No. 19-6055

IN THE SUPREME COURT OF THE UNITED STATES

EDWIN RICARDO FLORES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION

Ryan Fraser
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

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Introduction

In his petition for a writ of certiorari, Mr. Flores asked this Court to: 1) decide whether Article III courts may defer to an executive agency's interpretation of a statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), in a *criminal* case; and 2) resolve a circuit split over the phrase "theft offense (including receipt of stolen property)" in 8 U.S.C. § 1101(a)(43)(G). Because both questions affect thousands of immigration and criminal cases and carry serious separation-of-powers and *ex post facto* implications, Mr. Flores urged the Court to grant certiorari.

The government disagrees that review is warranted. First, while not defending the unprecedented use of *Chevron* deference in a criminal case, the government claims the Ninth Circuit would have reached the same conclusion without it. Second, the government denies that any meaningful circuit split exists

and defends the Ninth Circuit's result by delving into the merits. Finally, the government insists Mr. Flores's case is a poor vehicle to resolve these issues because his custodial sentence is complete and, the government claims, his conviction could have rested on other grounds.

The government's responses mask the serious consequences of this case for anyone charged with an aggravated felony—or any crime—or concerned about the unchecked authority of executive agencies. The Ninth Circuit's decision creates a circuit split, conflicts with *Nijhawan v. Holder*, 557 U.S. 29 (2009), and grants *Chevron* deference to the very agency prosecuting Mr. Flores. Should the Ninth Circuit's decision stand, it will permanently blur the line between executive and judicial decision-making and expand the definition of a "theft offense" well beyond its intended meaning. To provide Mr. Flores the tangible relief he deserves on this issue of national importance, the Court should grant certiorari.

Argument

I. Review is urgently needed to prevent appellate courts from granting *Chevron* deference in criminal cases.

In his petition, Mr. Flores explained that the aggravated felonies in 8 U.S.C. § 1101(a)(43) have immigration and criminal applications and courts must interpret them identically in both contexts. *See* Pet. 12–13 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11–12 (2004), and *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212–13 (2018)). Consequently, courts may not defer to the BIA's interpretations of aggravated felonies; while ambiguous immigration statutes are subject to *Chevron* deference, *Chevron* does not apply in the criminal context. *See* Pet. 13–15.

Yet here, the Ninth Circuit not only deferred to the BIA's definition of the theft aggravated felony in *Matter of Alday-Dominguez*, 27 I. & N. Dec. 48 (BIA 2017), it did so in a *criminal* case. That means an Article III court deferred to the statutory interpretation of the same Department of Justice that was simultaneously prosecuting Mr. Flores. This triggers serious separation-of-powers concerns. Moreover, *Matter of Alday-Dominguez*'s issuance fifteen years *after* Mr. Flores's removal (and non-existence at the time he reentered the United States) raises grave *ex post facto* concerns, too.

In response, the government never addresses these serious constitutional issues. Instead, it offers two unsatisfying responses.

First, the government claims it was "unnecessary for the court of appeals to resort to deference" because the "ordinary rules of statutory interpretation" support the Ninth Circuit's conclusion that receipt of stolen property includes property obtained by larceny and fraud. Government's Brief in Opposition ("BIO") 12. But the government never employs any canons of statutory construction to reach this conclusion. Instead, it relies solely on the BIA's rationale and its own attempts to distinguish other circuits' decisions. *See* BIO 8–11.

In fact, the "ordinary rules of statutory interpretation" support Mr. Flores's position. A plain reading of the text—the most ordinary of all canons—shows that Congress created one aggravated felony for theft-related offenses (8 U.S.C. § 1101(a)(43)(G)) and one aggravated felony for fraud-related offenses (8 U.S.C. § 1101(a)(43)(M)). By doing so, Congress signaled its intent to treat all *non-*

consensual takings in the former and all *consensual* takings in the latter. Absent deference to the BIA, then, the plain language of the statute would not have led the Ninth Circuit to the same conclusion.

Nevertheless, the Ninth Circuit *deliberately* deferred to the BIA. Because the BIA did not issue *Matter of Alday-Dominguez* until after Mr. Flores's briefing concluded, the Ninth Circuit ordered the parties to submit supplemental briefs on "what level of deference, if any, should be accorded" to the administrative decision. *See* Case No. 16-50096, DktEntry 39. Mr. Flores objected to deference in that supplemental briefing, in a citation of supplemental authority, and in his petition for rehearing. *See* Case No. 16-50096, DktEntry 43, 47, 52. Numerous organizations then filed an *amici* brief arguing against deference. *See* Case No. 16-50096, DktEntry 53. Given this opposition, the Ninth Circuit's deference to the agency was not a drafting error or shortcut; it was an intentional abdication of judicial authority to an executive agency.

The government also argues that the Ninth Circuit did not defer to the agency's interpretation of a "substantive criminal statute that [Mr. Flores] was charged with violating: 8 U.S.C. § 1326"—it only deferred to the agency's interpretation of an aggravated-felony provision that "appears in a civil immigration statute" and was "entered in a civil removal proceeding." BIO 12. But this aggravated-felony provision served as the legal basis for his removal. *See* 8 U.S.C. § 1228(b) (separate removal proceeding for aggravated-felony convictions). And the removal order, in turn, was an essential element of his criminal charge. *See*

8 U.S.C. § 1326(a)(1). As this Court held thirty-five years ago (and Congress codified in 8 U.S.C. § 1326(d)), a person charged with § 1326 may challenge the validity of a prior deportation order in a pretrial motion to dismiss. *United States v. Mendoza-Lopez*, 481 U.S. 828, 837–38 (1987). So disputing the aggravated-felony designation underlying Mr. Flores's removal was as essential to his defense as any motion to suppress, discovery dispute, or other pretrial challenge—none of which would involve deference to the same agency responsible for prosecuting him.

Deference might be more appropriate if *Matter of Alday-Dominguez* had existed during Mr. Flores's deportation. But the BIA issued *Alday-Dominguez* fifteen years later, when Mr. Flores had already been convicted and sentenced. So the Ninth Circuit's decision means an Article III court can travel back in time, defer to the DOJ's interpretation of an ostensibly civil statute at the moment of a person's removal, and then fast-forward to apply that deference to affirm the person's criminal conviction over a decade later. Used in this manner, *Chevron* deference becomes transformed into an *ex post facto* criminal law.

It is time for this Court to halt the circuit courts' erroneous and unconstitutional use of *Chevron* deference in construing statutes with criminal-law applications. Although this Court has never accepted the government's invitation to defer to the BIA's definition of an aggravated felony, *see* Pet. 14–15, nearly every federal appellate court has done so.[1] Absent this Court's intervention, then,

[1] *See, e.g., Soto-Hernandez v. Holder*, 729 F.3d 1, 4 (1st Cir. 2013); *Torres v. Holder*, 764 F.3d 152, 158 (2d Cir. 2014); *Restrepo v. Attorney Gen.*, 617 F.3d 787, 796 (3d Cir. 2010); *Espinal-Andrades v. Holder*, 777 F.3d 163, 169 (4th Cir. 2015); *Alwan v.*

appellate courts will continue to allow the same executive agency *enforcing* the law to retroactively *define* it. *See Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (criticizing a law that would "allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing"). Such concentrated power 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.

II. The circuit split on § 1101(a)(43)(G) warrants this Court's review.

In his petition, Mr. Flores also argued that the Ninth Circuit created a split with the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits, all of which interpret the phrase "theft offense (including receipt of stolen property") to be a unitary definition requiring lack of consent. Pet. 7–10. The government disagrees, claiming the Fifth, Seventh, and Tenth Circuits follow its interpretation because they define § 1101(a)(43)(G) to include "'a taking of property or an exercise of control over property without consent.'" BIO 9 (quoting *Hernandez-Mancilla v. INS*, 246 F.3d 1002, 1009 (7th Cir. 2001)) (emphasis government's). According to the government, this latter clause means that receipt of fraudulently obtained property fits the generic definition of theft: "[s]o long as the defendant controls the property – e.g., by

Ashcroft, 388 F.3d 507, 515 (5th Cir. 2004); *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1025 (6th Cir. 2016); *Gattem v. Gonzales*, 412 F.3d 758, 765 (7th Cir. 2005); *Armenta-Lagunas v. Holder*, 724 F.3d 1019, 1022 (8th Cir. 2013); *Perez-Paredes v. Holder*, 561 F. App'x 774, 777 (10th Cir. 2014); *Choizilme v. U.S. Attorney Gen.*, 886 F.3d 1016, 1022 (11th Cir. 2018).

receiving it without consent – it does not matter whether consent existed at the time of the original taking." BIO 9.

First, this argument concedes Mr. Flores's exact point—§ 1101(a)(43)(G) excludes consensual transfers. And on the merits, this concession is fatal to the government, because Mr. Flores's statute of conviction "includes theft by false pretense." *Bell v. Feibush*, 151 Cal. Rptr. 3d 546, 547 (Cal. Ct. App. 2013). Regardless, the Eleventh Circuit already rejected the argument that every consensual taking eventually becomes non-consensual in *Vassell v. U.S. Attorney Gen.*, 839 F.3d 1352, 1362–64 (11th Cir. 2016)—the only one of Mr. Flores's cases on this point the government ignores.

In *Vassell*, the government relied on the same "exercise of control over property without consent" clause to argue that the non-consensual element of § 1101(a)(43)(G) can be satisfied at "whatever moment an offender exceeds the victim's consent, even if this happens long after property is initially surrendered with consent." 839 F.3d at 1362. The Eleventh Circuit rejected this argument because it "turns all fraud into theft": "[a]ll fraud could become an 'exercise of control over[ ] property without consent' at whatever point the fraudulently obtained consent expires." *Id.* at 1363. So even if an owner eventually asked for his property back, what controls is whether the taking was consensual *at the time* the defendant "committed the crimes at issue." *Id.* As the Eleventh Circuit explained, "[c]alling these crimes 'a theft offense' ignores the INA's separate requirement for

fraud offenses," *id.* at 1363–64, and shows why the Fifth, Seventh, Tenth, and Eleventh Circuits all align with Mr. Flores.

As for the Fourth Circuit, the government does not deny the Ninth Circuit created a split with *Mena v. Lynch*, 820 F.3d 114 (4th Cir. 2016). *See* BIO 11. Instead, it downplays the split by claiming that *Mena* "considered itself bound" by the prior decision in *Soliman v. Gonzales,* 419 F.3d 276 (4th Cir. 2005). BIO 11. But *Mena*'s reliance on *Soliman* does not erase the circuit split. Furthermore, *Mena* considered both *Soliman and* "a straightforward reading" of § 1101(a)(43)(G). 820 F.3d at 119. Not only did this "straightforward reading" favor Mr. Flores, *Mena* "f[ou]nd the BIA's reliance on its survey of State statutes and the Model Penal Code to be unavailing." *Id.* at 120.

The government also asserts (with no explanation) that any "tension" between the Fourth and Ninth Circuits "does not warrant this Court's review." BIO 11. But this ignores the "anomalous result" the Ninth Circuit's decision creates. *Mena*, 820 F.3d at 120. For instance, a defendant convicted of taking property by fraud would not satisfy § 1101(a)(43)(G), since the taking was consensual, though deceitful. But under the Ninth Circuit's rule, a defendant convicted of receiving that same fraudulently obtained property would satisfy § 1101(a)(43)(G). That is, the original *fraudster* will not be deported under § 1101(a)(43)(G), but the person the fraudster *gives the property to* will. Such a result makes "scant sense," *Mena*, 820 F.3d at 121, and could not be what Congress intended.

While briefly mentioning *Nijhawan v. Holder*, 557 U.S. 29 (2009), the government ignores Mr. Flores's argument that the Ninth Circuit's reading undermines that decision. *Nijhawan* declined to apply the traditional categorical approach to the $10,000 loss requirement in the fraud aggravated felony, § 1101(a)(43)(M)(i), holding that to do so would leave this monetary threshold with "little, if any, meaningful application." *Id.* at 39. If courts were to hold that receipt of property obtained by fraud need *not* satisfy this $10,000 requirement, it would create yet another "anomalous" result: a person who fraudulently took property worth $9,999 would not be deportable as an aggravated felon, while a person who "knowingly receiv[ed] a fraction" of that property *would*. *Mena*, 820 F.3d at 120–21. So not only would the Ninth Circuit's rule undercut *Nijhawan*, it would undo Congress' intent to tie § 1101(a)(43)(M) to a specific financial-loss amount.

Alternatively, the government and Ninth Circuit's definition of the subordinated parenthetical term "receipt of stolen property" is implausibly broad because it makes the lead, independent term—"theft offense"—surplusage. *See* Pet. App. 8 (making "theft offense" a subset (without explicit recognition) because it is impossible to take or exercise control with intent and yet not possess with knowledge). Just as nobody would prepare a shopping list calling for "all apples (including fruits)," the structure chosen by Congress—*i.e.*, "X (including Y)"—excludes the possibility of the first term being a subset of the second.

Given these weaknesses in the government's response, the correct interpretation of the phrase "theft offense (including receipt of stolen property)" is,

if not a foregone conclusion, at least an open question. Accordingly, the Court should grant certiorari to provide a uniform definition of that phrase.

III. Mr. Flores's case presents a good vehicle.

The government's arguments that this case presents an unsuitable vehicle are also unavailing; the case directly implicates the questions presented.

A. Resolving the questions presented would affect Mr. Flores's supervised-release sentence.

The government acknowledges that the aggravated-felony issue determined the custodial range under the Guidelines. BIO 14. But it maintains that Mr. Flores already served his prison term, and the Court "typically declines to review contentions that district courts misinterpreted or misapplied the Sentencing Guidelines." BIO 14.

The completion of Mr. Flores's prison sentence, however, does not make his case moot, as the government silently concedes. *See also* Pet. 28. Nor does it make the case an unsuitable vehicle. Mr. Flores remains subject to supervised release until November 30, 2021, and a correctly recalculated, reduced custodial range under the Guidelines would weigh in favor of imposing no supervised release or less supervised release upon resentencing. After all, the Guidelines' custodial range is a supervised-release sentencing factor pursuant to 18 U.S.C. § 3583(c) (by reference to § 3553(a)(4)), application note 3 to Guidelines § 5D1.1, and application note 4 to Guidelines § 5D1.2. Because the miscalculation of the Guidelines custodial range infects the still-active supervised-release sentence, Mr. Flores's release from custody does not make his case an unsuitable vehicle.

Next, the government's reliance on *Braxton v. United States*, 500 U.S. 344, 348 (1991), and the general policy against granting certiorari to interpret the Guidelines is a red herring. BIO 14–15. The Court rarely grants certiorari to interpret Guidelines provisions because Congress has tasked the Sentencing Commission with periodically revising them. *See Braxton*, 500 U.S. at 348. But here, the Guidelines directly imported § 1101(a)(43)'s aggravated-felony definitions. *See* U.S.S.G. § 2L1.2(b)(1)(C) cmt. n.3(A) (2015). So the policy from *Braxton* is inapplicable. The statute that enhanced Mr. Flores's sentence exists independent of the Guidelines and continues to affect people in other criminal and immigration contexts. *See also* Pet. 18–22.

Moreover, the government is wrong in asserting that "the current Guidelines would [still] require" the same enhancement if Mr. Flores's sentence were overturned. BIO 15. If Mr. Flores's prior conviction is not an aggravated felony, resentencing without the eight-level enhancement is required to avoid an *ex post facto* violation. *See Peugh v. United States*, 569 U.S. 530, 544 (2013); U.S.S.G. § 2L1.2(b)(1)(D) (2015) (conduct-contemporaneous Guideline designating four-level enhancement). So resolving the questions presented would require the district court to reconsider supervised release using the correctly calculated Guidelines range.

B. Resolving the questions presented also determines whether Mr. Flores's conviction can stand.

The government also claims Mr. Flores's 2009 expedited-removal order insulates his § 1326 conviction, even if his 2001 removal order is invalid. BIO 13–14. This claim fails—and the government should know why, having argued below

that the 2009 removal order was valid *because* Mr. Flores "had amassed multiple aggravated felony convictions" and was "inadmissible as an aggravated felon." Case No. 16-50096, DktEntry 18-1 at 38 of 61.

Likewise, the Ninth Circuit regarded the aggravated-felony issue as inevitable, which is evident in two ways. First, if the Ninth Circuit had believed Mr. Flores's conviction could independently rest on the expedited-removal order, it would not have discussed the other removal order in the context of the § 1326(d) motion. Instead, the Ninth Circuit used *most* of the approximately nine pages concerning the § 1326(d) motion to address the 2001 removal. *See* Pet. App. 7–15. Second, the Ninth Circuit explicitly adopted the government's position that Mr. Flores's aggravated felony made him "deportable" and subject to a "virtually insurmountable block to any basis for admissibility." *Id.* at 14, n.17. As the lower courts and (until now) both parties have recognized, the aggravated-felony issue is necessary to both removal orders.

Finally, the government errs in suggesting that Mr. Flores, a resident of this country for most of his life and father of three United States citizens who continue living here, has only a "limited stake" in resolving his aggravated-felony issue. BIO 15. It affects not only his ongoing supervised release, but his future admissibility and deportability, too. *See, e.g.*, 8 U.S.C. § 1182(a)(9), § 1227(a)(2)(A)(iii).

Accordingly, Mr. Flores's case makes an exceptionally good vehicle to reach the weighty questions presented.

CONCLUSION

The Court should grant Mr. Flores's petition for certiorari.

Respectfully submitted,

Date: March 25, 2020

Ryan Fraser
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

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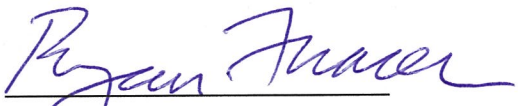
Certificate of Service

I, Ryan Fraser, appointed to represent the petitioner under the Criminal Justice Act, certify that on March 25, 2020, one copy of the Reply to the United States' Brief in Opposition in the above-captioned case were served by first-class mail, postage prepaid, to respondent's counsel. I further certify that all parties required to be served have been served. Service was addressed as follows:

Noel Francisco
Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001



Ryan Fraser
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner