No. 24-______

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a noncitizen is removable from the United States if he has been convicted of certain federal crimes or their state-law equivalents. 8 U.S.C. § 1227(a)(2).

The question presented is:

Under the categorical approach, when a state statute of conviction on its face criminalizes conduct not prohibited by the corresponding federal statute, does this mismatch defeat removal or must the noncitizen show something more?

RELATED PROCEEDINGS

Zuniga-Ayala, A074-370-720 (BIA Feb. 15, 2023).

Zuniga-Ayala v. Garland, No. 23-60118, 2024 WL 1507854 (5th Cir. Apr. 8, 2024).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Sabino Zuniga-Ayala respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-8a) is unpublished, but is available at 2024 WL 1507854. The Board of Immigration Appeals' order (Pet. App. 9a-16a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on April 8, 2024. On June 28, 2024, Justice Alito extended the time to file a petition for a writ of certiorari to and including August 6, 2024. No. 23A-1166. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 237 of the Immigration and Nationality Act, 8 U.S.C. § 1227, provides, in relevant part:

"Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) 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), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i).

Section 102(17)(D) of the federal Controlled Substances Act, 21 U.S.C. § 802(17)(D), defines the term "narcotic drug" to include "[c]ocaine, its salts, optical and geometric isomers, and salts of isomers."

Section 481.002 of the Texas Controlled Substances Act defines "cocaine" to include "its salts, its optical, position, and geometric isomers, and the salts of those isomers." Tex. Health & Safety Code Ann. § 481.002(29)(D)(i) (West 2021).

INTRODUCTION

The Immigration and Nationality Act authorizes the Attorney General to remove a noncitizen from the United States if that person is convicted of certain federal crimes or their state-law equivalents. To determine whether a state-law offense is equivalent to the listed federal crime, courts use a "categorical approach": If particular conduct is a crime under state law but not under federal law, then the state statute is not a categorical match and cannot serve as the basis for removal.

In this case, the Fifth Circuit acknowledged that the Texas Controlled Substances Act "on its face" is broader than its federal counterpart because Texas criminalizes possession and distribution of a substance not covered by the federal law. Pet. App. 5a. Nevertheless, in conflict with the law in eight other circuits, it held that this mismatch does not prevent the state statute from serving as a predicate to removal.

Instead, the Fifth Circuit insisted that a noncitizen show an "actual case" in which the state law was applied to conduct not covered by federal law. Pet. App. 5a. What's more, the Fifth Circuit held that

even judgments showing a conviction for conduct outside the federal statute are insufficient to satisfy this "actual case" requirement. *Id.* 6a. Only proof that the individuals were "*prosecuted*"—the court's italics—for such conduct can suffice. *Id.* 7a. That holding further conflicts with the decisions of at least two courts of appeals that have held plea documents sufficient to show that a state statute reaches conduct beyond the federal comparator.

This Court should grant certiorari to straighten out how the categorical approach works. And it should hold that if the text of a state statute plainly criminalizes more conduct than the federal comparator, then conviction under that state statute cannot provide a basis for removal. At the very least, if the Court finds that some additional showing is required, it should hold that a judgment of conviction resting on conduct outside the federal statute is sufficient.

STATEMENT OF THE CASE

A. Legal background

1. Under the Immigration and Nationality Act (INA), a noncitizen is removable from the United States if he has been convicted of certain federal crimes or their state-law equivalents. As relevant here, a noncitizen can be deported 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), other than [certain marijuana offenses]." 8 U.S.C. § 1227(a)(2)(B)(i).

2. This Court, lower federal courts, and executive agencies have long applied a "categorical approach" to

determine whether a particular state-law conviction can serve as the predicate for removal. *See Mellouli v. Lynch*, 575 U.S. 798, 805 (2015). To remove a noncitizen otherwise entitled to remain in the United States—for example, a legal permanent resident like the petitioner was here—the Government must show that the "state offense is a categorical match" with a federal offense. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). And a categorical match occurs "only if a conviction of the state offense 'necessarily involved facts equating to'" the corresponding federal offense. *Id.* (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion) (cleaned up)). A state offense cannot constitute a predicate for deportation unless all the conduct reached by the state statute "falls within the elements" of the corresponding federal statute. *Borden v. United States*, 593 U.S. 420, 441 (2021) (citing *Moncrieffe*, 569 U.S. at 190-91, in the context of an Armed Career Criminal Act case).

Thus, if a state schedule of prohibited drugs criminalizes substances that are not forbidden under the corresponding federal drug schedule, the state offense is not a categorical match. *Mellouli*, 575 U.S. at 813 ("to trigger removal under § 1227(a)(2)(B)(i)," the drug involved must appear "on a § 802 schedule").

3. Even if the Government has made a case that the elements of the state statute of conviction appear no broader than its federal comparator, a noncitizen sometimes still can defeat deportability. He can do so by showing that, despite the apparent categorical match, there is nonetheless a "realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside" the federal comparator. *Gonzales v. Duenas-Alvarez*, 549 U.S.

183, 193 (2007). "To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes" conduct not covered by federal law. *Moncrieffe*, 569 U.S. at 206. The noncitizen can do so by pointing either to his own case or to "other cases" involving conduct falling outside the federal statute. *Duenas-Alvarez*, 549 U.S. at 193.

4. This case concerns application of the categorical approach to a Texas drug conviction. The INA provides that any noncitizen convicted of crimes "relating to a controlled substance (as defined in section 802 of title 21)" is deportable. 8 U.S.C. § 1227(a)(2)(B)(i). In turn, Section 802—a part of the Controlled Substances Act—lists "[c]ocaine, its salts, optical and geometric isomers, and salts of isomers" as a controlled substance, but it does not include position isomers of cocaine in that definition. 21 U.S.C. § 802(17)(D). Indeed, Section 802 reinforces the exclusion of positional isomers: It specifies that "[a]s used in schedule II(a)(4)"—the drug schedule applicable to cocaine, *see* 21 U.S.C. § 812(c)—"the term 'isomer' means any optical or geometric isomer." 21 U.S.C. § 802(14). Conversely, with respect to certain other substances, "the term 'isomer' means any optical, positional, or geometric isomer." *Id.*

By contrast, Texas law criminalizes possession of cocaine's position isomers: The Texas Controlled Substances Act defines "cocaine" to include its "salts, its optical, position, geometric isomers, and salts of those isomers." Tex. Health & Safety Code § 481.102(3)(D)(i) (West 2023).

The Fifth Circuit has thus determined, and the Government has not contested, that the Texas

definition of "cocaine" is "on its face" broader than the federal definition of "cocaine." Pet. App. 5a; *see Alexis v. Barr*, 960 F.3d 722, 726 (5th Cir. 2020). Moreover, Texas has sentenced and incarcerated individuals based on their admissions to possessing position isomers of cocaine. *See* Pet. App. 3a.

B. Factual background

1. Petitioner Sabino Zuniga-Ayala was admitted into the United States in 1996 and was a lawful permanent resident. Pet. App. 2a. He has four young adult daughters who are all U.S. citizens. Mr. Zuniga-Ayala maintained his lawful status for 26 years. *See id.* At the time of the events giving rise to this case, he had been working for the same employer for nine years.

2. In September 2019, a confidential informant gave police a baggie containing 0.6 grams of cocaine that he claimed to have purchased from Mr. Zuniga-Ayala. In March 2022, Mr. Zuniga-Ayala pleaded guilty to delivery of less than one gram of cocaine in violation of Texas Health & Safety Code Section 481.112(b). Pet. App. 2a, 10a. He received a two-year suspended sentence along with 30 days confinement in county jail and five years of community service. ROA.23-60118.136, 138.[1]

C. Procedural history

1. In June 2022, the Department of Homeland Security (DHS) placed Mr. Zuniga-Ayala in removal proceedings, maintaining he was removable under 8 U.S.C. § 1227(a)(2)(B)(i). The basis for this charge was

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[1] "ROA" refers to the record on appeal before the Board of Immigration Appeals.

Mr. Zuniga-Ayala's March 2022 conviction under Section 481.112(b).

Before the Immigration Judge, Mr. Zuniga-Ayala denied that he was removable for that conviction. ROA.23-60118.105-06. The Immigration Judge disagreed and ordered Mr. Zuniga-Ayala removed to Mexico. ROA.23-60118.106, 119.

2. Mr. Zuniga-Ayala filed a timely Notice of Appeal to the Board of Immigration Appeals (BIA). ROA.23-60118.84. He argued that his Texas conviction could not justify removal because the law under which he was convicted, unlike federal law, covers position isomers of cocaine. ROA.23-60118.21. He pointed out that this was clear from the plain text of the state statute but further argued that even if he were required also to demonstrate a realistic probability that Texas applies its law to conduct beyond that prohibited by federal law, he had done so by providing certified copies of three judgments of conviction in Texas state court for possession of cocaine position isomers. ROA.23-60118.21; *see* ROA.23-60118.30-70 (providing the three judgments of conviction).

The BIA dismissed Mr. Zuniga-Ayala's appeal. Pet. App. 9a. The BIA acknowledged that the Texas statute was "not a categorical match to its federal counterpart." *Id.* 13a. Nonetheless, it held that Mr. Zuniga-Ayala needed to provide "charging documents, documents from a prosecutor, or findings by a court," *id.* 15a, to satisfy the "realistic probability test." His submission of the three judgments of conviction did not qualify because those documents were not "citable decisions." *Id.* 14-15a (citation omitted).

3. Mr. Zuniga-Ayala filed a timely petition for review in the Fifth Circuit. The Fifth Circuit denied the petition. Pet. App. 2a. As had the BIA, the panel conceded that "Texas law on its face defines cocaine more broadly than federal law because it includes position isomers." *Id.* 5a. But it, too, held that this overbreadth was not enough to preclude removal. Pointing to "binding circuit precedent," the court insisted that Mr. Zuniga-Ayala needed to provide an "actual case where Texas prosecuted someone specifically for delivery of cocaine position isomers." *Id.* (citing *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc)).

The court then rejected the three judgments of conviction that Mr. Zuniga-Ayala had provided as examples of "actual case[s]." *See* Pet. App. 6a-8a. The court held that these judgments of conviction fell short because they did not "on [their] own, indicate that those defendants were *prosecuted* for possessing position isomers" (as opposed to being convicted and incarcerated for doing so). *Id.* 7a (emphasis in original).

The Fifth Circuit conceded that "Texas simply does not charge cocaine offenses in that manner;" rather, Texas charges cocaine offenses by referring to the statute number alone. *See* Pet. App. 7a n.1. But the court nonetheless insisted on "evidence, such as charging documents" to prove prosecutions. *Id.* 7a.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's decision in this case further entrenches an already acknowledged split among the circuits over how the categorical approach applies. Unlike eight other courts of appeals, the Fifth Circuit

requires noncitizens to produce "actual cases" where states prosecuted individuals for conduct the federal comparator does not cover. And in adopting a particularly extreme version of the "actual case" requirement—one that refuses to consider evidence that a state has actually punished individuals for conduct not prohibited by the federal comparator—the Fifth Circuit's rule misconstrues this Court's decisions in *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007), *Moncrieffe v. Holder*, 569 U.S. 184 (2013), *Mellouli v. Lynch*, 575 U.S. 798 (2015), and *United States v. Taylor*, 596 U.S. 845 (2022). This case offers an ideal vehicle for the Court to sort out this frequently recurring issue.

I. There is an acknowledged and deeply entrenched split over the question presented.

The courts of appeals are divided as to how the categorical approach works when the text of a state statute unquestionably goes beyond the federal comparator. Eight circuits hold in that circumstance (by two separate routes) that the noncitizen is not deportable. A noncitizen is not required to show any additional "realistic probability" that the state "would apply its statute to conduct that falls outside" the federal law, *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). That requirement to point to an "actual case" applies only when the scope of the state statute is unclear.

The Fifth Circuit stands apart. It requires, in every case, that the noncitizen show an actual case where the state statute was applied to conduct beyond the federal comparator. And the noncitizen can do so only by providing charging documents or a citable

state-court decision involving conduct lying outside the federal comparator. An actual judgment of conviction for conduct outside the scope of federal law is not enough.

1. The First, Second, Third, Fourth, and Seventh Circuits take the position that when a state statute is broader on its face than its federal comparator, the Government has not met its burden of showing that a conviction under the state statute subjects a noncitizen to removal. These circuits end their inquiry there.

In the First Circuit, this approach was first articulated in *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017). There, the court held that *Duenas-Alvarez*'s actual case requirement was "inapplicable" when "'[t]he state crime at issue clearly does apply more broadly than the federally defined offense.'" *United States v. Burghardt*, 939 F.3d 397, 408 (1st Cir. 2019) (quoting *Swaby*, 847 F.3d at 66). Because the Rhode Island drug schedules at issue in *Swaby* covered at least one drug not on the federal schedules, conviction under the Rhode Island drug statute was "simply too broad to qualify as a predicate offense under the categorical approach, whether or not there is a realistic probability that the state actually will prosecute offenses involving that particular drug." *Id.* at 409 (quoting *Swaby*, 847 F.3d at 66); *see also Portillo v. DHS*, 69 F.4th 25, 35 (1st Cir. 2023) (applying *Swaby*); *DaGraca v. Garland*, 23 F.4th 106, 113-14 (1st Cir. 2023) (same).

The Second Circuit has taken a similar position. It holds that "[t]he realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the definition of the

corresponding federal offense." *Hylton v. Sessions,* 897 F.3d 57, 63 (2d. Cir. 2018); *see also Jack v. Barr*, 966 F.3d 95, 98 (2d Cir. 2020); *Giron-Molina v. Garland*, 86 F.4th 515, 520 (2d Cir. 2023).

The Third, Fourth, and Seventh Circuits similarly have declared that there is no need for a realistic probability inquiry if the text of the state statute is concededly broader. The Third Circuit in *Liao v. Attorney General*, 910 F.3d 714 (3d Cir. 2018), reasoned that "the elements" in the challenged state statute "leave nothing to the 'legal imagination,' because they show that one statute captures conduct outside of the other," and therefore it is unnecessary to apply the realistic probability test. *Id.* at 724 (quoting *Duenas-Alvarez*, 549 U.S. at 193). The Fourth Circuit articulated its approach in *Gordon v. Barr*, 965 F.3d 252 (4th Cir. 2020), holding 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 no further steps are required. *Id.* at 260. Finally, the Seventh Circuit, in *Aguirre-Zuniga v. Garland*, 37 F.4th 446 (7th Cir. 2022), explained that "[i]f the statute is overbroad on its face under the categorical approach, the inquiry ends." *Id.* at 450.

2. Three other circuits—the Eighth, Ninth, and Eleventh—hold that a noncitizen must always meet *Duenas-Alvarez*'s requirement that he show a "realistic probability." But they then hold that when the state statute's language is unambiguously broader than the federal crime, this showing fully resolves the issue. The noncitizen need not also point to a specific actual case where the "the state court[] in fact did

apply the statute" to the uncovered conduct, *Duenas-Alvarez*, 549 U.S at 193.

The Eighth Circuit so held in *Gonzalez v. Wilkinson*, 990 F.3d 654 (8th Cir. 2021). In that case, the parties agreed that the state statute of conviction "on its face" was overbroad because it "cover[ed] conduct that the federal one [did] not." *Id.* at 658. The court therefore rejected the Government's insistence that the noncitizen had also to "prove through specific convictions that unambiguous laws really mean what they say." *Id.* at 660. Because the state statute at issue was "unambiguously broader" than the federal comparator, that was "all that Gonzalez was required to show under the categorical approach." *Id.* at 661.

Similarly, the Ninth Circuit has held that one way to "show 'a realistic probability'" is to show that the "state statute expressly defines a crime more broadly" than its federal comparator. *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020). Under that circumstance, "there is not a categorical match." *Id.* In *Lopez-Aguilar*, the Oregon robbery statute's "greater breadth [was] evident from its text." *Id.* (quoting *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc)). Thus, it could not qualify as a predicate offense.

Finally, the Eleventh Circuit has held that "a petitioner may demonstrate that 'statutory language itself, rather than the application of legal imagination to that language, creates [a] realistic probability that a state would apply the statute to conduct beyond' the reach of a federal statute." *Aspilaire v. U.S. Att'y Gen.*, 992 F.3d 1248, 1255 (11th Cir. 2021) (quoting *Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013)); *see also Simpson v. U.S. Att'y Gen.,* 7 F.4th

1046, 1052-53 (11th Cir. 2021) (applying *Aspilaire*); *Said v. U.S. Att'y Gen.*, 28 F.4th 1328, 1331-33 (11th Cir. 2022) (taking similar position).

In these eight circuits, Mr. Zuniga-Ayala's conviction under the Texas Controlled Substances Act would not have qualified as a predicate offense for deportation. As the BIA recognized, and the Fifth Circuit confirmed, the Texas statute is "not a categorical match to its federal counterpart," Pet. App. 13a, because "Texas law on its face defines cocaine more broadly than federal law," *id.* 5a. In eight circuits, then, Mr. Zuniga-Ayala wouldn't have had to prove anything else to avoid deportation.

3. By contrast the Fifth Circuit has held that "[t]here is no exception to the actual case requirement articulated in *Duenas-Alvarez*." *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc). And for an individual "to successfully argue that a state statute" does not constitute a categorical match, he "must provide actual cases where state courts have applied the statute in that way." *Id.*; *see Vazquez v. Sessions*, 885 F.3d 862, 873-74 (5th Cir. 2018) (confirming this rule applies to "immigration cases involving controlled substances").

In the Fifth Circuit an "actual case" means one that was "actually prosecuted" for—by which it means actually and specifically charged with—conduct lying outside the federal comparator. *See* Pet. App. 7a. Even proof that individuals have been convicted, and sentenced to incarceration, for conduct beyond the federal or generic comparator is not enough. Instead, only "evidence, such as charging documents," will suffice. *Id.*; *see also United States v. Kerstetter*, 82 F.4th 437, 441 (5th Cir. 2023). Judgments of conviction

are insufficient. *See* Pet. App. 6a-7a (rejecting three certified judgments of conviction that resulted in individuals being incarcerated for conduct outside the federal equivalent).

And when it comes to how to prove the existence of "actual cases," the Fifth Circuit's rule conflicts with the position of the Second and Ninth Circuits. In situations where those circuits require showing an actual case (because it is unclear from the text whether the state statute criminalizes conduct beyond its federal comparator), they do not insist on charging documents. Quite the contrary: In *Matthews v. Barr*, 927 F.3d 606 (2d Cir. 2019), the Second Circuit was faced with the question whether a conviction for endangering the welfare of a child under New York law was necessarily a "crime of child abuse, child neglect, or child abandonment" for purposes of removal. In contrast to the Fifth Circuit, the Second Circuit expressly "decline[d] to rely upon charging documents" in favor of looking to "guilty pleas" to see whether the conduct for which individuals are actually convicted lies beyond federal law. *See id.* at 622-23. And in *United States v. Salgado-Urias*, 541 Fed. Appx. 736 (9th Cir. 2013), the Ninth Circuit declared documents such as a "plea colloquy" can be used to show that a state statute "applied to 'conduct outside the generic definition'" of a removable crime. *Id.* at 737 (citation omitted).

4. Circuits on both sides have acknowledged the conflict. For example, the Second Circuit cited decisions from the First, Third, Fourth, Ninth, and Eleventh Circuits as consistent with its approach and stated that the Fifth Circuit's approach has been met with "consistent judicial hostility" in other circuits.

Hylton, 897 F.3d at 63-65 & 65 n.4. For its part, the Fifth Circuit acknowledged that "[o]ther circuits have held that a statute's plain meaning is dispositive." *Vasquez*, 885 F.3d at 873. But it nonetheless insisted that "'a defendant must point to an actual state case applying a state statute in a nongeneric manner'" regardless of the text of the statute. *Id.* at 874 (citation omitted).[2]

The time for percolation has passed. There are conflicting en banc decisions on the question whether manifest overbreadth is enough to disqualify a state statute from serving as a predicate offense. So the conflict will not resolve without this Court's intervention.[3]

II. The question presented is frequently recurring and warrants this Court's attention.

1. The question presented is frequently raised in immigration cases.

Thousands of noncitizens are deported each year as a result of state-law convictions. *Cf.* U.S. Immigr. Customs Enf't, *Fiscal Year 2023 ICE Annual Report*

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[2] Similarly, the Board of Immigration Appeals recognizes that "some circuit courts have looked only to a State statute if they found that its language was plain and clearly reached conduct outside the generic definition." *In re Navarro Guadarrama*, 27 I. & N. Dec. 560, 565 (BIA 2019). Nonetheless, following Fifth Circuit precedent, it insisted that Mr. Zuniga-Ayala needed to provide "charging documents, documents from a prosecutor, or findings by a court." Pet. App. 15a.

[3] The Third Circuit recently granted *en banc* review to consider whether to "revisit" its position. Order at 1, *Ndungu v. Att'y Gen.*, No. 20-2562 (June 24, 2024). Regardless what the Third Circuit does, the conflict among the circuits will remain.

27 fig. 21 (2023), https://perma.cc/46V2-AD4D (reporting 57,021 criminal removals in 2023). Many of these deportations rest on drug convictions. So not surprisingly, a considerable number of cases within the split involve drug offenses. *See, e.g.*, *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017); *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018); *Aguirre-Zuniga v. Garland*, 37 F.4th 446 (7th Cir. 2022).

Moreover, a wide range of other state convictions potentially serve as a predicate offense to deportation, including crimes of "moral turpitude," "[a]ggravated felon[ies]," and "firearm offenses," 8 U.S.C. § 1227(a)(2)(A)(i), (iii), (C)—each of them terms where state law and the federal comparator might diverge. *Cf. Pereida v. Wilkinson*, 592 U.S. 224, 233-35 (2021). The question presented is thus consequential far beyond the drug context. And across the country, courts, the BIA, and DHS are frequently making determinations of whether a state statute matches its federal equivalent.

2. Moreover, the split here implicates a crucial attribute of our immigration system: uniformity. Congress has repeatedly emphasized the importance of creating and maintaining a "comprehensive and unified system" of laws governing noncitizens. *Arizona v. United States*, 567 U.S. 387, 401 (2012); *see also* Immigration Reform and Control Act of 1986, Pub. L. No. 99–603, § 115(1), 100 Stat. 3359, 3384 ("[T]he immigration laws of the United States should be enforced vigorously and uniformly."). This uniformity is lost when noncitizens facing deportation proceedings have different outcomes depending on where they are detained.

The lack of uniformity is particularly troubling because the law governing removal proceedings for a noncitizen who has been detained is the law of the circuit in which he is currently detained—not the law of the circuit where he lived or was convicted. *See* 8 U.S.C. § 1252(b)(2). Once DHS detains a noncitizen, it has practically unlimited authority to transfer him between detention centers. *See* 8 U.S.C. § 1231(g)(1); *Van Dinh v. Reno*, 197 F.3d 427, 433 (10th Cir. 1999) ("The Attorney General's discretionary power to transfer aliens from one locale to another, as she deems appropriate, arises from [8 U.S.C. § 1231(g)(1)'s] language."). Thus, the Government can transfer noncitizen detainees into circuits where there is more "favorable substantive law" for the Government. Roger C. Grantham, Jr., *Detainee Transfers and Immigration Judges: ICE Forum-Shopping Tactics in Removal Proceedings*, 53 Ga. L. Rev. 281, 303 (2018).

Several hundred thousand immigration detainees are transferred to a different detention facility each year. *See* Transaction Recs. Access Clearinghouse, *New Data on 637 Detention Facilities Used by ICE in FY 2015* (2016), https://perma.cc/8PEC-DUJD (374,059 in 2015). In 2015, 29 percent of inmates experienced at least one intercircuit transfer. Emily Ryo & Ian Peacock, Am. Immigr. Council, *The Landscape of Immigration Detention in the United States* 19 (2018). And transfers that implicate the circuit split here are not hypothetical. Alison Parker, Hum. Rts. Watch, *A Costly Move: Far and Frequent Transfers Impede Hearings for Immigrant Detainees in the United States* 13 (2011), https://perma.cc/BSP9-UFA8 (describing "[a] detainee who was transferred

1,400 miles away to a detention facility in Texas after a few weeks in a detention center in southern California").

Consider a noncitizen convicted of possessing cocaine under a state statute that covers position isomers (like the ones in Texas, New York, or Missouri, to name just a few). If he's detained within the Second or Eighth Circuits he will not be subject to removal: Those circuits have held that those state statutes as a matter of plain text do not satisfy the categorical approach. *See supra* pages 10-13; *United States v. Minter,* 80 F.4th 406, 412 & n.4 (2d. Cir. 2023) (stating that neither the New York nor the Texas statutes qualify as matches for the federal comparator); *United States v. Myers*, 56 F.4th 595, 598 (8th Cir. 2022) (Missouri statute). Conversely, if a noncitizen convicted in New York or Missouri is transferred to a detention facility within the Fifth Circuit, the plain text will not save him. He *will* be deportable unless he can provide a charging document showing actual prosecutions for possession of a position isomer of cocaine—a near insurmountable burden, particularly for an uncounseled noncitizen detained hundreds of miles from where he lived.

3. The question presented also has implications beyond the immigration context. The categorical approach applies to a broad swath of statutes, and courts have split over this question in Armed Career Criminal Act (ACCA) and Sentencing Guidelines cases, as well.

a. Begin with the divide in ACCA: The Ninth Circuit held en banc that a state burglary conviction does not qualify as a "burglary" predicate under ACCA when "[t]he state statute's greater breadth is evident

from its text." *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc). The Tenth Circuit, among many others, agrees with the Ninth. *See United States v. Titties*, 852 F.3d 1257, 1274-75 (10th Cir. 2017) ("The [*Mathis*] Court did not seek or require instances of actual prosecutions for the means that did not satisfy the ACCA. The disparity between the statute and the ACCA was enough.").

But the Fifth Circuit applies the same "actual case" rule to ACCA cases that it applies to immigration cases. A defendant must "point to 'cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues.'" *United States v. Herrold*, 941 F.3d 173, 178-80 (5th Cir. 2019) (en banc) (quoting *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc)). This requirement is unavoidable, "even where the state statute may be plausibly interpreted as broader on its face." *Id.* at 179 (quoting *Castillo-Rivera*, 853 F.3d at 224 n.4).

b. The same split runs to Sentencing Guidelines cases. *Compare United States v. Brown*, 879 F.3d 1043, 1050 (9th Cir. 2018) (no case needed because "Washington conspiracy is explicitly more broad than the generic federal definition"), *with United States v. Castillo-Rivera*, 853 F.3d at 222 (5th Cir. 2017) (defendant "must also show that Texas courts have *actually applied*" the state statute to nongeneric conduct).

c. For its part, although the Eighth Circuit is aligned with the majority rule in immigration cases, that circuit has occasionally demanded an "actual case" showing elsewhere. *Compare United States v. Myers*, 56 F.4th at 598-99 ("Because Missouri's

definition of cocaine included positional isomers while the federal definition does not, the Missouri definition is unambiguously broader than its federal counterpart" and does not count for ACCA), *with United States v. Hutchinson*, 27 F.4th 1323, 1327 (8th Cir. 2022) (in the ACCA context, "[t]he cases relied on by Hutchinson do not meet [the realistic probability] standard"), *and United States v. Bragg*, 44 F.4th 1067, 1076 (8th Cir. 2022) ("We have not applied [facial overbreadth] in an ACCA or career offender force clause case and decline to do so here.").

III. This case provides an excellent vehicle for resolving the question presented.

1. This case is an ideal vehicle for three reasons.

First, as the Fifth Circuit expressly acknowledged, the state statute at issue here is undeniably broader than the federal comparator. The court below recognized that Texas Health & Safety Code § 481 "defines cocaine more broadly than federal law because it includes position isomers." Pet. App. 5a; *see Alexis v. Barr*, 960 F.3d 722, 726 (5th Cir.), *cert. denied*, 141 S. Ct. 845 (2020) (same). The Government agrees. *See* Pet. App. 13a. Consequently, there is no need for this Court to engage in a detailed statutory analysis. Nor is there any risk that the Court would be unable to reach the question presented because it might conclude that the statutes are a categorical match. The question whether facial overbreadth can prove a categorical mismatch is cleanly teed up by this case.

Second, the question presented has been properly raised and passed upon below. Mr. Zuniga-Ayala argued that the BIA had erred in two respects: First,

he argued that the realistic probability analysis does not apply because the Texas statute is facially overbroad. Petr. C.A. Br. 21-22, *Zuniga-Ayala v. Garland*, No. 23-60118, 2024 WL 1507854 (5th Cir. Apr. 8, 2024). Second, he argued that even if an actual case were required, he had made that showing through three actual criminal judgments. *Id.* at 11. The Fifth Circuit acknowledged and rejected both arguments. Pet. App. 4a-8a.

Third, the question presented is outcome determinative for Mr. Zuniga-Ayala's removal proceeding. Mr. Zuniga-Ayala was ordered removed based solely on one conviction: for violation of Section 481.112(b). Pet. App. 2a. There are no other grounds for his removal.

2. By contrast, previous petitions raising the question presented suffered from a litany of procedural defects that could have kept this Court from resolving the issue.

a. Many petitions arose from cases where there was not a clear and acknowledged overbreadth in the state statute. BIO at 16, *Herrold v. United States*, 141 S. Ct. 273 (2020) (No. 19-7731) (court below did not find the text to be plainly overbroad, but instead "followed an authoritative interpretation of the Texas burglary statute by the State's highest criminal court"); BIO at 8, *Young v. United States*, 139 S. Ct. 53 (2018) (No. 17-7335) ("This case does not implicate the methodological question raised by petitioner, because the state statute's 'plain language' is not 'categorically broader' than the federal definition" (citation omitted)).

In these cases, the courts below never even reached the question whether facial overbreadth disqualifies a state crime as a predicate offense. And for petitions coming from outside the Fifth Circuit, this omission is damning. *Cf.* BIO at 14, 16-17, *Vega-Ortiz v. United States*, 139 S. Ct. 66 (2018) (No. 17-8527) (court below "rejected petitioner's argument because it determined that the California statute was not overbroad"; had he shown overbreadth, he would have won).

Indeed, several petitions all involved the same Florida statute that the Eleventh Circuit expressly held was not overbroad in *United States v. Vail-Bailon*, 868 F.3d 1293 (11th Cir. 2017) (en banc). *See* Pet. at 4, *Vail-Bailon v. United* States, 584 U.S. 1034 (2018) (No. 17-7151); Pet. at 3-4, 9, *Eady v. United States*, 140 S. Ct. 500 (2019) (No. 18-9424); Pet. at 3-5, *Frederick v. United States*, 139 S. Ct. 1618 (2019) (No. 18-6870); Pet. at 9, *Lewis v. United States*, 139 S. Ct. 1256 (2019) (No. 17-9097); Pet. at 4-6, *Gathers v. United States*, 584 U.S. 1034 (2018) (No. 17-7694); Pet. at 6-8, *Green v. United States*, 584 U.S. 1034 (2018) (No. 17-7299); Pet. at 3-5, *Robinson v. United States*, 584 U.S. 1034 (2018) (No. 17-7188). This Court would have had to reverse the holding of *Vail-Bailon* before reaching the question presented in any of these petitions.

b. Still other petitions arose from cases where the question presented had not actually been raised or passed upon below. *See* BIO at 19-20, *Rodriguez Vazquez v. Sessions*, 138 S. Ct. 2697 (2018) (No. 17-1304) ("[P]etitioner failed to exhaust the overbreadth claim presented here" before the BIA); BIO at 22, *Alexis v. Barr*, 141 S. Ct. 845 (2020) (No. 20-11)

("[P]etitioner did not contend before the Board that the realistic probability test does not apply and the Board did not pass on that question.").

c. Yet a third set of petitions arose from cases where the question presented was not ultimately outcome determinative. Some of these petitioners had a change of status that rendered their case moot. BIO at 16, *Young*, 139 S. Ct. 53 (2018) (No. 17-7335) ("[P]etitioner's release from prison presents a substantial mootness question."); BIO at 9, *Vail-Bailon*, 584 U.S. 1034 (2018) (No. 17-7151) ("This case is moot because petitioner's 37-month term of imprisonment has already expired.")

Others had additional grounds for removability. *E.g.*, BIO at 13, *Espinoza-Bazaldua v. United States*, 584 U.S. 1034 (2018) (No. 17-7490) ("[E]ven if petitioner were correct that portions of Indiana's dealing-in-marijuana statute are overbroad, his prior conviction would still qualify as a drug trafficking offense.").

3. In short, although the question presented arises frequently, there has yet to be an ideal vehicle to resolve it. This case is that vehicle.[4]

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[4] There is a petition for certiorari pending in *Kerstetter v. United States*, No. 23-7478 (filed May 10, 2024). The Court may wish to consider granting both that petition and Mr. Zuniga-Ayala's. *Kerstetter* raises the additional question whether the Sixth Amendment requires a jury to find the extra facts necessary to impose an ACCA sentence on the basis of a state conviction. Pet. at i, *Kerstetter*, No. 23-7478 (filed May 10, 2024). Like Mr. Zuinga-Ayala, Mr. Kerstetter offered judgments of conviction as evidence of a categorical mismatch. The Fifth Circuit rejected

IV. The Fifth Circuit's rule is wrong.

Once the Fifth Circuit correctly acknowledged that the text of the Texas statute under which Mr. Zuniga-Ayala was convicted covered conduct beyond that criminalized by the federal Controlled Substances Act, its inquiry should have ended. The Fifth Circuit should have held that Mr. Zuniga-Ayala's state conviction could not justify his removal. Instead, the Fifth Circuit improperly required him to produce an "actual case" to prove the text of the state statute meant what it said.

The Fifth Circuit compounded that legal error by then limiting the acceptable proof of an "actual case" to citable judicial opinions or charging documents—despite the fact that Mr. Zuniga-Ayala showed that Texas is actually *punishing* individuals with imprisonment for conduct involving position isomers. *See* Pet. App. 6a-7a; ROA.23-60118.30-70 (providing copies of the three judgments of conviction based on possession of cocaine position isomers). In doing so, the Fifth Circuit stood the categorical approach on its head, elevating the charging verbiage chosen by

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them on the grounds that they were not on-point because they pertained to possession, not delivery. *Id.* at 14-15.

There is also a petition for certiorari pending in *Alejos-Perez v. Garland*, No. 23-1325 (filed June 17, 2024). In that case, there are potentially other bases for removal unrelated to the Texas Controlled Substance Act. Pet. at 9 n.2, *Alejos-Perez*, No. 23-1325 (filed June 17, 2024); *see also Alejos-Perez v. Garland*, 991 F.3d 642, 652 (5th Cir. 2021). And if the Court determines that it needs to address the realistic probability standard to resolve the question presented, there are questions of exhaustion and forfeiture that the Court might need to resolve first. *See Alejos-Perez v. Garland*, 93 F.4th 800, 805-07 (5th Cir. 2024).

individual county prosecutors over the statutory language enacted by the state legislature.

1. The Government bears the burden of establishing that a state conviction can serve as a categorical match to some federal comparator statute. It has failed to do so here.

Under the categorical approach, whether a noncitizen is subject to removal depends on the statute of his conviction rather than his individual conduct. If the legal reach of the state statute is broader on its face than federal law, then there is no categorical match and no predicate offense for deportation. No additional factual inquiry is either needed or necessary.

This Court's precedents confirm that once the Fifth Circuit correctly acknowledged that Section 481.112(b) is broader on its face than 21 U.S.C. § 802, Pet. App. 5a, it should have ruled for Mr. Zuniga-Ayala. In case after case where there was undeniable overbreadth, this Court has held that the state offense was simply not a categorical match.

Consider *Mellouli v. Lynch,* 575 U.S. 798 (2015). The Court's analysis of the relative reach of the federal Controlled Substances Act and a Kansas drug paraphernalia statute relies entirely on textual comparison; nowhere is "realistic probability" mentioned or an "actual case" cited. Notably, the Court never asked whether anyone in Kansas had actually been prosecuted for offenses related to salvia or jimson weed—substances that, the Court explained, made Kansas's schedule of controlled substances broader than the corresponding federal schedule, *id.* at 808. Rather, "construction of § 1227(a)(2)(B)(i) must be

faithful to the text, which limits the meaning of 'controlled substance,' for removal purposes, to the substances controlled under § 802." 575 U.S. at 813. Because Kansas law made it "immaterial" whether a substance prohibited by state law also "was defined in 21 U.S.C § 802" as a prohibited substance, the INA "did not authorize Mellouli's removal." *Id.* at 801 (emphasis omitted).

The Court's ACCA jurisprudence has also recognized that a state statute broader on its face than the generic offense cannot serve as a predicate offense. Most recently, in *Brown v. United States*, 144 S. Ct. 1195 (2024), the Court stated that when state law criminalizes a particular "cocaine derivative" but federal law does not, the state and federal definitions are not "a categorical match"—no additional showing required. *Id.* at 1202. It follows inexorably from *Brown* that when Texas law criminalizes "position isomers" of cocaine but federal law does not, the state and federal definitions are likewise not "a categorical match," *id.*

So, too, in *United States v. Taylor*, 596 U.S. 845 (2022), this Court held that when the plain language of a statute is broader than its federal comparator, "that much is enough to resolve" the case. *Id.* at 851. Under those circumstances, the Court thought it unnecessary for an individual litigant to "present empirical evidence about the government's own prosecutorial habits." *Id.* at 857. Only when "the

elements of the relevant state and federal offenses clearly overlap[]" is that inquiry relevant. *Id.* at 859.[5]

In short, this case is straightforward: "Texas law on its face defines cocaine more broadly than federal law." Pet. App. 5a. That determination, standing alone, is enough to defeat removal and require reversal of the Fifth Circuit's judgment here.

2. To be sure, there is a narrow class of cases where an additional inquiry comes into play and the noncitizen cannot rest on statutory language alone. When the mismatch between state and federal law turns on judicial construction of unclear terms, the noncitizen must demonstrate a "realistic probability" that the state criminalizes conduct not criminalized by the federal comparator. In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), the Court introduced this requirement in response to a noncitizen who asserted by way of hypotheticals that a state aiding-and-abetting statute might extend to actions outside the generic federal definition of theft. *Id.* at 191-94. The Court rejected the hypotheticals, stating that "the application of legal imagination to a state statute's language" was insufficient to render the statute a mismatch under the categorical approach. *Id.* at 193. Instead of perhaps far-fetched hypotheticals that resolve the ambiguity in a way favorable to the

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[5] The Fifth Circuit has already announced that it thinks *Taylor* has no bearing on its realistic probability analysis. In response to Mr. Zuniga-Ayala's argument that *Taylor* "foreclose[s] the actual case requirement," the Fifth Circuit declared that it had "rejected that argument already, most recently in *United States v. Kerstetter*, 82 F.4th 437, 441 (5th Cir. 2023)." Pet. App. 5a. So there is no need for further percolation.

noncitizen, the noncitizen needed to point to some real-world case to demonstrate a "realistic probability" that the statute in question would apply to non-generic conduct. *Id.*

Duenas-Alvarez has no purchase in cases such as this one where the Government concedes that the state statute plainly criminalizes conduct outside the ambit of the federal comparator. When statutory language itself unquestionably establishes a mismatch, there is no need to look to actual cases to discern the scope of state law.[6]

In *Moncrieffe v. Holder*, 569 U.S. 184 (2013), this Court elaborated on the "realistic probability" standard. The question in *Moncrieffe* was whether the conduct covered by a Georgia statute criminalizing possession of marijuana with intent to distribute was

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[6] That being said, some circuits recognize that a textually overbroad state statute can still provide a categorical match when the overbreadth hinges on "factual[ly] impossible" conduct. *See United States v. Rodriguez-Gamboa*, 972 F.3d 1148, 1152, 1155 (9th Cir. 2020) (explaining that "a state statute criminalizing possession of dangerous animals, defined to include dragons," which do not exist, as well as other conduct could still serve as a predicate offense for a federal statute criminalizing the other conduct but omitting dragons); *see also United States v. Turner*, 47 F.4th 509, 524 (7th Cir. 2022); *Chamu v. U.S. Att'y Gen.*, 23 F.4th 1325, 1332-33 (11th Cir. 2022). In that line of cases, the Government proved the overbroad conduct was impossible. *See, e.g.*, *Rodriguez-Gamboa*, 972 F.3d at 1151.

In contrast to dragons, position isomers of cocaine (possession or distribution of which Texas criminalizes, but federal law does not) "*do* chemically exist and [have been] known to exist" since the mid-1970s. *United States v. Holmes*, 2022 WL 1036631, at *8 (E.D.N.Y. Apr. 6, 2022). The Government never contended to the contrary.

"'necessarily' conduct punishable as a felony" under the federal Controlled Substances Act. *Id.* at 192. This Court held that it was not, because conviction under the Georgia statute would "not reveal whether either remuneration or more than a small amount of marijuana was involved"—both elements of the federal comparator. *Id.* at 194. There was therefore no categorical match.

But in arguing against that conclusion, the Government suggested that refusing to find a categorical match could "frustrate" the enforcement of aggravated felony provisions relating to firearms offenses. *Moncrieffe*, 569 U.S. at 205. The federal firearms statute contained an affirmative defense for "antique firearms." *Id.* at 205-06. The Government raised the specter that ruling for Moncrieffe could result in state firearms-related statutes no longer qualifying as predicate offenses unless they too contained a carveout. In response to the Government's hypothetical, the Court suggested that noncitizens seeking to disqualify a state statute "in this manner" (i.e., for failure to include an affirmative defense) would have to show some state prosecutions actually "involving antique firearms." *Id.* at 206. Once again, that is a far cry from cases such as Mr. Zuniga-Ayala's—where the federal and state statutes plainly diverge.

This analysis confirms that the "realistic probability" standard is nothing more than a supplemental tool that addresses hypotheticals like the one the noncitizen offered in *Duenas-Alvarez* and the Government offered in *Moncrieffe.* Actual cases can be helpful in determining whether a state statute qualifies as a predicate offense when there is some

doubt as to whether the state statute is in fact broader than its federal comparator. But that inquiry is unnecessary when the plain text establishes the overbreadth.[7]

3. The Fifth Circuit has improperly transformed *Duenas-Alvarez's* inquiry into the existence of actual cases from a supplemental tool in cases of statutory ambiguity into an ironclad default rule. And it has compounded that error by making the text of the state statute largely irrelevant and replacing it with an indefensible version of an "actual case" requirement that focuses not on the *results* of cases—conviction and punishment—but solely on preliminary "charging documents."

As this petition has already explained, noncitizens are not required to provide evidence of actual cases when a state statute is broader on its face than its federal counterpart. *See supra* pages 24-27. But even if a noncitizen were required to provide an actual case to show that a facially overbroad statute means what it says, an actual conviction for conduct beyond the scope of the federal comparator should suffice because

[7] In the event, it turned out that California actually did prosecute antique gun-related crimes. *See United States v. Aguilera-Rios*, 769 F.3d 626, 635 (9th Cir. 2014) (citing published decisions affirming convictions involving a "'family heirloom' replica single-shot muzzle-loading rifle incapable of using modern ammunition," "an 'antique cowboy-style gun,'" and "black powder, muzzle-loading firearms"). Thus, "[u]nder the express language of *Moncrieffe*, the 'categorical comparison' is therefore 'defeat[ed]'" with respect to the statutes involved in those convictions. *Id.* (quoting *Moncrieffe*, 569 U.S. at 206); *see Medina-Lara v. Holder*, 771 F.3d 1106, 1117 (9th Cir. 2014) (holding that one of those California statutes could not serve as a predicate for deportation).

an actual conviction is the prerequisite for criminal punishment. The Fifth Circuit's current rule unjustifiably limits acceptable evidence to charging documents. That cannot be right. If it were, a noncitizen who pleaded guilty to distribution of position isomers—and was consequently imprisoned for distribution of position isomers—would be eligible for deportation: His time in prison would somehow not constitute an "actual case" because the charging documents would not have specified the form of cocaine that he was convicted of possessing. (Recall that the Fifth Circuit acknowledged that Texas charging documents normally do not contain that information. Pet. App. 7a n.1.) And as this Court recently explained in *Erlinger v. United States*, 144 S. Ct. 1840 (2024), state-court documents may contain incomplete or inaccurate information regarding issues relevant to a subsequent federal proceeding because the issue "might not have mattered a bit to [the defendant's] guilt or innocence" under state law. *Id.* at 1856.

The Fifth Circuit's draconian actual prosecution rule abandons the legal inquiry of the categorical approach in exchange for a "Catch-22" factual inquiry. *Alexis v. Barr*, 960 F.3d 722, 729 (5th Cir. 2020) (acknowledging the perverse consequences of the Fifth Circuit rule). This approach risks the same "practical difficulties and potential unfairness" that the categorical approach seeks to avoid. *Taylor v. United States*, 495 U.S. 575, 601 (1990). As a threshold matter, "most cases end in plea agreements." *United States v. Taylor*, 596 U.S. at 857. Excluding those cases from the "actual case" inquiry discards the vast

majority of applications of state law to criminal conduct.

Requiring noncitizens to produce charging documents from other individuals' cases is both impractical and unfair. Impractical because such a requirement demands a needle-in-a-haystack search through noncommercial databases or courthouse records to find a matching indictment. *See United States v. Taylor*, 596 U.S. at 857 (pointing to "the practical challenges such a burden would present in a world where most cases end in plea agreements, and not all of those cases make their way into easily accessible commercial databases"). Unfair because, as the Fifth Circuit itself acknowledges, "Texas simply does not charge cocaine offenses in [a] manner" that specifies the precise version of the substance for which the defendant is being charged, Pet. App. 7a n.1. The Fifth Circuit erroneously demands a noncitizen squeeze blood from a stone.

Even on its own terms, the Fifth Circuit's charging documents requirement cannot be defended. An actual conviction is far better evidence of whether a state law *punishes* conduct outside the federal equivalent. Charging documents, by contrast, merely reflect one prosecutor's belief (perhaps overly optimistic) of what state law covers. *See Matthews v Barr*, 927 F.3d 606, 622-23 (2d Cir. 2019).

The three plea agreements embodied in judgments of conviction that Mr. Zuniga-Ayala cited reflect the actual state of the law, given that 96 percent of convictions in Texas result from guilty pleas. Off. of Ct. Admin., Tex. Jud. Branch, *Annual Statistical Report for the Texas Judiciary: Fiscal Year 2021*, at 59 (2021), https://perma.cc/RZ66-9A7G; *cf.*

Missouri v. Frye, 566 U.S. 134, 143 (2012) (94 percent of state convictions are the result of guilty pleas).

Mr. Zuniga-Ayala's case also shows why it is deeply unfair to require noncitizens to produce that kind of documentation. Even in cases where criminal defendants were to go to trial for possession of a cocaine position isomer, there is no reason to believe these trials would produce citable decisions or other documents that would satisfy the Fifth Circuit. Cases where the defendant is acquitted (on grounds unrelated to the composition of the substance—for example because of a lack of mens rea) or where the defendant is convicted but does not appeal will almost certainly produce no citable decision. Indeed, even if there were an appeal, any citable decision might not mention the precise chemical structure of the controlled substance at issue. Unless the issue on appeal is the composition of the drugs for which the defendant was prosecuted, there would be no reason for a published opinion to distinguish between position isomers and other forms of cocaine. *Cf. Erlinger*, 144 S. Ct. at 1856 (pointing out that available documents from a state prosecution might not focus on issues that are irrelevant at the time); *Mathis v. United States*, 579 U.S. 500, 512 (2016) (pointing out that "[s]tatements of 'non-elemental fact'" can be prone to error "precisely because their proof is unnecessary" in the prior proceeding). For example, a drug possession prosecution where the defendant on appeal challenges the propriety of the search rather than the nature of the drug is unlikely to specify whether the cocaine at issue was a salt, a position isomer, or something else.

4. The Fifth Circuit's refusal to look at plea documents in cases where a noncitizen provides them

fares no better under this Court's precedent, which in a related set of categorical rule cases already looks to "plea colloquies and plea agreements." *Mathis*, 579 U.S. at 518 n.7.

These cases arise under the so-called modified categorical approach that governs "divisible" state statutes. Sometimes, a state statute lists multiple discrete offenses, only some of which fall within the federal equivalent. In these cases, to apply the categorical approach, a decisionmaker must first determine under which portion of the statute the noncitizen has been convicted: Only a conviction for the part of the statute that falls within the federal comparator can qualify. Under the modified categorical approach, courts look at an individual's conviction (in contrast to looking only at the statute itself). When the statute is divisible on its face, courts can look to a "charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented" to see whether his conduct falls within the federal generic. *Shepard v. United States*, 544 U.S. 13, 16 (2005). And when the text of the state law does not clearly indicate whether the statute is divisible, this Court has approved consideration of "indictments, jury instructions, plea colloquies, and plea agreements" to clarify the scope of a "state law [that] fails to provide clear answers." *Mathis*, 579 U.S. at 518 & n.7.[8]

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[8] To be clear: The Texas statute at issue here is not divisible as to different forms of cocaine. *See also United States v. Ruth*, 966 F.3d 642, 650 (7th Cir. 2020) (holding that when a state

It makes no sense that plea documents or judgments of conviction can serve as evidence in modified categorical approach cases but not as evidence of the nature of the offenses the state "actually prosecutes" in straight categorical approach cases. When it applies, the realistic probability test demands evidence "that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Duenas-Alvarez*, 549 U.S. at 193. A document that serves as evidence that a noncitizen was convicted—and punished—for a non-generic offense plainly constitutes evidence that the state statute applies to non-generic conduct. And, as the record demonstrates, Texas actually punishes cocaine position isomer-related conduct. *See* ROA. 23-60118.30-70 (judgments of conviction sentencing two defendants to seven months in county jail for cocaine position isomer possession and another defendant to one month's incarceration for cocaine position isomer possession).

Under any sensible test, the Texas statute under which Mr. Zuniga-Ayala was convicted does not qualify as a match for the federal generic and he should not have been ordered removed.

CONCLUSION

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

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statute defines cocaine overbroadly, a court's categorical "inquiry ends there" without asking which form of cocaine the defendant possessed).

Respectfully submitted,

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July 29, 2024

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23-60118

United States Court of Appeals Fifth Circuit
FILED
April 8, 2024
Lyle W. Cayce
Clerk

SABINO ZUNIGA-AYALA,

Petitioner,

versus

MERRICK GARLAND, *U.S. Attorney General*,

Respondent.

Appeal from the Board of Immigration Appeals
Agency No. A074 370 720

Before RICHMAN, *Chief Judge*, and GRAVES and WILSON, *Circuit Judges*.

PER CURIAM:*

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* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

An immigration judge found Sabino Zuniga-Ayala removable from the United States due to his Texas conviction for delivery of less than one gram of cocaine. The Board of Immigration Appeals dismissed Zuniga-Ayala's appeal. He now petitions this court for review of that dismissal, arguing that his conviction did not render him removable. We disagree and DENY his petition.

I. BACKGROUND

Zuniga-Ayala is a lawful permanent resident born in Mexico and admitted to the United States in 1996. In 2022, he was convicted of delivery of less than one gram of cocaine in violation of Texas Health & Safety Code § 481.112(b). Less than a month later, he was served a notice to appear for removal proceedings. The notice charged him with removability under 8 U.S.C. § 1227(a)(2)(B)(i), which requires removal of a lawfully admitted non-citizen who "has been convicted of a violation of . . . any law . . . of a State . . . relating to a controlled substance (as defined in [the federal Controlled Substances Act])[.]"

At Zuniga-Ayala's first removal hearing, he admitted to the conviction but argued that it did not subject him to removal because Texas criminalizes a broader range of cocaine-related offenses than corresponding federal law. The immigration judge ("IJ") found Zuniga-Ayala removable but granted him a month to apply for cancelation or for withholding of removal based on his overbreadth argument. At the next hearing, however, Zuniga-Ayala's attorney failed to present an application. The IJ rescheduled the hearing; again, Zuniga-Ayala failed to apply for relief. The IJ ordered Zuniga-Ayala removed from the United States.

Zuniga-Ayala appealed to the Board of Immigration Appeals ("BIA"). He again argued that "Texas' definition of cocaine is broader than the federal definition" because it includes position isomers of cocaine and the federal Controlled Substances Act does not. Thus, he argued, his conviction did not satisfy the criteria for removability under 8 U.S.C. § 1227(a)(2)(B)(i). To show that Texas actually prosecutes for possession/delivery of position isomers of cocaine, he submitted three sets of Texas criminal judgment documents. The documents pertained to defendants who were convicted under Texas law for possession of a controlled substance. Each set included the defendants' confessions, wherein each defendant confessed to having possessed position isomers.

Two of the three confessions concerned the same defendant and showed that the typed word "cocaine" had been crossed out and "cocaine position isomers" had been written in by hand. In the third confession, concerning a second defendant, the words "cocaine position isomers" were typed out; on a separate page titled "Admonishment," someone had handwritten: "[B]y accepting this plea, client may remain eligible to request relief if an attorney in immigration court argues that this offense is not a controlled substance offense."

The BIA construed Zuniga-Ayala's submission of the documents as a motion to remand to the IJ to present new evidence. The BIA declined to remand and dismissed Zuniga-Ayala's appeal. It concluded that the documents would not make a difference in Zuniga-Ayala's case because they did not demonstrate a realistic probability that Texas actually prosecutes for possession of position isomers.

Specifically, the BIA concluded, the evidence "does not show that Texas prosecuted three cases for possession of cocaine position isomers in 2019 and 2020, but rather the way the defendants chose to enter their guilty plea." Zuniga-Ayala petitioned our court for review.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction to review whether a petitioner's status makes him removable under 8 U.S.C. § 1227(a)(2)(B)(i). *Nehme v. INS*, 252 F.3d 415, 420 (5th Cir. 2001). We review such questions of law de novo. *Ponce v. Garland*, 70 F.4th 296, 299 (5th Cir. 2023).

III. DISCUSSION

a. The realistic probability standard

Zuniga-Ayala first challenges the standard applied in this circuit for determining whether a drug offense subjects the offender to removal under 8 U.S.C. § 1227(a)(2)(B)(i). As stated above, Section 1227(a)(2)(B)(i) requires the removal of a lawfully admitted person who "has been convicted of a violation of . . . any law . . . of a State . . . relating to a controlled substance (as defined in [the federal Controlled Substances Act])." To determine whether a state offense "relat[es] to" an offense under the Controlled Substances Act, we consider whether the state defines the offense in a way that is the same as federal law, or whether the state's definition is broader. *Alexis v. Barr*, 960 F.3d 722, 726 (5th Cir. 2020). Even if the state's definition is broader on its face, we then look to see whether there is a realistic probability that the state would actually prosecute

for the broader conduct—that is, conduct falling within the state law but outside the Controlled Substances Act. *Id.* To make that realistic probability showing, a petitioner must "point to his own case or other cases in which the state courts in fact did apply the statute in the [broader] manner." *Id.* at 727 (quoting *Vazquez v. Sessions*, 885 F.3d 862, 873 (5th Cir. 2018)).

We have already determined that Texas law on its face defines cocaine more broadly than federal law because it includes position isomers. *Id.* at 726. Thus, for Zuniga-Ayala to show that a Texas prosecution for delivery of cocaine is not an offense that subjects him to removal under Section 1227(a)(2)(B)(i), he must point to an actual case where Texas prosecuted someone specifically for delivery of cocaine position isomers.

First, however, he argues that this actual case requirement is not consistent with Supreme Court precedent. He argues that the Supreme Court has never required an actual case when a state statute on its face criminalizes more conduct than federal law.

To accept Zuniga-Ayala's argument would be to ignore binding circuit precedent, such as our en banc decision in *United States v. Castillo-Rivera*, where we emphasized that "[t]here is no exception to the actual case requirement . . . where a court concludes a state statute is broader on its face." 853 F.3d 218, 223 (5th Cir. 2017) (en banc). Zuniga-Ayala argues that the Supreme Court's recent decision in *United States v. Taylor*, 596 U.S. 845 (2022), foreclosed the actual case requirement, but we have rejected that argument already, most recently in *United States v. Kerstetter*, 82 F.4th 437, 441 (5th Cir. 2023). Our

rule of orderliness requires us to follow those decisions. *Burge v. Parish of St. Tammany*, 187 F.3d 452, 466 (5th Cir. 1999). Zuniga-Ayala must point to an actual Texas case involving position isomers.

b. Three confessions

Next, Zuniga-Ayala argues that he satisfied the actual case requirement before the BIA when he pointed to three criminal judgments involving defendants who confessed to possessing position isomers. The BIA rejected that argument because the confessions did not show that the defendants were prosecuted for possessing position isomers—only that the defendants admitted to doing so. We agree.

Kerstetter—a decision that postdated the parties' briefing in this case—lends support to the BIA's conclusion. There, the appellant challenged the district court's application of a sentencing enhancement, under the Armed Career Criminal Act ("ACCA"), that applies to prior convictions for "serious drug offense[s]." *Kerstetter*, 82 F.4th at 439. The appellant had a prior Texas conviction for delivering cocaine under Texas Health & Safety Code § 481.112(a). *Id.* at 441. Even though *Kerstetter* arose in the criminal context instead of the immigration context, the question of whether the appellant's conviction subjected him to the ACCA enhancement depended on whether, under the same realistic probability standard, the state offense of which he was convicted was broader than the analogous offense under the Controlled Substances Act. *Id.* at 440.

The appellant, the record in *Kerstetter* reveals, relied on two of the same sets of documents that Zuniga-Ayala relies on here to argue that there was a

realistic probability that Texas would prosecute a Section 481.112 offense based on position isomers. *Id.* at 441. We concluded that the appellant failed to satisfy the realistic probability standard because he "did not identify any actual cases *where Texas brought charges against someone* under Section 481.112(a) for delivery of position isomers of cocaine." *Id.* (emphasis added).

Here, Zuniga-Ayala's evidence only shows that Texas defendants have confessed to possessing position isomers. It does not, on its own, indicate that those defendants were *prosecuted* for possessing position isomers. Nor did Zuniga-Ayala provide any other evidence, such as charging documents, that would allow that conclusion.[1]

Zuniga-Ayala argues that cases such as *Monsonyem v. Garland* indicate that we would allow judicial confessions to satisfy the reasonable probability standard. 36 F.4th 639 (5th Cir. 2022). But *Monsonyem* is inapposite. When we looked at a confession in that case, which also concerned removability, we viewed it as one piece of evidence among others we used to determine whether a criminal statute was divisible into separate offenses. *Id.* at 644–45. Here, the inquiry is not whether Texas Health & Safety Code § 481.112(b) is divisible, but

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[1] Nor do we doubt that such evidence is difficult to come by. As we have explained, Texas simply does not charge cocaine offenses in that manner. *Alexis*, 960 F.3d at 728 ("[A] Texas 'indictment need only allege the name of the substance; it need not go further and describe the offense as a salt, isomer, or any other qualifying definition.'") (quoting MICHAEL B. CHARLTON, TEX. PRAC., TEXAS CRIMINAL LAW, *Controlled Substances* § 30.1 (2019)).

whether Texas actually prosecutes certain offenses that Section 481.112(b) ostensibly criminalizes.

In sum, Zuniga-Ayala failed to show that Texas "brought charges against someone . . . for delivery of position isomers of cocaine." *Kerstetter*, 82 F.4th at 441. The BIA did not err in dismissing his appeal.

IV. CONCLUSION

We DENY the petition for review.

APPENDIX B

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

Sabino ZUNIGA-AYALA, A074-370-720

Respondent

FILED
Feb 15,
2023

ON BEHALF OF RESPONDENT: Bertha Z. Zuniga, Esquire

ON BEHALF OF DHS: Ryan Schwank, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS

On Appeal from a Decision of the Immigration Court, Pearsall, TX

Before: Malphrus, Deputy Chief Appellate Immigration Judge

MALPHRUS, Deputy Chief Appellate Immigration Judge

The respondent, a native and citizen of Mexico and lawful permanent resident of the United States, appeals from the Immigration Judge's decision, dated August 15, 2022, deeming the respondent's applications for relief abandoned and ordering him removed. The Department of Homeland Security ("DHS") filed a motion for summary affirmance. The appeal will be dismissed.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We review de novo questions of law, discretion, and judgment, and all other issues in appeals from an Immigration Judge's decision. 8 C.F.R. § 1003.1(d)(3)(ii).

The Notice to Appear ("NTA"), dated June 22, 2022, charges the respondent under section 237(a)(2)(B)(i) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a)(2)(B)(i), for having been convicted of a controlled substance violation at any time after admission. The NTA alleges that on March 31, 2022, the respondent was convicted in the 216th Judicial District Court of Kerr County, Texas, for the offense of Manufacturing or Delivery of Controlled Substance Penalty Group 1, Less than 1 Gram (Tr. at 5).[1]

During pleadings at the first master calendar hearing on July 8, 2022, the respondent, through counsel, admitted the allegations, including the controlled substance conviction (Tr. at 3-5). The respondent, through counsel, denied the single charge of removability on the NTA based on his argument that unlike the federal statute, 481.112(b) of the Texas Health and Safety Code does not have a renumeration requirement (Tr. at 5-6). The Immigration Judge sustained the charge after finding

---

[1] The respondent has argued that the Immigration Judge erred by not formally entering the NTA into the record (Respondent's Br. at 6-7). We find this to be a harmless error since the Immigration Judge reviewed the NTA on the record when pleadings were taken (Tr. at 6-7).

it "doesn't require a distribution charge" (IJ (unpaginated); Tr. at 6).[2] The Immigration Judge advised the respondent that any brief contesting removability was due by July 25, 2022, and any application for relief from removal was due by August 1, 2022 (Tr. at 7-8). During the second master calendar hearing on August 1, 2022, the Immigration Judge extended the deadline to August 15, 2022 (Tr. at 11).

After pleadings, and in support of the allegations and charge of removability, DHS submitted the respondent's conviction records via an electronic filing on August 5, 2022 (DHS Exh. (unmarked)). At the final master calendar hearing on August 15, 2022, the respondent did not have any applications for relief ready for filing and the Immigration Judge deemed all applications abandoned and ordered the respondent removed (IJ (unpaginated); Tr. at 17).[3]

On appeal, the respondent contends the Immigration Judge erred in sustaining the charge of removability and that proceedings should be terminated because DHS did not meet its burden of proof to substantiate the charge of removability and did not present evidence that the respondent's conviction relates to a controlled substance as defined in 21 U.S.C. § 802 (Respondent's Br. at 8-11). The

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[2] The Immigration Judge issued both an oral decision and brief order on August 15, 2022. Since the written order is not paginated, we are unable to provide citations to specific pages.

[3] The respondent electronically filed a brief regarding membership in a particular social group, which was rejected on July 25, 2022, in ECAS, because the application was incomplete and there was no cover page (Tr. at 15-17).

respondent argues that the Immigration Judge's oral and written orders do not adequately address findings of fact and conclusions of law (Respondent's Br. at 5-6).[4] The respondent further argues that the Immigration Judge failed to conduct removal proceedings in accordance with section 240(b)(4) of the INA, 8 U.S.C. § 1229a(b)(4), depriving him of fundamental fairness (Respondent's Br. at 6-7).

We affirm the Immigration Judge's decision to sustain the charge of removability and decline to terminate proceedings because DHS met its burden of proof under section 240(c)(3)(A) of the INA, 8 U.S.C. § 1229a(c)(3)(A), to establish by clear and convincing evidence that the respondent is removable under section 237(a)(2)(B)(i) of the INA, 8 U.S.C. § 1227(a)(2)(B)(i).

DHS submitted conviction records to establish that the controlled substance underlying the respondent's conviction under section 481.112(b) of the Texas Health and Safety Code, was cocaine (DHS Exh. at 5-7). *See* INA § 240(c)(3)(B)(vi), 8 U.S.C. § 1229a(c)(3)(B)(vi) (proof of a criminal conviction may be established by "[a]ny document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the

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[4] The Immigration Judge addressed the arguments regarding removability that the respondent, through counsel, presented during proceedings (Tr. at 6). Since the respondent did not raise additional arguments regarding removability before the Immigration Judge, despite the invitation to brief them, we conclude that the Immigration Judge provided adequate analysis regarding the issues of removability that were raised by the parties during proceedings below.

existence of a conviction"); 8 C.F.R. § 1003.41(a)(6) (same).

The Texas statute under which the respondent was convicted, section 481.112(b) of the Texas Health and Safety Code, is divisible and not a categorical match to its federal counterpart since the Texas schedule includes position isomers of cocaine while the federal schedule does not. *Compare* Tex. Health & Safety Code Ann. § 481.102(3)(D)(i), *with* 21 U.S.C. § 812(c), Schedule II(a)(4); *see Alexis v. Barr*, 960 F.3d 722 (5th Cir. 2020), cert. denied, 141 S. Ct. 845 (2020) (finding Texas' definition of cocaine overbroad because it punishes the possession of position isomers of cocaine, unlike the federal Control Substances Act, but that the respondent failed to show a realistic probability of Texas prosecuting someone for overbroad conduct).

We will construe the respondent's submission of three judgements as new evidence to support the "realistic probability" test as a motion to remand (Respondent's Mot., Exh. A-C). *See* 8 C.F.R. § 1003.1(d)(3)(iv); *see also Matter of Fedorenko*, 19 I&N Dec. 57, 73-74 (BIA 1984) (providing that the Board does not consider evidence first offered on appeal, as the Board's review is a review of the record created before the Immigration Judge). Even if we construe the new evidence as a motion to remand, the respondent has not shown that the new evidence would likely change the outcome of the case. *See Matter of Coelho*, 20 I&N Dec. 464, 471-72 (BIA 1992) (providing that a motion to remand for the purpose of presenting additional evidence must conform to the same standards as a motion to reopen and will only be granted if the evidence was

previously unavailable, material, and new evidence that would likely change the result of the case).

We decline to remand proceedings because even if we consider the evidence presented on appeal, despite the judgements issued in 2020 being available at the time of these proceedings, the respondent did not establish overbreadth (Respondent's Mot., Exh. A-C). To determine overbreadth, the Fifth Circuit utilizes the "realistic probability" test. *See Vetcher v. Barr*, 953 F.3d 361, 367 (5th Cir. 2020) (citing to *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013)). The respondent must "point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner." *Vasquez v. Sessions*, 885 F.3d 862, 873 (5th Cir. 2018) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

The Fifth Circuit has concluded that it would be difficult to prevail with the realistic probability test to show overbreadth for a conviction of cocaine under Texas law because there is evidence that "Texas does not treat the different forms of cocaine as distinct, separate substances," such as the fact that charging documents under Texas law need not specify the variation of the controlled substance and Texas utilizes sample drug testing. *Alexis v. Barr*, 960 F.3d at 727-29. Furthermore, the Fifth Circuit also pointed to the fact that there is "limited citable decisions" considering that a vast majority of criminal cases "are resolved without a written judicial opinion or plea bargain." *Alexis*, 960 F.3d at 728-729.

On appeal, the respondent submitted what he purports to be "judgements from three Texas courts

finding a defendant guilty for possessing [position] isomers," but these are not "citable decisions," which establish overbreadth (Respondent Br. at 10). *Id.* The only documents indicating cocaine isomers are three judicial confessions with the phrase "cocaine position isomers," which was handwritten on two of the documents (Respondent's Mot., Exh. A-C) (unpaginated)). The evidence does not include any charging documents, documents from prosecutors, or findings by a court. This new evidence does not show that Texas prosecuted three cases for possession of cocaine position isomers in 2019 and 2020, but rather the way the defendants chose to enter their guilty plea. In one case, the defendant made it clear his pleas was designed in a way to potentially preserve eligibility for immigration relief (Respondent's Mot., Exh. C)(unpaginated)). Thus, we discern no error in the Immigration Judge's determination that the respondent is removable as charged and ordering the respondent removed.

Furthermore, since the respondent, through counsel, could have raised these removability issues after the Immigration Judge sustained the charge and DHS filed the conviction documents, the respondent has not shown a violation of his due process rights with resulting prejudice (Respondent's Br. at 6-8). *See Vetcher*, 953 F.3d at 370 ("[R]emoval proceedings must be conducted according to standards of fundamental fairness. This includes an alien's right to a full and fair hearing." (citation omitted)); *Okpala v. Whitaker*, 908 F.3d 965, 971 (5th Cir. 2018) ("As a general rule, due process requires that an alien be provided a notice of the charges against him, a hearing before an executive or

administrative tribunal, and a fair opportunity to be heard."). The respondent was afforded proper due process because the Immigration Judge twice set deadlines and provided the respondent, who had counsel, an opportunity to present arguments on removability and file for relief.

Accordingly, the following order is entered.

ORDER: The appeal is dismissed.

APPENDIX C

TITLE 8, UNITED STATES CODE
ALIENS AND NATIONALITY

* * *

8 U.S.C. § 1227. Deportable aliens.

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

* * *

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) 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), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * *

APPENDIX D

TITLE 21, UNITED STATES CODE
FOOD AND DRUGS

21 U.S.C. § 802. Definitions

As used in this subchapter:

* * *

(17) The term "narcotic drug" means any of the following whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(A) Opium, opiates, derivatives of opium and opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of such isomers, esters, ethers, and salts is possible within the specific chemical designation. Such term does not include the isoquinoline alkaloids of opium.

(B) Poppy straw and concentrate of poppy straw.

(C) Coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed.

(D) Cocaine, its salts, optical and geometric isomers, and salts of isomers.

(E) Ecgonine, its derivatives, their salts, isomers, and salts of isomers.

(F) Any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subparagraphs (A) through (E).

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APPENDIX E

TEXAS HEALTH AND SAFETY CODE
TITLE 6. FOOD, DRUGS, ALCOHOL, AND HAZARDOUS SUBSTANCES
SUBTITLE C. SUBSTANCE ABUSE REGULATION AND CRIMES
CHAPTER 481. TEXAS CONTROLLED SUBSTANCES ACT
SUBCHAPTER A. GENERAL PROVISIONS

* * *

Sec. 481.112. Offense: Manufacture or Delivery of Substance in Penalty Group 1.

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance listed in Penalty Group 1.

(b) An offense under Subsection (a) is a state jail felony if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, less than one gram.

(c) An offense under Subsection (a) is a felony of the second degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, one gram or more but less than four grams.

(d) An offense under Subsection (a) is a felony of the first degree if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, four grams or more but less than 200 grams.

(e) An offense under Subsection (a) is a felony of the first degree punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 10 years, and a fine not to exceed $100,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.

(f) An offense under Subsection (a) is a felony of the first degree punishable by imprisonment in the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 15 years, and a fine not to exceed $250,000, if the amount of the controlled substance to which the offense applies is, by aggregate weight, including adulterants or dilutants, 400 grams or more.