WASHINGTON'S BAIL JUMP STATUTE IS NOT AN AGGRAVATED FELONY UNDER 8 USC 1101(A)(43)(T), BECAUSE IT IS OVERBROAD AND INDIVISIBLE.[1]

I. The categorical approach applies to the first two elements of a failure to appear aggravated felony.

The aggravated felony definition at INA § 101(a)(43)(T), 8 U.S.C. § 1101(a)(43)(T) requires (1) a "failure to appear" (2) "before a court" (3) "pursuant to a court order" (4) "to answer to or dispose of a charge of a felony" (5) "for which a sentence of 2 years' imprisonment or more may be imposed." *Matter of Garza-Olivares*, 26 I&N Dec. 736, 739-40 (BIA 2016). The Board acknowledged in *Garza* that the categorical approach applies to the first two elements.[2] *Id.*

II. Applying the categorical approach to the first two elements under *Garza-Olivares*, the statute is overbroad.

A. Relevant Law

The categorical approach is set forth in *Taylor v. United States*, 495 U.S. 575, 602 (1990) and *Descamps v. United States*, 570 U.S. 254 (2013). "Because Congress predicated deportation 'on convictions, not conduct,' the [categorical] approach looks to the statutory definition of the offense of conviction, not to the particulars of [a noncitizen's] behavior." *Mellouli v. Lynch*, 135

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[1] This is a sample brief of the argument that can be made to contest deportability under INA § 101(a)(43)(T), based on the elements of RCW 9A.76.170. *See* https://apps.leg.wa.gov/RCW/default.aspx?cite=9A.76.170.

For an argument based on the "sentence imposed" requirement of §101(a)(43)(T), see the WDAIP's advisory on immigration implications of *United States v. Valencia-Mendoza*, 912 F.3d 1215 (9th Cir. 2019), at https://defensenet.org/wp-content/uploads/2019/02/Valencia-mendoza_2-20-2019.pdf

[2] *Cf. Renteria-Morales v. Mukasey*, 551 F.3d 1076 (9th Cir. 2008), treating every requirement of §101(a)(43)(T), other than the sentence component, as an element subject to the categorical, and modified categorical approach as applied prior to *Moncrieffe v. Holder* 133 S.Ct. 1678 (2013), *Descamps v. U.S.* 133 S.Ct. 2276 (2013) and *Mathis v. United State*s, 136 S. Ct. 894 (2016). The difference in approach between *Renteria-Morales* and *Matter of Garza-Olivares* is irrelevant to the argument made herein and would not alter the outcome. But immigration counsel may wish to preserve the argument that *Renteria* announced the proper rule in the Ninth Circuit, and that *Matter of Garza-Olivare*s does not merit deference.

S. Ct. 1980, 1986 (2015). Under a strict categorical analysis, the court looks to the minimum conduct under the statute that has a realistic probability of prosecution; a statute is overbroad if "there is a 'realistic probability' of its application to conduct that falls beyond the scope of the generic federal offense." *Castrijon-Garcia v. Holder*, 704 F.3d 1205, 1212 (9th Cir. 2013), (quoting *Nunez v. Holder*, 594 F.3d 1124, 1129 (9th Cir. 2010)); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).

A person can show a realistic probability if the overbroad aspect comes from the plain text of the statute. *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1010 (9th Cir. 2015) ("[W]hen a 'state statute's greater breadth is evident from its text,' a petitioner need not point to an actual case applying the statute of conviction in a nongeneric manner. [*United States v. Grisel*, 488 F.3d 844, 850 (9th Cir.2007) (en banc) (citation omitted)]" The petitioner may simply "rely on the statutory language to establish the statute as overly inclusive." [*United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir.2007) (en banc)]"). If the statute is not divisible, the analysis ends there, in favor of the noncitizen. *Lopez-Valencia v. Lynch*, 798 F.3d 863, 868 (9th Cir. 2015) ("If a statute does not list alternative elements, but merely encompasses different means of committing an offense, the statute is indivisible and the modified categorical approach has no role to play.") (internal quotation marks and citation omitted).

B. Washington State's bail jumping statute, RCW 9A.76.170, includes both failure to appear before a court and failure to surrender for service of a sentence, making it overbroad.

Revised Code of Washington (RCW) 9A.76.170, provides:

> Any person having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before any court of this state, or of the requirement to report to a correctional facility for service of sentence, and who fails to appear or who fails to surrender for service of sentence as required is guilty of bail jumping.

RCW 9A.76.170 (2001) (emphasis added). The last amendment to the statutory language was made in 2001, when the failure to surrender to serve a sentence provision was added. *See* History of statute, 13A Wash. Prac., Criminal Law § 1806 (2018-2019 ed.) (citing Laws of 2001, ch. 264, § 3.) ("In 2001, the Legislature added an alternative means, involving failure to report to serve a sentence."). The elements of Washington bail jumping are thus:

> (1) That on or about (date), the defendant failed [to appear before a court] [or] [to surrender for service of sentence];
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> (2) That the defendant [was being held for] [or] [was charged with] [or] [had been convicted of] [(fill in crime)] [a crime under RCW (fill in statute)] [a class A felony] [a class B or C felony] [a gross misdemeanor or misdemeanor]; and
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> (3) That the defendant had been released by court order [or admitted to bail] with knowledge of [the requirement of a subsequent personal appearance before that court] [or] [the requirement to report to a correctional facility for service of sentence].

11A Wash. Prac., Pattern Jury Instr. Crim. WPIC 120.41 (4th Ed).

Examining the elements, RCW 9A.76.170(1) is overbroad in at least one key respect, because it includes both failure to appear before a court and failure to surrender for service of a sentence.[3] Failure to surrender for service of a sentence has a realistic probability of prosecution since the overbroad text is in the plain language of the statute. *Chavez-Solis*, 803 F.3d at 1010.

C. The "realistic probability" test for overbroad statutes can be satisfied in the case of RCW 9A.76.170.

[3] While the INA contains a separate provision regarding failure to appear to serve a sentence for a charge that was punishable by five years' imprisonment or more, 101(a)(43)(Q), the Washington statute is overbroad in the case of both (T) and (Q), and is indivisible. In other words, the Washington statute contains an extra provision that makes it overbroad as to each, (T) and (Q).

There are at least two cases in Washington in which someone was prosecuted on the basis of the overbroad alternative. *State v. Laplante*, 131 Wash. App. 1029, 2006 WL 246547 (2006) ("The elements the State had to prove were that Mr. LaPlante: (1) was convicted of a crime; (2) was released by court order with the requirement to report to a correctional facility for service of sentence; and (3) knowingly failed to appear as required.") (citing *State v. Pope*, 100 Wn.App. 624, 628, 999 P.2d 51 (2000)) (Not Reported in P.3d). *See also State v. Prante*, 134 Wash. App. 1069 (2006) 2006 WL 2677930 ("The superior court sentenced him to six months in jail and ordered him to report to the Lewis County Jail on February 23, 2005. Prante did not report to jail on that date... . The State charged Prante with bail jumping for failing to report on the 23rd.").

III. The Washington bail jump statute is not divisible under the categorical approach.

A state offense is "divisible" if it has "'multiple, alternative elements, and so effectively creates several different crimes.'" *Almanza-Arenas v. Lynch*, 815 F.3d 469, 476 (9th Cir. 2016) (en banc) (quoting *Descamps*, 570 U.S. at 264). "Alternatively, if [the offense] has a 'single, indivisible set of elements' with different means of committing one crime, then it is indivisible and we end our inquiry, concluding that there is no categorical match." *Id*. at 476–77 (quoting *Descamps*, 570 U.S. at 265). An immigration adjudicator may not substitute their own interpretations of state statutes. *Schad v. Arizona,* 501 U.S. 624, 636, 111 S. Ct. 2491, 2499 (1991) ("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.").

The Washington statute at issue here is not divisible because "failure to appear before a court" and "failure to surrender for service of a sentence" are alternative means under

Washington law, not separate elements of distinct crimes. *See, e.g., State v. Torre*, No. 50405-7-II, 2018 WL 5977989, at *1 (Wash. Ct. App. Nov. 14, 2018) (in which the charging document repeated the statutory language, and included both alternatives: "On or about November 3, 2016, in the County of Kitsap, State of Washington, the above-named Defendant, having been released by court order or admitted to bail with knowledge of the requirement of a subsequent personal appearance before a court of this state or of the requirement to report to a correctional facility for service of sentence, did fail to appear or did fail to surrender for service of sentence in which a Class B or Class C felony has been filed, to-wit: Kitsap County Superior Court Cause No. 16-1-00970-9; contrary to Revised Code of Washington 9A.76.170"). *See also* History of statute, 13A Wash. Prac., Criminal Law § 1806 (2018-2019 ed.) (citing Laws of 2001, ch. 264, § 3.) ("In 2001, the Legislature added an *alternative means*, involving failure to report to serve a sentence.") (emphasis added).

Indeed, Washington courts have held that to convict a defendant of bail jumping, the State must only prove beyond a reasonable doubt that the defendant "'(1) was held for, charged with, or convicted of a particular crime; (2) was released by court order or admitted to bail with the requirement of a subsequent personal appearance; and, (3) knowingly failed to appear as required.'" *State v. Williams*, 162 Wash.2d 177, 183–84, 170 P.3d 30 (2007) (emphasis omitted) (quoting *State v. Pope*, 100 Wash.App. 624, 627, 999 P.2d 51 (2000)). *State v. Hart*, 195 Wash. App. 449, 456, 381 P.3d 142, 146 (2016), *abrogated on other grounds by State v. Burns*, 193 Wash. 2d 190, 438 P.3d 1183 (2019). Therefore, it is only necessary that the state prove a defendant failed to appear "as required"; the prosecution need not prove what the defendant failed to appear for, as long as it was one of the two alternative means (appear before a court or to serve a sentence). "[A]ll of the elements of bail jumping are clearly articulated in RCW

9A.76.170(1)." *State v. Williams*, 162 Wash. 2d 177, 184, 170 P.3d 30, 33 (2007) (citations omitted). The statutory text, jury instructions, and state case law all make clear that a person charged with failure to appear under RCW 9A.76.170 does not have to fail to appear before a *court* to be culpable.

IV. Conclusion

Both the Ninth Circuit and the Board have characterized the "appear before a court" requirement of 101(a)(43)(T) as an element requiring a categorical analysis. *Renteria-Morales v. Mukasey,* 551 F.3d 1076, 1083 (9th Cir. 2008); *Garza-Olivares*, 26 I&N Dec. at 739. As the Ninth Circuit has emphasized, if a statute is overbroad, the analysis ends there; it does not matter that a review of the record of conviction can identify one alternative or another. *Almanza-Arenas*, 815 F.3d at 476.[4]

Since the statute is both overbroad and indivisible with respect to the "before a court" element of 101(a)(43)(T), DHS can never meet its burden of proving removability for an aggravated felony conviction based on this charge.

[4] [PRACTICE NOTE TO IMMIGRATION COUNSEL]: If the Information and plea statement in a particular case indicate that a defendant was actually charged and pled guilty under the "failure to appear before a court" alternative, this is irrelevant to the analysis of the reach of the statute.