No. 18-558

In the Supreme Court of the United States

MIRIAM GUTIERREZ, PETITIONER

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH 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 an aggravated felony, including "a theft offense * * * for which the term of imprisonment [is] at least one year," is statutorily ineligible for discretionary cancellation of removal. 8 U.S.C. 1101(a)(43)(G), 1229b(a)(3) (footnote omitted). In determining an alien's eligibility for cancellation of removal or any other "relief or protection from removal," the alien bears the burden of proof to establish that she "satisfies the applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i). The question presented is:

Whether an alien satisfies her burden of proof where the record establishes that she has been convicted under a statute defining multiple crimes, at least one of which is an aggravated felony theft offense, 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-19a) is reported at 887 F.3d 770. The decisions of the Board of Immigration Appeals (Pet. App. 20a-27a) and the immigration judge (Pet. App. 28a-33a; 34a-44a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 16, 2018. A petition for rehearing en banc was denied on August 20, 2018 (Pet. App. 65a-66a). The petition for a writ of certiorari was filed on October 19, 2018. 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. 8 U.S.C. 1229b. To be statutorily eligible for cancellation, an alien who is a lawful permanent resident must: (1) have been "lawfully admitted for permanent residence for not less than 5 years"; (2) have "resided in the United States continuously for 7 years after having been admitted in any status"; and (3) have "not been convicted of any aggravated felony." 8 U.S.C. 1229b(a)(1)-(3). As relevant here, a disqualifying aggravated felony conviction includes "a theft offense (including receipt of stolen property)" or "an offense relating to commercial bribery, counterfeiting, [or] forgery * * * for which the term of imprisonment is at least one year." 8 U.S.C. 1101(a)(43)(G) and (R).

An alien seeking cancellation of removal, or any other form of relief from removal, "has the burden of proof to establish" that she "satisfies the[se] applicable eligibility requirements." 8 U.S.C. 1229a(c)(4)(A)(i); see 8 C.F.R. 1240.8(d). 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 she has not been convicted of such a crime. 8 C.F.R. 1240.8(d).

2. a. Petitioner, a native and citizen of Bolivia, was admitted to the United States in 1980 as a lawful permanent resident. Pet. App. 2a. In 2009, petitioner was convicted of petty larceny, in violation of Va. Code Ann. § 18.2-96 (2001), for which she was sentenced to jail time and probation. Pet. App. 3a; Administrative Record (A.R.) 244, 403-404, 479-480. In March 2012, petitioner was convicted of prescription fraud, in violation of Va. Code Ann. § 18.2-258.1 (2001), for which she received a

three year suspended sentence and two years of probation. Pet. App. 2a-3a; A.R. 229-230, 405-409. And, one month later, in April 2012, petitioner was convicted on two counts of credit card theft, in violation of Va. Code Ann. § 18.2-192 (2001); two counts of credit card forgery, in violation of Va. Code Ann. § 18.2-193 (2001); and two counts of credit card fraud, in violation of Va. Code Ann. § 18.2-195 (2001), for which she received a three year sentence, of which two years were suspended. Pet. App. 2a-3a, 49a; A.R. 231-243, 442-446.

Following petitioner's 2012 convictions, the Department of Homeland Security (DHS) served petitioner with a notice to appear for removal proceedings, charging her with being subject to removal pursuant to 8 U.S.C. 1227(a)(2)(A)(ii), as an alien who has been convicted of two or more crimes involving moral turpitude since admission. Pet. App. 46a; see A.R. 509-511. The charge of removability was based on petitioner's 2009 larceny conviction and her 2012 conviction for prescription fraud. Pet. App. 3a. Petitioner conceded her removability, but sought discretionary relief in the form of cancellation of removal. *Id.* at 47a; A.R. 103, 144-153.

b. An immigration judge (IJ) denied petitioner's application for cancellation of removal and entered an order of removal to Bolivia. Pet. App. 28a-64a.[1]

The IJ explained that, to be eligible for cancellation of removal, petitioner must not have been convicted of

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[1] The IJ's first decision denying petitioner's application for cancellation of removal was issued in July 2016. Pet. App. 45a-64a. The IJ then reconsidered and reaffirmed her decision following the Board of Immigration Appeals' decision in *Matter of Chairez-Castrejon*, 26 I. & N. Dec. 819 (2016). Pet. App. 28a-33a (oral decision); *id.* at 34a-44a (interim order); see *id.* at 31a-32a (incorporating the original decision and interim order into the final oral decision).

an aggravated felony, including any "theft offense" for which the term of imprisonment was at least one year or any "offense relating to * * * forgery" for which the term of imprisonment was at least one year. Pet. App. 47a-48a (quoting 8 U.S.C. 1101(a)(43)(G) and (R)). Applying the categorical approach, see *Descamps* v. *United States*, 570 U.S. 254, 263-264 (2013), the IJ considered whether either petitioner's convictions for credit card theft or her convictions for credit card forgery qualified as aggravated felonies under those provisions and therefore disqualified petitioner from receiving cancellation of removal.

With respect to petitioner's credit card theft convictions, the IJ determined that Va. Code Ann. § 18.2-192 (2001)[2] is a divisible statute and that the offenses defined in subsections (1)(a), (b), and (d) categorically

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[2] Virginia Code Annotated § 18.2-192 (2001) provides:

> (1) A person is guilty of credit card or credit card number theft when:
>
> (a) He takes, obtains or withholds a credit card or credit card number from the person, possession, custody or control of another without the cardholder's consent or who, with knowledge that it has been so taken, obtained or withheld, receives the credit card or credit card number with intent to use it or sell it, or to transfer it to a person other than the issuer or the cardholder; or
>
> (b) He receives a credit card or credit card number that he knows to have been lost, mislaid, or delivered under a mistake as to the identity or address of the cardholder, and who retains possession with intent to use, to sell or to transfer the credit card or credit card number to a person other than the issuer or the cardholder; or
>
> (c) He, not being the issuer, sells a credit card or credit card number or buys a credit card or credit card number from a person other than the issuer; or

match the generic "theft offense" specified in the INA. Pet. App. 38a, 49a-51a, 55a-56a. But the IJ concluded that the offense defined in subsection (1)(c) did not categorically qualify as theft, because illicitly selling or buying a credit card or credit number would "not necessarily constitute a 'taking'" of property without consent, "as required under the generic definition of theft." *Id.* at 39a; see *id.* at 51a-54a. The IJ further explained, however, that because the statute was divisible, she could "examine the underlying record of conviction," under the "modified categorical approach," "to determine which elements (generic or non-generic) formed the basis of the conviction." *Id.* at 49a; see *id.* at 39a-41a, 51a, 54a; see *Descamps*, 570 U.S. at 263-264.

The IJ observed that "neither of the[] documents [petitioner submitted from the record of conviction] indicate[d] which subsection of the statute [petitioner] was convicted under, or the specific elements of Credit Card Theft that led to her conviction." Pet. App. 55a. Relying on the statutory allocation of the burden of proof to the alien, the IJ therefore concluded that petitioner "was unable to meet her burden of showing she [was] eligible for Cancellation of Removal," and the IJ denied the application on that basis. *Id.* at 58a (citing 8 U.S.C. 1229a(c)(4)(A)); see *id.* at 40a-41a.

With respect to petitioner's credit card forgery convictions, the IJ determined that Va. Code Ann. § 18.2-193

> (d) He, not being the issuer, during any twelve-month period, receives credit cards or credit card numbers issued in the names of two or more persons which he has reason to know were taken or retained under circumstances which constitute a violation of § 18.2-194 and subdivision (1) (c) of this section.
>
> (2) Credit card or credit card number theft is grand larceny and is punishable as provided in § 18.2-95.

(2001)[3] was also divisible, and that *each* of the offenses defined by that statute was categorically "relat[ed] to * * * forgery," as required by 8 U.S.C. 1101(a)(43)(R). Pet. App. 41a (emphasis omitted); see *id.* at 43a, 58a-62a. "Since every subsection of [Section] 18.2-193 is a categorical match to the common law definition of forgery," the IJ reasoned that petitioner could again not

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[3] Virginia Code Annotated § 18.2-193 (2001) provides:

> (1) A person is guilty of credit card forgery when:
>
> (a) With intent to defraud a purported issuer, a person or organization providing money, goods, services or anything else of value, or any other person, he falsely makes or falsely embosses a purported credit card or utters such a credit card; or
>
> (b) He, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, signs a credit card; or
>
> (c) He, not being the cardholder or a person authorized by him, with intent to defraud the issuer, or a person or organization providing money, goods, services or anything else of value, or any other person, forges a sales draft or cash advance/withdrawal draft, or uses a credit card number of a card of which he is not the cardholder, or utters, or attempts to employ as true, such forged draft knowing it to be forged.
>
> (2) A person falsely makes a credit card when he makes or draws, in whole or in part, a device or instrument which purports to be the credit card of a named issuer but which is not such a credit card because the issuer did not authorize the making or drawing, or alters a credit card which was validly issued.
>
> (3) A person falsely embosses a credit card when, without the authorization of the named issuer, he completes a credit card by adding any of the matter, other than the signature of the cardholder, which an issuer requires to appear on the credit card before it can be used by a cardholder. Conviction of credit card forgery shall be punishable as a Class 5 felony.

prove that "she was not convicted under the subsections of [the statute] that are categorical matches to the generic definition of forgery." *Id.* at 43a; see *id.* at 63a.[4]

c. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 20a-27a.

The Board agreed with the IJ that the subsections of the credit card theft statute, Va. Code Ann. § 18.2-192 (2001), "define separate crimes, making the statute 'divisible.'" Pet. App. 24a. It agreed too that "[s]ubdivisions (1)(a) and (1)(b) of th[e] statute define generic theft offenses, but subdivision (1)(c) does not." *Id.* at 23a. The Board determined that the evidence therefore indicated that the "aggravated felony bar 'may apply' to [petitioner], and she must prove by a preponderance of the evidence that the bar is inapplicable." *Id.* at 25a (quoting 8 C.F.R. 1240.8(d)).

The Board further explained that petitioner could carry that burden by "producing conviction records indicating the she was charged and pled guilty under [subsection (1)(c)] (rather than under subdivisions (1)(a) or (1)(b))." Pet. App. 25a. But it observed that "[n]o such evidence has been provided" here. *Ibid.* Rather, the conviction documents filed by petitioner "are silent as to the subdivision under which she was convicted." *Ibid.* And because petitioner "bears the burden of proof," the Board concluded that that silence "prevents

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[4] In the IJ's initial decision, the IJ added that, even if subsection (1)(b) of Section 18.2-193 was not a categorical match for forgery, petitioner failed to prove that she was convicted of that subsection and so would be ineligible for cancellation on that basis. Pet. App. 61a-62a. On reconsideration, the IJ did not "disturb[]" its analysis from the first decision, but also did not repeat that observation. *Id.* at 43a; see *id.* at 42a.

her from showing that she qualifies for relief." *Ibid.* (citing 8 U.S.C. 1229a(c)(4)(A)).

In light of this conclusion, the Board found it "unnecessary to decide whether [petitioner's] 2012 conviction for credit card forgery" also qualified as an aggravated felony under the INA. Pet. App. 25a n.1.

3. The court of appeals affirmed. Pet. App. 1a-19a.

At the outset, the court of appeals noted that it is undisputed petitioner is removable due to her convictions for crimes involving moral turpitude; that her eligibility for cancellation of removal turns on whether she has "no 'convict[ion] of any aggravated felony'"; that Va. Code Ann. § 18.2-192 (2001) is "divisib[le] into multiple offenses, at least one of them not matching the generic definition" of theft; and that the record of conviction petitioner submitted was "inconclusive[] * * * as to which subsection of § 18.2-192 [petitioner] was convicted under." Pet. App. 9a (citation omitted; first set of brackets in original). The "sole issue in dispute" was "which 'side [may] claim[] the benefit of the record's ambiguity.'" *Ibid.* (citation omitted; brackets in original).

The court of appeals rejected petitioner's argument, based primarily on this Court's decision in *Moncrieffe* v. *Holder*, 569 U.S. 184 (2013), that "only where a record of conviction '*necessarily demonstrates* that a federal generic offense has occurred' can 'the categorical approach be satisfied.'" Pet. App. 10a (citation omitted). The court of appeals observed that *Moncrieffe* concerned the application of the categorical approach to an indivisible statute (rather than a divisible one) in the removability context (rather than the cancellation context). *Id.* at 11a-12a. And it explained that both distinctions matter. First, the court explained that the government bears the burden of proof in the removability context,

"while 'the clear text of the [INA] shifts the burden to the . . . noncitizen'" to prove eligibility for cancellation of removal. *Id.* at 11a (citation omitted). Second, the court added, because the statute in *Moncrieffe* was indivisible, this Court did not apply the modified categorical approach, as the court of appeals was required to do here. *Id.* at 12a.

The court of appeals also rejected petitioner's reliance on the First Circuit's decision in *Sauceda* v. *Lynch*, 819 F.3d 526 (2016). Pet. App. 13a-14a. For the same reasons it found *Moncrieffe* inapposite, the court of appeals found that *Sauceda* "does not stand on firm ground" in applying *Moncrieffe*'s analysis to a divisible statute in the cancellation context. *Id.* at 13a. In any event, the court reasoned, *Sauceda* "was distinguishable in that 'the complete record of conviction [wa]s present' there, a fact the court's holding treated as significant." *Ibid.* (quoting *Sauceda*, 819 F.3d at 532) (second set of brackets in original). "Here, in contrast, [petitioner] submitted only her plea agreement and sentencing order" —a fact the court found particularly "puzzling" "in view of the plea agreement's reference to [petitioner] 'hav[ing] read each of the indictments,' discussed them with her attorney, and 'understand[ing] each of the charges against [her].'" *Id.* at 14a (third, fourth, and fifth sets of brackets in original).

The court of appeals similarly determined that *Martinez* v. *Mukasey*, 551 F.3d 113 (2d Cir. 2008), was inapposite, because the case concerned an indivisible statute. Pet. App. 14a-15a. And the court rejected petitioner's contention that whether she had been convicted of an aggravated felony was a legal question to which the statutory burden of proof is irrelevant. *Id.* at 15a-16a. The court concluded that, "although the modified

categorical approach . . . involves some strictly legal issues, . . . the inquiry into which part of a divisible statute underlies the petitioner's crime of conviction is, if not factual, at least a mixed question of law and fact." *Ibid.* (brackets and citation omitted).

Having rejected the rationales asserted by petitioner, the court of appeals concluded that it was "persuaded that the view of the Third, Fourth, Fifth, Seventh, Ninth, Tenth, and Eleventh Circuits best comports with the statutory burden of proof." Pet. App. 18a. After removability is established, the court reasoned, the applicant must demonstrate her statutory eligibility for relief, including proving by a preponderance of the evidence that she has not been convicted of any disqualifying offense. *Ibid.* "[W]here a petitioner for relief under the INA was convicted under an overbroad and divisible statute, and the record of conviction is inconclusive as to whether the state offense matched the generic definition of a federal statute, the petitioner fails to meet her burden." *Id.* at 19a.

4. The court of appeals denied a petition for rehearing en banc without noted dissent. Pet. App. 65a-66a.

ARGUMENT

Petitioner contends (Pet. 26-35) that she is eligible for cancellation of removal because not every theft offense codified by Va. Code Ann. § 18.2-192 (2001) qualifies as an aggravated felony and the evidentiary record of her 2012 conviction does not indicate which particular theft offense she was convicted of—and therefore does not establish that she was convicted of an offense that would qualify as an aggravated felony. 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, for multiple reasons, this case would be a poor vehicle for deciding the question presented.[5]

1. The court of appeals correctly determined that petitioner did not carry her burden of proving her 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 prior 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 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 defines

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[5] A similar issue is raised in the pending petition for a writ of certiorari in *Lucio-Rayos* v. *Whitaker*, No. 18-64 (filed July 9, 2018).

"multiple crimes," however, the analysis is "more complicated." *Id.* at 2249. In those circumstances, the so-called "modified categorical approach" is applied. *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 she "satisfies the applicable eligibility requirements," 8 U.S.C. 1229a(c)(4)(A)(i), for cancellation of removal, including that she has not been convicted of a disqualifying crime, 8 U.S.C. 1229b(a)(3); 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 18.2-192; (2) a conviction for at least one of the crimes defined by Section 18.2-192 would disqualify petitioner from receiving cancellation of removal; and (3) the documents that petitioner submitted concerning her 2012 conviction are inconclusive as to whether her conviction was for one of those disqualifying offenses. Petitioner has therefore failed to carry her burden of establishing that she was *not* convicted of a disqualifying offense, and thus the court of appeals

correctly determined that she is statutorily ineligible for cancellation of removal.

b. Petitioner contends (Pet. 26-27) that the court of appeals' decision is contrary to the "least-acts-criminalized presumption" that she 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[ew] 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 in those cases was whether that crime categorically matched the generic federal offense. The Court applied the 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 Virginia statute under which petitioner was convicted is divisible, and therefore defines multiple crimes. See Pet. 25. They also agree that at least one of those crimes categorically matches the generic federal offense (theft)—*i.e.*, a conviction for that crime "necessarily involve[s]," *Moncrieffe*, 569 U.S. at 190, acts that are encompassed by that generic offense. Pet. 25. 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* speaks to that question. The INA's burden-of-proof provision does, and the failure of the record to establish which offense petitioner was convicted of requires the conclusion that petitioner did not carry her burden of proving that she was not convicted of an offense that rendered her ineligible for cancellation of removal.[6]

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[6] *Johnson* v. *United States*, 559 U.S. 133 (2010), is not to the contrary. Cf. Pet. 32-33. Although petitioner contends (*ibid.*) that *Johnson* applied the least-acts presumption to a conviction under a divisible statute, the portion of the opinion petitioner cites is a description of the district court's analysis, not this Court's. See 559 U.S. at 136-137. In any event, because *Johnson* arose in the criminal sentencing context, not cancellation of removal, the Court had no occasion to consider the effect of the INA's burden-of-proof provision on the categorical or modified categorical approach.

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 (citation 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 examining documents in the evidentiary record, including the indictment, jury instructions, or plea agreement and colloquy, is 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. 15a-16a; see also *Le* v. *Lynch*, 819 F.3d 98, 105 (5th Cir. 2016) ("When an alien'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. 34) that the court of appeals' decision creates an unwarranted risk that the alien will bear the adverse consequences "when conviction records that she neither creates nor maintains either do not contain clarifying 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. 12-16) that the court of appeals' decision conflicts with decisions of other courts of appeals. None of the decisions on which petitioner relies squarely considers the question presented here.

In *Thomas* v. *Attorney General of United States*, 625 F.3d 134 (2010), 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 *id.* at 138, 148. 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.[7]

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[7] Petitioner argues (Pet. 16 & n.3) that the Third Circuit has since applied her 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 an issue on which, in the court's view, the government bore the burden of proof. See *id.* at 142 ("The BIA concluded Johnson's conviction was an aggravated felony that, as a conviction for a particularly serious crime under 8 U.S.C. § 1158(b)(2)(A)(ii), barred him from receiving asylum."); *id.* at 144 ("[T]he government bears a burden of production to show the noncitizen was convicted of a particularly serious crime."). When the court turned to the alien's eligibility for discretionary relief, on which the alien bears the burden under 8 U.S.C. 1229a(c)(4)(A)(i), 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." 605 Fed. Appx. at 145. The court suggested, moreover, that had the issue been preserved, it would have adopted the Sixth Circuit's rule. *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)); see *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").

In *Martinez* v. *Mukasey*, 551 F.3d 113 (2008), 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 *id.* at 115. 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.*[8]

The Sixth Circuit's decision in this case does 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 Sixth Circuit's decision in this case held only that 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

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[8] *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.*

proving that he was not convicted of one of the disqualifying crimes. Pet. App. 19a. Although *Martinez* did not involve a divisible statute, the Sixth 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, 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 First Circuit held that 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, as the court of appeals noted, petitioner presented to the IJ "only her plea agreement and sentencing order." Pet. App. 14a. She did not submit the indictment, which the plea agreement indicated she had read and discussed with her lawyer for the purpose of "understand[ing] each of the charges against [her]." *Ibid.* (citation omitted; brackets in original). Nor did she submit any other *Shepard* documents, *e.g.*, a plea colloquy, that could shed light on the crime of conviction, or "proffer[] [any] explanation for the gap" in the evidentiary record. *Ibid.* And unlike in *Sauceda*, there is no agreement that "all the *Shepard* documents have been produced." *Sauceda*, 819 F.3d at 531.[9] *Sauceda* would therefore not require a subsequent panel of the First Circuit to reach a different conclusion in the circumstances of this case than the Sixth Circuit did here. See Pet. App. 14a (distinguishing *Sauceda* on the basis that, in that case, "[t]he court did not * * * address the effects of an incomplete record [of conviction]").

3. In any event, contrary to petitioner's assertion (Pet. 25), resolution of the question presented is not, in fact, "likely to determine the outcome of [petitioner's] application for relief," for two independent reasons.

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[9] Petitioner argues that in *Sauceda*, as here, there were *Shepard* documents "missing" from the record of conviction proffered to the IJ. Pet. 17 n.4. It is true that not every possible document that *Shepard* contemplates as potentially relevant to the modified categorical inquiry was submitted in *Sauceda*, but, unlike in this case, it was undisputed that no additional documents were available. *Sauceda*, 819 F.3d at 530 n.5 (noting the unavailability of additional conviction documents). Here, in contrast, the proffered conviction records explicitly refer to other documents, *e.g.*, the indictments, and the court of appeals expressly distinguished *Sauceda* on the ground that petitioner provided no explanation for why such documents were not provided. See Pet. App. 14a.

First, even if petitioner's 2012 credit card theft convictions do not qualify as "aggravated felon[ies]" under the INA, the IJ also determined that her 2012 credit card forgery convictions under Va. Code Ann. § 18.2-193 (2001) were aggravated felonies and thus independently make petitioner ineligible for cancellation. Pet. App. 41a-44a; 58a-63a. Petitioner notes (Pet. 25 n.11) that the records of conviction she produced for those offenses are similarly ambiguous as to which prong of Section 18.2-193 she was convicted. But the IJ concluded that "*every* subsection in [Section] 18.2-193 is a categorical match to the common law definition of forgery." Pet. App. 43a (emphasis added); see pp. 6-7, *supra*. So resolution of the question presented would not affect the IJ's analysis of those convictions.

Second, even if petitioner could establish that she is statutorily *eligible* for cancellation of removal, she would still need to show that she warranted a favorable exercise of the Attorney General's discretion. See 8 U.S.C. 1229a(c)(4)(A)(ii); cf. *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (likening suspension of deportation, the predecessor to cancellation of removal, to an "act of grace which is accorded pursuant to [the Attorney General's] unfettered discretion") (citation and internal quotation marks omitted). Here, petitioner's criminal history provides little basis for concluding that an exercise of that discretion would be warranted. Petitioner has a lengthy conviction record dating back to at least 1996, including multiple felony convictions. See A.R. 227-242, 244-251, 403-409, 442-446, 479-480. Indeed, she has been convicted of an additional crime even since she requested cancellation of removal. See 17A1361 Stay Appl. 3. Petitioner provides no reason why an alien in

these circumstances would warrant discretionary relief from removal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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