Docket No. 20-2017 & No. 23-1795

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

J. W.,

Petitioner,

v.

ATTORNEY GENERAL UNITED STATES OF AMERICA,

Respondent.

On Petition for Review of a Final Decision
of the Board of Immigration Appeals
No.

BRIEF OF THE CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, HIAS PENNSYLVANIA, IMMIGRANT DEFENSE PROJECT, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NATIONALITIES SERVICE CENTER, AND PROFESSOR KATE EVANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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March 7, 2024

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 20-2017, 23-1795

J.W.

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: 03/07/2024

(Signature of Counsel or Party)

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

The Supreme Court, and this Court, demand "certainty" that the elements of a conviction fall categorically within a federal statute in order to trigger conviction-based immigration consequences. *Mathis v. United States*, 579 U.S. 500, 519 (2016); *see infra* Section I. If a review of state case law and the text of the statute of conviction, or, in limited circumstances, a "peek" at certain record of conviction documents, does not show with certainty that statutory alternatives at issue are elements, then the statute is indivisible. The Supreme Court expressly acknowledges that, where allowed, the "peek" will sometimes or often be unhelpful or inconclusive. *Id.* In such cases, the statute is indivisible.

Amici agree with Petitioner that New Jersey case law clearly establishes that the particular controlled substance is not an element of N.J. Stat. Ann. § 2:35-10(a)(1). *See* Pet. Br. at 30-37 (Oct. 5, 2020); Pet. Br. at 37-47 (July 7, 2023); b*ut see Gayle v. Att'y Gen.*, No. 22-1811, 2023 WL 4077332 (3d Cir. June 15, 2023) (unpublished) (finding N.J. Stat. Ann. §§ 2C:35-5(a)(1) and (b)(1) divisible). Should this Court disagree and find the case law ambiguous, the same conclusion is confirmed by a "peek" at record of conviction documents from New Jersey

[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).

prosecutions under section 2C:35-10(a)(1) and related "controlled dangerous substance" (CDS) statutes. In this brief, *amici* attach and discuss several sets of record of conviction documents from New Jersey prosecutions—including the New Jersey state cases of other noncitizen litigants who have or have had cases before this Court or before the U.S. Court of Appeals for the Second Circuit[2]—that prove that New Jersey courts and prosecutors regard a controlled substance as a means of violating the statute, not an element. At minimum, these documents plainly introduce ambiguity into the means-elements determination such that the statute cannot be found divisible. These documents controvert the BIA's conclusion drawn from its "peek" in *Matter of Laguerre,* 28 I. & N. Dec 437, 447 (BIA 2022), by showing that New Jersey charges multiple substances in single counts, uses umbrella terms in *Shepard*[3] documents, and allows convictions where charging and conviction documents name different substances. They show that the specific substance is not an element under state law, even where record of conviction documents may reference a single substance. *Cf. Pesikan v. Att'y Gen.*, 83 F.4th 222, 231 (3d Cir. 2023) (finding a Pennsylvania DUI statute indivisible as to substance despite the identification of the substance involved because the mere fact that the government

[2] *See Gayle v. Att'y Gen.*, No. 22-1811, 2023 WL 4077332 (3d Cir. June 15, 2023) (unpublished); *Brown v. Att'y Gen.*, No. 22-1779 (3d Cir.); *Johnson v. Garland*, No. 23-6590 (2d Cir.).
[3] *Shepard v. United States*, 544 U.S. 13 (2005).

identified the substance "cannot add to or subtract from the elements of a statutory crime").

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); *Mathis v. United States*, 579 U.S. 500 (2016); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *I.N.S. v. St. Cyr*, 533 U.S. 289, 323 n. 50 (2001) (citing brief of *amicus* IDP); *Gayle v. Att'y Gen.*, No. 22-1811, 2023 WL 4077332 (3d Cir. June 15, 2023). 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 is grounded in the need for certainty. The categorical and modified categorical approach "focus[] on the legal question of what a

conviction *necessarily* established." *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015) (emphasis in original). The "categorical approach's central feature" is *always* "a focus on the *elements*, rather than the facts, of a crime." *Descamps v. United States*, 570 U.S. 254, 263 (2013) (emphasis added);); s*ee also Hillocks v. Att'y Gen.*, 934 F.3d 332, 336 (3d Cir. 2019) (cleaned up) ("Courts ask what elements of a given crime always require—in effect, what is legally necessary for a conviction."); *Taylor v. United States*, 495 U.S. 575, 602 (1990); *Matter of Kim*, 26 I. & N. Dec. 912, 913 (BIA 2017) (citing *Taylor*'s requirement that a prior conviction necessarily involve facts equating to the generic ground). 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) (explaining that "a crime must by its very nature and at its minimum, as defined by statute" match a removal ground). 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.'") (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010)); *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 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) (cleaned up). "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 considers 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 in divisibility determinations. 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 removal ground. *See, e.g.*, *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.

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. "[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 they are elements, the statute is divisible and the modified categorical approach applies, permitting the adjudicator to review certain record of conviction documents 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.

Mathis affirmed the methodology for divisibility determinations. The inquiry starts—and often concludes—by consulting "authoritative sources of state law,"

which often "readily" answer the question. *Id*. at 518. 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 (cleaned up).

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 the listed items are elements of the offense." *Id*. (cleaned up). But if an authorized peek at the record of conviction documents does not "speak plainly" as to the means or elements question, *Mathis* and the categorical approach's "demand for certainty" command that the alternatives are means. *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 acknowledged the certainty requirement in analyzing N.J. Stat. Ann. § 2C:35-7, a different New Jersey CDS statute. After finding that neither case law nor statutory language resolved 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 noncitizen convicted under an Illinois drug statute. The court applied *Mathis* 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 (cleaned up).[4] The court found the statute indivisible where a charging

[4] The Seventh Circuit also added "a note of caution" as to the utmost importance of requiring certainty as to divisibility, stating that

> "In applying this now-extensive body of law concerning collateral federal consequences of state convictions, lawyers for the federal government often urge federal courts to define the elements of state criminal offenses in particular ways essential or helpful in the particular case. If federal courts interpret state law incorrectly, by finding that state laws include essential elements that state courts have not treated as such, we could mistakenly cast doubt on the much higher volume of state criminal prosecutions under those same state statutes. To reduce that risk, we need to insist on clear signals—signals that convince us to a certainty that the elements are correct and support divisibility before imposing additional federal consequences for those state convictions.

Najera-Rodriguez, 926 F.3d at 356. The Fourth Circuit cited these same concerns in a case involving a South Carolina drug statute. *United States v. Hope*, 28 F.4th 487, 503–04 (4th Cir. 2022). There, the court found the means-elements question to be a close call, but ultimately found that the "best reading" of the case law and record of conviction documents was that the statute was indivisible. The court

document identified one substance, and a sentencing document did not. *Id*. The circuit later looked at a different Illinois statute, again finding the statute indivisible after a peek at the record failed to resolve the ambiguity from a review of the statute and case law. *Elion v. United States*, 76 F.4th 620, 634 (7th Cir. 2023). The court found the statute indivisible because divisibility could not be proven with certainty, despite the inclusion of one component of the statue to the exclusion of others, as charging documents "regularly include factual details that are not elements of the crime" and must be used with care. *Id.* (cleaned up).

In *United States v. Hamilton*, 889 F.3d 688 (10th Cir. 2018), the Tenth Circuit 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" for an Oklahoma burglary statute. *Id*. at 698–99 (finding that a charging document specifying the location did not answer the question because such documents often allege non-elemental facts). The court reached a similar conclusion in analyzing Oklahoma's aggravated assault and battery statute, finding limited significance in the fact that the criminal information alleged only one statutory alternative. *See United States v. Winrow*, 49 F.4th 1372, 1380

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emphasized that the lack of a state supreme court decision clearly signaling divisibility in fact limited the federal court's ability to find the statute divisible due to the certainty requirement. *Id.*

(10th Cir. 2022). In *United States v. Degeare*, the circuit likewise ruled a separate statute indivisible in the face of ambiguity in the record of conviction: "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).

In *Alejos-Perez v. Garland*, the Fifth Circuit found a Texas drug statute indivisible due to uncertainty as to means versus elements. 991 F.3d 642, 651 (5th Cir. 2021). The court found that there was ambiguity in the case law, 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 a record, the court duly recognized that the statute was indivisible. Similarly, in *United States v. Perlaza-Ortiz*, the Fifth Circuit found a Texas statute indivisible where a charging document referenced one statutory alternative to the exclusion of the others. 869 F.3d 375, 378 (5th Cir. 2017). The court found that the document 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

"[b]ecause 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) (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") (quoting *Mathis*, 579 U.S. at 519).

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 found that statutory text 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 noncitizen petitioner's argument that the statute was indivisible. *Id*. at 1072. The court found the state case law conflicting. *See id*. at 1072-73. Because the answer was "not clear," the court took a "peek" at the record of conviction and found those documents "ambiguous at best" in that they simply restated statutory language. *Id*. at 1073. Accordingly, the court found the statute 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 certainty requirement for determining divisibility is also 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 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. *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, 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

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. CONSISTENT WITH NEW JERSEY STATE CASE LAW AND THE REQUIREMENTS OF THE CATEGORICAL APPROACH, A "PEEK" AT RECORDS OF CONVICTION FROM STATE PROSECUTIONS CONFIRMS THAT NEW JERSEY TREATS THE SUBSTANCE AS A MEANS, NOT AN ELEMENT, OF ITS CONTROLLED DANGEROUS SUBSTANCE STATUTES.

Any conclusion that § 2C:35-10(a)(1) is divisible is controverted by records of conviction from New Jersey prosecutions, including Petitioner's. *See* A.R. 989-991; Appendix B. These record documents show that New Jersey law treats the specific substance as a means of violating the generic controlled dangerous substance element. These documents, at a minimum, introduce ambiguity such that the statutes cannot be found divisible with certainty.

Finding the statute divisible based on any mention of a particular substance in record of conviction documents, as was done without further analysis in *Laguerre*, is contrary to *Mathis*. Where a statutory alternative is exclusively identified in a record of conviction, *Mathis* requires more to conclude that the statutory alternative

is an element. *See also Pesikan v. Att'y Gen.*, 83 F.4th 222, 231 (3d Cir. 2023). Without more certain indication, the statute is presumed indivisible.

A. A "peek" at record of conviction documents proves that the particular substance is a means of violating New Jersey law, not an element.

Petitioner's own judgment of conviction ("JOC") as well as record of conviction documents from other New Jersey prosecutions demonstrate that controlled dangerous substance statutes are not divisible as to the particular substance. *Cf. Vurimindi v. Att'y Gen. United States*, 46 F.4th 134, 147 (3d Cir. 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). At a minimum, they show that the statutes cannot be found divisible with the required certainty, as they do not actually identify a specific drug "to the exclusion of all others." *Mathis,* 579 U.S. at 519. These documents show that a single charge and resulting conviction can permissibly (1) identify a different drug than charged, (2) identify multiple substances within a single count,[5] or (3) employ

[5] Were the specific substance an element, multiple substances could not be included under a single count, as that would violate New Jersey's rule against duplicity of charges. As the Supreme Court of New Jersey has ruled, "[i]t 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") (cleaned up). A duplicitous charge—one that contains separate

a generic umbrella term (controlled dangerous substance or "CDS") and/or fail to identify any particular substance.

Record of conviction documents from New Jersey prosecutions likewise prove indivisibility. They identify different substances in the charging document and JOC,[6] use generic umbrella terms (controlled dangerous substance or "CDS"),[7] identify multiple possible substances in a single count,[8] fail to identify any particular substance,[9] or identify a substance through the use of a videlicet[10]. These documents

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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." 5 W. LaFave, J. Israel, N. King, & O. Kerr, Criminal Procedure § 19.3(d) Duplicity (4th ed.). Duplicitous indictments threaten defendants' constitutional rights to a unanimous verdict, an appropriate sentence, and adequate judicial review. *Id.* (stating that "duplicity 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 New Jersey 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)).

[6] *See* Appendix B-1 (containing an indictment identifying a different substance (MDMA) from either of the possible substances named in the JOC (heroin/cocaine).

[7] *See* Appendix B-1 – B-9.

[8] *See* Appendix B-1, B-2, B-4, B-5, B-6, B-8, B-9.

[9] *See* Appendix B-2, B-4, B-6.

[10] Words such as "to wit" or "namely" are called the "videlicet." Videlicets "point out, particularize, or render more specific that which has been previously stated in

reflect that, where included, 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.B., *infra*. They are "as clear an indication as any" that the substances under New Jersey CDS statutes are means of commission, not elements. *Mathis*, 579 U.S. at 519. The following *Shepard* documents are attached at Appendix B:

	New Jersey State Case Name and/or Number	***Shepard* documents**
B-1	*State v. P.J.*, No. 08-10-01732-I (emphasis added) (JOC uses umbrella term and lists multiple alternative substances, indictment uses an umbrella term and identifies a different substance than either of those listed in JOC)	-Indictment charging, under each of three counts, actions related to "**a controlled dangerous substance**, **or its analog**, **namely 3, 4-METHYLENEDIOXYMETHAMPHETAMINE (MDMA) "ECSTASY"**)." At B4- B5. (emphasis added). -JOC listing charges and a conviction for violations of §2C:35-5(a)(l) as "MANUF/DISTR **CDS** OR INTENT TO MANUF/DISTR **CDS.**" At B1 (emphasis added). -JOC listing charge and conviction for violation of §2C:35-(b)(l) as "**CDS** – MANU/DIST/PWID – **HEROIN/COCAINE** - =/> 5OZ." *Id.*

general . . . language." Videlicet, Black's Law Dictionary (11th ed. 2019). A videlicet is often used to separate the charged offense from the supporting facts. *See State v. Callary*, 159 A. 161, 161-62 (N.J. 1932) (noting the words "dwelling house and store" specified after "to wit" were merely "parenthetical identification of the building" and incidental to the charged offense).

		-JOC listing charges for violations of §2C:35-(b)(2) as "**CDS**…**HEROIN/COCAINE** - .5OZ TO <5OZ." *Id.* -JOC listing charge under 2C:35-10(a)(1) as "**POSS CDS (COCAINE)**" At B6.
B-2	*State v. M.B.*, No. 17-09-00887-A (emphasis added) (JOC and accusation both use umbrella terms and specify multiple alternative substances or categories).	-JOC listing charge and conviction for 2C:35-10(a)(1) as "POSS **CDS**/ANALOG - **SCHD I II III IV**." At B8. -JOC listing charge for 2C:35-5 as "MANUF/DISTR **CDS-HEROIN/METH/LSD**." *Id*. -Waiver of indictment and accusation charging 2C:35-10(a)(1) for "POSSESSION OF **CDS (SCHEDULE I, II, III, OR IV**)." At B10-11.
B-3	*State v. M.B.*, No. 10-11-l01074-A (emphasis added) (JOC uses umbrella terms or identifies entire schedules, accusation uses umbrella term and videlicet).	-JOC listing charge and conviction under 2C:35-5 as "POSSESSION **CDS** WITH INTENT TO DISTRIBUTE." At B12, B15. -JOC listing charge under 2C:35-10 as "POSSESSION **CDS**." At B12. -Accusation charging 2C:35-10(a)(1) under count 7 and 2C:35-5 under count 8 for "a **controlled dangerous substance**, **namely** PERCOCET." At B23-24.
B-4	No. 04- [redacted] (emphasis added) (accusation uses umbrella term and specifies multiple substances)	-Accusation charging 2C:35-5(a)(1), for "intent to distribute a **controlled dangerous substance**, namely, **heroin and/or cocaine**." At B26.

B-5	*State v. R.G.*, No. 15-03-00180-I (emphasis added) (JOC and indictment both use umbrella terms, indictment uses videlicet.)	- JOC showing 2C:35-5(b)(1) charge for "MANUF/DISTR **CDS** OR INTENT TO MANUF/DISTR **CDS**" and conviction for "**CDS** - MANU/DIST/PWID - **HEROIN/COCAINE - =/>** 5OZ." At B28. -JOC charging 2C:35-10(a)(1) for "POSS **CDS**/ANALOG - **SCHD I II III IV**." At B31. -Indictment count six charging possession with intent to distribute "a **Controlled Dangerous Substance**, **namely** Heroin." At B40.
B-6	*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 B49. - 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 B54.
B-7	*State v. U.C.*, No. 13-09-02295-I (emphasis added) (JOC uses umbrella terms	-JOC listing original charge and ultimate conviction for 2C:35-10(a)(1) as "POSS **SCHD I II III IV**." At B56.

	or identifies entire schedules)	-JOC listing charge for 2C:35-5(a)(1) as "POSS/DIST/MANUFACTURING/DISPENSING OF **CDS**." *Id.*
B-8	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 B58. -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-9	*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 B62. -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 B65.

Petitioner's own JOC likewise confirms indivisibility because it uses an umbrella term and lists multiple substances. *See* A.R. 989 (listing both the charge and ultimate conviction under § 2C:35-10(a)(1) as "Poss Sch I II III IV**"**, thereby employing only the umbrella categories without referencing any specific substance;

id. (including a charge under a different statute, § 2C:35-5B(2), for **"**Mfg/D/D Her/Coke," thereby referencing multiple substances within a single count). While a subsequent page states the word "cocaine," *see* A.R. 991, this in no way indicates it is an element, and in fact supports that it is a means of commission. First, that page of the JOC is a fill-in-the-blank form and allows for multiple drugs to be listed. *See supra* Section II.A at n.7. Second, that page of the JOC is a worksheet that addresses discretionary sentencing factors such as restitution and license suspension, and has nothing to do with the elements of conviction. This single mention of a substance does nothing to prove divisibility with certainty, and concluding otherwise would be contrary to law. *See supra* Section I, II.A. (discussing the demand for certainty); *see infra* Section II.B. (refuting the Board's contrary conclusion in *Laguerre*).

B. Finding the statute divisible as to substance would violate New Jersey law and the categorical approach.

Federal and state law makes clear that where a statutory alternative is exclusively identified in a record of conviction, further analysis is needed to identify the elements of an offense with certainty. The BIA's cursory "peek" at the record of conviction documents in *Laguerre*, which formed the basis of its decision, did nothing more than note that the noncitizen's indictment mentioned a specific substance and then conclude that the substance is an element of the New Jersey offense. 28 I. & N. Dec. at 447. This violates the Supreme Courts' categorical

approach precedents and established criminal law principles as to what are the elements of a criminal offense.

After finding that state case law did not answer divisibility with certainty, the BIA in *Laguerre* conducted a "peek" at Mr. Laguerre's record of conviction to find the statute of conviction divisible by substance. *See Laguerre*, 28 I. & N. Dec. at 447. 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 drew a broad-reaching conclusion about New Jersey's CDS statutes.

The BIA's cursory "peek" at the record misunderstands what an "element" is under the categorical approach and is the kind of flawed methodology the Supreme Court specifically prohibits, as it ignores relevant state law regarding independent reasons for identifying the means of commission of an offense in a charging document. In introducing the "peek" at the record of conviction in categorical approach cases, it is apparent that the *Mathis* court envisioned circumstances where state law is inconclusive and a "peek" might "help in making" the means-elements

"determination." 579 U.S. at 518 n.7. The Court did not mean that the mention of a single statutory alternative in a charging document suffices to establish divisibility with certainty. 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). In *Mathis*, the Court was indicating that *Shepard* documents *might* be structured or written in a way that sheds light on state law sources and provides a clear answer on the elements of conviction, but not necessarily. The Court discussed three possibilities.

First, a scenario where the "peek" would be "as clear an indication as any" that the statute is indivisible. *Mathis*, 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. *Id.*

Second, another scenario where indivisibility is clear: where the *Shepard* "documents use a single umbrella term like 'premises.'" *Mathis*, 579 U.S. at 519. 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." *Mathis*, 579 U.S. at 519 (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* LaFave et al., Criminal Procedure § 19.3(c) Factual Specificity ("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).

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. *Descamps*, 570 U.S. at 268. In that case, 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 (February 2, 2024). 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* convicted under a law criminalizing that conduct. But that is just what we said, in *Taylor* and elsewhere, is not enough.").

Using a "peek" to find divisibility solely based on the mention of a specific substance would therefore violate *Mathis* and *Descamps*. Authoritative sources of state law reflect the routine inclusion of non-elemental facts in *Shepard* documents. *See, e.g.*, N.J. Ct. R. 3:7-3 (stating a count of indictment can include information about the "means" of commission); *State v. Dorn*, 182 A.3d 938, 946 (N.J. 2018) (stating the New Jersey Constitution requires indictments to include facts to satisfy each element to avoid double jeopardy and to 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.*, *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"); *see also, 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 Wisconsin statute 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").

CONCLUSION

Any finding that N.J. Stat § 2C:35-10(a)(1) is divisible by substance and subject to the modified categorical approach would 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 grant

the petition for review to avoid unauthorized consequences for New Jersey noncitizens and defendants.

Dated: New York, NY
March 7, 2024

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 6,489 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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CERTIFICATE OF BAR MEMBERSHIP

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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Pursuant to Rules 28.3(d) and 46.1(e) of the Local Rules of Appellate Procedure, I, Andrew Wachtenheim, 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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CERTIFICATE OF SERVICE

I, Amelia Marritz, Attorney for *Amici Curiae*, certify that I served the forgoing BRIEF OF THE CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, HIAS PENNSYLVANIA, IMMIGRANT DEFENSE PROJECT, THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, NATIONALITIES SERVICE CENTER, AND PROFESSOR KATE EVANS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER, and attachments, electronically via ECF, pursuant to L.A.R. 25.1 and L.A.R. Misc. 113.4, on:

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APPENDIX VOLUME I