U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

Office of the Chief Clerk

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April 12, 2021

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Re: Amicus Invitation No. 21-15-03

Dear Amici:

The Board of Immigration Appeals received on April 6, 2021, your request for extension of time in which to file your amicus curiae brief. Your request is hereby **GRANTED** as follows:

You brief and two copies should be submitted to the Board, not later than **May 6, 2021**. In addition, please attach a copy of this letter to the front of your brief.

Sincerely,

Mimi Gilliard
Supervisory Case Management Specialist
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cc:

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

In the matter of:	**A #: [NOT PROVIDED]**
Respondent [NOT PROVIDED]	

AMICI CURIAE BRIEF OF THE AMERICAN IMMIGRATION COUNCIL; AMERICAN IMMIGRATION LAWYERS ASSOCIATION; CATHOLIC LEGAL IMMIGRATION NETWORK, INC.; IMMIGRANT DEFENSE PROJECT; THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD; THE FEDERAL IMMIGRATION LITIGATION CLINIC, THE JAMES H. BINGER CENTER FOR NEW AMERICANS, UNIVERSITY OF MINNESOTA LAW SCHOOL; AND THE CORNELL LAW SCHOOL ASYLUM AND CONVENTION AGAINST TORTURE CLINIC.

AMICUS INVITATION No. 21-15-03

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INTRODUCTION AND STATEMENT OF AMICI

Amici, the American Immigration Council (Council), the American Immigration Lawyers Association (AILA), Catholic Legal Immigration Network, Inc. (CLINIC), Immigrant Defense Project (IDP), the National Immigration Project of the National Lawyers Guild (NIPNLG), the University of Minnesota Law School James H. Binger Center for New Americans Federal Immigration Clinic, and the Cornell Law School Asylum and Convention Against Torture Clinic, submit this brief in response to the Board of Immigration Appeals' ("the Board") amicus invitation 21-15-03. At issue is 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).

Amici agree with Respondent that Iowa law conclusively establishes that the alternatives under Iowa Code § 714.1 are means of committing one offense, not elements of different crimes. Accordingly, the statute is indivisible. *See* Section III. In addition, Amici write separately to highlight for the Board the categorical approach's demand for certainty in the divisibility analysis. *See* Sections I, II. 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 Board may only find a statute divisible if governing state law is certain that the statute includes multiple different crimes. In this instance, Iowa state law unambiguously compels the conclusion that Iowa Code § 714.1 is a single offense, and so the Board must sustain Respondent's appeal. Should the Board find ambiguity in Iowa's law, it must still rule the statute is indivisible and sustain the Respondent's appeal.

The 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.

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 DHS, immigration courts and the Board of Immigration Appeals, as well as before federal courts.

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 Iowa, represent immigrants caught in the criminal system.

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.

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.

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 Cornell Law School Asylum and Convention Against Torture Appellate Clinic represents immigrants in their appeals before the Board of Immigration Appeals or federal courts. Clinic faculty and student attorneys regularly appear in matters implicating interpretation of the INA, including its application at the intersection of state criminal and federal immigration law.

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

ARGUMENT

I. 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"); *Ortiz v. Barr*, 962 F.3d 1045, 1049 (8th Cir. 2020) ("Under [the categorical] approach, we consider whether the elements of the state offense necessarily fit within the BIA's generic definition . . . .") (internal quotation and punctuation omitted); *Larin-Ulloa v. Gonzales*, 462 F.3d 456, 470 (5th Cir. 2006) (holding petitioner not subject to removal "[b]ecause the record does not show that [the petitioner] was necessarily convicted of" a removable offense within a divisible statute); *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 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.

II. The Divisibility Analysis Demands Certainty Regarding Whether Statutory Alternatives Are "Means" or "Elements."

When evaluating whether an alternatively phrased statute is divisible, the Board must satisfy the categorical approach's demand for certainty. Such a requirement is supported by (1) Supreme Court and circuit court 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.

A. 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.*, *Cardoza Salazar v. Barr*, 932 F.3d 704, 707 (8th Cir. 2019). 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*, many circuit courts have followed the Supreme Court's clear directive regarding the demand for certainty within the divisibility analysis. For example, 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 three 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. Ochoa*, 861 F.3d 1010, 1018 (9th Cir. 2017) ("But to the extent that these materials do not 'speak plainly' enough, we cannot satisfy '*Taylor*'s demand for certainty' when determining whether a defendant was convicted of a generic offense. This reasoning means that the statute of conviction was not divisible, ending our analysis. Thus, we do not proceed to the modified categorical approach."); *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.

B. 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*: "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." 926 F.3d at 356.

These same legal standards and policy concerns apply to the Board, a federal agency that has no expertise in state law matters. *See, e.g.*, *Omargharib v. Holder*, 775 F.3d 192, 196 (4th Cir. 2014) (noting that the Board has "no particular expertise" over state law); *Patel v. Holder*, 707 F.3d 77, 79 (1st Cir. 2013) (same); *Jean-Louis v. Attorney Gen. of U.S.*, 582 F.3d 462, 466 (3rd Cir. 2009) (same); *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 385 (BIA 2007) ("Our interpretation of criminal statutes is not entitled to deference.").

Accordingly, in conducting an elements-versus-means inquiry with respect to Iowa Code § 714.1, the Board must not substitute its judgment for that of relevant sources of state authority that definitively resolve the question. In addition, the Board 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.

C. 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 statue with both criminal and civil immigration applications, including the aggravated felony statute.[1] *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 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.").

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[1] INA § 101(a)(43) defines "aggravated felony" not only for immigration proceedings, but also for purposes of defining crimes and setting forth criminal penalties. *See* INA § 277 (making it a crime to assist an inadmissible noncitizen convicted of an aggravated felony to enter the United States); INA § 276(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* INA § 243(a) (increasing the maximum penalty for failure to depart for a noncitizen with an aggravated felony conviction or other convictions described in INA § 237(a)(2)).

III. Iowa Code § 714.1 is Indivisible.

The statute at issue here, Iowa Code § 714.1, is indivisible because (1) Iowa courts have determined that it defines a single offense, and (2) the statute's legislative history, plain language, and sentencing scheme support such a determination.

A. Iowa Courts Have Determined Iowa Code § 714.1 Defines a Single Offense.

The Iowa Supreme Court has conclusively determined that Iowa Code § 714.1 defines a single criminal offense. The Board may not substitute its judgment for that determination. *See Mathis*, 136 S. Ct. at 2256; *Schad*, 501 U.S. at 636.

In 1983, the Iowa Supreme Court first held that Iowa Code § 714.1 defines different "*ways* in which theft may be committed" and not multiple different offenses. *State v. Williams*, 328 N.W.2d 504, 505 (Iowa 1983) (emphasis added). In *Williams,* the defendant challenged a prosecutor's amendment of the trial information after close of evidence to allege a different alternative under § 714.1 than the state had alleged initially. *Id.* Such an amendment is allowed under the Iowa Rules of Criminal Procedure only if "(1) substantial rights of the defendant are not prejudiced thereby, and (2) a wholly new or different offense is not charged." *Id.* (citing Iowa R. Crim. P. 4(8)(a), now Iowa R. Crim. P. 2.4(8)(a)). While the court reversed the conviction solely on the basis that the first prong was not satisfied, it separately suggested that the second prong was not at issue because:

> Under the revised criminal code the many separate theft offenses of the prerevised criminal code were consolidated into a single offense, theft, under section 714.1. 4 J. Yeager and R. Carlson, *Iowa Practice: Criminal Law and Procedure* §§ 311–12 (1979). The State, therefore, would not have been alleging a "wholly new and different offense" but merely an alternative means of committing the same offense.

Williams, 328 N.W.2d at 506 n.3.

The Iowa Court of Appeals subsequently interpreted § 714.1 in *State v. Conger*, 434 N.W.2d 406 (Iowa App. 1988). The appellant in *Conger* argued that the trial court denied his right to a unanimous verdict by instructing the jury on two alternative theories, 714.1(1) and (4). In accordance with the relevant legal standard, *see State v. Duncan*, 312 N.W.2d 519 (Iowa 1981), the *Conger* court first considered whether Iowa Code § 714.1 "defines a single offense which may be committed in more than one way or instead defines multiple offenses" that each require jury unanimity. *Conger*, 434 N.W.2d at 410. Citing *Williams*, the court explained that "Iowa Code section 714.1(1) through (8) lists definitions of theft. Any one of the enumerated situations results in the commission of theft. These subparagraphs clearly define alternative conduct that in a single occurrence can result in only one conviction of crime." *Id.* (citing *Williams*, 328 N.W.2d at 506 n.3).

Second, the court found that 714.1(1) and (4) were different means of the offense that are "not inconsistent or repugnant" to each other. *Id.* Based on these interpretations, the Court of Appeals found no violation of the right to a unanimous verdict and affirmed the conviction. In sum, *Conger* demonstrates that Iowa Code § 714.1 consists of alternative means of committing a single offense and that jury unanimity is not required for each of those means—*i.e.*, that it is an indivisible statute. *See Mathis*, 136 S. Ct. at 2251; *see also* 4 Ia. Prac., Criminal Law § 11:9 (2020–21 ed.) ("The theft statute defines a single crime that may be committed in various ways, not multiple offenses . . . . [W]hen various theories of theft are offered, the jury does not have to be unanimous as to the specific theory.").

In *State v. Nall*, 894 N.W.2d 514 (Iowa 2017), the Iowa Supreme Court once again cited *Williams* to interpret § 714.1. At issue in *Nall* was whether the definition of the phrase "took possession or control of property" in Iowa Code § 714.1(1) includes "presenting counterfeit

financial instruments in exchange for property." *Nall*, 894 N.W.2d at 517–18. This statutory interpretation was necessary because the prosecution had charged the defendant with a single theory of theft under Iowa Code § 714.1(1), and the defendant challenged the sufficiency of the evidence and factual basis to support her convictions, in part by pointing out that "her [underlying] conduct . . . more closely resembles" other subsections of 714.1 that were not charged. *Id.* at 517. The Iowa Supreme Court recognized that other courts had similarly addressed distinctions between theft alternatives. *Id.* at 523. Ultimately, the Iowa Supreme Court concluded there was insufficient evidence and no factual basis to support convictions under the single theory of theft presented by the prosecutor. *Id.* at 525. While the Iowa Supreme Court expounded upon the different definitions of theft under 714.1 and concluded that 714.1(1) does not "subsume the other subsections," *id.* at 519, it did not in any way disturb the holdings from *Williams* and *Conger*. *See Nall*, 894 N.W.2d at 521 (acknowledging *Williams*' holding that an amendment of the trial information to add a subparagraph "did not change the offense charged").

Thus, under *Williams* and *Conger*, and consistent with *Nall*, it is clear that Iowa Code § 714.1 is an indivisible offense.

B. The Statute's Legislative History, Plain Wording, and Sentencing Provision Confirm Iowa Code § 714.1 Is Indivisible.

Section 714.1's legislative history, plain wording, and applicable sentencing scheme all confirm that its articulated alternatives are factual means, not elements. And, as discussed in Section II, *supra*, even if the Board should determine that these sources of Iowa law are inconclusive, it must still rule that the statute is indivisible.

i. The History of Iowa Code § 714.1 Confirms the Legislature Intended to Create a Single Offense.

Legislative history clearly supports the holdings of the Iowa Supreme Court and the Iowa Court of Appeals that Iowa Code § 714.1 defines a single criminal offense. *See Conger*, 434 N.W.2d at 409 (noting that whether a statute "defines a single offense which may be committed in more than one way or instead defines multiple offenses" is a "question of legislative intent."). Iowa Code § 714.1 was codified in 1978, when the Iowa legislature instituted a comprehensive reform of its criminal laws. This included a consolidation of the crimes of larceny, embezzlement, false pretenses, receiving and concealing stolen property, and false drawing and uttering into one comprehensive crime of theft under § 714.1. *See* Kermit L. Dunahoo, *The New Iowa Criminal Code*, 29 Drake L. Rev. 237, 368 (1979–1980). Reporting on the major overhaul of Iowa's Criminal Code in 1978, a lead author of the provision stated: "Chapter 714 replaces several chapters in the 1977 Code on the subject of theft. The purpose of the drafting committee was to consolidate the many different theft offenses which had accumulated in the criminal statutes into a single offense, theft. §§ 714.1-714.6 were prepared with this purpose." 4 J. Yeager and R. Carlson, *Iowa Practice: Criminal Law and Procedure* §§ 311-12 (1979).

ii. The Plain Text of the Statute Indicates Iowa Code § 714.1 Is Indivisible.

The plain wording of § 714.1 further supports the conclusion that its listed alternatives are factual means and not elements. Specifically, the introductory language of § 714.1 says "[a] person commits theft when the person does *any* of the following . . . " Iowa Code § 714.1 (emphasis added). On two recent occasions, the Eighth Circuit has held "that when a defined phrase is prefaced with the word 'any' rather than 'a,' the phrasing suggests that the statute created only one offense with several means set forth in the definition because the word 'any' includes 'all'." *See Rendon v. Barr*, 952 F.3d 963, 969 (8th Cir. 2020) (citing *Martinez v.*

Sessions, 893 F.3d 1067, 1072 (8th Cir. 2018)). Under Eighth Circuit precedent, therefore, the plain language of Iowa Code § 714.1 indicates the statute sets forth a single, indivisible crime.

iii. The Theft Sentencing Provision Confirms Iowa Code § 714.1 Is Indivisible.

Iowa's theft sentencing provision classifies and punishes all "theft of property," primarily based upon the value of the property.[2] *See* Iowa Code § 714.2. The Supreme Court has held that "[i]f statutory alternatives carry different punishments, then under *Apprendi* they must be elements." *Mathis*, 136 S. Ct. at 1256. In stark contrast, the factual alternatives enumerated in Iowa Code § 714.1 are wholly untethered from the sentencing provision in § 714.2; the range of penalties § 714.2 imposes is thus the same, regardless of which statutory alternative was used in

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[2] Iowa's theft sentencing statute states:

> 1. The theft of property exceeding ten thousand dollars in value, or the theft of property from the person of another, or from a building which has been destroyed or left unoccupied because of physical disaster, riot, bombing, or the proximity of battle, or the theft of property which has been removed from a building because of a physical disaster, riot, bombing, or the proximity of battle, is theft in the first degree. Theft in the first degree is a class "C" felony.
> 2. The theft of property exceeding one thousand five hundred dollars but not exceeding ten thousand dollars in value or theft of a motor vehicle as defined in chapter 321 not exceeding ten thousand dollars in value, is theft in the second degree. Theft in the second degree is a class "D" felony. However, for purposes of this subsection, "motor vehicle" does not include a motorized bicycle as defined in section 321.1, subsection 40, paragraph "b".
> 3. The theft of property exceeding seven hundred fifty dollars but not exceeding one thousand five hundred dollars in value, or the theft of any property not exceeding seven hundred fifty dollars in value by one who has before been twice convicted of theft, is theft in the third degree. Theft in the third degree is an aggravated misdemeanor.
> 4. The theft of property exceeding three hundred dollars in value but not exceeding seven hundred fifty dollars in value is theft in the fourth degree. Theft in the fourth degree is a serious misdemeanor.
> 5. The theft of property not exceeding three hundred dollars in value is theft in the fifth degree. Theft in the fifth degree is a simple misdemeanor.

Iowa Code § 714.2.

committing the theft. *See* Iowa Code § 714.2. The sentencing provision contains no references to § 714.1's articulated alternatives, and none of the various alternatives correlate to different punishments. *Id.* When a statute carries the same range of penalties for each of its variations, this provides further support for the conclusion that the alternatives are a "mere 'means' of violating the statute, not a separate alternative element." *See Harbin v. Sessions*, 860 F.3d 58, 65 (2d Cir. 2017).

In sum, controlling precedent from the Iowa Supreme Court and the Iowa Court of Appeals, the statute's text, its legislative history, and its sentencing scheme all confirm that Iowa Code § 714.1 is indivisible.

IV. Conclusion

The Board may only conclude that Iowa Code § 714.1 is divisible if the state law is certain that the statute's alternatives represent distinct crimes, defined by different elements. But the roadmap provided by *Mathis* leads to the opposite result—Iowa law establishes conclusively that § 714.1 is a single offense that can be committed in multiple different ways. The Board should therefore hold that Iowa Code § 714.1 is indivisible, sustain Respondent's appeal, and reverse the decision of the Immigration Judge.

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Respectfully submitted,

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