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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Government agrees with petitioner that this Court should grant certiorari in this case. As the Government explains: "a conflict has developed among the courts of appeals on the question presented in this case," U.S. Br. 14; "the question presented is an important and recurring one," *id.* at 8; and this case presents an "appropriate vehicle" for resolving the question, *id.* at 16. Consequently, "[t]he petition for a writ of certiorari should be granted." *Id.* at 17. Because petitioner and the Government agree that certiorari should be granted in this case, this reply brief is limited to addressing only certain basic points.

1. Petitioner agrees with the Government that "the question presented [in this case] is an important and recurring one on which there is a conflict among the courts of appeals." U.S. Br. 8. Four circuits, two of which considered the matter after this Court issued its decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006), have held that an alien convicted of simple possession cannot be held "convicted" of an aggravated felony, 8 U.S.C. § 1229b(a)(3), in the absence of any finding of recidivism in the proceeding before the convicting court. *See* Pet. 9-10 (discussing cases from the First, Second, Third, and Sixth Circuits); *accord* U.S. Br. 14 & n.4. Two courts, including the court of appeals below, have held to the contrary. *See* Pet. 8-9 (discussing Fifth and Seventh Circuit cases); *accord* U.S. Br. 14. The BIA has taken the majority view, and its rule governs removal proceedings in any circuit in which the court of appeals has yet to issue a controlling decision. *See* Pet. 11-12; *accord* U.S. Br. 14-15.

The importance of the question presented in this case, and the need to resolve the conflict on the question, has only become all the more apparent since the petition was filed. Since then, the Fifth Circuit, citing the decision below, has denied 19 petitions for review of BIA decisions applying circuit precedent on the issue.[1] The Seventh Circuit has also denied peti-

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[1] *See King v. Holder*, No. 08-60762, 2009 WL 3833776, at *1 (5th Cir. Nov. 17, 2009) (per curiam); *Ruiz v. Holder*, No. 08-60261, 2009 WL 3833979, at *1 (5th Cir. Nov. 17, 2009) (per curiam); *Spence v. Holder*, No. 09-60102, 2009 WL 3833621, at *1 (5th Cir. Nov. 17, 2009) (per curiam); *Bharti v. Holder*, No. 08-60387, 2009 WL 3816967, at *1 (5th Cir. Nov. 16, 2009) (per curiam); *Alexis v. Holder*, No. 08-60745, 2009 WL 3806069, at *1 (5th Cir. Nov. 13, 2009) (per curiam); *Stanley v. Holder*, No. 08-60424, 2009 WL 3780705, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Diaz-Saenz v. Holder*, No. 08-60108, 2009 WL 3780717, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *De Leon-Castro v. Holder*, No. 06-60451, 2009 WL 3780683, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Martinez-Valero v. Holder*, No. 08-60234, 2009 WL 3780708, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Laguna-Hernandez v. Holder*, No. 08-60477, 2009 WL 3786077, at *1 (5th Cir. Nov. 12, 2009) (per curiam); *Okechukwu Osuagwu v. Holder*, No. 08-60579, 2009 WL 3634432, at *1 (5th Cir. Nov. 4, 2009) (per curiam); *Douglas v. Holder*, No. 08-60318, 2009 WL 3614535, at *1 (5th Cir. Nov. 3, 2009) (per curiam); *Simpson v. Holder*, No. 08-60874, 2009 WL 3524929, at *1 (5th Cir. Oct. 30, 2009) (per curiam); *Ata v. Holder*, No. 08-60636, 2009 WL 3525739, at *1 (5th Cir. Oct. 29, 2009) (per curiam); *Straker v. Holder*, No. 07-60285, 2009 WL 3471916, at *1 (5th Cir. Oct. 26, 2009) (per curiam); *Esmaili v. Holder*, No. 09-60115, 2009 WL 3345768, at *1 (5th Cir. Oct. 19, 2009) (per curiam); *Mosqueda-Masiel v. Holder*, No. 08-60843, 2009 WL 3270926, at *2 (5th Cir. Oct. 13, 2009) (per curiam); *Young v. Holder*, No. 08-60278, 2009 WL 2998905, at *1 (5th Cir. Sept. 21, 2009) (per curiam); *Hathaway v. Holder*, No. 08-61064, 2009 WL 2971787, at *2 (5th Cir. Sept. 17, 2009) (per curiam).

tions in four cases, citing its circuit precedent.[2] Countless additional aliens will be subject to the Fifth Circuit (and Seventh Circuit) rule in BIA proceedings but lack the resources to pursue the matter even to the courts of appeals. *Cf. In re Orville Wayne Fisher*, No. A037 337 283, 2009 WL 773214 (B.I.A. Mar. 9, 2009) (alien proceeding pro se). And the uncertainty caused by the conflict among the circuits will continue to frustrate the ability of defense counsel and prosecutors to offer defendants charged with drug possession offenses meaningful advice concerning the immigration consequences of a guilty plea or conviction. *See* Pet. 14.

2. Departing from the view of the majority of circuits and the BIA, the Government argues that a person who has been convicted only of simple drug possession (a federal law misdemeanor) can nonetheless be deemed convicted of the aggravated felony of recidivist possession. While a full refutation of the government's argument can await briefing on the merits, it is notable that the Government does not quote—much less engage—the critical textual requirement that a permanent resident alien is subject to mandatory deportation only if he "has . . . been *convicted* of an aggravated felony," 8 U.S.C. § 1229b(a)(3) (emphasis added). A person "convicted" of simple possession in state court, with no finding or charge of recidivism, has "been convicted" of a federal law misdemeanor. 21 U.S.C. § 844(a). He has not been "convicted" of an "aggravated fel-

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[2] Order, *Rodriguez-Diaz v. Holder*, No. 08-3309, at 2 (7th Cir. Nov. 24, 2009); Order, *Beckford v. Holder*, No. 08-1355, at 2 (7th Cir. Nov. 24, 2009); Order, *Ramirez-Solis v. Holder*, No. 08-3497, at 2 (7th Cir. Nov. 24, 2009); Order, *Garbutt v. Holder*, No. 08-4188, 2009 WL 3634336, at *4 (7th Cir. Nov. 5, 2009).

ony." 8 U.S.C. § 1229b(a)(3). The Government nowhere explains how its position can be reconciled with the relevant statutory text.

Additionally, the Government does not dispute that its position logically would result in "a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a . . . Federal *felony* on the ground that the defendant had prior convictions that *could have been* [but were not] used as the basis for a recidivist enhancement." Pet. App. 27a (BIA opinion). That position would have far-reaching implications. As the Center for the Administration of Criminal Law explains, the vast majority of federal drug possession convictions under § 844(a) are for the misdemeanor offense, because "federal prosecutors virtually always exercise their discretion to decline a recidivist drug charge under 21 U.S.C. § 851." Br. for *Amicus Curiae* Center on the Administration of Criminal Law, at 4 (explaining that, "in 2007, only 3 defendants were convicted" of recidivist possession under § 851). The Government's position logically means that those misdemeanor convictions would be transformed into convictions for aggravated felonies, in direct conflict with the requirement under federal law that a person charged with simple drug possession can be subject to treatment as a felon due to recidivism only if the government initiates and demonstrates a recidivism charge in accordance with Section 851.

3. Although petitioner disagrees with the Government's position on the merits, the parties are in agreement that "the present case would serve as an appropriate vehicle for this Court to resolve the conflict in the immigration context." U.S. Br. 16. Petitioner came to the United States at a very young

age, after which he became a lawful permanent resident. His fiancée is a United States citizen, with whom he has four children who are also United States citizens. The court of appeals held that petitioner was subject to mandatory deportation because he had been convicted for simple possession of one tablet of Xanax for which he lacked a prescription. The interpretation adopted by a majority of circuits and the BIA, in contrast, would permit him to seek discretionary relief from deportation that, if granted, would allow him to live in the United States with his family. *See* Pet. 16-17. This Court should grant the petition to resolve that conflict, and should reverse the decision below.

CONCLUSION

For the foregoing reasons and those stated in the petition and the brief of the United States, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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