No. 09-71415 & 10-73715
Agency No. 078-755-092

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GABRIEL ALMANZA-ARENAS,

Petitioner-Appellant,

vs.

LORETTA LYNCH, Attorney General,

Respondent-Appellee.

AMICI CURIAE IN SUPPORT OF PETITIONER-APPELLANT DURING PENDENCY OF REHEARING EN BANC

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TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES

STATE STATUTES

FEDERAL RULES

STATE RULES

INTEREST OF *AMICI CURIAE*

The Ninth Circuit Federal Public and Community Defenders represent indigent defendants before this Court pursuant to the Criminal Justice Act. *See* 8 U.S.C. § 3006A. As institutional defenders for indigent defendants, these organizations have an interest in all issues of federal criminal law and a unique perspective to offer the Court concerning application of prior en banc decisions and the categorical approach set forth in *Taylor v. United States*, 495 U.S. 575 (1990).

The California Public Defenders Association and individual **California Public Defender Offices** are dedicated to providing representation for indigent noncitizens in their proceedings on state and local criminal charges. Pursuant to the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010), these defenders must advise their noncitizen clients on the immigration consequences of criminal convictions, including whether a particular offense may render an individual removable or ineligible for relief from removal.

The **National Association of Criminal Defense Lawyers** ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

SUMMARY OF THE ARGUMENT

In *Rendon v. Holder,* 764 F.3d 1077 (9th Cir. 2014), this Court correctly interpreted the Supreme Court's decision in *Descamps v. United States,* 133 S. Ct. 2276 (2013), to hold that a statute containing disjunctively-worded alternatives is not "divisible" unless those alternatives would qualify as separate "elements" under state law. The contrary approach, set forth by the Government and Judge Graber's dissent from the denial of rehearing en banc in *Rendon,* rejects the principle that divisibility hinges on whether a statute contains alternative "elements" or "means," instead claiming that divisibility is tied *entirely* to a statute's disjunctive wording without regard to whether a jury would have to decide between the resulting alternatives within a single element. But not only is this approach flatly inconsistent with *Descamps*'s core holding, it is not even supported by the very footnote on which it is purportedly based. Because adopting this approach would be akin to resurrecting the Court's firmly-rejected decision in *United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc), and would create needless tension with over a century of state law, the Court should affirm *Rendon* and the panel's application of it here.

The Court should also affirm *Rendon*'s reliance on state law to identify an offense's elements. Because *Descamps* expressly reserved the question of whether

state law may be consulted, the majority's statements in footnote 2 should not be interpreted as *precluding* such an approach. Moreover, footnote 2's statement that the *Shepard* documents will reveal a crime's elements is based on a legal premise that holds true in federal court but not in California; thus, relying exclusively on *Shepard* documents in jurisdictions like California would lead to deeply-flawed results. And because California law creates a single intent element that does not require a jury to agree on whether a taking involved a temporary or permanent deprivation, a conviction under California Vehicle Code § 10851 is indivisible and categorically not a "crime involving moral turpitude."

The Court should also affirm the panel's decision in *Almanza-Arenas v. Holder*, 771 F.3d 1184 (9th Cir. 2014), because it brought much-needed clarity to criminal defense attorneys, who are constitutionally-mandated to advise noncitizens on the immigration consequences of their criminal convictions. *Almanza*'s approach to both divisibility and eligibility for relief vastly improved defense counsel's ability to accurately advise noncitizens by holding that the question of whether a conviction triggers a ground of removability does not turn on a noncitizen's immigration status or procedural posture. Because *Almanza* enables defense counsel to better predict an offense's immigration consequences, *amici* urge this Court to uphold the panel's decision.

ARGUMENT

I.

Rendon Faithfully Applied *Descamps*'s "Elements-Based" Approach and Correctly Held That State Law Determines a Statute's Elements.

In *Descamps,* the Supreme Court held that sentencing courts may not apply the modified categorical approach to crimes that have a "single, indivisible set of elements." 133 S. Ct. at 2282. But since *Descamps,* several competing views have arisen in regards to whether a statute that contains various lists, subsections, or alternatives may nevertheless contain a "single, indivisible set of elements" such that it, too, is not subject to the modified categorical approach. One view (exemplified by *Rendon*'s holding) holds that divisibility in all cases is linked to a statute's "elements," and that a disjunctively-worded statute does not contain separate "elements" unless state law requires a jury to decide between the various textual alternatives. Another view (represented by the Government and Judge Graber's dissent from the denial of rehearing in *Rendon*) argues that a statute's alternative wording is enough to render it divisible—regardless of whether those alternatives are "means" or "elements." *See* Respondent's Supplemental Brief, July 31, 2015 ("Resp. Br.") at 6-10; *Rendon v. Holder,* 782 F.3d 466, 467 (9th Cir. 2015) (Graber, J., dissenting from the denial of rehearing en banc). And a variant

of this view (put forth by Judge Kozinski's separate dissent from the denial of rehearing en banc in *Rendon*) suggests that, although a statute's divisibility turns on the elements/means distinction, the determination of elements should be limited to a "peek" at the judicial records a court is permitted to consult under *Shepard v. United States*, 544 U.S. 13 (2005). *See id.* at 473.

In all respects, *Rendon* represents the correct approach. *Descamps* unequivocally fused divisibility to an offense's *elements*, not an offense's statutory structure. And because state records of conviction will not necessarily identify an offense's elements, *Rendon* correctly held that courts must look to state law—rather than the *Shepard* documents—to discern a statute's elements.

A. The Government and Judge Graber's Approach Is Inconsistent With *Descamps*, Resurrects *Aguila-Montes*, and Creates Tension With a Century of State Law.

In its supplemental brief, the Government makes the bold claim that *Descamps* "disclaimed any need to inquire into whether statutes phrased in the alternative set out 'means' or 'elements' under state law"—thus, divisibility is "a simple matter of examining the text of the relevant criminal statute." Resp. Br. at 7. In other words, whenever a criminal statute may be violated in multiple ways, courts can abandon any inquiry into "means" and "elements" and simply assume that the statute is divisible. This position echoes Judge Graber's dissent from the

denial of rehearing in *Rendon*, which argued that "a *different* rule applies if the text of the statute contains a list of alternatives," one in which "the elements/means distinction is *not* relevant." 782 F.3d at 468 (emphasis in original). But this position is completely untenable, for four reasons.

First, it is impossible to reconcile this position with *Descamps*'s unwavering commitment to an elements-based approach. Consider just a handful of the *Descamps* majority's *84 references* to "elements":

- "The key, we emphasized, is *elements*, not facts."
- "Two more recent decisions have further emphasized the *elements*-based rationale . . . ."
- The modified categorical approach retains the categorical approach's "focus on the *elements*, rather than the facts, of a crime."
- *Aguila-Montes* "turns an *elements*-based inquiry into an evidence-based one."
- "This Court offered three grounds for establishing our *elements*-centric, formal categorical approach."
- "And 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."
- "The modified approach does not authorize a sentencing court to substitute such a facts-based inquiry for an *elements*-based one."

133 S. Ct. at 2283, 2284, 2285, 2287, 2288 (emphases added). It is inconceivable that the *Descamps* majority would so easily cast aside this firmly-held "elements-based" approach because of a mere difference in statutory structure—especially when this structure does not change the concerns that led the Supreme Court to adopt an "elements-based" approach in the first place. *See id.* at 2287 (confirming an "elements-centric approach" because it comports with the statute's text and history, avoids Sixth Amendment concerns, and avoids the "practical difficulties and potential unfairness of a factual approach").

Second, this position cannot be reconciled with the very footnote on which it is purportedly based. Both the Government and Judge Graber point to a sentence in footnote 2 stating: "Whatever a statute lists (whether elements or means), the documents we approved in *Taylor* and *Shepard—i.e.*, indictment, jury instructions, plea colloquy, and plea agreement—would reflect the crime's elements." *Id*. at 2285 n.2. But not only does this sentence show that a statute may "list" both elements and means, the phrase "reflect the crime's elements" confirms that the whole point of consulting the *Shepard* documents is to determine whether the disjunctively-worded alternatives *are* elements, which would be irrelevant if divisibility did not turn on this distinction. Yet confusingly, the Government claims that *Descamps* "disclaimed any need" to distinguish means

from elements—while in the same paragraph quoting footnote 2 for the proposition that courts must "discern whether an item listed in the statute *is an element for purposes of a divisibility analysis*." Resp. Br. at 7 (emphasis added). In other words, the proponents of this approach ignore the elephant in the room—that if the *Descamps* majority were abandoning the means/elements distinction for disjunctively-worded statutes, it would make no sense for footnote 2 to still say that the *purpose* of the inquiry is to discern an offense's elements.

Third, the Government and Judge Graber's position simply resurrects the *Aguila-Montes* approach that the Supreme Court so firmly rejected the first time around. *Descamps* rebuffed this Court's reliance on a prosecutorial allegation that was "irrelevant to the crime charge," which would do "just what we have said it cannot: rely on its own finding about a *non-elemental fact* to increase a defendant's maximum sentence." 133 S. Ct. at 2289 (emphasis added). If this Court were to eschew any difference between "means" and "elements," it would inevitably apply the modified categorical approach to facts that a jury need not have found—*i.e.*, facts that a defendant was not convicted of "in the deliberate and considered way the Constitution guarantees." *Id*. at 2290. Accordingly, it makes no difference whether a fact is one that appears on a statute's face—so long as it need not be found by a jury, the Court is swapping "a facts-based inquiry for an

elements-based one," which is precisely what the Supreme Court rejected in *Aguila-Montes*. *Id*. at 2293.

Fourth, the Government and Judge Graber's approach is in tension with how states have long regarded their own disjunctively-worded statutes. For over a century, the majority of states—including California—have followed the "*Sullivan* rule," which 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 (Ct. App. 1993) (citing *People v. Sullivan*, 65 N.E. 989, 989-90 (N.Y. 1903)).[1] In *Sullivan*, a New York state court found that a first-degree murder statute that, on its face, could be violated by killing the victim with either a "deliberate and premeditated design" or while the defendant was "engaged in the commission of a felony" simply described "the *same offense* as committed in *different manners* or by *different means*." *Sullivan*, 65 N.E. at 990 (emphasis added). As such, in states that follow the *Sullivan* rule, one would not be able to tell—simply by looking at a facially-disjunctive statute—whether it creates one

[1] *See also State v. Martinez*, 900 A.2d 485, 491 n.18 (Conn. 2006) (stating that "most states follow the rule of *People v. Sullivan*"); *State v. Delestre*, 35 A.3d 886, 898 n.13 (R.I. 2012) (stating that the *Sullivan* rule "has been widely adopted by many of our sister states").

crime or several separate crimes.[2] But if this Court reads *Descamps* to conclude that statutes with multiple alternatives are *always* divisible and subject to the modified categorical approach, it will create disharmony with state courts that interpret their own criminal statutes as codifying a single, unitary crime, thereby creating needless inconsistency and confusion between federal and state law.

Because the Government and Judge Graber's approach would negate nearly every principle upon which *Descamps* itself was based, return this Court to the much-maligned "facts-based inquiry" of *Aguila-Montes*, and diverge from a century of state law holding that disjunctive alternatives do not necessarily constitute separate offenses, the Court should affirm *Rendon*'s elements-based approach to statutory divisibility.

B. State Law—Not *Shepard* Documents—Determines a Statute's Elements.

Because *Rendon* correctly employed an elements-based approach to divisibility, the next question is *how* courts should go about identifying an offense's elements. In his dissent from the denial of rehearing in *Rendon*, Judge Kozinski offered an alternative reading of *Descamps*'s footnote 2—that while

[2] The minority of states follow the rule in *United States v. Gipson*, which holds that alternatives in a disjunctively-worded statute may be separated into "distinct conceptual groupings," each of which would constitute a separate offense. 553 F.2d 453, 458 (5th Cir. 1977). Thus, even the states that do not follow the *Sullivan* rule do not hold that every disjunctively-worded provision in a statute necessarily creates a separate crime.

divisibility *does* turn on the means/elements distinction, courts should be permitted to "peek at the *Shepard* documents" to determine whether a statutory alternative constitutes a means or an element. *Rendon*, 782 F.3d at 473. In other words, courts need not look to state law but may assume that whatever appears in the *Shepard*-approved documents will reveal the elements of the offense.

While this approach may seem tempting in theory, in practice it would lead to deeply-flawed results. In footnote 2, the Supreme Court optimistically assumed that all state courts—like federal courts—would create a judicial record in which the elements of the offense would be readily apparent. But the simple truth is that—at least in California—the *Shepard* documents do not accurately reflect a narrowed list of the elements of a defendant's conviction. Because of this, *Rendon* correctly held that courts must consult state law—rather than the *Shepard* documents—to discern an offense's elements.

1. In California, the *Shepard*-approved documents will not necessarily reflect a crime's elements.

Descamps's assumption in footnote 2 that "the documents we approved in *Taylor* and *Shepard* . . . would reflect the crime's elements" was likely based on the Supreme Court's experience with federal criminal proceedings, where the record of conviction will *always* contain a list of the offense's elements. For

instance, where a federal defendant pleads guilty to a crime, Fed. R. Crim. P. 11 requires that "the district court must advise the defendant of the elements of the crime and ensure that the defendant understands them." *United States v. Minore*, 292 F.3d 1109, 1115 (9th Cir. 2002). Federal defendants who plead guilty pursuant to a plea agreement will have the added bonus of receiving written notice of the elements in their signed plea agreement. *See United States v. Avery,* 719 F.3d 1080, 1084 (9th Cir. 2013) (referencing the list of elements in the plea agreement and vacating because the elements did not establish the correct offense to which the defendant pleaded guilty). And in cases where a defendant proceeds to trial, the federal court will instruct the jury on the elements of the offense. *See* Fed. R. Crim. P. 30. Moreover, federal criminal law does not permit "duplicity," or "the joining in a single count of two or more distinct and separate offenses." *United States v. UCO Oil Co*., 546 F.2d 833, 835 (9th Cir. 1976). Thus, whether in the charging instrument, the transcript of the proceedings, or the plea agreement, the *Shepard*-approved documents in a federal criminal case will always contain a narrowed list of the elements of an offense.

But the same is not true in state courts, particularly California. For over fifty years, California law has not only permitted but actually *required* prosecutors to charge offenses in the conjunctive. *See People v. Turner*, 8 Cal. Rptr. 285, 288

(Ct. App. 1960) ("It is well settled that where the statute enumerates several acts disjunctively, which separately or together shall constitute the offense, the indictment, if it charges more than one of them . . . should do so in the conjunctive.") (quotations and citation omitted). Indeed, only several years ago, the California Attorney General confirmed in the context of § 10851 that "[w]hen a crime can be committed in more than one way, it is standard practice to allege in the conjunctive that it was committed every way." *People v. Smith*, 303 P.3d 368, 375 (2013). Moreover, because California "does not attach any talismanic significance" to a charging document, prosecutors may orally amend a charge at the time of pleading. *People v. Sandoval*, 43 Cal. Rptr. 3d 911, 926 (2006). As a result, federal courts looking to discern an offense's elements from a California charging document might incorrectly assume that every conjunctive act alleged was an "element" of the offense—or even that the defendant admitted the same acts charged in the written document—when such is not necessarily true.

Indeed, this Court has frequently encountered California records of conviction that do not reflect an offense's elements. For instance, in this Court's en banc decision in *Young v. Holder*, the California *Shepard* documents before the Court consisted solely of a felony complaint and information and a copy of the electronic court docket stating that Young pleaded guilty to Count 1. 697 F.3d

976 (9th Cir. 2012) (en banc). Yet Count 1 charged Young with a series of separate offenses listed in the conjunctive ("transport, import . . ., sell, furnish, administer, and give away, and offer to transport, import . . ., sell, furnish, administer, and give away, and attempt to import . . . and transport a controlled substance"). *Id*. at 980-81. Thus, *Young* shows that, even where a statute contains separate crimes, with separate elements, a California record of conviction cannot be counted on to narrow the charge to a single crime that will reveal that crime's elements. And the *Young* record of conviction is far from unique in this respect, as conjunctively-charged offenses in the complaint or information tend to be the rule in California, rather than the exception.[3]

The frequency with which California prosecutors use conjunctive charges debunks *Descamps*'s assumption that, in a "typical case," a state prosecutor will only charge "one of [various] alternatives." 133 S. Ct. at 2284. Indeed, *Descamps* relied on a long list of secondary sources to confidently assert: "A prosecutor charging a violation of a divisible statute must generally select the relevant

[3] *See Malta-Espinoza v. Gonzales,* 478 F.3d 1080, 1082 (9th Cir. 2007) (finding in the context of a California offense that "[i]t is common to charge conjunctively when an underlying statute proscribes more than one act disjunctively"); *see also United States v. Vidal,* 504 F.3d 1072, 1075 (9th Cir. 2007) (en banc) (complaint alleged that defendant did "willfully and unlawfully drive and take a vehicle"); *United States v. Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (en banc) (complaint charged defendant with "enter[ing] an inhabited dwelling house and trailer coach and inhabited portion of a building").

element from its list of alternatives." *Id.* at 2290 and 2303 n.4. But these sources held—not only that a prosecutor "generally" charges a single offense—but that an accusation charging more than one offense would be "wholly insufficient." *Id*. (quoting *The Confiscation Cases*, 20 Wall. 92, 104, 22 L. Ed. 320 (1873)). *See also id.* at 2303 n.4 (citing multiple secondary sources suggesting that conjunctive charging is *not* permissible). In other words, *Descamps* was operating under the assumption that prosecutors *everywhere* will narrow counts in a charging document to a single offense, with a single set of elements.

It is easy to see why, if *Descamps* were operating under this assumption, footnote 2 would find "no real-world reason to worry" that the *Shepard* documents would not "reflect the crime's elements." *Id*. at 2285 n.2. If California prosecutors *always* narrowed counts to the elements of a single offense (and always negotiated pleas to that exact count), it would make sense to assume that the *Shepard* documents would "reflect the crime's elements." 133 S. Ct. at 2285 n.2. But because we know this is not true, footnote 2 cannot carry the weight Judge Graber and the Government ascribe it. In other words, because footnote 2 was based on a legal premise that does not reflect the reality of California courts, it should not be misinterpreted to subvert *Descamps*'s entire holding.

The varying ways in which a § 10851 offense is charged in California illustrate this point. Appendix A, attached to this brief, contains four redacted charging documents alleging a violation of § 10851 from four different California counties. The felony complaint from Contra Costa County charges a defendant with an "intent to temporarily *and* permanently deprive," while the felony complaint from Ventura County alleges an "intent, either permanently *or* temporary, to deprive." *See* Appendix A (emphasis added). *See also People v. Green*, 34 Cal. App. 4th 165, 175 (1995) (alleging an "intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle."). But the charging documents from Santa Clara County and San Francisco County merely charge the defendant with an "intent to deprive the owner," with no mention of the taking's duration. *See* Appendix A. *See also People v. Garza*, 35 Cal. 4th 866, 873 (2005) (alleging an "intent to deprive the owner of title to and possession of the vehicle"); *People v. Carter*, 48 Cal. App. 4th 1536, 1539 (1996) (same).

If Judge Graber's interpretation of footnote 2 were correct, a subsequent immigration or federal court considering a conviction from Contra Costa or Ventura might (incorrectly, *see infra* at 23-25) assume that a temporary or permanent taking represented "alternative elements" such that the statute was

divisible. But the same court considering a conviction from Santa Clara or San Francisco would correctly conclude that § 10851 requires only the intent to deprive for any period of time, making it indivisible. The end result is that *federal interpretation of the offense's elements would change depending on where the crime occurred*. Because such an approach would lead to egregious inconsistencies and allow prosecutors, rather than state legislatures, to determine an offense's elements, it cannot possibly be correct.

The simple truth is that—as Judge Kozinski himself admitted—the *Shepard* documents "may not clearly reveal which statutory terms are, in fact, elements." 782 F.3d at 474. *See also Young*, 697 F.3d at 991 ("[T]he clarity of state court plea or conviction records will often depend upon the habits and preferences of the individual trial judge and the clerk of the court") (B. Fletcher, J., concurring and dissenting). If California followed the federal criminal practice of independently listing a statute's elements in the plea colloquy or plea agreement and charging only one crime per count (as *Descamps* likely assumed it did), then courts could confidently look to the record of conviction to identify the elements of the statute. But where the *Shepard* documents simply contain a series of factual allegations—some of which may be elements and some of which may not—the act of looking to the record of conviction does not reveal which allegations are

elements and which are simply the "means of commission." *Descamps,* 133 S. Ct. at 2289 (quotations omitted). As such, this Court should not permit footnote 2 to wipe out the heart of *Descamps*'s holding—that it is jury unanimity, rather than statutory construction, that determines the elements of an offense.

2. Courts must look to state law—rather than the *Shepard* documents—to identify an offense's elements.

Because California records of conviction do not necessarily list the narrowed elements of an offense in the charging document, colloquy, or plea agreement, the only way to truly identify a statute's elements is to determine whether "state law requires" jury unanimity on a particular statutory alternative. *Rendon*, 764 F.3d at 1086. While Judge Graber's dissent argues that this is "precisely what [*Descamps*] instructed us not to do," *Rendon,* 782 F.3d at 467, this statement overlooks the fact that the *Descamps* majority specifically reserved judgment on the question of "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." *Descamps,* 133 S. Ct. at 2291. In other words, *Descamps* could not have *forbidden* courts to consider state law when it expressly stated that it had not yet decided that issue.

In fact, the Supreme Court has already found that federal courts must defer to state law on the question of whether a statutory alternative is a "means" or an "element." In *Schad v. Arizona*, the Supreme Court considered (as did the state court in *Sullivan*, 65 N.E. 989) whether a first-degree murder statute that could be facially divided into premeditated murder or felony murder required a jury to agree on which acts the defendant committed. 501 U.S. 624, 630 (1991). In a plurality opinion,[4] the Supreme Court confirmed that "legislatures frequently enumerate alternative means of committing a crime without intending to define separate elements or separate crimes." *Id*. at 636. Moreover, it sharply criticized the dissent's approach, which would have found that "whenever a statute lists alternative means of committing a crime," the jury must decide between them, "even where there is no indication that the statute seeks to create separate crimes." *Id*. at 635-36. *Schad* explained that this flawed approach "rests on the erroneous assumption that any statutory alternatives are *ipso facto* independent elements defining independent crimes under state law . . . ." *Id*. at 636.

But *Schad* declined to issue a bright line rule on the means-versus-elements question. *See id*. at 643. Finding that this line was a "value choice[] more

[4]While Justice Scalia agreed with the plurality that jurors need not reach unanimity on the means by which a defendant committed first-degree murder, he declined to reach this conclusion on the same grounds as the plurality. *See id*. at 649-50 (Scalia, J. concurring).

appropriately made in the first instance by a legislature than by a court," the Court invoked the need for judicial restraint and found that, at a minimum, the Arizona court's decision not to require juror unanimity on various statutory alternatives was constitutionally permissible. *Id*. at 637. Importantly, the Court found that "we are not free to substitute our own interpretations of state statutes for those of a State's courts," adding:

> If 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, where an inquiry turns on whether a disjunctively-worded state statute contains alternative "means" or "elements," federal courts are not free to ignore state law—they are *bound* by it. *See also Johnson v. United States*, 559 U.S. 133, 138-39 (2010) (holding in the categorical approach context that federal courts are "bound by" state court interpretations of state law). Because of this, Judge Graber's claim that "the Supreme Court told us precisely *not* to undertake this entire inquiry [into state law]," 782 F.3d at 473, is contradicted—not only by *Descamps*'s own language—but by other Supreme Court precedent holding that federal courts may not substitute their own opinions

for those of state courts in the elements/means context. Thus, *Rendon*'s holding (that a statute is only divisible when "state law requires" a jury to unanimously agree upon a statutory alternative, 764 F.3d at 1086) aligns perfectly with *Schad*.

Moreover, consulting state law is not the complicated task that Justice Alito's dissent made it out to be. First, "pars[ing] state law" is nothing new—in fact, courts already do it as part of the categorical approach. *See, e.g.*, *Marmolejo-Campos v. Holder*, 558 F.3d 903, 912 (9th Cir. 2009) (en banc) (looking to state law to define the elements of Arizona's Aggravated DUI statute). Second, since *Rendon* this Court has already "parse[d] state law" in a variety of cases without the analysis becoming overly cumbersome or complicated. *See, e.g.*, *Padilla-Martinez v. Holder*, 770 F.3d 825, 832 n.3 (9th Cir. 2014) (consulting jury instructions and state case law to find that a particular controlled substance is an "element" of a California drug offense). Third, federal courts need not determine a particular statute's elements over and over—once it does so, that analysis will apply to all future cases. To borrow *Descamps*'s language, examining state law presents "no real-world reason to worry" that the analysis will be unduly burdensome. 133 S. Ct. at 2285 n.2.

In sum, *Descamps*'s footnote 2 was based on a legal premise that is true in federal court but not California and should not be read to gut *Descamps*'s essential

holding. Thus, where the text of a state statute contains various lists, subsections, or alternatives, the Court should follow *Rendon* and examine state law to determine whether the disjunctively-worded options represent "alternative means," rather than "alternative elements."

3. At a minimum, this Court should apply the rule of lenity.

Because the Court's decision in this case will also shape the categorical approach for purposes of federal criminal sentencing enhancements, *amici* urge this Court, at a minimum, to consider this issue in light of the rule of lenity. The categorical approach is ultimately 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 v. United States,* 495 U.S. 575, 602 (1990)). In interpreting a statute, courts must follow the "rule of lenity" by adopting the interpretation that is more favorable to criminal defendants. *Ladner v. United States*, 358 U.S. 169, 178 (1958) (stating that courts "will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended"). Thus, where, as here, two competing statutory interpretations exist, the Court must adopt the interpretation more favorable to defendants, which is *Rendon.*

C. Applying These Principles Reveals That California Vehicle Theft Contains a Single, Indivisible Set of Elements.

Section 10851 is a classic example of a statute that lists multiple alternative means but has "a single, indivisible set of elements." *Descamps*, 133 S. Ct at 2281. Specifically, although § 10851 uses "either ... or" language in describing the length of deprivation, the statute is indivisible because it has just one intent element—"an intent to deprive" for any period of time.[5]

Almost forty years ago the California Supreme Court held that a jury need not agree whether an individual charged with a violation of § 10851 had the intent to "either permanently or temporarily deprive" the owner of possession. *See People v. Jaramillo*, 16 Cal. 3d 752, 757-58 (1976). In *Jaramillo*, the jury was instructed (in accord with the standard jury instruction of the time) that it must find a "specific intent to deprive the owner either permanently or temporarily of his title to, or possession of, such vehicle, whether with or without intent to steal

[5]There is no question that California actually prosecutes individuals who possess an intent to deprive the owner only temporarily. *See People v. Hutchings*, 242 Cal. App. 2d 294, 295 (1966) (§ 10851 conviction affirmed where defendant had permission to take the car for 30 or 40 minutes to show it to his wife but was found in the car about five hours later); *People v. Maxwell*, 2004 WL 2958311 (Cal. App. 2 Dist 2004) (§ 10851 conviction affirmed where defendant kept rental vehicle beyond agreed return date); *People v. Hao*, 2012 WL 4713123 (Cal. App. 4 Dist 2012) (§ 10851 conviction where defendant took a vehicle for about a day but returned it to "the same spot from which it had disappeared, with no damage but an empty gas tank").

the same." *Id*. at 756 n.3 (quoting CALJIC No. 14.36). *Jaramillo* concluded that it was "not possible" to determine "which combination of proscribed conduct and intent resulted in the finding of guilt in the present case." *Id*. at 757-58. Significantly, *Jaramillo* expressly recognized that jurors could have found the defendant guilty "simply because some doubt existed as to whether [he] intended to steal or merely to temporarily deprive the [owners] of possession and to drive their vehicle." *Id*. at 758. *See also People v. Carter*, 48 Cal. App. 4th 1536, 1541 (1996) ("[A] jury could find a defendant guilty of violating [§ 10851] without determining whether the defendant intended to steal or simply to temporarily deprive the owners of possession of their vehicle."). Because "such a general determination would be sufficient," *id*., under California law, the statute is thus indivisible. *See Rendon*, 764 F.3d at 1086 (finding a statute divisible "[o]nly when state law requires" the jury to unanimously agree on the particular statutory alternative).

Although an on-point state Supreme Court case should settle the matter (and total reliance on *Shepard*-approved documents is problematic in California, *see supra* at 11-18), even a "peek" at standard jury instructions confirms that § 10851 has a single element of an intent to deprive. Where § 10851 guilt has been determined by trial, reviewing courts have generally instructed juries pursuant to

CALCRIM No. 1820, or CALJIC No. 14.36, or both.[6] CALCRIM No. 1820's intent element is unquestionably indivisible—it requires the jury to find only that the defendant "intended to deprive the owner of possession or ownership of the vehicle for any period of time." And while CALJIC No. 14.36 uses the statute's disjunctive terms, it lists them as alternative means satisfying a single intent element. ("In order to prove such a crime, each of the following elements must be proved: ... [¶] 3. When such person drove the vehicle [he] had the specific intent to deprive the owner either permanently or temporarily of his or her title to or possession of the vehicle."). Thus, even a "peek" at standard jury instructions demonstrates the indivisibility of the statute. Plus, there is no reason to doubt the instructions' accuracy, since the goal of standard instructions is to "accurately state the law in a way that is understandable to the average juror," Cal. Rules of Court, rule 2.1050(a), and the Judicial Council "makes every effort to ensure that they accurately state existing law," Cal. Rules of Court, rule 2.1050(b). Thus, California unequivocally holds that jurors need not agree whether a defendant intended to temporarily or permanently deprive an owner of his vehicle in order to secure a conviction under § 10851.

[6] CALCRIM is the current standard instruction; CALJIC was the standard instruction at the time of Mr. Almanza's conviction.

Because *Rendon* correctly held that divisibility turns on an "elements" versus "means" distinction, and because California regards temporary and permanent takings as alternative "means" of committing § 10851, this Court should find that Mr. Almanza's conviction is categorically not a crime involving moral turpitude and affirm the panel's decision.

II.

The *Almanza* Approach Permits Defense Attorneys to Accurately Advise Their Clients of Immigration Consequences.

Amici also urge this Court to uphold the rationale of *Almanza-Arenas* for a different but equally compelling reason—*Almanza*'s approach provides much-needed clarity to defense attorneys advising noncitizens in compliance with the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. 356 (2010). *Almanza* affirmed a simple rule of interpretation: because courts must assume that a conviction rested on "the least of the acts criminalized," ambiguity in criminal statutes referenced by the Immigration & Nationality Act is construed in the noncitizen's favor. 771 F.3d at 1194 (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1693 (2013)). This rule resolves significant confusion in a notoriously complicated area of law and provides criminal defenders with confidence to

ensure that noncitizens are accurately advised of the immigration consequences of their criminal proceedings and can thereby make informed decisions.

Because deportation is "the equivalent of banishment or exile," criminal defense attorneys have an ethical duty to advise noncitizen clients as to whether a criminal conviction will cause deportation. *See Padilla*, 559 U.S. at 374. Failure to do so violates the noncitizen's right to competent counsel under the Sixth Amendment of the United States Constitution. *See id*. As criminal defense attorneys well know, "preserving a client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id*. at 390-391. *Padilla* thus requires defense attorneys to effectively navigate the extraordinarily complicated interplay between immigration and criminal laws and to craft immigration-safe plea bargains for noncitizen defendants. *See Mellouli v. Lynch*, 135 S. Ct. 1980, 1987 (2015) (explaining that the categorical approach "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") (internal quotations marks and alterations omitted). Considering the tremendously high-stakes nature of criminal proceedings for noncitizens, clarity in this area is crucial.

But prior to *Almanza*, this Court's case law made it difficult for defense attorneys to predict the immigration consequences of a conviction. *See Young*, 697 F.3d at 989 (finding that an inconclusive record of conviction could not establish removability but could establish ineligibility for relief). For instance, under *Young,* a vague record of conviction to an otherwise overbroad statute would generally protect a lawful permanent resident from deportation because the government has the burden to prove deportability. *Id*. But where a noncitizen has the burden to prove *admissibility* under 8 U.S.C. § 1182 (such as a permanent resident who seeks admission at a port of entry or a non-permanent resident who is applying for lawful status in the United States) or to prove eligibility for relief (such as a permanent resident who is otherwise deportable but applying for relief), a vague record of conviction would trigger removal because "the alien must establish that he or she was *not* convicted of such a crime." *Id*. In other words, under *Young,* the immigration consequences of a conviction would frequently turn—not on the offense of conviction itself—but on the noncitizen's status and procedural posture.

Before *Young*, criminal defense attorneys could count on a uniform application of the categorical or modified categorical approach, whether in the context of deportability, inadmissibility, or eligibility for relief. *See Sandoval-Lua*

v. Gonzales, 499 F.3d 1121, 1130 (9th Cir. 2007) (holding that a noncitizen carried his burden of establishing eligibility for relief by producing an inconclusive record of conviction). But the *Young* rule changed that by allowing the same criminal conviction to trigger immigration consequences in certain circumstances but not others. *Young* also forced criminal defense attorneys to undertake the complex inquiry of determining a noncitizen's immigration status—a legal analysis that criminal defenders are generally unprepared to conduct.

The following example illustrates *Young*'s challenge for defense attorneys. As previously discussed, § 10851 is not categorically a crime involving moral turpitude because it does not require "an intent to permanently deprive the owner of property." *See Castillo-Cruz v. Holder*, 581 F.3d 1154, 1161 (9th Cir. 2009). Under *Almanza,* a noncitizen charged with § 10851 could stipulate generally to "a factual basis" without specifying whether the defendant had an intent to "temporarily" or "permanently" deprive. *See People v. Palmer*, 313 P.3d 512, 518 (Cal. 2013) (trial court may accept a general stipulation from counsel without also requiring a recitation of facts or reference to a document). Such a plea would not involve moral turpitude because, under *Almanza*, the result would be the same regardless of whether the noncitizen did or did not have status, and was or was not

applying for relief. In other words, such a conviction would not trigger the consequences of a crime involving moral turpitude no matter the person or the context.

But the same was not true under *Young*. After *Young,* the attorney had to begin by deciphering the noncitizen's immigration status, whether the noncitizen would be seeking affirmative immigration relief in immigration court, and what type of relief she would be seeking. This is a hyper-technical inquiry usually reserved for qualified immigration attorneys. If the criminal defense attorney determined that the client was a prospective relief applicant, the noncitizen would then have to negotiate with the prosecutor to secure a plea with a specific intent to deprive the owner "temporarily" of enjoyment of the property. But such a plea is unlikely, because it would require the prosecutor to agree to a general fact that was immaterial for the criminal case.[7] In other words, the parties would usually be on a collision course to trial.

[7] Even if a noncitizen *could* persuade the prosecutor to agree to an immaterial fact, there is no guarantee that the noncitizen would be able to obtain court documents reflecting this. *See Young,* 697 F.3d at 991 (noting that noncitizens may be unable to obtain court documents "because of language barriers, a lack of information about the court system, their detained status, or an inability to pay fees for copies of court records") (B. Fletcher, J., concurring and dissenting).

Young essentially required defense attorneys to needlessly go through a host of labyrinthine legal inquiries to answer what should be a relatively simple question: will the conviction trigger the noncitizen's removal? By contrast, *Almanza* eliminated these complex inquiries and created a simple rule: analysis under the modified categorical approach will reveal whether the offense is a "crime involving moral turpitude," regardless of the noncitizen's immigration status or procedural posture. Such a rule provides much-needed clarity in the evolving world of *Padilla* advisals and significantly decreases the burden on criminal defense attorneys to understand the complex nuances of immigration law. And given that more than 95% of criminal cases are resolved through the plea bargain process, the sheer volume of cases underscores the critical need for such clarity. *See* Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 2003, p. 418 (31st ed. 2005); *Padilla*, 559 U.S. at 392 (more than 95% of criminal convictions are the result of a plea bargain). Thus, this Court should uphold the *Almanza* approach in order to ensure that defense attorneys are able to comply with their constitutionally-mandated duty of advising noncitizens on the immigration consequences of their criminal convictions.

CONCLUSION

For the aforementioned reasons, *amici curiae* urge this Court to apply *Rendon* and uphold the panel's decision in *Almanza-Arenas*.

Respectfully submitted,

/s/ Kara Hartzler

Dated: August 7, 2015

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CERTIFICATE OF COMPLIANCE

__X__ The brief *Amicus Curiae is* in compliance with Circuit Rule 29-2(c)(3): the word count of the within brief does not exceed 7000.

August 7, 2015
Date

/s/ Kara Hartzler
Signature of Attorney or
Unrepresented Litigant

Certificate of Service When All Case Participants Are CM/ECF Participants
No. 09-71415 & 10-73715

I hereby certify that on *August 7, 2015*, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ *Kara Hartzler*
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APPENDIX A

SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
PITTSBURG

THE PEOPLE OF THE STATE OF CALIFORNIA,

VS.

DEFENDANT./

NO. 182923-3
DA NO. C 14 013893-3
COMPLAINT - FELONY

01) CVC 10851(a)

The undersigned states, on information and belief, that , Defendant, did commit a felony, a violation of VEHICLE CODE SECTION 10851(a) (UNLAWFULLY DRIVING OR TAKING VEHICLE), committed as follows:

On or about July 2, 2014, at Pittsburg, in Contra Costa County, the Defendant, did unlawfully drive and take a 1992 Nissan , a vehicle which was owned by without the consent of the owner and with the intent to temporarily and permanently deprive the owner of title to and possession of the vehicle.

COMPLAINANT REQUESTS THAT DEFENDANT(S) BE DEALT WITH ACCORDING TO LAW. I DECLARE UNDER PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT.
DATED: December 1, 2014 AT MARTINEZ, CALIFORNIA

FREDDIE L. MARTINEZ/mp
DEPUTY DISTRICT ATTORNEY

ACER

GREGORY D. TOTTEN
District Attorney
800 S. Victoria Avenue
Ventura, CA 93009

SUPERIOR COURT OF CALIFORNIA

COUNTY OF VENTURA

THE PEOPLE OF THE STATE OF CALIFORNIA, vs [redacted] Defendant(s).	VCIJIS Case: [redacted] Amended Felony Complaint ☐ Complaint Deemed Information

The undersigned is informed and believes that:

COUNT 1

On or about April 08, 2015, in the above named Judicial District, the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, in violation of Vehicle Code 10851(a), a Felony, was committed by [redacted] who did unlawfully drive and take a certain vehicle, to wit, 2002 Suburu Forrester [redacted] then and there the personal property of [redacted] without the consent of and with intent, either permanently or temporarily, to deprive the said owner of title to and possession of said vehicle.

Special Allegation 1

It is further alleged that the defendant [redacted] O, prior to the commission of the above offense was convicted of the following:

Court Case #	Charge	Dt Offense	Dt Conviction	Court	Jurisdiction
[redacted]					

within the meaning of Penal Code section 667(c)(1), 667(e)(1), 1170.12(a)(1), and 1170.12(c)(1).

Special Allegation 2

It is further alleged pursuant to Penal Code section 1170(h)(3) that an executed sentence for a felony shall be served in state prison because DUKE JOHN TINOCO has suffered the following prior serious or violent felony conviction(s):

Court Case #	Charge	Dt Offense	Dt Conviction	Court	Jurisdiction
[redacted]					

NOTICE: Pursuant to Penal Code section 1170(f), the above allegation is not subject to dismissal.

SHO | State Prison Eligible

CASE NAME: [redacted]	CASE NUMBER: [redacted]
Arresting Agency: [redacted]	
Arresting Agency Report No: [redacted]	
Date Taken into Custody:	

VIOLATION OF LAW BY CHILD

The child is a person described by section 602 in that

1. the child was under the age of 18 years at the time of the law violations alleged below, and
2. the child has violated the following laws of the State of California, or of the United States, or any ordinance of a city or county of California.

(State, describe, and number as separate counts each code section and subdivision that the child is alleged to have violated, and as to each count, whether it is a misdemeanor or felony.)

COUNT 1

On or about January 11, 2015, in the County of Santa Clara, State of California, the crime of THEFT OR UNAUTHORIZED USE OF A VEHICLE, in violation of VEHICLE CODE SECTION 10851(a), a Felony, was committed by [redacted] who did drive and take a vehicle, a Honda Motorcycle, belonging to [redacted] without the consent of the owner and with the intent to deprive the owner of title to and possession of the vehicle.

COUNT 2

On or about January 11, 2015, in the County of Santa Clara, State of California, the crime of PURCHASING, RECEIVING, OR POSSESSING TOBACCO OR PARAPHERNALIA, in violation of PENAL CODE SECTION 308(b), an Misdemeanor, was committed by [redacted] who did while under the age of 18 years, purchase, receive, and possess any tobacco, cigarette, cigarette papers, a preparation of tobacco, and any instrument and paraphernalia designed for smoking tobacco and products prepared from tobacco.

Any juvenile, who is adjudicated that he or she comes within the description of Welfare and Institutions Code section 602 due to the commission of any felony offense, including any attempt to commit the offense, charged in this petition is required to provide buccal swab samples, right thumbprints and a full palm print impression of each hand, and any blood specimens or other biological samples required pursuant to the DNA and Forensic Identification Database and Data Bank Act of 1998 and Penal Code section 296, et seq.

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ATTORNEYS FOR THE PEOPLE

ENDORSED
FILED
San Francisco County Superior Court
[redacted] 2015
CLERK OF THE COURT
By: _____ Deputy Clerk
DEPT ___

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

THE PEOPLE OF THE STATE OF CALIFORNIA
Plaintiff,

v.

[redacted]

FELONY COMPLAINT

CASE NUMBER:
[redacted]

The Undersigned, being sworn says, on information and belief, that:

COUNT: I

The said defendant, [redacted] did in the City and County of San Francisco, State of California, on or about the [redacted] 2015, commit the crime of UNLAWFUL DRIVING OR TAKING OF A VEHICLE, to wit: Violating Section **10851(a)** of the California Vehicle Code, a Felony, in that the said defendant did willfully and unlawfully drive and take a certain vehicle not his/her own, to wit: [redacted] without the consent of [redacted] the owner thereof, and with the intent then and there to deprive said owner of his/her title to and possession of said vehicle.

COUNT: II

[redacted]