No. 15-6092

In The
Supreme Court of the United States

RICHARD MATHIS,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF *AMICUS CURIAE* IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae, Immigration Reform Law Institute ("IRLI"), is a non-profit legal education and advocacy law firm working to defend the rights of individual Americans and their local communities from the harms and challenges posed by mass migration to the United States, both lawful and unlawful, to monitor and hold accountable federal, state, or local government officials who undermine, fail to respect, or comply with our national immigration and citizenship laws, and to provide expert immigration-related legal advice, training, and resources to public officials, the legal community, and the general public.

While *Amicus Curiae* agrees with the points raised by the United States, *Amicus Curiae* submits this brief to lend its immigration-related expertise to the Court. This brief focuses on the use of the categorical and modified categorical approaches in the immigration context.

[1] Pursuant to Supreme Court Rule 37.6, *Amicus Curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *Amicus Curiae*, its members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), Petitioner Mathis and the United States received timely notice of, and consented to, *Amicus Curiae*'s filing of this brief. Their consent letters have been filed with this brief.

SUMMARY OF THE ARGUMENT

Immigration law has used the categorical and modified categorical approaches to determine if a certain conviction carries a penalty of deportation. An "elements versus means" distinction is not supported in the immigration context. Because of the unique nature and characteristics of crimes that carry a deportation penalty, the categorical and modified categorical approaches must be more flexible than the traditional criminal application. Additionally, the history and application of the categorical and modified categorical approaches by the Supreme Court do not support a distinction.

Not only is a distinction not supported by precedence, it is also not supported in the practical application of the approaches. If the Court were to adopt an arbitrary differentiation between elements and means, many state statutes would no longer carry deportation as a consequence for aliens convicted of felonies. This result is contrary to Congressional intent. Finally, a distinction would complicate the duty defense attorneys have in advising alien clients of the immigration consequences a guilty conviction may have upon their immigration status.

ARGUMENT

I. The Genesis of the Categorical and Modified Categorical Approaches.

The modern categorical and modified categorical approaches were adopted by this Court in *Taylor v. United States*, 495 U.S. 575 (1990). In *Taylor*, the Court was called upon to determine if a defendant's three prior convictions, including two burglary convictions, could be used to enhance his current sentence under 18 U.S.C. § 924(e)(2)(B)(ii). *Id.* at 576-78. Section 924(e)(2)(B)(ii) allows for sentencing enhancement when the defendant's conviction resulted from "burglary, arson, . . . or otherwise involves conduct that presents a serious potential risk to physical injury to another;. . . ."

In applying section 924(e)(2)(B)(ii), the Court was faced with a dilemma:

> On the face of the federal enhancement provision, it is not readily apparent whether Congress intended "burglary" to mean whatever the State of the defendant's prior conviction defines as burglary, or whether it intended that some uniform definition of burglary be applied to all cases in which the Government seeks a § 924(e) enhancement. And if Congress intended that a uniform definition of burglary be applied, was that definition to be the traditional common-law definition, or one of the broader "generic" definitions articulated in the Model Penal Code and in a predecessor statute to § 924(e),

> or some other definition specifically tailored to the purposes of the enhancement statute?

Id. at 579. To help resolve this dilemma, the Court examined the legislative history of section 924(e). *Id.* at 581-90. From that history, the Court expressed two observations: (1) In amending the sentence enhancing statute in 1986, Congress did not intend "to replace the 1984 'generic' definition of burglary with something entirely different," despite neglecting to include a definition of the crime of burglary as before, and (2) Congress did not abandon its "general approach, in designating predicate offenses, of using uniform, categorical definitions to capture all offenses of a certain level of seriousness that involve violence or an inherent risk thereof, and that are likely to be committed by career offenders, regardless of technical definitions and labels under state law." *Id.* at 590.

From these observations, the Court narrowed the range of possible meanings of the term "burglary." The Court rejected the appellate court's approach that relied on the label of the crime employed by the state criminal code. The Court also rejected the common law definition of the term as "the contemporary understanding of 'burglary' has diverged a long way from its common-law roots," "the arcane distinctions embedded in the common-law definition have little relevance to modern law enforcement concerns," and "construing 'burglary' to mean common-law burglary would come close to nullifying that term's effect in the statute, because few of the crimes now generally recognized as burglaries would fall within

the common-law definition." *Id.* at 593, 594. The Court concluded that "Congress meant by 'burglary' the generic sense in which the term is now used in the criminal codes of most States," that is, "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id.* at 598.

The Court then elucidated the analytical framework by which sentencing courts are to determine whether the underlying conviction fits the generic crime. "[I]f the state statute is narrower than the generic view" or "where the generic definition has been adopted, with minor variations in terminology," the trial court should use the categorical approach. *Id.* at 599. Under the categorical approach, courts are to "look only to the fact of conviction and the statutory definition of the prior offense." *Id.* at 602. If a statute includes conduct broader than that of the generic definition, the trial court should use the modified categorical approach. *Id.* at 601. Under the modified categorical approach, courts can examine conviction documents to determine whether the conduct corresponded to the generic crime or fell outside of it. *Id.* at 601-02.

II. The Application of the Categorical and Modified Categorical Approaches to Immigration Law Is Better Supported by Affirming the Decision Below.

Following *Taylor*, courts began applying the categorical and modified categorical approaches to

immigration law. *See, e.g.*, *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010) (noting a court must examine the conviction itself, not what might have or could have been charged); *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007) (finding that "aiding and abetting" fell within the generic crime of theft). As in the criminal context, "[t]he 'categorical' approach looks at solely the structure of the statute that is the subject of the conviction, and not the 'underlying circumstances' (what the person actually did). . . ." IRA J. KURZBAN, *KURZBAN'S IMMIGRATION LAW SOURCEBOOK* 255 (14TH ED. 2014). If a statute is divisible, where some alternatives list removal grounds and others do not, a court may examine the *Shepard* documents to determine if the conviction was a deportable offense. *See id.*; *see also Shepard v. United States*, 544 U.S. 13, 26 (2005) (allowing charging documents, plea agreement, transcript of a colloquy, or some comparable judicial record to be considered when applying the modified categorical approach).

Courts use these approaches to determine if the underlying conviction fits within a category of an offense that carries immigration consequences. These categories include crimes involving moral turpitude ("CIMT"), crimes of violence, offenses related to controlled substances, and aggravated felonies. An alien who is convicted of a crime in one of these categories is deportable. *See*, *e.g.*, 8 U.S.C. § 1227(a)(2) (CIMT provision); 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony provision); *see also*, *e.g.*, *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013) (applying the

categorical approach to determine if the alien's conviction under 18 U.S.C. § 841 qualified as an aggravated felony).

In criminal practice, the analysis of an underlying conviction stops with the modified categorical approach even if a court cannot discern if the conviction can be used to enhance a defendant's sentence. In the immigration context however, a third analytical framework was needed for assessment of some aggravated felonies. *See Nijhawan v. United States*, 557 U.S. 29 (2009) (recognizing the unique requirements of some subsections of the aggravated felony statute); *see also* 8 U.S.C. § 1101(a)(43)(M) (requiring that an offense "involves fraud or deceit" to qualify as an aggravated felony). Thus, the "specific circumstance approach" was created. This approach requires a court to consider the specific circumstances under which the crime was committed. *Nijhawan*, 557 U.S. at 38. Specifically, an immigration judge may use other documents such as "earlier sentencing-related materials" when determining if a conviction meets certain aggravated felony subsections. *Id.* at 42. Otherwise, certain aggravated felony provisions would be left with little to no meaningful application. *Id.* at 39.

Likewise, a unique analytical framework was needed for assessment of CIMT cases to stem confusion and disparity in immigration adjudications. This is so because moral turpitude is not defined by the Immigration and Naturalization Act ("INA") and is traditionally not an element of conviction. *Matter of*

Silva-Trevino, 24 I. & N. Dec. 687 (A.G. 2008), *vacated*, 26 I. & N. Dec. 550 (A.G. 2015) (recognizing the unique characteristics of the CIMT provision).[2] The Attorney General therefore announced in *Matter of Silva-Trevino* a specialized method for analyzing CIMTs that not only differed from the criminal use of the categorical and modified categorical approaches but also differed from how aggravated felonies are analyzed:

> [A]djudicators should: (1) look first to the statute of conviction under the categorical inquiry . . . ; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction does not resolve the inquiry, consider any additional evidence the adjudicator determines necessary or appropriate to resolve accurately the moral turpitude question.

Id. at 704. However, even this framework has been met with challenges in its application of the categorical and modified categorical approaches. *Matter of*

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[2] Moral turpitude has been described by the courts as "inherently base, vile, or depraved and contrary to the accepted rules of morality and in the duties owed between persons or to society in general." *Matter of Oretega-Lopez*, 26 I. & N. Dec. 99, 100 (B.I.A. 2015) (finding animal fighting constitutes a CIMT) (citation omitted).

Silva-Trevino, 26 I. & N. Dec. 550, 552 (A.G. 2015) (vacating the framework because of a circuit split which developed).

The characteristics of divisibility are still an open ended issue in the immigration field. *Compare Matter of Landerman*, 25 I. & N. Dec. 721 (B.I.A. 2012) ("[T]he categorical approach itself need not be applied with the same rigor in the immigration context as in the criminal arena[ ]. . . ."), *with Matter of Chairez-Castrejon*, 26 I. & N. Dec. 478 (B.I.A. 2015) (requiring the same application of the criminal field's use of the categorical and modified categorical approaches in the immigration field).[3] However, the analyses of both aggravated felonies and CIMTs demonstrate that the use of the categorical and modified categorical approaches in the immigration law context do not exactly track their uses in criminal law as applied in *Taylor* and later in *Descamps v. United States*, 133 S. Ct. 2276 (2013). *See also* ALINA DAS, *THE IMMIGRATION PENALTIES OF CRIMINAL CONVICTIONS: RESURRECTING CATEGORICAL ANALYSIS IN IMMIGRATION LAW*, 86 N.Y.U. L. REV. 1669, 1719 (2011) ("The Supreme Court's statement in *Nijhawan* – that there is 'nothing in prior law that so limits the immigration court' to the categorical analysis – is particularly telling.

[3] *Matter of Chairez-Castrejon*, 26 I. & N. Dec. 478 (B.I.A. 2015) has been stayed by the Attorney General for her to determine how the term "divisibility" is defined for immigration purposes. *See Matter of Chairez-Castrejon and Sama*, 26 I. & N. Dec. 686 (A.G. 2015).

None of the recent decisions account for the basis for the categorical analysis in immigration law.") (citation omitted).

Both CIMTs and aggravated felonies may contain alternatives that, regardless of whether a distinction is made, are neither elements nor means. For instance, certain aggravated felony subsections require a circumstance-specific analysis. *See* 8 U.S.C. § 1101(a)(43)(K), (M), and (P) (These aggravated felony subsections have been identified as possessing unique requirements, such as monetary thresholds or requiring fraud or deceit, that necessitate an analysis under the circumstance-specific approach). And CIMTs do not have a generic crime to which elements or means can be matched and analyzed; an adjudicator must simply judge and justify if a conviction is a CIMT. *See*, *e.g.*, *Matter of Louissaint*, 24 I. & N. Dec. 574 (B.I.A. 2009) (applying *Matter of Silva-Trevino* and the categorical method to determine that under a Florida burglary statute, burglary was a CIMT).

Affirming the Eighth Circuit's decision in the instant case would better account for the significant differences between immigration and criminal law. Without an elements and means distinction, the analyses of aggravated felonies and CIMTs would be simplified. Courts would not have to laboriously parse through common alternatives in state and federal statutes such as different *mens rea*, different weapons used to execute a crime, or different locations of where the crime took place. Instead, the presence of alternatives, as long as some language within the

statute qualified as a deportable offense, would trigger the modified categorical approach.

Affirming the lower court would also add needed flexibility to how statutes are analyzed in the immigration context as federal and state criminal statutes do not fit neatly within the INA's aggravated felony and CIMT provisions. For instance, a society's perception of a crime can change whether a conviction is a CIMT or how a generic crime is defined. *See Matter of Ortega-Lopez*, 26 I. & N. Dec. at 100 n.2. ("This case illustrates the difficulty in applying a narrow, static definition because of the evolving nature of what conduct society considers to be contrary to accepted rules of morality as reflected in criminal statutes."). To accommodate these various analyses, which may be required in the immigration context, the lower court's decision should be affirmed.

III. A Superficial Differentiation Between Elements and Means Would Disqualify Several State Statutes Where The Statutory Language Would Otherwise Meet The Generic Definition of Burglary.

Each state has independently defined what qualifies as burglary within their specific jurisdiction. While states may choose to codify burglary in degrees based upon circumstances, each burglary statute

requires unauthorized entry into a specific location.[4] Defining the specific location has taken three different forms. First, a very limited number of states use the generic language of building, structure, or dwelling without also defining these terms within the state's code. *See*, *e.g.*, ALASKA STAT. § 11.46.310 (using the term "building" in the second degree burglary statute without further defining the term's meaning). The second statutory pattern is to list multiple locations within the burglary statute's text; some of which are included in the generic burglary definition and some of which are broader. *See*, *e.g.*, GA. CODE ANN. § 16-7-1 (listing "an occupied, unoccupied, or vacant building, structure, vehicle, railroad car, watercraft, or aircraft" as possible locations where a second degree burglary may take place). Finally, in the most common pattern, a state may use a generic term such as building or structure in the burglary statute, but then define that term or terms elsewhere in the code. *See*, *e.g.*, N.J. STAT. ANN. § 2C:18-1 (2016); N.J. STAT. ANN. § 2C:18-2 (using the term "structure" in the burglary statute and then separately defining "structure" as a building, room, ship, vessel, car, vehicle, or airplane. . . .").

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[4] *Amicus Curiae* reviewed each state's burglary statutory scheme to analyze the text. Maryland's definition is an outlier to the three forms a definition may take. Maryland's definition of a "dwelling" in the burglary statute "retains a judicially determined meaning. . . ." MD. CRIM. LAW CODE. ANN. § 6-201.

The majority of state statutes include a specific location requirement, either within the statute or by reference to another section in the code. The most common statutory formulation is the third, where a generic term is used in the burglary statute while the generic term is defined elsewhere. Only six states have chosen to use generic language without including any additional locations within the statute itself or defining the generic term in another portion of its code.[5]

If a superficial distinction between elements and means was found, it would have a profound impact for most current state burglary statutes, as they would no longer qualify as an aggravated felony merely because the language does not mirror the generic definition.[6] In almost every state, at least one current burglary statute would no longer qualify, since the modified categorical approach could no longer be used to determine whether the state conviction was encompassed in the federal generic definition.

Narrowing the application of the aggravated felony statute is contrary to the legislative history of

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[5] These states are Alaska, Colorado, Massachusetts, North Carolina, Pennsylvania, and Texas.

[6] In addition to meeting the requirements of the generic crime, an aggravated felony conviction for burglary also requires a sentence of at least one year. 8 U.S.C. § 1101(a)(43)(G). *Amicus Curiae* considered only the statutory text, not the sentencing requirement.

the section and the current goals set out by Congress. The aggravated felony was introduced in the ANTI-DRUG ABUSE ACT OF 1988. It made murder, drug trafficking, illicit trafficking of firearms or destructive devices and conspiracy deportable offenses. ANTI-DRUG ABUSE ACT OF 1988, PUB. L. NO. 100-690, 102 STAT. 4181, 4469 (1988). From its original language, the aggravated felony statute has grown to include more crimes, require deportation for a conviction of an aggravated felony, and clarify statutory language to allow for easier application. *See* IMMIGRATION ACT OF 1990, PUB. L. NO. 101-649, 104 STAT. 4978; ILLEGAL IMMIGRATION REFORM AND IMMIGRATION RESPONSIBILITY ACT OF 1996, PUB. L. NO. 104-208, 110 STAT. 3009.

Over time, Congress has progressively expanded its view of the function of the aggravated felony classification, and its applicability to different crimes and convictions. Creating an "elements versus means" distinction would greatly limit the reach of the aggravated felony provision, which is contrary to the will of Congress. The aggravated felony of burglary is just one example of how almost every state would be affected by this unsupported distinction. Creating a distinction between elements and means would leave the immigration courts unable to use *Shepard* documents to determine whether the conviction fell within the generic definition, and thus arbitrarily block the removal of convicted felons from the United States. Moreover, applying this distinction would surely have a similar debilitating effect on

other generic crime subsections of the aggravated felony provision in the INA. *See* 8 U.S.C. § 1101(a)(43).

IV. Supreme Court Precedent Prior to and in *Descamps* Do Not Distinguish Between Elements and Means, and Support Use of the Modified Categorical Approach When Alternatives Are Present in a State or Federal Statute.

Petitioner focuses on footnote 2 of *Descamps* to suggest that the Court requires a distinction between elements and means. Petitioner's argument fails for two reasons. First, *Taylor* itself, upon which *Descamps* relied, did not distinguish between elements and means. *See* 495 U.S. at 602. In *Taylor*, this Court specifically recognized that where alternatives are present in a statute, some may comport with the generic crime while others may not. *Id.* (recognizing that a State's burglary statute may include entry into a building as well as an automobile). To properly analyze a conviction, a court may review additional information in applying the modified categorical approach.[7]

[7] In *Shepard*, the Court clarified in the criminal context which documents may be reviewed to complete a modified categorical approach analysis. 544 U.S. at 17 (allowing review of limited documents from the trial to determine whether a statute with "a broader definition of burglary" fulfilled the generic definition).

Second, other findings within the text of the *Descamps* opinion support the Government's approach and allow the majority of state burglary statutes to survive categorical approach review. In *Descamps* this Court gave the following example of a divisible statute as guidance:

> That kind of statute sets out one or more elements of the offense in the alternative – for example, stating that burglary involves entry into a building or an automobile. If one alternative (say, a building) matches an element in the generic offence, but the other (say, an automobile) does not, the modified categorical approach permits sentencing courts to consult a limited class of documents, such as indictments and jury instructions, to determine which alternative formed the basis of the defendant's prior conviction.

Descamps, 133 S. Ct. at 2281. The example makes clear that the presence of alternatives in a statute, some of which fit within the generic offense and some outside of it, require a court to apply the modified categorical approach. *See id.* at 2285. Footnote 2 merely clarifies this position by declining to draw an artificial distinction between elements and means for the application of the modified categorical approach. *See id.*

While Petitioner may find footnote 2 of *Descamps* instructive, *Amicus Curiae* finds the history of the modified categorical approach and the examples given by the Court itself more relevant. The Supreme Court has never created a distinction between elements and

means. To do so now would needlessly deviate from established precedent and inject added confusion as to the correct application of the categorical and modified categorical approaches.

V. Staying True to Current Precedent Will Enable Defense Counsel to Give Their Alien Clients Accurate Information Regarding Possible Deportation Consequences as Required Under *Padilla*.

To effectively represent an alien client in a criminal case, an attorney must advise the client of the potential for deportation. *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (requiring defense counsel to properly advise alien clients of the potential immigration consequences of a guilty plea). The "norms" of the profession require attorneys to alert their client of any negative immigration effects of a guilty plea. *Id.* at 372. As Padilla observed, the number of offenses for which deportation is a consequence has grown over time. *Id.* at 360. Even with the increased complexity of relevant offenses and statutory nuances, defense attorneys are still expected to provide "advice about . . . deportation." *Id.* at 371.

Because of the ethical obligation placed on attorneys, competency in applying the categorical approach has become a "prerequisite" for defense counsel representing aliens in criminal proceedings. JENNIFER LEE KOH, *THE WHOLE BETTER THAN THE SUM: A CASE FOR THE CATEGORICAL APPROACH TO DETERMINING THE IMMIGRATION CONSEQUENCES OF*

CRIME, 26 GEO. IMMIGR. L. J. 257, 269 (2012). Currently, the formal categorical approach compares elements of the statute forming the basis of the defendant's state conviction with the elements of the "generic" federal crime, also described as "the offense as commonly understood." *Descamps*, 133 S. Ct. at 2281. The modified categorical approach "helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Id.* at 2285. Defense counsel must fully understand both concepts to competently inform their clients of the immigration consequences of a guilty plea and subsequent conviction.

Petitioner's request to create a distinction between elements and means would add an uncertain intermediate analytical step between the traditional categorical approach and the modified categorical approach, forcing defense counsel to determine if the alternatives listed in the statute are elements or means. As usual, counsel would begin with the categorical approach, but if the statute did not match the generic language due to alternatives listed in the statute, counsel could no longer simply move on to the modified categorical approach. Counsel would first have to examine the alternatives and decide whether the list contained alternative elements or alternative means. This additional intermediate step may appear simple, but there is no comprehensive source that could instruct counsel on a means versus elements distinction for state and federal statutes.

Yet not until counsel made this extremely important determination could the attorney then properly apply the modified categorical approach, or find that the statutory language was broader than the generic crime, and thus did not qualify as an aggravated felony.

The proposed intermediary step would create more confusion for defense counsel who are obligated to accurately inform their clients of the possibility of deportation for certain offenses. Counsel would have to determine if the list of alternatives were elements or means before advising the client on whether a plea would carry the consequence of deportation if convicted as required in *Padilla*. If counsel were to incorrectly categorize alternatives and thus cause a client to enter a guilty plea for a crime that carries deportation as a ramification, a client could maintain an action under *Padilla* and *Strickland v. Washington*, 466 U.S. 668 (1984) (providing the benchmark standard for effective representation of a client). There is no public policy reason to impose this potential liability on the criminal defense bar. "[I]nformed consideration of possible deportation can only benefit both the State and noncitizen defendant. . . ." *Padilla*, 559 U.S. at 298.

Affirming the Eighth Circuit's approach would allow defense attorneys to give clients more certainty when entering into a plea agreement with prosecutors, as to whether immigration consequences will flow from a guilty plea and subsequent conviction. "It is quintessentially the duty of counsel to provide her client with available advice about an issue like deportation,

and the failure to do so 'clearly satisfies the first prong of the *Strickland* analysis.'" *Padilla*, 559 U.S. at 371 (citing *Hill v. Lockhart*, 474 U.S. 52, 62 (1985) (White, J., concurring in judgment). Instead of merely stating that there is a possibility of immigration consequences, defense attorneys could confidently advise their clients based upon the statutory language and accurately select the correct approach, *i.e.*, a categorical, modified categorical, circumstance-specific approach. In contrast, creating a muddled distinction between means and elements would inject even more confusion into the already complex categorical approach and its other analytical counterparts.

CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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