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P R O C E E D I N G S

(11:20 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 19-438, *Pereida versus Barr*.

Mr. Goldman.

ORAL ARGUMENT OF BRIAN P. GOLDMAN

ON BEHALF OF THE PETITIONER

MR. GOLDMAN: Mr. Chief Justice, and may it please the Court:

There's no dispute that the INA requires an applicant for relief to show that he has not been convicted of a disqualifying offense. The main question here is just whether he can rely on the categorical approach's "least acts" presumption to meet that burden of proof, just as parties may rely on presumptions to satisfy their burdens of proof in many other areas.

He can for two reasons. First, for decades, the statutory term "convicted" has been understood to require a categorical approach under which a past offense won't lead to mandatory removal or an enhanced sentence unless the record of conviction establishes every

1 element of a federal predicate offense to a
2 legal certainty.

3 So we always presume that a conviction
4 stands for nothing more than the least that the
5 record of conviction establishes. And that rule
6 works the same under the categorical and
7 modified categorical approaches because courts
8 can look to the least of the alternative
9 elements under a divisible statute, as this
10 Court has.

11 Second, Congress didn't disturb that
12 rule when it enacted a general burden-of-proof
13 provision that says nothing about convictions.
14 And that's not surprising because all we're
15 talking about is a gatekeeping step. There's
16 still the discretionary step, where the Attorney
17 General is unbound by the categorical approach
18 and can make an individualized determination
19 about who gets relief.

20 So, ultimately, it doesn't matter
21 whether you think of the modified categorical
22 approach as raising a question of law or a
23 question of fact, because it's common for
24 presumptions to operate on questions of fact
25 too.

1 And what matters is instead that the
2 least acts presumption always governs the
3 analysis, and because it supplies a default
4 answer, there's never any residual ambiguity for
5 a burden of proof to resolve.

6 CHIEF JUSTICE ROBERTS: Counsel, I --
7 I think your friend on the other side might
8 agree that it doesn't matter so much whether
9 it's factual or legal -- at least that's not the
10 underlying reason that you have this -- this
11 distinction between ACCA and the immigration
12 statute.

13 Under ACCA, the government has the
14 burden of showing that the increased sentence is
15 warranted, so it has to carry the burden of
16 looking to the least elements approach. But
17 it's different when you're seeking the benefit
18 of removal under the immigration case. There,
19 the person who's seeking -- has the burden of --
20 that benefit is your client, and, therefore, you
21 have the burden of showing the most elements
22 approach for the prior conviction.

23 Why isn't it simply the different
24 burdens under ACCA and the immigration statute
25 that account for the fact that in one case --

1 the different burden of going forward? Whether
2 you're seeking a greater sentence or seeking the
3 benefit of removal, why doesn't that simply
4 account for the allocation of the burden of
5 proof? And it's just incidental that in your
6 case, you have a factual question of whether or
7 not subsection (c) was the section of conviction
8 or not?

9 MR. GOLDMAN: So two responses to
10 that, Mr. Chief Justice.

11 First, the government is not actually
12 arguing that the least acts presumption and the
13 burden of proof are opposite ends of a single
14 spectrum, because the government acknowledges
15 that even where the non-citizen bears the burden
16 of proof, the least acts presumption still does
17 apply at least at the categorical step of the
18 analysis. So those two aren't inversely related
19 in the way that Your Honor's question suggests.

20 But also, second, even in contexts
21 where the government has borne the burden of
22 proof, that has not been what has animated the
23 decision under the categorical approach. And,
24 in fact, the standard that the Court has
25 adopted, which is this demand for certainty or,

1 I think, synonymously, a requirement that the
2 conviction necessarily establish every element,
3 goes far beyond the burden of proof that the
4 government would face at -- at sentencing or to
5 show removability.

6 CHIEF JUSTICE ROBERTS: Thank you,
7 counsel.

8 Justice Thomas.

9 JUSTICE THOMAS: Counsel, I'm just a
10 little confused. I'd like you to help me.

11 Normally, when we have these cases,
12 say, under ACCA, we are comparing a known crime
13 of conviction to the generic, say, for example,
14 burglary definition. Do you agree with that?

15 MR. GOLDMAN: Yes, Your Honor.

16 JUSTICE THOMAS: Now, here, you're
17 saying that the -- where you're applying it to
18 establishing the crime of conviction, isn't
19 there a difference?

20 MR. GOLDMAN: I don't think there's
21 any difference there. I think Shepard is a good
22 example of that, as is Johnson, where there --
23 the -- the uncertainty that existed in those
24 cases was which prong of the divisible statute,
25 that was a necessary step in the analysis, to

1 then compare to the federal offense.

2 JUSTICE THOMAS: But, here, you know,
3 there seemed to be an underlying current that
4 it's somewhat unfair to ask the Petitioner here
5 to say what he had just been convicted of in the
6 state courts.

7 Could you explain why you think that
8 would be unfair? It seemed as though that if I
9 were just convicted of a crime, I would know
10 what it was.

11 MR. GOLDMAN: So, sure, two -- two
12 responses to that, Justice Thomas.

13 First is that this is in some ways the
14 unusual case that it involves parallel criminal
15 and immigration proceedings. Oftentimes, these
16 convictions are invoked years after the fact.

17 And just as one example of that, this
18 Court right now is holding a case for this one
19 called Romero that involves a marijuana
20 conviction from 1985. So -- so the rule is
21 going to apply more generally.

22 But, second, even as to a
23 contemporaneous criminal proceeding, a -- a
24 non-citizen may have incentives but ultimately
25 isn't going to have ability to control what is

1 recorded or preserved by the state court that
2 might be processing 20 misdemeanor pleas in the
3 course of a single day. And the criminal
4 defense lawyer's brief, I think, details at
5 length why this is often unclear.

6 JUSTICE THOMAS: Could you explain
7 once more why -- I understand why in the
8 criminal cases this would be the government's
9 burden, because of the, you know, beyond a
10 reasonable doubt.

11 But this is in a civil context. Why
12 is it that the -- this is not the Petitioner's
13 burden?

14 MR. GOLDMAN: So our argument is that
15 the operation of the categorical approach is not
16 affected by the burden of proof either way.
17 So -- so the reason that we presume the least
18 under the state statute or require necessity
19 about a conviction is not that the government
20 bears the burden even when it does. It's that
21 that is an independent substantive component of
22 the categorical approach because of its
23 underlying demand for certainty and ensuring
24 that there's going to be predictability and
25 fairness so that people aren't losing the

1 benefit of their plea bargains based on the
2 fortuity of record-keeping practices years
3 later.

4 JUSTICE THOMAS: Thank you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Breyer.

7 JUSTICE BREYER: No, thank you very
8 much.

9 CHIEF JUSTICE ROBERTS: Justice Alito.

10 JUSTICE ALITO: If I say that your
11 client was convicted of violating Nebraska
12 Revised Statute Section 28-608, is that a
13 factual -- isn't that a factual question?

14 MR. GOLDMAN: So -- so that -- I -- I
15 think you could call that a factual question,
16 but that wouldn't change our analysis, because,
17 again, we think that the least acts presumption
18 applies even to questions of fact.

19 JUSTICE ALITO: All right. So let me
20 give you a very simple way of looking at this
21 case, and you can tell me why this is wrong.

22 Whether or not a person was convicted
23 of a particular crime is a question of fact.
24 There's nothing that prevents -- if that fact
25 has to be proven, there's nothing that prevents

1 Congress in a civil case like this from saying
2 the burden of proof on that fact is on one party
3 or the other party.

4 And, here, it's placed it on the
5 person seeking cancellation of removal. Is
6 there any obstacle, constitutional obstacle, to
7 Congress doing that?

8 MR. GOLDMAN: No, there's not a
9 constitutional obstacle. It's just that's not
10 what Congress did here.

11 Congress enacted a general
12 burden-of-proof provision without doing anything
13 to alter the reference to convictions as the
14 actual eligibility criteria.

15 JUSTICE ALITO: So the question --

16 MR. GOLDMAN: And that's where --

17 JUSTICE ALITO: -- is just -- because
18 my time is limited, excuse me for interrupting.
19 But the question then is the interpretation of
20 what Congress meant when it enacted this burden
21 of proof provision, right?

22 MR. GOLDMAN: Yes. And I think it is
23 clear from the entirety of the REAL ID Act that
24 Congress was focused on what you would think of
25 as questions of fact that would be proven with

1 weighing evidence and making credibility
2 determinations and taking testimony and the
3 like. That's the entire focus of the burden of
4 proof provision.

5 There's no indication --

6 JUSTICE ALITO: Well, where did this
7 -- what -- what you call the presumption of the
8 least of the acts criminalized come from? It --
9 it came from the categorical and modified
10 categorical approaches. They are called
11 categorical because they are making a
12 categorical determination.

13 And take the example of burglary,
14 which has been central to our cases in this
15 area. So you have somebody who's convicted of
16 burglary under, let's say, California law, and
17 the question is whether that is a conviction for
18 generic burglary. It -- it is a -- it is a
19 determination about an entire category of cases;
20 that is, all of the cases prosecuted and
21 convicted under the California burglary statute.

22 And it is in that situation where the
23 court asks -- looks to the least of the acts
24 criminalized. It asks what is the least thing
25 that could get somebody convicted of burglary in

1 California. Would that constitute generic
2 burglary? If the answer to that is no, then it
3 flunks under the categorical test.

4 But what's involved here is not
5 categorical at all. It is the determination of
6 a question of fact, was your client convicted
7 under subsection (c) or was he not convicted
8 under subsection (c)?

9 MR. GOLDMAN: So -- so I agree with
10 everything that you said, Justice Alito, except
11 that is not the only thing that the categorical
12 approach does. And I'll try to make this very
13 brief.

14 But, first, Shepard shows that the
15 demand for certainty also applies to the which
16 statutory prong question because it -- the --
17 the point of that case was that we are going to
18 demand certainty and only look to legally
19 conclusive records to determine what -- which
20 part of the divisible statute it was, and all of
21 that makes sense --

22 JUSTICE ALITO: Well, as --

23 MR. GOLDMAN: -- because whether --

24 JUSTICE ALITO: -- I mean, as the
25 Chief Justice pointed out, Shepard and Johnson,

1 the cases you rely on very heavily, were
2 criminal prosecutions, where the prosecution,
3 under the Constitution, has the burden of
4 proving beyond a reasonable doubt that the
5 person was convicted of a particular offense if
6 it wants to impose an enhanced sentence based on
7 that conviction.

8 MR. GOLDMAN: So I -- I --

9 JUSTICE ALITO: That's where the
10 certainty comes from.

11 MR. GOLDMAN: So I -- I -- I would
12 just add that this -- this has also been the
13 rule in the immigration context, the demand for
14 necessity, for 106 years, including in contexts
15 involving divisible statutes, like the Zaffarano
16 case we cite from the Second Circuit and that
17 the immigration professors cite the Matter of
18 Marchena case from the BIA in 1967 involving a
19 context in which the non-citizen bore the burden
20 of proof.

21 I think all of that tends to show that
22 the demand for certainty is not a function of
23 the burden of proof. The demand for certainty
24 is part of the categorical approach's
25 requirement that we are not going to treat your

1 offense as a predicate.

2 CHIEF JUSTICE ROBERTS: Thank you,
3 counsel.

4 Justice Sotomayor.

5 JUSTICE SOTOMAYOR: Mr. Goldman, I
6 have two different sets of questions. Let me
7 start with the first, which is, assuming we were
8 to disagree with you today and rule against you,
9 would we have any reason to vacate? Are there
10 any other arguments you could make that your
11 client wasn't, in fact, convicted of a CIMT?

12 For example, I read the Eighth Circuit
13 as saying that a sentence of one year or longer
14 fits the sentencing requirement of not being
15 more than one year. Did you challenge that
16 below, that that's wrong?

17 And, secondly, I see the statute here
18 as requiring harm but not necessarily financial
19 harm and not necessarily deception harm, could
20 be emotional harm or even physical harm. And
21 that wouldn't fit a CIMT.

22 Have those arguments been saved below?

23 MR. GOLDMAN: So -- so those
24 arguments -- the -- the first argument, Justice
25 Sotomayor, about the petty offense exception

1 was -- was presented to the Eighth Circuit
2 and as -- as well as to the BIA, and those
3 courts rejected those arguments. So I -- I wish
4 I could say that that were still open, but I
5 believe that is now foreclosed.

6 Second, with respect to the harm
7 required, the -- I think the -- the Eighth
8 Circuit's analysis held that, given ambiguity
9 about which statutory prong it was, Mr. Pereida
10 must lose by default. It essentially adopted
11 the government's rule that we --

12 JUSTICE SOTOMAYOR: All right.

13 MR. GOLDMAN: -- effectively take --

14 JUSTICE SOTOMAYOR: Mr. Goldman, can I
15 just stop you because there is one last question
16 I want to ask. I read 1229a(c)(3)(B). In any
17 proceeding under this chapter, any of the
18 following documents or records shall constitute
19 proof of a criminal conviction: an official
20 record of judgment and conviction, which was
21 provided here; an official record of plea,
22 verdict, and sentence, not provided because it
23 wasn't available, and nobody challenges that it
24 was available; and, C, a docket entry from court
25 records that in the -- in the -- indicates the

1 existence of the conviction, that was provided.

2 Doesn't that answer the question of
3 whether you've met your burden of proof? You've
4 shown them --

5 MR. GOLDMAN: I -- I think --

6 JUSTICE SOTOMAYOR: -- you've shown
7 them what you were convicted of, and the
8 lowest -- there is one CIMT that doesn't apply,
9 and, hence, under our case law, Johnson and
10 others, that ambiguity flows to your favor
11 automatically?

12 MR. GOLDMAN: Yes, that -- that is our
13 position, Justice Sotomayor, that -- that where
14 the record -- this is a conviction under an
15 overbroad statute. So we presume it is not
16 disqualifying until and unless the record of
17 conviction necessarily establishes otherwise.
18 And, here, it does not.

19 JUSTICE SOTOMAYOR: And all of the
20 record of conviction has been supplied?

21 MR. GOLDMAN: So -- so far as we know,
22 that's correct, that the government --

23 JUSTICE SOTOMAYOR: So there is --
24 there is -- on a burden of proof, even if you
25 have it, you've met it?

1 MR. GOLDMAN: Correct. Yes. And I
2 would just note that, here, it's the government
3 who produced the criminal record, as it does in
4 all of these cases as part of its criminal
5 history check.

6 JUSTICE SOTOMAYOR: Thank you,
7 counsel.

8 CHIEF JUSTICE ROBERTS: Justice Kagan.

9 JUSTICE KAGAN: Mr. Goldman, I
10 understand that you think it doesn't matter
11 whether the question here is legal or factual,
12 that you win either way.

13 On -- on the other hand, a lot of the
14 questions that you've been getting would
15 disappear if it were legal because even the
16 government concedes, I believe, that questions
17 of law are not affected by the burden of proof.

18 So I'm just going to ask you whether
19 you have an argument that this is a legal
20 question?

21 MR. GOLDMAN: Yes, and I think that is
22 the better way to look at it. I just think, as
23 -- as I've said, it doesn't ultimately matter
24 where you land on that.

25 JUSTICE KAGAN: Well, tell me why it's

1 the better way, because you have been talking
2 for a while and you haven't told anybody why
3 it's the better way to look at it, to say that
4 it's legal.

5 MR. GOLDMAN: Yeah. So -- so the idea
6 is that the categorical approach, the entirety
7 of the approach, is always asking, does a
8 conviction necessarily establish every element
9 of the federal offense? And the modified
10 categorical approach can help you answer that
11 question yes if it narrows the offense by
12 revealing a statutory alternative, because then
13 you are essentially looking at the record of
14 conviction as a stand-in for the statutory text
15 itself, much as the Court's opinion in Mathis
16 describes.

17 So the -- the point is that the only
18 reason we are looking to records is for the same
19 reason you look to the text, which is as part of
20 a legal analysis about the meaning of the
21 conviction and the elements it involved.

22 JUSTICE KAGAN: Well, I think what the
23 government would say is that, although the
24 entire inquiry might be a legal one, there's a
25 part of the inquiry which simply involves

1 asking, what crime were you convicted of? And
2 that that's a factual one, even though you then
3 go on to -- even though you then go on to the
4 more legal inquiry, and even though you decide
5 that question through the use of entirely legal
6 documents. I think that that's what the
7 government would say.

8 So what's the answer to that?

9 MR. GOLDMAN: So -- so the answer
10 there is that the only reason you are looking at
11 documents at all to ask which crime is still in
12 service of the bottom-line legal question. And
13 so, if the -- if asking that, with that question
14 about which prong of the statute it was, turns
15 up empty, as it did in Johnson, then that
16 doesn't -- that's not a failure of proof.

17 That doesn't mean that the analysis
18 can never reach the legal inquiry, which is the
19 government's argument. Instead, the -- the
20 categorical approach supplies its own rule for
21 resolving that ambiguity, which is you look to
22 the least of the alternative elements and make
23 the categorical comparison from there.

24 JUSTICE KAGAN: Mr. Goldman, a very
25 different question. If you win, would it be

1 permissible for the attorney general to say
2 something like, that was a pretty bad crime, and
3 because it was a pretty bad crime, I won't use
4 my discretion to cancel your removal?

5 In other words, could -- could the
6 government basically enact the rule that it is
7 arguing for on the back end of the process?

8 MR. GOLDMAN: So -- so I think, as a
9 matter of the INA, it certainly could. The INA
10 in no way limits the attorney general's
11 discretion. And what you've described happens
12 all the time, where the IJ or the BIA will say:
13 I don't need to undertake the categorical
14 analysis and go through the complicated
15 determination of if this is disqualifying or not
16 because I just know that you are losing as a
17 matter of discretion because of the severity of
18 what it seems that you did.

19 If -- if the attorney general were to
20 try to do that as a regulation, maybe there
21 would be APA challenges to that, but I don't
22 think the INA provides any obstacle.

23 JUSTICE KAGAN: Thank you,
24 Mr. Goldman.

25 CHIEF JUSTICE ROBERTS: Justice

1 Gorsuch.

2 JUSTICE GORSUCH: Counsel, I -- I
3 guess I'm a little stuck on -- on the arguments
4 you've made but wondering if there's one that
5 you haven't.

6 To me, it looks like this is probably
7 a factual question about, a contingent set of
8 questions about, what happened in a particular
9 time and place. We're not interpreting any law,
10 any neutral principle, any generally applicable
11 provision. I don't see how Johnson helps
12 because the burden there was on the government
13 in a criminal case. And so I -- so I'm stuck on
14 a lot of that, and maybe you can unstick me.

15 And the other thing I'm also stuck on,
16 just for what it's worth, is the burden in terms
17 of producing the -- the evidence of a conviction
18 mentioned in subsection (3) is the burdens on
19 proving -- the government has while proving
20 deportability, totally different than subsection
21 (4), which is applications for relief from
22 removal or deportability, which then fall on the
23 immigrant.

24 So that -- that's putting my cards on
25 the table as what I'm stuck on. What I'm --

1 what I'm hopeful for or want to explore a little
2 bit is Shepard and why you concede that -- or, I
3 don't know, maybe you don't -- that there is --
4 that this is all categorical approach.

5 Justice Breyer in, I think it was
6 Nijhawan -- you can correct my pronunciation,
7 I'm sure -- said that Shepard, you know, is a --
8 the categorical approach in the ACCA context may
9 not always apply in the INA context.

10 And I -- I would have thought that
11 Mr. Pereida might have argued, forget about the
12 categorical approach, I can -- I can show on the
13 facts here and my testimony might establish that
14 I wasn't using the Social Security card to
15 obtain benefits or to defraud anybody of
16 anything but simply to get a job, and,
17 therefore, it wasn't a crime of moral turpitude.

18 What about that argument? Should we
19 remand for that? Has that been preserved?
20 Thoughts?

21 MR. GOLDMAN: Sure, I'll -- I'll start
22 with the last of those three questions, Justice
23 Gorsuch.

24 I -- I don't think that that argument
25 is available anymore after Moncrieffe and the

1 way Moncrieffe distinguished --

2 JUSTICE GORSUCH: Let's suppose I
3 think it is.

4 MR. GOLDMAN: So -- so I think that it
5 would still be the wrong way to go because it
6 would pose -- for -- for all of the reasons the
7 Court reasoned that it was precluded in
8 Moncrieffe, I think those are correct, that it
9 would --

10 JUSTICE GORSUCH: Why -- why would you
11 -- why would you have a -- an immigrant
12 hamstrung by this crazy categorical approach
13 methodology that's nowhere in the statute? Why
14 -- why should he not be allowed to discharge his
15 burden by -- by -- by his testimony?

16 MR. GOLDMAN: So -- so I think that --

17 JUSTICE GORSUCH: And then put it on
18 the government?

19 MR. GOLDMAN: So -- so I think that
20 would disserve the entire immigration court
21 system to start inviting that type of
22 mini-trial, even when it's done for beneficial
23 purposes, as Your Honor is describing.

24 And I don't think that's any different
25 than when the Second Circuit addressed exactly

1 that question in the Mylius case in 1914, which
2 was the genesis of all of this, and saying, if
3 we allow the immigration officer to go behind
4 the fact of the conviction and analyze the facts
5 of the offense, why -- would we then be allowing
6 the non-citizen to try to prove that even though
7 he was nominally convicted of something, what he
8 actually did was less than that?

9 And I think it -- it undermines all of
10 the benefits around predictability and
11 efficiency of -- of this approach and instead --
12 and, again, all that we're talking about here is
13 a gatekeeping step. So I think the -- the more
14 sensible solution is to say that, if a
15 conviction does not clearly qualify as a
16 predicate offense, then we do get to --

17 JUSTICE GORSUCH: Thank you, counsel.

18 CHIEF JUSTICE ROBERTS: Justice
19 Kavanaugh.

20 JUSTICE KAVANAUGH: Thank you, Chief
21 Justice.

22 And good morning, Mr. Goldman.
23 There's no perfect solution as I see it here.
24 There's a situation of uncertainty, and what
25 that means is either some people who should not

1 be eligible for cancellation of removal will
2 remain in the country or some people who should
3 be at least eligible for cancellation of removal
4 will be removed from the country.

5 And I might choose a different policy
6 than Congress did about how to resolve that
7 uncertainty, but Congress put the burden of
8 establishly -- establishing eligibility for
9 cancellation of removal on the non-citizen.

10 It's kind of a big picture way that is
11 raised by this case. Why is that a wrong way to
12 -- to think about it?

13 MR. GOLDMAN: So -- so the -- the
14 reason -- and this answers Justice Gorsuch's
15 first question as well -- is that it is
16 commonplace for an individual to be able to
17 invoke a presumption to satisfy a burden of
18 proof.

19 We give the examples in our brief of
20 the bailed goods presumption, copyright
21 validity, and I think most importantly is the
22 asylum presumption we note at page 31 of our
23 blue brief, where the REAL ID Act added a
24 virtually identical burden-of-proof provision
25 for asylum claims, but that didn't in any way

1 eliminate an asylum applicant's ability to rely
2 on the presumption that he has a well-founded
3 fear of future persecution. That had been a
4 long-standing presumption as well.

5 So I think there is just no tension
6 between a presumption that favors someone and a
7 statutory burden of proof that is placed on that
8 person.

9 JUSTICE KAVANAUGH: And what do you do
10 with the fact that we're not talking about the
11 removal itself technically, but we're talking
12 about cancellation of removal? In other words,
13 you've already -- the non-citizen's already been
14 deemed usually or at the same time deemed
15 removable.

16 And we're talking about something that
17 would cancel that removable. In that
18 circumstance, it does seem more logical, I
19 suppose, or at least one could understand why
20 Congress made the choice in that circumstance to
21 put the burden on the non-citizen because of the
22 cancellation of removal context.

23 So does the context matter there, or
24 why doesn't it matter?

25 MR. GOLDMAN: So -- so the context

1 matters for most parts of a cancellation
2 application. And Mr. Pereida put on hundreds of
3 pages of evidence showing why he deserved
4 cancellation of removal.

5 But, with respect to this inquiry,
6 which is governed by a presumption, the burden
7 doesn't ultimately affect that either way
8 because there's never leftover ambiguity that a
9 burden of proof is going to solve. It's just
10 either the conviction does or doesn't
11 necessarily establish every element of the
12 federal offense.

13 And I think, again, because this is
14 ultimately discretionary relief, that makes
15 perfect sense, that we're just saying can you
16 get past that gatekeeping step to the point at
17 which the IJ can actually consider the
18 underlying facts of your criminal offense, which
19 is a much more sensible place to -- to resolve
20 that.

21 JUSTICE KAVANAUGH: That's a fair
22 point. Thank you, Mr. Goldman.

23 CHIEF JUSTICE ROBERTS: A minute to
24 wrap up, Mr. Goldman.

25 MR. GOLDMAN: Thank you, Mr. Chief

1 Justice.

2 It bears remembering that under the
3 government's rule, someone could plead guilty to
4 a statutory alternative that is clearly not a
5 disqualifying crime like subsection (c) here.

6 And he could plainly be deserving of
7 cancellation or asylum, but, if detailed
8 conviction records were never prepared or were
9 destroyed long ago, he would be subject to
10 mandatory removal. There would be absolutely
11 nothing that he or the attorney general could
12 do.

13 And the government just hasn't
14 explained why Congress would have thought that
15 it was mandating that drastically overinclusive
16 result simply by writing a burden-of-proof
17 provision that says nothing about convictions
18 but, instead, talks about fact-finding tools,
19 like testimony and corroboration, that have long
20 been irrelevant to the analysis of convictions.
21 The better answer is that that's not what
22 Congress did.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Mr. Bond.

2 ORAL ARGUMENT OF JONATHAN C. BOND

3 ON BEHALF OF THE RESPONDENT

4 MR. BOND: Mr. Chief Justice, and may
5 it please the Court:

6 The statutory text places on an alien
7 seeking relief from removal the burden of proof
8 to establish that he satisfies the applicable
9 steps of the eligibility requirement. That text
10 answers the question presented.

11 As Petitioner acknowledges in his
12 reply and again this morning, his burden
13 includes showing that he does not have a
14 disqualifying conviction. Petitioner has not
15 carried that burden, so he is ineligible for
16 cancellation.

17 Petitioner pleaded guilty to violating
18 a statute that covers multiple crimes, some of
19 which are disqualifying. It thus was his burden
20 to show that he was convicted of a
21 non-disqualifying crime under that statute.

22 But even though this immigration
23 proceeding was already ongoing before he pleaded
24 guilty and his immigration attorney knew of the
25 potential consequences of a conviction,

1 Petitioner did not submit anything to show the
2 particular offense of which he was convicted.

3 His position is that the court's
4 categorical approach precedent excused his
5 failure of proof and required resolving
6 ambiguity in the record in his favor. That is
7 incorrect.

8 Under that precedent, once the
9 elements of the offense have been identified,
10 courts then ask, what are the least -- least
11 acts to satisfy them? But this case concerns
12 the antecedent question of which set of elements
13 was the basis of the conviction.

14 The categorical approach and least
15 acts presumption cannot answer that question. A
16 court cannot determine the least acts
17 criminalized without first identifying the
18 elements. That's what the modified approach is
19 for. And if the record of conviction is
20 inconclusive, the party with the burden has not
21 carried it.

22 Petitioner's approach conflates the
23 visible and indivisible statutes which this
24 Court has made clear are distinct, and his rule
25 that ambiguity should be resolved in the alien's

1 favor contradicts Congress's judgment that an
2 alien claiming he is ineligible for relief --
3 claiming he is eligible for relief bears the
4 burden of proving it.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 counsel.

7 An issue that's kind of lurking in the
8 background throughout this case and is certainly
9 affected by the -- the question of what kind of
10 determination, is it legal or factual, is the
11 limitation to the so-called Shepard documents.

12 You're here from the Department of
13 Justice, so you should know as well as anybody
14 what the experience of the Department has been
15 around the country with that limitation.

16 Is it often the case that those
17 documents -- or how often are those documents
18 not available? Does it vary from one part of
19 the country to the other? Do you have
20 situations where people are coming forward with
21 documents that seem pretty probative on the
22 question, but they're excluded because they're
23 not Shepard documents?

24 What can you tell me about that?

25 MR. BOND: We don't have data at that

1 granular level that tracks why a party is not
2 deemed eligible for cancellation. We simply
3 don't have aggregate data that -- that point to
4 that specific thing.

5 However, I would suggest there's no
6 reason to expect that an alien who has a
7 criminal conviction, particularly like one in
8 this case, who was convicted after his
9 immigration proceeding was ongoing, would not
10 know his criminal history and he or his attorney
11 would not be able to -- or not at least know
12 what documents to look for and where to find
13 them.

14 By those, they can --

15 CHIEF JUSTICE ROBERTS: Well, he can
16 know what documents to look for, but the
17 reality, as I understand it, is that often you
18 don't have -- these things aren't often papered,
19 because you've got a lot of, you know, busy --
20 busy criminal dockets and plea bargains and
21 other things like that.

22 So the fact that the lawyer knows what
23 to look for isn't enough. And even if the
24 lawyer finds something probative, that's not
25 going to be admissible on the -- on the

1 question.

2 MR. BOND: Well, if it's a Shepard
3 document, it would be admissible. And I think
4 the --

5 CHIEF JUSTICE ROBERTS: No, no, I'm
6 talking about --

7 MR. BOND: -- kind of hypothetical --

8 CHIEF JUSTICE ROBERTS: -- I'm talking
9 about a situation where it's outside of Shepard.

10 MR. BOND: Sure. And with respect to
11 the limitation to Shepard documents, as you
12 know, in Shepard, we argued for a broader cast.
13 And in the lower courts, we've argued under this
14 particular provision for a broader array of
15 evidentiary materials.

16 That's not at issue here because the
17 Board rested on Shepard and because there are no
18 non-Shepard documents at issue in this
19 particular case.

20 But I would -- to the question of
21 unavailable records, I would say a couple of
22 things. In the case of a plea agreement, in the
23 case where an alien, as in Petitioner's
24 hypothetical, has pleaded guilty to a particular
25 version of an offense, he has all the incentive

1 in the world and the ability to memorialize that
2 agreement in a written document that -- that
3 reflects that agreement with the prosecutor.

4 In the context where the alien doesn't
5 personally have those records and tries through
6 reasonable diligence to obtain them, the
7 regulation allows him to ask for a subpoena to
8 get them from the courts.

9 And in the circumstance --

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Justice Thomas.

13 JUSTICE THOMAS: Thank you, Mr. Chief
14 Justice.

15 Mr. Bond, the -- if I heard
16 Petitioners right, they -- they don't seem --
17 Petitioner doesn't seem to see much deference
18 between the way we would treat this case and the
19 way we would treat it in the criminal context.

20 What's your reaction to that?

21 MR. BOND: I think they are very
22 different because of the judgment Congress made
23 when it expressly placed the burden of proof on
24 the alien to prove eligibility. That's what
25 sets this case apart from all of the cases

1 Petitioner cites in the sentencing context.

2 If you account for the difference in
3 the burden of proof, though, I think the cases
4 come to the right or come to the same conclusion
5 that the party with the burden of proof didn't
6 carry it.

7 So, for example, in Taylor, all that
8 the Court knew as the case came to this Court
9 was that the defendant had a conviction in
10 Missouri for Second Degree Burglary, but
11 Missouri had seven different burglary statutes,
12 so the case had to be remanded so that the
13 government, the party that had the burden of
14 proof, could produce the charging documents, and
15 it did and the sentence was ultimately affirmed.

16 It's the same kind of circumstance
17 here. Petitioner bears the burden of proof. He
18 just didn't carry it by presenting any document
19 to show which particular version of criminal
20 impersonation he pleaded guilty to committing.

21 JUSTICE THOMAS: Just a -- a matter of
22 curiosity, how much discretion do you have -- if
23 you think, for example, that a petitioner or an
24 applicant is being evasive, do you -- does the
25 attorney general have the discretion to -- to

1 simply dismiss or deny his request for
2 cancellation?

3 MR. BOND: Yes, the IJ could do that
4 on a case-by-case basis, and, yes, in response
5 to some of the earlier questions, the attorney
6 general could adopt a regulation that does it
7 categorically.

8 But I think that's not the right
9 approach or the right lens to -- to approach
10 this issue for two reasons.

11 First, as this Court has explained for
12 a very long time, Congress intended these
13 eligibility requirements under the predecessor
14 statute for governing suspension of deportation
15 and cancellation to be enforced before
16 discretion comes into the picture.

17 That was true in 1984 in this Court's
18 decision in *Kintakia*, and it's even more true
19 after IIRIRA and the REAL ID Act raised the bar
20 for cancellation eligibility precisely because
21 they were concerned that discretion was being
22 exercised too -- too readily and the REAL ID Act
23 had codified the burden of proof.

24 And the second reason is that
25 discretion -- dealing with it at the

1 discretionary phase changes the way that this
2 would be litigated. In a case like this, where
3 an applicant is demonstrably ineligible and
4 hasn't carried his burden, the case can be dealt
5 with at the motion to pretermite stage and no one
6 needs to spend time or resources litigating the
7 merits of whether discretion is appropriate.

8 But, if this is dealt with by the IJ
9 at the discretionary phase, the parties then
10 litigate the underlying merits and you lose all
11 of the efficiency of resolving it at the
12 threshold, where Congress intended it to be
13 decided.

14 JUSTICE THOMAS: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice
16 Breyer.

17 JUSTICE BREYER: Well, there is a
18 virtue in simplicity in the law, and ACCA is
19 complicated enough, much more than anyone
20 thought, as is this. So why isn't the simple
21 thing to do, keeping the law uniform, simple, as
22 much as it can be, if we read Taylor?

23 And when we read Taylor, here's how
24 you decide whether a statute that says, in
25 Section 1342(a), burglary of a car, a house, or

1 a boat, and some are and some are not federal
2 burglary, and which one was this? Was he
3 convicted of a boat burglary or a house?

4 And here's what it says to do: You
5 look at the statute. Well, that doesn't help.
6 They're all three. Then you look at the
7 indictment or information. And then you look at
8 the jury instructions.

9 Now, if those three things, the
10 statute, the jury instructions, and the -- and
11 the indictment or information, show that this
12 was burglary of a house, that it necessarily,
13 we've said in about 10 cases, is burglary of a
14 house, the government wins. And if they don't,
15 the other side wins.

16 Well, with slightly different words
17 here, slightly different documents do the same
18 thing. Does the statute forbid that? Of course
19 not. The statute that you're talking about has
20 words in it, and those words say that if the
21 evidence indicates one or more of the grounds
22 for mandatory denial of relief apply, then the
23 government wins.

24 So we look at the listed documents, we
25 see if they do, and that's the end of the case;

1 if they don't necessarily show that, then he's
2 carried his burden of proof. Whether they show
3 that or not is a question of law.

4 Now why isn't that the end of this
5 case?

6 MR. BOND: Two points, Your Honor.

7 First, I agree with the mode of
8 inquiry that you're describing, that Taylor --
9 Taylor prescribes looking to what we now call
10 Shepard documents, with one friendly amendment.
11 That approach means -- or, under that approach,
12 the party with the burden of proof under the
13 statute loses when they don't produce those
14 records. And Congress made a deliberate choice
15 in the --

16 JUSTICE BREYER: Oh, they did. Isn't
17 there a statute in this case?

18 MR. BOND: There is a statute, and it
19 isn't --

20 JUSTICE BREYER: Well, what says he
21 has to produce any more?

22 MR. BOND: What the statute in this
23 case provides is that the alien bears the burden
24 of proving that he -- that he satisfies the
25 requirements of eligibility. And the regulation

1 that you quoted, this is 8 C.F.R. 1240.8(d),
2 that regulation works against Petitioner because
3 what it says is, when the evidence indicates
4 that any ground of mandatory denial may apply,
5 the alien must show that it does not apply by a
6 preponderance.

7 So, in this case, when the alien puts
8 in his description of his criminal record and
9 it's clear that he may have a disqualifying
10 conviction, the regulation is clear that he then
11 bears the burden of showing that it does not
12 apply.

13 Now the Shepard framework is perfectly
14 compatible with that. He simply needs to use
15 Shepard documents to make that showing. But the
16 key they're making --

17 JUSTICE BREYER: He did show. He did
18 show. So that -- that's my basic point. He did
19 show that he satisfied the applicable
20 eligibility requirement because the applicable
21 eligibility requirement is that set of legal
22 documents in front of the judge does not
23 necessarily show that it was a crime of moral
24 turpitude or burglary in the other case.

25 So he met it.

1 MR. BOND: With respect, Your Honor, I
2 disagree --

3 JUSTICE BREYER: What's wrong --

4 MR. BOND: Yes. He did not -- he did
5 not show that with those documents. The
6 necessarily establishes a least acts presumption
7 the Court has applied applies at the final step
8 of the categorical analysis once you've
9 identified the elements.

10 What the documents he presented do not
11 show is which set of elements he pleaded guilty
12 to committing. We don't know which set of
13 elements or which set of facts he necessarily
14 had to admit. And until he can rule out a
15 disqualifying conviction, he has not carried his
16 burden under the statute and regulation.

17 JUSTICE BREYER: Thank you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 counsel.

20 Justice Alito.

21 JUSTICE ALITO: In 1229a(c)(4)(A)(i),
22 when it speaks of burden of proof, is that
23 burden of production, burden of persuasion, or
24 both?

25 MR. BOND: It is both. It is the

1 burden of proof that this Court ordinarily
2 understands to mean the burden of persuasion,
3 but we think it here subsumes the burden of
4 production, which is to say Petitioner couldn't
5 carry his burden of proof in this case without
6 producing documents or other admissible evidence
7 that show he was not convicted of a
8 disqualifying crime.

9 JUSTICE ALITO: But will --

10 MR. BOND: I would add on the --

11 JUSTICE ALITO: -- will the -- will
12 the government have necessarily been required --
13 will the government have been required to
14 provide certain documents relating to the
15 conviction anyway? If the conviction is the
16 basis for the determination of removability,
17 then I guess the answer to that is yes, but I
18 suppose that's not always so.

19 MR. BOND: That's right, it is not
20 always the case. It is not the case here.

21 The government did not seek
22 removability based on a prior conviction. It
23 was simply because, as Petitioner conceded, he
24 was in the country without having been admitted.
25 The conviction came in at the cancellation

1 stage.

2 Now, with respect to what the
3 government searches for and finds, it's true
4 that the government performs a simple background
5 check to find prior criminal activity, but that
6 produces a report that looks like a rap sheet,
7 with arrests and convictions at a high level of
8 generality.

9 It does not provide the kind of
10 granular information about which prong of a
11 divisible statute the alien was convicted under.
12 And it certainly does not result in a complete
13 set of Shepard documents with which the
14 government could demonstrate which version of
15 the offense the alien was convicted of
16 committing.

17 JUSTICE ALITO: Well, why -- why do
18 you think --

19 MR. BOND: In a case where the
20 government --

21 JUSTICE ALITO: -- why do you think
22 that the Shepard limitations would apply in this
23 situation? It's one thing for us to say in a
24 criminal case where the government, the
25 prosecution has the burden of proving prior

1 convictions beyond a reasonable doubt that we
2 are going to put a limit on the proof that the
3 government can rely on to try to discharge that
4 burden.

5 Whether or not that's -- that was a
6 good idea, that's what was done. But it's
7 something else again to say that where the alien
8 who is seeking cancellation of removal is the
9 one who will be disadvantaged by the failure of
10 proof, that person is limited in -- by -- by
11 Shepard in the documents that can be relied on
12 to discharge that burden.

13 What -- I don't know why -- why does
14 that make sense? Why is it fair? And where
15 would we get the authority to impose that
16 limitation?

17 MR. BOND: Your Honor, the government
18 has argued in -- in the past in lower courts,
19 including in the Young case cited in
20 Petitioner's reply brief, that in this context,
21 those limitations should not apply and that the
22 agency should have the ability to consider a
23 broader array of documents.

24 Now we haven't made that argument in
25 this particular case for two reasons, as I was

1 mentioning earlier.

2 First, the Board's decision took
3 Shepard as given, and we're defending the
4 agency's action on the rationale that it gave.

5 And, second, this isn't a case where
6 any issue of non-Shepard documents has come up,
7 at least as the case comes to this Court. No
8 one is arguing that some non-Shepard document
9 was presented but not considered or vice versa.

10 So I think the -- the issue is an
11 important one to leave open for the future, but
12 it's not one that's implicated in this case.

13 JUSTICE ALITO: Thank you.

14 CHIEF JUSTICE ROBERTS: Justice
15 Sotomayor.

16 JUSTICE SOTOMAYOR: Counsel, Justice
17 Breyer asked the question basically as I would,
18 which is I read the regulations, they require
19 the alien to put forth those documents in his or
20 her possession. The legal question is, do those
21 documents show that he's been committed -- he
22 has committed a CIMT?

23 You're asking the opposite question.
24 Do those documents show that he has -- hasn't
25 committed a CAI -- CIMT. But the burden of

1 proof is only by a preponderance of the
2 evidence. And if he's provided all of the
3 documents that exist, and no one's arguing -- I
4 don't think you are, because I think you did a
5 search in this case -- that any more documents
6 exist, and we have amici that show why they
7 don't tend to exist, at least with respect to
8 low-level misdemeanor charges, why the
9 presumption that -- the legal presumption, it
10 wasn't a factual presumption; it was a legal
11 presumption that we made in our prior case
12 law -- why that doesn't get him past the
13 preponderance of the evidence standard?

14 That's a very low standard. It's
15 51 percent. And if there's ambiguity, what does
16 that have to do with meeting the burden of
17 proof?

18 MR. BOND: The presumption, the least
19 acts presumption, simply does not apply to the
20 antecedent question of which version of the
21 crime was at issue. The least acts presumption
22 did not apply in Johnson. The Court's passing
23 language was describing the district court's
24 opinion. The least acts presumption did not
25 apply in Taylor, where the issue otherwise would

1 have come up.

2 The Court has not applied the least
3 acts presumption beyond the context of
4 determining what a particular set of elements
5 requires, what it means, because, to find a
6 defendant had committed those elements, the jury
7 need only find the minimum conduct.

8 But to go to your broader question
9 of --

10 JUSTICE SOTOMAYOR: But what you need
11 -- but what you need is the Shepard documents
12 proving that. And if they don't exist, then
13 you're back to the fact that, as a matter of
14 law, there's no proof that you committed that
15 act, because what you were charged with and what
16 the documents show is the possibility that you
17 might have but not that you did. You have to
18 prove the conviction that you were convicted of
19 CIMT and, in fact, you weren't.

20 MR. BOND: What the alien's burden is
21 under the regulation, once you know that he
22 might have been convicted of the disqualifying
23 offense, what you know is that he then has the
24 burden of showing the opposite.

25 In that sense, he has to prove a

1 negative, but that's exactly what the statutory
2 eligibility requirement --

3 JUSTICE SOTOMAYOR: But the
4 negative -- but the negative, counsel, is very
5 clear. The negative is, do the records of my
6 conviction show that I was convicted of CIMT?

7 The answer is no, they don't show
8 that. They show that I was convicted legally of
9 a crime that does not fit, that has subdivisions
10 or parts of it that don't fit a CIMT.

11 So that's where I'm having trouble
12 seeing why that's a factual rather than a legal
13 question. What do the documents that exist
14 show?

15 MR. BOND: They --

16 JUSTICE SOTOMAYOR: And they show that
17 as a matter of law, I wasn't convicted of a
18 CIMT.

19 MR. BOND: An alien's burden is not to
20 show that the available records don't show that
21 he is disqualified. What the burden of proof
22 requires him to show affirmatively is that he
23 does not have a disqualifying conviction.

24 Now, in a case where there simply are
25 no records because he has no criminal history,

1 his assertion -- his sworn assertion on his
2 application form that he has no criminal history
3 could carry that burden.

4 But, in a case where he has a
5 disqualifying conviction or he has a potentially
6 disqualifying conviction, he must show
7 affirmatively that it is not disqualifying, not
8 merely that the records are silent.

9 That's what the statute and
10 regulations provide.

11 CHIEF JUSTICE ROBERTS: Justice Kagan.

12 JUSTICE KAGAN: Mr. Bond, if I could
13 start by asking you about the legal/factual
14 question because I understand that you don't
15 think a question of law is affected by a burden
16 of proof. That would be right, right?

17 MR. BOND: Well, I would more -- more
18 narrowly say that we don't think the least acts
19 presumption in the categorical approach inquiry
20 in this case is affected by the burden of proof.

21 JUSTICE KAGAN: Well, okay.

22 MR. BOND: I wouldn't rule out the
23 burden --

24 JUSTICE KAGAN: So -- but let's just
25 talk about whether this is a legal or a factual

1 question. You know, you say it's a factual
2 question because you're asking what was he
3 convicted of.

4 But let's take an analogy. And I
5 guess, just first, I mean, let's remember how we
6 decide that factual question. We decide it by
7 looking under Shepard to a set of legal
8 documents.

9 So here's my analogy. Let's say this
10 is a contract case, and the question was, what
11 did I agree to? Now, in one sense, that's as
12 much a factual question as this one is.

13 And yet, because we look to the
14 contract, when we look to the contract to
15 determine what I agreed to, we don't think of it
16 as a factual question anymore. We think of it
17 as very much a question of law, we're doing
18 contract interpretation.

19 Why isn't the same thing true here?

20 MR. BOND: I think the contract
21 analogy works once you've identified the
22 elements and you're trying to understand what
23 they mean, what conduct they require in -- in
24 this context as a matter of state law.

25 JUSTICE KAGAN: I honestly don't think

1 it has anything to do with that, Mr. Bond. I
2 mean, in the contract, it's -- it's like -- it's
3 a factual question, what did I agree to. When
4 we look, because we look to the contract, it --
5 and that's a legal document, we treat that
6 question as a question of law.

7 And so too here. The only question
8 I'm talking about now is the preliminary one.
9 What were you convicted of? But, because you
10 look to a set of legal documents, it becomes a
11 question of law.

12 And I'll just add to this, Mr. Bond,
13 that is the way every court in America treats
14 it. Every court of appeals in this country uses
15 a de novo standard in ACCA cases in order to
16 review that determination. And for that matter,
17 the BIA uses a de novo standard to review the
18 IJ's determination.

19 So all of that we would have to throw
20 over if all of a sudden we decided that this was
21 a factual question.

22 MR. BOND: I think two things, Your
23 Honor.

24 First, even if you don't think it's a
25 factual question, it is at a minimum a mixed

1 question, which is equally susceptible of a
2 burden of proof, like an equitable tolling
3 question, which has factual predicates but
4 involves applying the legal standard. So, in
5 this context, what you were convicted of still
6 would be subject to a burden of proof.

7 JUSTICE KAGAN: Okay. Let me -- let
8 me turn to this -- let me turn to your broader
9 argument -- I'm sorry for cutting you off, Mr.
10 Bond.

11 You also don't -- you -- you -- you
12 agree that if this were just a categorical
13 approach case, the burden of proof wouldn't
14 apply, right?

15 MR. BOND: That's right. If it was an
16 individual --

17 JUSTICE KAGAN: Okay.

18 MR. BOND: -- statute --

19 JUSTICE KAGAN: It's a yes or no.
20 Yes.

21 And we have said many times, many
22 times, that the modified categorical approach is
23 just a tool to implement the categorical
24 approach. Isn't it?

25 MR. BOND: Yes. By answering an

1 antecedent question of which set of elements,
2 which statutory phrase was in a particular case,
3 the basis of a --

4 JUSTICE KAGAN: Right. So, if it's
5 just a tool to -- because a divisible statute is
6 opaque, if it's just a tool, the question is,
7 why should our basic approach change?

8 And the basic approach, which, as
9 somebody else said, you know, has been applied
10 to ACCA and immigration cases, the basic
11 approach is to say, unless we're certain that
12 the crime you were convicted of has at least the
13 same elements as the generic offense or as the
14 crime of moral turpitude category, unless we're
15 certain, you know, we will not impose the
16 penalty enhancement or impose the unfavorable
17 immigration treatment.

18 So why should that general approach
19 all of a sudden change here?

20 MR. BOND: I would say two things.

21 First, without answering that
22 antecedent question, if you can't identify which
23 element, set of elements was at issue, you just
24 can't perform the categorical analysis of
25 determining what the least acts are.

1 If you look at this Nebraska statute
2 on page 8 of our brief, you can't identify which
3 of these is the least version. They're just
4 different crimes. You need to isolate it first.

5 So I don't think you get into that
6 question of applying the categorical approach.
7 Instead, Congress made the judgment of what the
8 effect of lack of certainty is, which is, if the
9 alien --

10 JUSTICE KAGAN: Okay. Thank you, Mr.
11 Bond.

12 CHIEF JUSTICE ROBERTS: Justice
13 Gorsuch.

14 JUSTICE GORSUCH: Mr. Bond, would you
15 agree that a great many misdemeanor crimes
16 across the country have divisible statutes but
17 are not papered in a way to allow anyone to know
18 with any certainty which portion of the statute
19 defendants are convicted of?

20 MR. BOND: I don't know that
21 firsthand, but I have no reason to dispute it.

22 JUSTICE GORSUCH: Okay. Let -- let's
23 just suppose that's the case. It seems to me
24 that if we go down the Shepard road here and say
25 that -- that immigrants are restricted to

1 certain kinds of proof, that -- documents that
2 they can use to show their eligibility, in a
3 great many cases where they -- you just have
4 these divisible misdemeanor statutes, nobody's
5 going to be able to tell, right?

6 So one of two things is going to
7 happen. They all lose, right? And I think
8 that's the position you're asking us to adopt.
9 Or maybe we should allow them to prove by
10 whatever means necessary, including by their
11 sworn statement, whatever credible evidence an
12 IJ would allow, what actually happened.

13 And in this case, for example, that
14 Mr. Pereida wasn't using a Social Security card
15 to defraud anybody of anything but just to get a
16 job.

17 What -- what do you say to that?

18 MR. BOND: Well, as I mentioned
19 earlier, the government has in lower courts
20 argued for that broader cast unsuccessfully.
21 It's not implicated here, but we have no
22 objection to that general approach.

23 But, to the first part of your
24 question of what is the result when those
25 documents simply don't exist for whatever

1 reason, there is an exception in the INA's
2 burden-of-production provision that, although
3 not implicated in this case, might address
4 hypotheticals like that or the hypothetical
5 Petitioner ended with.

6 And this is Section 1229a(c)(4)(B) on
7 page 8A of the appendix to our brief. And what
8 the final sentence of that provision says is
9 that if the IJ otherwise finds the alien's
10 testimony credible, but the IJ requests
11 corroborating information, alien must apply that
12 corroboration unless he demonstrates that he
13 doesn't have it and can't reasonably obtain it.

14 Now the Board in the Almanza-Arenas
15 case applied that in the context of a prior
16 conviction and said --

17 JUSTICE GORSUCH: Right. But
18 that's -- that's all about corroborating his
19 testimony. But that -- and I admit that's a
20 possibility, but that comes in later, right? I
21 mean, nothing in the statute, you'd agree with
22 me, compels Shepard.

23 MR. BOND: I agree with you that
24 nothing compels Shepard, but I don't agree
25 testimony comes in at a later point. The

1 starting point for an application is a sworn
2 statement describing the alien's own criminal
3 history. And at the hearing, the IJ can follow
4 up with questions of the alien who was present
5 asking about what was the basis of --

6 JUSTICE GORSUCH: Mr. Bond, you'd
7 agree with me that -- that he just has to
8 provide facts that support his application,
9 right? And it's up to the IJ to determine
10 whether it's credible and persuasive or perhaps
11 whether further corroborating evidence would be
12 necessary, right?

13 MR. BOND: He has to submit supporting
14 documents with the form that's explicit on the
15 current form and I think was clear even on the
16 original form at issue in this case. He does
17 have to support -- provide supporting
18 information.

19 JUSTICE GORSUCH: I'm not talking
20 about your forms. I'm talking about the
21 statute, right?

22 MR. BOND: Well, but there's --

23 JUSTICE GORSUCH: What's he required
24 under the statute? Shepard's not required,
25 right?

1 MR. BOND: We -- we agree with that,
2 although the -- the very statute we're talking
3 about begins by requiring the alien to follow
4 the instructions on the form.

5 So Congress --

6 JUSTICE GORSUCH: All right. So
7 let -- let -- let me -- let me turn to another
8 area entirely, and -- and that is, do we -- do
9 we have burdens of proof in -- in contract
10 interpretation cases? And do they sometimes
11 become questions of fact about what a contract
12 means?

13 MR. BOND: A contract interpretation
14 dispute can certainly turn on questions of fact,
15 but there can be antecedent questions about is
16 this document the authentic version, or if
17 parties are offering competing pieces of paper
18 saying this is the final document, that can
19 raise a factual question. And that's the kind
20 of question we had here. Is this indictment,
21 for example, the final indictment that was used,
22 that was charged? Or is this plea agreement
23 authentic?

24 Those kinds of factual questions
25 underlie the question presented here.

1 JUSTICE GORSUCH: Thank you.

2 CHIEF JUSTICE ROBERTS: Justice
3 Kavanaugh.

4 JUSTICE KAVANAUGH: Thank you.

5 And good afternoon, Mr. Bond. I just
6 want to broaden it out a little bit here and
7 talk about the context. We're talking about
8 eligibility for cancellation of removal, and you
9 want to say that he is categorically ineligible
10 for cancellation of removal.

11 Even if you lose here, the executive
12 branch -- correct me if I'm wrong -- could still
13 deny cancellation of removal and remove him, is
14 that correct?

15 MR. BOND: The -- the executive would
16 have that discretion, that's correct.

17 JUSTICE KAVANAUGH: Okay. So we're
18 just talking about categorical ineligibility,
19 and, therefore, since you would still have the
20 discretion to deny it, it seems to make sense to
21 think about how this works in practice.

22 And, here, do you consider the facts
23 of this case typical of the cases where this
24 kind of issue arises?

25 MR. BOND: I'm not sure which aspect

1 of the facts you mean to be typical, but I think
2 this is an -- a very unusual case in which the
3 alien is representing that he can't produce the
4 documents that show which version of the statute
5 he pleaded guilty to, even though the
6 immigration proceeding predated his criminal
7 conviction, and his immigration attorney told
8 the IJ, you know, this ongoing criminal
9 conviction -- or criminal proceeding may affect
10 his outcome.

11 So I think this case illustrates why
12 it was sensible for Congress to put the burden
13 of proof on the alien.

14 And to the discussion --

15 JUSTICE KAVANAUGH: Well, I was
16 thinking -- I was thinking more that he's lived
17 here for 25 years in the United States, has a
18 wife and three kids here, one of whom is a U.S.
19 Citizen, works construction and cleaning, had a
20 fraudulent Social Security number, which got him
21 a \$100 fine but no jail time under state law.

22 You know, that seems a thin read to
23 make someone categorically ineligible for
24 cancellation of removal, and the thin read
25 corresponds legally to when you have such --

1 that kind of offense, it's not surprising, as
2 Justice Gorsuch says, that the records are going
3 to be thin as well.

4 And I just want to know how we should
5 think about that.

6 MR. BOND: So I -- I think about it
7 this way: Remember, we're only dealing in the
8 context of aliens who have been found removable,
9 including in this case for unrelated reasons,
10 and are seeking special dispensation, what this
11 Court has analogized to a pardon. And where --

12 JUSTICE KAVANAUGH: But with just --

13 MR. BOND: -- Congress has --

14 JUSTICE KAVANAUGH: I'm -- I'm sorry
15 to interrupt, but the special dispensation, you
16 could still deny cancellation of removal.
17 That's the point I started with and wanted to
18 underscore.

19 So it's not taking away the executive
20 branch's ability to deny cancellation of removal
21 if we rule against you. It's just taking away
22 the argument that someone in this situation
23 who's been here for that long with this kind of
24 offense is categorically ineligible.

25 MR. BOND: I think what it does is

1 contradict Congress's judgment. Even before
2 IIRIRA, Congress wanted these eligibility
3 criteria to be enforced stringently, and after
4 IIRIRA and the REAL ID Act, there's simply no
5 doubt that Congress wanted these to be taken
6 seriously and not reserved -- result as a matter
7 of the discretion at the merits phase of the
8 proceeding.

9 And I would add that I think Congress
10 would, in particular, not have intended this
11 statute to allow moving to the discretionary
12 phase with an -- for an alien who had every
13 opportunity and incentive to create and preserve
14 the very records that are at issue here.

15 There's no explanation for why those
16 records weren't presented and created in the
17 first place when he had every reason and
18 opportunity to do that.

19 JUSTICE KAVANAUGH: Thank you,
20 Mr. Bond.

21 CHIEF JUSTICE ROBERTS: A minute to
22 wrap up, Mr. Bond.

23 MR. BOND: Thank you, Mr. Chief
24 Justice.

25 Petitioner's basic argument is that

1 you should start with decisions that put a gloss
2 on various other statutes and retrofit this
3 statute to match.

4 We submit that that is backwards. The
5 Court should start with the governing statutory
6 text, and, here, that text answers the question
7 presented by putting the burden of proving
8 eligibility on the alien, including a lack of
9 disqualifying convictions.

10 Now, in our view, Congress's judgment
11 is compatible with this Court's precedent
12 addressing the categorical and modified
13 approaches, but if there were any inconsistency
14 or tension, it should be resolved in favor of
15 the language Congress enacted to address this
16 particular issue.

17 The court of appeals' decision should
18 be affirmed.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Three minutes for rebuttal.

22 REBUTTAL ARGUMENT OF BRIAN P. GOLDMAN
23 ON BEHALF OF THE PETITIONER

24 MR. GOLDMAN: Thank you, Mr. Chief
25 Justice. I'll try to make four points quickly.

1 First, I agree with my friend on the
2 other side that this is an issue of statutory
3 interpretation. The Congress passed two
4 provisions. One uses the term "conviction" that
5 embraces the least acts presumption, which
6 Congress understood serves the important
7 functions that we've discussed.

8 Separately, Congress passed a burden
9 of proof. But the two are not at war. A
10 non-citizen can satisfy his burden by invoking
11 the presumption, as is common in the law. And
12 the REAL ID Act did not suspend a 100-year-old
13 presumption.

14 Second, Justice Gorsuch asked me in
15 the opening argument about the burden of
16 production, and that came up in the last half
17 hour. And I would just emphasize that the
18 government produced the documents here. Page 2a
19 of our blue brief has the certification of the
20 immigration officer. And that wasn't an act of
21 generosity here. That is what the government
22 does in all of these cases, and that is because
23 it bears the initial burden of production to
24 show the existence of a conviction that, at
25 least on its face, appears to be disqualifying.

1 Section 1229a(c)(3)(B), which Justice
2 Gorsuch asked me about, and subparagraph (C) as
3 well, refer to "in any proceeding under this
4 chapter." So it's not limited to the context in
5 which the government is trying to prove
6 deportability.

7 As for the regulation that my friend
8 on the other side mentioned, Section 1240.8(d),
9 the attorney general's own interpretations of
10 that regulation in the Matter of A-G-G- case and
11 the Matter of S-K- case that we've cited in our
12 reply show that that regulation places an
13 initial burden of production on the government,
14 not to speculate that a bar may apply but to
15 actually make out a full prima facie case that
16 the bar to relief may apply.

17 Third, Mr. Chief Justice, you asked
18 about some of the practicalities around
19 memorializing the -- the terms of a plea. And I
20 didn't hear my friend on the other side give any
21 answer to how this could work for old
22 convictions, like the decades-old convictions
23 that I mentioned, nor did I hear any answer to
24 how exactly the criminal defendant could force
25 something to be recorded in the many county and

1 state systems where this is simply checking off
2 boxes on a computer program or a paper form and
3 there's no opportunity to comment further.

4 Finally, my friend on the other side
5 mentioned efficiency concerns around allowing
6 these cases to be decided at the threshold. And
7 I would just note that our rule has been in
8 effect in the First Circuit since 2016, in the
9 Second Circuit since 2008, and in the Ninth
10 Circuit for six of the last 13 years.

11 And as in the Nasrallah case last term
12 when the government made a similar efficiency
13 argument, it has not substantiated that by
14 pointing to any actual problems arising in those
15 circuits.

16 The judgment should be reversed.

17 CHIEF JUSTICE ROBERTS: Thank you,
18 counsel. The case is submitted.

19 (Whereupon, at 12:24 p.m., the case
20 was submitted.)

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