Matt A. Crapo
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave., NW, Ste. 335
Washington, DC 20001
(202) 232-5590

*Attorneys for Amicus Curiae*

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**BOARD OF IMMIGRATION APPEALS**

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| In the Matter of:<br><br>Amicus Invitiation No. 21-15-03 | Amicus Invitation No. 21-15-03 |

# REQUEST TO APPEAR AS AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE IMMIGRATION REFORM LAW INSTITUTE

## REQUEST TO APPEAR AS *AMICUS CURIAE*

The Immigration Reform Law Institute respectfully requests leave to file this *amicus curiae* brief at the invitation of the Board of Immigration Appeals. *See* Amicus Invitation No. 21-15-03.

## INTEREST OF *AMICUS CURIAE*

The Immigration Reform Law Institute ("IRLI") is a nonprofit 501(c)(3) public interest law firm incorporated in the District of Columbia. IRLI is dedicated to litigating immigration related cases on behalf of United States citizens, as well as organizations and communities seeking to control illegal immigration and reduce lawful immigration to sustainable levels. IRLI has litigated or filed *amicus curiae* briefs in many immigration-related cases before federal courts and administrative bodies, including: *Trump v. Hawaii*, 138 S. Ct. 2392 (2018); *United States v. Texas*, 136 S. Ct. 2271 (2016); *Arizona Dream Act Coal. v. Brewer*, 818 F.3d 101 (9th Cir. 2016); *Washington All. of Tech. Workers v. U.S. Dep't of Homeland Sec.*, 74 F. Supp. 3d 247 (D.D.C.2014); *Save Jobs USA v. U.S. Dep't of Homeland Sec.*, 942 F.3d 504 (D.C. Cir. 2019); *Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016); and *Matter of C-T-L-*, 25 I&N Dec. 341 (BIA 2010).

## INTRODUCTION

The Board of Immigration Appeals ("Board") has invited interested members of the public to file *amicus curiae* briefs addressing the issue below. As set forth in this *amicus* brief, the Immigration Reform Law Institute ("IRLI") believes that § 714.1 of the Iowa Code is divisible as to thefts by takings and thefts by fraud and that it can be violated in a way that is a categorical match to a theft offense as defined in § 101(a)(43)(G) of the Immigration and Nationality Act ("INA").

## ISSUE PRESENTED

Whether Iowa's theft statute, which is codified at Iowa Code § 714.1, is divisible as to thefts by takings and thefts by fraud, pursuant to the approach set forth in *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013), in light of the Iowa state court decisions in *State v. Nall*, 894 N.W. 2d 514 (Iowa 2017), *State v. Conger*, 434 N.W.2d 406 (Iowa Ct. App. 1988), and *State v. Williams*, 328 N.W.2d 504 (Iowa 1983).

## ARGUMENT

### I. The Categorical Approach

Under the INA, an alien who has been convicted of certain specified criminal offenses is subject to various immigration consequences. Sections 212(a)(2) and 237(a)(2) of the INA list a set of offenses that render an alien either inadmissible or deportable. In addition, an alien who has been convicted of certain offenses is ineligible for various forms of relief. For instance, an alien who has been convicted of an "aggravated felony" offense is not only deportable under the INA, but he or she is also ineligible for many forms of relief. INA §§ 237(a)(2)(A)(iii) (deportability); 208(b)(2)(B)(i) (an aggravated felony is considered to be a particularly serious crime that renders an alien ineligible for asylum); 240A(a)(3) (ineligible for permanent resident cancellation of removal); 240B(a)(1), (b)(1)(C) (ineligible for both pre-hearing and post-hearing voluntary departure); and 241(b)(3)(B) (ineligible for withholding of removal).[1] Because immigration consequences attach to the fact of conviction and not the conduct of the alien, the Board applies the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575, 110

[1] An alien who has been convicted of an aggravated felony is also unable to demonstrate "good moral character," which is a prerequisite for some forms of relief. INA § 101(f)(8); *see also*, *e.g.*, INA § 240A(b)(1)(B) (requiring a showing of "good moral character" for nonpermanent resident cancellation of removal).

S. Ct. 2143, 109 L. Ed. 2d 607 (1990), to determine whether a conviction constitutes an offense specified in the INA.[2]

*Taylor* adopted a "formal categorical approach" in which sentencing courts may "look only to the statutory definitions" of an offense (that is, the elements of the offense), and not "to the particular facts underlying those convictions." *Id.* at 600. Under this categorical approach, if the elements of the State crime are "*the same as, or narrower than*," the elements of the federal generic offense, the State crime is a categorical match and every conviction under that statute constitutes the federally specified crime. *Descamps v. United States*, 570 U.S. 254, 257, 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013) (emphasis added). But if the State statute contains elements that sweep more broadly than the basic elements of the generic crime, a conviction under the State law cannot constitute the generic crime even if the defendant actually committed the offense in its generic form. *See id.* at 261.

If the State statute of conviction sets out one or more elements of the crime in the alternative, and at least one set of alternative elements matches the generic crime, the statute is divisible. In this situation, the Board must identify the alternative elements that define the offense of conviction and determine whether a conviction under those elements categorically matches the generic crime specified in the federal statute. *Moncrieffe v. Holder*, 569 U.S. 184, 192, 133 S. Ct. 1678, 185 L. Ed. 2d 727 (2013); *see also Descamps*, 570 U.S. at 264. This inquiry into the specific section or elements for which the alien was convicted is referred to as the "modified categorical approach." *Descamps*, 570 U.S. at 257.

[2] The *Taylor* Court held that the term "burglary," as used in a federal sentencing statute, refers to the specific crime of "burglary" in "the generic sense in which the term is now used in the criminal codes of most States." 495 U.S. at 598. The Court also held that a State conviction qualifies as a burglary conviction, "regardless of" the "exact [State] definition or label" as long as it has the "basic elements" of "generic" burglary. *Id.* at 599.

Following Supreme Court precedent, the Board has found a statute to be divisible:

> only if it (1) lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction, and (2) at least one (but not all) of those listed offenses or combinations of disjunctive elements is a "categorical match" to the relevant generic standard.

*Matter of Chairez-Castrejon*, 26 I&N Dec. 819, 822 (BIA 2016) (citing *Descamps*, 133 S. Ct. at 2281, 2283). Disjunctive statutory language does not render a criminal statute divisible unless each statutory alternative defines an independent "element" of the offense, as opposed to a mere "brute fact" describing various "means" or methods by which the offense can be committed. *Id.* (citing *Mathis*, 136 S. Ct. at 2248). The *Mathis* Court explained the distinction between "elements" and "means" as follows:

> "Elements" are the "constituent parts" of a crime's legal definition—the things the "prosecution must prove to sustain a conviction." At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. (We have sometimes called them "brute facts" when distinguishing them from elements.) They are "circumstance[s]" or "event[s]" having no "legal effect [or] consequence": In particular, they need neither be found by a jury nor admitted by a defendant.

*Mathis*, 136 S. Ct. at 2248 (citations omitted). *See also Matter of Chairez-Castrejon*, 26 I&N Dec. at 822-23.

The *Mathis* Court went on to provide more guidance in distinguishing elements from mere means or brute facts:

> This threshold inquiry—elements or means?—is easy in this case, as it will be in many others. Here, a state court decision definitively answers the question . . . . When a ruling of that kind exists, a sentencing judge need only follow what it says. Likewise, the statute on its face may resolve the issue. If statutory alternatives carry different punishments, then under [Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000),] they must be elements. Conversely, if a statutory list is drafted to offer "illustrative examples," then it includes only a crime's means of commission. And a statute may itself identify which things must be charged (and so are elements) and which need not be (and so are means). Armed

> with such authoritative sources of state law, federal sentencing courts can readily determine the nature of an alternatively phrased list.
>
> And if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself. As Judge Kozinski has explained, such a "peek at the [record] documents" is for "the sole and limited purpose of determining whether [the listed items are] element[s] of the offense." *Rendon v. Holder*, 782 F.3d 466, [473-74 (9th Cir. 2015)] (opinion dissenting from denial of reh'g en banc). (Only if the answer is yes can the court make further use of the materials, as previously described.) Suppose, for example, that one count of an indictment and correlative jury instructions charge a defendant with burgling a "building, structure, or vehicle" . . . . That is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt. So too if those documents use a single umbrella term like "premises": Once again, the record would then reveal what the prosecutor has to (and does not have to) demonstrate to prevail. Conversely, an indictment and jury instructions could indicate, by referencing one alternative term to the exclusion of all others, that the statute contains a list of elements, each one of which goes toward a separate crime. Of course, such record materials will not in every case speak plainly, and if they do not, a sentencing judge will not be able to satisfy "*Taylor*'s demand for certainty" when determining whether a defendant was convicted of a generic offense. But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule.

136 S. Ct. at 2256-57 (footnote and citations omitted); *see also Matter of Chairez-Castrejon*, 26 I&N Dec. at 823-24.

In sum, it does not matter what label a State attaches to a crime. So long as the basic elements of the State offense match the generic elements of a crime specified in the INA, the State offense is a categorical match and the immigration consequences for a conviction of that State offense follow. Further, if a State offense is defined in the alternative, that offense may still match the generic crime so long as the alternatives constitute elements rather than mere means and at least one set of alternative elements for the offense match the basic elements of the generic crime.

## II. Iowa Code § 714.1 is Divisible Under *Descamps* and *Mathis*

The Board has invited *amici* to address whether Iowa Code § 714.1, which defines theft offenses, is divisible as to thefts by takings and thefts by fraud. Under the INA, both types of theft offenses may result in immigration consequences. For instance, the definition of an "aggravated felony" encompasses, among other things, "a theft offense (including receipt of stolen property) or burglary" for which the term of imprisonment is at least one year. INA § 101(a)(43)(G). Generic theft under § 101(a)(43)(G) of the Act is defined as the "taking of property or an exercise of control over property without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Matter of Ibarra*, 26 I&N Dec. 809, 811 (BIA 2016) (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189, 127 S. Ct. 815, 166 L. Ed. 2d 683 (2007)). Thus, under the INA, a State conviction for an offense that categorically matches a generic theft by taking constitutes an aggravated felony.

Thefts by fraud may also result in immigration consequences. For instance, the Board has "long held that crimes involving fraud or making false statements involve moral turpitude." *Matter of Pinzon*, 26 I&N Dec. 189, 193 (BIA 2013); *see also* INA §§ 212(a)(2)(A)(i)(I) (specifying crimes involving moral turpitude that render an alien inadmissible); 237(a)(2)(A)(i) & (ii) (specifying crimes involving moral turpitude that render an alien deportable). In addition, the INA's definition of an aggravated felony includes "an offense that . . . involves fraud or deceit" with a loss exceeding $10,000. INA §101(a)(43)(M)(i). But because this definition of an aggravated felony only requires an offense to "involve" fraud or deceit, there is no federal generic crime with which to compare a State offense. In *Kawashima v. Holder*, the Supreme Court held that "an offense that . . . involves fraud or deceit" as used in § 101(a)(43)(M)(i) is not limited to offenses that include fraud or deceit as formal elements, but instead encompasses

"offenses with elements that necessarily entail fraudulent or deceitful *conduct*." 565 U.S. 478, 483-84, 132 S. Ct. 1166, 182 L. Ed. 2d 1 (2012) (emphasis added). Consequently, no identification of generic offense elements is necessary for crimes "involv[ing] fraud or deceit." Instead, the Board need only decide whether a prior conviction necessarily entails fraudulent or deceitful *conduct* before the immigration consequences attach.

Applying the categorical approach, the Board begins with the text of the statute. Turning to Iowa Code § 714.1, it is apparent that the statute provides at least ten alternative definitions for a "theft" offense. Section 714.1 of the Iowa Code states: "A person commits theft when the person does *any* of the following:," followed by ten separate and disjunctive definitions of the offense. Each of the ten definitions contains different elements and ends in a period, which indicates that each definition completely defines a separate and discrete offense. Thus, on its face, Iowa Code § 714.1 is divisible.

Further, at least one of the disjunctive definitions is a categorical match to the generic theft offense under § 101(a)(43)(G) of the Act. *See Matter of Chairez-Castrejon*, 26 I&N Dec. at 822 (requiring at least one (but not all) of the listed offenses or combinations of disjunctive elements be a "categorical match" to the relevant generic standard). The Iowa Supreme Court has held that a taking under § 714.1(1) must be "without consent" of the owner and that it must be with the intent permanently to deprive the owner of the property. *See State v. Nall*, 894 N.W.2d 514, 524 (Iowa 2017) ("In order to '[take] possession or control' under [§ 714.1(1)], a person must acquire property *without the consent or authority* of another.") (emphasis added); *State v. Schminkey*, 597 N.W.2d 785, 789 (Iowa 1999) ("[The] intent to permanently deprive the owner of [the] property is an essential element of theft under section 714.1(1)."). Again, a generic theft offense requires the "taking of property or an exercise of control over property

without consent with the criminal intent to deprive the owner of rights and benefits of ownership, even if such deprivation is less than total or permanent." *Matter of Ibarra*, 26 I&N Dec. at 811. Thus, both the generic theft offense and Iowa Code § 714.1(1) require (1) the taking or control of property, (2) without consent, and (3) with the intent to deprive the owner of the property. Indeed, the generic theft offense sweeps more broadly than § 714.1(1), since the intent to deprive in the generic offense includes temporary takings whereas the intent to deprive in § 714.1(1) requires a permanent taking. Because the elements defining theft by taking under Iowa Code § 714.1(1) are narrower than the generic offense, a conviction under § 714.1(1) constitutes a theft by taking offense under § 101(a)(43)(G) of the Act.

Further, there is no question that several of the definitions listed in Iowa Code § 714.1 "involve" fraudulent or deceitful conduct and are therefore categorical matches to thefts by fraud. Indeed, § 714.1(3) requires that the theft be achieved "by deception." Subsection (5) requires that the theft be accomplished with the "intent to defraud." Likewise, subsection (6) requires a person who obtains property or services by passing a bad check to "know[] that such check" will not be paid when presented. Such crimes necessarily "involve" deceitful or fraudulent conduct and are therefore categorical matches to theft by fraud under § 101(a)(43)(M)(i). *Kawashima*, 565 U.S. at 483-84. Whether Iowa Code § 714.1 contains "multiple discrete offenses" or "defines a single offense by reference to disjunctive sets of 'elements,'" at least one of the "listed offenses or combinations of disjunctive elements" is a categorical match to a theft by taking offense (and several of the listed offenses are a categorical match to a theft by fraud offense). *See Matter of Chairez-Castrejon*, 26 I&N Dec. at 822. Therefore, § 714.1 is divisible under *Descamps* and *Mathis*.

To be sure, State case law complicates the question of whether the various subsections of § 714.1 constitute alternative means of committing a single offense or alternative elements defining discrete and separate crimes. In *State v. Williams*, the Supreme Court of Iowa stated in a footnote that in enacting § 714.1, the Iowa legislature consolidated many separate theft offenses into a single offense and that the various subsections constitute merely "alternative means of committing the same offense." 328 N.W.2d 504, 506 n.3 (Iowa 1983). But this language is dicta. In *Williams*, the court applied a two-pronged test to determine whether a trial information could be amended. *See id.* at 505-06. The test permits the information to be amended "only if (1) substantial rights of the defendant are not prejudiced thereby, and (2) a wholly new or different offense is not charged." *Id.* at 505. The court decided that the defendant was prejudiced because the amendment changed the elements of the offense after the close of evidence: the defendant was initially charged with theft by taking and burglary, but after he testified that he purchased the property from someone else, the information was amended to charge the defendant with "theft by exercising control over stolen property." *Id.* at 506. Indeed, the defendant was found not guilty of theft by taking under §714.1(1), but was found guilty of exercising control over stolen property under § 714.1(4). *See id.* at 505. Because the court decided that the late amendment to the charge prejudiced the defendant, it did not need to reach the question of whether the amended information charged the defendant with a "wholly new or different offense." The court simply noted in a footnote that several theft offenses were consolidated into the "single" theft offense defined in § 714.1. *See id.* at n.3.

Five years later, the Court of Appeals of Iowa picked up this dicta from *Williams* and relied on it to determine that § 714.1 defines a single offense (which may be committed in more than one way) instead of a statute that defines multiple offenses. *State v. Conger*, 434 N.W.2d

406, 409 (Iowa Ct. App. 1988) (citing *Williams*, 328 N.W.2d at 506 n.3). In *Conger*, the trial court instructed the jury on both theft by taking (under § 714.1(1)) and theft by exercising control over stolen property (under § 714.1(4)), but did not require juror unanimity on either theory. *See id.* The court concluded that the two alternative theories were not inconsistent or repugnant to one another in that they represent different points of time within one crime. *See id.* at 410. Because a "reasonable juror could conclude either the defendant took the vehicle himself or exercised control over it, knowing it was stolen," the court decided that the jury was properly instructed on alternative methods of committing theft. *Id.*

Finally, in *Nall*, the Iowa Supreme Court held that theft by taking as defined in § 714.1(1) is limited to situations where a person obtains property without the consent of the owner and is therefore incompatible with other theft offenses defined in subsections (3) and (6) in which property is obtained with the consent of the owner through deception or fraud. 894 N.W.2d at 518, 524. In reaching this conclusion, the *Nall* court revisited its decision in *Williams*, noting that "[a]lthough we acknowledged that the amendment [to the trial information] did not change the offense charged, we did not suggest that the amendment was unnecessary or that a section 714.1(1) charge could sustain a conviction under a section 714.1(4) theory. In fact, we indicated the opposite." *Id.* at 521. In other words, the court in *Nall* acknowledged what is evident on the face of § 714.1, that is, that each subsection of § 714.1 is composed of different elements and therefore defines a distinct and separate offense.

Although the Iowa state courts have stated that § 714.1 defines a single offense and have referred to the various subsections of § 714.1 as alternative means, methods, or ways to commit a theft offense, the divisibility of the statute does not turn on State court terminology. Under the approach to divisibility adopted in *Descamps* and *Mathis*, so long as the State "statute sets out

one or more elements of the offense in the alternative," the modified categorical approach permits the Board to consult a limited class of documents, such as indictments, jury instructions, or plea agreements and colloquies to determine which alternative formed the basis of the prior conviction. *Descamps*, 570 U.S. at 257. "[I]f state law fails to provide clear answers," the Board may "peek at the record documents" for the "sole and limited purpose of determining whether the listed items are elements of the offense." *Mathis*, 136 S. Ct. at 2256-57 (internal quotations and alterations omitted).

If the record documents reveal that an individual was convicted solely for violating Iowa Code § 714.1(1), the Board can reliably determine that the conviction constitutes a theft offense as defined in § 101(a)(43)(G) of the Act because the elements are a categorical match. If, however, it appears that elements from other subsections of § 714.1 are comingled with a theft by taking offense under subsection (1), as described in *Conger* (where the defendant was charged both with theft by taking and exercising control over stolen property under subsections (1) and (4) of § 714.1), the record may be inconclusive and the outcome will turn on which party bears the burden of proof.[3] *See generally Pereida v. Wilkinson*, 141 S. Ct. 754 (2021) (an inconclusive conviction record redounds to the detriment of the party who bears the burden of proof).

[3] In *Matter of Deang*, 27 I&N Dec. 57 (BIA 2017), the Board held that "reason to believe" property is stolen is an insufficient mens rea for an aggravated felony receipt of stolen property offense under § 101(a)(43)(G) of the Act. Iowa Code § 714.1(4) requires only a "reason to believe" property is stolen, so a conviction under § 714.1(4) does not constitute an aggravated felony.

## CONCLUSION

For the forgoing reasons, Iowa Code § 714.1 is divisible as to thefts by takings and thefts by fraud.

Respectfully submitted,

/s/ Matt Crapo
Matt A. Crapo
Christopher J. Hajec
Immigration Reform Law Institute
25 Massachusetts Ave NW, Suite 335
Washington, DC 20001
Phone: 202-232-5590
matt.crapo@pm.me
chajec@irli.org

Attorneys for *Amicus Curiae*

**CERTIFICATE OF SERVICE**

I certify that, on April 14, 2021, I caused to be submitted the foregoing Request to Appear and *amicus curiae* brief, with three copies, to the Board of Immigration Appeals at the following address:

Amicus Clerk
Board of Immigration Appeals
Clerk's Office
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041

/s/ Matt Crapo
Matt A. Crapo

Attorney for *Amicus Curiae*