No. 14-1390

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LUIS MIGUEL RAMIREZ-MOZ, Petitioner,

v.

ERIC H. HOLDER, JR., U.S. Attorney General, Respondent

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS

BRIEF OF *AMICI CURIAE* CAPITAL AREA IMMIGRANTS' RIGHTS (CAIR) COALITION AND IMMIGRANT & REFUGEE APPELLATE CENTER, LLC

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* the Capital Area Immigrants' Rights (CAIR) Coalition and the Immigrant and Refugee Appellate Center (IRAC), LLC state that they are, respectively, a nonprofit corporation and a for-profit law firm, and no publicly held corporation owns 10% or more of their stock. *Amici* are unaware of any publicly held corporation that has an interest in the outcome of this litigation.

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INTEREST OF *AMICI CURIAE*[1]

CAIR Coalition is a nonprofit, legal services organization. CAIR Coalition provides individuals and organizations representing immigrants with education and training services, public policy development leadership, forums for sharing information, legal support services and other empowerment programs. In addition, CAIR Coalition is the only organization working with individuals detained by the Department of Homeland Security (DHS) in Virginia and the Washington metropolitan area. CAIR Coalition provides legal rights presentations, conducts *pro se* workshops and provides legal advice and assistance to individuals detained by DHS at jails in Virginia and Maryland. CAIR Coalition also secures *pro bono* legal counsel for immigration detainees. Many of the detained immigrants CAIR Coalition serves have been placed in removal proceedings on account of their criminal convictions. Of those immigrants with criminal convictions, CAIR Coalition regularly encounters a high number who have unwittingly entered into criminal plea agreements that strip them of eligibility for relief in immigration court.

IRAC is a public service law firm based in Alexandria, Virginia, dedicated to assisting immigrants and immigration lawyers. IRAC attorneys frequently

[1] Pursuant to Fed. R. App. P. 29(c)(5), *amici* state that no counsel for any party authored this brief in whole or in part, and no party, party's counsel, or person or entity other than *amici* and their counsel contributed money that was intended to fund preparing or submitting the brief.

represent noncitizens on a *pro bono* basis and write extensively on immigration issues. As a public service, IRAC attorneys collect unpublished decisions of the Board of Immigration Appeals and post them online for immigrants, attorneys, academics, and policy makers. IRAC attorneys also provide guidance to public defenders and other criminal defense lawyers regarding the immigration consequences of criminal convictions in Maryland, Virginia, and other states.

SUMMARY OF ARGUMENT

The primary legal issue in this case is whether a conviction under Virginia's grand larceny statute, Va. Code Ann. 18.2-95, qualifies as an aggravated felony theft offense under the Immigration and Nationality Act ("INA"), 8 U.S.C. 1101(a)(43)(G), using the categorical approach, as recently clarified in *Descamps v. United States*. 133 S. Ct. 2276 (2013). In its ruling below, the Board of Immigration Appeals ("BIA" or the "Board") held that the grand larceny statute is not a categorical theft offense because it can be applied to fraud offenses, but it found the statute to be divisible and therefore applied the modified categorical approach. The Board's ruling on divisibility was erroneous and should be reversed. Accordingly, this Court should apply the categorical approach and hold that a conviction under Virginia's grand larceny statute cannot constitute an aggravated felony theft offense under the INA.

In light of the Board's decision concerning divisibility, the determinative issue here is whether the elements of "larceny," as defined by Virginia common law, criminalize a broader range of conduct than the generic elements of a theft offense under the INA. On that subject, rulings of Virginia appellate courts persuasively show that "larceny" comprises a single set of elements that may be established by alternate means of conduct, including fraudulent conduct leading a victim to consent to a taking as a result of a misrepresentation. A larceny conviction may therefore result from conduct that is significantly broader than that proscribed by the generic definition of theft, which requires, *inter alia*, that the theft be without the consent of the owner. Accordingly, applying the categorical approach, this Court should find that Va. Code Ann. 18.2-95 cannot constitute an aggravated felony theft offense under the INA, reverse the ruling of the Board, and vacate Petitioner's order of removal. Alternatively, if the Court believes that Virginia law is inconclusive as to the grand larceny statute's divisibility, the Court should still reverse the Board because the Government has failed to meet its burden of proof as to divisibility. Finally, although not required for the resolution of this case, the Court should make clear that the Government is always responsible for demonstrating that a statute is divisible for purposes of the modified categorical approach, even when a noncitizen is seeking relief from removal.

ARGUMENT

Amici respectfully ask the Court to reverse the decision of the Board because it misapplied the Supreme Court's holding in *Descamps* in finding Virginia's grand larceny statute, Va. Code Ann. 18.2-95, to be divisible. In *Descamps*, the Court confirmed that adverse federal consequences arising from a defendant's state law criminal conviction apply only when an individual has necessarily been convicted of the generic elements of the offense, as codified by federal law. 133 S. Ct. at 2290. Here, the Board's analysis is flawed because, despite acknowledging the holding in *Descamps*, it overlooked binding precedent from Virginia's appellate courts supporting the conclusion that the elements of "larceny," an offense defined by state common law, constitutes a single indivisible offense that does not match the definition of "theft" for the purposes of the aggravated felony theft offense set forth in 8 U.S.C. 1101(a)(43)(G). The Board therefore erred when it applied the modified categorical approach in affirming Petitioner's order of removal.

I. The Court Should Rule That *Descamps* Is Applicable to Immigration Cases and Analyze This Case Consistent with That Precedent

As an initial matter, and to clarify any remaining ambiguity, the Court should rule that the holding of *Descamps* applies in the context of immigration cases and, therefore, governs the analysis here. Such a holding would be consistent with rulings in this Circuit and in accordance with *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014), a recent precedential decision of the Board that adopts *Descamps*.

Although there is little doubt that *Descamps* applies in removal proceedings, the Government continues to take the position—and may argue here—that *Descamps* is inapplicable because it centers on Sixth Amendment concerns that, according to the Government, have little relevance in immigration cases. *See, e.g.*, Resp. Br. at 12-15, *Omargharib v. Holder*, No. 13-2229 (4th Cir. *filed* Feb. 26, 2014). The Government's argument concerning the inapplicability of *Decamps* is largely reliant on the Board's decision in *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012), which permitted a distortion of the categorical approach that allowed courts to look behind the fact of a noncitizen's criminal conviction to determine whether the conviction could be sustained based on removable conduct. However, the Board's recent precedential decision in *Matter of Chairez* adopts *Descamps* and explicitly withdraws from *Matter of Lanferman*, invalidating any such argument. 26 I&N Dec. at 354.[2]

Moreover, although this Circuit has not yet had the opportunity to apply the holding of *Descamps* in an immigration case, it has left little doubt about its intention to do so. In *Karimi v. Holder*, a pre-*Descamps* immigration case, the Court foreshadowed the importance of the Supreme Court's then pending decision,

[2] Importantly, the Board found in *Matter of Chairez* that, subsequent to *Descamps*, federal courts have not given deference to the Board's application of divisibility under *Matter of Lanferman*. 26 I&N Dec. at 354. (citing *Rojas v. Att'y Gen. of U.S.*, 728 F.3d 203, 216 n.12 (3d Cir. 2013) (en banc); *Aguilar-Turcios v. Holder*, 740 F.3d 1294, 1301-02 (9th Cir. 2014); *Donawa v. U.S. Att'y Gen*., 735 F.3d 1275, 1280 n.3 (11th Cir. 2013)).

writing, "we recognize some ripples of uncertainty [in the application of the modified categorical approach for statutes based in common law]… [but] we note that the Supreme Court, in *Descamps v. United States*,…appears poised to calm these waters." 715 F.3d 561, 568 (4th Cir. 2013). Indeed, given the Court's frequent application of the categorical approach to immigration cases, *see, e.g.*, *Prudencio v. Holder*, 669 F.3d 472, 474 (4th Cir. 2012) (applying the categorical approach to charge of removal based on conviction under Virginia law for contributing to delinquency of a minor), it would be highly anomalous for the Court to rule that *Descamps,* a decision that substantially clarifies the scope of the categorical approach, does not apply to immigration cases. Thus, in accordance with this Circuit's precedent and the Board's decision in *Matter of Chairez*, the Court should rule explicitly that *Descamps* applies to immigration cases and should apply the holding of *Descamps* here.

II. Under *Descamps*, Virginia's Grand Larceny Statute Is Not Divisible as to the Elements of Larceny and Therefore the Court Should Apply the Categorical Approach

The Board ruled in this case that a conviction under Virginia's grand larceny statute, Va. Code Ann. 18.2-95, does *not* categorically qualify as an aggravated felony theft offense under 8 U.S.C. 1101(a)(43)(G). Administrative Record (AR) at 4. The Board nevertheless held that the statute is divisible and applied the modified categorical approach, enabling it to review Petitioner's record of

conviction. AR at 4-5. For the reasons set forth below, *amici* agree with the Petitioner that the Board's holding as to divisibility is erroneous and should be reversed because Virginia appellate case law supports a finding that Va. Code Ann. 18.2-95 is not divisible as to elements of larceny. Alternatively, the Court should rule in favor of Petitioner because the Government has failed to meet its burden of proof.

A. The Divisibility Analysis Is a Threshold Inquiry That Allows a Fact Finder to Look at Documents Concerning the Record of Conviction in Very Limited Circumstances

As the Supreme Court recognized in *Descamps*, a fact finder can only look to the record of conviction when a statute is divisible. 133 S. Ct. at 2286. A statute is divisible if it defines a crime "alternatively, with one statutory phrase corresponding to the generic crime [under federal law] and another not." *Id.* The categorical approach therefore focuses on the elements of a crime that the prosecution must establish to sustain a conviction. *United States. v. Carthorne*, 726 F.3d 503, 511 (4th Cir. 2013) ("The 'central feature' of the categorical approach is 'a focus on the elements, rather than the facts, of a crime.'"). If the statute has the same elements as the generic offense, or is narrower, then the conviction can presumptively serve as the predicate for the application of a federal statute that codifies the generic crime. *See Descamps*, 133 S. Ct. at 2283. However, where the state statute "sweeps more broadly than the generic crime, a

conviction under that law cannot count as [a predicate for the federal statute], even if the defendant actually committed the offense in its generic form." *Id.* Importantly, "[g]eneral divisibility … is not enough; a statute is divisible for purposes of applying the modified categorical approach only if at least one of the categories into which the statute may be divided constitutes, *by its elements*, [the generic offense of removability]." *United States v. Cabrera-Umanzor*, 728 F.3d 347, 352 (4th Cir. 2013) (citing *Descamps*, 133 S. Ct. at 2285) (emphasis in original).

If a statute is actually divisible, a fact finder may rely on the modified categorical approach "as a tool for implementing the categorical approach" and, in doing so, may look to certain documents in the record of conviction. *Descamps*, 133 S. Ct. at 2284. However, as this Court has recognized, the modified categorical approach "serves a limited function," *United States v. Royal*, 731 F.3d 333, 340 (4th Cir. 2013), and applies in "limited circumstances." *Carthorne*, 726 F.3d at 511. Specifically, the modified categorical approach only serves the purposes of "help[ing] effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, render opaque which elements played a part in the defendant's conviction." *Descamps*, 133 S. Ct. at 2283.

In determining which "elements" of a state statute are necessary to sustain a conviction, the Supreme Court held that a reviewing court should ascertain which

elements a jury must find "unanimously and beyond a reasonable doubt" (or, if unanimity is not required, by whatever jury vote is required for conviction). *Id.* at 2288. In conducting this inquiry, an important distinction must be drawn between alternative *elements* that create distinct offenses and alternative *means* of committing the crime to satisfy those elements. *See Royal*, 731 F.3d at 341; *Matter of Chairez*, 26 I&N Dec. at 349 (in discussion of divisibility of Utah statute, stating, "[i]f Utah does not require such jury unanimity, then it follows that intent, knowledge, and recklessness are merely alternative 'means' by which a defendant can discharge a firearm, not alternative 'elements' of the discharge offense"). Thus, a statute is not divisible merely because an element may be satisfied through different types of conduct.

Furthermore, a statute that is overbroad or deemed to be missing an element in comparison to the generic ground of removability is unlikely to be divisible. This is so because "whether the statute of conviction has an overbroad or missing element, the problem is the same: [b]ecause of the mismatch in elements, a person convicted under that statute is never convicted of the generic crime." *Descamps*, 133 S. Ct. at 2292. Thus, a conviction under an overbroad statute does not constitute a conviction for the generic offense "whatever the underlying facts or the evidence." *Id.* at 2290.

The burden of proving divisibility is on the Government. *See Matter of Chairez*, 26 I&N Dec. at 355 (holding that DHS has burden of showing offense was an aggravated felony and, in finding statute indivisible, noting that "the DHS has not come forward with any authority to establish the statute's divisibility"). Ambiguity or a lack of evidence concerning the statute's divisibility should always favor a finding that the statute is *not* divisible. *Cf. Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693 (2013) ("ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor"); *Tan v. Phelan*, 333 U.S. 6, 10 (1948) (holding that doubts regarding statutory construction shall be resolved in favor of the noncitizen because "deportation is a drastic measure and at times the equivalent of banishment of exile"). Thus, where the Government offered no proof of a statute's divisibility, the reviewing court should not go beyond the fact of conviction and the language of the statute.

B. Virginia's Grand Larceny Statute Is Not Divisible Because "Wrongful" and "Fraudulent" Takings Are Alternative Means, Not Alternative Elements

In accordance with the legal principles set forth above, Va. Code Ann. 18.2-95 is not divisible and is instead overbroad when compared to the elements of the aggravated felony theft offense set forth in the INA. 8 U.S.C. 1101(a)(43)(G).

Virginia's grand larceny statute criminalizes three related crimes: (1) "larceny from the person of another of money or other thing of value for $5 or

more;" (2) "simple larceny not from the person of another of goods and chattels of the value of $200 or more;" and (3) "simple larceny not from the person of another of any firearm, regardless of the firearm's value." Va. Code Ann. 18.2-95. According to the Board, the statute is divisible because it can be split into three "discrete offenses," each of which criminalize some form of "larceny," which Virginia courts have defined to include "classic theft" offenses (*i.e.*, when the accused takes property without the consent of the victim) or "fraudulent taking" offenses (*i.e.*, when the victim voluntarily surrenders his property due to fraudulently obtained consent). AR at 5. Therefore, according to the Board, the statute lists three separate offenses, "some (but not all) of which have the elements of a theft offense, so as to categorically match section 101(a)(43)(G) [of the INA]." AR at 5.

While it is true that Virginia's grand larceny statute is generally divisible because it criminalizes three types of "larceny," that threshold determination has little significance here because it does not resolve whether any set of the statute's elements—all of which criminalize "larceny"—match the generic definition of theft under the INA. *Cf. Cabrera-Umanzor*, 728 F.3d at 352 (stating that the "general divisibility" of a statute is not sufficient to apply the modified categorical approach under *Descamps*). Rather, the common question among all of the

subsections of the statute is whether proof of the term "larceny" necessarily requires proof of the same elements that comprise theft under federal law.

The INA does not define the meaning of the term "theft offense," but this Circuit has defined generic "theft" as: the taking of property from its owner or representative without the owner's consent and with the intent to deprive the owner of that property. *Soliman v. Gonzales*, 419 F.3d 276, 281-83 (4th Cir. 2005). In so finding, the Court held that offenses involving fraud may only qualify as an aggravated felony if they satisfy the distinct requirements of 8 U.S.C. 1101(a)(43)(M)(i)—namely, a loss to the victim of more than $10,000. *Id*. at 282 (the "plain text [of the aggravated felony theft offense ground] shows that Congress specifically distinguished fraud from theft, and that it meant for the two offenses to be treated differently"). Thus, in order for Petitioner's conviction for grand larceny to constitute a generic theft offense, the elements of conviction must require a taking "without the owner's consent," as distinct from consent that has been fraudulently obtained.

The elements of "larceny" are set forth in Virginia common law.[3] According to the Supreme Court of Virginia, those elements are the "wrongful or

[3] The Supreme Court in *Descamps* "reserve[d] the question whether, in determining a crime's elements, a sentencing court should take account not only of the relevant statute's text, but of judicial rulings interpreting it," 133 S. Ct. at 2291. However, this Court subsequently held that the *Decamps* analysis applies with equal weight to common law offenses. *United States v. Hemingway*, 734 F.3d 323,

fraudulent taking of another's property without his permission and with the intent to permanently deprive the owner of that property." *Britt v. Commonwealth*, 667 S.E.2d 763, 765 (Va. 2008) (vacating conviction for grand larceny); *Stanley v. Webber*, 531 S.E.2d 311, 315 (Va. 2000) (stating same). For the purposes of the divisibility analysis under *Descamps*, as explained above, the Court must analyze which of those elements a jury must find unanimously in order to sustain a conviction for grand larceny. Importantly, although the common law elements of larceny appear to envision that the "wrongful" or "fraudulent" taking be "without consent," the Supreme Court of Virginia, along with Virginia' intermediate appellate courts, has not interpreted the statute as such.[4] Rather, Virginia courts have repeatedly held that larceny may be committed by means of a "fraudulent taking" that occurs *with* the consent of the victim, holdings that substantially undermine the ruling of the Board in this case.

In *Skeeter v. Commonwealth*, the Supreme Court of Virginia held that proof of a fraudulent taking is sufficient to sustain a conviction under Va. Code Ann. 18.2-95. 232 S.E.2d 756, 757-58 (Va. 1977). The defendant, who was convicted at

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331-32 (4th Cir. 2013). Thus, in analyzing the statute's divisibility, this Court may look to Virginia case law.

[4] Notably, the Fifth Circuit has already adopted this view of Virginia case law. *See United States v. Argumendo Perez*, 326 F. App'x 293, 296 (5th Cir. 2009) (holding that Virginia indictments alleging grand larceny can sustain convictions for fraud and confirming that the Supreme Court of Virginia has "explained that personal property acquired with fraudulently obtained consent will sustain a larceny conviction").

trial of grand larceny based on the allegation that he stole $200 by falsely representing to the victim that he would give him three televisions in exchange for the money, contended that the taking did not fall under the statute because the victim consented to paying the defendant. *Id.* at 758. Rejecting that argument, the court held, "the fact that [the victim] consented to surrender temporarily the possession of $200 . . . does not have the effect of negating the wrongful act perpetrated by defendant … [the] scheme was to commit larceny of money from [the victim] upon pretence [sic] of obtaining color television sets for a grossly inadequate price…" *Id.* The court therefore upheld the larceny conviction.

Other decisions of the Supreme Court of Virginia similarly hold that fraudulent takings are sufficient to sustain convictions for larceny. *See, e.g.*, *Bourgeois v. Commonwealth*, 227 S.E.2d 714, 717 (Va. 1976) ("Proof that the accused obtained money by false pretenses will sustain an indictment for larceny."); *Bateman v. Commonwealth*, 139 S.E.2d 102, 106 (1964) ("[I]t is well settled in this jurisdiction that proof that the accused obtained money by false pretenses will sustain an indictment for larceny … [h]ere there was manifest intent to defraud."); *Hagy v. Commonwealth*, 190 S.E. 144, 145 (1937) (holding, in connection with defendant's conviction for two counts under Virginia's similar petit larceny statute, that "[t]he sole issue was whether or not the accused, by a false pretense, obtained [the] money for mileage and attendance fees with an intent

to defraud"); *Lewis v. Commonwealth*, 91 S.E. 174, 175 (Va. 1917) ("It has been repeatedly held by this court, upon an indictment for larceny, proof that the accused obtained money by false pretenses will sustain the indictment.").

Rulings of Virginia's Court of Appeals, the state's intermediate appellate court, also illustrate this point. In *Walker v. Commonwealth*, for example, a jury convicted the defendant of, *inter alia*, larceny under Va. Code Ann. 18.2-95 based on the allegation that he received $300 from a bank in return for a forged check. 486 S.E.2d 126, 128 (Va. App. Ct. 1997), *abrogated on other grounds, Walls v. Commonwealth*, 563 S.E.2d 384, 388 (Va. App. Ct. 2002). Based on those facts, the court held that "[t]he evidence is sufficient for a jury to conclude that [the defendant] fraudulently induced the bank to give him this money and that he did not intend to return it. *All of the elements of grand larceny have been established*, we affirm this conviction." *Id.* at 130 (emphasis added). Similarly, in *Vernon v. Commonwealth*, the defendant was convicted of petit larceny in violation of Va. Code Ann. 18.2-96[5] based on his forging of two checks and cashing them at the bank. 2006 WL 3798766, at *2 (Va. App. Ct. Dec. 28, 2006). The court found that "[t]his evidence was sufficient for the trial court to conclude that [the defendant] '*fraudulently induced* the bank to give him this money and that he did not intend to return it,'" thereby sustaining a conviction for larceny. *Id.* (emphasis added).

[5] As discussed below, the language of Virginia's petit larceny statute is nearly identical to the grand larceny statute.

Finally, In *Owolabi v. Commonwealth*, 428 S.E.2d 14, 15 (Va. App. Ct. 1993), a jury convicted the defendant of grand larceny under Va. Code Ann. 18.2-95 on the basis that he obtained credit cards with a false social security number. In reversing the conviction based on the government's failure to offer evidence meeting the threshold monetary amount for a grand larceny conviction, the court stated that the defendant's conduct could have otherwise sustained a conviction, writing:

> "[l]arceny by trick occurs when one obtains the property of another by making a false representation of a past event or an existing fact with the intent to defraud the owner of the property by causing the owner to part with the property … *The jury could have found from this evidence that the issuers of the credit cards relied on the defendant's false representation* to part with the credit cards and, therefore, that the defendant obtained the credit cards through larceny."

Id. (emphasis added).

The cases discussed above clearly demonstrate that a grand larceny conviction may be sustained whether the defendant acted by means of classic theft or by means of fraud. The Board appears to have presumed that classic theft and fraud, alternative *means* of conduct supporting a larceny conviction in Virginia, are actually alternative *elements* of the statute, but it based that holding on nothing more than the general divisibility of Va. Code Ann. 18.2-95 and the language of *Britt*. A.R. at 4-5. However, Virginia case law—which the Board failed to analyze—strongly supports a finding that the elements of larceny are not divisible because there are no sets of alternative elements from which a prosecutor can

select when charging a defendant. In *Descamps*, the Supreme Court stated that, "[a] prosecutor charging a violation of a divisible statute must generally select the relevant elements from its list of alternatives…. And the jury… must then find that element, unanimously and beyond a reasonable doubt." 133 S. Ct. at 2290. In Virginia, however, charging documents for grand larceny regularly allege nothing more than "stealing," reflecting the fact that Va. Code Ann. § 18.2-95 simply criminalizes the single element of "larceny." *See, e.g., Skeeter v. Commonwealth*, 232 S.E.2d at 757-58 (finding indictment alleging merely that defendant stole more than $200 from victim, when underlying facts involved a fraudulent taking, sufficient to support conviction for larceny); *Owolabi*, 16 Va. App. at 80 (indictment charging defendant only with stealing property).

Under Virginia case law, therefore, "larceny" occurs when a defendant takes property without the consent of the owner *or* when the defendant engages in a fraudulent misrepresentation that causes the victim to willingly part with his property. In either situation, Virginia courts rely on the identical articulation of larceny's elements when sustaining a conviction. Thus, the case law strongly supports the conclusion that a Virginia state court could not *require* jury unanimity as to either a "wrongful" or a "fraudulent" taking because each one of those means of committing larceny, without an explicit finding of one versus the other, are sufficient to sustain a conviction under Va. Code Ann. 18.2-95.

This Circuit's decision in *Royal* is particularly instructive. There, the court examined a Maryland assault statute that, according to the interpretations of the state's highest court, required the state to prove, *inter alia*, that "the defendant caused offensive physical contact with, or harm to, the victim …" 731 F.3d at 341. Finding an absence of evidence that Maryland courts require jury unanimity as to either "offensive physical contact" or "physical harm," the court ruled that those terms are not alternative elements of the offense because a jury only has to agree "that one of the two occurred, without settling on which." *Id*. Similarly, in this case, the grand larceny statute is not divisible because "[t]he dispute here does not concern any list of alternative elements," *id.* (citing *Descamps*, 133 S. Ct. at 2285), but rather alternative means of conduct that satisfy the same element.

In sum, Virginia case law strongly supports reversal of the BIA on the grounds that "wrongful" or "fraudulent" takings are alternative *means* by which a defendant can commit grand larceny, as distinct from alternative *elements*. Accordingly, this Court should find that the statute is not divisible and should, therefore, apply the categorical approach.[6]

[6] The Court's ruling on this issue would also apply to Va. Code Ann. 18.2-96, which criminalizes petit larceny. That statute is nearly identical to Virginia's grand larceny statute other than a difference in the monetary threshold needed to sustain a conviction. Although this Circuit in *Salem v. Holder*, 647 F.3d 111, 114 (4th Cir. 2011) noted, without holding, that the Immigration Judge in that case had found the petit larceny statute to be divisible, that decision pre-dates *Descamps* and has little, if any, precedential weight as to the divisibility of Virginia's grand or petit

C. In the Alternative, the Court Should Find in Petitioner's Favor Because the Government Has Failed to Meet Its Burden of Proof

In the alternative, if the Court finds that Virginia case law is inconclusive as to whether Va. Code Ann. 18.2-95 is divisible, the Petitioner must still prevail because the Government possesses the burden of establishing a noncitizen's deportability. As the Board's recent decision in *Matter of Chairez* makes clear, a statute must be regarded as indivisible if the Government fails to introduce case law or other evidence demonstrating that a statute contains alternative elements rather than alternative means. 26 I&N Dec. at 355. Here, the Government has put forth no evidence to establish that Va. Code Ann. 18.2-95 is a divisible statute with respect to the elements of larceny and, as discussed above, it cannot do so in light of rulings of Virginia's appellate courts. Thus, even if the Court were to find that Virginia law is inconclusive as to which elements a jury must find unanimously, the lack of evidence strongly supports Petitioner and the Court should reverse the decision of the BIA on that basis.

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larceny statutes under the analysis set forth in *Descamps*. *See United States v. Aparicio-Soria*, 740 F.3d 152, 155-16 (4th Cir. 2014) (*en banc*) (stating that *Descamps* "abrogat[ed]" prior cases finding use of the modified categorical approach to be appropriate).

III. Application of the Categorical Approach Conclusively Demonstrates That Virginia's Grand Larceny Statute Is Not a Categorical Match to the Generic Theft Offense under the INA Because the Minimum Conduct That Has a Realistic Probability of Being Prosecuted Includes Fraudulent Taking Theft Offenses

Where, as here, the statute in question is indivisible, the Court need only apply the categorical approach. *Descamps*, 133 S. Ct. at 2282. Accordingly, the Court should restrict it analysis "to the fact of conviction and the statutory definition of the prior offense." *Taylor v. United States*, 495 U.S. 575, 603 (1990). Thus, the Court may not review the record of conviction and the Board erred in that regard.

Rather, the categorical approach requires the Court to focus on "the minimum conduct that has a realistic probability of being prosecuted" under a criminal statute. *United States v. Perez-Perez*, 737 F.3d 950, 955 (4th Cir. 2013); *Matter of Chairez*, 26 I&N Dec. at 351 (citing *Moncrieffe*, 133 S. Ct. at 1684-85). In making that determination, federal courts have no "authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *United States v. Henriquez*, No. 13-4238, 2014 WL 2900935, at *3 (4th Cir. June 27, 2014) (same); *Aparicio-Soria*, 740 F.3d at 155 (looking to precedent from the state of Maryland's highest court in applying categorical approach). "[T]to the extent that the statutory definition of the prior offense has been interpreted by the state's highest court, that

interpretation constrains [the Court's] analysis of the elements of state law.'" *Aparicio-Soria*, 740 F.3d at 154.

Here, there is little question that Va. Code Ann. 18.2-95 encompasses conduct that falls outside the generic definition of theft. Indeed, the Board recognized the categorical overbreadth of the statute in its decision below. A.R. at 4 ("The Immigration Judge thus erred in holding that a conviction under this statute categorically qualifies as an aggravated felony 'theft' offense"). Further, the Virginia state appellate court decisions discussed above confirm that Va. Code Ann. 18.2-95 is in fact regularly used to prosecute conduct that falls beyond the generic definition of a theft offense under the INA. Virginia courts have repeatedly applied the definition of "larceny" broadly to criminalize conduct involving fraudulent takings of property where the victim consented to the taking. *See, e.g.*, *Skeeter*, 232 S.E.2d at 757-58; *Bourgeois*, 227 S.E.2d at 717; *Walker*, 486 S.E.2d at 388. Such conduct clearly goes beyond the generic definition of a theft offense, which requires that the taking be "without the owner's consent." *Soliman*, 419 F.3d at 281-83.

Thus, Va. Code Ann. 18.2-95 is an overbroad statute "and so the categorical approach needs no help from its modified partner." *Descamps*, 133 S. Ct. at 2286. Indeed, given that the crime of conviction does not correspond to the relevant generic offense, "the inquiry is over." *Id.* Consequently, a Virginia conviction

under Va. Code Ann. 18.2-95 cannot constitute an aggravated felony theft offense under 8 U.S.C. 1101(a)(43)(G).

IV. Adopting Petitioner's Argument Would Not Create "Absurd Results"

In another pending matter before this Court presenting the same question of law, the Government argued that finding Va. Code Ann. 18.2-95 to be overbroad rather than divisible would create an "absurd result" because it "would essentially nullify two grounds of removability in Virginia." *See Omargharib*, Resp. Br. at 17, No. 13-2229 (citing 8 U.S.C. §§ 1101(a)(43)(G), (M)). This argument merits little credence. Under the law of this Circuit, the absurd results doctrine may be applied only in "exceptionally rare" cases where adhering to the literal text of the statute would produce a result "so gross as to shock the general moral or common sense." *United States v. Crabtree*, 565 F.3d 887, 889 (4th Cir. 2009). In truth, it is the Government's argument—not Petitioner's argument—that would lead to anomalous results.

Contrary to what the Government suggests, holding Va. Code Ann. 18.2-95 to be overbroad for purposes of 8 U.S.C. 1101(a)(43)(G) would not immunize noncitizens convicted under the statute from adverse immigration consequences. Because fraud, like theft, is regarded as a crime involving moral turpitude, *Jordan v. De George*, 341 U.S. 223, 227-28 (1951), a grand larceny conviction could still result in charges of removability for many noncitizens. *See* 8 U.S.C.

1182(a)(2)(A)(i), 8 U.S.C. 1227(a)(2)(A)(i). A larceny conviction also could prevent noncitizens from adjusting to permanent resident status, 8 U.S.C. 1255(a)(2), qualifying for cancellation of removal for nonpermanent residents, 8 U.S.C. 1229b(b)(1)(C), or demonstrating good moral character, 8 U.S.C. 1101(f)(3), a prerequisite for naturalization. 8 C.F.R. 316.10.

By contrast, adopting the Government's interpretation would have draconian consequences for many longtime lawful permanent residents convicted of minor offenses. For example, holding Virginia's grand larceny statute to be divisible would also mean that certain violations of Virginia's petit larceny statute—Va. Code Ann. 18.2-96—could qualify as an aggravated felony. Under the Government's interpretation, a lawful permanent resident who stole less than $5 could be charged with deportability as an aggravated felon, 8 U.S.C. 1227(a)(2)(A)(iii), subject to mandatory immigration detention, 8 U.S.C. 1226(c), and ineligible for nearly all forms of discretionary relief—including asylum and cancellation of removal. 8 U.S.C. 1158(b)(2)(B); 8 U.S.C. 1229b(a). A nonpermanent resident or conditional permanent resident convicted of petit larceny could be removed without a hearing before an Immigration Judge. 8 U.S.C. 1228(b). And any noncitizen removed after sustaining a petit larceny conviction would be permanently inadmissible, 8 U.S.C. 1182(a)(9)(ii), and could face a

twenty-year prison sentence if they unlawfully re-entered the country. 8 U.S.C. 1326(b)(2).

In practice, the Government's objection is "little more than an attack on the categorical approach itself." *Moncrieffe*, 133 S. Ct. at 1692-93. While Petitioner's argument may allow some noncitizens who committed true theft offenses to avoid the aggravated felony label, the Supreme Court "prefer[s] this degree of imperfection to the heavy burden of relitigating old prosecutions." *Id.* at 1693. Given the adverse immigration consequences that would still attach to larceny convictions in Virginia, adhering to the categorical approach in this case would yield no absurd results.

V. The Court Should Make Clear That the Government Always Bears the Burden of Demonstrating Divisibility

Finally, *amici* asks the Court to make clear that the Government is always responsible for demonstrating that a statute is divisible for purposes of the modified categorical approach, even when a noncitizen is seeking relief from removal. The Court should find that when the law does not clearly establish whether a statute contains alternative elements, the statute must be regarded as indivisible. Requiring noncitizens seeking relief from removal to demonstrate non-divisibility would be inequitable for those who cannot afford legal counsel, would conflict with the Board's aforementioned decision in *Matter of Chairez*, and would

create perverse incentives for the Government to withhold aggravated felony accusations until the relief stage of removal proceedings.

The importance of this issue is the result of the bifurcated nature of immigration proceedings, which are divided between a removal phase and a relief phase. During the removal phase, the Government bears the burden of proving that a noncitizen is removable from the United States. 8 U.S.C. 1229a(c)(3)(A). During the relief phase, noncitizens bear the burden of establishing that they satisfy any applicable eligibility requirements—and, if the form of relief is discretionary, that they merit a favorable exercise of discretion. 8 U.S.C. 1229a(c)(4)(A). In recent years, dispute has arisen over the burden facing noncitizens seeking relief from removal who were convicted under divisible statutes. For example, some courts hold that when the record of conviction is inconclusive—such that the crime committed of conviction may or may not have been an aggravated felony—the noncitizen is not barred from seeking relief. *Thomas v. Att'y Gen. of U.S.*, 625 F.3d 134, 148 (3d Cir. 2010); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006). Other courts, including this Court, hold that noncitizens convicted under a divisible statute cannot establish eligibility for relief if the record does not reflect the actual crime of conviction, thereby leaving open the possibility that they were convicted of an aggravated felony.

Salem, 647 F.3d at 115-16; *Young v. Holder*, 697 F.3d 976, 988-90 (9th Cir. 2012) (en banc); *Garcia v. Holder*, 584 F.3d 1288, 1290 (10th Cir. 2009).

However, even assuming that *Salem* remains valid,[7] asking which part of a divisible statute formed the basis of a noncitizen's conviction is qualitatively different than asking whether a statute is divisible in the first place. The former inquiry is largely factual. The latter inquiry is purely legal. Determining whether a statute is divisible can require extensive legal research and a thorough understanding of federal and state case law. Imposing this burden on noncitizens seeking relief from removal, many of whom are unrepresented by counsel, would be wholly impractical and inequitable. By contrast, imposing the burden on the DHS presents a far more workable approach and is consistent with recent BIA precedent.

The Government is always represented by counsel in removal proceedings and frequently litigates cases involving the same criminal statutes. More importantly, although noncitizens bear the ultimate burden of establishing eligibility for relief, the Government bears the initial burden of producing evidence

[7] In *Moncrieffe*, the Supreme Court stated that the application of the categorical approach should be identical in both the removal and relief phases of proceedings, 133 S. Ct. at 1684 n.4, and *amici* posit that this finding undermines this Court's holding in *Salem*. The Ninth Circuit is presently considering whether its decision in *Young* was overruled by *Moncrieffe*. Order, *Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715 (9th Cir. Apr. 30, 2013) (requesting parties to submit supplemental briefs addressing whether *Moncrieffe* overrules *Young*).

indicating that a ground for mandatory denial of relief may apply. *See*, *e.g.*, *Matter of A-G-G-*, 25 I&N Dec. 486, 501 (BIA 2011) (stating that DHS must present prima facie evidence that an asylum applicant received an offer of firm resettlement from a third country prior to arriving in the United States, after which point the burden shifts to the noncitizen) (citing 8 C.F.R. 1240.8(d)). For example, if the DHS believes a criminal conviction bars a noncitizen from obtaining a certain form of relief from removal, the DHS must come forward with proof that the noncitizen was indeed convicted of the offense. It follows that if the statute of conviction is potentially divisible, the DHS, rather than the noncitizen, should be required to produce evidence of that the statute contains alternative elements.

Requiring noncitizens to demonstrate a statute's non-divisibility at the relief stage of removal proceedings would also conflict with the Board's recent decision in *Matter of Chairez*. The noncitizen in *Matter of Chairez* was convicted of one offense but charged under two separate grounds of removability—(1) under 8 U.S.C. 1227(a)(2)(C) for having been convicted of a firearms offense, and (2) under 8 U.S.C. 1227(a)(2)(A)(iii) for having been convicted of an aggravated felony. 26 I&N Dec. at 350. The Board upheld the firearms-related charge of removability, *id*. at 355-58, but dismissed the aggravated felony charge upon finding it "unclear" whether the statute of conviction was divisible. *Id*. at 354-55. The Board then stated that because the record did not reflect that the respondent

was convicted of an aggravated felony, he was entitled to apply for cancellation of removal. *Id*. at 358-59. If the noncitizen bore the burden of disproving divisibility at the relief stage, the Board would have required Mr. Chairez to come forward with evidence of indivisibility to establish eligibility for such relief.

In sum, whether a statute is divisible is an objective legal question whose answer should not depend on the stage of removal proceedings in which the issue arises. Requiring noncitizens to demonstrate a statute's divisibility during the relief phase of removal proceedings would be impractical, inequitable, and would conflict with the Board's recent decision in *Matter of Chairez*.

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the Court hold that Va. Code Ann. 18.2-95 is not a divisible statute and, accordingly, that a conviction under that statute cannot constitute an aggravated felony theft offense under 8 U.S.C. 1101(a)(43)(G). *Amici* also respectfully ask the Court to make clear that the Government always bears the burden of demonstrating that a statute is divisible, even during the phase of proceedings when a noncitizen seeks relief from removal. The Court should accordingly reverse the decision of the Board.

August 20, 2014 Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because it contains 6,789 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

On August 20, 2014, I, Ben Winograd, served a copy of this Brief of *Amici Curiae* on Respondent via the CM/ECF system.

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