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

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Under 8 U.S.C. § 1227(a)(2)(B)(i), the government may remove a noncitizen convicted of violating "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21) …." For a state drug paraphernalia conviction to support deportation of a noncitizen under this statute, must the government prove that the conviction related to a substance included in 21 U.S.C. § 802's definition of "controlled substance"?

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The decision of the United States Court of Appeals for the Eighth Circuit, App. 1-14, is reported at 719 F.3d 995. The administrative decisions of the Immigration Judge, App. 23-28, 29-35, and the Board of Immigration Appeals, App. 17-19, are unreported.

JURISDICTION

The court of appeals entered its judgment and opinion on July 9, 2013. App. 1. It denied Petitioner's timely petition for panel rehearing or rehearing *en banc* by a seven to four vote on October 28, 2013. App. 36-37. Petitioner filed a timely writ of certiorari on February 25, 2014, following an extension of time granted by Justice Alito. This Court granted the writ on June 30, 2014. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes implicated in this case, 8 U.S.C. § 1227(a)(2)(B)(i) (defining classes of deportable aliens), 21 U.S.C. § 802(6) (defining "controlled substance"), Kan. Stat. Ann. § 21-5701(a), (f) (defining "controlled substance" and "drug paraphernalia"), and Kan. Stat. Ann. § 21-5709 (outlawing use or possession with intent to use drug paraphernalia) are reprinted in a Statutory Appendix. Stat'y App. 1a-2a.

STATEMENT OF THE CASE

1. Statutory Background

The government may remove a 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 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B)(i). The Government removed Mellouli under this provision based on his Kansas misdemeanor conviction for possession of drug paraphernalia, in his case a sock.

The Controlled Substances Act of 1970 ("CSA"), now codified in Title 21, created a complex scheme criminalizing conduct associated with various substances controlled under the Act. Section 802 of Title 21 defines the Act's terms. Congress defined "controlled substance" as a "drug or other substance, or immediate precursor, included in" one of five different schedules, organized by potential for abuse and accepted medical use. 21 U.S.C. §§ 802(6), 812(b). Congress provided detailed criteria governing a substance's designation as a controlled substance and authorized the Attorney General to amend the schedules through a rule-making process based on the same specified criteria. 21 U.S.C. § 811. Congress also established a series of criminal offenses and corresponding penalties with reference to these definitions and schedules. *See*, *e.g.*, 21 U.S.C. §§ 841(a)(1) (making it unlawful to "manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance"); 841(b)(1)-(3) (tying penalties to schedules); 841(c) (defining separate offenses for "listed chemicals"). Nowhere in the CSA did Congress incorporate in its definitions substances controlled only by other jurisdictions.

Kansas and other States have enacted their own drug laws. Kansas's law defines "controlled substance" as any drug, substance or immediate precursor included on the State's own set of schedules. Kan. Stat. Ann. § 21-5701(a) (referencing Kan. Stat. Ann. §§ 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113). Kansas controls certain substances that are not controlled substances under section 802. *See* Kan. Stat. Ann. § 21-5701. At the time of Mellouli's conviction, Kansas controlled at least nine substances not included in section 802's definition of controlled substance:

- Salvia divinorum or salvinorum A (Kan. Stat. Ann. § 65-4105(d)(30) (2010));
- Datura stramonium, commonly known as gypsum weed or jimson weed (Kan. Stat. Ann. § 65-4105(d)(31) (2010));
- 1–Pentyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. § 65-4105(d)(33) (2010));
- 1–Butyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. § 65-4105(d)(34) (2010));
- 1–(3–[trifluoromethylphenyl]) piperazine ("TFMPP") (Kan. Stat. Ann. § 65-4105(d)(36) (2010));
- Butyl nitrite (Kan. Stat. Ann. § 65-4111(g) (2010));
- Propylhexedrine (Kan. Stat. Ann. § 65-4113(d)(1) (2010));
- Pseudoephedrine (Kan. Stat. Ann. § 65-4113(f) (2010)); and
- Ephedrine (Kan. Stat. Ann. § 65-4113(e) (2010)).

Compare Pet. Cert. 3 n.1 *with* Br. in Opp. ("BIO") 9-10; *see also* Pet'r's. Reply at 7-8. Pseudoephedrine and ephedrine are only "listed chemicals" under the federal

statute, *see* BIO 9-10, and are thus not included as "controlled substance[s] (as defined in section 802 of Title 21)." *Compare* 21 U.S.C. § 802(6) *with* § 802(33). Thus, a controlled substance offense under Kansas law does not necessarily involve a controlled substance under section 802.

Indeed, the acts leading to Mellouli's Kansas misdemeanor would not be a crime under federal law. Kansas defines drug paraphernalia and the associated criminal acts differently than the CSA does. Federal law covers only selling, transporting in interstate commerce, importing and exporting drug paraphernalia. 21 U.S.C. § 863(a). Kansas criminalizes use of paraphernalia. Kan. Stat. Ann. § 21-5709(b)(2). Kansas also defines paraphernalia to include equipment or material "used" to store, contain, or conceal a Kansas controlled substance, while the federal definition is confined to equipment or material "primarily intended or designed for use" for those purposes. *Compare* Kan. Stat. Ann § 21-5701(f) *with* 21 U.S.C. § 863(d). Consequently, in Kansas, possessing a sock can satisfy the elements of a drug paraphernalia crime while it cannot under federal law. *See State v. Unruh*, 133 P.3d 35, 44 (Kan. 2006) (use to store, contain, conceal is sufficient); *State v. McMannis*, 747 P.2d 1343, 1346 (Kan. Ct. App. 1987) (use with a State controlled substance renders object paraphernalia).

2. Procedural History

1. Moones Mellouli entered the United States on a student visa in 2004. J.A. 12. He earned a bachelor of arts degree, *magna cum laude*, from Drury University in 2006, as well as master's degrees in applied

mathematics and economics from the University of Missouri-Columbia in 2009. *Id.* at 224-26. Mellouli worked as an actuary for two and a half years and taught mathematics at the University of Missouri-Columbia for three years. *Id.* at 183. He became a conditional permanent resident on January 26, 2009, J.A. 12, and a lawful permanent resident on March 9, 2011. Mellouli has been engaged to be married to a United States citizen since December 23, 2011. A.R. 228-30.

2. Immigration and Customs Enforcement officers arrested Mellouli in February 2012 and charged him as deportable under 8 U.S.C. § 1227(a)(2)(B)(i) based on his Kansas misdemeanor conviction for possession of drug paraphernalia. J.A. 6-13. In 2010, Mellouli had pleaded guilty to "unlawfully, knowingly and willfully us[ing] or possess[ing] with intent to use drug paraphernalia, to wit: a sock, to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance." *Id*. at 23-26 (a violation of Kan. Stat. Ann. § 21-36a09 in 2010; recodified at Kan. Stat. Ann. § 21-5709). He was sentenced to a suspended term of 359 days and twelve months' probation. *Id.* at 27-34. He successfully completed probation in July 2011. A.R. 13.

3. The documents the Government submitted underlying Mellouli's conviction—the complaint and plea agreement—did not specify the controlled substance involved. J.A. 23-26. Mellouli argued to the Immigration Judge that the record of conviction documents did not establish his deportability because Kansas's paraphernalia law was not limited to controlled substances defined in section 802 and his

record of conviction did not establish a relationship between the paraphernalia and a section-802 substance. App. 30-31. The Immigration Judge found that the absence of a specific controlled substance in Mellouli's record of conviction did not matter even though the Kansas definition of "controlled substance" was broader than the federal definition included in the removal ground. *Id.* at 33-34. That the Kansas drug paraphernalia statute criminalizes behavior associated with "the drug trade in general" was sufficient. *Id.* at 31-32 (quoting *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009)).

Based on a probable cause affidavit tied to a charge that had been abandoned by the Kansas prosecutor, the Immigration Judge went on to conclude that the government established by clear and convincing evidence that Mellouli's conviction was not an offense involving possession for one's own use of thirty grams or less of marijuana. App. 34-35; J.A. 19-20, 23-24. The probable cause affidavit alleged that sheriff's reports stated that Mellouli's sock contained four tablets of Adderall when he was processed into jail on April 4, 2010 on a charge of driving while intoxicated. J.A. 17-18; A.R. 138. There is no record of any lab testing. A.R. 90. Mellouli never admitted to the abandoned charge or conceded the contents of the probable cause affidavit.

On motion for reconsideration, the Immigration Judge once again found that the conviction fell within § 1227(a)(2)(B)(i) because it involved "other conduct associated with the drug trade in general." App. 25-26 (quoting *Matter of Martinez Espinoza*, 25 I. & N. Dec. at 121).

The Board of Immigration Appeals agreed that a "conviction for possession of drug paraphernalia involves the drug trade in general, and thus, is covered under" 8 U.S.C. § 1227(a)(2)(B)(i). App. 18. It also cited *Matter of Martinez Espinoza* as controlling. *Id*.

4. Mellouli filed a petition for review with the Eighth Circuit. C.A. Pet'r's Br. 7. He argued that the Government failed to satisfy its burden of proving that his conviction related to a controlled substance as defined by 21 U.S.C. § 802 because the record of conviction did not establish that the substance associated with the sock was federally controlled and the Kansas statute of conviction includes substances absent from the federal controlled substance list. C.A. Pet'r's Br. 15. The Government maintained that Mellouli's conviction involved "the drug trade in general," which was sufficient to establish that his possession of a sock involved a violation of a State law relating to a controlled substance. C.A. Resp't's. Br. 14.

The Eighth Circuit denied the petition for review. Analyzing Mellouli's statutory argument, the court acknowledged that Kansas's schedule of controlled substances "may not map perfectly with the federal schedules." App. 4 (internal quotation omitted). But the Eighth Circuit relied on Kansas's adoption of the Uniform Controlled Substances Act to conclude that "there is little more than a theoretical possibility" that a Kansas controlled substance conviction will not involve a section-802 substance. *Id.* (internal quotation omitted)

On this premise, the court deferred to the BIA's position that "a state court drug paraphernalia conviction 'relates to' a federal controlled substance

because it is a crime 'involving other conduct associated with the drug trade in general.'" App. 10 (quoting *Matter of Martinez Espinoza*, 25 I. & N. Dec. at 121). The Eighth Circuit concluded deference was appropriate under *Chevron v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984), because the BIA's interpretation was a reasonable reading of "relating to" in section 1227(a)(2)(B)(i). *Id.* The court decided that for those "States such as Kansas that adopted the Uniform Controlled Substance Act," the BIA could reasonably conclude that "any drug paraphernalia conviction . . . was categorically, a violation of a law 'relating to a controlled substance' within the meaning of 8 U.S.C. § 1227(a)(2)(B)(i)." *Id.* This included "a conviction for violating the Kansas paraphernalia statute." *Id.* at 11.

The Eighth Circuit denied Mellouli's petition for panel rehearing and rehearing *en banc* on a vote of seven to four. *Id.* at 11.

5. This Court granted certiorari. 134 S. Ct. 2873.

6. Mellouli has been removed from the United States and has no way to return, despite being engaged to marry a U.S. citizen. He was deemed ineligible for cancellation of removal because he had not been a lawful permanent resident for five years. 8 U.S.C. § 1229b(a). And he is considered inadmissible to return to the U.S. under the parallel provision in 8 U.S.C. § 1182(a)(2)(A)(i)(II), which can be waived only if the conviction concerned a single offense of simple possession of marijuana. 8 U.S.C. § 1182(h). Thus, the Kansas misdemeanor conviction for which Mellouli received no jail time has resulted in his permanent removal from the United States.

SUMMARY OF ARGUMENT

Congress authorized immigration officials to remove noncitizens convicted of some drug offenses, but not all drug offenses. An offense justifying removal must relate to a drug that the United States has chosen to control, rather than to the larger universe of drugs subject to State and foreign regulation. Yet here the Eighth Circuit held that lawfully admitted residents may be removed based on conduct involving substances that federal law does not control. Congress precluded such overreaching by expressly incorporating the federal controlled substance definition into the statute authorizing removal. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (citing 21 U.S.C. § 802). The Eighth Circuit's holding circumvents this plain language with a convoluted construction that ignores the statute's text, structure, purpose, and history. This Court has repeatedly struck down similar efforts to expand the scope of removal based on state drug convictions and should do so again here. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1691-92 (2013) (distribution of marijuana that could include social sharing of a small amount); *Carachuri-Rosendo v. Holder*, 560 U.S. 563, 575 (2010) (possession of Xanax); *Lopez v. Gonzales*, 549 U.S. 47, 51 (2006) (aiding and abetting another's possession of cocaine).

To justify removal, the language of section 1227(a)(2)(B)(i) requires that a conviction be related to a controlled substance as defined in 21 U.S.C. § 802. Ordinary principles of statutory construction support this reading, including considering the statute as a whole and Congress's use of similar and different language elsewhere in Title 8. The statutory and legislative history confirm as much. Rather than

accepting this straightforward application of the law, the Government seeks to distort the statutory language to make any drug paraphernalia conviction a basis for removal, but its approach reads out of the statute the limitations Congress imposed by incorporating the section 802 definition.

Because the statute focuses on a conviction, it invokes the categorical approach. The categorical approach requires focus on the elements of the State, federal, or foreign crime. Under this approach, removal under section 1227(a)(2)(B)(i) is limited to convictions encompassing only controlled substances defined in 21 U.S.C. § 802. But the Kansas statute outlaws conduct beyond that encompassed in section 1227(a)(2)(B)(i). The Eighth Circuit ignored the section-802 element in the federal removal ground, instead deciding that the law under which Mellouli was convicted was associated with the drug trade in general. This approach abandons reliance on the facts established by conviction—and with it the fairness and uniformity the categorical approach promotes.

The Eighth Circuit's decision is unanchored to the text and leads to anomalous outcomes. It relies on the degree of overlap between State controlled-substance schedules and the federal definition in section 802. This approach would give administrative decision-makers authority not provided by Congress to determine just how much overlap is sufficient to justify removal. The approach would also make the removal decision depend on not what drugs a State has outlawed, but rather how a State codified its offenses. Further, it would result in deportability for paraphernalia associated

with a substance controlled only by Kansas but not for possession or sale of the same substance.

There is no place for *Chevron* deference in this case. The statutory question is not one subject to agency interpretation; in previous cases the Court has itself determined which elements must be established for deportation. Also, the text and other evidence of congressional intent are unambiguous, leaving no room for deference. Moreover, the agency's reading is unreasonable because it applies the same statute inconsistently to different crimes and its interpretation leads to removal of noncitizens for minor offenses.

The Eighth Circuit misconstrued the requirements of section 1227(a)(2)(B)(i), and then it compounded the error by assuming that Kansas does not actually prosecute the non-section-802 drug offenses its legislature created. The Eighth Circuit rejected Mellouli's argument that he could not be removed although Kansas's definition of "controlled substance" was broader than Congress's definition in 21 U.S.C. § 802, reasoning in part that "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." The Eighth Circuit opined that a Kansas paraphernalia conviction is therefore categorically related to a controlled substance as that term is federally defined. No legal imagination is required to decide that Kansas enforces its law as written, including those provisions outside the federal removal ground, and no further proof of the realistic probability of prosecution should be required. The Eighth Circuit's rule conflicts with the categorical approach,

undermines its purpose, and is inherently unfair. Nonetheless, it is evident that Kansas, along with other States, prosecutes crimes involving substances other than those defined in section 802.

The Court should reverse the Eighth Circuit's judgment and remand to vacate the order of removal.

ARGUMENT

I. Section 1227(a)(2)(B)(i) allows removal of only those noncitizens whose convictions relate to a controlled substance defined in 21 U.S.C. § 802.

Section 1227(a)(2)(B)(i) requires that, to support deportability, a State conviction must have as an element a section-802 controlled substance. Straightforwardly read, the statutory text says so. The statutory reference to section 802 makes sense only as a condition on the conviction supporting removal. Additionally, Congress's careful use of references to various portions of the Controlled Substances Act elsewhere in Title 8 supports the conclusion that its choice to refer to "a controlled substance (as defined in section 802 of Title 21)" was purposeful. The Eighth Circuit's reading, which ties the section-802 definitions to the violated statute rather than the conviction itself, effectively reads out of the statute the limit Congress's reference to section 802 places on deportability.

The plain text is reinforced by the requirement—again by virtue of the word "conviction" in the statute—that the categorical approach must be used to determine whether any given conviction supports removal. The categorical approach compares the statute of conviction with the requirements of the

federal statute (often called the "generic federal definition" of the removal criterion) to determine whether the conviction *necessarily* requires each element of the generic federal definition. If it does not, the analysis is at an end and the conviction is insufficient to support deportation. The categorical approach promotes consistency, uniformity, and a streamlined approach. The Eighth Circuit's departure from the elements of the generic federal definition effectively abandoned the categorical approach altogether. It also departs from the statutory text, fails to consider the entire statutory scheme, and dictates results Congress could not have intended.

A. The statute requires that the conviction relate to a federally defined controlled substance.

1. Examining the "everyday understanding" of the words Congress used, *Lopez*, 549 U.S. at 53, and the "commonsense conception" of those terms, *Carachuri-Rosendo*, 560 U.S. at 573, the text of section 1227(a)(2)(B)(i) makes clear that a conviction must be tied to the "controlled substance" definition Congress provided. The statute allows removal for a conviction under a State, federal, or foreign law, but only if that conviction relates to a section-802 controlled substance, not just any substance a State or foreign government controls that is not listed in section 802.

The relevant portion of section 1227 provides that: "Any alien who at any time after admission 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 802 of Title 21), other

than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i). Naturally read, this sentence makes noncitizens deportable only if convicted of a statutory violation that relates to a controlled substance, but only a controlled substance defined in section 802. The *conviction* must be linked to a section-802 substance—it is insufficient, as the Government would have it, for just the *law or regulation* to relate to a section-802 substance.

The reason is commonsense: asking whether a statutory violation relates to "a controlled substance" as defined by section 802 is intuitive, while asking whether a State law criminalizing perhaps dozens of additional non-section-802 substances relates to at least one among the hundreds of substances identified by section 802 is not. A reader instinctively links "a controlled substance" to those nouns (a violation, a conspiracy, an attempt) that language could sensibly describe. *See generally Lopez*, 549 U.S. at 56 (reasoning that when reading "felony punishable under the CSA" to determine whether an alien is removable, "we instinctively understand 'felony punishable as such under the Act' or 'felony as defined by the Act'"). And that interpretation is confirmed in the next clause—"other than a single offense involving possession for one's own use of 30 grams or less of marijuana." Like the rule itself, the exception describes a kind of conviction, not a kind of law.

The natural reading of this sentence is the only reading Congress could intend. The phrase "relating to" may have a broad ordinary meaning, namely, "'to stand in some relation; to have bearing or concern; to

pertain; refer; to bring into association with or connection with.'" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). So if section 1227 requires only that the law (or regulation) relates to a section-802 substance, a noncitizen convicted of *any* offense under *any* domestic or foreign law that regulates *any* section-802 substance is removable—whether or not the conviction itself relates to a section-802 substance. Yet this interpretation is self-defeating: it eliminates any real limiting effect of the statutory citation to the definition in section 802. Congress would not take "the trouble to incorporate its own statutory scheme," here a scheme specific to this particular class of deportable offenses, "if it meant courts to ignore it whenever a State [or foreign government] chose to punish" conduct related to a different substance. *Lopez*, 549 U.S. at 58 (rejecting Eighth Circuit's reading that would "render the law of alien removal . . . dependent on varying state [law] classifications even when Congress has apparently pegged the immigration statutes to the classifications Congress itself chose").

Still less would Congress enact a substance-specific exception. As read by the BIA, section 1227 allows States and foreign governments to make conduct relating to any substances they choose—everything from jimson weed to poppy seeds—trigger removal under U.S. law. But why would Congress retrieve from the ocean of possible offenses the solitary crime of possessing marijuana "for one's own use"? And why would it define that already specific crime *to the very gram*? The particularity of the text contradicts the permissiveness of the BIA's interpretation. Congress

would not legislate the immigration consequences of one exception amid hundreds of controlled substances only to abandon that clarity to the vagaries of State and foreign substance classifications.

The Government's reading makes a noncitizen removable for a state or foreign law violation connected to any controlled substance whether or not it is "a controlled substance (as defined in section 802 of Title 21)." When the Government connects "controlled substance" not to "conviction," but instead to laws of "a State, the United States, or a foreign country," "the Government argues for a result that 'the English language tells us not to expect,' so we must be 'very wary of the Government's position.'" *Carachuri-Rosendo*, 560 U.S. at 575 (quoting *Lopez*, 549 U.S. at 54); *Lopez*, 549 U.S. at 58 (rejecting interpretation that would render removal dependent on varying state laws).

2. Congress's use of similar and different words elsewhere in the Immigration and Naturalization Act ("INA") demonstrates that Congress uses different language when it wants to reach conduct beyond the substances included in the federal definition of controlled substance. Courts should presume that "a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Where Congress includes language in one section of a statute but omits it elsewhere in the statute, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

Congress has used language relating to controlled substances precisely in the immigration statutes, prescribing different consequences for violations relating to different terms. Although Congress limited removal under section 1227(a)(2)(B)(i) to convictions relating to only those defined as "a controlled substance" in 21 U.S.C. § 802, it tied inadmissibility to illicit trafficking in "controlled substance or [] any listed chemical (as defined in section 802 of Title 21)," a broader category. 8 U.S.C. § 1182(a)(2)(C)(i). Congress has prescribed other consequences elsewhere in Title 8 for other conduct. *See* 8 U.S.C. § 1184(d)(3)(B)(iii) and (r)(5)(B)(iii) (allowing Secretary of Homeland Security to deny certain visa applications when applicant has at least three convictions of crimes "relating to a *controlled substance or alcohol* not arising from a single act") (emphasis added); 8 U.S.C. § 1357(d) (allowing detainer of any alien who has been "arrested by a Federal, State, or local law enforcement official for a violation of *any law relating to controlled substances*") (emphasis added); 8 U.S.C. § 1375a(d)(2)(B)(iv) (requiring international marriage brokers to collect signed certification of any "Federal, State, or local arrest or conviction … for offenses related to *controlled substances or alcohol*") (emphasis added). Section 1227(a)(2)(B)(i) is one of the few places in Title 8 where Congress has relied on the narrow reference to "a controlled substance (as defined in section 802 of Title 21)." When Congress wants to encompass substances beyond those defined in the Controlled Substances Act (e.g. "controlled substances or alcohol," "listed chemical," "any law relating to controlled substances"), it knows how to do so.

The text of the federal removal ground requires "a violation of . . . any law or regulation of a State … relating to *a* controlled substance," not multiple controlled substances. If Congress did not want the conviction to be defined by the substances in section 802, but rather any controlled substance included in a State or foreign definition, it could have said "any law relating to controlled substances" as it did elsewhere in Title 8. 8 U.S.C. § 1357(d).

3. The Eighth Circuit's construction renders Congress's reference to its "controlled substance" definition superfluous. Kansas law prohibits the mere use of a sock to store non-section-802 substances such as salvia pills, TFMPP, pseudoephedrine, or ephedrine, with nothing more required for a conviction. *See* Kan. Stat. Ann §§ 21-5701(f), 21-5701(a). No such conviction has any relation to a controlled substance defined in section 802. The Eighth Circuit's reading of the statutory language therefore deprives the explicit reference to section 802 of meaning when applied to convictions for paraphernalia possession. *See Rojas v. Att'y Gen.*, 728 F.3d 203, 209 (8th Cir. 2013) (en banc) ("[S]uch a result would violate the cardinal principle that we do not cripple statutes by rendering words therein superfluous, as the Department's reading would have us do to the 'as defined' parenthetical."); *Ransom v. FIA Card Servs., N.A.*, 131 S. Ct. 716, 724 (2011) ("[W]e must give effect to every word of a statute wherever possible.") (quoting *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004)).

The Eighth Circuit arrives at its holding by reading "relating to" to eliminate the requirement that the conviction be connected to a section-802 substance,

asserting that so long as a violation of the State law *could* relate to section-802 substances, all convictions under that law "relat[e] to" a section-802 substance. While the phrase "relating to" may be broad, it cannot do the work the Eighth Circuit assigns. *See Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995) ("related to," while broad, "cannot be limitless"). The phrase "relating to" functions in this statute only as a term that connects the state law crimes with the federal definition of what counts as a controlled substance. And this is how the BIA historically has applied the phrase. *See, e.g.*, *Matter of N-*, 6 I. & N. Dec. 557, 561 (B.I.A., A.G. 1955) (conviction of a conspiracy is a violation of a law relating to illicit trafficking in narcotics because object of the conspiracy involves trafficking); *Matter of Schunk*, 14 I. & N. Dec. 101, 102-03 (B.I.A. 1972) (conviction for being in a room where narcotics are smoked is not related to illicit trafficking). The Eighth Circuit's reading of "relating to" cannot overcome Congress's requirement that the conviction relate to a section-802 substance.

B. Section 1227(a)(2)(B)(i) requires the categorical approach and includes the element of a federally controlled substance.

1. The plain text requires the use of the categorical approach.

When the INA ties immigration consequences to criminal convictions, courts use the categorical approach to determine whether the conviction matches the requirements of the federal statute. *Moncrieffe*, 133 S. Ct. at 1684*; see also* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L.

Rev. 1669, 1688-1702, 1749-60 (describing historical development of the categorical approach and collecting cases). Under the categorical approach, either all convictions for a particular state offense fall within the generic federal definition or none of them does, as determined by looking at whether "the state statute defining the crime of conviction categorically fits within" an offense listed in the INA. *Moncrieffe*, 133 S. Ct. at 1684 (quotation marks omitted). The categorical approach asks "what offense the noncitizen was 'convicted' of, not what acts he committed." *Id.* at 1685 (citation omitted). Courts must "presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 1684 (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). The elements of the crime of conviction establish this minimum conduct. *Descamps v. United States*, 133 S. Ct. 2276, 2283 (2013).

A state offense matches the described federal removal charge "only if a conviction of the state offense *necessarily* involved … facts equating to the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1684 (quotation marks and brackets omitted) (emphasis added). If the elements of the crime do not necessarily establish conduct that fits within the federal description, the state offense is overinclusive and the conviction does not match the federal definition. *Descamps*, 133 S. Ct. at 2283.

Where the state statute is "divisible"—meaning it "lists multiple, alternative elements, and so effectively creates several . . . different crimes," and "one statutory phrase correspond[s] to the generic crime and another

[does] not," courts may use a modified categorical approach. *Descamps*, 133 S. Ct. at 2284-86 (citation and quotation marks omitted). Under this approach, a court consults documents in the record of conviction only "to determine which statutory phrase was the basis for the conviction." *Id.* at 2285 (citation omitted). The place of the modified categorical approach is limited: "It helps effectuate the categorical analysis when a divisible statute, listing potential offense elements in the alternative, renders opaque which element played a part in the defendant's conviction." *Id.* at 2283. Once the applicable portion of a divisible statute is identified, it is assessed categorically in the usual manner to determine whether the minimum conduct necessary to satisfy its elements corresponds to the generic federal offense. *Id.* at 2285; *Matter of S--*, 2 I. & N. Dec. 353, 357 (B.I.A., A.G. 1945).

Section 1227(a)(2)(B)(i) classifies deportability based on convictions and therefore provides "the relevant statutory hook" for the categorical approach to apply. *Moncrieffe*, 133 S. Ct. at 1685 (citation omitted); *compare* 8 U.S.C. § 1227(a)(2)(B)(ii) (no conviction required). The BIA has recently applied the categorical approach to a similar removal ground. *Matter of Chairez-Castrejon*, 26 I. & N. Dec. 349, 355-56 (B.I.A. 2014) (analyzing 8 U.S.C. § 1227(a)(2)(C)). Historically, the Board has taken the same approach with conviction-based deportation charges for controlled substances. *See e.g. Matter of Martinez-Gomez*, 14 I. & N. Dec. 104, 105 (B.I.A. 1972) (taking the statute "at its minimum"); *Matter of B-----*, 5 I. & N. Dec. 479, 481 (B.I.A. 1953) (contrasting conviction-based deportation ground with an immigration charge requiring only a "reason to believe"). Against this backdrop and

throughout its many amendments to the controlled substance deportation charge, Congress has maintained the requirement of a conviction. *See, e.g.*, Act of February 18, 1931, 46 Stat. 1171, 8 U.S.C. § 156a; Immigration and Nationality Act of 1952, Pub. L. 82-414, § 241(a)(11), 66 Stat. 163, 8 U.S.C. § 1251(a)(11); Anti-Drug Abuse Act of 1986, Pub. L. 99-570, § 1751(b), 100 Stat. 3207, 8 U.S.C. § 1251(b); *see Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

The categorical approach has been applied in immigration law to promote its uniform, fair, and predictable administration in a streamlined manner. Immigration adjudicators, including officers evaluating a paper application, not just immigration judges engaged in an adversarial process, are ill-equipped to conduct mini-trials into the facts underlying a past criminal conviction. *See, e.g.*, *United States ex rel Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914); *Matter of Pichardo-Sufren*, 21 I. & N. Dec. 330, 335-36 (B.I.A. 1996) (holding that a factual inquiry into the conduct underlying a conviction "is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence").

By providing that a section-802 substance must be an element underlying a State conviction, the categorical approach ensures "a uniform Rule" for noncitizens whose convictions establish the same facts.

U.S. Const., art. I, § 8 ("Congress shall have Power To … establish an uniform Rule of Naturalization"); *see*, *e.g.*, *Bustamonte-Barrera v. Gonzalez*, 447 F.3d 388, 399 (5th Cir. 2006) (citing "overarching constitutional interest in uniformity of federal immigration and naturalization laws"); *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").

Any inquiry into the underlying facts of conviction is in direct conflict with the categorical approach and introduces unfairness into the process. Facts not established by the conviction are inherently nonessential and thus their presence in the record of conviction or other documents is a matter of chance. This inquiry would also open the door to relitigation of criminal issues that depend on the availability of witnesses and evidence long after the fact. *See Moncrieffe*, 133 S. Ct. at 1690. Determinations of deportability would be influenced by the ability to secure counsel and invest resources in locating and presenting this evidence.

The principles furthered by the categorical approach also have constitutional underpinnings. The approach allows defense attorneys to meet their Sixth Amendment obligations to advise noncitizen defendants about the immigration consequences of criminal convictions because those consequences are uniform and predictable, based only on the facts established by a conviction compared with the requirements of the immigration charge. *See Padilla v. Kentucky*, 559 U.S. 356 (2010); *see also* Das, *supra*, 1743-45 (discussing the role of the categorical approach

in ensuring compliance with *Padilla*). By pegging immigration consequences to the conviction rather than an immigration judge's assumptions about what the underlying conduct could have involved, the categorical approach enables defense counsel to anticipate the consequences of a given plea and gives defendants notice of those consequences. *See Padilla*, 559 U.S. at 360.

2. Section 1227(a)(2)(B)(i) requires a conviction to establish the element of a section-802 substance.

The federal removal ground defined in section 1227(a)(2)(B)(i) mandates that the "violation" for which the noncitizen is "convicted" be one "relating to a controlled substance (as defined in section 802)." If the conviction could relate to a substance controlled only by a State or foreign government, the noncitizen is not removable. The statutory structure reveals the questions to be asked under the categorical approach:

1. Section 1227(a) describes *classes* of aliens who are deportable.
2. Section 1227(a)(2) identifies those classes that are based on "*Criminal offenses*," which are broken down by type of offense.
3. Section 1227(a)(2)(B) covers "*Controlled Substances*" offenses.
4. Section 1227(a)(2)(B)(i) covers "*Conviction*[*s*]."
5. Congress then provided the specific *definition* of "controlled substance"—the one provided in section 802 of Title 21.

In full, the federal definition of the removal ground describes those elements required for a conviction to

trigger deportability in terms of (1) the acts: a violation, attempted violation, or a conspiracy; (2) the laws: State, federal, and foreign; and (3) the controlled substances: those defined in section 802. The violation, whether of federal, State, or foreign law, must necessarily relate to a federally defined "controlled substance" under section 802, not other substances of separate concern to State and foreign governments. *See Davis v. Michigan Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme.").

That the conviction is defined by a section-802 substance provides the common characteristic that unifies these State, federal, and foreign convictions and makes this deportable class a class. "Congress knows that any resort to state law will implicate some disuniformity . . . , but that is no reason to think Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them." *Lopez*, 549 U.S. at 60 (rejecting construction of aggravated felony that would allow the element of "felony" to be satisfied by the State's classification of the crime instead of the federal "felony" definition provided in the removal ground). To allow removal for a conviction that lacks a section-802 substance as an element, but rather is a violation related only to a substance a State or foreign government controls would read out the requirement Congress expressly provided through the phrase "as defined in." *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." (Internal quotation marks omitted)).

3. The BIA and the Eighth Circuit read the statute inconsistently with the categorical approach.

Without statutory support, the BIA reads section 1227(a)(2)(B)(i) to simultaneously require one set of elements for paraphernalia convictions and a different set of elements for other types of convictions. But there can be only one generic federal definition of this congressionally supplied removal ground, not definitions that vary with the particular type of conduct covered by the state, federal, or foreign statute of conviction. The BIA has historically applied the categorical and modified categorical approaches to determine whether the substance, not just the conduct, involved in the conviction matched the federal definition of the removal ground, comparing either the State and federal definitions of the drugs covered or comparing the substance identified in the record of conviction with the removal charge. *Matter of Paulus,* 11 I. & N. Dec 274, 276 (B.I.A. 1965) (comparing California narcotic definition to federal "narcotic drug" definition); *Matter of McClendon*, 12 I. & N. Dec. 233, 234-35 (B.I.A. 1967) (concluding demerol conviction matched "narcotic drug"). It continues to apply this analysis to require a section-802 substance for violations involving "the possession of particular substances." *Martinez Espinoza*, 25 I. & N. Dec. at 121.

Without overruling these cases, the BIA reads the same federal removal ground in section 1227(a)(2)(B)(i) to require different elements for violations "involving other conduct associated with the drug trade in general." *Martinez Espinoza*, 25 I. & N. Dec. at 121. The BIA thus ignores the statutory reference to 21

U.S.C. § 802 when addressing what it calls "drug trade" convictions, classifying all paraphernalia offenses as deportable. *Id.* at 122.

The Eighth Circuit's decision is incompatible with the categorical approach as well. It deferred to the BIA's reading that every paraphernalia conviction satisfies the removal standard because these offenses relate to controlled substances generally, no matter if the particular conviction is untethered to a section-802 substance. App. 10-11 (stating that the statutory term "relating to" "reflects congressional intent to broaden the reach of the removal provision to include state *offenses* having 'a logical or causal connection' to federal controlled substances" such that *any* Kansas paraphernalia *conviction* categorically relates to a section-802 substance) (emphasis added).

This reading ties removability not to the minimum conduct established by a conviction but rather to the maximum conduct covered by the law, a concept antithetical to the categorical approach. In doing so, the Eighth Circuit drains the meaning from "conviction"—the term at the heart of the categorical approach. Under this approach, a noncitizen can be removed for a conviction of a violation only the State criminalizes involving substances only the State controls. Such a conviction would establish few uniform facts and not necessarily the ones Congress expressly required. Instead, an adjudicator would look to whether the State statute covers any conduct related to a section-802 substance, not (as under the categorical approach) whether the elements of the crime of conviction necessarily establish the facts encompassed in the federal definition. That analysis

disconnects the element of a federally controlled substance from the conduct established by a conviction. This result is fundamentally at odds with the categorical approach as this Court has described it. *Descamps*, 133 S. Ct. at 2283-86; *Moncrieffe*, 133 S. Ct. at 1684-86.

The Eighth Circuit's reading also undermines the uniformity the categorical approach promotes. Although "[d]ifferent state offenses will necessarily establish different facts" and not all offenses "will track the 'uniform' federal definition of the generic offense," the categorical approach "ensures that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law." *Moncrieffe*, 133 S. Ct. at 1693 n.11. States cannot have "free rein to define their criminal laws in a manner that would allow them to effectively usurp the federal government's authority to determine who is permitted to enter and live in this country. If a state decides to outlaw the distribution of jelly beans, then it would have no effect on one's immigration status to deal jelly beans, because it is not related to a controlled substance listed in the federal CSA." *Desai v. Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008).

And if removability is contingent on the scope of the law, as the Eighth Circuit ruled, a noncitizen with a Kansas paraphernalia conviction that establishes possession of an instrument used to store a substance that may not be included in section 802 is treated the same as a noncitizen in a State where the paraphernalia conviction necessarily establishes a connection to a substance defined in section 802. In reverse, under the Eighth Circuit's reading, a

conviction for paraphernalia used in connection with salvia would be a removable violation in Kansas but conviction for sale of salvia to a minor in California, which is criminalized outside its definition of "controlled substance" and has no overlap with section 802's definition, would not support removability—even though both convictions relate only to a non-section-802 substance. Cal. Penal Code § 379 (prohibiting salvia sale to minors); Cal. Health & Safety Code § 11007 (excluding salvia from "controlled substance" definition); *see also Lopez*, 549 U.S. at 59 (discussing intolerable disparity in inclusion of some convictions and exclusion of others if removability varies with State classifications); *Taylor v. United States*, 495 U.S. 575, 590 (1990) (rejecting Eighth Circuit's rule that a federal sentencing enhancement for a "burglary" conviction depended on a State's burglary definition). Congress's repeated use of the term "conviction" reflects its intent to ensure the predictability and uniformity the categorical approach provides, not the opposite as the Eighth Circuit's rule ensures.

C. The Eighth Circuit's construction is atextual, fails to consider the statute as a whole, and leads to anomalous results.

1. Reading the federal removal ground so that "relating to a controlled substance" qualifies "law," not "conviction," is untethered to the text and statutory history and leads to illogical consequences. The Eighth Circuit deferred to the BIA's stance on crimes involving the drug trade in general, stating that statutes that prohibit conduct associated with section-802 substances alongside non-section-802 substances relate to section-802 substances. App. 10.

The Eighth Circuit's justification requires several atextual leaps. To find a textual source for the BIA's rule that convictions for crimes involving the "drug trade in general" need not involve a section-802 substance, the court required the State definition of "controlled substance" to have a near complete overlap with section 802's definition. App. 10; *see also* BIO 7-8. It relied on a State's adoption of the Uniform Controlled Substances Act as a proxy for this overlap. App. 10. The federal removal ground, however, says nothing about the drug trade in general or adoption of the Uniform Controlled Substances Act. And simply adopting the Uniform Controlled Substances Act does not prevent States from adding non-section-802 substances to whatever extent they decide.

If, as the Eighth Circuit contends, the federal removal ground turns on the degree of overlap in the substances controlled by the State and federal government, then immigration judges, the BIA, and reviewing courts must examine State and federal schedules in their entirety to determine whether the overlap justifies immigration consequences. The Eighth Circuit provides no guidance on how much "overlap" is enough. This subjective task is more daunting because it is connected to nothing in the statutory language. In contrast, the natural reading of the statute, in which the conviction is related to a section-802 substance, requires the simpler task of determining whether the conviction establishes that the substance involved is listed in section 802. In other words, immigration judges must make the comparison the statute requires and no more.

Further, if removal depends on whether a given State's schedule is more or less similar to section 802, the decision is divorced from the facts established by a conviction and is tied instead to legislative action outside the noncitizen's control. Under that regime, two noncitizens with convictions that establish conduct associated only with a State's list of controlled substances could face different immigration consequences if one was in a jurisdiction where the State's schedule sufficiently mimicked section 802 and the other was not. *See Judulang v. Holder*, 132 S. Ct. 476, 485 (2011) (rejecting Government's statutory construction because "[r]ather than considering factors that might be thought germane to the deportation decision, that policy hinges [discretionary relief] eligibility on an irrelevant comparison between statutory provisions").

If "a controlled substance (as defined in section 802 of Title 21)" qualifies "law" and is not an element required in the conviction itself, a conviction under a State or foreign law that includes only one section-802 substance and many non-section-802 substances would render a noncitizen removable even though most convictions under the State or foreign law could involve non-section-802 substances. For example, five provinces in India outlaw sale and consumption of alcohol. *No Drink for You? India's Dry States*, Full Stop India, http://www.fullstopindia.com/liquor-prohibited-a-list-of-dry-states-in-india. Japan outlaws certain over-the-counter inhalers and allergy medications, even with a prescription. American Citizen Services, Embassy of the United States, Tokyo, Japan, http://japan.usembassy.gov/e/acs/tacs-medimport.html. The United Arab Emirates bans

possession or use of poppy seeds, even in baked goods. United Arab Emirates: Quick Facts, U.S. Dept. of State, Bureau of Consular Affairs, U.S. Passports & Int'l Travel, http://travel.state.gov/content/passports/english/country/united-arab-emirates.html. Removal for convictions relating to these substances is implicit in the Eighth Circuit's interpretation, and that cannot be what Congress intended.

The Government departs further from the statutory text by describing the Kansas statute as "prohibiting possession of tools *intended for* storing or consuming state-controlled substances" and thus prohibiting "tools of the drug trade in general." BIO 7-8. The Government reasons that because these tools can also be used "to serve the same function for substances that are federally controlled," the conviction falls within section 1227(a)(2)(B)(i). BIO 8. But this construction broadens the removal ground well beyond conduct justifying removability under federal law. Unlike the federal statute, Kansas's drug paraphernalia statute is not limited to tools *intended for* storing or consuming controlled substances. *Compare* Kan. Stat. Ann. § 21-5701(f) *with* 21 U.S.C. § 863(d). Nor is Kansas's paraphernalia crime restricted to acts involving distribution or trade in paraphernalia as the federal statute is. *Compare* 21 U.S.C. § 863(a) *with* Kan. Stat. Ann. § 21-5709(b)(2). Socks are not normally thought of as "tools of the drug trade in general" and their possession or use is not normally thought of as part of the drug trade. *See Lopez*, 549 U.S. at 53 (looking to the "everyday understanding" of the term "trafficking"). The Government's argument that "drug-paraphernalia statutes can be seen as proscribing 'conduct associated with the drug trade in general'" rings hollow in Kansas.

BIO 8 (quoting *Martinez Espinoza*, 25 I. & N. Dec. at 121).

2. The Eighth Circuit's approach also is inconsistent with the legislative purpose, as the evolution of the removal statute shows. In the predecessor to this statute, Congress specified both the substances justifying deportability and the acts supporting deportability. Conviction for violating "any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or … any law or regulation 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" identified substances would support deportation under the prior statute. 8 U.S.C. § 1251(a)(11) (1982).

In 1986, Congress amended the statute so that it no longer listed specific conduct that could support deportation, but Congress continued to define which drugs justify deportation by including the reference to 21 U.S.C. § 802. *See* Anti-Drug Abuse Act of 1986, Pub. L. 99-570, 100 Stat. 3207, 3207-47, Oct. 27, 1986; Omnibus Consolidated Appropriations Act, 1997, Pub. L. 104-208, § 305, 110 Stat. 3009 (1996) (redesignating statute as 1227(a)(2)(B)(i)). Congressional control over the substances to which the conviction must relate has remained constant.[1]

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[1] In the House debate over the 1986 amendments, the sponsor pointed out that the law had not kept up with "new types of drugs

Again, showing Congress's careful use of the definitions in the Controlled Substance Act to determine immigration consequences, in 1999 Congress amended the illicit trafficking ground of inadmissibility in 8 U.S.C. § 1182(a)(C) to expand the categories of substances encompassed by the ground to include "listed chemicals" not just "a controlled substance" as defined in 21 U.S.C. § 802. Intelligence Authorization Act for Fiscal Year 2000, Pub. L. 106-120, § 809, 113 Stat. 1606 (1999).

Congress has also demonstrated its ability to disconnect immigration law from the definitions provided by the Controlled Substances Act if it wants to do so. Section 212(a)(5) and section 241(a)(11) of the 1952 Act tied exclusion and deportation to addiction to "narcotic drug[s]"—a term defined by the Controlled Substance Act. 21 U.S.C. § 802(17). In 1990, Congress revised these grounds to eliminate that term and replace it with "drug abuser and addict" because it recognized that some drugs are addictive, harmful and dangerous, but not "narcotic drugs" under the federal

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and offenses" so as to include "convict[ion] of any drug offenses on the Federal Law." 132 Cong. Rec. H6700-1 (daily ed. Sept. 11, 1986) (Statement by Rep. Lungren). Another representative then said, "as I understand it, what the gentleman is doing is substituting language, Controlled Substances Act language, for specific substances in the act." *Id.* (Rep. Hughes) Representative Lungren agreed. *Id*. The Senate adopted this proposed language to amend both the inadmissibility and removability controlled-substances grounds in its bill. 132 Cong. Rec. S13461 (daily ed. Sept. 23, 1986). The Eighth Circuit asserted that "relating to" evidenced congressional intent to remove the requirement that a conviction relate to a substance the federal government controls, but this history shows just the opposite.

definition. H.R. Rep. No. 101-723, at 55 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6710, 6735; Immigration Act of 1990, Pub. L. 101-649, §§ 601(a), 602(a), 104 Stat. 4978 (1990).

D. Deference to the BIA is inappropriate.

1. The Eighth Circuit applied *Chevron* deference to the BIA's reading of the statute. App. 10. But the *Chevron* framework should not come into play at all where, as here, the interpretive question concerns proper application of the categorical approach. In past cases, this Court has determined for itself the elements that Congress requires for immigration consequences to attach to a conviction for purposes of categorical analysis. *E.g., Moncrieffe*, 133 S. Ct. at 1684-85; *Kawashima v. Holder*, 132 S. Ct. 1166, 1171-72 (2012); *Carachuri-Rosendo*, 560 U.S. at 573-74; *Nijhawan v. Holder*, 557 U.S. 29, 33-34 (2009); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007); *Lopez*, 549 U.S. at 48; *Leocal*, 543 U.S. at 9. The same should hold true here. Even the BIA itself has recognized that its application of the categorical approach does not receive *Chevron* deference. *Matter of Chairez-Castrejon*, 26 I. & N. Dec. at 354 (citing *Descamps* for the proposition that federal courts do not defer to the BIA's application of the categorical approach).

2. Even if this Court were to find *Chevron* applicable, there is no room for agency interpretation because Congress's intent is unambiguous. In assessing ambiguity, this Court does not "confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Instead, the Court applies traditional tools of construction, examining both the

text of a provision and its operation within the structure of the larger statute to identify the provision's meaning as part of a "symmetrical and coherent regulatory scheme." *Id.* at 133. While not necessary here, the Court may also look to legislative history and the "nature of the question" presented to determine whether a statute is ambiguous. *Id.* at 134, 159.

Here this evidence of congressional intent is powerful. There is (i) the plain text of the ground of removal tying deportability to section-802 controlled substances (and excepting minor marijuana possession), (ii) the language Congress carefully used to attach consequences for substances beyond those defined as controlled substances in section 802 when it wished to do so elsewhere in Title 8, (iii) the categorical approach Congress has followed for over a century to limit grounds of deportability based on criminal convictions, and (iv) the incoherent results the BIA's construction produces. These factors dictate that removal must be limited to convictions that are related to controlled substances actually "defined in section 802 of Title 21." While this evidence of congressional intent is more than sufficient to establish that the statute is unambiguous, it is reinforced by the legislative history showing Congress has always retained legislative control over which substances warrant deportability. In sum, it is not plausible that Congress would intend lifetime banishment of long-term residents for minor convictions that have no specific tie to any federally proscribed conduct.

The Eighth Circuit did not consider this evidence, but instead focused narrowly on the isolated words

"relating to." Although these words can have broad meaning in some contexts, breadth is not synonymous with ambiguity, and they do not establish ambiguity here.[2]

3. Even if the statute were found ambiguous, the Board's construction is unreasonable and unpersuasive. The Board's rule in *Martinez Espinoza* describes convictions for paraphernalia possession as "conduct associated with the drug trade in general" and does not require that these convictions establish the element of a section-802 substance. *Martinez Espinoza*, 25 I. & N. Dec. at 121. This reading of Congress's removal ground is unreasonable and due no deference. The BIA has interpreted the same text to apply one way for possession and distribution offenses and another for paraphernalia offenses. *See supra* I.B.3.

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[2] Circuits have construed the plain meaning of "relating to" in immigration and other contexts. *See Rojas*, 728 F.3d at 217; *Coronado-Durazo v. INS*, 123 F.3d 1322, 1324 (9th Cir. 1997). *Barrome v. Att'y Gen.*, 687 F.3d 150 (3d Cir. 2012); *Rana v. Holder*, 654 F.3d 547, 550 (5th Cir. 2011). *Denis v. Att'y Gen.*, 633 F.3d 201, 208 (3d Cir. 2011) (8 U.S.C. § 1101(a)(43)(S)); *Vasquez v. Holder*, 602 F.3d 1003, 1011-12 (9th Cir. 2010) (8 U.S.C. § 1227(a)(1)(H)); *Evangelista v. Ashcroft*, 359 F.3d 145, 151 (2d Cir. 2004) (8 U.S.C. § 1101(a)(43)(M)); *Kamagate v. Ashcroft*, 385 F.3d 144, 154 (2d Cir. 2004) (8 U.S.C. § 1101(a)(43)(R)); *Albillo-Figueroa v. INS*, 221 F.3d 1070, 1073-74 (9th Cir. 2000) (8 U.S.C. § 1101(a)(43)(R)).

The BIA has also applied the plain meaning of "relating to." *See*, *e.g.*, *Matter of Oppedisano*, 26 I. & N. Dec. 202, 206 (B.I.A. 2013) (8 U.S.C. § 1101(a)(43)(E)); *Matter of Gruenangerl*, 25 I. & N. Dec. 351, 355-56 (B.I.A. 2010) (8 U.S.C. § 1101(a)(43)(R)); *In re Ruiz-Romero*, 22 I. & N. Dec. 486, 489-90 (B.I.A. 1999) (8 U.S.C. § 1101(a)(43)(N); *In re Batista-Hernandez,* 21 I. & N. Dec. 955, 961 (B.I.A. 1997) (8 U.S.C. §§ 1251(a)(2)(B)(i), 1101(a)(43)(S)); *In re Alvarado-Alvino*, 22 I. & N. Dec. 718, 720 (B.I.A. 1999) (8 U.S.C. § 1101(a)(43)(N)).

Consequently, a noncitizen is not deportable for a Kansas conviction of distributing salvia or TFMPP (because they are not section-802 substances), but is deportable for a Kansas conviction of having salvia or TFMPP in his sock (because the sock is paraphernalia and associated with the drug trade in general). The Board's reading similarly could result in removal of a noncitizen based on a poppy seed or alcohol-related conviction in a foreign country.

The Board created these absurd results by inventing a "drug trade" exception in *Martinez Espinoza*, 25 I. & N. Dec. at 121, with no basis in text or precedent. The case on which *Martinez Espinoza* relies, *Martinez-Gomez*, 14 I. & N. Dec. 104, provides no support. That case involved only a comparison of the activity prohibited by the California law and the activity Congress described in the deportation ground. *Id*. at 105. The decision reflects no claim that the substances defined by the California law did not match those specified in the federal deportation ground. *Id.* at 104-05. The case simply did not consider this correspondence, nor did it call into question *Paulus*, which held that the substances established by the conviction must match Congress's definition. The Board has never explained why paraphernalia possession convictions constitute "drug trade," but drug possession and distribution apparently do not.

The Board's reading is also unreasonable because it would remove noncitizens for low-level offenses similar to the convictions Congress explicitly exempted. Nearly every State that criminalizes paraphernalia possession to store, contain, or conceal a controlled

substance punishes it akin to a federal misdemeanor.[3] Nineteen states, along with the federal government, do not criminalize the conduct for which Mellouli was convicted.[4] Of the thirty-two jurisdictions that

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[3] Alabama (Ala. Code §§ 13a-5-7(a)(1), 13a-12-260(c)); Arizona (Ariz. Rev. Stat. §§ 13-3415(A), 13-604(A) (allows judges to treat paraphernalia offenses as a misdemeanor); Arkansas (Ark. Code Ann. §§ 5-4-401(b)(1), 5-64-443(a)(1)); Colorado (Colo. Rev. Stat. §§ 18-18-428(2), 18-18-426); Connecticut (Conn. Gen. Stat. §§ 21a-267(a), 53a-36); Delaware (Del. Code Ann. tit. 11, § 4206(b), tit. 16, §§ 4771, 4774(a)); Florida (Fla. Stat. §§ 775.082(4)(a), 893.147(1)); Georgia (Ga. Code Ann. §§ 16-13-32.2, 17-10-3(a)); Idaho (Idaho Code Ann. § 37-2734A); Kansas (Kan. Stat. Ann. §§ 21-5709(b)(2), (e)(3), 21-6602(a)(1)); Kentucky (Ky. Rev. Stat. Ann. §§ 218A.500(5), 532.090(1)); Louisiana (La. Rev. Stat. Ann. §§ 40:1023(c), 40:1025); Maryland (Md. Crim. Law § 5-619(c)(2)); Mississippi (Miss. Code Ann. § 41-29-139(d)(1)); Missouri (Mo. Rev. Stat. §§ 195.233(2), 558.011(1)(5)); Montana (Mont. Code Ann. § 45-10-103); Nevada (Nev. Rev. Stat. §§ 193.150, 453.566); New Jersey (N.J. Stat. Ann. §§ 2C:36-2, 2C:43-8); New Mexico (N.M. Stat. Ann. § 30-31-25.1(A), (C)); North Carolina (N.C. Gen. Stat. §§ 15A-1340.23(c); 90-113.22(b)); North Dakota (N.D. Cent. Code §§ 12.1-32-01(5), 19-03.4-03); Ohio (Ohio Rev. Code Ann. §§ 2925.14(F)(1), 2929.24(A)(4)); Oklahoma (Okla. Stat. tit. 63, § 2-405(C), (E)(1)); Pennsylvania (35 Pa. Cons. Stat. § 780-113(a)(32), (i)); South Dakota (S.D. Codified Laws §§ 22-6-2(2), 22-42A-3); Tennessee (Tenn. Code Ann. §§ 39-17-425(a), 40-35-111(e)(1)); Texas (Tex. Health & Safety Code Ann. § 481.125(a), (d), Tex. Penal Code Ann. §12.23); Utah (Utah Code Ann. § 58-37a-5(1), 76-3-204(2)); Washington (Wash. Rev. Code §§ 9.92.030, 69.50.412(1)); Wisconsin (Wis. Stat. § 961.573(1)). Washington D.C. also limits punishment for drug paraphernalia possession to 30 days. D.C. Code § 48-1103(a).

[4] Four of those states do not criminalize paraphernalia-related conduct. Alaska (*see* Alaska Stat. § 11.71 *et seq.*); Maine (Me. Rev. Stat. tit. 17, § 1111-A(4-B) (civil penalty); Oregon (Or. Rev. Stat. § 475.565) (civil fine); South Carolina (S.C. Code Ann. § 44-53-391)

criminalize conduct that would encompass Mellouli's conviction, twenty-five treat the crime no more severely than simple possession of marijuana[5]—an offense

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(civil penalty). Another fifteen, plus the federal government, only criminalize paraphernalia-related offenses that require minimum conduct more serious than Mellouli's offense. Federal government (Controlled Substance Act, 21 U.S.C. § 863); California (Cal. Health & Safety Code § 11364.7); Illinois (720 Ill. Comp. Stat. 600/3.5); Indiana (Ind. Code. § 35-48-4-8.3); Iowa (Iowa Code § 124.414); Massachusetts (Mass. Gen. Laws ch. 94C, §32I); Michigan (Mich. Comp. Laws § 333.7453); Minnesota (Minn. Stat. § 152.01(subd. 18(a), 152.092); Nebraska (Neb. Rev. Stat. § 28-441); New Hampshire (N.H. Rev. Stat. Ann. § 318-B:2(II)); New York (N.Y. Penal Law § 220.50); Rhode Island (R.I. Gen. Laws § 21-28.5-2); Vermont (Vt. Stat. Ann. tit. 18, § 4476); Virginia (Va. Code Ann. §§ 18.2-265.3, 54.1-3466); West Virginia (W. Va. Code. § 60A-4-403a) (limiting criminal liability to unlicensed paraphernalia businesses); Wyoming (Wyo. Stat. Ann. § 35-7-1056).

[5] Alabama (Ala. Code §§ 13a-12-214, 13a-12-260(c)); Arizona (Ariz. Rev. Stat. §§ 13-3405(B)(1); 13-3415(A)); Arkansas (Ark. Code Ann. §§ 5-64-419(b)(5)(A), 5-64-443(a)(1)); Colorado (Colo. Rev. Stat. §§ 18-18-406(5)(a)(I), 18-18-428(2)); Connecticut (Conn. Gen. Stat. §§ 53a-36, 53a-42, 21a-267, 21a-279; Delaware (Del. Code Ann. tit. 16, §§ 4763(b), 4774(a)); Florida (Fla. Stat. §§ 893.13(6)(b), 893.147(1)); Georgia (Ga. Code Ann. §§ 16-13-2(b), 16-13-32.2); Idaho (Idaho Code Ann. §§ 37-2732(c)(3), 37-2734A); Kansas (Kan. Stat. Ann. §§ 21-5706(c)(2)(A), 21-5709(e)(3)); Louisiana (La. Rev. Stat. Ann. §§ 40:966(E), 40:1025); Maryland (Md. Crim. Law §§ 5-601(c)(2)(i), 5-619(c)(2)); Missouri (Mo. Rev. Stat. §§ 195.202(3), 195.233(2)); Montana (Mont. Code Ann. §§ 45-9-102(2), 45-10-103); New Jersey (N.J. Stat. Ann. §§ 2C:36-2, 2C:43-8, 2C:35-10(a)(4)); New Mexico (N.M. Stat. Ann. §§ 30-31-25.1, 30-31-23); North Carolina (N.C. Gen. Stat. §§ 90-113.22, 90-95); North Dakota (N.D. Cent. Code §§ 19-03.1-23(7), 19-03.4-03); Oklahoma (Okla. Stat. tit. 63, §§ 2-402(B)(2), 2-405(C), (E)(1)); South Dakota (S.D. Codified Laws §§ 22-42-6, 22-42A-3, 22-6-2); Tennessee (Tenn. Code Ann.

Congress explicitly excluded from the controlled-substance ground of removal. Similarly, of the sixteen jurisdictions that limit paraphernalia offenses to conduct more serious than Mellouli's offense, eight punish paraphernalia offenses no more severely than simple possession of marijuana,[6] and thirteen make paraphernalia offenses punishable by no more than one year's incarceration.[7] Congress exempted only one offense, low-level marijuana possession, from the reach of section 1227(a)(2)(B)(i), but its reference to section

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§§ 39-17-418(c)(1), 39-17-425(a)); Texas (Tex. Health & Safety Code Ann. §§ 481.121(b), 481.125(d)); Utah (Utah Code Ann. § 58-37-8(2)(d), 58-37a-5(1)); Washington (Wash. Rev. Code §§ 69.50.4014, 69.50.412(1)); Wisconsin (Wis. Stat. §§ 961.41(3g)(b), 961.573, 939.61(2)).

[6] California (Cal. Health & Safety Code §§ 11357(c), 11364.7(a), Cal. Penal Code § 19); Illinois (720 Ill. Comp. Stat. 550/4(c), 600/3.5); Iowa (Iowa Code §§ 124.401(5), 124.414, 903.1(1)(a), (b)); Michigan (Mich. Comp. Laws §§ 333.7403(2)(d), 333.7453, 333.7455); Minnesota (Minn. Stat. §§ 152.027(subd. 4(a), 152.092); Nebraska (Neb. Rev. Stat. §§ 28-416(13), 28-441); New Hampshire (N.H. Rev. Stat. Ann. 318-B:26(II)(d), 318-B:26(III)(c)); Wyoming (Wyo. Stat. Ann. §§ 35-7-1031(c)(i)(A), 35-7-1056).

[7] California (Cal. Health & Safety Code §§ 11357, 11364.7); Illinois (720 Ill. Comp. Stat. 600/3.5, 730 Ill. Comp. Stat. 5/5-1-14); Indiana (Ind. Code. §§ 35-48-4-8.3, 35-50-3-2); Iowa (Iowa Code §§ 903.1(1)(a), 124.414); Michigan (Mich. Comp. Laws § 333.7453 (no arrest if cease selling paraphernalia), 333.7455(1)); Minnesota (Minn. Stat. §§ 152.092, 609.02(subd.4(a))); Nebraska (Neb. Rev. Stat. §§ 28-441, 29-436); New Hampshire (N.H. Rev. Stat. Ann. §§ 318-B:2(II), 318-B:26(III)(c), 651:2(II)(c)); New York (N.Y. Penal Law §§ 70.15(1), 220.50); Vermont (Vt. Stat. Ann. tit. 18, § 4476); Virginia (Va. Code Ann. §§ 18.2-11(a), 18.2-265.3(A), 54.1-3466); West Virginia (W. Va. Code. § 60A-4-403a) (paraphernalia-related businesses only); Wyoming (Wyo. Stat. Ann. § 35-7-1056).

802 effectively keeps some other kinds of minor drug offenses from having immigration consequences. The Eighth Circuit's approach opens the deportability door wider than Congress intended. Removing lawful permanent residents for convictions that are among the lowest level offenses, if they are crimes at all, is an unreasonable reading of the statute and deserves no deference.

II. Mellouli's statute of conviction is overinclusive, and its express terms establish a realistic probability of prosecution for conduct outside section 1227(a)(2)(B)(i).

The federal removal ground in section 1227(a)(2)(B)(i) requires that Mellouli's conviction relate to a section-802 substance for him to be deportable. When the categorical approach is applied, it is apparent that his paraphernalia conviction is insufficient for deportability. The minimum conduct required for conviction under the Kansas paraphernalia law does not necessarily relate to a section-802 substance because the paraphernalia could be used to store, contain, or conceal a substance only Kansas controls.

The Eighth Circuit has required more, and the Government has adopted its position. The Eighth Circuit determined that Kansas's statute was similar enough to section 802 because Kansas had adopted the Uniform Controlled Substances Act, deferring to the BIA on that assumption. App. 4, 10. The Government went further to argue that Mellouli's failure to show that Kansas has "obtained a meaningful number of convictions—or brought any prosecutions at all [for non-section-802 substances] . . . would be fatal to

petitioner's claim" even if the Court construed section 1227(a)(2)(B)(i) to require the conviction, not the statute, to relate to a section-802 substance. BIO 7, 12. Engrafting a "realistic probability" requirement onto the analysis in this case is unsupported by federal law, assumes that the State will not prosecute crimes its own legislature has enacted, and eliminates the uniformity and fairness embodied in the categorical approach. Nonetheless, criminal court documents, statements by law enforcement, and news reports demonstrate that Kansas and other States prosecute conduct unrelated to section-802 substances.

A. The Kansas statute's explicit provisions demonstrate a realistic probability of prosecution for violations unrelated to section-802 substances.

Where a State statute explicitly covers substances excluded from section 802, the statute itself demonstrates a realistic probability of prosecution. Under *Moncrieffe*, "focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'" 133 S. Ct. at 1684-85 (quoting *Duenas-Alvarez* 549 U.S. at 193). But when the State law is facially broader than the federal statute, the "realistic probability" inquiry is satisfied because no "legal imagination" is required to conclude that States will prosecute the crimes expressly defined in their own laws.

The "realistic probability" test applies only where the reach of the State law is unclear and in dispute. *Duenas-Alvarez* required deciding whether the federal aggravated felony definition of theft includes a California aiding and abetting conviction—an inquiry inhibited by lack of clarity in California law. 549 U.S. at 189. Duenas-Alvarez's argument was based on California's "natural and probable consequences" doctrine, and Duenas-Alvarez offered a hypothetical as to how it might apply to conduct outside the federal generic theft definition. *Duenas-Alvarez*, 549 U.S. at 190-91. The Government countered that Duenas-Alvarez should not be permitted to use "a mere theoretical possibility" to defeat the categorical approach. Reply Br. at 15, *Duenas-Alvarez*, 549 U.S. 183 (No. 05-1629) 2006 WL 3414279 (2006). *Duenas-Alvarez* introduced the requirement to show a "realistic probability" of prosecution as a backstop for the categorical approach, but only where the contours of the State law are unclear and the statute's reach is disputed. 549 U.S. at 191-93; *see also Moncrieffe*, 133 S. Ct. at 1693 (discussing absence of explicit antique firearms exception in state law). When a State statute expressly applies to conduct falling outside the scope of the generic federal definition, the statute's overinclusiveness is clear on its face, and no more is needed. Indeed, the categorical approach has historically honored a State statute's own terms because they are fundamental to the elements-based comparison the approach requires. Neither *Duenas-Alvarez* nor *Moncrieffe* says otherwise.

Several circuits agree that when the State statute's terms encompass conduct beyond that in federal law, a realistic probability of prosecution is established.

Ramos v. Att'y Gen., 709 F.3d 1066, 1071-72 (11th Cir. 2013) (holding that *Duenas-Alvarez* does not require showing that a State would prosecute conduct outside the federal statute "when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition"); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (declining to import the "realistic probability" test into the context of crimes involving moral turpitude because the terms of the State statute required "no application of 'legal imagination.'"); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime." (citation omitted)); *Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 572 (6th Cir. 2007) (refusing to apply *Duenas-Alvarez* because the statute's "clear language . . . expressly and unequivocally" includes conduct outside the scope of the generic definition); *see also United States v. Aparicio-Soria*, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) (refusing to hypothesize about a "realistic probability" because the inquiry ends when the statutory elements are clear).

The Government's position ignores the language of the Kansas statutes and these authorities. The Kansas drug paraphernalia statute covers the use of equipment and material to store, conceal, or contain any substance the State controls, which at the time of Mellouli's conviction included at least nine substances excluded

from section 802's controlled substances definition. The Kansas statute leaves no room for the dispute present in *Duenas-Alvarez*. Nor does Mellouli posit any hypothetical set of facts. He claims only that the statute encompasses the precise conduct it says it encompasses. Mellouli's argument fits within the framework of the categorical approach and its "long pedigree in our Nation's immigration law." *Moncrieffe*, 133 S. Ct at 1685.

According to the Government, the legislature's amendments to the Kansas statutes to control additional substances are insufficient to show that the State will in fact enforce the laws it passed. But discrepancies between State and federal schedules are not happenstance. They reflect considered policy decisions by State and federal governments—decisions about the need to regulate behavior through criminal laws; in other words, decisions to make certain conduct subject to prosecution. While the Department of Justice's Drug Enforcement Agency is aware that some States control jimson weed and salvia, the Attorney General has continued to exclude them from the federal list of controlled substances. Drug Enforcement Administration, *Jimson Weed (Datura stramonium)* (Oct. 2013), *available at* http://www.deadiversion.usdoj.gov/drug_chem_info/jimson_w.pdf; Drug Enforcement Administration, *Salvia Divinorum and Salvinorin* (Jan. 2013) http://www.deadiversion.usdoj.gov/drug_chem_info/salvia_d.pdf.

In contrast, Kansas prosecutors lobbied for adding jimson weed and salvia to the State's controlled substances schedules, then heavily publicized the amendments to other prosecutors, judges, and law enforcement associations. The President of the Kansas

County and District Attorney Association championed the amendment, testifying in support of the additions to Kansas's list of controlled substances and submitting a formal letter urging "proactive" action. Kansas County & District Attorneys Association, Testimony for SB 481, Kansas House Judiciary Committee, Attachment 10 (March 17, 2008); Minutes of the House Judiciary Committee, 1-2, Mar. 17, 2008, *available at* http://www.kslegislature.org/li/m/historical/committees/minutes/07_08/house/hjud/20080317hJud.pdf. The legislative change was then communicated throughout Kansas's criminal justice system. *See also* Michael O'Neal, *2008 Legislative Changes of Interest to County and District Attorneys*, 5 Kan. Prosecutor Summer/Fall 2008, at 5, *available at* http://www.kcdaa.org/Resources/Documents/KSProsecutor-Fall08.pdf; *Adding Certain Hallucinogenics as Controlled Substances*, 44 The Verdict: The Official Publication of the Kansas Municipal Judges Association Summer 2008, at 9-10, *available at* http://www.kmja.org/wp-content/uploads/2010/09/VerdictSummer2008.pdf; Bill Reid, *Two Additions to List of Schedule I Substances*, 10 Kan. Crim. Just. Info. Sys. (KCJIS) News May 2008, at 5, *available at* http://www.access kansas.org/kbi/info/docs/pdf/KN200805.pdf. Shortly after Kansas passed this bill, Kansas officials confiscated salvia, educated shop owners that they could no longer sell the drug, created an amnesty program for salvia purchased before the law went into effect, and promised to search all stores to ensure that they no longer sell the substance. Rachel Davis, *Police Warn of Drug*, Garden City Telegram, May 6, 2008, at A1, A5.

As another example, in 2002, the Attorney General added TFMPP to the federal schedule I on an

emergency basis. *See* 67 Fed. Reg. 59161-01, 59161 (Sept. 20, 2002).[8] The Attorney General allowed this temporary scheduling to expire, 69 Fed. Reg. 12794-01, 12795 (Mar. 18, 2004), after the Drug Enforcement Administration reviewed the statutory factors including relative potential for abuse. *Id*. Yet in 2010, the Kansas Board of Pharmacy, which is required to consider the same criteria for designating a controlled substance as contained in the federal law, recommended that the Kansas legislature add TFMPP to its schedule I, which it did. *Compare* Kan. Stat. Ann. § 65-4102 *with* 21 U.S.C. § 811(c); Legislative Research Dep't, Supp. Note on H.B. 2411, 2010, *available at* http://www.kansas.gov/government/legislative/supplemental/2010/SN2411.pdf; Kansas Register Vol. 29 No. 11 at 341-42 (Mar. 18, 2010).

Under the Government's view, the Court must presume that Kansas does not prosecute conduct involving the non-section-802 substances the legislature added to the State's statutory definitions and offenses. BIO at 12. Such a presumption would denigrate the sovereignty of these States in passing their laws and the independent judgment of their prosecutors in enforcing them. *See Carachuri-Rosendo*, 560 U.S. at 579-80.

Because Kansas controls substances the federal government does not and criminalizes possession of paraphernalia associated with those substances, the

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[8] TFMPP is described as creating a hallucinogenic effect. Drug Enforcement Administration, *1-[3-(Trifluoro-methyl)-phenyl]piperazine* (Aug. 2013) http://www.deadiversion.usdoj.gov/drug_chem_info/tfmpp.pdf.

statute taken at its minimum does not necessarily involve a violation relating to a section-802 substance. *Moncrieffe*, 133 S. Ct. at 1684. Mellouli's conviction thus does not match the federal definition of the removal ground.

B. Requiring proof of prosecutions for conduct expressly covered by the Kansas statute subverts the categorical approach and is inherently unfair.

The "realistic probability" requirement would eviscerate the streamlined assessments the categorical approach allows and with it the fairness, predictability, and uniformity the approach promotes. Applying this rule to Mellouli demonstrates the problems.

Possession of drug paraphernalia is a misdemeanor in Kansas, as it is in most States. Kan. Stat. Ann. § 21-5709(e)(3); *infra*, nn.3 & 7 and accompanying text. As with Mellouli, these misdemeanor charges are often resolved in pleas involving no jail time. J.A. 25, 27-33; *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (stating that 97% of federal convictions and 94% of state convictions are the result of guilty pleas). With no sentence of confinement and few consequences for a misdemeanor conviction outside the immigration context, there is little incentive for defendants to appeal their convictions.

Further, a noncitizen charged with removability under section 1227(a)(2)(B)(i) is subject to mandatory detention. 8 U.S.C. § 1226(c)(1)(B). Nearly eighty-five percent of detained noncitizens have no attorney in their immigration hearings. Amer. Bar Ass'n, *Reforming the Immigration System: Proposals to*

Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases 5-8 (2010). These noncitizens would bear the burden to show a realistic probability of prosecution by trying to locate criminal records held only by district and municipal courts, which are not available in searchable databases (when States keep relevant, centralized records at all) and often do not contain the information they need. And they must do so without help from counsel and with limited ability to communicate with courts or public defender offices.

Not only is this burden on the noncitizen unfair, it fundamentally undermines the function and benefits of the categorical approach. The categorical approach allows immigration judges to determine the immigration implications of a conviction from the fact of conviction alone by restricting the remaining analysis to comparing the minimum conduct established by the conviction with the requirements of the immigration statute. *Moncrieffe*, 133 S. Ct. at 1685-86. If the minimum conduct does not necessarily satisfy the requirements of the immigration provision, those consequences do not attach. This streamlined assessment of immigration consequences is undone by the Government's elevation of realistic probability to a blanket evidentiary burden on the noncitizen to show actual prosecutions in every case regardless of the statute's express reach.

The Government argues that the Kansas drug paraphernalia statute is overinclusive only if Petitioner can show "a meaningful number of convictions" for non-federal substances. BIO at 12. Under the Government's approach, instead of assessing only the

facts established by a conviction, the immigration judge must also determine the reliability, weight, and sufficiency of the additional evidence of prosecutions, while also considering any arguments by the parties that are raised with this new procedural requirement. Streamlined review would become impossible.

And with the loss of streamlined review so goes predictability and uniformity. The consequences of a criminal conviction would depend not on the crime's elements but rather on the accessibility of criminal complaints and plea agreements; the noncitizen's ability to secure counsel to find this evidence; the recency of the non-section-802 addition; and the fortuity that examples of overbroad prosecutions are publicized or known by a particular immigration judge. The logistics required to identify example prosecutions demonstrates the unfairness and arbitrariness that flow from this requirement.

C. Criminal complaints, docket entries, and news reports demonstrate that Kansas and other States prosecute offenses involving non-section-802 substances.

Evidence that States prosecute paraphernalia offenses involving non-section-802 substances is difficult to come by because so many cases are resolved through plea agreements, appeals are not filed, and records are not readily accessible. Kansas's criminal courts do not maintain conviction records that are searchable by substance or offense; only two of Kansas's 105 county courts make their criminal dockets available through electronic databases managed by West. Westlaw Database Directory, Main Directory, Dockets, Kansas State Courts, *available at*

directory.westlaw.com. Consequently, Kansas criminal records can be retrieved only through a state-law Open Records Request or with the help of local attorneys. *See* Kan. Jud. Branch, *A Guide to Judicial Branch Open Records Requests*, http://www.kscourts.org/rules-procedures-forms/open-records-procedures/default.asp. And the felony and misdemeanor conviction records that can be obtained may not identify the substance involved because the journal entry on the conviction may be incomplete or not require that information. *See* Kan. Sentencing Comm'n, Select Drug Statutes Data (Sept. 3, 2014) (noting that the Sentencing Commission tracks only felony convictions; started tracking the substance associated with conviction in 2014; and only tracks certain substances).[9]

Nonetheless, there is at least one example from Saline County District Court of a Kansas prosecution for selling, delivering, or distributing an analog of 1-Pentyl-3(1-naphthoyl)indole, known as JWH-018.[10] The substance was not federally controlled at the time the conduct underlying the charge allegedly occurred. Temporary Placement of Five Synthetic Cannabinoids into Schedule 1, 76 Fed. Reg. 11,075-78 (Mar. 1, 2011). The defendant could thus be prosecuted only under Kansas's drug laws. The data from the Kansas Sentencing Commission reflects two 2014 convictions for "K2," which is the colloquial name for synthetic

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[9] Counsel has proposed to lodge this document with the Clerk under Supreme Court Rule 32.3.

[10] No. 11CR212 (Feb 18, 2011) (alleging violations of Kan. Stat. Ann. § 21-36a05(a)(4) (2009) (renumbered Kan. Stat. Ann. § 21-5706)).

cannabinoids and includes JWH-018.[11] It is likely Kansas prosecuted conduct associated with K2 before it was included in the federal definition, but Kansas began keeping these records only in 2014. Doubtless there are other such Kansas examples but records do not exist or are not retrievable.

In States that do provide docket information to electronic databases, there is evidence of reasonable probability of prosecutions for non-section-802 substances. For example, docket records reveal prosecution for TFMPP possession in Florida, *State v. Daniels*, No. 42-2013-CF-002883 (Fla. Marion Cnty. Ct. filed Sept. 3, 2013), ephedrine/pseudoephedrine possession in Michigan, *People v. Biel*, No. 2012240281FH (Mich. Cir. Ct., Oakland Cnty., Feb. 15, 2012), and a criminal complaint filed in Florida for propylhexedrine possession, *State v. Cook*, No. 42-2006-CF-002579 (Fla. Marion Cnty. Ct. filed June 27, 2006). Electronic database searches produced an Anchorage, Alaska prosecution for possession/use of cannabinoid (spice). *Anchorage v. Russell*, No. 11-2523 (Alaska Dist. Ct. Anchorage filed Mar. 5, 2011)) (prohibited since Dec. 7, 2010, A.O. 2010-87(s)). The offense occurred just three days after the federal government added the substances to its list but there are likely other prosecutions beginning in 2010 when the ordinance was passed. A.O. No. 2010-87(S). Washington State has prosecuted multiple cases of possession or attempted possession of ephedrine or pseudoephedrine. *E.g.*, *State v. Dallas*, No. 05-1-00322-

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[11] Kan. Sentencing Comm'n, Select Drug Statutes Data; Drug Enforcement Admin., Drug Fact Sheet: K2 or Spice, *available at* www.justice.gov/dea/druginfo/drug_data_sheets/K2_Spice.pdf

1 (Wash. Sup. Ct. Benton Cnty., filed Mar. 7, 2005). Similar searches have revealed multiple ephedrine/pseudoephedrine prosecutions in Oklahoma. *E.g.*, *State v. Way*, No. CM-2001-529 (Okla. Dis. Ct. Canadian Cnty., filed July 11, 2001). Despite the paucity of reported cases, Iowa has an appellate decision involving salvia possession. *State v. Bushnell*, No. 13-0236, 2014 WL 970025, *1, n.2 (Iowa Ct. App. Mar. 12, 2014).

News reports indicate that other States have prosecuted offenses associated with the nine non-section-802 substances outlawed by Kansas at the time of Mellouli's prosecution. *See* Phil Davis, *Gloucester County Grand Jury Indicts Several on Drugs, Weapons Charges*, NJ. Com, May 2, 2013, www.nj.com/gloucester-county/index.ssf/2013/05/gloucester_county_grand_jury_i_50.html (reporting arrest for jimson weed possession); Paul Gable, *SWAT Drug Bust Nets Arrests of Seven Individuals in Shelbyville*, Shelbyville News, Nov. 9, 2013, *available at* http://www.shelbynews.com/news/article_4bf60f87-97f6-5bb3-ba72-8168e1c9 e1bf.html (Indiana arrest for possession of salvia, other substances, and paraphernalia); Jail Bookings, Stacey Pages Online, Mar. 24, 2014, http://www.staceypageonline.com/2014/03/24/jail-bookings-457/ (Indiana arrests on charges of salvia/synthetic cannabinoid and paraphernalia possession); *LCSO charges 3 with MJ, salvia / synthetic cannabinoid possession*, J.-Aff., July 31, 2012, www.journal-advocate. com/ci_21199104/lcso-charges-3-mj-salvia-synthetic-cannabinoid-possession (Colorado); *Police Blotter for April 27*, Lafayette J. & Courier, Apr. 27, 2014 (reporting Indiana arrests for possession and dealing salvia) *available at* www.jconline.com/story/news/crime/ 2014/04/25/crime-

blotter/8133221/; *Police: Smoke shop busted for marijuana, salvia, drug paraphernalia*, WHAS11.com, Jan. 26, 2011, www.whas11.com/news/local/Police-Smoke-shop-busted-for-marijuana-salvia-drug-paraphernalia-114671699.html (Kentucky); Phillip S. Smith, *North Dakota Man Facing Years in Prison After Buying Salvia Divinorum on eBay*, AlterNet.org, May 1, 2008, www.alternet.org /story/84158/north_dakota_man_facing_years_in_prison_after_buying_salvia_divinorum_on_ebay; *Salvia Case Tests Court System*, St. Joseph News Press, May 18, 2012, *available at* www.newspressnow.com/news/article_2556dc51-4ae8-5dbe-b685-37d109fb3d51.html?mode=jqm (Missouri).

An example from Massachusetts illustrates how far States can deviate from the federal schedules and prosecute associated conduct. Massachusetts includes all prescription drugs on its list of controlled substances. Mass. Gen. Laws ch. 94C § 31 (Class E (b)). And based on the breadth of that addition to its list, the State has prosecuted an individual in the Boston Municipal Court Department for conduct associated with prescription strength *ibuprofen*, a common pain reliever.[12] *See* Mass. Gen. Laws ch. 94C § 32D. Under the Eighth Circuit's rule, if a noncitizen were convicted of a paraphernalia offense in Massachusetts, she would be removable even though the conviction could involve no more than containers for prescription-strength ibuprofen. Mass. Gen. L. Ch. 94C §§ 32I (paraphernalia offense), 1 (drug paraphernalia definition), 31 (controlled substance definition).

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[12] No. 1201CR003986 (Count 5) (filed Sept. 10, 2012); see Mass. Gen. Laws 94C § 32D.

The government's requirement to show a realistic probability of prosecution misapplies this Court's precedent, imposes an inherently unfair standard on unrepresented, detained noncitizens, and ignores the unsurprising evidence that States do in fact enforce their laws as written.

* * *

This Court should reverse the Eighth Circuit's judgment affirming deportation because the Kansas drug paraphernalia statute covers conduct beyond that defined in the generic federal definition the Government must satisfy to justify deportation. Section 1227(a)(2)(B)(i) requires the violation to be connected to a section-802 substance so that a federally controlled substance is an element of the conviction. Because Kansas's controlled substance definition includes section-802 substances along with non-section-802 substances, the State conviction does not necessarily require all of the elements mandated by section 1227(a)(2)(B)(i), and removal is not permissible under that law. *Moncrieffe*, 133 S. Ct. at 1684 (describing matching requirement); *Descamps*, 133 S. Ct. at 2283 (same).

III. Alternatively, the Court could remand the case on the issue of divisibility.

The Court should reverse and remand because Mellouli's Kansas conviction does not justify removal. If, however, the Court is concerned that no evaluation has been made as to whether the Kansas statute is divisible by substance and therefore subject to the modified categorical approach, this Court could remand for that determination. A statute that includes

"multiple, alternative versions of the crime," by "listing potential offense elements in the alternative" is divisible and subject to the modified categorical approach. *Descamps*, 133 S. Ct. at 2283-84. Under the modified categorical approach, a court can look to a limited set of documents—the indictment, jury instructions, plea colloquy, and plea agreement—solely "to identify, from among several alternatives, the crime of conviction" so that the court can compare the facts necessarily established by that conviction to the elements required by the removal charge. *Id.* at 2285 & n.2. No adjudicator has reached this question here because none has applied the categorical approach using the correct interpretation of the federal removal ground.[13] Because no court has reached the question of whether Mellouli's statute of conviction is divisible, the Court could remand for a decision on whether the modified categorical approach applies and whether Mellouli's conviction matches the requirements of section 1227(a)(2)(B)(i).

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[13] Kansas's paraphernalia crime is defined in terms of the various substances Kansas controls. Kan. Stat. Ann. §§ 21-5709; 21-5701. If the Kansas statute is divisible by substance, meaning the substance is an element, those crimes of conviction that establish a relationship to section-802 substances would match the federal removal ground and those unrelated to section-802 substances would not. If the statute is divisible, no consideration of the realistic probability of prosecution is necessary because the separate, alternative crimes could not be overbroad in this way.

CONCLUSION

This Court should reverse the Eighth Circuit's judgment and remand to vacate the order of removal.

Respectfully submitted,

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STATUTORY APPENDIX

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8 U.S.C. § 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

* * *

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission 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 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * *

21 U.S.C. § 802 - Definitions

* * *

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter.

The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

* * *

Kan. Stat. Ann. § 21-5701. Definitions

(a) "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

* * *

(f) "Drug paraphernalia" means all equipment and materials of any kind which are used, or primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance and in violation of this act.

* * *

Kan. Stat. Ann. § 21-5709. Unlawful possession of certain drug precursors and drug paraphernalia

(a) It shall be unlawful for any person to possess ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with an intent to use the product to manufacture a controlled substance.

(b) It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to:

(1) Manufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or

(2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

(c) It shall be unlawful for any person to use or possess with intent to use anhydrous ammonia or pressurized ammonia in a container not approved for that chemical by the Kansas department of agriculture.

(d) It shall be unlawful for any person to purchase, receive or otherwise acquire at retail any compound, mixture or preparation containing more than 3.6 grams of pseudoephedrine base or ephedrine base in any single transaction or any compound, mixture or preparation containing more than nine grams of pseudoephedrine base or ephedrine base within any 30-day period.

(e)(1) Violation of subsection (a) is a drug severity level 3 felony;

(2) violation of subsection (b)(1) is a:

(A) Drug severity level 5 felony, except as provided in subsection (e)(2)(B); and

(B) class A nonperson misdemeanor if the drug paraphernalia was used to cultivate fewer than five marijuana plants;

(3) violation of subsection (b)(2) is a class A nonperson misdemeanor;

(4) violation of subsection (c) is a drug severity level 5 felony; and

(5) violation of subsection (d) is a class A nonperson misdemeanor.

(f) For persons arrested and charged under subsection (a) or (c), bail shall be at least $50,000 cash or surety, and such person shall not be released upon the person's own recognizance pursuant to K.S.A. 22-2802, and amendments thereto, unless the court determines, on the record, that the defendant is not likely to reoffend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program.