In the
United States Court of Appeals
For the Seventh Circuit

No. 22-2282

JOSE DE JESUS CALDERA-TORRES,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General of the United States,

Respondent.

Petition for Review of an Order of the
Board of Immigration Appeals.
No. A206-274-405

ARGUED FEBRUARY 28, 2023 — DECIDED APRIL 27, 2023

Before EASTERBROOK, WOOD, and ST. EVE, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Jose De Jesus Caldera-Torres, a citizen of Mexico, is in the United States without permission. He conceded this but sought cancellation of removal under 8 U.S.C. §§ 1229a(c)(4), 1229b(b)(1). To be eligible for that relief an alien must show, among other things, that he has not been convicted of a crime of domestic violence. Caldera-Torres has on his record a conviction for battery, in violation of Wis. Stat.

§940.19(1), arising from an attack on the mother of his daughter. An immigration judge concluded that this conviction makes Caldera-Torres ineligible, and the Board of Immigration Appeals agreed. Caldera-Torres asks us to set aside that order on the ground that, although Wis. Stat. §940.19(1) is a "crime of violence" for federal purposes, it is not a crime of *domestic* violence, because the victim's identity is not an element of the offense.

Caldera-Torres is right about the elements of the offense under Wisconsin law. Section 940.19(1) reads: "Whoever causes bodily harm to another by an act done with intent to cause bodily harm to that person or another without the consent of the person so harmed is guilty of a Class A misdemeanor." We held in *Beltran-Aguilar v. Whitaker*, 912 F.3d 420 (7th Cir. 2019) (Barrett, J.), that this statute names a "crime of violence" under the elements clause of 18 U.S.C. §16(a). But the victim's identity is irrelevant to the state's law, so, if a "domestic" element is essential, then Caldera-Torres is not disqualified.

The definition of a disqualifying offense is in 8 U.S.C. §1227(a)(2)(E)(i):

> Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the 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 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.

This asks two questions. First, is the offense of conviction a "crime of violence" for the purpose of §16? *Beltran-Aguilar* answers "yes." Second, was it committed against "an individual with whom the person shares a child in common" or another listed victim? This is usually referred to as the "protected person" aspect of the definition. Caldera-Torres concedes that the victim of his battery was "an individual with whom [he] shares a child in common". That's enough, the IJ and BIA concluded, to block withholding of removal.

Section 1227(a)(2)(E)(i) does not say or imply that the "protected person" aspect of the definition must be an element of the crime. That the offense involved a "protected person" comes *in addition to* the elements. Whether a conviction is for a "crime of violence" depends on the statutory elements. See, e.g., *Mathis v. United States*, 579 U.S. 500 (2016). What makes a "crime of violence" a "crime of domestic violence" under §1227(a)(2)(E)(i) is the nature of the victim as a "protected person". That ingredient need not be part of the crime's elements. It is enough that the victim's status as a "protected person" be established.

The operation of §1227(a)(2)(E)(i) is similar to the operation of 8 U.S.C. §1101(a)(43)(M)(i), which defines as an "aggravated felony" for the purpose of §1227(a)(2)(A)(iii) "an offense that … involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *Nijhawan v. Holder*, 557 U.S. 29 (2009), holds that §1101(a)(43)(M)(i) requires immigration officials to decide two issues: first, is the conviction for an offense that is categorically "fraud or deceit" as federal law defines those terms; second, did the loss exceed $10,000? The

victim's loss may be shown independently, the Court held, whether or not the statute defining the crime of conviction includes the amount of loss as an element. The federal definition of a "crime of domestic violence" as a generic "crime of violence" plus the victim's status as a "protected person" works the same way, so it deserves the same treatment that §1101(a)(43)(M)(i) received in *Nijhawan*.

United States v. Hayes, 555 U.S. 415 (2009), is even closer to the mark. Someone convicted of a "misdemeanor crime of domestic violence" may not possess a firearm. *Hayes* holds that proof of this disqualifying crime proceeds in two steps: first, the record must show a crime of violence in the sense that the elements proscribe "the use or attempted use of physical force, or the threatened use of a deadly weapon". 18 U.S.C. §921(a)(33)(A)(ii). Second, the crime must be "committed by" a person who has a specified domestic relation with the victim. *Ibid*. *Hayes* holds that this second step—equivalent to the "protected person" component under §1227(a)(2)(E)(i)—need not be an element of the offense of conviction. It is enough, *Hayes* holds, that the relation between offender and victim be shown to the degree of confidence required by law.

Given *Nijhawan* and *Hayes*, it is unsurprising that all other circuits that have addressed the operation of §1227(a)(2)(E)(i) recently have held that the victim's status as a "protected person" need not be an element of the crime of conviction. *Hernandez-Zavala v. Lynch*, 806 F.3d 259, 264–68 (4th Cir. 2015); *Bianco v. Holder*, 624 F.3d 265, 268–73 (5th Cir. 2010). We agree with these decisions. *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004), held otherwise, but it preceded *Nijhawan* and *Hayes*; it did not survive those decisions. Caldera-Torres maintains that *Jauregui-Cardenas v. Barr*, 946 F.3d 1116, 1119 (9th Cir.

2020), shows that the Ninth Circuit continues to follow *Tokatly*, but *Jauregui-Cardenas* does not address §1227(a)(2)(E)(i) or any similar statute, and it does not cite *Tokatly*. We need not and do not consider whether *Jauregui-Cardenas* was rightly decided.

Caldera-Torres contends that Wisconsin must not have seen his conviction as one for a "crime of domestic violence", because he did not receive the "domestic abuse surcharge" (longer sentence) that applies to domestic offenses in Wisconsin. See Wis. Stat. §973.055. But we do not ask how Wisconsin classified Caldera-Torres's conviction for its own purposes. Our question is how §1227(a)(2)(E)(i) classifies it for federal purposes. The most one can say about the absence of a "surcharge" is that there is some ambiguity. (Perhaps the absence was just an oversight.) Ambiguity cuts against an applicant for withholding of removal, however, because *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021), holds that the alien bears the burden of persuasion on all findings needed to support withholding of removal. Caldera-Torres has not established the absence of a disqualifying conviction, so the petition for review of the Board's order is

DENIED.