No. 20-11

In the Supreme Court of the United States

RICHARD LAWRENCE ALEXIS, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming the Board of Immigration Appeals' determination that petitioner's Texas conviction for possession of cocaine made him removable from the United States under the provision of the Immigration and Nationality Act that renders removable an alien convicted of violating a "law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 960 F.3d 722. The decisions of the Board of Immigration Appeals (Pet. App. 26a-33a) and the immigration judge (Pet. App. 34a-54a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 8, 2020. The petition for a writ of certiorari was filed on July 7, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an alien, was convicted following a guilty plea of possessing cocaine in violation of Texas law. An immigration judge determined that petitioner was removable because he was convicted of a violation of "any

law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i). The Board of Immigration Appeals (Board) upheld that decision. Pet. App. 26a-33a. The court of appeals denied a subsequent petition for review. *Id.* at 1a-25a.

1. a. Since 1970, the federal government has regulated controlled substances through the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.* That statute establishes five schedules of controlled substances and precursors, the possession or distribution of which is generally prohibited. See 21 U.S.C. 811, 812, 841(a), and 844(a). And it authorizes the Attorney General to add or remove drugs based on specified criteria. See 21 U.S.C. 811(a) and (c); 812(a) and (b). The Attorney General has regularly added drugs to the schedules and has removed drugs as well. Since the enactment of the CSA, more than 150 substances have been added, removed, or transferred from one schedule to another. *In re Ferreira*, 26 I. & N. Dec. 415, 418 (B.I.A. 2014). The most recently published schedules of federally controlled substances appear at 21 C.F.R. 1308.11 to 1308.15. See also 21 U.S.C. 812(c) (setting forth initial schedules of controlled substances).

Most States, including Texas, use statutory frameworks that generally parallel the federal regime. Contemporaneously with the drafting and consideration of the CSA, state and federal authorities worked together to create a model state law that would "complement the comprehensive drug legislation being proposed to Congress at the national level." Richard Nixon, *Special Message to the Congress on Control of Narcotics and Dangerous Drugs*, Pub. Papers 513, 514 (July 14, 1969) (*Presidential Message*). That model law—the Uniform

Controlled Substances Act (1970) (UCSA), 9 U.L.A. 853 (2007)—seeks, by mirroring the CSA, to create "an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem." UCSA Prefatory Note, 9 U.L.A. 854; see *Presidential Message* 514 (describing federal and state law as an "interlocking trellis"). The UCSA created drug schedules identical to those in the CSA as originally enacted, and provided a mechanism for States to add or remove drugs, based on the same criteria employed by the Attorney General under the CSA. UCSA § 201 & cmt., 9 U.L.A. 866-870 (setting out criteria identical to those in the federal statute). Because the UCSA called for the States to apply these criteria themselves, the drafters contemplated that, at particular times, the state and federal schedules might not be identical. See UCSA Prefatory Note and § 201 cmt., 9 U.L.A. 855, 867.

b. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien is removable if he has been convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i). Section 802 of Title 21, in turn, defines "controlled substance" as "a drug or other substance, or immediate precursor," that is "included in" the federal schedules of controlled substances. 21 U.S.C. 802(6).

The Board of Immigration Appeals, which receives deference concerning its interpretation of the INA under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), addressed the application of Section 1227(a)(2)(B)(i) in *Ferreira*, 26 I. & N. Dec. at 417-422. In *Ferreira*, the Board decided that whether an alien is removable under Section 1227(a)(2)(B)(i) should be determined using a

categorical approach—"looking not to the facts of [the alien's] prior criminal case, but to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding removal ground." *Id.* at 418 (citations and internal quotation marks omitted); see *Mellouli* v. *Lynch*, 575 U.S. 798, 807-808 (2015) (noting that the Board has often used the categorical approach to interpret immigration provisions and citing *Ferreira* as an example).

Drawing from decisions of this Court in the categorical-approach context, which have instructed that there "must be a realistic probability, not a theoretical possibility, that the State would apply its statute" to conduct that falls outside the federal analogue, *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013) (citation and internal quotation marks omitted), the Board determined that an immigration judge should apply the realistic probability test in determining whether a state statute is overbroad. *Ferreira*, 26 I. & N. Dec. at 418-419. The Board observed that, "[s]ince the schedules of the CSA change frequently, they often do not match State lists of controlled substances, which are found in statutes and regulations that are amended with varying frequency." *Id.* at 418. Given that context, the Board explained, the realistic-probability analysis is necessary to prevent the categorical approach from "eliminating the immigration consequences for many State drug offenses, including trafficking crimes." *Id.* at 421. Accordingly, the Board concluded, an alien seeking to terminate removal proceedings because a state drug schedule regulated several "obscure [substances] that have not been included in the Federal schedules" should "'at least point to his own case or other cases in which the * * * state courts in fact did apply the statute'" to

prosecute offenses involving those substances. *Id.* at 421-422 (citation omitted).

The Board reaffirmed this interpretation of the INA in *In re Navarro Guadarrama*, 27 I. & N. Dec. 560 (2019), a case where a state law defined marijuana more broadly than the federal law because it included the stalks, stems, and sterilized seeds of the marijuana plant in its definition. *Id.* at 561-562. The Board observed that those portions of a marijuana plant "are of no value to a drug user." *Id.* at 563. "Even if the language of a statute is plain," the Board explained, "its application may still be altogether hypothetical." *Id.* at 567.

In addition to the realistic probability test, a second qualification applies to the minimum conduct analysis under the categorical approach, *Moncrieffe*, 569 U.S. at 191: courts and the Board use the modified categorical approach where a state statute is divisible. A statute is divisible if it defines multiple crimes, *i.e.*, because it sets out alternative elements—facts that the jury must find or the defendant must admit in order to sustain a conviction—rather than simply specifying alternative means. *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016). When applying that approach, the Board examines record materials, including the charging document and jury instructions, to determine whether the alien was convicted of an offense that satisfies the federal definition. See *Moncrieffe*, 569 U.S. at 191; *Mathis*, 136 S. Ct. at 2256.

2. a. Petitioner, a native and citizen of Trinidad and Tobago, was admitted to the United States as a permanent resident alien in 1991. Pet. App. 48a. In 2007, petitioner was removed from the United States as a result of two marijuana convictions; he ultimately obtained

cancellation of removal and returned to the United States. See 354 Fed. Appx. 62; Pet. C.A. Br. 12-13.

In 2016, petitioner was convicted of possessing cocaine in violation of Texas Health and Safety Code Annotated § 481.115(b) (West 2010) and sentenced to one year of imprisonment. Pet. App. 48a; Certified Administrative Record (C.A.R.) 654-656, 657-663. Texas Health and Safety Code Annotated § 481.115 (West 2010) prohibits "knowingly or intentionally possess[ing] a controlled substance listed in Penalty Group 1," and specifies graduated penalties based on the aggregate weight of the substance. As relevant here, Penalty Group 1 lists "[c]ocaine," which it defines to "includ[e] * * * its salts, its optical, position, and geometric isomers, and the salts of those isomers." Tex. Health & Safety Code Ann. § 481.102(3)(D) (West 2010).

b. Based on petitioner's cocaine conviction, the Department of Homeland Security charged petitioner with being removable from the United States under 8 U.S.C. 1227(a)(2)(B)(i), which renders removable an alien convicted of violating a law "relating to a controlled substance" as defined under the federal CSA. Pet. App. 49a. As originally enacted, the INA removal provision made deportable any alien convicted of "import[ing]," "buy[ing]," or "sell[ing]" any "narcotic drug," defined as "opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium, coca leaves, or cocaine." Act of May 26, 1922, ch. 202, 42 Stat. 596. Congress expanded the covered drugs over time, eventually replacing "the increasingly long list of controlled substances" with a reference to "a controlled substance (as defined in [the CSA])." *Mellouli*, 575 U.S. at 807 (citation omitted).

c. The immigration judge ruled that the government carried its burden of proving removability under Section 1227(a)(2)(B)(i). Pet. App. 48a-54a.

The immigration judge rejected petitioner's argument that his conviction does not qualify under Section 1227(a)(2)(B)(i) because Texas's drug schedules are categorically broader than the federal controlled substance schedules. See Pet. App. 50a. The judge first explained that petitioner identified monoacetylmorphine, a substance in Penalty Group 1 of the Texas law that (in the judge's view) was not federally controlled, and that petitioner demonstrated a realistic probability that Texas actually prosecutes violations related to monoacetylmorphine. *Id.* at 51a. The judge further determined, however, that the Texas statute is divisible by drug type because "the identity of the controlled substance is an essential element of the offense" on which the jury must unanimously agree. *Id.* at 53a; see *id.* at 51a-53a. Applying the modified categorical approach, the judge determined that petitioner was convicted specifically of possessing cocaine. *Id.* at 53a.

The CSA lists "cocaine" as a controlled substance, along with, *inter alia*, "its salts, optical and geometric isomers, and salts of isomers." 21 U.S.C. 812(c), Sched. II(a)(4); see 21 U.S.C. 802(14). Petitioner argued that Texas law defined cocaine more broadly than did federal law because it did not include positional isomers of cocaine. Isomers are "molecules that share the same chemical formula but have their atoms connected differently, or arranged differently in space." *United States* v. *Phifer*, 909 F.3d 372, 376 (11th Cir. 2018) (brackets and citation omitted). Positional isomers are isomers that have the same functional groups, but differ in the

position of those functional groups on the same fundamental carbon chain. See 2 *Concise Encyclopedia of Science and Technology* 1514 (McGraw-Hill 6th ed. 2009); *Dorland's Illustrated Medical Dictionary* 965 (32d ed. 2012). Positional isomers of cocaine must be synthesized in the laboratory, see F. Ivy Carroll et. al., *Cocaine Receptor: Biochemical Characterization and Structure-Activity Relationships of Cocaine Analogues at the Dopamine Transporter*, 35 J. of Medicinal Chemistry 969, 969 (1992), and have been created on only a handful of occasions documented in the chemical literature, see, *e.g.*, Robert L. Clarke & Sol J. Daum, β-*Cocaine*, 18 J. of Medicinal Chemistry 102, 102-103 (1975). See also L. D. Baugh & R. H. Liu, *Sample Differentiation: Cocaine Example*, 3 Forensic Science Review 101, 111 (Dec. 1991) ("Because it is less intensive and more economical to produce cocaine from a natural source, no actual number of illicit samples produced through the synthetic route is known.").[1]

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[1] Below, petitioner relied on the argument that scopolamine, which is used as an anti-nausea drug, is a positional isomer of cocaine that could be prosecuted (although he did not identify any actual prosecutions). Pet. App. 9a, 51a; see Pet. 5 n.1 (referencing scopolamine). In fact, however, scopolamine is not a positional isomer of cocaine because the two substances have different functional groups. Compare Nat'l Library of Med., Nat'l Insts. of Health, U.S. Dep't of Health and Human Servs., *PubChem, Cocaine*, 1.1, https://pubchem.ncbi.nlm.nih.gov/compound/Cocaine#section=2D-structure (reflecting a carbon skeleton with two ester functional groups), with Nat'l Library of Med., Nat'l Insts. of Health, U.S. Dep't of Health and Human Servs., *PubChem, (-)-Scopolamine*, 1.1, https://pubchem.ncbi.nlm.nih.gov/compound/Scopolamine#section=2D-Structure (reflecting a carbon skeleton with a single ester functional group, an epoxide functional group, and an alcohol functional group).

The immigration judge rejected petitioner's argument that the Texas definition of cocaine was overbroad, explaining that petitioner "d[id] not submit evidence that Texas has prosecuted or currently prosecutes individuals for possession of position isomers of cocaine." Pet. App. 51a. For that reason, the immigration judge concluded that petitioner "fail[ed] to demonstrate that there is a realistic probability that an individual could be convicted" in Texas for an offense involving positional isomers of cocaine. *Ibid.* The immigration judge separately rejected petitioner's requests for relief from removal, including cancellation of removal, withholding of removal, and asylum. *Id.* at 34a-47a.

d. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 26a-33a.

As relevant here, the Board agreed that Section 481.115 is "divisible as to the identity of the controlled substance," and that petitioner was convicted of possessing cocaine. Pet. App. 28a; see *id.* at 28a-29a. Petitioner did not argue before the Board that the realistic probability test was inapplicable, and the Board did not address that argument. See C.A.R. 43-47, 684-688; Pet. App. 26a-33a. Applying the realistic probability test, the Board concluded that "petitioner ha[d] not shown that the definition of cocaine is overbroad under Texas law" because he "ha[d] not shown that there is a realistic probability that Texas would prosecute individuals for possession of position isomers of cocaine." Pet. App. 29a n.3.

3. a. The court of appeals denied a petition for review. Pet. App. 1a-25a.

Petitioner argued for the first time in the court of appeals that the realistic probability test was inapplicable in his case; in the alternative, he renewed his argument that the test was satisfied. See Pet. C.A. Br. 26. The court of appeals rejected both arguments. The court acknowledged that the Texas definition of cocaine was facially broader than its federal analog because it included positional isomers. Pet. App. 6a. But the court explained that its precedent did not recognize any "exception to the actual case requirement articulated in [*Gonzales* v.] *Duenas-Alvarez,* [549 U.S. 183 (2007)]." *Id.* at 7a (citation and emphasis omitted). And it held that petitioner did not satisfy that requirement because he did not identify any actual prosecution that involved a positional isomer of cocaine. *Id.* at 7a-9a. The court noted that it would be difficult for an alien to satisfy the realistic probability test in this context because "Texas does not treat the different forms of cocaine as distinct, separate substances." *Id.* at 10a; see *id.* at 9a-10a. Because petitioner "ha[d] not shown" that the Texas statute is, in practice, broader than the federal statute, the court upheld the finding of removability. *Id.* at 11a; see *id.* at 11a-12a. The court separately affirmed the denial of petitioner's application for asylum and other relief. *Id.* at 12a-15a.

b. Judge Graves, the author of the majority opinion, concurred. Pet. App. 16a-21a. Judge Graves criticized the requirement to apply the realistic probability test in this case. Citing two of this Court's decisions that did not address the realistic probability test, Judge Graves expressed the view that this Court "clearly finds the realistic probability test unnecessary in certain instances." *Id.* at 18a. He further contended that the Fifth Circuit diverged from at least seven other courts of appeals in

applying the realistic probability test where "the elements of the [state and federal] offenses do not match." *Id.* at 19a; see *id.* at 18a-19a (citation omitted). In particular, he noted that "[s]atisfying the realistic probability test would be impossible for [a] petitioner" in some cases, including where state law is overbroad only in that it covers a substance, such as a geometric isomer of methamphetamine, that "do[es] not even exist." *Id.* at 21a.

c. Judge Dennis dissented. Pet. App. 21a-25a. Judge Dennis agreed that the realistic probability test should not be required. See *id.* at 23a n.2. He also took the view that the majority applied the realistic probability test too rigorously by requiring "that a petitioner identify a case in which the state explicitly prosecuted an individual for conduct that is not prohibited under the corresponding federal law." *Id.* at 23a. In his view, it should have been sufficient that petitioner demonstrated that Texas aggregates the weight of different forms of cocaine without testing to ensure that *none* of the substances are positional isomers. *Id.* at 24a.

4. According to the Department of Homeland Security, petitioner was removed from the United States in November 2018. See Pet. App. 4a-5a.

ARGUMENT

Petitioner challenges the affirmance of the Board's determination that he is removable under 8 U.S.C. 1227(a)(2)(B)(i). The court of appeals did not err in upholding that determination, and its decision does not present a conflict warranting this Court's review at this time. This Court has recently and repeatedly denied petitions for certiorari presenting similar questions, and the same result is warranted here.

1. a. The court of appeals correctly upheld the Board's removal determination. Principles of *Chevron* deference apply when the Board interprets the immigration laws. *Scialabba* v. *Cuellar de Osorio*, 573 U.S. 41, 56 (2014) (plurality opinion); *id.* at 76-79 (Roberts, C.J., concurring in the judgment) (deferring to Board under *Chevron*); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see also *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009).

This Court has repeatedly indicated that there must be "'a realistic probability'" of a State applying a statute beyond the federal definition in order for the state law "to fail the categorical inquiry," and that whether that probability exists depends on whether "the State *actually prosecutes* the relevant offense" in a manner broader than the federal law. *Moncrieffe* v. *Holder*, 569 U.S. 184, 191, 205-206 (2013) (emphasis added; citation omitted); see *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Accordingly, in discussing a provision regarding firearms convictions, this Court explained that the relevant inquiry did not turn on whether a state statute was broader than a federal one by its terms—because the state gun statute lacked the federal exception for "antique firearms"—but on whether "the State actually prosecutes the relevant offense in cases involving antique firearms." *Moncrieffe*, 569 U.S. at 206. In *Duenas-Alvarez*, the Court similarly stated that the relevant inquiry is not whether it was "theoretical[ly] possib[le]" that a person would be prosecuted for an offense outside the scope of the federal statute, but whether there was "a realistic probability" of that application. 549 U.S. at 193. The Court explained that "[t]o show that realistic probability, an offender * * * must at least point to his own case or other cases in which the

state courts in fact did apply the statute" in the manner on which he relies to assert overbreadth. *Ibid.*

The Board has reasonably interpreted the INA by concluding that an alien cannot render inapplicable the controlled-substance ground for removal in Section 1227(a)(2)(B)(i) for a state drug offense simply by pointing to the presence on the State's drug schedules of an obscure substance not listed under the federal CSA. See *In re Ferreira*, 26 I. & N. Dec. 415 (2014). Drawing from this Court's cases applying the categorical approach, the Board determined that when a State schedule lists a substance "not included in a Federal statute's generic definition"—as the Board observed that state schedules commonly do—"there must be a realistic probability that the State would prosecute conduct falling outside the generic [federal] crime in order to defeat a charge of removability." *Id.* at 420-421. Accordingly, the Board concluded that if a State's drug schedules include several obscure substances not controlled under federal law, whether the state offense can form a basis for removability depends on whether there is any indication that the State has successfully prosecuted violations involving those substances. *Id.* at 421 (noting that Connecticut controlled two "obscure opiate derivatives" not listed on the federal schedules, but concluding that "for the proceedings to be terminated based on this discrepancy * * * , Connecticut must actually prosecute violations * * * involving benzylfentanyl and thenylfentanyl").

As the Board explained, federal and state drug schedules are "amended with varying frequency," and a State schedule's listing of an obscure substance not presently contained on the federal schedules is common. *Ferreira*, 26 I. & N. Dec. at 418. Accordingly, "the realistic

probability test is necessary to prevent the categorical approach from eliminating the immigration consequences for many State drug offenses." *Id.* at 421. Reaffirming that analysis in a subsequent decision, the Board emphasized that employing the realistic probability test "is eminently reasonable because it promotes fairness and consistency in the application of the immigration laws by ensuring that aliens in different States face the same consequences for drug-related convictions." *In re Navarro Guadarrama*, 27 I. & N. Dec. 560, 568 (2019).

The Board's approach—consistent with the court of appeals' decision here—reflects a reasonable interpretation of the INA. The agency was reasonable in concluding that when a State actually prosecutes only offenses involving federally controlled substances under its drug laws, immigration authorities are not stripped of the authority to remove drug offenders because the State's schedules include additional obscure substances as to which there is no evidence the State has ever brought a prosecution.

b. None of petitioner's contrary arguments undermine the Board's interpretation. Petitioner contends (Pet. 11) that the realistic probability test should not apply where a "state statute explicitly defines a crime more broadly than the generic federal analog." See Pet. 2. That assertion is inconsistent with *Moncrieffe*. In that case, the Court concluded that a realistic-probability analysis would be required even with respect to a state statute that was unambiguously broader than its federal counterpart. *Moncrieffe*, 569 U.S. at 206 (stating that a realistic-probability analysis should be used to determine whether a state firearms statute, which contained no exception for antique firearms, was actually applied by the State more broadly than the federal

statute, which contained such an exception); see also *id.* at 194 (concluding that a state marijuana offense was in fact broader than a federal drug statute that contained an exception for distribution of small quantities with no remuneration because state authorities showed "that [the State] prosecutes this offense when a defendant possesses only a small amount of marijuana, and that 'distribution' does not require remuneration") (citation omitted).

Petitioner is likewise mistaken in arguing that this Court "declined" to apply the realistic probability requirement in *Mellouli* v. *Lynch*, 575 U.S. 798 (2015), and *Mathis* v. *United States*, 136 S. Ct. 2243 (2016). Pet. 22. Neither decision mentioned the realistic probability test. *Mellouli* addressed the application of Section 1227(a)(2)(B)(i) to drug-paraphernalia offenses, holding that it was an error to treat a conviction for such an offense as a ground for removal regardless of whether the conviction involved a federally controlled substance. 575 U.S. at 808-810. Further illustrating that the Court was not purporting to address the scope of the realistic probability test in *Mellouli*, the Court cited the Board's decision in *Ferreira* in support of the proposition that the alien was not deportable. *Id.* at 808. And *Mathis* addressed whether the modified categorical approach applied to a statute that listed alternative means by which a defendant could satisfy an element, where the statute, if indivisible, concededly failed the categorical analysis. 136 S. Ct. at 2250.

Petitioner is similarly mistaken in suggesting that this Court adopted the "realistic probability" requirement only as a "prophylactic against over-imaginative hypotheticals." Pet. 22. To the contrary, as explained above,

in *Moncrieffe*, the Court applied the realistic probability test to consider whether a State has prosecuted non-remunerative distributions of small amounts of marijuana as distributions or possession-with-intent-to-distribute crimes—hardly an improbable hypothetical—to determine whether those offenses are properly considered to be a categorical match to federal drug law. 569 U.S. at 194. Petitioner's argument conflates whether the realistic probability test applies in the first instance with whether that test is, in fact, satisfied: evidence of "cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which [the alien] argues" establishes that a particular application of state law is sufficiently likely (*i.e.*, "probab[le]," rather than merely "possib[le]") that the state statute is meaningfully overbroad. *Duenas-Alvarez*, 549 U.S. at 193.

Petitioner suggests (Pet. 4) that the requirement is unfair to aliens because it is "impossible to satisfy" in cases such as this one. See Pet. 22-23. But if so, that would likely be because there is no indication that Texas would prosecute a positional isomer of cocaine, a substance that has been created only a handful of times and that does not appear to exist in the drug trade. See p. 8, *supra*. And that, in turn, simply illustrates the weakness of petitioner's argument that the Texas definition of cocaine is meaningfully broader than the federal definition. As to other substances, by contrast, the test is routinely satisfied. For example, in this case, petitioner successfully established a realistic probability of prosecution for another substance that he claimed was not federally scheduled (but which ultimately proved irrelevant in light of the statute's divisibility). Pet. App. 51a.

Nor does the realistic probability test "lead[] to inexplicable vacillations in judicial determinations of the nature of singular state-law offenses," as petitioner contends. Pet. 23. Instead, it ensures that individuals in different States face comparable immigration consequences when they are convicted under drug statutes that have actually been applied in an identical matter. See *Navarro Guadarrama*, 27 I. & N. Dec. at 568 (explaining that the realistic probability test "promotes fairness and consistency in the application of the immigration laws by ensuring that aliens in different States face the same consequences for drug-related convictions").

2. Petitioner's case does not present a conflict warranting this Court's intervention. Petitioner contends (Pet. 11-16) that the courts of appeals are divided over the applicability of the "realistic probability" test where, on its face, a state statute encompasses more conduct than its federal analogue. This Court has recently and repeatedly denied petitions raising arguments based on the purported disagreement among the courts of appeals in interpreting the "realistic probability" test.[2]

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[2] See, *e.g.*, *Burghardt* v. *United States*, 140 S. Ct. 2550 (2020) (No. 19-7705); *Eady* v. *United States*, 140 S. Ct. 500 (2019) (No. 18-9424); *Hilario-Bello* v. *United States*, 140 S. Ct. 473 (2019) (No. 19-5172); *Bell* v. *United States*, 140 S. Ct. 123 (2019) (No. 19-39); *Luque-Rodriguez* v. *United States*, 140 S. Ct. 68 (2019) (No. 19-5732); *Frederick* v. *United States*, 139 S. Ct. 1618 (2019) (No. 18-6870); *Lewis* v. *United States*, 139 S. Ct. 1256 (2019) (No. 17-9097); *Vega-Ortiz* v. *United States*, 139 S. Ct. 66 (2018) (No. 17-8527); *Rodriguez Vazquez* v. *Sessions*, 138 S. Ct. 2697 (2018) (No. 17-1304); *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);

The same result is warranted here. The 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, but it did so only in the alternative, and did not consider deference principles. In *Swaby* v. *Yates*, 847 F.3d 62 (1st Cir. 2017), the government principally argued that an alien had been convicted under a drug statute that was divisible by substance, making it unnecessary to determine whether a conviction would support removal if the statute were indivisible. See, *e.g.*, Gov't C.A. Br. at 19, *Swaby*, *supra* (No. 16-1821) ("[T]he Court need not decide whether the Rhode Island provision * * * is categorically a controlled substance offense under the realistic probability test"); *id.* at 20-27 (detailed argument on divisibility). The government devoted only five sentences of its argument section to the alternative argument that the state law categorically qualified as a ground for removal based on the realistic probability test, and it did not discuss deference. *Id.* at 18-19. The First Circuit agreed with the government that the alien was removable because the state drug statute was divisible, *Swaby*, 847 F.3d at 67-69, and addressed the realistic-probability approach only in the alternative, stating that the State's scheduling of "at least one drug not on the federal schedules" foreclosed such an analysis. *Id.* at 66. The First Circuit did not address the applicability of deference to the Board's interpretation. See *id.* at 66-67.

Green v. *United States*, 138 S. Ct. 2620 (2018) (No. 17-7299); *Robinson* v. *United States*, 138 S. Ct. 2620 (2018) (No. 17-7188); *Vail-Bailon* v. *United States*, 138 S. Ct. 2620 (2018) (No. 17-7151); *Castillo-Rivera* v. *United States*, 138 S. Ct. 501 (2017) (No. 17-5054).

Swaby does not present a conflict warranting this Court's intervention. The First Circuit could decide to revisit *Swaby*'s discussion of realistic probability in a future case because it addressed that issue only in the alternative and because *Swaby* did not address the application of deference principles. Under *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), a court must apply an agency's reasonable interpretation of a statute that the agency is charged with construing even if the court has previously adopted a different construction, unless the prior decision "hold[s] that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *Id.* at 982-983. That exception does not apply to *Swaby*, where the court of appeals did not reach any holding regarding application of the *Chevron* framework or find the relevant provision unambiguous. Additionally, in *Navarro Guadarrama*, the Board observed that *Swaby*'s "discussion of the realistic probability analysis was not necessary to the result in the case," 27 I. & N. Dec. at 565 n.4, signaling that it does not view that aspect of *Swaby* as binding precedent regarding the application of Section 1227(a)(2)(B)(i). The Court recently denied certiorari in *Rodriguez Vazquez* v. *Sessions*, 138 S. Ct. 2697 (2018) (No. 17-1304), which presented the same question and likewise relied on a purported conflict with the First Circuit's decision in *Swaby*, and it should do the same here.

Petitioner relies (Pet. 12 n.4) on the First Circuit's subsequent decision in *United States* v. *Burghardt*, 939 F.3d 397, 407-409 (2019), cert. denied, 140 S. Ct. 2550 (2020). But in *Burghardt*, the First Circuit distinguished *Swaby*, applying the realistic probability test to a differ-

ent state law prohibiting the sale of a controlled substance. 939 F.3d at 407-409. For that reason, *Burghardt* does not conflict with the decision of the court of appeals in this case, and it illustrates that *Swaby*, which addressed a Rhode Island statute, does not resolve the First Circuit's view as to the application of the realistic probability test to the Texas statute at issue here.

Petitioner otherwise relies (Pet. 9-12) on cases that declined to engage in a realistic-probability analysis in the context of different statutory or Sentencing Guidelines provisions. See *Hylton* v. *Sessions*, 897 F.3d 57, 59 (2d Cir. 2018) (aggravated-felony "drug trafficking offense"); *Salmoran* v. *Attorney Gen.*, 909 F.3d 73, 76 (3d Cir. 2018) (aggravated-felony "child pornography offense"); *United States* v. *Aparicio-Soria*, 740 F.3d 152, 153 (4th Cir. 2014) (en banc) ("crime of violence" under U.S. Sentencing Guidelines § 2L1.2 (2011)); *United States* v. *Grisel*, 488 F.3d 844, 851 (9th Cir.) (en banc) ("burglary" under the Armed Career Criminal Act, 18 U.S.C. 924(e)), cert. denied, 552 U.S. 970 (2007); *United States* v. *Titties*, 852 F.3d 1257, 1262 (10th Cir. 2017) ("violent felony" under the Armed Career Criminal Act); *Ramos* v. *U.S. Attorney Gen.*, 709 F.3d 1066, 1068 (11th Cir. 2013) (aggravated-felony "theft offense").

Petitioner acknowledges (Pet. 14) that many of the cases have arisen in distinct statutory contexts, but argues that those distinctions are immaterial because the "categorical approach is methodological and applies in the same basic manner regardless of context." *Ibid.* Other decisions in the circuits on which petitioner relies point in the opposite direction. See, *e.g.*, *Burghardt*, 939 F.3d at 407-409 (applying the realistic probability test

to a state drug statute that had an express statutory term that was potentially overbroad because that term could carry an implicit limitation); *Pierre* v. *U.S. Attorney Gen.*, 879 F.3d 1241, 1252 (11th Cir. 2018) (applying the realistic probability test where an alien identified conduct that "would violate the letter of" state law while falling outside the generic offense). Moreover, because petitioner's cited cases involve different provisions of federal law, they do not establish whether the Board's approach to Section 1227(a)(2)(B)(i) is a reasonable one in light of, *inter alia*, the frequency with which federal and state drug schedules are amended; the likelihood that state schedules may include one or several obscure substances that are not federally listed but also have not formed the basis for prosecutions; the need to ensure fairness and consistency in the application of the immigration laws to aliens in different States, and the need "to prevent the categorical approach from" rendering Section 1227(a)(2)(B)(i) a provision of haphazard and infrequent application. *Ferreira*, 26 I. & N. Dec. at 421; see *Navarro Guadarrama*, 27 I. & N. Dec. at 568 (citation omitted).

3. Petitioner's case is in any event not an optimal vehicle for addressing the question presented, because it could require the Court to analyze complex chemical concepts not addressed below. In particular, it appears that petitioner's argument relies on an incorrect understanding of positional isomers of cocaine. The only specific substance on which petitioner relied below as a positional isomer of cocaine that could be prosecuted under Texas law was scopolamine, but that substance is not a positional isomer of cocaine. See p. 8 n.1, *supra*. And petitioner's argument before this Court appears to rely on the proposition that S-pseudococaine,

S-allococaine, and S-allopseudococaine are positional isomers of cocaine. See Pet. 5 n.1. In fact, those substances are stereoisomers. See Satendra Singh, *Chemistry, Design, and Structure-Activity Relationship of Cocaine Antagonists*, 100 Chem. Rev. 925, 970 Fig. 29 (2000) (identifying pseudococaine, allococaine, and allopseudococaine as "Stereoisomers of Cocaine"). Stereoisomers of cocaine comprise optical and geometric isomers. See, *e.g.*, Chemicool.com, *Chemicool Dictionary, Definition of Stereoisomers*, https://www.chemicool.com/definition/stereoisomers.html ("Stereoisomers can be subdivided into optical isomers and geometric isomers."). Accordingly, they are controlled under the federal CSA. 21 U.S.C. 812(c), Sched. II(a)(4) (listing "optical and geometric isomers" of cocaine); see *Brazil* v. *Kallis*, No. 17-cv-1420, 2019 WL 1292681, at *6 (C.D. Ill. Mar. 20, 2019) (determining that a state statute that includes stereoisomers covers the same isomers as the federal CSA because "'geometric' and 'optical' isomers are the two sub-types of 'stereoisomers.'"); *United States* v. *Phifer*, 909 F.3d 372, 377 (11th Cir. 2018) ("Optical and geometric isomers, which are mentioned in the DEA's definition of 'isomer,' are sub-types of stereoisomers."). When positional isomers of cocaine are properly understood, a prosecution on the basis of that substance is an "over-imaginative hypothetical[]," Pet. 22, and even petitioner does not appear to dispute that the realistic probability test is appropriate in such a circumstance. See *ibid.*

Moreover, petitioner did not contend before the Board that the realistic probability test does not apply and the Board did not pass on that question. See p. 9, *supra*. And because the applicability of the realistic

probability test was settled in the Fifth Circuit, the government did not ask for deference to the Board before the court of appeals. Determining the reasonableness of the Board's interpretation of Section 1227(a)(2)(B)(i) is significant to resolving the question presented, especially in light of the potential for the listing of an obscure substance on a state schedule to broadly undermine the applicability of that important ground of removal.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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