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IN THE SUPREME COURT OF THE UNITED STATES

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MOONES MELLOULI, :

Petitioner : No. 13-1034

v. :

ERIC H. HOLDER, JR., :

ATTORNEY GENERAL. :

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Washington, D.C.

Wednesday, January 14, 2015

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

APPEARANCES:

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

RACHEL P. KOVNER, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on 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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