

AN UNJUST BURDEN: THE TENTH CIRCUIT’S
MISAPPLICATION OF THE CATEGORICAL APPROACH IN
LUCIO-RAYOS v. SESSIONS

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ABSTRACT

In *Lucio-Rayos v. Sessions*, the Tenth Circuit concluded that a noncitizen facing deportation is ineligible to apply for a defense to such deportation if the only evidence regarding the noncitizen’s criminal history is an ambiguous record of conviction that fails to clarify whether the conviction constitutes a disqualifying crime. Such a conclusion exacerbated a burgeoning circuit court split on the same issue and had a sweeping and detrimental impact on the legal remedies available to thousands of noncitizens facing removal throughout the Tenth Circuit’s jurisdiction. This Article contends that *Lucio-Rayos* ran afoul of Supreme Court precedent insofar as it (1) misunderstood the import of the Supreme Court’s recent decision in *Moncrieffe v. Holder* and related case law regarding application of the categorical approach in removal proceedings, and (2) undermined congressional intent as established through clear statutory language and case law interpreting that language. Ultimately, this Article argues that the Tenth Circuit’s errors in *Lucio-Rayos*—as well as the related and unresolved circuit court split—have significant and concerning legal implications for precedent related to the categorical approach more generally and profound practical implications for thousands of noncitizens facing removal across the country.

TABLE OF CONTENTS

INTRODUCTION.....	370
I. BACKGROUND.....	372
<i>A. The Categorical Approach</i>	372
<i>B. Burdens of Proof in Immigration Proceedings</i>	374
II. <i>LUCIO-RAYOS</i> AND THE CIRCUIT SPLIT.....	375
<i>A. The Tenth Circuit’s Approach</i>	376
<i>B. The Circuit Court Split</i>	378
III. THE SUPREME COURT HAS ALREADY OPINED.....	383
<i>A. Moncrieffe</i>	384

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<i>B. Additional Federal Precedent</i>	387
<i>C. Policy Considerations</i>	392
IV. A CONCERNING FORK IN THE ROAD	394
CONCLUSION	396

INTRODUCTION

On November 14, 2017, the Tenth Circuit released its opinion in *Lucio-Rayos v. Sessions*,¹ and held that Mr. Lucio-Rayos, a noncitizen, had not established eligibility for cancellation of his removal proceedings.² Specifically, the court concluded that because Mr. Lucio-Rayos had only presented an ambiguous criminal record that failed to clarify whether he had ever been convicted of a crime involving moral turpitude (CIMT),³ he could not meet his burden of proof regarding the relief that he sought.⁴ In so concluding, the Tenth Circuit deferred to its precedential opinion in *Garcia v. Holder*⁵ (reaching the same conclusion regarding an ambiguous criminal record being insufficient to establish eligibility for cancellation of removal) and determined that because the Supreme Court's decision in *Moncrieffe v. Holder*⁶ had not overruled *Garcia*, it was not dispositive of the issue at hand.⁷

Legally, *Lucio-Rayos* exacerbated a circuit court split on the same issue.⁸ Courts across the country have struggled to reconcile the application of the categorical approach—a legal tool employed by the Supreme Court for determining whether a noncitizen's prior criminal conviction triggers certain immigration consequences—with the distinct burdens of proof that apply to various components of removal proceedings.⁹ Such a split, however, is merely one permutation of the ongoing confusion in federal courts about the proper application of the categorical approach

1. 875 F.3d 573 (10th Cir. 2017), *petition for cert. filed sub nom. Lucio-Rayos v. Whitaker* (U.S. July 12, 2018) (No. 18-64).

2. *Id.* at 575–76, 584.

3. CIMT is a term of art articulated in the Immigration and Nationality Act (INA). 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2018).

4. *Lucio-Rayos*, 875 F.3d at 583–84.

5. 584 F.3d 1288 (10th Cir. 2009).

6. 569 U.S. 184 (2013).

7. *Lucio-Rayos*, 875 F.3d at 583–84.

8. Sarah M. Rich, *Escaping Immigration Law's Cancellation Catch: Why an Inconclusive Record of Conviction Satisfies the Preponderance of the Evidence Standard in Cancellation of Removal* (July 18, 2013) (research paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2295784, provides an extremely thorough, cogent, and thoughtful analysis of many of the same themes presented in this Article. This Article focuses most prominently on the legal developments since Ms. Rich's article was published in 2013 and on how such developments might help inform new approaches for engaging with the legal question posed.

9. *See, e.g., Saucedo v. Lynch*, 819 F.3d 526, 533–34 (1st Cir. 2016); *Syblis v. Att'y Gen. of the U.S.*, 763 F.3d 348, 357 (3d Cir. 2014); *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012); *Salem v. Holder*, 647 F.3d 111, 115 (4th Cir. 2011).

generally.¹⁰ Even with significant guidance from Supreme Court precedent over the years, the categorical approach continues to present a legal thicket, rendered even more impassable when analyzed in conjunction with the generally nebulous legal question of what exactly constitutes a “burden of proof.”

Practically, for the thousands of noncitizens currently facing removal proceedings in immigration courts throughout the Tenth Circuit’s jurisdiction, the implications of *Lucio-Rayos* are severe. For any of those noncitizens seeking discretionary relief in removal proceedings¹¹ who have potentially disqualifying criminal convictions with ambiguous records of conviction, *Lucio-Rayos* squashed any chance of staying lawfully in the United States. For those individuals, the notion that their entire future—often implicating their ability to stay unified with their families, to provide financially and emotionally for those families, to stay in a country many have considered home for decades, and to remain safe from persecution and violence in their countries of origin—will pivot on the arbitrary question of whether their criminal records happen to be properly documented, is alarming, disempowering, and ultimately devastating.

This Article will argue that, upon a thorough evaluation of both the legal and practical underpinnings and implications of the Tenth Circuit’s decision in *Lucio-Rayos* (and by extension, *Garcia*), it becomes clear that the court ultimately reached the wrong result. First, Part I of this Article provides pertinent legal background regarding the categorical approach and how the Immigration and Nationality Act (INA) structures burdens of proof in immigration removal proceedings. Part II then reviews the Tenth Circuit’s decision in *Lucio-Rayos* and provides the reader context for that decision by discussing the growing circuit court split on these issues.

Part III of this Article contends that, in spite of some circuit court analysis to the contrary, Supreme Court precedent—including *Moncrieffe* and other pertinent case law on the categorical approach—does, in fact, resolve the question of how an ambiguous record of conviction impacts noncitizens’ ability to meet their burden of proof in removal proceedings. In addition, beyond reviewing the legal doctrine, Part III argues that considerations of equity, fairness, and consistency (which underpinned the creation and application of the categorical approach in the first place) all

10. Rebecca Sharpless, *Toward A True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 981 (2008).

11. Such discretionary relief may include, but is not limited to, applications for asylum, cancellation of removal for lawful permanent residents, cancellation for removal for certain nonpermanent residents, or adjustment of status. See 8 U.S.C. § 1158(a)(1) (2018) (asylum); § 1229b(a) (cancellation of removal for certain permanent residents); § 1229b(b)(1) (cancellation of removal for nonpermanent residents); § 1255(a) (adjustment of status).

weigh in favor of concluding that an ambiguous record of conviction is sufficient to demonstrate eligibility for relief in the immigration context.

Finally, Part IV discusses how the arbitrary delineation of immigration proceedings as “civil” versus “criminal” in nature—and the many legal fictions that follow, as a result—are responsible, in significant part, for the categorical quagmire federal courts often find themselves in. In an effort to ameliorate certain aspects of that quagmire, this Article argues that despite the civil nature of immigration proceedings, it is imperative that the application of the categorical approach in the immigration context remain consistent with application of the same approach throughout criminal law precedent. Any other result might spell the end of the categorical approach itself.

I. BACKGROUND

First, this Part summarizes the origins of the categorical approach and discusses its import and utility in both criminal and immigration cases. Second, this Part discusses the various burdens of proof articulated by Congress as pertaining to immigration removal proceedings.

A. *The Categorical Approach*

The categorical approach is originally rooted in Supreme Court precedent regarding when and how to properly apply sentence enhancers in federal criminal proceedings. The Supreme Court first explicitly employed the categorical approach as a legal tool in *Taylor v. United States*.¹² *Taylor*, a criminal case, raised the question of how to properly evaluate whether a defendant’s prior criminal convictions fall into the generic category of crimes, articulated by Congress, for triggering sentence enhancement.¹³ Specifically, for Mr. Taylor, the issue was whether his convictions for second-degree burglary in Missouri qualified as burglary convictions under the Career Criminals Amendment Act of 1986 (CCAA), such that he was subject to the sentence-enhancement regime articulated therein.¹⁴

In evaluating that question, the *Taylor* decision concluded that courts must apply a “formal categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions.”¹⁵ Such an approach, the Court explained, is distinct from an alternative factual approach which would allow a court, in issuing a sentence, to consider, beyond the elements of a defendant’s prior convictions, the particular facts underlying those convic-

12. 495 U.S. 575 (1990).

13. *Id.* at 577–80.

14. *Id.* at 577–79.

15. *Id.* at 600.

tions.¹⁶ In explaining the rationale supporting its decision to employ a strict categorical approach, the Court noted that: (1) Congress indicated, within the language of the CCAA, that courts should look to what defendants were convicted of, not what specific behavior they engaged in, when determining whether to apply sentence enhancers; (2) the legislative history of the CCAA provided no indication that Congress intended for a particular crime to sometimes count towards enhancement and sometimes not, as would occur in a fact-finding approach; and (3) “the practical difficulties and potential unfairness of a factual approach [would be] daunting” as access to the necessary factual information regarding the defendant’s underlying conduct could vary drastically from case to case.¹⁷

The same precepts underlying the adoption of the categorical approach in *Taylor* have similarly grounded courts’ application of the approach in the immigration context. As the Supreme Court recently explained in *Mellouli v. Lynch*,¹⁸ the categorical approach is deeply rooted in immigration jurisprudence.¹⁹ Specifically, the Court noted that: (1) like in the criminal-sentencing regime, Congress also specified that the pertinent inquiry when evaluating the immigration consequences of certain crimes is what a noncitizen was “convicted” of; (2) a factual evaluation of each noncitizen’s conduct would be onerous and burdensome to the immigration court system; and (3) “[b]y focusing on the legal question of what a conviction *necessarily* established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law.”²⁰

These general principles undergirding the categorical approach took on an additional dimension some fifteen years after *Taylor*, in the Court’s opinion in *Shepard v. United States*.²¹ There, the Court reaffirmed *Taylor*’s singular focus on what a prior conviction “necessarily” involved,²² and clarified that in making such an evaluation courts may only consult a limited range of record documents including a charging document and plea transcript or colloquy but excluding, for example, the use of police reports.²³ The exclusion of such documents from a court’s consideration was necessary, the Court opined, in order to preserve adherence to the principle established in *Taylor*: that the inquiry must focus on the fact of conviction, not on the facts of a particular defendant’s conduct.²⁴

16. *Id.* at 600–01.

17. *Id.* at 600–02.

18. 135 S. Ct. 1980 (2015).

19. *Id.* at 1986; *see also* Rich, *supra* note 8, at 13–33 (engaging in a rich discussion of the categorical approach’s history in immigration law).

20. *Mellouli*, 135 S. Ct. at 1986–87.

21. 544 U.S. 13 (2005).

22. *Id.* at 24.

23. *Id.* at 16.

24. *Id.* at 20, 22–23, 26.

The *Shepard* Court recognized that an adjudicator may sometimes need to reference certain documents in a record of conviction for the limited purpose of determining an individual's specific conviction under a statute that proscribes several different crimes.²⁵ This process has become commonly known as the "modified categorical approach."²⁶ As the Court later explained in *Descamps v. United States*,²⁷ when a statute sets out one or more elements of the offense in the alternative, "the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction."²⁸ Once the applicable alternative is identified, "[t]he court can then do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime."²⁹

It is under this categorical approach that the Tenth Circuit evaluated the legal claim raised in *Lucio-Rayos*.³⁰

B. Burdens of Proof in Immigration Proceedings

Congress has articulated clear burdens of proof for different stages of immigration proceedings. In 8 U.S.C. § 1229a(c)(3)(A), for example, Congress indicated that the Department of Homeland Security (DHS) has "the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable."³¹ Similarly, courts have concluded that DHS has the burden of establishing alienage for those noncitizens who have not been admitted to the United States.³²

By contrast, Congress indicated in 8 U.S.C. § 1229a(c)(4)(A), that a noncitizen

applying for relief or protection from removal has the burden of proof to establish that [he or she] (i) satisfies the applicable eligibility requirements; and (ii) with respect to any form of relief that is grant-

25. *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013); *Shepard*, 544 U.S. at 26.

26. *Mellouli*, 135 S. Ct. at 1986 n.4 (quoting *Moncrieffe*, 569 U.S. at 219).

27. 570 U.S. 254 (2013).

28. *Id.* at 257.

29. *Id.*; see also Sharpless, *supra* note 10 (reviewing the proper application of the elements test and noting the ways in which courts have strayed from such application).

30. *Lucio-Rayos v. Sessions*, 875 F.3d 573, 578 (2017), *petition for cert. filed sub nom. Lucio-Rayos v. Whitaker* (U.S. July 12, 2018) (No. 18-64).

31. 8 U.S.C. § 1229a(c)(3)(A) (2018).

32. See, e.g., *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 153 (1923) ("It is true that alienage is a jurisdictional fact; and that an order of deportation must be predicated upon a finding of that fact. It is true that the burden of proving alienage rests upon the government." (citation omitted)).

ed in the exercise of discretion, that [he or she] merits a favorable exercise of discretion.³³

Immigration regulations further expand on these congressionally articulated burdens of proof. For example, 8 C.F.R. § 1240.8(d) reiterates that, in removal proceedings, a noncitizen has “the burden of establishing that he or she is eligible for any requested benefit or privilege,” and if “the evidence indicates that one or more of the grounds of mandatory denial of the application for relief may apply, the [noncitizen] shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.”³⁴ Additionally, 8 C.F.R. § 1240.46(a) confirms that DHS has the burden of proving that a noncitizen is deportable by clear and convincing evidence.³⁵

As this Article will discuss below, the intent underlying such language was of significant concern to the Tenth Circuit in *Garcia* and *Lucio-Rayos*.

II. *LUCIO-RAYOS* AND THE CIRCUIT SPLIT

In *Lucio-Rayos*, the Tenth Circuit confronted the intersection of the two legal frameworks articulated above, one that insists on using only a categorical comparison of statutory elements to evaluate which criminal convictions carry immigration consequences, and one that clearly articulates distinct burdens of proof at various stages in immigration removal proceedings.³⁶ Specifically, the Tenth Circuit evaluated whether Mr. Lucio-Rayos, in presenting a record of conviction from his criminal case that did not clearly establish whether he had been convicted of a CIMT (thus precluding him from eligibility for cancellation of removal) or not (thus allowing him to pursue such a defense), could still meet his burden of proving eligibility for relief.³⁷

Ultimately, in concluding that, based on such a record, Mr. Lucio-Rayos could not establish eligibility for relief, the Tenth Circuit: (1) deferred to its prior decision on the same issue in *Garcia*; and (2) determined, contrary to Mr. Lucio-Rayos’s contention, that the Supreme Court’s decision in *Moncrieffe* did not overrule *Garcia*.³⁸ This Article will evaluate each basis for the Tenth Circuit’s ultimate holding, below.

33. 8 U.S.C. § 1229a(c)(4)(A).

34. 8 C.F.R. § 1240.8(d) (2018); *see also* Rich, *supra* note 8, at 36–43 (discussing the legal meaning of a “preponderance of the evidence” standard).

35. 8 C.F.R. § 1240.46(a).

36. *Lucio-Rayos v. Sessions*, 875 F.3d 573, 581–84 (10th Cir. 2017), *petition for cert. filed sub nom. Lucio-Rayos v. Whitaker* (U.S. July 12, 2018) (No. 18-64).

37. *Id.* at 584.

38. *Id.* at 583–84.

A. The Tenth Circuit's Approach

Almost eight years prior to issuing *Lucio-Rayos*, the Tenth Circuit engaged with the same legal question in *Garcia*.³⁹ There, a Salvadoran man, Carlos Marquez Garcia, sought to apply for Temporary Protected Status (TPS), voluntary departure, and cancellation of removal.⁴⁰ Prior to the initiation of removal proceedings against Mr. Garcia, however, he was convicted of third-degree assault in Colorado.⁴¹ Due to a messy and poorly translated guilty plea form, by the time his immigration proceedings commenced, it was not clear whether Mr. Garcia's assault conviction was for knowingly or recklessly causing bodily injury—two distinct bases for violating the Colorado statute.⁴² This distinction—between the mens rea of knowing versus the mens rea of reckless—had significant implications for Mr. Garcia's immigration case. The former mens rea would likely constitute a CIMT, thereby precluding Mr. Garcia from establishing eligibility for his relief sought, while the latter mens rea would not.⁴³ Both Mr. Garcia and DHS acknowledged that, based on the record evidence in his immigration proceedings, including the inconclusive guilty plea form, there was no definitive answer regarding which mens rea element applied to Mr. Garcia's plea and resulting criminal conviction.⁴⁴

Thus, the outstanding legal issue in *Garcia* was: Which party, Mr. Garcia or DHS, could claim the benefit of the ambiguous record of conviction?⁴⁵ The arguments on each side were quite straightforward. DHS contended that because Mr. Garcia bore the burden of proving eligibility for relief, an inconclusive record simply could not meet that burden.⁴⁶ By contrast, Mr. Garcia argued that an ambiguous record of conviction served to establish that he had “not necessarily” committed a CIMT; thus, he had met his burden.⁴⁷ In support of his argument, Mr. Garcia pointed to the Ninth Circuit's decision in *Sandoval-Lua v. Gonzales*,⁴⁸ which reached the same conclusion.⁴⁹

However, the Tenth Circuit ultimately disagreed with Mr. Garcia (and with the Ninth Circuit) due to the simple conclusion that allowing Mr. Garcia to prevail on the basis of an ambiguous record of conviction

39. 584 F.3d 1288, 1290 (10th Cir. 2009).

40. *Id.* at 1288–89.

41. *Id.* at 1289.

42. *Id.*

43. *See id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. 499 F.3d 1121, 1130 (9th Cir. 2007), *overruled by* *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012).

49. *Garcia*, 584 F.3d at 1290.

would “effectively nullif[y] the statutorily prescribed burden of proof.”⁵⁰ Therefore, notwithstanding the fact that Mr. Garcia was “not to blame for the ambiguity surrounding his criminal conviction,” the inquiry, according to the court, must begin and end with the legal reality that Congress imposed the burden of proof on Mr. Garcia.⁵¹

Despite the Tenth Circuit’s rather limited analysis in *Garcia*, it concluded later, in *Lucio-Rayos*, that it remained “bound by *Garcia*, ‘absent en banc reconsideration or a superseding contrary decision by the Supreme Court.’”⁵² In light of such binding precedent, the court in *Lucio-Rayos* provided very little additional analysis to buttress the legal basis supporting its earlier conclusion in *Garcia*. Instead, the court simply reiterated that the INA placed the burden of establishing eligibility for relief in removal proceedings on the noncitizen.⁵³

Still, the Tenth Circuit addressed Mr. Lucio-Rayos’s contention that the Supreme Court’s recent decision in *Moncrieffe* constituted “a superseding contrary decision” sufficient to overrule *Garcia*.⁵⁴ Specifically, Mr. Lucio-Rayos argued that, per *Moncrieffe*, any prior criminal conviction evaluated under the categorical approach is “presumed to have been for the least conduct criminalized under the statute of conviction,” and that such an evaluation is legal rather than factual in nature.⁵⁵ Accordingly, the burden of proof is irrelevant to resolving that legal inquiry.⁵⁶ For several reasons, however, the Tenth Circuit disagreed.⁵⁷

First, the Tenth Circuit highlighted the fact that the Supreme Court’s analysis in *Moncrieffe* took place in the context of evaluating whether Mr. Moncrieffe’s criminal convictions properly subjected him to removal, as opposed to whether such convictions precluded him from establishing eligibility for relief from removal.⁵⁸ Such a distinction is pertinent, the court concluded, because the government bears the burden of establishing removability, whereas the respondent bears the burden of establishing eligibility for relief.⁵⁹ Thus, although *Moncrieffe* did indicate that the categorical analysis should be “the same” when establishing removability and eligibility for relief, the court did not discuss how the

50. *Id.*

51. *Id.*

52. *Lucio-Rayos v. Sessions*, 875 F.3d 573, 582 (10th Cir. 2017) (quoting *Leatherwood v. Allbaugh*, 861 F.3d 1034, 1042 n.6 (10th Cir. 2017)), *petition for cert. filed sub nom. Lucio-Rayos v. Whitaker* (U.S. July 12, 2018) (No. 18-64).

53. *Id.* at 581.

54. *Id.* at 582 (quoting *Leatherwood*, 861 F.3d at 1042 n.6).

55. *Id.*

56. *Id.*

57. *Id.* at 582–83.

58. *Id.*

59. *Id.* at 583.

distinct burdens of proof in those two contexts might have influenced the outcome in *Moncrieffe*.⁶⁰

Second, the court noted that, unlike in Mr. Lucio-Rayos's case, there was no uncertainty in *Moncrieffe* about which set of statutory elements he had been convicted of.⁶¹ To the contrary, those elements were quite clear.⁶² Rather, according to the court, the outstanding inquiry in *Moncrieffe* was the question of how Georgia defined those elements and whether such a definition matched the pertinent federal definition.⁶³ By contrast, the record in Mr. Lucio-Rayos's case could not even serve to establish which elements he was convicted of, thus hindering the court from determining which elements to compare to the generic definition of a CIMT.⁶⁴ Accordingly, the court had to resort to the modified categorical approach in *Lucio-Rayos*, whereas in *Moncrieffe*, that approach was inapplicable and therefore not discussed by the Court or pertinent to the Court's analysis.⁶⁵

Finally, the Tenth Circuit addressed Mr. Lucio-Rayos's contention that the categorical inquiry does not implicate burdens of proof as it constitutes a purely legal question.⁶⁶ The court disagreed, noting that when a court must determine which offense an individual was convicted of under a divisible multi-offense statute, that determination is a factual one, "or at least a question of law and fact."⁶⁷ Thus, the burden of proof is still implicated, and "[i]t is well-established that the party who bears the burden of proof loses if the record is inconclusive on a critical point."⁶⁸

Accordingly, the court concluded that *Moncrieffe* had not "indisputably" overruled *Garcia*, and therefore it remained bound to apply the holding of *Garcia* to the facts of Mr. Lucio-Rayos's case.⁶⁹

B. The Circuit Court Split

The Tenth Circuit's conclusion in *Garcia*—that the language employed by Congress regarding a noncitizen's burden of establishing eligibility for relief from removal indicates that the same noncitizen must also bear the brunt of an inconclusive record⁷⁰—together with its conclusion in *Lucio-Rayos*—that *Moncrieffe* does not make any determinations to the contrary because it discussed neither (1) the modified categorical approach nor (2) the distinct burdens of proof at issue in different stages

60. *Id.* (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 191 n.4 (2013)).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 582–83.

67. *Id.* at 583.

68. *Id.* (quoting *Marinelarena v. Sessions*, 869 F.3d 780, 789 (9th Cir. 2017)).

69. *Id.* at 583–84.

70. *Garcia v. Holder*, 584 F.3d 1288, 1289–90 (10th Cir. 2009).

of removal proceedings⁷¹—are both paralleled, in significant part, by other circuit court cases that have opined on the same issue.

For example, in *Salem v. Holder*,⁷² the Fourth Circuit agreed with the Tenth Circuit’s conclusion in *Lucio-Rayos*, holding that such a conclusion—predicated fundamentally on how Congress chose to articulate the applicable burden of proof—hewed “more closely to the relevant statutory text.”⁷³ More specifically, based on the burden articulated by Congress that a noncitizen must demonstrate eligibility for relief by a preponderance of the evidence, the Fourth Circuit determined that an inconclusive record of conviction cannot meet the noncitizen’s burden of proof.⁷⁴ The Fourth Circuit reasoned that such a record “fails to establish that it is more likely than not that he was not convicted of [a disqualifying crime].”⁷⁵ Thus, “fidelity to the INA” commands that the noncitizen “suffer the detriment” of the inconclusive record.⁷⁶

Similarly, in *Syblis v. Attorney General of the United States*,⁷⁷ the Third Circuit noted that “[a] burden of proof by a preponderance of the evidence ‘requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.’”⁷⁸ Accordingly, when a noncitizen can only demonstrate that the record is inconclusive, or that the pertinent conviction may or may not be a match to the federal offense, such a demonstration “shows only that ‘the evidence is closely balanced’ and fails to show ‘that the existence of a fact is more probable than its nonexistence.’”⁷⁹

By contrast, in *Sauceda v. Lynch*⁸⁰ the First Circuit concluded that this issue could not be resolved by simply relying on the statutorily articulated burden of proof.⁸¹ Instead, the First Circuit concluded that the Supreme Court had already opined on the manner in *Moncrieffe* when it explained that application of the categorical approach is a purely “legal question of what a conviction *necessarily* established”⁸² and that such an inquiry is “the same” in both the removal and relief contexts.⁸³ Accordingly, under the categorical approach, a court’s determination of this

71. *Lucio-Rayos*, 875 F.3d at 583.

72. 647 F.3d 111 (4th Cir. 2011).

73. *Id.* at 116.

74. *Id.*

75. *Id.*

76. *Id.*

77. 763 F.3d 348 (3d Cir. 2014).

78. *Id.* at 357 (quoting *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993)).

79. *Id.* (first quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005); and then quoting *Concrete Pipe & Prods. of Cal., Inc.*, 508 U.S. at 622).

80. 819 F.3d 526 (1st Cir. 2016).

81. *Id.* at 533–34.

82. *Id.* at 534 (quoting *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015)).

83. *Id.*

legal question is not impacted by burdens of proof.⁸⁴ Further, the fact that, in some instances, a court might need to employ the modified categorical approach as a tool to determine under which portion of a statute a noncitizen's conviction occurred does not change the ultimate legal inquiry regarding whether the conviction itself is a categorical match to the generic crime.⁸⁵

The First Circuit found additional support for its conclusion based on the congressional directive, embodied in the INA, that evaluations regarding both removability and relief eligibility are predicated on an inquiry into what a noncitizen was *convicted of*, a question that must have a uniform answer at both the removal and relief stages.⁸⁶ Furthermore, the First Circuit read *Moncrieffe* as establishing a presumption within the categorical approach that a conviction rests on the *least* of the acts criminalized.⁸⁷ Thus, when confronted with an inconclusive record of conviction that fails to establish which proscribed acts the conviction was predicated on, the presumption serves to resolve the inquiry: it must have been predicated on the least of the acts criminalized.⁸⁸

The First Circuit was not persuaded otherwise by the Government's argument that Congress's imposition of limits on the number of individuals who can qualify for certain kinds of relief each year demonstrates its intention to place the burden of proof on noncitizens to access the benefits bestowed by Congress.⁸⁹ To the contrary, the First Circuit opined that, under the Supreme Court's analysis in *Moncrieffe*, noncitizens' burdens do not change, as they must still prove every other element of their defense.⁹⁰ For example, in the context of nonpermanent resident cancellation of removal, the noncitizen must prove ten years of continuous physical presence, good moral character, and exceptional and extremely unusual hardship.⁹¹

Ultimately, therefore, the First Circuit concluded that a faithful application of the categorical approach, as laid out by Supreme Court precedent in *Moncrieffe*, mandates the result that an inconclusive record of conviction regarding a potentially disqualifying criminal conviction does not preclude a noncitizen from establishing eligibility for relief from removal.⁹²

This split in reasoning between the aforementioned circuit courts is potently mirrored in the Ninth Circuit's vacillating precedent on this

84. *Id.*

85. *Id.* at 534.

86. *Id.*

87. *Id.* at 531.

88. *Id.* at 531–32.

89. *Id.* at 535.

90. *Id.* at 534.

91. *See id.*

92. *See id.* at 531–32.

question. The Ninth Circuit's meandering and, at times, contradictory approach to this issue helps to more clearly illuminate the tensions within and between both sides of the argument.

The Ninth Circuit first approached this question in *Sandoval-Lua*.⁹³ There, the Ninth Circuit evaluated whether Mr. Lua's California controlled substance conviction constituted an aggravated felony, thereby precluding him from establishing eligibility for lawful permanent resident cancellation of removal.⁹⁴ Applying the categorical approach, the court concluded that the statute under which Mr. Lua was convicted contained several overly broad sections; therefore his conviction was not categorically an aggravated felony.⁹⁵ Turning to the modified categorical approach, however, the court noted that the record of conviction did not establish whether Mr. Lua's conviction fell within the disjunctive section of the statute that did constitute an aggravated felony.⁹⁶

Still, the court ultimately held that “[b]y submitting an inconclusive record of conviction, Lua has affirmatively proven under the modified categorical analysis that he was not necessarily ‘convicted of [a disqualifying offense].’”⁹⁷ In so holding, the Ninth Circuit relied on the seminal Supreme Court cases addressing the categorical approach, *Taylor* and *Shepard*, which “both stress that a predicate conviction qualifies as a generic crime under the modified categorical approach only if the record of conviction shows the jury ‘necessarily’ found all of the generic elements or the defendant ‘necessarily’ admitted all of the generic elements in a plea.”⁹⁸ Thus, per *Taylor* and *Shepard*, the court reasoned that, “either the record of conviction shows that the predicate conviction was for the generic crime or it fails to show the conviction was for the generic crime.”⁹⁹ In other words, “[w]hen the record of conviction contains a charging document that lists conduct that does constitute [a disqualifying crime] and conduct that does not constitute [a disqualifying crime], the conclusion is that the jury was not *necessarily* required to find the elements of the generic [disqualifying crime] in order to convict on that document.”¹⁰⁰ Ultimately, therefore, “[w]ithout more, it cannot be said *as a matter of law* that such conviction was for the generic crime.”¹⁰¹

Just five years later, however, the Ninth Circuit overruled itself in *Young v. Holder*,¹⁰² thus falling in line with the Tenth Circuit and the

93. 499 F.3d 1121 (9th Cir. 2007), *overruled by* *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012).

94. *Id.* at 1126.

95. *Id.* at 1128.

96. *Id.* at 1129.

97. *Id.* at 1130 (quoting 8 U.S.C. § 1229b(a)(3) (2018)).

98. *Id.* at 1131.

99. *Id.*

100. *Id.* at 1132.

101. *Id.* (emphasis added).

102. *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012).

other circuit courts referenced above.¹⁰³ In doing so, it harkened back to the bare statutory language regarding the burden of proof to justify its holding that “[b]y placing the burden on the alien to show that prior convictions do not constitute aggravated felonies, the REAL ID Act established that an inconclusive record of conviction does not demonstrate eligibility for cancellation of removal.”¹⁰⁴ The court noted that because an inconclusive record of conviction in the context of establishing removability is insufficient for the government to meet its burden of proof at that procedural stage, “[i]t makes equal sense that when the burden rests on the alien to show eligibility for cancellation of removal, an inconclusive record similarly is insufficient to satisfy the alien’s burden of proof.”¹⁰⁵

The court further noted that such a conclusion “comports with our general understanding of the burden of persuasion, which determines ‘which party loses if the evidence is closely balanced.’”¹⁰⁶ Accordingly, regarding disqualifying crimes, the noncitizen

must establish that he or she was *not* convicted of such a crime. . . . By demonstrating that the record of conviction is inconclusive, the [noncitizen] has failed to establish the absence of a predicate crime. Instead, the [noncitizen] has simply demonstrated that the evidence about the nature of the conviction is in equipoise.¹⁰⁷

Although not explicitly stated in *Young*, the Ninth Circuit seemed to predicate its 180-degree change on a key shift in its framing of the issue: whether the question at hand was one of law or fact. In its discussion regarding burdens of proof, the *Young* court noted that “[t]he party who bears the burden runs ‘the risk of non-persuasion,’” and the “burden of proof denotes the duty of establishing by a fair preponderance of the evidence the truth of the *operative facts* upon which the issue at hand is made to turn by substantive law.”¹⁰⁸ By contrast, in *Sandoval-Lua*, the Ninth Circuit focused on what was necessarily required as a *matter of law* under the categorical approach.¹⁰⁹

Thus, understanding which framework applies to the question at issue is crucial to understanding the emerging circuit court split. Is the inquiry factual in nature and therefore deferential to applicable burdens of proof? Or does a presumption apply to an ultimately legal inquiry that demands a “yes” or “no” answer?

103. *See id.* at 1003.

104. *Id.* at 989.

105. *Id.*

106. *Id.* (quoting *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56 (2005)).

107. *Id.*

108. *Id.* (emphasis added) (quoting *Overman v. Loesser*, 205 F.2d 521, 523 (9th Cir. 1953); *Burden of Proof*, BLACK’S LAW DICTIONARY (10th ed. 2014)).

109. *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130–31 (9th Cir. 2007), *overruled by* *Young v. Holder*, 697 F.3d 976, 1003 (9th Cir. 2012).

Additionally, the differing circuit court analyses, discussed above,¹¹⁰ reveal several further points of disagreement. First: Does Supreme Court precedent regarding the categorical approach, as articulated in *Moncrieffe*, resolve the question at hand? And, second: Does congressional intent, as manifested through applicable statutory language, dictate a certain result? In response to those questions, this Article argues that by answering the first question in the affirmative, a resolution to the second question logically follows.

More specifically, this Article argues that: (1) Supreme Court precedent regarding the categorical approach clearly controls the inquiry here; (2) although the modified categorical approach constitutes a question of fact, the categorical inquiry writ large is undeniably a question of law; and (3) the entire purpose of the categorical approach is to implement congressional intent, which shows that Congress sought to establish clear and consistent answers to questions about what convictions trigger immigration consequences such that a conviction either always results in immigration consequences or it never does. Accordingly, the only way that a court can honor both Supreme Court precedent and congressional intent is to determine that an inconclusive record of conviction is sufficient to meet a noncitizen's burden of proving eligibility for relief in removal proceedings.

III. THE SUPREME COURT HAS ALREADY OPINED

The circuit court opinions discussed above focused, in significant part, on the Supreme Court's recent decision in *Moncrieffe*, in an effort to evaluate whether that decision is controlling regarding the overlap between the categorical approach and a noncitizen's burden of establishing eligibility for relief from removal.¹¹¹ This Article contends that, although *Moncrieffe* is helpful to answering the question at hand, the circuit courts' preoccupation with whether *Moncrieffe* is "controlling" has distracted courts from pursuing a more important holistic inquiry into Supreme Court and federal court precedent regarding the categorical approach generally. By engaging in such a holistic inquiry, as this Article begins to do below, one can readily conclude that a close reading of *Moncrieffe*, in conjunction with a thorough review of other Supreme Court and federal court precedents on the categorical approach, reveals that because the categorical inquiry is ultimately a legal one—whereby a presumption applies that a conviction rests on the minimum culpable conduct—neither burdens of proof nor the modified categorical approach can be determinative to the inquiry.

110. See *supra* text accompanying notes 70–109.

111. See *supra* Part II.

A. Moncrieffe

The Court's 2013 decision in *Moncrieffe* applied the categorical approach in the context of evaluating whether petitioner Adrian Moncrieffe's conviction for possession of marijuana with intent to distribute under GA. Code Ann. Section 16-13-20(j)(1) constituted an aggravated felony, thereby subjecting him to deportation and precluding him from various forms of discretionary relief.¹¹² The Court first reiterated a number of important precepts regarding the categorical approach, including: (1) the approach's focus not on the facts of a particular case, but rather, on whether the crime of conviction categorically fits within the generic federal definition of the pertinent crime;¹¹³ (2) that "a state offense is a categorical match with a generic federal offense *only if a conviction of the state offense 'necessarily involved . . . facts equating to [the] generic [federal offense]'*,"¹¹⁴ and (3)

[b]ecause we examine what the state conviction necessarily involved, not the facts underlying the case, *we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized*, and then determine whether even those acts are encompassed by the generic federal offense.¹¹⁵

Next, the Court discussed two "qualifications" to the categorical approach, including that: (1) when a state statute contains several crimes, a court may determine which particular offense the noncitizen was convicted of by examining certain documents from the record of conviction; and (2) focusing on the minimum conduct criminalized is not an invitation to apply "legal imagination" to the state offense¹¹⁶ because "there must be a 'realistic probability . . . that the State would apply its statute to conduct that falls outside the generic definition of the crime.'"¹¹⁷

Additionally, the Court emphasized that the roots of the categorical approach are predicated on statutory language in the INA that "asks what offense the noncitizen was 'convicted' of, not what acts he committed."¹¹⁸ The "conviction," therefore, is the "relevant statutory hook."¹¹⁹

112. *Moncrieffe v. Holder*, 569 U.S. 184, 187–90 (2013).

113. *Id.* at 190–91.

114. *Id.* (emphasis added) (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)).

115. *Id.* at 190–91 (emphasis added) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

116. *Id.* at 190 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); see Doug Keller, *Causing Mischief for Taylor's Categorical Approach: Applying 'Legal Imagination' to Duenas-Alvarez*, 18 GEO. MASON L. REV. 625, 625 (2010) (arguing that such a "qualification" does not fundamentally alter the nature of the categorical approach).

117. *Moncrieffe*, 569 U.S. at 191 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

118. *Id.* (citation omitted) (quoting 8 U.S.C. § 1227(a)(2)(A)(iii) (2018)).

119. *Id.* (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010)).

The Court then proceeded to apply the categorical approach to Mr. Moncrieffe's statute of conviction in order to determine whether its elements categorically matched the elements within the pertinent definition of an aggravated felony.¹²⁰ After parsing the elements of the two crimes, the Court concluded that Mr. Moncrieffe's conviction could correspond to either a federal crime that would be a categorical match for an aggravated felony, or it could correspond to a federal crime that would not be a categorical match for an aggravated felony.¹²¹ The Court then explicitly noted that "[a]mbiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, *Moncrieffe* was not convicted of an aggravated felony."¹²²

Finally, the Court discussed the Government's contention that ambiguity regarding whether Mr. Moncrieffe's conviction constituted an aggravated felony could be resolved by allowing him, and other noncitizens like him, to present evidence during their immigration proceedings that their convictions fell into the overly broad portion of the federal crime that does not constitute an aggravated felony.¹²³ The Court rejected the Government's proposal, concluding that, among other things, such an approach would mean that "two noncitizens, each 'convicted of' the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an immigration judge. The categorical approach was designed to avoid this 'potential unfairness.'"¹²⁴

The specific language employed by the Court throughout its categorical analysis in *Moncrieff* is particularly illuminating to the question at issue in *Lucio-Rayos*. Four points are worth noting. First, the Court explicitly articulated the categorical inquiry as including a "presumption" that the conviction at issue "rested upon [nothing] more than the least of th[e] acts' criminalized" by the relevant statute.¹²⁵ Presumption is defined as "a legal inference as to the existence or truth of a fact not certainly known that is drawn from the known or proved existence of some other fact."¹²⁶ In other words, in determining which criminalized act a conviction is predicated on, the categorical approach demands an inference that the conviction was predicated on the least of the acts.

120. *Id.* at 192–194.

121. *Id.* at 194.

122. *Id.* at 194–95 (emphasis added).

123. *Id.* at 200.

124. *Id.* (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990)).

125. *Id.* at 191 (alteration in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

126. *Presumption*, MERRIAM WEBSTER, <https://www.merriam-webster.com/dictionary/presumption> (last visited Dec. 24, 2018).

Second, the Court addressed the precise question of how to handle ambiguity regarding which of the criminalized acts are at issue in a noncitizen's conviction.¹²⁷ It concluded that, in the face of such ambiguity, the presumption applies; only the least of the acts criminalized may be considered.¹²⁸

Third, the Court did not discuss, nor did it predicate its conclusion at any point on the fact that the Government had the burden of establishing Mr. Moncrieffe's removability. Indeed, any discussion of how burdens of proof impacted the categorical analysis is conspicuously absent from the entire opinion. When discussing the ambiguity of Mr. Moncrieffe's conviction, the Court did not indicate that the reason Mr. Moncrieffe prevailed is because the Government has the burden of establishing removability and could not do so on the basis of an inconclusive record of conviction. Quite to the contrary, the Court's language was much more definitive in nature. Regardless of what burden of proof might apply, ambiguity regarding whether Mr. Moncrieffe's conviction was a categorical match meant that the conviction "did not" necessarily involve the minimum conduct necessary to constitute an aggravated felony.¹²⁹

Finally, the Court harkened back to the purpose of the categorical approach (and by extension Congress's intent manifested through the INA) as focusing on convictions, not facts, in order to create consistency across proceedings and between noncitizens convicted of the same crimes.¹³⁰ Such consistency is essential, the Court noted, to avoiding potential unfairness.¹³¹

Notably, the Tenth Circuit's opinion in *Lucio-Rayos* did not engage with any of these aspects of the *Moncrieffe* decision. Indeed, the Tenth Circuit brushed off the fact that the Court did not discuss burdens of proof in *Moncrieffe* by concluding that it simply had no reason to do so.¹³² The Tenth Circuit is certainly correct that, based on the facts and procedural posture of *Moncrieffe*, the Court had no reason to discuss a noncitizen's burden of proof for *establishing relief eligibility*. What is curious, however, is the conspicuous lack of a conversation in *Moncrieffe* about the Government's burden of *establishing removability*. By the Tenth Circuit's own acknowledgment in *Lucio-Rayos*, it is the Government's burden to establish by clear and convincing evidence the removability of noncitizens based on their criminal conviction.¹³³ And yet, as

127. *Moncrieffe*, 569 U.S. at 194–95.

128. *Id.* at 195.

129. *Id.* at 194–95.

130. *Id.* at 191 n.4.

131. *Id.* at 201 (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990)).

132. *Lucio-Rayos v. Sessions*, 875 F.3d 573, 583 (10th Cir. 2017), *petition for cert. filed sub nom. Lucio-Rayos v. Whitaker* (U.S. July 12, 2018) (No. 18-64).

133. *Id.*

discussed above, that burden played no role whatsoever in the Court's ultimate conclusion that Mr. Moncrieffe's conviction "did not necessarily" constitute an aggravated felony.¹³⁴

If the logic of the Tenth Circuit's analysis in *Lucio-Rayos* regarding the categorical approach carries the day, (i.e., that "it is well-established that the party who bears the burden of proof loses if the record is inconclusive on a critical point"),¹³⁵ one would certainly have expected the Court in *Moncrieffe* to at least mention the fact that the Government cannot carry its burden of proving removability by clear and convincing evidence based on an ambiguous record of conviction. However, the *Moncrieffe* Court made absolutely no mention of that burden.

Ultimately, therefore, the Tenth Circuit's conclusion that because *Moncrieffe* did not discuss burdens of proof it cannot be controlling to the inquiry in Mr. Lucio-Rayos's case,¹³⁶ collapses on itself. It is precisely the lack of any discussion regarding burdens of proof in *Moncrieffe* that indicates that those burdens—whether in the context of establishing removability or eligibility for relief—do not affect the purely legal question of whether a criminal conviction is a categorical match to an applicable federal offense.

B. Additional Federal Precedent

These points gleaned from *Moncrieffe*—that (1) the categorical approach is a legal question that operates off a presumption that a conviction rested on the least of the acts criminalized, (2) burdens of proof do not impact that legal question, and (3) the modified categorical approach does not change the ultimate inquiry¹³⁷—are further buttressed by other Supreme Court and federal court precedent on the categorical approach.

Indeed, many courts, in applying the categorical approach, have harkened back to the Supreme Court's initial decision in *Taylor*. And, it has become clear over the years that *Taylor* implicates a "demand for certainty" regarding whether a conviction is a categorical match to the applicable generic crime.¹³⁸ This demand for certainty still holds, as several cases have noted, even when the modified categorical approach applies.

For example, in *Mathis v. United States*,¹³⁹ the Supreme Court evaluated whether Mr. Mathis's prior convictions for burglary in Iowa were a

134. See *supra* text accompanying note 129.

135. *Lucio-Rayos*, 875 F.3d at 583 (quoting *Marinelarena v. Sessions*, 869 F.3d 780, 789 (9th Cir. 2017)).

136. *Id.* at 583–84.

137. *Moncrieffe v. Holder*, 569 U.S. 184, 190–91, 197, 219 (2013).

138. *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016) (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)).

139. *Id.*

categorical match to the generic definition of burglary, such that they triggered sentencing enhancements in an underlying felony firearm-possession case.¹⁴⁰ Such an evaluation ultimately turned on the question of whether the sentencing court could apply the modified categorical approach in an effort to determine whether Mr. Mathis had burgled a structure (thereby resulting in a categorical match) or a vehicle (thereby resulting in an overly broad conviction).¹⁴¹ The Supreme Court concluded that because the Iowa statute's reference to structures versus vehicles merely articulated distinct means of committing the crime of burglary (rather than independent elements that must be proven beyond a reasonable doubt), the modified categorical approach did not apply.¹⁴² In so concluding, the Supreme Court provided additional step-by-step instructions for evaluating when the modified categorical approach does or does not apply (i.e., instructions for determining whether a disjunctive list identifies elements or means).¹⁴³ In providing these instructions, the Court noted that, although documents from the record of conviction will often be essential to resolving the elements or means question, "such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy 'Taylor's demand for certainty' when determining whether a defendant was convicted of a generic offense."¹⁴⁴

The prediction in *Mathis* that not all records of conviction will provide absolute clarity regarding the application of the categorical approach has proved all too prescient. For example, in *Kirkland v. United States*,¹⁴⁵ the Seventh Circuit was confronted with a record that failed to resolve the question of whether a defendant's prior convictions occurred simultaneously (thus not constituting distinct convictions for sentencing purposes) or occurred on separate occasions (thus rendering each independently applicable to the sentencing scheme).¹⁴⁶ In the face of such an inconclusive factual record, the Seventh Circuit concluded, "we believe that an ambiguous record regarding whether a defendant actually had the opportunity 'to cease and desist or withdraw from his criminal activity' does not suffice to support the [Armed Career Criminal Act (ACCA)] enhancement."¹⁴⁷

Indeed, the Tenth Circuit itself has reflected on *Taylor's* "demand for certainty" when applying the categorical approach in the criminal-sentencing context. In *United States v. Huizar*,¹⁴⁸ for example, the court

140. *Id.* at 2247–48.

141. *Id.* at 2253.

142. *See id.*

143. *Id.* at 2256–57; *see also* Sharpless, *supra* note 10, at 1279–80 (engaging in a thorough and critical review of the Court's application of the categorical approach in *Mathis*).

144. *Mathis*, 136 S. Ct. at 2257 (quoting *Shepard v. United States*, 544 U.S. 13, 21 (2005)).

145. 687 F.3d 878 (7th Cir. 2012).

146. *Id.* at 882–83.

147. *Id.* at 895 (quoting *United States v. Hudspeth*, 42 F.3d 1015, 1021 (7th Cir. 1994)).

148. 688 F.3d 1193 (10th Cir. 2012).

discussed the implications of a record of conviction with “dueling possibilities,” whereby the defendant’s conviction might have been predicated on elements that trigger a sentencing enhancement but also might not have.¹⁴⁹ There, the *Huizar* court noted that when the only evidence available regarding what a defendant was convicted of is a charging document that “does not necessarily show” that the defendant committed the applicable generic crime, such a record is insufficiently certain and a sentencing enhancement cannot be applied.¹⁵⁰

And, in *United States v. Degeare*,¹⁵¹ the Tenth Circuit queried whether Mr. Degeare’s two prior convictions for forcible sodomy constituted violent felonies sufficient to trigger sentence enhancement.¹⁵² Essential to a determination of that question was whether the statute under which Mr. Degeare’s sodomy convictions occurred was divisible.¹⁵³ Ultimately, however, the court was unable to determine with certainty whether that statute was “necessarily” divisible.¹⁵⁴ As the court discussed, if “[the] ‘record materials’ don’t ‘speak plainly,’” then “we will be unable ‘to satisfy *Taylor [v. United States]*’s demand for certainty,” and “in the absence of such certainty, we can’t treat an offender’s prior conviction as an ACCA predicate.”¹⁵⁵ “In other words, unless we are certain that a statute’s alternatives are elements rather than means, the statute isn’t divisible and we must eschew the modified categorical approach.”¹⁵⁶

Additionally, the First Circuit’s precedent on the issue of the categorical approach’s implicit demand for certainty is particularly helpful in understanding why an application of the modified categorical approach does not change that demand. In *United States v. Fish*,¹⁵⁷ for example, the First Circuit evaluated whether Mr. Fish’s prior conviction for, among other things, assault and battery with a deadly weapon (ABDW), constituted a violent offense.¹⁵⁸ In its determination of that question, the First Circuit engaged in a hypothetical inquiry whereby the ABDW statute consisted of two subsections, the first of which clearly constituted a violent offense and the second of which did not.¹⁵⁹ The court noted that, in such a scenario, should the defendant’s record of conviction provide “no indication as to whether the charge was under a particular subdivision, *one would have to assume* that the conviction might have taken

149. *Id.* at 1196–97.

150. *Id.*

151. 884 F.3d 1241 (10th Cir. 2018).

152. *Id.* at 1245.

153. *Id.* at 1245–48.

154. *Id.* at 1258 (quoting *United States v. Titties*, 852 F.3d 1257, 1268 (10th Cir. 2017)).

155. *Id.* at 1249, 1254 (quoting *Mathis v. United States*, 136 S. Ct. 2243, 2257 (2016)).

156. *Id.* at 1248.

157. 758 F.3d 1 (1st Cir. 2014).

158. *Id.* at 4–5.

159. *Id.* at 15.

place under part (2),” because “[o]nly the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant.”¹⁶⁰

Later, the First Circuit’s hypothetical came to life in *Villanueva v. Holder*.¹⁶¹ There, the inquiry was whether Mr. Villanueva’s conviction for third-degree assault in Connecticut constituted a crime of violence aggravated felony, thereby precluding him from eligibility for TPS.¹⁶² The statute under which Mr. Villanueva was convicted, however, was overly broad because at least two subsections contained mens rea elements insufficient to constitute crimes of violence.¹⁶³ Still, the Government argued, by applying the modified categorical approach, one could determine that Mr. Villanueva’s conviction occurred under a subsection that did, in fact, constitute a crime of violence.¹⁶⁴ As the First Circuit noted, however, Mr. Villanueva’s record of conviction did not establish which prong of the statute his conviction fell under.¹⁶⁵ Due to the inconclusive nature of that record, the court determined that it “*must discard the modified categorical approach* and determine whether *all* of the alternative means of committing the predicate crime fit within the federal definition of the generic offense.”¹⁶⁶ And, ultimately, because the Connecticut statute writ large did not categorically constitute a crime of violence aggravated felony, Mr. Villanueva’s conviction did not preclude him from establishing eligibility for TPS.¹⁶⁷

The First Circuit’s discussion of the modified categorical approach in *Villanueva* provides a helpful framework for understanding that the modified categorical approach serves as an on- and off-ramp that only temporarily takes adjudicators away from the legal question posed by the categorical approach. In other words, if taking the off-ramp to the modified categorical approach for the purpose of resolving the factual inquiry regarding what subsection a criminal defendant was convicted of in a divisible statute is inconclusive, one must then “discard” the modified categorical approach and take the on-ramp back to the categorical approach.¹⁶⁸ This is true because, regardless of whether the modified categorical approach provides clarity about the specific set of elements im-

160. *Id.* at 15 (emphasis added) (quoting *Aguiar v. Gonzalez*, 438 F.3d 86, 89 (1st Cir. 2006)).

161. 784 F.3d 51 (1st Cir. 2015).

162. *Id.* at 52–53.

163. *Id.* at 54–55.

164. *Id.* at 55.

165. *Id.*

166. *Id.* at 54 (first emphasis added).

167. *Id.* at 56.

168. *See also* *Descamps v. United States*, 570 U.S. 254, 260, 263–64 (2013) (“[T]he modified 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.” Furthermore, the modified categorical approach is used “only to assess whether the plea was to the version of the crime . . . corresponding to the generic offense.” “Applied in that way—which is the only way we have ever allowed—the modified approach merely helps implement the categorical approach when a defendant was convicted of violating a divisible statute. The modified approach thus acts not as an exception, but instead as a tool.”).

plicated in an individual's conviction, one must still resolve the fundamental legal question of whether the conviction is a categorical match to the pertinent generic crime. And, if the modified categorical approach cannot meet *Taylor's* demand for certainty on that point, then one must presume that the whole statute applies and that the defendant was convicted of the minimum conduct proscribed by that statute.

These cases reveal that a holistic reading of federal precedent regarding the categorical approach—grounded in the Supreme Court's original language in *Taylor* and *Shepard*—makes clear that: (1) the categorical inquiry is a legal one, which must result in a yes or no answer; (2) within that legal inquiry there is a presumption that a noncitizen's conviction rested upon nothing more than the least of the acts criminalized (and thus an ambiguous record of conviction fails to rebut that presumption); and (3) the modified categorical approach constitutes only a brief departure from the categorical approach itself and, even if the modified categorical approach is inconclusive, the categorical inquiry must still proceed.

The Tenth Circuit's analysis in *Lucio-Rayos*, however, is fundamentally incompatible with those conclusions in a number of ways. First, *Lucio-Rayos* frames the inquiry at issue as “a question of fact or at least a question of law and fact.”¹⁶⁹ Although it is undeniably true that the inquiry into what a noncitizen was convicted of is a question of fact, such an inquiry is simply one step within the greater legal question regarding whether the noncitizen's conviction is or is not a categorical match to the pertinent generic crime. And, regardless of how that factual question is answered, *Taylor's* “demand for certainty” still applies.¹⁷⁰ Accordingly, one cannot answer the question of whether a respondent's criminal conviction constitutes a match to the generic crime with a “maybe”—as is the result in *Lucio-Rayos*—and still abide by the categorical approach as articulated by the Supreme Court.

Second, *Lucio-Rayos* flips the *Moncrieffe* presumption, that a conviction rested on the least of the acts proscribed, on its head. Per *Moncrieffe*, in the face of a conviction that may or may not be a match to the generic crime at issue, we “must presume that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized.”¹⁷¹ Per *Lucio-Rayos*, however, in the face of an inconclusive criminal record of a conviction that may or may not be a match to the generic crime at issue, a noncitizen is precluded from establishing eligibility for relief.¹⁷² Therefore, in such a scenario, the court has effectively presumed that the

169. *Lucio-Rayos v. Sessions*, 875 F.3d 573, 583 (10th Cir. 2017), *petition for cert. filed sub nom. Lucio-Rayos v. Whitaker* (U.S. July 12, 2018) (No. 18-64).

170. *Shepard v. United States*, 544 U.S. 13, 20–21 (2005).

171. *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013) (alteration in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)).

172. *Lucio-Rayos*, 875 F.3d at 583–84.

noncitizen was convicted of the overly broad conduct, rather than the least of the acts criminalized.

Due to these tensions, the reasoning in *Lucio-Rayos*, and other circuit court cases reaching similar conclusions, cannot be reconciled with over two decades of clear Supreme Court and federal precedent applying the categorical approach in both the criminal and immigration contexts.

C. Policy Considerations

Beyond the legal tensions between *Lucio-Rayos* and the Supreme Court's precedent on the categorical approach, the equity and policy implications of *Lucio-Rayos* also clash with those that underpinned the creation of the categorical approach in *Taylor*.

For example, one of the primary bases for utilizing the categorical approach in the first place, in both the criminal and immigration court contexts, has been the judiciary's desire to create consistent and predictable outcomes across cases and individuals. As the Supreme Court reflected in *Mathis*, within federal criminal-sentencing proceedings it is "impermissible for 'a particular crime [to] sometimes count towards enhancement and sometimes not, depending on the facts of the case.'"¹⁷³ The Court reiterated that notion in *Descamps*, stating that

Congress made a deliberate decision to treat every conviction of a crime in the same manner: During the lengthy debate preceding the statute's enactment, 'no one suggested that a particular crime might sometimes count towards enhancement and sometimes not, depending on the facts of the case.' Congress instead meant ACCA to serve as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none.¹⁷⁴

And, as the Supreme Court noted in *Mellouli*, "[b]y focusing on the legal question of what a conviction necessarily established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law."¹⁷⁵

The legal regime created in *Lucio-Rayos*, however, fundamentally undermines that goal of creating consistency and predictability. Based on that regime, it will be all too common for two respondents with convictions under the same statutory provision to attain distinct results when attempting to establish eligibility for relief from removal. Take, for ex-

173. *Mathis v. United States*, 136 S. Ct. 2243, 2251 (2016) (alteration in original) (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990)).

174. *Descamps v. United States*, 570 U.S. 254, 268 (2013) (citation omitted) (quoting *Taylor v. United States*, 495 U.S. 575, 601 (1990)).

175. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015); see also Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 296–98 (2012) (discussing the practical benefits of the categorical approach for noncitizens facing criminal charges that may subject them to removal).

ample, the statute at issue in *Lucio-Rayos*. It is easy to imagine a scenario whereby two individuals (A and B) both agree to enter guilty pleas for theft under Municipal Code WMC 6-3-1(A) subsection (4), which, as the Tenth Circuit concluded, is not a CIMT.¹⁷⁶ For Individual A, the public defender ensured that the plea colloquy explicitly referenced subsection 4 and that colloquy is entered into the record during Individual A's removal proceedings. Thus, Individual A can establish eligibility for relief on that aspect of an application for, perhaps, cancellation of removal. For Individual B, however, due to clerical errors, none of the documents in the record of conviction establish that Individual B specifically pled guilty to subsection 4. Rather, the record merely indicates that he was convicted under WMC 6-3-1(A), which contains subsections, besides subsection 4, that constitute CIMTs. Accordingly, Individual B cannot establish eligibility for relief and will likely be deported.¹⁷⁷

In such a scenario, per *Lucio-Rayos*, a guilty plea to the exact same statutory provision will be sufficient to establish a noncitizen's eligibility for relief from removal in some circumstances while fundamentally precluding a noncitizen from establishing eligibility for relief in other circumstances. Congress cannot have intended such an arbitrary result.

Furthermore, in addition to undermining the congressional goal of creating consistency across cases and individuals,¹⁷⁸ *Lucio-Rayos* has concerning practical implications. Because noncitizens' ability to establish eligibility for relief will fundamentally be predicated on the quality of record documents that exist in their criminal case, those individuals who can pay for the best possible criminal defense attorneys will likely benefit from such an attorney's knowledge about the necessity of establishing a clear record of conviction for future potential immigration cases. By contrast, an individual who is, for example, represented by a public defender in an overburdened office with little experience in immigration law, will likely suffer the negative consequences of a harried or incomplete record. The *Lucio-Rayos* court's willingness to allow the categorical approach to be so fundamentally undermined by practical inequalities flies in the face of congressional intent.

Ultimately, therefore, the Tenth Circuit's decision in *Lucio-Rayos*: (1) is legally incompatible with the categorical approach regime as established by Supreme Court precedent, (2) undermines Congress's intent to create consistent and predictable outcomes, and (3) has concerning practical implications for how the categorical approach will function across courts and between individuals.

176. *Id.* at 578.

177. *See also* Rich, *supra* note 8, at 7–11 (engaging in a similar hypothetical and fleshing out, in more detail, the likely practical implications of an ambiguous record of conviction in removal proceedings).

178. *See Descamps*, 570 U.S. at 268.

Furthermore, any concerns that reaching the opposite result in *Lucio-Rayos* fundamentally undermines Congress's clear and unambiguous intent to place the burden for establishing eligibility on the noncitizen's shoulders are misplaced. As discussed above, the categorical inquiry is a legal question that does not implicate the issue of who carries the burden of proof.¹⁷⁹ Accordingly, using such inconclusive records to answer that legal question does not allow the noncitizen to side-step any aspects of the burden of proof enacted by Congress. To the contrary, this result properly focuses Congress's articulated burden of proof on factual inquiries such as, in the case of cancellation of removal for nonpermanent residents, length of continuous residence and whether an applicant's qualifying family member would suffer exceptional and extremely unusual hardship.¹⁸⁰

Even if one were to conclude that Congress intended courts to require a noncitizen to carry the burden of proof in every aspect of a noncitizen's application for relief—including the legal question about whether a noncitizen's conviction constitutes a disqualifying crime—the noncitizen still meets his burden of proof by presenting an inconclusive record regarding an overly broad statute. In the face of that uncertainty, the presumption regarding the least of the acts criminalized kicks in to resolve the question.

Finally, allowing noncitizens to use inconclusive records of conviction to establish eligibility for relief is the only way we can harmonize Congress's intent that criminal convictions must consistently implicate certain outcomes in immigration proceedings with Congress's intent regarding burdens of proof. As precedent currently stands in the Tenth Circuit, no such harmony exists. The Tenth Circuit's decision in *Lucio-Rayos* has effectively swept decades of Supreme Court precedent clearly indicating that (1) the categorical approach must result in certainty and (2) such certainty must ultimately align with a presumption that individuals were convicted of the least of the acts criminalized, under the rug.

IV. A CONCERNING FORK IN THE ROAD

As discussed above, the Tenth Circuit's opinion in *Lucio-Rayos*, and the parallel opinions from various other circuit courts do not comport with: (1) the legal principles established throughout categorical approach precedent, (2) the congressional intent articulated throughout the INA, or (3) practical notions of fairness and consistency.¹⁸¹

Beyond the immediate precedential and practical implications of the Tenth Circuit's erroneous reasoning in *Lucio-Rayos*, there are additional lessons that courts can learn from the legal quandary posed therein. Most

179. See *supra* Section I.A.

180. See 8 U.S.C. § 1229b(b)(1) (2018).

181. See *supra* Part II.

notably, court decisions in this context continue to reinforce the ongoing legal myth that immigration proceedings are purely “civil” in nature. This trend has only convoluted the application of the categorical approach in immigration cases. As referenced above, circuit courts have readily answered the same question at issue here—how to handle the intersection of an ambiguous record and the application of the categorical approach—in the context of criminal-sentencing proceedings.¹⁸² Such courts have consistently answered this question by reaching the opposite conclusion from the Tenth Circuit’s in *Lucio-Rayos*.¹⁸³ How, then, can we reconcile two different outcomes to the same legal question in the criminal and immigration contexts? For several reasons, we cannot.

First, these precedential distinctions between application of the categorical approach in criminal versus immigration cases create a concerning fork in the road where the Supreme Court has never indicated that courts should apply the approach differently in the two contexts. To the contrary, the Supreme Court and federal courts have readily cross-referenced between criminal and immigration cases when discussing the categorical approach, indicating that courts can and should apply the approach interchangeably in both contexts.¹⁸⁴

Second, as the Supreme Court recently noted in its seminal case *Padilla v. Kentucky*,¹⁸⁵ the implications of immigration proceedings are, for many individuals, even more severe than those at issue in criminal proceedings.¹⁸⁶ There, the Court noted that

changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction . . . These changes confirm our view that, as a matter of federal law, deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes.¹⁸⁷

Additionally, the Court noted that,

[a]lthough removal proceedings are civil in nature, deportation is [nevertheless] intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century . . . Thus, we find it “most difficult” to divorce the penalty from the conviction in the deportation context . . .

We too have previously recognized that “[p]reserving the client’s right to remain in the United States may be more important to the cli-

182. See *supra* Section II.B.

183. See, e.g., *United States v. Huizar*, 688 F.3d 1193, 1197 (10th Cir. 2012); *Kirkland v. United States*, 687 F.3d 878, 895 (7th Cir. 2012).

184. See, e.g., *Moncrieffe v. Holder*, 569 U.S. 184, 190–91 (2013).

185. 559 U.S. 356 (2010).

186. *Id.* at 365–66.

187. *Id.* at 364 (footnote omitted).

ent than any potential jail sentence.” Likewise, we have recognized that “preserving the possibility of” discretionary relief from deportation . . . “would have been one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.”¹⁸⁸

Such language provides yet another basis for ensuring that the categorical approach remains consistent throughout criminal and immigration precedent.¹⁸⁹ Because, although noncitizens receive far fewer protections in immigration proceedings, due to their categorization as being “civil” in nature (e.g., there is no right to government-paid appointed counsel),¹⁹⁰ the implications of those proceedings for noncitizens are often severe. At the very least, therefore, we can choose to consistently apply a legal rule, as intended by Congress and as articulated by the Supreme Court almost thirty years ago, in a manner that acknowledges those severe stakes for the individuals the rule was intended to protect.

CONCLUSION

Congress clearly and explicitly placed the burden of establishing eligibility for relief from removal on noncitizens. However, Congress also clearly indicated an intent that criminal convictions trigger the same immigration consequences across jurisdictions and between individuals. The categorical approach is not always the easiest tool for courts to apply, and its application often implicates thorny legal questions, as acutely manifested in *Lucio-Rayos*. However, it has, at a minimum, functioned as a mechanism for courts to: (1) implement Congress’s articulated goal of predicating, for the most part, ineligibility for relief on what a noncitizen was “convicted” of (rather than what acts he committed); and (2) protect individual rights by creating consistency across individuals and jurisdictions.¹⁹¹ And, as discussed above, the categorical approach is not incompatible with courts’ additional goal of preserving Congress’s express requirement that noncitizens carry the burden of proving all factual aspects of their application for relief from removal.¹⁹²

Indeed, allowing noncitizens to rely on inconclusive records of conviction to establish relief from removal is simply giving those individuals the opportunity *to apply* for such relief. Such an application for relief must still successfully fulfill all of Congress’s articulated requirements

188. *Id.* at 365–66, 368 (citations omitted) (first quoting *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982); and then quoting *INS v. St. Cyr*, 533 U.S. 289, 368 (2001)).

189. Although I argue here that it would be to the benefit of noncitizens for criminal and immigration law to mirror one another on this issue, it is important to note that the convergence of immigration and criminal law is, in many other ways, quite concerning. Juliet Stumpf’s article, *The Cimmigration Crisis: Immigrants, Crime, and Sovereign Power*, 56 AM. U. L. REV. 367 (2006), thoughtfully touches on many of those concerns.

190. See 8 U.S.C. § 1229a(b)(4)(A) (2018).

191. See *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986–87 (2015).

192. See *supra* Part III.

including, as exists in almost all applications for relief, a showing that the noncitizen deserves to win as a matter of discretion.¹⁹³ To be sure, an inconclusive record of conviction evaluated under the categorical approach will also be extremely pertinent to an immigration judge's discretionary evaluation of a noncitizen's application for relief. Indeed, the extraordinarily lax rules of evidence in immigration proceedings means that, when it comes to factual matters outside of the categorical approach, DHS can file hearsay documents—like police reports or other witness statements speaking to noncitizens' actual conduct underpinning their criminal conviction (a very concerning practice, discussion of which will be left, however, for another day)—when arguing against noncitizens in court.¹⁹⁴ Accordingly, the implications of a court properly applying the categorical approach to the very limited question of whether respondents' criminal convictions bar them from even applying for relief will often be of minimal significance in terms of whether noncitizens are ultimately meritorious in their effort to remain in the United States.

Ultimately, the legal, policy, and practical considerations discussed above all indicate that the Tenth Circuit's decision in *Lucio-Rayos* was in error. In order to preserve the principles embodied by the categorical approach and to ensure fairness to noncitizen respondents in removal proceedings across the country, the Supreme Court should grant certiorari on this issue and rectify the Tenth Circuit's error.

193. For examples of discretionary relief, see 8 U.S.C. § 1158(a)(1) (2018) (asylum); § 1229b(a) (cancellation of removal for lawful permanent residents); § 1229b(b)(1) (cancellation of removal for non-permanent residents); § 1255(a) (adjustment of status).

194. See Mary Holper, *Confronting Cops in Immigration Court*, 23 WM. & MARY BILL RTS. J. 675, 693, 697–98 (2015).