No. 13-697

In the Supreme Court of the United States

PEDRO MADRIGAL-BARCENAS,
Petitioner,

v.

ERIC H. HOLDER, JR. ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

This petition presents a straightforward question of statutory interpretation—whether the plain text of the Immigration and Nationality Act (INA) requires that a drug paraphernalia conviction relate to a controlled substance that is actually "defined in [the federal Controlled Substances Act (CSA)]." Certiorari is necessary to resolve this recurring and important question.[1] The government's arguments to the contrary lack merit.

First, the government acknowledges that there is a direct conflict between the Third Circuit's twelve-to-two *en banc* decision in *Rojas v. U.S. Att'y Gen.*, 728 F.3d 203, 211 (2013) and the decisions of the Ninth, Eighth, Eleventh, and Fourth Circuits over this question in the context of deportation under 8 U.S.C. § 1227(a)(2)(B)(i). This conflict is squarely presented in Petitioner's case, which involves identical statutory language in the context of cancellation of removal under 8 U.S.C. § 1182(a)(2)(A)(i). Second, the burden of proof in cancellation-of-removal proceedings has no impact on the statutory interpretation of the INA or the application of the categorical approach. Third, the government's "reasonable probability" argument fails because the language of Nevada's drug-paraphernalia statute expressly extends to conduct outside the INA's scope. Finally, the conflict among the courts of appeals regarding the proper interpretation of the "as defined in [the CSA]" parenthetical is ripe for review and will not be resolved absent this Court's intervention.

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[1] This recurring question has also been presented to the Court in *Mellouli v. Holder*, No. 13-1034 (filed Feb. 25, 2014).

ARGUMENT

I. The Ninth Circuit's Decision Conflicts with the Third Circuit's Twelve-to-Two *En Banc* Decision in *Rojas*

There is a four-to-two circuit split regarding the proper statutory interpretation of the "as defined [in the CSA]" parenthetical in the INA. *See* Pet. 11-21. While the government acknowledges that a circuit split exists, it argues that it does not implicate Petitioner's case. BIO 9-10. The government is wrong.

In *Rojas*, a twelve-to-two supermajority of the *en banc* Third Circuit held that the INA's plain text requires that a state drug-paraphernalia conviction involve a controlled substance that is actually prohibited under the CSA. *Rojas*, 728 F.3d at 220. The Third Circuit stated:

> The outcome of this case turns on the plain text of § 1227(a)(2)(B)(i), and, in particular, on the language of the parenthetical: "as defined in [the CSA]." We conclude that this clause means that the controlled-substances conviction that is the basis of removal must involve or relate to a substance "defined in" federal law.

Id. The government acknowledges that *Rojas* conflicts with the Ninth Circuit's decisions in *Luu-Le v. INS*, 224 F.3d 911 (2000), *Bermudez v. Holder*, 586 F.3d 1167 (2009) (per curium), and *United States v. Oseguera-Madrigal*, 700 F.3d 1196 (2012), the Eighth Circuit's decision in *Mellouli v. Holder*, 719 F.3d 995 (2013), the Eleventh Circuit's decision in *Alvarez Acosta v. U.S. Att'y Gen.*, 524 F.3d 1191 (2008), and the

Fourth Circuit's unpublished decision in *Castillo v. Holder*, 539 Fed. Appx. 243 (2013) (per curium). BIO 10-11.

This acknowledged conflict among the courts of appeals directly extends to Petitioner's case. First, the Ninth Circuit's decision below was based exclusively on its prior decisions in *Luu-Le*, *Bermudez*, and *Oseguera-Madrigal*. Pet. App. 2a. The government acknowledges that these decisions conflict with *Rojas*. BIO 10-11.

Second, although *Rojas* addressed Section 1227 of Title 8, Section 1182 contains identical language regarding controlled-substance offenses. Specifically, Sections 1182 and 1227 both contain the identical "as defined in [the CSA]" parenthetical. *Compare* 8 U.S.C. § 1227(a)(2)(B)(i) *with* 8 U.S.C. § 1182(a)(2)(A)(i). As this Court recently noted in *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 n.4 (2013), the identical language in Sections 1182 and 1227 must be interpreted consistently. *See id.* (holding that the Court's "analysis is the same" for both cancellation of removal and deportation); *see also Ratzlaf v. United States*, 510 U.S. 135, 143 (1994) ("A term appearing in several places in a statutory text is generally read the same way each time it appears.").

The government's continued reliance on *Matter of Espinoza*, 25 I & N Dec. 118 (B.I.A. 2009), in its opposition further highlights the conflict between the Ninth Circuit's decision here and the Third Circuit's twelve-to-two *en banc* decision in *Rojas*. BIO 5-6. In *Espinoza*, the BIA held that drug-paraphernalia convictions relate to the "drug trade in general" and are therefore distinguishable from "possessory offenses." *Id.* at 121. The Third Circuit explicitly rejected

Espinoza's "illogical and atextual interpretation of § 1227(a)(2)(B)(i)." *Rojas*, 728 F.3d at 211. Specifically, the Third Circuit noted that "common sense indicates that there should be no difference" between a conviction for possession of a controlled substance and the paraphernalia used with that substance. *Id*. *Rojas* further stated that it "cannot square the text of the law with a world in which a noncitizen may be deported for using . . . paraphernalia, but not for 'possessing' the drug itself." *Id*. Although the Third Circuit found *Espinoza* distinguishable on other grounds, *Rojas* clearly rejects the government's argument that drug-paraphernalia convictions should be treated differently than convictions for the possession of a controlled substance.

The Ninth Circuit's decision here also conflicts with the Seventh Circuit's decision in *Desai v. Mukasey*, 520 F.3d 762 (2008). The government's attempt to limit the depth of the four-to-two circuit split by arguing that *Desai* does not support *Rojas* is misplaced. Although *Desai* did not specifically address drug-paraphernalia convictions, it unequivocally held that, under the INA's plain text, a conviction must relate to "a controlled substance listed in the federal CSA." *Desai*, 520 F.3d at 765-66; *see also Matter of Perez*, A92-384-987, 2008 WL 2517572, *1 (B.I.A. June 6, 2008) (holding that a California conviction for the sale of a counterfeit substance must relate to a controlled substance contained in the CSA). Indeed, the *en banc* Third Circuit relied heavily on *Desai*'s interpretation of the "as defined in [the CSA]" parenthetical, which confirms, contrary to the government's argument, that the current split is not four-to-one, but is four-to-two. *See Rojas*, 728 F.3d at 210 (noting that its decision

"follows . . . from the reasoning in *Desai*."). Moreover, the Seventh Circuit has separately rejected the government's argument that drug-paraphernalia convictions do not relate to a specific controlled substance. *See Barraza v. Mukasey*, 519 F.3d 388, 391-92 (7th Cir. 2008) (holding that "drug paraphernalia relates to the drug with which it is used"). *Desai* and *Barraza* support *Rojas* and deepen the acknowledged conflict between the *en banc* Third Circuit and the Ninth, Eighth, Eleventh, and Fourth Circuits.

II. The Burden of Proof in Cancellation-of-Removal Proceedings Has No Impact on this Petition

The government argues that certiorari is inappropriate because Petitioner bears the burden of proof in cancellation-of-removal proceedings and he cannot meet this burden. BIO 13. The government's burden arguments are inconsistent with this Court's recent jurisprudence and have no impact on the legal questions at issue here.

Before considering burdens of proof or applying the categorical approach, courts must *first* interpret the relevant INA provision and/or determine the generic federal definition of the offense. *See, e.g.*, *Taylor v. United States*, 495 U.S. 575, 599 (1990). The central issue here is the Immigration Judge (IJ), Board of Immigration Appeals (BIA), and Ninth Circuit's "illogical and atextual" interpretation of the INA's text. *Rojas*, 728 F.3d at 211; *see also* Pet. App. 2a, 7a-9a, 30a. Burdens of proof have no relationship to the proper statutory interpretation of the "as defined in [the CSA]" parenthetical.

Indeed, neither the IJ nor Ninth Circuit even mentioned Petitioner's burden of proof. Pet. App. 2a, 30a. And the BIA's consideration of Petitioner's burden was entirely dependent on its incorrect interpretation of the INA. Pet App. 9a-10a. Should this Court grant certiorari and adopt the *en banc* Third Circuit's plain-text interpretation of the INA, it would not need to consider the burden of proof. Rather, remand would be appropriate to allow the Ninth Circuit or BIA to determine in the first instance whether Petitioner was necessarily convicted of an offense relating to a controlled substance "as defined in [the CSA]." *Cf. INS v. Ventura*, 537 U.S. 12 (2002).

Additionally, the burden of proof in cancellation-of-removal proceedings does not impact the application of the categorical and modified categorical approaches. In *Moncrieffe,* this Court recognized that, under the categorical approach, the test for whether a conviction bars immigration relief is a *legal inquiry* that turns on "what the state conviction necessarily involved, not the facts underlying the case." 133 S. Ct. at 1684. The Court explained that "[b]ecause we examine what the state conviction necessarily involved . . . we must presume that the conviction rested upon nothing more than the *least of the acts criminalized*." *Id.* at 1684 (emphasis added).

This Court also clarified in *Moncrieffe* that the categorical approach "is the same in both [the deportation and cancellation of removal] contexts." *Id.* at 1685 n.4. Indeed, consistent with this understanding, the Court determined the consequences of the petitioner's prior conviction without applying or even mentioning burdens of proof. *Id.*

Finally, should the Court reach the categorical approach or modified categorical approach,[2] the record of conviction does not establish that Petitioner was "necessarily convicted" of an offense relating to a controlled substance "as defined in [the CSA]." Petitioner was never charged with an offense relating to a controlled substance "contained in the federal schedules." C.A. Admin. Rec. 345-47. The criminal complaint merely states that Petitioner was charged with possessing a "glass pipe containing burnt residue." C.A. Admin. Rec. 347. Because Nevada Revised Statute § 453.566 prohibits the use of drug paraphernalia in connection with at least four substances not listed in the CSA,[3] Petitioner was not "necessarily convicted" of an offense relating to a controlled substance identified in the CSA. *See Moncrieffe*, 133 S. Ct. at 1684 (holding that "we examine what the state conviction necessarily involved, not the facts underlying the case"); *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010) ("The mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be 'convicted of a[n] aggravated felony' before he loses the opportunity to seek cancellation of

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[2] The IJ, BIA, and Ninth Circuit never considered the modified categorical approach.

[3] The government acknowledges that at least four substances prohibited under Nevada law are not listed in the CSA—datura, human growth hormone, hydrogen iodide gas, and carisoprodol. BIO 8-9.

removal."). Any determination to the contrary would be inconsistent with this Court's categorical approach jurisprudence.

III. The Government's Reasonable-Probability Argument Fails

The government also argues that the petition should be denied because Petitioner has not demonstrated that there is a "reasonable probability" that Nevada's drug-paraphernalia statute would apply to conduct falling outside the INA's scope. BIO 6-9. This argument, which was never raised below, fails for multiple reasons.

First, the government's reliance on *Moncrieffe* and *Gonzales v. Duenas-Alvarez*, 549 U.S. 183 (2007), in support of its reasonable-probability argument, is misplaced because Nevada's misdemeanor drug-paraphernalia statute expressly reaches conduct falling outside the INA's scope. *Duenas-Alvarez* only applies when the application of "legal imagination" to the elements of the state offense is necessary to establish that the statute is overbroad. *Id.* at 193. But numerous circuits agree that where a state statute expressly reaches conduct outside the INA's scope, no "legal imagination" is required.[4] *See, e.g.*, *United States v. Aparicio-Soria,* 740 F.3d 152, 158 (4th Cir. 2014) (*en banc*); *Ramos v. U.S. Att'y Gen.,* 709 F.3d 1066, 1071-72 (11th Cir. 2013); *Jean-Louis v. U.S. Att'y Gen.*, 582 F.3d 462, 487 (3d Cir. 2009); *United States v.*

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[4] Because this Court's decision in *Moncrieffe* did not alter or expand upon *Duenas-Alvarez*, the prior decisions applying *Duenas-Alvarez* remain applicable.

Jennings, 515 F.3d 980, 989 n.9 (9th Cir. 2008); *Mendieta-Robles v. Gonzales*, 226 Fed. Appx. 564, 572–73 (6th Cir. 2007).

Here, Nevada's drug-paraphernalia statute is clear. An individual can be convicted of possessing drug paraphernalia *only* if there is a connection to a controlled substance prohibited under Nevada law. Nev. Rev. Stat. § 453.566. It is undisputed that Nevada law prohibits at least four controlled substances that are not contained in the federal schedules, BIO 9—including datura (also known as jimson weed), a plant which is commonly smoked. *See* New Mexico State Univ., Medicinal Plants of the Southwest, *Jimson Weed,* http://medplant.nmsu.edu/Diseases/asthma/asthma_JimsonWeed.htm (last visited May 15, 2014). Accordingly, it requires no "legal imagination" to conclude that Nevada's drug-paraphernalia statute is overbroad.

Second, Petitioner's case demonstrates that Nevada's drug-paraphernalia statute has been used to prosecute offenses not tied to federally-controlled substances. *See Duenas-Alvarez*, 549 U.S. at 193 ("To show that realistic probability, an offender, of course, may show, that the statute was so applied in his own case."). The record of conviction here does not identify any federally-controlled substance. C.A. Admin. Rec. 345-47. Rather, Petitioner was charged with possessing a "glass pipe containing burnt residue." C.A. Admin. Rec. 347. Petitioner was therefore never convicted of possessing drug paraphernalia that was tied to a controlled substance "as defined in [the CSA]."

Third, requiring Petitioner to cite actual prosecutions to establish that the statute is overbroad

is not only unnecessary here, but unrealistic and unfair. A lack of citable precedent "does not imply a lack of convictions." *Nunez v. Holder*, 594 F.3d 1124, 1138 n.10 (9th Cir. 2010). Indeed, there is no legal database that would identify all Nevada controlled-substance convictions, let alone all misdemeanor drug-paraphernalia convictions.

IV. The Acknowledged Conflict Among the Courts of Appeals is Ripe for Review

This straightforward and recurring question of statutory interpretation presented here impacts thousands of persons each year. Six federal courts of appeals have interpreted the "as defined in [the CSA]" parenthetical and reached different conclusions. There is no basis for the government's arguments that the conflict is not ripe for review or that the conflict may resolve itself. BIO 14-15.

The government argues that certiorari is premature because the Third Circuit did not "squarely address an argument of deference" under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). BIO 14. However, deference is only afforded when the statutory text is "silent or ambiguous." *Chevron*, 467 U.S. at 843. "If the intent of Congress is clear, that is the end of the matter." *Id.* at 842-43. Here, the *en banc* Third Circuit correctly determined that the BIA's interpretation is not entitled to deference because the text of the INA "unambiguously" requires that a drug-paraphernalia conviction relate to a controlled substance that is actually "defined in [the CSA]." *Rojas*, 728 F.3d at 209. Indeed, *Rojas* held that any other interpretation violates the "cardinal principle that we do not cripple statutes by rendering words therein superfluous"

because it would read out of Sections 1182 and 1227 the explicit reference to the federal CSA. *Id.* at 209-10 (citing *Duncan v. Walker*, 533 U.S. 167, 174 (2001)).

The government also argues that the Third Circuit did not consider whether there is a reasonable probability that Pennsylvania's drug-paraphernalia statute applies to controlled substances not appearing on the federal schedules. BIO 14. The government is incorrect. The *en banc* Third Circuit specifically "decline[d] to follow" the Eighth Circuit's decision in *Mellouli*, which adopted the government's reasonable-probability argument.[5] *Rojas*, 728 F.3d at 219 n.8. Moreover, the government ignores that the Third Circuit addressed a nearly identical argument. In *Rojas*, the government argued that the Pennsylvania drug-paraphernalia statute was a categorical match because Pennsylvania's controlled-substance schedules were sufficiently "close to" the federal schedules. *Rojas*, 728 F.3d at 213. The *en banc* Third Circuit correctly rejected this argument because it would be inconsistent with the INA's plain text and would lead to "unworkable inquiries." *Id.* at 213-14.

Further, there is no merit to the government's suggestion that the BIA could address the internal conflict in its jurisprudence between possessory and non-possessory offenses in a manner that would cause the Third Circuit to reconsider its twelve-to-two *en banc* decision in *Rojas*. BIO 15. The distinction

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[5] As discussed above, the government's reasonable-probability argument is irrelevant when the state statute's language expressly incorporates conduct falling outside the INA's scope. *See supra* Argument § III at 8-9.

between drug-paraphernalia offenses and possessory offenses was analyzed at length in *Espinoza* and rejected by the Third Circuit. *See Rojas*, 728 F.3d at 211 (criticizing *Espinoza*). There is no reason to believe that the BIA will alter its jurisprudences in cases involving possession. BIO 15. The BIA continues to require a connection to a federally-controlled substance in possession cases after *Rojas* was decided. *See Matter of Barrios Rojas*, A090-145-871, 2014 WL 1120192, *1 (B.I.A. Feb. 7, 2014) (citing *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076-77 (9th Cir. 2007)).

Finally, although the government notes that this Court has recently refined its jurisprudence concerning the categorical and modified categorical approaches, this fact strongly supports granting the petition. The Third Circuit and Eighth Circuit both considered *Descamps v. United States*, 133 S.Ct. 2276 (2013), and *Moncrieffe*, yet issued conflicting decisions. *See, e.g.*, *Rojas*, 728 F.3d at 215-16, 220; *Mellouli*, 719 F.3d at 997, 1000-01. Thus, despite recent guidance from this Court, the acknowledged conflict among the courts of appeals is unlikely to be resolved.

Absent this Court's intervention, the important and recurring question of statutory interpretation presented here will result in disparate treatment of noncitizens throughout the country. Certiorari is necessary to resolve this conflict.[6]

[6] If the Court grants certiorari in *Mellouli*, No. 13-1043, Petitioner requests that the Court defer the disposition of the instant petition until *Mellouli* is resolved on the merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

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