United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce
Clerk

No. 22-60555

MARIO ALBERTO ALEJOS-PEREZ,

Petitioner,

versus

MERRICK GARLAND, *U.S. Attorney General*,

Respondent.

Appeal from the Board of Immigration Appeals
Agency No. A034 007 696

Before CLEMENT, HAYNES, and OLDHAM, *Circuit Judges*.

EDITH BROWN CLEMENT, *Circuit Judge*:

Mario Alejos-Perez seeks review of a Board of Immigration Appeals final order of removal that found his Texas conviction for possessing a synthetic cannabinoid made him removable under 8 U.S.C. § 1227(a)(2)(B)(i). On remand from a prior Fifth Circuit panel, Alejos-Perez sought to show the BIA that there was a "realistic probability" that Texas would use the state statute he was convicted under to prosecute the possession of drugs that are not criminalized under federal law, meaning that his conviction would not be a removable offense. The BIA concluded that Alejos-Perez made no such showing. We agree and DENY his petition for review.

I.

Mario Alejos-Perez, a Mexican citizen, was admitted to the United States as a lawful permanent resident in January 1972. He has been convicted of at least three crimes since 2009: (1) attempting to take a weapon from a peace officer in March 2009; (2) theft in February 2013; and (3) possessing MMB-Fubinaca, an "ultrapotent" synthetic cannabinoid, in June 2018. Two days after his 2018 drug conviction, the government initiated removal proceedings. The government cited two bases for Alejos-Perez's removal: (1) he was convicted of two crimes involving moral turpitude (and thus removable under 8 U.S.C. § 1227(a)(2)(A)(ii)); and (2) he was convicted of possessing a controlled substance other than marijuana (and thus removable under 8 U.S.C. § 1227(a)(2)(B)(i)).

A.

In immigration court, Alejos-Perez moved to terminate his removal proceedings, arguing that none of his convictions made him removable under the Immigration and Nationality Act. Among other things, he asserted that his drug charge did not qualify as a "controlled substance" conviction. The IJ disagreed and found that Alejos-Perez's drug charge made him removable under 8 U.S.C. § 1227(a)(2)(B)(i).[1]

At issue was whether the Texas law that Alejos-Perez was convicted of violating—Texas Health & Safety Code § 481.1161 (possession of a substance in Penalty Group 2-A)—"relates to" a federal drug crime. This is because the INA ties the definition of "controlled substance" to the federal standard, and binding precedent requires a special analysis to assess whether

[1] The immigration judge also found that Alejos-Perez was removable under § 1227(a)(2)(A)(ii), but that finding was not addressed by the BIA and is therefore not at issue here.

the state law underlying a conviction is broader than the federal definition. *See Mathis v. United States*, 579 U.S. 500, 504 (2016); *see also Vazquez v. Sessions*, 885 F.3d 862, 870–71 (5th Cir. 2018) (applying *Mathis* framework in immigration context).

After finding that Penalty Group 2-A, *see* Texas Health & Safety Code § 481.1031, contained substances that were not criminalized under federal law, the IJ nonetheless determined that the underlying Texas statute was "divisible," *i.e.*, the statute could be divided up into several crimes. Accordingly, the IJ applied the "modified categorical approach" to assess whether the charge was a deportable offense under the INA. As MMB-Fubinaca is a Schedule I controlled substance under federal law, the IJ found that the conviction was a deportable offense. This was so even though MMB-Fubinaca was not expressly listed in Penalty Group 2-A because Penalty Group 2-A criminalized the possession of "cannabinol derivatives," which included MMB-Fubinaca.

Alejos-Perez appealed the IJ's determination to the BIA. The BIA dismissed the appeal, applying similar logic as the IJ.[2] Specifically, the BIA concluded that the Texas statute was divisible because each substance listed in Penalty Group 2-A was an element that the state would have to allege and prove to convict someone.

Alejos-Perez petitioned this court to review the BIA's determination, and we granted the petition, reversed, and remanded, holding that the Texas statute at issue was indivisible and that the BIA erred in applying the modified categorical approach instead of the categorical approach used to assess

[2] Because the BIA agreed with the IJ's determination that Alejos-Perez was removable under § 1227(a)(2)(B)(i), it did not address the IJ's other basis for removing Alejos-Perez (*i.e.*, his convictions of two crimes involving moral turpitude).

indivisible crimes. *Alejos-Perez v. Garland*, 991 F.3d 642, 651 (5th Cir. 2021) [hereinafter *Alejos-Perez I*]. Under the categorical approach, if a state law is facially overbroad, *i.e.*, criminalizes more drugs than criminalized federally, an immigrant must show a "realistic probability" that a state would apply its statute to conduct that is beyond the reach of federal law. *Id.* at 652. Although the BIA had recognized that the Texas statute was facially overbroad (§ 481.1031 lists at least one drug, naphthoylindane, which was not criminalized federally), the agency had not addressed the realistic-probability requirement. Accordingly, this court remanded to the BIA for consideration of whether Alejos-Perez had shown "a realistic probability that Texas would prosecute conduct that falls outside the relevant federal statute." *Id.* The court also remanded so that the BIA could consider the government's second basis for Alejos-Perez's removal, *i.e.*, that he had been convicted of two crimes of moral turpitude. *Id.*

B.

On remand, Alejos-Perez sought to show the BIA that there was a "realistic probability" that, under § 481.1161, Texas would prosecute possession of a drug that is not prohibited by federal law. He argued that in *Vetcher v. Barr*, 953 F.3d 361 (5th Cir. 2020), the Fifth Circuit "all but conceded" that Texas had prosecuted a drug listed in Penalty Group 2-A that was not federally criminalized at the time of prosecution in *Carter v. Texas*, 620 S.W.3d 147 (Texas Crim. App. 2021), but because that case was pending before the Texas Court of Criminal Appeals—the highest court in Texas for criminal matters—at the time, *Vetcher* concluded that the *Carter* case could not be used to demonstrate realistic probability. Per Alejos-Perez, because the Texas Court of Criminal Appeals ultimately upheld the drug conviction at issue in *Carter*, that case satisfies the realistic-probability test. Alejos-Perez cited no other cases to satisfy the realistic-probability test during the remand

proceedings.[3] He also argued that the realistic-probability standard should not apply at all.

The BIA rejected Alejos-Perez's arguments. After explaining that it must apply the realistic-probability test, the BIA rejected Alejos-Perez's reliance on *Vetcher* and *Carter*. First, the BIA found that *Vetcher* did not help him. The BIA explained that, in *Vetcher*, this Court noted that the respondent cited to Texas's *brief* in *Carter*, which asserted that the state prosecuted a substance that was not on the federal schedule until months later. The BIA concluded that this was not a concession, as Alejos-Perez argued, but simply a chronicling of the respondent's argument. In any event, the BIA explained, *Carter* was of no help to Alejos-Perez either, because the substance at issue there—fluoro-ADB—*was* federally controlled at the time of Carter's prosecution. Accordingly, the BIA found that Alejos-Perez failed to show that there was a realistic probability that Texas would apply the statute to drugs outside the controlled-substance offense under federal law. The BIA again did not address the other basis for Alejos-Perez's removal.

II.

Although the INA precludes judicial review of "any final order of removal against an alien who is removable by reason of having committed a criminal [drug] offense," 8 U.S.C. § 1252(a)(2)(C), courts retain jurisdiction to consider "constitutional claims or questions of law," 8 U.S.C. § 1252(a)(2)(D). The BIA's determination that a violation of a state criminal

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[3] When Alejos-Perez's case was before the BIA the first time, he cited to a brief submitted in *Stephens v. State of Texas*, No. 03-17-00117-CR (Tex. App. 2018) that he said showed that Texas prosecuted a non-federally-controlled drug. But he failed to cite this authority during the remand proceedings.

law relates to a controlled-substance violation under federal law is a pure question of law that is reviewed *de novo*. *Vazquez*, 885 F.3d at 867, 870.

As to the relevant burdens of proof, while the government bears the burden to show by clear and convincing evidence that an alien is deportable, 8 U.S.C. § 1229a(c)(3)(A), and to "connect an element of the alien's conviction to a drug [offense]," *Mellouli v. Lynch*, 575 U.S. 798, 813 (2015), the alien bears the burden to "show that [the state] courts have actually applied the statute to conduct beyond the federal statute," *Alejos-Perez I*, 991 F.3d at 648 (citing *United States v. Castillo-Rivera*, 853 F.3d 218, 222 (5th Cir. 2017) (en banc)) (quotation marks and emphasis omitted).[4]

While we had long viewed 8 U.S.C. § 1252(d)(1)—which requires the exhaustion of administrative remedies—as depriving the court of jurisdiction to consider arguments not made before the BIA,[5] the Supreme Court recently held that § 1252(d)(1) is *not* a jurisdictional bar, but rather a claim-processing requirement. *Santos-Zacaria v. Garland*, 598 U.S. 411, 419 (2023).

III.

Under the categorical approach, when a state drug statute is facially overbroad, an alien must show "that the State actually prosecutes the non-generic offense." *Vazquez*, 885 F.3d at 871 (internal quotation marks and

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[4] In his reply brief, Alejos-Perez asserts that he should not bear the burden of showing a realistic probability because the government must show that an alien is deportable and the realistic probability test is difficult to satisfy. But it is settled law in this circuit that the immigrant, not the government, must show that there is a realistic probability that the state will enforce its law in a non-generic manner. *Vazquez*, 885 F. 3d at 874; *Castillo-Rivera*, 853 F.3d at 226. In any event, Alejos-Perez did not raise this issue in his opening brief, so we need not consider it. *United States v. Rodriguez*, 602 F.3d 346, 360 (5th Cir. 2010).

[5] *E.g.*, *Vazquez*, 885 F.3d at 868; *Omari v. Holder*, 562 F.3d 314, 319 (5th Cir. 2009); *Wang v. Ashcroft*, 260 F.3d 448, 452 (5th Cir. 2001).

citation omitted). "[E]stablishing a realistic probability is not an exercise in educated guessing. Rather, to show a realistic probability, an offender . . . 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." *Castillo-Rivera*, 853 F.3d at 222 (cleaned up). Merely pointing to a brief that mentions a drug will not do because "a brief filed in a case is not the law." *Alejos-Perez I*, 991 F.3d at 648 (alteration adopted) (quoting *Vetcher*, 953 F.3d at 368). A citation to a case pending before an appellate court is also insufficient because it "necessarily is not settled law." *Vetcher*, 953 F.3d at 368. "In other words, the alien must show that Texas courts have *actually applied* the statute to conduct beyond the federal statute." *Alejos-Perez I*, 991 F.3d at 648 (emphasis original) (quotation marks omitted) (citing *Castillo-Rivera*, 853 F.3d at 222).

A.

Alejos-Perez cites several authorities that he failed to raise during his remand proceedings before the BIA. Specifically, Alejos-Perez cites to *Stephens v. State*, No. 03-17-0017-CR, 2018 WL 3235322 (Tex. App. July 3, 2018) in his opening brief and *Texas v. Charlez*, No. 1538632 (Harris County District Court), *Texas v. Palmer*, No. 1539051 (Harris County District Court), and *Texas v. Finch*, No. 151340D (Tarrant District County Court) in his reply. And he cites to even more cases in a supplemental-authorities letter, all of which existed at the time of his remand proceedings before the BIA. Before assessing whether Alejos-Perez has carried his burden, we must determine whether Alejos-Perez has exhausted his administrative remedies as to these authorities. We hold that he has not.

An immigrant must "exhaust[] all administrative remedies available to the alien as of right." 8 U.S.C. § 1252(d)(1). Although this statutory requirement is not jurisdictional, it is a "claim-processing rule" that

"instruct[s] the court on the limits of its discretion." *Santos-Zacaria*, 598 U.S. at 419–20 (quotation marks and citation omitted). An immigrant's "failure to fairly present [to the BIA] the issues he now brings on appeal constitutes a failure to exhaust." *Omari*, 562 F.3d at 322.

The government argues that Alejos-Perez's failure to cite certain authorities before the BIA amounts to a failure to exhaust his administrative remedies with respect to these authorities and therefore the court cannot consider them. Per the government, Alejos-Perez was required to "raise, present, or mention" these cases to the BIA to "put [the BIA] on notice that he sought to rely on" these additional authorities. Alejos-Perez replies that the BIA *was* on notice with respect to *Stephens* because he cited it in BIA proceedings prior to this court's remand. As to the additional authorities cited in his reply and supplemental letter, Alejos-Perez contends that the panel should consider them because they relate to an issue that "he has raised [] consistently throughout his proceedings: that Texas prosecutes the overbroad portion of the" statute.

The purpose of the exhaustion requirement is to aid in the efficient adjudication of immigration claims, putting the BIA on notice of the issues it should address. *Omari*, 562 F.3d at 321–23. It also "promotes finality in immigration cases" as "it cuts the risk that [courts] must prolong a proceeding by reversing to correct errors that the [BIA] had no chance to address." *Martinez-Guevara v. Garland*, 27 F.4th 353, 359 (5th Cir. 2022). An immigrant exhausts his or her administrative remedies if he or she raises a "less developed form" of an argument before the BIA. *Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 206 (5th Cir. 2007); *see also Omari*, 532 F.3d at 321–22 ("[A] semantic difference in the framing of an issue before this court and before the BIA [does] not raise any significant question of whether the issue was exhausted."). But if an issue merely "overlap[s]" with one raised before the BIA, that is insufficient to provide the BIA with notice. *Omari*, 532

F.3d at 321. Put another way, "effective exhaustion" is not enough. *Id.* at 322.[6]

Whether an immigrant may satisfy the realistic-probability test on appeal by relying on state criminal cases that he did not cite before the administrative agency is a rather difficult question. Under ordinary circumstances, parties may, of course, cite new legal authorities on appeal of an administrative decision without running into an exhaustion problem. But in this context, the state criminal cases are more like evidence than law. *See Castillo-Rivera*, 853 F.3d at 224 n.1 (Higginson, J., concurring in part and dissenting in part) (referring to state law cases under the realistic-probability test as "evidence"); *United States v. Balderas-Rubio*, 499 F.3d 470, 474 (5th Cir. 2007) (same). An immigrant uses the state criminal cases to, essentially, make a factual showing: that the state has, in fact, applied the statute outside the generic definition of the crime under federal law. Because Alejos-Perez failed to present this evidence—*i.e.*, the additional cases—below, the BIA did not have the opportunity to consider them when it assessed whether Alejos-Perez had carried his realistic-probability burden. *See Hernandez-Ortez v. Holder*, 741 F.3d 644, 647 (5th Cir. 2014) (declining to consider evidence not presented to the BIA). In that sense, the BIA was not "on notice" that Alejos-Perez would rely on these authorities, and therefore Alejos-Perez failed to exhaust his administrative remedies with respect to them. *See*

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[6] There is some question as to whether *Omari*, *Martinez-Guevara*, and other cases interpreting § 1252(d) as a jurisdictional bar are still good law in light of *Santos-Zacaria*. We find that that they are at the very least instructive in assessing when and why requiring exhaustion is appropriate. Relatedly, neither the Supreme Court nor this court has decided if § 1252(d)'s claim-processing requirement is a mandatory one, *i.e.*, one that courts must enforce if raised by the opposing party. *See Carreon v. Garland*, 71 F.4th 247, 257 n.11 (5th Cir. 2023). We decline to reach this issue because we would find that Alejos-Perez failed to exhaust his remedies either way.

Omari, 562 F.3d at 323 ("[P]arties must fairly present their contentions to the BIA to satisfy exhaustion.").

By considering these authorities, the court would be giving Alejos-Perez an inappropriate second bite at the apple to satisfy the realistic-probability test. In doing so, the court would supplant itself for the BIA in evaluating whether Alejos-Perez satisfied his burden of proof in the first (or rather, second) instance. This would, essentially, shift the burden of proof under the realistic-probability test from the immigrant onto the BIA. *See id.* at 322 ("Accepting Omari's claims of effective exhaustion would shift some of the burden of identifying contested issues from the parties to the BIA."). Indeed, the only way for the BIA to consider cases that the parties did not cite would be for the agency to identify them itself. *See id.* ("Perhaps wary of leaving any issue unaddressed, the BIA might waste resources . . . . The parties are in a better position than the BIA to identify all issues that they contest, and placing the burden of raising those issues on the parties provides an appropriate incentive.").

To be sure, the question of whether a violation of a state criminal law relates to a controlled substance is a "pure question of law" that is reviewed *de novo*. *Vazquez*, 885 F.3d at 867, 870. And one way to interpret this standard of review would be that exhaustion is simply not required in the realistic-probability context. But this would be in tension with how the realistic-probability test works in practice, specifically its evidentiary nature. We therefore require exhaustion here. *Cf. Alejos-Perez I*, 991 F.3d at 652 (explaining that courts can "only affirm the BIA on the basis of its stated

rationale"). Otherwise, an alien could keep coming back to the Fifth Circuit with cases that the BIA never had a chance to consider.[7]

Turning, then, to the application of the exhaustion test to Alejos-Perez's presented cases, it is clear that the new authorities raised for the first time in his reply brief and supplemental letter are unexhausted. *Stephens*, however, is a closer call. Although Alejos-Perez cited *Stephens* in his first appeal to the BIA, he failed to do so on remand after this court directed the agency to specifically consider the realistic-probability issue. Because Alejos-Perez bears the burden of proof here, citing to *Stephens* in a prior appeal to the BIA was not enough to put the agency "on notice" that Alejos-Perez was relying on that authority as part of his realistic-probability argument. To the contrary, his post-remand brief bases the entirety of his realistic-probability argument on *Carter*. Therefore, we find that *Stephens* is unexhausted as well.

In addition to being unexhausted, the state law authorities that Alejos-Perez cites in his reply brief and supplemental letter raise a separate forfeiture issue. Arguments raised for the first time in a reply brief or Rule 28(j) letter are forfeited. *Conway v. United States*, 647 F.3d 228, 237 n.8 (5th Cir. 2011); *Block v. Tanenhaus*, 815 F.3d 218, 221 n.3 (5th Cir. 2016). Alejos-Perez's failure to raise these authorities in his opening brief forfeits his ability to rely on them, as the government had no ability to respond.

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[7] At oral argument, counsel for Alejos-Perez argued that *Castillo-Rivera* forecloses requiring exhaustion because, in that case, we explained that the appellant had "multiple opportunities" to make a realistic probability showing: before the court below, during his appeal, and before the *en banc* court. *Castillo-Rivera*, 853 F.3d at 224–25. But *Castillo-Rivera* was an appeal of a criminal case tried in district court, not a BIA appeal subject to exhaustion requirements. Therefore, it is inapposite.

B.

Because Alejos-Perez failed to exhaust and/or forfeited his argument that *Stephens*, *Charlez*, *Palmer*, *Finch*, and the cases in his 28(j) letter show a realistic probability that Texas will enforce § 481.1161 in an overbroad manner, we need only consider *Carter*, 620 S.W.3d 147.

Alejos-Perez admits that Carter was arrested under § 481.1161 for possessing a drug, fluoro-ADB, several weeks *after* it was added to the federal schedule. This is of no matter, according to Alejos-Perez, because "Texas's enforcement against fluoro-ADB began years prior to Carter's arrest." As proof of this prior enforcement, Alejos-Perez says that, before fluoro-ADB was criminalized federally, "Texas executed several search warrants at Carter's residence" and a district attorney sent Carter a letter stating that the sale of products containing fluoro-ADB was illegal.

Alejos-Perez's reliance on *Carter* fails. A defendant must provide "*actual cases* where state courts have applied the statute in [an overbroad] way." *Vetcher*, 953 F.3d at 368 (citing *Castillo-Rivera*, 853 F.3d at 223) (emphasis added); *see also Alexis v. Barr*, 960 F.3d 722, 727 (5th Cir. 2020) ("The Fifth Circuit creates *no exception* to the *actual case requirement* . . . where a court concludes a state statute is broader on its face.") (quotation marks and citation omitted) (emphases in original). *Carter* does not meet the actual case requirement because executing search warrants and issuing warnings do not amount to an "actual case[] where state courts have applied the statute in that way." *Vetcher*, 953 F.3d at 368. The relevant inquiry is whether Texas will actually *prosecute* an individual under § 481.1161 in an overbroad way. *Alexis*, 960 F.3d at 727 ("[W]e examine whether Alexis can point to other cases where Texas *has prosecuted* or *currently prosecutes* individuals" beyond the scope of federal law) (emphasis added). Because the drug for which Carter was prosecuted was federally criminalized at the time

of his arrest, *Carter* does not satisfy this requirement.[8] Thus, Alejos-Perez has failed to carry his burden under the realistic probability test.[9]

V.

Alejos-Perez also argues that we should not apply the realistic-probability test at all, contending that it is inconsistent with Supreme Court precedent and generally unfair. But these arguments are foreclosed by the rule of orderliness. *See Jacobs v. Nat'l Drug Intel. Ctr.*, 548 F.3d 375, 378 (5th Cir. 2008) ("It is a well-settled Fifth Circuit rule of orderliness that one panel of our court may not overturn another panel's decision, absent an intervening

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[8] Additionally, the warnings and search warrants discussed in *Carter* did not necessarily target fluoro-ADB specifically. The 2014 letter "warn[ed] [Carter] against the continued sale of *synthetic marijuana.*" *Carter*, 620 S.W.3d at 150 (emphasis added). And although Carter sent samples of the product to Texas authorities for testing, they were not tested for fluoro-ADB at that time (only at some later point). *Id.*

[9] Even if we did consider the other authorities Alejos-Perez cited but failed to exhaust, he would still fail to carry his burden under the realistic probability test. The *Stephens* opinion on which Alejos-Perez relies states that the defendant was arrested for possessing "synthetic marihuana." *Stephens*, 2018 WL 3235322, at *1. Alejos-Perez points to Texas's *brief* for the proposition that the defendant was really arrested for possessing "methyl methoxy oxobutane," which he says was not federally criminalized at the time, but the opinion references no such chemical. *See id.* Citations to briefs cannot satisfy the realistic-probability test's actual case requirement. *Vetcher*, 953 F.3d at 368 ("Reliance on a brief filed in [a] case is not the law."). And, "synthetic marijuana" *was* federally controlled when Stephens was indicted in September 2016. *See* 21 C.F.R. § 1308.11(d)(31) (effective May 16, 2016) (including "synthetic equivalents of the substances contained in the cannabis plant"). As to the authorities cited in his reply and 28(j) letter, at oral argument Alejos-Perez's counsel explained that these authorities were "convictions or plea agreements" in which counsel "tracked . . . the non-generic substance from the lab" to the arresting officers to the "corresponding prosecution." But these statements are unsupported by the record. *See I.N.S. v. Phinpathya*, 464 U.S. 183, 188 n. 6 (1984). And even if they were, we are skeptical that such methodology would comply with our "actual case" requirement. *See Castillo-Rivera*, 853 F.3d at 223 ("[T]o successfully argue that a state statute is nongeneric, a defendant must provide actual cases *where state courts* have applied the statute in that way.") (emphasis added).

change in the law, such as by a statutory amendment, or the Supreme Court, or our *en banc* court."). *Castillo-Rivera*—an *en banc* decision—and its progeny require the panel to apply the realistic-probability analysis. *See Castillo-Rivera*, 853 F.3d at 221; *Vazquez*, 885 F.3d at 870.

The law of the case also precludes us from reaching Alejos-Perez's assertion that the realistic-probability test "does not apply" here. *See Med. Ctr. Pharm. v. Holder*, 634 F.3d 831, 834 (5th Cir. 2011) ("[A]n issue of . . . law decided on appeal may not be reexamined by the district court on remand or by the appellate court on a subsequent appeal."). In *Alejos-Perez I*, this court already decided that it did. 991 F.3d at 652. As such, Alejos-Perez's argument that we should decline to apply the realistic-probability test must fail.

VI.

In accordance with the foregoing, we DENY Alejos-Perez's petition for review.

ANDREW S. OLDHAM, *Circuit Judge*, concurring in the judgment.

This should have been an easy case. Texas convicted Mario Alejos-Perez of violating a state law that proscribes possession of the "ultrapotent" synthetic cannabinoid MMB-Fubinaca. MMB-Fubinaca is a Schedule I controlled substance under federal law. *See* 21 C.F.R. § 1308.11(d)(79). An alien is deportable if he is convicted of a violation of a state law or regulation "relating to" a federally controlled substance. 8 U.S.C. § 1227(a)(2)(B)(i) (hereinafter "Romanette i"). So under a plain reading of Romanette i, Alejos-Perez is clearly deportable.

Unfortunately, this court's precedent complicates things—so much so that it took two BIA proceedings and two appeals to determine that Alejos-Perez is in fact deportable. Why did it take so long to hold what I described in a few sentences at the beginning of this opinion? Because our court applies the "categorical approach" to Romanette i. That means we cannot simply hold Alejos-Perez is deportable because he was convicted of a violation of a state law relating to a federally controlled substance. Rather, we are required to *ignore* Alejos-Perez's case and instead adjudicate a series of *hypothetical* cases to determine whether Texas law proscribes possession of any substances that are not federally controlled, and if so, whether the State actually uses the law to prosecute people for possessing those non-federally-controlled substances. That is the precise opposite of how Article III's judicial power works. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) ("Under Article III, federal courts do not adjudicate hypothetical or abstract disputes.").

Moreover, that approach has no basis in the text of Romanette i or the Supreme Court's precedents applying it. And as this case shows, it is enormously impractical. Therefore, in an appropriate case, we should revisit our Romanette i precedent. I first (I) explain the categorical approach and all

its anomalies. I then (II) explain why it makes little sense to apply the categorical approach to Romanette i.

I.

To understand the strange test we applied in this case, it is necessary to understand something about the so-called "categorical approach." I (A) explain the origins and expansion of the categorical approach. Then I (B) explain the bizarre consequences of its logic. Lastly I (C) explain that while the categorical approach applies broadly, the Supreme Court has made clear it does not apply infinitely.

A.

1.

The categorical approach has its roots in the Armed Criminal Career Act ("ACCA"), 18 U.S.C. § 924. That statute increases the sentence of a defendant who "has three previous convictions by any court . . . for a violent felony or a serious drug offense." *Id.* § 924(e)(1). In turn, ACCA defines a "violent felony" as:

> [A]ny crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that—
>
> > (i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or
> >
> > (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another.

Id. § 924(e)(2)(B) (the "Violent Felony Provision").

The Supreme Court first interpreted the Violent Felony Provision in *Arthur Taylor v. United States*, 495 U.S. 575 (1990).[10] The question presented in *Arthur Taylor* was whether the crime of second-degree burglary, as defined by Missouri law, constituted a violent felony within the meaning of ACCA. *Id.* at 579–80. It might seem peculiar the Court thought that question merited its attention, seeing as burglary is one of the crimes listed in § 924(e)(2)(B)(ii) (the "enumerated-offense clause"). But the Court explained "the criminal codes of the States define burglary in many different ways[,] . . . [and] it is not readily apparent whether Congress intended 'burglary' to mean whatever the State of the defendant's prior conviction defines as burglary, or whether it intended that some uniform definition of burglary be applied to all cases in which the Government seeks a § 924(e) enhancement." *Id.* at 580.

In light of that disuniformity, the Court reasoned burglary as referenced in the enumerated-offense clause "must have some uniform definition independent of the labels employed by the various States' criminal codes." *Id.* at 592. Thus, the Court held that clause refers to the crime of *generic* burglary, meaning a crime "having the basic *elements* of unlawful or unprivileged entry into, or remaining in, a building or structure, with intent to commit a crime." *Id.* at 599 (emphasis added).

After assuring itself that the enumerated-offense clause refers to burglary in its generic sense, the Court proceeded to hold "§ 924(e) mandates a formal categorical approach," meaning the question of whether a defendant's prior conviction constitutes generic burglary must be resolved by "looking only to the statutory definitions of the prior offenses, and not to

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[10] There are two important categorical-approach cases named after different defendants with the surname Taylor. To distinguish them, I use the first and last names of both *Taylor* defendants.

the particular facts underlying those convictions." *Id.* at 600. In other words, courts discerning whether a crime constitutes generic burglary must ignore the actual conduct of the defendant before them. Instead, they must ask only "whether the *elements* of the [defendant's] crime of conviction sufficiently match the *elements* of generic burglary." *Mathis v. United States*, 579 U.S. 500, 504 (2016) (emphasis added).

For example, in *Mathis* the Court held a defendant's burglary conviction did not constitute the predicate offense of burglary under the Violent Felony Provision because the burglary statute under which he was convicted "cover[ed] more conduct than generic burglary does." *Id.* at 507. As the Court explained: "The generic offense requires unlawful entry into a 'building or other structure.' [The state's] statute, by contrast, reaches a broader range of places: 'any building, structure, or land, water, or air vehicle.'" *Ibid.* (alteration adopted) (emphasis and citations omitted). It did not matter that the defendant actually burgled a "house and garage" and so indisputably committed burglary as the Court has defined it. *Id.* at 541 (Alito, J., dissenting). The hypothetical possibility that some defendant somewhere could commit burglary under the state's statute without committing generic burglary evinced the kind of elemental mismatch that precludes an offense from counting as an ACCA predicate.

The categorical approach is surely counterintuitive, but the Court reasoned § 924(e)'s text requires it. That is because one part of the Violent Felony Provision defines a violent felony by reference to elements in the abstract rather than the particular circumstances of a case. *Arthur Taylor*, 495 U.S. at 600. And elements are "the things the 'prosecution must prove to sustain a conviction.'" *Mathis*, 579 U.S. at 504 (quoting BLACK'S LAW DICTIONARY 634 (10th ed. 2014)). That—says the Court—suggests "Congress intended . . . sentencing court[s] to look only to the fact that the defendant had been convicted of crimes falling within certain categories, and

not to the facts underlying the prior convictions." *Arthur Taylor*, 495 U.S. at 600.

2.

Arthur Taylor applied the categorical approach only to ACCA's enumerated-offense clause. But *Arthur Taylor* justified the categorical approach principally by reference to the word "element" in § 924(e)(2)(B)(i) (the "elements clause"). *See* 495 U.S. at 600. So it was only a matter of time before courts extended the categorical approach to the elements clause itself and to analogous clauses within ACCA. *See, e.g.*, 18 U.S.C. § 924(c)(3)(A). And once courts applied the categorical approach to those clauses, the next logical step was to apply the categorical approach to analogous statutory provisions outside of ACCA. For example, the provision in the Sentencing Guidelines defining a "crime of violence" as "any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that[] has as an element the use, attempted use, or threatened use of physical force against the person of another." U.S. SENT'G GUIDELINES § 4B1.2(a)(1); *see* U.S. SENT'G COMM'N, PRIMER ON CATEGORICAL APPROACH 22–23 (2023) (noting courts of appeals uniformly apply categorical approach to the Guidelines). Or the provision in the Immigration Nationality Act defining a "crime of violence" as an offense with a term of imprisonment of at least one year that "has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See* 8 U.S.C. § 1101(a)(43) (incorporating by reference that definition from 18 U.S.C. § 16(a)); *see also Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007).

The categorical approach demands a similar inquiry in all these contexts. Courts must "divine what constitutes the least serious conduct the prior conviction or predicate offense covers and decide whether that conduct

falls within the [elements] clause." *United States v. Justin Taylor*, 596 U.S. 845, 864 (2022) (Thomas, J., dissenting) (emphasis in original) (alteration accepted) (citation and quotation omitted).

For instance, in *Justin Taylor* the Court held a defendant's Hobbs Act conviction was not an ACCA predicate offense under § 924(c)(3)(A), which defines a predicate offense as any "offense that is a felony and has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The defendant and an accomplice unquestionably used force: they threatened, shot, and killed a person during a robbery. *Id.* at 861 (Thomas, J., dissenting). But the Court explained a Hobbs Act conviction does not have "*as an element* the use, attempted use, or threatened use of physical force" because attempted Hobbs Act robbery violates the Hobbs Act but does not necessarily involve conduct that satisfies the elements clause. *Id.* at 850 (majority opinion) (emphasis in original) (citation omitted).

B.

In essence, the categorical approach asks judges to "ignor[e] the particular facts of the case." *Mathis*, 579 U.S. at 504; *see also United States v. Burris*, 912 F.3d 386, 409 (6th Cir. 2019) (en banc) (Thapar, J., concurring) (noting the categorical approach requires judges to answer "abstract legal questions" without employing "common sense" (citation omitted)). That has led to some bewildering results. For example:

- A defendant's sexual battery conviction was not a crime of violence, even though he raped a 16-year-old girl. *United States v. Wynn*, 579 F.3d 567, 569–70 (6th Cir. 2009).

- A defendant's willful aggravated assault conviction was not a crime of violence, even though he "pinned down his then-girlfriend[,] placed his forearm over her throat, kicked the windshield of her car until it broke free, drove off with their two-year-old child, and used the child

as a human shield after police officers caught up with him." *United States v. Schneider*, 905 F.3d 1088, 1089 (8th Cir. 2018).

- A defendant's kidnapping conviction was not a violent felony, even though he "pulled a gun, ordered the owner [of a car] into the car, drove across state lines, and hit the owner with a revolver in the face and threatened that [he] would take [the owner] in the woods and kill him by burning him with gasoline." *United States v. Graham*, 67 F.4th 218, 220 (4th Cir. 2023) (alterations accepted) (internal quotations omitted).

One court of appeals even convened en banc to consider "whether a carjacking in which an assailant struck a 13-year-old girl in the mouth with a baseball bat and a cohort fired an AK-47 at her family is a crime of violence[.]" *Ovalles v. United States*, 905 F.3d 1231, 1253 (11th Cir. 2018) (W. Pryor, J., concurring), *abrogated by United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

C.

Fortunately, the Supreme Court has made clear the categorical approach does not apply everywhere. In fact, the Court has declined to impose the categorical approach on statutory provisions that "differ[]" from the Violent Felony Provision. *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009).

Consider *Nijhawan*. There, the Court considered a provision making deportable "any alien who is convicted of an aggravated felony any time after admission." 8 U.S.C. § 1227(a)(2)(A)(iii). The term aggravated felony includes "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." *Id.* at § 1101(a)(43)(M)(i) ("the Fraud Provision"). The petitioner argued the text of the Fraud Provision "refers to a generic kind of crime"—like burglary—and so the categorical approach should apply. *Nijhawan*, 557 U.S. at 36.

The Court unanimously rejected that argument. In doing so, it explained that the text of the Fraud Provision is dissimilar from the text of the Violent Felony Provision. Unlike ACCA, which speaks exclusively in terms of elements and generic offenses (*i.e.*, crimes containing particular elements), the Fraud Provision spoke in terms of the defendant's specific circumstances. *See id.* at 36–38; *see also id.* at 39 ("[T]he words 'in which' (which modify "offense") . . . refer to the conduct involved '*in*' the commission of the offense of conviction, rather than the elements *of* the offense." (emphasis in original)). And that dissimilarity precluded application of the categorical approach to the Fraud Provision. *See id.* at 40.

The upshot of *Nijhawan* is that whether the categorical approach applies to a provision depends on the text of that provision. Thus, courts may not reflexively extend the domain of the categorical approach. Rather, when pressed to apply the approach to a new provision, courts must parse statutory language to determine whether the new provision evinces the same elements-focus as the clauses of the Violent Felony Provision.

II.

Back to Romanette i. This court held the categorical approach applies to Romanette i. *See Vazquez v. Sessions*, 885 F.3d 862 (5th Cir. 2018). That means under our precedent a drug offense does not make an alien deportable under Romanette i if the law creating the offense criminalizes more drugs than are criminalized federally. *See Alejos-Perez v. Garland* (*Alejos-Perez I*), 991 F.3d 642, 647–48 (5th Cir. 2021) (citing *Vazquez*, 885 F.3d at 871). I (A) explain that *Vazquez*'s categorical approach cannot be squared with Romanette i's text. Then I (B) explain that Supreme Court precedent does not require us to impose a categorical approach on the text of Romanette i.

A.

First, the text. Romanette i makes deportable "any alien who . . . has been convicted of a violation of . . . any law or regulation . . . relating to a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1227(a)(2)(B)(i). In determining whether the categorical approach applies to Romanette i, the relevant question is whether that provision is sufficiently analogous to the Violent Felony Provision and thus requires the categorical approach. *See Nijhawan*, 557 U.S. at 36 (declining to apply the categorical approach because the Fraud Provision "differs specifically from ACCA's provisions"). The answer is no.

Recall the Violent Felony Provision. That provision has two clauses: the elements clause and the enumerated-offense clause. Both clauses define offenses that constitute violent felonies. The elements clause provides that all offenses that have "as an element the use, attempted use, or threatened use of physical force against the person of another" are violent felonies. 18 U.S.C. § 924(e)(2)(B)(i). The enumerated-offense clause lists certain generic offenses (burglary, arson, extortion, and crimes involving the use of explosives or involving conduct that presents a "serious potential risk of physical injury to another") that are violent felonies. *Id.* § 924(e)(2)(B)(ii).

The text of the Violent Felony Provision directs an elements-based inquiry because both of its clauses focus *solely* on the *elements* of the crime of conviction. *See Arthur Taylor*, 495 U.S. at 600 (noting the language of the Provision "supports the inference that Congress intended the sentencing court to look only to" criminal elements). The elements clause does so explicitly. *See, e.g.*, *Justin Taylor*, 596 U.S. at 850. The enumerated-offense clause does so implicitly by enumerating generic offenses containing particular elements. *See, e.g.*, *Mathis*, 579 U.S. at 503–04.

The centrality of elements to those clauses narrows their reach considerably because an element is something the government is "*always* require[d] . . . to prove" before a defendant may be convicted. *See Justin Taylor*, 596 U.S. at 850 (emphasis added). That means a conviction cannot satisfy the elements clause unless the government was *required* to prove the use, attempted use, or threatened use of physical force against the person of another to obtain that conviction. Similarly, it means a conviction cannot satisfy the enumerated-offense clause unless the government was *required* to prove all the elements of a particular enumerated offense to obtain that conviction. It follows that a statute cannot create a predicate offense under the elements clause unless the entire universe of conduct that violates the statute involves the use, attempted use, or threatened use of physical force against the person of another. And a statute cannot create a predicate offense under the enumerated-offense clause unless there is complete overlap between the universe of conduct that violates the statute and an enumerated generic offense. Hence, the categorical approach.

Romanette i, in contrast, does *not* focus solely on the elements of the crime of conviction. In fact, the elements of the crime of conviction are of no independent significance because Romanette i asks *only* whether an alien has been convicted of a violation of (1) "any law or regulation" that (2) "relat[es] to a controlled substance (as defined in [21 U.S.C. § 802])." Thus, while Romanette i makes clear a predicate offense must be created by a law or regulation that relates to a controlled substance as defined in § 802, it does not express or imply that a predicate offense must have *as an element* the use of a controlled substance as defined in § 802. Romanette i is therefore unlike the elements clause; it does not specify an element that a predicate offense must contain. Romanette i is also unlike the enumerated-offense clause—it does not enumerate a generic offense containing certain elements (*e.g.*, burglary). It sweeps far more broadly, encompassing all offenses defined by

laws relating to federally controlled substances. The text of Romanette i therefore "differs specifically from ACCA's provisions." *Cf. Nijhawan*, 557 U.S. at 36.

Congress certainly could have drafted Romanette i after the Violent Felony Provision. For example, it could have enumerated an element: "Any alien who has been convicted of a violation that has *as an element* use or possession of a federally controlled substance (as defined in § 802) is deportable." That would have mirrored the elements clause in § 924(e)(2)(B)(i) and thus clearly would have evinced the elements focus that triggers the categorical approach. Alternatively, Congress could have enumerated a generic offense: "Any alien who has been convicted of the use or possession of a controlled substance (as defined in § 802) is deportable." That would have mirrored the enumerated-offense clause in § 924(e)(2)(B)(ii) and thus clearly would have evinced the elements focus that triggers the categorical approach. But Congress did not do either of those things.

Instead, Congress made "law[s]" and "regulation[s]"—not elements or generic offenses—the focus of the Romanette i inquiry. And Congress modified those nouns with the phrase "relating to," which invokes a connection as broad as the law allows. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992). A law or regulation defining an offense can relate to—that is, have some "connection with"—federally controlled substances even if use or possession of a federally controlled substance is not an element of that offense. *Id.* at 383 (quoting BLACK'S LAW DICTIONARY 1158 (5th ed. 1979)). *Contra* the Violent Felony Provision, then, Romanette i does not require that a predicate offense has as an element

involvement of a controlled substance as defined in § 802.[11] That means the text of Romanette i does not trigger the categorical approach.[12]

B.

The text of Romanette i makes clear the categorical approach does not apply. Nevertheless, the *Vazquez* panel applied that approach, and it did so without even considering Romanette i's text. Apparently, the panel inferred from Supreme Court precedent the principle that the categorical approach applies everywhere and always. *See Vazquez*, 885 F.3d at 870–71 (citing *Mathis*, 579 U.S. 500; *Duenas-Alvarez*, 549 U.S. 183; *Moncrieffe v. Holder*, 569 U.S. 184 (2013); and *Mellouli v. Lynch*, 575 U.S. 798 (2015)).

But that is not what the Supreme Court's precedents say. As explained above, the Supreme Court's precedents say the categorical approach applies to a provision only if the text of that provision is sufficiently analogous to the text of the provisions the Supreme Court has held dictate a

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[11] Congress did use language in other parts of § 1227 that, under the Supreme Court's instructions, courts must employ a categorical approach. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(E)(i) ("Any alien who . . . is convicted of . . . a crime of stalking . . . is deportable."). That makes our decision to apply the categorical approach to Romanette i especially anomalous because we ordinarily presume variation in language across different sections of a statute evinces that Congress "intended a difference in meaning." *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1323 (2020) (citation omitted).

[12] This court's precedents layer the realistic probability test on top of the categorical approach, *see Alejos-Perez I*, 991 F.3d at 648, but that does not make them easier to reconcile with Romanette i's text. That is because it would only make sense to apply the categorical approach to Romanette i if its text dictates that a predicate offense must have as an element involvement of a federally controlled substance. But an element is something the government is "always require[d]" to prove, *Justin Taylor*, 596 U.S. at 850, and the whole point of the realistic probability test is to swap "always" for "most likely." That may be sensible policy, but it makes little sense as a matter of interpretation.

categorical approach. *See Nijhawan*, 557 U.S. at 39–40. So we cannot justify applying the categorical approach to a new statutory provision simply by citing precedents applying that approach to other, dissimilar provisions.

The *Vazquez* panel did not heed this principle. If it did, it would have recognized that three of the precedents it cited—*Mathis*, *Duenas-Alvarez*, and *Moncrieffe*—are plainly irrelevant to the question of whether the categorical approach applies to Romanette i. That is because in all those cases the Court considered enumerated-offense clauses that—like the enumerated-offense clause of the Violent Felony Provision—are elements-based and are therefore unlike Romanette i. *See Mathis*, 579 U.S. at 504 (applying the categorical approach to a provision enumerating the generic offense of burglary); *Duenas-Alvarez*, 549 U.S. at 189 (applying the categorical approach to a provision enumerating the generic offense of theft); *Moncrieffe*, 569 U.S. at 192 (applying the categorical approach to a provision enumerating the generic offense of illicit trafficking in a controlled substance).

That means of the cases cited in *Vazquez*, only *Mellouli* could possibly support application of a categorical approach to Romanette i. But the Court in that case did not countenance a categorical approach.

The question presented in *Mellouli* was whether an alien was deportable under Romanette i because he was convicted under state law for possessing drug paraphernalia. The BIA concluded paraphernalia statutes relate to "the drug trade in general." 575 U.S. at 809 (citation omitted). Accordingly, it reasoned all paraphernalia convictions make aliens deportable under Romanette i, whether or not "the type of controlled substance involved in a paraphernalia conviction is one defined in § 802." *Ibid.*

The Court rejected that position. In doing so, it noted the BIA's position severed the link between Romanette i and "particular federally

controlled drug[s]" because the logic of BIA's position was that a conviction under a statute that had *any* relation to the drug trade would make an alien deportable. *Id.* at 812. For example, the Court explained BIA's position would logically "encompass convictions for offenses related to drug activity more generally, such as gun possession, even if those convictions do not actually involve drugs." *Ibid.* That implication, the Court held, could not be reconciled with Romanette i's textual focus on "the substances controlled under" federal law. *Ibid.* The Court therefore held a state-law offense relates to federally controlled substances only if there is a "direct link" between the alien's crime of conviction and some federally controlled drug. *Ibid.* And the Court concluded paraphernalia convictions lack the requisite link. *Id.* at 813.

That is not the same as the categorical approach. When the Court applies the categorical approach, it does so explicitly. *See, e.g.*, *Moncrieffe*, 569 U.S. at 192 ("The aggravated felony at issue here, 'illicit trafficking in a controlled substance,' is a 'generic crime.' So the categorical approach applies." (quotation omitted)). The *Mellouli* Court did not say anything like that. Nor does the test the Court announced suggest *Mellouli sub silentio* adopted a categorical approach. The Court required only a connection between an element of the alien's offense and some federally controlled substance. It did not require that an alien's offense actually have as an element involvement of a federally controlled substance. *See Justin Taylor*, 596 U.S. at 850. Or that "the [offense] at issue always require[] the government to prove" involvement of a federally controlled substance. *Ibid.* Or that an alien's offense "necessarily involve[]" a federally controlled substance. *Moncrieffe*, 569 U.S. at 190.

Thus, the *Mellouli* Court (1) did not say it was applying the categorical approach, and (2) announced a test that differs from any formulation of the categorical approach the Court has ever pronounced. It therefore seems to me the direct link requirement is distinct from the categorical approach. That

means far from being faithful to the Supreme Court's precedents, *Vazquez* may violate them.

* * *

The majority correctly applies *Vazquez*'s categorical approach. But I see no basis for that approach in the text of Romanette i or the Supreme Court's precedents. Instead, our panel was required to engage in this curious inquiry only because *Vazquez* extended the categorical approach without considering or explaining why. I am troubled by that approach, both because it runs in tension with Supreme Court precedent and because the categorical approach has caused immense mischief. Thus, in an appropriate case, our court should overrule *Vazquez* and its progeny.