20-2395

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JOSE CANDELARIO BERMUDEZ PAIZ, AKA JOSE BERMUDEZ,
***Petitioner*,**

v.

MERRICK B. GARLAND, UNITED STATES ATTORNEY GENERAL,
***Respondent*.**

ON PETITION FOR REVIEW
FROM THE BOARD OF IMMIGRATION APPEALS (A094-393-914)

BRIEF OF AMICUS CURIAE THE AMERICAN IMMIGRATION LAWYERS ASSOCIATION
In support of the Petitioner
and reversal of the Board of Immigration Appeals

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FRAP RULE 29 STATEMENTS

Pursuant to Federal Rules of Appellate Procedure (FRAP), Rule 29(a)(2), undersigned counsel for amicus curiae states that all parties have consented to the filing of this brief.[1]

Dated: March 10, 2021

/s/ David A. Isaacson
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CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for amicus curiae certifies pursuant to FRAP 26.1 that the American Immigration Lawyers Association is a non-profit organization that does not have any parent corporation and does not issue stock, so there is no publicly held corporation owning 10% or more of its stock.

Dated: March 10, 2021

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[1] Pursuant to FRAP 29(a)(4)(E) and Local Rule 29.1(b), counsel for amicus curiae states that no counsel for the parties authored this brief in whole or in part, and no party, party's counsel, or person or entity other than Amicus and their counsel contributed money that was intended to fund the preparing or submitting of this brief.

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INTEREST OF AMICUS CURIAE

The American Immigration Lawyers Association ("AILA") is a national non-profit association with more than 15,000 members throughout the United States and abroad, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in a representative capacity in immigration and naturalization matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review, as well as before the United States District Courts, Courts of Appeal, and Supreme Court. AILA members regularly litigate cases involving the application of the categorical approach to state statutes, including the specific New York statute involved in this case.

AILA Doc. No. 21031730. (Posted 3/17/21)

SUMMARY OF THE ARGUMENT

Amicus curiae submits this brief to highlight that a correct application of the categorical approach and binding precedent compel a ruling in favor of Petitioner Jose Candelario Bermudez Paiz ("Mr. Bermudez" or "Petitioner").

There is no controversy that the New York definition of cocaine, N.Y. Penal L. § 220.06 (5), is broader than its federal counterpart, in that New York explicitly refers to types of "cocaine" not covered by 21 U.S.C. § 802. *See* Petitioner's Initial Brief ("Pet. Br."), at 7, 8 (describing immigration judge and BIA's acknowledgment of "statutory mismatch"). Conviction-based immigration consequences only flow from violation of a law that necessarily relates to a federally-defined controlled substance. *See e.g.* 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i) (enumerating immigrant "inadmissibility" and "deportability" for offenses relating to controlled substances offenses, as defined at 21 U.S.C. § 802); *Mellouli v. Lynch*, 575 U.S. 798, 135 S.Ct. 1980 (2015) (rejecting that *factual* possession of a CSA substance (there, Adderall) triggered an immigration consequence where Kansas conviction did not require legal element

identifying the specific drug involved, and where Kansas' defined controlled substances list was broader than the federal enumerated list).

It is also the case that the statutory definition of "cocaine" under New York law is not divisible—i.e. that New York convictions for crimes relating to a statutory element of "cocaine," do not require the prosecution to allege or prove that the offense involved any specific isomer or molecular form. *See* Br. of Petitioner, at 5 (citing A.R. 521 to establish that a "generic" prosecution occurred in the instant case); *see generally Mathis v. United States,* 136 S. Ct. 2243 (2016) (distinguishing between criminal "elements," which a jury must find established in order to convict, and criminal alternative "means" for satisfying the element, which a jury does not).

No additional showing of "realistic probability" is required where there is a clear mismatch between the text of the state statute and that of the federal statute. The Second Circuit, like the majority of the Courts of Appeals, has correctly held that the explicit language of a statute of conviction itself establishes the scope of that statute, and thus, the statutory text itself also establishes the "realistic probability" that the statute attaches criminal consequences to each of its enumerated

component parts. *E.g.*, *Hylton v. Sessions*, 897 F.3d 57, 64 (2d Cir. 2018) (distinguishing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007)); *Jack v. Barr*, 966 F.3d 95 (2d Cir. 2020)). Nor has the Supreme Court ever applied a heightened version of the realistic probability test to a facially overbroad statute, including in its March 4, 2021, opinion in *Pereida v. Wilkinson*, No. 19-438, Slip op. at 3-4 (2021).

Amicus curiae respectfully submits that this Court's case law conclusively resolves that a New York conviction for "cocaine," as defined by New York law, is not an offense relating to a federally controlled substance, based on the facial statutory overbreadth. *See generally id.* That holding also comports with the New York legislature's clear intent, which is made plain both in the text of the statute and as applied by the New York courts in state prosecutions, such as Mr. Bermudez' own. *See* N.Y. Penal L. § 220.06(5); *see also* A.R. 521.

ARGUMENT

A. The New York Definition of Cocaine is Both Overbroad and Indivisible.

Section 220.06(5) of New York Penal Law defines "cocaine" to include substances not criminalized by the federal Controlled Substances

Act. See Pet. Br. at 7-8. The dissonance is plain from a comparison of the two statutory texts. *See* Pet. Br. at 16-20 (describing statutes, interpretative state cases, and uncontradicted evidence including chemist Dr. Gregory Dudley's identification of "two non-optical, non-geometric isomers of cocaine which fall under the New York definition and are not uncommon in the physical world" but are not covered by the federal definition). Indeed, neither the Department of Homeland Security (DHS) nor the agency below disputed the overbreadth of New York's definition of cocaine. *See* Pet. Br. At 7-8.

Well-established principles guide the court in its analysis of that apparent statutory overbreadth. First, it is clear that there are many substances that satisfy the definition of "cocaine" in New York; the element "cocaine" is multi-pronged. Second, it is clear that in New York (as evidenced by the Petitioner's own conviction), convictions for cocaine offenses rest on nothing more than a finding that the offense involved any one of the versions of "cocaine" that New York criminalizes, rather than a specific isomer or molecule.

In order for a state controlled-substance conviction to trigger immigration consequences, "the elements that make up the state crime

of conviction" must "relate to a federally controlled substance." *Mellouli*, 575 U.S. at 1990. Additionally, as the Supreme Court has explained,

> A crime counts […] under the Act if its elements are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not [a generic offense] — even if the defendant's actual conduct (i.e., the facts of the crime) fits within the generic offense's boundaries.

Mathis, 136 S. Ct. at 2248 (addressing the parallel scenario of Iowa's multi-pronged and indivisible burglary statute, finding it overly broad relative to the federal burglary definition, and, consequently, convictions thereunder failing to trigger sentencing consequences).

Supreme Court case law thus confirms the singular use of the elements-based categorical approach to resolve the question of whether a state offense triggers an immigration consequence. The inquiry in this case, therefore, must begin and end with the elements-based categorical approach. Mr. Bermudez was convicted under a state statute that is plainly overbroad and indivisible, and therefore categorically not an offense relating to a federally controlled substance. *See* id.

B. No Additional Showing of Realistic Probability is Required where, As Here, the Statutory Mismatch is Clear.

In recent years, the Supreme Court has made clearer than ever that a strict categorical approach applies when determining whether a noncitizen's criminal conviction triggers a negative immigration consequence that Congress has based on "conviction" of a generic crime. See, e.g., *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). Under the categorical approach, the adjudicator must consider the "least of the acts criminalized" under the criminal statute of conviction—regardless of what the underlying facts might have been in the noncitizen's own case—and then determine if that minimum conduct falls completely within the definition of the generic crime referenced in the immigration provision. *See e.g., Moncrieffe*, 133 S.Ct. at 1684; *Mathis, supra*; *Mellouli*, *supra*; *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

The "realistic probability" standard stems from the Court's decision in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Concerned that the categorical approach argument in that case—an interpretation of California's aiding and abetting doctrine—might be based on no more than the application of "legal imagination" to the statutory text," the

Court found that there must be a showing, or "realistic probability," that the convicting jurisdiction has applied the statute in the same overbroad manner claimed by the noncitizen. *Duenas-Alvarez*, 549 U.S. at 193 (explaining that the categorical approach "requires more than the application of legal imagination to [the] . . . statute's language.").

The Supreme Court again referenced the realistic probability in *Moncrieffe v. Holder*, addressing the antique firearms exception under the firearms trafficking aggravated felony ground under 8 U.S.C. § 1101(a)(43)(C). The Court explained that, in order to establish that a conviction under a state firearms law that does not have an antique firearms exception is an aggravated felony, "a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms." 133 S. Ct. at 1693. The Supreme Court has not since issued any other decisions regarding the realistic probability test. Nor has it applied a realistic probability standard to any other case involving the categorical approach.

Taken together, *Duenas-Alvarez* and *Moncrieffe* indicate that in the context of the categorical approach, the noncitizen must show a realistic probability of "actual" prosecution when their minimum-conduct

argument necessitates "legal imagination." *See e.g. Pereida v. Wilkinson,* 2021 U.S. Lexis 1278, ___ S. Ct. ___ (2021); *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Mellouli v. Holder*, 573 U.S. 944 (2014); *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017); *Descamps v. United States*, 570 U.S. 254 (2013).

Numerous circuits—including the Second Circuit—have since held, however, that no legal imagination is required where the text of a state's criminal statute is facially overbroad. *See, e.g.*, *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018); *Williams v.* Barr, 960 F.3d 68 (2d Cir. 2020); *Jack v. Barr*, 966 F.3d 95 (2d Cir. 2020).

This Court established its realistic probability standard unambiguously in *Hylton v. Sessions*. There, the Board of Immigration Appeals had applied the "realistic probability test" to determine whether a conviction under NYPL § 221.45 was a categorical match for an aggravated felony drug trafficking crime, thus rendering Mr. Hylton deportable. The *Hylton* Court held, categorically, that "[t]his was error".

> By its terms, NYPL § 221.45 punishes the transfer without remuneration of less than an ounce of marijuana, which is not necessarily felonious under the CSA. The realistic probability test is obviated by the wording of the state statute, which on its face extends to conduct beyond the

> definition of the corresponding federal offense. *See Mathis v. United States,* 136 S. Ct. 2243, 2251, 195 L. Ed. 2d 604 (2016) ("[T]he elements of Mathis's crime of conviction ... cover a greater swath of conduct than the elements of the relevant [federal] offense. Under our precedents, that undisputed disparity resolves this case."); see also *United States v. Titties,* 852 F.3d 1257, 1275 (10th Cir. 2017).

Hylton, at 63.

As this Court explained, the "realistic probability test" is only applicable where the statute's reach is indeterminate and "where minimum conduct analysis invites improbable hypotheticals." *Id.* it is inapplicable, however, "'when the statutory language itself, rather than the application of legal imagination to that language, created the realistic probability that a state would apply the statute to conduct beyond the generic definition.'" *Id.*, citing *Ramos v. United States AG*, 709 F.3d 1066, 1072 (11th Cir. 2013).

This Court subsequently reaffirmed its holding in two published opinions. *See Williams v. Barr*, 960 F.3d 68, 78 (2d Cir. 2020) ("The 'realistic probability' test articulated in *Duenas-Alvarez* has no role to play in the categorical analysis, however, when the state statute of conviction on its face reaches beyond the generic federal definition); *Jack v. Barr*, 966 F.3d 95 (2d Cir. 2020) (where the New York statutes at issue

facially reached conduct not covered by the generic definition is was error to require the petitioners to pass the "realistic probability test").

In contrast, this Court has only required the production of an actual prosecution in those instances where the statute is both overbroad and unclear on its face. *See, e.g. United States v. Scott*, 2021 U.S. App. LEXIS 6014 (2d Cir. Mar. 2, 2021) (holding that defendant must demonstrate not only that it is theoretically possible to prosecute first-degree manslaughter in circumstances of complete inaction, but also that it is realistically probable that New York would so apply its law); *United States v. Hill*, 890 F.3d 51 (2d Cir. 2016) (applying the realistic probability test to determine if a conviction constitutes a crime of violence); and *Matthews v. Barr*, 927 F.3d 606, 618 (2d Cir. 2019) (applying the realistic probability test to determine whether a state conviction for child abuse is a categorical match to the generic definition). In all these instances, the statutes in question were unclear on their face as to what conduct was covered, and the burden shifted to the defendant (or petitioner) to produce an actual case where an individual was prosecuted for conduct outside the generic definition. Where such evidence was not produced this Court found the test was not satisfied.

This is in stark contrast to those cases where, as here, there is nothing unclear about the statute.

Second Circuit precedent regarding the application of the realistic probability approach is joined by a majority of circuits that have squarely addressed the issue of whether a facially overbroad statute requires an additional showing of "realistic probability." See e.g. *Swaby v. Yates*, 847 F.3d 62 (1st Cir. 2017); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462 (3d Cir. 2009); *Singh v. Att'y Gen.*, 839 F.3d 273 (3d Cir. 2016); *Salmoran v. Att'y Gen.*, 900 F.3d 73 (3d Cir. 2018); *Zhi Fei Liao v. Att'y Gen.*, 910 F.3d 714 (3d Cir. 2018); *United States v. Aparicio-Soria*, 740 F.3d 152, 157-58 (4th Cir. 2014) (*en banc*); *Gordon v. Barr*, 965 F. 3d 252 (4th Cir. 2020); *Nunez-Vasquez v. Barr*, 965 F.3d 272 (4th Cir. 2020); *United States v. Havis*, 907 F.3d 439, 446 (6th Cir. 2018); *Gonzalez v. Wilkinson*, No. 19-3412, 2021 U.S. App. LEXIS 6732 (8th Cir. Mar. 9, 2021); *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007); *Lopez-Aguilar v. Barr*, 948 F.3d 1143 (9th F.3d 1143) (9th Cir. 2020) (*en banc*); *United States v. Titties*, 852 F.3d 1257 (10th Cir. 2017); *Ramos v. United States AG*, 709 F.3d 1066, 1071-1072 (11th Cir. 2013). *But see*, *Alexis v. Barr*, 960 F.3d 722, 725 (5th Cir. 2020), *infra*.

In Mr. Bermudez's case, the statute of conviction, N.Y. Penal L. § 220.06(5), is facially broader than its federal counterpart. Therefore, no additional showing of realistic probability of actual prosecution is required to establish that his conviction is not categorically a conviction relating to a federally controlled substance.

C. Strict Adherence to Second Circuit Precedent Prevents Unjust Outcomes

Two recent cases further illustrate how justice depends on resolving Mr. Bermudez' case with an elements-based test and strict adherence to *Hylton,* which requires only an examination of the plain statutory language for determining the minimum conduct necessarily upon which a state conviction rests. *See Hylton; see also Pereida*, at *30-31 (Mar. 4, 2021) (Breyer, J, dissenting) (cataloging cases and explaining practical merits of the "categorical approach" over consideration of the particular facts underlying convictions).

As explained above, the "realistic probability" test is inapplicable. *See Hylton.* What is realistic, instead, is that in New York, "cocaine" offenses are charged "generically." A New York jury is not required to identify the specific isomer involved, before convicting defendants

(including Mr. Bermudez), leading to sentences ranging from days to decades. *See* A.R. 521 (evidencing same, in Mr. Bermudez' case). Thus, in New York, as a matter of law, the *type* of cocaine possessed is not an element of a crime to be proven by prosecutors.

The BIA's decision demands that Mr. Bermudez produce an exemplar New York conviction for a non-generic (non-federal) form of cocaine. *See* BIA Decision, at A.R. 4-5. Pursuant to state law, as evidenced by Mr. Bermudez' own conviction, this is the proverbial quest for a "unicorn." As a matter of law, such a prosecution does not exist, as "cocaine" is clearly chargeable as an *indivisible* element in a New York prosecution. *See* A.R. 521.

The BIA (and the Government, here) would hold Mr. Bermudez to a higher standard than the State of New York is held in its prosecutions of its populace. Again, New York never is required to prove the isomer involved; consequently, any individual convicted under New York law would face a near-impossible task of producing an exemplar prosecution. Yet, the BIA expects Mr. Bermudez to produce such a detailed prosecution here. *See* BIA Dec., at A.R. 4-5. Thus, the BIA's logic rests on both a false dichotomy and a double standard that must be rejected.

A comparison of two decisions from the Fifth and Seventh Circuits further illustrates the fairness and correctness of the Second Circuit's precedent with respect to the realistic probability test. In *United States v. Ruth,* the Seventh Circuit analyzed the federal sentencing consequences of a predicate Illinois "cocaine" conviction, where (as in New York) "[o]n its face, […]the Illinois statute is categorically broader than the federal definition." 966 F.3d 642, 647 (7th Cir. 2020), *cert. denied, Ruth v. United States*, 208 L.Ed.2d 630 (U.S. 2021). The Seventh Circuit rejected the Government's argument that this distinction was "nothing but spilled ink":

> It is not the province of the judiciary to rewrite Illinois's statute to conform to a supposed practical understanding of the drug trade. This is particularly true here where the Illinois legislature purposefully included positional isomers of cocaine in its statute. . . . Illinois went from generically prohibiting "isomers" to expressly identifying the precise types of cocaine isomers it sought to proscribe. We must give effect to the law as written.

Id. at 648. In ruling for Mr. Ruth on this issue, the Seventh Circuit held that under the elements-based categorical approach the job of a court is "straightforward: [to] compare the state statute to the federal recidivism statute at issue and ask only if the state law is the same as or narrower

than federal law." *Id.* Thus, Ruth prevailed, based on the textual overbreadth of the state definition of cocaine.

In contrast, a panel of the Fifth Circuit reached the opposite conclusion with respect to the immigration consequence of Texas's definition of "cocaine," which (as in New York) also is distinct from the federal definition, in its inclusion of position isomers of cocaine. *See Alexis v. Barr*, 960 F.3d 722, 725 (5th Cir. 2020), *cert. denied Alexis v. Barr*, 208 L.Ed.2d 422 (U.S. 2020). There, the BIA had determined that "Alexis could not establish a realistic probability that Texas prosecutes individuals for possession of position isomers of cocaine," in the form of an exemplar Texas prosecution. *See id.*

Bound by precedent, the Fifth Circuit ruled against Mr. Alexis and held that "the Fifth Circuit creates '*no exception to the actual case requirement* articulated in *Duenas-Alvarez* where a court concludes a state statute is broader on its face.'" *See id.* at 727 (emphasis in original) (citing *United States v. Castillo-Rivera*, 853 F.3d 218, 223 (5th Cir. 2017)). In doing so, it nevertheless emphasized that the element of "cocaine" under the Texas statute was indivisible, specifically noting:

> Although controlled substances include several derivatives of isomers or salts, a Texas indictment need only allege the name of the substance; it need not go further and describe the offense as a salt, isomer, or any other qualifying definition. Therefore, prosecutors and criminal defense attorneys will likely never seek testing of the isomer types of cocaine.

Id. at 728 (internal citation omitted).

The Fifth Circuit further recognized the impossibility of the standard it imposed on Mr. Alexis, via *Castillo-Rivera*, as "Texas does not treat the different forms of cocaine as distinct, separate substances" and the dominance of plea bargaining results in "very small percentage of prosecutions" resulting in published decisions to mine for an exemplar. *See* id. at 728-729. Consequently, the court found "Alexis is in essentially a Catch-22 situation when it comes to meeting the realistic probability test." *See* id. at 729.

Thus, the Second Circuit should take heed of the concurrence by Judge Graves, describing "the realistic probability test and 'actual case' requirement [as] simply illogical and unfair in the context of Alexis's petition for review." *Id.* at 731. Judge Graves went further, describing *Castillo-Rivera* as a "misstep" and noting that but for its prior precedent rule, the Fifth Circuit should follow the better logic of the Second Circuit

in *Hylton* and reject the applicability of the realistic probability test "where the statutory elements of a state offense alone are broader than the corresponding federal offense." *Id.* at 732 (also discussing conspicuous absence of "realistic probability" test in *Mellouli* (finding no immigration consequence for Kansas conviction indivisible element of state-defined controlled substance that was facially overbroad), and *Mathis* (finding no sentencing consequence for Iowa burglary conviction with overbroad and indivisible locational element); distinguishing the "ill-defined" statute at issue in *Duenas-Alvarez* (discussed, *supra*, and which accepted requiring the "realistic probability" test for resolving the "interpretive dilemma" in that limited scenario)).

D. Long-established Canons of Statutory Interpretation Require Rejection of the "Realistic Probability" Test in the Case of a Facially Overbroad Statute

To paraphrase Justice Kagan in *Mathis*, "a good rule of thumb for reading [statutes] is that what they say and what they mean are one and the same". *Mathis* at 2254.

Three of the canons of statutory construction can further guide this Court's review of Mr. Bermudez' petition: (1) Plain language; (2) *expressio unius;* and (3) the federalism canon.

(1) Plain language: In order to find a categorical match between the New York statute and the generic definition of cocaine, this Court would need to ignore the plain language of the statutes passed by the New York legislature after due deliberation. The definitions of cocaine contained in New York's schedule of controlled substances clearly cover more 'variants' of cocaine (including optical, geometric, positional, and constitutional isomers)[2], where federal law covers fewer (optical and geometric isomers only)[3].

More specifically, the Supreme Court has held that:

> In interpreting a statute, a court should always turn first to one, cardinal canon before all others.... [C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there. See, *e. g., United States* v. *Ron Pair Enterprises, Inc.,* 489 U. S. 235, 241-242 (1989); *United States* v. *Goldenberg,* 168 U. S. 95, 102-103 (1897); *Oneale* v. *Thornton,* 6 Cranch 53, 68 (1810). When the words of a statute are unambiguous, then, this first canon is also the last: "judicial inquiry is complete."

Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54 (1992).

Thus, the Supreme Court has for decades directed strict adherence to the text chosen by Congress. *See Lopez v. Gonzales,* 549 U.S. 47, 54-55

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[2] N.Y. Pub. Health L. § 3302.

[3] 21 C.F.R. §§ 1300.01(b), 1308.12(b)(4).

(2006) (rejecting a government interpretation that was directly contradictory to the statute, quoting L. Carroll's *Alice In Wonderland and Through the Looking Glass,* "Humpty Dumpty used a word to mean "just what [he chose] it to mean – neither more nor less, and legislatures, too, are free to be unorthodox. Congress can define a [term] in an unexpected way. But Congress would need to tell us so, and there are good reasons to think it was doing no such thing here.").

Numerous decisions of this Court have followed the same canon. See, *United States v. Gayle*, 342 F.3d 89, 92 (2d Cir. 2003); *United States v. Zapatero*, 961 F.3d 123, 127 (2d Cir. 2020); *Lee v. Bankers Tr. Co.*, 166 F.3d 540, 544 (2d Cir. 1999); *Spadaro v. United States Customs & Border Prot.*, 978 F.3d 34, 46 (2d Cir. 2020) ("Legislative history and other tools of interpretation[4] may be relied upon only if the terms of the statute are ambiguous.").

(2) *Expressio unius*: Moreover, to conclude that the statutes at issue are a categorial match would require finding that Congress didn't know what it was doing when it listed – and thereby criminalized – fewer

[4] Such 'other tools of interpretation' would include, Amicus contends, expert scientific testimony.

isomers than do a number of states, or that Congress inadvertently failed to amend or update the federal definition of cocaine. To do so would require ignoring another well-worn canon of statutory interpretation, *expressio unius est exclusio alterius,* "the expression of one thing implies the exclusion of others."[5] This canon is strongest "when the items expressed are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (quoting *United States v. Vonn*, 535 U.S. 55, 65 (2002)). When statutes list specific 'variants' or isomers of a controlled substance this canon requires deference to those lists, and not attempts to explain them away.

Under every applicable canon of statutory construction, the plain reading of the New York statute at issue here has to control. *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* (2012), at 69 ("The ordinary-meaning rule is the most fundamental semantic rule

[5] A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* (2012) at 107.

of interpretation" and "[i]nterpreters should not be required to divine arcane nuances or to discover hidden meanings.").

(3) Federalism canon: Finally, the "federalism" canon of statutory interpretation dictates that courts generally require a clear statement before finding that a federal statute "alter[s] the federal-state balance." *See*, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2088-89 (2014). As indicated in Petitioner's brief, there is clear evidence that New York chose to broaden its definition of isomers in 1978 in response to concerns about court challenges to existing definitions. The federal government elected not to do the same. New York's legislative decision must be given deference. Pet. Br. at 22.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief is compliant with Local Rules 29.1(c) and 32.1(a)(4)(A) because it contains 4275 words of text that are counted toward the word limitation pursuant to Fed. R. App. P. 32(f). (According to the word-processing system used to prepare the brief, there are 5531 words in total within the document, minus 1256 words in the cover, corporate disclosure statement under FRAP 26.1, certificates of counsel under FRAP 29, in the tables of contents and authorities, and in the signature block and certificate of compliance.)

This brief is compliant with Fed. R. App. P. 32(a)(5)(A) because it uses a proportionally spaced typeface that is 14-point or larger, Century Schoolbook 14-point typeface.

/s/ David A. Isaacson
David A. Isaacson
Dated March 10, 2021