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IN THE SUPREME COURT OF THE UNITED STATES

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JORGE LUNA TORRES, :

Petitioner : No. 14-1096

v. :

LORETTA E. LYNCH, :

ATTORNEY GENERAL. :

- - - - - x

Washington, D.C.

Tuesday, November 3, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 a.m.

APPEARANCES:

MATTHEW L. GUADAGNO, ESQ., New York, N.Y.; on behalf of Petitioner.

ELAINE J. GOLENDERG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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1 P R O C E E D I N G S

2 (11:01 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next this morning in Case 14-1096, Torres v. Lynch.

5 Mr. Guadagno.

6 ORAL ARGUMENT OF MATTHEW L. GUADAGNO

7 ON BEHALF OF THE PETITIONER

8 MR. GUADAGNO: Mr. Chief Justice, and may it
9 please the Court:

10 Congress made a choice. Congress did not
11 choose to make generic arson an aggravated felony.
12 Instead, Congress chose to make Federal arson an
13 aggravated felony.

14 And that makes sense. The Federal arson
15 statute has a minimum sentence of five years. There are
16 at least 18 States with arson offenses that are
17 classified as misdemeanors. Arizona and Colorado have
18 misdemeanor arson offenses involving damage to property
19 worth less than a hundred dollars.

20 Congress would not have wanted to make such
21 minor offenses aggravated felonies. We know this
22 because of the statutory scheme.

23 Within the aggravated felony statute, we
24 have generic offenses, very serious ones like murder and
25 rape. There are no -- there are no sentence

1 requirements for those very serious generic offenses.

2 However, for the remaining generic offenses
3 that are -- that are listed in -- in -- in the
4 aggravated felony statute, they -- they are associated
5 with a sentence of a year or more. Theft offenses,
6 obstruction of justice, burglary, they all require a
7 sentence of a year or more.

8 Also listed with -- among the generic
9 offenses is crime of violence. There is a requirement
10 of a sentence of a year or more.

11 Arson is a crime of violence, and so -- so
12 Congress would have realized that -- that arson offenses
13 would -- would fall under the crime-of-violence
14 provision, and -- and for more serious State arson
15 offenses, they would fall under this -- this -- this
16 provision so that, for the minor arson offenses, where
17 there's a sentence of less than a year, the individual
18 would -- would not be an aggravated felon and would be
19 eligible for discretionary relief.

20 JUSTICE GINSBURG: But your reading leaves
21 out some very serious arson offenses. Say under foreign
22 law or under State law it could be the worst kind of
23 arson, but there's no commerce hooker and so it would be
24 left out, on your reading.

25 MR. GUADAGNO: But -- but -- but on -- on

1 our reading, while -- while it wouldn't fall under
2 the -- the -- the (e) provision in the aggravated felony
3 statute, these more serious arson offenses, the -- the
4 State and foreign offenses, they -- they would fall
5 under the -- the (f), crime of violence, provision
6 where -- where there is a sentence to a year or more.

7 And -- and under -- under that -- that
8 approach, these less-serious arsons would -- would not
9 be aggravated felons. And -- and individuals like --
10 like my client, Mr. Luna, who only received a sentence
11 of one day, they would be eligible to receive
12 cancelation of a --

13 JUSTICE ALITO: Do you think that's still
14 clear after our decision in Johnson?

15 MR. GUADAGNO: Johnson, if I -- if I
16 remember correctly, dealt -- dealt with -- with -- with
17 16 -- 16(b). You could still -- you -- one could still
18 be an aggravated felon under -- under 16(a). But -- but
19 regardless, what I'm talking about is --

20 JUSTICE ALITO: But what you're relying
21 is -- you're relying on language that is similar to,
22 maybe, and -- and maybe different in an -- in an
23 important respect; but nevertheless bears some
24 similarity to the residual clause in the -- in the armed
25 criminal -- Armed Career Criminal Act, does it not?

1 MR. GUADAGNO: Yes. But I'm talking about
2 what Congress intended. When Congress write -- writes a
3 law, it doesn't intend for -- for the -- for the Supreme
4 Court to find the language ambiguous and -- and -- and
5 strike it down. So -- so that -- we should be looking
6 at what Congress's intent was, not -- not -- not whether
7 or not the crime of violence will still be an aggravated
8 felony after Johnson. If -- if -- if there are problems
9 with this, that will be -- that will be for Congress to
10 fix.

11 JUSTICE ALITO: May I ask you about the
12 statutory language that seems to me to present the
13 greatest problem for your position. Maybe it's not
14 fatal, but what I'm referring to is the provision that
15 says the term applies -- so we're looking at whether
16 the -- the State offense here is described in the
17 Federal arson statute. And then there's language that
18 says, the term applies to an offense described in this
19 paragraph whether in violation of Federal or State law.

20 What do you make of that? It can be argued
21 that what that means is that, when you have a Federal
22 offense with a jurisdictional provision, you disregard
23 the jurisdictional provision because you're never going
24 to find that in a State provision.

25 MR. GUADAGNO: The -- the language you're --

1 you're referring to is -- is referred to normally as the
2 penultimate sentence. And -- and the penultimate
3 sentence merely tells us that -- that State offenses
4 that are described in the aggravated felony provision
5 are aggravated felonies. In the -- in the board's first
6 matter of Vasquez-Muniz decision, the board looked at
7 that language and concluded that -- that -- that all
8 that means is that sometimes State offenses could --
9 could be aggravated felonies, but it didn't require
10 that -- that State offenses always be -- be aggravated
11 felonies.

12 CHIEF JUSTICE ROBERTS: Right. But, I mean,
13 the point is usually when you see language, you know,
14 in -- in interstate commerce, your immediate reaction
15 is, oh, that's Federal jurisdiction as opposed to State.
16 But here the one thing we know is they didn't want it to
17 matter. They said in violation of Federal or State law.

18 So as I look at it, the -- your instinctive
19 reaction is to say, well, then, of course you don't have
20 to worry about provision that is in there to limit the
21 offense to Federal -- Federal offenses.

22 MR. GUADAGNO: This -- this -- this
23 language, it -- it -- it doesn't -- it doesn't directly
24 address jurisdiction. It -- it just -- it's just saying
25 that -- that -- that certain offenses, certain State

1 offenses can be aggravated felonies, but it's not
2 saying --

3 JUSTICE SOTOMAYOR: There -- this -- this
4 provision applies to an entire list of multiple crimes,
5 right?

6 MR. GUADAGNO: That is correct, Your Honor.

7 JUSTICE SOTOMAYOR: And so for most of those
8 crimes there is no jurisdictional element at all.

9 MR. GUADAGNO: That -- that is also correct,
10 yes.

11 JUSTICE SOTOMAYOR: So if you're looking at
12 this as superfluous to not this individual subprovision,
13 one subprovision of many --

14 MR. GUADAGNO: Yes.

15 JUSTICE SOTOMAYOR: -- it's doing a lot of
16 work.

17 MR. GUADAGNO: Yeah.

18 JUSTICE SOTOMAYOR: It's doing a lot of work
19 because there are a lot of other crimes that qualify
20 under State law, correct?

21 MR. GUADAGNO: That's correct, yeah.

22 JUSTICE SOTOMAYOR: I mean, your brief and
23 the solicitor general's sort of tunnel in on this one
24 provision of many. But I'm wondering why?

25 I'm looking at the entire provision has many

1 State court analogues that don't involve interstate
2 commerce, correct?

3 MR. GUADAGNO: Yes. So -- so under -- under
4 our -- our reading of the statute, it -- it -- it
5 doesn't render the -- the penultimate sentence a nullity
6 because as -- as Justice Sotomayor noted, there -- there
7 are -- are many State provisions that -- that will still
8 be aggravated felonies. We have all -- all -- I -- I
9 mentioned the -- the generic offenses, all the generic
10 offenses will -- will be both -- both State and --

11 JUSTICE ALITO: But suppose --

12 JUSTICE KAGAN: What your --

13 JUSTICE ALITO: Go ahead.

14 JUSTICE KAGAN: What your theory does is at
15 least create a world in which some things are included
16 and some things are excluded in a way that appears not
17 to make much sense. Now, you've said no, there is a
18 reason for doing this with arson to limit it to the
19 Federal offense. But I mean, there are a lot of things,
20 a lot of things on that list that have jurisdictional
21 hooks in them.

22 So you would be excluding -- in addition to
23 arson, you would be excluding the child pornography
24 crime. You would be excluding a kidnapping crime,
25 excluding felon and possession, excluding receiving

1 explosives for the purpose of killing somebody. So you
2 would be excluding all of those.

3 And then on the other hand, you would be
4 including some things that seem a lot more minor that
5 just happen not to have jurisdictional hooks, like
6 operating a gambling establishment.

7 So you create a world in which the
8 exclusions and the inclusions seem not to match up with
9 anybody's view of -- of a sensible categorization.

10 MR. GUADAGNO: Well, the -- the -- the same
11 way that -- that -- that there's -- there's an
12 aggravated felony provision for arson in the generics
13 for all those things that Your Honor mentioned, that
14 there are other categories of aggravated felony which
15 would cover State offenses for those things: Sexual
16 abuse of a minor, crime of violence. And -- and even
17 outside the aggravated felony scope, we have crimes
18 involving moral turpitude. So individuals who commit
19 those crimes on -- within a State, they would still be
20 removable and they would still be removable for
21 aggravated felonies --

22 JUSTICE ALITO: Take two -- two defendants.
23 One is convicted of the Federal offense of possession of
24 a firearm by a convicted felon, where you have to prove
25 a connection between the firearm and interstate

1 commerce. The second defendant is convicted under an
2 identical State statute, but of course, there's no need
3 to prove an interstate commerce element. And under your
4 argument, the first would be included and the second
5 would not.

6 MR. GUADAGNO: The person -- the State
7 individual would still be removable under the firearm's
8 removability ground.

9 JUSTICE KENNEDY: Well, but that may be
10 discretionary as mandatory. That -- that does avoid the
11 question somewhat when you say, oh well, there's another
12 section. Don't worry. That's your answer.

13 But that doesn't seem to me a complete
14 answer to the statutory question that Justice Alito's
15 question poses. You're making the statute a nullity as
16 to the States.

17 MR. GUADAGNO: Well, you know, the
18 interstate-commerce provision, it's -- it's an element
19 of -- of the statute that -- that's required for a
20 conviction.

21 JUSTICE SCALIA: But does it have to be
22 expressed in the statute? Is it not always a required
23 element of a Federal crime? There has to be Federal
24 jurisdiction, so as -- as a matter of fact, every
25 Federal crime has some jurisdictional element in it.

1 Right?

2 MR. GUADAGNO: Yes, but --

3 JUSTICE SCALIA: Whether it's expressed in
4 the -- in the text of the statute or not, the statute's
5 invalid if there's no Federal hook.

6 MR. GUADAGNO: But at the same time in -- in
7 Federal criminal law --

8 JUSTICE SCALIA: But -- but you're -- you're
9 not -- you're just limiting it to the jurisdictional
10 element recited in the statute, right? That seems to me
11 a little illogical.

12 MR. GUADAGNO: But in this -- this Court
13 always requires the jurisdictional element for -- for
14 the conviction. *Jones v. United States*, there was --
15 there was a conviction under 18 U.S. 844(i), and this
16 Court overturned that -- that conviction because the
17 interstate-commerce element wasn't met. So you -- you
18 can't -- you can't have the Federal conviction without
19 the interstate-commerce element.

20 JUSTICE SCALIA: No, but -- but it doesn't
21 have to be recited in the statute. And I mean, if a
22 defendant could come in and challenge his conviction on
23 the ground that there -- there was no basis on which the
24 Federal government could -- could have reached my
25 conduct. It was not interstate commerce. There was --

1 it was not pursuant to a treaty or anything else.

2 Doesn't that make the Federal jurisdictional
3 hook a necessary element of any Federal crime?

4 MR. GUADAGNO: Yes. It -- the -- the
5 Federal jurisdiction element is -- is a requirement
6 for -- for a -- for a conviction. And --

7 JUSTICE SCALIA: But -- but -- but you're
8 not arguing that. You're -- you're saying only when
9 it's recited in the statute, right?

10 MR. GUADAGNO: I'm -- I'm not following the
11 distinction that you're making.

12 JUSTICE SOTOMAYOR: On those other -- the
13 ones that are not stated in the statute, it's presumed.
14 It doesn't have to be proven to a jury beyond a
15 reasonable doubt, correct?

16 MR. GUADAGNO: Okay. Correct, yes.

17 JUSTICE SOTOMAYOR: Can I have -- I'm going
18 to sound like my colleague, Justice Breyer.

19 MR. GUADAGNO: Okay.

20 JUSTICE SOTOMAYOR: I became interested in
21 the argument of the National Association of Criminal
22 Lawyers. And basically, their position is that the
23 definition here that says, an offense described in
24 844 -- what -- of that title, relating to explosive
25 material offenses. And they argue that that takes arson

1 out of this section.

2 Why -- I don't see that argument in your
3 brief. Are you disavowing it? And if so, why?

4 MR. GUADAGNO: We're -- we're not disavowing
5 it, and I think that that does show -- support our --
6 our position in -- in that it shows how easy it is
7 when -- when you have broad language that says
8 eliminate -- eliminate elements as -- as the government
9 says, that it could be any -- it could be any element
10 that gets eliminated. They're saying it's jurisdiction.

11 In the amicus brief, it says -- it says
12 arson --

13 JUSTICE SOTOMAYOR: I'm not -- I'm not even
14 on your point.

15 MR. GUADAGNO: Okay.

16 JUSTICE SOTOMAYOR: All right. Did you read
17 the National Association --

18 MR. GUADAGNO: I -- I am -- I am familiar
19 with --

20 JUSTICE SOTOMAYOR: All right. They don't
21 argue that point at all.

22 MR. GUADAGNO: Okay.

23 JUSTICE SOTOMAYOR: They're just saying that
24 this -- this is not covered by -- the fire, the arson is
25 not covered by the statute at all by the enhancement --

1 by the statute at all, except under the arson provision
2 that requires a sentence for a year. That's their
3 argument.

4 MR. GUADAGNO: That is.

5 JUSTICE SOTOMAYOR: Forget about interstate
6 or anything else.

7 So tell me why you didn't make that
8 argument.

9 MR. GUADAGNO: We -- we didn't make that
10 argument because we didn't think about it. Their brief
11 came -- came after ours. And we -- we don't necessarily
12 disagree with their provision, with their argument.
13 We -- we just didn't make it in our brief.

14 But -- but it does support our -- our
15 position, and as -- as I was saying earlier that --
16 that -- you know, the statute says "described in," okay?
17 And the government is saying "described in" tells us
18 that we -- we -- we can eliminate elements. But what's
19 the criteria? How do you know what -- what -- what
20 element to -- gets eliminated. And that -- that example
21 shows that -- that it -- it may not necessarily be
22 the -- the jurisdictional element, and -- and it could
23 just as well be the arson element.

24 And -- and -- yeah, why does it have to be
25 the jurisdictional element that gets eliminated? It

1 could just as easily be the arson element.

2 JUSTICE GINSBURG: The sole purpose -- the
3 sole purpose of it is to enable Federal authority to be
4 brought to bear on the problem. It has no relationship
5 to the conduct. The arson is the same. The only reason
6 for the jurisdictional provision is to authorize Federal
7 action and nothing to do with the conduct involved in
8 the crime itself.

9 So I think a jurisdictional provision is not
10 like any other element. It's there for one purpose
11 only, which is to authorize Federal action.

12 MR. GUADAGNO: On Page 24 of our brief, we
13 cite three provisions from Title 18, two from
14 18 U.S.C. Section 3142, and the third one is 18 U.S.C.
15 Section 5032. And these three provisions have language
16 referring to State offenses if circumstances giving rise
17 to Federal jurisdiction had existed. That -- that is
18 very clear language removing the jurisdictional element
19 or -- or applying a State offense with -- to a Federal
20 law.

21 JUSTICE GINSBURG: And I agree -- yes, I
22 agree with you, that's clearer. But it still doesn't
23 say if -- if the jurisdictional element, why not some
24 other element? Because jurisdictional elements are
25 unique.

1 MR. GUADAGNO: But the important point
2 about -- about those three Federal statutes is -- is
3 that Congress is saying that if they want jurisdictional
4 elements to be ignored, they're going to say so, and
5 they're going to say so with clear language, much
6 clearer language than -- than -- than the penultimate
7 sentence or described in, and Congress didn't -- didn't
8 do that here.

9 I mean, basically we're -- we're asking to
10 apply the full language of -- of -- of the statute, and
11 the government is saying omit things. And -- and to
12 omit things, you need clear language.

13 CHIEF JUSTICE ROBERTS: No, but your
14 assumption is that there -- an element is an element is
15 an element, whether it's substantive or jurisdictional.
16 And that's not the way our -- our cases have treated
17 them, or -- or the general. I mean, you don't need to
18 rely on it for -- for everything, but the Model Penal
19 Code draws a precise distinction between matters
20 relating to the harm or evil sought to be prevented and
21 facts that relate to jurisdiction, venue, or
22 limitations.

23 MR. GUADAGNO: But -- but still, the
24 jurisdictional element is required for the conviction.
25 You -- you cannot have the -- the conviction.

1 CHIEF JUSTICE ROBERTS: Oh, I know. But my
2 point is it's required for a conviction. But that
3 doesn't necessarily mean that you would include the
4 jurisdictional element when you're saying, well, what
5 does the claim -- what is the -- what is the harm or
6 evil sought to be prevented? And in a statute like
7 this, it seems to me that that's what Congress is
8 concerned about, not the technical elements like, for
9 example, venue. I mean, is venue an element if it's
10 listed under the -- the criminal provision? Well, sure.
11 It's an element that could have to be proved depending
12 on the terms of the statute. But that has nothing to do
13 with the harm or evil sought to be prevented.

14 MR. GUADAGNO: Okay. You know, going back
15 to -- to the United States v. Jones again, I mean, you
16 know, this -- this Court said that Congress didn't
17 intend to make all arson -- all -- all arsons Federal
18 offenses. And -- and by -- by the same token, but
19 that -- that if Congress didn't intend to -- to make
20 all -- all State arsons Federal offenses. They --
21 they -- they shouldn't have intended to make all State
22 arsons rutable offenses or aggravated felonies.

23 CHIEF JUSTICE ROBERTS: No, but they wanted
24 to make arsons offenses, whether in violation of Federal
25 or State law.

1 MR. GUADAGNO: But -- but it's -- it's --
2 it's described in this paragraph. So it's still --
3 the language of the penultimate sentence is -- is still
4 requiring all -- all the -- all the elements to -- to be
5 met. You know, it -- described in. It -- it has to be
6 described in.

7 And -- and the 844(i), okay, has that
8 jurisdictional element. And -- and there's nothing
9 about the penultimate sentence that -- that -- that
10 indicates that -- that any element of that offense -- of
11 an offense can -- can be ignored.

12 You know, under -- under the categorical
13 approach, this -- this Court has -- has regularly
14 compared elements of -- of offenses, and we've never had
15 a -- a categorical approach case where -- where this
16 Court has -- has said an element can -- can be excluded
17 in the categorical analysis.

18 And --

19 CHIEF JUSTICE ROBERTS: Well, we've -- we've
20 not addressed this question in the context of the
21 categorical -- application of the categorical approach.

22 MR. GUADAGNO: I -- I -- I don't dispute it.
23 It -- it's never come up and -- and sort of my point.
24 But -- but -- but still, in light of the fact that --
25 that Congress is -- is aware that -- that this Court

1 utilizes the -- the -- the categorical approach,
2 Congress would have used strong language or clearer
3 language if -- if -- if there was going to be a
4 modification of the categorical -- I mean, this would be
5 a -- a major deviation from the way that the categorical
6 approach is applied. And --

7 JUSTICE KAGAN: Mr. Guadagno, this is along
8 the same lines as the Chief Justice's question. I mean,
9 tell me if I'm wrong, but jurisdictional elements are
10 different in one important way, which is we don't
11 require mens rea as to jurisdictional elements.

12 So that's a pretty critical distinction that
13 we've made. Are you suggesting that jurisdictional
14 elements are different? You know, you have to prove
15 them, but you don't have to -- the -- the defendant
16 doesn't have to have mens rea with respect to them.

17 Why doesn't that suggest that there is a
18 real distinction here between jurisdictional elements
19 and substantive elements that can come into play in this
20 context as well?

21 MR. GUADAGNO: This is the -- what Congress
22 showed. Congress shows a statutory provision with --
23 with -- with jurisdictional elements I think should be
24 presumed that -- that -- that Congress knew what it was
25 doing and it -- and it meant --

1 JUSTICE KAGAN: But -- but that -- the mens
2 rea example is also an example where -- where basically
3 State and what we think Congress meant. And we're
4 saying, you know, Congress could not have meant to
5 require mens rea for a jurisdictional element.

6 Notwithstanding that there's not language in
7 a statute that says, and there shall be in mens rea for
8 a jurisdictional element. So why not the same here?

9 MR. GUADAGNO: Well, even -- even if it's
10 different, okay, even if you're going to say
11 jurisdiction is different, it -- it doesn't stop it from
12 being a requirement. Okay? It -- it may -- it may be a
13 different element, it may a different kind of
14 requirement, but it's still a requirement. And --
15 and -- and so you -- you can't just -- just wish it
16 away.

17 The -- the language -- the language in the
18 statute isn't there to -- to say, circumstances giving
19 rise to Federal jurisdiction had existed. Congress
20 didn't put the language in the statute that was
21 necessary to ignore the plain language of the statute,
22 which is -- which is that Congress wanted convictions
23 under 18 U.S.C. 844(i) to be aggravated felonies.

24 The -- the --

25 JUSTICE BREYER: You could, perhaps, treat

1 it as we treated the \$10,000 -- million in the --

2 MR. GUADAGNO: -- in the Ashwan case.

3 JUSTICE BREYER: Right. And -- and say,
4 yes, Congress did mean to pick up this definition, the
5 jurisdictional part.

6 But since no State explosives law will have
7 that in the language, you can -- the government could,
8 if it wanted, prove it at the -- prove that it was
9 interstate-commerce related at the deportation hearing.
10 That's what we did with the 10,000, isn't it?

11 MR. GUADAGNO: Yes.

12 JUSTICE BREYER: The reason really is pretty
13 similar here. The -- the reason is there isn't a -- you
14 know, there isn't a theft statute in the States which
15 have a \$10,000 thing in it, and so it didn't make really
16 sense to think Congress wanted to exclude all those.
17 And -- and -- and so here this is a big thing,
18 explosives. I mean, that's quite -- quite a major
19 problem trying to have an explosive to blow up a
20 building. And I think if anything counts as an
21 aggravated Felony, it's that.

22 But there is this jurisdictional problem.

23 What do you think about that? I just --

24 MR. GUADAGNO: I think -- the Ashwan, I
25 think, is -- is a very different situation. The Ashwan

1 dealt with one specific provision, the
2 \$10,000-requirement just -- just affected that -- that
3 single provision.

4 And -- and in that case, there was pretty
5 much a -- a nullity situation where that specific
6 provision would -- would -- would have been rendered a
7 nullity.

8 Here, the -- the penultimate sentence
9 relates to the -- the entire aggravated Felony
10 provision.

11 So my -- my reading of the statute --

12 JUSTICE BREYER: The penultimate sentence of
13 what?

14 MR. GUADAGNO: The penultimate sentence
15 of -- of -- of 1101(a)(43). The -- the language -- the
16 term applies to an offense described in this paragraph
17 whether in violation of Federal or State law. The
18 board, in its decisions, calls that the penultimate
19 sentence. That -- that -- that's why I -- I keep
20 referring to it as -- as -- as that.

21 JUSTICE BREYER: I just need to read it.

22 MR. GUADAGNO: Okay.

23 JUSTICE BREYER: It's 1101(43) --

24 MR. GUADAGNO: -- (a) -- (a)(43). It is in
25 the -- the -- our Joint Appendix at page 4A.

1 JUSTICE BREYER: Thanks.

2 JUSTICE GINSBURG: What about the -- the
3 respect that we owe to the BIA for their interpretation?

4 MR. GUADAGNO: The -- the board should not
5 be owed any -- any -- any deference under -- under two
6 different theories.

7 One is that the criminal lenity rule should
8 apply. The second is that the long-standing principle
9 of construing lingering ambiguities in deportation
10 statutes in favor of the alien should also be applied.

11 And with regard to those rules, Chevron is
12 not a rubber stamp. Chevron tells us that there are
13 certain circumstances when -- when deference should be
14 applied to boards' decisions and, if those circumstances
15 are not met, then the board is -- is not supposed to be
16 given deference.

17 And in -- in this particular situation, both
18 of these principles that I've just mentioned, they're
19 statutory tools of construction. And statutory tools of
20 construction are supposed to be applied at -- at Chevron
21 step one. And therefore, the agency should not be owed
22 deference.

23 Unless there are any further questions, I
24 reserve rebuttal time.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 Ms. Goldenberg.

2 ORAL ARGUMENT OF ELAINE J. GOLDENBERG

3 ON BEHALF OF THE RESPONDENT

4 MS. GOLDENBERG: Mr. Chief Justice, and may
5 it please the court:

6 Section 1101(a)(43) indicates that
7 violations of State and foreign law should be considered
8 aggravated felonies along with violations of Federal
9 law. It was enacted against the backdrop of multiple
10 doctrines across multiple areas of the law in which a
11 jurisdictional element drops away when a Federal crime
12 is being compared to a State support crime.

13 JUSTICE SOTOMAYOR: All these examples you
14 gave me in your brief, either it's clear explicitly that
15 jurisdiction was excluded by the statute or the nature
16 of the offense gives jurisdiction or the Assimilated
17 Crimes Act, it makes sense, because the whole purpose is
18 that it's -- that Federal -- that a State law is going
19 to apply when there isn't a Federal law. So applying
20 jurisdiction makes no sense.

21 MS. GOLDENBERG: Our point --

22 JUSTICE SOTOMAYOR: But -- so I don't take
23 much from your arguments, which is the fact that it
24 drops away in other sections. Congress didn't just say
25 it dropped away here.

1 MS. GOLDENBERG: Well, our point isn't that
2 each one of those is exactly analogous. It's that there
3 are so many different places where it drops away and
4 that that's very telling. And of course, the purpose of
5 this statute is to capture people who are particularly
6 dangerous who shouldn't be --

7 JUSTICE BREYER: But I -- I thought -- I
8 agreed with that when I came in. And -- and then I
9 thought, my goodness. Of course. It's an explosives
10 crime. My God. Blowing up a building or a person, if
11 anything's an aggravated felony, that must be.

12 Then the first words out of his mouth, your
13 friend's mouth, were, have no fear, read on, because
14 there is a section that makes it an aggravated felony to
15 commit a crime of violence. And "a crime of violence"
16 is very broadly defined. So any human being who commits
17 an explosives violation where that's a State law
18 violation will fall within the definition of aggravated
19 felony because they will have committed a crime of
20 violence.

21 So now, if that's right, I'm left with only
22 half the problem I thought I was left with. And the
23 half I'm still left with is, if we follow your
24 interpretation, what we will suddenly do is put into the
25 category "aggravated felony," which forbids the attorney

1 general to exercise her discretion and keep the person
2 here even when she wants to, though the Mor case isn't a
3 problem, because after all, she doesn't have to keep him
4 here. All right?

5 We put in every tax fraud state, every
6 racketeering, gambling. I mean, you know the list. And
7 it includes an awful lot of trivial stuff. So now I
8 have removing the attorney general's discretion when she
9 wants to keep the thing here -- keep the person here in
10 a whole lot of trivial stuff, if I accept your
11 definition.

12 And if I accept theirs, I don't have the
13 problem I thought I had, which was that people who
14 commit very serious explosive crimes are not in the
15 category "aggravated."

16 So what is the answer to that?

17 MS. GOLDENBERG: I --

18 JUSTICE BREYER: I didn't think of it until
19 I heard his first argument.

20 MS. GOLDENBERG: I disagree with, I think,
21 both halves of that.

22 And let me start by talking about why I
23 think it remains true, despite the crime of violence
24 provision and other parts of the aggravated felony
25 provision, that Petitioner's approach is radically

1 underinclusive.

2 First of all, it's important that we're not
3 just talking about arson here. We're talking about all
4 of the different described-in provisions where there is
5 a Federal jurisdictional element. And so there are many
6 things that it is clear would never be picked up by
7 other parts of the aggravated felony that --

8 JUSTICE BREYER: I have the list in front of
9 me, thanks to my law clerk. And I couldn't find
10 anything on that list which either wouldn't fit within
11 crime of violence or would be so terrible to leave out.

12 MS. GOLDENBERG: Well, there are a couple of
13 different examples. And I also think it's true -- and I
14 don't want to leave this on the table -- that not all
15 arsons would qualify as crimes of violence. So I want
16 to get to that as well.

17 But the things that would be left out and
18 that would not be picked up by other parts of the
19 aggravated felony provision under Petitioner's view
20 would be a number of really serious child pornography
21 offenses if they were prosecuted by a State or by a
22 foreign sovereign, including possessing child
23 pornography, transporting child pornography, putting out
24 a notice saying that you want to receive or exchange
25 child pornography.

1 Petitioner says in his brief that the sexual
2 abuse of a minor, generic offense, would pick that up.
3 But it wouldn't pick up any of those things that I just
4 described, although, it might pick up some kinds of
5 child pornography offenses: Gun possession offenses,
6 being a felon in possession of a firearm, being a
7 fugitive from justice in possession of a firearm. A lot
8 of really serious gun possession offenses also, if
9 prosecuted by a State or prosecuted by a foreign
10 sovereign, would not be picked up. And Petitioner
11 actually doesn't contend otherwise.

12 So it is an underinclusive approach. And
13 that's true even with respect to arson, because under
14 the crime of violence provision, that has to involve use
15 of force against the person or property of another. A
16 number of State arson offenses would cover arson against
17 your own property. And this is a categorical approach.
18 So if a --

19 JUSTICE SCALIA: I don't -- I don't
20 understand. Your argument is we have to interpret this
21 thing to be as expansive as possible?

22 MS. GOLDENBERG: No. It's --

23 JUSTICE SCALIA: I mean, you know, if
24 Congress wanted to cover all those things, it could have
25 used the language it used elsewhere, which says, you

1 know, except -- except for the jurisdictional element.

2 But it -- it didn't say that.

3 MS. GOLDENBERG: It --

4 JUSTICE SCALIA: What -- what do you do
5 about the Federal statute that -- that -- that makes
6 arson of a Federal building a crime?

7 MS. GOLDENBERG: Well, in that case --

8 JUSTICE SCALIA: Does -- does that mean that
9 all state arson statutes are picked up, whether it's of
10 a Federal building or of -- of the corner grocery store?

11 MS. GOLDENBERG: No. I think you'd have to
12 engage in an analysis at that point about whether that
13 element was a purely jurisdictional element or whether
14 it had some substantive force to it. That's not an
15 analysis --

16 JUSTICE SCALIA: That's -- that's the key
17 you -- you --

18 MS. GOLDENBERG: Well, I think the key is
19 if -- if the board were going to undertake that
20 analysis, which it hasn't done with respect to anything
21 besides interstate-commerce jurisdictional elements,
22 which are classic jurisdictional elements.

23 But if the board were going to undertake
24 that analysis, I think it would look to the model penal
25 code definition that the Chief Justice pointed to

1 earlier. And that is the distinction between the harm
2 or evil sought to be prevented and the legislature's
3 power, jurisdictional power, to regulate that harm or
4 evil.

5 And in the case that you mentioned, I think
6 that might very well be a substantive element, because
7 Congress could be making a determination that if there
8 is something particularly pernicious, particularly
9 culpable, particularly in need of deterrence about arson
10 with respect to Federal property, which Congress really
11 specially wants to protect. But I don't think you can
12 say that about the interstate-commerce jurisdictional
13 element, which this Court has recognized --

14 JUSTICE ALITO: Why -- why is that?

15 MS. GOLDENBERG: -- is a term of art.

16 JUSTICE SOTOMAYOR: Isn't -- go ahead.

17 CHIEF JUSTICE ROBERTS: Justice Alito.

18 JUSTICE ALITO: Thank you.

19 Following up on that. But why isn't that
20 true here, in light of the -- the Court's decision in
21 Jones?

22 MS. GOLDENBERG: The Court's --

23 JUSTICE ALITO: Didn't the Court's -- didn't
24 the Court's decision in Jones interpret the reference to
25 interstate commerce to be something more than just a

1 jurisdictional hook, but rather a substantive
2 requirement that limited the scope of this particular
3 statute to more severe instances of -- of examples of
4 the crime?

5 MS. GOLDENBERG: I don't think so, because
6 the analysis in Jones was against the backdrop of
7 constitutional-avoidance principle. And the Court said
8 there might very well have been constitutional problems
9 with interpreting the statute more broadly. I think
10 the -- the best comparison is between Jones and -- and
11 Russell. And you can see there that the
12 interstate-commerce element is not doing substantive
13 work. If --

14 JUSTICE SOTOMAYOR: Well, I -- I don't know
15 why you say that, if it has to have substantive work,
16 otherwise it wouldn't be in the statute.

17 MS. GOLDENBERG: Well --

18 JUSTICE SOTOMAYOR: It -- it is picking a
19 crime that only Congress would prosecute, which is
20 following up on Justice Alito's point, substantive
21 because it's more serious. It has -- we have to protect
22 people who are affected from interstate travel, or that
23 affects interstate travel. You could -- even following
24 the model penal code, you could still call this
25 substantive.

1 MS. GOLDENBERG: I don't think so. And
2 again, I think the comparison between Jones and Russell
3 makes this point. In Russell, the Court said that the
4 offense was something that could be prosecuted by the
5 Federal government because it was arson of a rental
6 property which was used in interstate commerce. In
7 Jones, it was arson against a private nonrental
8 property. And that was said to fall outside the scope
9 of Section 844(i).

10 But I don't think you can say that there is
11 something particularly pernicious or culpable about
12 arson against a rental property v. arson against a
13 nonrental property. I think --

14 JUSTICE SCALIA: Why -- why have to subject
15 the Federal courts to -- to this -- this new distinction
16 between a jurisdictional element that's substantive and
17 one that isn't substantive, just jurisdictional? Why --
18 why should I do that? I mean, if it's an element, it's
19 an element. And if Congress really wants to eliminate
20 the jurisdictional element, it can -- it can say so, the
21 way -- the way it did in some other statutes.

22 MS. GOLDENBERG: I think --

23 JUSTICE SCALIA: And if it doesn't say that,
24 you know, don't bother me. Isn't -- isn't that a
25 sensible way to handle this?

1 MS. GOLDENBERG: I don't think so, Your
2 Honor. I don't think it's possible to draw a negative
3 inference from those other statutes. Congress obviously
4 can get at the same meaning using different forms of
5 words in different statutes in the U.S. Code.

6 And what's very important about the statutes
7 the Petitioner has pointed to that expressly say that
8 the jurisdictional element should be taken out is that
9 they don't have an analogue to the penultimate sentence
10 in this case, which shows Congress's intent in the
11 aggravated felony provision, that State offenses and
12 foreign offenses count, along with Federal offenses, as
13 aggravated felonies.

14 And so I think once you get that penultimate
15 sentence in there, it may very well be that Congress no
16 longer feels any need to put in language that's
17 equivalent to the language of those other statutes. And
18 that --

19 JUSTICE KAGAN: Is that really,
20 Ms. Goldenberg, the only textual basis for your
21 position? You know, your brief says a good deal about
22 the difference between "described" and "defined," which
23 the Petitioner has suggested is -- is -- is not a very
24 good distinction, because the "defined" only refers to
25 actual statutory definitions.

1 So are you still relying on that? Are you
2 relying on anything else in the statutory text beyond
3 the penultimate sentence, or is the penultimate sentence
4 really the statutory basis for your argument?

5 MS. GOLDENBERG: No. We're certainly still
6 relying on the "described-in" language and the
7 distinction between that language and other language
8 that Congress chose to use elsewhere in the aggravated
9 felony provision. It's just that we think that it's
10 important that when you look at the meaning of
11 "described in," it be read in light of the penultimate
12 sentence, in light of the purpose of this provision, in
13 light of the irrational patchwork that would be created
14 by Petitioner's view. So I think all those things
15 inform how you would understand "described in" but with
16 respect to the question of whether "defined in" in this
17 provision was just used to refer to dictionary
18 definition-type statutory provisions. I think that that
19 is true. As a descriptive matter, there are only a
20 couple of "defined in" provisions of the aggravated
21 felony statute, and they do refer to other statutes that
22 say the word X means Y.

23 But that's not true throughout the U.S.
24 Code, which was Petitioner's original submission. There
25 are lots of places where Congress has used "defined in"

1 to refer to offenses and to mean exactly what follows
2 but nothing else. And one very telling example is
3 Section 844(n) which actually refers to Section 844(i),
4 the provision at issue in this case, by talking about
5 offenses defined in this chapter.

6 So Congress had at its fingertips language
7 that it could have used to refer to these Federal
8 criminal provisions if all it had meant to do was to
9 say, look, we want you to use exactly what comes after
10 this and nothing else. And there's actually another
11 distinction as well as the "defined in" language in the
12 statute, and that's in Subsection (p), which is found on
13 4A -- page 4A of the appendix to the government's brief.
14 There, Congress uses the words "in violation of," an
15 offense which is in violation of a particular Federal
16 statute.

17 The upshot of Petitioner's position is that
18 any time there's an interstate-commerce jurisdictional
19 element in any of the Federal provisions that are
20 referred to, only a violation of the Federal statute,
21 only a Federal criminal prosecution and conviction will
22 count as an aggravated felony, because no State crime,
23 no foreign crime is ever going to have interstate
24 commerce as an element.

25 If that's what Congress had meant, if it had

1 meant to strict it to violations of that Federal
2 statute, then, again, it had language at its fingertips
3 that it has used elsewhere in this provision that would
4 have allowed it to do that.

5 And there's one other aspect of the
6 statutory text that I'd like to mention, and that's just
7 a particular example of a place where Petitioner's
8 reading doesn't make sense in a -- in a particular
9 context, in the statute. And that's Subsection (j)
10 which is on page 2A of the appendix to our brief, and
11 that's offenses described in several Federal provisions,
12 one of which is RICO. RICO has in it
13 interstate-commerce elements. And then at the end of
14 the provision, there is one of the limitations that
15 Congress puts in sometimes, and the limitation is that
16 the offense has to be punishable by more than one year.

17 Again, under Petitioner's view, only actual
18 violations of the Federal -- the Federal RICO statute
19 and an actual Federal prosecution and conviction under
20 the Federal RICO statute would ever count under
21 Subsection (j) as an aggravated felony.

22 But if that were true, there would have been
23 no reason for Congress to have included that last clause
24 there because Federal RICO convictions are always
25 punishable by more than a year. It says so right in the

1 RICO statute. They're punishable by up to 20 years. So
2 it must be --

3 JUSTICE SCALIA: I don't understand what you
4 -- say it again.

5 MS. GOLDENBERG: Okay. I'll try.
6 So it's Subsection (j).

7 JUSTICE SCALIA: Got it.

8 MS. GOLDENBERG: And it is an offense
9 described in -- and I'm just referring to the first
10 Federal statute that's listed there.

11 JUSTICE SOTOMAYOR: I'm sorry. Can you give
12 me the number again?

13 MS. GOLDENBERG: It's page 2A of the
14 appendix to the government's brief. And I should say
15 when this provision went into the aggravated felony
16 statute, it was only RICO and not these other statutes
17 that follow in Subsection (j) that were listed. So it
18 says an offense described in Section 1962 of Title 18,
19 which is RICO, for which a sentence of one-year
20 imprisonment or more may be imposed.

21 And what I'm saying is you can always impose
22 a sentence of one year or more as an abstract matter
23 when you have convicted somebody of a Federal RICO
24 offense. And so it can't be that just because there's
25 an interstate-commerce element in the Federal RICO

1 statute, that, therefore, State and foreign convictions
2 all drop away and the only time someone is an aggravated
3 felon under (j) is if they have been convicted of a
4 Federal RICO crime.

5 If that were right, then there would have
6 been no need for Congress to include that language at
7 the end.

8 JUSTICE SCALIA: I see.

9 MS. GOLDENBERG: That's there clearly
10 because Congress wanted to pick up State and foreign
11 versions --

12 JUSTICE SCALIA: Right, right, right.

13 MS. GOLDENBERG: -- of the crime, and to
14 then drop away, as Congress does sometimes, to sort of
15 more minor versions of those crimes where there are
16 different sentencing and penalty schemes in place.

17 JUSTICE SCALIA: Of course he's -- he's not
18 arguing that -- that all -- all Federal jurisdictional
19 requirements have to be one of the elements. He's only
20 saying that where -- where the statute itself recites
21 the jurisdictional element. Does RICO do that? What
22 does RICO say?

23 MS. GOLDENBERG: Yes. RICO does recite an
24 interstate-commerce element. It does.

25 JUSTICE BREYER: The basic point is I

1 counted -- made an effort to count these. I accept
2 your argument there are about ten of these sections
3 that -- you know, you -- you couldn't use that as a
4 limitation. But if I look at those ten individually, I
5 will discover that I -- Congress did want to pick up
6 State crimes there or they don't use exactly
7 jurisdiction language like evade a tax imposed under
8 this title.

9 MS. GOLDENBERG: Yeah.

10 JUSTICE BREYER: And it isn't really going
11 to be the anomaly I thought it was. That's your point.

12 MS. GOLDENBERG: Yes, that's one of my
13 points, certainly. There are, I think, 17 different
14 places in the aggravated felony provision, if you look
15 at actually each of its little subsections, and some of
16 them have two or three subsections. And by my count,
17 about nine of them have an interstate-commerce
18 jurisdictional element. And so it's not that the
19 penultimate sentence would be superfluous in
20 Petitioner's view, but it would start doing work in this
21 very odd way for only about half of the aggravated
22 felony provision, and that would just be a very
23 strange --

24 JUSTICE BREYER: It wouldn't be strange if
25 those were things that covered offenses that it makes

1 sense not to want to put in --

2 MS. GOLDENBERG: Right.

3 JUSTICE BREYER: -- to the definition.

4 MS. GOLDENBERG: And I don't think you --

5 JUSTICE BREYER: I thought that some of them
6 did, but --

7 MS. GOLDENBERG: Well, no.

8 JUSTICE BREYER: The tax one, for example,
9 the fraud -- tax fraud, but he uses different language.

10 MS. GOLDENBERG: Yes. No, I think as to
11 many of them, as with respect to the arson offense at
12 issue here, it would make sense to pick up State and
13 also particularly foreign crimes. I don't want foreign
14 crimes to get left out of this discussion because I
15 think it's very important and very important to Congress
16 when dealing with the kinds of people who are going to
17 be covered by the aggravated felony provision that if
18 they had committed a sufficiently serious foreign crime,
19 that that would get picked up. And, of course, foreign
20 crimes are never going to have an interstate-commerce
21 jurisdictional element in them.

22 JUSTICE GINSBURG: How do you deal with his
23 lack of uniformity argument? That is, some crimes
24 will -- under State law, the same conduct will be
25 labeled by some States a felony, other States a

1 misdemeanor, and you get a lot of these lesser-type
2 offenses swept up into the provision that doesn't allow
3 for cancelation of removal?

4 MS. GOLDENBERG: That's not a feature of the
5 board's interpretation in this case. That's just a
6 feature of the aggravated felony provision that it
7 sometimes sweeps in things that the States characterize
8 as misdemeanors. And that's very well-recognized both
9 by the board and by the courts of appeals. This is a
10 Federal term of art, aggravated felony, which is used to
11 show that certain immigration consequences should attach
12 to someone.

13 And so the fact that a State
14 idiosyncratically or for its own reasons attaches a
15 particularly low penalty to something that's set forth
16 here is well-recognized not to be a reason to keep it
17 out of the aggravated felony provision.

18 JUSTICE KAGAN: But I believe that
19 Mr. Guadagno's point was that this is -- it's a reason
20 why Congress may have used the language that it did,
21 rather than, say, just arson. Right? That it wanted --
22 that it understood that there was a wealth of very minor
23 arson crimes out there in the States, that it wanted to
24 exclude those. And the way it excluded those was
25 essentially by saying, no, it's got to be the Federal

1 offense.

2 MS. GOLDENBERG: I think that would be,
3 again, a sort of strange roundabout way to exclude them,
4 and to move it back through the crime of violence
5 provision, it would be a lot of work. What Congress
6 could much more easily have done is just to put a
7 limitation right there in (e)(1) as it did in many other
8 provisions that said you have to have a crime that --
9 for which you're imprisoned for at least a year, or a
10 certain value of property has to be affected.

11 And Congress did that, not only when it was
12 describing -- I'm sorry, generic aggravated felonies,
13 but also it did it in some of the "described-in"
14 sections like Subsection (j) that I was talking about
15 earlier. So that, I think, would be the way that
16 Congress would have approached it.

17 At the same time, I don't think there's
18 anything at all strange in thinking that Congress didn't
19 want to exclude even things that are more minor as
20 arsons go on a scale of arsons on the view that arson is
21 a really serious crime. It is aggravated in every sense
22 of that word.

23 JUSTICE GINSBURG: But this one -- this one
24 wasn't -- I mean, his -- his crime, he got one-day jail
25 time and five years of probation. So it falls on the

1 lesser side. Given your argument, is there any way that
2 a person in his situation could get a cancelation of
3 removal?

4 MS. GOLDENBERG: No.

5 JUSTICE GINSBURG: So he's just stuck --
6 this is absolute? Even when it's a one-day jail time, a
7 lesser crime, there's no -- you're really locked into no
8 means to obtain cancelation of removal.

9 MS. GOLDENBERG: That's right that he can't
10 obtain cancelation of removal, and that's consistent
11 with Congress's intent in putting the aggravated felony
12 provision into place, which was to constrain the
13 attorney general's discretion and to make it so that the
14 attorney general was locked into certain conclusions.

15 And that was because Congress thought that
16 the way that the whole cancelation of removal process
17 was working before the aggravated felony provision went
18 into place was it wasn't working well. Too many people
19 were being allowed to stay, and too many people were
20 having their removal canceled. And Congress expressed
21 very clear in the legislative history that it didn't
22 like that, and it wanted to constrain the attorney
23 general's discretion.

24 CHIEF JUSTICE ROBERTS: I was just going to
25 say, of course, the attorney general may decide not to

1 subject the alien to removal in the first place, right?

2 MS. GOLDENBERG: That's true, yes.

3 Although, aggravated felony is a ground for removal.

4 But also, I don't want to lose sight of the
5 fact that just because this Petitioner's sentence was
6 one day and five years of probation does not mean that
7 he committed a minor crime of some kind. We actually
8 don't know what the conduct was. It's not in the
9 record.

10 JUSTICE BREYER: But the only thing you've
11 been able to think of, my guess is, that gets around his
12 argument that arson and explosives will be covered by
13 the crime of violence is that: What if a person sets
14 fire to his own property?

15 Now, when would a person set fire to his own
16 property? When he wants to commit fraud. And here we
17 have a provision that puts fraud within it. And
18 moreover, it has the limitation of \$10,000. So
19 therefore, serious fraud crimes will fall within this
20 other section.

21 So not even the case that you've really
22 brought up is -- actually needs this provision if you
23 prosecute State explosives crimes, because either
24 they're against other people's property, in which case
25 they fall within crime of violence, or they're against

1 your own property, in which case they are a specie of
2 fraud over \$10,000.

3 MS. GOLDENBERG: I'm not sure that
4 necessarily works under the categorical approach because
5 it would depend what the person was actually prosecuted
6 for in State court, and if they were prosecuted not for
7 fraud, but simply for arson, and it was a provision that
8 said -- that included arson against your own property,
9 then I think you wouldn't fall into either one.

10 But there's actually another reason that I
11 didn't get to before why I think some arsons might not
12 be crimes of violence. And there's actually just some
13 uncertainty around this, but after this Court's decision
14 in *Leocal*, people are continuing to wrestle with whether
15 recklessness would count as a crime of violence. I
16 think there are some, at least, forms of recklessness
17 that are picked up by the substantive elements of
18 Section 844. Malicious arson would include deliberate
19 indifference to the possibility that there is going to
20 be damage, so there might be some slippage there as
21 well. Although, as I say, I --

22 JUSTICE BREYER: So what do you think about
23 this? I mean, I -- I think I dread the suggestion, but
24 when I got into that, I thought, God, there is no way to
25 avoid just doing this section by section and saying,

1 what did Congress want, section by section. And then
2 sometime -- you know, and then if we did that section by
3 section, maybe it would be satisfactory to say, you
4 know, let them prove the jurisdictional hook in the --
5 in the deportation proceeding.

6 That gives the attorney general considerably
7 more discretion. She can do it if she wants; she
8 doesn't have to do it if she doesn't want to.

9 MS. GOLDENBERG: Although I hesitate to
10 object to a helpful suggestion, I actually think that
11 the answer here is to drop out the jurisdictional
12 provision entirely and not to do that for a couple
13 different reasons.

14 JUSTICE SOTOMAYOR: Well, we --

15 MS. GOLDENBERG: First of all, I don't think
16 it works for foreign crimes. So in a foreign crime
17 situation, you can't come in and provide proof that it
18 had an interstate commerce element because there's not
19 really an equivalent to that on the foreign side.

20 And so I just think there is a whole serious
21 set of crimes that Congress wanted to include as to
22 which that approach wouldn't function.

23 It would also really multiply the difficulty
24 of the proceedings and make them much longer and harder.

25 And I do think the language here is a little

1 different here than the language that the Court was
2 looking at in Nijhawan, where this \$10,000 limitation
3 was in the aggravated felony provision itself and it was
4 worded in a particular way that the Court seized on.

5 I -- I -- so I just don't think that
6 analysis necessarily carries over here.

7 But again, I think that all of the various
8 signs that you would use to interpret the statute --
9 and -- and by the way, four of the courts of appeals
10 that have addressed this have said the statute is
11 unambiguously clear. It means what the board said it
12 meant. I think that -- that all of those signs are in
13 place and so you should be talking --

14 JUSTICE ALITO: Can I -- can I go back to
15 your -- to your argument about Subsection (j)?

16 MS. GOLDENBERG: Yes.

17 JUSTICE ALITO: Are there State RICO
18 offenses for which a maximum -- the maximum term of
19 imprisonment is less than a year?

20 MS. GOLDENBERG: I don't know the answer to
21 that, but I think there might be -- there might be such
22 offenses and there might be foreign offenses like that
23 as well. And I haven't been able to canvas that whole
24 area, obviously.

25 And I still think that's the only

1 explanation for that limiting language at the end of --

2 JUSTICE KAGAN: Are there State or foreign
3 RICO offenses at all?

4 MS. GOLDENBERG: I -- I -- I -- honestly, I
5 don't know the answer to that, but I think there might
6 well be.

7 JUSTICE ALITO: There are State -- there are
8 State RICO statutes, but RICO is a -- is a -- is
9 regarded as a very serious crime. It seems strange to
10 have a -- a RICO misdemeanor. I've never heard of such
11 a thing.

12 MS. GOLDENBERG: I mean, I seized on the
13 RICO statute, but actually the very next provision in J,
14 which is Section 1084, the same analysis would apply.
15 Section 1084 is a statute that has an interstate
16 commerce element in it. It has to do with gambling and
17 transmitting information for gambling interstate
18 commerce. And it is punishable by two years when it is
19 prosecuted federally and there is a Federal conviction.

20 So the same analysis would work there as
21 well, and that's something where I think it's pretty
22 clear that there would be State analogues to the
23 substantive elements of that crime. There would be
24 foreign analogues to the substantive elements of that
25 crime as well.

1 I did want to pick up on one other thing
2 that Petitioner said in his presentation, which is,
3 well, why didn't Congress just use the generic
4 definition of arson here?

5 And I think there are a number of reasons
6 for that.

7 For one thing, I think it would have been
8 underinclusive because it wouldn't have included the
9 explosive offenses that are set forth in the Federal
10 statute very likely. Or it's possible that courts would
11 have reached that conclusion.

12 For another, I think it would have
13 entailed -- and I know this Court is familiar with the
14 process -- it would have entailed coming up with what
15 the elements of that generic offense are, and that can
16 be difficult. I think it could be especially difficult
17 in the arson context where there are states that are
18 sort of all over the place and that has moved away from
19 the classic common law definition of burning of a
20 dwelling place.

21 And so I think there are very good reasons
22 that Congress had when it found a Federal criminal
23 provision that had the substantive elements that it
24 wanted to simply refer to that Federal criminal
25 provision using the looser language of described in, in

1 light of the penultimate sentence, and that's something
2 that would --

3 JUSTICE SOTOMAYOR: I can't square this with
4 the categorical approach. I -- I -- you know, we've
5 been very clear. The categorical approach says, every
6 element of a crime that has to be proven to a jury has
7 to be included in the State offense. But now you're
8 saying it's every categorical element that's not
9 jurisdictional.

10 Where do you get that from?

11 MS. GOLDENBERG: Well, I think the thrust of
12 the categorical approach is that you don't look at the
13 particular conduct that the person engaged in. You look
14 at the elements of the crime that they were convicted
15 of. And then you compare it to something that Federal
16 law tells you to compare it to.

17 And I think that is a question of statutory
18 interpretation, what it is that you're supposed to be
19 comparing it to, that the Federal law is telling you is
20 the proper comparator.

21 And here, that's the question we're
22 answering. I mean, that's the question about what
23 described in means. About what it means in light of the
24 penultimate sentence.

25 I don't think there's anything in this

1 Court's categorical-approach cases that would preclude
2 the interpretation that we're putting forth here today.
3 I just think it hasn't a risen in exactly this way
4 before.

5 But again, this -- the important thing about
6 the categorical approach is that you don't look at the
7 Petitioner's particular conduct here. As I say, it's
8 not even in the record what his conduct is. All that we
9 know is that he committed a felony under New York State
10 law that was punishable, my understanding is, by up to
11 seven years in prison.

12 And that's the only information we have.

13 And then we have to look at the elements of
14 the New York statute that he was convicted under and
15 compare them to the offense described in Section 844(i).

16 To the extent that the Court thought there
17 were ambiguities, we would ask for deference to the
18 board here. But we don't think there is ambiguity. We
19 think that, as the courts of appeals have said, that
20 there is one reading of the statute to which all signs
21 point, and that's the reading the Court should adopt.

22 If there are no further questions --

23 JUSTICE GINSBURG: But the board's original
24 decision was the other way, and it wasn't till the
25 circuit came -- came out, and then the board went in

1 line with the circuit so that the board read it --
2 doesn't that dilute the strength of the board's current
3 position, that it was not its original position?

4 MS. GOLDENBERG: I don't think so. I mean,
5 it is true that the board changed positions, but it knew
6 that it was doing it and it gave reasons for doing it
7 and it gave a lot of reasons in its ultimate decision in
8 2002 that are not reflected in the original decision
9 that the board doesn't seem to have considered in the
10 original decision.

11 So I just think it's the -- the
12 Vasquez-Muniz decision from 2002 that has an analysis
13 very similar to the analysis of the courts of appeals
14 that have found the statute unambiguous, have walked
15 through here in looking at, not only at the described-in
16 language itself, but at all the other signs about what
17 the statute means. And I don't think it should be a
18 negative that the board revisited it and came to the
19 correct conclusion.

20 CHIEF JUSTICE ROBERTS: Am I not remembering
21 this right? But wasn't there a change in position in
22 Chevron --

23 JUSTICE GINSBURG: Yes.

24 CHIEF JUSTICE ROBERTS: -- itself?

25 Well, there you go.

1 MS. GOLDENBERG: There you go.

2 CHIEF JUSTICE ROBERTS: I wasn't
3 misremembering.

4 MS. GOLDENBERG: Thank you.

5 CHIEF JUSTICE ROBERTS: Mr. Guadagno, you
6 have four minutes remaining.

7 MR. GUADAGNO: Okay.

8 REBUTTAL ARGUMENT OF MATTHEW L. GUADAGNO
9 ON BEHALF OF THE PETITIONER

10 MR. GUADAGNO: Congress could -- could have
11 utilized generic arson. Throughout Title XVIII there
12 are references to -- to arson. Both briefs talk about
13 the Federal "Three Strikes" law. Within the Federal
14 "Three Strikes" law is actually a definition of arson.
15 Congress could have -- could -- could have referred to
16 the definition of arson in that provision.

17 In provision (K) of the aggravated felony
18 provision, it -- it discusses, first generically,
19 managing a prostitution business, and then it refers to
20 Title XVIII offenses regarding transportation of --
21 of -- of prostitutes.

22 Congress could have said arson, and then --
23 and then referred to Title XVIII U.S.C. 844(i). It
24 could have combined both generic arson and a reference
25 to -- to -- to explosive devices.

1 With regards to the comment about not all
2 State arson offenses being crimes of violence because
3 some would involve personal property, that issue has
4 been resolved by the Board of Immigration Appeals since
5 1998. Our brief -- our reply brief mentions a case from
6 the board called Matter of Palacios where the board held
7 that damaging your own property would -- would
8 constitute -- burning your own property through arson
9 would constitute a -- a -- a crime of violence.

10 With regards to the comments about -- about
11 "defined in" with regards to the INA, "defined in" is
12 used consistently to -- to refer to a definition, and
13 the congressional drafting manuals all indicate that
14 "defined in" should -- should be referring to -- to a
15 definition.

16 And my final point is that what we're
17 seeking here is -- is cancelation of removal,
18 discretionary relief, and that -- that Congress would
19 not have wanted to deprive individuals who have been
20 convicted of minor offenses or less serious offenses of
21 such discretionary relief and would want them to have a
22 chance to demonstrate --

23 JUSTICE SOTOMAYOR: What do you do with --
24 if we rule your way, that it won't address the child
25 pornography possession laws or that it won't address

1 some of the explosion laws?

2 MR. GUADAGNO: As I said before, there --
3 there is overlap and -- and that they're very likely --

4 JUSTICE SOTOMAYOR: No, I want to know where
5 the overlap is for the child pornography.

6 MR. GUADAGNO: There -- there is -- on that
7 one, I don't think there is -- there is any question
8 about that because there is a Second Circuit case -- I
9 believe it's called Ouch v. Holder, where -- where the
10 government did not pursue the child pornography under --
11 under the provision my friend is referring to. It was
12 pursued under -- under sexual abuse of the minor. So --
13 so that -- that is -- there is at least one case out
14 there where -- where that is the way that the government
15 pursued one -- one of these cases.

16 If there are no further questions, thank
17 you.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 Mr. Guadagno, counsel.

20 The case is submitted.

21 (Whereupon, at 12:00 p.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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