

No. 17-8527

In the
Supreme Court of the United States

MARTIN VEGA-ORTIZ,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

Reply Brief for Petitioner

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TABLE OF CONTENTS

Table of Authorities	iii
Introduction	1
Argument	2
I. This Petition squarely raises the question presented, and thus by granting review this Court could resolve a long-simmering, acknowledged circuit split over an important federal question.	2
II. The government’s prudential reasons for denying review have no merit. ..	5
Conclusion	8

TABLE OF AUTHORITIES

Cases

<i>Cutter v. Wilkinson</i> , 544 U.S. 709 (2005)	7
<i>Gonzales v. Duenas-Alvarez</i> , 549 U.S. 183 (2007)	passim
<i>Goodyear Tire & Rubber Co. v. Haeger</i> , 137 S. Ct. 1178 (2017).....	8
<i>Hylton v. Sessions</i> , 897 F.3d 57 (2d Cir. 2018)	2
<i>Jean-Louis v. Attorney General</i> , 582 F.3d 462 (3d Cir. 2009)	3
<i>Manuel v. City of Joliet, Ill.</i> , 137 S. Ct. 911 (2017).....	8
<i>McFadden v. United States</i> , 135 S. Ct. 2298 (2015)	7
<i>Mowlana v. Lynch</i> , 803 F.3d 923 (8th Cir. 2015)	3
<i>Neder v. United States</i> , 527 U.S. 1 (1999).....	8
<i>North Carolina v. Covington</i> , 137 S. Ct. 1624 (2017).....	8
<i>Ramos v. Attorney General</i> , 709 F.3d 1066 (11th Cir. 2013).....	3
<i>Sibron v. New York</i> , 392 U.S. 40 (1968).....	9
<i>Spencer v. Kemma</i> , 523 U.S. 1 (1998)	9
<i>Swaby v. Yates</i> , 847 F.3d 62 (1st Cir. 2017)	2
<i>United States v. Alcavaz-Bustos</i> , 382 F. App'x 568 (9th Cir. 2012)	9
<i>United States v. Aparicio-Soria</i> , 740 F.3d 152 (4th Cir. 2014) (en banc)	2
<i>United States v. Castillo-Rivera</i> , 853 F.3d 218 (5th Cir. 2017) (en banc)	3
<i>United States v. McGrattan</i> , 504 F.3d 608 (6th Cir. 2007)	3
<i>United States v. Titties</i> , 852 F.3d 1257 (10th Cir. 2017).....	2
<i>United States v. Ubaldo-Figueroa</i> , 364 F.3d 1042 (9th Cir. 2004).....	9

Statutes

8 U.S.C. § 1326.....	5
California Health & Safety Code § 11378.....	3

Other Authorities

21 C.F.R. § 1308.22.....	4
Brief for Appellee, <i>United States v. Ortiz</i> , 822 F.3d 1031 (9th Cir. 2016) (No. 14-50100)	6
<i>Matter of Ferreira</i> , 26 I. & N. Dec. 415 (BIA 2014)	3

INTRODUCTION

The government’s opposition does not dispute that the courts of appeals are openly split over the question presented, a question concerning the meaning of this Court’s “realistic probability” test announced in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007). The government does not dispute that this split has persisted for nearly a decade in part because this Court has sent mixed signals over what *Duenas-Alvarez* means. And the government does not dispute that *Duenas-Alvarez*’s meaning is an important, reoccurring issue affecting the categorical approach’s application in countless cases. Nevertheless, the government contends that this Court should deny review, thereby leaving in place the status quo in which the lower courts apply a non-uniform rule to determine whether a defendant committed the charged offense, to determine what sentence a defendant should receive, and to determine whether a non-citizen can remain lawfully in the country.

To support its contention that this Court should deny review, the government claims that this Petition does not squarely raise the question presented. BIO 12–18. The government also raises two prudential concerns—that Petitioner is “unlikely” to succeed on remand because he cannot prove “prejudice” and that vacating his conviction will have “limited practical significance” to him. BIO 18–21.

The government, however, is incorrect that this Petition does not squarely raise the question presented. And its prudential concerns are overblown and irrelevant. Thus, this Court should grant review to resolve a circuit split over an important, re-occurring federal question that has persisted for nearly a decade.

ARGUMENT

I. This Petition squarely raises the question presented, and thus by granting review this Court could resolve a long-simmering, acknowledged circuit split over an important federal question.

The courts of appeals are openly divided over how to apply the categorical approach properly. As the Petition explained, the First, Third, Fourth, Sixth, Tenth, and Eleventh Circuits apply the categorical approach by comparing the legal scope of state law with the legal scope of federal law.¹ Pet. 12–16. If state law criminalizes more conduct than federal law, there is not a categorical match—period. *E.g.*, *Swaby v. Yates*, 847 F.3d 62, 65–66 (1st Cir. 2017); *United States v. Titties*, 852 F.3d 1257, 1270, 1272–75 (10th Cir. 2017); *United States v. Aparicio-Soria*, 740 F.3d 152, 155–56 (4th Cir. 2014) (en banc); *Ramos v. Attorney General*, 709 F.3d 1066, 1067, 1069–71 (11th Cir. 2013); *Jean-Louis v. Attorney General*, 582 F.3d 462, 468–69, 81 (3d Cir. 2009); *United States v. McGrattan*, 504 F.3d 608, 614–15 (6th Cir. 2007). In these courts, the categorical approach answers a legal question concerning the legal scope of federal and state law. By contrast, the Fifth Circuit, Eighth Circuit, and the Board of Immigration Appeals have rejected the view that the categorical approach is a strict question of whether the legal scope of state law is broader than the legal scope of federal law. Pet. 16–19. Instead, these courts ask whether there is a “realistic probability” that the state would actually

¹ Since this Petition was filed, the Second Circuit has joined the majority view in a case (like this one) involving a drug statute. *See Hylton v. Sessions*, 897 F.3d 57, 63–65 & 65 n.4 (2d Cir. 2018) (identifying the split of authority on *Duenas-Alvarez*’s meaning, adopting the majority position, and rejecting the Board of Immigration Appeal’s contrary view).

prosecute defendants for conduct not covered by the federal, generic offense. *E.g.*, *United States v. Castillo-Rivera*, 853 F.3d 218, 222–25 (5th Cir. 2017) (en banc), *cert. denied*, 138 S. Ct. 501 (2017); *Mowlana v. Lynch*, 803 F.3d 923, 925–27 (8th Cir. 2015); *Matter of Ferreira*, 26 I. & N. Dec. 415, 416–17, 420–22 (BIA 2014). In these courts, the categorical approach is a fact-based question concerning what conduct a state actually prosecutes. For its part, the Ninth Circuit has issued published decisions embracing both views. In some cases, the court asks whether the legal scope of state law is broader than the legal scope of federal law; in other cases, the court asks whether the state prosecutes defendants for conduct not covered under federal law. *See* Pet. 20–22 (listing cases).

In this case, Petitioner had contended that his statute of conviction—California Health & Safety Code § 11378—criminalized conduct that federal law did not. Specifically, the California statute criminalized possessing inhalers containing “L-meth,” whereas federal law did not. Pet. App. 10a. Under the majority view, this legal mismatch between state and federal law meant there was no categorical match. But the court of appeals below did not apply the majority view. Indeed, the court made no attempt to determine the legal scope of state law. Instead, the court applied the minority view and held that the Petitioner could not show that there was a “‘realistic probability’ that he would be prosecuted under § 11378 for possession of the excluded product containing L-meth.” Pet. App. 10a. Accordingly, resolving the question presented is outcome determinative and this Petition therefore squarely raises the question presented.

In its opposition, the government never disputes that it is unlawful under Petitioner’s statute of conviction to possess an inhaler containing L-meth with the intent to sell it. In other words, the government does not dispute that the legal scope of state law criminalizes a broader swath of conduct than the relevant federal law. Nevertheless, the government contends that this case does not “implicate” the circuit split because the state statute is “not facially overbroad.” BIO 11. In support, the government points out that the decision below stated that the state statute is “not ‘overboard on its face.’” Pet. App. 10a (cited in BIO 13–14). The government (like the court below), however, has latched onto a distinction without a difference.

It is true that to determine whether selling inhalers containing L-meth is illegal under state law not federal law you must consult a federal regulation (21 C.F.R. § 1308.22) that provides an unambiguous carve out for such inhalers. See BIO 8; Pet. App. 9a. It is also true that California law contains no such carve out. Thus, state law unambiguously criminalizes selling inhalers containing L-meth. Accordingly, regardless of whether that state of affairs involves a facially overbroad statute, the point remains that the scope of state and federal law differ. And under the majority view, that is dispositive; under the minority view, it is not. Thus, the label “facially overbroad” has no relevance to resolving this case or the question presented.

But, if the government is right that the Ninth Circuit has articulated a third way to resolve *Duenas-Alvarez’s* meaning—a way that turns on whether the

underlying statute is facially overbroad—that would underscore that this Petition is an ideal vehicle to resolve the circuit split. If the analysis turns on whether a statute is facially overbroad, and this case involves a facially overbroad statute, that will allow this Court to address whether facial over breadth is relevant to apply the realistic-probability test. If this Court were to grant review in another case regarding *Duenas-Alvarez*'s meaning in which the underlying state is not facially overbroad, that case would not allow this Court to resolve whether facial over breadth is the key to unlocking *Duenas-Alvarez*.

In short, this Petition squarely raises the question presented and will allow this Court to resolve the precise contours of the “realistic probability” test it announced in *Duenas-Alvarez*. This Court should therefore grant review.

II. The government’s prudential reasons for denying review have no merit.

The government also contends that, even if this Petition squarely raises an important issue over which the circuits have long been openly divided, this Court should still deny review. The government does not raise any fatal substantive or procedural problem. Instead, the government points to two prudential concerns it believes counsels in favor of denying review. As the government notes, the Petition raises the question presented in the context of a motion to dismiss under 8 U.S.C. § 1326(d). *See* BIO 6–10. And, according to the government, even if this Court agrees with Petitioner on the answer to the question presented, Petitioner is “unlikely” to win his motion to dismiss on an altogether different ground. BIO 19.

Specifically, the government contends that Petitioner is unlikely to succeed because he cannot prove that he would “suffer[] prejudice from the [immigration judge’s] failure to inform him of his ability to apply for” pre-conclusion voluntary departure[.]” BIO 19. The government also claims that, even if Petitioner ultimately succeeds in winning his motion to dismiss, obtaining reversal of his conviction would (in the government’s view) have “little practical significance” to Petitioner. BIO 21. Neither contention provides a good reason to deny review.

1. The government’s contention that Petitioner is unlikely to ultimately succeed is irrelevant, even assuming it were true. This Court is “a court of review, not of first review[.]” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). And, here, the government did not press the issue of prejudice before the court of appeals, *see* Brief for Appellee, *United States v. Ortiz*, 822 F.3d 1031 (9th Cir. 2016) (No. 14-50100), and the court of appeals court did not pass on the issue, *see* Pet. App. 6a–11a. Thus, if this Court granted review, it would not address the issue of prejudice. (Indeed, the government does not ask this Court to review that issue.) Instead, if this Court granted review and agreed with Petitioner, it would remand this case to the court of appeals for it to determine whether Petitioner can prove prejudice. *See, e.g., McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015) (holding that the lower court erred and remanding the case to the court of appeals “for that court to determine whether the error was harmless”); *Neder v. United States*, 527 U.S. 1, 25 (1999) (holding that the lower court had erred and remanding the case to the court of appeals “for it to consider in the first instance whether the . . . error was

harmless”). This Court, of course, frequently resolves a predicate issue and then remands the case for the court of appeals to address any other remaining issues. *See, e.g., North Carolina v. Covington*, 137 S. Ct. 1624, 1626 (2017) (resolving the question presented and remanding the case for the lower court to conduct “proceedings consistent with this opinion”); *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1190 (2017) (same); *Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 922 (2017) (same).

Accordingly, whether Petitioner will ultimately succeed on the merits has no relevance to whether the important legal question raised by this Petition is worthy of review by this Court. Rather, this Court should take this opportunity to resolve the question presented and the parties can litigate on remand whether Petitioner can establish prejudice.²

2. As for the government’s claim that it will have “little practical significance” to Petitioner to obtain reversal of his conviction, BIO 21, this

² For what it is worth, the government has substantially overestimated its chance on winning on remand. To establish prejudice, Petitioner must merely show that it was “plausible” that he would have received pre-conclusion voluntary departure had the immigration judge not erroneously concluded that he had been convicted of an aggravated felony. *See United States v. Ubaldo-Figueroa*, 364 F.3d 1042, 1050–51 (9th Cir. 2004). To obtain pre-conclusion voluntary departure, Petitioner would needed to have shown that his equities outweighed his prior convictions. *See United States v. Alcavaz-Bustos*, 382 F. App’x 568, 570 (9th Cir. 2012). While the government focuses on Petitioner’s drug convictions, *see* BIO 19–20, the government ignores the substantial amount of equities that would have suggested that it was plausible that an immigration judge would have allowed him to voluntarily depart rather than ordering him removed. Among other things, by the time of his removal hearing, Petitioner had lived in the United States for nearly three decades; he had numerous U.S. citizen family members, including children, who relied on him; and he had substantial work history.

speculative claim is also irrelevant. As the government itself acknowledges, BIO 21, this Court “presume[s] that a wrongful criminal conviction has continuing collateral consequences,” *Spencer v. Kemma*, 523 U.S. 1, 8 (1998) (citing *Sibron v. New York*, 392 U.S. 40, 55–56 (1968)). Thus, the parties agree this case is not moot. See BIO 21. Accordingly, Petitioner has a concrete, pressing interest in this Petition and obtaining reversal of his illegal re-entry conviction. And the government’s belief about the importance of this conviction to Petitioner does not create any sort of impediment to this Court resolving a longstanding circuit split over an important federal question.

In short, while this Court has denied review in several cases recently raising the circuit split arising over *Duenas-Alvarez’s* meaning, see BIO 12 n.5 (listing cases), this case has none of the vehicle problems raised in those cases. Rather, this Petition presents an ideal vehicle to resolve the question presented. Indeed, if the government is correct that whether a state statute is facially overbroad is key to resolving *Duenas-Alvarez’s* meaning, this case is the perfect vehicle to resolve the question presented. Thus, this Court should grant review in this case and finally resolve the circuit split over *Duenas-Alvarez’s* meaning.

CONCLUSION

This Court should grant this petition for a writ of certiorari.

August 29, 2018

Respectfully submitted,

A handwritten signature in black ink, appearing to be 'Doug Keller', with a long horizontal flourish extending to the right.

Doug Keller