UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 20-73583

DIEGO MENDOZA-GARCIA,
Petitioner

v.

MERRICK GARLAND, U.S. ATTORNEY GENERAL,
Respondent

On Petition for Review of an Order of the Board of Immigration Appeals

---

Brief of Amicus Curiae American Immigration Lawyers Association in Support of Granting Petitioner's Petition for Review

---

KARI E. HONG
Boston College Law School
885 Centre Street
Newton, MA 02459
E: kari.hong@bc.edu

ELISA STEGLICH
SIMON LU, Supervised Law Student
JILL APPLEGATE, Sup'd Law Student
University of Texas School of Law
727 E. Dean Keeton St.
Austin, TX 78705
E: esteglich@law.utexas.edu

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

Federal Statutes

State Statutes

Federal Constitution

State Constitution

Oregon Jury Instructions

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure, Rules 26.1, 29(a)(4)(A) and 29(b)(4), Amicus Curiae American Immigration Lawyers Association ("AILA") state that no subsidiaries or any corporation, and no publicly held corporation owns 10% or more of its stock.

FRAP RULE 29 STATEMENT OF CONSENT

Pursuant to Federal Rules of Appellate Procedure, Rule 29 and Circuit Rule 29-2(a), counsel for Amicus Curiae AILA has secured the consent of attorneys representing both parties to file this amicus brief. Amicus Curiae state that no counsel for the party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus Curiae and their counsel contributed money that was intended to fund the preparing or submitting of the brief.

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae AILA is a national association with more than 15,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in

immigration and naturalization matters.

AILA's members practice regularly before the Department of Homeland Security ("DHS"), immigration courts, and the Board of Immigration Appeals ("BIA" or "Board"), as well as before the United States District Courts, Courts of Appeals, andSupreme Court. As Amicus Curiae in this case, AILA draws on the expertise of its members who represent noncitizens facing immigration consequences arising out of interactions with the criminal justice system. AILA has an interest in the fair and proper application of the immigration and criminal laws of the United States.

INTRODUCTION

This case presents the question of whether Oregon's first-degree burglary offense, ORS § 164.225(1), criminalizes structures and locations that fall outside of the generic burglary definition. Ninth Circuit precedent, Supreme Court precedent, the text of the statute, and Oregon cases answer that question affirmatively.

On overbreadth, in 2016, *United States v. Cisneros* held that ORS §164.225(1) is broader than the generic burglary statute because it criminalizes structures that the generic definition does not: namely, "generic burglary does not include booths, vehicles, boats, or aircrafts," while the Oregon statute does. 826 F.3d 1190, 1194 (9th Cir. 2016). *Cisneros* answered this question correctly and no intervening caselaw has disturbed this holding.

The BIA erroneously claimed that *United States v. Stitt*, ___ U.S. ___, 139 S. Ct. 399, 406–07 (2018), overturned *Cisneros*, but it did not. In analyzing burglary offenses from Tennessee and Arkansas, *Stitt* clarified that the generic burglary definition includes buildings where an individual only sometimes slept in that location. "After all, a burglary is no less a burglary because it took place at a summer home during the winter, or a commercial building during a holiday." *Id*. at 406. But *Stitt*'s inclusion of structures where people reside or sleep does not sweep in all structures listed in Oregon's first-degree burglary statute as the BIA said it did. A.R. 12.

The BIA's determination that *Stitt* eliminated the Oregon statute's overbreadth is wrong for two reasons: First, under the guise of its first-degree burglary statute, Oregon criminalizes the entry of a non-dwelling with a firearm or with specific burglary tools. *See* ORS § 164.225(1)(a).

Second, Oregon criminalizes the entry of curtilage. In *State v. Taylor,* the Oregon Court of Appeals upheld a first-degree burglary conviction, rejecting the defendant's challenge that his entry onto a breezeway was curtilage and beyond the intended definition of a "building" as defined by Oregon law. 271 Or. App. 292, 303–06 (2015). Both examples fall outside of the generic definition of burglary laid out in *Taylor v. United States* and clarified by *Stitt*.

On divisibility, Oregon's first-degree burglary remains indivisible for two reasons: First, *Cisneros* held that jurors are not tasked to agree on which structure is involved in the offense as long as the potential buildings are included in the statute's list of structures. 826 F.3d at 1194–95. *State v. Taylor* confirmed this analysis when it noted that a factfinder need not parse out if an entry was on curtilage or the residential home to uphold a first-degree burglary offense. 271 Or. App. at 306.

Second, Mr. Mendoza-Garcia's conviction was in 2016. A.R. 852. This date is significant because until 2020, Oregon never required jury unanimity in ***any*** non-capital felony cases. In a rule that has since been struck down as unconstitutional, Oregon was unique among the states by providing that only ten of the selected twelve jurors need to agree on each element in adjudicating guilt. This means that before 2020, Oregon jurors were never asked to unanimously agree on the key fact that would trigger immigration consequences. This defect was not limited to jury trials. Mr. Mendoza-Garcia, when deciding to go to trial or not, had to calculate whether ten jurors would convict him, an impermissible deviation from the constitutionally-mandated calculation of that all twelve jurors must agree on his guilt before finding him guilty.

//

//

//

ARGUMENT

I. Even After *Stitt*, Oregon's First-Degree Burglary Statute, ORS § 164.225(1), Is Overbroad Because the Express Text Criminalizes the Entry of a Non-Dwelling with a Firearm or with Burglary Tools and the Offense Criminalizes a Person's Entry on Curtilage.

To figure out if ORS § 164.225(1) is overbroad to the general burglary definition, we must determine the elements of the generic burglary definition and compare them to the elements of the state statute. If the state statute has the same elements, or is narrower than, the generic federal definition, then the state statute is a categorical match and immigration consequences apply. *See Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). If the state offense criminalizes more conduct than the generic definition, then the state statute is considered "overbroad," and the immigration consequences may not apply. *Id.*

If the statute is overbroad, the non-citizen must establish that there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). "There are two ways to show 'a realistic probability' that a state statute exceeds the generic definition." *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020). The first way is that the statute's text alone may prove overbreadth. "As long as the application of the statute's express text in the nongeneric manner is not a logical impossibility, the relative likelihood of application to nongeneric conduct is immaterial." *Id.* (citing *United States v.*

Valdivia-Flores, 876 F.3d 1201, 1208 (9th Cir. 2017)). The second way arises "if the petitioner can point to at least one case in which the state courts applied the statute in a situation that does not fit under the generic definition." *Id.* (citations and internal modifications omitted).

In 1990, the Supreme Court defined generic burglary as "an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Taylor v. United States*, 495 U.S. 575, 598 (1990). In 2018, *Stitt* clarified that buildings and structures that were "adapted or customarily used for lodging" fall within the generic definition. 139 S. Ct. at 406. In *Stitt*, the Supreme Court clarified that an RV, which is accommodated for overnight lodging, would fall within this definition, but a "car in which a homeless person occasionally sleeps" would not. *Id*. at 407. *Stitt* further clarified that what it called nontypical structures—vending machines, railroad cars, etc.—are outside of the generic definition as well. *Id*.

Oregon defines first-degree burglary as:

> (1) A person commits the crime of burglary in the first degree if the person violates ORS 164.215 and the building is a dwelling, or if in effecting entry or while in a building or in immediate flight therefrom the person:
>
> (a) Is armed with a burglary tool or theft device as defined in ORS 164.235 or a deadly weapon;
>
> (b) Causes or attempts to cause physical injury to any person; or
>
> (c) Uses or threatens to use a dangerous weapon.

ORS § 164.225.

The last time this Court compared Oregon's first-degree burglary offense to the generic burglary definition, this Court held it was overbroad because Oregon criminalizes non-structures not adapted for overnight accommodation such as booths, vehicles, boats, or aircrafts. *Cisneros*, 826 F.3d at 1194 ("[T]he 'building or structure' element of generic burglary does not include booths, vehicles, boats, or aircrafts" [that Oregon criminalizes]).

This Court's recent decision in *Diaz-Flores v. Garland,* No. 17-72563, ___ F.3d ___, 2021 WL 1257834 (9th Cir. Apr. 6, 2021), did not affect this analysis. This Court held that ORS § 164.225(1) is overbroad and divisible as a crime involving moral turpitude, and that Mr. Diaz-Flores's specific conviction was a categorical match under the modified categorical analysis. *Id.* at *4. However, *Diaz-Flores* is not relevant to the question of whether ORS § 164.225(1) is a categorical match to the generic burglary definition and thus did not disturb *Cisneros*' overbreadth and divisibility analysis. *Id*. at *5–6.

But after *Stitt, Cisneros* is not necessarily dispositive because Oregon's first-degree burglary clarifies in its first clause that only "buildings" that are also "dwellings" are ones that will be prosecuted. *See* ORS § 164.225(1) ("A person commits the crime of burglary in the first degree if the person violates ORS 164.215 ***and the building is a dwelling***. . . ") (emphasis added). A "dwelling" under Oregon

law "means a building which regularly or intermittently is occupied by a person lodging therein at night, whether or not a person is actually present." ORS § 164.205(2). An initial assumption is that by definition, any first-degree burglary in Oregon involves the entry into a residential structure. But as set forth below, there are two ways by which Oregon's first-degree burglary offense is overbroad to the generic definition of burglary.

A. The Express Text of ORS § 164.225(1) Provides a "Realistic Probability" That Oregon Criminalizes First-Degree Burglary of Non-Typical Structures as Long as the Person Possesses Burglar's Tools or a Weapon or Causes Injury to a Victim Inside the Building.

The first way by which ORS § 164.225(1) is overbroad as compared to the generic definition is that it is not limited to burglaries of dwellings as the first clause in subsection (1) provides. Rather, the disjunctive clause in that same subsection provides that a person will commit first-degree burglary:

> if in effecting entry or while in a building or in immediate flight therefrom the person:
>
> (a) Is armed with a burglary tool or theft device as defined in ORS 164.235 or a deadly weapon;
>
> (b) Causes or attempts to cause physical injury to any person; or
>
> (c) Uses or threatens to use a dangerous weapon.

ORS § 164.225(1).

The express language of the statute then provides that first-degree burglary will criminalize people who enter into a simple "building," which, as *Cisneros*

established, includes non-typical structures that are not dwellings, such as booths, vehicles, boats, aircraft or other structures adapted for business use, if the person enters "armed with a burglary tool or theft device" under subsection (1)(a), if the person "causes or attempts to cause physical injury" under subsection (1)(b), or if the person "uses of threatens to use a dangerous weapon" under subsection (1)(c).

This text alone establishes overbreadth. *See Lopez-Aguilar*, 948 F.3d at 1147. Given that it is quite logical for someone intending to burglarize a building to arrive with burglary tools, and given that the fear animating burglary is the harm an intruder may impose to an individual in their home,[1] the overbreadth of this text "is not a logical impossibility" and thus satisfies *Duenas-Alvarez. Id.*

Oregon's broad first-degree burglary offense stands in contrast to North Carolina's breaking-or-entering statute that this Court in *Mutee v. United States* found to be a categorical match with the federal definition. 920 F.3d 624, 627 (9th Cir. 2019). Before *Stitt* was decided, Mr. Mutee had argued that North Carolina's breaking-or-entering statute,[2] was overbroad "because [North Carolina] burglary

[1] *See Stitt,* 139 S. Ct at 406 ("Congress, as we said in *Taylor,* viewed burglary as an inherently dangerous crime because burglary 'creates the possibility of a violent confrontation between the offender and an occupant, caretaker, or some other person who comes to investigate.'") (quoting *Taylor*, 495 U.S. at 588) (other citations omitted).

[2] Under the North Carolina statute, a "'building' shall be construed to include any dwelling, dwelling house, uninhabited house, building under construction, building within the curtilage of a dwelling house, and any other structure designed to house or secure within it any activity or property." N.C. Gen. Stat. § 14-54(c).

includes burglary of mobile structures customarily used or adapted for overnight accommodation." *Id.* at 627. *Stitt* clarified that the mobile home at issue in *Mutee* was within the generic definition. North Carolina's statute is different from Oregon's first-degree burglary offense, which permits the prosecution of burglarizing a non-typical structure—such as a vehicle, plane, or storage unit—if the person is carrying burglary tools, a weapon, or causes physical injury to a person in the non-residential structure.

B. An Actual Case Proves a "Realistic Probability" That ORS § 164.225(1) Criminalizes the Burglary of Curtilage.

A second way by which ORS § 164.225(1) is overbroad as compared to the generic definition of burglary is that it criminalizes the entry onto curtilage. In 2007, the Supreme Court clarified that "the inclusion of curtilage takes Florida's underlying offense of burglary outside the definition of 'generic burglary' set forth in *Taylor,* which requires an unlawful entry into, or remaining in, 'a ***building or other structure.***'" *James v. United States*, 550 U.S. 192, 212 (2007), *overruled on other grounds by Johnson v. United States*, 576 U.S. 591 (2015) (emphasis in *James*).

Oregon, by contrast, criminalizes the entry onto curtilage under its first-degree burglary statute. In *State v. Taylor,* the Oregon Court of Appeals upheld a first-degree burglary conviction by a man who claimed that his entry onto breezeway was not a "dwelling" under Oregon law "because the area that he entered was a separate

area outside the house." 271 Or. App. at 293. "The breezeway connects a two-story house with a two-story, two-car garage, and shares a wall with both the house and garage." *Id*. "From inside the breezeway, there is a door to the garage that locks, but no door to the house. Stated another way, there is no direct access to the house from inside the breezeway." *Id*. at 294. "The homeowners use the breezeway to store various things, including nonperishable food items in a large cabinet, empty pop cans in a barrel, tools and equipment, as well as some furniture. They also use the breezeway as a dog run. Additionally, the homeowners use the breezeway to gain access to their garage and backyard." *Id*. Mr. Taylor attempted to "steal pop cans from inside the breezeway" and engaged in the mischief of "moving the homeowners' table saw in the breezeway." *Id*. For this conduct, he was charged and convicted of first-degree burglary. *Id*.

On appeal, Mr. Taylor argued there was insufficient evidence "to establish that he had entered a dwelling as required for first-degree burglary" because the breezeway was "outside of the house, but within the curtilage" and thus fell "outside the definition of a dwelling" as defined under ORS § 164.225(1). 271 Or. App. at 295, 302. The Oregon Court of Appeals rejected this argument, citing lengthy legislative history that determined that the Oregon legislature intended to include burglaries "within the curtilage" within the new definition of a first-degree burglary. *Id.* at 303–06 & nn. 5–9. Because *State v. Taylor* offers an actual instance of

prosecuting the unlawful entry onto curtilage as first-degree burglary, this is a second way by which ORS § 164.225(1) is overbroad.

II. For Convictions Before 2020, Oregon's First-Degree Burglary Offense Is Indivisible Because Oregon Did Not Require Jury Unanimity for Any Felony Prosecution of This Offense.

In Mr. Mendoza-Garcia's case, the BIA never reached the question of divisibility. A.R. 12. Nevertheless, this Court may address the question because the statute's divisibility is a legal issue that is in this Court's, not the agency's, area of expertise. *See Lopez-Valencia v. Lynch*, 798 F.3d 863, 869 (9th Cir. 2015) (clarifying the divisibility test); *Mandujano-Real v. Mukasey*, 526 F.3d 585, 588 (9th Cir. 2008) (rejecting Government's request to remand aggravated felony analysis to the BIA because "the answer to this question lies in the interpretation of an Oregon criminal statute: this is a matter that is not committed to the BIA's expertise.").

There are two reasons why ORS § 164.225(1) is indivisible:

First, this Court, and the federal district court for the District of Oregon, previously held that Oregon first-degree "dwelling" burglary was indivisible because Oregon's "building" definition listed out different means and not different elements. *Cisneros*, 826 F.3d at 1194–96; *see also United States v. Mayer*, 162 F. Supp. 3d 1080, 1085–87 (D. Or. 2016) (finding that Oregon's first-degree burglary statute was indivisible because the building definition did not provide for alternative elements).

Under the Oregon jury instructions, a jury is never asked "to specify which alternate type of building applies." *Cisneros*, 826 F.3d at 1195–96. Instead, the jury is merely asked whether "the premises described in the charge is a dwelling." Or. U.Cr.J.I. 1901 (2013). The instructions then point to the statutory definitions of "building" and "dwelling," without asking the jury to decide as to which structure is at issue. *See* Or. U.Cr.J.I. 1900 (2014) (providing statutory definitions of "building" and "dwelling"). There is no intervening law to alter this analysis.

Second, unique to all non-capital felony convictions arising before 2020, Oregon's first-degree burglary offense is indivisible because an Oregon jury did not need to unanimously agree as to any of the elements in the offense.

Until 2020, Oregon was one of only two states that did not require jury unanimity for non-capital felony sentencing. *Ramos v. Louisiana*, 590 U.S. __, 140 S. Ct. 1390, 1394 (2020). Instead, the Oregon Constitution only required a minimum of ten jurors out of twelve to convict a defendant of any crime. OR. CONST. art. 1, § 11;[3] *see also* ORS § 136.450 ("The verdict of a trial jury in a criminal action shall be by concurrence of at least 10 of 12 jurors."). The adoption of the non-unanimity jury rule can "be traced to the rise of the Ku Klux Klan and efforts to dilute the

[3] The Oregon Constitution states that "[i]n the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise." OR. CONST. art. 1, § 11.

influence of racial and ethnic and religious minorities on Oregon juries." *Ramos*, 140 S. Ct. at 1394 (internal citations and quotation marks omitted).

The Supreme Court in 2020 struck down Oregon's non-unanimous jury rule because "the Sixth Amendment right to a jury trial is fundamental to the American scheme of justice and [is] incorporated against the States under the Fourteenth Amendment." *Ramos*, 140 S. Ct. at 1397 (internal citations and quotation marks omitted). Because "the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court." *Id*.

Oregon's non-unanimous jury rule is now unconstitutional, and after *Ramos,* the Oregon legislature changed its jury instructions to require unanimity. *See* Or. U.Cr.J.I. 1015 (2021) ("Guilty verdicts must be unanimous, which means that each and every juror must agree on a guilty verdict."). But Mr. Mendoza-Garcia was convicted in 2016, A.R. 852, which, under the old scheme, he was guilty even if two jurors disagreed on the elements. *Ramos*, 140 S. Ct. at 1395–97; see also *United States v. Bayya*, No. 3:13-cr-00558-HZ, 2015 WL 8751795 at *3 (D. Or. Dec. 14, 2015) ("[T]here is no indication that the [Oregon] legislature intended to require juror unanimity about the type of building . . . before finding [the defendant] guilty of burglary.").

Jury unanimity is significant because it helps determine whether a statute's listed structures are different means or are alternative elements. *See Mathis v. United*

States, 570 U.S. __, 136 S. Ct. 2243, 2248–50 (2016). This is not technical exercise. An order of removal is a "drastic measure," often amounting to lifelong "banishment or exile." *Sessions v. Dimaya*, ___ U.S. ___, 138 S. Ct. 1204, 1213 (2018) (citations omitted). For long-term residents like Mr. Mendoza-Garcia, who have built lives, families, and dreams in this country, removal would deprive them of "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922).

Under the Armed Career Criminal Act[4] and Illegal Immigration Reform and Immigrant Responsibility Act[5], the primary justification for attaching any collateral consequence to a criminal conviction—often times one that may arise years earlier—was because the jury had unanimously agreed on the key fact that could result in a person's permanent exile from their home. To comport with the Sixth Amendment, *Mathis* explained that its focus on elements and not conduct "focus avoids unfairness to defendants" because "only a jury, and not a judge, may find facts." 136 S. Ct. at 2252. Indeed, in *Mathis*, the Supreme Court noted that the Iowa burglary statute at issue listed different means—rather than elements—because a jury did not need to unanimously agree "whether the burgled location was a building, other structure, or vehicle." *Id*. at 2256. Thus, the statute was indivisible. *Id.*

[4] 18 U.S.C. § 924(e) ("ACCA")
[5] Pub.L. No. 104–208, 110 Stat. 3009–546 ("IIRIRA")

Until 2020, twelve Oregon jurors were ***never required*** to unanimously agree as to whether ***any*** of the elements defining first degree burglary were met. Only a majority of ten jurors was needed, which means that if two jurors disagreed about whether an entry happened, about the nature of the structure, or about the existence of a dwelling, a person was still guilty under Oregon law. Any immigration court that orders removal as a collateral consequence for a conviction that was rendered without a unanimous jury violates the fundamental fairness guaranteed by the Sixth Amendment.

The taint from non-unanimous jury rule is not confined to just trials, but must be presumed to have cast an unconstitutional, coercive shadow over Mr. Mendoza-Garcia's decision to plead guilty or not. Instead of calculating whether twelve jurors would convict him, Mr. Mendoza-Garcia unfortunately needed to calculate whether the evidence against him could still result in his guilt even when two jurors would have acquitted him. His plea of "guilt" was unconstitutionally qualified by the reality that the jury was literally rigged against him. If he was in 48 other states, Mr. Mendoza-Garcia may have decided differently. But he was in Oregon, and Oregon's non-unanimous jury threshold is a structural error, because it impermissibly compromised his decision to plead to the charge against him without regard to proving individualized prejudice. *See United States v. Dominguez Benitez*, 542 U.S. 74, 81 (2004) ("It is only for certain structural errors undermining the fairness of a

criminal proceeding as a whole that even preserved error requires reversal without regard to the mistake's effect on the proceeding.").

Mr. Mendoza-Garcia need not vacate his plea to receive the correction of this fundamental error. Collateral consequences may only attach to jury verdicts that comport with the Sixth Amendment, and—with respect to divisibility—Mr. Mendoza-Garcia's conviction did not. An immigration court thus is precluded from deeming his conviction to be on the same constitutional standing as others secured with the protections of the Sixth Amendment.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that this Court grant the petition for review.

Dated: April 21, 2021

Respectfully submitted,

s/ Kari Hong
KARI HONG
Boston College Law School

/s Elissa Steglich
ELISSA STEGLICH
Jill Applegate, *Supervised Law Student*
Simon Lu, *Supervised Law Student*
University of Texas School of Law

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I certify that: Pursuant to Fed. R. App. P., Rule 32(a)(7)(B) and (C), Rule (a)(5) and (6), and Ninth Circuit Rules 32-1 and 32-4, the attached brief is proportionally spaced, has a typeface of 14 points or more, and contains approximately 3,941 words, exclusive of the table of contents, table of authorities, corporate disclosure statement, certificates of counsel, and signature block, which is does not exceed the 4,200 word-limit for an amicus brief. The word count includes the FRAP Rule 29 Statement and footnotes.

CERTIFICATE OF SERVICE

I, Kari Hong, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: April 21, 2021 Respectfully submitted,

/s Kari Hong
KARI HONG