No. 18-273

In the Supreme Court of the United States

RAMON ANDREW WILLIAMS,
AKA ANDREW DENTON WILLIAMSON, PETITIONER

v.

MATTHEW G. WHITAKER, ACTING ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether forgery in the first degree, in violation of Ga. Code Ann. § 16-9-1(a) (2003), is an aggravated felony under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, because it is "an offense relating to * * * forgery," 8 U.S.C. 1101(a)(43)(R).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 880 F.3d 100. The decisions of the Board of Immigration Appeals (Pet. App. 20a-31a) and the Immigration Judge (Pet. App. 32a-62a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2018. A petition for rehearing was denied on May 2, 2018 (Pet. App. 63a-64a). On July 2, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 30, 2018, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, an alien who has been admitted to the United States is removable if the alien is thereafter "convicted of an aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). An alien convicted of an aggravated felony also is ineligible for various forms of relief from removal, such as cancellation of removal. See 8 U.S.C. 1229b(a)(3).

The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses, whether committed "in violation of Federal or State law." 8 U.S.C. 1101(a)(43). As relevant here, the list of qualifying offenses includes "an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year." 8 U.S.C. 1101(a)(43)(R). The INA does not define the term "forgery."

2. a. Petitioner is a native and citizen of Guyana who was admitted to the United States as a lawful permanent resident in 1970. Pet. App. 33a. In 2005, petitioner was arrested in Georgia for possessing several driver's licenses in fictitious names, which petitioner had obtained by providing false information to the department of motor vehicles. *Id.* at 39a; Gov't C.A. Br. 5. In 2006, petitioner pleaded guilty to five counts of forgery in the first degree under Georgia law, an offense punishable "by imprisonment for not less than one nor more than ten years," Ga. Code Ann. § 16-9-1(b) (2003). Pet. App. 4a. At the time, Georgia defined forgery in the first degree as follows:

> A person commits the offense of forgery in the first degree when with intent to defraud he knowingly

> makes, alters, or possesses any writing in a fictitious name or in such manner that the writing as made or altered purports to have been made by another person, at another time, with different provisions, or by authority of one who did not give such authority and utters or delivers such writing.

Ga. Code Ann. § 16-9-1(a) (2003).[1] Petitioner initially received a sentence of two years in prison, which was later reduced to one year. Pet. App. 4a.

In 2013, the Department of Homeland Security (DHS) instituted removal proceedings against petitioner based on his Georgia forgery convictions. Pet. App. 33a. DHS charged petitioner as removable under 8 U.S.C. 1227(a)(2)(A)(iii) as an alien convicted of an aggravated felony—specifically, "an offense relating to * * * forgery," 8 U.S.C. 1101(a)(43)(R). Pet. App. 33a-34a. Petitioner denied the charge, contending that his forgery convictions were not encompassed by Section 1101(a)(43)(R) because they involved "providing false information on genuine documents," and (according to petitioner) most jurisdictions did not consider such conduct forgery at common law. *Id.* at 42a-44a. Petitioner also applied for various forms of relief from removal. See *id.* at 35a.

On May 27, 2015, after a hearing, an immigration judge (IJ) sustained the charge of removability and denied petitioner's requests for relief from removal. Pet. App. 61a-62a. The IJ explained that "[t]he offenses included in [Section 1101(a)(43)(R)] encompass a broader range of conduct than the traditional definitions of the

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[1] In 2012, Georgia amended this provision to cover "any writing, other than a check," and moved it to Section 16-9-1(b). See 2012 Ga. Laws 913; Ga. Code Ann. § 16-9-1(b) (2018).

listed crimes since the offenses described need only 'relate' to * * * those crimes." *Id.* at 42a; see *id.* at 43a ("Unless the words 'relating to' have no effect, the enumerated crime—here, forgery—must not be strictly confined to its narrowest meaning.") (quoting *Drakes* v. *Zimski*, 240 F.3d 246, 249 (3d Cir. 2001)).

b. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 20a-25a. Petitioner again contended that his convictions for first-degree forgery under Georgia law are not offenses "relating * * * to forgery," 8 U.S.C. 1101(a)(43)(R), because "forgery" should be construed narrowly to exclude "the use of a fictitious name when signing a document or obtaining an official document." Pet. App. 21a. The Board disagreed. It noted that even one of the cases cited by petitioner recognized that "the generally accepted rule is that forgery may be committed through the use of a fictitious or assumed name." *Id.* at 22a (quoting *State* v. *Sandoval*, 166 P.3d 473, 479 (N.M. Ct. App. 2007)).

c. Petitioner moved for reconsideration in light of this Court's decision in *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), which was issued after the IJ's decision but before the Board's decision. Pet. App. 27a. According to petitioner, the Georgia statute "punishes conduct that is not forgery or an offense relating to forgery" and "is not divisible" under *Mathis*. *Ibid.* In particular, petitioner asserted for the first time that "the statute punishes the fraudulent assertion of authority to execute documents, such as when an employee authorized to sign corporate documents for corporate purposes signs a corporate check for personal use." *Id.* at 28a. Petitioner pointed to a decision in which the Ninth Circuit had concluded that such conduct was not an offense "relating to * * * forgery" for purposes of 8 U.S.C.

1101(a)(43)(R). See Pet. App. 28a (citing *Vizcarra-Ayala* v. *Mukasey*, 514 F.3d 870 (9th Cir. 2008)).

The Board denied petitioner's motion. Pet. App. 26a-31a. It noted that the California law at issue in *Vizcarra-Ayala* "is not identical to the Georgia statute at issue in [petitioner's] case." *Id.* at 28a. As to the Georgia statute, the Board determined that petitioner had failed to show a "realistic probability" that Georgia would in fact apply the statute "to prosecute conduct that does not qualify as an offense relating to forgery for the purposes of" Section 1101(a)(43)(R). *Id.* at 29a. The Board also concluded that, even if the Georgia statute could theoretically reach some conduct that "does not constitute forgery or an offense relating to forgery," the statute "is divisible" because it "defines the offense of forgery in the first degree in the alternative using disjunctive phrases." *Ibid.* Petitioner's record of conviction demonstrated that he was convicted of "knowingly and with intent to defraud possessing and delivering a writing that purported to have been made by another person," not the type of conduct that petitioner claimed to be "outside the realm of offenses relating to forgery." *Id.* at 30a.

3. The court of appeals denied consolidated petitions for review of the Board's original decision and its decision on reconsideration. Pet. App. 1a-19a. Like the Board, the court unanimously concluded that petitioner's forgery convictions qualify as offenses relating to forgery under Section 1101(a)(43)(R). *Id.* at 3a.

The court of appeals applied "what is known as the 'categorical approach'" in assessing petitioner's prior forgery convictions. Pet. App. 6a-7a (citing *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013)). Under that ap-

proach, an alien's prior conviction qualifies as an aggravated felony only if the prior conviction necessarily required proof of the same elements as an offense listed in Section 1101(a)(43). *Id.* at 7a-8a. Noting that Congress had not "articulated a specific definition" of forgery in the INA, the court reasoned that the term should be given a generic definition drawn from its "traditional common law definition": "'(a) The false making or material alteration (b) with intent to defraud (c) of a writing which, if genuine, might be of legal efficacy.'" *Id.* at 8a (citation omitted). The court also explained, however, that consulting that generic definition "is not enough," because Section 1101(a)(43)(R) encompasses not only forgery but also any offense "*relating to*" forgery. *Ibid.* Under the circuit's approach in those circumstances, a prior offense that is not a "precise match" to generic federal forgery nonetheless relates to forgery if it bears a "'logical or causal connection'" to forgery. *Id.* at 9a (citation omitted).

Applying that analysis, the court of appeals determined that first-degree forgery, in violation of Ga. Code Ann. § 16-9-1(a) (2003), shares a sufficient logical connection to the generic federal offense of "forgery" to qualify as an offense "relating to" forgery for purposes of Section 1101(a)(43)(R). Pet. App. 9a-14a. The court accepted petitioner's contention (which the Board had rejected) that a realistic possibility exists that Georgia might use the statute to prosecute "false agency endorsement" as forgery—that is, a forgery in which a document is false because an agent exceeds his authority in endorsing it, as when a corporate officer signs his own name to a corporate check for personal use. Pet. App. 11a; cf. Ga. Code Ann. § 16-9-1(a) (2003) (prohibiting making or altering a writing "in such manner that

the writing as made or altered purports to have been made * * * by authority of one who did not give such authority"); *Warren* v. *State*, 711 S.E.2d 108, 109 (Ga. Ct. App. 2011) (upholding a first-degree forgery conviction where an employee signed checks drawn on her employer's account, without authority, to pay personal expenses).[2]

The court of appeals then explained that forgery by false agency endorsement is an offense "relating to" generic federal forgery because the offenses "share a logical connection" and "'target the same, core criminal conduct.'" Pet. App. 12a, 13a (citation omitted). In a forgery by false agency endorsement, the agent signs his own name and not a fictitious one, but thereby makes the document false by implication—conduct that, the court continued, "gives rise to essentially the same concerns about the inauthenticity and unauthorized nature of the written instrument" as traditional forgery. *Id.* at 13a. The court found its conclusion "buttresse[d]" by the fact that "the Model Penal Code and a number of state statutes" define "forgery" to include false agency endorsement. *Id.* at 14a. Finally, the court noted that it disagreed with the Ninth Circuit's reasoning in *Vizcarra-Ayala*, *supra*, which had found that a California statute did not relate to forgery for purposes of Section 1101(a)(43)(R) because it did not require proof of a facially false document. See Pet. App. 14a-16a.[3]

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[2] At oral argument, the government conceded that the Georgia first-degree forgery statute is "indivisible" under *Mathis*. Pet. App. 7a n.2. The court of appeals therefore assumed without deciding that the statute is indivisible. *Ibid.*

[3] The court of appeals also rejected petitioner's arguments that the Georgia first-degree forgery statute is missing an element of generic federal forgery and that removing him would violate the

The court of appeals denied rehearing en banc. Pet. App. 63a-64a.

ARGUMENT

The court of appeals correctly determined that petitioner's prior convictions for first-degree forgery, in violation of Ga. Code Ann. § 16-9-1(a) (2003), are aggravated felonies under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, because Georgia first-degree forgery is an offense "relating to * * * forgery," 8 U.S.C. 1101(a)(43)(R). That decision does not conflict with any decision of this Court, nor does it implicate any division of authority in the courts of appeals warranting review. The Third Circuit disagreed in part with the reasoning of a Ninth Circuit decision, but the two cases concerned materially different California and Georgia statutes. Review is also unwarranted at this time because the Board has yet to address the issue in a precedential decision. Accordingly, the petition should be denied.

1. The court of appeals correctly held that first-degree forgery, in violation of Ga. Code Ann. § 16-9-1(a) (2003), is categorically an offense "relating to * * * forgery," 8 U.S.C. 1101(a)(43)(R). Pet. App. 3a.

a. Under the "categorical approach" that is generally used to determine whether a state offense qualifies as an aggravated felony listed in the INA, the state offense "is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved . . . facts equating to the generic federal offense." *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013)

Eighth Amendment. Pet. App. 16a-19a & n.5. The court noted that petitioner had abandoned his claims for relief from removal. *Id.* at 4a n.1. Petitioner does not renew any of those arguments here.

(brackets, citation, and internal quotation marks omitted); see, *e.g.*, *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007). In 8 U.S.C. 1101(a)(43)(R), however, Congress included as aggravated felonies not merely the offense of "forgery" but also any offense "relating to" forgery. The ordinary meaning of the phrase "relating to" "is a broad one—'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). "Congress characteristically employs the phrase to reach any subject that has 'a connection with, or reference to,' the topics the statute enumerates." *Coventry Health Care of Mo., Inc.* v. *Nevils*, 137 S. Ct. 1190, 1197 (2017) (quoting *Morales*, 504 U.S. at 384).

For that reason, it is well established among the courts of appeals that the phrase "relating to" in Section 1101(a)(43)(R) indicates that the provision encompasses more than merely generic forgery or the generic form of the other listed offenses. Indeed, all of the cases petitioner holds up as correctly decided (Pet. 9-10) reflect that consensus. See *United States* v. *Villafana*, 577 Fed. Appx. 248, 251-252 (5th Cir. 2014) (per curiam) ("[O]ur inquiry does not end [with the generic definition]. The state court records clearly establish that Villafana was charged and convicted of a crime *relating to* the Model Penal Code's definition of forgery."); *United States* v. *Martinez-Gonzalez*, 663 F.3d 1305, 1308 (11th Cir. 2011) (per curiam) ("[T]he violation of a state law proscribing the possession of a forged document with the intent to defraud is a crime related to forgery under § 1101(a)(43)(R)."); *Nwagbo* v. *Holder*, 571 F.3d 508, 511 (6th Cir. 2009) ("To limit [Section 1101(a)(43)(R)] to

cases of actual counterfeiting would be to read the phrase 'relating to' out of the statute."); *Magasouba* v. *Mukasey*, 543 F.3d 13, 15 (1st Cir. 2008) (per curiam) ("By employing that phrase, 'Congress evidenced an intent to define the listed offenses in their broadest sense.'") (brackets and citation omitted); *United States* v. *Chavarria-Brito*, 526 F.3d 1184, 1186 (8th Cir. 2008) ("The words 'relating to' make it apparent that many crimes that are not specifically listed in 8 U.S.C. § 1101(a)(43)(R) will constitute an aggravated felony as long as they are related to the crimes listed.") (citing *Morales*, 504 U.S. at 383-384); *Richards* v. *Ashcroft*, 400 F.3d 125, 129-130 (2d Cir. 2005) (Sotomayor, J.) ("Even if possession of a forged instrument with intent to defraud * * * is not 'forgery' as defined at common law, it is unarguably an offense 'relating to' forgery within the broad construction we have given that term.").

b. Although petitioner does not take issue with the principle that Section 1101(a)(43)(R) encompasses more than merely generic forgery, he contends (Pet. 1-2, 10-11) that the Third Circuit went too far in the decision below. The crux of petitioner's argument is that Ga. Code Ann. § 16-9-1(a) (2003) encompasses the crime of "false agency endorsement"—an agent's endorsement of a document without authority—and that false agency endorsement does not fall within the scope of Section 1101(a)(43)(R) because it does not require "proof of a false instrument." Pet. 10.

Petitioner's premise that the generic definition of "forgery" applicable under 8 U.S.C. 1101(a)(43)(R) excludes false agency endorsement is unfounded. The common-law definition of forgery at one time "excluded so-called 'false agency endorsements,' in which an agent endorses an instrument on his principal's behalf, and

signs his own true name, but lacks actual authority to make the endorsement." *United States* v. *Hunt*, 456 F.3d 1255, 1260 (10th Cir. 2006) (citing *Gilbert* v. *United States*, 370 U.S. 650, 657 (1962)). But the Model Penal Code rejected that distinction, as have numerous States in their modern criminal codes. See Model Penal Code § 224.1(1)(b) (1985) (defining "forgery" to include making or uttering a writing "so that it purports to be the act of another who did not authorize that act"); Model Penal Code § 224.1 cmt. 4(b), at 293 (1980) (*MPC Commentary*) ("Such a defect of authority goes to the authenticity of the document as much as an unauthorized signing that does not purport to be by an agent."); Pet. App. 14a (collecting state code citations and describing false agency endorsement as falling within "a broad minority definition of forgery") (internal quotation marks omitted). This Court has made clear that those sources can be instructive in determining the "generic" offense Congress intended. See, *e.g.*, *Taylor* v. *United States*, 495 U.S. 575, 598-599 & n.8 (1990) (considering the Model Penal Code and contemporary state codes to ascertain the elements of generic "burglary" under 18 U.S.C. 924(e)); cf. *Martinez-Gonzalez*, 663 F.3d at 1310 (explaining that "in modern usage, the concept of forgery is broader" than at common law).

Even granting petitioner's premise, however, the court of appeals was also correct in concluding that false agency endorsement is, at a minimum, an offense "relating to" generic forgery. Pet. App. 9a-16a. As the court explained, even petitioner's narrow understanding of "forgery" would cover the act of an agent falsely marking a document "by authority of" his principal, when the agent acts without authority. *Id.* at 13a. In that case, the instrument itself would be false on its

face, which petitioner contends is an "essential element" of forgery. Pet. 1 (citation omitted). But false agency endorsement involves the same deceit, committed by implication. Although the agent signs his own genuine name, his false endorsement "gives rise to essentially the same concerns about the inauthenticity and unauthorized nature of the written instrument," and statutes prohibiting it "'target the same, core criminal conduct'" as traditional common-law forgery. Pet. App. 13a (citation omitted); accord *MPC Commentary* 293 ("There is no reason in principle to distinguish [false agency endorsement] from others that are properly within the concept of forgery."). The offenses thus share a "logical connection," targeting substantially similar conduct for similar reasons. Pet. App. 13a; cf. *Morales*, 504 U.S. at 384 (construing the phrase "relating to" to include "having a connection with").

c. Petitioner asserts (Pet. 14-18) that the decision below conflicts with this Court's decision in *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015), but that is incorrect. In *Mellouli*, the Court considered whether a state conviction for possession of drug paraphernalia was a crime "relating to a controlled substance (as defined in section 802 of Title 21)," where the state offense could be committed without proof that the relevant substance was in fact listed in 21 U.S.C. 802. *Mellouli*, 135 S. Ct. at 1984 (quoting 8 U.S.C. 1227(a)(2)(B)(i)). The Court recognized that the words "relating to" are "broad." *Id.* at 1990 (citations omitted). But it found that the context of that provision—in particular, its "historical background"—demonstrated that Congress intended to require "a direct link between an alien's crime of conviction and a particular federally controlled drug." *Ibid.*

Petitioner identifies no analogous context or historical background that would "tug . . . in favor of" the narrow reading he urges here. *Mellouli*, 135 S. Ct. at 1990 (brackets and citation omitted). Moreover, *Mellouli* did not establish a general rule that "the phrase 'relating to'" in the INA always "requires a 'direct link' between the offense of conviction and whatever object is modified by the words 'relating to.'" Pet. 16; cf. *In re Gruenangerl*, 25 I. & N. Dec. 351, 355 (B.I.A. 2010) ("The courts of appeals * * * and the Board have consistently ruled that the phrase 'relating to' has an expansive meaning, particularly when it is used with a general term like 'counterfeiting' or 'controlled substance,' rather than with a specific statutory reference."). Even if *Mellouli* could be read so broadly, false agency endorsement has a direct link to generic forgery for the same reasons that the court of appeals found the crimes related. See pp. 11-12, *supra*.[4]

d. Finally, petitioner argues (Pet. 18-20) that Section 1101(a)(43)(R) as construed by the Third Circuit is unconstitutionally vague in light of *Sessions* v. *Dimaya*, 138 S. Ct. 1204 (2018), and *Johnson* v. *United States*, 135 S. Ct. 2551 (2015). To the extent petitioner argues that the Court should grant review to consider the constitutionality of Section 1101(a)(43)(R), that argument is not properly before the Court, because petitioner's own framing of the question presented (Pet. i) makes no

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[4] Petitioner suggests (Pet. 17-18) that the decision below portends treating any "fraud and deceit offenses" as offenses relating to forgery, but there is no basis for that suggestion in the Third Circuit's decision, which was limited to false agency endorsement. Petitioner also adverts (Pet. 11-12) to the use of "relating to" in other provisions of the INA, but he does not argue that the decision below conflicts with any decision interpreting those other provisions.

mention of any constitutional issues. See Sup. Ct. R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535 (1992) (noting that "[t]he framing of the question presented has significant consequences" because the Court "ordinarily do[es] not consider questions outside those presented in the petition"). Even if the question were properly presented here, it would not merit review. Petitioner does not assert that there is any disagreement in the lower courts on the constitutionality of Section 1101(a)(43)(R) (and there is not), and the statute, as construed below, does not contain either of the features that led this Court to find the provisions at issue in *Johnson* and *Dimaya* unconstitutional. See *Dimaya*, 138 S. Ct. at 1213-1216.[5] Because the statutory text is clear and does not give rise to any serious constitutional concerns, the avoidance canon (Pet. 20) has no application here.

2. Petitioner contends (Pet. 8-11) that the decision below conflicts with the Ninth Circuit's decision in *Vizcarra-Ayala* v. *Mukasey*, 514 F.3d 870 (2008). That decision concerned a materially different state statute, and the Ninth Circuit has otherwise approached Section 1101(a)(43)(R) in a manner consistent with the Third

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[5] In *Dimaya*, the Court held that the definition of a "crime of violence" in 18 U.S.C. 16(b), as incorporated into various provisions of the INA, is unconstitutionally vague because it requires courts "to identify a crime's 'ordinary case' in order to measure the crime's risk," and it leaves "fatal * * * uncertainty about the level of risk that makes a crime 'violent.'" 138 S. Ct. at 1215. *Johnson* reached a similar conclusion with respect to the residual clause of the definition of "violent felony" in 18 U.S.C. 924(e)(2)(B)(ii). 135 S. Ct. at 2557-2558. By contrast, Section 1101(a)(43)(R) does not require a court to hypothesize the "ordinary case" of forgery, *Dimaya*, 138 S. Ct. at 1215, nor does it turn on assessing the risk of that "judge-imagined abstraction," *Johnson*, 135 S. Ct. at 2558.

Circuit—both before and after *Vizcarra-Ayala*. The Third Circuit's acknowledged disagreement with one aspect of *Vizcarra-Ayala*'s reasoning does not merit this Court's review.

In *Vizcarra-Ayala*, the Ninth Circuit considered whether a conviction under Cal. Penal Code § 475(c) (West 2005) qualifies as an offense "relating to * * * forgery," 8 U.S.C. 1101(a)(43)(R). 514 F.3d at 872. The California statute provides that "[e]very person who possesses any completed check, money order, traveler's check, warrant or county order, whether real or fictitious, with the intent to utter or pass or facilitate the utterance or passage of the same, in order to defraud any person, is guilty of forgery." Cal. Penal Code § 475(c) (West 2005). On its face, that statute sweeps considerably more broadly than the Georgia statute at issue here. The California statute covers the possession of a check or certain other documents "whether real or fictitious," as long as the document is possessed with the intent to utter or pass it "in order to defraud," *ibid.*—regardless of whether the document has been altered or made to appear genuine or authorized. As the Ninth Circuit noted, see *Vizcarra-Ayala*, 514 F.3d at 876, California has prosecuted a defendant under that statute for signing her real name to and cashing checks that she received in the mail and knew were intended for a third party. See *People* v. *Viel*, No. D044101, 2005 WL 904806 (Cal. Ct. App. Apr. 20, 2005) (unpublished). The defendant in that case did not falsely imply that she was an agent of the third party. See *id.* at *1-*2.

Applying the categorical approach, the Ninth Circuit reasoned that the California statute did not require proof of facts that would establish "generic forgery" for purposes of 8 U.S.C. 1101(a)(43)(R). *Vizcarra-Ayala*,

514 F.3d at 876. The court of appeals identified the elements of generic forgery in substantially the same terms as the decision below: "(1) a false making of some instrument in writing; (2) a fraudulent intent; and (3) an instrument apparently capable of effecting a fraud." *Id.* at 874 (brackets and citation omitted); see Pet. App. 8a. In the Ninth Circuit's view, the California statute did not match generic forgery because it did not require that "the document [be] falsified in any way." *Vizcarra-Ayala*, 514 F.3d at 876. In reaching that conclusion, the court discussed both *Viel*, and a second decision in which California had prosecuted a defendant under the statute for writing a check on her employer's account to "cash," without authorization, to use for personal expenses. *Id.* at 876-877 (discussing *People* v. *Leonard*, No. G032720, 2004 WL 2610365 (Cal. Ct. App. Nov. 17, 2004) (unpublished)). Finally, the court determined that the California statute did not define an offense "relating to" forgery because "[e]xpanding the definition of offenses 'relating to' forgery to include conduct where documents are not altered or falsified stretches the scope too far." *Id.* at 877.

The Third Circuit disagreed only with the final step of the Ninth Circuit's reasoning and its "ultimate conclusion." Pet. App. 15a; see *id.* at 16a ("[W]e respectfully disagree with the premise that the falsity of the instrument must be reflected on its face in order for conduct to 'relate to' forgery.").[6] That minor disagreement does not warrant this Court's review. No other

[6] The Third Circuit was plainly right to reject the Ninth Circuit's reasoning on that point. The Ninth Circuit did not discuss the ordinary meaning of the phrase "relating to," and the court appeared

court of appeals has considered whether Georgia first-degree forgery is an aggravated felony under the INA, nor has any other court decided the more general question of whether a state statute prohibiting forgery by false agency endorsement qualifies as an offense "relating to" forgery under 8 U.S.C. 1101(a)(43)(R).

Moreover, resolving the question whether false agency endorsement is an offense that relates to generic federal forgery would not even necessarily affect the different outcomes in *Vizcarra-Ayala* and the decision below, because the California statute sweeps more broadly than the Georgia statute in other ways. As discussed at p. 15, *supra*, California has interpreted its statute to cover a defendant's act of signing his real name to a check, without any false agency endorsement, where the defendant acts with fraudulent intent. See *Viel*, 2005 WL 904806, at *1-*2 (defendant signed her real name to a check she knew was intended for a third party, with whom she had no real or implied agency relationship); see also *People* v. *Mathers*, 183 Cal. App. 4th 1464, 1468 (2010) (stating that, where the defendant intended to pass checks on an account he knew to have already been closed, the defendant's "fraudulent intent" rendered possession of the checks "illegal under section[] 475, subdivision (c)," even though the checks "were genuine rather than fictitious").

The question presented also does not implicate any larger disagreement about the "relating to" language in 8 U.S.C. 1101(a)(43)(R). The Ninth Circuit has made clear both before and after *Vizcarra-Ayala* that, like

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not to appreciate that the Model Penal Code and some modern criminal codes define "forgery" to include false agency endorsement. See pp. 10-11, *supra*.

the Third Circuit, it construes the "relating to" language in Section 1101(a)(43)(R) broadly to reach more than merely generic forgery. See *Addy* v. *Sessions*, 696 Fed. Appx. 801, 804 (9th Cir. 2017) ("The use of a forged instrument is also clearly related to forgery because it is an activity 'ancillary to the core offense' of forgery.") (quoting *Vizcarra-Ayala*, 514 F.3d at 877); *Albillo-Figueroa* v. *INS*, 221 F.3d 1070, 1073 (9th Cir. 2000) ("Section [1101](a)(43)(R) necessarily covers a range of activities beyond those of counterfeiting or forgery itself.").

3. Even if the Court were inclined to consider in an appropriate future case whether forgery by false agency endorsement is an offense "relating to * * * forgery," 8 U.S.C. 1101(a)(43)(R), review would still be unwarranted at this time. The Board has yet to address the question presented in a precedential decision. It did not do so here, in part because it resolved the case on the alternate ground that the Georgia first-degree forgery statute is divisible and petitioner was convicted of violating the portion of the statute directed to common-law forgery. Pet. App. 29a-30a. Were the Board to address the issue, its decision would be entitled to deference and could resolve the shallow divergence in approach between the Third and Ninth Circuits without this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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