No. 19-1437

In the Supreme Court of the United States

IVAN ALEXANDROVICH VETCHER, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

JEFFREY B. WALL
Acting Solicitor General
Counsel of Record
JEFFREY BOSSERT CLARK
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 Texas convictions for manufacture or delivery of psilocybin mushrooms made him removable from the United States under the provision of the Immigration and Nationality Act that renders removable an alien convicted of violating a "law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 953 F.3d 361. The opinions of the Board of Immigration Appeals and the opinions of the immigration judge are unreported.[1]

JURISDICTION

The judgment of the court of appeals was entered on March 19, 2020. A petition for rehearing was denied on May 19, 2020. The petition for a writ of certiorari was

[1] The opinions of the Board of Immigration Appeals and the opinions of the immigration judge were not reproduced in the appendix. The Board's May 11, 2018 opinion can be located in the Certified Administrative Record (C.A.R.) 2-5. The Board's November 8, 2016 opinion can be located at C.A.R. 1253-1258. The October 4, 2017 and October 27, 2015 decisions of the immigration judge can be located at C.A.R. 624-630 and C.A.R. 1380-1392, respectively.

filed on June 26, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, an alien, was convicted following a guilty plea on two counts of selling psilocybin mushrooms in violation of Texas law. An immigration judge determined that petitioner was removable because he was convicted of violations of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i). The Board of Immigration Appeals (Board) upheld that decision. Certified Administrative Record (C.A.R.) 1253-1258. The court of appeals denied a subsequent petition for review. Pet. App. 1a-14a.

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, 841(a), and 844(a). And it authorizes the Attorney General to add or remove drugs based on specified criteria. See 21 U.S.C. 811(a) and (c); 812(a) and (b). The Attorney General has regularly added drugs to the schedules and has removed drugs as well. Since the enactment of the CSA, more than 150 substances have been added, removed, or transferred from one schedule to another. *In re Ferreira*, 26 I. & N. Dec. 415, 418 (B.I.A. 2014). The most recently published schedules of federally controlled substances appear at 21 C.F.R. 1308.11 to 1308.15. See also 21 U.S.C. 812(c) (setting forth initial schedules of controlled substances).

Most States, including Texas, use statutory frameworks that generally parallel the federal regime. Contemporaneously with the drafting and consideration of the CSA, state and federal authorities worked together to create a model state law that would "complement the comprehensive drug legislation being proposed to Congress at the national level." Richard Nixon, *Special Message to the Congress on Control of Narcotics and Dangerous Drugs*, Pub. Papers 513, 514 (July 14, 1969) (*Presidential Message*). That model law—the Uniform Controlled Substances Act (1970) (UCSA), 9 U.L.A. 853 (2007)—seeks, by mirroring the CSA, to create "an interlocking trellis of Federal and State law to enable government at all levels to control more effectively the drug abuse problem." UCSA Prefatory Note, 9 U.L.A. 854; see *Presidential Message* 514 (describing federal and state law as an "interlocking trellis"). The UCSA created drug schedules identical to those in the CSA as originally enacted, and provided a mechanism for States to add or remove drugs, based on the same criteria employed by the Attorney General under the CSA. UCSA § 201 & cmt., 9 U.L.A. 866-870 (setting out criteria identical to those in the federal statute). Because the UCSA called for the States to apply these criteria themselves, the drafters contemplated that, at particular times, the state and federal schedules might not be identical. See UCSA Prefatory Note and § 201 cmt., 9 U.L.A. 855, 867.

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

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

The Board of Immigration Appeals, which receives deference concerning its interpretation of the INA under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), addressed the application of Section 1227(a)(2)(B)(i) in *Ferreira*, 26 I. & N. Dec. at 417-422. In *Ferreira*, the Board decided that whether an alien is removable under Section 1227(a)(2)(B)(i) should be determined using a categorical approach—"looking not to the facts of [the alien's] prior criminal case, but to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding removal ground." *Id.* at 418 (citations and internal quotation marks omitted); see *Mellouli* v. *Lynch*, 575 U.S. 798, 807-808 (2015) (noting that the Board has often used the categorical approach to interpret immigration provisions and citing *Ferreira* as an example).

Drawing from decisions of this Court in the categorical-approach context, which have instructed that there "must be a realistic probability, not a theoretical possibility, that the State would apply its statute" to conduct that falls outside the federal analogue, *Moncrieffe* v. *Holder*, 569 U.S. 184, 191 (2013) (citation and internal quotation marks omitted), the Board determined that an immigration judge should apply the realistic probability test in determining whether a state statute is overbroad. *Ferreira*, 26 I. & N. Dec. at 418-419. The Board observed that, "[s]ince the schedules of the CSA change frequently, they often do not match State lists of controlled substances, which are found in statutes and regulations that are amended with varying frequency." *Id.* at 418. Given that context, the Board

explained, the realistic-probability analysis is necessary to prevent the categorical approach from "eliminating the immigration consequences for many State drug offenses, including trafficking crimes." *Id.* at 421. Accordingly, the Board concluded, an alien seeking to terminate removal proceedings because a state drug schedule regulated several "obscure [substances] that have not been included in the Federal schedules" should "'at least point to his own case or other cases in which the * * * state courts in fact did apply the statute'" to prosecute offenses involving those substances. *Id.* at 421-422 (citation omitted).

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

In addition to the realistic probability test, a second qualification applies to the minimum conduct analysis under the categorical approach, *Moncrieffe*, 569 U.S. at 191: courts and the Board use the modified categorical approach where a state statute is divisible. A statute is divisible if it defines multiple crimes, *i.e.*, because it sets out alternative elements—facts that the jury must find or the defendant must admit in order to sustain a conviction—rather than simply specifying alternative means. *Mathis* v. *United States*, 136 S. Ct. 2243, 2249

(2016). When applying that approach, the Board examines record materials, including the charging document and jury instructions, to determine whether the alien was convicted of an offense that satisfies the federal definition. See *Moncrieffe*, 569 U.S. at 191; *Mathis*, 136 S. Ct. at 2256.

2. a. Petitioner, a native and citizen of Belarus, came to the United States in 2001. Pet. App. 2a. Between 2009 and 2012, he was repeatedly arrested on charges including burglary and obstruction of justice. *Ibid.* In 2013, petitioner twice sold hallucinogenic mushrooms containing psilocybin and psilocin to undercover police officers. C.A.R. 1565-1566, 1572-1573. Texas Health and Safety Code Section 481.113 prohibits "knowingly manufactur[ing], deliver[ing], or possess[ing] with intent to deliver a controlled substance listed in Penalty Group 2 or 2-A," and specifies graduated penalties based on the aggregate weight of the substance. Tex. Health & Safety Code Ann. § 481.113(a)-(e) (West 2010). Psilocin and psilocybin are listed in Penalty Group 2. See *id.* § 481.103(a)(5)(B)(ii).

Petitioner was charged with two counts of delivering "a controlled substance, namely, psilocybin/psilocin, in an amount of four grams or more but less than 400 grams, by aggregate weight," in violation of Texas Health and Safety Code Annotated § 481.113(d) (West 2010). C.A.R. 2180; see C.A.R. 2187 (second charge identifying the controlled substance as "[p]silocin"). Petitioner pleaded guilty to those charges in April 2014. C.A.R. 2174, 2181. He was fined, sentenced to concurrent terms of ten years' incarceration, which were then suspended, and placed on community supervision for ten years. *Ibid.*

b. Shortly thereafter, petitioner was charged with being removable from the United States. Pet. App. 2a. The government initially charged petitioner with removability as an alien "convicted of an aggravated felony at any time after admission." 8 U.S.C. 1227(a)(2)(A)(iii). The government subsequently withdrew that charge and replaced it with a charge of removability under Section 1227(a)(2)(B)(i) based on a conviction "relating to a controlled substance" as defined under the federal CSA. Pet. App. 3a (citation omitted). Psilocin and psilocybin are controlled substances under the CSA. 21 C.F.R. 1308.11(d)(29) and (30); see 21 U.S.C. 812(c), Sched. I(c)(15) and (16).

The immigration judge ruled that the government carried its burden of proving removability under Section 1227(a)(2)(B)(i). C.A.R. 1382. The judge acknowledged petitioner's argument that the Texas statute is "overbroad[] since it includes at least two drugs which are not included in the Federal Schedule," but observed that the statute is "divisible." C.A.R. 1382-1383. After reviewing "the indictment[s] relating to [petitioner]'s conviction[s]," the judge determined that petitioner was convicted of offenses involving psilocybin and psilocin, which are federally controlled, and concluded that petitioner was subject to removal. *Ibid.*

The Board of Immigration Appeals upheld the finding of removability. C.A.R. 1254-1255, 1258. It explained that petitioner's argument before the Board that the crime of conviction was overbroad relied on the proposition that a synthetic cannabinoid referred to as XLR-11 is regulated by Texas law but is not covered by the federal drug schedules. C.A.R. 1255; see C.A.R. 1295 (brief of petitioner to the Board). The Board rejected that argument as "factually incorrect" because XLR-11

was a controlled substance under federal law at the relevant time. C.A.R. 1255. Because petitioner did not claim that the state statute of conviction included any other substances excluded from the federal schedules, the Board concluded that the government had carried its burden of proving removability under Section 1227(a)(2)(B)(i). *Ibid.* It remanded for further consideration of petitioner's application for cancellation of removal. C.A.R. 1254.

Following additional proceedings, the immigration judge denied petitioner's application for relief and ordered removal. Pet. App. 4a. On petitioner's subsequent appeal to the Board, petitioner renewed his challenge to the removability finding, this time claiming that 180 substances listed in Penalty Groups 2 and 2-A under Texas law are not regulated by federal law. C.A.R. 21, see C.A.R. 27, 140-142. The Board declined to consider this new challenge on the "already decided" issue of removability, explaining that "removability clearly was not an issue for consideration on remand" in light of the Board's prior affirmance. C.A.R. 3-5. The Board also upheld the decision of the immigration judge to deny petitioner's request for cancellation of removal. *Ibid.*

3. The court of appeals denied a petition for review. Pet. App. 1a-14a.

Before the court of appeals, petitioner argued that his convictions did not satisfy 1227(a)(2)(B)(i) because "at least 43 substances in Penalty Group 2-A" were not on any federal schedule at the time of his conviction. Pet. App. 5a. In its opinion, the court stated that "at least six substances" listed in Penalty Group 2-A "do not appear on any federal schedule." *Id.* at 7a. The court explained however, that under this Court's decision in

Moncrieffe, petitioner must "show 'a realistic probability' " that Texas would prosecute conduct that falls outside the federal CSA. *Id.* at 7a-8a (quoting 569 U.S. at 191). To satisfy that requirement, petitioner 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." *Id.* at 8a (quoting *Vazquez* v. *Sessions*, 885 F.3d 862, 873 (5th Cir.), cert. denied, 138 S. Ct. 2697 (2018)). The court concluded that petitioner "ha[d] not identified case law demonstrating a realistic probability that Texas would apply" the statute of conviction "to conduct that falls outside of the federal definition." *Ibid.* Accordingly, the court upheld the removability finding. *Id.* at 9a. The court also rejected petitioner's challenges as to withholding of removal and due process, and denied his petition for cancellation of removal. *Id.* at 9a-14a.

The court of appeals subsequently denied a petition for panel rehearing. Pet. App. 15a.

4. According to the Department of Homeland Security, petitioner was removed from the United States in August 2018.

ARGUMENT

Petitioner challenges the affirmance of the Board's determination that he is removable under 8 U.S.C. 1227(a)(2)(B)(i). The court of appeals did not err in upholding that determination, and its decision does not present a conflict warranting this Court's review at this time. In any event, petitioner's case would be an unsuitable vehicle for addressing the question presented because the Texas statute is divisible by substance and petitioner was convicted for substances that are undisputedly federally controlled.

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

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

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

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

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

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

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

b. None of petitioner's contrary arguments undermine the Board's interpretation. Petitioner contends that it is sufficient to "show[] that the state statute is facially broader than its federal analogue." Pet. 3. That assertion is inconsistent with *Moncrieffe*. In that case, the Court concluded that a realistic-probability analysis would be required even with respect to a state statute that was unambiguously broader than its federal counterpart. *Moncrieffe*, 569 U.S. at 206 (stating that a realistic-probability analysis should be used to determine whether a state firearms statute, which contained no exception for antique firearms, was actually applied by the State more broadly than the federal statute,

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

Petitioner is likewise mistaken in arguing that after *Moncrieffe* this Court has "clarified" that "the realistic-probability test is satisfied without the need to identify actual cases" for facially broader state statutes in *Mellouli* v. *Lynch*, 575 U.S. 798 (2015), and *Mathis* v. *United States*, 136 S. Ct. 2243 (2016). Pet. 8. Neither decision mentioned the realistic probability test. *Mellouli* addressed the application of Section 1227(a)(2)(B)(i) to drug-paraphernalia offenses, holding that it was an error to treat a conviction for such an offense as a ground for removal regardless of whether the conviction involved a federally controlled substance. 575 U.S. at 808-810. Further illustrating that the Court was not purporting to address the scope of the realistic probability test in *Mellouli*, the Court cited the Board's decision in *Ferreira* in support of the proposition that the alien was not deportable. *Id.* at 808. And *Mathis* addressed whether the modified categorical approach applied to a statute that listed alternative means by which a defendant could satisfy an element, where the statute, if indivisible, concededly failed the categorical analysis. 136 S. Ct. at 2250.

Petitioner is similarly mistaken in suggesting that this Court adopted the "realistic probability" requirement *only* to address the "oft-encountered difficulty in

the categorical approach" that state statutes "sometimes have indeterminate reach" by preventing consideration of "improbable hypotheticals." Pet. 7-8. To the contrary, as explained above, in *Moncrieffe*, the Court applied the realistic probability test to consider whether a State has prosecuted non-remunerative distributions of small amounts of marijuana as distributions or possession-with-intent-to-distribute crimes—hardly an improbable hypothetical—to determine whether those offenses are properly considered to be a categorical match to federal drug law. 569 U.S. at 194. Petitioner's argument conflates whether the realistic probability test applies in the first instance with whether that test is, in fact, satisfied: evidence of "cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which [the alien] argues" establishes that a particular application of state law is sufficiently likely (*i.e.*, "probab[le]," rather than merely "possib[le]") that the state statute is meaningfully overbroad. *Duenas-Alvarez*, 549 U.S. at 193.

2. Petitioner's case does not present a conflict warranting this Court's intervention. Petitioner contends (Pet. 9-14) that the courts of appeals are divided over the applicability of the "realistic probability" test where, on its face, a state statute encompasses more conduct than its federal analogue. This Court has recently and repeatedly denied petitions raising arguments based on the purported disagreement among the courts of appeals in interpreting the "realistic probability" test.[2]

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[2] See, *e.g.*, *Burghardt* v. *United States*, 140 S. Ct. 2550 (2020) (No. 19-7705); *Eady* v. *United States*, 140 S. Ct. 500 (2019) (No. 18-9424); *Hilario-Bello* v. *United States*, 140 S. Ct. 473 (2019) (No. 19-5172); *Bell* v. *United States*, 140 S. Ct. 123 (2019) (No. 19-39); *Luque-*

The same result is warranted here. The First Circuit is the only other court to address the application of the categorical approach to Section 1227(a)(2)(B)(i) in the context of a state drug schedule that is broader than the federal schedules, but it did so only in the alternative, and did not consider deference principles. In *Swaby* v. *Yates*, 847 F.3d 62 (1st Cir. 2017), the government principally argued that an alien had been convicted under a drug statute that was divisible by substance, making it unnecessary to determine whether a conviction would support removal if the statute were indivisible. See, *e.g.*, Gov't C.A. Br. at 19, *Swaby*, *supra* (No. 16-1821) ("[T]he Court need not decide whether the Rhode Island provision * * * is categorically a controlled substance offense under the realistic probability test"); *id.* at 20-27 (detailed argument on divisibility). The government devoted only five sentences of its argument section to the alternative argument that the state law categorically qualified as a ground for removal based on the realistic probability test, and it did not discuss deference. *Id.* at 18-19. The First Circuit agreed with the government that the alien was removable because the state drug statute was divisible, *Swaby*, 847 F.3d at 67-69, and addressed the realistic-probability approach

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Rodriguez v. *United States*, 140 S. Ct. 68 (2019) (No. 19-5732); *Frederick* v. *United States*, 139 S. Ct. 1618 (2019) (No. 18-6870); *Lewis* v. *United States*, 139 S. Ct. 1256 (2019) (No. 17-9097); *Vega-Ortiz* v. *United States*, 139 S. Ct. 66 (2018) (No. 17-8527); *Rodriguez Vazquez* v. *Sessions*, 138 S. Ct. 2697 (2018) (No. 17-1304); *Gathers* v. *United States*, 138 S. Ct. 2622 (2018) (No. 17-7694); *Espinoza-Bazaldua* v. *United States*, 138 S. Ct. 2621 (2018) (No. 17-7490); *Green* v. *United States*, 138 S. Ct. 2620 (2018) (No. 17-7299); *Robinson* v. *United States*, 138 S. Ct. 2620 (2018) (No. 17-7188); *Vail-Bailon* v. *United States*, 138 S. Ct. 2620 (2018) (No. 17-7151); *Castillo-Rivera* v. *United States*, 138 S. Ct. 501 (2017) (No. 17-5054).

only in the alternative, stating that the State's scheduling of "at least one drug not on the federal schedules" foreclosed such an analysis. *Id.* at 66. The First Circuit did not address the applicability of deference to the Board's interpretation. See *id.* at 66-67.

Swaby does not present a conflict warranting this Court's intervention. The First Circuit could decide to revisit *Swaby*'s discussion of realistic probability in a future case because it addressed that issue only in the alternative, because *Swaby* did not address the application of deference principles, and because it was specific to the Rhode Island statute at issue in that case. Under *National Cable & Telecommunications Ass'n* v. *Brand X Internet Services*, 545 U.S. 967 (2005), a court must apply an agency's reasonable interpretation of a statute that the agency is charged with construing even if the court has previously adopted a different construction, unless the prior decision "hold[s] that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *Id.* at 982-983. That exception does not apply to *Swaby*, where the court of appeals did not reach any holding regarding application of the *Chevron* framework or find the relevant provision unambiguous. Additionally, in *Navarro Guadarrama*, the Board observed that *Swaby*'s "discussion of the realistic probability analysis was not necessary to the result in the case," 27 I. & N. Dec. at 565 n.4, signaling that it does not view that aspect of *Swaby* as binding precedent regarding the application of Section 1227(a)(2)(B)(i). Finally, the First Circuit itself distinguished *Swaby* in a subsequent case, applying the realistic probability test to a different State's drug law.

United States v. *Burghardt*, 939 F.3d 397, 407-409 (1st Cir. 2019), cert. denied, 140 S. Ct. 2550 (2020).[3]

Petitioner otherwise relies (Pet. 9-12) on cases that declined to engage in a realistic-probability analysis in the context of different statutory or Sentencing Guidelines provisions. See *Hylton* v. *Sessions*, 897 F.3d 57, 59 (2d Cir. 2018) (aggravated-felony "drug trafficking offense"); *Zhi Fei Liao* v. *Attorney Gen. U.S. of Am.*, 910 F.3d 714, 717 (3d Cir. 2018) ("crime of child abuse, child neglect, or child abandonment" under 8 U.S.C. 1227(a)(2)(E)(i)); *United States* v. *Aparicio-Soria*, 740 F.3d 152, 153 (4th Cir. 2014) (en banc) ("crime of violence" under U.S. Sentencing Guidelines § 2L1.2 (2011)); *United States* v. *Grisel*, 488 F.3d 844, 851 (9th Cir.) (en banc) ("burglary" under the Armed Career Criminal Act, 18 U.S.C. 924(e)), cert. denied, 552 U.S. 970 (2007); *United States* v. *Titties*, 852 F.3d 1257, 1262 (10th Cir. 2017) ("violent felony" under the Armed Career Criminal Act); *Ramos* v. *U.S. Attorney Gen.*, 709 F.3d 1066, 1068 (11th Cir. 2013) (aggravated-felony "theft offense"). But because those cases involve different provisions of federal law, they do not establish whether the Board's approach to Section 1227(a)(2)(B)(i) is a reasonable one in light of, *inter alia*, the frequency with which federal and state drug schedules are amended; the likelihood that state schedules may include one or several obscure substances that are not federally listed but also have not formed the basis for prosecutions; the need to ensure fairness and con-

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[3] The Court recently denied a petition for a writ of certiorari in *Rodriguez Vazquez* v. *Sessions*, which presented the same question and likewise relied on a purported conflict with the First Circuit's decision in *Swaby*. See 138 S. Ct. 2697 (2018) (No. 17-1304).

sistency in the application of the immigration laws to aliens in different States, and the need "to prevent the categorical approach from" rendering Section 1227(a)(2)(B)(i) a provision of haphazard and infrequent application. *Ferreira*, 26 I. & N. Dec. at 421; see *Navarro Guadarrama*, 27 I. & N. Dec. at 568. Nor do those decisions establish that the courts would have reached the opposite result on the facts of this case. To the contrary, other decisions in the circuits on which petitioner relies establish that the application of the realistic probability test is context-specific. See, *e.g.*, *Burghardt*, 939 F.3d at 407-409 (applying the realistic probability test to a state drug statute that had an express statutory term that was potentially overbroad because that term could carry an implicit limitation); *Pierre* v. *U.S. Attorney Gen.*, 879 F.3d 1241, 1252 (11th Cir. 2018) (applying the realistic probability test where an alien identified conduct that "would violate the letter of" state law while falling outside the generic offense).

3. In any event, this case would be an unsuitable vehicle for addressing the question presented.

First, petitioner's case would be a poor vehicle for addressing the circumstances under which a state drug conviction furnishes a ground 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. The immigration judge determined that petitioner was removable because the Texas statute is divisible, C.A.R. 1382-1383, and neither the Board nor the court of appeals addressed the divisibility question in this case because they ruled against petitioner on other grounds. C.A.R. 1255; see Gov't C.A. Br. 16 n.4 (asking the court of appeals to remand to the Board to

pass on the divisibility question in the first instance in the event the court ruled against the government under the realistic probability test). The immigration judge's conclusion as to divisibility was undoubtedly correct. An authoritative state court decision holds that each violation of Texas's Controlled Substances Act involving a different substance constitutes a separate offense: In *Watson* v. *State*, 900 S.W.2d 60 (1995) (en banc), the Texas Court of Criminal Appeals determined that "the [Texas] Legislature intended to make possession of *each* individual substance within the same penalty group a separate and distinct offense." *Id.* at 62; see *Nichols* v. *State*, 52 S.W.3d 501, 503 (Tex. Crim. App. 2001) (explaining that "possession of each individual substance within the same penalty group constitutes a different statutory offense"). Offering further confirmation, petitioner was specifically charged with delivering psilocybin and psilocin. C.A.R. 2180, 2187. The fact that petitioner was charged with and convicted of "one alternative" version of the offense indicates that "the statute contains a list of elements, each one of which goes toward a separate crime." *Mathis*, 136 S. Ct. at 2257. Because the statute is divisible by substance, and the substances for which petitioner was convicted are undisputedly federally controlled, it is irrelevant whether there is a realistic probability of Texas prosecutions based on *other* substances listed in Penalty Group 2. Because the case is readily resolved on that basis, addressing whether the entire Texas statute is a categorical match for the Controlled Substances Act would be a hypothetical exercise. And because the divisibility question would be resolved against petitioner on remand, prevailing on the question presented would not entitle petitioner to any relief.

Second, this case would be an unwieldly vehicle because petitioner never presented his current argument to the Board. Petitioner's argument to the Board was that the state drug schedules were broader than the federal schedules because they included a synthetic cannabinoid referred to as XLR-11. C.A.R. 1255; see C.A.R. 1295 (brief of petitioner to the Board). The Board rejected that argument as "factually incorrect," and expressly noted that petitioner did not claim that any other drug covered by Texas's drug schedules is "excluded from the federal schedules." C.A.R. 1255. When petitioner later challenged the denial of his request for discretionary relief, he claimed that the Texas statute regulated 180 substances not regulated by federal law, a claim the Board declined to consider. Petitioner then relied on the asserted mismatch of 43 substances for the first time before the court of appeals, but the precise extent of the mismatch and the nature of those substances was not adequately developed. That has resulted in a lack of clarity and potential factual errors that would complicate any further review. For example, the court made its own determination, different from the position of either party, that "at least six substances listed in Penalty Group 2" "do not appear on any federal schedule." Pet. App. 7a. But a comparison between that group and the federal schedules suggests that at most one substance listed there—(1-(3-trifluromethylphenyl)piperazine or TFMPP—is unregulated under federal law. That substance is encountered in combination with a widely abused federally-controlled substance, N-benzylpiperazine (BZP). *Schedules of Controlled Substances; Placement of 2,5-Dimethoxy-4-(n)-propylthiophenethylamine and N-Benzylpiperazine Into Schedule I of the Controlled*

Substances Act, 69 Fed. Reg. 12,794, 12,795 (Mar. 18, 2004). Yet because the immigration judge, the Board, and even the court of appeals did not address that substance specifically, there is no record about the likelihood that there would be a prosecution for illicit conduct involving TFMPP only. Given the lack of factual development below, this case is an unwieldly and underdeveloped vehicle for addressing whether a "realistic probability" inquiry is called for in assessing the particular overbreadth asserted by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General
JEFFREY BOSSERT CLARK
Acting Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
BRYAN S. BEIER
Attorneys

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