No.

In the Supreme Court of the United States

RICHARD LAWRENCE ALEXIS,

Petitioner,

v.

WILLIAM P. BARR, U. S. 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

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QUESTION PRESENTED

The Immigration and Nationality Act provides for the deportation of any noncitizen who has been convicted of a state drug offense "relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. 1227(a)(2)-(B)(i). Section 802 defines a "controlled substance" as a substance appearing on any one of five federal drug schedules established by Section 812.

In *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015), this Court held that, for a state drug offense to be deportable under Section 1227(a)(2)(b)(i), the government must show that the offense *categorically* concerns drugs appearing on the federal controlled-substance schedules. *Id.* at 1986. It is not enough, in other words, for the government to show that the state offense incorporates drug schedules that "substantially overlap" with the federal schedules. *Id.* at 1989. Section 1227(a)(2)(B)(i) instead "require[s] a direct link between an alien's crime of conviction and a particular" substance appearing on a federal controlled-substance schedule. *Id.* at 1990.

The question presented, over which there is an open and entrenched circuit conflict, is as follows:

When a State's definition of a drug expressly sweeps in more substances than the federal definition, does a noncitizen convicted of possessing that drug bear the burden of showing in deportation proceedings under 8 U.S.C. 1227(a)(2)(B)(i) that the State has actually prosecuted a criminal defendant with respect to one of the non-federally-controlled substances?

RELATED PROCEEDINGS

United States District Court:

Alexis v. *Sessions*, No. 4:18-cv-1923 (S.D. Tex.)

United States Court of Appeals:

Alexis v. *Holder*, No. 08-60745 (5th Cir.)

Supreme Court of the United States:

Alexis v. *Holder*, No. 09-955

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Richard L. Alexis respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit (App., *infra*, 1a-25a) is reported at 960 F.3d 722. The opinion of the Board of Immigration Appeals (App., *infra*, 26a-33a) and the two opinions of the immigration judge (App., *infra*, 34a-54a) are unpublished.

JURISDICTION

The Fifth Circuit issued its decision on June 8, 2020. This Court's jurisdiction rests on 28 U.S.C. 1254.

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are set out in the appendix (App., *infra*, 55a).

INTRODUCTION

This case involves a stubborn and acknowledged circuit split concerning the so-called "categorical approach."

The Immigration and Nationality Act lists several drug crimes and other felonies, convictions for which will render a noncitizen deportable. See 8 U.S.C. 1227(a). Under the categorical approach, a noncitizen is deportable on the basis of a state-law offense only if the offense is *categorically* of the sort that Congress specified in the INA. The categorical approach thus asks, at a general level, whether the elements of the state-law offense are narrower or broader than the generic analog identified in the INA.

Determining the overlap between a particular state-law offense and a generic federal offense is complicated when "the elements of the state statute alone do not provide sufficient guidance on [the statute's] application." *Hylton* v. *Sessions*, 897 F.3d 57, 64 (2d Cir. 2018). When

presented with a state offense with an "indeterminate reach" like this (*id.* at 63), courts applying the categorical approach must construct hypotheticals to identify "the minimum conduct criminalized" by the state offense and "then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013). If the minimum conduct criminalized is not encompassed by the generic analog, the state crime is not deportable.

This Court has cautioned, however, that courts must not apply boundless "legal imagination" to the minimum-conduct inquiry. *Moncrieffe*, 569 U.S. at 191 (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). When faced with an indeterminate state-law offense, a court must evaluate whether there is "a realistic probability," rather than a mere "theoretical possibility," that "the State would apply its statute to [the minimum] conduct" hypothesized. *Duenas-Alvarez*, 549 U.S. at 193. This requirement is satisfied by finding at least one case in which it was actually "so applied." *Ibid.*

But a state offense does not implicate this problem when its elements are clearly specified by statute. Drug crimes, for example, are typically defined with particularity, by reference to determinate schedules of controlled substances. Courts comparing this kind of state offense with its generic analog are often able to tell, by reference to plain statutory text alone, that the state offense is facially broader than its federal counterpart—for example, when the State defines a particular controlled substance more broadly than does the federal government.

The question presented here is whether the "actual case" requirement applies in cases of this sort, where the overbreadth of the state offense is readily discernable on the face of the statute. Six courts of appeals hold that it does not. According to these courts, identifying conduct criminalized by the state offense but not by its generic ana-

log does not invite "legal imagination" when the state statute is broader on its face. The actual-case requirement, devised as a constraint on the excesses of imagination, is therefore "not meant to apply" in this context. *Singh* v. *Attorney General*, 839 F.3d 273, 286 n.10 (3d Cir. 2016). Thus, "when a state statute's greater breadth is evident from its text, a petitioner need not point to an actual case applying the statute of conviction in a nongeneric manner." *Chavez-Solis* v. *Lynch*, 803 F.3d 1004, 1010 (9th Cir. 2015) (quotation marks omitted).

The Fifth Circuit stands alone in disagreement. It holds that individuals must "point to an actual state case applying a state statute in a nongeneric manner, even where the state statute may be plausibly interpreted as broader on its face." *United States* v. *Castillo-Rivera*, 853 F.3d 218, 224 n.4 (5th Cir. 2017) (en banc). "[W]ithout supporting state case law," according to the Fifth Circuit, "a state statute's text alone is simply not enough to establish the necessary 'realistic probability'" that the state statute is broader than its federal counterpart. *Id.* at 223.

That rule was outcome-determinative in this case. Petitioner Richard Alexis entered this country nearly 30 years ago as a lawful permanent resident. In 2016, he was convicted of possessing less than one gram of cocaine. The government sought to deport him under 8 U.S.C. 1227(a)(2)(B)(i) on the theory that he was convicted of a state crime "relating to a controlled substance" as defined in the federal drug schedules.

Petitioner argued that his Texas conviction did not qualify under the "modified" categorical approach because he was convicted of possessing cocaine, which Texas defines more broadly than federal law. The Fifth Circuit agreed that "cocaine" is more broadly defined under Texas law than federal law. It nevertheless denied relief because petitioner could not point to an "actual case" in which Texas had prosecuted a version of cocaine penalized under

Texas law but not federal law—a requirement that the panel candidly admitted is impossible to satisfy.

The Fifth Circuit's rule is wrong and warrants further review. It conflicts with the holdings of every other circuit to consider the issue, erects a pointless and typically insurmountable barrier for individuals in countless deportation and criminal proceedings, and is inconsistent with this Court's cases concerning the categorical approach.

What is more, this is an appropriate vehicle for review. The court below described the question presented here as the "crux" of this appeal (App., *infra*, 6a), and the concurring judge expressly recognized the circuit split and called for this Court's intervention (App., *infra*, 18a-19a & n.1, 21a). In addition, the parties and the lower court all agreed that the relevant state law is facially broader than its federal analog. App., *infra*, 6a-7a, 22a. The outcome of this appeal—and petitioner's ability to remain in the United States—thus turns cleanly on the question presented.

STATEMENT

A. Legal background

1. Section 1227(a)(2)(B)(i) authorizes the removal of a noncitizen who 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)." According to *Mellouli* v. *Lynch*, 135 S. Ct. 1980 (2015), the question whether a state offense qualifies as a drug offense under Section 1227(a)(2)(B)(i) depends upon the categorical approach. "Because Congress predicated deportation 'on convictions, not conduct,' the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior." *Mellouli*, 135 S. Ct. at 1986.

Section 1227(a)(2)(B)(i) therefore "require[s] a direct link between an alien's crime of conviction and a particular federally controlled drug." *Mellouli*, 135 S. Ct. at 1990. It is not enough, under this requirement, for the government

to show that a State's drug schedules have a "substantial overlap" with the federal schedules. *Ibid.* Rather, "the Government must connect an element of the alien's conviction to a drug 'defined in [Section] 802.'" *Id.* at 1991 (alteration incorporated).

2. Sections 481.102 through 481.105 of the Texas Health & Safety Code establish six schedules of controlled substances, called "Penalty Groups," for purposes of the Texas Controlled Substances Act.

Texas's Penalty Group 1 lists "[c]ocaine" and includes its "optical, position, and geometric isomers," salts of such isomers, and any "compound, derivative, or preparation * * * that is chemically equivalent" to cocaine. Texas Health & Safety Code § 481.102(3)(D).[1]

Cocaine is included on the federal Schedule II of controlled substances, but the federal definition is narrower. As relevant to this comparison, it lists only "optical and geometric isomers" and "any compound, mixture, or preparation which contains any quantity of" cocaine, its salts, or its optical or geometric isomers. 21 U.S.C. 812, Schedule

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[1] "[C]ocaine is an alkaloid with the molecular formula $C_{17}H_{21}NO_4$." *DePierre* v. *United States*, 564 U.S. 70, 72 (2011). Isomers are molecules with the same molecular formulas but different molecular structures. See *United States* v. *Kelly*, 874 F.3d 1037, 1044 n.4 (9th Cir. 2017). Positional isomers are isomers with functional groups in different positions along a common carbon chain or ring. See *Positional Isomers*, LibreTexts, perma.cc/5RFV-PCLK.

Naturally occurring cocaine is *R*-cocaine. See Satendra Singh, *Chemistry, Design, and Structure-Activity Relationship of Cocaine Antagonists*, 100 Chem. Rev. 925, 970 (2000). Our understanding is that *S*-pseudococaine, *S*-allococaine, and *S*-allopseudococaine are among the positional isomers of *R*-cocaine. *Ibid.* (Figure 29). The salts of these are *S*-pseudococaine hydrochloride, *S*-allococaine hydrochloride, and *S*-allopseudococaine hydrochloride. See *DePierre*, 564 U.S. at 72-73. As the lower court recognized (App., *infra*, 9a), there are more than 8,000 isomers of cocaine in total, including scopolamine.

II(a)(4). The federal schedule does not include positional isomers of cocaine, salts of positional isomers of cocaine, or derivatives of cocaine.

It is therefore undisputed in this case that "Texas's definition of 'cocaine' is facially broader than the federal definition of 'cocaine.'" App., *infra*, 6a.

B. Factual background

Petitioner is a 40 year old native of Trinidad and Tobago. He entered the United States, along with his mother and brother, as a lawful permanent resident in July, 1991. ROA 146.[2] His stepfather, mother, and four siblings are all U.S. citizens. Petitioner's seven-year-old daughter is also a U.S. citizen. ROA 145-146.

Petitioner, whose testimony the immigration judge credited (App., *infra*, 38a), came to the United States when he was 11 years old, after his mother married a U.S. citizen. ROA 197-198. Before then, petitioner was a victim of severe domestic abuse by his biological father. ROA 521. In the United States, petitioner became involved in his family's church. ROA 522. During middle school and high school in Texas, petitioner was the victim of sexual abuse by a trusted adult male. ROA 254. Petitioner began suffering from depression and using drugs. ROA 180.

Petitioner was placed in removal proceedings in 2007. After issuing its decision in *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010), this Court granted petitioner's then-pending petition for a writ of certiorari and remanded to the Fifth Circuit for further proceedings. See *Alexis* v. *Holder*, 561 U.S. 1001 (2010). Petitioner was thereafter granted cancellation of removal.

In 2016, Petitioner was walking down the street near his home, when an officer approached him and accused him

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[2] Citations to the "ROA" are to the certified administrative record filed in the Fifth Circuit.

of trespassing in someone's yard. ROA 134. Petitioner denied the allegation, but the officer proceeded to search petitioner and discovered less than a gram of a cocaine-like substance in his possession. *Ibid.*

Petitioner was indicted and convicted of possessing cocaine, in violation of Section 481.115 of the Texas Health & Safety Code.

C. Procedural background

The government detained petitioner in June 2017 and again initiated proceedings to remove him from the United States, this time on the basis of the 2016 drug offense.

1. Petitioner moved to terminate removal proceedings, arguing that his 2016 possession offense is not categorically an offense covered by Section 1227(a)(2)(B)(i).

The immigration judge (IJ) denied relief. App., *infra*, 48a-54a. As relevant here, the IJ concluded that controlled-substances offenses under Texas law are divisible by substance because "the identity of the controlled substance is an essential element of the offense." App., *infra*, 53a. The IJ thus undertook the modified categorical approach. Reviewing the relevant documents from petitioner's conviction, he determined that petitioner had been convicted of possession of cocaine. *Ibid.*[3]

The IJ rejected petitioner's contention that he was entitled to relief despite that "the Texas definition of cocaine is overbroad because it includes position isomers of cocaine." App., *infra*, 51a. "[I]t is not enough," in the IJ's

[3] "[T]he 'modified categorical approach,' applies to 'state statutes that contain several different crimes, each described separately.'" *Mellouli*, 135 S. Ct. at 1986 n.4 (quoting *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013)). "In such cases, 'a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or * * * some comparable judicial record of the factual basis for the plea.'" *Ibid.* (quoting same).

view, for "a state statute [to] include[] more substances than the federal schedules." *Ibid.* Here, because petitioner "[did] not submit evidence that Texas has prosecuted or currently prosecutes individuals for possession of position isomers of cocaine" (*ibid.*), the IJ held that Texas's definition of cocaine is not in fact broader than the federal definition. App., *infra*, 53a-54a.

The IJ separately denied asylum and withholding of removal. App., *infra*, 34a-47a.

2. Board of Immigration Appeals (BIA) affirmed. App., *infra*, 26a-33a. With respect to the question presented here, the BIA agreed with the IJ that petitioner's offense is divisible by substance type, and therefore that the appeal turned on whether Texas's definition of cocaine is broader than the federal definition. App., *infra*, 28a-29a. The BIA then concluded, like the IJ, that because petitioner "has not shown that there is a realistic probability that Texas would prosecute individuals for possession of position isomers of cocaine, [petitioner has] not shown that the definition of cocaine is overbroad under Texas law." App., *infra*, 29a n.3. It therefore affirmed the denial of petitioner's motion to terminate proceedings.

The BIA separately affirmed the IJ's denial of asylum and withholding of removal. App., *infra*, 30a-33a.

3.a. A divided panel of the Fifth Circuit denied a petition for review. App., *infra*, 1a-25a. As relevant here, it rejected petitioner's argument that his Texas drug offense does not fall within the ambit of Section 1227(a)(2)(B)(i). App., *infra*, 5a-12a.

The majority opinion, authored by Judge Graves, began by noting that "[t]he parties do not dispute that Texas's definition of 'cocaine' is facially broader than the federal definition of 'cocaine.'" App., *infra*, 6a. And the court independently confirmed its agreement: "Texas Health & Safety Code § 481.102(3)(D)(i) and Federal

Schedule II(a)(4)" are not a "categorical match" because "Texas's definition of 'cocaine' is facially broader than its federal analog." *Ibid.*

"But," the majority explained, "the inquiry does not stop there." App., *infra*, 6a. "To show that the Texas statute is broader than its federal counterpart, [petitioner] must also show 'a realistic probability' that Texas will prosecute the 'conduct that falls outside the generic definition of a crime.'" *Ibid.* (quoting *Vetcher* v. *Barr*, 953 F.3d 361, 367 (5th Cir. 2020)). Thus, "[t]he crux of the parties' dispute hinges on whether [petitioner] has demonstrated 'a realistic probability' that Texas will prosecute" individuals for possessing positional isomers or salts of positional isomers of cocaine. App., *infra*, 6a-7a.

"To do so," the court went on, petitioner "must 'point to his own case or other cases in which the state courts in fact did apply the statute in [that] manner.'" App., *infra*, 7a (quoting *Vazquez* v. *Sessions*, 885 F.3d 862, 873 (5th Cir. 2018)). There is "no exception to the actual case requirement," the court stressed, even "where a court concludes a state statute is broader on its face." *Ibid.* (emphases omitted) (quoting *United States* v. *Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc)).

The majority held that petitioner failed to meet this burden. App., *infra*, 7a-9a.

At the conclusion of its analysis on this point, the majority expressed its "sympath[y] [for petitioner's] challenge in finding a case that meets the realistic probability test." App., *infra*, 9a. "Due to Texas's indictment process, [limited] drug testing procedures, and limited citable decisions," individuals like petitioner are "essentially in a Catch-22 situation when it comes to meeting the realistic probability test." App., *infra*, 10a-11a. The majority concluded nonetheless that it was "constrained" by *Castillo-Rivera*, which held that courts within the Fifth Circuit may not "speculat[e]" that Texas actually prosecutes drug

crimes based on the drugs that appear expressly on its controlled-substances schedules. App., *infra*, at 11a.

b. Judge Graves concurred in his own majority opinion. App., *infra*, 16a-21a. In his view, "the realistic probability test and 'actual case' requirement are simply illogical and unfair in [this] context." App., *infra*, 16a. Because "it is facially clear from the statutory text that Texas's definition of cocaine contains 'position isomers of cocaine' and the federal definition does not," Judge Graves would have dispensed with the "actual case" requirement and held that petitioner's offense does not qualify under Section 1227-(a)(2)(B)(i). *Ibid.*

In justifying that position, Judge Graves observed that this Court has never applied a realistic probability analysis when presented with state offense elements that are facially overbroad. App., *infra*, 16a-18a. In addition, he went on, the Fifth Circuit's actual case requirement, applied in this context, "diverge[s] from at least seven other circuit courts." App., *infra*, 18a-19a. See also App., *infra*, 18a-19a n.1 (collecting cases). Judge Graves expressly invited this Court to "resolve the circuit split and add clarity" to this area of law. App., *infra*, 21a.

c. Judge Dennis dissented. App., *infra*, 21a-25a. He agreed with Judge Graves that individuals like petitioner "will likely never be able to produce court records showing that Texas prosecutes individuals for possessing cocaine position isomers because such records will almost invariably simply refer to cocaine position isomers as 'cocaine.'" App., *infra*, 23a. Judge Dennis would have "interpret[ed] *Castillo-Rivera* more narrowly and realistically to avoid creating such an unreasonable and insurmountable hurdle." *Ibid.* At the same time, Judge Dennis expressed his "continue[d]" belief that "*Castillo-Rivera* itself was incorrectly decided." App, *infra*, 23a n.2.

REASONS FOR GRANTING THE PETITION

Six federal courts of appeals hold that when a state statute explicitly defines a crime more broadly than the generic federal analog, the state crime does not qualify as a predicate offense under the categorical approach, regardless whether or not the individual can cite an actual case involving the broader conduct.

The Fifth Circuit alone disagrees. "[E]ven where the state statute [is] plausibly interpreted as broader on its face," according to the Fifth Circuit, the individual "must point to an actual state case applying a state statute in a nongeneric manner." *United States* v. *Castillo-Rivera*, 853 F.3d 218, 224 n.4 (5th Cir. 2017) (en banc). "[W]ithout supporting state case law," in the Fifth Circuit's view, "a state statute's text alone is simply not enough to establish the necessary 'realistic probability'" that the state statute is in fact broader than its federal counterpart. *Id.* at 223.

That rule has no foundation in law or common sense, and it conflicts with the holdings of every other circuit to consider the issue. The issue is important, the conflict will not resolve itself, and this is an optimal vehicle for review. The petition accordingly should be granted.

A. The Fifth Circuit's rule conflicts with the law of six other circuits

There is no denying that the Fifth Circuit's answer to the question presented diverges from the law of every other circuit to consider the issue.

Judge Graves expressly recognized the "circuit split" and invited this Court to "add clarity" to this area of the law. App., *infra*, 21a. The seven dissenting judges from *Castillo-Rivera* similarly observed that the Fifth Circuit's law "directly conflicts with holdings" of numerous other circuits. 853 F.3d at 241 (Dennis, J., dissenting). And at least two other courts of appeals also have acknowledged the split. See *Salmoran* v. *Attorney Gen. United States*,

909 F.3d 73, 81 (3d Cir. 2018) (noting that there is "confusion in the courts of appeals" on the question presented, and pointing to *Castillo-Rivera*); *Hylton* v. *Sessions*, 897 F.3d 57, 65 & n.4 (2d Cir. 2018) (noting that *Castillo-Rivera*'s reasoning has been met with "consistent judicial hostility" in other circuits).

1. By our count, six federal courts of appeals have held in various statutory contexts that, when a state statute is facially broader than its federal comparator, no "realistic probability" or "actual case" analysis is required.

- **First Circuit.** The court held in a Section 1227-(a)(2)(B)(i) case that, when "the plain terms of the [state] drug schedules make clear that the [state] offense covers at least one drug not on the federal schedules," the "offense is simply too broad to qualify as a predicate offense under the categorical approach, whether or not there is a realistic probability that the state actually will prosecute offenses involving that particular drug." *Swaby* v. *Yates*, 847 F.3d 62, 66 (1st Cir. 2017).[4]
- **Second Circuit.** The court expressly rejected the rule adopted by the Fifth Circuit and the BIA, holding that "*Duenas-Alvarez* does not require [courts] to conduct a separate realistic probability test * * * to illustrate what the statute makes punishable by

[4] The Solicitor General has previously argued that *Swaby*'s holding is dictum, because the First Circuit ultimately ruled against the petitioner on the subsequent question of divisibility and the modified categorical approach. That is misguided. The court in *Swaby* could reach the government's "fallback argument" (847 F.3d at 66) under the modified categorical approach only after resolving the question presented here against the government. Perhaps unsurprisingly, the First Circuit itself has described *Swaby* as establishing binding law for the circuit. See, *e.g.*, *United States* v. *Burghardt*, 939 F.3d 397, 408 (1st Cir. 2019) (describing *Swaby*'s resolution of the question presented here as a holding and a "teaching").

its text." *Hylton*, 897 F.3d at 64. "When the state law is facially overbroad, we look no further." *Id.* at 65 (quotation marks omitted).

- **Third Circuit.** The court took an "alternative approach" to the Fifth Circuit's holding in *Castillo Rivera*, concluding that "the realistic probability language of *Moncrieffe* is simply not meant to apply" when the state statute "plainly encompasses a broader range of conduct than the federal offense." *Salmoran*, 909 F.3d at 81 (quotation marks and parenthetical omitted).
- **Ninth Circuit.** According to the court, when "a state statute explicitly defines a crime more broadly than the generic [federal] definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition" because "[t]he state statute's greater breadth is evident from its text." *United States* v. *Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc).
- **Tenth Circuit.** The court held that, when a state "statute [expressly] lists means to commit a crime that would render the crime" broader than the federal analog, "no legal imagination is required" and the actual case inquiry is inapplicable. *United States* v. *Titties*, 852 F.3d 1257, 1274-1275 (10th Cir. 2017). There is "no persuasive reason why [a court] should ignore [a statute's] plain language to pretend the statute is narrower than it is." *Id.* at 1274.
- **Eleventh Circuit.** The court concluded that "*Duenas-Alvarez* does not require" an actual case "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 defini-

tion." *Ramos* v. *Attorney Gen.*, 709 F.3d 1066, 1071-1072 (11th Cir. 2013).

These courts all agree that "where the elements of the [state] crime of conviction are not the same as the elements of the generic federal offense," the realistic probability or actual case test is simply inapposite. *Salmoran*, 909 F.3d at 81 (quotation marks omitted). Thus, where "the * * * statute's greater breadth is evident from its text," the individual "need not point to an actual case applying the statute of conviction in a nongeneric manner." *United States* v. *Werle*, 815 F.3d 614, 622 (9th Cir. 2016).

It is irrelevant that some of these courts' holdings have arisen in statutory contexts other than Section 1227-(a)(2)(B)(i). The categorical approach is methodological and applies in the same basic manner regardless of context. The "actual case" inquiry does not apply differently to the INA than it does to the ACCA or sentencing guidelines. The decision below proves the point, applying a guidelines case (*Castillo-Rivera*) as binding precedent in this immigration case.

2. The Fifth Circuit is in conflict. "[E]ven where the state statute may be plausibly interpreted as broader on its face," individuals in the Fifth Circuit "must point to an actual state case applying a state statute in a nongeneric manner." *Castillo-Rivera*, 853 F.3d at 224 n.4. Without an actual nongeneric prosecution to cite, "a state statute's text alone is simply not enough to establish the necessary 'realistic probability'" that the state statute is broader than its federal counterpart in practice. *Id.* at 223. That holding cannot be squared with the holdings of the First, Second, Third, Ninth, Tenth, or Eleventh Circuits.

Although the Fifth Circuit stands alone among the courts of appeals, the BIA has sided with the Fifth Circuit on the question presented. It did so first in *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014). There, it held succinctly that, "even where a State statute on its face covers

a type of object or substance not included in a Federal statute's generic definition, there must be a realistic probability that the State would prosecute conduct falling outside the generic crime in order to defeat a charge of removability." *Id.* at 420-421.

After the Fifth Circuit's decision in *Castillo-Rivera*, the BIA acknowledged the split, rejected the First Circuit's reasoning in *Swaby* and the Second Circuit's reasoning in *Hylton*, cited *Castillo-Rivera* approvingly, and "reaffirm[ed] [its] decision in *Matter of Ferreira*." *Matter of Guadarrama*, 27 I. & N. Dec. 560, 566 & n.8 (BIA 2019). Thus, according to the BIA, "[e]ven if the language of a statute is plain, its application may still be altogether hypothetical * * * if the respondent cannot point to his own case or other cases where the statute has been applied in the manner that he advocates." *Id.* at 567.

3. The split will not dissipate on its own. The Fifth Circuit's unbending actual-case requirement is more than a decade old. See *Castillo-Rivera*, 853 F.3d at 223-224 (collecting cases dating to 2008). The Fifth Circuit has had repeated opportunities in the meantime to consider the conflicting views of its sister circuits, and it has consistently refused to shift position.

The circuit split was expressly brought to the court's attention in *Castillo-Rivera*. See 853 F.3d at 241 (Dennis, J., dissenting) (identifying the conflict). Undeterred, the en banc court reaffirmed its rule. It has applied the rule in numerous other recently published opinions, including two other en banc cases. See *Vetcher* v. *Barr*, 953 F.3d 361, 367 (5th Cir. 2020); *United States* v. *Herrold*, 941 F.3d 173, 180 (5th Cir. 2019) (en banc); *United States* v. *Gracia-Cantu*, 920 F.3d 252, 254 (5th Cir. 2019); *United States* v. *Reyes-Contreras*, 910 F.3d 169, 185 (5th Cir. 2018) (en banc); *Vazquez* v. *Sessions*, 885 F.3d 862, 874 (5th Cir. 2018); *United States* v. *Hernandez-Montes*, 831 F.3d 284, 289

(5th Cir. 2016); *United States* v. *Carrasco-Tercero*, 745 F.3d 192, 197-198 (5th Cir. 2014).

Against this background, the Fifth Circuit cannot be expected to resolve the split itself. Only this Court can restore uniformity on the question presented.

B. The question presented is surpassingly important

The question is also manifestly important. It arises in countless deportation proceedings, with profound implications for the uniform administration of the Nation's immigration laws. More broadly, the question presented arises in every case in which, under the categorical approach, the state crime is facially broader than its generic analog, including many additional cases under the Armed Career Criminal Act and the sentencing guidelines.

1. The specific issue here—whether an individual must point to an actual prosecution for a substance appearing uniquely on a state drug schedule, and not the federal schedules—is outcome-determinative in every deportation proceeding involving a state drug offense where the state controlled-substances schedules are broader than the federal schedules.[5]

For example, the Ninth Circuit "has held repeatedly that California's controlled substances schedules are broader than their federal counterparts," meaning that a California drug offense "cannot be a categorical controlled substance or drug trafficking offense under federal law." *United States* v. *Valdavinos-Torres*, 704 F.3d 679, 687 (9th

[5] Section 1227(a)(1)(A)(iii) authorizes the removal of a noncitizen who has committed an "aggravated felony." Much like Section 1227-(a)(2)(B)(i), Section 1101(a)(43)(B) defines "aggravated felony" to include "illicit trafficking in a controlled substance (as defined in section 802 of Title 21)." Determining whether a Section 1101(a)(43)(B) drug trafficking crime is categorically a deportable offense thus entails the same analysis as it does under Section 1227(a)(2)(B)(i). See, *e.g.*, *Doe* v. *Sessions*, 886 F.3d 203, 207 (2d Cir. 2018).

Cir. 2012). Similarly, the Fifth Circuit held below that there is no "categorical match between Texas Health & Safety Code § 481.102(3)(D)(i) and Federal Schedule II(a)(4) because Texas's definition of 'cocaine' is facially broader than its federal analog." App., *infra*, 6a.

The question presented will therefore arise in every deportation proceeding in the Ninth Circuit that concerns a California drug offense—and the Ninth Circuit's resolution of the question presented will typically mean a grant of relief. See, *e.g.*, *Lorenzo* v. *Whitaker*, 752 F. App'x 482, 485 (9th Cir. 2019) (granting relief in light of the "mismatch between the federal and [California]" drug schedules). It also will arise in every deportation proceeding in the Fifth Circuit that concerns a Texas drug offense involving cocaine—but in contrast, the Fifth Circuit's resolution of the question presented will typically mean a denial of relief, as this case shows.

Courts have concluded that other state drug schedules are facially broader than their federal analogs, too, coming similarly to different results based on the question presented. Compare, *e.g.*, *Harbin* v. *Sessions*, 860 F.3d 58, 68 (2d Cir. 2017) (granting relief because New York's drug schedules, on their face, "punish conduct that is not criminal under the CSA") with *Vazquez*, 885 F.3d at 871-874 (finding that "the Oklahoma schedules facially extends beyond those substances that are controlled under federal law" but denying relief for failure to satisfy the Fifth Circuit's actual-case requirement).

Drug crimes under Section 1227(a)(2)(B)(i) and Section 1227(a)(1)(A)(iii) are among the most commonly invoked grounds for deportation. Such stark variability in the outcomes of so many immigration cases is intolerable.

2. The question presented is also outcome determinative in many deportation cases in which the noncitizen does not appeal to a circuit court of appeals.

As we have noted, the BIA sided with the Fifth Circuit on the question presented in *Matter of Guadarrama* and *Matter of Ferreira*. The BIA routinely applies this rule in cases involving facial overbreadth of state drug schedules. In some of those cases, the individual has appealed, and the court of appeals has rejected the BIA's rule and reversed. See, *e.g.*, *Singh*, 839 F.3d at 284 (reversing *In Re: Gurpreet Singh*, 2015 WL 3932289 (BIA 2015)).

But in many other such cases, the BIA's application of *Matter of Ferreira* goes unreviewed by a court of appeals. See, *e.g.*, *In Re: Jorge Leonel Sanchez-Orozco*, 2018 WL 3416255, at *4 (BIA 2018) (denying relief despite that the Illinois drug schedule is facially broader than the federal schedules); *In Re: Ariel Jonathan Diaz Vargas*, 2016 WL 807252, at *1 (BIA 2016) (denying relief despite that the New York drug schedule is facially broader than the federal schedules).

In each of these cases and many others like them, the BIA's resolution of the question presented determines the outcome. If, as we argue, the BIA and Fifth Circuit are wrong on the question presented, countless individuals are being wrongfully deported from the United States.

Even aside from its highly frequent recurrence, this state of affairs cries out for this Court's intervention. "The impact of deportation upon the life of an alien is often as great if not greater than the imposition of a criminal sentence." *Bridges* v. *Wixon*, 326 U.S. 135, 164 (1945) (Murphy, J. concurring). "A deported alien may lose his family, his friends and his livelihood forever," and "[r]eturn[ing] to his native land may result in poverty, persecution and even death." *Ibid*. This Court's review is thus essential.

3. Review is all the more imperative because the question presented has significant practical implications for areas of law beyond deportation proceedings involving state drug schedules.

State criminal laws can be facially broader than their federal generic counterparts in virtually any circumstance. *E.g.*, *Salmoran*, 909 F.3d at 80 (holding that New Jersey's sex offense law "plainly encompasses a broader range of conduct than the federal offense"); *Ramos*, 709 F.3d at 1070 (holding that Georgia's theft statute is facially broader than generic federal theft). For its part, the Fifth Circuit has applied its inflexible "actual case" rule in sentencing guidelines cases and Armed Career Criminal Act cases. See, *e.g.*, *Castillo Rivera*, *supra* (sentencing guidelines); *Herrold*, *supra* (ACCA).

In those contexts too—indeed, in any context implicating the categorical approach—the question presented is likely to affect the outcome if the state statute is facially broader than its generic federal analog.

C. This is an optimal vehicle for review

This case presents a uniquely suitable vehicle for resolving the question presented.

1. The question is squarely presented here and is outcome-dispositive. Petitioner has agreed that Texas drug laws are divisible by substance. See App., *infra*, 2a n.1. There is therefore no dispute here that the modified categorical approach applies.

Under that approach, petitioner must show that the particular substance underlying his state conviction is defined more broadly than its federal counterpart. He has done so. Indeed, there is no dispute that Texas's definition of cocaine is broader than the federal definition of cocaine—the government does not contend otherwise, and the Fifth Circuit so held. App., *infra*, 6a.

Thus, the sole issue remaining for decision is whether, in light of this facial overbreadth, petitioner's 2016 Texas drug conviction was for an offense covered by Section 1227(a)(2)(B)(i). The Fifth Circuit held not for a single reason: Petitioner failed to cite a case in which Texas had

prosecuted a defendant for the isomers of cocaine criminalized by Texas but not by the federal government.

The First, Second, Third, Ninth, Tenth, and Eleventh Circuits would not have held petitioner to that requirement. Thus, if his deportation proceedings had arisen in any of those circuits, he would not be subject to removal. That is why Judge Graves expressly called for this Court's intervention. App., *infra*, 21a. In short, a cleaner vehicle is not possible.

2. The Court has denied review in a handful of recent cases, but those cases have had obvious vehicle defects that are not present here.

The Court does not ordinarily grant review to resolve a conflict arising from the application of the advisory sentencing guidelines, principally because the Sentencing Commission may eliminate the conflict by revising the guidelines' language. See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). Accordingly, the Court recently denied review of the question presented in three sentencing guidelines cases. See *Castillo-Rivera* v. *United States*, 138 S. Ct. 501 (2017) (mem.) (No. 17-5054); *Young* v. *United States*, 139 S. Ct. 53 (2018) (mem.) (No. 17-7335); *Espinoza-Bazaldua* v. *United States*, 138 S. Ct. 2621 (2018) (mem.) (No. 17-7490). Two of the cases—*Castillo-Rivera* and *Young*—additionally had been mooted by the petitioners' respective releases from prison. And in *Espinoza-Bazaldua*, there had been an intervening amendment to the guidelines that limited the prospective importance of the case. The same cannot be said here.

The Court also recently denied review in *Vazquez*. See 138 S. Ct. 2697 (2018) (mem.) (No. 17-1304). But the Solicitor General argued there that the petitioner had failed to exhaust his claim, presenting a potential jurisdictional bar to review. See Brief for the United States in Opposition at 19-20, *Vazquez* v. *Sessions*, 138 S. Ct. 2697 (2018) (No. 17-1304). In addition, the government contended that Okla-

homa's drug laws are divisible by substance, and that petitioner was not entitled to relief under the modified categorical approach because the substance underlying the conviction was covered by the federal schedules. *Id.* at 20-21. Neither of those arguments is available to the government in this case.

Another petition is pending and would allow the Court to resolve the question presented in the context of the categorical approach rather than the modified categorical approach. See *Vetcher* v. *Barr* (No. 19-1437) (filed June 26, 2020). Like *Vazquez*, however, *Vetcher* involves a substance that is expressly included on a federal drug schedule. See 953 F.3d at 364 (psilocybin).[6]

This case, by contrast, comes to the Court on the assumption that Texas's drug crimes are divisible by substance. Even under the modified categorical approach, the Texas statute at issue here is facially broader than its federal analog. Thus, unlike every other case presenting the same question, there are no impediments to this Court's review in this case.

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[6] The BIA has held that Texas drug crimes are divisible by substance, meaning that the general over-inclusiveness of the Texas drug schedules is not relevant. See, *e.g.*, *In Re: Ramon Flores-Tavarez*, 2018 WL 2761482, at *2 (BIA 2018) ("Even if Tex. Health & Safety Code § 481.115 is categorically overbroad, we agree with the DHS that it is divisible as to the identity of the controlled substance in Penalty Group 1."). Accord App., *infra*, 28a.

Although the Fifth Circuit has not definitively ruled on the divisibility of Texas's drug laws, nearly every court of appeals to consider the issue has found that state drug laws are divisible by substance. See, *e.g.*, *Cucalon* v. *Barr*, 958 F.3d 245, 252 (4th Cir. 2020) (Virginia drug schedules); *Rendon* v. *Barr*, 952 F.3d 963, 968 (8th Cir. 2020) (Minnesota drug schedules); *Guillen* v. *Attorney General*, 910 F.3d 1174, 1180-1184 (11th Cir. 2018) (Florida drug schedules); *Martinez* v. *Sessions*, 893 F.3d 1067, 1071 (8th Cir. 2018) (Missouri drug schedules); *Swaby*, 847 F.3d at 68-69 (Rhode Island drug schedules); *Singh*, 839 F.3d at 284 (Pennsylvania drug schedules).

D. The Fifth Circuit's rule is wrong

All that we have said is already sufficient to warrant a grant of certiorari. It bears emphasis that the Fifth Circuit's rule is also wrong on the merits.

1. This Court developed the actual-case requirement as a prophylactic against over-imaginative hypotheticals in cases concerning indeterminate state offenses. See *Moncrieffe*, 569 U.S. at 190; *Duenas-Alvarez*, 549 U.S. at 193. As several courts of appeals have explained, when "a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' 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." *Grisel*, 488 F.3d at 850 (citation omitted). Thus, when the state statute's plain text eliminates the "need to imagine hypothetical * * * facts to take a statute outside the [federal law's] ambit," that ought to be an end to the inquiry. *Titties*, 852 F.3d at 1274. More fundamentally, courts "cannot ignore the statutory text and construct a narrower statute than the plain language supports." *United States* v. *O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017).

This Court, for its part, declined to apply the actual-case requirement in *Mellouli*. And in *Mathis* v. *United States*, 136 S. Ct. 2243 (2016), the Court held that it "resolves this case" to observe simply that "the elements of Mathis's crime of conviction * * * cover a greater swath of conduct than the elements of the relevant [federal] offense." *Id.* at 2251. It did so without a hint that the petitioner was required to cite an actual case enforcing the state law according to its expressly broader terms. See App., *infra*, 17a; *Titties*, 852 F.3d at 1275.

2. Apart from lacking a coherent justification, the Fifth Circuit's rule is unworkable as a practical matter, often placing litigants like petitioner in a "Catch-22" that Congress could not have intended. App., *infra*, 10a.

This case demonstrates the point. Criminal indictments in Texas "need only allege the name of the substance" at issue and "need not go further [to] describe the offense as [involving] a salt, isomer, or any other qualifying definition." App., *infra*, 9a (quoting Michael B. Charlton, Texas Practice, Texas Criminal Law, *Controlled Substances* § 30.1 (2019)). In addition, "Texas does not treat the different forms of cocaine as distinct, separate substances" and thus does not test to determine whether a particular sample of cocaine is comprised by any particular isomers. App., *infra*, 10a. In other words, it is usually impossible to tell in Texas if a prior prosecution for cocaine possession involved a positional isomer or some other isomer or salt.

This problem is amplified because, even if it were possible to determine that a particular cocaine-possession prosecution involved a positional isomer, such cases would be near impossible to find. The great "majority of criminal cases are resolved without a written judicial decision" or written plea bargain, meaning that "citable state decisions" are produced "in a very small percentage of prosecutions." App., *infra*, 10a. Congress could not have intended for Section 1227(a)(2)(B)(i)'s application to turn on searches for needles in haystacks like this.

3. The Fifth Circuit's rule also leads to inexplicable vacillations in judicial determinations of the nature of singular state-law offenses.

Here, petitioner's offense was held to be a Section 1227(a)(2)(B)(i) predicate because he failed to locate a positional-isomer prosecution, despite that Texas law expressly makes possession of positional isomers of cocaine unlawful. If the next litigant has the good luck to find a news article reporting that a Texas district attorney recently charged a drug lab for producing positional isomers of cocaine, the Fifth Circuit would rule the opposite way: It would hold that cocaine possession in violation of Section 481.115 is *not*

categorically a deportable offense, after all. The court would thus come to a different conclusion about the nature of Section 481.115 offenses, not because of any change in the law, but because a litigant, in his single case, happened upon a favorable news clipping.

There isn't the slightest indication that Congress meant individuals to sift endlessly through public records and news reports in every case, on a relentless search for the minutia of the State's criminal enforcement patterns, let alone that it meant for the "categorical" nature of an offense to change from case to case depending on the results. "[P]lacing a supplementary, individualized burden on the noncitizen petitioner" like this is "fundamentally inconsistent with formal categorical analysis." *Hylton*, 897 F.3d at 65. The overbreadth of Texas's definition of cocaine is plain on the face of the statute. No more is needed.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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