No. 13-1034

In the Supreme Court of the United States

MOONES MELLOULI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Under 8 U.S.C. 1227(a)(2)(B)(i), an alien is removable from the United States if 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)."

The question presented is whether, for a state drug-paraphernalia conviction to permit an alien's removal, the government must prove that an alien's particular conviction related to a substance controlled under 21 U.S.C. 802.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 719 F.3d 995. The decisions of the Board of Immigration Appeals (Pet. App. 17-19) and the immigration judge (Pet. App. 23-35) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 9, 2013 (Pet. App. 15-16). A petition for rehearing was denied on October 28, 2013 (Pet. App. 36-37). On January 17, 2014, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including February 25, 2014, and the petition was filed on that date. The petition for a writ of certiorari was granted on June 30, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

This case concerns the provision of the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, under which an alien is removable if he has been 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)." 8 U.S.C. 1227(a)(2)(B)(i).

1. a. In the United States, controlled substances are regulated by the federal government and also by the States, typically under frameworks that largely mirror the federal scheme. Since 1970, the federal government has regulated controlled substances through the Controlled Substances Act (CSA), 21 U.S.C. 801 *et seq.* That statute established five schedules of controlled substances and precursors the possession or distribution of which is generally prohibited, see 21 U.S.C. 811, 812, 841(a), 844(a), and authorizes the Attorney General to add or remove drugs on those schedules based on specified criteria. 21 U.S.C. 811(a) and (c), 812(a) and (b). In exercising that authority, the Attorney General is to consider, with respect to the substance in question:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

> (5) The scope, duration, and significance of abuse.
>
> (6) What, if any, risk there is to the public health.
>
> (7) Its psychic or physiological dependence liability.
>
> (8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

21 U.S.C. 811(c). The Attorney General has regularly added drugs to those schedules based on those criteria, and has removed drugs as well. The most recently published schedules of federally controlled substances appear at 21 C.F.R. 1308.11-1308.15.

b. Most States, including Kansas, have adopted statutory frameworks that are designed to parallel the federal regime. Contemporaneously with the drafting and consideration of the CSA, state and federal authorities worked together to create a model state law that would "complement the comprehensive drug legislation being proposed to Congress at the national level." *Special Message to the Congress on Control of Narcotics and Dangerous Drugs*, 1969 Pub. Papers 514 (July 14, 1969) (*Presidential Message*).

That model law—the Uniform Controlled Substances Act (1970) (UCSA (1970)), 9 U.L.A. 853, Pt. 5 (2007)—seeks to create "an interlocking trellis of federal and state law to enable government at all levels to control more effectively the drug abuse problem" by mirroring the CSA. See UCSA (1970) Prefatory note, 9 U.L.A. 854; see also *Presidential Message* 514 (also describing federal and state law as an "interlocking trellis"). The UCSA was promulgated by the National Conference of Commissioners on Uniform State Laws based on the work of a committee that

included a federal representative. See Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Controlled Substances Act* 2 (1970). The model law created drug schedules identical to those in the CSA as originally enacted, and provided a mechanism for States to add or remove drugs, based on the same criteria employed by the Attorney General under the CSA. UCSA (1970) § 201 cmt., 9 U.L.A. 867; § 201, at 866 (setting out criteria identical to thosfe in federal statute). Because the UCSA called for the States to apply these criteria themselves, the drafters contemplated that, over time, the state and federal schedules would not remain precisely identical. See § 201 cmt. *id.* at 868 (stating that "[t]he Uniform Act is not intended to prevent a State from adding or removing substances from the schedules"); Prefatory note, *id.* at 855 (noting that model law "insures legislative and administrative flexibility to enable the States to cope with both present and future drug problems").

Thirty-five States and the District of Columbia adhere to a UCSA-based scheduling scheme.[1]

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[1] Ala. Code § 20-2-20(a) (LexisNexis 2006); Ark. Code Ann. § 5-64-201(a)(2) (Supp. 2013); D.C. Code § 48-902.01 (LexisNexis Supp. 2014); Fla. Stat. Ann. § 893.035(4) (West 2013); Ga. Code Ann. § 16-13-22(a) (2011) (one additional factor); Idaho Code Ann. § 37-2702(a) (2011); 720 Ill. Comp. Stat. Ann. 570/201(a) (West Supp. 2014) (two additional factors); Ind. Code Ann. § 35-48-2-1(a) (LexisNexis 2009); Iowa Code Ann. § 124.201(1) (West 2014); Kan. Stat. Ann. § 65-4102(b) (Supp. 2013); Ky. Rev. Stat. Ann. § 218A.020(1) (LexisNexis Supp. 2014); La. Rev. Stat. Ann. § 40:962(C) (2012); Md. Code Ann., Crim. Law § 5-202(c) (LexisNexis 2012); Minn. Stat. Ann. § 152.02, subdiv. 8 (West Supp. 2014); Miss. Code Ann. § 41-29-111(1)(a) (West Supp. 2013); Mo. Ann. Stat. § 195.015(1) (West 2011); Mont. Code Ann. § 50-32-201 (2013); Nev. Rev. Stat. Ann. § 453.146(2) (LexisNexis 2009); N.H. Rev. Stat. Ann. § 318-

c. Federal and state governments also worked together to stem drug distribution and use through criminal controls on drug paraphernalia. State authorities sought the assistance of the Drug Enforcement Administration (DEA) in drafting laws on this subject. See Model Drug Paraphernalia Act, reprinted in *Drug Paraphernalia: Hearing Before the House Select Comm. on Narcotics Abuse and Control*, 96th Cong., 1st Sess. 88 (1979) (1979 Hearing). A committee of the House of Representatives held a hearing at which witnesses articulated concern that existing laws were inadequate to address the proliferation of tools for drug consumption and distribution. See 1979 Hearing 1-45. In connection with the hearing, the DEA drafted the Model Drug Paraphernalia Act, which it recommended as an amendment to the UCSA. See *id.* at 88-95 (reprinting Model Drug Paraphernalia Act). Thirty-eight States, including Kansas, then adopted paraphernalia bans patterned on the Model

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B:1-a(I) (LexisNexis 2010); N.J. Stat. Ann. § 24:21-3(a) (West Supp. 2014); N.M. Stat. Ann. § 30-31-3(A) (Supp. 2014); N.C. Gen. Stat. § 90-88(a1) (2013); N.D. Cent. Code § 19-03.1-02(1) (2009); Ohio Rev. Code Ann. § 3719.44(B) (LexisNexis 2012); Okla. Stat. Ann. tit. 63, § 2-201(D) (West Supp. 2014); 35 Pa. Cons. Stat. Ann. § 780-103(a) (West 2012) (one factor changed); R.I. Gen. Laws § 21-28-2.01(a)(1) (2002); S.C. Code Ann. § 61-4.201 (Supp. 2013) (one additional factor); Tenn. Code Ann. § 39-17-403(a) (2014) (one additional factor); Va. Code Ann. § 54.1-3443(A) (Supp. 2014) (one additional factor); Wash. Rev. Code Ann. § 69.50.201(a)(1) (West Supp. 2014); W. Va. Code Ann. § 60A-2-201(a) (LexisNexis 2014) (omitting one factor); Wis. Stat. Ann. § 961.11(1m) (West 2007); Wyo. Stat. Ann. § 35-7-1011(a) (2013) (one additional factor); see also Mass. Ann. Laws ch. 94C, § 2(b) (LexisNexis 2010) (adopting comparable eight factors, but not for criminal law purposes); Tex. Health & Safety Code Ann. § 481.034(d) (West 2010) (same, with an additional factor).

Drug Paraphernalia Act, and an additional six states adopted distinct regimes to control paraphernalia. See Kerry Murphy Healey, Nat'l Inst. of Justice, *State and Local Experience with Drug Paraphernalia Laws* 15, 108-139 (Feb. 1988).

The Model Drug Paraphernalia Act prohibits the possession of drug paraphernalia, defined as "all equipment, products and materials of any kind which are used, intended for use, 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 substance on the State's controlled-substance schedules, in violation of the State's controlled substance laws. See 1979 Hearing 89 (Model Drug Paraphernalia Act, Art. I (definitions)).

The drafters adopted a broad definition of paraphernalia because "there are so many forms of drug paraphernalia that any attempt to define the term in more specific language would guarantee major loopholes in the Act's coverage." 1979 Hearing 91 (Model Drug Paraphernalia Act, Art. I cmt.). To stem the use of household objects to facilitate drug consumption and distribution, the drafters chose to criminalize possession of objects that have innocent purposes when possessed with criminal intent. For instance, though "a spoon, a hypodermic syringe, and a length of surgical tubing" have "legitimate uses in the community," if those objects were "assembled and used by an addict to illegally melt heroin and inject it into his body, they become drug paraphernalia." *Id.* at 92. Similarly, "balloons, envelopes, and other containers" would be

paraphernalia if "used, intended for use, or designed for use" in packaging drugs or "storing or concealing controlled substances." *Id.* at 89 (Model Drug Paraphernalia Act, Art. I (definitions)).

d. Seven years later, Congress enacted a statute targeting the sale of paraphernalia, known as the Mail Order Drug Paraphernalia Control Act, Pub. L. No. 99-570, 100 Stat. 3207-51. That law's House sponsor explained that "[a]though State drug paraphernalia laws * * * have been quite effective," purveyors of drug paraphernalia were operating mail-order businesses in "a deliberate attempt to circumvent State and local law enforcement efforts to control the sale of paraphernalia and to reduce drug abuse." *Mail Order Drug Paraphernalia Control Act: Hearing on H.R. 1625 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 99th Cong., 2d Sess. 16 (1986) (1986 Hearing).

To target that activity, the Mail Order Drug Paraphernalia Control Act targeted commercial sales of paraphernalia, which it defined as "any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance, possession of which is unlawful" under the CSA. § 1822(d), 100 Stat. 3207-51; see 1986 Hearing 15 (statement of sponsor Rep. Mel Levine) (explaining that definition was "drafted closely after the Model Drug Paraphernalia Act"). The federal provision made it illegal to use the Postal Service or another interstate conveyance as part of a scheme to sell drug paraphernalia; to offer paraphernalia for

sale or transport in interstate or foreign commerce; and to import or export drug paraphernalia. § 1822(a), 100 Stat. 3207-51.

In 1990, Congress replaced the paraphernalia provisions in the Mail Order Drug Paraphernalia Control Act with the current federal paraphernalia provisions, enacted in the Crime Control Act of 1990, Pub. L. No. 101-647, § 2401, 104 Stat. 4858. See 21 U.S.C. 863 (codifying paraphernalia provisions); see also *Posters 'N' Things, Ltd.* v. *United States*, 511 U.S. 513, 516 n.5 (1994). The revisions changed the wording of the statute but did not materially alter its substantive scope. *Ibid.*

e. Kansas has adopted the collaborative approaches of the UCSA and the Model Drug Paraphernalia Act. The Kansas Legislature enacted the UCSA in 1972, designating as "controlled" the same drugs that were then controlled under the federal CSA, and embracing the same criteria for adding and removing substances as are set out in the CSA. See 1972 Kan. Sess. Laws 943-944; see also Kan. Stat. Ann. § 65-4102(b) (Supp. 2013). Under Kansas's statute as currently in effect, the State Board of Pharmacy annually submits a report to legislators concerning proposed scheduling or removal of substances based on consideration of those factors, and the legislature then decides on any changes. *Ibid.*

The resulting Kansas schedules mirror the federal controlled-substance schedules with only minor deviation. At the time of petitioner's arrest, Kansas controlled 306 substances by name, nine of which were not identifiable as federally controlled substances. Those nine substances are a psychoactive plant known as salvia divinorum and its active ingredient sal-

vinorum A, which have hallucinogenic properties; an herb known as datura stramonium, "gypsum weed" or "jimson weed," consumed to produce euphoria and delirium; two synthetic cannabinoids; the hallucinogen TFMPP; the inhalant butyl nitrate; the stimulant propylhexedrine; and ephedrine and pseudoephedrine, stimulants that are used in methamphetamine production.[2]

Two of those substances—pseudoephedrine and ephedrine—were nevertheless subject to federal con-

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[2] See Kan. Stat. Ann. § 65-4105(d)(30) (Supp. 2010) (scheduling salvia divinorum); DEA, *Salvia Divinorum and Salvinorin A* (Oct. 2013), http://www.deadiversion.usdoj.gov/drug_chem_info/salvia_d.pdf (describing drug); Kan. Stat. Ann. § 65-4105(d)(31) (Supp. 2010) (scheduling datura stramonium); DEA, *Jimson Weed (Datura stramonium)* (Jan. 2013), http://www.deadiversion.usdoj.gov/drug_chem_info/jimson_w.pdf (describing drug); see Kan. Stat. Ann. § 65-4105(d)(33) (Supp. 2010) (scheduling synthetic cannabinoid 1- pentyl-3-(1-naphthoyl)indole, also known as JWH-018); *id.* § 65-4105(d)(34) (scheduling synthetic cannabinoid 1-Butyl-3-(1-naphthoyl)indole, also known as JWH-073); *id.* § 65-4105(d)(36) (scheduling 1-(3-[trifluoromethylphenyl]) piperazine, or TFMPP); DEA, *1-[3-(Trifluoro-methyl)-phenyl]piperazine* (Aug. 2013), http://www.deadiversion.usdoj.gov/drug_chem_info/tfmpp.pdf (describing TFMPP); Kan. Stat. Ann. § 65-4111(g) (2002) (scheduling butyl nitrite); Ronald W. Wood, *The Acute Toxicity of Nitrite Inhalants* (1988) (discussing risks associated with butyl nitrate and other nitrite inhalants), available at https://urresearch.rochester.edu/fileDownloadForInstitutionalItem.action?itemId=967&itemFileId=1141 (last visited Nov. 18, 2014); Kan. Stat. Ann. § 65-4113(d)(1) (Supp. 2010) (scheduling propylhexedrine); Julia Paige Fernandez & Elie M. Francis, *Propylhexedrine: A Vintage Drug of Abuse, Rediscovered*, Journal of Psychoactive Drugs, July 2012, at 277-279 (describing properties of propylhexedrine); see Kan. Stat. Ann. § 65-4113(e) (Supp. 2010) (scheduling ephedrine); *id.* § 65-4113(f) (scheduling pseudoephedrine).

trols at all relevant times, through federal designation as "list I" chemicals used in the manufacture of federally controlled substances. 21 U.S.C. 802(34)(C) and (K). Two more of the nine substances—the synthetic cannabinoids—were federally controlled through an emergency action the year after petitioner's arrest. See 76 Fed. Reg. 11,075 (Mar. 1, 2011). Those drugs were permanently controlled the following year by the Synthetic Drug Abuse Prevention Act of 2012, Pub. L. No. 112-144, Tit. XI, Subtit. D, § 1151, 26 Stat. 1130; 21 U.S.C. 812(c) (Sched. I(d)(2)(B)(iii) and (iv)).

Kansas has also adopted a paraphernalia ordinance based on the Model Drug Paraphernalia Act. Accordingly, it is unlawful in Kansas "for any person to use or possess with intent to use any drug paraphernalia to * * * store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance," as defined under Kansas law, "into the human body." Kan. Stat. Ann. § 21-5709(b) (Supp. 2013); *id.* § 21-5701. The State's definition of drug paraphernalia generally mirrors that in the Model Drug Paraphernalia Act, reaching "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" in violation of Kansas law. *Id.* § 21-5701(f).[3]

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[3] At the time of petitioner's conviction, Kan. Stat. Ann. §§ 21-5701(a) and (f), 21-5709(b) (Supp. 2013) were codified at, respectively, Kan. Stat. Ann. §§ 21-36a01(a) and (f), 21-36a09(b) (Supp. 2010).

2. Under the INA, "[a]ny 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).

Removal is not mandatory for all aliens convicted of crimes of this type. The Attorney General, in his discretion, may grant cancellation of removal for an alien who has been a lawful permanent resident for not less than five years and has resided in the United States continuously for seven years after having been admitted in any status, so long as the alien has not committed one of the narrower class of crimes referred to as aggravated felonies. See 8 U.S.C. 1229b(a); see also, *e.g.*, *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 571 (2010); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013). Exercise of that discretion generally turns on a balancing of factors, including duration of residence, family or business ties, employment history, evidence of good character, the nature and circumstances of the grounds of removal, and whether the alien has committed other crimes or otherwise shown bad character. See *In re C-V-T-*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).

In addition, an alien who is removable under 8 U.S.C. 1227(a)(2)(B)(i) may be eligible for asylum, see 8 U.S.C. 1158; withholding of removal, 8 U.S.C. 1231(b)(3); and protection under the Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess.

(1988), 1465 U.N.T.S. 113; see 8 C.F.R. 1208.16-1208.18.

3. Petitioner, a native and citizen of Tunisia, was admitted into the United States in 2004 on a student visa. J.A. 12. He became a conditional permanent resident in 2009, and the conditions on his permanent residency were lifted in 2011. *Ibid.*

In 2010, the year after petitioner became a conditional permanent resident, he was arrested for driving under the influence of alcohol or drugs and driving with a suspended license. Pet. App. 5-6; J.A. 16. He was taken to a detention facility. Pet. App. 5-6. According to an affidavit submitted in the state criminal prosecution, petitioner was questioned there about whether he had drugs on his person and said he did not. J.A. 17-18. During a search, however, deputies discovered four orange tablets marked "M Aphet Salts 30 mg" hidden in petitioner's sock. *Ibid.* Petitioner admitted the tablets were Adderall, a controlled substance under both federal and Kansas law. J.A. 18; Pet. 4 n.2. Petitioner acknowledged that he did not have a prescription for the drugs. J.A. 18. Based on the sworn affidavit detailing these events, a complaint was filed charging petitioner with trafficking contraband in a jail. J.A. 19-22.

In July 2010, petitioner pleaded guilty to using or possessing drug paraphernalia—specifically, a sock used to conceal and store a controlled substance. J.A. 23-34; Pet. App. 6. He also pleaded guilty to driving under the influence of alcohol or drugs. J.A. 16. On both charges, petitioner was sentenced to a suspended jail term of 359 days and 12 months of probation. J.A. 31.

4. After the Department of Homeland Security (DHS) initiated removal proceedings, an immigration judge (IJ) found that petitioner was removable. Pet. App. 29-35. The judge relied on Board of Immigration Appeals (Board or BIA) precedent establishing that drug-paraphernalia convictions in States that ban federally controlled substances and some additional drugs qualify as convictions under state laws "relating to" federally controlled substances. *Id.* at 31-33 (discussing *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009)). Applying *Martinez Espinoza*, which had interpreted identical language in an admissibility provision, 8 U.S.C. 1182(a)(2)(A)(i)(II), the IJ concluded that petitioner's conviction under Kansas's drug-paraphernalia statute made him removable, even though "the Kansas definition of 'controlled substance' does not 'map perfectly' the definition of that term as used in section 102 of the [federal] Controlled Substances Act." Pet. App. 33-34 (citation omitted).

In a portion of the IJ's decision not challenged here, the IJ also found that petitioner's offense did not fall within the exception to removability for "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). Pet. App. 34-35. The IJ applied a "circumstance-specific" approach to determining whether an offense was one "involving" possession of a small quantity of marijuana for personal use. *Ibid.*; see *In re Dominguez-Rodriguez*, 26 I. & N. Dec. 408, 411 (B.I.A. 2014) (explaining that circumstance-specific approach is warranted based on standards set forth in *Moncrieffe*, 133 S. Ct. at 1678, and *Nijhawan* v. *Holder*, 557 U.S. 29 (2009)); see also *In re Davey*, 26 I. & N. Dec. 37, 39 (B.I.A. 2012). Using that approach, the IJ

found by clear and convincing evidence that petitioner's drug-paraphernalia offense did not involve possession of less than 30 grams of marijuana, relying on the sworn affidavit in support of the criminal complaint in petitioner's case describing the discovery of petitioner's concealed tablets. Pet. App. 30.

The IJ accordingly ordered the removal of petitioner, see Pet. App. 20-21, who was not eligible for cancellation of removal because he did not satisfy the requirements regarding duration of permanent resident status, see 8 U.S.C. 1229b(a).

The Board denied a petition for review. It found the case was controlled by its decision in *Martinez Espinoza*, which had held that state drug-paraphernalia convictions constitute convictions for violations of laws relating to federally controlled substances in States that criminalize both federally controlled drugs and a small number of additional substances. Pet. App. 17-19.

According to DHS records, petitioner was removed from the country in 2012.

5. The court of appeals denied review. Pet. App. 1-14. The court noted that petitioner did not claim that paraphernalia crimes never fall within the provision making removable any alien convicted of a violation of any state law "relating to a controlled substance (as defined in section 802 of title 21)," within the meaning of 8 U.S.C. 1227(a)(2)(B)(i). Pet. App 9. The court agreed that such a claim would lack merit, expressing "no doubt" that, as a general matter, statutes seeking to address substance abuse by controlling drug paraphernalia "'relate to' federal control of illicit drugs." *Ibid.*

The court of appeals found unpersuasive petitioner's contention that state drug-paraphernalia crimes are removable offenses under Section 1227(a)(2)(B)(i) only if state conviction records establish the involvement of a federally controlled substance. Pet. App. 9. The court noted that petitioner's position was contrary to the view of the Board, which had construed Section 1227(a)(2)(B)(i) to categorically reach drug-paraphernalia convictions in States that control federally controlled substances and some additional drugs. *Id.* at 10.

The court of appeals observed that under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), it was required to defer to the Board's interpretation of the INA so long as the interpretation was "neither arbitrary nor manifestly unreasonable." Pet. App. 10. The court found the Board's construction here to be reasonable, agreeing that Congress's decision to make an alien removable when convicted of a violation of any state law "relating to a controlled substance" reflected an "intent to broaden the reach of the removal provision to include state offenses having 'a logical or causal connection' to federal controlled substances," including in the States that do not regulate precisely the same substances as are controlled under federal law. *Ibid.* (quoting *Webster's Third New International Dictionary* 1916 (1961)). Emphasizing that there is "nearly a complete overlap between the definition of controlled substance in 21 U.S.C. § 802 and in the statutes of States such as Kansas that adopted the [UCSA]," the court concluded that the Board reasonably construed Section 1227(a)(2)(B)(i) when it ruled that Kansas's drug-paraphernalia stat-

ute was a law "relating to" federally controlled substances. *Ibid.*

The court of appeals rejected petitioner's argument that the Board's treatment of drug-paraphernalia offenses was unreasonable because it was inconsistent with the Board's treatment of drug-possession crimes. The court concluded that a recent Board decision "strongly signal[led]" that the Board regarded state drug convictions as categorically a basis for removal "when the state statute has 'a list of narcotic drugs that is substantially identical to the federal one, and indeed was drafted with the obvious intent to match precisely with the federal schedules.'" Pet. App. 11 (quoting *In re Huerta-Flores*, 2010 WL 5808899, at *4 (B.I.A. Aug. 27, 2010) (unpublished), review granted and remanded by *Huerta-Flores* v. *Holder*, No. 10-73389, 2014 WL 3361435 (9th Cir. July 10, 2014)). In the court's view, that decision indicated that the Board did not now treat as controlling, with respect to such deliberately overlapping state statutes, its prior decision in *In re Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A. 1965), which "involved pre-1970 controlled substance and INA statutes." Pet. App. 11. The court therefore rejected the "premise" that the Board had "arbitrarily ignored" *Paulus*. *Ibid.* The court accordingly denied the petition for review. *Id.* at 10-11, 14.

SUMMARY OF ARGUMENT

An alien who violates the drug-paraphernalia laws of a State that controls hundreds of federally controlled drugs and a small number of additional, similar substances is removable from the United States because—as the BIA has concluded—such a conviction constitutes "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)." 8 U.S.C. 1227(a)(2)(B)(i).

A. 1. Aliens who commit drug crimes in States like Kansas that have adopted the Uniform Controlled Substances Act (UCSA) are removable under the Immigration and Nationality Act (INA), because state statutes that criminalize hundreds of federally controlled drugs and a handful of similar substances, are laws "relating to" federally controlled substances. 8 U.S.C. 1227(a)(2)(B)(i). State drug laws based on the UCSA—which are designed to form an "interlocking trellis" with federal drug laws, UCSA (1970) Prefatory note, 9 U.L.A. 854 (2007)—satisfy the "broad," common-sense meaning of the "relating to" requirement because they "stand in some relation" to, "have bearing or concern" on, "pertain" to, and "refer" to federally controlled substances. *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citation omitted). And the statutory text makes clear that it is the state law under which the alien is convicted that must "relat[e] to" a federally controlled substance, not the particular conduct that led to the conviction.

Statutory structure confirms this meaning, for when Congress has imposed an immigration consequence only if an alien was convicted of particular conduct, Congress has directly said so—both in Section 1227 itself and in other portions of the INA addressing drug crimes. Congress's use of broader language in Section 1227(a)(2)(B)(i)—referring to any conviction under any *law* relating to a federally controlled substance—establishes that Congress meant the ordinary meaning of the "relating to" language it enacted.

Giving the statutory language its ordinary meaning serves well-settled purposes. It ensures that aliens who commit drug crimes are removable—even when, as the UCSA contemplates, federal and state controlled-substance schedules are not perfectly overlapping. Giving the statutory language its ordinary meaning also avoids unwarranted disparities. It ensures that removability of aliens convicted of crimes involving federally controlled substances does not vary from State to State; from state court to federal court; or from time to time as controlled-substance schedules are modified.

2. Petitioner's arguments do not justify a different reading. Contrary to petitioner's suggestion, the statute's definitional parenthetical carries meaning on any reading of Section 1227(a)(2)(B)(i), by ensuring that an alien is removable only if convicted under the serious criminal prohibitions covering federally controlled drugs, and not under myriad state and federal regulations limited to other pharmaceuticals.

Further, while the removal provision speaks of any law "relating to *a* controlled substance (as defined in section 802 of title 21)," rather than relating to "controlled substances," the singular form is necessary to track the definition in Section 802, which is singular. The use of the singular does not alter the provision's meaning, because, as a general matter, "words importing the singular include and apply to several persons, parties, or things." Dictionary Act, 1 U.S.C. 1.

Finally, petitioner draws the wrong inference from Congress's creation of a personal-use marijuana exception to removability. The enumeration of one exception indicates that others are not to be implied. Further, when Congress sought to carve out from

removability offenses involving marijuana, it did so with a circumstance-specific exception looking to the conduct underlying a conviction—rather than by carving out all convictions under entire drug statutes reaching marijuana crimes. It is implausible that Congress would have sought to carve out convictions involving state-controlled drugs through a much blunter exclusion that would reach all convictions under entire state drug statutes.

Reading Section 1227(a)(2)(B)(i) in the manner consistent with its text and structure is also consistent with the provision's history, which involves repeated expansions of the removal ground. Among these expansions was the 1986 revision specifying that an alien is removable if convicted of violating any state law relating to any federally controlled substance—not simply any law relating to a shorter list of drugs previously enumerated in the INA.

3. Interpreting Section 1227(a)(2)(B)(i) to permit removal of aliens convicted of drug violations in States that criminalize both federally controlled drugs and a small number of additional, similar substances is fully consistent with the categorical approach to identifying convictions. Statutes that speak of whether "convictions" meet certain criteria typically call for examination of the "statutory definitions" of the crimes at issue, not "the particular facts" underlying the convictions. *Taylor* v. *United States*, 495 U.S. 575, 600 (1990). Application of that approach confirms petitioner's removability, for an examination of the "statutory definition" of petitioner's crime establishes that he was convicted of violating "a law * * * relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i).

B. 1. Because state drug-paraphernalia statutes criminalize tools of drug consumption and distribution that can be used with federally controlled drugs as well as state-controlled substances, even individual violations under those statutes uniformly bear a relationship to federally controlled drugs. A statute criminalizing tools designed for use, intended for use, or used to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body," Kan. Stat. Ann. § 21-5709(b) (Supp. 2013), relates to federally controlled drugs because such tools are not limited in usefulness to any single substance. Thus, as the Board has explained, paraphernalia crimes are offenses relating to "the drug trade in general," not limited to any single substance. *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009).

2. Petitioner fails to refute this connection. Petitioner principally asserts that violations of Kansas's paraphernalia law cannot be related to federally controlled substances because, like other state statutes based on the Model Drug Paraphernalia Act, Kansas's statute criminalizes possession of ordinary household objects when intended for use or used for drug-related purposes. These statutes, however, rest on a legislative judgment that even household objects can facilitate drug distribution and consumption when they are intended for use, or used, as tools of this type. And since the objects' utility for these purposes is not limited to a particular drug, these crimes relate to federally controlled substances.

C. Any ambiguity should be resolved in favor of the Board's reasonable interpretation. The Board is entitled to deference concerning its interpretations of

the INA under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984). Here, the Board's published opinion concerning paraphernalia reflects, at a minimum, a reasonable exercise of its interpretive authority. The Board explained that even if a state conviction must relate to federally controlled substances to form a basis for removal, state drug-paraphernalia crimes meet that standard. That is because paraphernalia statutes seek to control the tools that can be used with a variety of controlled substances—"conduct associated with the drug trade in general," rather than conduct linked only to a "*particular* drug." *Martinez Espinoza*, 25 I. & N. Dec. at 121. And while petitioner asserts that the Board's interpretation is unreasonable because it would permit removal based on what petitioner describes as "low-level offenses," Pet. Br. 38, the language of the removal provision, which allows removal of "[*a*]*ny* alien who at *any* time after admission has been convicted of a violation of * * * *any* law or regulation of a State * * * relating to a controlled substance" 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added), reflects a judgment that drug crimes are serious enough to allow for an alien's removal. That language does not admit of a general minor-crime exception. The Board's construction is therefore reasonable.

ARGUMENT

A CONVICTION UNDER THE KANSAS DRUG-PARAPHERNALIA LAW IS A CONVICTION FOR A VIOLATION OF A STATE LAW RELATING TO A FEDERALLY CONTROLLED SUBSTANCE UNDER 8 U.S.C. 1227(a)(2)(B)(i)

Under the controlled-substance-removal provision in the INA, 8 U.S.C. 1227(a)(2)(B)(i), an alien convict-

ed of violating a state drug-paraphernalia law is removable from the United States, although the alien is not thereby rendered ineligible for discretionary relief from removal. By rendering removable aliens who violate state laws "relating to" federally controlled substances, the controlled-substance-removal provision reaches aliens convicted of state drug laws that apply to hundreds of federally controlled substances as well as a small number of additional, similar drugs. *Ibid.* And even if petitioner were correct that Section 1227(a)(2)(B)(i) permits removal only when an alien's particular conviction bears a relationship to federally controlled substances, drug-paraphernalia convictions would meet that standard. As the BIA has reasonably concluded, because drug-paraphernalia statutes prohibit possession of tools for drug use and distribution that are not limited in their utility to a single substance, convictions under such statutes therefore relate to federally controlled drugs and state-controlled drugs alike.

A. The Kansas Controlled-Substance Statutes Are Laws "Relating To" Federally Controlled Substances

The INA's controlled-substance removal provision, 8 U.S.C. 1227(a)(2)(B)(i), permits the removal of an alien who violates the Kansas controlled-substance laws, because a state drug law relating to hundreds of federally controlled substances and a small number of additional, similar substances is a "law * * * of a State * * * relating to a controlled substance (as defined in section 802 of title 21)."

1. The text, structure, and purpose of Section 1227(a)(2)(B)(i) establish its applicability

a. Statutory interpretation begins "with the language of the statute itself." *Caraco Pharm. Labs., Ltd.* v. *Novo Nordisk A/S*, 132 S. Ct. 1670, 1680 (2012) (citation omitted). In analyzing statutory text, words carry "their ordinary, contemporary, common meaning" unless they are otherwise defined. *Octane Fitness, LLC* v. *ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (citation omitted); see also, *e.g.*, *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 573 (2010) ("[W]e begin by looking at the terms of the provisions and the 'commonsense conception' of those terms.") (citation omitted).

Petitioner's conviction for violating a Kansas drug-paraphernalia statute is a violation of a state law "relating to" a federally controlled substance within the ordinary meaning of that phrase. "The ordinary meaning" of "relating to" "is a broad one." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). A statute is one "relating to" a subject if it "stand[s] in some relation," "ha[s] bearing or concern," "pertain[s]," or "refer[s]" to the subject. *Ibid.* (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)); see *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."); see also *Metropolitan Life Ins. Co.* v. *Massachusetts*, 471 U.S. 724, 739 (1985) (same). The term is not "limitless," *Celotex Corp.* v. *Edwards*, 514 U.S. 300, 308 (1995), and a "tenuous, remote, or peripheral" connection will not suffice," *Trans World Airlines*, 504 U.S. at 390 (citation omitted). Nevertheless, this Court has explained,

the phrase "relating to" has a "broad common-sense meaning" and "expansive sweep." *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 47 (1987) (citation omitted).

The Kansas controlled-substance statutes are laws "relating to" federally controlled substances under the meaning given to that phrase in this Court's decisions. Indeed, Kansas's drug statutes were specifically designed to "relat[e] to" federally controlled substances, because they enact a model statute created to "complement" and form an "interlocking trellis" with the federal controlled substance regime. See *Presidential Message* 514. And because Kansas's drug statutes principally apply to federally controlled substances, the statutes do indeed "ha[ve] a connection with or reference to," *Shaw*, 463 U.S. at 97, "have bearing or concern" on, and "pertain" to federally controlled substances, *Trans World Airlines*, 504 U.S. at 383 (citation omitted). Further, because federally scheduled drugs comprise virtually all of the substances regulated by Kansas's drug laws, the connection between Kansas's law and federally controlled substances is especially tight, not "peripheral" or "tenuous."

This application of the ordinary definition of "relating to" comports with common usage. For example, a student asked to select classes from a course catalog "relating to" copyright law would surely pick out an introduction to intellectual property (even if the class also covered trademarks and patents). So too, a legislative aide asked to identify the laws in a state code "relating to" heroin (for example) would surely pick out laws banning possession and distribution of heroin and of associated paraphernalia—even if the statutes in question also banned drug-related activities with respect to certain other substances. In sum, because a

statute of this type "ha[s] bearing or concern" on and "pertain[s]" to federally controlled substances in a direct and intended manner, see *Trans World Airlines*, 504 U.S. at 383, a person convicted of violating the controlled-substance statutes of Kansas has committed "a violation of * * * [a] law * * * of a State * * * relating to a controlled substance (as defined in section 802 of title 21)," 8 U.S.C. 1227(a)(2)(B)(i).

Given the virtually complete overlap between Kansas's controlled-substance schedules and the federal schedules, petitioner does not appear to dispute that a violation of Kansas's drug-paraphernalia statute is a violation of a law "relating to" a federally controlled substance. See Pet. Br. 12. Instead, he asserts that Congress required not that a person be convicted under a *law or regulation* relating to a federally controlled substance, but rather that a person be convicted of a *criminal act* relating to a federally controlled substance.

That reading, however, violates ordinary canons of interpretation. As this Court has explained, "a limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Jama* v. *Immigration & Customs Enforcement*, 543 U.S. 335, 343 (2005) (quoting *Barnhart* v. *Thomas*, 540 U.S. 20, 26 (2003)); *Federal Trade Comm'n* v. *Mandel Bros., Inc.*, 359 U.S. 385, 389-390 (1959). A limiting phrase, in particular, ordinarily modifies "[t]he last antecedent," or "the last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence," absent contrary indicia of statutory meaning. 2A Norman J. Singer & Shambie Singer, *Statutes and Statutory Construction* § 47:33, at 494-496 (7th ed. 2014)

(citation omitted). Here, the "last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence," *id.* at 495-496, is "any law or regulation of a State, the United States, or a foreign country," 8 U.S.C. 1227(a)(2)(B)(i). Accordingly, Section 1227(a)(2)(B)(i) is best read to permit removal of any alien who violates a "law or regulation of a State, the United States, or a foreign country" relating to a federally controlled substance. *Ibid.*

By contrast, the text of Section 1227(a)(2)(B)(i) does not permit petitioner's reading, because there is no prior antecedent that the "relating to" clause could modify that would yield petitioner's view of the statute. While petitioner does not explain what phrase he believes the "relating to" limitation modifies, the only apparent candidate is "violation (or a conspiracy or attempt to violate)." 8 U.S.C. 1227(a)(2)(B)(i). But the "relating to" language could not modify those terms. While it may be possible (although quite strained) to speak of a "violation [relating to a controlled substance] of * * * any law or regulation" it is not possible to speak of a "conspiracy or attempt to violate [relating to a controlled substance] * * * any law or regulation." The only antecedent that can be modified by the "relating to" clause, consistent with ordinary grammar, is "law or regulation of a State, the United States, or a foreign government." See *ibid.*

b. The broader context of Section 1227 reinforces the conclusion that it is appropriate to give the controlled-substance-removal provision its ordinary textual reading. When Congress sought in particular subsections of Section 1227 to tie removal to convictions for particular acts, it said so. For instance, a firearms-related provision makes an alien removable

for certain convictions involving a weapon which "*is* a firearm or destructive device (as defined in section 921(a) of title 18)"—rather than for convictions under laws relating to firearms or explosive devices. 8 U.S.C. 1227(a)(2)(C) (emphasis added). And a domestic-violence-related provision makes aliens removable if convicted of certain crimes that "ha[ve] as an element" "the use, attempted, or threatened use of physical force against the person * * * of another," 18 U.S.C. 16(a)—rather than if convicted under laws relating to the conduct in question. 8 U.S.C. 1227(a)(2)(E) (providing for removal of aliens convicted of such offenses when the victim was a spouse or domestic partner). The controlled-substance-removal provision, with its language centering on whether a conviction was for a violation of a *law* relating to a controlled substance, should not be read—as petitioner would have it—to command the type of link between conviction and conduct that Congress elsewhere enacted through different language. See *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (explaining that principles of statutory interpretation counsel against "concluding * * * that the differing language in the two subsections has the same meaning in each").

Comparison with the aggravated-felony provision provides additional support for this conclusion. In contrast to the broad language that Congress used in Section 1227(a)(2)(B)(i) to define the convictions that make an alien removable, Congress used narrow language when it defined the drug crimes that constitute aggravated felonies, conviction of which not only renders an alien removable but also ineligible for cancellation of removal. See 8 U.S.C. 1229b(a). For a drug crime to qualify as an "aggravated felony," Congress

required that a conviction match—rather than merely be under a law "relating to"—a particular statutory definition. See 8 U.S.C. 1227(a)(2)(A)(iii) (providing that "[a]ny alien who *is convicted of*" an aggravated felony is deportable) (emphasis added); 8 U.S.C. 1101(43)(B) (enumerating aggravated felonies, including "illicit trafficking in a controlled substance (as defined in section 802 of title 21)"). This contrast underscores that "[i]f Congress wanted a one-to-one correspondence between the state laws and the federal CSA, it would have used a word like 'involving' instead of 'relating to,' or it could have written the [removability] statute the way it wrote" the aggravated-felony provision. *Desai* v. *Mukasey*, 520 F.3d 762, 765 (7th Cir. 2008). Congress's use of different language indicates that it intended the result its language produces: A broad sweep for the provision regarding removability, as to which discretionary relief remains possible, and a narrow sweep for the provision that triggers ineligibility for discretionary relief.

Controlled-substance-related provisions that petitioner identifies elsewhere in the INA further support giving the controlled-substance-removal provision its ordinary textual reading. Petitioner cites (Br. 17) several provisions that trigger immigration consequences only upon a showing that a particular *conviction* involves federally controlled substances—in contrast to Section 1227's triggering of immigration consequences when an alien violates a *law* relating to a controlled substance. See 8 U.S.C. 1184(d)(3)(B)(iii) and (r)(5)(B)(iii) (providing for denial of visas to applicants with "[a]t least three convictions for *crimes* relating to a controlled substance or alcohol not aris-

ing from a single act") (emphasis added); 8 U.S.C. 1375a(d)(2)(B)(iv) (requiring certain certifications with respect to any "Federal, State, or local arrest or conviction * * * for *offenses* related to controlled substances or alcohol") (emphasis added). Those sections confirm that when Congress wants proof that a particular offense involved a federally controlled substance, Congress says so.[4]

c. This plain-language reading of Section 1227(a)(2)(B)(i) reflects time-honored purposes and avoids irrational disparities. See *Abramski* v. *United States*, 134 S. Ct. 2259, 2267 (2014) (explaining that statutory terms must be interpreted "with reference to the statutory context, 'structure, history, and purpose'") (citation omitted). Giving the text of Section 1227(a)(2)(B)(i) its ordinary meaning, the provision protects public safety by ensuring that the Attorney General has the authority to order the removal of aliens who are convicted of drug crimes—even when federal and state drug schedules are not perfectly overlapping. Indeed, this Court has repeatedly expressed the understanding that the controlled-

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[4] Petitioner cites these provisions because he believes they establish that Congress would have used language such as "crimes relating to a controlled substance or alcohol" if it wished to allow for the removal based on state statutes that encompass federally controlled substances and similar additional substances (see Pet. Br. 17), but he is mistaken. Petitioner's proposed alternative language—referring to aliens convicted of "crimes relating to a controlled substance or alcohol"—reaches a different class of individuals than language referring to aliens convicted under any law "relating to" a federally controlled substance. That Congress referred to "crimes relating to a controlled substance or alcohol" in other provisions thus suggests simply that it intended to reach different conduct in those provisions.

substance-removal provision grants the Attorney General authority to remove those convicted of state crimes involving federally controlled drugs. See *Carachuri-Rosendo*, 560 U.S. at 581 (stating that although state drug conviction did not qualify as aggravated felony, an alien convicted of possessing controlled substances "will not avoid the fact that his conviction makes him, in the first instance, removable"); *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1692 (2013) (noting that "[a]ny marijuana distribution offense * * * will * * * render a noncitizen deportable as a controlled substances offender").

By providing that aliens who commit violations of state drug laws are removable, notwithstanding some variations in state law, Congress aligned the removal provisions with other statutes premised on the recognition that drug crimes have "a substantial and detrimental effect on the health and general welfare of the American people." 21 U.S.C. 801(2), (3) and (4); see *National Treasury Emps. Union* v. *Von Raab*, 489 U.S. 656, 674 (1989) (noting that "drug abuse is one of the most serious problems confronting our society today"); *Harmelin* v. *Michigan*, 501 U.S. 957, 1003 (1991) (Kennedy, J., concurring in part) (noting "pernicious effects of the drug epidemic" and the "direct nexus between illegal drugs and crimes of violence").

Petitioner's approach, in contrast, would undercut the Attorney General's ability to remove aliens for drug offenses in States that, consistent with the UCSA, proscribe both federally controlled drugs and a small number of additional substances. The government would frequently lack the authority to remove aliens, such as petitioner, based on convictions for paraphernalia crimes in States adhering to the

UCSA approach. See Nat'l Immigrant Justice Ctr. Amicus Br. 29 (noting that many States do not require proof of identity of substance involved in paraphernalia crimes, so that conviction records would not establish whether federally controlled substance was involved); NACDL Amicus Br. 10 (same). The government would also lack removal authority under petitioner's approach with respect to some aliens convicted of possession and distribution offenses, because States do not uniformly require the identity of the substance involved in such crimes to be charged or proven. See, *e.g.*, *In re De Jesus Rodriguez*, 2009 WL 2437164, at *2 (B.I.A. July 30, 2009) (conviction records for state drug-conspiracy crime did not reflect identity of substance); *In re Gonzalez-Chavez*, 2006 WL 901378, at *2 (B.I.A. Feb. 23, 2006) (conviction records for drug-possession crime specified only that substance was narcotic drug); *In re Medel-Navarro*, 2005 WL 698568, at *2 (B.I.A. Feb. 9, 2005) (per curiam) (conviction records for state crime of possession of controlled substance for sale did not reflect particular substance involved); *In re Beckford*, 22 I. & N. Dec. 1216, 1217 (B.I.A. 2000) (conviction records for state possession with intent to sell did not reflect particular substance involved).

It is implausible to suppose that when Congress enacted a removal provision reaching state drug crimes, against the backdrop of UCSA-based enactments contemplating substantial overlap but some minor variation in scheduling, Congress intended to deny the Attorney General the authority to order the removal of aliens convicted of those crimes. Indeed, it is particularly unlikely that Congress would have intended that result even as it permitted the Attorney

General to order the removal of aliens for non-criminal conduct and less serious crimes. See, *e.g.*, 8 U.S.C. 1227(a)(5) (permitting removal of alien who becomes a public charge); 8 U.S.C. 1227(a)(3)(A) (permitting removal of alien for failure to notify the government of a change of address); *Padilla* v. *Kentucky*, 559 U.S. 356, 379 (2010) (Alito, J., concurring in the judgment) (noting that removable crimes involving moral turpitude may include writing bad checks and knowingly driving with a revoked license).

By providing for the removal of aliens who violate state laws relating to federally controlled substances even when state schedules do not perfectly mirror those in federal law, Congress served the further objective of avoiding disparities that have no relationship to culpability. Permitting removal only of those aliens whose state conviction records establish involvement of a federally controlled substance would generate disparities among those who committed identical crimes in different States. Some aliens would be non-removable for crimes involving federally controlled drugs simply because they were convicted in a State that also controlled additional substances. Petitioner's approach would also generate disparities within States that control some non-federally controlled drugs, depending on whether a prosecution for a crime involving a federally controlled drug was brought by state or federal authorities. And because the UCSA and federal law each contemplates adjustments to drug schedules over time—which may bring individual States in and out of perfect alignment with federal law—petitioner's approach would mean that offenders within a State would face different immigra-

tion consequences depending on the timing of their crimes.

Petitioner contends (Br. 10) that Congress must not have intended to permit removal based on all violations of state laws relating to federally controlled substances because that approach itself produces disparities. But those disparities are not among similarly situated offenders. Subjecting aliens to different immigration consequences for conduct involving a drug depending on whether the drug was prohibited in the jurisdiction where the alien acted is entirely reasonable; it separates aliens who have committed drug crimes from those who have not. And in any event, because of the extent of the overlap between federal and state schedules, petitioner's own research suggests that state criminal prosecutions involving substances that are not federally controlled are exceedingly rare in States adopting a UCSA approach. See Pet. Br. 51-55 (identifying only one instance of Kansas prosecution for non-federally controlled substance and only a handful of possible prosecutions involving such substances in other States).

2. Petitioner's arguments do not justify a different reading of Section 1227(a)(2)(B)(i)

None of petitioner's arguments justifies departing from ordinary grammatical rules or from the commonsense meaning of the removal provision's terms.

Petitioner first suggests (Br. 15, 18) that his reading is necessary to save from superfluity the parenthetical referring to controlled substances "as defined in section 802 of title 21." Petitioner is mistaken. Absent a more precise definition, the term "controlled substance" naturally refers to "[a]ny type of drug whose possession and use is regulated by law."

Black's Law Dictionary 378-379 (9th ed. 2009). As a result, without the parenthetical, Section 1227(a)(2)(B)(i) would render removable aliens who violate myriad state and federal regulations concerning the medicines and pharmaceuticals that—absent a definitional parenthetical—might well be described as "controlled substances." The parenthetical makes plain that such violations are not within the statute's ambit, and permits the institution of removal proceedings only if an alien has violated the serious criminal prohibitions that apply to both federally controlled substances and—in a number of UCSA States—a small number of additional drugs that the State has concluded present a similar danger.

Petitioner next contends (Br. 18) that Section 1227(a)(2)(B)(i) must have been intended to render removable only aliens whose conviction records establish that they committed an *act* relating to a federally controlled substance because of its use of the singular in referring to any alien convicted of "a violation of * * * any law * * * relating to *a* controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added). The use of the singular, however, tracks the definition in Section 802 of Title 21—it is the term "controlled substance," not the term "controlled substances," that Section 802 defines. See 21 U.S.C. 802(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."). And Congress's use of language that tracks the definitional provision does not alter the provision's meaning because, pursuant to the Dictionary Act, 1 U.S.C. 1, "unless the context indicates otherwise—words importing the singular

include and apply to several persons, parties, or things." *Ibid.*

Nor is petitioner correct that his reading is "confirmed" by the clause that creates an exception to removability for "a single offense involving possession for one's own use of 30 grams or less of marijuana." Pet. Br. 14-16 (quoting 8 U.S.C. 1227(a)(2)(B)(i)). "Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman* v. *Maretta*, 133 S. Ct. 1943, 1953 (2013) (quoting *Andrus* v. *Glover Constr. Co.*, 446 U.S. 608, 616-617 (1980)). It is unsurprising that Congress created an exception limited to a single common drug about which Congress could make a substance-specific risk assessment, without also creating an exception for the smaller subset of cases that involve substances controlled only under state law. That is a class of drugs about which no similar substance-specific risk assessment can be made. State-scheduled substances may include, for example, dangerous drugs with respect to which States have simply been quicker to act. Cf. DEA, *National Drug Threat Assessment Summary* 14 (2013) (noting "fast growing threat" of synthetic cannabinoids); 2010 Kan. Sess. Laws 50 (banning synthetic cannabinoids including JWH-018 and JWH-073); 76 Fed. Reg. at 11,075 (temporarily scheduling synthetic cannabinoids including JWH-018 and JWH-073).

In any event, the structure of the marijuana exception undermines petitioner's reading of Section 1227(a)(2)(B)(i) as excluding convictions under entire state drug statutes. When Congress sought to bar removal based on convictions involving a particular

substance—marijuana—it did not carve out convictions under entire statutes, but rather enacted a circumstance-specific exception that requires an examination of the conduct that led to conviction. See *In re Davey*, 26 I. & N. Dec. 37, 39 (B.I.A. 2012) (noting that the "exceedingly narrow and fact-specific" language of the marijuana exception "calls for * * * a 'circumstance-specific' inquiry * * * into the nature of the alien's conduct"). This structure ensures that those who commit drug offenses involving substances other than marijuana possessed for personal use remain subject to removal. It is implausible that Congress would have taken this narrow and circumstance-specific approach concerning marijuana and yet carved out state-controlled substances in a manner that would have the effect of also carving out state convictions involving drugs in the heartland of the federal controlled-substance schedules.

Lastly, petitioner is incorrect to suggest (Br. 33-34) that the history of the controlled-substance-removal provision supports his view. Over the years, Congress has modified the controlled-substance removal provision on a number of occasions, generally with the effect of expanding its scope. See, *e.g.,* Narcotics Control Act of 1956 (1956 Act), Pub. L. No. 84-728, § 301, 70 Stat. 575; Act of July 14, 1960, Pub. L. No. 86-648, § 9, 74 Stat. 505. The Anti-Drug Abuse Act of 1986 on which petitioner focuses, was one such broadening amendment, authorizing removal of aliens convicted of violating any law relating to any of the substances on the federal drug schedules. See Pub. L. No. 99-570, Tit. I, Subtit. M, § 1751, 100 Stat. 3207-47 (replacing with reference to "a controlled substance (as defined in section [802 of title 21])" references to

"opium, coca leaves, heroin, marihuana, or any salt derivative or preparation of opium or coca leaves, or isonipecaine or any addiction-forming or addiction-sustaining opiate" and to "narcotic drugs or marihuana"); see also § 9, 74 Stat. 505.[5] The 1986 revision ensured that all convictions for violations of laws relating to any of the substances in the federal schedules are covered—not simply convictions under laws relating to a narrower subset of substances. Nothing in this revision suggests, however, that when a conviction is under a statute governing *both* federally controlled substances and some additional drugs, Congress intended to foreclose an alien's removal. As noted above, the language that Congress enacted indicates Congress intended to permit removal in such cases. And the inclusion of the relevant language in the Anti-Drug Abuse Act of 1986—an enactment that generally toughened the treatment of drug crimes, including through increased penalties and a ban on controlled substance analogs—makes petitioner's

[5] The prior version of the statute permitted removal of any person "who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of, or a conspiracy to violate, 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 opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate." See 1956 Act § 301, 70 Stat. 575.

reading even less plausible. See § 1751, 100 Stat. 3207-47.

3. Cases concerning the categorical approach support application of Section 1227(a)(2)(B)(i) to petitioner

Giving Section 1227(a)(2)(B)(i) the meaning indicated by its language, structure, and purpose is consistent with decisions describing what is often referred to as the "categorical" approach to identifying qualifying convictions. See, *e.g.*, *Descamps* v. *United States*, 133 S. Ct. 2276, 2283 (2013). Statutes that speak of whether convictions meet certain criteria typically call for a "categorical" analysis examining "the statutory definitions of the prior offenses," not "the particular facts underlying those convictions." *Taylor* v. *United States*, 495 U.S. 575, 600 (1990); see *Descamps*, 133 S. Ct. at 2287 (explaining that reference to "conviction" acts "as an on-off switch, directing that a prior crime would qualify as a predicate offense in all cases or in none"). Courts assess whether the conviction—defined by a statutory definition—falls within a category established in federal law. This approach establishes petitioner's removability under Section 1227: An examination of the "statutory definition[]" of petitioner's crime, *id.* at 2283, reveals that petitioner was convicted of violating a "law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i). No examination of "the particular facts underlying [his] conviction[]" is involved. *Descamps*, 133 S. Ct. at 2283 (citation omitted).

When petitioner suggests that the categorical approach requires that "a section-802 substance *must be an element* underlying a State conviction" to allow removal, Pet. Br. 22 (emphasis added), he disregards

the statutory text, as explained above, and substitutes an analysis that the categorical approach does not require. Section 1227(a)(2)(B)(i) requires only that the conviction be under a "law or regulation of a State * * * relating to a" federally controlled substance—not that a federally controlled substance must be an element of each crime under the statute. This Court has applied the categorical approach with attention to what the relevant definition in federal law actually demands. When the definition demands less than a one-to-one correspondence between state law and federal elements, the Court has understood the categorical approach to implement the text, not to trump it. See *James* v. *United States*, 550 U.S. 192, 208 (2007) (explaining that determination whether crime, under categorical approach, "presents a serious potential risk of injury to another" turns on whether "the conduct encompassed by the elements of the offense, *in the ordinary case*," presents that risk, notwithstanding that there may be instances in which crimes defined by elements "do not present" the risk) (emphasis added). The statute here requires only that the conviction was under a law relating to federally controlled substances, and the categorical approach requires nothing more.[6]

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[6] This Court's categorical-approach decisions suggest that even if the statutory text called for each state drug conviction to relate to a federally controlled substance, convictions under Kansas's drug statutes may categorically qualify. This Court has explained that there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside" a definition in federal law in order for convictions under the state statute to fall outside the generic definition. *Moncrieffe*, 133 S. Ct. at 1684-1685 (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The listing of additional drugs on Kansas's controlled-

B. A Conviction Under The Kansas Law Prohibiting Possession of Drug Paraphernalia, In Particular, Is A Removable Offense Under Section 1227(a)(2)(B)(i)

It is particularly clear that criminal possession of drug paraphernalia qualifies as a removable offense. As the Board has explained, tools of drug distribution and use are not limited to any particular substance. Possession of those tools is instead "conduct associated with the drug trade in general," *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009), and therefore relates to both federally controlled drugs and other controlled substances.

1. The conduct prohibited under the instant Kansas drug-paraphernalia statute relates to federally controlled substances because that statute bans possession of tools of the drug trade that facilitate drug

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substance schedules establishes a theoretical possibility that Kansas would apply its statutes to conduct involving substances that are not federally controlled. But even petitioner's own exhaustive search has identified no Kansas paraphernalia prosecutions involving non-federally-controlled substances, and only a single case in which Kansas brought a drug prosecution of any type involving a substance that was not federally controlled. See Pet. Br. 52 (identifying a prosecution for a synthetic cannabinoid, approximately one month before that cannabinoid was federally controlled). This evidence supports the court of appeals' assessment 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." Pet. App. 5 (quoting *Duenas-Alvarez*, 549 U.S. at 193). However, since Section 1227(a)(2)(B)(i), by its express terms, contemplates a less-than-complete alignment between federal and state controlled-substance schedules, this Court need not decide whether—as petitioner asserts—the listing of additional substances on a State's drug schedules, or the fact of a single prosecution, would undermine a categorical match under a provision requiring one.

crimes involving federally controlled substances and other drugs alike. Like the other States that have adopted the Model Drug Paraphernalia Act, Kansas seeks to combat drug distribution and use by combatting the tools that facilitate those crimes. Those tools are defined under Kansas law—drawing from the language of the Model Drug Paraphernalia Act—to include "all equipment and materials of any kind which are used, primarily intended for use, or designed for use" in a variety of drug-related activities, from planting and preparing drugs, to storing and concealing them, to ingesting or otherwise introducing them into the human body. See Kan. Stat. Ann. § 21-5701(f) (Supp. 2013). In keeping with the Model Drug Paraphernalia Act, Kansas makes it unlawful "for any person to use or possess with intent to use" any item of drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance," as defined under Kansas law, "into the human body." *Id.* § 21-5709(b); see *id.* § 21-5701.

Paraphernalia offenses necessarily are ones "relating to" federally controlled substances because paraphernalia offenses "stand in some relation" "have bearing or concern," and "pertain" to or have "association with or connection with" federally controlled drugs. *Trans World Airlines*, 504 U.S. at 383 (citation omitted). Tools designed for use, primarily intended for use, or used in "storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body" a controlled substance, Kansas Stat. Ann. § 21-5701(f) (Supp. 2013), are not limited in their utility to any single substance; rather, they can be used to facilitate the use of, or trade in, a variety of drugs. Thus, as the Board has concluded, drug para-

phernalia crimes are properly regarded as crimes relating to "the drug trade in general"—including the sale and consumption of federally controlled drugs—rather than related only to any single substance. See *Martinez Espinoza*, 25 I. & N. Dec. at 121.

2. Petitioner's argument that paraphernalia offenses are not related to federally controlled substances is mistaken. Petitioner principally objects (Br. 32-33) that Kansas's paraphernalia law, like those of all States adopting the Model Drug Paraphernalia Act, reaches ordinary household objects when they serve as tools used or intended to be used in "storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body" a controlled substance. Kansas Stat. Ann. § 21-5701(f) (Supp. 2013). But this is not an objection to the critical point that tools for drug use or distribution can just as readily be used for federally controlled substances as for state-controlled drugs. Rather, it is an objection to the legislature's choice to treat household objects as items that criminally facilitate the drug trade at all—even when those objects were used for, or intended to be used for, consumption or distribution of federally controlled drugs alone.

Petitioner's belief that household objects repurposed as drug tools are not appropriately classified as tools that facilitate the drug trade is at loggerheads with the conclusions of the state and federal governments that have studied the drug-paraphernalia problem. The drafters of the Model Drug Paraphernalia Act defined paraphernalia broadly—to encompass ordinary objects used or intended for use as tools of drug use or distribution—because the drafters found that narrower laws with more restrictive definitions

had been "too limited in coverage * * * to be very effective." See 1979 Hearing 88 (Model Drug Paraphernalia Act, Prefatory note); see also *id.* at 91 (Art. I cmt.) (explaining broad definition was needed to avoid "major loopholes in the Act's coverage"). Legislators thus deliberately included dual-use household objects devoted to criminal purposes. See *id.* at 92 (explaining that "a spoon, a hypodermic syringe, and a length of surgical tubing" were properly classed as drug paraphernalia when used to melt and inject a drug, even though they were also items with "legitimate uses in the community"); *id.* at 89 (Art. I(9) and (10) (definitions)) (explaining that "balloons, envelopes and other containers used, intended for use, or designed for use" in packaging drugs and "[c]ontainers and other objects used, intended for use, or designed for use" in storing or concealing controlled substances would be covered). These statutes therefore rest on a considered judgment that household objects used or intended for use as tools of drug consumption or distribution *do* facilitate drug crimes. Since the utility of such objects is, as the Board puts it, as tools of the drug trade in general—not limited to any single drug—possession of drug paraphernalia is a crime related to federally controlled substances.

Petitioner also suggests (Br. 32) that state drug-paraphernalia crimes are not violations of laws relating to federally controlled substances because the federal paraphernalia statute targets a narrower range of conduct than the law based on the Model Drug Paraphernalia Act enacted in Kansas. He notes that federal law makes criminal only the distribution and sale of paraphernalia—not simple possession—and contains its own paraphernalia definition based

on, but somewhat narrower than, the definition in the Model Drug Paraphernalia Act. *Ibid.*; see 1986 Hearing 15 (sponsor explaining that federal paraphernalia definition was "drafted closely after the model Drug Paraphernalia Act").

Those differences are not relevant under Section 1227(a)(2)(B)(i), however, because that provision makes removable an alien "convicted of a violation of * * * *any* law or regulation of a State * * * relating to a controlled substance," 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added), without requiring that the conduct proscribed also be criminal under federal law. See *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). That is unsurprising, for limits on the scope of federal prohibitions can reflect resource constraints and federalism considerations. See 1979 Hearing 87-88 (statement of Department of Justice official that paraphernalia was appropriately addressed through state and local legislation in light of limited federal enforcement resources); 1986 Hearing 16 (statement of federal act's sponsor that state drug-paraphernalia laws "have been quite effective" but that federal law was necessary because "the success of that legislation on the State level has wrought a Federal problem, the Federal problem being that paraphernalia dealers who can no longer utilize intrastate commerce are now turning to interstate commerce"). In any event, petitioner did not raise in the court of appeals or in his petition for certiorari a challenge to the use of paraphernalia-possession convictions to trigger removability as a general matter; instead, he asserted only that

removal turns on a nexus between state paraphernalia-possession convictions and federally scheduled drugs. See Pet. App. 9 (noting that petitioner had not contended that state paraphernalia offenses, as a general matter, do not relate to controlled substances); Pet. i (raising question concerning whether conviction records must establish link between paraphernalia and federally controlled substance).

C. Any Ambiguity Should Be Resolved In Favor Of The Board's Reasonable Interpretation

For the reasons set out above, Section 1227(a)(2)(B)(i), properly read, provides for the removal of aliens who violate drug-paraphernalia laws in States that outlaw both federally controlled drugs and a small number of additional substances. To the extent that the Court finds that section ambiguous, however, deference is warranted under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 845 (1984), to the Board's reasonable interpretation.

1. Principles of Chevron *deference apply*

"Principles of *Chevron* deference apply when the BIA interprets the immigration laws." *Scialabba* v. *Cuellar de Osorio*, 134 S. Ct. 2191, 2203 (2014) (plurality opinion); *id.* at 2214-2216 (Roberts, C.J., concurring in the judgment) (deferring to Board under *Chevron*); see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999); see also *Negusie* v. *Holder*, 555 U.S. 511, 516-517 (2009). Under *Chevron*, courts defer to the Board's interpretation of the INA unless the interpretation is "clearly contrary to the plain and sensible meaning of the statute," *Mota* v. *Mukasey*, 543 F.3d 1165, 1167 (9th Cir. 2008), such that it is "not one that

Congress would have sanctioned," *Chevron*, 467 U.S. at 845 (citation omitted).

Petitioner seeks (Br. 35) to carve out an exception to deference for cases in which the Board uses the "categorical approach" to determine if a state crime meets a federal statutory definition. There is no basis for such an exception. This case turns on the construction of a term in the INA—in particular, the phrase "a violation of * * * any law * * * of a State * * * relating to a controlled substance (as defined in section 802 of title 21)." 8 U.S.C. 1227(a)(2)(B)(i). Because this term falls within a statute that the Attorney General is entrusted with administering, and for which the Attorney General has vested interpretive authority in the Board, the prerequisite for deference to the Board exists here. See *Scialabba*, 134 S. Ct. at 2203 (plurality opinion); *Aguirre-Aguirre*, 526 U.S. at 424-426. That this is a case involving the categorical approach—a method for assessing whether a state crime *meets* a federal definition—does not settle the appropriate construction of the federal definition itself.

Petitioner offers no reason why deference to the Board's construction of a term in the INA should be altered by use of the categorical approach, but he suggests such an exception is implicit in this Court's decisions. See Pet. Br. 35. Petitioner is mistaken. Four of the decisions that petitioner cites as declining to defer to a Board interpretation did not turn on the meaning of a term in the INA, but rather on the meaning of a term in the criminal code that the INA cross-referenced. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (construing "crime of violence" in 18 U.S.C. 16, "a criminal statute"); *Carachuri-Rosendo*,

560 U.S. at 581 ("[T]he critical language appears in a criminal statute, 18 U.S.C. § 924(c)(2)."); *Moncrieffe*, 133 S. Ct. at 1683 (interpreting same term); *Lopez* v. *Gonzales*, 549 U.S. 47, 50 (2006) ("The question raised is whether conduct made a felony under state law but a misdemeanor under the Controlled Substances Act is a 'felony punishable under the Controlled Substances Act.' 18 U.S.C. 924(c)(2)"). While the Board is entitled to deference concerning terms in the INA, it is not entitled to deference concerning the meaning of criminal statutes. See *Abramski*, 134 S. Ct. at 2274 ("[C]riminal laws are for courts, not for the Government, to construe."); *Leocal*, 543 U.S. at 384 n.8 (noting criminal provisions must carry same meaning in criminal and noncriminal contexts).

The remaining decisions of this Court that petitioner cites (Br. 35) simply adopted the government's reading of an INA provision, after briefing in which the government argued principally that its view was unambiguously correct. See *Nijhawan* v. *Holder*, 557 U.S. 29, 32 (2009); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 185 (2007); *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1171-1172 (2012).[7] Those decisions did not suggest that this Court found the relevant provisions ambiguous. And they did not qualify the Court's past holdings that the Board is entitled to deference in construing the INA. Finally, petitioner is mistaken in suggesting (Br. 35) that the Board itself has "recognized" the limitation he asserts. The Board has

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[7] In *Kawashima* and *Duenas-Alvarez,* the Board had not yet issued a precedential construction of the provision at issue that resolved the question in dispute. See Gov't Br. at 43 n.19, *Kawashima*, *supra* (No. 10-577); Gov't Br. at 19 n.12, *Duenas-Alvarez*, *supra* (No. 05-1629).

acknowledged that it is bound by *Descamps* and other federal precedent concerning the method for determining whether a criminal statute is divisible, but it has not suggested that it lacks the authority to construe ambiguous terms in the INA in categorical-approach cases. See *In re Chairez-Castrejon*, 26 I. & N. Dec. 349 (B.I.A. 2014).

2. The Board reasonably concluded that state drug-paraphernalia crimes are removable offenses

To the extent that the scope of the controlled-substance-removal provision is ambiguous, the Board's reasonable conclusion that drug-paraphernalia crimes trigger removal warrants deference. In a precedential decision, the Board reasonably concluded based on statutory text, precedent, and purpose that, at a minimum, state drug-paraphernalia statutes fall within the language of the controlled-substance removal provision because such statutes criminalize tools usable with multiple drugs. See *Martinez Espinoza*, 25 I. & N. Dec. at 119-121 (interpreting identical language in an admissibility provision, 8 U.S.C. 1182(a)(2)(A)(i)(II)).

Petitioner contends that the Board's approach reflects an unreasonable reading of the statute, because, he asserts, the Board "interpret[s] the same text to apply one way for possession and distribution offenses and another for paraphernalia offenses." Pet. Br. 37. But as the court of appeals' decision reflects, see Pet. App. 11, there is some uncertainty regarding the Board's current understanding of possession and distribution crimes. The Board held in 1965 that a California conviction for offering to sell a controlled substance could not lead to removal unless it was established that the drug involved in the crime was a

"narcotic" under federal law. *In re Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A.). But "that case involved pre-1970 controlled substance and INA statutes," Pet. App. 11, and "preceded by decades the analysis and reasoning of cases" construing the term "relating to," *In re Huerta-Flores*, 2010 WL 5808899, at *4 (B.I.A. Aug. 27, 2010) (unpublished), review granted and remanded by *Huerta-Flores* v. *Holder*, No. 10-73389, 2014 WL 3361435 (9th Cir. July 10, 2014) (rejecting BIA's holding in *Huerta-Flores* under court of appeals' precedent). Recent decisions signal uncertainty concerning the precedential effect of that 1965 case. *Ibid.* Some unpublished decisions have expressed the view that *Paulus* remains authoritative in the context of distribution and possession convictions, see, *e.g.*, *In re Torres Sotelo*, 2007 WL 2074451 (B.I.A. June 18, 2007), and a recent published decision assumed the applicability of that framework, see *In re Ferreira*, 26 I. & N. Dec. 415, 422 (B.I.A. 2014), motion for reconsideration filed on October 22, 2014, albeit without considering the argument that the statutory provision requires only that the state law or regulation be one "relating to" a federally controlled substance.[8] But

[8] DHS filed a motion for reconsideration in *Ferreira*, seeking, *inter alia*, clarification of the Board's position with respect to whether a state law prohibiting trafficking in controlled substances qualifies as a "law * * * of a State * * * relating to a controlled substance (as defined in section 802 of title 21)," 8 U.S.C. 1227(a)(2)(B)(i), when it proscribes both trafficking in numerous drugs that are federally controlled and trafficking in a small number of additional drugs. See DHS Mot. to Reconsi*der, In re Ferreira*, *supra* (filed Oct. 22, 2014). The respondent submitted an opposition contending that reconsideration in his case is unwarranted because he is no longer removable under any construction of the controlled-substance removal ground, as a result of a state

another unpublished decision found an alien removable for a sale of an unspecified controlled substance in a State that criminalized several non-federally controlled substances. *Huerta-Flores*, 2010 WL 5808899. The decision in that case considered *Paulus* and found it inapplicable to distribution and possession crimes in States whose drug schedules were virtually identical to those in federal law. *Id.* at *4. While that decision is not precedential, as the court of appeals noted, it suggests that it is not settled within the Board whether *Paulus* governs with respect to distribution and possession offenses in States whose schedules largely mirror those in federal law.[9]

In any event, petitioner misunderstands the Board's decision in *Martinez Espinoza*. The Board

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court decision vacating his underlying drug conviction. Opp. to DHS Mot. to Reconsider, *In re Ferreira*, *supra* (filed Nov. 3, 2014). The Board has not yet acted on the motion for reconsideration.

[9] Because of this uncertainty, were the Court to find the statutory text ambiguous, and to determine that the case cannot be affirmed based on the reasoning of the Board specifically with respect to paraphernalia offenses, the appropriate course would be to remand the case to the Board to clarify whether, in its view, convictions for violations of state drug laws generally qualify as laws "relating to a controlled substance (as defined in section 802 of title 21)," 8 U.S.C. 1227(a)(2)(B)(i), when state law proscribes possession or trafficking of numerous drugs that are controlled substances as defined under federal law and also proscribes the possession or trafficking of a small number of additional drugs. That is because when the manner in which an expert agency would resolve an interpretive question is not clear, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.'" *Negusie*, 555 U.S. at 523 (quoting *Gonzales* v. *Thomas*, 547 U.S. 183, 186 (2006) (per curiam)).

did not give the same text different meanings. Rather, it concluded that even if a conviction must itself be one "relating to" federally controlled substances to trigger removal, paraphernalia crimes categorically meet that standard, although possession crimes in States that control some non-federally controlled drugs do not. See *Martinez Espinoza*, 25 I. & N. Dec. at 121. This distinction, which has longstanding roots in the Board's precedent, is a reasonable one. See *id.* at 121-122 (discussing *In re Martinez-Gomez*, 14 I. & N. Dec. 104, 105 (B.I.A. 1972); *In re T-C-*, 7 I. & N. Dec. 100, 102 (B.I.A. 1956)). As noted above, paraphernalia statutes target tools that facilitate drug use and distribution—items that, by their nature, can be used with multiple substances, whether federally controlled or state controlled. See *id.* at 121 (noting that paraphernalia statutes proscribe "conduct associated with the drug trade in general," not conduct linked only to a "*particular* drug"). Indeed, paraphernalia merchants may facilitate drug use and distribution by selling such tools without having in mind any particular illegal substance at all. See 1979 Hearing 92 (Model Drug Paraphernalia Act, Art. I cmt.) (noting act has a "generalized" intent element, requiring defendant to "intend[] [an object] for use with illicit drugs" but not "pinpoint[] a specific time and place of future use"). In this way, paraphernalia crimes relate to the use and distribution of multiple controlled substances in a way that cannot be said of possession of non-federally controlled drugs themselves.

Petitioner's other attack on the Board's exercise of expert interpretive judgment is similarly refuted by the reasoned response that the Board offered. Peti-

tioner asserts (Br. 38-42) that it is unreasonable to classify drug-paraphernalia offenses as relating to federally controlled substances because doing so "would remove noncitizens for low-level offenses." Pet. Br. 38. But as the Board explained, Section 1227(a)(2)(B)(i) expressly contemplates the removal of aliens for "low-level" drug offenses. *Martinez Espinoza*, 25 I. & N. Dec. at 120. It makes removable "[*a*]*ny* alien who at *any* time after admission has been 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 those whose conduct involved personal use quantities of marijuana. 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added). The exception for one particular lower-level drug crime—"a single offense involving possession for one's own use of 30 grams or less of marijuana"—reinforces the conclusion that, absent a specific exception, minor drug crimes render an alien removable. See *Martinez Espinoza*, 25 I. & N. Dec. at 120; *Hillman*, 133 S. Ct. at 1953 ("[W]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.") (citation omitted). In any event, petitioner's legal claim in this case has not been that paraphernalia crimes are too minor to trigger removal, but rather that removal is barred only for paraphernalia convictions in certain States whose drug laws extend to some non-federally controlled substances. See Pet. App. 9; Pet i. That proposed carve-out is not based on crime severity. At a minimum, the Board acted reasonably in rejecting petitioner's statutory construction.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 8 U.S.C. 1101(a) provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18);

* * * * *

2. 8 U.S.C. 1182 provides in pertinent part:

Inadmissible aliens

(a) Classes of aliens ineligible for visas or admission

Except as otherwise provided in this chapter, aliens who are inadmissible under the following paragraphs are ineligible to receive visas and ineligible to be admitted to the United States:

* * * * *

(2) Criminal and related grounds

(A) Conviction of certain crimes

(i) In general

* * * * *

[A]ny alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of—

* * * * *

(II) 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),

is inadmissible.

* * * * *

3. 8 U.S.C. 1227(a) provides in pertinent part:

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.

* * * * *

4. 8 U.S.C. 1229b(a) provides:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

5. 21 U.S.C. 811 provides in pertinent part:

Authority and criteria for classification of substances

* * * * *

(c) Factors determinative of control or removal from schedules

In making any finding under subsection (a) of this section or under subsection (b) of section 812 of this title, the Attorney General shall consider the following factors with respect to each drug or other substance proposed to be controlled or removed from the schedules:

(1) Its actual or relative potential for abuse.

(2) Scientific evidence of its pharmacological effect, if known.

(3) The state of current scientific knowledge regarding the drug or other substance.

(4) Its history and current pattern of abuse.

(5) The scope, duration, and significance of abuse.

(6) What, if any, risk there is to the public health.

(7) Its psychic or physiological dependence liability.

(8) Whether the substance is an immediate precursor of a substance already controlled under this subchapter.

* * * * *

6. 21 U.S.C. 863 provides:

Drug paraphernalia

(a) In general

It is unlawful for any person—

(1) to sell or offer for sale drug paraphernalia;

(2) to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or

(3) to import or export drug paraphernalia.

(b) Penalties

Anyone convicted of an offense under subsection (a) of this section shall be imprisoned for not more than three years and fined under title 18.

(c) Seizure and forfeiture

Any drug paraphernalia involved in any violation of subsection (a) of this section shall be subject to seizure and forfeiture upon the conviction of a person for such violation. Any such paraphernalia shall be delivered to the Administrator of General Services, General Services Administration, who may order such paraphernalia destroyed or may authorize its use for law enforcement or educational purposes by Federal, State, or local authorities.

(d) "Drug paraphernalia" defined

The term "drug paraphernalia" means any equipment, product, or material of any kind which is primarily intended or designed for use in manufacturing, compounding, converting, concealing, producing, processing, preparing, injecting, ingesting, inhaling, or

otherwise introducing into the human body a controlled substance, possession of which is unlawful under this subchapter. It includes items primarily intended or designed for use in ingesting, inhaling, or otherwise introducing marijuana[1], cocaine, hashish, hashish oil, PCP, methamphetamine, or amphetamines into the human body, such as—

(1) metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(2) water pipes;

(3) carburetion tubes and devices;

(4) smoking and carburetion masks;

(5) roach clips: meaning objects used to hold burning material, such as a marihuana cigarette, that has become too small or too short to be held in the hand;

(6) miniature spoons with level capacities of one-tenth cubic centimeter or less;

(7) chamber pipes;

(8) carburetor pipes;

(9) electric pipes;

(10) air-driven pipes;

(11) chillums;

(12) bongs;

(13) ice pipes or chillers;

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[1] So in original. Probably should be "marihuana."

(14) wired cigarette papers; or

(15) cocaine freebase kits.

(e) Matters considered in determination of what constitutes drug paraphernalia

In determining whether an item constitutes drug paraphernalia, in addition to all other logically relevant factors, the following may be considered:

(1) instructions, oral or written, provided with the item concerning its use;

(2) descriptive materials accompanying the item which explain or depict its use;

(3) national and local advertising concerning its use;

(4) the manner in which the item is displayed for sale;

(5) whether the owner, or anyone in control of the item, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;

(6) direct or circumstantial evidence of the ratio of sales of the item(s) to the total sales of the business enterprise;

(7) the existence and scope of legitimate uses of the item in the community; and

(8) expert testimony concerning its use.

(f) Exemptions

This section shall not apply to—

(1) any person authorized by local, State, or Federal law to manufacture, possess, or distribute such items; or

(2) any item that, in the normal lawful course of business, is imported, exported, transported, or sold through the mail or by any other means, and traditionally intended for use with tobacco products, including any pipe, paper, or accessory.

7. Kansas Stat. Ann. § 21-5701 (Supp. 2013) provides in pertinent part:

Definitions. As used in K.S.A. 2013 Supp. 21-5701 through 21-5717, and amendments thereto: (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. "Drug paraphernalia" shall include, but is not limited to:

(1) Kits used or intended for use in planting, propagating, cultivating, growing or harvesting any

species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) kits used or intended for use in manufacturing, compounding, converting, producing, processing or preparing controlled substances;

(3) isomerization devices used or intended for use in increasing the potency of any species of plant which is a controlled substance;

(4) testing equipment used or intended for use in identifying or in analyzing the strength, effectiveness or purity of controlled substances;

(5) scales and balances used or intended for use in weighing or measuring controlled substances;

(6) diluents and adulterants, including, but not limited to, quinine hydrochloride, mannitol, mannite, dextrose and lactose, which are used or intended for use in cutting controlled substances;

(7) separation gins and sifters used or intended for use in removing twigs and seeds from or otherwise cleaning or refining marijuana;

(8) blenders, bowls, containers, spoons and mixing devices used or intended for use in compounding controlled substances;

(9) capsules, balloons, envelopes, bags and other containers used or intended for use in packaging small quantities of controlled substances;

(10) containers and other objects used or intended for use in storing or concealing controlled substances;

(11) hypodermic syringes, needles and other objects used or intended for use in parenterally injecting controlled substances into the human body;

(12) objects used or primarily intended or designed for use in ingesting, inhaling or otherwise introducing marijuana, cocaine, hashish, hashish oil, phencyclidine (PCP), methamphetamine or amphetamine into the human body, such as:

(A) Metal, wooden, acrylic, glass, stone, plastic or ceramic pipes with or without screens, permanent screens, hashish heads or punctured metal bowls;

(B) water pipes, bongs or smoking pipes designed to draw smoke through water or another cooling device;

(C) carburetion pipes, glass or other heat resistant tubes or any other device used or intended to be used, designed to be used to cause vaporization of a controlled substance for inhalation;

(D) smoking and carburetion masks;

(E) roach clips, objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(F) miniature cocaine spoons and cocaine vials;

(G) chamber smoking pipes;

(H) carburetor smoking pipes;

(I) electric smoking pipes;

(J) air-driven smoking pipes;

(K) chillums;

(L) bongs;

(M) ice pipes or chillers;

(N) any smoking pipe manufactured to disguise its intended purpose;

(O) wired cigarette papers; or

(P) cocaine freebase kits.

"Drug paraphernalia" shall not include any products, chemicals or materials described in subsection (a) of K.S.A. 2013 Supp. 21-5709, and amendments thereto.

* * * * *

8. Kansas Stat. Ann. § 21-5709 (Supp. 2013) provides in pertinent part:

Unlawful possession of certain drug precursors and drug paraphernalia.

* * * * *

(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.

* * * * *

9. Kansas Stat. Ann. § 21-5711 (Supp. 2013) provides:

Factors to consider when determining what is drug paraphernalia. (a) In determining whether an object is drug paraphernalia, a court or other authority shall consider, in addition to all other logically relevant factors, the following:

(1) Statements by an owner or person in control of the object concerning its use;

(2) prior convictions, if any, of an owner or person in control of the object, under any state or federal law relating to any controlled substance;

(3) the proximity of the object, in time and space, to a direct violation of K.S.A. 2013 Supp. 21-5701 through 21-5717, and amendments thereto;

(4) the proximity of the object to controlled substances;

(5) the existence of any residue of controlled substances on the object;

(6) direct or circumstantial evidence of the intent of an owner or person in control of the object, to deliver it to a person the owner or person in control of the object knows, or should reasonably know, intends to use the object to facilitate a violation of K.S.A. 2013 Supp. 21-5701 through 21-5717, and amendments thereto. The innocence of an owner or person in control of the object as to a direct violation of K.S.A. 2013 Supp. 21-5701 through 21-5717, and amendments thereto, shall not prevent a finding that the object is intended for use as drug paraphernalia;

(7) oral or written instructions provided with the object concerning its use;

(8) descriptive materials accompanying the object which explain or depict its use;

(9) national and local advertising concerning the object's use;

(10) the manner in which the object is displayed for sale;

(11) whether the owner or person in control of the object is a legitimate supplier of similar or related items to the community, such as a distributor or dealer of tobacco products;

(12) direct or circumstantial evidence of the ratio of sales of the object or objects to the total sales of the business enterprise;

(13) the existence and scope of legitimate uses for the object in the community;

(14) expert testimony concerning the object's use;

(15) any evidence that alleged paraphernalia can or has been used to store a controlled substance or to introduce a controlled substance into the human body as opposed to any legitimate use for the alleged paraphernalia; or

(16) advertising of the item in magazines or other means which specifically glorify, encourage or espouse the illegal use, manufacture, distribution or cultivation of controlled substances.

(b) The fact that an item has not yet been used or did not contain a controlled substance at the time of the seizure is not a defense to a charge that the item was possessed with the intention for use as drug paraphernalia.

10. Kansas Stat. Ann. § 65-4102 (Supp. 2013) provides in pertinent part:

Board of pharmacy to administer act; authority to control; report to speaker of house and president of senate on substances proposed for scheduling, rescheduling or deletion; scheduling of the controlled substance analog.

* * * * *

(b) Annually, the board shall submit to the speaker of the house of representatives and the president of the senate a report on substances proposed by the board for scheduling, rescheduling or deletion by the legislature with respect to any one of the schedules as set forth in this act, and reasons for the proposal shall be submitted by the board therewith. In making a determination regarding the proposal to schedule, reschedule or delete a substance, the board shall consider the following:

(1) The actual or relative potential for abuse;

(2) the scientific evidence of its pharmacological effect, if known;

(3) the state of current scientific knowledge regarding the substance;

(4) the history and current pattern of abuse;

(5) the scope, duration and significance of abuse;

(6) the risk to the public health;

(7) the potential of the substance to produce psychological or physiological dependence liability; and

(8) whether the substance is an immediate precursor of a substance already controlled under this article.

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