No. 14-72003

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ARACELY MARINELARENA,

Petitioner,

v.

JEFFERSON B. SESSIONS III, United States Attorney General,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF BEFORE THE EN BANC PANEL

Agency No. A[redacted]

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I. INTRODUCTION

This case presents the question of whether Petitioner is eligible for discretionary relief from removal notwithstanding her conviction for conspiracy to violate the drug laws of California. For two reasons, the Court should conclude that Petitioner cannot establish eligibility for relief. First, the controlled substance element of California Health & Safety Code § 11352 is not meaningfully overbroad, and there is no realistic probability that California would prosecute conduct involving substances omitted from the federal drug schedules. The Court should thus hold that *any* conviction under that provision is a "violation of [a] law * * * relating to a controlled substance (as defined in section 802 of Title 21)," 8 U.S.C. 1227(a)(2)(B)(i), and accordingly that Petitioner's offense renders her ineligible for relief as a categorical matter.

Second, assuming overbreadth, Section 11352 is divisible, and the statutory burden of establishing eligibility for relief is on the alien. An inconclusive record of conviction that fails to establish the particular subsection of a divisible statute under which the alien was convicted is insufficient to demonstrate the absence of a disqualifying conviction. That conclusion is the most reasonable synthesis of the modified categorical approach and the statutory allocation of the burden of proof. No decision of the Supreme Court has held to the contrary, nor has that Court ever opined that the least-acts presumption has a role to play in determining which

specific section of a divisible statute an alien was convicted of violating. The Court should thus affirm the rule of *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc).

II. ISSUES PRESENTED

A. Whether the controlled substance element of California Health & Safety Code § 11352 is meaningfully overbroad, where there is no realistic probability that the statute would be applied to non-federally controlled substances.

B. Whether, assuming the controlled substance element is overbroad but divisible, Petitioner failed to discharge her burden of establishing eligibility for relief, where her record of conviction is inconclusive regarding the substance involved in her conspiracy conviction.

III. ARGUMENT

A. Petitioner is Ineligible for Relief as a Categorical Matter, as the Controlled Substance Element of § 11352 is not Meaningfully Overbroad

Petitioner's conspiracy conviction is, categorically, a violation of a law relating to a controlled substance as defined by the Controlled Substances Act. This is so despite the technical overbreadth of California's drug schedules because there was no realistic probability that California would have prosecuted the single drug then on its schedules that was omitted from the federal schedules: apomorphine. To the extent this Court has concluded that facial overbreadth is sufficient to establish

a realistic probability of prosecution, it should overrule or limit those cases, as they are in tension with the Supreme Court's own view of the inquiry.

1. The categorical approach and the "realistic probability" test

To determine whether a conviction constitutes an offense that would disqualify an alien from eligibility for relief, this Court utilizes a categorical approach. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015). Under this approach, the Court "looks 'not to the facts of the particular case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding" offense. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013) (citation omitted). A state conviction "is a categorical match with a generic federal offense only if a conviction of the state offense 'necessarily involved . . . facts equating to [the] generic [federal offense].'" *Ibid.* (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion)).

Under the categorical inquiry, a court must generally "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." *Moncrieffe*, 569 U.S. at 190-91 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). This presumption is not, however, without important qualifications. At the categorical stage, a court's "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to

the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" *Moncrieffe*, 569 U.S. at 191 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

2. Section 11352 is categorically an offense "relating to a controlled substance" as defined by the Controlled Substances Act

In Petitioner's case, she was charged with conspiracy "to commit the crime of Sell and Transport, in violation of Section 11352 of the Health & Safety Code[.]" A.R. 136. Because the INA renders removable or ineligible for relief any alien convicted of conspiring to violate a law relating to federally controlled substances, 8 U.S.C. 1227(a)(2)(B)(i), the only question is whether Section 11352 *is* such a law.[1]

The controlled substance element of Section 11352 is technically overbroad, as the portions of the California drug schedules referenced in section 11352 contained (as of the date of Petitioner's offense and conviction) just one substance not federally controlled: apomorphine.[2] *See* Cal. Health & Safety Code § 11055(b)(1)(G). But there was not then, nor has there been since apomorphine's

[1] Section 802 of Title 21, cross-referenced in Section 1227(a)(2)(B)(i), defines "controlled substance" as "a drug or other substance, or immediate precursor," that is "included in" the federal schedules of controlled substances. 21 U.S.C. 802(6); *see* 21 C.F.R. 1308.11-1308.15 (federal drug schedules).

[2] California also scheduled two analogues of fentanyl, Cal. Health & Safety Code §§ 11054(b)(45)-(46), not then included on the federal schedules, but such analogues "shall . . . be treated[] for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. 813.

own federal delisting, *see* Apomorphine, Removal From Schedule II, 41 Fed. Reg. 26,568 (Jun. 28 1976), any realistic probability that California would prosecute any controlled substance offense with apomorphine as the relevant element, nor is the government aware of an actual prosecution involving this substance;[3] a question that has become moot since California's *own* delisting of apomorphine in 2011. *See* Cal. Health & Safety Code § 11055 (2011); 2010 Cal. Legis. Serv. Ch. 76 (West) (A.B. 1414). Because there is no realistic probability that California would apply Section 11352 to non-federally controlled substances, a violation of Section 11352 is *categorically* a violation of a "law or regulation of a State [] relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. 1227(a)(2)(B)(i).

To the extent this Court has previously held that a facially overbroad statute is not susceptible to the realistic probability assessment, *see United States v. Vidal*, 504 F.3d 1072, 1074-75 (9th Cir. 2007) (en banc); *United States v. Grisel*, 488 F.3d 844, 845 (9th Cir.) (en banc), *cert. denied* 552 U.S. 970 (2007), the Court should overrule or limit the holdings of those cases to the distinct provisions addressed therein, to prevent the technical overbreadth of a state's controlled substance schedules from defeating the enforcement of the immigrations laws.

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[3] Likewise regarding any prosecution involving "geometrical isomers," which federal law generally excludes. *See* 21 C.F.R. 1300.01.

The rule embodied by *Vidal* and *Grisel* finds little support in the Supreme Court's own distillation and application of the realistic probability analysis. Although the Supreme Court has consistently indicated that the categorical approach should include an assessment of whether there is a "realistic probability [] that the State would apply its statute to conduct that falls outside the generic [federal] definition of a crime," *Moncrieffe*, 569 U.S. at 191, it has never *excluded* from that inquiry statutes that are facially overbroad. In *Moncrieffe*, for instance, the Supreme Court discussed a provision regarding firearms convictions, where the federal statute contains an exception for "antique firearms" whereas many analogous state statutes do not. 569 U.S. at 206. That Court indicated that the relevant inquiry would *not* turn only on whether the state statute lacked the federal exception for "antique firearms," but rather on whether "the State *actually prosecuted* the relevant offense in cases involving antique firearms." *Ibid.* And the Court's discussion of that hypothetical was in fact consistent with its specific holding that Georgia's possession-of-marijuana-with-intent-to-distribute statute was broader than the generic federal drug offense, which unlike the state provision contained an exception for distribution of small quantities with no remuneration, because state judicial decisions showed "that [the State] prosecutes this offense when a defendant possesses only a small amount of marijuana, and that 'distribution' does not require remuneration[.]" *Id.* at 194. Likewise, in enunciating the "realistic probability" test

in *Duenas-Alvarez*, the Court directed that to establish the realistic possibility of prosecution, "an offender * * * must at least point to his own case or other cases in which the state courts did in fact apply the statute" in a manner that would entail overbreadth. 549 U.S. at 193. The Supreme Court's approach to the "realistic probability" inquiry is thus in tension with the holdings of this Court that facial overbreadth is sufficient to establish that the state statute is meaningfully broader than the generic offense.

Even if the Court did not overrule *Vidal* and *Grisel*, it should distinguish those cases from this case, as Section 11352's overbreadth is not necessarily "evident from its text." *Grisel*, 488 F.3d at 850. At the relevant time, California excluded from its schedules the class of "isoquinoline alkaloids of opium." Cal. Health & Safety Code § 11055(b)(2) (2007). But apomorphine *is* an isoquinoline alkaloid of opium, meaning that California simultaneously included a controlled substance where elsewhere in its schedules it categorically excluded the class to which that substance belongs. This apparent contradiction in California's schedules raises a substantial question whether a hypothetical prosecution for a violation of Section 11352 involving apomorphine is a legal possibility, despite canons of statutory construction such as the rule of lenity or the void-for-vagueness doctrine. *See State v. Lambert*, 515 So.2d 550, 552-53 (La. Ct. App. 1987) (finding simultaneous inclusion of

apomorphine and exclusion of isoquinoline alkaloid of opium unconstitutionally vague.).

Even if Section 11352's overbreadth is "evident from its text," the Court should adopt the reasonable interpretation of Section 1227(a)(2)(B)(i) and the use of the "realistic probability" analysis in *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014), in the specific context of comparing state and federal drug schedules. First, such an approach is a better application of Supreme Court precedent and the Board has expressly adopted it in this precise context. As the foregoing makes clear, the relevant decisions have all contemplated some role for the "realistic probability" test to play at the categorical stage of the inquiry, *regardless* of whether the statute at issue is facially overbroad. *See supra* pp. 6-8. And the Board has based its own interpretation of Section 1227(a)(2)(B)(i) on these decisions. In *Ferreira*, the Board held that the categorical approach applies to determining whether an alien is removable under Section 1227(a)(2)(B)(i), and that as part of that analysis the adjudicator should determine whether there exists "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic [federal] definition." *Matter of Ferreira*, 26 I. & N Dec. at 419 (quoting *Duenas-Alvarez*, 549 U.S. at 193). In the context of Section 1227(a)(2)(B)(i), that question entails determining whether any substance included on state drug schedules, but missing from the federal schedules, is actually

prosecuted. As the Board concluded, to establish actual overbreadth for categorical purposes between disparate state and federal schedules, an alien must "'at least point to his own case or other cases in which the . . . state courts in fact did apply the statute'" to prosecute offenses involving the substances excluded from the federal schedules. *Id.* at 421-22 (citation omitted).

Second, the Board's analysis is consistent with the essentially complementary nature of the state and federal drug schedules. The Uniform Controlled Substances Act was adopted contemporaneously with the drafting of the CSA. *See* 9 U.L.A. 853 (2007). That Uniform Act created drug schedules identical to those in the CSA as originally enacted, and provided a mechanism for states to add or remove drugs based on the same criteria employed by the Attorney General under the CSA. *Id.* at 866-70. Because the Uniform Act called for the states to apply these criteria themselves, the drafters contemplated that, at particular times, the state and federal schedules might not be identical. *See id.* at 855, 868. But these gaps have no real significance, as this case shows. Both California and the federal government originally scheduled apomorphine, and both also eventually delisted that substance. *See supra* pp. 4-5. The only issue relates to timing, and that lag was more likely due to legislative lethargy in California than any intent to continue (non-existent) prosecutions relating to apomorphine. In any event, the "realistic probability" analysis better responds to this animating intent behind the CSA and the Uniform

Act by ensuring that only those differences that have substantive dimension—*i.e.*, that actually result in state level prosecution of substances not federally scheduled—will defeat a categorical match between a state drug schedule and the current federal schedules.

Finally, applying the "realistic probability" test in the manner adopted by the Board ensures that Section 1227(a)(2)(B)(i) will have more than "haphazard" coverage, given the many subtle but most likely irrelevant differences between state drug schedules and the federal schedules. *See Torres v. Lynch*, 136 S. Ct. 1619, 1628 (2016). Eschewing this application of the "realistic probability" analysis would create a "crazy-quilt" of statutory coverage inconsistent with the intent that the state and federal drug scheduling regimes would complement each other. *United States v. Beasley*, 12 F.3d 280, 284 (1st Cir. 1993) (Breyer, J.).

B. Assuming Section 11352 is Overbroad, Petitioner's Inconclusive Record of Conviction is Insufficient to Carry Her Burden of Establishing Eligibility for Relief

Even if the Court concludes that Section 11352 is not categorically a disqualifying offense, Petitioner is nonetheless ineligible for cancellation of removal. This is so because Section 11352 is divisible regarding its controlled substance element,[4] Petitioner's record of conviction is incomplete and inconclusive

[4] Petitioner does not dispute the divisibility of Section 182(a)(1) as to the object offense of the conspiracy, Petr.'s Supp. Br. 28, and divisibility is in any event clearly established by authoritative decisions of the California Supreme Court, *see People*

regarding the substance involved, and, according to the statutory allocation of the burden of proof, this inconclusiveness inures to her detriment.

1. Section 11352 is divisible regarding its controlled substance element

This Court resolved the divisibility of Section 11352's controlled substance element in *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir.) (en banc), *cert. denied* 138 S. Ct. 523 (2017). Reviewing decisions from the California Supreme Court, which established that defendants were subject to multiple convictions based on a single criminal enterprise involving multiple substances, as well as relevant jury instructions, which require the insertion of a specific controlled substance, the en banc court concluded that Section 11352 "is divisible with regard to its controlled substance requirement." 864 F.3d at 1040-41.

Petitioner does not challenge *Martinez-Lopez*, but rather argues that Section 11352 is not divisible when charged as the object crime of a conspiracy. Petr.'s Supp. Br. 27-31. This contention is contrary to California case law, which establishes that a defendant must have the specific intent to commit the elements of the object offense, *see Swain*, 12 Cal. 4th at 296 ("To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree but also that they intended to commit the elements

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v. Swain, 12 Cal.4th 593, 600 (1996), and relevant jury instructions, *see* CALJIC 6.25.

of that offense.") (citation omitted), as well as the relevant jury instructions, which direct the judge, in instructing on the conspiracy charge, to give the jury instruction for the object offense that has been charged, *see* CALCRIM 415 ("To decide whether (the/a) defendant * * * intended to commit _____ *<insert alleged crime[s]>*, please refer to the separate instructions that I (will give/have given) you on (that/those) crime[s]."). In the context of Section 11352, that would entail giving the same instruction that this court found established divisibility in *Martinez-Lopez*, which requires the inclusion of a specific drug when instructing the jury. *See* CALCRIM 2300. Petitioner cites only truisms in response, that conspiracy "is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy," or that a single conspiracy may encompass multiple drugs or object offenses. Petr.'s Supp. Br. 29-30. What Petitioner does not cite is a single case explicitly holding that for a jury to convict, a prosecutor may omit or otherwise fail to present to the jury the controlled substance involved in a charged conspiracy. And for good reason—such a holding would be contrary to California Supreme Court case law and relevant jury instructions.

2. Under the modified categorical approach, Petitioner has the burden to establish the substance involved in her offense, and the inconclusiveness of her record of conviction means she cannot discharge that burden

As Section 11352's controlled substance element is divisible, Petitioner's eligibility for cancellation of removal turns on whether her offense involved a

federally controlled substance, and to resolve that question this court applies the modified categorical approach.

The modified categorical approach is applied to determine whether, in connection with a prior conviction, "a jury was actually required to find all the elements of" the generic offense, *Taylor v. United States*, 495 U.S. 575, 602 (1990), or whether "a plea of guilty to [an offense] defined by a nongeneric statute necessarily admitted elements of the generic offense," *Shepard*, 544 U.S. at 26 (plurality opinion). The modified categorical approach "helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Descamps v. United States*, 570 U.S. 254, 260 (2013). Where a criminal statute has a "statutory phrase corresponding to the generic crime and another not," a court may utilize the modified categorical approach and "look to the additional documents to determine which of the statutory offenses (generic or non-generic) formed the basis of the defendant's conviction." *Id.* at 265.

Assessing the documents in order to "discover the statutory phrase" of conviction involves, as both the Supreme Court and this Court have noted, at least a mixed question of law and fact. *Descamps*, 570 U.S. at 263; *see Medina-Lara v. Holder*, 771 F.3d 1106, 1113-15 (9th Cir. 2014). For this reason, the Supreme Court has explicitly noted that the "least acts presumption" applicable in the categorical

analysis *is not* relevant to discerning the discrete statutory phrase of conviction at the modified categorical stage. *Moncrieffe*, 569 U.S. at 191 (modified categorical inquiry is a "qualification" to the "least acts presumption").

Under the statute and regulations, the burden is on Petitioner to establish that she was not convicted of a disqualifying offense. In this context, that means providing evidence of the basis for her conviction, including whether the controlled substance involved is federally controlled. The statute governing removal proceedings provides that "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[.]" 8 U.S.C. 1229a(c)(4)(A). For purposes of cancellation of removal, establishing eligibility includes demonstrating that the alien "has not been convicted of an offense under" 8 U.S.C. 1227(a)(2), which includes convictions for violations of laws relating to controlled substances (8 U.S.C. 1227(a)(2)(B)(i)). 8 U.S.C. 1229b(b)(1)(C). If the evidence indicates that the alien's conviction may be for a disqualifying offense, she must prove by a preponderance of the evidence that she has *not* been so convicted. 8 C.F.R. 1240.8(d). The preponderance standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [court] of the fact's existence." *Concrete Pipe & Prods. of Cal., Inc. v*

Construction Laborers Pension Trust, 508 U.S. 602, 622 (1993) (citation and internal quotation marks omitted).

Petitioner belatedly argues that in relief-from-removal cases the government bears an initial burden of producing evidence that a disqualifying conviction may exist, and that the government failed in this case to carry that burden. Petr.'s Supp. Br. 22-27. This argument was never presented to the agency, however, and thus is not properly before the court. *Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004). In any event, the government bears *no* initial burden of production under the regulation before an alien must establish the absence of a disqualifying conviction, and Petitioner's contrary argument is inconsistent with the regulation, administrative practice, and the statute.

The regulation specifies that the applicant's burden of proof attaches "[if] the evidence," regardless of its source, "indicates that one or more of the grounds for mandatory denial of the application for relief may apply." 8 C.F.R. 1240.8(d). This regulation does not, on its face, assign any burden of production to the government, and reflects only the "well-settled rule" that an applicant "bears the burden of establishing eligibility for relief or a benefit." *Inspection and Expedited Removal of Aliens: Detention and Removal of Aliens; Conduct of Removal Proceedings; Asylum Procedures*, 62 Fed. Reg. 10,312, 10,322 (Mar. 3, 1997). Nothing stops the government from submitting evidence of a conviction, but nothing in the regulation

requires that the government produce such evidence before the alien's burden is triggered.

This common-sense reading of the text is bolstered by the fact that aliens applying for discretionary relief already have an independent duty to disclose prior criminal history and to provide relevant information about those offenses. Question 54 on the application filled out by Petitioner, for instance, asked whether she had ever been convicted of a criminal offense and directed her to "give a brief description of each offense including the name and location of the offense, date of conviction, any penalty imposed, any sentence imposed, and the time actually served." A.R. 336. Likewise, the instructions on the application included requests for supporting documentation regarding the facts alleged in the application, and made clear that the immigration judge can request, *from the applicant*, additional documents "which reflect," *inter alia*, "court convictions[.]" *Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents*, Instructions § 3 (revised Jan. 2006).

This directive in the application is made an obligation by the statute. Section 1229a(c)(4)(B) expressly declares that an applicant must comply with the applicable requirements to submit information or documentation in support of her application for relief as provided by law, regulation, or the instructions in the application form. This sentence unambiguously requires an applicant to comply with agency requests

for information relevant to an application for relief, regardless of the form in which they are made, in keeping with the general proposition that an applicant for discretionary relief "must, upon the request of the Attorney General, supply such information that is within his knowledge and has a direct bearing on his eligibility under the statute." *Kimm v. Rosenberg*, 363 U.S. 405, 408 (1960).

Petitioner's contrary arguments are misguided. First, to the extent she relies on Board precedent to contend that the government frequently does have an initial burden of production before the burden of proof shifts to the alien, *see* Petr.'s Supp. Br. 22-23, the Board has not yet addressed the scope of the regulation in the context of an application for cancellation of removal, nor has it considered the interplay between the application's instructions and the regulatory and statutory directive to the alien. To the extent the Board has indicated that the government sometimes bears an initial burden of production, its holding has either arisen in a context where the moving party *already* bears the burden of establishing the truth of the proposition, *Matter of S-K-*, 23 I. & N. Dec. 936, 939 (BIA 2006), or was based on DHS's concession, *Matter of A-G-G-*, 25 I. & N. Dec. 486, 501 (BIA 2011).

To the extent the Board *has* addressed the regulation, its holding points in the contrary direction to what Petitioner claims. Petitioner cites *Matter of M-B-C-*, 27 I. & N. Dec. 31, 36-37 (BIA 2017), for the proposition that the "government must provide 'some evidence from which a reasonable factfinder could conclude that one

or more grounds for mandatory denial . . . may apply[.]'" Petr.'s Supp. Br. 23. Nowhere in that decision does this extraordinary proposition appear. In fact, the Board rejected the proposition that DHS bears an affirmative burden of production prior to the alien's burden of persuasion being engaged, taking pains to describe the inquiry under the regulation as "whether *the evidence indicates* that the grounds for mandatory denial * * * *may apply* [to the alien] so that he then has the burden to show that they do not apply." 27 I. & N. Dec. at 36 (emphasis in original). And the full quotation that Petitioner shortened for her parenthetical states that "we [the Board] hold that where the *record contains some evidence* from which a reasonable factfinder could conclude that one or more grounds for mandatory denial of the application may apply, the alien bears the burden under" the regulation "to prove by a preponderance of the evidence that such grounds do not apply." *Id.* at 37. To the extent the Board has addressed the regulation in a case where the alien bears the burden of proof, it has never placed an affirmative burden of production on DHS prior to the burden of proof being engaged.

Second, contrary to Petitioner's cursory assertion, Petr.'s Supp. Br. 26, the government is not in a *better* position than an alien to obtain evidence related to a conviction, and may likely be in a worse position. Before the time of the application, the alien knows whether she has been previously convicted, in what court, and for

what offense.[5] The alien may also have *better* access to documents that she has retained or that might be retrievable from a prior attorney. This is true of domestic convictions, but is doubly so regarding foreign convictions, where the government may have no idea that a conviction has been entered absent the alien complying with her affirmative obligation, in the application, to describe the offense and proffer relevant conviction documents. Given this state of knowledge, it is incorrect to argue that the government is necessarily in a significantly better position to provide relevant evidence of the conviction. It also turns the concept of the burden of proof on its head—an alien could hide behind silence rather than affirmatively discharge her burden, while the government attempts to track down information that should be peculiarly well-known to the alien. *See*, *e.g.*, *Sidhu v. INS*, 220 F.3d 1085, 1090 n.2 (9th Cir. 2000) (courts should be wary of "a rule that creates a disincentive for [] applicants to bring forward highly pertinent information.").

Third, a holding along the lines advocated by Petitioner negates the statutory burden of proof in a different sense. Under Petitioner's reading, the alien has no

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[5] For this reason, the additional cases Petitioner cites, *see* Petr.'s Supp. Br. 26, are inapposite, as the party assigned the burden of production in those cases, unlike the government in this case, had arguably better access to or control of the relevant evidence. *See Matter of Garcia-Ramirez*, 26 I. & N. Dec. 674, 677 n.4 (BIA 2015) (Customs and Border Patrol documents regarding border turn-arounds); *United States v. Cortez-Rivera*, 454 F.3d 1038, 1041 (9th Cir. 2006) (finding that criminal defendant alleging border search damaged his vehicle was in best position to establish the condition of his vehicle before the search).

burden until the government affirmatively provides evidence indicating, effectively, that a ground of denial *does* apply. *See* Petr.'s Supp. Br. 23. This hardly constitutes a simple burden-sharing and –shifting scheme. It would, rather, effectively assume the alien's eligibility for relief in the absence of government proffered evidence that the alien is ineligible, in derogation of the Congressionally-enacted scheme requiring the alien to establish that she meets the statutory eligibility criteria. And it is additionally contrary to the Board's interpretation of the appropriate standard. As the Board explained in *Matter of M-B-C-*, "[i]n using the terms 'indicates' and 'may apply' together, 8 C.F.R. § 1240.8(d) does not create an onerous standard and necessarily means a showing less than the preponderance of the evidence standard." 27 I. & N. Dec. at 36-37. The issue is whether the record evidence creates a legitimate question of whether a ground for mandatory denial exists, and a conviction under a divisible statute certainly meets that standard.

Accordingly, so long as the record evidence, whatever its province, establishes that a conviction may constitute a disqualifying offense, the alien's burden of establishing that it is not disqualifying is engaged. The only relevant conviction document proffered for Petitioner's conspiracy offense was the criminal complaint to which she pled, and this document does not specifically allege the

controlled substance involved in the conspiracy.[6] A.R. 136-40. Petitioner's record of conviction is thus inconclusive as to whether her conviction involved a federally controlled substance. Under *Young*, this inconclusiveness inures to her detriment, meaning that she is unable to carry her burden of establishing eligibility for cancellation of removal.

3. Nothing in Supreme Court precedent dictates a contrary result

Petitioner does not dispute that the statute allocates to her the burden of proving the absence of a disqualifying conviction, nor does she contend that the record conclusively establishes a conviction for non-disqualifying conduct. Rather, she contends that she discharged her burden of proof by proffering an incomplete and inconclusive record of conviction, because the court must, in such circumstances, assume that the conviction rested on the "least" of the acts criminalized under the statute of conviction. Petr.'s Supp. Br. 7-9. This conclusion, she argues, follows directly from the Supreme Court's decision in *Moncrieffe*. She is mistaken.

First, *Moncrieffe* itself directs that the "least acts presumption" has no role to play in applying the modified categorical approach. In enunciating that rule for

[6] Heroin is referenced in the complaint to the extent specific overt acts in furtherance of the conspiracy were alleged, A.R. 138, explicitly noted in Count 2, to which Petitioner did not enter a plea, A.R. 139, and implicitly cross-referenced as to both counts for purposes of the enhancement provision, Cal. Health & Safety Code § 11370.4(a)(1). No other controlled substance is mentioned in the complaint.

categorical purposes, the Court opined that the "rule is not without qualification." 569 U.S. at 191. One of those qualifications is application of the modified categorical approach, which permits a limited assessment of the factual basis for the conviction by reviewing a narrow range of conviction documents. *Ibid*. In modified categorical approach cases, the presumption plays *no* role at all in ascertaining the actual basis for conviction. Once that basis is determined through modified categorical analysis, the presumption could again come into play if the specific statutory subsection under which the alien was convicted is overbroad and indivisible. But until the specific basis of the conviction is discovered through the modified categorical analysis, the presumption has no part to play.

Moncrieffe's explicit qualification of the presumption is unsurprising, since the Supreme Court has never—ever—applied the presumption other than at the categorical level of the analysis. That is how the presumption was applied in *Moncrieffe* itself. In applying the categorical approach to the specific provision under which the alien was convicted, the Court stated that it "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." *Moncrieffe*, 569 U.S. at 190-191 (citation omitted). Reviewing Georgia law, the Court noted that prosecutions for possession-with-intent-to-distribute do not necessarily exclude offenses for possession of only a small amount of marijuana, nor

is remuneration a requirement for "distribution." *Id.* at 194. The statute thus encompassed conduct that was punishable as both a felony under the CSA, and conduct that would be punishable as a misdemeanor. Under the categorical approach, this "ambiguity" triggered the "least acts presumption," resulting in the conclusion that the alien "was not convicted of an aggravated felony." *Id.* at 194-195.

The presumption was applied in similar fashion, at the categorical level of analysis, in *Johnson*, 559 U.S. at 137-39 (concluding that the defendant's state conviction was not a predicate offense under the Armed Career Criminal Act, where the least of the acts criminalized under Florida's battery statute did not constitute the use of "physical force"), and most recently in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (least of the acts criminalized by a California statutory rape provision did not constitute "sexual abuse of a minor"). The presumption has never been applied outside the categorical approach in the manner being urged by Petitioner.

Second, even had *Moncrieffe* not spoken so explicitly about the inapplicability of the "least acts presumption" to the modified categorical analysis, the different issue resolved by that case would caution against importing that rule to resolve the distinct issue presented here. *Moncrieffe* unquestionably did not address the circumstances presented by this case—modified categorical analysis involving an

application for relief from removal. Rather, *Moncrieffe* was involved with the issue of deportability, and although it commented that the relevant "analysis" of a prior criminal conviction "is the same in both" the deportability and relief contexts, 569 U.S. at 191 n.4, there is no reason to believe this statement means anything more than that the categorical analysis applies in both contexts. Moreover, unlike the current case, the analysis in *Moncrieffe* is confined to the categorical level, since the conviction records disclosed the specific offense of conviction. *Id.* at 192. For the same reasons, *Moncrieffe* did not address the issue of inconclusiveness presented here—whereas the records there showed which subsection the alien was convicted of violating, in this case they do not. As a case focused on application of the categorical approach to the question of removability, where the specific basis for the conviction is known, *Moncrieffe* simply does not address the issues presented by this case.

Extrapolation from *Moncrieffe* to the circumstances presented here is unreasonable, as the differences in context have practical implications for the question of whether an alien can establish eligibility for relief. Although the Court in *Moncrieffe* opined that the alien in that case would be eligible for cancellation of removal, *see* 569 U.S. at 204, that conclusion was based on the rule of decision provided by the *categorical* approach: if a statute does not categorically encompass conduct that constitutes an aggravated felony, *and* that statute is not divisible, then

the categorical approach dictates that the alien has not been convicted of an aggravated felony, a conclusion that holds in both the removal and relief contexts.

There is *no* similar rule of decision under the modified categorical approach where the statute is divisible and the record inconclusive, as the inconclusiveness prevents the adjudicator from being able to ascertain the ground of conviction. In that situation, allocation of the burden of proof becomes important, and that issue was neither presented in nor resolved by *Moncrieffe*.

Petitioner would fill this gap with the "least acts presumption." But even had the Supreme Court not explicitly noted the irrelevance of this presumption to the modified categorical approach, its poor conceptual fit with the intent of modified categorical analysis would dictate its inapplicability. In categorical approach cases, it makes sense to assess the least conduct criminalized under an indivisible statute to determine if it is overbroad and thus not a categorical match to the generic definition. In modified categorical approach cases, however, the statute is divisible and thus the question is whether the alien's conviction was under one of the statutory alternatives that would constitute a disqualifying offense. Determining what elements to compare when a statute is divisible requires the intermediate factual task accomplished by assessing the documents, and it is this intermediate task that is the "tool for implementing the categorical approach." *Descamps*, 570 U.S. at 262. Presuming the least culpable conduct in such cases—where the statute is divisible

and the burden of proof is on the alien—would entirely negate the statutory burden of proof and presuppose eligibility for relief from removal where ambiguity remained.

Petitioner also attempts to negate the burden of proof by arguing that the modified categorical approach presents a legal question where the burden is irrelevant, but this is false. Application of the *categorical* approach does involve a pure legal question—whether a statute of conviction falls within the generic definition of the offense. When an alien is convicted under an overbroad but divisible statute containing several alternative crimes, however, a court must first determine which of the crimes to compare, and the modified categorical approach assists courts in finding those elements by assessing the statutory language and certain conviction documents. Assessing those documents in order to "discover the statutory phrase" of conviction is at least a mixed question of law and fact. *Descamps*, 570 U.S. at 263. Or, as this court has concluded, the issue is fundamentally whether "clear and convincing" evidence establishes a link between the relevant conviction documents and a specific section of a divisible statute. *Medina-Lara*, 771 F.3d at 1113-15.

Finally, Petitioner argues that a contrary rule risks placing an "impossible burden" on the alien, Petr.'s Supp. Br. 17-18, but there is no evidence that this "risk" exists in reality. First, in cases such as Petitioner's, where the alien willfully fails to

produce significant portions of the conviction record, there is no unfairness in holding the ambiguity in the portions of the record actually proffered against the alien. Second, there is no claim, and no indication under California law, that Petitioner could not have taken steps to avoid ambiguity in the conviction documents. During a plea colloquy, for instance, the alien could ensure that the record reflects the specific subsection under which she is pleading, or the specific controlled substance that was involved in the offense. Had Petitioner's offense involved a non-federally controlled substance (unlike heroin, which there is little doubt was the controlled substance she was conspiring to traffic), she could have ensured that the conviction documents reflected that and thus safeguarded her eligibility to seek discretionary relief. The assertion that there is some "impossibility" to aliens taking these simple steps is unsupported by any objective evidence. The argument, rather, comes down to the fact that Petitioner believes aliens should be entitled to obfuscate the true basis of their convictions, while then claiming the benefits of that obfuscation. As the foregoing makes clear, however, such a rule is contrary to the statute enacted by Congress, as well as foundational principles governing the burdens of proof and production.

C. Petitioner's Expunged Conviction May be Used for Immigration Purposes

Petitioner finally contends that "the agency should not have treated [her] offense as a prior conviction because a California court had vacated and dismissed

it for rehabilitative purposes under California's expungement provision[.]" Petr.'s Supp. Br. 32. This argument is foreclosed by Ninth Circuit case law, holding in the context of both the INA and the United States Sentencing Guidelines that a state conviction expunged under California Penal Code § 1203.4 remains a conviction for federal purposes. *See Ramirez-Castro v. INS*, 287 F.3d 1172, 1175 (9th Cir. 2002); *United States v. Hayden*, 255 F.3d 768, 770-74 (9th Cir. 2001). Petitioner provides no compelling reason for this Court to reconsider those decisions.

First, no other court of appeals has accepted Petitioner's contention that a state conviction expunged for rehabilitative purposes is no longer valid for the distinct purposes of federal immigration law. *See Reyes v. Lynch*, 834 F.3d 1104, 1107 & n.15 (9th Cir. 2016) (collecting cases). To accept Petitioner's argument would thus be to create a circuit conflict where there had previously been unanimity. *See id.* at 1107 ("we see no reason to create a circuit split").

Second, despite Petitioner's attempts to inject deference-related questions into the argument, *see* Petr.'s Supp. Br. 31-34, the interpretation adopted by this court is the best interpretation of the statute, as evidenced by its adoption in the context of the Sentencing Guidelines where it was *not* bound to defer, *see Hayden*, 255 F.3d at 770-74. And it is easy to see why on a simple mapping of the statutory provision regarding convictions to Petitioner's own circumstances: she "entered a plea of guilty" (8 U.S.C. 1101(a)(48)(A)(i)), and "the judge [] ordered some form of

punishment, penalty, or restraint on the alien's liberty to be imposed," (8 U.S.C. 1101(a)(48)(A)(ii)). *See* A.R. 164-70, 215.

Third, cases of rehabilitative expungements and those where the underlying conviction is vacated based on substantive or constitutional defects in the prosecution are clearly distinguishable. In the latter cases, the underlying judgment of guilt is entirely "erased" and the conviction is as though it never existed at all due to a finding of error that undermines the reliability of the outcome. *See Wiedersperg v. INS*, 896 F.2d 1179, 1182 (9th Cir. 1990). In contrast, a rehabilitative expungement does not evince such concerns regarding the prior adjudication of guilt, and convictions expunged under Section 1203.4 remain relevant for many purposes. For instance, "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." California Penal Code § 1203.4(a)(1); *see Hayden*, 255 F.3d at 771-72 (noting broad range of circumstances where expunged convictions may still be used for state law purposes). Especially where California still treats the conviction as though it exists for many purposes, there is no incongruity with the federal government doing the same for purposes of the immigration laws.

IV. CONCLUSION

For the foregoing reasons the petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I hereby certify that the foregoing brief is proportionally spaced using Times New Roman typeface, has a typeface of 14 points, and contains 6,992 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 23, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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