No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ALEJANDRO VEDUZCO-RANGEL,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Petition for Writ of Certiorari

Ellis M. Johnston III
Clarke Johnston Thorp & Rice PC
1010 Second Avenue Suite 1800
San Diego, CA 92101
(619) 756-7632
trip@cjtrlaw.com

Counsel for Petitioner

QUESTION PRESENTED

Under the Immigration and Nationality Act, a noncitizen is subject to mandatory removal if convicted of an "aggravated felony." The list of aggravated felonies contains "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). This provision has been uniformly interpreted to consist of two definitional routes: (1) "illicit trafficking in a controlled substance (as defined in section 802 of title 21)," and (2) "a drug trafficking crime (as defined in section 924(c) of title 18)." A state drug crime constitutes an "aggravated felony" if it corresponds to either definition.

The question presented concerns the first definitional route: does a conviction for a state drug-trafficking crime with no mens rea element, or a mens rea element different than that required under federal law, constitute the "aggravated felony" of "illicit trafficking in a controlled substance (as defined in section 802 or title 21)"?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE(S)**

STATE CASES

FEDERAL STATUTES

STATE STATUTES

MISCELLANEOUS

PETITION FOR A WRIT OF CERTIORARI

Petitioner Alejandro Verduzco-Rangel respectfully requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The published opinion of the United States Court of Appeals for the Ninth Circuit is reproduced in Appendix A to this petition. Mr. Verduzco subsequently filed a petition for panel rehearing and rehearing en banc, which the court of appeals denied. *See* Appendix B.

JURISDICTION

The court of appeals affirmed Mr. Verduzco's conviction on March 9, 2018. *See* Appendix A. The court thereafter denied Mr. Verduzco's petition for rehearing and rehearing en banc on May 18, 2018. *See* Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

Appendix C contains the following pertinent constitutional and statutory provisions: (1) U.S. Const. Amend V; (2) 8 U.S.C. § 1101(a)(43); and (3) 8 U.S.C. § 1326(d).

INTRODUCTION

Under the Immigration and Nationality Act ("INA"), a conviction for an "aggravated felony" is like no other crime. While the INA prescribes various consequences for a noncitizen convicted of any crime, "aggravated felonies" are "singled out for the harshest deportation consequences." *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 566 (2010). An aggravated felony conviction "has two primary repercussions for noncitizens:" it subjects them to removal, 8 U.S.C. § 1227(a)(2)(A)(iii), and it "makes them categorically ineligible for several forms of immigration relief ordinarily left to the discretion of the Attorney General." *Torres v. Lynch*, 136 S. Ct. 1619, 1634 (2016).

Among "the approximately 80 'aggravated felonies,'" *Torres*, 136 S. Ct. at 1634, the one for drug-trafficking crimes—"illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)," 8 U.S.C. § 1101(a)(43)(B)—has generated considerable confusion. Indeed, over the past thirty years, since § 1101(a)(43)(B) was promulgated in its current form, Pub. L. No. 101-649 § 501, 104 Stat. 4978 (1990), this Court has addressed it three times. *See Moncrieffe v. Holder*, 569 U.S. 184 (2013) (conviction under state law that covers the social sharing of a small amount of marijuana is not a "drug trafficking crime (as defined in section 924(c) of title 18)"); *Carachuri-Rosendo*, 560 U.S. at 563 (state conviction for simple

possession offense, committed after state conviction for a prior simple possession offense, is not a "drug trafficking crime (as defined in section 924(c) of title 18)" unless the second conviction was based on the fact of the prior conviction); *Lopez v. Gonzales*, 549 U.S. 47 (2006) (felony conviction under state law that corresponds only to misdemeanor conviction under federal law is not a "drug trafficking crime (as defined in section 924(c) of title 18)").

Much of the confusion arises because "[t]he general phrase 'illicit trafficking' is left undefined[.]" *Lopez*, 549 U.S. at 50. With no express statutory definition to turn to, the lower courts have viewed "the term 'illicit trafficking in a controlled substance[,] . . . including a drug trafficking crime' [a]s a 'riddle wrapped in a mystery inside an enigma.' Churchill by Himself: The Definitive Collection of Quotations 145 (R. Langworth ed. 2008)." *Choizilme v. Att'y Gen.*, 886 F.3d 1016, 1030 (11th Cir. 2018) (Jordan, J., concurring) (second alteration added).

Despite § 1101(a)(43)(B)'s enigmatic character, one point courts have agreed on is that it consists of two definitional routes. That is, a conviction qualifies under § 1101(a)(43)(B) if it either constitutes "illicit trafficking in a controlled substance" or corresponds to a felony under the federal drug laws ("a drug trafficking crime (as defined in section 924(c) of title 18)"). *See Lopez*, 549 U.S. at 57 ("Thus, if Lopez's state crime actually fell within the general term 'illicit trafficking,' the state felony conviction would count as an 'aggravated felony,' regardless of the existence of a federal felony counterpart."); *Flores-Larrazola v. Lynch*, 840 F.3d 234, 239 & n.11

(5th Cir. 2016) (noting that "illicit trafficking in a controlled substance" and a "drug trafficking crime" are separate tests); *Donawa v. Att'y Gen.*, 735 F.3d 1275, 1280 (11th Cir. 2013) (same); *Daas v. Holder*, 620 F.3d 1050, 1054 (9th Cir. 2010) (recognizing that § 1101(a)(43)(B) gives rise to two different "routes" for a state drug conviction to qualify as an aggravated felony); *Gerbier v. Holmes*, 280 F.3d 297, 312-13 (3d Cir. 2002) ("[A] state drug conviction may constitute an 'aggravated felony' under § 1101(a)(43) whether it constitutes either 'illicit trafficking in any controlled substance' or a 'drug trafficking crime.'").

Given § 1101(a)(43)(B)'s two-pronged reach, much of the attention has focused on route two—"a drug trafficking crime (as defined in section 924(c) of title 18)." In fact, all three of this Court's decisions—*Lopez*, *Carachuri-Rosendo*, and *Moncrieffe*—are concerned with route two. Route one thus remains "a riddle wrapped in a mystery inside an enigma.'" *Choizilme*, 886 F.3d at 1030. The lower courts need guidance on what the elements of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" are. Specifically, does that generic provision incorporate as an element any mental state? And if so, what mental state?

At present, the courts of appeals have provided two different answers to that question. The Fifth and Eleventh Circuits, along with the Board of Immigration Appeals ("BIA"), have held that "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" has no mens rea element whatsoever. *See Choizilme*, 886 F.3d at 1029; *Flores-Larrazola*, 840 F.3d at 240; *Matter of L-G-H*, 26

I. & N. Dec. 365 (BIA 2014). In contrast, the Ninth Circuit, in the case of Mr. Verduzco held that "[t]o the extent 'illicit trafficking' in route one incorporates a mens rea requirement," it requires only that "the intended substance and the actual substance be controlled." *Verduzco-Rangel*, 884 F.3d at 923. In other words, the Ninth Circuit concluded that "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" requires knowledge that the substance involved is controlled by some law, without having to know further which body of law.

The plain language of § 1101(a)(43)(B), the structure of the INA, the categorical approach, and decisions of this Court, however, all counsel in favor of a third reading: "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" requires a person to know that the substance he is dealing with is controlled by federal law. Because the courts of appeals are in conflict over the generic mens rea element of § 1101(a)(43)(B)'s first definitional route, this Court should hear the case. Granting certiorari will provide a uniform definition of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" and ensure this uniform definition is satisfied before noncitizens are subject to "the harsh consequence of mandatory removal." *Carachuri-Rosendo*, 560 U.S. at 591; *see* Sup. Ct. R. 10(a) & 10(c).

STATEMENT OF THE CASE

Mr. Verduzco is the eldest son of immigrants who came to the United States when he was less than a year old in the 1970s. And he ultimately became a lawful permanent resident, but in 2004, Mr. Verduzco was convicted of violating Cal. Health and Safety Code § 11378 and sentenced to 5 years' probation, with a condition that he serve 365 days' jail. Three months later, immigration officials issued a Notice to Appear, alleging that Mr. Verduzco was removable because his §11378 conviction was an aggravated felony. An immigration judge found Mr. Verduzco removable on that basis and entered an order of removal on November 1, 2004.

In 2014, despite making a life for himself in Mexico for many years, Mr. Verduzco became concerned about his parents' health and wellbeing. And on October 22, he attempted to return to the United States through the port of entry. He was arrested and ultimately charged in a three-count indictment with improper entry by an alien in violation of 8 U.S.C. §1325, attempted re-entry of a removed alien in violation of 8 U.S.C. § 1326, and making a false claim to United States citizenship in violation of 18 U.S.C. §911. He pled not guilty.

For the illegal reentry charge, Mr. Verduzco's 2004 removal order served as a predicate element of the prosecution. Mr. Verduzco, in turn, moved to dismiss the charges against him, pursuant to 8 U.S.C. § 1326(d) and *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). Specifically, he maintained that his removal order was

fundamentally unfair, and therefore could not be used as an element of the illegal reentry offense, because his prior 2004 conviction under § 11378 was not, in fact, an aggravated felony.

This was so, according to Mr. Verduzco, because the mens rea element of his § 11378 conviction was overbroad. As an initial matter, he noted that California law proscribes substances not criminalized under federal law. *See United States v. Martinez-Lopez*, 864 F.3d 1034, 1038 (9th Cir. 2017) (en banc) (noting that California drug statutes "are not a categorical match with a federal drug trafficking offense" in part because of the greater array of substances that are controlled). Moreover, in terms of mens rea, California drug statutes require only that a defendant knowingly possess any California controlled substance. *See e.g., People v. Romero*, 5 Cal. App. 4th 147 (Cal. App. 1997) (affirming conviction for possessing for sale and transporting cocaine, although defendant believed he possessed marijuana); *People v. Garringer*, 48 Cal. App. 3d 827, 830 (Cal. App. 1975) (affirming conviction for possessing phenobarbital although defendant believed he possessed secobarbital); *People v. Guy*, 107 Cal. App. 3d 593, 601 (Cal. App. 1980) (affirming conviction under § 11378 for possessing for sale PCP, although defendant believed he possessed cocaine).

In contrast, he maintained that § 1101(a)(43)(B) required a noncitizen to knowingly possess any substance within the narrower class of federally controlled substances. *See McFadden v. United States*, 135 S. Ct. 2298, 2304 (2015) ("The

ordinary meaning of [21 U.S.C.] § 841(a)(1) thus requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules."). Because the state mens rea was broader than the generic mens rea of § 1101(a)(43)(B), Mr. Verduzco argued that his conviction was not an aggravated felony.

The district court denied Mr. Verduzco's motion, and he thereafter appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit heard oral argument in Mr. Verduzco's case, ultimately rejecting Mr. Verduzco's arguments for the reasons stated in a published opinion. *See United States v. Verduzco-Rangel*, 884 F.3d 918 (9th Cir. 2018).

The court noted that the generic aggravated felony provision at § 1101(a)(43)(B) "creates two possible routes for a state drug felony to qualify as a drug trafficking aggravated felony[.]" 884 F.3d at 921 (citing *Rendon v. Mukasey*, 520 F.3d 967, 974 (9th Cir. 2008)). First, under § 1101(a)(43)(B)'s initial part, a state drug felony is an aggravated felony if it constitutes "illicit trafficking in a controlled substance." *See Verduzco-Rangel*, 884 F.3d at 921. Second, under § 1101(a)(43)(B)'s latter part, a state drug felony qualifies if it is punishable as a felony under the federal drug laws. *See id.* The court further noted that "California law [] criminalizes trafficking in a few obscure substances that federal law does not, such as chorionic gonadotropin (a performance enhancing drug also banned in many sports)." *Id.*

With that background, the court summarized Mr. Verduzco's position that the mens rea of § 11378 is broader than the mens rea of § 1101(a)(43)(B):

> Verduzco [] argues that his California conviction is not categorically an aggravated felony because section 11378 remains broader than federal law as to defendants' beliefs about the kind of substance in which they were trafficking. Under federal law, a person actually selling cocaine who thought he was selling baking soda does not possess the required mens rea to be guilty of drug trafficking. *See McFadden v. United States*, —— U.S. ——, 135 S. Ct. 2298, 2304, 192 L.Ed.2d 260 (2015). Under section 11378, defendants can be found guilty even if they were mistaken about what specific substance was being trafficked, as long as the substance in which they intended to traffic is in fact controlled under California law. *See People v. Romero*, 55 Cal.App.4th 147, 64 Cal.Rptr.2d 16, 23 (1997) (affirming conviction of defendant who sold cocaine that he thought was marijuana). This means that a person who believed she was trafficking in chorionic gonadotropin but was in fact trafficking in methamphetamine would violate California law but not federal law. Verduzco argues that section 11378 is thus not categorically a drug trafficking crime under the second route laid out in *Rendon*.

Id. at 922. The government, for its part, assumed the foregoing was true but contended it was "irrelevant." *Id.* In its view, the defendants' position would only make § 11378 overbroad with respect to § 1101(a)(43)(B)'s second route, which expressly incorporates the mental state of the federal drug laws; section 11378 would remain "an aggravated felony under the first route, at least where, as here, the defendant was trafficking a substance (methamphetamine) that is also controlled by federal law." *Id.*

The court agreed. *See id.* It rejected the notion that § 1101(a)(43)(B)'s first route "incorporates the federal law's scienter requirement that the substance in

which the defendant intends to traffic be a substance controlled be federal law." *Id.* As support for its holding, the court relied on the plain language of § 1101(a)(43)(B):

> But there is no good reason to suppose that, when Congress defined "aggravated felony" in the INA to include "illicit trafficking in a controlled substance," it meant to implicitly incorporate such a requirement. Indeed, the plain meaning of the statutory language is to the contrary. If the first route were to require (1) a trafficking element, (2) the actual involvement of a drug that is banned federally, and (3) that federal law control the substance in which the defendant intended to traffic, then it would cover only drug trafficking crimes punishable as felonies under federal law—exactly what the second route already encompasses. In addition to rendering the statute redundant, Verduzco's proposed reading ignores the word "including," which suggests that what follows is a subset of what preceded, and not that the two are coextensive. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9, 105 S. Ct. 1421, 84 L.Ed.2d 406 (1985).

Id. at 922–23.

Despite rejecting federal law's knowledge requirement, the court did not hold that the first route had no mental state whatsoever. Instead, the court acknowledged that "'illicit trafficking" in route one [may] incorporate[] a mens rea requirement[.]" *Id.* at 923. But it found that "section 11378 suffices because it requires that the defendant intend to possess for sale a controlled substance and actually possess for sale a controlled substance, and that both the intended substance and the actual substance be controlled." *Id.* at 923. That is, the court found that the generic mens rea element of the first route is knowledge that a substance is controlled by some unspecified law.

The Ninth Circuit denied Mr. Verduzco's petitions for panel rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The federal courts of appeals are divided over whether a state drug-trafficking crime with a mens rea element different from the mens rea element required under federal law constitutes "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" under 8 U.S.C. § 1101(a)(43)(B) of the INA. Two courts of appeals and the BIA have held that the generic definition of "illicit trafficking in a controlled substance" contains no mental state whatsoever and is essentially a strict-liability "aggravated felony." Another court of appeals has defined the generic mens rea of "illicit trafficking in a controlled substance" as knowledge that a substance is controlled by law, without having to know which law. Neither approach is consistent with the plain language of § 1101(a)(43)(B), the structure of the INA, or this Court's case law on the categorical approach and aggravated felonies. The issue is a recurring and important one for the many noncitizens subject to mandatory removal, as well as the many noncitizens charged with illegal reentry on the basis of such a removal. Additionally, this case presents a highly suitable vehicle for resolving the conflict. The Court should therefore grant review.

I. The courts of appeals are divided over whether the "illicit trafficking in a controlled substance" aggravated felony has a mens rea element.

The courts of appeals are divided two-to-one over the generic definition of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)."

A. The Fifth and Eleventh Circuits have interpreted "illicit trafficking in a controlled substance" as a strict-liability generic offense.

On the one hand, the Fifth and Eleventh Circuits, along with the BIA, have held that the first definitional route contains no mens rea element. The Fifth Circuit was the first court of appeals to address the question in *Flores-Larrazola v. Lynch*, 840 F.3d 234 (5th Cir. 2016). There, the court considered whether a noncitizen's Arkansas conviction for "recklessly possessing with the intent to deliver at least ten pounds of marijuana for remuneration" constituted "illicit trafficking in a controlled substance" such that the noncitizen was "an aggravated felon and [wa]s therefore ineligible for relief from removal." *Flores-Larrazola*, 840 F.3d at 236. The court found the conviction to be a categorical match.

It began by assuming that the Arkansas conviction was not a federal drug-trafficking crime under § 1101(a)(43)(B)'s second route because federal law requires a knowing or intentional mens rea, while the Arkansas statute encompasses reckless conduct. *See id.* at 237-238. The court therefore focused its analysis on § 1101(a)(43)(B)'s first definitional route. *See id.* at 237. In so doing, the court

rejected the noncitizen's argument that the first route incorporates federal law's mens rea requirement:

> The *mens rea* required to commit the former is not required to commit the latter. The "rule against superfluities" encourages us to interpret 8 U.S.C. § 1101(a)(43)(B) in a way that "effectuate[s] all its provisions, so that no part is rendered superfluous." We do so here and hold that a state crime can constitute "illicit trafficking in a controlled substance" even if does not qualify as a "drug trafficking crime" as defined in 18 U.S.C. § 924(c)(2).

Id. at 238. Upon holding that the first route does not have the same mens rea as the second route, the court went on to adopt the BIA's definition of "illicit trafficking" as "any state, federal, or qualified foreign felony conviction involving the unlawful trading or dealing in a controlled substance as defined by Federal law." *Id.* at 239 (internal quotations omitted). That definition plainly contains no mens rea element. Because the noncitizen's Arkansas conviction was a state felony, marijuana is a controlled substance under federal law, and the ten pounds of marijuana was evidence of trafficking, the court held that the conviction was categorically "illicit trafficking in a controlled substance (as defined in section 802 of title 21)." *See id.*

Two years later, the Eleventh Circuit addressed a similar question regarding whether a Florida conviction for sale of cocaine was an aggravated felony for "illicit trafficking" even though "the Florida statute does not include knowledge of the illicit nature of the controlled substance as an element of the offense." *Choizilme v. Att'y Gen.*, 886 F.3d 1016, 1027 (11th Cir. 2018). The question arose because in

2002, the Florida legislature amended its drug statutes to eliminate knowledge as an element. Fla. Stat. § 893.101; *see Donawa v. Att'y Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013). In *Choizilme*, the court was forced to address whether the generic definition of "illicit trafficking" "require[s] knowledge of the illicit nature of the substance trafficked." 886 F.3d at 1028.

Agreeing with the BIA's decision in *Matter of L-G-H-*, 26 I. & N. Dec. 365 (BIA 2014), the court answered no. *Choizilme*, 886 F.3d at 1027-29. As support for its position, the court considered the plain language of the statute (the word "including" shows that the second definitional route is only a subset of the first); the ordinary meaning of the word "illicit," which does not necessarily imply a mens rea element; and Congress's intent to expand, rather than limit, the removal of aliens convicted of drug offenses. *See id.* For these three reasons, the court "conclude[d] that 'illicit trafficking' under § 1101(a)(43)(B) does not require a specific mens rea of knowledge of the illicit nature of the controlled substance being trafficked." *Id.* at 1029.

Judge Jordan issued a concurring opinion. He believed a prior Eleventh Circuit case answered the question, even though it did not consider whether § 1101(a)(43)(B)'s first route contained a mens rea requirement. *See id.* at 1029. Nevertheless, Judge Jordan pointed out that the phrase "illicit trafficking in a controlled substance" is hopelessly ambiguous and a "'riddle wrapped in a mystery inside an enigma.' Churchill by Himself: The Definitive Collection of Quotations 145

(R. Langworth ed. 2008)." *Id.* at 1030 (alteration in original). The first problem, he noted, was that the individual words "illicit" and "trafficking," when combined, provided no clear meaning: "If 'trafficking' already connotes some level of illegality or unlawfulness, as Black's Law Dictionary suggests, it is difficult to see what 'illicit' adds to the calculus. And even if 'illicit' means something else as an adjective for 'trafficking,' it is not apparent what that something else is." *Id.*

The second problem, Judge Jordan pointed out, was the odd structure of § 1101(a)(43)(B). *See id.* Although the provision uses the term "including" between the first and second definitional routes, the word "including" does not operate to signify that the second route is a subset of the first. *See id.* Rather, "the example ('a drug trafficking crime') is in some ways broader than the general category ('illicit trafficking in a controlled substance'), and in those instances the example swallows the general category." *Id.* Given this, "it is impossible to say with any certainty that 'a drug trafficking crime' is just a narrower subset of 'illicit trafficking in a controlled substance.'" *Id.*

Third, Judge Jordan explained that other parts of the federal code that used phrase "illicit trafficking" were unilluminating. *See id.* at 1031. Those other statutes also left the phrase "illicit trafficking" undefined. *See id.* (citing 6 U.S.C. § 348(a)(1), 22 U.S.C. § 2291f(a)(2), 8 U.S.C. § 1101(a)(43)(C)).

B. The Ninth Circuit has interpreted "illicit trafficking in a controlled substance" as containing whatever mens rea state law provides.

In contrast to the Fifth and Eleventh Circuits, the Ninth Circuit has answered the question presented differently. Here, the court acknowledged that § 1101(a)(43)(B)'s first definitional route may contain a mens rea element. *See Verduzco-Rangel*, 884 F.3d at 923. But it went on to define that mens rea as simply knowing the substance was controlled:

> [I]t is sufficient that the state statute contains an "illicit trafficking" element, which [California Health & Safety Code] section 11378 clearly does . . . To the extent "illicit trafficking" in route one incorporates a mens rea requirement, section 11378 suffices because it requires that the defendant intend to possess for sale a controlled substance and actually possess for sale a controlled substance, and that both the intended substance and the actual substance be controlled.

Id.

Consequently, the lower courts have two different and contradictory answers to the question presented: § 1101(a)(43)(B)'s first route contains no mens rea element, according to the Fifth and Eleventh Circuits, and it contains a mens rea requirement that a defendant know the substance is controlled, according to the Ninth Circuit.

II. The question presented is extremely important for noncitizens and their families, the courts, prosecutors, and defense counsel.

This Court has frequently granted certiorari to clarify the scope of generic offenses enumerated as "aggravated felonies" under the INA. *See, e.g., Esquivel-*

Quintana v. Sessions, 137 S. Ct. 1562 (2017); *Torres v. Lynch*, 136 S. Ct. 1619 (2016); *Moncrieffe v. Holder*, 569 U.S. 184 (2013); *Kawashima v. Holder*, 565 U.S. 478 (2012); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Nijhawan v. Holder*, 557 U.S. 29 (2009); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1. (2004). Here, too, resolving the conflict over the meaning of "illicit trafficking in a controlled substance" is vitally important for this country's millions of noncitizens, as well for lower courts, prosecutors, and criminal defense attorneys alike.

For lawful permanent residents, the import of whether a conviction constitutes an "aggravated felony"—thus subjecting them to "mandatory removal," *Moncrieffe*, 569 U.S. at 204—can hardly be overstated. "Deportation can be the equivalent of banishment or exile." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947); *see also Padilla v. Kentucky*, 559 U.S. 356, 365 (2010) (recognizing that "deportation is a particularly severe 'penalty.'"). It "visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom." *Bridges v. Wixon*, 326 U.S. 135, 154 (1945). These consequences are even more severe for lawful permanent residents who, like Mr. Verduzco, came here as children and now face permanent banishment from the country where they built their lives and where their family resides.

Likewise, for noncitizens who are not lawful permanent residents, the "aggravated felony" designation has other substantial and far-reaching

consequences. Beyond mandatory removal and ineligibility for any discretionary relief, non-permanent residents convicted of aggravated felonies are subject to mandatory detention, 8 U.S.C. § 1231(a)(2); conclusively presumed to be removable, 8 U.S.C. § 1228(c); and subject to expedited removal, meaning they have no right to a hearing before an immigration judge, 8 U.S.C. § 1228(b).

Because the "stakes are indeed high and momentous," removal decisions should not depend upon "fortuitous or capricious" circumstances or subject noncitizens to "irrational" hazards. *Delgadillo*, 332 U.S. at 391. Yet the BIA and the courts of appeals have created exactly this sort of irrational scheme.

The specific question presented here, concerning the aggravated felony for drug-trafficking offenses, is even more significant, as drug convictions constitute the second-most common criminal basis for removal of aliens from the United States after immigration crimes. Of the 135,570 aliens removed from the United States in 2016 due to a criminal offense, 23,217 (or 17.1%) were removed for a drug crime. Department of Homeland Security, *Immigration Enforcement Actions*, at 10, available at https://www.dhs.gov/sites/default/files/publications/Enforcement_Actions_2016.pdf. The question presented thus arises with frequency in the lower courts and the BIA, and this Court's intervention is needed to address this important and frequently recurring question of law.

Moreover, the uncertainty caused by the conflict frustrates the ability of defense counsel and prosecutors to offer a defendant charged with a state drug offense meaningful advice concerning the immigration consequences of a guilty plea or conviction. Resolving whether state drug convictions constitute "aggravated felonies" under the INA would enable prosecutors to make charging and plea-bargaining decisions with full knowledge of the immigration consequences. Indeed, some states impose on prosecutors explicit statutory or ethical duties to consider the immigration consequences of potential plea agreements. *See, e.g.*, Cal. Penal Code § 1016.3(b); Va. State Bar Legal Ethics, Formal Op. 1876 (2015). Prosecutors cannot do that effectively against the current backdrop of uncertainty.

Defense attorneys also need clarity in this area. The categorical approach is designed partly to enable noncitizens "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (internal quotations omitted). And defense counsel have a duty to advise clients as to which crimes are "aggravated felonies" and which are not. *See Padilla*, 559 U.S. at 367. Yet defense counsel cannot provide such advice when the very definition of "illicit trafficking in a controlled substance" is disputed.

Finally, the question presented also affects the criminal justice system more widely. As Mr. Verduzco's case illustrates, noncitizens who illegally enter the country are subjected to an enhanced twenty-year penalty, pursuant to 8 U.S.C.

§ 1326(b)(2), if they have been convicted of an aggravated felony. Such criminal consequences arise frequently. Illegal reentry alone constitutes approximately 26% of all federal criminal cases. U.S. Sentencing Comm'n, *Illegal Reentry Offenses* 8 (Apr. 2015). And approximately 40% of illegal-reentry offenders are convicted of aggravated felonies and face increased sentencing exposure. *Id.* At 9. Courts, prosecutors, and defense counsel need to know when these prosecutions are properly charged and when they are not. For all of these reasons, the question presented carries weighty real-world consequences and requires intervention by this Court.

III. This case is a good vehicle for the Court to resolve the question presented.

Mr. Verduzco's case is an excellent vehicle for resolving the generic definition of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" for three reasons. First, at every stage in the proceedings, Mr. Verduzco properly raised and preserved his argument that his state law conviction should not be considered an aggravated felony. Second, the case yielded a published Ninth Circuit opinion. And third, the question presented is outcome determinative for Mr. Verduzco. That is, if "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" requires that a noncitizen know the substance he is dealing with is controlled by federal law, then Mr. Verduzco's conviction under California

Health & Safety Code § 11378 is not an aggravated felony; his predicate removal order is invalid; and his resulting illegal-reentry conviction is infirm.

IV. Neither of the lower courts' approaches to the mens rea element of the "illicit trafficking" aggravated felony is correct.

Currently, there are two answers to the question presented. According to the Fifth Circuit, the Eleventh Circuit, and the BIA, the generic definition of "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" contains no mens rea element whatsoever. According to the Ninth Circuit, "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" may contain a mens rea element, but that element is simply knowledge that a substance is controlled by some unspecified law. Both approaches are incorrect.

A. Interpretive tools clearly show that the strict-liability interpretation of the Fifth and Eleventh Circuits is wrong.

Each time this Court has addressed § 1101(a)(43)(B), it has focused on the "commonsense conception of 'illicit trafficking,' the term ultimately being defined." *Lopez*, 549 U.S. at 53; *see also Moncrieffe*, 133 S. Ct. at 1693 (sharing a small amount of marijuana for no remuneration does not fit everyday understanding of trafficking); *Carachuri-Rosendo*, 560 U.S. at 573 ("[W]e begin by looking at the terms of the provisions and the 'commonsense conception' of those terms.").

Here, in holding that "illicit trafficking in a controlled substance (as defined in section 802 of title 21)" requires only the act of trafficking, without any

corresponding mens rea, the Fifth and Eleventh Circuits have essentially converted the first definitional route of § 1101(a)(43)(B) into a strict-liability provision. If the that position were correct, then a grocer selling what he believed to be oregano, but what in fact turned out to be marijuana, could be deported under the "illicit trafficking" provision as an aggravated felon. Such an outcome, however, is at odds with an everyday understanding of "illicit trafficking in a controlled substance." After all, "Congress meant the term 'aggravated felony' to capture serious crimes . . . ." *Torres*, 136 S. Ct. at 1626. But applying "an 'aggravated' . . . label to" such an unknowing offender "is, to say the least, counterintuitive and 'unorthodox[.]'" *Carachuri-Rosendo*, 560 U.S. at 574. That alone should leave this Court "very wary of the [the Fifth and Eleventh Circuits'] position." *Lopez*, 549 U.S. at 54.

Moreover, the Fifth and Eleventh Circuits' position fails to give effect to every statutory term at issue: "illicit," "trafficking," and "controlled substance." "Illicit" is defined as "illegal or improper." Black's Law Dictionary (10th ed. 2014). "Trafficking" means "[t]he act of transporting, trading, or dealing, esp. in illegal goods or people." *Id.* Under the Fifth and Eleventh Circuits' reading, what makes an act of trafficking illegal or improper (i.e., "illicit") is that it involves a substance proscribed under law (i.e., a "controlled substance."). But the prohibited nature of the substance is already accounted for by the statutory terms "trafficking" and "controlled substance." Thus, the term "illicit" must have some meaning independent of "trafficking" and "controlled substance" to avoid rendering any term

superfluous. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("This Court has a "duty to give effect, if possible, to every clause and word of a statute.") (internal quotations omitted).

A preferable reading is that "illicit" requires knowledge of the unlawful nature of the controlled substance. *See Choizilme*, 886 F.3d at 1030 (recognizing that "illicit" could denote "the level of mens rea"). Such a reading would distinguish between *lawful* trafficking in a controlled substance (which would cover the oregano/marijuana seller described above) and *illicit* trafficking in a controlled substance.

Construing "illicit trafficking in a controlled substance" to contain a mens rea element would also ensure cohesion among the aggravated felonies enumerated in § 1101(a)(43). Courts have uniformly come down in favor of a mens rea requirement when interpreting other crimes on the aggravated felony list. *See, e.g., Leocal*, 543 U.S. at 11 (interpreting "crime of violence" aggravated felony to require mental state greater than accidental or negligent conduct); *Rangel-Perez v. Lynch*, 816 F.3d 591, 602 (10th Cir. 2016) (holding that "sexual abuse of a minor" aggravated felony "requires proof of at least a 'knowing' mens rea," as this reading is "consistent with the 'longstanding precept of criminal law . . . that, except in the case of public welfare or regulatory offenses, criminal statutory provisions should not be read to impose strict liability and should instead be construed as carrying a *mens rea* element when they are silent."); *Tran v. Gonzales*, 414 F.3d 464, 465 (3d Cir. 2005)

(holding that reckless burning or exploding is a not a "crime of violence" because aggravated felony provision requires more than reckless conduct).

Against these other aggravated felonies, the Fifth and Eleventh Circuits' position would effectively single out the drug-trafficking provision as encompassing strict-liability offenses. One should be highly skeptical of according 8 U.S.C. § 1101(a)(43)(B) such a singular status, as "word[s]" in a statute are generally "known by the company [they] keep[]." *Yates v. United States*, 135 S. Ct. 1074, 1085 (2015).

The legislative history of § 1101(a)(43)(B) further militates against the Fifth and Eleventh Circuits' approach. Congress first coined "aggravated felony" as a term of art within the immigration laws in 1988, with the passage of the Anti-Drug Abuse Act. *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 915 (9th Cir. 2004). That provision covered murder, "any drug trafficking crime defined in section 924(c)(2) of title 18, United States Code," or any illicit trafficking in firearms or destructive devices. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181 (1998); *see also Cazarez-Gutierrez*, 382 F.3d at 915. This initial version thus exclusively anchored the definition of a drug-trafficking aggravated felony in federal law.

Two years later, with the passage of the Immigration Act of 1990, Congress gave the drug-trafficking aggravated felony its current two-pronged reach, extending it to both "illicit trafficking offenses" and drug-trafficking offenses as

defined by federal law. Pub. L. No. 101-649, § 501, 104 Stat. 4978 (1990). The purpose of this amendment was to clarify that the aggravated felony provision extends to state drug offenses:

> Current law clearly renders an alien convicted of a Federal drug trafficking offense an aggravated felon. It has been less clear whether a state drug trafficking conviction brings that same result, although the Board of Immigration Appeals in *Matter of Barrett* (March 6, 1990) has recently ruled that it does. Because the Committee concurs with the recent decision of the Board of Immigration Appeals and wishes to end further litigation on this issue, section 1501 of H.R. 5269 specifies that drug trafficking (and firearms/destructive device trafficking) is an aggravated felony whether or not the conviction occurred in state or Federal court.

H.R. REP. NO. 101-681(1) (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6553. Thus, the only reason Congress included the "illicit trafficking" language was to codify the BIA's decision in *Matter of Barrett*, 20 I. & N. Dec. 171, 177-78 (BIA 1990), that a state conviction can qualify as a drug-trafficking aggravated felony for immigration purposes. *See Cazarez-Gutierrez*, 382 F.3d at 916.

Since 1990, Congress "has not altered the definition of a drug trafficking crime." *Id.* at 917. In fact, Congress has left that definition intact despite "expand[ing] the crimes defined as aggravated felonies" and "dramatically overhaul[ing] the INA by enacting the Anti-terrorism and Effective Death Penalty Act of 1996 and IIRIRA." *Id.* at 916-17. Against this backdrop, "there is absolutely no evidence that Congress" was broadening the definition of a drug-trafficking aggravated felony to sweep in strict-liability crimes. *Id.*

Because Congress has not indicated either through "the language or legislative history of the" "illicit trafficking" provision that it intended to create a strict-liability grounds of removal, *Liparota v. United States*, 471 U.S. 424 (1985), the proper approach is to read § 1101(a)(43)(B) "against a 'background rule' that the defendant must know each fact making his conduct illegal." *Torres*, 136 S. Ct. at 1631. This is so even if the term "illicit" does not expressly impart a mens rea requirement. *See id.* at 1630-31 (longstanding rule applies even if statute by its terms does not specify a mental state).

Indeed, this presumption against strict-liability provisions and in favor of a scienter requirement has a long lineage. *See, e.g., Elonis v. United States*, 135 S. Ct. 2001, 2009-12 (2015); *Liparota*, 471 U.S. at 423-27; *Poster 'N' Things, Ltd. v. United States*, 511 U.S. 513, 517-24 (1994); *United States v. X-Citement Video*, 513 U.S. 64, 71-72 (1994); *Staples v. United States*, 511 U.S. 600, 605-07, 614-18 (1994); *Morisette v. United States*, 342 U.S. 246, 250-63 (1952). As these cases illustrate, "strict liability" provisions remain the exception, not the rule.

The presumption in favor of a scienter requirement gains particular force in cases where the statute carries a "potentially harsh penalty." *Staples*, 511 U.S. at 616; *see also X-Citement Video*, 513 U.S. at 72 (presumption especially appropriate because child-pornography statute carries penalty of up to ten years in prison, substantial fines, and forfeiture). Here, as explained *supra* at Part II, the consequences of an aggravated felony determination are undoubtedly severe.

Considering these severe consequences attending the aggravated felony label, the presumption against strict liability is especially appropriate, and the Fifth and Eleventh Circuits' approach is indefensible.

B. Interpretive tools also undercut the Ninth Circuit's state-law dependent approach.

The Ninth Circuit's approach fares no better. The court rejected Mr. Verduzco's position that "the phrase 'illicit trafficking' in § 1101(a)(43)(B) incorporates the federal law's scienter requirement that the substance in which the defendant intends to traffic be a substance controlled by federal law." *Verduzco-Rangel*, 884 F.3d at 922. The court found "no good reason to suppose that, when Congress defined 'aggravated felony' in the INA to include 'illicit trafficking in a controlled substance,' it meant to implicitly incorporate such a requirement." *Id.* It went on to conclude that "the plain meaning of the statutory language is to the contrary." *Id.*

But there is, in fact, a very good reason to suppose that when Congress codified the "illicit trafficking in a controlled substance" aggravated felony, it meant to incorporate the federal mens rea. That reason is simple: the first definitional route expressly references the federal list of controlled substances—"illicit trafficking in a controlled substance (*as defined in section 801 of title 21*)." 8 U.S.C. § 1101(a)(43)(B) (emphasis added). This express incorporation of the federal drug schedules has two consequences. First, it shows that under the first route, a

defendant must traffic in a federally controlled substance—a point the Ninth Circuit recognized. *Verduzco-Rangel*, 884 F.3d at 921.

Second, it shows that under the first route, a defendant must know the substance he is trafficking in is listed on the federal drug schedules. This second point follows from ordinary rules of English grammar. *See McFadden*, 135 S. Ct. at 2304 ("Under the most natural reading of this provision, the word 'knowingly' applies not just to the statute's verbs but also to the object of those verbs-'*a* controlled substance.'"); *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) ("As a matter of ordinary English grammar, it seems natural to read the statute's word 'knowingly' as applying to all the subsequently listed elements of the crime."); *Lopez*, 549 U.S. at 56 ("But we do not normally speak or write the Government's way. We do not use a phrase like 'felony punishable under the [CSA]' when we mean to signal or allow a break between the noun 'felony' and the contiguous modifier 'punishable under the [CSA]' . . . Regular usage points in the other direction."). And it follows from the "'background rule'" that "a defendant must possess a *mens rea*, or guilty mind, as to every element of an offense." *Torres*, 136 S. Ct. at 1630 (quoting *Staples*, 511 U.S. at 619).

Combining that background rule with the most natural reading of "illicit trafficking in a controlled substance," the mental state derived from the word "illicit" applies not just to the word "trafficking" but also to the object of that trafficking—"a controlled substance," *see* 8 U.S.C. § 1101(a)(43)(B), and not just any

such substance, but one controlled by federal law, *see id.* ("a controlled substance (as defined in section 801 of title 21"). In other words, the first route requires a defendant to know that the substance he is trafficking is on the federal drug schedules. The Ninth Circuit's approach overlooks the first definitional route's express incorporation of the federal drug schedules. And it ignores that any mental state attaches "to every element of an offense," which, in this case, includes a federally controlled substance. *Torres*, 136 S. Ct. at 1630.

In addition to relying on "the plain meaning of" route one, the Ninth Circuit also invoked the canon of statutory construction against redundancy. *Verduzco-Rangel*, 884 F.3d at 922. Specifically, the court reasoned that "[i]f the first route were to require (1) a trafficking element, (2) the actual involvement of a drug that is banned federally, and (3) that federal law control the substance in which the defendant intended to traffic, then it would cover only drug trafficking crimes punishable as felonies under federal law—exactly what the second route already encompasses." *Id.*

The court's concern with supposed redundancy, however, is unfounded. Even adopting Mr. Verduzco's view of the mens rea required for the first definitional route, there would be no redundancy. Under the "illicit trafficking" prong, "trafficking" requires "some sort of commercial dealing." *Lopez*, 549 U.S. at 53. The meaning of "trafficking" in the second definitional route, however, is more expansive. The second route concerns "a drug trafficking crime (as defined in

section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c)(2), in turn, defines a "drug trafficking crime" as any felony punishable under the Controlled Substances Act, the Controlled Substance Import and Export Act, and the Maritime Drug Law Enforcement Act. 18 U.S.C. § 924(c)(2). These acts cover many crimes that do not require any commercial dealing whatsoever, such as

- Acquiring or obtaining possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge, 21 U.S.C. § 843(a)(3);
- Using any communication facility in committing, causing, or facilitating an act under the CSA, 21 U.S.C. § 843(b);
- Maintaining a drug-involved premises, 21 U.S.C. § 856;
- Importing a controlled substance, 21 U.S.C. § 952;
- Exporting a controlled substance, 21 U.S.C. § 953;
- Possessing a controlled substance on board a vessel arriving in or departing from the United States, 21 U.S.C. § 955;
- Destroying property that is subject to forfeiture under section 511(a) of the Comprehensive Drug Abuse Prevention and Control Act of 1970 while on board a covered vessel, 46 U.S.C. § 70502(a)(2); and
- Concealing currency in excess of $100,000 on a covered vessel outfitted for smuggling, 46 U.S.C. § 70502(a)(3).

Therefore, even if the two definitional routes were to have the same mental state, as Mr. Verduzco urges, the routes would not be redundant because of their differing definitions of "trafficking." The Ninth Circuit never addressed that point.

Moreover, as further support for its claim of redundancy, the Ninth Circuit concluded that Mr. Verduzco's "proposed reading ignores the word 'including,' which suggests that what follows [in route two] is a subset of what preceded" in route one. *Id.* at 922-23 (citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423 n.9 (1985)). To begin, if what follows in route two is merely a "subset" of what precedes it in route one, then route two would be merely superfluous, a statutory construction to be avoided. *See Choizilme*, 886 F.3d at 1030 (noting that "[t]he majority's reasoning also potentially renders 'drug trafficking crime' superfluous.").

Nor does the Ninth Circuit's reliance on the word "including" carry the weight the court gives it. According to the court, the word "including" generally connotes an illustrative example of the preceding general category. But "the flaw with this analysis is that, unlike most broad general categories that are followed by narrower illustrative examples, here the example ('a drug trafficking crime') is in some ways broader than the general category ('illicit trafficking in a controlled substance'), and in those instances the example swallows the general category." *Id.* Given this structure, "it is impossible to say with any certainty that 'a drug trafficking crime' is just a narrower subset of 'illicit trafficking in a controlled substance.'" *Id.*

Thus, while the term "including" can be understood to mean part of a larger group, *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 77 n.7 (1979), that term still is commonly understood to have "a broader meaning than compris[ing] . . . [I]t is also

used in a non-restrictive way, implying that there may be other things not specifically mentioned that are part of the same category." *See* English Oxford Living Dictionaries (2018). This understanding is consistent with how the term "including" is used in other portions of the INA's aggravated felony definition. Section 1101(a)(43)(G), for example, defines as an aggravated felony any "theft offense (*including* receipt of stolen property)." 8 U.S.C. § 1101(a)(43)(G) (emphasis added). Receipt of stolen property is not a theft offense per se, yet it is included *in addition to* theft offenses in that particular sub-definition of aggravated felonies. *See Hernandez-Mancilla v. I.N.S.*, 246 F.3d 1001, 1008 (7th Cir. 2001). The same holds true in § 1101(a)(43)(B).

Finally, the Ninth Circuit's approach is fundamentally at odds with the categorical approach this Court first articulated in *Taylor v. United States*, 495 U.S. 575 (1990). The definition the court adopted—knowledge the drug involved is controlled by law, without having to know further which body of law—suffers from serious problems. Knowing that a substance is controlled by law necessarily begs the question: knowing that it is controlled by *which* law? To answer that question, one must look at the substances that each particular state controls. The court therefore makes the knowledge element necessarily dependent on state law. In so doing, the court "turns the categorical approach on its head by defining the generic federal offense . . . as whatever is illegal under the particular law of the State where the defendant was convicted." *Esquivel-Quintana*, 137 S. Ct. at 1570. Ultimately,

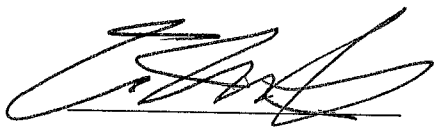
then, "[u]nder the [Ninth Circuit's] preferred approach, there is no 'generic' definition at all." *Id.* Because such a state-law dependent approach cannot be squared with the categorical analysis, the Ninth Circuit's approach is erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted.

August 16, 2018

Respectfully submitted,



Ellis M. Johnston III