No. 24-103

In the Supreme Court of the United States

SABINO ZUNIGA-AYALA, PETITIONER

v.

MERRICK B. GARLAND, 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 sustaining the Board of Immigration Appeals' determination that petitioner's Texas conviction for delivery of cocaine makes him removable for being 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. la-8a) is unreported. The decision of the Board of Immigration Appeals (Pet. App. 9a-16a) is unreported. The order of the immigration judge is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2024. On June 28, 2024, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including August 6, 2024, and the petition was filed on July 29, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea, petitioner was convicted of delivering cocaine in violation of Texas law. An immigration judge later determined that petitioner is removable from the United States 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 upheld that decision. Pet. App. 9a-16a. The court of appeals denied a subsequent petition for review. *Id.* at la-8a.

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); see Drug Enforcement Admin., U.S. Dep't of Justice, *Lists of: Scheduling Actions, Controlled Substances, Regulated Chemicals* (July 2024), https://www.deadiversion.usdoj.gov/schedules/orangebook/orangebook.pdf. 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 the 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 a noncitizen 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).[1] Section 802 of Title 21, in turn, defines a "controlled substance" as "a drug or other substance, or immediate

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[1] This brief uses the term "noncitizen" as equivalent to the term "alien." See *Barton* v. *Barr*, 590 U.S. 222, 226 n.2 (2020) (quoting 8 U.S.C. 1101(a)(3)).

precursor," that is "included in" the federal schedules of controlled substances. 21 U.S.C. 802(6).

The Board of Immigration Appeals (Board) addressed the application of Section 1227(a)(2)(B)(i) in *Ferreira*, 26 I. & N. Dec. at 417-422. There, the Board decided that whether a noncitizen is removable under Section 1227(a)(2)(B)(i) should be determined using a categorical approach—"looking not to the facts of [the noncitizen'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 involving removability provisions 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, see *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013) (citation and internal quotation marks omitted), the Board determined that an immigration judge should apply that 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 categor-

ical approach from "eliminating the immigration consequences for many State drug offenses, including trafficking crimes." *Id.* at 421. Accordingly, the Board concluded, a noncitizen 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 that view 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," and that the facially broader coverage of state law does not reflect "any intent to criminalize forms of marijuana that are not also federally controlled." *Id.* at 562 n.3, 563. "Even if the language of a statute is plain," the Board observed, "its application may still be altogether hypothetical." *Id.* at 567.

2. a. Petitioner, a native and citizen of Mexico, was admitted to the United States as a lawful permanent resident in 1996. Pet. App. 2a. In 2022, he was convicted of delivery of less than one gram of cocaine in violation of Texas Health & Safety Code Ann. § 481.112(b) (West 2017), and sentenced to two years of imprisonment, which was suspended for five years of community supervision. Pet. App. 2a; see Certified Administrative Record (C.A.R.) 133-136. Texas Health and Safety Code Annotated § 481.112(b) prohibits "knowingly man-

ufactur[ing], deliver[ing], or possess[ing] with intent to deliver 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 2017).

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 (sometimes called "position" isomers) 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, and their creation has been documented in the chemical literature on only a handful of occasions. 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 Sci. Rev. 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.").

b. Based on petitioner's cocaine conviction, the Department of Homeland Security (DHS) charged petitioner with being removable from the United States under 8 U.S.C. 1227(a)(2)(B)(i), which renders removable a noncitizen convicted of violating a law "relating to a

controlled substance" as defined under the federal CSA. See Pet. App. 10a. As early as 1922, Congress specified that a noncitizen would be deportable if he had a conviction for "import[ing]," "buy[ing]," or "sell[ing]" any "narcotic drug," which was 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 the current cross-reference to "a controlled substance (as defined in [the CSA])." *Mellouli*, 575 U.S. at 807 (citation omitted). 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). It does not refer to cocaine's positional isomers.

Petitioner challenged his removability, contending that Texas law is overbroad relative to federal law because it does not require renumeration for providing the controlled substance. See Pet. App. 10a. The immigration judge rejected that argument. See *id.* at 10a-11a. After additional proceedings, the immigration judge deemed petitioner's requests for relief from removal to be abandoned and ordered petitioner removed. *Id.* at 11a; C.A.R. 84-86.

c. The Board dismissed petitioner's appeal in an unpublished decision. Pet. App. 9a-16a.

Before the Board, petitioner contended for the first time that his state-law offense is not a categorical match for a federal offense because the Texas schedule of controlled substances "includes position isomers of cocaine while the federal schedule does not." Pet. App. 13a. Petitioner moved the Board to take administrative notice

of three sets of conviction records involving other defendants, which contained references to "cocaine position isomers" rather than cocaine, purportedly illustrating a realistic probability of prosecution by Texas for positional-isomer offenses. See *id.* at 13a, 15a.

As relevant here, the Board observed that petitioner "did not raise additional arguments regarding removability before the Immigration Judge, despite the invitation to brief them." Pet. App. 12a n.4. It "construe[d] [petitioner's] submission" of the conviction records—which were all "available at the time of [petitioner's original] proceedings" but not presented to the immigration judge—as a motion to remand for consideration of new evidence. *Id.* at 13a-14a. But the Board determined that the new evidence was not "likely [to] change the outcome of the case." *Id.* at 13a. It noted that one of the records "made it clear [that the defendant's] plea[] was designed in a way to potentially preserve eligibility for immigration relief." *Id.* at 15a. And petitioner had provided no evidence that positional isomers had been referenced in "charging documents, documents from prosecutors, or findings by a court." *Ibid.* The Board determined that the records "do[] not show that Texas prosecuted three cases for possession of cocaine position isomers * * *, but rather the way the defendants chose to enter their guilty plea[s]." *Ibid.*

Petitioner was removed from the United States in March 2023.

3. Petitioner sought review in the court of appeals, which denied his petition for review in an unpublished decision. Pet. App. la-8a.

The court of appeals first explained that a noncitizen seeking to establish that a state-law offense is overbroad relative to federal law must show that "there is a

realistic probability that the state would actually prosecute for the broader conduct." Pet. App. 4a-5a; see *id.* at 5a-6a (citing *United States* v. *Kerstetter*, 82 F.4th 437 (5th Cir. 2023) (per curiam), cert. granted, vacated, and remanded, No. 23-7478, 2024 WL 4426463 (Oct. 7, 2024), and *United States* v. *Castillo-Rivera*, 853 F.3d 218 (5th Cir.) (en banc), cert. denied 583 U.S. 1015 (2017)).

The court of appeals then agreed with the Board's conclusion that the state conviction records submitted by petitioner did not establish a realistic probability of prosecution for an offense involving positional isomers of cocaine. Pet. App. 6a-8a. The court explained that it had already considered an argument based on "two of the same sets of documents" in *Kerstetter*, *supra*, and rejected it for the same reasons, determining that the reference to positional isomers in those defendants' confessions does not establish that Texas had actually prosecuted positional isomer of cocaine offenses. Pet. App. 6a; see *id.* at 6a-8a.[2]

ARGUMENT

Petitioner challenges the unpublished decision denying his petition for review of the Board's unpublished determination that he is removable under 8 U.S.C. 1227(a)(2)(B)(i) because the Texas law under which he was convicted, unlike federal law, criminalizes conduct involving positional isomers of cocaine. The court of appeals did not err in denying review of the Board's determination, and its decision does not present a conflict

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[2] Petitioner suggests (Pet. 23 n.4) that the Court may wish to grant the petition for a writ of certiorari in *Kerstetter* for consideration alongside his petition. This Court has already granted the petition for a writ of certiorari in *Kerstetter* and remanded for further consideration in light of its ruling in *Erlinger* v. *United States*, 602 U.S. 821 (2024). See 2024 WL 4426463.

warranting this Court's review. 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. This Court has repeatedly indicated that there must be "a realistic probability" that a State will apply a statute beyond the federal definition in order for the state law "to fail the categorical inquiry," and 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).

The Court viewed that as the correct approach even in the context of an asserted mismatch between federal gun laws and a state gun statute that lacked the federal exception for "antique firearms." *Moncrieffe*, 569 U.S. at 206. And in *Duenas-Alvarez*, the Court similarly stated that the relevant inquiry is not whether it is "theoretical[ly] possib[le]" that a person would be prosecuted for an offense outside the scope of the federal statute, but whether there is "a realistic probability" of that application. 549 U.S. at 193. That safeguard inserts common sense into the categorical approach, helping it perform its function by excluding only those convictions where a state statute actually is broader than its federal counterpart. See *Quarles* v. *United States*, 587 U.S. 645, 655 (2019) (explaining that, in adopting the categorical approach, this "Court cautioned courts against seizing on modest state-law deviations from the generic definition of burglary").

The realistic-probability approach is particularly apt when considering whether a noncitizen can render inapplicable the controlled-substance ground of removal in Section 1227(a)(2)(B)(i) by invoking the purported overbreadth of a state drug offense. First, this Court has recently reiterated the role of the realistic-probability approach when an "immigration statute" "require[s] a federal court to make a judgment about the meaning of a state statute." *United States* v. *Taylor*, 596 U.S. 845, 858-859 (2022). In that context, the Court explained, taking account of what is realistically probable gives "respect due state courts as the final arbiters of state law in our federal system" by instructing a federal court "to consult how a state court would interpret its own State's laws." *Id.* at 859.

Second, as the Board has explained, without the realistic-probability inquiry, a noncitizen could defeat removability for a state-law drug conviction simply by pointing to the presence on the State's drug schedules of an obscure substance that is not listed on a schedule under the federal CSA. See *In re Ferreira*, 26 I. & N. Dec. 415, 421 (2014) (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"). Federal and state drug schedules are "amended with varying frequency," and a state schedule may list a substance not contained on the federal schedules at a relevant point in time. *Id.* 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, on account of mi-

nor and technical discrepancies that make no real-world difference. Reaffirming that analysis in a later decision, the Board emphasized that the realistic-probability approach "promotes fairness and consistency in the application of the immigration laws by ensuring that [noncitizens] in different States face the same consequences for drug-related convictions." *In re Navarro Guadarrama*, 27 I. & N. Dec. 560, 568 (2019).

Thus, 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 simply due to a theoretical disparity between state and federal law—whether the respective controlled-substance schedules include positional isomers of cocaine in their definitions of "cocaine"—that has no significance to any real-world prosecutions.

b. Petitioner's arguments to the contrary are unavailing.

Petitioner primarily contends (Pet. 27-28) that "there is no need to look to actual cases to discern the scope of state law" when "statutory language itself unquestionably establishes a mismatch." Pet. 28; see Pet. 24-30. But that is not invariably correct. To be sure, there may be instances where a comparison of the federal and state statutes unquestionably establishes a mismatch, rendering it unnecessary to apply the realistic-probability approach. See, *e.g.*, *Mellouli* v. *Lynch*, 575 U.S. 798 (2015). In other instances, however, a seeming disparity between the federal and state statute might have only theoretical significance. See *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 on its

face, was actually applied by the State more broadly than the federal statute, which specifically excluded "antique firearm[s]"); see also 18 U.S.C. 921(a)(3) and (16).

Similarly, as the Ninth Circuit has explained (and as petitioner appears to accept, see Pet. 28 n.6), a seeming facial divergence between state and federal law does not create overbreadth if it captures conduct that does not actually exist in the real world. See *United States* v. *Rodriguez-Gamboa*, 972 F.3d 1148, 1155 (9th Cir. 2020) ("[W]e would not find overbroad a state statute criminalizing the possession of dangerous animals, defined to include dragons, if the relevant federal comparator outlawed possession of the same animals but did not include dragons."). Based on that principle, several courts have held that a state statute is not overbroad when it lists substances excluded from the federal schedule that the criminal defendant or noncitizen has failed to establish actually exist. See, *e.g.*, *ibid.* (geometric isomers of methamphetamine); *United States* v. *Turner*, 47 F.4th 509, 518-524 (7th Cir. 2022) (ester of cocaine and salt of an ester of cocaine); *Chamu* v. *U.S. Att'y General*, 23 F.4th 1325, 1332-1333 (11th Cir. 2022) (nongeometric diastereomers of cocaine). Those decisions reflect a common-sense principle: Merely "differing statutory language does not automatically create a reasonable probability" of overbreadth. *Chamu*, 23 F.4th at 1332.

Petitioner attempts to cabin that principle to cases of "impossible" conduct, Pet. 28 n.6, but the realistic-probability inquiry is a common-sense gloss on the categorical approach. It helps ensure that the categorical inquiry does not devolve into an exercise in absurdity and instead accurately reflects the nature of the underlying conviction. There is no principled reason to dis-

tinguish conduct that is literally impossible (such as possessing a dragon or possessing a geometric isomer of methamphetamine) from conduct that could occur under the laws of nature but for which prosecution is, for all practical purposes, inconceivable (such as distributing positional isomers of cocaine, substances whose creation has been documented only a handful of times and only under strict lab conditions, and which may have only limited psychoactive properties, if any). The common-sense reasons for evaluating what is a realistically probable state-law prosecution do not support the adoption of petitioner's line between the metaphysically and the practically impossible.

2. Petitioner's case does not present a conflict warranting this Court's intervention. Petitioner contends that the courts of appeals are divided over the applicability of the realistic-probability inquiry "when the text of a state statute unquestionably goes beyond the federal comparator." Pet. 9; see Pet. 9-15. This Court has recently and repeatedly denied petitions raising similar arguments about the realistic-probability approach, including several petitions arising, as this one does, from the Fifth Circuit.[3] The same result is warranted as to the Fifth Circuit's unpublished decision in this case.

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[3] See, *e.g.*, *Bragg* v. *United States*, 143 S. Ct. 1062 (2023) (No. 22-6130); *Tinlin* v. *United States*, 143 S. Ct. 1054 (2023) (No. 21-8191); *Womack* v. *United States*, 143 S. Ct. 468 (2022) (No. 22-5892); *Croft* v. *United States*, 142 S. Ct. 347 (2021) (No. 21-297); *Capelton* v. *United States*, 141 S. Ct. 927 (2020) (No. 20-6122); *Alexis* v. *Barr*, 141 S. Ct. 845 (2020) (No. 20-11); *Vetcher* v. *Barr*, 141 S. Ct. 844 (2020) (No. 19-1437); *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);

Perhaps in light of the Court's long string of denials in cases presenting the same, or a similar, question, petitioner spends a substantial portion of his petition asserting a different error: that the Fifth Circuit's *application* of the realistic-probability approach was unduly restrictive in this case because petitioner cited records from three Texas state-court convictions in which the defendants described positional isomers of cocaine as the substance involved in their offenses. See Pet. 30-35. That asserted problem, however, falls outside the scope of petitioner's own question presented, which asks (Pet. i) whether a noncitizen must "show something more" than a facial disparity between state and federal law, rather than asking how much more the noncitizen must show. See *ibid.* Nor does petitioner assert a circuit conflict on that second question.

In any event, petitioner's request for error correction on the evidentiary point is misplaced because the court of appeals was correct in sustaining the Board's determination that petitioner's documents fail to establish that there is any realistic probability of prosecution in Texas for positional isomers of cocaine. The documents petitioner invokes are three sets of state conviction records. See Pet. App. 3a. Each contains a plea document in which the defendant's own confession re-

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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*, 585 U.S. 1017 (2018) (No. 17-1304); *Gathers* v. *United States*, 584 U.S. 1034 (2018) (No. 17-7694); *Espinoza-Bazaldua* v. *United States*, 584 U.S. 1034 (2018) (No. 17-7490); *Green* v. *United States*, 584 U.S. 1034 (2018) (No. 17-7299); *Robinson* v. *United States*, 584 U.S. 1034 (2018) (No. 17-7188); *Vail-Bailon* v. *United States*, 584 U.S. 1034 (2018) (No. 17-7151); *Castillo-Rivera* v. *United States*, 583 U.S. 1015 (2017) (No. 17-5054).

ferred to "cocaine position isomers" rather than "cocaine." *Ibid.* One of the documents expressly indicated that, by accepting the plea, the defendant "may remain eligible" for immigration relief "if an attorney in immigration court argues that this offense is not a controlled substance offense." *Ibid.*

The Board noted that in one of the three cases, "the defendant made it clear his plea[] was designed in a way to potentially preserve eligibility for immigration relief." Pet. App. 15a. The Board further noted that petitioner had provided no evidence in those three cases or any others that positional isomers had been referenced in "charging documents, documents from prosecutors, or findings by a court." *Ibid.* The Board determined that the records "do[] not show that Texas prosecuted three cases for possession of cocaine position isomers," but merely "the way the defendants chose to enter their guilty plea[s]." *Ibid.*; see *id.* at 7a. The Board also noted that the Fifth Circuit—the court of appeals with the most experience dealing with Texas law—had rejected previous attempts to establish that there is any realistic probability of such prosecutions. *Id.* at 14a. And the Fifth Circuit then agreed that petitioner had failed to establish such a probability here. *Id.* at 6a-8a.

Under the circumstances, the Board reasonably determined that the references to positional isomers of cocaine in the confessions of three Texas defendants reflected efforts to circumvent the federal immigration consequences of their convictions, rather than actual prosecutions for possession of positional isomers of cocaine—particularly given the nature of positional isomers of cocaine and the practical impossibility that the state defendants in those three cases had in fact possessed those isomers. See p. 6, *supra*. And the court of

appeals was similarly reasonable in concluding that petitioner has provided no evidence that any defendant has actually been "*prosecuted* for possessing position isomers." Pet. App. 7a. This Court's intervention to consider that assessment is not warranted.

3. In any event, petitioner's case would not be an optimal vehicle for addressing the question presented, because it could require the Court to analyze complex chemical concepts without the benefit of a developed record. Before the immigration judge, petitioner did not invoke a mismatched-offense theory based on positional isomers of cocaine. See Pet. App. 10a-11a, 13a. Instead, he raised the positional-isomer theory before the Board in what the Board construed as "a motion to remand" for the consideration of new evidence. *Id.* at 13a. The record does not contain evidence about the chemical characteristics of positional isomers of cocaine, nor expert declarations about the feasibility and desirability of using such substances in the drug trade. The literature generally indicates that positional isomers of cocaine must be synthesized in strict laboratory conditions, and that the synthesis of cocaine is generally more intensive and less economical than producing it from a natural source. Indeed, the synthesis of positional isomers has been documented in the literature on only a handful of occasions. And the limited documentation suggests that the pharmacological effects—if any—of such isomers may be substantially milder than federally regulated forms of cocaine. See p. 6, *supra*. Yet none of those factual predicates were developed in the agency proceeding or in the court below. Considering the case in this posture, without the benefit of factual development and expert declarations, could hamper the Court's ability to consider whether there is any

relevant real-world mismatch between state and federal controlled-substance offenses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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