



---

1-1-2018

## Domestic Victims Aren't the Only Victims: Deporting Aliens Who Commit Violent Crimes Regardless of the Victim's Relationship to the Offender

Carly D. Self

[How does access to this work benefit you? Let us know!](#)

Follow this and additional works at: <https://commons.und.edu/ndlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Self, Carly D. (2018) "Domestic Victims Aren't the Only Victims: Deporting Aliens Who Commit Violent Crimes Regardless of the Victim's Relationship to the Offender," *North Dakota Law Review*. Vol. 93: No. 1, Article 3.

Available at: <https://commons.und.edu/ndlr/vol93/iss1/3>

This Article is brought to you for free and open access by the School of Law at UND Scholarly Commons. It has been accepted for inclusion in North Dakota Law Review by an authorized editor of UND Scholarly Commons. For more information, please contact [und.common@library.und.edu](mailto:und.common@library.und.edu).

DOMESTIC VICTIMS AREN'T THE ONLY VICTIMS:  
DEPORTING ALIENS WHO COMMIT VIOLENT CRIMES,  
REGARDLESS OF THE VICTIM'S RELATIONSHIP TO THE  
OFFENDER

CARLY D. SELF\*

ABSTRACT

Unless they commit crimes involving moral turpitude or crimes of domestic violence, aliens are not deportable for just any violent crime. So, if an alien batters his live-in girlfriend, he may be deported, but if he batters a stranger on the street, he may not be. Under the Immigration and Nationality Act (INA), “[a]ny alien who . . . is convicted of a crime of domestic violence . . . is deportable.” The problem is determining whether the *domestic* requirement must be an element in the underlying state criminal statute to make the alien deportable under the federal INA.

Federal circuit courts are split about which of three approaches may be used to determine whether a state crime satisfies the federal deportation statute. Only one approach – the circumstance-specific approach – allows a court to consider other evidence in determining whether a state conviction satisfies the federal INA’s requirements. This Article will analyze the three approaches and determine that the circumstance-specific approach should be used. It will also propose that the INA should be modified, so aliens would be deportable for all crimes of violence, not only for crimes of violence against domestic victims.

---

\*† Carly D. Self is the Deputy Director of Academic Support and an Adjunct Professor at Western Michigan University Thomas M. Cooley Law School. She teaches Research and Writing, Advanced Writing, Scholarly Writing, Bar Exam Skills, and Introduction to Law. She is a 2010 *Magna Cum Laude* graduate of Western Michigan University Thomas M. Cooley Law School and is a member of the Florida bar.

I.	INTRODUCTION .....	89
II.	BACKGROUND .....	90
	A. THREE APPROACHES TO DETERMINING WHETHER PREDICATE STATE STATUTES MUST INCLUDE AS ELEMENTS CERTAIN TERMS FROM FEDERAL STATUTES .....	92
	1. <i>The Categorical and Modified Categorical Approaches</i> .....	92
	2. <i>The Circumstance-Specific Approach</i> .....	93
	B. TIMELINE OF COURTS USING THE THREE APPROACHES, INCLUDING THE CURRENT CIRCUIT SPLIT .....	94
	1. <i>Using the Categorical and Modified Categorical Approaches Before the 2009 Supreme Court Decisions</i> .....	95
	2. <i>The 2009 Supreme Court Holdings Not Requiring a Federal Statute’s Qualifying Terms to be Elements of the Predicate State Statutes and Using the Circumstance-Specific Approach</i> .....	99
	3. <i>The Post-2009 Circuit Split Over Using the Circumstance- Specific Approach</i> .....	102
III.	ANALYSIS .....	104
	A. COURTS HAVE MISAPPLIED LAW, YIELDING ABSURD RESULTS .....	104
	B. SOLVING THE PROBLEM BY INCORPORATING THE CIRCUMSTANCE-SPECIFIC APPROACH INTO THE INA AND DELETING THE WORD DOMESTIC FROM THE CRIME-OF- DOMESTIC-VIOLENCE PROVISION .....	105
	1. <i>The Circumstance-Specific Approach Should be the Test for all Deportable Crimes</i> .....	106
	2. <i>Defendants Should Be Deportable for Committing any Crime of Violence, Regardless of Who the Victim Is</i> .....	106
IV.	CONCLUSION .....	108

## I. INTRODUCTION

Political leanings likely influence what many Americans think about aliens and deportation, but many might agree that if an alien commits a violent crime, that alien should be deported.<sup>1</sup> The Immigration and Nationality Act (INA) is the federal statute that provides several offenses for which an alien may be deported.<sup>2</sup> Aliens are deportable for a wide variety of wrongs, ranging from minor issues like failing to provide notice of a change of address<sup>3</sup> to serious crimes like espionage<sup>4</sup> and aggravated felonies.<sup>5</sup> But unless they commit crimes involving moral turpitude<sup>6</sup> or crimes of domestic violence,<sup>7</sup> they are not deportable for just any violent crime.<sup>8</sup>

Under section 237(a)(2)(E)(i) of the INA, found at 8 U.S.C. § 1227(a)(2)(E)(i), “[a]ny alien who . . . is convicted of a crime of *domestic violence* . . . is deportable.”<sup>9</sup> The problem is determining whether the *domestic* requirement needs to be an element in the underlying state criminal statute to make the alien deportable under the federal INA.<sup>10</sup> Courts have used three approaches to determine whether a conviction under a state statute may justify deportation under the federal INA.<sup>11</sup> The first two approaches, the categorical and modified categorical approaches, require that the state statutes include the relevant federal elements as part of the state offense, so the domestic requirement would need to be a specific element in the state statute for an alien to be deported under the federal INA for committing a crime of domestic violence.<sup>12</sup> But the third approach, the circumstance-specific approach, allows a court to consider other evidence in determining whether a state conviction satisfies the federal INA’s

---

1. See *Voters Want to Build A Wall, Deport Felon Illegal Immigrants*, RASMUSSEN REPORTS, [http://www.rasmussenreports.com/public\\_content/politics/current\\_events/immigration/august\\_2015/voters\\_want\\_to\\_build\\_a\\_wall\\_deport\\_felon\\_illegal\\_immigrants](http://www.rasmussenreports.com/public_content/politics/current_events/immigration/august_2015/voters_want_to_build_a_wall_deport_felon_illegal_immigrants) (last visited June 29, 2016) (stating that eighty percent of likely Republican voters support deporting illegal aliens with felony convictions).

2. See 8 U.S.C. § 1227 (2008).

3. 8 U.S.C. § 1227(a)(3)(A) (2008).

4. 8 U.S.C. § 1227(a)(4)(A)(i) (2008); 8 U.S.C. § 1227(a)(2)(D)(i) (2008).

5. 8 U.S.C. § 1227(a)(2)(A)(iii) (2008).

6. 8 U.S.C. § 1227(a)(2)(A)(i) (2008).

7. 8 U.S.C. § 1227(a)(2)(E)(i) (2008).

8. See 8 U.S.C. § 1227(a)(2) (2008).

9. 8 U.S.C. § 1227(a)(2)(E)(i) (2008) (emphasis added).

10. *Hernandez-Zavala v. Lynch*, 806 F.3d 259, 262-64 (4th Cir. 2015).

11. *Id.*

12. *Id.* at 263.

requirements.<sup>13</sup> Therefore, under the circumstance-specific approach, the alien could be deported if he or she had been convicted of a crime of violence that did not have a domestic element in the underlying state statute, if a court could ask a witness – like the convicted alien – whether he or she had a domestic relationship with the victim.<sup>14</sup> Federal circuit courts are split about which approaches courts may use in interpreting the INA.<sup>15</sup>

Part II of this Article will discuss the history of the three approaches and the current circuit split. Part III will propose that Congress should modify the INA to establish a uniform circumstance-specific approach. It should also delete the word *domestic* from the provision allowing aliens to be deported for crimes of domestic violence, so aliens would be deportable for all crimes of violence, not only for crimes of domestic violence. Part IV will conclude that the circuit split may resolve itself but that the proposals from Part III will expedite the process and yield consequences that are fairer and more uniform.

## II. BACKGROUND

Deportability for crimes of domestic violence was added to the INA in 1996.<sup>16</sup> Specifically, section 237(a)(2)(E)(i) of the INA provides that “[a]ny alien who at any time after admission is convicted of a crime of domestic violence . . . is deportable.”<sup>17</sup> It defines a crime of domestic violence as follows:

[T]he term “crime of domestic violence” means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an

---

13. *Id.* at 264.

14. *Id.* at 263.

15. See *Tokatly v. Ashcroft*, 371 F.3d 613, 624 (9th Cir. 2004) (using the categorical and modified categorical approaches in determining whether a conviction constituted a crime of domestic violence before the 2009 holdings); *Olivas-Motta v. Holder*, 746 F.3d 907, 916 (9th Cir. 2013) (using the categorical and modified categorical approaches in holding that for the “crime involving moral turpitude” provision of section 8 U.S.C. § 1227(a)(2)(A)(ii), the state statute must have an “involving moral turpitude” element); *Hernandez-Zavala*, 806 F.3d at 267 (using the circumstance-specific approach in determining that for the “crime of domestic violence” provision of 8 U.S.C. § 1227(a)(2)(A)(i), the statute need not have a “domestic” element).

16. James Lockhart, *Validity, Construction, and Application of § 237(a)(2)(E) of Immigration and Nationality Act (8 U.S.C.A. §1227(a)(2)(E)), Providing for Removal of Alien for Domestic Violence, Stalking, Child Abuse, Neglect or Abandonment, or Violation of Protection Order*, 40 A.L.R. Fed. 2d 27 (2009).

17. 8 U.S.C. § 1227(a)(2)(E)(i) (2008).

individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.<sup>18</sup>

Section 237(a)(2)(E)(i) refers to section 16 of Title 18 to define a crime of violence, and it does so two ways. First, “an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another” is a crime of violence.<sup>19</sup> In addition, “any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense” is also a crime of violence.<sup>20</sup> So, a crime of violence has been defined,<sup>21</sup> but the question becomes whether an underlying state offense must include a specific domestic-relationship element or whether Congress meant to use the word *domestic* as a qualifier to explain how the victim must be related to the defendant alien.<sup>22</sup>

Before 2009, to determine whether certain convictions under predicate state statutes satisfied the federal INA’s requirements for deportability for different offenses,<sup>23</sup> courts followed the 1990 landmark case of *Taylor v. U.S.*<sup>24</sup> *Taylor* allowed only the categorical and modified-categorical approaches to be used to determine whether a state conviction satisfied a federal sentence-enhancement statute.<sup>25</sup> But in 2009, the Supreme Court used a circumstance-specific approach in an immigration case for the first time.<sup>26</sup> And earlier in 2009, the Supreme Court held that for a similarly worded federal statute, having a domestic requirement under the federal statute does

---

18. *Id.*

19. 18 U.S.C. § 16(a) (West 2015).

20. 18 U.S.C. § 16(b) (West 2015), *invalidated by* United States v. Vivas-Ceja, 808 F.3d 719, 723 (7th Cir. 2015).

21. 8 U.S.C. § 1227(a)(2)(E)(i) (incorporating by reference 18 U.S.C. § 16 (2015)).

22. *Hernandez-Zavala*, 806 F.3d at 262-66.

23. *Tokatly*, 371 F.3d at 624.

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

25. *Id.*

26. *Nijhawan v. Holder*, 557 U.S. 29, 32 (2009) (using the circumstance-specific approach in a case with a dollar-amount qualifier, instead of the “domestic” qualifier).

not require the predicate state statute to include a domestic-relationship element.<sup>27</sup> Since 2009, circuits have split on whether these decisions mean that the INA's domestic requirement requires a domestic-relationship element under the predicate state statute or whether courts may use a circumstance-specific approach along with the categorical and modified categorical approaches to determine whether a state conviction satisfies the federal INA's domestic-relationship requirement.<sup>28</sup>

A. THREE APPROACHES TO DETERMINING WHETHER PREDICATE STATE STATUTES MUST INCLUDE AS ELEMENTS CERTAIN TERMS FROM FEDERAL STATUTES

Congress specified that conviction, not conduct, triggers immigration consequences.<sup>29</sup> Therefore, courts have long used the categorical and modified-categorical approaches in the immigration context even though they originated in the criminal context.<sup>30</sup> However, more recently, some courts have also begun applying the circumstance-specific approach in immigration cases.<sup>31</sup>

1. *The Categorical and Modified Categorical Approaches*

The Ninth Circuit Court of Appeals has stated, “[w]hen possible, [courts] apply the ‘categorical’ approach, ‘looking only to the statutory definition[ ] of the prior offense.’”<sup>32</sup> Under this approach, the court only looks at the state statute to see if its elements correspond to the federal statute's elements.<sup>33</sup> The facts of the underlying state case are irrelevant; instead, the focus is on “whether ‘the state statute defining the crime of conviction’ cat-

---

27. *United States v. Hayes*, 555 U.S. 415, 418 (2009) (holding that for purposes of the Gun Control Act, to satisfy the definition of “misdemeanor crime of domestic violence, . . . the domestic relationship, although it must be established beyond a reasonable doubt . . . need not be a defining element of the predicate offense”).

28. *See Tokatly*, 371 F.3d at 624 (using the categorical and modified categorical approaches in determining whether a conviction constituted a crime of domestic violence before the 2009 holdings); *Olivas-Motta*, 746 F.3d at 916 (using the categorical and modified categorical approaches in holding that for the “crime involving moral turpitude” provision of section 8 U.S.C. § 1227(a)(2)(A)(ii), the state statute must have an “involving moral turpitude” element); *Hernandez-Zavala*, 806 F.3d at 267 (using the circumstance-specific approach in determining that for the “crime of domestic violence” provision of 8 U.S.C. § 1227(a)(2)(E)(i), the statute need not have a “domestic” element).

29. *Hernandez-Zavala*, 806 F.3d at 264 (internal quotation omitted).

30. *Id.* at 263 (citation omitted).

31. *See, e.g., Nijhawan*, 557 U.S. at 30.

32. *Tokatly*, 371 F.3d at 620 (quoting *Taylor*, 495 U.S. at 600) (alterations in original).

33. *See Hernandez-Zavala*, 806 F.3d at 264.

egorically fits within the ‘generic’ federal definition of a corresponding [crime].”<sup>34</sup> The term *generic* means that “the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense . . .”<sup>35</sup> “Accordingly, a 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].”<sup>36</sup> So, for purposes of the crime-of-domestic-violence section of the INA, “[u]nder the categorical approach, one need only look to the statutory definition of the [state] offense to see if it contains the necessary elements of a ‘crime of domestic violence’ under the INA. If the elements do not correspond, the inquiry stops there.”<sup>37</sup>

Under *Taylor*, when the state statute does not make it clear that the underlying state offense categorically matches the generic federal offense, courts should next apply the modified-categorical approach.<sup>38</sup> Thus, if the underlying state offense is not clearly a removable offense under the INA, courts may look beyond the state statute’s language to “a narrow, specified set of documents that are part of the record of conviction, including ‘the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings.’”<sup>39</sup> However, courts still may not look “beyond the record of conviction itself to the particular facts underlying the conviction.”<sup>40</sup> When these documents do not “establish that the offense the [alien] committed qualifies as a basis for removal under section 237(a)(2)(E)(i), [courts] are compelled to hold that . . . the conviction may not be used as a basis for removal.”<sup>41</sup>

## 2. *The Circumstance-Specific Approach*

When “the INA incorporates other criminal statutes wholesale, . . . it ‘must refer to generic crimes,’ to which the categorical approach applies.”<sup>42</sup> On the other hand, “[w]hen the federal statute does not describe a generic

---

34. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (internal quotation omitted).

35. *Id.*

36. *Id.* (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion)) (alterations in original).

37. *Hernandez-Zavala*, 806 F.3d at 263.

38. *Tokatly*, 371 F.3d at 613, 620 (citation omitted).

39. *Id.* (quoting *United States v. Rivera-Sanchez*, 247 F.3d 905, 908 (9th Cir. 2001) (en banc)).

40. *Id.* at 620 (citing *Taylor*, 495 U.S. at 600).

41. *Id.* at 620-21 (citing *United States v. Franklin*, 235 F.3d 1165, 1172 (9th Cir. 2000)).

42. *Moncrieffe*, 133 S. Ct. at 1678, 1691.



offense, but instead ‘refer[s] to the specific acts in which an offender engaged on a specific occasion,’ the circumstance-specific approach is appropriate.”<sup>43</sup> For example, placing an exception “in the INA . . . suggests an intent to have the relevant facts found in immigration proceedings.”<sup>44</sup>

Under the circumstance-specific approach, “while the congruence of the elements of the underlying [state] offense and the offense described in the federal statute must be assessed using the categorical approach, courts may consider other evidence to see if the necessary attendant circumstances existed.”<sup>45</sup> Under this approach, for purposes of the INA’s crime-of-domestic-violence section, “the court may also consider underlying evidence of the conviction to determine if a domestic relationship existed.”<sup>46</sup> Specifically, the domestic relationship “can be proven by evidence generally admissible for proof of facts in administrative proceedings,”<sup>47</sup> including evidence like probable-cause affidavits, the criminal complaint and pleadings, the defendant’s admissions during proceedings, and the sentencing sheet.<sup>48</sup>

#### B. TIMELINE OF COURTS USING THE THREE APPROACHES, INCLUDING THE CURRENT CIRCUIT SPLIT

Section 237(a)(2)(E)(i) of the INA provides that “[a]ny alien who at any time after admission is convicted of a crime of domestic violence . . . is deportable.”<sup>49</sup> For almost two decades, courts almost exclusively followed the categorical and modified categorical approaches laid out in the 1990 decision in *Taylor v. U.S.*<sup>50</sup> But in 2009, the Supreme Court used a circumstance-specific approach in an immigration case<sup>51</sup> and held that under a similar federal statute, having a domestic requirement under the federal statute does not require the underlying state statute to include a domestic-

---

43. *Hernandez-Zavala*, 806 F.3d at 259, 264 (quoting *Nijhawan*, 557 U.S. at 34) (alteration in original).

44. *Moncrieffe*, 133 S. Ct. at 1691.

45. *Hernandez-Zavala*, 806 F.3d at 264 (citing *Nijhawan*, 557 U.S. at 42-43).

46. *Id.* at 263.

47. *Bianco v. Holder*, 624 F.3d 265, 273 (5th Cir. 2010).

48. *Id.*

49. 8 U.S.C. § 1227(a)(2)(E)(i) (2008).

50. *E.g.*, *Tokatly*, 371 F.3d at 613, 624. *Contra Flores v. Ashcroft*, 350 F.3d 666, 671 (7th Cir. 2003) (stating that the INA’s domestic requirement did not mean that the underlying state statute needed a domestic-relationship element and considering evidence beyond the record of conviction in finding that the defendant was in a domestic relationship with the victim).

51. *Nijhawan*, 557 U.S. at 29, 30.

relationship element.<sup>52</sup> Since then, circuits have split on whether state statutes need a domestic-relationship element for an alien to be deportable under the INA and whether courts may use a circumstance-specific approach to determine whether a state conviction satisfies the INA's domestic-relationship requirement.<sup>53</sup>

*1. Using the Categorical and Modified Categorical Approaches Before the 2009 Supreme Court Decisions*

In 1990, the Supreme Court articulated the categorical and modified-categorical approaches in *Taylor v. U.S.*<sup>54</sup> In *Taylor*, the Court had to determine whether a second-degree burglary conviction under a state statute met the generic burglary definition of a federal sentence-enhancement statute.<sup>55</sup> The Court rejected the idea that burglary should be defined by state statutes because those varied so greatly: one state's burglary statute prohibited stealing from unoccupied automobiles, while another's had varying degrees of breaking and entering without ever using the word burglary.<sup>56</sup> The Court also rejected the common-law definition of burglary, because most states no longer included all of the old common-law elements.<sup>57</sup> Instead, the Court reasoned that "Congress meant . . . 'burglary' [in] the generic sense in which the term is now used in the criminal codes of most States."<sup>58</sup>

After deciding which definition of burglary it thought Congress intended, the Court moved on to the question of whether a state statute satisfied the generic federal definition of burglary.<sup>59</sup> The Court first reasoned that the federal enhancement statute's language "supports the inference that

---

52. *Hayes*, 555 U.S. at 415, 418 (holding that for purposes of the Gun Control Act, to satisfy the definition of "misdemeanor crime of domestic violence," . . . the domestic relationship, although it must be established beyond a reasonable doubt . . . , need not be a defining element of the predicate offense").

53. See *Tokatly*, 371 F.3d at 624 (using the categorical and modified categorical approaches in determining whether a conviction constituted a crime of domestic violence before the 2009 holdings); *Olivas-Motta*, 746 F.3d at 916 (using the categorical and modified categorical approaches in holding that for the "crime involving moral turpitude" provision of section 8 U.S.C. § 1227(a)(2)(A)(ii), the state statute must have an "involving moral turpitude" element); *Hernandez-Zavala*, 806 F.3d at 267 (using the circumstance-specific approach in determining that for the "crime of domestic violence" provision of 8 U.S.C. § 1227(a)(2)(A)(i), the statute need not have a "domestic" element).

54. *Tokatly*, 371 F.3d at 615 (citing *Taylor*, 495 U.S. at 575).

55. *Taylor*, 495 U.S. at 578-79.

56. *Id.* at 590-91 (citation omitted).

57. *Id.* at 593-94 (citation omitted).

58. *Id.* at 598 (citation omitted).

59. *Id.* at 600.

Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions” because the federal statute referred to a defendant with “‘three previous convictions’ for—not a person who has committed—three previous violent felonies or drug offenses.”<sup>60</sup> And the statute defined a “‘violent felony’ as any crime punishable by imprisonment for more than a year that ‘has as an element’—not any crime that, in a particular case, involves—the use or threat of force.”<sup>61</sup>

Second, the Court reasoned that the enhancement statute’s legislative history showed that “Congress generally took a categorical approach to predicate offenses. There was considerable debate over what kinds of offenses to include and how to define them.”<sup>62</sup> “[B]ut no one suggested that a . . . crime might sometimes count towards enhancement and sometimes not, depending on the [case’s] facts . . . .”<sup>63</sup>

Third, the Court reasoned that it would be difficult and potentially unfair to use a factual approach.<sup>64</sup> Potential problems include whether the government would be allowed to introduce the trial transcript or witnesses’ testimonies before the sentencing court and whether the sentencing court’s conclusion “that the defendant actually committed a generic burglary” could be challenged as abridging the defendant’s right to a jury trial.<sup>65</sup> It also noted that with guilty pleas, “there often is no record of the underlying facts,” so “[e]ven if the Government were able to prove those facts, if a guilty plea to a lesser, nonburglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary.”<sup>66</sup> The Court reasoned that the “only plausible interpretation of [the federal sentence-enhancement statute] is that . . . it generally requires the trial court to look only to the fact of conviction and the statutory definition of the prior offense.”<sup>67</sup>

However, the Court acknowledged that this “categorical approach . . . may permit the sentencing court to go beyond the mere fact of conviction in a narrow range of cases where a jury was actually required to find all the

---

60. *Id.*

61. *Taylor*, 495 U.S. at 600.

62. *Id.* at 601.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 601-02.

67. *Taylor*, 495 U.S. at 602.

elements of generic burglary.”<sup>68</sup> For example, if a state’s burglary statutes include entry of an automobile and a building, if the charging paper and jury instructions “show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.”<sup>69</sup> The Court ultimately held that “an offense constitutes ‘burglary’ for purposes of a . . . sentence enhancement if either its statutory definition substantially corresponds to ‘generic’ burglary, or the charging paper and jury instructions actually required the jury to find all the elements of generic burglary . . . to convict the defendant.”<sup>70</sup>

But in 2003, the Seventh Circuit Court of Appeals reached a slightly different conclusion in a case about the deportation statute at issue in this Article: it held that evidence beyond the statute’s elements – like police reports – may be considered and that a federal statute’s “domestic” requirement did not need to be an element of the state offense to satisfy § 237(a)(2)(E).<sup>71</sup> In *Flores v. Ashcroft*, an alien plead guilty to misdemeanor battery<sup>72</sup> after police reports stated that he attacked and beat his wife.<sup>73</sup> The court reasoned that “it may be necessary . . . to rely on some aspects of the defendant’s actual behavior . . . to know what he has been convicted of: when one state-law offense may be committed in multiple ways, and federal law draws a distinction, it is necessary to look behind the statutory definition.”<sup>74</sup> The court pointed out that “[a]lthough § 16(a) directs attention to the statutory elements, § 237(a)(2)(E) . . . departs from that model by making the ‘domestic’ ingredient a real-offense characteristic.”<sup>75</sup>

The court held that “when classifying the state offense of battery for purposes of § 16(a), . . . the inquiry begins and ends with the elements of the crime.”<sup>76</sup> But the “‘domestic partner’ . . . requirement [is] based entirely on federal law and may be proved without regard to the elements of the state crime,” and “[s]ubstantial evidence, independent of [the defendant’s] admission, show[ed] that the victim was his wife.”<sup>77</sup> Therefore, “it does not

---

68. *Id.*

69. *Id.*

70. *Id.*

71. See *Flores*, 350 F.3d at 666.

72. *Id.* at 669.

73. *Id.* at 670-71.

74. *Id.* at 670.

75. *Id.*

76. *Id.* at 671.

77. *Flores*, 350 F.3d at 670-71.

matter for purposes of federal law that the crime . . . is the same whether the victim is one's wife or a drinking buddy . . . ."<sup>78</sup>

Then in 2004, the Ninth Circuit Court of Appeals clarified what documents may be consulted when using the modified-categorical approach.<sup>79</sup> In *Tokatly v. Ashcroft*, an alien argued that he could not be deported for a crime of violence because the underlying state statute did not have a domestic-relationship element, but in a post-conviction hearing before the Immigration Judge (IJ), the victim testified that she had cohabitated with the alien.<sup>80</sup> The court reiterated that "[w]hen possible, we apply the 'categorical' approach, 'looking only to the statutory definition[ ] of the prior offense.'"<sup>81</sup> But "when it is not clear from the statutory definition of the prior offense whether that offense constitutes a removable offense under section 237(a)(2)(E)(i), we apply a 'modified' categorical approach" and "look beyond the . . . statute to a narrow, specified set of documents that are part of the record of conviction, including 'the indictment, the judgment of conviction, jury instructions, a signed guilty plea, or the transcript from the plea proceedings.'"<sup>82</sup> When those documents "are insufficient to establish that the offense . . . qualifies as a basis for removal," the alien may not be deported based on that conviction.<sup>83</sup>

The court went on to point out that it could not look at anything except the record of conviction "to determine whether an alien's crime was one of 'violence,' or whether the violence was 'domestic' within the meaning of the provision."<sup>84</sup> So, the court could not consider "testimonial evidence outside the record of conviction," like the defendant's admission that he had a domestic relationship with the victim<sup>85</sup> or the victim's testimony before the IJ.<sup>86</sup> The court stated that the IJ's examination of the victim was inappropriate fact finding under the categorical and modified-categorical approaches.<sup>87</sup> Therefore, the burglary and kidnapping charges were not

---

78. *Id.*

79. *See generally* *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004).

80. *Id.* at 616.

81. *Id.* at 620 (quoting *Taylor*, 495 U.S. at 600).

82. *Id.* at 620 (quoting *Rivera-Sanchez*, 247 F.3d at 908 (en banc)).

83. *Id.* at 620-21 (citation omitted).

84. *Id.* at 624.

85. *Tokatly*, 371 F.3d at 624.

86. *Id.* at 623.

87. *Id.*

“crimes of ‘domestic violence’ under the categorical or modified categorical approach.”<sup>88</sup>

Before 2009, courts used both the categorical and modified categorical approaches to determine whether a state offense could qualify as a basis for removal.<sup>89</sup> The *Flores* court did not use the terms categorical or modified-categorical approach, but it considered evidence from a police report in determining that a state battery conviction could qualify a defendant for removal under § 237(a)(2)(E)(i), even though the state battery statute did not include a domestic-relationship element.<sup>90</sup> The *Tokatly* court would not have considered a police report, but it would have looked beyond the state statute to the record of conviction.<sup>91</sup> However, the *Tokatly* court would not allow a defendant’s admission or a victim’s testimony to an IJ to be used to satisfy the domestic requirement.<sup>92</sup> But both courts agreed that it was acceptable to look beyond the underlying state criminal statute.<sup>93</sup> In 2009, the Supreme Court went even further, allowing evidence beyond police reports and records of conviction by moving to a circumstance-specific approach.<sup>94</sup>

## 2. *The 2009 Supreme Court Holdings Not Requiring a Federal Statute’s Qualifying Terms to be Elements of the Predicate State Statutes and Using the Circumstance-Specific Approach*

In February of 2009, the United States Supreme Court decided *U.S. v. Hayes*.<sup>95</sup> In *Hayes*, the Court held that for purposes of a statute that is worded identically to parts of § 237(a)(2)(E)(i), the term “domestic” did not need to be an element of the predicate state offense.<sup>96</sup> The Court considered “[t]he definition of ‘misdemeanor crime of domestic violence’” under the federal Gun Control Act of 1968,<sup>97</sup> which prohibited anyone who had

---

88. *Id.* at 624-25.

89. See generally *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); *Flores v. Ashcroft*, 350 F.3d 666 (7th Cir. 2003); *Taylor v. United States*, 495 U.S. 575 (1990).

90. *Flores*, 350 F.3d at 670-71.

91. *Tokatly*, 371 F.3d at 620 (quoting *Rivera-Sanchez*, 247 F.3d at 908 (en banc)).

92. *Id.* at 623-24.

93. *Flores*, 350 F.3d at 671; *Tokatly*, 371 F.3d at 620.

94. *Hayes*, 555 U.S. at 415.

95. *Id.*

96. *Id.* at 429.

97. 18 U.S.C. § 921 et seq. (2012).

been convicted of a misdemeanor crime of domestic violence from possessing a firearm.<sup>98</sup>

The Court reasoned that Congress used “element” – not “elements” – to mean that only the use-of-force requirement needed to be an element of the predicate state offense.<sup>99</sup> It further reasoned that Gun Control Act “would have been ‘a dead letter’ in some two-thirds of the States from the very moment of its enactment”<sup>100</sup> because when the Gun Control Act was expanded to include misdemeanors, “only about one-third of the States had criminal statutes that specifically proscribed domestic violence.”<sup>101</sup> The Court concluded that “Congress defined ‘misdemeanor crime of domestic violence’ to include an offense ‘committed by’ a person who had a specified domestic relationship with the victim, whether or not the misdemeanor statute itself designates the domestic relationship as an element of the crime.”<sup>102</sup>

Later that same year, the Supreme Court also held that – at least in the immigration context – courts could use the circumstance-specific approach in determining whether predicate state offenses satisfied the generic federal deportation statute.<sup>103</sup> In *Nijhawan v. Holder*, the defendant was convicted of “mail fraud, wire fraud, bank fraud, and money laundering,” but those statutes did not require findings of particular loss amounts, so the jury did not make any findings about loss amounts.<sup>104</sup> “At sentencing [he] stipulated that the loss exceeded \$100 million.”<sup>105</sup>

The government sought to have him deported arguing that he had been convicted of an aggravated felony.<sup>106</sup> The generic federal immigration statute stated that an “‘alien who is convicted of an aggravated felony at any time after admission is deportable.’”<sup>107</sup> “A related statute defines ‘aggravated felony’ in terms of a set of listed offenses that includes ‘an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000.’”<sup>108</sup> The IJ agreed that the defendant had been convicted

---

98. *Hayes*, 555 U.S. at 418.

99. *Id.* at 421-22.

100. *Id.* at 427 (quotation omitted).

101. *Id.*

102. *Id.* at 429.

103. *Nijhawan*, 557 U.S. at 32.

104. *Id.*

105. *Id.*

106. *Id.* at 33.

107. *Id.* at 32 (quoting 8 U.S.C. § 1227(a)(2)(A)(iii)).

108. *Id.* (quoting 8 U.S.C. § 1101(a)(43)(M)(i)).

of an aggravated felony based on his finding “that the sentencing stipulation and restitution order showed that the victims’ loss exceeded \$10,000.”<sup>109</sup>

The Court focused on whether the \$10,000 loss should be interpreted as referring to a generic crime – in which case the categorical approach had to be used – or “as referring to the specific way in which an offender committed the crime on a specific occasion” – where the circumstance-specific approach should be used instead.<sup>110</sup> The Court decided against applying the categorical approach.<sup>111</sup> The Court pointed out that unlike in *Taylor*, the federal statute “contains some language that refers to generic crimes and some language that . . . refers to the specific circumstances in which a crime was committed.”<sup>112</sup>

First, the federal statute “refers to ‘an offense that . . . involves fraud or deceit *in which the loss to the victim . . . exceeds \$10,000,*”<sup>113</sup> which “is consistent with a circumstance-specific approach” because “the words ‘in which’ (which modify ‘offense’) can refer to the conduct involved ‘in’ the commission of the offense of conviction, rather than to the elements of the offense.”<sup>114</sup> Second, applying a categorical approach would leave the relevant part of the federal statute with almost no meaningful application because there is “no widely applicable federal fraud statute that contains a relevant monetary loss threshold.”<sup>115</sup> Therefore, the circumstance-specific approach was appropriate,<sup>116</sup> and there was nothing unfair about the IJ relying on the defendant’s stipulation at sentencing and the court’s restitution order, which showed that the amount in question was much greater than \$10,000.<sup>117</sup>

After 2009, it seemed clear that courts could use the circumstance-specific approach in immigration cases.<sup>118</sup> It appeared that the domestic requirement of the INA did not need to be an element of a predicate state offense.<sup>119</sup> But not all circuits agreed.

---

109. *Nijhawan*, 557 U.S. at 33.

110. *Id.* at 34.

111. *Id.* at 38.

112. *Id.*

113. *Id.* (quoting § 1101(a)(43)(M)(i)).

114. *Id.* at 38-39.

115. *Nijhawan*, 557 U.S. at 39.

116. *Id.* at 40.

117. *Id.* at 42-43.

118. *Id.* at 40.

119. *See id.* at 40; *Hayes*, 555 U.S. at 429.



### 3. *The Post-2009 Circuit Split Over Using the Circumstance-Specific Approach*

After the *Hayes* and *Nijhawan* decisions, the Fourth and Fifth Circuits have used the circumstance-specific approach in immigration cases.<sup>120</sup> However, the Ninth Circuit Court has not used it in cases applying the INA's crime-of-domestic-violence provision.<sup>121</sup> So *Tokatly*, which applied only the categorical and modified-categorical approaches in determining whether a defendant committed a crime of domestic violence, is still the law in the Ninth Circuit.<sup>122</sup>

Specifically, in 2010, the Fifth Circuit held in *Bianco v. Holder* that a crime of domestic violence does not need a domestic-relation element.<sup>123</sup> Instead, the domestic relationship “can be proven by evidence generally admissible for proof of facts in administrative proceedings.”<sup>124</sup> So, a probable-cause affidavit, criminal complaint, defendant's pleadings, and sentencing sheet were all considered “sufficient, admissible proof” of a conviction for a crime of domestic violence.<sup>125</sup>

Additionally, in November of 2015, the Fourth Circuit used the circumstance-specific approach in *Hernandez-Zavala*.<sup>126</sup> The Fourth Circuit held that like the monetary qualifier in *Nijhawan* and – more importantly – the domestic-relationship qualifier in *Bianco*, the word *domestic* is a qualifier.<sup>127</sup> Therefore, the underlying offense did not need to include a domestic-relationship element.<sup>128</sup> Instead, the domestic-relationship qualifier “requires a fact-specific review” using the circumstance-specific approach.<sup>129</sup>

The Fourth Circuit reasoned that the INA incorporated the definition of a “crime of violence” by reference under 18 U.S.C. § 16 but limited deportation to offenders in domestic relationships with their victims.<sup>130</sup> In fact, 18 U.S.C. § 16 defines a “crime of violence” as “an offense that has *as an element* the use, attempted use, or threatened use of physical force against the person or property of another[.]” so it is “even more clear in the INA

---

120. *Hernandez-Zavala*, 806 F.3d at 267; *Bianco*, 624 F.3d at 272.

121. *See Olivas-Motta*, 746 F.3d at 916.

122. *Tokatly*, 371 F.3d at 624-25.

123. *Bianco*, 624 F.3d at 272.

124. *Id.* at 272-73.

125. *Id.*

126. *See generally* *Hernandez-Zavala v. Lynch*, 806 F.3d 259 (4th Cir. 2015).

127. *Id.* at 267 (quotation omitted).

128. *Id.* (citing *Bianco*, 624 F.3d at 272).

129. *Id.* (quotation omitted).

130. *Id.* at 266 (citing 8 U.S.C. § 1227(a)(2)(E)(i)).

than in the statute at issue in *Hayes* that the term ‘element’ applies only to the use of force requirement[,]” and not to the domestic-relationship requirement.<sup>131</sup> The Fourth Circuit repeated the rule that when Congress puts such limitations “‘in the INA proper,’ it indicates its ‘intent to have the relevant facts found in immigration proceedings.’”<sup>132</sup>

The Fourth Circuit also emphasized that “Congress passed the INA’s ‘crime of domestic violence’ provision in 1996, the same year it passed . . . the statute at issue in *Hayes*.”<sup>133</sup> “Just as in *Hayes*, to construe this statute as requiring the domestic relationship to be an element of the underlying offense ‘would frustrate Congress’ manifest purpose,’ given that the law ‘would have been ‘a dead letter’ in some two-thirds of the States from the very moment of its enactment.”<sup>134</sup> Finally, to alleviate fears of opening floodgates to mini-trials by using the circumstance-specific approach, the Fourth Circuit pointed out that determining whether the domestic-relationship requirement has been met “involves the inspection of a single threshold fact” that “will often be straightforward and objective . . . ,”<sup>135</sup> because as the *Hayes* Court pointed out, determining whether the victim had a domestic relationship with the defendant does not often require an “‘elaborate factfinding process.’”<sup>136</sup>

But the Ninth Circuit has not yet used the circumstance-specific approach in determining whether a defendant is deportable under the INA’s crime-of-domestic-violence provision. Before the 2009 Supreme Court decisions in *Hayes* and *Nijhawan*, the Ninth Circuit held in *Cisneros-Perez v. Gonzales* that the “modified categorical approach applies to prior crimes of domestic violence in the immigration context . . . .”<sup>137</sup> In addition, in *Carrillo v. Holder*, there was a categorical match to the predicate domestic-violence offense, so the Ninth Circuit did not need to consider whether the circumstance-specific approach applied.<sup>138</sup> It used the categorical approach again in *Olivas-Motta v. Holder*, a case about a crime involving moral turpitude – which is deportable under a different section of the INA – not a

---

131. *Id.* (citing 18 U.S.C. § 16).

132. *Hernandez-Zavala*, 806 F.3d at 266 (quoting *Moncrieffe*, 133 S. Ct. at 1691).

133. *Id.* at 267.

134. *Id.* (quoting *Hayes*, 555 U.S. at 427).

135. *Id.*

136. *Id.* (quoting *Hayes*, 555 U.S. at 427 n.9).

137. *Cisneros-Perez v. Gonzales*, 465 F.3d 386, 392 (9th Cir. 2006) (citing *Tokatly*, 371 F.3d at 613).

138. *Carrillo v. Holder*, 781 F.3d 1155, 1159 (9th Cir. 2015), *cert. denied* *Marquez Carillo v. Lynch*, 136 S. Ct. 1217 (2016).

crime of domestic violence.<sup>139</sup> In June of 2015, the Ninth Circuit in *Arce Fuentes v. Lynch* finally followed *Nijhawan* to hold that the circumstance-specific approach applied in the same scenario involved in *Nijhawan*: when a case involves the INA's \$10,000 threshold for an aggravated felony.<sup>140</sup> But whether the Ninth Circuit would use that approach for a case about a crime of domestic violence is still unclear, creating the current circuit split.

### III. ANALYSIS

This circuit split exists for several reasons. Courts have misapplied law and have used different approaches when addressing different sections of the INA, so results have been inconsistent at best and absurd at worst. The circuit split could have been remedied years ago or could still be resolved the next time the Ninth Circuit hears a case about deportation based on a crime of domestic violence.

#### A. COURTS HAVE MISAPPLIED LAW, YIELDING ABSURD RESULTS

First, as the *Nijhawan* Court suggested, cases about the INA's domestic-violence provision do not compare apples-to-apples to *Taylor*.<sup>141</sup> In *Taylor*, there was no qualifier: the case was about burglary, not about burglary with a certain victim or a certain threshold amount stolen.<sup>142</sup> The *Taylor* court discussed grouping crimes by level of seriousness and who commits them,<sup>143</sup> not by whom the victim is, which these INA crime-of-domestic-violence cases like *Tokatly* focused on.<sup>144</sup> The *Tokatly* court should have focused on this distinction and concluded that the circumstance-specific approach was appropriate and that burglary and kidnapping against a victim the alien lived with were crimes of domestic violence.<sup>145</sup> The categorical and modified-categorical approaches still need to be the starting point for analysis involving parts of federal statutes referring to generic crimes,<sup>146</sup> but the circumstance-specific approach should have been available since *Tokatly* was incorrectly decided in 2004.

---

139. *Olivas-Motta*, 746 F.3d at 916.

140. *Arce Fuentes v. Lynch*, 788 F.3d 1177, 1181 (9th Cir. 2015).

141. *Nijhawan*, 557 U.S. at 38 (stating that unlike in *Taylor*, the federal statute "contains some language that refers to generic crimes and some language that, almost certainly refers to the specific circumstances in which a crime was committed").

142. *See generally* *Taylor v. United States*, 495 U.S. 575 (1990).

143. *Id.* at 590.

144. *E.g.*, *Tokatly*, 371 F.3d at 616.

145. *Contra id.* at 624.

146. *Hernandez-Zavala*, 806 F.3d at 268 (quoting *Bianco*, 624 F.3d at 73).

Another problem is that courts are still using the categorical and modified-categorical approaches when dealing with other sections of the INA, which muddies the waters and makes unnecessary distinctions applying different approaches to INA provisions. For example, the court in *Olivas-Motta* used the categorical approach in a case under the INA provision about crimes involving moral turpitude.<sup>147</sup> Although it applied the circumstance-specific approach in *Hayes* and *Nijhawan*, the United States Supreme Court in *Moncrieffe* used the categorical approach, not the circumstance-specific approach, in a deportation case after *Nijhawan*.<sup>148</sup> It reasoned that the type of drug-offense statute involved was incorporated in the INA wholesale, so “it ‘must refer to generic crimes.’”<sup>149</sup> Therefore, the Court determined the categorical approach applied.<sup>150</sup> Yet even the Ninth Circuit in *Fuentes v. Lynch* applied the circumstance-specific approach when a case involves the INA’s \$10,000 threshold for an aggravated felony, which is directly on point with *Nijhawan*.<sup>151</sup>

The final problem is that using the categorical approach can yield absurd results. For example, in a pre-*Hayes* and *Nijhawan* case, the Ninth Circuit held that a misdemeanor domestic-violence conviction was not categorically a crime of violence or a crime of domestic violence under the INA.<sup>152</sup> That same year, the same court held that battery is not categorically a crime of violence.<sup>153</sup> Surely Congress meant for crimes about violence – and more specifically, domestic violence – to constitute crimes of domestic violence under the INA.

B. SOLVING THE PROBLEM BY INCORPORATING THE CIRCUMSTANCE-SPECIFIC APPROACH INTO THE INA AND DELETING THE WORD DOMESTIC FROM THE CRIME-OF-DOMESTIC-VIOLENCE PROVISION

Struggling through analyses from multiple old cases and deciding on a circuit-by-circuit basis which approach should apply to different parts of the INA is tedious, inefficient, and inherently unfair. Instead, all three approaches should be used for all deportable-crimes provisions in the INA

---

147. *Olivas-Motta*, 746 F.3d at 916.

148. *Moncrieffe*, 569 U.S. at 202.

149. *Id.* (quoting *Nijhawan*, 557 U.S. at 37).

150. *Id.*

151. *Fuentes v. Lynch*, 788 F.3d 1177, 1181 (9th Cir. 2015).

152. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006).

153. *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1012 (9th Cir. 2006).

that are not generic offenses. As to the crime-of-domestic-violence provision, Congress should simply delete the domestic qualifier and provide for deportation for any crime of violence. Then, the circuit split about which approach should be used becomes irrelevant, as even the most limited categorical approach would allow for deportation based on a categorical match with a crime of violence.<sup>154</sup>

1. *The Circumstance-Specific Approach Should be the Test for all Deportable Crimes*

“Although the categorical approach . . . has ‘a long pedigree’ in immigration law,”<sup>155</sup> and Congress has specified “‘conviction, not conduct, as the trigger for immigration consequences,’”<sup>156</sup> once the defendant has been convicted, it requires no mini-trial to determine who the victim was or many of the other factors listed in the INA, like monetary amounts or whether a crime is one of moral turpitude.<sup>157</sup> For most – if not all – of the deportable crimes in the INA, Congress cannot account for what each predicate state statute will prohibit or what language each state legislature will use in its statute. This has been problematic since the Court in *Taylor* first articulated the three approaches.<sup>158</sup> But when a statute like the INA includes what appear to be generic crimes with qualifying terms, courts are already using,<sup>159</sup> and should continue to use, the circumstance-specific approach without rehashing the entire analyses from cases like *Taylor*, *Hayes*, and *Nijhawan* each time. Congress could resolve this circuit split by adding a section allowing for all three approaches to be used or amending each section it used qualifiers in to allow courts to use the circumstance-specific approach.

2. *Defendants Should Be Deportable for Committing any Crime of Violence, Regardless of Who the Victim Is*

Congress could also resolve the narrower issue about which test applies in cases involving a crime of domestic violence by deleting the word *domestic* and providing for deportation of all defendant aliens for all crimes of violence. Congress added the crime-of-domestic-violence provision to pro-

---

154. See *Moncrieffe*, 569 U.S. at 190-91. (quotation omitted).

155. *Hernandez-Zavala*, 806 F.3d at 263-64 (quoting *Moncrieffe*, 569 U.S. at 191).

156. *Id.* at 264 (quoting *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015)).

157. *Id.* at 267 (quoting *Hayes*, 555 U.S. at 427 n.9).

158. See *Taylor*, 495 U.S. at 575.

159. See *Hernandez-Zavala*, 806 F.3d at 263.

tect domestic victims and punish domestic-violence perpetrators,<sup>160</sup> but domestic victims are not the only victims of violent crimes. And despite Congress' intent, some domestic victims are currently unprotected. For example, in *Tokatly*, the alien was not deported<sup>161</sup> although he lived with and had a romantic relationship with the victim.<sup>162</sup> The victim would have been protected if the defendant had been prosecuted under a domestic-violence statute.<sup>163</sup> And the defendant would have been deportable for several other things that might not have physically harmed victims, like if he violated a protection order with a credible threat of – not action of – violence,<sup>164</sup> committed document fraud,<sup>165</sup> or had been addicted to drugs.<sup>166</sup> That makes little sense and is easily remedied by deleting a single word.

Deleting the word *domestic* would eliminate questions about whether IJ's should review any material beyond the record and would allow the INA to better serve the same basic purpose of deporting violent criminals.<sup>167</sup> It would also improve the INA's effectiveness because applying the categorical and modified-categorical approaches sometimes leaves parts of the INA meaningless: as the court in *Hernandez-Zavala* pointed out when it quoted the United States Supreme Court's decision in *Hayes*, "requiring the domestic relationship to be an element of the underlying offense 'would frustrate Congress' manifest purpose,' given that the law 'would have been 'a dead letter' in some two-thirds of the States from the very moment of its enactment.'"<sup>168</sup> It would also be better public policy to have the same consequences apply to all convicted defendant aliens, instead of leaving it to charging prosecutors to bring charges and handle plea bargaining based on the potential deportation consequences convictions would have.<sup>169</sup>

---

160. *Fernandez-Ruiz*, 466 F.3d at 1138 (Wardlaw, J., dissenting) (quoting 142 CONG. REC. S4058–02, S4059 (1996) (statement of Sen. Dole); (citations omitted).

161. *Tokatly*, 371 F.3d at 624.

162. *Id.* at 616–17.

163. *See id.*

164. *See* 8 U.S.C. § 1227 (a)(2)(E)(ii) (2008).

165. *See* 8 U.S.C. § 1227 (a)(3)(C) (2008).

166. *See* 8 U.S.C. § 1227 (a)(2)(B)(ii) (2008).

167. *See Fernandez-Ruiz*, 466 F.3d at 1138 (Wardlaw, J., dissenting) (quoting 142 CONG. REC. S4058–02, S4059 (1996) (statement of Sen. Dole); (citations omitted).

168. *Hernandez-Zavala*, 806 F.3d at 267 (quoting *Hayes*, 555 U.S. at 427).

169. *See Bianco*, 624 F.3d at 273.

#### IV. CONCLUSION

The Fourth and Fifth Circuits have used the circumstance-specific approach to hold that the predicate state offense does not need to include a domestic-relationship element for a defendant alien to be deportable for committing a crime of domestic violence.<sup>170</sup> However, the Ninth Circuit still applies the categorical and modified-categorical approaches in cases about crimes of domestic violence.<sup>171</sup> But it has used the circumstance-specific approach in a case about another INA provision.<sup>172</sup>

This circuit split may be resolved the next time the Ninth Circuit decides a case about whether a defendant has committed a crime of domestic violence that does not get resolved under the categorical and modified-categorical approaches. However, the problem could be addressed more quickly if Congress added the circumstance-specific approach to the INA. Better yet, Congress could delete the word *domestic* from the provision providing for deportation for convictions of crimes of domestic violence. That would eliminate the need to determine which approach applies, result in more consistent consequences without regard to the approach the jurisdiction applies or whether the alien was prosecuted under a specific domestic-violence statute, and – most importantly – protect more domestic and non-domestic victims.

---

170. *Id.* at 272; *Hernandez-Zavala*, 806 F.3d at 267.

171. *See Carrillo v. Holder*, 781 F.3d 1155, 1159 (9th Cir. 2015), *cert. denied* *Marquez Carillo v. Lynch*, 136 S. Ct. 1217 (2016).

172. *Fuentes*, 788 F.3d at 1181.