No. 21-8229

IN THE
Supreme Court of the United States

JUAN JESUS BARRIETA-BARRERA,
Petitioner,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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INTRODUCTION

The split between the Fifth and Eighth Circuits is clear, acknowledged, and worthy of this Court's review. The Fifth Circuit reads § 1101(a)(43)(O) in a way that contravenes its plain language and, as a result, ossifies the INA. The Eighth Circuit, in contrast, follows (a)(43)(O)'s textual mandate to conduct an aggravated-felony inquiry based on what is *presently* "described in another subparagraph of [(a)(43)]." 8 U.S.C. § 1101(a)(43)(O). The government does not assert that the split is not ripe nor that the Eighth Circuit has misread the statute. Instead, it tries to wave away the split by pointing to an irrelevant civil–criminal distinction with no basis in the statute, this Court's precedents, or the Fifth and Eighth Circuits' opinions.

Nor does the government dispute that an erroneous aggravated-felony designation carries severe collateral consequences. For Mr. Barrieta, and many of those impacted by the INA, the difference between the Fifth and Eighth Circuits' constructions of § 1101(a)(43)(O) means the difference between having a chance at lawful return to the United States and having our nation's doors closed on them forever. Mr. Barrieta's case is an ideal vehicle to resolve the split, provide meaningful relief on an issue affecting substantial rights and, in the process, ensure the immigration system that Congress designed remains "uniform." U.S. Const. art. 1, § 8, cl. 4.

Leaving this split unresolved is all the more untenable given the Fifth Circuit's disproportionate impact upon this nation's immigration law. The Fifth Circuit handles, by no small margin, the lion's share of illegal reentry cases. Its misreading of the INA therefore has the potential to disrupt the lives of thousands more people than any other circuit.

ARGUMENT

I. There is a clear, acknowledged circuit split.

In the Eighth Circuit, courts must "independently determine" whether a prior conviction counts as an "aggravated felony under [8 U.S.C.] § 1101(a)(43)." *Lopez-Chavez* v. *Garland*, 991 F.3d 960, 964 (8th Cir. 2021). Mr. Barrieta's appeal would've gone forward there. But the Fifth Circuit "eliminat[es] the interpretive question." *United States* v. *Piedra-Morales*, 843 F.3d 623, 624 (5th Cir. 2016) (quoting *United States* v. *Gamboa-Garcia*, 620 F.3d 546, 549 (5th Cir. 2010)). That court tossed this case because a district court previously treated Mr. Barrieta's state conviction as an aggravated felony. The Eighth Circuit considered that approach and rejected it—finding "the rule adopted in *Gamboa-Garcia* and applied in *Piedra-Morales* to be inconsistent with the plain language of § 1101(a)(43)(O)." *Lopez-Chavez*, 991 F.3d at 996 n.5.

The government briefly asserts (at 6, 8) that the split is too "narrow" to be certworthy. But this Court resolves similarly "narrow" splits all the time—often at the government's own urging.[1] And in any case, the government offers no reason to kick the can down the road. The Fifth Circuit's approach is well-established, and nothing suggests that the split will resolve itself. Nor does the government claim that the issue needs more time to percolate. The Fifth and Eighth Circuits are entrenched in their respective positions.

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[1] *See*, *e.g.*, U.S. Pet. at 25, *United States* v. *Sanchez-Gomez*, No. 17-312 (Aug. 29, 2017), 2017 WL 3809745 (alleging 2-1 split); Pet. at 11, *U.S. Army Corps of Eng'rs* v. *Hawkes Co.*, No. 15-290 (Sept. 8, 2015), 2015 WL 5265284 (alleging 1-1 split); U.S. Pet. at 13, *United States* v. *Ressam*, No. 07-455 (Oct. 4, 2007), 2007 WL 2898699 (same).

Changing tack, the government next ventures (at 9) that the Eighth Circuit doesn't actually disagree with the Fifth Circuit because *Lopez-Chavez* arose in a "different" context. But that's not what the Eighth Circuit said. In *Lopez-Chavez*, the Eighth Circuit "decline[d]" to "adopt the reasoning of [its] sister circuit," observing that the Fifth Circuit's approach was "inconsistent with the plain language" of § 1101(a)(43)(O). *Lopez-Chavez*, 991 F.3d at 966 n.5. This explicit disagreement was based on clear statutory text—not context, which went unmentioned. And if context distinguished the Fifth Circuit's cases, the Eighth Circuit would not have gone out of its way to create a circuit split by disagreeing with them.

In all events, the government's "context" theory doesn't wash. True, *Gamboa-Garcia* and *Piedra-Morales* were criminal cases, whereas *Lopez-Chavez* involved cancellation of removal. But all three cases turned on the meaning of § 1101(a)(43)(O). And whatever that provision means, giving it "a different meaning [in different contexts] would be to invent a statute rather than interpret one." *Clark* v. *Martinez*, 543 U.S. 371, 378 (2005); see also *United States* v. *Santos*, 553 U.S. 507, 522 (2008) (plurality) (the Court has "never" given "the same word, *in the same statutory provision*, different meanings *in different factual contexts*"). In short, if the Eighth Circuit's interpretation is right, the Fifth Circuit's is wrong, and vice versa.

II. This case is an excellent vehicle.

Because the Fifth Circuit's holding would render Mr. Barrieta permanently inadmissible, see 8 U.S.C. § 1182(a)(9)(A), Mr. Barrieta has a substantial interest in the outcome of the case. This Court thus has the chance to both clarify an important issue in immigration and criminal law and provide meaningful relief.

A. Plain error is no obstacle to this Court's review.

The government asserts that, given "the Fifth Circuit decisions explaining why such [plea] admissions are binding," Mr. Barrieta cannot show that the district court "clear[ly] or obvious[ly]" erred in sentencing him under subsection (b)(2). Opp. 10–11. That is wrong. The judgment below constitutes an "obvious instance[] of injustice or misapplied law," so plain-error review would not prevent meaningful relief on remand. *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 (1981); cf. *Henderson* v. *United States*, 568 U.S. 266, 273–274 (2013) ("[A]n error is 'plain' even if the trial judge's decision was plainly *correct* at the time when it was made but subsequently becomes incorrect based on a change in law." (quoting *Johnson* v. *United States*, 520 U.S. 461, 468 (1997))).

The government further protests (at 11) that Mr. Barrieta's "substantial rights" were not affected by the improper (b)(2) designation, because his sentence "was substantially below" the maximum that would have applied "if his prior offense were *not* classified as [an] aggravated felony." Yet not even the Fifth Circuit agrees with that. Even when "nothing in the record suggests that the error influenced the district court's sentencing decision," the Fifth Circuit itself regularly corrects lower-court judgments—on *plain error* review—if "the judgment erroneously reflects that [defendant] was convicted under § 1326(b)(2)." *United States* v. *Medrano-Camarillo*, 653 F. App'x 239, 240 (5th Cir. 2016). That is because, unlike the government, the Fifth Circuit acknowledges the "potentially significant immigration consequences" of an aggravated-felony designation. *United States* v. *Montanez-*

Trejo, 708 F. App'x 161, 168 (5th Cir. 2017).[2] Other circuits agree.[3]

B. The government also argues that, "even if the district court had (*sua sponte*) considered anew whether petitioner's underlying state conviction in fact qualified as an aggravated felony, it would have determined it was." Opp. 11. But *Mathis* and Fifth Circuit precedent suggest otherwise. And in all events, the lower courts did not address that argument. If this Court answers the question presented in Mr. Barrieta's favor, the state-conviction issue will be "ripe for consideration on remand." *Skinner* v. *Switzer*, 562 U.S. 521, 537 (2011).

1. As all agree, Mr. Barrieta was "convicted . . . in Minnesota state court for criminal sexual con[duct] in

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[2] *See*, *e.g.*, *United States* v. *Rodriguez-Flores*, 25 F.4th 385, 386–87 (5th Cir. 2022) (erroneous 1326(b)(2) designation under *Mathis* was plain error); *United States* v. *Fuentes-Rodriguez*, 22 F.4th 504, 506 (5th Cir. 2022) (vacating incorrect (b)(2) enhancement "because of the collateral consequences associated with aggravated felonies"); *see also United States* v. *Gomez-Gomez*, 23 F.4th 575, 578 and n.3 (5th Cir. 2022) (collecting over twenty cases "in keeping with [the] court's common practice" of "remand[ing] to the district court to reform the judgment").

[3] *See*, *e.g.*, *United States* v. *Juardo-Lara*, 287 F. App'x 704, 707 (10th Cir. 2008) ("[A] noncitizen convicted of an aggravated felony is permanently inadmissible. . . . [Thus] [h]is appeal is not moot because the asserted collateral consequences from the judgment give [defendant] 'a substantial stake' in the outcome of this case.") (quoting *Carafas* v. *La Vallee*, 391 U.S. 234, 237 (1968)); *United States* v. *Mesa-Rodriguez*, 798 F.3d 664, 668 (7th Cir. 2015) ("The possibility of returning to this country is a 'tangible benefit' to [defendant]; likewise, his current inability to reenter is a 'concrete and continuing injury.'"); *Steele* v. *Blackman*, 236 F.3d 130, 134 n.4 (3d Cir. 2001) ("Erroneous conviction of an aggravated felony will have several continuing and serious legal consequences for [defendant], including serving as a permanent bar preventing his return to the United States to visit his family.").

the third degree," Opp. 2. Under the Minnesota statute, "[a] person who engages in sexual penetration with another person is guilty of criminal sexual conduct" in fourteen different "circumstances," any one of which can serve as the basis for the offense. Minn. Stat. Ann. § 609.344(1)(a)–(n) (2003).

These "circumstances" define different means of committing the offense—not elements of the offense. The statute is thus indivisible, and a "court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution." *Mathis* v. *United States*, 570 U.S. 500, 517 (2016). Because many of these circumstances unambiguously cover conduct beyond "sexual abuse of a minor," see, *e.g.*, Minn. Stat. Ann. § 609.344(1)(l)(ii) (2003) (criminalizing sexual penetration between clergy member and individual "meeting on an ongoing basis with the actor to seek or receive religious or spiritual advice"), the offense fails this Court's "categorical approach," so Mr. Barrieta's Minnesota conviction cannot be an aggravated felony under 8 U.S.C. § 1101(a)(43)(A).

The government retorts that § 609.344 is "divisible," jumping the turnstile to fact-specific documents to implement the modified categorical approach and zero in on subdivision 1(b). Opp. 12–13 (citing *United States* v. *Mata*, 869 F.3d 640, 642 (8th Cir. 2017)). Yet the government departs—again—from the practice of the circuit whose decision it defends, which has "appl[ied] the categorical approach" to a sexual misconduct statute materially similar to § 609.344. See *Sanchez-Fuentes* v. *Garland*, No. 21-60697, 2022 WL 3229984, at *1 (5th Cir. Aug. 10, 2022) (per curiam) (Arkansas conviction for sexual indecency with a minor under matched federal "sexual abuse of a minor" because "*each of the five ways* of violating [it] meets th[e] [generic] elements" (emphasis added)).

2. Even if the statute were divisible and the court had to focus on subdivision 1(b) alone, Mr. Barrieta's offense would still fall outside the federal generic definition. The government misquotes *Esquivel-Quintana* to assert that *any* "statutory rape offense falls within 'the generic federal definition of "sexual abuse of a minor" under [Section] 1101(a)(43)(A)' if it 'requires the age of the victim to be less than 16.'" Opp. 12 (alteration in original) (quoting 137 S. Ct. 1562, 1572–73 (2017)). Not so. Far from reducing federal generic statutory rape to a single element, *Esquivel-Quintana* v. *Sessions* expressly "le[ft] for another day whether the generic offense requires a particular age differential between the victim and the perpetrator." 137 S. Ct. 1562, 1572 (2017).

Since then, at least some courts have defined federal generic statutory rape as requiring "an age difference of at least four years between the defendant and the minor." *Estrada-Espinoza* v. *Mukasey*, 546 F.3d 1147, 1152 (9th Cir. 2008) (en banc); see also *United States* v. *Gaspar-Juarez*, 291 F. Supp. 3d 1186, 1189 (D. Or. 2018) ("*Estrada-Espinosa* continues to be the law of the Circuit."). By contrast, subdivision 1(b) of Mr. Barrieta's offense requires an age difference of only two years. See Minn. Stat. Ann. 609.344(1)(b) (2003) ("[T]he actor is more than 24 months older than the complainant.").

At a minimum, then, the government is wrong that subdivision 1(b) *necessarily* matches the federal generic offense simply "[b]ecause it requires the victim to be less than 16." Opp. 12 (cleaned up). And since "federal courts have not reached a consensus on the meaning of the phrase 'sexual abuse of a minor,'" *Sanchez* v. *State*, 890 N.W.2d 716, 723 (Minn. 2017) (cleaned up), that issue may be addressed on remand and will not

hinder the Court from resolving this important circuit conflict.

III. The issue is important and recurring.

While the Eighth and Fifth Circuits disagree over how to analyze whether someone is guilty of an "aggravated felony," no one disputes the gravity of this label.

An aggravated-felony designation doubles the maximum term of imprisonment for illegal reentry from ten to twenty years. 8 U.S.C. § 1326(b)(1)–(2). The Attorney General cannot cancel removal for noncitizens who have been convicted of an aggravated felony. *Id.* § 1229b(b)(1)(C); see also *id.* § 1182(h)(2). And noncitizens facing deportation who otherwise may be admissible in the future become permanently inadmissible if they are removed subsequent to an aggravated felony. *Id.* § 1182(a)(9)(A). The government does not dispute the seriousness of these consequences.

Moreover, the particular issue of unlawful reentry after removal arises often—especially in the Fifth Circuit—meaning misapplication of the INA will subject thousands to unjust punishment.

In the last five years, federal courts have heard over 87,000 illegal reentry cases. *Quick Facts on Illegal Reentry Offenses*, U.S. Sent'g Comm'n, http://bit.ly/3VhqEV9 (last visited Nov. 21, 2022). And of the more than 11,000 illegal reentry cases last year, constituting 73% of the 2021 immigration offense docket, nearly half involved people with prior illegal reentry convictions. *Id.*

The Fifth Circuit has handled, and will likely continue to handle, the bulk of these cases. See *id.* So—in the government's own words—"[i]f left uncorrected, the decision below would also have significant conse-

quences for the administration of the Nation's immigration laws." Pet. for a Writ of Certiorari at 26, *Barr* v. *Ming Dai*, No. 19-1155, *cert. granted*, 141 S. Ct. 221 (2020).

IV. The decision below is wrong.

A. Section 1101(a)(43)(O) applies when a noncitizen has been "previously deported on the basis on a conviction for an offense described in another subparagraph of this paragraph." That language doesn't freeze the law at the time of the previous deportation: it "unambiguously anchors the inquiry in the text as written and understood *at the time* of that inquiry." *Lopez-Chavez*, 991 F.3d at 967. In other words, courts must ask whether an offense is *presently* described in another subparagraph of section 1101(a)(43)—not what the statute said when the noncitizen was "previously deported."

And that makes sense. Suppose, as the Eighth Circuit did, a person facing a § 1326 charge was previously convicted and sentenced under (b)(2) because he was removed for a state offense "that—at the time of his deportation—qualified as an aggravated felony under § 1101(a)(43)(C)." *Id.* at 967 n.8. If, before the person returned to court again, Congress excised (a)(43)(C) from the statute, the prior 1326 conviction could not be "'on the basis of a conviction for an offense described in another subparagraph of [(a)(43)],' because the relevant subparagraph would no longer exist in [(a)(43)]." *Id.*

This is no mere hypothetical. Congress *has* amended the INA to exclude offenses from the definition of "aggravated felony." Compare 8 U.S.C. § 1101(a)(43)(N), (P) (1996), with *id.* § 1101(a)(43)(N), (P) (1997) (adding exceptions for "first offense[s] for which the alien . . . committed the offense for the purpose of assisting

abetting, or aiding only the alien's spouse, child, or parent"). Judicial construction has similarly altered which offenses are "described in [the] subparagraph[s] of [(a)(43)]." See, *e.g.*, *Esquivel-Quintana*, 137 S. Ct. at 1570 ("[F]or a statutory rape offense to qualify as sexual abuse of a minor under the INA based solely on the age of the participants, the victim must be younger than 16."); see also *Rivers* v. *Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994) ("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction."). Neither statutory text nor common sense supports treating such a conviction as an "aggravated felony" even after Congress has made clear it isn't one.

B. The government's only answer to the Eighth Circuit's reasoning is the same point discussed above about the criminal versus immigration contexts. Opp. 10. But again, there is only one § 1101(a)(43)(O), and "the meaning of words in a statute cannot change with the statute's application," *Santos*, 553 U.S. at 522 (plurality).

The government instead defends the Fifth Circuit's rule by arguing that "a valid guilty plea relinquishes any claim that would contradict the 'admissions necessarily made upon entry of a voluntary plea of guilty,'" relying on one decision and one separate opinion from a denial of certiorari. Opp. 8 & n.3 (quoting *Class* v. *United States*, 138 S. Ct. 798, 805 (2018) and citing *Grzegorczyk* v. *United States*, 142 S. Ct. 2580, 2580 (2022) (Kavanaugh, J., respecting denial of certiorari)).

Neither opinion is relevant, and the proposition is wrong. Both *Class* and *Grzegorczyk* capture the debate surrounding post-admission challenges to elements of

an underlying conviction, but Mr. Barrieta is only requesting that his judgment be re-entered under the correct sentencing provision. For that matter, § 1326(b)(2) is a sentencing factor, not an element a defendant "admits." *Almendarez–Torres* v. *United States*, 523 U.S. 224, 244 (1998) ("Congress intended to set forth a sentencing factor in subsection (b)(2) and not a separate criminal offense."). Mr. Barrieta's previous guilty pleas for illegal reentry cannot absolve a court of its statutory duty to assess whether his prior conviction is "described in another subparagraph of [1101(a)(43)]." 8 U.S.C. § 1101(a)(43)(O).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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