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UNITED STATES DEPARTMENT OF JUSTICE
OFFICE OF THE ATTORNEY GENERAL
WASHINGTON, D.C.

In the Matter of

Onesta REYES, Respondent,

Respondent.

27 I&N Dec. 708 (A.G. 2019)
Interim Decision #3969

REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE ATTORNEYS UNITED FOR A SECURE AMERICA

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REQUEST TO APPEAR AS AMICUS CURIAE

Attorneys United for a Secure America ("AUSA") respectfully requests leave to file this amicus curiae brief at the invitation of the Attorney General. *See* 27 I. & N. Dec. 708 (A.G. 2019).

INTEREST OF AMICUS CURIAE

AUSA is a nationwide network of attorneys who share an interest in the enforcement of our nation's immigration laws. AUSA is a project of the Immigration Reform Law Institute ("IRLI"), a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration-related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed amicus curiae briefs in many immigration-related cases before federal courts and administrative bodies, including: *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C. 2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, No. 16-5287 (D.C. Cir., filed Sept. 28, 2016); *Matter of Silva-Trevino*, 26 I. & N. Dec. 826 (B.I.A. 2016); and *Matter of C-T-L-*, 25 I. & N. Dec. 341 (B.I.A. 2010).

QUESTION PRESENTED

The question presented in this case is whether an alien has been convicted of an aggravated felony under 8 U.S.C. §1227(a)(2)(A)(iii) ("Any alien who is convicted of an aggravated felony at any time after admission is deportable."), where all of the elements of the underlying statute of conviction—and thus all of the means of committing the offense—correspond either to an aggravated felony theft offense, 8 U.S.C. §1101(a)(43)(G) ("A theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment is at least one year."), or

to an aggravated felony fraud offense, 8 U.S.C. §1101(a)(43)(M)(i) ("an offense that—(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000.").

ARGUMENT

Under the Immigration and Nationality Act ("INA"), Congress instructs the Attorney General to remove aggravated felons from the United States. 8 U.S.C. § 1227(a)(2)(A)(iii).

The INA describes certain categories of offense that qualify as an "aggravated felony," including, for example, theft offenses "for which the term of imprisonment is at least one year" and fraud offenses "in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. §1101(a)(43)(G) (theft); 8 U.S.C. §1101(a)(43)(M)(i) (fraud).

The respondent in this case is an alien who "was convicted of grand larceny in the second degree" under New York's Penal Law. *Matter of Reyes*, ___ B.I.A. at 1 (Apr. 2019). Respondent's conviction for grand larceny entailed *both* a term of imprisonment of at least one year *and also* harm to her victims exceeding $10,000. "It is undisputed that the 'term of imprisonment' for the respondent's State larceny offense was at least 1 year . . . and that the loss to her 'victim or victims exceed[ed] $10,000.'" *Id.* at 2 n.2. Consequently, the respondent is removable either under the INA's aggravated felony theft provision or under its aggravated felony fraud provision. Either way, she is an aggravated felon under the INA. "Therefore, by necessity, the respondent was convicted of an aggravated felony offense, and therefore is removable[.]" *Id.* at 10 (O'Connor, dissenting).

I. An alien has been convicted of an aggravated felony if his criminal conviction implies the commission of either an aggravated felony fraud or an aggravated felony theft.

The statute of conviction under which the respondent was convicted encompasses both theft offenses and fraud offenses. The difference between theft offenses and fraud offenses is that

a theft offense is "the taking of property without consent" whereas a fraud offense is "the taking or acquisition of property with consent that has been fraudulently obtained." *Matter of Garcia-Madruga*, 24 I. & N. Dec. 436, 440 (B.I.A. 2008). "The key and controlling distinction between these two crimes is therefore the 'consent' element—theft occurs without consent, while fraud occurs with consent that has been unlawfully obtained." *Soliman v. Gonzales*, 419 F.3d 276, 282 (4th Cir. 2005).

That is a distinction without a difference in this case. The statute of conviction includes no other possible offenses besides theft and fraud, and both offenses are defined as aggravated felonies under the INA. The Board of Immigration Appeals ("BIA") assumed "that all of the means of committing 'larceny' under section 155.40(1) involve either a taking 'without consent' or 'fraud or deceit,' as contemplated by either section 1101(a)(43)(G) [theft] or (M)(i) [fraud] respectively." *Reyes*, ___ B.I.A. at 3n.4. No matter whether respondent's conviction is read to be a conviction for theft or a conviction for fraud, the consequence under INA is the same: respondent has been convicted of an aggravated felony.

Nevertheless, the Immigration Judge granted respondent's motion to terminate removal proceedings because "the statute is much broader than either of the charges brought by the Government." *Matter of Reyes*, ___ I.J. at 4 (July 2015). That decision was erroneous. Each of the statutory examples listed by the Immigration Judge entail *either* taking property without consent (common law larceny; trespassory taking; lost property; extortion) *or* taking property with unlawfully-obtained consent (common law larceny by trick; embezzlement; obtaining property by false pretenses; issuing a bad check; false promise). *Id.* If, indeed, "the statute is much broader than either of the charges," the Immigration Judge failed to identify how.

On appeal, the Board of Immigration Appeals ("BIA") interpreted the statute of conviction to cover *only* "a taking 'without consent' or 'fraud or deceit,' as contemplated by" the INA. *Reyes*, ___ B.I.A. at 3 n.4. Nonetheless, the BIA dismissed the Government's appeal merely because the statute of conviction encompasses both theft and fraud.

> Since the respondent's State statute of conviction reaches larceny offenses involving fraudulent takings (such as larceny by trick, embezzlement, issuing a bad check, false pretenses; and false promise), and takings "without consent" (such as trespassory taking, acquiring lost property, or extortion), it is overbroad relative to the definition of a theft offense[.]

Reyes, ___ B.I.A. at 3. "For that same reason, the statute is overbroad relative to the definition of 'fraud or deceit.'" *Id.* As explained below, this dismissal was erroneous.

II. Under the "categorical approach," an alien has been convicted of an aggravated felony when the elements of the crime of conviction sufficiently match the generic definition of a theft or fraud.

The BIA's error lies in its misapplication of the "categorical approach." The categorical approach is a judicial doctrine used to decide whether a criminal conviction under a specific statute matches the generic definition of a crime. An inquiry utilizing the categorical approach would "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the] generic [crime], while ignoring the particular facts of the case." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016).

Thus, the categorical approach could help determine whether respondent's State statute of conviction fits within the category of "theft" or "fraud" as used generically in the INA, that is, "whether the elements of her State statute of conviction proscribe conduct falling within the Federal generic definition of the offense." *Reyes*, ___ B.I.A. at 2 (citing *Mathis*, 136 S. Ct. at 2248). Here, the elements of respondent's State statute of conviction proscribe conduct falling within the federal generic definition, namely, the definition of theft or fraud. The INA proscribes

both, and designates both as an "aggravated felony." The State statute of conviction proscribes both offenses, as well. No matter "the particular facts of the case"—which in this instance might specify whether respondent's conduct was committed with her victim's consent—either way the proscribed conduct for which respondent was convicted matches a generic federal definition.

A mismatch might occur under the categorical approach if the State statute of conviction also proscribed conduct *other than* that of a federal generic definition. "[I]f the crime of conviction covers any more conduct than the generic offense, then it is not" a conviction under the generic offense. *Mathis*, 136 S. Ct. at 2248. So, if the larceny statute in this case prohibited theft, fraud, and also vandalism, then a conviction under the statute would not necessarily match the federal generic crimes of theft or fraud: the conviction might imply that respondent committed vandalism, a mismatch. In *Mathis*, the State statute of conviction allowed for the possibility of a burglary conviction for entry into vehicles as well as into buildings, causing a mismatch with a federal generic definition of burglary that only applies to buildings. "Iowa's burglary statute, all parties agree, covers more conduct than generic burglary does." *Mathis*, 136 S. Ct. at 2250. Here, by contrast, the State statute of conviction does not cover more conduct than the applicable generic crimes: it only covers theft and fraud, both of which fall under the INA's aggravated felony definitions. It is impossible for a conviction under this State statute of conviction to mismatch the federal definition of theft or fraud: whatever the particular *modus operandi* of a criminal convicted under this statute, his conviction will sufficiently match one of the two generic crimes at issue.

The purpose of the categorical approach is to guarantee that a criminal conviction falls within the generic crime. Thus, the BIA erred by concluding that there was a categorical mismatch even while conceding that the conviction only admits of two possibilities, theft and fraud, both of

which are within the INA's list of generic crimes for aggravated felony purposes. This was a misuse of the categorical approach.

CONCLUSION

For the foregoing reasons, the judgment of the BIA should be reversed.

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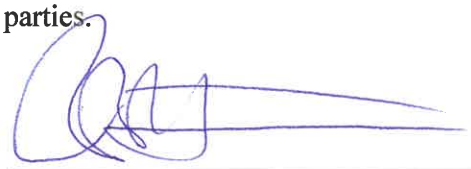
CERTIFICATE OF SERVICE

I hereby certify that, on January 17, 2020, I electronically submitted the foregoing amicus curiae brief to the United States Department of Justice via email to AGCertification@usdoj.gov, and, via first class mail, sent three copies to the Office of the Attorney General at the United States Department of Justice for distribution to the parties.



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