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No. _____

IN THE
Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

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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 courts of appeals have divided 4-2 on the following question presented by this case:

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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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at ___ F.3d ___, 2009 WL 1492821. The decision of the Board of Immigration Appeals (App. B, *infra*), which heard the matter en banc, is reported at 21 I. & N. Dec. 382. The decision of the Immigration Judge (App. C, *infra*) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2009. App., *infra*, 1a-10a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix. App. D, *infra*, 76a-82a.

STATEMENT OF THE CASE

The court of appeals' decision in this case squarely raises an issue on which there is an acknowledged conflict among the circuits, *viz.*, 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. Two courts of appeals, including the court of appeals below, have

held that an alien has been “convicted” of an “aggravated felony” in that situation. Four courts of appeals have reached the opposite conclusion. The Board of Immigration Appeals (BIA) agrees with the latter courts that an alien convicted of simple possession cannot be considered “convicted” of an “aggravated felony” on the theory that he *could have been* prosecuted as a recidivist possessor, if there in fact was no prosecution as a recidivist and hence no finding by a judge or jury of any valid prior conviction. The issue is a recurring and important one—as the BIA has recognized—because an alien deemed “convicted” of an “aggravated felony” upon a conviction for simple drug possession faces mandatory removal from the country. This Court’s review is warranted.

1. An alien convicted of an “aggravated felony” faces a number of adverse consequences under the Immigration and Nationality Act (INA). Of particular salience here, an alien subject to removal, if convicted of an aggravated felony, is categorically ineligible to petition the Attorney General for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(3).

The INA defines an “aggravated felony,” in pertinent part, as “illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18).” 8 U.S.C. § 1101(a)(43)(B). Section 924(c) in turn defines a “drug trafficking crime” as, *inter alia*, “any felony punishable under the Controlled Substances Act [CSA].” 18 U.S.C. § 924(c)(2). Simple possession of drugs—*i.e.*, possession with no finding of an intent to distribute—ordinarily constitutes only a misdemeanor under the CSA, *see* 21 U.S.C. § 844(a), and

thus fails to qualify as an aggravated felony. But in the case of a defendant with a previous conviction for simple possession, the prosecutor may seek a recidivist sentencing enhancement, in which event the defendant would face a felony sentence of up to two years of imprisonment upon the judge's determination of a valid prior conviction for simple possession. *Id.*; see 21 U.S.C. § 851.

In *Lopez v. Gonzales*, 549 U.S. 47 (2006), this Court 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. *Lopez* addressed, in particular, whether a 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.” 549 U.S. at 50 (quoting 18 U.S.C. § 924(c)). The Court found it irrelevant whether state law makes possession a felony; what matters instead 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,” which would be inconsistent “with any commonsense conception of ‘illicit trafficking.’” *Id.* at 53-54. Because *Lopez*’s state law simple possession offense would fail to constitute a felony under the CSA, the offense failed to qualify as an “aggravated felony” under the INA. *Lopez* accordingly retained eligibility to seek cancellation of removal. See *id.* at 52.

2. Petitioner is a native and citizen of Mexico who entered the United States with his parents when he was four years old. App., *infra* 13a; Pet. C.A. Br. 8; BIA Tr. 1; *see* IJ Tr. 2. Petitioner became a lawful permanent resident in 1993, and worked as a carpet installer from the time he was seventeen years old. App., *infra*, 1a; Pet. C.A. Br. 6, 8; IJ Tr. 28. Petitioner's fiancée is a United States citizen with whom he has four children, each of whom is also a United States citizen. BIA Tr. 1; Pet. C.A. Br. 8; *see* IJ Tr. 26.

On October 28, 2004, petitioner pleaded guilty to simple possession of zero to two ounces of marijuana, a misdemeanor violation of Texas law, Tex. Health & Safety Code Ann. § 481.121(b). App., *infra*, 1a-2a; Pet. C.A. Br. 6. He was sentenced to 20 days of confinement. *Id.* at 2a. On November 15, 2005, petitioner pleaded *nolo contendere* to possessing a tablet of Xanax for which he had no prescription, also a misdemeanor under Texas law, Tex. Health & Safety Code Ann. §§ 481.117(b), 481.104(a)(2). App., *infra*, 2a; IJ Tr. 33-34. Although the State could have sought to prosecute petitioner as a recidivist offender, *see* Tex. Penal Code § 12.43 (providing for recidivist sentencing enhancement if shown at trial that offense is second or subsequent misdemeanor), the State elected to forgo any recidivist charge. Petitioner was sentenced to 10 days in confinement. App., *infra*, 2a; Pet. C.A. Br. 6.

3. On September 14, 2006, the federal government initiated removal proceedings against petitioner on the basis of his misdemeanor conviction for possessing a tablet of Xanax. App., *infra*, 2a, 72a; Pet. C.A. Br. 6. The government sought petitioner's

removal under 8 U.S.C. § 1227(a)(2)(B)(i), which provides for removal of an alien who “has been convicted” of violating “any law or regulation of a State . . . relating to a controlled substance . . . other than a single offense involving possession for one’s own use of 30 grams or less of marijuana.” Petitioner, appearing pro se before the immigration judge (IJ), applied for cancellation of removal. App., *infra*, 2a, 72a; Pet. C.A. Br. 6; see 8 U.S.C. § 1229b(a).

On December 19, 2006, the IJ issued an order finding petitioner removable based on his possession conviction, and further finding petitioner categorically ineligible for cancellation of removal on the ground that his conviction qualified as an “aggravated felony.” App., *infra*, 72a-75a. The IJ reasoned that petitioner’s “second controlled substance conviction in state criminal proceedings” would have the “potential” to give rise to a felony sentence under federal law if he were prosecuted as a recidivist possessor. *Id.* at 74a.

4. Petitioner appealed the IJ’s decision to the Board of Immigration Appeals (BIA). The BIA explained that the courts of appeals disagree on “whether, and under what circumstances, a State offense of simple possession . . . qualifies as an aggravated felony based on its correspondence to the Federal felony of ‘recidivist possession.’” App., *infra*, 17a. Emphasizing that the issue is “important in general,” the BIA observed that it “strive[d] for as consistent a nationwide application of the immigration laws as possible.” *Id.* at 22a. The BIA elected to hear petitioner’s appeal en banc after choosing it “as the vehicle for articulating [its] analytical approach to the ‘recidivist possession’ issue.” *Id.* at 22a n.5.

The BIA recognized 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. App., *infra*, 14a-15a. In the BIA's view, a state possession conviction 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 26a. The BIA thus concluded 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." *Id.* at 27a-28a. 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 'recidivist possession' unless the State actually used those laws to prosecute the [defendant]." *Id.* at 31a.

The BIA acknowledged that its approach disagreed with that of the Fifth and Seventh Circuits. App., *infra*, 17a-18a, 28a-29a (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 ex-

plained that its approach should govern “in the absence of controlling circuit law,” it concluded that the Fifth Circuit’s controlling precedent compelled a contrary resolution in this case. *Id.* at 22a. Accordingly, although the BIA determined that petitioner “has not been convicted of an aggravated felony,” it considered itself “constrained” by Fifth Circuit precedent to affirm the IJ’s decision holding petitioner ineligible for cancellation of removal. *Id.* at 28a-29a.¹

5. The court of appeals affirmed. App., *infra*, 1a-10a. 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. App., *infra*, 4a. Under those decisions, conviction of a state possession offense constitutes conviction of an aggravated felony 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. *Id.* at 4a-5a. The court acknowledged the existence of a “circuit split” on whether an alien qualifies as an aggravated felon in the circumstances of this case, with the “Seventh Circuit agree[ing] with this court’s ap-

¹ In an opinion concurring in the result, two Board Members concluded that no Fifth Circuit precedent bound the Board but that petitioner had been convicted of an aggravated felony. App., *infra*, 33a-69a. In their view, an alien with a prior conviction could be deemed convicted of recidivist possession under *Lopez* regardless of whether the State in fact had prosecuted him as a recidivist, and indeed, even in “the absence of a State[] recidivism statute.” *Id.* at 48a.

proach” and the “First, Second, Third, and Sixth Circuits hav[ing] adopted the approach the BIA advocated in its *en banc* opinion in this case.” *Id.* at 8a n.5 (citing cases).

REASONS FOR GRANTING THE PETITION

There is a mature and acknowledged conflict among the courts of appeals on whether an alien convicted of simple drug possession can be deemed “convicted” of an “aggravated felony” on the theory that he could have been prosecuted as a recidivist, even if he in fact was not prosecuted as a recidivist and no court or jury thus made such a finding in connection with his conviction. Not only have six courts of appeals resolved the issue, but the BIA has established that its approach will govern in removal proceedings in any circuit yet to issue a controlling decision. The issue is a recurring and important one for the many aliens subject to mandatory removal under the approach of the court of appeals below, and this case presents a highly suitable vehicle for resolving the conflict. In addition, the court of appeals’ decision cannot be squared with the plain terms of the governing statutes. This Court therefore should grant review.

A. THERE IS A DEEP AND ACKNOWLEDGED CONFLICT AMONG THE COURTS OF APPEALS ON THE QUESTION PRESENTED

1. The court of appeals explicitly acknowledged the existence of a 4-2 “circuit split” on whether an alien in petitioner’s circumstances can be considered convicted of an aggravated felony under the INA. App., *infra*, 8a n.5. Two courts of appeals have held

that a second state conviction for simple possession constitutes conviction of an aggravated felony regardless of whether there was any recidivism finding by the convicting judge or jury. The court below reached that conclusion. App., *infra*, 5a, 9a-10a; see *United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 (5th Cir. 2005) (applying eight-level enhancement to sentence on ground that second state possession offense constitutes an “aggravated felony” under the CSA). And the Seventh Circuit has reached the same conclusion, holding that “an alien’s second (or subsequent) state conviction for simple drug possession amounts to an aggravated felony in terms of a felony punishable under the [CSA],” even “when the state did not treat the alien as a recidivist.” *Fernandez v. Mukasey*, 544 F.3d 862, 866 (7th Cir. 2008) (internal quotation marks omitted), *reh’g and reh’g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009); see *United States v. Pacheco-Diaz*, 506 F.3d 545, 548-49 (7th Cir. 2007) (sentencing context), *reh’g denied*, 513 F.3d 776 (2008).

By contrast, four circuits have held that an alien convicted a second time for simple possession cannot be considered “convicted” of an aggravated felony in the absence of any recidivism finding in the proceedings before the convicting court. To begin with, in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), the Third Circuit reversed a ruling denying cancellation of removal to an alien twice convicted of misdemeanor drug offenses. Observing that “[o]ne cannot suffer the disabilities associated with having been convicted of an aggravated felony unless one has been *convicted* of a felony,” the Third Circuit con-

cluded that the alien's second misdemeanor offense failed to constitute an aggravated felony because his "[recidivist] status was never litigated as part of . . . the second misdemeanor proceeding." *Id.* at 136, 138. Similarly, in *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006), the First Circuit held that an alien's second misdemeanor possession conviction failed to constitute a drug trafficking "aggravated felony" because the record associated with the second conviction "contain[ed] no reference to [the alien's] prior conviction, or to any other factor that would hypothetically convert his [second] state misdemeanor conviction into a felony under a federal law." *Id.* at 86.

The Second and Sixth Circuits, in decisions postdating this Court's decision in *Lopez*, have joined the First and Third Circuits. In *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008), the Sixth Circuit held that an alien's second conviction failed to amount to an aggravated felony under the INA because his "second drug-possession conviction made no reference to his first such conviction." *Id.* at 448. The Second Circuit later agreed, holding "that a second conviction for simple drug possession under state law is not a felony under the [CSA] simply because it *could have been* prosecuted as a recidivist offense under 21 U.S.C. § 844(a)." *Alsol v. Mukasey*, 548 F.3d 207, 210 (2d Cir. 2008). Instead, the court explained, if an IJ denies cancellation of removal on the basis of a prior conviction, "the fact of recidivism must be reflected in the conviction the government seeks to classify as an aggravated felony," rather than "merely in [a defendant's] underlying conduct." *Id.*

at 217.² Both of those circuits, like the Seventh Circuit and the court of appeals below, have explicitly recognized the division of authority. *See Alsol*, 548 F.3d at 213-14; *Fernandez*, 544 F.3d at 872 & n.8; *Rashid*, 531 F.3d at 443-445; App., *infra*, 8a n.5.

The 4-2 conflict among the courts of appeals is mature and entrenched, and can be resolved only by this Court. Four courts of appeals have now addressed the issue raised by this case following this Court's decision in *Lopez*, and those four courts have divided 2-2. The competing opinions thoroughly canvass the arguments on both sides of the issue, and the court of appeals below and the Seventh Circuit have considered and rejected the majority view. And despite its recognition of the conflict, the Seventh Circuit has refused to rehear the issue en banc. *See Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009); *see also United States v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007), *reh'g denied*, 513 F.3d 545 (2008).

2. In addition to the 4-2 conflict among the courts of appeals, the BIA, "the agency with the expertise in immigration matters," *Omari v. Holder*, 562 F.3d 314, 322 (5th Cir. 2009), has addressed and resolved the issue in the proceedings below. Sitting en banc,

² The Ninth Circuit has also ruled that a second misdemeanor offense fails to constitute an aggravated felony, but in doing so it relied on an en banc decision that has since been rejected by this Court. *See Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (citing *United States v. Corona-Sanchez*, 291 F.3d 1201, 1209 (9th Cir. 2002) (en banc)); *United States v. Rodriguez*, 128 S. Ct. 1783, 1787-93 (2008) (rejecting approach taken in *Corona-Sanchez*).

the BIA agreed with the majority of courts of appeals, concluding that an alien's second conviction for misdemeanor possession constitutes conviction of an aggravated felony only if the individual's "status as a recidivist drug possessor [was] . . . admitted or determined by a court or jury within the prosecution for the second drug crime." App., *infra*, 28a. The two courts of appeals to have adopted the contrary view—the Fifth Circuit below and the Seventh Circuit—have considered the BIA's resolution but have declined to adopt it.

The BIA decision is especially significant in light of the Board's prescription that its resolution now governs removal proceedings in any circuit in which the court of appeals has yet to issue a controlling decision. App., *infra*, 32a-33a. As a result, the approach of the court of appeals below governs in two circuits, the contrary approach under which an alien in petitioner's circumstances fails to qualify as an aggravated felon governs in four circuits, and the BIA's agreement with that majority approach governs removal proceedings in all remaining circuits. The upshot is that, in the two circuits that have jurisdiction to review over one-quarter of the immigration proceedings completed in this country each year, an alien in petitioner's position is categorically ineligible to seek cancellation of removal. See Office of Planning, Analysis, and Technology, U.S. Dep't of Justice Executive Office for Immigration Review, FY 2008 Statistical Year Book, at B6 tbl.2A (2009), available at <http://www.usdoj.gov/eoir/stats/pub/fy08syb.pdf> (collecting total immigration court completions by court). But in every other circuit, an identically-situated alien would have an opportunity

to obtain cancellation of removal and thus to remain in the United States. There is no justification for permitting that stark disparity of treatment to persist, particularly in view of the Constitution's contemplation of a "uniform Rule of Naturalization." U.S. Const. art. I § 8, cl. 4.

B. THE QUESTION PRESENTED IS HIGHLY IMPORTANT AND RECURRING, AND THIS CASE PRESENTS AN IDEAL VEHICLE FOR RESOLVING IT

1. a. As the BIA recognized in its en banc opinion, the proper treatment under the INA of a second or subsequent conviction for simple drug possession is "important in general," and is deserving of a uniform national resolution. App., *infra*, 22a. That six courts of appeals have issued controlling decisions on the issue further attests to its significance. Given the frequency with which defendants are convicted of simple drug possession, there is no reason to suppose that the issue's significance will abate over time.

Indeed, the issue continues to arise frequently in the immigration context. Several petitions for review that raise the question presented in this case are currently pending in the Fifth Circuit alone. See, e.g., *Lemaine v. Holder*, Dkt. No. 08-60286 (5th Cir. filed Apr. 2, 2008); *Young v. Holder*, Dkt. No. 08-60278 (5th Cir. filed Mar. 28, 2008); *Martinez-Valero v. Holder*, Dkt. No. 08-60234 (5th Cir. filed Mar. 20, 2008); *Donnoli v. Holder*, Dkt. No. 08-60168 (5th Cir. filed Feb. 27, 2008). In addition, the same issue arises in criminal cases. See 8 U.S.C. § 1326(b) (increasing maximum sentence for illegal re-entry where "removal was subsequent to a conviction for

commission of an aggravated felony”); U.S.S.G. § 2L1.2 (providing for upward adjustment for defendant convicted of an “aggravated felony”). The Sentencing Guidelines make clear that the “the term ‘aggravated felony’” in the criminal context has the same meaning as in the immigration context. U.S.S.G. § 2L1.2 & cmt. n.3(A). And criminal defendants regularly file appeals in the Fifth Circuit solely to challenge an aggravated felony designation.³

The uncertainty caused by the conflict frustrates the ability of defense counsel and prosecutors to offer a defendant charged with a possession offense meaningful advice concerning the immigration consequences of a guilty plea or conviction. *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 decisions.”). Under 8 U.S.C. § 1226(c)(1)(B), the Attorney General must detain any alien removable for violating a state law related to a controlled substance, 8 U.S.C. § 1227(a)(2)(B)(i). Consequently, any alien whom the government seeks to remove for a controlled sub-

³ *See, e.g., United States v. Gonzalez*, No. 08-20753, 2009 WL 1687797 (5th Cir. June 16, 2009) (per curiam); *United States v. Rodriguez-Montelvo*, No. 08-50979, 2009 WL 1685153 (5th Cir. June 16, 2009) (per curiam); *United States v. Mendez-Monroy*, No. 08-50790, 2009 WL 1676117 (5th Cir. June 16, 2009) (per curiam); *United States v. Alfaro-Cardenas*, No. 08-40779, 2009 WL 1676095 (5th Cir. June 16, 2009) (per curiam). The issue continues to arise in other circuits as well. *See, e.g., United States v. Ayon-Robles*, 557 F.3d 110, 112-13 (2d Cir. 2009) (per curiam) (applying court’s decision in *Alsol* in the criminal context).

stance offense will automatically be detained and subject to the circuit law that governs the jurisdiction of his detention. *See* 8 U.S.C. § 1252(b)(2) (providing that any “petition for review [of an order of removal] shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings”). And because the site of immigration detention bears no necessary connection to the site of conviction or residence, defense attorneys and prosecutors will be unable to predict with certainty what law will be applied. In addition, the approach of the court of appeals below tends to “undermine the State’s ability to negotiate plea agreements with defendants [who] would admit guilt to drug possession with the understanding that their criminal records would reflect [a] misdemeanor,” but would refuse to do so when an “aggravated felony” is at stake. *Alsol*, 548 F.3d at 217.

b. Whether an alien is properly deemed “convicted” of an “aggravated felony” has substantial and far-reaching consequences for immigrants and their families. An alien convicted of an aggravated felony is subject to removal, 8 U.S.C. § 1227(a)(2)(A)(iii); presumed removable, 8 U.S.C. § 1228(c); ineligible to seek judicial review of a removal order, 8 U.S.C. § 1252(a)(2)(C); and, of course, ineligible to seek cancellation of removal, 8 U.S.C. § 1229b(a)(3).

If removed from the United States, an aggravated felon is permanently barred from seeking readmission to the country (absent a waiver), and is subject to increased punishment if he returns. *See* 8 U.S.C. §§ 1182(a)(9)(A)(ii), 1326(a)-(b) (increasing maximum sentence for illegal entry into the country from two to twenty years of imprisonment). If convicted of an

aggravated felony on or after November 29, 1990, an alien is categorically unable to demonstrate the “good moral character” required for naturalization. 8 U.S.C. § 1101(f)(8); 8 C.F.R. § 316.10(b)(1)(ii). And because federal law automatically categorizes any aggravated felony as a “particularly serious crime,” an aggravated felon is ineligible for asylum. *See* 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i).

2. As the BIA recognized when it “chose[] [petitioner’s case] as the vehicle for articulating [its] analytical approach to the ‘recidivist possession’ issue,” App. 22a n.5, this case presents a highly suitable vehicle for resolving the proper treatment of an alien convicted of simple possession without any finding of a prior conviction. Petitioner properly raised and preserved in his immigration proceedings and in the court of appeals his request for cancellation of removal, as well as his objection to the IJ’s conclusion that he has been convicted of a drug-trafficking aggravated felony. *See* App., *infra*, at 1a, 13a. Moreover, the en banc majority in the BIA and the concurring opinion thoroughly review and assess the competing arguments on both sides of the conflict.

This case also presents in especially stark relief the substantial implications of the question presented for an alien designated as an “aggravated felon.” Petitioner came to the United States at a very young age, after which he became a lawful permanent resident and worked as a carpet installer since reaching seventeen years of age. His fiancée is a United States citizen, with whom he has four children who are also United States citizens.

Petitioner was removed from the country and separated from his family based on his conviction for possessing one tablet of Xanax without a prescription. Although the prosecutor exercised discretion to forgo charging petitioner as a recidivist based on his prior conviction for possessing a small quantity of marijuana, the court of appeals' approach effectively overrides that exercise of prosecutorial discretion and treats petitioner as an "aggravated felon" on the theory that he could have been prosecuted as a recidivist. The contrary view adopted by a majority of circuits would enable petitioner to seek relief that would allow him to live in the United States with his family.

C. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER HAS BEEN "CONVICTED" OF AN "AGGRAVATED FELONY"

The court of appeals in this case held that petitioner's conviction for simple possession of Xanax without a prescription subjected him to mandatory removal from the country because, even though simple drug possession is a misdemeanor under federal law, 21 U.S.C. § 844, petitioner could have been prosecuted for recidivist possession—a federal felony. *Id.* That holding cannot be squared with the text of the INA or with the other relevant sources of statutory interpretation.

1. As relevant here, the INA subjects to mandatory deportation a person who "has . . . been convicted" of an "aggravated felony," *i.e.*, a "felony punishable under" the federal drug laws. 8 U.S.C. § 1229b(a)(3); 18 U.S.C. § 924(c)(2). A person "con-

victed” of simple possession “has been convicted” of an offense that is punishable under the federal drug laws as a misdemeanor, not a “felony.” See 21 U.S.C. § 844(a). Such a person therefore remains eligible for cancellation of removal.

That is true regardless of whether that person *could have been* prosecuted for recidivist possession. For purposes of determining whether a person is subject to mandatory removal, the statute focuses on what a person in fact “has been convicted” of, not what a person could have been prosecuted for. See *Alsol*, 548 F.3d at 215 (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”); *Rashid*, 531 F.3d at 445 (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”); *Pacheco-Diaz*, 513 F.3d at 781 (Rovner, J., dissenting from denial of rehearing) (objecting to majority’s focus on what an individual “could have been charged with in state court”).

An examination of what would have happened to petitioner in an analogous federal law prosecution underscores the significance of the INA’s requirement of an actual felony conviction. Under the federal drug laws, a person convicted of possession may be sentenced as a felon for recidivist possession only if the prosecutor files an information charging recidivism, and the court makes a finding that the person is a recidivist. 21 U.S.C. §§ 844(a), 851. Accordingly, if a federal prosecutor charged petitioner only

with simple possession and petitioner pleaded guilty only to that charge, petitioner would have been convicted of simple possession, a misdemeanor, not recidivist possession, a felony. In that event, petitioner could not be considered to have been convicted of the felony of recidivist possession simply because the federal prosecutor *could have* charged him as a recidivist. See *United States v. LaBonte*, 520 U.S. 751, 759-60 (1997) (“[F]or defendants who have received the notice 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))).

The same analysis applies to petitioner’s state law conviction. The text of the INA draws no distinction between federal and state law convictions. Indeed, it expressly requires their parallel treatment. See 8 U.S.C. § 1101(a)(43) (applying the definition of aggravated felony to an offense “whether in violation of Federal or State law”). Petitioner, having been charged with and convicted of simple possession, remains eligible to seek cancellation of removal. He is not subject to mandatory deportation simply because he instead could have been prosecuted under state law for recidivist possession.

The DHS changed its position on the question presented in this case, evidently based on its implications for federal law convictions. 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.” App., *infra*, at 26a. But the

DHS changed its position after argument before the BIA, conceding that mandatory deportation requires an actual conviction for recidivist possession. The DHS did so apparently 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.” App., *infra*, 27a.

2. The INA’s definition of “aggravated felony” as applied to drug crimes confirms that a state conviction for simple possession does not constitute an aggravated felony. With respect to drug offenses, the definition treats as an aggravated felony only “illicit *trafficking* in a controlled substance.” 8 U.S.C. § 1101(a)(43)(B) (emphasis added). It then includes within that definition any “drug *trafficking* crime (as defined in section 924(c) of title 18).” *Id.* (emphasis added). Section 924(c) in turn defines a “drug trafficking crime” as, among other things, “any felony punishable under the Controlled Substances Act.” 18 U.S.C. § 924(c)(2). As this Court emphasized in *Lopez*, the determination whether a state conviction for possession of a controlled substance constitutes a “felony punishable under” the federal drug laws must begin with a “commonsense conception of ‘illicit trafficking,’ the term ultimately being defined.” 549 U.S. at 53. “[O]rdinarily[,] ‘trafficking’ means some sort of commercial dealing.” *Id.* at 53-54 (citing Black’s Law Dictionary 1534 (8th ed. 2004)). And “[c]ommerce . . . certainly [] is no element of simple possession.” *Id.* at 54.

The Court in *Lopez* noted that certain possession offenses under the CSA are punishable as felonies, including recidivist possession. 549 U.S. at 54, 55 n.6. But the Court made clear that a departure from the ordinary meaning of trafficking to include a possession offense could be justified only by a “clear statutory command” that “coerce[d]” its inclusion. *Id.* at 55 n.6. Here, there is no “clear statutory command” that “coerces” the “inclusion” of a conviction for simple possession as an aggravated felony simply because it might have been prosecuted as recidivist possession instead. To the contrary, given the textual requirement of a felony “conviction,” there is a clear statutory command that compels its exclusion.

3. The court of appeals’ interpretation is not only inconsistent with statutory text; it would also undermine important policies advanced by Congress’s felony conviction standard. Mandatory removal is an especially harsh sanction. That is especially true for lawful permanent residents like petitioner, who came to this country when four years old and established deep roots here thereafter. Nor are the consequences of a person’s deportation felt by that person alone; they extend to persons like petitioner’s children, who, under the court of appeals’ decision, must either leave the country or be separated from their father. The requirement of a recidivist conviction ensures that a prosecutor has made a considered judgment that the defendant’s conduct warrants a charge and conviction that automatically gives rise to those severe consequences. Had Congress made a potential felony charge rather than an actual felony conviction the predicate for mandatory removal, that

salutary protection against unwarranted removal would not exist.

Indeed, the approach adopted by the court of appeals stands fundamentally at odds with Congress's basic objectives in enacting 21 U.S.C. § 851. Prior to the enactment of Section 851, a prosecutor was required to advise the court whether a drug possession conviction was the offender's first or subsequent offense and then 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 successfully 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 accomplish that goal, Congress provided that "[n]o person . . . shall be sentenced to increased punishment by reason of one or more prior convictions" unless the prosecutor files an information prior to trial or plea alleging those prior convictions. 21 U.S.C. § 851(a)(1). That statutory directive reflects Congress's view that prosecutors have the experience and judgment to determine when a recidivist charge is appropriate based on the defendant's "individual circumstances." See H.R. Rep. No. 91-1444, reprinted in 1970 U.S.C.C.A.N. 4566, 4576. By linking mandatory removal to an actual felony conviction, rather than a conceivable felony charge, Congress incorporated that same prosecutorial screen into the removal process.

The court of appeals' standard is inconsistent with the congressional determination reflected in Section 851. Under the court of appeals' standard, a prosecutor's charging decisions carry no weight; individuals like petitioner are treated as recidivist felons even when a prosecutor has expressly declined to charge them as such. And the system of careful and conscientious prosecutorial decision-making mandated by Congress is supplanted by a regime under which all persons convicted of simple possession who have prior drug convictions are treated as convicted of an aggravated felony. *See Alsol*, 548 F.3d at 217 (concluding that the standard adopted by the court below "intrude[s] on prosecutorial discretion to make charging decisions," and "undermines the State's ability to negotiate plea agreements").

The court of appeals' mandatory removal standard also undermines another significant feature of the recidivist conviction requirement—that the determination of recidivist possession must be made in a court of law in connection with proceedings concerning the conviction, rather than by an immigration judge. That protection is important. Under federal law, for example, a person charged with recidivist possession has an opportunity to contest the validity of a charged prior conviction. 21 U.S.C. § 851. If the prior conviction is invalid, a person may not be convicted of recidivist possession. *Id.* An immigration judge, by contrast, lacks authority to inquire into the validity of a prior conviction. *Alsol*, 548 F.3d at 217.

The court of appeals' interpretation therefore exposes a person convicted of simple possession to mandatory removal even if a prior drug conviction is

wholly invalid. That danger is a real one. “Many misdemeanor or lesser 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 making a felony conviction the predicate for mandatory deportation, Congress avoided the palpable unfairness of requiring mandatory deportation based on a conviction that could have been successfully challenged in a prosecution for recidivist possession. *Alsol*, 548 F.3d at 217; *Rashid*, 531 F.3d at 446-47.

The text of the INA and the other relevant sources of statutory interpretation thus demonstrate that the court of appeals erred in its interpretation of the statute. To the extent that there is any ambiguity, however, the rule of lenity applied in deportation cases requires an interpretation that favors petitioner. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). Under that rule, 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. *INS v. Errico*, 385 U.S. 214, 225 (1966). Because the question presented arises with respect to the maximum sentence available for the crime of illegal reentry, see 8 U.S.C. § 1326(b), the rule of lenity applied in criminal cases applies in this case as well. See *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Here, at the very least, the court of appeals’ interpretation is not required by the narrowest possible meaning of the statute. The rule of lenity therefore requires its rejection.

4. In adopting its possible felony prosecution standard, the court of appeals did not address the INA's text or other relevant sources of statutory interpretation. Instead, it reached the conclusion that this Court in *Lopez* mandated its approach. In particular, the court viewed its interpretation to be required by the Court's holding that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under the federal law." 549 U.S. at 60. The court of appeals' reliance on *Lopez* was entirely misplaced.

The court of appeals erred in attempting to parse the language of a holding directed to a different issue—whether the state's denomination of an offense as a felony makes it an aggravated felony when the conduct proscribed by the offense is punishable only as misdemeanor under federal law. In any event, as the BIA and the Second and Sixth Circuits have correctly concluded, far from dictating the court of appeals' approach, *Lopez* supports the contrary approach. See App., *infra*, 26a; *Alsol*, 548 F.3d at 215; *Rashid*, 531 F.3d at 445-46. When a person is charged with and convicted of simple possession, the conduct proscribed by the offense is simple possession, a federal law misdemeanor. It is only when a prosecutor charges the defendant as a recidivist possessor, and the defendant is found to have been a recidivist possessor, that the conduct proscribed by the offense becomes recidivist possession, a federal felony. *Id.* The court of appeals accordingly erred in holding that petitioner's conviction for simple possession qualified as an aggravated felony simply be-

cause he could have been prosecuted for recidivist possession instead.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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