DETAINED

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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
[CITY, STATE]

In the Matter of:	
LAST NAME, First Name	**File No.: A XXX XXX XXX**
In removal proceedings	

RESPONDENT'S BRIEF IN OPPOSITION TO THE DEPARTMENT OF HOMELAND SECURITY'S MOTION TO REOPEN AND TERMINATE WITHHOLDING OF REMOVAL

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Respondent submits this brief in opposition to the Department of Homeland Security's Motion to Reopen and Terminate Withholding of Removal. Although this Court previously granted Mr. Respondent withholding of removal under INA § 241(b)(3) in recognition of the clear probability that he will face persecution if removed to Colombia, the Department of Homeland Security ("Department") seeks to revoke this protective statutory entitlement, alleging that Mr. Respondent has been convicted of a particularly serious crime. However, the Department has failed to establish grounds for reopening these proceedings because it cannot demonstrate by a preponderance of the evidence that Mr. Respondent's alleged conviction is an aggravated felony and thus a particularly serious crime. For that reason, this Court must deny the Department's motion.

I. FACTUAL AND PROCEDURAL HISTORY

Mr. Respondent is a XX-year-old citizen of Colombia.[1] He is gay and lives with human immunodeficiency virus ("HIV"). Mr. Respondent was admitted to the United States on [DATE], 20XX as a nonimmigrant visitor. On [DATE], 20XX, the Department of Homeland Security issued and served upon Mr. Respondent a Notice to Appear, charging him as removable from the United States under various provisions of INA § 237(a).

As a defense to removal, Mr. Respondent filed an I-589 Application for Asylum, Withholding of Removal, and protection under the Convention Against Torture based on his fear of persecution on account of his membership in a particular social group if removed to Colombia. When Mr. Respondent was a child and adolescent, his father beat him because of his sexual orientation and attempted to force him to have sex with women. Mr. Respondent's family later blamed him for his father's suicide. Mr. Respondent's mother threatened to subject him to a coercive and torturous "conversion" ritual. Mr. Respondent had to quit school out of fear for his safety after suffering a torrent of homophobic insults. In 20XX, Mr. Respondent received an HIV diagnosis; because he must seek treatment and take daily medication, Mr. Respondent would be unable to hide his HIV status—and the presumption that he is gay—if removed to Colombia. On [date] 20XX, this Court denied Mr. Respondent's application for asylum but granted his application for withholding of removal under INA § 241(b)(3), after the Department conceded that Mr. Respondent faced a clear probability of persecution if removed to Colombia.[2]

On [date], 20XX, the Department filed a motion asking this Court to reopen Mr. Respondent's removal proceedings and terminate his protective grant of withholding of removal. DHS Motion at 2. The Department asserts that this Court has the authority to terminate Mr.

[1] Counsel provides this factual and procedural summary upon knowledge and belief after a review of relevant portions of the record of proceedings.
[2] The Court did not reach Mr. Respondent's request for protection under the Convention Against Torture.

Respondent's grant of withholding of removal pursuant to 8 C.F.R. § 1208.24(e) and (b)(3) because he has been convicted of a particularly serious crime, which would have been grounds for denial of his application under INA § 241(b)(3)(B). *Id.* In support of its motion, the Department alleges that Mr. Respondent was convicted of conspiracy to commit racketeering under N.J. Stat. § 2C:41-2(d) and sentenced to an eight-year term of confinement. *Id.* at 3. As its sole argument in support of the motion, the Department contends that Mr. Respondent's alleged conviction under N.J. Stat. § 2C:41-2(d) is an aggravated felony resulting in a sentence of five years or more and thus a per se particularly serious crime under INA § 241(b)(3)(C). *Id.* The Department also asks this Court to administratively close these proceedings after reopening and terminating withholding of removal. *Id.* at 4.

II. STATEMENT ON THE BURDEN OF PROOF

The movant bears the burden to establish the grounds to support a motion to reopen. *See* 8 C.F.R. § 1003.23(b)(3). A motion to reopen must "state the new facts that will be proven at a hearing to be held if the motion is granted and shall be supported by affidavits and other evidentiary material." *Id.* Where the Department requests reopening to terminate a grant of asylum or withholding of removal, it "must establish, by a preponderance of evidence, one or more of the grounds" for termination of such relief. *Id.* § 1208.24(f). These grounds include a conviction for a particularly serious crime. *Id.* § 1208.24(b)(3); INA § 241(b)(3)(B)(ii). Under any circumstances, the Immigration Judge retains the discretion to deny a motion to reopen. 8 C.F.R. § 1003.23(b)(3)

III. SUMMARY OF ARGUMENT

Under the categorical approach, a conviction for conspiracy to commit racketeering under N.J. Stat. § 2C:41-2(d) is not an aggravated felony "described in section 1962 of title 18"

because it indivisibly encompasses more conduct than does the federal analog at 18 U.S.C. § 1962(d). Both statutes require that the prosecution prove a "pattern of racketeering activity" to sustain a conviction, and both state and federal law define that phrase by reference to a statutory list of qualifying predicate acts. However, among the New Jersey predicate acts are numerous offenses not included in the federal list, including theft, various theft-related offenses, and such mundane regulatory offenses as unlicensed practice of acupuncture. New Jersey thus defines the term "pattern of racketeering activity"—an essential element in a racketeering-conspiracy prosecution—more expansively than does federal law. Not only is N.J. Stat. § 2C:41-2(d) therefore overbroad, it is indivisibly so—the modified categorical approach does not apply. A conviction under N.J. Stat. § 2C:41-2(d) therefore cannot qualify as an aggravated felony nor as a particularly serious crime.

IV. ARGUMENT

The "categorical approach" ordinarily applies to the determination whether a noncitizen has been convicted of an aggravated felony. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Baptiste v. AG United States*, 841 F.3d 601, 607–08 (3d Cir. 2016); *Matter of Garza–Olivares*, 26 I&N Dec. 736, 738 (BIA 2016). Under the categorical approach, a removal provision applies if the noncitizen was convicted under a state statute which, by its elements, prescribes *only* conduct that comes within the federal ground of removal. *Moncrieffe*, 133 S. Ct. at 1684. At every point in the analysis, the noncitizen's "actual conduct is irrelevant to the inquiry, as the adjudicator must presume that the conviction rested upon nothing more than the least of the acts criminalized under the state statute." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015) (internal quotation marks omitted); *accord Mathis v. United States*, 136 S. Ct. 2243 (2016) (commanding adjudicators to "ignor[e] the particular facts of the case" when applying the categorical

approach); *Baptiste*, 841 F.3d at 608 ("Under [the categorical] approach, we do not consider the facts underlying [the noncitizen]'s conviction . . . ."). In other words, the analysis is strictly categorical, and the focus never shifts from the legal question of what the conviction *necessarily* establishes. *Mellouli*, 135 S. Ct. at 1987.

In this case, the Department can demonstrate that Mr. Respondent has been convicted of a particularly serious crime only if it can establish by a preponderance of the evidence that a conviction for conspiracy to commit racketeering under N.J. Stat. § 2C:41-2(d) is categorically "an offense described in section 1962 of title 18"—the federal Racketeer Influenced and Corrupt Organizations (RICO) Act—and thus an aggravated felony.[3] INA §§ 101(a)(43)(J); 241(b)(3)(C). Mr. Respondent's actual conduct, including whether he committed acts that would satisfy the federal removal ground, "is quite irrelevant." *Moncrieffe*, 133 S. Ct. at 1684 (*quoting United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939)). This Court must focus instead on the minimum conduct criminalized under N.J. Stat. § 2C:41-2(d), comparing it with the range of conduct encompassed by 8 U.S.C. § 1962. *See Mellouli*, 135 S. Ct. at 1986. Applying this analysis reveals that a violation of N.J. Stat. § 2C:41-2(d) is not an offense described in 8 U.S.C. § 1962 and therefore not an aggravated felony under INA § 101(a)(43)(J).

[3] The Department does not argue that Mr. Respondent's alleged conviction is a particularly serious crime under the circumstance-specific analysis applied in cases like *Matter of Frentescu*, 18 I&N Dec. 244, 247 (BIA 1982). *See* DHS Brief at 2–3. Nor could it: under Third Circuit precedent, only an aggravated felony may constitute a particularly serious crime barring an applicant from withholding of removal. *Alaka v. AG of the United States*, 456 F.3d 88, 105 (3d Cir. 2006). Although the Board of Immigration Appeals has declined to apply *Alaka* even in cases arising in the Third Circuit, *Matter of M–H–*, 26 I&N Dec. 46, 49 (BIA 2012), *Alaka* still binds this Court. *See Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. . . . If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *Alaka*, 456 F.3d at 104 ("The plain language and structure (i.e., context) of [INA § 241(b)(3)] indicate that an offense must be an aggravated felony to be sufficiently 'serious.'").

A. Although New Jersey's anti-racketeering statutes, N.J. Stat. § 2C:41-1 et seq., are patterned upon the federal Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq., the two laws are not identical, and the New Jersey Act departs significantly from the federal version.

This case implicates the relationship between the federal RICO Act, 18 U.S.C. § 1961 et seq., and the New Jersey RICO Act, N.J. Stat. § 2C:41-1 et seq. Congress enacted RICO as Title IX of the Organized Crime Control Act of 1970. Pub. L. 91-452, 84 Stat. 922. Concerned with the economic impact of organized crime, Congress intended the legislation to disable criminal enterprises by empowering law enforcement, providing new remedies, and expanding deterrence and punishment. *See Beck v. Prupis*, 529 U.S. 494, 496 (2000). RICO attempts to accomplish these goals primarily by creating—and severely punishing violations of—a federal anti-racketeering statute and by establishing a civil cause of action for individuals economically injured by racketeering activity. *See id*; 18 U.S.C. §§ 1962, 1964(c).

The basic federal anti-racketeering statute, 18 U.S.C. § 1962, creates four separate criminal offenses. Subsections (a) through (c) proscribe: (a) investing proceeds gained "from a pattern of racketeering activity" in an enterprise; (b) acquiring or maintaining an interest in or control of an enterprise "through a pattern of racketeering activity"; and (c) conducting or participating in the affairs of an enterprise "through a pattern of racketeering activity." *See United States v. Turkette*, 452 U.S. 576, 583–84 (1981); *H. J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 232–33 (1989). Subsection (d), the analog to the state statutory provision most directly at issue in this case, prohibits conspiring to violate any of the foregoing three subsections. *See H. J. Inc.*, 492 U.S. at 233. Section 1961(5) of Title 18 defines "pattern of racketeering activity" to mean "at least two acts of racketeering activity" occurring within ten

years of one another. "Racketeering activity," in turn, means commission of one of numerous statutorily enumerated violations of federal or state law, among them offenses like murder, kidnapping, gambling, arson, and bribery. 18 U.S.C. § 1961(1).

New Jersey enacted its own RICO legislation in 1981. *State v. Ball*, 661 A.2d 251, 258 (N.J. 1995). As originally introduced in the legislature, the New Jersey RICO statute neatly resembled the federal version. *Id.* And even after its passage, the text of the basic statutory section criminalizing racketeering closely parallels its federal counterpart. *Compare* N.J. Stat. § 2C: 41-2 *with* 18 U.S.C. § 1962. As under federal law, N.J. Stat. § 2C: 41-2 sets forth three distinct substantive offenses and, in subsection (d), proscribes conspiring to commit them. *See Ball*, 661 A.2d at 255. However, during the legislative process, the New Jersey Legislature also identified its own goals and priorities, some of which differed from Congress's. *Id.* at 258. "Consequently, in many respects [the New Jersey] Legislature departed from the federal example." *Id.* It is this departure that renders the New Jersey RICO statute significantly broader than the federal RICO statute.

B. The existence of a "pattern of racketeering activity" is an essential element that the government must prove in a prosecution for conspiracy to commit racketeering under both the federal and New Jersey RICO Acts.

To win a conviction for a RICO conspiracy under 18 U.S.C. § 1962(d), "the government must show: (1) that two or more persons agreed to conduct or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity; (2) that the defendant was a party to or member of that agreement; and (3) that the defendant joined the agreement or conspiracy knowing of its objective to conduct or participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity." *United States v. John–Baptiste*, 747 F.3d 186, 207 (3d Cir. 2014). In other words, the

government must prove that the defendant both agreed to participate in conducting an enterprise's affairs "through a pattern of racketeering activity" and that he knew that the objective of the agreement was to participate in the conduct of an enterprise's affairs "through a pattern of racketeering activity." *See United States v. Bergrin*, 650 F.3d 257 (3d Cir. 2011) ("It is the 'person' charged with the racketeering offense—not the entire enterprise—who must engage in the 'pattern of racketeering activity.'"). Thus, in every prosecution under 18 U.S.C. § 1962(d), proving a "pattern of racketeering activity" is essential. *See Turkette*, 452 U.S. at 583 ("[T]o secure a conviction under RICO, the Government must prove both the existence of an 'enterprise' and the connected 'pattern of racketeering activity.'"); *see also H. J. Inc.*, 492 U.S. at 236 (referring to "RICO's key requirement of a pattern of racketeering").

Under New Jersey law, like in the federal context, "[t]he gravamen of a RICO violation . . . is the involvement in the affairs of an enterprise *through a pattern of racketeering activity*." *Ball*, 661 A.2d at 257 (emphasis added). Under N.J. Stat. § 2C:41-2(d), "a RICO conspiracy ha[s] two elements: an agreement to conduct or participate in the conduct of the affairs of the enterprise, and an agreement to the commission of at least two predicate acts." *Mayo, Lynch & Assocs., Inc. v. Pollack*, 799 A.2d 12, 22 (N.J. Super. Ct. App. Div. 2002) (citing *Ball*, 661 A.2d at 251). And it is "[t]he two requisite predicate acts which constitute the pattern of racketeering activity." *State v. Passante*, 542 A.2d 952, 957 (N.J. Super. Ct. Law Div. 1987). Therefore, as under federal law, the prosecution must prove a "pattern of racketeering activity" to sustain a charge of conspiracy to commit racketeering under N.J. Stat. § 2C:41-2(d).

C. The New Jersey RICO Act expansively defines "pattern of racketeering activity" to include numerous offenses—most notably, theft and theft-related offenses—that are not included in the federal definition, rendering a conviction under N.J. Stat. § 2C:41-2(d) overbroad and not categorically a violation of the federal RICO Act.

The federal RICO Act defines "pattern of racketeering activity" to mean commission of two or more enumerated violations of state and federal law, each occurring within a ten-year period. 18 U.S.C. § 1961(1), (5). The New Jersey RICO Act defines the same phrase in a nearly identical manner—but with reference to a distinct list of enumerated offenses.[4] N.J. Stat. § 2C:41-1(a), (d). Thus, to the extent that the New Jersey RICO Act designates predicate offenses not contemplated by the federal RICO Act, it extends the meaning of the phrase "pattern of racketeering activity" beyond the federal definition.

Section 2C:41-1(a)(1) of the New Jersey Statutes lists the following offenses as RICO predicates, none of which are enumerated in 18 U.S.C. § 1961(1): promoting prostitution[5]; violations of Title 33 of the New Jersey Revised Statutes (relating to intoxicating liquors); burglary; forgery[6] and fraudulent practices and all offenses defined in chapter 21 of Title 2C of the New Jersey Statutes[7]; alteration of motor vehicle identification numbers[8]; unlawful

[4] Section 2C:41-1(a) also incorporates by reference those offenses described in "Title 18, U.S.C. § 1961(1)(A), (B) and (D)."

[5] Under the federal RICO Act, prostitution is not itself a predicate offense. Instead, an offense related to prostitution is a federal RICO predicate only if punishable under enumerated federal statutes like 18 U.S.C. § 1952 (relating to the use of interstate facilities in furtherance of specified unlawful activity, including prostitution) and 18 U.S.C. § 1961 (relating to money laundering). *See United States v. Montague*, 29 F.3d 317, 322 (7th Cir. 1994).

[6] Only forgery of a passport under 18 U.S.C. § 1543 is a federal RICO predicate offense. 18 U.S.C. § 1961(1)(B).

[7] The federal RICO Act defines various fraud offenses as predicates, including mail, wire, bankruptcy, and securities fraud and fraud related to identification documents, access devices, financial institutions, foreign labor contracting, and visas, permits, and other documents. 18 U.S.C. § 1961(1)(B), (D). However, the federal statute does not reach certain offenses criminalized under chapter 21 of Title 2C of the New Jersey Statutes. *See, e.g.*, N.J. Stat. §§ 21:2C-2.2 (police badge transfers); 2C:21-4.6 (insurance fraud); 2C:21-20.1 (unlicensed practice of acupuncture); 2C:21-33 (electrical contracting without a business permit).

[8] Alteration of vehicle identification numbers, per se, is not a federal RICO predicate offense. Instead, only violations of 18 U.S.C. 2321, which punishes trafficking in motor vehicles and motor vehicle parts with knowledge that the vehicle identification number has been altered, are federal predicates. *See* 18 U.S.C. § 1961(1)(B).

manufacture, purchase, use or transfer of firearms; unlawful possession or use of destructive devices or explosives; certain violations of N.J. Stat. § 2C:24-4 (relating to endangering the welfare of a child)[9]; leading a firearms trafficking network punishable under N.J. Stat. § 2C:39-16; weapons training for illegal activities punishable under N.J. Stat. § 2C:39-14; certain simple and aggravated assaults punishable under N.J. Stat. § 2C:12-1; and terroristic threats punishable under N.J. Stat. § 2C:12-3.

Of particular importance here, the New Jersey RICO statute also defines theft and numerous theft-related offenses punishable under N.J. Stat. §§ 2C:20-1–38 as predicate offenses. N.J. Stat. § 2C:41-1(a)(1)(n). However, theft offenses are not enumerated predicate crimes under the federal RICO Act. *See* 18 U.S.C. § 1961(1). Moreover, "RICO's list of acts constituting predicate acts of racketeering activity is exhaustive" and "courts discussing the state crime of theft, and its analogues, have refused to read it into § 1961's expansive list." *Annulli v. Panikkar*, 200 F.3d 189, 199–200 (3d Cir. 1999). Indeed, the federal courts have routinely rejected theft as a RICO predicate. *See id.*; *United States v. Napoli*, 54 F.3d 63, 68 (2d Cir. 1995) ("[T]he crime of theft, standing alone, is not a specified unlawful activity. It is neither a federal crime listed in sections 1956 and 1961, nor one of the state-law offenses that constitute RICO predicate acts."); *Toms v. Pizzo*, 4 F. Supp. 2d 178, 183 (W.D.N.Y. 1998) ("[S]imple theft is not one of the crimes constituting a predicate act for purposes of establishing a pattern of racketeering activity."); *Bonton v. Archer Chrysler Plymouth*, 889 F. Supp. 995 (S.D. Tex 1995) ("Under RICO . . . acts that constitute theft under state law are not predicate acts for racketeering activity."); *Buck Creek*

[9] Under the federal RICO Act, only offenses "relating to sexual exploitation of children" and punishable under 18 U.S.C. §§ 2251, 2251A, 2252, 2260 are predicate offenses. 18 U.S.C. § 1961(1)(B); *c.f.* N.J. Stat. § 2C:24-4(a)(2) (punishing non-sexual abuse or neglect of a child).

Coal v. United Mine Workers, 917 F. Supp. 601, 612 (S. D. Ind. 1995) ("[T]heft is not the type of act that forms a predicate act under RICO.").[10]

Because the New Jersey RICO Act designates theft and other crimes as predicate offenses while the federal RICO Act does not, New Jersey law defines "racketeering activity" and thus the phrase "pattern of racketeering activity"—an essential element in a RICO conspiracy prosecution—more broadly than does federal law. *Compare* N.J. Stat. § 2C:41-1(a), (d) *with* 18 U.S.C. § 1961(1), (5). Therefore, under New Jersey state law, a defendant could be prosecuted for and convicted of the offense of conspiracy to commit racketeering under N.J. Stat. § 2C:41-2(d) where the agreement to which he was a party involved two or more acts of theft. *See* N.J. Stat. § 2C:41-1(a)(1)(n). The very same defendant, positing identical facts, could not be convicted of conspiracy to commit racketeering under the federal RICO Act. *See* 18 U.S.C. § 1961(1); *Annulli*, 200 F.3d at 199–200. The same disparity holds true for cases in which the alleged predicate acts involve offenses as mundane as unlicensed practice of acupuncture and as serious as aggravated assault and unlawful use of explosives. *Compare* N.J. Stat. § 2C:41-1(a)(1)(o), (s), (aa), *with* 18 U.S.C. § 1961(1). Although any defendant against whom RICO conspiracy allegations rest on such predicate acts is indictable for RICO conspiracy under New Jersey law, he could not be prosecuted under the federal RICO Act.

[10] That theft is absent from the federal RICO Act reflects the will of Congress, not an inherent limit on federal criminal jurisdiction. *See Annulli*, 200 F.3d at 200 (explaining that theft is absent "for good reason" because "if garden-variety state law crimes, torts, and contract breaches were to constitute predicate acts of racketeering (along with mail and wire fraud), civil RICO law, which is already a behemoth, would swallow state civil and criminal law whole"). In fact, if Congress had wanted to designate theft as a RICO predicate, it would merely have needed to specify that any act involving theft and criminalized under state law constitutes racketeering activity, as it did for numerous other categories of crimes. *See* 18 U.S.C. 1961(1) ("'[R]acketeering activity' means . . . any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical . . . which is chargeable under State law and punishable by imprisonment for more than one year . . . .").

The upshot of these substantial discrepancies between the New Jersey and federal RICO Acts is that the statute defining the offense of conspiracy to commit racketeering, N.J. Stat. § 2C:41-2(d), "sweeps more broadly than the generic crime," defined by 18 U.S.C. § 1962(d). *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013). The categorical approach is concerned with the question "whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony." *Moncrieffe*, 133 S. Ct. at 1684 (internal quotations marks omitted). In this instance, it does not. A conviction under N.J. Stat. § 2C:41-2(d) therefore does not constitute a generic federal RICO Act offense under the categorical approach.[11] *See Mathis*, 136 S. Ct. at 2251 ("We have often held, and in no uncertain terms, that a state crime cannot qualify as [a federal generic crime] if its elements are broader than those of a listed generic offense.").

D. Under controlling Third Circuit precedent, there is no requirement to demonstrate a "realistic probability" that New Jersey would prosecute violations of its RICO Act relying on theft-related offenses, or other crimes not enumerated in the federal RICO statute, as predicates because the substantially greater breadth of the state statute is plain from its text.

In *Gonzalez v. Duenas–Alvarez*, the United States Supreme Court held that, in cases where a noncitizen posits a "special" application of the statute of conviction as a basis to contest application of a federal removal ground, he must demonstrate a "realistic probability, not a theoretical possibility, that the State would apply its statute" to conduct beyond the removal ground. 549 U.S. 183, 193 (2007). The Court further held that the noncitizen may make this showing by "point[ing] to his own case or other cases in which the state courts in fact did apply

[11] RICO conspiracy under N.J. Stat. § 2C:41-2(d) is overbroad for the additional reason that the substantive RICO offense of conducting an enterprise's affairs through a pattern of racketeering activity under N.J. Stat. § 2C:41-2(c) is broader than its federal counterpart, 18 U.S.C. § 1962(c). *See Mayo, Lynch & Assocs., Inc.*, 799 A.2d at 21 ("Under 18 U.S.C.A. § 1962(c), unlike N.J.S.A. 2C:41-2(c), mere participation in the enterprise is insufficient; the actor must 'participate in the operation or management of an enterprise through a pattern of racketeering activity.'" (quoting *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993)).

the statute" in such a manner. *Id.* In other words, resort to "legal imagination" is not enough to defeat the application of a federal removal ground. *Id.*

While a noncitizen must point to an actual prosecution to support an argument for a "special" application of the statute of conviction, the courts require no such showing when the statute of conviction plainly and expressly proscribes conduct beyond the federal removal ground. *See, e.g., Jean–Louis v. AG of the United States*, 582 F.3d 462, 481 (3d Cir. 2009). In *Jean–Louis*, the Third Circuit held that the *Duenas–Alvarez* realistic-probability does not apply where the elements of the relevant state and generic offenses are clear and the government's ability to prosecute a defendant for non-generic conduct is undisputed because in such a situation "no application of 'legal imagination' . . . is necessary." *Id.* More recently, the Third Circuit rejected the application of the realistic-probability test to the question whether a state conviction was an aggravated felony, reaffirming that the inquiry "is simply not meant to apply" to situations where the mismatch between the state and federal offenses is clear. *Singh v. AG of the United States*, 839 F.3d 273, 286 n.10 (3d Cir. 2016).[12]

Here, to determine that conspiracy to commit racketeering under N.J. Stat. § 2C:41-2(d) is broader than its federal counterpart, "does not require an exercise of imagination, merely mundane legal research skills." *Aparicio–Soria*, 740 F.3d at 157. Indeed, by statute, New Jersey extends the "pattern of racketeering activity" element of RICO conspiracy to include a litany of

[12] Other federal courts are in universal agreement that the realistic-probability test does not apply when the state statute, by its plain terms, penalizes conduct not included in the removal ground. *See Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) (refusing to apply the realistic-probability test where the state statute's "plain terms" make it broader than the federal generic offense); *United States v. Aparicio–Soria*, 740 F.3d 152 157–58 (4th Cir. 2014) (en banc) (holding that the realistic-probability test does not apply where there is no question that state prosecutors have the authority to charge defendants for non-generic conduct); *Ramos v. Att'y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013) (requiring no proof of actual prosecution "when the statutory language itself . . . creates the 'realistic probability'"); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (holding that the realistic-probability requirement is satisfied where "[t]he state statute's greater breadth is evident from its text"); *see also Mellouli*, 135 S. Ct. at 1987 (holding that a Kansas drug-paraphernalia statute was overbroad on its face without applying the realistic-probability test).

predicate acts not encompassed by the federal RICO Act. "Nothing in *Duenas–Alvarez*, therefore, indicates that this state[-]law crime may be treated as if it is narrower than it plainly is." *Swaby*, 847 F.3d at 66. No legal imagination is required, and no additional showing is necessary, to demonstrate that N.J. Stat. § 2C:41-2(d) is broader than 18 U.S.C. § 1962(d) and therefore not an aggravated felony under the categorical approach.[13]

E. The modified categorical approach has no application to the question whether a conviction for conspiracy to commit racketeering under N.J. Stat. § 2C:41-2(d) is an aggravated felony because a New Jersey jury need not unanimously determine the relevant predicate crimes, and the statute is therefore indivisible.

Although ordinarily limited under the categorical approach to consideration of the statute of conviction, an adjudicating court may sometimes look beyond the statute's text and consider a limited set of judicially noticeable documents. *Descamps*, 133 S. Ct. at 2285; *Shepard v. United States*, 544 U.S. 13, 26 (2005). This is the case because a single statute may sometimes define several different crimes, and in such cases the court must identify which of the various offenses formed the basis of the noncitizen's conviction. *Mathis*, 136 S. Ct. at 2249. Under this "modified categorical approach," the court may consult the indictment, jury instructions, plea agreement, and plea colloquy to identify the crime of which the defendant was convicted. *Shepard*, 544 U.S. at 16; *Descamps*, 133 S. Ct. at 2283–85, 2288.

Vitally, in keeping with the expressly categorical nature of the inquiry, the modified categorical approach is merely a "tool" that helps the adjudicating court implement the categorical approach by identifying which elements of the state statute to compare to the federal generic definition. *Mathis*, 136 S. Ct. at 2253 (explaining that "the modified approach serves—

[13] Even if the categorical analysis in this case *did* require proof that New Jersey actually prosecutes RICO conspiracy relying on non-federal predicate acts, Mr. Respondent could amply make such a showing. *See, e.g.*, *State v. Ball*, 632 A.2d 1222, 1250 (N.J. Super. Ct. App. Div. 1993) (affirming the defendants' convictions for RICO conspiracy where the predicate acts included "theft of services"), *aff'd*, 661 A.2d at 275.

and serves solely—as a tool to identify the elements of the crime of conviction"); *Descamps*, 133 S. Ct. at 2285. The "modified categorical approach still 'retains the categorical approach's central feature: a focus on the elements, rather than the facts, of a crime.'" *United States v. Brown*, 765 F.3d 185, 190 (3d Cir. 2014) (quoting *Descamps*, 133 S. Ct. at 2285). Employing the modified categorical approach to instead attempt to decipher the noncitizen's actual conduct "has no roots in . . . precedent[]" and "conflict[s] with each of the rationales supporting the categorical approach and threaten[s] to undo all its benefits." *Id.* at 2287; *accord Mathis*, 136 S. Ct. at 2254. Thus, at every stage of the analysis, the noncitizen's actual conduct remains strictly irrelevant. *Descamps*, 133 S. Ct. at 2288; *Mathis*, 136 S. Ct. at 2251–52, 2257.

The modified categorical approach applies only to a "narrow range of cases." *Descamps*, 133 S. Ct. at 2283–84. A statute is amenable to the modified categorical approach—that is "divisible"—only where it "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes.'" *Id.* at 2285 (alteration in original). "Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis*, 136 S. Ct. at 2248 (internal quotation marks omitted). An element is therefore something which a jury would be required to find "unanimously and beyond a reasonable doubt." *Descamps*, 133 S. Ct. at 2288. Consequently, whether a statute is comprised of alternative elements—and thus defines distinct crimes that call for application of the modified categorical approach—depends on whether a jury would be asked to agree unanimously on those particular circumstances of the offense. *Id.* at 2297–98 (Alito, J., dissenting); *United States v. Lockett*, 810 F.3d 1262, 1269 (11th Cir. 2016); *Omargharib v. Holder*, 775 F.3d 192, 198 (4th Cir. 2014); *Rendon v. Holder*, 764 F.3d 1077, 1086 (9th Cir. 2014); *Chang–Cruz v. AG United States*, 659 Fed. Appx. 114, 117 (3d Cir. 2016).

Here, the modified categorical approach is simply inapposite: the various predicate acts described in N.J. Stat. § 2C:41-1(a) are not alternatively phrased elements which must be proved unanimously and beyond a reasonable doubt. *See State v. Cagno*, 978 A.2d 921, 950–952 (N.J. Super. Ct. App. Div. 2009) ("Cagno I"); *State v. Cagno*, 49 A.3d 388, 404–05 (N.J. 2012) ("Cagno II"). In *Cagno I*, the defendant appealed his conviction for RICO conspiracy under N.J. Stat. § 2C:41-2(d) on the ground that the trial court's instructions violated his due-process rights by not requiring the jury to reach unanimity with respect to the two or more predicate acts upon which the conspiracy charge rested. 978 A.2d at 950. The New Jersey Superior Court Appellate Division affirmed Cagno's conspiracy conviction, holding that the jury need not "unanimously find the actual commission of racketeering acts *or agree as to the commission of two such predicate acts*." *Id.* at 599 (emphasis added). The New Jersey Supreme Court later affirmed the lower court, agreeing that there was no need for jury unanimity concerning the nature of the predicate acts underlying Cagno's conspiracy conviction. *Cagno II*, 49 A.3d at 404–05.

Because New Jersey jurors are not required to reach a unanimous conclusion with respect to which of the alleged predicate offenses establish "a pattern of racketeering activity" in a prosecution under N.J. Stat. § 2C:41-2(d), the statutorily enumerated predicate acts are merely alternatively phrased means of committing the same crime. *See Mathis*, 136 S. Ct. at 2257 (explaining that in such a case, "each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt"). As with the statute at issue in *Mathis*, N.J. Stat. § 2C:41-2(d) "defines one crime, with one set of elements, broader than [the generic offense]—while specifying multiple means . . . some but not all of which . . . satisfy the generic definition." *Id.* at 2250. And where a statute defines but one crime, defined by

a single indivisible set of elements, the modified categorical approach does not apply.[14] *E.g.*, *Descamps*, 133 S. Ct. at 2285 ("All the modified approach adds is a mechanism for making [the] comparison when a statute lists multiple, alternative elements, and so effectively creates several different . . . crimes." (internal quotation marks omitted; alteration in original)).

In sum, N.J. Stat. § 2C:41-2(d) embraces more conduct than its federal analog, 18 U.S.C. § 1962(d), and a conviction for conspiracy to commit racketeering under New Jersey law is thus not categorically a violation of the federal RICO Act. Moreover, the modified categorical approach has no application because the New Jersey statute does not create multiple conspiracy crimes, each distinguished by the nature of the alleged predicate acts—it creates one crime. Conspiracy to commit racketeering under N.J. Stat. § 2C:41-2(d) is consequently overbroad, and invisibly so. It is therefore not an aggravated felony under INA § 101(a)(43)(J) because it is not "an offense described in section 1962 of title 18." And it is not a particularly serious crime. *See Alaka*, 456 F.3d at 105 ("[A]n offense must be an aggravated felony in order to be classified as a 'particularly serious crime.'"). For that reason, the Department has failed to carry its burden to justify reopening these proceedings, and this Court lacks the authority to terminate Mr. Respondent's grant of withholding of removal.

In the alternative, if this Court grants the Department's motion to reopen, the Court should deny the Department's request to administratively close these proceedings. Instead, the Court should schedule a hearing for the presentation of evidence and argument concerning the termination of Mr. Respondent's grant of withholding. *See Matter of E–F–H–L–*, 26 I&N Dec. 319, 321 n.2 (BIA 2014) ("Even where an Immigration Judge is inclined to conclude that a

[14] Even were this Court to erroneously apply the modified categorical approach, it would reveal that Mr. Respondent's alleged conviction for conspiracy to commit racketeering under N.J. Stat. § 2C:41-2(d) rests upon alleged theft-related predicate acts. *See* DHS Brief at 8–12, Judgment of Conviction (alleging, in counts 3–5 and 7–12, theft, shoplifting, and burglary).

mandatory bar applies, the statutory and regulatory provisions require the Immigration Judge to conduct a full evidentiary hearing on any disputed factual issues related to *that* question." (emphasis in original)); INA § 240(b)(4)(B) (giving the respondent the right to present evidence on his own behalf). In addition, the Court should provide Mr. Respondent the opportunity to immediately renew his application for protection under the Convention Against Torture. *See United States v. Arrieta*, 224 F.3d 1076, 1079 (9th Cir. 2000) (discussing the respondent's "right to apply for relief from deportation"). Finally, the Court should order the Department to produce Mr. Respondent for any future hearing before this Court. *See* INA § 240(b)(4)(B).

V. CONCLUSION

For the foregoing reasons, the Department has not established by a preponderance of the evidence that Mr. Respondent has been convicted of a particularly serious crime. This Court must deny the Department's motion to reopen proceedings and terminate withholding of removal.

[date], 20XX

Respectfully submitted,

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[Title]
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