No._____

IN THE SUPREME COURT OF THE UNITED STATES

SALVADOR ORTIZ-URESTI,
PETITIONER,

- VS. -

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

When deciding whether a conviction under Colorado's primary drug statute qualifies as a federal predicate for an increased sentence, should a court treat the statute as "indivisible," as the Tenth Circuit held and a divided 2-1 Fifth Circuit panel suggested, or "divisible," as the Third Circuit panel held?

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– VS. –

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Salvador Ortiz-Uresti respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this case on January 31, 2018.

OPINION BELOW

The opinion of the court of appeals affirming the district court's judgment is reported at 721 F. App'x 145 (3d Cir. 2018), and is attached as Appendix A. The order denying rehearing is attached as Appendix B.

JURISDICTION

The district court had jurisdiction over this federal criminal case pursuant to 18 U.S.C. § 3231. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury…

Section 1326 of Title 8, United States Code, provides:

> (a) In general
> Subject to subsection (b), any alien who--
> (1) has been denied admission, excluded, deported, or removed … and thereafter
> (2) enters, attempts to enter, or is at any time found in, the United States …
> shall be fined under Title 18, or imprisoned not more than 2 years, or both.
>
> (b) Criminal penalties for reentry of certain removed aliens
> Notwithstanding subsection (a), in the case of any alien described in such subsection…
> (2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both. …

Section 1101(a) of Title 8, United States Code, provides:

> (43) The term "aggravated felony" means …
> (B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

Section 18-18-405(1)(a) of the 1999 Colorado Criminal Code provides:

> [I]t is unlawful for any person knowingly to manufacture, dispense, sell, distribute, possess, or to possess with intent to manufacture, dispense, sell, or distribute a controlled substance; or induce, attempt to induce, or conspire with one or more other persons, to manufacture, dispense, sell, distribute, possess, or possess with intent to manufacture, dispense, sell, or distribute a controlled substance.

STATEMENT OF THE CASE

This case reflects a circuit split over the treatment of Colorado's primary drug statute as a basis for increased punishment and deportation under federal law, as well as a broader disagreement about how to determine the divisibility of any drug statute for purposes of these severe penalties. When sentencing Mr. Ortiz-Uresti for illegal reentry, the district court increased his statutory maximum from 2 to 20 years' imprisonment because it found that his prior drug conviction in Colorado qualified as an "aggravated felony." *See* 8 U.S.C. § 1326(b)(2). It then sentenced him to 48 months' imprisonment.

The Third Circuit affirmed. Although it acknowledged that the Colorado statute covered more conduct than the federal definition of an aggravated felony, it found that the statute was "divisible" and that Mr. Ortiz-Uresti was convicted of a qualifying predicate. Pet. App. A6. The panel considered and rejected the analysis of the Tenth Circuit, where Colorado is located, which had held that the same statute was "indivisible" and that it was plain error to treat it otherwise. *United States v. McKibbon*, 878 F.3d 967 (10th Cir. 2017). A Fifth Circuit panel fragmented on the same question, with the panel majority assuming that the Colorado drug statute was indivisible but calling the answer "unclear," and the dissent saying it was "obvious[ly]" indivisible. *United States v. Gomez*, 706 F. App'x 172 (5th Cir. 2017) (unpublished); *id.* at 177 (Graves, J., dissenting). Because this circuit split has significant criminal and immigration consequences for people across the country, this Court should step in to resolve it.

A. Legal Background

The statutory maximum sentence for illegally reentering the United States after deportation increases if the defendant has a prior conviction for an "aggravated felony." 18

U.S.C. § 1326(b)(2). The default maximum sentence is 2 years' imprisonment, but a prior conviction for an aggravated felony increases the maximum to 20 years' imprisonment. *Id.*

The definition of an "aggravated felony" comes from the Immigration and Nationality Act (INA), and therefore has grave consequences not only for people charged with illegal reentry, but also for immigration law more broadly. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony conviction is grounds to deport legal immigrant); 8 U.S.C. § 1229b(a)(3) (aggravated felony conviction bars discretionary cancellation of removal).

The INA includes a list of offenses that qualify as aggravated felonies, such as murder, rape, "illicit trafficking in a controlled substance … including a drug trafficking crime (as defined in section 924(c) of Title 18)," 8 U.S.C. § 1101(a)(43), and many others. But because states and the federal government often define these offenses differently, courts must sometimes inquire as to the scope of a state offense, as a matter of law, to decide whether a prior conviction qualifies as an aggravated felony.

This Court uses a "categorical approach" to decide whether a prior conviction qualifies as an aggravated felony. *Moncrieffe v. Holder*, 569 U.S. 184, 189 (2013). This approach asks "whether the state statute defining the crime of conviction categorically fits within the generic federal definition of the corresponding aggravated felony." *Id.* at 189-91 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-87 (2007)) (internal quotation marks omitted). If the statute "sweeps more broadly" than the generic definition of an aggravated felony, then a conviction under the statute does not qualify as one, "even if the defendant actually committed the offense in its generic form." *Descamps v. United States*, 570 U.S. 254, 261 (2013) (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). In other words, the categorical approach focuses only on "what crime, with what elements, the defendant was convicted of," not how the

defendant actually committed the offense. *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016).

When a statute uses disjunctive language to describe the offense, the first step in applying the categorical approach is to determine whether the statute is "indivisible" or "divisible." *See Descamps*, 570 U.S. at 257-58. A statute is "indivisible" if the disjunctive language lists various "factual means" of committing "a single element of a single crime." *Mathis*, 136 S. Ct. at 2249 (citing *Descamps*, 570 U.S. at 268-69). A statute is "divisible," by contrast, if the disjunctive language lists "alternative elements" that define distinct and separate crimes. *See id.*

If the statute is indivisible, then the Court applies the ordinary categorical approach, described above. But if the statute is divisible, then the Court applies a "modified" categorical approach, which permits resort to the record of the defendant's prior conviction to identify the particular element from the disjunctive list that formed the basis for his conviction. *Id.* The Court then asks whether that element fits within the generic definition of the corresponding aggravated felony.

The key to distinguishing elements from means, and therefore indivisible from divisible statutes, is asking what the jury must find unanimously to convict under the statute. *See Descamps*, 133 S. Ct. at 2288. If the jury must unanimously agree on an item from the disjunctive list, then it is an element and the statute is divisible. But if the jury need not unanimously agree on the item, then it is just one means of committing the offense and the statute is indivisible. *See id.* Any ambiguity is resolved in favor of indivisibility. *See Mathis*, 136 S. Ct. at 2257.

This admittedly intricate analysis is important for three reasons. *See id.* at 2252-53. First, the text of § 1326(b)(2) requires a categorical approach, since it says that the defendant

must have a prior "conviction" for an aggravated felony, not that he previously "committed" such a crime. *See, e.g.*, *Moncrieffe*, 569 U.S. at 191; *Taylor*, 495 U.S. at 600-01. Second, the categorical approach protects defendants' Sixth Amendment rights, since "only a jury, not a judge, may find facts that increase a maximum penalty," and thus "a judge cannot go beyond identifying the crime of conviction to explore the manner in which the defendant committed that offense." *Mathis*, 136 S. Ct. at 2256 (citing *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)). Finally, this approach "avoids unfairness to defendants," who "may have no incentive to contest" facts that were not relevant to their convictions at the time of trial, such that assorted portions of the record may (especially when considered in an unfamiliar jurisdiction years later) suggest there was proof of something that was actually a point of universal neglect. *Id.* at 2253.

B. Factual and Procedural Background

Mr. Ortiz-Uresti came to the United States from Mexico without permission in 1997. (C.A. App. 38). In 1999, he was arrested in Colorado and pled guilty to a drug offense under Colo. Rev. Stat. Ann. § 18-18-405. (C.A. App. 38, 40). He received a four-year sentence, served approximately one year in prison, and was deported back to Mexico. (C.A. App. 40-41).

At the time of his prior conviction, the Colorado drug statute used disjunctive language to proscribe a long list of acts satisfying the offense's basic conduct element, making it a crime to knowingly:

> manufacture, dispense, sell, distribute, possess, or to possess with intent to manufacture, dispense, sell, or distribute a controlled substance; or induce, attempt to induce, or conspire with one or more other persons, to manufacture, dispense, sell, distribute, possess, or possess with intent to manufacture, dispense, sell, or distribute a controlled substance.

Colo. Rev. Stat. Ann. § 18-18-405(1)(a) (West 1999). The statute remains essentially the same today, though notably mere "possession" has been removed from the list of acts provable to satisfy the element. *See* Colo. Rev. Stat. Ann. § 18-18-405 (West).

Sometime after he was deported, Mr. Ortiz-Uresti returned to the United States without permission. In 2015, he was arrested in Pennsylvania and charged with illegal reentry after removal, in violation of 8 U.S.C. § 1326. (C.A. App. 14, 32). He pled guilty. (C.A. App. 34-35).

The government argued, (C.A. App. 32, 41), that Mr. Ortiz-Uresti was subject to an increased penalty under § 1326(b)(2) because his prior drug conviction in Colorado qualified as the aggravated felony of "drug trafficking." *See* 8 U.S.C. § 1101(a)(43)(B) ("aggravated felony" includes "illicit trafficking in a controlled substance … including a drug trafficking crime"). The district court agreed and increased the maximum sentence from 2 to 20 years' imprisonment. (C.A. App. 22-24). It then sentenced him to 48 months' imprisonment. (C.A. App. 66).

Mr. Ortiz-Uresti appealed, arguing that his prior conviction did not qualify as an aggravated felony. First, he noted that the Colorado drug statute's conduct element – the list of acts including "manufacture," "dispense," and "possess" — was indivisible, as the Tenth Circuit squarely held in *United States v. McKibbon*, 878 F.3d 967, 974-76 (10th Cir. 2017), reversing the district court's contrary conclusion as plain error. Second, he contended that the statute covered more conduct than the federal definition of a drug-trafficking predicate, in that it also reached mere possession, the solicitation or inducement of drug activity, the gifting of drugs without remuneration, and non-bona fide offers to sell drugs, such as offers made in a ploy to rob the would-be buyer. He therefore claimed that the district court should not have sentenced him above the two-year maximum.

A panel of the Third Circuit Court of Appeals rejected his argument and affirmed the 48-month sentence in an unpublished opinion. Pet. App. A. The panel acknowledged that the Colorado statute may have swept broader than the federal definition of a drug trafficking crime. *See* Pet. App. A7 n.2 ("one means for violating the statute may not be a 'drug trafficking crime'"). But it reasoned that the statute was divisible because "the type and amount of drugs can increase the punishment." Pet. App. A6; *see* Colo. Rev. Stat. Ann. § 18-18-405(2). The court proceeded to apply the modified categorical approach and, relying on the state court charging instrument, concluded that Mr. Ortiz-Uresti was convicted of possession with intent to distribute a quantity of cocaine, conduct falling within the scope of the federal definition of a drug trafficking crime. *See* Pet. App. A7. Recognizing that the Tenth Circuit had found the same statute indivisible, the Third Circuit panel said that its decision in *McKibbon* had "overlooked the teachings of *Alleyne* [*v. United States*, 570 U.S. 99 (2013)], *Descamps*, and *Mathis*, which dictate that any fact that impacts a statutory sentencing range is an element of the offense. Here, because the penalty for violating the statute varies depending on the type and quantity of drug involved in the offense, the statute is divisible." Pet. App. A7 n.2. The court denied a petition for rehearing. This timely petition for certiorari follows.

REASONS FOR GRANTING THE WRIT

The divisibility of Colorado's primary drug statute has bedeviled the circuit courts. Their divergent conclusions on this matter not only affect the tens of thousands of people who have been convicted under the statute, but also the interpretation of other drug statutes across the country. The Court should therefore grant this petition to resolve the circuit split and provide necessary guidance on how to determine the divisibility of a drug statute, a question with significant sentencing and immigration consequences.

In concluding that the Colorado statute was divisible, the Third Circuit panel infringed the Sixth Amendment right to a jury trial, failed to apply this Court's recent decisions in *Mathis* and *Descamps*, and created a remarkable split with the Tenth Circuit on a matter of Colorado law. Unfortunately, the panel's flawed analysis is just one instance of ongoing and outspoken opposition to the categorical approach. This Court has repeatedly had to correct the courts of appeals for failing to correctly apply this doctrine, and it should do so again in this case.

I. The Courts of Appeals Are Divided as to the Divisibility of the Colorado Drug Statute, with Broad Implications for the Divisibility of All Drug Statutes.

The Courts of Appeals are divided and confused about the divisibility of the Colorado drug statute. The Third Circuit panel said that the statute was divisible. Pet. App. A6. The Tenth Circuit held that it was indivisible, and that it was plain error to conclude otherwise. *McKibbon*, 878 F.3d at 974-76. A Fifth Circuit panel split on the question, with the majority assuming the statute was indivisible but saying the answer was "unclear," and the dissent finding it "obvious[ly]" indivisible. *United States v. Gomez*, 706 F. App'x 172, 177 (5th Cir. 2017) (unpublished); *id.* at 177 (Graves, J., dissenting). These disparate readings of the same Colorado statute reflect a more fundamental disagreement about how to determine the divisibility of any drug statute.

In contrast to the Third Circuit panel, the Tenth Circuit held in *McKibbon* that the Colorado drug statute was indivisible. Citing this Court's decision in *Mathis*, the Tenth Circuit explained that it was an "easy" case because "a state court decision definitely answers the question." *McKibbon*, 878 F.3d at 974 (quoting *Mathis*, 136 S. Ct. at 2256). In *People v. Abiodun*, 111 P.3d 462, 486 (Colo. 2005), the Colorado Supreme Court had held that § 18-18-405(1)(a) "defines a single offense," and the Tenth Circuit therefore concluded that the statute was "indivisible … setting forth one offense which can be committed by a variety of means." *McKibbon*, 878 F.3d at 974-75. Applying the categorical approach, the Tenth Circuit found that because the statute covered non-bona fide offers to sell drugs, it did not qualify as a "controlled substance offense." *Id.* at 976. The district court had plainly erred by finding otherwise. *Id.*

When the same Colorado statute came before a panel of the Fifth Circuit in *Gomez*, it produced a divided opinion as to its divisibility. There, the defendant argued that the district court had plainly erred by treating his Colorado conviction as a "drug trafficking offense" within the meaning of Sentencing Guideline § 2L1.2(b)(1)(A)(i). *Gomez*, 706 F. App'x at 173. The majority disagreed. While acknowledging *Abiodun*'s holding that the statute defined a "single crime," the majority also noted the later decision in *People v. Valenzuela*, 216 P.3d 588, 592 (Colo. 2009), which described the statute as covering "three distinct categories of actions." *Gomez*, 706 F. App'x at 176. The majority concluded that while "*Valenzuela* did not expressly overrule *Abiodun* … it arguably undermined its holding that [the statute] constitutes a single, indivisible crime," making it "unclear whether the subsections of section (1)(a) of the Colorado statute were elements or means." *Id.* at 177. The dissent, by contrast, said that the statute was "obvious[ly]" indivisible because "*Valenzuela* did not overrule *Abiodun*." *Id.* at 177 (Graves, J., dissenting).

This conflict among the Third, Fifth, and Tenth Circuits as to the divisibility of the Colorado statute reflects a broader disagreement about how to analyze the divisibility of drug statutes in general. Like several states, Colorado has enacted a drug statute that prohibits a broad range of conduct and then varies the punishment based on the type and quantity of drugs involved. *See* Colo. Rev. Stat. Ann. § 18-18-405(2)*; see also*, *e.g.*, Fla. Stat. Ann. § 893.13 (West); 720 Ill. Comp. Stat. Ann. 570/401 (West); Tex. Health & Safety Code Ann. § 481.112 (West). Indeed, 48 states have based their drug laws on the Uniform Controlled Substances Act, which follows this pattern. *See* Uniform Controlled Substances Act 401(a)-(g); *Abiodun*, 111 P.3d at 466 n.3 ("Forty-eight states (including Colorado) have now adopted some version of the Uniform Controlled Substances Act.").

As the Tenth Circuit held in *McKibbon*, courts assessing this kind of drug statute must distinguish between its treatment of the defendant's conduct and its treatment of drug type and quantity. If the statute is indivisible with respect to conduct, then the question of whether it reaches more conduct than the federal definition of a predicate crime should be answered through the ordinary categorical approach. The Ninth Circuit has adopted similar logic, assessing the divisibility of a California drug statute first "with regard to its actus reus requirement" and then "with regard to its controlled substance requirement." *United States v. Martinez-Lopez*, 864 F.3d 1034, 1039-42 (9th Cir. 2017).

In the present case, by contrast, the Third Circuit panel presumed that the divisibility of one element (drug type/quantity) permitted recourse to the record of conviction to identify the means by which a second, indivisible element (the *actus reus* of the offense) was supposedly established. *See* Pet. App. A6-A7 & n.2. The court identified no authority for this innovation.

Because many states have adopted drug statutes similar to Colorado's, the question in this case has nationwide import. Given the significant role prior drug convictions play in both criminal and immigration law, the Court should step in to answer the question and resolve the circuit split about the divisibility of Colorado's drug statute.

II. The Question Presented Has Nationwide Sentencing and Immigration Consequences, and This Case Is a Sound Vehicle for Resolving It.

Although it may seem arcane, the divisibility of Colorado's primary drug statute has grave consequences not only for tens of thousands of people with drug convictions in Colorado, but also for anyone who has ever been convicted of a drug offense. The Third Circuit panel's flawed decision, moreover, presents a ready vehicle for review, because it squarely presents the question and resulted in an illegal sentence above the 2-year statutory maximum.

Colorado is one of the country's largest states. The statute at issue, Colo. Rev. Stat. Ann. § 18-18-405, is its primary prohibition on drug offenses, covering nearly all illegal conduct related to controlled substances. *See Abiodun*, 111 P.3d at 466 (§ 18-18-405 "join[s] in a single proscription an entire range of conduct potentially facilitating or contributing to illicit drug traffic").[1] In 2001 alone, prosecutors filed over 10,000 felony drug charges in Colorado courts, about a quarter of all felony charges in the state. *See* Colorado Judicial Branch Annual Report at 23, 63 (2001), *available at* https://www.courts.state.co.us/userfiles/file/Administration /Planning_and_Analysis/Annual_Statistical_Reports/2001/2001%20annual%20report.pdf. By

[1] A few other Colorado statutes define additional drug offenses, though some of the conduct may be within the scope of § 18-18-405. *See, e.g.*, Colo. Rev. Stat. Ann. § 18-18-411 (property use in relation to drug crimes); Colo. Rev. Stat. Ann. § 18-18-412.5 (possession of nonprescription drugs with intent to manufacture a controlled substance); Colo. Rev. Stat. Ann. § 18-18-412.7 (distribution of materials to manufacture a controlled substance); Colo. Rev. Stat. Ann. § 18-18-415 (fraud or deceit in relation to drugs); Colo. Rev. Stat. Ann. § 18-18-422 (imitation controlled substances); Colo. Rev. Stat. Ann. § 18-18-423 (counterfeit controlled substances); Colo. Rev. Stat. Ann. §§ 18-18-428-430 (drug paraphernalia).

2017, that number climbed to over 15,000 felony drug charges, nearly a third of all felonies. *See* Colorado Judicial Branch Annual Statistical Report at 15, 35 (2017), *available at* https://www.courts.state.co.us/userfiles/file/Administration/Planning_and_Analysis/Annual_Statistical_Reports/2017/FY2017ANNUALREPORT.pdf. The divisibility of the Colorado drug statute, therefore, has significant consequences for the many thousands of people who have been convicted of drug offenses in that state.

The divisibility of the Colorado drug statute has broader import as well. The statute is "a version of the Uniform Controlled Substances Act," which 48 states have now adopted. *Abiodun*, 111 P.3d at 466 & n.3. As a result, many other states' drug statutes follow the same model as Colorado by prohibiting a broad range of drug-related conduct and then varying the penalty depending on the quantity and type of drugs involved. *See, e.g.*, Fla. Stat. Ann. § 893.13 (West); 720 Ill. Comp. Stat. Ann. 570/401 (West); Tex. Health & Safety Code Ann. § 481.112 (West). Under the Third Circuit's theory, all such statutes permit recourse to the modified categorical approach to try to determine the means by which *any* element was established because "the type and amount of drugs can increase the punishment." Pet. App. A6. But on the approach properly directed by this Court's precedents and applied by the Tenth Circuit, resort to the modified categorical approach is not permissible when these statutes' basic *actus reus* element "set[s] forth one offense which can be committed by a variety of means." *McKibbon*, 878 F.3d at 974-75. These conflicting approaches to analyzing prior drug convictions cannot stand.

Drug offenses are of course a significant focus of the criminal justice system, as the Colorado data illustrates. And a drug statute's divisibility frequently determines whether people are subject to significant recidivist penalties or deportation, because it is the first step in deciding

if a prior conviction qualifies as an "aggravated felony," a "controlled substance offense," or another federal predicate. *See, e.g.*, 8 U.S.C. §§ 1101(a)(43)(B) ("aggravated felony" includes "illicit trafficking in a controlled substance … including a drug trafficking crime"); 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony conviction is grounds to deport legal immigrant); 8 U.S.C. § 1326(b)(2) (aggravated felony conviction increases statutory maximum from 2 to 20 years' imprisonment); U.S.S.G. § 4B1.1(a) (multiple "controlled substance offense" convictions trigger federal Sentencing Guidelines' most severe enhancement). It is therefore critical for the Court to resolve the conflict between the Third, Fifth, and Tenth Circuits, and to make clear how to properly determine the divisibility of this kind of criminal statute.

Finally, the Third Circuit's decision presents a sound vehicle for addressing this issue. The panel acknowledged that the Colorado statute's basic conduct element (at least until it was amended to no longer reach simple possession) swept more broadly than a generic drug trafficking offense. *See* Pet. App. A7 n.2 ("one means for violating the statute may not be a 'drug trafficking crime'"). If the panel had properly respected the conduct element's indivisibility, it would have had to conclude that Mr. Ortiz-Uresti's prior conviction did not trigger the increased statutory maximum.[2]

In candor, the defense failed to preserve the challenge in the district court and indeed agreed that the statutory maximum was 20 years due to a qualifying aggravated felony. That lapse was unfortunate, though it also reflects how difficult it can be to reconstruct all of "the realities at play in sentencing proceedings." *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1910 (2018). Thankfully, the question presented remains dispositive of Mr. Ortiz-Uresti's

[2] Mr. Ortiz-Uresti also argued that his Colorado conviction did not qualify as a "felony" triggering a 10-year statutory maximum sentence under § 1326(b)(1). Because the Court of Appeals found that the conviction qualified as an aggravated felony, it did not reach this argument.

appeal, because a defendant cannot waive the right to be sentenced to no greater punishment than authorized by statute. *See United States v. Caruthers*, 458 F.3d 459, 471 (6th Cir. 2006) (collecting cases). In the Third Circuit and others, moreover, a sentence exceeding the statutory maximum is plain error subject to automatic reversal. *See United States v. Lewis*, 660 F.3d 189, 192 (3d Cir. 2011); *accord United States v. Westbrooks*, 858 F.3d 317, 327 (5th Cir. 2017), *vacated on other ground*, 138 S. Ct. 1323 (2018); *United States v. Gibson*, 356 F.3d 761, 766 (7th Cir. 2004); *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002). That rule applies here, as the panel's opinion silently confirms. The divisibility of Colorado's primary drug statute therefore remains outcome determinative in this case, presenting ripe occasion for this Court's resolution of the question presented.

III. The Decision Below is Clearly Incorrect and Evinces the Vocal Opposition to the Categorical Approach that Continues in the Circuits.

The Third Circuit's conclusion that the Colorado drug statute is divisible clearly contradicts this Court's controlling decisions in *Mathis* and *Descamps*. The panel's disagreement with the Tenth Circuit's analysis is particularly remarkable because the Tenth Circuit includes Colorado, and thus considered this question with the benefit of a specialized familiarity with the pertinent body of state law. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 16 (2004) ("Our custom on questions of state law ordinarily is to defer to the interpretation of the Court of Appeals for the Circuit in which the State is located."). Unfortunately, the flawed analysis is symptomatic of an openly stated hostility toward the categorical approach, meriting attention for this additional reason.

In cases like this one, neglect of the categorical approach threatens the constitutional deprivation it was adopted to avoid: punishment exceeding the statutory maximum, in violation of the Sixth Amendment right to have "only a jury, and not a judge, … find facts that increase a

maximum sentence." *Mathis*, 136 S. Ct. at 2252. And as this Court has repeatedly explained, the categorical approach is also essential to fairness in that defendants may have no incentive to dispute non-elemental facts, so that records wind up bearing stray suggestions that do not represent a correct statement of the defendant's actual conduct. *Id.* at 2253; *Descamps*, 570 U.S. at 270-71.

Despite the uncertainties of any aged record, especially in an unfamiliar jurisdiction, some jurists continue to insist that judicial findings based on various sources are so infallible that to limit inquiry to elements (and leave facts to juries) requires going "down the rabbit hole … to a realm where we must close our eyes as judges to what we know as men and women." *United States v. Davis*, 875 F.3d 592, 595 (11th Cir. 2017). That view has adherents on the Third Circuit, where judges have repeatedly expressed "dismay at having to employ the categorical approach," due to its "disregard of the actual facts of a conviction." *Moreno v. Attorney General of U.S.*, 887 F.3d 160, 163 n.3 (3d Cir. 2018). "[W]e must … 'ignore facts already known and proceed with eyes shut,'" the court has stated, "requir[ing] us to undertake an academic thought experiment that bears no relation to the factual premise for the petitioner's underlying conviction." *Id.* (citation omitted). Indeed, the Third Circuit's skepticism is profound enough that it has held the categorical approach not to be commanded by statutory language defining a predicate as an offense having "as an element" the use or threat of force.[3] *See United States v.*

[3] In more colorful language, individual Third Circuit judges have decried the categorical approach and stated their desire to constrain it. "Were I a poet, I would opine that the 'categorical approach' is an albatross hung round my neck. … If the albatross around my neck cannot be slayed, I will at least have the noose around its neck tightened." *United States v. Lewis*, 720 F. App'x 111, 118-20 (3d Cir. 2018) (Roth, J., concurring). "I … write separately to express dismay at … the kudzu quality of the categorical approach, which seems to be always enlarging its territory. … Some work is needed to bring the categorical approach back in line with its original goal." *United States v. Chapman*, 866 F.3d 129, 136-37 (3d Cir. 2017) (Jordan,

Robinson, 844 F.3d 137, 141 (3d Cir. 2016) (uniquely construing 18 U.S.C. § 924(c)(3)(a)'s definition of "crime of violence" supporting mandatory minimum for certain firearm offenses); *see also United States v. Galati*, 844 F.3d 152 (3d Cir. 2016).

Over the past several years, this Court has repeatedly reminded the courts of appeal of their duty to apply the categorical approach correctly and faithfully. *See, e.g.*, *Mathis*, 136 S. Ct. at 2251-52 ("Th[is] simple point became a mantra in our subsequent ACCA decisions. At the risk of repetition (perhaps downright tedium), here are some examples."); *Descamps*, 570 U.S. at 265 ("The Court of Appeals took a different view. Dismissing everything we have said on the subject as 'lack[ing] conclusive weight'…"). Here, opposition to the categorical approach calls for an exercise of jurisdiction to ensure uniform application of established precedent. Indeed, given the nature of the question presented, the Court may wish simply to reverse the judgment of the panel and remand for further proceedings to reaffirm the divisibility analysis set out in *Mathis* and *Descamps*. *See, e.g., Lynch v. Arizona*, 136 S. Ct. 1818, 1819 (2016) (per curiam) (granting, reversing, and remanding where state court's "conclusion conflict[ed] with this Court's precedents [in] … *Simmons* … *Ramdass*, *Shafer*, and *Kelly*"); *Hardy v. Cross*, 565 U.S. 65, 72 (2011) (per curiam) (granting, reversing, and remanding where court of appeals failed to heed "the deferential standard of review set out in 28 U.S.C. § 2254(d)"); *Spears v. United States*, 555 U.S. 261, 264 (2009) (per curiam) (granting, reversing, and remanding so as to reiterate and clarify what "was indeed the point of *Kimbrough*: a recognition of district courts' authority to vary from the crack cocaine Guidelines based on policy disagreement with them"); *Flippo v. West Virginia*, 528 U.S. 11, 12 (1999) (per curiam) (granting, reversing, and remanding where "the rule applied directly conflict[ed] with *Mincey v. Arizona*, 437 U.S. 385 (1978)").

J., concurring); *see also United States v. Oliver*, No. 17-2747, 2018 WL 1547595, at *2 n.3 (3d Cir. Mar. 29, 2018).

CONCLUSION

For the foregoing reasons, Mr. Ortiz-Uresti respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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