No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RAMIRO GOMEZ-REYES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner

QUESTION PRESENTED

To establish that a "realistic probability" exists that a state statute applies to conduct not covered by a federal "crime of violence" definition for purposes of the categorical approach under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), must a defendant point to actual state prosecutions under the state statute of non-qualifying conduct?

PARTIES, RELATED PROCEEDINGS, AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Ramiro Gomez-Reyes and the United States. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

All proceedings directly related to the case, per Rule 14.1(b)(iii), are as follows:

- *United States v. Gomez-Reyes,* U.S. District Court for the Southern District of California, Order issued May 5, 2023.
- *United States v. Gomez-Reyes*, No. 24-724, U.S. Court of Appeals for the Ninth Circuit. Memorandum disposition issued June 26, 2025.
- *United States v. Gomez-Reyes*, No. 24-724, U.S. Court of Appeals for the Ninth Circuit. Order denying petition for rehearing. August 11, 2025.

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A.	*United States v. Gomez-Reyes*, U.S. Court of Appeals for the Ninth Circuit. Memorandum, filed June 26, 2025
B.	*United States v. Gomez-Reyes*, U.S. Court of Appeals for the Ninth Circuit. Order denying the petition for rehearing, filed August 11, 2025

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Ramiro Gomez-Reyes respectfully prays that the Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit entered on August 11, 2025.

INTRODUCTION

Federal courts use the "categorical approach" countless times a year to determine whether a defendant's prior state conviction triggers a sentencing enhancement. And federal courts and immigration officials use it countless times a year to analyze the immigration consequences of a noncitizen's prior conviction. This approach requires a comparison of the elements of an individual's prior state conviction with the elements of the relevant federal offense. If those elements match, or if the federal elements are broader than the state elements, the defendant has necessarily been "convicted of" the federal offense, and a categorical match exists. *Mathis v. United States*, 579 U.S. 500, 503 (2016). In that situation, the prior

conviction triggers the sentencing enhancement or immigration consequence. *See id.* at 503–04. On the other hand, if the state statute covers conduct federal law does not, no categorical match exists, and the sentencing enhancement or immigration consequence may not follow. *See id.*

In *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), this Court addressed the categorical approach and its requirement that a court determine a state crime's scope. This Court warned lower courts against applying "legal imagination to a state statute's language" and instead asked courts to ensure that there was 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.* at 193.

Following *Duenas-Alvarez*, the federal courts of appeals have openly and deeply split over what this Court meant by its "realistic probability" language. According to the First, Second, Third, Fourth, Seventh, Tenth, and Eleventh Circuits, *Duenas-Alvarez* merely warned lower courts against applying novel interpretations of state law to find that the state statute covers non-generic conduct. Under this view, the realistic-probability test just requires the defendant to establish, through either the state statute's text or state judicial decisions, that the legal scope of state law covers non-qualifying conduct. Once they do, a realistic probability exists that the state would apply its statute to non-qualifying conduct, and there is no categorical match.

On the other hand, the Fifth, Sixth, and Eighth Circuits, as well as the Board of Immigration Appeals (BIA), view *Duenas-Alvarez* differently. Under their view, it

does not matter whether a state statute's *legal scope* is broader than federal law. Instead, what matters is whether the state actually *prosecutes* individuals for that non-qualifying conduct. Only if a defendant can point to a specific prosecution can they establish a "realistic probability" that a state would apply its statute to non-qualifying conduct.

Judges on the Ninth Circuit have embraced both views, as Mr. Gomez-Reyes's own case demonstrates. Mr. Gomez-Reyes argued that his conviction under an Illinois attempt statute was not a crime of violence for the same reason this Court recently held in *United States v. Taylor*, 596 U.S. 845 (2022), that attempted Hobbs Act robbery was not a crime of violence—because an *attempt* to threaten force does not necessarily involve an element of force. Yet two judges on the panel believed that Mr. Gomez-Reyes had not satisfied *Duenas-Alvarez* because the Illinois statute's overbreadth was "difficult to imagine," and the Petitioner "cite[d] no case illustrating it." Pet. App. 3a. While the dissent acknowledged that there were "no reported Illinois cases in which the statute has been applied to attempts to threaten," it explained that individuals "need not cite a specific case to show a realistic probability where the state statute explicitly defines a crime more broadly than the generic definition." Pet. App. 9a (quotations omitted). In other words, this case perfectly embodies the circuit split over *Duenas-Alvarez* this Court should resolve.

OPINION BELOW

The unpublished decision of the U.S. Court of Appeals for the Ninth Circuit is reproduced on pages 1 through 10 of the appendix. The court's denial of Petitioner's petition for rehearing can be found on page 11 of the appendix.

JURISDICTION

The court of appeals entered judgment on June 26, 2025. Pet. App. 1a. The court denied the petition for rehearing on August 11, 2025. Pet. App. 11a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Ramiro Gomez-Reyes was born into poverty in Mexico and only has a sixth-grade education. He came to the United States as a teenager and worked in a Chicago barbecue restaurant until he was convicted of attempted aggravated criminal sexual assault under 720 ILCS § 5/12-14 (now § 5/11-1.30).

After serving his prison sentence, Mr. Gomez-Reyes was transferred to immigration custody. He received a "Notice of Intent to Issue a Final Administrative Removal Order," an immigration charging document that initiates removal proceedings under 8 U.S.C. § 1228(a)(1). Those are removal proceedings limited to noncitizens convicted of certain categories of offenses, including offenses "covered in section 1227(a)(2)(A)(iii)"—that is, "aggravated felon[ies]." Mr. Gomez-Reyes's Notice of Intent alleged that his conviction for violating 720 ILCS § 5/12-14 qualified as an aggravated felony "crime of violence" as defined by 18 U.S.C. § 16. On the basis of this purported aggravated felony, the immigration officer ordered him removed.

After he was deported, Mr. Gomez-Reyes attempted to resume his life in Mexico. But six years later, after his wife had an emergency appendectomy and they faced mounting medical bills, he tried to return to the United States. He was caught near the border and charged with illegal reentry under 8 U.S.C. § 1326.

Mr. Gomez-Reyes moved to have the charge against him dismissed by attacking the validity of the predicate removal order under 8 U.S.C. § 1326(d). Among other things, he contended that his Illinois conviction under 720 ILCS § 5/12-14 did not qualify as an aggravated felony, which rendered entry of his removal order "fundamentally unfair." *See* 8 U.S.C. § 1326(d)(3). The district court denied his motion to dismiss the indictment, and he negotiated a conditional plea agreement that allowed him to challenge that denial on appeal.

On appeal, Mr. Gomez-Reyes Petitioner argued that his Illinois conviction was not a "crime of violence" under 18 U.S.C. § 16(a) because an *attempt* to threaten violence does not necessarily require an element of force. He relied on *United States v. Taylor*, where this Court explained that a person may be convicted of attempted Hobbs Act robbery if that person "buys a ski mask," "plots his escape route," "recruits his brother to drive the getaway car," and "drafts a note," but then is immediately arrested once he "crosses the threshold into the store." 596 U.S. at 852. Such a person "did not 'use' physical force" or "'attempt' to use such force" since "his note was a bluff and never delivered." *Id.* And the person "never even got to the point of threatening the use of force"—even though he "may have intended and attempted to do just that." *Id.* So while such a defendant committed a "substantial

step" that triggered a conviction for attempted robbery, no element of that step "requires proof that the defendant used, attempted to use, or threatened to use force." *Id*. Accordingly, *Taylor* rejected the theory that a crime of violence "encompasses not only any offense that qualifies as a 'crime of violence' but also any *attempt* to commit such a crime." *Id*. at 853 (emphasis added).

Mr. Gomez-Reyes argued that, as in *Taylor*, a person could take a substantial step towards committing Illinois aggravated criminal sexual abuse—and thus be convicted of attempt—even though they never "used, attempted to use, or threatened to use force." *Id*. at 852. For instance, a person could follow a victim home with the intent to commit sexual assault, hold a knife as he walked through the door, and then be immediately scared off by a security alarm after he "crosses the threshold" of the house. *Id*. As in *Taylor*, such a person "did not 'use' physical force," "'attempt' to use such force," or reach "the point of threatening the use of force"—even though he "may have intended and attempted to do just that." *Id*. In fact, Illinois courts have themselves applied *Taylor* to find that an *attempt* to commit an Illinois "forcible felony" does not require an element of force. *See, e.g., People v. Mosley*, 228 N.E.3d 231, 241 (Ill. App. Ct. 2023) (finding *Taylor* "persuasive" and holding that an Illinois attempt offense was not a "forcible felony" because "no element of the offense necessarily entails that the defendant used or threatened force or violence against another").

Yet in a divided decision, the court of appeals affirmed. The majority acknowledged *Taylor*'s holding that "attempted Hobbs Act robbery is not categorically a crime of violence because an attempted robbery could be interrupted before any threat of force was communicated." Pet. App. 3a. Nevertheless, the majority held that "*Taylor* does not relieve Gomez-Reyes of his burden to show that there is a realistic probability that the state courts would apply the statute in the manner for which he argues." Pet. App. 3a (citing *Duenas-Alvarez*, 549 U.S. at 193). It thus rejected Mr. Gomez-Reyes's argument that a person could be convicted under the Illinois statute for conduct not involving force, claiming that "[s]uch a scenario is difficult to imagine," and Mr. Gomez-Reyes had "cite[d] no case illustrating it." Pet. App. 2a–3a (citing *Duenas-Alvarez*, 549 U.S. at 193).

Dissenting, Judge Miller disagreed, concluding that "[t]he Supreme Court's decision in *United States v. Taylor* shows that Gomez-Reyes's offense does not satisfy [the crime of violence] definition." Pet. App. 7a. "Under Illinois law," as with attempted Hobbs Act robbery, "a perpetrator who is apprehended before he communicates a threat to use a dangerous weapon can be convicted of attempt," even though "that attempt to threaten does not qualify as a crime of violence." Pet. App. 8a. And though "there are no reported Illinois cases in which the statute has been applied to attempts to threaten," a defendant "need not cite a specific case to show a realistic probability where the state statute explicitly defines a crime more broadly than the generic definition." Pet. App. 9a (quotations omitted). Thus, Judge Miller would have reversed and remanded.

Mr. Gomez-Reyes petitioned for rehearing, arguing that the panel had misapplied *Duenas-Alvarez*. The majority voted to deny the petition, while Judge Miller voted to grant it. Pet. App. 11a. This petition follows.

REASONS FOR GRANTING THE PETITION

The Court should grant this petition to resolve a recurring question about the categorical approach that has openly and deeply divided the circuits: what did this Court mean in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), when it required a noncitizen to show a "realistic probability" that a state would apply its statute in a non-qualifying way? Courts have offered conflicting answers. Seven circuits have held that an individual can meet that burden by establishing that the state statute or case law covers non-qualifying conduct. By contrast, three circuits and the BIA have held that an individual must prove that a state actually prosecutes non-qualifying conduct. Only this Court can resolve that conflict and ensure that courts and the BIA apply the categorical approach uniformly in the tens of thousands of cases where it arises every year.

Mr. Gomez-Reyes's case presents an ideal vehicle to resolve that split. The disagreement over *Duenas-Alvarez*'s "realistic probability" test between the panel majority and the dissent perfectly mirrors the disagreement between the circuits. This confusion will continue until this Court addresses which view of *Duenas-Alvarez* is correct. Finally, this Court should grant review because the lower court, by applying the actual-prosecution view of *Duenas-Alvarez*, misinterpreted the "realistic probability" test.

I.

The circuits are openly and deeply split over the interpretation of *Duenas-Alvarez*'s "realistic probability" requirement.

In *Duenas-Alvarez*, this Court addressed whether a noncitizen's car-theft conviction categorically qualified as a "theft offense," thereby rendering him removable as an aggravated felon under 8 U.S.C. § 1101(a)(43)(G). 549 U.S. at 188. In undertaking that analysis, this Court observed that California's car-theft statute covered not only stealing a car—conduct that qualified as generic theft—but also "aiding and abetting" someone else's car theft. *Id.* at 188.

The noncitizen pointed out that California's aiding-and-abetting doctrine covered not only the crime the defendant had "intend[ed], but also . . . any crime that 'naturally and probably result[ed] from [the] intended crime.'" *Id.* at 820–21 (quoting *People v. Durham*, 449 P.2d 198, 204 (1964)). He posed a hypothetical, arguing that California's doctrine might hold "an individual who wrongly bought liquor for an underage drinker criminally responsible for that young drinker's later (unforeseen) reckless driving." *Id.* at 191.

In rejecting the hypothetical, this Court made the following pronouncement about "realistic probability"—a pronouncement that would become a chronic source of controversy among the courts of appeals:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires 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. 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. at 193. The noncitizen, this Court observed, made "no such showing here," and thus there was a categorical match between his conviction and generic theft. *Id.* at 193–94.

Since *Duenas-Alvarez*, the circuits have split over what this "realistic probability" test requires. As explained below, seven circuits have interpreted *Duenas-Alvarez* as a gloss on the categorical approach—that this Court merely intended to warn courts against holding, as a legal matter, that state law covers non-qualifying conduct based on novel, speculative interpretations of state law. By contrast, three circuits (joined by the BIA) have interpreted *Duenas-Alvarez* to alter the categorical approach radically—holding that a defendant must prove a state prosecutes non-qualifying conduct, even when the statute itself covers non-qualifying conduct. And as Mr. Gomez-Reyes's case shows, judges in the Ninth Circuit pinball back and forth between these competing interpretations.

A. In the First, Second, Third, Fourth, Seventh, Tenth, and Eleventh Circuits, a realistic probability exists if the legal scope of state law criminalizes non-generic conduct.

Seven courts of appeals have interpreted *Duenas-Alvarez* to mean that courts should not apply novel interpretations of state law to find that a state statute covers non-generic conduct. In these courts, the defendant need not prove that the state prosecutes individuals for non-generic conduct; instead, if the elements of the state statute or decisions include non-qualifying conduct, a "realistic probability" exists that state law applies in a non-generic way.

First Circuit. In *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017), the court addressed whether the BIA had properly determined that a noncitizen's Rhode Island drug conviction categorically qualified as a federal drug-trafficking offense. In analyzing the state statute, the First Circuit noted that "the Rhode Island drug schedules included at the relevant time at least one drug—thenylfentanyl—not listed on the federal drug schedules." *Id.* at 65. The BIA had recognized the statute's overbreadth, but (citing *Duenas-Alvarez*) held that the noncitizen "had failed to show that there was a realistic probability that Rhode Island would actually prosecute offenses" involving thenylfentanyl. *Id.* The First Circuit rejected this actual-prosecution analysis. "*Duenas-Alvarez*," the court noted, "made no reference to the state's enforcement practices." *Id.* at 66. Rather, the case "discussed only how broadly the state criminal statute applied." *Id.* (underlining in original). Thus, *Duenas-Alvarez* offered only "sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes," caution that had "no relevance" when a state statute's language criminalized non-generic conduct. *Id. See also United States v. Burghardt,* 939 F.3d 397, 408 (1st Cir. 2019); *Da Graca v. Garland*, 23 F.4th 106, 113–14 (1st Cir. 2023).

Second Circuit. In *Hylton v. Sessions*, 897 F.3d 57, 59–60 (2d Cir. 2018), the court addressed whether the BIA had properly determined that a noncitizen's New York conviction for selling marijuana categorically qualified as illicit trafficking. Under federal law, a defendant has not committed an illicit trafficking offense if the offense involved fewer than 30 grams of marijuana. *Id.* at 61. The Second Circuit

held that the noncitizen's prior conviction did not qualify under that standard because the minimum conduct criminalized under the state statute was "the nonremunerative transfer of anything over 25 grams of a substance containing marijuana." *Id.* at 62–63. In reaching that conclusion, the court rejected the BIA's contention that there was not a "realistic probability" that New York would apply its statute to that non-generic conduct. *Id.* at 60, 63. The Second Circuit held that the "realistic probability" standard applied only "as a backstop when a statute has indeterminate reach." *Id.* at 63. But the state statute's language made clear that it criminalized conduct that fell outside the generic definition. *Id.* at 63–64. *See also Jack v. Barr*, 966 F.3d 95, 98 (2d Cir. 2020); *Giron-Molina v. Garland*, 86 F.4th 515, 520 (2d Cir. 2023).

Third Circuit. In *Jean-Louis v. Attorney General*, 582 F.3d 462 (3d Cir. 2009), the court addressed whether the BIA had properly determined that a noncitizen's Pennsylvania conviction for assaulting a child categorically qualified as a crime involving moral turpitude. The Third Circuit acknowledged that the state statute covered situations "where a reckless driver strikes a vehicle bearing a child occupant"; such reckless conduct, the court pointed out, did not appear to "implicate 'moral turpitude.'" *Id.* at 468–69. The court then addressed the realistic-probability test, a test the BIA viewed as a requirement that the noncitizen prove the state would prosecute non-generic conduct. *Id.* at 481. The court rejected the idea that the test had relevance to a case in which the "elements" of the state crime "are clear." *Id.* Because the noncitizen had established that the state law's legal scope was

broader than the federal offense, there was no categorical match between state and federal law. *Id. See also Liao v. Attorney General,* 910 F.3d 714 (3d Cir. 2018).

Fourth Circuit. In *United States v. Aparicio-Soria*, 740 F.3d 152 (4th Cir. 2014) (en banc), the court addressed whether a Maryland conviction for resisting arrest had, "as an element, the use, attempted use, or threatened use of physical force against the person of another" for purposes of the illegal re-entry Guideline. In applying the categorical approach, the Fourth Circuit noted that state courts interpreted the crime of resisting arrest to require only the use of "de minimis force" rather than the violent force required to qualify under "the use of physical force" clause. *Id.* at 155–56. The government argued that state authorities did not as a factual matter prosecute cases involving non-violent conduct and thus there was no categorical match under *Duenas-Alvarez*. *Id.* at 157. The Fourth Circuit rejected this analysis. It noted that "the Government's argument misses the point of the categorical approach and wrenches the Supreme Court's language in *Duenas-Alvarez* from its context." *Id*. (internal quotation marks omitted). The court continued: "We do not need to hypothesize about whether there is a 'realistic probability' that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; we know that they can because the state's highest court has said so." *Id.*

Seventh Circuit. In *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 450 (7th Cir. 2022), the government argued that "even when a statute is facially overbroad under the categorical approach, noncitizens must still satisfy the realistic probability test"

by pointing to an actual prosecution. The court rejected this argument, explaining that when "the state statute of conviction is plain and intentional, our job is straightforward: we compare the state statute to the federal recidivism statute at issue and ask only if the state law is the same as or narrower than federal law." *Id.* Thus, "[i]f the statute is overbroad on its face under the categorical approach, the inquiry ends." *Id.*

Tenth Circuit. In *United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017), the court addressed whether an Oklahoma statute prohibiting an individual from pointing a gun at another categorically qualified as a "violent felony" under the Armed Career Criminal Act. The Tenth Circuit pointed out that the Oklahoma statute criminalized pointing a gun at someone "for purposes of whimsy, humor or prank," conduct that was non-violent. *Id.* at 1270, 1272–73 (internal quotation marks omitted). Even so, the government argued that the defendant could not "prevail because he [had] not supplied 'any cases in which Oklahoma [had] prosecuted someone . . . for pointing a firearm in obvious jest.'" *Id.* at 1274. The Tenth Circuit rejected this argument, stating that the defendant had not asked the court to use "legal imagination." *Id.* Instead, the statute's "plain language" criminalized non-generic conduct, and thus, no categorical match existed. *Id.* This reading of *Duenas-Alvarez*, the Tenth Circuit noted, tracked decisions from the First, Third, Fourth, Ninth, and Eleventh Circuits. *Id.* at 1275 n.23.

Eleventh Circuit. In *Ramos v. Attorney General*, 709 F.3d 1066 (11th Cir. 2013), the court addressed whether the BIA had properly determined that a

noncitizen's Georgia shoplifting conviction categorically qualified as a generic theft offense. In doing so, the court noted that a defendant could commit shoplifting in Georgia with an intent to "appropriate" the property, conduct that would not qualify as generic theft. *Id.* at 1067, 1069–71. In response, the government (citing *Duenas-Alvarez*) argued that the noncitizen needed to "show that Georgia would use the Georgia statute to prosecute conduct falling outside the generic definition of theft." *Id.* at 1071. The Eleventh Circuit disagreed. It held that "[t]he [state] statute's language . . . creates the 'realistic probability' that [Georgia] will punish crimes that do qualify as theft offenses and crimes that do not." *Id.* at 1072. *See also Aspilaire v. U.S. Att'y Gen.*, 992 F.3d 1248, 1255 (11th Cir. 2021); *Simpson v. U.S. Att'y Gen.*, 7 F.4th 1046, 1052–53 (11th Cir. 2021); *Said v. U.S. Att'y Gen.*, 28 F.4th 1328, 1331–33 (11th Cir. 2022).

In short, under the majority view, *Duenas-Alvarez* did not alter the categorical approach because a defendant need not point to an actual state prosecution for non-qualifying conduct to establish that the state statute criminalized non-qualifying conduct. Instead, *Duenas-Alvarez* merely warned lower courts against giving state law an unreasonable interpretation.

B. In the Fifth, Sixth, and Eighth Circuits, and at the Board of Immigration Appeals, a realistic probability exists only if the state actually prosecutes individuals for non-qualifying conduct.

Three courts of appeals, as well as the BIA, view *Duenas-Alvarez* differently. They contend that a state law's legal scope cannot by itself establish a categorical mismatch between state and federal law. Instead, the defendant must prove that

the state would actually prosecute someone for the non-qualifying conduct. Only by pointing to a particular prosecution can the defendant establish there is a "realistic probability" that the state would apply its statute to non-qualifying conduct.

Fifth Circuit. In *United States v. Castillo-Rivera*, 853 F.3d 218 (5th Cir. 2017) (en banc), the court addressed whether there was a categorical match between Texas's felon-in-possession statute and the federal felon-in-possession statute. The state statute provides that a felony constitutes any offense that "'(1) is designated by a law of this state as a felony; (2) contains all the elements of an offense designated by a law of this state as a felony; or (3) is punishable by confinement for one year or more in a penitentiary.'" *Id.* at 222 (quoting TEX. PENAL CODE § 46.04(f)). By contrast, federal law defines a felony as any offense for which the term of imprisonment exceeds one year. *Id.* Yet a divided en banc court held that this legal discrepancy did not matter; the defendant needed to point to a case in which Texas prosecuted someone for being a felon in possession of a firearm where the definition of felony used would not qualify under federal law. *Id.* According to the majority, there was "no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face." *Id.* at 223. Because the defendant could not point to a case in which Texas had prosecuted someone for being a felon in possession where the prior offense would not qualify as a felony under federal law, the court held there was no categorical match. *Id.* at 224–25.

Seven judges dissented, arguing that the majority had misread *Duenas-Alvarez*. The dissent contended that the defendant did not rely on "legal imagination," as *Duenas-Alvarez* had warned against. *Id.* at 238 (Dennis, J., dissenting). Instead, he had relied on "the statute's plain language." *Id.* The dissent criticized the majority for failing to "address or even acknowledge that its holding directly conflict[ed] with holdings from the First, Third, Sixth, Ninth, and Eleventh Circuits. *Id.* at 241 (listing cases). Applying *Duenas-Alvarez* properly, the dissent argued, meant that the defendant had proven there was no categorical match between state and federal law. *Id.*

Sixth Circuit. In *United States v. Burris*, 912 F.3d 386 (6th Cir. 2019) (en banc), the court addressed whether convictions of Ohio felonious assault and Ohio aggravated assault qualified as violent-felony predicates under the Armed Career Criminal Act and the Sentencing Guidelines elements clauses. These statutes criminalized conduct causing "serious physical harm" to another but defined that harm to include "[a]ny mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment." *Id.* at 397 (quoting Ohio Rev. Code § 2901.01(A)(5)(a)). Applying the "realistic probability" test, the court found the statutes overbroad but only because the defendant had "pointed to" several cases upholding convictions for emotional harm—even though the statute on its face criminalized emotional harm. *Id.* at 401.

Eighth Circuit. In *Mowlana v. Lynch*, 803 F.3d 923 (8th Cir. 2015), the court addressed whether the BIA properly determined that a noncitizen's federal

conviction for possessing benefits in a manner contrary to regulations categorically qualified as a generic fraud offense. In addressing the categorical approach, the Eighth Circuit stated that it must determine whether there was a "'realistic probability' that the government would apply its statute to conduct that does not involve fraud or deceit." *Id.* at 925 (quoting *Duenas-Alvarez*, 549 U.S. at 193). The court further refined this requirement: "Our analysis of realistic probability must go beyond the text of the statute of conviction to inquire whether the government actually prosecutes offenses" that involve non-qualifying conduct. *Id.* Applying that test, the Eighth Circuit determined that there was a categorical match because all of the "prosecutions" the government brought under the statute involved fraud or deceit. *Id.* at 926–27.

One judge concurred. He pointed out that the "plain language" of the statute of conviction "contradicts the . . . conclusion that every violation of the statute necessarily involves fraudulent or deceitful conduct." *Id.* at 929. The concurring judge questioned the majority's reading of *Duenas-Alvarez*, stating that "the Supreme Court has clearly not directed or permitted this court to speculate as to whether or not[] a United States Attorney or even most United States Attorneys would or would not charge and prosecute" non-generic conduct. *Id.* That sort of fact-based inquiry was inconsistent with the "traditional categorical/modified categorical framework" the courts must employ. *Id.* at 930–31. *See also Gonzalez v. Wilkinson,* 990 F.3d 654 (8th Cir. 2021) (rejecting the government's argument that a noncitizen

must "prove through specific convictions that unambiguous laws really mean what they say").

The BIA. In *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014), the BIA addressed whether a noncitizen's Connecticut drug-trafficking conviction categorically qualified as illicit trafficking in a controlled substance under federal law. The BIA first acknowledged that the Connecticut drug schedules regulated "two obscure opiate derivatives (benzylfentanyl and thenylfentanyl) that have not been included in the Federal controlled substance schedules since 1986." *Id.* at 416–17. Nevertheless, it held that, "even where a State statute on its face covers a type of object or substance not included in a Federal statute's generic definition, there must be a realistic probability that the State would prosecute conduct falling outside the generic crime" for there to not be a categorical match. *Id.* at 420–21. The BIA noted that this analysis required "fact-finding," which the immigration judge had not performed. *Id.* at 422. As a result, the BIA remanded the case so the immigration judge could determine whether either party could supply "evidence of Connecticut prosecutions (or lack thereof) for possession or sale of benzylfentanyl or thenylfentanyl[.]" *Id. See also Matter of Felx-Figueroa,* 29 I&N Dec. 157 (BIA 2025) (applying the realistic probability test to controlled substance isomers).

In short, under the minority view, *Duenas-Alvarez* significantly altered the categorical approach by requiring defendants to point to an *actual* state prosecution for non-qualifying conduct to establish that the state statute criminalized non-

qualifying conduct. Under this view, *Duenas-Alvarez* was not merely a warning against giving state law an unreasonable interpretation.

C. The Ninth Circuit has taken inconsistent positions.

For its part, the Ninth Circuit has issued published decisions embracing both views of *Duenas-Alvarez*.

At first, the Ninth Circuit embraced the majority view in *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007) (en banc). There, the court addressed whether an Oregon burglary conviction categorically qualified as generic burglary. The Oregon statute criminalized conduct—burglarizing vehicles, boats, and aircraft—that did not fall under the generic definition of burglary. *Id.* at 850. Without requiring the defendant to prove that Oregon had prosecuted individuals for burglarizing vehicles, boats, or aircraft, the court held that the defendant had met his burden under *Duenas-Alvarez* to prove that Oregon applied its statute to non-generic conduct. *Id.* "Where . . . 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.*

After *Grisel*, a handful of Ninth Circuit panels followed its holding that an overbroad state statute is not a categorical fit with the relevant generic offense no matter whether the defendant has proven that the state has actually prosecuted an individual for non-generic conduct. *See, e.g.*, *United States v. Valdivia-Flores*, 876 F.3d 1201, 1208 (9th Cir. 2017); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009–10 (9th

Cir. 2015); *Cerezo v. Mukasey*, 512 F.3d 1163, 1167 (9th Cir. 2008); *United States v. Becerril-Lopez*, 541 F.3d 881, 890 (9th Cir. 2008) .

But other Ninth Circuit panels rejected this view of *Duenas-Alvarez*. Instead—consistent with the Fifth, Sixth, and Eighth Circuits, as well as the BIA—these decisions looked to whether the defendant could prove that the state actually prosecutes individuals for non-generic conduct. For example, in *Lopez-Aguilar v. Barr*, 921 F.3d 898, 903–04 (9th Cir. 2019), the Ninth Circuit addressed whether a noncitizen's Oregon robbery conviction qualified as generic theft. The Oregon statute criminalized "theft by deception," which would not qualify as generic theft. *Id.* at 903. Yet citing *Duenas-Alvarez*, the court held there was no categorical match because "there is no realistic probability that Oregon would prosecute such conduct under the statute." *Id.* In dissent, Judge Berzon contended that the "plain text" of the Oregon statute established that it was not a categorical match with generic theft. *Id.* at 907–08. Judge Berzon lamented that the majority had misread *Duenas-Alvarez* to require "a case involving an actual prosecution of the state offense in a nongeneric manner." *Id.* She further explained that it would "'make little sense' to require a state appellate decision involving an actual prosecution of nongeneric conduct before concluding that there is a realistic probability that the state statute would be so applied[.]" *Id.* at 910 (quoting Doug Keller, *Causing Mischief for* Taylor*'s Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO MASON L. REV. 625, 659–60 (2011) (bracket omitted)).

Other Ninth Circuit panels have similarly applied the actual-prosecution approach to determine whether a categorical match exists. *See, e.g.*, *United States v. Vega-Ortiz*, 822 F.3d 1031, 1035–36 (9th Cir. 2016); *United States v. Burgos-Ortega*, 777 F.3d 1047, 1053–55 (9th Cir. 2015); *Medina-Lara v. Holder*, 771 F.3d 1106, 1116–17 (9th Cir. 2014); *United States v. Hernandez*, 769 F.3d 1059, 1062–63 (9th Cir. 2014). And, in this case, a divided Ninth Circuit panel held that Petitioner could not establish the state statute's overbreadth because he "cites no case illustrating it." Pet. App. 3a.

* * *

In sum, the circuits and the BIA are openly and deeply split over what *Duenas-Alvarez* meant by requiring defendants to prove there was a "realistic probability" that a state statute applies to non-generic conduct. As a result, the contours of the categorical approach shift dramatically depending on which circuit resolves the case—and, in the Ninth Circuit, which panel.

II.

This case presents a recurring and important constitutional issue.

The existence of a split on this fundamental question is particularly concerning because of the enormous volume of criminal and immigration cases that courts and immigration authorities decide under the categorical approach.

The categorical approach is a critical part of federal sentencing law. For instance, the federal definition at issue here—the "use, attempted use, or threatened use of physical force"—appears in numerous places throughout the

federal criminal code and the U.S. Sentencing Guidelines. It adds a minimum mandatory five-year consecutive sentence onto a firearm offense. *See* 18 U.S.C. § 924(c). It transforms a federal firearm offense into a discretionary life sentence. *See* 18 U.S.C. § 924(e)(2)(B)(ii). It adds a mandatory life sentence onto a variety of federal crimes. *See* 18 U.S.C. § 3559(c)(1). It raises the statutory maximum for illegal reentry offenses to twenty years. 8 U.S.C. § 1326(b)(2). It triggers mandatory restitution. *See* 18 U.S.C. § 3663A(c)(1)(A)(i). It dramatically raises a person's Sentencing Guidelines range, particularly in the context of the unlawful possession of a firearm. *See* U.S.S.G. § 4B1.2(a)(1); U.S.S.G § 2K2.1(a). A Westlaw search indicates that in the last ten years, this phrase has appeared in over two thousand written decisions. Simply put, the categorical approach is frequently one of the most important factors affecting an individual's federal criminal sentence.

The categorical approach is equally ubiquitous in the immigration context. It applies to both the grounds of inadmissibility at 8 U.S.C. § 1182(a)(2) and the grounds of deportability at 8 U.S.C. § 1227(a)(2), covering generic and federal offenses such as aggravated felonies, crimes involving moral turpitude, controlled substance crimes, and domestic violence offenses. Every year, it thus determines whether thousands of immigrants will be admitted to the United States, eligible for relief from removal, or deported.

Indeed, this Court has not hesitated in the past to grant review when the circuits have divided over aspects of the categorical approach. *See, e.g.*, *Torres v. Lynch*, 578 U.S. 452, 456 (2016); *Mathis*, 579 U.S. at 509; *United States v.*

Castleman, 572 U.S. 157, 162 (2014); *Descamps v. United States*, 570 U.S. 254, 260 (2013); *United States v. Hayes*, 555 U.S. 415, 420 (2009). Given the widespread application of the "realistic probability" test, this Court should not hesitate to do so here.

III.

This case presents an ideal vehicle to resolve the question presented.

It is difficult to imagine a case that more squarely presents this issue. As explained, the majority rejected Mr. Gomez-Reyes's argument that the Illinois statute is overbroad because it includes attempts to threaten, claiming that "[s]uch a scenario is difficult to imagine," and Mr. Gomez-Reyes had "cite[d] no case illustrating it." Pet. App. 2a–3a (citing *Duenas-Alvarez*, 549 U.S. at 193). This mirrors the position of the Fifth, Sixth, and Eighth Circuits, as well as the BIA.

In response, Judge Miller's dissent acknowledged that "there are no reported Illinois cases in which the statute has been applied to attempts to threaten," but explained that a defendant "need not cite a specific case to show a realistic probability where the state statute explicitly defines a crime more broadly than the generic definition." Pet. App. 9a (quotations omitted). This precisely mirrors the position of the First, Second, Third, Fourth, Seventh, Tenth, and Eleventh Circuits. Moreover, this issue was squarely presented below and controlled the outcome of the case. This Court is unlikely to encounter a better vehicle to resolve the entrenched circuit split over the *Duenas-Alvarez* question.

IV.

The decision below is wrong.

Granting review is particularly warranted because the court of appeals decision below—embracing the actual-prosecution view of *Duenas-Alvarez*—misunderstands *Duenas-Alvarez*. As explained here, this view finds no support in the language this Court used in *Duenas-Alvarez*, deviates from the categorical approach it purports to apply, and makes no sense on its own terms.

A. The decision below is inconsistent with *Duenas-Alvarez*.

As noted above, *Duenas-Alvarez* addressed the scope of California's aiding-and-abetting doctrine. 549 U.S. at 190–91. The noncitizen's counsel at oral argument had claimed that California's aiding-and-abetting doctrine covered a hypothetical fact pattern that generic aiding-and-abetting would not. *Id.* at 191. In response, this Court stated that:

> [T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than application of *legal imagination to a statute's language*.

Id. at 193 (emphasis added). Thus, the Court's language suggests that it was not concerned with "legal imagination" as a stand-alone concept. Instead, this Court's language focused on courts applying an idiosyncratic interpretation of *statutory language* to claim the statute covers non-generic conduct. This Court then continued: "It requires 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.* Put together, *Duenas-Alvarez* held that, if you use "legal imagination" to interpret a state statute's language, there would be only a "theoretical possibility,"

rather than a "realistic probability," that the statute covered such conduct. Thus, when the noncitizen was arguably using legal imagination to interpret state law, this Court required the noncitizen to point to a case (his own or another's) in which the court *interpreted* "the statute in the special (nongeneric) manner for which he argues." *Id.*

Duenas-Alvarez, then, did not deal with a state statute that covered both generic and non-generic conduct. Instead, the Court faced a hypothetical that the state statute did not cover—that the noncitizen was just "arguing for a novel judicial interpretation of a state theft statute." *United States v. Madera*, 521 F. Supp. 2d 149, 156 (D. Conn. 2007) (discussing *Duenas-Alvarez*). Viewed this way, *Duenas-Alvarez* was just a case about not misinterpreting state law, nothing more. Indeed, *Duenas-Alvarez* "made no reference to the state's enforcement practices." *Swaby*, 847 F.3d at 66. Only by "wrench[ing] . . . language in *Duenas-Alvarez* from its context" can the case be viewed as affecting how a statute is typically applied in practice. *Aparicio-Soria*, 740 F.3d at 157–58; *accord Hylton*, 897 F.3d at 65.

In fact, *Taylor* explained why *Duenas-Alvarez* does *not* apply here. In *Taylor*, the government raised a similar *Duenas-Alvarez* argument that this Court rejected "for at least two reasons." 596 U.S. at 858. The first—that the elements comparison involved two federal statutes—does not apply here. *See id.* at 859. But the second—that there is "no overlap" between a definition that requires the use of force and one that does not—*does* apply. *Id.* Like the attempt to threaten Hobbs Act robbery in *Taylor*, an attempt to threaten aggravated criminal sexual abuse in Illinois "does

not require proof of *any* of the elements" of 18 U.S.C. § 16(a). *Id.* So as in *Taylor*, "[t]hat ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise." *Id.*

B. The decision below conflicts with decades of case law from this Court on the categorical approach.

This Court's decision in *Duenas-Alvarez* must also be viewed in the context of this Court's categorical-approach jurisprudence. When viewed in that context, interpreting *Duenas-Alvarez* as requiring a focus on who is prosecuted under state law makes no sense.

Since the beginning, the Court has made clear that the categorical approach is an elements-based inquiry. *See Descamps*, 570 U.S. at 260–61 (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)). And the Court has reiterated that foundational premise in the thirty years since. Most recently, this Court in *Mathis* wrote that the categorical approach "focus[es] *solely* on whether the elements of the crime of conviction sufficiently match the elements of" the relevant federal offense. 579 U.S. at 504 (emphasis added). This continued reminder that courts should focus on the "elements" of the defendant's prior conviction—nothing else—has become something of a "mantra" in this Court's categorical-approach case law. *Id.* at 510. And this elements-based inquiry is a "legal question," not a factual one. *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015). So in determining the elements of a state prior conviction, courts must answer that question by looking to "state law[.]" *Johnson v. United States*, 559 U.S. 133, 138 (2010). This legal inquiry—comparing the elements of state law to the elements of the federal qualifying offense—avoids the "practical

difficulties and potential unfairness of a factual approach[.]" *Taylor*, 495 U.S. at 601.

It is impossible to reconcile an elements-based approach—an approach that focuses on the legal scope of a state law—with the fact-based view embraced by the court below; the Fifth, Sixth, and Eighth Circuits; and the BIA. Whatever can be said of the actual-prosecution view, it has nothing to do with an elements-based categorical approach. *See Aparicio-Soria*, 740 F.3d at 158 (rejecting the actual-prosecution view because what "really matters" for categorical approach purposes is "'elements, not facts'"). A state criminal statute, after all, does not alter in legal scope based on what conduct state prosecuting authorities choose to charge. Thus, reading *Duenas-Alvarez* consistent with an actual-prosecution view as the decision purports to apply the categorical approach leads to a reading of the decision that renders it incoherent.

In short, when considered against the backdrop of this Court's categorical-approach jurisprudence as a whole, *Duenas-Alvarez* cannot be read to require individuals to prove that a state actually prosecutes non-qualifying conduct. Reading *Duenas-Alvarez* that way would improperly "turn[] an elements-based inquiry into an evidence-based one." *Descamps,* 570 U.S. at 266–67. Only by interpreting *Duenas-Alvarez* consistently with the majority view will this Court ensure that the categorical approach "retains" its "central feature: a focus on the elements, rather than the facts, of a crime." *Id.* at 263.

C. The decision below articulates a view of the categorical approach that would waste time and resources.

Not only is the actual-prosecution view inconsistent with this Court's precedent, it fails on its own terms. The view "creates the same 'daunting' difficulties and inequities that first encouraged [the Court] to adopt the categorical approach." *Descamps*, 570 U.S. at 270 (quoting *Taylor*, 495 U.S. at 601–02). Specifically, the view would ultimately require courts (and immigration officials) to waste time and resources determining the particular facts of prior convictions.

If courts must determine how a state chooses to enforce its statutes in practice under *Duenas-Alvarez*, it makes little sense to limit the universe of materials courts can consult to appellate decisions. Our "criminal justice today is for the most part a system of pleas," and "[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Lafler v. Cooper*, 566 U.S. 156, 169–70 (2012). That means the total universe of cases that end up on appeal represents a microscopic fraction of the cases prosecuted under the statute. It is hard to learn anything meaningful, then, about how a state enforces its statutes by reviewing appellate decisions. This is especially true in small states or when a defendant was convicted under a new statute. In those situations, it is likely that there will be few, if any, appellate decisions. Given that reality, it would be unfair and arbitrary—and raise troubling due process concerns—to artificially limit the type of evidence someone could adduce to establish that a state prosecutes non-qualifying conduct.

To avoid that problem, courts would need to allow individuals to rely on other sorts of evidence to establish that a state prosecutes non-qualifying conduct. That would presumably lead to evidentiary hearings in which the parties would litigate what happened in other state cases. *Cf. Matter of Ferreira*, 26 I&N Dec. at 420–21 (remanding so an immigration judge could conduct "fact-finding" and take "evidence" about who Connecticut prosecutes under its drug statutes).

In the original decision establishing the categorical approach, however, this Court made clear that one of its virtues was to avoid wasting time and resources by holding mini-trials on the facts of a prior conviction. *Taylor*, 495 U.S. at 601–02; *accord Moncrieffe v. Holder*, 569 U.S. 184, 200–02 (2013). Thus, the actual-prosecution view flips a strength of the categorical approach on its head by making the analysis *more* fact-intensive and *less* efficient. Moreover, it would mean that a defendant's sentencing enhancement, or a noncitizen's immigration consequence, turns on the particular facts of someone else's conviction, rather than what the defendant or noncitizen necessarily admitted. That makes little sense.

* * *

Not only should this Court resolve the inter-circuit confusion over *Duenas-Alvarez*'s "realistic probability" test, it should do so in a way that maintains the coherence and integrity of the categorical approach. The only way to do so is to reject the actual-prosecution approach by "focusing *solely* on whether the elements of the crime of conviction sufficiently match the elements of" the relevant federal offense or definition. *Mathis,* 579 U.S. at 504 (emphasis added).

CONCLUSION

For these reasons, this Court should grant Mr. Gomez-Reyes's petition for a writ of certiorari to clarify the "realistic probability" test under *Duenas-Alvarez*.

Respectfully submitted,

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s/ Kara Hartzler

KARA HARTZLER
Federal Defenders of San Diego, Inc.
225 Broadway, Suite 900
San Diego, California 92101
Telephone: (619) 234-8467

Attorneys for Petitioner