No. _____

IN THE SUPREME COURT OF THE UNITED STATES

EDWIN RICARDO FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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QUESTIONS PRESENTED

In this criminal "illegal reentry" case, the Ninth Circuit applied *Chevron* deference to the Board of Immigration Appeals' interpretation of the phrase "theft offense (including receipt of stolen property)" under 8 U.S.C. § 1101(a)(43)(G). In doing so, the Ninth Circuit adopted a definition that reaches property obtained with consent of the owner.

The Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits have adopted the opposite construction, ruling that the same phrase requires a taking of property "without consent."

I. Does a "theft offense (including receipt of stolen property)" under § 1101(a)(43)(G) require a taking of property without consent?

II. May courts defer to an executive agency's interpretation of a statute that has both criminal and immigration applications?

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

Petitioner, Edwin Ricardo Flores, respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW AND JURISDICTION

The Court of Appeals entered judgment on August 28, 2018. *See United States v. Flores*, 901 F.3d 1150 (9th Cir. 2018). *See* Pet. App. A. The Court of Appeals then denied Mr. Flores's petition for rehearing en banc on April 24, 2019. *See* Pet. App. B. On July 12, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including September 21, 2019. *See* Pet. App. C. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS

The relevant constitutional, statutory, and Sentencing Guideline provisions are attached. *See* Pet. App. D.

STATEMENT OF THE CASE

This is a criminal "illegal reentry" case. Mr. Flores faced a single-count indictment charging him with violating 8 U.S.C. § 1326(a) and (b) by being "found in" the United States as an "alien" who had been removed after a certain date.[1] The criminal charge was based on two different orders of removal—one an expedited removal under 8 U.S.C. § 1225, and the other for an aggravated felony under § 1228 of the same title. Mr. Flores pleaded not guilty and moved to dismiss the indictment.

His motion, a collateral attack against each order of removal, invoked the due process clause, *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987), and § 1326(d). As to the § 1228 removal order, Mr. Flores argued that only a noncitizen who has been convicted of an "aggravated felony" can be removed under this provision. The immigration authorities had claimed Mr. Flores's conviction for "Receiving Stolen Property, in violation of California Penal Code § 496(a) ("CPC § 496(a)"), was an aggravated felony because it represented "a theft offense (including receipt of stolen property) . . . for which the term of imprisonment [was] at least one year" under 8 U.S.C. § 1101(a)(43)(G). Mr. Flores's motion to dismiss maintained that he had not been convicted of an aggravated felony because CPC § 496(a) is indivisibly overbroad in comparison to the generic definition of "a theft offense (including receipt of stolen property)."

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[1] The district court had original jurisdiction under 18 U.S.C. § 3231. *See* S. Ct. R. 14(g)(ii).

In support of this argument, Mr. Flores showed that CPC § 496(a) extends to takings of property that occur "with consent," albeit fraudulently obtained consent—for example, as in obtaining property by false pretenses. In contrast, Mr. Flores contended, § 1101(a)(43)(G) is narrower than CPC § 496(a) because § 1101(a)(43)(G) requires a taking of property *without* consent. Mr. Flores argued that because this feature of CPC § 496(a) makes it overbroad as a "theft offense (including receipt of stolen property)" under § 1101(a)(43)(G), he was ordered removed—without counsel or a hearing before an immigration judge—when he should not have been.

The district court denied Mr. Flores's motion to dismiss by addressing each order of removal separately and concluding that CPC § 496(a) constitutes an aggravated felony "theft offense." At a bench trial, the district court then found Mr. Flores guilty of § 1326.

In determining Mr. Flores's sentence, the district court applied a Guidelines enhancement that was also based on the conclusion that CPC § 496(a) is an aggravated felony. Mr. Flores again objected. The district court overruled the objection and sentenced Mr. Flores to forty months' imprisonment followed by three years' supervised release. Had the aggravated-felony enhancement not applied, the custodial sentencing range under the Guidelines would have been twenty-four to thirty months.

Mr. Flores appealed his conviction and sentence. Before the Ninth Circuit, he pressed his argument that CPC § 496(a) is overbroad as an aggravated felony under

§ 1101(a)(43)(G). The Ninth Circuit disagreed and affirmed both the conviction and sentence. Like the district court, the Ninth Circuit addressed each removal order independently. But the Ninth Circuit went one step further and interpreted the phrase "theft offense (including receipt of stolen property)" in § 1101(a)(43)(G) by deferring, under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to the Board of Immigration Appeals' ("BIA") recently-issued decision in *Matter of Alday-Dominguez*, 27 I. & N. Dec. 48 (B.I.A. 2017). It did so even though this was a criminal case and even though the BIA issued *Alday-Dominguez* while Mr. Flores's case was on appeal—long after he was found guilty or sentenced.

In *Alday-Dominguez*, the BIA concluded that a CPC § 496(a) conviction constitutes "receipt of stolen property" under § 1101(a)(43)(G) because that aggravated-felony provision "does not require that unlawfully received property be obtained by means of theft." 27 I. & N. Dec. at 49. *Alday-Dominguez* found that "receipt of stolen property" under § 1101(a)(43)(G) is not a subset of a "theft offense" even though it follows the words "theft offense" in a parenthetical phrase introduced by the word "including." *Id.* at 50. Additionally, *Alday-Dominguez* noted that this Court "held in a different, albeit relevant, context that the term 'stolen' is not a common law term with a fixed meaning that relates only to common law offenses such as theft and larceny but should, instead, be interpreted broadly as including offenses of embezzlement, false pretenses, and any other felonious takings." *Id.* at 50 (citing *United States v. Turley*, 352 U.S. 407, 415–17 (1957)).

Deferring to *Alday-Dominguez*, the Ninth Circuit concluded that, within the phrase "theft offense (including receipt of stolen property)" under § 1101(a)(43)(G), the term "receipt of stolen property" is not a subset of "theft offense," but instead its own class of aggravated felony. *Flores*, 901 F.3d at 1159. So, the Ninth Circuit reasoned, even though a "theft offense" requires property obtained without consent, "receipt of stolen property" under § 1101(a)(43)(G) does not share the same limitation. *Id.* at 1156–60. The Ninth Circuit held that CPC § 496(a) fits the aggravated felony of "receipt of stolen property" under § 1101(a)(43)(G), regardless of whether it is a "theft offense." *Id.* at 1160–61. Based on this interpretation of § 1101(a)(43)(G), the Ninth Circuit affirmed Mr. Flores's conviction and sentence.

After the Ninth Circuit panel's affirmance, Mr. Flores submitted a petition for rehearing en banc arguing that the panel erred in its interpretation of the statute and in its deference to the BIA on a provision that has both criminal and immigration applications. The Ninth Circuit denied his petition for rehearing. *See* Pet. App. B. Mr. Flores now has at least 800 days of supervised release remaining on his sentence.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's reinterpretation of § 1101(a)(43)(G) below conflicts with this Court's prior guidance on the issue, as well as the considered precedents of five other federal circuit courts. Resolving this divergence is of immediate national importance for two reasons. First, § 1101(a)(43)(G) controls the outcome in many criminal, as well as immigration, matters. And second, the Ninth Circuit's decision

deferring to an executive agency in a criminal prosecution raises serious separation-of-powers and *ex post facto* concerns. And because this case is an excellent vehicle to correct these problems, the Court should grant certiorari.

I. This Court should grant certiorari to resolve a circuit split, ensure the generic definition of § 1101(a)(43)(G) is consistent with *Nijhawan*, and address important separation-of-powers and *ex post facto* issues.

Two important reasons exist to grant certiorari in this case. First, the Ninth Circuit created a split in authority over the generic meaning of § 1101(a)(43)(G). This Court should resolve that split by bringing the Ninth Circuit in line with the otherwise-uniform view of the courts of appeals and with this Court's decision in *Nijhawan v. Holder*, 557 U.S. 29 (2009) . Second, the Court should halt the Ninth Circuit's practice of deferring to executive agencies on statutes that have both criminal and immigration applications lest it continue to create serious separation-of-powers and *ex post facto* concerns.

A. The Ninth Circuit's interpretation of "a theft offense (including receipt of stolen property)" conflicts with that of five other circuits and is in tension with this Court's decision in *Nijhawan*.

As to the first question presented, there are two reasons why this Court should grant certiorari to address the generic definition of § 1101(a)(43)(G). First, the Ninth Circuit's definition below is at odds with the definitions adopted by five other federal courts of appeals. *See* Sup. Ct. R. 10(a). Second, the Ninth Circuit's definition below is inconsistent with the reasoning of *Nijhawan*. *See* Sup. Ct. R. 10(c).

1. The decision below has created a circuit split over whether lack of consent is an element of § 1101(a)(43)(G).

In *Flores*, the Ninth Circuit concluded that a "theft offense (including receipt of stolen property)," § 1101(a)(43)(G), consists of two different aggravated felonies. 901 F.3d at 1156–59. The first aggravated felony—a "theft offense"—"requires lack of consent[.]" *Id.* at 1158. In contrast, the second—"receipt of stolen property"—is "a distinct aggravated felony independent of theft and the property received need not have been stolen by means of 'theft' as generically defined." *Id* at 1159. In other words, in the Ninth Circuit's view, generic receipt of stolen property, unlike generic theft, can occur with the owner's consent. *See id.*

The Ninth Circuit's interpretation of § 1101(a)(43)(G) as extending to property obtained with consent conflicts with decisions of five other federal courts of appeals. The Fourth Circuit, for example, has held "that a taking of property 'without consent' is an essential element" of § 1101(a)(43)(G). *Soliman v. Gonzales*, 419 F.3d 276, 283 (4th Cir. 2005). To reach this conclusion, the Fourth Circuit noted that the list of aggravated felonies includes both "a theft offense (including receipt of stolen property)," § 1101(a)(43)(G), and "an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," § 1101(a)(43)(M)(i). *Id.* at 282. These separate provisions show that "Congress [] decided to treat fraud as a distinct offense from theft within § 1101(a)(43)[.]" *Id.*

Given "that theft and fraud offenses are to be treated differently for purposes of an 'aggravated felony' issue," *Soliman* reasoned that "a proper definition of the term 'theft offense' must distinguish between such an offense and a fraud scheme."

Id. at 283. Looking to "[t]he classic definitions of 'theft' and 'fraud,'" the court noted that "[t]he key and controlling distinction . . . is the 'consent' element—theft occurs without consent, while fraud occurs with consent that has been unlawfully obtained." *Id.* at 282. Interpreting § 1101(a)(43)(G) to cover takings with consent (as the BIA in *Solimon* did below) would "make[] the fraud provision of Subsection (M)(i) superfluous[.]" *Id.* at 283. Specifically, it would "transform[] all fraud offenses into theft offenses," "contrary to Congress's explicit inclusion of a $10,000 threshold for fraud offenses into Subsection (M)(i)[.]" *Id.* at 283; *see also Omarharib v. Holder*, 775 F.3d 192, 197 (4th Cir. 2014) ("[T]he INA treats" fraud and theft offenses "differently.").

A little over a decade later, the Fourth Circuit addressed the scope of § 1101(a)(43)(G) again. This time, the court clarified the relationship between the two parts of § 1101(a)(43)(G): "receipt of stolen property" is a subset of a "theft offense." *Mena v. Lynch*, 820 F.3d 114, 119 n.4 (4th Cir. 2016). As a result of this relationship, the court explained that "a receipt crime" also "requires a taking of property without consent." *Id.* at 119.

Other courts of appeals have, in turn, widely endorsed the Fourth Circuit's approach. *See Vassell v. Atty. Gen.*, 839 F.3d 1352, 1357 (11th Cir. 2016) ("No court appears to have criticized *Soliman*'s reasoning."). In light of *Soliman*, the Eleventh Circuit has likewise interpreted § 1101(a)(43)(G) so that it has a distinct meaning, independent of § 1101(a)(43)(M)(i). According to that court, "[t]heft involves an utter lack of the victim's consent at the moment his property is surrendered." *Vassell*, 839

F.3d at 1358. "By contrast, fraud involves a victim who willingly consents at the time the property is surrendered, though this consent was obtained through some kind of falsehood." *Id.* at 1359. In the Eleventh Circuit, then, as in the Fourth, what differentiates § 1101(a)(43)(G) from § 1101(a)(43)(M)(i) is a lack of consent.

Along with the Fourth and Eleventh Circuits, the Seventh Circuit has also construed § 1101(a)(43)(G) to require a lack of consent. In *Hernandez-Mancilla v. INS*, 246 F.3d 1002, 1008 (7th Cir. 2001), the court began by explaining the connection between the two parts of § 1101(a)(43)(G). Specifically, the court "d[id] not read the entire phrase ["theft offense (including receipt of stolen property)"] as merely a list of two offenses—theft and receipt." *Id.* Rather, it "read 'theft' offense as an umbrella label, and 'including receipt of stolen property' as indicating that the label encompasses a myriad of offenses." *Id.* at 1008-09. With that clarification, the court "h[e]ld that the modern, generic, and broad definition of *the entire phrase* 'theft offense (including receipt of stolen property)' is a taking of property or an exercise of control over property *without consent* with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Id.* at 1009 (emphases added).

Following *Hernandez-Mancilla*'s lead, the Fifth Circuit has likewise "formally adopt[ed]" the Seventh Circuit's "interpretation of § 1101(a)(43)(G)." *Burke v. Mukasey*, 509 F.3d 695, 697 (5th Cir. 2007) (per curiam). The same is true of the Tenth Circuit. *See United States v. Vasquez-Flores*, 265 F.3d 1122, 1125 (10th Cir.

2001) ("We find the Seventh Circuit's reasoning to be persuasive and we adopt this definition.").

In sum, five courts of appeals have adopted a single generic definition for the entire phrase—"theft offense (including receipt of stolen property)," § 1101(a)(43)(G). And those five courts of appeals have, in turn, uniformly held that absence of the property owner's consent is a hallmark of that definition. By contrast, the Ninth Circuit stands alone in construing § 1101(a)(43)(G) to cover takings with the property owner's consent. In so doing, the Ninth Circuit collapses any meaningful distinction between § 1101(a)(43)(G) and § 1101(a)(43)(M)(i) and renders part of the aggravated-felony statute superfluous. It is evident that The Ninth Circuit is on the wrong side of the circuit split, and this Court should grant review to bring the Ninth Circuit in line with the majority view.

2. The decision below is irreconcilable with the reasoning of *Nijhawan*.

Beyond engendering a division among the courts of appeals, the Ninth Circuit's decision in *Flores* is also at odds with *Nijhawan*. In that case, this Court considered the definition of the fraud aggravated felony, § 1101(a)(43)(M)(i)—specifically, whether the $10,000 loss amount is an element of the generic offense or a factual circumstance surrounding the commission of a specific offense. *See Nijhawan*, 557 U.S. at 32. Ultimately, the Court concluded that the $10,000 threshold "refers to the particular circumstances in which an offender committed a (more broadly defined) fraud or deceit crime on a particular occasion." *Id.*

In adopting this "circumstance-specific" interpretation and jettisoning the categorical approach, the Court explained that an elements-based approach "would leave subparagraph (M)(i) with little, if any, meaningful application." *Id.* at 39. There were "no widely applicable federal fraud statute[s] that contain[] a relevant monetary loss threshold" as an element. *Id.* And there were only "8 States with statutes in respect to which subparagraph (M)(i)'s $10,000 threshold, as categorically interpreted, would have full effect." *Id.* at 40. The Court "d[id] not believe Congress would have intended (M)(i) to apply in so limited and so haphazard a manner." *Id.*

Nijhawan, then, represents this Court's considered judgment not to treat the $10,000 loss amount as an appendage that comes into play only in rare and exotic circumstances. Instead, the Court has chosen to construe the loss threshold robustly as a factual circumstance applying to a significant share of real cases.

The Ninth Circuit's decision in *Flores*, however, contravenes this principle. Under *Flores*, the "receipt of stolen property" prong of § 1101(a)(43)(G) sweeps in property obtained with consent. *See* 901 F.3d at 1159. The upshot is that all fraudulent takings—that is, consent-based takings—with a sentence of at least one year fit within that definition, regardless of the loss amount. Section (M)(i)'s separate $10,000 loss threshold thus becomes virtually meaningless. *Nijhawan*, however, instructs that we should be wary of any approach that "would leave subparagraph (M)(i) with little, if any, meaningful application." 557 U.S. at 39. The Ninth Circuit's decision below invites surplusage into § 1101(a)(43)(M)(i)—just what

Nijhawan tells us not to do. This Court should therefore grant the petition to reverse *Flores* and, consistent with *Nijhawan*, define § 1101(a)(43)(G) in a way that allows § 1101(M)(i)'s loss threshold to retain independent significance.

B. Courts may not defer to an agency's interpretation of a statute that applies in both criminal and immigration contexts.

The second reason this Court should grant the petition for certiorari is because *Flores* decided an important issue of federal law—that a court may defer to an executive agency's interpretation of a statute with criminal-law applications—raising serious separation-of-powers and *ex post facto* concerns. This Court should grant the petition to halt the constitutional crisis engendered by the Ninth Circuit's decision. *See* Sup. Ct. R. 10(c).

1. This Court applies the same interpretation of a statute in both criminal and immigration contexts.

When a statute has both criminal and immigration applications, this Court has always applied the same interpretation in both contexts. For instance, in *Leocal v. Ashcroft*, the Court held that driving under the influence of alcohol and causing serious bodily injury was not a "crime of violence" aggravated felony under 8 U.S.C. § 1101(a)(43)(F) and 18 U.S.C. § 16. 543 U.S. 1, 11–12 (2004). Although the BIA had previously reached the opposite conclusion, the Court construed the aggravated-felony statute de novo. *Id.* at 5, 11-12. The Court explained that to the extent the statute was unclear, the rule of lenity applied because § 16 has "both criminal and noncriminal applications" and must be interpreted "consistently, whether we encounter its application in a criminal or noncriminal context." *Id.* at 11-12, 11 n.8.

See also Carachuri-Rosendo v. Holder, 560 U.S. 563, 581 (2010) (noting that "the critical language appears in a criminal statute," and "ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor").

The Court reached the same conclusion last year in *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212–13 (2018). There, the Government had argued that because "this is not a criminal case," a "less searching" void-for-vagueness standard applied to the residual clause in § 16(b) than to a similarly-worded residual clause in the Armed Career Criminal Act. *Id.* at 1212. But binding precedent "forecloses that argument," the Court explained, because it had "long ago held" that the higher vagueness standard applies equally in immigration cases. *Id.* at 1213.

Concurring, Justice Gorsuch agreed that "the happenstance that a law is found in the civil or criminal part of the statute books cannot be dispositive." *Id.* at 1229. Given that the Court had previously held that the statute was unconstitutionally vague in the criminal context, Justice Gorsuch confirmed, "I do not see how we might reach a different judgment here." *Id.* at 1231. So no fewer than three of this Court's recent decisions apply the same interpretation of a statute regardless of whether the case arises in the criminal or immigration contexts.

2. Deference to executive agencies in criminal cases raises serious separation of powers and *ex post facto* concerns.

Because courts must apply the same interpretation of a given statute in both criminal and civil contexts, deference to an executive agency can play no part in it. The Court reached this conclusion in *United States v. Thompson/Center Arms Co.*,

504 U.S. 505, 506–08 (1992), a case construing a tax provision of the National Firearms Act ("NFA"), that had both criminal- and tax-law applications. There, the statute's text was ambiguous as to whether particular conduct constituted "mak[ing]" a firearm, so as to trigger an NFA tax. *Id.* at 517. But the "key to resolving the ambiguity," the Court held, was not to follow what executive agencies had said, but to recognize that, although the Court was construing the statute in a civil setting, the NFA also has criminal applications. *Id.* So even if agency interpretations had been on point, courts could not defer to them. *See id.* at 518, 518 nn.9–10 (responding to dissent by explaining that although it is a "tax statute," it is a "tax statute [with] criminal applications, and we know of no other basis for determining when the essential nature of a statute is 'criminal'").

While this Court has interpreted aggravated felony statutes on numerous occasions in the last decade, it has never deferred to the BIA's interpretation.[2] This is not due to a lack of effort on the Government's part. In nearly *all* of these

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[2] *See, e.g.,* E*squivel-Quintana v. Sessions,* 137 S. Ct. 1562, 1572 (2017) (holding that "the statute, read in context, unambiguously forecloses the Board's interpretation."); *Torres v. Lynch*, 136 S. Ct. 1619, 1634 (2016) (relying on Congressional intent to interpret aggravated felony statute); *Moncrieffe v. Holder*, 569 U.S. 184, 197 (2013) (rejecting the BIA's rationale); *Kawashima v. Holder*, 565 U.S. 478, 484 (2012) (relying on the "clear" language of the statute); *Carachuri-Rosendo*, 560 U.S. at 581 (holding that "ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor"); *Nijhawan v. Holder*, 557 U.S. 29, 38 (2009) (relying solely on statutory language); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189 (2007) (relying on common law to craft a generic definition); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (relying on the "commonsense conception of 'illicit trafficking'"); *Leocal*, 543 U.S. at 12 (stating that it must "interpret any ambiguity in the statute in petitioner's favor").

aggravated felony cases, the Government argued for agency deference, and in *none* of them did the Court grant it.[3] In other words, this Court has silently declined to give any weight to the agency's interpretation when it comes to statutes with criminal applications such as aggravated felonies.

But here, not only did the Ninth Circuit defer to the BIA's interpretation of an aggravated felony, it did so in a *criminal* case, and it did so *twice*. First, the Ninth Circuit deferred to the BIA on the meaning of the word "including" in § 1101(a)(43)(G). *See* 901 F.3d at 1158. Then, the Ninth Circuit deferred to the BIA's generic definition of the phrase "receipt of stolen property." *See id.* at 1160. So to determine whether Mr. Flores could be convicted of a crime, and to determine whether he could be sentenced to up to 20 years in federal prison, the Ninth Circuit deferred to the same executive branch that was prosecuting him in the first place. This process resembles a feedback loop in which the only independent arbiter is the Attorney General. *See Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting) (criticizing a law that "purports to endow the nation's chief

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[3] *See, e.g.,* Brief for *United States, Torres v. Lynch*, 2015 WL 5626637, at *14 (2015) (stating that the case "should be resolved based on deference under *Chevron*"); Brief for *United States, Moncrieffe v. Holder*, 2012 WL 3803440, at *15 (2012) (urging the Court to adopt the rational of the BIA's decision); Brief of *United States, Kawashima v. Holder*, 2011 WL 4590846, at *16 (2011) (arguing that "the proper course would be to remand to the agency to exercise its *Chevron* discretion to interpret the statute in the first instance") (quotations and alterations omitted); Brief of *United States, Nijhawan v. Holder*, 2009 WL 815242, at *46 (2009) (stating that lenity applies "only *after* the Attorney General has had an opportunity to interpret the relevant statutory provision and the courts have given appropriate deference to that interpretation"); Brief of *United States, Lopez v. Gonzales*, 2006 WL 2474082, at *32 (2006) (arguing that the BIA's interpretation "merit[s] deference").

prosecutor with the power to write his own criminal code governing the lives of a half-million citizens").

The Ninth Circuit's deference to an agency in a criminal case raises grave separation-of-powers concerns. As justices of this court have recognized, federal agencies already "pok[e] into every nook and cranny of daily life." *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 307 (2013) (Roberts, C.J., dissenting, joined by Kennedy, J., and Alito, J.). But now individuals charged with crimes can anticipate judges turning to members of the executive branch—rather than Congress—for direction on whether a person may be convicted of and sentenced for an offense. Not only will this "allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing," it will also "'unite' the 'legislative and executive powers ... in the same person.'" *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) (quoting The Federalist No. 47, p. 302 (C. Rossiter ed. 1961) (J. Madison) (alterations omitted)). To do so will "mark the end of any meaningful enforcement of our separation of powers" and "invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands." *Id.* at 2144–45.

Not only does the Ninth Circuit's approach threaten to irrevocably demolish the separation of powers, it also encourages *ex post facto* violations. No better example of this exists than Mr. Flores himself. Mr. Flores was arrested and convicted in 2015 and sentenced in February 2016. But the BIA did not issue its decision that the Ninth Circuit deferred to until over a year later, in June 2017. *See*

Matter of Alday-Dominguez, 27 I. & N. Dec. at 48 (issued June 1, 2017). Yet the Ninth Circuit deferred to this agency decision to determine both whether Mr. Flores could be *convicted* of a crime and whether he could be *sentenced* to a maximum of 20 years in prison. *See* 8 U.S.C. § 1326(d) (permitting challenges to a conviction); 8 U.S.C. § 1326(b)(2) (doubling the maximum sentence from 10 to 20 years if a removal was subsequent to an aggravated felony). Mr. Flores's purported aggravated felony also triggered the *ex post facto* application of an eight-level enhancement for an aggravated felony under the Sentencing Guidelines. *See Peugh v. United States*, 569 U.S. 530, 541 (2013) (holding that "sentencing guidelines that increase a defendant's recommended sentence can violate the Ex Post Facto Clause"). So not only did the Ninth Circuit defer to an executive agency to determine Mr. Flores's conviction, statutory maximum, and Sentencing Guidelines range, it did so retroactively—years after he committed the crime and was removed.

The Ninth Circuit's radical demolition of the walls separating the three branches of government will "mark the end of any meaningful enforcement of our separation of powers." *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting). If its decision stands, individuals charged with crimes will have no protection against an Attorney General who demands judicial deference in criminal prosecutions for the very decisions that he himself issued. This will certainly "invite the tyranny of the majority that follows when lawmaking and law enforcement responsibilities are united in the same hands." *Id.* at 2144–45.

II. Both questions presented are of pressing national importance.

Independently and cumulatively, the questions presented here raise issues of urgent national importance for immigrants and criminal defendants, and also carry chilling implications for the erosion of barriers separating our three branches of government.

A. The meaning of "a theft offense (including receipt of stolen property)" arises frequently in both criminal and immigration cases.

As to the first question presented, the generic definition of § 1101(a)(43)(G) is a recurring issue in federal criminal litigation—both before trial and at sentencing—as well as in the civil immigration context. The question is thus worthy of this Court's attention.

1. The "aggravated felony" issue pervades the courts' processing of federal crimes related to immigration, which account for about one quarter of all federal criminal cases.

For starters, the scope of the aggravated-felony statute, including subsection (G), plays a prominent role in federal criminal law. For instance, the very criminal statute Mr. Flores was charged with and convicted of, 8 U.S.C. § 1326, incorporates § 1101(a)(43) in two ways. First, § 1101(a)(43)'s meaning often determines, as here, whether an order of removal withstands a collateral attack under § 1326(d). Second, the aggravated-felony question also determines the maximum prison sentence, potentially increasing it from two or ten to *twenty* years. *See* § 1326(a), (b). Along similar lines, a former version of the illegal-reentry Guideline incorporated the aggravated-felony definition. In particular, under § 2L1.2(b)(1)(C) of the 2015

Sentencing Guidelines (the version applicable to Mr. Flores), an eight-level increase, sufficient to *double* the base offense level, also depended on the aggravated-felony question.

Illegal-reentry prosecutions, moreover, are extremely prevalent in the federal courts. According to the United States Sentencing Commission, in fiscal year 2013 (the most recent year for which the data appear to be publicly available), illegal-reentry cases accounted for 26% of all federal criminal cases that were sentenced under the Guidelines and reported to the Commission. United States Sentencing Commission, *Illegal Reentry Offenses*, at 8 (2015), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/immigration/2015_Illegal-Reentry-Report.pdf. "[S]lightly more than 40% [of illegal-reentry offenders] faced a statutory maximum of 20 years" pursuant to § 1326(b)(2), the provision reserved for those with aggravated felonies. *Id.* at 9. Likewise, the aggravated-felony enhancement of eight offense levels under the illegal-reentry Sentencing Guideline applied no fewer than 1,498 times in fiscal year 2013. *Id.* at 12.

Nor is the meaning of an "aggravated felony" limited to the crime of illegal reentry. A neighboring crime, 8 U.S.C. § 1327, provides for specially enhanced penalties for aiding or assisting the entry of noncitizens with aggravated felonies into the United States. Thus, the scope of the aggravated-felony statute has numerous applications to criminal law.

2. Aggravated felonies also play a frequent and critical role in civil immigration procedures.

In addition to playing a central role in criminal law, the meaning of an "aggravated felony" has obvious significance in immigration law. Although data are difficult to find, a Syracuse University organization called "TRAC Immigration" actively investigates empirical data concerning the use of the aggravated-felony statute. TRAC Immigration concludes that between mid-1997 and May 2006, authorities have used aggravated felony charges in immigration court against 156,713 people. TRAC Immigration, *How Often is the Aggravated Felony Statute Used?*, (2006), *available at* https://trac.syr.edu/immigration/reports/158/. The American Immigration Council ("AIC") explains that "the primary impact of the 'aggravated felony' classification relates to the increased immigration penalties attached to the label, including the inability to apply for most forms of relief from removal." American Immigration Council, *Aggravated Felonies: An Overview*, (2016), *available at* https://exchange.americanimmigrationcouncil.org/research/aggravated-felonies-overview. All of the following count as important potential immigration consequences of an aggravated-felony conviction:

- Deportation without a removal hearing;
- Mandatory, unreviewable detention after release from criminal custody;
- Ineligibility for asylum, cancellation of removal, certain waivers of inadmissibility, or voluntary departure;
- Permanent bar to naturalization; and
- Permanent inadmissibility after departing the United States.

Id. The meaning of an aggravated felony thus carries high-stakes consequences in the immigration world.

3. This Court has repeatedly exercised its discretion to review aggravated-felony questions and clarify the interpretation of § 1101(a)(43).

Recognizing the importance of the aggravated-felony designation to federal law, this Court has repeatedly chosen to review cases implicating § 1101(a)(43). *See, e.g.*, *Dimaya*, 138 S. Ct. at 1204 (subparagraph (F), "crime of violence (as defined in section 16 of title 18 . . .)"); *Esquivel-Quintana*, 137 S. Ct. at 1562 (subparagraph (A), "sexual abuse of a minor"); *Torres*, 136 S. Ct. at 1619 (determining the approach to a statute of conviction's jurisdictional elements in comparing categorically with any definition under § 1101(a)(43)); *Moncrieffe*, 569 U.S. at 184 (subparagraph (B), "illicit trafficking in a controlled substance"); *Kawashima*, 565 U.S. at 478 (subparagraph (M)(i), fraud or deceit causing loss to victims exceeding $10,000); *Carachuri-Rosendo*, 560 U.S. at 563 (subparagraph (B)); *Nijhawan*, 557 U.S. at 29 (subparagraph (M)(i)); *Duenas-Alvarez*, 549 U.S. at 185 (subparagraph (G), "theft offense"); *Lopez*, 549 U.S. at 47 (subparagraph (B)); *Leocal*, 543 U.S. 1 (subparagraph (F)).

Indeed, subparagraph (G) has already generated one grant of certiorari to determine a different facet of interpreting "a theft offense (including receipt of stolen property)"—whether it includes aiding and abetting. *See Duenas-Alvarez*, 549 U.S. at 185. For its part, subparagraph (M)(i) has previously spawned two of its own. *See Kawashima*, 565 U.S. 478; *Nijhawan*, 557 U.S. 29. And if properly

interpreting each of those subparagraphs on their own was important, then the issue in this case is equally or more important, as it involves interpreting subparagraph (G) when read in conjunction with subparagraph (M)(i).

Finally, the Government itself would not likely question the importance of correctly determining whether § 1101(a)(43)(G) requires consent. In the Government's own 2006 petition for a writ of certiorari in *Duenas-Alvarez*, it relied heavily on the Department of Homeland Security's report that "there [were then] approximately 8000 aliens who [had] either been charged with removability or been ordered removed in the Ninth Circuit on the basis of a conviction for a 'theft offense.'" Petition for a Writ of Certiorari, *Gonzalez v. Duenas-Alvarez*, 2006 WL 1723979, at *15 (2006). This figure can only have grown significantly in the intervening thirteen years. Therefore, resolving whether lack of consent is an element of "a theft offense including (receipt of stolen property)" deserves the Court's immediate attention.

B. Halting agency deference in criminal proceedings is also a pressing matter of national importance.

The second question presented also raises serious and urgent constitutional concerns this Court must immediately resolve. As previously explained, few things could lead to a more drastic erosion of a criminal defendant's rights than "giving the nation's chief prosecutor the power to write a criminal code rife with his own policy choices." *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting). Yet that is precisely what the Ninth Circuit's precedential decision here allows. Not only that, it permits the Attorney General's rewrites of the criminal code to apply *retroactively* to a

defendant's conviction, statutory maximum, and Sentencing Guidelines range. It is difficult to imagine a more complete demolition of the barriers separating the three branches of government. Without this Court's intervention, the Ninth Circuit's decision can and will be used to justify deference to an executive agency's decision in a plethora of contexts—all of which will only further the tendency of agencies to "pok[e] into every nook and cranny of daily life." *City of Arlington, Tex.*, 569 U.S. at 307 (Roberts, C.J., dissenting).

III. This case presents an especially clean vehicle to reach these important questions of pure law because they are inevitable and no idiosyncrasies get in the way.

Not only is there a pressing need to create national uniformity on the questions presented, but no better vehicle exists to resolve these issues than Mr. Flores's case.

A. Because each question presented is essential to the judgment, neither could be avoided in deciding whether to affirm or reverse.

Neither Mr. Flores's sentence nor his conviction could be affirmed without reaching the questions presented.

1. Each question presented is essential to Mr. Flores's sentence.

Mr. Flores's sentence necessarily implicates each of the questions presented because each was essential to properly determining the custodial range pursuant to the Sentencing Guidelines. That is because, under the "illegal reentry" Guideline that applied at Mr. Flores's sentencing, the eight-level enhancement he received depended on the "aggravated felony" determination. *See* U.S. Sentencing Guidelines

Manual § 2L1.2(b)(1)(C) (2015) (instructing to "increase by 8 levels" if the defendant "was deported, or unlawfully remained in the United States, after . . . a conviction for an aggravated felony"). If not for the aggravated-felony enhancement, only a four-level enhancement would have applied. *Id.*, U.S.S.G. § 2L1.2(b)(1)(D). Given district courts' obligation to begin the sentencing process by correctly calculating the Guidelines sentence, the aggravated-felony issue is central to deciding whether to disturb Mr. Flores's sentence. *See, e.g., Peugh,* 569 U.S. at 542 ("Indeed, the rule that an incorrect Guidelines calculation is procedural error ensures that [the Guidelines] remain the starting point for every sentencing calculation in the federal system.").

a. If "a theft offense (including receipt of stolen property)" requires a taking of property without consent, then Mr. Flores's Guidelines range was miscalculated.

Both California and federal law are clear that the elements of CPC § 496(a) cover theft by false pretenses, which can be accomplished with the owner's consent. *See Bell v. Feibush*, 151 Cal. Rptr. 3d 546, 551 (Ct. App. 2013); *Carrillo-Jaime v. Holder*, 572 F.3d 747, 752–53 (9th Cir. 2009). So CPC § 496(a) lacks any "without consent" element. The Ninth Circuit conceded as much in *Flores*:

> Flores is right that . . . [CPC §] 496(a) . . . lacks . . . a ["without consent"] requirement. Instead, it criminalizes receipt of property taken from its owner through any theft, with or without consent. Therefore, if we conclude that "including" has only the one meaning of "subset," receiving known stolen property under California law would not be a categorical match with the generic federal offense of "receipt of stolen property."

Flores, 901 F.3d at 1157.

With the breadth of the state statute so clearly established, only the other half of the categorical analysis remains to be settled: whether "a theft offense (including receipt of stolen property)" has a "without consent" element. And that is the first question presented. Because under *Peugh*, 569 U.S. at 542, and the caselaw cited in *Peugh*, the Guidelines must be calculated correctly, the first question presented is integral to Mr. Flores's sentence.

b. Likewise, if courts should not defer to an executive agency's interpretation of a statute, then Mr. Flores had no aggravated-felony prior and the sentence must be vacated.

For closely related reasons, the second question presented is also essential to Mr. Flores's sentence. This second question presented concerns *Chevron* deference. And *Chevron* deference was the analytical means by which the Ninth Circuit reached its two conclusions that—

(1) "receipt of stolen property" is not a subset of "a theft offense" under § 1101(a)(43)(G) even though it appears within a parenthetical phrase introduced by the word "including"; *Flores*, 901 F.3d at 1159, and,

(2) as a result, "receipt of stolen property" under § 1101(a)(43)(G) is not limited to property that was the subject of a "theft offense" in the sense of a taking without consent. *Id.* at 1160.

In *Flores*, the Ninth Circuit got to these outcome-determinative, erroneous conclusions only by deferring to the BIA.

The Ninth Circuit's opinion leaves absolutely no doubt of this. It says: "Because we conclude that the term 'including' in the INA is ambiguous, we must turn to the familiar *Chevron* framework, where, as here, the [BIA] has previously interpreted the term 'including' within 8 U.S.C. § 1101(a)(43)(G)." *Id.* at 1158.

Therefore, the second question presented—whether courts should decide the constitutionality of a criminal conviction or sentence by deferring to the same branch of government that is prosecuting the defendant—is likewise essential to Mr. Flores's sentence.

2. Each question presented is also essential to Mr. Flores's conviction.

Similarly, if Mr. Flores is correct on either question presented, then not only his sentence, but also his conviction, must be vacated. To be sure, it might appear superficially that the conviction could be affirmed without reaching aggravated-felony questions because there was another removal order aside from the § 1228 one. But in truth, the validity of the § 1225 removal order *also* depends on the aggravated-felony question.

That is because the aggravated-felony issue plays a big role in deciding whether Mr. Flores suffered prejudice from the (undisputed) due process violations that immigration officials committed in ordering him removed under § 1225. *See United States v. Raya-Vaca*, 771 F.3d 1195, 1207–10 (9th Cir. 2014) (ruling that the prejudice from a § 1225 removal order depends on multiple factors, several of which are linked to whether the noncitizen is an aggravated felon—" the seriousness of the immigration violation," "intent on the part of the alien to violate the law," "ability to easily overcome the ground of inadmissibility," and "other . . . public interest considerations").

The lower courts' and the Government's actions in this case reflect their understanding of this. If the district court had believed it could determine the

validity of the § 1225 removal order without reaching the aggravated-felony issue, then it could have avoided discussing the § 1228 removal order altogether. But it did not. Instead, the district court *began* its denial of the motion to dismiss by giving reasons for the (erroneous) conclusion that CPC § 496(a) is an aggravated-felony "theft offense." Thus, the district court *fully* addressed the § 1228 removal order in denying the motion.

All of that analytical work really was necessary because the aggravated-felony issue affected both removal orders. So although the district court reached incorrect conclusions that were based on false legal premises, its analytical process is evidence of its correct understanding that the aggravated-felony issue was important to both removal orders.

The Ninth Circuit proceedings also show that the aggravated-felony question permeates both removal orders. In the Government's answering brief on appeal, it argued that Mr. Flores could not overcome the § 1225 removal order because he had an aggravated-felony conviction. The Ninth Circuit then agreed with, and adopted, that theory. *Flores*, 901 F.3d at 1163 n.17 (focusing on the aggravated-felony determination to conclude that Mr. Flores could not show the necessary prejudice because his criminal history presented a "virtually insurmountable block to any basis for admissibility").

Therefore, there is no way to extricate the aggravated-felony questions from the decision whether to vacate Mr. Flores's conviction. Each question presented by this petition is essential to the conviction, as well as the sentence.

B. Mr. Flores's case is not moot because a defendant may always challenge his underlying conviction and he is still subject to his sentence.

Nor does Mr. Flores's case raise any mootness concerns. In criminal appeals, Article III's case-or-controversy requirement is satisfied where "the defendant challenges his underlying *conviction*." *United States v. Juvenile Male*, 564 U.S. 932, 936 (2011). An expired sentence may also be challenged as long as the defendant identifies "some ongoing 'collateral consequenc[e]' that is 'traceable' to the challenged portion of the sentence and 'likely to be redressed by a favorable judicial decision.'" *Id.* (quoting *Spencer v. Kemna*, 523 U.S. 1, 7, 14 (1998)). Here, although Mr. Flores has been released from prison, his sentence is not expired; he remains subject to supervised release until November 30, 2021—more than two years from now. Therefore, his case is not moot. *See also United States v. Wiltshire*, 772 F.3d 976, 979 (2d Cir. 2014) ("Wiltshire's appeal is not moot because a favorable appellate decision might prompt the district court to reduce her term of supervised release." (internal quotation marks, alterations, and citation omitted)).

* * *

For all of these reasons, Mr. Flores's case affords the ideal occasion to resolve the pressing and important questions presented here.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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