No.

In the Supreme Court of the United States

SANDRA YAMILETH ESPINAL-ANDRADES,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration and Nationality Act authorizes the Attorney General to order the deportation of any alien convicted of an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). The statute employs three approaches to identify offenses that qualify as aggravated felonies: (1) generic offense descriptions, such as "murder" or "rape" (*id.* § 1101(a)(43)(A)); (2) generic offense descriptions with one or more elements defined by reference to a provision of federal law—for example, "illicit trafficking in a controlled substance (as defined in section 802 of Title 21)" (*id.* § 1101(a)(43)(B)); and (3) particular crimes "described in" federal statutes—for example, "an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)" (*id.* § 1101(a)(43)(H)).

The question presented is:

Whether a conviction for arson in violation of Maryland law qualifies as a conviction for "an offense described in * * * section 844[(i)]" of Title 18 even though the elements of the two offenses are not identical.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sandra Yamileth Espinal-Andrades respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 777 F.3d 163. The opinion of the Board of Immigration Appeals (App., *infra*, 13a-17a) is unreported. The immigration judge's removal order (App., *infra*, 18a-24a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 22, 2015. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 101(1)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43), is set forth at App., *infra*, 25a-28a.

STATEMENT

There is a clear, acknowledged conflict among the courts of appeals regarding the standard to apply in determining when a state criminal offense qualifies as one "described in" a federal criminal statute—and therefore constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43), triggering deportation under the immigration law. The Third Circuit holds that the elements of the offense of conviction must be identical to the elements of the referenced federal crime, but others—like the court below—hold that

the jurisdictional elements of federal crimes may be disregarded in making the comparison.

The text and structure of Section 1101(a)(43) preclude that result. When Congress wanted to define aggravated felony in generic terms—not tied to the specific elements of the relevant federal crime—it did so by specifying "murder" or "rape" as an aggravated felony or by referring to a generic offense and incorporating a specific definition contained in federal law. The category of aggravated felonies at issue here—those "described in" specified federal criminal statutes—is therefore limited to offenses with the same elements as the referenced federal crimes.

This issue has very significant practical importance. Deportation proceedings against a large number of individuals turn on this question. This Court's intervention is essential to resolve the conflict and provide the national uniformity that is especially important with respect to our immigration law.

A. Legal Background.

Under the Immigration and Nationality Act, the Attorney General of the United States may order the deportation of an alien found, by clear and convincing evidence, to have committed an "aggravated felony." 8 U.S.C. § 1227(a)(2)(A)(iii). The court's finding must be based on evidence that is "reasonable, substantial, and probative." *Id*. § 1229a(c)(3)(A).

Section 1101(a)(43) of Title 8 lists the offenses that qualify as aggravated felonies, identifying them in three different ways:

- Generic offenses such as "murder, rape, or sexual abuse of a minor," 8 U.S.C. §

1101(a)(43)(A), and a "burglary offense for which the term of imprisonment [is] at least one year." *Id.* § 1101(a)(43)(G).

- Generic offenses, but with one or more elements defined by a provision in the federal criminal code—such as "illicit trafficking in a controlled substance (as defined in section 802 of Title 21)," 8 U.S.C. § 1101(a)(43)(B), and "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." *Id.* § 1101(a)(43)(F).
- Specific federal offenses, for example "an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)," 8 U.S.C. § 1101(a)(43)(H), and "an offense that * * * is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." *Id.* § 1101(a)(43)(M)(ii).

The penultimate sentence of Section 1101(a)(43) makes clear that "aggravated felony" is not limited to violations of federal law, stating that the term "applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years."

In determining whether a particular conviction qualifies as an aggravated felony under Section 1101(a)(43), this Court has prescribed a "categorical

approach" that compares the elements of the offense of conviction to the statutory definition but does not consider the specific conduct engaged in by the defendant. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013).

B. Factual Background.

Sandra Yamileth Espinal-Andrades immigrated from El Salvador to the United States in 1999 and became a lawful permanent resident that year. App., *infra*, 2a. Espinal has been a resident since the age of nine, and her family lives in the United States. *Id*. at 24a. She is the mother of a young child who is a United States citizen. *Ibid*.

On August 27, 2009, a Maryland grand jury indicted Espinal on a charge of first degree arson, in violation of Maryland Criminal Code § 6-102(a), which provides that "[a] person may not willfully and maliciously set fire to or burn: (1) a dwelling; or (2) a structure in or on which an individual who is not a participant is present." App., *infra*, 2a, 21a-22a. She subsequently entered an *Alford* plea and received a 360-day sentence. *Id*. at 2a.

C. Proceedings Below.

1. On March 12, 2013, the Department of Homeland Security (DHS) issued a Notice to Appear, which placed Espinal in a removal proceeding. App., *infra*, 2a, 21a-22a. Espinal challenged DHS's claim in the Notice to Appear that her state-law arson conviction constituted an aggravated felony under Section 1101(a)(43)(E), which in pertinent part includes within the definition of aggravated felony "an offense described in * * * [S]ection" 844(i) of Title 18. The latter provision states:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both * * *.

2. The immigration judge concluded that Espinal's state-law arson conviction qualified as an aggravated felony, "even though the state offense lacks the jurisdictional elements of the federal crime." App., *infra*, 23a-25a. Based on this determination, the judge ordered Espinal's removal. *Id*. at 24a. In so ruling, the judge explained:

> This is a sad and tragic case. The Respondent has been a resident since age nine. She is the mother of a young child, a United States citizen. Her family is in the United States[,] and she is being sent to a homeland that is not her home. Yet the law permits her no relief.

Ibid.

3. A single-member panel of the Board of Immigration Appeals dismissed Espinal's appeal. App., *infra*, 13a-17a. Relying on BIA precedent, the panel found that Congress's reference to Section 844(i) was not intended to exclude state arson offenses "because a State crime lacked a Federal jurisdictional element." *Id*. at 16a. "Even if" Espinal's state-law conviction "lacks the jurisdictional element of the federal statute, since the * * * state crime is described in the federal statute, *see* 18 U.S.C. 844(i), * * * the re-

spondent was convicted of an aggravated felony as defined in" the Act. *Id*. at 17a.

4. The court of appeals denied Espinal's petition for review of the BIA's decision. App., *infra*, 1a-12a. The court observed that some subparagraphs of Section 1101(a)(43) "use the term '*defined in*' instead of '*described in*' to identify aggravated felonies." App., *infra*, 7a-8a. It concluded that "'described in' is the broader of the two terms," and that "it appears as if Congress intended for the aggravated felonies 'described in' the pertinent federal statute to include crimes that are not 'defined in'—that is, precisely identical to—that federal statute." *Ibid*.

The court noted that "the penultimate sentence of 8 U.S.C. § 1101(a)(43) states that convictions under the described offenses qualify as aggravated felonies '*whether in violation of Federal or State law*'" and that it was obligated to "try to give every word in the statute meaning to avoid rendering its terms superfluous." App., *infra*, 8a. That principle, the court said, required it to conclude that "Congress clearly expressed its intent for aggravated crimes 'described in' federal statutes to include substantively identical state and foreign crimes that lack only the federal jurisdictional element." *Ibid*.

The court of appeals went on to conclude that even if the statute were ambiguous, the BIA's interpretation was reasonable and therefore entitled to deference under *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). App., *infra*, 9a-11a.

REASONS FOR GRANTING THE PETITION

Section 1101(a)(43) enumerates offenses that qualify as aggravated felonies for purposes of deportation in several different ways, including by specifying particular offenses "described in" cited federal criminal provisions. There is a clear conflict among the courts of appeals on whether a state law crime that lacks all of the elements of the cited federal offense—in particular, the federal jurisdictional element—satisfies that standard. Congress's decision to define some offenses generically and others by reference to a federal crime makes clear that when it used the latter approach, as here, the state law crime's elements must be identical to those of the federal crime. This question regarding the standard to be applied in determining whether an offense is one "described in" a federal law arises with great frequency, and the inconsistent results produced by the differing lower court standards are patently unfair. Review by this Court is plainly warranted.

A. There Is An Acknowledged Circuit Split On The Question Presented.

The courts of appeals have divided sharply regarding the question presented. While the Third Circuit has held that a conviction such as the one involved here does not qualify as an aggravated felony for purposes of the INA, six other circuits disagree. Courts on both sides acknowledge the clear conflict.

The court below, for example, stated that "a sister circuit has come down the other way on this issue." App., *infra*, 9a. So did the Second Circuit. *Torres* v. *Holder*, 764 F.3d 152, 154 (2d Cir. 2014). And the Third Circuit observed that its position had

previously "been rejected by several of [its] sister circuits." *Bautista* v. *Attorney Gen. of U.S.*, 744 F.3d 54, 61 (3d Cir. 2014).

1. The Third Circuit holds that the elements of the offense of conviction must be identical to the elements of the federal offense.

In *Bautista*, 744 F.3d at 61, the Third Circuit reached the opposite conclusion from the court below, holding that Section 1101(a)(43)(E)(i)'s reference to the offense "described in" 18 U.S.C. § 844(i) does not include a state arson offense that lacks the federal jurisdictional element.

The court explained that the paragraphs of Section 1101(a)(43) identifying offenses "described in" federal law specify a narrower, more stringent standard than the paragraphs utilizing the phrase "defined in." Congress used "defined in" when "the state conviction need not be punishable under that federal statute but need only include the listed criminal conduct." *Bautista*, 744 F.3d at 59. In contrast, Congress used "described in" when the state offense would be punishable under the referenced federal statute because the state offense contains the same elements as the federal offense. *Ibid.*

The court rejected the contention that the penultimate sentence of Section 1101(a)(43) constitutes a congressional directive to disregard the federal jurisdictional element. *Bautista*, 744 F.3d at 64. If Congress had intended that result, the court stated, it would have said so expressly or used generic terms, rather than statutory references, to define those aggravated felonies. *Ibid.* The federal offense's inter-

state commerce nexus is therefore required for a conviction to qualify as an aggravated felony under Section 1101(a)(43)(E)(i). *Id.* at 66.

2. Six courts of appeals disagree with the Third Circuit.

Six courts of appeals—the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits—have interpreted Section 1101(a)(43)'s references to aggravated felonies "described in" other federal statutes to include state crimes lacking the "interstate commerce" element of the referenced federal offenses. App., *infra*, 1a-12a; *Torres*, 764 F.3d 152; *Spacek* v. *Holder*, 688 F.3d 536 (8th Cir. 2012); *Nieto Hernandez* v. *Holder*, 592 F.3d 681 (5th Cir. 2009); *Negrete-Rodriguez* v. *Mukasey*, 518 F.3d 497 (7th Cir. 2008); *United States* v. *Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001).

Although these courts have reached the same result, they have relied on varying—and in some cases, inconsistent—rationales.

The Second Circuit in *Torres*, like the court below, concluded that "described in" is broader than "defined in" such that "an offense identified [by 'described in'] need not reproduce the federal jurisdictional element to have immigration consequences." 764 F.3d at 157; accord App., *infra*, 7a-8a; see also *Negrete-Rodriguez*, 518 F.3d at 503.

But the Second Circuit has rejected other courts' reliance on Section 1101(a)(43)'s penultimate sentence stating that "aggravated felony" "applies to 'an offense described in this paragraph whether in violation of Federal or State law.'" *Torres*, 764 F.3d at 155. It concluded that the sentence could mean that

Section 1101(a)(43) does not exclude offenses simply because they rest on state or foreign law. *Id.* at 157-158. The Fourth and Fifth Circuits, by contrast, hold that the sentence is a directive to ignore the jurisdictional element of specified federal offenses. App., *infra*, 8a-9a; *Nieto Hernandez*, 592 F.3d at 685.

Some other courts base their decision on the view that the jurisdictional element of the offense is not "substantive." *E.g.*, *Spacek*, 688 F.3d at 539 (noting a "presumption that interstate commerce nexuses are jurisdictional and not substantive elements of federal criminal statutes"). The Ninth Circuit in *Castillo-Rivera* held that the interstate commerce nexus was "merely a jurisdictional basis" and expressed concern that requiring the elements of offenses to be identical would violate congressional intent by excluding a wide range of state crimes from the definition of aggravated felony. 244 F.3d at 1023-1024.

Given the clear conflict with the Third Circuit, and the inconsistent rationales adopted by other courts of appeals, the need for this Court's intervention is plain.

B. An Offense Is "Described In" Section 1101(a)(43)(E)(i) Only If Its Elements Are Identical To Those Of The Federal Offense.

The Fourth Circuit's holding—that the Maryland arson statute is "described in" 18 U.S.C. § 844(i)—contravenes the provision's plain language and violates basic principles of statutory interpretation.

1. Section 1101(a)(43) employs "described in" to specify offenses with the same elements as the referenced federal crime.

Congress used three distinct methods to identify the offenses that qualify as "aggravated felonies" under Section 1101(a)(43).

First, it selected generic offenses. These include murder, rape, or sexual abuse of a minor, 8 U.S.C. § 1101(a)(43)(A), theft and burglary offenses, *id.* § 1101(a)(43)(G), and offenses relating to the owning, controlling, managing, or supervising of a prostitution business, *id.* § 1101(a)(43)(K)(i). They also include fraud, *id.* § 1101(a)(43)(M)(i), failure to appear, *id.* § 1101(a)(43)(Q), commercial bribery, counterfeiting, forgery, or trafficking in vehicle identification numbers, *id.* § 1101(a)(43)(R), obstruction of justice, perjury, or bribery of a witness, *id.* § 1101(a)(43)(S), and any attempt or conspiracy to commit these and other offenses, *id.* § 1101(a)(43)(U). Because these descriptions are generic, offenses in this first category qualify as aggravated felonies whether or not their elements mirror the elements of a federal offense—the critical question is whether they mirror the elements of the generic offense.

Second, Congress identified another set of generic offenses, but defined one or more of the elements by reference to a definitional provision in federal law. Section 1101(a)(43)(F), for example, includes as an aggravated felony "a crime of violence (as defined in section 16 of Title 18)." Section 16 of Title 18—entitled "Crime of violence defined"—provides a defi-

nition for the term "crime of violence."[1] Because offenses in this category are, like offenses in the first category, described generically, they too qualify as aggravated felonies irrespective of whether their elements mirror all of the elements of a federal offense.

Third, Congress identified specific federal offenses. For instance, Section 1101(a)(43)(D) includes within the category of aggravated felony "an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments)," while Section 1101(a)(43)(I) includes "an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography)."

The language and structure of Section 1101(a)(43) point, then, to the same conclusion: a state offense lacking a federal jurisdictional element will qualify as an aggravated felony only if it falls into one of the first two categories. To qualify as an aggravated felony under the third category—as an offense "described in" a cited federal statute—the state offense must include *all* of the elements of the federal crime specifically referenced in the statutory provision.

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[1] 18 U.S.C. § 16 provides:

> The term "crime of violence" means—
>
> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

If Congress had wanted to incorporate some but not all of the federal crime's elements into the "aggravated felony" definition, it would have used one of the other two methods of identifying offenses—each of which plainly does not require that the offense of conviction mirror the elements of a federal offense. By utilizing the third method—referencing particular federal crimes—Congress made clear that it *did* intend to require identical elements.

Indeed, had Congress intended for courts to ignore jurisdictional elements in the federal crimes catalogued in Section 1101(a)(43), it could have made this clear in a variety of ways. Most obviously, it could have simply listed the generic name for each crime—"arson," for instance, rather than "an offense described in section 844(i)."

Alternatively, it could have stated in each subsection that the federal jurisdictional element in the cited federal statute is immaterial. For instance, 18 U.S.C. § 3142(f)(1)(D), relating to pretrial detention, refers to "two or more State or local offenses that would have been offenses described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed." Similarly, 18 U.S.C. § 5032, relating to delinquency proceedings, refers to an offense "in violation of a State felony statute that would have been * * * an offense ['described in' a cited federal statute] if a circumstance giving rise to Federal jurisdiction had existed."

The absence of that language from Section 1101(a)(43) confirms that Congress meant to include *all* of the elements of each of the federal offenses it

cited directly, as the structure and language of the statute require.

2. The contrary reasoning of the lower courts does not withstand scrutiny.

Lower courts have offered three basic arguments to support their conclusion that an offense with different elements qualifies as the offense "described in" a federal statute. Each of these rationales is fundamentally flawed.

First, some courts have asserted that "described in" and "defined in" must have different meanings, and that "described in" provides a "looser standard" than "defined in"—one that authorizes courts to choose which elements of federal law the offense must mirror and which elements may be ignored. See App., *infra*, 8a.

But Congress did not use "defined in" to refer to some statutes, and "described in" to refer to others in order to draw this distinction. As explained above, "defined in" references federal statutes in order to define specific terms that Section 1101(a)(43) employs in connection with otherwise-generic offense descriptions. "Described in" refers to specific federal crimes.

Asking whether "defined" or "described" requires greater congruity with the federal offense elements is simply the wrong inquiry. The latter term is not used to reference an entire federal offense; only the former is. And "described in" therefore must be given its logical meaning: incorporation of all of the elements of the federal offense.

Second, some lower courts assert that the penultimate sentence of Section 1101(a)(43)—which states that "[t]he term ['aggravated felony'] applies to an offense described in this paragraph whether in violation of Federal or State law"—means that state crimes lacking a federal jurisdictional element nonetheless qualify as offenses "described in" the federal statutes cited in the section. Indeed, at least one circuit has asserted that "any contrary reading would render the penultimate sentence superfluous." App., *infra*, 8a.

A much more plausible interpretation of the penultimate sentence, which does not make the sentence superfluous, is that state convictions are not categorically excluded from the definition of "aggravated felony" and can qualify if they satisfy a standard set forth in one of the specific paragraphs of Section 1101(a)(43). This interpretation not only comports with the ordinary meaning of "describe,"[2] but also adheres to the basic interpretive principle that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act * * * [it] acts intentionally and purposely in the disparate inclusion or exclusion." *Russello* v.

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[2] See, *e.g.*, *Black's Law Dictionary* 539 (10th ed. 2014) ("A delineation or explanation of something by an account setting forth the subject's characteristics or qualities"; "[a]n enumeration or *specific identification* of something" (emphasis added)); *Webster's Third New International Dictionary* 610 (1993) ("to transmit a mental image, an impression, or an understanding of the nature and characteristics of (something immaterial)"; "[to] present distinctly by means of properties and qualities").

United States, 464 U.S. 16, 23 (1983) (quotations omitted).

Moreover, if Congress meant for state crimes to constitute aggravated felonies for each offense "described in" a federal statute under Section 1101(a)(43), it could easily have said so by writing that "a state crime qualifies as an aggravated felony for every offense listed in this paragraph, whether or not the offense conduct satisfies a federal jurisdictional element." That is the approach it has taken in similar statutory settings. See page 12, *supra*.

Finally, if Section 1101(a)(43)'s references to offenses "described in" federal law require only an approximation of that offense's constituent elements, then there is no principled reason why courts cannot exclude any element under Section 1101(a)(43) that they perceive to be irrelevant to deportation proceedings. For instance, although Section 844(i) penalizes an offense in which one "maliciously damages * * * any building, vehicle, or other real or personal property used in interstate or foreign commerce," a court may conclude that "maliciousness" should have no bearing on whether the offense constitutes an aggravated felony. Surely Congress did not empower courts to exercise discretion in determining who will, and who will not, be deported.

Third, some lower courts have suggested that the jurisdictional elements of federal offenses are not "substantive" and may be disregarded for purposes of the aggravated felony inquiry. But this Court has rejected the argument that these requirements have "second-class" status—in the context of the very federal crime at issue here.

The defendant in *Jones* v. *United States*, 529 U.S. 848 (2000), was convicted of violating Section 844(i) by throwing a Molotov cocktail through a window in his cousin's Indiana home. This Court reversed the conviction, holding that the house was not "used in" interstate commerce as Section 844(i) required. 529 U.S. at 854. "Were we to adopt the Government's expansive interpretation of § 844(i)," the Court cautioned, "hardly a building in the land would fall outside the federal statute's domain." *Id.* at 857. "[T]he statute's limiting language, 'used in' any commerce-affecting activity, would have no office." *Ibid.*

Citing a BIA decision, the Fourth Circuit concluded that *Jones* does not apply in immigration settings. App., *infra*, 10a. But there is no justification for treating the offense's jurisdictional element differently that the other elements of the federal crime. As this Court made clear in *Jones*, "[j]udges should hesitate … to treat statutory terms *in any setting* [as surplusage], and resistance should be heightened when the words describe an element of a criminal offense." 529 U.S. at 857 (emphasis added) (quoting *Ratzlaf* v. *United States*, 510 U.S. 135, 140-141 (1994)). Courts, in other words, cannot accord some elements second-class status and ignore them in determining whether an individual has committed a federal offense.

In sum, the statutes plain language and this Court's precedents permit only one interpretation of the provision at issue here: an offense "described in" a federal criminal statute is an offense with the same elements as the referenced federal crime.

C. The Question Presented Is Important.

For individuals convicted of state crimes and charged under Section 1101(a)(43), deportation often turns on whether an aggravated felony "described in" a specific federal statute must contain a federal jurisdictional element. The importance of this issue is demonstrated by the large number of cases in which it arises.

A significant number of cases involve the precise provision at issue here, Section 1101(a)(43)(E). See, *e.g.*, *Torres* v. *Holder*, 764 F.3d 152 (2d Cir. 2014); *Bautista* v. *Attorney Gen. of U.S.*, 744 F.3d 54 (3d Cir. 2014); *Nieto Hernandez* v. *Holder*, 592 F.3d 681 (5th Cir. 2009); *United States* v. *Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001); *In re Juan Ramon Belliard Tejada*, 2012 WL 6968960 (BIA); *In re Jose Antonio Martinez-Torres*, 2011 WL 585591 (BIA); *In re Jose Cortez-Flores*, 2010 WL 1747397 (BIA).

The same interpretive issue also has arisen in decisions construing other paragraphs of Section 1101(a)(43). And it is little wonder, given how many aggravated felonies specified in Section 1101(a)(43) are those "described in" particular federal statutes.[3]

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[3] Not counting Section 1101(a)(43)(E), ten other aggravated felony sub-provisions use the phrase "described in" to reference federal statutes. See, *e.g.*, 8 U.S.C. § 1101(a)(43)(D) ("an offense *described in* section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000"); *id.* § 1101(a)(43)(H) ("an offense *described in* section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom)"); *id.* §

See, *e.g.*, *Spacek*, 688 F.3d at 539 (considering whether a state racketeering offense lacking an interstate commerce nexus qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(J)); *Armijo* v. *Mukasey*, 266 Fed. App'x 511, 513 (9th Cir. 2008) (conducting same analysis for 8 U.S.C. § 1101(a)(43)(I)); *In re Faran Khan Yusafi*, 2008 WL 339652, at *1 (BIA) (per curiam) (interpreting 8 U.S.C. § 1101(a)(43)(I)); *In re Carlos Calderon-Figueroa*, 2006 WL 1558706 (BIA) (construing 8 U.S.C. § 1101(a)(43)(J)).

What is more, some courts have found the aggravated felony standard satisfied without even considering the offense of conviction's lack of the jurisdictional element specified in the referenced federal law. These decisions provide further confirmation of the frequency with which the issue arises. See, *e.g.*, *Serrato-Navarrete* v. *Holder*, 2015 WL 1037309, at *3 (10th Cir. 2015) (holding that conviction under Colorado law for possession of child pornography constitutes an "offense described in § 2252(a)(4)(B), and, thus * * * an aggravated felony under § 1101(a)(43)(I)," without noting the absence of a jurisdictional element in Colorado's law); *Kaufmann* v. *Holder*, 759 F.3d 6, 8 (1st Cir. 2014) (concluding that conviction under Connecticut's obscenity law constitutes an offense "described in 18 U.S.C. §§ 2251, 2251A, or 2252" and therefore also qualifies as an aggravated felony under Section 1101(a)(43)(I))

1101(a)(43)(I) ("an offense *described in* section 2251, 2251A, or 2252 of Title 18 (relating to child pornography)"); *id.* § 1101(a)(43)(M)(ii) ("an offense that * * * *is described* in section 7201 of Title 26 (relating to tax evasion)") (emphases added).

without considering that Connecticut's law lacked an interstate commerce nexus); *Murillo-Prado* v. *Holder*, 735 F.3d 1152, 1156 (9th Cir. 2013) (finding that a conviction under Arizona's racketeering statute constitutes an aggravated felony under Section 1101(a)(43)(J) without examining the absence of a jurisdictional element in the state offense); *United States* v. *Mendoza-Reyes*, 331 F.3d 1119, 1122 (9th Cir. 2003) (finding that a state crime qualifies as an aggravated felony because it contains the same elements as the federal statute); *In re Roland Harry Garn*, 2007 WL 1180491 (BIA) (taking for granted that conviction under a state pornography offense that lacks a jurisdictional element nonetheless constitutes an offense "described in" 18 U.S.C. § 2252).

In short, the question presented by this case extends well beyond Section 1101(a)(43)(E), implicating a host of other aggravated felony provisions that define an offense by reference to a federal statute.

More important, a ruling by this Court would provide a uniform standard. The current division among the lower courts means that individuals convicted of similar predicate state offenses face disparate immigration outcomes depending on where in the country they reside.

The county courthouse in which Espinal pleaded guilty to the crime of arson lies less than sixty miles to the west of the Third Circuit. Surely, she ought to face the same deportation consequences as someone convicted of substantially the same crime in a courthouse just a few miles to the east.

"Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for

irrelevant and fortuitous factors, be treated in a like manner." *Francis* v. *INS*, 532 F.2d 268, 273 (2d Cir. 1976). Other courts have also emphasized the particular need for uniformity in the context of federal immigration law. See *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 912 (9th Cir. 2004) (noting the "strong interest in national uniformity in the administration of immigration laws"); *Gerbier* v. *Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (locating the policy favoring a uniform immigration law in Article I, § 8 of the Constitution); *Rosendo-Ramirez* v. *INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount * * *."). See also U.S. Const. Art. I, § 8, cl. 4 (authorizing Congress "[t]o establish an uniform Rule of Naturalization").

Review by this Court is essential to provide that uniformity here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 2015

[4] The representation of petitioner by a clinic affiliated with Yale Law School does not reflect any institutional views of Yale Law School or Yale University.

APPENDIX

Appendix A

United States Court of Appeals
For the Fourth Circuit

No. 13–2418

SANDRA YAMILETH ESPINAL–ANDRADES,
Petitioner,
v.
ERIC H. HOLDER, JR., Attorney General,
Respondent

On Petition for Review of an Order of the Board of Immigration Appeals

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Argued: Oct. 30, 2014

Decided: Jan. 22, 2015

Before: SHEDD, AGEE, and WYNN, Circuit Judges.

WYNN, Circuit Judge:

Petitioner Sandra Yamileth Espinal–Andrades, a lawful permanent resident, pled guilty to arson under Maryland's arson-in-the-first-degree statute. At the heart of this appeal is whether that conviction qualifies as an aggravated felony under the Immi-

gration and Nationality Act ("INA"). We agree with the immigration judge and Board of Immigration Appeals ("BIA") that it does and, for the reasons explained below, deny Espinal's petition.

I.

Espinal immigrated to the United States from El Salvador in 1999 and became a lawful permanent resident that same year. On August 27, 2009, a Maryland grand jury indicted her on four counts: (1) first degree arson, (2) second degree arson, (3) first degree malicious burning of property greater than $1,000, and (4) reckless endangerment. On January 27, 2010, Espinal entered a plea pursuant to *N. Carolina v. Alford*, 400 U.S. 25 (1970), on the first degree arson count, and the state dropped the remaining three charges. She was sentenced to 360 days in prison.

On March 12, 2013, the Department of Homeland Security ("DHS") issued Espinal a Notice to Appear ("Notice"). The Notice made several factual allegations concerning Espinal's citizenship status, and she denied each one. Espinal also denied the charge that she was subject to removal under 8 U.S.C. § 1227(a)(2)(A)(iii), contesting DHS's assertion that her first degree arson conviction qualified as an aggravated felony.

On May 9, 2013, an immigration judge ruled that all of DHS's factual allegations in the Notice were true, and Espinal raised no objections to this ruling. Espinal did, however, object to the classification of her state arson charge as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E), which defines "aggravated felony" as, *inter alia*, "an offense described in" 18 U.S.C. § 844(i), a federal arson statute.

The parties briefed the issue, and on June 4, 2013, the immigration judge ruled against Espinal. In doing so, the immigration judge acknowledged that the Maryland statute lacked the federal jurisdictional element contained in § 844(i), which requires that the destroyed property be "used in interstate or foreign commerce." However, the immigration judge favorably cited two precedential BIA cases holding that convictions under state statutes qualified as removable aggravated felonies under the INA "even though the state offense [s] lack[ed] the jurisdictional elements of the federal crime[s]." A.R. 44 (citing *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011), *vacated sub nom. Bautista v. Attorney Gen. of U.S.*, 744 F.3d 54 (3d Cir. 2014), and *In re Vasquez–Muniz*, 23 I. & N. Dec. 207 (BIA 2002) (en banc)). Accordingly, the immigration judge ruled that Espinal's arson conviction qualified as an aggravated felony and ordered her removed.

Espinal appealed the decision to the BIA. In a single-member panel decision, the BIA dismissed Espinal's appeal. It recognized agency precedent establishing that "Congress meant to cover State arson offenses when it referenced § 844(i) in the definition of an aggravated felony and did not intend to exclude them simply because a State crime lacked a Federal jurisdictional element." A.R. 3 (citing *In re Vasquez–Muniz*, 23 I. & N. Dec. 207 (BIA 2002) (en banc), and *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011)). Espinal then petitioned this Court for review of the BIA's decision.

II.

Generally, this Court lacks jurisdiction to review the final order of removal of an alien convicted of cer-

tain enumerated crimes, including an aggravated felony. *Ramtulla v. Ashcroft*, 301 F.3d 202, 203 (4th Cir. 2002). But under 8 U.S.C. § 1252(a)(2)(D), we retain jurisdiction to consider questions of law, such as whether a conviction qualifies as an aggravated felony. *Mbea v. Gonzales*, 482 F.3d 276, 279 (4th Cir. 2007)

We review the BIA's legal conclusions *de novo*. *Martinez v. Holder*, 740 F.3d 902, 909 (4th Cir. 2014). The BIA's statutory interpretations of the INA are afforded the appropriate deference, "recognizing that Congress conferred on the BIA decisionmaking power to decide such questions of law." *Id.* (citing *INS v. Aguirre–Aguirre*, 526 U.S. 415, 424 (1999), and *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

To determine what deference is owed, "we begin our analysis with a determination of whether the statute at issue is unambiguous with respect to the question presented. If so, then the plain meaning controls the disposition of [Espinal's] appeal." *Bracamontes v. Holder*, 675 F.3d 380, 384 (4th Cir. 2012). This is *Chevron* step one. But if the statute is silent or ambiguous, "the question for this court becomes whether the BIA's interpretation 'is based on a permissible construction of the statute.' " *Saintha v. Mukasey*, 516 F.3d 243, 251 (4th Cir. 2008) (quoting *Chevron,* 467 U.S. at 843). This is *Chevron* step two.

However, we do not afford the BIA's single-member decisions *Chevron* deference because they lack precedential value. See, e.g., *Martinez*, 740 F.3d at 909-10. But the single-member BIA decision on appeal here relies on precedential en banc and three-member panel decisions. See A.R. 3–4 (citing *In re*

Vasquez–Muniz, 23 I. & N. Dec. 207 (BIA 2002) (en banc) (holding that possession of a firearm in violation of California law qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43) despite the absence of the federal jurisdictional element), and *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011) (holding that a conviction under a New York arson statute qualified as an aggravated felony under 8 U.S.C. § 1101(a)(43) despite the absence of the federal jurisdictional element), *vacated sub nom. Bautista v. Attorney Gen. of U.S.*, 744 F.3d 54 (3d Cir. 2014)).[1] That controlling precedent is given *Chevron* deference.

III.

With her main argument on appeal, Espinal contends that she is not deportable because her Maryland arson conviction does not qualify as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(E). Both the immigration judge and the BIA reached the opposite conclusion, relying on the BIA's precedential decisions in *Matter of Bautista* and *In re Vasquez–Muniz*. Upon careful review, we, too, reject Espinal's argument.

A.

To provide context for our *Chevron* analysis, we find it helpful to first set out the pertinent statutes.

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[1] Although the Third Circuit vacated the BIA decision in *Matter of Bautista*, 25 I. & N. Dec. 616 (BIA 2011), this does not affect the decision's precedential effect outside the Third Circuit. See *Matter of Anselmo*, 20 I. & N. Dec. 25, 31 (BIA 1989) ("We are not required to accept an adverse determination by one circuit court of appeals as binding throughout the United States." (citing several circuit court cases)).

Under the INA, "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). And an "aggravated felony" is "an offense described in . . . 18 U.S.C. § 844(i)." 8 U.S.C. § 1101(a)(43)(E).

In turn, 18 U.S.C. § prescribes various punishments for an individual who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." The elements of 18 U.S.C. § 844(i) and the Maryland statute under which Espinal was convicted are identical in all but one respect: the Maryland statute lacks the federal jurisdictional element requiring that the destroyed property be "used in interstate or foreign commerce." Compare 18 U.S.C. § 844(i), with Md.Code Ann., Crim. Law § 6–102 (West). See also Gov't's Br. 11 (noting that this is not in dispute).

Finally, the penultimate sentence of 8 U.S.C. § 1101(a)(43) states that "[t]he term ['aggravated felony'] applies to an offense described in this paragraph *whether in violation of Federal or State law* and applies to such an offense in violation of the *law of a foreign country* for which the term of imprisonment was completed within the previous 15 years." 8 U.S.C. § 1101(a)(43) (emphases added).

B.

In analyzing these statutes under *Chevron,* we "must first consider whether 'Congress has directly spoken to the precise question' at issue." *United States v. Thompson–Riviere*, 561 F.3d 345, 350 n.2

(4th Cir. 2009) (quoting *Chevron*, 467 U.S. at 842). To determine whether Congress has spoken directly through the relevant statutes, we must "begin by examining [the statute's] plain language" and "give the relevant terms their common and ordinary meaning." *Yi Ni v. Holder*, 613 F.3d 415, 424 (4th Cir. 2010).

Section § 1101(a)(43)(E) defines "aggravated felony," in relevant part, as "an offense *described in* . . . 18 U.S.C. § 844(i)." (emphasis added). By contrast, three other subparagraphs in 8 U.S.C. § 1101(a)(43) use the term *"defined in* " instead of "*described in* " to identify aggravated felonies. E.g., 8 U.S.C. § 1101(a)(43)(B), (C), and (F).

Comparing dictionary definitions, "described in" is the broader of the two terms. The American Heritage Dictionary defines "define" as "[t]o state the precise meaning," "make clear the outline or form of," or "[t]o specify distinctly." *The American Heritage Dictionary of the English Language* 476 (5th ed. 2011). By contrast, the same dictionary defines "describe" as "[t]o convey an idea or impression of," or "[t]o trace the form or outline of." *Id.* at 490. Other circuits have also interpreted the terms this way. *See, e.g., Torres v. Holder*, 764 F.3d 152, 157 (2d Cir. 2014) (noting that "described in" has a "broader standard"); *United States v. Castillo–Rivera*, 244 F.3d 1020, 1023 (9th Cir. 2001) (noting that "described in" is a looser standard).[2] Bearing the plain

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[2] We recognize that the Third Circuit, in a divided opinion, ruled differently on this precise issue. *Bautista*, 744 F.3d at 54. Frankly, we disagree with the majority opinion's analysis and conclusion, not least for many of the reasons expressed in Judge Ambro's thoughtful dissent. *Id.* at 69-74.

meaning of "define" and "describe" in mind, it appears as if Congress intended for the aggravated felonies "described in" the pertinent federal statute to include crimes that are not "defined in"—that is, precisely identical to—that federal statute.

Further, the penultimate sentence of 8 U.S.C. § 1101(a)(43) states that convictions under the described offenses qualify as aggravated felonies "*whether in violation of Federal or State law* and applies to such an offense in violation of the *law of a foreign country* for which the term of imprisonment was completed within the previous 15 years." (emphases added). It is "a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Alaska Dep't of Envtl. Conservation v. E.P.A.*, 540 U.S. 461, 489 n.13 (2004) (citations omitted). Accordingly, we must try to give every word in the statute meaning to avoid rendering its terms superfluous. *Discover Bank v. Vaden*, 396 F.3d 366, 369 (4th Cir. 2005).

Doing so here yields an obvious result: Because state laws will seldom—if ever—contain a federal jurisdictional element, and foreign crimes are even less likely to contain a United States-jurisdictional element, we conclude that Congress clearly expressed its intent for aggravated crimes "described in" federal statutes to include substantively identical state and foreign crimes that lack only the federal jurisdictional element. Any contrary reading would render the penultimate sentence superfluous.

The plain meaning of the terms and the application of statutory construction principles leave us

with no doubt regarding Congress's intent. Nevertheless, a sister circuit has come down the other way on this issue. *Bautista*, 744 F.3d at 57. Recognizing that such a disagreement may be, to some, an indication that the statute is ambiguous (again, we do not think it is), we take a belt-and-suspenders approach and turn to the second step of *Chevron*.

C.

At *Chevron* step two, we determine whether the BIA's interpretation of 8 U.S.C. § 1101(a)(43)(E) is reasonable. If it is, we cannot substitute our own preferred statutory interpretation. *Chevron*, 467 U.S. at 844. And the BIA's interpretation is reasonable as long as it is not "arbitrary, capricious, or manifestly contrary to the statute." *Id.*

As noted above, the single-member BIA panel that issued Espinal's decision relied on the precedential decisions of *In re Vasquez–Muniz* and *Matter of Bautista*. In *In re Vasquez–Muniz*, the BIA looked at the statute's "overall design," "the language of the aggravated felony provision itself," "very specific [statutory] references" that a contrary interpretation would render superfluous, and persuasive authority from an analogous Ninth Circuit case.[3] 23 I. & N.

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[3] In *In re Vasquez–Muniz*, the BIA briefly discussed *United States v. Castillo–Rivera*, 244 F.3d 1020 (9th Cir. 2001). 23 I. & N. Dec. 207, 212 (BIA 2002). *Castillo–Rivera* held that a state firearm possession offense was an aggravated felony under the INA, concluding that that the interstate commerce element included in 18 U.S.C. § 922(g) is "merely a jurisdictional basis." 244 F.3d at 1023-24. Two circuits have since adopted the same interpretation. See *Nieto Hernandez v. Holder*, 592 F.3d 681, 685 (5th Cir. 2009) (holding that the "interstate commerce element is simply an element that en-

Dec. at 209–12. *In Matter of Bautista*, the BIA reaffirmed *In re Vasquez–Muniz's* analysis and, after analyzing *Jones v. United States*, 529 U.S. 848 (2000) (discussing scope of a federal arson statute vis-à-vis a federal jurisdictional element), specifically concluded that "Congress meant to cover State arson offenses when it referenced § 844(i) in the definition of an aggravated felony." 25 I. & N. Dec. at 618–21. The BIA tethered its interpretation to traditional tools of statutory interpretation, and nothing leads this Court to conclude that its construction is unreasonable.

In sum, we conclude that (1) Espinal's state arson conviction unambiguously qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E), and (2) even if any ambiguity existed, the BIA's interpretation was reasonable.

IV.

Espinal advances two arguments in the alternative: (1) the BIA should have applied the rule of lenity to her case, and (2) the BIA's application of *Matter of Bautista* was impermissibly retroactive. Neither argument has merit.

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sures federal jurisdiction" and that requiring it to be present in a state offense "would undermine Congress's evident intent that jurisdiction be disregarded in applying" the definition of an aggravated felony); *Negrete–Rodriguez v. Mukasey*, 518 F.3d 497, 501-03 (7th Cir. 2008) (holding that, "[a]lthough not 'mere surplusage,' a jurisdictional element does little more than ensure that the conduct regulated in a federal criminal statute is within the federal government's limited power to proscribe" and, therefore, finding the state offense to be an aggravated felony).

Espinal first argues that the BIA should have applied the rule of lenity to her case. In the immigration context, "the rule of lenity stands for the proposition that ambiguities in deportation statutes should be construed in favor of the noncitizen." *Hosh v. Lucero*, 680 F.3d 375, 383 (4th Cir. 2012) (citing *Fong Haw Tan v. Phelan*, 333 U.S. 6, 9-10 (1948)).

Assuming, without deciding, that *Chevron* still leaves some place for the rule of lenity,[4] "[t]o invoke the rule, we must conclude that there is a grievous ambiguity or uncertainty in the statute." *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998) (citations omitted). That is simply not the case here; the pertinent statute is not grievously ambiguous. The rule of lenity therefore has no place here.

Espinal next argues that applying *Matter of Bautista* to her case violates her due process rights because the BIA adopted "a novel construction of the INA and federal criminal law," leaving her without the requisite notice. Pet.'s Br. 19. Espinal's 2010 conviction postdates the 1996 enactment of 8 U.S.C. § 1101(a)(43). In relying on the 2011 *Matter of Bautista* decision, the BIA therefore "did not retroactive-

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[4] In light of *Chevron,* some have questioned the rule of lenity's role in the immigration context. See, e.g., David S. Rubenstein, *Putting the Immigration Rule of Lenity in Its Proper Place: A Tool of Last Resort After Chevron,* 59 ADMIN. L. REV. 479 (2007) (arguing that the rule of lenity should be used to resolve lingering statutory ambiguities only after *Chevron's* second step); Matthew F. Soares, Note, *Agencies and Aliens: A Modified Approach to Chevron Deference in Immigration Cases,* 99 CORNELL L. REV. 925 (2014) (arguing that the immigration rule of lenity should be used as an underlying principle to inform the *Chevron* analysis).

ly apply a new law but instead applied [its] determination of what the law 'had *always* meant.' " *De Quan Yu v. U.S. Attorney Gen.*, 568 F.3d 1328, 1333 (11th Cir. 2009) (per curiam) (quoting *Rivers v. Roadway Express, Inc.,* 511 U.S. 298, 313 n.12 (1994)). Once *Matter of Bautista* issued, "that decision became the controlling interpretation of the law and was entitled to full retroactive effect in all cases still open on direct review, regardless of whether the events predated the . . . decision." *Id.* at 1334. And although the Third Circuit vacated *Matter of Bautista*, this does not affect the decision's precedential effect in the Fourth Circuit. See *supra* note 1. Accordingly, *Matter of Bautista* was not applied impermissibly, and it governs Espinal's case.

V.

For the foregoing reasons, we deny Espinal's petition for review.

PETITION DENIED.

Appendix B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530
File: A046 938 455 – Baltimore, Maryland
Date: Oct 30, 2013
In re: SANDRA YAMILETH ESPINAL-ANDRADES

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jorge E. Artieda, Esquire

CHARGE:

> Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] – Convicted of aggravated felony

APPLICATION: Termination, waiver of inadmissibility under section 212(h) of the Act

The respondent, a native and citizen of El Salvador, and a lawful permanent resident of the United States since her admission as an immigrant on November 29, 1999, has filed a timely appeal of an Immigration Judge's June 4, 2013, decision. In that decision, the Immigration Judge found the respondent removable as charged, based on her record of conviction[1] (Group Exh. 1) as to her 2010 Maryland arson

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[1] The record reflects that the respondent was convicted on March 31, 2010, upon a plea of guilty, in the Circuit Court for Prince George's County, Maryland, for the offense of Arson in the first degree, in violation of MD Code, Criminal

in the first degree conviction,[2] which the Immigration Judge found to qualify as an aggravated felony under section 101(a)(43)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43)(E)(i). In addition, the Immigration pretermitted the respondent's application for a "stand-alone" waiver of inadmissibility under section 212(h) of the Act, 8 U.S.C. § 1182(h), as her 2010 Maryland aggravated felony conviction followed her admission to the United States as an immigrant in 1999 and was not as a result of an adjustment of status. *See Leiba* v. *Holder*, 699 F.3d 346 (4th Cir. 2012). The respondent's appeal will be dismissed. The request for oral argument before the Board is denied. 8 C.F.R. § 1003.1(e).

The Board reviews an Immigration Judge's findings of fact, including findings as to the credibility of testimony, under the "clearly erroneous" standard. *See* 8 C.F.R. § 1003.l(d)(3)(i); *Matter of R-S-H-,* 23 I&N Dec. 629 (BIA 2003); *Matter of S-H-,* 23 I&N Dec. 462 (BIA 2002). The Board reviews questions of law, discretion, judgment, and all other issues in an appeal from an Immigration Judge's decision de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii).

Law, § 6-102, sentenced to a term of imprisonment of 360 days, all but 90 days suspended; and thereafter placed on supervised probation for a period of 3 years (Group Exh. 1).

[2] Maryland's Arson in the first degree statute at MD Code, Criminal Law, § 6-102, provides in relevant part that:

> (a) A person may not willfully and maliciously set fire to or burn:
>
> (1) a dwelling; or
>
> (2) a structure in or on which an individual who is not a participant is present.

Applying the categorical approach to see if the respondent's 2010 conviction under Maryland's Arson in the first degree statute qualifies as an aggravated felony under section 101(a)(43)(E)(i) of the Act,[3] the Immigration Judge found that the substantive elements of the Maryland arson offense and the Federal arson crime are "substantially the same," *i.e.*, the "malicious damage of a dwelling" by fire (I.J. at 3). The only difference is that the Federal arson crime set forth at 18 U.S.C. § 844(i),[4] has an additional element, which is that property must be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." This requirement that the property be "used in interstate or foreign commerce" is a jurisdictional element. *See Jones* v. *United States,* 529 U.S. 848 (2000). However, the Immigration Judge considered that the Board had addressed this very issue in *Matter of Bautista,* 25 I&N Dec. 616 (BIA 2011) (finding that a New York conviction for attempted arson qualified as an

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[3] In pertinent part, section 101(a)(43) of the Act, includes within the definition of the term "aggravated felony:"

> (E) an offense described in:
>
> > (i) section 842(h) or (i) of title 18, United States Code, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses) …

[4] 18 U.S.C. § 844(i) provides in pertinent part as follows:

> Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both . . .

aggravated felony under section 101(a)(43)(E)(i) of the Act even though the state offense lacked the jurisdictional elements of the federal crime). As in *Matter of Bautista,* the Immigration Judge found our analysis in *Matter of Vasquez-Muniz,* 23 I&N Dec. 207 (BIA 2002) (finding that Congress meant to cover State arson offenses when it referenced § 844(i) in the definition of an aggravated felony and did not intend to exclude them simply because a State crime lacked a Federal jurisdictional element) controls, and supports also finding the respondent's 2010 conviction under Maryland's Arson in the first degree statute qualifies as an aggravated felony under section 101(a)(43)(E)(i) of the Act. *See Matter of Bautista, supra,* at 621.

The sum and thrust of the respondent's appellate argument concerns the Board's precedents in *Matter of Bautista* and *Matter of Vasquez-Muniz,* and that they were wrongly decided, and asks us to reverse those decisions. However, absent a precedent decision directing us otherwise on those issues from the appropriate federal courts having jurisdiction over this case, we will continue to follow Board precedent in this matter.[5]

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[5] Notwithstanding the respondent's appellate due process challenge to the Immigration Judge's pretermission of her request for a waiver of inadmissibility under section 212(h) of the Act, as with the Immigration Judge, we are bound by the jurisdictional authority of the United States Court of Appeals for the Fourth Circuit, the jurisdiction wherein this case arises, which finds that the aggravated felony bar to section 212(h) relief applies under the circumstances presented herein. *See Leiba* v. *Holder*, *supra* at 352-353 (finding that the aggravated felony bar for a section 212(h) waiver

Even if the respondent's 2010 conviction under Maryland's Arson in the first degree statute lacks the jurisdictional element of the federal statute, since the respondent's state crime is described in the federal statute, *see* 18 U.S .C. 844(i), the Immigration Judge correctly held that the respondent was convicted of an aggravated felony as defined in section 101(a)(43)(E)(i) of the Act. *See Matter of Bautista, supra; Matter of Vasquez-Muniz, supra.*

Based on the record before us, we agree with the Immigration Judge that the respondent is subject to removal from the United States based on the respondent's conviction records submitted in this case (Group Exh. 1). *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). Moreover, the respondent has not established her eligibility for any relief or protection from removal, including a "stand-alone" waiver of inadmissibility under section 212(h) of the Act.5 *See* section 240(c)(4)(A) of the Act, 8 U.S.C. § 1229a(c)(4)(A); 8 C.P .R.§ 1240.8(d).

Accordingly, we will affirm the Immigration Judge's decision, and dismiss the appeal.

ORDER: The appeal is dismissed.

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applicable to lawful permanent residents who are first admitted to the United States as immigrants does not apply to an alien who adjusts her status to that of a lawful permanent resident after illegally entering the United States without inspection); *see also Bracamontes v. Holder,* 675 F.3d 380 (4th Cir. 2012).

Appendix C

IJ ORDER

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW

IMMIGRATION COURT

31 HOPKINS PLAZA, ROOM 440

BALTIMORE, MD 2120

ARTIEDA JORGE

100 N. WASHINGTON ST ST 222

FALLS CHURCH, VA 22046

IN THE MATTER OF ESPINAL-ANDARADES, SANDRA YAMILETH

FILE A 046-938-455 DATE: JUNE 5, 2013

___ UNABLE TO FORWARD – NO ADDRESS

___ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND

FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS

OFFICE OF THE CLERK

P.O. BOX 8530

FALLS CHURCH, VA 22041

___ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c) (3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B{c) (3) IN DEPORTATION PROCEEDINGS OR SECTION 240{c) (6), 8 U.S.C. SECTION 1229a(c) (6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT

31 HOPKINS PLAZA, ROOM 440

BALTIMORE, MD 21201

___ OTHER: COPY OF IJ WRITTEN DECISION MAILED

_____

COURT CLERK

IMMIGRATION COURT

CC: DHS, ICE, OFFICE OF THE CHIEF COUNSEL

31 HOPKINS PLAZA 16TH FLOOR

BALTIMORE, MD, 212010000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW UNITED STATES IMMIGRATION COURT

BALTIMORE, MARYLAND

IN THE MATTER OF	IN REMOVAL PROCEEDINGS CEEDINGS
ESPINAL-ANDRADES, Sandra Y. (DETAINED)	Case A# 046-938-455

CHARGE: INA§ 237(a)(2)(A)(iii), aggravated felony conviction under INA § 101(a)(43)(E), convicted of an offense under 18 USC 844(f) relating to explosive materials offenses.

APPLICATIONS: Termination of Removal.[1]

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[1] Respondent requested relief under INA§212(h), hardship waiver (stand alone). The application was pretermitted by the Court. See INA§ 212(h); *Leiba v. Holder*, 699 F.3d 346 (4th Cir. 2012).

APPEARANCES

ON BEHALF OF RESPONDENT

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MEMORANDUM OF DECISION AND ORDER

The sole issue before the Court is whether the Respondent's conviction under Section 6- 102 of the Criminal Law Article of the Annotated Code of Maryland for arson-dwelling is an aggravated felony offense under INA § 10l(a)(43)(E)?

I. STATEMENT OF THE FACTS

The Respondent is a native and citizen of El Salvador who entered the United States as an immigrant on November 29,1999 at Washington, D.C. Subsequently, on March 31, 2010, she was convicted of the offense of "First Degree Arson-dwelling," under Section 6-102 of the Criminal Law Article of the Annotated Code of Maryland. She was sentenced to a term of imprisonment of 360 days. As a result of her conviction, the Respondent was placed in removal

proceedings on March 22,2013 through the issuance of a Notice to Appear (NTA).

In pleading proceedings, the Respondent initially denied all allegations of fact and the charge of removability. At a contested proceeding, the Court admitted the Department of Homeland Security (DHS) evidence and upon review sustained all of the allegations of fact.

The parties have now filed their briefs on the question of law, which have been reviewed by the Court.

II. STATEMENT OF THE LAW & FINDINGS OF THE COURT

INA § 101(a)(43)(E) states that any person convicted of an offense described under Title

18 USC Section 844(t) (relating to explosive materials offenses) is an aggravated felon and subject to removal. Under the "categorical approach," *Taylor v. U.S.*; 495 U.S. 575-(1990), the criminal offense for which the Respondent stands convicted (first degree arson) under Maryland law is an aggravated felony offense.

The Annotated Code of Maryland at Section 6-102, Arson in the First Degree states:

> "(a) A person may not willfully and maliciously set fire to or burn: (1) a dwelling; or (2) a structure in or on which an individual who is not a participant is present."

The federal statute at 18 USC Section 844(F)(i) states,

> "[W]hoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof, or any institution or organization receiving Federal financial assistance, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both,"

and Section 844(i) has the added element that the property be used in interstate or foreign commerce.

The Respondent of course was not convicted under the federal statute, and thus there is no federal property involved, nor interstate commerce involved. However, the Board of Immigration Appeals (BIA) has ruled in Matter of Bautista, 25 I&N Dec. 616 (BIA 2011) that attempted arson under the New York Penal Code is an aggravated felony pursuant to INA§ 101(a)(43)(E)(l) even though the state offense lacks the jurisdictional elements of the federal crime.

> "An offense defined by state or foreign law may be classified as an aggravated felony as an offense 'described in' a federal statute enumerated in section l01(a)(43) of the Immigration and Nationality Act, 8 U.SC. § 1101 (a)(43) (1994 & Supp. V 1999), even if it lacks the jurisdictional element of the federal statute."

See also *Matter of Vasguez-Muniz*, 23 I&N Dec. 207 (BIA 2002).

In this case, the substantive elements of the Maryland state statute correspond to the federal offense, that is the "malicious damage of a dwelling" by fire.

The Court finds that the Respondent is an aggravated felon under INA§ 10l(a)(43)(E) and as such is not eligible for an INA § 212(h) waiver.

This is a sad and tragic case. The Respondent has been a resident since age nine. She is the mother of a young child, a United States citizen. Her family is in the United States and she is being sent to a homeland that is not her home. Yet the law permits her no relief.

The Respondent shall be removed as charged to El Salvador.

Done and Ordered this ____ day of ____, 2013.

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John F. Gossart, Jr.
United States Immigration Judge
Baltimore, Maryland

Appendix D

8. U.S.C. § 1101(a)(43)

(43) The term "aggravated felony" means--

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in--

> **(i)** section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);
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> **(ii)** section 922(g)(1), (2), (3), (4), or (5), (j), (n), (o), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or
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> **(iii)** section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that--

(i) relates to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

(L) an offense described in--

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 3121 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 3121 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that--

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for

the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.