



# CHALLENGING DIVISIBILITY

## HOW TO USE IDP'S LITIGATION TIPS & CASE LAW SURVEY.



### What is included in this resource?

- 1) An overview of divisibility and the Supreme Court's decision in *Mathis*, a primer on important criminal law concepts related to case law research on divisibility, and a discussion of litigation tips and strategies in making indivisibility arguments; and
- 2) A survey of divisibility cases published in the Second, Third, Fifth, Ninth, and Eleventh circuits post-*Mathis*. The resulting case chart covers cases arising in both the criminal and immigration contexts, summarizes the analysis and conclusion reached in each case, and includes thoughts on case strengths or weaknesses, potential errors in analysis, and anything else of note that may be helpful to a practitioner in understanding the case or making indivisibility arguments.

### Why does divisibility matter?

Recent developments in categorical approach case law have complicated the defense of noncitizens charged with negative immigration consequences based on past convictions under overbroad criminal statutes. Now it has become more important than ever to resist government efforts to persuade adjudicators that such overbroad statutes are “divisible” into separate narrower crimes, at least one of which is a categorical match to a removal ground. In such cases, the noncitizen will want to make any available arguments to persuade the adjudicator that the overbroad statute is instead “indivisible” into multiple offenses and therefore cannot trigger the immigration consequence.

Divisibility analyses involve very high stakes for the noncitizen. Whether a noncitizen is removable, ineligible for relief, or subject to mandatory detention can be won or lost on the issue of divisibility. Fortunately, in defending against government divisibility arguments, immigrants continue to have a powerful weapon in the Supreme Court's earlier decision in *Mathis v. United States*, 579 U.S. 500 (2016), which set forth strict requirements before a criminal statute could be found divisible.

### What is this resource meant to do?

This resource is meant to assist in the legal representation of those noncitizens who are confronting, or expect to confront, divisibility arguments as to certain statutes of conviction within the application of the categorical approach.

### What should I do if I need assistance?

IDP encourages litigants to contact us for technical assistance and amicus support in cases involving divisibility determinations. We can be reached at: [litigation@immdefense.org](mailto:litigation@immdefense.org), [amelia@immdefense.org](mailto:amelia@immdefense.org), or [andrew@immdefense.org](mailto:andrew@immdefense.org).

### Where can I find additional resources?

Additional resources related to categorical approach litigation are on IDP's website at: <https://www.immigrantdefenseproject.org/using-and-defending-the-categorical-approach-2/>.