No. 14-1096

In the Supreme Court of the United States

JORGE LUNA TORRES, PETITIONER

v.

LORETTA E. LYNCH, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Board of Immigration Appeals reasonably concluded that attempted arson in the third degree, in violation of New York Penal Law §§ 110.00 and 150.10, is an aggravated felony under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq*.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 764 F.3d 152. The decisions of the Board of Immigration Appeals (Pet. App. 15a-17a) and of the immigration judge (Pet. App. 18a-23a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 20, 2014. A petition for rehearing was denied on November 7, 2014 (Pet. App. 24a). On January 16, 2015, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including March 9, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After records disclosed that petitioner, an alien, had been convicted of attempted third-degree arson in violation of New York Penal Law §§ 110.00 (McKinney 2009) and 150.10 (McKinney 2010), the Department of Homeland Security (DHS) instituted removal proceedings against him. An immigration judge found that petitioner was inadmissible to enter the country based on his conviction and that his conviction qualified as an aggravated felony, making him ineligible for cancellation of removal. Pet. App. 18a-22a. The Board of Immigration Appeals (Board) affirmed that ruling, *id.* at 15a-17a, and the court of appeals upheld the Board's decision, *id.* at 1a-14a.

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, defines certain serious crimes as "aggravated felonies." 8 U.S.C. 1101(a)(43). An alien "who is convicted of an aggravated felony at any time after admission" into the United States is deportable. 8 U.S.C. 1227(a)(2)(A)(iii). In addition, an alien convicted of an aggravated felony is ineligible for many forms of discretionary relief, including cancellation of removal, 8 U.S.C. 1229b(a)(3) and (b)(1)(C); asylum, 8 U.S.C. 1158(b)(2)(A)(ii) and (B)(i); and voluntary departure, 8 U.S.C. 1229c(b)(1)(C).[1]

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[1] An aggravated felony conviction does not categorically disqualify an alien from obtaining withholding of removal, see 8 U.S.C. 1231(b)(3)(B)(ii), or deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, see 8 C.F.R. 208.16(d)(2)-(3), 1208.16(d)(2)-(3). Aliens convicted of aggravated felonies are generally barred from seeking readmission following removal, but that bar does not apply if the alien obtains advance consent to apply for readmission. 8 U.S.C. 1182(a)(9)(A)(iii).

The INA specifies that crimes, "whether in violation of Federal or State law," 8 U.S.C. 1101(a)(43), constitute aggravated felonies if they fall within any of a number of categories—most of which are defined in one of three ways. First, crimes are defined as aggravated felonies if they satisfy a generic definition—for example, "murder" or "rape." See 8 U.S.C. 1101(a)(43)(A). Second, crimes are aggravated felonies if they are "defined in" particular provisions of federal law. See, *e.g.*, 8 U.S.C. 1101(a)(43)(B) and (F). Third, crimes are aggravated felonies if they are "described in" particular other provisions of federal law. See, *e.g.*, 8 U.S.C. 1101(a)(43)(D), (E), (H), and (I).

Arson-related offenses are expressly addressed through the last type of aggravated-felony definition—with the INA providing that an alien has convicted of an aggravated felony if the alien has been convicted of any "offense described in" 18 U.S.C. 844(i), the federal arson statute. 8 U.S.C. 1101(a)(43)(E). The federal arson statute, in turn, makes it a crime to "maliciously damage[] or destroy[], or attempt[] to damage or destroy, by means of fire or an explosive, any building, vehicle, or other * * * property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. 844(i).

New York's third-degree arson statute parallels the federal provision. The substantive statute makes it a crime to "intentionally damage[] a building or motor vehicle by starting a fire or causing an explosion," N.Y. Penal Law § 150.10(1) (McKinney 2010), and another subsection makes it a crime to attempt the same offense, *id.* § 110.00 (McKinney 2009). These statutes do not apply if the defendant owned

the property at issue or the lawful owner consented to the defendant's conduct, so long as the defendant intended only to destroy the property for a lawful purpose and the defendant had no reasonable ground to believe his conduct might endanger others or damage another building or vehicle. *Id.* § 150.10(2) (McKinney 2010). The New York statutes bar only conduct that is forbidden under the federal arson statute, except that the New York statutes do not contain the jurisdictional element in the federal arson statute, which ensures that the provision constitutes a valid exercise of the federal Commerce Clause power. See Pet. App. 5a (identifying jurisdictional element as the difference between the statutes); *id.* at 16a (identifying jurisdictional element as "the sole difference" between federal and state arson statutes).

2. Petitioner, a native and citizen of the Dominican Republic, is a lawful permanent resident of the United States. Pet. App. 2a. He was convicted in 1999 of attempted third-degree arson in violation of New York Penal Law §§ 110.00 (McKinney 2009) and 150.10 (McKinney 2010). *Ibid.*; Certified Administrative Record (C.A.R.) 127. According to records before the Board, petitioner was originally charged with arson, grand larceny, possession of burglary tools, and other offenses, and his guilty plea to attempted arson reflected a plea bargain. C.A.R. 130. In his state plea colloquy, petitioner did not provide an account of the facts making him guilty of attempted arson. C.A.R. 214-219. Petitioner was sentenced to one day of imprisonment and five years of probation. Pet. App. 2a; C.A.R. 127.

In 2006, after a trip to the Dominican Republic, petitioner sought reentry to the United States at a port

of entry. C.A.R. 125-126. After a database query disclosed petitioner's conviction for attempted arson, petitioner was charged with being inadmissible to the United States because of that conviction. Pet. App. 18a-19a; C.A.R. 126, 383-385.

3. a. In the subsequent removal proceedings, immigration judges found that petitioner's attempted-arson offense made him inadmissible into the United States and ineligible for cancellation of removal. First, an immigration judge determined that petitioner had been convicted of attempted arson and that petitioner's conviction made him inadmissible into the United States. C.A.R. 71-78; see also Pet. App. 19a-21a. Second, an immigration judge determined that petitioner was ineligible for cancellation of removal, relying on a precedential Board decision that convictions for attempted third-degree arson in violation of New York law are aggravated felonies. Pet. App. 21a-23a (discussing *In re Bautista*, 25 I. & N. Dec. 616 (B.I.A. 2011), vacated and remanded, 744 F.3d 54 (3d Cir. 2014)).

b. The Board dismissed petitioner's appeal in an unpublished order. Pet. App. 15a-17a. The Board rejected petitioner's argument that his arson offense was not an aggravated felony because he was convicted under a state statute that "lacks the jurisdictional element in the applicable federal arson offense." *Id.* at 16a. The Board found the question controlled by its decision in *Bautista*, because that decision had held that a conviction under the state arson statute under which petitioner was convicted qualified as an aggravated felony when the sole difference between the state and federal arson statutes was the absence of "the jurisdictional element applicable in the federal

arson offense." *Ibid.* (citing *Bautista*, 25 I. & N. Dec. at 620-621). The Board also relied on *In re Vasquez-Muniz*, 23 I. & N. Dec. 207 (B.I.A. 2002), which had concluded that "state and foreign statutes need not contain a nexus to interstate commerce" in order for violations to qualify as aggravated felonies because they are offenses "'described in' 18 U.S.C. 922(g)(1)," the federal statute forbidding felons from possessing firearms. *Id.* at 16a. "[T]he respondent's appellate arguments," the Board wrote in petitioner's case, "do not persuade us that these precedents were wrongly decided." *Id.* at 17a.

4. The court of appeals denied a petition for review, Pet. App. 1a-14a, "defer[ring] to the [Board's] reasonable determination that a state 'offense described in' 18 U.S.C. 844(i) need not contain a federal jurisdictional element," *id.* at 1a-2a.

The court of appeals took as its starting point the Board's published decisions in *Bautista* and *Vasquez-Muniz*. The court explained that those decisions had relied on textual indicators to conclude that state convictions for attempted arson and for possessing a firearm following a felony conviction were offenses described in the federal arson statute and the federal felon-in-possession statute, although the federal statutes (but not the state statutes) had jurisdictional elements requiring a link to interstate commerce. Pet. App. 6a (citations omitted). The Board had noted that the INA states that "the term 'aggravated felony' applies to 'an offense described in this paragraph whether in violation of Federal or State law' or 'the law of a foreign country.'" *Ibid.* (citation omitted). The Board took that language to indicate that the definition of "aggravated felony" "expressed a con-

gressional 'concern over *substantive* offenses rather than any concern about the jurisdiction in which they are prosecuted.'" *Ibid.* (quoting *Vasquez-Muniz,* 23 I. & N. Dec. at 210).

The court of appeals further explained that the Board had noted that 8 U.S.C. 1231(a)(4)(B)(ii) sets forth rules concerning aliens who were "in the custody of a State" based on state convictions for "offenses described in" the federal felon-in-possession statute, federal arson statute, or other enumerated federal provisions. Pet. App. 6a-7a. The Board reasoned that since States "rarely include federal jurisdictional language in their criminal statutes, requiring state crimes to reproduce federal jurisdictional elements in order to constitute aggravated felonies would virtually excise state criminal convictions from the ambit of [S]ection 1101(a)(43)(E), despite [the] clear language" in 8 U.S.C. 1231(a)(4)(B)(ii) referring to individuals in state custody based on state offenses "described in" the relevant federal provisions. Pet. App. 6a (citing *Vasquez-Muniz,* 23 I. & N. Dec. at 211).

After recounting this reasoning by the Board, the court of appeals concluded that the Board's conclusion that attempted arson in violation of the New York statutes is an aggravated-felony reflected a reasonable construction of an ambiguous term within the INA. Pet. App. 7a-12a. The court noted that it was required "to defer to an agency's reasonable interpretation of the statute it administers." *Id.* at 7a (citing *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-844 (1984)). Here, after "[c]onsidering the language of clause 1101(a)(43)(E)(i) and its place in paragraph 1101(a)(43) and the INA as a whole," the court concluded that Congress had not

spoken directly to "whether a state crime must contain a federal jurisdictional element in order to constitute an aggravated felony." *Id.* at 8a. The court drew meaning from the language and structure of the aggravated-felony definition. It emphasized the contrasting language Congress used elsewhere in the INA's aggravated-felony definition, specifying that aggravated felonies include offenses "defined in" certain provisions and offenses "described in" certain other provisions. *Id.* at 8a-9a. This naturally suggested, the court noted, that Congress meant for the two terms to have different meanings. And the court wrote that "[i]t seems to us, as it did to the Fifth, Seventh, Eighth, and Ninth Circuits, that 'described in' is the broader standard, and that an offense identified in this way need not reproduce the federal jurisdictional element to have immigration consequences." *Id.* at 9a-10a (citations omitted).

The court of appeals looked to several other sources as relevant in finding that the Board was reasonable in construing the aggravated felony provision concerning arson to cover petitioner's state offense. The court noted that the Board's interpretation aligned "with the conclusions of the Fifth, Seventh, Eighth, and Ninth Circuits concerning related provisions of" 8 U.S.C. 1101(a)(43). Pet. App. 12a. And the court noted that the Board had also relied on other sentences in the statute to support its reading. See *id.* at 10a-11a (discussing 8 U.S.C. 1101(a)(43)(E) and 8 U.S.C. 1231(a)(4)(B)(ii)). While the court stated that in its view those additional portions of the text did not unequivocally compel the Board's statutory construction, it found "persuasive" the Board's construction and stated that it "might well adopt" that construction

if the case were not viewed through the lens of *Chevron*. *Ibid.* At a minimum, the court concluded, the Board's approach reflected a "'permissible construction' of section 1101(a)(43)(E)(i)." *Id.* at 12a. The court therefore declined to disturb the Board's conclusion that petitioner's state arson conviction was for an aggravated felony. *Id.* at 13a-14a.

ARGUMENT

Petitioner renews his contention (Pet. 11-12, 22-31) that his conviction for attempted arson in violation of New York law does not constitute an aggravated felony. The court of appeals correctly rejected that contention. And this Court's intervention on that question, which has only recently been the subject of any judicial consideration, would be premature.

1. The court of appeals correctly upheld the Board's determination that petitioner's state arson conviction was for an aggravated felony. The Board adopted the best reading—and certainly a permissible reading—of the relevant portion of the INA's aggravated-felony definition when it concluded that an alien convicted of an arson offense in violation of a state statute with every substantive element of the federal arson statute, but not the federal jurisdictional element, has committed an "offense described in" the federal arson provision.

First, as a matter of background principles, courts have long distinguished between substantive elements (that define the *actus reus*) and jurisdictional elements (which limit a sovereign's ability to prosecute it). An element requiring a connection to interstate commerce, such as that contained in the federal arson statute, is the latter—a "term[] of art connecting the congressional exercise of legislative authority with the

constitutional provision (here, the Commerce Clause) that grants Congress that authority." *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 17-18 (2006) (citing *Allied–Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995); *Russell* v. *United States*, 471 U.S. 858, 859 (1985)). A jurisdictional element "may limit, but it will not primarily define, the behavior that the statute calls a 'violation' of federal law." *Ibid.* The Board's treatment of convictions under state arson statutes identical to federal arson in all respects except for the interstate-commerce element appropriately reflects that interstate nexus is "not a substantive element of the offense, but [one that] arises only from 'constitutional limitations on congressional power over intrastate activities under the Commerce Clause.'" *United States* v. *Blackmon*, 839 F.2d 900, 907 (2d Cir. 1988); *United States* v. *Bryant*, 766 F.2d 370, 375 (8th Cir. 1985) (same), cert. denied, 474 U.S. 1054 (1986).

Second, the operative language in the INA's aggravated-felony definition strongly supports the Board's interpretation. The aggravated-felony definition provides that offenses are aggravated felonies if they are "described in" certain federal provisions or "defined in" certain other provisions. 8 U.S.C. 1101(a)(43). As courts of appeals have uniformly recognized, the contrasting language within this single definition suggests that "defined in" and "described in" carry different meanings. And the term "described in" is a "looser" one than the term "defined in"—as dictionaries reflect. See *Espinal-Andrades* v. *Holder*, 777 F.3d 163, 168 (4th Cir.) (noting that dictionary definition of "describe" includes "[t]o convey an idea or impression of" or "[t]o trace the form or outline of"), petition for

cert. pending, No. 14-1268 (filed Apr. 22, 2015). Petitioner disregards the principle that different words in the same provision should be given different meanings, by treating "defined in" and "described in" as having identical effects—each requiring that a state offense meet each prong of a federal definition (including any jurisdictional element).[2]

The surrounding text reinforces the conclusion that a state arson offense identical to federal arson except for the jurisdictional element is an offense "described in" the federal arson provision. Both the meaning of statutory terms, and their "plainness or ambiguity," are to be "determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole." *Yates* v. *United States*, 135 S. Ct. 1074, 1081-1082 (2015) (quoting *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997)) (alteration marks omitted). Here, in the text following the operative definitional provision, Congress stated that its aggravated-felony definition was meant to reach state crimes. 8 U.S.C. 1101(a)(43) (stating that term "aggravated felony" applies to any "offense described in this paragraph whether in violation of Federal or State law"). And a related INA provision expressly contemplates that state offenses would qualify as aggravated felonies under Section 1101(a)(43)(E)—a

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[2] Petitioner's observation that that the *objects* of those phrases are different (Pet. 27-28) does not give "defined in" and "described in" different meanings, as needed to accord with the presumption that different words in a single provision carry different meanings. That is because on petitioner's view, the alternating "defined in" and "described in" phrases both require that a statute of conviction exactly satisfy a federal definition.

provision that discusses *only* crimes that are "described in" enumerated federal provisions. See 8 U.S.C. 1231(a)(4)(B)(ii) (setting out rules concerning aliens "in the custody of a State" based on convictions for "an offense described in" Section 1101(a)(43)(C) or (E)). While these provisions would not be entirely without effect under petitioner's view, because a few federal crimes referenced in Section 1101(a)(43)(E) have no interstate-commerce element, see Pet. 28-29, these statutory provisions reinforce the other textual indicators (and the background principles) indicating that whether a particular *actus reus* is prosecuted under federal or state law ought not to affect its classification under the INA.

Petitioner's reading, moreover, creates absurdities. Petitioner cannot explain why, when an alien is convicted of arson, the immigration consequences of his offense should turn on whether the alien was prosecuted under a federal statute or under a state statute that is indistinguishable except for the absence of an interstate-commerce jurisdictional element. Neither the seriousness of the crime nor the danger posed differs if a defendant sets fire to a residence that is a rental unit, see *Russell*, 471 U.S. at 858 (interstate-commerce element satisfied), rather than an owner-occupied unit, see *Jones* v. *United States*, 529 U.S. 848 (2000) (interstate-commerce element not satisfied). Nor can petitioner explain why the immigration consequences for a felon convicted of possessing a firearm should turn on whether the state prosecutor proved the firearm was manufactured outside the State in which it was possessed or was otherwise transported in interstate commerce. See 18 U.S.C. 922(g).

Petitioner's lone attempt to place the disparities he advocates on a rational footing is his statement (Pet. 30) that "it would not have been absurd for Congress to exclude ordinary state arson from the definition of aggravated felony," because "[i]n New York," he asserts, "a person whose cigarette leaves a burn mark on the wall of a residence has committed the felony of third degree arson." Insofar as petitioner is suggesting that the New York's arson statute reaches conduct that is less serious than the conduct prohibited under federal law, he misunderstands the relationship between New York's law and the federal arson statute. The Board and the courts of appeals have uniformly concluded that the New York and federal arson statutes are identical in scope, except for the federal statute's jurisdictional element. Thus, if a person who intentionally starts a fire that leaves a burn mark on another person's home or vehicle violates New York's prohibition on deliberately "starting a fire or causing an explosion" that "intentionally damages" another person's home or vehicle, New York Penal Law § 150.10 (McKinney 2010), then that alien's conduct *also* violates the federal prohibition on "maliciously damag[ing] * * * by means of fire or an explosive, any building [or] vehicle," so long as the building or vehicle in question was "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 18 U.S.C. 844(i). Indeed, petitioner himself has not previously disputed that the statutes are identical except for a federal jurisdictional element that even petitioner does not suggest has any bearing on culpability, danger, or any similar concern.

At a minimum, given the textual and structural support for the Board's view, and the absurd conse-

quences that would follow from petitioner's reading, the Board's construction reflects a permissible construction of the portion of the aggravated-felony definition addressing arson. As courts considering this provision have recognized, and petitioner does not dispute, the Board's construction of Section 1101(a)(43)(E)(i), is appropriately evaluated under the framework of *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because the Board's constructions of INA terms are judged under that deferential framework. See, *e.g.*, *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); see also *id.* at 2214 (Roberts, C.J., concurring in the judgment).

Petitioner asserts (Pet. 29-30) that the Board's views should receive reduced respect because the Board itself "in effect, deferr[ed] to the Ninth Circuit," in construing Section 1101(a)(43)(E), but his argument misunderstands the Board's decisions. While the Board modified its construction of the aggravated-felony definition concerning offenses "described in" 18 U.S.C. 922(g) following consideration of a Ninth Circuit decision, the Board's ultimate decision was based on statutory text and structure—with an emphasis on Sections 1101(a)(43)(E) and 1231(a)(4)(B)(ii). See *In re Vasquez-Muniz*, 23 I. & N. Dec. 207, 210 (B.I.A. 2002); see also *id.* at 212 (stating after statutory analysis that "the Ninth Circuit arrived at the same conclusion we reach here for many of the same reasons enunciated above"). Similarly, the Board decision construing the specific subparagraph of Section 1101(a)(43)(E) at issue here relied on the subparagraph's language, surrounding statutory provisions, consideration of statutory purpose, and an

analysis of the federal arson statute. See *In re Bautista*, 25 I. & N. Dec. 616, 619-620 (B.I.A. 2011), vacated and remanded, 744 F.3d 54 (3d Cir. 2014).

Petitioner's several additional arguments do not undercut the reasonableness of the Board's construction. Petitioner principally argues that the Board is not free to disregard the statutory text, but he fails to recognize that the Board's construction reflects a permissible reading of the statutory language. See, *e.g.*, *Espinal-Andrades*, 777 F.3d at 168 (noting that Board's construction comports with dictionary definition). Indeed, the Board's reading is the most natural one, in light of the contrasting "described in" and "defined in" language. Pet. App. 9a (agreeing with "the Fifth, Seventh, Eighth, and Ninth Circuits" that "described in" appears to be a "broader" standard than "defined in").

Nor is petitioner correct in contending that his reading of the statute is compelled because Congress could have achieved the construction the Board has adopted through other language. While there may be many formulations that could convey any given statutory meaning, none of the alternative formulations Congress actually used in the aggravated-felony provision would have achieved the present meaning with equal clarity. Petitioner suggests (Pet. 23) that Congress "could simply have used the generic term 'arson,'" but because arson's substantive elements vary among jurisdictions and have changed considerably over time, the reference to Section 844(i) is considerably more precise. See, *e.g.*, 3 Wayne R. LaFave, *Substantive Criminal Law* § 21.3, at 239 (2d ed. 2003) (noting that common-law arson was limited to "the malicious burning of the dwelling house of another"

and that arson now "usually is defined by a statutory formulation bearing little resemblance to the common law crime"); *United States* v. *Whaley*, 552 F.3d 904, 906 (8th Cir. 2009).

Petitioner likewise cannot draw support from other provisions in the criminal code, enacted a decade before the aggravated-felony definition, that refer to state crimes that would have been federal offenses "if a circumstance giving rise to federal jurisdiction had existed." Pet. 23-24 (discussing 18 U.S.C. 3142(e)(2)(A) and (f)(1)(D)). There is a "well-established canon of statutory interpretation that the use of different words or terms *within a statute* demonstrates that Congress intended to convey a different meaning for those words," *Spencer Enters., Inc.* v. *United States*, 345 F.3d 683, 689 (9th Cir. 2003) (emphasis added)—the principle implicated by Congress's alternating uses of "described in" and "defined in" within the INA's single aggravated-felony definition. But there is no such principle with respect to Congress's use of different words in unrelated statutes, let alone unrelated statutes enacted by different Congresses, a decade apart. Cf. Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4320 (enacting relevant aggravated-felony definitions in INA; Bail Reform Act of 1984, Pub. L. No. 98-473, Tit. II, ch. I, § 203(a), 98 Stat. 1976 (enacting cited bail provisions).

2. While a shallow division of authority has arisen since courts began to address the aggravated-felony classification of state arson offenses under 8 U.S.C. 1101(a)(43)(E) last year, this Court's intervention would be premature. In the first appellate decision addressing the issue, the Third Circuit held last year

that the INA forecloses classification of state arson convictions as aggravated felonies under Section 1101(a)(43)(E)(i) when the convictions arise under state statutes that lack the federal interstate-commerce jurisdictional element, even if the conduct covered by those statutes otherwise satisfies the federal arson definition. *Bautista,* 744 F.3d at 68. The panel distinguished appellate decisions holding that firearms-related convictions under state statutes lacking an interstate-commerce jurisdictional element may constitute aggravated felonies under Section 1101(a)(43)(E)(ii). The court wrote that "the rationale that our sister circuits have developed in applying the categorical approach to" firearms offenses "under § 101(a)(43)(E)(ii) has limited import to our categorical approach to" arson offenses "under § 101(a)(43)(E)(i)" because gun and arson offenses are "distinct categories of aggravated felonies and that distinction bears on the application of the subsection." *Id.* at 62. The Third Circuit explained that in its view, arson and firearms offenses present different considerations because "the jurisdictional element of § 844(i) substantially narrows the range of arson criminalized therein" and "does more than provide a jurisdictional hook for Congress." *Id.* at 65-66. In view of this distinction, the court concluded that "even if we accept our sister circuits' application of the categorical approach to Section 922(g)(1)," setting out firearm-related crimes, it would not apply that approach to state arson convictions. *Id.* at 66.

In recent months, two court of appeals—the court below and the Fourth Circuit—have disagreed with that holding, affirming the Board's approach to state arson offenses under the INA. Several months after

the decision below, in which the Second Circuit deferred to the Board's approach to state arson offenses as reasonable under *Chevron*, see Pet. App. 1a-14a, the Fourth Circuit affirmed the Board's approach on the ground that a conviction under a state statute that mirrors federal arson in all respects but its jurisdictional element "unambiguously qualifies as an aggravated felony," and that "if any ambiguity existed, the BIA's interpretation was reasonable" under *Chevron*. *Espinal-Andrades*, 777 F.3d at 169.

This Court's intervention in this months-old disagreement would be premature. First, as petitioner acknowledged below, the legal question presented here is not one of broad practical importance, because many arson convictions qualify as aggravated felonies under a distinct definitional provision. See Pet. C.A. Br. 29 (stating that adoption of petitioner's view "would have a very limited impact" because many arsons qualify as aggravated felonies under the crime-of-violence provision, 8 U.S.C. 1101(a)(43)(F)).

Second, the debate on this question is nascent. Only three courts of appeals have considered the classification of state arson offenses under the INA, all in recent opinions. And the shallow disagreement stemming from the *Bautista* decision does not support pretermitting development of this issue. Far from representing an entrenched disagreement, the outlier *Bautista* decision—which drew the support of a single member of the relevant court of appeals—has only just now become an appropriate candidate for that court's en banc review. See 744 F.3d at 56-69 (opinion of one Third Circuit judge and one visiting judge); *id.* at 69-74 (dissenting opinion of Third Circuit judge). That is, since *Bautista* was the first decision of any

court to address the aggravated-felony classification of arson crimes, and it expressly distinguished the cases addressing the aggravated-felony status of firearms offenses, *Bautista* did not—when decided—"conflict[] with the authoritative decisions of other United States Courts of Appeals," Fed. R. App. P. 35(b)(1)(B), nor with decisions of this Court or the Third Circuit itself.[3] That has changed as a result of the decision below (and the subsequent *Espinal-Andrades* decision). Yet the Third Circuit has not yet had the opportunity to consider en banc review of the "described in" language in 8 U.S..C. 1101(a)(43)(E), as it could do in a case involving, *e.g.*, the closely related question of the classification of firearms offenses under Section 1101(a)(43)(E). Indeed, the dissenting panel member below suggested that a case involving that provision would force that court to confront the panel's reasoning anew. See *Bautista*, 744 F.3d at 73 (Ambro, J., dissenting) (explaining that consideration of that related question would require the court to "either abandon[] the logic of the majority's opinion" or to adopt a rule that conflicts with the holdings of other circuits). Under these circumstances, there is not now a disagreement that requires this Court's intervention.

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[3] Petitioner acknowledged as much below, where he described *Bautista* as "the first Court of Appeals decision to address" the classification of arson offenses under the INA and distinguished other cases as not addressing arson-specific case law. 13-2498 Docket entry No. 68, at 3-4 (May 1, 2014).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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