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.

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

PETITIONER'S SUPPLEMENTAL EN BANC BRIEF

Andrew Knapp
SOUTHWESTERN LAW SCHOOL
3050 Wilshire Blvd.
Los Angeles, CA 90010

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

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

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes & Regulations

Other Authorities

INTRODUCTION

Aracely Marinelarena applied for cancellation of removal because deporting her would cause exceptional and extremely unusual hardship to her U.S.-citizen children. But she was told that her California conviction for "conspir[ing] … [t]o commit any crime" barred her from even pleading her case for cancellation. The reason: She had not proven that the object crime of the conspiracy was *not* a drug offense involving a federally controlled substance. The record of her conviction did not show that a federally controlled substance *was* an element of her conspiracy offense; it was inconclusive in that regard. But she was deemed ineligible anyway because, under *Young v. Holder*, 697 F.3d 976, 990 (9th Cir. 2012) (en banc), even an ambiguous record of conviction is disqualifying where the noncitizen bears the burden to prove her eligibility for relief.

That rule is incompatible with the Supreme Court's decision in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), and should be overruled. Courts "must presume that [a past] conviction 'rested upon nothing more than the least of the acts' criminalized." *Id.* at 190-91 (internal brackets omitted). Only where the record of conviction "necessarily"

establishes the elements of a corresponding federal offense may a noncitizen be deemed to have a disqualifying conviction. *Id.* at 192. But ambiguity means that the conviction did not "necessarily" involve the elements of the federal offense. *Young* flips this approach on its head and requires a reviewing court to presume that a conviction rests on the *most* of the acts criminalized unless the record shows otherwise. *Moncrieffe*, however, sets out a legal presumption that is unaffected by an evidentiary burden of proof. Rather, the "analysis is the same in both [the removal and cancellation] contexts," 569 U.S. at 191 n.4. *Infra* § I.

This Court need not decide whether to overturn *Young*, however, if it holds at the outset that California's conspiracy statute is indivisible and thus the modified categorical approach does not apply. California prosecutors need not—and so the prosecutor in Marinelarena's case did not—charge a particular drug as the object of a drug conspiracy. Indeed, that indivisibility is the main reason why her record of conviction is inconclusive in the first place. *Infra* § II. And even more fundamentally, Marinelarena's offense should not have disqualified her from seeking relief because it was expunged under California law and

should not have counted as a "conviction." *Infra* § III. For these three independent reasons, the petition for review should be granted.

STATEMENT

1. A noncitizen who is removable from the United States may apply for discretionary relief from removal, including cancellation of removal, provided she meets certain eligibility requirements. Nonpermanent residents are ineligible for cancellation of removal if they have been "convicted" of one of several categories of crimes, including, as relevant here, a crime "relating to a controlled substance" as defined in the federal drug schedules. *See* 8 U.S.C. § 1229b(b)(1)(C) (incorporating §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i)).

2. Aracely Marinelarena is a Mexican citizen who moved to the United States in 1992. AR332-33. She conceded she was removable because she had remained in the United States longer than permitted, but she applied for cancellation of removal, citing the exceptional and extremely unusual hardship her removal would cause her two U.S.-citizen children. AR332-39. The Immigration Judge (IJ) denied Marinelarena's request for cancellation of removal because she "failed to meet her burden of proof that she is eligible for cancellation." AR43.

The Board of Immigration Appeals (BIA) dismissed her appeal, reasoning that her 2007 conviction under California Penal Code § 182(a)(1) for conspiring to commit a crime rendered her ineligible for cancellation. AR2-3. After concluding that the object of the conspiracy was to violate California Health and Safety Code § 11352 and that § 11352 is divisible by drug type, the BIA determined that Marinelarena failed to establish that she was *not* convicted of "conspiring to commit a disqualifying controlled substance" offense. AR2-3.

3. A divided panel of this Court denied Marinelarena's petition for review. The panel majority recognized that a conspiracy conviction is not categorically a controlled-substances offense because § 182(a)(1) covers "*any* criminal conspiracy, whether or not it relates to a controlled substance." Slip op. 10. But it held that the modified categorical approach applies. It reasoned that (a) the conspiracy statute is divisible as to the object crime of a conspiracy, and (b) the object crime here (§ 11352) is divisible as to the specific drug involved, so (c) those divisibility determinations could be linked together to hold that a

conspiracy conviction is divisible with respect to the specific drug involved. Slip op. 10-13.

The majority determined that Marinelarena's record of conviction was "inconclusive" about which controlled substance was an element of her offense. Slip op. 13.[1] That was significant because California's drug schedules include more substances than the federal schedules. *United States v. Martinez-Lopez*, 864 F.3d 1034, 1037-38 (9th Cir. 2017) (en banc). Under *Young*, however, that ambiguity meant that Marinelarena had failed to meet her burden to show that she had *not* been convicted of a disqualifying crime. Slip op. 13-14. The majority rejected Marinelarena's argument that *Young* was "clearly irreconcilable" with the Supreme Court's intervening decision in *Moncrieffe*. Slip op. 14-22.

The majority also dismissed Marinelarena's claim that the expungement of her conspiracy conviction meant it no longer qualified

[1] Although the criminal complaint mentioned "heroin," it did so only "in the list of overt acts," slip op. 13, and a particular overt act is neither an object of a conspiracy nor an element of the offense, *People v. Russo*, 25 P.3d 641, 647 (Cal. 2001).

as a "conviction" under 8 U.S.C. § 1101(a)(48)(A) because she had not presented the issue to the BIA. Slip op. 22-23.

Judge Tashima dissented, concluding that *Young* is clearly irreconcilable with *Moncrieffe*. Slip op. 23. In his view, the ambiguity in the record as to Marinelarena's offense means that she was not necessarily convicted of a disqualifying offense. Slip op. 24, 28.

ARGUMENT

I. A Conviction With A Merely Ambiguous Record Is Not A Disqualifying Offense As A Matter Of Law.

We begin with the question on which this Court directed supplemental briefing: "[W]hether *Young v. Holder* is clearly irreconcilable with *Moncrieffe v. Holder*." Dkt. 125 (citations omitted). It is. *Young* overturned a line of this Court's cases that has since been vindicated by *Moncrieffe* and more recent Supreme Court decisions. So *Young* itself should now be overturned, and this Court should return to the rule that applied in this Circuit before 2012. Under that rule, a conviction like Marinelarena's is not disqualifying because a merely ambiguous record of conviction does not "necessarily" establish the elements of a corresponding disqualifying offense.

A. Under *Moncrieffe*, when the record of conviction is ambiguous, a noncitizen was not "convicted of" a disqualifying offense.

Marinelarena's eligibility for cancellation turns on whether she had been "*convicted of*" a crime "relating to a controlled substance." 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1229b(b)(1)(C) (emphasis added). "[C]onviction" 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 omitted). Accordingly, the categorical approach requires courts to determine "if a conviction of the state offense 'necessarily' involved … facts equating to [the] generic [federal offense]." *Id.* at 190-91 (internal quotation marks 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 th[e] least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 190-91 (emphasis added); *see also Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (same); *Mellouli v. Lynch*, 135

S. Ct. 1980, 1986 (2015) (same). So, when a state statute sweeps in more conduct than the corresponding federal offense, a conviction under that statute presumptively is not disqualifying.

This presumption is rebuttable, though. Immediately after setting out the presumption, *Moncrieffe* explains that the modified categorical approach is a "qualification" on that "rule." 569 U.S. at 191; *see also Mellouli*, 135 S. Ct. at 1986 n.4 (same). 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, then the least-acts-criminalized presumption will be rebutted under the modified categorical approach. *Moncrieffe*, 569 U.S. at 190-91, 197-98 (emphasis added). The conviction will thus have immigration consequences, notwithstanding that the statute also criminalizes less serious offenses.

But where the record of conviction does not establish which prong of a divisible statute the noncitizen was convicted under, there is nothing to rebut the presumption. The "[a]mbiguity" regarding the nature of a noncitizen's offense "means that the conviction did not 'necessarily' involve facts that correspond to [a federal] offense," and so

the noncitizen "was *not* convicted of [the disqualifying offense,]" by operation of *Moncrieffe*'s presumption. *Id.* at 194-95 (emphasis added).

Moncrieffe thus confirms that this Court was correct when it held, a decade ago, that "an inconclusive record of conviction is sufficient to demonstrate an alien petitioner was not 'necessarily' convicted of the generic crime" because anything short of "necessarily" establishing the generic elements means "*as a matter of law* that the conviction was not for a generic offense." *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1132 (9th Cir. 2007) (emphasis added). An "inconclusive record of conviction" is enough to "affirmatively prove[] under the modified categorical analysis that [a petitioner] was not necessarily 'convicted of any [disqualifying offense].'" *Id.* at 1130; *accord id.* at 1133 (Thomas, J., concurring) (the correct "legal standard allows an alien to establish eligibility when his record of conviction is inconclusive"); *Rosas-Castaneda v. Holder*, 655 F.3d 875, 883-86 (9th Cir. 2011) (reaffirming *Sandoval-Lua* after the REAL ID Act added 8 U.S.C. § 1229a(c)(4)(A)'s burden-of-proof provision).

B. This Court should overrule *Young* in light of *Moncrieffe*.

1. In 2012, a fractured en banc Court overruled *Sandoval-Lua* and *Rosas-Castaneda*. According to *Young*, this Court's earlier cases were inconsistent with the INA's burden-of-proof provision (and a comparable regulation), which places on noncitizens the burden of proving their eligibility for relief from removal. 697 F.3d at 988-90 (citing 8 U.S.C. § 1229a(c)(4) and 8 C.F.R § 1240.8(d)). *Young* reasoned that an inconclusive record "fail[s] to establish the absence of a predicate crime," but rather "simply demonstrate[s] that the evidence about the nature of the conviction is in equipoise," so a noncitizen "cannot carry the burden of proof with an inconclusive record." *Id.* at 989.

Young was wrong because "an evidentiary standard of proof"—like the preponderance of the evidence standard in 8 C.F.R. § 1240.8(d)—"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. 2013). To prove her eligibility for cancellation, for example, Marinelarena had to marshal evidence that her U.S.-citizen children would suffer exceptional and extremely unusual hardship, because that is a question of fact.

In contrast, as the First Circuit held in rejecting *Young*, "the categorical approach—with the help of its modified version—answers the purely 'legal question of what a conviction *necessarily* established.'" *Sauceda v. Lynch*, 819 F.3d 526, 533-34 (1st Cir. 2016) (quoting *Mellouli*, 135 S. Ct. at 1987); *see* slip op. 28 & n.1 (Tashima, J., dissenting). The burden of proof "does not come into play." *Sauceda*, 819 F.3d at 534.[2]

Judge Watford has persuasively explained why that is so: 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." *Almanza-Arenas v. Lynch*, 815 F.3d 469, 489 (9th Cir. 2015) (en banc) (Watford, J., concurring). Rather, "[w]hat matters here is whether [the petitioner's] conviction

[2] There is nothing unusual about a legal presumption neutralizing an evidentiary burden of proof. In a copyright-infringement suit, for example, the plaintiff bears the burden of proving each element of her claim. One element is owning a valid copyright. To satisfy that element, however, she may simply rely on the legal presumption that her registered copyright is valid unless the defendant shows otherwise. *See e.g.*, *Acad. of Motion Picture Arts & Scis. v. Creative House Promotions, Inc.*, 944 F.2d 1446, 1451 (9th Cir. 1991). In contrast, her burden of proof will provide a true hurdle when she sets out to prove the second element—that the defendant copied her work—just like the noncitizen's burden here on factual questions like hardship.

necessarily established" the elements of a corresponding federal offense. *Id.* "That is a legal question with a yes or no answer, *see Mellouli*, 135 S. Ct. at 1986-87," and where the record is ambiguous, "the answer is no," because "the conviction is deemed to rest on only the least of the acts criminalized" absent a record that *necessarily* establishes otherwise. *Id.* at 488-89. "The record is not inconclusive in that regard, and because this issue involves a purely legal determination (rather than a factual determination, as *Young* wrongly held), its resolution is unaffected by which party bears the burden of proof." *Id.* at 489.

Or, to use *Young*'s phrase, no "evidence" is ever "in equipoise"; there can never be a 40% or 60% chance that the conviction was for the generic offense. 697 F.3d at 989. There is *0%* chance, unless the record of conviction "necessarily" (i.e., 100%) establishes the elements of the narrower federal offense. So, to prove she was not "convicted of" a disqualifying controlled substance offense, Marinelarena did not need to affirmatively prove that her conviction actually involved a non-federally controlled substance; all she needed to show was that her conviction did not "necessarily" involve a federally controlled substance. By taking the opposite view, *Young* effectively requires that a conviction be presumed

to rest on the *most* of the acts criminalized. That improperly reverses *Moncrieffe*'s legal presumption.

Moreover, under *Young*, an ambiguous conviction like Marinelarena's would not count as a controlled-substances offense at the removal stage of proceedings, where the government bears the burden of proof, yet it would count as a controlled-substances offense at the relief stage, where the noncitizen bears the burden. That outcome is inconsistent with *Moncrieffe*'s holding that the analysis of a prior conviction operates the "same in both [the removal and cancellation] contexts," 569 U.S. at 191 n.4. Congress could not have intended so erratic a result when it used the same term—"conviction"—in both the INA's removal and relief provisions.

2. The panel majority held that *Moncrieffe* was inapplicable for two reasons. Neither withstands scrutiny.

First, the panel majority concluded that *Moncrieffe*'s least-acts-criminalized presumption applies only to removal, not cancellation of removal, because of the different burdens. Slip op. 16, 18, 21. But *Moncrieffe* addressed both removal and cancellation. The question in *Moncrieffe*—whether the petitioner's conviction was an "aggravated

felony"—mattered *only* because, if it was, he could not apply for discretionary relief from removal; it was undisputed that he was removable either way. 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 have been redundant.[3]

[3] Moreover, the Supreme Court "granted certiorari [in *Moncrieffe*] to resolve a conflict" that had arisen in both the removal and cancellation contexts. 569 U.S. at 189-90 & n.3 (citing *Garcia v. Holder*, 638 F.3d 511, 513 (6th Cir. 2011), and *Martinez v. Mukasey*, 551 F.3d 113, 116 (2nd Cir. 2008), which both concerned noncitizens seeking cancellation of removal). *Moncrieffe* resolved the cancellation cases as well as the removal cases. *See Garcia v. Holder*, 569 U.S. 956 (2013) (granting, vacating, and remanding in light of *Moncrieffe*).

Second, the panel majority distinguished *Moncrieffe* because it applied only the categorical approach and did not need to reach the modified categorical step. Slip op. 19-21. But "[t]his purported distinction overstates the difference" between the two variants. Slip op. 26 (Tashima, J., dissenting). Indeed, any argument "that *Moncrieffe* is inapplicable because it focused on the categorical, 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 v. United States*, 570 U.S. 254, 263 (2013)).

The majority nevertheless held that the modified categorical approach involves a question that "is, if not factual, at least a mixed question of law and fact"—unlike the categorical inquiry—that requires "review[ing] approved 'extra-statutory materials … [to] discover which statutory phrase contained within a statute listing several different crimes[] covered a prior conviction.'" Slip op. 20 (quoting *Descamps*, 570 U.S. at 263). But 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. Rather, it is a limited "tool for implementing the categorical approach." *Id.* at 262. A court applying the modified categorical approach does not start with a blank slate and weigh "evidence" of what a conviction actually entailed. Instead, as always, it starts from the presumption that the conviction rests on the least of the acts criminalized under the statute, and then checks whether the record of conviction rebuts that presumption by showing that the conviction "necessarily" establishes the elements that correspond to a disqualifying offense. *Supra* 7-8.

There is no weighing of "evidence" in this analysis; the modified categorical approach *forbids* any factual inquiry into the offense and, indeed, strictly limits the analysis to a narrow range of conviction documents. True, the "absence of records will often frustrate application of the modified categorical approach" as a result. *Johnson*

v. United States, 559 U.S. 133, 145 (2010). But that "common-enough consequence" is a feature, not a flaw, of the modified categorical approach, *id.*; it is one way the categorical approach is "underinclusive" by design, *Moncrieffe*, 569 U.S. at 205.

An inconclusive record thus does not signal an evidentiary failure of proof. It simply means that the least-acts-criminalized presumption is not rebutted. *Sauceda*, 819 F.3d at 534. As noted above, whether the presumption is rebutted is a "legal question with a yes or no answer." *Almanza-Arenas*, 815 F.3d at 489 (Watford, J., concurring); slip op. 28 n.1 (Tashima, J., dissenting). That question can never be in "equipoise."

3. *Young* is also inconsistent with *Moncrieffe* in another respect: It risks placing an impossible burden on the noncitizen seeking relief. *Young* may require applicants for asylum and cancellation to prove the unprovable by asking them to establish the basis for their convictions using only conviction records that they were not responsible for creating or maintaining, and which may no longer exist. *See generally* Immigrant Defense Project Supp. Amicus Br. Even if those records do exist, they may not specify the basis. And just obtaining them may

prove impossible for noncitizens who are often detained, unrepresented by counsel, or unable to speak English fluently. *Id.*

Young acknowledged that "some aliens will surely face challenges" in attempting to locate the necessary state court records, but it concluded that its "result is not so absurd that Congress could not have intended it." 697 F.3d at 989. *Moncrieffe* has since undercut this rationale, however, by explaining that "[t]he categorical approach was designed to avoid" precisely the sort of "potential unfairness" in which "two noncitizens, each 'convicted of' the same offense, might obtain different aggravated felony determinations depending on *what evidence remains available*." 569 U.S. at 201 (emphasis added). Indeed, nine of the eleven Judges who decided *Young* concluded that Congress could *not* have intended so unfair an outcome. 697 F.3d at 991-92 (B. Fletcher, J., concurring in part and dissenting in part); *id.* at 1003 (Ikuta, J., concurring in part and dissenting in part). Judge Ikuta explained that the "two-judge … 'majority's' holding is absurd" in simultaneously (a) deeming the burden of proof relevant to the modified categorical inquiry, and (b) "impos[ing] [the] strict evidentiary limitations" of that approach by "limiting the alien to a narrow range of

Shepard documents" to meet her burden. *Id.* at 992-93, 997, 1000, 1003.

Of course, *Young*'s *second* holding—that the analysis must be limited to the formal record of conviction, *id.* at 982-85—has now been confirmed by *Moncrieffe*, which squarely rejected after-the-fact "minitrials," and strictly forbade resort to materials outside of the record of conviction. 569 U.S. at 200-01. Judge Ikuta's alternative proposal to avoid the "inherent unfairness" of the controlling opinion's approach—relaxing these evidentiary limits—is thus foreclosed. 697 F.3d at 993, 998, 1003. Marinelarena could not, for example, have "submitted testimony from [her] lawyer" or "the judge who accepted [her] plea to ascertain what offense was charged and pleaded to in the state court." *Sauceda*, 819 F.3d at 532.

After *Moncrieffe*, then, the only approach that avoids *Young*'s "illogical" and "unfair[]" result is the one that had been the law of this Circuit before *Young*. 697 F.3d at 992 n.1, 993, 1003 (Ikuta, J.); *see id.* at 990-92 (B. Fletcher, J.) (defending *Sandoval-Lua* and *Rosas-Castaneda*). This Court should therefore return to its prior rule. That approach, of course, does not require immigration judges to *grant*

discretionary relief. The agency may always consider the actual facts of any offense, along with all other equities, at the discretionary phase. Accordingly, if application of *Moncrieffe*'s presumption has "any practical effect on policing our Nation's borders, it is a limited one." *Moncrieffe*, 569 U.S. at 204.

4. Not only did a majority of the *Young* Court disagree with its approach, but other Members of this Court have also recognized that it stands on even shakier ground after the Supreme Court's more recent decisions. *See* slip op. 25 (Tashima, J., dissenting); *Lozano-Arredondo v. Sessions*, 866 F.3d 1082, 1088 (9th Cir. 2017); *Almanza-Arenas*, 815 F.3d at 489 (Watford, J., concurring) ("*Young* [is] fundamentally incompatible with the categorical approach.").

So has the First Circuit. In *Sauceda*, it explained that *Young* cannot be squared with *Moncrieffe*. Instead, it held that *Moncrieffe*'s presumption "dictates the outcome" where the record is ambiguous, regardless of who bears the evidentiary burden of proof. *See Sauceda*, 819 F.3d at 531-32, 532 n.10. And it rejected the two rationales the panel majority relied on to distinguish *Moncrieffe*. *See id.* at 533-34. Similarly, the Second and Third Circuits have adopted positions

consistent with *Sauceda*. *See Thomas v. Att'y Gen.*, 625 F.3d 134, 148 (3d Cir. 2010); *Martinez*, 551 F.3d at 122; *see also Scarlett v. U.S. Dep't of Homeland Sec.*, 311 F. App'x 385, 386-87 (2d Cir. 2009) (applying *Martinez* in a modified categorical case).[4]

Two circuits have concluded that *Moncrieffe* does not apply in this context. But those courts relied heavily on the panel majority opinion here without additional analysis. *See Gutierrez v. Sessions*, 887 F.3d 770, 776-78 (6th Cir. 2018); *Lucio-Rayos v. Sessions*, 875 F.3d 575, 581-83 (10th Cir. 2017), *petition for cert. forthcoming*, No. 17A1302 (U.S.) (due July 9, 2018). They are incorrect for the same reasons that the panel's opinion was incorrect.[5]

---

[4] The government has argued that the Third Circuit took the opposite position in *Syblis v. Attorney General*, 763 F.3d 348 (3d Cir. 2014). Gov't Opp. to Pet. for Reh'g ("Opp.") 4-5. But *Syblis* involved a "circumstance-specific" inquiry that *does* require the immigration judge to examine the actual conduct and facts of a prior criminal offense—a special context in which "the categorical approach does not apply." *Id.* at 356. *Syblis* distinguished the Third Circuit's earlier decision in *Thomas* on exactly this ground. *Id.* at 357 n.12. The Third Circuit has since applied its earlier cases—not *Syblis*—where, as here, the modified categorical approach governs. *See Johnson v. Att'y Gen.*, 605 F. App'x 138, 141-42 (3d Cir. 2015).

[5] The government has stated that several other circuits support its position. Opp. 4-5. But *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), predates *Moncrieffe*. In *Sanchez v. Holder*, 757 F.3d 712 (7th Cir. 2014),

In short, *Young* was wrong when it was decided and is even more wrong today. It should be overruled. And under the proper rule, Marinelarena's conviction should not disqualify her from relief because it does not *necessarily* establish the elements of a federal controlled-substances offense.

C. The noncitizen bears no threshold burden of producing a record of conviction.

The panel majority also observed that the record was inconclusive in part because "there is no plea agreement, plea colloquy, judgment, or other document in the record that reveals the factual basis for Petitioner's guilty plea." Slip op. 13. But it is the government, not the noncitizen, who must produce the *Shepard* documents in the first instance.

Noncitizens bear no initial burden of production. The relevant regulation provides that "[*i*]*f the evidence indicates* that one or more of

---

the Seventh Circuit first found that the categorical approach did not apply and then discussed this issue in a footnote's worth of dicta, *id.* at 720 n.6, while ruling for the noncitizen on different grounds. *Le v. Lynch*, 819 F.3d 98 (5th Cir. 2016), expressly *reserved* the question presented here, *id.* at 107 n.5, and the question remains an open one in the Fifth Circuit, *see Gomez-Perez v. Lynch*, 829 F.3d 323, 326 & n.1 (5th Cir. 2016).

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). Thus, before any "burden of proof … shift[s] to the [noncitizen]," the government must first "satisf[y] its burden of establishing that the evidence 'indicate[s]' that [the relevant] bar applie[s]." *In re S-K-*, 23 I. & N. Dec. 936, 939 (BIA 2006); *see also In re M-B-C-*, 27 I. & N. Dec. 31, 36-37 (BIA 2017) (government must provide "some evidence from which a reasonable factfinder could conclude that one or more grounds for mandatory denial … may apply"); *In re A-G-G-*, 25 I. & N. Dec. 486, 501 (BIA 2011) (describing the government's "initial burden" to "secure and produce direct evidence").

Only a record of conviction that could succeed in rebutting the least-acts-criminalized presumption would render a conviction disqualifying. *See supra* §§ I.A-B. So the government must offer "evidence indicat[ing]" that such a record exists. To meet its burden of production, the government therefore must produce a record of conviction suggesting that the noncitizen was actually convicted of a disqualifying alternative element.

As a result, it is not enough for the government simply to show that the noncitizen was convicted under a divisible statute containing a disqualifying alternative element, and then to contend that she (like anyone else convicted under the statute) *might have been* convicted of the disqualifying alternative. Such speculation is not enough for the government to carry its initial burden, in this context or any other. The government cannot establish, for example, that the former-persecutor bar to asylum (8 U.S.C. § 1158(b)(2)(A)(i)) may apply solely by noting that the noncitizen was a police officer who (like any official) *could have* abused his power by persecuting others; under the regulation, the government must provide evidence that the noncitizen actually engaged in persecution before the burden flips to the noncitizen to prove he did not. *See, e.g.*, *Budiono v. Lynch*, 837 F.3d 1042, 1048-49 (9th Cir. 2016).

That is why "the government bears the burden of proving the existence and nature of prior convictions, even when those prior convictions are at issue only as they relate to an alien's application for discretionary relief." *Sandoval-Lua*, 499 F.3d at 1133 (Thomas, J., concurring) (citing *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006)). Moreover, the burden-of-proof statute, § 1229a(c)(4)(B), does not

even *permit* immigration judges to require that a noncitizen fill gaps in the record of conviction by producing any missing "judicially noticeable conviction documents." *See Rosas-Castaneda*, 655 F.3d at 881, 884-85. Such conviction records are not "credible testimony" of the sort a noncitizen may be required to produce. *See id.* at 884-85 (quoting § 1229a(c)(4)(B)). Thus, it is the government, not the noncitizen, which must produce the required conviction records.

If the government makes the requisite "prima facie showing," *A-G-G-*, 25 I. & N. Dec. at 501, by producing the record of conviction, the noncitizen must prove that the conviction is not actually disqualifying. In many cases, that "proof" will simply be legal argument because evaluating a predicate offense under the categorical approach is a purely "legal question," *Mellouli*, 135 S. Ct. at 1987. In some cases, though, the noncitizen might attempt to disprove the validity or accuracy of the *Shepard* documents the government has produced, for example, by establishing that the conviction has since been vacated or the indictment had been superseded before judgment. *See, e.g.*, *Esparza-Recendez v. Holder*, 526 F. App'x 886, 891-92 (10th Cir. 2013).

The applicable statute and regulation therefore place on noncitizens at most a burden of persuasion, not production—two "distinct concepts." *Dir., Office of Workers' Comp. Programs, Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). Because "[b]urdens are generally placed on the party who is in the best position to present the evidence," *United States v. Cortez-Rivera*, 454 F.3d 1038, 1041 (9th Cir. 2006); *In re Vivas*, 16 I. & N. Dec. 68, 70 (BIA 1977), the burden of production is properly placed on the government.

The government is in the "better position to fill gaps in the evidence and resolve any disputes by presenting documentation in its own records" or those of fellow public agencies, even though the noncitizen "ultimately bears the burden of pro[of]." *In re Garcia-Ramirez*, 26 I. & N. Dec. 674, 677 & n.4 (BIA 2015) (applying § 1240.8(d)); *see Cortez-Rivera*, 454 F.3d at 1041. As a practical matter, the government will always determine at the outset of removal proceedings whether a noncitizen has prior convictions that should be investigated further as possible grounds for removal; and, by regulation, it must fingerprint and conduct a background check on all applicants for relief from removal. *See* 8 C.F.R. § 1003.47. By contrast, as noted

above (at 17-18), noncitizens with criminal convictions face "serious practical handicap[s]," *Vivas*, 16 I. & N. Dec. at 70, to obtaining the records because, among other things, they are often subject to mandatory detention and are not entitled to appointed counsel. *See Moncrieffe*, 569 U.S. at 201; *see generally* IDP Br.

II. California Penal Code § 182(a)(1) Is Not Divisible With Respect To Particular Controlled Substances.

The chief reason why Marinelarena's record of conviction is inconclusive is that it is not divisible in the first place: California prosecutors charging a drug conspiracy need not—and here, did not—charge that a particular substance is the object of the conspiracy. This independent ground for granting the petition would eliminate the need to reconsider *Young* in this case.

As the panel correctly held, California's general conspiracy statute "cannot count as a controlled substance offense under the categorical approach" because it proscribes all conspiracies, including those that have nothing to do with controlled substances. Slip op. 9-10. Where a state statute is broader than the federal statute, however, it may still count as a predicate offense under the modified categorical approach—but only if the statute of conviction is divisible. *See Mathis v. United*

States, 136 S. Ct. 2243, 2249 (2016). And a statute is divisible only if it "list[s] elements in the alternative, and thereby define[s] multiple crimes," some of which fall within the scope of the federal offense. *Id.*

Section 182(a)(1) is not divisible in the way that would be necessary for it to count as a disqualifying controlled substance offense. Even assuming that the conspiracy offense is divisible with respect to object crimes as a general matter,[6] it is not *doubly* divisible into conspiracies to commit a drug offense involving a specific drug (e.g., conspiracy to commit a marijuana offense), as opposed to conspiracy to

---

[6] At least one California court has held that conspiracy is not divisible in this way because the particular object crime is not itself an "element[]" but instead just a "means by which the purpose of the conspiracy was to be achieved." *People v. Vargas*, 110 Cal. Rptr. 2d 210, 247 (Ct. App. 2001). On this understanding of § 182(a)(1), a conspiracy conviction would *never* be divisible into controlled-substances conspiracies, let alone those involving a particular drug type. But as the panel noted, slip op. 11, there is some tension between this holding and the broad language found in *People v. Horn*, 524 P.2d 1300, 1304 (Cal. 1974), which states that "the jury must also determine which felony defendants conspired to commit," as well as language wrenched out of context from other cases, like *People v. Smith*, 337 P.3d 1159, 1168 (Cal. 2014), that describe conspiracy in general terms. If the question whether conspiracy is generally divisible with respect to object crimes becomes dispositive, this Court should certify that question to the California Supreme Court. *See United States v. Figueroa-Beltran*, No. 16-10388, 2018 WL 2750775, at *4-5 (9th Cir. June 6, 2018) (certifying question of state statute's divisibility when two state-court decisions "seemingly stand in conflict" on that point).

commit a drug offense, full stop. At most, § 182(a)(1) requires prosecutors to prove a conspiracy with specific intent to violate a drug statute, like § 11352, not the particular drug that would be involved in that future agreed-upon § 11352 offense.

Indeed, it would make little sense to require that drug conspiracies always be charged with respect to a specific drug. The crime of conspiracy "is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy." *People v. Morante*, 975 P.2d 1071, 1079 (Cal. 1999). While violating § 11352 requires trafficking in an actual drug, conspiracy is an inchoate offense; the crime is complete when there is an unlawful agreement made (and some overt act taken), which means that individuals can "*conspir*[*e*] to possess for sale or to transport a controlled substance" long before anyone knows or decides what drugs they will traffic in, let alone "physically possess[es]" any drugs. *Morante*, 975 P.2d at 1080.

Jurors therefore need not be unanimous on the identity of any particular drug in the nascent conspiracy. Some conspiracies might even involve multiple drugs (i.e., a conspiracy to violate § 11352 in multiple ways), but they would still have to be charged as a single

offense with a single punishment because there is only a single agreement. *People v. Jasso*, 48 Cal. Rptr. 3d 697, 698, 701, 703-04 (Ct. App. 2006) (concluding that there can be a single conspiracy "to smuggle drugs" into prison in a case involving "marijuana, black tar heroin, and cocaine.").

That is why courts refer to drug conspiracies as a crime "of conspiring to possess for sale or to transport a *controlled substance*" generally. *See, e.g.*, *Morante*, 975 P.2d at 1080 (emphasis added); *People v. Romero*, 64 Cal. Rptr. 2d 16, 18 (Ct. App. 1997) (identifying specific drug for underlying offense but not conspiracy offense). Because prosecutors may allege a conspiracy to violate § 11352 in its entirety, without seeking a "unanimous jury verdict on one particular prong," *Ramirez v. Lynch*, 810 F.3d 1127, 1137 (9th Cir. 2016)—here, the particular drug at issue—the conspiracy statute is indivisible with respect to drug type.

The panel majority reached a contrary conclusion by noting that § 11352—the drug statute the government argues is at issue here—is divisible with respect to controlled substance. Slip op. 12-13 (citing *Martinez-Lopez*, 864 F.3d at 1039-42). But it is not enough to say that

conspiracy is divisible into object crimes and then to say that the relevant object crime *when charged directly* is divisible by controlled substance. There is no transitive property of divisibility. The question is only whether the statute of conviction—conspiracy, not § 11352—is divisible into offenses involving specific controlled substances. As *Morante* and *Jasso* show, it is not.

Sometimes, of course, prosecutors may charge, or the jury may be instructed on, the specific drug anyway. *E.g.*, *People v. Cook*, No. F066847, 2015 WL 7571697, at *25 (Cal. Ct. App. Nov. 24, 2015) (cited in Gov't Br. 20). But prosecutors *need not* do so under California law, and indeed, the complaint here *did not* charge a conspiracy that targeted a specific drug under § 11352. AR136; *see Mathis*, 136 S. Ct. at 2256-57 (allowing a "peek" at *Shepard* materials for purposes of determining the elements of the offense).

In any event, the panel majority recognized there is at least "uncertainty" about what prosecutors must prove. *See* Slip op. 11. Yet a reviewing court cannot deny relief under the modified categorical analysis when there is "indeterminacy," given the categorical approach's "demand for certainty." *See Mathis*, 136 S. Ct. at 2257. To the extent

there is any doubt, the proper approach is to certify the question to the California Supreme Court. *See supra* 28 n.6.

III. An Expunged Conviction Cannot Bear Immigration Consequences.

Even more fundamentally, the agency should not have treated Marinelarena's offense as a prior conviction because a California court had vacated and dismissed it for rehabilitative purposes under California's expungement provision, Penal Code § 1203.4. *See* AR215-16.

As relevant here, the INA defines "conviction" as a "formal judgment of guilt of the alien entered by a court." 8 U.S.C. § 1101(a)(48)(A). The statute says "nothing about expungement, and could well be interpreted to establish only *when* a conviction occurred without determining what might be the effect of a later expungement." *Murillo-Espinoza v. I.N.S.*, 261 F.3d 771, 744 (9th Cir. 2001). The agency, however, has held that "Congress did not intend to provide any exceptions from its statutory definition of a conviction for expungements pursuant to state rehabilitative proceedings." *In re Salazar-Regino*, 23 I. & N. Dec. 223, 234 (BIA 2002); *see also In re Marroquin-Garcia*, 23 I. & N. Dec. 705, 713-14 (A.G. 2005). While this

Court determined that the BIA's "interpretation" is not "the only plausible one," it accorded the BIA's interpretation *Chevron* deference given the ambiguity. *Murillo-Espinoza*, 261 F.3d at 774; *see also Reyes v. Lynch*, 834 F.3d 1104, 1107-08 (9th Cir. 2016).

That deference was misplaced. Resolving statutory ambiguity against a noncitizen is inconsistent with the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Lafarga v. INS*, 170 F.3d 1213, 1216 (9th Cir. 1999). Moreover, the INA's definition of "conviction" also has criminal applications, *see* 8 U.S.C. § 1326, and so the traditional criminal rule of lenity governs as well. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004); *see also Sessions v. Dimaya*, 138 S. Ct. 1204, 1217 (2018) (same). And even when a statute is ambiguous, "*Chevron* has no role to play in construing hybrid [immigration] statutes." *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1031 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part), *rev'd on other grounds*, 137 S. Ct. 1562. *Chevron* should have even less of a role where federalism concerns are at stake. *See* Immigration Professors' Amicus Br. §§ II-III.

The BIA has shown that it is possible to interpret § 1101(a)(48)(A) to exclude at least some convictions that have been relieved under state law: Unlike rehabilitative expungements, convictions that are vacated for procedural or substantive reasons do *not* count as convictions for immigration purposes. *In re Pickering*, 23 I. & N. Dec. 621, 624 (BIA 2003), *rev'd on other grounds*, 465 F.3d 263 (2006); *see Nath v. Gonzales*, 467 F.3d 1185, 1188-89 (9th Cir. 2006). That interpretation is necessary to "avoid … constitutional problems." *Pinho v. Gonzales*, 432 F.3d 193, 209 n.22 (3d Cir. 2005). But there is "no basis in the statutory text" to read "conviction" to include some offenses as to which courts later granted post-conviction relief but not others. *See Pereira v. Sessions*, ___ S. Ct. ____, No. 17-459, 2018 WL 3058276, at *9 (U.S. June 21, 2018). Statutes must be interpreted "consistently," and therefore any saving construction must apply consistently to all such convictions, not just those raising constitutional concerns. *See Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

The panel majority rejected Marinelarena's arguments on expungement because she did not raise them before the BIA. Slip op. 22-23. But exhaustion is required only for "remedies available … as of

right," 8 U.S.C. § 1252(d)(1), and no remedy is available when an issue is "entirely foreclosed by prior BIA case law." *Sun v. Ashcroft*, 370 F.3d 932, 942-43 (9th Cir. 2004). So, "one need not exhaust administrative remedies that would be futile or impossible to exhaust." *Singh v. Ashcroft*, 362 F.3d 1164, 1169 (9th Cir. 2004). That is the case here. *See Salazar-Regino*, 23 I. & N. Dec at 234; *Marroquin-Garcia*, 23 I. & N. Dec. at 713-14.

When this Court last considered this statute en banc, it "assume[d], without deciding, that the statutory term 'conviction' includes expunged state convictions.'" *Nunez-Reyes v. Holder*, 646 F.3d 684, 689 n.2 (9th Cir. 2011). It should now finally resolve this significant question and hold that the BIA's interpretation finds no support in the statutory text.

CONCLUSION

The petition for review should be granted.

Respectfully submitted,

/s/ Brian P. Goldman

Andrew Knapp
SOUTHWESTERN LAW SCHOOL
3050 Wilshire Blvd.
Los Angeles, CA 90010

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

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

Counsel for Petitioner

June 22, 2018

STATEMENT OF DETENTION STATUS

I certify that pursuant to Ninth Circuit Rule 28-2.4(b) that (1) petitioner is not detained in the custody of the Department of Homeland Security, that (2) petitioner has not again moved the Board of Immigration Appeals to reopen her proceedings, and that (3) petitioner has not applied to the District Director of the U.S. Citizenship and Immigration Services for adjustment of status.

ORRICK, HERRINGTON & SUTCLIFFE LLP

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

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits permitted by the Court's April 26, 2018, order. The brief is 6,998 words, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

ORRICK, HERRINGTON & SUTCLIFFE LLP

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

CERTIFICATE OF SERVICE

I hereby certify that 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 appellate CM/ECF system on June 22, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

ORRICK, HERRINGTON & SUTCLIFFE LLP

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