than generic theft. AR129-30. The IJ also concluded that the

statute is divisible because each subsection represents a distinct offense, and thus the IJ applied the modified categorical approach. AR129-30, 136. But the record of conviction was ambiguous—it did not specify which particular subsection formed the basis for the underlying conviction. AR127-28. Because the conviction documents thus did not definitively demonstrate that she *was* convicted under subsection (c), the IJ found Ms. Gutierrez had failed to prove that she was *not* convicted of an aggravated felony. Slip op. 3; AR130.

3. The Board of Immigration Appeals (BIA) dismissed Ms. Gutierrez's appeal. Like the IJ, it determined that Ms. Gutierrez was required to prove "that she was charged and pled guilty under 18.2-192(1)(c) (rather than under subdivisions (1)(a) or (1)(b))." AR5; slip op. 3-4. 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. AR5-6; slip op. 4.

4. The panel here denied Ms. Gutierrez's petition for review in a precedential decision issued without oral argument. As the panel explained, "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." Slip op. 4 n.4, 6 (internal punctuation omitted). It observed that the question is one "of first impression" on which "our sister circuits are divided." *Id.* The panel acknowledged the Supreme Court's holding in *Moncrieffe v. Holder* that a court examining the effect of a criminal conviction "*must presume* that the conviction 'rested upon [nothing] more than *the least of th[e] acts*' criminalized." *Id.* at 7 (quoting *Moncrieffe*, 569 U.S. at 190-91). It concluded, however, that *Moncrieffe*'s presumption applies only to determinations of removability, not eligibility for relief from removal, and only when applying the categorical approach, not the modified categorical approach. *Id.* at 7-8.

REASONS FOR GRANTING THE PETITION

I. The Panel's Decision Conflicts With Recent Supreme Court Decisions

The panel held that an inconclusive record of conviction precludes a noncitizen from even seeking cancellation of removal because noncitizens bear the burden of proving eligibility for relief from removal. Under *Moncrieffe*, however, an ambiguous record of conviction does *not* render a conviction disqualifying. *Moncrieffe* governs

regardless of which party bears the burden of proof because the analysis of past convictions is "the same in both [the removal and cancellation] contexts." 569 U.S. at 191 n.4. That is because Congress used the same language—"convicted of" an "aggravated felony"—in both contexts. As the First Circuit recently held, *Moncrieffe* "dictates the outcome" where a conviction based on an overbroad statute is ambiguous, because the categorical approach (and its modified variant) entails a purely legal analysis that is unaffected by any evidentiary burden of proof. *Sauceda*, 819 F.3d at 531.

A. Ms. Gutierrez's eligibility for cancellation turns on whether she has been "convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3). "'Conviction' is 'the relevant statutory hook,'" so the inquiry centers on "what offense the noncitizen was 'convicted' of, not what acts [s]he committed." *Moncrieffe*, 569 U.S. at 191 (citation and brackets omitted). Accordingly, courts must examine a criminal statute's elements to determine "if a conviction of the state offense 'necessarily' involved ... facts equating to the generic federal offense." *Id.* at 190 (some internal punctuation 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." *Id.* at 190-91 (emphases added) (citation and brackets omitted); *Descamps v. United States*, 570 U.S. 254, 267 (2013). The Supreme Court has since reaffirmed that least-acts-criminalized presumption several times. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 n.1 (2018); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

Under *Moncrieffe*, then, when a state statute sweeps in more conduct than the corresponding federal offense, a conviction under that statute presumptively is not disqualifying. This least-acts-criminalized presumption may be rebutted under 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 the federal 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, when a record of conviction is ambiguous, the noncitizen "was not *convicted* of [the federal offense]," as a matter of law. *Id.* at 194-95 (emphasis added).

Here, it is "undisputed" that the Virginia statute of conviction is overbroad—that "at least one" of the statute's subsections does not match the generic definition—and that the record of conviction does not establish whether Ms. Gutierrez was convicted under a subsection that fits within that definition. Slip op. 6. Because the conviction does not *necessarily* establish a generic theft offense, by default it does not count as an aggravated felony.

B. The panel nevertheless held that a noncitizen with an inconclusive record of conviction is ineligible to even apply for cancellation of removal, because, in general, the immigration laws place a burden on noncitizens to prove their eligibility for immigration relief. Slip op. 10-12 (citing 8 U.S.C. § 1229a(c)(4)(A)(i) and 8 C.F.R. § 1240.8(d)). But an "evidentiary standard of proof applies to questions of fact and not to questions of law." *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114 (2011) (Breyer, J., concurring); *see* 2 McCormick on Evidence § 339 (7th ed. 2016). To prove her eligibility for cancellation,

for example, Ms. Gutierrez had to marshal evidence that she continually resided in the United States for seven years prior to her application for cancellation of removal. 8 U.S.C. § 1229b(a)(2).

In contrast, "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 534-35 (quoting *Mellouli*, 135 S. Ct. at 1987). As Judge Watford of the Ninth Circuit has explained, this is a binary "legal question with a yes or no answer … [whose] resolution is unaffected by which party bears the burden of proof." *Almanza-Arenas v. Lynch*, 815 F.3d 469, 488-89 (9th Cir. 2015) (en banc) (Watford, J., concurring). When a record of conviction is inconclusive, "uncertainty remains as to what [the petitioner] actually *did* to violate" the state statute, "[b]ut uncertainty on that score doesn't matter." *Id.* at 489. Rather, "[w]hat matters … is whether [the petitioner's] conviction *necessarily* established" the elements of a corresponding federal offense. *Id.* The burden of proof "does not come into play." *Sauceda*, 819 F.3d at 534.

Under the panel's ruling, however, an ambiguous conviction like Ms. Gutierrez's *would not* count as an aggravated felony conviction 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 divergence makes no sense: "[I]dentical words used in different parts of the same act are intended to have the same meaning." *Pereira v. Sessions*, ___ S. Ct. ___, No. 17-459, 2018 WL 3058276, at *8 (U.S. June 21, 2018). And it is flatly inconsistent with *Moncrieffe*'s observation that the analysis of a prior conviction "is the same in both [the removal and cancellation] contexts." 569 U.S. at 191 n.4; *infra* 13-14.

The panel discounted *Moncrieffe*'s statement because *Moncrieffe* was referring to convictions, and not—according to the panel—burdens of proof. Slip op. 8. But what it means to be "convicted of any aggravated felony" is precisely the question the categorical inquiry answers. Giving "conviction" a single meaning under the INA not only is proper statutory interpretation, but also avoids the illogic of the panel's rule.

C. The panel's reasoning is also inconsistent with *Moncrieffe* in another respect. It risks creating precisely the sort of "potential unfairness" that "[t]he categorical approach was designed to avoid":

"[T]wo 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.

The Supreme Court has long understood and accepted "that in many cases state and local records … will be incomplete." *Johnson v. United States*, 559 U.S. 133, 145 (2010). Even where state courts record which portion of a divisible statute formed the basis for a conviction in the first place, they may have a practice of destroying records for old convictions. Kentucky and Ohio, for example, permit destruction of certain misdemeanor case files after five years.[1] So it is a "common-enough consequence" that the "absence of records will often frustrate application of the modified categorical approach." *Id.*

Yet, when critical details are missing from the record, a noncitizen would have no other recourse to establish the basis of her conviction. As the panel acknowledged (at 5-6), courts may look only to a narrow range of official conviction records (the "*Shepard* documents"). *Moncrieffe*, 569 U.S. at 191. Ms. Gutierrez could not, for example,

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

"submit[] testimony from [her] lawyer" or "the judge who accepted [her] plea to ascertain what offense was charged and pleaded to in the state court"—assuming anyone could even remember those details. *Sauceda*, 819 F.3d at 532. *Moncrieffe* "squarely rejected" such "minitrials." 569 U.S. at 533.

Congress did not intend that applicants for relief like asylum and cancellation must prove the unprovable by requiring them to establish the basis of their conviction using only documents that may no longer exist, and, indeed, may never have existed in the first place. But the panel opinion would pin a noncitizen's fate on this fortuity of state recordkeeping practices.

D. The panel deemed *Moncrieffe* distinguishable "for two reasons." Slip op. 7. Neither withstands scrutiny.

First, relying on the Ninth Circuit's decision in *Marinelarena* (which has now been taken en banc), the panel concluded that *Moncrieffe*'s least-acts-criminalized presumption applies only to determining removability, not eligibility for cancellation of removal. *Id.* But *Moncrieffe* addressed both removal and cancellation. The question in *Moncrieffe*—whether Mr. Moncrieffe's conviction constituted an

"aggravated felony"—mattered only because, if it did, he could not apply for discretionary relief from removal; there was no dispute that his drug conviction rendered him removable, as a controlled-substances offender, whether or not the conviction was also an aggravated felony. *Moncrieffe*, 569 U.S. at 187, 204; *see also id.* at 211 (Alito, J., dissenting) (correctly recognizing that the Court's "holding" was that the noncitizen was "eligible for cancellation of removal"). That is why the Supreme Court held that, "having been found not to be an aggravated felon" for removal purposes, "the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the *other* eligibility criteria." *Id.* at 204 (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 again for cancellation purposes would be redundant.

Second, the panel distinguished *Moncrieffe* because *Moncrieffe* applied only the categorical approach and did not need to reach the modified categorical step. Slip op. 8-9. But 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); *see Mellouli*, 135 S. Ct. at 1986 n.4.

The panel thus erred in reasoning—again relying on *Marinelarena*—that the modified categorical inquiry "is, if not factual, at least a mixed question of law and fact." Slip op. 10 (quoting *Marinelarena*, 869 F.3d at 791). The modified categorical analysis, like the categorical analysis, concerns only what a conviction under a given statute establishes "*as a legal matter*." *Mathis v. United States*, 136 S. Ct. 2243, 2255 n.6 (2016); *Sauceda*, 819 F.3d at 532 n.10. Nothing about that inquiry resembles a "mixed question" of law and fact: The Court need not "expound on the law … by amplifying or elaborating on a broad legal standard" nor "immerse" itself "in case-specific factual issues" that require the weighing of evidence or credibility judgments. *U.S. Bank Nat'l Ass'n v. Village at Lakeridge, LLC*, 138 S. Ct. 960, 967 (2018). Nor is the inquiry a "factual" determination. *Descamps*

specifically rejected any effort to cast the modified categorical approach as "an evidence-based [inquiry]." 570 U.S. at 266-67.

The panel similarly erred in saying that "*Moncrieffe* itself placed divisible statutes outside of the *Moncrieffe* presumption." Slip op. 8. On the contrary, *Moncrieffe* explained that the modified categorical approach—which only applies to divisible statutes—is a tool to *rebut* the least-acts-criminalized presumption. 569 U.S. at 190-91, 197-98. But it rebuts the presumption only if the "record of conviction of the predicate offense *necessarily* establishes" that the "particular offense the noncitizen was convicted of" *was* the more serious alternative corresponding to the federal definition. *Id.* (emphasis added); *see also Descamps*, 570 U.S. at 257-63. If the record of conviction is ambiguous, "the unrebutted *Moncrieffe* presumption applies, and, as a matter of law," a noncitizen "was not convicted of [an aggravated felony]," so the conviction is not disqualifying. *Sauceda*, 819 F.3d at 532; *see Moncrieffe*, 569 U.S. at 194-95.

II. The Panel's Decision Conflicts With Other Circuits' Holdings.

En banc review is also warranted because the panel's decision conflicts with decisions of the First, Second, and Third Circuits.

The First Circuit concluded that *Moncrieffe*'s least-acts-criminalized presumption "dictates the outcome" where the record is ambiguous, regardless of who bears an *evidentiary* burden of proof, because the analysis of a prior conviction is a purely *legal* question. *Sauceda*, 819 F.3d at 531-32 & n.10, 534. And it rejected the two rationales this Court relied on to distinguish *Moncrieffe*. *See* slip op. 7-8, 10; *Sauceda*, 819 F.3d at 533-34.

The panel acknowledged it was rejecting *Sauceda*. Slip op. 7-9. It also suggested that *Sauceda* might be "distinguishable" because, in *Sauceda*, it was clear that "all the *Shepard* documents [had] been produced." *Id.* at 9 (quoting 819 F.3d at 531-32). But that is no basis for distinguishing *Sauceda* because it raises an independent issue. Burdens of production and proof are "distinct concepts." *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). And it is the government, not the noncitizen, who must produce the relevant *Shepard* documents indicating that a conviction necessarily involved the elements of an aggravated felony. The relevant regulation provides that "[*i*]*f 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." 8 C.F.R. § 1240.8(d) (emphasis added). Before any "burden of proof … shift[s] to the [noncitizen] to show" that her conviction is not disqualifying, the government must first "satisf[y] its burden of establishing that the evidence 'indicate[s]' that [this] bar applie[s]." *In re S-K-*, 23 I. & N. Dec. 936, 939 (BIA 2006). Because only a record of conviction that succeeds in rebutting *Moncrieffe*'s presumption would render a conviction disqualifying, *see supra* 16, the government must offer "evidence indicat[ing]" that the noncitizen was convicted of a disqualifying alternative element.

In any event, the panel's decision also conflicts with decisions of the Second and Third Circuits. Even before *Moncrieffe*, the Second and Third Circuits adopted positions consistent with *Sauceda*. *See Thomas v. Att'y Gen.*, 625 F.3d 134, 148 (3d Cir. 2010);[2] *Martinez v. Mukasey*,

[2] The panel stated that the Third Circuit has joined the other side of the split, citing *Syblis v. Att'y Gen.*, 763 F.3d 348, 355-57 (3d Cir. 2014). But *Syblis* applied a circumstance-specific inquiry that required examination of the actual facts of a prior offense—a special context in which "the categorical approach does not apply." 763 F.3d at 356. *Syblis* distinguished *Thomas* on exactly this ground. *Id.* at 357 n.12. The Third Circuit has since applied its earlier cases, not *Syblis*, where,

551 F.3d 113, 122 (2d Cir. 2008). The panel thought *Martinez* was "of limited relevance" because it involved the categorical approach, slip op. 10, but the Second Circuit has applied its holding in a modified-categorical-approach case as well. *See Scarlett v. U.S. Dep't of Homeland Sec.*, 311 F. App'x 385, 386-87 (2d Cir. 2009).

The panel stated that several other circuits support its position. Slip op. 12. But only the Tenth Circuit has conclusively resolved the question presented here (whether *Moncrieffe*'s least-acts-criminalized presumption governs in this context) against the petitioner, and it relied extensively on the panel opinion in *Marinelarena*. *Lucio-Rayos v. Sessions*, 875 F.3d 573, 581-83 (10th Cir. 2017), *petition for cert. forthcoming*, No. 17A1302 (due July 9, 2018). As noted (at 3), *Marinelarena* has been taken en banc; the Ninth Circuit no longer allows the panel opinion to "be cited as precedent." 886 F.3d 737. The Ninth Circuit's earlier holding in *Young v. Holder*, 697 F.3d 976, 990 (9th Cir. 2012), that even an ambiguous record of conviction is disqualifying, remains on the books but predates *Moncrieffe*. The

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as here, the modified categorical approach governs. *See Johnson v. Att'y Gen.*, 605 F. App'x 138, 141-42 (3d Cir. 2015).

Fourth Circuit's opinion in *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), also predates *Moncrieffe*. The other opinions cited by the panel did not decide the question presented here.[3]

[3] The Fifth Circuit expressly reserved the question presented here, in *Le v. Lynch*, 819 F.3d 98, 107 n.5 (5th Cir. 2016); *see also Gomez-Perez v. Lynch*, 829 F.3d 323, 326 & n.1 (5th Cir. 2016). The Seventh Circuit in *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014) first held that the categorical approach did not apply, and then discussed this issue in a footnote's worth of dicta, *id.* at 720 n.6, before ruling for the noncitizen on different grounds. An unpublished Eleventh Circuit opinion, *Omoregbee v. U.S. Att'y Gen.*, 323 F. App'x 820, 826 (11th Cir. 2009), also involved a circumstance-specific inquiry to which the categorical approach does not apply, as the Supreme Court clarified two months later, *see Nijhawan v. Holder*, 557 U.S. 29, 38 (2009). The question is still an open one in the Eleventh Circuit as well. *See Cintron v. U.S. Att'y Gen.*, 882 F.3d 1380, 1385 n.6 (11th Cir. 2018).

CONCLUSION

The panel should grant the petition for rehearing and either grant the petition for review outright or restore the case to the oral argument calendar. Alternatively, the Court should grant rehearing en banc.

Respectfully submitted,

/s/Brian P. Goldman

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

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

Brian P. Goldman
Cynthia B. Stein
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105
(415) 773-5700
brian.goldman@orrick.com

Aaron W. Scherzer
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 W. 52nd Street
New York, NY 10019

Counsel for Petitioner

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/s/ Brian P. Goldman
Brian P. Goldman
Counsel for Petitioner

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/s/ Brian P. Goldman
Brian P. Goldman
Counsel for Petitioner

ADDENDUM

Opinion, *Gutierrez v. Sessions*,
No. 17-3749 (6th Cir. April 16, 2018)

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 18a0073p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MIRIAM GUTIERREZ,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, Attorney General,

Respondent.

No. 17-3749

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 an aggravated felony theft offense under 8 U.S.C.

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

§ 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] 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

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> (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.

[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.

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 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

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

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, 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.

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

[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. (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).

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 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 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.*,

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

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.