No. 13-697

In the Supreme Court of the United States

PEDRO MADRIGAL-BARCENAS, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether an 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 drug-paraphernalia conviction did not disclose that his conviction involved a specific substance listed in the Controlled Substances Act, 21 U.S.C. 801 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the *Federal Reporter* but is reprinted at 507 Fed. Appx. 715. The decisions of the Board of Immigration Appeals (Pet. App. 4a-10a) and the immigration judge (Pet. App. 14a-16a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2013. A petition for rehearing was denied on July 29, 2013 (Pet. App. 32a). On October 22, 2013, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 6, 2013, 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 aliens who are "present in the United States without being admitted or paroled" into the country are inadmissible and may be removed from the United States. 8 U.S.C. 1182(a)(6)(A)(i), 1229a.

An inadmissible alien may petition the Attorney General for cancellation of removal—a form of discretionary relief. See 8 U.S.C. 1229b. However, pursuant to Section 1229b(b)(1)(C), an alien is ineligible for cancellation of removal if the alien has been convicted of an offense under Section 1227(a)(2), including a "violation of * * * any law or regulation of a State * * * relating to a controlled substance (as defined in section 802 of title 21)," other than an offense involving the possession of a small quantity of marijuana for personal use, 8 U.S.C. 1227(a)(2)(B)(i). An alien has the burden of proving eligibility for cancellation of removal by a preponderance of the evidence. 8 U.S.C. 1229a(c)(4); 8 C.F.R. 1240.8(d).

2. Petitioner is a native and citizen of Mexico. Pet. App. 5a. He entered the United States without being legally admitted or paroled into the country. Administrative Record (A.R.) 356. Subsequently, petitioner was arrested and pleaded guilty to possession of drug paraphernalia in violation of Nevada Revised Statute Annotated § 453.566 (LexisNexis 2005), after a glass pipe containing burnt residue was found in his car. Pet. App. 5a; A.R. 347.

The Department of Homeland Security (DHS) began removal proceedings, charging that petitioner was removable because he was an alien illegally present in the United States without having been admitted or

paroled into the country. A.R. 356-357. Petitioner conceded that he was removable on this ground, but requested cancellation of removal. A.R. 81-82; Pet. App. 5a. An immigration judge denied that relief, determining that petitioner was ineligible for cancellation of removal because petitioner's drug-paraphernalia conviction was an offense relating to a controlled substance. Pet. App. 5a.

Petitioner appealed, and the Board of Immigration Appeals (BIA) affirmed. Pet. App. 4a-10a. The BIA first noted that under both Ninth Circuit and BIA precedent, petitioner's conviction for possessing drug paraphernalia qualified as a conviction for violating a state law "relating to a controlled substance (as defined in section 802 of Title 21)." *Id.* at 5a-8a (citing *Luu-Le* v. *INS*, 224 F.3d 911, 915 (9th Cir. 2000); *In re Martinez Espinoza*, 25 I. & N. Dec. 118 (B.I.A. 2009)). In particular, the BIA had long treated statutes that prohibit "conduct associated with the drug trade in general" as statutes "relating to" federally controlled substances. *Id.* at 8a. Thus, it concluded, "drug paraphernalia [does] not need to be tied to a specific, federally controlled substance before a conviction for possession or use of drug paraphernalia could qualify as a conviction for an offense relating to a controlled substance." *Ibid.*

Second, the BIA concluded that even if paraphernalia convictions did not uniformly trigger ineligibility for cancellation of removal under 8 U.S.C. 1229b(b)(1)(C), petitioner had failed to meet his burden of establishing that his conviction was among those that did not trigger removal. Pet. App. 10a. It explained that "[u]nder the governing statute and regulations, [petitioner], not the government, bears

the burden of proving that [he] is not inadmissible" under Section 1227(a)(2)(B). *Id.* at 9a. Here, "[b]ecause [petitioner] has not offered any evidence to contradict the DHS's evidence" that petitioner had been convicted of a controlled-substance offense "and because [petitioner] bears the ultimate burden of establishing his eligibility for relief," the BIA dismissed petitioner's appeal. *Id.* at 10a.

3. The court of appeals affirmed in an unpublished memorandum. Pet. App. 1a-3a. The court noted that it had previously found that violations of drug-paraphernalia statutes were violations of laws "relating to a controlled substance" under federal law. *Id.* at 2a (citation omitted). It further found that the Nevada statute under which petitioner was convicted was materially identical to the statutes at issue in its prior cases. *Ibid.* Accordingly, it denied the petition. *Id.* at 3a.

ARGUMENT

Petitioner seeks further review (Pet. 15-25) of the determination that he failed to establish that he was eligible for cancellation of removal because his drug-paraphernalia offense was not a conviction for a violation of a state statute relating to a controlled substance. The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. When a removable alien seeks cancellation of removal, the alien bears the burden of establishing eligibility for relief, which requires the alien to establish that he has not been convicted of an offense relating to a controlled substance. See 8 U.S.C. 1229a(c)(4); 8 C.F.R. 1240.8(d). Petitioner failed to

meet this burden. Petitioner failed to prove, as required under Section 1229a(c)(4), that his drug paraphernalia conviction was not a violation of a state law relating to a federally controlled substance as defined in Section 1227(a)(2)(B)(i). Pet. App. 7a.

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 reasonably 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 reach state drug-paraphernalia laws such as the one at issue in this case. "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, 384 (1992) (citation and internal quotation marks omitted). A state law prohibiting the possession of items designed or intended for use in illicit activities regarding federally controlled substances is one "relating to" federally controlled substances under this definition when it reaches the tools used to prepare or consume the hundreds of substances that are controlled under federal law, whether or not it also forbids possession of tools used to prepare or consume certain other substances.

That is particularly true because drug paraphernalia need not be tied to a single controlled substance. As the BIA has explained, while some statutes proscribe "crimes involving the possession or distribution of a *particular* drug," others prohibit "conduct associated with the drug trade in general." *In re Martinez*

Espinoza, 25 I. & N. Dec. 118, 121 (B.I.A. 2009). The BIA has treated statutes prohibiting "conduct associated with the drug trade in general"—such as paraphernalia statutes—as controlled-substance offenses even when such statutes do not require proof that the tools were connected to 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. Because paraphernalia designed or intended for use in preparing or ingesting controlled substances can be used in preparing or ingesting federally controlled substances as well as state-controlled substances, the Board has reasonably classified a statute prohibiting possession of such items as a law "relating to" federally controlled substances.

b. Petitioner's request for cancellation of removal would fail even if the inclusion of additional substances on a State's controlled-substance schedule was relevant under the INA provisions at issue here, because petitioner has not established a realistic probability of prosecutions under Nevada's paraphernalia law for conduct tied only to non-federally-controlled substances. Even when a state statute is more expansive than a "generic" federal definition, the state stat-

ute should not be treated as overbroad under the categorical approach that petitioner urges 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)).

Under this approach, the inclusion of non-federally-controlled substances on a state's controlled-substance schedule is not relevant unless there is a "realistic probability, not a theoretical possibility" of prosecution for an offense tied solely to a state-controlled substance. See *Mellouli* v. *Holder*, 719 F.3d 995, 997 (8th Cir. 2013) (finding "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") (citing *Duenas-Alvarez*, 549 U.S. at 193), petition for cert. pending, No. 13-1034 (filed Feb. 25, 2014); see also *Martinez Espinoza*, 25 I. & N. Dec. at 121 (noting alien with burden of proof must resolve "any issue that might arise in his case by virtue of an asymmetry between the Federal and State controlled substance schedules"); *Young* v. *Holder*, 697 F.3d 976, 988-989 (9th Cir. 2012) (en banc) ("By placing the burden on the alien to show that prior convictions do not constitute aggravated felonies, the REAL ID Act established that an inconclusive record of conviction does not demonstrate eligibility for cancellation of removal").

Petitioner has not demonstrated a "realistic probability" that Nevada's drug-paraphernalia statute has been used to prosecute offenses not tied to federally

controlled substances. Petitioner claims (Pet. 23-24) that "approximately sixteen" substances, of the more than two hundred that are controlled under Nevada law, were not federally controlled when he sustained his conviction. Even this number is inflated. Ten of the substances petitioner identifies (Pet. 23 n.7) are anabolic steroids, which are Schedule III substances except in the case of products affirmatively exempted by the Drug Enforcement Administration (DEA) from coverage under the Controlled Substances Act, 21 U.S.C. 801 *et seq.* Compare Nev. Admin. Code § 453.530(7) (2013) (identifying methandrenone, methandrostenolone, 17-methyltestosterone, quinbolone, bolandiol, chlormethandienone, chorionic gonadotropin (HGC), dihydrochloromethyltestosterone, dihydromesterone, and formyldienolone as controlled anabolic steroids), with 21 C.F.R. 1308.13(f) (providing that anabolic steroids are federally controlled); see also 21 C.F.R. 1300.01(b) (defining anabolic steroid).[1] In addition, the Ethylamine Analog of Phencyclidine, also known as Eticyclidine or PCE, is a Schedule I

[1] The DEA has promulgated regulations specifically identifying certain substances as anabolic steroids. See 56 Fed. Reg. 5753 (Feb. 13, 1991). Those regulations, which identify substances using common chemical names, specifically classify as anabolic steroids a number of steroids controlled under alternative chemical names under Nevada law. See, *e.g.*, Nat'l Ctr. for Biotechnology Info. (NCBI), *Methandrostanolone,* at http://pubchem.ncbi.nlm.nih.gov/summary/summary.cgi?cid=6300&loc=ec_rcs (last visited Apr. 30, 2014) (identifying Methandrostenolone as synonym for the federally identified steroid Methandienone); NCBI, *4-estren-3,17-diol*, http://pubchem.ncbi.nlm.nih.gov/summary/summary.cgi?cid=9835303&loc=ec_rcs (last visited Apr. 30, 2014) (identifying Bolandiol as synonym for federally identified steroid 19-Norandrostenediol).

controlled substance. See 43 Fed. Reg. 43,295 (Sept. 25, 1978). And Mazindol is a Schedule IV stimulant. See 21 C.F.R. 1308.14(e) (2008). Thus, only four of several hundred substances controlled under Nevada law—datura, hydrogen iodide gas, carisoprodol, and human growth hormone—appear not to have been federally controlled substances at the time of petitioner's drug-paraphernalia conviction.[2]

Petitioner has failed to demonstrate a realistic probability of prosecution under Nevada law for a crime involving those four substances. He has offered no evidence that Nevada has brought any prosecutions at all in cases involving these comparatively esoteric drugs, let alone paraphernalia for preparing or ingesting such drugs. A search of Nevada cases reveals no such prosecutions and, indeed, no mention of those substances whatsoever. Under these circumstances, petitioner has not demonstrated a "realistic probability" that a Nevada 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 uniformly laws "relating to" federally controlled substances. See *Moncrieffe*, 133 S. Ct. at 1684-1685.

2. Petitioner contends (Pet. 11-21) that this Court's review is warranted because of a disagreement among courts of appeals concerning whether drug-paraphernalia laws categorically qualify as controlled-substance offenses. But there is no conflict in the context of cases—like petitioner's case—that involve a concededly removable alien who bears the

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[2] One of these substances, carisoprodol, is now federally controlled. 76 Fed. Reg. 77,330 (Dec. 12, 2011).

burden of establishing that he did not commit a controlled-substance offense in order to be eligible for discretionary relief from removal. And even if this case implicated the recent disagreement among courts in contexts in which the government bears the burden of proof, review of that disagreement would be premature.

a. There is a recent disagreement among the courts of appeals concerning whether, in contexts in which the government bears the burden of proof, the government establishes that a defendant has violated the 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), by offering evidence that the defendant was convicted of a state drug-paraphernalia offense. The Ninth Circuit has held that evidence that a defendant was convicted of a drug-paraphernalia offense meets the government's burden. See Pet. App. 2a (citing *United States* v. *Oseguera-Madrigal*, 700 F.3d 1196, 1199-1200 (2012); *Bermudez* v. *Holder*, 586 F.3d 1167, 1168-1169 (2009) (per curiam); *Luu-Le* v. *INS*, 224 F.3d 911, 915-916 (2000)). The Eighth and Eleventh Circuits have reached the same conclusion. *Mellouli*, 719 F.3d at 1001-1002 (concluding that government had established that alien was removable, based on clear and convincing evidence, as a result of Kansas drug-paraphernalia conviction); *Alvarez Acosta* v. *United States Att'y Gen.*, 524 F.3d 1191, 1195-1196 (11th Cir. 2008) (concluding that petitioner was excludable based on drug-paraphernalia conviction). The Fourth Circuit has agreed in an unpublished decision. *Castillo* v. *Holder*, 539 Fed. Appx. 243, 244 (2013) (per curiam) (citing *Mellouli* and *Alvarez Acosta* in concluding that alien's "conviction for

possession of drug paraphernalia was related to a controlled substance violation" and made him removable).

In contrast, the Third Circuit recently held that the government failed to meet its burden of establishing that a lawful permanent resident was removable through evidence that the alien had been convicted of violating Pennsylvania's drug-paraphernalia statute, relying on the fact that Pennsylvania's controlled-substance statute covers some substances that are not controlled under federal law. *Rojas* v. *Attorney Gen. of the United States*, 728 F.3d 203 (2013) (en banc). The Third Circuit interpreted a provision making 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 those aliens whose *convictions* were directly tied to a federally controlled substance. 728 F.3d at 211; see *id.* 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"). In addressing *Martinez Espinoza*, in which the BIA had found an alien ineligible for cancellation of removal based on a drug-paraphernalia offense, the court of appeals relied in part on the fact that the alien had borne the burden of proof in *Martinez Espinoza* but that the petitioner in *Rojas* did not, concluding that this difference "alone factually and legally distinguish[es] *Espinoza*." *Id.* at 211. The court also suggested that *Martinez Espinoza* "completely ignored" a BIA precedent that treated drug-possession crimes as triggering removability under the INA only when the drug involved was federally

controlled. *Id.* at 210 (discussing *In re Paulus*, 11 I. & N. Dec. 274, 275 (B.I.A. 1965)). The court 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. 18-20) that the Seventh Circuit adopted the Third Circuit's approach to drug-paraphernalia convictions in a case involving "look-alike" drugs. He is mistaken. The Seventh Circuit in *Desai* v. *Mukasey*, 520 F.3d 762 (2008), found that an alien was removable as a result of his state conviction for unlawful delivery of pills represented to be the hallucinogen psilocybin (or "shrooms"), in violation of an Illinois statute prohibiting "Unlawful Delivery of a Look-Alike Substance." *Id.* at 763, 766. Although the substance that the alien delivered was not federally controlled, the court concluded that the conviction was for a crime "relating to a controlled substance." *Id.* at 764. The court emphasized the "broadening effect" of the term "relating to" in the INA, and concluded that because the statute at issue bore some relationship to a federally controlled drug, it was a law "related to a federally controlled substance." *Id.* at 766. In a portion of the opinion on which petitioner relies, the court added that the "look-alike" statute at issue was properly distinguished from a state law 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 crimes that relate to federally controlled substanc-

es. As noted above, *Desai* recognized that the INA's reference to statutes "relating to" federally controlled substances encompasses some statutes that do not themselves prohibit federally controlled substances. And the court of appeals' aside that a law proscribing jelly beans would not be one relating to a controlled substance sheds little light on state drug-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, decisions that treat drug-paraphernalia offenses as controlled substance offenses have also held that statutes prohibiting possession of non-federally-controlled substances (like the hypothesized jelly-bean statute) do not trigger removability. See *Ruiz-Vidal* v. *Gonzales*, 473 F.3d 1072 (9th Cir. 2007); *Paulus*, 11 I. & N. Dec. at 275.

b. The instant petition does not implicate the recent disagreement between the Third Circuit in *Rojas* and other courts of appeals. Unlike the alien in *Rojas*, petitioner bore the burden of establishing that his drug-paraphernalia offense was not a conviction for a crime related to a federally controlled substance. *Rojas* recognized that distinction to have potential significance. 728 F.3d at 211. And *Rojas* did not conclude that an alien who bears the burden of proof may establish his eligibility for the discretionary relief of cancellation of removal simply by noting that a State's controlled-substance schedule includes several substances not covered under federal law.

c. Even if the disagreement concerning the evidence the government must offer to prove a drug-paraphernalia conviction was under a law relating to a controlled substance for purposes of establishing an

alien's removability were squarely presented here, review of that disagreement would be premature.

In several recent cases, this Court has refined its jurisprudence concerning the categorical approach that petitioner urges should be applied here (Pet. 23-24). See *Descamps* v. *United States*, 133 S. Ct. 2276 (2013); *Moncrieffe*, 133 S. Ct. at 1684-1685. In doing so, as noted above, this Court has emphasized that a state statute is not overbroad under the modified categorical approach unless there is a realistic probability of prosecution for an offense not covered by the applicable generic federal definition. See *Moncrieffe*, 133 S. Ct. at 1684-1685. The Third Circuit has not addressed whether a drug-paraphernalia statute like that in *Rojas* presents a realistic probability of prosecution for conduct outside the purview of a federal definition. Because 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, the disagreement that petitioner identifies between the Third Circuit and other courts of appeals may be illusory in practice.

Similarly, the BIA has not had the opportunity to address the suggestion in *Rojas* that *Martinez Espinoza* conflicts with the BIA's approach in *Paulus*. *Rojas* did not squarely address an argument of deference under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 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 that *Martinez Espinoza* had "ignored" that prior BIA decision. *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 may 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 may 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 illusory or short-lived, review of that disagreement would be premature even if it were squarely presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
Attorneys

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