No. 05-1629

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,

Petitioner,

v.

LUIS ALEXANDER DUENAS-ALVAREZ

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

Whether a conviction under a broadly worded criminal statute that reaches a wide array of relatively nonserious conduct qualifies categorically as a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G).

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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

INTEREST OF THE *AMICUS CURIAE*

The National Immigration Project of the National Lawyers Guild (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws.[1] Members of the National Immigration Project represent non-citizens before the Executive Office for Immigration Review, the Department of Homeland Security, and the federal courts, and in criminal matters in state and federal courts. The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises published by Thomson-West. The National Immigration Project also has participated as *amicus curiae* in significant immigration-related cases before this Court, including, among others: *Fernandez-Vargas* v. *Gonzales*, 126 S. Ct. 2422 (2006); *United States* v. *Mendoza-Lopez*, 481 U.S. 828 (1987); and *Jean* v. *Nelson*, 472 U.S. 846 (1985). Because the National Immigration Project has substantial expertise in the issue presented here, it presents this brief to assist the Court in its consideration of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

The government's position in this case is that "all

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

conduct" (U.S. Br. 3) that may be prosecuted under California Vehicle Code Section 10851(a) is a generic "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G). The government's highly technical argument does not have much to say about the practical consequences of its proposed rule. But the government's myopic focus on what it thinks is wrong with the court of appeals' holding in this case should not obscure either the extraordinary implications of the government's approach or its inconsistency with the more fundamental structure of federal immigration law.

In the statutory framework governing criminal offenses committed by non-citizens, Congress intended that aggravated felonies be the *most* serious crimes with the *most* serious consequences. The historical development and legislative history of federal immigration law reveal that Congress listed only what it regarded as the most serious offenses as aggravated felonies. This understanding is demonstrated both by Congress's choice of the statutory term "aggravated" and by its repeated reference to persons convicted of aggravated felonies as ones who are "especially dangerous" or who have committed "particularly serious" crimes.

The severe consequences that Congress attached to aggravated felony convictions confirm the common sense understanding that it intended to reserve the aggravated felony label for the most serious crimes. Non-citizens convicted of an aggravated felony are subject to automatic, expedited removal with almost no opportunity to challenge the proceedings. Judicial review is severely limited, and persons convicted of aggravated felonies are ineligible for cancellation of removal, voluntary departure, asylum, and withholding or deferral of removal. Such persons are put in mandatory detention, often immediately upon release from prison, and are permanently barred from becoming citizens. Finally, persons convicted of aggravated felonies who have been deported face up to twenty years in prison for illegal

reentry. In contrast, the penalties for non-citizens convicted of other offenses – such as "crimes involving moral turpitude," the original and most general provision dealing with criminal offenses committed by non-citizens – are not nearly as severe.

The California statute at issue here, California Vehicle Code section 10851(a), applies criminal sanctions to a broad range of conduct, some relatively innocuous (*e.g.*, rummaging through the glove compartment of someone else's car), a point demonstrated in detail by respondent. Furthermore, it is uncontested that section 10851(a) offenses do not qualify categorically as crimes involving moral turpitude, even though that is a catch-all category of offenses. It would be anomalous to hold that Congress nevertheless intended a violation of sectioin 10851(a) to trigger the most severe consequences; logic and common sense caution against such a jarring result. Because nothing about the vague term "theft offense" compels that conclusion, such a holding would undermine the congressional scheme, depart from this Court's longstanding rule that deportation statutes be construed narrowly in favor of non-citizens, cause considerable tension with the United States' treaty obligations, and run afoul of principles of lenity.

ARGUMENT

I. CONGRESS INTENDED AGGRAVATED FELONIES TO INCLUDE ONLY THE MOST SERIOUS OFFENSES.

A. The Text And History Of The Statutory Framework Governing Criminal Offenses Committed By Non-Citizens Demonstrate That Congress Intended Aggravated Felonies To Encompass Only The Worst Offenses.

The term "aggravated felony" is a relatively recent addition to federal immigration law. In 1891, Congress barred entry of "persons who have been convicted of a felony

or other infamous crime or misdemeanor involving moral turpitude." Act of March 3, 1891, ch. 551, § 1, 26 Stat. 1084, 1084. In 1917, it provided that a non-citizen would be subject to deportation if convicted within five years of entry of a "crime involving moral turpitude" carrying a sentence of a year or longer, or upon conviction of two separate crimes involving moral turpitude at any point after entry. Act of Feb. 5, 1917, ch. 29, § 19, 39 Stat. 874, 889 (1917).

The Immigration and Nationality Act (INA) of 1952, which (as amended) still provides the statutory framework for modern immigration law, incorporated these 1917 deportation provisions. See Ch. 477, § 241(4), 66 Stat. 163, 204. The current exclusion for crimes involving moral turpitude and current grounds for deportation are effectively unchanged from those of the 1917 Act. See 8 U.S.C. § 1182(a)(2)(A)(i); § 1227(a)(2)(A)(i)(2000); see also *INS* v. *St. Cyr*, 533 U.S. 289, 294 (2001).

Congress first used the term "aggravated felony" in the Anti-Drug Abuse Act of 1988 (ADAA), superimposing the aggravated felony category onto the pre-existing "crimes involving moral turpitude" provision to provide enhanced penalties for a limited number of dangerous crimes. Pub. L. No. 100-690, § 7341, 102 Stat. 4181. The ADAA defined an aggravated felony as "murder, any drug trafficking crime * * * or any illicit trafficking in any firearms or destructive devices * * * or any attempt or conspiracy to commit any such act." *Id*., § 7342. The statute made conviction of an aggravated felony grounds for deportation, *id*., § 7344, and introduced a new set of harsher consequences for those convicted of aggravated felonies. *Id*., §§ 7343-7349. On the day the law was passed, Sen. D'Amato, a co-sponsor of the legislation, explained that the purpose of these new provisions was to create more effective sanctions for a "particularly dangerous class" of criminals. 134 Cong. Rec. S17301, S17317 (1988).

The Immigration Act of 1990 added money laundering and "crime[s] of violence" to the list of aggravated felonies, and also added language about state offenses to the definition. See Pub. L. No. 101-649, § 501(a), 104 Stat. 4978, 5048. The legislative background again showed that Congress focused on the seriousness of the aggravated felony offenses; Congress acted to "tighten existing laws regarding the categorization and deportation of aliens who commit serious crimes – crimes defined in the Anti-Drug Abuse Act of 1988 as 'aggravated felonies.'" 136 Cong. Rec. S17741-04 (1990) (statement of Sen. Graham).

For the same reason, Congress again added to the list of aggravated felonies in 1994 to include firearms offenses, ransom demands, child pornography, racketeering, prostitution, slavery, espionage, sabotage, treason, fraud, tax evasion, and alien smuggling. See Immigration and Nationality Technical Correction Act of 1994, Pub. L. No. 103-416, §222(a), 108 Stat. 4305, 4320-21. Congress also included for the first time the provision at issue here, "theft offense[s] * * * for which the term of imprisonment imposed * * * is at least 5 years." *Ibid.* Although Congress wanted to "do a better job of deporting criminal aliens," 140 Cong. Rec. H11291, H11293 (1994) (statement of Rep. McCollum), it added only what the sponsors described as "extremely serious crimes" to the list. *Ibid.* (statement of Rep. Mazzoli); see 140 Cong. Rec. S13707, S13731 (1994) (statement of Sen. Simpson) ("This bill would also expand the definition of "aggravated felony" so that aliens convicted of *serious crimes* can be swiftly deported." (emphasis added)).

One year later, in 1995, Congress again found that serious crimes had been left off the aggravated felony list, as it "noted with concern the development and increase of organized alien smuggling rings." H.R. Rep. 104-22, at *7. To deal with "[t]his new form of organized crime," Congress added offenses "often committed by persons involved in organized immigration crime" to the list of aggravated

felonies. *Ibid.*; see Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 440(e), 110 Stat. 1214, 1277-78; see also H.R. Rep. 104-22, at *14 (listing crimes added).

In adding these crimes to the list, Congress again intended to include only the most serious offenses. As the House Committee that drafted the bill explained in its report:

> In adding crimes to the list, effort was made to ensure that the overall reach of the definition would be consistent with the sentencing guidelines established by the United States Sentencing Commission. With only certain limited exceptions, the Committee attempted to ensure that all of the crimes defined as aggravated felonies carry a base offense level of at least 12. *These minimums have been selected to ensure that only the most serious crimes, or the more serious convictions of lesser crimes, render the alien deportable.*

H.R. Rep. 104-22, at *7-8 (emphasis added).[2]

In 1996, with its most recent major revision to the aggravated felony definition, Congress listed additional serious crimes, including rape and sexual abuse of a minor, as aggravated felonies. See Illegal Immigrant Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, Div. C, § 321(a), 110 Stat. 3009-546, at 3009-627 to 628; see also H.R. Rep. No. 104-828, at 223 (Conf. Rep.) (reporting the addition of new offenses "relating to gambling, bribery, perjury, revealing the identity of undercover agents,

[2] Base level twelve and higher offenses are extremely serious. When AEDPA was drafted, they included, for example, murder, kidnapping, aggravated assault, and sexual abuse. See U.S. Sentencing Guidelines Manual §§ 2A1.1, 2A2.2, 2A3.1, 2A4.1 (1993).

and transporting prostitutes").[3] In its last additions, as in its first, Congress attempted to include only those offenses that warranted the most severe consequences.

Taken as a whole, the final list of aggravated felonies, 8 U.S.C. § 1101(a)(43), demonstrates a consistent congressional goal: Congress meant to include only offenses involving manifestly serious misconduct. Congress has been primarily concerned with offenses threatening serious harm to persons (murder, rape, sexual abuse of a minor, child pornography, weapons and explosives trafficking, crimes of violence, kidnapping, prostitution and human trafficking, organized crime, and drug trafficking (§ 1101(a)(43)(A), (B), (C), (E), (F), (H), (I), (J), (K), (M))); serious harm to property (money laundering, fraud, theft, counterfeiting, trafficking in stolen vehicles (§ 1101(a)(43)(D), (G), (M), (R))); serious threats to national security (espionage, treason, sabotage (§ 1101(a)(43)(L))); and harm to governmental interests (tax evasion, failure to appear in court or to serve sentence, perjury, and obstruction of justice (§ 1101(a)(43)(M), (Q), (S), (T))). Congress also has concluded that some immigration offenses warrant serious immigration-related consequences. See § 1101(a)(43)(N), (O), (P) (alien smuggling, illegal reentry of previously-deported aggravated felons, passport fraud). It is in this context that Congress included "theft offenses" as an aggravated felony.

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[3] IIRIRA also lowered the minimum term of imprisonment required for a number of crimes to be deemed aggravated felonies from five years to one year. See IIRIRA, § 321(a), 110 Stat. at 3009-627 to -628. In the Sentencing Guidelines in force at the time, a minimum sentence of one year corresponded to base offense levels of thirteen and above. See U.S. Sentencing Guidelines Manual § 5A (1993); cf. *supra* text accompanying note 2 (noting Congress's intent in AEDPA to limit aggravated felonies to offenses above base level twelve).

B. Congress's Use Of The Term "Aggravated" Also Signaled Its Intent To Reach Only Those Offenses Most Deserving Of Harsh Punishment.

Congress's choice of language confirms its focus on what it regarded as serious misconduct. It is well-established that "where Congress uses terms that have accumulated settled meaning under * * * the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981); see also *Leocal v. Ashcroft*, 543 U.S. 1 (2004) ("[W]e construe language in its context and in light of the terms surrounding it."); *United States* v. *U.S. Gypsum Co.*, 438 U.S. 422, 437 (1978) ("Congress will be presumed to have legislated against the background of our traditional legal concepts * * * ."). Although Congress first used the term "aggravated felony" in the immigration context, the word "aggravated" had a well-established prior meaning in federal and state law, identifying the most egregious offenses. A Congress that legislated against the background of that usage accordingly would have expected "aggravated felonies" to include only the most serious misconduct.[4]

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[4] In addition, while the point is not directly at issue here, surely another essential element of an "aggravated *felony*" is that it *is* a felony. "Common sense and standard English grammar dictate that when an adjective – such as 'aggravated' – modifies a noun – such as 'felony' – the combination of the terms delineates a subset of the noun." *United States* v. *Pacheco*, 225 F.3d 148, 157 (2d Cir. 2000) (Straub, J., dissenting). It strains logic and common sense, therefore, to suggest that the definition of an "aggravated felony" includes offenses that are not felonies, such as misdemeanors. Such a contorted definition does violence not only to the plain meaning of the statute, but also to congressional intent. Furthermore, the word "aggravated" signifies something "worse or more serious." *Id.* at 158. Therefore, "[t]o include misdemeanors within the definition of 'aggravated felony' turns the plain

In general parlance, the term "to aggravate" means "to increase the gravity of." *Oxford English Dictionary* 40 (1993). In the criminal context, "aggravated" describes a crime "made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime." *Black's Law Dictionary* 71 (8th ed. 2004). For instance, the Model Penal Code defines aggravated assault as "assault with an intent to cause serious bodily injury or with a deadly weapon," and it is classified as a felony in the second, rather than in the third, degree. Model Penal Code § 211.1 (2001). A survey of state criminal codes confirms that aggravated assault is "an assault that is more serious than a common assault." *Merriam-Webster Dictionary*, http://www.m-w.com/dictionary/aggravated-assault (last visited Nov. 19, 2006). In every state in which "aggravated assault" exists as a separate offense, it refers to more serious misconduct and carries harsher penalties than simple assault.[5] Similarly, the term "aggravated" refers to

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meaning of the word 'aggravated' entirely on its head, since in addition to not *being* felonies in the first place, misdemeanors are conventionally understood as being *less severe* than felonies, as well." *Id.* at 158. See also *United States* v. *Gonzales-Tamariz*, 310 F.3d 1168, 1172 (9th Cir. 2002) (Berzon, J., dissenting) (arguing that an aggravated felony must first be a felony, and that a felony has historically been a crime punishable by *more* than one year).

[5] Ariz. Rev. Stat. § 13-1204; Ark. Code Ann. § 5-13-204; Conn. Gen. Stat. § 53-11; D.C. Code § 22-404.01; Fla. Stat. § 784.021; Ga. Code Ann. § 16-5-21; Idaho Code Ann. § 18-905; 720 Ill. Comp. Stat. 5/12-2; Kan. Stat. Ann. § 21-3410; La. Rev. Stat. Ann. § 14:37; Me. Rev. Stat. tit. 17-A, § 208; Miss. Code Ann. § 97-3-7; Mont. Code Ann. § 45-5-202; N.M. Stat. Ann. § 30-3-2; N.D. Cent. Code § 12.1-17-02; Ohio Rev. Code Ann. § 2903.12; Okla. Stat. tit. 21, § 646; 18 Pa. Cons. Stat. § 2702; S.D. Codified Laws § 22-18-1.1; Tenn. Code Ann. § 39-13-102; Tex. Penal Code § 22.02; Utah Code Ann. § 39-6-101; Vt. Stat. Ann. tit. 13, § 1024; Wyo. Stat. Ann. § 6-2-502.

more serious forms of stalking,[6] kidnapping,[7] robbery,[8] rape,[9] and arson.[10]

In the federal context, the term "aggravated" also signifies a crime that is more serious or more violent than the underlying crime standing alone. For instance, aggravated sexual abuse, covered under 18 U.S.C. § 2241, is defined as sexual abuse "by force or threat" or sexual abuse of a minor, both of which are more serious crimes than sexual abuse without additional aggravating factors. Enacted before Congress used the term "aggravated felony" in the immigration context (see Criminal Law and Procedure Technical Amendments Act of 1986, Pub. L. No. 99-646, § 87(b), 100 Stat. 3620 (codified as amended at 18 U.S.C. § 2241)), § 2241 reflects Congress's familiarity with the use of the word "aggravated" to identify criminal conduct that causes especially serious injury.

Even ignoring this broader context, the statutory

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[6] See, *e.g.*, Ala. Code § 13A-6-91; Fla. Stat. § 784.048; Ga. Code Ann. § 16-5-91; 720 Ill. Comp. Stat. 5/12-7.4; Mich. Comp. Laws Serv. § 750.411i; Mo. Rev. Stat. § 565.225; Nev. Rev. Stat. Ann. § 200.575; N.M. Stat. Ann. § 30-3A-3.1; Tenn. Code Ann. § 39-17-315; Vt. Stat. Ann. tit. 13, § 1063.

[7] See, *e.g.*, 720 Ill. Comp. Stat. 5/10-2; Kan. Stat. Ann. § 21-3421; La. Rev. Stat. Ann. § 14:44; Mont. Code Ann. § 45-5-303; S.D. Codified Laws § 22-19-1; Tenn. Code Ann. § 39-13-304; Tex. Penal Code § 20.04; Utah Code Ann. § 76-5-302.

[8] See, *e.g.*, Ariz. Rev. Stat. § 13-1903; Colo. Rev. Stat. § 18-4-302; 720 Ill. Comp. Stat. 5/18-5; Kan. Stat. Ann. § 21-3427; Minn. Stat. § 609.245; Ohio Rev. Code Ann. § 2911.01; Tenn. Code Ann. § 39-13-402; Tex. Penal Code § 29.03; Utah Code Ann. § 76-6-302; Wyo. Stat. Ann. § 6-2-401.

[9] See, *e.g.*, La. Rev. Stat. § 14:42; Tenn. Code Ann. § 39-13-502.

[10] See, *e.g.*, Cal. Penal Code § 451.5; Idaho Code Ann. § 18-805; 720 Ill. Comp. Stat. 5/20-1.1; Kan. Stat. Ann. § 21-3719; La. Rev. Stat. § 14:51; N.J. Stat. Ann. § 2C:17-1; N.M. Stat. Ann. § 30-17-6; Ohio Rev. Code Ann. § 2909.02; Tenn. Code Ann. § 39-14-302; Utah Code Ann. § 39-6-99; Wyo. Stat. Ann. § 6-3-101.

framework of the Immigration and Nationality Act itself suggests that Congress intended use of the term "aggravated" to distinguish a set of more serious offenses. For instance, a non-citizen convicted of any controlled substance offense as defined in 21 U.S.C. § 802[11] is deportable. See 8 U.S.C. § 1227(a)(2)(B)(i). But a non-citizen convicted of "*illicit trafficking* in a controlled substance (as defined in section 802 of Title 21) [the same statute]" is an aggravated felon. 8 U.S.C. § 1101(a)(43)(B) (emphasis added). Congress's fine distinction between aggravated ("illicit trafficking") and non-aggravated (everything else) drug offenses – a distinction repeated as to firearms offenses[12] and passport fraud[13] – reflects the congressional intention to select only the most serious crimes for inclusion as aggravated felonies.

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[11] There is one exception: conviction under § 802 for a single offense involving possession for one's own use of 30 grams or less of marijuana is not grounds for deportation. See 8 U.S.C. § 1227(a)(2)(B)(i).

[12] Conviction "under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18, United States Code)" makes a non-citizen deportable. 8 U.S.C. § 1227(a)(2)(C). Only "*illicit trafficking* in firearms or destructive devices (as defined in section 921 of Title 18) [the same statute]," by contrast, is an aggravated felony. See 8 U.S.C. § 1101(43)(C) (emphasis added).

[13] Any non-citizen convicted of passport fraud under 18 U.S.C. § 1546 is deportable. 8 U.S.C. § 1227(a)(3)(B)(iii). But a violation of 18 U.S.C. § 1546 is an aggravated felony only if the sentence is a year or more. 8 U.S.C. § 1101(a)(43)(P).

II. THAT AGGRAVATED FELONIES CARRY THE HARSHEST SANCTIONS FOR NON-CITIZENS CONFIRMS CONGRESS'S INTENT TO TREAT ONLY THE MOST SERIOUS OFFENSES AS AGGRAVATED FELONIES.

Because Congress considers aggravated felonies "the most serious offenses" covered by the INA, H.R. Rep. No. 109-345(I), at 69 (2005), it has reserved the most severe consequences for these offenses. Conviction of an aggravated felony subjects non-citizens to serious and permanent penalties, including mandatory detention and deportation, ineligibility for most forms of discretionary relief and asylum, and permanent bars to reentry and naturalization. Conviction of a crime that is not an aggravated felony, on the other hand, carries far less severe consequences. To illustrate the severity of the penalties associated with the aggravated felony label, we next compare the sanctions for conviction of an aggravated felony with those for conviction of a crime involving moral turpitude, the largest, catch-all category of offenses under the immigration laws. As we note below, there also are other types of criminal offenses that trigger adverse immigration consequences; in every case, the penalties for aggravated felonies are the most severe.[14] This reality is powerful evidence that Congress intended aggravated felonies to encompass only the most serious types of misconduct.

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[14] In addition to aggravated felonies and crimes involving moral turpitude, categories of crimes with immigration consequences include controlled substance offenses, 8 U.S.C. § 1182(a)(2)(B); firearms offenses, 8 U.S.C. § 1182(a)(2)(C); money laundering, 8 U.S.C. § 1182(a)(2)(I); crimes of domestic violence, 8 U.S.C. § 1227(a)(2)(E); alien smuggling, 8 U.S.C. § 1227(a)(1)(E); visa and passport fraud, 8 U.S.C. § 1227(a)(3)(B)(iii); and export law violations, 8 U.S.C. § 1227(a)(4)(C).

A. Removal

1. Aggravated Felonies

The INA provides that "[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). There is no requirement that the crime be committed within a certain number of years from the date of admission. In fact, non-citizens are often detained and placed in removal proceedings five, ten, or even twenty years after conviction of an aggravated felony. See, *e.g.*, *Kuhali* v. *Reno*, 266 F.3d 93 (2d Cir. 2001) (finding a non-citizen deportable for a conviction twenty years prior to removal order). Nor does it matter how long an individual has resided in the United States. See, *e.g.*, *Ayala-Chavez* v. *INS*, 944 F.2d 638, 640 (9th Cir. 2001) (finding an 18-year resident deportable even though most of his family resided near him and he had a minor daughter whom he supported); *Zaluski* v. *INS*, 37 F.3d 72, 72 (2d Cir. 1994) (finding a 30-year resident who spoke only English and had no family in home country deportable). Finally, it takes only one aggravated felony conviction to trigger deportation. 8 U.S.C. § 1227(a)(2)(A)(iii).

2. Crimes Involving Moral Turpitude

Conviction of a crime involving moral turpitude is grounds for deportation only if the offense is punishable by one year or more and is committed within five years of admission. 8 U.S.C. § 1227(a)(2)(A)(i). After five years, only multiple moral turpitude convictions can trigger deportation. 8 U.S.C. § 1227(a)(2)(A)(i). In contrast, only certain aggravated felonies must carry a minimum sentence to trigger deportation. See, *e.g.*, 8 U.S.C. § 1101(43)(D) (requiring only that money laundering offenses involve at least $10,000 to be aggravated felonies).

B. Cancellation Of Removal

1. Aggravated Felonies

A non-citizen who is removable because of an

aggravated felony conviction may not petition for discretionary cancellation of removal. Lawful permanent residents may generally petition for cancellation of removal so long as they have resided in the United States for at least seven years and have been lawful permanent residents for at least five years. 8 U.S.C. § 1229b(a). Non-lawful permanent residents seeking cancellation of removal face a somewhat more difficult road; among other requirements, these non-citizens must demonstrate "good moral character" and that removal would mean "exceptional and extremely unusual" hardship to family members. 8 U.S.C. § 1229b(b)(1). But an aggravated felony conviction automatically ends the non-citizen's chances: lawful permanent residents and non-lawful permanent residents alike are barred from seeking cancellation of removal if they have been convicted of an aggravated felony. 8 U.S.C. § 1229b(a) ("The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien * * * has not been convicted of any aggravated felony."); 8 U.S.C. § 1229b(b) (allowing discretionary cancellation of removal for a non-legal permanent resident, but specifically excluding individuals convicted of aggravated felonies). Non-citizens convicted of aggravated felonies, unlike other non-citizens, are not eligible for waiver of deportation even if they are victims of domestic violence. 8 U.S.C. § 1229b(b)(2).

2. Crimes Involving Moral Turpitude

Lawful permanent residents are eligible for cancellation of removal if convicted of a crime involving moral turpitude, so long as they meet additional residency requirements. 8 U.S.C. § 1229b(a)(1)-(2).

C. Voluntary Departure

1. Aggravated Felonies

Voluntary departure is another form of discretionary relief for which a non-citizen with an aggravated felony

conviction is ineligible. It allows otherwise removable individuals to leave the country at their own expense within a designated amount of time to avoid a final order of removal. There are two types of voluntary departure: pre-hearing under 8 U.S.C. § 1229c(a)(1) and at the conclusion of the hearing under 8 U.S.C. § 1229c(b)(1). Both forms of voluntary departure are important forms of relief that allow non-citizens to "avoid[] the stigma of compulsory removal, permit[] the alien to select his or her own destination, and facilitate[] the possibility of return to the United States." *Rife v. Ashcroft*, 374 F.3d 606, 614 (8th Cir. 2004); see also *Dekoladenu v. Gonzales*, 459 F.3d 500, 506 (4th Cir. 2006). Pre-hearing voluntary departure is available for non-citizens who do not wish to undergo official deportation proceedings, and is available *unless* the non-citizen has been convicted of an aggravated felony or has engaged in terrorist activities. 8. U.S.C. § 1229c(a)(1). To be eligible for voluntary departure at the conclusion of the hearing, the non-citizen must show that he or she was "present in the United States" for "at least one year" before the "notice to appear was served" and a person of "good moral character" for at least the past five years. § 1229c(b)(1). As with pre-hearing voluntary departure, an aggravated felony conviction automatically makes a non-citizen ineligible.

2. Crimes Involving Moral Turpitude

Non-citizens convicted of crimes that have been placed in less serious categories by Congress (including crimes involving moral turpitude) may obtain pre-hearing voluntary departure, since that form of voluntary departure does not include a "good moral character" bar. A non-citizen with a conviction for a crime involving moral turpitude may be eligible for voluntary departure at the conclusion of the hearing if she or he can establish good moral character for the requisite period and satisfy the other statutory requirements. 8 U.S.C. § 1229c(b)(1).

D. Asylum And Withholding Of Removal

Asylum is a form of relief available to a non-citizen who fears persecution in his or her country of origin on account of "race, religion, nationality, membership in a particular social group, or political opinion." 8 U.S.C. § 1158(b)(1)(B)(i). An alternative to asylum, withholding of removal, is available to some otherwise-deportable non-citizens whose "life or freedom" would be threatened on account of the same five factors. 8 U.S.C. § 1231(b)(3)(A). Unlike asylum, withholding of removal may not lead to permanent residence or naturalization, but usually serves as the last resort for removable individuals who would face extreme forms of persecution, torture, or even death if they return to their home country. Similarly, deferral of removal is available for non-citizens who would be subjected to torture for any reason if they were forced to return home. See 8 C.F.R. § 208.16(c)(2) (2006). Withholding of removal under 8 U.S.C. § 1231(b)(3)(A) and deferral of removal under 8 C.F.R. § 208.16(c)(2) fulfill the United States' legal obligations under the 1951 Refugee Convention[15] and the 1984 Convention Against Torture,[16] respectively. Moreover, asylum is an important humanitarian protection.

1. Aggravated Felonies

A non-citizen convicted of an aggravated felony, however, is permanently barred from seeking asylum. 8 U.S.C. § 1158(b)(2)(B)(i); 8 U.S.C. § 1231(b)(3)(B). Under the Immigration and Nationality Act, an alien is ineligible for asylum if "convicted by a final judgment of a particularly serious crime," 8 U.S.C. § 1158(b)(2)(A)(ii); INA §

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[15] Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter "Refugee Convention"].

[16] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85, G.A. Res. A/39/46, U.N. Doc. A/39/51 (Dec. 10 1984).

208(b)(2)(A)(ii). Aggravated felonies count as particularly serious crimes. See *id*, § 1158 (b)(2)(B)(i).

Additionally, a non-citizen convicted of an aggravated felony is presumptively ineligible for withholding of removal. See, *e.g.*, *In re Y-L-*, 23 I&N Dec. 270, 273 (AB.I.A. 2002) (noting presumption for drug trafficking aggravated felonies). If the non-citizen is "convicted of an aggravated felony (or felonies) for which the alien has been sentenced to an aggregate term of imprisonment of at least 5 years," the bar becomes inescapable. See 8 U.S.C. § 1231(b)(3)(B); Non-citizens convicted of aggravated felonies and sentenced to less than five years' imprisonment also may be subject to discretionary denial of withholding of removal. *Ibid*.; see also *Tunis* v. *Gonzales*, 447 F.3d 547, 549 (7th Cir. 2006). Non-citizens convicted of aggravated felonies likewise may not petition for deferral of removal under the Convention Against Torture if the aggregate term of imprisonment is at least five years. 8 C.F.R. § 208.16(d)(2) (2006).[17]

2. Crimes Involving Moral Turpitude

Non-citizens convicted of a crime involving moral turpitude, on the other hand, are eligible for asylum and are not automatically barred from withholding of removal. 8 U.S.C. §§ 1158(b)(2)(A), 1231(b)(3)(B).

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[17] Non-citizens convicted of particularly serious crimes within the meaning of the statute may still apply for deferral of removal. 8 C.F.R. § 208.17(a), (b)(i)-(iv). Deferral of removal, however, may not lead to residency or citizenship, may be revoked at any point, and does not require a release from detention. In fact, non-citizens are often detained until another country agrees to accept them or until conditions in their home country change. Deferral of removal also does not protect refugees who fear persecution that does not rise to the level of torture under U.S. law.

E. Mandatory Detention

1. Aggravated Felonies

Under 8 U.S.C. § 1226(c)(1), individuals in removal proceedings because of an aggravated felony conviction are subject to mandatory detention. Unless the non-citizen is a witness in an ongoing criminal investigation or prosecution, release for any reason is prohibited. 8 U.S.C. § 1226(c)(2). Aggravated felons are generally released from incarceration directly into Department of Homeland Security (DHS) custody. If the non-citizen eludes DHS at the time of release, however, or if the non-citizen serves no time for the offense, detention is still required. See *In re Rojas*, 23 I & N Dec. 117 (B.I.A. 2001).

2. Crimes Involving Moral Turpitude

Non-citizens convicted of one crime of moral turpitude, on the other hand, are subject to mandatory detention only if they were actually sentenced to one year or more in prison. 8 U.S.C. § 1226(c)(1)(C).

F. Expedited Removal

1. Aggravated Felonies

Non-lawful permanent residents convicted of aggravated felonies are subject to expedited removal, in which individuals have no right to a hearing in front of an immigration judge. 8 U.S.C. § 1228(a). Instead, a service officer makes a determination as to whether the individual has been convicted of an aggravated felony and is therefore deportable. 8 C.F.R § 1238.1(b) (2006). This procedural shortcut makes a significant difference: the non-citizen may not appear in person and therefore may challenge the charges only in writing. If the deciding officer finds that "deportability is established by clear, convincing, and unequivocal evidence in the record of proceeding," a final removal order is issued without formal removal proceedings. *Id*, § 1238.1(d)(2). There is a presumption of deportability for any non-citizen convicted of a crime that is determined to be

an aggravated felony. 8 U.S.C. § 1228(c). There is no appeal to the Board of Immigration Appeals of a final removal order for non-citizens subject to expedited removal. 8 C.F.R. § 1238.1(g)(2); *United States* v. *Santiago-Ochoa*, 447 F.3d 1015, 1019 (7th Cir. 2006). Because of these limitations, for a non-citizen placed in expedited proceedings, removal is a "foregone conclusion" as a practical matter. *United States v. Garcia-Martinez*, 228 F.3d 956, 963 (9th Cir. 2000); see also *United States v. Benitez-Villafuerte*, 186 F.3d 651 (5th Cir. 1999).

Furthermore, Congress has stated its preference that the enforcement agency place non-citizens with an aggravated felony conviction in removal proceedings before completing their sentences. 8 U.S.C. § 1228(a)(3)(A). In 2004, 25,633 non-citizens convicted of criminal offenses were removed under the Institutional Removal Program, which is designed to identify non-citizens while still incarcerated. See Department of Homeland Security, *Immigration Enforcement Actions: 2004*, *in* 2004 Yearbook of Immigration Statistics (2005). A non-citizen with a removal order still must serve his or her sentence before the Department of Homeland Security will execute the removal order. 8 U.S.C. § 1228(a)(3)(B). Unless it is not foreseeable that the government will be able to execute a removal order, a non-citizen will be detained until the government can execute the order. 8 U.S.C. § 1231(a)(2); *Zadvydas* v. *Davis*, 533 U.S. 678, 683 (2001).

2. Crimes Involving Moral Turpitude

Non-citizens convicted of a single crime involving moral turpitude are not subject to expedited removal provisions. 8 U.S.C. § 1228(a)(1). They receive procedural protection and an independent adjudication before the Executive Office for Immigration Review.

G. Unlawfully Entering The United States

1. Aggravated Felonies

Under 8 U.S.C. § 1326, non-citizens who unlawfully enter or re-enter the United States are subject to an array of penalties. All illegal entrants are subject to fines and prison terms. As with deportation and admissibility consequences, the most serious penalties for illegal entrants are reserved for non-citizens who were previously convicted of an aggravated felony. See 8 U.S.C. § 1327(b)(2). Courts have recognized the hierarchy of penalties:

> The clear purpose of § 1326 is to deter aliens who have been forced to leave the United States from reentering the United States without prior consent of the Attorney General, and to provide for varied maximum terms of imprisonment for undeterred aliens *depending on the convictions prior to deportation*. An alien who committed a felony may be imprisoned for a longer term on illegally [sic] reentry than an alien who has not committed a felony, and an alien who has committed an aggravated felony may be imprisoned for a longer term than one who has committed a non-aggravated felony.

United States v. *Cooke*, 850 F. Supp. 302, 306 (E.D. Penn. 1994) (emphasis added). Non-citizens convicted of aggravated felonies who attempt to re-enter the United States are subject to a fine, imprisonment for up to twenty years, or both. 8 U.S.C. § 1326(b)(2).[18]

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[18] The Federal Sentencing Guidelines suggest more serious penalties upon reentering for non-citizens previously deported for certain aggravated felonies: "a drug trafficking offense for which the sentence imposed exceeded 13 months; a crime of violence; a firearms offense; a child pornography offense; a national security or terrorism offense; a human trafficking offense; or an alien smuggling offense." U.S. Sentencing Guidelines Manual §

This Court has held, for purposes of § 1326, that a prior conviction for an aggravated felony is a sentence enhancement. See *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). Section 1326(a) establishes a substantive offense of illegally entering or attempting to enter the United States; that offense is punishable by a fine and up to two years in prison. Under *Almendarez-Torres*, courts treat aggravated felony offenders as recidivists, a finding that increases the maximum penalty to twenty years in prison. *Id.* at 226. A tenfold increase in the maximum prison term thus results from a prior aggravated felony conviction.

In addition, anyone who aids or assists an aggravated felon in unlawfully reentering the United States faces a fine and/or up to ten years in prison. 8 U.S.C. § 1327. At least two courts of appeals have held that knowledge of the non-citizen's prior conviction is not required for conviction; the aider need only know that the non-citizen is inadmissible. See *United States* v. *Flores-Garcia*, 198 F.3d 1119 (9th Cir. 2000) (holding that an aider's lack of knowledge of an alien's prior narcotics convictions was not required); *United States* v. *Figueroa*, 165 F.3d 111 (2d Cir. 1998) (holding that an aider's lack of knowledge of an alien's prior kidnapping conviction was not required).

Aiders of entering non-citizens convicted of an

2L1.2(b)(1)(A) (2005). Assuming no prior criminal history and no other aggravating factors, the Guidelines recommend up to sixty-three months in prison for those offenders. *Id.*, §§ 2L1.2(b)(1)(A), 5A. Keeping the same assumptions, non-citizens previously deported for one of the other aggravated felonies face a recommended maximum of up to twenty-seven months in prison upon re-entry. *Id.*, §§ 2L1.2(b)(1)(C), 5A. At the bottom of the Sentencing Guidelines' hierarchy are persons with previous convictions for non-aggravated felonies or three or more violent or drug-related misdemeanors, who face a recommendation of up to sixteen months in prison upon re-entry. *Id.*, §§ 2L1.2(b)(1)(D), 5A.

aggravated felony face the same statutory maximum penalty as those who aid terrorists in entering the United States. See 8 U.S.C. §§ 1182(a)(3)(B), 1327.

2. Other Offenses

Placed a notch below those convicted of aggravated felonies in Congress's hierarchy of illegal reentrants are non-citizens who have committed "three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)." 8 U.S.C. § 1326(b)(1). These illegal re-entrants face a statutory maximum of ten years in prison. The lowest level of penalties is reserved for those who re-enter the United States without a misdemeanor, felony, or aggravated felony conviction. Those non-citizens face a statutory maximum of two years' imprisonment. 8 U.S.C. 1326(a)(2).

H. Naturalization

1. Aggravated Felonies

Under 8 U.S.C. § 1427(a), an individual who wishes to naturalize must have good moral character. But the INA states that "[n]o person shall be regarded as, or found to be, a person of good moral character who, during the period for which good moral character is required to be established, is, or was * * * one who at any time has been convicted of an aggravated felony." 8 U.S.C. § 1101(f). An aggravated felony committed after November 29, 1990 is thus an automatic and permanent barrier to naturalization.

2. Crimes Involving Moral Turpitude

Non-citizens convicted of a crime involving moral turpitude are not automatically considered to lack good moral character. The statute establishes a non-exhaustive list of acts that constitute a bar to good moral character. Commission of a crime involving moral turpitude is not on the list. 8 U.S.C. § 1101(f). To be sure, many of § 1101(f)'s enumerated acts are also crimes involving moral turpitude, and the statute does not "preclude a finding that for other reasons such

person is or was not of good moral character." *Ibid.* Nevertheless, although conviction of some offenses that are also crimes involving moral turpitude will result in denial of naturalization, the bare fact of conviction of a crime of moral turpitude will not. Disqualification is thus not automatic for crimes of moral turpitude the way it is for aggravated felonies.

III. BECAUSE IT IS DOUBTFUL THAT CONGRESS INTENDED ALL OF THE CONDUCT MADE CRIMINAL BY CAL. VEH. CODE § 10851 TO BE TREATED AS AN AGGRAVATED FELONY, § 10851 CONVICTIONS SHOULD NOT CATEGORICALLY BE DEEMED "THEFT OFFENSES."

The aggravated felony regime contains the harshest immigration sanctions in our Nation's history. Recognizing this, Congress explicitly has tried to cabin the definition of aggravated felonies to the most serious offenses. Given the congressional scheme, if an offense makes criminal a wide array of conduct, some of it relatively innocuous, courts should categorize it as an aggravated felony only if the congressional intent to so treat it is unambiguous.

This logical, common sense conclusion draws support from the Court's settled doctrine, based on the rule of lenity, that deportation statutes should be construed narrowly and in favor of non-citizens because of the gravity of the consequences. See *Leocal v. Ashcroft*, 543 U.S. 1 (2004). Furthermore, courts should not construe a statute in a manner that would put the United States in violation of its international treaty obligations unless the law's language unambiguously compels that result, see *Murray* v. *The Charming Betsy*, 6 U.S. 64, 118 (1804); courts accordingly should not label particular offenses aggravated felonies if doing so would contravene the United States' obligations under the 1951 Refugee Convention unless Congress's

contrary intent is absolutely clear.

Applying these principles here, violations of California Vehicle Code section 10851 should not be treated as categorical theft offenses.

1. This Court recently reaffirmed "'the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien.'" *INS* v. *St. Cyr*, 533 U.S. 289, 320 (2001) (quoting *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (collecting cases)). This approach is an extension of the rule of lenity from the criminal to the deportation context. Speaking for the Court, Justice Frankfurter explained why the lenity principle is so entrenched in criminal law:

> When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment.

Bell v. *United States*, 349 U.S. 81, 83 (1955).

It did not take the Court long after Congress made crimes involving moral turpitude grounds for deportation in 1917 to recognize that deportation can carry consequences every bit as severe as those imposed by criminal penalties. See *Ng Fung Ho* v. *White*, 259 U.S. 276, 284 (1922) (Brandeis, J.) ("[Deportation] may result also in loss of both property and life, or of all that makes life worth living."). As a consequence, the Court extended the rule of lenity to deportation: "Although not penal in character, deportation statutes as a practical matter may inflict 'the equivalent of banishment or exile' * * * and should be strictly construed." *Barber* v. *Gonzales*, 347 U.S. 637, 642-43 (1954) (internal

citations omitted); see also *INS* v. *Errico*, 385 U.S. 214, 225 (1966) ("'To construe this statutory provision less generously to the alien might find support in logic. But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used'" (quoting *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948)).). Given the extraordinary penalties Congress has attached to a conviction for an aggravated felony, the rule of lenity applies with special force in this context. Cf. *Leocal*, 543 U.S. at 11 n.8. (holding that since the rule of lenity applies to criminal statutes, it must also apply in deportation proceedings triggered by criminal convictions).

2. In the legal setting here, the United States' international legal obligations also require courts to ensure that aggravated felonies include only serious offenses. It is well-established that courts should not construe a statute in a manner that would put the United States in violation of its treaty obligations unless the law's language unambiguously compels that result. See, *e.g.*, *The Charming Betsy*, 6 U.S. at 118; *Weinberger* v. *Rossi*, 456 U.S. 25, 32 (1982). To the extent that a statute is open to multiple interpretations, courts should pick the one most consistent with the United States' treaty obligations.

The United States is a party to the 1951 Refugee Convention, which prohibits signatories from returning refugees to countries where their life or freedom are threatened ("non-refoulement"). *Refugee Convention*, *supra* note 15, art. 33(1). This Court has recognized that withholding of removal is the domestic implementation of the United States' obligations under article thirty-three. *Cardoza-Fonseca*, 480 U.S. at 429; *INS* v. *Stevic*, 467 U.S. 407, 421 (1984). The Refugee Convention contains an exception to non-refoulement for individuals convicted "of a particularly serious crime." *Refugee Convention*, art. 33(2).

Congress intended to comply with its obligations under the Refugee Convention by ensuring that convictions for non-serious offenses not result in refoulement. Congress used language identical to article 33(2) in its restrictions on withholding of removal, denying withholding to non-citizens convicted of a "particularly serious crime." 8 U.S.C. § 1231(b)(3)(B). The Immigration Act of 1990 originally defined a "particularly serious crime" as any aggravated felony. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5053 (1990). Congress later amended this definition to include only an offense or offenses carrying an aggregate sentence of five years or more. See IIRIRA, § 305(a)(3), 110 Stat. 3009-546, at 3009-602 (currently codified at 8 U.S.C. § 1231(b)(3)(B)). The Board of Immigration Appeals has recognized that Congress made this change out of a particular concern to fulfill the United States' international obligations under the Refugee Convention. See *In Re Q-T-M-T-*, 21 I. & N. Dec. 639, 648 & n.4 (1996) (surveying the applicable legislative history and noting that Congress found the change "necessary to ensure that the refoulement of a particular criminal alien would not place our compliance with the [Refugee Convention] in jeopardy"). Although Congress has always intended to exclude all non-serious offenses from the definition of "aggravated felony," see *supra* Part I, it felt the need for extra caution in the non-refoulement context.

Because the five-year requirement applies to aggregate sentences, however, there are situations in which this extra caution will come to naught if conduct that is not serious may be deemed an aggravated felony. For instance, a non-citizen convicted of five theft offenses for shoplifting with a one-year suspended sentence for each offense would be barred from withholding of removal. Likewise, a suspended five-year sentence would bar a non-citizen from withholding of removal, even if no time were actually served. To avoid this problem, and thus to ensure that the United States acts in

accordance with its treaty obligations, the Court should take care to ensure that all convictions held to be "aggravated felonies" are for serious offenses.

3. Section 10851(a) punishes a broad range of conduct, much of which is far less serious than most aggravated felonies.[19] Violations of section 10851(a) are "wobblers," so-called because they may be charged as either felonies or misdemeanors. See, *e.g.*, *In re Nancy C.*, 34 Cal. Rptr. 3d 871 (Cal. Ct. App. 2005) (juvenile charged with section 10851(a) wobbler); see also *People* v. *Statum*, 28 Cal. 4th 682 (2002) (reviewing scope of sentencing court's discretion when confronted with wobbler offense). Defendants have been convicted under this section for offenses such as sitting in someone else's car, rummaging through the glove compartment. See *People* v. *Score*, 120 P.2d 52 (Cal. Ct. App. 1941). Respondent further demonstrates the ways in which section 10851 sweeps with an especially broad brush.

There is no indication that Congress meant to include such relatively innocuous conduct in the definition of an aggravated felony theft offense. Quite the contrary: as we have shown, Congress intended to define only the most serious offenses as aggravated felonies. This background militates powerfully against the conclusion that Congress intended the general term "theft offense" categorically to include all conduct reached by California Vehicle Code section 10851.

Adding further support to this conclusion, the immigration judge in this case held that section 10851(a)

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[19] It provides: "Any person who drives or takes a vehicle not his or her own * * * with intent either to permanently or temporarily deprive the owner thereof of his or her title to or possession of the vehicle * * * or any person who is a party or an accessory to or an accomplice in the driving or unauthorized taking or stealing * * * shall be punished by imprisonment * * * or by a fine * * * or by both." Cal. Veh. Code § 10851(a).

offenses are not even categorical crimes involving moral turpitude. Pet. App. 8a-9a. The government did not challenge that ruling in the court below. And for good reason: courts have held for decades that only thefts involving *permanent* deprivations of property qualify as crimes involving moral turpitude. See, *e.g.*, *Bakal* v. *Ashcroft*, 56 Fed. Appx. 650, 654 (2003) (citing *In re Matter of Grazley*, 14 I. & N. Dec 330, 332 (B.I.A. 1973)). Convictions under a statute that covers temporary deprivations, then, like the one at issue here, cannot categorically be crimes involving moral turpitude.[20] Indeed, the BIA has held that the predecessor to California Vehicle Code section 10851(a) was not a crime involving moral turpitude, precisely because it covered temporary deprivations. See *In re V-Z-S*, 22 I. & N. Dec. 1338, 1350 n.12 (B.I.A. 2000) (referring to *In re D-*, 1 I&N Dec. 143 (B.I.A. 1941).

The hierarchy of offenses laid out above, as well as the evolution and legislative history of the statute, illustrate that Congress intended aggravated felonies to be the most serious ground of deportability. Because section 10851 offenses are not even categorical crimes involving moral turpitude, it defies logic to label them categorical aggravated felonies. Doing so would have the anomalous consequence of attaching the *most* serious penalties to conduct that does not trigger *any* penalty under a related provision that addresses

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[20] Of course, non-citizens who violate broad criminal statutes that reach both temporary and permanent deprivations of property may be deportable if the record of conviction reveals that the "jury was actually required to find all the elements" of a generic theft offense. See *Taylor* v. *United States*, 495 U.S. 575, 602 (1990). See also *Shepard* v. *United States*, 544 U.S. 13, 17 (2005) (reaffirming *Taylor*'s holding that a jury must have "necessarily" found all the elements of the generic offense, as evidenced by the record of conviction, to deport a non-citizen for a conviction under a non-generic statute).

similar conduct. Surely Congress did not intend such a jarring result. As it seems most unlikely that Congress intended the full weight of the draconian aggravated felony penalties to fall on people convicted of joyriding or rummaging through a glove compartment, a section 10851 conviction should not be understood to be a "theft offense" within the meaning of 8 U.S.C. § 1101(a)(43)(G).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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NOVEMBER 2006