

1 IN THE SUPREME COURT OF THE UNITED STATES

3 MOONES MELLOULI, :

5 v. :

7 ATTORNEY GENERAL. :

9 Washington, D.C.

11

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 10:11 a.m.

16 JON LARAMORE, ESQ., Indianapolis, Ind.; on behalf of
17 Petitioner.

19 General, Department of Justice, Washington, D.C.; on
20 behalf of Respondent.

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1 P R O C E E D I N G S

2 (10:11 a.m.)

3 THE COURT: We'll hear argument first this
4 morning in Case 13-1034, Mellouli v. Holder.

5 Mr. Laramore.

6 ORAL ARGUMENT OF JON LARAMORE

7 ON BEHALF OF THE PETITIONER

8 MR. LARAMORE: Mr. Chief Justice, and may it
9 please the Court:

10 The initial goal of this appeal was to
11 reverse a single Board of Immigration Appeals decision
12 that changed the removability analysis for drug
13 paraphernalia convictions. It abandoned the
14 longstanding practice that Congress had ratified.

15 We wanted to reinstate the rule that still
16 applies in all other drug deportation decisions which
17 looks at the facts that must be established by a
18 conviction and at the record of conviction, when that's
19 appropriate, under this Court's precedents in Moncrieffe
20 and Descamps. That methodology has led to tens of
21 thousands of drug deportations each year, but not for
22 someone convicted of possessing a sock.

23 Now, the government has argued that this
24 wrongheaded BIA paraphernalia decision should be
25 expanded to all drug convictions. The government wants

1 any drug conviction to be a deportable offense, even if
2 it's clearly for a non-Federal drug.

3 This Court should reject the government's
4 position and the BIA's position and adhere to the
5 time-tested approach that the statute -- to the -- to
6 the statute that Congress has ratified.

7 JUSTICE SOTOMAYOR: Can I --

8 JUSTICE ALITO: Can we begin by looking at
9 the text of the statute? What does the phrase "relating
10 to a controlled substance," et cetera, modify?

11 MR. LARAMORE: Relating to serves the
12 function of connecting the very broad range of offenses
13 that Congress wants to make deportable to the list of
14 substances that -- that the -- that Congress has
15 specified.

16 JUSTICE ALITO: Well, let's say we were --
17 let's say we're back in high school and we have to
18 diagram this sentence.

19 MR. LARAMORE: Yes.

20 JUSTICE ALITO: We could start out that way,
21 and maybe we'll get beyond it, but let's start out that
22 way. We have a phrase here, "relating to a controlled
23 substance." What does it modify? It has to modify a
24 noun. What noun does it modify?

25 MR. LARAMORE: "Relating to" would modify --

1 would modify "law" or "regulation." But if you
2 bought -- if you diagram the sentence, everything --

3 JUSTICE ALITO: If it modifies "law," then I
4 think you've lost the case.

5 MR. LARAMORE: But if -- if you diagram the
6 sentence, though, everything in that whole phrase,
7 "convicted of a violation of a law or regulation
8 relating to a controlled substance under Section 802,"
9 all modifies "alien." The whole phrase has to be taken
10 together and read together to modify what alien is
11 deportable.

12 And -- and the pure grammar does -- is not
13 sufficient to determine what Congress meant when it
14 enacted that text.

15 JUSTICE SOTOMAYOR: If you -- if you -- I
16 think Justice Alito is right. If you're claiming that,
17 then you're accepting that there's ambiguity, and you
18 have an uphill battle to fight.

19 MR. LARAMORE: Well, again, given the text
20 and the context of this statute and the history of its
21 application over decades and decades, um there's --

22 JUSTICE SOTOMAYOR: That's an argument that
23 they're arbitrary and capricious.

24 MR. LARAMORE: Well, it -- it's also part of
25 the analysis that goes into determining the Chevron, the

1 question that you allude to, Justice Sotomayor, because
2 Chevron should be approached after applying the usual
3 principles of statutory interpretation, and that's --
4 that's what Chevron says.

5 JUSTICE BREYER: Wait, wait. How does it --
6 how does it -- I've missed this. I -- I'm missing
7 something. Why -- why do you lose the case?

8 MR. LARAMORE: Well --

9 JUSTICE BREYER: I mean, I -- I assume
10 that -- I assumed as you said -- what -- what are you
11 fighting here? I assumed, as you said, that -- that the
12 words --

13 JUSTICE ALITO: Well, that was my question.

14 JUSTICE BREYER: -- relating to a controlled
15 substance as defined in Section 102 concern any law or
16 regulation. And --

17 MR. LARAMORE: And that's only --

18 JUSTICE BREYER: You deny that?

19 MR. LARAMORE: Well -- and -- but that's
20 only part of the analysis.

21 JUSTICE BREYER: I understand that it's not.
22 I thought that was not your argument to deny that. Your
23 argument was that this -- where -- where you have a -- a
24 State law or a foreign law or something, and it does
25 relate to the regulation of a controlled substance, but

1 a lot of other things as well, that that falls outside.

2 MR. LARAMORE: Yes. And particularly in a
3 sentence that -- that has such a focus on the word
4 "convicted."

5 JUSTICE BREYER: Suppose it
6 relates to the State law, there -- there are 36 802
7 substances and here it has -- it relates to 37. That's
8 case one.

9 Case two, it relates to 4,037.

10 MR. LARAMORE: Yes.

11 JUSTICE BREYER: And both of these statutes
12 contain the 36 that are in Section 802. One contains
13 4,000 more, and one contains one more. How am I
14 supposed to analyze those two statutes?

15 MR. LARAMORE: This goes to the application
16 of the categorical approach and the modified categorical
17 approach. If the identity of the substance is -- is an
18 element of the offense, then you use the modified
19 categorical approach, you look at the record of
20 conviction, and you determine what substance is
21 involved. And if it's a substance on the 802 list, then
22 the person is deportable.

23 And as the analysis that we've provided in
24 the appendix to our reply brief shows, many, many, many
25 State statutes um are divisible in exactly that manner.

1 JUSTICE BREYER: Okay. So your -- your
2 argument is, it relates to 4,036, and 36 are 802s. And
3 so what we do is we read the statute. It doesn't tell
4 us what this conviction is about. We look to the
5 documents in the modified categorical. If it lists one
6 of the 36, that's the end of it, good-bye, he's
7 deported.

8 MR. LARAMORE: Yes.

9 JUSTICE BREYER: If it doesn't, we don't
10 know. If we don't know, he wins.

11 MR. LARAMORE: Yes. That's exactly right.

12 JUSTICE BREYER: Okay.

13 JUSTICE ALITO: Well, that -- that might be
14 sensible, but I -- I really do need to start with the
15 text of the statute and understand what you make of the
16 text of the statute.

17 So if "relating to" modifies "law," do you
18 deny that the law -- that the -- the Kansas law in
19 question here relates to a controlled substance? Or do
20 you read relating to a controlled substance to mean
21 relating solely to controlled substances as defined by
22 Federal law?

23 MR. LARAMORE: The Kansas statute in this
24 instance relates to a Federally controlled substance
25 sometimes. It relates to -- and that's why --

1 JUSTICE ALITO: But the law -- the law
2 relates to what it relates to. It doesn't relates to.
3 It doesn't relate to something at one time and something
4 at another time. What does the law relate to? The law
5 relates to a long list of drugs. The great majority of
6 them are on the Federal list. A few of them are not on
7 the Federal list. Now, if it said relating solely to
8 drugs on the Federal list, you'd have an argument. I
9 just need to know what you want us to do with the text
10 of the -- of the statute.

11 MR. LARAMORE: When it's in the context that
12 it's in, in -- in this sentence, again, with the focus
13 on convicted, a -- a law that -- or I'm sorry, a word
14 that Congress has put -- has used in our immigration
15 statutes for decades with this particular meaning,
16 convicted is the statutory hook, as the Court said in
17 Moncrieffe, for the categorical approach. And it's --

18 JUSTICE GINSBURG: Suppose -- suppose the
19 State's list was identical to the Federal list. You
20 still don't know which particular. We know, but it's
21 not part of the charge.

22 MR. LARAMORE: Yes.

23 JUSTICE GINSBURG: So Kansas has an
24 identical list.

25 MR. LARAMORE: If it's identical or

1 narrower, the person is deportable. And there are many
2 statutes --

3 JUSTICE GINSBURG: And if it has one that's
4 different, not deportable?

5 MR. LARAMORE: No. If -- if the -- if the
6 substance is an element and you use the modified
7 categorical approach, then you can determine what --
8 what substance is at issue and --

9 JUSTICE GINSBURG: Well, we don't know what
10 substance -- in this case, we don't.

11 MR. LARAMORE: If you don't --

12 JUSTICE GINSBURG: It's not charged. So
13 it's not an element.

14 MR. LARAMORE: That's --

15 JUSTICE GINSBURG: So it's not -- it's the
16 difference that --

17 MR. LARAMORE: It's not in the record of
18 conviction.

19 JUSTICE GINSBURG: It -- it doesn't seem to
20 make a whole lot of sense to say deportable if the lists
21 are identical, but if Kansas has one more on the list
22 not deportable.

23 MR. LARAMORE: This Court has -- well, this
24 Court has -- has applied the categorical approach in
25 just that way, as have many of the courts of appeals.

1 It is a -- it is a way of determining what
2 is the -- the -- what the person was convicted of,
3 because you look at the facts that are -- that must be
4 found for the conviction, and it's a mode of analysis
5 that's been used in the immigration laws going back
6 decades.

7 JUSTICE SCALIA: I mean, that's lovely, but
8 it doesn't get you around the question that Justice
9 Alito asked, what is the law? May I make a suggestion?

10 MR. LARAMORE: Certainly, Justice Scalia.

11 JUSTICE SCALIA: Perhaps the law -- if you
12 ask somebody what law did Mellouli violate here, it
13 would be perfectly natural to respond by reciting one --
14 the elements of the law that he violated. He was
15 convicted of possessing drug paraphernalia to store a
16 controlled substance.

17 And so also with any other violation of a
18 law that names a number of controlled substances. If
19 you ask what law did -- did you violate, he would say, I
20 violated the -- the law that made it unlawful to have
21 marijuana or that it made it unlawful to have cocaine.

22 It seems to me you've got to -- you -- you
23 have to divide the word "law" and the word "regulation"
24 up into the component elements of the law or regulation
25 before you can reach the result that you would like to

1 reach.

2 MR. LARAMORE: Yes. And that's --

3 JUSTICE SCALIA: Is that a good suggestion?

4 (Laughter.)

5 MR. LARAMORE: Yes, your Honor. And -- and
6 in our view that's precisely the work that's done in the
7 statute by the word "conviction" and its association
8 with the categorical approach.

9 JUSTICE KAGAN: Mr. Laramore --

10 MR. LARAMORE: That's the framework.

11 JUSTICE KAGAN: -- that is one way of
12 looking at it, but might I suggest that you gave in a
13 little bit too fast to Justice Alito that the phrase
14 "relating to a controlled substance" has to modify
15 "law." It's -- it's very true that usually in grammar a
16 phrase like that would modify the last noun --

17 MR. LARAMORE: Yes.

18 JUSTICE KAGAN: -- which in this case is
19 "law." There is another noun in this sentence, which is
20 "violation." And can I suggest to you that maybe, if
21 you read this entire provision, it's pretty clearly
22 talking about violation, because here is the way it
23 reads. It's -- "convicted of a violation of any law
24 relating to a controlled substance other than a
25 marijuana offense." "Other than a marijuana offense."

1 Now, it just doesn't make any sense to say,
2 a law relating to a controlled substance other than a
3 marijuana offense. What makes sense is to say, a
4 violation of law --

5 MR. LARAMORE: Violation.

6 JUSTICE KAGAN: -- other than a marijuana
7 offense. So this last phrase, "other than a marijuana
8 offense," which is an exception and so you say what's it
9 an exception to? The offense is an exception to the
10 violation. So the violation is the key word doing the
11 work in this phrase.

12 MR. LARAMORE: Yes. And "law" really has to
13 be in the sentence to support "States, United States,
14 and -- and foreign country." Other -- otherwise, that,
15 which is an important concept in the law, couldn't be
16 sensibly -- sensibly there.

17 JUSTICE ALITO: It certainly is possible for
18 "relating to" to modify "violation." It's an awkward
19 way of phrasing it, but that is possible. It's a noun.
20 It could modify that.

21 So what would the violation be? Is the --
22 the violation then is not -- the violation, I take it,
23 then, would be the alien's conduct, what the alien did.

24 MR. LARAMORE: I think that's right. I
25 think that's right.

1 JUSTICE ALITO: Is that right?

2 MR. LARAMORE: I believe so.

3 JUSTICE ALITO: So what then happens if the
4 alien's conduct relates to a Federally controlled
5 substance, but the conviction is under a law that does
6 not relate to a Federally controlled substance? What if
7 the alien, for example, is convicted of burglarizing a
8 house for the purpose of stealing drugs that are in the
9 house?

10 MR. LARAMORE: It --

11 JUSTICE ALITO: The law doesn't relate to a
12 controlled substance, but the conduct does relate to a
13 controlled substance.

14 MR. LARAMORE: Right. And the deportability
15 rises and falls on what the person is convicted of.

16 JUSTICE KAGAN: Yes. It's not the conduct.
17 I think you misspoke when you said that. It's -- the
18 violation is the crime of conviction.

19 MR. LARAMORE: I certainly didn't mean to
20 say conduct if I did, and I know that conviction is the
21 key concept here and it always has been the key concept
22 as we've applied this set of laws to -- to our
23 immigration, to noncitizens.

24 CHIEF JUSTICE ROBERTS: A few moments ago, I
25 understood you to concede when Justice Ginsburg asked

1 the question that if there is an exact parallel between
2 the State law and the Federal law, your client would be
3 deportable.

4 MR. LARAMORE: Yes.

5 CHIEF JUSTICE ROBERTS: So the fact that
6 there's a -- it's a drug paraphernalia conviction has
7 nothing to do with the -- the issue before us?

8 MR. LARAMORE: Well, the um -- the -- the
9 drug paraphernalia statute under which he's convicted
10 requires that the conduct be associated with a
11 controlled -- a Kansas controlled substance. So if the
12 Kansas controlled substance list is the same as the
13 Section 802 list, and then the conviction satisfies the
14 statute.

15 CHIEF JUSTICE ROBERTS: So, so long as the
16 drug offense is related to, then the paraphernalia
17 offense is related to? So it doesn't make any
18 difference that we're dealing with paraphernalia?

19 MR. LARAMORE: I -- I think I understand
20 your question, and I think that the answer to your
21 question is yes, because the paraphernalia statute
22 specifically incorporates the controlled substance
23 schedule from Kansas.

24 JUSTICE GINSBURG: So you don't get any help
25 by what seems to be the case, that this sock would not

1 count as drug paraphernalia if we were -- if we were
2 dealing with a Federal prosecution.

3 MR. LARAMORE: You are absolutely right that
4 it would not. Possession of paraphernalia is not a
5 Federal offense. One cannot be prosecuted Federally for
6 possessing drug paraphernalia.

7 JUSTICE GINSBURG: But the question I wanted
8 to ask --

9 MR. LARAMORE: But that --

10 JUSTICE GINSBURG: -- is a sock considered
11 drug paraphernalia under Federal law?

12 MR. LARAMORE: It would not, be because the
13 Federal statute says that -- I don't have the language
14 in my head, but the concept is that to be paraphernalia
15 it -- its usual purpose has to be to facilitate drug
16 sales or drug use or one of those things that
17 paraphernalia does. And the Kansas definition is far
18 broader than that. It's really any object that can be
19 used to store or facilitate storage of or facilitate use
20 of a controlled substance.

21 CHIEF JUSTICE ROBERTS: Well, that's why I
22 would have thought your answers to me would have been
23 different because you would want to say that the
24 paraphernalia is an additional hurdle. Just because the
25 drugs relate to the Federal drugs doesn't mean that you

1 can say the paraphernalia does, because it covers all
2 sorts of things that the Federal law doesn't.

3 MR. LARAMORE: That's correct. It does --
4 it does cover many things that the Federal law doesn't.

5 And it would -- it would be inappropriate.

6 It -- that shows why this isn't the conduct that
7 Congress was trying to address when it --

8 JUSTICE ALITO: What if the -- what if
9 someone was convicted of possession of a pipe that is
10 very well designed to smoke crack, but maybe conceivably
11 could be used to smoke a little bit of tobacco. So
12 it -- maybe it's lawfully sold in some places because it
13 could have a legitimate use. What would -- what would
14 happen then?

15 MR. LARAMORE: The question is what the
16 person is convicted of and --

17 JUSTICE ALITO: He's convicted of possessing
18 a crack pipe.

19 MR. LARAMORE: If he is convicted of
20 possessing --

21 JUSTICE ALITO: It's necessary to show
22 that -- that there was crack in the pipe?

23 MR. LARAMORE: Not under the Kansas statute.
24 The Kansas statute just says that the -- that the object
25 has to have -- have been used or is intended to be

1 used --

2 JUSTICE ALITO: Well, in your view, in order
3 to make -- in order to make this count as a -- as a
4 deportable offense, it would be necessary to show that
5 there actually was crack in the pipe or that he actually
6 used the pipe to smoke crack.

7 MR. LARAMORE: Not the way we read the
8 statute. But the conviction would have to involve a
9 controlled substance and would -- if it's both tobacco
10 and crack, the crack would have to be in the -- in the
11 conviction.

12 JUSTICE SOTOMAYOR: It has to involve a
13 controlled -- a Federally controlled substance.

14 MR. LARAMORE: It has to involve a Federally
15 controlled, Section 802 controlled substance, yes.

16 JUSTICE SOTOMAYOR: That -- that's the
17 linchpin.

18 MR. LARAMORE: Yes.

19 JUSTICE ALITO: Well, crack is a Federally
20 controlled substance.

21 MR. LARAMORE: Yes.

22 JUSTICE ALITO: So I didn't understand the
23 answer to your question. Would -- would it be -- would
24 the crack pipe itself be enough or do you have to show
25 actual crack?

1 MR. LARAMORE: The crack pipe itself would
2 be enough, as long as there was proof or a pleading to
3 its use with, at some point, or its intention to be used
4 with crack. That's --

5 JUSTICE SCALIA: Well, well, well, wait.
6 Only -- only using the modified approach so that you
7 would show it was -- it was intended to be used with
8 crack. But on its face, if the Kansas statute still
9 covers crack, yes, but a lot of other stuff --

10 MR. LARAMORE: That is correct.

11 JUSTICE SCALIA: -- that alone would not
12 support the conviction, would it?

13 MR. LARAMORE: That is --

14 JUSTICE SCALIA: You -- you'd have to go to
15 look to see what he was actually convicted of.

16 MR. LARAMORE: Right. And -- and our
17 analysis, again, as I point to that lengthy appendix, is
18 that the great majority of State statutes that cover the
19 primary drug activities -- manufacturing, sale, and
20 possession -- are divisible statutes and would be
21 subject to the modified categorical approach.

22 There are also many statutes that fit within
23 the Federal -- within the Federal 802 schedule under the
24 categorical approach. There are State statutes that
25 outlaw marijuana possession, that outlaw narcotic

1 possession, in ways that -- that the statute just fits
2 within the categorical approach. But -- but the
3 modified categorical approach is what may apply most of
4 the time and -- and it would -- it -- and really what
5 we're doing here is, is I'm making this argument about
6 the modified categorical approach to counter the
7 government's policy argument, which is that our
8 perspective would cut back on the number of people who
9 could be deported for drug violations and -- and that's
10 just not so.

11 In fact, the Board of Immigration Appeals
12 has been applying the law the way we say it should be
13 applied for -- for all nonparaphernalia offenses for
14 decades, and it always is deporting, if you look at
15 their own statistics, 30,000, 35,000 people a year for
16 drug offenses.

17 So it's not -- the approach that we are
18 advocating here, that has been used for many years, is
19 not something that brings a halt to drug deportations.
20 Drug deportations have been happening all along in --
21 under -- under the approach that we suggest.

22 The government is really reading the law
23 here to encompass all drug convictions, and it would be
24 odd for that -- for that argument to be correct, given
25 that the statute says -- makes this reference to Section

1 802, which is only Federally controlled substances.

2 You can't really reconcile that with the
3 Section 802 reference. The government's position reads
4 that out of the statute.

5 The last -- well, Congress has always --
6 well, the categorical approach has applied for decades.
7 The -- the academic history takes it back to 1913, the
8 first application of the doctrine, and Congress has been
9 aware of that approach to the law, that approach to
10 applying the law, has continued to pass statutes that
11 use the word "convicted," which is what embodies the
12 categorical approach. And under the -- under the
13 application of that principle that we are advocating
14 here, Congress has add -- has amended the statute
15 numerous times since it was put into the form it's in
16 now, which is 1986, in a way that add -- that signifies
17 its ratification of the approach that we're suggesting.

18 Congress has not only been aware of the
19 categorical approach, but also has, since the outset of
20 the statute, controlled the list of drugs that are
21 deportable. And currently, the way the statute is set
22 up is --

23 JUSTICE SCALIA: Nobody's disagreeing with
24 the categorical approach. I don't know why you're
25 wasting your argument on that. We -- we all agree with

1 the categorical approach.

2 MR. LARAMORE: Well, let me --

3 JUSTICE SCALIA: The question is categorical
4 to what? That's the issue.

5 MR. LARAMORE: Well -- and just to
6 differentiate our -- what we're saying from the
7 government's position, which they also argue, is a
8 species of the categorical approach, we're talking about
9 the categorical approach as it has traditionally been
10 applied, where the elements of -- of the conviction have
11 to be compared to the generic Federal statute or to the
12 statute of --

13 JUSTICE ALITO: When you say "categorical
14 approach," you mean the modified categorical approach,
15 do you not?
16

17 JUSTICE ALITO: In -- in a jurisdiction like
18 Kansas or in any foreign jurisdiction that has a list of
19 controlled substances that is a little bit broader than
20 the Federal list, lists at least one or two that are
21 broader than the Federal list, the pure categorical
22 approach would never result in -- in removal; am I
23 right?

24 MR. LARAMORE: No --

25 JUSTICE ALITO: In a removable offense.

1 MR. LARAMORE: That's not correct.

2 JUSTICE ALITO: How would it? You'd say --
3 the person was convicted of selling a drug that is
4 categorized, that is on a list or part of a list, that
5 would be the element of the offense.

6 MR. LARAMORE: But um --

7 JUSTICE ALITO: So you would have to look
8 beyond that to see which particular drug. That's the
9 modified approach, is it not?

10 MR. LARAMORE: Many States, including
11 Kansas, have some statutes that don't invoke their
12 entire schedule. For example, a marijuana possession
13 statute that stands alone. That would be -- that would
14 fit under the categorical approach.

15 JUSTICE SCALIA: That's not his
16 hypothetical. His hypothetical is a statute that
17 includes one drug which is not on the Federal list.

18 MR. LARAMORE: I misunderstood. Then under
19 the categorical approach that person would not be
20 deportable. As -- as we've shown, we think that most of
21 those statutes would be analyzable under the modified
22 categorical approach, yes.

23 Congress always has retained control over
24 the substances that can lead to deportability. Under
25 the current statute it's opened up the conduct, the

1 kinds of crimes that are deportable, allowing those to
2 be crimes defined by the States, defined by the
3 United States or defined by foreign countries, as long
4 as they relate to the Federal crimes.

5 And that is -- that is shown by -- these
6 substances that are on the State schedules that are not
7 on the Federal schedules could be on the Federal
8 schedules if the attorney general determined that they
9 were serious enough drugs, that they were dangerous
10 enough drugs. Some of the subjects -- of the substances
11 on the Kansas schedule, TFMPP, which is a hallucinogen,
12 for example, have been on the Federal schedule, but have
13 been removed from the Federal schedule.

14 So these indicate that they're -- they're
15 substances of the sort that the government has not
16 thought to be significant enough to even involve in
17 Federal crimes --

18 JUSTICE SOTOMAYOR: Counsel, if we -- just
19 to move you along, if we -- do you agree with the
20 government that if we find the government's distinction
21 between drug trade offenses like the paraphernalia
22 statute and drug possession and distribution offenses
23 unreasonable, do we remand to the board? And if not,
24 why not? And if you want to save it in an answer on
25 rebuttal, you can.

1 MR. LARAMORE: Well, I think that the -- the
2 BIA has had its chance to state its position and it has
3 carved out -- this drug trade exception is really a drug
4 paraphernalia exception. Nothing fits within drug trade
5 except for drug paraphernalia. The things we ordinarily
6 think of as drug trade, like selling and trafficking,
7 are not part of the drug trade exception.

8 So the BIA has had its chance to -- to
9 construe the statute.

10 I'd like to reserve the remainder of my
11 time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Ms. Kovner.

14 ORAL ARGUMENT OF RACHEL P. KOVNER

15 ON BEHALF OF THE RESPONDENT

16 MS. KOVNER: Mr. Chief Justice, and may it
17 please the Court:

18 There are two independently sufficient
19 reasons why Petitioner's drug paraphernalia conviction
20 permitted his removal.

21 The first is that Federal law allows the
22 removal of an alien convicted of violating a law
23 relating to controlled substances, and State drug laws
24 that cover hundreds of Federally controlled substances,
25 in addition to some additional drugs, are laws that

1 relate to Federally controlled substances.

2 CHIEF JUSTICE ROBERTS: What -- what if the
3 State law covers controlled substances entirely
4 different from the Federal law? Maybe they figure the
5 feds can take care of that list; we're just going to
6 have a law with these. Does the State law relate to
7 controlled substances?

8 MS. KOVNER: We would say it does not relate
9 to "controlled substances as defined in Section 802,"
10 which is the full statutory phrase.

11 JUSTICE SOTOMAYOR: I'm sorry, I don't
12 understand that. You're doing the flip of Justice
13 Ginsburg. You're -- so how many drugs on that list have
14 to relate to 802 drugs for it to relate generally?

15 MS. KOVNER: It -- we would concede, along
16 the lines of Justice Breyer's hypothetical, that if you
17 have a State law that controls 6,000 State-controlled
18 substances and one federally controlled --

19 JUSTICE KAGAN: How about half and half?

20 CHIEF JUSTICE ROBERTS: Wait, what was the
21 answer? If you have it --

22 (Laughter.)

23 MS. KOVNER: That -- that law has the kind
24 of tenuous relationship to federally controlled drugs
25 that the Court has said is not a relating to --

1 relation --

2 JUSTICE SCALIA: It doesn't say more than
3 tenuously related to. It says related to. Where are
4 you smuggling in the "tenuously"?

5 MS. KOVNER: I'm taking it from this Court's
6 cases. The Court has said "relating to" is extremely
7 broad, but the Court has said there is some outer limit
8 at which even if there's a literal relating to
9 relationship --

10 JUSTICE SOTOMAYOR: Well, that's how you get
11 to drug paraphernalia, meaning, as Justice Kagan said,
12 the drug paraphernalia comes in only because it relates
13 to drug possession and distribution --

14 MS. KOVNER: That's right.

15 JUSTICE SOTOMAYOR: -- of a controlled
16 substance under 801.

17 MS. KOVNER: We think that --

18 JUSTICE SOTOMAYOR: Or 802, what is it --
19 whatever it is.

20 MS. KOVNER: That's right. We think that
21 crimes involving drug paraphernalia are crimes that
22 relate to controlled substances, and there are two --

23 JUSTICE SOTOMAYOR: You keep leaving out the
24 802. There are other sections of the criminal act that
25 specifically say, any conviction and -- and it could be

1 of any law, right? But this one doesn't say it that
2 way.

3 MS. KOVNER: We think that, as Your Honor
4 correctly notes, these are laws that relate to
5 controlled substances as defined in Section 802. And
6 there are two reasons why: The first is that a statute
7 that -- that relates -- a statute that forbids
8 possession of paraphernalia that's connected to hundreds
9 of federally controlled drugs, and here nine additional
10 substances, relates to federally controlled drugs. And
11 the second is that --

12 JUSTICE SOTOMAYOR: And -- difficult -- now
13 answer.

14 MS. KOVNER: Yes.

15 JUSTICE SOTOMAYOR: How many of the laws --
16 how many of the controlled substances have to be on the
17 State list? Is 50/50 enough, 75/25, 6 out of --

18 MS. KOVNER: We think that --

19 JUSTICE SOTOMAYOR: I mean, what -- what's
20 the -- how many have to be on the list?

21 MS. KOVNER: We think that all the State
22 laws that currently exist are laws that relate to
23 federally controlled substances. And all of those --

24 JUSTICE SOTOMAYOR: But that's not true of
25 foreign laws and this relates to foreign laws. I mean,

1 there are some foreign countries that list many of the
2 controlled substances the U.S. does but adds alcohol.
3 Now, some people may think alcohol is a controlled
4 substance, but it's not on the 802 list.

5 MS. KOVNER: Your Honor, we acknowledge
6 there might be a case involving a foreign law or
7 involving if in the future a State decided to take a
8 very different approach, where you would have a literal
9 relating-to relationship, but there would be a question
10 of whether the law was so far beyond what existed at the
11 time and what Congress could have imagined that it no
12 longer relates to. But Petitioner's reading of
13 "relating to" isn't a permissible reading of the --

14 JUSTICE BREYER: But what second --
15 second --

16 JUSTICE SCALIA: Do you, please -- do you
17 think that if we apply a modified categorical approach
18 and focus in on the conviction here which was for a
19 sock? Do you think a sock is more than tenuously
20 related to -- to these Federal drugs?

21 MS. KOVNER: Yes, Your Honor. And here's
22 why: These drug paraphernalia statutes modified on the
23 model act, like Kansas's, are quite broad, and we
24 acknowledge.

25 JUSTICE SCALIA: Right. That's why I'm

1 proposing modified categorical approach. He was
2 convicted of having a sock and you think that's more
3 than tenuously related to these Federal drugs.

4 MS. KOVNER: We do, because he wasn't
5 exactly convicted of having a sock. He was convicted
6 using an innocent item as a tool for the storage of
7 drugs, and that's true of every drug paraphernalia
8 conviction. Typically drug paraphernalia involves
9 objects that have an innocent use and objects that have
10 an illicit use. But essentially every State has decided
11 that in order to impede the drug trade and drug use you
12 need to prohibit those.

13 JUSTICE BREYER: What about, you said
14 second? You said two reasons. You got your first out
15 and I'd like to hear your second.

16 MS. KOVNER: Yes.

17 JUSTICE SCALIA: You said the second, didn't
18 you?

19 MS. KOVNER: There is an additional reason,
20 Your Honor.

21 JUSTICE SCALIA: She said it.

22 JUSTICE BREYER: She didn't.

23 MS. KOVNER: The BIA has reasoned -- the BIA
24 has reasoned, in a conclusion that entitled to Chevron
25 deference, that paraphernalia statutes are statutes that

1 attack the drug trade in general.

2 JUSTICE BREYER: Okay. Now I got the second
3 one. Now I do have one question, and it's right related
4 to Justice Scalia's, and it seems to me that --
5 what he said, if I understand it correctly, makes this
6 not too difficult a case, but you won't like it:
7 That -- that we have long -- yes, it modifies law, but
8 we have long, if we go back to the seminal case, Taylor.
9 There is a Massachusetts statute. It forbids a burglary
10 of a boat, a car, and a house. So what Justice Blackmun
11 said -- I think it was he who wrote it -- go back to the
12 documents to see whether he was charged with burglary of
13 a house, a boat, or a car.

14 So we have a tradition of looking back to
15 the charging documents and maybe a couple of others to
16 see what part of the statute. Now, this statute is a
17 statute that first penalizes many, many things,
18 packaging -- packaging is relevant here. What kind of
19 packaging? Packaging of drugs. Okay. What drugs? It
20 doesn't say drugs. It says controlled substance, so you
21 have to cross-reference.

22 Then we look to cross-reference, and it says
23 controlled substance means a substance included on State
24 schedule 12345 or part B, so it incorporates that.

25 So then we go look to those documents, and

1 those documents will have a long list. And we look to
2 see here which of the documents on the list which is
3 incorporated into the statute is he charged of
4 packaging. Very simple. Happens it's not that simple
5 to do, but that is absolutely traditional given our
6 holdings on how to apply the categorical -- modified
7 categorical system.

8 So why not just do that right here? Solves
9 every problem that's raised.

10 MS. KOVNER: Let me give two responses. One
11 is a textual one, and the second, I think, goes to your
12 practical point because I really think it's important
13 that it won't actually solve the practical problems
14 here.

15 As to the textual point, when Your Honor
16 talks about Taylor, I think it's important to note how
17 different the statute here is, which is unlike many
18 provisions that talk about being deportable or suffering
19 some other consequence for being convicted of a crime
20 relating to something, here it's talking about being
21 convicted of violating a law relating to something.

22 But I really want to address this practical
23 point, because, Your Honor, we think the result under
24 Petitioner's view is going to be a real patchwork in
25 terms of what conduct is removable depending on what

1 State you're in. And the reason why, Justice Breyer, is
2 that it's not going to be possible to apply the modified
3 categorical approach to many drug statutes. It will
4 sometimes and it won't other times, and let me explain
5 why.

6 For instance, here, under this statute, it
7 appears and under paraphernalia status generally, there
8 will typically not be a requirement of a finding or an
9 admission of what particular drug you intended to use
10 the --

11 JUSTICE KAGAN: But if I understand the way
12 the law works, right, Ms. Kovner, that's -- that is true
13 of paraphernalia drugs, that they're indivisible with
14 respect to the controlled substance. It's not true with
15 respect to most possession statutes or distribution
16 statutes or so forth. And the reason that there is that
17 distinction is because paraphernalia offenses are
18 generally extremely minor offenses; they're not
19 felonies. They're just, as in this case, they're
20 misdemeanors that are meant to catch leftover things
21 that, you know, prosecutors plead to when they don't
22 really want to charge a more serious offense.

23 And so it makes good sense that all of these
24 paraphernalia offenses would be counted out by this
25 approach. You're counting out a bunch of trivial -- I

1 mean, you know, "trivial," I don't want to say
2 trivial -- minor offenses.

3 MS. KOVNER: Your Honor, I think two points
4 about that. The first is that we don't think it's
5 correct that this is going to be just paraphernalia
6 offenses and not any possession or distribution
7 offenses. And if you look at the cases that are cited
8 on page 31 of our brief, they illustrate that, which is
9 the conviction records are not necessarily specifying
10 the drug that's involved in a particular offense. And
11 so you're going to have a really haphazard system.

12 JUSTICE SOTOMAYOR: Well, right now even
13 your brief admits that the BIA is applying a different
14 standard to possession and distribution offenses. It's
15 applying the 802 specification.

16 MS. KOVNER: Your --

17 JUSTICE SOTOMAYOR: And it's trying to draw
18 a difference. I don't -- I still don't understand how
19 it does it, but my point is that you're proving it's --
20 you're living by the 802 distinction with distribution
21 and possession.

22 MS. KOVNER: Your Honor, I'm not sure that
23 that's true. We think that the BIA's precedent at this
24 point is unclear. The BIA --

25 JUSTICE SOTOMAYOR: Yeah, what you're hoping

1 for is that they will change that one, too. But let's
2 answer what's happened up until now.

3 MS. KOVNER: Yes. As to what's happened up
4 until now, I don't think that's clear. My understanding
5 is that the BIA will generally try to seek removal of
6 people who have been convicted --

7 JUSTICE SOTOMAYOR: Because they have
8 discretion. If they're not automatically removable and
9 they look at the underlying papers and decide it's a
10 more serious crime than -- than the -- than the strict
11 removability statute, they let the person -- they remove
12 this person anyway.

13 MS. KOVNER: I don't think that's correct,
14 Your Honor. What we're seeking here is the authority to
15 seek removal for persons who've committed these
16 offenses. If -- in this case, for instance, if we were
17 to not prevail, we would lack the authority, the
18 government would lack the authority to remove Petitioner
19 no matter how serious it regarded his underlying
20 conduct.

21 CHIEF JUSTICE ROBERTS: A couple of
22 sentences ago you said that a sock, when it's used in
23 connection with the drug activity, is sufficiently
24 related to the Federal Controlled Substances Law. What
25 about a gun? Those are often used in connection with

1 drug activity. So is a law concerning gun possession or
2 gun control or whatever, a State law that relates to the
3 Federal Controlled Substances Law?

4 MS. KOVNER: Your Honor, I think this would
5 be a -- a difficult question on either of our sides,
6 which is to say, for -- for both parties there would be
7 some set of statutes that are related to -- that have
8 some connection to drugs indirectly and there would be a
9 question of whether those statutes count. We don't
10 think that a statute that addresses guns merely because
11 guns and drugs have some, you know, relationship --

12 CHIEF JUSTICE ROBERTS: Well, yes. But if a
13 statute addresses socks, it does.

14 MS. KOVNER: Well, here, Your Honor, it's
15 not a statute addressing socks. It's a statute --

16 CHIEF JUSTICE ROBERTS: It was addressing
17 socks when used in connection with drug activity. I'm
18 talking about guns when used in connection with drug
19 activity.

20 MS. KOVNER: Oh. Your Honor, a statute like
21 the 924(c) that applies to guns when used in connection
22 with drug activity, we think would be a law that relates
23 to controlled substances. We think statutes that
24 regulate conduct, that um leads to the proliferation of
25 drugs or the use of drugs is a poor statute relating to

1 the drug trade.

2 JUSTICE ALITO: Under your definition --
3 under your understanding of this, what practical work is
4 done by the phrase as defined in Section 802 of Title
5 XXI?

6 MS. KOVNER: Your Honor --

7 JUSTICE ALITO: You said a couple of minutes
8 ago, and I had assumed this to be true, that under the
9 laws of all the States, the great majority of controlled
10 substances are on the Federal list, and there -- in some
11 instances -- are a few additional ones and you said that
12 all of those laws would be covered. If that's the case,
13 then I don't see what was achieved by putting the
14 reference to the Federal list in the statute. They
15 might have just said relating to a controlled substance.

16 MS. KOVNER: Your Honor, we think that this
17 parenthetical clarifies that -- the meaning of
18 controlled substance, the thing that it has to relate to
19 are the substances as defined in Federal law. There is
20 another colloquial meaning of controlled substance if
21 you look in, like, Black's Law Dictionary, which is just
22 any regulated drug and that would apply to, for
23 instance, prescription drugs that aren't controlled
24 under the Controlled Substances Act.

25 JUSTICE SCALIA: Would it have to be drugs?

1 I mean, there are some States that ban pate, for
2 example, right?

3 (Laughter.)

4 JUSTICE SCALIA: You wouldn't want that
5 swept into this statute, would you?

6 MS. KOVNER: That would not be a statute
7 under the law of a State relating to a controlled
8 substance as defined in Section 802, because it wouldn't
9 be regulated under a State's direct statutes that also
10 include the Section 802 substances.

11 And if I could just explain why we think
12 that Congress enacted or -- a law that applies to any
13 person who violates a State law relating to controlled
14 substances. When Congress enacted the -- the provision
15 of the INA that's currently in effect, it acted against
16 the backdrop of State laws that were designed to tightly
17 coordinate with Federal laws and that were designed to
18 produce the kind of regime that they have, in fact,
19 produced for any -- any overlap between the State and
20 Federal schedules is the overwhelming proportion of the
21 drugs that are controlled on State schedules.

22 And, Justice Breyer, if the Court were to
23 hold that those laws aren't laws relating to controlled
24 substances, whether an alien is removable under those
25 State laws designed to parallel with Federal laws is

1 going to depend on what -- what kinds of findings the
2 State requires to be made in connection with those
3 possession --

4 JUSTICE BREYER: Well, that's -- it wouldn't
5 make that law a nullity. Indeed, the person would be
6 deportable provided when you went through the State
7 charge, the State charge was you violated the packaging
8 for use statute, packaging a controlled substance, in
9 respect to Item 13 under Schedule II, which they could
10 say, anyway, and that happens to be heroin. And if, in
11 fact, when you went through Schedule III, Part 4(a), the
12 word there was "alcohol," then it wouldn't.

13 Now, that's simple. And if the State's
14 charging practice is such that they don't tell you,
15 that's equivalent to a State charging practice that in
16 Massachusetts didn't tell you whether you were accused
17 of burglary of a boat, of a house or of a car. And if
18 the State wants to do that, I guess it might be up to
19 them if you get a guilty plea and then you could not
20 deport the person.

21 MS. KOVNER: But Congress didn't want that
22 result, Justice Breyer. Congress --

23 JUSTICE BREYER: Well, I want -- a lot of
24 people -- but they can't control the State charging
25 practices and the States are likely, for reasons of

1 information, to put in the charge the whole thing,
2 including the correct reference on the schedule. So is
3 that the only thing you find wrong with it? And I agree
4 with you that that is a slight problem, that -- that
5 we'll read back the conviction of four years ago in
6 Missouri and we will see that it doesn't tell us what
7 item on the schedule. That's the problem that you see.

8 MS. KOVNER: That --

9 JUSTICE BREYER: Any other?

10 MS. KOVNER: Your Honor, that's a
11 significant practical problem that's going to introduce
12 widespread variation in the deportability of people who
13 have committed crimes involving Federally controlled
14 substances.

15 JUSTICE KAGAN: But -- but as Ms. -- as
16 Justice Sotomayor suggested, it's a significant
17 practical problem that's implicated in the current
18 practice of the BIA.

19 MS. KOVNER: I -- I'm -- I don't think
20 that's correct. We think the current BIA precedent is
21 quite ambiguous on the possession point and we think
22 that --

23 JUSTICE KAGAN: It at least might be
24 implicated in the current practice of the BIA.

25 MS. KOVNER: We think that the BIA's

1 precedent on this point is unclear.

2 But, Justice Breyer, our argument isn't just
3 about the practical consequences. It's also about the
4 best reading of this text. We don't think this text
5 is -- is ambiguous. It talks about violations of laws
6 relating to --

7 JUSTICE BREYER: You have to choose. As you
8 well know, the problem you just mentioned is a problem
9 that we're just having a terrible time with in respect
10 to the violence add-ons. And it's -- stems from the
11 fact that State laws differ one from the other
12 enormously. So we either have that problem or we have
13 the problem of you have a general statute and which does
14 it apply more to and so forth. Or you have the problem
15 of do you look -- as I think Justice Kagan's approach --
16 do you -- you look at the individual facts of the case
17 and require them to prove it out again. I -- I don't
18 see how we escape one serious problem or another.

19 MS. KOVNER: I agree. And let me propose
20 that there are -- there's difficulties under either
21 approach -- approach. Let me tell you why I think this
22 is the best approach here.

23 The first is I think the text signal that
24 Congress chose our approach here. And the text is
25 different from any other similar provisions. The second

1 is that there's --

2 JUSTICE SOTOMAYOR: It's -- it's exactly
3 like it. When Congress intended to say -- and I can
4 point to at least three provisions -- when it wanted to
5 say any controlled substance without reference to -- to
6 802, it said, any controlled substance. And when it
7 wanted to limit it to 802, it defined the controlled
8 substance as being listed in 802.

9 MS. KOVNER: Your Honor --

10 JUSTICE SOTOMAYOR: So it knows how to
11 differentiate the two.

12 MS. KOVNER: The -- the textual contrast that
13 we find most revealing here is that there are provisions
14 of the INA that talk about being removable for a crime
15 related to controlled substances, and then you would do
16 the categorical approach just as you're proposing. But
17 let me just mention the practical reason why we think
18 our approach is preferable, Justice Breyer, and why we
19 think that Congress chose it, which is that Congress
20 acted against the backdrop of State drug laws like
21 Kansas's, which -- which weren't States just enacting
22 random lists of substances as their controlled substances.
23 These laws are designed, as -- as Congress put it, as an
24 interlocking trellis to closely relate to Federal law.
25 So Congress wanted --

1 JUSTICE KAGAN: But, Ms. Kovner, I would
2 think that the history works against you in the
3 following way: Because the prior statute here was a
4 statute that listed all these Federally controlled
5 substances. And that eventually got to be impractical,
6 there were too many of them, they kept changing and so
7 Congress went to this approach. But it was clear in the
8 old statute that the only way that you could be held
9 deportable was if you had been convicted of an offense,
10 you know, possession or distribution or whatever, with a
11 Federally controlled substance. And there's no reason
12 to think that in enacting this statute that -- that
13 Congress meant to do something broader than that.
14 There's every reason to think it wanted to do the exact
15 same thing. If you're convicted of a controlled
16 substance -- of possession of a controlled substance,
17 you are deportable. If you're not, if it's only
18 Sudafed, you're not.

19 MS. KOVNER: Your Honor, I don't think
20 that's correct. Congress, in the prior versions of the
21 statute, did specify particular acts that your conduct
22 had to involve and also specified a narrower list of
23 substances that your conduct had to relate to. But I
24 don't think it's clear that Congress believed -- there's
25 nothing in the legislative history or other documents to

1 suggest that Congress believed that "relating to"
2 language meant involving --

3 JUSTICE KAGAN: No. But the question is,
4 when Congress makes a change like that, which we know is
5 a change for a particular reason because the list of
6 substances was getting out of control -- it's very much
7 like yesterday's case; I don't know if you're familiar
8 with that -- but Congress makes a change for one reason,
9 suggests -- does not make any -- any suggestion that
10 this change is supposed to do something else and
11 something much bigger, which is extend this
12 deportability provision to controlled substances that
13 aren't part of the Federal list, and there's just no
14 reason to think that Congress did that in making this
15 change.

16 MS. KOVNER: Your Honor, the -- the
17 "relating to" language, which is very broad language, is
18 within the prior statute, and it's within the statute
19 now. We don't think there's an indication that Congress
20 read that statute narrowly in the prior versions. We
21 think the plain meaning of that -- that language is
22 quite broad.

23 Your Honor, let me just mention. There is a
24 second reason that we've talked principally about the
25 first one, but the BIA was also entitled to Chevron

1 deference for its separate reasoning pertaining to
2 paraphernalia. The BIA has for many, many years
3 reasoned that there are some crimes that are related to
4 the drug trade in general, not necessarily to any
5 individual substance. And the earliest case on this was
6 a case about --

7 JUSTICE SOTOMAYOR: Espinoza came out when?

8 MS. KOVNER: The case I'm thinking of is
9 Martinez-Gomez from 1972, which talks about opening a
10 drug -- essentially, opening a drug den, and they say
11 that's a crime that doesn't necessarily relate just to
12 any individual substance; it bears a relationship to all
13 substances. And then in Martinez Espinoza, more
14 recently, um the Court --

15 JUSTICE SOTOMAYOR: That was a Federal
16 crime, though. It had to relate to a controlled
17 substance on the Federal list, to all drugs on the
18 Federal list.

19 MS. KOVNER: Your Honor, the reasoning of
20 Martinez-Gomez and then the reasoning of Martinez
21 Espinoza is that these are crimes that don't necessarily
22 have to bear a relationship to a single substance. For
23 instance, drug paraphernalia are tools that can be used
24 with multiple substances. So you might possess, you
25 know, scales and baggies for the purpose of packaging a

1 particular drug on one occasion, but those items can
2 just as easily facilitate those activities with respect
3 to --

4 JUSTICE GINSBURG: But a -- a sock. I mean,
5 one of the strange things about this case is you have a
6 disjunction. A sock doesn't count as drug paraphernalia
7 under the Federal law, but it does under the State law;
8 it means any container. And then to take that State
9 law -- I mean, suppose we -- we have a conviction for
10 one of those drugs that's not on the Federal list, just
11 for possession of that drug, and then we have another
12 conviction where that drug is inside a sock and it's for
13 drug paraphernalia.

14 So in the one case you would say not
15 removable, if it's just the substance itself, and in the
16 other case, because of the sock, it becomes removable?

17 MS. KOVNER: Your Honor, I agree that I
18 think a strange feature of this case is that it involves
19 an item that's not usually thought of as drug
20 paraphernalia. I think the classic paraphernalia items
21 and the ones you see most often prosecuted in Kansas and
22 in other States are things like hyperdermic needles and
23 scales and substances that are used to mix with drugs
24 before sale, and I think it's easiest to see in that
25 case why the BIA's reasoning makes sense, which is,

1 those items, when they're possessed by somebody in
2 connection, even with a State-controlled drug, are
3 tools --

4 JUSTICE SOTOMAYOR: I don't think that's the
5 important point that Justice Ginsburg's making. She's
6 saying under Federal law, this person can't be convicted
7 for that drug -- that's not a drug on the Federal
8 list -- but it can -- or the State list -- but can be
9 convicted, under your theory, for possessing the sock
10 and that non-illicit drug in the sock.

11 MS. KOVNER: For possessing the sock. And I
12 think it's easiest --

13 JUSTICE SOTOMAYOR: With the -- with that
14 particular unscheduled item.

15 MS. KOVNER: And I think it's easiest to see
16 why the BIA drew this conclusion when you talk about the
17 more classical tools of paraphernalia, which is, if
18 somebody possesses scales and distribution baggies and
19 cut in connection with a State-controlled substance --
20 say it's synthetic marijuana, an item that's not
21 Federally controlled at the time -- those are tools that
22 could be used in connection with a Federal drug as well.
23 And so this -- the BIA reasoned that there are certain
24 crimes that -- that involve conduct that could
25 facilitate the distribution of one drug just as easily

1 as another.

2 JUSTICE ALITO: Do we -- do we even know
3 that this is a -- a proper conviction under Kansas law,
4 that the Kansas statute actually means what it's been
5 interpreted here to mean? The Petitioner pled guilty to
6 this, I think, because he got a break, because he could
7 have been charged with something -- if, in fact, he had
8 Adderall, which is a Federally controlled substance --
9 he could have been charged with something more serious.
10 So he pled to this misdemeanor. But it's really hard to
11 believe that the Kansas statute actually regards as drug
12 paraphernalia anything that is used at any time to
13 contain a controlled substance.

14 Suppose somebody buys marijuana or some
15 other drug and it's in a plastic bag. So the plastic
16 bag is -- that's one violation. The person puts it in a
17 pocket; that's another violation. The pocket is -- is
18 drug paraphernalia. Takes it out of the pocket and puts
19 it in the glove compartment of a car; that's a third
20 violation. The car is equipment that's used to store
21 it. Takes it out of that, puts it in something -- it --
22 it can't really mean this, but we don't have State court
23 interpretations.

24 MS. KOVNER: That's right. And if I could
25 just make two brief points about that.

1 You're right that this was a result of a
2 plea, and as a result, we don't know exactly what Kansas
3 courts would say about this application, which is a very
4 unusual application. But I think that illustrates,
5 Justice Alito, I think, the bad consequences of
6 Petitioner's view, which is, for Petitioner, even if it
7 was cocaine that was stored in the sock, if he pleads
8 guilty to the paraphernalia offense, the BIA will lack
9 any ability to take enforcement action against him,
10 because he's convicted of a paraphernalia crime, and the
11 nature of the substance doesn't --

12 JUSTICE KAGAN: If he had cocaine in his
13 sock, he would probably be convicted of possession of
14 cocaine.

15 MS. KOVNER: But --

16 JUSTICE KAGAN: He was convicted of
17 paraphernalia here because he had four pills of
18 Adderall, which if you go to half the colleges in
19 America, people -- you know, and just randomly pick
20 somebody, there would be a decent chance --

21 (Laughter.)

22 MS. KOVNER: I think -- I think Justice
23 Alito's explanation of this case explains why that's not
24 so. In a plea bargain, prosecutors may be willing to
25 let somebody plead to a drug paraphernalia offense in

1 lieu of a possession offense, and Congress did not want
2 the fact that a State or local prosecutor allows that
3 kind of plea bargain to mean that immigration
4 authorities lack the ability to remove somebody
5 convicted of a crime that relates to a controlled
6 substance.

7 CHIEF JUSTICE ROBERTS: Well, I would have
8 thought the opposite inference. If it's not such a big
9 deal that the State is willing to let him cop a plea to
10 drug paraphernalia, why should that be the basis for
11 deportation under Federal law?

12 MS. KOVNER: Your Honor, we don't think that
13 Congress viewed drug crimes that way. The way it wrote
14 this removal provision was to say that any crime
15 relating to controlled substances permits the BIA to
16 seek removal. And that's because, we think, Congress
17 saw drug crimes as quite serious. This Court has
18 recognized that, and Congress has essentially said so in
19 other statutes. So we --

20 CHIEF JUSTICE ROBERTS: Well, but, I mean,
21 the only -- it's because you give "relating to" such a
22 broad construction that you get the -- what I think is
23 the unusual situation that I talked about, which is that
24 the State thinks it's a very minor offense and yet it
25 can become so significant that the person's deported.

1 MS. KOVNER: But Petitioner's approach is a
2 poor way of reading a crime severity distinction into
3 the statute. We don't think that's what the language
4 allows, for minor drug crimes to be set aside as a basis
5 for --

6 JUSTICE SOTOMAYOR: Why is it a poor way? I
7 mean, the drugs that the Federal government believes are
8 the most serious are listed in 802. And so if you have
9 to prove, under the modified categorical approach, that
10 one of those drugs was the intended use, what is so
11 horrible and -- and dissonant about affecting the intent
12 based on the drugs Congress has chosen to list?

13 MS. KOVNER: Your Honor, it's a bad way
14 because serious drug crimes involving Federally
15 controlled substances will not be removable under
16 Petitioner's view. And to get --

17 JUSTICE SOTOMAYOR: No, no, no, no, no. We
18 -- I know that you keep saying "for many years," but
19 it's not that many years. And the BIA has routinely
20 required in distribution and possession cases that you
21 identify the drug.

22 MS. KOVNER: Your --

23 JUSTICE SOTOMAYOR: And so they haven't
24 found it impossible in thousands of those cases. It may
25 be more difficult in the drug paraphernalia case because

1 Justice Kagan was right. They're minor offenses; often,
2 States won't bother with pleas that are very lengthy or
3 very complex. But that's a happenstance. That's not --

4 MS. KOVNER: It would --

5 JUSTICE SOTOMAYOR: Does it call for
6 changing the natural reading of the sentence?

7 MS. KOVNER: No. We -- Your Honor, we're
8 seeking the application of what we think is the best
9 reading of the sentence. Your Honor, I think if you
10 look at the BIA cases that we cite on Page 31, they show
11 that Petitioner's approach will prevent the removal of
12 aliens committing crimes involving Federally controlled
13 substances in many cases because the conviction records
14 aren't going to specify the drug involved.

15 Thank you.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.
17 Mr. Laramore, you have four minutes left.

18 REBUTTAL ARGUMENT OF JON LARAMORE

19 ON BEHALF OF THE PETITIONER

20 MR. LARAMORE: First, the BIA's position is
21 not unclear or in flux.

22 The BIA reaffirmed in a case called Ferreira
23 last year, cited on page 22 of our reply brief, its
24 position, just as Justice Sotomayor said, that the
25 substance has to be identified in um possession and sale

1 cases and it has to be an 802 substance. That's a
2 system that has been in place for decades. It has
3 worked. It has allowed the deportation of drug
4 criminals. It doesn't need to be changed.

5 I'd ask the Court to focus on -- on
6 something that -- that Ms. Kovner raised, which is what
7 Congress intended and knew about when it enacted this
8 version of the statute in 1996, and -- I'm sorry, 1986.
9 And she said that they knew about the Uniform Controlled
10 Substances Act and that may have had an influence,
11 although there's nothing that shows in the legislative
12 history that it did.

13 But Congress also knew about the categorical
14 approach when it put the word "convicted" into the
15 statute at that time. And it knew that the categorical
16 approach and the modified categorical approach would be
17 used when it -- when it invoked the word "convicted."
18 And that's what we're asking the Court to reaffirm now.

19 The word "law" that we've talked about so
20 much that's in the sentence, or "law and regulation,"
21 is necessary in the statute to support what -- another
22 thing that Congress tried to do in that law, in that
23 statute, which was to clearly invoke States' authority
24 and foreign countries' authority to convict -- to allow
25 those convictions to support deportation. And if --

1 there's -- it was a convenient way to insert that
2 concept into the statute.

3 I would also point out that the
4 underpinnings of the Martinez Espinoza case, which is
5 the one that they rely on now -- this is the so-called
6 drug trade exception, this -- which is really just a
7 drug paraphernalia exception -- are not nearly as
8 strong as the government suggests.

9 Martinez-Gomez is a case about -- I'm not
10 quite sure what you call it -- a drug house, a place
11 where drugs are commonly used. But there was no
12 indication in Martinez-Gomez that it necessarily
13 involved any substances that were not Section 802
14 substances.

15 It's not very strong support for this
16 creation out of really whole cloth a drug trade
17 exception.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 The case is submitted.

21 (Whereupon, at 11:10 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

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