No. 17-1304

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The decision below acknowledges that the outcome here would have been different in several "[o]ther circuits": Under those courts' understanding of the "realistic probability" test, "the fact that Oklahoma plainly criminalizes a substance suggests a realistic probability of prosecution that does not exist at the federal level." 885 F.3d 862, 873 & n.4. But in the Fifth Circuit, "interpreting a state statute's text alone is simply not enough to establish the necessary 'realistic probability.'" *Id.* at 874. What *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), means is thus "largely unsettled" in the lower courts. 885 F.3d at 873. Only this Court can clarify.

The government does not dispute the existence of a conflict. It insists instead that the conflict does not "warrant[] this Court's review at this time." BIO 10. But it offers no good reason why not. First, the government suggests that the Fifth Circuit overstated the depth of the split it created because some courts adopting the opposite interpretation of *Duenas-Alvarez* did so when evaluating predicate offenses other than controlled-substances offenses. But that is truly a distinction without a difference. The categorical approach applies the same way regardless of the predicate offense; *Duenas-Alvarez* itself involved a theft offense, yet the government agrees it governs here. Besides, even the government's narrower view of the conflict would still leave a conflict with three circuits.

Second, the government asserts two vehicle objections. But one (involving exhaustion) turns on a question the Fifth Circuit correctly resolved *against* the

government, and this Court would not need to revisit that holding. The other (involving the modified categorical approach) raises a question that would not arise until *remand*; it would not interfere with this Court's review either. Ultimately, the government does not deny that the question presented was dispositive below.

Third, the government defends the judgment below primarily by appealing to *Chevron* deference. But the Board of Immigration Appeals (BIA) did not purport to interpret an ambiguous statute, so *Chevron* has no role to play. This Court already rejected a virtually identical argument in *Mellouli v. Lynch*, 135 S. Ct. 1980 (2015).

The Court should heed the government's earlier advice to wait for a case just like this to resolve this recurring circuit split. Pet. 20. The conflict is especially intolerable here. Mr. Rodriguez would have prevailed under the rule in the Tenth Circuit (where he lived and was arrested and convicted), yet his case arose in the Fifth Circuit because the government opted to detain and charge him there instead. His petition should be granted.

ARGUMENT

I. There Is A Square And Acknowledged Conflict Among The Circuits.

The government does not deny that, unlike the Fifth Circuit, six circuits have held that *Duenas-Alvarez*'s "realistic probability" test is satisfied anytime a

statute's plain terms sweep more broadly than a corresponding generic offense; no evidence of prosecutorial practices is necessary. Pet. 11-14. The government nevertheless maintains that most of these cases are distinguishable or should otherwise be disregarded. Those arguments lack merit.

A. With a single string cite, the government discounts most of the cases the Fifth Circuit acknowledged it was rejecting. BIO 18-19. The government observes that "those decisions involved different provisions" addressing other types of past convictions. BIO 19. But the categorical approach applies the same way to the analysis of all categories of predicate offenses. That is true whether it is a past "convict[ion] of a violation of … any law … relating to a controlled substance (as defined in [the Controlled Substances Act])," 8 U.S.C. § 1227(a)(2)(B)(i), as here; a "convict[ion] of an aggravated felony" related to trafficking in federally controlled substances, § 1227(a)(2)(A)(iii), as in *Moncrieffe v. Holder*, 569 U.S. 184 (2013); any other aggravated felony, as in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); or a "violent felony," under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1)—a different statute altogether—as in *Descamps v. United States*, 570 U.S. 254 (2013). The approach is the same because all of these provisions "ask[] what offense the noncitizen was 'convicted'" of: "'[C]onviction' is 'the relevant statutory hook'" for the categorical approach. *Moncrieffe*, 569 U.S. at 191; *see Descamps*, 570 U.S. at 267.

Indeed, one need look no further than *Mellouli*, which involved the same exact controlled-substances ground of removal at issue here yet applied this

Court's full set of categorical-approach cases. 135 S. Ct. at 1988. Or consider *Duenas-Alvarez*, which the government says applies here: It involved a theft offense and had nothing to do with controlled substances. The Justice Department's adjudicatory arm certainly sees no distinction: The BIA does not limit *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014)—the case the BIA relied on here—to controlled-substances offenses. *See, e.g.*, *In re Kapanadze*, No. A056-502-590, 2017 WL 4946931, at *7 (BIA Sept. 12, 2017) (burglary).

The government offers nothing to distinguish the Ninth, Tenth, and Eleventh Circuit decisions we cited (Pet. 11-14) other than this immaterial observation that they do not involve drug offenses. They squarely conflict with the decision below.

B. In any event, the other three cases on that side of the split do involve controlled-substances offenses.

The government does not dispute that the Fifth Circuit's rule directly conflicts with the First Circuit's holding in *Swaby v. Yates*, which involved this same controlled-substances ground of removal. 847 F.3d 62, 66 (1st Cir. 2017). The government maintains that *Swaby*'s holding on this question "was not necessary to" its decision, BIO 15, but that is simply wrong. The court could reach the question on which the petitioner ultimately lost—whether he "had been convicted under a drug statute that was divisible by substance," BIO 15—only *after* it resolved the question presented here against the government, because a modified-categorical analysis is necessary only "if the statute sweeps more broadly than the generic crime."

Descamps, 570 U.S. at 261. Had the First Circuit accepted the government's view that a state statute cannot be deemed overbroad without proof of state charging practices, it would have ended the inquiry at the categorical step. There is no reason to believe the First Circuit will sit en banc in some future case to revisit *Swaby*, especially when its rule accords with that of five other courts of appeals. *Contra* BIO 16-17.

The Third Circuit's opinion in *Singh v. Att'y Gen.*, 839 F.3d 273 (3d Cir. 2016), also adopted the majority rule in the context of a disparity between federal and state drug schedules. That the court reached its holding while applying the modified categorical approach (BIO 17) is no distinction. The modified categorical approach "preserves the categorical approach's basic method: comparing [a state statute's] elements with the generic offense's." *Descamps*, 570 U.S. at 263. At that key step, *Singh* determined that the state offense, by its plain terms, did not match the elements of the federal offense, and rejected the BIA's reliance on "a 'realistic probability' inquiry." 839 F.3d at 285-86 & n.10; *see id.* at 281.

Nor is the Sixth Circuit case, *Mendieta-Robles v. Gonzales*, 226 F. App'x 564 (6th Cir. 2007), "f[ar] afield," BIO 18 n.3. The government argued that *Duenas-Alvarez* allowed it to "assum[e]" a conviction was based on conduct punishable as a federal drug offense, even though "the clear language of [the statute] … expressly and unequivocally punishes" conduct that is not a federal offense. 226 F. App'x at 572. The Sixth Circuit disagreed. Here, in contrast, the Fifth Circuit agreed with the government that it could "presume[]"

the Oklahoma conviction was akin to a federal controlled-substance offense absent case law establishing that Oklahoma enforces its salvia prohibitions. 885 F.3d at 873.

C. In short, the Fifth Circuit was not exaggerating when it recognized that its approach was inconsistent with the view of all "[o]ther circuits" to address the issue. 885 F.3d at 873 & n.4. Notwithstanding the government's fine parsing, there is a square six-to-one split. And because "the Fifth Circuit receives, by a large margin, the most interstate transfers" of noncitizens for immigration detention and removal proceedings—including Mr. Rodriguez—it is untenable for the Fifth Circuit to apply a different rule than many noncitizens' home circuits.[1]

II. The Government's Vehicle Objections Are Misplaced.

Neither of the government's suggestions why this case is an "unsuitable vehicle," BIO 19, is valid.

A. The government contends that Mr. Rodriguez failed to exhaust his challenge. BIO 19-20. But, as the government acknowledges, the Fifth Circuit evaluated and rejected that argument, finding the claim fully exhausted. 885 F.3d at 868-69. That determination need not be revisited because the government has not conditionally cross-petitioned on that question. As

[1] Human Rights Watch, *A Costly Move*, § IV (June 14, 2011), https://www.hrw.org/report/2011/06/14/costly-move/far-and-frequent-transfers-impede-hearings-immigrant-detainees-united#aad0f8.

the case comes to the Court, then, there is no threshold exhaustion issue that would stand in the way of the question presented.

The government nevertheless argues that "failure to exhaust" is "jurisdictional" and thus "could preclude this Court from reaching the question presented." But this Court has never held that exhaustion of a precise version of a legal argument before the BIA is a "jurisdictional" requirement, nor could it be under this Court's efforts "'in recent cases to bring some discipline to the use' of the term 'jurisdiction.'" *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013); *see Issaq v. Holder*, 617 F.3d 962, 968 (7th Cir. 2010) (the exhaustion requirement of the Immigration and Nationality Act (INA) "is not … a jurisdictional rule," but rather "a case-processing rule"); *Rafeedie v. INS*, 880 F.2d 506, 526 (D.C. Cir. 1989) (R.B. Ginsburg, J., concurring) ("[A] statutory exhaustion requirement, unless Congress explicitly declares otherwise, does not impose an absolute, unwaivable limitation on judicial review.").

Regardless, the Fifth Circuit correctly held Mr. Rodriguez "exhausted his argument that the Oklahoma statute is broader than its federal counterpart" when he "argued that Oklahoma's drug schedules included substances that were not included in any of the federal drug schedules." 885 F.3d at 868-69; *see* C.A.R. 24, 26. Although Mr. Rodriguez "may have cited different *examples*, the *issue* he identified was that the Oklahoma schedules were not a categorical match to federal schedules." 885 F.3d at 869. And, "[i]n any event, where the BIA chooses to address an

issue on its merits … the issue is considered exhausted." *Id.* Here, the BIA addressed the question presented directly; it was not deprived of any opportunity to pass upon it. *See* Pet. App. 26a n.1.

B. The government also asserts (BIO 20-21) that this case is not a good vehicle because, it says, (1) the Oklahoma statute is divisible, thus (2) the modified categorical approach would apply even if Mr. Rodriguez prevails on the question presented here, and (3) under that approach, he would lose because of the factual reference to "cocaine" in his charging document. But the government acknowledges that the Fifth Circuit "declined to address" these questions because the BIA did not reach them. BIO 9. Considering divisibility and then (if appropriate) applying the modified categorical approach "would extend beyond the proper scope of th[e] Court's review." 885 F.3d at 872. So the government's argument is just that it might eventually win on remand to the agency. The possibility that a respondent might prevail on remand, however, has never been a basis for denying certiorari. *See, e.g.*, *Byrd v. United States*, 138 S. Ct. 1518, 1530-31 (2018) (remanding for determination whether probable cause justified search); *Ayestas v. Davis*, 138 S. Ct. 1080, 1095 (2018) (remanding for application of a clarified standard in the first instance).

The government's divisibility argument is also wrong, so Mr. Rodriguez would not "be subject to removal regardless of the disposition of the question presented." BIO 10-11. Oklahoma's highest criminal court has determined that an analogous drug statute (in the neighboring code section) does *not* define "separate offenses" for each substance. *Watkins v. State*,

855 P.2d 141, 142 (Okla. Crim. App. 1992) (order denying rehearing). The government discounts this state court interpretation of state law, pointing instead to the fact that "the penalties for drug possession in Oklahoma … depend in part on the drug involved." BIO 20 (citing *Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016)). But penalty ranges offer no help in this divisibility analysis: Possession of nearly all "Schedule I [and] II substance[s]" is punishable by two to ten years' imprisonment, and all Schedule III, IV, and V substances are punishable by "confinement for not more than one (1) year" under 63 Okla. Stat. Ann. § 2-402(B)(1)-(2) (2013). A conviction that leads to a three-year sentence (like Mr. Rodriguez's deferred sentence) could have involved almost any schedule I or II substance, including salvia. *See* 885 F.3d at 869. If an Oklahoma jury need only agree on whether a Schedule I/II substance or a Schedule III/IV/V substance is involved, such that individual jurors can "cho[ose] between different substances" within each grouping, then "the statute does not create separate crimes—it creates separate means of committing the same crime." *Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017) (holding a New York controlled-substances offense indivisible by drug type).

The Fifth Circuit properly declined to pass on this downstream question of Oklahoma law in the first instance, and there is no reason this Court could not similarly leave it to be addressed on remand.

III. The Fifth Circuit's Decision Is Wrong.

A. The government primarily defends the decision below on an alternative ground. It invokes *Chevron*

deference and asserts that the BIA "interpreted Section 1227(a)(2)(B)(i) of the INA *reasonably*." BIO 11 (emphasis added). But the BIA's decision did not hinge on resolving any statutory ambiguity. Nor has this Court ever applied *Chevron* when reviewing the BIA's application of the categorical approach. On the contrary, *Mellouli*—which addressed this precise removal provision—held that "the BIA's interpretation … is owed no deference under the doctrine described in *Chevron*." *Mellouli*, 135 S. Ct. at 1989. Perhaps for this reason, the government did not ask the Fifth Circuit to apply *Chevron*. Even now, the government does not argue that the statute is ambiguous. This is simply not a *Chevron* case, and the government cannot now muddy the waters with this flawed argument.

Notably, this Court granted review in *Mellouli* despite the government's brief in opposition making a similar *Chevron* argument: It urged this Court to deny review in part because "the BIA's construction" of § 1227(a)(2)(B)(i) was "reasonable," even though, as here, the BIA had neither found nor purported to fill any gap in the statute. Brief in Opposition, *Mellouli v. Holder*, 135 S. Ct. 1980 (2015) (No. 13-1034), 2014 WL 1936162, at *7. The sequel here is no better than the original.

The government's reliance on *Chevron* is also misplaced because the BIA interpreted this Court's cases as *requiring* the version of the realistic probability test that it adopted. *See Matter of Ferreira*, 26 I. & N. Dec. at 419. The BIA called it a "Supreme Court rule." *Id.* at 420. But when "[t]he BIA deemed its interpretation to be mandated by" this Court's cases, *Chevron*

deference does not apply, because the agency is not "exercise[ing] its interpretive authority." *Negusie v. Holder*, 555 U.S. 511, 521-22 (2009).

B. The government's defense of the Fifth Circuit's reading of *Duenas-Alvarez* is also unpersuasive.

The realistic probability test cautions against "the application of legal imagination to a state statute's language" to preclude a categorical match between state and federal offenses. *Duenas-Alvarez*, 549 U.S. at 193. But it takes no imagination to see that a state drug schedule listing salvia means that the state criminalizes salvia. *See* Pet. 22-25. Most courts (and our petition) have relied on *Duenas-Alvarez*'s "legal imagination" rationale to explain why the realistic probability test is satisfied in cases like this, but the government hazards no response at all.

The government contends that *Moncrieffe* supports the decision below because it reaffirmed *Duenas-Alvarez* while discussing a hypothetical about a gun statute that is "unambiguously broader than its federal counterpart." BIO 14. Not so. In responding to a policy concern the government raised, *Moncrieffe* explained that a noncitizen convicted under a broadly worded state statute covering firearms could not avoid removal unless he could show that the state would prosecute even for possession of antique firearms. *Moncrieffe*, 569 U.S. at 205-06. That is because it would be unclear from the face of the state statute whether it could be interpreted to extend to antique firearms. But where a broader term is *expressly listed* in the state statute, there is no uncertainty in interpretation at all.

This Court certainly did not read *Moncrieffe* as requiring proof of actual enforcement practice in cases like this when, two years later, it addressed the scope of the controlled-substances provision. The petitioner in *Mellouli* was convicted under a Kansas law that included "at least nine substances—e.g., *salvia* and jimson weed—not defined in [the Controlled Substances Act]." *Mellouli*, 135 S. Ct. at 1988 (emphasis added). This Court found it straightforward that, because "[t]he state law involved in Mellouli's conviction … was not confined to federally controlled substances," applying the "categorical approach" would "not render him deportable." *Id.* The Court did not need to see any state prosecutions for salvia to arrive at that conclusion. The fact that "federal and state drug statutes are 'amended with varying frequency,'" BIO 13, made no difference; Kansas's law was not a categorical match.

Finally, the government claims that its version of the realistic probability test promotes "fairness[] by ensuring that individuals in different States face comparable immigration consequences" for drug convictions. BIO 15. But there is nothing fair about disregarding the plain text of statutes of conviction—especially because noncitizens often will have "enter[ed] 'safe harbor' guilty pleas" under those state statutes believing they "do not expose the alien defendant to the risk of immigration sanctions." *Mellouli*, 135 S. Ct. at 1987 (brackets and internal quotation marks omitted). States have the prerogative to define their own crimes differently, and the categorical approach takes those statutes as they come.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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