No. 09-60

IN THE
Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The question presented is:

Whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

PARTIES TO THE PROCEEDING

Petitioner is Jose Angel Carachuri-Rosendo, petitioner below.

Respondent is United States Attorney General Eric H. Holder, Jr., respondent below.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Fifth Circuit is reported at 570 F.3d 263 and reprinted at Pet. App. 1-10. The decision of the Board of Immigration Appeals, which heard the matter en banc, is reported at 24 I. & N. Dec. 382 and reprinted at Pet. App. 11-69. The decision of the Immigration Judge is unreported and reprinted at Pet. App. 70-75.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2009. Pet. App. 1. The petition for a writ of certiorari was filed on July 15, 2009, and granted on December 14, 2009. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant statutes are reproduced in the appendix to this brief. App., *infra*, 1-10.

STATEMENT OF THE CASE

A. Statutory Background

1. The Immigration and Nationality Act (INA), 8 U.S.C. § 1101 et seq., establishes the framework under which non-citizens may enter and remain in the United States, and also sets forth the conditions under which non-citizens may be removed from the country. As to the latter, an alien who has been convicted of a violation of any state or federal law "relating to a controlled substance" (except for a single offense involving possession of a small quantity of marijuana) may be removed from the United States. 8 U.S.C. § 1227(a)(2)(B)(i). Notwithstanding such a conviction, certain lawful permanent resident aliens may apply to the Attorney General for discretionary cancellation of removal. *Id.* § 1229b(a). Such persons, however, are categorically ineligible for discretionary cancellation of removal if they have been "convicted of any aggravated felony." *Id.* § 1229b(a)(3).[1]

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[1] An alien convicted of an aggravated felony is subject to a number of other adverse consequences. For example, a conviction for an aggravated felony renders an alien ineligible for asylum, *id.* §§ 1158(b)(2)(A)(ii), (b)(2)(B)(i), presumptively barred from withholding of removal, *id.* § 1231(b)(3)(B)(ii), and ineligible for voluntary departure, *id.* § 1229c(a)(1). An aggravated-felony conviction also serves as a permanent bar to reentering the country, *id.* § 1182(a)(9)(A)(i)-(ii), and increases the maximum sentence for illegal reentry by a factor of ten. *Compare id.* § 1326(a) (setting statutory maximum penalty at two years for an illegal reentrant), *with id.* § 1326(b) (setting

The INA sets forth a list of offenses that constitute aggravated felonies. *See* 8 U.S.C. § 1101(a)(43). Of particular salience, the INA defines "aggravated felony" to include "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of title 18)." *Id.* § 1101(a)(43)(B). Section 924(c) in turn defines the term "drug trafficking crime" as, *inter alia*, "any *felony* punishable under the Controlled Substances Act [CSA]." 18 U.S.C. § 924(c)(2) (emphasis added). That definition applies regardless of whether the offense is "in violation of Federal or State law." 8 U.S.C. § 1101(a)(43)(B).

2. The CSA makes it a crime to "knowingly or intentionally . . . possess a controlled substance" without a prescription. 21 U.S.C. § 844(a). Simple possession of a controlled substance under Section 844(a) is ordinarily a misdemeanor punishable by "a term of imprisonment of not more than 1 year." *Id.*; *see* 18 U.S.C. § 3559(a)(6) (classifying an offense carrying a maximum term of imprisonment of "one year or less but more than six months[] as a Class A misdemeanor"). Because simple possession ordinarily constitutes a misdemeanor under the CSA, that offense, standing alone, fails to constitute an "aggravated felony" for purposes of the INA.

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statutory maximum penalty at twenty years for an illegal reentrant with an aggravated-felony conviction). In addition, such a conviction dramatically increases the base offense level under the Sentencing Guidelines. *See* U.S.S.G. § 2L1.2 (providing for an 8-level increase in the base offense level for illegal reentry for an alien with a conviction for an aggravated felony).

Under the CSA, when a person possesses a controlled substance after a prior conviction for a drug offense under federal or state law has become final, the prosecutor has the option of seeking a recidivist enhancement. A recidivist enhancement, if established, would convert misdemeanor simple possession into a felony. 21 U.S.C. §§ 844, 851. The CSA prescribes, however, that no defendant may be made subject to a recidivist enhancement unless the prosecutor files an information with the court setting forth any previous convictions on which the government seeks to rely, and unless the defendant has an opportunity to challenge the government's reliance on the alleged prior convictions, including by challenging the validity of the prior convictions if they occurred within the preceding five years. *Id.* § 851.

If the prosecutor follows the required steps and the court concludes that the defendant is subject to the recidivist enhancement by reason of a prior drug conviction, the defendant may be sentenced "to a term of imprisonment for not less than 15 days but not more than 2 years." 21 U.S.C. § 844(a); *see also id.* § 851(d). A conviction for recidivist possession constitutes a felony under the CSA. *See* 18 U.S.C. § 3559(a)(5) (classifying an offense carrying a maximum term of imprisonment of "less than five years but more than one year[] as a Class E felony").

B. Factual Background

1. Petitioner was born in Mexico and immigrated to the United States with his parents. J.A. 52. He later became a lawful permanent resident, and has worked as a carpet installer from the time he was seventeen years old. *Id.* at 52, 79, 109. Petitioner is engaged to a U.S. citizen, with whom he has four

children, each also a U.S. citizen. *Id.* at 76-77; A.R. 527-35. In addition, petitioner's mother and two sisters live in the United States. J.A. 72-74. Petitioner has no family in Mexico, and before the government removed him from the country, petitioner had made no visits to Mexico since childhood. *Id.* at 89-90.

2. In October 2004, petitioner was arrested in Harris County, Texas, for possession of less than two ounces of marijuana, a Class B misdemeanor under Texas law. Tex. Health & Safety Code Ann. § 481.121(b)(1); *see also* J.A. 17. Petitioner waived his right to a jury trial and pleaded guilty to the offense. *Id.* at 19-20. The court sentenced petitioner to 20 days of confinement. *Id.* at 20.

In November 2005, petitioner pleaded *nolo contendere* to possession of a controlled substance without a prescription, a Class A misdemeanor under Texas law, based on his possession of one tablet of Xanax. Tex. Health & Safety Code Ann. §§ 481.104(a)(2), 481.117(b); *see also* Pet. App. 2; J.A. 86-87. Texas's recidivist laws punish second or subsequent offenses more harshly than first offenses if the prior offense is a class A misdemeanor or more serious offense. But because petitioner's prior conviction for possession of marijuana was only a Class B misdemeanor, it could not be used as the basis for a recidivist charge under Texas Law. *See* Tex. Penal Code § 12.43. While petitioner also had a prior conviction for Class A misdemeanor assault that could have served as the basis for a recidivist charge, the state prosecutor elected to forgo seeking a recidivist enhancement based on that conviction. J.A. 32 (handwritten note to "[a]bandon enhancement"). The state court sentenced petitioner to 10 days of confinement. *Id.*

C. Proceedings Below

1. On September 14, 2006, the federal government issued petitioner a Notice to Appear, charging that he was removable from the United States based on his misdemeanor drug conviction for possessing a controlled substance (Xanax) without a prescription. J.A. 52. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (authorizing removal based on any drug offense other than a single offense of possessing a small quantity of marijuana). The immigration judge (IJ) found that petitioner was subject to removal based on his conviction of a controlled substance violation, but advised petitioner that he was eligible to apply for discretionary cancellation of removal pursuant to 8 U.S.C. § 1229b(a). The IJ continued the hearing to enable petitioner to file an application for cancellation of removal. J.A. 60-61.

While petitioner's immigration proceedings were pending, this Court issued its decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006). *Lopez* considered the circumstances in which a state-law drug possession offense qualifies as a "drug-trafficking crime"—and hence an "aggravated felony"—under the INA. *Id.* at 50. *Lopez* addressed, in particular, whether a state drug possession offense "made a felony under state law but a misdemeanor under the Controlled Substances Act is a 'felony punishable under the Controlled Substances Act,'" and thus is a "drug-trafficking crime" for purposes of the INA's definition of "aggravated felony." *Id.* (quoting 18 U.S.C. § 924(c)). The Court found it irrelevant whether state law makes possession a felony, holding instead that the salient question is whether the state offense "proscribes conduct punishable as a felony under"

the CSA. *Id.* at 60. A contrary conclusion, the Court explained, "would often turn simple possession into trafficking" whenever a state deemed simple possession a felony rather than a misdemeanor. *Id.* at 54. That result, the Court concluded, would be inconsistent "with any commonsense conception of 'illicit trafficking.'" *Id.* at 53. Because Lopez's state law conviction for simple possession failed to constitute a felony under the CSA, the offense did not qualify as an "aggravated felony" under the INA. Lopez thus retained eligibility to seek cancellation of removal. *See id.* at 52.

On December 12, 2009—one week after this Court issued its decision in *Lopez*—the IJ held a final hearing to consider petitioner's application for cancellation of removal. On December 19, 2006, the IJ issued a written order finding petitioner removable because of his conviction for possession of Xanax. Pet. App. 72-75. The IJ denied petitioner's application for cancellation of removal without addressing its merits. The IJ concluded that petitioner's conviction for simple possession constituted conviction of an aggravated felony, thus rendering petitioner ineligible for cancellation. The IJ reasoned that petitioner's conviction for simple possession would have the "potential" to give rise to a felony sentence under the CSA if petitioner had been federally charged with, and convicted of, recidivist possession. *Id.* at 73.

2. Petitioner filed a timely appeal of the IJ's decision with the Board of Immigration Appeals (BIA). The BIA described the issue as "whether, under *Lopez v. Gonzales*, a second State drug possession offense committed after the first such offense has become final constitutes an aggravated felony, not-

withstanding that the second offense did not charge the alien as a recidivist or otherwise allow the alien to challenge the validity of the first conviction." A.R. 247 (citation omitted).

The BIA heard the case en banc, observing that the case presented an appropriate "vehicle for articulating [the BIA's] analytical approach to the 'recidivist possession' issue." Pet. App. 12, 22 n.5. The BIA explained that, under this Court's decision in *Lopez*, an alien convicted of a state offense could be considered "convicted" of an "aggravated felony" under the INA only if the offense conduct would have been punishable as a felony under federal law. *Id.* at 14-15. The BIA concluded that a state conviction for drug possession could be deemed punishable as a felony under federal law due to recidivism only if "the State offense corresponds in a meaningful way to the essential requirements that must be met before a felony sentence can be imposed under Federal law on the basis of recidivism." *Id.* at 26.

The BIA thus determined that a state possession conviction fails to qualify as an aggravated felony based on recidivism "unless the State successfully sought to impose punishment for a recidivist drug conviction"—that is, unless the defendant's "status as a recidivist" was "admitted or determined by a court or jury within the prosecution for the second drug [possession] crime." Pet. App. 27-28. In so holding, the BIA observed that the Department of Homeland Security (DHS) had initially objected to that approach, but had "modified its position" after argument and "concede[d] that a conviction arising in a State that has drug-specific recidivism laws cannot be deemed a State-law counterpart to 'recidi-

vist possession' unless the State actually used those laws to prosecute the [defendant]." *Id.* at 26.

The BIA noted that the Fifth and Seventh Circuits had adopted a contrary view. Pet. App. 17-18, 28-29 (discussing *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), and *United States v. Pacheco-Diaz*, 506 F.3d 545, 548-49 (7th Cir. 2007)). While the BIA stated that the Fifth Circuit "may want to reexamine its law in the wake of *Lopez*," it concluded that it was compelled to defer to the court in resolving petitioner's case. *Id.* at 21. Accordingly, even though the BIA believed that petitioner "ha[d] not been convicted of an aggravated felony" and should be eligible for cancellation of removal, the BIA was "constrained" to affirm the IJ's decision. *Id.* at 28-29. "[I]n the absence of controlling circuit law," however, the BIA determined that its approach would govern the issue. *Id.* at 22.

3. The court of appeals affirmed. Pet. App. 1-10. The court concluded that its pre-*Lopez* decision in *Sanchez-Villalobos*, and its post-*Lopez* decision in *United States v. Cepeda-Rios*, 530 F.3d 333 (5th Cir. 2008), "control[led]" the case. *Id.* at 4. Under those decisions, conviction of a state drug possession offense constitutes conviction of an aggravated felony for purposes of the INA if the offense is an alien's "second possession offense" and it "therefore[] could have been punished as a felony under the CSA's recidivism provision"—even if no recidivism charge in fact was brought and no recidivism finding in fact was made. *Id.* at 4-5.

SUMMARY OF ARGUMENT

Under the INA, an alien who has "been convicted" of an aggravated felony is categorically ineligible to seek discretionary cancellation of removal. 8 U.S.C. § 1229b(a)(3). The issue in this case is whether petitioner was "convicted" of an aggravated felony by virtue of his conviction for possessing a controlled substance (Xanax) without a prescription. The answer is no. Simple possession of drugs is generally a misdemeanor, not a felony. While drug possession can rise to a felony when a defendant is convicted of recidivist possession based on a prior conviction, there was no charge or finding of recidivism when petitioner was convicted for possessing Xanax. Even if, as the Government contends, petitioner *could have been* convicted of recidivist possession had additional charges and findings been made, the statute prescribes mandatory removal only of persons who have "been convicted" of an aggravated felony, not of any person who "could have been convicted" of an aggravated felony.

A. An alien has been "convicted" of felony recidivist possession only if, unlike here, the convicting court made a finding of recidivism. The INA defines "aggravated felony" to include "illicit [drug] trafficking," and defines "illicit trafficking" to include "any felony punishable under the [CSA]." 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). As this Court explained in *Lopez*, a state law drug offense constitutes a "felony punishable under the [CSA]" if the state offense "proscribe[s] conduct punishable as a felony under [the CSA]." 549 U.S. at 60. The Court emphasized that, because the overarching category is "illicit trafficking," and because drug possession fails to constitute "trafficking" as a matter of ordi-

nary meaning, a possession offense could constitute the aggravated felony of illicit trafficking only in the event of a "clear statutory command" coercing that conclusion. *Id.* at 55 n.6.

Here, there is no such "clear statutory command" coercing the conclusion that petitioner's conviction for possessing Xanax constituted a conviction for felony recidivist possession. To the contrary, the INA defines a "conviction" to mean "a formal judgment of guilt . . . by a court." 8 U.S.C. § 1101(a)(48)(A). The state court formally judged petitioner guilty of simple possession of a controlled substance. The court made no determination—much less a "formal judgment"—that petitioner had a prior drug conviction when he committed the possession offense. Accordingly, petitioner was "convicted" only of simple possession, a federal law misdemeanor, not recidivist possession, a federal law felony.

That conclusion is underscored by examining what would have happened to petitioner in an analogous federal prosecution. If petitioner had been charged in federal court with simple possession of Xanax and had pleaded guilty to that charge, he would be eligible only for a misdemeanor sentence. Under the approach of the court of appeals below, however, an *IJ* could *later* determine that petitioner in fact had a prior drug possession conviction, and on that basis could transform petitioner's misdemeanor conviction into a felony for purposes of the INA on the theory that he *could have been* charged with recidivist possession. There is no merit to that approach. The INA directs attention to whether a person has "been convicted" of an aggravated felony, not whether he "could have been convicted" of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3).

The treatment of other felony possession offenses reinforces the point. Federal law separately criminalizes simple possession of drugs, a misdemeanor, and possession of drugs with intent to distribute them, a felony. Certain states, however, lack any separate offense of possession with intent to distribute, and instead tie the penalty for possession to the quantity of drugs possessed. This Court has explained that a person convicted of possession in such a state would be treated for INA purposes as having been convicted of misdemeanor simple possession, even if the quantity of drugs possessed was substantial. Just as an IJ could not subsequently find that an alien *could have been* prosecuted for possession with intent to distribute, an IJ cannot subsequently find here that an alien could have been prosecuted for recidivist possession.

The Government suggests that, because recidivism fails to constitute an offense element for constitutional purposes, recidivism need not have been found by the convicting court here and instead could be later found by an IJ. The question whether recidivism is an offense element for *constitutional* purposes, however, has no bearing on the *statutory* issue presented here. The INA's requirement that a person have been "convicted" of recidivist possession calls for a finding of recidivism by the convicting court, regardless of whether the fact of recidivism may be considered a non-element for constitutional purposes. In any event, even assuming, *arguendo*, that the INA treats as an aggravated felony only a drug offense whose elements render it a felony, simple possession would *never* qualify as an aggravated felony on that understanding because the elements alone constitute a misdemeanor.

B. While the absence of a finding of recidivism by the convicting court alone suffices to establish that petitioner was not convicted of an aggravated felony, his state offense fails to qualify for the additional reason that it lacked the essential features required for the conduct to be "punishable as a felony" under the CSA. *See Lopez*, 549 U.S. at 60. The CSA prescribes that a defendant may not be convicted of recidivist possession unless the prosecution files an information setting forth the prior convictions relied on by the government, and unless the defendant has an opportunity to challenge the prior convictions on which the prosecutor intends to rely. 21 U.S.C. § 851. In order for a state possession conviction to qualify as an aggravated felony on the basis that it is analogous to the CSA offense of recidivist possession, the state conviction must contain those essential features of the federal scheme.

The Government's effort to discount those features as "procedural" is unpersuasive and irrelevant. The requirement of a prosecutorial screen embodies a substantive judgment by Congress to refrain from treating every drug possessor with a prior conviction as a felon, and instead to rely on the experience and judgment of prosecutors to determine when felony treatment as a recidivist is warranted based on the individual's circumstances. Similarly, the requirement to afford the defendant an opportunity to challenge the validity of prior convictions relied on by the government constitutes a substantive determination by Congress that invalid convictions should play no role in assessing whether a defendant is a recidivist. At any rate, regardless of whether those features are characterized as "procedural" or "substantive," they are necessary components of any state law offense

deemed to be analogous to recidivist possession under the CSA because they are absolute preconditions to a federal conviction for recidivist possession.

C. The court of appeals' interpretation, by categorically denying eligibility for cancellation of removal to persons convicted of simple drug possession, unnecessarily visits harsh consequences on lawful permanent resident aliens who have extensive ties to the country. Conversely, preserving petitioner's ability to seek cancellation of removal would not disserve the government's legitimate interests in removing criminal aliens. It would grant petitioner no automatic entitlement to remain in the country, but instead would merely afford petitioner and similarly situated aliens an opportunity to apply for discretionary relief from removal. In considering whether to grant discretionary relief, the Attorney General would remain free to consider any prior convictions, whether or not found by the convicting court.

D. Finally, while the terms of the INA demonstrate that petitioner was not "convicted" of an aggravated felony, principles of lenity would dictate resolving any lingering ambiguities on the matter in petitioner's favor. Ambiguities in immigration statutes are resolved in favor of the alien, and ambiguities in criminal statutes—including, as here, statutes with criminal and non-criminal applications—are resolved in favor of the defendant. Both of those lenity principles apply here.

ARGUMENT

A PERSON CONVICTED OF SIMPLE POSSESSION OF DRUGS, WITH NO CHARGE OR FINDING OF RECIDIVISM IN THE CONVICTING COURT, HAS BEEN CONVICTED OF A MISDEMEANOR RATHER THAN AN AGGRAVATED FELONY

The INA bars the grant of discretionary cancellation of removal to any alien who has "been convicted of an[] aggravated felony," including "any felony punishable under the [CSA]." 8 U.S.C. § 1229b(a)(3); *id.* § 1101(a)(43)(B); 18 U.S.C. § 924(c). The statute's prescription of mandatory removal for an alien convicted of an aggravated felony applies not only to an alien convicted of a federal drug felony, but also to an alien convicted of a state drug offense corresponding to a federal felony. *See Lopez v. Gonzales*, 549 U.S. 47; 8 U.S.C. § 1101(a)(43)(B) ("[T]he term [aggravated felony] applies to an offense . . . whether in violation of Federal or State law[.]"). In particular, an alien convicted of a state drug offense is subject to mandatory removal if the state offense at issue "proscribes conduct punishable as a felony under" the CSA. *Lopez*, 549 U.S. at 60. Conversely, "[u]nless a state offense is punishable as a federal felony it does not count." *Id.* at 55.

The issue in this case thus is whether petitioner has "been convicted of an[] aggravated felony," 8 U.S.C. § 1229b(a)(3)—*i.e.*, of "conduct punishable as a felony under" the CSA, *Lopez*, 549 U.S. at 60. He has not. Petitioner was convicted under state law of simple possession of a controlled substance without a prescription, conduct punishable as a misdemeanor under federal law. 21 U.S.C. § 844(a); *see Lopez*, 549

U.S. at 53 ("Mere possession is not . . . a felony under the federal CSA."). There was no charge or finding in petitioner's state proceeding that he committed simple possession "after a prior conviction under" a federal or state drug law had "become final"—a finding that, had it been made, could have rendered petitioner convicted of recidivist possession, a federal law felony. 21 U.S.C. § 844(a). The court of appeals nonetheless held that petitioner's conviction for simple possession subjected him to mandatory removal because an *IJ subsequently* found that petitioner in fact had a prior drug conviction when he committed his simple possession offense, and that petitioner therefore *could have been* prosecuted for—and convicted of—the federal felony of recidivist possession.

That holding cannot be squared with the text of the INA. The statute prescribes the mandatory removal only of an alien who has "been convicted of an[] aggravated felony," 8 U.S.C. § 1229b(a)(3), not of any alien who "could have been convicted" of an aggravated felony had additional charges and findings been made. Because petitioner was prosecuted for, and found guilty of, simple possession, a federal law misdemeanor—not recidivist possession, a federal law felony—he retains eligibility to seek discretionary cancellation of removal.

A. A Person Has Been "Convicted" Of The Aggravated Felony Of Recidivist Possession Only If The Convicting Court Made A Finding Of Recidivism

1. A drug possession offense constitutes the aggravated felony of drug "trafficking" only if, unlike here, the statute compels that reading

Petitioner may seek cancellation of removal unless he has been "convicted of" an "aggravated felony." 8 U.S.C. § 1229b(a)(3). The INA defines an "aggravated felony" to include "illicit [drug] trafficking," and in turn defines "illicit trafficking" to include "any felony punishable under the [CSA]." *Id.* § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). As this Court emphasized in *Lopez*, because "the term ultimately being defined" is "illicit trafficking," the "everyday understanding of 'trafficking' should count for a lot" when assessing whether a person has been convicted of an "aggravated felony." 549 U.S. at 53.

This case concerns the circumstances in which a person may be deemed convicted of the felony of "recidivist possession." *Lopez*, 549 U.S. at 55 n.6. Drug possession offenses, including recidivist possession, fail to constitute drug "trafficking" as a matter of ordinary meaning. As the Court explained in *Lopez*, "ordinarily 'trafficking' means some sort of commercial dealing," and commerce "certainly . . . is no element of simple possession." *Id.* at 53-54. The Court observed in a footnote that "Congress did counterintuitively define some possession offenses as 'illicit trafficking'"—including "recidivist possession"—notwithstanding the anomaly of treating possession as "trafficking." *Id.* at 55 n.6. But the Court made clear that, to the extent the INA required concluding

that certain possession offenses qualify as "trafficking," the INA could be read to "override ordinary meaning" in that manner only in the event of a "clear statutory command" that "coerce[s]" the "inclusion" of a possession offense "in the definition of 'illicit trafficking.'" *Id.*

Here, there is no "clear statutory command" coercing the conclusion that petitioner's conviction for drug possession should be treated as a conviction for the aggravated felony of illicit trafficking on the basis that he could have been (but was not) found guilty of recidivism. To the contrary, as we explain next, the INA's textual requirement of a felony "conviction" establishes a "clear statutory command" compelling the opposite conclusion.

2. The INA's terms establish that a conviction for felony recidivist possession requires a finding of recidivism by the convicting court

a. Under the terms of the INA, a person is subject to mandatory deportation based on a drug offense if he has been "*convicted of*" conduct punishable as a felony under the CSA. 8 U.S.C. § 1229b(a)(3) (emphasis added); *see Lopez*, 549 U.S. at 60. The INA defines the pivotal term "conviction," in pertinent part, as "a formal judgment of guilt . . . by a court." 8 U.S.C. § 1101(a)(48)(A).[2]

[2] When a formal judgment of guilt has been withheld—*i.e.*, when a court defers issuing a judgment of guilt pending a probationary period, *e.g.,* 18 U.S.C. § 3607—the INA provides an alternative definition of a conviction: "where . . . a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt," and "the judge has ordered some

The INA therefore prescribes a straightforward test for determining whether a person with a state law drug conviction has been "convicted" of "conduct punishable as a felony under [the CSA]." *Lopez*, 549 U.S. at 60. First, the IJ must identify the conduct as to which the convicting court rendered "a formal judgment of guilt." 8 U.S.C. § 1101(a)(48)(A). Then, the IJ must determine whether that conduct of conviction is punishable as a felony under the CSA.

With "few exceptions, the CSA punishes drug possession offenses as misdemeanors"—"that is, by one year's imprisonment or less"—rather than as felonies. *Lopez*, 549 U.S. at 54 n.4; *see also id.* at 53 ("[T]he CSA punishes possession, albeit as a misdemeanor."); 21 U.S.C. § 844(a). One such exception is for "recidivist possession," *Lopez*, 549 U.S. at 55 n.6, which arises under the CSA if the defendant commits drug possession "after a prior conviction . . . for any drug, narcotic, or chemical offense . . . has become final," in which event the defendant faces a felony sentence of up to two years of imprisonment. 21 U.S.C. § 844(a). Other exceptions in which the CSA punishes possession as a felony include possession of five or more grams of cocaine base, and possession of flunitrazepam (commonly known as a date-rape drug). *Id.*; *see Lopez*, 549 U.S. at 54 n.4.

b. In this case, the state court formally judged petitioner guilty of simple possession of a controlled substance. J.A. 31. The court made no determination—much less a "formal judgment," 8 U.S.C. § 1101(a)(48)(A)—that petitioner committed his pos-

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form of punishment, penalty, or restraint on the alien's liberty to be imposed." 8 U.S.C. § 1101(a)(48)(A)(1). That alternative definition has no bearing when, as here, the convicting court does not withhold or defer a formal judgment of guilt.

session offense "after a prior conviction under" a federal or state drug law had "become final." 21 U.S.C. § 844. Petitioner therefore was "convicted" of simple drug possession, a federal law misdemeanor. He was not convicted of recidivist possession, a federal law felony. Accordingly, while petitioner was subject to removal based on his conviction of a drug offense, 8 U.S.C. § 1227(a)(2)(B)(i), he retained eligibility to seek discretionary cancellation of removal, *id.* § 1229b(a)(3).

In reaching a contrary conclusion, the court of appeals failed to address the significance of the INA's requirement that petitioner must have "been convicted" of conduct punishable as a federal drug felony. 8 U.S.C. § 1229b(a)(3). Instead, as the BIA explained, the court of appeals allowed the IJ "to collect" two simple possession convictions, each punishable as a federal law misdemeanor, "bundle them together for the first time in removal proceedings, and then declare the resulting package to be 'an offense' that *could have been* prosecuted as a Federal felony." Pet. App. 30 (emphasis added).

The INA, as the BIA correctly concluded, does not countenance that result. The INA does not subject to mandatory removal a person who has been convicted of two or more misdemeanor drug offenses. Nor does the INA subject to mandatory removal a person whose conduct "could have been prosecuted as a Federal felony." Pet. App. 30. Instead, it subjects to mandatory removal a person who has been "convicted" of conduct punishable as a felony under the CSA. 8 U.S.C. § 1229b(a)(3); *see Lopez*, 549 U.S. at 60. That statutory standard requires, as a precondition to mandatory removal, a "formal judgment" by the state convicting court not only that pe-

titioner possessed a controlled substance, but also that he did so after he had been previously convicted of a drug offense. *See* 8 U.S.C. § 1101(a)(48)(A); 21 U.S.C. § 844(a). Because the state convicting court made no such finding of recidivism, petitioner was not convicted of an aggravated felony.

The courts of appeals that have focused on the INA's "conviction" requirement have recognized that a person is not subject to mandatory removal merely because an IJ finds that he could have been prosecuted for a drug felony. As one of those courts explained, the INA requires "an actual conviction for an offense that proscribes conduct that is punishable as a federal felony, not a conviction that *could* have been obtained *if* it had been prosecuted." *Alsol v. Mukasey*, 548 F.3d 207, 215 (2d Cir. 2008); *see also Rashid v. Mukasey*, 531 F.3d 438, 445 (6th Cir. 2008) (statutory question is "whether the crime that an individual was *actually convicted of* would be a felony under federal law," not "what federal crimes an individual could hypothetically have been charged with").

The contrary conclusion of the Fifth Circuit below cannot be squared with the INA's textual requirement of a conviction of an aggravated felony. The court below erroneously drew a fundamental distinction between (i) a person convicted of simple possession who has no prior drug conviction, and (ii) a person convicted of simple possession who has a prior drug offense that was never introduced, charged, or found in the proceedings before the convicting court. The court of appeals below would treat the former as convicted of a misdemeanor and the latter as convicted of an aggravated felony, even though, from the perspective of the statutory definition of "conviction,"

both persons would have a "formal judgment of guilt" of exactly the same conduct—*i.e.*, simple possession. 8 U.S.C. § 1101(a)(48)(A). Because both persons would have been "convicted" of the same conduct, there is no statutory basis for drawing a salient distinction between them.

c. An examination of what would have happened to petitioner in a corresponding federal law prosecution illuminates the fundamental flaws in the approach of the Fifth Circuit below. If petitioner had been prosecuted under 21 U.S.C. § 844(a) for simple possession of a controlled substance and had pleaded guilty to that offense, and if there had been no finding by the convicting court that petitioner had a prior drug conviction, he indisputably would stand convicted only of misdemeanor simple possession because any term of imprisonment could not exceed one year. *Id.* While petitioner would be ineligible for a sentence exceeding one year of imprisonment, the Fifth Circuit below nonetheless would deem him to have been "convicted" of a felony on the theory that he could have been charged with, and convicted of, recidivist possession. The court below would conclude, in short, that a person convicted of a federal misdemeanor was convicted of a federal felony because he could have been prosecuted for a federal felony, even though he was not. To state that proposition is to confirm its indefensibility.

Indeed, when this case was before the BIA, the DHS evidently changed its position on the question presented because it could not defend that result. Initially, the DHS took the position that a state conviction for simple possession constitutes an aggravated felony whenever an alien "has a criminal history that *could have* exposed him to felony treatment

had he been prosecuted federally." Pet. App. 26. But the DHS changed its position after oral argument before the BIA, evidently based on concerns that its initial position logically would result in "a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been used* as the basis for a recidivist enhancement." *Id.* at 27.

As the DHS apparently recognized, there is no basis under the INA for distinguishing between (i) a *federal* conviction for simple possession of a controlled substance where there has been no formal judgment of recidivism and (ii) a *state* conviction for simple possession where there has been no such formal judgment. Rather, the requirement of a "conviction" of a federal drug "felony" applies equally to both state and federal offenses. *See* 8 U.S.C. §§ 1229b(a), 1101(a)(43)(B) (incorporating 18 U.S.C. § 924(c)(2)). Indeed, Congress specifically amended the INA to make the definition of aggravated felony "appl[y] . . . whether in violation of Federal or State Law." *Id.* § 1101(a)(43). As this Court explained in *Lopez*, one purpose of that amendment was to ensure that state crimes "analogous" to a federal felony receive the same treatment under the INA. *See* 549 U.S. at 57 & n.8.

Consequently, insofar as a federal conviction for recidivist possession is an aggravated felony subjecting an alien to mandatory deportation, an "analogous" state conviction would have the same consequence. But because a federal conviction for simple possession with no judgment of recidivism by the convicting court fails to constitute a conviction for an aggravated felony, neither does a corresponding

state law conviction. In both events, an IJ's subsequent finding that the person could have been prosecuted for recidivist possession cannot transform a conviction for misdemeanor simple possession into a conviction for felony recidivist possession.[3]

3. Congress's treatment of drug possession in related provisions reinforces the need for a finding of recidivism by the convicting court

a. Recidivist possession should be treated in a manner consistent with other felony drug possession offenses under the CSA. A conviction for possession of drugs with intent to distribute them, for instance, constitutes a felony under the federal drug laws. 21 U.S.C. § 841. But if state law contains no corre-

[3] Some of the confusion in this area may stem from the use of the phrase "hypothetical federal felony" to describe the approach adopted in *Lopez*. *Lopez* did not use that terminology. But before *Lopez*, the BIA and many lower courts did. That phrase is unhelpful here because it does not address the question whether an IJ must look solely to conduct found by the convicting court in deciding whether a person hypothetically could have been convicted of a federal felony, or whether an IJ may also consider facts *not* adjudicated by the convicting court. The answer to that question is supplied by the term "conviction," which limits the IJ to the conduct adjudicated by the convicting court. Thus, as one court has explained, the only permissible "hypothetical" is "whether the crime that an individual was actually convicted of would be a felony under federal law," and "looking to facts not at issue in the crime of conviction in order to determine whether an individual *could have been charged* with a federal felony" adds "an impermissible second hypothetical." *Rashid*, 531 F.3d at 445.

sponding offense of possession with intent to distribute and instead ties the penalty to the quantity of drugs possessed, a defendant with a state conviction for possessing drugs would be treated under the INA as having been convicted of misdemeanor simple possession rather than the aggravated felony of possession with intent to distribute.

That would be so even if the defendant were convicted under state law of possessing a massive quantity of drugs. An IJ could not later deem the defendant convicted of an aggravated felony on the theory that, because of the quantity of drugs involved, he could have been convicted under federal law of having an intent to distribute. This Court in *Lopez* made that precise point, explaining that "an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount." 549 U.S. at 60.

As that example illustrates, the question whether a state conviction for drug possession is punishable as a federal drug felony depends on the offense conduct found by the convicting court, not on an IJ's subsequent, independent assessment of the conduct for which the defendant *could have been* (but was not) prosecuted and convicted. Because statutes are interpreted as a "symmetrical and coherent" whole, *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995), the felony of recidivist possession should be treated the same way, and should likewise turn on whether the convicting court made a finding of recidivism—not on a post hoc assessment of whether a court could have made that finding. *See Nijhawan v. Holder*, 129 S. Ct. 2294, 2300 (2009) (indicating that a categorical approach applies to the aggravated fel-

ony of illicit trafficking, including recidivist possession, and citing cases purporting to apply the categorical approach to recidivist possession).[4]

b. The court of appeals' interpretation also cannot be reconciled with the distinction drawn by Congress in the illegal reentry statute, 8 U.S.C. § 1326, between misdemeanor and aggravated felony drug convictions. In that statute, Congress established a maximum penalty of 20 years of imprisonment for illegal reentry subsequent to a conviction for an "aggravated felony." *Id.* § 1326(b)(2). In contrast, Con-

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[4] The aggravated felony at issue here differs in important respects from the aggravated felony at issue in *Nijhawan*. That offense requires conviction of "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). The initial language, "offense that . . . involves fraud or deceit," undisputedly requires a formal judgment by the convicting court of guilt of fraud or deceit. The need for a finding of fraud or deceit by the convicting court mirrors the need for a finding of recidivism here. But the ensuing language, "*in which* the loss . . . exceeds $10,000," is most naturally read to refer to the underlying factual circumstances rather than the conduct found by the convicting court. That language therefore permits the loss amount to be determined later by an IJ. Any contrary interpretation would leave the loss threshold "with little, if any, meaningful application," because there is "no widely applicable federal fraud statute that contains a relevant monetary loss threshold." *Nijhawan*, 129 S. Ct. at 2301. Here, by contrast, there is a "widely applicable federal statute" that requires a finding of recidivism, 21 U.S.C. § 844(a), and a number of federal and state drug offenses would qualify as aggravated felonies under petitioner's interpretation, *see* pp. 36-37, *infra*.

gress prescribed a maximum penalty of 10 years of imprisonment for illegal reentry subsequent to a conviction for "three or more misdemeanor crimes involving drugs." *Id.* § 1326(b).

Under the plain meaning of the reentry statute, persons who reenter the country subsequent to a conviction for three or more misdemeanor drug possession offenses are exposed to a 10-year statutory maximum. But under the court of appeals' interpretation, because such persons could have been (but were not) charged with recidivist possession, a federal felony, they would be exposed to the 20-year maximum for reentry subsequent to a conviction for an aggravated felony. Given § 1326's basic distinction between reentry subsequent to three or more drug misdemeanors and reentry subsequent to an aggravated felony, "it is impossible to believe that Congress intended [that 10-year] quantum leap in punishment." *Abuelhawa v. United States*, 129 S. Ct. 2102, 2107 (2009).

Under an approach correctly focused on what the convicting court found, the existence of three or more misdemeanor possession convictions would expose an illegal reentrant to a 10-year statutory maximum, rather than the 20-year maximum reserved for aggravated felons. Only persons actually convicted of recidivist possession—persons whose convicting court made a finding of recidivism—would be exposed to the 20-year maximum. That approach, unlike the court of appeals' understanding, fully preserves the distinction in the illegal reentry statute between reentry subsequent to a conviction for three or more misdemeanors and reentry subsequent to a conviction for an aggravated felony.

4. The question whether recidivism is an offense element for constitutional purposes has no bearing on the issue in this case

a. The Government, invoking *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), suggests (Br. in Opp. 13) that recidivism may be found by an IJ rather than the convicting court under the INA because recidivism fails to constitute an offense element for constitutional purposes. The Government, however, offers no explanation why a holding that the *Constitution* permits a fact to be found by a court rather than a jury in a criminal trial could imply that the *INA* permits that fact to be found by an IJ rather than the convicting court.

In fact, the *constitutional* holding in *Almendarez-Torres* simply has no bearing on the *statutory* question presented by this case. The INA subjects to mandatory removal a person who has "been convicted" of a "felony" punishable under the federal drug laws. 8 U.S.C. § 1229b(a)(3). That language requires a formal judgment by the convicting court of the facts that make the offense a felony, regardless of whether those facts may be considered elements or non-elements for constitutional purposes. A person convicted of simple possession has not been "convicted" of a "felony" unless there has been a "formal judgment" by the convicting "court" of recidivism. *Id.* §§ 1101(a)(48)(A), 1229b(a)(3). Absent that finding by the convicting court, the defendant has been convicted of conduct that is a federal law misdemeanor, not a federal law felony. Nothing in *Almendarez-Torres* speaks to the issue, much less suggests otherwise.

b. Even assuming, *arguendo*, that the INA treats as an aggravated felony only a drug offense whose *elements* make it a felony, that result would not assist the Government. In that event, petitioner *still* would not have been convicted of an aggravated felony. In fact, if an offense could be considered an aggravated felony only if its elements rendered it a felony, *no* conviction for simple possession could count as an aggravated felony because the *elements* of simple possession never make it a felony. *See* 21 U.S.C. § 844(a); *Steele v. Blackman*, 236 F.3d 130, 137 (3d Cir. 2001) ("the only alternative" to treating recidivism as a fact that must be found by the convicting court "would be to treat any § 844 offense in this context as a misdemeanor"). Simple possession instead becomes a felony by virtue of the finding of a *non*-element—recidivism. For that reason, the Government's apparent reliance on *Almendarez-Torres* ultimately would prove far too much.

B. Recidivist Possession Is Not Punishable As A Federal Felony Absent A Prosecutorial Charge Of Recidivism And An Opportunity To Challenge Any Charged Prior Convictions

The absence of any finding of recidivism by the convicting court alone suffices to establish that petitioner has not been "convicted" of an aggravated felony. But petitioner's state law conviction does not qualify as an aggravated felony for the additional reason that his state proceeding failed to contain two critical features of any federal conviction for recidivist possession—a prosecutorial decision to bring a recidivism charge, and an opportunity by the defendant to challenge any alleged prior convictions.

1. Because a federal conviction for recidivist possession requires a prosecutorial screen and an opportunity to challenge a prior conviction, a corresponding state conviction must as well

Under federal law, a defendant may be punished for the felony of recidivist possession only if a federal prosecutor files a charge of recidivism identifying the previous convictions to be relied upon. 21 U.S.C. § 851(a)(1). In addition, a defendant charged as a recidivist possessor must be afforded an opportunity to challenge the prosecutor's reliance on the alleged prior convictions, including by challenging the fact or finality of any alleged conviction or by demonstrating that any prior conviction (within the preceding five years) was constitutionally invalid. *Id.* §§ 851(c), (e). If there has been no prosecutorial charge of recidivism or if the defendant successfully challenges the prior convictions, the defendant's conduct of drug possession is not "punishable" as a "felony" under the CSA, 18 U.S.C. § 924(c)(2).

The court of appeals' holding fails to respect those important statutory limitations. Rather, it permits an IJ to deem a conviction for simple possession "punishable" as a "felony" under the CSA even when there has been no prosecutorial charge of recidivism and no opportunity in the criminal proceeding to challenge the prior conviction. That approach stands fundamentally at odds with Congress's basic objectives in enacting 21 U.S.C. § 851.

a. Before the enactment of Section 851, a prosecutor bringing a drug possession charge was required to file an information "setting forth [any] prior convictions." *See United States v. Noland*, 495 F.2d 529, 530 (5th Cir. 1974), *see also* 26 U.S.C.

§ 7237(c)(2) (1964). The district court was then required to sentence the defendant as a recidivist unless the defendant could prove that he had no prior conviction. *See* 26 U.S.C. § 7237(c)(2) (1964).

By enacting Section 851, Congress sought to make the penalty structure for drug offenses "more flexible." H.R. Rep. No. 91-1444 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. To that end, Congress prescribed that "[n]o person . . . shall be sentenced to increased punishment by reason of one or more prior convictions" unless the prosecutor elects to file an information alleging those prior convictions. 21 U.S.C. § 851(a)(1). That statutory directive embodies Congress's considered view that prosecutors possess the experience and judgment to determine the circumstances in which a charge of recidivism—and punishment as a recidivist—is appropriate in light of the defendant's "individual circumstances." *See* H.R. Rep. No. 91-1444, *reprinted in* 1970 U.S.C.C.A.N. 4566, 4576. By conditioning mandatory removal on conviction of an offense punishable as a felony under the CSA, Congress made the requirement of a prosecutorial screen a precondition to mandatory removal based on a conviction for recidivist possession.

The court of appeals' approach conflicts with the congressional determination to impose a prosecutorial screen. The court of appeals would give a prosecutor's charging decisions no weight. Instead, individuals like petitioner would be treated as recidivist felons even when, as here, a prosecutor expressly declines to charge them as a recidivist. *See* J.A. 32. And the system of careful and conscientious prosecutorial decision-making mandated by Congress would give way to a regime under which *any* person con-

victed of simple possession, if they have a prior drug conviction, would be deemed convicted of an aggravated felony. *See Alsol*, 548 F.3d at 217 (explaining that the standard adopted by the court below "intrude[s] on prosecutorial discretion to make charging decisions," and "undermin[es] the State's ability to negotiate plea agreements").

b. The court of appeals' approach also undermines Congress's prohibition against basing a felony sentence for recidivist possession on a constitutionally invalid prior conviction. Moreover, the court of appeals' holding does not merely shift the assessment of a prior conviction's validity from the convicting court to the IJ. Rather, it eliminates that assessment altogether because an IJ lacks authority to inquire into a prior conviction's validity. *See Alsol*, 548 F.3d at 217.

The court of appeals' understanding thus exposes a person convicted of simple possession to mandatory removal even if the prior drug conviction is constitutionally invalid. That danger is a real one. At least some number of misdemeanor convictions "involve indigent defendants whose convictions are processed under questionable circumstances and may be found invalid if challenged." *Rashid,* 531 F.3d at 447 (internal quotation marks omitted). By conditioning mandatory removal on conviction of conduct punishable as a felony under federal law, Congress avoided the unfairness of imposing mandatory deportation based on a prior conviction that could have been successfully challenged in a prosecution for recidivist possession. *See Alsol,* 548 F.3d at 217; *see also Rashid*, 531 F.3d at 446-47.

2. The Government's characterization of Section 851's requirements as "procedural" is both incorrect and irrelevant

a. The Government contends (Br. in Opp. 12) that the requirements of a prosecutorial screen and an opportunity to challenge a prior conviction are merely "procedural," and thus fail to override Congress's "substantive" determination to punish recidivist possession as a felony. The requirement of a prosecutorial decision to bring a recidivism charge, however, cannot be dismissed as merely "procedural." That requirement instead reflects a substantive judgment by Congress to refrain from imposing felony punishment on every drug possessor with a prior drug conviction, to instead separate those recidivist possessors who warrant felony treatment from those who do not, and to give the prosecutor substantive responsibility to examine the individual circumstances and determine whether felony treatment is justified. The court of appeals' holding fails to respect that substantive congressional judgment.

Section 851's requirement of an opportunity to challenge a prior conviction's validity likewise cannot be dismissed as merely "procedural." Instead, it reflects Congress's substantive judgment that convictions shown to be invalid should play no role in determining whether a defendant is guilty of the felony of recidivist possession. Because the court of appeals' holding allows an IJ to find that a defendant is punishable as a felon on the basis of an invalid prior conviction, it cannot be reconciled with that substantive congressional judgment.

b. At any rate, insofar as Section 851's institution of a prosecutorial screen and of an opportunity to challenge a prior conviction's validity could be de-

scribed as "procedural," that description would not undermine their fundamental importance. They remain absolute preconditions to a conviction under the CSA for the felony of recidivist possession. *See United States v. LaBonte*, 520 U.S. 751, 759-60 (1997) ("[F]or defendants who have received the [prosecutor's charge of prior convictions] under § 851(a)(1), . . . the 'maximum term authorized' is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies." (quoting 28 U.S.C. § 994(h))). Because of the fundamental importance of the prosecutorial screen and the opportunity challenge a prior conviction, they are necessary components for any state offense involving recidivism to be considered sufficiently "analogous" to the federal felony of recidivist possession. *See Lopez*, 549 U.S. at 57 n.8.

C. The Court Of Appeals' Interpretation Unnecessarily Visits Harsh Consequences On Permanent Resident Aliens Without Advancing The Government's Legitimate Interests

The court of appeals' interpretation of the INA has unusually severe consequences for persons who would otherwise benefit from discretionary cancellation of removal. At the same time, petitioner's interpretation would fully serve the government's interests in effecting the removal of criminal aliens and would leave the mandatory deportation provision with real and substantial effect.

1. The court of appeals' interpretation subjecting persons convicted of simple possession to mandatory deportation visits particularly harsh consequences on lawful permanent resident aliens with longstand-

ing ties to the country. Under that interpretation, even if a lawful permanent resident alien has lived and worked in this country for many years, and even if removal would impose serious hardships on his family, two convictions for minor drug possession would categorically preclude the Attorney General from exercising discretion to grant cancellation of removal. That would be true even if a prosecutor made a deliberate decision declining to prosecute the second possession offense as recidivist possession based on the equities in the case. Congress should not be presumed to have intended those severe consequences. *See INS v. Errico*, 385 U.S. 214, 225 (1966) (courts should "not assume that Congress meant to trench on [an alien's] freedom beyond that which is required by the narrowest of several possible meanings of the words used" in a statute).

The facts of the case starkly illustrate the unusually harsh consequences of the court of appeals' approach. Petitioner came to the United States with his family at a young age. As a lawful permanent resident, petitioner worked as a carpet installer from the age of seventeen. Petitioner's immediate family, including his mother and sisters, remain in the United States. Petitioner and his fiancée, a United States citizen, have four children together, all of whom are United States citizens. Petitioner's removal therefore imposes substantial hardships not only on him, but also on his family. Yet the court of appeals' interpretation effectively banishes petitioner from the United States based on his possession of one tablet of Xanax, without permitting any individualized consideration of his longstanding ties to the country or the hardship caused to his family.

2. Conversely, maintaining petitioner's eligibility to seek discretionary cancellation of removal would not disserve the government's legitimate interests. That interpretation would confer no automatic entitlement to remain in the country. To the contrary, under the INA, any alien convicted of a drug related offense (other than one-time possession of a small quantity of marijuana) may be removed from the country. 8 U.S.C. § 1227(a)(2)(B)(i).

Preserving petitioner's eligibility to seek cancellation of removal would create no entitlement to remain in the country, but would afford him an opportunity to persuade the Attorney General that deportation is inappropriate in the particular circumstances. Moreover, in assessing the propriety of granting discretionary relief, an IJ may consider "the existence of a criminal record and, if so, its nature, recency, and seriousness," in addition to weighing such favorable factors as "family ties within the United States, residence of long duration in th[e] country . . . [and] evidence of hardship to the respondent and his family if deportation occurs." *In re C-V-T,* 21 I. & N. Dec. 7, 11 (B.I.A. 1998). Accordingly, while an IJ could not subject a lawful permanent resident to mandatory removal based on a prior offense not found by the convicting court, the IJ could consider that conviction in deciding whether to grant discretionary relief from removal. *Id*. That approach fairly balances the interest of an individual with longstanding ties to the country in remaining here against the government's interest in effecting the removal of aliens whose criminal history calls for that outcome.

3. Petitioner's interpretation gives "real and substantial effect" to Congress's judgment that certain

drug convictions warrant a criminal alien's mandatory removal from the country. *Stone v. INS*, 514 U.S. 386, 397 (1985). Persons convicted of recidivist possession under Section 844 or under a corresponding state law offense remain subject to mandatory deportation. Recidivist possession offenses, in any event, constitute only a fraction of the drug offenses intended by Congress to constitute aggravated felonies. Congress subjected to mandatory deportation persons convicted of any "illicit trafficking in a controlled substance." 8 U.S.C. § 1101(a)(43)(B). That overarching standard encompasses a conviction for *any* state or federal offense involving commercial activity in connection with federally controlled substances. *Lopez*, 549 U.S. at 53-54. Under that general standard, there is no requirement that a state trafficking offense correspond to a federal drug offense. *See* 8 U.S.C. § 1101(a)(43)(B).

To be sure, petitioner's interpretation would exclude from treatment as an aggravated felony those state possession offenses that fail to correspond to the federal recidivist possession offense in 21 U.S.C. § 844(a). But that is the inevitable result of Congress's election to include state possession offenses, as opposed to state trafficking offenses, only if they are "analogous to" a federal felony. *Lopez*, 549 U.S. at 57 n.8. For instance, as the Court recognized in *Lopez*, state offenses that increase penalties for possession based on quantity would not be analogous to the federal felony of possession with intent to distribute, and therefore would fail to count as aggravated felonies. *Id.* at 59-60. A state possession offense that departs from the offense of recidivist possession under Section 844(a) similarly fails to qualify as an aggravated felony.

Again, such a state offense may still bear on the decision whether to remove a person from the country. In deciding whether to grant or withhold discretionary relief from removal, the Attorney General may take into account the applicant's prior convictions. The dissimilarity of a state possession offense to recidivist possession under Section 844(a) only means that, in accordance with Congress's intent, a conviction for that state offense would not automatically compel removal.

D. Insofar As The Statutory Terms Admit Any Ambiguity, Principles Of Lenity Would Compel Construing The Terms In Petitioner's Favor

The terms of the INA and the other relevant sources of statutory interpretation demonstrate that a person convicted of simple possession cannot be considered convicted of an aggravated felony on the theory that he could have been charged with recidivist possession. To the extent there exists any ambiguity on that interpretive question, principles of lenity would require construing the statute in petitioner's favor. Indeed, this case involves the confluence of two principles of lenity, both of which, independently and in combination, compel rejection of the court of appeals' interpretation.

First, as explained, this case implicates the rule that ambiguities in immigration statutes governing deportation must be construed in favor of the alien. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *Errico*, 385 U.S. at 225. In addition, the criminal rule of lenity requires an interpretation favoring petitioner. *See Rewis v. United States*, 401 U.S. 808, 812 (1971) ("ambiguity concerning the am-

bit of criminal statutes should be resolved in favor of lenity"). The criminal rule of lenity applies here because the definition of "drug trafficking crime" at issue comes from the criminal code and is used for criminal law purposes. *See* 18 U.S.C. § 924(c). Additionally, while the INA defines the terms "conviction" and "aggravated felony," they also bear on the maximum sentence for criminal reentry offenses. *See* 8 U.S.C. § 1326(b). When statutory terms are used for both immigration and criminal law purposes, the criminal rule of lenity applies. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004).

For all the reasons explained, a person convicted of simple possession of drugs, with no charge or finding of recidivism in the convicting court, has not "been convicted" of the aggravated felony of recidivist possession within the meaning of the INA. 8 U.S.C. § 1229b(a)(3). At the very least, however, the INA is ambiguous on the matter, thus requiring the application of lenity principles. Indeed, one can readily imagine situations in which a permanent resident alien pleads guilty to simple possession, thereby avoiding any possibility of a charge of recidivist possession, precisely to ensure that he is convicted of a misdemeanor rather than a felony so as to retain eligibility to seek discretionary cancellation of removal. *See INS v. St. Cyr*, 533 U.S. 289, 322 (2001) ("There can be little doubt that . . . alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions."). It is difficult enough to accept that such a person, although intending to plead guilty to misdemeanor simple possession, unwittingly pleaded guilty to felony recidivist possession despite the absence of any charge or

finding of recidivism. But it is virtually inconceivable to suppose that he *unambiguously* pleaded guilty to the felony of recidivist possession even though there was no charge or finding of recidivism.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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STATUTORY APPENDIX

APPENDIX

STATUTORY PROVISIONS INVOLVED

The United States Code, 8 U.S.C. § 1101(a)(43)(B), 8 U.S.C. § 1101(a)(48)(A), 8 U.S.C. § 1227(a)(2)(B)(i), 8 U.S.C. § 1229b(a), 18 U.S.C. § 924(c)(2), 21 U.S.C. § 844, and 21 U.S.C. § 851, provides in pertinent part as follows:

8 U.S.C. § 1101(a)(43)(B)
§ 1101. Definitions

(a) As used in this chapter—

* * *

(43) The term "aggravated felony" means—

* * *

(B) illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)[.]

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law[.]

8 U.S.C. § 1101(a)(48)(A)
§ 1101. Definitions

(a) As used in this chapter—

* * *

(48) (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

8 U.S.C. § 1227(a)(2)(B)(i)
§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

* * *

(B) Controlled substances

(i) Conviction

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), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1229b(a)
§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

18 U.S.C. § 924(c)(2)
§ 924. Penalties

* * *

(c)

* * *

(2) For purposes of this subsection, the term "drug trafficking crime" means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46.

21 U.S.C. § 844
§ 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has

ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of

the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

* * *

(c) "Drug, narcotic, or chemical offense" defined

As used in this section, the term " drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or

conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

21 U.S.C. § 851
§ 851. Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part [21 U.S.C. §§ 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any

issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing

sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.