No. 22-

IN THE
Supreme Court of the United States

SHAMAR CORTEZ WOMACK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for 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 categorical approach to classifying a prior conviction, a state offense is nongeneric or overbroad if it covers conduct that its federal counterpart does not reach. In *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), this Court held that—when no apparent daylight exists between the statutory elements of the state and generic offenses—a defendant arguing that a state conviction is nongeneric "must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.* at 193. The question presented is:

When a state statute is *facially* broader than its federal counterpart, must a defendant still offer examples of overbroad state prosecutions to confirm the statute's scope?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner is Shamar Cortez Womack.

Respondent is the United States of America.

There are no corporate parties involved in this case.

RULE 14.1(B)(iii) STATEMENT

This case arises from the following proceedings in the United States District Court for the Northern District of Texas and the United States Court of Appeals for the Fifth Circuit:

United States v. *Womack*, No. 21-10942, 2022 WL 1073860 (5th Cir. Apr. 11, 2022);

United States v. *Womack*, No. 4:21-CR-50-Y(1) (N.D. Tex. Sept. 14, 2021).

There are no other proceedings directly related to this case.

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

TABLE OF AUTHORITIES—continued

STATE CODES

TABLE OF AUTHORITIES—continued

PETITION FOR A WRIT OF CERTIORARI

Shamar Cortez Womack respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (Pet. App. 1a–2a) is not reported but is available at 2022 WL 1073860. The judgment imposing sentence (Pet. App. 3a–5a) is not published in the Federal Supplement or on Westlaw.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on April 11, 2022. Pet. App. 1a. Mr. Womack filed a timely petition for rehearing, which the Fifth Circuit denied on May 23, 2022. Pet. App. 6a. Justice Alito then issued two orders extending the deadline to file this petition by 30 days each, for a total of 150 days from the order denying the petition for rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 922(g)(1) provides:

> It shall be unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding on year . . . to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which

has been shipped or transported in interstate or foreign commerce.

18 U.S.C. § 924(e)(1) provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(A)(ii) provides:

> As used in this subsection . . . the term "serious drug offense" means . . . an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law . . . .

21 U.S.C. § 802(16) provides, in relevant part:

> (A) Subject to subparagraph (B), the term "marihuana" means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any

> part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin.
>
> (B) The term "marihuana" does not include—
>
> (i) hemp, as defined in section 1639o of title 7 . . . .

7 U.S.C. § 1639o(1) provides:

> The term "hemp" means the plant Cannabis sativa L. and any part of that plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent on a dry weight basis.

Ark. Code Ann. § 5-64-101(15)(A)(i) (West) (eff. July 31, 2007 to June 30, 2019) provides:

> "Marijuana" means . . . [a]ny part and any variety or species, or both, of the Cannabis plant that contains THC (Tetrahydrocannabinol) whether growing or not . . . .

INTRODUCTION

This Court has long applied the "categorical approach" to classify a criminal conviction for various purposes. For example, the categorical approach determines whether a defendant's prior conviction qualifies as a "violent felony" or "serious drug offense" under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), with significant sentencing implications. See *Taylor* v. *United States*, 495 U.S. 575, 600 (1990). The

categorical approach has always "involve[d], and involve[d] only, comparing elements. Courts must ask whether the crime of conviction is the same as, or narrower than, the relevant generic offense" or other federal law comparator. *Mathis* v. *United States*, 579 U.S. 500, 519 (2016). In making this comparison, the state statute's text is the obvious starting point—and, if it is facially broader than its federal counterpart, it is the end point as well.

This Court has looked beyond the statutory text only when a party has urged an unintuitive reading of that language. In *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183 (2007), a categorical-approach case in the immigration context, the state theft statute's elements were identical to those of the generic offense. *Id.* at 187, 189. The noncitizen, however, argued that his offense was nongeneric because the state courts had applied the statute more broadly. *Id.* at 190. Since this broader interpretation was in no way apparent from the statutory text, this Court required him to "at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.* at 193.

Ten circuits correctly apply *Duenas-Alvarez*'s "actual case" requirement only when the state statute's scope is unclear. In that situation, the defendant must substantiate his claim that the state law is broader than its federal counterpart. But, in keeping with the most basic principles of statutory interpretation, no such showing is necessary when the state law's plain language is facially broader. When the statute's sweep is clear on its face, requiring example prosecutions that confirm what the statute already says is pointless, wasteful, and unjust.

Yet the Fifth Circuit requires application of the "actual case" test even where divergence in statutory language is plain. By an 8-to-7 vote, the *en banc* court read *Duenas-Alvarez* to mean that a party arguing that a state statute is broader than its federal counterpart must *always* produce an actual case demonstrating the overbreadth. See *United States* v. *Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc). In the Fifth Circuit's view, and in open disagreement with the other circuits, there is "no exception" to this requirement even "where a court concludes a state statute is broader *on its face*." *Id.* (emphasis added). The court has rejected repeated invitations to reconsider this nonsensical rule.

The Fifth Circuit again has applied this rule—and again rejected a plea to reconsider it *en banc*—to uphold Mr. Womack's ACCA sentencing enhancement. The court thus brushed aside his showing that his state offense of conviction is facially broader than its federal counterpart because it covers substances that are not federally controlled. As a result, Mr. Womack faced at least five additional years in prison, which he would not face in any other circuit.

This Court should resolve this open, entrenched, and lopsided split. Alternatively, because the Fifth Circuit's outlier rule is so plainly wrong, the Court should summarily reverse the decision below.

STATEMENT OF THE CASE

1. Mr. Womack was indicted by a federal grand jury on one count of possessing a firearm as a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). ROA.10–12. This offense carries a maximum sentence of ten years in prison. See 18 U.S.C. § 924(a)(2).

However, after Mr. Womack pled guilty (see ROA.73), the district court applied the ACCA based on Mr. Womack's convictions in Arkansas for (1) robbery; (2) murder II; and (3) possession of a schedule VI controlled substance (marijuana) with purpose to deliver in violation of Ark. Code. Ann. § 5-64-436(a). ROA.180, 201–11.[1] Because of the ACCA enhancement, Mr. Womack was subject to a mandatory minimum sentence of fifteen years' imprisonment. ROA.195; 18 U.S.C. § 924(e)(1). Also, because of his ACCA designation, Mr. Womack's offense level was increased under USSG § 4B1.4. ROA.180. This designation caused increases to both his total offense level (30, instead of 21) and guideline range (168–210 months, increased from 77–96 months). See ROA.180, 195, 217.

Mr. Womack objected, arguing that his drug-possession offense was not categorically a "serious drug offense" under the ACCA because the Arkansas statute covers a broader set of substances than federal law. ROA.156–58, 214–17; see also ECF Sealed Doc. 40. The government agreed that "certain drugs identified in Arkansas's Schedule VI . . . are not controlled substances in section 102 of the Controlled Substances Act." ROA.222. The district court, however, overruled the objection based on the Fifth Circuit's requirement that Mr. Womack show an "actual case" that would demonstrate "a realistic probability" that Arkansas would prosecute someone for an offense under that statute for offenses involving substances not found among the federal list of controlled substances.

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[1] Mr. Womack also had additional convictions in Arkansas for possession of controlled substances with purpose to deliver. ROA.186. However, the parties agreed that these could not qualify as ACCA predicates because they occurred on the same occasion as the qualifying murder conviction. *See* ROA.158.

ROA.158; see also ROA.223–24. That the statutory text lists such substances was not enough. The district court thus sentenced Mr. Womack to 210 months' imprisonment. Pet. App. 4a.

2. On appeal, Mr. Womack reiterated his arguments but conceded that he could not show an actual example of an Arkansas prosecution involving a non-federally-controlled substance. The Fifth Circuit agreed, affirming the district court's decision based on *Castillo-Rivera*'s inflexible "actual case" requirement. Pet. App. 2a. The Fifth Circuit denied Mr. Womack's timely petition for rehearing *en banc*. Pet. App. 6a.

REASONS FOR GRANTING THE PETITION

I. There is an entrenched, lopsided split on whether *Duenas-Alvarez*'s "actual case" requirement applies when a state statute is facially broader than its federal counterpart.

The decision below conflicts with the decisions of ten other circuits, which all interpret *Duenas-Alvarez* to require an "actual case" only when a state statute is not facially broader than its federal counterpart.

In *Duenas-Alvarez*, the petitioner tried to show that his prior conviction under a California theft statute was broader than the generic federal definition of "a theft offense," and so was not an "aggravated felony" under the Immigration and Nationality Act ("INA"). 549 U.S. at 185, 193–94; 8 U.S.C. § 1101(a)(43)(G). Although the California law's text closely resembled generic theft offenses in other jurisdictions, the petitioner argued that "California's doctrine, unlike that of most other States, makes a defendant criminally liable for conduct that the defendant did not intend, not

even as a known or almost certain byproduct of the defendant's intentional acts." *Duenas-Alvarez,* 549 U.S. at 187, 189–191.

This Court concluded that, to support the petitioner's against-the-grain reading, more was required "than the application of legal imagination to [the] state statute's language." *Id.* at 193. Instead, the petitioner had to show "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Id.* "To show that realistic probability, an offender, of course, may show that the statute was so applied in his own case. But he must at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argues." *Id.*

The Fifth Circuit alone reads *Duenas-Alvarez* to require a party to point to an actual overly broad state prosecution in every case—even if the "state statute is broader on its face." *Castillo-Rivera*, 853 F.3d at 223. Ten other circuits explicitly disagree.

A. The Fifth Circuit alone reads *Duenas-Alvarez* to require an "actual case" despite clear statutory language.

The circuit split here stems from the Fifth Circuit's fragmented *en banc* decision in *United States* v. *Castillo-Rivera*, 853 F.3d 218. By a bare 8-to-7 majority, with six total opinions, the court held that a defendant must always produce an actual example of an overly broad prosecution.

The *Castillo-Rivera* defendant argued that his prior conviction under Texas's felon-in-possession statute was "substantively broader" than the federal felon-in-possession statute—so was "not an 'aggravated felony' under the sentencing guidelines"—because the Texas

definition of "felony" was facially broader. *Id.* at 220–222. The Texas definition of "felony" included an offense "'punishable by confinement for one year or more in a penitentiary,'" while the federal statute defined felony as "'a crime punishable by imprisonment for a term exceeding one year.'" *Id.* at 222 (citations omitted). The defendant thus argued that "crimes that are punishable for exactly one year are considered felonies for purposes of [the Texas statute], but not for [the federal statute]." *Id.*

Interpreting *Duenas-Alvarez*, the *en banc* majority held that the defendant could not "simply point to certain crimes that may be included in one [statute] but not the other." *Id.* Instead, the majority required that the defendant "also show that Texas courts have *actually applied* [the Texas statute] in this way." *Id.* Because the defendant "ma[de] no attempt" to do so, his argument failed. *Id.* at 222, 225.

The majority explicitly rejected the argument that "because the Texas statute's definition of felon is plainly broader than its federal counterpart, [the defendant] is not required to point to an actual case." *Id.* at 223. It reasoned: "There is no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face." *Id.* Turning the most basic interpretive principles on their head, the majority said that, "without supporting state case law, interpreting a state statute's text alone is simply not enough." *Id.*

Judge Dennis's dissent, for himself and six other judges, rejoined that the majority had "distorted" *Duenas-Alvarez*'s rule, "stretching it far beyond its original meaning and inserting additional requirements of the majority's own creation." *Id.* at 237 (Dennis, J., dissenting). Judge Dennis explained that "*Duenas-Alvarez* is concerned with the defendant who tries to

demonstrate that a statute is overbroad by hypothesizing that it might be applied in some fanciful or unlikely way—through 'the application of legal imagination.'" *Id.* at 239 (quoting *Duenas-Alvarez*, 549 U.S. at 193). He noted, however, that the defendant in *Castillo-Rivera* was not relying on "legal imagination" but instead was "relying on the statute's plain language." *Id.* Judge Dennis thus concluded "it is clear that *Duenas-Alvarez* does not, as the majority opinion holds, require a defendant to disprove the inclusion of a statutory element that the statute plainly does not contain using a state case." *Id.* Judge Dennis further noted that the majority's holding was in conflict with (at the time) five other circuits. *Id.* at 2441.

Judge Higginson agreed, writing separately to note that "the majority's absolute requirement . . . places an impractical burden on defendants without access to the required information." *Id.* at 244–45 (Higginson, J., concurring in part and dissenting in part). "With most criminal prosecutions ending in plea agreements and putative charges driving plea negotiations, the conduct states define as criminal may not be expressed in appellate-level decisions, and the evidence required to satisfy the majority's rule may thus be unavailable." *Id.* at 245. In closing, Judge Higginson commented that the Fifth Circuit's "ongoing struggle to apply the categorical approach . . . may justify Supreme Court intervention yet again." *Id.* at 244.

Since *Castillo-Rivera*, the Fifth Circuit has repeatedly applied its extreme rule. See, *e.g.*, *Alejos-Perez* v. *Garland*, 991 F.3d 642, 648 (5th Cir. 2021); *In re Hall*, 979 F.3d 339, 345 (5th Cir. 2020); *Alexis* v. *Barr*, 960 F.3d 722, 727 (5th Cir. 2020); *Vetcher* v. *Barr*, 953 F.3d 361, 367–68 (5th Cir. 2020); *United States* v. *Gracia-Cantu*, 920 F.3d 252, 254–55 (5th Cir. 2019); *Vazquez* v. *Sessions*, 885 F.3d 862, 872–74 (5th Cir. 2018);

United States v. *Elizalde-Perez*, 727 F. App'x 806, 810 (5th Cir. 2018); *United States* v. *Espinoza-Bazaldua*, 711 F. App'x 737, 744–45 (5th Cir. 2017); *United States* v. *Young*, 872 F.3d 742, 746–47 (5th Cir. 2017).

These cases persist despite repeated pleas from some judges to "interpret *Castillo-Rivera* more narrowly and realistically to avoid creating . . . unreasonable and unsurmountable hurdle[s]" for petitioners. *Alexis*, 960 F.3d at 735 (Dennis, J., dissenting); see also *id.* at 731–32 (Graves, J., concurring) (noting that *Castillo-Rivera*'s "'actual case' requirement" is "simply illogical and unfair . . . where the statutory elements of a state offense alone are broader than the corresponding federal offense"); *Hall*, 979 F.3d at 355 (Dennis, J., dissenting) ("The realistic probability test is a judge-made rule designed by a badly fractured court of appeals to legalistically but illogically fit more state offenses into federal generic offense definitions to enhance punishments. It ill-fits the ends for which it was conceived . . . ." (citation omitted)). And, as in Mr. Womack's case, Pet. App. 6a, the Fifth Circuit recently denied another petition for rehearing challenging *Castillo-Rivera* without further comment, see *United States* v. *Williams*, No. 21-11263 (5th Cir. Oct. 12, 2022).

The Fifth Circuit's rule is thus deeply entrenched.

B. Ten circuits reject the Fifth Circuit's outlier rule.

Every other circuit to address this issue reads *Duenas-Alvarez* to require an actual example of an overly broad state prosecution only if the state statute is not facially broader than its federal counterpart. The Eighth Circuit's cases most thoroughly describe this approach. The other circuits to consider the question—the First, Second, Third, Fourth, Sixth, Seventh,

Ninth, Tenth, and Eleventh—have likewise rejected the Fifth Circuit's approach.[2]

1. The Eighth Circuit has explained that *Duenas-Alvarez*'s "actual case" requirement applies only where— as in *Duenas-Alvarez* itself—a party asserts an "against-the-grain" or hypothetical "reading of the statutory language." See *Gonzalez* v. *Wilkinson*, 990 F.3d 654, 659 (8th Cir. 2021); see also *United States* v. *Maldonado*, 864 F.3d 893, 899–900 (8th Cir. 2017) (rejecting argument that terms in two state statutes "could be construed" more broadly than federal counterpart where no case supported that hypothetical reading). On the other hand, if the "realistic probability [is] evident from the language of the statute itself," there is "no need to provide evidence regarding how [the state] in fact applied it." *Gonzalez* 990 F.3d at 660; see also *Ortiz* v. *Barr*, 962 F.3d 1045, 1050 (8th Cir. 2020) (realistic probability test satisfied where "plain language" of state statute was broader than federal counterpart).

In support of this distinction, the Eighth Circuit explained that "the focus of the realistic probability inquiry is on how a state statute might be *applied*." *Gonzalez*, 990 F.3d at 660. Where "'a statute has indeterminate reach,'" a "petitioner may be required to demonstrate through examples that the statute in question has the reach she ascribes to it." *Id.* (quoting *Hylton* v. *Sessions*, 897 F.3d 57, 63 (2d Cir. 2018)). "But when the statute's reach is clear on its face, it takes no 'legal imagination' or 'improbable hypotheticals' to understand how it may be applied and to determine

[2] The D.C. Circuit has required an actual case where the state statute was not facially broader than its federal counterpart, *United States* v. *Redrick*, 841 F.3d 478, 484–85 (D.C. Cir. 2016), but has not addressed a facially broader state law.

whether it covers conduct an analogous federal statute does not." *Id.*

Thus, in that case, the Eighth Circuit found that "the plain language of the [state] statute makes clear that it applies to conduct not covered by the federal statute" and was, therefore, "unambiguously broader than the federal [counterpart]." *Id.* at 661. The court concluded that was "all that [the noncitizen] was required to show under the categorical approach." *Id.* This approach, of course, conflicts directly with the Fifth Circuit's rule that a defendant or petitioner must always identify an actual case—no matter how clear the state statute's language.

2. Other circuits agree. The First Circuit has likewise rejected a reading of *Duenas-Alvarez* that requires a party to present an actual case where the state statute is facially broader. *Swaby* v. *Yates*, 847 F.3d 62, 65–66 (1st Cir. 2017); see also *Da Graca* v. *Garland*, 23 F.4th 106, 113–14 (1st Cir. 2022). The First Circuit reasoned that "*Duenas-Alvarez* made no reference to the state's enforcement practices. It discussed only how broadly the state criminal statute *applied*." *Swaby*, 847 F.3d at 66. Further, *Duenas-Alvarez*'s "sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance" when the "state crime at issue clearly does apply more broadly than the federally defined offense." *Id.* Indeed, "[n]othing in *Duenas-Alvarez* . . . indicates that [a] state law crime may be treated as if it is narrower than it plainly is." *Id.*

The Second Circuit concurs: *Duenas-Alvarez*'s "requirement that a defendant show a 'realistic probability' . . . operates as a backstop when a statute has indeterminate reach, and where minimum conduct analysis invites improbable hypotheticals." *Hylton*, 897

F.3d at 63 (quoting *Duenas-Alvarez*, 549 U.S. at 193). But that backstop is unnecessary where the "plain language" of the state statute determinately reaches conduct beyond the federal statute. *Id.* ("The 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.") "*Duenas-Alvarez* does not require . . . a separate realistic probability test . . . to illustrate what the statute makes punishable by its text . . . ." *Id.* at 64.

The Third Circuit has similarly recognized that *Duenas-Alvarez* applies only where "the relevant elements [a]re identical," *Singh* v. *Att'y Gen.*, 839 F.3d 273, 286 n.10 (3d Cir. 2016), and "the hypothetical conduct asserted" is "not clearly a violation of [the state] law," *Jean-Louis* v. *Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009). If "the elements of the crime of conviction are not the same as the elements of the generic federal offense," *Singh*, 839 F.3d at 286 n.10, or the elements of the state statute are "clear" and undisputedly apply more broadly than the federal counterpart, *Jean-Louis*, 582 F.3d at 481, "the 'realistic probability' language is simply not meant to apply," *Singh*, 839 F.3d at 286 n.10; see also *Salmoran* v. *Att'y Gen. U.S.*, 909 F.3d 73, 81–82 (3d Cir. 2018) (explicitly rejecting Fifth Circuit's approach and concluding that, because the state statute "plainly encompasses more conduct than its federal counterpart, [the noncitizen] d[id] not need to identify cases in which [the state] actually prosecuted overbroad conduct").

So too has the Fourth Circuit recognized 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; there is no categorical match." *Gordon*

v. *Barr*, 965 F.3d 252, 260 (4th Cir. 2020). "In such circumstances, the burden does not shift to the respondent to 'find a case' in which the state successfully prosecuted a defendant for the overbroad conduct." *Id.* Thus, in an immigration case, the Fourth Circuit held that because "the plain language" of the relevant state statute encompassed broader conduct than its federal counterpart, the noncitizen "was not required to identify a prosecution" adopting the overbroad reading. *Id.* at 254.

And the Sixth Circuit, when urged by the government to require a noncitizen to produce an actual case, refused. The government's position would "require[] [the court] to ignore the clear language" of the state statute, which "expressly and unequivocally punishe[d]" conduct beyond its federal counterpart. *Mendieta-Robles* v. *Gonzales*, 226 F. App'x 564, 572 (6th Cir. 2007). In another case, the Sixth Circuit recognized that no state cases applied a state burglary statute in the overbroad way advanced by a defendant but still found the state crime was not "categorically a crime of violence," noting that the court "should not ignore the plain meaning of the statute." *United States* v. *Lara*, 590 F. App'x 574, 584–85 (6th Cir. 2014).

In an ACCA case subsequent to, but without citing, *Duenas-Alvarez*, the Seventh Circuit conducted a categorical-approach analysis following the basic principles of the state statutory text, consistent with all other circuits who have rejected an "actual case" requirement. *Van Cannon* v. *United States*, 890 F.3d 656, 662–65 (7th Cir. 2018). Because the language of the state burglary statute "cover[ed] a broader swath of conduct than generic burglary," it could not serve as an ACCA violent felony predicate. *Id.* at 658, 664–65. Like the Eighth Circuit, the Seventh Circuit has only

required an actual case where a party relies on "hypothetical" interpretations of state offenses that are not apparent from their text. See, *e.g.*, *United States* v. *Jennings*, 860 F.3d 450, 459–60 (7th Cir. 2017); *Beltran-Aguilar* v. *Whitaker*, 912 F.3d 420, 421–22 (7th Cir. 2019); *United States* v. *Maxwell*, 823 F.3d 1057, 1062–63 (7th Cir. 2016).

Further, the Ninth Circuit has concluded that *Duenas-Alvarez* merely provided "[o]ne way a petitioner can show the requisite 'realistic probability' of prosecution for conduct that falls outside the generic definition." *Chavez-Solis* v. *Lynch*, 803 F.3d 1004, 1009 (9th Cir. 2015) (quoting *Duenas-Alvarez*, 549 U.S. at 193). "But," the Ninth Circuit has explained, "if a state statute explicitly defines a crime more broadly than the generic definition, no legal imagination is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." *Id.* at 1009–10 (internal quotation marks omitted) (quoting *United States* v. *Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc), *abrogated on other grounds by United States* v. *Stitt*, 139 S. Ct. 399 (2018)). Thus, in an immigration aggravated-felony case where the "statutory language" of the state "statute of conviction . . . explicitly prohibit[ed]" conduct that was "neither included in nor fairly encompassed by the [relevant] federal definition," there was "no need to point to any actual prosecution." *Id.* at 1010.

The Tenth Circuit has also rejected the government's argument for an inflexible "actual case" requirement. *United States* v. *Titties*, 852 F.3d 1257, 1274 (10th Cir. 2017); see also *United States* v. *O'Connor*, 874 F.3d 1147, 1154 (10th Cir. 2017). In an ACCA violent-felony case, it held: "Where . . . the statute lists means to

commit a crime that would render the crime non-violent under the ACCA's force clause, any conviction under the statute does not count as an ACCA violent felony." *Titties*, 852 F.3d at 1275. It reasoned that the state statute reached non-violent conduct "because the statute specifically sa[id] so. The Government g[ave] no persuasive reason why [the court] should ignore this plain language to pretend the statute is narrower than it [was]." *Id.* at 1274. The Tenth Circuit concluded that the state statute was "therefore not categorically a violent felony." *Id.* at 1275.

Lastly, the Eleventh Circuit has agreed, holding: "*Duenas-Alvarez* does not require [an 'actual case'] showing when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition." *Ramos* v. *U.S. Att'y. Gen.*, 709 F.3d 1066, 1071–72 (11th Cir. 2013). Thus, in an immigration case in the same theft context as *Duenas-Alvarez*, the court held that "*Duenas-Alvarez* d[id] not control" because the state statute "expressly" included an "alternate intent[]" that did not "fall[] under the generic definition of theft." *Id.*

In short, the Fifth Circuit's approach is an extreme outlier. All ten other circuits to consider this issue agree that *Duenas-Alvarez*'s "realistic probability" test does not trump clear statutory language.

II. The Fifth Circuit's decision is wrong.

The Fifth Circuit's rule violates basic interpretive principles, contravenes this Court's precedents, and creates pointless and unjust practical barriers and complications for defendants and noncitizens alike.

1. The ACCA imposes a fifteen-year mandatory minimum sentence if a defendant is convicted of being

a felon in possession of a firearm following three prior convictions for "violent felon[ies]" or "serious drug offense[s]." 18 U.S.C. § 924(e)(1). A state offense is a "serious drug offense" only if it "involv[es] manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. [§] 802))." 18 U.S.C. § 924(e)(2)(A)(ii).

To determine whether a defendant's prior convictions qualify under the ACCA, this Court uses a "categorical approach," looking "only to the statutory definitions of the prior offenses." *Taylor*, 495 U.S. at 600. "Under this approach, [courts] consider neither 'the particular facts underlying the prior convictions' nor 'the label a State assigns to the crimes.'" *Shular* v. *United States*, 140 S. Ct. 779, 783 (2020) (cleaned up) (quoting *Mathis*, 579 U.S. at 509–10).

"For more than 25 years," this Court "ha[s] repeatedly made clear that application of [the] ACCA involves, and involves only, comparing elements" between the state offense and the relevant federal comparator or generic offense. *Mathis*, 579 U.S. at 519. Those elements come from the "statutory definition of the prior offense," *Taylor*, 495 U.S. at 602—that is, how the *statutory text* defines the state offense's elements. This inquiry is thus governed by the "preeminent canon of statutory interpretation": the analysis "begins with the statutory text, and ends there as well if the text is unambiguous." *E.g.*, *Bedroc Ltd.* v. *United States*, 541 U.S. 176, 183 (2004).

The Fifth Circuit's approach violates this basic principle. The categorical analysis is, at bottom, an exercise in statutory interpretation. This Court has held countless times, in countless contexts, that when a statute is clear, a court's only task is to apply its plain language. There is no warrant to insist that a party

produce example cases to resolve a question that the plain statutory text already answers. When a state law is facially broader than its federal counterpart, the categorical analysis is over: the offense is nongeneric. A court cannot "ignore [a statute's] plain language" by demanding more. *Titties*, 852 F.3d at 1274.

2. Nothing in *Duenas-Alvarez* altered these basic principles. There, "the relevant elements were identical" across "the crime of conviction" and "the generic federal offense." *Singh*, 839 F.3d at 286 n.10; see *Duenas-Alvarez*, 549 U.S. at 187, 189–90. Unable to argue that the statutory text of his state offense was *facially* broader than a generic theft offense, the noncitizen argued that it was broader *as applied* by California courts. *Duenas-Alvarez*, 549 U.S. at 190–93.

It was in this context, where the noncitizen's "against-the-grain reading of the statutory language," *Gonzalez*, 990 F.3d at 659, was supported only by "legal imagination" or a "theoretical possibility," that this Court required him to "at least point to his own case or other cases in which the state courts in fact did apply the statute in the special (nongeneric) manner for which he argue[d]," *Duenas-Alvarez*, 549 U.S. at 193.[3] Because "'[l]egal imagination' may conjure up scenarios that lurk in the indeterminacy of statutory wording," (quoting *Duenas-Alvarez*, 549 U.S. at 193), *Duenas-Alvarez*'s "actual case" requirement operates "as a backstop when a statute has indeterminate reach, and where minimum conduct analysis invites improbable hypotheticals." *Hylton*, 897 F.3d at 63 (quoting

[3] This Court's reference to this language in *Duenas-Alvarez* in dicta in *Moncreiffe* v. *Holder*, 569 U.S. 184, 205–06 (2013), where "the relevant elements were [also] identical" in "the crime of conviction" and "the generic federal offense," *Singh*, 839 U.S. at 286 n.10, did not alter the narrow context in which *Duenas-Alvarez* applies.

Duenas-Alvarez, 549 U.S. at 193). It does not apply where "the plain language of the [state] statute makes clear that it applies to conduct not covered by the federal statute." *Gonzalez*, 990 F.3d at 661.

This Court has made clear in multiple cases after *Duenas-Alvarez* that the Fifth Circuit's requirement that a party provide an actual case in every context under the categorical approach is wrong. In *Mellouli* v. *Lynch*, 575 U.S. 798 (2015), this Court held that a petitioner's Kansas conviction for hiding unnamed pills in his sock did not qualify as a "controlled substance offense" under the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, that would trigger removal. 575 U.S. at 808, 813. "At the time of [the noncitizen's] conviction, Kansas' schedules included at least nine substances not included in the federal lists." *Id.* at 802. *Mellouli* "did not mention the realistic probability test or require the petitioner to cite a Kansas case prosecuting one of the nine controlled substances not included on the Federal Schedule." *Alexis*, 960 F.3d at 732 (Graves, J., concurring). "In fact, the Court found that [the] petitioner's state conviction did not trigger removal . . . based on the statutory comparisons alone, indicating that the Court did not consider the realistic probability [test] necessary." *Id.* (citing *Mellouli*, 575 U.S. at 813).

Likewise, in *Mathis* v. *United States*, 579 U.S. 500, this Court considered whether a defendant's conviction for Iowa burglary "cover[ed] a greater swath of conduct than the elements of the relevant ACCA offense (generic burglary)." *Id.* at 509. Again, this "Court did not apply or even mention the realistic probability test but instead it found that the statute at issue listed alternative means and that some of those means did not satisfy the ACCA's generic burglary definition." *Alexis*, 960 F.3d at 732 (Graves, J., concurring) (citing

Mathis, 579 U.S. at 506–08). The Court concluded that, under its precedents, "that undisputed disparity [of alternative means] resolve[d] th[e] case." *Mathis*, 579 U.S. at 509.

Finally, in *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562 (2017), this Court considered whether a conviction under California's statutory rape statute qualified as a "sexual abuse of a minor" under the INA. *Id.* at 1567–68. The California statute defined "minor" as "a person under the age of 18." *Id.* at 1567 (citation omitted). The Court concluded that "the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Id.* at 1568. Noting that courts "begin, as always, with the text," *id.*, the Court held that the petitioner "ha[d] 'shown something *special* about California's version of the doctrine'—that the age of consent is 18, rather than 16—and needs no more to prevail." *Id.* at 1572 (alteration adopted) (quoting *Duenas-Alvarez*, 549 U.S. at 191). That *Esquivel-Quintana* directly quoted *Duenas-Alvarez*, but nowhere mentioned or applied any "actual case" requirement, shows *Duenas-Alvarez*'s limited scope.

In fact, this Court "has never conducted a 'realistic probability' inquiry" where "the elements of the crime of conviction are not the same as the elements of the generic federal offense." *Singh*, 839 F.3d at 286 n.10. Nor has it conducted a "realistic probability" inquiry in any case other than *Duenas-Alvarez*, showing the unique circumstances where such an inquiry is proper.

3. Applying an "actual case" requirement in every situation undoes some of the reasons this Court first adopted the categorical approach, as opposed to a factual approach. Over 30 years ago this Court noted the "daunting" "practical difficulties and potential unfairness of a factual approach" to ACCA predicates. *Taylor*, 495 U.S. at 601. Difficulties would be encountered,

this Court noted, both in cases that went to trial where "the indictment or other charging paper" did not "reveal the theory or theories of the case presented to the jury" leaving "only the Government's actual proof at trial [to] indicate whether the defendant's conduct constituted" a generic offense, and "where the defendant pleaded guilty" and there was "no record of the underlying facts." *Id.*

Mr. Womack's own prior conviction demonstrates these difficulties. In theory, he could have "'point[ed] to his own case'" to show that his Arkansas marijuana offense covered more types of marijuana than the federal offense. *Castillo-Rivera*, 853 F.3d at 222 (quoting *Duenas-Alvarez*, 549 U.S. at 193). But, as in so many cases, his plea, indictment, and sentencing documents do not specify the exact type of marijuana at issue. ROA.203–06. Like many defendants, he lacked the specific information needed to use his own case as an example.

Recently, in *United States* v. *Taylor*, 142 S. Ct. 2015 (2022), this Court acknowledged some of the "practical challenges" an "actual case" requirement can present. *Id.* at 2024. *Taylor* addressed whether "attempted Hobbs Act robbery qualif[ies] as a 'crime of violence' under 18 U.S.C. § 924(c)(3)(A)." *Id.* at 2018. Comparing the statutory elements, the Court concluded that "no element of attempted Hobbs Act robbery requires proof that the defendant used, attempted to use, or threatened to use force" as required by the definition of "crime of violence." *Id.* at 2019–21.

Despite this natural conclusion, the government argued that the defendant had "fail[ed] to identify a single case in which it has prosecuted someone for attempted Hobbs Act robbery without proving a communicated threat." *Id.* at 2024. The Court asked: "But what does that prove?" *Id.* The Court noted "the oddity

of placing a burden on the defendant to present empirical evidence about the government's own prosecutorial habits," and "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." *Id.*

A dissent in *Castillo-Rivera* also noted the difficulty of "most criminal prosecutions ending in plea agreements and putative charges driving plea negotiations." *Castillo-Rivera*, 853 F.3d at 244–45 (Higginson, J., concurring in part and dissenting in part). As a result, "the conduct states define as criminal may not be expressed in appellate-level decisions, and the evidence required to satisfy the [Fifth Circuit's] rule may thus be unavailable." *Id.* at 245; see also *Betansos* v. *Barr*, 928 F.3d 1133, 1146–47 (9th Cir. 2019) (Murguia, J., specially concurring) (explaining that the "vast majority" of state prosecutions "are resolved through plea bargains" and "are not published, nor are they readily accessible through review").

The Fifth Circuit's rule also inappropriately and unfairly shifts the burden of proving a predicate offense to a defendant or noncitizen. The Government bears the burden of proving sentencing enhancements like the ACCA. *Pereida* v. *Wilkinson*, 141 S. Ct. 754, 765–66 (2021). And, in some immigration contexts, the Government also bears the burden of proving removability. 8 U.S.C. § 1229a(c)(3)(A) (the Government "has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable"). The Fifth Circuit's rule, however, shifts these burdens onto the defendant or noncitizen to affirmatively demonstrate the state's prosecutorial practices.

For all of these reasons, the Fifth Circuit's rule is wrong and should be overturned.

4. Under the correct approach, the Arkansas statute under which Mr. Womack was convicted is not a "serious drug offense" because, on its face, it does not "necessarily require" the conduct specified in the ACCA's "serious drug offense" definition. See *Shular*, 140 S. Ct. at 785 (cleaned up). As relevant, the ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. [§] 802))." 18 U.S.C. § 924(e)(2)(A)(ii).

Mr. Womack's Arkansas drug offense does not count. A "state crime cannot qualify as an ACCA predicate if its elements are broader than those of" the relevant federal counterpart, *Mathis*, 579 U.S. at 509—here the CSA. The Arkansas statute under which Mr. Womack was convicted for possession with intent to deliver a controlled substance provides: "Except as provided by this chapter, it is unlawful if a person possesses a Schedule VI controlled substance with the purpose to deliver the Schedule VI controlled substance." Ark. Code. Ann. § 5-64-436(a).

A separate statute, Ark. Code Ann. § 5-64-214, sets the criteria necessary for a substance to be placed in Schedule VI, while Ark. Code Ann. § 5-64-215 sets forth a list of controlled substances that qualify as Schedule VI substances. Arkansas's Schedule VI list is currently broader than the substances controlled by federal statute. For example, Arkansas's Schedule VI includes Salvia divinorum and Salvinorin A (forms of hallucinogenic mint). Ark. Code Ann. § 5-64-215(a)(4). Neither is a controlled substance under federal law.

Moreover, in April 2013, when Mr. Womack committed his marijuana-based offense (ROA.203), the Arkansas statute defined marijuana more broadly than

did its federal counterpart: "[a]ny part and any variety or species, or both, of the Cannabis plant that contains THC (Tetrahydrocannabinol) whether growing or not." Ark. Code Ann. § 5-64-101(15)(A)(i) (West) (eff. July 31, 2007 to June 30, 2019).

The CSA similarly defines marijuana as "all parts of the plant Cannabis sativa L., whether growing or not." 21 U.S.C. § 802(16)(A). But the CSA expressly excludes "hemp" as defined in 7 U.S.C. § 1639o, see 21 U.S.C. § 802(16)(B), which defines "hemp" as "the plant Cannabis sativa L. and any part of that plant" with a THC "concentration of not more than 0.3 percent on a dry weight basis," 7 U.S.C. § 1639o(1). Thus, the CSA excludes Cannabis sativa L. plant, and all its parts, that have a THC concentration of less than 0.3 percent. 7 U.S.C. § 1639o(1). The Arkansas statute makes no such exclusion. See Ark. Code Ann. § 5-64-101(15)(B) (listing exceptions but none based on THC concentration). It is thus facially broader than the CSA.

Because, when Mr. Womack engaged in the conduct underlying his conviction, Arkansas law was facially broader than federal law, his conviction does not qualify as a "serious drug offense" under 18 U.S.C. § 924(e). See *United States* v. *Abdulaziz*, 998 F.3d 519, 521, 531 (1st Cir. 2021) (holding that a Massachusetts conviction for possession with intent to distribute marijuana under a statute which included hemp did not qualify as a controlled substance under USSG § 4B1.2). Only by "ignor[ing] this plain language to pretend the statute is narrower than it is," *Titties*, 852 F.3d at 1274, could the Fifth Circuit hold otherwise. Pet. App. 2a.

* * *

In short, the Fifth Circuit's holding is meritless. In no context does this Court allow—let alone require—"empirical evidence" of government practice to override plain statutory text. *Taylor*, 142 S. Ct. at 2024. The Fifth Circuit's sole justification for such a requirement is that *Duenas-Alvarez* admits of "no exception[s]." *Castillo-Rivera*, 853 F.3d at 223. But that view violates the maxim that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used," and "ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 399 (1821) (Marshall, C.J.). *Duenas-Alvarez* did not purport to address the question presented here.

III. The question presented is important and recurring.

Without this Court's intervention, defendants across the country face disparate outcomes. In 2019 alone, 312 people were sentenced under the ACCA, and 3,572 people in the Federal Bureau of Prisons custody as of June 2020 were sentenced pursuant to the ACCA. See U.S.S.C., Federal Armed Career Criminals: Prevalence, Patterns, and Pathways 29 (Mar. 2021).[4] And those numbers do not capture the many defendants who, while not ultimately sentenced under the ACCA, face the threat of ACCA enhancements during charge bargaining. Although not all of these convictions involve a discrepancy between the applicable state and federal definitions, the prevalence of ACCA enhancements highlights the need for clarity. Anyone under

[4] https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2021/20210303_ACCA-Report.pdf.

the Fifth Circuit's jurisdiction and subjected to a similar issue as Mr. Womack faces a substantial sentencing increase. Anywhere else in the country, a defendant would have more leverage at the plea bargaining table and would not spend this time behind bars.

Nor is this problem limited to the specific drug offense here, or even to the ACCA. The categorical approach applies in many situations. Thus, the Fifth Circuit has applied its extreme reading of *Duenas-Alvarez* in criminal cases to other drug offenses when determining if they qualify as "drug trafficking offenses" under the Sentencing Guidelines. *Espinoza-Bazaldua*, 711 F. App'x at 744–45; *Elizalde-Perez*, 727 F. App'x at 810. It has also applied it to the "violent felony" definition under the ACCA, *United States* v. *Herrold*, 941 F.3d 173, 178 (2019) (en banc), and to the terms "crime of violence," *Gracia-Cantu*, 920 F.3d at 254–55; *United States* v. *Reyes-Contreras*, 910 F.3d 169, 184–86 (2018), *abrogated in part on other grounds by Borden* v. *United States*, 141 S. Ct. 1817 (2021); *Hall*, 979 F.3d at 345, and "abusive sexual contact," *Young*, 872 F.3d at 746–47, in the Sentencing Guidelines.

The Fifth Circuit's erroneous reading of *Duenas-Alvarez* also applies in the immigration context. The Fifth Circuit has found noncitizens removable for controlled-substance violations even where the state statute is facially broader than the federal CSA. *Alexis*, 960 F.3d at 726–29; *Vazquez*, 885 F.3d at 872–74; *Alejos-Perez*, 991 F.3d at 648; *Vetcher*, 953 F.3d at 367–68. A noncitizen may thus face deportation for failing to show an actual case, which would not happen in any other circuit. The Fifth Circuit's rule therefore produces disparate outcomes involving both the deprivation of liberty for people convicted of crimes and the ability to stay in this country for noncitizens.

This question also has a serious impact on Mr. Womack's own life. Mr. Womack went from a ten-year *maximum* to a fifteen-year mandatory *minimum*. ROA.195; 18 U.S.C. § 924(a)(2), (e)(1). In any other circuit, that would not be the case.

IV. This case is an ideal vehicle to resolve the split.

This case arrives on direct appeal and presents a single question. That question was preserved at the district court level (ROA.156–58, 214–17) and on appeal. Appellant's Initial Br. at 1.

Moreover, the question is both squarely presented and dispositive. No serious factual disputes exist. Mr. Womack concedes that he has been convicted of two ACCA predicate offenses (Appellant's Initial Br. 2–3), and the parties agree that only one of his prior convictions, his 2013 conviction under Ark. Code. Ann. § 5-64-436(a), could qualify as a third. ROA.158, 186. Thus, whether his 2013 conviction qualifies determines whether Mr. Womack is subject to the maximum sentence of ten years in prison under 18 U.S.C. § 924(a)(2) or the ACCA's mandatory minimum sentence of fifteen years. ROA.195; 18 U.S.C. § 924(e)(1). Because the government conceded in the district court that the Arkansas statute is facially broader than its federal counterpart, whether Mr. Womack must provide an actual case determines the outcome here. See ROA.222 ("Womack correctly points out that certain drugs identified in Arkansas's Schedule VI . . . are not controlled substances in section 102 of the Controlled Substances Act.").

CONCLUSION

For these reasons, the Court should summarily reverse the decision below and remand for resentencing. Alternatively, the Court should grant this petition and set this case for argument.

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