No. 17-____

IN THE

Supreme Court of the United States

IVAN BERNABE RODRIGUEZ VAZQUEZ,

Petitioner,

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

Amanda Waterhouse
REINA & BATES
P.O. Box 670608
Houston, TX 77267

Thomas M. Bondy
Benjamin F. Aiken
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
Brian P. Goldman
Cynthia B. Stein
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

Counsel for Petitioner

QUESTION PRESENTED

A noncitizen convicted of an offense under state law is deportable if the elements of the state offense correspond to the elements of an offense enumerated in the Immigration and Nationality Act (INA). Under this "categorical approach," a state conviction is not a categorical match with a corresponding federal offense if the state statute punishes conduct that exceeds the scope of the federal offense. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), however, this Court cautioned that the categorical approach "requires more than the application of legal imagination to a state statute's language"; rather, "[i]t requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside" the scope of the federal law. *Id.* at 193.

Six circuits hold that *Duenas-Alvarez*'s "realistic probability" test is satisfied when a state statute's plain text lists alternative terms that are broader than the corresponding federal elements, because no "legal imagination" is required to understand its breadth. The Fifth Circuit and the Board of Immigration Appeals, in contrast, hold that a noncitizen must prove that a state actually enforces the broader provision of state law to establish a "realistic probability."

The question presented is:

Whether a conviction under a state criminal statute whose plain terms sweep in more conduct than a corresponding federal offense cannot be a categorical match with that federal offense.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Ivan Rodriguez Vazquez, a lawful permanent resident of this country, was convicted of a simple drug possession offense in Oklahoma. The government sought to remove him on the ground that he was "convicted of a violation of … any law or regulation of a State … relating to a controlled substance" as defined in the federal drug schedules. 8 U.S.C. § 1227(a)(2)(B)(i). Mr. Rodriguez argued that his Oklahoma conviction did not meet the federal definition under this Court's "categorical approach." A state conviction is a removable offense only if the full range of conduct punishable under the state law is also punishable under the corresponding federal offense, but the Oklahoma drug statute extends to substances that do not appear in the federal drug schedules.

The Fifth Circuit agreed that Oklahoma's drug laws go beyond federal law. It nevertheless held that Mr. Rodriguez's conviction was categorically a "controlled substance" offense as defined by federal law. It thought that result was demanded by this Court's decision in *Gonzales v. Duenas-Alvarez*, which requires a "realistic probability" that a state "would apply its statute to conduct that falls outside the [federal] definition." 548 U.S. 183, 193 (2007). According to the Fifth Circuit, *Duenas-Alvarez* required Mr. Rodriguez to unearth state-court records showing that Oklahoma had actually prosecuted cases involving the substances named only on the Oklahoma schedules.

The Fifth Circuit acknowledged that its view directly conflicts with opinions of the First, Third, Sixth, Ninth, and Eleventh Circuits, each of which

has held that when a state statute is broader on its face, there is a sufficient probability that the statute will be enforced according to its plain terms. The Tenth Circuit has also adopted the majority position in an analogous context.

This Court's intervention is necessary to resolve this disagreement. En banc courts have recently weighed in on each side of the split, so the conflict will not resolve itself; only this Court can clarify the meaning of its language in *Duenas-Alvarez* that has confused the lower courts. The conflict is also untenable: The immigration laws must have the same meaning throughout the country, especially because the government may choose the forum where it initiates removal proceedings. Here, for example, Mr. Rodriguez lived and was convicted in the Tenth Circuit, but his immigration case arose in the Fifth Circuit because the government moved him to an immigration detention facility there.

Moreover, the question presented will continue to arise. It implicates some of the most commonly invoked grounds for removal, as well as important sentencing determinations under the Armed Career Criminal Act and the Sentencing Guidelines. And the question is squarely presented here.

Last, the Fifth Circuit's rule is wrong. In adopting a "realistic probability" test, *Duenas-Alvarez* focused on curbing the use of "legal imagination" to craft sweeping interpretations of state statutes that would artificially destroy a categorical match with a listed federal offense. 548 U.S. at 193. But no "legal imagi-

nation" is necessary when the wider sweep of a statute is evident in its plain language. Moreover, the Fifth Circuit's rule imposes an impractical and unfair burden on noncitizens. At bottom, the Fifth Circuit's view is that lawful permanent residents may be deported unless they can find records that "prove" that state and federal criminal statutes are not coextensive, even when by their very terms they are not. That makes no sense.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported at 881 F.3d 396 and is reproduced at Pet. App. 1a-21a. The decisions of the Board of Immigration Appeals and Immigration Judge are unreported and reproduced at Pet. App. 22a-27a and 28a-32a, respectively.

JURISDICTION

The Court of Appeals entered judgment on February 1, 2018. Pet. App. 21a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The provision of the Immigration and Nationality Act at issue, 8 U.S.C. § 1227(a)(2)(B)(i), is reproduced at Pet. App. 33a. The relevant portion of the Controlled Substances Act, 21 U.S.C. § 802(6), is reproduced at Pet. App. 34a. The relevant portion of

Oklahoma's Uniform Controlled Dangerous Substances Act, 63 Okla. Stat. Ann. § 2-402, is reproduced at Pet. App. 35a-39a.

STATEMENT OF THE CASE

1. The Immigration and Nationality Act (INA) lists a set of offenses that may subject noncitizens, including lawful permanent residents, to deportation. 8 U.S.C. § 1227(a). Relevant here, the INA makes deportable "[a]ny alien who at any time after admission has been convicted of a violation of … any law or regulation of a State … relating to a controlled substance (as defined in section 802 of title 21) …." *Id.* § 1227(a)(2)(B)(i). The Controlled Substances Act (CSA) defines "controlled substance" as a drug or substance listed in the federal drug schedules. 21 U.S.C. § 802(6).

To determine whether a state-law conviction counts as one of the listed offenses, courts apply the "categorical approach." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 185-87 (2007). That approach compares the elements of the state statute to the elements of the listed federal offense. The aim is to determine whether the state offense is a "categorical" match because the elements are the same as (or narrower than) the federal offense, or instead whether the state offense is overbroad in the sense that it criminalizes more conduct than the federal offense. *Descamps v. United States*, 570 U.S. 254, 261 (2013). Thus, "[t]he state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015).

A 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." *Id.* (quoting *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)); *see also Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016); *Descamps*, 570 U.S. at 261. Accordingly, a state statute of conviction is a categorical match with the federal offense "only if a conviction of the state offense 'necessarily' involved facts equating to" the federal offense. *Moncrieffe*, 569 U.S. at 190 (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)).[1]

2. Petitioner Ivan Rodriguez Vazquez is a native and citizen of Mexico. Pet. App. 2a. He was admitted to the United States as a lawful permanent resident in 2007. *Id.* He is the father of two U.S.-citizen children, and he worked for six years at a meatpacking plant, where he was highly regarded by his supervisor. Certified Administrative Record (C.A.R.) at 219-20. In 2013, he pleaded guilty to a charge of possessing a controlled dangerous substance under Oklahoma law. *See* 63 Okla. Stat. Ann. § 2-402 (2013); Pet. App. 2a-3a. The information alleged, and Mr. Rodriguez admitted in his plea, that the "factual basis" for

[1] Where "[a] single statute … list[s] elements in the alternative, and thereby define[s] multiple crimes," it is described as "divisible." *Mathis*, 136 S. Ct. at 2249. For "divisible" statutes, courts apply a "modified categorical approach" that "looks to a limited class of documents … to determine what crime, with what elements, a defendant was convicted of," before proceeding to "compare that crime, as the categorical approach commands, with the relevant generic offense." *Id.* This case does not concern this "modified" variant.

the charge was that he possessed "cocaine." C.A.R. 144, 148. He was sentenced to a deferred term of imprisonment of three years, with only 30 days to serve in county jail, followed by two years of probation, after which his conviction would automatically be expunged. Pet. App. 3a.

3. In July 2015, the government initiated removal proceedings against Mr. Rodriguez in Texas, where it had elected to detain him. Pet. App. 28a-29a. An immigration judge found that Mr. Rodriguez's Oklahoma conviction was a controlled substances offense that rendered him removable under 8 U.S.C. § 1227(a)(2)(B)(i). Pet. App. 31a.

4. Mr. Rodriguez appealed to the Board of Immigration Appeals (BIA). He argued that the immigration judge erred in finding him deportable because his state drug conviction was not categorically a violation of the CSA, given that "the Oklahoma schedules contain substances that are not contained in any of the five federal schedules." Pet. App. 7a; Pet. App. 25a-26a.

The BIA applied the categorical approach to compare the state and federal offenses, but it compared only the controlled substances listed in Oklahoma's Schedule II, Part B, with the substances listed in Schedule II of the federal schedule. Pet. App. 25a-26a. Finding that all controlled substances in the state's Schedule II, Part B were included in the federal Schedule II, it concluded that a "violation of 63 Okla. Stats. Ann. § 2-402[] is a categorical match to the cor-

responding federal offense and supports the Immigration Judge's findings as to the respondent's removability." Pet. App. 26a-27a.

In a footnote, the BIA reasoned that, "even assuming, arguendo," that the Oklahoma statute was broader, it would "presume there is a categorical match between [the] state and federal drug schedules" unless Mr. Rodriguez could establish a "realistic probability that the State would prosecute conduct under the state statute that falls outside" the federal offense. Pet. App. 26a n.1. In so concluding, the BIA applied its opinion in *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014), which held that, in order to show a state drug statute is not a categorical match with the federal CSA, the noncitizen must "show that the state actually prosecutes cases involving substances not on the federal schedule." *Id.*

5. The Fifth Circuit denied Mr. Rodriguez's petition for review. It first rejected the government's mistaken contention that Mr. Rodriguez's challenge was not administratively exhausted. Pet. App. 5a-10a. The Court of Appeals then agreed with Mr. Rodriguez that the BIA "erred in [its] conclusion" that "Oklahoma's statute categorically matched its federal counterpart," because "the Oklahoma schedules facially extend[] beyond those substances that are controlled under federal law." Pet. App. 14a, 16a. The court explained that the BIA "should have compared both [Oklahoma] Schedules I and II" to the federal schedules because "the Oklahoma statute criminalized controlled substances on Schedule I and II." Pet. App 16a. Looking to the proper sources of state law made plain

that "Oklahoma schedules contain at least two substances (Salvia Divinorum and Salvinorin A)… that are not included in any federal schedule."[2] Pet. App. 16a. The court noted that the government "agree[d] that the Oklahoma statute of conviction here is broader than its federal analog." Pet. App. 14a.

The Fifth Circuit then rejected the government's alternative argument that, even if the Oklahoma statute is overbroad, it is "divisible" and thus subject to the modified categorical approach. Pet. App. 14a-16a (citing *Mathis*, 136 S. Ct. at 2249). "Employing the modified approach in this case … would extend beyond the proper scope of [the Court of Appeals's] review," because "the BIA did not decide this issue" and the parties disputed whether the Oklahoma statute is divisible. Pet. App. 15a-16a. The court "thus decline[d] to assess whether the Oklahoma statute is divisible, or whether the modified categorical approach applies," in the first instance. Pet. App. 16a.

Last, however, after finding the state statute broader in its terms than the federal statute, the Court of Appeals upheld the BIA's alternative holding. Applying the Fifth Circuit's recent en banc opinion in *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017), the court held that even where a state statute is broader on its face than the federal analogue, the individual "must point to an actual state

---

[2] Salvia Divinorum and Salvinorin A "evoke hallucinogenic effects" and are known by several street names, including simply "salvia." Drug Enf't Admin., *Salvia Divinorum and Salvinorin A*, (Oct. 2013), https://tinyurl.com/y7g68ysl.

case applying [the] state statute" in circumstances involving the broader terms in order to show the absence of a categorical match. Pet. App. 19a (quoting *Castillo-Rivera*, 853 F.3d at 224 n.4).

The court acknowledged that several "[o]ther circuits have held that a statute's plain meaning is dispositive; where a state statute is facially overbroad compared to a corresponding federal statute, there is a realistic probability that the state will apply its statute to conduct that falls outside the [federal] definition." Pet. App. 18a-19a & n.4. But it held that "*Castillo-Rivera* is clear in its breadth" and applied here. Pet. App. 19a. Rodriguez was thus removable because the court considered itself "bound by that decision." *Id.*

REASONS FOR GRANTING THE WRIT

I. The Question Presented Has Intractably Divided The Courts Of Appeals.

To decide whether a prior state conviction yields federal immigration or sentencing consequences, the categorical approach requires comparing the elements of a state offense to the elements of a corresponding offense as defined by federal law. *See supra* 4-5.

Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007), set out a limitation to this categorical approach to prevent individuals from attempting to artificially broaden state offenses in order to avoid a categorical match with a corresponding federal offense. The noncitizen in *Duenas-Alvarez* was convicted of auto

theft under California law. Even though the elements of the California statute matched the elements of generic theft referenced in the INA, the noncitizen hypothesized that his California theft conviction was *not* a categorical match with the federal offense. He argued that while generic theft required proof of intent to deprive ownership, California law allows an individual charged on an aid-or-abet theory to be found liable not only for any "crime he intends, but also for any crime that 'naturally and probably' results from his intended crime." *Duenas-Alvarez*, 549 U.S. at 190-91.

This Court rejected the noncitizen's convoluted argument. It explained:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime. To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.

Duenas-Alvarez, 549 U.S. at 193.

Since *Duenas-Alvarez*, six circuits have agreed that a noncitizen does *not* need to make any additional showing when a state statute's plain terms encompass conduct that goes beyond the corresponding federal offense—in contrast to the California theft statute, which was not facially broader and could only have been found broader by creatively applying fringe doctrines regarding aid-and-abet liability. But in the decision below, the Fifth Circuit expressly rejected the other circuits' position and found Mr. Rodriguez removable because he had not affirmatively identified a case where Oklahoma actually prosecuted someone for a crime involving a substance controlled under state but not federal law. The court's decision was consistent with the BIA's approach, which binds immigration judges in the five regional circuits that have not yet addressed this question. Only this Court can settle this widespread divide.

A. Six circuits hold that when a state statute's plain text contains broader terms than the corresponding federal offense, nothing more is required to establish that the state crime is not a categorical match.

Sitting en banc, the Ninth Circuit has held that a conviction under a state statute that is broader on its face than the federal analogue satisfies *Duenas-Alvarez*'s realistic probability test. In *United States v. Grisel*, the court concluded that an Oregon statute that "expressly … defines second-degree burglary more broadly" than generic burglary was not a categorical burglary offense for purposes of the Armed Career Criminal Act. 488 F.3d 844, 850 (9th Cir. 2007)

(en banc). As the court explained, "[w]here … a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' *Duenas-Alvarez*, [549 U.S. at 193], is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." *Id.*; *see also United States v. Vidal*, 504 F.3d 1072, 1082 (9th Cir. 2007) (en banc) (reaffirming *Grisel* and concluding the defendant "satisfied his burden by pointing to the text").

The First Circuit adopted the Ninth Circuit's approach in a context identical to the one here. *Swaby v. Yates* held that a Rhode Island drug offense was not categorically a controlled substance offense under § 1227(a)(2)(B)(i), because the state drug schedules "included at the relevant time at least one drug—thenylfentanyl—not listed on the federal drug schedules." 847 F.3d 62, 64-65 (1st Cir. 2017). The court explained that *Duenas-Alvarez*'s "realistic probability" test reflects a "sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes." *Id.* at 66. That concern "has no relevance," the court reasoned, where the state law's "plain terms" show that it "clearly does apply more broadly than the federally defined offense." *Id.*

The Third Circuit similarly rejected a contention that a Pennsylvania statute, which addressed possession of a "counterfeit substance under Pennsylvania law but not under federal law," could be deemed a categorical match with the federal CSA simply because

no "reported decision of a Pennsylvania court" established "that Pennsylvania actually prosecutes people under [the state statute] for substances that are not federally controlled." *Singh v. Att'y Gen.*, 839 F.3d 273, 280-81, 285-86 (3d Cir. 2016). The court explained that the "realistic probability" test comes into play *only* when "the elements of the crime of conviction" are "the *same* as the elements of the generic federal offense," as in *Duenas-Alvarez*. *Id.* at 286 n.10 (emphasis added). Where the elements of the state statute are broader on their face, "the 'realistic probability' language is simply not meant to apply." *Id.*; *see also Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009).

Three more circuits agree. The Eleventh Circuit found no categorical match between a Georgia shoplifting statute and the generic "theft" offense listed in the INA. Generic "theft" requires an "intent to deprive" the owner of his property, whereas the Georgia statute criminalized both "intent of appropriating" and "intent … to deprive." *Ramos v. Att'y Gen.*, 709 F.3d 1066, 1067-69 (11th Cir. 2013). *Duenas-Alvarez*, the court held, does not require evidence proving that the state has actually prosecuted conduct falling outside the generic definition "when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition." *Id.* at 1071-72 (quoting *Duenas-Alvarez*, 549 U.S. at 193); *see also Vassell v. Att'y Gen.*, 839 F.3d 1352, 1362 (11th Cir. 2016).

The Tenth Circuit recently reached the same conclusion in a case involving a federal, rather than state, predicate offense. The court found no categorical match between a conviction for Hobbs Act robbery, which requires "actual or threatened force … to [a] *person or property*," and the generic definitions of robbery and extortion, both of which require force or threat of force against a *person*. *United States v. O'Connor*, 874 F.3d 1147, 1153-54, 1156-58 (10th Cir. 2017) (emphasis added). The court rejected the government's argument that the defendant was required to "demonstrate that the government has or would prosecute threats to property as a Hobbs Act robbery," observing that "Hobbs Act robbery reaches conduct directed at 'property' because the statute specifically says so." *Id.* at 1054. The court expressly endorsed the "[p]ersuasive case law from [its] sibling circuits [that] supports this conclusion." *Id.* at 1154 n.9 (citing *Ramos*, *Jean-Louis*, and *Grisel*).

Finally, in an unpublished opinion, the Sixth Circuit declined to read "*Duenas-Alvarez* to mean that [the court] should … assum[e]," absent contrary proof, that a noncitizen's conviction under a state statute criminalizing both "selling" and "offering to sell" a controlled substance was within the scope of the narrower federal drug-trafficking offense, which only covered selling. *Mendieta-Robles v. Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007). That approach, the court observed, would have required it "to ignore the clear language" of the state statute. *Id.*

B. The Fifth Circuit and BIA require proof of state enforcement practices even when a state statute's elements are expressly broader than the analogous federal offense's elements.

The Fifth Circuit acknowledged that its decision conflicted with other circuits' understanding of this Court's decision in *Duenas-Alvarez*. Pet. App. 18a-19a & n.4. The panel in this case was bound by a recent eight-to-seven en banc decision holding that the "realistic probability" test requires proof that states actually *enforce* the portions of their state statutes that go beyond federal law. *See Castillo-Rivera*, 853 F.3d 218.

The question in *Castillo-Rivera* was whether a Texas felon-in-possession statute was a categorical match with its federal analogue—and thus an "aggravated felony" for purposes of the U.S. Sentencing Guidelines. *Id.* at 221-22. Although the text of the Texas statute plainly covered a broader range of conduct, the majority concluded the statutes were a categorical match. *Id*. at 222. According to the majority, the "realistic probability" test required the offender to "show that Texas courts have *actually applied*" the state law more broadly. *Id.* The court relied on *Duenas-Alvarez* and quoted dicta in *Moncrieffe* stating that an individual seeking to show the absence of a categorical match must "demonstrate that the State actually prosecutes the relevant offense" in cases that implicate the state statute's overbreadth. *Id.* (quoting *Moncrieffe*, 569 U.S. at 206).

Judge Dennis dissented, joined in relevant part by Chief Judge Stewart and Judges Smith, Prado, Graves, Higginson, and Costa. He agreed with the holding of every other circuit to address the issue that the "realistic probability" test "does not … require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case." *Id.* at 239. Judge Higginson, dissenting in part, also observed that the majority's interpretation of *Duenas-Alvarez* "places an impractical burden on defendants without access to the required information." *Id.* at 244-45.

Like the Fifth Circuit, the BIA has held that *Duenas-Alvarez* requires a noncitizen to "show[] that the State actually prosecutes" conduct outside the federal definition of the crime to satisfy the "realistic probability" test. Pet. App. 25a. The BIA staked out its view in *Matter of Ferreira*, which, like this case and the First Circuit's *Swaby* decision, involved state drug schedules that "d[id] not match" the list of controlled substances in the federal schedules. 26 I. & N. Dec. at 418. The BIA continues to apply *Matter of Ferreira* in circuits that have not yet decided the question. *See, e.g.*, *In re Kapanadze*, No. A056-502-590, 2017 WL 4946931, at *7 (BIA Sept. 12, 2017) (Second Circuit); *In re Perez*, No. A044-041-067, 2014 WL 7691447, at *1 (BIA Dec. 19, 2014) (Fourth Circuit).

* * *

As these decisions make clear, the conflict is square and acknowledged. Pet. App. 18a-19a & n.4; *see also Castillo-Rivera*, 853 F.3d at 241 (Dennis, J., dissenting). And it is intractable, because both the

Fifth and Ninth Circuits have cemented their views in en banc decisions, and the BIA continues to apply *Matter of Ferreira* everywhere that it is not foreclosed. This Court's intervention is needed.

II. The Question Presented Is Recurring And Extremely Important.

"[T]he Constitution requires an *uniform* Rule of Naturalization; Congress has instructed that 'the immigration laws of the United States should be enforced vigorously and *uniformly*; and the Supreme Court has described immigration policy as a comprehensive and *unified* system." *Texas v. United States*, 809 F.3d 134, 187-88 (5th Cir. 2015) (internal quotation marks omitted), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016) (per curiam). Banishing lawful permanent residents is a "high stakes" matter; "deportation decisions cannot be made a sport of chance" that turns on the circuit in which a removal proceeding takes place. *Judulang v. Holder*, 565 U.S. 42, 58, 59 (2011) (internal quotation marks omitted).

Disuniformity is particularly untenable in this context because the venue for a removal proceeding is entirely in the government's control. Here, for example, Mr. Rodriguez lived in Kansas and was convicted in Oklahoma, but his case was governed by Fifth Circuit law because the government chose to detain him in Texas and put him into proceedings there. *See supra* 6. Had the government detained him closer to home, his prior conviction would *not* have rendered him automatically removable under the Tenth Circuit's contrary rule in *O'Connor*. *See supra* 14. Same

if the government had elected to detain him instead in Arizona or Georgia.

Moreover, this question will continue to recur frequently. The categorical approach applies in virtually every removal case that is based on a prior conviction. Indeed, some of the most common criminal grounds for removal were involved in the cases forming the circuit conflict. So a court's understanding of *Duenas-Alvarez* can determine whether lawful permanent residents like Mr. Rodriguez may be deported because of convictions for, among other things, common drug offenses (*see, e.g.*, *Swaby*, 847 F.3d 62; *Mendieta-Robles*, 226 F. App'x 564; *Matter of Ferreira*, 26 I. & N. Dec. 415), and theft offenses (*see, e.g.*, *O'Connor*, 874 F.3d 1147; *Vassell*, 839 F.3d 1352; *Ramos*, 709 F.3d 1066). It can also determine whether a conviction is classified as an aggravated felony, which would render a noncitizen ineligible for humanitarian relief like asylum and cancellation of removal. *See, e.g.*, *Singh*, 839 F.3d 273.

Even the specific context in which the question arises here is sure to arise regularly. As the BIA observed, the federal drug schedules change frequently, meaning state schedules often will list drugs not banned under federal law. Pet. App. 17a; *see also, e.g.*, *Swaby*, 847 F.3d at 65-66.

The question presented is also significant beyond the immigration context. The categorical approach applies equally to sentencing under the Armed Career Criminal Act, *see Mathis*, 136 S. Ct. at 2251, and the U.S. Sentencing Guidelines. *Castillo-Rivera*, for example, was a Guidelines case. *See* 853 F.3d at 221.

Resolving the question presented will bring much-needed clarity to both immigration and sentencing proceedings in the wake of ongoing confusion over *Duenas-Alvarez*.

III. This Case Is An Ideal Vehicle For Deciding The Question Presented.

This case provides an ideal setting to clarify *Duenas-Alvarez*'s meaning. It arises under the INA's removal statute, § 1227, just like *Duenas-Alvarez*. As the government has previously acknowledged, that is the appropriate context to resolve this split. It also distinguishes this case from others that have recently presented this question.

This Court denied certiorari in *Castillo-Rivera*, the en banc Fifth Circuit case that the panel was bound by here. *See* 138 S. Ct. 501 (2017) (mem.) (No. 17-5054). But, as noted, *Castillo-Rivera* was a Sentencing Guidelines case, which this Court does not ordinarily review given the Sentencing Commission's primary role in resolving circuit conflicts arising under the Guidelines. *See Braxton v. United States*, 500 U.S. 344, 348 (1991). Indeed, as the government explained in opposing certiorari in *Castillo-Rivera*, a Guideline amendment issued after Mr. Castillo-Rivera was sentenced had already "eliminate[d] any need to categorize a defendant's pre-removal conviction as an aggravated or non-aggravated felony"—the central issue in that case. Brief for the United States in Opposition at 19, *Castillo-Rivera v. United States*, 138 S. Ct. 501 (2017) (No. 17-5054). Moreover, Mr. Castillo-Rivera's challenge to his sentence had become moot because he had already been released from

prison and was no longer under supervised release. *Id.* at 14-17.

Accordingly, the government's brief in opposition in *Castillo-Rivera* urged the Court to wait until this question was presented in a "more appropriate vehicle … aris[ing] in another context"—like "immigration proceedings" as in "*Duenas-Alvarez* itself"—rather than address it "through the lens of a now-defunct Guidelines provision." *Id.* at 20. This case is that "more appropriate vehicle."

For similar reasons, this case presents a cleaner vehicle to resolve the circuit conflict than two other pending petitions from the Fifth Circuit that have raised this question. Both *Young v. United States*, No. 17-7335, and *Espinoza-Bazaldua v. United States*, No. 17-7490, are also Sentencing Guidelines cases. And neither squarely presents the question here. At issue in *Young* and *Espinoza-Bazaldua* is whether state statutes whose terms are *not* plainly broader than the federal analogue, but could potentially be interpreted to apply to a wider set of circumstances, are categorical matches with the federal offense.[3] Both

[3] *Young* asks whether a state statute criminalizing sexual contact without reference to specific body parts is broader than a federal offense that is limited to contact involving enumerated body parts. Petition for Certiorari at 16, *Young v. United States*, No. 17-7335 (U.S. Jan. 8, 2018). In *Espinoza-Bazaldua*, the defendant argued below that his state controlled substance conviction encompassed purchasing a drug for personal use, which would fall outside the federal definition of a "trafficking offense." Petition for Certiorari at 5, *Espinoza-Bazaldua v. United States*, No. 17-7490 (U.S. Jan. 16, 2018); *United States v. Espinoza-Bazaldua*, No. 16-41069, 2017 WL 4641264 at *5 (5th Cir. Oct. 16,

cases thus differ somewhat from the decisions of other circuits. This case, in contrast, involves a direct conflict.

The question presented is also ripe for review in this case. The Fifth Circuit based its decision exclusively on its answer to the question presented, so that question is outcome-determinative here. The Fifth Circuit and the government agreed with Mr. Rodriguez that the Oklahoma drug schedules were facially broader than the federal schedules. Pet. App. 14a. So, if the Fifth Circuit erred in its application of the "realistic probability" test, then its only holding—that an Oklahoma controlled substance conviction falls categorically within the federal definition—cannot stand.

Moreover, a reversal on the question presented would likely mean that Mr. Rodriguez would eventually be restored to lawful permanent resident status and allowed to return to his family in the United States. Because the Oklahoma statute is not divisible, a conviction under it would categorically *not* constitute a deportable controlled substance offense.[4] That,

---

2017). But nothing on the face of the state law indicates it applies in that manner.

[4] The subsection of the Oklahoma statute under which Mr. Rodriguez was convicted, 63 Okla. Stat. Ann. §2-402(A)(1), describes a single offense—possession of a controlled dangerous substance without a valid prescription—not a list of "alternatively phrased" elements constituting different crimes, one for each drug. *Mathis*, 136 S. Ct. at 2256. Indeed, the government acknowledged below that it found no state case holding that the jury must agree on the drug type or otherwise establishing that specific drug type is an element of the offense. Gov't C.A. Br. 17; *see United States v. Constante*, 544 F.3d 584, 586-87 (5th Cir. 2008) (government bears the "burden of proving [the defendant]

however, is a downstream (not threshold) issue that would arise only on remand following a reversal. There would be no need for this Court to address it, just as the Fifth Circuit declined to address it in the first instance because the BIA had not yet reached this issue. *See* Pet. App. 15a-16a.

IV. The Fifth Circuit's Decision Is Incorrect.

On the merits, the Fifth Circuit's rule is wrong for five reasons.

First, it misunderstands *Duenas-Alvarez*. The Court's focus in *Duenas-Alvarez* was to ensure that individuals cannot defeat the categorical approach by conceiving of a fringe and speculative application of state law—like the noncitizen's "rather creative reasoning" regarding the scope of California aid-and-abet liability in that case. *Ramos*, 709 F.3d at 1071; *see supra* 9-10. The "realistic probability" test cabins sweeping hypothetical interpretations of state statutes that do not obviously follow from the text.

---

was convicted under a statute that satisfies [the federal definition]"). To the contrary, the Oklahoma Court of Criminal Appeals has affirmed that "the elements" of a violation of § 2-402(A)(1) are "the same" regardless of the drug involved because § 2-402(A)(1) "does not distinguish between types or classifications of drug[]." *Watkins v. State*, 855 P.2d 141, 142 (Okla. Crim. App. 1992). Because the statute is not divisible under Oklahoma law, the modified categorical approach would not apply. *See supra* 5 n.1. Thus it would be "quite irrelevant" that the charging document alleged, as a factual matter, that Mr. Rodriguez was in possession of "cocaine." *Moncrieffe*, 569 U.S. at 190; *see Mathis*, 136 S. Ct. at 2253.

By contrast, there is no need for the "application of legal imagination to a state statute's language" where the breadth of the state offense is evident from the "statute's language" itself. *Duenas-Alvarez*, 549 U.S. at 193. Nothing in *Duenas-Alvarez* suggests a noncitizen must provide additional proof of a state crime's breadth when the state statute expressly includes additional terms. *See Moncrieffe*, 569 U.S. at 205-06 (observing in dicta that *Duenas-Alvarez*'s concern might apply to state firearms statutes that are *silent* as to whether they extend to "antique firearms," unlike a corresponding federal offense). *Duenas-Alvarez*'s concern was "how broadly the state … statute *applied*," not how often its plain terms were *enforced*; "*Duenas-Alvarez* made no reference to the state's enforcement practices." *Swaby*, 847 F.3d at 66. This Court has thus looked no further than the text of the statute when the text itself makes clear the statute is overbroad. *See, e.g.*, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017); *Mellouli v. Lynch*, 135 S. Ct. 1980, 1986 (2015) ("[A] state conviction triggers removal only if, *by definition*, the underlying crime falls within a category of removable offenses defined by federal law." (emphasis added)).

Second, no principle of statutory interpretation supports reading a state statute that covers A, B, C, and D, as though it covers only A, B, and C. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174-79 (2012). As the Tenth Circuit put it, "We cannot ignore the statutory text and construct a narrower statute than the plain language supports." *O'Connor*, 874 F.3d at 1154.

Third, the Fifth Circuit's rule disrespects states' conscious choices in crafting their criminal codes. The Oklahoma legislature added Salvia Divinorum and Salvinorin A to its controlled-substance schedules just ten years ago. *See* H.B. 3148, 2008 Leg., 51st Sess. (Okla. 2008). The legislature opted to go beyond the Controlled Substances Act in response to local concerns. Yet the Fifth Circuit would disregard Oklahoma's sovereign decision, and treat its statutory amendment as a nullity, simply because no criminal case involving salvia has yet resulted in a published appellate decision. *Contra Grisel*, 488 F.3d at 850 (respecting the fact that "[t]he Oregon legislature expressly recognized the ordinary, generic meaning of [federal] burglary and consciously defined second-degree burglary more broadly").

Fourth, the Fifth Circuit's rule undermines the purposes of the categorical approach. The categorical approach "err[s] on the side of underinclusiveness," *Moncrieffe*, 569 U.S. at 205, in order to lend predictability to the law and relieve courts of the burden of assessing the details of old criminal convictions in every case. *Taylor v. United States*, 495 U.S. 575, 601 (1990). The Fifth Circuit's approach, by contrast, would require the court and parties to search anew in every case to determine whether a state's enforcement patterns have changed. That would diminish the "efficiency, fairness, and predictability" that the categorical approach fosters. *Mellouli*, 135 S. Ct. at 1987.

Fifth, the Fifth Circuit's approach places an impractical and unfair burden on noncitizens. "[N]inety-four percent of state convictions are the result of

guilty pleas." *Missouri v. Frye*, 566 U.S. 134, 143 (2012). So the vast majority of criminal cases do not result in published appellate opinions that noncitizens would count on to demonstrate that a state actually enforces its law as written. Noncitizens also have no right to government-appointed counsel in immigration proceedings, *see* 8 U.S.C. § 1362; 8 U.S.C. § 1229a(b)(4)(A), and thus the majority of noncitizens in removal proceedings proceed pro se. Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1685 (2011). And the government provides only limited access to legal materials in detention facilities. *See* U.S. Immigration and Customs Enf't, *2011 Operations Manual ICE Performance-Based National Detention Standards* § 6.3 (rev. Dec. 2016), https://tinyurl.com/ybs9cjbt.

The Fifth Circuit's rule thus amounts to a requirement that a pro se noncitizen scrounge through limited state court records and decisions, hoping to find examples that would prove that a state statute means what it says. That requirement is utterly impractical, unnecessary, and inconsistent with this Court's cases.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Amanda Waterhouse
REINA & BATES
P.O. Box 670608
Houston, TX 77267

Thomas M. Bondy
Benjamin F. Aiken
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005

E. Joshua Rosenkranz
Counsel of Record
Brian P. Goldman
Cynthia B. Stein
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019
(212) 506-5000
jrosenkranz@orrick.com

March 9, 2018