

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 21-70888

**Luis Miguel JUAREZ,
Petitioner,**

v.

**Merrick B. GARLAND, Attorney General,
Respondent.**

**ON PETITION FOR REVIEW OF A DECISION OF
THE BOARD OF IMMIGRATION APPEALS
Agency No. A073-390-011**

**CONSENTED TO BRIEF OF THE AMERICAN IMMIGRATION COUNCIL,
AMERICAN IMMIGRATION LAWYERS ASSOCIATION, CATHOLIC LEGAL
IMMIGRATION NETWORK, IMMIGRANT DEFENSE PROJECT, JAMES H. BINGER
CENTER FOR NEW AMERICANS, AND THE NATIONAL IMMIGRATION PROJECT
OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE IN SUPPORT OF
PETITIONER**

Emma Winger
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005
(617) 505-5375
ewinger@immcouncil.org

Tanika Vigil
Catholic Legal Immigration Network,
Inc. (CLINIC)
8758 Georgia Avenue, Suite 850
Silver Spring, MD 20910
tvigil@cliniclegal.org

Kathleen Moccio
James H. Binger Center for New
Americans
University of Minnesota Law School
190 Walter Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 625-5515
kmoccio@umn.edu

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT UNDER FRAP 26.1

I, Emma Winger, attorney for amici curiae certify that the American Immigration Council, American Immigration Lawyers Association, Catholic Legal Immigration Network, Inc., Immigrant Defense Project, James H. Binger Center for New Americans at the University of Minnesota Law School, and the National Immigration Project of the National Lawyers Guild are non-profit organizations that do not have any parent corporations or issue stock and, consequently, there exists no publicly held corporation which owns 10% or more of stock.

DATED: October 21, 2021

/s/ Emma Winger

Emma Winger
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005
(617) 505-5375
ewinger@immcouncil.org

STATEMENT OF PARTY CONSENT TO AMICUS BRIEF FILING

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), I, Emma Winger, attorney for amici curiae, state that I informed counsel for Petitioner, Katherine Evans, and counsel for Respondent, Laura Hickein, of the instant amicus brief and that both Ms. Evans and Ms. Hickein consented to the filing of this amicus brief.

DATED: October 21, 2021

/s/ Emma Winger

Emma Winger
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005
(617) 505-5375
ewinger@immcouncil.org

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND STATEMENT OF AMICI.....	1
II. ARGUMENT.....	5
A. The Demand for Certainty Is a Threshold Component of the Longstanding Categorical Approach.....	5
B. The Divisibility Analysis Demands Certainty Regarding Whether Statutory Alternatives Are “Means” or “Elements”.....	8
1. Supreme Court and Circuit Court Precedent Establish That an Indeterminate Statute Must Be an Indivisible Statute.....	8
2. The Certainty Required Under the Categorical Approach Must Be Established by State Law.....	13
3. The Rule of Lenity Reinforces That Ambiguity in Criminal Statutes Resolve in Favor of the Respondent.....	15
III. CONCLUSION.....	17

TABLE OF AUTHORITIES

	Page
Cases	
<i>Alejos-Perez v. Garland</i> , 991 F.3d 642 (5th Cir. 2021)	13
<i>Almanza-Arenas v. Lynch</i> , 815 F.3d 469 (9th Cir. 2016)	5
<i>Bridges v. Wixon</i> , 326 U.S. 135 (1945)	7
<i>Carachuri-Rosendo v. Holder</i> , 560 U.S. 563 (2010)	17
<i>Johnson v. Fankell</i> , 520 U.S. 911 (1997)	14
<i>Johnson v. United States</i> , 559 U.S. 133 (2010)	14
<i>Leocal v. Ashcroft</i> , 543 U.S. 1 (2004)	16
<i>Lopez-Marroquin v Garland</i> , 9 F.4th 1067 (9th Cir. 2021)	11
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016)	3, 8, 9, 10, 11, 14
<i>Matter of Deang</i> , 27 I&N Dec. 57 (BIA 2017)	16
<i>Matter of Kim</i> , 26 I&N Dec. 912 (BIA 2017)	5
<i>Matter of P-</i> , 3 I&N Dec. 56 (BIA 1947)	6
<i>Matter of Pichardo-Sufren</i> , 21 I&N Dec. 330 (BIA 1996)	7

<i>Matter of T</i> , 3 I&N Dec. 641 (BIA 1949).....	7
<i>Matter of Velazquez-Herrera</i> , 24 I&N Dec. 503 (BIA 2008).....	6
<i>Mellouli v. Lynch</i> , 575 U.S. 798 (2015)	1, 5, 6, 7, 8, 9
<i>Moncrieffe v. Holder</i> , 569 U.S. 184 (2013)	5, 6
<i>Najera-Rodriguez v. Barr</i> , 926 F.3d 343 (7th Cir. 2019)	12, 15
<i>Ng Fung Ho v. White</i> , 259 U.S. 276 (1922)	7
<i>Sandoval v. Sessions</i> , 866 F.3d 986 (9th Cir. 2017).....	8
<i>Schad v. Arizona</i> , 501 U.S. 624 (1991)	14
<i>United States ex rel. Guarino v. Uhl</i> , 107 F.2d 399 (2d Cir. 1939)	6
<i>United States ex rel. Mylius v. Uhl</i> , 203 F. 152 (S.D.N.Y. 1913)	6, 7
<i>United States v. Degeare</i> , 884 F.3d 1241 (10th Cir. 2018).....	12
<i>United States v. Hamilton</i> , 889 F.3d 688 (10th Cir. 2018).....	12
<i>United States v. Ritchey</i> , 840 F.3d 310 (6th Cir. 2016).....	13
<i>United States v. Santos</i> , 553 U.S. 507 (2008)	15

<i>Whitman v. United States</i> , 574 U.S. 1003 (2014)	15
---	----

Statutes

8 U.S.C. § 1101(a)(43).....	16
8 U.S.C. § 1227(a)(2).....	16
8 U.S.C. § 1253(a)	16
8 U.S.C. § 1326(b)(2).....	16
8 U.S.C. § 1327.....	16
Idaho Code § 37-2732(a)(1)(A).....	1, 15, 17

Other Authorities

Alina Das, <i>The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law</i> , 86 N.Y.U. L. Rev. 1669 (2011).....	6
---	---

I. INTRODUCTION AND STATEMENT OF AMICI¹

This case requires the Court to determine whether an Idaho controlled substance statute is divisible as to a particular controlled substance under the categorical approach. If the statute is divisible, Luis Juarez, a long-time legal permanent resident who arrived in the United States as a child, will be deported. If the statute is not divisible, Mr. Juarez can remain with his U.S. children, parents, and siblings in the United States. Amici write to highlight for the Court the categorical approach's demand for certainty in the divisibility analysis. Certainty is a threshold requirement in the categorical analysis, which "focus[es] on the legal question of what a conviction *necessarily* established." *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015). The Court may only find a statute divisible if governing state law is certain that the statute includes multiple different crimes. In this instance, Amici agree with Mr. Juarez that Idaho state law unambiguously compels the conclusion that Idaho Code § 37-2732(a)(1)(A) is indivisible as to the particular substance. Should the Court find ambiguity in Idaho's law, however, it must still rule that the statute is indivisible and grant Mr. Juarez' petition for review.

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)

The American Immigration Council is a nonprofit organization established to increase public understanding of immigration law and policy, advocate for the just and fair administration of our immigration laws, protect the legal rights of noncitizens, and educate the public about the enduring contributions of America's immigrants.

The American Immigration Lawyers Association (AILA) is a national non-profit association with more than 15,000 members throughout the United States and abroad, 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, 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, immigration courts and the Board of Immigration Appeals, as well as before federal courts.

The Catholic Legal Immigration Network, Inc., (CLINIC) is the nation's largest network of nonprofit immigration legal services providers in the United States. CLINIC's mission, which derives from its broader purpose of embracing the Gospel value of welcoming the stranger, is to promote the dignity and protect the rights of immigrants in partnership with its network affiliates. CLINIC

implements its mission in part by providing substantive legal training and technical assistance on a variety of legal topics, including the immigration consequences of contact with state criminal systems. Many of CLINIC's almost 400 nonprofit immigration legal service providers, which includes nonprofits in Idaho, represent immigrants caught in the criminal system.

Immigrant Defense Project (IDP) is a not-for-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants having contact with the criminal legal and immigration detention and deportation systems. IDP provides defense attorneys, immigration attorneys, immigrants, and judges with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. IDP seeks to improve the quality of justice for immigrants accused of crimes and therefore has a keen interest in ensuring that immigration law is correctly interpreted to give noncitizens the full benefit of their constitutional and statutory rights. IDP has submitted *amicus curiae* briefs in many key cases before the U.S. Supreme Court and Courts of Appeals involving the interplay between criminal and immigration law and the rights of immigrants in the criminal legal and immigration systems. *See, e.g.,* *Pereida v. Wilkinson*, 141 S. Ct. 754 (2021); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Leocal v. Ashcroft*, 543 U.S. 1

(2004); *I.N.S. v. St. Cyr*, 533 U.S. 289, 322–23 (2001) (citing IDP brief); *Marinelarena v. Barr*, 930 F.3d 1039 (9th Cir. 2019) (en banc).

The Federal Immigration Litigation Clinic, part of the James H. Binger Center for New Americans at the University of Minnesota Law School, engages law students in collaborative impact litigation aimed to improve and transform U.S. immigration law. The clinic and its partner organizations litigate on behalf of clients before the Board of Immigration Appeals, U.S. District Courts, U.S. Circuit Courts of Appeals, and the U.S. Supreme Court.

The National Immigration Project of the National Lawyers Guild (NIPNLG) is a nonprofit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants’ rights. NIPNLG has provided legal training to the bar and the bench on the immigration consequences of criminal convictions and is the author of *Immigration Law and Crimes*, a leading treatise on the intersection of criminal and immigration law published by Thomson Reuters.

Collectively, amici have a direct interest in ensuring that the Court correctly conducts the divisibility analysis so as to satisfy the categorical approach’s demand for certainty.

II. ARGUMENT

A. The Demand for Certainty Is a Threshold Component of the Longstanding Categorical Approach.

Divisibility analysis must be considered within the context of the categorical approach as a whole, which itself is grounded in the need for certainty. The categorical approach and the modified categorical approach “focus[] on the legal question of what a conviction *necessarily* established.” *Mellouli*, 575 U.S. at 806 (emphasis in original); see *Moncrieffe v. Holder*, 569 U.S. 184, 190, 196 (2013) (holding that under the categorical approach courts “examine what the state conviction necessarily involved”); *Almanza-Arenas v. Lynch*, 815 F.3d 469, 477 (9th Cir. 2016) (“[A] single element must be part of a charged offense with which a jury necessarily found the defendant guilty.”); *Matter of Kim*, 26 I&N Dec. 912, 913 (BIA 2017) (recognizing “*Taylor*’s demanding requirement that a prior conviction ‘necessarily’ involved facts equating to the generic offense” (internal quotation and punctuation omitted)). Because of this demand for certainty, courts employing a categorical analysis presume that a conviction “rested upon nothing more than the least of the acts criminalized, and then determine 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 immigration agency have applied a categorical analysis to determine whether a particular 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 criminal conduct punished by the statute); *Matter of P-*, 3 I&N Dec. 56, 59 (BIA 1947) (holding “that a crime must by its very nature and at its minimum, as defined by statute” match a removal ground) (citing *United States ex rel. Mylius v. Uhl*, 203 F. 152, 154 (S.D.N.Y. 1913)). 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.”) (internal quotation omitted); *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 threshold 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) (citing *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922)). “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. As the Board of Immigration Appeals (BIA) has acknowledged, it is “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); see *Matter of T*, 3 I&N Dec. 641, 643 (BIA 1949) (“[T]he use of fixed standards . . . are necessary for the efficient administration of the immigration laws.”) (quoting *Uhl*, 203 F. at 154). The alternative, in which the agency weighs evidence to determine 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.” *Matter of Pichardo-Sufren*, 21 I&N Dec. at 335.

B. The Divisibility Analysis Demands Certainty Regarding Whether Statutory Alternatives Are “Means” or “Elements”

When evaluating whether an alternatively phrased statute is divisible, the Court must satisfy the categorical approach’s demand for certainty. Such a requirement is supported by (1) Supreme Court and Ninth Circuit precedent concluding that indeterminate statutes must be treated as indivisible statutes, (2) the long-standing principle that federal adjudicators must defer to state law when analyzing state convictions, and (3) the rule of lenity.

1. Supreme Court and Circuit Court Precedent Establish That an Indeterminate Statute Must Be an Indivisible Statute

Determining whether a respondent’s state conviction triggers a conviction-based ground of removal requires application of the categorical approach. *Mellouli*, 575 U.S. at 804. Under the categorical approach, a court must compare the elements of the relevant conviction statute with the generic elements of the removal ground. *See, e.g., Sandoval v. Sessions*, 866 F.3d 986, 988 (9th Cir. 2017). An “element” is a “constituent part[] of a crime’s legal definition” that a jury must find unanimously and beyond a reasonable doubt in order to sustain a conviction at trial. *Mathis*, 136 S. Ct. at 2248. A categorical match results only if the conviction statute contains the same elements or elements narrower than those of the generic offense. *Id.* Wholly irrelevant to the inquiry is the respondent’s actual conduct. *Mellouli*, 575 U.S. at 805.

Essential to the categorical approach, therefore, is proper identification of the conviction elements that must be compared to the generic elements. Only by accurately identifying the elements is it possible to satisfy the categorical approach's "demand for certainty" when determining whether a noncitizen has been convicted of the generic removable offense. *Mathis*, 136 S. Ct. at 2257; *see Mellouli*, 575 U.S. at 806.

Where a conviction statute articulates only one set of elements, the categorical matching process will be "straightforward." *Mathis*, 136 S. Ct. at 2248. By contrast, where a statute sets out language in the alternative, the adjudicator must determine whether such language reflects distinct elements, rendering the statute divisible into multiple offenses, or simply articulates various possible factual means of committing one offense. *Id.* at 2249. If the statute is divisible, the modified categorical approach applies, permitting the adjudicator to review certain documents from the record of conviction in order to identify which offense the individual was convicted of. *Id.* But if the statute's alternatives only spell out the factual means by which a defendant might commit a single crime, the statute is not divisible and no reference to specific case records can be made. *Id.* at 2253.

In *Mathis v. United States*, the Supreme Court provided a roadmap for conducting the divisibility analysis. Three key takeaways from *Mathis* are relevant here.

First, as a threshold matter, *Mathis* rejected the notion that an “alternatively phrased statute” is necessarily divisible. *Id.* at 2256. Instead, it explained that such alternatives may either reflect *elements* subject to the modified categorical approach or *means* for which “the court has no call to decide which of the statutory alternatives was at issue in the earlier prosecution.” *Id.*

Second, *Mathis* affirmed that to determine whether a listed item in an alternatively phrased statute is an element or means, courts must look to “authoritative sources of state law,” which “readily” answer the question in many cases. *Id.* at 2256. Specifically, these sources include state case law as well as the text or structure of a statute. *Id.* (citing examples). Only where state law fails to provide clear answers, a court may look to the record of a prior conviction “for the sole and limited purpose of determining whether items are elements of the offense.” *Id.* at 2256–57 (quotation marks, alternations, and citation omitted).

Third, although the *Mathis* court noted that its divisibility roadmap should make for an “easy” inquiry in many cases and that indeterminacy “should prove more the exception than the rule,” it also acknowledged that when the relevant sources fail to “speak plainly,” the categorical approach’s “demand for certainty” will not be satisfied. *Id.*

Ultimately, therefore, *Mathis* provides instructions not only for how to conduct the divisibility analysis, but also for what outcome to reach when such an analysis is indeterminate: the statute is indivisible. *See id.*

Since *Mathis*, the Ninth Circuit and many other circuit courts have followed the Supreme Court’s clear directive regarding the demand for certainty within the divisibility analysis. In *Lopez-Marroquin v Garland*, 9 F.4th 1067 (9th Cir. 2021), this Court considered whether theft of a vehicle under California Vehicle Code § 10851(a) is divisible as to its treatment of accessories after the fact. The Court began by looking to the statutory text and determined that it gave “no clue on the question of divisibility,” though it ultimately agreed that the text in combination with the structure “tend[ed]” to support petitioner’s argument that the statute was indivisible. *Id.* at 1072. The Court next looked to the state case law and found the law conflicting. *Id.* at 1072-73. Because the answer was “not clear” from the statute and the case law, the Court took a “peek” at the record of conviction and found those documents “ambiguous at best.” *Id.* at 1073. The Court ultimately held that statute was indivisible because “[s]tate law sources and a ‘peek’ at the record do not satisfy ‘*Taylor’s* demand for certainty’ when deciding if a defendant was necessarily convicted of a generic offense.” *Id.* (quoting *Mathis*, 136 S. Ct. at 2257).

Similarly, in *Najera-Rodriguez v. Barr*, 926 F.3d 343 (7th Cir. 2019), the Seventh Circuit reviewed whether the petitioner—a lawful permanent resident—was removable for a conviction under Illinois’s 720 ILCS 570/402(c) (possession of a controlled substance). Because all parties agreed that the Illinois statute was not categorically a controlled substance offense, Mr. Najera-Rodriguez’s removability hinged on a determination of whether the statute was divisible. *Id.* at 348. Accordingly, the court went on to apply the *Mathis* divisibility framework 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 (internal quotations omitted). Absent such certainty, the court vacated Mr. Najera-Rodriguez’s removal order. *Id.*

Additionally, in *United States v. Hamilton*, 889 F.3d 688 (10th Cir. 2018), the Tenth Circuit conducted a divisibility analysis for Oklahoma’s second-degree burglary statute. After reviewing the *Mathis* resources, the court ultimately 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.” *Id.* at 698–99. As a result of that uncertainty, the Tenth Circuit followed the Supreme Court’s directive and reached the legally required result: “we must treat the Oklahoma statute as indivisible.” *Id.*; *see also United States v. Degeare*, 884 F.3d 1241 (10th Cir. 2018) (concluding that

because it was not certain whether Oklahoma’s forcible sodomy statute articulated distinct elements, the district court had erred in applying the modified categorical approach).

At least two other circuit courts post-*Mathis* have conducted a divisibility analysis and found that the relevant sources failed to “speak plainly” on the elements-versus-means inquiry. In the face of such uncertainty, each court duly recognized that the statute at issue was indivisible and thus the strict categorical approach applied. *See, e.g., United States v. Ritchey*, 840 F.3d 310, 321 (6th Cir. 2016) (explaining that “at bottom, record materials will resolve the elements—means dilemma only when they ‘speak plainly’” and that “because the documents in this case are, at the very most, inconclusive on this score, they cannot form the basis of [Mich. Comp. Laws] § 750.100’s divisibility”); *Alejos-Perez v. Garland*, 991 F.3d 642, 651 (5th Cir. 2021) (“Although ‘indeterminacy should prove more the exception than the rule,’ we conclude that state law and the record of conviction do not clearly show whether Penalty Group 2-A is divisible.”). Supreme Court and circuit court precedent plainly establishes that an indeterminate statute must always be an indivisible statute.

2. The Certainty Required Under the Categorical Approach Must Be Established by State Law

Mathis explained that the cleanest way to resolve a divisibility inquiry is to defer to any state court decision that “*definitively*” answers the elements-versus-

means question. *Mathis*, 136 S. Ct. at 2256 (emphasis added). And even if no such decision exists, adjudicators may only consult other state materials (the statutory language and conviction records). *Id.*

Federal precedent supports *Mathis*'s emphasis on using only "authoritative sources of state law." *Id.* Indeed, the Supreme Court has made clear that, as a general matter, no federal entity "has any authority to place a construction on a state statute different from the one rendered by the highest court of the state." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). This key principle applies equally in the context of the categorical approach—including identification of the relevant elements—when a state statute of conviction is at play. *See, e.g., Johnson v. United States*, 559 U.S. 133, 138 (2010) ("We are, however, bound by the Florida Supreme Court's interpretation of state law, including its determination of the elements of Fla. Stat. § 784.03(2)."). More specifically, for the divisibility analysis, the Supreme Court has affirmed that "[i]f a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." *Schad v. Arizona*, 501 U.S. 624, 636 (1991).

Such deference to state court decisions is grounded in important policy considerations. As the Seventh Circuit explicitly cautioned in *Najera-Rodriguez*,

926 F.3d at 356. “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.”

Accordingly, in conducting an elements-versus-means inquiry with respect to Idaho Code § 37-2732(a)(1)(A), the Court must not substitute its judgment for that of relevant sources of state authority that definitively resolve the question. In addition, the Court must not infer divisibility where the state law sources fail to speak plainly and thus fail to satisfy the categorical approach’s demand for certainty. Any other approach risks the messy and unintended consequences that decades of federal court precedent have sought to avoid.

3. The Rule of Lenity Reinforces That Ambiguity in Criminal Statutes Resolve in Favor of the Respondent

The requirement for certainty when determining the divisibility of a criminal statute is consistent with, and 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 the necessary separation of powers. *Id.*; see also *Whitman v. United States*, 574 U.S. 1003, 1004 (2014) (Scalia, J., statement respecting denial of certiorari) (noting “the norm that legislatures, not executive officers, define crimes”). And it is equally applicable

when construing a statute with both criminal and civil immigration applications, including the aggravated felony statute.² 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”); *Matter of Deang*, 27 I&N Dec. 57, 63–64 (BIA 2017) (“[I]f we remained in doubt as to the proper interpretation of [an aggravated felony provision], the rule of lenity would obligate us to construe any ambiguity in favor of the respondent.”) (citing *Leocal*, 543 U.S. at 11 n.8).

Thus, the lenity doctrine closely complements the demand for certainty regarding the divisibility of a criminal statute. Under both principles, where a criminal statute is ambiguous—as to either divisibility or the scope of conduct criminalized—such ambiguity must be resolved in favor of the respondent by finding the statute indivisible or by adopting the narrower construction. See

² 8 U.S.C. § 1101(a)(43) defines “aggravated felony” not only for immigration proceedings, but also for purposes of defining crimes and setting forth criminal penalties. See 8 U.S.C. § 1327 (making it a crime to assist an inadmissible noncitizen convicted of an aggravated felony to enter the United States); 8 U.S.C. § 1326(b)(2) (providing for a ten-fold increase in penalty for illegal reentry—from a baseline two-year maximum prison sentence to a twenty-year maximum sentence—for a defendant convicted of an aggravated felony); see also 8 U.S.C. § 1253(a) (increasing the maximum penalty for failure to depart for a noncitizen with an aggravated felony conviction or other convictions described in 8 U.S.C. § 1227(a)(2)).

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.”).

III. CONCLUSION

The Court may only conclude that Idaho Code § 37-2732(a)(1)(A) is divisible by particular controlled substance if the state law is certain that each controlled substance represents a distinct crime, defined by different elements. Amici agree with Petitioner that the roadmap provided by *Mathis* leads to the opposite result—Idaho law establishes conclusively that convictions involving different controlled substances within the same schedule are not distinct crimes. But if the Court finds the law inconclusive, the outcome must be the same and the offense ruled indivisible. The Court should grant Mr. Juarez’ petition for review.

//

//

//

//

//

//

//

Respectfully submitted,

/s/ Emma Winger

Emma Winger
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005
(617)505-5375
ewinger@immcouncil.org

Tanika Vigil
Defending Vulnerable Populations
Program
Catholic Legal Immigration Network,
Inc. (CLINIC)
8758 Georgia Avenue, Suite 850
Silver Spring, MD 20910
tvigil@cliniclegal.org

Attorneys for Amici

Kathleen Moccio, Esq.
James H. Binger Center for New Americans
University of Minnesota Law School
190 Walter Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 625-5515
kmoccio@umn.edu

DATED: October 21, 2021

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Rule 32-1, Fed. R. App. P. 32(a)(7)(B)(i) and 29(a)(5), because it contains 3,795 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word for Office 365, is proportionately spaced, and has a typeface of 14 point.

/s/ Emma Winger

Emma Winger
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005
(617) 505-5375
ewinger@immcouncil.org

Dated: October 21, 2021

CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2021, I electronically filed the foregoing consented to amici brief of the American Immigration Council, American Immigration Lawyers Association, Catholic Legal Immigration Network, Inc., Immigrant Defense Project, James H. Binger Center for New Americans at the University of Minnesota Law School, and the National Immigration Project of the National Lawyers Guild with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Emma Winger

Emma Winger
American Immigration Council
1331 G Street, NW, Suite 200
Washington, DC 20005
(617) 505-5375
ewinger@immcouncil.org

Dated: October 21, 2021