Docket No. 22-1779

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MARIANO BROWN,

Petitioner,

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA,

Respondent.

On Petition for Review of a Final Decision
of the Board of Immigration Appeals
No. A [redacted]

BRIEF OF THE AMERICAN IMMIGRATION COUNCIL, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, HIAS PENNSYLVANIA, IMMIGRANT DEFENSE PROJECT, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, PENNSYLVANIA IMMIGRATION RESOURCE CENTER, AND PROFESSORS KATE EVANS AND JOANNE GOTTESMAN AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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September 3, 2022

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 22-1779

Mariano Brown

v.

Attorney General United States of America

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Amici Curiae makes the following disclosure: (Name of Party)

1) For non-governmental corporate parties please list all parent corporations: None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

None

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/Amelia Marritz Dated: 09/03/2022

(Signature of Counsel or Party)

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INTRODUCTION AND STATEMENT OF IDENTIFICATION OF *AMICI*[1]

In *Matter of Laguerre*, 28 I. & N. Dec. 437 (BIA 2022) the Board of Immigration Appeals ("BIA") violated the Supreme Court's categorical approach and divisibility precedents. *See, e.g.*, *Mathis v. United States*, 579 U.S. 500 (2016); *Mellouli v. Lynch*, 575 U.S. 798 (2015); *Descamps v. United States*, 570 U.S. 254 (2013). Those precedents demand "certainty" that the elements of a prior conviction fall categorically within a federal generic definition for immigration or sentencing consequences to be triggered. In *Laguerre*, the BIA imposed draconian immigration consequences based on a clearly incorrect conclusion about the elements of a New Jersey controlled substance statute.

Amici agree with Petitioner that New Jersey law unambiguously demonstrates that the subsections of New Jersey's controlled dangerous substance ("CDS") statute are indivisible as to particular substance. However, should the Court find ambiguity in New Jersey's law, *amici* respectfully submit this brief to address the additional error in *Laguerre*, where the BIA reviewed record of conviction documents incorrectly and relied on this "peek" at the record to issue its erroneous holding that

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than amici curiae, its members, and its counsel contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(a)(4)(E).

a specific substance is an element under New Jersey law.[2] The BIA's methodology and conclusion were wrong and must be overturned.

The BIA's "peek" at the *Shepard*[3] documents in the case, which formed the basis of its decision, took two sentences of its eleven-page opinion. 28 I. & N. Dec. at 447. Noting only that the noncitizen's indictment mentioned a specific substance, the BIA concluded that the substance is an element. This misunderstands what an "element" is, and is the kind of flawed methodology the Supreme Court specifically prohibited in *Mathis* and *Descamps*.

In Section I of this brief, *amici* discuss the categorical approach's settled demand for "certainty" as to elements of conviction. In Section II, *amici* explain that *Laguerre* violates the categorical approach and draws an incorrect conclusion about New Jersey law. *Amici* further attach and discuss *Shepard* documents from other New Jersey prosecutions under its CDS statute. *See* Appendix B. These documents

[2] In *Laguerre*, the specific CDS statute subsection at issue was N.J. Stat. Ann. § 2C:35-10(a)(1). In Petitioner's case, the specific CDS statute subsections at issue are the same statute and subsection as in *Laguerre*, § 2C:35-10(a)(1), and a related statute, N.J. Stat. Ann. §§ 2C:35-5(a)(1) and 2C:35-5(b)(5). However, The BIA provided no analysis with respect to Mr. Brown's conviction under the related statute. *See* Pet. Br. At 16. In a related case pending before this Court, *Gayle v. Att'y Gen.*, No. 22-1811, the specific CDS statute subsections at issue are N.J. Stat. Ann. §§ 2C:35-10(a)(1) and 2C:35-5(b)(1). In Petitioner's case and in *Gayle*, the Board relied on *Laguerre* and its "peek" at Mr. Laguerre's record of conviction to find each of the addressed New Jersey CDS statute divisible by particular substance. *Amici* have also filed a brief in support of the petitioner in *Gayle*.

[3] *Shepard v. United States*, 544 U.S. 13, 16 (2005).

controvert the BIA's conclusion drawn from its "peek" at a single *Shepard* document and show that the specific substance is not an element of conviction.

Amici are organizations providing specialized advice to immigrants and lawyers on the interrelationship of criminal and immigration law. *Amici* have a strong interest in assuring that rules governing classification of criminal convictions are fair and accord with longstanding precedent on which immigrants, attorneys, and the courts have relied for over a century. *Amici* have also submitted briefs to the Supreme Court and this Court in numerous cases involving the immigration consequences of convictions. *See, e.g.*, *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 579 U.S. 500 (2016); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001). Statements of interest for individual *amici* are attached at Appendix A.

ARGUMENT

I. FOR A PRIOR "CONVICTION" TO TRIGGER AN INA PROVISION, THE SUPREME COURT REQUIRES CERTAINTY THAT THE ELEMENTS—NOT MEANS OR FACTS—OF A CONVICTION FALL CATEGORICALLY WITHIN THE REMOVAL GROUND.

A. The demand for certainty is a threshold component of the longstanding categorical approach.

The categorical approach and divisibility are grounded in the need for certainty. The categorical and modified categorical approach "focus[] on the legal

question of what a conviction *necessarily* established." *Mellouli*, 575 U.S. at 806 (emphasis in original); *see Moncrieffe v. Holder*, 569 U.S. 184, 190, 196 (2013) (holding that under the categorical approach courts "examine what the state conviction necessarily involved"). The "categorical approach's central feature" is *always* "a focus on the *elements*, rather than the facts, of a crime." *Descamps*, 570 U.S. at 263 (emphasis added); s*ee also Hillocks v. Att'y Gen.*, 934 F.3d 332, 336 (3d Cir. 2019) ("Courts ask what elements of a given crime always require—in effect, what is legally necessary for a conviction.") (quoting *Sessions v. Dimaya*, 138 S. Ct. 1204, 1211 n.1 (2018)); *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Matter of Kim*, 26 I. & N. Dec. 912, 913 (BIA 2017) (recognizing "*Taylor*'s demanding requirement that a prior conviction 'necessarily' involved facts equating to the generic offense" (internal quotation and punctuation omitted)). Because of this demand for certainty, a categorical analysis presumes that a conviction "rested upon nothing more than the least of the acts criminalized, and then determine[s] whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 569 U.S. at 190–91.

"Th[e] categorical approach has a long pedigree in our Nation's immigration law." *Id.* at 191 (citing Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1688–1702, 1749–52 (2011)). For over a century, courts and the agency

have applied a categorical analysis to determine whether a conviction "necessarily" carries an immigration consequence. Das, *supra* at 1688–1701; *see United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (L. Hand, J.) (determining what a conviction "'necessarily'" establishes by examining the least conduct punished by the statute); *Matter of P-*, 3 I. & N. Dec. 56, 59 (BIA 1947) (holding "that a crime must by its very nature and at its minimum, as defined by statute" match a removal ground) (citing *United States ex rel. Mylius v. Uhl*, 203 F. 152, 154 (S.D.N.Y. 1913)). The approach is "[r]ooted in Congress' specification of conviction, not conduct, as the trigger for immigration consequences." *Mellouli*, 575 U.S. at 806; *see Moncrieffe*, 569 U.S. at 191 ("Conviction is the relevant statutory hook.") (internal quotation omitted); *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (BIA 2008) ("For nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was convicted, to the exclusion of any other criminal or morally reprehensible acts he may have committed.").

The threshold certainty requirement is particularly significant when viewed against the realities of a large administrative adjudicative system where the outcome for the noncitizen may be "the loss of all that makes life worth living." *Bridges v. Wixon*, 326 U.S. 135, 147 (1945) (citing *Ng Fung Ho v. White*, 259 U.S. 276, 284

(1922)). "By focusing on the legal question of what a conviction necessarily established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 575 U.S. at 806. The BIA has acknowledged it as "the only workable approach in cases where deportability is premised on the existence of a conviction." *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 335 (BIA 1996) (en banc). The alternative, in which the agency weighs evidence to determine the crime *committed* rather than the crime of *conviction*, would be contrary to the statute and inconsistent "with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence." *Id*.

B. The categorical approach demands certainty regarding whether statutory alternatives are "means" or "elements."

The demand for certainty applies across the categorical approach, including determining whether a statute is divisible. This is compelled by Supreme Court and circuit court precedent concluding that ambiguous statutes are indivisible statutes, and by the criminal rule of lenity.

1. Supreme Court and circuit court precedent establish that an ambiguous statute is an indivisible statute.

The categorical approach applies when determining whether a noncitizen's conviction triggers a conviction-based removal ground. *See Mellouli*, 575 U.S. at 804. The categorical approach "compare[s] the elements of the statute forming the basis of the [prior] conviction with the elements of the 'generic' crime." *Descamps*, 570 U.S. at 257. An "element" is a "constituent part[] of a crime's legal definition" that a jury must find unanimously and beyond a reasonable doubt to sustain a conviction. *Mathis*, 579 U.S. at 504. A categorical match results only if the statute contains the same or narrower elements than those of the generic offense. *Id*. The individual's actual conduct is irrelevant. *Mellouli*, 575 U.S. at 805.

Essential to the categorical approach, therefore, is proper identification of the conviction elements. Only by accurately identifying the elements is it possible to satisfy the "demand for certainty." *Mathis*, 579 U.S. at 519; *see Mellouli*, 575 U.S. at 806. This is because, when examining a prior conviction in subsequent immigration proceedings "the only facts the court can be sure the jury so found are those constituting elements of the offense–as distinct from amplifying but legally extraneous circumstances." *Descamps*, 570 U.S. at 269-70 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

Where a statute of conviction "sets out a single (or 'indivisible')" set of elements, the categorical approach is "straightforward." *Mathis*, 579 U.S. at 504-05. "The court lines up that crime's elements alongside those of the generic offense and

sees if they match." *Id.* at 505. "[W]hen a statute lists multiple, alternative elements, and so effectively creates 'several different crimes[,]'" "the modified categorical approach adds . . . a mechanism for making that comparison." *Descamps*, 570 U.S. at 263-64 (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)).

To determine whether the modified categorical approach applies to an "alternatively phrased law," the adjudicator must determine whether the alternatives are distinct elements, or simply various factual means of committing a single element. *Mathis*, 579 U.S. at 505. If the alternatives are elements, the statute is divisible and the modified categorical approach applies, permitting the adjudicator to review certain documents from the record of conviction in order to identify the offense of conviction. *See id* at 505-06. But if the alternatives are means, the statute is *in*divisible and the modified categorical approach is inapplicable. *See id*. at 512-13.

In *Mathis*, the Supreme Court affirmed the methodology for distinguishing elements and means. The inquiry starts—and often concludes—by consulting "authoritative sources of state law," which "readily" answer the question in many cases. *Id*. at 518. Specifically, these sources include state court decisions and statutory text. Conceptually, markers of means versus elements include: whether juror unanimity is required, which can be established by statute or case law; whether

"statutory alternatives carry different punishments;" and whether "a statutory list is drafted to offer illustrative examples." *Id.* at 518 (internal quotation omitted).

If, and *only* if, these state sources do not provide a clear answer, an adjudicator may "peek" at the record of conviction "for the sole and limited purpose of determining whether items are elements of the offense." *Id*. (quotation and alternations omitted). But if an authorized peek at the record of conviction documents does not "speak plainly" as to whether the statutory alternatives are means or elements, *Mathis* and the categorical approach's "demand for certainty" command that the alternatives are means, not elements. *Id.* at 519.

This Court and five sister circuits have applied *Mathis* accordingly by finding statutes indivisible when faced with uncertain state case law and an ambiguous peek at a record of conviction. In *Rosa v. Att'y Gen.*, 950 F.3d 67 (3d Cir. 2020), this Court explicitly acknowledged this certainty requirement in analyzing N.J. Stat. Ann. § 2C:35-7, a different New Jersey CDS statute. After finding that neither state case law nor the statutory language resolved statutory divisibility as to the *actus reus*, the Court remanded the case to supplement the incomplete record of conviction materials. *See id.* at 82. The Court concluded, "[I]f the record cannot be supplemented to satisfy the demand for certainty in analyzing whether the statute lists means or elements, Rosa cannot be found to have committed an aggravated felony." *Id.* at 82-83 (internal quotation omitted).

In *Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019), the Seventh Circuit ruled in favor of a lawful permanent resident convicted under an Illinois controlled substance statute. The court applied the *Mathis* framework to determine whether the statute was divisible as to the substance and concluded that "[t]he state law sources, let alone the record materials, do not speak plainly, so we are not able to satisfy *Taylor*'s demand for certainty." *Id*. at 356 (internal quotations omitted). In that case, a charging document identified one substance, and a sentencing document did not. *Id*. The court vacated the removal order, finding the statute indivisible. *Id*.

In *United States v. Hamilton*, 889 F.3d 688 (10th Cir. 2018), the Tenth Circuit conducted a *Mathis* divisibility analysis for Oklahoma's second-degree burglary statute. The court determined that "neither Oklahoma case law, the text of the Oklahoma statute, nor the record of conviction establishes with certainty whether the locational alternatives constitute elements or means." *Id*. at 698–99 (finding that a charging document specifying the location did not answer the question because such documents often allege facts that are not elements of a crime). The Tenth Circuit concluded: "[W]e must treat the Oklahoma statute as indivisible." *Id*. The Tenth Circuit ruled the same way in *United States v. Degeare* as to a different Oklahoma statute, concluding, "In any event, we need not decide which of the parties' competing interpretations of the charging documents is correct. We hold only that, whatever the charging documents might have to say about the means-or-

elements question in this case, they don't say it 'plainly.'" 884 F.3d 1241, 1258 (10th Cir. 2018). The court found the statute indivisible and the modified categorical approach inapplicable.

In *Alejos-Perez v. Garland*, the Fifth Circuit found a Texas controlled substance statute indivisible due to uncertainty as to means versus elements. 991 F.3d 642, 651 (5th Cir. 2021). In that case, the court found that one state decision read as if the alternative were an element, state double jeopardy cases did not answer the indivisibility question with certainty, and the record of conviction did reference one statutory alternative to the exclusion of all others but also referred to the drug penalty group as a whole. *See id.* In the face of such uncertainty in state law and the record of conviction, the court duly recognized that the statute was indivisible, and the strict categorical approach applied. Similarly, in *United States v. Perlaza-Ortiz*, the Fifth Circuit found a Texas statute indivisible despite a charging document that referenced one statutory alternative to the exclusion of the others. 869 F.3d 375, 378 (5th Cir. 2017). The court found that the record of conviction did not meet the demand for certainty, noting unpublished case law indicating the statutory alternative was a means not an element. *See id.* at 380.

The Sixth Circuit reached a similar conclusion in analyzing a Michigan breaking and entering statute, explaining that "at bottom, record materials will resolve the elements-means dilemma only when they speak plainly" and that

"because the documents in this case are, at the very most, inconclusive on this score, they cannot form the basis of divisibility." *United States v. Ritchey*, 840 F.3d 310, 321 (6th Cir. 2016) (internal quotations omitted) (examining record of conviction documents that included (1) a charge identifying one location not listed in the statute, (2) a charge alleging breaking and entering into a "BARN/GARAGE," and (3) offense captions indicating "the term 'building' is a placeholder that encompasses a broad swath of locations").

In *Lopez-Marroquin v Garland*, the Ninth Circuit found a statute indivisible because "[s]tate law sources and a 'peek' at the record [did] not satisfy '*Taylor*'s demand for certainty' when deciding if" an individual "was necessarily convicted of a generic offense." 9 F.4th 1067, 1073 (9th Cir. 2021), (quoting *Mathis*, 579 U.S. at 518-19). The court began by looking to the statutory text and determined that it gave "no clue on the question of divisibility," though the court ultimately agreed that the text in combination with the structure "tend[ed]" to support the petitioner's argument that the statute was indivisible. *Id*. at 1072. The court next looked to the state case law and found it conflicting. *See id*. at 1072-73. Because the answer was "not clear" from the statute and the case law, the court took a "peek" at the record of conviction and found those documents "ambiguous at best" in that they simply restated the statutory language. *Id*. at 1073. Accordingly, the court found statute was indivisible.

Amici urge this Court to affirm its decision in *Rosa* and the decisions of its sister circuits finding that an ambiguous statute is an indivisible statute.

2. The criminal rule of lenity further reinforces that ambiguous criminal statutes must be found indivisible.

The requirement for certainty when determining the divisibility of a criminal statute is also consistent with, and supported by, the canonical criminal rule of lenity. The "venerable" rule of lenity requires "ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008). It is grounded in principles of fair notice and the necessary separation of powers. S*ee id*. The rule is equally applicable when construing a statue with both criminal and civil immigration applications, such as the aggravated felony provision at issue in in Petitioner's case. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (holding that when interpreting a dual-application statute "the rule of lenity applies," because courts "must interpret the statute consistently, whether [courts] encounter its application in the criminal or noncriminal context"); *see also Carachuri-Rosendo v. Holder*, 560 U.S. 563, 581 (2010) ("[A]mbiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor.").

If federal adjudicators were to conclude that ambiguous state criminal laws are divisible—ambiguity notwithstanding—the consequence would be deprivations of liberty and enhanced criminal penalties for federal defendants and noncitizens.

For example, the baseline maximum sentence for a previously removed noncitizen convicted of illegal reentry under 8 U.S.C. § 1326 is two years. *See* 8 U.S.C. § 1326(a). But a noncitizen who was previously removed following a conviction that qualifies as an aggravated felony is subject to a ten-fold enhancement of up to twenty-years imprisonment. *See* 8 U.S.C. § 1326(b); *United States v. Resendiz-Ponce*, 549 U.S. 102, 105 (2007). Courts apply the rule of lenity to prevent such an unjust outcome and to "perhaps most importantly" to "serve[] our nation's strong preference for liberty." *United States v. Nasir*, 17 F.4th 459, 473 (3d Cir. 2021) (Bibas, J., concurring).

II. BY MISAPPLYING THE "PEEK" AT THE RECORD OF CONVICTION IN *LAGUERRE*, THE BIA VIOLATED THE CATEGORICAL APPROACH AND DREW AN INCORRECT AND UNAUTHORIZED CONCLUSION ABOUT NEW JERSEY LAW.

In *Laguerre*, the BIA committed multiple errors in applying the modified categorical approach. After finding that New Jersey case law did not answer divisibility with certainty, the BIA in *Laguerre* conducted a "peek" at Mr. Laguerre's record of conviction to reach its divisibility holding. 28 I. & N. Dec. at 447 ("Because New Jersey case law and the language of the statute of conviction . . . do not provide clear or definitive answers, we may "peek" at the respondent's record of conviction.") (internal quotation and citation omitted). In addition to erroneously concluding that the authoritative sources of state law were inconclusive as to the

elements of the New Jersey statute, *see* Pet. Br. at 25-40, the BIA conducted an inadequate "peek" at the record of conviction in the case and drew an incorrect conclusion about the elements of N.J. Stat. Ann. § 2C:35-10(a)(1). In this section, *amici* focus on this second error.

In conducting its "peek" at the record of conviction in *Laguerre*, the BIA wrote only the following two sentences:

> The indictment in the respondent's case reflects that he was charged with possessing the controlled dangerous substance of cocaine. Because this charging document "referenc[es] one alternative [controlled dangerous substance] to the exclusion of all others," the *Mathis* "peek" supports our view that the identity of the controlled dangerous substance possessed is an "element" of section 2C:35-10(a)(1), as opposed to a "means" of violating the statute.

28 I. & N. at 447. Without further analysis, the BIA concluded that because the indictment in Mr. Laguerre's case referenced "cocaine," the specific substance is an element of section 2C:35-10(a)(1).

The BIA's superficial review suffers from two fatal flaws. First, the BIA applied *Mathis*'s suggestion that the contents of a record of conviction might inform divisibility too broadly. Contrary to *Laguerre*, where a statutory alternative is exclusively identified in a record of conviction, the Supreme Court requires further analysis to confirm, with certainty, that the alternative is an element. Second, the analysis violates foundational criminal law charging requirements. *Amici* have

gathered New Jersey record of conviction documents, *see* Appendix B, that directly controvert the conclusion in *Laguerre* and, along with Petitioner's own record document, show that New Jersey law treats the specific substance as a means of violating the generic controlled dangerous substance element.

A. Where a statutory alternative is exclusively identified in a record of conviction, the categorical approach requires further analysis to distinguish between means and elements.

A review of relevant federal and state law makes clear that where a statutory alternative is exclusively identified in a record of conviction, further analysis is needed to confirm divisibility with certainty. In discussing the concept of the "peek" at the record of conviction at the indivisibility/divisibility step of the categorical approach, it is apparent that the *Mathis* court envisioned a circumstance where state law is inconclusive, and record of conviction documents "help in making that [means-elements] determination." 579 U.S. at 518 n.7. The Court by no means meant that the mention of a single statutory alternative in a charging document suffices to resolve divisibility. The Court had already rejected this suggestion in *Descamps*. *See* 570 U.S. at 270 (discussing that facts stated in the record of conviction—such as, what "a defendant admitted in a plea colloquy, or a prosecutor showed at trial"— may nevertheless be "unnecessary to the crime of conviction" and therefore not elements). Rather, the Court was indicating that *Shepard* documents

might be structured or written in a way that interacts with state law sources to provide a clear answer regarding means-or-elements. The Court discussed three possibilities.

First, a scenario where the "peek" would be "as clear an indication as any" that the statute is indivisible. 579 U.S. at 519. The Court gives the example of "one count of an indictment and correlative jury instructions charg[ing] a defendant with burgling a 'building, structure, or vehicle'—thus reiterating all the alternative statutory terms of" an Iowa burglary statute. *Mathis*, 579 U.S. at 519.

Second, another scenario where indivisibility is clear: where the *Shepard* "documents use a single umbrella term like 'premises.'" *Id.* Such a "record *would* then reveal what the prosecutor has to (and does not have to) demonstrate to prevail." *Id.* (citing *Descamps*, 570 U.S. at 272) (emphasis added).

Third, the Court gave a final example of "an indictment *and* jury instructions" that "referenc[e] one alternative term to the exclusion of all others." *Id*. (emphasis added). Such a record of conviction "*could* indicate" "that the statute contains a list of elements." *Id*. (emphasis added). But the Court cautions that this is an example of a record of conviction with especially plain meaning, which will not always be the case. *See id.* Thus, the Court recognized that identification of a single statutory alternative does not *automatically* mean that the alternative is an element rather than a means of violating a statute.

This third scenario requires further analysis because statutory alternatives are frequently identified in records of conviction for reasons unrelated to the means-or-elements distinction. For example, non-element facts are included to provide sufficient notice to a defendant to mount a defense. *See* 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 19.3(c) Factual Specificity (4th ed.) ("As courts repeatedly note, an indictment [or information] must not only contain all the elements of the offense charged, but must also provide the accused with a sufficient description of the acts he is alleged to have committed to enable him to defend himself adequately.") (internal quotation omitted). *See also* Section II.B.2., *infra*.

Descamps "demonstrate[d]" the very "point" that the mention of a fact or term in a *Shepard* document does not automatically render the fact or term an element of conviction. 570 U.S. at 268. The government tried to rely on an admission to "breaking and entering" in Mr. Descamps's plea colloquy, arguing that the reliability of record of conviction documents overrode the fact that it agreed the manner of unlawful entry was not an element of the offense. *See* Brief of Respondent-Appellee at 34, 49, *Descamps v. United States*, 570 U.S. 254 (2013), *available at* https://tinyurl.com/2x4tp6af (last visited Aug. 31, 2022). Rejecting this view, the Court found that non-elemental facts contained in record of conviction documents cannot be considered under the categorical approach regardless of the reliability of such documents. *See Descamps*, 570 U.S. at 268 ("At most, the colloquy showed

that Descamps *committed* generic burglary, and so hypothetically *could have been* convinced under a law criminalizing that conduct. But that is just what we said in *Taylor* and elsewhere is not enough.") (citing *Taylor*, 495 U.S. at 600; *Carachuri-Rosendo*, 560 U.S. at 576 (emphasis in original)).

Laguerre's "peek" to find divisibility therefore violated *Mathis* and *Descamps*. The BIA did not review a complete record of conviction or explain how the single *Shepard* document affirmed its conclusion under New Jersey law. It did not address the authoritative sources of New Jersey law that cause the routine inclusion of non-elemental facts in record of conviction documents. *See, e.g.*, N.J. Ct. R. 3:7-3 (stating that a count of indictment can include information about the "means" through which an offense was committed); *State v. Dorn*, 182 A.3d 938, 946 (N.J. 2018) (stating that the New Jersey Constitution requires indictments to include facts to satisfy each element to avoid double jeopardy and allow the defendant to adequately prepare a defense); *State v. Salter*, 42 A.3d 196, 203 (N.J. Super. Ct. App. Div. 2012) (an indictment must "'[set] forth all . . . critical facts and . . . essential elements' . . . so as to enable defendant to prepare a defense") (quoting *State v. Wein*, 404 A.2d 302, 305 (N.J. 1979)).

Several courts of appeals have applied this reasoning about non-elemental facts to find statutes indivisible. *See, e.g.*, *Hamilton*, 889 F.3d at 698 (finding Oklahoma statute indivisible due to lack of certainty in part because "charging

documents often allege additional facts that are not elements of the crime"); *United States v. Edwards*, 836 F.3d 831, 837 (7th Cir. 2016) (finding a Wisconsin law indivisible in part because under state law "the complaint and information . . . must allege every element of the crime charged, but they may also (and usually do) include additional facts that need not be proved to the jury beyond a reasonable doubt"); *Harbin v. Sessions*, 860 F.3d 58, 66 (2d Cir. 2017) (discounting the probative value of certain New York case law as to means-or-elements because "the values of fair notice and avoidance of double jeopardy often demand that the government specify accusations in ways unrelated to a crime's elements"). *Laguerre*'s holding is incorrect and unauthorized by law and must be reversed.

B. Record of conviction documents show with certainty that the particular substance is a means of violating New Jersey law, not an element.

As discussed above, *Mathis* described specific scenarios when the "peek" at a record of conviction would confirm that a statute is *indivisible*. *See* Section II.A, *supra*. *Mathis* recognized that record of conviction documents that use an umbrella term or list multiple statutory alternatives prove indivisibility. *See Mathis*, 579 U.S. at 519. Evidence that the state allows such charges and convictions proves definitively that juror unanimity as to one specific statutory alternative is not required. Both Petitioner's record of conviction, and *Shepard* documents from other

New Jersey cases reflect these two scenarios contemplated in *Mathis*, and show with certainty that New Jersey does not treat the specific substance as an element.

1. New Jersey case law confirms that a single count cannot contain multiple alternative elements.

Were the specific substance an element of the offense, multiple substances could not be included under a single count, as that would violate New Jersey's rule against duplicity of charges. The Supreme Court of New Jersey has ruled, "It is well settled in this State that separate and distinct offenses cannot be charged in the same count of an indictment." *State v. New Jersey Trade Waste Ass'n,* 96 N.J. 8, 21 (1984). *See also State v. Jeannotte-Rodriguez*, 469 N.J. Super. 69, 99 (App. Div. 2021) (finding two offenses under N.J. Stat. Ann. § 2C:21-20 charged in a single count to be duplicitous as they are "separate and distinct because they have different elements and require different proofs") (internal quotation omitted). A duplicitous charge—one that contains separate offenses in a single count—"is unacceptable because it prevents the jury from deciding guilt or innocence on each offense separately and may make it difficult to determine whether the conviction rested on only one of the offenses or both." LaFave at § 19.3(d) Duplicity. Duplicitous indictments threaten defendants' constitutional rights to a unanimous verdict, an appropriate sentence, and adequate judicial review. *Id.* ("[D]uplicity can result in prejudice to the defendant in the shaping of evidentiary rulings, in producing a conviction on less

than a unanimous verdict as to each separate offense, in determining the sentence, and in limiting review on appeal" as well as creating possible double jeopardy concerns.); *see also N.J. Trade Waste Ass'n*, 96 N.J. at 21 (citing the discussion in *United States v. Starks*, 515 F.2d 112, 116–117 (3d Cir.1975), of prejudice to defendants from duplicitous counts).

Conversely, multiple means of commission can be included within a single count. *See* N.J. Ct. R. 3:7-3 ("It may be alleged in a single count either that the *means* by which the defendant committed the offense are *unknown* or that the defendant committed it by *one or more specified means*.") (emphasis added). Therefore, New Jersey law makes clear that if multiple statutory alternatives are contained within a single count, the alternative must be a means of commission.

2. New Jersey record of conviction documents containing umbrella terms and multiple possible controlled substances within a single count controvert the BIA's conclusion in *Laguerre*.

Petitioner's own records of conviction demonstrate that a single charge and resulting conviction can permissibly identify multiple substances or employ the generic umbrella term only. *See* A.R. 868-890. The judgment of conviction ("JOC") for accusation[4] [redacted] reflects a charge and conviction for 2C:35-10(a)(1) as "POSS **CDS**/ANALOG - **SCHD I II III IV**," and a charge for 2C:35-5 as

[4] "Accusations" and "Indictments" are both charging documents under New Jersey law. *See* N.J. Ct. R. 3:7-2.

"MANUF/DISTR **CDS-HEROIN/METH/LSD**." A.R. 887 (emphasis added). The accusation for 2C:35-10(a)(1) charges "POSSESSION OF **CDS (SCHEDULE I, II, III, OR IV**)." A.R. 889-90 (emphasis added). The JOC for accusation [redacted] reflects a charge and conviction under 2C:35-5 as "POSSESSION **CDS** WITH INTENT TO DISTRIBUTE," and a charge under 2C:35-10 as "POSSESSION **CDS**." A.R. 868-871 (emphasis added). Petitioner also attached an accusation associated with another defendant that reflects a charge under 2C:35-5(a)(1), for "intent to distribute a **controlled dangerous substance**, **namely**, **heroin and/or cocaine**." A.R. 893-94 (emphasis added). Each of these documents reflect either use of an umbrella term ("controlled dangerous substance" or "CDS") or identification of multiple substances in the alternative.

Petitioner's accusation under [redacted] uses *both* the umbrella term *and a* specific substance. A.R. 883-84 (charging under counts 7 and 8 for "a controlled dangerous substance, namely PERCOCET"). The specific drug is not actually identified "to the exclusion of all others." *Mathis,* 579 U.S. at 519. Furthermore, this supports the conclusion that, where included in a charging document, a particular substance is simply an underlying fact specified to fulfill the essential element of the existence of *a* controlled dangerous substance and comply with required procedural protections. *See* Section II.A. Words such as "to wit" or "namely" are called the "videlicet," which is used to separate the charged offense

from supporting facts. Words such as "to wit" or "namely" are called the "videlicet," which is used to point out, particularize, or render more specific that which has been previously stated in general language only. Videlicet, Black's Law Dictionary (11th ed. 2019); *see also State v. Callary*, 159 A. 161, 161-62 (N.J. 1932) (noting that the words "dwelling house and store" specified after "to wit" were merely "parenthetical identification of the building" and incidental to the charged offense).

Additional New Jersey *Shepard* documents also reflect charges of multiple substances in a single count, use of umbrella terms, and nonidentification of a particular substance. *Cf. Vurimindi v. Att'y Gen.*, No. 19-1848, 2022 WL 3642104, at *9 (3d Cir. Aug. 24, 2022) (recognizing that in conducting a "peek" at records of conviction to ascertain means-or-elements, records other than those of the individual noncitizen are germane and therefore reviewable). This includes an indictment listing multiple alternative substances within a single count. *See* Appendix B-2 (indictment No. 16-06-00388). This charging document is "as clear an indication as any" that the substances under New Jersey CDS statutes are means of commission. 579 U.S. at 519. The following *Shepard* documents are attached at Appendix B:

	New Jersey State Case Name and Number	***Shepard* documents**
B-1	*State v.* [redacted], No. [redacted]-I[5](emphasis added) (JOC and	- JOC showing 2C:35-5(b)(1) charge for "MANUF/DISTR **CDS** OR INTENT TO MANUF/DISTR **CDS**"

[5] [redacted]

	indictment both use umbrella terms, indictment uses videlicet.)	and conviction for "**CDS** - MANU/DIST/PWID - **HEROIN/COCAINE - =/>** 5OZ." At B1. -JOC charging 2C:35-10(a)(1) for "POSS **CDS**/ANALOG - **SCHD I II III IV**." At B4. -Indictment count six charging possession with intent to distribute "a **Controlled Dangerous Substance**, **namely** Heroin." At B13.
B-2	*State v. A.A.*, No. 16-06-00388-I (emphasis added) (JOC and indictment both use umbrella terms and specify multiple alternative substances).	- JOC listing charge and conviction for 2C:35-10(a)(1) as "POSS **CDS**/ANALOG - **SCHD I II III IV.**" At B22. - JOC listing charge and conviction for 2C:35-5(a)(1) as "MANUF/DISTR **CDS**", and for 2C:35- 5(b)(3) as "**CDS** - MANU/DIST/PWID - **HEROIN/COCAINE** - < .5OZ." *Id*. -Indictment count one charging under section 35-10(a)(1) for "a **controlled dangerous substance**, **namely, Heroin, Schedule I, and/or Pentylone, Schedule I, and/or Cocaine, Schedule II,**" and count 3 charging under 2C:35- 5(b)(3) for "**Heroin, Schedule I, and/or Pentylone, Schedule I, and/or Cocaine, Schedule II**." At B27.
B-3	*State v. U.C.*, No. 13-09-02295-I (emphasis added) (JOC uses umbrella terms or identifies entire schedules)	-JOC listing original charge and ultimate conviction for 2C:35-10(a)(1) as "POSS **SCHD I II III IV**." At B29.

		-JOC listing charge for 2C:35-5(a)(1) as "POSS/DIST/MANUFACTURING/DISPENSING OF **CDS**." *Id*.
B-4	State v. [redacted], No. 18-10-00609-I (emphasis added) (JOC uses umbrella terms and specifies multiple alternative substances)	- JOC listing charges for 2C:35-10(a)(1) as "POSS **CDS**/ANALOG-**SCHD I II III IV**." At B31. -JOC listing charges for 2C:35-5(a)(1) as "MANUF/DISTR **CDS** OR INTENT TO MANUF/DISTR **CDS,**" and for 2C:35-5(b)(3) as "**CDS** - MANU/DIST/PWID - **HEROIN/COCAINE** - < .5OZ." *Id*.
B-5	*State v. M.C.*, No. 19-04-00313-A (emphasis added) (JOC uses umbrella terms and identifies multiple substances, accusation uses umbrella term and videlicet)	-JOC listing charges for 2C:35-10(a)(1) as "POSS **CDS**/ANALOG-**SCHD I II III IV**." At B35. -JOC listing charges and conviction for 2C:35-5(a)(1) as "MANUF/DISTR **CDS** OR INTENT TO MANUF/DISTR **CDS**" and 2C:35-5(b)(2) as **"CDS** - MANU/DIST/PWID - **HEROIN/COCAINE** - .5OZ TO < 5OZ." *Id*. -Accusation charging 2C:35-5(a)(1) and 2C:35-5(b)(2) for possessing "a **controlled dangerous substance, namely, Cocaine**." At B38.

Because these documents demonstrate that someone can be charged and convicted without specifying a single specific substance, they clearly demonstrate that the substance is a means of commission, not an element. In the alternative, at minimum they expose that the document the Board relied on in *Laguerre* does not

meet the categorical approach's demand for certainty. *See supra*, Sections I-II; *see also Najera-Rodriguez v. Barr*, 926 F.3d 343, 356 (7th Cir. 2019); *United States v. Hamilton*, 889 F.3d 688 (10th Cir. 2018); *United States v. Degeare*, 884 F.3d 1241, 1258 (10th Cir. 2018); *Alejos-Perez v. Garland*, 991 F.3d 642, 651 (5th Cir. 2021); *United States v. Perlaza-Ortiz*, 869 F.3d 375, 378 (5th Cir. 2017); *United States v. Ritchey*, 840 F.3d 310, 321 (6th Cir. 2016); *Lopez-Marroquin v Garland*, 9 F.4th 1067, 1073 (9th Cir. 2021).

CONCLUSION

Using flawed methodology, the BIA in *Matter of Laguerre* incorrectly concluded that N.J. Stat § 2C:35-10(a)(1) is divisible by substance and subject to the modified categorical approach. The BIA's decision and its application to Petitioner's case violate the Supreme Court's categorical approach precedents demanding certainty as to the elements of conviction for immigration consequences to trigger, and both violate and misunderstand New Jersey criminal law. *Amici* respectfully urge this Court to overturn *Laguerre* and grant the petition for review to avoid unauthorized and unjust consequences for noncitizens and defendants of New Jersey.

Dated: New York, NY
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Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, I, Amelia Marritz, hereby certify that this brief complies with the type-volume limitation in Rule 32(a)(7)(B). As measured by the word processing system used to prepare this brief, this brief contains 6,418 words.

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ELECTRONIC DOCUMENT CERTIFICATE

Pursuant to Rule 31.1(c) of the Local Rules of Appellate Procedure, I, Amelia Marritz, hereby certify that the text of the electronic brief filed with the Court via ECF is identical to the text of the paper copies filed with Court via hand delivery.

Pursuant to Rule 31.1(c) of the Local Rules of Appellate Procedure, I, Amelia Marritz, hereby certify that the PDF version of this brief has been scanned by McAfee VirusScan antivirus software and no virus has been detected.

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Pursuant to Rules 28.3(d) and 46.1(e) of the Local Rules of Appellate Procedure, I, Amelia Marritz, hereby certify that I am a member in good standing of the bar of the United States Court of Appeals for the Third Circuit.

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