Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MELLOULI *v.* LYNCH, ATTORNEY GENERAL

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

No. 13–1034. Argued January 14, 2015—Decided June 1, 2015

Petitioner Moones Mellouli, a lawful permanent resident, pleaded guilty to a misdemeanor offense under Kansas law, the possession of drug paraphernalia "to . . . store [or] conceal . . . a controlled substance." Kan. Stat. Ann. §21–5709(b)(2). The sole "paraphernalia" Mellouli was charged with possessing was a sock in which he had placed four unidentified orange tablets. Citing Mellouli's misdemeanor conviction, an Immigration Judge ordered him deported under 8 U. S. C. §1227(a)(2)(B)(i), which authorizes the deportation (removal) of an alien "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)." Section 802, in turn, limits the term "controlled substance" to a "drug or other substance" included in one of five federal schedules. 21 U. S. C. §802(6). Kansas defines "controlled substance" as any drug included on its own schedules, without reference to §802. Kan. Stat. Ann. §21–5701(a). At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not on the federal lists. The Board of Immigration Appeals (BIA) affirmed Mellouli's deportation order, and the Eighth Circuit denied his petition for review.

Held: Mellouli's Kansas conviction for concealing unnamed pills in his sock did not trigger removal under §1227(a)(2)(B)(i). Pp. 5–14.

(a) The categorical approach historically taken in determining whether a state conviction renders an alien removable looks to the statutory definition of the offense of conviction, not to the particulars of the alien's conduct. The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law. The BIA has long applied the categorical approach to assess whether a state drug conviction trig-

gers removal under successive versions of what is now §1227(a)(2)(B)(i). *Matter of Paulus*, 11 I. & N. Dec. 274, is illustrative. At the time the BIA decided *Paulus*, California controlled certain "narcotics" not listed as "narcotic drugs" under federal law. *Id.*, at 275. The BIA concluded that an alien's California conviction for offering to sell an unidentified "narcotic" was not a deportable offense, for it was possible that the conviction involved a substance controlled only under California, not federal, law. Under the *Paulus* analysis, Mellouli would not be deportable. The state law involved in Mellouli's conviction, like the California statute in *Paulus*, was not confined to federally controlled substances; it also included substances controlled only under state, not federal, law.

The BIA, however, announced and applied a different approach to drug-paraphernalia offenses (as distinguished from drug possession and distribution offenses) in *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118. There, the BIA ranked paraphernalia statutes as relating to "the drug trade in general," reasoning that a paraphernalia conviction "relates to" any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used. *Id.*, at 120–121. Under this reasoning, there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in §802.

The BIA's disparate approach to drug possession and distribution offenses and paraphernalia possession offenses finds no home in §1227(a)(2)(B)(i)'s text and "leads to consequences Congress could not have intended." *Moncrieffe* v. *Holder*, 569 U. S. ___, ___. That approach has the anomalous result of treating less grave paraphernalia possession misdemeanors more harshly than drug possession and distribution offenses. The incongruous upshot is that an alien is *not* removable for *possessing* a substance controlled only under Kansas law, but he *is* removable for using a sock to contain that substance. Because it makes scant sense, the BIA's interpretation is owed no deference under the doctrine described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843. Pp. 5–11.

(b) The Government's interpretation of the statute is similarly flawed. The Government argues that aliens who commit *any* drug crime, not just paraphernalia offenses, in States whose drug schedules substantially overlap the federal schedules are deportable, for "state statutes that criminalize hundreds of federally controlled drugs and a handful of similar substances, are laws 'relating to' federally controlled substances." Brief for Respondent 17. While the words "relating to" are broad, the Government's reading stretches the construction of §1227(a)(2)(B)(i) to the breaking point, reaching state-

Syllabus

court convictions, like Mellouli's, in which "[no] controlled substance (as defined in [§802])" figures as an element of the offense. Construction of §1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under §802. Accordingly, to trigger removal under §1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§802]." Pp. 11–14.

719 F. 3d 995, reversed.

GINSBURG, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. THOMAS, J., filed a dissenting opinion, in which ALITO, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 13–1034

MOONES MELLOULI, PETITIONER *v.* LORETTA E. LYNCH, ATTORNEY GENERAL

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

[June 1, 2015]

JUSTICE GINSBURG delivered the opinion of the Court.

This case requires us to decide how immigration judges should apply a deportation (removal) provision, defined with reference to federal drug laws, to an alien convicted of a state drug-paraphernalia misdemeanor.

Lawful permanent resident Moones Mellouli, in 2010, pleaded guilty to a misdemeanor offense under Kansas law, 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) (2013 Cum. Supp.). The sole "paraphernalia" Mellouli was charged with possessing was a sock in which he had placed four orange tablets. The criminal charge and plea agreement did not identify the controlled substance involved, but Mellouli had acknowledged, prior to the charge and plea, that the tablets were Adderall. Mellouli was sentenced to a suspended term of 359 days and 12 months' probation.

In February 2012, several months after Mellouli successfully completed probation, Immigration and Customs Enforcement officers arrested him as deportable under 8

U. S. C. §1227(a)(2)(B)(i) based on his Kansas misdemeanor conviction. Section 1227(a)(2)(B)(i) authorizes the removal of an alien "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)." We hold that Mellouli's Kansas conviction for concealing unnamed pills in his sock did not trigger removal under §1227(a)(2)(B)(i). The drug-paraphernalia possession law under which he was convicted, Kan. Stat. Ann. §21–5709(b), by definition, related to a controlled substance: The Kansas statute made it unlawful "to use or possess with intent to use any drug paraphernalia to . . . store [or] conceal . . . a controlled substance." But it was immaterial under that law whether the substance was *defined in 21 U. S. C. §802*. Nor did the State charge, or seek to prove, that Mellouli possessed a substance on the §802 schedules. Federal law (§1227(a)(2)(B)(i)), therefore, did not authorize Mellouli's removal.

I

A

This case involves the interplay between several federal and state statutes. Section 1227(a)(2)(B)(i), a provision of the Immigration and Nationality Act, 66 Stat. 163, as amended, authorizes the removal of an alien "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." Section 1227(a)(2)(B)(i) incorporates 21 U. S. C. §802, which limits the term "controlled substance" to a "drug or other substance" included in one of five federal schedules. §802(6).

The statute defining the offense to which Mellouli pleaded guilty, Kan. Stat. Ann. §21–5709(b), proscribes

"possess[ion] with intent to use any drug paraphernalia to," among other things, "store" or "conceal" a "controlled substance." Kansas defines "controlled substance" as any drug included on its own schedules, and makes no reference to §802 or any other federal law. §21–5701(a).[1] At the time of Mellouli's conviction, Kansas' schedules included at least nine substances not included in the federal lists. See §65–4105(d)(30), (31), (33), (34), (36) (2010 Cum. Supp.); §65–4111(g) (2002); §65–4113(d)(1), (e), (f) (2010 Cum. Supp.); see also Brief for Respondent 9, n. 2.

The question presented is whether a Kansas conviction for using drug paraphernalia to store or conceal a controlled substance, §21–5709(b), subjects an alien to deportation under §1227(a)(2)(B)(i), which applies to an alien "convicted of a violation of [a state law] relating to a controlled substance (as defined in [§802])."

B

Mellouli, a citizen of Tunisia, entered the United States on a student visa in 2004. He attended U. S. universities, earning a bachelor of arts degree, *magna cum laude*, as well as master's degrees in applied mathematics and economics. After completing his education, Mellouli worked as an actuary and taught mathematics at the University of Missouri-Columbia. In 2009, he became a conditional permanent resident and, in 2011, a lawful permanent resident. Since December 2011, Mellouli has been engaged to be married to a U. S. citizen.

In 2010, Mellouli was arrested for driving under the influence and driving with a suspended license. During a postarrest search in a Kansas detention facility, deputies discovered four orange tablets hidden in Mellouli's sock. According to a probable-cause affidavit submitted in the

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[1]At the time of Mellouli's conviction, Kan. Stat. Ann. §§21–5701(a) and 21–5709(b) (2013 Cum. Supp.) were codified at, respectively, §§21–36a01(a) and 21–36a09(b) (2010 Cum. Supp.).

state prosecution, Mellouli acknowledged that the tablets were Adderall and that he did not have a prescription for the drugs. Adderall, the brand name of an amphetamine-based drug typically prescribed to treat attention-deficit hyperactivity disorder,[2] is a controlled substance under both federal and Kansas law. See 21 CFR §1308.12(d)(1) (2014) (listing "amphetamine" and its "salts" and "isomers"); Kan. Stat. Ann. §65–4107(d)(1) (2013 Cum. Supp.) (same). Based on the probable-cause affidavit, a criminal complaint was filed charging Mellouli with trafficking contraband in jail.

Ultimately, Mellouli was charged with only the lesser offense of possessing drug paraphernalia, a misdemeanor. The amended complaint alleged that Mellouli had "use[d] or possess[ed] with intent to use drug paraphernalia, to-wit: a sock, to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance." App. 23. The complaint did not identify the substance contained in the sock. Mellouli pleaded guilty to the paraphernalia possession charge; he also pleaded guilty to driving under the influence. For both offenses, Mellouli was sentenced to a suspended term of 359 days and 12 months' probation.

In February 2012, several months after Mellouli successfully completed probation, Immigration and Customs Enforcement officers arrested him as deportable under §1227(a)(2)(B)(i) based on his paraphernalia possession conviction. An Immigration Judge ordered Mellouli deported, and the Board of Immigration Appeals (BIA) affirmed the order. Mellouli was deported in 2012.

Under federal law, Mellouli's concealment of controlled-substance tablets in his sock would not have qualified as a drug-paraphernalia offense. Federal law criminalizes the sale of or commerce in drug paraphernalia, but possession

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[2] See H. Silverman, The Pill Book 23 (13th ed. 2008).

alone is not criminalized at all. See 21 U. S. C. §863(a)–(b). Nor does federal law define drug paraphernalia to include common household or ready-to-wear items like socks; rather, it defines paraphernalia as any "equipment, product, or material" which is "primarily *intended or designed for use*" in connection with various drug-related activities. §863(d) (emphasis added). In 19 States as well, the conduct for which Mellouli was convicted—use of a sock to conceal a controlled substance—is not a criminal offense. Brief for National Immigrant Justice Center et al. as *Amici Curiae* 7. At most, it is a low-level infraction, often not attended by a right to counsel. *Id.,* at 9–11.

The Eighth Circuit denied Mellouli's petition for review. 719 F. 3d 995 (2013). We granted certiorari, 573 U. S. ___ (2014), and now reverse the judgment of the Eighth Circuit.

II

We address first the rationale offered by the BIA and affirmed by the Eighth Circuit, which differentiates paraphernalia offenses from possession and distribution offenses. Essential background, in evaluating the rationale shared by the BIA and the Eighth Circuit, is the categorical approach historically taken in determining whether a state conviction renders an alien removable under the immigration statute.[3] Because Congress predicated de-

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[3]We departed from the categorical approach in *Nijhawan* v. *Holder*, 557 U. S. 29 (2009), based on the atypical cast of the prescription at issue, 8 U. S. C. §1101(a)(43)(M)(i). That provision defines as an "aggravated felony" an offense "involv[ing] fraud or deceit in which the loss to the victim or victims exceeds $10,000." The following subparagraph, (M)(ii), refers to an offense "described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000." No offense "described in section 7201 of title 26," we pointed out, "has a specific loss amount as an element." 557 U. S., at 38. Similarly, "no widely applicable federal fraud statute . . . contains a relevant monetary loss threshold," *id.,* at 39, and "[most] States had no

portation "on convictions, not conduct," the approach looks to the statutory definition of the offense of conviction, not to the particulars of an alien's behavior. Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N. Y. U. L. Rev. 1669, 1701, 1746 (2011). The state conviction triggers removal only if, by definition, the underlying crime falls within a category of removable offenses defined by federal law. *Ibid.* An alien's actual conduct is irrelevant to the inquiry, as the adjudicator must "presume that the conviction rested upon nothing more than the least of the acts criminalized" under the state statute. *Moncrieffe* v. *Holder*, 569 U. S. ___, ___ (2013) (slip op., at 5) (internal quotation marks and alterations omitted).[4]

The categorical approach "has a long pedigree in our Nation's immigration law." *Id.,* at ___ (slip op., at 6). As early as 1913, courts examining the federal immigration

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major fraud or deceit statute with any relevant monetary threshold," *id.,* at 40. As categorically interpreted, (M)(ii), the tax evasion provision, would have no application, and (M)(i), the fraud or deceit provision, would apply only in an extraordinarily limited and haphazard manner. *Ibid.* We therefore concluded that Congress intended the monetary thresholds in subparagraphs (M)(i) and (M)(ii) to apply "to the specific circumstances surrounding an offender's commission of [the defined] crime on a specific occasion." *Ibid.* In the main, §1227(a)(2)(B)(i), the provision at issue here, has no such circumstance-specific thrust; its language refers to crimes generically defined.

[4]A version of this approach, known as the "modified categorical approach," applies to "state statutes that contain several different crimes, each described separately." *Moncrieffe* v. *Holder*, 569 U. S. ___, ___ (2013) (slip op., at 5). In such cases, "a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or some comparable judicial record of the factual basis for the plea." *Ibid.* (internal quotation marks omitted). Off limits to the adjudicator, however, is any inquiry into the particular facts of the case. Because the Government has not argued that this case falls within the compass of the modified-categorical approach, we need not reach the issue.

statute concluded that Congress, by tying immigration penalties to *convictions*, intended to "limi[t] the immigration adjudicator's assessment of a past criminal conviction to a legal analysis of the statutory offense," and to disallow "[examination] of the facts underlying the crime." Das, *supra*, at 1688, 1690.

Rooted in Congress' specification of conviction, not conduct, as the trigger for immigration consequences, the categorical approach is suited to the realities of the system. Asking immigration judges in each case to determine the circumstances underlying a state conviction would burden a system in which "large numbers of cases [are resolved by] immigration judges and front-line immigration officers, often years after the convictions." Koh, The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime, 26 Geo. Immigration L. J. 257, 295 (2012). By focusing on the legal question of what a conviction *necessarily* established, the categorical approach ordinarily works to promote efficiency, fairness, and predictability in the administration of immigration law. See *id.,* at 295–310; Das, *supra,* at 1725–1742. In particular, the approach enables aliens "to anticipate the immigration consequences of guilty pleas in criminal court," and to enter "'safe harbor' guilty pleas [that] do not expose the [alien defendant] to the risk of immigration sanctions." Koh, *supra,* at 307. See Das, *supra,* at 1737–1738.[5]

The categorical approach has been applied routinely to assess whether a state drug conviction triggers removal under the immigration statute. As originally enacted, the removal statute specifically listed covered offenses and

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[5] Mellouli's plea may be an example. In admitting only paraphernalia possession, Mellouli avoided any identification, in the record of conviction, of the federally controlled substance (Adderall) his sock contained. See *supra,* at 3–4.

covered substances. It made deportable, for example, any alien convicted of "import[ing]," "buy[ing]," or "sell[ing]" any "narcotic drug," defined as "opium, coca leaves, cocaine, or any salt, derivative, or preparation of opium or coca leaves, or cocaine." Ch. 202, 42 Stat. 596–597. Over time, Congress amended the statute to include additional offenses and additional narcotic drugs.[6] Ultimately, the Anti-Drug Abuse Act of 1986 replaced the increasingly long list of controlled substances with the now familiar reference to "a controlled substance (as defined in [§802])." See §1751, 100 Stat. 3207–47. In interpreting successive versions of the removal statute, the BIA inquired whether the state statute under which the alien was convicted covered federally controlled substances and not others.[7]

Matter of Paulus, 11 I. & N. Dec. 274 (1965), is illustrative. At the time the BIA decided *Paulus*, the immigration statute made deportable any alien who had been "convicted of a violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or mari-

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[6]The 1956 version of the statute, for example, permitted removal of any alien "who at any time has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs, or who has been convicted of a violation of, or a conspiracy to violate, 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." Narcotic Control Act of 1956, §301(b), 70 Stat. 575.

[7]See, *e.g.*, *Matter of Fong*, 10 I. & N. Dec. 616, 619 (BIA 1964) (a Pennsylvania conviction for unlawful use of a drug rendered alien removable because "every drug enumerated in the Pennsylvania law [was] found to be a narcotic drug or marijuana within the meaning of [the federal removal statute]"), overruled in part on other grounds, *Matter of Sum*, 13 I. & N. Dec. 569 (1970).

huana." *Id.,* at 275. California controlled certain "narcotics," such as peyote, not listed as "narcotic drugs" under federal law. *Ibid.* The BIA concluded that an alien's California conviction for offering to sell an unidentified "narcotic" was not a deportable offense, for it was possible that the conviction involved a substance, such as peyote, controlled only under California law. *Id.,* at 275–276. Because the alien's conviction was not necessarily predicated upon a federally controlled "narcotic drug," the BIA concluded that the conviction did not establish the alien's deportability. *Id.*, at 276.

Under the *Paulus* analysis, adhered to as recently as 2014 in *Matter of Ferreira*, 26 I. & N. Dec. 415 (BIA 2014),[8] Mellouli would not be deportable. Mellouli pleaded guilty to concealing unnamed pills in his sock. At the time of Mellouli's conviction, Kansas' schedules of controlled substances included at least nine substances—*e.g.*, salvia and jimson weed—not defined in §802. See Kan. Stat. Ann. §65–4105(d)(30), (31). The state law involved in Mellouli's conviction, therefore, like the California statute in *Paulus*, was not confined to federally controlled substances; it required no proof by the prosecutor that Mellouli used his sock to conceal a substance listed under §802, as opposed to a substance controlled only under Kansas law. Under the categorical approach applied in *Paulus*, Mellouli's drug-paraphernalia conviction does not render him deportable. In short, the state law under which he was charged categorically "relat[ed] to a controlled substance," but was not limited to substances "defined in [§802]."[9]

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[8]The Government acknowledges that *Ferreira* "assumed the applicability of [the *Paulus*] framework." Brief for Respondent 49. Whether *Ferreira* applied that framework correctly is not a matter this case calls upon us to decide.

[9]The dissent maintains that it is simply following "the statutory text." *Post,* at 1. It is evident, however, that the dissent shrinks to the

The BIA, however, announced and applied a different approach to drug-paraphernalia offenses (as distinguished from drug possession and distribution offenses) in *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118 (2009). There, the BIA ranked paraphernalia statutes as relating to "the drug trade in general." *Id.,* at 121. The BIA rejected the argument that a paraphernalia conviction should not count at all because it targeted implements, not controlled substances. *Id.,* at 120. It then reasoned that a paraphernalia conviction "relates to" any and all controlled substances, whether or not federally listed, with which the paraphernalia can be used. *Id.,* at 121. Under this reasoning, there is no need to show that the type of controlled substance involved in a paraphernalia conviction is one defined in §802.

The Immigration Judge in this case relied upon *Martinez Espinoza* in ordering Mellouli's removal, quoting that decision for the proposition that "'the requirement of a correspondence between the Federal and State controlled substance schedules, embraced by *Matter of Paulus* . . . has never been extended'" to paraphernalia offenses. App. to Pet. for Cert. 32 (quoting *Martinez Espinoza*, 25 I. & N. Dec., at 121). The BIA affirmed, reasoning that Mellouli's conviction for possession of drug paraphernalia "involves drug trade in general and, thus, is covered under [§1227(a)(2)(B)(i)]." App. to Pet. for Cert. 18. Denying Mellouli's petition for review, the Eighth Circuit deferred to the BIA's decision in *Martinez Espinoza*, and held that a Kansas paraphernalia conviction "'relates to' a federal

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vanishing point the words "as defined in [§802]." If §1227(a)(2)(B)(i) stopped with the words "relating to a controlled substance," the dissent would make sense. But Congress did not stop there. It qualified "relating to a controlled substance" by adding the limitation "as defined in [§802]." If those words do not confine §1227(a)(2)(B)(i)'s application to drugs defined in §802, one can only wonder why Congress put them there.

controlled substance because it is a crime . . . 'associated with the drug trade in general.'" 719 F. 3d, at 1000.

The disparate approach to state drug convictions, devised by the BIA and applied by the Eighth Circuit, finds no home in the text of §1227(a)(2)(B)(i). The approach, moreover, "leads to consequences Congress could not have intended." *Moncrieffe*, 569 U. S., at ___ (slip op., at 15). Statutes should be interpreted "as a symmetrical and coherent regulatory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000) (internal quotation marks omitted). The BIA, however, has adopted conflicting positions on the meaning of §1227(a)(2)(B)(i), distinguishing drug possession and distribution offenses from offenses involving the drug trade in general, with the anomalous result that minor paraphernalia possession offenses are treated more harshly than drug possession and distribution offenses. Drug possession and distribution convictions trigger removal only if they necessarily involve a federally controlled substance, see *Paulus*, 11 I. & N. Dec. 274, while convictions for paraphernalia possession, an offense less grave than drug possession and distribution, trigger removal whether or not they necessarily implicate a federally controlled substance, see *Martinez Espinoza*, 25 I. & N. Dec. 118. The incongruous upshot is that an alien is *not* removable for *possessing* a substance controlled only under Kansas law, but he *is* removable for using a sock to contain that substance. Because it makes scant sense, the BIA's interpretation, we hold, is owed no deference under the doctrine described in *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U. S. 837, 843 (1984).

III

Offering an addition to the BIA's rationale, the Eighth Circuit reasoned that a state paraphernalia possession conviction categorically relates to a federally controlled

substance so long as there is "nearly a complete overlap" between the drugs controlled under state and federal law. 719 F. 3d, at 1000.[10] The Eighth Circuit's analysis, however, scarcely explains or ameliorates the BIA's anomalous separation of paraphernalia possession offenses from drug possession and distribution offenses.

Apparently recognizing this problem, the Government urges, as does the dissent, that the overlap between state and federal drug schedules supports the removal of aliens convicted of *any* drug crime, not just paraphernalia offenses. As noted, §1227(a)(2)(B)(i) authorizes the removal of any alien "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 [§802])." According to the Government, the words "relating to" modify "law or regulation," rather than "violation." Brief for Respondent 25–26 (a limiting phrase ordinarily modifies the last antecedent). Therefore, the Government argues, aliens who commit "drug crimes" in States whose drug schedules substantially overlap the federal schedules are removable, for "state statutes that criminalize hundreds of federally controlled drugs and a handful of similar substances, are laws 'relating to' federally controlled substances." Brief for Respondent 17.

We do not gainsay that, as the Government urges, the last reasonable referent of "relating to," as those words appear in §1227(a)(2)(B)(i), is "law or regulation." The removal provision is thus satisfied when the elements that make up the state crime of conviction relate to a federally controlled substance. As this case illustrates, however, the Government's construction of the federal removal

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[10] The BIA posited, but did not rely on, a similar rationale in *Martinez Espinoza*. See 25 I. & N. Dec., 118, 121 (2009) (basing decision on 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").

statute stretches to the breaking point, reaching state-court convictions, like Mellouli's, in which "[no] controlled substance (as defined in [§802])" figures as an element of the offense. We recognize, too, that the §1227(a)(2)(B)(i) words to which the dissent attaches great weight, *i.e.*, "relating to," *post*, at 2–3, are "broad" and "indeterminate." *Maracich* v. *Spears*, 570 U. S. ___, ___ (2013) (slip op., at 9) (internal quotation marks and brackets omitted).[11] As we cautioned in *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655 (1995), those words, "extend[ed] to the furthest stretch of [their] indeterminacy, . . . stop nowhere." "[C]ontext," therefore, may "tu[g] . . . in favor of a narrower reading." *Yates* v. *United States*, 574 U. S. ___, ___ (2015) (slip op., at 10). Context does so here.

The historical background of §1227(a)(2)(B)(i) demonstrates that Congress and the BIA have long required a direct link between an alien's crime of conviction and a particular federally controlled drug. *Supra*, at 8–9. The Government's position here severs that link by authorizing deportation any time the state statute of conviction bears some general relation to federally controlled drugs.

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[11] The dissent observes that certain provisions of the immigration statute involving firearms and domestic violence "specif[y] the conduct that subjects an alien to removal" without "the expansive phrase 'relating to.'" *Post*, at 3. From this statutory context, the dissent infers that Congress must have intended the words "relating to" to have expansive meaning. *Post*, at 3–4. But the dissent overlooks another contextual clue—*i.e.*, that other provisions of the immigration statute tying immigration consequences to controlled-substance offenses contain no reference to §802. See 8 U. S. C. §1357(d) (allowing detainer of any alien who has been "arrested by a Federal, State, or local law enforcement official for a violation of any law relating to controlled substances"); §1184(d)(3)(B)(iii) (allowing Secretary of Homeland Security to deny certain visa applications when applicant has at least three convictions of crimes "relating to a controlled substance or alcohol not arising from a single act"). These provisions demonstrate that when Congress seeks to capture conduct involving a "controlled substance," it says just that, not "a controlled substance (as defined in [§802])."

The Government offers no cogent reason why its position is limited to state drug schedules that have a "substantial overlap" with the federal schedules. Brief for Respondent 31. A statute with *any* overlap would seem to be *related to* federally controlled drugs. Indeed, the Government's position might well encompass convictions for offenses related to drug activity more generally, such as gun possession, even if those convictions do not actually involve drugs (let alone federally controlled drugs). The Solicitor General, while resisting this particular example, acknowledged that convictions under statutes "that have some connection to drugs indirectly" might fall within §1227(a)(2)(B)(i). Tr. of Oral Arg. 36. This sweeping interpretation departs so sharply from the statute's text and history that it cannot be considered a permissible reading.

In sum, construction of §1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under §802. We therefore reject the argument that *any* drug offense renders an alien removable, without regard to the appearance of the drug on a §802 schedule. Instead, to trigger removal under §1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§802]."

* * *

For the reasons stated, the judgment of the U. S. Court of Appeals for the Eighth Circuit is reversed.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 13–1034

MOONES MELLOULI, PETITIONER *v.* LORETTA E. LYNCH, ATTORNEY GENERAL

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

[June 1, 2015]

JUSTICE THOMAS, with whom JUSTICE ALITO joins, dissenting.

The Court reverses the decision of the United States Court of Appeals for the Eighth Circuit on the ground that it misapplied the federal removal statute. It rejects the Government's interpretation of that statute, which would supply an alternative ground for affirmance. Yet it offers no interpretation of its own. Lower courts are thus left to guess which convictions qualify an alien for removal under 8 U. S. C. §1227(a)(2)(B)(i), and the majority has deprived them of their only guide: the statutory text itself. Because the statute renders an alien removable whenever he is convicted of violating a law "relating to" a federally controlled substance, I would affirm.

I

With one exception not applicable here, §1227(a)(2)(B)(i) makes removable "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) 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)." I would hold, consistent with the text, that the provision requires that the conviction arise under a "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)." Thus, Mellouli was properly subject to removal if the Kansas statute of conviction "relat[es] to a controlled substance (as defined in section 802 of title 21)," regardless of whether his particular conduct would also have subjected him to prosecution under federal controlled-substances laws. See *ante,* at 6 ("An alien's actual conduct is irrelevant to the inquiry"). The majority's 12 references to the sock that Mellouli used to conceal the pills are thus entirely beside the point.[1]

The critical question, which the majority does not directly answer, is what it means for a law or regulation to "relat[e] to a controlled substance (as defined in section 802 of title 21)." At a minimum, we know that this phrase does not require a complete overlap between the substances controlled under the state law and those controlled under 21 U. S. C. §802. To "relate to" means "'to stand in some relation; to have bearing or concern; to pertain; refer; to bring into association with or connection with.'" *Morales* v. *Trans World Airlines, Inc.*, 504 U. S. 374, 383 (1992) (quoting Black's Law Dictionary 1158 (5th ed. 1979)). In ordinary parlance, one thing can "relate to" another even if it also relates to other things. As ordinarily understood, therefore, a state law regulating various controlled substances may "relat[e] to a controlled substance (as defined in section 802 of title 21)" even if the statute also controls a few substances that do not fall within the federal definition.

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[1] It is likewise beside the point that the pills were, in fact, federally controlled substances, that Mellouli concealed them in his sock while being booked into jail, that he was being booked into jail for his second arrest for driving under the influence in less than one year, that he pleaded to the paraphernalia offense after initially being charged with trafficking contraband in jail, or that he has since been charged with resisting arrest and failure to display a valid driver's license upon demand.

The structure of the removal statute confirms this interpretation. Phrases like "relating to" and "in connection with" have broad but indeterminate meanings that must be understood in the context of "the structure of the statute and its other provisions." *Maracich* v. *Spears*, 570 U. S. ___, ___ (2013) (slip op., at 9) ("in connection with"); see also *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Ins. Co.*, 514 U. S. 645, 655 (1995) ("relate to"); see generally *California Div. of Labor Standards Enforcement* v. *Dillingham Constr., N. A., Inc.*, 519 U. S. 316, 324 (1997) (describing the Court's efforts to interpret the "'clearly expansive'" "relate to" language in the pre-emption provision of the Employee Retirement Income Security Act of 1974). In interpreting such phrases, we must be careful to honor Congress' choice to use expansive language. *Maracich*, *supra,* at ___ (GINSBURG, J., dissenting) (slip op., at 7) (noting that a statute should be interpreted broadly in light of Congress' decision to use sweeping language like "in connection with"); see also, *e.g., Alaska Dept. of Environmental Conservation* v. *EPA*, 540 U. S. 461, 484 (2004) (GINSBURG, J.) (interpreting Environmental Protection Agency's authority in light of the "notably capacious terms" contained in its authorizing statute).

Here, the "structure of the statute and its other provisions" indicate that Congress understood this phrase to sweep quite broadly. Several surrounding subsections of the removal statute reveal that when Congress wanted to define with greater specificity the conduct that subjects an alien to removal, it did so by omitting the expansive phrase "relating to." For example, a neighboring provision makes removable "[a]ny alien who . . . is convicted under any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying . . . any weapon, part, or accessory *which is* a firearm or destructive device (as defined in section 921(a) of title 18)." 8 U. S. C.

§1227(a)(2)(C) (emphasis added). This language explicitly requires that the object of the offense fit within a federal definition. Other provisions adopt similar requirements. See, *e.g.,* §1227(a)(2)(E)(i) (making removable "[a]ny alien who . . . is convicted of a crime of domestic violence," where "the term 'crime of domestic violence' means any crime of violence (as defined in section 16 of title 18) . . . committed by" a person with a specified family relationship with the victim); see generally §1101(a)(43) (defining certain aggravated felonies using federal definitions as elements). That Congress, in this provision, required only that a law *relate to* a federally controlled substance, as opposed to *involve* such a substance, suggests that it understood "relating to" as having its ordinary and expansive meaning. See, *e.g., Russello* v. *United States*, 464 U. S. 16, 23 (1983).

Applying this interpretation of "relating to," a conviction under Kansas' drug paraphernalia statute qualifies as a predicate offense under §1227(a)(2)(B)(i). That state statute prohibits the possession or use 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) (2013 Cum. Supp.). And, as used in this statute, a "controlled substance" is a substance that appears on Kansas' schedules, §21–5701(a), which in turn consist principally of federally controlled substances. *Ante,* at 3; see also Brief for Petitioner 3 (listing nine substances on Kansas' schedules that were not on the federal schedules at the time of Mellouli's arrest); Brief for Respondent 8 (noting that, at the time of Mellouli's arrest, more than 97 percent of the named substances on Kansas' schedules were federally controlled). The law certainly "relat[es] to a controlled substance (as defined in section 802 of title 21)" because it prohibits conduct involving controlled substances falling within the federal definition in §802.

True, approximately three percent of the substances appearing on Kansas' lists of "controlled substances" at the time of Mellouli's conviction did not fall within the federal definition, *ante,* at 3, meaning that an individual convicted of possessing paraphernalia may never have used his paraphernalia with a federally controlled substance. But that fact does not destroy the relationship between the *law* and federally controlled substances. Mellouli was convicted for violating a state law "relating to a controlled substance (as defined in section 802 of title 21)," so he was properly removed under 8 U. S. C. §1227(a)(2)(B)(i).

II

A

The majority rejects this straightforward interpretation because it "reach[es] state-court convictions . . . in which '[no] controlled substance (as defined in [§802])' figures as an element of the offense." *Ante,* at 13. This assumes the answer to the question at the heart of this case: whether the removal statute does in fact reach such convictions. To answer that question by assuming the answer is circular.

The majority hints that some more limited definition of "relating to" is suggested by context. See *ibid.* I wholeheartedly agree that we must look to context to understand indeterminate terms like "relating to," which is why I look to surrounding provisions of the removal statute. These "reveal that when Congress wanted to define with greater specificity the conduct that subjects an alien to removal, it did so by omitting the expansive phrase 'relating to.'" *Supra,* at 3. For its part, the majority looks to the context of other provisions referring to "controlled substances" without a definitional parenthetical, *ante,* at 13, n. 11, and rejoins that the most natural reading of the statute "shrinks to the vanishing point the words 'as

defined in [§802],'" *ante,* at 9–10, n. 9. But the definition of controlled substances *does* play a role in my interpretation, by requiring that the law bear some relationship to *federally* controlled substances. Although we need not establish the precise boundaries of that relationship in this case given that Kansas' paraphernalia law clearly qualifies under any reasonable definition of "relating to," the definition of controlled substances imposes a meaningful limit on the statutes that qualify.

B

The majority *appears* to conclude that a statute "relates to" a federally controlled substance if its "definition of the offense of conviction" necessarily includes as an element of that offense a federally controlled substance. *Ante,* at 6. The text will not bear this meaning.

The first problem with the majority's interpretation is that it converts a removal provision expressly keyed to features of the statute itself into one keyed to features of the underlying generic offense. To understand the difference, one need look no further than this Court's decision in *Moncrieffe* v. *Holder*, 569 U. S. ___ (2013). In that case, removal was predicated on the generic offense of "illicit trafficking in a controlled substance." *Id.,* at ___ (slip op., at 2). Thus, in order to satisfy the federal criteria, it was necessary for the state offense at issue to have as elements the same elements that make up that generic offense. *Id.,* at ___ (slip op., at 5). By contrast, §1227(a)(2)(B)(i) does not refer to a generic offense for which we must discern the relevant criteria from its nature. Instead, it establishes the relevant criteria explicitly, and does so for the law of conviction itself rather than for some underlying generic offense—that is, the law of conviction must "relat[e] to" a federally controlled substance.

The only plausible way of reading the text here to refer to a generic offense that has as one element the involve-

ment of a federally controlled substance would be to read "relating to" as modifying "violation" instead of "law." Under that reading, the statute would attach immigration consequences to a "*violation* . . . relating to a controlled substance (as defined in section 802 of title 21)," rather than a violation of a "*law* . . . relating to a controlled substance (as defined in section 802 of title 21)." Yet the majority expressly—and correctly—rejects as grammatically incorrect Mellouli's argument that the "relating to" clause modifies "violation." *Ante,* at 12.

Having done so, the majority can reconcile its outcome with the text only by interpreting the words "relating to" to mean "regulating only." It should be obvious why the majority does not make this argument explicit. Even assuming "regulating only" were a *permissible* interpretation of "relating to"—for it certainly is not the most natural one—that interpretation would be foreclosed by Congress' pointed word choice in the surrounding provisions. And given the logical upshot of the majority's interpretation, it is it even more understandable that it avoids offering an explicit exegesis. For unless the Court ultimately adopts the modified categorical approach for statutes, like the one at issue here, that define offenses with reference to "controlled substances" generally, and treats them as divisible by each separately listed substance, *ante,* at 6, n. 4, its interpretation would mean that *no* conviction under a controlled-substances regime more expansive than the Federal Government's would trigger removal.[2] Thus,

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[2] If the Court ultimately adopts the modified categorical approach, it runs into new textual problems. Under that approach, an alien would be subject to removal for violating Kansas' drug paraphernalia statute whenever a qualifying judicial record reveals that the conviction involved a federally controlled substance. If that result is permissible under the removal statute, however, then Kansas' paraphernalia law must qualify as a law "relating to" a federally controlled substance. Otherwise, the text of the statute would afford no basis for his removal.

whenever a State moves first in subjecting some newly discovered drug to regulation, every alien convicted during the lag between state and federal regulation would be immunized from the immigration consequences of his conduct. Cf. Brief for Respondent 10 (explaining that two of the nine nonfederally controlled substances on Kansas' schedules at the time Mellouli was arrested became federally controlled within a year of his arrest). And the Government could never, under §1227(a)(2)(B)(i), remove an alien convicted of violating the controlled-substances law of a State that defines "controlled substances" with reference to a list containing even one substance that does not appear on the federal schedules.

Finding no support for its position in the text, the majority relies on the historical background, *ante,* at 13–14, and especially the Board of Immigration Appeals' (BIA) decision in *Matter of Paulus*, 11 I. & N. Dec. 274 (1965)—a surprising choice, given that the majority concludes its discussion of that history by acknowledging that the BIA's atextual approach to the statute makes "scant sense," *ante,* at 11. To the extent that the BIA's approach to §1227(a)(2)(B)(i) and its predecessors is consistent with the majority's, it suffers from the same flaw: It fails to account for the text of the removal provision because it looks at whether the *conviction* itself necessarily involved a substance regulated under federal law, not at whether the statute related to one. See *Paulus*, 11 I. & N. Dec., at 276 ("[O]nly a *conviction* for illicit possession of or traffic in a substance which is defined as a narcotic drug under federal laws can be the basis for deportation" (emphasis added)); *Matter of Ferreira*, 26 I. & N. Dec. 415, 418–419 (BIA 2014) (modeling its categorical approach to

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It would then follow that any alien convicted of "a violation of" that law is removable under §1227(a)(2)(B)(i), *regardless* of whether a qualifying judicial record reveals the controlled substance at issue.

§1227(a)(2)(B)(i) after the analysis in *Moncrieffe*, which, as explained above, keyed removal to the characteristics of the offense).

Section 1227(a)(2)(B)(i) requires only that the state law itself, not the "generic" offense defined by the law, "relat[e] to" a federally controlled substance. The majority has not offered a textual argument capable of supporting a different conclusion.

* * *

The statutory text resolves this case. True, faithfully applying that text means that an alien may be deported for committing an offense that does not involve a federally controlled substance. Nothing about that consequence, however, is so outlandish as to call this application into doubt. An alien may be removed only if he is convicted of violating a law, and I see nothing absurd about removing individuals who are unwilling to respect the drug laws of the jurisdiction in which they find themselves.

The majority thinks differently, rejecting the only plausible reading of this provision and adopting an interpretation that finds no purchase in the text. I fail to understand why it chooses to do so, apart from a gut instinct that an educated professional engaged to an American citizen should not be removed for concealing unspecified orange tablets in his sock. Or perhaps the majority just disapproves of the fact that Kansas, exercising its police powers, has decided to criminalize conduct that Congress, exercising its limited powers, has decided not to criminalize, *ante,* at 4–5. Either way, that is not how we should go about interpreting statutes, and I respectfully dissent.

In re Liber Remberto SEJAS, Respondent

File A91 540 618 - Arlington

Decided July 25, 2007

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

The offense of assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code is not categorically a crime involving moral turpitude.

FOR RESPONDENT: Ivan Yacub, Esquire, Falls Church, Virginia

FOR THE DEPARTMENT OF HOMELAND SECURITY: Rook Moore, Assistant Chief Counsel

BEFORE: Board Panel: OSUNA, Acting Chairman; FILPPU and PAULEY, Board Members.

OSUNA, Acting Chairman:

In a decision dated November 2, 2005, the Immigration Judge found the respondent removable and denied his application for cancellation of removal as a lawful permanent resident under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a) (2000). The respondent has appealed from that decision. The appeal will be sustained.

The respondent is a native and citizen of Bolivia who was admitted to the United States as a lawful permanent resident in 1990. In April 2003, removal proceedings were initiated against the respondent, charging him with inadmissibility under section 212(a)(2)(A)(i)(I) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2000), based on two criminal convictions in 1996 and 2000 for assault and battery against his wife in violation of section 18.2-57.2 of the Virginia Code. A person is guilty of violating section 18.2-57.2 of the Virginia Code if he or she "commits an assault and battery against a family or household member." According to section 16.1-228 of the Virginia Code, a "[f]amily or household member" includes "the person's spouse, whether or not he or she resides in the same home with the person."

The Immigration Judge found that the respondent's two assault and battery convictions were for crimes involving moral turpitude, which rendered him inadmissible under section 212(a)(2)(A)(i)(I) of the Act. The Immigration Judge denied the respondent's application for cancellation of removal after determining that the respondent did not merit a grant of relief in

the exercise of discretion. On appeal, the respondent argues that he is not inadmissible as charged because his convictions for assault and battery against a family or household member under section 18.2-57.2 of the Virginia Code are not crimes involving moral turpitude.

Generally, a crime involves "moral turpitude" if it is "inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general." *Matter of Olquin*, 23 I&N Dec. 896, 896 (BIA 2006) (citing *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001)). In determining whether a crime is one involving moral turpitude, we must look to the elements of the statute. *See Matter of Torres-Varela*, *supra*, at 84-85. Our determination is necessarily driven "'by the statutory definition or by the nature of the crime not by the specific conduct that resulted in the conviction.'" *Id.* at 84 (quoting *McNaughton v. INS*, 612 F.2d 457, 459 (9th Cir. 1980)). If necessary, we also seek guidance from court decisions in the convicting jurisdiction. *See Matter of Sanudo*, 23 I&N Dec. 968, 970-71 (BIA 2006).

Neither the seriousness of a criminal offense, nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude. *Matter of Serna*, 20 I&N Dec. 579, 581 (BIA 1992). Although as a general rule, a simple assault and battery offense does not involve moral turpitude, an aggravating factor can alter our determination. *See, e.g.*, *Yousefi v. U.S. INS*, 260 F.3d 318, 326-27 (4th Cir. 2001); *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988). Assault and battery offenses requiring the "*intentional* infliction of *serious* bodily injury on another have been held to involve moral turpitude because such intentionally injurious conduct reflects a level of immorality that is greater than that associated with a simple offensive touching." *Matter of Sanudo*, *supra*, at 971.

In *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996), we held that the willful infliction of corporal injury on "a person with whom one has . . . a familial relationship is an act of depravity which is contrary to accepted moral standards." The statute at issue there required the willful infliction of "'corporal injury resulting in a traumatic condition'" upon the perpetrator's spouse, a person with whom he or she was cohabiting, or the mother or father of his or her child. *Id.* at 292 (quoting section 273.5(a) of the California Penal Code). We concluded that the crime was one involving moral turpitude.

In *Matter of Sanudo*, *supra*, at 973, we examined the California crime of domestic battery and found that unlike the statute in *Matter of Tran*, there was no requirement that there be "actual or intended physical harm to the victim." The offense at issue involved nothing "more than the minimal nonviolent 'touching' necessary to constitute" the battery offense. *Id.* at 972-73. As we explained, we have found moral turpitude in general assault and battery offenses when the offense "necessarily involved the *intentional* infliction of *serious* bodily injury." *Id.* at 971. We concluded that an intentional touching

of a domestic partner without causing or intending to cause physical injury does not involve moral turpitude. *Id.* at 972-73; *see also Galeana-Mendoza v. Gonzales*, 465 F.3d 1054, 1055, 1061-62 (9th Cir. 2006) (approving our decision in *Matter of Sanudo* in finding that a violation of section 243(e) of the California Penal Code does not qualify categorically as a crime involving moral turpitude).

A conviction for assault and battery in Virginia does not require the actual infliction of physical injury and may include any touching, however slight. *See Adams v. Commonwealth*, 534 S.E.2d 347, 351 (Va. App. 2000) ("In Virginia, it is abundantly clear that a perpetrator need not inflict a physical injury to commit a battery."). While the Virginia law of assault and battery requires an intent or imputed intent to cause injury, "'the intended injury may be to the feelings or mind, as well as to the corporeal person.'" *Wood v. Commonwealth*, 140 S.E. 114, 115 (Va. 1927) (quoting 2 Am. & Eng. Ency. L. 953, 955); *see also Lynch v. Commonwealth*, 109 S.E. 427 (Va. 1921). Although some decisions have referred to an intent to do "bodily harm," that term has been broadly construed to include offensive touching. *See, e.g.*, *Gilbert v. Commonwealth*, 608 S.E.2d 509, 511 (Va. App. 2005) (stating that the requisite harm under the Virginia assault and battery statutes can include the "'slightest touching . . . in a rude, insolent, or angry manner'" (quoting *Crosswhite v. Barnes*, 124 S.E. 242, 244 (Va. 1924))). We therefore find, in concert with *Matter of Sanudo*, that the offense of assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code is not categorically a crime involving moral turpitude.

The record of conviction in this case, which includes a certified copy of the warrant of arrest, the plea, and the judgment, does not offer any specific facts regarding the conviction. Consulting the conviction documents could therefore provide no information that would lead us to conclude that the respondent was convicted under elements of the Virginia statute that would constitute a crime involving moral turpitude. For this reason, we need not decide whether the statute is divisible or whether we should employ the modified categorical approach, because the result would be the same. *See Matter of Ajami*, 22 I&N Dec. 949, 950 (BIA 1999); *Matter of Short*, 20 I&N Dec. 136, 137-38 (BIA 1989).

In conclusion, we find that the respondent's convictions for assault and battery against a family or household member in violation of section 18.2-57.2 of the Virginia Code were not for crimes involving moral turpitude. We therefore find that the respondent is not inadmissible. Accordingly, the respondent's appeal will be sustained.

ORDER: The appeal is sustained, and the removal proceedings are terminated.

Matter of Julio E. VELASQUEZ, Respondent

File A094 038 330 - Arlington, Virginia

Decided July 16, 2010

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

The misdemeanor offense of assault and battery against a family or household member in violation of section 18.2-57.2(A) of the Virginia Code Annotated is not categorically a crime of violence under 18 U.S.C. § 16(a) (2006) and therefore not categorically a crime of domestic violence within the meaning of section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) (2006).

FOR RESPONDENT: John T. Riely, Esquire, Bethesda, Maryland

FOR THE DEPARTMENT OF HOMELAND SECURITY: Rhonda M. Dent, Appellate Counsel; Karen Donoso Stevens, Assistant Chief Counsel

BEFORE: Board Panel: GRANT and MILLER, Board Members. Concurring Opinion: MALPHRUS, Board Member, joined by MILLER, Board Member.

GRANT, Board Member:

In a decision dated May 21, 2008, an Immigration Judge found the respondent removable on his own admissions under section 212(a)(6)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(6)(A)(i) (2006), as an alien who is present in the United States without being admitted or paroled. The Immigration Judge also pretermitted the respondent's application for cancellation of removal pursuant to section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C) (2006), finding that he was ineligible for that relief because he had been convicted of a crime of domestic violence. The respondent has appealed from the Immigration Judge's finding regarding his eligibility for cancellation of removal. The appeal will be sustained and the record will be remanded to the Immigration Judge for further proceedings.

This case requires us to determine whether the offense of misdemeanor assault and battery of a family member in violation of section 18.2-57.2(A) of the Virginia Code Annotated categorically qualifies as a crime of domestic violence within the meaning of section 237(a)(2)(E) of the Act, 8 U.S.C. § 1227(a)(2)(E) (2006). In light of the decision of the United States Supreme Court in *Johnson v. United States*, 130 S. Ct. 1265 (2010), we hold

that because the Virginia statute reaches conduct that cannot be classified as "violent force," the respondent's offense is not categorically a "crime of violence" and thus cannot be classified as a categorical crime of domestic violence for purposes of section 237(a)(2)(E) of the Act. Accordingly, the record will be remanded to determine whether the respondent's offense qualifies as a crime of domestic violence under the modified categorical approach.

I. FACTUAL AND PROCEDURAL HISTORY

The respondent is a native and citizen of El Salvador who entered the United States at an unknown place and time. On August 18, 2004, he was convicted of assault and battery of a family member in violation of section 18.2-57.2(A) of the Virginia Code Annotated. He was sentenced to a term of imprisonment of 10 days and was subjected to certain conditions, including a no-contact order with the victim.

On August 30, 2005, the Department of Homeland Security ("DHS") initiated removal proceedings against the respondent. At his hearing, the respondent filed an application for cancellation of removal under section 240A(b)(1) of the Act. The DHS filed a motion to pretermit the respondent's application, arguing that his conviction was for a categorical crime of domestic violence, which rendered him ineligible for relief under section 240A(b)(1)(C) of the Act. The Immigration Judge granted the motion and ordered the respondent removed to El Salvador.

The respondent appealed from the Immigration Judge's finding regarding his eligibility for cancellation of removal, arguing that he was not convicted of a crime of domestic violence. Subsequent to the decision of the Supreme Court in *Johnson v. United States*, 130 S. Ct. 1265, we invited the parties to submit supplemental briefs, and both parties did so. We review de novo the Immigration Judge's determination on this question of law. 8 C.F.R. § 1003.1(d)(3)(ii) (2010); *see also Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009).

II. ANALYSIS

An alien who has been convicted of a crime of domestic violence under section 237(a)(2)(E)(i) of the Act is ineligible for cancellation of removal under section 240A(b)(1)(C). A "crime of domestic violence" means any "crime of violence," as that term is defined in 18 U.S.C. § 16 (2006), that is committed by a specified person against one of a defined set of victims. *See* section 237(a)(2)(E)(i) of the Act. A crime of violence is defined at 18 U.S.C. § 16 as follows:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or
>
> (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

The respondent pled guilty to assault and battery under section 18.2-57.2(A) of the Virginia Code Annotated, which states that any "person who commits an assault and battery against a family or household member is guilty of a Class 1 misdemeanor." According to section 18.2-11 of the Virginia Code Annotated, a Class 1 misdemeanor under Virginia law is punishable by not more than 1 year in prison. Consequently, for purposes of Federal law, the respondent's offense would be classified as a misdemeanor, not as a felony. *See* 18 U.S.C. §§ 3559(a)(5), (6) (2006). Thus, because the respondent's offense is not a felony under Federal law, it cannot constitute a crime of violence under 18 U.S.C. § 16(b). *See Matter of Martin*, 23 I&N Dec. 491, 493 (BIA 2002). Accordingly, our inquiry is limited to whether the respondent's offense has as an element the use, attempted use, or threatened use of physical force against the person or property of another under § 16(a).

Because the Virginia Code Annotated does not define assault and battery, Virginia courts have relied on common law definitions of those crimes. *See, e.g.*, *Carter v. Commonwealth*, 606 S.E.2d 839, 841 (Va. 2005); *Zimmerman v. Commonwealth*, 585 S.E.2d 538, 539 (Va. 2003); *Clark v. Commonwealth*, 676 S.E.2d 332, 336 (Va. Ct. App. 2009). However, Virginia law is clear that "only the offense of an assault *and* a battery is encompassed within the statute." Va. Op. Att'y Gen. 99 (1997), 1997 WL 767056 (emphasis added). Thus, we must look to the definitions of both assault and battery under Virginia law to determine if, on a categorical basis, they require the use, attempted use, or threatened use of violent force.[1]

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[1] Contrary to the respondent's argument on appeal, the statute under which he was convicted is sufficiently clear with respect to the "domestic" status of the protected victim. *See* Va. Code Ann. § 16.1-228 (2004) (defining "family or household member"). In regard to whether the victim is a "protected" person within the meaning of section 237(a)(2)(E)(i) of the Act, we note that it lists a broad class of victims, including current or former spouses, parties with a child in common, individuals currently or formerly cohabiting as a spouse, individuals similarly situated to a spouse under the domestic or family violence laws of the jurisdiction where the offense occurs, or any other individual who is protected from the perpetrator's acts under the domestic or family violence laws of the jurisdiction. Virginia's definition of a "family or household member" includes both those who fit within the most restrictive definition of family members (such as spouses) and others, such as cohabitants and individuals who recently cohabited, who fit within the broad list of protected individuals

(continued...)

An assault occurs "when an assailant engages in an overt act intended to inflict bodily harm and has the present ability to inflict such harm *or* engages in an overt act intended to place the victim in fear or apprehension of bodily harm and creates such reasonable fear or apprehension in the victim." *Carter v. Commonwealth*, 606 S.E.2d at 841 (noting the merger of the criminal offense of assault and the tort of assault, which have the same definition under Virginia law); *see also Zimmerman v. Commonwealth*, 585 S.E.2d at 539 (stating that assault also includes the "unequivocal appearance" of an attempt to do physical injury to another); *Clark v. Commonwealth*, 676 S.E.2d at 336. There is no requirement that a victim of assault be physically touched. *See, e.g.*, *Zimmerman v. Commonwealth*, 585 S.E.2d at 539.

A battery under Virginia law is "'the actual infliction of corporal hurt on another . . . willfully or in anger, whether by the party's own hand, or by some means set in motion by him.'" *E.g.*, *Commonwealth v. Vaughn*, 557 S.E.2d 220, 222 (Va. 2002) (quoting *Jones v. Commonwealth*, 36 S.E.2d 571, 572 (Va. 1946)). Unlike assault, battery requires the unlawful touching of another, although it is not necessary for the touching to result in injury to the person. *See Adams v. Commonwealth*, 534 S.E.2d 347, 350-51 (Va. Ct. App. 2000) (defining touch as to be in contact or to cause to be in contact); *Perkins v. Commonwealth*, 523 S.E.2d 512, 513 (Va. Ct. App. 2000). Additionally, the "'slightest touching of another . . . if done in a rude, insolent, or angry manner, constitutes a battery.'" *Adams v. Commonwealth*, 534 S.E.2d at 350 (quoting *Crosswhite v. Barnes*, 124 S.E. 242, 244 (Va. 1924)); *see also Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007). However, whether a touching is a battery depends on the intent of the actor, not the force applied. *See Adams v. Commonwealth*, 534 S.E.2d at 350.

In *Johnson v. United States*, 130 S. Ct. at 1271, the Supreme Court held that in order to constitute a "violent felony" under the relevant provisions of the Armed Career Criminal Act ("ACCA"), the level of "physical force" required for a conviction must be "*violent* force—that is, force capable of causing physical pain or injury to another person." *See* 18 U.S.C. §§ 924(e)(1), (2)(B)(i) (2006). The Court concluded that simple battery under Florida law was not a violent felony because a conviction under the relevant statute may occur when an individual has committed an actual and intentional touching involving physical contact, no matter how slight. *Johnson v. United States*, 130 S. Ct. at 1269-70.

(...continued)
in section 237(a)(2)(E)(i). Moreover, we note that the domestic or family relationship need not be an element of the predicate offense to qualify as a misdemeanor crime of domestic violence under this section. *See United States v. Hayes*, 129 S. Ct. 1079 (2009).

Since the ACCA's definition of a "violent felony" is, in pertinent part, identical to that in 18 U.S.C. § 16(a), *Johnson* controls our interpretation of a "crime of violence" under § 16(a).[2] The Court in *Johnson*, 130 S. Ct. at 1271, relied on its prior decision in *Leocal v. Ashcroft*, 543 U.S. 1, 11 (2004), holding that the definitions in 18 U.S.C. § 16 suggest a category of "violent, active crimes." The Court also specifically endorsed the holding of the United States Court of Appeals for the Seventh Circuit in *Flores v. Ashcroft*, 350 F.3d 666, 672 (7th Cir. 2003), that in order to constitute an aggravated felony crime of violence, the elements of the offense must require the intentional use of "violent force." *Johnson v. United States*, 130 S. Ct. at 1271.

Finally, the Court specifically acknowledged that many generic domestic battery statutes do not require as an element the intentional use of violent force. The Government argued that because of this, a ruling that "violent force" is required under the ACCA would make it more difficult to obtain removal orders under section 237(a)(2)(E)(i) of the Act, which is the very issue in this case. The Court acknowledged the difficulty but stated that in such cases, recourse must be had to the modified categorical approach. In response to the Government's argument that the type of conviction records allowed under the modified categorical approach are often incomplete (and thus silent on the precise nature of the "force" used to sustain a conviction), the Court stated that the "absence of records will often frustrate application of the modified categorical approach—not just to battery but to many other crimes as well." *Johnson v. United States*, 130 S. Ct. at 1273. Moreover, the Fourth Circuit recently applied *Johnson* to reverse a conviction under 18 U.S.C. § 922(g)(9) for possession of a firearm after having "been convicted in any court of a misdemeanor crime of domestic violence," holding that section 18.2-57.2(A) of the Virginia Code Annotated includes nonviolent force, such as an offensive touching, and that "violent force," as required in *Johnson*, is not an element of assault and battery under Virginia common law. *United States v. White*, 606 F.3d 144 (4th Cir. 2010).

The DHS argues in its supplemental brief that *Johnson* does not control the outcome of this case because the Court's decision was limited to the question of what constitutes a "violent felony," and because the Court specifically endorsed the use of the modified categorical approach to determine whether, in the immigration context, an offense is a crime of domestic violence. However, the DHS argument overlooks both the Court's specific endorsement

[2] The ACCA does not, as does 18 U.S.C. § 16(a), reach crimes against the property of another. Because it is not necessary to address whether "violent" force would be required for property crimes as well as for crimes against the person, we do not resolve that issue in this case.

of the Seventh Circuit's decision in *Flores* and its clear statement that resort could be made to the modified categorical approach. Had the Supreme Court determined that its ruling in *Johnson* did not apply outside the context of the ACCA, it could have responded to the Government's specific arguments regarding immigration cases, and to those of the dissent,[3] by so limiting its ruling. Instead, it fully engaged those arguments and left no room for the Government to contend that 18 U.S.C. § 16(a) can be satisfied with proof of anything less than "violent" force. Only Congress can address whether the categorical approach should be required to establish deportability in these circumstances.

Accordingly, in regard to crimes against the person, we conclude that the "physical force" necessary to establish that an offense is a "crime of violence" for purposes of the Act must be "violent" force, that is, force capable of causing physical pain or injury to another person. The key inquiry is not the alien's intent for purposes of assault, but rather whether battery, in all cases, requires the intentional use of "violent force." An offense cannot therefore be classified as a "categorical" crime of violence unless it includes as an element the actual, attempted, or threatened use of violent force that is capable of causing pain or injury. The crime of assault and battery in Virginia does not contain such a requirement.

For the reasons discussed above, an assault and battery conviction under section 18.2-57.2(A) of the Virginia Code Annotated does not, in all cases, require the use, attempted use, or threatened use of violent physical force under 18 U.S.C. § 16(a). Consequently, the respondent's offense is not categorically a crime of violence and therefore not categorically a crime of domestic violence under section 237(a)(2)(E) of the Act. Thus, the modified categorical approach must now be applied. *See Johnson v. United States*, 130 S. Ct. at 1273; *United States v. White*, 606 F.3d at 155; *see also, e.g.*, *Matter of Milian*, 25 I&N Dec. 197, 199-200 (BIA 2010) (discussing documents that may be considered in applying the modified categorical approach). The record will therefore be remanded for consideration of evidence regarding whether the offense constitutes a crime of domestic violence under the modified categorical approach.[4] Accordingly,

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[3] The dissent in *Johnson* clearly foretold the result here. It explained that the analysis regarding "violent force" in *Johnson* would be applicable in the context of domestic violence and noted that the outcome of this approach would be that "many convicted spousal and child abusers will escape removal, a result that Congress is unlikely to have intended." *Johnson v. United States*,130 U.S. at 1278 (Alito, J., dissenting).

[4] Analysis under the modified categorical approach must include an assessment of whether the respondent was convicted of intentional, as opposed to reckless, use of violent force. *Garcia v. Gonzales*, 455 F.3d 465 (4th Cir. 2006).

the respondent's appeal will be sustained, and the record will be remanded for further proceedings.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

CONCURRING OPINION: Garry D. Malphrus, Board Member, in which Neil P. Miller, Board Member, joined

I fully concur with the reasoning and the result in this case, which is controlled by *Johnson v. United States*, 130 S. Ct. 1265 (2010). However, because of this approach to section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i) (2006), "many convicted spousal and child abusers will escape removal." *Johnson v. United States*, 130 S. Ct. at 1278 (Alito, J., dissenting). This is true because in State courts, "many people who engage in serious spousal or child abuse ultimately are not charged with or convicted of felonies." *United States v. Hayes*, 129 S. Ct. 1079, 1087 (2009). Instead, these domestic abusers are routinely prosecuted under generally applicable misdemeanor assault or battery laws. *See id.* The legislative history behind the relevant provisions indicates that Congress intended for these perpetrators to face immigration consequences. *See generally Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1138, 1142 (9th Cir. 2006) (Wardlaw, J., dissenting) (discussing congressional intent to protect victims and punish perpetrators of misdemeanor crimes of domestic violence in enacting section 237(a)(2)(E)(i) of the Act); *Matter of Martin*, 23 I&N Dec. 491, 494 (BIA 2002) (discussing legislative history showing that Congress intended to include a "threatened or attempted simple assault or battery" in the definition of a crime of violence under 18 U.S.C. § 16(a)).

Moreover, even when the modified categorical approach is applied, which *Johnson* permits, the limited conviction records that may be consulted to "conclusively show that the offender's conduct involved the use of violent force" often are not available in these cases. *Johnson v. United States*, 130 S. Ct. at 1278 (Alito, J., dissenting). Both the majority and dissent in *Johnson* recognized the limitations of applying the modified categorical approach to this crime. *Id.* at 1273, 1278. Going forward, only Congress can determine whether the categorical approach and its inherent restrictions on considering the actual conduct of the offender should apply to convictions involving domestic violence in immigration proceedings.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

MONCRIEFFE *v.* HOLDER, ATTORNEY GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 11–702. Argued October 10, 2012—Decided April 23, 2013

Under the Immigration and Nationality Act (INA), a noncitizen convicted of an "aggravated felony" is not only deportable, 8 U. S. C. §1227(a)(2)(A)(iii), but also ineligible for discretionary relief. The INA lists as an "aggravated felony" "illicit trafficking in a controlled substance," §1101(a)(43)(B), which, as relevant here, includes the conviction of an offense that the Controlled Substances Act (CSA) makes punishable as a felony, *i.e.,* by more than one year's imprisonment, see 18 U. S. C. §§924(c)(2), 3559(a)(5). A conviction under state law "constitutes a 'felony punishable under the [CSA]' only if it proscribes conduct punishable as a felony under that federal law." *Lopez* v. *Gonzales*, 549 U. S. 47, 60.

Petitioner Moncrieffe, a Jamaican citizen here legally, was found by police to have 1.3 grams of marijuana in his car. He pleaded guilty under Georgia law to possession of marijuana with intent to distribute. The Federal Government sought to deport him, reasoning that his conviction was an aggravated felony because possession of marijuana with intent to distribute is a CSA offense, 21 U. S. C. §841(a), punishable by up to five years' imprisonment, §841(b)(1)(D). An Immigration Judge ordered Moncrieffe removed, and the Board of Immigration Appeals affirmed. The Fifth Circuit denied Moncrieffe's petition for review, rejecting his reliance on §841(b)(4), which makes marijuana distribution punishable as a misdemeanor if the offense involves a small amount for no remuneration, and holding that the felony provision, §841(b)(1)(D), provides the default punishment for his offense.

Held: If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony

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under the INA. Pp. 4–22.

(a) Under the categorical approach generally employed to determine whether a state offense is comparable to an offense listed in the INA, see, *e.g.*, *Nijhawan* v. *Holder*, 557 U. S. 29, 33–38, the noncitizen's actual conduct is irrelevant. Instead "the state statute defining the crime of conviction" is examined to see whether it fits within the "generic" federal definition of a corresponding aggravated felony. *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 186. The state offense is a categorical match only if a conviction of that offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Shepard* v. *United States*, 544 U. S. 13, 24. Because this Court examines what the state conviction necessarily involved and not the facts underlying the case, it presumes that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, before determining whether even those acts are encompassed by the generic federal offense. *Johnson* v. *United States*, 559 U. S. 133, 137. Pp. 4–6.

(b) The categorical approach applies here because "illicit trafficking in a controlled substance" is a "generic crim[e]." *Nijhawan*, 557 U. S., at 37. Thus, a state drug offense must meet two conditions: It must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" prescribe felony punishment for that conduct. Possession of marijuana with intent to distribute is clearly a federal crime. The question is whether Georgia law necessarily proscribes conduct punishable as a felony under the CSA. Title 21 U. S. C. §841(b)(1)(D) provides that, with certain exceptions, a violation of the marijuana distribution statute is punishable by "a term of imprisonment of not more than 5 years." However, one of those exceptions, §841(b)(4), provides that "any person who violates [the statute] by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor, *i.e.*, as a misdemeanant. These dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one a felony, the other not. The fact of a conviction under Georgia's statute, standing alone, does not reveal whether either remuneration or more than a small amount was involved, so Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Thus, the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Pp. 6–9.

(c) The Government's contrary arguments are unpersuasive. The Government contends that §841(b)(4) is irrelevant because it is merely a mitigating sentencing factor, not an element of the offense. But that understanding is inconsistent with *Carachuri-Rosendo* v. *Holder*, 560 U. S. ___, which recognized that when Congress has chosen to

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define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too. The Government also asserts that any marijuana distribution conviction is presumptively a felony, but the CSA makes neither the felony nor the misdemeanor provision the default. The Government's approach would lead to the absurd result that a conviction under a statute that punishes misdemeanor conduct only, such as §841(b)(4) itself, would nevertheless be a categorical aggravated felony.

The Government's proposed remedy for this anomaly—that noncitizens be given an opportunity during immigration proceedings to demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana and no remuneration—is inconsistent with both the INA's text and the categorical approach. The Government's procedure would require the Nation's overburdened immigration courts to conduct precisely the sort of *post hoc* investigation into the facts of predicate offenses long deemed undesirable, and would require uncounseled noncitizens to locate witnesses years after the fact.

Finally, the Government's concerns about the consequences of this decision are exaggerated. Escaping aggravated felony treatment does not mean escaping deportation, because any marijuana distribution offense will still render a noncitizen deportable as a controlled substances offender. Having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, but the Attorney General may, in his discretion, deny relief if he finds that the noncitizen is actually a more serious drug trafficker. Pp. 9–21.

662 F. 3d 387, reversed and remanded.

SOTOMAYOR, J., delivered the opinion of the Court, in which ROBERTS, C. J., and SCALIA, KENNEDY, GINSBURG, BREYER, and KAGAN, JJ., joined. THOMAS, J., and ALITO, J., filed dissenting opinions.

SUPREME COURT OF THE UNITED STATES

No. 11–702

ADRIAN MONCRIEFFE, PETITIONER *v.* ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

[April 23, 2013]

JUSTICE SOTOMAYOR delivered the opinion of the Court.

The Immigration and Nationality Act (INA), 66 Stat. 163, 8 U. S. C. §1101 *et seq.*, provides that a noncitizen who has been convicted of an "aggravated felony" may be deported from this country. The INA also prohibits the Attorney General from granting discretionary relief from removal to an aggravated felon, no matter how compelling his case. Among the crimes that are classified as aggravated felonies, and thus lead to these harsh consequences, are illicit drug trafficking offenses. We must decide whether this category includes a state criminal statute that extends to the social sharing of a small amount of marijuana. We hold it does not.

I

A

The INA allows the Government to deport various classes of noncitizens, such as those who overstay their visas, and those who are convicted of certain crimes while in the United States, including drug offenses. §1227. Ordinarily, when a noncitizen is found to be deportable on one of these grounds, he may ask the Attorney General for cer-

tain forms of discretionary relief from removal, like asylum (if he has a well-founded fear of persecution in his home country) and cancellation of removal (if, among other things, he has been lawfully present in the United States for a number of years). §§1158, 1229b. But if a noncitizen has been convicted of one of a narrower set of crimes classified as "aggravated felonies," then he is not only deportable, §1227(a)(2)(A)(iii), but also ineligible for these discretionary forms of relief. See §§1158(b)(2)(A)(ii), (B)(i); §§1229b(a)(3), (b)(1)(C).[1]

The INA defines "aggravated felony" to include a host of offenses. §1101(a)(43). Among them is "illicit trafficking in a controlled substance." §1101(a)(43)(B). This general term is not defined, but the INA states that it "includ[es] a drug trafficking crime (as defined in section 924(c) of title 18)." *Ibid.* In turn, 18 U. S. C. §924(c)(2) defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act," or two other statutes not relevant here. The chain of definitions ends with §3559(a)(5), which provides that a "felony" is an offense for which the "maximum term of imprisonment authorized" is "more than one year." The upshot is that a noncitizen's conviction of an offense that the Controlled Substances Act (CSA) makes punishable by more than one year's impris-

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[1] In addition to asylum, a noncitizen who fears persecution may seek withholding of removal, 8 U. S. C. §1231(b)(3)(A), and deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), Art. 3, Dec. 10, 1984, S. Treaty Doc. No. 100–20, p. 20, 1465 U. N. T. S. 85; 8 CFR §1208.17(a) (2012). These forms of relief require the noncitizen to show a greater likelihood of persecution or torture at home than is necessary for asylum, but the Attorney General has no discretion to deny relief to a noncitizen who establishes his eligibility. A conviction of an aggravated felony has no effect on CAT eligibility, but will render a noncitizen ineligible for withholding of removal if he "has been sentenced to an aggregate term of imprisonment of at least 5 years" for any aggravated felonies. 8 U. S. C. §1231(b)(3)(B).

onment will be counted as an "aggravated felony" for immigration purposes. A conviction under either state or federal law may qualify, but a "state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." *Lopez* v. *Gonzales*, 549 U. S. 47, 60 (2006).

B

Petitioner Adrian Moncrieffe is a Jamaican citizen who came to the United States legally in 1984, when he was three. During a 2007 traffic stop, police found 1.3 grams of marijuana in his car. This is the equivalent of about two or three marijuana cigarettes. Moncrieffe pleaded guilty to possession of marijuana with intent to distribute, a violation of Ga. Code Ann. §16–13–30(j)(1) (2007). Under a Georgia statute providing more lenient treatment to first-time offenders, §42–8–60(a) (1997), the trial court withheld entering a judgment of conviction or imposing any term of imprisonment, and instead required that Moncrieffe complete five years of probation, after which his charge will be expunged altogether.[2] App. to Brief for Petitioner 11–15.

Alleging that this Georgia conviction constituted an aggravated felony, the Federal Government sought to deport Moncrieffe. The Government reasoned that possession of marijuana with intent to distribute is an offense under the CSA, 21 U. S. C. §841(a), punishable by up to five years' imprisonment, §841(b)(1)(D), and thus an aggravated felony. An Immigration Judge agreed and ordered Moncrieffe removed. App. to Pet. for Cert. 14a–18a. The Board of Immigration Appeals (BIA) affirmed that

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[2] The parties agree that this resolution of Moncrieffe's Georgia case is nevertheless a "conviction" as the INA defines that term, 8 U. S. C. §1101(a)(48)(A). See Brief for Petitioner 6, n. 2; Brief for Respondent 5, n. 2.

conclusion on appeal. *Id.,* at 10a–13a.

The Court of Appeals denied Moncrieffe's petition for review. The court rejected Moncrieffe's reliance upon §841(b)(4), a provision that, in effect, makes marijuana distribution punishable only as a misdemeanor if the offense involves a small amount of marijuana for no remuneration. It held that in a federal criminal prosecution, "the default sentencing range for a marijuana distribution offense is the CSA's felony provision, §841(b)(1)(D), rather than the misdemeanor provision." 662 F. 3d 387, 392 (CA5 2011). Because Moncrieffe's Georgia offense penalized possession of marijuana with intent to distribute, the court concluded that it was "equivalent to a federal felony." *Ibid.*

We granted certiorari, 566 U. S. ___ (2012), to resolve a conflict among the Courts of Appeals with respect to whether a conviction under a statute that criminalizes conduct described by both §841's felony provision and its misdemeanor provision, such as a statute that punishes all marijuana distribution without regard to the amount or remuneration, is a conviction for an offense that "proscribes conduct punishable as a felony under" the CSA.[3] *Lopez*, 549 U. S., at 60. We now reverse.

II

A

When the Government alleges that a state conviction qualifies as an "aggravated felony" under the INA, we generally employ a "categorical approach" to determine whether the state offense is comparable to an offense listed in the INA. See, *e.g., Nijhawan* v. *Holder*, 557 U. S.

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[3] Compare 662 F. 3d 387 (CA5 2011) (case below), *Garcia* v. *Holder*, 638 F. 3d 511 (CA6 2011) (is an aggravated felony), and *Julce* v. *Mukasey*, 530 F. 3d 30 (CA1 2008) (same), with *Martinez* v. *Mukasey*, 551 F. 3d 113 (CA2 2008) (is not an aggravated felony), and *Wilson* v. *Ashcroft*, 350 F. 3d 377 (CA3 2003) (same).

29, 33–38 (2009); *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 185–187 (2007). Under this approach we look "not to the facts of the particular prior case," but instead to whether "the state statute defining the crime of conviction" categorically fits within the "generic" federal definition of a corresponding aggravated felony. *Id.,* at 186 (citing *Taylor* v. *United States*, 495 U. S. 575, 599–600 (1990)). By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Shepard* v. *United States*, 544 U. S. 13, 24 (2005) (plurality opinion). Whether the noncitizen's actual conduct involved such facts "is quite irrelevant." *United States ex rel. Guarino* v. *Uhl*, 107 F. 2d 399, 400 (CA2 1939) (L. Hand, J.).

Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction "rested upon [nothing] more than the least of th[e] acts" criminalized, and then determine whether even those acts are encompassed by the generic federal offense. *Johnson* v. *United States*, 559 U. S. 133, 137 (2010); see *Guarino*, 107 F. 2d, at 400. But this rule is not without qualification. First, our cases have addressed state statutes that contain several different crimes, each described separately, and we have held that a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or "'some comparable judicial record' of the factual basis for the plea." *Nijhawan*, 557 U. S., at 35 (quoting *Shepard*, 544 U. S., at 26). Second, our focus on the minimum conduct criminalized by the state statute is not an invitation to apply "legal imagi-

nation" to the state offense; there must be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Duenas-Alvarez*, 549 U. S., at 193.

This categorical approach has a long pedigree in our Nation's immigration law. See Das, The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law, 86 N. Y. U. L. Rev. 1669, 1688–1702, 1749–1752 (2011) (tracing judicial decisions back to 1913). The reason is that the INA asks what offense the noncitizen was "convicted" of, 8 U. S. C. §1227(a)(2)(A)(iii), not what acts he committed. "[C]onviction" is "the relevant statutory hook."[4] *Carachuri-Rosendo* v. *Holder*, 560 U. S. ___, ___ (2010) (slip op., at 16); see *United States ex rel. Mylius* v. *Uhl*, 210 F. 860, 862 (CA2 1914).

B

The aggravated felony at issue here, "illicit trafficking in a controlled substance," is a "generic crim[e]." *Nijhawan*, 557 U. S., at 37. So the categorical approach applies. *Ibid.* As we have explained, *supra,* at 2–3, this aggravated felony encompasses all state offenses that "proscrib[e] conduct punishable as a felony under [the CSA]." *Lopez*, 549 U. S., at 60. In other words, to satisfy the categorical approach, a state drug offense must meet two conditions: It must "necessarily" proscribe conduct that is an offense under the CSA, and the CSA must "necessarily" prescribe felony punishment for that conduct.

Moncrieffe was convicted under a Georgia statute that

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[4] *Carachuri-Rosendo* construed a different provision of the INA that concerns cancellation of removal, which also requires determining whether the noncitizen has been "*convicted* of any aggravated felony." 8 U. S. C. §1229b(a)(3) (emphasis added). Our analysis is the same in both contexts.

makes it a crime to "possess, have under [one's] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." Ga. Code Ann. §16–13–30(j)(1). We know from his plea agreement that Moncrieffe was convicted of the last of these offenses. App. to Brief for Petitioner 11; *Shepard*, 544 U. S., at 26. We therefore must determine whether possession of marijuana with intent to distribute is "necessarily" conduct punishable as a felony under the CSA.

We begin with the relevant conduct criminalized by the CSA. There is no question that it is a federal crime to "possess with intent to . . . distribute . . . a controlled substance," 21 U. S. C. §841(a)(1), one of which is marijuana, §812(c).[5] So far, the state and federal provisions correspond. But this is not enough, because the generically defined federal crime is "any felony punishable under the Controlled Substances Act," 18 U. S. C. §924(c)(2), not just any "offense under the CSA." Thus we must look to what punishment the CSA imposes for this offense.

Section 841 is divided into two subsections that are relevant here: (a), titled "Unlawful acts," which includes the offense just described, and (b), titled "Penalties." Subsection (b) tells us how "any person who violates subsection (a)" shall be punished, depending on the circumstances of his crime (*e.g.,* the type and quantity of controlled substance involved, whether it is a repeat offense).[6]

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[5] In full, 21 U. S. C. §841(a)(1) provides,

"Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

[6] In pertinent part, §§841(b)(1)(D) and (b)(4) (2006 ed. and Supp. V) provide,

"Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

. . . . . .

Subsection (b)(1)(D) provides that if a person commits a violation of subsection (a) involving "less than 50 kilograms of marihuana," then "such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years," *i.e.,* as a felon. But one of the exceptions is important here. Paragraph (4) provides, "Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as" a simple drug possessor, 21 U. S. C. §844, which for our purposes means as a misdemeanant.[7] These dovetailing provisions create two mutually exclusive categories of punishment for CSA marijuana distribution offenses: one

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"[(1)](D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. . . .

. . . . .

"(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18."

[7] Although paragraph (4) speaks only of "distributing" marijuana, the parties agree that it also applies to "the more inchoate offense of possession with intent to distribute that drug." *Matter of Castro Rodriguez*, 25 I. & N. Dec. 698, 699, n. 2 (BIA 2012); see Brief for Petitioner 6, n. 2; Brief for Respondent 8, n. 5.

The CSA does not define "small amount." The BIA has suggested that 30 grams "serve[s] as a useful guidepost," *Castro Rodriguez*, 25 I. & N. Dec., at 703, noting that the INA exempts from deportable controlled substances offenses "a single offense involving possession for one's own use of 30 grams or less of marijuana," 8 U. S. C. §1227(a)(2)(B)(i). The meaning of "small amount" is not at issue in this case, so we need not, and do not, define the term.

a felony, and one not. The only way to know whether a marijuana distribution offense is "punishable as a felony" under the CSA, *Lopez*, 549 U. S., at 60, is to know whether the conditions described in paragraph (4) are present or absent.

A conviction under the same Georgia statute for "sell[ing]" marijuana, for example, would seem to establish remuneration. The presence of remuneration would mean that paragraph (4) is not implicated, and thus that the conviction is necessarily for conduct punishable as a felony under the CSA (under paragraph (1)(D)). In contrast, the fact of a conviction for possession with intent to distribute marijuana, standing alone, does not reveal whether either remuneration or more than a small amount of marijuana was involved. It is possible neither was; we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana, see, *e.g., Taylor* v. *State*, 260 Ga. App. 890, 581 S. E. 2d 386, 388 (2003) (6.6 grams), and that "distribution" does not require remuneration, see, *e.g., Hadden* v. *State*, 181 Ga. App. 628, 628–629, 353 S. E. 2d 532, 533–534 (1987). So Moncrieffe's conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.

III

A

The Government advances a different approach that leads to a different result. In its view, §841(b)(4)'s misdemeanor provision is irrelevant to the categorical analysis because paragraph (4) is merely a "mitigating exception," to the CSA offense, not one of the "elements" of the offense. Brief for Respondent 12. And because possession

with intent to distribute marijuana is "presumptive[ly]" a felony under the CSA, the Government asserts, any state offense with the same elements is presumptively an aggravated felony. *Id.,* at 37. These two contentions are related, and we reject both of them.

First, the Government reads our cases to hold that the categorical approach is concerned only with the "elements" of an offense, so §841(b)(4) "is not relevant" to the categorical analysis. *Id.*, at 20. It is enough to satisfy the categorical inquiry, the Government suggests, that the "elements" of Moncrieffe's Georgia offense are the same as those of the CSA offense: (1) possession (2) of marijuana (a controlled substance), (3) with intent to distribute it. But that understanding is inconsistent with *Carachuri-Rosendo*, our only decision to address both "elements" and "sentencing factors." There we recognized that when Congress has chosen to define the generic federal offense by reference to punishment, it may be necessary to take account of federal sentencing factors too. See 560 U. S., at ___ (slip op., at 3). In that case the relevant CSA offense was simple possession, which "becomes a 'felony punishable under the [CSA]' only because the sentencing factor of recidivism authorizes additional punishment beyond one year, the criterion for a felony." *Id.,* at ___ (SCALIA, J., concurring in judgment) (slip op., at 2). We therefore called the generic federal offense "recidivist simple possession," even though such a crime is not actually "a separate offense" under the CSA, but rather an "'amalgam'" of offense elements and sentencing factors. *Id.,* at ___, and n. 3, ___ (majority opinion) (slip op., at 3, and n. 3, 7).

In other words, not only must the state offense of conviction meet the "elements" of the generic federal offense defined by the INA, but the CSA must punish that offense as a felony. Here, the facts giving rise to the CSA offense establish a crime that may be either a felony or a misdemeanor, depending upon the presence or absence of cer-

tain factors that are not themselves elements of the crime. And so to qualify as an aggravated felony, a conviction for the predicate offense must necessarily establish those factors as well.

The Government attempts to distinguish *Carachuri-Rosendo* on the ground that the sentencing factor there was a "narrow" aggravating exception that turned a misdemeanor into a felony, whereas here §841(b)(4) is a narrow mitigation exception that turns a felony into a misdemeanor. Brief for Respondent 40–43. This argument hinges upon the Government's second assertion: that any marijuana distribution conviction is "presumptively" a felony. But that is simply incorrect, and the Government's argument collapses as a result. Marijuana distribution is neither a felony nor a misdemeanor until we know whether the conditions in paragraph (4) attach: Section 841(b)(1)(D) makes the crime punishable by five years' imprisonment "*except* as provided" in paragraph (4), and §841(b)(4) makes it punishable as a misdemeanor "*[n]otwithstanding* paragraph (1)(D)" when only "a small amount of marihuana for no remuneration" is involved. (Emphasis added.) The CSA's text makes neither provision the default. Rather, each is drafted to be exclusive of the other.

Like the BIA and the Fifth Circuit, the Government believes the felony provision to be the default because, in practice, that is how federal criminal prosecutions for marijuana distribution operate. See 662 F. 3d, at 391–392; *Matter of Aruna*, 24 I. & N. Dec. 452, 456–457 (2008); Brief for Respondent 18–23. It is true that every Court of Appeals to have considered the question has held that a defendant is eligible for a 5-year sentence under §841(b)(1)(D) if the Government proves he possessed marijuana with the intent to distribute it, and that the Government need not negate the §841(b)(4) factors in each case. See*, e.g., United States* v. *Outen*, 286 F. 3d 622, 636–

639 (CA2 2002) (describing §841(b)(4) as a "mitigating exception"); *United States* v. *Hamlin*, 319 F. 3d 666, 670–671 (CA4 2003) (collecting cases). Instead, the burden is on the defendant to show that he qualifies for the lesser sentence under §841(b)(4). Cf. *id.,* at 671.

We cannot discount §841's text, however, which creates no default punishment, in favor of the procedural overlay or burdens of proof that would apply in a hypothetical federal criminal prosecution. In *Carachuri-Rosendo*, we rejected the Fifth Circuit's "'hypothetical approach,'" which examined whether conduct "'could have been punished as a felony' 'had [it] been prosecuted in federal court.'" 560 U. S., at ___, ___ (slip op., at 8, 11).[8] The outcome in a hypothetical prosecution is not the relevant inquiry. Rather, our "more focused, categorical inquiry" is whether the record of conviction of the predicate offense necessarily establishes conduct that the CSA, on its own terms, makes punishable as a felony. *Id.,* at ___ (slip op., at 16).

The analogy to a federal prosecution is misplaced for another reason. The Court of Appeals cases the Government cites distinguished between elements and sentencing factors to determine which facts must be proved to a jury,

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[8] JUSTICE ALITO states that the statute "obviously" requires examination of whether "conduct associated with the state offense . . . *would have* supported a qualifying conviction under the federal CSA." *Post,* at 3 (dissenting opinion) (emphasis added); see also *post,* at 8. But this echoes the Fifth Circuit's approach in *Carachuri-Rosendo*. As noted in the text, our opinion explicitly rejected such reasoning based on conditional perfect formulations. See also, *e.g., Carachuri-Rosendo*, 560 U. S., at ___ (slip op., at 16) (criticizing approach that "focuses on facts known to the immigration court that *could have* but did not serve as the basis for the state conviction and punishment" (emphasis altered)). Instead, as we have explained, *supra,* at 10–11, our holding depended upon the fact that Carachuri-Rosendo's conviction did not establish the fact necessary to distinguish between misdemeanor and felony punishment under the CSA. The same is true here.

in light of the Sixth Amendment concerns addressed in *Apprendi* v. *New Jersey*, 530 U. S. 466 (2000). The courts considered which "provision . . . states a complete crime upon the fewest *facts*," *Outen*, 286 F. 3d, at 638, which was significant after *Apprendi* to identify what a jury had to find before a defendant could receive §841(b)(1)(D)'s maximum 5-year sentence. But those concerns do not apply in this context. Here we consider a "generic" federal offense in the abstract, not an actual federal offense being prosecuted before a jury. Our concern is only which facts the CSA relies upon to distinguish between felonies and misdemeanors, not which facts must be found by a jury as opposed to a judge, nor who has the burden of proving which facts in a federal prosecution.[9]

Because of these differences, we made clear in *Carachuri-Rosendo* that, for purposes of the INA, a generic federal offense may be defined by reference to both "'elements' in the traditional sense" and sentencing factors. 560 U. S., at ___, n. 3, ___ (slip op., at 3, n. 3, 7); see also *id.,* at ___ (SCALIA, J., concurring in judgment) (slip op., at 3) (describing the generic federal offense there as "the Controlled Substances Act felony of possession-plus-recidivism"). Indeed, the distinction between "elements" and "sentencing factors" did not exist when Congress added illicit drug trafficking to the list of aggravated felonies, Anti-Drug Abuse Act of 1988, 102 Stat. 4469–4470, and most courts at the time understood both §841(b)(1)(D) and §841(b)(4) to contain sentencing factors

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[9]The Government also cites 21 U. S. C. §885(a)(1), which provides that the Government need not "negative any exemption or exception set forth" in the CSA, and instead "the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit." Brief for Respondent 21. Even assuming §841(b)(4) is such an "exception," §885(a)(1) applies, by its own terms, only to "any trial, hearing, or other proceeding under" the CSA itself, not to the rather different proceedings under the INA.

that draw the line between a felony and a misdemeanor. See, *e.g., United States* v. *Campuzano*, 905 F. 2d 677, 679 (CA2 1990). *Carachuri-Rosendo* controls here.

Finally, there is a more fundamental flaw in the Government's approach: It would render even an undisputed misdemeanor an aggravated felony. This is "just what the English language tells us not to expect," and that leaves us "very wary of the Government's position." *Lopez*, 549 U. S., at 54. Consider a conviction under a New York statute that provides, "A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, *without consideration*, [marihuana] of an aggregate weight of *two grams or less*; or one cigarette containing marihuana." N. Y. Penal Law Ann. §221.35 (West 2008) (emphasis added). This statute criminalizes only the distribution of a small amount of marijuana for no remuneration, and so all convictions under the statute would fit within the CSA misdemeanor provision, §841(b)(4). But the Government would categorically deem a conviction under this statute to be an aggravated felony, because the statute contains the corresponding "elements" of (1) distributing (2) marijuana, and the Government believes all marijuana distribution offenses are punishable as felonies.

The same anomaly would result in the case of a noncitizen convicted of a misdemeanor in federal court under §§841(a) and (b)(4) directly. Even in that case, under the Government's logic, we would need to treat the federal misdemeanor conviction as an aggravated felony, because the conviction establishes elements of an offense that is presumptively a felony. This cannot be. "We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and misdemeanors," only to have courts presume felony treatment and ignore the very factors that distinguish felonies from misdemeanors. *Lopez*, 549 U. S., at 58.

B

Recognizing that its approach leads to consequences Congress could not have intended, the Government hedges its argument by proposing a remedy: Noncitizens should be given an opportunity during immigration proceedings to demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana and no remuneration, just as a federal criminal defendant could do at sentencing. Brief for Respondent 35–39. This is the procedure adopted by the BIA in *Matter of Castro Rodriguez*, 25 I. & N. Dec. 698, 702 (2012), and endorsed by JUSTICE ALITO's dissent, *post,* at 11–12.

This solution is entirely inconsistent with both the INA's text and the categorical approach. As noted, the relevant INA provisions ask what the noncitizen was "convicted of," not what he did, and the inquiry in immigration proceedings is limited accordingly. 8 U. S. C. §§1227(a)(2)(A)(iii), 1229b(a)(3); see *Carachuri-Rosendo*, 560 U. S., at ___ (slip op., at 11). The Government cites no statutory authority for such case-specific factfinding in immigration court, and none is apparent in the INA. Indeed, the Government's main categorical argument would seem to preclude this inquiry: If the Government were correct that "the fact of a marijuana-distribution conviction *alone* constitutes a CSA felony," Brief for Respondent 37, then all marijuana distribution convictions would categorically be convictions of the drug trafficking aggravated felony, mandatory deportation would follow under the statute, and there would be no room for the Government's follow-on factfinding procedure. The Government cannot have it both ways.

Moreover, the procedure the Government envisions would require precisely the sort of *post hoc* investigation into the facts of predicate offenses that we have long deemed undesirable. The categorical approach serves "practical" purposes: It promotes judicial and administra-

tive efficiency by precluding the relitigation of past convictions in minitrials conducted long after the fact. *Chambers* v. *United States*, 555 U. S. 122, 125 (2009); see also *Mylius*, 210 F., at 862–863. Yet the Government's approach would have our Nation's overburdened immigration courts entertain and weigh testimony from, for example, the friend of a noncitizen who may have shared a marijuana cigarette with him at a party, or the local police officer who recalls to the contrary that cash traded hands. And, as a result, two noncitizens, each "convicted of" the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge. The categorical approach was designed to avoid this "potential unfairness." *Taylor*, 495 U. S., at 601; see also *Mylius*, 210 F., at 863.

Furthermore, the minitrials the Government proposes would be possible only if the noncitizen could locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention, §1226(c)(1)(B), where they have little ability to collect evidence. See Katzmann, The Legal Profession and the Unmet Needs of the Immigrant Poor, 21 Geo. J. Legal Ethics 3, 5–10 (2008); Brief for National Immigrant Justice Center et al. as *Amici Curiae* 5–18; Brief for Immigration Law Professors as *Amici Curiae* 27–32. A noncitizen in removal proceedings is not at all similarly situated to a defendant in a federal criminal prosecution. The Government's suggestion that the CSA's procedures could readily be replicated in immigration proceedings is therefore misplaced. Cf. *Carachuri-Rosendo*, 560 U. S., at ___ (slip op., at 14–15) (rejecting the Government's argument that procedures governing determination of the recidivism sentencing factor could "be satisfied during the immigration proceeding").

The Government defends its proposed immigration court proceedings as "a subsequent step *outside the categorical approach* in light of Section 841(b)(4)'s 'circumstance-specific' nature." Brief for Respondent 37. This argument rests upon *Nijhawan*, in which we considered another aggravated felony, "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U. S. C. §1101(a)(43)(M)(i). We held that the $10,000 threshold was not to be applied categorically as a required component of a generic offense, but instead called for a "circumstance-specific approach" that allows for an examination, in immigration court, of the "particular circumstances in which an offender committed the crime on a particular occasion." *Nijhawan*, 557 U. S., at 38–40. The Government suggests the §841(b)(4) factors are like the monetary threshold, and thus similarly amenable to a circumstance-specific inquiry.

We explained in *Nijhawan*, however, that unlike the provision there, "illicit trafficking in a controlled substance" is a "generic crim[e]" to which the categorical approach applies, not a circumstance-specific provision. *Id.*, at 37; see also *Carachuri-Rosendo*, 560 U. S., at ___, n. 11 (slip op., at 12–13, n. 11). That distinction is evident in the structure of the INA. The monetary threshold is a limitation, written into the INA itself, on the scope of the aggravated felony for fraud. And the monetary threshold is set off by the words "in which," which calls for a circumstance-specific examination of "the conduct involved '*in*' the commission of the offense of conviction." *Nijhawan*, 557 U. S., at 39. Locating this exception in the INA proper suggests an intent to have the relevant facts found in immigration proceedings. But where, as here, the INA incorporates other criminal statutes wholesale, we have held it "must refer to generic crimes," to which the categorical approach applies. *Id.,* at 37.

Finally, the Government suggests that the immigration

court's task would not be so daunting in some cases, such as those in which a noncitizen was convicted under the New York statute previously discussed or convicted directly under §841(b)(4). True, in those cases, the record of conviction might reveal on its face that the predicate offense was punishable only as a misdemeanor. But most States do not have stand-alone offenses for the social sharing of marijuana, so minitrials concerning convictions from the other States, such as Georgia, would be inevitable.[10] The Government suggests that even in these other States, the record of conviction may often address the §841(b)(4) factors, because noncitizens "will be advised of the immigration consequences of a conviction," as defense counsel is required to do under *Padilla* v. *Kentucky*, 559 U. S. 359 (2010), and as a result counsel can build an appropriate record when the facts are fresh. Brief for Respondent 38. Even assuming defense counsel "will" do something simply because it is required of effective counsel (an assumption experience does not always bear out), this argument is unavailing because there is no reason to believe that state courts will regularly or uniformly admit evidence going to facts, such as remuneration, that are irrelevant to the offense charged.

In short, to avoid the absurd consequences that would flow from the Government's narrow understanding of the categorical approach, the Government proposes a solution

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[10] In addition to New York, it appears that 13 other States have separate offenses for §841(b)(4) conduct. See Cal. Health & Safety Code Ann. §11360(b) (West Supp. 2013); Colo. Rev. Stat. Ann. §18–18–406(5) (2012); Fla. Stat. §893.13(2)(b)(3) (2010); Ill. Comp. Stat., ch. 20, §§550/3, 550/4, 550/6 (West 2010); Iowa Code §124.410 (2009); Minn. Stat. §152.027(4)(a) (2010); N. M. Stat. Ann. §30–31–22(E) (Supp. 2011); Ohio Rev. Code Ann. §2925.03(C)(3)(h) (Lexis 2012 Cum. Supp.); Ore. Rev. Stat. §475.860(3) (2011); Pa. Stat. Ann., Tit. 35, §780–113(a)(31) (Purdon Supp. 2012); S. D. Codified Laws §22–42–7 (Supp. 2012); Tex. Health & Safety Code Ann. §481.120(b)(1) (West 2010); W. Va. Code Ann. §60A–4–402(c) (Lexis 2010).

that largely undermines the categorical approach. That the only cure is worse than the disease suggests the Government is simply wrong.

C

The Government fears the consequences of our decision, but its concerns are exaggerated. The Government observes that, like Georgia, about half the States criminalize marijuana distribution through statutes that do not require remuneration or any minimum quantity of marijuana. *Id.,* at 26–28. As a result, the Government contends, noncitizens convicted of marijuana distribution offenses in those States will avoid "aggravated felony" determinations, purely because their convictions do not resolve whether their offenses involved federal felony conduct or misdemeanor conduct, even though many (if not most) prosecutions involve either remuneration or larger amounts of marijuana (or both).

Escaping aggravated felony treatment does not mean escaping deportation, though. It means only avoiding mandatory removal. See *Carachuri-Rosendo*, 560 U. S., at ___ (slip op., at 17). Any marijuana distribution offense, even a misdemeanor, will still render a noncitizen deportable as a controlled substances offender. 8 U. S. C. §1227(a)(2)(B)(i). At that point, having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the other eligibility criteria. §§1158(b), 1229b(a)(1)–(2). But those forms of relief are discretionary. The Attorney General may, in his discretion, deny relief if he finds that the noncitizen is actually a member of one "of the world's most dangerous drug cartels," *post,* at 2 (opinion of ALITO, J.), just as he may deny relief if he concludes the negative equities outweigh the positive equities of the noncitizen's case for other reasons. As a result, "to the extent that our rejection of the Gov-

ernment's broad understanding of the scope of 'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one." *Carachuri-Rosendo*, 560 U. S., at ___ (slip op., at 17).

In any event, serious drug traffickers may be adjudicated aggravated felons regardless, because they will likely be convicted under greater "trafficking" offenses that necessarily establish that more than a small amount of marijuana was involved. See, *e.g.,* Ga. Code Ann. §16–13–31(c)(1) (Supp. 2012) (separate provision for trafficking in more than 10 pounds of marijuana). Of course, some offenders' conduct will fall between §841(b)(4) conduct and the more serious conduct required to trigger a "trafficking" statute. Brief for Respondent 30. Those offenders may avoid aggravated felony status by operation of the categorical approach. But the Government's objection to that underinclusive result is little more than an attack on the categorical approach itself.[11] We prefer this degree of imperfection to the heavy burden of relitigating old prosecutions. See *supra,* at 15–16. And we err on the side of underinclusiveness because ambiguity in criminal statutes

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[11] Similarly, JUSTICE ALITO's dissent suggests that he disagrees with the first premises of the categorical approach. He says it is a "strange and disruptive resul[t]" that "defendants convicted in different States for committing the same criminal conduct" might suffer different collateral consequences depending upon how those States define their statutes of conviction. *Post,* at 9. Yet that is the longstanding, natural result of the categorical approach, which focuses not on the criminal conduct a defendant "commit[s]," but rather what facts are necessarily established by a conviction for the state offense. Different state offenses will necessarily establish different facts. Some will track the "uniform" federal definition of the generic offense, and some will not. *Taylor* v. *United States*, 495 U. S. 575, 590 (1990). Whatever disparity this may create as between defendants whose real-world conduct was the same, it ensures that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law. This was *Taylor*'s chief concern in adopting the categorical approach. See *id.,* at 599–602.

referenced by the INA must be construed in the noncitizen's favor. See *Carachuri-Rosendo*, 560 U. S., at ___ (slip op., at 17); *Leocal* v. *Ashcroft*, 543 U. S. 1, 11, n. 8 (2004).

Finally, the Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions, like §1101(a)(43)(C), which refers to a federal firearms statute that contains an exception for "antique firearm[s]," 18 U. S. C. §921(a)(3). The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry. But *Duenas-Alvarez* requires that there be "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." 549 U. S., at 193. To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms. Further, the Government points to §1101(a)(43)(P), which makes passport fraud an aggravated felony, except when the noncitizen shows he committed the offense to assist an immediate family member. But that exception is provided in the INA itself. As we held in *Nijhawan*, a circumstance-specific inquiry would apply to that provision, so it is not comparable. 557 U. S., at 37–38.

* * *

This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as "illicit trafficking in a controlled substance," and thus an "aggravated felony." Once again we hold that the Government's approach defies "the 'commonsense conception'" of these terms. *Carachuri-Rosendo*, 560 U. S., at ___ (slip op., at 9) (quoting *Lopez*, 549 U. S., at 53). Sharing a small amount of marijuana for no remuneration, let alone possession with

intent to do so, "does not fit easily into the 'everyday understanding'" of "trafficking," which "'ordinarily . . . means some sort of commercial dealing.'" *Carachuri-Rosendo*, 560 U. S., at ___ (slip op., at 9) (quoting *Lopez*, 549 U. S., at 53–54). Nor is it sensible that a state statute that criminalizes conduct that the CSA treats as a misdemeanor should be designated an "aggravated felony." We hold that it may not be. If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA. The contrary judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

No. 11–702

ADRIAN MONCRIEFFE, PETITIONER *v.* ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

[April 23, 2013]

JUSTICE THOMAS, dissenting.

A plain reading of 18 U. S. C. §924(c)(2) identifies two requirements that must be satisfied for a state offense to qualify as a "felony punishable under the Controlled Substances Act [(CSA)]." "First, the offense must be a felony; second, the offense must be capable of punishment under the [CSA]." *Lopez* v. *Gonzales*, 549 U. S. 47, 61 (2006) (THOMAS, J., dissenting). Moncrieffe's offense of possession of marijuana with intent to distribute satisfies both elements. No one disputes that Georgia punishes Moncrieffe's offense as a felony. See Ga. Code Ann. §16–13–30(j)(2) (Supp. 2012). ("Except as otherwise provided in subsection (c) of Code Section 16–13–31 or in Code Section 16–13–2, any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years").[1] And, the offense is "pun-

[1] Section 16–13–31(c) (Supp. 2012) increases the punishment for trafficking in marijuana, while §16–13–2(b) (2011) decreases the punishment for simple possession of 1 ounce or less of marijuana. Neither provision is applicable to Moncrieffe's offense of possession of marijuana with intent to distribute.

The Court correctly points out that Moncrieffe was sentenced pursuant to §16–13–2(a) because he was a first-time offender. *Ante,* at 3. That provision does not alter the felony status of the offense. Rather, it

ishable under the [CSA]," 18 U. S. C. §924(c)(2), because it involved "possess[ion] with intent to manufacture, distribute, or dispense, a controlled substance," 21 U. S. C. §841(a)(1). Accordingly, Moncrieffe's offense is a "drug trafficking crime," 18 U. S. C. §924(c)(2), which constitutes an "aggravated felony" under the Immigration and Nationality Act (INA), 8 U. S. C. §1101(a)(43)(B).[2]

The Court rejected the plain meaning of 18 U. S. C. §924(c)(2) in *Lopez*. 549 U. S., at 50. There, the defendant was convicted of a state felony, but his offense would have been a misdemeanor under the CSA. *Id.,* at 53. The Court held that the offense did not constitute a "'felony punishable under the [CSA]'" because it was not "punishable *as a felony* under that federal law." *Id.,* at 60 (quoting §924(c)(2); emphasis added). I dissented in *Lopez* and warned that an inquiry into whether a state offense would constitute a felony in a hypothetical federal prosecution would cause "significant inconsistencies." *Id.,* at 63. I explained that one such inconsistency would arise if an alien defendant never convicted of an actual state felony were subject to deportation based on a hypothetical federal prosecution. *Id.,* at 67.

This precise issue arose in *Carachuri-Rosendo* v. *Holder*, 560 U. S. ___ (2010). Instead of following the logic of *Lopez*, however, the Court contorted the law to avoid the

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gives courts discretion to impose probation instead of imprisonment and to do so without entering a conviction. As the majority recognizes, petitioner has waived any argument that he was not convicted for purposes of the Immigration and Nationality Act. *Ante*, at 3, n. 2.

[2] See 8 U. S. C. §1227(a)(2)(A)(iii) (providing that aliens convicted of an "aggravated felony" after admission are deportable); §1229b(a)(3) (providing that aliens convicted of an "aggravated felony" are ineligible for cancellation of removal); §1101(a)(43)(B) (defining "aggravated felony" as "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in [18 U. S. C. §924(c)])"); 18 U. S. C. §924(c)(2) (defining "drug trafficking crime" as "any felony punishable under the [CSA]").

harsh result compelled by that decision. In *Carachuri-Rosendo*, the defendant was convicted of a crime that the State categorized as a misdemeanor, but his offense would have been a felony under the CSA because he had a prior conviction. 560 U. S., at ___ (slip op., at ___). The Court held that the offense did not constitute an "aggravated felony" because the state prosecutor had not charged the existence of a prior conviction and, thus, the defendant was not "*actually convicted* of a crime that is itself punishable as a felony under federal law." *Id.,* at ___ (slip op., at 17). Concurring in the judgment, I explained that the Court's decision was inconsistent with *Lopez* because the defendant's conduct was punishable as a felony under the CSA, but that *Lopez* was wrongly decided and that a proper reading of §924(c)(2) supported the Court's result. 560 U. S., at ___ (slip op., at 1). Carachuri-Rosendo's crime of conviction was a state-law misdemeanor and, as a result, it did not qualify as a "felony punishable under the [CSA]." See *ibid.*

I declined to apply *Lopez* in *Carachuri-Rosendo*, and I am unwilling to apply it here. Indeed, the Court itself declined to follow the logic of *Lopez* to its natural end in *Carachuri-Rosendo*. And, now the majority's ill-advised approach once again leads to an anomalous result. It is undisputed that, for federal sentencing purposes, Moncrieffe's offense would constitute a federal felony unless he could prove that he distributed only a small amount of marijuana for no remuneration. Cf. *United States* v. *Outen*, 286 F. 3d 622, 637–639 (CA2 2002) (Sotomayor, J.) (agreeing with the Government that 21 U. S. C. §841(b)(4) is a mitigating exception to the "default provision" under §841(b)(1)(D) and that it need not negate the §841(b)(4) factors to support a sentence under §841(b)(1)(D)). But, the Court holds that, for purposes of the INA, Moncrieffe's offense would necessarily correspond to a federal misdemeanor, regardless of whether he could

in fact prove that he distributed only a small amount of marijuana for no remuneration. *Ante,* at 11 (asserting that neither §841(b)(1)(D) nor §841(b)(4) is the "default" provision). The Court's decision, thus, has the effect of treating a substantial number of state felonies as federal misdemeanors, even when they would result in federal felony convictions.

The majority notes that "[t]his is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as . . . an 'aggravated felony.' " *Ante*, at 20–21. The Court has brought this upon itself. The only principle uniting *Lopez*, *Carachuri-Rosendo*, and the decision today appears to be that the Government consistently loses. If the Court continues to disregard the plain meaning of §924(c)(2), I expect that these types of cases will endlessly—and needlessly—recur.

I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 11–702

ADRIAN MONCRIEFFE, PETITIONER *v.* ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

[April 23, 2013]

JUSTICE ALITO, dissenting.

The Court's decision in this case is not supported by the language of the Immigration and Nationality Act (INA) or by this Court's precedents, and it leads to results that Congress clearly did not intend.

Under the INA, aliens[1] who are convicted of certain offenses may be removed from this country, 8 U. S. C. §1227(a)(2) (2006 ed. and Supp. V), but in many instances, the Attorney General (acting through the Board of Immigration Appeals (BIA)) has the discretion to cancel removal, §§1229b(a), (b). Aliens convicted of especially serious crimes, however, are ineligible for cancellation of removal. §1229b(a)(3) (2006 ed.). Among the serious crimes that carry this consequence is "illicit trafficking in a controlled substance." §1101(a)(43)(B).

Under the Court's holding today, however, drug traffickers in about half the States are granted a dispensation. In those States, even if an alien is convicted of possessing tons of marijuana with the intent to distribute, the alien is

[1] "Alien" is the term used in the relevant provisions of the Immigration and Nationality Act, and this term does not encompass all noncitizens. Compare 8 U. S. C. §1101(a)(3) (defining "alien" to include "any person not a citizen or national of the United States") with §1101(a)(22) (defining "national of the United States"). See also *Miller* v. *Albright*, 523 U. S. 420, 467, n. 2 (1998) (GINSBURG, J., dissenting).

eligible to remain in this country. Large-scale marijuana distribution is a major source of income for some of the world's most dangerous drug cartels, Dept. of Justice, National Drug Intelligence Center, National Drug Threat Assessment 2, 7 (2011), but the Court now holds that an alien convicted of participating in such activity may petition to remain in this country.

The Court's decision also means that the consequences of a conviction for illegal possession with intent to distribute will vary radically depending on the State in which the case is prosecuted. Consider, for example, an alien who is arrested near the Georgia-Florida border in possession of a large supply of marijuana. Under the Court's holding, if the alien is prosecuted and convicted in Georgia for possession with intent to distribute, he is eligible for cancellation of removal. But if instead he is caught on the Florida side of the line and is convicted in a Florida court—where possession with intent to distribute a small amount of marijuana for no remuneration is covered by a separate statutory provision, compare Fla. Stat. §893.13(3) (2010) with §893.13(1)(a)(2)—the alien is likely to be ineligible. Can this be what Congress intended?

I

Certainly the text of the INA does not support such a result. In analyzing the relevant INA provisions, the starting point is 8 U. S. C. §1229b(a)(3), which provides that a lawful permanent resident alien subject to removal may apply for discretionary cancellation of removal if he has not been convicted of any "aggravated felony." The term "aggravated felony" encompasses "illicit tracking in a controlled substance . . . including a drug trafficking crime (as defined in [18 U. S. C. §924(c)])." 8 U. S. C. §1101(a)(43)(B). And this latter provision defines a "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U. S. C. 801 et seq.)."

18 U. S. C. §924(c)(2). Thus "any felony punishable under the [CSA]" is an "aggravated felony."

Where an alien has a prior federal conviction, it is a straightforward matter to determine whether the conviction was for a "felony punishable under the [CSA]." But 8 U. S. C. §1101(a)(43) introduces a complication. That provision states that the statutory definition of "aggravated felony" "applies to an offense described in this paragraph *whether in violation of Federal or State law*." (Emphasis added.) As noted, the statutory definition of "aggravated felony" includes a "felony punishable under the [CSA]," and therefore §1101(a)(43)(B) makes it necessary to determine what is meant by a state "offense" that is a "felony punishable under the [CSA]."

What §1101(a)(43) obviously contemplates is that the BIA or a court will identify conduct associated with the state offense and then determine whether that conduct would have supported a qualifying conviction under the federal CSA.[2] Identifying and evaluating this relevant conduct is the question that confounds the Court's analysis. Before turning to that question, however, some preliminary principles should be established.

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[2]The Court's disagreement with this proposition, *ante* at 12, n. 8, is difficult to understand. If, as 8 U. S. C. §1101(a)(43) quite plainly suggests and the Court has held, a state conviction can qualify as an "aggravated felony," we must determine what is meant by a state "offense" that is a "felony punishable under the [CSA]." There is no way to do this other than by identifying a set of relevant conduct and asking whether, based on that conduct, the alien could have been convicted of a felony if prosecuted under the CSA in federal court. In rejecting what it referred to as a "hypothetical approach," the *Carachuri-Rosendo* Court was addressing an entirely different question, specifically, *which* set of conduct is relevant. *Carachuri-Rosendo* v. *Holder*, 560 U. S. ___, ___–___ (2010) (slip op., at 8, 15–17). We held that the relevant set of conduct consisted of that which was in fact charged and proved in the state-court proceeding, not the set of conduct that could have been proved in a hypothetical federal proceeding.

In *Lopez* v. *Gonzales*, 549 U. S. 47, 50 (2006), we held that felony status is controlled by federal, not state, law. As a result, once the relevant conduct is identified, it must be determined whether proof of that conduct would support a felony conviction under the CSA. The federal definition of a felony is a crime punishable by imprisonment for more than one year. 18 U. S. C. §§3559(a)(1)–(5). Consequently, if the proof of the relevant conduct would support a conviction under the CSA for which the maximum term of imprisonment is more than one year, the state conviction qualifies as a conviction for an "aggravated felony."

II

This brings us to the central question presented in this case: how to determine and evaluate the conduct that constitutes the state "offense." One possibility is that actual conduct is irrelevant, and that only the elements of the state crime for which the alien was convicted matter. We have called this the "categorical approach," *Taylor* v. *United States*, 495 U. S. 575, 600 (1990), and we have *generally* used this approach in determining whether a state conviction falls within a federal definition of a crime, see *id.,* at 600–601 ("Section 924(e)(2)(B)(i) defines 'violent felony' as any crime punishable by imprisonment for more than a year that 'has as an element'—not any crime that, in a particular case, involves—the use or threat of force. Read in this context, the phrase 'is burglary' in §924(e)(2)(B)(ii) most likely refers to the elements of the statute of conviction, not to the facts of each defendant's conduct"). But, as will be discussed below, we have also departed in important ways from a pure categorical approach.

The Court's opinion in this case conveys the impression that its analysis is based on the categorical approach, but that is simply not so. On the contrary, a pure categorical

approach leads very quickly to the conclusion that petitioner's Georgia conviction was a conviction for an "aggravated felony."

The elements of the Georgia offense were as follows: knowledge, possession of marijuana, and the intent to distribute it. Ga. Code Ann. §16–13–30(j)(1) (2007); *Jackson* v. *State*, 295 Ga. App. 427, 435, n. 28, 671 S. E. 2d 902, 909, n. 28 (2009). Proof of those elements would be sufficient to support a conviction under 21 U. S. C. §841(a), and the maximum punishment for that offense is imprisonment for up to five years, §841(b)(1)(D) (2006 ed., Supp. V), more than enough to qualify for felony treatment. Thus, under a pure categorical approach, petitioner's Georgia conviction would qualify as a conviction for an "aggravated felony" and would render him ineligible for cancellation of removal.

The Court departs from this analysis because §841(b)(4) provides a means by which a defendant convicted of violating §841(a) (2006 ed.) may lower the maximum term of imprisonment to no more than one year. That provision states that "any person who violates [§841(a)] by distributing a small amount of marihuana for no remuneration shall be treated as" a defendant convicted of simple possession, and a defendant convicted of that lesser offense faces a maximum punishment of one year's imprisonment (provided that the defendant does not have a prior simple possession conviction), §844 (2006 ed., Supp. V). Reading this provision together with §841(a), the Court proceeds as if the CSA created a two-tiered possession-with-intent-to-distribute offense: a base offense that is punishable as a misdemeanor and a second-tier offense (possession with intent to distribute more than a "small amount" of marijuana or possession with intent to distribute for remuneration) that is punishable as a felony.

If the CSA actually created such a two-tiered offense, the pure categorical approach would lead to the conclusion

that petitioner's Georgia conviction was not for an "aggravated felony." The elements of the Georgia offense would not suffice to prove the second-tier offense, which would require proof that petitioner possessed more than a "small amount" of marijuana or that he intended to obtain remuneration for its distribution. Instead, proof of the elements of the Georgia crime would merely establish a violation of the base offense, which would be a misdemeanor.

The CSA, however, does not contain any such two-tiered provision. And §841(b)(4) does not alter the elements of the §841(a) offense. As the Court notes, every Court of Appeals to consider the question has held that §841(a) is the default offense and that §841(b)(4) is only a mitigating sentencing guideline, see *United States* v. *Outen*, 286 F. 3d 622, 636–639 (CA2 2002) (Sotomayor, J.) (describing §841(b)(4) as a "mitigating exception"); *United States* v. *Hamlin*, 319 F. 3d 666, 670 (CA4 2003) (collecting cases), and the Court does not disagree, *ante*, at 11–13.

Confirmation of this interpretation is provided by the use of the term "small amount" in §841(b)(4). If §841(b)(4) had been meant to alter the elements of §841(a), Congress surely would not have used such a vague term. Due process requires that the elements of a criminal statute be defined with specificity. *Connally* v. *General Constr. Co.*, 269 U. S. 385, 393 (1926). Accordingly, it is apparent that §841(b)(4) does not modify the elements of §841(a) but instead constitutes what is in essence a mandatory sentencing guideline. Under this provision, if a defendant is convicted of violating §841(a), the defendant may attempt to prove that he possessed only a "small amount" of marijuana and that he did not intend to obtain remuneration for its distribution. If the defendant succeeds in convincing the sentencing judge, the maximum term of imprisonment is lowered to one year.

In sum, contrary to the impression that the Court's

opinion seeks to convey, the Court's analysis does not follow the pure categorical approach.

III

Nor is the Court's analysis supported by prior case law. The Court claims that its approach follows from our decision in *Carachuri-Rosendo* v. *Holder*, 560 U. S. ___ (2010), but that case—unlike the Court's opinion—faithfully applied the pure categorical approach.

In *Carachuri-Rosendo*, the alien had been convicted in a Texas court for simple possession of a controlled substance. *Id.*, at ___ (slip op., at 6). At the time of that conviction, Carachuri-Rosendo had a prior state conviction for simple possession, but this fact was not charged or proved at his trial and was apparently not taken into account in setting his sentence, which was 10 days in jail. *Id.*, at ___, ___–___ (slip op., at 5–6). Arguing that Carachuri-Rosendo was ineligible for cancellation of removal, the Government maintained that his second simple possession conviction qualified under the INA as a conviction for an "aggravated felony." *Id.*, at ___ (slip op., at 5). This was so, the Government contended, because, if Carachuri-Rosendo's second simple-possession prosecution had been held in federal court, he could have been punished by a sentence of up to two years due to his prior simple possession conviction. *Id.*, at ___ (slip op., at 5).

This more severe sentence, however, would have required the federal prosecutor to file a formal charge alleging the prior conviction; Carachuri-Rosendo would have been given the opportunity to defend against that charge; and the heightened sentence could not have been imposed unless the court found that the prior conviction had occurred. *Id.,* at ___ (slip op., at 14).

Our rejection of the Government's argument thus represented a straightforward application of the pure categorical approach. The elements of the Texas offense for which

Carachuri-Rosendo was convicted were knowledge or intent, possession of a controlled substance without a prescription, and nothing more. *Id.,* at ___ (slip op., at 6); Tex. Health & Safety Code Ann. §§481.117(a), (b) (West 2010). Proof of a prior simple possession conviction was not required, and no such proof appears to have been offered. The maximum penalty that could have been imposed under federal law for simple possession (without proof of a prior simple possession conviction) was one year's imprisonment. Thus, proof in federal court of the elements of the Texas offense would not have permitted a felony-length sentence, and consequently the state conviction did not qualify as a felony punishable under the CSA.

IV

Unsupported by either the categorical approach or our prior cases, the decision of the Court rests instead on the Court's belief—which I share—that the application of the pure categorical approach in this case would lead to results that Congress surely did not intend.

Suppose that an alien who is found to possess two marijuana cigarettes is convicted in a state court for possession with intent to distribute based on evidence that he intended to give one of the cigarettes to a friend. Under the pure categorical approach, this alien would be regarded as having committed an "aggravated felony." But this classification is plainly out of step with the CSA's assessment of the severity of the alien's crime because under the CSA the alien could obtain treatment as a misdemeanant by taking advantage of 21 U. S. C. §841(b)(4).

For this reason, I agree with the Court that such an alien should not be treated as having committed an "aggravated felony." In order to avoid this result, however, it is necessary to depart from the categorical approach, and that is what the Court has done. But the particular way in which the Court has departed has little to recommend

it.

To begin, the Court's approach is analytically confused. As already discussed, the Court treats §841(b)(4) as if it modified the elements of §841(a), when in fact §841(b)(4) does no such thing. And the Court obviously knows this because it does not suggest that §841(b)(4) changes the elements of §841(a) for criminal law purposes.[3]

In addition, the Court's approach leads to the strange and disruptive results noted at the beginning of this opinion. As an initial matter, it leads to major drug trafficking crimes in about half the States being excluded from the category of "illicit trafficking in a controlled substance." Moreover, it leads to significant disparities between equally culpable defendants. We adopted the categorical approach to avoid disparities in our treatment of defendants convicted in different States for committing the same criminal conduct. See *Taylor,* 495 U. S., at 590–591 (rejecting the view that state law determined the meaning of "burglary" because "[t]hat would mean that a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State

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[3]The Court defends its interpretation of 21 U. S. C. §§841(a), (b)(4) by arguing that *Carachuri-Rosendo* v. *Holder*, 560 U. S. ___ (2010), rejected any recourse to a "hypothetical approach" for determining how a criminal prosecution likely would have proceeded, see *ante,* at 12, and that is true enough. But, as discussed above, see n. 2, *supra*, just because the categorical approach does not require conjecture as to whether a hypothetical federal prosecutor would be likely to charge and prove a prior conviction does not mean that it also precludes analysis of the structure of the federal criminal statute at hand. Indeed, our categorical-approach cases have done little else. See, *e.g., Carachuri-Rosendo, supra*, at ___ (slip op., at 14) (discussing procedural protections Carachuri-Rosendo would have enjoyed had he been prosecuted federally); *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 185, 189–194 (2007) (the term "theft offense" in 8 U. S. C. §1101(a)(43)(G) includes the crime of aiding and abetting a theft offense).

of his prior conviction happened to call that conduct 'burglary'"). Yet the Court reintroduces significant disparity into our treatment of drug offenders. All of this can be avoided by candidly acknowledging that the categorical approach is not the be-all and end-all.

When Congress wishes to make federal law dependent on certain prior state convictions, it faces a difficult task. The INA provisions discussed above confront this problem, and their clear objective is to identify categories of criminal conduct that evidence such a high degree of societal danger that an alien found to have engaged in such conduct should not be allowed to obtain permission to remain in this country. Since the vast majority of crimes are prosecuted in the state courts, Congress naturally looked to state, as well as federal, convictions as a metric for identifying these dangerous aliens.

But state criminal codes vary widely, and some state crimes are defined so broadly that they encompass both very serious and much less serious cases. In cases involving such state provisions, a pure categorical approach may frustrate Congress' objective.

The Court has said that the categorical approach finds support in the term "conviction." *Taylor*, *supra,* at 600; *Shepard* v. *United States*, 544 U. S. 13, 19 (2005). But the Court has never held that a pure categorical approach is dictated by the use of that term,[4] and I do not think that it is. In ordinary speech, when it is said that a person was convicted of or for doing something, the "something" may include facts that go beyond the bare elements of the

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[4] Instead, the Court adopted the categorical approach based on a combination of factors, including judicial efficiency. See *Taylor*, 495 U. S., at 601 ("[T]he practical difficulties and potential unfairness of a factual approach are daunting. In all cases where the Government alleges that the defendant's actual conduct would fit the generic definition of burglary, the trial court would have to determine what that conduct was").

relevant criminal offense. For example, it might be said that an art thief was convicted of or for stealing a Rembrandt oil painting even though neither the identity of the artist nor the medium used in the painting are elements of the standard offense of larceny. See 3 W. LaFave, Substantive Criminal Law §19.1(a) (2d ed. 2003).

For these reasons, departures from the categorical approach are warranted, and this Court has already sanctioned such departures in several circumstances. See *Taylor*, *supra*, at 602 (modified categorical approach); *Gonzales* v. *Duenas-Alvarez*, 549 U. S. 183, 193 (2007) (categorical approach does not exclude state-law convictions unless there is "a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime"); *Nijhawan* v. *Holder*, 557 U. S. 29, 32 (2009) (interpreting an enumerated "aggravated felony" in 8 U. S. C. §1101(a)(43) not to be a generic crime). Consistent with the flexibility that the Court has already recognized, I would hold that the categorical approach is not controlling where the state conviction at issue was based on a state statute that encompasses both a substantial number of cases that qualify under the federal standard and a substantial number that do not. In such situations, it is appropriate to look beyond the elements of the state offense and to rely as well on facts that were admitted in state court or that, taking a realistic view, were clearly proved. Such a look beyond the elements is particularly appropriate in a case like this, which involves a civil proceeding before an expert agency that regularly undertakes factual inquiries far more daunting than any that would be involved here. See, *e.g., Negusie* v. *Holder*, 555 U. S. 511 (2009).

Applying this approach in the present case, what we find is that the Georgia statute under which petitioner was convicted broadly encompasses both relatively minor

offenses (possession of a small amount of marijuana with the intent to share) and serious crimes (possession with intent to distribute large amounts of marijuana in exchange for millions of dollars of profit). We also find that petitioner had the opportunity before the BIA to show that his criminal conduct fell into the category of relatively minor offenses carved out by §841(b)(4). Administrative Record 16–26. The BIA takes the entirely sensible view that an alien who is convicted for possession with intent to distribute may show that his conviction was not for an "aggravated felony" by proving that his conduct fell within §841(b)(4). *Matter of Castro-Rodriguez*, 25 I. & N. Dec. 698, 701–702 (2012). Petitioner, for whatever reason, availed himself only of the opportunity to show that his conviction had involved a small amount of marijuana and did not present evidence—or even contend—that his offense had not involved remuneration. Administrative Record 16–26, 37. As a result, I think we have no alternative but to affirm the decision of the Court of Appeals, which in turn affirmed the BIA.

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 13-2229

SAYED GAD OMARGHARIB,

Petitioner,

v.

ERIC H. HOLDER, JR., Attorney General,

Respondent.

CAPITAL AREA IMMIGRANTS' RIGHTS COALITION; IMMIGRANT AND REFUGEE APPELLATE CENTER, LLC,

Amici Supporting Petitioner.

On Petition for Review of an Order of the Board of Immigration Appeals.

Argued: September 16, 2014 Decided: December 23, 2014

Before NIEMEYER, WYNN, and FLOYD, Circuit Judges.

Petition for review granted; reversed and remanded with instructions by published opinion. Judge Floyd wrote the opinion, in which Judge Niemeyer and Judge Wynn joined. Judge Niemeyer wrote a separate concurring opinion.

ARGUED: Steffanie Jones Lewis, INTERNATIONAL BUSINESS LAW FIRM, PC, Washington, D.C., for Petitioner. Aimee J. Carmichael, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for

Respondent. **ON BRIEF**: Stuart F. Delery, Assistant Attorney General, Civil Division, John S. Hogan, Senior Litigation Counsel, Office of Immigration Litigation, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. Heidi Altman, Morgan Macdonald, CAPITAL AREA IMMIGRANTS' RIGHTS COALITION, Washington, D.C.; Ben Winograd, IMMIGRANT & REFUGEE APPELLATE CENTER, LLC, Alexandria, Virginia, for Amici Supporting Petitioner.

FLOYD, Circuit Judge:

In this appeal, we consider whether Sayed Gad Omargharib's conviction under Virginia's grand larceny statute, Va. Code Ann. § 18.2-95, constitutes an "aggravated felony" under the Immigration and Nationality Act (INA) § 101, 8 U.S.C. § 1101(a)(43). The Board of Immigration Appeals (BIA) answered this question in the affirmative using the so-called modified categorical approach, as clarified by Descamps v. United States, 133 S. Ct. 2276 (2013). Under Descamps, the modified categorical approach applies only if Virginia's definition of "larceny" is "divisible" — that is, if it lists potential offense elements in the alternative, thus creating multiple versions of the crime. The BIA concluded that Virginia larceny is divisible because Virginia state courts have defined it to include either theft or fraud.

Consistent with our prior precedent on this issue, however, we conclude that mere use of the disjunctive "or" in the definition of a crime does not automatically render it divisible. We further hold that, under our recent decisions construing Descamps, the Virginia crime of larceny is indivisible as a matter of law. As such, we agree with Omargharib that the modified categorical approach has no role to play in this case. Instead, the categorical approach applies, and under that approach Omargharib's grand larceny conviction

does not constitute an aggravated felony under the INA. We therefore grant Omargharib's petition for review, reverse the BIA's ruling, and remand with instructions to vacate the order of removal.

I.

Omargharib, an Egyptian native and citizen, entered the United States in 1985 and became a lawful permanent resident in 1990. In 2011, he was convicted in Virginia state court of grand larceny under Va. Code Ann. § 18.2-95 for "tak[ing], steal[ing], and carry[ing] away" two pool cues valued in excess of $200 following a dispute with his opponent in a local pool league. J.A. 452. Omargharib received a suspended sentence of twelve months.[1]

Following his conviction, the Department of Homeland Security sought Omargharib's removal, contending that his conviction constituted an "aggravated felony" under the INA — namely, "a theft offense . . . for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G); see 8 U.S.C. § 1227(a)(2)(A)(iii) (rendering deportable an alien who is convicted of an aggravated felony).

[1] Omargharib later filed a motion to reconsider his sentence (which the trial court denied), but did not appeal his conviction. He also filed habeas motions in both state and federal court, all of which were likewise denied.

Before an immigration judge (IJ), Omargharib denied that his conviction made him removable. Omargharib argued that, under the categorical approach set forth in Taylor v. United States, 495 U.S. 575 (1990), the IJ could only compare the elements of larceny under Virginia law with the generic elements of a "theft offense" in the INA and determine whether they match. According to Omargharib, the elements do not match because Virginia law broadly defines larceny to include both theft and fraud, whereas the INA's aggravated felony statute distinguishes between theft and fraud. Compare 8 U.S.C. § 1101(a)(43)(G) (theft) with id. § 1101(a)(43)(M)(i) (fraud).[2]

Under the categorical approach, it is thus possible that Omargharib's grand larceny conviction rested on facts amounting to fraud, not theft. It is undisputed that Omargharib's conviction does not constitute a fraud offense under the INA.[3] And under the categorical approach, the IJ was not free to review the record to determine whether Omargharib's grand larceny conviction was based on theft, not fraud.

[2] The INA's theft offense is not tied to any dollar threshold – a theft of even one penny will suffice as long as the term of imprisonment is at least one year. In contrast, the INA's fraud offense only applies if the loss to the victim exceeds $10,000.

[3] The record reflects that the two pool cues were together valued between $525 and $800 – well below the INA's $10,000 fraud threshold. Accordingly, the government does not argue that Omargharib's conviction constitutes a fraud offense under the INA.

The IJ agreed that Virginia's definition of larceny is broader than the INA's corresponding "theft offense" crime and thus that the two crimes are not a categorical match.[4] But the IJ proceeded to employ the modified categorical approach, which the IJ held permits consideration of the underlying facts surrounding Omargharib's conviction. Applying that approach, the IJ concluded that Omargharib's larceny conviction rested on facts amounting to theft, not fraud. As such, the IJ held that Omargharib's conviction constituted a theft offense under the INA, making Omargharib removable and ineligible for all forms of discretionary relief.[5]

Omargharib appealed the IJ's decision to the BIA. On September 6, 2013, the BIA dismissed Omargharib's appeal and affirmed the IJ's decision in all respects. Like the IJ, the BIA concluded that the modified categorical approach applied because Virginia law defines larceny in the disjunctive to

[4] At the hearing, the IJ first issued an oral decision devoid of any legal analysis. Omargharib appealed the oral decision to the BIA, which remanded back to the IJ to explain his reasoning. The IJ issued a written order on December 26, 2012.

[5] If Omargharib's state law conviction had been classified as a crime under the INA other than an aggravated felony he could have sought certain discretionary relief from removal, such as asylum or cancellation of removal. See Moncrieffe v. Holder, 133 S. Ct. 1678, 1682 (2013) (citing 8 U.S.C. §§ 1158, 1229b). Because the IJ found he committed an aggravated felony, however, he was ineligible for these forms of discretionary relief. See id.

include "wrongful or fraudulent" takings. J.A. 3. Omargharib then timely petitioned this Court for review. We have jurisdiction pursuant to 8 U.S.C. § 1252.

II.

The central issue before us is whether Omargharib's 2011 grand larceny conviction in Virginia constitutes a "theft offense" as defined by 8 U.S.C. § 1101(a)(43)(G), and thus an aggravated felony under the INA that is grounds for removal.

We review the BIA's determination on this issue de novo. Karimi v. Holder, 715 F.3d 561, 566 (4th Cir. 2013). "Although we generally defer to the BIA's interpretations of the INA, where, as here, the BIA construes statutes [and state law] over which it has no particular expertise, its interpretations are not entitled to deference." Id.; see also Matter of Chairez-Castrejon, 26 I. & N. Dec. 349, 353 (BIA 2014) (recognizing that the BIA is bound by this Court's "interpretation of divisibility under Descamps"). The government has the burden of proving that Omargharib committed an aggravated felony by clear and convincing evidence. Karimi, 715 F.3d at 566.

To qualify as an aggravated felony, Omargharib's conviction must have been "a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment [is] at least one year." 8 U.S.C. § 1101(a)(43)(G). Because we

conclude that his crime of conviction did not constitute a "theft offense" under the INA, we reverse without reaching Omargharib's alternative argument that his term of imprisonment was for less than one year.

A.

In order to determine whether a state law conviction qualifies as an aggravated felony for removal purposes, we use the categorical approach set forth in Taylor v. United States, 495 U.S. 575 (1990), and recently clarified in Descamps. See United States v. Aparicio-Soria, 740 F.3d 152, 160-61 (4th Cir. 2014) (en banc).[6] Under that approach, we consider only the elements of the statute of conviction rather than the defendant's conduct underlying the offense. Descamps, 133 S. Ct. at 2285 (stating that the categorical approach's "central feature" is "a focus on the elements, rather than the facts, of a crime"). If the state offense has the same elements as the generic INA crime, then the prior conviction constitutes an

[6] Although Taylor discussed divisibility in the context of a sentence enhancement under the Armed Career Criminal Act (ACCA), we have held that it applies equally in the immigration context to determine whether an alien is removable under the INA as a result of a prior conviction. See Karimi, 715 F.3d at 567 n.6. Because Descamps only clarified Taylor's analysis, we hold it also applies here (as several other Circuits have done in the immigration context). Accord Avendano v. Holder, 770 F.3d 731, 734 (8th Cir. 2014); Aguilar-Turcios v. Holder, 740 F.3d 1294, 1299-1300 (9th Cir. 2014).

aggravated felony. See id., 133 S. Ct. at 2283. But, if the state law crime "sweeps more broadly" and criminalizes more conduct than the generic federal crime, the prior conviction cannot count as an aggravated felony. Id. This is true "even if the defendant actually committed the offense in its generic form." Id.[7]

Like the BIA, we conclude that the Virginia crime of larceny does not categorically match the INA's theft offense crime because Virginia larceny punishes a broader range of conduct than that federal offense. Specifically, Virginia law defines larceny to include both fraud and theft crimes.[8] See

[7] The elements-based categorical approach thus avoids the "daunting . . . practical difficulties and potential unfairness" of a facts-based approach. Id. at 2289. Among other problems, a facts-based approach would require sentencing courts "to expend resources examining (often aged) documents for evidence that a defendant admitted in a plea colloquy, or a prosecutor showed at trial, facts that, although unnecessary to the crime of conviction, satisfy an element of the relevant generic offense. The meaning of those documents will often be uncertain. And the statements of fact in them may be downright wrong. A defendant, after all, often has little incentive to contest facts that are not elements of the charged offense . . . ."). Id. at 2289.

[8] Although Omargharib was convicted of grand larceny under Va. Code Ann. § 18.2-95, that statute does not define the elements of larceny in Virginia. Rather, it merely categorizes larceny of more than $200 as "grand larceny" and defines the punishment for that crime. Id. The statute thus incorporates Virginia's common-law recitation of the elements for larceny. And although Descamps addressed a state crime defined by statute, we have since held that the Descamps analysis applies to state crimes that, as here, are defined by common law rather (Continued)

Britt v. Commonwealth, 667 S.E.2d 763, 765 (Va. 2008) (Keenan, J.) (defining larceny as "the wrongful or fraudulent taking of another's property without his permission and with the intent to permanently deprive the owner of that property" (emphasis added)); see also Stokes v. Commonwealth, 641 S.E.2d 780, 782, 784 (Va. Ct. App. 2007) (upholding a conviction for grand larceny when the defendant was indicted for defrauding a bank). Indeed, the Supreme Court of Virginia has repeatedly sustained larceny convictions when the property at issue was obtained through fraudulently obtained consent.[9] See, e.g., Skeeter v. Commonwealth, 232 S.E.2d 756, 758 (Va. 1977); Bourgeois v. Commonwealth, 227 S.E.2d 714, 717 (Va. 1976).

By contrast, the INA expressly distinguishes between theft and fraud offenses. Unlike the INA's theft offense, which is not tied to any dollar threshold, the INA's fraud offense only applies if the loss to the victim exceeds $10,000. Compare 8

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than by statute. United States v. Hemingway, 734 F.3d 323, 331–33 (4th Cir. 2013).

[9] As these cases demonstrate, a "wrongful" taking means a taking without the victim's consent; a "fraudulent" taking means a taking with the victim's consent that has been obtained fraudulently. As set forth below, both wrongful and fraudulent takings satisfy the "without consent" element of larceny under Virginia law. In contrast, under the generic federal definition of "theft," fraudulent takings do not constitute takings "without consent." See Soliman v. Gonzales, 419 F.3d 276, 282-83 (4th Cir. 2005). The "without consent" element under Virginia law is thus significantly broader than the federal "without consent" element.

U.S.C. § 1101(a)(43)(G) (theft) with id. § 1101(a)(43)(M)(i) (fraud). Consistent with this distinction, we have previously held that a conviction for credit card fraud for less than $10,000 under Virginia law does not amount to a "theft offense" or "fraud offense" for purposes of the INA. Soliman, 419 F.3d at 282-83 (noting that any other result would transform all fraud offenses into theft offenses, thus rendering the $10,000 threshold for fraud offenses "superfluous").

In short, Virginia law treats fraud and theft as the same for larceny purposes, but the INA treats them differently. As such, Virginia larceny "sweeps more broadly" than the INA's theft offense. Descamps, 133 S. Ct. at 2283. We therefore conclude that Omargharib's Virginia larceny conviction does not constitute an aggravated felony for purposes of the INA under the categorical approach.

B.

The government claims a different result is warranted under the modified categorical approach. As Descamps recently clarified, the modified categorical approach applies only if a state crime consists of "multiple, alternative elements" creating "several different crimes," some of which would match the generic federal offense and others that would not. 133 S. Ct. at 2284-85. Under this approach, courts may look beyond the

statutory text and consult a limited set of documents in the record – so-called Shepard documents[10] – to determine which crime the defendant was convicted of committing. Id. at 2283-84. In this way, the modified approach is a tool for implementing the categorical approach. Id. at 2284.

According to the government, the BIA correctly applied the modified categorical approach and so properly examined the underlying facts of Omargharib's conviction to determine that he was convicted of theft, not fraud.[11] For the following reasons, we disagree.

After Descamps, we may apply the modified categorical approach only if the state crime at issue is divisible. Id. at 2283. A crime is divisible only if it is defined to include "potential offense elements in the alternative," thus rendering "opaque which element played a part in the defendant's conviction." Id. Stated differently, crimes are divisible only if they "set out elements in the alternative and thus create

[10] These documents derive their name from the Supreme Court's decision in Shepard v. United States, 544 U.S. 13, 16 (2005). Relevant Shepard documents include the "charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." Johnson v. United States, 130 S. Ct. 1265, 1273 (2010).

[11] Because we find that the modified categorical approach does not apply, we need not address Omargharib's alternative argument that he would also prevail under that approach because the Shepard documents purportedly do not demonstrate whether he was convicted of a "theft offense."

multiple versions of the crime."[12] United States v. Montes-Flores, 736 F.3d 357, 365 (4th Cir. 2013).

The government asserts that the Virginia common-law crime of larceny is divisible because it purportedly lists the elements of theft and fraud in the alternative. See Britt, 667 S.E.2d at 765 (defining "larceny" as a "wrongful or fraudulent taking" (emphasis added)). In the government's view, the use of the word "or" creates two different versions of the crime of larceny: one involving wrongful takings (theft), and one involving fraudulent takings (fraud). In this view, the Virginia larceny would be divisible under Descamps and so the modified categorical approach would apply.

As we have previously held, however, use of the word "or" in the definition of a crime does not automatically render the crime divisible. See United States v. Royal, 731 F.3d 333, 341-42 (4th Cir. 2013); see also Rendon v. Holder, 764 F.3d 1077, 1086-87 (9th Cir. 2014) (reasoning that when a state criminal law "is written in the disjunctive . . . , that fact alone cannot end the divisibility inquiry"). As these cases recognize, a crime is divisible under Descamps only if it is

[12] An indivisible crime, by contrast, contains the same elements as the federal crime (or omits an element entirely), but construes those elements expansively to criminalize a "broader swath of conduct" than the relevant federal law. Descamps, 133 S. Ct. at 2281.

defined to include multiple alternative elements (thus creating multiple versions of a crime), as opposed to multiple alternative means (of committing the same crime). Royal, 731 F.3d at 341; United States v. Cabrera-Umanzor, 728 F.3d 347, 353 (4th Cir. 2013); see also Rendon, 764 F.3d at 1086. Elements, as distinguished from means, are factual circumstances of the offense the jury must find "unanimously and beyond a reasonable doubt." Royal, 731 F.3d at 341 (quoting Descamps, 133 S. Ct. at 2288). In analyzing this distinction, we must consider how Virginia courts generally instruct juries with respect to larceny. See id.

Our decision in Royal is particularly instructive. In that case we addressed a crime defined in the alternative – assault under Maryland law – and held that it was indivisible under Descamps. 731 F.3d at 340-341. Like here, the government argued that use of the disjunctive "or" in the definition of assault made the crime divisible, thus warranting application of the modified approach. Id. at 341. But we rejected that argument, holding that the requirements on either side of the "or" were "merely alternative means of satisfying a single element" of assault, rather than alternative elements. Id. at 341. This was true because "Maryland juries are not instructed that they must agree 'unanimously and beyond a reasonable doubt' on whether the defendant caused either 'offensive physical

contact' or 'physical harm' to the victim; rather, it is enough that each juror agree only that one of the two occurred, without settling on which." Id.

We likewise conclude here that Virginia juries are not instructed to agree "unanimously and beyond a reasonable doubt" on whether defendants charged with larceny took property "wrongfully" or "fraudulently." Rather, as in Royal, it is enough for a larceny conviction that each juror agrees only that either a "wrongful or fraudulent" taking occurred, without settling on which. By way of example, the Virginia model jury instruction for grand larceny requires only a finding that "the taking was against the will and without the consent of the owner." 2-36 Virginia Model Jury Instructions – Criminal G36.100 (2014). The model instruction does not tell the jury to distinguish between wrongful and fraudulent takings – rather, it only requires a finding of a taking "without the consent of the owner." Id. Moreover, Virginia law has long used the "wrongful" versus "fraudulent" distinction as two different means of satisfying the "without consent" element:

> The common law had substantial difficulty with cases in which the thief, intending permanently to deprive the possessor of his chattel, obtained possession of it with the apparent consent of the possessor by use of some fraud. Such conduct, called larceny by trick, was assimilated into larceny on the theory that consent obtained by fraud was not true consent and hence that the taker

> had trespassed upon the chattel without consent of the possessor. The Virginia definition [of larceny], by use of the word "fraudulent" has adopted this doctrine and often applied it. This is the theory upon which cashing a forged check becomes larceny.

Ronald J. Bacigal, Larceny and Receiving, in Virginia Practice Series, Va. Prac. Criminal Offenses & Defenses L3 (2014); see also John Wesley Bartram, Note, Pleading for Theft Consolidation in Virginia: Larceny, Embezzlement, False Pretenses and § 19.2-284, 56 Wash. & Lee L. Rev. 249, 260-61 (1999) (noting that Virginia incorporates larceny by trick into its common law larceny definition through the use of the word "fraudulent"); Skeeter, 232 S.E.2d at 758 (holding that personal property acquired with fraudulently obtained consent will sustain a larceny conviction); United States v. Argumedo-Perez, 326 F. App'x 293, 295-98 (5th Cir. 2009) (per curiam) (holding that the "without consent" element of Virginia larceny includes "fraudulently obtained consent" and so a Virginia larceny conviction does not constitute a generic federal theft crime).[13] Put simply, wrongful or fraudulent takings are alternative means of committing larceny, not alternative elements.

[13] Although Virginia law does distinguish certain types of fraud offenses from general larceny, see Va. Code Ann. §§ 18.2-111 (proscribing embezzlement), 18.2-178 (proscribing obtaining money by false pretense), the above authorities clearly demonstrate that larceny by trick – a fraud-based offense – is included within Virginia's general definition of larceny.

In summary, we conclude that larceny in Virginia law is indivisible as a matter of law. That means only the categorical approach applies. And as established above, Omargharib's larceny conviction is not categorically an INA theft offense. The government makes no meaningful argument to rebut this analysis other than pointing to the disjunctive "or" in Virginia's definition of larceny.[14] As such, it has not satisfied its burden to establish removability by clear and convincing evidence. See Karimi, 715 F.3d at 566.

III.

Because Omargharib's 2011 conviction for grand larceny, in violation of Va. Code Ann. § 18.2-95, was not a "theft offense" under the INA, the BIA erred as a matter of law in relying on that conviction as a basis to order his removal under 8 U.S.C.

[14] The government's policy argument that a ruling in Omargharib's favor will end deportations for theft and fraud crimes in Virginia is not well-founded. Although Virginia larceny convictions will no longer support an "aggravated felony" finding under the INA, "escaping aggravated felony treatment does not mean escaping deportation . . . . It means only avoiding mandatory removal." Moncrieffe, 133 S. Ct. at 1692. A Virginia larceny conviction can still render a non-citizen deportable in some instances, though with the opportunity to seek discretionary relief. See 8 U.S.C. §§ 1227(a)(2)(A)(i), 1229b. Thus, "to the extent that our rejection of the Government's broad understanding of the scope of 'aggravated felony' may have any practical effect on policing our Nation's borders, it is a limited one." Moncrieffe, 133 S. Ct. at 1692 (quoting Carachuri-Rosendo v. Holder, 560 U.S. 563, 581 (2010)).

§ 1227(a)(2)(A)(iii). Accordingly, we grant Omargharib's petition for review, reverse the BIA's decision, and remand the action with instructions to vacate Omargharib's order of removal.

PETITION FOR REVIEW GRANTED;
REVERSED AND REMANDED WITH INSTRUCTIONS

NIEMEYER, Circuit Judge, concurring:

I am pleased to concur in Judge Floyd's well-crafted opinion, especially in light of the existing state of the law regarding when to apply the modified categorical approach. Because of the ever-morphing analysis and the increasingly blurred articulation of applicable standards, we are being asked to decide, without clear and workable standards, whether disjunctive phrases in a criminal law define alternative elements of a crime or alternative means of committing it.

More particularly, in this case, we are called upon to decide whether a wrongful taking and a fraudulent taking are alternative elements defining two versions of the crime of larceny or alternative means of committing larceny. While Judge Floyd concludes that the applicable Virginia law defines alternative means, thereby precluding use of the modified categorical approach under current law, I find it especially difficult to comprehend the distinction. Virginia's law could just as easily be viewed as prescribing two crimes: (1) larceny by wrongful taking, and (2) larceny by fraudulent taking.[*]

[*] The applicable statute prohibits "simple larceny not from the person of another of goods and chattels of the value of $200 or more," Va. Code Ann. § 18.2-95(ii), leaving "larceny" to be defined by common law. The Virginia Supreme Court has defined larceny as "the wrongful or fraudulent taking of another's property without his permission and with the intent to (Continued)

The Supreme Court's recent decision in Descamps v. United States, 133 S. Ct. 2276 (2013), which adopted the elements-versus-means distinction, is the source of much of the confusion. In Descamps, the Court held that it was error to apply the modified categorical approach to determine whether a defendant's prior burglary conviction was for generic burglary when the California statute under which he was convicted prohibited a person from entering specified locations with intent to commit grand or petit larceny or any felony. Id. at 2282. In its discussion, the Court recognized that a hypothetical statute defining burglary as the illegal "entry of an automobile as well as a building" would be divisible, thus justifying application of the modified categorical approach. Id. at 2284 (quoting Taylor v. United States, 495 U.S. 575, 602 (1990)) (internal quotation marks omitted). It similarly noted that it had previously recognized such divisibility in Nijhawan v. Holder, 557 U.S. 29 (2009). To distinguish those cases and others, however, the Descamps Court explained that "[a]ll those decisions rested on the explicit premise that the laws 'contain[ed] statutory phrases that cover several different . . . crimes,' not several different methods of

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permanently deprive the owner of that property." Britt v. Commonwealth, 667 S.E.2d 763, 765 (Va. 2008) (emphasis added).

committing one offense." 133 S. Ct. at 2285 n.2 (quoting Johnson v. United States, 559 U.S. 133, 144 (2010)). While the Court acknowledged that the California statute left open the possibility that several means could be employed to commit burglary, some but not all of which would qualify as generic burglary, it dismissed the concern that "distinguishing between 'alternative elements' and 'alternative means' is difficult," telling us not "to worry." Id. The Court elaborated:

> Whatever a statute lists (whether elements or means), the documents we approved in Taylor and Shepard . . . [will] reflect the crime's elements. So a court need not parse state law in the way the dissent suggests: When a state law is drafted in the alternative, the court merely resorts to the approved documents and compares the elements revealed there to those of the generic offense.

Id. Respectfully, this purportedly comforting language hardly clarifies. Indeed, in dissent, Justice Alito stated:

> While producing very modest benefits at most, the Court's holding will create several serious problems. . . . To determine whether a statute contains alternative elements, as opposed to merely alternative means of satisfying an element, a court . . . will be required to look beyond the text of the statute, which may be deceptive. . . . The only way to be sure whether particular items are alternative elements or simply alternative means of satisfying an element may be to find cases concerning the correctness of jury instructions that treat the items one way or the other. And such cases may not arise frequently.

Id. at 2301-02 (Alito, J., dissenting). In Justice Alito's view, a more practical approach is required.

Similarly, in his separate concurring opinion, Justice Kennedy agreed that "the dichotomy between divisible and indivisible state criminal statutes is not all that clear" and suggested that the Court's decision would require state legislatures to amend their statutes to meet the Court's new divisibility requirement. Descamps, 133 S. Ct. at 2293-94 (Kennedy, J., concurring). He indicated that "[t]his is an intrusive demand on the States." Id. at 2294.

The relevant Virginia conviction for grand larceny in this case could have been obtained either by showing that the defendant wrongfully took property, which Judge Floyd notes would constitute a generic theft conviction, or by showing that the defendant fraudulently took property, which he notes would not constitute generic theft. One would think that whether the defendant was convicted of a wrongful taking or a fraudulent taking could appropriately be resolved by looking at the documents identified in Shepard v. United States, 544 U.S. 13 (2005). And this seems to have been the approach taken for years before Descamps. Yet Descamps now applies a confusing layer to this analysis that renders this area of the law unsatisfactorily amorphous by limiting the use of Shepard documents to distinguish elements but not means. Judge Floyd's analysis in this case is thus as good as any.

Were the Supreme Court willing to take another look at this area of law, it might well be persuaded, when focusing on the goals of the categorical approach, to simply allow lower courts to consider Shepard documents in any case where they could assist in determining whether the defendant was convicted of a generic qualifying crime. See, e.g., United States v. Gomez, 690 F.3d 194, 204 (4th Cir. 2012) (Niemeyer, J., dissenting) ("In determining what convictions qualify as a sentencing enhancement, courts [should be] authorized to use the modified categorical approach pragmatically whenever the approach yields an answer, in circumstances made ambivalent by an overbroad statute, to whether the prior conviction qualifies as a predicate conviction, so long as the use of the approach avoids 'subsequent evidentiary inquiries in the factual basis for the earlier conviction' and 'collateral trials'" (quoting Shepard, 544 U.S. at 20, 23)). It is difficult to find any downside to such a pragmatic approach. Moreover, such an approach would yield the same result here because no Shepard documents were available to show that Omargharib was convicted of a crime that qualifies as generic theft.