Nos. 14-1036, 14-1713

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JESUS EDUARDO LOPEZ SILVA,
Petitioner,

vs.

ERIC H. HOLDER, JR., Attorney General of the United States,
Respondent.

ON PETITION FOR REVIEW FROM
THE BOARD OF IMMIGRATION APPEALS
A043-459-660

BRIEF OF NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, IMMIGRANT DEFENSE PROJECT, AND IMMIGRANT LAW CENTER OF MINNESOTA AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

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DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 29(c), *amici curiae* National Immigration Project of the National Lawyers Guild, Immigrant Defense Project, and Immigrant Law Center of Minnesota state that no publicly held corporation owns 10% or more of the stock of any of the parties listed above, which are nonprofit organizations.

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

INTRODUCTION AND STATEMENT OF AMICI

Under Federal Rule of Appellate Procedure 29(b), the National Immigration Project of the National Lawyers Guild, the Immigrant Defense Project, and the Immigrant Law Center of Minnesota respectfully submit this brief to assist the Court in determining whether the Minnesota offense of possession of a firearm by an ineligible person, under Minn. Stat. § 624.713 subd. 1(2), qualifies as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii). The question is both one of first impression and one of great significance for this Court.

The Board of Immigration Appeals wrongly found that petitioner's conviction for possession of a firearm by an ineligible person under Minnesota law was an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii), as an offense described in 18 U.S.C. § 922(g)(1), and therefore made him ineligible for cancellation of removal for permanent residents under 8 U.S.C. § 1229b(a). Specifically, the Board affirmed that a conviction under the Minnesota statute was a categorical match to 18 U.S.C. § 922(g)(1). R. 24.

The Minnesota firearms statute counterintuitively defines firearms to include BB guns, which are excluded from the generic federal definition of firearms. *See e.g.*, *State v. Fleming*, 724 N.W.2d 537, 540 (Minn. App. 2006). Because the state law definition of firearms is plainly broader than the generic federal definition, it cannot be a categorical match under the approach recently reaffirmed by the United

States Supreme Court in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013), and *Descamps v. United States*, 133 S. Ct. 2276 (2013), both of which recognized the statutory basis and critical purposes served by adherence to a categorical assessment of past convictions. And an examination of the record of conviction is not appropriate as both the statutory structure and the case law demonstrate that Minn. Stat. § 624.713 subd. 1(2) does not define multiple, alternative crimes, but a singular offense. *See Descamps*, 133 S. Ct. at 2284. Consequently, because Minnesota law covers the possession of BB guns, as evidenced by routine prosecution of such offenses, *see infra* I.C, a conviction under Minn. Stat. § 624.713 subd. 1(2) is never a categorical match to 18 U.S.C. § 922(g)(1), and the analysis ends.

In its misguided application of the categorical approach in Petitioner's case, the Board ignored the breadth of the Minnesota statute as pointed out below and as highlighted by Petitioner's brief. The Board's ruling, if uncorrected, stands to sweep up countless BB gun users and wrongly subject them to mandatory banishment from the United States for a conviction of an aggravated felony. *Amici* submit this brief to shed light on this critical error and urge this Court to reject the Board's analysis. This Court can correct the mistaken designation of Minn. Stat. § 624.713 subd. 1(2) as an aggravated felony, and thereby avoid the unjust consequences of this designation for myriad noncitizens and their families.

Amici are non-profit organizations with a direct interest in assuring that the rules governing classification of criminal convictions for immigration purposes are fair and predictable and give noncitizen defendants the benefit of their plea bargains. The National Immigration Project of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The Immigrant Defense Project is a non-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused and convicted of crimes. The Immigrant Law Center of Minnesota (ILCM) is a Minnesota based non-profit organization that engages in advocacy, direct services, education, outreach, and impact litigation to protect the civil and human rights of noncitizens. ILCM routinely represents noncitizens with criminal convictions and receives state funding to provide technical assistance and training on the immigration consequences of criminal convictions to Minnesota's public defenders.

ARGUMENT

I. MINNESOTA POSSESSION OF A FIREARM BY AN INELIGIBLE PERSON DOES NOT CONSTITUTE AN AGGRAVATED FELONY UNDER 8 U.S.C. § 1101(a)(43)(E)(ii) BECAUSE IT CRIMINALIZES THE POSSESSION OF BB GUNS.

This case boils down to a single question: Does Petitioner's state offense of conviction match the generic definition of the federal ground of deportability? The

comparison is between the Minnesota offense of possession of a firearm by an ineligible person, codified at Minn. Stat. § 624.713 subd. 1(2), and 8 U.S.C. § 1101(a)(43)(E)(ii), which includes an offense described in 18 U.S.C. § 922(g)(1), the federal felon in possession of a firearm law. Because the elements of the Minnesota statute do not match the generic definition of the federal firearms statute, this Court should find that Petitioner's conviction is not an aggravated felony.

A. The "Least of the Acts" Criminalized under the Minnesota Offense of Possession of a Firearm by an Ineligible Person Does Not Match the Generic Federal Definition of Firearm.

When determining whether a particular offense qualifies as an aggravated felony, this Court applies the categorical approach the Supreme Court applied in *Taylor v. United States*, 495 U.S. 575 (1990). *See Moncrieffe*, 133 S. Ct. at 1684*; Armenta–Lagunas v. Holder*, 724 F.3d 1019, 1021 (8th Cir. 2013). "The categorical approach 'focus[es] on the elements, rather than the facts, of a crime,'" and it compares the elements of the state offense of conviction with the elements of the generic offense. *United States v. Olsson*, 742 F.3d 855, 855-56 (8th Cir. 2014) (citing to *Descamps*, 133 S. Ct. at 2285).

This approach requires two basic steps. First, the adjudicator must look at the statute defining the criminal offense to determine the *minimum* conduct it covers. *See Moncrieffe*, 133 S. Ct. at 1684 (requiring "presum[ption] that the

conviction 'rested upon nothing more than the least of the acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense") (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). Next, the adjudicator compares that minimum conduct to the generic definition in the federal statute. *Moncrieffe,* 133 S. Ct. at 1684; *Descamps,* 133 S. Ct. at 2283. Only when the state statute, at its minimum, necessarily and in every case satisfies the generic definition in the federal statute is that conviction a "categorical match." *Id*.

In certain, limited circumstances, a "modified categorical approach" may be appropriate. This is when a state statute is divisible—"contain[ing] several different crimes, each described separately." *Moncrieffe,* 133 S. Ct. at 1684; *see United States v. Bankhead*, 746 F.3d 323, 326 (8th Cir. 2014) (the modified categorical approach may be used only "when a prior conviction is for violating a so-called divisible statute" which "sets out one or more elements of the offense in the alternative"). If some, but not all, of the distinct offenses match the generic definition, the modified categorical approach permits review of a limited set of documents from the record of conviction to reveal the part of the statute under which the noncitizen was convicted. *Descamps*, 133 S. Ct. at 2284. However, no matter the structure of the statute, the focus of categorical analysis is always on the statutory definition of the crime of conviction, not the particular facts underlying the offense. *Descamps*, 133 S. Ct. at 2285; *Moncrieffe*, 133 S. Ct. at 1684.

Here, the Department of Homeland Security charged and the Board wrongly found that Petitioner was convicted for an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii), as an offense "described in" 18 U.S.C. § 922(g)(1). R. 24. 18 U.S.C. § 922(g)(1) makes it unlawful for a person previously convicted of a felony to "possess in or affecting commerce, any firearm." "Firearm" for the purposes of this statute is defined at 18 U.S.C. § 921(a)(3). *See* 18 U.S.C. § 921(a) (setting forth the definition of firearm "as used in [Chapter 44 of Title 18]"); *see also United States v. Counce*, 445 F.3d 1016, 1018 (8th Cir. 2006) ("To obtain a conviction under 18 U.S.C. § 922(g), the government must prove that an object satisfies the federal definition of a firearm" at 18 U.S.C. § 921 (a)(3)). 18 U.S.C. § 921(a)(3) defines the term "firearm" as:

> (A) any weapon (including a starter gun) which will or is designed to or may readily be converted *to expel a projectile by the action of an explosive*; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

18 U.S.C. § 921(a)(3) (emphasis added). This is the generic federal definition of firearm. It expressly covers only weapons designed to expel a projectile through the action of an explosive; but not weapons, such as "BB" or pellet guns, that use *air or carbon dioxide* to expel a projectile.

Weapons that use air to expel a projectile are therefore not firearms for the purpose of the generic federal definition. *See United States v. Maloney*, 466 F.3d

663, 666 (8th Cir. 2006) ("It is undisputed that the pellet gun protruding from one bag in the back seat of the Chevrolet was not a 'firearm' within the meaning of [18 U.S.C. § 922(g)(1)]"); *United States v. Jones*, 222 F.3d 349, 352–53 (7th Cir. 2000) (jury had "a sufficient basis to reasonably conclude that Mr. Jones knew that he possessed a 'firearm' [in violation of § 922(g)(1)] and not a BB gun"); *United States v. Tahan*, 2009 WL 4110133, at *1 (W.D. Va. Nov 24, 2009) (unpublished) (explaining that a BB gun that expels a projectile through the action of compressed air does not qualify as a firearm under 18 U.S.C. § 921(a)(3)); *United States v. Say*, 233 F.Supp.2d 221, 222 (D. Mass. 2002) ("pellet guns … do not qualify as firearms under [18 U.S.C. § 922(j)]", which cross references 18 U.S.C. § 921(a)). *Cf. United States v. Patterson*, 684 F.3d 794, 796 (8th Cir. 2012) ("it was ultimately determined that Patterson had been carrying a BB gun pistol, which does not qualify as a firearm under federal law"); *United States v. Wardrick*, 350 F.3d 446, 453 (4th Cir. 2003) ("A pellet gun, on the other hand, has been characterized as "a dangerous weapon but not a firearm" under federal law); *United States v. Koonce*, 991 F.2d 693, 698 (11th Cir. 1993) (noting that a BB gun is not an explosive weapon and, as such, is generally not considered a firearm). The law is clear: BB guns are not here considered a "firearm."

Minnesota courts, interpreting Minnesota statutes, take a different approach, lumping together BB guns with traditional firearms. *See State v. Seifert*, 256

N.W.2d 87, 88 (Minn. 1977). The Minnesota game and fish law broadly defines "firearm" as "any gun from which a shot or a projectile is discharged by means of explosive, *gas, or compressed air*." Minn. Stat. § 97A.015, subd. 19[1] (emphasis added). The Minnesota courts have applied this broad definition of firearm to the offense of certain persons ineligible to possess firearms under Minn. Stat. § 624.713 subd. 1(2), Petitioner's statute of conviction, and expressly held that BB guns fall within this definition. *See State v. Fleming*, 724 N.W.2d 537, 540 (Minn. App. 2006) (upholding conviction for BB gun under Minn. Stat. § 624.713 subd. 1(2)). The "least of acts" criminalized under Minn. Stat. § 624.713 subd. 1(2) is thus possession of a BB gun. Thus, a conviction under this offense does not satisfy the generic federal definition under 18 U.S.C. § 921(a)(3).

In *Moncrieffe v. Holder*, the Supreme Court confirmed that a state firearms law that defines firearms more broadly than federal law, e.g., because it realistically allowed conviction for antique firearms, would not categorically match the federal firearms offense:

> [T]he Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions, like § 1101(a)(43)(C), which refers to a federal firearms statute that contains an exception for "antique firearm[s]," 18 U.S.C. § 921(a)(3). The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. But [*Gonzalez v.*] *Duenas–Alvarez* requires that there be "a realistic probability, not a theoretical possibility, that the State would apply its

[1] This statute was previously codified at Minn. Stat. § 97.40, subd. 34 (1974).

> statute to conduct that falls outside the generic definition of a crime." [549 U.S. 183, 193 (2007)]. *To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms.*

Moncrieffe, 133 S. Ct. at 1693 (emphasis added).[2] The Supreme Court's reasoning plainly demonstrates that if Petitioner can show that Minnesota actually prosecutes defendants for firearm offenses involving BB guns, there is a "realistic probability" that a conviction under Minn. Stat. § 624.713.1(2) is overbroad, and therefore not a categorical match.

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[2] In doing so, the Supreme Court abrogated the Board's decision in *Matter of Mendez-Orellana*, 25 I&N Dec. 254 (BIA 2010). There, the Board held that a respondent charged with the firearm ground of deportability must affirmatively demonstrate that he or she was convicted of possessing an antique to defeat deportability. *Id*. at 256. The Board reasoned that because a criminal defendant bears the burden to affirmatively establish that the antique exception applies in a federal criminal prosecution, that the noncitizen should bear the same burden in removal proceedings. *Id*. at 255-56. But the *Moncrieffe* Court was clear that this burden-shifting provision in the underlying federal statute of conviction does not extend to the application of the categorical approach. *Moncrieffe,* 133 S. Ct. at 1701 n.9. Instead, the categorical approach hinges on the "minimum conduct" necessary for a conviction and questions whether the "least of the acts criminalized" would satisfy the generic definition. *Id.* at 1680, 1684. And if the predicate statute reaches conduct outside the generic definition, it is not a categorical match— regardless of whether such conduct was required to be shown by the defendant to be exempted from criminal liability in the criminal case. *Id.* at 1689. However, the reasoning in *Matter of Mendez-Orellana* regarding affirmative defenses is not at issue in the instant case because it is the federal prosecutor who has the burden to prove that the charged weapon uses an explosive to expel a projectile and not air or carbon dioxide used in a BB gun. In other words, it is not an "affirmative defense" like the antique firearm exception.

The Ninth Circuit's recent decision in *United States v. Aguilera-Rios*, __ F.3d __, 2014 WL 2723766 (9th Cir. June 17, 2014) also confirms that *Moncrieffe v. Holder* dictates the outcome in this case. In *Aguilera-Rios*, the Ninth Circuit held that because the California firearm statute "does not have an antique firearms exception, and California prosecutes for offenses involving antique firearms," that a conviction under the California statute is "therefore not a categorical match for the federal aggravated felony firearms offense." *Id*. at *9. In doing so, the Court explained that this result was required by both "the express language of *Moncrieffe*'s antique firearms discussion … and the opinion's overall analysis and holding." *Id*. at *7. Significantly, the Court presumed that the defendant was convicted of using an antique firearm, the minimum conduct under the statute, and did not apply the modified categorical approach. *Id*. ("*Moncrieffe* requires us to presume that Aguilera was convicted of an offense under California Penal Code § 12021(c)(1) using an antique firearm"). *Moncrieffe v. Holder* compels the same conclusion in Petitioner's case.

The Board erred in its application of the categorical approach, by failing to correctly identify the "least of the acts" criminalized under the Minnesota statute. And while this Court defers to the BIA's reasonable interpretations of ambiguous terms in the immigration statute, the Court does not defer to the Board's construction of the underlying state criminal statute, as to which it has no expertise.

See Johnson v. United States, 559 U.S. 133, 138 (2010) (finding that it was "bound by" state courts' interpretation of state law elements for purposes of the categorical approach). Without any examination of the broad definition of firearm under state law, and without any comparison to the more narrow definition of firearm under federal law, the Board concluded that "[s]ince the elements of the respondent's firearms crime under the aforementioned Minnesota statutes correspond to those of the generic offense under 18 U.S.C. § 922(g)(1), his Minnesota conviction for 'possession of firearm by an ineligible person' is for a categorical aggravated felony." R. 24. For the reasons discussed above, this Court should reverse the agency's misguided conclusion that Minnesota possession of a firearm by an ineligible person is a categorical match to felon in possession of a firearm under 18 U.S.C. § 922(g)(1).

B. The Minnesota Offense of Possession of a Firearm by an Ineligible Person is Not Divisible, so the Analysis Must End with the "Least of the Acts" Criminalized.

Unless a statute is divisible, the categorical approach begins and ends by determining whether the minimum conduct criminalized by the statute satisfies the generic federal definition. *Moncrieffe*, 133 S. Ct. at 1684. A statute is divisible where it "sets out one or more elements of the offense in the alternative." *Descamps*, 133 St. Ct. at 2281; *see Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013). An element is a fact that a jury must find "unanimously and beyond a

reasonable doubt." *Descamps*, 133 S. Ct. at 2290; *see Richardson v. United States*, 526 U.S. 813, 817 (1999); *Schad v. Arizona*, 501 U.S. 624, 630-36 (1991) (plurality); *United States v. Rice*, 699 F.3d 1043, 1047-48 (8th Cir. 2012).

An element of an offense is not to be confused with the mere means by which the offense was actually committed; a convicting jury may disagree on the means by which the crime was committed, so long as the jurors find unanimously and beyond a reasonable doubt all the elements of the offense. *See Richardson*, 526 U.S. at 817; *Schad*, 501 U.S. at 631-32 (plurality); *United States v. Rice*, 699 F.3d at 1048 ("the jury need not agree on the … means the defendant used to commit an element of the crime"); *United States v. James*, 172 F.3d 588, 593 (8th Cir. 1999) ("Because the statute does not seek to create several crimes based on each listed alternative mode of transfer, the jury is not required to agree upon or articulate which alternative means of transfer the defendant used").

Whether particular conduct may be treated as a "means" or an "element" of a state offense turns on the intent of the state legislature, as interpreted by state courts, so long as that interpretation does not violate due process. *See Schad*, 501 U.S. at 631-37 (plurality); *United States v. Pate*, __ F.3d __, 2014 WL 2535302, at *3 (8th Cir. June 6, 2014) (relying on Minnesota law to conclude that the disjunctive alternatives in state statute defining the term "flee" were "means" and not "elements").

Here, an examination of the record under the modified categorical approach is not appropriate as both the statutory structure and the case law demonstrate that Minn. Stat. § 624.713.1(2)[3] is not divisible with respect to the particular firearm used, meaning that possession of a pistol, possession of a semiautomatic, and possession of "any other" firearm are not three distinct offenses, but simply alternative means to commit one indivisible offense – possession of *any* firearm by an ineligible person.

First, the structure of the statute establishes Minn. Stat. § 624.713 subd. 1(2) defines one, indivisible offense. Specifically, the statute's use of the broad clause "any other firearm" suggests that the two earlier named weapons – pistols and semiautomatics – are means, not elements, that simply illustrate the types of firearms that are covered by the statute.[4] In *State v. Underdahl*, for example, the

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[3] Under Minn. Stat. § 624.713, Certain Persons Not To Possess Firearms**,** Subdivision 1, "the following persons shall not be entitled to possess a pistol or semiautomatic military-style assault weapon or, except for clause (1), any other firearm:

(1) a person under the age of 18 years except that a person under 18 may carry or possess a pistol or semiautomatic military-style assault weapon (i) in the actual presence or under the direct supervision of the person's parent or guardian …

(2) except as otherwise provided in clause (9), a person who has been convicted of, or adjudicated delinquent or convicted as an extended jurisdiction juvenile for committing, in this state or elsewhere, a crime of violence …"

…

[4] In 1994, the state legislature added the language "any other firearm," to the statute, which previously prohibited only possession of "pistols" and "semiautomatics." *See* 1994 Minn. Laws ch. 636, art. 3, §§ 27, 28.

Court defined the elements of Minn. Stat. § 624.713 subd. 1(2) as (1) "convicted of a crime of violence and (2) possess[ing] a *firearm*." 2008 WL 2965324, at *5 (Minn. App. Aug. 5, 2008) (unpublished) (emphasis added). Even though the defendant in that case was found with a firearm described as a "pistol," the Court did not distinguish between "pistol" and "firearm" in describing the elements, confirming that a pistol is just one *means* of committing the offense and not its own distinct offense. Further, that § 624.713 subd. 1(2) incorporates the general definition of "firearm" set forth in the game and fish laws, *see Fleming*, 724 N.W.2d at 540, demonstrates that the legislature intended the statute to cover firearms in a global, broad sense; not to a limited number of named firearms.

Moreover, the penalty provision for Minn. Stat. § 624.713 subd. 1(2) refers only to "any type of firearm" and does not distinguish between pistols, semiautomatics, and other firearms. *See* Minn. Stat. § 624.713 subd. 2(b) ("A person named in subdivision 1, clause (2), who possesses *any type of firearm* is guilty of a felony and may be sentenced to imprisonment for not more than 15 years …") (emphasis added). Nor does it provide a more or less serious punishment based on type of firearm, but provides the same punishment regardless of type of firearm. Here, this absence of delineation among type of firearm and associated length of punishment is telling. It demonstrates that the legislature views possession of these various weapons as equal and alternate means of

committing the same offense. Minn. Stat. § 624.713 subd. 1(2) is consequently a singular offense and resort to the modified categorical approach would be inappropriate.

Second, that Minn. Stat. § 624.713 subd. 1(2) defines only one offense can also gleaned from the language of Minn. Stat. § 609.165, subd. 1b(a),[5] which prohibits the possession of any "firearm" by those previously convicted of crimes of violence and makes no reference to pistols or semiautomatics. Minnesota law provides that the intention of the legislature may be discerned from "other laws on same or similar subjects." Minn.Stat. § 645.16(5). Relying on this rule of statutory construction, Minnesota courts have held that "the two statutes' prohibitions on firearm possession and penalties are equivalent." *State v. Glaser*, 2013 WL 656463, at *4 (Minn. App. Feb. 25, 2013) (unpublished). Furthermore, a conviction under section 609.165 precludes any prosecution under section 624.713 subd. 1(2) for the same offense. *See* Minn. Stat. § 609.165, subd. 1b(b). The Minnesota courts have found that this proscription demonstrates "that the two statutes are intended to be coextensive." *Fleming,* 724 N.W. 2d at 540 n.1; *see State v. Austin*, 2008 WL 224035, at *3 (Minn. App. Jan. 24, 2008) (unpublished) (relying on statutory interpretation of § 624.713 subd.1(2) to conclude that BB

[5] "(a) Any person who has been convicted of a crime of violence, as defined in section 624.712, subdivision 5, and who ships, transports, possesses, or receives a firearm, commits a felony…"

guns also qualify as firearms under § 609.165 as both statutes are intended to be "coextensive"). Both statutes are therefore indivisible with respect to the particular firearm used, and the alternative weapons listed in the former merely represent alternative means of commission.

The Fourth Circuit recently faced a similar question regarding the divisibility of a statute, when considering whether Maryland sexual abuse qualified as a crime of violence under the Sentencing Guidelines. *United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir. 2013). Like the Minnesota statute, the Maryland statute includes a disjunctive list that provides alternative means to commit the offense. The government, however, argued that the Maryland statute is divisible as it expressly defines "sexual abuse" to "include[], but [] not limited to: (1) Incest, rape, or sexual offense in any degree; (2) Sodomy; and (3) Unnatural or perverted sexual practices," and that some of those offenses categorically qualify as crimes of violence. *Id.* at 354. The Fourth Circuit disagreed:

> The crimes listed in § 35C(6)(ii) are merely illustrative ... and they simply provide[ ] examples of acts that come within [the statutory] definition . . . . The crimes, therefore, are not elements of the offense, but serve only as a non-exhaustive list of various means by which the elements of sexual molestation or sexual exploitation can be committed . . . . And as alternative means rather than elements, the listed crimes are simply irrelevant to our inquiry. *See Descamps*, 133 S.Ct. at 2285 n.2.

Cabrera-Umanzor, 728 F.3d at 353 (internal citations omitted). The Fourth Circuit thus concluded that the district court erred in applying the modified categorical

approach. *Id. Cf. United States v. Pate*, __F.3d __, 2014 WL 2535302, at *3 (8th Cir. June 6, 2014) (concluding that the disjunctive alternatives in the state statute were "means" and not "elements," and statute was thus indivisible regarding means of fleeing).

Faced with a similarly indivisible statute, this Court should conclude that the modified categorical approach may not be applied to analyze the Minnesota offense of ineligible persons in possession of a firearm. Accordingly, the factfinder does not look to the record of conviction to attempt to determine the nature of the weapon actually at issue, which is "irrelevant" under the categorical approach because it was not necessarily established in the criminal case. *See Moncrieffe*, 133 S. Ct. at 1684, 1686 (looking only to the minimum conduct punished under the statute of conviction, rather than the record of conviction to determine whether a small amount of marijuana was actually transferred for no remuneration); *Descamps*, 133 S. Ct. at 2286 ("Whether Descamps *did* break and enter makes no difference. And likewise, whether he ever admitted to breaking and entering is irrelevant") (emphasis in original); *U.S. v. Aguilera-Rios*, 2014 WL 2723766, at *7 (presuming that defendant was convicted of minimum conduct under the statute – using an antique firearm—rather than looking to the record of conviction to determine type of firearm used). Because the statute is not divisible and because it bars conduct broader than the generic definition—possession of BB guns—this

Court should find that a conviction under Minn. Stat. § 624.713 subd. 1(2) is not a categorical match to 18 U.S.C. § 922(g)(1).

C. There is a "Realistic Probability" That Minnesota Would Apply its Possession of a Firearm by an Ineligible Person Statute to Conduct that Falls Outside the Generic Federal Definition of Firearm.

In *Moncrieffe*, the Supreme Court pointed out that its "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense." *Moncrieffe*, 133 S. Ct. at 1684–85 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). In other words, there must be a "realistic probability" that a state would apply its statute to non-removable conduct. *Duenas-Alvarez*, 549 U.S. at 193.[6] In Minnesota, the state routinely prosecutes the possession of a BB gun by those previously convicted of crimes of violence. For example, in *State v. Fleming*, 724 N.W.2d 537, 540 (Minn. App. 2006), the Minnesota Court of Appeals upheld a defendant's conviction

[6] *Amici* contend that where a statute plainly and expressly reaches conduct that falls outside the generic immigration removal ground, it requires no "legal imagination" to determine that it is categorically overbroad. In such cases, the "realistic probability" language from *Duenas-Alvarez* requires no departure from the traditional categorical approach that examines the "minimum conduct" necessary to offend the relevant statute of conviction. Thus, when the law under review plainly reaches conduct outside the generic ground at issue, respondents in immigration proceedings need not point to actual cases involving prosecutions for the covered conduct. *See Ramos v. Attorney General*, 709 F.3d 1066, 1071-72 (11th Cir. 2013); *Jean-Louis v. Attorney General*, 582 F.3d 462, 481 (3d Cir. 2009); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (*en banc*). The Court need not address that issue here, however, because several cases establish that Minnesota routinely prosecutes individuals for BB guns, which are not included in 18 U.S.C. § 921(a)(3).

under Minn. Stat. § 624.713 subd. 1(2) for possession of a BB gun. *See also State v. Mayl*, 836 N.W.2d 368, 369 (Minn. App. 2013) (defendant convicted of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(2) for possession of a BB gun); *State v. McGhee*, 2012 WL 6652592, at *3 (Minn. App. Dec. 24, 2012) (unpublished) (same); *State v. Machen*, 2012 WL 1970051, at *1-2 (Minn. App. June 4, 2012) (unpublished) (same); *State v. Nelson*, 2010 WL 2484668, at *6 (Minn. App. June 22, 2010) (unpublished) (same); *State v. Jamison*, 2009 WL 5088755, at *1 (Minn. App. Dec. 29, 2009) (unpublished) (same). *Accord State v. Anderson*, 2013 WL 5777906, at *1 (Minn. App. Oct. 28, 2013) (unpublished) (conviction upheld for possession of a BB gun under sister firearms statute, Minn. Stat. § 609.165); *State v. Glaser*, 2013 WL 656463, at *5 (Minn. App. Feb. 25, 2013) (unpublished) (same); *State v. Austin*, 2008 WL 224035 at *1 (Minn. App. Jan. 24, 2008) (unpublished) (same). Thus, where the least of the acts, as illustrated above, do not satisfy the generic federal definition, this Court should find that the offense itself cannot qualify as an aggravated felony, and Petitioner is thereby eligible for cancellation of removal.[7]

[7] In *Moncrieffe*, the Court confirmed that the same categorical analysis applies whether assessing a noncitizen's deportability or assessing eligibility for relief from removal. 133 S. Ct. at 1685 n.4 ("Our analysis is the same in both contexts"). Thus, where a statute is both overbroad—covering conduct that falls outside the generic definition, and indivisible—defining only one offense (as here), it is not for an aggravated felony, and the immigrant is eligible for cancellation of removal.

CONCLUSION

For the foregoing reasons, the Court should find that the offense of possession of a firearm by an ineligible person, under Minn. Stat. § 624.713 subd. 1(2), does not qualify as an aggravated felony under 8 U.S.C. § 1101(a)(43)(E)(ii), as an offense described in 18 U.S.C. § 922(g)(1).

Dated: June 25, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(d), I hereby certify that the attached amicus brief is proportionately spaced, has a typeface of 14 points and, according to computerized count, contains 5,097 words. The attached amicus brief complies with Local Rule 28A(h) because it has been scanned for viruses and is virus free.

Dated: June 25, 2014

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CERTIFICATE OF SERVICE

U.S. Court of Appeals Docket Nos. 14-1036, 14-1713

I, Sejal Zota, hereby certify that I served the foregoing by paper copies to the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit via Fed Ex on June 27, 2014.

I certify that service on all parties in the case will be accomplished via Fed Ex on June 27, 2014.

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