No. _____

In the
# Supreme Court of the United States

HIGINIO ALEJANDRO GONZALEZ-REYES,
*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 A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether, under the categorical approach, the generic definition of a traditional offense as "commonly understood" may include elements recognized in just multiple jurisdictions, or is the generic meaning limited to the elements found in most jurisdictions.

## PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Higinio Alejandro Gonzalez-Reyes and the United States. There are no non-governmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Gonzalez-Reyes*, No. 23-CR-202-TWR, U.S. District Court for the Southern District of California, Judgment issued October 30, 2023.
- *United States v. Gonzalez-Reyes*, No. 23-3532, U.S. Court of Appeals for the Ninth Circuit, Opinion issued April 15, 2026.

## TABLE OF CONTENTS

**PAGE**


QUESTION PRESENTED ..... *prefix*

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT ..... *prefix*

TABLE OF CONTENTS ..... i

APPENDIX TABLE OF CONTENTS ..... ii

TABLE OF AUTHORITIES ..... iii

PETITION FOR A WRIT OF CERTIORARI ..... 1

INTRODUCTION ..... 1

OPINION BELOW ..... 3

JURISDICTION ..... 3

CONSTITUTIONAL PROVISION INVOLVED ..... 3

STATEMENT OF THE CASE ..... 4

REASONS FOR GRANTING THE PETITION ..... 9

I. The question presented arises whenever courts apply the categorical approach to a traditional offense, which frequently occurs across federal criminal and immigration law. ..... 9

II. There is a split among the circuits regarding how the definition of a federal generic offense is determined. ..... 13

III. This case is an ideal vehicle because the choice between the two approaches decides the outcome. ..... 16

IV. The Ninth Circuit's "multiple jurisdictions" approach is wrong. ..... 18

CONCLUSION ..... 20

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## APPENDIX TABLE OF CONTENTS


PAGE

Appendix A: U.S. Court of Appeals for the Ninth Circuit, *United States v. Gonzalez-Reyes*, Opinion, April 15, 2026 ..... 1a

Appendix B: U.S. Court of Appeals for the Ninth Circuit, *United States v. Gonzalez-Reyes*, Order denying the petition for rehearing and petition for rehearing en banc, July 22, 2026 ..... 25a

Appendix C: U.S. District Court, Southern District of California, *United States v. Gonzalez-Reyes*, Judgment, October 30, 2023 ..... 26a

Appendix D: Administrative removal order excerpt of record, in U.S. Court of Appeals for the Ninth Circuit, *United States v. Gonzalez-Reyes*..... 29a

## TABLE OF AUTHORITIES

**Federal Cases** **Page(s)**

*Barrie v. U.S. Att'y Gen.*,
167 F.4th 1315 (11th Cir. 2026) ..... 2, 15, 16, 17

*Brown v. United States*,
602 U.S. 101 (2024) ..... 12

*Descamps v. United States*,
570 U.S. 254 (2013) ..... 11, 12, 18

*Esquivel-Quintana v. Sessions*,
581 U.S. 385 (2017) ..... 20

*Gonzales v. Duenas-Alvarez*,
549 U.S. 183 (2007) ..... 11, 12

*Kawashima v. Holder*,
565 U.S. 478 (2012) ..... 11

*Keeley v. Whitaker*,
910 F.3d 878 (6th Cir. 2018) ..... 16, 17

*Mathis v. United States*,
579 U.S. 500 (2016) ..... 2, 3, 9, 10, 11, 12, 17, 18

*Mellouli v. Lynch*,
575 U.S. 798 (2015) ..... 12

*Moncrieffe v. Holder*,
569 U.S. 184 (2013) ..... 1, 10, 11, 12

*Quarles v. United States*,
587 U.S. 645 (2019) ..... 11, 12, 19

*Quito-Guachichulca v. Garland*,
122 F.4th 732 (8th Cir. 2024) ..... 16, 17

*Shular v. United States*,
589 U.S. 154 (2020) ..... 12

*Taniguchi v. Kan Pac. Saipan, Ltd.*,
566 U.S. 560 (2012) ..... 7, 19

*Taylor v. United States*,
495 U.S. 575 (1990) ..... 1, 3, 9, 10, 11, 19, 20

*United States v. Ferguson*,
131 F.4th 617 (7th Cir. 2025) ..... 14-15

*United States v. Gonzalez-Reyes*,
172 F.4th 1088 (9th Cir. 2026) ..... 2, 5, 6, 8, 9, 13, 16, 17, 19

*United States v. Graves*,
877 F.3d 494 (3d Cir. 2017) ..... 14, 15

*United States v. Leaverton*,
895 F.3d 1251 (10th Cir. 2018) ..... 15

*United States v. Lockley*,
632 F.3d 1238 (11th Cir. 2011) ..... 15

*United States v. McCollum*,
885 F.3d 300, 308 & n.10 (4th Cir. 2018) ..... 2, 14

*United States v. Rabb*,
942 F.3d 1 (1st Cir. 2019) ..... 14

*United States v. Schneider*,
905 F.3d 1088 (8th Cir. 2018) ..... 2, 15

*United States v. Soto-Sanchez*,
623 F.3d 317 (6th Cir. 2010) ..... 14

*United States v. Stitt*,
586 U.S. 27 (2018) ..... 11, 12, 19

**State Cases**

*Matter of Anselmo*,
20 I. & N. Dec. 25 (BIA 1989) ..... 13

*People v. Serrano*,
2005 WL 615788 ..... 5, 6

**Federal Statutes**

8 U.S.C. § 1101 ..... 3, 11

8 U.S.C. § 1227 ..... 10

8 U.S.C. § 1326 ..... 4, 5, 6, 8
18 U.S.C. § 924 ..... 11
18 U.S.C. § 3006A ..... 1
28 U.S.C. § 1254 ..... 3

**State Statutes**

California Penal Code § 261 ..... 4, 5, 6, 8, 17

**Other**

Black's Law Dictionary ..... 6
Black's Law Dictionary (6th ed. 1990) ..... 6
Black's Law Dictionary (7th ed. 1999) ..... 6, 7, 8, 14
*Coercion*, 64 Brook. L. Rev. 39, 119 (1998) ..... 8

**United States Sentencing Guidelines**

U.S.S.G. § 4B1.2 ..... 11

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Higinio Alejandro Gonzalez-Reyes respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on July 22, 2026.

### INTRODUCTION

Courts frequently use the "categorical approach" to determine whether a prior conviction qualifies as a predicate offense requiring removal from the country or a sentencing enhancement. *See Taylor v. United States*, 495 U.S. 575, 600–02 (1990); *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). Under the categorical approach, when Congress lists a traditional crime as a basis for removal or a sentencing enhancement and does not define it, courts must determine the elements of the "generic" version of the offense—"the offense as commonly understood."

*Mathis v. United States*, 579 U.S. 500, 503 (2016). Courts are now divided, however, on what makes an offense "commonly understood."

The Ninth Circuit has now held that the common understanding of an offense is not limited to how the offense elements are usually defined. Instead, the generic definition can expand to include elements used in just "multiple jurisdictions." *United States v. Gonzalez-Reyes*, 172 F.4th 1088, 1093–95 (9th Cir. 2026). The First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits, by contrast, hold that an offense as commonly understood is limited to its elements as defined in "the criminal codes of most States." *See, e.g.,* U*nited States v. McCollum,* 885 F.3d 300, 308 & n.10 (4th Cir. 2018); *United States v. Schneider*, 905 F.3d 1088, 1093 (8th Cir. 2018); *Barrie v. U.S. Att'y Gen.*, 167 F.4th 1315, 1329 (11th Cir. 2026).

This case is a good vehicle to resolve the conflict because it shows how the method used to determine the meaning of a traditional crime will often change the outcome. When Congress added "rape" as an aggravated felony in 1996, only some jurisdictions defined rape to include sex accomplished through non-physical coercion. The majority view, however, required physical force or a threat of physical injury. *See Gonzalez-Reyes*, 172 F.4th at 1104 (de Alba, J., dissenting). Mr. Gonzalez-Reyes's prior conviction arose under a California statute that reaches sexual intercourse accomplished through threats of non-physical "retribution." *Id.* at 1093 (majority opinion). The methodology therefore determines the outcome: the California statute is an aggravated felony under the Ninth Circuit's approach, but it would not be one under the approach of the other circuits.

The Ninth Circuit's reading of "commonly understood" is wrong. The Court has been clear that the generic version of an offense is "the offense as commonly understood," *Mathis*, 579 U.S. at 503, and that when Congress uses a traditional term, it incorporates "the generic sense in which the term is now used in the criminal codes of most States," *Taylor*, 495 U.S. at 598. A definition found in just multiple jurisdictions is not the common one. The petition should be granted.

## OPINION BELOW

A divided Ninth Circuit panel affirmed Mr. Gonzalez-Reyes's conviction in a published opinion. *See* Pet. App. A. Two panel members voted to deny rehearing and rehearing en banc. *See* Pet. App. B. Judge de Alba voted to grant the petition for rehearing.

## JURISDICTION

The Ninth Circuit affirmed Mr. Gonzalez-Reyes's conviction on April 15, 2026. Pet. App. A. The court denied Mr. Gonzalez-Reyes's petition for rehearing and rehearing en banc on July 22, 2026. *United States v. Gonzalez-Reyes*, No. 23-3532, Docket No. 57.1. The Court has jurisdiction under 28 U.S.C. § 1254(1)(1).

## RELEVANT STATUTORY PROVISIONS AND RULES

8 U.S.C. § 1101(a)(43)(A) states:

> (a) As used in this Act—
>
> (43) The term "aggravated felony" means—
> (A) murder, rape, or sexual abuse of a minor…

Section 1326(d) of Title 8 states:

> In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) or subsection (b) unless the alien demonstrates that—
>
> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
>
> (3) the entry of the order was fundamentally unfair.

California Penal Code § 261(a)(2) states:

> (a) Rape is an act of sexual intercourse accomplished under any of the following circumstances: . . . .
>
> (2) If it is accomplished against a person's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the person or another.

California Penal Code § 261(b)(1) states:

> (b) For purposes of this section, the following definitions apply:
>
> (1) "Duress" means a direct or implied threat of force, violence, danger, or retribution sufficient to coerce a reasonable person of ordinary susceptibilities to perform an act which would otherwise not have been performed, or acquiesce in an act to which one otherwise would not have submitted. The total circumstances, including the age of the victim, and the victim's relationship to the defendant, are factors to consider in appraising the existence of duress.

## STATEMENT OF THE CASE

In early 2023, Mr. Gonzalez-Reyes attempted to enter the United States after having been removed. He was arrested and charged with attempted illegal reentry under 8 U.S.C. § 1326. He moved to dismiss the information under 8 U.S.C. §

1326(d). He argued that he was prejudiced under § 1326(d)(3) because he was removed as an aggravated felon when he was not one. That classification rested entirely on his conviction under Cal. Pen. Code § 261(a)(2). But Cal. Pen. Code § 261(a)(2) is not a categorical match to the generic definition of rape, so the conviction did not make him an aggravated felon. He argued that his conviction under § 261(a)(2) was not rape as Congress understood the term in 1996 because California courts have held the statute can be violated through sex accomplished by threats of economic or social retribution. S*ee e.g.*, *People v. Serrano*, 2005 WL 615788, *1 (Cal. Ct. App. Mar. 17, 2005) (unpublished) (sexual intercourse by threatening to disseminate a sex video).

Mr. Gonzalez-Reyes also claimed that he satisfied the first two prongs of 8 U.S.C. § 1326(d). He argued that these prongs were satisfied because the forms he was given misled him into believing that he could not challenge the characterization of his prior conviction as an aggravated felony and that there was no means to do so in the type of removal proceedings that he was placed.

The district court denied the motion, holding that Mr. Gonzalez-Reyes could not satisfy the first two prongs of 8 U.S.C. § 1326(d). The district court did not reach third prong or decide whether Mr. Gonzalez-Reyes was an aggravated felon.

A divided Ninth Circuit panel affirmed the district court's denial, resting solely on the third prong. *Gonzalez-Reyes*, 172 F.4th 1088. The majority held that, "[e]ven assuming Gonzalez Reyes has satisfied the first two prongs of 1326(d)…he

has not met his burden to prove his removal was 'fundamentally unfair' under the third prong of Section 1326(d)." *Id.* at 1092-93.

In the majority's view, Mr. Gonzalez-Reyes "was rightfully removed as an aggravated felon based on his state rape conviction." *Id.* at 1092. Relying on *People v. Serrano*, it "assume[d] for the categorical approach analysis that California Penal Code § 261(a)(2) criminalizes rape committed through non-physical deprivation of consent." *Id.* at 1093. The case therefore turned on whether generic rape, as Congress understood it in 1996, also includes rape accomplished through non-physical coercion.

The majority described its task as identifying "the widespread and common understanding of the term when Congress enacted the law." *Id.* It began with two editions of Black's Law Dictionary. The sixth edition (1990) defined rape to include intercourse "when the woman's resistance is overcome by force or fear, or under other prohibitive conditions." *Id.* at 1093–94 (quoting Rape, Black's Law Dictionary (6th ed. 1990)). The majority read that definition to have "encompassed rape committed through non-physical duress." *Id.* at 1094. It set aside the same edition's second definition, which required force or the threat of death, serious bodily injury, extreme pain, or kidnapping, because that definition was "merely summarizing the Model Penal Code's definition." *Id.* at 1094 n.2.

The majority next turned to Black's seventh edition (1999) which defined rape as unlawful sexual activity "without consent and usu[ally] by force or threat of injury." *Id.* at 1094 (quoting Rape, Black's Law Dictionary (7th ed. 1999)). The

majority read that definition as having "recognized that rape could be committed through non-physical duress." *Id.* The majority then rejected the Model Penal Code's definition, which requires force or the threat of physical harm, describing the Code as "potentially outdated." *Id.* at 1095. The majority also declined to examine how the States defined rape in 1996: "We do not think it would be fruitful to look at a state-by-state analysis of the definition of rape to determine the generic federal definition because… states in the late 1990s had widely varying definitions. *Id.* at 1095 n.4. Instead, it was enough for the majority that "the definition of rape had become broader across multiple jurisdictions to encompass acts committed through non-physical force or threats of non-physical coercion." *Id*. at 1095.

Judge de Alba dissented and correctly identified a problem with the majority's methodology: "it conflates *plausible* ways rape may be defined in 1996…with how these terms were *commonly understood* at the time Congress added rape to the INA as an aggravated felony." *Id.* at 1101. As she explained, "just because 'a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense.'" *Id.* (quoting *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012)). Applying that standard, she concluded that each source the majority relied on pointed the other way.

Using the same dictionaries as the majority, the dissent demonstrated that "fear" and "prohibitive conditions" were tied to threats of physical harm, as displayed by the Model Penal Code's reference to the dictionary definition. *Id.* at

1101, n. 3. Judge de Alba noted that both Black's Law Dictionary (Seventh Edition) and Merriam-Webster's Dictionary of Law described rape as "usually" committed by force or threat of injury, which depicts a "common understanding" that state law also confirms. *Id.* at 1102, n.4.

Additionally, where the majority declined to examine state laws, the dissent did so. It concluded that "in 1996, most states that criminalized rape accomplished by threats commonly linked it with a threat of physical injury." *Id.* at 1104. It relied on a contemporaneous survey, which identified "approximately twenty jurisdictions" whose statutes "deviate from rape laws by substituting non-physical forms of coercion for the traditional requirement of physical force or threat of physical force." *Id.* (quoting Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev. 39, 119 (1998)).

The dissent therefore concluded that § 261(a)(2) is not a categorical match for generic rape, that Mr. Gonzalez-Reyes "was removed on illegitimate grounds," and that his removal was fundamentally unfair. *Id.* at 1104. She further concluded that he satisfied the first two requirements of § 1326(d), because the expedited-removal process "operates as a simple dead end" for legal challenges and he "had no opportunity to challenge the classification of his conviction." *Id.* at 1097–99. She would have held that Mr. Gonzalez-Reyes "satisfies all of Section 1326(d)'s three mandatory requirements." *Id.* at 1105.

Mr. Gonzalez-Reyes petitioned for rehearing en banc. C.A. Dkt. 56. He argued that the majority's methodology "turns the determination of what constitutes a

'generic' offense on its head." *Id.* at 1. The Ninth Circuit denied the petition on July 22, 2026, with Judge de Alba voting to grant it. Pet. App. B.

Mr. Gonzalez-Reyes now asks this Court to resolve the circuits' conflict over how courts apply the categorical approach to define generic federal offenses.

## REASONS FOR GRANTING THE PETITION

The categorical approach governs a wide range of federal sentencing and immigration decisions, and every application to a traditional offense begins by defining the generic offense, that is, "the offense as commonly understood." *Mathis*, 579 U.S. at 503. The circuits are divided over what makes an offense "commonly understood." The Ninth Circuit extends the generic offense to elements recognized in "multiple jurisdictions," *Gonzalez-Reyes*, 172 F.4th at 1095, while the First, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits limit it to the elements found in *most* jurisdictions. This case presents that conflict cleanly, and the choice between the two rules decides it: Mr. Gonzalez-Reyes's California conviction is an aggravated felony under the Ninth Circuit's rule, but it would not be one under the rule the other circuits apply. And the Ninth Circuit's rule departs from this Court's precedent, which defines a traditional offense by "the generic sense in which the term is now used in the criminal codes of most States." *Taylor*, 495 U.S. at 598.

### I. The question presented arises whenever courts apply the categorical approach to a traditional offense, which frequently occurs across federal criminal and immigration law.

Congress often attaches federal consequences to prior convictions, such as a longer sentence or removal from the country, by listing the kinds of crimes that

trigger them. In *Taylor*, this Court held that when Congress lists a traditional crime, the term "must have some uniform definition independent of the labels employed by the various States' criminal codes." 495 U.S. at 592. To apply that uniform definition, *Taylor* adopted what is now called the categorical approach.

Under the categorical approach, Courts "look only to the fact of conviction and the statutory definition of the prior offense," not to the facts underlying the conviction. *Id.* at 602. The Court has explained that this approach follows from the statutory text, avoids the Sixth Amendment concerns that would arise if judges found facts about prior convictions, and spares courts the practical difficulty of reconstructing old cases. *Mathis*, 579 U.S. at 511-14. In immigration cases, it also promotes efficiency and predictability in a system that decides huge numbers of cases. *Moncrieffe*, 569 U.S. 205 n.11.

The categorical approach now governs a wide range of federal statutes, and many of them list undefined traditional crimes. The Immigration and Nationality Act makes any noncitizen convicted of an "aggravated felony" removable. 8 U.S.C. § 1227(a)(2)(A)(iii). It defines that term to include, among other offenses, "murder, rape," "a theft offense (including receipt of stolen property) or burglary offense," an offense that "involves fraud or deceit," "an offense relating to commercial bribery, counterfeiting, [or] forgery," "perjury or subornation of perjury, or bribery of a witness," and attempts or conspiracies to commit those crimes. *Id.* § 1101(a)(43)(A),(G),(M)(i),(R),(S),(U). This Court applies the categorical approach to those provisions. *Moncrieffe*, 569 U.S. at 190; *Gonzales v. Duenas-Alvarez*, 549 U.S. 183,

187 (2007) (theft offense); *Kawashima v. Holder*, 565 U.S. 478, 483 (2012) (fraud or deceit).

The same is true of federal sentencing law. ACCA lists "burglary, arson, or extortion." 18 U.S.C. § 924(e)(2)(B)(ii); *see Taylor*, 495 U.S. at 598–99; *Mathis*, 579 U.S. at 504-05. The Sentencing Guidelines list still more: "murder, voluntary manslaughter, kidnapping, aggravated assault, a forcible sex offense, robbery, arson, [and] extortion." U.S.S.G. § 4B1.2(a)(2). Each of these provisions requires a court to determine what the traditional crime that Congress (or the Commission) named actually means.

The categorical approach proceeds in three steps. First, the court identifies the elements of the generic offense, that is, "the offense as commonly understood." *Mathis*, 579 U.S. at 503. When Congress has named a traditional crime, a court asks what that term meant when Congress enacted the provision. *See United States v. Stitt*, 586 U.S. 27, 33-34 (2018); *Quarles v. United States*, 587 U.S. 645, 652-53 (2019). Second, the court identifies the elements of the statute of conviction. *Descamps v. United States*, 570 U.S. 254, 257 (2013). If the statute is "divisible," meaning it lists alternative elements that define multiple crimes, the court may consult a limited set of record documents to determine which alternative formed the basis of the conviction. *Mathis*, 579 U.S. at 505-06; *Descamps*, 570 U.S. at 268-69. Third, the court compares the two. A conviction qualifies only if the statute's elements "are the same as, or narrower than, those of the generic offense." *Mathis*, 579 U.S. at 503. The court presumes that the conviction "rested upon nothing more

than the least of the acts criminalized." *Moncrieffe*, 569 U.S. at 190–91 (alterations omitted). That presumption is limited by the requirement of "a realistic probability, not a theoretical possibility," that the State would apply its statute to conduct outside the generic definition. *Duenas-Alvarez*, 549 U.S. at 193. Because the comparison at step three measures the state statute against the generic definition, the scope of that definition determines which convictions qualify.

Because the categorical approach recurs across so many statutes, this Court regularly grants review to resolve disagreements about how it applies, often when the courts of appeals have divided. The Court has addressed how to define the generic offense. *See e.g.*, *Stitt*, 586 U.S. 27 (burglary of vehicles adapted for lodging); *Quarles*, 587 U.S. 645 (remaining-in burglary); *Duenas-Alvarez*, 549 U.S. 183 (theft and aiding-and-abetting liability); *Shular v. United States*, 589 U.S. 154 (2020) (whether ACCA's "serious drug offense" requires a generic-offense comparison). It has addressed how to identify the elements of the statute of conviction. *See e.g.*, *Descamps*, 570 U.S. 254; *Mathis*, 579 U.S. 500. And it has addressed how to compare the two. *See e.g.*, *Moncrieffe*, 569 U.S. 184; *Mellouli v. Lynch*, 575 U.S. 798 (2015); *Brown v. United States*, 602 U.S. 101 (2024). This petition concerns the first and most basic of those steps, the one every categorical analysis of a traditional offense must begin with.

The question also carries notable weight because of where the Ninth Circuit's rule applies. The Ninth Circuit hears more immigration appeals than any other circuit. *See* U.S. Courts, Table B-3, Sources of Appeals, Original Proceedings, and

Miscellaneous Applications Commenced, by Circuit, During the 12-Month Periods Ending September 30, 2021 through 2025. Its territory also includes the Southern District of California and the District of Arizona, which handle a large share of the Nation's illegal-reentry prosecutions. Immigration judges and the Board of Immigration Appeals apply the law of the circuit in which a case arises. *See* Matter of Anselmo, 20 I. & N. Dec. 25, 31 (BIA 1989). So although the division is between the Ninth Circuit and the other circuits, the Ninth Circuit's rule governs a disproportionate share of the cases in which the generic definition of a traditional offense is decided.

## II. There is a split among the circuits regarding how the definition of a federal generic offense is determined.

In the Ninth Circuit, the generic definition of an offense is not limited to how the offense is usually defined. It expands to include elements recognized in "multiple jurisdictions," even if *most* jurisdictions do not recognize them. *Gonzalez-Reyes*, 172 F.4th at 1093-95.

The decision below demonstrates how that approach works. The Ninth Circuit described its task as identifying "the widespread and common understanding of the term ['rape'] when Congress enacted the law" in 1996. *Id.* at 1093. It began with a legal dictionary that defined rape as committed "usu[ally] by force or threat of injury." *Id.* at 1094 (quoting Rape, *Black's Law Dictionary* (7th ed. 1999)). Although Black's indicated that rape "usually" required "force or threat of injury," the Ninth Circuit read that definition as having "recognized that rape could be committed through non-physical duress." *Id.* at 1093-94. It then explained that

"[b]y 1996, the definition of rape had become broader across multiple jurisdictions to encompass acts committed through non-physical force or threats of non-physical coercion." *Id.* at 1095-96. Thus, in the Ninth Circuit, the "common understanding" of a generic offense can be broadened to include the minority rule of "multiple" jurisdictions.

Every other circuit to address the question, however, takes a majority rule approach and hold that an offense as "commonly understood" is the offense as defined in "most" jurisdictions—definitions adopted in only some jurisdictions fall outside it. *See United States v. Rabb*, 942 F.3d 1, 6 (1st Cir. 2019) (adopting the definition used by "the majority of states" and the "great weight of authority"); *United States v. Graves*, 877 F.3d 494, 504 (3d Cir. 2017) ("[T]he most important factor in defining the generic version of an offense is the approach of the majority of state statutes defining the crime."); *McCollum*, 885 F.3d at 308 & n.10 (relying "on the conspiracy definition adopted by most states"); *United States v. Soto-Sanchez*, 623 F.3d 317, 322 (6th Cir. 2010) ('[T]he generic, contemporary meaning of an offense is the way the offense is defined by the criminal codes of most states."); *United States v. Ferguson*, 131 F.4th 617, 629 (7th Cir. 2025) (generic definition reflects "definitions commonly followed under state law"; definitions followed by "only two states" were not generic); *United States v. Schneider*, 905 F.3d 1088, 1093, 1095 (8th Cir. 2018) (how "the criminal codes of most States' define an offense provides strong evidence of its generic meaning"; mental state permitted by "only eighteen states" were not generic); *United States v. Leaverton*, 895 F.3d 1251, 1256-

57 (10th Cir. 2018) (a state's "minority view" not generic because a generic offense tracks "the majority view"); *United States v. Lockley*, 632 F.3d 1238, 1244 (11th Cir. 2011) ("[T]he generic contemporary form of robbery is better reflected in the majority definition.").

These circuits routinely hold that how most jurisdictions define an offense determines its generic meaning. As the Eighth Circuit has explained, "[t]he overriding goal is to find the common, contemporary definition of the crime—in other words, to uncover the common set of elements" that most jurisdictions require. *Schneider*, 905 F.3d at 1093. The Third Circuit likewise "[a]ffords predominant weight to the majority of states" because doing so "best recognizes" Congress's goal of uniformity. *Graves*, 877 F.3d at 504.

In fact, at least three circuits have applied that rule to "rape," the same term at issue here. The Eleventh Circuit asked how "rape" was "commonly understood" in 1996 and answered that question by looking to the majority of jurisdictions. *Barrie*, 167 F.4th at 1329. It found that "the majority of states that had an offense called 'rape' defined it consistent with that word's traditional, common-law meaning," while broader definitions appeared in statutes "using different names." *Id.* at 1329. It therefore concluded that "in 1996 the word 'rape' was still commonly understood to conform to its traditional meaning." *Id.*

The Sixth Circuit applied the same majority standard. Relying on the fact that "the majority of state statutes criminalizing 'rape' in 1996" did not reach the broader conduct at issue, it held that "generic understanding of the term 'rape' in

1996" did not include that conduct. *Keeley v. Whitaker*, 910 F.3d 878, 883 (6th Cir. 2018). It so held even "accepting as true that many of the states" had treated broader offenses as interchangeable with rape. *Id.* at 884.

The Eighth Circuit likewise defined rape by the majority rule. The Eighth Circuit explain that because "[o]f the 23 states that had an offense called 'rape' in 1996, only a handful" had adopted a broader definition, the broader definition was not generic. *Quito-Guachichulca v. Garland*, 122 F.4th 732, 736-37 (8th Cir. 2024).

In sum, outside of the Ninth Circuit, the common understanding of an offense is its definition in most jurisdictions, and a definition shared by only some, or "multiple," jurisdictions, even many of them, is not generic. But in the Ninth Circuit, a definition shared by "multiple jurisdictions" is enough. The result is that the same California conviction is an aggravated felony in the Ninth Circuit but would not be the one in the circuits that apply the majority rule.

## III. This case is an ideal vehicle because the choice between the two approaches decides the outcome.

This case presents the question cleanly. Mr. Gonzalez-Reyes raised it in a motion to dismiss the information, and preserved it through a conditional plea, *Gonzalez-Reyes*, 172 F.4th at 1091. The Ninth Circuit decided it in a published opinion over a dissent. Mr. Gonzalez-Reyes then sought rehearing en banc on the specific ground that the panel had defined the generic offense by what "multiple jurisdictions" had adopted rather than what most jurisdictions had adopted. C.A. Dkt. 56. The Ninth Circuit denied rehearing. Pet. App. B. No facts are in dispute, and the question is purely legal.

The question is also outcome-determinative. The Ninth Circuit rested its judgment on a single ground. It assumed that Mr. Gonzalez-Reyes had satisfied the first two requirements of § 1326(d) and decided only whether his removal was fundamentally unfair. *Id.* at 1091. It also assumed that California Penal Code § 261(a)(2) reaches intercourse accomplished through a non-physical deprivation of consent, as California courts have held. *Id.* at 1093. The case therefore turned on one question: whether generic rape, as Congress understood it in 1996, includes intercourse procured through non-physical coercion. The Ninth Circuit answered yes because that broader definition had been adopted "across multiple jurisdictions." *Id.* at 1095–96.

In the circuits that define the generic offense by its definition in *most* jurisdictions, the answer is different. Those circuits have held that, in 1996, generic rape retained its traditional meaning, because that was how most jurisdictions with an offense called "rape" defined it. *Barrie*, 167 F.4th at 1329; *Keeley*, 910 F.3d at 883–84; *Quito-Guachichulca*, 122 F.4th at 736-37. The traditional offense required intercourse accomplished "through force and against [the victim's] will." *Gonzalez-Reyes*, 172 F.4th at 1102 (de Alba, J., dissenting). A statute that reaches threats of non-physical retribution sweeps more broadly than that definition, so it is not a categorical match. *See Mathis*, 579 U.S. at 503. Under that rule, Mr. Gonzalez-Reyes was not an aggravated felon, and his removal on that basis was fundamentally unfair. That is exactly what the dissent concluded. *Gonzalez-Reyes*, 172 F.4th at 1104–05 (de Alba, J., dissenting). The same California conviction that

supports this prosecution in the Ninth Circuit would not have supported it in the Sixth, Eighth, or Eleventh Circuits.

Finally, the issue will not be resolved without this Court's intervention. The Ninth Circuit adopted its approach in a published decision and declined to reconsider it en banc. The "multiple jurisdictions" approach now binds every district court, immigration judge, and Board of Immigration Appeals decision within the Ninth Circuit, while the other circuits continue to apply a "most jurisdictions" rule. This is a problem that only this Court can resolve.

## IV. The Ninth Circuit's "multiple jurisdictions" approach is wrong.

The Ninth Circuit's approach departs from this Court's precedent in four respects. First, an offense as "commonly understood" is the offense as it is usually defined. The categorical approach compares the statute of conviction to "the elements of the 'generic' version of the listed offense—*i.e.*, the offense as "commonly understood." *Mathis v. United States*, 579 U.S. 500, 503 (2016); *accord Descamps v. United States*, 570 U.S. 254, 257 (2013). What is common is what is usual. A definition that describes how an offense is "usually" committed therefore identifies its common understanding; it does not bring every less common variant within that understanding.

The Court has stated exactly that: a dictionary's indication of "the most common usage suggests that other usages, although acceptable might not be common or ordinary," and "[t]hat a definition is broad enough to encompass one sense of a word does not establish that the word is ordinarily understood in that sense." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568-69 (2012). The Ninth Circuit did the

opposite. Faced with a definition of rape as committed "usu[ally] by force or threat of injury," it concluded that definition "recognized that rape could be committed through non-physical duress." *Gonzalez-Reyes*, 172 F.4th 1093-94. In other words, the Ninth Circuit treated the exception as the rule.

Second, the generic definition is the one found in most jurisdictions, not merely multiple ones. When Congress uses a traditional term, it incorporates "the generic sense in which the term is now used in the criminal codes of most States." *Taylor,* 495 U.S. at 598. This Court has applied that rule consistently for traditional crimes. For example, the Court held that generic burglary covers vehicles adapted for overnight lodging because "[i]n 1968, a majority of state burglary statutes covered" them. *Stitt*, 586 U.S. at 33. And generic burglary also includes "remaining-in" burglary because "[a]s of 1986, a majority of States proscribed" it. *Quarles*, 587 U.S. at 651-52. The question in each case of these cases was what most States did. The Ninth Circuit asked instead whether a broader definition had been adopted "across multiple jurisdictions." *Gonzalez-Reyes*, 172 F.4th at 1095. It did not find, and did not ask, whether most jurisdictions that still proscribed the offense had adopted it.

Third, the Ninth Circuit's approach is inconsistent with Congress's choice of uniform definitions. Congress uses "uniform, categorical definitions" so that predicate offenses are identified "regardless of technical definitions and labels under state law." *Taylor*, 495 U.S. at 590. A listed offense therefore "must have some uniform definition independent of the labels employed by the various States' criminal codes." *Id.* at 592. The Ninth Circuit's approach gives those labels

controlling effect. Because some States, California among them, call coercion by non-physical threats "rape," the Ninth Circuit treated that conduct as generic rape, even though most states did not define rape that way. Under that approach, the reach of a federal offense depends on what the broadest states choose to call a crime. That is the "odd result[]" *Taylor* refused to attribute to Congress. *Id.* at 591.

Fourth, the Ninth Circuit's approach "turns the categorical approach on its head." *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 393 (2017). Under the Ninth Circuit's approach a State's expansive broad definition of a crime becomes the generic definition as long as "multiple" other States share it. But the categorical approach is designed to measure state convictions against a common federal standard. Under the Ninth Circuit's rule, the outlying state statutes set the standard. Thus, the petition should be granted bring the Ninth Circuit back in line with the Court's precedent and the rule of the other circuits.

## CONCLUSION

For these reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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