No. 14-60808

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

HERMENEGILDO GOMEZ-PEREZ,
Petitioner,

v.

LORETTA LYNCH, ATTORNEY GENERAL,
Respondent.

ON PETITION FOR REVIEW FROM THE
BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICI CURIAE* AMERICAN IMMIGRATION LAWYERS ASSOCIATION AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD IN SUPPORT OF THE PETITIONER

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CERTIFICATE OF INTERESTED PERSONS

Case No. 14-60808

Petition for Review from a Final Order of the Board of Immigration Appeals

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Fifth Circuit Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Immigration Judge:	IJ Gary Burkholder
Board of Immigration Appeals:	Roger Pauley
Petitioner:	Hermenegildo Gomez-Perez
Respondent:	Loretta Lynch H.
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici curiae* American Immigration Lawyers Association and National Immigration Project of the National Lawyers Guild state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above, which are nonprofit organizations.

Pursuant to Fed. R. App. P. 29(c)(5), *amici 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 *amici curiae* and their counsel contributed money that was intended to fund preparing or submitting the brief.

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INTRODUCTION AND STATEMENT OF *AMICI CURIAE*

Under Federal Rule of Appellate Procedure 29(b), the American Immigration Lawyers Association and the National Immigration Project of the National Lawyers Guild proffer this brief to assist the Court in its consideration of whether a conviction for Texas misdemeanor assault under Texas Penal Code § 22.01(a)(1) qualifies as a "crime involving moral turpitude." This case presents the Court the opportunity to provide guidance to the Board of Immigration Appeals (BIA) on how to interpret the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), for cases arising in the Fifth Circuit.[1]

In *Descamps v. United States*, the Supreme Court provided the dispositive framework an adjudicator should apply to determine whether a statute is "divisible" and thus permits the modified categorical approach. The Supreme Court held that the modified categorical approach applies *only* when the statute at issue "sets out one or more *elements* of the offense in the alternative," at least one of which would match the generic ground and one of which would not. *Descamps*, 133 S. Ct. at 2281 (emphasis added). Although this Court quickly followed suit in *Franco-Casasola v. Holder*, 773 F.3d 33 (5th Cir. 2014), the BIA reached an incorrect decision here because it misread this Court's decisions following *Descamps*.

[1] *Amici* take no position on the other issues raised by the Petitioner.

As shown below, *Descamps*, *Franco-Casasola*, the BIA, and other circuits generally require a focus on the elements on which the jury must *unanimously* agree to determine if an offense is divisible. Only when state law requires the jury to unanimously find a fact alleged by the State does the allegation become an element; otherwise, the fact is merely one of several potential means by which a single crime may be committed.

Under this means versus elements test, assault under Texas Penal Code § 22.01 (a)(1) is *not* divisible because Texas law unambiguously establishes that assaults committed intentionally, knowingly, or recklessly are not alternative elements essential for a conviction, but rather separate means by which a defendant can carry out the offense. *See Landrian v. State*, 268 S.W.3d 532, 537 (Tex. Crim. App. 2008); Pet. Supp. Br. 19-26. The jury does not have to agree on which mental state a defendant possessed. Because Texas courts authoritatively treat the mental states as different means of committing a single, unified crime, a factfinder's inquiry is complete without examining the underlying state-court record. Put differently, a conviction under this statute is not subject to the modified categorical approach because it does not define more than one offense, at least one of which would come within the removal ground and one of which would not. Furthermore, as the BIA has previously held that violating the statute by causing bodily injury recklessly is not a crime involving moral turpitude, no conviction under the statute

qualifies as a crime involving moral turpitude under the categorical approach. *See Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996).

The BIA below, however, failed to apply the *Descamps* means versus elements test. It misread the law of this Circuit as requiring application of the modified categorical approach where the statute is merely phrased in the disjunctive without any additional analysis. ROA. 391, 392. Applying that incorrect test, the BIA *assumed* that the alternative mental states in Texas Penal Code § 22.01 (a)(1) defined separate crimes—intentional assault, knowing assault, or reckless assault—and erroneously resorted to the modified categorical approach. ROA. 391, 392. After looking to the petitioner's record of conviction, the BIA determined the record was inconclusive and that the petitioner had therefore not established that his conviction *was not* a crime involving moral turpitude for relief eligibility purposes. It erred in not treating *Descamps* and *Franco-Casasola* as being the controlling authority. *Amici* urge the Court to now end the BIA's confusion and clarify that *Descamps* and *Franco-Casasola* are the governing law.

The centrality of the categorical and modified categorical approaches in immigration adjudications makes it especially important that this Court use the present case to clarify that the BIA and immigration courts should look to *Descamps* and *Franco-Casasola* to employ the modified categorical approach only

when the statute of conviction contains alternative elements that must be found beyond a reasonable doubt and unanimously before a conviction can be secured.

Amici are organizations with a direct interest in assuring that the rules governing classification of criminal convictions for immigration purposes are fair and predictable and give noncitizen defendants the benefit of their plea bargains. American Immigration Lawyers Association (AILA) is a national association with more than 13,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States. National Immigration Project of the National Lawyers Guild (NIPNLG) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws.

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ARGUMENT

I. The Fifth And Other Circuits Have Correctly Applied *Descamps'* Test Of Distinguishing Between Means And Elements.

At question in this case is whether petitioner's conviction for assault under Texas Penal Code § 22.01(a)(1)[2] is a crime involving moral turpitude. The answer turns on whether the Texas statute is "divisible," with distinct sets of alternative elements and correspondingly distinct crimes, or "indivisible." If the latter, the analysis begins and ends with the categorical approach, which limits inquiry to the elements of the statute of conviction. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Franco-Casasola v. Holder*, 773 F.3d 33, 42-43 (5th Cir. 2014). Only in the former may the modified categorical approach be used—permitting examination of select documents in the state-court record to identify the offense of conviction. *Moncrieffe*, 133 S. Ct. at 1684.

A. *Descamps* clarifies that a statute is "divisible" when it contains alternative elements that must be found unanimously by a jury.

The Supreme Court in *Descamps* held that the modified categorical approach applies *only* when a defendant is convicted of violating a "divisible" statute—one that "sets out one or more *elements* of the offense in the alternative," at least one of which would match the generic ground and one of which would not.

[2] "A person commits an offense if he intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse ." Tex. Penal Code § 22.01(a)(1).

133 S. Ct. 2276, 2281 (2013) (emphasis added). It thus held that "courts may not apply the modified categorical approach when the crime of which the defendant was convicted has a single, indivisible set of elements," such as California burglary. *Id.* at 2282.

Significantly, *Descamps* tied divisibility to the requirement of alternative "elements." And the Court looked to its prior decision in *Richardson v. United States*, 526 U.S. 813, 817 (1999), to define "elements" as facts a jury must find "unanimously and beyond a reasonable doubt." 133 S. Ct. at 2288. [3] The Court distinguished elements from facts that are merely "amplifying but legally extraneous circumstances," which a jury need not find in order to secure a conviction. *Id*. at 2288 (citing *Richardson,* 526 U.S. at 817).

Indeed, Supreme Court precedent dictates that a convicting jury may disagree on the "means" by which the crime was committed, so long as the jurors find unanimously and beyond a reasonable doubt all the elements of the offense. *Richardson*, 526 U.S. at 817; *Schad v. Arizona*, 501 U.S. 624, 631-32 (1991) (plurality); *see Descamps* at 2298 (Alito, J., dissenting) ("The feature that distinguishes elements and means is the need for juror agreement . . . ."); *United*

[3] The relevant question is whether the jury was required to find a particular fact beyond a reasonable doubt to convict. Some jurisdictions require that a quorum of jurors find each necessary element to secure a criminal conviction, rather than a unanimous jury. In these jurisdictions, "elements" are those facts about which the jury must agree by the quorum necessary for conviction. *See Matter of Chairez*, 26 I&N Dec. 349, 353 n.2 (BIA 2014).

States v. Williams, 449 F.3d 635, 647 (5th Cir. 2006) (Jury "unanimity is not required as to the particular *means* used by the defendant to commit a particular element of the offense."). Thus, *Descamps* teaches that the central characteristic of an "element" is that "the jury *must* find [it] to convict the defendant." *Descamps*, at 2290 (emphasis added).

Under *Descamps*, then, that a statute contains a list of alternative terms does not necessarily render it divisible. The alternative terms may be alternative "elements" of distinct offenses or alternative "means" of committing a single offense. *Descamps*, 133 S. Ct. at 2285 n.2. As the Supreme Court has observed, "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." *Schad*, 501 U.S. at 636 (plurality). Thus, *Descamps* requires courts to engage in a meaningful analysis of a disjunctively phrased statute to determine whether it sets forth alternative *elements* of distinct crimes. Only if they do – and *not* when the statute merely sets forth alternative *means* of committing the same offense – may the modified categorical approach be employed.

Whether particular conduct may be treated as a "means" or an "element" of a state offense turns on the intent of the state legislature, as interpreted by state courts, so long as that interpretation does not violate due process. *See Schad*, 501 U.S. at 631-37 (plurality). Thus, courts should look to case law, jury instructions,

and other sources of law to determine whether the convicting jurisdiction treats the disjunctive alternatives in statutes as true "elements" or "means." *See e.g.*, *Omargharib v. Holder*, 775 F.3d 192, 199 (4th Cir. 2014); *Rendon v. Holder,* 764 F.3d 1077, 1089 (9th Cir. 2014).

B. Circuit precedent supports petitioner's reading of *Descamps*, and proves the decision below to be in error.

In *Franco-Casasola*, this Court expressly adopted and applied the *Descamps* analytical framework in determining whether a statute is divisible. 773 F.3d at 43. ("Accordingly, *Descamps* controls on the application of the modified categorical approach to determining whether Franco–Casasola had been convicted of an aggravated felony."). In doing so, this Court recognized that "the central tenet of divisibility analysis" requires "examining the statutorily provided *elements* of the offense." *Id*. at 37 (emphasis added). This Court noted that 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*. (quoting *Descamps*, 133 S. Ct at 2283).

Significantly, like *Descamps*, this Court defined "elements" as facts "that must be charged and proven to fact-finders" beyond a reasonable doubt. *Id*. at 39. Thus, in applying the *Descamps* divisibility test and determining whether the statute at issue—18 U.S.C. § 554(a)—contained alternative elements, this Court

examined what a prosecutor would have had to prove and a judge or jury necessarily find to convict under the statute. *See id*. at 38 ("A prosecutor charging a violation of Section 554(a) must select the relevant elements from the possible alternative statutes and regulations."); *id*. at 41 ("[N]ot only must Franco–Casasola be convicted of the elements of Section 554(a) …, he must also have been found guilty of each element of the other statutes that complete the offense."); *id*. ("Jury instructions need to charge each of the essential elements from the indictment, leaving it for jurors to determine whether the evidence supported each of those elements.").

Accordingly, *Franco–Casasola* treats a statute as divisible if it contains alternative "elements" that must be found beyond a reasonable doubt by the factfinder, and at least one of those elements come within the ground of removal and one does not. This divisibility approach supersedes any prior approaches to the contrary.

Below, the BIA mistakenly assumed that the law of the Circuit requires application of the modified categorical approach merely where the statute is phrased in the disjunctive without any additional analysis of whether those alternative phrases are elements, rather than means. ROA. 391, 392. Thus, the agency erred by ignoring the Court's thorough analysis in *Franco-Casasola*.

This Court now should end the BIA's confusion and clarify that *Descamps*, and *Franco-Casasola* are the governing law. The precedent decisions of the Board and this Court's sister circuits – consistently looking to the elements a jury must find unanimously and beyond a reasonable doubt – only buttress this conclusion.

C. In the wake of *Descamps*, the Board of Immigration Appeals and other Circuits have correctly tied statutory divisibility to jury unanimity.

The Board and other circuits post-*Descamps*, namely the Fourth, Ninth, and Eleventh Circuits, have correctly recognized that the touchstone of determining whether a statute is divisible is whether it requires jury unanimity on one alternative over the other. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 478, 483 n.3 (BIA 2015) (*Chairez II*) (agreeing with and citing the Fourth, Ninth, and Eleventh Circuits as adopting the jury-unanimity approach).

First, in *Matter of Chairez-Castrejon*, the Board explained that, after *Descamps*, a statute is divisible only if, *inter alia*, "it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of 'elements,' more than one combination of which could support a conviction." 26 I&N Dec. 349, 353 (BIA 2014) (*Chairez I*). The Board further explained that for purposes of the modified categorical approach, "an offense's 'elements' are those facts about the crime which '[t]he Sixth Amendment

contemplates that a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt.'" *Id.* (quoting *Descamps*,133 S.Ct. at 2288).

The BIA applied its new, post- *Descamps* approach to the Utah statute at issue, a criminal statute punishing certain discharges of a firearm with a mens rea element requiring that the defendant acted with "intent, knowledge, or recklessness." *Id.* at 352. Despite the fact that the mental states were written in the disjunctive, the BIA, citing to *Schad* and *Richardson*, recognized that the Utah statute is divisible only if Utah law mandates jury unanimity with respect to the mens rea. *Id*. ("If Utah does not require such jury unanimity, then it follows that intent, knowledge, and recklessness are merely alternative 'means' by which a defendant can discharge a firearm, not alternative 'elements' of the discharge offense.").

Upon reconsideration, however, the Board in *Chairez II* found the Utah statute to be divisible. *Chairez II*, 26 I&N Dec. at 482. The Board did not reverse its interpretation of *Descamps*, but found that it was bound to follow the circuit court's interpretation of divisibility, even where that test diverges from the one affirmed by the Supreme Court in *Descamps*. *Id.* at 483 n.3. And in Mr. Chairez's case, which arose in the Tenth Circuit, the Board found that its divisibility

approach had been superseded by *United States v. Trent*, 767 F.3d 1046, 1053 (10th Cir. 2014).[4]

Significantly, however, the Tenth Circuit's analysis is inconsistent with *Franco-Casasola*, where this Court addressed the divisibility analysis head on. *Franco-Casasola* followed the Supreme Court's formulation in *Descamps*, and teaches that an element is something that has to be proven to the trier of fact and

[4] The BIA characterized the Tenth Circuit's approach as one in which any disjunctive phrases will be considered alternative elements, and thus trigger the modified categorical approach. *Amici* take a different view of the Tenth Circuit's decision in *Trent*. There, the Tenth Circuit struggled with whether alternative "means" could be sufficient to trigger the modified categorical approach. 767 F.3d at 1053. But ultimately the court did not need to resolve the issue because even applying the correct means versus elements test, it found the modified categorical approach was appropriate as state law actually required jurors to unanimously agree on the statutory alternatives at issue. *Id* at 1061. It was only in dicta then that *Trent* posited that, to determine if the modified categorical approach applied with respect to a state offense, a federal appeals court could completely ignore the state-law interpretation of the elements of the offense. This dicta proposal is a recipe for chaos. Not surprisingly, *Trent* admitted that "our conclusion may be wrong," and therefore rested on an alternative analysis. *Id.* at 1061.

In *Chairez II*, the Board also cited to two other cases as looking only to disjunctive phrasing to trigger divisibility. 26 I&N Dec. at 483 n.3. Unlike *Trent*, the other two cases cited by the BIA did not specifically engage the question of whether jury unanimity sets the parameters of an offense's elements. Accordingly, these cases can be quickly dismissed because they did not *reject* the relevance of jury unanimity but simply failed to address it. *See United States v. Carter*, 752 F.3d 8, 17 (1st Cir. 2014) (stating that the appellant "does not contend that the Maine general-purpose assault statute is an 'indivisible' statute"); *United States v. Marrero*, 743 F.3d 389, 396 (3d Cir. 2014) ("Because the Pennsylvania statute lists potential offense *elements* in the alternative, it is divisible and the modified categorical approach applies.") (emphasis added, citation and quotations omitted).

found by the trier of fact by whatever margin is needed to sustain a conviction. *Franco-Casasola*, 773 F.3d at 41.

The Fourth Circuit's interpretation also mirrors *Franco-Casasola's* understanding of *Descamps*. *See United States v. Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (holding that "offensive physical contact" and "physical harm" are "merely alternative *means* of satisfying a single element" of the Maryland assault statute, rather than alternative *elements*, because "Maryland juries are not instructed that they must agree 'unanimously and beyond a reasonable doubt' on whether the defendant caused 'offensive physical contact' or 'physical harm' to the victim; rather, it is enough that each juror agree only that one of the two occurred, without settling on which"); *United States v. Cabrera-Umanzor*, 728 F.3d 347, 352-53 (4th Cir. 2013); *Omargharib v. Holder*, 775 F.3d 192, 198 (4th Cir. 2014).

Specifically, in *Omargharib v. Holder*, the government asserted that the Virginia common-law crime of larceny is divisible and subject to the modified categorical approach "because it purportedly lists the elements of theft and fraud in the alternative." 775 F.3d at 198. The Fourth Circuit held otherwise. It explained that "the use of the word 'or' in the definition of a crime does not automatically render the crime divisible." *Id*. Rather, "a crime is divisible under *Descamps* only if it is defined to include multiple alternative *elements* (thus creating multiple versions of a crime), as opposed to multiple alternative *means* (of committing the

same crime).” *Id*. And “elements, as distinguished from means, are factual circumstances of the offense the jury must find ‘unanimously and beyond a reasonable doubt.’” *Id*. at 198-99.

In analyzing the means versus elements distinction, the Fourth Circuit found that it “must consider how Virginia courts generally instruct juries with respect to larceny.” *Id*.at 199. After reviewing the case law and model jury instruction, the Court concluded “that Virginia juries are not instructed to agree ‘unanimously and beyond a reasonable doubt’ on whether defendants charged with larceny took property ‘wrongfully’ or ‘fraudulently.’” 775 F.3d at 199. Rather, “it is enough for a larceny conviction that each juror agrees only that either a wrongful or fraudulent taking occurred, without settling on which.” *Id*. Thus, the Court determined that “wrongful or fraudulent takings are alternative means of committing larceny, not alternative elements.” *Id*. at 199-200. The Fourth Circuit recognizes that only after a court applies the elements versus means test set forth in *Descamps*, and consulting state law, may it resort to the modified categorical approach.

The Ninth and Eleventh Circuits have reasoned similarly. *Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014) (“it is black-letter law [under *Descamps*] that a statute is divisible only if it contains multiple alternative *elements*, as opposed to multiple alternative *means.*”) (emphasis in original); *United States v. Estrella*, 758 F.3d 1239, 1246 (11th Cir. 2014) (“[I]f the statutory scheme is not such that it

would typically require the jury to agree to convict on the basis of one alternative as opposed to the other, then the statute is not divisible in the sense required to justify invocation of the modified categorical approach.").

Like the BIA, and Fourth, Ninth, and Eleventh Circuits, this Court should apply the Supreme Court's analysis in the instant case; Section 22.01 (a)(1) is divisible and subject to the modified categorical approach only if it contains multiple alternative *elements*, rather than multiple alternative *means*. And if the statute is not divisible, the minimum conduct of causing injury recklessly establishes that the statute is categorically not a crime involving moral turpitude.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court grant the petition for review, and vacate Petitioner's removal order.

June 8, 2015

Respectfully submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), I hereby certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points or more and, according to computerized count, contains 3484 words.

DATED: June 8, 2015

/s/ Sejal Zota
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CERTIFICATE OF SERVICE

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U.S. Court of Appeals Docket No. 14-60808

I, Sejal Zota, hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system on June 8, 2015.

I certify that all participants in the case (who are listed below) are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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