No. 13-1034

In the Supreme Court of the United States

MOONES MELLOULI, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

An alien previously admitted to the United States is generally removable under 8 U.S.C. 1227(a)(2)(B)(i) if he has been "convicted of a violation of * * * any law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of title 21)."

The question presented is whether a violation of Kansas's statute prohibiting possession of drug paraphernalia is "a violation of * * * any 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).

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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. 23-28, 29-35) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15-16) was entered on July 9, 2013. 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 jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that an alien is removable from the United States 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), other than a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B)(i). Section 802 of Title 21 of the United States Code defines "controlled substance" to refer to certain drugs, other substances, or precursors on schedules of controlled substances promulgated under the Controlled Substances Act, 21 U.S.C. 801 *et seq.* See 21 U.S.C. 802(6).

2. a. Petitioner is a native and citizen of Tunisia who was admitted to the United States in 2004 on a student visa. Pet. App. 2; Administrative Record (A.R.) 109. He became a conditional resident in 2009 and a lawful permanent resident in 2011. A.R. 109.

On April 4, 2010, while petitioner was detained on charges of driving under the influence of alcohol, jail officials discovered four orange tablets hidden in petitioner's sock. Pet. App. 5-6; A.R. 130. Petitioner admitted that the tablets were Adderall, which is a controlled substance under both federal law and Kansas law. Pet. App. 6; A.R. 130. Petitioner was charged with trafficking contraband in a jail in violation of Kansas law. Pet. App. 6.

Petitioner pleaded guilty to an amended complaint containing the lesser charge that he had possessed drug paraphernalia—specifically, a sock used to store a controlled substance. A.R. 131; Pet. App. 6. Kansas makes it unlawful "for any person to use or possess

with intent to use any drug paraphernalia to * * * store, contain, conceal, inject, ingest, inhale, or otherwise introduce a controlled substance into the human body." Kansas Stat. Ann. § 21-5709(b) (2013).[1] "Drug paraphernalia" includes "containers and other objects used or intended for use in storing or concealing controlled substances." *Id.* § 5701(f). "Controlled substance" is defined as any substance on Kansas's schedules of illegal drugs, precursors, and chemicals. *Id.* § 21-5701; see Pet. App. 7. Those schedules contain hundreds of substances that are controlled under federal law, and also list a handful of substances that are not federally controlled. *Id.* at 4. Following his guilty plea, petitioner was sentenced to twelve months of probation with a suspended jail term of 359 days. A.R. 157.

b. In 2012, the Department of Homeland Security (DHS) charged that petitioner was removable from the United States pursuant to 8 U.S.C. 1227(a)(2)(B)(i), based on his drug-paraphernalia conviction. Pet. App. 30. An immigration judge agreed, determining that DHS had established petitioner's removability by clear and convincing evidence by showing that petitioner had been convicted of violating Kansas's drug-paraphernalia statute. *Id.* at 29-35. The judge rejected petitioner's contention that his conviction did not trigger removability because it was not tied to a specific federally controlled substance. *Id.* at 31-35. The judge noted that the Board of Immigration Appeals (BIA) had concluded that crimes involving "conduct associated with the drug trade in

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

general" were crimes relating to controlled substances, even if conviction records did not establish a link to a particular federally controlled substance. *Id.* at 31-32 (quoting *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (B.I.A. 2009)).

The immigration judge concluded that Kansas's statute prohibiting the possession of items used in storing or consuming controlled substances was a statute of this type, even though Kansas's regulation of several non-federally controlled substances meant that "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. The judge denied reconsideration. *Id.* at 23-28.

The BIA dismissed petitioner's appeal, agreeing that petitioner's drug-paraphernalia conviction was a conviction for an offense relating to controlled substances under *Martinez Espinoza.* Pet. App. 17-19.

3. The court of appeals denied a petition for review. Pet. App. 1-14. The court began by observing that there was virtually no chance that a defendant would be convicted of a crime related to a substance that was controlled under Kansas law but not federal law. Kansas's controlled-substance statute was based on the Uniform Controlled Substances Act (UCSA), a model law drafted "to complement the federal law and provide an interlocking trellis of federal and state law to enable government at all levels to control more effectively the drug abuse problem." *Id.* at 3-4 (quoting UCSA (amended 1994), 9 [Pt. II] U.L.A. 5) (2007). The UCSA controlled the same substances as were then controlled under federal law. *Id.* at 4. Later, Kansas and some other States "added a small number

of substances not listed on the federal schedules" to their controlled-substance lists. *Ibid.* At the time of petitioner's conviction, however, "[o]f the hundreds of substances currently listed" on Kansas's schedules, "less than a handful" were not federally scheduled. *Ibid.* As a result, the court of appeals concluded 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. [Section] 802." *Id.* at 4-5 (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

The court of appeals rejected petitioner's claim that this "possibility, however remote, that a Kansas drug paraphernalia conviction [would] not involve use in connection with a federal controlled substance" meant that he had not violated a state law relating to federally controlled substances. Pet. App. 7. The court noted that the BIA had concluded that state statutes prohibiting the possession of drug paraphernalia were state laws relating to controlled substances, for removability purposes, even when a State's controlled-substance schedules included some substances that were not federally controlled. *Id.* at 10. The court explained that under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), it was required to defer to that interpretation so long as it was "neither arbitrary nor manifestly unreasonable." Pet. App. 10.

The court of appeals concluded that the BIA's interpretation was reasonable. The court explained that Congress's decision to make aliens removable when convicted of violating state laws relating to controlled substances signaled an intent "to broaden the reach of the removal provision to include state offenses having 'a logical or causal connection' to federal controlled

substances," even when the state laws in question did not regulate precisely the same substances as are controlled under federal law. Pet. App. 10 (quoting *Webster's Third New International Dictionary* 1916 (1961)). "'If Congress wanted a one-to-one correspondence between the state laws and the federal'" schedules, the court reasoned, '"it would have used a word like "involving" instead of "relating to."'" *Ibid.* (quoting *Desai* v. *Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008)). At a minimum, the court decided, it was "reasonable for the BIA to conclude that any drug paraphernalia conviction in these States was, categorically, a violation of a law 'relating to a controlled substance' within the meaning of" the removability provision, given that there is "nearly a complete overlap between the definition of controlled substance in 21 U.S.C. [Section] 802 and in the statutes of States such as Kansas that adopted the Uniform Controlled Substances Act." *Ibid.*

The court of appeals also rejected petitioner's argument that the BIA's interpretation of the removability provision in the context of drug-paraphernalia statutes had arbitrarily ignored a prior BIA decision. Pet. App. 11 (discussing *In re Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A. 1965)).

The court of appeals denied a petition for rehearing en banc, with four members of the court voting to grant rehearing. Pet. App. 36.

ARGUMENT

Petitioner seeks further review (Pet. 7-25) of the determination that he is removable because his drug-paraphernalia conviction was for a violation of a state law relating to federally controlled substances. The court of appeals correctly decided that petitioner was

removable on that ground, and its decision is consistent with the approaches of virtually every other court to consider the question. While there is tension between the decision below and a single recent Third Circuit case, there is not a mature conflict requiring this Court's intervention. Further review of this case is accordingly not warranted.

1. The court of appeals was correct that petitioner is removable from the United States because he violated a law relating to substances that are controlled under federal law. Pet. App. 9-14.

a. The BIA, which is entitled to deference concerning its construction of ambiguous terms in the INA, see *INS* v. *Aguirre-Aguirre*, 526 U.S. 415, 424-425 (1999), has construed the phrase "any 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), to encompass state laws that prohibit possession of drug paraphernalia even when there is not a one-to-one correspondence between state and federal controlled substance schedules. See *In re Martinez Espinoza*, 25 I. & N. Dec. 118, 122 (2009).

The BIA's construction is reasonable. "The ordinary meaning" of the phrase "relating to" "is a broad one—to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with." *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (citation and internal quotation marks omitted). Given the "nearly * * * complete overlap" between controlled-substance schedules of the federal government and those of the States that adopted the UCSA, Pet. App. 10, state statutes prohibiting possession of tools intended for storing or consuming state-controlled sub-

stances "stand in some relation" to federally controlled substances, *Morales,* 504 U.S. at 383, because such state paraphernalia statutes prohibit possession of tools used to store or consume the hundreds of substances that are federally controlled.

This relationship is accentuated because drug paraphernalia need not be tied only to a single controlled substance. As the BIA has explained, drug-paraphernalia statutes can be seen as proscribing "conduct associated with the drug trade in general." *Martinez Espinoza*, 25 I. & N. Dec. at 121. The BIA has long treated statutes targeting that type of conduct as "relating to" federally controlled substances without requiring proof of a connection between the conduct and a particular federally controlled substance. Thus, as *Martinez Espinoza* noted, *In re Martinez-Gomez*, 14 I. & N. Dec. 104 (B.I.A. 1972), concluded "that an alien's California conviction for opening or maintaining a place for the purpose of unlawfully selling, giving away, or using any narcotic was a violation of a law relating to illicit traffic in narcotic drugs" under the INA, "even though the California statute required no showing that only *Federal* narcotic drugs were sold or used in the place maintained, because the 'primary purpose' of the law was 'to eliminate or control' traffic in narcotics." *Martinez Espinoza*, 25 I. & N. Dec. at 121. Particularly given the likelihood that items used to consume or store the few state-controlled substances that are not federally listed also could be used to serve the same function for substances that are federally controlled, it is reasonable for the BIA to treat prohibitions on drug paraphernalia as relating to federally controlled substances because they forbid possession of tools of the drug trade in general.

b. Even if the inclusion in a State's own controlled-substance schedules of substances that are not federally controlled had potential relevance, Kansas's listing of several additional substances would not render its statute overbroad. Even when a State's criminal statute must correspond to a generic federal definition in order to trigger a sentencing or immigration consequence, the necessary correspondence exists unless there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic [federal] definition" at issue. *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1684-1685 (2013) (quoting *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 193 (2007)); see Pet. App. 4-5.

As the court of appeals concluded, 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. [Section] 802." Pet. App. 4-5 (citing *Duenas-Alvarez*, 549 U.S. at 193). While petitioner asserts (Pet. 3 n.1) that there were 12 substances out of more than 300 controlled under Kansas law at the time of his conviction that were not federally controlled, even that small number overstates the difference between the two jurisdictions' schedules. Three of the state-controlled substances on which petitioner relies (Methandranone, Methandrostenolone, and Stanolone) are anabolic steroids, see Kansas Stat. Ann. § 65-4109(f)(12), (14) and (23) (2014), which are also controlled under federal law. See 21 U.S.C. 802(41)(A), 812(c) (Sched. III(e)); 21 C.F.R. 1300.01(b), 1308.13(f)(1).[2] Two others

[2] The Drug Enforcement Administration (DEA) has promulgated regulations specifically identifying certain substances as anabolic steroids. See 56 Fed. Reg. 5753 (Feb. 13, 1991). Two of the Kansas-

—ephedrine and pseudoephedrine—are federally controlled as "list I chemical[s]" that are used in the manufacture of federally controlled substances. 21 U.S.C. 802(34)(C) and (K). Thus, only seven of several hundred substances controlled under Kansas law at the time of petitioner's conviction were not also federally regulated under provisions that relate to federally controlled substances.[3] And two of those—"1-pentyl-3-(1-naphthoyl)indole" and "1-butyl-3-(1-naphthoyl) indole"—have since been added to the federal schedules. See 21 U.S.C. 812(c) (Sched. I(d)(2)(B)(iii) and (iv)).[4]

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controlled steroids that petitioner suggests were not federally controlled are in fact identified as federally controlled anabolic steroids in these regulations using alternative chemical names. See Nat'l Ctr. for Biotechnology Info., *Methandrostenolone*, http://pubchem.ncbi.nlm.nih.gov/summary/summary.cgi?cid=6300&loc=ec_rcs (last visited May 12, 2014) (identifying Methandrostenolone as synonym for the federally identified steroid Methandienone); Office of Diversion Control, DEA, *Lists of: Scheduling Actions, Controlled Substances, Regulated Chemicals* (Mar. 2014), http://www.deadiversion.usdoj.gov/schedules/orangebook/d_cs_drugcode.pdf (last visited May 12, 2014) (identifying Stanolone as synonym for federally identified steroid of 4-Dihydrotestosterone). The remaining substance identified as a controlled steroid under Kansas law, Methandranone, was identified as a controlled anabolic steroid under federal regulations for a time, see 62 Fed. Reg. 13,938, 13,941 (Mar. 24, 1997), but is no longer so identified. See 21 C.F.R. 1300.01. One treatise suggests that name was mistakenly included in the original list but is not in fact an existing steroid. See *Drug Abuse Handbook* 30 (Steven B. Karch ed., 2d ed. 2007).

[3] These are salvia divinorum; jimson weed; 1-(3-[trifluoromethylphenyl])piperazine (also known as TFMPP); butyl nitrite; propylhexedrine; 1-pentyl-3-(1-naphthoyl)indole and 1-butyl-3-(1-naphthoyl)indole. Pet. 3 n.1.

[4] Petitioner asserts (Pet. 3 n.1) that since his offense, Kansas has added nine substances to its controlled-substance schedules that

have not also been added to federal schedules. As an initial matter, petitioner's case would be an inappropriate vehicle for consideration of any discrepancy between federal and state controlled substance schedules arising after his conviction. But in any event, recent changes have not resulted in substantial discrepancies between the Kansas and federal controlled-substance schedules. Several of the substances added to Kansas's schedules without corresponding DEA identification numbers are in fact federally scheduled. See 21 C.F.R. 1308.11(e)(1) (scheduling substance appearing at Kansas Stat. Ann. § 65-4105(e)(3) (2014)); 21 C.F.R. 1308.12(b)(2) (scheduling substances named at Kansas Stat. Ann. § 65-4107(b)(2) (2014)); 21 C.F.R. 1308.12(b)(3) (scheduling substances named at Kansas Stat. Ann. § 65-4107(b)(3) (2014)); 21 C.F.R. 1308.13(c)(6) (scheduling substance named at Kansas Stat. Ann. § 65-4109(b)(13) (2014)); 21 C.F.R. 1308.15(c)(1)-(5) (scheduling substances named at Kansas Stat. Ann. § 65-4113(b)(1)-(5) (2014)).

Several other substances were added to Kansas's schedules as part of the State's efforts to control two classes of synthetic substances—"substituted cathinones" and "synthetic cannabinoids"—that have also been the focus of recent federal regulatory activity. See DEA, *2013 National Drug Threat Assessment Summary*, http://www.justice.gov/dea/resource-center/DIR-017-13%20NDTA%20Summary%20final.pdf at 14 (last visited May 13, 2014). Congress has enacted a ban on substances it defines as "cannabimimetic agents," see 21 U.S.C. 812(c) (Sched. I(d)), while Kansas has adopted a ban on "synthetic cannabinoids" that mirrors the approach of the National Conference of State Legislatures, see Kansas Stat. Ann. § 65-4105(h)(2)-(8) (2014). Similar developments have occurred with respect to "substituted cathinones." See National Conference of State Legislatures, *Substituted Cathinones Chemical Classes and Their Trade Names*, http://www.ncsl.org/research/civil-and-criminal-justice/substituted-cathinones-chemical-classes.aspx (last visited May 13, 2014) (describing state regulation of synthetic cathinones); 79 Fed. Reg. 12,938, 12,942-12,943 (Mar. 7, 2014) (instituting federal controls on ten synthetic cathinones). These developments illustrate that even state bans of non-federally controlled substances often address substances regulated under federal law using slightly different chemical definitions.

Petitioner has offered no reason to doubt the court of appeals' observation that a prosecution for one of the few comparatively esoteric substances listed only on Kansas's schedules is "little more than a 'theoretical possibility.'" Pet. App. 4 (quoting *Duenas-Alvarez*, 549 U.S. at 193). He has offered no evidence that Kansas has obtained a meaningful number of convictions—or brought any prosecutions at all—in cases involving those substances, let alone their associated paraphernalia. A search of Kansas cases not only reveals no such prosecutions but also reveals no mention of those substances. Under these circumstances, petitioner has not demonstrated a "realistic probability" that a Kansas paraphernalia conviction would involve one of the handful of substances listed on the State's schedules that are not also controlled under federal law. This would be fatal to petitioner's claim even if state drug-paraphernalia statutes were not related to federally controlled substances as a more general matter. See *Moncrieffe*, 133 S. Ct. at 1684-1685.

2. Petitioner contends (Pet. 7-18) that this Court should grant review to resolve a disagreement concerning whether state drug-paraphernalia laws categorically qualify as state laws relating to federally controlled substances, for purposes of determining an alien's removability.[5] While a recent decision of the

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[5] A similar claim is raised in *Madrigal-Barcenas* v. *Holder*, petition for cert. pending, No. 13-697 (filed Dec. 6, 2013). That case concerns whether a removable alien seeking cancellation of removal satisfies his burden of proving that he has not been convicted of a violation of any State "law or regulation * * * relating to a controlled substance (as defined in section 802 of title 21)," 8 U.S.C. 1227(a)(2)(B)(i), by noting that the record of his state drug-

Third Circuit regarding a Pennsylvania drug-paraphernalia law is in tension with the decision of the court of appeals in this case, addressing Kansas's drug-paraphernalia statute, this Court's review would be premature, because the conflict may be illusory in practice and because the BIA has not had the opportunity to address aspects of BIA precedent that led the Third Circuit to find deference to the BIA's approach unwarranted.

a. Most of the courts of appeals that have considered the question have concluded that the government establishes under 8 U.S.C. 1227(a)(2)(B)(i) that an alien has been convicted of violating the law of "a State * * * relating to a controlled substance (as defined in section 802 of title 21)" by establishing that the defendant was convicted of violating a drug-paraphernalia statute even if that State's controlled-substance schedules include substances not controlled under federal law. The Eleventh Circuit, see *Alvarez Acosta* v. *United States Att'y Gen.*, 524 F.3d 1191, 1196-1197 (2008), and the Ninth Circuit, see *United States* v. *Oseguera-Madrigal*, 700 F.3d 1196, 1198-1199 (2012); *Bermudez* v. *Holder*, 586 F.3d 1167, 1168-1169 (2009); *Estrada* v. *Holder*, 560 F.3d 1039, 1042 (2009); *Luu-Le* v. *INS*, 224 F.3d 911, 915-916 (2000), have both held, like the court of appeals in this case, that the government established removability through proof of such a state conviction. The Fourth Circuit has agreed in an unpublished opinion. *Castillo* v. *Holder*, 539 Fed. Appx. 243 (2013) (available at 2013 WL 5075590).

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paraphernalia conviction did not disclose that his conviction involved a federally controlled substance.

In contrast, the Third Circuit recently held that the government failed to establish that a lawful permanent resident was removable based on his conviction for violating Pennsylvania's drug-paraphernalia statute, where the State's controlled-substance schedules included some substances that were not federally controlled. *Rojas* v. *Attorney Gen. of the United States*, 728 F.3d 203 (2013) (en banc). The Third Circuit interpreted the provision rendering removable an alien convicted of violating "any *law* * * * relating to a [federally] controlled substance," 8 U.S.C. 1227(a)(2)(B)(i) (emphasis added), as making removable only individuals whose *convictions* were directly tied to a federally controlled substance. *Rojas*, 728 F.3d at 209 (concluding that immigration authorities "must show that 'a controlled substance' included in the definition of substances in section 802 of Title 21 was involved in the crime of conviction at issue"). That circuit declined to defer to the interpretation of Section 1227(a)(2)(B)(i) adopted by the BIA in *Martinez Espinoza* on several grounds. First, the court suggested that *Martinez Espinoza* was not controlling because it arose in a context in which the alien bore the burden of proving he had *not* been convicted of a controlled-substance offense. See *Rojas*, 728 F.3d at 211 (stating that this difference "alone factually and legally distinguish[es] *[Martinez] Espinoza*"). Second, the court suggested that *Martinez Espinoza* had ignored a BIA precedent that treated drug-possession crimes as triggering removability under the INA only when the substance involved was federally controlled. *Id.* at 210 (discussing *In re Paulus*, 11 I. & N. Dec. 274, 275 (B.I.A. 1965)). It suggested that the statutory text did not support a distinction between drug-

possession and drug-paraphernalia crimes. *Ibid.* The Third Circuit did not address in its analysis whether there was a realistic probability that a Pennsylvania defendant would be prosecuted for possessing paraphernalia not linked to a federally controlled substance. Cf. *Moncrieffe*, 133 S. Ct. at 1684-1685.

Petitioner suggests (Pet. 12-13) that the Seventh Circuit adopted the approach of the Third Circuit to drug-paraphernalia convictions in a case involving "look-alike" drugs. He is mistaken. In *Desai* v. *Mukasey*, 520 F.3d 762 (7th Cir. 2008), the court ruled that an alien was inadmissible as a result of his state conviction for unlawful delivery of a substance represented to contain the hallucinogen Psilocybin (or "shrooms"), in violation of an Illinois statute prohibiting "unlawful delivery of a look-alike substance." Although the actual substance that the alien delivered was not federally controlled, the court concluded that the conviction was for a crime "relating to a controlled substance." It emphasized the "broadening effect" of the term "relating to" in the INA, and concluded that the crime at issue had "enough" of a relation to a federally controlled substance to be a law "relating to a federal controlled substance." *Id.* at 766. In a portion of the opinion on which petitioner places great weight, the court added that the "look-alike" statute at issue was properly distinguished from a state statute that "outlaw[ed] the distribution of jelly beans"—a hypothetical crime that the court observed would not constitute a controlled-substance offense. *Ibid.*

Desai does not establish that the Seventh Circuit would decline to treat drug-paraphernalia convictions as controlled-substance offenses. As noted above, *Desai* recognized that, as a result of the INA's refer-

ence to statutes "relating to" a federally controlled substance, the relevant INA provision covers some statutes that do not themselves exclusively prohibit federally controlled substances. And the court of appeals' aside that a state law prohibiting jelly beans would not be a controlled-substance offense sheds little light on state paraphernalia crimes, because a statute banning jelly beans—unlike a statute banning drug paraphernalia—is wholly unconnected to the trade in federally controlled substances. Indeed, some courts that treat state drug-paraphernalia offenses as crimes relating to federally controlled substances have still held that state statutes prohibiting possession of non-federally controlled substances (like the hypothesized jelly-bean statute) do not categorically trigger removability. See *Ruiz-Vidal* v. *Gonzales*, 473 F.3d 1072 (9th Cir. 2007); *Martinez Espinoza*, 25 I. & N. Dec. at 121-122 (distinguishing between possession of particular substances and conduct associated with drug trade in general).

b. Consideration by this Court of the conflict suggested by the *Rojas* decision would be premature. While *Rojas* concluded that a state drug-paraphernalia statute was not a state law relating to a federally controlled substance, it did so without addressing whether there was a realistic probability of prosecution under the state statute at issue for conduct associated solely with non-federally controlled drugs. This Court, however, has emphasized in recent decisions that state statutes are not overbroad with respect to a federal definition unless there is a realistic probability of prosecution for conduct not covered by the applicable federal definition. See *Moncrieffe*, 133 S. Ct. at 1684-1685. And, as the analysis of the court of appeals

in this case indicates, there is good reason to believe that there is "little more than a 'theoretical possibility'" of prosecution under many state controlled-substance statutes for crimes involving substances that are not also federally controlled, given the "nearly * * * complete overlap" of state and federal schedules in the "interlocking trellis of federal and state law." Pet. App. 4, 9, 10. The rule adopted by courts other than the Third Circuit regarding paraphernalia offenses may thus be justified on grounds not yet considered by that court. And at a minimum, the Third Circuit's decision in *Rojas* casts no doubt on the court of appeals' analysis here of the minimal likelihood of a prosecution under *Kansas's* drug-paraphernalia statute for a violation not tied to federally controlled substances. Accordingly, review of the disagreement that petitioner identifies would be premature.

Similarly, the BIA has not had the opportunity to address the suggestion in *Rojas* that the BIA's interpretation of the relevant removability provision does not warrant deference because it conflicts with an earlier BIA decision. *Rojas* did not squarely address an argument of deference under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984), because it concluded that its own "proposed reading of the statute has been accepted by the BIA" in *Paulus* and subsequently ignored by the BIA. *Rojas*, 728 F.3d at 210. The BIA has not had the opportunity to address *Rojas*'s reading of the BIA's own precedents. It could do so in a manner that eliminates any conflict on this issue—for instance, by adopting the Third Circuit's analysis in *Rojas*. Or it could address *Rojas*'s claim of an internal conflict in the BIA's jurisprudence in a manner that

justifies reconsideration of *Rojas*—for instance, by disapproving *Paulus* or providing an explanation for the distinction between possessory and nonpossessory drug offenses that the *Rojas* court found absent from the BIA's prior decisions. Because, for the reasons above, the recent disagreement between the Third Circuit and other courts of appeals may prove short-lived, this Court's review would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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