No. 15-6092

IN THE

Supreme Court of the United States

RICHARD MATHIS,

Petitioner,

v.

UNITED STATES,

Respondent.

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

BRIEF OF THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus Curiae the National Association of Federal Defenders ("NAFD"), formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. Each year, federal defenders represent tens of thousands of individuals in federal court, including thousands who are facing or serving sentences under the Armed Career Criminal Act and other sentencing enhancement provisions. *Amicus* NAFD therefore have both particular expertise and interest in the subject matter of this litigation.

Amicus Curiae the National Association of Criminal Defense Lawyers ("NACDL"), was founded in 1958, NACDL's approximately 9,000 direct members in 28 countries - and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys - include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. In keeping with this commitment, NACDL files numerous *amicus* briefs with this Court and did

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from amici curiae, their members, and counsel, made any monetary contribution towards the preparation and submission of this brief. Pursuant to Rule 37.2(a), petitioner Mathis and the United States received timely notice of, and consented to, amici curiae's filing of this brief. Their consent letters have been filed with this brief.

so in the related cases of *Taylor* v. *United States*, 495 U.S. 575 (1990); *Shepard* v. *United States*, 544 U.S. 13 (2005); and *Descamps* v. *United States*, 133 S. Ct. 2276 (2013). By offering its perspective, NACDL seeks to assist in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

INTRODUCTION

In his brief, petitioner Richard Mathis shows that the Eighth Circuit erred in permitting the district court to consult the record from his prior Iowa burglary convictions to determine whether those convictions triggered a 15-year mandatory minimum under the Armed Career Criminal Act (ACCA). *Amici curiae* agree with Mr. Mathis that this Court's decision in *Descamps* v. *United States*, 133 S. Ct. 2276 (2013), prohibits such an inquiry. As petitioner's brief correctly explains, courts should apply the "modified categorical approach" only where a jury would have to unanimously decide between two or more alternatives in a statute such that those alternatives constitute "elements" of the offense, rather than a "means" of commission. As such, *amici* do not repeat those arguments here.

Amici write separately, however, to suggest the methodology that sentencing courts should use to determine whether a particular statutory alternative constitutes a "means" or an "element." Under this methodology, courts should presume a statute is "indivisible" unless the law of the convicting jurisdiction clearly requires a jury to unanimously decide between multiple statutory alternatives. While courts may look to the documents specified in *Shepard* v. *United States*, 544 U.S. 13, 16 (2005)—*i.e.,* the indictment, jury instructions, plea colloquy, and

plea agreement—to identify a defendant's crime of conviction once the statute is deemed divisible, courts should *not* consult these "*Shepard* documents" to make the threshold determination of whether a statutory alternative represents a means or an element. As the real-world examples in this brief demonstrate, many *Shepard* documents do not accurately distinguish a statute's elements from its means. Thus, unless relevant law shows that a statute defines multiple crimes, courts must abide by the presumption of indivisibility and hold that a defendant has not been "convicted of" a generic federal offense.

ARGUMENT

I. *SHEPARD* DOCUMENTS ARE NOT RELIABLE INDICATORS OF WHETHER A PARTICULAR STATUTORY ALTERNATIVE IS A "MEANS" OR AN "ELEMENT."

Amici urge the Court to correct the misperception among some lower courts that *Descamps* established a blanket rule permitting sentencing courts to rely on *Shepard* documents to ascertain statutory divisibility. In *Descamps,* this Court unequivocally rejected a lower court's attempt to substitute "a facts-based inquiry for an elements-based one," holding that the modified categorical approach does not apply to crimes that contain a "single, indivisible set of elements." 133 S. Ct. at 2282, 2293. In a brief footnote, the majority hypothesized that "[w]hatever a statute lists (whether elements or means), the documents we approved in *Taylor* [v. *United States*, 495 U.S. 575 (1990)] and *Shepard* . . . would reflect the crime's elements." *Descamps*, 133 S. Ct. at 2285 n.2.

Since *Descamps*, some courts of appeals have relied on this passing observation to broadly assume that *Shepard* documents will *always* reflect a crime's elements—regardless of whether a particular jurisdiction's rules of procedure and practice support that assumption. See, *e.g., Almanza-Arenas* v. *Lynch*, 809 F.3d 515, 524 (9th Cir. 2015) (en banc) (relying on "an examination of the *Shepard* documents" to determine whether a statute is indivisible); *Franco-Casasola* v. *Holder*, 773 F.3d 33, 40 (5th Cir. 2014) (upholding the means/elements distinction but stating that "reliance solely on the indictment will allow identification of the statutory elements that apply to the offense"); *United States* v. *Trent*, 767 F.3d 1046, 1060 (10th Cir. 2014) *cert. denied* (U.S. Feb. 23, 2015) (No. 14-7762) (concluding that a statute is divisible "when only one alternative appears in the charging document or plea agreement"). By doing so, these courts risk turning *Descamps*' core holding upside down by incorrectly presuming that factual allegations contained in a charging document represent a crime's elements, rather than one or more of its alternative means of commission.

In *amici*'s experience, many state[2] criminal justice systems have little to no awareness of the *Taylor* categorical approach and are ill-equipped to produce a record of conviction that accurately distinguishes a

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[2] Although state convictions comprise the majority of predicate offenses, sentencing courts also rely on prior federal crimes to impose a sentencing enhancement. Because the jurisdiction in which the offense arose would not affect the proposed methodology discussed here, *amici* assumes in this brief, for ease of reference, that the potential predicate is a state crime.

crime's elements from its means. From the filing of an initial charging document, to the modification of these allegations during criminal proceedings, to the entry of a guilty plea or the completion of a jury trial, the *Shepard* documents are often incomplete and untrustworthy indicators of whether statutory alternatives represent elements or means.

A. State Law And Rules Of Criminal Procedure Do Not Require *Shepard* Documents To Reflect A Crime's Elements.

The problems with state court documents begin with the initial charging document. In many states, the criminal code or applicable rule of criminal procedure permits prosecutors to allege in a single count of an indictment, information, or complaint "alternative theories of committing the offense." Minn. R. Crim. P. 17.02(3).[3] Such rules and statutes

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[3] *See also* Ala. Code § 15-8-50 ("When an offense may be committed by different means or with different intents, such means or intents may be alleged in an indictment in the same count in the alternative."); Fla. R. Crim. P. 3.140(5) ("For an offense that may be committed by doing 1 or more of several acts, or by 1 or more of several means, or with 1 or more of several intents or results, it is permissible to allege in the disjunctive or alternative such acts, means, intents, or results."); Ky. R. Crim. P. 6.10(3) ("It may be alleged in any count . . . that the defendant committed [the offense] by one or more specified means."); Mass. Gen. Laws Ann. ch. 277, § 31 ("Different means or different intents by or with which a crime may be committed may be alleged in the same count in the alternative."); Nev. Rev. Stat. § 173.075(2) ("It may be alleged in a single count that . . . the defendant committed [the offense] by one or more specified means."); Ohio R. Crim. P. 7(B) ("It may be alleged in a single count . . . that the defendant committed [the offense] by one or more specified means."); Okla. Stat. Ann. tit. § 22-404 ("[W]here the offense may be committed by the use of different means, the

give prosecutors an incentive to capture the defendant's conduct by drafting allegations as broadly as possible—rather than narrowing the allegations to pinpoint the elements of the crime.

These broad charging documents present two discrete concerns. First, they frequently include boilerplate statutory recitations that list multiple, alternative means of committing an offense, which a later sentencing court could mistake for the elements of the offense. In Colorado, for instance, an indictment may "state[] the offense in the terms and language of the statute defining it, including either conjunctive or disjunctive clauses . . . . [and] shall place a defendant on notice that the prosecution *may rely on any or all of the alternatives alleged*." Colo. Rev. Stat. Ann. § 16-5-201 (emphasis added).[4]

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means may be alleged in the alternative in the same count."); R.I. Super. R. Crim. P. 7(c) ("It may be alleged in a single count that . . . the defendant committed the offense . . . by one or more specified means."); Tenn. Code Ann. § 40-13-206(a) ("When the offense may be committed by different forms, by different means or with different intents, the forms, means or intents may be alleged in the same count in the alternative."); W. Va. R. Crim. P. 7(c)(1) ("It may be alleged in a single count that . . . the defendant committed [the offense] by one or more specified means."); Wyo. R. Crim. P. 3(b)(1) ("It may be alleged in a single count that . . . the defendant committed [the offense] by one or more specified means.").

[4] *See also State* v. *Laundy,* 103 Or. 443, 465-66 (Or. 1922) ("The indictment must charge but one crime, and in one form only; except that where the crime may be committed by the use of different means the indictment may allege the means in the alternative.") (citation omitted); *State* v. *Grimsley,* 721 N.E.2d 488, 490 (Ohio Ct. App. 1998) (holding that although a count for aggravated robbery contained multiple alternatives, the indictment was sufficient because it "tracks the language of the statute precisely"); *State* v. *Roque*, 569 P.2d 417, 419 (N.M. Ct. App. 1977) ("[T]here is no duplicity because all that is charged is

Second, many common law offenses are charged using boilerplate terms that allege a patently incorrect version of the facts. For instance, Massachusetts permits prosecutors to charge assault and battery using only the language: "[the defendant] did assault and beat [the victim]"—even though the crime may be committed by an offensive or reckless battery that did not involve "beat[ing]" or anything resembling it. *United States* v. *Holloway,* 630 F.3d 252, 260 (1st Cir. 2011). See also *Commonwealth* v. *Welansky*, 55 N.E.2d 902, 908 (Mass. 1944) (finding no deficiency in an indictment that alleged a nightclub owner "did assault and beat" the victims who died as a result of the owner's failure to maintain safe conditions in the club); *United States* v. *Kirksey*, 138 F.3d 120, 122, 125 (4th Cir. 1998) (acknowledging that the term "beat" in a charging document represents the "common law verb for a battery" and can be used to describe offensive touchings, such as throwing water on another or "kissing without consent") (citation omitted). Yet a federal sentencing court confronted with the language "assault and beat" in a *Shepard* document

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that the one robbery was committed in two ways[:] robbery without specification of the means and robbery by firearm. That is not duplicity. Rather, it is alternative pleading.") (citation omitted); *Vest* v. *State*, 930 N.E.2d 1221, 1226 (Ind. Ct. App. 2010) ("[W]here, as here, a criminal statute enumerates several acts disjunctively, and provides the same punishment for doing any one or all of said acts, then two or more of said acts may be charged conjunctively in a single count without objection for duplicity.") (quotations and citation omitted); *Hall* v. *State*, 261 So. 2d 521, 522 (Fla. Dist. Ct. App. 1972) ("For an offense which may be committed by the doing of one or more of several acts, or by one or more of several means, or with one or more of several intents or results, it is permissible to allege in the disjunctive or alternative such two or more acts, means, intents or results.") (citation omitted).

would have no way of knowing that it represented the state's standard charging language, rather than alternative elements of the offense.

Exceptions also exist to the general principle underlying *Descamps*' footnote 2—that "[o]ne offence only may be stated in a single indictment or count;" and if more than one offense is charged, "the indictment is bad for duplicity." Black's Law Dictionary (10th ed. 2014) (quoting Joseph Henry Beale, *A Treatise on Criminal Pleading and Practice* 103–04 (1899)). For instance, some states permit prosecutors to charge multiple crimes in the same count if they constitute a "continuing offense." See *State* v. *Lomagro*, 335 N.W.2d 583, 587 (Wis. 1983) ("If the defendant's actions in committing the separate offenses may properly be viewed as one continuing offense, it is within the state's discretion to elect whether to charge one continuous offense or a single offense or series of single offenses.") (quotations and citation omitted).[5] And even where a

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[5] *See also Vest*, 930 N.E.2d at 1226 ("[A] count or charge is not duplicitous when it alleges two or more acts committed in a single transaction even if each of the acts constitutes a separate and complete offense by itself.") (quotations and citation omitted); *State* v. *Didier*, 254 So. 2d 262, 265 (La. 1971) ("A count in an indictment is not duplicitous because, in stating the elements of the offense charged or describing how it was committed, it alleges criminal acts which would separately constitute another offense or other offenses.") (quotations and citation omitted); *Cooksey* v. *State*, 752 A.2d 606, 612 (Md. 2000) ("The other averments, although they could have been charged as separate offenses, were only recitals of the means taken by him to accomplish the end and considered as a whole, they constitute but one transaction.") (quotations omitted); *People* v. *First Meridian Planning Corp.*, 658 N.E.2d 1017, 1021 (N.Y. 1995) ("Where, however, a crime by its nature as defined in the Penal Law may be committed either by one act or by multiple

prosecutor oversteps state rules and errs by charging a duplicitous count, a defendant may "waive[] his right to challenge on appeal any pleading defects including that of duplicity" by failing to file a timely objection. *People* v. *Butler*, 615 N.Y.S.2d 843, 846 (N.Y. Sup. Ct. 1994).[6] If such waiver occurs, the duplicitous indictment would stand, preventing a

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acts and can be characterized as a continuing offense over time, the indictment may charge the continuing offense in a single count.") (citations omitted); *Commonwealth* v. *Bradshaw*, 364 A.2d 702, 705 (Pa. Super. Ct. 1975) ("To require grand juries to separate the offenses proscribed by one statute into separate counts is to require an 'overly technical' act."); *State* v. *Roberts*, 14 P.3d 713, 737 (Wash. 2000) (upholding a single count that charged "separate offenses" because separating them would not have provided the defendant "any additional or better notice").

[6] *See also Trounce* v. *State*, 498 P.2d 106, 110-11 (Alaska 1972) ("[A]n objection to the indictment on grounds of duplicity is waived unless this objection is raised prior to trial . . . ."); *State* v. *Hargrave*, 234 P.3d 569, 579 (Ariz. 2010) (holding that where the defendant failed to challenge the duplicitous indictment before trial, "he has waived this issue unless he can establish fundamental error."); *People* v. *Johnson*, 595 N.E.2d 1381, 1390 (Ill. App. Ct. 1992) ("Assuming, *arguendo,* that count III was duplicitous, improper joinder of offenses nevertheless may be waived") (citations omitted); *People* v. *Branch*, 73 A.D.2d 230, 234-35 (N.Y. App. Div. 1980) (holding that "[w]hile a jurisdictional defect may be raised for the first time on appeal," duplicity is not a jurisdictional defect, and the defendant's failure to raise it "constituted a waiver of any objection"); *State* v. *Saluter*, 715 A.2d 1250, 1254 (R.I. 1998) (allowing a duplicitous charging document to stand because the defendant forfeited his right to challenge it under state rules of criminal procedure); *Scruggs* v. *State*, 66 Tenn. 38, 39 (1872) ("[I]f [defendant] choose to submit to be tried on a count which is double, without objection in the court below, we cannot say the court erred in taking no action on this informal mode of charging him."); *Schuler* v. *State*, 181 P.3d 929, 932 (Wyo. 2008) (finding that the defendant "waived the issue by failing to raise it prior to trial").

later sentencing court from even identifying the offense of conviction, much less the elements of that offense.

A prosecutor's use of conjunctive versus disjunctive language also provides no assurances that a charged fact is a means or an element. It is an "accurate statement of the law" to say that "indictments charging in the conjunctive may be proven disjunctively." *United States* v. *Powell*, 226 F.3d 1181, 1193 (10th Cir. 2000); see also 5 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a), at 263 & n. 72, 284–85 & n. 178 (3d ed. 2007) (acknowledging that some jurisdictions allow prosecutors to charge a defendant in the conjunctive and prove their case in the disjunctive).[7] But this distinction does not hold true across the board, as some jurisdictions allow indictments to employ "either conjunctive or disjunctive clauses". Colo. Rev. Stat. Ann. § 16-5-201. Thus, prosecutors' latitude to charge facts that misrepresent the elements of an offense is so ubiquitous that it fundamentally undermines the trustworthiness of the *Shepard* documents as a representation of what a jury must have "necessarily found." *Descamps*, 133 S. Ct. at 2290.

Indeed, this Court recognized more than a century ago that there is "no sound reason why the doing of the prohibited thing in each and all of the prohibited

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[7] This practice likely traces back to the requirement that a grand jury must find probable cause for each conjunctively-phrased allegation in the count, while a factfinder need not do so to convict. *See United States* v. *LaPointe*, 690 F.3d 434, 440 (6th Cir. 2012) ("Indictments must be phrased in the conjunctive so that society can be confident that the grand jury has found probable cause for all of the alternative theories that go forward. Juries, on the other hand, may convict a defendant on any theory contained in the indictment.").

modes may not be charged in one count, so that there may be a verdict of guilty upon proof that the accused had done any one of the things constituting a substantive crime under the statute." *Crain* v. *United States,* 162 U.S. 625, 636 (1896); *accord. United States* v. *Miller,* 471 U.S. 130, 136 (1985). Earlier this term, the Court echoed this conclusion by acknowledging that prosecutors may "charge[] different means of committing a crime in the conjunctive" without those conjunctive alternatives representing two separate offenses. *Musacchio* v. *United States*, 136 S. Ct. 709, 715 n.2 (2016). Thus, a charging document's mere reference to a particular method of committing a crime provides a federal sentencing court no reliable indication of whether state law considers that method to be a means or an element.

The improbability that *Shepard* documents will distinguish the elements of an offense from the means of commission is not only evident at the initial charging stage but also during the period leading up to the guilty plea or trial. For instance, most states allow prosecutors to amend charging documents at any stage of the pre-pleading or pre-trial proceedings. See, *e.g.*, Cal. Penal Code § 1009 ("An indictment, accusation or information may be amended by the district attorney, and an amended complaint may be filed by the prosecuting attorney, without leave of court at any time before the defendant pleads or a demurrer to the original pleading is sustained."). But when a prosecutor amends a charging document, a future sentencing court has no way of knowing whether the particular charging document later presented to establish the elements of a predicate offense was the last and best version of the charge. See, *e.g., Medina-Lara* v. *Holder*, 771 F.3d 1106, 1114

(9th Cir. 2014) (holding that discrepancies in the record suggested the existence of a superseding indictment that the government had failed to produce); *United States* v. *Martinez,* 756 F.3d 1092, 1098 (8th Cir. 2014) (refusing to rely on facts alleged in an original charging document where the defendant pleaded guilty to an amended count that did not appear in the record).

Even assuming that later sentencing courts have access to a complete version of the record, this version may still contain an inaccurate recitation of the elements underlying the offense. *Descamps* itself recognized that defendants have "little incentive to contest facts that are not elements of the charged offense" and may, in fact, have good reason not to, since "extraneous facts and arguments may confuse the jury" at trial. 133 S. Ct. at 2289. And in pleaded cases, defendants similarly "may not wish to irk the prosecutor or court by squabbling about superfluous factual allegations" when such allegations are "irrelevant to the proceedings" and will not result in a different outcome. *Id.* Thus, when a defendant pleads guilty to a charge that alleges an alternative factual way of committing an offense—as many state statutes and rules of criminal procedure allow her to do—future sentencing courts have no way of knowing from the record of conviction whether those facts reflect alternative "means" of committing that offense, rather than "elements."

Cases that proceed to trial may fare no better, as this Court's recent decision in *Musacchio* also illustrates. There, the trial court misinstructed a jury by adding an additional element that did not appear in the statute or the indictment. See 136 S. Ct. at 714. Specifically, while the statute "provide[d] two ways of committing the crime" (unauthorized

computer access *or* improper use of authorized computer access), the trial court erroneously added an element by instructing the jury that it must find both in order to convict. *Id*. at 713. *Musacchio* provides a perfect example of a case where, if a sentencing court were to examine the individual jury instructions in the record of conviction, it would conclude that the "two ways of committing the crime" were both required for conviction, regardless of whether they were actually elements or means. See also *State* v. *Beamon,* 830 N.W.2d 681, 692 (Wis. 2013) (holding that the trial court erred by instructing the jury that it must find the defendant received "a visual *and* audible signal from a marked police vehicle").[8] Thus, if an appellate court had relied on the jury instruction in Mr. Musacchio's case to identify the statute's elements, it would have reached an incorrect legal conclusion.

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[8] *See also State* v. *Lowery,* 565 S.W.2d 680, 683-84 (Mo. Ct. App. 1978) ("The effect of Instruction No. 6 was to submit the offense of robbery in the form of a conjunctive submission, placing a burden on the State beyond that which is legally required."); *Nickerson* v. *State*, 782 S.W.2d 887, 889-90 (Tex. Crim. App. 1990) (finding no error where the State failed to object to a jury instruction that added an element to the offense); *United States* v. *Zanghi*, 189 F.3d 71, 79 (1st Cir. 1999) (holding that the trial court erred by instructing the jury that the defendant's "*sole* intent in making the transactions was tax evasion.") (emphasis added); *United States* v. *Guevara*, 408 F.3d 252, 258 (5th Cir. 2005) (finding error where the trial court mistakenly instructed that the defendant's act had to "substantially" affect interstate commerce when the statute only required "some" effect on interstate commerce); *United States* v. *Staples,* 435 F.3d 860, 866-67 (8th Cir. 2006) (finding error where the trial court erroneously instructed that bank fraud required the defendant to obtain money that was "owned by *and* under the custody of the financial institution");

As these examples show, state law and rules of criminal procedure—from the initial charge, to any subsequent amendments, to the guilty plea or jury trial—do not necessarily require a defendant's conviction record to accurately delineate between a crime's elements and its means. What is more, any rule permitting courts to use the documents in this way would fundamentally alter the nature of the categorical approach from that of a *legal* inquiry (i.e., "what are the statute's elements as a matter of law?") to a *factual* inquiry (i.e., "what particular words did a state court judge, prosecutor, or defendant use to describe the offense?"). Because the "central feature" of the categorical approach has always been its "focus on the elements, rather than the facts, of a crime," *Descamps,* 133 S. Ct. at 2285, the Court should correct the lower courts' misperception that *Shepard* documents will necessarily reflect those elements.

B. The Attached *Shepard* Documents Provide Real-World Examples Of Cases Where A Sentencing Court Would Not Have Been Able To Distinguish A Statute's Means From Its Elements.

To provide practical examples of *Shepard* documents' inability to distinguish means from elements, *amici* have attached an appendix to this brief that contains actual charging documents from several states. For instance, Appendix A contains four redacted charging documents alleging violations of the same vehicle theft statute (Cal. Veh. Code § 10851(a)) from four different California counties. The statutory language of § 10851(a) contains various alternatives worded in the disjunctive, including an intent either "to temporarily or permanently deprive the owner". But of the four charging documents, one charges an "intent to temporarily *and* permanently

deprive," the second alleges an "intent, either permanently *or* temporarily, to deprive," while the third and fourth merely charge an "intent to deprive the owner", with no mention of the taking's duration. See Appendix A. Thus, a sentencing court provided with the first or second charging document might believe that the temporal language represents alternative "elements" of § 10851(a), while a court given the third or fourth would reach the opposite conclusion. Accordingly, the record of conviction is not only unhelpful in discerning what a jury must have necessarily found, it has the potential to actively *mislead* courts as to the true elements of an offense.

Similarly, Appendix B contains two charging documents from two different Washington counties, both of which allege counts of theft and vehicle prowling. One count charges theft by repeating the statutory language of Wash. Rev. Code Ann. § 9A.56.020(1)(a) that includes the "property or services" of another, while another county cites the same definition but narrows the charge to "property." See Appendix B. The count alleging "property" would suggest to a sentencing court that a prosecutor has "select[ed] the relevant *element* from its list of alternatives," *Descamps*, 133 S. Ct. at 2290 (emphasis added), while the count alleging "property or services" suggests that these alternatives could be means *or* elements, depending on how one interprets the disjunctive wording. Likewise, one count alleges vehicle prowling under Wash. Rev. Code Ann. § 9A.52.100 by expressly stating that the offense may be committed as a "principle [sic] or accomplice," while another count omits this language entirely. See Appendix B. While a sentencing court may safely assume that a count omitting the "principle [sic] or accomplice" language suggests that this language is

superfluous (and thus a means), a sentencing court considering a count that included this disjunctive language might not be so sure.

Several indictments from Arizona would also confound sentencing courts. See Appendix C. The first indictment simply charges a defendant with "commit[ing] theft with a value of $4,000 or more but less than $25,000" under Ariz. Rev. Stat. § 13-1802(A), while the second indictment charges a defendant with "commit[ing] theft *by knowingly obtaining the property of another* in an amount more than $4,000 but less than $25,000 . . . *by means of any material misrepresentation with intent to deprive the other of such property*," in violation of § 13-1802(A)(3). See Appendix C (emphasis added). While a sentencing court considering the second indictment in isolation might reasonably assume that the specific "property" and "material misrepresentation" allegations rendered subsection (A)(3) a separate crime, a sentencing court considering the first indictment could easily conclude that any violation of subsection of § 13-1802(A) constitutes a single offense. And a final example shows how sentencing courts that try to rely on the disjunctive versus conjunctive language of an indictment to discern a statute's elements would be confused by the *Shepard* documents, as the indictment, charges a defendant with committing money laundering by "knowingly initiating, organizing, planning, financing, directing, managing, supervising *and/or* was in the business of money laundering." See Appendix C (emphasis added).

These real-world examples illustrate that many *Shepard* documents are poor indicators of whether state law would require a jury to find, or a defendant to admit, the factual allegations contained in the

documents such that they represent elements, rather than means. Particularly in the 97 percent of federal convictions and 94 percent of state convictions that result from guilty pleas, see *Missouri* v. *Frye*, 132 S. Ct. 1399, 1402 (2012), neither the state court, nor the prosecutor, nor the defendant has any motive to narrow the defendant's judicial admissions to the actual elements of an offense so long as all parties agree that the facts satisfy those elements. As such, the fact-based *Shepard* documents, while effective indicators of the particular offense of conviction *under* the modified categorical approach, are ill-suited to determine *whether* the modified categorical approach should apply in the first place. Accordingly, *amici curiae* urge this Court to correct the lower courts' misperception that *Shepard* documents may be relied upon to determine whether a statute is divisible.

II. STATE LAW IS A RELIABLE AND ACCESSIBLE INDICATOR OF STATUTORY DIVISIBILITY.

Even if use of the *Shepard* documents would not lead to incorrect legal conclusions, it would nevertheless be beside the point because this Court has held it must defer to state courts' interpretations of whether a statutory alternative represents an "element" or a "means." In *Schad* v. *Arizona*, the Court considered whether a first-degree murder statute that could be facially divided into premeditated murder or felony murder required jurors to agree on which acts the defendant committed. 501 U.S. 624, 630-31 (1991) (plurality opinion). Characterizing this as a "value choice[]" more appropriately made by the state than by federal courts, the plurality invoked the need for judicial restraint and limited itself to the issue of whether the

Arizona court's decision not to require juror unanimity was constitutionally permissible, ultimately holding that it was. *Id*. at 637-38. The plurality confirmed 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." *Id.* at 636 (emphasis added). The message of *Schad* is that courts must "look to a state's laws to determine whether that state's courts 'have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime.'" *Almanza-Arenas*, 809 F.3d at 525 (quoting *Schad*, 501 U.S. at 636).

Not only are state court decisions an impartial source of authority to distinguish statutory elements from nonessential means, federal courts are "*bound by* the [state court's] interpretation of state law, including its determination of the elements of" a state offense. *Johnson* v. *United States*, 559 U.S. 133, 138 (2010) (emphasis added). Indeed, courts already consult state law to determine what constitutes the "least of the acts criminalized" by a particular state statute. *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1986 (2015) (quoting *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684 (2013)). And in identifying this "minimum conduct," *Moncrieffe*, 133 S. Ct. at 1684, courts necessarily look to state law to discern the acts that a jury would have to agree upon to convict the defendant of the crime.

The inquiry here is no different. In the context of disjunctively-worded statutes, courts must still look to state law to confirm whether a jury would have to

unanimously agree on acts that form a separate, distinct offense. And when it is only this separate, distinct offense, as defined by elements upon which a jury must agree, that matches the generic federal definition, courts must be confident that this conclusion of a categorical match is a legal one derived from state law, not a factual one derived from the language a state court judge, prosecutor, or defendant used to describe the offense below. If a court is not confident in this conclusion, there can be no assurance that a defendant was actually "convicted, in the deliberate and considered way the Constitution guarantees, of an offense with the same (or narrower) elements as the supposed generic crime . . . ." *Descamps*, 133 S. Ct. at 2290. Thus, whether a court looks to a statute's minimum elements to determine whether the *entire* statute is a categorical match, or whether a court looks to a set of elements representing a distinct crime contained *within* that statute, the inquiry is the same—courts must identify the conduct that a jury had to unanimously agree upon (or a defendant had to admit) to ensure that the elements of the crime match the elements of the generic offense.

To date, the inquiry into the elements of state offenses has not been overly burdensome or required more than "merely mundane legal research skills." *United States* v. *Aparicio-Soria*, 740 F.3d 152, 157 (4th Cir. 2014) (en banc). Indeed, those circuits that have already looked to state law to distinguish statutory "elements" from "means" have not encountered any serious difficulties resolving the issue. See, *e.g.*, *United States* v. *Royal*, 731 F.3d 333, 341 (4th Cir. 2013) (citing state law to find a statute indivisible); *Trent*, 767 F.3d at 1061-63 (holding in the alternative that state law supported its

conclusion that the statute was divisible); see also *United States* v. *Montes-Flores,* 736 F.3d 368 (4th Cir. 2013); *Rendon* v. *Holder*, 764 F.3d 1077, 1089-90 (9th Cir. 2014); *Padilla-Martinez* v. *Holder*, 770 F.3d 825, 831 n.3 (9th Cir. 2014); *Omargharib* v. *Holder*, 775 F.3d 192, 199 (4th Cir. 2014); *United States* v. *Simmons*, 782 F.3d 510, 517 (9th Cir. 2015); *Lopez-Valencia* v. *Lynch*, 798 F.3d 863, 869-70 (9th Cir. 2015); *Chavez-Solis* v. *Lynch*, 803 F.3d 1004, 1013 (9th Cir. 2015); *United States* v. *Lockett*, 810 F.3d 1262, 1270-72 (11th Cir. 2016). Importantly, the court in each of these decisions readily reached a conclusion on divisibility *without* looking to the *Shepard* documents and did not find the inquiry unduly burdensome in their absence.

The question may arise as to whether courts could reasonably consult the *Shepard* documents *in combination with* state law to confirm an offense's elements. See *Almanza-Arenas*, 809 F.3d at 523-25 (employing a multi-step process in which courts first consult the statutory text and *Shepard* documents and then look to state law to "verify that our interpretation of elements versus means is consistent with how California would instruct a jury as to this offense."). The answer is no. As previously mentioned, use of the *Shepard* documents fundamentally compromises the integrity of the categorical approach by turning the legal inquiry into a crime's elements into a factual inquiry into how the state court judge and the parties described the offense below.

But even as a practical matter, resorting to *Shepard* documents offers no benefits and simultaneously carries the potential for great harm. Even in the best case scenario, a carefully-laid record of conviction that perfectly reflects state law and the prior criminal proceedings will still be of little use to

a later sentencing court because it will be facially indistinguishable from a record that does *not* accurately reflect state law. And in the worst case scenario, a court may believe that an inherently flawed set of *Shepard* documents carries more weight than—or completely eliminates the need to consult—state case law and rely on the former to erroneously sentence a defendant to a 15-year mandatory minimum. In other words, not only are the *Shepard* documents unable to confirm a *correct* legal conclusion as to the elements of the offense, they may very well trigger an *incorrect* conclusion—one with grave and irrevocable consequences.[9] Thus, *amici* urge this Court to hold that state law—not *Shepard* documents—is the appropriate tool for determining an offense's statutory elements.

III. IN THE RARE CASE WHERE STATE LAW IS INCONCLUSIVE, COURTS MUST APPLY A PRESUMPTION OF INDIVISIBILITY.

In the event that state law is unclear about whether an alternative is a "means" or an "element,"

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[9] Not only does this means/elements distinction affect a defendant's potential criminal sentence, it also impacts whether a non-citizen may be subject to removal from the United States or eligible for relief from removal under a variety of provisions in the Immigration and Nationality Act. *See Padilla* v. *Kentucky*, 559 U.S. 356, 364 (2010) (observing that under current immigration law, the non-citizen's removal was "practically inevitable but for the possible exercise of limited remnants of equitable discretion vested in the Attorney General"). In *Padilla*, the Court held that defense attorneys have an affirmative duty to advise their clients of the immigration consequences of a particular crime, *see id.* at 370-71—a duty made much easier by a presumption of statutory indivisibility than by a case-by-case analysis of *Shepard* documents.

see *Descamps,* 133 S. Ct. at 2301-02 (Alito, J., dissenting), this Court's precedents require that the statute be deemed indivisible. As *Descamps* explained, if there is no clear legal assurance that a statutory definition would "necessarily require an adjudicator to find the generic offense," courts must presume that a defendant has not been "convicted of" that generic offense. 133 S. Ct. at 2287.

A. The Rationale Of *Taylor* And *Descamps* And The *Sullivan* Rule Require Courts To Presume That A Statute Is Indivisible In The Absence Of Case Law To The Contrary.

To justify a legal, categorical approach to ACCA predicates, both *Taylor* and *Descamps* cited three critical rationales underlying those decisions, all of which support a presumption of statutory indivisibility. First, the cases explained that ACCA's language expressly references a defendant's "previous *convictions*," rather than the facts underlying these convictions. *Taylor,* 495 U.S. at 600 (citing 18 U.S.C. § 924(e); *Descamps*, 133 S. Ct. at 2287 (same). This language shows that "Congress intended the sentencing court to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and not to the facts underlying the prior convictions." *Descamps*, 133 S. Ct. at 2287 (quoting *Taylor*, 495 U.S. at 600).

The same logic applies to a statute's facial alternatives. If state law does not clearly reveal whether a defendant was convicted of the *elements* of an offense, rather than the facts underlying a particular *way* of committing it, there can be no assurance that a defendant was "*convicted*, in the deliberate and considered way the Constitution

guarantees," of the generic federal definition. *Id*. at 2290 (emphasis added). Thus, where state case law does not definitively establish a crime's elements, sentencing courts must adhere to the plain language of the ACCA statute and presume that statutory alternatives represent only alternative "means of commission." *Id*. at 2289.

Second, in both *Taylor* and *Descamps* the Court employed the categorical approach to "avoid[] the Sixth Amendment concerns that would arise from sentencing courts' making findings of fact that properly belong to juries." *Descamps*, 133 S. Ct. at 2287. These concerns "counsel against allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea,' or what the jury in a prior trial must have accepted as *the theory of the crime*." *Id*. at 2288 (quoting *Shepard*, 544 U.S. at 25 (plurality opinion) (emphasis added)). But if a sentencing court cannot conclusively say that a statutory alternative represents an "element," rather than a mere "theory of the crime," its reliance on a prior offense to trigger an ACCA enhancement risks committing the identical Sixth Amendment violation by "rely[ing] on its own finding about a non-elemental fact to increase a defendant's maximum sentence." *Id*. at 2289. Because "the only facts the court can be sure the jury so found are those constituting elements of the offense—as distinct from amplifying but legally extraneous circumstances," *id*. at 2288, courts must avoid constitutional concerns by assuming—in the absence of state case law showing to the contrary—that a statutory alternative represents no more than a means of committing the offense.

Third, *Taylor* and *Descamps* confirmed the wisdom of employing the categorical approach by pointing to "the practical difficulties and potential unfairness of a factual approach." *Descamps*, 133 S. Ct. at 2287 (quoting *Taylor*, 495 U.S. at 601). *Descamps* explained that courts relying on a circumstance-based approach "would have to expend resources examining (often aged) documents" to screen for facts that, "although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense." *Id.* at 2289. But "[t]he meaning of those documents will often be uncertain," and "the statements of fact in them may be downright wrong." *Id.* Likewise, a sentencing court that combs a record of conviction to discern whether a particular fact constitutes an "element" or a "means" will often be led astray by documents that had no obligation to make such a distinction at the time of the conviction. Such an approach would trigger "practical difficulties and potential unfairness" by allowing a later sentencing court's fact-based speculation as to the elements of an offense to preempt state courts' *actual legal conclusions* on the same issue. Thus, in the absence of unambiguous state case law showing that a statutory alternative is an "element," the three rationales in *Taylor* and *Descamps* require a sentencing court to presume that the statute is indivisible.

If the reasons underlying *Taylor* and *Descamps* were not enough, a century-old line of state court cases applies the default presumption that, where a statute on its face contains multiple, alternative ways of committing an offense, it is "not necessary that all the jurors should agree" on which alternative the defendant employed because it was "sufficient that each juror was convinced beyond a reasonable doubt

that the defendant had committed the crime . . . as that offense is defined by the statute." *People* v. *Sullivan*, 65 N.E. 989, 989-90 (N.Y. 1903). Known as the "*Sullivan* rule," this doctrine holds that "where a statute prescribes disparate alternative means by which a single offense may be committed, no unanimity is required as to which of the means the defendant employed . . . ." *People* v. *Sutherland*, 21 Cal. Rptr. 2d 752, 758 (Cal. Ct. App. 1993). Indeed, in *Schad*, the Court recognized that the *Sullivan* rule had "sufficiently widespread acceptance" to regard it as "the norm."[10] *Schad*, 501 U.S. at 642. Thus, where state law fails to elucidate a statute's elements, courts must, at a minimum, defer to long-standing state law doctrine rejecting the "erroneous assumption that any statutory alternatives are *ipso facto* independent elements defining independent crimes under state law." *Id.* at 636.[11]

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[10] Even states that have not adopted the "*Sullivan* rule" follow the rule, stated in *United States* v. *Gipson*, 553 F.2d 453, 458 (5th Cir. 1977), which holds that alternatives in a disjunctively-worded statute may be separated into "distinct conceptual groupings," each of which would constitute a separate offense. *Schad*, 501 U.S. at 634-36 (plurality opinion). Thus, even jurisdictions that do not follow the *Sullivan* rule recognize that "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes" *Id.* at 636.

[11] A presumption of statutory indivisibility within the categorical approach also fits neatly with the rule of lenity. *See McNally* v. *United States,* 483 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when [the legislature] has spoken in clear and definite language."). As this Court has recognized, the categorical approach is an exercise in statutory interpretation. *See Shepard*, 544 U.S. at 23 (stating that "[w]e are, after all, dealing with an issue of statutory interpretation") (citing *Taylor,* 495 U.S. at 602). Thus,

B. Iowa Law Supports, Rather Than Defeats, The Presumption Of Statutory Indivisibility.

Applying these principles to Mr. Mathis's case reveals that Iowa law does not require a jury to agree that a defendant has committed the generic federal definition of "burglary" in order to convict him. Below, the Eighth Circuit recognized that Iowa defines an "occupied structure" for purposes of the burglary statute to include "land, water, or air vehicle[s]," which fall outside *Taylor*'s generic definition of burglary that requires entry into a "building or structure." *United States* v. *Mathis*, 786 F.3d 1068, 1074 (8th Cir. 2015), *cert. granted* (U.S. Jan. 19, 2016) (No. 15-6092) (quoting Iowa Code § 702.12). But in *State* v. *Duncan*, the Supreme Court of Iowa rejected the contention in a burglary prosecution that "the jury had to be unanimous on guilt with respect to" a particular type of "occupied structure"—in that case a boat or a marina. 312 N.W.2d 519, 523 (Iowa 1981). *Duncan* explained that "[i]f substantial evidence is presented to support each alternative method of committing a single crime, and the alternatives are not repugnant to each other, then unanimity of the jury as to the mode of commission of the crime is not required." *Id.* To reach this conclusion, the Iowa Supreme Court expressly relied on the *Sullivan* rule—quoting the language of *People* v. *Sullivan*, citing other states that had adopted it, and acknowledging that it had previously "applied an aspect of th[at] rule." See *id.* at 523-24.

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if it is unclear whether a state legislature intended to create two separate crimes or merely two different ways of committing the same crime, and if state law does not provide a ready answer, the rule of lenity requires federal courts to resolve the question without resort to the modified categorical approach.

This state authority affirmatively shows that Iowa law does not require a jury to agree upon the type of "occupied structure" the defendant entered in order to convict him of burglary—thus, the particular structure is a "means" of committing the offense, rather than an "element." And even in the absence of such state authority, Iowa's adoption of the *Sullivan* rule would require a sentencing court to identify contrary state authority providing clear legal assurance that a jury would have to decide between generic and non-generic conduct—authority sufficient to overcome the presumption of indivisibility. Thus, as in *Descamps*, the modified categorical approach does not apply because "[w]e know [Mr. Mathis'] crime of conviction, and it does not correspond to the relevant generic offense." *Descamps*, 133 S. Ct. at 2286.

Such a result may seem counterintuitive in cases where, as here, the record of conviction suggests that Mr. Mathis' conduct *actually involved* a "building or structure." See *Mathis*, 786 F.3d at 1074-75 (noting that two of Mr. Mathis' burglary charges alleged that he entered a garage). But the record in *Descamps* contained similar documents showing that the defendant pleaded guilty to the "breaking and entering of a grocery store." 133 S. Ct. at 2282. Yet the Court found this fact to be beside the point, reminding us that "[w]hether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant." *Id*. at 2286; see also *United States* v. *Brown*, 765 F.3d 185, 194 (3d Cir. 2014) (recognizing that the defendant's offenses would "appear to be 'crimes of violence' to a layperson" but explaining that "the factual circumstances of the conviction are not what matter, the key is the elements of the crime").

Because an elements-based approach compels a presumption of statutory indivisibility that has not been overcome in this case, the Eighth Circuit erred in applying the modified categorical approach below.

C. The Presumption Of Statutory Indivisibility Does Not Prevent Courts From Considering A Defendant's Criminal History.

The failure to apply an ACCA sentencing enhancement under 18 U.S.C. § 924(e)(1) does not mean that defendants like Mr. Mathis will not be convicted of the underlying offense of being a felon in possession of a firearm, or even that they will escape enhanced punishment for their prior offenses. Even in the absence of a sentencing enhancement, the federal Sentencing Guidelines rely on a defendant's prior offenses to assign the defendant a Criminal History Category that will assist in determining the appropriate sentencing Guidelines range. See U.S.S.G. § 4A1.1 (assigning points based on the number and length of a defendant's prior criminal sentences). And if Mr. Mathis's Guidelines range were lower than the statutory maximum sentence, the sentencing court had the discretion under 18 U.S.C. § 3553(a)(1) to rely on his "history and characteristics" to vary upwards and impose a maximum sentence of ten years. See 18 U.S.C. § 924(a)(2). Additionally, the government could have sought an upward departure if it believed the Guidelines calculation under-represented Mr. Mathis's prior criminal history. See U.S.S.G. § 4A1.3(a) (permitting a sentencing court to depart upward if the defendant's criminal history category "substantially underrepresents the seriousness of the defendant's criminal history"). As such, the absence of an ACCA enhancement in no way prevents courts

from convicting Mr. Mathis for being a felon in possession of a firearm or relying on his past crimes to enhance the sentence through any number of non-categorical avenues.

Moreover, nothing prevents prosecutors from seeking ACCA enhancements for crimes that still fall at the heart of the "violent felony" definition—i.e., those that have as an element the "use, attempted use, or threatened use of physical force". See 18 U.S.C. § 924(e)(2)(B)(i). Furthermore, Congress may always amend the statutory scheme to abolish the categorical approach altogether, as the Sentencing Commission has sought to do in certain Guidelines contexts. See "Immigration," *Proposed Amendments to the Sentencing Guidelines (Preliminary),* United States Sentencing Commission, Jan. 8, 2016, p. 8 (proposing amendments to U.S.S.G. § 2L1.2 that would be "based on the sentence imposed rather than on the type of offense (e.g., 'crime of violence')" and thus "eliminate the use of the "categorical approach").[12] And as Justice Kennedy stated in his concurrence to *Descamps*, Congress may always take action if it "wishes to pursue its policy in a proper and efficient way without mandating uniformity among the States with respect to their criminal statutes." 133 S. Ct. at 2294.

But until such steps are taken, the same concerns underlying *Taylor* and *Descamps,* as well as the *Sullivan* rule, prevent courts from assuming that a statute's disjunctive terms, subsections, or phrases automatically trigger application of the modified categorical approach. Only where state law—rather

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[12] *Available at*: http://www.ussc.gov/sites/default/files/pdf/amendment-process/reader-friendly-amendments/20160108_RFP.pdf

than a defendant's *Shepard* documents—unambiguously establishes that a jury must unanimously decide between these statutory alternatives may a sentencing court look to the record of conviction to determine "which statutory phrase was the basis for the conviction." *Johnson,* 559 U.S. at 144. Thus, *amici curiae* urge this Court to adopt the methodology set forth in this brief to determine whether a crime's statutory alternatives constitute means or elements.

Because state law—not *Shepard* documents—accurately reflects whether a particular statutory alternative constitutes a "means" or an "element," *amici curiae* ask the Court to hold that sentencing courts should look exclusively to state law to determine statutory divisibility and, in the absence of it, apply a presumption of indivisibility.

CONCLUSION

For the foregoing reasons, the judgment of the Eighth Circuit Court of Appeals should be reversed.

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