No.

IN THE

Supreme Court of the United States

RAMON ANDREW WILLIAMS,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration and Nationality Act (INA) creates severe consequences for any noncitizen, including any lawful permanent resident, who is convicted of an offense defined as an "aggravated felony": The noncitizen is both removable and ineligible for discretionary relief from removal. The INA defines "aggravated felony" to encompass various offenses including, relevant here, "an offense relating to … forgery." 8 U.S.C. § 1101(a)(43)(R).

At issue here is whether, under the categorical approach, a state conviction for "false agency endorsement" constitutes an offense "relating to forgery." In *Vizcarra-Ayala v. Mukasey*, the Ninth Circuit held that it does not: False agency endorsement entails the unauthorized use of a *genuine* document, whereas forgery requires a *falsified* document. 514 F.3d 870, 877 (9th Cir. 2008). Before this case, every other circuit's application of § 1101(a)(43)(R) was consistent with the boundaries articulated by the Ninth Circuit. Here, the Third Circuit expressly disagreed with the Ninth Circuit, applying what it called a "looser categorical approach." Pet. App. 8a.

The question presented is whether an indivisible state statute that criminalizes false agency endorsement is categorically "an offense relating to … forgery" and thus an aggravated felony.

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INTRODUCTION

The breadth of the term "aggravated felony" under the INA is a vital issue that this Court has repeatedly confronted. This case turns on the scope of 8 U.S.C. § 1101(a)(43)(R), which defines "aggravated felony" to include "an offense relating to … forgery."

This Court has instructed the lower courts to apply the term "relating to" in the INA with care. *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015). Those words are "broad and indeterminate"—after all, at some level everything is related to everything else. *Id.* at 1990. To avoid such a limitless result, courts must apply a "narrower reading" informed by "context." *Id.* The Third Circuit failed to heed that instruction here—and created a square circuit split—by expanding the words "relating to" in § 1101(a)(43)(R) beyond all sensible limits.

Until now, the lower courts' approach to § 1101(a)(43)(R) was entirely consistent with *Mellouli*. The Ninth Circuit, in particular, gave the statutory language the requisite "narrower reading" informed by "context"—it properly recognized that an offense "relating to" forgery requires either the act of forgery or its end product, a false instrument. *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870, 877 (9th Cir. 2008). That is because a false instrument is the "essential element" of forgery. *Id.* at 875. Thus, *Vizcarra-Ayala* held that the offense typically referred to as "false agency endorsement" does not relate to forgery. Rather, that offense involves the unauthorized use of a *genuine* document—for example, the use of a legiti-

mate corporate check for unapproved personal expenses. Because it does not involve a false document, it falls outside the scope of § 1101(a)(43)(R). *Id.*

The Third Circuit expressly split from the Ninth Circuit in this case and held that false agency endorsement *is* an offense relating to forgery. It did so by reading the words "relating to" far more broadly than any other court has. Under the court's self-described "looser categorical approach" for "relating to" statutes, it is enough for the offense to implicate the same general "concerns" as forgery. In the Third Circuit's view, those "concerns" include not only the falsification of documents—as is necessary to satisfy the elements of forgery—but also any *unauthorized* use of *genuine* documents. The court therefore held that false agency endorsement relates to forgery and is an "aggravated felony" under § 1101(a)(43)(R).

The Third Circuit's decision is exactly what *Mellouli* forbids: a construction of "relating to" that succumbs to indefiniteness, in defiance of statutory context. If an offense that *excludes* false documents relates to one that *requires* them, then § 1101(a)(43)(R) would encompass any criminalized conduct involving any type of document. Neighboring provisions that also use the "relating to" structure would become comparably expansive. That cannot be squared with the remainder of § 1101(a)(43), which uses 21 distinct subparagraphs to place precise limits on the meaning of "aggravated felony"—limits that the "relating to" provisions would obliterate under the Third Circuit's approach. Worse still, the Third Cir-

cuit's standard is unconstitutionally vague under *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson v. United States*, 135 S. Ct. 2551 (2015).

As long as the Third Circuit's decision stands, noncitizens in multiple states are at risk of an improper "aggravated felony" designation. Meanwhile, an intractable circuit conflict regarding the construction of "relating to" statutes will fester, and will continue to generate confusion and disparate results across the country. This state of affairs is all the more intolerable because the consequences of an aggravated felony designation are dire: banishment from this country without the opportunity for discretionary relief. The petition for a writ of certiorari should be granted.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 880 F.3d 100 and reproduced at Pet. App. 1a-19a. The order of the Court of Appeals denying rehearing is reproduced at Pet. App. 63a-64a. The decision of the Board of Immigration Appeals is reproduced at Pet. App. 20a-25a. The decision of the Board of Immigration Appeals denying reconsideration is reproduced at Pet. App. 26a-31a. The decision of the Immigration Judge is reproduced at Pet. App. 32a-62a.

JURISDICTION

The Court of Appeals entered judgment on January 19, 2018. Pet. App. 2a. It denied a timely rehearing petition on May 2, 2018. Pet. App. 64a. Justice Alito granted an extension of time to file a petition for

a writ of certiorari to August 30, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1101(a)(43) is reproduced in full at Pet. App. 65a-69a. The relevant version of Georgia Code § 16-9-1(a) is reproduced at Pet. App. 70a.

STATEMENT OF THE CASE

1. The INA provides that "[a]ny alien who is convicted of an aggravated felony … is deportable," 8 U.S.C. § 1227(a)(2)(A)(iii), and also ineligible for discretionary relief from removal, *id.* § 1229b(a), (b). Section 1101(a)(43) of the INA defines the term "aggravated felony" by listing dozens of generic offenses that qualify as aggravated felonies.

Courts apply the "categorical" approach to determine whether "a state conviction qualifies as an 'aggravated felony.'" *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). That approach requires comparing the elements of the state offense of conviction with the elements of the generic federal offense. *Id.* Only if the state conviction necessarily (i.e., categorically) falls within the ambit of the generic federal offense will it qualify as an aggravated felony, thereby rendering the individual removable. *Id.*; *see Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186-87 (2007).

At issue in this case is the portion of the "aggravated felony" definition encompassing "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered." 8 U.S.C. § 1101(a)(43)(R).

2. Petitioner Ramon Andrew Williams is a lawful permanent resident of the United States. Pet. App. 4a, 38a. He has lived in the United States since he was thirteen months old, when he emigrated from Guyana. Pet. App. 4a, 38a. His parents and siblings are all United States citizens, as are his children. Pet. App. 4a, 38a-39a. He has no family in Guyana. Pet. App. 39a.

In 2005, Williams pleaded guilty under § 16-9-1(a) of the Georgia criminal code. At the time, § 16-9-1(a) provided:

> A person commits the offense of forgery in the first degree when with intent to defraud he knowingly makes, alters, or possesses any writing in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing.

Although this state provision is labeled "Forgery in the first degree," it sweeps far more broadly than traditional forgery, which entails the falsification of a document. In addition, this language embraces—and has been enforced against—a false representation about authority to use a *genuine* document. Pet. App. 10a-11a; *see Warren v. State*, 711 S.E.2d 108 (Ga. Ct. App. 2011). Such conduct is referred to as "false

agency endorsement." *Id.* Williams was convicted, pursuant to his plea, of this broad state offense.[1]

3. Many years later, the government sought to remove Williams under 8 U.S.C. § 1227(a)(2)(A)(iii). It alleged that Williams's Georgia conviction is an "aggravated felony" under subparagraph (R), as an "offense relating to … forgery." The IJ and the BIA agreed. The BIA recognized that false agency endorsement might not relate to forgery. Pet. App. 27a-30a. But it concluded that there was no "realistic probability" that § 16-9-1(a) would be enforced against false agency endorsement. Pet. App. 28a-29a. In the alternative, the BIA held that even if § 16-9-1(a) *did* reach false agency endorsement, the statute was divisible under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and false agency endorsement was not an element of Williams's particular conviction. Pet. App. 29a-30a. The BIA thus concluded that Williams was removable and ineligible to seek discretionary relief from removal. Pet. App. 25a, 30a-31a.

The Third Circuit denied Williams's petition for review. Disagreeing with the BIA, the court acknowledged that Williams's offense of conviction, § 16-9-1(a), *does* encompass "false agency endorsement." Pet. App. 11a-14a. The Third Circuit also treated the statute as indivisible—a point the government conceded.

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[1] Section 16-9-1 has since been amended in ways that are not significant here. It retains the same language covering false agency endorsement. *See* Ga. Code Ann. § 16-9-1(b)-(e) (2018) (criminalizing the use, alteration, or possession of documents "in such manner that the writing as made or altered purports to have been made … by authority of one who did not give such authority").

Pet. App. 7a. Section 16-9-1(a) thus sweeps more broadly than generic forgery. Pet. App. 12a-13a. The court nevertheless concluded that any conduct within the statute's broad sweep qualifies as an offense "*relating to* … forgery." Pet. App. 15a-16a (emphasis added).

To reach this conclusion, the Third Circuit applied its own "looser categorical approach," which "do[es] not require a precise match between the elements of the generic federal crime and those of the Georgia offense," but "[i]nstead … survey[s] the[ir] interrelationship and consider[s] whether there is a logical or causal connection between them." Pet. App. 8a-9a (internal quotation marks omitted). Under this "looser" variant of the categorical approach, the court determined that there was no "causal relationship" between the state law here and the generic federal offense. But it nevertheless found a "logical relationship between common law forgery and false agency endorsement," because in its view, the offenses "give[] rise to essentially the same *concerns*." Pet. App. 13a, 15a-16a (emphasis added).

The court expressly acknowledged that its decision "diverge[d] from" the Ninth Circuit's ruling in *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008). Pet. App. 15a. The Ninth Circuit there held that a state statute encompassing false agency endorsement was *not* an offense relating to forgery under the INA. The Third Circuit explained that "[t]he Ninth Circuit's test for whether a state offense 'relat[es] to … forgery' is more restrictive than [the Third Circuit's], and here, that difference was outcome-determinative." Pet. App. 16a.

REASONS FOR GRANTING THE PETITION

I. This Question Irreconcilably Divides The Courts Of Appeals.

The circuit split regarding § 1101(a)(43) could not be clearer. The Ninth Circuit held in *Vizcarra-Ayala* that an offense does not relate to forgery if (like false agency endorsement) it does not require the act of forgery or its end product, a false instrument. 514 F.3d at 877. For decades, the courts of appeals have uniformly hewed to those sensible limits when applying the statute. *See id.* But the Third Circuit declined to follow suit here, expressly "diverg[ing]" from the Ninth Circuit's reasoning and "ultimate conclusion." Pet. App. 15a.

The Ninth Circuit in *Vizcarra-Ayala* evaluated another state statute that, like the Georgia provision here, criminalized both the use of false documents and false agency endorsement. 514 F.3d at 875-77. The court emphasized that "[f]alsifying the genuineness of a document" is "critical to the offense of forgery." *Id.* at 875. Accordingly, it held that offenses "relate to" forgery only if they require "proof of the basic forgery element … namely, a false instrument." *Id.* at 877. In the Ninth Circuit's view, "[e]xpanding the definition of offenses 'relating to' forgery to include conduct where documents are not altered or falsified"—including false agency endorsement—"stretches the scope too far." *Id.* Where false agency endorsement is concerned, the "underlying wrong is 'not ... forgery, but a breach of trust.'" *United States v. Hunt*, 456 F.3d 1255, 1261 (10th Cir. 2006) (quoting

Abbott v. Rose, 62 Me. 194, 201 (1873)); *see Vizcarra-Ayala*, 514 F.3d at 875 (citing *Hunt*).

The Ninth Circuit's decision thus gave effect to the "relating to" language of § 1101(a)(43)(R) while establishing clear and sensible boundaries: It goes beyond generic forgery only to cover crimes involving a false instrument, including the knowing possession or transfer of forged documents. 514 F.3d at 877. Those crimes are readily identifiable by noncitizens, lawyers, and immigration officials. And they bear a concrete connection to forgery: They seek to "discourage" it "through the criminalization of the use of its end product." *Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073 (9th Cir. 2000).

Until now, other courts of appeals had applied § 1101(a)(43)(R) consistent with the boundaries set by the Ninth Circuit. None had found an offense to be related to forgery (or counterfeiting) in the absence of a forged (or counterfeit) instrument. *See United States v. Villafana*, 577 F. App'x 248, 251-52 (5th Cir. 2014) (unpublished) (finding petitioner's conviction for possession of a forged instrument outside the generic crime of forgery but still related to it); *United States v. Martinez-Gonzalez*, 663 F.3d 1305, 1308-09 (11th Cir. 2011) (holding "the violation of a state law proscribing the possession of a forged document with the intent to defraud is a crime related to forgery" and noting the agreement of the "other circuits considering this question"); *Nwagbo v. Holder*, 571 F.3d 508, 511 (6th Cir. 2009) (finding petitioner's conviction for conspiracy to possess and aiding and abetting the possession of counterfeited obligations of the United States "related to" counterfeiting); *United States v.*

Chavarria-Brito, 526 F.3d 1184, 1186 (8th Cir. 2008) (finding that a conviction for "possession of a false document with the intent to perpetrate a fraud or with the knowledge that his possession was facilitating a fraud" qualified as an aggravated felony because it "related to the false making or material alteration of a document"); *Magasouba v. Mukasey*, 543 F.3d 13, 15 (1st Cir. 2008) (same, with knowing use of good bearing counterfeit mark); *Richards v. Ashcroft*, 400 F.3d 125, 129-30 (2d Cir. 2005) (same, with possession of forged instruments with intent to deceive, defraud, or injure).

The Third Circuit squarely rejected the Ninth Circuit's approach. Here, as in *Vizcarra-Ayala*, a state statute criminalizes both the use of false documents and false agency endorsement. Pet. App. 6a, 9a-11a. The Third Circuit agreed with the Ninth Circuit that generic forgery requires a false instrument—one that is not "genuine." Pet. App. 15a. But it "diverge[d] from [the Ninth Circuit's] ultimate conclusion" by holding that the state offense nonetheless related to forgery. *Id.* In doing so, the Third Circuit did not ask whether the elements of the state offense require proof of a false instrument. Instead, it asked whether the offense and generic forgery address the same types of "concerns." Pet. App. 15a-16a. The Third Circuit did not define the term "concerns," except to make clear that it sweeps more broadly than the statutory elements codified by Congress.

The Third Circuit then concluded, without citing any authority, that generic forgery addresses a wide range of "concerns": not merely the use of "inauthentic[]" documents, as required by its elements, but *any*

"unauthorized" act with respect to even a genuine document. *Id.* The Third Circuit on that basis concluded that the state statute at issue in this case—which criminalizes false agency endorsement—addresses the same concerns as generic forgery, even though false agency endorsement has no connection to a falsified document. *See id.*

The division among the courts of appeals is thus stark and irreconcilable.

II. The Question Presented Is Important And Recurring.

Certiorari is particularly vital in this case because the Third Circuit's ruling hinges on its interpretation of the statutory term "relating to," which appears repeatedly in the INA, is frequently enforced, and has profound consequences.

The government frequently conducts removal proceedings under § 1101(a)(43)(R). That is clear from the numerous decisions on the issue. *Supra* 9-10. And the effect of the Third Circuit's decision extends even more broadly. In addition to § 1101(a)(43)(R), four other definitions of "aggravated felony" use the same "offense relating to" formulation. *See* 8 U.S.C. § 1101(a)(43)(K), (Q), (S)-(T). And they cover common offenses such as obstruction of justice, *id.* § 1101(a)(43)(S), and failing to appear before a court, *id.* § 1101(a)(43)(T).[2]

[2] Enforcement of § 1101(a)(43)'s "relating to" provisions will likely become even more common. The Secretary of Homeland

Moreover, these "relating to" provisions impose some of the "harshest" consequences the INA has to offer. *Torres v. Lynch*, 136 S. Ct. 1619, 1634 (2016) (Sotomayor, J., dissenting); *accord Sessions v. Dimaya*, 138 S. Ct. 1204, 1213 (2018) ("this Court has reiterated that deportation is a particularly severe penalty" (quotation marks omitted)). By rendering a prior conviction an "aggravated felony," they mean that a noncitizen—even a lawful permanent resident; even one who, like Mr. Williams, has spent virtually his entire life in this country—may be deported to a country he doesn't know. 8 U.S.C. § 1227(a)(2)(A)(iii); *see also id.* § 1229b(a)(3) (precluding cancellation of removal). As the Court has previously recognized in the context of the decision whether to enter into a guilty plea, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Padilla v. Kentucky*, 559 U.S. 356, 368 (2010) (quoting *INS v. St. Cyr*, 533 U.S. 289, 322 (2001)).

This case presents an ideal vehicle to resolve the question presented. The Third Circuit analyzed the Ninth Circuit's reasoning in *Vizcarra-Ayala* at length and specified its points of disagreement in detail. And

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Security has been instructed to prioritize removal of non-citizens convicted of aggravated felonies and other criminal offenses. *See* Exec. Order No. 13,768 § 5, 82 Fed. Reg. 8,799 (Jan. 25, 2017); *see also* U.S. Immigration and Customs Enforcement, *Fiscal Year 2017 ICE Enforcement & Removal Ops. Rpt.* (Dec. 13, 2017), https://tinyurl.com/y9h9fosd (detailing elevated level of enforcement of immigration and removal-related offenses as compared with Fiscal Year 2016, including a 12% increase in arrests of non-citizens suspected of criminal offenses).

as the Third Circuit expressly acknowledged, its decision turned squarely on this issue: Its departure from the Ninth Circuit's reading of § 1101(a)(43)(R) was "outcome-determinative." Pet. App. 16a. That is because here—unlike in many removal proceedings where the government asserts multiple bases for removal—§ 1101(a)(43)(R) is the only alleged ground for removal. If this Court grants certiorari, therefore, its decision will dictate whether Williams's prior conviction qualifies as an aggravated felony and accordingly authorizes Williams's mandatory removal from the United States.

III. The Third Circuit's Ruling Conflicts With This Court's Precedents.

Review is further warranted because the Third Circuit's analysis is irreconcilable with this Court's precedents. The Third Circuit's "looser categorical approach" calls upon judges to identify the generalized "concerns" underlying a state criminal offense and a generic federal offense to determine whether and to what extent those "concerns" overlap. That approach is flatly contrary to *Mellouli*, in which the Court endorsed a narrower construction of the INA's "relating to" language that is properly grounded in statutory text and context. *Infra* § III.A. It also raises grave vagueness concerns under *Dimaya* and *Johnson*, which condemned the very sort of "judge-imagined abstraction" that the Third Circuit now requires. *Infra* § III.B.

A. The Third Circuit's "looser categorical approach" conflicts with *Mellouli*.

1. This Court has recently interpreted the term "relating to" in the INA. *Mellouli* construed 8 U.S.C. § 1227(a)(2)(B)(i), which renders removable a noncitizen "convicted of a violation of ... any law ... *relating to* a controlled substance (as defined in section 802 of title 21)." Everyone in that case agreed that the statute covers offenses that necessarily involve a federally controlled substance or its paraphernalia—just as everyone agrees here that § 1101(a)(43)(R)'s "relating to … forgery" language covers offenses necessarily involving a forgery or a false document. And like here, the government in *Mellouli* sought to go further. It argued that the phrase "relating to" expanded the provision beyond offenses involving the federally controlled substances referenced in the statute to also cover offenses involving a state-controlled drug. 135 S. Ct. at 1989.

Seven Justices rejected the argument. The words "relating to" are "broad and indeterminate." *Id.* at 1990 (quotation marks and alterations omitted). If those words were "extended to the furthest stretch of their indeterminacy," the Court warned, they would "stop nowhere." *Id*. "[C]ontext," therefore, "tug[ged] in favor of a narrower reading": The words "relating to" instead require "a *direct link* between an alien's crime of conviction and a particular federally controlled drug." *Id.* (emphasis added; quotation marks omitted). Thus, an offense of conviction relates to a federally controlled substance under § 1227(a)(2)(B)(i) only

if the government could necessarily "connect an element" of the state offense to such a substance. *Id.* at 1991.

The Court explained that this construction properly gives effect to the words "relating to"—it means that any state offense necessarily involving a federally controlled substance would qualify, regardless of whether it criminalizes possession, distribution, or some other type of conduct. In addition, this interpretation is "faithful to the text" because it honors Congress's express reference to federally controlled substances. *Id.* at 1990. And it is simple and straightforward to administer: A state offense that does not necessarily involve the sort of "controlled substance" referenced in the statutory text would not qualify as a drug crime under this INA provision. For instance, a hazily defined "general relation" between the state offense of conviction and a federally controlled substance would not suffice. *Id.*[3]

2. The Third Circuit's approach is flatly contrary to *Mellouli*.

[3] This Court has likewise relied on statutory context to limit other prepositional phrases in immigration statutes that similarly would be indeterminate in isolation. *See Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018) ("the word 'under' is a chameleon that must draw its meaning from its context" (brackets and quotation marks omitted)); *Jennings v. Rodriguez*, 138 S. Ct. 830, 840 (2018) ("when confronted with capacious phrases like 'arising from,' we have eschewed 'uncritical literalism' leading to results that 'no sensible person could have intended'" (quoting *Gobeille v. Liberty Mut. Ins. Co.*, 136 S. Ct. 936, 943 (2016)).

First, the Third Circuit's interpretation of "relating to" is not "faithful to the text" of the INA. *Id.* at 1990. Under *Mellouli*, the phrase "relating to" requires a "direct link" between the offense of conviction and whatever object is modified by the words "relating to"—there, "controlled substance"; here, "forgery." A court must apply the categorical approach to determine whether such a link exists. *Id.* at 1989. The Third Circuit, by contrast, holds that the words "relating to" require only some "logical or causal connection." Pet. App. 9a. And, to determine whether this connection exists, the Third Circuit would have a court apply its "looser categorical approach," which compares not the elements of the state and generic offenses, but rather their underlying "concerns." Pet. App. 15a-16a.

This difference in approach is not just semantic. Indeed, the Third Circuit's approach would have led to a different outcome in *Mellouli*. Applying that approach, a court would consider whether a state-controlled drug and federally-controlled drug present similar "concerns." Which of course they would—every controlled substance reflects a legislative judgment that a substance poses a risk to public health and safety. Thus, under the Third Circuit's "looser" approach, these common concerns would create enough of a link between an offense involving a state-controlled substance and one involving a federally-controlled substance for the state offense to provide a basis for removal. This is precisely the logic *Mellouli* rejected when it said that a "general relation" is insufficient to satisfy the INA's "relating to" standard. 135 S. Ct. at 1990. That same understanding of "relating to" should apply here. *See Pereira v. Sessions*,

138 S. Ct. 2105, 2115 (2018) ("it is a normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning").

Second, the Third Circuit ignored *Mellouli*'s instruction to pay attention to statutory "[c]ontext." 135 S. Ct. at 1990. *Mellouli* cautioned that "[s]tatutes should be interpreted as a symmetrical and coherent regulatory scheme." *Id.* at 1989 (quotation marks omitted). Section 1101(a)(43) requires particular attentiveness in this regard, because—in direct odds with a boundless "relating to" standard—it is conspicuous for the ways in which it is carefully drawn and finely reticulated. It defines "aggravated felony" using *21* distinct subparagraphs, many with their own additional sub-parts. Section 1101(a)(43)(M)(i), for example, covers an offense that "involves fraud or deceit"—but only if "the loss to the victim or victims exceeds $10,000." By adding that loss requirement, Congress ensured that only the most serious fraud and deceit offenses would trigger the draconian repercussions of an "aggravated felony" designation. *See Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017) (noting the heightened seriousness of aggravated felonies). Neighboring provisions are similarly precise and cabined, often referring to specific offenses defined elsewhere in the U.S. Code. *See, e.g.*, 8 U.S.C. § 1101(a)(43)(M)(ii) (covering an offense "described in section 7201 of title 26" in which "revenue loss to the Government exceeds $10,000").

The importance of those limitations—and the ways in which the Third Circuit's interpretation would render them a nullity—is vividly illustrated by

this very case. Recall that here, the Third Circuit determined that the unauthorized use of a genuine document is an "offense relating to … forgery." To use a genuine document without authority is simply to use it fraudulently or deceitfully. But as noted above, there is a different provision, § 1101(a)(43)(M)(i), that already specifically addresses offenses involving "fraud or deceit"—and does so subject to a $10,000 loss requirement that § 1101(a)(43)(R) does not impose. Thus, the practical effect of the Third Circuit's approach is to permit the government to recharacterize fraud and deceit offenses involving the unauthorized use of a document as offenses "relating to ... forgery" under § 1101(a)(43)(R)—thereby circumventing § 1101(a)(43)(M)(i)'s explicit loss requirement. And these problems are only multiplied when the Third Circuit's decision is applied to other "relating to" provisions. *See* 8 U.S.C. § 1101(a)(43)(K)(i), (Q), (S)-(T).

In short, the Third Circuit's interpretation of "relating to" makes a hash of Congress's careful line-drawing.

B. The Third Circuit's "looser categorical approach" renders the INA's "relating to" provisions unconstitutionally vague under *Dimaya* and *Johnson*.

The Third Circuit's construction of "relating to" also renders § 1101(a)(43)(R) unconstitutionally vague. Under *Dimaya* and *Johnson*, a noncitizen cannot be removed on the basis of a statute "so vague that it fails to give ordinary people fair notice of the con-

duct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556; *see Dimaya*, 138 S. Ct. at 1212-13; *id.* at 1228-29 (Gorsuch, J., concurring). The Third Circuit's construction of the INA runs headlong into that constitutional principle.

Dimaya invalidated a different statute used to define an "aggravated felony" under the INA. That statute—18 U.S.C. § 16(b), incorporated into the INA via 8 U.S.C. § 1101(a)(43)(F)—defined the term "crime of violence" to include an offense "that, by its nature, involves a substantial risk [of] physical force." 138 S. Ct. at 1211. To apply this statute, judges had to imagine the "ordinary case" of an offense—the conduct that typically *accompanies* the elements of an offense involving force, but that is not necessary to satisfy them. *Id.* at 1214. Yet the statute provided no "reliable" guidance for that "judge-imagined abstraction." *Id.* at 1214, 1216. As a result, noncitizens could not predict which offenses would be covered by the statute, and immigration officials had too much leeway for arbitrary enforcement. *Id.* at 1223. The statute was therefore unconstitutionally vague, as was a similar provision, 18 U.S.C. § 924(e)(2)(B), that the Court struck down in *Johnson*.

The Third Circuit's "loose[]" construction of "relating to" in § 1101(a)(43)(R) generates the same constitutional problem. Like the statutes in *Dimaya* and *Johnson*, the "relating to" provision here (as construed by the Third Circuit) hinges on a "judge-imagined abstraction": articulating and comparing the underlying "concerns" that motivated state legislators to enact § 16-9-1 on the one hand, and that underlie

generic forgery on the other. And, just like the statutes in *Dimaya* and *Johnson*, § 1101(a)(43)(R) provides no guidance how to identify such concerns. Which authorities should judges consult to uncover the concerns animating distinct criminal offenses? What level of generality should they aim for? And consider the noncitizen contemplating a plea offer and the possible immigration consequences of a criminal conviction—how would he even begin to discern the underpinnings of distinct state and federal offenses, and to assess whether and to what extent they address sufficiently congruent "concerns"? The Third Circuit does not say.

At the very least, the Third Circuit's construction raises "grave and doubtful constitutional questions" under the Due Process Clause. *Jones v. United States*, 529 U.S. 848, 857 (2000) (quoting *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). Where a statute "is susceptible" to an alternative construction by which "such questions are avoided, [a court's] duty is to adopt the latter." *Id.* *Mellouli* and *Vizcarra-Ayala* offer just such an alternative. That reading gives appropriate meaning to the words "relating to" by construing them to go beyond the "core offense" of forgery to include "ancillary" conduct like trafficking or possession of a forged document. *Supra* 8-9; *Vizcarra-Ayala*, 514 F.3d at 877. But it avoids serious constitutional problems by retaining a vital grounding in statutory text and precluding a reading of "relating to" that requires no direct link to the underlying generic offense. This Court should grant certiorari to correct an error of constitutional dimension.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

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