No. 13-1034

IN THE

Supreme Court of the United States

MOONES MELLOULI,

Petitioner,

v.

ERIC H. HOLDER, JR.,

Respondent.

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

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, IMMIGRANT DEFENSE PROJECT, AND NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS AMICI CURIAE SUPPORTING PETITIONER

MARK C. FLEMING
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

ALAN SCHOENFELD
Counsel of Record
ARI J. SAVITZKY
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 230-8800
alan.schoenfeld@wilmerhale.com

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

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INTEREST OF AMICI CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL"), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. Founded in 1958, NACDL has a nationwide membership of approximately 10,000 and up to 40,000 including affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is dedicated to advancing the proper, efficient, and just administration of justice, including the administration of criminal law.

NACDL files numerous amicus curiae briefs each year in this Court and other courts. This Court has often cited NACDL amicus briefs that address the everyday workings of the criminal justice system and the implications of the Court's decisions in criminal justice and immigration cases. *See, e.g.*, *Navarette* v. *California*, 134 S. Ct. 1683, 1694 (2014) (Scalia, J., dissenting); *Fernandez* v. *California*, 134 S. Ct. 1126, 1142 & n.4 (2014) (Ginsburg, J., dissenting); *Alleyne* v. *United States*, 133 S. Ct. 2151, 2164 (2013) (Sotomayor, J., concurring); *Missouri* v. *Frye*, 132 S. Ct. 1399, 1402 (2012); *INS* v. *St. Cyr*, 533 U.S. 289, 322-323 (2001).

The Immigrant Defense Project ("IDP") is a not-for-profit legal resource and training center that provides criminal defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and

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[1] No counsel for a party authored this brief in whole or in part, and no person other than amici, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief are on file with the Clerk.

training on issues involving the interplay between criminal and immigration law. IDP is dedicated to promoting fundamental fairness for immigrants accused of crimes, and therefore has a keen interest in ensuring the correct interpretation of laws that may affect the rights of immigrants at risk of detention and deportation based on past criminal charges. IDP has submitted amicus curiae briefs in many of this Court's key cases involving the interplay between criminal and immigration law. *See, e.g.*, *Vartelas* v. *Holder*, 132 S. Ct. 1479 (2012); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563 (2010); *Padilla* v. *Kentucky*, 559 U.S. 356 (2010); *Lopez* v. *Gonzales*, 549 U.S. 47 (2006); *Leocal* v. *Ashcroft*, 543 U.S. 1 (2004); *St. Cyr*, 533 U.S. at 322-323 (citing IDP brief).

The National Immigration Project of the National Lawyers Guild ("NIP") is a non-profit membership organization of attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and secure the fair administration of the immigration and nationality laws. For thirty years, the NIP has provided legal training to the bar and the bench on immigration consequences of criminal conduct and is the author of *Immigration Law and Crimes* and three other treatises. The NIP has participated as amicus curiae in several significant immigration-related cases before this Court. *See, e.g.*, *Vartelas*, 132 S. Ct. 1479; *Carachuri-Rosendo*, 560 U.S. 563; *Padilla*, 559 U.S. 356.

This case raises an important issue at the intersection of criminal and immigration law: whether a conviction under state law for simple possession of drug paraphernalia (here, a sock) renders a lawful permanent resident removable under 8 U.S.C. § 1227(a)(2)(B)(i). The decision below has significant implications for criminal defendants who are immigrants to the United States; their lawyers, who are obligated under this

Court's case law to apprise their clients of the immigration consequences of any criminal convictions; and the criminal justice system more broadly.

INTRODUCTION AND SUMMARY OF ARGUMENT

Moones Mellouli, a lawful permanent resident, was deemed removable from the United States for a misdemeanor state conviction for possession of drug paraphernalia—namely, a sock that allegedly contained pills whose specific identity was not established. His conduct was not a crime under federal law. Indeed, Mellouli's offense of conviction would not constitute a crime in many States; in those where it would, it is generally treated as a low-level misdemeanor with limited if any criminal consequences. Yet under the Eighth Circuit's reading of the federal immigration laws, Mellouli is subject to the "drastic measure" of deportation. *Fong Haw Tan* v. *Phelan*, 333 U.S. 6, 10 (1948). That rule contravenes Congress' intent by predicating removability on a low-level offense that does not match the criminal removal ground in question, and it defeats the uniformity of our Nation's immigration laws by subjecting a lawful permanent resident to different immigration consequences depending upon where his state conviction was entered. What is more, the rule makes it decidedly more difficult for criminal defendants to navigate our Nation's overlapping criminal and immigration systems and for the other participants in that system—defense lawyers, prosecutors, and courts—to discharge their duties effectively.

This case implicates three critical principles. First, Congress' intent is the touchstone in determining whether a state criminal conviction suffices to establish removability under federal law, because "Congress' aim in drafting [the federal immigration laws] was to de-

termine which crimes are sufficiently serious to warrant the 'drastic measure' of deportation, and which are not." *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1179 (2012) (Ginsburg, J., dissenting). Second, as the Constitution's Naturalization Clause makes plain, the Founders placed a premium on "uniform" immigration laws. *See* U.S. Const. art. I, § 8, cl. 4. Rules that undermine the "overarching constitutional interest in uniformity of federal immigration and naturalization law" are disfavored. *Bustamante-Barrera* v. *Gonzales*, 447 F.3d 388, 399 (5th Cir. 2006). Third, the administration of a just immigration system depends on the ability of noncitizens to understand what acts or omissions may give rise to their removal from the United States. Rules that are enforced arbitrarily, or contrary to their plain terms, undermine this Court's directive that immigrants "be treated consistently, and thus predictably, under federal law." *Moncrieffe* v. *Holder*, 133 S. Ct. 1678, 1693 n.11 (2013).

Under the Eighth Circuit's reading of 8 U.S.C. § 1227(a)(2)(B)(i), a state conviction for possession of drug paraphernalia is considered to be "relate[d] to a controlled substance" for immigration purposes, even if there is no demonstrated connection to an actual federally controlled substance. *See* Pet. App. 10 (internal quotation marks omitted). That rule undermines each of the principles just described, and threatens the careful balance this Court has drawn between state criminal law and the federal immigration law.

In addition, as a practical matter, the court of appeals' rule will have at the very least confounding—and potentially disastrous—effects on the administration of criminal justice in overburdened state courts. Charges for possession of drug paraphernalia are treated consistently with their low-level, nuisance status—they

are hurriedly processed through the court system with a minimum of protection for defendants. The dire immigration consequences that may follow from these convictions raise the stakes for criminal defendants, but do not translate into increased time or attention from the criminal courts. That leaves criminal defense attorneys and their clients in the untenable position of having to speculate about the consequences of low-level crimes that are ordinarily resolved in contexts that do not provide the opportunity for, much less require the development of, a record identifying what controlled substance was supposedly involved.

The rule also limits the ability of prosecutors, defense attorneys, and uncounseled noncitizens alike to negotiate plea deals for low-level crimes that are acceptable to all parties. This accordingly increases the chances that noncitizens accused of drug-paraphernalia-related conduct will be advised to reject plea bargains and to insist on trials that place a strain on the already overburdened court system. More generally, the rule is inconsistent with this Court's recent decisions recognizing the centrality of plea bargaining to the modern administration of criminal justice and the Sixth Amendment implications of the collateral consequences of criminal pleas.

ARGUMENT

I. Simple Possession Of Paraphernalia Offenses Are Low-Level Crimes That, As Charged And Pleaded, Often Have No Connection To A Federally-Scheduled Controlled Substance

Mellouli was convicted under Kansas law prohibiting "possession of drug paraphernalia" (PDP)—to wit, "a sock" used to "store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a

controlled substance." Pet. App. 6 n.2 (internal quotation marks omitted). That is a minor offense under Kansas law, as it is under the law of most States, where it is usually prosecuted as a common misdemeanor. In practice, such low-level PDP charges often result in a quick plea with minimal court process, no exploration or exposition of the particular substance at issue (federally scheduled or otherwise), and little if any jail time. PDP statutes are also very broad, as this case evidences: they reach virtually any item that can be said to bear even the most glancing or speculative relation to controlled substances. And PDP statutes vary materially from State to State, not only in the array of paraphernalia they address, but also in the list of substances controlled under state law to which the paraphernalia may relate and the mens rea required for a conviction.

These defining features of PDP offenses make them uniquely problematic from the vantage point of immigration law. First, the statutes' exceptional breadth, coupled with their uniformly low-level status, means that countless individuals stand convicted of truly minor crimes; to the extent federal immigration law can be read to predicate removability categorically on such convictions, Congress' intent in reserving the drastic measure of deportation only for controlled-substance crimes truly relating to federally controlled substances is thwarted. Second, the statutes vary materially from State to State, not only as to the affected paraphernalia and its proscribed uses (*i.e.*, simple possession or something more), but also as to the schedule of controlled substances to which the paraphernalia must relate. To the extent States are permitted to expand the breadth of federal immigration law unilaterally—whether by enlarging the scope of their PDP statutes or scheduling controlled substances that are not

also federally scheduled—the abiding national interest in uniform immigration laws is undermined.

These concerns are only heightened by the manner in which PDP offenses are resolved in state courts. Given their traditionally low stakes, PDP offenses are charged and pleaded to in the most informal of settings, by often uncounseled criminal defendants. This expeditious administration of criminal justice provides no reason or opportunity for defendants to make the record that the Eighth Circuit's rule would require in order to challenge the unanticipated immigration consequences of an uncounseled plea.

A. Congress Did Not Intend For Convictions For Low-Level State Paraphernalia Offenses To Categorically Trigger Removal

1. Unlike the federal paraphernalia statute, state paraphernalia statutes are broadly inclusive and uniformly low-level

The federal law regulating drug paraphernalia is substantially narrower and more severe than the corresponding patchwork of State drug paraphernalia statues. The federal statute criminalizes as a felony only the sale of or commerce in paraphernalia; possession is not criminalized at all. *See* 21 U.S.C. § 863(a)-(b). In contrast, States may punish possession of drug paraphernalia, but only as a misdemeanor. And a substantial number do not even criminalize simple possession of paraphernalia, the conduct to which Mellouli pleaded. While the state paraphernalia laws differ from one another in the important ways discussed below, they share two broad features in common, each of which highlights how disconnected low-level PDP offenses are from the types of well-defined federal controlled sub-

stance crimes that are the focus of 8 U.S.C. § 1227(a)(2)(B).[2]

First, the definition of "paraphernalia" itself is extremely broad, covering any item that might be used in conjunction with drugs. The Kansas statute is typical in this respect: The statute defines paraphernalia functionally, making it unlawful to "use or possess … any drug paraphernalia to … [m]anufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or … store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. § 21-5709; *see also*, *e.g.*, Tex. Health & Safety Code Ann. § 481.125. Many PDP statutes employ additional criteria for determining whether an object is paraphernalia, including lengthy, non-exclusive lists of items that are typically used in connection with illegal drugs, and a direction to courts to examine circumstantial, "logically-related factors," which can include the presence of drugs, a prior drug conviction, or even national or local advertising relating to a product's use. *See* Regnier, *"Civilizing" Drug Paraphernalia Policy: Preserving Our Free Speech And Due Process Rights While Protecting Children*, 14 N.Y.U. J. Legis. & Pub. Pol'y 115, 126-127 (2010); *see also* Model Drug Paraphernalia Act art. 1 (providing non-exhaustive list of items and enu-

[2] The statute provides that "[a]ny alien who … has been convicted of a violation of … any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i).

merating "logically related" factors); *see also*, *e.g.*, Kan. Stat. Ann. § 21-5711.[3]

"[T]he variety of items used in conjunction with illicit drugs is limitless." *Town Tobacconist* v. *Kimmelman*, 462 A.2d 573, 580 (N.J. 1983); *see also United States* v. *Brooks*, No. 07-705-1, 2008 WL 4601924, at *3 (E.D. Pa. Oct. 15, 2008) ("acknowled[ging] that [there is] a limitless list of everyday … objects" that can constitute paraphernalia). Under the broad, functional definition of paraphernalia employed by these PDP statutes, *any* item, if used or intended for use in connection with any drug, can be paraphernalia.[4] Numerous everyday household items can qualify: Bottles, credit cards, pens, unopened boxes of sandwich bags, balloons, duct tape, or even, as here, a sock.[5]

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[3] The Model Drug Paraphernalia Act (the "Model Act") was issued by the Justice Department in the early 1980s. *See, e.g.*, Gersten, *Drug Paraphernalia: Illustrative of the Need for Federal-State Cooperation in Law Enforcement in an Era of New Federalism*, 26 Sw. U. L. Rev. 1067, 1077 (1997). It has been adopted in some form by a number of states, and many state laws have copied verbatim the Model Act's functional elements of "paraphernalia."

[4] Statutes based on the Model Act are thus broadly inclusive, so much so that they draw Due Process and First Amendment-based criticism. *See generally* Regnier, 14 N.Y.U. J. Legis. & Pub. Pol'y at 119; Note, *The Model Drug Paraphernalia Act: Can We Outlaw Head Shops-and Should We?*, 16 Ga. L. Rev. 137, 141 (1981).

[5] *See, e.g.*, *State* v. *McAllister*, 731 S.E.2d 276 (N.C. Ct. App. 2012) (pill bottle), *rev. denied*, 736 S.E.2d 491 (N.C. 2013); *State* v. *Christian*, 795 N.W.2d 702, 706 (N.D. 2011) ("pen barrels," as well as "an agate stone, a credit card, a pestle, and mashing bowls"); *Commonwealth* v. *Torres*, 617 A.2d 812, 815 (Pa. Super. Ct. 1992) ("three unopened boxes of sandwich bags"). In addition, some states have added items directly into their paraphernalia statutes. Florida, for example, has added to the Model Act's list of items a

Nor is it always necessary to prove that paraphernalia was intended for use with respect to any *specific* drug. Rather, a PDP charge is proven in some States by establishing simply that the item is used or intended for use "with illicit drugs." *Kimmelman*, 462 A.2d at 584 (collecting cases); *see, e.g.*, *State* v. *Lee*, 856 P.2d 1246, 1261 (Haw. 1993) (holding that jury instruction on sale of paraphernalia charge requires "the specific intent that the object(s) be used with illegal drugs," but no mention of any specific drug); *see also, e.g.*, Idaho Crim. Jury Instr. § 408 (elements do not include specification of substance); Md. Crim. Pattern Jury Instr. § 4:24.4 (requiring intended use in connection with a "controlled dangerous substance"); Tenn. Prac. Pattern Jury Instr. – Crim. § 31.03 (requiring used of paraphernalia in conjunction with a "controlled substance" or "controlled substance analogue"). In these States where the controlled substance at issue need not be proven or pleaded to, "paraphernalia" is further untethered from any objective or defined relationship to any particular controlled substance—whether federally scheduled or otherwise.

Second, PDP is a uniformly minor offense—both as a general matter, and particularly compared to offenses involving the possession of actual drugs. *E.g.*, *United States* v. *Grover*, 486 F. Supp. 2d 868, 883 (N.D. Iowa 2007) (at sentencing, referring to PDP conviction as a "minor offense[]"), *aff'd*, 511 F.3d 779 (8th Cir. 2007); *United States* v. *Nelson*, 166 F. Supp. 2d 1091, 1099 (E.D. Va. 2001) (at sentencing, referring to PDP conviction as a "minor" offense, similar to trespassing and traffic infractions). PDP is usually classified as a mis-

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"tank," a "balloon," a "hose or tube," a "2-liter-type soda bottle," and "[d]uct tape." Fla. Stat. § 893.145(12)(r)-(v).

demeanor or a petty offense or infraction under state law. *See, e.g.*, Cal. Health & Safety Code § 11364.7 (paraphernalia offenses classified as misdemeanors); Neb. Rev. Stat. § 28-441 (PDP is an "infraction").[6]

Consistent with their low-level status, PDP charges and convictions proliferate as a catch-all for disfavored conduct that bears some glancing relationship to illicit drugs. As NACDL and others have observed, PDP is a commonly charged misdemeanor in some jurisdictions. *See* Boruchowitz et al., NACDL, *Minor Crimes, Massive Waste* 11 (2009) ("Common misdemeanor offenses include … paraphernalia offenses."); *see also* Harmell, *Modern Drug Crimes: Unique Strategies For A Changing Environment*, Aspatore (Oct. 2010), 2010 WL 6425215, at *1 ("In the state of Washington, possession of less than forty grams of marijuana and possession of drug paraphernalia are the only drug crimes we see with any regularity charged as misdemeanors."); *cf.* Burris & Ng, *supra* note 6, at 88 & nn.42 ("Anecdotal evidence and research suggest that [paraphernalia] laws are often enforced, at least in some states."); *id.* at 75 (noting public health research on the enforcement of paraphernalia laws in syringe cases indicating many hundreds of cases annually in some States).

These low-level offenses are usually punished by probation or a fine, or perhaps a short period of incar-

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[6] *See also* Burris et al., *Lethal Injections: The Law, Science, and Politics of Syringe Access for Injection Drug Users*, 37 U.S.F. L. Rev. 813, 828 (2003) (paraphernalia offense is "typically a misdemeanor"); Burris & Ng, *Deregulation of Hypodermic Needles and Syringes As A Public Health Measure: A Report on Emerging Policy and Law in the United States*, 12 Geo. Mason U. Civ. Rts. L.J. 69, 88 (2001) ("In most states, a paraphernalia law violation is a misdemeanor.").

ceration. For example, in Montana, "[a] person convicted of a first violation of [PDP] is presumed to be entitled to a deferred imposition of sentence of imprisonment." Mont. Code Ann. § 45-10-103; *see also, e.g.*, Colo. Rev. Stat. § 18-18-428 (1992) (providing that possession of drug paraphernalia is punishable by a fine of not more than $100).

By contrast, possession of actual drugs (rather than just paraphernalia) is often subject to felony status or even mandatory minimum periods of incarceration, in addition to other collateral consequences. For example, in Minnesota, the lowest-level drug possession charge, which applies to any substance other than a small amount of marijuana, can result in up to five years' incarceration. *See* Minn. Stat. Ann. § 152.025(2). A similar offense in Mississippi is punishable as a felony and may result in a period of incarceration of up to 20 years, even for first-time offenders. Miss. Code. Ann. § 41-29-139(d)(1), (2), (4). Indeed, the only "drug crime" to which PDP bears any practical resemblance as a matter of charging and sentencing is low-level marijuana possession—an offense that is expressly exempted from the INA's controlled substances removability provision. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (exception to removability for first offense involving 30 grams or less of marijuana). As a practical matter, then, PDP offenses are categorically different from the types of federal controlled-substance crimes that trigger removability.

Simple PDP is thus broadly applicable to any defendant facing a potential drug possession-related charge, but comes without the relatively severe state-law punishments and consequences of other drug-related offenses. *Compare, e.g.*, Miss. Code. Ann. § 41-29-139(d)(1), (2), (4) (up to 20 years in prison for non-marijuana drug offenses), *with id.* § 41-29-139(d)(1)

(maximum six months' incarceration for misdemeanor possession of paraphernalia). As explained in further detail below, that combination of qualities makes PDP a significant feature of the contemporary landscape for resolution of drug prosecutions—and a frequent basis for plea deals, which in turn helps avoid the costs of litigation, chemical testing, and trial. Both of these features set PDP apart from the types of higher-penalty federal controlled-substance crimes that Congress included as removal grounds in § 1227.

Notwithstanding these two general similarities—a broad, functional definition of "paraphernalia" and low-level offense status—state PDP laws are highly variable in other key respects that also highlight the incongruity between PDP and the goals of removal under § 1227. Far from supporting a uniformly applicable set of rules governing removability, bound tightly to federally-scheduled substances, the Eighth Circuit's rule would produce the opposite result: conduct that is not even criminal in one State will render a noncitizen deportable in another. *See Lopez* v. *Gonzales*, 549 U.S. 47, 60 (2006) ("Congress knows that any resort to state law will implicate some disuniformity … , but that is no reason to think Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them."); *Carachuri-Rosendo* v. *Holder*, 560 U.S. 563, 575 (2010) (rejecting rule that would "render the law of alien removal … dependent on varying state classifications even when Congress has apparently pegged the immigration statutes to the classification Congress itself chose").

For example, while a number of States—like Kansas—make simple possession of paraphernalia a crime, others do not. New York's paraphernalia statute is oriented specifically towards drug sales, and only covers

items used for drug production and commerce, *e.g.*, "for purposes of unlawfully mixing, compounding, or otherwise preparing any narcotic drug or stimulant" or "for purpose of unlawfully manufacturing, packaging or dispensing of any narcotic drug or stimulant." N.Y. Penal Law § 220.50; *see also* N.Y. Gen. Bus. L. § 851 (violation of General Business Law to possess paraphernalia with intent to sell or purchase it). Thus, Mellouli's use of his sock would not have been a crime in New York or in many other States. *See generally* NIJC Amicus Br.

Of course, States are permitted to criminalize different conduct, and the non-uniformity of state criminal laws is an acceptable feature of the federal system. Immigration law, however, should be uniform. *See Arizona* v. *United States*, 132 S. Ct. 2492, 2498 (2012). Yet under the Eighth Circuit's rule, conduct that is not even unlawful in one State (and therefore would not trigger removal either) might result not only in a low-level criminal conviction, but also in removability in another State, *regardless* of whether it involves a federally controlled substance. That is deeply at odds with this Court's case law, which has consistently rejected rules that would accord different removal effect to convictions for similar conduct. *See, e.g.*, *Moncrieffe*, 133 S. Ct. at 1693 n.11 (underscoring that this Court's approach ensures "that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law").

2. A rule that categorically deems state paraphernalia offenses to relate to federally controlled substances impermissibly allows States to define and expand the bases for removal unilaterally

The state-by-state variations in paraphernalia statutes discussed above are only exacerbated by the state-by-state variations as to which substances are controlled under state law. Even in the instances when States do require some proven connection between paraphernalia and an illicit drug, *see supra* p. 10, the illicit substance may be one that is unlawful under state law, but not under federal law.

The federal government's and the state governments' lists of prohibited drugs were originally virtually identical, due to the States' mass adoption of the Uniform Controlled Substances Act ("UCSA"). *See* 1 Uelmen et al., *Drug Abuse and the Law Sourcebook* § 1:29 (2013 ed.); *see also* Pet. App. 4 (Eighth Circuit noting that the UCSA "was drafted to maintain uniformity between the laws of the several States and those of the federal government" (internal quotation marks omitted)). However, "because the classification of substances under the [federal Controlled Substances Act] changes over time based on federal administrative action, uniformity in the overall classification scheme does not always translate into uniformity as to whether a specific substance has been scheduled." Uelmen, *Drug Abuse* § 1:29. Moreover, States can and do revise their drug schedules according to their own policies and priorities. Accordingly, "[w]hile the UCSA serves as the foundation for the controlled substances laws across the country, states have tailored it to their own needs with a variety of changes, big and small." *Id.* § 1:28.

State lists of controlled substances often automatically encompass updates to the federal list, letting States "piggyback on a federal scheduling action." *See* Uelmen, *Drug Abuse* § 1:30; *see also* UCSA § 204 cmt. (rev. 1994) ("States that would not have a delegation of legislative authority problem may want to replace the specific list of substances with an adoption of the federal schedules by reference[.]"). But this practice of "piggybacking" goes only one way, and the States' own lists of controlled substances often include the drugs outlawed by the federal Controlled Substances Act as well as additional drugs outlawed by the State for its own public policy reasons. For example, "California law regulates the possession and sale of *numerous* substances that are not similarly regulated by" federal law. *Ruiz-Vidal* v. *Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007) (emphasis added), *abrogated on other grounds as recognized in Cardozo-Arias* v. *Holder*, 495 F. App'x 790 (9th Cir. 2012); *accord Mielewczyk* v. *Holder*, 575 F.3d 992, 995 (9th Cir. 2009).[7] Kansas likewise prohibits a number of drugs that are not barred under federal law, including salvia and jimson weed. *See* Pet. Br. 3; Pet. App. 4-5; *see also* Detrick, *Salvia Takes a Starring Role*, N.Y. Times, Dec. 23, 2010 (noting that while salvia possession is legal in California and under federal law, "[s]everal states have banned the herb").

The upshot of the Eighth Circuit's rule dispensing with the need to establish some connection between a

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[7] Similarly, Pennsylvania's "controlled-substances schedules list drugs that are not in the federal schedules," *Rojas* v. *Attorney Gen.*, 728 F.3d 203, 206 (3d Cir. 2013) (en banc), as do Connecticut's, *United States* v. *Lopez*, 536 F. Supp. 2d 218, 221 (D. Conn. 2008), Hawaii's, *Ragasa* v. *Holder*, 752 F.3d 1173, 1176 (9th Cir. 2014), and Arizona's, *Huerta-Flores* v. *Holder*, __ F. App'x __, 2014 WL 3361435 (9th Cir. July 10, 2014), just to name a few.

state PDP conviction and a federally controlled substance is that States may unilaterally expand immigration law's removability grounds by banning the use and possession of substances that are permitted under federal law. *See Rojas*, 728 F.3d at 213 (rule adopted by the Eighth Circuit "effectively permit[s the States] to control who may remain in the country via their controlled-substance schedules"). Because, as discussed above, paraphernalia offenses encompass possession of virtually any item associated with an illegal drug, increasing the number of substances controlled under state law also necessarily expands the scope of PDP statutes. The Eighth Circuit's rule thus pushes the outer reaches of removability even further from the boundaries set by Congress.

Moreover, the Eighth Circuit's rule has no clear limits. Under the Eighth Circuit's interpretation of § 1227, a noncitizen could potentially be deported for possession of a trick-or-treat bag or a Big Gulp cup if a state passed a law listing "jelly beans or large sugary beverages" as controlled substances. *See Rojas*, 728 F.3d at 210, 212 & n.7, 213; *Desai* v. *Mukasey*, 520 F.3d 762, 766 (7th Cir. 2008). It is unclear under this approach at what point a State's list of prohibited drugs (which in turn controls what items constitute paraphernalia) would diverge enough from the federal list to be no longer "related to" the list of prohibited substances in the federal Controlled Substances Act. *See Rojas*, 728 F.3d at 213 ("It is left unexplained just how many substances a state would have to include in its lists that are not in the federal lists before its drug-related offenses would no longer qualify as removable offenses, or whether inclusion of a particularly odd substance … would suffice."). Under the Eighth Circuit's rule, the mere fact that Kansas adopted the UCSA means that

any PDP conviction suffices to establish removability, regardless of how far Kansas's schedules of controlled substances depart from the federal schedules. And its rule admits of significant disparity between the States, permitting "a patchwork of removability rules dependent on the whims of the legislatures of the fifty states." *Id.*; *see also supra* pp. 13-16.

Rules like the Eighth Circuit's are clearly and properly disfavored: "Congress knows that any resort to state law will implicate some disuniformity in state misdemeanor-felony classifications, but that is no reason to think that Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them." *Lopez*, 549 U.S. at 60; *see also Arizona*, 132 S. Ct. at 2498; *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982). Considered from every angle, and particularly from the ground floor of our criminal justice system, PDP offenses—low-level misdemeanors that often require no connection to any specific drug, let alone a federally scheduled one—bear no serious resemblance to the federally defined controlled-substance crimes that trigger automatic removability under 8 U.S.C. § 1227.

B. The Circumstances Under Which PDP Offenses Are Charged And Pleaded Only Exacerbates The Untoward Effects Of The Eighth Circuit's Rule

Because PDP offenses are non-specific, low-level misdemeanors, pleading to a PDP offense often affords no opportunity to grapple with the serious immigration consequences that the Eighth Circuit's rule now requires. And because PDP pleas are commonplace, the practical effects of the Eighth Circuit's rule will be far-reaching and unjust for noncitizen criminal defendants.

A PDP plea arises, like any other misdemeanor plea, in an overburdened misdemeanor system where the pressure to plead is high, with little time to assess the consequences (especially in a complicated legal regime), and with little process or fanfare. Over 10 million misdemeanor cases were charged in 2006, and that figure continues to grow. *See* Boruchowitz et al., *Minor Crimes, Massive Waste* 11, 21, 39. The misdemeanor system is characterized by a "meet-and-plead" paradigm: In many jurisdictions, a significant number of cases are resolved at a defendant's first appearance, in a series of brief, seriatim proceedings.

Such pleas help the criminal justice system move more quickly, and are often the best and most effective result that defenders can secure for their clients. They are part of, and essential to, the large-scale operation of the American criminal justice system. *See, e.g.*, Hashimoto, *The Price of Misdemeanor Representation*, 49 Wm. & Mary L. Rev. 461, 473 (2007) ("[A] public defender under pressure from an enormous caseload who is trying to stay on top of that caseload 'must inevitably enter guilty pleas for most of his clients, and as a public defender becomes attuned to his work, the guilty plea may tend to become his almost instinctive response to all but the most serious or exceptional cases.'" (quoting Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1254 (1975)); *see also* Alexander, *Go To Trial: Crash The Justice System*, N.Y. Times, Mar. 10, 2012 ("If everyone charged with crimes suddenly exercised his constitutional rights, there would not be enough judges, lawyers or prison cells to deal with the ensuing tsunami of litigation.").

Where a misdemeanor defendant has a right to counsel for PDP offenses—and he is not afforded such a right in every State, as explained below—a defender

may often already have a plea offer in hand before meeting the client for the first time, and may only have a few minutes with the client before a decision point is reached, *see* Boruchowitz et al., *Minor Crimes, Massive Waste* 31-32. The pressure to plead due to docket sizes, the prospect of not making bail, and the threat of more serious charges is inescapable. *Id.* at 33-36.

What is more, where misdemeanor defendants *do* have the right to counsel because of the potential criminal exposure under state law, NACDL has documented numerous instances where defendants are simply not afforded the right to counsel (or make uninformed waivers of the right) in violation of *Alabama* v. *Shelton*, 535 U.S. 654 (2002). Observers in Pennsylvania, for example, reported misdemeanor defendants being directed to a basement room in the courthouse to negotiate directly with prosecutors. Although seemingly at odds with *Shelton*, these practices occurred even when misdemeanor defendants faced periods of incarceration. *See* Boruchowitz et al., *Minor Crimes, Massive Waste* 14-17. More broadly, in some jurisdictions, a defendant may in effect be asked to waive the right to counsel at the outset in exchange for a sentence of no incarceration. *Cf. United States* v. *Pollard*, 389 F.3d 101, 105 (4th Cir. 2004) (no violation of Sixth Amendment right to counsel where uncounseled defendant received a stand-alone sentence of probation).

Nor is a probing plea colloquy required in many states. *See, e.g.*, *Fleming* v. *State*, 972 So. 2d 831, 832 (Ala. Crim. App. 2006) (no plea colloquy required for "minor misdemeanors" where a defendant will not be incarcerated); *Maloney* v. *State*, 684 N.E.2d 488, 491 (Ind. 1997) (misdemeanor plea colloquy may be waived); Iowa Ct. R. § 2.8(2)b.5 (defendant may waive colloquy procedure if they "sign a written document that in-

cludes a statement that conviction of a crime may result in the defendant's deportation or other adverse immigration consequences if the defendant is not a United States citizen"); Ohio Crim. R. 11(D), (E); *see also* N.Y. C.P.L.R. § 220.50(7) (court only required to advise defendant of possible immigration consequences of plea if the noncitizen pleads guilty to "a count or counts charging a felony offense"). NACDL observers in Washington State observed that misdemeanor proceedings "took an average of five minutes from presentation to sentencing." One defendant "was sentenced to 10 days in jail and a $500 fine for marijuana possession in less time than it takes to get a hamburger from a McDonald's drive-through window." Boruchowitz et al., *Minor Crimes, Massive Waste* 32.

These features of the misdemeanor charging-and-pleading system are exacerbated in the context of PDP statutes, which, as discussed above, *see supra* p. 11, are among the most frequently invoked criminal laws. And to the extent serious immigration consequences attach to PDP convictions, the limited procedural protections accorded to immigrant misdemeanor defendants take on grave constitutional dimensions. With little time or assistance in understanding the consequences of their pleas, immigrants charged with PDP may simply fail to apprehend the seriousness of their decisions. *See generally infra* Part II.[8] In particular, the absence of a

[8] The plea-bargaining calculus differs for immigrant defendants in critical ways, specifically in the context of PDP statutes, making it all the more important that defendants charged with PDP offenses have the opportunity to consider the alternatives carefully and thoroughly. For example:

> [C]onsider the not uncommon case in which police stop a driver for speeding and discover what appears to be paraphernalia for smoking marijuana. Prosecutors in these

probing colloquy not only prevents noncitizen defendants from creating a record that might help them in later immigration proceedings—for example, by establishing that the controlled substance to which the paraphernalia relates is not in fact scheduled under federal law, *see supra* pp. 15-16 & n.7—but also makes it less likely that they will be informed of the potential immigration consequences of a quick plea in the first place. This prospect is all the more problematic for uncounseled noncitizen defendants, who look to the court accepting the plea as their source of needed information or at least a warning about potential immigration consequences. *Cf. Padilla* v. *Kentucky*, 559 U.S. 356, 368-369 (2010).

II. THE EIGHTH CIRCUIT'S RULE SOWS UNCERTAINTY AND UNFAIRNESS FOR NONCITIZENS AND CRIMINAL DEFENSE LAWYERS AND UNDULY BURDENS THE COURT SYSTEM

The Eighth Circuit's interpretation of § 1227 also creates a number of problems for criminal defense law-

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> cases routinely charge both reckless driving and possession of drug paraphernalia (PDP), and then offer a plea to the PDP charge with probation or time-served. For many defendants this may be a beneficial bargain, because that charge won't result in drivers license points and they can return immediately to their lives. But for noncitizens, the PDP offense qualifies as a deportable controlled substance offense.

Cade, *The Plea-Bargain Crisis for Noncitizens in Misdemeanor Court*, 34 Cardozo L. Rev. 1751, 1782-1783 (2013). Accordingly, highly capable defenders have described taking "worse" deals for their clients rather than plead to PDP because of the potential immigration consequences. *See* Chapin et al., *Panel Discussion III: Recognizing and Addressing Immigration Concerns in the Criminal Process*, 9 Tenn. J.L. & Pol'y 185, 198 (2013).

yers and their noncitizen clients, and the court system as a whole. The court of appeals' decision makes it more difficult for defense attorneys to fulfill their *Padilla* duties and for uncounseled noncitizens to understand precisely what kind of conviction triggers immigration consequences. It imposes a burden on the court system as a whole by requiring judges, defense attorneys, and prosecutors to become experts on the thousands of substances banned under state and federal law and by making it more likely that noncitizen criminal defendants will choose to go to trial. The Eighth Circuit's rule also makes it more likely that noncitizens will receive disproportionate punishment for their conduct.

A. The Eighth Circuit's Rule Severely Complicates Defense Attorneys' Constitutional Duty To Provide Correct Advice Regarding The Immigration Consequences Of A Criminal Conviction

The "simple reality" of our criminal justice system is that nearly 95% of all criminal convictions derive from plea bargains. *Missouri* v. *Frye*, 132 S. Ct. 1399, 1407 (2012). Accordingly, defense attorneys have long recognized their ethical obligations in plea negotiations, including the duty to inform their clients "to the extent possible" of "the possible collateral consequences that might ensue" from accepting a guilty plea, such as the plea's effect on the client's immigration status. *See* ABA Standards for Criminal Justice, *Pleas of Guilty* § 14-3.2(f) (3d ed. 1999); *see also* Nat'l Legal Aid & Defender Ass'n, *Performance Guidelines for Criminal Representation* § 6.2(a)(3) (1995); Reimer, Frye *and* Lafler: *Much Ado About What We Do—And What Prosecutors And Judges Should Not Do*, The Champion, Apr. 2012, at 7, 7.

Recently, this Court recognized that these duties were constitutionally required. *See Padilla*, 130 S. Ct. at 1482. Decided against a backdrop of an "increasing number of crimes triggering deportation and the decreasing availability of equitable relief," Lee, *De Facto Immigration Courts*, 101 Calif. L. Rev. 553, 563 (2013), *Padilla* explained that a defendant may argue ineffective assistance of counsel due to his attorney's incorrect "advice regarding deportation." *Padilla*, 130 S. Ct. at 1482; *see also Frye*, 132 S. Ct. at 1406 ("*Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction."). Indeed, a defense attorney has a constitutional obligation to conduct an inquiry into "adverse immigration consequences" facing his client even "[w]hen the law is not succinct and straightforward." *Padilla*, 130 S. Ct. at 1483 & n.10 (although "deportation consequences are often unclear[,] [l]ack of clarity in the law … does not obviate the need for counsel to say something about the possibility of deportation").

Padilla was followed by *Frye* and *Lafler* v. *Cooper*, 132 S. Ct. 1376 (2012), in which this Court explained that a defense attorney potentially provides ineffective assistance when he fails to notify his client of, or offers incorrect advice regarding, a plea deal. *See id.* at 1384 ("Defendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process."); *see also* Garcia Hernandez, Strickland-*Lite*: Padilla*'s Two-Tiered Duty For Noncitizens*, 72 Md. L. Rev. 844, 863 (2013) ("[N]ot providing advice, or providing inaccurate advice that leads to a worse outcome, whether by pleading to a worse offer or by conviction after trial, can serve as the basis of an ineffective assistance claim."). Even after a full and fair trial has been

held, a defendant can make out an ineffective assistance claim if he can demonstrate both inaccurate advice and that "but for the [advice] there is a reasonable probability that the plea offer would have been presented to the court …, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *Lafler*, 132 S. Ct. at 1385.

These three decisions articulate a constitutional requirement that criminal defense attorneys provide their clients with accurate information about both the immigration consequences of a plea and their odds of success at trial if they do not take their plea. Here, the immigration statute is clear: The state conviction must relate to a federally controlled substance. And the state statute of conviction by its express terms covers conduct unrelated to a federally controlled substance. When the statute is clear in this way, a defense lawyer should be able to rely on the express terms of the statute when advising his or her noncitizen client so that the goal of *Padilla* that noncitizens understand the immigration consequences of the choices that they make during criminal proceedings may be fulfilled. *See Padilla*, 130 S. Ct. at 1480 ("The importance of accurate legal advice for noncitizens accused of crimes has never been more important.").

B. The Eighth Circuit's Rule Places Defense Attorneys In An Intractable Situation And Burdens The Court System As A Whole

Courts have taken two routes to interpreting the scope of 8 U.S.C. § 1227(a)(2)(B)(i). The Third Circuit sitting en banc has adopted a commonsense reading of the provision, concluding that the phrase "as defined

in" the federal Controlled Substances Act means that the state crime the defendant is convicted of must be related to a drug prohibited by federal law. *See Rojas*, 728 F.3d at 205; *see also Desai*, 520 F.3d at 766 (noting that the provision does not give the States "free rein to define their criminal laws in a manner that would allow them to effectively usurp the federal government's authority" over immigration law). The Eighth Circuit's interpretation is not only contrary to the plain meaning of the statute but also "effectively permit[s the States] to control who may remain in the country via their controlled substance schedules." *Rojas*, 728 F.3d at 213. Like the Third Circuit, the Eighth Circuit in this case acknowledged that the drugs prohibited by a State "may not 'map perfectly'" on to the federal Controlled Substances Act, Pet. App. 4, but nonetheless concluded that *any* drug paraphernalia offense under a state statute that covers some federal substances renders a criminal defendant deportable under § 1227(a)(2)(B)(i), *see* Pet. 16-17 & n.5.

The Eighth Circuit held that Mellouli's PDP conviction was sufficient to render him removable despite the fact that it was never established that the PDP charge was connected to a federally scheduled drug. This rule places criminal defense attorneys in an intractable situation and places an additional burden on the entire court system.

First, defense attorneys should be able to rely on the statutory text in order to comply with their duties under *Padilla* to advise noncitizens regarding the immigration consequences of a conviction. The Eighth Circuit's rule confounds that straightforward approach by transforming state statutes that do not on their face necessarily implicate federally controlled substances into plausible bases for removal.

Second, to the extent that the government's position that the petitioner satisfies the "realistic probability" test only by showing actual prosecutions for non-federally controlled substances requires a noncitizen to prove that his conviction—or those of others prosecuted and convicted by plea under the same statute—relates to a non-federal substance, the misdemeanor plea bargaining process generally provides neither the need nor the occasion to spend time developing a record about the drug at issue. *See supra* Part I.B. Prosecutors have numerous incentives to reach a quick plea bargain in the mine run of cases. *See* Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2740-2741 & n.17 (2004); Johnson, *Effective Assistance of Counsel and Guilty Pleas—Seven Rules to Follow*, The Champion, Nov. 2013, at 24, 25 ("[T]he best plea offers are often made early on in the life of a case (usually because the prosecutor is interested in avoiding as much work on the case as possible)[.]"). And having a defense attorney introduce additional information about his client's purported crime—such as proof that it related to a particular non-federal controlled substance—risks simply handing the prosecutor ammunition she can use if the case ultimately goes to trial. Johnson, *Effective Assistance*, at 28 ("If there is a legitimate chance that the case may go to trial, then giving the prosecutor additional information about the case … likely will not be worth the risk.").

Moreover, with respect to paraphernalia offenses, some States specify that the controlled substance with which the paraphernalia was to be used is an element of the offense, while others do not. *Compare*, *e.g.*, Ind. Pattern Jury Instr., Crim. Instr. No. 8.29 (substance must be named in jury instruction), *with* Ill. Crim. Pattern Jury Instr. § 17.66 (jury instruction calls for speci-

fication of either "cannabis" or "a controlled substance"). In some States, that requirement applies only to paraphernalia statutes that address more than simple possession: Florida, for example, requires that the specific substance be proven with respect to possession with intent to deliver paraphernalia, but not with respect to simple PDP. *Compare In re Standard Jury Instructions In Criminal Cases*, 969 So. 2d 245, 273 (Fla. 2007) (charge for violation of Fla. Stat. § 893.147(1), simple PDP), *with id.* at 276 (charge for violation of Fla. Stat. § 893.147(2), possession with intent to deliver paraphernalia).[9]

The Eighth Circuit's rule also places an additional, significant resource burden on the criminal and immigration systems. Its impact is not limited to defense attorneys, although they will certainly be affected. *See* Lee, *De Facto Immigration Courts*, at 594 (observing that "defense attorneys often must contend with resource and time constraints" and discussing study noting that some part-time defense attorneys handle the equivalent of 19,000 cases a year, leaving them only roughly seven minutes per case); *cf.* Johnson, *Effective Assistance*, at 27 ("*Padilla*'s requirement of accurate advice regarding the consequences of a guilty plea requires, at the most basic level, that defense attorneys

[9] Additionally, in NACDL's experience, it is inherently more difficult for a defense attorney to provide his client with adequate advice when the collateral consequences of a conviction are far more serious than the prison time for the underlying offense for which the lawyer is representing the client. A defendant's decision to go to trial—even when the evidence is against him—is a peculiarly personal choice when the alternative is potentially automatic deportation. Such advice is all the more difficult to give in the case of indigent clients, since representation in any follow-on immigration proceeding may not be covered by the same attorney, or indeed any attorney at all.

focus more time and attention to the advice they provide clients before a plea."). The Eighth Circuit's rule will also require federal courts and immigration judges, as well as government attorneys in immigration court, to become experts on the chemical properties of the countless substances banned by the federal government and the States to determine whether a State's schedules or individual banned substances are sufficiently related to federally prohibited drugs to trigger immigration consequences. *See Rojas*, 728 F.3d at 212 (rule adopted by the Eighth Circuit "would require immigration agencies and federal courts to become lab experts").

More broadly, the Eighth Circuit's rule risks spurring more trials for relatively minor crimes, thus expending the time and energy of the prosecution, the defense, and the court. *See* Lee, *De Facto Immigration Courts*, at 590 & n.195 ("[F]or defendants arrested for petty conduct, *Padilla* very much matters.... [O]ne foreseeable consequence of *Padilla* is that noncitizen defendants will be more willing to reject a plea offer."); Eagly, *Criminal Justice for Noncitizens: An Analysis of Variation in Local Enforcement*, 88 N.Y.U. L. Rev. 1126, 1195-1196 & n.315 (2013) (discussing anecdotal evidence that noncitizens facing a potential conviction with immigration consequences are more likely to go to trial); *see also* Johnson, *Effective Assistance*, at 26 ("[E]ven a small increase in the percentage of cases that are taken to trial in a particular jurisdiction would place significant strain on the prosecutor's office and the police."); Alexander, *Go to Trial: Crash the Justice System* ("[I]f the number of people exercising their trial rights suddenly doubled or tripled in some jurisdictions, it would create chaos.'"). This Court has previously refused to "so burden the Nation's trial courts ab-

sent any genuine affront to [constitutional principles]," *Oregon* v. *Ice*, 555 U.S. 160, 172 (2009); it should not do so here either.

C. The Eighth Circuit's Rule Also Entails Significant Unfairness For Noncitizens, Whether Or Not Represented By Counsel

Finally, the Eighth Circuit's rule will have unjust consequences for noncitizens.

First, it creates a gap between the wrongfulness of a noncitizen criminal defendant's conduct underlying the conviction and the resulting consequences. Holding that such a conviction triggers § 1227, which carries the possibility of mandatory deportation, leads to disproportionate penalties for relatively minor crimes. *See Padilla*, 130 S. Ct. at 365 ("We have long recognized that deportation is a particularly severe 'penalty' … ."). Relatedly, even if the government's case that a noncitizen criminal defendant was in possession of drug-related paraphernalia is weak, the noncitizen may choose to plead guilty to an entirely different, and more serious, offense—possession of a substance prohibited only under state law—in order to avoid triggering § 1227 under the doctrine established in the BIA's decision in *Matter of Paulus*, 11 I. & N. Dec. 274, 276 (BIA 1965). *See Matter of Martinez Espinoza*, 25 I. & N. Dec. 118, 121 (BIA 2009) (*Paulus* "require[s]" "correspondence between the Federal and State controlled substance schedules … for cases involving the possession of particular substances"). Under this scenario, too, the Eighth Circuit's rule would produce a penalty disproportionate to the wrongful conduct.

Second, the Eighth Circuit's rule improperly undermines the categorical approach's minimum conduct test. *See generally* Pet. Br. 27-29. As this Court has

held, the categorical approach permits the reviewing court to conclude that a state conviction matches a generically described federal offense "only if a conviction of the state offense necessarily involved facts equating to the generic federal offense." *Moncrieffe*, 133 S. Ct. at 1685 (alterations omitted). In other words, the state conviction categorically triggers removal "only if the [state] statute's elements are the same as, or narrower than, those of the generic offense." *Descamps* v. *United States*, 133 S. Ct. 2276, 2281 (2013). By holding that *any* state drug paraphernalia conviction from a State that has adopted the UCSA "relate[s]" to a federally controlled substance—even though the list of drugs potentially underlying a state conviction is inarguably different than the list of federally scheduled drugs, *see* Pet. App. 10—the Eighth Circuit's rule inappropriately expands the type of noncitizen conduct that potentially triggers automatic deportation.

Third, the Eighth Circuit's rule will lead to noncitizens spending more time in confinement during removal proceedings—regardless of whether they are ultimately deported. This is because under the government's interpretation of the INA, an immigration judge may not grant bond to noncitizens who are deportable for federally-controlled substance offenses as defined by 8 U.S.C. § 1227(a)(2)(B). *See* 8 U.S.C. § 1226(c); *Demore* v. *Kim*, 538 U.S. 510, 514 n.3 (2003). And detention generally leads to lack of access to counsel or to other resources that would allow noncitizens to pursue valid challenges to their removal, or even their continued detention. Experienced defenders have seen clients with a single, decades-old misdemeanor on their records accede to removal, despite a potentially meritorious defense to removability, rather than spend

months detained while awaiting the chance to put the government to its proof.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MARK C. FLEMING
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6000

ALAN SCHOENFELD
Counsel of Record
ARI J. SAVITZKY
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 230-8800
alan.schoenfeld@wilmerhale.com

THOMAS G. SPRANKLING
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

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