No. 17-1304

In the Supreme Court of the United States

IVAN BERNABE RODRIGUEZ VAZQUEZ, PETITIONER

v.

JEFFERSON B. SESSIONS III, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
BRYAN S. BEIER
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the court of appeals is reported at 885 F.3d 862. A prior opinion of the court of appeals (Pet. App. 1a-20a) was withdrawn on a grant of rehearing. The decision of the Board of Immigration Appeals (Pet. App. 22a-27a) is unreported. The decision of the immigration judge (Pet. App. 28a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 21a) was entered on February 1, 2018. The petition for a writ of certiorari was filed on March 9, 2018. On March 21, 2018, the court of appeals granted a petition for rehearing, withdrew its prior opinion, substituted a new opinion, and issued its judgment that same day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an alien, was convicted following a guilty plea of possessing cocaine in violation of Oklahoma law. An immigration judge determined that petitioner was removable because he was convicted of a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i); see 885 F.3d 862, 866.[1] The Board of Immigration Appeals (Board) upheld that decision. Pet. App. 22a-27a. The court of appeals affirmed. 885 F.3d at 866-874.

1. a. Since 1970, the federal government has regulated controlled substances through the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.* That statute establishes five schedules of controlled substances and precursors the possession or distribution of which are generally prohibited. See 21 U.S.C. 811, 812 (2012 & Supp. IV 2016); 21 U.S.C. 841(a), 844(a). And it authorizes the Attorney General to add or remove drugs based on specified criteria. See 21 U.S.C. 811(a) and (c), 812(a) and (b). The Attorney General has regularly added drugs to those schedules based on those criteria, and has removed drugs as well. The most recently published schedules of federally controlled substances appear at 21 C.F.R. 1308.11-1308.15.

Most States, including Oklahoma, use statutory frameworks that are designed to parallel the federal regime. Contemporaneously with the drafting and consideration of the CSA, state and federal authorities

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[1] This brief cites the decision below using Federal Reporter citations, because the court of appeals withdrew its initial decision and replaced it with the version cited here after the petition for a writ of certiorari and the petition appendix were filed.

worked together to create a model state law that would "complement the comprehensive drug legislation being proposed to Congress at the national level." Richard Nixon, *Special Message to the Congress on Control of Narcotics and Dangerous Drugs*, 1969 Pub. Papers 513, 514 (July 14, 1969) (*Presidential Message*). That model law—the Uniform Controlled Substances Act (1970) (UCSA), 9 U.L.A. 853 (2007)—seeks, by mirroring the CSA, to create "an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem." Prefatory Note, 9 U.L.A. 854; see *Presidential Message* 514 (also describing federal and state law as an "interlocking trellis"). The UCSA created drug schedules identical to those in the CSA as originally enacted, and provided a mechanism for States to add or remove drugs, based on the same criteria employed by the Attorney General under the CSA. UCSA § 201 & cmt., 9 U.L.A. 866-870 (setting out criteria identical to those in federal statute). Because the UCSA called for the States to apply these criteria themselves, the drafters contemplated that, at particular times, the state and federal schedules might not be identical. See Prefatory Note, § 201 cmt., 9 U.L.A. 855, 868.

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

The Board, which receives deference concerning its interpretation of the INA under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), addressed the application of Section 1227(a)(2)(B)(i) in *In re Ferreira*, 26 I. & N. Dec. 415, 417-422 (2014). The Board decided that whether an alien is removable under Section 1227(a)(2)(B)(i) should be determined using a categorical approach—"looking not to the facts of [the alien's] prior criminal case, but to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding removal ground." *Id.* at 418 (citations and internal quotation marks omitted); see *Mellouli* v. *Lynch*, 135 S. Ct. 1980, 1987-1988 (2015) (noting that the Board has often used the categorical approach to interpret immigration provisions and citing *Ferreira* as an example).

Drawing from decisions of this Court in the categorical-approach context, the Board determined that as part of that analysis, an immigration judge should determine whether there exists "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic [federal] definition." *Ferreira*, 26 I. & N. Dec. at 419 (quoting *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). That analysis, the Board explained, is necessary to prevent the categorical approach from "eliminating the immigration consequences for many State drug offenses, including trafficking crimes." *Id.* at 421. Accordingly, the Board concluded, an alien seeking to terminate removal proceedings because a state drug schedule regulated several "obscure [substances] that have not been included in the Federal schedules" should "'at least point to his own case or other cases in which the * * * state courts in fact did apply the statute'" to

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

An alternative method of analysis, known as the "modified categorical approach," may be used to determine whether a state conviction matches a federal generic offense, when a "single [state] statute * * * list[s] elements in the alternative, and thereby define[s] multiple crimes." *Mathis* v. *United States*, 136 S. Ct. 2243, 2249 (2016). If so, then a court or agency may assess whether the defendant was convicted of a *form* of the offense that satisfies the generic federal definition. *Id.* at 2256. In order for the modified categorical approach to be applicable, however, the state statute must set out alternative elements—facts that the jury must find or the defendant must admit in order to sustain a conviction—rather than simply specifying alternative means: "various factual ways of committing some component of the offense," which "a jury need not find (or a defendant admit)" in order to convict. *Id.* at 2249. Determining whether alternative forms of an offense reflect different elements or means is "easy" when "statutory alternatives carry different punishments," because in those circumstances *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), requires that "they must be elements." *Mathis*, 136 S. Ct. at 2256. It is also easy when "a state court decision definitively answers the question." *Ibid.* In other circumstances, federal courts may look to "the record of a prior conviction itself." *Ibid.* If case documents such as the charging instrument or jury instructions enumerate "one alternative term to the exclusion of all others"—that is, one form of the offense—that is an indication that "the statute contains a list of elements, each one of which goes toward a separate crime." *Id.* at 2257.

2. a. Petitioner, a native and citizen of Mexico, was admitted to the United States as a permanent resident alien in 2007. 885 F.3d at 866. In 2013, he was "convicted in Oklahoma for possession of a controlled and dangerous substance, cocaine, in violation of Oklahoma Statute Annotated title 63, § 2-402(A)(1) (2013)." *Ibid.*

The penalties for drug possession in Oklahoma—and whether a drug-possession offense is a misdemeanor or felony—depend in part on the drug involved in the offense. See Okla. Stat. tit. 63, § 2-402(B) (Supp. 2013). Consistent with that statutory framework, petitioner was specifically charged with—and pleaded guilty to—a cocaine offense. The relevant charging information identified the charge as "Possession of Controlled Dangerous Substance—Cocaine." Administrative Record (A.R.) 144 (capitalization omitted). Petitioner thereafter entered a written guilty plea to "Possession of Controlled Substance—Cocaine," A.R. 146, while supplying as a factual basis that he "intentionally and knowingly possessed under [his] control cocaine, a controlled dangerous substance," A.R. 148; see A.R. 146-149. The Oklahoma district court then entered a judgment on the count of "possession of [a] controlled dangerous substance—cocaine." A.R. 154 (capitalization omitted). And it made "[e]nhancer [i]nformation" determinations that cocaine was the "predominant drug" in the offense. A.R. 156. Petitioner was sentenced to three years of imprisonment with all but 30 days deferred, to be followed by 24 months of supervised probation. 885 F.3d at 866.

b. After petitioner's conviction, the Department of Homeland Security (DHS) issued a notice to appear, charging that petitioner was removable under 8 U.S.C. 1227(a)(2)(B)(i). 885 F.3d at 866. DHS submitted doc-

uments to demonstrate that petitioner had been convicted of possessing cocaine, including the amended criminal information, the written guilty plea, the judgment, and the enhancer information, each of which identified cocaine possession as the relevant charge. A.R. 144, 145-153, 154-155, 156.

c. The immigration judge "found by clear and convincing evidence that [petitioner] was convicted of cocaine possession based on [the] documentary evidence submitted by the DHS * * * that [petitioner] pleaded guilty in 2013 to 'possession of [a] controlled dangerous substance—cocaine.'" 885 F.3d at 867.

d. The Board dismissed petitioner's appeal. Pet. App. 22a-27a. Before the Board, petitioner argued for the first time that his conviction could not support removal under Section 1227(a)(2)(B)(i) because Oklahoma's drug-possession statute covers some drugs that are not listed on the federal drug schedules, and, in petitioner's view, Oklahoma's drug-possession statute is not divisible based on drug type. *Id.* at 25a-26a. In particular, petitioner alleged that "Schedule II of the Oklahoma schedules" contained 22 substances that were not controlled under federal law. A.R. 24 n.2. The Board rejected petitioner's contention because it determined that Oklahoma's schedule II was not in fact broader than its federal counterpart. Pet. App. 26a. In a footnote, the Board added that even if petitioner "had shown the presence of controlled substances" on Oklahoma's schedules that were not federally listed, petitioner would not be entitled to relief on that basis alone, because, to defeat removal, "there must be a realistic probability that the State would prosecute conduct under the statute that falls outside the generic definition

of the removable offense." *Id.* at 26a n.1 (citing *Ferreira*, *supra*).

e. The court of appeals denied a petition for review. 885 F.3d at 866-874. In the court of appeals, petitioner asserted that Oklahoma's drug schedules were broader than the federal schedules because of the state schedules' inclusion of three substances different from those on which petitioner had relied before the Board. *Id.* at 869. The court agreed that two were not on the federal schedules: salvia divinorum and its active ingredient, salvinorin A. *Ibid.*[2]

The court of appeals first concluded that it had jurisdiction to adjudicate petitioner's claim of overbreadth based on those substances. 885 F.3d at 867-871. The court acknowledged that it lacked jurisdiction to consider any claim as to which petitioner had not exhausted administrative remedies, by first raising the claim before the Board. *Id.* at 868. But it rejected the government's argument that petitioner had not exhausted his overbreadth claim because he failed to make any Schedule I argument before the Board. The court concluded that petitioner exhausted his claim by making an overbreadth argument based on Schedule II of the Oklahoma drug statute. *Id.* at 868-871.

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[2] Salvia divinorum is "a perennial herb in the mint family native to certain areas of the Sierra Mazateca region of Oaxaca, Mexico." Drug & Chem. Evaluation Section, Office of Diversion Control, Drug Enforcement Admin., Salvia Divinorum *and Salvinorin A* (Oct. 2013), https://www.deadiversion.usdoj.gov/drug_chem_info/salvia_d.pdf. It has hallucinogenic effects believed to be attributable to the active ingredient salvinorin A. *Ibid.* Twenty States control salvia divinorum, its active ingredient, or both. *Ibid.*

The court of appeals next declined to address the government's principal argument for affirmance in petitioner's case—that petitioner was convicted of possessing the federally controlled substance of cocaine, under a divisible state statute. 885 F.3d at 871-872; see Gov't C.A. Br. 13-28 (devoting the bulk of the government's brief to this argument). The court concluded that it could not affirm on that ground because the Board had relied on a realistic-probability analysis with respect to Oklahoma's drug statute as a whole. 885 F.3d at 872-873.

The court of appeals then agreed that petitioner was subject to removal under that realistic-probability approach. 885 F.3d at 872-874. It acknowledged that the "categorical approach" typically requires a determination of whether "there is a categorical match between the predicate offense" under state law and the "generic definition" of the offense in the immigration laws. *Id.* at 871. But the court stated that "[t]he 'realistic probability test' qualifies the categorical approach." *Id.* at 872 (citing *Moncrieffe* v. *Holder*, 569 U.S. 184, 190-191 (2013)). Under that test, the court stated, "there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition.'" *Id.* at 872-873 (quoting *Duenas-Alvarez*, 549 U.S. at 193). That would be so only if in the alien's "own case or other cases * * * the state courts in fact did apply the statute" to the conduct that was not criminalized under the generic federal version of the offense. *Id.* at 873 (quoting *Duenas-Alvarez*, 549 U.S. at 193).

The court of appeals concluded that the Board had permissibly rejected petitioner's challenge based on the realistic-probability test. 885 F.3d at 873-874. The

court noted that *Ferreira* addressed that test in the context of removals based on state drug convictions, and concluded that an alien who alleged that he was not removable because a state drug schedule contained some substance that was not federally controlled could defeat the drug-based ground for removability only if the State "actually prosecutes cases involving substances not on the federal schedule." *Id.* at 873.

The court of appeals observed that "[t]he application of the realistic probability test" was still "largely unsettled," but that the Board's realistic-probability analysis accorded with the approach that the court had itself used, and to which the court considered itself bound to adhere. 885 F.3d at 873; see *id.* at 874 (discussing *United States* v. *Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir.), cert. denied, 138 S. Ct. 501 (2017)). Since petitioner had "never suggested that the realistic probability test is satisfied here," the court affirmed the Board's decision. *Id.* at 874.

f. According to DHS, petitioner was removed from the United States in April 2016.

ARGUMENT

Petitioner challenges the affirmance of the Board's determination that he was removable under 8 U.S.C. 1227(a)(2)(B)(i). The court of appeals did not err in upholding that determination, and its decision does not present a conflict warranting this Court's review at this time. In any event, petitioner's case would be an unsuitable vehicle for addressing the question presented, both because petitioner failed to exhaust his claims and because, as the immigration judge in petitioner's case concluded, petitioner was convicted of possessing cocaine. He would therefore be subject to removal regardless of

the disposition of the question presented. No further review is warranted.

1. The court of appeals correctly upheld the Board's removal determination. "Principles of *Chevron* deference apply when the [Board] interprets the immigration laws." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *id.* at 2214-2216 (Roberts, C.J., concurring in the judgment) (deferring to Board under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see also *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009).

The Board interpreted Section 1227(a)(2)(B)(i) of the INA reasonably when it concluded that an alien cannot render inapplicable the controlled-substance ground for removal in Section 1227(a)(2)(B)(i) simply by pointing to the presence on the State's drug schedules of an obscure substance not listed under the federal CSA—in the absence of any basis to conclude that the State has prosecuted offenses involving the non-federally-controlled substance. See *In re Ferreira*, 26 I. & N. Dec. 415, 417-422 (2014). Drawing from this Court's own cases applying the categorical approach, the Board concluded that when a state schedule lists a substance "not included in a Federal statute's generic definition"—as the Board observed that state schedules commonly do—"there must be a realistic probability that the State would prosecute conduct falling outside the generic [federal] crime in order to defeat a charge of removability." *Id.* at 420-421. Accordingly, the Board concluded that if a State's drug schedules include several obscure substances not controlled under federal law, whether the state offense can form a basis for removability depends on

whether there is any indication that the State has actually prosecuted use of those substances. *Id.* at 421 (noting that Connecticut controlled two "obscure opiate derivatives" not listed on the federal schedules, but concluding that "for the proceedings to be terminated based on this discrepancy between the Connecticut and Federal statutes, Connecticut must actually prosecute violations * * * involving benzylfentanyl and thenylfentanyl").

The Board's approach—affirmed by the court of appeals' decision here—reflects a reasonable interpretation of the INA. This Court has itself repeatedly indicated that the categorical approach should include an assessment of whether there is a "realistic probability * * * that the State would apply its statute to conduct that falls outside the generic [federal] definition of a crime." *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013) (quoting *Gonzalez* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Accordingly, in discussing a provision regarding firearms convictions, this Court indicated that the relevant inquiry would not turn on whether a state statute was broader than a federal one by its terms—because the state gun statute lacked the federal exception for "antique firearms"—but on whether "the State actually prosecutes the relevant offense in cases involving antique firearms." *Id.* at 206. In *Duenas-Alvarez*, the Court similarly directed an examination of not whether it was "theoretical[ly] possib[le]" that a person would be prosecuted for an offense outside the scope of the federal statute, but whether there was "a realistic probability" of that application. 549 U.S. at 193. To make that determination, the Court called for the use of the approach employed by the Board here—stating that "[t]o show that realistic probability, an offender * * * must at least point to his own case or other cases in

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

The Board reasonably concluded in *Ferreira* that it was proper to apply this realistic-probability analysis in the context of Section 1227(a)(2)(B)(i), to determine whether a state drug violation constitutes a ground for removal. As the Board explained, federal and state drug statutes are "amended with varying frequency," and a State schedule's listing of an obscure substance not presently contained on the federal schedules is common. *Ferreira*, 26 I. & N. Dec. at 418. Accordingly, "the application of the realistic probability test is necessary to prevent the categorical approach from" rendering Section 1227(a)(2)(B)(i) inapplicable to many States' "drug offenses, including trafficking crimes." *Id.* at 421. The agency was not unreasonable in concluding that when a State actually prosecutes only offenses involving federally controlled substances under its drug laws, immigration authorities are not stripped of the authority to remove drug offenders because the State's schedules include several additional obscure substances as to which there is no evidence the State has ever brought a prosecution.

Petitioner is mistaken in arguing (Pet. 22-23) that this Court's cases prohibit the Board from considering the manner in which a State actually applies its statute except to defeat "sweeping hypothetical interpretations of state statutes that do not obviously follow the text." This Court's decisions do not limit the Board in that way. Instead, the Court has more broadly stated that there must be "a realistic probability" of a State applying a statute beyond the federal definition in order for the state law "to fail the categorical inquiry," and that

whether that probability exists depends on whether "the State *actually prosecutes* the relevant offense" in a manner broader than the federal law. *Moncrieffe*, 569 U.S. at 205-206 (emphasis added). Accordingly, *Moncrieffe* concluded that a realistic-probability analysis would be required even with respect to a state statute that was unambiguously broader than its federal counterpart. *Id.* at 206 (stating that a realistic-probability analysis should be used to determine whether a state firearms statute, which contained no exception for antique firearms, was applied more broadly than the federal statute, which contains such an exception); see *id.* at 194 (concluding that a state marijuana offense was in fact broader than the generic federal drug offense that contained an exception for distribution of small quantities with no remuneration because state judicial decisions showed "that [the State] *prosecutes* this offense when a defendant possesses only a small amount of marijuana, and that 'distribution' does not require remuneration") (emphasis added; citation omitted). That approach does not "ignore the statutory text," as petitioner asserts—it simply reflects a permissible determination that the immigration consequences of a state drug conviction should be determined based on whether the state statute is actually applied to cases not covered by the generic federal offense. Pet. 23 (citation omitted).

Petitioner is similarly mistaken in asserting (Pet. 24) that the Board's approach "disrespects states' conscious choices in crafting their criminal codes." The Board's approach does not stand as an obstacle to any State's prosecution of persons who possess non-federally listed substances if the State chooses that course. Nor does it otherwise frustrate application of state law. It merely

construes the terms of the federal INA to permit analysis of States' choices with respect to a statute's application.

Petitioner is also mistaken in asserting that the Board's realistic-probability analysis "undermines the purposes of the categorical approach," including "efficiency, fairness, and predictability." Pet. 24 (citation omitted). The Board's approach enhances fairness, by ensuring that individuals in different States face comparable immigration consequences when they are convicted under drug statutes that have been applied in an identical matter. And while petitioner asserts (*ibid.*) that the Board's approach is inefficient because it imposes the "burden of assessing" how a statute has actually been applied, the Board simply determined that it was appropriate in the controlled-substance context for parties to demonstrate overbreadth using the method contemplated in *Duenas-Alvarez* and *Moncrieffe*—pointing to any case "in which the state courts in fact did apply the statute in the special (non-generic) manner for which [the challenger] argues." *Duenas-Alvarez*, 549 U.S. at 193.

2. Petitioner's case does not present a conflict warranting this Court's intervention. The First Circuit is the only other court to issue a published opinion addressing the application of the categorical approach to Section 1227(a)(2)(B)(i) in the context of a state drug schedule that is broader than the federal schedules, but the court's discussion was not necessary to its decision, and did not consider deference principles. In *Swaby* v. *Yates*, 847 F.3d 62 (1st Cir. 2017), the government principally argued that an alien had been convicted under a drug statute that was divisible by substance—making it unnecessary to determine whether a conviction would support removal if the statute were indivisible. See Gov't C.A. Br. at 19, *Swaby*, *supra* (No. 16-1821) ("[T]he

Court need not decide whether the Rhode Island provision * * * is categorically a controlled substance offense under the realistic probability test."); *id.* at 20-27 (detailed argument on divisibility). The government devoted only five sentences of its argument section to the alternative argument that the state law categorically qualified as a ground for removal based on a realistic-probability test, and it did not discuss deference. *Id.* at 18-19. The First Circuit agreed with the government that the alien was removable because the state drug statute was divisible, *Swaby*, 847 F.3d at 67-69, and it addressed the realistic-probability approach only by stating that in its view *Duenas-Alvarez* did not support that approach and that the State's scheduling of "at least one drug not on the federal schedules" foreclosed such an analysis, *id.* at 66. The court did not address this Court's subsequent decision in *Moncrieffe* or the applicability of deference to the Board's interpretation. *Id.* at 66-67.

Swaby does not present any conflict warranting this Court's intervention. The First Circuit might well choose to revisit *Swaby*'s discussion of realistic probability in a future case, both because its discussion was not necessary to the result, see *Seminole Tribe* v. *Florida*, 517 U.S. 44, 67 (1996) (explaining that a court is bound by "the result" and "those portions of the opinion necessary to that result"), and because, in any event, *Swaby* did not address the application of deference principles. Under *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), a court must apply an agency's reasonable interpretation of a statute that the agency is charged with construing even if the court has previously adopted a different construction, unless the prior decision "hold[s]

that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *Id.* at 982-983. That exception would not apply here, in a case in which the court of appeals did not reach any holding regarding application of the *Chevron* framework or find the relevant provision unambiguous.

Petitioner next suggests (Pet. 12-13) a circuit conflict based on a decision of the Third Circuit, but the case on which petitioner relies overturned a removal decision on very different grounds. In *Singh* v. *Attorney General*, 839 F.3d 273 (3d Cir. 2016), the Board erroneously invoked reasonable-probability analysis to conclude that an alien was removable under the INA's aggravated-felony drug-trafficking removal provision, 8 U.S.C. 1101(a)(43)(B), 1227(a)(2)(A)(iii), even though the alien had pleaded guilty to an offense involving a substance that was *not* federally controlled. See, *e.g.*, 839 F.3d at 284 (describing plea of guilty to "PA Counterf[e]it Substance—Non Fed.") (citation omitted; brackets in original); *id.* at 284-285 (plea colloquy also explaining that substance was not federally controlled). On appeal, the Third Circuit accepted the threshold argument advanced by the government, as well as by the alien, that the Board erred in applying the categorical approach at all, because the circuit had already determined that the relevant state drug statute was "divisible 'with regard to both the conduct and the controlled substances to which it applies.'" *Id.* at 282 (citation omitted). Then, applying the modified categorical approach, the court determined that the alien had been convicted of a crime involving a non-federally-controlled substance. *Id.* at 285 ("By definition, a 'PA Counterf[eit] Substance-Non Fed,' or a 'counterfeit substance under Pennsylvania law but not under federal law' cannot be a substance

listed on one of the[federal] schedules.") (citations omitted). Because the court determined that the alien's conviction was for an offense not involving a federally controlled substance, the court concluded that his conviction "d[id] not sufficiently match the elements of the generic federal offense," and that "[t]he [Board] erred in conducting a 'realistic probability' inquiry, and concluding otherwise."[3] *Id.* at 286. The Third Circuit's conclusion in the circumstances of that case does not conflict with the Board's approach here.

Finally, petitioner asserts (Pet. 11-14) that the decision below conflicts with cases that declined to engage in a realistic-probability analysis in the context of distinct statutory or Sentencing Guidelines provisions. See *United States* v. *O'Connor*, 874 F.3d 1147, 1150 (10th Cir. 2017) (robbery and extortion under the Sentencing Guidelines); *Vassell* v. *U.S. Attorney Gen.*, 839 F.3d 1352, 1355 (11th Cir. 2016) (aggravated-felony "theft offense"); *Ramos* v. *U.S. Attorney Gen.*, 709 F.3d 1066, 1068-1069 (11th Cir. 2013) (aggravated-felony "theft offense"); *Jean-Louis* v. *Attorney Gen. of U.S.*, 582 F.3d

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[3] The unpublished decision in *Mendieta-Robles* v. *Gonzales*, 226 Fed. Appx. 564 (6th Cir. 2007), see Pet. 14, is further afield. In that case, the government argued that the court of appeals should "assum[e] [the alien] was convicted of selling cocaine[,] instead of offering to sell cocaine," despite the absence of evidence to this effect in the alien's conviction records, simply "because it is *less likely* [the alien] was simply a cocaine offerer." *Mendieta-Robles*, 226 Fed. Appx. at 572 (emphasis added). The court rejected that argument by explaining that, *inter alia,* there was, in fact, a realistic probability of a conviction under the state statute in question for offering to sell a controlled substance. *Ibid.* (citing *State* v. *Chandler*, 846 N.E.2d 1234, 1236-1237 (Ohio), reconsideration denied, 852 N.E.2d 190 (Ohio 2006) (Tbl.), and other authorities).

462, 464 (3d Cir. 2009) (crime involving moral turpitude); *United States* v. *Vidal*, 504 F.3d 1072, 1074-1075 (9th Cir. 2007) (en banc) (aggravated-felony "theft offense"); *United States* v. *Grisel*, 488 F.3d 844, 845 (9th Cir.) (en banc) ("burglary" under the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)), cert. denied, 552 U.S. 970 (2007). But because those decisions involved different provisions, they do not establish whether the Board's approach to Section 1227(a)(2)(B)(i) is a reasonable one in light of, *inter alia*, the deliberate patterning of many state controlled substance acts on the federal CSA; the frequency with which federal and state drug schedules are amended; the likelihood that state schedules may include one or several obscure substances that are not federally listed but also have not formed the basis for prosecutions; and the need "to prevent the categorical approach from" rendering Section 1227(a)(2)(B)(i) a provision of haphazard and infrequent application. *Ferreira*, 26 I. & N. Dec. at 421.

3. Petitioner's case would be an unsuitable vehicle for addressing the question presented.

First, petitioner failed to exhaust the overbreadth claim presented here. Petitioner's argument to the Board was that Oklahoma's drug schedules were broader than the federal schedules because "Schedule II of the Oklahoma schedules" contained 22 substances that were not controlled under federal law. A.R. 24 n.2. He did not raise before the Board his claim that convictions under Oklahoma's drug laws cannot support removal due to Oklahoma's inclusion of salvia divinorum and salvinorin A on Schedule I. As the government argued in the court of appeals, petitioner could not obtain relief based on that Schedule I argument because he had not presented it to the Board. See 11/16/17 C.A. Letter 1-2. Although

the court of appeals rejected that contention, an alien's failure to exhaust a claim before the Board "serves as a jurisdictional bar to [a court's] consideration of" his claim," 885 F.3d at 868 (quoting *Wang* v. *Ashcroft*, 260 F.3d 448, 452 (5th Cir. 2001)). Accordingly, petitioner's failure to exhaust could preclude this Court from reaching the question presented.

Second, petitioner's case would be a poor vehicle for addressing the circumstances under which a state drug conviction furnishes grounds for removal under an *indivisible* statute because the record makes plain that petitioner was convicted under a *divisible* statute and is removable without regard to the question on which he seeks review. See 885 F.3d at 867 (noting that immigration judge "found by clear and convincing evidence that [petitioner] was convicted of cocaine possession based on [the] documentary evidence submitted by the DHS * * * that [petitioner] pleaded guilty in 2013 to 'possession of a controlled dangerous substance—cocaine'").

This Court has explained that it is "easy" to determine that a statute is a divisible one, setting out multiple alternative elements, "[i]f statutory alternatives carry different punishments." *Mathis* v. *United States*, 136 S. Ct. 2243, 2256 (2016). Petitioner was convicted under a statute of that type: Because the penalties for drug possession in Oklahoma—and whether a drug-possession offense is a misdemeanor or felony—depend in part on the drug involved in the offense, the substance that formed the basis of conviction is a necessary part of a defendant's conviction. See Okla. Stat. tit 63, § 2-402(B) (Supp. 2013).

The record in petitioner's case further confirms that he was convicted of cocaine possession under a divisible state statute. As this Court explained in *Mathis*, when

there is not clear evidence with respect to a statute's divisibility, federal courts may look to "the record of a prior conviction itself" to determine whether a person was charged with and convicted of "one alternative" version of the offense, which would indicate that "the statute contains a list of elements, each one of which goes toward a separate crime." 136 S. Ct. at 2256-2257. Here, petitioner's charging instrument, written guilty plea, judgment, and enhancer information each specified that the charge against petitioner was possession of cocaine—not a generic, indivisible state drug offense. A.R. 144, 145-153, 154-155, 156. Because those documents reinforce the conclusion that petitioner was convicted under a divisible statute of cocaine possession (as the immigration judge initially determined), petitioner's case would be a poor vehicle for considering the application of the realistic-probability approach to determine removability under *indivisible* drug statutes.[4]

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[4] Petitioner cites (Pet. 22 n.4) *Watkins* v. *State*, 855 P.2d 141 (Okla. Crim. App. 1993) (order denying rehearing), as establishing that he was convicted under an indivisible statute. But *Watkins* addresses a different Oklahoma drug law, Okla. Stat. tit 63, § 2-401 (Supp. 1988), see 855 P.2d at 142, and did not determine even with respect to that law whether a jury must find (or a defendant admit) the identity of the substance at issue. *Watkins* concerned whether double jeopardy principles forbade punishing the defendant twice for the act of causing the shipment of a package containing two controlled substances (cocaine and phencyclidine) to himself. *Id.* at 141. In its first decision, the Court of Criminal Appeals of Oklahoma stated that the separate counts relating to each substance were merged into a single count relating to both substances. See *Watkins* v. *State*, 829 P.2d 42, 43 (1991). Denying a petition for rehearing, the court observed that the state legislature "has the power to create separate penal provisions prohibiting different acts which may

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
CHAD A. READLER
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
BRYAN S. BEIER
Attorneys

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be committed at the same time," but concluded that "it was not exercised in the passage of the provisions of Section 2-401(A)(1)." *Watkins*, 855 P.2d at 142.