No. 11-206

In the Supreme Court of the United States

JAD GEORGE SALEM,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONER

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PETITIONER'S REPLY

The government acknowledges the "inconsistency among the courts of appeals" (Opp. 10) concerning the question presented: whether an alien convicted under a "divisible" statute satisfies his or her burden of demonstrating eligibility for cancellation of removal where the relevant record of conviction is, through no fault of the alien, inconclusive on the question whether the conviction qualifies as an aggravated felony. And it does not dispute our showing that the issue is a frequently recurring one of substantial practical importance, determining the outcomes of a great many removal proceedings every year.

The government nevertheless asserts that this Court should deny review for two principal reasons: because the law of the circuits "has not yet coalesced" and thus review of this case "would be premature" (Opp. 12); and because this case is a not a suitable vehicle to resolve the question presented (Opp. 9). Each of these contentions is wrong.

A. The Courts Of Appeals Are Divided On The Question Presented.

Although the government concedes there is "some inconsistency among the courts of appeals" (Opp. 10), it nonetheless attempts to distinguish the holdings of the Second and Ninth Circuits. The government's efforts are unavailing; indeed, the court below expressly—and correctly—recognized that it was departing from the views of those courts, each of which has concluded "that presentation of an inconclusive record of conviction satisfies a noncitizen's burden to demonstrate that he has not been con-

victed of an aggravated felony." Pet. App. 13a. See also *id.* at 8a, 14a.[1]

There can be no serious dispute that petitioner would be eligible for relief in the Second Circuit under that court's decision in *Martinez* v. *Mukasey*, 551 F.3d 113 (2d Cir. 2008). There, the Second Circuit concluded that, although distribution of marijuana ordinarily is a federal felony, someone who distributes a "small amount of marihuana for no remuneration" may be convicted of a federal misdemeanor rather than a felony under 21 U.S.C. § 841(b)(4); thus, according to that court, such a conviction cannot constitute an "aggravated felony" for immigration purposes. *Martinez*, 551 F.3d at 120-121.

Applying Section 841(b)(4) to the alien's conviction under New York Penal Law § 221.40, which punishes distribution of 2 grams or more of marijuana (*Martinez*, 551 F.3d at 119), the Second Circuit interpreted New York Penal Law § 221.40 to be divisible—that is, some convictions under 221.40 do not qualify as an "aggravated felony" (*i.e.*, convictions for distribution of a "small amount" of marijuana for no remuneration), while other convictions do.[2] Next,

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[1] Similarly, in *Marquez Garcia* v. *Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009), the Tenth Circuit expressly rejected the approach taken by the Ninth Circuit.

[2] As we noted in the petition (at 14-15), the courts of appeals also have divided on this aspect of *Martinez*; that disagreement is the subject of the pending petition in *Jorge Garcia* v. *Holder*, No. 11-79. Because *Martinez* holds state marijuana statutes divisible, the question presented here frequently accompanies the question there. The government understates the connection between the two questions, observing only that "both issues could arise in the same case." Opp. 13. But the fact is, both issues typically are present in cancellation-of-removal cases involving

employing "a straightforward application of the categorical approach," the court concluded that "the *sole* ground for determining whether an immigrant was convicted of an aggravated felony is the minimum criminal conduct necessary to sustain a conviction under a given statute." *Martinez*, 551 F.3d at 121. Because the alien's "conviction could have been based on a nonremunerative transfer of a small amount of marijuana," the court found that the alien there had established that he had not been convicted of an aggravated felony, and was eligible for cancellation. *Id*. at 121-122.

Because petitioner's conviction for petty larceny under Va. Code Ann. § 18.2-96 *could have been* for fraudulent (rather than wrongful) taking, he categorically would be eligible for cancellation of removal under the Second Circuit's rule. Indeed, pursuant to that rule, *no* conviction for a divisible offense may bar an alien from cancellation. To be sure, in this respect the Second Circuit's use of the categorical approach differs from, and is more favorable to aliens than, the Ninth Circuit's use of the *modified* categorical approach in *Sandoval-Lua* v. *Gonzales*, 499 F.3d 1121 (9th Cir. 2007) and *Rosas-Castaneda* v. *Holder*, 630 F.3d 881, amended on denial of reh'g en banc

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marijuana possession: state records of conviction for marijuana possession offenses ordinarily fail to demonstrate whether or not a defendant was convicted for distributing a "small amount" of marijuana for no "remuneration." Indeed, should the petitioner in *Jorge Garcia* prevail, the subsequent question is whether he can satisfy his burden of demonstrating that his conviction for "attempted possession of an *unspecified* amount of marijuana with intent to deliver" (*Jorge Garcia* Pet. 5 (emphasis added)) actually qualifies under the CSA misdemeanor exception—a question that implicates the exact issue presented here.

655 F.3d 875 (9th Cir. 2011). According to those decisions, an IJ may consider the record of conviction in addition to the elements of the underlying offense. But as the court below recognized, aliens in petitioner's position will prevail under either test. And because the differences between the decision below and *Martinez* are outcome-determinative, the government is flatly wrong to contend that "[t]here is no conflict between" the Second Circuit's holding in *Martinez* and the "Fourth Circuit's determination in this case." Opp. 11.

The government's efforts to distinguish the holdings of the Ninth Circuit are equally unpersuasive. To begin with, the government concedes that, in *Sandoval-Lua*—which was not governed by the REAL ID Act—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." Opp. 11. And it acknowledges that, in *Rosas-Castaneda*—which *was* governed by the REAL ID Act—the court "did reaffirm its decision in *Sandoval-Lua*" in light of that statute. Opp. 12.[3]

The government's suggestion, nevertheless, that the Ninth Circuit's views have "not yet coalesced" and that there are "outstanding issues surrounding this question occasioned by the enactment of the REAL ID Act" (Opp. 12) is puzzling. Tellingly, it fails to identify *what* any of those outstanding issues may be. In fact, there are none. That much is evident from the Ninth Circuit's denial of en banc rehearing

[3] Since our filing of the petition, the Ninth Circuit amended and superseded its prior opinion on denial of the petition for rehearing en banc. See 655 F.3d 875 (9th Cir. 2011).

in *Rosas-Castaneda*; in his dissent from the denial, Chief Judge Kozinski characterized the panel opinion as "addressing whether *Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007), survives the enactment of the REAL ID Act." 655 F.3d at 877 (Kozinski, C.J., dissenting from denial of rehearing en banc). The dissenting opinion does not even hint that there may be any additional outstanding issues with respect to the panel's affirmative resolution of that question; the government offers no reason to conclude otherwise.[4]

Thus, as the government appears to recognize in acknowledging that *Rosas-Castaneda* "may not be consistent with the Fourth Circuit's decision in this case" (Opp. 12), petitioner would have received a different result in the Ninth Circuit. There, he would be eligible for cancellation of removal because "[w]here a record of conviction proves inconclusive, an alien carries his burden of proving by a preponderance of the evidence that she has not been convicted of an aggravated felony." *Rosas-Castaneda*, 655 F.3d at

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[4] In arguing that *Sandoval-Lua* and *Rosas-Castaneda* have substantial importance, we cited a sampling of recent cases applying the rule of those cases, including *Young* v. *Holder*, 634 F.3d 1014 (9th Cir. 2011). Pet. 12 n.3. The government notes (Opp. 11-12) that the Ninth Circuit has granted rehearing en banc in *Young*. See 653 F.3d 897 (9th Cir. 2011). But the government sought rehearing in that case on an entirely separate issue: whether, when later applying the modified categorical approach, a defendant's guilty plea to a conjunctively phrased charge (*e.g.*, "committed a robbery by force *and* fear") admits each allegation. Br. in Supp. of En Banc Reh'g at 1, *Young* v. *Holder*, No. 07-70949 (9th Cir. June 13, 2011) (quotation omitted). That question has nothing to do with the issue presented here.

886. This is precisely the rule that the court below rejected. Pet. App. 8a-9a.[5]

And lest there be any doubt on this point, in the time since the petition was filed, the Ninth Circuit has applied its resolution of the question presented once again. See *Garcia Tellez* v. *Holder*, 2011 WL 4542678, at *1 (9th Cir. Oct. 3, 2011) (citing *Sandoval-Lua*). Because the state conviction in that case was divisible, and the "conviction record [wa]s inconclusive," the court found that the alien had "met his burden to prove he is not barred from relief on the grounds of an aggravated felony conviction." *Ibid.* The Ninth Circuit's routine application of this rule in unpublished decisions makes clear that nothing about its approach is unsettled. This conflict in the

[5] As the government notes (Opp. 12), in amending *Rosas-Castaneda* the Ninth Circuit supplemented its remand instructions "to permit the government to put forth reliable evidence to show that the petitioner was convicted of an aggravated felony." 655 F.3d at 886. But the government misunderstands the basis for that disposition. Although the "record of conviction" under the modified categorical approach consists of the "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented," Rosas-Castaneda proffered only the charging document and a copy of the plea agreement. *Ibid.* (quotation omitted). In seeking rehearing, the government contended that this record of conviction was incomplete because the alien had "refus[ed] a request to produce a requested plea transcript, without demonstrating that the transcript is unavailable despite the alien's attempt to obtain it." Pet. for En Banc & Panel Reh'g, at 7, *Rosas-Castaneda* v. *Holder*, No. 10-70087 (9th Cir. Mar. 21, 2011) (emphasis omitted). Thus, in remanding for further proceedings, the Ninth Circuit simply recognized the possibility that the record of conviction, in that particular case, may have been incomplete.

circuits will not be resolved absent this Court's intervention.

B. This Case Is An Appropriate Vehicle With Which To Resolve The Question Presented.

The government also argues that "this case is not a suitable vehicle to resolve the question * * * presented" because there is no "agency finding that the record of conviction was 'complete.'" Opp. 9. But if the government means by this to suggest that petitioner could (or should) have submitted evidence *beyond* what is permitted by the *Taylor-Shepard* modified categorical approach, that argument simply begs the question presented here. Under the approaches taken by the Second and Ninth Circuits, such evidence would not have been admissible and thus could not have been relevant to petitioner's eligibility for cancellation of removal; the question here is whether the approach taken by those courts is correct.[6]

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[6] The government also makes the related assertion that "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," and that "[b]oth 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." Opp. 9 (citing Pet. App. 22a, 39a). Again, this assertion begs the question whether such evidence could be material. But if the government means by this to suggest that the agency invited petitioner to submit materials beyond those contemplated by a modified categorical inquiry, it is simply incorrect. At the cited pages of their decisions, the Board and IJ pointed solely to materials admissible under *Shepard*.

If the government instead means to argue, as it did in *Rosas-Castaneda*, that there are additional documents not entered below that may be considered under the *Taylor-Shepard* framework, that misses the mark for at least three reasons. First, the government never argued before the Fourth Circuit that the record was incomplete in this case, and that court assumed for purposes of its decision that petitioner had "present[ed] an inconclusive, *though complete*, record of conviction." Pet. App. 6a (emphasis added). Second, the government provides no reason to doubt the ultimate accuracy of the lower court's assumption on this point: unlike its briefing in *Rosas-Castaneda*, it has not pointed to any specific documents that it asserts might be missing from the record. And third, the completeness of the record is irrelevant in any event: the question presented here is a prior one of law, and the government's argument would be, at most, a factual issue to be addressed on remand, should petitioner prevail on the merits.

C. The Decision Below Is Wrong.

The presence of a cleanly presented and acknowledged circuit conflict, coupled with the indisputable frequency with which the issue arises, establishes that this Court's review is warranted. The government nevertheless suggests (Opp. 7-10) that the decision below is correct. Although this is not a reason to deny certiorari given the current disarray in the administration of the Nation's immigration laws, the government is wrong.

The government contends that an "inconclusive record of conviction" cannot "discharge[]" an alien's "statutory burden." Opp. 8. But the government ignores our argument (Pet. 19-25) that Congress surely understood that the term "conviction" has particular

meaning when used in this context, and thus that both the BIA and the courts of appeals would use the modified categorical approach articulated in *Taylor* and *Shepard* to determine when a conviction is for an "aggravated felony" and when it is not. That follows both from the statute's emphasis on the alien's "conviction" and from the "pragmatic" imperative of avoiding protracted collateral trials. *Shepard* v. *United States,* 544 U.S. 13, 20 (2005). Accordingly, "[w]hen the law under which the defendant has been convicted contains statutory phrases that cover several different generic crimes"—just as in this case—a court's inquiry into whether the alien's offense constitutes an aggravated felony is limited to "the trial record[,] including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." *Johnson* v. *United States*, 130 S. Ct. 1265, 1273 (2010).

Notably, the government does not take issue with our argument on this point. And for good reason. In its opposition in *Jorge Garcia*, filed the same day as its opposition here, the government acknowledged that "[w]here a conviction does not *categorically* qualify as an aggravated felony"—that is, where the statute of conviction is divisible—"further analysis under the 'modified categorical approach' is appropriate to determine (from a limited set of documents) whether the particular defendant was convicted of conduct that qualifies as an aggravated felony." Br. in Opp. at 10 n.7, *Jorge Garcia* v. *Holder*, No. 11-79. The government thus does not quarrel with our view of the law on this issue.

Against this backdrop, whatever Congress could have intended by placing the burden of proof on the

alien to prove that a prior conviction was not an aggravated felony, it could not have intended to put aliens in the impossible situation of being categorically unable to establish eligibility for discretionary relief when the limited range of documents permitted under *Shepard* are inconclusive. This conclusion is supported by other sections of the statute. In 8 U.S.C. § 1229a(c)(4)(B), for example, Congress exempted aliens from their burden of proof in a related context when "the applicant demonstrates that the applicant does not have the evidence and cannot reasonably obtain the evidence." The government offers no response to this crucial point.

At bottom, and as both the Second and Ninth Circuit have recognized, if the complete record does not demonstrate that an alien "necessarily" was convicted of an aggravated felony, the conviction must be presumed *not* to be an aggravated felony. Thus when the record of conviction is inconclusive, the alien has satisfied, as a matter of law, his or her burden to show the conviction was not an aggravated felony.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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