No. 09

IN THE

Supreme Court of the United States

MARTIN ESCOBAR,
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 Seventh 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 Martin Escobar, petitioner below.

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

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

CONSTITUTIONAL PROVISION

ADMINISTRATIVE MATERIALS

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

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 Seventh Circuit.

OPINIONS BELOW

The order of the court of appeals is unpublished and reprinted in App. A, *infra*. The orders of the Board of Immigration Appeals are unpublished and reprinted in App. B and App. C, *infra*. The decision of the Immigration Judge is unreported and reprinted in App. D, *infra*.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. App., *infra*, 1a-2a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The relevant statutory provisions are reproduced in the appendix. App. E, *infra*, 20a-27a.

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.

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." *Id.* 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 in 1981, and became

a lawful permanent resident in 1990. Certified Administrative Record of Proceedings (C.A.R.) 35, 133-34. Petitioner has worked as a tree trimmer since 1998. C.A.R. 135, 148. Petitioner's wife is a lawful permanent resident with whom he has three children, each of whom is a United States citizen. C.A.R. 35, 136, 140-41.

On July 11, 1997, petitioner pleaded guilty to simple possession of 2.5 to 10 grams of marijuana, a misdemeanor violation of Illinois law, 720 Ill. Comp. Stat. § 550/4(b). App., *infra*, 3a, 8a; C.A.R. 2. He was sentenced to six months of court supervision. App., *infra*, 3a-4a; C.A.R. 151. On March 13, 1998, petitioner pleaded guilty to possession of a controlled substance, App., *infra*, 4a, 8a, which is a felony under Illinois law, 720 Ill. Comp. Stat. § 570/402(c), but a misdemeanor under federal law, *see* 21 U.S.C. § 844(a). The State did not prosecute petitioner under a statute that allows it to seek a recidivist sentencing enhancement when a defendant is convicted of a "second or subsequent offense." 720 Ill. Comp. Stat. § 570/408(a). Instead, petitioner was sentenced to two years of probation. C.A.R. 35; 153-54.

3. Almost eight years after that conviction, the federal government detained petitioner as he was returning to the United States after a brief trip to Mexico, and initiated removal proceedings against him. App., *infra*, 8a; C.A.R. 35. The government sought petitioner's removal under 8 U.S.C. § 1227(a)(2)(A)(i)(II), which provides for removal of an alien who "is convicted of a crime for which a sentence of one year or longer may be imposed." App., *infra*, 7a-8a, 15a; C.A.R. 75-76. Petitioner, appearing before the immigration judge (IJ), applied for

cancellation of removal. App., *infra*, 4a, 15a (C.A.R. 76); *see* 8 U.S.C. § 1229b(a).

On May 1, 2006, the IJ issued an oral decision holding that petitioner was removable on the basis of his conviction for drug possession, and was categorically ineligible for cancellation of removal because that conviction was an "aggravated felony" as defined by 8 U.S.C. § 1101(a)(43)(B). App., *infra*, 15a-19a (C.A.R. 76-78). The IJ reasoned that petitioner's conviction qualified as an aggravated felony because the conviction occurred after petitioner "had previously been convicted of a controlled substance violation," *id.* at 17a-18a (C.A.R. 78), and thus could have subjected him to more than one year of imprisonment under 21 U.S.C. § 844(a) if he had been charged in the federal system and had been treated as a recidivist.

4. On October 13, 2006, the Board of Immigration Appeals (BIA) affirmed, holding that petitioner had been convicted of an aggravated felony "drug trafficking crime," *see* 8 U.S.C. § 1101(a)(43)(B), because his second conviction "would be punishable as a felony, under the Controlled Substances Act." App., *infra*, at 9a. The BIA rejected petitioner's argument that his state conviction did not meet the statutory requirements for recidivist possession under the CSA, 21 U.S.C. § 851, stating that it would not "presume the process of the 'actual' convicting jurisdiction" in determining whether an offense constitutes an aggravated felony. App., *infra*, 10a.

5. Petitioner filed an appeal in the court of appeals. C.A.R. 8. Before that court issued an opinion, however, the government filed an unopposed motion

to remand the case to the BIA for reconsideration in light of this Court's decision in *Lopez v. Gonzales*. *Id.* The Seventh Circuit granted the motion and remanded the case. *Id.* at 7.

6. On remand, the BIA issued a second opinion affirming the decision of the IJ, relying on its en banc decision in *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382 (B.I.A. 2007), *aff'd sub nom Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), *petition for cert. filed*, No. 09-60 (July 15, 2009). In *Carachuri-Rosendo*, the Board held that an alien's second conviction for simple possession is a 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." *Id.* at 391. The Board also held, however, that it was bound by circuit precedent where a court of appeals had held to the contrary. *See id.* at 393-94. Because the Seventh Circuit in *United States v. Pacheco-Diaz*, 506 F.3d 545, 550 (7th Cir. 2007), *reh'g denied*, 513 F.3d 776 (2008), had held that a "second drug possession charge" would be treated as a federal felony under Section 844(a) and thus an aggravated felony in the sentencing context, which "has the same meaning as in the immigration context," *see* U.S.S.G. § 2L1.2 & cmt. n.3(A)), the Board concluded that circuit precedent "control[led]" petitioner's case and required the Board to affirm. App., *infra*, 5a.

7. Petitioner again appealed to the Seventh Circuit, which suspended his appeal pending resolution of *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), *petition for cert. filed*, No. 09-5386 (July 15, 2009), a case that raised the same question presented in this case. App., *infra*, 2a. On September 15, 2008, the court of appeals issued an opinion in *Fernandez* 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*, 544 F.3d at 866. On June 4, 2009, the court of appeals denied petitioner's petition for review of the BIA decision, citing the court's decision in *Fernandez* and concluding that petitioner's second possession offense "constitutes a 'drug trafficking crime' and, thus, an aggravated felony under 8 U.S.C. § 1101(a)(43)(B)." App., *infra*, at 2a.

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 ap-

peals' decision cannot be squared with the plain terms of the governing statutes.

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

1. The courts of appeals have 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. *See, e.g.*, *Carachuri-Rosendo*, 570 F.3d at 267 n.5; *Fernandez*, 544 F.3d at 866-67. 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*, 2a; *accord Fernandez*, 544 F.3d at 866; *Pacheco-Diaz*, 506 F.3d at 548-49 (applying eight-level enhancement to sentence on ground that second state possession offense constitutes an "aggravated felony"). The Fifth Circuit has reached the same conclusion, holding that an alien's second possession offense "qualified as an aggravated felony because it . . . *could have been* punished as a felony under the CSA's recidivism provision." *Carachuri-Rosendo*, 570 F.3d at 265 (emphasis added); *see United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 (5th Cir. 2005) (holding the same in sentencing context).

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 proceed-

ings 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 concluded that the alien's second offense failed to constitute an aggravated felony because his "[recidivist] status was never litigated as a 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 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 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.[1] Both of those circuits, like the court of appeals below and the Fifth Circuit, have explicitly recognized the division of authority. *See Carachuri-Rosendo*, 570 F.3d at 267 n.5; *Alsol*, 548 F.3d at 213-14; *Fernandez*, 544 F.3d at 872 & n.8; *Rashid*, 531 F.3d at 443-445.

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 Fifth Circuit have considered and rejected the majority view. And despite its recognition of the conflict, the court of appeals 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*

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[1] 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. Rodriquez*, 128 S. Ct. 1783, 1787-93 (2008) (rejecting approach taken in *Corona-Sanchez*).

also United States v. Pacheco-Diaz, 506 F.3d 545 (7th Cir. 2007), *reh'g denied*, 513 F.3d 776 (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. Sitting en banc, the BIA concluded that 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." *In re Carachuri-Rosendo*, 24 I. & N. Dec. at 391. The BIA thus held 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.*

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. *Id.* at 393-94. As a result, the approach of the court of appeals below governs in two circuits, which have considered and rejected the BIA's view; 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/statspub/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 A HIGHLY SUITABLE VEHICLE FOR RESOLVING IT

1. a. As the BIA recognized in its en banc opinion in *Carachuri-Rosendo*, 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. 24 I. & N. Dec. at 388. 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 both in the court below and in the Fifth Circuit.[2] 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 solely to challenge an aggravated felony designation.[3]

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[2] *See, e.g., Garbutt v. Holder*, Dkt. No. 08-4188 (7th Cir. filed Dec. 16, 2008); *Ffrench v. Holder*, Dkt. No. 08-4162 (7th Cir. filed Dec. 11, 2008); *Ramirez-Solis v. Holder*, Dkt. No. 08-3497 (7th Cir. filed Oct. 1, 2008); *Rodriguez-Diaz v. Holder*, Dkt. No. 08-3309 (7th Cir. filed Sept. 8, 2008); *Lopez-Mendoza v. Holder*, Dkt. No. 08-2916 (7th Cir. filed July 31, 2008); *Alvarez v. Holder*, Dkt. No. 08-2902 (7th Cir. filed July 30, 2008); *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); *Beckford v. Holder* (No. 08-1355) (7th Cir. filed Feb. 14, 2008).

[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-

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 convictions."). 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 substance 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 "undermin[e] the State's ability to negotiate plea agreements with defendants [who] would admit guilt to drug possession with the understanding that their

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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).

criminal records would reflect [a] misdemeanor," but would refuse to do so when the basis for 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. 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 8a-9a. The court of appeals below has already thoroughly reviewed and assessed the competing arguments on both sides of the conflict and denied rehearing en banc. *See Fernandez*, 544 F.3d at 865-74; *id.* at 874-80 (Rovner, J., dissenting), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009), *petition for cert. filed* (July 15, 2009).

Furthermore, this case presents in especially stark relief the substantial implications of the question presented for an alien designated as an "aggravated felon." Petitioner became a lawful permanent resident of the United States in 1990 and developed deep roots thereafter. He has worked as a tree trimmer since 1998, and is married to a lawful permanent resident, with whom he has three children and two grandchildren who are United States citizens.

Petitioner was removed from the country and separated from his family based on a conviction for simple drug possession that was then eight years old. Although there was no finding in that proceeding that petitioner was a recidivist possessor, the court of appeals' approach treats petitioner as an "aggravated felon" on the theory that he could have been prosecuted as a recidivist had he been charged in the federal system. 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 subjected him to mandatory removal from the country because, even though that offense is a misdemeanor under federal law, 21 U.S.C. § 844, petitioner could have been federally 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 "convicted" 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") (emphasis added); *see also 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").

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 on the theory that he instead could have been prosecuted for recidivist possession in the federal system.

In its filings in *Carachuri-Rosendo*, 24 I. & N. Dec. 382, the Department of Homeland Security (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." *Id.* at 390. But the DHS changed its position after argument before the BIA, "conced[ing] 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 390-91. 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." *Id.* at 391. The same concerns should apply here.

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 convic-

tion 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 became a lawful permanent resident in 1990 and has established deep roots here. Nor are the consequences of a person's deportation felt by that person alone; they extend to persons like petitioner's family members, who, under the court of appeals' decision, must either leave the country or be separated from him. 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 are treated as recidivist felons even when there is no decision 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 "undermin[es] 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. "[M]any 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 determined that it was bound by its decision in *Fernandez*, which concluded that this Court's holding in *Lopez* "settle[d] the matter." *Fernandez*, 544 F.3d at 870. In particular, the *Fernandez* 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 that federal law." *Lopez*, 549 U.S. at 60; *see Fernandez*, 544 F.3d at 870-71. 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 Carachuri-Rosendo*, 24 I. & N. Dec. at 390; *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. *See Carachuri-Rosendo*, 24 I. & N. Dec. at 390. The court of appeals accordingly erred in holding that petitioner's conviction for simple possession qualified as an aggravated felony simply because he could have been federally prosecuted for recidivist possession.

CONCLUSION

The petition in this case presents the same question presented in *Carachuri-Rosendo v. Holder*, *petition for cert. filed*, No. 09-60 (July 15, 2009), and *Fernandez v. Holder*, *petition for cert. filed*, No. 09-5386 (July 15, 2009). Petitioner in *Fernandez* has asked this Court to hold the petition in that case pending the Court's disposition of the petition in *Carachuri-Rosendo, supra.*

In this case, the Court should hold the petition pending the Court's disposition of the petition in *Carachuri-Rosendo, supra*, and then dispose of the petition in this case accordingly. In the alternative, the Court should grant the petitions in this case and in *Carachuri-Rosendo, supra*, and then consolidate the cases and allot a total of one hour for oral argument.

Respectfully submitted,

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