Nos. 09-71415 and 10-73715

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GABRIEL ALMANZA-ARENAS,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

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

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

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INTRODUCTION

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

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

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

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

BACKGROUND

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

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

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

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

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

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

ARGUMENT

I. THE PANEL DECISION IS CORRECT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

Rehearing en banc is not warranted.

Respectfully submitted,

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March 30, 2015

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

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

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

or

____ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

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CERTIFICATE OF SERVICE

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

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