No. 13-1034

In the Supreme Court of the United States

MOONES MELLOULI,
Petitioner,
v.

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

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

REPLY BRIEF FOR THE PETITIONER

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This Court should resolve the intractable 4-2 circuit split on the construction of 8 U.S.C. § 1227(a)(2)(B)(i), which is illustrated by the Third Circuit's *en banc* decision and the Eighth Circuit's decision in this case. The government's two grounds of opposition to certiorari are not persuasive. First, this Court should not assume that States, like Kansas, will not enforce their drug laws as enacted by their legislatures. Deportation for drug paraphernalia not related to a federally listed drug is a real possibility, not just speculation. Second, the Board of Immigration Appeals (BIA) is not entitled to deference in interpreting 8 U.S.C. § 1227(a)(2)(B)(i) because the government has never shown how the statute is ambiguous.

ARGUMENT

I. The circuit conflict is intractable and the question of Section 1227(a)(2)(B)(i) is ripe for review.

The Third Circuit held by a 12-2 vote in *Rojas v. Attorney General*, 728 F.3d 203 (3d Cir. 2013) (en banc) that, to establish removability, the government must show that a state paraphernalia conviction involved a federally controlled substance. In contrast, the Eighth Circuit held that the BIA reasonably concluded that "any drug paraphernalia conviction" – including Mellouli's conviction for possessing a sock – categorically violated a law relating to a controlled substance even absent evidence from the government

that the drug involved was federally controlled.[1] *See* Pet. App. 10. *Rojas* expressly declined to follow the Eighth Circuit's approach, *see* 728 F.3d at 219 n.18, and the government has acknowledged the "disagreement among the courts of appeal," *see* BIO 10, *Madrigal-Barcenas v. Holder*, No. 13-697 (filed Dec. 6,

[1] The government submitted the original complaint with the probable cause affidavit, the amended complaint, plea agreement on the amended charge, sentencing document, but no plea colloquy. A.R. 150-58. The government asserts that Petitioner admitted he possessed Adderall. BIO 2. This statement misconstrues the record. The government relies on double hearsay in a probable cause affidavit tied to a charge to which Petitioner did not plead. A.R. 130, 150-52. In the affidavit, a sergeant recounts the alleged contents of police reports. *Id.* Petitioner pled guilty only to the amended possession of paraphernalia complaint with no reference to the substance involved. Consequently, neither the statements of the sergeant nor those of the unnamed officers were tested for reliability. *See Crawford v. Washington*, 541 U.S. 36 (2004). Likewise, any constitutional infirmities associated with the alleged statement remain unknown. *See Miranda v. Arizona*, 384 U.S. 436 (1966). This Court has made clear that even where a court may consider documents outside the record of conviction, those documents "must meet a 'clear and convincing' standard" and "must 'be tied to the specific counts covered by the conviction.'" *Nijhawan v. Holder*, 557 U.S. 29, 42 (2009) (citing with approval the holdings in *Alaka v. Att'y Gen.*, 456 F.3d 88, 107 (3d Cir. 2006), that the "loss amount must be tethered to [the] offense of conviction . . . [not based] on acquitted or dismissed counts," and *Knutsen v. Gonzales*, 429 F.3d 733, 739–740 (7th Cir. 2005), for the same). The contents of the probable cause affidavit fail both requirements. The alleged admission is not a proven fact. The record establishes only that Petitioner possessed a sock and that the sock was associated with a controlled substance under Kansas law.

2013).[2] The conflict is not mere "tension," as the government would have it now. *Compare* BIO 13 *with* BIO 10, *Madrigal-Barcenas*, No. 13-697. The decisions in Petitioner's case and *Rojas* represent contradictory interpretations of the same statute involving the same set of circumstances. Consequently, a noncitizen can be ordered removed in one circuit based on evidence that would be insufficient for removal in another.[3] The circuit split is intractable and intolerable.

The Third Circuit is unlikely to resolve the conflict by reversing course in a new *en banc* decision and adopting the government's "realistic probability" argument as the government suggests. Indeed, the full court rejected the notion that Pennsylvania's state schedule was sufficiently "close to" the federal schedule to obviate any inquiry into whether the substance itself is federally controlled—an argument akin to the government's assertion that there is no realistic probability of prosecution for paraphernalia tied to a substance controlled only by the state. *Rojas*, 728 F.3d at 213, 213 n.8.

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[2] The Court has scheduled the petition in *Madrigal-Barcenas*, No. 13-697, for conference on May 29, 2014. If the Court grants certiorari in *Madrigal-Barcenas*, Petitioner requests that the Court defer the disposition of this Petition until *Madrigal-Barcenas* is resolved on the merits.

[3] Because eligibility for cancellation of removal also turns on a "conviction" for a controlled substance, 8 U.S.C. § 1229b(b)(1)(C), a conviction for paraphernalia possession may preclude eligibility for relief in one circuit and not another. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685, 1685 n.4 (2013).

The Eighth Circuit's decision also conflicts with the Seventh Circuit. *Desai v. Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008), held that the court's "task is simply to examine whether the state law is one relating to a federal controlled substance," not to determine whether the state law addresses conduct associated with the drug trade in general. *Desai* rejected the claim that the "related to" language could expand the list of controlled substances beyond those listed in the Controlled Substances Act (CSA) but agreed that the term could expand the types of *conduct* justifying removal. *Id.* Based on *Desai*, a state's ban on distributing "look-alike" substances could be conduct "related to" a federally controlled substance. But a state's criminalization of non-federally controlled substances would have no effect on immigration status when a state-banned substance is not a CSA controlled substance. *Id.* Echoing *Lopez v. Gonzales*, 549 U.S. 47 (2006), *Desai* emphasized that Congress did "not give states free rein to define their criminal laws in a manner that would allow them to effectively usurp the federal government's authority to determine who is permitted to enter and live in this country." 520 F.3d at 766.

The government appears to recognize that *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118, 122 (B.I.A. 2009), and *Matter of Paulus*, 11 I. & N. Dec. 274 (B.I.A. 1965), conflict, BIO 14, but asks the Court to delay review so that the Board can decide whether to resolve the conflict. The government offers no reason to suspect that the BIA would repudiate its position, and in the eight months since *Rojas*'s *en banc* decision the Board has not changed its view. *See In re Alejandro*

Diego-Carreras, A070 119 531, 2014 WL 347685 (B.I.A. Jan. 9, 2014).

Courts of appeals have disagreed over whether a drug conviction must relate to a federally controlled substance to support removability. Tens of thousands of noncitizens are removed annually for offenses related to controlled substances. There is no good reason to delay resolution of this intractable disagreement. The conflict over interpretation of an important statutory provision governing this nation's immigration laws is ripe.

II. The realistic probability analysis does not apply.

The government relies on this Court's statement in *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), that a statute is categorically overbroad only when there is a "realistic probability" it would be applied to conduct not reached by the Immigration and Nationality Act (INA). BIO 9. It then asserts that Section 1227(a)(2)(B)(i) does not require proof of a federally controlled substance for a paraphernalia offense because there is no realistic probability that an individual would be prosecuted for a non-federally controlled substance. BIO 9-12. This is backwards under the categorical approach and inappropriate as applied to Kansas law.

A. This Court must first interpret the scope of the INA's controlled substance provision—only then can the agency determine whether the Kansas paraphernalia statute is overbroad.

Section 1227(a)(2)(B)(i) refers to a conviction for a violation of state law. The categorical approach requires comparing a state crime of conviction to the relevant INA provision to determine if the minimum conduct necessary for conviction under the state statute matches the requirements of the federal provision. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684-85 (2013). To perform this matching analysis, a court must know the requirements of the federal provision. The circuit courts, however, are split on what requirements are in Section 1227(a)(2)(B)(i), and that is the question before this Court.

Once the federal requirements are identified, an agency fact finder can then identify the crime of conviction and determine whether that crime encompasses conduct not reached by the federal provision—an inquiry that involves asking whether there is a realistic probability that the state statute would reach conduct outside the scope of the federal one. *See id.* But the question of whether there is a realistic probability of a state statute's overbreadth has no place in determining the requirements of the INA provision.

Employing the same flawed analysis the government asserts here, the Eighth Circuit determined that the controlled substance ground of removability in the INA does not require the conviction to be tied to a federally controlled substance because

there was no realistic probability that a state conviction would not be tied to a federal substance. *Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013). Under this interpretation, a Kansas paraphernalia possession conviction is a categorical match with the INA regardless of the substance involved and it is irrelevant whether the Kansas statute is divisible by substance and whether the record of conviction established that substance.

To resolve the circuit split, the Court must first determine what the text of Section 1227(a)(2)(B)(i) requires—an analysis in which the realistic probability of a state statute's reach plays no part. Only once the scope of the INA provision is clear can the agency determine whether the minimum conduct necessary for Petitioner's crime of conviction is a categorical match with the INA. That determination requires analysis of the elements of the Kansas law and its related divisibility—questions which the Eighth Circuit eluded due to its atextual reading of the statute and its improper use of this Court's "realistic probability" qualification.

B. That a state would enforce its laws as written requires no legal imagination.

The government agrees that seven substances appeared on Kansas's list of controlled substances that did not appear on the federal government's list at the time of Petitioner's conviction. BIO 10.[4] Thus Kansas'

[4] The government incorrectly treats federally listed chemicals as synonymous with federally controlled substances to dismiss the divergence between the Kansas and federal schedules in their treatment of pseudoephedrine and ephedrine. *Compare* 21 U.S.C.

list of controlled substances was broader than the federal schedule when Petitioner was convicted of a Kansas paraphernalia offense.

Where a state statute explicitly proscribes conduct that falls outside the scope of the INA, no "legal imagination" is required to demonstrate the statute's overbreadth. *Cf. Moncrieffe*, 133 S. Ct. at 1684-85. Numerous circuit courts agree that the realistic probability question is inappropriate in this circumstance. *See, e.g.*, *Ramos v. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) ("*Duenas–Alvarez* does not require this showing when the statutory language itself . . . creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition."); *Jean-Louis v. Att'y Gen.*, 582 F.3d 462, 481 (3d Cir. 2009) (finding no "application of 'legal imagination' to the Pennsylvania simple assault statute" necessary because the "elements . . . are clear, and the ability of the government to prosecute a defendant . . . is not disputed."); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) ("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' . . . is required to hold that a realistic probability exists that the state will apply its statute to

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§ 802(6) ("controlled substance") *with* 21 U.S.C. § 802(33) ("listed chemical"). Congress used these terms with precision in the INA. *Compare* 8 U.S.C. § 1182(a)(2)(C)(i) (illicit traffickers in "any controlled substance or in any listed chemical" as inadmissible) *with* 8 U.S.C. § 1227(a)(2)(B)(i) (those convicted of a law relating to a "controlled substance" as removable). Kansas prosecutes pseudoephedrine possession, a listed chemical but not a CSA controlled substance. *See State v. Snellings*, 273 P.3d 739 (Kan. 2012); *State v. Campbell*, 106 P.3d 1129 (Kan. 2005).

conduct that falls outside the generic definition of the crime." (citation omitted)); *Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 572-73 (6th Cir. 2007) (rejecting application of *Duenas-Alvarez* because the statute's "clear language . . . expressly and unequivocally" included conduct outside the generic definition's scope).

Kansas prosecutors, judges, and law enforcement associations hardly ignore additions to the state schedules of substances. *See* Michael O'Neal, *2008 Legislative Changes of Interest to County and District Attorneys*, 5 The Kan. Prosecutor 1, 6 (Summer/Fall 2008);[5] *Adding Certain Hallucinogenics as Controlled Substances*, 44 The Verdict 9-10 (Summer 2008);[6] Bill Reid, *Two Additions to List of Schedule I Substances*, 10 KCJIS News 1, 5 (May 2008) (discussing recent addition of jimson weed to the Kansas schedules).[7] The government urges the Court to assume Kansas will not enforce its laws – even recent additions including

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[5] Available at http://www.kcdaa.org/Resources/Documents/KSProsecutor-Fall08.pdf.

[6] Available at http://www.kmja.org/wp-content/uploads/2010/09/VerdictSummer2008.pdf.

[7] Available at http://www.accesskansas.org/kbi/info/docs/pdf/KN200805.pdf. Other states that have added non-federally listed salvia to their controlled substance schedules prosecute its possession. *See McCullough v. State,* 970 N.E.2d 795 *on reh'g,* 979 N.E.2d 1070 (Ind. Ct. App. 2012) *trans. denied,* 984 N.E.2d 221 (Ind. 2013); Joe Blumberg, *Salvia Case Tests Court System*, News-Press & Gazette, May 18, 2012, http://www.newspressnow.com/news/article_2556dc51-4ae8-5dbe-b685-37d109fb3d51.html?mode=jqm (Missouri).

Jimson weed – unless the noncitizen can show through prosecutions for substances controlled only by the state that Kansas law really does apply to the conduct to which it says it applies. Given the high percentage of charges resolved through plea agreements and the resulting limitations in searchable databases of cases, this requirement is not only misplaced but also unfair. *See Missouri v. Frye*, 132 S. Ct. 1399, 1402 (2012) (stating that 97% of federal convictions and 94% of state convictions are the result of guilty pleas).

III. The government's reliance on *Chevron* is improper because Section 1227(a)(2)(B)(i) is unambiguous.

A dispute over a statute's proper interpretation does not establish the ambiguity necessary to invoke *Chevron* deference. *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 n.9 (1984) ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *see also Bautista v. Att'y Gen.*, 744 F.3d 54, 58 (3d Cir. 2012) ("[N]ot every difficult question of statutory construction amounts to a statutory gap for a federal agency to fill . . . To conclude otherwise would be to find that every time there is a disagreement about statutory construction, we accord deference to agencies."). Rather, ambiguity occurs when Congress failed to speak directly on the disputed question. Though the government states that the Third Circuit did not "squarely address an argument of deference under *Chevron*," BIO 17, that court's opinion indicates otherwise. The Third Circuit considered whether to review the BIA's unpublished decision *de*

novo or under *Chevron* and determined that it need not decide the question because the result was the same under either standard, relying on a textual analysis of Section 1227(a)(2)(B)(i). *Rojas*, 728 F.3d at 207-14. The Third Circuit's reading of the statute is the only one consistent with the statutory text and requires the government to "show that the conviction for which it seeks to remove a foreign national involved or was related to a federally controlled substance." *Id.* at 205; *see also id.* at 209 (employing the rule of the last antecedent and rejecting a result that "would violate the cardinal principle that we do not cripple statutes by rendering words therein superfluous").

Congress, by importing no fewer than five schedules of substances into Section 1227, "pegged the immigration statutes to the classifications Congress itself chose." *Lopez*, 549 U.S. at 58. By specifically citing its own list of substances in Section 1227(a)(2)(B)(i), "Congress took the trouble to incorporate its own statutory scheme of" offenses, an approach that it could not have meant for courts to ignore whenever a State's scheme diverged. *Id.* (rejecting government's interpretation of 8 U.S.C. § 1101(a)(43)(B) that supplanted Congress's classifications with the States' as "passing strange").

Just as the Third Circuit relied on the statute's plain meaning, so too does the Board. In *Martinez Espinoza*, the Board used the phrase "relating to" to support its inconsistent distinction between offenses "involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in general" to require proof of a federally controlled substance for convictions of the former but

not the latter. 25 I. & N. Dec. at 121. Although the decisions conflict, neither rests on textual ambiguity.

The government claims the relationship between state paraphernalia statutes and federal controlled substances is "accentuated because drug paraphernalia need not be tied only to a single controlled substance." BIO 8. Simply because the paraphernalia could be tied to multiple substances does not eliminate the textual requirement that at least one substance be one Congress references in Section 1227(a)(2)(B)(i), that is, a substance defined in Section 802 of the Title 21. Here, the government submitted evidence that Petitioner pled guilty to possessing a sock used in connection with a substance controlled by Kansas and no more. A.R. 151-58. The Eighth Circuit said that the evidence was sufficient to remove Petitioner from the United States. The statutory text does not permit this result.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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