No. 21-70888

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LUIS MIGUEL JUAREZ,

Petitioner,

v.

MERRICK B. GARLAND, Attorney General,

Respondent.

On Petition for Review of a Decision of the Board of Immigration Appeals, File No. A073-390-011

BRIEF FOR AMICI CURIAE CRIMINAL LAW AND SENTENCING SCHOLARS, IDAHO ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IDAHO STATE APPELLATE PUBLIC DEFENDER'S OFFICE, FEDERAL DEFENDER SERVICES OF IDAHO, THE FEDERAL PUBLIC DEFENDER FOR THE CENTRAL DISTRICT OF CALIFORNIA, FEDERAL DEFENDERS OF SAN DIEGO, INC., WESTERN DISTRICT OF WASHINGTON FEDERAL PUBLIC DEFENDER, AND WASHINGTON DEFENDER ASSOCIATION IN SUPPORT OF PETITION FOR REVIEW

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, amici curiae Idaho Association of Criminal Defense Lawyers, Idaho State Appellate Public Defender's Office, Federal Defender Services of Idaho, Federal Public Defender for the Central District of California, Federal Defenders of San Diego, Inc., Western District of Washington Federal Public Defenders, and Washington Defender Association certify that they do not have parent corporations and do not issue shares or securities that are publicly traded.

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INTEREST OF AMICI CURIAE[1]

The amici criminal law and sentencing scholars are law professors, directors and students at some of America's leading universities who have devoted a substantial part of their teaching, work, research and/or writing to criminal law and procedure, including sentencing equality and the intersection of criminal law and immigration law. Their work has been published by major university presses and in leading law journals. The amici include[2]:

- Brandon L. Garrett, Neil Williams Professor of Law, Director, Wilson Center for Science and Justice at Duke University School of Law;
- Yvette Garcia Missri, Executive Director, Wilson Center for Science and Justice at Duke University School of Law;
- David Jaros, Professor of Law, University of Baltimore School of Law;
- Gabriel J. Chin, Edward L. Barrett Jr. Chair, Martin Luther King Jr. Professor, and Director of Clinical Legal Education, University of California, Davis, School of Law;
- Erin R. Collins, Associate Professor of Law, University of Richmond School of Law;
- Josh Bowers, F.D.G. Ribble Professor of Law, University of Virginia School of Law; and

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[1] All parties have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). No counsel for any party has 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 or their counsel contributed money intended to fund preparing or submitting this brief.

[2] Institutional affiliations of amici scholars are included for identification purposes only; amici scholars are submitting the brief in their personal capacity only.

- Gabe Berumen, J.D. Candidate, Class of 2023, Duke University School of Law.

Idaho Association of Criminal Defense Lawyers (IACDL) is a non-profit, voluntary organization of attorneys with more than 400 lawyer members. IACDL's membership includes both public defenders and private counsel, attorneys who work in both state and federal court, and attorneys who focus on trials, appeals, post-conviction, and federal habeas proceedings. One of IACDL's primary goals is to improve the quality of representation provided to criminal defendants in Idaho, especially those who cannot afford counsel. IACDL attorneys routinely advise their clients as to the immigration consequences of criminal charges and convictions in Idaho state court.

Idaho State Appellate Defender's Office ("SAPD") provides appellate representation to indigent defendants, including those who have been convicted of a felony in district court, pursuant to Idaho Code Ann. § 19-5905. SAPD is the primary provider of indigent appellate services in Idaho and strives to improve the quality of representation to all indigent defendants on appeal from a judgment of conviction. SAPD attorneys regularly handle appeals involving controlled substance convictions in Idaho state court.

The Federal Defender Services of Idaho, Federal Public Defender for the Central District of California, Federal Defenders of San Diego, Inc., and Western District of Washington Federal Public Defenders all represent indigent defendants

in federal court in the Ninth Circuit pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A. As the institutional counsel for indigent defendants, these organizations have a direct interest in all issues of federal criminal law in the Circuit. Specific to this case, attorneys, investigators, and other Defender personnel from each organization regularly advocate on behalf of individuals who are faced with removal orders due to prior state convictions.

Washington Defender Association (WDA) is a statewide non-profit membership organization of public defender agencies, indigent defenders and those working to improve the quality of indigent defense in Washington State. WDA provides expertise to defenders to ensure high quality legal representation, educates defenders, and collaborates with the community and other justice system stakeholders to advance systemic reforms. In 1999, WDA established an Immigration Project to focus on reducing the immigration consequences to noncitizens of criminal legal system involvement. WDA has filed amicus briefs in cases at all levels of state and federal courts, including in this Court.

Amici have a unique and broad perspective on this Court's review of removal decisions. In particular, amici have a strong interest in the correct development and application of the categorical approach, including how state appellate court decisions are used to inform the question whether a noncitizen's

prior state conviction is a predicate offense for purposes of the removal provisions of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227.

BACKGROUND

Idaho broadly criminalizes manufacture, delivery and possession with intent to deliver "a controlled substance," Idaho Code Ann. § 37-2732(a), and creates four subsections (§ 37-2732(a)(1)(A), (B), (C), and (D)) specifying the punishment that will apply depending on the classification schedule (schedules I through VI) of the controlled substance:

> (a) Except as authorized by this chapter, it is unlawful for any person to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance.
>
> (1) Any person who violates this subsection with respect to:
>
> (A) A controlled substance classified in schedule I which is a narcotic drug or a controlled substance classified in schedule II, except as provided for in section 37-2732B(a)(3), Idaho Code, is guilty of a felony and upon conviction may be imprisoned for a term of years not to exceed life imprisonment, or fined not more than twenty-five thousand dollars ($25,000), or both;
>
> (B) Any other controlled substance which is a nonnarcotic drug classified in schedule I, or a controlled substance classified in schedule III, is guilty of a felony and upon conviction may be imprisoned for not more than five (5) years, fined not more than fifteen thousand dollars ($15,000), or both;
>
> (C) A substance classified in schedule IV is guilty of a felony and upon conviction may be imprisoned for not more than three (3) years, fined not more than ten thousand dollars ($10,000), or both;

> (D) A substance classified in schedules V and VI is guilty of a misdemeanor and upon conviction may be imprisoned for not more than one (1) year, fined not more than five thousand dollars ($5,000), or both.

Idaho Code Ann. § 37-2732(a). Petitioner Luis Miguel Juarez was convicted under subdivision (1)(A), which specifies that, when the crime involves certain schedule I and II controlled substances, the crime is a "felony" punishable up to life imprisonment and/or a fine up to $25,000. *Id.*

The Board of Immigration Appeals ("BIA") agreed that the Idaho statute (and subsection) of conviction sweeps more broadly than 8 U.S.C. § 1227(a)(2)(A)(iii), which renders a noncitizen removable for a "drug trafficking aggravating felony offense." AR7. That is because Idaho criminalizes at least two substances (ephedrine and pseudoephedrine) that the immigration law does not treat as "controlled substances." AR7. Nevertheless, the BIA concluded, based on state court appellate decisions discussing *mens rea* and quantum of evidence required to sustain a guilty verdict, that the Idaho statute was divisible not only into its four express subsections, but further into each individual drug substance that is included in drug schedules I through VI. AR8. The BIA thus allowed recourse to the "modified" categorical approach and looked to the specific drug substance underlying Mr. Juarez's state convictions. AR8-9. The BIA deferred to the Immigration Judge's conclusion that the "record of conviction documents" revealed that "the substance underlying" Mr. Juarez's convictions was

methamphetamine. AR8-9. The BIA concluded that, because methamphetamine is a federally controlled substance, Mr. Juarez's state court conviction fell within the ambit of the federal offense and was a categorical match for the ground of removal. AR8-9.

SUMMARY OF ARGUMENT

In applying the categorical approach, the BIA first concluded (correctly) that, because different subdivisions of the Idaho statute will carry a different punishment, "drug identity is a *de facto* 'element' of the offense that must be proved to a jury beyond a reasonable doubt." AR7. But from there, the BIA concluded (incorrectly) that the "drug identity" element refers to the individual drug substance, rather than the broader categories of drugs that the statute's subdivisions expressly specify. AR8. That was legal error, because the state cases the BIA considered do not speak "definitively" to whether an individual drug substance is an element or merely an alternative factual means of proving a broader element. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). Instead, the BIA relied on state appellate decisions discussing the *mens rea* requirement and sufficiency of evidence standards applicable under the Idaho statute of conviction. AR8, AR10. The BIA's reliance on such decisions resulted in a circular analysis that wrongly treated the particular ***facts*** that the prosecution used to meet its

burden of proof in Mr. Juarez's case as though they were ***elements*** of the statute of conviction that must be proven in every prosecution under the statute.

In *Mathis*, the Supreme Court made clear that a fact that aggravates a punishment is an element. 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements."). But *Mathis* made equally clear that alternative factual means of committing such an aggravating fact would not themselves necessarily be elements. *See id.* at 2249 (stating that diverse means of satisfying a single "deadly weapon" element would not themselves be elements). Prosecutors can, and often do, present evidence of just one factual means of committing an element, and in such cases, must prove that factual means—and potentially knowledge thereof—beyond a reasonable doubt. But a prosecutor's decision to put forth a single factual means does ***not*** convert that alternative factual means into an element. For example, the fact that an element of a burglary offense was proven solely by evidence that the accused broke into a house (as opposed to a car or a boat) does not make breaking into a house an element of the offense. *See id.* at 2250. The categorical approach's focus is not on the fact(s) that were presented to the jury in any particular case, but on what facts a prosecutor must show in ***every*** case in order to sustain a conviction—i.e. the elements of the offense.

The *mens rea* and sufficiency of evidence cases relied upon by the BIA in this case did not address that essential inquiry. While state *mens rea* cases cited by the BIA help inform whether the *mens rea* element of the statute of conviction matches the *mens rea* element of the federal offense, *see* Pet. Br. 22-25, they do not similarly inform whether an individual drug substance is means or an element, *see id.* at 25-31. The mere fact that the prosecution must prove the defendant's mental state does not tell us whether it must also prove a specific individual drug substance, as opposed to a broader indivisible category of drug substances. Similarly, appellate cases reviewing the sufficiency of the evidence will frequently discuss the evidence of the alternative factual means—i.e., the individual drug substance(s)—actually proven by the prosecution in the particular case. Indeed, in controlled substance cases in particular, a prosecutor will typically focus on the individual drug substance underlying the defendant's crime rather than generically setting out to prove a "controlled substance." But a prosecutor's evidence on an individual drug substance does not inform whether that substance itself is an element of the offense, or instead was merely the chosen means by which the prosecution sought to prove a broader element, such as the category of drug substances set forth in Idaho Code Ann. § 37-2732(a)(1)(A). In short, the cases the BIA relied on are equally reconcilable with the view that each individual drug substance is a means of committing a single crime that has as an element the

category of drugs set forth in § 37-2732(a)(1)(A)—meaning that each particular drug is merely an alternative means of showing that element, not an element of its own separate crime.

Contrary to what the BIA did here, the appropriate initial inquiry for distinguishing elements from means should focus on state law that directly addresses what evidence a prosecutor must show ***in every case*** in order to sustain a conviction under Idaho Code Ann. § 37-2732(a)(1)(A).

Here, for example, the prosecution relied on methamphetamine to prove its case, but nothing in Idaho law prevents a prosecutor from relying more generally on a drug classification (e.g., a "schedule II controlled substance" within the scope of § 37-2732(a)(1)(A)), or even an alternative theory of any individual drugs therein (e.g., "Methamphetamine and/or Amphetamine"). In such instances, an Idaho jury could still convict under § 37-2732(a)(1)(A) if the jurors disagreed as to whether the defendant possessed methamphetamine or amphetamine. So long as they all agreed that the defendant knowingly possessed a schedule I controlled substance "which is a narcotic drug" or schedule II controlled substance "except as provided for in section 37-2732B(a)(3)," it would not matter if they disagreed on which one. *Mathis*, 136 S. Ct. at 2249 (noting that where there are "various factual ways of committing some component of the offense," a jury need not agree on the particular factual means in order to find the component met). Because a prosecutor

seeking to convict under Idaho's § 37-2732(a)(1)(A) need not always prove methamphetamine, methamphetamine is not an element of the offense. Rather, a prosecutor must prove only a schedule I or II controlled substance within subdivision (1)(A); that is the element, and the statute is not divisible beyond that. And because subdivision (1)(A) sweeps more broadly than the removal ground, it is not a categorical match.

This Court should grant the petition for review.

ARGUMENT

I. ELEMENTS MUST BE PROVED BEYOND A REASONABLE DOUBT TO A UNANIMOUS JURY, WHEREAS MEANS OR "BRUTE" FACTS NEED NOT

The relevant removal section of the INA, 8 U.S.C. § 1227(a)(2)(A)(iii), focuses on the elements of the statute of conviction, not the particular facts the prosecution might have chosen to prove to satisfy those elements in the specific case. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). Thus, in deciding whether to remove a noncitizen under § 1227(a)(2)(A)(iii), the Supreme Court has directed use of a "categorical" approach comparing the elements of the offense of conviction to the elements of the generic offense encompassed by the removal provision. *Id*. If the offense of conviction sweeps more broadly than the removal provision's generic offense, it cannot serve as a predicate for removal. *See id.* In making that determination, "the means by which the defendant, in real life, committed his crimes" is irrelevant. *Mathis*, 136 S. Ct. at 2251. Indeed, the

principle that a judge "may look only to 'the elements of the offense, not to the facts of the defendant's conduct'" has become a "mantra" in the Court's decisions applying the categorical approach in immigration cases. *Id.* at 2251 & n.2; *Mellouli v. Lynch*, 575 U.S. 798, 805 (2015) ("Because Congress predicated deportation 'on convictions, not conduct,' the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior. ... An alien's actual conduct is irrelevant to the inquiry, as the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute." (citation omitted)); *Moncrieffe*, 569 U.S. at 190 (judge must "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").

Where a court is presented with "an alternatively phrased" statute, a key inquiry in applying the categorical approach is whether and to what extent the statute of conviction is "divisible." Determining whether a statute is divisible requires determining whether the statute sets forth alternative ***elements*** of multiple offenses, or instead sets forth a single offense that may be committed by alternative factual ***means***. *Mathis*, 136 S. Ct. at 2256 (a court's "first task" when applying the categorical approach is "to determine whether [the statute's] listed items are elements or means"). "'Elements' are the 'constituent parts' of a crime's legal

definition—the things the 'prosecution must prove to sustain a conviction.'" *Id.* at 2248 (quoting *Black's Law Dictionary* 634 (10th ed. 2014)); *Richardson v. United States*, 526 U.S. 813, 817 (1999) ("[C]rimes are made up of factual elements."). Means or "brute" facts, by contrast, refer to the manner in which a crime has been committed or an element is satisfied in a particular case. *Mathis*, 136 S. Ct. at 2248. "[L]egislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." *Schad v. Arizona*, 501 U.S. 624, 636 (1991). Whereas the jury must be instructed as to and unanimously agree upon each element of the offense, the jury need not unanimously agree upon any particular means to convict. *Mathis*, 136 S. Ct. at 2249; *Richardson*, 526 U.S. at 817. Instead, alternative means are just examples of different facts that can be proved to satisfy a particular element. *Mathis*, 136 S. Ct. at 2249; *Descamps v. United States*, 570 U.S. 254, 273 (2013); *Richardson*, 526 U.S. at 817.

If a single statute lists ***elements*** in the alternative, it defines multiple crimes and is divisible into those sub-crimes. *See Mathis*, 136 S. Ct. at 2249. In such instances courts apply the "modified" categorical approach "in which the categorical approach is applied separately to the relevant sub-crime within the statute." *United States v. Cantu*, 964 F.3d 924, 927 (10th Cir. 2020). One such sub-crime might be a valid predicate for removal or a sentence enhancement, while

others are not. *See Mathis*, 136 S. Ct. at 2249. Under the modified categorical approach, the court may use a limited set of records to determine which sub-crime was the basis for the conviction. *See Shepard v. United States*, 544 U.S. 13, 26 (2005); *Taylor v. United States*, 495 U.S. 575, 602 (1990).

However, if a single statute merely lists ***alternative factual means*** of committing a single offense, it is not divisible as to those means. *See Mathis*, 136 S. Ct. at 2249; *Descamps*, 570 U.S. at 273; *Richardson*, 526 U.S. at 817. For example, a statute may include as an element of a crime the "use of a 'deadly weapon'" and further provide that "use of a 'knife, gun, bat, or similar weapon' would all qualify" as "use of a deadly weapon." *Mathis*, 136 S. Ct. at 2249. A jury could convict under that statute if some jurors believe that the defendant used a bat, while others believed that the defendant used a knife or gun. *Id.* As long as there was juror unanimity on the ***element***—the use of a deadly weapon—the jury could convict the defendant of the crime. *Id.* Thus, "that kind of list merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense." *Id.*

This is so even if the prosecution in a given case chooses only one means to put forth at trial. "[E]ven if in many cases, the jury could have readily reached consensus on the [means] used, a later sentencing court cannot supply that missing

judgment." *Descamps*, 570 U.S. at 273. The mere fact that the prosecution chose one means to meet its burden of proof on that element does not convert that means into an element of the offense. "At that point, the court is merely asking whether a particular set of facts leading to a conviction conforms to a generic … offense," which would turn the categorical approach on its head in a manner that the Supreme Court has expressly disapproved. *Id.* at 274. The presence of alternative means of committing a single crime is accordingly not a valid basis for resorting to the modified categorical approach.

II. TO DISTINGUISH ELEMENTS FROM MEANS, THE COURT MUST ASK NOT WHAT FACT WAS PROVED IN THIS CASE, BUT WHAT FACT MUST BE PROVED IN *EVERY* PROSECUTION UNDER THE CRIMINAL STATUTE

The key inquiry for distinguishing elements from means when applying the categorical approach is what evidence a prosecutor must prove in ***every*** case in order to sustain a conviction under the statute. It is not relevant whether, as a factual matter, the prosecution asserted or the jury found the defendant to have engaged in particular conduct; what matters is whether that conduct must be proven by the prosecution in every case (such that it is an element of the offense) or whether there are alternative means available to the prosecution in other cases, such that the particular conduct is merely a means of committing a broader element. This is because the approach is "categorical": it focuses on what must be proven in *every* prosecution as a "categorical" matter. *See Descamps*, 570 U.S. at

268 (stating that Congress' intent for a federal statute focused on convictions rather than underlying facts was to "treat every conviction of a crime in the same manner" and have the federal statute "function as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none").

Here, the BIA was wrong to hold that a particular "drug identity" was an element of an offense under the Idaho statute of conviction merely because conviction under the statute's different subdivisions triggers different punishments. AR7. That conclusion does not end the inquiry. While a fact that aggravates a punishment is an element, *Mathis*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* they must be elements."), an alternative factual ***means*** of committing such an aggravating fact would not itself necessarily be an element, *see id.* at 2249 (stating that diverse means of satisfying a single "deadly weapons" element would not themselves be elements). The BIA therefore needed to unpack what fact triggered punishment, and whether there were alternative factual means of showing that trigger.

Here, Idaho's statutory subdivisions set forth ***categories*** of substances for purposes of punishment. Idaho Code Ann. § 37-2732(a). The categories include long lists of the substances and types of substances covered. *See, e.g.*, *id.* § 37-2705 (listing the opiates, opium derivatives, hallucinogenics, and depressants that are classified as a schedule I controlled substance). The punishment is not

different for each controlled substance within a category. *See id.* Thus, while a prosecutor might often present evidence of just one factual means of committing an element (e.g., that the defendant knowingly sold methamphetamine), a prosecutor could equally rely more generally on the drug classification (e.g., the defendant knowingly sold a schedule I narcotic drug) or even alternative theories of drug substances falling within the category (e.g., the defendant knowingly sold either ephedrine or methamphetamine). Thus, the drugs listed within each classification are alternative factual means of proving a single element—i.e., the classification covered by the subdivision. To hold otherwise would result in the "impermissible" situation in which a particular crime will "sometimes count" to aggravate the sentence (e.g., where the prosecution offers only one factual means), and "sometimes not" (e.g., where the prosecution offers alternative theories of drug substance). *See Mathis*, 136 S. Ct. at 2251.

Other circuits have concluded that similarly-structured statutes are divisible by schedule, but not by individual controlled substance. For example, in *United States v. Cantu*, 964 F.3d 924, 931 (10th Cir. 2020), the Tenth Circuit considered whether a defendant's prior convictions for drug offenses under Oklahoma law were predicate convictions for a sentencing enhancement under the Armed Career Criminal Act ("ACCA"). Like the Idaho statute in this case, the Oklahoma statute set different penalties for different categories of "controlled dangerous

substances." *Id.* at 929. The Tenth Circuit held that the statute was divisible by category but not by individual drug substance because different penalties were assigned by ***category*** of substance, not by individual drug substance. *Id.* at 931 ("It is not as if the penalty is different for each controlled dangerous substance. Those substances are divided into only three categories for purposes of punishment. Therefore, [the statute] is divisible based on those three categories."); *see also Alejos-Perez v. Garland*, 991 F.3d 642, 647-647 (5th Cir. 2021) (holding that a Texas law prohibiting knowing possession of "a controlled substance listed in Penalty Group 2-A" was not divisible by individual drug substance where the statute did not vary punishment "by the *type* of drug" within Penalty Group 2-A); *Najera-Rodriguez v. Barr*, 926 F.3d 343, 350-352 (7th Cir. 2019) (holding a subsection of Illinois statute not divisible by individual drug substance, noting that the drug schedule under which the substance of conviction fell included "several dozen listed substances" with "no indication that possession of one substance versus another would call for a different penalty or any other differential treatment" and concluding that "[t]he text and structure [of the subsection] do not show that the identity of the controlled substance is an element"); *Harbin v. Sessions*, 860 F.3d 58, 65-68 (2d Cir. 2017) (holding New York statute indivisible by substance: "The statute criminalizes sale of a 'controlled substance.' Although it incorporates state schedules to clarify which substances are 'controlled,' it

provides no indication that the sale of each substance is a distinct offense. Moreover, the text does not suggest that a jury must agree on the particular substance sold. If some jurors believed that a defendant had sold cocaine, and others believed that he had sold heroin, they could still agree that he had sold 'a controlled substance,' and issue a guilty verdict.").[3]

III. STATE APPELLATE CASES REGARDING *MENS REA* AND SUFFICIENCY OF EVIDENCE DO NOT ANSWER WHETHER AN INDIVIDUAL DRUG SUBSTANCE IS AN ELEMENT THAT MUST BE PROVED IN EVERY CASE

The BIA relied on Idaho cases that it believed showed that the Idaho statute of conviction was divisible by drug substance. But the BIA committed legal error, because the state decisions it considered did not "definitively" answer the question whether individual drug substance is an element under the Idaho statute of conviction. *Mathis*, 136 S. Ct. at 2256. Instead, the BIA sought to infer divisibility from state appellate cases (1) discussing the crime's required mental

[3] The BIA suggested (AR8) that this Court took a contrary approach in *United States v. Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) (en banc), in which this Court found that a California statute broadly prohibiting transportation of controlled substances was divisible by individual drug substance. *Id.* at 1040-1041. But that conclusion was premised on a finding that the California Supreme Court had sanctioned "multiple convictions under a single statute for a single act as it relates to multiple controlled substances." *Id.* at 1040 ("Because defendants are routinely subjected to such convictions, and because such convictions are recognized as separate crimes by the California Supreme Court, we have a 'definitive[] answer[]': section 11352 does not simply describe 'alternative methods of committing one offense.'" (quoting *Mathis*, 136 S. Ct. at 2256)). Here, the BIA did not identify any Idaho case standing for a similar proposition.

state, and (2) reviewing the sufficiency of the evidence presented on drug identity. This approach resulted in a circular analysis that mistakenly treated the ***means*** that the prosecution used to prove individual elements as though they were elements themselves.

A. *Mens Rea* Cases Do Not Show That The Jury Must Unanimously Find An Individual Drug Substance

First, the BIA relied on Idaho Supreme Court cases that, according to the BIA, hold that "a defendant's knowledge of the identity of a controlled substance is an element of a drug crime that must be proved beyond a reasonable doubt." AR8. Such state *mens rea* cases may inform whether the *mens rea* element of the statute of conviction matches the *mens rea* element of the federal offense. *See* Pet. Br. 22-25. But cases discussing the defendant's mental state do ***not*** similarly inform whether an individual drug substance is means or an element because they do not answer the critical question whether the prosecution must prove a specific individual drug substance as an element, as opposed to proving a broad category of drug substances of which a particular drug is merely a means. Because the cases do not show that, in every case, a jury must unanimously agree on a particular drug substance to sustain a conviction under the Idaho statute, they do not support the BIA's determination that individual drug substance is an element of the offense.

The structure and wording of Idaho's statutory scheme would allow a prosecutor to obtain a conviction in one case by proving that the defendant

knowingly delivered methamphetamine knowing it was methamphetamine, but it would also allow a prosecutor to obtain the same conviction by proving that the defendant delivered "methamphetamine and/or ephedrine" knowing it could be "methamphetamine and/or ephedrine." Just like with the drug substance itself, the jury would not need to agree about whether the defendant knew it was methamphetamine or ephedrine in order to convict. Instead, the only fact about drug identity, or knowledge thereof, that the prosecution must prove in every case to sustain a conviction—the only element—is the involvement of a schedule I or II substance within the scope of the subdivision. The individual drug substances are merely means of proving that element.

This is borne out by the very cases that the BIA relied upon. For example, the BIA cited *State v. McKean*, 356 P.3d 368, 375 (Idaho 2015), for the proposition that "the drug's identity is an element that the State must prove beyond a reasonable doubt to support a conviction for violating" the Idaho statute of conviction. AR10. But in that case, the Idaho Supreme Court held that the knowledge element does not require proof that the defendant knew of ***a particular drug substance***. Rather, it was sufficient that the defendant believe the substance was ***any*** controlled substance, even if he was wrong about which controlled substance it actually was:

> Delivery under section 37-2732(a) only requires the knowledge that one is delivering the substance. This

> knowledge element requires that the defendant know the identity of the substance, ***or believe it to be another controlled substance***.

356 P.3d at 375 (citation, quotation marks, and alteration omitted; emphasis added).

To the extent *McKean* informs the divisibility analysis at all, it states that a defendant's knowledge does ***not*** have to be of a particular substance—suggesting that the jury could disagree on the particular substance and still unanimously convict. *See* 356 P.3d at 375. In other words, the knowledge requirement indicates only that the jurors must unanimously find that the defendant knew of "a controlled substance"; it does not require that they unanimously find that the defendant knew of the *same specific* controlled substance. A defendant's knowledge that he possessed an individual drug substance shows nothing more than the means by which the offense was committed. If six jurors believed he knowingly possessed ephedrine, while six others believed he knowingly possessed methamphetamine, the jury could still convict under Idaho law, because all twelve would agree that he knew of "a controlled substance." That shows that the identity of the particular substance (ephedrine vs. methamphetamine) is not an element, but a mere means of proving the element. *See Mathis*, 136 S. Ct. at 2251; *Descamps*, 570 U.S. at 272-273; *Richardson*, 526 U.S. at 817.

B. Sufficiency Of The Evidence Cases Typically Focus On Means Of Commission, Not Elements

The BIA also relied on a decision from the Idaho Court of Appeals that, according to the BIA, held that drug identity "must be proved beyond a reasonable doubt" and "may be proved by circumstantial evidence rather than chemical analysis." AR8. This discussion of the burden of proof to establish "drug identity" beyond a reasonable doubt, however, again does not answer whether a specific individual drug substance is an element to be proven in every case, or simply a means of proving a broader category of drug substances. As with *mens rea* cases, such decisions leave that question open; they are equally reconcilable with the view that each individual drug substance is merely a means of committing a broader element, namely a category of drugs (here, a schedule I or II controlled substance).

On top of that, cases discussing the type and amount of evidence necessary to meet the state's burden of proof will be, by necessity, focused on a review of the particular factual evidence—i.e., the individual drug substance(s)—actually presented by the prosecution. *See, e.g.*, *State v. Mitchell*, 937 P.2d 960, 961(Idaho Ct. App. 1997) ("Appellate review of the sufficiency of evidence supporting a criminal conviction is limited. A verdict will not be set aside if there is substantial evidence upon which a rational trier of fact could find the essential elements of the

crime to have been proved beyond a reasonable doubt."). Each case will typically focus on certain means or "brute facts" by which the prosecution sought to meet its burden of proof. Thus, while the prosecution in a burglary case may only need to prove a "building or other structure," it will typically provide evidence of a specific means, such as "a house at 122 Maple Road" (*Mathis*, 136 S. Ct. at 2255-2256)—and in a sufficiency appeal, the defendant will argue that the record failed to show beyond a reasonable doubt that he burglarized that house. But that does not make breaking into "a house at 122 Maple Road"—or even "a house" generally—into an element of the offense; it is simply the particular means that the prosecution sought to prove, and that the state appellate courts will review for sufficiency (*see id.*).

This dynamic is particularly common in controlled substance cases, where drug possession or sale offenses are often predicated on only a single substance, and the prosecution therefore will set out to establish the underlying fact of substance identity beyond a reasonable doubt. But the prosecution's proof of the ***facts of commission*** of a crime—such as the particular drug at issue in a drug case—is generally how the prosecution demonstrates that a crime occurred at all and warrants the corresponding penalty. Given that dynamic, state appellate cases will typically focus on the means presented—for example, proof of possession of methamphetamine, or proof of burglary of "a house at 122 Maple Road"—to

evaluate whether the state met its burden of proof. But such decisions do not turn those brute facts into elements of their own offenses. To the contrary, "the particular facts underlying" the defendants' prior convictions—and the type and sufficiency of evidence supporting such facts—are to be "ignored" as wholly irrelevant to the categorical approach, which considers only the elements of the offense. *Mathis*, 136 S. Ct. at 2248 (stating that courts applying the categorical approach "focus solely on whether the elements of the crime of conviction sufficiently match the elements of [the generic offense], while ignoring the particular facts of the case"); *Mellouli*, 575 U.S. at 805 ("An alien's actual conduct is irrelevant to the [categorical] inquiry, as the adjudicator must 'presume that the conviction rested upon nothing more than the least of the acts criminalized' under the state statute."). "[A] federal jury need not always decide unanimously … which of several possible means the defendant used to commit an element of the crime." *Richardson*, 526 U.S. at 817. Unlike a criminal prosecutor, whose interest lies in the sufficiency of the evidence underlying a conviction, the Constitution and Congress's interest in a case applying the categorical approach lies in making sure that no individual is deported (or has their sentence increased) for a drug crime that is not categorically covered by the federal provision. That is why the Supreme Court adopted the categorical approach, which requires looking ***beyond*** the means presented to what, as a categorical matter, must be proved in every prosecution.

In that vein, the inquiry could be assisted by an appellate decision involving two alternative factual bases presented to the jury as a basis for conviction, where the appellate court decided whether the jury was required to unanimously find one basis or the other. But no such decision was identified or relied upon by the BIA. Although an Idaho prosecutor must prove beyond a reasonable doubt a drug that fell within a particular subsection of conviction (the element), the BIA identified no Idaho case suggesting that the jury was required to agree on ***which*** drug it was (the means).

The Supreme Court has explained precisely why inquiry into the means of commission invites constitutional error and fundamental unfairness into the criminal process. When a court looks to a fact that "a prosecutor showed at trial" that "satisfies an element" of the generic offense but was "unnecessary to the crime of conviction," it engages in a flawed, ad hoc fact-finding. *Descamps*, 570 U.S. at 270-271. That is because defendants "often ha[ve] little incentive to contest facts that are not elements of the charged offense—and may have good reason not to." *Id.* This case illustrates the same danger: a defendant like Mr. Juarez would not have been motivated to "squabbl[e]" about whether his Idaho prosecution involved methamphetamine (which is a federal controlled substance) or ephedrine (which is not); the distinction is immaterial under Idaho law. *See id.* The same conviction could be achieved with many, many other drug substances. *See, e.g.*, Idaho Code

Ann. § 37-2705; *Descamps*, 570 U.S. at 278 (Kennedy, J. concurring) ("Certain facts … may go uncontested because they do not alter the sentencing consequences of the crime…."). The element of conviction, by contrast—the drug schedules falling within the scope of Idaho's § 37-2732(a)(1)(A)—are what must be proved in every case and require jury unanimity. *See id.* at 269-270 ("The Sixth Amendment contemplates that a jury—not a sentencing court—will find such facts, unanimously and beyond a reasonable doubt. And the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances."). When the BIA relied on appellate decisions discussing proof of the means of commission, it introduced exactly the same errors. Decisions discussing the sufficiency of the evidence regarding the means of commission the prosecution chose to present do not transform the means into an element.

In short, observing the distinction between an element and an alternative factual means is particularly important and particularly susceptible to error in the context of deciding deportability for prior controlled substance offenses, where the prosecution is typically focused on the underlying factual means of conviction. A state appellate court's discussion of the state's burden of proof in these cases will often result in opinions that emphasize that the state must prove the identity of the particular underlying substance beyond a reasonable doubt. But those decisions

generally do not support a determination that an individual drug substance is a discrete element. Questions of the amount and type of evidence actually presented on an individual drug substance in a particular case do not answer whether an individual drug substance is an element, or instead merely the means by which the prosecution proves a broader category of drug substances. Put another way, there is no reason to conclude that an Idaho prosecutor must prove a particular drug substance (e.g., methamphetamine) in ***every*** prosecution under Idaho Code Ann. § 37-2732(a)(1)(A), as would be required were methamphetamine an element of the offense. The BIA's contrary ruling, based on a sufficiency case that did not address the question relevant here, was legal error.

CONCLUSION

The BIA erred in concluding that an individual drug substance is an element of Idaho Code Ann. § 37-2732(a)(1)(A). Under the correct approach, the offense's element is divisible by the category of substances set forth in § 37-2732(a)(1)(A), but no further. And because the category of substances set forth in § 37-2732(a)(1)(A) sweeps more broadly than the ground of removal, Petitioner's conviction is not a categorical match. This Court should grant the petition for review.

Respectfully submitted,

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Counsel knows of no related cases pending in this Court.

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FOR THE NINTH CIRCUIT

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