No. 22-6540

In the

Supreme Court of the United States

Brandon Williams,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

The government brushes aside the impact of this Court's recent decision in *Taylor v. United States*, 142 S. Ct. 2015 (2022), and treats Petitioner's claims as isolated, minor issues. The response fails to address the continued disagreement regarding the applicability of the realistic probability test post-*Taylor*. Instead, the government's response focuses on whether the state statute of conviction was facially overbroad at the time of the underlying offense. The government's argument is a red herring—this Court need not resolve whether the statute must be overbroad at the time of the underlying offense or at the time of federal sentencing. This Case squarely presents the more pressing issue of the circuit split over the application of *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007).

I. The circuit split on the realistic probability test has deepened since *Taylor*.

In its response, the government treats *Taylor*'s holding as limited to interpretation of federal statutes. Opp. Br. 7–8. The government argues that *Taylor* has no implication in the categorical approach when analyzing a prior state conviction, relying on federalism principles. *Id.* But the government has merely highlighted yet another circuit split on the realistic probability test. In *United States v. Bragg*, 44 F.4th 1067 (8th Cir. 2022), the Eighth Circuit explicitly held that *Taylor* does not apply when analyzing a state statute of conviction under the categorical approach. The Sixth Circuit has suggested it agrees with the Eighth Circuit's interpretation of *Taylor*. *See United States v. Paulk*, 46 F.4th 399, 403 n.1 (6th Cir. 2022).

On the other hand, the Ninth Circuit interpreted *Taylor* as confirmation of the already majority rule—overbroad statutory language establishes overbreadth, whether interpreting a state or federal statute. The Ninth Circuit cited *Taylor* for the proposition that when "overbreadth is evident from a [state statute's] text, we need not identify a case in which the state courts did in fact apply the statute in a nongeneric manner." *Cordero-Garcia v. Garland*, 44 F.4th 1181, 1193 (9th Cir. 2022) (citing *Taylor*, 142 S. Ct. at 2025).

The Ninth Circuit's position is correct. *Taylor* explained that the actual-case requirement discussed in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), is about respecting state courts' interpretations of state law, not the charging habits of prosecutors. *Taylor* confirms that the point of the actual-case requirement is to understand how a state court interprets its statute—it is not a way to find empirical evidence of what types of cases a prosecutor would realistically prosecute (or even more, what prosecutors have prosecuted before). If the state legislature has clearly drafted a statute in an overbroad manner, it is not the role of federal courts to require confirmation.

Indeed, here, federalism concerns support not requiring a specific case example when a statute is unambiguously overbroad on its face. Unlike *Duenas-Alvarez*, there is clearly a mismatch between the Louisiana statute and the federal Controlled Substances Act. By requiring a case example, the Fifth Circuit is stating that state legislatures do not mean what they say. This approach ignores clear directives from state legislatures and fails to show deference and respect to states on how to define

their own laws. In doing so, federal courts "could mistakenly cast doubt on the much higher volume of state criminal prosecutions under those same state statutes." *Najera-Rodriguez v. Barr*, 926 F.3d 343, 354 (7th Cir. 2019); *see also United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018) (vacating a panel decision on divisibility and certifying the question to the state supreme court because "this issue of state law is important for both the federal and state court systems, and a wrong decision on our part could cause substantial uncertainty and confusion if the Wisconsin Supreme Court were to disagree with us in a later decision.").

II. This case presents an ideal vehicle for review.

First, the government claims this case is not a proper vehicle because it involves the Sentencing Guidelines. Opp. Br. 8–9. But Petitioner's case hinges on the application of the categorical approach. The categorical approach is a creation of this Court's precedent, not a question of Sentencing Guideline interpretation. The categorical approach is the same whether analyzing ACCA or the Guidelines. Petitioner had his sentence substantially increased based on a state statute that is unambiguously overbroad. And, as the government concedes, the Sentencing Commission declined to resolve whether it should remove the categorical approach from the guidelines. Opp. Br. 9. This Court should grant certiorari to address this error.

Second, the government contends that this Court will have to grapple with other sticky questions to resolve Petitioner's case. Not so. The government asserts that Petitioner "presupposes that under the Sentencing Guidelines, a state controlled-substance conviction must be a categorical match to the federal Controlled

Substances Act," which the government describes as an open question. Opp. Br. 10. But the Fifth Circuit has already answered that question. *See United States v. Gomez-Alvarez*, 781 F.3d 787, 793 (5th Cir. 2015) (holding a substance must be controlled under the Controlled Substances Act to qualify as a drug trafficking offense under the Guidelines).

The government also argues that because there is an open timing question, the Court should deny the Petition. Opp. Br. 11–12. In 2013, when Petitioner committed the underlying Louisiana offense, the CSA's definition of "marijuana" included hemp; but at the time of Petitioner's federal sentencing in this case, hemp was excluded from the CSA. Opp. Br. at 11. This Court recently granted certiorari to resolve the timing question in an Armed Career Criminal Act case. *Jackson v. United States*, No. 22-6640.

But, as the government concedes, the Fifth Circuit decided this case precisely on the grounds of the realistic probability test—because Petitioner could not show that Louisiana had specifically prosecuted hemp under the statute, Petitioner lost. It didn't matter that the statute is facially overbroad. Thus, this case squarely presents a pressing issue that has split the circuits. This Court should resolve that question now.

CONCLUSION

Petitioner submits that this Court should summarily reverse the decision below and remand for resentencing. Alternatively, the Court should grant this Petition and set the case for argument.

Respectfully submitted,

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