No. 13-1034

In The
Supreme Court of the United States

MOONES MELLOULI,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF IMMIGRATION LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

Amici curiae are 92 professors of law who specialize in immigration law, including its intersection with administrative and criminal law. *Amici* have an interest in this Court's consideration of the development and proper application of the categorical approach, which has served as a bedrock principle of immigration adjudications involving criminal convictions for over a century. *Amici* submit this brief to provide the Court with the history and principles behind the categorical approach in the immigration context, to describe immigration officials' long-standing application of this approach to analyzing drug convictions, and to illustrate how Respondent's position conflicts with statutory requirements and precedent in this arena. The names, titles, and institutional affiliations (for identification purposes only) of *amici* are listed in an Appendix.[1]

SUMMARY OF ARGUMENT

As this Court recently recognized in *Moncrieffe v. Holder*, ___ U.S. ___, 133 S. Ct. 1678, 1685 (2013), immigration adjudicators have applied the categorical

[1] Pursuant to Rule 37, *amici* state that no counsel for a party authored any part of this brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief. Letters of consent have been filed with the Clerk of the Court.

approach to determine whether a person has been "convicted" of an offense triggering immigration consequences for over a century. This approach, grounded in Congress's requirement that noncitizens be "convicted" of certain types of offenses to face specified grounds of removal or bars to relief, has been affirmed by case after case and repeatedly reenacted by Congress since it first specified a conviction requirement in the statute in 1875. This approach requires immigration adjudicators to determine the immigration consequences of a conviction based solely on the minimum conduct that is necessarily established by the conviction under the applicable criminal statute, not the underlying facts.

First developed in the context of "crimes involving moral turpitude," the categorical approach has long applied to the determination of whether a noncitizen has been convicted of the type of controlled substance offense that triggers immigration consequences under federal immigration law. This has included a categorical inquiry into both the type of drug activity and the type of substance proscribed by statute.

Respondent's position is at fundamental odds with this long-established approach in immigration cases. Under Respondent's position, noncitizens convicted of the possession of drug paraphernalia – a minor offense in many state and local jurisdictions (and one that is not criminalized federally) – would be deportable regardless of whether the conviction involved a federally controlled substance. The

consequences of this position are severe. Minor offenses that involve substances not proscribed under federal law could subject noncitizens to deportation, detention, and in some cases bar them from seeking relief from removal.

This brief is organized in two points. Point I describes the century of jurisprudence affirming Congress's choice of a categorical approach for the assessment of convictions by immigration adjudicators, including controlled substance offenses. It demonstrates immigration officials' longstanding recognition of the importance of tethering the conviction to the relevant type of controlled substance. Point II illustrates how Respondent's position conflicts with this longstanding approach.

ARGUMENT

I. COURTS AND THE AGENCY HAVE LONG APPLIED THE CATEGORICAL APPROACH TO ASSESS THE IMMIGRATION CONSEQUENCES OF CONVICTIONS, INCLUDING DRUG CONVICTIONS.

Courts and the agency have long applied the categorical approach in determining whether a criminal disposition leads to immigration consequences that are based on a "conviction" of an offense. Under the categorical approach, immigration adjudicators may consider only the minimum conduct proscribed by the statute of conviction in determining the immigration

consequences of the past conviction. *See Moncrieffe,* 133 S. Ct. at 1684 (holding that immigration adjudicators must determine only "what the state conviction necessarily involved," requiring a presumption that the conviction "rested on nothing more than the least of the acts criminalized" (quotation marks omitted)). Where the statute proscribes alternate offenses – some of which carry immigration consequences and some of which do not – the "modified" categorical approach permits immigration adjudicators to review the record of conviction to determine which offense constituted the basis for the conviction. *See id.* (explaining the modified categorical approach's application to "state statutes that contain several different crimes, each described separately" permitting a court to review the record of conviction "to determine which particular offense the noncitizen was convicted of" (citations omitted)); *see also Descamps v. United States*, ___ U.S. ___, 133 S. Ct. 2276, 2284 (2013) (explaining that the modified categorical approach applies when a "statute is 'divisible' – i.e., comprises multiple, alternative versions of the crime," and thus operates as "a tool for implementing the categorical approach, to examine a limited class of documents to determine which of a statute's alternative elements formed the basis of the defendant's prior conviction" (citation omitted)). Under no circumstances may an immigration adjudicator consider or assume facts beyond those necessary for the conviction.

Grounded in Congress's choice to predicate certain immigration consequences on convictions, the

categorical approach ensures fairness, uniformity, and predictability in the administration of immigration law. *See* Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257, 295-310 (2012) (analyzing rationales for the categorical approach in the immigration context); Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting the Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669, 1725-46 (2011) (same); Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law*, 62 U. MIAMI L. REV. 979, 1032-34 (2008) (same).

Over the years, this Court has applied the categorical and/or modified categorical approach in both the criminal sentencing and immigration contexts. In *Descamps*, the Court most recently applied the categorical approach to determine if a prior conviction triggered federal sentencing enhancement under the Armed Career Criminal Act. 133 S. Ct. at 2285-86. Similarly, the Court has applied a categorical approach in a number of immigration cases predicated on past convictions. *See Moncrieffe*, 133 S. Ct. at 1685; *Carachuri-Rosendo v. Holder*, ___ U.S. ___, 130 S. Ct. 2577 (2010); *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183 (2007); *see also Lopez v. Gonzalez*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

These recent cases reinforce the applicability of the categorical approach in this case. For controlled substance conviction-based grounds of removability

and bars to relief, immigration adjudicators must rely only on the minimum conduct necessary for the conviction to determine whether the conviction qualifies as a controlled substance offense – the crux of the issue here being whether an individual has been convicted of a violation of a law "relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 8 U.S.C. § 1227(a)(2)(B)(i); *see also* 8 U.S.C. § 1182(a)(2)(A)(i)(II).

Respondents seek to read out the definitional provision of what constitutes a controlled substance from the statute and, by doing so, bypass the dictates of the categorical approach in this case. Yet the possibility that some noncitizens may be convicted of foreign, state, or local drug offenses that are not related to federally controlled substances is not new. Since Congress first predicated adverse immigration consequences of certain types of drug convictions, immigration adjudicators have had to assess whether noncitizens' convictions involved the relevant type of controlled substance for purposes of deportation. This inquiry has applied regardless of the type of offense – possession, sale, or other types of drug offenses – for decades.

This section of the brief outlines the principles behind the categorical approach and describes their proper application in the immigration context. Part I.A describes the development of the categorical approach. Part I.B describes the application of the categorical approach to drug convictions. Part I.C describes how these rules have applied to inquiries

regarding both the type of drug activity and the type of substance necessary for conviction. Part I.D explains how the term "relating to" has been historically used by immigration officials to assess whether an individual was necessarily convicted of the relevant type of drug activity, not as a basis to ignore the requirement that an individual be convicted of the relevant type of substance specified in the statute.

A. The categorical approach has long required courts and agency officials to assess the minimum conduct proscribed under a criminal statute in order to determine whether an individual was necessarily "convicted" of a given offense.

The categorical approach has been applied in the immigration context for over a century. It is relied upon by front-line immigration officers and immigration judges every day to decide thousands of claims regarding conviction-based grounds of removability and bars to status or relief from removal. Congress, aware of the streamlined administrative nature of these adjudications, has repeatedly required that immigration officials and courts rely only on what is established by the conviction itself, i.e., the minimum conduct established by the criminal court's adjudication of the case based on the criminal statute. This test is well-established in case law interpreting Congress's conviction requirement, which Congress has repeatedly utilized when adding certain grounds

of removal and bars to status or relief in federal immigration law. *See United States v. Hayes*, 555 U.S. 415, 424-25 (2009) ("[W]hen judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its . . . judicial interpretations as well." (citation omitted)); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

Since 1875, Congress has premised specific immigration consequences on certain types of *convictions*. *See* Act of Mar. 3, 1875, ch. 141, § 5, 18 Stat. 477, 477 (excluding "persons who are undergoing a sentence for conviction in their own country of felonious crimes"); Act of Mar. 3, 1891, ch. 551 § 1, 26 Stat. 1084, 1084 (excluding "persons who have been convicted of a felony or other infamous crime or misdemeanor involving moral turpitude"). Congress chose language requiring a conviction to trigger some immigration consequences, while prescribing a conduct-based standard for others. *Compare id. with* Act of Feb. 20, 1907, ch. 1134, § 3, 34 Stat. 898, 900 ("[A]ny alien woman or girl . . . practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported").

In examining Congress's use of the "convicted" language in early federal immigration cases, courts concluded that Congress intended to limit the authority of immigration adjudicators to determine

consequences based on the conviction rather than the underlying conduct. One of the first cases discussing this requirement is *United States ex rel. Mylius v. Uhl*, in which a noncitizen challenged his detention and exclusion from the United States on the basis of a prior conviction for criminal libel in England. 203 F. 152, 153 (S.D.N.Y. 1913). Immigration officials had concluded that the petitioner had been "convicted" of an offense "involving moral turpitude" by reviewing reports of the trial and the underlying facts that gave rise to his conviction. *Id.* Judge Noyes, writing for the federal district court in the Southern District of New York, concluded that the immigration officials erred by not confining their review to the "inherent nature" of the statutory offense of criminal libel, which "depends upon what *must be shown* to establish [the noncitizen's] guilt." *Id.* at 154 (emphasis added). Under this inquiry, the court held that libel did not necessarily involve moral turpitude, for libel convictions could be obtained where defendants violated the statute without intent or knowledge. *Id.* The Second Circuit affirmed, holding that Congress did not intend for immigration officers to "act as judges of the facts to determine from the testimony in each case whether the crime of which the immigrant is convicted does or does not involve moral turpitude. . . . this question must be determined from the judgment of conviction." *United States ex rel. Mylius v. Uhl*, 210 F. 860, 863 (2d Cir. 1914).

This reading of the statute was further reinforced by Judge Learned Hand in a series of cases. In *United*

States ex rel. Guarino v. Uhl, Judge Hand addressed the issue of whether a conviction for possession of a "jimmy," a common burglary tool, with intent to commit a crime was properly classified as a crime involving moral turpitude. 107 F.2d 399, 400 (2d Cir. 1939). Judge Hand focused the inquiry upon "whether all crimes which [the petitioner] may intend are 'necessarily,' or 'inherently,' immoral." *Id.* Judge Hand observed that the statute of conviction covered conduct that could be "no more than a youthful prank" born of "curiosity, or a love of mischief." *Id.* Focused upon this minimum level of conduct, Judge Hand stated that "it would be to the last degree pedantic to hold that [the conviction] involved moral turpitude and to visit upon it the dreadful penalty of banishment." *Id.* While acknowledging that "other circumstances [made] it highly unlikely that this alien had possession of the jimmy for [a] relatively innocent purpose," Judge Hand nevertheless honored the minimum conduct test, holding that "[deportation] officials may not consider the particular conduct for which the alien has been convicted, and indeed this is a necessary corollary of the doctrine itself." *Id*.

The categorical approach was also applied in cases in which a noncitizen had been convicted under a so-called "divisible" statute – one proscribing multiple, separate offenses, only some of which necessarily trigger specific immigration consequences. In such cases, courts permitted immigration adjudicators to examine the official record of conviction – not as an inquiry into the facts underlying the conviction, but

rather for the limited purpose of determining which offense within the statute served as the basis for the noncitizen's conviction. This test – which courts later termed a "modified categorical approach" – was applied in the seminal case *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933). The Second Circuit assessed whether a noncitizen's prior conviction for second degree assault under New York law necessarily involved moral turpitude. *Id.* Finding that the state offense defined second degree assault through five subdivisions specifying different offenses, only some of which inherently involved moral turpitude, the court held that immigration officials could look to "the charge (indictment), plea, verdict, and sentence" to determine "the specific criminal charge of which the alien is found guilty and for which he is sentenced." *Id.* at 759. The court further held that the inquiry was limited solely to this "record of conviction," permitting immigration adjudicators to determine only which subsection gave rise to the noncitizen's conviction. *Id.* at 757. The court reaffirmed the minimum conduct test, holding that "[t]he evidence upon which the verdict was rendered may not be considered." *Id.* at 759.

The reasoning of these early federal court decisions was also adopted by the Attorney General and the Board of Immigration Appeals ("B.I.A.") soon after its formation. *See Op. of Hon. Cummings*, 37 Op. Att'y Gen. 293 (A.G. 1933) (applying a categorical approach to convictions); *see also Matter of S-,* 2 I. & N. Dec. 353 (B.I.A., A.G. 1945) (same). In doing so,

both the Attorney General and the B.I.A. have looked to the minimum conduct necessary under a conviction to determine deportation or exclusion consequences. *See, e.g.*, *Matter of B-*, 4 I. & N. Dec. 493, 496 (B.I.A. 1951) ("[T]he definition of the crime must be taken at its minimum . . . an administrative body must follow definite standards, apply general rules, and refrain from going behind the record of conviction."); *Matter of P-*, 3 I. & N. Dec. 56, 59 (B.I.A. 1947) ("[A] crime must by its very nature and at its minimum, as defined by the statute, involve an evil intent before a finding of moral turpitude would be justified.").

The categorical approach has remained the dominant inquiry in immigration cases, whether the provision relates to having been convicted of a crime involving moral turpitude or other immigration grounds, such as the controlled substance ground of removability.[2] *See* Das, 86 N.Y.U. L. REV. at 1688-1702, 1749-1752 (describing the historical

[2] The Attorney General recently departed in part from the categorical approach for crimes involving moral turpitude in *Matter of Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008), *overruled in Silva-Trevino v. Holder*, 742 F.3d 197 (5th Cir. 2014). A majority of federal circuits have rejected *Silva-Trevino* as contrary to Congressional intent requiring a categorical approach. *See Silva-Trevino*, 742 F.3d at 198; *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013); *Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012); *Fajardo v. Att'y Gen.,* 659 F.3d 1303 (11th Cir. 2011); *Jean-Louis v. Att'y Gen.,* 582 F.3d 462 (3d Cir. 2009); *but see Bobadilla v. Holder*, 679 F.3d 1052 (8th Cir. 2012); *Mata-Guerrero v. Holder,* 627 F.3d 256 (7th Cir. 2010).

development of the categorical approach in immigration law and collecting cases).

B. Where Congress has predicated adverse immigration consequences on whether an individual has been "convicted" of a violation of any law "relating to" specified controlled substances, the categorical approach has long applied.

In the context of federal drug regulation, Congress has long premised adverse immigration consequences on convictions. *See* Narcotic Drugs Import and Export Act of 1909, ch. 100, 35 Stat. 614, *as amended by* Act of May 26, 1922, ch. 202, 42 Stat. 596, 597 (specifying that "any alien who at any time after his entry is *convicted* under subdivision (c) [narcotics offense under the act] shall, upon the termination of the imprisonment . . . be taken into custody and deported" (emphasis added)); Act of Feb. 18, 1931, ch. 224, 46 Stat. 1171, 1171 (providing that a noncitizen "*convicted* and sentenced for violation or conspiracy to violate any statute of the United States taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, or any salt, derivative, or preparation of opium or coca leaves" shall be detained and deported (emphases added)).

Over time, Congress expanded the bases by which a drug conviction may trigger immigration consequences, without changing the requirement that a conviction is required. In 1940, Congress eliminated the prior law's requirement of a sentence thus making a conviction alone sufficient for deportation, and extended the provisions to apply to any noncitizens convicted under state and federal law. *See* Act of June 28, 1940, ch. 439, title III, § 30, 54 Stat. 673. In 1952, Congress broadened the grounds of drug-conviction-based deportability to make deportable any noncitizen "who at any time has been *convicted* of a violation of any law or regulation relating to the illicit traffic in narcotic drugs" or "who has been *convicted* of a violation of any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction sustaining opiate." Immigration and Nationality Act of 1952, ch. 5, § 241, 66 Stat. 204, 206-07 (emphasis added). In 1956, Congress amended the Immigration and Nationality Act to include convictions for "illicit possession" of narcotic drugs. Act of July 18, 1956, ch. 629, title III, § 301, 70 Stat. 567, 575. In 1960, Congress further expanded the act to include convictions for "illicit possession" of marijuana. Act of July 14, 1960, Pub. L.

No. 86-648, 74 Stat. 504, 505. By 1986, Congress replaced the lengthy list of various types of drug offenses involving various types of controlled substances (which had included narcotics, marijuana, opiates, heroin, and other specific drugs) with the present-day framework, predicated on the conviction of any violation of a law relating to a controlled substance defined in 21 U.S.C. § 802, i.e., the federal schedules. *See* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-47 (allowing deportation for a noncitizen "*convicted* of . . . a violation of . . . any law . . . of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21)").

Not all drug-based immigration consequences were predicated on convictions, however. Congress also attached consequences to any individual deemed a "drug addict," Immigration and Nationality Act of 1952, ch. 5, § 241, 66 Stat. 204, 206, or whom "officers know or have reason to believe is or has been an illicit trafficker in any of the aforementioned drugs," Immigration and Nationality Act of 1952, ch. 2, § 212, 66 Stat. 182, 184. These provisions continue to exist in the present-day version of the statute. 8 U.S.C. §§ 1182(a)(1)(A)(iv) ("drug abuser or addict" inadmissibility), 1182(a)(2)(C) ("reason to believe . . . illicit trafficker" inadmissibility), 1227(a)(2)(B)(ii) ("drug abuser or addict" deportability). The present-day version of the statute also makes inadmissible (but not deportable) a person who "admits" the commission of violation of law relating to a controlled substance (as

defined by 21 U.S.C. § 802). 8 U.S.C. §1182(a)(2)(A)(i); *see also* Das, 86 N.Y.U. L. REV. at 1689-90 (discussing the limitations on application of "admits" terminology).

In interpreting these various drug provisions, the federal immigration agency applied the categorical approach to the provisions predicated on convictions. In the 1949 case *Matter of D-S-*, the B.I.A. considered whether a noncitizen's federal marijuana conviction rendered him deportable as someone "*convicted* for the violation of a (Federal) statute ' . . . taxing, prohibiting, or regulating the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of . . . marihuana. . . .'" under the applicable statute. 3 I. & N. Dec. 502, *1-2 (B.I.A. 1949) (emphasis added, citation omitted). Examining the indictment, the B.I.A. concluded that the noncitizen had been convicted of the unlawful possession of marijuana, which was not proscribed under the relevant immigration provision at the time. *Id*. at *2-3. The issue was whether the immigration judge was entitled to examine the noncitizen's testimony in immigration proceedings to go behind the record of conviction to assess whether the underlying conduct would trigger deportation. *Id*. at *4. Rejecting this factual inquiry and overruling a prior case that had deemed such an inquiry permissible, the B.I.A. explained that the statute required the categorical approach and thus prohibited immigration officials from going beyond the record of conviction:

> It is well settled in immigration proceedings that the nature of the crime is conclusively established by the record of conviction consisting of the charge or indictment, the plea, the verdict and sentence. We are not permitted to go behind this record to determine purpose, motive, or facts, either favorable or unfavorable to the alien. The act of February 18, 1931, does not empower us to retry a closed narcotic case.

Id. at *4-5 (overruling *Matter of L-C-*, 2990174 (B.I.A. May 30, 1945)).

Since *Matter of D-S-,* the B.I.A. has consistently applied the categorical approach to the assessment of drug convictions. In doing so, the B.I.A. distinguished provisions that predicated consequences on drug *convictions* from provisions that were not tethered to convictions. In the 1953 case *Matter of B-,* for example, the B.I.A. rejected any reliance on facts beyond the record of conviction to determine if a noncitizen was convicted of the type of drug offense that rendered him deportable under immigration law. 5 I. & N. Dec. 479, *5 (B.I.A. 1953) (holding that "we are bound by the record of conviction and are precluded from going behind such record to the testimony of the respondent or to other evidence to establish the ground of deportability herein"). In doing so, the B.I.A. observed that had the relevant immigration charge not required a conviction (such as the provision that provided for exclusion if there were "reason to believe" the person engaged in illicit trafficking), then a factual inquiry would have been permissible.

Id. at *5-6. But because Congress predicated the particular adverse immigration consequences on drug convictions, the categorical approach had to apply. *Id.*; *see also Matter of L-,* 5 I. & N. Dec. 169 (B.I.A. 1953) (rejecting immigration officials' request to look beyond record of conviction to determine whether a possession conviction actually involved the trafficking of narcotics under the relevant immigration provision). Thus the categorical approach has long applied to the assessment of controlled substance offenses where Congress predicated consequences on such convictions.

C. The categorical approach has historically applied to assessing both whether a noncitizen was convicted of the type of drug *activity* and the type of *substance* required under the relevant conviction-based immigration provision.

The categorical assessment of the immigration consequences of drug convictions has historically involved two main inquiries. First, immigration officials have to assess whether the individual was convicted of the type of *drug activity* that was listed in the relevant immigration provision. Second, immigration officials have to assess whether the individual was convicted of a violation involving the type of *substance* that was listed in the relevant immigration provision. The categorical approach has long applied to both inquiries.

The B.I.A. has long grappled with the first inquiry, determining whether a noncitizen was convicted of the relevant type of drug activity. The scope of this inquiry has changed with various versions of drug-related immigration provisions. For example, prior to "possession" being added to the list of grounds for deportation, several cases arose where immigration officials would assess whether an individual's conviction was for possession (and thus not a deportable offense) or for trafficking (a deportable offense). In those cases, the categorical approach has consistently applied. *See Matter of L-,* 5 I. & N. Dec. 169 (B.I.A. 1953) (rejecting immigration officials' request to look beyond record of conviction to determine whether a possession conviction actually involved trafficking); *Matter of B-*, 5 I. & N. Dec. 479 (B.I.A. 1953) (same); *Matter of D-S-,* 3 I. & N. Dec. 502 (B.I.A. 1949) (same).

Similarly, immigration officials have long had to assess whether the individual was convicted of a violation involving the type of *substance* that was listed in the relevant immigration provision using the categorical approach. Over the various iterations of drug-related immigration provisions, all have been statutorily connected to specific types of drugs, whether defined as "narcotics," "narcotics or marihuana," a list including "opium, coca leaves, heroin, marihuana," or eventually "a controlled substance (as defined in section 802 of title 21)." *See* Point I.B, *supra*. Noncitizens who were not convicted of the

relevant type of controlled substance would therefore raises challenges in their removal cases.

In some of these challenges, the statute or record of conviction specified the type of drug, and the noncitizen would challenge whether that drug was of the type proscribed under the relevant immigration provision. Immigration officials would accordingly engage in an analysis of whether the type of drug at issue matched the type of drug specified in the immigration statute. For example, at various points over the last several decades, the B.I.A. has issued decisions assessing whether opium poppy, LSD, and Demerol were the type of substances proscribed under various provisions of immigration law. *See Matter of McClendon*, 12 I. & N. Dec. 233 (B.I.A. 1967) (holding that a conviction for obtaining Demerol for personal use triggers deportation under the Immigration and Nationality Act of 1952, as amended, after determining that Demerol is a "salt derivative or preparation of . . . isonipecaine or any addiction-forming opiate"); *Matter of M-*, 9 I. & N. Dec. 181 (B.I.A. 1961) (holding that a conviction under the Opium Control Act of 1942 for the growing of "opium poppy" without a license constitutes a violation of "any law or regulation governing or controlling the . . . production of opium, . . . any salt derivative or preparation of opium . . . or any addiction-forming or addiction sustaining opiate" under the Immigration Act of 1952 by determining that the statute of conviction was limited to the cultivation of opium itself rather than any noncontrolled food product (citation

omitted)); *see also Matter of Abreu-Semino*, 12 I. & N. Dec. 775 (B.I.A. 1968) (noting that LSD, as a depressant and stimulant drug, is not a narcotic and thus would not be a deportable offense under the relevant controlled substance ground at the time).

In other cases, the statute or record of conviction did not specify the type of drug at issue, in which case the B.I.A. had to assess whether or not the types of drugs listed in the statute of conviction were all included within the type of drugs listed in the relevant immigration provision. For example, in *Matter of Fong*, the B.I.A. held that a conviction for unlawful use of a drug defined under Pennsylvania law is a conviction relating to illicit possession of a narcotic drug or marijuana "since *every* drug enumerated in the Pennsylvania law is found to be a narcotic drug or marijuana within the meaning of section 241(a)(11) of the Immigration and Nationality Act." 10 I. & N. Dec. 616, 619 (B.I.A. 1964) (emphasis added). Applying the same categorical statutory inquiry to a California law in *Matter of Paulus*, the B.I.A. concluded that a conviction for offering to sell a controlled substance under California law was not necessarily a deportable offense because California proscribes the offer to sell peyote, which was not (at the time) proscribed under federal law. 11 I. & N. Dec. 274, 275 (B.I.A. 1965). In such an instance where the state list of controlled substances did not match the federal list, the B.I.A. held that the government had not met its burden of establishing deportability. *Id*. at 276 ("Since the conviction here could have been for an offer to sell a

substance which though a narcotic under California law is not a narcotic drug under federal laws, we cannot say that the Service has borne its burden of establishing that respondent has been convicted of a violation of a law relating to narcotic drugs.").

Not every noncitizen challenges his or her removal order on the basis of these types of alleged mismatches. Where a challenge is raised, however, for decades the B.I.A. has consistently applied the categorical approach with respect to analyzing the inquiry.

D. Immigration officials have considered the term "relating to" when assessing whether an individual was convicted of the relevant type of drug activity, not as a basis for ignoring the requirement that an individual be convicted of the relevant type of substance.

Inquiries involving the phrase "relating to" in the immigration drug statute have historically arisen when noncitizens have challenged whether they were convicted of the type of the drug activity – not the type of substance – that would render them deportable under the statute. When these challenges have arisen, immigration officials have examined the minimum conduct required by the statute – rather than underlying facts – to determine whether that conduct is the type of conduct to which Congress intended to tie adverse immigration consequences.

For example, the B.I.A. has had to determine whether offenses like conspiracy, attempt, misprision of a felony, or firearms possession during the commission of a felony – each where underlying acts involved drugs – were "relating to" a violation of trafficking or possession laws under the relevant law. The B.I.A. came to differing conclusions based on whether the conviction required involvement in the prohibited drug activity. *Compare Matter of Carrillo*, 16 I. & N. Dec. 625 (B.I.A. 1978) (conviction for unlawful carrying of a firearm during commission of a felony, illicit possession of heroin, is not a violation of a law "relating to" illicit possession of a narcotic drug because it is a separate offense than the underlying felony) *and Matter of Velasco*, 16 I. & N. Dec. 281 (B.I.A. 1977) (conviction of misprision of a felony, to wit, possession of marijuana with intent to distribute, is not a conviction of a law "relating to" the illicit possession of or traffic in narcotic drugs or marijuana because such a conviction does not necessarily involve the commission of the offense that was concealed) *with Matter of Bronsztejn*, 15 I. & N. Dec. 281 (B.I.A. 1975) (holding that conviction for attempted possession of marijuana is a violation of law "relating to" possession of marijuana because the substantive offense that was attempted involved marijuana possession); *Matter of N-*, 6 I. & N. Dec. 557, 561 (B.I.A., A.G. 1955) (holding that a drug conspiracy conviction is a violation of a law "relating to" the illicit trafficking of narcotics under the Immigration and Nationality Act of 1952 because the substantive offense that was the object of the conspiracy involved trafficking).

Similarly, the B.I.A. has assessed whether drug possession and drug use offenses triggered deportability by "relating to" the types of drug activity listed under the relevant immigration provisions at the time. The B.I.A. strictly construed statutory references to possession to exclude convictions that did not necessarily involve the type of possession contemplated by Congress. *See, e.g.*, *Matter of Sum*, 13 I. & N. Dec. 569 (B.I.A. 1970) (holding that state conviction for unlawful "use" of narcotics is not a violation of a law "relating to" illicit possession of narcotics because the individual does not have control of or the ability to traffic in the substance once it is in his or her system (*overruling in part Matter of H-U-*, 7 I. & N. Dec. 533 (B.I.A. 1957) and *Matter of Fong*, 10 I. & N. Dec. 616 (B.I.A. 1964), *superseded by statute as explained in Matter of Hernandez-Ponce*, 19 I. & N. Dec. 613 (B.I.A. 1988)); *Matter of R-M-*, 8 I. & N. Dec. 397 (B.I.A. 1959) (holding that a conviction for simple possession of marijuana is not a deportable offense under the Immigration and Nationality Act of 1952 because Congress (at the time) tethered deportation consequences only to convictions relating to possession specifically for the purpose of manufacturing or producing marijuana, nor for personal use).

The B.I.A. has also applied the term "relating to" to determine whether state statutes aimed broadly at regulating the drug trade were sufficiently related to illicit possession or trafficking for purposes of the relevant deportation provisions at the time. The B.I.A. came to differing conclusions based on whether

the state statute of conviction necessarily entailed engagement in drug possession or trafficking. *Compare Matter of Schunck*, 14 I. & N. Dec. 101, 102-103 & n.1 (B.I.A. 1972) (holding a state conviction for "visit[ing] or . . . be[ing] in any room where any narcotics are being unlawfully smoked or used with knowledge that such activities are occurring" is not a conviction of a law "relating to" the illicit possession or trafficking of narcotics or marijuana since a conviction under the state statute "does not ipso facto establish that he is engaged in the illicit possession of or traffic in narcotic drugs or marijuana" (internal quotation marks omitted)) *with Matter of Martinez Gomez*, 14 I. & N. Dec. 104, 105 (B.I.A. 1972) (holding that a state conviction for "maintain[ing] any place for the purpose of unlawfully selling, giving away or using any narcotic," is a conviction of a law relating to "illicit traffic in narcotic drugs or marijuana" within the meaning of the statute because the place must be maintained for the unlawful disposal of narcotics).

None of these cases involved a challenge to the type of controlled substance involved, and prior to its 2009 decision in *Matter of Martinez Espinoza,* 25 I. & N. Dec. 118 (B.I.A. 2009), the B.I.A. did not use the term "relating to" to resolve a challenge involving the type of controlled substance by broadening or ignoring the list of substances proscribed in the relevant immigration statute. *See* Point II, *infra* (addressing fallacies in Respondent's arguments).

II. RESPONDENT'S POSITION CONFLICTS WITH THE PROPER APPLICATION OF THE LONGSTANDING CATEGORICAL APPROACH IN THE DRUG CONTEXT.

Petitioner Moones Mellouli was convicted under a Kansas statute that prohibits the possession of drug paraphernalia to "store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. § 21-5709(b)(2). The Kansas statute defines "controlled substance" as any drug, substance or immediate precursor included on its own set of schedules. Kan. Stat. Ann. § 21-5701. At the time of Mr. Mellouli's conviction, the Kansas schedule of controlled substances included at least nine substances that were not defined in the federal schedule, 21 U.S.C. § 802. *See* Kan. Stat. Ann. § 21-5701; Pet'r Br. at 3. The Kansas drug paraphernalia statute thus did not refer to the specific type of substance underlying Mr. Mellouli's conviction, nor did any reference to the substance appear in the record of his conviction. Pet'r Br. at 5-6.

Under the longstanding categorical approach described in Point I, *supra*, Mr. Mellouli has not been convicted of a violation of a law "relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." 8 U.S.C. § 1227(a)(2)(B)(i). Neither the statute nor record of conviction establishes that he was necessarily convicted of the type of substance defined in 21 U.S.C. § 802.

Rather than faithfully adhere to this straightforward and longstanding inquiry, Respondent argues that immigration officials may simply ignore the statutory requirement that a noncitizen must be "convicted" of a violation of a law related to a controlled substance "as defined in section 802 of title 21." *See* Resp. Br. in Opp. to Cert. ("BIO") at 7-10 (explaining Respondent's position). Relying on a recent B.I.A. decision, *Matter of Martinez Espinoza,* 25 I. & N. Dec. 118 (B.I.A. 2009), both the U.S. Court of Appeals for the Eighth Circuit and the B.I.A. held that because Mr. Mellouli was convicted under a drug paraphernalia statute that involves "the drug trade in general," it was a violation of law "relating to" a controlled substance offense, despite not necessarily involving a controlled substance as defined in 21 U.S.C. § 802. *Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013). The Eighth Circuit further held the lack of any reference to the type of substance in the Kansas statute and record of conviction was irrelevant to the inquiry because there is "little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will not involve a controlled substance as defined in 21 U.S.C. § 802. *Id.* at 997, 1000 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Finally, while this is not an issue in Mr. Mellouli's deportability case, Respondent has argued that the categorical approach applies differently in cases involving inadmissibility and relief from removal where the burden of proof is on the noncitizen. *See, e.g.*, *Madrigal-Barcenas v. Holder*, No. 13-697, Resp. Br. in Opp. to Cert. at 7-9

(discussing petitioner's failure to meet his burden of proof in drug paraphernalia context); *Matter of Martinez Espinoza,* 25 I. & N. Dec. at 121 (discussing burden of proof in inadmissibility context as another reason not to require that type of substance be established by a drug paraphernalia conviction).

As this section of the brief explains, none of these points provides a basis for departing from the longstanding categorical approach in this case or similar cases. First, prior to the B.I.A.'s 2009 decision in *Matter of Martinez Espinoza*, there was no "drug trade" exception to the requirement that a conviction must establish the specified type of substance required under federal law (which is, under the present statute, a substance defined in 21 U.S.C. § 802). *See* Point II.A, *infra.* Second, Respondent's reliance on the analysis in *Duenas-Alvarez* is flawed. One need not use "legal imagination" to determine whether Kansas criminalizes a substance not on the federal schedule – the statute expressly includes non-federally-controlled substances. *See* Point II.B, *infra.* Finally, this Court should also reject any contention that the categorical approach – a legal inquiry – varies based on burden of proof. *See* Point III.C.

A. There is no "drug trade" exception to the categorical approach when assessing drug convictions.

In *Matter of Martinez Espinoza*, a noncitizen convicted of a Minnesota drug paraphernalia offense challenged his removability on several grounds, including the mismatch between the types of substances proscribed under Minnesota law and those proscribed under 21 U.S.C. § 802. 25 I. & N. Dec. 118, 121-22 (B.I.A. 2009). After stating that the noncitizen's argument had "little relevance to his own case" because the criminal complaint charged him with possessing a marijuana pipe, the B.I.A. made additional observations in rejecting his claim. *Id.* In particular, the B.I.A. noted that "we have long drawn a distinction between crimes involving the possession or distribution of a particular drug and those involving other conduct associated with the drug trade in general." *Id.* For an offense involving "the drug trade in general," the B.I.A. reasoned, there was no need for the statute or record of conviction to establish that the type of controlled substance serving as the basis of the conviction is one of the drugs defined under 21 U.S.C. § 802. *Id.* In doing so, the B.I.A. distinguished the case from *Matter of Paulus*, which dealt with an offer to sell drugs and required that the state statute proscribe the types of controlled substance punishable under federal law. *Id.*

Nowhere in the statute is there any mention of a "drug trade" exception to the "as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)"

requirement. 8 U.S.C. § 1227(a)(2)(B)(i). Nor did the B.I.A. provide a statutory basis for its distinction between "drug trade in general" versus "possession or distribution" crimes, or explain why possession of drug paraphernalia would fit into a "drug trade" exception while the offer to sell drugs – at issue in *Matter of Paulus* – does not. If anything, Congress eliminated some of its prior distinctions between types of drug activity when it replaced its growing lists of types of drug activities with the language in the current statute, which punishes "any violation" relating to a controlled substance defined under 21 U.S.C. § 802.

Nor does the B.I.A. decision in *Matter of Martinez Espinoza* draw from its own precedent. Indeed, the B.I.A. cited only one case for its proposition that "we have long drawn a distinction between crimes involving the possession or distribution of a particular drug and those involving other conduct associated with the drug trade in general." *Id*. at 121-22 (citing *Matter of Martinez Gomez*, 14 I. & N. Dec. 104 (B.I.A. 1972)). Yet that one case, *Matter of Martinez Gomez*, did not involve any argument about a mismatch between the types of substances proscribed under state and federal law.

In *Matter of Martinez Gomez*, immigration officials charged a noncitizen with deportability based on a California conviction for "maintain[ing] any place for the purpose of unlawfully selling, giving away or using any narcotic." 14 I. & N. Dec. at 104 n.1. The question was whether the statute proscribed the type

of drug activity that would render it "relating to illicit traffic in narcotic drugs or marijuana" within the meaning of the Immigration and Nationality Act. *Id.* at 105. There is no reference to any argument (either raised by the noncitizen, who was apparently pro se, or considered sua sponte by the B.I.A.) regarding whether the state statute's definition of narcotics was broader than the federal definition. Nor did the B.I.A. state that such an inquiry would be irrelevant to deportability because of the term "relating to" or because the conviction involved "the drug trade in general."

Rather than establish a "drug trade" exception, the longstanding precedent prior to *Matter of Martinez Espinoza* establishes a careful adherence to the federal requirement that a person's conviction involve a particular type of substance. As noted in Point I.C, *supra*, this requirement has applied to all types of drug offenses, including offenses involving possession, sale, and other drug activity. Nothing in the statutory language or precedent suggest the existence of two different tests, one of which gives meaning to statutory language defining controlled substances by reference to 21 U.S.C. § 802, and one of which ignores that language.

B. No "legal imagination" is required here.

In addition to adopting the B.I.A.'s "drug trade" exception, the Eighth Circuit also invoked *Duenas-Alvarez* to suggest that it need not determine that Mr. Mellouli was convicted of a substance defined on the

federal drug schedule. *Mellouli*, 719 F.3d at 997, 1000 (excusing mismatch between state and federal schedules by noting there is "little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will not involve a controlled substance as defined in 21 U.S.C. § 802." (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), which holds that a party may not use "legal imagination" in interpreting a state statute of conviction).

The Eighth Circuit's erroneous invocation of *Duenas-Alvarez* perverts its role as a tool of the categorical approach. *See* Doug Keller, *Causing Mischief for Taylor's Categorical Approach: Applying "Legal Imagination" to* Duenas-Alvarez, 18 GEO. MASON L. REV. 625, 637-67 (2011) (describing how lower courts have misapplied *Duenas-Alvarez*). Under the categorical approach, immigration officials must assess the minimum conduct proscribed under the statute of conviction. In many cases, the minimum conduct will be clear from the statutory language and case law interpreting the terms. In some cases, however, a party might resort to additional interpretive tools to argue that a statute does or does not cover removable or nonremovable conduct. *Duenas-Alvarez* merely holds a party may not use "legal imagination" to advance a novel interpretation that the statutory language is broader or narrower than the text and case law might otherwise establish. *See Moncrieffe*, 133 S. Ct. at 1684-85 (explaining that the categorical approach's "focus on the minimum conduct

criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense" (quoting *Duenas-Alvarez*, 549 U.S. at 193); *Duenas-Alvarez*, 549 U.S. at 193 (applying the categorical approach to petitioner's theft offense and rejecting petitioner's attempt to advance a novel theory of accessory liability as a means for going beyond the minimum conduct proscribed by the statute); *see also* Keller, 18 GEO. MASON L. REV. at 644-58 (arguing that the *Duenas-Alvarez* test is properly applied to novel interpretations of the law as a tool of the categorical approach, not as a basis to ignore statutory requirements).

Thus, *Duenas-Alvarez* is not an invitation to ignore the focus of the categorical approach – to determine what is necessarily required by the statute of conviction. Indeed, in most cases, the statutory language (and, where relevant, binding court interpretations) will be the beginning and the end of the inquiry. *See Ramos v. U.S. Att'y Gen.*, 709 F.3d 1066, 1071-72 (11th Cir. 2013) (finding no concern under *Duenas-Alvarez* when "the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition"); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) ("Where . . . a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination' is required to hold that a realistic probability exists. . . . The state statute's greater breadth is evident from its text.");

see also United States v. Aparicio-Soria, 740 F.3d 152, 158 (4th Cir. 2014) (en banc) ("We do not need to hypothesize about whether there is a 'realistic probability' that Maryland prosecutors will charge defendants engaged in non-violent offensive physical contact with resisting arrest; we know that they can because the state's highest court has said so.").

Here, Mr. Mellouli is not relying on legal imagination to argue that the Kansas statute is broader than federal requirements. One need look no further than the definitions of controlled substances in Kansas law to see that it covers substances not defined in 21 U.S.C. § 802. Respondent cannot say the statutes are 'close enough' when the Kansas statute is plainly broader.

C. The categorical approach does not vary based on burden of proof.

Although this case arises in the context of deportability, drug convictions may also give rise to charges of inadmissibility or as a possible bar to relief from removal. Notably, the B.I.A. in *Matter of Martinez Espinoza* suggested that the burden of proof on the noncitizen in these contexts is further reason to ignore the categorical approach for drug paraphernalia convictions. 25 I. & N. Dec. 118, 121 (B.I.A. 2009) (addressing issue in context of inadmissibility and distinguishing *Matter of Paulus* as deportability case); *see also Madrigal-Barcenas v. Holder*, No. 13-697, Resp. Br. in Opp. to Cert. at 7-9 (discussing

petitioner's failure to meet his burden of proof in the cancellation of removal context). Because this rationale is plainly wrong, *amici* note here that any rule adopted in this case should be consistent across contexts.

Throughout its history, the categorical approach has not varied based on the burden of proof. While the party carrying the burden of proof varies across contexts, *compare* 8 U.S.C. § 1229a(c)(3)(A) (government bears burden to prove basis for deportability), *with* 8 U.S.C. § 1229a(c)(2)(A) (noncitizen bears burden to prove admissibility) *and* 8 U.S.C. § 1229a(c)(4)(A) (noncitizen bears burden to prove eligibility for relief from removal), the application of the categorical approach is a legal, rather than factual, inquiry. While it sometimes calls for reference to the record of conviction, this is solely for the purpose of determining which offense within a divisible statute gave rise to the noncitizen's conviction. *See* Point I, *infra*. The outcome therefore does not turn on burdens of proof; either the conviction is for an offense that is a controlled substance offense or it is not. *See Moncrieffe*, 133 S. Ct. at 1685 n.4 (noting that the drug aggravated felony issue presents itself both in the context of deportability and relief from removal and stating that the "[categorical] analysis is the same in both contexts"). Thus, where the statute and record of conviction leave the answer ambiguous, the conviction is not a controlled substance offense. *See id.* at 1687 (noting that Mr. Moncrieffe's offense might meet the aggravated felony definition or not,

and that "[a]mbiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to an offense" under the definition of illicit trafficking aggravated felony); *Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) ("Although an alien must show that he has not been convicted of an aggravated felony, he can do so merely by showing that he has not been *convicted* of such a crime. And . . . under the categorical approach, a showing that the minimum conduct for which he was convicted was not an aggravated felony suffices to do this.").

Thus any emphasis of the burden of proof in the categorical approach context is a red herring. Indeed, historically, courts have long applied the categorical approach to contexts where the noncitizen bears the burden of proof. For example, the Second Circuit's landmark opinion in *Mylius* arose out of a noncitizen's challenge to his exclusion from the United States – a context in which the noncitizen generally bears the burden of proof. *Mylius*, 210 F. at 863. The federal immigration agency has adopted this same stance in subsequent exclusion cases, irrespective of the placement of the burden on the noncitizen. *See, e.g.*, *Attorney General Op.,* 37 Op. Att'y Gen. 293, 294-95 (1933); *Matter of T-*, 2 I. & N. Dec. 22, 22 (B.I.A. 1944); *Matter of P-*, 3 I. & N. Dec. 56 (B.I.A. 1947).

Moreover, the consistent application of the categorical approach regardless of burden preserves uniformity and predictability across the various contexts in which drug conviction-based immigration consequences may arise. *See* Das, 86 N.Y.U. L. REV.

at 1733-38 (discussing how the categorical approach serves important uniformity and predictability rationales). A drug conviction may come up as a ground of deportability, a ground of inadmissibility, or bar to discretionary relief. *See, e.g.*, 8 U.S.C. § 1227(a)(2)(B)(i) (deportability ground); 8 U.S.C. § 1229b(b)(1)(C) (bar to nonpermanent resident cancellation of removal); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (inadmissibility ground); 8 U.S.C. § 1182(h) (bar to inadmissibility waiver). If the categorical approach were cast aside and the outcome of an inquiry into what a noncitizen was "convicted of" varied based on burden of proof, the government could control the outcome based on its charging decisions. This would impose a "layer of arbitrariness" to immigration proceedings, for a noncitizen's relief eligibility would "hang[ ] on the fortuity of an individual official's decision" to specify charges at the removal stage. *See Judulang v. Holder*, ___ U.S. ___, 132 S. Ct. 476, 486 (2011).

Congress's continued choice to predicate various immigration consequences on whether a noncitizen has been "convicted" of a controlled substance offense in the deportability, inadmissibility, and relief eligibility contexts – regardless of burden – demonstrates the continued applicability of the categorical approach in all contexts. *See Fajardo v. Att'y Gen.*, 659 F.3d 1303, 1309 (11th Cir. 2011) ("Had there been congressional disagreement with the courts' interpretation of the word 'conviction,' Congress could easily have removed the term 'convicted' from . . . the INA during any one of the *forty times* the statute has been

amended since 1952." (citing 8 U.S.C. § 1182 (historical notes)) (emphasis added)); *Matter of Velazquez-Herrera*, 24 I. & N. Dec. 503 (B.I.A. 2008) ("[W]e must presume that Congress was familiar with [the history of the categorical approach] when it made [a ground of removal] depend on a 'conviction.'"); *see also* Point I.A-B, *supra*. As long as an immigration adjudicator is tasked with determining whether an individual has been "convicted of" any violation of law "relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))," that immigration adjudicator must apply the categorical approach to determine whether the individual was necessarily convicted of a controlled substance offense where the substance is defined under 21 U.S.C. § 802. The outcome of this legal inquiry should not turn on burdens of proof.

CONCLUSION

For the foregoing reasons, *amici* urge this Court to uphold the application of the longstanding categorical approach to determinations of whether a person

has been convicted of a violation of law relating to a controlled substance as defined under 21 U.S.C. § 802.

Respectfully submitted,

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