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UNITED STATES DEPARTMENT OF JUSTICE  
OFFICE OF THE ATTORNEY GENERAL

_____	)
In the Matter of:	)
	)
Matter of Onesta REYES	)
	)
_____	)

**BRIEF OF THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL  
LAWYERS GUILD, AMERICAN IMMIGRATION LAWYERS ASSOCIATION,  
IMMIGRANT DEFENSE PROJECT, AND FLORENCE IMMIGRANT & REFUGEE  
RIGHTS PROJECT AS AMICI CURIAE**

## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	ii
INTRODUCTION AND STATEMENT OF AMICI.....	1
ARGUMENT .....	4
I.    Under Supreme Court Precedent, DHS Can Only Establish Removability Where the Statute of Conviction Categorically Matches Every Element of a Specific Aggravated Felony Definition. ....	4
A.    Supreme Court law requires an adjudicator to identify a one-to-one categorical match between the statute of conviction and a specific generic offense, not an amalgam of offenses.....	6
B.    Where an offense is indivisible and does not come within a specific aggravated felony offense, DHS cannot point to the means to demonstrate that it necessarily comes within one of many aggravated felonies.....	8
CONCLUSION.....	10
CERTIFICATE OF SERVICE .....	12

## **TABLE OF AUTHORITIES**

### **Cases**

<i>Carachuri-Rosendo v. Holder</i> , 560 U.S. 563 (2010).....	4
<i>Descamps v. United States</i> , 133 S. Ct. 2276 (2013) .....	passim
<i>Esquivel-Quintana, v. Sessions</i> , 137 S. Ct. 1562 (2017) .....	5, 6
<i>Gonzales v. Duenas-Alvarez</i> , 549 U.S. 183 (2007) .....	5
<i>Lopez v. Gonzales</i> , 549 U.S. 47 (2006).....	5
<i>Mathis v. United States</i> , 136 S. Ct. 2243 (2016).....	6
<i>Mellouli v. Lynch</i> , 135 S. Ct. 1980 (2016).....	1, 5
<i>Moncrieffe v. Holder</i> , 569 U.S. 184 (2013) .....	4, 5, 6

### **Statutes**

8 U.S.C. § 1101(a)(43)(G) .....	8
8 U.S.C. § 1101(a)(43)(M) .....	8

### **Administrative Decisions**

<i>Matter of Chairez-Castrejon</i> , 26 I&N Dec. 349 (BIA 2014) .....	2
<i>Matter of Garcia-Madruga</i> , 24 I&N Dec. 436 (BIA 2008).....	7, 8
<i>Matter of Lanferman</i> , 25 I&N Dec. 721 (BIA 2012).....	2
<i>Matter of Rosa</i> , 24 I&N Dec. 228 (BIA 2018) .....	7

## **INTRODUCTION AND STATEMENT OF AMICI**

On February 14, 2018, the Board of Immigration Appeals (“Board” or “BIA”) issued a request for amicus briefing on “whether DHS can establish removability by charging an alien as an aggravated felon under two separate aggravated felony definitions, neither of which would independently be a categorical match to the statute of conviction, if all means of violating the statute fall within at least one of the charged aggravated felony definitions?” The National Immigration Project, Immigrant Defense Project, and Florence Immigrant and Refugee Rights Project filed a version of this brief in response to the Board’s amicus invitation.

On November 21, 2019, after the Board rejected DHS’s unusual theory of removability, the Attorney General certified the case to himself. The National Immigration Project, Immigrant Defense Project, Florence Immigrant and Refugee Rights Project, and American Immigration Lawyers Association refile this amicus brief in response to the Attorney General’s certification.

For over a century, the Board and the federal courts have held that the determination of whether a criminal conviction carries immigration consequences is governed by the categorical approach. The U.S. Supreme Court time and again has explained that this is so because Congress predicated removal “on convictions, not conduct.” *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2016). The question presented here is resolved by this settled precedent. The Supreme Court has put to rest any question that the adjudicator is required to apply the strict categorical approach in evaluating the charges presented here. Under that approach, the adjudicator is required to determine whether the noncitizen’s conviction is a one-to-one categorical match to *every* element of a *specific* generic offense. If not, the noncitizen has not been “convicted” of the generic offense and the noncitizen prevails.

The Board has previously sought to depart from the categorical approach with regard to the proper application of the modified categorical approach. *See Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012) (holding that a statute is divisible whenever its elements “could be satisfied either by removable or non-removable conduct,” regardless of whether they were set forth disjunctively). That attempt was ultimately withdrawn, however, after the Supreme Court in *Descamps v. United States*, 133 S. Ct. 2276 (2013), expressly rejected arguments that seek to end-run the categorical approach or to alter the way in which it is applied. *See Matter of Chairez-Castrejon*, 26 I&N Dec. 349 (BIA 2014) (withdrawing *Matter of Lanferman*, 25 I&N Dec. 721 in light of *Descamps v. United States*, 133 S. Ct. 2276). Supreme Court precedent prevents the Attorney General from similarly departing from the categorical approach.

The National Immigration Project of the National Lawyers Guild 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. It has provided legal training to the bar and the bench on the immigration consequences of criminal conduct and authored *Immigration Law and Crimes* and four other treatises published by Thompson-Reuters. The National Immigration Project has participated as *amicus curiae* in several significant immigration related cases before the Supreme Court, Circuit Courts of Appeals, and Board of Immigration Appeals.

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.

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 and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and United States Supreme Court.

The Florence Immigrant & Refugee Rights Project (“Florence Project”) provides free legal and social services to immigrant men, women, and children detained in immigration custody in Arizona. In 2018, approximately 10,000 detained people facing removal charges received a Florence Project orientation on immigration law and procedure. Florence Project staff also provide legal trainings to defense attorneys throughout Arizona on the immigration consequences of criminal convictions. In any given year we see hundreds of lawful permanent residents who have been detained as a result of criminal convictions, many of whom may seek relief in the form of termination of proceedings, waivers for their convictions, or cancellation of removal. In addition, we also encounter hundreds more whose eligibility for relief such as asylum depend on whether their conviction categorically disqualifies them for relief. The

Florence Project supports the proper application of the categorical approach as the necessary framework for determining when criminal convictions can legally trigger immigration consequences.

## **ARGUMENT**

### **I. Under Supreme Court Precedent, DHS Can Only Establish Removability Where the Statute of Conviction Categorically Matches Every Element of a Specific Aggravated Felony Definition.**

The Attorney General here asks: Can DHS establish removability by charging a noncitizen under two separate aggravated felony definitions, neither of which would independently be a categorical match to the statute of conviction, but where all means of violating the statute fall within at least one of the charged aggravated felony definitions? The Supreme Court’s jurisprudence makes clear that to find removability when a noncitizen has *not* been “convicted” of any specific charged aggravated felony ground would be in direct violation of the categorical approach. An adjudicator may find the government’s burden satisfied *only* where the noncitizen’s conviction is a one-to-one categorical match to *every* element of a *specific* generic offense.

The “categorical approach has a long pedigree in our Nation’s immigration law.” *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). The Supreme Court has repeatedly held that the categorical approach applies where the immigration statute asks what offense the noncitizen was “convicted” of, as with the statute here, and not what acts he or she committed. *Id.* “[C]onviction’ is ‘the relevant statutory hook.’” *Id.* (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010)). Under this approach, therefore, courts “look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the ‘generic’ federal definition of a corresponding aggravated felony.”

*Id.* at 190-91 (citing *Gonzales v. Duenas–Alvarez*, 549 U.S. 183,186 (2007) (internal quotations omitted)).

The first step of the analysis is to determine the generic federal crime. *See, e.g., Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1570 (2017) (relying on “[t]he structure of the INA, a related federal statute, and evidence from state criminal codes” to determine generic elements); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006).

The adjudicator then compares the elements of the statute of conviction with the elements of the generic federal crime. In making this comparison, the Court has repeatedly held that courts, “examine what the state conviction necessarily involved, not the facts underlying the case,” and “presume that the 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*, 133 S. Ct. at 1684 (internal citations and brackets omitted). *See Esquivel-Quintana*, 137 S. Ct. at 1568 (2017); *Mellouli v. Lynch*, 135 S. Ct. at 1986. Only when the state statute, at its minimum, necessarily and in every case satisfies the generic definition in the federal statute is that conviction a “categorical match.” *Esquivel-Quintana*, 137 S. Ct. at 1568.

In certain, limited circumstances, a “modified categorical approach” may be appropriate. This is where a state statute is “divisible” and sets out multiple discrete *elements* in the alternative, and at least one, but not all, of the offenses created by these alternatives is a categorical match to the generic definition. *Descamps v. United States*, 133 S. Ct. 2276, 2285 (2013). An “element” is what the jury must find “unanimously and beyond a reasonable doubt” to convict the defendant or what the defendant necessarily admits when he pleads guilty. *Id.* at 2288. In that case, the modified categorical approach permits review of a limited set of documents from the record of conviction to reveal the offense of conviction. *Descamps*, 133 S.



Ct. at 2284. In contrast, if the statute does not list multiple *elements*, but enumerates various factual *means* of committing a single element, it is not divisible. *Mathis v. United States*, 136 S. Ct. 2243, 2251-52 (2016).

**A. Supreme Court law requires an adjudicator to identify a one-to-one categorical match between the statute of conviction and a specific generic offense, not an amalgam of offenses.**

Any categorical approach analysis begins with identifying the specific generic definition that is implicated by the statute of conviction. *See, e.g., Esquivel-Quintana*, 137 S. Ct. at 1568-69. To determine whether a statute of conviction triggers a generic offense under the categorical approach, an adjudicator would have to find that every element of a particular generic offense is satisfied by the minimum conduct criminalized by the statute of conviction. *Id.* at 168. This analysis necessitates a one-to-one comparison between the statute of conviction and a specific generic definition of an aggravated felony.

Under the unusual theory of removability being explored here, an adjudicator would have to deviate from the settled categorical approach's one-to-one comparison and mix and match the minimum conduct criminalized by a statute of conviction with multiple separate generic offense definitions. This is not the test the Supreme Court applies or requires. In every Supreme Court case applying the categorical approach the Court applied a one-to-one comparison between the statute of conviction and a particular generic offense. *See, e.g., Mathis*, 136 S. Ct. at 2256 ("Courts must ask whether the crime of conviction is the same as, or narrower than, *the relevant generic offense*." (emphasis added)); *Moncrieffe*, 133 S. Ct. at 1684 ("Under this approach we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of *a corresponding aggravated felony*." (internal quotations omitted) (emphasis added)); *Descamps*, 133 S. Ct. at

2279 (“To determine whether a past conviction is for one of those crimes, courts use what has become known as the “categorical approach”: They compare the statutory elements of a prior conviction with the elements of *the “generic” crime*” (emphasis added)).

Similarly, we are not aware of any BIA precedential decisions in which the Board abandons the necessary one-to-one comparative analysis between the statute of conviction and a specific generic offence. In fact, in cases where the BIA has addressed statutes of conviction that seem to implicate more than one generic definition of an aggravated felony, the Board has distinguished between the similar generic offenses and applied a clean one-to-one comparison between the statute of conviction and one generic offense. *See, e.g., Matter of Garcia-Madruga*, 24 I&N Dec. 436, 440 (BIA 2008) (distinguishing generic fraud from generic theft and finding that the relevant statute of conviction is not a categorical match to generic theft.).

In *Matter of Rosa*, 24 I&N Dec. 228 (BIA 2018), the BIA confirmed that a proper application of the categorical approach must consider only a single aggravated felony generic crime ground in deciding whether a statute of conviction qualifies as an aggravated felony. In that case, the BIA held that an adjudicator may choose one of multiple felony provisions within the Controlled Substance Act (“CSA”) as a point of comparison in determining whether a state drug offense qualifies as an aggravated felony drug trafficking crime. *Matter of Rosa*, 24 I&N Dec. at 233 . Similar to the approach being explored here, the concurring opinion in *Matter of Rosa* sought to adopt an analysis that found a state drug offense would qualify as an aggravated felony drug trafficking crime so long as all of the means of committing the state offense qualify under either one of two felony provisions within the CSA. *Id.* at 234-236. Despite the argument put forth by the concurrence, the BIA’s majority opinion chose to instead correctly apply the

categorical approach by comparing the state drug offense with a single generic offense within the CSA.

Similarly, the BIA explicitly rejected this approach in the case the Attorney General seeks to revisit today. Accordingly, the categorical approach necessitates a one-to-one comparison between the statute of conviction and a specific generic definition of an aggravated felony.

**B. Where an offense is indivisible and does not come within a specific aggravated felony offense, DHS cannot point to the means to demonstrate that it necessarily comes within one of many aggravated felonies.**

Where an adjudicator finds that DHS has established removability by charging a noncitizen under two separate generic offense grounds, neither of which would independently be a categorical match to the statute of conviction, but where all means of violating the statute fall within at least one of the charged generic offense grounds, she would implicitly and erroneously be applying the modified categorical approach to an indivisible statute.

For example, assume a noncitizen is convicted under a state larceny statute that defines only one indivisible crime, but covers both nonconsensual takings and takings by trick. In determining whether the noncitizen has been convicted of a generic theft offense, the adjudicator finds that the statute of conviction is broader than the elements of generic theft in 8 U.S.C. § 1101(a)(43)(G) because the offense punishes taking by trick. *See Matter of Garcia-Madruga*, 24 I&N Dec. 436 (BIA 2008). The adjudicator also finds that the statute of conviction is broader than the elements of generic fraud in 8 U.S.C. § 1101(a)(43)(M) because it punishes non-consensual takings. *See Id.* at 440. The state offense thus is not a categorical match to either generic theft or generic fraud. Now assume that the adjudicator does something entirely novel. In a matter of first impression, she concludes that if a conviction under the state statute involved

conduct not encompassed by generic theft, it would necessarily constitute generic fraud and qualify as an aggravated felony where there was an accompanying loss of more than \$10,000. Conversely, she concludes that where a conviction under the state statute involved a taking not encompassed by generic fraud, it would necessarily constitute generic theft and still qualify as an aggravated felony. In other words, if an offense involved a nonconsensual taking, it would qualify as generic theft and if it involved taking by trick it would qualify as generic fraud. As a result, the adjudicator finds that she need *not* identify which conduct was implicated in any particular case because she could assume that the noncitizen's act would always qualify as an aggravated felony, though she would be unable to identify *which particular aggravated felony*.

Such an abrupt departure from the categorical approach flies in the face of both *Descamps* and *Mathis*. In order to reach the conclusion she did, the adjudicator had to implicitly hold that the state offense contained alternative “elements”—i.e., that a jury would have to decide whether the defendant obtained the property through a nonconsensual taking (and thus committed generic theft) or obtained the property by trick (and thus committed generic fraud). Only by assuming that “nonconsensual taking” and “taking by trick” represent alternative elements could the factfinder silently apply the modified categorical approach to conclude that the elements of the immigrant's crime of conviction could be a categorical match to either generic theft or generic fraud.

But under *Mathis* and *Descamps*, courts cannot apply the modified categorical approach (even silently) without first determining whether the statute contains alternative “means” or “elements.” Only if a jury would have to agree that the taking was “nonconsensual” or “by trick” such that they constitute “elements” rather than “means” could the statute be divisible. Yet in our hypothetical, the adjudicator does not dispute that the statute is indivisible. Where the statute at

issue is indivisible and can *never* be narrowed to a conviction for “nonconsensual taking” or “taking by trick,” the conviction can *never* be a categorical match either to generic theft or generic fraud. That is because under a proper application of the categorical approach, the adjudicator compares the elements of the state offense to elements of the generic offense definition, not to some selective combination of multiple generic offense definitions. That is unmistakable from the Supreme Court’s teachings. *See, e.g., Descamps*, 133 S. Ct. at 2290-2291 (“Courts can go much further in reconceiving indivisible statutes as impliedly divisible ones. In fact, every element of every statute can be imaginatively transformed as the Ninth Circuit suggests—so that every crime is seen as containing an infinite number of sub-crimes corresponding to all the possible ways an individual can commit it. . . . And that is what we have expressly and repeatedly forbidden.”) (citation omitted).

There is no basis under the law for the Attorney General to depart from decades of jurisprudence to create an exception to the categorical approach here. The proposed question turns the categorical analysis upside-down: if the elements of the state offense reach broader than the generic crime, and the statute is indivisible, the inquiry must stop. There is no basis to impliedly apply the modified categorical approach where the statute is indivisible. To do so would invite the same error resoundingly rejected by the Court in *Descamps*.

### **CONCLUSION**

For the reasons stated above, *amici* urge the Attorney General to adhere to a faithful application of the categorical approach and continue to find that a conviction qualifies as an aggravated felony only where it is a categorical match to every element of the specific generic crime.

Dated: January 15, 2020

Respectfully submitted,

A handwritten signature in blue ink, consisting of stylized, overlapping loops and a long horizontal stroke extending to the right.

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 15, 2020, the foregoing brief was submitted electronically to AGCertification@usdoj.gov and in triplicate via Fedex to:

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Dated: January 15, 2020



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