No. 18-64

In the Supreme Court of the United States

JUAN ALBERTO LUCIO-RAYOS, PETITIONER

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, an alien who has been convicted of certain offenses, including any "crime involving moral turpitude," is statutorily ineligible for discretionary cancellation of removal. 8 U.S.C. 1227(a)(2)(A)(i); 8 U.S.C. 1182(a)(2)(A)(i)(I); see 8 U.S.C. 1229b(b)(1)(C). In determining an alien's eligibility for cancellation or any other "relief or protection from removal," the alien bears the burden of proof to establish that he "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i). The question presented is:

Whether an alien satisfies his burden of proof where the record establishes that he has been convicted under an ordinance defining multiple crimes, at least some of which are crimes involving moral turpitude, but it is inconclusive as to which crime formed the basis of the alien's conviction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 875 F.3d 573. The decisions of the Board of Immigration Appeals (Pet. App. 25a-33a) and the immigration judge (Pet. App. 34a-49a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 14, 2017. A petition for rehearing was denied on March 9, 2018 (Pet. App. 50a-51a). On May 23, 2018, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including July 9, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, the Attorney General has

discretion to cancel the removal of an alien who is inadmissible or deportable, but meets certain statutory criteria for such relief. 8 U.S.C. 1229b. To be statutorily eligible for cancellation, an alien who is not a lawful permanent resident must: (1) have been "physically present in the United States for a continuous period" of at least ten years; (2) have been "a person of good moral character" during that period; (3) have "not been convicted" of any of the offenses described in Sections 1182(a)(2), 1227(a)(2), or 1227(a)(3) of the INA; and (4) establish that removal would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. 1229b(b)(1)(A)-(D). An alien seeking cancellation of removal, or any other form of relief from removal, "has the burden of proof to establish" that he "satisfies the[se] applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i). Accordingly, when the evidence indicates that the alien "may" have been convicted of a disqualifying offense, governing regulations provide that "the alien shall have the burden of proving by a preponderance of the evidence" that he has not been convicted of such a crime. 8 C.F.R. 1240.8(d).

Disqualifying offenses for non-lawful permanent resident aliens include any "crime involving moral turpitude," if the offense was committed "within five years" of the alien's admission and the crime is one for which "a sentence of one year or longer may be imposed." 8 U.S.C. 1227(a)(2)(A)(i); see also 8 U.S.C. 1182(a)(2)(A)(i)(I) (including "crime[s] involving moral turpitude," as well as "attempt[s] or conspiracy to commit such a crime"). Under Board of Immigration Appeals (BIA or Board)

precedent that applied when petitioner's removal proceedings were initiated, a theft offense constituted a crime involving moral turpitude if it required the defendant to act "with the intent to permanently deprive an owner of property." *Garcia-Martinez* v. *Sessions*, 886 F.3d 1291, 1294 (9th Cir. 2018) (quoting *In re Diaz-Lizarraga*, 26 I. & N. Dec. 847, 849 (B.I.A. 2016)) (emphasis omitted).

2. a. Petitioner, a native and citizen of Mexico, unlawfully entered the United States in January 1999. Pet. App. 35a-36a; see Administrative Record (A.R.) 137, 579. In 2009, petitioner pleaded guilty to theft, in violation of Westminster, Colo., Ordinance § 6-3-1(A).[1] Pet. App. 38a; see A.R. 549, 552. That ordinance provided:

> (A) It shall be unlawful to commit theft. A person commits theft when he knowingly obtains or exercises control over anything of value of another without authorization, or by threat or deception, where the value of the thing involved is less than five hundred dollars ($500), and:
>
> (1) Intends to deprive the other person permanently of the use or benefit of the thing of value; or
>
> (2) Knowingly uses, conceals, or abandons the thing of value in such manner as to deprive the other person permanently of its use or benefit; or
>
> (3) Uses, conceals, or abandons the thing of value intending that such use, concealment or abandonment will deprive the other person permanently of its use and benefit; or

[1] All references to the Westminster Ordinance are to the version in effect in 2009.

> (4) Demands any consideration to which he is not legally entitled as a condition of restoring the thing of value to the other person.

Westminster, Colo., Ordinance § 6-3-1(A). At the time, a violation of Section 6-3-1(A) was punishable by up to one year imprisonment and a fine of up to $1000. *Id.* § 1-8-1. Petitioner was sentenced to three months of probation and ordered to pay a $255 fine. Pet. App. 42a; see A.R. 554.

In August 2010, U.S. Department of Homeland Security served petitioner with a notice to appear for removal proceedings, charging him with being present in the United States without having been admitted or paroled. Pet. App. 35a; see A.R. 579-580; see also 8 U.S.C. 1182(a)(6)(A)(i). Petitioner conceded his removability, but sought relief from removal in the form of cancellation. Pet. App. 36a; see 8 U.S.C. 1229b(b)(1). In the alternative, petitioner requested voluntary departure. Pet. App. 36a; see 8 U.S.C. 1229c(a)(1).

b. An immigration judge (IJ) denied petitioner's application for cancellation of removal, granted his application for voluntary departure, and entered an alternative order of removal to Mexico should petitioner fail to voluntarily depart. Pet. App. 34a-49a.

As relevant here, the IJ explained that, to be eligible for cancellation of removal, petitioner must prove, *inter alia*, that he has not been convicted of a disqualifying offense under Sections 1182(a)(2), 1227(a)(2), or 1227(a)(3), including a crime involving moral turpitude. Pet. App. 37a. Applying the categorical approach, see *Descamps* v. *United States*, 570 U.S. 254, 263-264 (2013), the IJ determined that the Westminster Ordinance did not categorically qualify as a crime involving

moral turpitude under then-current BIA precedent because, although paragraphs (1) and (3) require "an intent to permanently deprive the owner of the property" and paragraph (2) requires "knowingly depriving the owner of the property," paragraph (4) does not require an intent to permanently deprive the owner of the property. Pet. App. 40a.

The IJ further explained, however, that the ordinance was divisible and therefore the "modified categorical approach" permitted her to consider the record of conviction "to determine the crime of conviction"—*i.e.*, which paragraph petitioner violated. Pet. App. 41a; see *Descamps*, 570 U.S. at 263-264. But the IJ found the record inconclusive as to the "particular offense" for which petitioner was convicted. Pet. App. 41a; see *id.* at 41a-43a. The IJ concluded that petitioner had thus "failed to prove that he was convicted of a theft offense that *did not* involve an intent to permanently deprive the owner of property," and therefore "failed to establish his eligibility for cancellation of removal." *Id.* at 43a.

c. The Board dismissed petitioner's appeal. Pet. App. 25a-33a.

Contrary to the IJ's determination, the Board concluded that the Westminster Ordinance did categorically qualify as a crime involving moral turpitude. Pet. App. 28a. The Board reasoned that the ordinance "consolidate[s] the crimes of larceny, embezzlement, and theft under false pretenses." *Id.* at 30a (citing *People* v. *Warner*, 801 P.2d 1187, 1189 (Colo. 1990) (en banc)). Although there are various ways in which the ordinance may be violated, the Board reasoned, "[w]hichever way the crime is committed * * * it constitutes the offense of 'theft,'" and it requires "the intent to deprive another permanently of the use or benefit of his property as an

element." *Ibid.* The Board therefore "agree[d] with the [IJ's] ultimate decision" that petitioner is not eligible for cancellation of removal. *Id.* at 31a.

Having concluded that the offense of conviction was categorically a crime involving moral turpitude, the Board declined to "address [petitioner's] arguments regarding the [IJ's] application of the modified categorical approach." Pet. App. 28a n.3. Nonetheless, it added that, "even assuming that the ordinance is divisible, and the modified categorical approach applies, we agree with the [IJ] that [petitioner] did not provide sufficient evidence establishing that he was not convicted of a crime involving moral turpitude." *Ibid.* (citing *Garcia* v. *Holder*, 584 F.3d 1288 (10th Cir. 2009)).

3. A two-judge panel of the court of appeals affirmed. Pet. App. 1a-24a.[2]

Agreeing with the IJ, the court of appeals first determined that the Westminster Ordinance did not qualify categorically as a crime involving moral turpitude, because paragraph (4) "does not require proof that the perpetrator intended to deprive the victim permanently of his property." Pet. App. 11a-12a; see *id.* at 9a-14a. The court noted that the other three paragraphs "expressly require proof of the perpetrator's intent to deprive the victim of his property permanently, but [paragraph (4)] does not." *Id.* at 12a. The court rejected the government's argument that paragraph (4) implies that the deprivation will be permanent if the property owner is "unwilling or unable to pay the consideration demanded" for its return. *Id.* at 12a-13a.

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[2] Then-Judge Gorsuch heard oral argument in the case, but was confirmed as an Associate Justice of this Court before the opinion was issued, and thus did not participate in the decision. See Pet. App. 3a n.1.

The court of appeals further concluded, however—again in agreement with the IJ—that the ordinance is divisible "because it sets forth different crimes in its four separate provisions," and therefore the modified categorical approach applied. Pet. App. 15a (citing *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016)); see *ibid.* (citing Colorado's Criminal Jury Instructions for the analogous state theft statute setting forth different elements for each paragraph). The court noted that it was "undisputed" that none of the documents in the record relevant under that approach indicates of which crime covered by the Westminster Ordinance petitioner was convicted. *Id.* at 16a. And the court concluded that petitioner "bears the brunt of this unclear record." *Ibid.*; see *id.* at 16a-22a.

The court of appeals explained that "Congress has placed the burden of proving eligibility for relief from removal squarely on the alien." Pet. App. 17a (citing 8 U.S.C. 1229a(c)(4)(A)). "[I]n a case like this one," the court reasoned, it is thus the alien who bears the burden "under the modified categorical approach, to show that his prior conviction was not a [crime involving moral turpitude] that would make him ineligible for relief from removal." *Id.* at 17a-18a (citing *Garcia*, 584 F.3d at 1289-1290). Although petitioner argued that the burden of proof was irrelevant, on the theory that whether his prior conviction qualifies as a crime involving moral turpitude "is a legal, rather than a factual, question," the court explained that determining "which of the several offenses set forth in the divisible statute the alien was convicted" of is a factual determination based on "documentary evidence." *Id.* at 18a n.14. Accordingly, the court concluded that "burdens of proof are relevant and can be dispositive." *Ibid.*

The court of appeals rejected petitioner's contention that this Court's decision in *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013), required a different result. Pet. App. 19a-22a; see *id.* at 19a (stating that "[o]ther circuits are divided" on the question). In *Moncrieffe*, this Court explained that, in applying the categorical approach, a federal court must examine "what the state conviction necessarily involved, not the facts underlying the case," and therefore the court must "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." 569 U.S. at 190-191 (citation omitted; brackets in original). The court of appeals explained that this least-conduct-criminalized presumption did not undermine the result in this case for two primary reasons.

First, the court of appeals explained that *Moncrieffe* concerned whether the alien was removable in the first instance, not whether the alien was eligible for cancellation of removal. Pet. App. 20a-21a. In the former context, it is the government's burden to prove that an alien's prior conviction warrants removal, not the alien's burden to prove eligibility for cancellation. *Id.* at 20a. Thus, although the Court in *Moncrieffe* noted the application of the categorical approach in the removal and cancellation of removal contexts are generally the same, it had no occasion to consider and did not discuss how the "differences in the burden of proof" might affect the analysis. *Id.* at 20a-21a (citation omitted).

Second, the court of appeals explained that, "[u]nlike here, there was no question as to what offense Moncrieffe was convicted [of] under Georgia law"; the only question was the "clearly * * * legal question" of

"how Georgia courts defined the elements of that offense." Pet. App. 21a. By contrast, the question at issue here—"which offense listed in a divisible, multi-offense statute the petitioner was convicted" of—is "a question of fact or at least a question of law and fact, that turns on findings made from the limited category of documents relevant to the modified categorical approach." *Id.* at 21a-22a (citations omitted). And the court reiterated that "[t]he burden of proof remains relevant to that determination." *Id.* at 22a.

4. The court of appeals denied rehearing en banc without noted dissent. Pet. App. 50a-51a.

ARGUMENT

Petitioner contends (Pet. 26-34) that he is eligible for cancellation of removal because not every theft offense codified by Westminster, Colo., Ordinance § 6-3-1(A) qualifies as a crime involving moral turpitude and the evidentiary record for his 2009 conviction does not indicate which particular theft offense he was convicted of—and therefore does not establish that he was convicted of a crime involving moral turpitude. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. In any event, this case would be a poor vehicle for deciding the question presented for multiple reasons.

1. The court of appeals correctly determined that petitioner did not carry his burden of proving his statutory eligibility for cancellation of removal.

a. In determining whether a prior conviction constitutes an offense that would disqualify an alien from eligibility for cancellation of removal, the categorical approach generally applies. See *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986-1987 (2015). Under that approach, the IJ "look[s]

'not to the facts of the particular case,'" but whether 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 crime of conviction is a categorical match with the generic federal offense if "the elements of the crime of conviction sufficiently match the elements of [the] generic [offense], while ignoring the particular facts of the case." *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016). In other words, the previous conviction, as a legal matter, must have "'necessarily involved' . . . facts equating to [the] generic [federal offense]." *Moncrieffe*, 569 U.S. at 190 (citation omitted; brackets in original).

When the statute (or ordinance) defining the alien's previous crime of conviction "sets out a single (or 'indivisible') set of elements to define a single crime," application of the categorical approach requires only a comparison of that single crime's elements with the federal generic offense. *Mathis*, 136 S. Ct. at 2248. Where the statute (or ordinance), however, defines "multiple crimes," the analysis is "more complicated." *Id.* at 2249. In those circumstances, the Court applies the so-called "modified categorical approach." *Ibid.* That approach proceeds in two steps. A court first "looks to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a defendant was convicted of." *Ibid.*; see *Descamps* v. *United States*, 570 U.S. 254, 265 (2013) (explaining that the documents assist the court in "determin[ing] which of the statutory offenses * * * formed the basis of the defendant's conviction.").

"The court can then compare that crime, as the categorical approach commands, with the relevant generic offense." *Mathis*, 136 S. Ct. at 2249.

As noted, the INA places on the alien "the burden of proof to establish" that he "satisfies the applicable eligibility requirements," 8 U.S.C. 1229a(c)(4)(A)(i), including that he has not been convicted of a disqualifying crime, 8 U.S.C. 1229b(b)(1)(C); see 8 C.F.R. 1240.8(d) (establishing the burden of proof as "a preponderance of the evidence."). The application of that burden of proof to the modified categorical analysis in this case is straightforward. It is common ground here that (1) the evidence establishes that petitioner was convicted of one of the several theft crimes defined by Section 6-3-1(A); (2) a conviction for at least some of the crimes defined by Section 6-3-1(A) would disqualify petitioner from receiving cancellation of removal; and (3) the documents that petitioner submitted concerning his 2009 conviction are inconclusive as to whether his conviction was for one of those disqualifying offenses. Petitioner has therefore failed to carry his burden of establishing that he was *not* convicted of a disqualifying offense, and thus the court of appeals correctly determined that he is statutorily ineligible for cancellation of removal.

b. Petitioner contends (Pet. 26-28) that the court of appeals' decision is contrary to the "least-acts-criminalized presumption" that he ascribes to this Court's analysis in *Moncrieffe* and *Mellouli*. In *Moncrieffe*, this Court explained that because, under the categorical approach, courts "examine what the state conviction necessarily involved, not the facts underlying the case, [they] must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by

the generic federal offense." 569 U.S. at 190-191 (citation omitted; second and third sets of brackets in original); see *Mellouli*, 135 S. Ct. at 1986 (same); see also *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1568 (2017) (same). Petitioner argues that the same presumption should apply here.

But *Moncrieffe*, *Mellouli*, and *Esquivel-Quintana* addressed a different stage of the categorical approach in different circumstances. In *Esquivel-Quintana* and *Mellouli*, the statute of conviction was indivisible (or at least no one argued to the contrary), and therefore defined only a single crime. See *Esquivel-Quintana*, 137 S. Ct. at 1568 n.1; *Mellouli*, 135 S. Ct. at 1986 n.4. In *Moncrieffe*, although the Georgia statute defined multiple offenses, the Court "kn[e]w from [the alien's] plea agreement" which of those offenses he was convicted of. 569 U.S. at 192. There was no serious question in any of those cases as to "the actual crime of which the alien was convicted." *Esquivel-Quintana*, 137 S. Ct. at 1568 n.1. The question the Court addressed was whether that crime categorically matched the generic federal offense. The Court applied this least-acts presumption to answer "the legal question," *Mellouli*, 135 S. Ct. at 1987, of what criminal conduct (or acts) the conviction "necessarily involved," before asking "whether even those acts are encompassed by the generic federal offense," *Moncrieffe*, 569 U.S. at 190-191.

This case is different. Here, the parties agree that the Westminster Ordinance under which petitioner was convicted is divisible, and therefore defines multiple crimes. See Pet. 13, 26. They also agree that at least some of those crimes categorically match the generic federal offense (theft)—*i.e.*, a conviction for those crimes "necessarily involve[s]," *Moncrieffe*, 569 U.S. at

190, acts that are encompassed by that generic offense. Pet. 27. The only question under the modified categorical approach here is the factual one of whether "the actual crime of which the alien was convicted" was one of those crimes. *Esquivel-Quintana*, 137 S. Ct. at 1568 n.1. Neither *Esquivel-Quintana*, *Moncrieffe,* nor *Mellouli* speak to that question. The INA's burden-of-proof provision does, and the failure of the record to establish that fact requires the conclusion that petitioner did not carry his burden of proving that he was not convicted of an offense that rendered him ineligible for cancellation of removal.

Petitioner argues that the burden of proof imposed by the statute applies only to "*factual* questions of eligibility," not to the "purely 'legal question of what a conviction necessarily established.'" Pet. 28 (citations omitted). But, again, that "purely legal question" is not at issue here. Whether a conviction "necessarily established" conduct that is encompassed by the federal generic offense is just another way of asking whether the elements of the crime of conviction sufficiently match the elements of the generic offense. That is the question answered at the *second* step of the modified categorical approach. This case turns on the *first* step, which asks "what crime * * * a defendant was convicted of." *Mathis*, 136 S. Ct. at 2249. And *that* question, which involves sifting through documents in the evidentiary record, including the indictment, jury instructions, or plea agreement and colloquy, is undoubtedly a factual one (or at least a mixed question of law and fact) to which the INA's allocation of the burden of proof applies. See Pet. App. 18a n.14; see also *Le* v. *Lynch*, 819 F.3d 98, 105 (5th Cir. 2016) ("When an al-

ien's prior conviction is at issue, the offense of conviction itself is a factual determination, not a legal one.") (citation and internal quotation marks omitted).

Finally, petitioner contends (Pet. 33-34) that the court of appeals' decision creates an unwarranted risk that the alien will "bear[] the adverse consequences when conviction records that he neither creates nor maintains either do not contain necessary details or no longer exist." But assigning the consequences of an insufficient evidentiary record is precisely what a burden of proof is designed to do. See *Black's Law Dictionary* 236 (10th ed. 2014) (defining "burden of proof" as "a proposition regarding which of two contending litigants loses when there is no evidence on a question or when the answer is simply too difficult to find"). By assigning the burden to the alien, Congress ensured that aliens do not benefit from withholding available evidence that would shed light on which offense an alien was previously convicted of.

2. Petitioner errs in contending (Pet. 13-17) that the court of appeals' decision conflicts with decisions of other courts of appeals. Indeed, none of the decisions on which petitioner relies squarely considers the question presented here.

In *Thomas* v. *Attorney General of United States*, for example, the Third Circuit reversed a BIA determination that the evidence concerning an alien's prior state convictions affirmatively established that the convictions were for aggravated felonies, thus rendering the alien ineligible for cancellation of removal. See 625 F.3d 134, 138, 148 (2010). The bulk of the Third Circuit's opinion explained that the Board erred in treating the police officers' reports as the "relevant accusatory instruments" for each conviction under New York law, *id.*

at 144, and that, properly considered, the relevant documents did not "conclusively determine" whether the alien had been convicted of an offense that qualified as an aggravated felony or of a related offense that did not so qualify, *id.* at 147.

Although the Third Circuit further concluded that, "[i]n the absence of judicial records to establish such a finding," the alien's convictions did not "qualify as aggravated felonies," *Thomas*, 625 F.3d at 148, the decision cannot be read as deciding the question presented here. Unlike here, the BIA's decision in *Thomas* had not found the record of conviction inconclusive, nor applied the burden-of-proof framework; rather, as noted, the BIA had concluded that the record affirmatively established aggravated felonies. See *id.* at 144. In keeping with that approach, the Third Circuit's analysis focused exclusively on whether the BIA's evaluation of the relevant documents was correct. See *id.* at 141-148. Indeed, the court did not discuss the relevant burdens or even cite the provision imposing on the alien the burden of proving that he had not been convicted of such an offense. And after determining that the record of conviction was inconclusive, the court simply assumed without analysis that the lack of evidence inured to the alien's benefit.[3]

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[3] Petitioner argues (Pet. 16 n.4) that the Third Circuit has since applied his approach in an unpublished decision. See *Johnson* v. *Attorney Gen. of U.S.*, 605 Fed. Appx. 138 (2015). But the portion of the *Johnson* opinion on which petitioner relies addressed the BIA's analysis of the alien's removability, not the alien's eligibility for discretionary relief. See *id.* at 140-142. When the court turned to that latter question, it declined to decide whether the alien had carried his burden of proving he had not been convicted of a disqualifying offense because the government had "failed to preserve this issue for appeal." *Id.* at 145. The court suggested, moreover, that

In *Martinez* v. *Mukasey*, the Second Circuit anticipated this Court's decision in *Moncrieffe*, holding that a conviction for a state drug offense that covered nonremunerative transfers of small amounts of marijuana did not qualify as an "aggravated felony" under the INA. See 551 F.3d 113, 115 (2008). Applying the categorical approach, the court of appeals declined to look beyond the elements of the state conviction to determine whether the alien's "particular conduct which led to his conviction" would nevertheless have qualified as an aggravated felony under federal law. *Id.* at 122; see *id.* at 120-122. The court explained that, although an alien must show that he has not been convicted of an aggravated felony, that did not "require[] any alien seeking cancellation of removal to prove the facts of his crime to the BIA." *Id.* at 122. Rather, the alien can carry his burden "merely by showing that he has not been *convicted* of such a crime." *Ibid.*[4]

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had the issue been preserved, it would have adopted the Tenth Circuit's rule. See *ibid.* ("In a typical case, * * * [the alien] would be required to show by a preponderance of the evidence that he was not convicted of a [disqualifying offense] in order to be eligible for asylum.") (citing *Syblis* v. *Attorney Gen. of U.S.*, 763 F.3d 348, 357 (3d Cir. 2014)); *Syblis*, 763 F.3d at 357 (holding in a related context that "an inconclusive record of conviction does not satisfy a noncitizen's burden of demonstrating eligibility for relief from removal").

[4] *Scarlett* v. *United States Department of Homeland Security*, 311 Fed. Appx. 385 (2d Cir. 2009), is in accord. In that case, the Second Circuit cited *Martinez* for the proposition that "an alien's burden to prove eligibility for cancellation relief" does not "mean[] that the categorical approach * * * does not apply." *Id.* at 387. The court therefore refused to consider "evidence outside of [the alien's] record of conviction" to determine whether the alien's particular conduct underlying his prior conviction would have qualified as an aggravated felony. *Ibid.*

The court of appeals' decision in this case did not require "any alien seeking cancellation of removal to prove the facts of his crime," *Martinez*, 551 F.3d at 122. To the contrary, the Tenth Circuit held only that in cases where the statute of conviction defines multiple crimes, some of which are disqualifying and some of which are not, the alien "bears the burden of proving that he was not convicted" of one of the disqualifying crimes. Pet. App. 16a (emphasis omitted). Although *Martinez* did not involve a divisible statute, the Tenth Circuit's requirement is fully consistent with the Second Circuit's statement that to carry his burden of proof, the alien must "show[] that he has not been *convicted* of [a disqualifying] crime." 551 F.3d at 122.

Finally, although the First Circuit's decision in *Sauceda* v. *Lynch*, 819 F.3d 526 (2016), did actually consider the effect of an inconclusive record of conviction in a case involving a divisible statute, the circumstances before the First Circuit are distinguishable from those presented here. In that case, the First Circuit held in a case in which it was "undisputed that all the *Shepard* documents have been produced and that they shed no light on the nature of the offense or conviction," the alien had carried his burden of establishing eligibility for relief from removal. *Id.* at 531; see *id.* at 531-532.

In reaching that conclusion, however, the First Circuit repeatedly emphasized that the court had before it all of the existing conviction records. See *Sauceda*, 819 F.3d at 531 ("Both parties agree that the *Shepard* documents that exist are unable to help identify the prong of the [statute of conviction] under which [the alien] was convicted."); *id.* at 532 n.8 ("[A]ll the *Shepard* documents were produced."). And, indeed, the court expressly conditioned its holding on that premise: "We

hold that *since all the* Shepard *documents have been produced* and the modified categorical approach using such documents cannot identify the [relevant] prong of the divisible Maine statute * * * , as a matter of law, [the alien] was not convicted of a [disqualifying offense]." *Id.* at 532 (emphasis added).

In this case, petitioner presented to the IJ two sentencing-related documents and the summons and complaint. See Pet. App. 41a-43a. He did not argue that those documents constituted the complete record of conviction or offer any explanation as to why additional evidence that could shed light on the crime of conviction, *e.g.*, a plea colloquy, were not provided or were not available. Unlike in *Sauceda*, there is no agreement that "all the *Shepard* documents have been produced." *Sauceda*, 819 F.3d at 531.[5] *Sauceda* would therefore not require a subsequent panel of the First Circuit to reach a different conclusion in these circumstances than the Tenth Circuit did here. See Pet. App. 18a n.14 (emphasizing that, in *Sauceda*, "*the complete record of conviction [wa]s present*") (quoting *Sauceda*, 819 F.3d at 534).

3. In any event, this case would be not an appropriate vehicle for addressing the question presented for at least two independent reasons.

First, contrary to petitioner's suggestion (Pet. 25), the question presented may not be dispositive here.

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[5] Petitioner states (Pet. 18 n.5) that the government has not "disputed that the record of [petitioner's] conviction is complete." But the government had no occasion to address the question below given the binding precedent in the Tenth Circuit, see *Garcia* v. *Holder*, 584 F.3d 1288, 1290 (2009), and its primary contention below that, in any event, all of the offenses in the Westminster Ordinance qualify as crimes involving moral turpitude. See Gov't C.A. Br. 20-28; pp. 18-20, *infra*.

The BIA's principal ground of decision was not based on the effect of the inconclusive record of conviction, but on the BIA's conclusion that, regardless of the paragraph of the Westminster Ordinance under which petitioner was convicted, the conviction qualified as a crime involving moral turpitude. Pet. App. 29a-31a. In the Board's view, "the entirety of the Westminster Ordinance requires the intent to deprive another permanently of the use or benefit of his property." *Id.* at 30a. And, therefore, any conviction under the ordinance would make petitioner ineligible for cancellation of removal.

Petitioner notes (Pet. 25 n.10) that the Tenth Circuit disagreed with the BIA's conclusion, reasoning that some of the paragraphs "expressly require" proof of the requisite intent, while paragraph (4) only *expressly* requires that the defendant knowingly obtain control over the property of another and "[d]emand[] * * * consideration to which he is not legally entitled as a condition of restoring" the property, Westminster, Colo., Ordinance § 6-3-1(A)(4); see Pet. App. 12a-14a. Paragraph (4), however, plainly implies an intent to permanently deprive the victim of *either* the property initially taken or the consideration demanded. See *People* v. *Sharp*, 104 P.3d 252, 256 (Colo. App. 2004) (stating in a case concerning convictions under related Colorado theft statutes that "[t]he intent to deprive another permanently of the use or benefit of his property is an essential element of [theft]") (citation omitted; second set of brackets in original). And, even if such an intent were not strictly required, the Tenth Circuit also failed to consider whether there exists a "realistic probability, not a theoretical possibility" that the County would ever apply its ordinance to circumstances where such an intent did not

exist. *Moncrieffe*, 569 U.S. at 191 (citation omitted). Although those questions are not independently certworthy, the government would be free to "defend the judgment below on any ground which the law and the record permit." *Smith* v. *Phillips*, 455 U.S. 209, 215 n.6 (1982); accord *Schiro* v. *Farley*, 510 U.S. 222, 228-229 (1994).

Second, before the Tenth Circuit, then-Judge Gorsuch participated in the oral argument of this case. Pet. App. 3a n.1. Accordingly, the full court may not be available to decide this case. Even if the question presented otherwise warranted this Court's review, the Court may therefore wish to consider it in another case.[6]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[6] A similar issue is raised in the pending petition for a writ of certiorari in *Gutierrez* v. *Whitaker*, No. 18-558 (filed Oct. 19, 2018).