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 REPLY BRIEF

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes and Regulations

Other Authorities

ARGUMENT

The government contends that the petition for review should be denied for two main reasons. First, it argues—for the first time in these proceedings—that the plain text of an overbroad state drug statute can be ignored because there is no "realistic probability" it would be enforced as written. But this Court, sitting en banc, has rejected that argument *three times*. So has every other Court of Appeals to consider it, save one.

Second, the government maintains that *Young v. Holder*'s reasoning remains sound. The government insists that the Supreme Court did not really mean what it said when it held, in a series of recent cases, that the categorical approach operates the same in the removal and relief-from-removal contexts; that the categorical and modified categorical approaches are not two distinct analyses; that the analysis begins from a legal presumption that a conviction rests on the least acts criminalized under a statute; and that the analysis should not turn on what evidence of old crimes remains available. "But a good rule of thumb for reading [these] decisions is that what they say and what they mean are one and the same." *Mathis v. United States*, 136 S. Ct. 2243,

2254 (2016). Notwithstanding the government's fine parsing, *Young* cannot be sustained.

I. California Penal Code § 182(a)(1) Is Overbroad And Indivisible With Respect To Controlled Substances.

A. The government does not dispute that California Penal Code § 182(a)(1) is broader than a federal controlled-substances offense because it covers "*any* criminal conspiracy," not just drug conspiracies. Slip op. 10. Until now, it has also acknowledged that even a conspiracy to violate California Health and Safety Code § 11352 is overbroad, because California's controlled substances schedules list drugs that are not listed on the federal schedules. *E.g.*, Opp. to Pet. for Reh'g 6. This Court has long recognized § 11352's overbreadth as well. *See, e.g.*, *United States v. Martinez-Lopez*, 864 F.3d 1034, 1038 (9th Cir. 2017) (en banc); *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007) (citing geometric isomers and apomorphine). The threshold dispute over whether the modified categorical approach applies here has therefore focused simply on whether "conspiracy to violate § 11352" is further divisible into, for example, heroin conspiracies, fentanyl conspiracies, and apomorphine conspiracies.

The government now backtracks, however, and argues that conspiracy to violate § 11352 is not overbroad at all, because the non-federally listed substances can simply be ignored. That belated contention is improperly presented and meritless.

First, because the BIA concluded that § 11352 was overbroad (though divisible), AR2-3 (citing *Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009)), this Court cannot affirm the agency on the government's new alternative ground. *See Recinos De Leon v. Gonzales*, 400 F.3d 1185, 1189 (9th Cir. 2005) (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943)). Adherence to that administrative-law principle is particularly important where the government's new argument involves complex factual assertions—such as whether apomorphine is an "isoquinoline alkaloid of opium"—on which the agency developed no record. *See* Gov't Supp. En Banc Br. ("Gov't Br.") 4 n.2, 7.

Second, the government's argument is wrong regardless. The government maintains that § 11352's overbreadth is only "technical"—and its plain text is "irrelevant"—unless Marinelarena shows a "realistic probability" that California applies its statute to conduct involving non-federally controlled substances. Gov't Br. 4-5, 8-10

(quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). But a statute whose overbreadth is "evident from its text" is not "technically" overbroad; it is overbroad, period. *United States v. Grisel*, 488 F.3d 844, 845, 850 (9th Cir. 2007) (en banc); *United States v. Vidal*, 504 F.3d 1072, 1074-75 (9th Cir. 2007) (en banc). *Duenas-Alvarez*'s "realistic probability" test aims only to prevent "the application of legal imagination" from creating a categorical mismatch. 549 U.S. at 193. But "no 'legal imagination'… is required" where the "state statute's greater breadth is evident from its text." *Grisel*, 488 F.3d at 850.

Indeed, except for the Fifth Circuit, every other Circuit to have addressed this question has agreed with this Court and rejected the government's argument here. *Hylton v. Sessions*, ___ F.3d ____, 2018 WL 3483561, at *5 (2d Cir. July 20, 2018); *Swaby v. Yates*, 847 F.3d 62, 64-65 (1st Cir. 2017); *United States v. O'Connor*, 874 F.3d 1147, 1153-54 (10th Cir. 2017); *Singh v. Att'y Gen.*, 839 F.3d 273, 285-86 (3d Cir. 2016); *Ramos v. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013); *Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007). *But see United States v. Castillo-Rivera*, 853 F.3d 218, 222-24 (5th Cir.) (en banc), *cert denied*, 138 S. Ct. 501 (2017).

The government gives no good reason to abandon the prevailing approach now. Just a year ago, the en banc Court reaffirmed that *this very statute*, "section 11352, … is not a categorical match with a federal drug trafficking offense." *Martinez-Lopez*, 864 F.3d at 1038. The government made the same "realistic probability" argument there, *see* Gov't Supp. Br., *United States v. Martinez-Lopez*, No. 14-50014, 2016 WL 6882997 at *10 (9th Cir. Nov. 16, 2016), and this Court implicitly rejected it in proceeding to a divisibility analysis, 864 F.3d at 1038-41.

B. Turning to divisibility, the government insists (Br. 11-12) that conspiracy convictions involving § 11352 can be further divided into distinct crimes by the particular controlled substance involved. It invokes the generic proposition that conspirators not only must "intend[] to agree but also … intend[] to commit the elements of [a particular] offense." *People v. Swain*, 909 P.2d 994, 997 (Cal. 1996). But that just begs the question of what "elements" are necessary to form the requisite "inten[t]"—an intent involving controlled substances generally or an intent involving a specific substance.

On that point, the government hazards no response to California's rule that a drug conspiracy involving *multiple substances* must be

treated as a *single crime*. *See* Pet'r Br. 29-31. Indeed, an agreement to violate § 11352 in multiple ways can yield only one conviction, because "[a] single agreement to commit several crimes constitutes one conspiracy." *People v. Johnson*, 303 P.3d 379, 390 (Cal. 2013). And the conviction will carry the same punishment no matter how many different ways the defendant intended to violate § 11352. *See* § 182(a). So a conspiracy to violate § 11352 plainly differs from a direct violation of § 11352. Unlike a § 11352 defendant, a § 182 defendant *cannot* be "subjected to multiple convictions under a single statute for a single act as it relates to multiple controlled substances." *Martinez-Lopez*, 864 F.3d at 1040.

As to conspiracy, then, the controlled-substances element *does* merely "describe 'alternative methods of committing one offense.'" *Id.* (quoting *Mathis*, 136 S. Ct. at 2256). That is why Marinelarena's own charging document charges an intent to violate § 11352 *generally*. Pet'r Br. 31. The government offers no case holding that California nonetheless requires juries to unanimously agree on the legally irrelevant question of which controlled substance is involved in a conspiracy. *See Richardson v. United States*, 526 U.S. 813, 818 (1999).

II. *Young* Should Be Overruled.

A. An ambiguous record of conviction does not rebut the least-acts-criminalized presumption.

If, however, the modified categorical approach applies, then this Court should return to its earlier position that "an inconclusive record of conviction is sufficient to demonstrate an alien petitioner was not 'necessarily' convicted of the generic crime," and thus "it cannot be said as a matter of law that such conviction was for the generic crime" for purposes of determining eligibility for relief from removal. *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1132 (9th Cir. 2007).

As we explained (Br. 10-13), *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), is incompatible with the Supreme Court's subsequent explanation that courts "must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense," *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)), and its holding that the analysis of a prior conviction operates the "same in both [the removal and cancellation] contexts," *id.* at 191 n.4. The government's four counterarguments lack merit.

1. The government first contends that *Moncrieffe* "explicitly noted" that the least-acts-criminalized presumption "*is not* relevant … at the modified categorical stage." Gov't Br. 13-14, 21. But *Moncrieffe* says just the opposite. In holding that the presumption "is not without qualification," 569 U.S. at 191, *Moncrieffe* shows that the least-acts-criminalized presumption can be *rebutted* in two ways: (1) if, under the modified categorical approach, the record of conviction reveals "which particular offense the noncitizen was convicted of," and (2) if the "least of the acts" is just a "theoretical possibility" that is the product of "legal imagination." *Moncrieffe*, 569 U.S. at 191; *see* Pet'r Br. 8. In other words, the modified categorical approach operates within, not outside, the least-acts-criminalized presumption.

That is confirmed by *Johnson*, the very case whose least-acts-criminalized language *Moncrieffe* formalized as a presumption. 569 U.S. at 191. *Johnson* analyzed a divisible Florida battery statute with three alternative elements, the most minor of which was mere offensive touching. 559 U.S. at 136-37. Because "nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the *least of these*

acts"—the offensive-touching prong of the divisible statute—the Court had to address whether that offense counted as a "violent felony" under federal law. *Id.* at 137 (emphasis added). That is, the least-acts-criminalized presumption focuses the analysis on the least criminal prong of a divisible statute *precisely when* the "absence of records" renders the "application of the modified categorical approach" inconclusive. *Id.* at 145. So the government's assertion (Br. 22) that "the Supreme Court has never—ever—applied the presumption" in a modified categorical case is just wrong.

2. The government next makes a related point. It insists that the modified categorical approach involves an "intermediate" step—using the conviction documents to "discover the statutory phrase" of conviction—that is a "mixed question of law and fact" for which there can be no presumptive answer. Gov't Br. 13-14, 22, 25-26. But that contradicts *Moncrieffe* and *Johnson* for the same reasons just noted. The modified categorical inquiry does not start with a blank slate; it begins from the presumption that the conviction rests on the least acts criminalized. And that presumption holds unless "the record of conviction of the predicate offense *necessarily* establishes conduct that"

corresponds to the disqualifying federal offense. *Moncrieffe*, 569 U.S. at 197-98. That is why the modified categorical approach and categorical approach answer the same "purely 'legal question of what a conviction *necessarily* establishe[s].'" *Sauceda v. Lynch*, 819 F.3d 526, 533-34 (1st Cir. 2016) (quoting *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015)); *see* Pet'r Br. 10-17.

The government asserts, however, that "both the Supreme Court and this Court have noted" that this inquiry is "at least a mixed question of law and fact." Br. 13. But neither case it cites says that. On the contrary, *Descamps v. United States* specifically *rejected* the argument that the modified categorical analysis differs in kind from the categorical approach, such that it could amount to an "evidence-based" inquiry. 570 U.S. 254, 266-67 (2013). The government just resists *Descamps*—as demonstrated by its emphasis on the "factual basis for the conviction," and its assurance that there is "little doubt" about what Marinelarena's conduct *really* entailed. Gov't Br. 22, 27. *Descamps* rejected any attempt to ask "what facts can confident[ly] be thought to underlie the defendant's conviction"; the emphasis is instead on the "elements" of the offense that a conviction "*necessarily*" establishes. 570

U.S. at 266 & n.3 (internal quotation marks omitted). And whether a "conviction *necessarily* established" the elements of the disqualifying offense is "a legal question with a yes or no answer" because "the conviction is deemed to rest on only the least of the acts criminalized" absent a record of conviction showing otherwise. *Almanza-Arenas v. Lynch*, 815 F.3d 469, 488-89 (9th Cir. 2015) (en banc) (Watford, J., concurring).

Nor did *Medina-Lara v. Holder*, 771 F.3d 1106, 1113-15 (9th Cir. 2014) call this a "mixed question." *Medina-Lara* does discuss burdens of proof, but that is understandable because the case was decided under the *Young* regime that deems those burdens relevant. Under *Moncrieffe*'s rule, *Medina-Lara*'s outcome would be the same: The ambiguity in the record would mean that the least-acts-criminalized presumption would remain unrebutted.

3. The government further posits that "[p]resuming the least culpable conduct" would "entirely negate the statutory burden of proof and presuppose eligibility for relief from removal." Gov't Br. 25-26. But applying *Moncrieffe* "does not relieve an alien applying for relief of any burden," because "an alien who is found, as a matter of law, not to have

been convicted of a disqualifying offense must still prove continuous physical presence, good moral character, and 'exceptional and extremely unusual hardship,'" *Sauceda*, 819 F.3d at 534, as well as why she merits a *discretionary* grant of relief, *Moncrieffe*, 569 U.S. at 204. It does not negate the statutory burden of proof to recognize that one of several ineligibility grounds "involves a purely legal determination" whose "resolution is unaffected by which party bears the burden of proof." *Almanza-Arenas*, 815 F.3d at 489 (Watford, J., concurring); *see* Pet'r Br. 11 n.2.

4. Finally, the government questions (Br. 26-27) our explanation that *Young* can require noncitizens seeking essential relief to prove the unprovable—the reason that nine of eleven judges in *Young* rejected its ultimate holding. Pet'r Br. 17-18. But the government does not dispute that in "many cases state and local records from [past] convictions will be incomplete." *Johnson*, 559 U.S. at 145; *see also* Pet'r Br. 17-19; IDP Supp. Br. 11-17. The government suggests that a noncitizen can "take[] steps to avoid ambiguity in the conviction documents" by "ensur[ing] that the record reflects the specific subsection under which she is pleading." Gov't Br. 27. But the Supreme Court has stressed twice in

recent years that defendants "may have good reason not to" risk "irk[ing] the prosecutor or court by squabbling" about details that were "irrelevant to the proceedings," *Descamps*, 570 U.S. at 270—such as a precise alternative element that is irrelevant to the plea or sentence—and indeed might "even be precluded from doing so by the court," *Mathis*, 136 S. Ct. at 2253.

B. Noncitizens bear no threshold burden of production.

Moreover, Marinelarena cannot be faulted for the fact that her record of conviction is inconclusive. It is the government, not the noncitizen, that bears the initial burden of producing records of conviction; burdens of production and proof are distinct concepts. Pet'r Br. 22-27.[1]

Before any "burden of proof … shift[s] to the [noncitizen] to show" that a bar to relief does not apply, the government must first "satisf[y] its burden [under 8 C.F.R. § 1240.8(d)] of establishing that the evidence

[1] The government contends (Br. 15) that this question was never presented to the agency. But the production issue did not become relevant until after the BIA rendered its decision. The IJ did not rest its decision on any problem of production because it (mistakenly) held that the record of conviction established a conspiracy relating to heroin. AR43.

'indicates[s]' that [the] bar applie[s]." *In re S-K-*, 23 I. & N. Dec. 936, 939 (BIA 2006); *see Budiono v. Lynch*, 837 F.3d 1042, 1049 (9th Cir. 2016); *Sandoval-Lua*, 499 F.3d at 1133 (Thomas, J., concurring) (agreeing with "the First Circuit in holding that the government bears the burden of proving the existence and nature of prior convictions") (citing *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006)); *In re A-G-G-*, 25 I. & N. Dec. 486, 501 (BIA 2011).

The government contends that *In re M-B-C-*, 27 I. & N. Dec. 31 (BIA 2017), "rejected the proposition that DHS bears an affirmative burden of production." Gov't Br. 18. That would come as news to the BIA. It cited *M-B-C-* just two months ago to reiterate that only "[o]nce the DHS meets its burden" does "the burden shift[] to the alien," because "the initial burden is on the DHS to show evidence that indicates that the alien" may be barred from relief. *In re Negusie*, 27 I. & N. Dec. 347, 366-67 (BIA 2018).

That *A-G-G-* and *S-K-* involved asylum applications rather than applications for cancellation of removal makes no difference. *Contra* Gov't Br. 17. These decisions interpret § 1240.8(d), which recites the

"burden of proof for relief applications *generally*." *Budiono*, 837 F.3d at 1047 (emphasis added).

The government references (Br. 16-17) application forms that request a broad range of information to inform the IJ's *discretionary* determination whether to grant cancellation. Nothing in these forms contradicts the BIA's holdings that, when the government moves to pretermit an application for relief on the ground that a mandatory bar applies, it must make an initial showing. Indeed, this Court previously interpreted the provision on which the government relies (Br. 16), § 1229a(c)(4)(B), to *forbid* immigration judges from requiring noncitizens to produce all "judicially noticeable conviction documents." *Rosas-Castaneda v. Holder*, 655 F.3d 875, 881, 884-85 (9th Cir. 2011).[2]

To the extent requiring the government to make a prima facie showing of a disqualifying conviction means that a noncitizen's burden often will not play a significant role in answering that question (in contrast with other, fact-intensive bars to relief), that is simply because analyzing a prior conviction under the categorical and modified

[2] *Young* overruled a different holding of *Rosas-Castaneda*, but reaffirmed its reading of § 1229a(c)(4)(B). *See* 697 F.3d at 984.

categorical approaches involves a binary "legal question," *Mellouli*, 135 S. Ct. at 1987, "with a yes or no answer," *Almanza-Arenas*, 815 F.3d at 489 (Watford, J., concurring); Pet'r Br. 23-24.

Moreover, "fairness and common sense often counsel against requiring a party to prove a negative fact, and favor, instead, placing the burden of coming forward with evidence on the party with superior access to the affirmative information." *United States v. Cortez-Rivera*, 454 F.3d 1038, 1042 (9th Cir. 2006). The government's suggestion (Br. 18-19) that it "may likely be in a worse position" to obtain conviction documents is fanciful. The government has access to national criminal databases, collaborates regularly with local law enforcement, and is required to fingerprint and conduct a background check on all applicants, 8 C.F.R. § 1003.47. By contrast, "during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention, … where they have little ability to collect evidence." *Moncrieffe*, 569 U.S. at 201; *see also* Pet'r Br. 26-27; IDP Supp. Br. 18-24. The ordinary allocation of burdens of production accounts for such "serious practical handicap[s]." *In re Vivas*, 16 I. & N. Dec. 68, 70 (BIA 1977).

Last, the government fears that our rule would allow noncitizens to "obfuscate[]." Gov't Br. 27. But that would get noncitizens nowhere. Any whiff of "hid[ing] behind silence" could be grounds to deny relief at the discretionary phase of relief proceedings, when an IJ decides if an eligible noncitizen *should* be granted relief. Gov't Br. 19; *see Moncrieffe*, 569 U.S. at 204. So this imaginary concern does not justify overlooking the reality that obtaining a complete record of conviction may be impossible for noncitizens.

III. An Expunged Conviction Is Not A "Conviction" Under The INA.

Marinelarena's conviction should not have been disqualifying in the first place because it was expunged under California Penal Code § 1203.4. Such convictions are no longer convictions within the meaning of 8 U.S.C. § 1101(a)(48)(A). Unlike other federal statutes that expressly indicate when an expungement will have no effect, *see* Immigration Professors Br. 20-21, § 1101(a)(48)(A) is at best silent as to the effect of expungements.

Responding to our argument (Br. 34) that § 1101(a)(48)(A) must be given the same meaning as applied to convictions vacated on constitutional grounds as on rehabilitative ones, the government points

(Br. 29) to the fact that offenses expunged under § 1203.4 maintain some collateral consequences under state law. But that is nonresponsive. The statutory text draws no distinction among grounds for post-conviction relief. So, as a matter of statutory interpretation and the rule of lenity, convictions expunged under § 1203.4 cannot count if—as the government does not dispute—convictions vacated on other grounds do not. *See* Pet'r Br. 33-34.

Besides, nothing in § 1101(a)(48)(A) requires that all consequences stemming from a since-vacated judgment of guilt be "erased" under state law in order for the conviction to lose immigration consequences under federal law. It is enough that no "formal judgment of guilt" or "plea of guilty" remains in force. § 1101(a)(48)(A). In this way, § 1101(a)(48)(A) stands in contrast to the Sentencing Guidelines commentary at issue in *United States v. Hayden*, 255 F.3d 768, 770-74 (9th Cir. 2001), which provided authoritative guidance requiring that an expungement be complete in order not to count under the guidelines.

CONCLUSION

The petition for review should be granted.

Respectfully submitted,

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August 13, 2018

CERTIFICATE OF COMPLIANCE

This brief complies with the length limits implied by the Court's April 26, 2018, and May 7, 2018, orders. The brief is 3,498 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).

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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 August 13, 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.

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