No. 20-11

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

REPLY BRIEF FOR PETITIONER

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According to the Fifth Circuit, there is no exception to the actual-case requirement, even when the state statute of conviction plainly encompasses a broader range of conduct than the federal offense. As we demonstrated in the petition (at 11-16), every other circuit to address the issue has rejected the Fifth Circuit's position, holding that when a state criminal statute encompasses, on its face, a broader range of conduct than the federal offense, the actual-case requirement does not apply.

Two cases decided after the filing of the petition have further deepened the conflict. The Fourth Circuit's decision in *Gordon* v. *Barr*, 965 F.3d 252 (4th Cir. 2020), resolves the question presented in the context of a Section 1227(a)(2) deportation proceeding. And the Seventh Circuit's decision in *United States* v. *Ruth*, 966 F.3d 642 (7th Cir. 2020), involves a state statute that criminalizes possession of positional isomers of cocaine. Although the conflict was not previously in doubt, these developments eviscerate the government's already dubious contention that the split is narrow and unworthy of immediate review.

We also showed in the petition (at 16-21) that the question is exceptionally important, and this case is a clean vehicle for resolving the conflict. The government offers no persuasive reason to think otherwise. Further review is therefore warranted.

A. The conflict is deep and persistent

1. As we showed (Pet. 11-16), the Fifth Circuit stands alone in its answer to the question presented. According to its frequently reaffirmed precedent, there is "no exception to the actual case requirement * * * where a court concludes a state statute is broader on its face." Pet. App. 7a (emphasis omitted) (quoting *United States* v. *Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc)). As relevant here, Texas's definition of cocaine is facially broader than the federal definition. But because petitioner failed to identify an actual, past prosecution for a positional

isomer of cocaine, the Fifth Circuit treated the Texas definition as coextensive with the federal definition, ignoring the plain text to the contrary. Pet. App. 7a-9a.

No other court agrees with this approach. Each to address the issue has held that the actual-case requirement does not apply when the state statute of conviction plainly encompasses a broader range of conduct than the federal offense. See Pet. 12-14 (collecting cases). The conflict is not statute-specific and goes to the heart of how the categorical approach applies in cases involving facially broader state criminal statutes.

2. The conflict has deepened since the filing of the petition: The Fourth and Seventh Circuits have joined the First, Second, Third, Ninth, Tenth, and Eleventh Circuits in rejecting the Fifth Circuit's reasoning below.

In *Gordon*, the **Fourth Circuit** concluded that, "when the state, through plain statutory language, has defined the reach of a state statute to include conduct that the federal offense does not, the categorical analysis is complete," and "there is no categorical match." 965 F.3d at 260. "In such circumstances, the burden does not shift to the respondent to 'find a case' in which the state successfully prosecuted a defendant for the overbroad conduct." *Ibid.* The court thus concluded that, because "Virginia has defined the crime of willful discharge of any firearm in a public place to encompass a broader range of conduct than that covered by the INA removal statute, * * * the Virginia offense does not qualify as a removable offense under the INA removal statute," Section 1227(a)(2). *Id.* at 259.

In *Ruth*, the **Seventh Circuit** concluded that the defendant's Illinois cocaine conviction was not categorically a "felony drug offense" under 21 U.S.C. 841(b)(1)(C) because the Illinois drug statute, just like the Texas drug statute at issue here, "prohibits possession of positional isomers of cocaine whereas the federal Controlled Substances Act does not." 966 F.3d at 644. The court rejected the govern-

ment's contention that Illinois does not actually prosecute possession of positional isomers. *Id.* at 647-648. According to the Seventh Circuit, courts "must give effect to [state] law[s] as written" and may not disregard facially broader statutory language as a mere "drafting oversight." *Id.* at 648. On that basis, the Seventh Circuit vacated the defendant's sentence.

There is no doubt that petitioner would not have been deported if his case had been decided under the rules announced in *Gordon*, *Ruth*, or any of the other cases discussed in the petition (at 12-14).

3. The government says (BIO 11) that the split does not "warrant[] this Court's review at this time." The premise (BIO 20-21) for that assertion is the government's view that the categorical approach is not a uniform tool of statutory analysis and that it can vary depending on statutory context. As the government sees it, the BIA therefore has leeway under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), to develop its own, agency-specific version of the categorical approach, applicable exclusively to Section 1227(a)(2) cases.

From that premise, the government draws two conclusions. First, it contends (BIO 20-21) that the courts that have resolved the question presented in statutory contexts other than Section 1227(a)(2) do not actually conflict with the Fifth Circuit's holding below. And second, it asserts (BIO 11, 18-19) that the conflict may resolve itself because "[t]he First Circuit is the only other court to address the application of the categorical approach to Section 1227-(a)(2)(B)(i) in the context of a state drug schedule that is broader than the federal schedules" and that "[t]he First Circuit could decide to revisit" its precedent.

That is wrong at every step.

As an initial matter, the government is simply wrong that the First Circuit is the only other circuit to confront

the question presented in a Section 1227(a)(2)(B)(i) case. As we noted on page 18 of the petition, the Third Circuit, in *Singh* v. *Attorney General*, 839 F.3d 273 (3d Cir. 2016), reversed the BIA in a Section 1227(a)(2)(B)(i) case, reasoning that the BIA had "erred in conducting a 'realistic probability' inquiry" notwithstanding that Pennsylvania's drug schedule was facially overbroad. *Id.* at 286. That is the precise opposite of the outcome in this case. Thus, the conflict would be entrenched even if it were as narrow as the government suggests.

That is doubly so because Section 1227(a)(2) identifies dozens of deportable offenses, including not only drug offenses under Section 1227(a)(2)(B)(i), but also firearms offenses (Section 1227(a)(2)(C)), and various aggravated felonies (Section 1227(a)(2)(A)(iii)). See Pet. 16 n.5. The government does not suggest that the BIA is entitled to vary the requirements for the categorical approach on an offense-by-offense basis. Nor could it. Cf. *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1989 (2015) (rejecting the BIA's "disparate approach" to drug and drug paraphernalia convictions). That matters because three other circuits—the Second, Fourth, and Ninth—have joined the First and Third Circuits in resolving the question presented in deportation cases arising under other paragraphs of Section 1227(a)(2). See *Gordon*, 965 F.3d at 254 (Section 1227(a)(2)(C) firearm offense); *Hylton* v. *Sessions*, 897 F.3d 57, 59 (2d Cir. 2018) (Section 1227(a)(2)(A)(iii) drug trafficking offense); *Chavez-Solis* v. *Lynch*, 803 F.3d 1004, 1005 (9th Cir. 2015) (Section 1227(a)(2)(A)(iii) aggravated felony). Thus, five circuits have rejected the Fifth Circuit's rule in the Section 1227(a)(2) immigration context.

The conflict is broader still. We explained in the petition (at 14) that the categorical approach is methodological and not substantive. Thus, the decisions defining its contours cut across statutory contexts. Experience bears this out. This Court, for instance, routinely cites and

applies ACCA cases—including *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005)—in categorical-approach cases arising under the immigration laws. *E.g.*, *Moncrieffe* v. *Holder*, 569 U.S. 184, 190 (2013); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007). The Fifth Circuit has followed that lead in the context of the question presented: It has applied *Castillo-Rivera*, a sentencing guidelines case, as binding precedent in appeals arising under 18 U.S.C. 16(a),[1] the ACCA,[2] and the immigration laws.[3] See also *Lorenzo* v. *Whitaker*, 752 F. App'x 482, 485 (9th Cir. 2019) (citing the Ninth Circuit's resolution of the question presented in an ACCA case as precedent for granting relief in a Section 1227(a)(2)(B)(i) case). These cases confirm beyond debate that the categorical approach is a uniform tool of judicial analysis that does not vary depending on statutory context.

Finally, even if it could have, the BIA did not exercise *Chevron* deference in *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014), or *Matter of Guadarrama*, 27 I. & N. Dec. 560 (BIA 2019).

As the government acknowledges (BIO 4, 13), the BIA's analysis in both cases turned, not upon any agency expertise, but simply upon the agency's reading of *Moncrieffe* and other judicial precedents, including sentencing guidelines cases. Of course, "*Chevron* deference is inapplicable" to the BIA's interpretation of "[judicial] precedent." *Guzman Orellana* v. *Attorney General*, 956 F.3d 171, 178 n.18 (3d Cir. 2020) (citing *Akins* v. *FEC*, 101 F.3d 731, 740 (D.C. Cir. 1996) (en banc)). To say otherwise would "permit

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[1] *United States* v. *Gracia-Cantu*, 920 F.3d 252, 254 (5th Cir. 2019).

[2] *United States* v. *Herrold*, 941 F.3d 173, 178-179 (5th Cir. 2019).

[3] *Vetcher* v. *Barr*, 953 F.3d 361, 367 (5th Cir. 2020); *Vazquez* v. *Sessions*, 885 F.3d 862, 866 (5th Cir. 2018).

executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring).

B. The question presented is important

1. We showed (Pet. 16-19) that the question presented is exceptionally important. Given the facial overbreadth of many state drug schedules and definitions, resolution of the question determines the outcome of countless deportation proceedings involving drug offenses. See Pet. 16-17. It also determines the outcome in countless other deportation proceedings that turn on facial mismatches between state and federal firearms offenses and other aggravated felonies. *E.g.*, *Gordon*, 965 F.3d at 260; *Chavez-Solis*, 803 F.3d at 1009-1010. And because the question presented has direct implications for other statutory contexts involving the categorical approach, it will influence the outcomes in countless federal criminal cases, as well. *E.g.*, *Ruth*, 966 F.3d at 648; *Castillo-Rivera*, 853 F.3d at 223.

2. The government implies (BIO 17 & n.2) that the question presented is not important because the Court has "recently and repeatedly denied petitions" in 15 cases raising similar issues. That is misleading.

Eleven of the 15 cases cited by the government involved state criminal statutes that the lower court held were *not* facially broader than their federal counterparts. See, *e.g.*, U.S. Br. in Opp. 20-21, *Vail-Bailon* v. *United States*, 138 S. Ct. 2620 (2018) (No. 17-7151) (noting that the lower court had "determined that the state statute was not overbroad on its face" and that, "[t]o the extent [a] division exists" on the question presented here, the case therefore

"does not implicate it").[4] In contrast, this case involves a Texas drug statute that everyone acknowledges is plainly and facially broader than its federal analog. See Pet. App. 6a.

Three of the remaining four denied petitions were filed in sentencing guidelines cases, review of which is disfavored.[5] The final case—*Vazquez* v. *Sessions*, 138 S. Ct. 2697 (2018) (No. 17-1304)—had a host of vehicle problems, including doubt as to this Court's jurisdiction and a clear waiver before the court of appeals and BIA. See *Vazquez* v. *Sessions*, 885 F.3d 862, 866 (5th Cir. 2018). We observed these distinctions in the petition (at 20-21), but the government declines to respond.

C. This is a perfect vehicle for review

1. As the petition explains (at 19-21), this is a uniquely suitable vehicle for review. The government asserts (BIO 21) that this case is "not an optimal vehicle for addressing

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[4] Six cases cited by the government involved subsequent application of *Vail-Bailon*, concerning Florida felony battery. Those are *Eady* v. *United States*, 140 S. Ct. 500 (2019) (No. 18-9424); *Frederick* v. *United States*, 139 S. Ct. 1618 (2019) (No. 18-6870); *Lewis* v. *United States*, 139 S. Ct. 1256 (2019) (No. 17-9097); *Green* v. *United States*, 138 S. Ct. 2620 (2018) (No. 17-7299); and *Robinson* v. *United States*, 138 S. Ct. 2620 (2018) (No. 17-7188). The other cases involving non-overbroad statutes are *Burghardt* v. *United States*, 140 S. Ct. 2550 (2020) (No. 19-7705) (New Hampshire drug statute); *Bell* v. *United States*, 140 S. Ct. 123 (2019) (No. 19-39) (Maryland robbery); *Hilario-Bello* v. *United States*, 140 S. Ct. 473 (2019) (No. 19-5172) (Hobbs Act robbery); and *Luque- Rodriguez* v. *United States*, 140 S. Ct. 68 (2019) (No. 19-5732) (California drug statute); *Vega-Ortiz* v. *United States*, 139 S. Ct. 66 (2018) (No. 17-8527) (California drug statute).

[5] See *Braxton* v. *United States*, 500 U.S. 344, 347-349 (1991). The guidelines case are *Gathers* v. *United States*, 138 S. Ct. 2622 (2018) (No. 17-7694); *Espinoza-Bazaldua* v. *United States*, 138 S. Ct. 2621 (2018) (No. 17-7490); *Castillo-Rivera* v. *United States*, 138 S. Ct. 501 (2017) (No. 17-5054).

the question presented, because it could require the Court to analyze complex chemical concepts not addressed below." That is a puzzling contention. The government admits that positional isomers of cocaine do occur. See BIO 8 (stating that positional isomers of cocaine have been "documented in the chemical literature"). That, by itself, is enough to hold that petitioner's Texas drug offense is not categorically an offense covered by Section 1227(a)(2)(B)(i): The Texas definition of cocaine includes a substance that unquestionably exists and plainly is not included within the federal definition. Nothing more is required. See *Ruth*, 966 F.3d at 648.

The government also asserts (BIO 9, 22) that petitioner did not challenge applicability of the actual-case requirement before the BIA. That is a red herring. Petitioner argued before the BIA that "the Texas definition of cocaine itself is overbroad" because "[c]ocaine, as defined under Texas law," includes positional isomers, whereas the federal definition "does not expressly list position isomers of cocaine." ROA 45-46. According to petitioner, "[t]he need for categorical" overlap between state and federal law "is simply not met under these circumstances." ROA 47.

The BIA rejected that argument based on its resolution of the question presented: "[B]ecause the respondent has not shown that there is a realistic probability that Texas would prosecute individuals for possession of position isomers of cocaine, the respondent has not shown that the definition of cocaine is overbroad under Texas law." Pet. App. 29a n.3. Petitioner then challenged the BIA's reasoning at his first opportunity, on petition for review to the Fifth Circuit. Pet. C.A. Br. 26-31. The lower court expressly resolved the issue against him (Pet. App. 7a) and recognized the circuit split along the way (Pet. App. 21a). No more is required to have preserved the issue for this

Court's review—which is likely why the government does not make a waiver or failure-to-exhaust argument.

D. The Fifth Circuit's outlier rule is wrong

The government devotes the bulk of its argument to the merits. See BIO 12-17. Needless to say, the merits are for the next stage of the case, after the Court grants review; they are not a basis for denying the petition. In any event, the government's contentions are unpersuasive.

Under the categorical approach, statutes like Section 1227(a)(2)(B)(i) require a comparison of "the statutory definition of the offense of conviction" with federal law, not the factual "particulars" underlying long-past convictions. *Mellouli*, 135 S. Ct. at 1986. As we explained (Pet. 22), the actual-case requirement is intended to ensure that, when comparing the legal definitions of state offenses with their federal counterparts, courts consider the *true* scope of the state offense, rather than a hypothetical one—that the statute is construed through the lens of reality rather than imagination. *Moncrieffe*, 569 U.S. at 191. But the government's position turns the actual-case requirement on its head, employing it as a means to disregard the true scope of a state offense when its reach is expressed plainly on the face of the statute.

This case proves the point. Reduced to its essence, the government's position (BIO 16) is that "there is no indication that Texas would prosecute a positional isomer of cocaine." In fact, there is a very clear indication that Texas would do just that: the express statutory text saying so. And there is "no persuasive reason why [a court] should ignore [a statute's] plain language to pretend the statute is narrower than it is." *United States* v. *Titties*, 852 F.3d 1257, 1274-1275 (10th Cir. 2017).

Perhaps recognizing as much, the government offers the fallback view (BIO 13, 16) that the Texas statute is not "meaningfully broader" than the federal CSA because

positional isomers are "obscure" and not common in the "drug trade." But that is just a version of the "substantial overlap" argument that the Court rejected in *Mellouli*. 135 S. Ct. at 1990. According to *Mellouli*, it is not enough for "the state statute of conviction [to bear] some general relation to federally controlled drugs." *Ibid.* Rather, there must be "a direct link between an alien's crime of conviction and a particular federally controlled drug." *Ibid.* The question, therefore, is not whether the state statute is "meaningfully" broader than the federal statute; it is only whether it is *broader*. And if it is, then the state statute cannot be said, categorically, to bear the requisite "direct link" to a federally-scheduled substance. *Ibid.* That ought to be an end to the matter.

A contrary conclusion not only would break from this Court's precedents but also would invite an endless stream of new litigation over what it means for state drug schedules to overlap "meaningfully" (or not), and what it means for drugs to be "obscure" (or not). That would defeat the central purpose of the categorical approach, which is "to promote efficiency, fairness, and predictability in the administration of immigration law." *Mellouli*, 135 S. Ct. at 1987. For those reasons, and all the others expressed in the petition, further review is warranted.

Respectfully submitted.

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