No. 18-273

IN THE

Supreme Court of the United States

RAMON ANDREW WILLIAMS,

Petitioner,

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Third Circuit gave 8 U.S.C. § 1101(a)(43)(R) an unprecedented, nearly boundless construction. Under it, a state offense "relates to" forgery so long as the two crimes merely implicate the same general "concerns"—whatever that means—even if the state offense doesn't require a forged instrument. That reading expressly rejects the Ninth Circuit's decision in *Vizcarra-Ayala v. Mukasey*, 514 F.3d 870 (9th Cir. 2008), which placed appropriate limits on the meaning of "relating to" in § 1101(a)(43)(R). It clashes with *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), which placed comparable limits on "relating to" in a neighboring provision of the INA. It creates serious vagueness concerns under *Sessions v. Dimaya,* 138 S. Ct. 1204 (2018) and *Johnson v. United States,* 135 S. Ct. 2551 (2015). And it thereby stretches the definition of "aggravated felony"—a term with dire consequences for noncitizens—far beyond the limits Congress imposed.

The government's arguments against review do not withstand scrutiny. It recasts the square and acknowledged circuit split as a "minor disagreement." It doesn't even contest that the question presented is important and recurring. And ultimately, its treatment of *Mellouli*, *Dimaya*, and *Johnson* would do serious violence to those precedents. For all of these reasons, the petition should be granted.

I. The Circuit Split Is Square And Explicit.

A. The division of authority concerning § 1101(a)(43)(R) is as clear as they come. In *Vizcarra-*

Ayala, the Ninth Circuit read the phrase "relating to … forgery" to encompass only offenses that categorically require forgery or its end product, "a false instrument." 514 F.3d at 875-77. The Ninth Circuit's interpretation properly excludes false agency endorsement, in which the offender misrepresents her authority to use a *genuine* document. *Id.* at 877. In the decision below, the Third Circuit rejected that interpretation. It expressly "diverge[d]" from the Ninth Circuit's reading, which it called unduly "restrictive." Pet. App. 15a-16a. The Third Circuit construed "relating to … forgery" to cover *any* offense that raises the same general "concerns" as forgery, regardless of whether the offense requires a false instrument. Pet. 10-11; Pet. App. 12a-13a.

This disagreement was, according to the Third Circuit itself, "outcome-determinative." Pet. App. 16a. Mr. Williams' offense of conviction, Georgia Code Ann. § 16-9-1(b) (2003), covers false agency endorsement as well as common-law forgery. Pet. 5-6. Thus, in the Ninth Circuit, Mr. Williams is not removable because his offense of conviction does not categorically "relate to" forgery. But in the Third Circuit, the opposite is true, and he is removable as an aggravated felon. No other court has gone as far as the Third Circuit did here. Pet. 9-10.

B. Given the Third Circuit's acknowledgment of the conflict, the government is left to minimize it.

First, it suggests that the split matters less because *Vizcarra-Ayala* "concerned a materially different [California] statute" that "sweeps more broadly" than the Georgia statute. Opp. 14; *see id.* 8, 15-17.

Specifically, it says that the California statute additionally criminalizes the act of knowingly endorsing a check intended for someone else, without altering the payee. Opp. 15. But that's just like false agency endorsement; in both cases, the crime is committed when the defendant misrepresents that she has the payor's permission to collect on a *genuine* document. *See Vizcarra-Ayala*, 514 F.3d at 876. Most importantly, nothing about the legal rule announced in *Vizcarra-Ayala*—the rule the decision below rejected—turned on any such distinction.

Even if there were some such minor difference at the margins, what matters is that the California and Georgia statutes both undisputedly cover crimes that involve genuine rather than forged documents, including false agency endorsement. Both statutes thus implicate the federal question giving rise to the circuit split: whether the term "relating to … forgery" in § 1101(a)(43)(R) is properly confined to offenses involving forgery's core element, a false instrument. It would be very strange if minor differences in state statutes prevented the Court from reviewing square and acknowledged conflicts on questions of federal law. On the contrary, the Court repeatedly has thought it appropriate to review cases like *United States v. Stitt*, 139 S. Ct. 399, 403-05 (2018), and *Moncrieffe v. Holder*, 569 U.S. 184, 190 n.3 (2013),

which resolved conflicts emerging from convictions under differing state statutes.[1]

Second, the government suggests that the Third and Ninth Circuits actually *agree*—subject only to a "minor disagreement"—because they both read § 1101(a)(43)(R) to "reach more than merely generic forgery." Opp. 18; *see id.* at 9-10. But of course the statute reaches *something* more than generic forgery; otherwise, the parties wouldn't have been litigating the meaning of "relating to." The courts disagree fundamentally, however, about *how much* more those words add. Indeed, they even disagree about how to answer the question: The Third Circuit applies a "looser categorical approach" focused on "concerns," Pet. App. 15a-16a, while the Ninth Circuit requires the presence of the "core" element of the generic offense, *Vizcarra-Ayala*, 514 F.3d at 877. That is not a "shallow divergence," Opp. 18; it is a key disconnect about what this statute means and how to interpret other such statutes.

Third, the government suggests that the circuit split isn't even implicated—its theory being that, under the Model Penal Code, forgery *simpliciter* encompasses false agency endorsement, so the scope of "relating to" doesn't even matter. But that's not what

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[1] For the same reason, it is beside the point that no other court has applied § 1101(a)(43)(R) to Georgia's statute in particular, as opposed to another state statute that works just like it. Opp. 16-17. The Third Circuit itself explicitly found that the Ninth Circuit, confronting Georgia's forgery statute, would reach a different conclusion. Pet. App. 15a.

the Third Circuit thought when it found that the generic offense of forgery *does not* include false agency endorsement, and then moved on to the "relating to" question where it expressly departed from the Ninth Circuit. Presumably that's because the government didn't even make this argument below; rather, it merely argued that the Model Penal Code should inform the "relating to" inquiry. Pet. App. 14a (describing the government's argument). It's far too late to make the argument here for the first time. Notably, moreover, on this question the Third and Ninth Circuits agree—the government is wrong.[2] Both courts considered the "minority" approach that the government attributes to the Model Penal Code, Pet. App. 14a, and neither was persuaded that it supplies the generic version of forgery. This and other courts have held likewise. *E.g.*, *Gilbert v. United States*, 370 U.S. 650, 657-58 (1962) ("'forge' … should not be taken to include an agency endors[e]ment"); *United States v. Hunt*, 456 F.3d 1255, 1264 (10th Cir. 2006) (forgery "does not extend to an agent's false assertion of authority"). It speaks volumes that the government feels the need to defend the decision below on the basis of an argument it didn't make and no court has adopted.

Finally, the government urges the Court to leave the circuit split intact because the BIA "has yet to ad-

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[2] *See* Pet. App. 12a (holding that the "elements" of "common law forgery and false agency endorsement … do not line up with precision"); *Vizcarra-Ayala*, 514 F.3d at 875-76 ("forgery requires the falsification of a document or instrument," and so does not include "use of a genuine instrument with intent to defraud").

dress the question presented." Opp. 18. This has matters backwards. "It is emphatically the province and duty of the judicial department"—not an Article I administrative tribunal—"to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Moreover, even if the BIA issued a "precedential" decision on this issue (which it has shown no intention of doing), and even if such a decision would command deference (which it should not[3]), it is exceedingly unlikely that both the Third and Ninth Circuits would find the decision reasonable, given how thoroughly those courts have rejected each other's interpretations. So the split will persist regardless. Indeed, *Vizcarra-Ayala* rejected the BIA's interpretation (albeit nonprecedential) of "relating to," despite having recognized that "the BIA's interpretation of the immigration laws is entitled to deference." 514 F.3d at 873-74. The meaning of § 1101(a)(43)(R) has led to a square and acknowledged division of authority, and this Court must resolve it.

II. The Question Presented Is Important And Recurring.

As the petition explains, the meaning of "relating to" in § 1101(a)(43) is an important question that surely will recur. In addition to § 1101(a)(43)(R), that phrase appears in four other provisions that define

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[3] *See Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1028-31 (6th Cir. 2016) (Sutton, J., concurring in part and dissenting in part) (*Chevron* does not apply to the definitions of "aggravated felony" in § 1101(a)(43) because they have criminal applications); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1156 (10th Cir. 2016) (Gorsuch, J., concurring) (citing Judge Sutton's separate opinion in *Esquivel-Quintana*).

"aggravated felony" as an offense "relating to" other generic crimes. 8 U.S.C. § 1101(a)(43)(K), (Q), (S)-(T). These provisions are frequently enforced, and will only be more so following the Third Circuit's decision. Pet. 11. And their consequences are among the harshest the INA has to offer: Virtually certain banishment for life, even for lawful permanent residents like Mr. Williams. Pet. 12. The government does not, and could not, dispute any of those considerations. With such a drastic penalty hanging in the balance, nationwide uniformity is essential, and a circuit split is particularly intolerable.

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

A. The decision below conflicts with *Mellouli*.

The Third Circuit's reading of "relating to" is incompatible with *Mellouli*'s interpretation of the same language. The government's effort to reconcile the decisions, Opp. 12-13, is unpersuasive.

1. As the petition explains (at 14-15), the Court in *Mellouli* interpreted "relating to" in another provision of the INA, § 1227(a)(2)(B)(i), which encompasses offenses "relating to a [federally] controlled substance." This language, the Court held, requires a "direct link" between the "offense" and the object modified by the words "relating to." 135 S. Ct. at 1990; *see* Pet. 14-15. That provision therefore covered only offenses that categorically involve the existence of a federally controlled substance—using, trafficking in, and possessing paraphernalia for federally controlled drugs—

but not offenses that involve a *state*-controlled substance. 135 S. Ct. at 1990; Pet. 16-17. The words "relating to" require a more immediate connection.

The same words require a comparably "direct link" in § 1101(a)(43)(R). The Third Circuit defied *Mellouli* when it expanded § 1101(a)(43)(R) to cover any offense that reflects the same general "concerns" as forgery, even if no forged instrument is involved. That is exactly the type of abstracted "general relation" that *Mellouli* found insufficient. Pet. 16-17.

The government offers no serious answer. It never disputes that *Mellouli* would have come out the other way if it had applied the Third Circuit's "concerns" standard. After all, surely the same "concerns" are implicated by state-controlled and federally-controlled substances. *See* Pet. 16. Instead, the government suggests that "*Mellouli* did not establish a general rule" that "relating to" must be read the same way elsewhere in the INA. Opp. 13. But "[i]t 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." *Pereira v. Sessions*, 138 S. Ct. 2105, 2115 (2018). It is telling that the government cannot prevail without defying that basic interpretive canon.

Next, the government asserts that the Third Circuit in fact satisfied *Mellouli* by identifying a "direct link" between false agency endorsement and forgery. Opp. 13. But it identifies no such link; it merely parrots the Third Circuit's assertion that the two crimes involve "essentially the same concerns." Opp. 12. For the reasons set forth above, that isn't enough, and it's

wrong besides. Forgery is concerned with the nature of the *instrument*—whether it is what it purports to be. False agency endorsement concerns the identity of the *person* using a document—whether they are who they purport to be. The offenses resemble each other only in that both require a document and some misrepresentation. Again, that is exactly the type of "general relation" that *Mellouli* found insufficient.

2. Even more fundamentally, the decision below does serious violence to *Mellouli*'s teaching that, in the context of the INA, the words "relating to" cannot be "extended to the furthest stretch of their indeterminacy." 135 S. Ct. at 1990. Such a reading would "stop nowhere." *Id.* (quotation marks and alterations omitted). The Third Circuit disregarded that instruction when it expansively construed "relating to" as requiring only an overlap in the "concerns" underlying an offense. *See* Pet. 17-18.

Strikingly, the government doesn't dispute that this is what the Third Circuit did. Instead, the government embraces it, relying on cases from other contexts, such as preemption, to argue that "relating to" is a "broad" term. *E.g.*, Opp. 9 (quoting *Morales v. TWA*, 504 U.S. 374, 383 (1992); *Coventry Health Care of Mo. v. Nevils*, 137 S. Ct. 1190, 1197 (2017)). And it notes a pre-*Mellouli* Board decision endorsing an expansive reading of "relating to." Opp. 13 (citing *In re Gruenangerl*, 25 I. & N. Dec. 351, 355 (B.I.A. 2010)). But the government's position is precisely the one that *Mellouli* rejected (and the *Mellouli* dissent would have embraced). After noting the general breadth of the term "relating to," the Court clarified that when construing the INA, the words "relating to" cannot be

"extended to the furthest stretch of their indeterminacy." 135 S. Ct. at 1990; *compare id.* at 1991-92 (Thomas, J., dissenting) (invoking *Morales*). There could be no clearer indication of the conflict between the decision below and this Court's precedent.[4]

B. The Third Circuit's ruling would render the INA's "relating to" provisions unconstitutionally vague.

Finally, the petition explains that the Third Circuit's boundless reading creates serious vagueness problems. Pet. 19-20. It would require judges to engage in the unguided, highly speculative exercise of imagining—and then comparing and contrasting—the general "concerns" animating particular offenses. As *Dimaya* and *Johnson* make clear, when a statute requires that type of unbounded, "judge-imagined abstraction," it raises serious vagueness issues under the Due Process Clause. *Id.* And statutory vagueness

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[4] *Mellouli* also instructs that statutory context is critical, 135 S. Ct. at 1990, which the Third Circuit's construction ignores. Section 1101(a)(43) defines "aggravated felony" in 21 carefully drawn subparagraphs, some of which impose heightened requirements on particular qualifying offenses. Pet. 17. The Third Circuit's reading would swallow many offenses covered by those neighboring subparagraphs, rendering their heightened requirements a dead letter. Pet. 18. The government offers no serious response. It says the petition "identified" no relevant "context" favoring a narrower reading. Opp. 13. But the petition spent pages doing just that. Pet. 17-18. The government eventually acknowledges as much in a footnote. Opp. 13 n.4. It then argues that the Third Circuit's holding was "limited to false agency endorsement." *Id.* But it offers no explanation why the Third Circuit's reasoning would not expand into surrounding statutory provisions.

is particularly problematic when, as here, it blurs the INA's definition of "aggravated felony." Doing so makes it near-impossible to accurately advise noncitizens about the immigration consequences of criminal convictions, a core dimension of the constitutional right to counsel. *See Dimaya*, 138 S. Ct. at 1213 (opinion of Kagan, J.); *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

The government responds that the constitutionality of § 1101(a)(43)(R) is not before the Court. Opp. 13-14. Of course not; this isn't a direct constitutional challenge. But there is a problem, which the government goes on to address in a footnote, Opp. 14 n.5—namely, that the Third Circuit's construction (i.e., its amorphous "concerns" test) gives rise to just the sort of vagueness that the Court held unconstitutional in *Dimaya* and *Johnson* (there, the vague "ordinary case" test). *See* Pet. 19-20. *Dimaya* and *Johnson* teach that "judge-imagined abstraction[s]" create serious vagueness problems. The Third Circuit's "concerns" standard creates just such dangers, and the doctrine of constitutional avoidance therefore supplies yet another reason to reject it. Pet. 20 (citing *Jones v. United States*, 529 U.S. 848, 857 (2000)).

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted.

Respectfully submitted,

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