Loyola University Chicago Law Journal

Volume 47
Issue 2 *Winter 2015*

Article 10

2015

No Satisfaction: *Italicized:Mellouli v. Lynch* Rejects Deportation for Hidden Sock Pills

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Recent Development

No Satisfaction: *Mellouli v. Lynch* Rejects Deportation for Hidden Sock Pills

*Thai-Binh H. Tran**

On June 1, 2015, the Supreme Court held in *Mellouli v. Lynch* that a Kansas drug paraphernalia conviction failed to satisfy federal requirements for removability.[1] Federal statute permits removal[2] for any noncitizen violating a law related to a controlled substance as defined in the Controlled Substances Act ("CSA").[3] The 7–2 decision applied a strict categorical analysis to compare the Kansas and federal statutes concerning controlled substances.[4] Justice Ginsburg, writing for the majority, concluded that state drug paraphernalia crimes must link with a particular federal drug as defined in the CSA for removal under 8 U.S.C. § 1227(a)(2)(B)(i).[5] Because the Kansas schedules of

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1. Mellouli v. Lynch, 135 S. Ct. 1980, 1990 (2015). "Removability" is the legal term for the federal government's ability to deport a noncitizen. *See* Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229a(e)(2) (2012) (defining "removable" as "the case of an alien admitted to the United States" who is "deportable under section 1227 of this title."). This Recent Development uses "removability" and "deportability" interchangeably.

2. The United States Constitution provides that immigration law and deportation or removal actions are the exclusive province of the federal government. *See* U.S. CONST. art. I, § 8, cl. 3 (authorizing Congress "to regulate commerce with foreign nations" and among the states); *id.* § 8, cl. 4 (empowering Congress "to establish a uniform Rule of Naturalization"); *id.* § 9, cl. 1 (limiting immigration to persons "proper to admit").

3. 8 U.S.C. § 1227(a)(2)(B)(i) ("Any 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), . . . is deportable."). The Controlled Substances Act ("CSA"), 21 U.S.C. §§ 801–971 (2012), defines "controlled substance" as "a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of Part B of this subchapter." § 802(6).

4. *Mellouli*, 135 S. Ct. at 1987 ("The categorical approach has been applied routinely to assess whether a state drug conviction triggers removal under the immigration statute.").

5. *Mellouli*, 135 S. Ct. at 1990 ("[T]he Government must connect an element of the alien's

controlled substances included nine controlled substances not federally listed under the CSA, the Court found the Kansas statute categorically mismatched the federal counterpart, and as such, removal was not triggered.[6]

Yet *Mellouli* also left several issues unresolved. For example, the Court declined to address "divisible" state statutes—e.g., a statute with alternative elements that are divisible into separate crimes.[7] Divisible statutes permit a "modified" categorical analysis to show which crime formed the basis of conviction.[8] Moreover, while *Mellouli* rejected a drug paraphernalia ruling from the Board of Immigration Appeals ("BIA"),[9] the Court did not apply the BIA's recent "realistic probability" test.[10] Under the realistic probability test, a noncitizen's drug conviction could still trigger removability if the federally unlisted

conviction to a drug 'defined in [§ 802].'" (quoting § 1227(a)(2)(B)(i))).

6. *Id.* at 1984–88. Several recent Supreme Court cases have declined removal for certain drug crimes. *See, e.g.*, Moncrieffe v. Holder, 133 S. Ct. 1678 (2013) (conviction for possession of marijuana with intent to distribute is not an aggravated felony); Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010) (second offense for simple drug possession that is factually distinct from the first conviction is not an aggravated felony for removal under 8 U.S.C. § 1229b(a)(3)); Lopez v. Gonzales, 549 U.S. 47 (2006) (state felony drug conviction does not thereby make someone subject to removability, unless the conviction is also punishable as a federal felony).

7. *Id.* at 1987 n.4 ("Because the Government has not argued that this case falls within the compass of the modified categorical approach, we need not reach the issue.").

8. *See* Descamps v. United States, 133 S. Ct. 2276, 2286 (2013) (finding that only divisible statutes warrant a modified categorical approach and defining divisibility in terms of a statute with "elements" forming alternative crimes (in subsections or a disjunctive list), one of which does not trigger a federal consequence.). "Elements" are facts necessary for conviction; they require jury unanimity for a guilty verdict. *Id.* at 2284, 2286 n.3, 2290, 2296 (Alito, J., dissenting). The BIA and federal circuit courts, however, have differed in their interpretation of *Descamps*'s divisibility analysis. In *Matter of Chairez*, the BIA specifically defined divisibility in terms of jury unanimity, but on October 30, 2015, Attorney General Loretta Lynch issued an ordering staying *Chairez* and requesting amicus briefs on the issue of jury unanimity. *See Matter of Chairez*, 26 I. & N. Dec. 686 (A.G. 2015). Currently, each federal circuit's interpretation of *Descamps*'s divisibility analysis trumps BIA case law. *Matter of Chairez*, 26 I.& N. Dec. 478, 481–82 (B.I.A. 2015) (deferring to individual circuits' interpretations of divisibility under *Descamps*). While some circuit courts have followed *Chairez*'s emphasis on jury unanimity to prove divisibility, other circuits have differed, holding that statutes are divisible so long as they contain alternative statutory phrases, regardless of jury unanimity. *Compare* United States v. Rendon, 764 F.3d 1077, 1085–86 (9th Cir. 2014) (A statute is indivisible "if the jurors need not agree on which method of committing the offense the defendant used."), *with* United States v. Yang, 799 F.3d 750, 753 (7th Cir. 2015) (noting divisible statutes are ambiguous, containing imprecise "statutory phrases"), *and* United States v. Trent, 767 F.3d 1046, 1055 (10th Cir. 2014) (finding statutes containing alternative statutory phrases to be divisible).

9. Matter of Martinez Espinosa, 25 I. & N. Dec. 118 (B.I.A. 2009), *abrogated by Mellouli*, 135 S. Ct. 1980.

10. *Mellouli*, 135 S. Ct. at 1988 n.8 (stating that whether the BIA's *Matter of Ferreira*, 26 I. & N. Dec. 415 (B.I.A. 2014), correctly applied the law was "not a matter this case calls upon us to decide").

controlled substances are not realistically prosecuted.[11]

Despite these unanswered issues, the decision shows the vital immigration consequences stemming from statutory interpretation and categorical matching.[12] *Mellouli* relied on the "categorical approach" to assess removability under the Immigration and Nationality Act ("INA").[13] This approach employs an intricate matching of state and federal statutes.[14] A noncitizen is removable if the elements of the state conviction match the INA removal ground.[15] No extra-statutory evidence or underlying facts may be considered.[16] Instead, the approach looks to the conviction's statutory text, and presumes the conviction rested on the least of the acts criminalized by statute.[17]

If a conviction statute is divisible into multiple crimes involving removable and nonremovable conduct, the court may use a "modified categorical approach."[18] The modified categorical approach permits

11. *See, e.g.*, Matter of Chairez, 26 I. & N. Dec. 349, 355–57 (B.I.A. 2014) (explaining that the noncitizen bears the burden of proving a "realistic probability" that his statute is categorically overbroad, while the government bears the burden of proving divisibility for modified categorical analysis); *Ferreira*, 26 I. & N. Dec. at 419–22 (placing the burden on the alien to show a "realistic probability" that his conduct would fall outside of the CSA definition to "prevent the categorical approach from eliminating the immigration consequences for many State drug offenses, including trafficking crimes"); *see also* Moncrieffe v. Holder, 133 S. Ct. 1678, 1685 (2013) ("[T]here must be 'a realistic probability,' not a theoretical possibility" that the state would prosecute conduct outside the federal definition of a crime.'" (quoting Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007)).

12. *See generally* CHARLES GORDON, STANLEY MAILMAN & STEPHEN YALE-LOEHR, IMMIGRATION LAW AND PROCEDURE §§ 1.01–.02 (Matthew Bender & Co. Inc., Rev. Ed. 2014) ("Part of the complexity of immigration law is mechanical; it lies in the arrangement of provisions within the many-layered statute, and in the . . . various agencies that share in . . . administering . . . immigration law.").

13. *Mellouli*, 135 S. Ct. at 1986–88 ("The categorical approach 'has a long pedigree in our Nation's immigration law.'" (quoting *Moncrieffe*, 133 S. Ct. at 1685)).

14. *See generally* Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. REV. 1669 (2011); Jennifer Lee Koh, *The Whole Better than the Sum: A Case for the Categorical Approach to Determining the Immigration Consequences of Crime*, 26 GEO. IMMIGR. L.J. 257 (2012).

15. *Mellouli*, 135 S. Ct. at 1986 (citing *Moncrieffe*, 133 S. Ct. at 1684–85)).

16. *See generally* IRA J. KURZBAN, KURZBAN'S IMMIGRATION LAW SOURCEBOOK 227 (13th ed. 2012) (explaining how the categorical approach looks solely to the structure of a statute rather than underlying circumstances).

17. *Mellouli*, 135 S. Ct. at 1986–87 (the categorical approach focuses "on the legal question of what a conviction *necessarily* established"); *see also Moncrieffe*, 133 S. Ct. at 1684 (explaining that categorical analysis assumes the conviction rested on the least of the acts criminalized). *But see, e.g.*, Latu v. Mukasey, 547 F.3d 1070, 1076–80 (9th Cir. 2008) (O'Scannlain, J., dissenting) (criticizing the use of the categorical approach as "counter-intuitive" where the majority found that a hit-and-run statute was not a crime of moral turpitude for removability); Mary Holper, *The New Moral Turpitude Test: Failing* Chevron *Step Zero*, 76 BROOK. L. REV. 1241, 1301 (2011) (discussing how some courts have questioned the categorical approach as unduly formulaic because it requires adjudicators to "put on blinders" as to "what really happened").

18. *See supra* note 9 and accompanying text; *see also Moncrieffe*, 133 S. Ct. at 1684–85

examination of limited conviction documents to determine removability under the INA.[19] In *Mellouli*, however, because the government did not argue divisibility, the Court did not apply the modified categorical approach to Moones Mellouli's paraphernalia conviction.[20]

Mellouli, a Tunisian citizen, entered the United States on a student visa in 2004.[21] He later adjusted his status to a legal permanent resident and became engaged to a U.S. citizen.[22] In 2010, Mellouli was arrested for driving under the influence and for driving with a suspended license.[23] During a post-arrest search, deputies found four orange Adderall pills hidden in Mellouli's sock.[24] Mellouli admitted in an affidavit that he did not have a prescription for Adderall.[25] The prosecution charged Mellouli with use of drug paraphernalia—"to-wit: a sock, to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance."[26] He pleaded guilty to misdemeanor possession of paraphernalia in violation of section 21-5709(b) of Kansas statutes.[27] This Kansas statute does not identify a particular drug within its text, but rather generally proscribes "possess[ion] with intent to use any drug paraphernalia to . . . store . . . or conceal . . . a controlled substance."[28]

In 2012, U.S. Immigration and Customs Enforcement sought to deport Mellouli under 8 U.S.C. § 1227(a)(2)(B)(i).[29] This section

(explaining that if the statute broadly defines separate crimes without identifying which crime formed the alien's conviction, the court may look to the charging document, jury instructions, or plea agreement for instruction).

19. Permissible documents are those within the "record of conviction," also called the *Taylor–Shepard* documents, which include jury instructions, charging documents, plea agreement, and transcript of the plea colloquy. *See* Shepard v. United States, 544 U.S. 13, 26 (2005).

20. *See supra* note 8; Brief for the Respondent at 16–21, Mellouli v. Lynch, 135 S. Ct. 1980 (2015) (No. 13-1034).

21. *Mellouli*, 135 S. Ct. at 1984.

22. *Id.* at 1985. Mellouli obtained conditional permanent residence in 2009, and the conditions were lifted 2011. *Id.* For a general explanation of conditional permanent residence, *see Conditional Permanent Residence*, U.S. CITIZENSHIP & IMMIGR. SERVS., http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence (last updated Jan. 14, 2011).

23. *Mellouli*, 135 S. Ct. at 1985.

24. *Id.* Adderall is an amphetamine-based drug listed as a controlled substance under both federal and state law. *See* 21 C.F.R. § 1308.12(d)(1) (2014); KAN. STAT. ANN. § 65-4107(d)(1) (West 2015).

25. *Mellouli*, 135 S. Ct. at 1985. Mellouli's affidavit would not be a permissible document for consideration under the modified categorical analysis. *See supra* note 20 and accompanying text.

26. *Mellouli*, 135 S. Ct. at 1985; *see also* Brief for the Respondent, *supra* note 21, at 12.

27. *Mellouli*, 135 S. Ct. at 1984.

28. The statute does not identify a specific controlled substance. *See* KAN. STAT. ANN. § 21-5709(b) (West 2015).

29. *Mellouli*, 135 S. Ct. at 1985.

permits removal of any noncitizen "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*)."[30] An immigration judge ordered deportation, and Mellouli appealed to the BIA.[31] The BIA affirmed the immigration judge's order and Mellouli petitioned unsuccessfully for Eighth Circuit review.[32] Notably, circuit courts will generally defer to the BIA's reasonable interpretation of an ambiguous INA provision.[33]

In declining review of Mellouli's case, the Eighth Circuit deferred to the BIA's precedential decision on drug paraphernalia, *Matter of Martinez Espinoza*.[34] In *Martinez Espinoza*, the BIA analyzed drug paraphernalia crimes as being distinct from drug possession crimes.[35] The BIA found drug paraphernalia convictions to be deportable offenses, regardless of their link to federally controlled substances, because they "relate to" the "drug trade in general."[36] On the other hand, in *Matter of Paulus*, the BIA required state drug *possession* crimes to tie directly with federally controlled substances.[37] In *Paulus*, the BIA reasoned that the possession offenses at issue referred to a state's controlled substances in general but did not connect with

30. 8 U.S.C § 1227(a)(2)(B)(i) (2012) (emphasis added). The INA provides an exception to removability for a "single offense involving possession for one's own use of 30 grams or less of marijuana." *Id.*

31. *Mellouli*, 135 S. Ct. at 1985.

32. *Id.* The Attorney General has conferred the BIA with the power to provide, through precedent decisions, "clear and uniform guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations." 8 C.F.R § 1003.1(d)(1) (2015); *see also* BD. OF IMMIGRATION APPEALS, PRACTICE MANUAL ch. 1, at 1–3 (2014) (explaining the policies and functions of the BIA).

33. *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984) (establishing a two-step analysis on whether an entrusted agency interpretation is lawful). Under *Chevron*, a court will consider congressional intent, the ambiguity of the statutory language, and whether the agency adopted a permissible or reasonable interpretation. *Id.* If the statute is ambiguous, the court must defer to the agency's interpretation under the second step as long as it is a permissible construction of the statute. *See* Nat'l Cable & Telecomms. Ass'n. v. Brand X Internet Servs., 545 U.S. 967, 984–96 (2005) (clarifying that a permissible interpretation need not be the best interpretation); *see also* United States v. Mead Corp., 533 U.S. 218, 226 (2000) (holding that *Chevron* deference is proper "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation was promulgated in the exercise of that authority").

34. Mellouli v. Holder, 719 F.3d 995, 1000 (8th Cir. 2013), *rev'd sub nom. Mellouli*, 135 S. Ct. 1980; *see also Mellouli*, 135 S. Ct. at 1985.

35. Matter of Martinez Espinoza, 25 I. & N. Dec. 118, 120–22 (B.I.A. 2009)

36. *Mellouli*, 135 S. Ct. at 1988 (citing *Martinez Espinoza*, 25 I. & N. Dec. at 121).

37. Matter of Paulus, 11 I. & N. Dec. 274 (B.I.A. 1965)); *see also Mellouli*, 135 S. Ct. at 1987–89 (citing *Paulus*, 11 I. & N. Dec. 274) (explaining that if an alien's conviction record does not specify which narcotic was associated therewith, such a conviction for the sale or delivery of that substance will be insufficient for removal under the INA).

federally controlled substances.[38] Hence, the BIA imposed stricter federal correspondence for drug possession crimes than drug paraphernalia crimes.[39]

Considering the BIA's disparate frameworks, the Eighth Circuit noted that *Paulus* was a pre-1970 decision, before most states mapped their drug schedules according to the federal schedules.[40] Thus, to the Eighth Circuit, *Paulus* seemed unpersuasive in the post-1970 era where Kansas drug schedules aligned nearly perfectly with federal schedules.[41] The Eighth Circuit instead found there was only a theoretical (rather than a realistic) probability[42] that a drug offense would not involve a federal substance.[43] As such, the Eighth Circuit found Mellouli's conviction sufficiently related to a CSA controlled substance under *Martinez Espinoza*.

Reversing the Eighth Circuit's ruling, the Supreme Court held that *Martinez Espinoza* made "scant sense" and merited no deference.[44] The Court found that the decision skirted the INA's text mandating that the violation of law "relat[e] to a controlled substance" as defined by the CSA.[45] Applying *Paulus*, the Court held that Mellouli's conviction required overt relation to a federally controlled substance, rather than a vague reference to "controlled substances."[46] Accordingly, the Court declined removal, overruled *Martinez Espinoza*, and endorsed *Paulus*'s stricter categorical analysis.

The Court also rejected the Government's broad interpretation of the

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38. In *Paulus*, the BIA specifically stated that the broad California violation could include peyote, a drug not federally listed as a controlled substance. 11 I. & N. Dec. at 275.

39. *Compare Paulus*, 11 I. & N. Dec. 274, *with Martinez Espinoza*, 25 I. & N. Dec. at 120.

40. Mellouli v. Holder, 719 F.3d 995, 997 (8th Cir. 2013) (explaining that in 1970 the states adopted the Uniform Controlled Substances Act which was designed to complement the federal law and "provide an interlocking trellis of federal and state law") (quoting UNIF. CONTROLLED SUBSTANCES ACT (AMENDED 1994), 9 U.L.A. 5 (1990))).

41. The 8th Circuit stated:

> The BIA's conclusion is a reasonable interpretation of the term ''relating to,'' a term that reflects congressional intent to broaden the reach of the removal provision to include state offenses having ''a logical or causal connection'' to federal controlled substances. While the "map" may be imperfect, there is nearly a complete overlap between the definition of controlled substance in 21 U.S.C. § 802 and in the statutes of States such as Kansas that adopted the Uniform Controlled Substances Act.

Mellouli, 719 F.3d at 1000 (citation removed).

42. *See supra* note 12 and accompanying text.

43. *Mellouli*, 719 F.3d at 997.

44. Mellouli v. Lynch, 135 S. Ct. 1980, 1989 (2015) (explaining that because the BIA's interpretation "makes scant sense" it is owed no deference under the *Chevron* doctrine); *see also supra* note 34 and accompanying text.

45. *Id.*; *see also* 8 U.S.C. § 1227(a)(2)(B)(i) (2012).

46. *Mellouli*, 135 S. Ct.. at 1982–88 ("Mellouli's conviction . . . was not confined to federally controlled substances . . . as opposed to a substance controlled only under Kansas law.").

phrase "relating to" in Section 1227(a)(2)(B)(i).[47] The Government had argued that such expansive federal language reached state drug offenses notwithstanding minor variations in state law.[48] At the time of Mellouli's arrest only nine out of the 306 controlled substances under Kansas statutes were not federally listed.[49] Within a year of Mellouli's arrest, two of the nine unlisted substances became federally controlled.[50] The government contended that this significant overlap satisfied the INA's "relating to" requirement.[51] The government also observed that few states actually identify the controlled substance in their criminal statutes.[52] Hence, requiring the state offense to explicitly link with a federally listed drug would severely limit the removal provision.[53] Instead, the government argued that the INA's broad "relating to" language permits removal for state drug crimes without demanding precise correspondence between state and federal law.[54]

The Court rejected this "sweeping" interpretation that would allow deportation for any drug conviction bearing some general relation to a federally controlled substance.[55] The Court restricted the INA's "relating to" language to the parenthetical requiring that the controlled substance be "defined in" 21 U.S.C. § 802.[56] Such context required the government to directly link the noncitizen's conviction with a particular federally listed drug.[57] Accordingly, the Court held that the government had not established removability.[58]

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47. *Id.* at 1989–90; Brief for the Respondent, *supra* note 21, at 15–17.

48. Brief for the Respondent, *supra* note 21, at 15–17. The lower court similarly stated, "[i]f Congress wanted a one-to-one correspondence between the state laws and the federal [schedules], it would have used a word like 'involving' instead of 'relating to.'" *Mellouli*, 719 F.3d at 1000.

49. Brief for the Respondent, *supra* note 21, at 8. (citing KAN. STAT. ANN. § 65-4105(d)(30) (West 2010)).

50. *Id.* at 10.

51. *Id.* at 6–9.

52. *Id.* at 31 (arguing that States do not uniformly require identifying the substance to prove a criminal drug charge.); *see also* Brief Amici Curiae of the National Immigrant Justice Center & American Immigration Lawyers Ass'n in Support of Petitioner at 29, Mellouli v. Lynch 135 S. Ct. 1980 (2015) (No. 13-1034) (finding many states do not identify the substance involved in paraphernalia crimes).

53. Brief for the Respondent, *supra* note 21, at 30.

54. *Id.* at 39.

55. Mellouli v. Lynch, 135 S. Ct. 1980, 1990–91 (2015).

56. *Id.* Many removal provisions of the INA have "relating to" language without a limiting parenthetical. *See infra* notes 67–68 and accompanying text.

57. *Mellouli*, 135 S. Ct. at 1990 ("Congress and the BIA have long required a direct link between an alien's crime of conviction and a particular federally controlled drug."). A realistic probability analysis could potentially meet this "direct link" requirement. *See supra* 11–12, and accompanying text.

58. The government has the burden to establish removability by clear and convincing evidence. *See* 8 U.S.C. § 1229a(c)(3)(A) (2012).

Justice Thomas, joined by Justice Alito, dissented by challenging the majority's restrictive view of "relating to."[59] The dissent argued that the INA's statutory scheme supported a broad interpretation of the phrase.[60] As one example, the dissent offered, an adjacent provision allows removal for the sale of a weapon "*which is* a firearm . . . (as defined in section 921(a) of title 18)."[61] Such syntax suggests that when Congress requires more specificity for removal, it replaces "relating to" language with more restrictive language, such as "involving" or "which is."[62] The dissent further criticized the majority's emphasis on connecting an element of the conviction with a particular federal drug.[63] Such a view conflates an analysis of the conviction and its elements, with an analysis of state law and its relation to federal substances.[64] The dissent concluded that because state drug schedules often have minor deviations from the federal schedules, statutes generally referencing a "controlled substance" will now prompt removal only if the term is divisible into separately listed substances.[65]

Mellouli may ultimately lead to the termination of many removal cases in which the state drug paraphernalia statute refers generally to a "controlled substance" without naming a specific substance. It is unclear, however, whether *Mellouli*'s ruling applies to other INA provisions containing identical[66] or similar "relating to" language.[67]

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59. *Mellouli*, 135 S. Ct. at 1991–95 (Thomas, J., dissenting).

60. *Id.* at 1992 (explaining that the statute and its provisions indicate "that Congress understood this phrase to sweep quite broadly"); *see also* Brief for the Respondent, *supra* note 21, at 27–29 (finding that Congress did not use "relating to" in other removal provisions of the INA). *But see Mellouli*, 135 S. Ct. at 1988 n.9 (majority opinion) (explaining that the dissent "shrinks to vanishing point" the language within § 802).

61. *Mellouli*, 135 S. Ct. at 1992 (Thomas, J., dissenting) (citing 8 U.S.C. § 1227(a)(2)(C)).

62. *Id.* at 1993 ("[The surrounding provisions] 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.'"). *See generally* KURZBAN, *supra* note 17, at 226 (explaining how the term "involving" suggests necessity while "relating to" suggests the broadest sense).

63. *Mellouli*, 135 S. Ct. at 1993–94 (Thomas, J., dissenting).

64. *Id.* (contending that the majority did not properly account for the removal provision's text due to the fact that "it looks at whether the *conviction* itself necessarily involved a substance regulated under federal law" as opposed to "whether the state related to one").

65. *Id.* ("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 . . . its interpretation would mean that no conviction under a controlled-substances regime more expansive than the Federal Government's would trigger removal.").

66. *See, e.g.*, 8 U.S.C. § 1182(a)(2)(A)(i)(II) (containing identical language regarding the admissibility of a noncitizen into the United States). The noncitizen, however, bears the burden of proving their admissibility, while the government bears the burden of proving removability. *See id.* § 1229a(c)(2)(A) (requiring noncitizens seeking admission to establish that he or she is "clearly and beyond doubt entitled to be admitted").

67. The INA has a list of several "aggravated felonies" containing "relating to" language

Mellouli also seems to indicate that removal under Section 1227(a)(2)(B)(i) depends on the state and federal drug schedules *at the time* of the noncitizen's conviction, rather than at the time of arrest or initiation of removal proceedings.[68]

Lastly, adjudicators must grapple with the decision's unaddressed issues of divisibility and realistic probability.[69] *Mellouli* declined to address divisibility because the government had not raised the issue.[70] In contrast, the government raised a realistic probability analysis, but the Court merely referenced *Matter of Ferreira* without further consideration.[71] Thus, *Mellouli* may still permit use of this realistic probability test.[72]

Despite the decision's unanswered issues, *Mellouli* shows the mounting complexity of statutory interpretation in executing federal removal. Yet, clarity seems vital for a swollen immigration system with rising litigation and limited resources.[73] As such, whether the language

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without an "as defined in" parenthetical. *See, e.g.*, *id.* § 1101(a)(43)(K)(i) (an offense that relates to the owning, controlling, managing, or supervising of a prostitution business); *id.* § 1101(a)(43)(Q) (an offense relating to a failure to appear for sentence); *id.* § 1101(a)(43)(S) (an offense relating to obstruction of justice, perjury, or bribery of a witness); *id.* § 1101(a)(43)(T) (an offense relating to a failure to appear to answer to a felony).

68. *Compare Mellouli*, 135 S. Ct. at 1988 (majority opinion) (explaining that Kansas had nine substances not federally listed "[a]t the time of Mellouli's conviction"), *and id.* at 1993 (Thomas, J., dissenting) (noting that "at the time of Mellouli's conviction" three percent of Kansas's controlled substances were not federally listed), *with* Gousse v. Ashcroft, 339 F.3d 91, 99 (2d Cir. 2003) (holding that changes to the federal schedules subsequent to the date of conviction for the noncitizen are to be applied retroactively).

69. *See, e.g.*, Madrigal-Barcenas v. Lynch, 797 F.3d 643 (9th Cir. 2015). On remand from the Supreme Court, the Ninth Circuit held that while a drug paraphernalia crime may not categorically be a removable crime, the BIA must consider applying the modified categorical approach. *Id.* at 644–45.

70. Divisibility and a modified categorical analysis here would have failed to prove removability since Mellouli's conviction record did not identify Adderall as the controlled substance. *See supra* notes 8–9, 25–26, and accompanying text; *see also* Mellouli v. Holder, 719 F.3d 995, 999 (8th Cir. 2013) ("Here, the Kansas statutes and the only documents reflecting his Kansas conviction that may be considered in applying the modified categorical approach did not identify a particular controlled substance.").

71. Brief for the Respondent, *supra* note 21, at 39–40 n.6 ("This Court has explained that there must be a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct outside the definition of federal law . . . ."); *see supra* notes 11–12 and accompanying text.

72. *See supra* notes 11–12 and accompanying text.

73. *See, e.g.*, Press Release, Human Rights First, *TRAC Numbers Demonstrate Need for Immigration Court Funding to Address Worsening Backlogs* (Sept. 22, 2015) (covering a newly released report showing that half a million cases are pending before the U.S. Immigration Courts and characterizing the Immigration Courts as "overwhelmed and woefully under-resourced"); *see also* U.S. DEP'T OF HOMELAND SEC., ANNUAL REPORT: IMMIGRATION ENFORCEMENT ACTIONS: 2013, at 6 fig.2 (2014) (showing the increase of removals between 2004–13), http://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2013.pdf; David Noriega & Adolfo Flores,

of conviction satisfies removal is an urgent, rapidly evolving question the Court will continue to face.[74]

Immigration Courts Could Lose a Third of Their Interpreters, BUZZFEED NEWS (Oct. 5, 2015 1:19 PM), http://www.buzzfeed.com/davidnoriega/immigration-courts-could-lose-a-third-of-their-interpreters#.cdO50mpG0D.

74. On November 3, 2015, the Supreme Court heard oral arguments on whether a state arson offense is removable conduct depending on the broadness of the phrase "described in" under 8 U.S.C. § 1101(a)(43) (2012). *See* Torres v. Holder, 764 F.3d 152 (2d Cir. 2014) (finding a New York arson offense is a removable aggravated felony because the phrase "described in" does not require exact state-federal matching), *cert. granted sub nom.* Torres v. Lynch, 135 S. Ct. 2918 (2015).