No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ALFONSO LOPEZ-RODRIGUEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Mathis v. United States*, 136 S. Ct. 2243 (2016), this Court clarified the divisibility analysis that must be conducted when applying the categorical approach to prior state convictions underlying federal sentencing enhancements. Under *Mathis*, a statute of conviction that lists alternative elements that create multiple crimes is divisible—and thus subject to the modified categorical approach—whereas a statute that lists only multiple means of committing a single defined offense is indivisible. "Elements" are "the things the prosecution must prove to sustain a conviction," whereas "means" are the facts of "[h]ow a given defendant actually perpetrated the crime," which are "extraneous to the crime's legal requirements" and need not be found by a jury. *Id.* at 2248, 2251.

In *Mathis*, this Court held that to distinguish between elements and means in a state statute of conviction, federal sentencing courts should look to "authoritative sources of state law," such as "a state court decision [that] definitively answers the question" of whether a particular statutory alternative must be proven to a jury. *See id.* at 2256. The Court further explained that "the statute on its face may resolve the issue" in three ways. First, the "statutory alternatives [may] carry different punishments" and therefore must be elements under *Apprendi v. New Jerse*y, 530 U.S. 466 (2000). Second, the statute may be drafted to offer "illustrative examples," and are therefore means of committing a crime. And third, the statute "may itself identify which things must be charged (and so are elements) and which need not be (and so are means)."

In the wake of *Mathis*, the federal courts of appeals are divided on what role the text of the statute plays in the divisibility inquiry. Seven circuits—the Second, Fourth, Sixth,

Seventh, Eighth, Ninth, and D.C. Circuits—hew closely to the text-based analysis described in *Mathis* and require a statute's text to resolve the means-versus-elements question with certainty, by looking for unmistakable textual clues. Five circuits, including the Fifth Circuit in this case, have answered the means-versus-elements inquiry by simply reading the text of the statute and often drawing conclusions from the presence of the disjunctive "or." This approach takes its cue from the Court's earlier decision in *Descamps v. United States*, 570 U.S. 254 (2013), where the Court emphasized the disjunctive "or" when describing a hypothetical statute that involved alternative elements. *See* 570 U.S. at 257.

In light of the foregoing, the questions presented are:

I. What role does the text of a statute play in the divisibility analysis under the categorical approach?

II. Is the Texas statute prohibiting the offense of aggravated robbery, Texas Penal Code § 29.03(a), divisible?

PARTIES TO THE PROCEEDINGS

All parties to petitioner's Fifth Circuit proceedings are named in the caption of the case before this Court.

DIRECTLY RELATED PROCEEDINGS

- *United States v. Lopez-Rodriguez*, No. 19-cr-897, U.S. District Court for the Southern District of Texas. Judgment entered February 21, 2020.
- *United States v. Lopez-Rodriguez*, No. 20-40097, U.S. Court of Appeals for the Fifth Circuit. Judgment entered August 18, 2020.
- *United States v. Lopez-Rodriguez*, No. 20-6539, U.S. Supreme Court. Judgment entered July 23, 2021.
- *United States v. Lopez-Rodriguez*, No. 20-40097, U.S. Court of Appeals for the Fifth Circuit. Judgment entered November 24, 2021.

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MISCELLANEOUS

PRAYER

Petitioner Alfonso Lopez-Rodriguez prays that a writ of certiorari be granted to review the judgment entered by the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in Mr. Lopez-Rodriguez's case is attached to this petition as an Appendix. The district court did not issue a written opinion.

JURISDICTION

The Fifth Circuit issued its opinion and judgment on November 24, 2021. *See* Appendix. This petition is filed within 90 days after the entry of judgment. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

8 U.S.C. § 1326. Reentry of removed aliens

(a) In general

Subject to subsection (b), any alien who--

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to any alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

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--

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisonment not more than 10 years, or both;

(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;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence[;] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

* * * *

8 U.S.C. § 1101(a)(43)(F)

The term "aggravated felony" means--

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year;

* * * *

18 U.S.C. § 16

The term "crime of violence" means--

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

* * *

Tex. Penal Code § 29.02(a). Robbery

(a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

* * *

Tex. Penal Code § 29.03. Aggravated Robbery

(a) A person commits an offense if he commits robbery as defined in Section 29.02, and he:

(1) causes serious bodily injury to another;

(2) uses or exhibits a deadly weapon; or

(3) causes bodily injury to another person or threatens or places another person in fear of imminent bodily injury or death, if the other person is:

(A) 65 years of age or older; or

(B) a disabled person.

(b) An offense under this section is a felony of the first degree.

(c) In this section, "disabled person" means an individual with a mental, physical, or developmental disability who is substantially unable to protect himself from harm.

STATEMENT OF THE CASE

I. Statutory framework

A person who is convicted of the crime of illegal reentry, that is, of being found unlawfully present in the United States after a previous deportation, faces up to two years in prison. 8 U.S.C. § 1326(a). The maximum penalty increases to 10 years if the person has a pre-deportation felony conviction. 8 U.S.C. § 1326(b)(1). If the person has a pre-deportation conviction for an "aggravated felony," however, he or she is subject to a maximum term of 20 years in prison. 8 U.S.C. § 1326(b)(2).

The term "aggravated felony" is defined to include, among other things, "a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(F). Section 16 of Title 18, in turn, defines crime of violence as:

> (a) an offense that that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16. Since § 16(b), the "residual clause," is void for vagueness, *see Sessions v. Dimaya*, 138 S. Ct. 1204, 1213-15 (2018), that leaves only § 16(a), the "force clause," for analyzing whether a prior conviction qualifies as a "crime of violence" and thus an "aggravated felony."

Like § 16, the Armed Career Criminal Act ("ACCA") has a force clause. *See* 18

U.S.C. § 924(e)(1)(B)(i). Under ACCA, a person who commits the offense of unlawful possession of a firearm or ammunition after three convictions for a "violent felony" faces a mandatory minimum sentence of 15 years in prison. 18 U.S.C. § 924(e)(1). ACCA defines "violent felony" to include (in relevant part) "any crime punishable by imprisonment for a term exceeding one year . . . that—(i) has as an element the use, attempted use, or threatened use of physical force against the person of another." § 924(e)(1)(B)(i). The only difference between the two force clauses is that § 16 encompasses force against another person as well as property, while ACCA covers force against another person only. Because the force clauses are nearly identical, courts typically treat the two clauses as interchangeable. *See, e.g.*, *United States v. Ramos*, 744 Fed. Appx. 215, 217 (5th Cir. 2018) (unpublished); *United States v. Holston*, 471 Fed. Appx. 308, 308 (5th Cir. 2012) (unpublished).

Interpreting the applicability of these force clauses requires courts to employ the categorical approach. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990). Under that approach, courts must look to the elements of the "statute of conviction, rather than to the specific facts underlying the crime." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1568 (2017) (citation omitted). "Distinguishing between elements and facts is therefore central . . . ." *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). Elements are "the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction." *Id.* (quoting Black's Law Dictionary 634 (10th ed. 2014)). "[A]t a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.* Means, by contrast, are the facts of "[h]ow a given defendant actually perpetrated the crime" and

are "extraneous to the crime's legal requirements" and need not be found by a jury. *Id.* at 2248, 2251. Statutes that list alternative elements that create multiple crimes are divisible—and thus subject to the modified categorical approach. *See id.* at 2246. If the statute's alternatives are means, however, the modified categorical approach has no role to play, and courts must decide whether the least of the acts sufficient to meet the statute's elements satisfies the force clause. *See Esquivel-Quintana*, 137 S. Ct. at 1568.

II. Factual background

On October 1, 2019, Petitioner Alfonso Lopez-Rodriguez was charged by indictment with being found in the United States without the consent of the Attorney General or Secretary of the Department of Homeland Security after previously having been deported following an aggravated felony conviction, in violation of 8 U.S.C. § 1326(a) and (b)(2). On November 13, 2019, he pleaded guilty to the indictment. At the rearraignment, the prosecutor proffered the following factual basis:

> On September 5th of 2019, the Defendant, Alfonso Lopez-Rodriguez was found in the United States in Cameron County, Texas by Border Patrol Agents. It was determined that he was an alien and citizen of Mexico who had entered the United States illegally. The Defendant had been previously deported or removed from the United States on April 20th of 2017, after having been convicted of the aggravated felony of aggravated robbery on March 20, 2012. The Defendant had not received consent from the Attorney General or Secretary of Homeland Security to reapply for admission in the United States when found.

The district court held a sentencing hearing on February 5, 2020, and sentenced Mr. Lopez-Rodriguez to 57 months in the custody of the Bureau of Prisons, with no supervised release to follow. The written judgment entered by the district court on February

21, 2020, states that Mr. Lopez-Rodriguez was convicted under "8 U.S.C. §§ 1326(a) and (b)(2)."

Mr. Lopez-Rodriguez filed a timely notice of appeal on February 21, 2020. On appeal, he argued that the district court committed reversible plain error when it convicted, sentenced, and entered judgment against him under 8 U.S.C. § 1326(b)(2), because a conviction for Texas aggravated robbery does not qualify as an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43). Mr. Lopez-Rodriguez argued that Texas aggravated robbery is not a "crime of violence"-type of "aggravated felony" because a conviction for that offense can be sustained based on a *mens rea* of recklessness. And, although the Fifth Circuit had held in *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017), that the Texas aggravated robbery statute was divisible, no documents in the record permitted the narrowing of his conviction to eliminate the recklessness form of Texas aggravated robbery. The Fifth Circuit granted the government's unopposed motion for summary affirmance, agreeing that the only issue on appeal was foreclosed by circuit precedent. *United States v. Lopez-Rodriguez*, 817 Fed. Appx. 18, 19 (5th Cir. 2020) (unpublished).

Mr. Lopez-Rodriguez timely filed a petition for a writ of certiorari. On June 21, 2021, this Court granted that petition, vacated the Fifth Circuit's judgment, and remanded the case to the Fifth Circuit for further consideration in light of *Borden v. United States*, 141 S. Ct. 1817 (2021). This Court's judgment issued on June 23, 2021.

The Fifth Circuit ordered the parties to file supplemental letter briefs on the effect of *Borden*. Mr. Lopez-Rodriguez filed his supplemental letter brief on September 17, 2021,

and argued that the Court should vacate the district court's judgment and remand for entry of an amended judgment to reflect a conviction under 8 U.S.C. § 1326(b)(1), because the record did not establish that Mr. Lopez-Rodriguez had a pre-deportation conviction for an "aggravated felony" under *Borden*. On September 24, 2021, the government filed its supplemental letter brief, as well as an opposed motion to supplement the record on appeal with a copy of the state court indictment from Mr. Lopez-Rodriguez's prior Texas aggravated robbery conviction. The government argued in its letter brief that the record, if supplemented, would show that Mr. Lopez-Rodriguez did have a "aggravated felony" even after *Borden*. The government pointed to the Fifth Circuit's divisilibity decision in *Lerma*, and argued that the indictment that the government had requested be added to the record on appeal showed that Mr. Lopez-Rodriguez's conviction was for aggravated robbery under Tex. Penal Code § 29.03(a)(2), predicated on robbery under Tex. Penal Code § 29.02(a)(2), which did not include a *mens rea* of recklessness.

On October 15, 2021, the Fifth Circuit granted the government's opposed motion to supplement the record on appeal. On November 24, 2021, the Fifth Circuit relied on the record as supplemented and its prior holding in *Lerma* that the Texas aggravated robbery statute is divisible to reinstate its previous judgment and thus affirm the district court's judgment. *See* Appendix, slip op. at 4-8.

Mr. Lopez-Rodriguez now seeks to have this Court resolve an important question of federal law on which the lower courts have intractably divided.

BASIS OF FEDERAL JURISDICTION IN THE UNITED STATES DISTRICT COURT

The district court had jurisdiction pursuant to 8 U.S.C. § 1329 and 18 U.S.C. § 3231.

REASONS FOR GRANTING THE PETITION

This Court's intervention is necessary to resolve the division among the circuits, after *Descamps* and *Mathis*, over what role the text of a statute plays in the divisibility inquiry of the categorical approach.

In *Mathis v. United States*, 136 S. Ct. 2243 (2016), the Court provided guidance for lower courts about how to conduct the divisibility analysis of the categorical approach. *Id.* at 2256-57; *see also Descamps v. United States*, 570 U.S. 254, 260-66 (2013). *Mathis* clearly holds that in order for a statue to be divisible, it must set forth alternative "elements," and that elements are "the things the prosecution must prove to sustain a conviction." *Mathis*, 136 S. Ct. at 2248. *Mathis* emphasizes the primary role of state law in making the means-or-elements determination. When "a state court decision definitively answers the question" by making clear that "a jury need not agree" on the particular way an offense is committed, then "a [federal] sentencing judge need only follow what it says." *Id.* at 2256.

But *Mathis* further specified that the text of the statute may play a secondary role in the divisibility inquiry, in the absence of a dispositive state case on jury unanimity. *Mathis* offered three ways that "the statute on its face may resolve the issue." *Id.* First, the "statutory alternatives [may] carry different punishments" and therefore must be elements under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). *Mathis*, 136 S. Ct. at 2256. Second, the statute may be drafted to offer "illustrative examples," which demonstrates that the alternatives are means of committing a single crime. *Id.* And third, the statute "may itself identify which things must be charged (and so are elements) and which need not be (and

so are means)." *Id.*

A. Seven circuits have construed *Mathis* to require a statute's text to answer the means-versus-elements question with certainty.

Seven circuits have interpreted *Mathis*'s text-based analysis as requiring that the statute's text definitively resolve the means-or-elements question. A good illustration of the *Mathis* approach comes from the Eighth Circuit's *en banc* decision in *United States v. Naylor*, 887 F.3d 397 (8th Cir. 2018) (*en banc*). Before the court was Missouri's second-degree burglary statute, which defined that offense to mean a person who "knowingly enters unlawfully or knowingly remains unlawfully *in a building or inhabitable structure* for the purpose of committing a crime therein." *Naylor*, 887 F.3d at 400 (quoting Mo. Rev. Stat. § 569.170) (emphasis added). The court had to decide whether "building" and "inhabitable structure" were means or elements.

A panel of the Eighth Circuit previously found that these alternatives were elements. *See United States v. Sykes*, 844 F.3d 712 (8th Cir. 2016), *cert. granted, judgment vacated*, 138 S. Ct. 1544 (2018), and *overruled by Naylor*, 887 F.3d 397. In doing so, the panel relied solely on the presence of the disjunctive "or" between "building" and "inhabitable structure." *See Sykes*, 844 F.3d at 715.

But the *en banc* court disagreed with the panel's approach, finding that the text "does little to guide our means-elements inquiry" for two reasons. *Naylor*, 887 F.3d at 401. First, the statute assigned the same punishment to both acts. *Id.* Second, the statute did "not identify which things must be charged and which things need not be." *Id.* As the concurring opinion explained: "The statutory text is unenlightening; by listing the terms in the

alternative, the text merely raises the question whether the alternatives are means or elements." *Id.* at 407 (Colloton, J., concurring in the judgment, joined by Wollman and Gruender, JJ.).

Another example of the *Mathis* approach comes from the Fourth Circuit. In *United States v. Jackson*, 713 Fed. Appx. 172 (4th Cir. 2017) (unpublished), the Fourth Circuit explained that "'mere use of the disjunctive "or" in the definition of a crime does not automatically render it divisible.'" 713 Fed. Appx. at 175 (quoting *Omargharib v. Holder*, 775 F.3d 192, 194 (4th Cir. 2014)). "Rather," the court continued, "only when the law requires that in order to convict the defendant the jury must unanimously agree that he committed a particular substantive offense contained within the disjunctively worded statute are we able to conclude that the statute contains alternative *elements* and not alternative *means*." *Jackson*, 713 Fed. Appx. at 175 (quoting *United States v. Fuertes*, 805 F.3d 485, 498 (4th Cir. 2015)) (emphasis in original).

Five other circuits—the Second, Sixth, Seventh, Ninth, and D.C. Circuits—have adopted the *Mathis* approach. The Second Circuit in *Harbin v. Sessions*, 860 F.3d 58 (2d Cir. 2017), found that the text of a New York statute prohibiting the unlawful sale of a controlled substance suggested that the legislature had created a single crime because (1) the text provided "no indication that the sale of each substance is a distinct offense"; (2) "the text does not suggest that a jury must agree on the particular substance sold"; and (3) the statute "prescribe[s] the same narrow range of penalties . . . no matter which controlled substance a defendant has sold." *Harbin*, 860 F.3d at 65.

In *Richardson v. United States*, 890 F.3d 616 (6th Cir. 2018), the Sixth Circuit

determined that the text of Georgia's burglary statute "provides no help" because (1) the text did not assign different punishments to the statutory alternatives and (2) the statute did not provide a non-exhaustive list of "illustrative examples." *Id.* at 622-23.

Likewise, the Seventh Circuit in *United States v. Edwards*, 836 F.3d 831 (7th Cir. 2016), focused on the examples from *Mathis*. The court found that the text of the Wisconsin burglary statute suggested that the subsections were "merely 'illustrative examples' of particular location types" and therefore means. *Edwards*, 836 F.3d at 937. That the alternatives all carried the same punishment buttressed the court's conclusion. *Id.* In another opinion, the Seventh Circuit described the text-based analysis under *Mathis* as a search for "unmistakable signals in the statute itself." *United States v. Franklin*, 895 F.3d 954, 959 (7th Cir. 2018).

The Ninth Circuit has also adopted the *Mathis* approach. *See United States v. Robinson*, 869 F.3d 933, 939 (9th Cir. 2017) (finding that, under *Mathis*, nothing in the text of the Washington second-degree assault statute clarifies whether the alternatives are means or elements because the statute does not specify what must be charged and what need not be charged, does not mention any jury unanimity requirements, and does not set different punishments for the alternatives); *see also United States v. Arraiga-Pinon*, 852 F.3d 1195, 1203 (9th Cir. 2017) (Thomas, C.J., concurring) (explaining that the text of the California statute "is not a clearly elemental statute, as described in *Mathis*," because it does not provide different punishments for different alternatives and does not explicitly establish that the alternatives are elements).

Finally, the D.C. Circuit has embraced the *Mathis* approach as well. *See United*

States v. Sheffield, 832 F.3d 296, 315 (D.C. Cir. 2016) ("Nothing in the statutory text or case law requires a jury, in convicting a defendant of attempted robbery, to first find that the defendant committed one of multiple alternative elements, one of which is a crime of violence under the elements clause."); *see also United States v. Redrick*, 841 F.3d 478, 482-83 (D.C. Cir. 2016) (holding that Maryland armed robbery is a separate crime from simple robbery because the statute assigns a greater penalty for robbery with a dangerous or deadly weapon than for simple robbery).

In sum, seven circuits have read *Mathis* to require that a statute's text resolve the means-versus-elements question with certainty, by looking in large part to the specific examples that *Mathis* itself provided.

B. Other circuits, taking their cue from *Descamps*, decide the means-versus elements question by simply reading the text of the statute and often drawing conclusions from the presence of the disjunctive "or."

By contrast to the *Mathis* approach of seven circuits, five circuits resolve the means-versus-elements question by simply reading the text of the statute and often drawing conclusions from the presence of the disjunctive "or." For example, the Fifth Circuit in *United States v. Lerma*, 877 F.3d 628 (5th Cir. 2017), which was applied in petitioner's case, did not examine the Texas aggravated robbery statute for "unmistakable signals"[1] that the statutory alternatives were means or elements, such as the establishment of different punishments, the creation of a list of illustrative examples, or the designation of things that must or need not be charged. Rather, the Fifth Circuit reproduced the text of the

[1] *Franklin*, 895 F.3d at 959.

statute, emphasized the words "and" and "or," and made a chart dividing the statute into four crimes. *See Lerma*, 877 F.3d at 633-34 & 636-37. In another example, the Fifth Circuit primarily resolved the divisibility question by looking at the text of Texas simple robbery statute and holding that the statute created two distinct crimes because the "pertinent portion of the statute is divided into two separate, numbered subdivisions separated by a semicolon." *United States v. Garrett*, ___ F.4th ___, No. 17-10516, 2022 WL 214472 (5th Cir. Jan. 25, 2022).

The First, Third, Tenth, and Eleventh Circuits have taken a similar approach to the role of text in the divisibility inquiry. In *United States v. Tavares*, 943 F.3d 1 (1st Cir. 2016), the First Circuit reproduced the text of the Massachusetts resisting-arrest statute and concluded that the offense "reads as a divisible statute" that defines multiple crimes. *Tavares*, 943 F.3d at 14. The Third Circuit in *United States v. Ramos*, 892 F.3d 599 (3d Cir. 2018), determined that the Pennsylvania second-degree aggravated assault statute was divisible into four offenses because the statute used "disjunctive language." *Ramos*, 892 F.3d at 609. Likewise, the Tenth Circuit in *United States v. Taylor*, 843 F.3d 1215 (10th Cir. 2016), reaffirmed that court's pre-*Mathis* decision in *United States v. Mitchell*, 653 Fed. Appx. 639 (10th Cir. 2016) (unpublished), which held that the alternatives of an Oklahoma statute were elements based solely on the statute's use of the word "or." *Taylor*, 843 F.3d at 1222 (emphasizing the word "or" between the alternatives); *Mitchell*, 653 Fed. Appx. at 643 (same).

Lastly, the Eleventh Circuit's decision in *United States v. Gundy*, 842 F.3d 1156

(11th Cir. 2016), which the Sixth Circuit expressly rejected in *Richardson*,[2] takes a similar view of a federal court's role in examining a state statute's text for divisibility purposes. The Eleventh Circuit began by recommitting to its pre-*Mathis* statement in *United States v. Howard*, 742 F.3d 1334, 1346 (11th Cir. 2014), that "sentencing courts should usually be able to determine whether a statute is divisible by simply reading its text." *Gundy*, 842 F.3d at 1166 (brackets and ellipsis omitted). Then, relying on the statute's "plain text," the court concluded that the Georgia burglary statute contained elements because the alternatives were "stated in the alternative and in the disjunctive." *Id.* at 1167.

Because of this division among the circuits on this important question, the Court's intervention is necessary. In addition, the Court's intervention is necessary to resolve the tension between the Court's decisions in *Descamps* and *Mathis*. As the Sixth and Eleventh Circuits have recognized, some support for relying on disjunctive phrasing when conducting the divisibility inquiry can be found in the Court's decision in *Descamps*. *See Richardson*, 890 F.3d at 623 (quoting *Descamps*, 570 U.S. at 257); *Gundy*, 842 F.3d at 1167 (same). When explaining how the modified categorical approach can be used when a statute is divisible into elements, the Court in *Descamps* gave as an example a burglary statute that "involves entry into a building *or* an automobile. *Descamps*, 570 U.S. at 257 (emphasis in original). The Court emphasized the presence of the disjunctive "or," as did the Fifth Circuit in *Lerma*.

But in *Mathis*, the Court engaged in a more sophisticated analysis, disregarding the

[2] *Richardson*, 890 F.3d at 623.

presence of the word "or" and focusing instead on state law. *See Mathis*, 136 S. Ct. at 2250. The Court in *Mathis* acknowledged the role the text of a statute can play in the divisibility inquiry, but suggested a stricter approach to the text than the Court had previously indicated in *Descamps*, by setting forth three ways in which a statute's text on its face would resolve the means-versus-elements inquiry with certainty. *See Mathis*, 136 S. Ct. at 2256 (a statute could assign different punishments to different alternatives, a statute could offer illustrative examples, or a statute could identify what must be charged or need not be charged). The Court's guidance is needed to determine whether the *Mathis* approach or the *Descamps* approach is the proper method for analyzing a statute's text when conducting the divisibility inquiry under the categorical approach.

C. The Fifth Circuit's analytical method is flawed.

In *Lerma*, the Fifth Circuit concluded that the Texas aggravated robbery statute creates four crimes. *See Lerma*, 877 F.3d at 633-34. The court reached that conclusion "[b]ased on the language of the statute." *Id.* at 634. For example, the court found that "[o]n the face of the statute, the alternatives of 'using' a deadly weapon or 'exhibiting' a deadly weapon cannot be means because they are not listed as ways of satisfying a single element." *Id.* at 633.

Only after concluding that its own reading of the statute indicated that the alternatives were divisible as elements did the court turn to state law. And the court concluded that the state case law relied on by the defendant did not overcome the court's text-based conclusion. *See id.* at 634. The best example of this reasoning is the court's treatment of *Woodard v. State*, 294 S.W.3d 605 (Tex. App.—Houston [1st Dist.] 2009, pet.

ref'd), as "not helpful." *Lerma*, 877 F.3d at 634 n.4. The state court in *Woodard* held that jury "unanimity as to the aggravating factors was not required, and the jury could convict appellant of aggravated robbery if each juror concluded that at least one of the aggravating factors of [Tex. Penal Code §] 29.03 was proved." 294 S.W.3d at 609. But the Fifth Circuit rejected the significance of that state court case, citing as its sole authority the court's own chart dividing the statutory alternatives into four crimes. *See Lerma*, 877 F.3d at 634 n.5.

There are at least two problems with the Fifth Circuit's analysis. First, it elevates the federal court's own reading of the text of the state statute over state court law. The Fifth Circuit did not consider, from the perspective of the state court, how that court would go about answering the means-versus-elements question. Instead, the Fifth Circuit relied exclusively on its own judgment about a state statute based on the plain language of the text. This violates principles of federalism, which require federal courts to defer to state court decisions of state law. *See, e.g.*, *Curtis Johnson v. United States*, 559 U.S. 133, 138 (2010) (federal courts are "bound by" state court interpretations of state law, including the state court's determination of the elements of a state statute). The *Mathis*-based approach of the Second, Fourth, Sixth, Seventh, Eighth, Ninth, and D.C. Circuits provides the proper deference to state courts on matters of state law. *See Schad v. Arizona*, 501 U.S. 624, 636 (1991) (plurality op.) (federal courts "are not free to substitute [their] own interpretations of state statutes for those of a State's courts") ; *see also id.* at 638 ("States must be permitted a degree of flexibility in defining" the elements of a crime).

Second, the Fifth Circuit's decision inappropriately shifts the burden to the defendant when the government is the party that bears the burden to meet the categorical

approach's "demand for certainty." *Mathis*, 136 S. Ct. at 2257. Under the *Descamps*-based approach, the government can satisfy its burden by simply pointing to the disjunctive phrasing of the statute's text, *see, e.g.*, *Lerma*, 877 F.3d at 633-34, despite the fact that disjunctively phrased statutes have been found to be indivisible, *see, e.g.*, *Mathis*, 136 S. Ct. at 2249-50. Defendants then bear the burden to overcome that text-based conclusion. *See Lerma*, 877 F.3d at 633-34; *see also Garrett*, slip op. at 8-9 (adhering to the initial text-based conclusion that the statute was divisible despite mixed state case law on the question). The *Mathis* approach avoids this pitfall. By requiring the government to point to "unmistakable signals"[3] in the statutory text, the *Mathis* approach correctly places the burden on the government to answer the means-versus-elements question with certainty.

Applying the *Mathis* approach to this case, nothing about the text of the Texas aggravated robbery statute resolves the means-versus-elements inquiry with the requisite certainty. All of the alternatives carry the same punishment. *See* Tex. Penal Code § 29.02(b) ("An offense under this section is a felony of the first degree."). The statute does not provide a list of illustrative examples by using an umbrella term or creating a non-exhaustive list. *See Mathis*, 136 S. Ct. at 2256 (citing *United States v. Howard*, 742 F.3d 1334, 1348 (11th Cir. 2014), and *United States v. Cabrera-Umanzor*, 728 F.3d 347, 353 (4th Cir. 2013)). And the statute itself does not specify which things must be charged or need not be charged. *Mathis*, 136 S. Ct. at 2256.

[3] *Franklin*, 895 F.3d at 959.

D. The divisibility question presented in this petition is important to federal sentencing law with significant consequences for defendants.

Years of imprisonment turn on the correct answer to the divisibility question presented by this case. The Fifth Circuit's holding in *Lerma* has the effect of dramatically increasing the sentences for criminal defendants under the Armed Career Criminal Act. Without the ACCA enhancement, a defendant's punishment exposure for the offense of felon in possession of a firearm is a maximum of 10 years in prison. *See* 18 U.S.C. §§ 922(g)(1) & 924(a)(2). But with the ACCA enhancement, the defendant faces a mandatory minimum sentence of 15 years, with a maximum term of life in prison. *See* 18 U.S.C. § 924(e)(1).

In addition, the divisibility analysis carries severe immigration consequences. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (rendering an alien deportable for committing a an aggravated felony, including a crime of violence); *id.* § 1229b(a)(3) (rendering an alien ineligible for cancellation of removal). Indeed, "a conviction under [8 U.S.C.] § 1326(b)(2)—involving a prior conviction of an aggravated felony—is itself an aggravated felony, 'rendering [the defendant] permanently inadmissible to the United States.'" *United States v. Ovalle-Garcia*, 868 F.3d 313, 314 (5th Cir. 2017) (quoting *United States v. Briceno*, 681 Fed. Appx. 334, 337 (5th Cir. 2017) (unpublished)) (brackets added in *Ovalle-Garcia*). Given the high stakes and harsh consequences, the divisibility question raised by this petition is of great importance and worthy of the Court's consideration.

CONCLUSION

The petition for a writ of certiorari should be granted.

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Respectfully submitted,

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