No. 11-206

In the Supreme Court of the United States

JAD GEORGE SALEM, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH 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 bears the burden of establishing his eligibility for cancellation of removal under 8 U.S.C. 1229b, including that he "has not been convicted of any aggravated felony." 8 U.S.C. 1229b(a)(3); see also 8 U.S.C. 1229a(c)(4)(A)(i). If the evidence indicates that a disqualifying ground (such as an aggravated felony conviction) may apply, then the alien "shall have the burden of proving by a preponderance of the evidence that [a disqualifying ground] do[es] not apply." 8 C.F.R. 1240.8(d).

The question presented is whether petitioner failed to satisfy that burden by submitting record evidence pertaining to his conviction for petit larceny under Va. Code Ann. § 18.2-96 (1996), that did not conclusively establish whether petitioner had been convicted of theft, which is an aggravated felony under 8 U.S.C. 1101(a)(43)(G).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 647 F.3d 111. The opinions of the Board of Immigration Appeals (Pet. App. 18a-24a) and the immigration judge (Pet. App. 25a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2011. The petition for a writ of certiorari was filed on August 17, 2011. 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. 8 U.S.C.

1229b. An alien who has been convicted of an "aggravated felony" is ineligible for that relief. 8 U.S.C. 1129b(a)(3). An alien bears the burden of establishing his eligibility for cancellation of removal, including that he "has not been convicted of any aggravated felony." *Ibid.*; see 8 U.S.C. 1229a(c)(4)(A)(i). "If the evidence indicates that [a disqualifying ground, such as an aggravated felony conviction,] may apply," then the alien must prove by a preponderance of the evidence "that [a disqualifying ground] do[es] not apply." 8 C.F.R. 1240.8(d).

As relevant here, an aggravated felony includes "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G), "whether in violation of Federal or State law," 8 U.S.C. 1101(a)(43).

2. Petitioner entered the United States from the West Bank and was granted lawful permanent resident status in the United States in 1966. Pet. App. 26a. Petitioner has three criminal convictions relevant to these proceedings. On April 17, 2003, he was convicted of petit larceny, in violation of Va. Code Ann. § 18.2-96 (1996). Pet. App. 18a-19a. On November 21, 2005, he was convicted of concealment/price altering of merchandise, in violation of Va. Code Ann. § 18.2-103 (2004). Pet. App. 18a-19a. On December 20, 2007, he was convicted of petit larceny, third/subsequent, in violation of Va. Code Ann. § 18.2-96 (2004). Pet. App. 18a-19a.[1] Petitioner's 2007 petit larceny conviction was a felony conviction for which he was sentenced to five years in prison. *Ibid.* According to the factual proffer submitted in that case,

[1] Petitioner was also convicted of larceny on three separate occasions in August 1987, September 1987, and July 1989, Pet. App. 29a; he was convicted of felony concealment in April 1992, *ibid.*; and he was convicted of driving under the influence of alcohol in January 2001, *ibid.*

the crime involved petitioner pumping gas into his car at a gas station and driving away without paying for it. *Id.* at 3a n.2, 30a.

On January 3, 2008, the Department of Homeland Security (DHS) issued a Notice to Appear, charging petitioner with being subject to removal under 8 U.S.C. 1227(a)(2)(A)(ii), as an alien convicted of two crimes involving moral turpitude, and also under 8 U.S.C. 1227(a)(2)(A)(iii), as an alien convicted of an aggravated felony, specifically, "a theft offense * * * for which the term of imprisonment [is] at least one year." 8 U.S.C. 1101(a)(43)(G); see Pet. App. 26a-27a. Petitioner conceded his removability under 8 U.S.C. 1227(a)(2)(A)(ii), denied removability under 8 U.S.C. 1227(a)(2)(A)(iii), and requested cancellation of removal. Pet. App. 27a, 39a-40a.

3. The immigration judge (IJ) ordered petitioner removed to Israel. Pet. App. 25a-43a. The IJ determined that petitioner was removable under 8 U.S.C. 1227(a)(2)(A)(ii), as an alien who had been convicted of two crimes involving moral turpitude, which petitioner did not contest. Pet. App. 39a-40a. The IJ further concluded that petitioner was not removable as an aggravated felon under Section 1227(a)(2)(A)(iii). *Id.* at 37a-39a. The IJ explained that the petit larceny statute under which petitioner had been convicted, Va. Code Ann. § 18.2-96 (2004), covers fraudulent conduct such as "embezzlement, false pretenses, and uttering a bad check." Pet. App. 38a. The IJ explained that larceny offenses based on fraud would not constitute "theft" under the INA, because the generic elements of theft include taking property from its owner without consent. *Ibid.* (citing *Soliman* v. *Gonzales*, 419 F.3d 276 (4th Cir. 2005)). The IJ concluded that because the evidence submitted

by the DHS did not indicate whether petitioner defrauded the gas station to obtain gas, or rather took the gas without paying for it, DHS had not proved by clear and convincing evidence that petitioner had committed an aggravated felony. See Pet. App. 39a.

The IJ further determined that petitioner was ineligible for cancellation of removal. Pet. App. 40a-42a. The IJ explained that when petitioner sought cancellation of removal, the burden shifted to him to show that his petit larcency conviction was *not* a theft offense under Section 1101(a)(43)(G). *Id.* at 40a-41a. The IJ noted that a conviction under Va. Code Ann. § 18.2-96 (2004) could be a theft offense, and that because petitioner had produced no evidence to show that his 2007 larceny conviction involved fraud rather than theft, petitioner failed to establish by a preponderance of the evidence that he had not been convicted of an aggravated felony. Pet. App. 41a-42a.

4. The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 18a-24a. The Board explained that because respondent had been convicted of petit larceny in Virginia and sentenced to five years in prison, he was required to come forward with evidence establishing that he had not in fact been convicted of an aggravated felony. Pet. App. 20a. The Board concluded that petitioner had not satisfied that burden. *Ibid.*

The Board acknowledged that the Virginia larceny statute was broad enough to encompass fraud offenses, which would not qualify as theft under Section 1101(a)(43)(G). Pet. App. 21a. The Board concluded, however, that it was petitioner's burden to prove by a preponderance of the evidence that the particular offense he committed was not an aggravated felony. *Id.* at

20a (citing 8 C.F.R. 1240.8(d)). The Board explained that "any lingering uncertainty that remains after consideration of the conviction record necessarily inures to the detriment of the party who bears the burden of proof." *Id.* at. 22a-23a.

The Board noted that the Ninth Circuit has held that an alien can satisfy his burden of proof under 8 U.S.C. 1229b(a)(3) by producing a record of conviction that is inconclusive about whether he was convicted of an aggravated felony. Pet. App. 23a n.2. But the Board concluded that the Ninth Circuit's decision was "not faithful to the plain meaning of the statutory language, which requires proof of the absence of an aggravated felony conviction." *Ibid.* The Board further noted that the Ninth Circuit's decision "gives the alien an incentive to create an 'inconclusive' record by withholding material evidence about prior convictions," which "has the effect of placing the burden on the Government to establish the alien's ineligibility for relief." *Ibid.*

5. The court of appeals denied the petition for review. Pet. App. 1a-17a. The court rejected petitioner's argument that an alien can satisfy his burden of proving that he has not been convicted of an aggravated felony by proffering his complete record of conviction, even if that record is inconclusive. *Id.* at 6a-7a.

The court explained that at the relief stage, the alien must establish by a preponderance of the evidence that he was not convicted of an aggravated felony. Pet. App. 9a. An inconclusive record of conviction fails to carry that burden, and the detriment of that failure must inure to the party who bears the burden. *Ibid.* The court explained that given the inconclusive record, "it is equally likely that [petitioner] was convicted of an aggravated

felony as it is that he was not," a showing that does not satisfy his burden of proof. *Id.* at 10a.

The court noted that its decision comported with the Tenth Circuit's decision in *Garcia* v. *Holder*, 584 F.3d 1288 (2009), which held that an inconclusive record of conviction is insufficient to discharge the alien's burden of proving eligibility for discretionary relief. Pet. App. 7a-8a (citing *Garcia*, 584 F.3d at 1290). The court further noted that the Second and Ninth Circuits have held that an alien satisfies his burden of proving that he has not been convicted of an aggravated felony by proffering an inconclusive record of conviction. *Id.* at 8a (citing *Martinez* v. *Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Sandoval-Lua* v. *Gonzales*, 499 F.3d 1121 (9th Cir. 2007)). The court explained that those decisions were contrary to the clear statutory language, which placed the burden of establishing eligibility for relief from removal on the alien. *Id.* at 14a.

The court further explained that petitioner was not necessarily limited by the modified categorical approach of *Shepard* v. *United States*, 544 U.S. 13 (2005), to presenting only the charging documents, plea colloquy, plea transcript, and factual findings in support of his showing that he was not convicted of an aggravated felony. Pet. App. 12a-13a. The court stated that it had "never considered whether the evidentiary limits imposed by [the modified categorical] approach should apply when the burden shifts to the noncitizen to prove his eligibility for cancellation of removal"—a position the court found to be bolstered by this Court's decision in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), which distinguished immigration proceedings from the criminal proceedings in which the categorical approach is used. Pet. App. 14a-15a. The court noted, however, that petitioner had not

offered any additional evidence to the immigration judge beyond the record of conviction, and it therefore would not address "the proper scope and limit—if any—of a noncitizen's evidentiary presentation when seeking relief from removal." *Id.* at 15a.

ARGUMENT

Petitioner contends (Pet. 19-25) that he satisfied his burden of proving that he had not been convicted of an aggravated felony, and thus is eligible for cancellation of removal under 8 U.S.C. 1229b, by submitting the record of conviction for his 2007 petit larceny conviction, which was inconclusive about whether petitioner had been convicted of the aggravated felony of theft. 8 U.S.C. 1101(a)(43)(G). The court of appeals correctly rejected that argument, and its decision does not implicate a circuit conflict worthy of this Court's review.

1. a. To establish eligibility for cancellation of removal, an alien must prove by a preponderance of the evidence that he has not been convicted of an aggravated felony. See 8 U.S.C. 1229b(a)(3); 8 C.F.R. 1240.8(d). The preponderance standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence before [he] may find in favor of the party who has the burden to persuade the [court] of the fact's existence." *Concrete Pipe & Prods. of Cal., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 622 (1993) (citation and internal quotation marks omitted; first alteration original).

In this case, the evidence indicated that a disqualifying ground "may apply" to petitioner, 8 C.F.R. 1240.8(d), because he was convicted in 2007 of petit larceny and sentenced to five years of imprisonment. Petitioner therefore had the burden to "prove by a preponderance

of the evidence that [a disqualifying ground] d[id] not apply." *Ibid.* The record of conviction that petitioner submitted did not show whether his larceny conviction involved taking of property through fraud (which would not amount to theft), or taking of property without consent (which would). The court of appeals correctly concluded that because it was "equally likely that [petitioner] was convicted of an aggravated felony as it is that he was not," petitioner did not satisfy his burden of proof. Pet. App. 10a; see also *Garcia* v. *Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009) (stating that accepting the argument that the alien's burden of proof is satisfied based on an inconclusive record of conviction would "effectively nullif[y] the statutorily prescribed burden of proof").

Petitioner's contention that presenting an inconclusive record of conviction satisfies his burden of proof is directly contrary to the statutory framework, which places the burden on him to establish his eligibility for cancellation of removal. See 8 U.S.C. 1229b(a)(3). If either of two outcomes is equally likely, it cannot be said that the party bearing the burden of proof has carried that burden by a preponderance of the evidence. See *Concrete Pipe & Prods. of Cal., Inc.*, 508 U.S. at 622. An inconclusive record of conviction may well give rise to a finding in a specific case that one outcome is more likely than the other, but the court here found the evidence to be in equipoise. See Pet. App. 10a, 16a. In these circumstances, the statutory burden is clearly not discharged and that failure must inure to the detriment of the party bearing the burden of proof.

b. Furthermore, petitioner's argument rests on an assumption (Pet. 20-24) that in the relief phase of removal proceedings, an alien may not present evidence

outside of the "record of conviction," as defined by *Shepard* v. *United States*, 544 U.S. 13 (2005). Petitioner's question presented therefore expressly presupposes that the record of conviction before the IJ and BIA was "complete," and that the only issue was whether the inconclusiveness of the record should inure to the benefit of the alien. Pet. i.

But nothing prohibited petitioner from presenting additional evidence to show that his petit larceny conviction was based on fraud and thus was not an aggravated felony. Both the IJ and the Board rested their decisions, in part, on petitioner's failure to submit any additional evidence showing that his petit larceny conviction did not amount to an aggravated felony. See Pet. App. 22a, 39a. Petitioner could have, for example, offered testimony or investigative reports indicating that he had defrauded someone into giving him gasoline, rather than obtaining the gasoline through theft. The only documents submitted were the conviction and referral order, Administrative Record 342-43, the sentencing order, (A.R. 345-347), and the plea colloquy (A.R. 287-305). There was no argument before the agency that these documents exhaust the record of conviction, and no finding that no additional evidence was available. Because petitioner did not attempt to provide additional evidence to support his burden of proof, the court of appeals expressly refused to consider whether he would be limited in doing so. Pet. App. 15a.

Without an agency finding that the record of conviction was "complete," this case is not a suitable vehicle to resolve the question petitioner has presented. Whether an alien should be deemed to have carried his burden based on a "complete" record of conviction that was inconclusive is a question of interpretation that the Board

should consider in the first instance. The only applicable decision is *Almanza-Arenas, In re*, 24 I. & N. Dec. 771 (BIA 2009), in which the Board held that an IJ may require an alien to submit evidence relating to his conviction in connection with his cancellation application, and that the failure to submit such requested evidence entails a failure of the applicant to carry his burden of proof. The Board has not yet addressed in a precedential decision the specific question presented by the petition.

2. Petitioner contends (Pet. 11-14) that the court of appeals' decision conflicts with the Second Circuit's decision in *Martinez* v. *Mukasey*, 551 F.3d 113 (2008), and the Ninth Circuit's decision in *Sandoval-Lua* v. *Gonzales*, 499 F.3d 1121 (2007). Although there is some inconsistency among the courts of appeals, review is unwarranted at this time.

In *Martinez*, the Second Circuit did not consider or decide whether an alien may satisfy his burden of proof in establishing eligibility for cancellation of removal by providing an inconclusive record of conviction. The issue in *Martinez* was whether the alien's New York marijuana-sale convictions were for a "felony punishable under the Controlled Substances Act" (CSA), and thus for an aggravated felony. *Martinez*, 551 F.3d at 117, 122 (quoting 18 U.S.C. 924(c)(2)); see 21 U.S.C. 841(a)(1), (b)(1)(D) and (4). The court held that under the categorical approach, the New York conviction could have been punishable as a misdemeanor under federal law, because the CSA permits possession with intent to distribute to be treated as a misdemeanor if the offense involves distribution of only "a small amount of marihuana for no remuneration." 21 U.S.C. 841(b)(4). *Martinez*, 551 F.3d at 120. Because the court considered only the use of the

categorical approach, it also determined that the fact petitioner bore the burden of proving eligibility for cancellation of removal was irrelevant to whether his conviction was for an offense "punishable under the [CSA]" as a felony. *Id*. at 117.

The court did not, as petitioner contends (Pet. 12), hold that an inconclusive record of conviction establishes eligibility for cancellation of removal. It held that on application of the categorical approach, the alien's drug convictions did not constitute aggravated felonies, which was sufficient to establish that the aggravated felony bar to cancellation of removal did not apply. *Martinez*, 551 F.3d at 120, 122. There is no conflict between the holding that Martinez was not convicted of an aggravated felony under the categorical approach and the Fourth Circuit's determination in this case that an inconclusive record of conviction inures to the detriment of the applicant for discretionary relief.

In *Sandoval-Lua*, the Ninth Circuit held that an alien discharges his burden of proving that he has not been convicted of an aggravated felony for cancellation purposes if the record of conviction is inconclusive. 499 F.3d at 1132. *Sandoval-Lua*, however, was not governed by the REAL ID Act of 2005, Pub. L. No. 109-13, § 3, 119 Stat. 302, which enacted new burden of proof provisions. 449 F.3d at 1132 n.10 (noting that its decision did not address the relevance of the new burden of proof framework). Petitioner contends that the Ninth Circuit has since "applied this rule repeatedly" in the post-REAL ID Act context, see Pet. 12 n.3 (citing *Rosas-Castaneda* v. *Holder*, 630 F.3d 881, amended, 655 F.3d 875 (2011); *Young* v. *Holder*, 634 F.3d 1014 (2011), reh'g en banc granted July 29, 2011), but the Ninth Circuit's

interpretation of the REAL ID Act's burden-of-proof provisions has not yet coalesced.

The Ninth Circuit vacated the panel decision in *Young* and granted rehearing en banc. See *Young* v. *Holder*, 653 F.3d 897 (2011). In *Rosas-Castaneda*, the court of appeals did reaffirm its decision in *Sandoval-Lua*, but it did so in the course of holding that an alien cannot be *required* to submit additional evidence regarding his conviction if the record before the agency is inconclusive. 630 F.3d at 886-888. Although the court maintained that an inconclusive record of conviction did not foreclose eligibility for cancellation of removal, it did not hold that such a record *established* the alien's eligibility. In an amended opinion, the court remanded to provide the government an opportunity to proffer additional evidence relating to the conviction. *Rosas-Castaneda*, 655 F.3d at 877. That approach may not be consistent with the Fourth Circuit's decision in this case, but it does not present a direct conflict. In any event, certiorari would be premature before the Ninth Circuit has an opportunity to resolve the outstanding issues surrounding this question occasioned by the enactment of the REAL ID Act.

c. Petitioner attempts (Pet. 14-15) to link his petition for a writ of certiorari to the petition pending in *Garcia* v. *Holder*, No. 11-79 (filed July 18, 2011), and he contends that certiorari in this case would be warranted if certiorari is granted in *Garcia*. The question presented in *Garcia* is whether a state conviction for possession of an unspecified amount of marijuana categorically constitutes a "felony punishable under the [CSA]" and, therefore, an aggravated felony. See Pet. i, *Garcia*, *supra* (No. 11-79). Even if the Court were to grant the petition in *Garcia*, the resolution of that question would

have no bearing on whether applicants for cancellation of removal can establish statutory eligibility based on an inconclusive record of conviction. Although both issues could arise in the same case, there is nothing about the issues that would mandate parallel grants.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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