No. 20-1048

In the Supreme Court of the United States

STEVENSON RUBEN ONEAL MOORE, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
BRYAN S. BEIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in upholding the Board of Immigration Appeals' determination that petitioner's conviction for fifth degree conspiracy to commit second degree murder in violation of New York Penal Law § 105.05 (McKinney 2009) rendered him inadmissible under 8 U.S.C. 1182(a)(2)(A)(i)(I) as an alien convicted of a "crime involving moral turpitude" "or an attempt or conspiracy to commit such a crime."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Statutes:

In the Supreme Court of the United States

No. 20-1048

STEVENSON RUBEN ONEAL MOORE, PETITIONER

v.

MERRICK B. GARLAND, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-8a) is unreported but is reprinted at 819 Fed. Appx. 11. The decisions of the Board of Immigration Appeals (Pet. App. 38a–42a and Pet. App. 43a-51a) and of the immigration judge (Pet. App. 9a–37a) are unreported. An additional prior decision of the Board of Immigration Appeals (Administrative Record 135-136) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 30, 2020. A petition for rehearing was denied on September 8, 2020. The petition was filed on January 26, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 2013, petitioner pleaded guilty to conspiring to commit murder and was convicted of one count of fifth degree conspiracy under New York Penal Law § 105.05 (McKinney 2009). Pet. App. 4a-5a, 20a. He was subsequently charged with inadmissibility under 8 U.S.C. 1182(a)(2)(A)(i)(I), as an alien convicted of a "crime involving moral turpitude" "or an attempt or conspiracy to commit such a crime." Pet. App. 3a. Both the immigration judge (IJ) and the Board of Immigration Appeals (Board) found petitioner inadmissible as charged. *Ibid.* The court of appeals denied a petition for review, explaining that the agency had properly found that petitioner was inadmissible because the object of petitioner's conspiracy was second degree murder, an offense that indisputably qualifies as a crime involving moral turpitude. Pet. App. 6a.

1. Petitioner, a citizen of Barbados, was admitted to the United States as an immigrant in 1989. Pet. App. 10a. In 2000, petitioner joined the Bloods, a criminal street gang. *Id.* at 13a, 89a. In 2010, petitioner was arrested and charged with attempted murder. *Id.* at 14a. According to a declaration petitioner filed in connection with his removal proceedings, petitioner's arrest came after police tapped his phone and heard a series of conversations he had with his fellow Bloods about a man referred to as "Shawn Don." *Id.* at 90a. The declaration explained that petitioner suspected that Shawn Don had been involved in the murder of petitioner's friend, and the declaration acknowledged that—in the tapped conversations—petitioner spoke of wanting Shawn Don to "face consequences," and wanting to "'get [Shawn Don]' while he was at Rikers." *Id.* at 90a-91a. Petitioner's declaration also acknowledged that the police

tapped "separate conversations where people asked [petitioner] where they might be able to purchase a gun," although—in petitioner's view—the police erred in concluding that these conversations were related to his stated desire to "get" Shawn Don, and he observed that Shawn Don was "alive and well to this day." *Id.* at 91a.

Petitioner ultimately faced two indictments charging numerous gang-related crimes, including enterprise corruption, attempted criminal sale of firearms, criminal sale of firearms, attempted criminal possession of a weapon, criminal possession of weapons, conspiring to sell a controlled substance and a firearm, hindering prosecution, witness tampering, Administrative Record (A.R.) 445-526, and conspiracy in the second degree, A.R. 543-551. In order to resolve the charges in the first indictment, petitioner pleaded guilty to attempted criminal possession of a weapon and hindering prosecution. Pet. App. 60a-64a. To resolve the charges in the second indictment, he pleaded guilty to fifth degree conspiracy to commit murder. *Id.* at 66a-71a. At the plea hearing, the judge asked petitioner whether it was "true" that his conspiracy was "to murder Sean Don," and petitioner said "Yes." *Id.* at 68a.

2. In 2015, petitioner visited Barbados and, upon his return, he applied for admission to the United States as a lawful permanent resident. Pet. App. 10a. Thereafter, he was charged with inadmissibility under 8 U.S.C. 1182(a)(2)(A)(i)(I), which provides that an alien is inadmissible if he "is convicted of" or "admits having committed * * * a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime."

a. The IJ found petitioner inadmissible as charged. Pet. App. 17a-21a. The IJ explained that a crime involving moral turpitude "generally refers to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons, or the duties owed to society in general." *Id.* at 17a. Accordingly, to constitute a crime involving moral turpitude, an offense must generally involve "reprehensible conduct and a culpable mental state." *Ibid.* (citation omitted).

The IJ also observed that, in order to determine whether a state offense qualifies as a crime involving moral turpitude, courts generally apply the "categorical approach," under which the court analyzes whether the minimum conduct the state statute proscribes would render the alien removable. Pet. App. 17a (citing *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013)). In some instances, however, a court will find that a particular state offense is "divisible" into multiple distinct crimes, and it will therefore apply a "modified categorical approach," *id.* at 18a (citation omitted), under which the court may examine "'extra-statutory materials,' such as the record of conviction," to determine whether the alien's particular crime of conviction involved moral turpitude, *id.* at 20a (citation omitted).

Here, the IJ found that New York Penal Law §105.05 (McKinney 2009) was divisible and therefore susceptible to the modified categorical approach. Pet. App. 18a. The IJ observed that a statute is divisible where it sets out alternative "[e]lements"—i.e., alternative "'things the "prosecution must prove to sustain a conviction."'" *Id.* at 19a (quoting *Mathis* v. *United States*, 136 S. Ct. 2243, 2248 (2016)). A person may be convicted of violat-

ing Section 105.05 if "he agrees with one or more persons to engage in or cause the performance" of a felony "with intent that conduct constituting" the felony will "be performed," or if, "being over eighteen years of age," he "agrees with one or more persons under sixteen" to "engage in or cause the performance" of a "crime." *Id.* at 18a (quoting New York Penal Law § 105.05 (McKinney 2009)). The IJ explained that, under New York law, "the prosecution has to prove" the "object felony" and "object crime" that the defendant conspired to commit. *Id.* at 19a. Accordingly, the "object felony" and the "object crime" are "elements that create several different crimes," *ibid.*, permitting the application of the modified categorical approach to determine what the object of petitioner's conspiracy was, *id.* at 20a.

The IJ then found that, according to petitioner's plea transcript, he pleaded guilty to "conspiracy to murder." Pet. App. 20a. The IJ explained that, under *In re Vo*, 25 I. & N. Dec. 426, 429 (B.I.A. 2011), to evaluate whether a conspiracy offense qualifies as a crime involving moral turpitude, an IJ "looks at whether the substantive crime underlying the conspiracy" qualifies. Pet. App. 20a. Because Board precedent established that murder is a crime involving moral turpitude, the IJ sustained the charge of inadmissibility. *Id.* at 20a-21a.[1]

b. The Board dismissed petitioner's administrative appeal. Pet. App. 38a-42a. As relevant here, it rejected petitioner's assertion that the conspiracy statute under

---

[1] The IJ also denied petitioner's applications for relief and protection from removal to Barbados, Pet. App. 24a-36a, finding—among other things—that petitioner lied during the hearing and provided misleading and implausible testimony, *id.* at 21a-24a. Petitioner has not sought certiorari review with respect to that denial.

which he was convicted was not divisible because—according to petitioner—New York permits a "'"stand-alone" conviction for conspiracy without any underlying crime being necessary to the offense.'" *Id.* at 40a (citation omitted). The Board explained that petitioner's view of New York law was mistaken because New York state courts "have repeatedly held that," in conspiracy cases, "identification of the 'object crime' is a necessary portion of the offense." *Ibid.* (citing *People* v. *Flanagan*, 28 N.Y.3d 644 (N.Y. 2017) and *In re Robinson* v. *Snyder*, 259 A.D.2d 280 (N.Y. App. Div. 1999)). The Board then determined that the transcript of petitioner's plea colloquy demonstrated that he "pled guilty to conspiracy in which the object of the conspiracy was to commit murder." *Ibid.* And, because "[i]t is well-settled that murder constitutes a crime involving moral turpitude," the Board determined that petitioner is removable. *Id.* at 41a.

c. Petitioner sought review in the Second Circuit. Before the court heard the case, however, the parties stipulated to a remand to allow the Board to "further consider whether [petitioner's] conviction for conspiracy" qualifies as a crime involving moral turpitude. A.R. 131.

In his briefs on remand, petitioner again asserted that the New York conspiracy statute is not divisible based on his belief that, under New York law, proof of the criminal objective of a conspiracy is not an offense element. A.R. 38. Petitioner observed that, under this Court's decision in *Mathis*, *supra*, a statute is divisible only if it has alternative "elements" that establish multiple distinct crimes; it is not divisible if the statute merely sets out alternative "'means'" through which a single crime may be committed. A.R. 35 (quoting

Mathis, 136 S. Ct. 2248). Petitioner argued that the different "object crimes or felonies" that can give rise to a New York conspiracy conviction constitute different means of committing a single crime, not different elements. A.R. 38. Petitioner further argued that *Mathis* superseded the Board's precedents in *In re Gonzalez Romo*, 26 I & N. Dec. 743, 746 (B.I.A. 2016), and *In re Vo*, *supra*, to the extent those precedents permit the Board or IJ to determine whether inchoate crimes (like conspiracy, attempt, and solicitation) constitute crimes involving moral turpitude by considering the underlying offense, even when the state statute demonstrates that the underlying offense is a "means" and not an "element." A.R. 40-41.

A three-member panel of the Board issued an order dismissing petitioner's appeal. A.R. 3-7; Pet. App. 43a-51a. The Board first reiterated that Section 105.05 "is a divisible offense with respect to the object of the conspiracy." Pet. App. 46a. The Board explained that, based on evidence from New York law, it simply could not agree "with [petitioner's] claim that the object of the conspiracy, murder, is not an element of the offense of conspiracy, but a means of committing conspiracy such that the statute is not divisible." *Id.* at 48a. The court also explained that its precedents in *Gonzalez Romo* and *Vo* stand for the proposition that "when deciding whether an inchoate offense, such as solicitation or conspiracy to commit a crime, constitutes a crime involving moral turpitude, there is no meaningful distinction between the inchoate offense and the completed crime," such that it is "appropriate to look to the substantive offense when making [the moral turpitude] determination." *Ibid.* Accordingly, the Board found that it "need[ed] only to look to the substantive offense, in this

case conspiracy to commit murder," to determine that petitioner had committed a crime involving moral turpitude. *Id.* at 49a. A "further divisibility analysis * * * [wa]s not necessary." *Ibid.*

3. The court of appeals denied a petition for review in an unpublished summary order. Pet. App. 1a-8a. As relevant here, the court determined that petitioner is inadmissible "for having been convicted of a" crime involving moral turpitude "because the object crime of his conspiracy offense was second-degree murder." *Id.* at 4a. The court explained that, when "the ground of removal involves" an inchoate crime like conspiracy, "we consider only whether the 'object crime' charged is [a removable offense]" because "absent proof of a specific intent to commit the object crime, an inchoate offense cannot lead to a conviction." *Id.* at 5a (quoting *Santana-Felix* v. *Barr*, 924 F.3d 51, 54 (2d Cir. 2019) (per curiam)) (brackets in original). The court also explained that when the criminal judgment "reflects only the statute for the inchoate offense," "the record of conviction," which includes "the charging document" and "a plea colloquy transcript," may be consulted "to determine the object offense." *Ibid.* (quoting *Santana-Felix*, 924 F.3d at 55). The court determined that those items "support the conclusion that the object crime of [petitioner's] inchoate offense of conviction was second-degree murder." *Ibid.* Observing that "[t]here can be no question that second-degree murder is a" crime involving moral turpitude, the court held that petitioner "is removable as charged." *Id.* at 6a.

ARGUMENT

Petitioner renews his contention (Pet. 3-5, 29) that, under *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), his conviction for conspiracy to commit second degree

murder does not qualify as a crime involving moral turpitude. The court of appeals' unpublished summary decision is correct; it does not conflict with any decision of this Court or another court of appeals; and this case would in any event be a poor vehicle for addressing the question presented. This Court's review is therefore unwarranted.

1. The court of appeals correctly upheld the Board's determination that petitioner's conviction for conspiracy to commit second degree murder renders him inadmissible as an alien who has been convicted of a "crime involving moral turpitude" or "an attempt or conspiracy to commit such a crime." 8 U.S.C. 1182(a)(2)(A)(i)(I). Petitioner does not dispute that the object of his conspiracy was second degree murder, or that second degree murder constitutes a crime-involving moral turpitude. Instead, he argues (Pet. 24-28) that *Mathis* bars any consideration of the object of his conspiracy because New York's general conspiracy statute is "indivisible." Pet. i. That is incorrect. *Mathis* held that a state statute is divisible where it sets out alternative elements that a prosecutor must prove, 136 S. Ct. at 2249, and the court of appeals' decision was predicated on the determination that, under New York law, a conspiracy conviction requires "proof of a specific intent to commit the object crime." Pet. App. 5a (quoting *Santana-Felix* v. *Barr*, 924 F.3d 51, 54 (2d Cir. 2019) (per curiam)).

a. In *Mathis*, this Court considered when a state offense is divisible for purposes of deciding whether a defendant's prior conviction qualifies as a "violent felony" under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e). The Court held that a statute is divisible where it sets out alternative elements—*i.e.*, alterna-

tive "things the prosecution must prove to sustain a conviction." *Mathis*, 136 S. Ct. at 2248 (citation and internal quotation marks omitted). A statute is not divisible where it simply describes alternative "means"—"various factual ways of committing some component of the offense" that "a jury need not find (or a defendant admit)." *Id.* at 2249. To tell the difference between "elements" and "means," courts must look to "state law," considering—for example—whether "a state court decision definitively answers the question" by dictating whether "a jury need[s]" to "agree" on a particular issue. *Id.* at 2256.

In *Santana-Felix*, the Second Circuit applied *Mathis* to determine whether an alien's New York state conviction for conspiracy in the second degree constitutes an "aggravated felony" under immigration law. 924 F.3d at 54. The court of appeals concluded that second degree conspiracy does not categorically qualify as an aggravated felony, but it determined that it was appropriate to apply an "approach analogous to the modified categorical approach" to determine the object of the conspiracy because "absent proof of a specific intent to commit the object crime, an inchoate offense cannot lead to a conviction." *Ibid.* In reaching that conclusion, the Second Circuit relied on its prior decision in *Mizrahi* v. *Gonzales*, 492 F.3d 156 (2007), in which the court had concluded that it is permissible to examine the underlying offense when an alien has been convicted of solicitation under New York law because New York's jury instructions and caselaw make clear that "proof of 'intent to solicit the commission of [the] particular crime' was necessary to the conviction." *Santana-Felix*, 924 F.3d at 54 (quoting *Mizrahi*, 492 F.3d at 161) (brackets in original).

The *Santana-Felix* court determined that the same is true with respect to New York conspiracy offenses. 924 F.3d at 54. "New York's jury instruction for a conspiracy charge requires an instruction as to the specific object of the conspiracy," and "New York caselaw" requires that "the prosecution prove the defendant had the intent to commit the specific object offense." *Id.* at 54-55. In other words, for New York conspiracy convictions, the "object crime" is no different than an "element" as defined by *Mathis*; it is something the "prosecution must prove to sustain a conviction." 136 U.S. at 2248 (citation omitted).

The decision in this case represents a straightforward application of *Mathis* and *Santana-Felix*. Petitioner was convicted of conspiracy under New York law. Pet. App. 5a. *Santana-Felix* makes clear that, under *Mathis*, a court may look to the object of a New York conspiracy conviction because "absent proof of a specific intent to commit the object crime," a conviction is not possible. *Ibid* (quoting *Santana-Felix*, 924 F.3d at 54). And, because the object of petitioner's conspiracy was second degree murder, the conviction qualifies as a crime involving moral turpitude. *Id.* at 5a-6a.

b. Petitioner nonetheless contends (Pet. 25) that the court of appeals' decision conflicts with *Mathis* because, in petitioner's view, "[t]he type of felony or crime" a defendant conspires to commit "is not an element, but a means." But petitioner ignores the agency's determination that "the object of the conspiracy * * * *is an element of the offense*." Pet. App. 48a (emphasis added); see *id.* at 19a, 40a. Although petitioner contends (Pet. 25) that the object of a conspiracy cannot be an element because a conviction does not require "specific intent to commit any particular crime," he offers no evidence to

rebut the agency's determination that, under New York law, the "identification of the 'object crime' is a necessary portion of the offense" that the "prosecution must prove." Pet. App. 40a (citing *People* v. *Flanagan*, 28 N.Y.3d 644 (N.Y 2017) and *In re Robinson* v. *Snyder*, 259 A.D.2d 280 (N.Y. App. Div. 1999)); see *id.* at 19a.

Instead of grappling with the agency's determination that New York law treats the object of a conspiracy as an element, petitioner erroneously suggests (Pet. 26) that the Second Circuit's decision ignored "the elements-means analysis" and inappropriately "skipped to the modified categorical approach." In fact, the Second Circuit expressly relied on *Santana-Felix*, Pet. App. 5a, which applied an analysis akin to the modified categorical approach to a New York conspiracy conviction precisely because, under New York law, the prosecution must "prove the defendant had the intent to commit the specific object offense," *Santana-Felix*, 924 F.3d at 55.

Moreover, to the extent petitioner intends to suggest that the Second Circuit's approach is at odds with *Mathis* merely because the court of appeals did not use the term "element" to describe the object of the conspiracy, he is mistaken. *Mathis* stands for the proposition that a court must focus on facts that were "necessarily found or admitted," 136 S. Ct. at 2249; it does not require the use of any magic words. See *Descamps* v. *United States*, 570 U.S. 254, 274 (2013) (recognizing that courts may "modify" the modified categorical approach to fit a particular statutory context).

c. Petitioner also asserts (Pet. 27-28) that the Second Circuit's decision was flawed because it failed to consider that petitioner's conviction arose from a guilty

plea. Petitioner observes (Pet. 28) that, where something is not an element of an offense that the government must prove, a defendant has little reason to contest it at a plea hearing. But here the agency and the court found that the government *did* have to prove the nature of the underlying offense, such that petitioner had every reason to contest it. Pet. App. 5a. Yet, at the plea hearing, petitioner expressly agreed that he had conspired to commit murder, see p. 3, *supra*, and well after that hearing, he submitted a declaration acknowledging the evidence police had regarding his desire to make the intended murder victim "face consequences," see p. 2, *supra*.

d. Finally, petitioner suggests in the statement of his certiorari petition (at 10)—although not in the argument—that the Board's precedent regarding conspiracy offenses might be in tension with *Mathis*. Petitioner observes (Pet. 10-11) that *In re Vo*, 25 I. & N. Dec. 426 (B.I.A. 2011), and *In re Gonzalez Romo*, 26 I & N. Dec. 743 (B.I.A. 2016), both found that inchoate offenses should be analyzed in the same way as the substantive crime for purposes of evaluating whether the crime involves moral turpitude. But that reasoning has no relevance to *Mathis* because the Board was not analyzing whether the state statutes in question were divisible; it was merely considering whether the moral turpitude analysis should be different depending on whether an alien was convicted of committing a particular crime or *attempting or soliciting* the same crime. The Board reasoned that those convictions were the same "with respect to moral turpitude" because the same immoral intent was involved. *Vo*, 25 I. & N. Dec. at 428. That conclusion does not implicate *Mathis*.

Moreover, the Board has recently confirmed that a divisibility analysis under *Mathis* is consistent with its "decades-old approach" to the analysis of conspiracy convictions. *In re Al Sabsabi*, 28 I. & N. Dec. 269, 272 (B.I.A. 2021). *Al Sabsabi* explains that the Board has long looked to "the offense underlying" the conspiracy to analyze whether a conviction qualifies as a crime involving moral turpitude precisely because proof of the underlying offense is generally required to prove the conspiracy. *Ibid.* Thus, "the criminal object of the conspiracy is an element of the conspiracy offense." *Ibid.*

2. Petitioner's claim of division in the circuits lacks merit. He asserts (Pet. 4) that there is a conflict between Tenth Circuit precedent and decisions of the Second and Fourth Circuits as to how to analyze a conviction under a general conspiracy statute. Petitioner is mistaken because all three circuits recognize that where a State's general conspiracy statute makes a conviction depend on proof of the object of the conspiracy, a court may consider the object crime in determining the consequences of the conviction.

As explained, the Second Circuit has found it appropriate to look to the object of the conspiracy in analyzing the immigration consequences of a prior conspiracy conviction under New York law because conspiracy convictions require "proof of a specific intent to commit the object crime." *Santana-Felix*, 924 F.3d at 54. The Fourth Circuit reached a similar conclusion in *Shaw* v. *Sessions*, 898 F.3d 448 (2018), holding that a court may look to the object of a conspiracy because to obtain a conviction, "it must always be asked: 'conspiracy to do what?," such that the underlying crime "logically must be proven to support a conviction for conspiracy." *Id.*

at 453 (quoting *United States* v. *Ward*, 171 F.3d 188, 192-193 (4th Cir.), cert. denied, 528 U.S. 855 (1999)).

Petitioner asserts (Pet. 14-16) that the Tenth Circuit has taken a contrary approach in *United States* v. *Trent*, 767 F.3d 1046 (2014), cert. denied, 574 U.S. 1175 (2015), and *Jimenez* v. *Sessions*, 893 F.3d 704 (2017), but the distinction is illusory. In *Trent*, the court considered a defendant's contention that his conviction under the Oklahoma general conspiracy statute did not qualify as a serious drug offense under the ACCA because the drug crime that was the object of the conspiracy was a means of committing the general conspiracy offense rather than an element. 767 F.3d at 1057-1063. In a pre-*Mathis* decision on direct appeal, the court held that it could look to the object of the conspiracy for two reasons: (1) the "means" versus "elements" distinction is irrelevant to the divisibility analysis; and (2) Oklahoma law makes clear that the object of the conspiracy is an element because a jury must agree unanimously on the object in order to convict. *Ibid.* When *Trent* returned to the court on post-conviction review after *Mathis*, the Tenth Circuit recognized that the first rationale was no longer valid, but it upheld the validity of the defendant's ACCA conviction based on the second rationale. It reasoned that "*Mathis* did not create an intervening change in the law with respect" to the court's determination that the conspiracy statute is divisible because a jury must agree unanimously on the object of the conspiracy. *United States* v. *Trent*, 884 F.3d 985, 996 (10th Cir.), cert. denied, 139 S. Ct. 615 (2018); see *id.* at 989. That conclusion accords with the Second and Fourth Circuit's determination that a court may consider the object of a conspiracy because proof of that object is necessary for a conviction.

Petitioner asserts (Pet. 15-16), however, that *Jimenez*, *supra*, demonstrates that the Tenth Circuit's approach to inchoate defenses is distinct because *Jimenez* held that it was improper to look to the ulterior crime in analyzing whether a Colorado conviction for first degree criminal trespass constituted a crime involving moral turpitude. But *Jimenez* applied the same reasoning that animated the decision below, *Shaw*, and *Trent* because, like those decisions, *Jimenez* focused on whether "the jury must necessarily agree on a particular intended offense in order to convict" under the relevant state statute. 893 F.3d at 713. *Jimenez*'s outcome was different only because the court believed that the Colorado criminal trespass law did *not* require juror unanimity with respect to the ulterior crime, such that it could not be treated as an "element" under the *Mathis* framework. *Id.* at 713-714. Petitioner offers no basis to suggest that the Second and Fourth circuits would reach a different conclusion in the same circumstances.

3. Even if petitioner were correct that a conflict exists as to whether a court may look to the object of a conspiracy in evaluating the conviction's immigration consequences, this would be a poor vehicle to consider the question. Petitioner asserts (Pet. 29) that his "very removability turns on the question presented," but the application of the inadmissibility ground at issue in this case does not even require a conviction: An alien can also be held inadmissible as charged if he "admits having committed" "a crime involving moral turpitude (other than a purely political offense) or an attempt or conspiracy to commit such a crime," or "admits committing acts which constitute the essential elements of" such a crime. 8 U.S.C. 1182(a)(2)(A)(i)(I); cf. 8 U.S.C. 1227(a)(2)(A)(i) (providing that an alien admitted to the

United States is deportable if "convicted of" a crime involving moral turpitude under specified circumstances). At petitioner's plea hearing, he admitted that he had conspired to commit murder, see p. 3, *supra*. Accordingly, even if this Court were to accept petitioner's argument, he could be found inadmissible on remand on that alternative basis.[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
BRYAN S. BEIER
Attorneys

APRIL 2021

[2] Any further proceedings to consider petitioner's removability on the basis of that admission would be governed by *In re K-*, 7 I. & N. Dec. 594 (B.I.A. 1957), and *In re J-*, 2 I. & N. Dec. 285 (B.I.A. 1945). Under the procedures set forth there, petitioner would be provided with a statement of the essential elements of the conspiracy offense and could be held removable based on admissions to those elements in immigration court. See *In re K-*, 7 I. & N. Dec. at 597.