Immigration and Nationality Act — Aggravated Felony — Luna Torres v. Lynch

The stakes are high in deportation cases, and the gravity of each decision is matched by the complexity of the legal doctrine. One type of complexity arises when courts must decide whether an alien's prior criminal conviction satisfies a federal predicate for deportation. Courts address this challenge with the so-called "categorical approach": they examine the statute under which an alien was convicted and ask whether the minimum conduct the statute reaches is also covered by a federal statute mandating deportation. If so, the two statutes are a categorical match, and the alien qualifies for deportation.

Last Term, in *Luna Torres v. Lynch*,[1] the Supreme Court made it easier for the government to show a categorical match. It held that courts using the categorical approach should ignore the "jurisdictional element" of a federal criminal statute when deciding whether a state offense is "described in" the federal statute.[2] The Court saw that the jurisdictional element would almost always prevent a categorical match by driving a wedge between the state and federal criminal laws. It refused to let such a minor disparity frustrate the immigration system. Though the decision to ignore jurisdictional elements marks a shift in the categorical approach, the reasons for the shift are the same as those given for past developments in this area of the law: the ruling dodged perverse outcomes, had a statutory hook, and injected no new factfinding into the deportation process.

In 1999, New York state prosecutors charged George Luna with arson, grand larceny, and possession of burglary tools.[3] Luna, a lawful permanent resident from the Dominican Republic, pleaded guilty to attempted arson and served one day in jail.[4] From that moment, he was caught in the tangled web of the Immigration and Nationality Act (INA).[5] Under the INA, the government must deport certain aliens who are convicted of "aggravated felon[ies]."[6] The INA defines "aggravated felony" with a list of about eighty offenses.[7] The law identifies some of the offenses with generic terms: "murder" and "rape," for example, are always aggravated felonies.[8] The INA also provides that

---

[1] 136 S. Ct. 1619 (2016).

[2] *Id.* at 1623; *see, e.g.*, 18 U.S.C. § 1956(c)(4)(A) (2012) (using a jurisdictional element to criminalize money laundering that "affects interstate or foreign commerce").

[3] *See* Brief for the Respondent at 4, *Luna Torres*, 136 S. Ct. 1619 (No. 14-1096).

[4] *See Luna Torres*, 136 S. Ct. at 1623.

[5] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

[6] 8 U.S.C. § 1227(a)(2)(A)(iii) (2012); *see id.* § 1229b(a)(3).

[7] *See id.* § 1101(a)(43).

[8] *Id.* § 1101(a)(43)(A).

any offense "described in" certain other parts of the U.S. Code is an aggravated felony. For instance, an offense is an aggravated felony if it is "described in" the federal child pornography statute[9] or the federal arson statute.[10] The end of the list specifies that an offense is an aggravated felony "whether in violation of Federal or State law."[11]

The government contended that Luna's state arson conviction[12] was for an aggravated felony "described in" the federal arson statute[13] and therefore sought to deport him.[14] The elements of the two crimes almost match: the statutes punish the same mens rea and reach the same conduct targeting the same property. But the federal statute contains an "interstate commerce" element,[15] inserted to provide federal jurisdiction under the Commerce Clause. By contrast, the New York law contains no such jurisdictional hook. Luna's fate hinged on whether, despite the omission, the minimum conduct criminalized by New York's statute was still "described in" the federal statute.[16]

An Immigration Judge ruled that it was, and the Board of Immigration Appeals (BIA) affirmed.[17] Both rulings relied on a prior BIA decision concluding that the New York arson statute was "described in" the federal arson statute.[18] The federal law's additional "jurisdictional element" didn't matter.[19]

The Second Circuit affirmed. Writing for the panel, Judge Sack[20] noted that the statute's "described in" standard was relatively broad.[21] The court held that the statute was ambiguous and thus that the BIA's interpretation deserved deference if it was reasonable. The court concluded that it was.[22] The government had to deport Luna.

---

9 *Id.* § 1101(a)(43)(I) (referencing 18 U.S.C. §§ 2251–2252 (2012)).

10 *Id.* § 1101(a)(43)(E)(i) (referencing, among other statutes, 18 U.S.C. § 844(i)).

11 *Id.* § 1101(a)(43).

12 The New York arson statute provides: "A person is guilty of arson in the third degree when he intentionally damages a building or motor vehicle by starting a fire or causing an explosion." N.Y. PENAL LAW § 150.10(1) (McKinney 2010).

13 The federal arson statute provides: "Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" is guilty of arson. 18 U.S.C. § 844(i).

14 *See Luna Torres*, 136 S. Ct. at 1623.

15 The targeted property must be "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." 18 U.S.C. § 844(i).

16 *See Luna Torres*, 136 S. Ct. at 1623.

17 *Id.* at 1623–24.

18 *See* Luna Torres v. Holder, 764 F.3d 152, 154 (2d Cir. 2014) (citing *In re* Bautista, 25 I. & N. Dec. 616 (B.I.A. 2011)).

19 *Bautista*, 25 I. & N. Dec. at 620.

20 Judge Sack was joined by Judges Raggi and Chin.

21 *Luna Torres*, 764 F.3d at 157.

22 *Id.* at 158.

The Supreme Court affirmed. Writing for the Court, Justice Kagan[23] held that a state offense is an aggravated felony if it is an element-for-element match with a federal offense "in all ways but one" — namely, if the state offense lacks a federal jurisdictional hook.[24] The Court started with the INA's plain text: "The term 'aggravated felony' means . . . an offense described in" the federal arson statute.[25] The word "described" *could* mean "set forth," requiring the state offense to include every single element of the federal law.[26] But it could also have a "looser meaning," requiring the state statute to contain only the federal law's "core, substantive elements."[27] The "bare term," read in isolation, couldn't get the Court to a holding.[28] So the Court relied on two "contextual considerations" instead.[29]

The first context clue was the end of the INA's aggravated felony list: "The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law . . . ."[30] This was Congress's way of saying that a criminal law's source was "irrelevant."[31] Meanwhile, a strict "jot-for-jot" approach, disqualifying state offenses simply for lacking federal jurisdictional hooks, would produce "upside-down" results.[32] About half of the federal predicates in the aggravated felony list contain jurisdictional elements, meaning that almost no conviction under state law would ever be "described in" these predicates.[33] Worse yet, the crime's gravity has no bearing on whether the federal predicate contains a jurisdictional element. The predicates for kidnapping and child pornography have jurisdictional hooks (and thus would *not* "describe" state convictions for those offenses), while predicates for forgery and possessing a firearm without a serial number have no jurisdictional hook (and thus *would* "describe" state convictions).[34] In other words, the "gravest" state crimes would not be aggravated felonies, but "comparatively minor" state crimes would.[35] The jot-for-jot reading therefore contravened the first context clue's core message: "[T]he national, local, or foreign character of

---

[23] Justice Kagan was joined by Chief Justice Roberts and Justices Kennedy, Ginsburg, and Alito.

[24] *Luna Torres*, 136 S. Ct. at 1623.

[25] 8 U.S.C. § 1101(a)(43)(E) (2012).

[26] *Luna Torres*, 136 S. Ct. at 1625.

[27] *Id.*

[28] *Id.* at 1625–26.

[29] *Id.* at 1626.

[30] *Id.* (alteration in original) (quoting 8 U.S.C. § 1101(a)(43)).

[31] *Id.*

[32] *Id.* at 1627–28.

[33] *Id.* at 1627.

[34] *See id.* at 1628.

[35] *Id.*

a crime has no bearing on whether it is grave enough to warrant an alien's automatic removal."[36]

The next context clue was the fact that courts often distinguish between jurisdictional and substantive elements. The Court highlighted three examples of this strategy at work. First, federal courts require a mens rea as to every element of a criminal offense — except for the element "that confers federal jurisdiction."[37] Second, courts disregard jurisdictional elements when deciding whether a state statute has a federal counterpart so similar that the state law need not apply on exclusively federal enclaves like military bases.[38] Third, courts set aside federal jurisdictional elements when applying the three-strikes law,[39] which asks them to decide whether state offenses are "described in" federal statutes.[40] In sum, jurisdictional and substantive elements "are not created equal."[41]

The Court then disposed of Luna's best argument. Luna had pointed out that Congress knew of two ways to tell courts to ignore jurisdictional elements. First, Congress could have used the generic term "arson," as it had with murder, rape, theft, burglary, bribery, forgery, and perjury.[42] But the Court explained that referencing a specific statute enabled Congress to incorporate more than "garden-variety arson"; the federal arson statute reached explosives offenses, too.[43] Second, Congress could have specified that a state statute matching every substantive element of the federal arson law would be described in the federal law "if a circumstance giving rise to Federal jurisdiction had existed" — language Congress had used to correct a similar jurisdictional mismatch in the Bail Reform Act of 1984.[44] The Court acknowledged that Congress could indeed have drafted the INA more precisely. But a drafting imperfection should not change the "right and fair reading of the statute": a state offense is "described in" a federal statute if it matches every federal element except for the jurisdictional hook.[45]

---

[36] *Id.* at 1629.

[37] *Id.* at 1631 (quoting United States v. Feola, 420 U.S. 671, 677 n.9 (1975)).

[38] *Id.* (citing Lewis v. United States, 523 U.S. 155, 165 (1998)).

[39] 18 U.S.C. § 3559(c)(1) (2012).

[40] *Luna Torres*, 136 S. Ct. at 1632 (citing United States v. Rosario-Delgado, 198 F.3d 1354, 1357 (11th Cir. 1999) (per curiam); United States v. Wicks, 132 F.3d 383, 386–87 (7th Cir. 1997)).

[41] *Id.* at 1630.

[42] *See id.* at 1633; *see also* 8 U.S.C. § 1101(a)(43)(A) (2012) (murder and rape); *id.* § 1101(a)(43)(G) (theft and burglary); *id.* § 1101(a)(43)(R) (bribery and forgery); *id.* § 1101(a)(43)(S) (perjury).

[43] *Luna Torres*, 136 S. Ct. at 1633.

[44] *Id.* (quoting 18 U.S.C. § 3142(e)(2)(A)).

[45] *Id.* at 1634.

Justice Sotomayor dissented.[46] She advocated using the approach the Court had taken "in every case to date": the state offense must "match *every* element" of the federal statute.[47] Since the state statute lacked a jurisdictional element, the case was "closed."[48]

The dissent asserted that the plain text of the statute — an offense *described* in the federal arson law — mandated the element-for-element match. The opinion posited an ad "describing" an apartment with in-unit laundry, a dishwasher, and roof access.[49] Though vague, the description still made clear that the apartment "*at least*" had roof access; if the apartment lacked roof access, the ad "*mis* describe[d]" the apartment.[50] Similarly, the federal arson statute, with its jurisdictional element, misdescribed the New York arson law.[51]

The dissent doubted that dangerous criminals would get off scot-free under its reading. Instead, the INA's three "overlapping provisions" would ensure that serious crimes are "adequately captured."[52] First, the aggravated felony list has a built-in safety net: any "crime of violence" is an aggravated felony.[53] Second, the INA's "overlapping structure" extends beyond the aggravated felony list; other offenses, including crimes of moral turpitude, can lead to automatic deportation.[54] Third, finding that an offense is not automatically deportable is not the same as letting a criminal alien go free; the Attorney General can usually order deportation anyway, "whether or not [a] criminal has been convicted of an aggravated felony."[55] Thus, the INA's intertwining coverage was enough to ensure that dangerous aliens stay off America's streets. The statute didn't need a strained reading of the aggravated felony list to accomplish that task.

Finally, the dissent contended that jurisdictional elements are substantively important. Would Congress really be crazy to think that federal arson offenses are "more uniformly serious" than their state counterparts and, therefore, to count only federal convictions as aggravated felonies?[56] The dissent didn't think so. After all, *Jones v. United States*[57] held that the federal arson statute did not reach the arson of a home with only a "passive, passing, or past" connection to inter-

---

[46] Justice Sotomayor was joined by Justices Thomas and Breyer.

[47] *Luna Torres*, 136 S. Ct. at 1635–36 (Sotomayor, J., dissenting).

[48] *Id.* at 1634.

[49] *Id.* at 1636.

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] 8 U.S.C. § 1101(a)(43)(F) (2012).

[54] *Luna Torres*, 136 S. Ct. at 1637 (Sotomayor, J., dissenting) (citing 8 U.S.C. § 1227(a)(2)(A)(i), (B)(i), (C); *id.* § 1182(a)(2)(A)(i)–(ii)).

[55] *Id.*

[56] *Id.* at 1641.

[57] 529 U.S. 848 (2000).

state commerce.[58] To the dissent, that holding demonstrated that the jurisdictional element was neither "technical" nor "trivial."[59] Instead, the element ratcheted up "the magnitude and nature of the 'evil'" Congress sought to outlaw.[60]

Luna Torres is a new chapter in the history of the categorical approach, a method courts use to decide whether the minimum conduct that one statute criminalizes is also criminalized by another statute. The holding — that in seeking an element-for-element match between two statutes, courts must ignore jurisdictional elements — marks a shift in the approach. But in another sense, *Luna Torres* is more of the same: as in previous developments in the categorical approach, the Court avoided perverse results, grounded its holding in the text, and introduced no new factfinding to the immigration system.

Courts have applied the categorical approach for over a century.[61] The approach stops judges from looking into the facts of a defendant's predicate conviction. Relitigating the facts of a long-ago case hampers "efficiency, fairness, and predictability."[62] Rather than focus on the facts, courts presume that the prior state conviction "rested upon [nothing] more than th[e] least of" the activity outlawed by the state law, and then decide whether the federal law reaches that activity as well.[63] In other words, a categorical, element-for-element match only exists if the minimum conduct criminalized by the state statute is also encompassed in the federal definition.[64]

The categorical approach has recently undergone three developments. The first, beginning with *Taylor v. United States*,[65] arose in response to state criminal codes containing divisible statutes — that is, statutes that "list elements in the alternative, and thereby define multiple crimes."[66] For example, imagine that a state burglary statute prohibits lawful entry *or* unlawful entry with intent to steal, while federal generic burglary only reaches *unlawful* entry. If a defendant were convicted of the state crime, then a federal court would need to know whether the entry was lawful.[67] To solve this problem, *Taylor* and its progeny "modified" the categorical approach by expanding the uni-

---

[58] *Luna Torres*, 136 S. Ct. at 1641 (Sotomayor, J., dissenting) (quoting *Jones*, 529 U.S. at 855).

[59] *Id.* at 1641–42.

[60] *Id.* at 1642 (quoting *id.* at 1630 (majority opinion)).

[61] *See, e.g.*, United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914).

[62] Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015).

[63] Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013) (alterations in original) (quoting Johnson v. United States, 559 U.S. 133, 137 (2010)).

[64] Mathis v. United States, 136 S. Ct. 2243, 2247 (2016).

[65] 495 U.S. 575 (1990).

[66] *Mathis*, 136 S. Ct. at 2249.

[67] *Id.*

verse of data available to courts.[68] When faced with a divisible statute, a court could examine certain record documents, including the indictment and plea agreement.[69]

Gonzales v. Duenas-Alvarez[70] marked the next development in the categorical approach. There, the circuit court had reasoned that under California law, "one might 'aid' or 'abet' a theft without taking or controlling property," which was required for liability under generic federal "theft."[71] This reasoning meant that California theft law reached more conduct than its federal counterpart.[72] Unconvinced, the Supreme Court held that it would take more than "legal imagination" to show that a state criminal statute swept more broadly than a federal statute.[73] The Court demanded "a realistic probability, not a theoretical possibility," of a categorical mismatch.[74]

The categorical approach's third development, *Nijhawan v. Holder*,[75] arose because no widely applicable federal fraud statute required that a jury find a *specific* amount of loss to a fraud victim.[76] Yet the INA's aggravated felony list provided that only fraud offenses "in which the loss to the victim or victims *exceeds $10,000*" were aggravated felonies.[77] The upshot was that almost no federal fraud conviction would ever qualify as an aggravated felony because an element-for-element mismatch was practically inevitable. To solve the problem, the Court sidestepped the categorical approach: the INA's loss amount wasn't an element at all.[78] In deviating from the categorical approach, *Nijhawan* gave courts free rein to "inquire into the facts underlying the loss" to fraud victims.[79]

As the legal issue in *Luna Torres* wound its way through the judicial system, circuit courts applied the categorical approach with varying degrees of rigidity. The Fifth Circuit, for instance, did not strictly apply the categorical approach. Instead, it presaged the *Luna Torres* decision by holding that the approach did not require a match between jurisdictional elements.[80] The Third Circuit disagreed, holding that the New York arson statute simply failed to "match the elements" of

---

[68] *E.g.*, Descamps v. United States, 133 S. Ct. 2276, 2283–84 (2013).
[69] *See* Shepard v. United States, 544 U.S. 13, 16 (2005).
[70] 549 U.S. 183 (2007).
[71] *Id.* at 188.
[72] *Id.*
[73] *Id.* at 193.
[74] *Id.*
[75] 557 U.S. 29 (2009).
[76] *Id.* at 39.
[77] 8 U.S.C. § 1101(a)(43)(M)(i) (2012) (emphasis added).
[78] *Nijhawan*, 557 U.S. at 32.
[79] Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1702 (2011).
[80] *See* Nieto Hernandez v. Holder, 592 F.3d 681, 686 (5th Cir. 2009).

the federal arson statute.[81] The *Luna Torres* dissent picked up the Third Circuit's mantle, emphasizing that the Court had "always" required a match between "*every* element" of the state and federal statutes.[82] It argued that by dropping that requirement for jurisdictional elements, the Court was distorting the categorical approach.

The dissent is correct: *Luna Torres* does change the categorical approach. But in three ways, its shift is consistent with previous developments. First, *Luna Torres* is consistent in its desire to avoid perverse results. Second, the case is in line with past emphasis on a textual justification for deviating from the categorical approach. Third, the decision preserves the approach's purpose by injecting no new factfinding into the immigration system.

First, *Luna Torres* is in keeping with past shifts because it reflects the Court's desire to avoid perverse results. *Taylor* justified its "modified" categorical approach by pointing out that Congress sought "fundamental fairness" — it wanted to ensure that "the same type of conduct is punishable on the Federal level in all cases."[83] The "most formalistic" categorical approach would have allowed violent recidivists to escape heightened punishment "based solely on the fortuity of where they had committed their previous crimes."[84] *Taylor* rejected such a random outcome.

Duenas-Alvarez similarly tweaked the categorical approach in demanding "a realistic probability, not a theoretical possibility," that the state statute would apply to conduct beyond the scope of the federal crime.[85] To allow aliens to find a mismatch based on outlandish hypotheticals might have been more faithful to the strictest form of the approach, but it would have defeated the statute's purpose. Instead, the Court opted to be "realistic" about what conduct would slip through the cracks between the state and federal statutes.

Nijhawan also deviated from the categorical approach to avoid thwarting the statute's purpose. That approach — searching for a match to the INA's "exceeds $10,000" clause — would have sapped the fraud prong of the aggravated felony list of any "meaningful application."[86] To avoid "so limited and so haphazard" an application of the INA, the Court deviated from the categorical approach.[87]

---

81 Bautista v. Att'y Gen., 744 F.3d 54, 56 (3d Cir. 2014).
82 *Luna Torres*, 136 S. Ct. at 1635 (Sotomayor, J., dissenting).
83 Taylor v. United States, 495 U.S. 575, 582 (1990) (quoting S. REP. NO. 98-190, at 20 (1983)).
84 Shepard v. United States, 544 U.S. 13, 30 (2005) (O'Connor, J., dissenting).
85 Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).
86 Nijhawan v. Holder, 557 U.S. 29, 39 (2009).
87 *Id.* at 40.

Like its predecessors, *Luna Torres* strove to avoid "perverse" results.[88] The Court worried that requiring a full element-for-element match would mean that some minor criminals would face automatic deportation, while more serious criminals would not.[89] Thus, an unbending application of the categorical approach would lead to "utterly random" outcomes.[90] The dissent accused the Court of basing its conclusion on "an intuition about how the statute ought to work."[91] That characterization may be true; the Court thought it saw a potential perverse result and sought to avoid it. But avoiding haphazard outcomes is exactly how the Court has refined the categorical approach in the past.

The second way *Luna Torres* fits with past developments is its textual justification. In this way, *Luna Torres*'s shift was more firmly grounded than *Taylor* and *Duenas-Alvarez*, neither of which had a textual hook. In *Nijhawan*, on the other hand, snippets of text in the INA's aggravated felony list invited factfinding.[92] Examining the list, the *Nijhawan* Court found several elements too oddly specific to ever match a prior state (or federal) offense. For instance, passport forgery came with an exception for assisting family; transporting prostitutes included a "commercial advantage" requirement; and tax evasion contained a loss-to-government threshold.[93] These textual hooks begged for further factfinding because they could not "possibly" match another criminal statute.[94]

Text was also a basis for the shift in *Luna Torres*, given the Court's reliance on the sentence at the end of the aggravated felony list. By saying that an offense was an aggravated felony "whether in violation of Federal or State law,"[95] Congress signaled its desire that courts ignore the source of the violation — and therefore any elements relating

---

[88] *Luna Torres*, 136 S. Ct. at 1628.

[89] *Id.*

[90] *Id.* at 1630. One might wonder whether deporting George Luna — who was engaged to a U.S. citizen, owned a home, and was taking college engineering classes — was itself a perverse result. *See id.* at 1635 (Sotomayor, J., dissenting). But such thinking ignores the purpose of the categorical approach: to focus on the defendant's conviction and not on the facts of the individual case. For every sympathetic fact about Luna's life, the government could dig up an unsavory one — like the fact that Luna was originally charged with several crimes before pleading down to arson. *See* Brief for the Respondent, *supra* note 3, at 4–5. Looking beyond the fact of conviction invites speculation and thwarts the "efficiency, fairness, and predictability" that the categorical approach provides. Mellouli v. Lynch, 135 S. Ct. 1980, 1987 (2015).

[91] *Luna Torres*, 136 S. Ct. at 1638 (Sotomayor, J., dissenting).

[92] *See Nijhawan*, 557 U.S. at 37.

[93] *Id.* at 37–38 (emphasis omitted) (first citing 8 U.S.C. § 1101(a)(43)(P) (2012) (passport forgery); then quoting *id.* § 1101(a)(43)(K)(ii) (transporting prostitutes); and then citing *id.* § 1101(a)(43)(M)(ii) (tax evasion)).

[94] *Id.* at 37.

[95] 8 U.S.C. § 1101(a)(43).

to the source, including the jurisdictional hook.[96] The Court's textually derived shift is consistent with the deviation in *Nijhawan* and backstops the results-based justification that already put *Luna Torres* squarely in line with *Taylor* and *Duenas-Alvarez*.

Comparing the case with *Nijhawan* also highlights the third and final way that *Luna Torres* is in line with past shifts. Indeed, though it borrowed both of *Nijhawan*'s rationales (avoidance of perverse results and adherence to text), *Luna Torres* rocked the doctrinal boat far less than *Nijhawan* did. To understand why, recall the purpose of the categorical approach: to keep immigration officials from acting "as judges of the facts."[97] Factfinding by immigration officers is unfair. Imagine, for example, that a defendant is charged with a serious crime but bargains down to a conviction for a lesser crime. The Court has found it unfair for a later court to treat the defendant as if he were convicted of the serious crime.[98] And factfinding is inefficient. The system is already weighed down by "large numbers of cases," often resolved "years after the convictions."[99] Delving into the facts of each case would burden the system even more.

To address these challenges, the categorical approach erected a wall between the immigration system and the facts underlying an alien's previous conviction. *Duenas-Alvarez*'s "realistic probability" did not come near the wall;[100] *Taylor*'s "modified" categorical approach allowed a "peek" over it;[101] and *Nijhawan*'s "circumstance-specific" analysis kicked it down for certain indeterminate "elements" of specific crimes.[102] Like *Duenas-Alvarez*, *Luna Torres* didn't touch the wall. The Court could have followed *Nijhawan* and allowed new factfinding to determine whether an alien's underlying criminal conduct satisfied an interstate commerce element. Instead, *Luna Torres* teaches that courts should ignore jurisdictional elements when applying the categorical approach. The case thus injects no new factfinding into the system. The categorical approach is different after *Luna Torres* — but in a very consistent way.

---

96 *See Luna Torres*, 136 S. Ct. at 1626.

97 United States *ex rel.* Mylius v. Uhl, 210 F. 860, 863 (2d Cir. 1914).

98 Taylor v. United States, 495 U.S. 575, 602 (1990).

99 Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 295 (2012).

100 *See* Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

101 *See* Rendon v. Holder, 782 F.3d 466, 473 (9th Cir. 2015) (Kozinski, J., dissenting from the denial of rehearing en banc).

102 *See* Nijhawan v. Holder, 557 U.S. 29, 36 (2009).