No. 19-438

IN THE

Supreme Court of the United States

CLEMENTE AVELINO PEREIDA,
Petitioner,

v.

WILLIAM P. BARR, ATTORNEY GENERAL,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

1. The government has acquiesced in a grant of certiorari in this case. The government agrees that "the courts of appeals are divided" on the question presented and that the conflict is now "entrenched" after the en banc Ninth Circuit rejected the government's position. Br. 14-15; *see also id.* at 7; Pet. 11-22. The government also agrees that the "question presented is important to the uniform administration of the INA and warrants this Court's resolution." Br. 14; Pet. 22-25. And it agrees that this case "provides a suitable vehicle for resolving that disagreement" because, unlike in other cases, there are no threshold disputes about whether the modified categorical approach applies; rather, the question presented "was necessary to the court of appeals' determination." Br. 14-15; *see id.* at 11; Pet. 25-27.

For these reasons alone, the petition should be granted.

2. The government also argues (Br. 7-12) that the decision below was correct. There will be time enough to respond fully to the government's merits contentions if the Court grants plenary review, but a few of the government's more fundamental errors should be corrected immediately.

a. The government agrees with the basic premises of our argument: The categorical approach and its modified variant address a "legal question of what a conviction *necessarily* established," *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015). And that analysis requires a "legal" "presum[ption] that the conviction

'rested upon [nothing] more than the least of th[e] acts' criminalized." Gov't Br. 10; *see* Pet. 28. But instead of following this reasoning to its natural conclusion, the government argues that the modified categorical approach includes an initial "step"—using conviction documents to determine "what crime … a defendant was convicted of"—that is a *factual* question with no presumptive answer. Br. 12.

This Court's cases say the opposite. The modified categorical inquiry does not start from a blank slate, such that the first step would be to identify the prong of the given divisible statute. Instead, as *Moncrieffe v. Holder* says, it starts with the presumption that the conviction rests on the least of the acts criminalized. 569 U.S. 184, 190-91 (2013). That presumption can then be *rebutted* using the modified categorical approach, but only if the record of conviction reveals "which particular offense the noncitizen was convicted of." *Id.* at 191; *see* Pet. 3, 12, 28-29. The presumption holds, however—and a noncitizen meets his burden—unless "the record of conviction of the predicate offense *necessarily* establishes" a disqualifying offense. *Moncrieffe*, 569 U.S. at 197-98 (emphasis added).*

* The government resists our explanation (Pet. 32) that *Johnson v. United States*, 559 U.S. 133, 136-37, 145 (2010), establishes as much. Gov't Br. 11 n.2. *Johnson*—the case whose least-acts-criminalized language *Moncrieffe* formalized as a presumption, *see* 569 U.S. at 191—was a modified categorical approach case, and it presumed that a conviction rested on the most minor prong of a divisible statute *precisely when* the "absence of records" rendered the "application of the modified categorical approach" inconclusive. 559 U.S. at 136-37, 145. The

For the same reason, the government is also wrong to say that the modified categorical approach involves a distinct factual inquiry that the categorical approach does not. *Descamps* specifically *rejected* the argument that the modified categorical analysis uniquely allows for a distinct, "evidence-based" inquiry. 570 U.S. at 266-67. That the inquiry "involves examining documents" in the conviction record does not transform it into a factual one, Gov't Br. 12; the analysis involves no credibility judgments or reconciling evidence, but only assessing the *legal* meaning of an undisputed documentary record.

b. As for the impossible burden the Eighth Circuit's rule often places on noncitizens seeking humanitarian relief, *see* Pet. 33-34, the government embraces the unfairness of its approach, declaring that "assigning … consequences" is "precisely what a burden of proof is designed to do," Br. 12. But that merely assumes the conclusion that the INA's evidentiary burden of proof is meant to apply to a narrow legal inquiry like the categorical approach. The government cites *no* other context in which establishing eligibility for important benefits requires proving a

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government contends that the portion of *Johnson* we cite reflects only "the district court's analysis, not this Court's." Br. 11 n.2 (citing *Johnson*, 559 U.S. at 136-37). But *Moncrieffe* adopted precisely that passage. *See* 569 U.S. at 191. And this Court has expressly recognized that *Johnson* analyzed a divisible state statute under the modified categorical approach. *Descamps v. United States*, 570 U.S. 254, 263-64 & n.2 (2013). That "*Johnson* arose in the criminal sentencing context," Gov't Br. 11 n.2, is immaterial because the categorical approach is identical in both contexts. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567-68 (2017).

negative, using *only* a narrow range of documents that the applicant neither creates nor maintains, and that "in many cases … will be incomplete" or impossible to obtain. *Johnson*, 559 U.S. at 145. Noncitizens may not rely on any other reliable evidence—not even their own testimony—to establish the basis for their conviction. *See Moncrieffe*, 569 U.S. at 200-01. That circumscribed approach makes sense if the analysis is a formalized, legal inquiry into what a conviction "necessarily" establishes, but not if it is a factual inquiry requiring the noncitizen to prove the particular *way* he violated a state statute years earlier. *See id.* (admonishing that the categorical approach precludes "*post hoc* investigation into the facts of predicate offenses … in minitrials conducted long after the fact").

The government also says that Congress sought to "ensure[] that aliens do not benefit from withholding available evidence." Br. 12. But any whiff of "withholding available evidence" could be grounds to deny relief at the discretionary phase of relief proceedings, when an immigration judge decides if an eligible noncitizen *should* be granted relief on the equities of his case. *See Moncrieffe*, 569 U.S. at 204. So this imaginary concern does not justify an approach that often requires noncitizens to prove the unprovable.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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