

No.

In the Supreme Court of the United States

JULIUS AUGILLARD,

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**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Numerous provisions of federal law impose consequences based on prior state criminal convictions. To determine which state convictions constitute valid predicates, the Court has long used the categorical approach, comparing the elements of the state statute of conviction with the relevant federal standard. If the state offense is identical to (or narrower than) the federal standard, there is a categorical match, and the state offense can serve as a valid predicate. But if the state offense criminalizes conduct that falls outside the federal standard, the prior conviction is not a valid predicate under the categorical approach.

Ten circuits hold that the statutory text itself can establish that a state offense is categorically broader than the relevant federal definition. The Fifth Circuit alone requires a defendant to identify an actual case in which the State prosecuted the broader conduct, statutory text notwithstanding.

The question presented is:

Whether, under the categorical approach, a defendant must always produce an actual case to demonstrate a state statute's overbreadth, even when the state statute is facially broader than the federal standard.

PARTIES TO THE PROCEEDING

Petitioner Julius Augillard was the defendant in the United States District Court for the Eastern District of Louisiana and the Appellant in the U.S. Court of Appeals for the Fifth Circuit.

Respondent United States of America was the plaintiff in the district court and the appellee in the Fifth Circuit.

RELATED PROCEEDINGS

- *United States v. Augillard*, No. 25-30192 (5th Cir. Aug. 18, 2026) (reissuing order denying petition for rehearing en banc)
- *United States v. Augillard*, No. 25-30192 (5th Cir. July 28, 2026) (denying petition for rehearing en banc)
- *United States v. Augillard*, No. 25-30192 (5th Cir. Apr. 27, 2026) (affirming district court)
- *United States v. Augillard*, No. 2:24-cr-90 (E.D. La. Mar. 27, 2025) (criminal judgment).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Julius Augillard respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported but is available at 2026 WL 1135452 and is reproduced in the appendix at 1a-15a. The opinions of Judge Oldham (app., *infra*, 23a-31a) and Chief Judge Elrod (*id.* at 31a-43a) respecting the denial of en banc review are reported at 187 F.4th 352. The decision and oral sentence of the district court are reproduced in the appendix at 16a-18a, 19a-21a.

JURISDICTION

The court of appeals entered its judgment on April 27, 2026, and denied a timely filed petition for rehearing on July 28, 2026. The court of appeals reissued its order denying rehearing en banc on August 18, 2026. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT

This case presents an acknowledged and enduring 10-1 circuit conflict over a question that frequently determines criminal convictions, deportation, and years of imprisonment. Under the categorical approach, ten circuits hold that statutory text itself can establish that a state offense is broader than the relevant federal standard and therefore cannot serve as a valid predicate. The Fifth Circuit alone requires a defendant additionally to produce evidence of an actual prosecution of the broader conduct—even when the statutory mismatch is conceded. That rule replaces an inquiry into what the legislature criminalized with a search for what prosecutors have charged, and the

split among the circuits subjects criminal defendants and immigrants to intolerable differences in consequences based on geography.

Petitioner’s case presents that conflict in its cleanest form. The government agreed, both at sentencing and on appeal, that his Louisiana drug offense was broader than the relevant federal definition. Yet the Fifth Circuit upheld his sentencing enhancement solely because petitioner could not identify a Louisiana prosecution involving the substance (Ioflupane) that state law covered and federal law excluded. No disputed interpretation of state law obscures the question presented, and no independent ground supports the judgment. The actual-case requirement alone stood between petitioner and relief.

The opinions accompanying the denial of rehearing en banc confirm that the Court’s intervention is necessary. Chief Judge Elrod explained that *United States v. Taylor*, 596 U.S. 845 (2022), “made clear that the ‘actual case’ requirement is not the law.” App., *infra*, 32a. But the Fifth Circuit declined to reconsider, with Judge Oldham defending the Circuit’s rule and urging his colleagues to “await direction from the Supreme Court.” *Id.* at 30a.

After nearly a decade of disagreement, the split is fully developed and firmly entrenched. The Court should grant certiorari to provide the direction sought by the court below.

A. Legal background

1. The categorical approach is an analytical tool for classifying offenses in contexts where federal statutes attach consequences to prior convictions, including substantive criminal law, sentencing, and

immigration. Under the categorical approach, courts “look only to the *fact* of conviction and the statutory definition of the prior offense,” rather than “the defendant’s actual prior criminal conduct.” *Taylor v. United States*, 495 U.S. 575, 602 & n.10 (1990) (emphasis added) (*Taylor* 1990). This elements-based method ensures that prior convictions for the same offense receive uniform federal treatment and avoids the practical and constitutional difficulties of relitigating a defendant’s past conduct. See *Descamps v. United States*, 570 U.S. 254, 267 (2013).

To apply the categorical approach, courts first identify “the least of the acts’ criminalized by the [prior-offense] statute” and then “determine whether that conduct would fall within the federal definition of the crime.” *Esquivel-Quintana v. Sessions*, 581 U.S. 385, 389 (2017) (alteration adopted) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). “If any—even the least culpable—of the acts criminalized” by that statute fall outside of the federal definition, the overbroad prior “statute of conviction does not categorically match the federal standard” and cannot serve as a predicate. *Borden v. United States*, 593 U.S. 420, 424 (2021) (plurality opinion).

At its core, the categorical inquiry thus compares the legal elements of an offense against a federal definition. If the elements of the prior offense do not “overlap” with the federal definition, “[t]hat ends the inquiry” and the enhancement cannot attach. *Taylor*, 596 U.S. at 859.

Sometimes the mismatch between the predicate offense and the federal standard is facially evident from statutory text or authoritative judicial construction. See, e.g., *Mellouli v. Lynch*, 575 U.S. 798, 812-

813 (2015) (comparing differing federal and state controlled-substances schedules). In other cases, litigants argue that a state statute—while not a facial mismatch—is nonetheless overbroad because it could be *applied* to conduct beyond the federal standard.

When disputes over the practical reach of a state statute emerge, the Court has explained that a federal court must determine whether there is “a realistic probability,” rather than a “theoretical possibility,” that “the State would apply its statute to [the overbroad] conduct” hypothesized by a litigant. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). To do so, the litigant ordinarily must “point to his own case or other cases in which the state courts in fact did apply the statute in the special” overbroad “manner for which he argues.” *Ibid.*

As later cases make clear, that holding did not alter the categorical approach’s “focus on the minimum conduct criminalized by state statutes.” *Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013). Nor did it suggest that the requirement that a litigant point to an actual case would play any role when there is a facial mismatch between an offense and the federal standard. And in the decade that followed *Duenas-Alvarez*, the Court continued to apply the plain meaning of state laws to find offenses categorically overbroad—and thus invalid predicates—without requiring evidence of an actual state prosecution of non-qualifying conduct. See, e.g., *Mellouli*, 575 U.S. at 808; *Mathis v. United States*, 579 U.S. 500, 508 (2016).

In 2022, the Court declined the government’s request to import an actual-case requirement into all categorical approach analyses. *Taylor*, 596 U.S. at 857-859. Such a requirement is “atextual,” the Court

explained, because the categorical approach focuses on “the elements” of an offense rather than how it “is normally committed or usually prosecuted.” *Id.* at 858. Rather, the test articulated in *Duenas-Alvarez* applies where “the elements of the relevant state and federal offenses clearly overlap[] and the only question the Court face[s] [is] whether state courts *also* ‘appl[y] the statute in [a] special (nongeneric) manner.’” *Id.* at 859 (quoting *Duenas-Alvarez*, 549 U.S. at 193)). But where there is a *facial* mismatch, the Court held, “[t]hat ends the inquiry, and nothing in *Duenas-Alvarez* suggests otherwise.” *Ibid.*

B. Factual and procedural background

1. In 2011, petitioner Julius Augillard was convicted of cocaine possession with intent to distribute under Louisiana law. Years later, petitioner pleaded guilty to unlawful possession of a firearm under 18 U.S.C. § 922(g)(1). App., *infra*, 2a.

Under the Sentencing Guidelines, defendants who previously committed a “controlled substance offense” receive a higher base offense level. U.S.S.G. § 2K2.1(a)(3). The probation office determined that petitioner’s Louisiana cocaine offense constituted a “controlled substance offense,” which the Guidelines define in relevant part as “an offense under federal or state law” that “prohibits * * * the possession of a controlled substance * * * with intent to manufacture, import, export, distribute, or dispense.” *Id.* § 4B1.2(b).

Petitioner objected, arguing that his Louisiana conviction was not a “controlled substance offense” under the categorical approach. Under Fifth Circuit precedent, a “controlled substance offense” is an offense that necessarily involved a substance that is on the federal drug schedules at the time of a defendant’s

federal sentencing. See *United States v. Minor*, 121 F.4th 1085, 1089-1090 (5th Cir. 2024). At the time of petitioner’s earlier conviction, Louisiana’s drug schedules defined cocaine broadly to include “any salt, isomer, salt of an isomer, compound, derivative, or preparation of * * * cocaine.” La. Stat. Ann. § 40:964, Schedule II(A)(4) (2011). That definition encompassed, among other substances, a “radioactive cocaine derivative” called Ioflupane. *Brown v. United States*, 602 U.S. 101, 108 (2024). In contrast, the federal Controlled Substances Act (CSA) expressly excluded Ioflupane from the federal schedules at the time of his federal sentencing. See 21 C.F.R. § 1308.12(b)(4)(ii).

Following binding Fifth Circuit precedent, the district court rejected petitioner’s categorical-approach argument. App., *infra*, 17a-18a. The sentencing court acknowledged that Louisiana’s definition at the time of petitioner’s state conviction was broader than the current CSA. *Id.* at 18a. But it concluded that an “actual case” prosecuting that broader conduct was required even where a state statute is facially more expansive than the federal counterpart. *Id.* at 6a, 18a. Applying the enhancement, the court sentenced petitioner to concurrent 70-month imprisonment terms and three years of supervised release. *Id.* at 3a, 19a.

2. A panel of the Fifth Circuit affirmed. The panel acknowledged that “the parties agreed at sentencing and on appeal that Augillard’s 2011 Louisiana statute of conviction contained a broader definition of controlled substance than the CSA’s definition” due to the inclusion of Ioflupane. App., *infra*, 4a-5a. But the panel held that, even for a “facially overbroad statute,” circuit precedent requires a defendant to “cite a

state court case showing that overbreadth.” *Id.* at 3a-4a. In doing so, it applied a line of Fifth Circuit precedent tracing back to *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc), in which the en banc Fifth Circuit held that a defendant or immigrant challenging the use of an offense as a predicate under the categorical approach must point to an actual prosecution for conduct that falls outside the federal standard. “Because Augillard failed to locate a Louisiana case in which a defendant was prosecuted for possession of Ioflupane, he failed to satisfy the realistic probability test.” App., *infra*, 11a.

The panel rejected petitioner’s argument that intervening Supreme Court decisions—*Taylor* and *Brown*—abrogated the Fifth Circuit’s across-the-board actual-case requirement. It distinguished *Taylor* as involving a federal predicate offense and reasoned that it did not expressly overrule *Duenas-Alvarez* in the context of state predicates. App., *infra*, 8a-10a. As a result, the panel believed itself bound by pre-*Taylor* Fifth Circuit precedent and affirmed the district court’s application of the actual-case requirement.

3. Petitioner sought rehearing *en banc*, contending that the Fifth Circuit’s actual-case requirement should be overruled because it involves an issue of exceptional importance, conflicts with the Court’s precedents, and departs from decisions of other courts of appeals. The Fifth Circuit denied the petition, over the votes of four judges who would have granted it. App., *infra*, 23a.

Judge Oldham concurred in the denial of rehearing. He defended the Fifth Circuit’s actual-case requirement and suggested that “if further innovation

is warranted in this area, we should await direction from the Supreme Court.” App., *infra*, 30a.

Chief Judge Elrod, joined by Judge Higginson, dissented from the denial of rehearing *en banc*. Although Chief Judge Elrod was in the majority in *Castillo-Rivera* when the Fifth Circuit created its actual-case requirement (App., *infra*, at 32a), she explained that intervening Supreme Court precedent—particularly *Taylor*—had abrogated the Fifth Circuit’s rule. In her view, the court’s application of that rule to petitioner put the Fifth Circuit “on the short side of a 10-1 split” and, “more importantly, puts [the] circuit’s precedent in tension with the Supreme Court’s.” *Id.* at 33a. While the Fifth Circuit’s actual-case requirement came from *Duenas-Alvarez*, that case “was *not* about a situation where the texts of the state and federal statutes conflict”—that is, “[t]he Court was not confronting a statute that was overbroad on its face.” *Id.* at 36a. Instead, “[t]he ‘actual case’ requirement was the Court’s solution to speculative arguments about state-court interpretation.” *Ibid.*

But, Chief Judge Elrod observed, the Court in *Taylor* instructed that “the realistic-probability test is inapplicable when either: (1) the text of the predicate statute is a mismatch with the federal definition, or (2) where the predicate offense is a federal crime.” App., *infra*, 38a. *Taylor* thus undermined any basis for the Fifth Circuit’s approach. *Ibid.* And Chief Judge Elrod noted that the question is one of “exceptional importance,” which “has created a geographic disparity in immigration and criminal law.” *Id.* at 41a (quoting Fed. R. App. P. 40(b)(2)(D)).

REASONS FOR GRANTING THE PETITION

This case presents an ideal vehicle to resolve a longstanding split between the Fifth Circuit and ten other circuits. The opinions concerning denial of rehearing en banc make unmistakably clear that the Court’s intervention is necessary to remedy the arbitrary disparities in criminal and immigration cases that flow from the Fifth Circuit’s outlier rule. Criminal liability, criminal sentences, and immigration consequences should not depend on accidents of geography. The Court should grant review.

A. The circuits are irreconcilably divided over the actual-case requirement.

The decision below—coupled with the order denying *en banc* rehearing over dissents—cements an acknowledged 10-1 split regarding whether a litigant challenging the use of a concededly overbroad prior conviction as a federal predicate must nonetheless produce an actual case in which the prior offense statute had been used to prosecute conduct falling outside the federal standard.

1. The Fifth Circuit requires defendants and immigrants to produce an actual case in every challenge to a prior offense’s use as a predicate—no matter what the statute’s text or authoritative judicial constructions might say. The requirement traces back to *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017) (en banc), where a closely divided Fifth Circuit held that “[t]here is no exception to the actual case requirement articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face.” The result is that in the Fifth Circuit, “interpreting a state statute’s text alone is simply not

enough to establish the necessary ‘realistic probability.’” *Id.* (quoting *Duenas-Alvarez*, 549 U.S. at 193).

That rule was dispositive in this case. “Here, the parties agreed at sentencing and on appeal that Augillard’s 2011 Louisiana statute of conviction contained a broader definition of controlled substance than the CSA’s definition.” App., *infra*, 4a-5a. The district court upheld the sentencing enhancement because “Augillard was unable to pinpoint a case in which Louisiana had prosecuted anyone for Ioflupane.” *Id.* at 5a. And the Fifth Circuit affirmed for the same reason: Petitioner “failed to locate a Louisiana case in which a defendant was prosecuted for possession of Ioflupane.” *Id.* at 11a. The sentencing enhancement—and at least two years of liberty¹—rose and fell on the actual-case requirement.

As numerous judges on the Fifth Circuit have recognized, the Fifth Circuit is alone in its across-the-board application of the actual-case requirement. In her opinion dissenting from denial of rehearing en banc, Chief Judge Elrod observed that the “‘actual case’ requirement * * * places [the Fifth Circuit] on the short side of a 10-1 circuit split.” App., *infra*, 33a. Six years earlier, Judge Graves explained that the court’s steadfast adherence to the actual-case requirement “diverge[s] from at least seven other circuit courts.” *Alexis v. Barr*, 960 F.3d 722, 732-733 (5th Cir.

¹ The base offense for a conviction like Augillard’s is 20. See U.S.S.G. § 2k2.1(a)(4)(B). Following a 3-point reduction for acceptance of responsibility, his correct offense level was 17. Combined with his criminal history category of IV, but without the controlled-substance-offense enhancement, the Guidelines recommended a range of 37-46 months. See U.S.S.G. Ch. 5, Pt. A (sentencing table).

2020) (Graves, J., concurring). And nearly a decade ago, a panel of the Fifth Circuit observed that “[o]ther circuits have held that a statute’s plain meaning is dispositive; where a state statute is facially overbroad compared to a corresponding federal statute, there is a realistic probability that the state will apply its statute to conduct that falls outside the generic definition.” *Vazquez v. Sessions*, 885 F.3d 862, 873 & n.4 (5th Cir. 2018) (citing decisions of five other circuits).

2. In contrast to the Fifth Circuit, ten other circuits agree that, when a state offense is facially or concededly broader than the federal comparator, the categorical approach inquiry ends.

Indeed, three circuits have rejected an across-the-board actual-case requirement—and have therefore embraced the precise argument the Fifth Circuit rejected here—in circumstances materially identical to those of this case.

The **Eleventh Circuit**, geographically adjacent to and once part of the Fifth Circuit, offers perhaps the starkest illustration of the split. In *United States v. Miller*, 157 F.4th 1365 (11th Cir. 2025), the Eleventh Circuit invalidated a predicate in nearly identical circumstances, holding that “there was a mismatch between Florida’s definition of cocaine, which treated ioflupane as a form of cocaine, and the federal schedules, which did not.” *Id.* at 1378. There was no need to identify an actual case prosecuting Ioflupane because the Eleventh Circuit has held that a challenger can *either* point to an actual case or “demonstrate that ‘statutory language itself, rather than the application of legal imagination to that language, creates [a] realistic probability that a state would apply the statute to conduct beyond’” the reach of a federal

statute. *Aspilaire v. U.S. Att’y Gen.*, 992 F.3d 1248, 1255 (11th Cir. 2021) (quoting *Ramos v. U.S. Att’y Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013)); see also *Said v. U.S. Att’y Gen.*, 28 F.4th 1328, 1331 (11th Cir. 2022) (noting that the Eleventh Circuit has “rejected the government’s argument that the offender must always ‘point to a case’”).

The **Ninth Circuit** has also rejected the need for an actual case where “a state statute expressly defines a crime more broadly than the generic offense.” *Lopez-Aguilar v. Barr*, 948 F.3d 1143, 1147 (9th Cir. 2020). Instead, “[a]s long as the application of the statute’s express text in the nongeneric manner is not a logical impossibility, the relative likelihood of application to nongeneric conduct is immaterial.” *Ibid.*; accord *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009-1010 (9th Cir. 2015) (“Chavez-Solis has no need to point to any actual prosecution” because “[t]he statute of conviction * * * expressly prohibits * * * conduct” broader than the federal standard). And the Ninth Circuit has applied this rule to Ioflupane specifically, holding that the Montana drug schedule statute was “overbroad on its face.” *United States v. Holliday*, 853 F. App’x 53, 55 (9th Cir. 2021).

The **Eighth Circuit** has similarly rejected an actual-case requirement in the context of state drug statutes that include substances beyond the federal schedules. *Gonzalez v. Wilkinson*, 990 F.3d 654, 660 (8th Cir. 2021). The court explained that where “the plain language of the [state] statute makes clear that it applies to conduct not covered by the federal statute,” “[t]his is all” a defendant is “required to show under the categorical approach.” *Id.* at 661. The court thus joined “[t]he majority of [its] sister circuits” in

rejecting “the government’s framing of the realistic probability inquiry,” expressly departing from the Fifth Circuit’s outlier *Castillo-Rivera* decision. *Id.* at 661 n.3. And the Eighth Circuit has applied this reasoning to state statutes that include Ioflupane too. *United States v. Perez*, 46 F.4th 691, 701 (8th Cir. 2022) (“Because Perez’s state statute of conviction included Ioflupane whereas the CSA specifically excludes Ioflupane as a controlled substance, the state statute is overbroad on its face, and our categorical analysis ends with the text of the statute.”), *abrogated on other grounds by Brown*, 602 U.S. 101.

Seven other circuits² have also squarely held that no actual case is needed where the prior offense is facially overbroad, and some have expressly critiqued the Fifth Circuit’s rule in particular.

The **First Circuit** has held that “there is no actual case requirement where a statute is facially broader than its generic counterpart.” *Da Graca v. Garland*, 23 F.4th 106, 113-114 (1st Cir. 2022). In reaching that conclusion, the court favorably cited Judge Dennis’s dissenting explanation in *Castillo-Rivera* that the Fifth Circuit’s approach “misconstrues *Duenas-Alvarez*, directly conflicts with [*Taylor 1990*],

² The D.C. Circuit has not squarely addressed this issue, but its cases applying the categorical approach have notably not required the challenger to produce an actual case. See, e.g., *United States v. Sheffield*, 832 F.3d 296, 314-315 (D.C. Cir. 2016) (holding that D.C.’s attempted robbery statute was not a valid predicate because a “clause” of the text showed that it was overbroad, without demanding an actual prosecution); *United States v. Cooper*, 610 F. Supp. 3d 184, 197 n.14 (D.D.C. 2022) (“The D.C. Circuit has not adopted an ‘actually applied’ standard, and this Court will not do so either.”).

and ignores both [Fifth Circuit] precedent and the holdings of several” other “circuits.” *Id.* at 113 n.8.

The **Second Circuit** likewise considers the actual-case requirement “obviated” when “the wording of the state statute * * * on its face extends to conduct beyond the definition of the corresponding federal offense.” *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018). It has thus held that there is no actual-case requirement “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.” *Ibid.* (quoting *Ramos*, 709 F.3d at 1072). In rejecting an actual-case requirement, the Second Circuit has noted the “practical challenges” of the Fifth Circuit’s approach and explained that “it finds little purchase in Supreme Court precedent.” *Id.* at 64.

The **Third Circuit** takes the same approach, holding that there is no need to identify an “actual prosecution where the statute expressly authorizes the state government to enforce broader conduct.” *Salmoren v. Att’y Gen.*, 909 F.3d 73, 81-82 (3d Cir. 2018); accord *Cabeda v. Att’y Gen.*, 971 F.3d 165, 176 (3d Cir. 2020). The court expressly rejected the Fifth Circuit’s requirement. *Salmoren*, 909 F.3d at 81 (citing *Castillo-Rivera* and noting that the Third Circuit “takes the alternative approach”).

The **Fourth Circuit** also rejects the actual-case requirement where the state statute is facially broader than the federal standard, at which point “the categorical analysis is complete” and the defendant need not “find a case” applying the statute as written. *Gordon v. Barr*, 965 F.3d 252, 260-261 (4th Cir. 2020). That court rejected the actual-case requirement after

expressly identifying *Castillo-Rivera* as contrary authority. *Id.* at 261 n.9.

The **Sixth Circuit** holds that a challenger “need not provide caselaw when they can point to the text of the state statute.” *United States v. Cervenak*, 135 F.4th 311, 326 (6th Cir. 2025) (en banc). Because “[t]he plain language of a criminal statute can demonstrate” “that a state would apply it to a broader swath of conduct than the generic definition of a Guidelines offense,” the en banc court rejected the demand for evidence of the state’s “prosecutorial habits.” *Ibid.* The court noted that it was “in good company” in rejecting the actual-case requirement, favorably citing cases from nine other circuits and the concurrence in *Alexis v. Barr*, while unfavorably referencing the Fifth Circuit’s majority opinion in *Alexis*. *Id.* at 326-327 & n.5.

The **Seventh Circuit** does not require an actual case if the prior offense is facially overbroad: “If the statute is overbroad on its face under the categorical approach, the inquiry ends.” *Aguirre-Zuniga v. Garland*, 37 F.4th 446, 450 (7th Cir. 2022). In that case, the Indiana methamphetamine definition at issue included isomers beyond the federal definition, and the court rejected the Board of Immigration Appeals’ demand for an actual prosecution. *Id.* at 451. The realistic probability test applies only when “the court determines that the statute is ambiguous or has indeterminate reach.” *Id.* at 450.

The **Tenth Circuit** also rejected the Fifth Circuit’s approach, in the course of analyzing the same Louisiana prior offense at issue here. *United States v. Cantu*, 964 F.3d 924, 934-936 (10th Cir. 2020). The court noted that “the Fifth Circuit has held that the realistic-probability test would apply to [this] very

statute.” *Id.* at 935. “But whatever another circuit has to say about the realistic-probability test does not make the law in” the Tenth Circuit “any less clear.” *Id.* at 936. Unlike the Fifth Circuit, the Tenth “does not apply the realistic-probability test when the statute on its face clearly proscribes the relevant conduct.” *Ibid.*; accord *United States v. Titties*, 852 F.3d 1257, 1274-1275 & n.23 (10th Cir. 2017) (“The Court did not seek or require instances of actual prosecutions for the means that did not satisfy the ACCA. The disparity between the statute and the ACCA was enough.”).

* * *

Because the government conceded that his Louisiana offense was overbroad, petitioner’s challenge to his sentencing enhancement turned entirely on whether he was required to produce an actual case in which Louisiana prosecuted the overbroad conduct. In the Fifth Circuit, his inability to identify such a case imposed years of additional incarceration. In ten other circuits, the government’s concession would have ended the inquiry, and Augillard would have received a significantly shorter sentence. The Court should grant certiorari to address the intolerable disparities created by the Fifth Circuit’s approach.

B. This case is an appropriate vehicle to resolve the question presented.

This case presents a prime opportunity to resolve this question. The longstanding, well-recognized 10-1 split is deeply entrenched, and the Fifth Circuit’s opinions respecting denial of rehearing *en banc* make unmistakably clear that only the Court can bring consistency to this critical aspect of federal law. App., *infra*, 41a. (Elrod, C.J., dissenting from denial of rehearing *en banc*); see *id.* at 30a. (Oldham, J., concurring in

denial of rehearing en banc) (“[W]e should await direction from the Supreme Court.”). Resolving this stark conflict with such substantial consequences is necessary for criminal defendants and immigrants to find legitimacy in case outcomes: Years of freedom should not turn on geography alone.

1. *The actual-case requirement distorts results across contexts.*

The question presented is “of exceptional importance.” App., *infra*, 41a. (Elrod, C.J., dissenting from denial of rehearing en banc). “The categorical approach * * * has been applied with remarkable uniformity to many areas of law. It’s used for ACCA; it’s used for immigration; it’s used for the Sentencing Guidelines.” *United States v. Mayer*, 560 F.3d 948, 951 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc).

a. Perhaps most prominently, the categorical approach applies to cases under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e). See *Stokeling v. United States*, 586 U.S. 73, 86 (2019). Ordinarily, a defendant convicted of being a felon in possession of a firearm in violation of Section 922(g)(1) faces a maximum sentence of 15 years. See 18 U.S.C. § 924(a)(8). But under ACCA, if the offender’s criminal record includes three or more convictions for a “serious drug offense” or “violent felony,” he or she is subject to a mandatory minimum of 15 years and a maximum sentence of life imprisonment. *Id.* § 924(e). Courts apply the categorical approach to determine whether a prior offense is such a predicate. *Shular v. United States*, 589 U.S. 154, 157 (2020); *Taylor 1990*, 495 U.S. at 600; *Mathis v. United States*, 579 U.S. 500, 504 (2016). The same is true in other criminal contexts; for example,

18 U.S.C. § 924(c)’s definition of a “crime of violence” likewise demands the categorical approach. *Taylor*, 596 U.S. at 850; *Delligatti v. United States*, 604 U.S. 423, 426 (2025).

The proper construction of the realistic-probability test in ACCA cases is thus a matter of years or decades in prison for some criminal defendants. The Fifth Circuit continues to enforce its actual-case requirement in ACCA cases. See *United States v. Kerstetter*, 2025 WL 1079071, at *3-4 (5th Cir. 2025). Other circuits expressly reject that requirement when statutory text establishes overbreadth. See *United States v. Minter*, 80 F.4th 406, 413 (2d Cir. 2023); *Cantu*, 964 F.3d at 934-936. The consequences are substantial: *Minter* affirmed a six-year sentence rather than ACCA’s fifteen-year minimum, while *Cantu* vacated a sentence exceeding the lawful maximum by seven and a half years.

The stakes are substantial in the sentencing context as well. In the 2025 fiscal year, “1,211 individuals were sentenced as ‘career offenders’ * * * and 159 were sentenced as ‘armed career criminals.’” U.S. Sent’g Comm’n, *2025 Annual Report* 16. The career-offender guideline assigns qualifying defendants to Criminal History Category VI and can substantially increase their offense levels. U.S.S.G. § 4B1.1(b). In 2016, a Sentencing Commission report found an average Guidelines minimum increase of seven years due to the career-offender designation. U.S. Sent’g Comm’n, *Report to Congress: Career Offender Sentencing Enhancements* 21 (2016). In one Fifth Circuit case, correcting an erroneous career-offender designation led to a sentence reduction of more than eight years.

United States v. Hinkle, 832 F.3d 569, 571 (5th Cir. 2016).

Although the Court “first discussed the categorical approach in the criminal context,” it applies in the immigration setting, too. *Pereida v. Wilkinson*, 592 U.S. 224, 233 (2021). For example, courts apply the categorical approach when evaluating whether a crime involved “moral turpitude” (*Ndungu v. Att’y Gen.*, 126 F.4th 150, 160-161 (3d Cir. 2025)), and when determining “whether an alien’s conviction qualifies as an aggravated felony” under the INA (*Esquivel-Quintana*, 581 U.S. at 389). The outcome in dispute is frequently deportation. See, e.g., *In re Felix-Figueroa*, 29 I&N Dec. 157, 159-161 (BIA 2025) (applying realistic-probability test to predicate state drug conviction in removal proceeding).

b. The Fifth Circuit’s anomalous actual-case approach “has created a geographic disparity in immigration and criminal law.” App., *infra*, 41a. (Elrod, C.J., dissenting from denial of rehearing en banc). The Eighth, Ninth, and Eleventh Circuits have all considered state statutes defining cocaine to include Ioflupane, and have all concluded that those state statutes are not valid federal predicates because they include Ioflupane—without requiring challengers to demonstrate any actual Ioflupane prosecutions. See *supra* 11-13. Thus, if petitioner had been federally prosecuted in (for example) Arkansas, his Louisiana state drug conviction would not have been a valid predicate for the disputed sentencing enhancement. See *Perez*, 46 F.4th at 701. But just across the border in Louisiana, the Fifth Circuit says it *is*. That distinction is arbitrary and unjustifiable: “[I]n our federal system, a defendant’s location should not determine

the severity of his punishment.” *Wiggins v. United States*, 145 S. Ct. 2621, 2622 (2025) (statement of Sotomayor, J., respecting denial of certiorari).

In the immigration context, this geographic disparity is equally disturbing. “[U]niformity in the administration of immigration law” has long been recognized as a compelling goal that can support a grant of certiorari. *Dep’t of State v. Muñoz*, 602 U.S. 899, 907 n.3 (2024). And the consequences of nonuniformity can be substantial because “the Government regularly transfers detained noncitizens between facilities, often multiple times.” *Garland v. Aleman Gonzalez*, 596 U.S. 543, 570 (2022) (Sotomayor, J., concurring in judgment in part and dissenting in part).

For all these reasons, the petition presents a “question[] of exceptional importance.” App., *infra*, 41a. (Elrod, C.J., dissenting from denial of rehearing en banc).

2. *This is an attractive vehicle to address a recurring issue that requires resolution.*

The petition is also an exceptional opportunity for the Court to correct the Fifth Circuit’s misapplication of the categorical approach. It presents a single question, and there are no antecedent factual disputes. The government conceded below that the Louisiana drug law is facially overbroad, and that concession has “[h]elpfully * * * simplified matters.” *Collins v. Virginia*, 584 U.S. 586, 594 n.2 (2018).

While the Court has passed on previous opportunities to weigh in on this issue, the Fifth Circuit’s *en banc* vote and related opinions here make clear that only the Court can resolve the split. Judge Oldham’s observation about the Fifth Circuit’s “lopsided vote to

deny rehearing” makes plain that the *en banc* process is not an available corrective mechanism. App., *infra*, 31a. (Oldham, J., concurring in denial of rehearing en banc). Instead, the Fifth Circuit will “await direction from the Supreme Court.” *Id.* at 30a. (Oldham, J., concurring in denial of rehearing en banc). There is thus no chance that the split resolves itself.

Nor does the existence of prior petitions cut against certiorari here. It should go without saying that the “denial of a writ of certiorari in the Court imports no expression of opinion upon the merits of the case.” *Brown v. Davenport*, 596 U.S. 118, 142 (2022) (citation modified); cf. *Montana v. Planned Parenthood of Montana*, 145 S. Ct. 2627, 2627 (2025) (statement of Alito, J., respecting denial of certiorari) (noting it is “especially important that the denial of review is not read * * * as a rejection of the argument that the petition asks us to decide”). The vast majority of these petitions preceded the Court’s 2022 decision in *Taylor*, which Chief Judge Elrod recognized rendered the Fifth Circuit’s actual-case requirement blatantly inconsistent with the Court’s precedent. App., *infra*, 36a-38a. Whatever the arguable merit of the Fifth Circuit’s law before *Taylor*, there is now none.

This petition is also unmarred by defects that plagued prior presentations of this issue. Here there is no factual dispute over the nature of the drugs at issue, and there is no legal dispute over the scope of Louisiana’s cocaine definition or the federal cocaine definition. The government “agreed at sentencing and on appeal that Augillard’s 2011 Louisiana statute of conviction contained a broader definition of controlled substance than the CSA’s definition.” App., *infra*, 4a-5a (panel opinion). Accordingly, this case squarely

implicates the circuit split over whether textual overbreadth alone is sufficient to prove a categorical mismatch.

Finally, the Fifth Circuit has now, after significant deliberation, explicitly stated that it will not itself resolve the conflict. See generally App., *infra*, 23a-31a (Oldham, J., concurring in denial of rehearing en banc). The decision below thus represents far more than a “one-off misapplication of law.” *Thompson v. Lumpkin*, 592 U.S. 1344, 1347 (2021) (Kagan, J., concurring in denial of certiorari). The actual-case requirement is a consistent line of erroneous doctrine only the Court can correct. And there is no benefit to be gained from allowing further percolation regarding a split that has persisted for nearly a decade and “shows no signs of resolving itself.” *Robinson v. Department of Educ.*, 590 U.S. 914, 916 (2020) (Thomas, J., dissenting from denial of certiorari).

C. The actual-case requirement is wrong.

By imposing an actual-case requirement even when statutory text facially establishes the categorical mismatch, the Fifth Circuit has transformed *Duenas-Alvarez*’s limited safeguard against speculative interpretation into a universal, empirical prerequisite. That rule cannot be squared with decades of the Court’s categorical approach cases, including its recent rejection of essentially the same argument in *Taylor*.

1. The Fifth Circuit’s actual-case requirement is irreconcilable with the basic foundation of the categorical approach. All contexts in which the categorical approach applies share a core similarity: comparing “the statutory definitions of the prior offenses” to the federal definitions. *Shular*, 589 U.S. at 157. The “central

feature” remains “a focus on the elements, rather than the facts, of a crime.” *Descamps v. United States*, 570 U.S. 254, 263 (2013). This feature “precludes * * * an inquiry into how any particular defendant may commit the crime.” *Taylor*, 596 U.S. at 850. “If any—even the least culpable—of the acts criminalized” by the state statute falls outside the federal definition, “the statute of conviction does not categorically match the federal standard.” *Borden*, 593 U.S. at 424.

In *Duenas-Alvarez*, the Court addressed how defendants may establish overbreadth. It instructed that they must show a “realistic probability, not a theoretical possibility,” that the minimally culpable conduct they hypothesize is actually criminalized by the allegedly overbroad prior offense statute. *Duenas-Alvarez*, 549 U.S. at 193. Where a challenger argues that a state court would “apply the statute in [a] special (nongeneric) manner” to reach conduct that federal law does not, making that showing will require a defendant to “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].” *Ibid.*

The Court first articulated the realistic-probability requirement in *Duenas-Alvarez* as a check on overimaginative hypothetical conduct asserted by litigants in cases involving indeterminate offenses. 549 U.S. at 193; see also *Moncrieffe*, 569 U.S. at 191. While the realistic-probability requirement is an important guardrail against findings of overbreadth based on speculative interpretations of state law, it is *not* a freestanding restriction on applying the categorical approach when no special construction is necessary. As Chief Judge Elrod explained, “*Duenas-Alvarez* was

not about a situation where the texts of the state and federal statutes conflict.” App., *infra*, 36a. The Court’s rule was limited to situations in which court are asked to speculate about the scope of state laws.

2. Though the Fifth Circuit purportedly “picked up where *Duenas-Alvarez* left off” (App., *infra*, 6a), its atextual “actual-case requirement” in fact blocks courts from relying on the unambiguous language of facially overbroad statutes, contradicting the categorical approach’s fundamental elements-based structure.

Contrary to the Fifth Circuit’s rule, *Duenas-Alvarez* itself establishes when an actual case is necessary: when a challenger seeks to apply “legal imagination to a state statute’s language,” rather than the ordinary tools of statutory interpretation. 549 U.S. at 193. When a challenger attempts to concoct a hypothetical scenario and suggests that the text of a state law can be stretched to reach it, the challenger must show “a realistic probability, not a theoretical possibility, that the State would apply its statute” to that conduct. *Ibid.* But where a statute clearly and expressly includes a category of conduct that falls beyond the federal standard, there is no need for imagination or speculation—the text itself establishes a realistic probability that the statute may be applied to the relevant conduct.

Any other conclusion is incompatible with the elements-focused nature of the categorical approach. And the Court has repeatedly rejected similar attempts to inject an “empirical inquiry into how crimes are usually committed” that would require defendants “to present empirical evidence about the government’s own prosecutorial habits.” *Taylor*, 596 U.S. at 857,

860. For example, the Court previously assessed cases under Section 924’s residual clause by asking “whether the conduct encompassed by the elements of the offense, in the *ordinary case*, presents a serious potential risk of injury to another.” *James v. United States*, 550 U.S. 192, 208 (2007) (emphasis added). The rationale for the ordinary-case test tracks the Fifth Circuit’s justification for the actual-case requirement: a challenger can “always hypothesize unusual cases in which even a prototypically violent crime might not present a genuine risk of injury.” *James*, 550 U.S. at 208 (relying on *Duenas-Alvarez*). But just a few years after *James*, the Court held that the ordinary-case test created “grave uncertainty about how to estimate the risk posed by a crime” and thus rendered the residual clause unconstitutionally vague. *Johnson v. United States*, 576 U.S. 591, 595, 597 (2015).

The same problem inheres in the actual-case requirement. When courts focus on how statutes have historically been *enforced* rather than how they are drafted or authoritatively interpreted, consequences hinge on the whims of prosecutors and the availability of detailed court records. Not only is this wrong, it is unworkable. It is impractical—and often impossible—for criminal defendants to scour the haystack of state criminal case records for the needle of a relevant prosecution. The “majority of criminal cases are resolved without a written judicial decision or by plea bargain, * * * which means that citable state decisions are only available in a very small percentage of prosecutions.” *Alexis v. Barr*, 960 F.3d 722, 728-729 (5th Cir. 2020); accord *Hunter v. United States*, 608 U.S. 713, 730 (2026) (Gorsuch, J., concurring) (“In our times, the

jury trial has given way to a conveyor belt of plea bargains.”). Congress did not intend to put criminal defendants and immigrants to such an impossible task, and the Court has never done so.

Indeed, the Court has not applied the realistic-probability requirement in the manner the Fifth Circuit suggests. Instead, the Court has recognized that some statutes—including state drug laws that include substances absent from the federal schedules—are *expressly* broader than the federal standards. In *Mellouli*, the relevant state statute was facially overbroad because it included salvia and “jimson weed,” which are excluded from the federal schedules. 575 U.S. at 808. And in *Mathis*, Iowa’s burglary statute was broader than generic burglary because Iowa’s law included entry into vehicles. 579 U.S. 500, 507 (2016). In each case it was enough to “resolve[] th[e] case” to observe that the “crime of conviction * * * cover[s] a greater swath of conduct than the elements of the relevant” federal standard. *Id.* at 509; *Mellouli*, 575 U.S. at 808. The Court reached those conclusions based solely on the overbreadth of the statutory text without need for an actual case.

3. If there were previously any doubt about the proper application of the realistic-probability test, the Court dispelled it in *Taylor*, 596 U.S. 845. There, the Court rejected the government’s request to adopt the same actual-case requirement the Fifth Circuit continues to apply. *Taylor* thus confirms that courts may not use prosecutorial practice to override a clear categorical mismatch established by text or precedent.

i. *Taylor* concerned whether attempted Hobbs Act robbery qualified as a “crime of violence” under 18 U.S.C. § 924(c). The elements of that offense required

the government to prove an intent to commit a Hobbs Act robbery and a substantial step toward its commission. *Taylor*, 596 U.S. at 851-852. But neither element required the defendant to use, attempt to use, or threaten physical force, as Section 924(c) demands. *Ibid.* The Court illustrated this mismatch with a simple hypothetical: A defendant could intend to rob a store and take numerous steps towards doing so but be arrested before communicating a threat to anyone. *Ibid.* Because that conduct satisfies the elements of the predicate offense without meeting Section 924(c)'s definition, the offense is not a categorical match.

Invoking *Duenas-Alvarez*, the government argued that Taylor nevertheless had to identify an actual prosecution involving an attempted Hobbs Act robbery without a communicated threat. *Taylor*, 596 U.S. at 857.

The Court unambiguously rejected that position. Once the statutory elements established the mismatch, the government could not prevail simply by pointing to a lack of evidence that federal prosecutors have charged certain conduct. "To determine whether a federal felony qualifies as a crime of violence," the Court explained, the categorical approach "doesn't ask whether the crime is *sometimes* or even *usually* associated with communicated threats of force (or, for that matter, with the actual or attempted use of force)." *Taylor*, 596 U.S. at 857-858. Instead, the very premise of the categorical approach is to evaluate "the statute's terms" to compare the elements. *Id.* at 857. The government's attempt to supplant the categorical approach's legal comparisons with an empirical presentation was thus "atextual." *Id.* at 858.

The Court also acknowledged the “oddity of placing a burden on the defendant to present empirical evidence about the government’s own prosecutorial habits,” especially “in a world where most cases end in plea agreements, and not all of those cases make their way into easily accessible commercial databases.” 596 U.S. at 857.

Taylor thus rejected the government’s argument for a standard nearly identical to the Fifth Circuit rule at issue here. And the Court’s emphasis on the primacy of statutory elements—and its skepticism of requiring defendants to excavate ill-documented prosecutorial history—condemn *Castillo-Rivera*’s global actual-case requirement with equal force.

ii. To be sure, *Taylor* distinguished *Duenas-Alvarez* on two grounds: (1) the nature of the asserted mismatch and (2) federalism concerns. But far from signaling support for the actual-case requirement, that treatment further highlights the errors of the Fifth Circuit’s outlier approach.

First, *Taylor* differed from *Duenas-Alvarez* in the nature of the alleged mismatch. In *Duenas-Alvarez*, “the elements of the relevant state and federal offenses clearly overlapped”; the defendant argued only that California’s courts applied, or would apply, otherwise matching language in a “special” manner. 549 U.S. at 193. Whether there was a mismatch thus depended on a contested proposition about the meaning of state law—and before adopting a reading of the state statute that would extend to less culpable conduct, the Court required some evidence that that was how the law should actually be read. In *Taylor*, by contrast, neither element of attempted Hobbs Act robbery required the force element demanded by Section

924(c). *Taylor*, 596 U.S. at 859. There was therefore “no overlap to begin with” between the predicate offense’s required elements and the definition that triggers the enhancement. *Ibid.* That “end[ed] the inquiry”: the elements established the mismatch without any further realistic-probability showing. *Ibid.*

This distinction precisely tracks the circuit-majority approach to the realistic-probability test and forecloses the Fifth Circuit’s. Here, as in *Taylor*, the asserted mismatch appears in the governing statute: The government concedes that Louisiana’s schedule included a substance the relevant federal schedule does not. There is no more interpretation to be done—all that remains is to compare the uncontested meaning of the state statute to the federal criterion. The realistic-probability requirement thus has no more work to do, “and nothing in *Duenas-Alvarez* suggests otherwise.” 596 U.S. at 859. Just as *Taylor* did not need to identify a prosecution lacking a communicated threat, *Augillard* did not need to identify a Louisiana prosecution involving Ioflupane.

Second, the *Taylor* Court noted that *Duenas-Alvarez* involved a federal court’s “judgment about the meaning of a state statute,” potentially raising federalism concerns. *Taylor*, 596 U.S. at 858-859. Such concerns naturally arise when a federal court must predict whether state courts would adopt a “special” construction of an otherwise generic state law, which counsels caution before adopting expansive definitions. *Ibid.*

But the federalism concerns presented by the Fifth Circuit’s actual-case requirement are just as severe, if not more so. “A facial mismatch requires no prediction.” App., *infra*, 38a (Elrod, C.J., dissenting

from denial of rehearing en banc). The text of the statute (along with interpretations by state courts) defines the statute’s scope. The actual-case requirement, by contrast, gives federal courts license to disregard the text state legislatures chose and the interpretations state courts gave that language. When statutory text establishes a mismatch, respect for federalism thus means giving full effect to the statute the State enacted—not using the absence of past state prosecutions, alone, to narrow it. Because of the Fifth Circuit’s rule, the federal courts sitting in three States cannot apply state law as the States intend it.

* * *

Four years ago, *Taylor* “made clear that the ‘actual case’ requirement is not the law.” App., *infra*, 32a. (Elrod, C.J., dissenting from denial of rehearing en banc). It unambiguously confirmed that an uncontested, facial mismatch completes the categorical inquiry. But the Fifth Circuit has refused to conform its doctrine to *Taylor*, expressly electing to “await direction from the Supreme Court.” *Id.* at 30a. (Oldham, J., concurring in the denial of rehearing en banc). The Court should grant review to provide that long-needed direction.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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