No. 13-1034

In the Supreme Court of the United States

MOONES MELLOULI,
Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF *AMICI CURIAE* OF THE NATIONAL IMMIGRANT JUSTICE CENTER AND AMERICAN IMMIGRATION LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

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The National Immigrant Justice Center ("NIJC") and American Immigration Lawyers Association ("AILA") respectfully submit this brief as *Amici Curiae* in support of Petitioner.[1]

INTEREST OF *AMICI CURIAE*

Amici NIJC and AILA are immigration-focused organizations with substantial interest in the Court's resolution of this case.

Amicus NIJC is a Chicago-based non-profit organization accredited since 1980 by the Board of Immigration Appeals ("BIA") to provide representation to individuals in removal proceedings. NIJC promotes human rights and access to justice for immigrants, refugees, and asylum seekers through legal services, policy reform, impact litigation, and public education. Through its staff of attorneys and paralegals, and a network of over 1,000 *pro bono* attorneys, NIJC provides free or low-cost legal services to over 10,000 individuals each year.

Amicus AILA is a national organization comprised of more than 13,000 immigration lawyers throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA's objectives are to advance the administration of law pertaining to

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[1] All parties have consented in writing to the filing of this *Amici Curiae* brief, and counsel for *Amici* will file those consents with the Court. No counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici Curiae*, their members, or counsel made a monetary contribution to the preparation or submission of this brief.

immigration, nationality, and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor, and courtesy of those appearing in immigration, nationality, and naturalization matters. AILA's members regularly appear in immigration proceedings, often on a *pro bono* basis.

As preeminent organizations in the immigration litigation field, *Amici* share a significant interest in ensuring the fair, uniform, and predictable administration of federal immigration laws. The decision below would impose drastic immigration consequences for all minor drug paraphernalia offenses and place impossible and impractical burdens on individuals in immigration proceedings. *Amici* are uniquely qualified to address the immigration law statutory interpretation questions and substantial policy concerns implicated by this case.

SUMMARY OF ARGUMENT

The Immigration and Nationality Act ("INA") deems deportable any noncitizen "convicted of a violation of * * * any law or regulation of a State, the United States, or a foreign country relating to a controlled substance *(as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802))*," other than a single offense involving possession of thirty grams or less of marijuana for personal use. 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). The Eighth Circuit reads this provision as rendering noncitizens categorically deportable for any state drug paraphernalia conviction, thereby nullifying the cross-reference to the Controlled Substances Act ("CSA") and distorting this Court's

categorical approach jurisprudence. *Amici* illustrate how the Eighth Circuit's treatment of minor state drug paraphernalia convictions has disproportionate immigration consequences, demonstrate that § 1227(a)(2)(B)(i) should parallel federal criminal law and ensure the fair and uniform application of the nation's immigration laws, and address the substantial injustice resulting from the Eighth Circuit's rule that noncitizens bear the extraordinary burden of proving that categorically overbroad state statutes have been prosecuted in an overbroad manner.

First, the Eighth Circuit's ruling would impose drastic immigration consequences for conduct that is universally considered to be either an extremely minor offense or not a crime at all. Nineteen states and the federal government do not criminalize the conduct for which Petitioner was convicted—the use of a sock to store a controlled substance. And nearly every state that criminalizes this conduct classifies it as a minor misdemeanor punishable by as little as a small fine. Most states do not even provide defendants with the right to counsel in drug paraphernalia prosecutions since there is little chance of incarceration. Yet under the Eighth Circuit's ruling, any noncitizen convicted of a state drug paraphernalia offense would face draconian consequences, including permanent banishment from her home and family in the United States. These drastic immigration consequences stand in stark contrast to the minimal penal consequences imposed by the states. This fundamentally unfair result must be rejected by this Court.

Second, as Petitioner correctly argues, § 1227(a)(2)(B)(i) at a minimum requires that a state

conviction relate to a substance that is "defined in Section 102 of the Controlled Substances Act." However, deportability under § 1227(a)(2)(B)(i) should additionally be limited to conduct prohibited under federal criminal law. Section 1227(a)(2)(B)(i) incorporates by reference the CSA, which specifically defines "controlled substances" *and* broadly delineates conduct "relating to" the federally controlled substances. The Anti-Drug Abuse Act of 1986 ("ADAA") amended § 1227(a)(2)(B)(i) to include this cross-reference to the CSA, while simultaneously expanding the substances and conduct constituting federal drug offenses under the CSA. Nothing in the ADAA or its legislative history suggests that Congress intended to expand deportable conduct beyond that which is prohibited under federal law. The ADAA also amended the CSA to criminalize the *sale* of drug paraphernalia, but not the mere *possession* of paraphernalia. There is therefore no reason to believe that Congress intended to expand § 1227(a)(2)(B)(i) to reach such conduct. Moreover, the Eighth Circuit's contrary interpretation creates a substantial risk that the immigration laws will be applied inconsistently and arbitrarily. Per the Eighth Circuit's interpretation, convictions for substances or conduct that are not criminalized under federal law would render noncitizens deportable in some states, but not others. Congress—which has admonished that the immigration laws must be applied "uniformly"—cannot have intended such a result. Limiting § 1227(a)(2)(B)(i) to conduct prohibited under federal law would ensure that the same underlying conduct would not result in disparate immigration consequences, simply because of variations in state drug laws.

Third, the Eighth Circuit's expansive view of the realistic probability test turns the categorical approach into a fundamentally unfair factual inquiry. Even in cases where the state statute expressly covers conduct that is categorically overbroad, the Eighth Circuit's ruling requires noncitizens to prove that the government has prosecuted a meaningful number of cases in an overbroad manner. This application of the realistic probability test lacks legal support and would place an impossible burden on noncitizens facing removal. There is often no practical way to confirm that a state has applied its drug paraphernalia statute in an overbroad manner. State conviction records are rarely available on standard legal databases. Moreover, even if such records were readily available, noncitizens would face insurmountable hurdles obtaining them. Noncitizens facing deportation under § 1227(a)(2)(B)(i) are subject to mandatory detention, will likely be unrepresented by counsel, and will have extremely limited access to legal materials. The Eighth Circuit's version of the realistic probability test is not only illogical, but would be practically impossible for noncitizens to meet.

ARGUMENT

I. THE EIGHTH CIRCUIT'S RULING IMPOSES DRASTIC IMMIGRATION CONSEQUENCES FOR STATE CONVICTIONS THAT HAVE MINIMAL PENAL CONSEQUENCES

The Eighth Circuit held that a state conviction for possession of drug paraphernalia categorically renders a noncitizen deportable. (Pet. App. 11.) If adopted by this Court, the Eighth Circuit's ruling would inevitably

impose drastic consequences on noncitizens for conduct that is almost universally considered an extremely minor offense or not a crime at all. The Court should reject the Eighth Circuit's unfair and disparate treatment of drug paraphernalia convictions.

A. Possession of Drug Paraphernalia is Typically Considered a Minor Misdemeanor or Civil Infraction

Petitioner was convicted of violating Kansas Statute § 21-5709(b)(2) by using a sock to conceal an unidentified controlled substance. (Pet. Br. 2.) Section 21-5709(b)(2) states:

> It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to * * * store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

Kan. Stat. § 21-5709(b). Whereas Kansas Statute § 21-5709(b)(1) addresses the use of drug paraphernalia to manufacture or produce controlled substances, Kansas Statute § 21-5709(b)(2) is focused solely on the personal use of drug paraphernalia. Specifically, Kansas Statute § 21-5709(b)(2) addresses the personal use of: (1) items, such as small plastic bags, to store or conceal controlled substances; and (2) items, such as pipes, to consume controlled substances.

Other states have adopted different definitions of both the conduct that constitutes illegal personal possession of drug paraphernalia and the types of items that are classified as drug paraphernalia. The common denominator is that nearly every state considers the conduct at issue here—the mere possession or personal

use of drug paraphernalia to conceal or store a controlled substance—to be either a minor misdemeanor or not a crime at all.

The federal drug paraphernalia statute, 21 U.S.C. § 863, criminalizes the sale, transportation, importation, or exportation of drug paraphernalia, *but not* personal use or possession of paraphernalia. Nineteen states, including Alaska, California, Illinois, Indiana, Iowa, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New York, Oregon, Rhode Island, South Carolina, Vermont, Virginia, West Virginia, and Wyoming, do not criminalize the specific conduct at issue here—the possession of items used to conceal or store a controlled substance.[2] For example, Nebraska specifically excludes the use of items to store or conceal a controlled substance from its misdemeanor drug paraphernalia statute. *See* Neb. Rev. Stat. § 28-441.

Twelve of these nineteen states also do not prohibit the personal use or possession of items, such as a pipe, to consume controlled substances. Five states (Alaska,

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[2] Alaska (no applicable statute); California (Cal. Health & Safety Code § 11364.1(a)); Illinois (720 Ill. Comp. Stat. 600/3.5(a)); Indiana (Ind. Code § 35-48-4-8.3); Iowa (Iowa Code § 124.414); Maine (Me. Rev. Stat. tit.17-A, § 1111-A(4-B)); Massachusetts (Mass. Gen. Laws ch. 94C, § 32I); Michigan (Mich. Comp. Laws § 333.7453(a));, Minnesota (Minn. Stat. § 152.092); Nebraska (Neb. Rev. Stat. § 28-441(1)); New Hampshire (N.H. Rev. Stat. §318-B:26(III)(c)); New York (N.Y. Penal Law § 220.50); Oregon (Or. Rev. Stat. § 475.525(1)); Rhode Island (R.I. Gen. Laws § 21-28.5-2); South Carolina (S.C. Code § 44-53-391(a)); Vermont (Vt. Stat. tit.18, § 4476(a)); Virginia (Va. Code § 54.1-3466); West Virginia (W. Va. Code § 60A-4-403a, § 47-19-1); and Wyoming (Wyo. Stat. § 35-7-1056).

Maine, Oregon, South Carolina and West Virginia)[3] do not criminalize possession or personal use of drug paraphernalia at all, and seven states (Massachusetts, Michigan, New Hampshire, New York, Rhode Island, Vermont, and Wyoming) specifically limit criminal liability to either the sale and distribution of paraphernalia or the use of paraphernalia to manufacture or sell controlled substances.[4] This means that in Michigan, for example, the personal use of drug paraphernalia is not a crime; only the sale of drug paraphernalia is criminalized. *See* Mich. Comp. Laws § 333.7453. Similarly, New York limits its drug paraphernalia statute to the possession of paraphernalia used to manufacture, sell, or distribute controlled substances. N.Y. Penal Law § 220.50. Neither the possession of items to consume a controlled substance nor the possession of items to conceal or store a controlled substance is prohibited. *Id.*

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[3] Alaska (no applicable statute); Maine (Me. Rev. Stat. tit.17-A, § 1111-A(4-B) (classifying possession of paraphernalia as a civil violation); *id.* § 4-B(1) ("All civil violations are expressly declared not to be criminal offenses.")); Oregon (Or. Rev. Stat. § 475.565(1)(a) (imposing civil penalty for violation of paraphernalia statute)); South Carolina (S.C. Code § 44-53-391(c) (possession of paraphernalia punishable by a civil fine, which "shall not give rise to any disability or legal disadvantage based on conviction for a criminal offense")); and West Virginia (W. Va. Code § 47-19-1 (prohibiting sale of paraphernalia without license)).

[4] Massachusetts (Mass. Gen. Laws ch. 94C, § 32I(a)); Michigan (Mich. Comp. Laws § 333.7453(a)); New Hampshire (N.H. Rev. Stat. § 318-B:26(III)(c)); New York (N.Y. Penal Law § 220.50); Rhode Island (R.I. Gen. Laws § 21-28.5-2); Vermont (Vt. Stat. tit.18, § 4476(a)); and Wyoming (Wyo. Stat.§ 35-7-1056).

Additionally, thirty of the thirty-one states that criminalize possession of drug paraphernalia to store or conceal a controlled substance categorize this conduct as a misdemeanor or minor offense.[5] In these thirty states, the penal consequences for drug paraphernalia convictions can be as low as a small fine.[6] For example, in Colorado, possession of drug paraphernalia is classified as a "drug petty offense," which is punishable "by a fine of not more than one hundred dollars." Colo. Rev. Stat. § 18-18-428(2); *see also* Md. Code Crim. Law § 5-619(c)(2)(i) ($500 fine for first offense); Tex. Health

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[5] Alabama (Class A Misdemeanor (Ala. Code § 13A-12-260(c)); Arizona (Ariz. Rev. Stat. § 13-3415(A); *id.*, § 13-604(a) (drug paraphernalia is punishable as a class 1 misdemeanor)); Arkansas (Ark. Code. § 5-64-443(a)(1)); Colorado (Colo. Rev. Stat. § 18-18-428(2)); Connecticut (Conn. Gen. Stat. §21a-267(a), (d)); Delaware (Del. Code tit. 16, § 4774(a)); Florida (Fla. Stat. § 893.147(1)); Georgia (Ga. Code §16-13-32.2(b)); Idaho (Idaho Code § 37-2734A(3)); Kansas (Kan. Stat. § 21-5709(e)(3)); Kentucky (Ky. Rev. Stat. § 218A.500(5)); Louisiana (La. Rev. Stat. §§ 40:1025(A),40:1023(A)); Maryland (Md. Code Crim. Law § 5-619(c)(2)); Mississippi (Miss. Code § 41-29-139(d)(1)); Missouri (Mo. Stat. § 195.233(2)); Montana (Mont. Code § 45-10-103); Nevada (Nev. Rev. Stat. § 453.566); New Jersey (N.J. Stat. § 2C:36-2); New Mexico (N.M. Stat. § 30-31-25.1(C)); North Carolina (N.C. Gen. Stat. § 90-113.22(b)); North Dakota (N.D. Cent. Code, § 19-03.4-03); Ohio (Ohio Rev. Code § 2925.14 (F)(1)); Oklahoma (Okla. Stat. tit. 63, § 2-405(E)); Pennsylvania (35 Pa. Cons. Stat. § 780-113(i)); South Dakota (S.D. Codified Laws § 22-42A-3); Tennessee (Tenn. Code § 39-17-425(a)(2)); Texas (Tex. Health & Safety Code § 481.125(d)); Utah (Utah Code § 58-37a-5(1)(b)); Washington (Wash. Rev. Code § 69.50.412(1)); Wisconsin (Wis. Stat. §§ 961.573, 939.60).

[6] *See supra* note 5.

& Safety Code § 481.125(d) and Tex. Penal Code § 12.23 ($500 maximum fine).

Moreover, the majority of states that criminalize the personal use or possession of drug paraphernalia to store or conceal a controlled substance do not provide defendants with the right to counsel for such prosecutions; that right is only guaranteed in eleven states.[7] Six states, including Kansas, do not guarantee the right to counsel for misdemeanor drug paraphernalia prosecutions.[8] In fourteen other states, the right to counsel is left in the discretion of the court and is generally provided only if it is likely that incarceration would be imposed.[9] Thus, in most states,

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[7] Georgia (Ga. Code §§ 16-13-32.2(b), 17-10-3, 17-12-23(a)(1)); Hawaii (Haw. Rev. Stat. §§ 802-1, 329-43.5(a)); Idaho (Idaho Code §§ 19-852, 19-851(5), 37-2734A(1), (3)); Kentucky (Ky. Rev. Stat. §§ 31.110(1)(a), 31.100(8)(b), 218A.500(2), 532.09(1)); Louisiana (La. Code Crim. Proc. Ann. Art. 511, 513); New Mexico (N.M. Stat. §§ 31-16-3(A) and (D), 30-31-25.1(C)); Ohio (Ohio Rev. Code §§ 120.16(A)(1), 2925.14(F)(1), 2929.24(A)(4)); Oklahoma (Okla. Stat. tit. 22, § 1355.6(A), tit. 63, 2-405(E)); Tennessee (Tenn. Code §§ 40-14-102, 39-17-425(a)(2); *see also* Tenn. R. Crim. P. 44); Washington (Wash. Super. Ct. Crim. R. 3.1(a); Wash. Rev. Code §§ 9.92.030, 69.50.412(1)); Wisconsin (Wis. Stat. §§ 967.06(1), 961.573(1)).

[8] Alabama (Ala. R. Crim. P. Rule 6.1(a); Ala. Code §§ 13A-12-260(c), 13A-5-2(c)); Colorado (Colo. Rev. Stat. §§ 18-18-428(2), 21-1-103(2)); Kansas (Kan. Stat. §§ 21-5709(e)(3), 22-4503); Maryland (Md. Code Crim. Proc. § 16-101, 16-204(b)(1)(i); Md. Code Crim. Law § 5-619(c)(2)(i)); Nevada (Nev. Rev. Stat. §§ 178.397, 453.566); Texas (*See* Tex. Code Crim. Proc. art. 1.051(c)); Tex. Penal Code § 12.23).

[9] Arizona (Ariz. R. Crim. P. 6.1(b); Ariz. Rev. Stat. § 13-901.01(A)); Arkansas (Ark. R. Crim. P. Rule 8.2(b); Ark. Code §§ 5-4-104(d), 5-

a noncitizen charged with possession or personal use of drug paraphernalia will likely have no legal representation and could be completely unaware of the devastating immigration consequences of her conviction.

In sum, the mere possession or personal use of drug paraphernalia, if a crime at all, is considered a minor criminal offense with minimal penal consequences throughout the country.

B. Under the Eighth Circuit's Ruling, Minor Drug Paraphernalia Convictions Could Lead to Permanent Removal

The immigration consequences of the Eighth Circuit's ruling extend far beyond deportability under § 1227(a)(2)(B)(i). Indeed, the Eighth Circuit's interpretation of this provision will leave many noncitizens ineligible to seek relief from removal, and permanently banished from home and family on account of state drug paraphernalia convictions.

64-443(a)(1)); Connecticut (Conn. Gen. Stat. §§ 21a-267(a), 51-296(a), 53a-28(a)-(b)); Delaware (Del. Code tit. 11, § 5103; Del. Super. Ct. Crim. R. 44(a)); Florida (Fla. R. Crim. P. 3.111(b)(1); Fla. Stat. §§ 775.082, 775.083, 893.147); Mississippi (Miss. Code §§41-29-139(d)(1), 99-15-15); Missouri (Mo. Stat. §§195.233(2), 557.011(2), 600.042(4)(2)); Montana (Mont. Code §§ 45-10-103, 46-8-101(3)); New Jersey (N.J. Stat. §§ 2A:158A-5.2, 2C:36-2, 2C:43-2); North Carolina (N.C. Gen. Stat. §§ 7A-451(a)(1), 15A-1340.23(b)-(c), 90-113.22(b)); North Dakota (N.D. R. Crim. P. 44(a)(2); N.D. Cent. Code, §§ 12.1-32-02, 19-03.4-03); Pennsylvania (Pa. R. Crim. P. 122(A)(1); 35 Pa. Cons. Stat. § 780-113(i)); South Dakota (S.D. Codified Laws §§22-42A-3, 23A-40-6.1); Utah (Utah Code §§ 58-37a-5(1)(b), 76-3-201(2), 77-32-302(1)).

First, the Eighth Circuit's ruling would eliminate the ability of many lawful permanent residents to apply for cancellation of removal under 8 U.S.C. § 1229b(a). Under § 1229b(a), the Attorney General may cancel the removal of legal permanent residents if, among other requirements, an individual "has resided in the United States continuously for 7 years after having been admitted in any status[.]" 8 U.S.C. § 1229b(a)(2). However, § 1229b(d)(1)(B) states that the required period of continued residence is deemed to end when a noncitizen has committed an offense identified under § 1227(a)(2)(B)(i). Thus, a drug paraphernalia conviction would preclude many lawful permanent residents who otherwise qualify for cancellation of removal from even seeking this discretionary relief.

Second, a conviction under § 1227(a)(2)(B)(i) is a total bar to cancellation of removal for nonpermanent residents, eliminating an important safety valve for unusual humanitarian situations. Section 1229b(b)(1) permits the Attorney General to cancel the removal of a nonpermanent resident if her removal "would result in exceptional and extremely unusual hardship to [her] spouse, parent or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." 8 U.S.C. § 1229b(b)(1)(D). But a noncitizen is only eligible for this relief if, among other requirements, she "has not been convicted of an offense under section [1182(a)(2), 1227(a)(2) or 1227(a)(3)]." 8 U.S.C. § 1229b(b)(1)(C). Thus, even if the noncitizen's removal would result in extraordinary hardship to a family member, such as a United States citizen child needing particular medical treatment, a misdemeanor conviction for possession of drug paraphernalia would

completely eliminate the possibility of discretionary relief. *See id.*

Third, a state drug paraphernalia conviction would serve as a permanent, unwaivable ground of inadmissibility for most noncitizens thereby preventing lawful immigration at any time in the future.[10] Under 8 U.S.C. § 1182(a)(2)(A)(i)(II), a noncitizen is inadmissible if she has been convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 102 of the Controlled Substances Act (21 U.S.C. § 802))." Section 1182(a)(2)(A)(i)(II), which contains identical language to § 1227(a)(2)(B)(i), is therefore also subject to the Eighth Circuit's ruling. *See Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears."). Accordingly, an individual like Petitioner could *never* return to be with his family.

Finally, under the Eighth Circuit's approach, a state drug paraphernalia conviction would implicate the ability of noncitizens to establish "good moral character," which is required for various immigration benefits, such as cancellation of removal, special rule cancellation of removal for battered spouses and children, voluntary departure, and naturalization. *See*

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[10] The BIA has found that the 8 U.S.C. § 1182(h) waiver could extend to a drug paraphernalia conviction, but only if the noncitizen can prove that the offense "relate[d] to a single offense of simple possession of 30 grams or less of marijuana." *Matter of Espinoza*, 25 I. & N. Dec. 118, 123-25 (B.I.A. 2009).

8 U.S.C. §§ 1229b(b)(1)(B), 1229b(b)(2)(A)(iii), 1229c(b)(1)(B), 1427(a)(3). 8 U.S.C. § 1101 bars a finding of good moral character if the noncitizen was convicted of an offense covered under 8 U.S.C. § 1182(a)(2)(A), other than a single offense for possession of thirty grams or less of marijuana. 8 U.S.C. § 1101(f)(3). Again, the ramifications for noncitizens are severe.

In sum, under the Eighth Circuit's ruling, a noncitizen who pleads guilty to misdemeanor possession of drug paraphernalia is not just deportable—she will likely be ineligible for discretionary relief and be barred from ever returning lawfully to the United States. These drastic immigration consequences stand in stark contrast to the minimal criminal consequences for such convictions. This Court should reject the Eighth Circuit's illogical and unfair interpretation of the INA.

II. SECTION 1227 SHOULD BE LIMITED TO CONTROLLED SUBSTANCES DEFINED IN THE CSA AND CONDUCT PROHIBITED UNDER FEDERAL CRIMINAL LAW

A. Section 1227 Does Not Extend to Convictions for Possession of Drug Paraphernalia

Section 1227 incorporates by reference the federal CSA. Specifically, a noncitizen is deportable only if she has been convicted of a state, federal, or foreign offense "relating to a controlled substance *(as defined in Section 102 of the Controlled Substances Act)*." 8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). Petitioner properly argues that, at a minimum, § 1227(a)(2)(B)(i)

requires that a state conviction relate to a substance that is "defined in the Controlled Substances Act." (Pet. Br. 13-19.) *Amici* agree. Additionally, reading the statute and the 1986 amendments to § 1227(a)(2)(B)(i)[11] in context, the explicit reference to the CSA also requires limiting the provision's reach to conduct that is prohibited under federal criminal law. Because possession of drug paraphernalia is not prohibited under federal law, it is not a deportable offense.

First, § 1227(a)(2)(B)(i) should be read consistently with the CSA in its entirety. *See K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988) (holding that the Court should consider "the language and design of the statute as a whole"). The cross-reference to the CSA in § 1227(a)(2)(B)(i) does not only provide the definition of a "controlled substance." 21 U.S.C. § 802, the specific provision of the CSA referenced in § 1227(a)(2)(B)(i), also identifies conduct "relating to" these controlled substances, such as delivery (21 U.S.C. § 802(8)), distribution (*id.* § 802(11)), manufacturing (*id.* § 802(15)), production (*id.* § 802(22)), and sale (*id.* §§ 802(46)-(48)).[12] Section 802 also defines a "felony

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[11] At the time of the 1986 amendment, the drug deportation provision found at 8 U.S.C. § 1227(a)(2)(B)(i) was codified at 8 U.S.C. § 1251(a)(11). *See* Pub. L. No. 99-570, tit. I, § 1751, 100 Stat. 3207, 3207-47 (1986). In this brief, any reference to § 1227(a)(2)(B)(i) also refers to § 1251(a)(11).

[12] Respondent appears to argue that § 1227(a)(2)(B)(i) defines "controlled substances" to include items, such as "listed chemicals," which 21 U.S.C. § 802 defines separately from the term "controlled substances." (*See* BIO 9-10.) Section 802 does define other categories of substances, but not *as "controlled substances*."

drug offense." 21 U.S.C. § 802(44). Section 802, however, does not include any reference to paraphernalia. And beyond § 802, the CSA broadly defines what conduct is considered an offense "relating to a controlled substance." *See, e.g.*, 21 U.S.C. §§ 841-844, 863. *Nowhere* does the CSA prohibit the mere possession of drug paraphernalia. *See* 21 U.S.C. § 863. Because § 1227(a)(2)(B)(i) expressly incorporates the CSA by reference, conduct that is neither proscribed in § 802, specifically, nor prohibited by the CSA, generally, should not render a noncitizen deportable.

The Eighth Circuit, however, interprets the "relating to" language in § 1227(a)(2)(B)(i) so broadly that it renders the explicit cross-reference to the CSA superfluous and meaningless. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute.") (quoting *United States v. Menasche*, 348 U.S. 528, 538-539 (1955)) (internal quotations omitted). While the phrase "relating to" is frequently accorded a broad meaning, it must be interpreted consistently with the statutory context in which it sits. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) (holding that the

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Compare 21 U.S.C. § 802(6) *with* 21 U.S.C. §§ 802(33)-(35) (listed chemicals), *id.* § 802(40) (chemical mixtures). As noted above, however, the CSA also defines conduct associated with those substances. Respondent cannot have it both ways. If § 1227(a)(2)(B)(i) refers to § 802 to define "controlled substance," it must refer only to § 802(6)'s definition of that term. If, by contrast, § 1227(a)(2)(B)(i) incorporates the entire definitional opus of § 802, it follows that Congress not only cross-referenced the definition of "controlled substance," but also the CSA's definition of what conduct constitutes "a violation * * * relating to a controlled substance" under federal law.

phrase "related to," while broad, "cannot be limitless."). Reading § 1227(a)(2)(B)(i) in context, the minimum conduct necessary to satisfy the deportation provision must be limited to controlled substances defined in § 802 and also conduct that the CSA considers to "relat[e] to a controlled substance." The mere possession of drug paraphernalia is not such an offense.

Second, the 1986 amendments to the drug deportation provision demonstrate that § 1227(a)(2)(B)(i) must be read to parallel federal criminal law. Congress amended the INA's deportation provision to include the explicit cross-reference to the CSA as part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, tit. I, § 1751, 100 Stat. 3207, 3207-47 (1986) (the "ADAA"). Before the 1986 amendments, the predecessor provision of the INA specifically enumerated the substances and conduct that constituted a deportable drug offense, all of which were criminalized under federal law. *See* 8 U.S.C. § 1251(a)(11) (1982).[13] But federal treatment of drug offenses and controlled substances had changed considerably since the enactment of the INA in 1952. *See, e.g.*, Thomas M. Quinn & Gerald T. McLaughlin,

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[13] Prior to the 1986 amendment, a noncitizen was deportable if "convicted" of any law "relating to the illicit possession of or traffic in narcotic drugs or marihuana" or "governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate." 8 U.S.C. § 1251(a)(11) (1982).

The Evolution of Federal Drug Control Legislation, 22 Cath. U.L. Rev. 586 (1972) (discussing federal drug laws before and after the 1970 Controlled Substances Act). This is apparent on the face of the 1986 amendments, which—in addition to modifying the language of the INA's deportability provision—substantially amended the federal controlled substances schedules *and* conduct constituting federal drug offenses under the CSA. *See, e.g.*, Pub. L. No. 99-570 at §§ 1002, 1202, 1203. Congress thus opted to simplify and streamline the drug deportability provision in the INA by incorporating the CSA by reference. Pub. L. No. 99-570 at § 1751(b).

The legislative history demonstrates that Congress intended to maintain a connection between the deportation provision and conduct prohibited under federal law. When Congress amended § 1227(a)(2)(B)(i) in 1986, Representative Lungren (the amendment's sponsor) explained that a state drug conviction must still tie to "Federal law" and "Federal offenses":

> Under the present law a sentencing judge has the authority to make a binding recommendation to the Attorney General that an alien *convicted of a variety of Federal offenses* not be deported * * * * Unfortunately, *we have not upgraded that or brought that up to present-day law*, and we only articulate particular drug offenses. * * * *What I say is if you are convicted of any drug offenses on the Federal law*, including those with designer drugs and so forth, the judge may make a recommendation but it is not binding on the Attorney General.

132 Cong. Rec. H6679-02 at 6700-6071 (daily ed. Sept. 11, 1986) (Statement by Rep. Lungren). Representative Hughes confirmed the narrow purpose of the ADAA's amendments to the deportation provision, stating: "as I understand it, what the gentleman is doing is substituting language, Controlled Substances Act language, for specific substances in the act." *Id.* at 6701. And Representative Lungren agreed that this was the amendments' purpose. *Id.* There is no evidence that Congress intended to broaden the scope of the drug deportation provision beyond conduct prohibited under federal law. Rather, the legislative history confirms that Congress merely intended to simplify the deportation provision so that it paralleled federal criminal law.

"Under established canons of statutory construction, 'it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed.'" *Finley v. United States*, 490 U.S. 545, 554 (1989) (quoting *Anderson v. Pac. Const. S.S. Co.*, 225 U.S. 187, 199 (1912)), *superseded by statute on other grounds as stated in Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 558 (2005). Nothing in the ADAA or the legislative history of the amendments to § 1227(a)(2)(B)(i) suggests, let alone "clearly expresse[s]," that Congress intended to expand deportable conduct beyond that which is prohibited under federal law. An interpretation of § 1227(a)(2)(B)(i) that contradicts the CSA would thus undermine the Congressional purpose behind its enactment.

Third, the ADAA's broader context further demonstrates that Congress did not consider the possession of drug paraphernalia to be an offense "relating to a controlled substance." *See Winkelman ex rel. Winkelman v. Parma City School Dist.*, 550 U.S. 516, 523 (2007) (holding that proper statutory interpretation "requires a consideration of the entire statutory scheme."). Among other changes to the CSA, the ADAA added the mail order drug paraphernalia statute, 21 U.S.C. § 857, making it unlawful to sell, import, or export drug paraphernalia. Pub. L. No. 99-570 at § 1822.[14] But the ADAA did not criminalize the possession or use of drug paraphernalia. *Id.*[15] It would be inconsistent to interpret the ADAA's amendments to § 1227(a)(2)(B)(i) as extending deportability to possession of drug paraphernalia offenses, while the same act intentionally chose not to criminalize this conduct.

In contrast, limiting § 1227(a)(2)(B)(i) to trafficking in drug paraphernalia (a federal offense), would be entirely consistent with the purpose of the ADAA's

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[14] The contents of 21 U.S.C. § 857 were later transferred to 21 U.S.C. § 863. *See* Crime Control Act of 1990, Pub. L. No. 101-647, tit. XXIV, § 2401(b), 104 Stat. 4858, 4859 (1990).

[15] The ADAA's definition of drug paraphernalia is also inconsistent with the Eighth Circuit's ruling that a drug paraphernalia conviction need not be tied to a federally controlled substance. *See* Pub. L. No. 99-570 at § 1822(d) (defining "drug paraphernalia" to mean "any equipment, product, or material of any kind which is primarily intended or designed for use" in connection with "a *controlled substance in violation of the Controlled Substances Act '(title II of Public Law 91-513)* [21 U.S.C. § 802]."") (emphasis added).

amendments to the INA, which were titled the "Narcotics Traffickers Deportation Act." Pub. L. No. 99-570, tit. I, subtitle M, § 1751, 100 Stat. 3207-47; *see also INS v. Nat'l Ctr. for Immigrants' Rights, Inc.*, 502 U.S. 183, 189 (1991) ("[T]he title of a statute or section can aid resolving an ambiguity in the legislation's text."). Simply put, in light of the ADAA's amendments to the CSA and INA, § 1227(a)(2)(B)(i) should be interpreted to exclude convictions for possession of drug paraphernalia.

This Court routinely looks to federal law to define the federal removal grounds and determine the immigration consequences of a state offense. *See generally Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013); *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006). This is particularly true when, as is the case here, "Congress has apparently pegged the immigration statutes to the classifications Congress itself chose." *Lopez*, 549 U.S. at 58. Section 1227(a)(2)(B)(i)'s explicit incorporation by reference of the CSA must mean that a noncitizen is deportable only when convicted of an offense involving a federally controlled substance and conduct that would necessarily be prohibited under federal law. Because the possession or personal use of drug paraphernalia is not a federal offense under the CSA, this conduct should have no immigration consequences under § 1227(a)(2)(B)(i).

B. Interpreting Section 1227 Consistently with Federal Criminal Law Would Ensure the Uniform Application of the Immigration Laws

Congress is constitutionally empowered to "establish a *uniform* Rule of Naturalization[.]" U.S. Const. art. I, § 8, cl. 4 (emphasis added). Indeed, Congress has declared that "the immigration laws of the United States should be enforced vigorously and *uniformly*." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, tit. I, § 115, 100 Stat. 3559, 3384 (1986) (emphasis added). Limiting § 1227(a)(2)(B)(i) to federally controlled substances *and* conduct that is prohibited by federal criminal law would advance this goal. The Eighth Circuit's interpretation, by contrast, would lead to inconsistent and arbitrary results.

For example, Jimson Weed (also known as Datura) is not prohibited under the CSA. (Pet. Br. 3.) Indeed, only eight states, including Kansas, criminalize Jimson Weed.[16] But under the Eighth Circuit's ruling, a noncitizen living in Kansas who possesses a sock used to store Jimson Weed is deportable, while a noncitizen living in forty-two other states would face no

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[16] Kansas, Nevada, and Rhode Island include Jimson Weed or Datura in their controlled substance schedules. Kan. Stat. § 65-4105((d)(31); Nev. Admin. Code § 453.510; R.I. Gen. Laws § 21-28-2.08, *amm'd by* 2014 Rhode Island Laws Ch. 14-68 (14-S 2651). An additional five states regulate the use of Jimson Weed or Datura outside of their controlled substance schedules. *See* Conn. Gen. Stat. §§ 21a-240(49); 720 Ill. Comp. Stat. 570/312(c)(9); La. Rev. Stat. § 40:9889.1(C)(2)(i); Neb. Rev. Stat. § 71-2501(1)(a); N.J. Stat. § 26:2-82.

immigration consequences for the same conduct. These disparities are even more pronounced under foreign laws (also potential deportability grounds under § 1227(a)(2)(B)(i)), which classify alcohol, allergy medication, and even poppy seeds as controlled substances. (Pet. Br. 15, 32, 38.)

Similarly, the mere possession of drug paraphernalia is not a federal offense. *See* 21 U.S.C. § 863. And nineteen states do not criminalize the conduct for which Petitioner was convicted—the possession of drug paraphernalia used to store, contain, or conceal a controlled substance. Thus, if Petitioner engaged in the same alleged conduct in Illinois, Massachusetts, New York, or South Carolina, he would never have been convicted of a drug paraphernalia offense. But simply because Petitioner was arrested in Kansas, he was deported, separated from his fiancée, and will never be allowed to legally return to the United States.

Adopting Petitioner's plain text interpretation of § 1227(a)(2)(B)(i) would reduce these disparate and arbitrary results. But even then, individuals in thirty-one states could be deported for a paraphernalia possession conviction involving a federally controlled substance, while individuals in nineteen other states could not be convicted, let alone deported, for the same conduct. This disparity would be avoided entirely by further limiting § 1227(a)(2)(B)(i) to conduct that would necessarily be prohibited under federal criminal law. This approach ensures that noncitizens' immigration status will not depend on variations in state laws and that the deportation provision is applied in a way that comports with the United States Constitution, the

purpose of the INA, and the categorical approach. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1693 n.11 (reiterating that the categorical approach is designed to "ensure[ ] that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law"); *Bustamante-Barrera v. Gonzales*, 447 F.3d 388, 399 (5th Cir. 2006) (citing "overarching constitutional interest in uniformity of federal immigration and naturalization law"); *Gerbier v. Holmes*, 280 F.3d 297, 311 (3d Cir. 2002) (stating that "the policy favoring uniformity in the immigration context is rooted in the Constitution"); *Nemetz v. INS*, 647 F.2d 432, 435-436 (4th Cir. 1981) (noting that where homosexual sodomy was not criminalized in nine states, the "use of state law defeats the uniformity requirement").

Accordingly, this Court should hold that a noncitizen is deportable only if convicted of an offense relating to a federally controlled substance that would be prohibited under federal law.

III. THE EIGHTH CIRCUIT'S EXPANSION OF THE REALISTIC PROBABILITY TEST PLACES AN IMPOSSIBLE BURDEN ON NONCITIZENS

The categorical approach has a "long pedigree in our Nation's immigration law." *Moncrieffe*, 133 S. Ct. at 1685. Under the categorical approach, courts must examine the statutory definition of the crime to determine whether the state statute of conviction "necessarily" renders a noncitizen removable under the INA. *Id.* at 1684-85. Here, Kansas' drug paraphernalia statute expressly prohibits conduct that falls outside the scope of § 1227(a)(2)(B)(i)—the use of

drug paraphernalia in connection with at least nine substances not treated as controlled substances under the CSA. (Pet. Br. 45-46.)

Nevertheless, the Eighth Circuit held that Kansas' drug paraphernalia statute is a categorical match because there is "little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. § 802." (Pet. App. 4-5.) In support of this holding, Respondent argues that this Court's decisions in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (2007), and *Moncrieffe*, 133 S. Ct. at 1685, require that individuals in removal proceedings factually prove that the government has prosecuted a "meaningful number" of cases in an overbroad manner, even where the state statute expressly covers overbroad conduct. (BIO 12.) Under Respondent's distorted version of the realistic probability test, an adjudicator must engage in substantial fact-finding and consider additional "evidence" regarding state prosecutions involving substances that state legislatures intentionally and explicitly criminalized. As Petitioner notes, Respondent's position and the Eighth Circuit's holding constitute an improper expansion of the realistic probability test, turning the categorical approach into a fact-intensive inquiry. (Pet. Br. 42-43, 49-50.) The realistic probability test was not meant to require every individual in immigration proceedings to provide evidence of actual prosecutions to establish that a state statute is categorically overbroad. (Pet. Br. 50.) Rather, the realistic probability test was meant to function as a backstop to prevent "legal imagination" from expanding the scope

of a state statute that would otherwise prove a categorical match. (Pet. Br. 44.)

The Eighth Circuit's application of the realistic probability test not only lacks legal support, but would place an impossible and unfair burden on noncitizens in immigration proceedings. Indeed, if adopted by this Court, the Eighth Circuit's expansive view of the realistic probability test would have broad negative implications in all immigration or criminal cases involving the categorical approach.

A. It is Practically Impossible to Locate the Evidence Required Under the Eighth Circuit's Expanded Realistic Probability Test

The Eighth Circuit's expansion of the realistic probability test would unfairly place an impossible burden on noncitizens in removal proceedings. This case itself demonstrates the significant practical concerns and unfair results that would be caused by the Eighth Circuit's approach.

Respondent previously argued that Kansas' drug paraphernalia statute is a categorical match because Petitioner "had not demonstrated a 'realistic probability' that a Kansas paraphernalia conviction would involve one of the handful of substances listed on the State's schedules that are not also controlled under federal law." (BIO 12.) In support of this argument, Respondent noted that "a search of Kansas cases not only reveals no such prosecutions but also reveals no mention of those substances." (BIO 12.)

Respondent was incorrect. As Petitioner demonstrated, Kansas and other states have

prosecuted individuals for offenses involving substances prohibited under Kansas law, but not the CSA. (Pet. Br. 52-55.) That this information was not readily available to either the government or Petitioner's counsel at the *certiorari* stage highlights the fundamentally unfair nature of Respondent's position. Although Kansas has prosecuted individuals for offenses involving substances that are not prohibited under the CSA, the records reflecting such prosecutions are practically impossible to find for a number of reasons.

Citable state decisions will only be available in the extremely small percentage of prosecutions that result in a trial and appeal. Therefore, a "lack of published cases or appellate-level cases does not imply a lack of convictions." *Nunez v. Holder*, 594 F.3d 1124, 1137 n.10 (9th Cir. 2010). The "majority of people who are convicted * * * never go to trial at all, but rather plead guilty to the charge." *Id.* Indeed, the Department of Justice has found that ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Standard legal databases on Westlaw or LexisNexis are typically limited to reported decisions from state appellate courts. But when an individual pleads guilty to a charge, there is very little chance that the case would result in a reported decision from a state court.

The lack of reported decisions is more pronounced when researching drug paraphernalia offenses. Nevada's drug paraphernalia statute provides a fitting example. In Nevada, possession of drug paraphernalia is a misdemeanor. *See* Nev. Rev. Stat. §§ 193.150,

453.566. *Amici* were, however, only able to locate a handful of reported states cases on Westlaw addressing Nevada's drug paraphernalia statute. *See, e.g.*, *Hernandez v. State*, No. 57320, 2011 WL 4378840 (Nev. Sep. 19, 2011) (unpublished); *Howe v. State*, 112 Nev. 458 (1996). Certainly, this does not mean that Nevada rarely prosecutes individuals for possession of drug paraphernalia. Rather, the lack of reported decisions attests to the likelihood that most defendants would rather plead guilty and pay a small fine than hire an attorney to contest the charges at trial or at the appellate level.

It is also practically impossible to search for specific conviction records in most states. Westlaw does not provide access to any state criminal records for twenty-five states. *See* Thomson Reuters, *Court Dockets and Court Wire Coverage*, http://legalsolutions.thomsonreuters.com/law-products/solutions/courtwire-dockets/map (last visited Sept. 23, 2014). And criminal records for the other twenty-five states are limited to a small number of specific counties. *See id.* For example, using Westlaw, it is only possible to search for criminal documents in 2 of 105 counties in Kansas and 3 of 30 counties in California. *See id.* Similarly, Lexis only provides access to state court documents in specific counties in fifteen states. *See* LexisNexis, *Support Center*, https://support.lexis-nexis.com/courtlink/record.asp?ArticleID=9439 (last visited Sept. 23, 2014).

The utility of individual state electronic docket systems is even more limited. For example, it is impossible to determine whether Kansas has prosecuted drug paraphernalia convictions in an

overbroad manner using Kansas' electronic docket system. Kansas' District Court Records Search website does not allow an individual to search for terms of phrases, such as a specific substance. *See* Kansas Office of Judicial Administration, *District Court Records Search*, https://www.kansas.gov/countyCourts/search/records?execution=e3s1 (last visited Sept. 23, 2014). Rather, Kansas' District Court Records system is limited to searching, on a county-by-county basis, for specific records using the name and birthdate of individual defendants. *See id.*

And even in states with more robust electronic docket systems, the controlled substance underlying a drug paraphernalia conviction may not be ascertainable in a search. Many states do not appear to require that the particular substance be identified to convict an individual for possession of drug paraphernalia.[17] Thus, in these states, it is unlikely that available conviction records would identify a particular controlled substance. Moreover, even in those states that require that the substance be identified, the substance may not be identified on the criminal docket. (*See* Pet. Br. 52.)

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[17] For example, although limited criminal records are available for some counties in Florida, Illinois, Maryland, Michigan, and Pennsylvania, the jury instructions indicate that a particular substance may not be identified in a paraphernalia prosecution in those jurisdictions. *Compare* Fla. Standard Crim. Jury Instr. § 25.14; Ill. Pattern Jury Instr., Crim. §§ 17.65, 17.66; Md. Crim. Pattern Jury Instr. § 4:24.4; Mich. Crim. Non-Standard Jury Instr. § 11:7; Pa. Suggested Standard Crim. Jury Instr. § 16.13(a)(32)) *with* Thomson Reuters, *Court Dockets and Court Wire Coverage*, http://legalsolutions.thomsonreuters.com/law-products/solutions/courtwire-dockets/map (last visited Sept. 23, 2014).

In drug paraphernalia cases, there is no practical way to obtain the evidence necessary to satisfy Respondent's expansion of the realistic probability test. It would therefore be fundamentally unfair to rely on the lack of such evidence as the basis to deport a legal permanent resident or deny noncitizens other critical immigration relief.

B. Noncitizens Would Face Insurmountable Hurdles Satisfying the Eighth Circuit's Expanded Realistic Probability Test

Satisfying the requirements of the Eighth Circuit's realistic probability test would be incredibly difficult for anyone to accomplish. As discussed above, even with unlimited time and resources, the odds of locating the required conviction records are extremely low. Noncitizens subject to removal proceedings, however, are particularly ill-suited to meet this burden for several reasons.

First, individuals in removal proceedings under § 1227(a)(2)(B)(i) are subject to mandatory detention. 8 U.S.C. § 1226(c)(1)(B); *see also Demore v. Kim*, 538 U.S. 510 (2003) (upholding mandatory detention during removal proceedings where noncitizen conceded removability). In 2012, Immigration and Customs Enforcement detained an "all-time high" of 477,523 noncitizens. U.S. Dep't of Homeland Security, Office of Immigration, Statistics, *Immigration Enforcement Actions: 2012*, 5 (2013), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_1.pdf. And in 2013, thirty-seven percent of all completed immigration cases (63,313 out of 173,018 cases) involved detained noncitizens. *See Executive Office for*

Immigration Review, FY 2013 Statistics Yearbook, G1 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf. But detention is only the first of many hurdles a nonimmigrant faces in satisfying the Eighth Circuit's realistic probability test.

Second, the vast majority—eighty-three percent—of detainees are unrepresented by counsel. *See* Building an Immigration System Worthy of American Values, *Testimony of the American Immigration Lawyers Association submitted to the Committee on the Judiciary of the U.S. Senate*, hearing on March 20, 2013 (2013), http://www.aila.org/content/default.aspx?bc=6755%7C12178%7C48664%7C43741. Noncitizens in immigration proceedings have no right to be appointed counsel. 8 U.S.C. § 1362; *Matter of Gutierrez*, 16 I. & N. Dec. 226, 228-29 (B.I.A. 1977) (holding that the government will not appoint counsel, regardless of the circumstances). And detainees typically cannot afford counsel or are shuffled through the system before they find an advocate. *See* Capps, Fix, Passel, & Perez-Lopez, *A Profile of the Low-Wage Immigrant Workforce*, http://www.urban.org/publications/310880.html (last visited Sept. 23, 2014) (reporting that nearly half of immigrants earn less than two-hundred percent of the minimum wage). In total, 560,499 noncitizens whose removal proceedings were completed between 2008 and 2013 were unrepresented. *See Executive Office for Immigration Review, FY 2013 Statistics Yearbook*, F1, Figure 10 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf. It is therefore highly unlikely that noncitizens will have any legal assistance locating the required state conviction records.

Third, detained noncitizens proceeding *pro se* will rarely (if ever) have the resources needed to obtain conviction records satisfying the realistic probability test. Most notably, detainees' access to legal materials is significantly limited. *See 2011 Operations Manual ICE Performance-Based National Detention Standards* (hereinafter "PBNDS"), Part 6, Appendix 6.3A (List of Legal Reference Materials for Detention Facilities), 410-13, (as modified by February 2013 Errata), http://www.ice.gov/doclib/detention-standards/2011/law_libraries_and_legal_material.pdf. For example, detention facilities' law libraries apparently lack any state-specific legal materials.[18] *See id.* And detainees do not appear to have access to email or the internet, let alone online legal databases. *Id.* Furthermore, detainees have limited access to telephone or facsimile communications. *See* PBNDS, Part 5.6 (Telephone Access), 362-363, (as modified by February 2013 Errata), https://www.ice.gov/doclib/detention-standards/2011/telephone_access.pdf; *PBNDS*, Part 5.1 (Correspondence and Other Mail), 334, (as modified by February 2013 Errata), http://www.ice.gov/doclib/detention-standards/2011/correspondence_and_other_mail.pdf. These substantial limitations make it practically impossible for noncitizens to even attempt to compile the evidence necessary to satisfy the Eighth Circuit's expanded realistic probability test.

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[18] Even if a detention center law library has state-specific legal materials, there is no guarantee that it would have legal materials for the state in which a detained noncitizen was actually convicted because, for instance, there are not detention centers in every state. *See* ICE, *Facility Locator*, http://www.ice.gov/detention-facilities/ (last visited Sept. 23, 2014).

Fourth, language barriers and limited education further exacerbate the difficulties noncitizens would face under the Eighth Circuit's ruling. Approximately eighty-one percent of noncitizens in removal proceedings are not fluent in English. *See Executive Office for Immigration Review*, *FY 2013 Statistics Yearbook*, E-1, Figure 9 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf. Nearly half of noncitizens have not completed high school, and many others have completed no schooling at all. *See Educational Attainment in the United States: 2009*, 2 (Feb. 2012), http://www.census.gov/prod/2012pubs/p20-566.pdf (reflecting a forty-eight percent rate of high school completion among foreign-born Hispanics); Elizabeth Grieco, *Educational Attainment of the Foreign Born in the United States* (July 2004), http://www.migrationinformation.org/feature/display.cfm?ID=234 (finding that 1.4 million foreign born individuals over the age of twenty-four completed no schooling). Even if they could locate (currently nonexistent) court records which could satisfy the realistic probability test, noncitizens with limited English fluency and limited education may not be able to recognize the value of what they located.

Finally, noncitizens are unlikely to have sufficient time to compile the evidence necessary to satisfy the reasonable probability test. The Executive Office for Immigration Review ("EOIR") has case completion goals designed to expedite detainee cases (other than those involving asylum claims). For example, in 2013, seventy-three percent of detainee cases were completed within sixty days, and ninety-seven percent of detainee appeals were completed by the BIA within one-hundred and fifty days. *See* Department of Justice, *FY 2013 Annual Performance Report & FY 2015 Annual*

Performance Plan, II-51-II-53 (March 2014), http://www.justice.gov/sites/default/files/ag/legacy/2014/05/14/apr2013-app2015.pdf. Continuance requests are also often denied. *See, e.g.*, *Dent v. Holder*, 627 F.3d 365 (9th Cir. 2010) (evaluating IJ's denial of a motion for continuance because petitioner was unable to gather factual evidence quickly enough for the immigration judge's review); *Badwan v. Gonzales*, 494 F.3d 566, 569-570 (6th Cir. 2007) (evaluating IJ's denial of a motion for continuance and statement that "we're under severe constraints in terms of making certain that cases are handled in an expeditious manner"). Thus, lack of time is another essentially insurmountable obstacle noncitizens face in obtaining the evidence necessary to satisfy the realistic probability test.

Congress requires that a noncitizen be afforded a "reasonable opportunity * * * to present evidence on [her] own behalf." 8 U.S.C. § 1229a(b)(4)(B). There is nothing reasonable about requiring a noncitizen to prove that states have applied drug paraphernalia statutes to controlled substances that are not prohibited under the CSA. Rather, this places an impossible burden on those individuals least capable of meeting it.

C. The Eighth Circuit's Fact-Intensive Approach Would Overburden the Immigration System and Lead to Inconsistent Results

The categorical approach requires a straightforward, purely legal analysis of a noncitizen's prior state conviction. In contrast, the Eighth Circuit's rule would burden the immigration system by calling

for Immigration Judges ("IJs") to conduct complicated, fact-intensive inquiries.

IJs have an affirmative duty to develop the record, particularly in *pro se* cases. *See* 8 U.S.C. § 1229a(b)(1) ("The immigration judge shall administer oaths, receive evidence, and interrogate, examine, and cross-examine the alien and any witnesses."); *Richardson v. Perales*, 402 U.S. 389, 410 (1971) (an administrative law judge "acts as an examiner charged with developing the facts"); Charles H. Koch, Jr., *Administrative Law and Practice* § 5.25 (2d ed.1997) ("an administrative judge has a well-established affirmative duty to develop the record."). Under the Eighth Circuit's rule, IJs will first need to determine the degree of overlap, if any, between a state's controlled substances statute and the federal CSA. IJs will then need to determine whether the particular substance at issue has been prosecuted in a "meaningful number" of cases, if at all. But IJs presiding over removal proceedings have extremely limited resources. Immigration courts suffer from substantial backlogs,[19] and IJs' caseloads are triple that of federal district court judges.[20] IJs do not even

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[19] As of August 2014, there were 408,037 pending immigration cases. *See* TRACImmigration, *Immigration Court Backlog Tool*, http://trac.syr.edu/phptools/immigration/court_backlog/ (Last visited Sept. 22, 2014). And in 2013, immigration courts received over 270,000 new matters and completed over 250,000 proceedings. *See* Executive Office for Immigration Review, *FY 2013 Statistics Yearbook*, A2, Figure 1 (2014), http://www.justice.gov/eoir/statspub/fy13syb.pdf.

[20] IJs each hear up to 1,500 cases per year, whereas federal judges typically hear only 440. *See* Eli Saslow, *In a crowded immigration*

have their own law clerks—on average four IJs share one law clerk.[21] Yet the Eighth Circuit and Respondent would call upon overburdened IJs to comb through unpublished state decisions or conviction records (when available) to confirm that states actually prosecute the crimes that are on their books. The consequences of this scheme would, of course, be disproportionately felt by the *pro se* detainees whose cases are delayed or denied because evidence is either not available or not located in time.

The Eighth Circuit's expanded realistic probability test also invites inconsistent results. For example, two noncitizens convicted of the same offense in the same jurisdiction would be treated very differently. One noncitizen's administrative record may include "factual" evidence about other prosecutions in that jurisdiction, while the other's—because she appeared *pro se* and the presiding IJ's shared law clerk failed to adequately supplement her research efforts—does not. This fact-intensive inquiry can hardly be called a categorical approach. And without the categorical approach, dramatically different immigration outcomes

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court, seven minutes to decide a family's future, Washington Post, February 2, 2014, http://www.washingtonpost.com/national/in-a-crowded-immigration-court-seven-minutes-to-decide-a-familys-future/2014/02/02/518c3e3e-8798-11e3-a5bd-844629433ba3_story.html.

[21] *See generally* Testimony of Dana Leigh Marks, Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law of the House Committee on the Judiciary on Oversight Hearing on the Executive Office For Immigration Review, at 2 (June 17, 2010), http://judiciary.house.gov/_files/hearings/pdf/Marks100617.pdf.

for people convicted of the same criminal offense are inevitable. That cannot have been Congress' intent.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Eighth Circuit. First, to ensure the fair and uniform application of the immigration laws, this Court should hold that § 1227(a)(2)(B)(i) only applies to convictions involving federally controlled substances and conduct that is actually prohibited under federal law. Second, the Court should reject the Eighth Circuit's improper application of the "realistic probability" test, which would place an impossible burden on noncitizens in removal proceedings.

Respectfully submitted,

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