No. 15-6092

IN THE
Supreme Court of the United States

RICHARD MATHIS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION, IMMIGRANT DEFENSE PROJECT, NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, AND INDIVIDUALS WITH PENDING IMMIGRATION APPEALS RAISING THE QUESTION PRESENTED, AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTRODUCTION AND INTEREST OF AMICI[1]

In encouraging the Court to grant certiorari, the Government emphasized the importance of the question presented "not only" to sentencing law, "but also … in the immigration context." U.S. Cert. Br. 22. The categorical approach applies equally under immigration law, and "the approach to divisibility will often determine whether [a noncitizen] who has committed a … crime may remain in the country." *Id.* at 23. This brief addresses the immigration half of the equation.

The Court's decision will directly affect the individual amici's pending immigration appeals, as well as those of other noncitizens represented by the organizational amici and their members. Their cases vividly illustrate why the Eighth Circuit's approach to divisibility is incompatible with both *Descamps v. United States*, 133 S. Ct. 2276 (2013), and the prerogative of the States to define their own crimes (*infra* § I), why it would cause serious and unfair practical difficulties for those facing removal proceedings and for the immigration system as a whole (*infra* § II), and why it would require criminal defense attorneys representing noncitizens to burden state criminal proceedings with precisely the sorts of disputes *Descamps* sought to avoid (*infra* § III).

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

In his pending Fifth Circuit immigration appeal, **Hermenegildo Gomez-Perez** raises the question presented here. *See Gomez-Perez v. Lynch*, No. 14-60808 (5th Cir., argued and submitted Nov. 3, 2015). Sixteen years ago, Gomez-Perez was convicted of a misdemeanor assault offense for which he served only probation. The Texas statute under which he was convicted proscribes "intentionally, knowingly, or recklessly causing bodily injury." Immigration law treats an intentional or knowing assault as a crime involving moral turpitude, but not a reckless assault. The Texas Court of Criminal Appeals has held, however, that "intentional assault" is not a separate crime from "knowing assault" or "reckless assault" under Texas law, and thus a jury could divide 6-6 on the mental state. In Texas, the terms are not alternative elements defining different crimes, but only different means of committing a single crime; defining a single, broad offense this way makes it easier for juries to convict. Accordingly, Gomez-Perez was "convicted of" only the unitary crime of causing bodily injury with at least a reckless mens rea—an offense that is not a crime involving moral turpitude under federal law.

Disregarding how Texas has elected to define its criminal offense, the Board of Immigration Appeals (BIA) held that the statute is divisible merely because it contains the word "or," echoing the Eighth Circuit's erroneous focus in this case on disjunctive phrasing rather than elements. The BIA thus applied the modified categorical approach and concluded that the conviction rendered Gomez-Perez ineligible for cancellation of removal, so it could not even consider the hardship his removal would cause his three U.S.-citizen children.

Vera Sama has been a lawful permanent resident for 14 years. Her case is pending before the Attorney General, who referred the question presented here to herself after the BIA applied the Fourth Circuit's divisibility rule in Sama's favor. *See Matters of Chairez-Castrejon & Sama*, 26 I. & N. Dec. 686, 686 (AG 2015). Sama was convicted under a Maryland statute that defines "theft" to include several forms of conduct. Some correspond to generic "theft," an aggravated felony under the Immigration and Nationality Act (INA), and some do not. Maryland's highest court has held, however, that a jury need not agree on which enumerated form of theft a defendant committed. Indeed, the Maryland Legislature brought the different acts together under one "consolidated" statute precisely to eliminate the "subtle distinctions" that had complicated prosecutions when they were separate crimes. The statute is therefore not divisible under *Descamps*. Yet, under the Eighth Circuit's rule, Maryland's deliberate decision to "consolidate" would be ignored, the modified categorical approach would apply, and a lawful permanent resident could be deported based on an alleged fact that was immaterial to her conviction under state law—a conviction for which she too served no time in prison.

Other noncitizens represented or counseled by amici the **American Immigration Lawyers Association**, the **Immigrant Defense Project**, and the **National Immigration Project of the National Lawyers Guild** (each described in Addendum A), and by amici's members, would similarly face severe consequences under the Eighth Circuit's approach. Facts that they were never actually *convicted* of would lead not only to removal, but also to ineligibility for

discretionary relief like cancellation of removal or asylum.

Descamps leaves no room for the Eighth Circuit's approach. *Descamps* held that a statute is divisible, such that the modified categorical approach applies, *only if* it lists multiple alternative elements, meaning facts a jury would have to agree upon and find beyond a reasonable doubt. As *Descamps* explained, this formal-elements rule is the only reason the modified categorical approach does not violate the Sixth Amendment in the sentencing context. It is also the only reason the modified categorical approach is consistent with the INA's focus on what noncitizens were "convicted of," not what acts they committed. *Descamps*'s element-centric approach best serves the INA's overriding goal of ensuring uniform, predictable, and fair treatment of prior convictions.

The Eighth Circuit's approach, in contrast, would disregard legislative choices made by the States. And it would cause factual embellishments that were never "necessarily" established in state court to yield grave downstream immigration consequences, as the examples described in this brief illustrate. Scouring the record of conviction for "non-elemental facts" directly contradicts *Descamps*, and it is a time-consuming enterprise that would unduly burden noncitizens and already-overstretched immigration courts. Worse still, it would result in noncitizens who have each been *convicted of* the same offense receiving different treatment depending on what record documents still exist or what they happen to describe about the means by which an offense was committed. *Descamps* aimed to prevent precisely these types of "'daunting'

difficulties and inequities." The Eighth Circuit's nullification of *Descamps* should be rejected, and *Descamps*'s formal-elements rule of divisibility should be reaffirmed.

ARGUMENT

I. *Descamps*'s Formal-Elements Rule Ensures Uniformity, Predictability, And Fairness In The Application Of The Immigration Laws.

A. Evenhanded treatment of prior convictions has long been a central aim of both immigration and sentencing law.

The categorical approach and "its modified partner" apply equally in the sentencing and immigration contexts. *Descamps*, 133 S. Ct. at 2286; *see, e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (applying *Taylor v. United States*, 495 U.S. 575 (1990), *Shepard v. United States*, 544 U.S. 13 (2005), and *Johnson v. United States*, 559 U.S. 133 (2010)). That is because both the Armed Career Criminal Act (ACCA) and "the INA ask[] what offense [an individual] was 'convicted' of, not what acts he committed." *Moncrieffe*, 133 S. Ct. at 1685 (internal citation omitted); *see Descamps*, 133 S. Ct. at 2287 ("ACCA increases the sentence of a defendant who has three 'previous convictions' for a violent felony—not a defendant who has thrice committed such a crime."). "'[C]onviction' is 'the relevant statutory hook'" in both Acts. *Moncrieffe*, 133 S. Ct. at 1685.[2]

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[2] *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(ii) ("Any alien who at any time after admission is convicted of two or more crimes involving

The categorical approach ensures that noncitizens convicted of the same offenses under state law "will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 133 S. Ct. at 1693 n.11 (citing *Taylor*, 495 U.S. at 599-602). This "policy favoring uniformity in the immigration context is rooted in the Constitution." *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (citing U.S. Const. art. I, § 8). By pegging immigration consequences to "convictions," Congress sought to avoid the "potential unfairness" of having "two noncitizens, each 'convicted of' the same offense, … obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge." *Moncrieffe*, 133 S. Ct. at 1690. Congress similarly "meant ACCA to function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none." *Descamps*, 133 S. Ct. at 2287-88.

The categorical approach's emphasis on predictability and fairness in the treatment of prior convictions has been a hallmark of immigration law for over a century. *See Moncrieffe*, 133 S. Ct. at 1685 (citing *United States ex rel. Mylius v. Uhl*, 210 F. 860, 862 (2d Cir. 1914), and Alina Das, *The Immigration Penalties Of Criminal Convictions: Resurrecting Categorical Analysis In Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1688-1702 (2011)). Strictly limiting the analysis to what noncitizens were "convicted of" has only become

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moral turpitude … is deportable."); § 1229b(a)(3) (lawful permanent residents are ineligible for cancellation of removal if they have "been convicted of any aggravated felony").

more essential over time, as "changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders." *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010).

Today, a conviction for an "aggravated felony"—a category that now includes theft, obstruction of justice, and many nonviolent drug offenses, 8 U.S.C. § 1101(a)(43)—not only renders noncitizens deportable, § 1227(a)(2)(B)(iii), but also automatically disqualifies them from vital forms of discretionary relief: cancellation of removal, based on deep connections to their communities and extreme hardship that would befall their families, § 1229b(a)(3), (b)(1)(C); asylum, to avoid the risk of persecution abroad, § 1158(b)(2)(A)(ii), (B)(i); naturalization, §§ 1101(f)(8), 1427(a); relief under the Violence Against Women Act, §§ 1154(a)(1)(A)(iii)(II)(bb), 1229b(b)(2)(A)(iv); and adjustment of status for victims of trafficking, § 1255(*l*)(1)(b). Even misdemeanor crimes involving moral turpitude and low-level drug offenses can cause longtime residents to be torn from this country and their families without any recourse. *See* § 1182(a)(2)(i); § 1227(a)(2)(A)(ii), (B)(i); § 1229b(b)(1)(C), (d)(1)(B).[3]

In short, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who

[3] Prior "conviction[s] for" certain felonies and misdemeanors will also substantially increase the maximum sentence that may be imposed under the INA's criminal illegal-reentry provision, from two years' imprisonment to ten or twenty. 8 U.S.C. § 1326(b)(1)-(2).

plead guilty to specified crimes." *Padilla*, 559 U.S. at 364 (footnote omitted). The need for "the categorical approach … to promote efficiency, fairness, and predictability" in the treatment of prior convictions is therefore paramount. *Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015).

B. Because individuals are only "convicted of" those elements a jury must find, a uniform approach requires considering only the formal elements of an offense, not mere methods of committing one.

To ensure that the grave immigration consequences of prior convictions are meted out uniformly and predictably, the categorical approach treats a state conviction as a federal predicate offense "only if a conviction of the state offense '"*necessarily*" involved ... facts equating to the generic federal offense.'" *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Shepard*, 544 U.S. at 24) (emphasis added; brackets omitted). The modified categorical approach can sometimes "help[] effectuate [this] categorical analysis," but only if the "*Shepard* documents" in the record shed light on what facts the conviction '"necessarily"' involved. *Descamps*, 133 S. Ct. at 2283; *see Shepard*, 544 U.S. at 26. So the question presented turns on what facts a conviction "necessarily" establishes: just the formal elements of the offense, or also other alleged facts regarding how the offense was committed, like the particular means employed.

Descamps already answered that question: "[T]he only facts the court can be sure the jury … found are those constituting elements of the offense—as distinct

from amplifying but legally extraneous circumstances." 133 S. Ct. at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)). Similarly, "when a defendant pleads guilty to a crime, he waives his right to a jury determination of only that offense's elements; whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment." *Id.* Whether reached by plea or verdict, all that a conviction "necessarily" establishes are the "elements" of the offense—those facts "a jury [must find] unanimously and beyond a reasonable doubt." *Id.*; *see also id.* at 2296, 2298 (Alito, J., dissenting) ("By an element, I understand the Court to mean something on which a jury must agree by the vote required to convict …. The feature that distinguishes elements and means is the need for juror agreement, and therefore … the critical question is whether a jury would have to agree on the [fact].") (citing *Richardson*, 526 U.S. at 817, and *Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality opinion)); *Matter of R–*, 2 I. & N. Dec. 819, 826 (BIA 1947) (a conviction establishes only "that which must be shown to establish … guilt," because "[i]ssue was joined on th[e] charge, … but nothing more").

Accordingly, a statute is "divisible," such that the modified categorical approach applies, only if its alternative phrases are a "list of alternative *elements*," one of which "[a] prosecutor … must generally select" and "the jury … must then find … unanimously and beyond a reasonable doubt." *Descamps*, 133 S. Ct. at 2285, 2290 (emphasis added). If, instead, the statute merely lists different means of satisfying a single element—means that "[t]he jurors need not all agree

on"—the statute is "indivisible" and the modified categorical approach "has no role to play." *Id.* at 2285, 2290. Defendants are never "convicted" of a particular listed means, even if such a statutory phrase describes "what the defendant actually did." *Id.* at 2287.

"Dismissing everything [this Court] said" regarding the "focus on the elements, rather than the facts, of a crime," *id.* at 2285-86, the Eighth Circuit held that any statute containing a "disjunctive list of [terms] … is divisible," regardless of "[w]hether these amount to alternative elements or merely alternative means to fulfilling an element," J.A. 18-19.[4] But the Eighth Circuit "nowhere explains how a factfinder can have 'necessarily found' a non-element—that is, a fact that by definition is *not* necessary to support a conviction." *Descamps*, 133 S. Ct. at 2286 n.3. And there is no possible explanation. A jury cannot have "necessarily" found a mere means of commission that it did not have to agree upon; only formal elements fit the bill. Thus, the "mere use of the disjunctive 'or' in the definition of a crime does not automatically render it divisible." *Omargharib v. Holder*, 775 F.3d 192, 194 (4th Cir. 2014); *see Almanza-Arenas v. Lynch*, 809 F.3d 515, 523 & n.11 (9th Cir. 2015) (en banc).

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[4] The Tenth Circuit similarly disregarded *Descamps*. *Compare United States v. Trent*, 767 F.3d 1046, 1060 (10th Cir. 2014) ("[T]he alternative statutory phrases may not be 'elements' in the full sense of the term as used in *Richardson* and *Schad*, but for the purposes of modified-categorical-approach analysis, that 'shortcoming' is generally irrelevant."), *with Descamps*, 133 S. Ct. at 2288 (expressly relying on *Richardson*'s definition of elements).

Ultimately, this Court meant what it said when it used the word "element" 85 times in *Descamps*: "All the modified approach adds is a mechanism for making [the categorical] comparison when a statute lists multiple, alternative *elements*, and so effectively creates '*several different* ... *crimes*.'" 133 S. Ct. at 2285 (emphasis added). A statute is only "divisible" if it can be divided into different *crimes*, and crimes are only different if they comprise distinct *elements*. This is how divisibility analysis has long worked in immigration law—the context in which the concept of "divisible" predicate offenses was developed decades ago. *Matter of P–*, 2 I. & N. Dec. 117, 118-19 (BIA 1944) ("Where, however, the statute is *divisible* or separable and so drawn as to include within its definition *crimes which do and some which do not* involve moral turpitude, the record of conviction … may be examined.") (emphasis added). Because a statute does not create *several different* crimes if it merely lists alternative ways to commit a *single* crime, the modified categorical approach does not apply to statutes that list alternative means rather than elements.

C. Amici's cases highlight how the Eighth Circuit's approach contradicts *Descamps* and would yield grave, unpredictable results for noncitizens convicted of even minor offenses.

Amici's cases illustrate the significance of the distinction between alternative elements and means.

***Matter of Sama* (BIA; Attorney General).** Amicus Vera Sama has been a lawful permanent resident of the United States since 2002. In 2006, she

was convicted of theft, a violation of Maryland's Consolidated Theft Statute, Md. Code Ann., Crim. Law § 7-104. Her entire sentence was suspended and she served only probation. She later applied for naturalization, seeking to fulfill her dream of becoming a U.S. citizen, like her daughter. The Government instead launched removal proceedings against her because, in its view, her then-eight-year-old Maryland conviction constituted generic theft, and thus an aggravated felony. And because the Government charged her with being an aggravated felon, it placed her in mandatory immigration detention while she defended herself against removal. *See* 8 U.S.C. § 1226(c).

Generic theft requires taking (or exercising control over) another's property without consent and with the criminal intent to deprive the owner of the rights and benefits of ownership. *E.g.*, *Castillo v. Holder*, 776 F.3d 262, 267 (4th Cir. 2015). The Maryland "consolidated" provision, however, extends to two acts that do not qualify as generic theft: obtaining property *with* consent, such as "obtain[ing] control over property by … deception," and theft of *services*. § 7-104(b), (e). Those portions of the statute appear in a disjunctive list with three other phrases that do correspond to generic theft. But the statute makes clear that a theft offense can be charged without specifying the means by which property or services were stolen (e.g., unauthorized taking versus deceit). § 7-108(a). And Maryland's highest court has confirmed that "Maryland's theft statute [does] not require … jury unanimity" with respect to the "five … alternate methods by which the crime of theft can be committed." *Rice v. State*, 532 A.2d 1357, 1358, 1361 (Md. 1987). Rather, "six jurors may think the defendant

guilty of violating [one phrase] and six guilty of violating [another phrase]," and the jury could still convict, because the statute creates just one, broad crime. *Id.* at 1361. Indeed, the Maryland Legislature's express purpose in enacting "the Consolidated Theft Statute was to avoid the subtle distinctions that existed and had to be alleged and proved to establish the separate crimes under the former law." *State v. Manion*, 112 A.3d 506, 514 (Md. 2015) (internal punctuation omitted).

Applying the Fourth Circuit's correct interpretation of *Descamps*, the BIA therefore held that "§ 7-104 is indivisible and the Immigration Judge is precluded from conducting a modified categorical inquiry." *In re Vera Sama*, 2015 WL 4761234, at *3 (BIA July 17, 2015). Because a conviction under the Maryland statute is not an aggravated felony, "the removal proceedings [were] terminated." *Id.* at *4. Sama was set to receive her green card back and focus on rebuilding her life after her time in immigration detention had caused her to lose her job and her home. In October, however, the Attorney General referred Sama's case to herself to address the precise question presented here. *Matters of Chairez-Castrejon & Sama*, 26 I. & N. Dec. 686, 686 (AG 2015). The matter is now likely being held pending disposition of this case.

If the Eighth Circuit's rule is adopted, the Attorney General will have to deconsolidate a statute that Maryland deliberately consolidated. Especially where, as in *Sama*, "state criminal statutes" have been "amended by state legislatures" for the purpose of making them broader than the generic offense (and thus easier for the State to obtain convictions under),

it would be "intrusive … on the States" to ignore their prerogatives to define their own crimes. *Descamps*, 133 S. Ct. at 2293-94 (Kennedy, J., concurring). Moreover, the Attorney General would then have to attempt to discern which statutory prong gave rise to Sama's conviction. She would rely upon whatever facts happen to be recited in the record of conviction, notwithstanding that no reason existed under state law to clarify or contest such details. That unpredictable inquiry could result in a lawful permanent resident of 14 years being deported because of alleged facts she was never "convicted" of.

***Gomez-Perez v. Lynch* (5th Cir.).** Amicus Hermenegildo Gomez-Perez has lived in the United States for over 20 years. He and his wife have three U.S.-citizen children. In 2000, he was convicted of misdemeanor assault in Texas following an altercation with his roommate. He served no time in prison. Gomez-Perez came to the attention of the authorities in 2011 following a traffic stop, and he was placed in removal proceedings. He applied for cancellation of removal, but the BIA found his then-15-year-old conviction was a crime involving moral turpitude that rendered him ineligible. *See* Add. 4a-6a. His petition for review is pending in the Fifth Circuit and raises the question presented here.

Under the INA, nonaggravated assault crimes do not entail moral turpitude unless they involve intentionally or knowingly causing bodily injury; recklessly causing bodily injury does not count. *Matter of Solon*, 24 I. & N. Dec. 239, 241-42 (BIA 2007). The Texas statute under which Gomez-Perez was convicted is

overbroad because it proscribes "intentionally, knowingly, or recklessly caus[ing] bodily injury." Tex. Penal Code § 22.01(a)(1). In the BIA's view, consistent with the Eighth Circuit's approach, the Texas statute is divisible because it contains the word "or," and thus application of the modified categorical approach was appropriate to determine whether Gomez-Perez's offense involved reckless conduct or not. Add. 4a-6a.

Texas law, however, is unequivocal that the terms are merely alternative means of satisfying a single mens rea element. "There is no indication that the legislature intended for an 'intentional' bodily injury assault to be a *separate crime* from a 'knowing' bodily injury assault or that both of those differ from a 'reckless' bodily injury assault." *Landrian v. State*, 268 S.W.3d 532, 537 & n.24 (Tex. Ct. Crim. App. 2008) (emphasis added) (citing *Schad*, 501 U.S. at 644). Rather, there is just a *single crime* of causing bodily injury "at least reckless[ly]." *Morales v. State*, 293 S.W.3d 901, 905 (Tex. App. 2009). Thus, "six members of a jury" could find intent, and six others could find recklessness, and the jury could still convict. *Landrian*, 268 S.W.3d at 537. Such disagreement is not unlikely, particularly with respect to nesting terms, like mental states, that involve nuanced gradations and are not mutually exclusive. *See id.* ("[P]roof of a greater culpability is also proof of any lesser culpability."). Under *Richardson*, the different mens rea levels are not elements, and so under *Descamps*, the statute is indivisible.

Consistent with *Descamps*, and contrary to the Eighth Circuit's rule, there can be no recourse to the modified categorical approach to try to infer from the

record of conviction what Gomez-Perez's mental state must have been. Texas prosecutors may choose to charge one or two mental states under § 22.01(a)(1) for simplicity's sake, *see, e.g.*, *Esparza-Rodriguez v. Holder*, 699 F.3d 821, 825-26 (5th Cir. 2012), or they may charge all three, as in Gomez-Perez's case. The happenstance of which alternative means are discussed in the *Shepard* documents cannot result in one noncitizen being deported, and another not, despite each being "convicted of" the same single offense. Such "differential treatment … based on minor variations in the cases' … documents" is just what *Descamps* forbids. 133 S. Ct. at 2288. Reaffirming *Descamps*'s formal-elements rule would ensure that Gomez-Perez's 16-year-old misdemeanor conviction would not deprive him of the opportunity merely to be considered for discretionary relief based on the exceptional and extremely unusual hardship his removal would cause his U.S.-citizen children. 8 U.S.C. § 1229b(b)(1).[5]

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[5] Precisely because the particular mens rea is not an element that had to be found, the record of conviction from Gomez-Perez's bench trial does not contain any finding regarding his specific mental state. So the modified categorical approach would offer little assistance in his case even if the statute were divisible. The BIA held, however, that this ambiguity under the modified categorical approach inured to Gomez-Perez's detriment because, as the applicant for cancellation of removal, he bore the burden of proving that he was *not* convicted of a predicate offense. Add. 6a, 13a. That holding was wrong as well; analyzing "what a conviction *necessarily* established" is a purely "legal question," *Mellouli*, 135 S. Ct. at 1987, which is unaffected by evidentiary burdens of proof. *See Moncrieffe*, 133 S. Ct. at 1685 n.4 ("Our analysis is the same in both [the cancellation and removal] contexts."). That

Other recent immigration cases similarly demonstrate that the Eighth Circuit's rule is incompatible with *Descamps* and would yield unfair and unpredictable results.

***Lopez-Valencia v. Lynch* (9th Cir.).** Roberto Lopez-Valencia, a lawful permanent resident since 1989, pleaded nolo contendere in 2004 to a California petty theft offense. Theft in California is broader than generic theft because the statute includes conduct like theft of labor, false credit reporting, and theft by false pretenses. Cal. Penal Code § 484(a). Applying the modified categorical approach, the BIA held his conviction involved conduct equating to generic theft and ordered Lopez-Valencia removed.

Relying on *Descamps*, the Ninth Circuit granted Lopez-Valencia's petition for review. 798 F.3d 863 (9th Cir. 2015). Although the various forms of theft are enumerated in a disjunctive statute, "[t]he California Supreme Court has spoken directly on juror unanimity under the theft statute, reasoning that

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question has divided the Courts of Appeals, however, and the Court need not address the effect of burdens of proof in this case. *Compare Thomas v. Att'y Gen.*, 625 F.3d 134, 147-48 (3d Cir. 2010) (ambiguous record of conviction means the conviction is not a predicate offense, even in context where noncitizen bears the burden of proof), *and Martinez v. Mukasey*, 551 F.3d 113, 121-22 (2d Cir. 2008) (same), *and Berhe v. Gonzales*, 464 F.3d 74, 79, 85-86 (1st Cir. 2006) (same), *with Young v. Holder*, 697 F.3d 976, 979-80 (9th Cir. 2012) (en banc) (ambiguous record fails to satisfy noncitizen's burden), *and Salem v. Holder*, 647 F.3d 111, 115-16 (4th Cir. 2011) (same), *and Garcia v. Holder*, 584 F.3d 1288, 1289-90 (10th Cir. 2009) (same).

while all jurors must agree that the defendant committed some form of unlawful taking, it is 'immaterial whether or not [the jury] agreed as to the technical pigeonhole into which the theft fell.'" *Id.* at 869-70 (quoting *People v. Nor Woods*, 233 P.2d 897, 898 (Cal. 1951)). Moreover, "the state legislature has gone a step further" by expressly providing that "'[i]n charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another,'" without specifying one or the other as an element. *Id.* at 869-70 (quoting Cal. Penal Code § 952). Because no jury would be required to "unanimously agree on the fact critical to the federal statute," the Ninth Circuit held that "the statute is overbroad and indivisible, … the modified categorical approach 'has no role to play,'" and the court "should not go further to examine any of the documents contained in Lopez-Valencia's record of conviction." *Id.* at 868-70 (quoting *Descamps*, 133 S. Ct. at 2285).

That decision was correct and fully consistent with *Descamps*. Under the Eighth Circuit's approach, however, a lawful permanent resident for a quarter century would be deported merely on account of "the prosecution's theory of [the] case," not the actual "elements [he] was convicted of violating." *Id.* at 870.

***Omargharib v. Holder* (4th Cir.).** Sayed Gad Omargharib has been a lawful permanent resident since 1990. In 2011, he was convicted of grand larceny in Virginia, having walked off with "two pool cues valued in excess of $200 following a dispute with his opponent in a local pool league." 775 F.3d at 194. His 12-month sentence was suspended in full. The BIA nev-

ertheless held this was an aggravated felony theft offense, which subjected him to mandatory deportation. "Virginia law defines larceny in the disjunctive to include 'wrongful or fraudulent' takings," so the agency applied the modified categorical approach to determine "that Omargharib's larceny conviction rested on facts amounting to theft, not fraud." *Id.* at 195 (citing Va. Code Ann. § 18.2-95).

Applying *Descamps*, the Fourth Circuit granted his petition for review. "Virginia juries are not instructed to agree 'unanimously and beyond a reasonable doubt' on whether defendants charged with larceny took property 'wrongfully' or 'fraudulently.' Rather … , it is enough for a larceny conviction that each juror agrees only that either a 'wrongful or fraudulent' taking occurred, without settling on which." *Id.* at 199. Because "wrongful or fraudulent takings are alternative means of committing larceny, not alternative elements," the modified categorical approach could not apply, and the conviction categorically was not an aggravated felony. *Id.* at 200.

The Fourth Circuit was correct; Virginia's larceny statute does not "consist[] of 'multiple, alternative *elements*' creating 'several *different* crimes,' some of which would match the generic federal offense and others that would not," but rather "multiple alternative *means* (of committing the *same* crime)." *Id.* at 197-98 (quoting *Descamps*, 133 S. Ct. at 2284-85) (some emphases added). Yet, under the Eighth Circuit's approach, Omargharib and another noncitizen, "each 'convicted of' th[is] same offense, might obtain different aggravated felony determinations depend-

ing on" what "non-elemental facts" the *Shepard* documents contain. *Moncrieffe*, 133 S. Ct. at 1690; *Descamps*, 133 S. Ct. at 2289.

***Rendon v. Holder* (9th Cir.).** Carlos Alberto Rendon has been a lawful permanent resident since 1989. He was convicted of second-degree burglary under Cal. Penal Code § 459. Although *Descamps* held that § 459 does not qualify as generic burglary, the BIA determined that the conviction qualified as an "attempted theft." As relevant, the California statute criminalizes "enter[ing] any … vehicle … , when the doors are locked, … *with intent to commit grand or petit larceny or any felony*." Cal. Penal Code § 459 (emphasis added). The BIA thought the italicized phrase was divisible because it contains the word "or." Applying the modified categorical approach, "the BIA looked to the contents of petitioner's plea to determine that he had been convicted … for 'entering a locked vehicle *with the intent to commit larceny*, an aggravated felony,'" and thus he was subject to mandatory deportation. 764 F.3d 1077, 1082 (9th Cir. 2014).

The Ninth Circuit granted Rendon's petition for review because "California state law is clear: the jury need not be unanimous regarding the particular offense the defendant intended to commit in order to convict under section 459. All the prosecution must prove is that the defendant intended to commit *an* offense listed in the statute—namely, 'grand or petit larceny or any felony....' Therefore, the substantive crimes are alternative *means* of satisfying the intent element of the statute, and the statute is indivisible." *Id.* at 1088-89 (footnote omitted); *see, e.g.*, *People v. Failla*, 414 P.2d 39, 45 (Cal. 1966) ("[I]n prosecutions

for burglary ... the jurors need not be instructed that to return a verdict of guilty they must all agree on the specific 'theory' of the entry—i.e., what particular felony or felonies the defendant intended at the time—provided they are told they must be unanimous in finding that a felonious entry took place."). The Eighth Circuit's approach would instead endorse the BIA's recourse to the plea colloquy, and Rendon would be subject to mandatory deportation on the basis of "superfluous factual allegations" regarding which felony he intended to commit (larceny versus another felony)—allegations that were "irrelevant to the proceedings" in California court. *Descamps*, 133 S. Ct. at 2289.

As each of these cases shows, the only way to ensure "efficiency, fairness, and predictability" in the treatment of prior convictions is to limit the inquiry to the only facts "a conviction *necessarily* establishe[s]": those elements that a jury must agree upon and find beyond a reasonable doubt. *Mellouli*, 135 S. Ct. at 1987; *see Descamps*, 133 S. Ct. at 2288.

II. Abandoning *Descamps*'s Formal-Elements Rule Would Cause Serious Practical Difficulties In Immigration Proceedings And Produce "Manifestly Unjust" Results.

Affirming the Eighth Circuit's approach would require repudiating *Descamps*'s holding that "the categorical approach's central feature" is "a focus on the elements … of a crime," meaning those facts a jury must agree upon and "find … beyond a reasonable doubt." 133 S. Ct. at 2285, 2288 (citing *Richardson*, 526 U.S. at 817). Such a retreat is unwarranted. Not

only would it raise serious Sixth Amendment concerns when applied to the INA's criminal provisions, *see supra* 7 n.3, Pet'r Br. 26-27, but also it would contravene a century's worth of immigration law deeming it "manifestly unjust … to exclude one person and admit another where both were convicted of [the same offense]," based on what evidence is presented to immigration officials. *Mylius*, 210 F. at 863.

And because the Eighth Circuit's approach will lead to many more statutes being deemed divisible, adjudicators will have to examine conviction records in many more cases. That greater role for the modified categorical approach in cases like those described above would mean that the "severe 'penalty'" of deportation, *Padilla*, 559 U.S. at 365, will often hinge on "what evidence remains available" regarding facts that were not necessary to a conviction, "or how [the record] is perceived by an individual immigration judge" long after the fact, *Moncrieffe*, 133 S. Ct. at 1690. That is precisely the unfair and unpredictable result the categorical approach is meant to avoid.

A. Noncitizens, who are often unrepresented and detained, would face significant obstacles under an expanded modified categorical approach.

Under the Eighth Circuit's rule, the modified categorical approach would apply to *all* disjunctively phrased statutes, not just the subset of such statutes that actually define separate crimes by listing alternative elements. The result of this broader application of the modified categorical approach will be much more recourse to the *Shepard* documents under

circumstances where "[t]he meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense—and may have good reason not to." *Descamps*, 133 S. Ct. at 2289. Thus, the decision whether longtime residents with deep community and family ties may remain in the country would turn on what facts are merely alleged or discussed in *Shepard* documents, whether or not they are complete or correct.

Moreover, increased parsing of often-inscrutable conviction records will make the inquiry into the immigration consequences of prior crimes much more onerous and case specific. A more bogged-down inquiry will work especially to the detriment of noncitizens. When the modified categorical approach applies, noncitizens will often be required to demonstrate why the *Shepard* documents produced by the Government are inaccurate, inconclusive, or do not establish what the Government contends they do (e.g., because an indictment was later superseded or a plea was entered under *North Carolina v. Alford*, 400 U.S. 25 (1970), and thus does not admit the relevant facts). Yet 45 percent of noncitizens in removal proceedings are unrepresented.[6] The INA entitles noncitizens to representation in removal proceedings only "at no expense to the government," 8 U.S.C. §§ 1229a(b)(4)(A), 1362, and many cannot afford

[6] U.S. Dep't of Justice, Exec. Office of Immigration Review, FY 2014 Statistics Yearbook, at F1, fig. 10 (2015) ("EOIR Yearbook"), *available at* http://www.justice.gov/sites/default/files/eoir/pages/attachments/2015/03/16/fy14syb.pdf.

counsel on their own. Pro se noncitizens will particularly struggle with scrutinizing old conviction documents if they are among the 85 percent of noncitizens in removal proceedings who are not fluent in English.[7]

Adding to the difficulty, most noncitizens merely *charged* as removable because of prior convictions are subject to mandatory detention during removal proceedings, § 1226(c), in facilities that are indistinguishable from jail or prison. Mandatory detention is not limited to those with prior felonies; even noncitizens with misdemeanor drug or firearms convictions, or two misdemeanor crimes involving moral turpitude, must be detained. § 1226(c)(1)(B). As a result, in 2013, the Government detained over 440,000 noncitizens in removal proceedings.[8] And in 2014, 37 percent of all completed immigration cases involved detained noncitizens.[9] Those in detention are even less likely to be assisted by counsel; from 2007 to 2012, only 16 percent of detained noncitizens had lawyers. *See* Ingrid V. Eagly & Steven Shafer, *A National Study of Access to Counsel in Immigration Court*, 164 U. Pa. L. Rev. 1, 32 (2015). Even those who do have counsel have difficulty communicating with their at-

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[7] *Id.* at E1, fig. 9.

[8] U.S. Dep't of Homeland Security, Office of Immigration Statistics, Immigration Enforcement Actions: 2013, at 5 (2014), *available at* https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf.

[9] EOIR Yearbook at G1, fig. 11.

torneys. In 2010, 78 percent of detainees "were in facilities where lawyers were prohibited from scheduling private calls with clients."[10]

Expanded use of the modified categorical approach will take an especially heavy toll on those in detention, because they often lack copies of their own *Shepard* documents and thus must fly blind in defending against the Government's assertions regarding the nature of their convictions. The Government sometimes mails noncitizens copies of records. But noncitizens are regularly transferred among detention facilities anywhere in the country; in 2009, 52 percent of detainees were transferred at least once.[11] And the Government's detention standards do not provide for forwarding mail following transfers.[12]

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[10] Nat'l Immigrant Justice Ctr., Isolated in Detention: Limited Access to Legal Counsel in Immigration Detention Facilities Jeopardizes a Fair Day in Court 4 (2010), *available at* https://www.immigrantjustice.org/sites/immigrantjustice.org/files/Detention%20Isolation%20Report%20FULL%20REPORT%202010%2009%2023.pdf.

[11] Human Rights Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States, § 4 (2011), *available at* https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united.

[12] U.S. Immigration & Customs Enforcement, 2011 Operations Manual ICE Performance-Based National Detention Standards, §§ 5.1 (Correspondence and Other Mail), 7.4 (Detainee Transfers), *available at* https://www.ice.gov/detention-standards/2011.

Some noncitizens may seek to obtain their own copies of *Shepard* documents in order to verify or rebut the Government's assertions, for example, or show that the records produced by the Government are incomplete. But they are often stymied by the communication barriers in detention. In addition to the difficulty of receiving mail, they have very limited access to telephones, and generally no Internet access.[13] Even if noncitizens are able to locate the proper contact information for the state court in which they were convicted, requesting copies of records can be cumbersome and costly.[14] The Court has thus recognized that noncitizens in detention "have little ability to collect evidence." *Moncrieffe*, 133 S. Ct. at 1690.

B. The immigration system would become even more overburdened under the Eighth Circuit's less administrable rule.

The Court has also expressed concern about the practical implications of a fact-based approach for "our Nation's overburdened immigration courts,"

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[13] *Id.* § 5.6 (Telephone Access); *see* U.S. Gov't Accountability Office, Alien Detention Standards: Telephone Access Problems Were Pervasive at Detention Facilities, at 5 (2007), *available at* http://www.gao.gov/assets/270/263327.pdf; Amnesty Int'l, Jailed Without Justice: Immigration Detention in the USA 35-36 (2009), *available at* http://www.amnestyusa.org/pdfs/JailedWithoutJustice.pdf.

[14] *See, e.g.*, Policies and Procedures, Judicial Records Center, Rhode Island (2013) (requiring certified check or money order for $3 per offense as well as a letter with specific information about the conviction), *available at* https://www.courts.ri.gov/JudicialRecordsCenter/PDFs/Policies Procedure.pdf.

Moncrieffe, 133 S. Ct. at 1690, and the broader adjudicatory "system in which 'large numbers of cases [are resolved by] immigration judges and front-line immigration officers, often years after the convictions,'" *Mellouli*, 135 S. Ct. at 1986-87 (quoting Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 Geo. Immigration L. J. 257, 295 (2012)). Those burdens are significant. In 2015, 254 immigration judges had 457,106 cases pending, or 1,800 cases per judge.[15] By comparison, the average district court judge had 626 pending cases that year.[16] And while district judges may each be assisted by two or three law clerks, four immigration judges typically share a single clerk.[17] The caseload has led to a tremendous backlog in immigration court.[18]

The expanded modified categorical approach under the Eighth Circuit's rule would only add to this

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[15] Statement of Juan P. Osuna, Director of the Executive Office of Immigration Review, Before the House Committee on the Judiciary 1, 3 (Dec. 3, 2015) ("Osuna Statement"), *available at* http://judiciary.house.gov/_cache/files/467e5f9e-e9e9-4141-99be-5c24cac1db55/osunatestimony.pdf.

[16] Administrative Office of the U.S. Courts, United States District Courts – National Judicial Caseload Profile (June 2015), *available at* http://www.uscourts.gov/file/18457/download.

[17] *Executive Office for Immigration Review: Hearing Before the Subcomm. on Immigration, Citizenship, Refugees, Border Security, and International Law*, 111th Cong. 56 (2010) (statement of Hon. Dana Marks).

[18] *See* EOIR Yearbook at A2 (163,042 more cases were opened than closed between 2010 and 2014).

burden. Although searching for the word "or" in a statute may be simple, what follows will be anything but: By expanding the inquiry beyond formal elements, the Eighth Circuit's approach will result in poring over *Shepard* documents in many more cases. Application of the modified categorical approach is already onerous enough for those agency adjudicators, who have no expertise in parsing the records of old state criminal proceedings. And the *Shepard* documents in the additional category of cases to which the modified categorical approach would apply—those involving mere alternative means in a disjunctive statute—will be especially difficult to dissect. Those documents are even more likely to be confusing or unclear precisely because, under state law, there will have been no need to carefully identify in an indictment or jury instructions which alternative means was at issue in the case. As a result, immigration adjudicators "would have to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Descamps*, 133 S. Ct. at 2289.

Three examples illustrate the difficulty. Amicus Gomez-Perez's charging document did not specify which mental state (intent, knowledge, or recklessness) he had, and the state court's judgment following a bench trial did not indicate which it was. *See* Add. 12a. That omission was no surprise, given Texas's clear position that the mental states are interchangeable and that one need not be specifically charged or found. *See supra* at 15. Yet the immigration judge and BIA spent considerable time examining the record of

conviction and considering whether the mental state could be inferred from the facts described in the complaint. Add. 11a-13a.

Similarly, in *Rendon*, the BIA examined Rendon's plea in an attempt to divine what felony he intended to commit once he entered a vehicle. 764 F.3d at 1082. But any indication he intended to commit larceny was a "superfluous factual allegation[]" that "was irrelevant to the proceedings" in the California court. *Descamps*, 133 S. Ct. at 2289. So the Ninth Circuit correctly recognized that the BIA should not have occupied itself with the *Shepard* documents at all.

And in *Olmsted v. Holder*, 588 F.3d 556 (8th Cir. 2009), the BIA pored over the noncitizen's plea transcript to determine whether his "hostile and belligerent" statements during a "drunken encounter with police" were made "with purpose to terrorize" the officers (which would be an aggravated felony crime of violence) or merely "in reckless disregard of the risk of causing such terror" (which would not). *Id.* at 558-60 (quoting Minn. Stat. § 609.713(1)). That hair-splitting analysis of intent should have been unnecessary; those two mental states can be charged disjunctively to a jury, which means that the jury need not agree on whether a defendant made threatening statements purposely or only recklessly. *See* 10 Minn. Prac., Jury Instruction Guides—Criminal § 13.106 (6th ed. 2015).

Beyond removal proceedings, greater application of the modified categorical approach would be even more challenging for the "front-line immigration officers" who also must consider whether noncitizens' convictions are disqualifying. *Mellouli*, 135 S. Ct. at

1987. Consular visa officials, Customs and Border Protection officers, Citizenship and Immigration Services adjudicators, and Immigration and Customs Enforcement agents all must evaluate noncitizens' convictions in the course of deciding whether to admit, naturalize, grant asylum to, or summarily remove noncitizens. 8 U.S.C. § 1158(a)(2), (d)(5)(A); § 1182(a)(2); § 1201(a)(1); § 1225(b)(1), (c)(1); § 1446(b). Those determinations are made by nonlawyers in nonadversarial proceedings. While an "immigration officer at the border" is capable of "check[ing] the alien's records for a conviction[,] [h]e would not call into session a piepowder court" to litigate what the prosecution's theory of the case was in the prior criminal proceeding, as the Eighth Circuit's approach would require. *Vartelas v. Holder*, 132 S. Ct. 1479, 1492 (2012).

Under *Descamps*'s elements-centric approach, in contrast, all these "'daunting' difficulties" can be avoided. 133 S. Ct. at 2289. Whether a given state criminal statute is divisible or corresponds to a generic offense is a purely legal determination that need only be made once, rather than by reference to the nuances of the *Shepard* documents in each case. Lists of which state statutes are disqualifying could then be provided to front-line adjudicators, as is already common practice. And, as *Descamps* correctly explained, there is "no real-world reason to worry" that "distinguishing between 'alternative elements' and 'alternative means' [will be] difficult," even the first time that determination must be made for a given state statute. *Id*. at 2285 n.2. As the examples above illustrate, state court decisions or other state authorities will often answer whether statutory terms are elements

that must be agreed upon by the jury and found beyond a reasonable doubt, or just methods of committing a single crime.

The text of the state statute standing alone may also make clear whether provisions are means or elements. In Sama and Lopez-Valencia's cases, for example, the statutes expressly provide that the particular means of committing theft need not be charged. Md. Code Ann., Crim. Law § 7-108(a); Cal. Penal Code § 952. In Petitioner and Rendon's cases, the use of a catchall term demonstrates that the terms that precede it are just illustrative examples. *See* Pet'r Br. 35-36. And where the statute provides different penalties for different alternatives, those alternatives will necessarily be elements under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *See, e.g.*, Md. Code Ann., Crim. Law § 6-202 (providing a higher sentence for burglary with intent to commit a crime of violence than burglary with intent to commit theft); Tex. Penal Code § 22.01(b)-(c) (assigning different penalties for the various acts in subsection (a)(1)-(3)).[19]

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[19] As *Descamps* recognized, when courts have before them the individual's record of conviction, that record itself may sometimes be useful as one example of what state law treats as elements, because the documents may "reflect the crime's elements." *Descamps*, 133 S. Ct. at 2285 n.2. Of course, the documents in one particular case sometimes will not shed light on what terms are means versus elements under state law, because "prosecutors' charging documents do not always charge a defendant properly. In some instances, prosecutors may fail to 'select the relevant element[s] from its list of alternatives,' *Descamps*, 133 S. Ct. at 2290, or may include the specific means of committing the offense out of convenience" or to avoid juror confusion, and "defendants may plead to these imprecisely

Burdening immigration adjudicators with even more application of the modified categorical approach would only further compromise the fairness of process noncitizens receive from an overstretched system. Even now, as one immigration judge put it, serving on the immigration bench is "'[l]ike doing death-penalty cases in a traffic-court setting.'" *See* Eli Saslow, *In A Crowded Immigration Court, Seven Minutes To Decide A Family's Future*, Washington Post (Feb. 2, 2014). Rather than require immigration judges to "expend [additional] resources examining (often aged) documents," *Descamps*, 133 S. Ct. at 2289, the Court should adhere to *Descamps*'s limited, formal-elements-based modified categorical approach.

III. Abandoning *Descamps*'s Formal-Elements Rule Would Also Severely Burden State Criminal Proceedings, Given Defense Attorneys' *Padilla* Obligations.

Affirming the Eighth Circuit's approach would also create several problems for criminal defense lawyers representing noncitizens, for the state criminal

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charged indictments or informations without alteration." *Almanza-Arenas*, 809 F.3d at 524 n.13. Certainly, where a state court has definitively stated what facts are true elements that a jury must agree upon and find beyond a reasonable doubt, that binding pronouncement of state law would control the divisibility inquiry, regardless of how a given prosecutor may have charged the crime in a particular case. After all, *Descamps* did not purport to overrule this Court's earlier holdings that federal tribunals "are bound by [a state] Supreme Court's interpretation of state law, including its determination of the elements of [a criminal statute]." *Johnson*, 559 U.S. at 138; *see also Schad*, 501 U.S. at 636-37 (plurality opinion).

courts themselves, and for noncitizens who would be deprived of the benefits of their pleas—problems that *Descamps* expressly sought to avoid.

Under *Padilla*, "counsel must inform her client whether his plea carries a risk of deportation." 559 U.S. at 374. Indeed, a defense attorney has a constitutional obligation to conduct some inquiry into "adverse immigration consequences" facing his client even "[w]hen the law is not succinct and straightforward." *Padilla*, 559 U.S. at 369 & n.10. *Descamps*'s formal-elements rule facilitates this duty. Defense counsel will be aware of which particular facts in an indictment a jury would *necessarily* have to find in the pending criminal proceedings (e.g., causing bodily injury to another at least recklessly), as distinct from embellishing or superfluous facts that merely describe the manner in which the offense was committed (e.g., intentionally hitting one's rival in the head). And defense counsel can then readily compare the formal elements of the offense with the elements of deportable offenses under federal law.

"The modified categorical approach complicates the negotiation process for prosecutors and criminal defense lawyers because it introduces additional variables they must consider in crafting a deal that minimizes the likelihood of downstream removal." *See* Stephen Lee, *De Facto Immigration Courts*, 101 Cal. L. Rev. 553, 605 (2013). If other "non-elemental facts" arising in indictments or plea colloquies may later be considered in removal proceedings, notwithstanding that those particulars are irrelevant in the state criminal proceedings, defense counsel will often be required to advise clients that they cannot be certain

whether a negotiated plea will succeed in avoiding deportation.

The result will be fewer pleas. *See id.* at 590. Because "deportation is … sometimes the most important part … of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes," *Padilla*, 559 U.S. at 364 (footnote omitted), noncitizens may prefer to take their chances at trial than plead to an offense that could result in deportation. *See* Ingrid V. Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126, 1195-1196 & n.315 (2013) (discussing anecdotal evidence that noncitizens facing a potential conviction with immigration consequences are more likely to go to trial). The predictability afforded by an elements-based categorical approach is essential to giving noncitizens sufficient comfort to accept pleas. "In particular, the approach enables aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Mellouli*, 135 S. Ct. at 1987 (internal quotation marks and brackets omitted).

Defense counsel may also feel compelled to "contest facts that are not elements of the charged offense," such as a "prosecutor's statement" describing the criminal conduct, if the presence of those facts in the record of conviction could have downstream immigration consequences. *Descamps*, 133 S. Ct. at 2289. Yet, precisely because "squabbling about superfluous factual allegations" may "irk the prosecutor or court," *Descamps* emphasized that only actual elements of an

offense should be considered in the modified categorical analysis. *Id.* Similarly, if the Eighth Circuit's approach is adopted, immigration-minded defense counsel will be put in the untenable position of disputing alleged facts at trial that the jury need not find, even though such "extraneous facts and arguments may confuse the jury," or may be outright "prohibit[ed]" by the court. *Id.*; *see also Moncrieffe*, 133 S. Ct. at 1692 ("[T]here is no reason to believe that state courts will regularly or uniformly admit evidence going to facts … that are irrelevant to the offense charged."). The Eighth Circuit's approach would thus impose the very burdens on state criminal proceedings that *Descamps* guards against.

Worse still, the Eighth Circuit's "approach will deprive some defendants of the benefits of their negotiated plea deals." *Descamps*, 133 S. Ct. at 2289. Noncitizens who accept what they believe to be "'safe harbor' guilty pleas" to offenses with elements that do not correspond to a federal crime, *Mellouli*, 135 S. Ct. at 1987, may later be surprised to discover that "legally extraneous facts in the old record" will nevertheless cause their convictions to be treated as deportable offenses, *Descamps*, 133 S. Ct. at 2289. That "'unfair'" result should be avoided. *Id.*

In the end, *Descamps*'s reasoning was sound: Federal sentencing and immigration consequences should flow only from those facts that were *necessarily* contested and found in prior state proceedings—the formal elements of the offense. *Descamps* controls here and should be reaffirmed.

CONCLUSION

The Court should reject the Eighth Circuit's approach to divisibility and reaffirm *Descamps*'s holding that statutes are divisible, such that the modified categorical approach applies, only if they contain multiple alternative elements, one of which a jury must agree upon and find beyond a reasonable doubt.

Respectfully submitted,

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February 29, 2016

ADDENDUM A

Background on Organizational Amici

The **American Immigration Lawyers Association** (AILA) is a national organization of more than 14,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a pro bono basis.

The **Immigrant Defense Project** (IDP) is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted amicus curiae briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), *Vartelas v. Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo v.*

Holder, 560 U.S. 563 (2010); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001) (citing IDP brief).

The **National Immigration Project of the National Lawyers Guild** (NIPNLG) is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For thirty years, the NIPNLG has provided legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of Immigration Law and Crimes and three other treatises. The NIPNLG has participated as amicus curiae in several significant immigration-related cases before this Court. *See, e.g.*, *Mellouli*, 135 S. Ct. 1980, *Vartelas*, 132 S. Ct. 1479; *Carachuri-Rosendo*, 560 U.S. 563; *Padilla*, 559 U.S. 356.

ADDENDUM B

U.S. Department of Justice
Executive Office for Imigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: A200 958 511–San Antonio, TX

Date: Mar-3 2015

In re:
HERMENEGILDO GOMEZ-PEREZ

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION:
Reconsideration

In a final administrative order dated October 21, 2014, this Board dismissed the respondent's appeal from an Immigration Judge's February 21, 2013, re-

moval order. The respondent now moves for reconsideration pursuant to section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6), alleging that the Immigration Judge and the Board erroneously found him ineligible for cancellation of removal. The motion will be denied.

The respondent is a native and citizen of Guatemala who concedes that he is removable by virtue of his unlawful presence in the United States. To qualify for cancellation of removal, the respondent must demonstrate that he "has not been convicted of an offense under section 212(a)(2) [or] 237(a)(2)," among other things. In our decision of October 21, 2014, we concluded that the respondent has not carried his burden of proof in that regard because he is unable to establish that his 2000 Texas conviction for "assault family violence" is not for a disqualifying crime involving moral turpitude ("CIMT") under sections 212(a)(2)(A)(i)(I) and 237(a)(2)(A)(i) of the Act. To be precise, we concluded that the criminal statute under which the respondent was convicted—Tex. Penal Code § 22.01(a)(1)—is "divisible" vis-à-vis the CIMT concept and that the record of his conviction is "inconclusive" because it does not reveal whether he committed his offense knowingly or intentionally (in which case it would be a CIMT) as opposed to recklessly (in which case it would not be a CIMT).

In his motion to reconsider, the respondent maintains that our prior decision was erroneous in two respects. First, he asserts that Tex. Penal Code § 22.01(a)(1) is not "divisible" at all within the meaning of *Descamps v. United States*, 133 S. Ct. 2276 (2013), because the alternative mental states with

which that offense can be committed (i.e., intent, knowledge, and recklessness) do not define alternative offense "elements," but rather mere alternative "means" by which the statute's mens rea element can be satisfied. Second, and in the alternative, he claims that even if Tex. Penal Code § 22.01(a)(1) is divisible, we erred when we held that the inconclusiveness of the conviction record disqualifies him from relief. We will address each argument in turn.

While we understand the respondent's "elements-versus-means" argument, the divisibility of Tex. Penal Code § 22.01(a)(1) is ultimately a question of circuit law. *See Matter of Chairez*, 26 I&N Dec. 349, 354 (BIA 2014). The United States Court of Appeals for the Fifth Circuit (in whose jurisdiction this case arises) has held in its post-*Descamps* CIMT cases that a statute is divisible, so as to warrant a modified categorical inquiry, whenever it "has multiple subsections or an element phrased in the disjunctive, such that some violations of the statute would involve moral turpitude and others not." *See Cisneros-Guerrerro v. Holder*, 774 F.3d 1056, 1059 (5th Cir. 2014) (citations omitted). The Fifth Circuit has not interpreted *Descamps* to require a focus upon the distinction between "elements" and "means" when evaluating a statute's divisibility. *See also United States v. Trent*, 767 F.3d 1046, 1058-61 (10th Cir. 2014). Applying the Fifth Circuit's conception of divisibility in this case, as we must, we conclude that Tex. Penal Code § 22.01(a)(1) is a divisible statute vis-à-vis the CIMT concept because its mens rea element is phrased in the disjunctive and defines some offenses that are morally turpitudinous and others that are

not. Accordingly, with respect to the divisibility question, we discern no legal error in our prior decision that would warrant reconsideration.

We also find no legal or factual error in our prior decision as it relates to the effect of an "inconclusive" conviction record upon the respondent's eligibility for cancellation of removal. As the Fifth Circuit has recognized, in cancellation of removal cases the burden is on the applicant to demonstrate that his criminal convictions do not bar relief; the burden is not on the DHS to establish his ineligibility. *See Vasquez-Martinez v. Holder*, 564 F.3d 712, 715-16 (5th Cir. 2009). As the party with the burden of persuasion, the respondent necessarily bears the risk of uncertainty when important facts remain in doubt. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49, 56-57 (2005). Thus, most courts to have addressed the question—including the Fifth Circuit, in a non-precedential opinion—have held that an applicant for cancellation of removal who has a criminal record cannot carry his burden of proving the absence of a disqualifying conviction merely by presenting an "inconclusive" record. *See Francis v. Holder*, 556 Fed. Appx. 343 (5th Cir. 2014); *see also Syblis v. Atty. Gen. of U.S.,* 763 F.3d 348, 356-57 (3d Cir. 2014); *Sanchez v. Holder*, 757 F.3d 712, 720 n. 6 (7th Cir. 2014); *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009).

We realize that the Ninth Circuit recently reversed course on this question, holding that an inconclusive conviction record is sufficient to establish eligibility for cancellation of removal. *Almanza-Are-*

nas v. Holder, 771 F.3d 1184 (9th Cir. 2014), *abrogating in part*, *Young v. Holder*, 697 F.3d 976, 990 (9th Cir. 2012) (en banc). We decline to follow that decision in Fifth Circuit cases, however; indeed, we note that *Almanza-Arenas* is currently the subject of a petition for panel rehearing in the Ninth Circuit and has been made the subject of a sua sponte en banc call. Under the circumstances, we will reaffirm our prior determination that the respondent—having been convicted under a divisible statute—is ineligible for cancellation of removal because his conviction record is inconclusive with respect to the mental state with which the offense was committed.

The following order will be entered.

ORDER: The motion to reconsider is denied.

/s/ Roger A. Pauley
FOR THE BOARD

ADDENDUM C

U.S. Department of Justice Executive Office for Immigration Review FallsChurch, Virginia 20530	Decision of the Board of Immigration Appeals
File: A200 958 511—San Antonio, TX	Date: **Oct-21 2014**

In re: HERMENEGILDOGOMEZ-PEREZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Stephen O'Connor, Esquire

ON BEHALF OF DHS: Eric C. Bales

Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)]—Present without being admitted or paroled

APPLICATION: Cancellation of removal

The respondent, a native and citizen of Guatemala, appeals from an Immigration Judge's February 21, 2013, decision denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be dismissed.

The respondent concedes removability (Tr. at 3), and thus the sole issue on appeal is whether the respondent has carried his burden of proving that he "has not been convicted of an offense under section 212(a)(2) [or] 237(a)(2)" that bars him from applying for cancellation of removal. Section 240A(b)(1)(C) of the Act.

It is undisputed that the respondent sustained a 2000 Texas conviction for "assault family violence," an offense which was designated a "class A misdemeanor" by the sentencing court (Exh. 3, tab E, pp. 101-124). Although the respondent's conviction record does not specifically identify the section of the Texas Code under which he was convicted, the Immigration Judge properly found that the language of the charging document was consistent only with a conviction under section 22.01(a)(1) of the Texas Penal Code (I.J. at 4; Exh. 3, tab E, p. 101). The respondent maintains on appeal that he might have been convicted under paragraphs (2) or (3) of section 22.01(a) and that the Immigration Judge erred by failing to consider those possibilities, but we discern no error in the Immigration Judge's determination

that the respondent was in fact convicted under paragraph (1). As noted, the respondent's offense was denominated a "class A misdemeanor," a designation that is consistent *only* with a violation of section 22.01(a)(1); violations of sections 22.01(a)(2) and (a)(3) were designated "class C misdemeanors," except in instances—not applicable here—where the victim was proven to be elderly or disabled. *See* Tex. Penal Code §§ 22.01(b), (c) (1998).

Having concluded that the respondent was convicted under Tex. Penal Code § 22.01(a)(1), the Immigration Judge found him ineligible for cancellation of removal on the ground that his offense of conviction was a crime involving moral turpitude ("CIMT") within the meaning of sections 212(a)(2)(A)(i)(I) and section 237(a)(2)(A)(i) of the Act (I.J. at 3-4). The respondent disputes that determination on appeal.

To determine whether the respondent has a CIMT conviction, we employ the methodology adopted by the Attorney General in *Matter of Silva-Trevino,* 24 I&N Dec. 687, 688-89, 696 (A.G. 2008), to the fullest extent possible. *See* 8 C.F.R. § 1003.1(g). Under *Silva-Trevino,* the first step of the CIMT analysis involves a "categorical" inquiry, in which the statute defining the offense of conviction is examined to ascertain whether moral turpitude inheres in all offenses that have a "realistic probability" of being successfully prosecuted thereunder. *Id.* at 689-90, 696-98. If this categorical inquiry reveals that the statute of conviction is sometimes used to prosecute non-turpitudinous conduct, then *Silva-Trevino* requires the Immigration Judge to conduct a second-step inquiry in which specific documents comprising the alien's

record of conviction are examined in order to discern the nature of the underlying offense of conviction. *Id.* at 690, 698-99.[1]

At all relevant times, Tex. Penal Code § 22.01(a)(1) has provided that "[a] person commits an offense if the person intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse." This language does not define a categorical CIMT because it covers the *reckless* infliction of bodily injury. *See Matter of Fualaau,* 21 I&N Dec. 475 (BIA 1996) (holding that third-degree assault under Hawaii law, which involves recklessly causing bodily injury, is not a CIMT).

As a realistic probability exists that section 22.01(a)(1) would be applied to prosecute non-turpitudinous conduct, it was permissible for the Immigration Judge to examine the respondent's conviction record in order to ascertain the nature of the respondent's particular offense of conviction. Conducting such an inquiry, the Immigration Judge noted that the respondent was charged with "intentionally, knowingly, and recklessly" causing

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[1] The Attorney General also held that if consideration of the record of conviction does not conclusively resolve the moral turpitude issue, evidence *beyond* the record of conviction may be considered by an Immigration Judge to determine whether a particular crime involved moral turpitude. *Matter of Silva-Trevino, supra,* at 690, 699-701. This aspect of *Silva-Trevino—the* so-called "third step" inquiry into evidence beyond the record of conviction—was not applied by the Immigration Judge and will not be applied on appeal because it has been rejected as impermissible by the United States Court of Appeals for the Fifth Circuit. *See Silva-Trevino v. Holder,* 742 F.3d 197 (5th Cir. 2014).

bodily injury to his victim by "hitting [him] on and about the head" with his hand (I.J. at 3, 4; Exh. 3, tab E, p. 101). Based on that description of the offense, the Immigration Judge concluded that the respondent had committed an *intentional* violent assault against a member of his household (i.e., his roommate).

As a rule, the intentional infliction of bodily injury upon another is morally turpitudinous conduct, without regard to the existence of a "domestic" relationship between the offender and the victim. *See Matter of Solon,* 24 I&N Dec. 239 (BIA 2007). The respondent contends on appeal, however, that the Immigration Judge erred by deeming him to have been convicted of committing an *intentional* assault, and we are inclined to agree with the respondent in that regard. The respondent's conviction record reflects that he pled "not guilty" to the foregoing charge (Exh. 3, tab E, at p. 120); and while the trial court found him guilty after a bench trial, the court's judgment does not contain any findings of fact or statement of reasons specifying exactly which charged elements or facts the judge found to be true beyond a reasonable doubt. As the respondent explains in his brief, when a Texas prosecutor alleges criminal mental states in the conjunctive (i.e., "intentionally, knowingly, *and* recklessly"), the factfinder may render a guilty verdict if he or she finds that the defendant acted with *any* of the enumerated mental states, including the least culpable of them (in this case, recklessness). *See Perez v. State,* 704 S.W.2d 499, 501 (Tex. Ct. App. 1986). Thus, in our view the record does not conclusively establish which mental state the respondent was convicted of possessing when he inflicted bodily injury upon his victim; he may have

been convicted of an intentional (turpitudinous) assault or a reckless (non-turpitudinous) one.

The inconclusiveness of the conviction record does not aid the respondent, however, because as an applicant for cancellation of removal he bears the burden of proving the *absence* of a disqualifying conviction. An inconclusive record is insufficient to carry that burden. *See Francis v. Holder,* 556 Fed. Appx. 343 (5th Cir. 2014); *Matter of Almanza,* 24 I&N Dec. 771, 774-75 (BIA 2009); *see also Syblis v. Atty. Gen. of U.S.,* 763 F.3d 348, 356-57 (3d Cir. 2014); *Sanchez v. Holder,* 757 F.3d 712, 720 n. 6 (7th Cir. 2014); *Young v. Holder,* 697 F.3d 976, 990 (9th Cir. 2012) (en banc); *Salem v. Holder,* 647 F.3d 111, 116 (4th Cir. 2011); *Garcia v. Holder,* 584 F.3d 1288, 1290 (10th Cir. 2009). Inasmuch as the respondent has not established the absence of a disqualifying CIMT conviction, his application for cancellation of removal was properly denied.

In conclusion, the respondent is removable based on his unlawful presence and ineligible for cancellation of removal by virtue of his 2000 Texas conviction for assault family violence. The Immigration Judge granted the respondent the privilege of voluntary departure, however, and the respondent has provided us with timely proof that he posted the mandatory voluntary departure bond with the DHS. Accordingly, we will reinstate voluntary departure.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with

conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to

this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

s/Roger A. Pauley
FOR THE BOARD