Nos. 09-71415 & 10-73715

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GABRIEL ALMANZA-ARENAS,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

PETITIONS FOR REVIEW OF ORDERS
OF THE BOARD OF IMMIGRATION APPEALS
Agency No. A078-755-092

BRIEF FOR RESPONDENT IN RESPONSE TO JANARY 15, 2015 ORDER OF THE COURT

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INTRODUCTION

The Court has directed briefing on whether to rehear this case en banc. At issue is whether an alien's application for relief from removal was properly denied for failure to establish eligibility in view of a criminal conviction. The Rule 35 en banc criteria are met: the case involves the three questions of exceptional importance set out below. The case should be reheard en banc if the panel does not correct its errors as discussed herein.

First – has an alien failed to carry his burden of proving eligibility for relief from removal if the conviction record is "inconclusive," *i.e.*, it neither establishes that the conviction is disqualifying nor excludes the possibility that it is? A two-judge majority of the panel answered this question even though the agency did not address it in this case (the Court's opinion discloses that the panel misapprehended the basis of the agency decision). And in answering no, that majority wrongly held that *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), which answers this question yes, was overruled by *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). The decision in this case conflicts with *Young* and consideration by the full court is necessary to secure and maintain uniformity of the court's decisions.

Second – has an alien failed to carry his burden of proving that he is eligible for relief from removal despite a criminal conviction if he has failed without justification to furnish a document requested by the immigration judge to resolve

whether the conviction bars relief? This question, which is analytically distinct from (and logically antecedent to) the inconclusive-record question addressed by the panel majority, implicates the agency's core function of determining what evidence is considered in deciding eligibility. Although the agency answered this question yes (the decision below is the agency's precedent on this issue), the panel bypassed it, compounding its violation of the administrative-law principle that a court reviews an agency decision based on the reasons given by the agency.

The Court should rehear this case en banc to correct the panel's errors on these issues if the panel does not correct them by granting Respondent's pending petition for panel rehearing. On rehearing the court should uphold the agency decision on the basis stated there. A contrary ruling on that issue would enable the alien applicant, rather than the agency adjudicator, to determine what documents the adjudicator considers to determine eligibility, an important matter, as both the Board and members of this Court have pointed out. *See In re Almanza-Arenas*, 24 I. & N. Dec. 771, 776 (BIA 2009) (decision below); *Rosas-Castaneda v. Holder*, 655 F.3d 875, 880 (9th Cir. 2011) (opinion of then-Chief Judge Kozinski, joined by Judge O'Scannlain, dissenting from order denying en banc rehearing).

Third – what is the proper method for determining whether a criminal statute is divisible for purposes of determining through a modified categorical analysis whether an alien was convicted of committing an offense that bars relief for

removal? As explained in the Brief for Respondent in Response to October 28, 2014 Order of the Court in Ninth Cir. No. 10-72239, *Rendon v. Holder* ("*Rendon* Brief"), the proper method for determining the divisibility of a criminal statute in general is a matter of exceptional importance. Without relevant briefing or argument, the panel ruled that the statute petitioner Almanza-Arenas was convicted of violating, California Vehicle Code § 10851(a) is not divisible, but its decisional method is inconsistent with the proper approach to divisibility under *Descamps v. United States*, 133 S. Ct. 2273 (2013). If a rehearing is ordered in R*endon* – which is a better vehicle than this case for addressing divisibility issues in general – the Court should defer the briefing and further consideration of that issue in this case pending a decision in *Rendon* because that decision could be expected to have a significant bearing on the further consideration of that issue in this case. The presence in this case of the issue also present in *Rendon* should not, however, detract from the importance of the other two issues in this case for en banc consideration.

BACKGROUND

Petitioner Almanza-Arenas is a native of Mexico who has never had lawful status in the United States. His criminal record includes convictions for possessing illegal drug paraphernalia in violation of California Health & Safety Code section 11364 (entry of judgment was deferred and the charge was dismissed following

successful completion of a diversion program) and for driving a motor vehicle without a valid driver's license in violation of California Vehicle Code section 12500(a), as well as his conviction for violating California Vehicle Code section 10851(a), a car-theft statute. Almanza-Arenas conceded removability and requested, as relevant here, a cancellation of removal and adjustment of status under 8 U.S.C. § 1229b(b)(1), a grant of which would give him lawful-resident status. That request was denied, with the Board of Immigration Appeals ruling in a precedent decision that Almanza-Arenas's failure to comply with the immigration judge's request to provide a transcript of his plea colloquy constituted a failure to carry his burden of proving eligibility for that relief. This Court reversed and remanded. After Respondent petitioned for panel rehearing and Almanza-Arenas filed an answer, the Court announced a sua sponte en banc poll.

1. Cancellation relief under 8 U.S.C. § 1229b(b)(1) may only be granted to an alien who "has not been convicted of an offense under [8 U.S.C.] section 1182 (a)(2), 1227 (a)(2), or 1227(a)(3)." 8 U.S.C § 1229b(b)(1)(C). One such class of offense is a "crime involving moral turpitude" "for which a sentence of one year or longer may be imposed." *See* 8 U.S.C. § 1227(a)(2)(A)(i). Section 10851(a) includes morally turpitudinous conduct, *see In re D-*, 1 I. & N. Dec. 143, 145 (BIA

1941) (addressing predecessor statute), and the requisite sentence length.[1] As a result, Almanza-Arenas's conviction for that offense, entered in September 2000, was one focus of the agency proceeding.

The Department of Homeland Security counsel first mentioned that conviction as a possible bar to relief. *See* Administrative Record (R) 130. The immigration judge asked DHS counsel to submit documents bearing on Almanza-Arenas's eligibility but admonished that "obviously," the "burden of proof is on" Almanza-Arenas "to show his eligibility so he in the first instance should obtain any type of conviction documents." R 131.[2] The DHS subsequently obtained and filed records from the criminal court file, including the felony complaint, Almanza-

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[1] At the time of Almanza-Arenas's offense, section 10851(a) provided:

> Any person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle, whether with or without intent to steal the vehicle, or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing, is guilty of a public offense. ***

See Cal. Veh. Code § 101851(a) (West 2000). A violation is not turpitudinous when it involves intended "deprivation[s] of possession from the owner for a temporary period without intent to steal." *In re D-*, 1 I. & N. Dec. at 145.

[2] In general, an alien has the burden of establishing that he or she "satisfies the applicable eligibility requirements" for a form of relief from removal, 8 U.S.C. § 1229a(c)(4)(A)(i); and, more particularly, the burden of "proving by a preponderance of the evidence that" any "grounds for mandatory denial of the application for relief" "do not apply," 8 C.F.R. § 1240.8(d).

Arenas's written plea, and a minute order reflecting the conviction and sentencing. *See* 419-428.

It was undisputed that the documents supplied by DHS were insufficient to affirmatively show a conviction for a crime involving moral turpitude. *See* R 407-408 (DHS prehearing statement that records "do[] not reflect whether [Almanza-Arenas] permanently or temporarily deprived the owner of the vehicle"). Those documents indicate that Almanza-Arenas pled guilty to a misdemeanor violation of Section 10851(a) pursuant to *People v. West*, 477 P.2d 409 (Cal. 1970). R 424, 425. The minute order indicated that the plea proceeding had been tape-recorded and specified the number of the tape. *See* R 425.

The immigration judge asked Almanza-Arenas and his counsel for a transcript of his plea hearing and memorialized that request in a contemporaneous written order indicating that he "is to provide transcript of Sept. 2000 plea to show not a CIMT." R 146-147, 207. Almanza-Arenas had six months to supply the transcript or other evidence of the plea proceeding. R 207. When the hearing resumed, Almanza-Arenas submitted some conviction records, but his counsel stated that he did not have the requested transcript. R 158-159, 179-188. The immigration judge concluded that Almanza-Arenas had failed to carry his burden of establishing eligibility. R 168.

2. As relevant here, Almanza-Arenas argued to the Board of Immigration Appeals that his conviction "cannot serve as a disqualifying C[I]MT" because, *inter alia*, "neither the record of conviction nor the available corroborative evidence could definitively demonstrate" whether the elements of his conviction involved moral turpitude. R 64-66. He also argued that the immigration judge erred in requiring him to produce a transcript of his plea colloquy, claiming, *inter alia*, the immigration judge's request was based on a misunderstanding regarding the legal significance of a *West* plea, and that the transcript was irrelevant because it "would have provided nothing further for a C[I]MT determination" given that plea. *See* R 61-64.

The Board did not address Almanza-Arenas's first argument, but it rejected the second one. It explained that the *People v. West* notations introduced an ambiguity as to the basis of Almanza-Arenas's conviction, and that, given his burden of proof, it was appropriate for the immigration judge to request additional evidence, including the plea colloquy. 24 I. & N. Dec. at 775. (The Board relied for this reasoning on *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc). *See* 24 I & N. Dec. at 775.)

Then, the Board ruled that Almanza-Arenas's failure to produce the transcript or other evidence constituted a failure to carry his burden of proving eligibility. 24 I & N. Dec. at 775-776. Earlier in its decision, the Board noted that

the immigration judge had determined that Section 10851(a) is "divisible." *See id.* at 773. It observed that the immigration judge had "explained on the record that the respondent was expected to obtain additional conviction documents, including a transcript of his criminal proceeding, and continued the case to give him ample opportunity to comply"; in an accompanying footnote, the Board stated it "would encourage" use of that procedure. *Id.* at 775 and n.4. After noting that Almanza-Arenas "did not submit the requested documentation at the resumed hearing and gave no reason for failing to do so," the Board stated that "in failing to meet his burden to produce the requested evidence, [Almanza-Arenas] has failed to meet his burden of proof to establish that he was not convicted of a crime involving moral turpitude." *Id.* at 775.

3. The panel reversed and remanded. It concluded (as relevant here) that the Board "erred by applying the modified categorical approach to examine Almanza–Arenas's record of conviction." *Almanza-Arenas v. Holder*, 771 F.3d 1184, 1191-92 (9th Cir. 2014). It concluded that Section 10851(a) is not divisible and reasoned that *Descamps* "prohibits us from applying the modified categorical approach to an indivisible statute like § 10851(a)." *Id.* at 1192. A majority of the panel went on to state that the Board had "determined that, where the record of conviction was inconclusive, the petitioner was ineligible for cancellation of removal," and held that determination erroneous. *Id.* at 1193-94. In doing so, the

majority assumed *arguendo* that Section 10851(a) is divisible. *Id.* at 1192. The majority acknowledged that, under *Young v. Holder*, 697 F.3d 976, "a petitioner like Almanza-Arenas would *not* be eligible for cancellation of removal because there is ambiguity as to whether he was convicted of a crime involving moral turpitude." 771 F.3d at 1193. But the majority believed that *Young* is "clearly irreconcilable" with *Moncrieffe v. Holder*, 133 S. Ct. 1678. 771 F.3d at 1193. In a separate concurring opinion, Judge Fisher stated that he declined to join those aspects of the opinion because the panel's ruling that Section 10851(a) is indivisible made it "unnecessary to apply the modified categorical approach." *Id.* at 1194.

4, Respondent petitioned for panel rehearing. The petition urges the panel to excise the portion of its opinion that overruled *Young*'s holding concerning "inconclusive" records of conviction in cases in which an alien bears the burden of proof, pointing out that that part of the decision rests on a misunderstanding of the Board's reasoning. Resp. Pet. for Panel Reh'g (Reh'g Pet.) at 7-8. Additionally, the petition argues that the panel was mistaken in failing to adhere to *Young* because *Young* is not clearly irreconcilable with *Moncrieffe*. *Id.* at 10-18. Directed to file a response, Almanza-Arenas urged, *inter alia*, that proceedings be held in abeyance pending resolution of *Rendon*. Response of Pet'r to Resp. Pet. for Panel Reh'g (Pet'r Resp.) at 2-4. He also stated that he "would not oppose panel

rehearing to remove the Court's alternative ruling regarding burden of proof" if the court adhered to its divisibility approach in *Rendon*. *Id.* at 3.

ARGUMENT

The Court Should Order This Case Reheard En Banc If The Panel Does Not Withdraw Its Improvident Inconclusive-Record Ruling

Rehearing en banc is warranted. A conflict with a decision of the United States Supreme Court warrants en banc rehearing. Fed. R. App. P. 35(b)(1)(A). Likewise, a conflict with another decision of this Court warrants en banc rehearing because "consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions." Fed. R. App. P. 35(a)(1). Rehearing is also warranted if "the proceeding involves a question of exceptional importance." Fed. R. App. P. 35(a)(2). Such a question is presented when the case "involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue." Fed. R. App. P. 35(b)(1)(B). Each type of conflict is presented in this case.

I. En Banc Rehearing Is Warranted Of The Ruling That A Conviction Does Not Disqualify An Alien From Receiving Relief From Removal When the Criminal Statute Is Divisible And The Conviction Record Is Inconclusive.

First, en banc rehearing is warranted because of the panel majority's ruling that an alien is not disqualified from receiving relief from removal when convicted under a divisible criminal statute and the conviction record is inconclusive, thereby

leaving the possibility open the alien "may have been convicted of a crime that does not include" the element that makes the conviction disqualifying (771 F.3d at 1194). En banc rehearing on the issue can be avoided if, as explained in Respondent's pending petition for panel rehearing, the panel corrects its violation of the administrative-law principle that judicial review of an agency decision is to be confined to the grounds of decision actually relied upon by the agency. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); Reh'g Pet. at 6-10. The opinion reflects that the panel misapprehended the basis of the agency decision. The panel majority may eliminate the need for en banc rehearing on this issue by correcting that misapprehension and eliminating that ruling from its opinion, as urged in the petition for panel rehearing, and addressing whether the alien's application was properly denied because of his unjustified failure to produce the conviction record requested by the immigration judge, the agency's basis for its decision. If, however, the panel declines to correct that error, the Court should grant en banc.

A. The Panel Majority's Ruling Conflicts with *Young v. Holder* and Decisions of the Fourth and Tenth Circuits.

1. En banc review of the panel majority's ruling on this issue is warranted because the decision squarely conflicts with a holding of *Young*, as the panel acknowledged. *See* 771 F.3d at 1193 (acknowledging that "[u]nder *Young*, a petitioner like Almanza-Arenas would not be eligible for cancellation of removal

because there is ambiguity as to whether he was convicted of a crime involving moral turpitude").

The majority's declaration that *Young* has been abrogated by *Moncrieffe* is incorrect. *Moncrieffe* did not involve the question decided in *Young*, *i.e.*, whether an alien satisfies his burden of showing eligibility for discretionary relief from removal when the alien may have been convicted of violating the disqualifying portion of a divisible statute and the record of the conviction provided to the immigration judge is simply inconclusive. At issue in *Moncrieffe* was whether the alien's conviction was an aggravated felony that rendered him deportable. The conviction record in *Moncrieffe* was not inconclusive in the sense meant in *Young*. In *Young*, the Court explained, the alien's plea was to a charge that listed the full range of conduct encompassed by the statute, and the Court could not "tell from the record of conviction" which of the fourteen different types of conduct was the basis for the conviction. *See* 697 F.3d at 988; *see also id.* at 980-981 (describing indictment). In *Moncrieffe*, by contrast, the conviction documents enabled the Supreme Court to identify which one of the distinct crimes listed in the statute was the basis of the conviction. *See* 133 S. Ct. at 1685. The Court then analyzed that specific crime and held that it is not an aggravated felony because it is overbroad with respect to the relevant generic criteria. *See id.* at 1686-87. As such,

Moncrieffe did not address the inconclusive-record issue, and does not abrogate the en banc decision in *Young*.

Thus, when the opinion states that "Moncrieffe's record of conviction was ambiguous: the Supreme Court could not determine whether Moncrieffe's conviction otherwise satisfied the elements of a generic aggravated felony," 771 F.3d at 1193 (citing *Moncrieffe*, 133 S. Ct. at 1686-87), it is referencing a wholly different sort of ambiguity from that addressed by *Young*. The ambiguity in *Moncrieffe* was ambiguity resulting from the overbreadth of the relevant portion of the statute, *not* ambiguity in the conviction records used in applying the modified categorical approach. The *Moncrieffe* Court stated that "the fact of a conviction for possession with intent to distribute marijuana" – the specific crime disclosed by the conviction records – "standing alone, does not reveal whether" the factors that trigger aggravated felony consequences were or were not presented. 133 S. Ct. at 1686-87. *That* "[a]mbiguity," the *Moncrieffe* Court stated, meant "that the conviction did not necessarily involve facts that correspond to a" disqualifying offense, and that "[u]nder the categorical approach," the conviction was not disqualifying. *Id.* at 1687. That ruling has no bearing on the resolution of the inconclusive-record issue.

The panel majority also erred in reading *Moncrieffe* as establishing a presumption, for purposes of gauging eligibility for relief from removal, that an

alien's conviction "rested upon nothing more than the least of the acts criminalized," 771 F.3d at 1191-92 (quoting *Moncrieffe*, 133 S. Ct. at 1684), unless the record affirmatively shows otherwise. As noted, *Moncrieffe* concerned an alien's deportability. Properly read, the presumption referenced in *Moncrieffe* is relevant only when determining whether a criminal statute is overbroad – the Court stated that a court must "presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *See* 133 S. Ct. at 1684. That describes how the analysis works at the categorical level, *i.e.*, in deciding whether a statute is or is not overbroad. Confirming this, the Court states that this rule "is not without qualification," and then points to the modified categorical method as one of those qualifications. *See id.* (observing that "a court may determine which particular offense the noncitizen was convicted of" when a statute "contain[s] several different crimes, each described separately," by examining the documents from the record of conviction). *Moncrieffe* does not expressly state that the presumption has a further role under those circumstances, and the panel majority errs in inferring otherwise.

Finally, it bears noting that the panel majority's claim that, based on *Moncrieffe*, it "must err on the side of underinclusiveness" and construe ambiguity referenced in criminal statutes in the alien's favor is misplaced in two respects.

First, the resolution of this issue does not depend on the application of any criminal statute. *Moncrieffe* concerned the interpretation of three federal criminal statutes – in particular whether the offense of possession of marijuana with intent to distribute under 21 U.S.C. § 841(a) is a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) in view of an ameliorative provision, 21 U.S.C. § 841(b)(4). *See* 133 S. Ct. at 1685-87. The resolution of the issue in this case, by contrast, concerns the application of statutory and regulatory provisions that have no application in the criminal context – 8 U.S.C § 1229b(b)(1)(C), the substantive cancellation eligibility criterion, and 8 U.S.C. § 1229a(c)(4)(A)(i) and 8 C.F.R. § 1240.8(d), statutory and regulatory provisions bearing on the burden of proof. As such, the principle invoked by the majority is inapposite. And second, to the extent that there is ambiguity in those statutes, the matter should have been left to the agency for its consideration. *See Ceron v. Holder*, 747 F.3d 773, 784-785 (9th Cir. 2014) (en banc). The majority's reference to that aspect of *Moncrieffe* is thus a telling indicator that the panel majority is using *Moncrieffe* to impose its own preferred view of how the statute should apply, contrary to ordinary agency-deference principles.

2. In addition to that clear intra-circuit conflict, this aspect of the decision warrants rehearing because it conflicts with the decisions of other courts of

appeals. Fed. R. App. P. 35(b)(1)(B). In particular, the ruling conflicts with decisions of the Fourth Circuit and the Tenth Circuit.

The Fourth Circuit, in *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011), squarely held that an alien convicted of violating a divisible statute is ineligible for relief when the record of conviction is inconclusive. There, the court of appeals considered and rejected the contention that an applicant for relief "satisfies his burden of proof to demonstrate that he has not been convicted of [a disqualifying offense] by presenting an inconclusive, though complete, record of conviction." *See id.* at 115-120. That conclusion is directly opposite to the ruling in this case. Although the *Salem* Court declined to decide that categorical-approach principles apply to the eligibility determination, *see id.* at 119 (noting that "we are reluctant to extend application of the categorical approach to the immigration relief context" but observing that the court need not decide "the proper scope and limit – if any – of a noncitizen's evidentiary presentation when seeking relief from removal"), the Court later decided that they do. *See Mondragon v. Holder*, 706 F.3d 535, 546-547 (4th Cir. 2013). As such, it is clear that the law of the Fourth Circuit and the ruling in this case are in conflict.

Likewise, the Tenth Circuit, in *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009), faced a question of eligibility where the record of conviction was inconclusive and the parties stipulated that no other records would shed light on

whether the conviction was disqualifying. Under those circumstances, the Court ruled that the alien failed to establish eligibility for relief from removal. That ruling is not reconcilable with the decision in this case. Additionally, the panel majority's resolution of the issue is at odds with the view of the Seventh Circuit on this issue. *See Sanchez v. Holder*, 757 F.3d 712, 720 n.6 (7th Cir. 2014) ("we agree that . . . if the analysis has run its course and the answer is still unclear, the alien loses by default"). As such, a conflict is presented that warrants the attention of an en banc panel.

B. The Panel Majority Should Not Have Decided The Inconclusive-Record Issue.

This case does not, however, actually present the inconclusive-record issue. As explained in Respondent's pending petition for panel rehearing, the Court's review must be "based on the Board's reasoning rather than our own independent analysis of the record." *Azanor v. Ashcroft*, 364 F.3d 1013, 1021 (9th Cir. 2004); *see also, e.g.*, *Andia v. Ashcroft*, 359 F.3d 1181, 1184 (9th Cir. 2004) (per curiam) ("In reviewing the decision of the BIA, we consider only the grounds relied upon by that agency."); *Martinez-Zelaya v. INS*, 841 F.2d 294, 296 (9th Cir. 1988) ("[O]ur review is confined to the BIA's decision and the bases upon which the BIA relied."). The Board did not decide the inconclusive-record issue. The panel majority should not have decided it either.

As explained above, although Almanza-Arenas urged his inconclusive-record argument to the Board, the Board decided the case on other grounds. Almanza-Arenas claimed that his conviction "cannot serve as a disqualifying C[I]MT" because, *inter alia*, "neither the record of conviction nor the available corroborative evidence could definitively demonstrate" whether the elements of his conviction involved moral turpitude, R 64-66, raising the inconclusive-record issue. But after holding that it was appropriate for the immigration judge to request additional evidence, including the plea colloquy, and noting that Almanza-Arenas "did not submit the requested documentation at the resumed hearing and gave no reason for failing to do so," the Board stated that "in failing to meet his burden to produce the requested evidence, [Almanza-Arenas] has failed to meet his burden of proof to establish that he was not convicted of a crime involving moral turpitude." 24 I. & N. Dec. at 775. That ruling does not fairly include a finding that the record is definitively inconclusive or address how to resolves eligibility under such circumstances.

If there were any room for doubting that the Board did not decide the inconclusive-record issue, moreover, it is eliminated by the Board's distinguishing of *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), which was decided while this case was before the Board. The Board noted this Court's ruling in that case — that an alien "meets his burden of proof to establish that his conviction is

not for a [disqualifying offense] when he produces an 'inconclusive' record of conviction." 24 I. & N. Dec. at 775. The Board distinguished that precedent in ways that directly relate an applicant's burden of producing evidence bearing on his eligibility. The Board pointed to the immigration judge's request for additional documents "in the face of a partial and inconclusive record of conviction" and observed that "[n]o such request was evident in *Sandoval-Lua*." *Id*. at 776. The Board also stated that it declined to read *Sandoval-Lua* as "permitting a[n applicant for relief from removal] to default on a requirement . . . to produce available documents from the record of conviction, including the transcript of the proceedings." *Id.* at 776 n.5. "Simply put," the Board stated, "we do not believe that a[n applicant], bound by the requirements of the REAL ID Act, can satisfy his burden of proof by producing the inconclusive portions of a record of conviction, and by failing to comply with an appropriate request . . . to produce the more conclusive portions of that record." *Id.* at 776. "To hold otherwise," the Board added, "would allow the [applicant] to pick and choose, to his advantage, the portions of evidence relevant to the determination of his eligibility for relief." *Id.* The agency's reasoning was thus based on Almanza-Arenas's failure to produce the transcript.

The panel's opinion suggests that the panel majority concluded that the record is "inconclusive," but it appears that the majority did so by disregarding the

burden-of-production issue, contrary to the Board's reasoning. After first referring to the documents produced as "ambiguous as to whether Almanza-Arenas was convicted of either permanently or temporarily taking a vehicle," the opinion reviews those documents. *See* 771 F.3d at 1192. From there, the opinion then concludes: "The record is thus inconclusive as to whether Almanza–Arenas was convicted of temporarily or permanently taking a vehicle." *Id.* That conclusion about "the record" does not follow, however, as long as a relevant part of the record is missing. To reach that conclusion, the panel had to assume that the whole record comprises the documents that were produced – in other words, its decision necessarily rested on the premise, contrary to the Board's reasoning, that the transcript was unavailable or need not have been produced. There lies the heart of the panel majority's *Chenery* error – the majority failed to review the Board's reasoning and instead simply substituted its own view. If the panel does not correct that error on panel rehearing, the en banc court should correct it.

In his response to Respondent's panel rehearing petition, Almanza-Arenas suggests another way to conclude that the Board necessarily decided whether an alien is eligible for relief from removal when the record of a conviction is inconclusive, but that argument too lacks merit. He asserts (Pet'r Resp. at 5) that the Board's decision included a determination that the record provided to the agency "was inconclusive." That is not correct. The Board described the

documents that had been produced as "the inconclusive *portions* of a record of conviction," and described the record before it as "*partial and* inconclusive." *See* 24 I. & N. Dec. at 776 (emphasis added). As the Board's decision reflects, the Board considered that "more conclusive portions of that record" were available, but Almanza-Arenas had "failed to comply with an appropriate request" to produce them. *Id.* The Board's decision thus rested squarely on Almanza-Arenas's failure to produce that missing evidence. That being so, the panel majority did not have a basis for addressing the inconclusive-record issue. At a minimum, this portion of the opinion should be excised.

II. The En Banc Court Should Decide Whether The Agency's Denial of Almanza-Arenas's Application Was Proper In View of His Unjustified Failure to Produce A Requested Conviction Document Relevant To His Eligibility.

If this case is reheard en banc, the Court should address the Board's burden-of-production rationale and uphold the Board's decision on that basis. The issue is of exceptional importance, warranting en banc.

First, the attention of the en banc Court to this issue is warranted in view of the holding in *Rosas-Castaneda*, 655 F.3d at 884-885, *overruled on other grounds*, *Young*, 697 F.3d at 990, that immigration judges lack statutory authority to require aliens to produce conviction documents. No other court of appeals has ever questioned the agency's ability to require an alien applying for relief to produce conviction records relevant to establishing eligibility. And as then-Chief Judge

Kozinski's opinion dissenting from rehearing en banc in that case explained, that ruling (which was made without the benefit of briefing or argument) rested entirely on an exceedingly strained reading of the REAL ID Act amendments – which were broadly intended to shore up the latitude of immigration judges to draw inferences from evidence and an alien's failure to produce evidence – as restricting an immigration judge's latitude in other matters not mentioned in the text. *See* 655 F.3d at 877-878.[3] That holding, not having been overruled, presumably is still binding on the three-judge panel. It may affect the panel's consideration of this issue – after all, a holding that the immigration judge lacks authority to require an alien to produce a conviction record is equivalent to a holding that an alien has no burden of production. In either case, the practical effect of the ruling is that an alien applicant may disregard an immigration judge's request without

[3] The Immigration and Nationality Act and its implementing regulations include sufficiently broad delegations of authority to permit immigration judges to require aliens to produce evidence of any nature bearing on an application for relief. In particular, the INA generally provides authorization to "delegate such authority, and perform such other acts as the Attorney General determines to be necessary for carrying out" the powers and duties given him under the INA, *see* 8 U.S.C. § 1103(g)(2), which includes adjudicating applications for cancellation of removal. *See* 8 C.F.R. § 1240.1(a)(1)(ii). By regulation, the Attorney General has directed immigration judges to "receive and consider material and relevant evidence, rule upon objections, and otherwise regulate the course of [a removal] hearing," 8 C.F.R. § 1240.1(c); *see* 8 C.F.R. § 1240.1(a)(1)(ii), and authorized immigration judges to "interrogate, examine, and cross-examine aliens and any witnesses," and to "take any action consistent with their authorities under the Act and regulations that is appropriate and necessary for the disposition" of a case, 8 C.F.R. § 1003.10(b).

consequence, effectively shifting the burden of producing the requested document to DHS. At a minimum, the en banc court would need to overrule that holding of *Rosas-Castaneda* in order to ensure that this issue is properly addressed.

Second, when coupled with the panel's ruling that an inconclusive record of conviction is sufficient to establish eligibility, this burden-of-production issue is of exceptional importance to the administration of the immigration laws. No other court of appeals has suggested that an alien's unjustified failure to comply with an immigration judge's instruction to produce a record is irrelevant to establishing whether a conviction bars relief – on this front, this Court stands alone. As shown by the facts of this case, the panel majority's refusal to recognize and enforce the applicant's burden of production profoundly impacts the enforcement of the immigration laws. Here, the Board was entitled to require production of that evidence to ascertain what was admitted in the plea instead of crediting Almanza-Arenas's supposition about the plea. Almanza-Arenas had both clear instruction and ample time to seek the recording of the plea proceeding or a transcript of that recording. He did not submit any evidence of any attempt to do so or make any showing that the recording was unavailable. Despite that, the panel's ruling excuses Almanza-Arenas' failure to carry his burden of production and announces a rule enabling him to establish eligibility despite that failure of proof.

In doing so, the Court has eliminated both the obligation and the incentive for an applicant to produce relevant transcripts or other records even when, as in this case, the applicant is expressly directed to do so by the adjudicator. The impact of that ruling cannot be overstated. Writ large, judicial resistance to enforcing an alien's burden of production would effectively require the Government to shoulder the burden of obtaining transcripts and other conviction records, regardless of whether they are needed to prove removability, in a sizable number of cases. This would represent substantial additional demands on both agency personnel – who already face challenging operational priorities and concerns – to track down and acquire those documents, and on other agency resources, in the form of unduly prolonged removal proceedings and increased detention costs.

DHS advises that, each year, thousands of aliens with convictions under divisible statutes (i.e., where a plea transcript or other conviction records may be needed to assess an alien's eligibility for relief from removal) are placed in removal proceedings within this judicial Circuit. (According to the latest publicly-available DHS statistics, in Fiscal Year 2014, 177,960 criminal aliens were removed from the United States, slightly more than half of whom were apprehended attempting to enter the United States. *See ICE Enforcement and Removal Operations Report Fiscal Year 2014*, at 7, *available at*

https://www.ice.gov/doclib/about/offices/ero/pdf/2014-ice-immigration-removals.pdf (last visited Mar. 26, 2015)). It is reasonable to expect that a sizable number of such aliens will apply for various forms of relief from removal after being found deportable or, in the case of aliens who like Almanza-Arenas, were not admitted to the United States, after being found inadmissible; determining their eligibility will depend on classifying their convictions using categorical-approach principles.

The alien knows at least as much about his or her conviction as the Government does, and is as capable as the Government is in requesting a transcript or other record. Indeed, because an alien will know before the Government does whether or not he will be applying for relief from removal, and what transpired at his plea hearing, the alien is better situated to avoid such delays by obtaining and furnishing a complete record of each conviction, including any plea transcript, to support his or her application, at the earliest time. Accordingly, in addition to being legally obligated to bear the burden to establish his or her eligibility for relief from removal, *see* 8 U.S.C. § 1229a(c)(4)(A)(i), the alien applicant is better situated than the Government to produce documents requested by the immigration judge concerning the alien's own conviction.

The burdens of obtaining plea transcripts, aside from their cost, are substantial. Unlike other conviction records like complaints, minute orders,

abstracts of judgment and other documents that may be obtained from the clerk of a court in the course of obtaining documents for purposes of establishing deportability, a transcript of a plea colloquy may not have been prepared – when a case has been resolved by plea and there is no appeal, there would be no need for such a transcript – and generally must be obtained from a court reporter or a recording kept by the court.

In addition to those direct burdens, the panel's ruling may also unduly prolong removal proceedings and increase detention costs, because – in order to conserve resources – the Government may not seek such documents until receiving notice that a relief application will be filed and, consequently, that a transcript might be needed.

There is no justification for imposing those burdens and costs on the Government. Particularly when, as in this case, the alien applicant is represented by an attorney, the applicant is at least as well situated as the Government is to bear the burden of producing transcripts and other conviction documents.

III. The Divisibility of A Criminal Statute Is An Exceptionally Important Issue Warranting En Banc Consideration, And Briefing And Consideration of That Issue In This Case Should Be Deferred Pending The Conclusion of *Rendon v. Holder,* Ninth Circuit No. 10-72239.

Finally, how to determine the divisibility of a criminal statute involves a recurring question of importance. As shown in detail in Respondent's *Rendon* Brief, the proper approach for determining the divisibility of a criminal statute is

an issue that warrants en banc consideration. An en banc decision in *Rendon* – a better case than this one for addressing divisibility issues in general, because the conviction records in that case disclose the basis of the conviction at issue – would restore uniformity to this Court's precedent on this important issue. The Court should therefore hold this case pending the conclusion of *Rendon*.[4]

That said, the Rule 35 en banc criteria are satisfied for this issue. Many of the conflicts detailed in the *Rendon* Brief are also applicable here.

The panel's holding that Section 10851(a) is not divisible rests on essentially three points. First, the panel construed Section 10851(a)'s reference to an "intent either to permanently or temporarily deprive the owner" of his or her ownership rights as "establish[ing] a threshold for the intent element – that is, a taking of a vehicle that is at least temporary, but could also be permanent." 771 F.3d at 1191. Second, the panel cited pattern jury instructions, promulgated years after Almanza-Arenas's conviction, to conclude that a jury "need only agree that 'the defendant ... intended to deprive the owner of possession or ownership of the vehicle for any period of time.'" *Id.* (quoting Judicial Council of California Criminal Jury

[4] Although Respondent declined in his pending petition for panel rehearing to challenge the ruling that Section 10851(a) is not divisible (*see* Reh'g Pet. at 2 n.1), that statement was made for purposes of panel rehearing and before the court announced that a *sua sponte* en banc poll was pending and directed briefing on whether the case should be reheard en banc. Respondent expressly declined to concede that the divisibility ruling is correct and noted the prospect of en banc rehearing on that issue in *Rendon*. *See id.*

Instruction 1820.) And finally, the panel cited a California precedent for the proposition that Section 10851(a) "describes a single crime that can be committed in a variety of ways depending on the intent of the actor," *id.* (quoting *People v. Llamas*, 51 Cal.App.4th 1729, 1740 (Cal. Ct. App. 1997)). On this basis, the panel ruled that the modified categorical approach cannot be applied to categorize any conviction for violating Section 10851(a) as a crime involving moral turpitude.

The panel's approach is not consistent with *Descamps*. A disjunctively-written phrase such as Section 10851(a)'s reference to an "intent either to permanently or temporarily deprive the owner," which appears on its face to set out "alternative versions of the crime," is the hallmark of divisibility under *Descamps*, *see* 133 S. Ct. at 2284. The panel construed that phrase, however, as constituting a unitary, overbroad, indivisible element. *See* 771 F.3d at 1191-92. In doing so, the panel apparently foreclosed classification of any Section 10851(a) conviction as a crime involving moral turpitude even when the record in a given case shows that the prosecutor charged the defendant with violating Section 10851(a) intending a permanent deprivation and that the defendant admitted to intending a permanent deprivation when he pled guilty.

The panel also relied on pattern jury instructions, but they may generally indicate what juries might *typically* be asked to find, not what juries are *required* to find in every case, and not what the jury or the trier of fact was required to find in a

particular case. As such, consulting them is not a substitute for the inquiry specified by *Descamps*, which consists of examining the text of the criminal statute and the conviction record without conducting a threshold inquiry into means-elements distinctions or jury agreement under state criminal practice. And in particular, consulting such resources should not replace the process of determining just what elements were admitted or found as part of a plea.

Finally, the panel's resort to a state appellate court's classification of the offense as "a single crime" does not comport with *Descamps*. The language from *Llamas* quoted by the panel does not bear the weight the panel would place on it. Importantly, the court of appeals did not make any observation that might shed light on the elements of the offense – it indicated only that intended temporary deprivations and intended permanent deprivations are separate "theories of guilt." *See* 51 Cal.App.4th at 1741. The decision does not indicate why the court viewed Section 10851(a) as a "single crime" or the relevance of that statement.

Additionally, the panel's approach to divisibility conflicts with decisions of this Court that have found divisible for purposes of applying a modified categorical approach based on the text-focused methodology set out in *Descamps*. One such opinion is *Ibarra-Hernandez v. Holder*, 770 F.3d 1280 (9th Cir. 2014) (per curiam). At issue in that case was an Arizona criminal statute declaring it unlawful to use the personal identifying information "of another person or entity, including a

real or fictitious person or entity . . . for any unlawful purpose or to cause loss to a person or entity * * * or with the intent to obtain or continue employment." The Court declared the statute divisible as between using the information of a real person or entity on the one hand, and of a fictitious person or entity on the other, without attempting to construe the statutory phrase in the manner that the panel in this case construed Section 10851(a). *See Ibarra*, 770 F.3d at 1281. Apparently relying on the details of the conviction record, in particular a transcript of the plea colloquy, as well as the text of the statute, the Court concluded that using the identifying information of a real person in order to obtain or maintain employment, is a crime involving moral turpitude. *Id.* at 1282. That approach is consistent with the method for determining divisibility set out in *Descamps*, but not readily reconciled with the decision in this case. Other cases, discussed in more detail in the *Rendon* Brief, that found statutes divisible based on a similar textual analysis include: *Cervantes v. Holder*, 772 F.3d 583, 588 (9th Cir. 2014) (finding statute divisible based on pre-*Descamps* precedent); *Murillo-Prado v. Holder*, 735 F.3d 1152, 1157 (9th Cir. 2013) (per curiam) (same); *United States v. Quintero-Junco*, 754 F.3d 746, 751-52 (9th Cir. 2014) (finding statute divisible because its "language demonstrates" that "a defendant can violate the statute in two distinct ways"); *Duenas-Alvarez v. Holder*, 733 F.3d 812, 814-15 (9th Cir. 2013) (statute phrased in disjunctive "is divisible in that it imposes criminal liability in the

alternative on principals as well as on accessories after the fact"); *Ceron*, 747 F.3d at 776 n.1 (statute punishing "assault upon the person of another with a deadly weapon or instrument other than a firearm or by any means of force likely to produce great bodily injury" is divisible).

In addition to conflicting with *Descamps* and opinions of this Court, the decision conflicts with the decisions of other courts of appeals. No other court of appeals relies on reasoning like the panel's in deciding whether a statute is divisible.

Among those conflicts, a particularly clear one is with the Tenth Circuit. *United States v. Trent*, 767 F.3d 1046, 1060 (10th Cir. 2014), rejected the proposition underlying the decision in this case that a statute is not divisible if it set out multiple "means," not multiple "elements." The Court there explained that the *Descamps* Court's use of the word "elements" was "shorthand" that "capture[d] the Court's concerns in explaining the proper sphere of the modified categorical approach." *Id.* Rather, the Court concluded, so long as a prosecutor charges a particular offense from a disjunctive list, and the jury unanimously finds that offense was committed, "the modified categorical approach 'permits a court to determine which statutory phrase was the basis for the conviction.'" *Id.* (quoting *Descamps*, 133 S. Ct. at 2285). Similarly, the Eighth and Eleventh Circuits have observed that a divisibility determination is made on the basis of the statutory text.

In *United States v. Bankhead*, 746 F.3d 323, 326 (8th Cir. 2014), the Eighth Circuit stated that the "hallmark of divisibility is the enumeration of alternative bases for conviction separated by the disjunctive 'or.'" And in *United States v. Howard*, 742 F.3d 1334, 1346 (11th Cir. 2014), the Eleventh Circuit stated that "sentencing courts should usually be able to determine whether a statute is divisible by simply reading its text and asking if its elements or means are 'drafted in the alternative.'" *Id.* at 1346 (quoting *Descamps*, 133 S. Ct. at 2285 n.2).[5] These decisions indicate that those courts (among others) do not make a distinction between means and elements critical to the divisibility inquiry in the manner that the decision in this case does.

These conflicts bear on a matter of great importance to the application of many provisions of the immigration laws, the Armed Career Criminal Act, and sentencing guidelines. Making divisibility depend on inquiries regarding state law that may be time-intensive and complex can only complicate and hinder the

[5] Subsequently, in *United States v. Estrella*, 758 F.3d 1239 (11th Cir. 2014), the Eleventh Circuit quoted and applied that same standard. The opinion also included an observation that "[t]he Supreme Court's effort to distinguish divisible and indivisible statutes makes clear that we should ask ourselves the following question when confronted with a statute that purports to list elements in the alternative: If a defendant charged with violating the statute went to trial, would the jurors typically be required to agree that their decision to convict is based on one of the alternative elements?" *See* 758 F.3d at 1246. But that *dicta* played no role in its reasoning or result. A focus on what jurors would "typically" find, rather than what jurors must find in every case, is not a focus on offense elements, and that court has not applied that approach in any other case.

classification of convictions whenever a predicate conviction is under a criminal statute that is not a categorical match to a relevant generic offense. The resolution of divisibility issues under the rule reflected in this case may be quite difficult and may spawn substantial collateral litigation, substantially burdening all adjudicators bound by Ninth Circuit law.

The importance of the issue is hard to overstate, moreover, given the sheer number and frequency of the cases in which such issues arise. From a criminal perspective, application of the modified categorical approach occurs daily in objections to pre-sentencing recommendations, at sentencing hearings, and in criminal appeals. If the considerations identified by the panel are relevant to determining the divisibility of a statute, sentencing courts (and the parties) will have to undertake resource-draining research into state law, the end result of which may well be an unclear answer. And the availability of the modified categorical approach, a threshold matter, may be outcome-determinative regarding a defendant's sentence.

From a civil immigration perspective, the impact is no less profound. Making divisibility and the application of the modified categorical approach hinge on considerations identified by the panel burdens immigration prosecution decisions and adjudications at all levels regarding removability and eligibility for relief from removal in the busiest circuit for immigration enforcement. From an

enforcement perspective, aliens convicted of aggravated felonies or other serious or violent crimes have been and remain among the top immigration enforcement priorities. And that is not all. The modified categorical approach is also frequently applied in adjudicating applications for immigration benefits, including citizenship. The opinion, left uncorrected, will lead to adjudicatory delays and may result in criminal aliens being permitted to remain in the United States and even being granted citizenship when doing so is contrary to Congressional directive and is not required by *Descamps* or any other decision of the Supreme Court.

In view of these conflicts and the importance of the issue, en banc rehearing is warranted, but *Rendon* is expected to address this issue. With respect to that issue, the en banc Court or the panel on remand should hold this case pending the conclusion of *Rendon*.

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CONCLUSION

For the foregoing reasons and the reasons in Respondent's Petition for Panel Rehearing, the Court should grant rehearing. If the Court's errors are not corrected as indicated herein, the Court should order the case reheard en banc.

Respectfully submitted.

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Dated: March 30, 2015

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 8,426 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 and 14-point Times New Roman type style.

PROOF OF SERVICE

The foregoing Brief for Respondent in Response to January 15, 2015 Order of the Court was filed with the Clerk of the Court on March 30, 2015, through the appellate CM/ECF system. Service will be accomplished through that system inasmuch as all participants in the case are registered users of it.

s/ BRYAN S. BEIER
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Nos. 09-71415 and 10-73715

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GABRIEL ALMANZA-ARENAS,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

On Petitions for Review of a Decision of the Board of Immigration Appeals
No. A 078 755 092

PETITIONER'S SUPPLEMENTAL BRIEF IN RESPONSE TO ORDER DATED JANUARY 15, 2015

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March 30, 2015

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INTRODUCTION

Petitioner Gabriel Almanza-Arenas respectfully submits this supplemental brief in response to the Court's order dated January 15, 2015. In Mr. Almanza's view, rehearing en banc is not warranted.

The question in this case is whether Mr. Almanza's conviction under California Vehicle Code § 10851(a) is for a crime involving moral turpitude (CIMT) rendering him ineligible for cancellation of removal. The statute covers both vehicle theft, which is a CIMT, and joyriding, which is not. The panel ruled that Mr. Almanza's conviction was not for a CIMT on two alternative grounds. ***First***, because the statute defines a single offense with a single set of elements, the panel held that the Board of Immigration Appeals (BIA) was not permitted to apply the modified categorical approach. ***Second***, the panel held that even if the modified categorical approach were employed, the BIA erred in treating Mr. Almanza's conviction as a CIMT because the record does not establish that Mr. Almanza's conviction was for theft and not for joyriding.

The government's petition for panel rehearing challenged only the second holding. Its substantive challenge to that holding fails under *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), and its arguments that the panel erred in reaching the second issue at all are equally meritless. While the panel *could* have decided the case on only the first basis, it reasonably exercised its discretion to address both

issues in the alternative, as this Court has often done and in light of the pressing need for clarity on these issues.

BACKGROUND

Mr. Almanza sought cancellation of removal under 8 U.S.C. § 1229b(b)(1). The government argued that he was ineligible for relief because he had been convicted under California Vehicle Code § 10851(a), which prohibits vehicle theft and joyriding. The Immigration Judge (IJ) recognized that, because joyriding is not a disqualifying CIMT, Mr. Almanza's conviction could not categorically bar relief. Administrative Record (AR) 206-207. The IJ then applied the modified categorical approach and found that the record submitted by the government did not establish whether the conviction was for theft or joyriding. AR 207-208. Instead of holding that the record did not show a CIMT, however, the IJ ruled that Mr. Almanza had failed to show he was ***not*** convicted of a CIMT and accordingly found him ineligible for relief. AR 208.

The BIA dismissed Mr. Almanza's appeal in a precedential opinion. *Matter of Almanza-Arenas*, 24 I. & N. Dec. 771 (BIA 2009). The BIA did not disturb the IJ's determination that a § 10851(a) conviction does not categorically constitute a CIMT. *Id.* at 773 n.3. Like the IJ, however, it concluded that Mr. Almanza was ineligible for relief because he had "failed to meet his burden of proof to establish that he was ***not*** convicted of a [CIMT]." *Id.* at 775 (emphasis added). The BIA

denied reconsideration, AR 2-3, and Mr. Almanza timely petitioned for review of both decisions.

A panel of this Court granted the petitions for review. It held unanimously that, because § 10851(a) forbids both theft and joyriding, a conviction under that statute "is not categorically a crime of moral turpitude." Op. 10. The panel then held—as its first basis for decision—that it was inappropriate for the agency to apply the modified categorical approach, because § 10851(a) sets forth "alternative means by which the offense may be committed, not alternative elements." Op. 12 (applying *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013)). A panel majority also adopted a second holding: that, even were it proper to apply the modified categorical approach, Mr. Almanza was not convicted of a CIMT because the record of his conviction was inconclusive and "'[a]mbiguity on this point means that the conviction did not "necessarily" involve facts that correspond to'" a disqualifying conviction. Op. 16 (quoting *Moncrieffe*, 133 S. Ct. at 1687). The panel majority concluded that any contrary ruling in *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc), was "clearly irreconcilable with *Moncrieffe*." Op. 16.[1]

[1] Judge Fisher concurred in part and in the judgment, explaining that he would not have reached this additional basis for the holding.

The government did not seek rehearing en banc, and its petition for panel rehearing challenged only the panel's second holding.[2]

ARGUMENT

I. THE PANEL DECISION IS CORRECT

The IJ, the BIA, and the panel all held that a conviction under § 10851(a) is not categorically a CIMT, and the government has not challenged that holding. *See* Pet. for Panel Reh'g 1. Mr. Almanza's eligibility for relief therefore turns on two questions: First, under *Descamps*, was the BIA permitted to reach the modified categorical approach to determine the basis for his conviction? And second, even if the modified categorical approach is allowed here, what is the effect of the inconclusive record of conviction on Mr. Almanza's eligibility for relief? The panel correctly answered both questions under governing Supreme Court precedent.

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[2] In opposing panel rehearing, Mr. Almanza asked that the panel hold this case in abeyance pending the Court's determination whether to rehear *Rendon v. Holder*, 764 F.3d 1077 (9th Cir. 2014) (No. 10-72239), which raises an issue related to the panel's first ground of decision in this case. Mr. Almanza further stated that if the Court were to reject the government's arguments in *Rendon*—whether by denying rehearing or by granting rehearing and upholding the *Rendon* panel's analysis—it would effectively resolve the panel's first ground of decision in Mr. Almanza's favor. In that circumstance, when the decision in *Rendon* becomes final, Mr. Almanza would not object to the panel's amending its opinion in this case to remove the second holding. *See* Response to Pet. for Panel Reh'g, Jan. 28, 2015, ECF No. 87 (No. 09-71415). Of course, Mr. Almanza does not concede that en banc reversal of *Rendon* would lead to a different outcome regarding divisibility in this case, as *Rendon* involves a conviction under a different California statutory provision.

A. The Panel's First Holding: Section 10851(a) Is Not Divisible, Such That Mr. Almanza Has Not Been Convicted Of A CIMT Under The Categorical Approach

In *Descamps*, the Supreme Court explained that the modified categorical "approach serves a limited function: It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." 133 S. Ct. at 2283. Where a statute is divisible—that is, where it "sets out one or more elements of the offense in the alternative," *id.* at 2281—courts can apply the modified categorical approach to discern which elements supported a particular conviction. That is because "[a] prosecutor charging a violation of a divisible statute must generally select the relevant element from its list of alternatives," and "as instructions in the case will make clear," the jury "must then find that element, unanimously and beyond a reasonable doubt." *Id.* at 2290. By contrast, "courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements." *Id.* at 2282. When an offense has only one set of elements, after all, courts need not labor to identify which elements supported a given conviction; there is only one answer.

Section 10851(a) imposes criminal liability on "[a]ny person who drives or takes a vehicle not his or her own, without the consent of the owner thereof, and with intent either to permanently or temporarily deprive the owner thereof of his or

her title to or possession of the vehicle, whether with or without intent to steal the vehicle." The statute criminalizes a single offense with a single set of elements, for at least three reasons.

First, the statute does not enumerate theft and joyriding offenses in separate subsections, which prosecutors could charge (and juries could find) distinctly. Had the California Legislature meant to distinguish between theft and joyriding offenses, it could easily have done so. Its choice to codify a single prohibition against driving or taking someone else's vehicle—no matter "whether with or without intent to steal"—supports reading § 10851(a) as indivisible. *See Descamps*, 133 S. Ct. at 2290 ("A prosecutor charging a violation of a divisible statute must generally select the relevant element from its *list of alternatives*." (emphasis added)).

Second, the language appended to the end of the critical phrase—"whether with or without intent to steal"—eliminates any chance that the State could prosecute a theft offense as distinct from a joyriding offense under § 10851(a). Even if the earlier disjunctive phrase ("either to permanently or temporarily deprive") were read to define divisible mental state elements, it would make no sense for a prosecutor to charge that a defendant drove or took someone else's vehicle, "with intent … to permanently … deprive the owner thereof … , whether with or without intent to steal the vehicle." An intent to permanently deprive *is* an intent to steal. *See, e.g.*, *People v. Davis*, 965 P.2d 1165, 1167-1168 (Cal. 1998).

Read together, then, the two relevant phrases—"intent either to permanently or temporarily deprive" and "whether with or without intent to steal"—simply "establish[] a threshold for the intent element." Op. 12. They relieve the State of any burden to show that a § 10851(a) defendant intended to steal. *See* 2 Witkin, *Cal. Crim. Law* § 108 (4th ed. 2012) (explaining that a person may violate § 10851(a) even when his or her "intent is only to deprive the owner of title or possession 'temporarily,'" whereas "[t]heft under [Cal. Penal Code § 487(d)] requires an intent to steal"). As a result, § 10851(a) is precisely the type of statute to which the modified categorical approach cannot apply: Given its text, a court could never determine that a particular conviction was based on theft elements rather than joyriding elements.

Third, California's standard jury instruction on § 10851(a) does not direct juries to find whether the defendant intended a permanent or a temporary deprivation. Rather, it requires the jury simply to find that the defendant "intended to deprive the owner of possession or ownership of the vehicle ***for any period of time***." CALCRIM No. 1820 (emphasis added).[3] And the older CALJIC instruction also did not require a jury to find whether the defendant intended a temporary or a permanent deprivation; a conviction required that the jury find that the defendant "had the specific intent to deprive the owner *either permanently or*

[3] CALCRIM instructions are endorsed by the California Judicial Council. *See* Cal. Rule of Court 2.1050.

temporarily of [his or her] title to or possession of the vehicle." CALJIC No. 14.36 (emphasis added). As *Descamps* explains, the mark of divisible statutes is that they "enable a sentencing court to conclude that a jury (or judge at a plea hearing) has convicted the defendant of every element of the generic crime." 133 S. Ct. at 2290. Section 10851(a) lacks this essential attribute, because juries do not find whether the defendant intended a permanent deprivation (which is a CIMT) or a temporary one (which is not).

Because § 10851(a) defines one offense with one set of elements, the panel was correct that the BIA erred in applying the modified categorical approach, and that Mr. Almanza accordingly was not convicted of a CIMT.

B. The Panel's Second Holding: The Inconclusive Record Establishes That Mr. Almanza Has Not Been Convicted Of A CIMT Under The Modified Categorical Approach

The panel was equally correct to hold that the inconclusive record of Mr. Almanza's conviction establishes that, even using the modified categorical approach, he has not been convicted of a CIMT.[4]

[4] Contrary to the assertions in the government's petition for panel rehearing, the BIA based its denial of Mr. Almanza's eligibility for relief on the ground that, with an inconclusive record of conviction, he did not "establish that he was ***not*** convicted of a [CIMT]." *Matter of Almanza-Arenas*, 24 I. & N. Dec. at 775 (emphasis added). The BIA *additionally* relied on the fact that Mr. Almanza did not produce a transcript of his plea colloquy. But that could not be, nor did the BIA treat it as, the sole basis to conclude that Mr. Almanza was ineligible for relief as having been convicted of a CIMT.

At any rate, the IJ had no authority to require Mr. Almanza to produce the transcript. *See Rosas-Castaneda v. Holder*, 655 F.3d 875, 884-885 (9th Cir. 2011), *overruled on other grounds by Young*, 697 F.3d 976. In *Rosas-Castaneda*, as in this case, an immigrant applied for cancellation of removal, and the IJ found that the record submitted by the government was inconclusive as to whether the immigrant had been convicted of a disqualifying offense. *Id.* at 881. The IJ therefore ordered the immigrant to produce the transcript of his plea colloquy. *Id.* When the immigrant failed to do so, the IJ and BIA held (as in this case) "that the production of an inconclusive record of conviction did not carry [the immigrant's] burden to prove eligibility for cancellation of removal." *Id.* at 882. This Court granted the immigrant's petition for review, holding inter alia that the IJ lacked authority to require the immigrant to supplement the record of conviction. *Id.* at 884-885. Under the REAL ID Act, the Court explained, IJs may "request corroboration of only *testimonial* evidence"; the statute "conspicuously excludes the authority to require an alien to corroborate 'other evidence in the record,'" *id.* at 884, such as "judicially noticeable conviction documents," *id.* at 885. *Young* overruled a different part of the *Rosas-Castaneda* opinion, 697 F.3d at 979-980, but not only did it decline to overrule the holding discussed above, it actually relied on it. *See id.* at 984 (citing *Rosas-Castaneda*, 655 F.3d at 884-885, for the proposition that the REAL ID Act "merely allows the IJ to require corroborative evidence for *testimony*," and does not "open[] the door for additional evidence to supplement the *documentary* record of conviction allowed under *Shepard*").

Here, moreover, the transcript would have been irrelevant to the determination whether Mr. Almanza had been convicted of a CIMT, because Mr. Almanza never admitted the facts underlying his conviction. *See* Op. 4-5 & n.1 (explaining that Mr. Almanza pleaded guilty under the doctrine of *People v. West*, 477 P.2d 409 (Cal. 1970)). This Court has suggested that a *West* plea can establish the basis of a conviction under the modified categorical approach, *see United States v. Valdavinos-Torres*, 704 F.3d 679, 687 (9th Cir. 2012), but that reasoning cannot survive the Supreme Court's more recent clarification that under that approach, courts may rely only on factual admissions that were *necessary* to a conviction. *See Descamps*, 133 S. Ct. at 2284 ("[A] conviction based on a guilty plea can qualify as an ACCA predicate only if the defendant 'necessarily admitted [the] elements of the generic offense.'"); *Moncrieffe*, 133 S. Ct. at 1684 ("[W]e examine what the state conviction necessarily involved[.]"). The whole point of a *West* plea is that a defendant's admission of facts is unnecessary to his conviction.

Although this Court once adopted the BIA's contrary view, *see Young v. Holder*, 697 F.3d 976, 988-990 (9th Cir. 2012) (en banc), the panel was right to hold that *Young* cannot be squared with the Supreme Court's intervening decision in *Moncrieffe*. *Moncrieffe* explains that, where an immigrant's status turns on whether he has been *convicted* of a particular offense—rather than whether he *committed* the offense—courts and the agency must "examine what the … conviction *necessarily* involved," rather than looking to "the facts underlying the case," and "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized." 133 S. Ct. at 1684 (emphasis added); *see also id.* at 1688 (proper inquiry is to determine "whether the record of conviction … necessarily establishes conduct that" qualifies as a generic federal offense). Where the record makes it impossible to discern whether an immigrant has *necessarily* been convicted of the elements of a generic federal offense, the only permissible conclusion—as a matter of law—is that he has not been convicted of such an offense. *See id.* at 1687 ("Ambiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA.").

Moncrieffe addressed a question of removability, on which the government bears the burden, rather than eligibility for relief, on which the immigrant bears the burden. But that distinction has nothing to do with its reasoning. *See* 133 S. Ct. at

1685 n.4 ("Our analysis is the same in both contexts."). The inquiry described by *Moncrieffe* is legal, not factual. *See id.* at 1684 ("Whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'"). And the allocation of the burden cannot affect this purely legal inquiry: Either the record of an immigrant's conviction shows that it necessarily rested on the elements of the generic federal offense, in which case the immigrant has been "convicted" of that offense, or not.[5] *See United States v. Norbury*, 492 F.3d 1012, 1014 n.2 (9th Cir. 2007) (burden to establish a prior conviction was "irrelevant" to legal question "whether a dismissed conviction qualifies as a prior conviction"); *United States v. Seschillie*, 310 F.3d 1208, 1215 (9th Cir. 2002) ("Because 'harmless error analysis is a purely legal question which lies outside the realm of fact-finding,' we ordinarily 'dispense with burdens of proof and presumptions[.]'"); *see also, e.g.*, *Sequa Corp. & Affiliates v.*

[5] This by no means negates the overall burden on noncitizens to justify relief from removal, *see* 8 U.S.C. § 1229a(c)(4); 8 C.F.R. § 1240.8(d), because the allocation of the burden *does* affect factual determinations. To qualify for cancellation of removal, for example, Mr. Almanza bears the burden to show that he "has been physically present in the United States for a continuous period of not less than 10 years," that he "has been a person of good moral character during such period," and that his "removal would result in exceptional and extremely unusual hardship to [his] 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). Other forms of relief are similarly subject to bars that turn on factual determinations on which the alien bears the burden, at least once the government has put the bar in issue. *See, e.g.*, *id.* § 1158(b)(2)(A)(vi) (asylum applicant is ineligible if she "was firmly resettled in another country prior to arriving in the United States"); *id.* § 1255(c)(8) (applicant for adjustment of status is ineligible if he "was employed while" unauthorized).

United States, 350 F. Supp. 2d 447, 449 (S.D.N.Y. 2004) ("[T]he concept of 'burden of proof' has no relevance where a dispute is solely on a question of law."), *aff'd*, 437 F.3d 236 (2d Cir. 2006).

Indeed, *Moncrieffe*'s reasoning was prefigured in *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), which *Young* overruled. *Sandoval-Lua* held that, where the record of an immigrant's conviction is inconclusive, the immigrant has not been convicted of the generic federal offense:

> We have before us a record of conviction that is inconclusive. On the basis of the documents in the record, we cannot say that Lua's … plea "necessarily admitted" the elements of the generic offense. … When confronted with such a record, … we must conclude as a matter of law that the conviction was ***not*** for a generic offense for purposes of determining whether Lua has committed an aggravated felony under the INA.

Id. at 1132 (emphasis added). In overruling this holding, *Young* reasoned that an immigrant "cannot carry the burden of proof with an inconclusive record," because he "has simply demonstrated that the evidence about the nature of the conviction is in equipoise." 697 F.3d at 989. But this logic cannot be reconciled with *Moncrieffe*'s holding that "[a]mbiguity" in the record of conviction "means that the conviction did ***not*** 'necessarily' involve" the elements of the generic federal offense. 133 S. Ct. at 1687 (emphasis added).

While *Moncrieffe* arose in a slightly different context, lower courts are "bound not only by the holdings of higher courts' decisions but also by their 'mode

of analysis.'" *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (quoting Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1177 (1989)). And *Moncrieffe*'s "mode of analysis" is that of *Sandoval-Lua*, not that of *Young*. Because *Moncrieffe* "undercut the theory or reasoning underlying [*Young*] in such a way that the cases are clearly irreconcilable," the panel was permitted to treat *Young* as having been abrogated in relevant part by the Supreme Court, without need for an initial hearing or rehearing en banc. *Miller*, 355 F.3d at 900.

II. THE PANEL REASONABLY ADDRESSED BOTH GROUNDS FOR GRANTING THE PETITIONS

Considerations of judicial economy support the panel's decision to resolve both the question whether § 10851(a) is divisible and the question how to treat the inconclusive record of Mr. Almanza's conviction under the modified categorical approach. Had the panel declined to decide the second question, it would have left Immigration Judges, immigrants, and their families in a prolonged and unnecessary state of limbo as to the validity of the BIA's precedential decision of that question.

This Court routinely decides cases on alternative grounds even though it could rely on just one. *See, e.g.*, *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 750 (9th Cir. 2006) (holding that claims were barred both by issue preclusion and by release); *United States v. Griffin*, 440 F.3d 1138, 1141 (9th Cir. 2006) (identifying two bases for interlocutory appellate jurisdiction); *Calderon v. U.S. Dist. Court for Cent. Dist. of Cal.*, 163 F.3d 530, 542 (9th Cir. 1998)

(en banc) (later abrogated) (holding that AEDPA's statute of limitations did not apply and, even if it did, that it was equitably tolled). This practice is commonplace and commonsensical: "Panels often confront cases raising multiple issues that could be dispositive, yet they find it appropriate to resolve several, in order to avoid repetition of errors on remand or provide guidance for future cases. Or, panels will occasionally find it appropriate to offer alternative rationales for the results they reach." *United States v. Johnson*, 256 F.3d 895, 914 (9th Cir. 2001) (opinion of Kozinski, J.) (footnote omitted).

The Supreme Court regularly follows the same practice for the same reasons. Just last Term, for example, the Court chose to address all three questions presented in a case concerning the validity of recess appointments, even though an answer to one would have resolved the case. *See NLRB v. Noel Canning*, 134 S. Ct. 2550, 2558 (2014) (explaining that the Court "believe[d] it [was] important to answer all three questions" in light of their importance to other litigants). And in another case, the Court decided both prongs of the qualified immunity standard—where only one was necessary—on the premise that doing so would provide useful guidance in future cases. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2020 (2014).

In certain situations, to be sure, courts are forbidden from reaching unnecessary issues. For example, a court may not hold that it lacks jurisdiction

and, in the alternative, decide the merits. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Where a court can resolve a case on statutory grounds, it generally ought not opine on constitutional grounds. *See, e.g.*, *Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 343 (1999). And where an issue is unlikely to recur, most courts would not consider an unnecessary decision on that issue to be worth judicial resources.

But none of these cautionary factors applies here. The two issues decided by the panel stood on equal footing: Both were statutory, each was sufficient to dispose of the petitions for review, and there was no reason the panel should have preferred to decide one over the other. And as noted above, immigrants and Immigration Courts throughout this Circuit benefit from guidance on both issues, given that the BIA's precedential opinion in this case was called into question by not one but two intervening decisions of the Supreme Court. Under these circumstances, the panel acted reasonably in deciding both issues.

CONCLUSION

Rehearing en banc is not warranted.

Respectfully submitted,

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March 30, 2015

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 and 40-1, the attached supplemental brief regarding rehearing en banc is:

_X_ Proportionately spaced, has a typeface of 14 points or more and contains _4039_ words (petitions and answers must not exceed 4,200 words).

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of March, 2015, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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