No. 24-103

IN THE

Supreme Court of the United States

SABINO ZUNIGA-AYALA,

Petitioner,

v.

MERRICK GARLAND, 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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REPLY BRIEF FOR PETITIONER

The Fifth Circuit has for years been on the short side of an 8-1 split over whether noncitizens can defeat removal by showing a facial mismatch between the state statute under which they were convicted and the federal comparator. In this case, the court extended its outlier rule, holding not only that noncitizens must identify an "actual case" involving conduct beyond the federal comparator, Pet. App. 5a, but that even judgments of conviction resting solely on admissions of such conduct are insufficient. A noncitizen must also show that the State initially charged him with such conduct—by producing documents that the court concedes never contain the information it demands. *Id.* 7a n.1.

Faced with an acknowledged split on an important question of federal law, the Government devotes the bulk of its brief in opposition to defending—indeed, pushing beyond—the Fifth Circuit's rule. That is hardly an argument for denying certiorari. Moreover, the Government's merits arguments are unpersuasive. This Court should grant certiorari to rein in the Fifth Circuit's misinterpretation of the categorical approach.

I. The Government's attempt to wave away the conflict is unpersuasive.

The Government does not contest that courts of appeals are divided 8-1 on whether facial overbreadth of a state statute is enough to precludes a categorical match. *See* BIO 14; *see also* Pet. 9-15. That circuit split alone warrants review. *See id.* 16-18.

The Fifth Circuit's extension of its outlier rule here makes review all the more urgent. Already, the Board of Immigration Appeals cites the opinion in this case as law of the circuit with respect to what constitutes proof of "actual cases." *See, e.g.*, *Matter of V-D,* A-036-756-535 (BIA Nov. 6, 2024).

Trying to fend off review, the Government first contends that the Fifth Circuit's extension of its rule in this case is not encompassed by petitioner's question presented, which asks whether facial overbreadth is enough or whether a noncitizen must show "something more," Pet. i., because petitioner does not also ask "how much more the noncitizen must show." BIO 15.

That is nonsense. Petitioner argues that nothing more is required. *See* Pet. 25-30. But, as the Government itself acknowledges (BIO 15), petitioner "spends a substantial portion of his petition" arguing that, if facial overbreadth alone is not enough, the Fifth Circuit's requirement that a noncitizen produce actual charging documents is wrong. *See* Pet. 30-35. Accordingly, there can be no doubt that if this Court were to hold that something more is required, the next order of business would be to specify the nature of that "something" to provide guidance to courts, the Board of Immigration Appeals, and immigration judges.

Second, the Government claims petitioner did not "assert a circuit conflict" on the "how much more" question. BIO 15. Wrong. To be sure, no other circuits apply the "actual case" requirement in instances of facial overbreadth. But as petitioner explained, in situations where other circuits *do* apply an "actual case" requirement, "the Fifth Circuit's rule conflicts with the position of the Second and Ninth Circuits."

Pet. 14. No matter how the Government slices things, there's a split.

II. This case is the right vehicle to decide the question presented.

The question presented was pressed and passed upon below. Before both the Board of Immigration Appeals and the Fifth Circuit, Mr. Zuniga-Ayala argued that (1) the Texas statute was facially overbroad, (2) this was enough to defeat his removal, and (3) if more were required, the three judgments of conviction sufficed. Both the BIA and the Fifth Circuit (1) acknowledged the facial mismatch, (2) held that actual cases were required, and (3) held that petitioner's evidence was insufficient. Pet. App. 6a, 14a-15a.

As the petition explains, this case is a uniquely clean vehicle compared to the cases where this Court denied certiorari after the Fifth Circuit announced its rule. *See* Pet. 21-23. Each of the Government's additional citations drives this home. In seven of those cases, the lower courts held that the state statute was not facially overbroad.[1] In two cases, there were

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[1] *See* BIO at 8, *Bragg v. United States*, 143 S. Ct. 1062 (2023) (No. 22-6130); BIO at 15, *Tinlin v. United States*, 143 S. Ct. 1054 (2023) (No. 21-8191); Pet. at 7-8, *Croft v. United States*, 142 S. Ct. 347 (2021) (No. 21-297); Pet. at 4, *Capelton v. United States*, 141 S. Ct. 927 (2020) (No. 20-6122); Pet. at 6, *Burghardt v. United States*, 140 S. Ct. 2550 (2020) (No. 19-7705); Pet. at 6-7, *Bell v. United States*, 140 S. Ct. 123 (2019) (No. 19-39); BIO at 19, *Green v. United States*, 584 U.S. 1034 (2018) (No. 17-7299).

additional grounds for removal, so the question presented here was not dispositive.[2]

This case is the right vehicle for another reason: The other petitions pending when this petition was filed no longer provide an opportunity to resolve the split. The Court has since granted, vacated, and remanded the petition in *Kerstetter v. United States*, No. 23-7478, in light of its decision in *Erlinger v. United States*, 602 U.S. 821 (2024)—a decision whose analysis has no bearing on the question presented here. *See Kerstetter v. United States*, 2024 WL 4426463 (U.S. Oct. 7, 2024). And the Government has agreed to the petitioner's suggestion of mootness in the other petition before this Court. BIO at 4, *Alejos-Perez v. Garland*, No. 23-1325 (filed June 17, 2024).

III. The Fifth Circuit's rule is wrong.

The Government offers a barrage of merits arguments purportedly based on this Court's prior decisions, "common-sense" intuitions (BIO 13), and policy. None is persuasive. Indeed, they are belied by the fact that in eight circuits, the Government has been content for years to live with the rule petitioner asks this Court to adopt.

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[2] *Vetcher v. Barr*, 141 S. Ct. 844 (2020) (No. 19-1437); *Luque-Rodriguez v. United States*, 140 S. Ct. 68 (2019) (No. 19-5732).

As to the remaining two cases, *United States v. Womack*, 2022 WL 1073860, at *1 (5th Cir. Apr. 11, 2022), *cert. denied*, 143 S. Ct. 468 (2022) (No. 22-582), ruled against the defendant without considering whether there was facial overbreadth. And *Hilario-Bello v. United States*, 140 S. Ct. 473 (2019) (No. 19-5172), involved other questions presented altogether.

1. The Government's arguments are inconsistent with this Court's precedent.

a. The Government concedes that *Mellouli v. Lynch*, 575 U.S. 798 (2015), holds that it is "unnecessary to apply the realistic-probability approach" where "a comparison of the federal and state statutes unquestionably establishes a mismatch." BIO 12. That concession should be the end of this case: The Fifth Circuit correctly acknowledged, and the Government does not contest, that the Texas statute under which Mr. Zuniga-Ayala was convicted is facially broader than the corresponding federal statute. Pet. App. 5a. That establishes a mismatch that fails the categorical approach.

Instead, the Government argues that two other decisions support engrafting an "actual prosecution" requirement onto every categorical approach inquiry. BIO 10. But as petitioner has already explained, Pet. 27-30, neither case supports such a rule.

Gonzalez v. Duenas-Alvarez, 549 U.S. 183 (2007), does not bear on this case because it concerned a state statute that was not facially overbroad. Pet. 27-28. And in *Moncrieffe v. Holder*, 569 U.S. 184 (2013), this Court ruled for the noncitizen because he was convicted under a facially overbroad state statute—no additional showing was required. *Id.* at 194.

The Government nonetheless seizes on *Moncrieffe*'s discussion of a hypothetical concern the Government had raised. But that hypothetical, about how to address affirmative defenses, has no bearing on cases like this, where there is undisputed overbreadth on the face of the state statute. Pet. 29-30.

Moreover, the Government overreads *Moncrieffe*'s use of the phrase "actually prosecutes," BIO 10 (citing *Moncrieffe*, 569 U.S. at 184, 191, 205-06). That case did not consider any difference between charging documents and judgments of conviction as evidence of a state statute's overbreadth. In any event, a judgment of conviction is the best evidence that the state "actually prosecutes" the overbroad state conduct. Even the BIA, in the two cases cited by the Government (BIO 4-5), understands the "actually prosecutes" criterion to be satisfied by a state court's application of its statute. *See In re Ferreira*, 26 I. & N. Dec. 415, 421-22 (B.I.A. 2014) (actual prosecution is shown if the noncitizen can point to cases where "state courts in fact did apply the statute" to conduct beyond the federal comparator); *In re Navarro Guadarrama*, 27 I. & N. Dec. 560, 562-63 (2019) (same).

b. The Government's rendition of this Court's precedent also conflicts with the recent decision in *Brown v. United States*, 602 U.S. 101 (2024). The Government suggests a realistic probability inquiry should be required here because disparities between federal and state drug schedules would otherwise "defeat removability," BIO 11. But in *Brown*, this Court reaffirmed that a state drug conviction is a categorical match only "if the drugs on the federal and state schedules matched when the state drug offense was committed." 602 U.S. at 119. It is therefore irrelevant that "[f]ederal and state drug schedules are amended with varying frequency" or whether a discrepancy between the two schedules concerns an "obscure substance," BIO 11 (internal quotations omitted). Not even the Government argued otherwise in *Brown.* And here, there is no doubt that the federal

Controlled Substances Act did not include position isomers of cocaine at the time of petitioner's state conviction.

2. The Government cannot defend the decision below by arguing that possession of position isomers should be treated as if it were an impossibility. Possession of position isomers is not, in any sense, impossible.

To begin, the Fifth Circuit made no such claim. And the Government itself admits that position isomers of cocaine exist. BIO 6. So the Government makes no headway by citing cases (BIO 13) where, as a scientific matter, the additional substances listed in the state statute simply did not exist. *See* Pet. 28 n.6.

Having conceded that possession of position isomers of cocaine is possible, the Government nonetheless insists it should be treated as if it were "impossible" because their possession is "for all practical purposes, inconceivable." BIO 14.

But the Government is wrong here too. There *is* a "principled reason," BIO 13, not to elide the distinction between conduct that is literally impossible and conduct that is merely rare. A literal impossibility test is "purely scientific"—does this substance exist or not? *United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1154 (9th Cir. 2020). The Government's proposed "for all practical purposes" test instead requires looking at *all* the state convictions under a given statute and ascertaining the precise conduct underlying each in order to figure out which prosecutions were for which substance. But this Court has repeatedly explained that the categorical approach forecloses looking into the "underlying facts" of even *one* defendant's case.

See, e.g., *Mathis v. United States*, 579 U.S. 500, 504 (2016); *Taylor v. United States*, 495 U.S. 575, 600-01 (1990). The Government's "for all practical purposes" test would have courts look into the underlying facts of hundreds or thousands of cases and would require constant updating.

3. These workability concerns are exacerbated if judgments of conviction do not suffice to show that a state statute punishes conduct beyond its federal comparator.

a. The Government suggests judgments of conviction cannot satisfy the realistic probability test because these are somehow not "real-world prosecutions." BIO 12. But they are precisely that. To begin, Texas courts cannot accept guilty pleas unless there is "sufficient evidence" providing a factual basis for the conviction. Tex. Code Crim. P. Art. 1.15. One way to provide that evidence is through "judicial confessions"—written documents that "stipulate to the factual content" underlying a guilty plea. *United States v. Garcia-Arellano*, 522 F.3d 477, 481 (5th Cir. 2008). In immigration cases that apply the modified categorical approach (which governs cases involving statutes that criminalize multiple discrete offenses, *see* Pet. 34), the Fifth Circuit treats "judicial confession[s]" as a "sufficiently reliable record for consideration when characterizing [the conduct underlying] a prior guilty-plea offense." *Abraham v. Holder*, 544 F. Appx. 526, 527 (5th Cir. 2013); *see also Monsonyem v. Garland*, 36 F.4th 639, 645 (5th Cir. 2022). If these confessions are sufficient to prove conduct for purposes of removability when the Government introduces them, they should be equally sufficient for purposes of confirming a mismatch

between a state statute and its federal comparator when a noncitizen introduces them. The Government cannot have it both ways.

Those tenets are dispositive here. The plea agreements submitted by petitioner each included the defendant's judicial confession to possessing a position isomer of cocaine. Each judicial confession was accepted by a Texas court that then sentenced the defendant. This suffices to show that Texas, unlike the federal government, will convict individuals for possessing position isomers of cocaine.

And even if the Government were right that the convictions to which petitioner pointed reflect strategic plea bargaining, BIO 16, that does not undercut their status as evidence that Texas's law is broader than the federal comparator. It "benefit[s] both the State and noncitizen defendants" to agree to such pleas. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Texas has accepted that its statute covers position isomers.

Indeed, if the Government's critique of plea bargains were taken to its logical conclusion, then even the charging documents referred to by the Fifth Circuit would not suffice. After all, if a prosecutor in Texas were to include the words "position isomer" in a charging document, that inclusion might itself be the result of pre-charge bargaining between the prosecutor and defense counsel. The Government's position is thus wholly unsustainable.

b. More fundamentally, rejecting judgments of conviction achieved by plea bargaining defeats the very purpose of the categorical approach: to "promote[] judicial and administrative efficiency" by avoiding

"the relitigation of past convictions in minitrials." *Moncrieffe*, 569 U.S. at 200.

If providing judicial confessions plus judgments of conviction resting on those confessions is insufficient, as the Government argues, then noncitizens in every immigration proceeding will be required to go behind the formal documents to prove up the underlying facts in the "actual cases" they cite. This could require immigration judges to approve subpoenas and hear testimony from prosecutors, defense lawyers, and individual criminal defendants themselves—all to figure out what happened in someone else's case. This could require a potentially endless series of "minitrials" and "post hoc investigation[s]" into the facts of those cases. *Moncrieffe*, 569 U.S. at 201. Indeed, in the context of ACCA sentencing, petitioner's counsel is aware of district courts in the Fifth Circuit that have already confronted this sort of satellite litigation. Because this Court has "long deemed" such proceedings "undesirable" even as to noncitizens' own cases, *id.*, it should reject the Government's argument here to have such proceedings as to an endless universe of other cases.

4. The Government is even less persuasive when it argues that the Fifth Circuit's rule promotes consistency and affords the "respect due state courts," BIO 11-12. Both consistency and respect for states in fact militate against the Fifth Circuit's approach.

a. As this Court has explained, the "chief concern" behind the adoption of the categorical approach was ensuring that "defendants whose convictions establish the same facts will be treated consistently, and thus predictably under federal law." *Moncrieffe*, 569 U.S. at 205 n.11 (citing *Taylor v. United States*, 495 U.S. at

599-602). But due to the circuit split on the question presented, noncitizens convicted under the very same Texas statute will now be treated differently depending on whether removal proceedings take place in Texas or virtually anywhere else in the country. *See* Pet. 18. The concerns for fairness and consistency underlying the categorical approach thus favor granting certiorari to resolve the inconsistent application of federal immigration law to similarly-situated noncitizens proceeding in different circuits.

Moreover, this Court has already rejected the Government's argument that the realistic probability test is necessary to "ensur[e] that [noncitizens] in different States face the same consequences for drug-related convictions," BIO 12. In *Moncrieffe*, this Court recognized that variation in collateral consequences resulting from differences in state criminal law is "the longstanding natural result of the categorical approach." 569 U.S. at 205 n.11.

b. Next, the Government argues that the Fifth Circuit's charging document rule "gives 'respect due state courts.'" BIO 11 (quoting *United States v. Taylor*, 596 U.S. 845, 859 (2022)). Not true. The Fifth Circuit's approach disrespects the states twice over—first by instructing federal courts to second-guess the unambiguous text of state statutes, and second by ignoring a state's repeated application of its law to conduct outside the federal comparator.

The categorical approach respects state laws by giving them their plain meaning. Here, the political branches of Texas enacted a statute whose plain text criminalizes conduct beyond what the federal Controlled Substances Act proscribes—namely, the possession of position isomers. A court properly

applying the categorical approach would hold that because the state statute's text is broader, petitioner's state conviction is not a qualifying offense. The Government instead asks this Court to disregard the text of the duly-enacted Texas law and require noncitizens to produce something more to prove the state law means what it plainly says.

What's more, the Fifth Circuit doubts the plain meaning of Texas statutes even where the state has applied those statutes to punish people. Rather than accepting Texas judgments of conviction entered by state courts that expressly convict and punish people for the overbroad portion of the state statute, the Fifth Circuit requires a defendant show charging documents where prosecutors singled out the overbroad part of the statute. This rule elevates the actions of county prosecutors across Texas over the state courts that have actually applied the statute. So much for the "respect due state courts."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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