No. 20-__

IN THE

Supreme Court of the United States

KEEFE GORDON,

Petitioner,

v.

UNITED STATES ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Anne Marie Lofaso
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
U.S. SUPREME COURT LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26056

Lawrence D. Rosenberg
Counsel of Record
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

Benjamin J. Osorio
MURRAY OSORIO PLLC
4103 Chain Bridge Road
Suite 300
Fairfax, VA 22030

Chané Buck
JONES DAY
4655 Executive Dr.
Suite 1500
San Diego, CA 92121

Counsel for Petitioner

QUESTION PRESENTED

Noncitizens are deportable if they are convicted of an "aggravated felony" such as a "drug trafficking crime." *See* 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1101(a)(43)(B). To determine whether a state-court conviction qualifies as an "aggravated felony," courts decide whether a statute is divisible or indivisible. If a statute is indivisible, courts apply a "categorical approach," comparing the elements of the state crime to the elements of the federal crime. But if the state statute is "divisible" (*i.e.*, sets out elements in the alternative) courts apply a "modified categorical approach," looking to the noncitizen's record of conviction to determine the basis of the conviction and whether the state crime is an "aggravated felony."

This Court has held that a state statute is divisible if state law provides a definite answer. *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). Interpreting *Mathis*, two courts of appeals held that a definitive answer to the divisibility question in state law is required. *E.g.*, *Najera-Rodriguez v. Barr*, 926 F.3d 343, 355 (7th Cir. 2019). Five courts of appeals, however, do not require a definitive answer and hold, for example, that a single, decades-old state intermediate appellate court decision is sufficient to determine divisibility. *E.g.*, *Raja v. Sessions*, 900 F.3d 823, 829 (6th Cir. 2018). The Eleventh Circuit here is one of the five courts of appeals holding that a statute is divisible even when state law is less than definitive.

The question presented is whether state law must definitively resolve the question whether a state statute is divisible for purposes of determining whether a

prior state-court conviction is an "aggravated felony" under the Immigration and Nationality Act.

PARTIES TO THE PROCEEDING AND RELATED CASES

Petitioner is Keefe Gordon, an individual. He was the Petitioner-Appellant below.

Respondent is the United States Attorney General. He was the Respondent-Appellee below.

There are no corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

United States Court of Appeals for the Eleventh Circuit:

Keefe Gordon v. United States Attorney General, No. 18-14513 (Decided June 24, 2020).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Keefe Gordon respectfully petitions for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion (Pet. App. 1a) is published and reported at 962 F.3d 1344. The Board of Immigration Appeal's decision (Pet. App. 15a) is unreported. The immigration judge's decision (Pet. App. 15a) is unreported.

JURISDICTION

The Eleventh Circuit entered judgment on June 24, 2020. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the order to 150 days from the lower court judgment or denial of rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions (8 U.S.C. § 1227 and O.C.G.A. § 16-13-30) are reprinted at Pet App. 64a.

INTRODUCTION

This petition presents a mature circuit split on the question whether state law must definitively resolve the issue whether a state statute is divisible allowing a court to depart from the categorical approach and apply the modified categorical approach for purposes of determining when a state-court conviction constitutes an aggravated felony under the Immigration and Nationality Act (INA).

This Court has declared that the categorical approach, which compares the elements of the state conviction with federal law, "has a long pedigree in our Nation's immigration law." *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). The reason is the plain language of the INA. *Id.* Specifically, "the INA asks what offense the noncitizen was 'convicted' of, 8 U.S.C. § 1227(a)(2)(A)(iii), not what acts he committed" and thus, the word "[c]onviction" is "the relevant statutory hook." *Id.* (quoting *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 580 (2010)).

As a result, the modified categorical approach allowing a court to look to the record of conviction to determine whether a state conviction matches the federal crime "serves—and serves solely—as a tool to identify the elements of the crime of conviction when a statute's disjunctive phrasing renders one (or more) of them opaque." *Mathis v. United States*, 136 S. Ct. 2243, 2253–54 (2016). And "[i]t is not to be repurposed as a technique for discovering whether a defendant's prior conviction, even though for a too-broad crime, rested on facts (or otherwise said, involved means) that also could have satisfied the elements of a generic offense." *Id.*

Consistent with this Court's instructions, some courts of appeals have held that a definitive answer to the divisibility question in state law is required before the court may apply the modified categorical approach. *E.g.*, *Najera-Rodriguez v. Barr*, 926 F.3d 343, 355 (7th Cir. 2019). However, other courts of appeals have held that a statute is divisible even in the absence of a clear, definitive answer in state law. *E.g.*, *Raja v. Sessions*, 900 F.3d 823, 829 (6th Cir. 2018)

For at least the following three reasons, the Court should grant the petition and make clear that a definitive answer to the divisibility question in state law is required under the INA.

First, this case involves a split among the circuits regarding the proper standard to apply in determining whether similarly worded state statutes are divisible or indivisible. Two circuits hold that when state law does not provide a definitive answer as to whether a statute is divisible, the statute is indivisible. Five circuits, however, hold that a statute is divisible if there is any state court authority suggesting it is divisible.

Second, questions about the proper standard to determine whether a state statute is divisible or indivisible are nationally important and recurring. Stakes for deportation are "high and momentous," and this Court has declared that immigration laws should be interpreted and administered uniformly to ensure that the Nation speaks with one voice. Moreover, fundamental fairness requires that there be a uniform standard.

Third, this case presents an ideal vehicle to settle this division of authority, and the decision below is incorrect. The Eleventh Circuit has squarely ruled on

this issue, presenting it cleanly for this Court's review, and the Eleventh Circuit's decision was wrong.

STATEMENT OF THE CASE

A. Legal Framework

The INA, 8 U.S.C. §§ 1101 *et seq.*, "allows the Government to deport various classes of noncitizens, such as … those who are convicted of certain crimes while in the United States, including drug offenses," *Moncrieffe*, 569 U.S. at 187. "[I]f a noncitizen has been convicted of one of a narrower set of crimes classified as 'aggravated felonies,' then he is not only deportable … but also ineligible for … discretionary forms of relief," such as asylum and cancellation of removal. *Id.* (citing 8 U.S.C. § 1227(a)(2)(A)(iii)).

"The INA defines 'aggravated felony' to include a host of offenses," including "illicit trafficking in a controlled substance," itself defined as "any felony punishable under the Controlled Substances Act." *Id.* at 188. (quoting 8 U.S.C. § 1101(a)(43)(B), 18 U.S.C. § 924(c)). "[A] 'felony' is an offense for which the 'maximum term of imprisonment authorized' is 'more than one year.'" *Id.* (quoting 18 U.S.C. § 3559(a)(5)).

"The upshot is that a noncitizen's conviction of an offense that the Controlled Substances Act … makes punishable by more than one year's imprisonment will be counted as an 'aggravated felony' for immigration purposes." *Id.* "A conviction under either state or federal law may qualify, but a 'state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." *Id.* (quoting *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006)).

"When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA," courts "generally employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA." *Id.* at 190; *see also Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1567 (2017). Under this approach, courts "look 'not to the facts of the particular prior case,' but instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." *Moncrieffe*, 569 U.S. at 190. "[O]ffenses" thus "must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison," and "a state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal offense." *Id.* (citations and alterations omitted). The categorical approach "has a long pedigree in our Nation's immigration law" and is based on the plain language of the INA. *Id.* at 191.

"But this rule is not without qualification." *Id.* "Where a state statute contains several different crimes that are described separately"—thus rendering that statute "divisible"—courts "employ what is known as the 'modified categorical approach.'" *Esquivel-Quintana*, 137 S. Ct. at 1568 n.1 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007)); *see, e.g.*, *Najera-Rodriguez*, 926 F.3d at 348. "Under that approach … the court may review the charging documents, jury instructions, plea agreement, plea colloquy, and similar sources to determine the *actual* crime of which the alien was convicted." *Esquivel-Quintana*, 137 S. Ct. at 1568 n.1 (emphasis added). "The court

can then compare that crime, as the categorical approach commands, with the relevant generic offense." *Mathis*, 136 S. Ct. at 2249.

B. Factual Background

Petitioner Keefe Gordon, a citizen of Jamaica, has been a lawful permanent resident of the United States for approximately 25 years. Pet. App. 2a. In 2003, Gordon was convicted in Georgia state court of possession with intent to distribute "ecstasy," in violation of O.C.G.A. § 16-13-30(b) and (d); and obstruction of a police officer, in violation of O.C.G.A. § 16-10-24(a). *Id.* In 2006, Gordon was also convicted in Georgia state court for possession of cocaine, in violation of O.C.G.A. § 16-13-30(b); possession of a firearm by a felon, in violation of O.C.G.A. § 16-11-131; and theft by receipt of stolen property, in violation of O.C.G.A. § 16-8-7. *Id.*

Gordon is deeply remorseful for his past conduct, and after his last arrest in 2005, Gordon has worked diligently to rehabilitate himself in the community and has turned his life around. Pet. App. 88a–89a. For example, in 2013, Gordon graduated from the Technical College System of Georgia and has maintained employment since then. Pet. App. 89a, 94a. He also married in 2014, and he and his wife have four minor children together. Pet. App. 89a, 93a. Gordon's son Keefe has a medical history of Attention Deficit Disorder, and his son Delaney has a history of Chronic Moderate Persistent Asthma. Pet. App. 95a–96a. Both children require close monitoring and care by family. *Id.*

Gordon had lived a law-abiding life with his family for about 11 years when in 2017, the Department of Homeland Security (DHS) charged him as removable based on his prior Georgia convictions. Pet. App. 88a.

Gordon argued for termination and, in the alternative, applied for cancellation of removal for certain permanent residents under 8 U.S.C. § 1229b(a). Pet. App. 3a. In immigration court, Gordon argued that he had not been convicted of any aggravated felonies; he was not removable as charged; and if he was removable, he was eligible for cancellation of removal. Pet. App. 3a. Andrew Young, the former Mayor of the City of Atlanta and a former U.S. ambassador to the United Nations, and his wife, Carolyn Young, a retired teacher, wrote a letter to the immigration court in support of Gordon explaining that Gordon is actively involved in his church and since his last conviction over ten years ago has completely committed himself to following the law. Pet. App. 91a–92a.

C. Procedural History

The immigration judge (IJ) found that Gordon was removable as a result of his 2003 Georgia drug convictions. The IJ recognized that the Georgia statute criminalizes substances that the federal statute does not and thus that Gordon's conviction under § 16-13-30(b) was not categorically a drug-trafficking aggravated felony. Pet. App. 39a. But the IJ nonetheless concluded that the Georgia statute was divisible because the list of controlled substances were "exhaustive, and not merely examples of substances" and the jury instructions for the charge provide for the identification of the controlled substance. *Id.* The IJ did not look to any state decisions to determine whether the statute was divisible.

Because the IJ determined that the Georgia statute was divisible, the IJ looked to Gordon's record of conviction showing that he was convicted of possession of

"ecstasy." Pet. App. 41a. Ecstasy, the IJ found, is a controlled substance under both federal and Georgia law and therefore Petitioner Gordon's conviction was a "drug trafficking offence." *Id.* But his conviction for possession of a firearm by a felon did not qualify as an aggravated felony. Pet. App. 46a. The IJ ordered that Gordon be removed to Jamaica. Pet. App. 63a.

Gordon appealed to the Board of Immigration Appeals (BIA). Pet. App. 4a. He argued that, because O.C.G.A. § 16-13-30 is broad and includes more substances than the federal Controlled Substances Act, his conviction did not qualify as an aggravated felony under the categorical approach and that the statute was indivisible. Pet. App. 22a. Alternatively, he argued that even if the modified categorical approach applied, his conviction documents do not establish that he was convicted of a federally controlled substance because "ecstasy" is not listed in the Georgia or federal statutes. Pet. App. 23a. Moreover, Gordon argued, it is impossible to identify the substance involved in his 2003 conviction. *Id.* Gordon was charged with possession of "ecstasy," but "ecstasy" is not listed as a chemical substance in O.C.G.A. § 16-13-25 or the Controlled Substances Act. And "ecstasy" is the street name for a drug that is often made up of many different chemical substances and can often have a varying composition. The BIA rejected these arguments and affirmed. Pet. App. 23a.

Gordon then petitioned the Eleventh Circuit for review of the BIA's decision. *See* Pet. App. 1a. The Eleventh Circuit denied his petition based on the ecstasy conviction noting that although the IJ had mentioned an additional drug conviction, the BIA had only ad-

dressed the ecstasy conviction to sustain the IJ's finding. Pet. App. 3a. The Eleventh Circuit concluded that the BIA did not err in determining that the Georgia state statute was divisible and that ecstasy is a federally controlled substance. Pet. App. 9a–12a. First, the court held that the Georgia statute was broader than the federal Controlled Substances Act and thus the question whether Gordon's conviction could qualify as an aggravated felony under the modified categorical approach depended on whether the state statute was divisible. Pet. 6a. Second, the court held that the state statute was divisible because a Georgia Supreme Court decision from 1982 had found that the controlled substances listed under the state statute could form the basis of separate offenses. Pet. App. 8a. The court did not address subsequent state court decisions, cited in Gordon's briefing, indicating that the Georgia statute is indivisible—for example, decisions in which an indictment sufficiently alleged all elements because it charged the defendant with selling a "schedule I controlled substance," or where the recidivist language of O.C.G.A. § 16-13-30(d) was applied regardless of the identity of the controlled substance. *See* e.g., *Budhani v. State*, 345 Ga. App. 34 (2018), *overruled on unrelated grounds by Willis v. State*, 304 Ga. 686 (2018); *Ray v. State*, 181 Ga. App. 42 (1986)).

Since the Eleventh Circuit found the Georgia statute divisible, it applied the modified categorical approach and looked to Gordon's indictment, which revealed that Gordon was convicted of possessing "ecstasy." Pet. App. 9a. While ecstasy is not listed in the federal Controlled Substances Act, the chemical compound MDMA is, and "Georgia case law indicate[d]" to the Eleventh Circuit "that Georgia courts refer[ed] to

MDMA as ecstasy" (Pet. App. 10a), ignoring that "ecstasy" is a street name that often refers to several different drugs (some of which are not listed in the Controlled Substances Act) and that Georgia courts have referred to substances as "ecstasy" that were not MDMA (*see Farley v. State*, 732 S.E.2d 131, 132 (Ga. Ct. App. 2012) (affirming conviction for "sale of ecstasy" under § 16-13-30(b) for selling pills containing both BZP and TFMPP); *State v. Rogers*, 319 Ga. App. 834, 835 n.3 (2013) (noting pills identified as ecstasy by law enforcement were piperazine, which is a controlled substance similar to ecstasy); *Walker v. State*, 323 Ga. App. 685, 687 (2013) (finding defendant sold pills containing 1–(3–trifluoromethylphenyl) piperazine (TFMPP), "an Ecstasy-like compound that is referred to on the street as 'Ecstasy'")). Notably, TFMPP was only temporarily a controlled substance under the Controlled Substances Act in 2002 and it was removed in 2004. Pet. App. 101a; DEA, *1-[3-(Trifluoro-methyl)-phenyl]piperazine* (Oct. 2019). Thus, it was not on the Controlled Substances list in 2017 when Gordon was charged as removable and is still not listed. Notwithstanding this, the court below held that the BIA correctly determined that Gordon "was removable and ineligible for cancellation of removal based on an aggravated felony for a drug trafficking crime" and thus denied his petition for review. Pet. App. 12a.

REASONS TO GRANT THE PETITION

The petition should be granted for at least three reasons. *First*, this case involves a split among the circuits regarding the proper standard to apply to determine whether a state statute is divisible or indivisible under the INA. *Second*, questions about the proper standard

to determine whether a state statute is divisible or indivisible are nationally important and recurring. *Third*, this case presents an ideal vehicle to settle this division of authority, and the decision below is incorrect.

I. THE COURTS OF APPEALS APPLY DIFFERENT STANDARDS TO DETERMINE WHETHER A STATE STATUTE IS DIVISIBLE OR INDIVISIBLE UNDER THE INA

The Court should grant the petition, first, because the courts of appeals disagree about the standard that should be applied to decide whether a state statute is divisible or indivisible under the INA. Only this Court's intervention can settle this disagreement.

Before a court can apply the modified categorical approach, it must determine whether a statute is divisible or indivisible. *Najera-Rodriguez*, 926 F.3d at 349. In other words, the court must determine whether items listed in the state statute—for example, substances listed in statutes to define a "controlled substance"—are elements of the crime or merely various means of committing the crime. *Mathis*, 136 S. Ct. at 2256. If the items are elements of the crime, meaning the statute is divisible, the court may apply the modified categorical approach and examine the record of the defendant's conviction to determine whether he was convicted of a crime "relating to a controlled substance." *Najera-Rodriguez*, 926 F.3d at 348. If the items listed in the statute are means, the statute is one "that enumerates various factual means of committing a single element" and is indivisible, such that

it cannot form the basis of a crime "relating to a controlled substance" if it is broader than the federal statute. *Mathis*, 136 S. Ct. at 2249, 2256.

To determine whether a statute lists elements or means, this Court has instructed lower courts to first look to state law. *Id.* at 2256. If state law "*definitively* answers the question," the inquiry ends. *Id.* (emphasis added). "[I]f state law fails to provide clear answers," a court may "peek" at the record of a prior conviction. *Id.* at 2256–57. But if the record does not "speak plainly," the "demand for certainty" is not satisfied. *Id.* at 2257.

The federal courts of appeals have applied varying standards to determine whether state law "definitely" answers the question whether a state statute is divisible or indivisible. As explained below in detail, some circuits hold that, where no clear authority from the state courts determines whether the state statute involves elements or means, the statute at issue is indivisible and the categorical approach must be applied. Other circuits, on the other hand, hold that no such clear authority from the state courts is required and that even a single, decades-old decision from a state intermediate appellate court is sufficient to "definitely" answer the divisibility question.

A. Some Circuits Hold That State Statutes Are Indivisible Absent A Definitive Answer To The Contrary Under State Law

Two federal courts of appeals require a "definitive" answer under state law to determine whether a state statute is divisible or indivisible. Absent that clear answer, these courts hold that the statute is indivisible and that the categorical approach applies.

1. In *Najera-Rodriguez*, for example, the Seventh Circuit concluded that a state controlled substances statute was indivisible because there was no "textual support [in the statute]" or "clear decision by the Illinois Supreme Court treating the identity of the controlled substance as an element," and "hunting through the dicta of state court decisions [was] a method not supported by Supreme Court precedent." 926 F.3d at 354. Looking to the language of the statute, the court noted that there was no indication that possession of one substance versus another would result in a different penalty, and nothing indicated that the identity of the substance was an element under the state statute. *Id.* at 351–52. Rather, the state statute spoke generally of "a controlled substance" and was a "a broad residual or catch-all crime." *Id.* at 351. The court next turned to state court decisions but did not find "a clear decision by the Illinois Supreme Court treating the identity of the controlled substance as an element." *Id.* at 354. And an "advocacy-oriented reading of state case law also thwarts the ability of 'aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter "safe harbor" guilty pleas that do not expose the alien defendant to the risk of immigration sanctions.'" *Id.* The Seventh Circuit stated that this Court had directed it "to look for a 'state court decision that definitively answers the question,' not to construct [the court's] own patchwork theory of state statutory elements through a pastiche of dicta in cases that do not address the issue directly." *Id.* at 355 (internal citation omitted). The Seventh Circuit therefore concluded that the state statute was not divisible. *Id.* at 347. Accordingly, the Seventh Circuit vacated the order of removal.

2. Similarly, in *Harbin v. Sessions*, the Second Circuit held that a state controlled substances statute was indivisible after concluding that state court decisions did not definitively show that the statute was divisible. 860 F.3d 58, 61, 64 (2d Cir. 2017). The court looked to the plain text of the statute and concluded that it "suggest[ed] that it create[d] only a single crime" because it criminalized the "sale of a 'controlled substance,'" but did not indicate that the sale of each substance was a distinct offense. *Id.* at 65. Additionally, no state court decision clearly addressed whether the statute was divisible—at most, the state appellate decisions "appear[ed]" to favor the conclusion that the statute was indivisible. *Id.* at 66–67. Thus, the state statute was held indivisible, and the court vacated the order that the petitioner was ineligible for asylum. *Id.* at 61.

B. Other Courts of Appeals Hold That State Statutes Are Divisible If *Any* State Court Authority Suggests That It Is Divisible

In contrast, five circuits do not require a clear "definitive" answer under state law to the question whether a state statute is divisible or indivisible. Notably, two of these decisions involved strong dissents arguing that state court decisions relied on by the majorities did not "definitely" answer the question, and thus, the statute was in fact indivisible.

1. In *Bah v. Barr*, for example, the Fourth Circuit held that a state controlled substances statute was divisible because state appellate decisions "focus[ed] on the specific identity of the controlled substance." 950 F.3d 203, 209 (4th Cir. 2020). But as Judge Thacker

explained in dissent, "[a] survey of the landscape reveals that Virginia courts [had] been anything but clear," because Virginia Supreme Court decisions did not speak directly to the elements-versus-means question and referred inconsistently to "the state's simple possession offense." *Id.* at 215–16. Specifically, the dissent criticized the majority because "a single *ambiguous* published state appellate court decision paired with an *unpublished* appellate memorandum decision do not clearly state anything definitive." *Id.* at 212. "Even if it seems quite likely that Virginia considers controlled substance identity to be an element, that is not enough; we need to be certain, otherwise we cannot hold the statute to be divisible." *Id.* at 214–15. Thus, the dissent concluded, although some state lower court decisions "offer[ed] some guidance," the question was not "definitively answer[ed]" and the statute should have been found to be indivisible. *Id.* at 216.

2. Likewise, in *United States v. Martinez-Lopez*, the en banc Ninth Circuit held that a state controlled substances statute was divisible because a state supreme court case "implicitly held that the controlled substance requirement is an element" since as a result of the case "defendants are routinely subjected to multiple convictions under a single statute for a single act as it relates to multiple controlled substances." 864 F.3d 1034, 1037, 1040–41 (9th Cir. 2017). The court held that this was sufficient to determine whether the statute was divisible. *Id.* at 1040–41. Joined by Chief Judge Thomas, Judge Reinhardt dissented, arguing that whether the substances listed in the statute "are elements or means is far from clear." *Id.* at 1059. They joined Judge Berzon, concurring in part and dissenting in part, and noted that when there is uncertainty

as to whether a state statute is divisible, "federal courts must err on the side of caution." *Id.* at 1046. These three judges urged that the majority did not rest its decision on a state court opinion that provided "a *definitive* answer" as to whether each substance listed in the statute was a separate element rendering the statute divisible as instructed by this Court in *Mathis*. *Id.* "[T]o apply the modified categorical approach a federal court must be able to say that a state law decision dispositively answers the means-or-elements question." *Id.* at 1047.

3. Similarly, the Sixth Circuit in *Raja v. Sessions*, relied on one state intermediate appellate court decision, which provided "helpful guidance," to conclude that each type of controlled substance was a separate element of the statute making the statute divisible. 900 F.3d at 829.

4. And in *Martinez v. Sessions*, the Eighth Circuit was satisfied that a state controlled substances statute was divisible because two state appellate decisions had concluded that convictions involving different drugs did not violate double jeopardy. 893 F.3d 1067, 1070 (8th Cir. 2018).

5. Here, the Eleventh Circuit, similarly did not rely on "definitive" state law. Instead, the court looked to an almost 40-year-old Georgia Supreme Court decision, *Tabb*, that as a result of subsequent state court decisions, is far less than clear on whether the Georgia controlled substances statute is divisible. *See Gordon*, 962 F.3d at 1349. Specifically, the Eleventh Circuit determined that because *Tabb* held that a defendant could be convicted on separate counts for simultaneous

possession of different substances, the Georgia controlled substances statute is divisible. *Id*.

But the Eleventh Circuit did not address subsequent Georgia state court cases rendering the *Tabb* case less than definitive on this issue. Of course *Tabb* did not address whether a statute is divisible or indivisible, but any indication that the Eleventh Circuit drew from *Tabb* on this issue has been refuted by subsequent cases. In particular, the court did not address the recent decision in *Budhani v. State*, concluding that an indictment was not void because it asserted all elements of the crime by charging the defendant with selling a "schedule I controlled substance." 345 Ga. App. at 36. "The indictment put [the defendant] on notice of the specific dates involved, his actions that constituted an alleged violation of O.C.G.A. § 16-13-30(b) (2014), and that the State alleged that [the specific substance] he sold and possessed was a 'Schedule I controlled substance' as that term is defined by statute." *Id.* at 38. In finding the indictment valid, the decision suggests that the various substances listed in Georgia's controlled substance statute are means and not elements of the crime of possessing a "controlled substance." And in *Ray v. State*, also decided after *Tabb*, the court interpreted the recidivist portion of O.C.G.A. § 16-13-30(g) to refer to "any controlled substance" regardless of the identity of the substance involved in the convictions. 181 Ga. App. at 46. *Budhani* and *Ray* both strongly suggest that, regardless of *Tabb*, Georgia state courts have not definitively resolved whether the state controlled substances statute is divisible or not. However, despite the less than clear state of Georgia law, the Eleventh Circuit held that the statute was divisible.

* * *

In light of these conflicting decisions about the required clarity regarding whether nearly identically worded state statues are divisible or indivisible, and thus whether noncitizens are removable based on violations of those statutes, this Court's intervention is necessary.

II. Questions About The Proper Standard For Determining Whether State Statutes Are Divisible Or Indivisible Are Nationally Important and Recurring

The Court should grant the petition, second, because questions about the proper standard for determining whether a state statute is divisible or indivisible under the INA are nationally important and recurring.

The stakes of deportation are "high and momentous." *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947). It is "the equivalent of banishment or exile." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Deportation thus "cannot be made a 'sport of chance'" that turns on the circuit in which a removal proceeding takes place. *Judulang v. Holder*, 565 U.S. 42, 58–59 (2011).

But conflicting decisions across the country illustrate that the circuit in which a defendant is located is decisive for whether convictions for similar drug charges result in different removability outcomes. As a result, due process protections for noncitizens are in jeopardy, as the serious consequences of removal orders founded on varying standards of law loom overhead. Fundamental fairness requires that there be a uniform standard.

The consequences of being classified as an aggravated felon are severe. Not only are these individuals deported; they are also permanently barred from entering the United States again. From just 1992 to 2007, an estimated 300,000 noncitizens were ordered deported from the United States after being categorized as "aggravated felons." TRAC Immigration, *New Data on the Processing of Aggravated Felons* (Jan. 5, 2007). Moreover, data suggests that persons charged with aggravated felonies often have been in the country for substantial periods of time—on average 15 years—and many, such as Gordon, may be permanent legal residents or have family members who are United States citizens. *See* TRAC Immigration, *How Often is the Aggravated Felony Statute Used?* (2006).

Since this Court's decision in *Mathis* in 2015, the decisions of courts of appeal have used state cases to guide their determination of the means-element distinction in about sixty percent of cases. Alexander G. Peerman, *Parsing Prior Convictions:* Mathis v. United States *and the Means-Element Distinction*, 118 Colum. L. Rev. 171, 187 (2018). Once the courts of appeals issue their interpretation of state law, district courts and administrative agencies follow their guidance, generally unable to second guess the appellate court's reading of the statute. For instance, no more than one month following the Eleventh Circuit's opinion in this case, the BIA relied on the opinion to find another petitioner removable due to an underlying state conviction. *See Matter of P-B-B-*, 28 I. & N. Dec. 43 (B.I.A. July 23, 2020).

Additionally, this Court has explained that immigration laws should be uniformly interpreted and administered because of "the Nation's need to 'speak

with one voice' in immigration [matters]." *Zadvydas v. Davis*, 533 U.S. 678, 700–01 (2001) (adopting, "for the sake of *uniform* administration in the federal courts," as "reasonable" a six-month period for detention of aliens under a final order of removal (emphasis added)). Immigration regulation is one of the few legal frameworks with an almost exclusively national character. *See* U.S. Const. art. I, § 8, cl. 4; *see also, e.g.*, *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("Policies pertaining to the entry of aliens and their right to remain here are … entrusted exclusively to Congress."). The lower courts have recognized that "[n]ational uniformity in the immigration and naturalization laws is paramount." *Rosendo-Ramirez v. INS*, 32 F.3d 1085, 1091 (7th Cir. 1994); *see also Jaramillo v. INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) (recognizing that "nationwide uniformity" in immigration matters "is particularly important"); *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (concluding that "the interests of nationwide uniformity [in the administration of immigration laws] outweigh our adherence to Circuit precedent in this instance"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (recognizing "the need for uniformity in the immigration context"); *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 910–12 (9th Cir. 2004) (relying on "[t]he presumption that immigration laws should be interpreted to be nationally uniform").

Uniformity is particularly important here, where the split of authority concerns a common and recurring issue. Therefore, the question presented in this case is nationally important and recurring, and it warrants this Court's review.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT, AND THE DECISION BELOW IS INCORRECT

Finally, the petition should be granted because this case is an ideal vehicle to decide the proper standard for determining whether a state court statute is divisible or indivisible under the INA and because the decision below is incorrect and should be reversed.

A. *First*, the Eleventh Circuit squarely ruled on this issue, thus presenting this issue of law cleanly for this Court's review. The Eleventh Circuit expressly stated that, "[t]o determine whether Gordon's statute of conviction qualifies as an aggravated felony … [the court] must … evaluate whether the statute is divisible." *Gordon*, 962 F.3d at 1348. And contrary to the Seventh and Second Circuits, the Eleventh Circuit concluded that where a state supreme court decision "implicitly" found that the identity of the substance is an element, the issue is "definitively" resolved. *Id.* at 1348–49.

B. *Second*, the decision of the Eleventh Circuit is incorrect.

1. As the dissents in *Barr* and *Martinez* persuasively explained, federal courts should err on the side of caution and find a statute divisible only where state law "definitively" provides that it is divisible. *Barr*, 950 F.3d at 214–15 (Thacker, J., dissenting) ("Even if it seems quite likely that Virginia considers controlled substance identity to be an element, that is not enough; we need to be certain, otherwise we cannot hold the statute to be divisible."); *Martinez-Lopez*, 864 F.3d at 1047 (Berzon, J., dissenting in part) ("[T]o apply the modified categorical approach a federal court

must be able to say that a state law decision dispositively answers the means-or-elements question"). This standard "demonstrate[s] 'the comity due state courts when faced with state law questions.'" *Martinez-Lopez*, 864 F.3d at 1060 (Reinhardt, J., dissenting). Moreover, a requirement that the state court decisions provide a clear, definitive, answer as to whether a statute is divisible ensures that aliens are able "to anticipate the immigration consequences of guilty pleas in criminal court, and to enter 'safe harbor' guilty pleas that do not expose the alien defendant to the risk of immigration sanctions." *Najera-Rodriguez*, 926 F.3d at 354.

2. Here, the Eleventh Circuit did not rely on "definitive" state law and instead looked to an almost-40-year-old Georgia Supreme Court decision that has since been called into question, *Tabb v. State*, 250 Ga. 317 (1982), to conclude that the state statute here is divisible, *see Gordon*, 962 F.3d at 1349. *Tabb* held that a court could convict a defendant in separate counts for simultaneous possession of different substances. 250 Ga. at 319. But the Eleventh Circuit did not address subsequent Georgia state court cases rendering the *Tabb* case less than definitive on this issue. In particular, the court did not address the recent decision in *Budhani v. State*, concluding that an indictment was not void because it did assert all elements of the crime by charging the defendant with selling a "schedule I controlled substance." 345 Ga. App. at 36. "The indictment put [the defendant] on notice of the specific dates involved, his actions that constituted an alleged violation of O.C.G.A. § 16-13-30(b) (2014), and that the State alleged that [the specific substance] he sold and possessed was a 'Schedule I controlled substance' as that term is defined by statute." *Id.* at 38. In finding

the indictment valid, the decision suggests that the various substances listed in Georgia's controlled substance statute are means and not elements of the crime of possessing a "controlled substance." And in *Ray v. State*, also decided after *Tabb*, the court interpreted the recidivist portion of O.C.G.A. § 16-13-30(g) to refer to "any controlled substance" regardless of the identity of the substance involved in the convictions. 181 Ga. App. at 46. *Budhani* and *Ray* both strongly suggest that, regardless of *Tabb*, Georgia state courts have not definitively resolved whether the state controlled substances statutes is divisible or not.

Allowing the Eleventh Circuit decision to stand sets a precedent that state statutes can be divisible—and thus the categorical approach ignored—even when state law is less than clear.

This Court has repeatedly stated that "[t]he categorical approach 'has a long pedigree in our Nation's immigration law.'" *Mellouli v. Lynch*, 575 U.S. 798, 798 (2015) (quoting *Moncrieffe*, 569 U.S. at 191). Not only is this approach rooted in the language of the INA, it is "suited to the realities of the system." *Id.* "By focusing on the legal question of what a conviction necessarily established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law." *Id.* (emphasis omitted). And it "enables aliens to anticipate the immigration consequences of guilty pleas in criminal court, and to enter safe harbor guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions." *Id.* (quotations omitted). This is why the categorical approach is "applied routinely to assess whether a state drug conviction triggers removal under the immigration statute." *Id.*

Accordingly, a definitive answer from state law on whether a statute is divisible is necessary before a court departs from the categorical approach. A definitive answer is necessary for the additional reason that it demonstrates the comity due to state courts on issues of state law. *See Martinez-Lopez*, 864 F.3d at 1060 (Reinhardt, J., dissenting).

Yet the Eleventh Circuit departed from the categorical approach based on an almost 40-year old state court decision that, as a result of subsequent decisions, is far less than clear. Not only does this harm Gordon by rendering him removable, but it also has broader consequences. It sets a precedent allowing courts to find that a statute is divisible even when state law does not provide a definitive answer, meaning that other noncitizens will not be able to anticipate when pleading guilty to state crimes will them to being found guilty of an "aggravated felony" under the INA. And it risks increasing the burdens on the immigration system by requiring judges to look to the record of conviction rather than simply addressing the legal issue.

3. Additionally, this case demonstrates the risk that courts will have to depart from merely comparing the elements of the state and federal crimes, and instead look to the facts of the case contrary to this Court's instructions. *See Mathis*, 136 S. Ct. at 2253–54. Here, Gordon was charged with possessing "ecstasy." Pet. App. 97a. But "ecstasy" is not listed as a substance in O.C.G.A. § 16-13-25 or the Controlled Substances Act. As recognized by the Drug Enforcement Agency, "ecstasy" is the street name for a drug that is often made up of many different chemical substances, some of which are not listed in the Controlled

Substances Act. Thus, to determine whether "ecstasy" is a controlled substance under the statutes it is necessary to determine what chemicals make up the "ecstasy" a person is charged with possessing. The Eleventh Circuit simply concluded that "ecstasy" here is a controlled substance because "Georgia case law indicates that Georgia courts refer to [3, 4-methylenedioxymethamphetamine (MDMA)] as ecstasy." *Gordon*, 962 F.3d at 1350. But nothing in the record indicates that the pills Gordon was charged with possessing consisted of MDMA. And Georgia state courts have referred to other substances as "ecstasy." *See, e.g.*, *Farley v. State*, 732 S.E.2d 131, 132 (Ga. Ct. App. 2012) (affirming conviction for "sale of ecstasy" under § 16-13-30(b) for selling pills containing both BZP and TFMPP); *Rogers*, 319 Ga. App. at 835 n.3 (noting pills identified as ecstasy by law enforcement were piperazine, which is a controlled substance similar to ecstasy); *Walker*, 323 Ga. App. at 687 (finding defendant sold pills containing TFMPP "an Ecstasy-like compound that is referred to on the street as 'Ecstasy'"). In fact, one of those substances, TFMPP, was only temporarily a controlled substance under the Controlled Substances Act in 2002 and it was removed in 2004. Pet. App. 99a; DEA, *1-[3-(Trifluoro-methyl)-phenyl]piperazine* (Oct. 2019). Thus, at the time of Gordon's removal proceedings in 2017, TFMPP, a substance which Georgia law criminalizes and Georgia state courts have referred to as "ecstasy," was not a controlled substance under the Controlled Substances Act.

CONCLUSION

The petition should be granted.

Respectfully submitted,

Anne Marie Lofaso
WEST VIRGINIA UNIVERSITY COLLEGE OF LAW
U.S. SUPREME COURT LITIGATION CLINIC
101 Law Center Dr.
Morgantown, WV 26056

Lawrence D. Rosenberg
Counsel of Record
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
ldrosenberg@jonesday.com

Benjamin J. Osorio
MURRAY OSORIO PLLC
4103 Chain Bridge Road
Suite 300
Fairfax, VA 22030

Chané Buck
JONES DAY
4655 Executive Dr.
Suite 1500
San Diego, CA 92121

Counsel for Petitioner

November 20, 2020