No. 03-115

In the Supreme Court of the United States

OWIN FINBAR DANZELL, PETITIONER

v.

JOHN D. ASHCROFT, ATTORNEY GENERAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether petitioner's state felony drug convictions for possessing cocaine are "aggravated felonies" under the Immigration and Nationality Act, 8 U.S.C. 1101(a)(43)(B).

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Aquirre v. *INS*, 79 F.3d 315 (2d Cir. 1996)	9
Armentero v. *INS*, 340 F.3d 1058 (9th Cir. 2003)	6
Gerbier v. *Holmes*, 280 F.3d 297 (3d Cir. 2002)	8
Nehme v. *INS*, 252 F.3d 415 (5th Cir. 2001)	10
Rogers v. *Bellei*, 401 U.S. 815 (1971)	10
Roman v. *Ashcroft*, 340 F.3d 314 (6th Cir. 2003)	6
Schlanger v. *Seamans*, 401 U.S. 487 (1971)	6
Stellwagen v. *Clum*, 245 U.S. 605 (1918)	10
Toll v. *Moreno*, 458 U.S. 1 (1982)	10
United States v. *Briones-Mata*, 116 F.3d 308 (8th Cir. 1997)	8
United States v. *Cabrera-Sosa*, 81 F.3d 998 (10th Cir.), cert. denied, 519 U.S. 885 (1996)	8
United States v. *Caicedo-Cuero*, 312 F.3d 697 (5th Cir. 2002), cert. denied, 123 S. Ct. 1948 (2003)	5
United States v. *Hernandez-Avalos*, 251 F.3d 505 (5th Cir.), cert. denied, 534 U.S. 935 (2001)	5, 6, 8
United States v. *Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997)	5, 6, 8
United States v. *Ibarra-Galindo*, 206 F.3d 1337 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001)	7-8

Cases—Continued:	Page
United States v. *Pornes-Garcia*, 171 F.3d 142 (2d Cir.), cert. denied, 528 U.S. 880 (1999)	8, 9
United States v. *Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996)	8
United States v. *Wilson*, 316 F.3d 506 (4th Cir.), cert. denied, 123 S. Ct. 1959 (2003)	7
Vasquez v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001)	6
Yanez-Garcia, In re, 23 I. & N. Dec. 390 (BIA 2002)	9
Constitution, statutes and regulations:	
U.S. Const.:	
Art. I, § 8, Cl. 4	9, 10
Art. III	10
Controlled Substances Act, 21 U.S.C. 844(a)	4
Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546:	
§ 309(a), 110 Stat. 3009-625	2
§ 309(c), 110 Stat. 3009-625	2
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:	
8 U.S.C. 1101(a)(43)	2, 3
8 U.S.C. 1101(a)(43)(B)	2, 4, 8, 9, 10
8 U.S.C. 1227(a)(2)(A)(iii)	2, 4, 7, 11
8 U.S.C. 1227(a)(2)(B)(i)	3
8 U.S.C. 1229	2
8 U.S.C. 1229a	2
8 U.S.C. 1229b(a)(3)	2
8 U.S.C. 1229b(b)(1)(C)	2
8 U.S.C. 1252(a)(2)(C)	5
8 U.S.C. 1252(b)(3)(A)	6
8 U.S.C. 1326(a)	2
8 U.S.C. 1326(b)(2)	3
18 U.S.C. 924(c)	2
18 U.S.C. 924(c)(2)	2, 5, 7

Statute and regulations—Continued: Page

28 U.S.C. 2241 ..... 5, 6
United States Sentencing Guidelines:
§ 2L1.2 7
§ 2L1.2, comment. (n.2) 3
§ 2L1.2(b)(1)(C) 3

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OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-2) is unreported. The memorandum and opinion of the district court (Pet. App. 5-6) is unreported. The opinion of the Board of Immigration Appeals (Pet. App. 9-12) and the oral decision of the immigration judge (Pet. App. 16-24) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 13, 2003. A petition for rehearing was denied on April 22, 2003 (Pet. App. 25-26). The petition for a writ of certiorari was filed on July 21, 2003. Petitioner does not identify the statutory provision believed to confer jurisdiction on this Court. See Sup. Ct. R.

14.1(e)(iv). It appears, however, that the jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The term "aggravated felony" is defined for purposes of the immigration laws in the Immigration and Nationality Act (INA), 8 U.S.C. 1101(a)(43). Under Section 1101(a)(43)(B), the term includes a drug trafficking crime defined in 18 U.S.C. 924(c). Section 924(c)(2), in turn, provides that "the term 'drug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." 18 U.S.C. 924(c)(2). An alien who is convicted of an aggravated felony after admission to the United States is removable on that basis. See 8 U.S.C. 1227(a)(2)(A)(iii). Aggravated felons are ineligible to be considered for the discretionary immigration relief of cancellation of removal. See 8 U.S.C. 1229b(a)(3) and (b)(1)(C).[1]

The INA also makes it unlawful for an alien to reenter the United States, without the consent of the Attorney General, after having been removed. 8 U.S.C. 1326(a). If the defendant's earlier removal followed a

[1] In 1996, amendments to the immigration laws instituted a new form of proceeding—known as "removal"—that applies to aliens who have entered the United States but are deportable, as well as to aliens who are inadmissible at the border. See 8 U.S.C. 1229, 1229a; see also Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 309(a) and (c), 110 Stat. 3009-625. Deportable aliens now are "removed" from the United States under a "removal order," whereas before the 1996 amendments they were "deported" under a "deportation order." For simplicity, this brief uses the term "removal" to encompass deportation.

conviction for commission of an aggravated felony, then a sentencing enhancement applies and the alien may be sentenced to a term of imprisonment of up to 20 years for the illegal-reentry offense. 8 U.S.C. 1326(b)(2). Implementing Section 1326(b)(2), the Sentencing Guidelines establish an eight-level enhancement of the defendant's offense level in an illegal-reentry prosecution if the defendant's earlier removal followed an aggravated-felony conviction. Sentencing Guidelines § 2L1.2(b)(1)(C). Commentary to the Guidelines states that "[f]or purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in 8 U.S.C. 1101(a)(43), without regard to the date of conviction of the aggravated felony." *Id.* § 2L1.2, comment. (n.2).

2. a. Petitioner is a native and citizen of Trinidad. Pet. App. 16. In 1989, he became a lawful permanent resident of the United States. *Id.* at 2. In August 1999, petitioner was convicted in Texas, after pleading guilty, of felony possession of cocaine. He received a sentence of four years of imprisonment for that offense, but was not required to serve that sentence due to a deferred adjudication of guilt. *Id.* at 12, 17.

In January 2000, petitioner again was convicted in Texas, after a guilty plea, of felony cocaine possession. Petitioner was sentenced to a jail term of one year for his second offense. Pet. App. 17-18. He also was resentenced for his August 1999 conviction, for which he received a concurrent jail term of one year. *Id.* at 10.

b. In January 2001, the Immigration and Naturalization Service commenced removal proceedings against petitioner based on his drug convictions. At his removal hearing in February 2001, petitioner conceded that he is removable from the United States under 8 U.S.C. 1227(a)(2)(B)(i) for having been convicted of a state controlled-substance offense. He contested, how-

ever, that he is removable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii)—a ground of removal that would make him ineligible to receive the discretionary relief of cancellation of removal. Pet. App. 16-17.

The immigration judge (IJ) determined that petitioner is removable on both grounds charged by the INS and therefore ineligible for cancellation of removal. Pet. App. 23. Addressing the status of petitioner's drug convictions as aggravated felonies, the IJ first considered precedential decisions in which the Board of Immigration Appeals (BIA) had concluded that the term "aggravated felony," as used in 8 U.S.C. 1101(a)(43)(B), does not include first offenses for simple drug possession because such offenses, although punishable under the federal Controlled Substances Act, are not punishable *as felonies* under that Act. See 21 U.S.C. 844(a); Pet. App. 10 (discussing BIA cases). Applying that BIA precedent, the IJ determined that petitioner's August 1999 offense for cocaine possession should not be deemed an aggravated felony. *Id.* at 18-20. The IJ determined, however, that petitioner's January 2000 conviction *is* an aggravated felony under the BIA's cases because that second, recidivist offense could have been punished as a felony under the federal Controlled Substances Act, 21 U.S.C. 844(a). See Pet. App. 19-22.

c. The BIA affirmed and ordered petitioner removed to Trinidad. Pet. App. 9-15. It agreed with the IJ that petitioner's first drug conviction should not be treated as an aggravated felony under BIA precedent, and that the second conviction is a felony under that precedent because it is punishable as a felony under the Controlled Substances Act. *Id.* at 11.

The BIA also analyzed petitioner's case, which arose in the immigration court in Texas, under Fifth Circuit law. The BIA observed that the Fifth Circuit treats

first state felony convictions for simple possession of a controlled substance as aggravated-felony convictions. Pet. App. 11-12; see *United States* v. *Hernandez-Avalos*, 251 F.3d 505, 508, cert. denied, 534 U.S. 935 (2001). Contrary to the BIA's approach at the time of petitioner's removal proceedings, the Fifth Circuit has determined that the reference in 18 U.S.C. 924(c)(2) to "any felony punishable under the Controlled Substances Act" requires that the offense must be (1) a felony in the relevant jurisdiction and (2) potentially punishable under the Controlled Substances Act. See *United States* v. *Caicedo-Cuero*, 312 F.3d 697, 706-711 (5th Cir. 2002), cert. denied, 123 S. Ct. 1948 (2003); *Hernandez-Avalos*, 251 F.3d at 508; *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 693-694 (5th Cir. 1997). The BIA thus concluded in this case that *both* of petitioner's convictions are aggravated felonies under Fifth Circuit law "because possession of cocaine is clearly punishable under the Controlled Substances Act, and is a felony under Texas law." Pet. App. 12.

d. Petitioner sought review of the BIA's final order of removal in the Fifth Circuit. The government moved to dismiss the petition for review under 8 U.S.C. 1252(a)(2)(C), which provides that "no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed [an aggravated felony] covered in section * * * 1227(a)(2)(A)(iii)." 8 U.S.C. 1252(a)(2)(C). In October 2001, the court of appeals granted the government's motion to dismiss. Pet. App. 7.

3. Petitioner then challenged his removal order in a habeas corpus petition filed under 28 U.S.C. 2241 in the United States District Court for the Southern District of Texas. See Pet. App. 5. The district court dismissed the petition, holding that the court of appeals' dismissal

of petitioner's petition for review prevented the district court from exercising jurisdiction over the same claims in a habeas corpus proceeding. *Id.* at 6. The district court further stated, however, that petitioner would not obtain relief even if the court did have jurisdiction, because Fifth Circuit law clearly establishes that state felony convictions for possession of cocaine are aggravated felony convictions. *Ibid.* (citing *Hernandez-Avalos*, *supra*, and *Hinojosa-Lopez*, *supra*).[2]

4. The court of appeals affirmed in an unpublished per curiam decision. Pet. App. 1-2. The court of appeals stated that "[i]t is unclear from the record" whether petitioner's habeas corpus petition raised the same issues that were raised in his petition for direct review of the removal order, but affirmed the district court's decision on the basis that "the arguments [petitioner] raised in his 28 U.S.C. § 2241 petition concerning whether his state controlled-substance convictions are 'aggravated felonies' are foreclosed by [Fifth Circuit] precedents." *Id.* at 2 (citing *Hernandez-Avalos*, *supra*, and *Hinojosa-Lopez*, *supra*).

ARGUMENT

Although the question presented in the petition addresses a supposed requirement of national uni-

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[2] Petitioner named the Attorney General, among others, as a respondent to his habeas corpus petition in the district court. See Pet. App. 5. Although the Attorney General was the proper respondent in the petition for review proceeding in the court of appeals, see 8 U.S.C. 1252(b)(3)(A), he was not respondent's immediate custodian and was not present in the Southern District of Texas, and therefore was not a proper respondent to the habeas corpus petition. See *Schlanger* v. *Seamans*, 401 U.S. 487 (1971); *Roman* v. *Ashcroft*, 340 F.3d 314, 323-325 (6th Cir. 2003); *Vasquez* v. *Reno*, 233 F.3d 688 (1st Cir. 2000), cert. denied, 534 U.S. 816 (2001); but see *Armentero* v. *INS*, 340 F.3d 1058 (9th Cir. 2003).

formity in judicial interpretations of the immigration laws, see Pet. i, the question on which petitioner actually seeks review is whether the Board of Immigration Appeals correctly determined that he is removable under 8 U.S.C. 1227(a)(2)(A)(iii) as an aggravated felon, and therefore ineligible to apply for the discretionary relief of cancellation of removal. See Pet. 5 (petitioner "challenges his inclusion into a class of aliens known as 'aggravated felons'"). The court of appeals correctly upheld the BIA's decision, and there is no conflict with any decision of this Court or conflict among the circuits that warrants review by this Court. Moreover, whether or not the court of appeals was correct that petitioner's *first* state felony conviction for drug possession is an aggravated felony, petitioner is removable as an aggravated felon based on his *second* state felony conviction, which could have been prosecuted as a federal felony offense.

1. a. Numerous courts of appeals have considered the application of the "aggravated felony" definition in Sentencing Guidelines § 2L1.2—which incorporates the definition in the Immigration and Nationality Act—to state felony convictions for simple possession of a controlled substance. Those courts uniformly have concluded that a state offense satisfies the requirement of being a "felony punishable under the Controlled Substances Act," 18 U.S.C. 924(c)(2), if it is (1) a felony in the relevant jurisdiction and (2) potentially punishable under the Controlled Substances Act. Accordingly, the courts all have held that a drug possession offense that was punished as a felony under state law and would be punishable under the federal Controlled Substances Act constitutes an aggravated felony. See, *e.g.*, *United States* v. *Wilson*, 316 F.3d 506, 512 (4th Cir.), cert. denied, 123 S. Ct. 1959 (2003); *United States* v. *Ibarra-*

Galindo, 206 F.3d 1337, 1338-1341 (9th Cir. 2000), cert. denied, 531 U.S. 1102 (2001); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 145-148 (2d Cir.), cert. denied, 528 U.S. 880 (1999); *United States* v. *Hinojosa-Lopez*, 130 F.3d 691, 693-694 (5th Cir. 1997); *United States* v. *Briones-Mata*, 116 F.3d 308, 309-310 (8th Cir. 1997); *United States* v. *Cabrera-Sosa*, 81 F.3d 998, 999-1000 (10th Cir.), cert. denied, 519 U.S. 885 (1996); *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 364-367 (1st Cir. 1996). In *United States* v. *Hernandez-Avalos*, 251 F.3d 505, cert. denied, 534 U.S. 935 (2001), the Fifth Circuit applied that same rule to the removal of an alien in the civil immigration context, directly under the INA's definition of "aggravated felony." *Id.* at 508.

Petitioner states (Pet. 7-8) that *Gerbier* v. *Holmes*, 280 F.3d 297 (3d Cir. 2002), and the Second Circuit's decision in *Pornes-Garcia*, *supra*, conflict with the Fifth Circuit's adherence, in the civil immigration context, to the rule uniformly applied under the Sentencing Guidelines. Like this case, *Gerbier* was a civil case involving habeas corpus review of an alien's order of removal. See 280 F.3d at 301-302. Also like this case, it arose against the background of earlier decisions in which the BIA concluded that the term "aggravated felony," as used in 8 U.S.C. 1101(a)(43)(B), does not include first offenses for simple drug possession because the federal Controlled Substances Act does not classify such offenses as felonies. See *Gerbier*, 280 F.3d at 304-306, 309-310. The Third Circuit accepted the BIA's application of the term "aggravated felony" in removal proceedings "[i]n light of * * * the need for uniformity in the immigration context," *id.* at 310-311, but specifically "reserve[d] for another day the proper interpretation of § 924(c)(2) in the Sentencing Guidelines context," *id.* at 299; see *id.* at 307. Similarly, the Second Circuit ac-

cepted the BIA's application of Section 1101(a)(43)(B) to simple possession offenses in the immigration context, see *Aguirre* v. *INS*, 79 F.3d 315, 317 (1996) (citing "the interests of nationwide uniformity" in immigration enforcement), while holding in the Sentencing Guidelines context that simple possession offenses are aggravated felonies, see *Pornes-Garcia*, 171 F.3d at 145-148.

The tension between the approach developed in criminal cases under the Sentencing Guidelines, and the approach the Second and Third Circuits have taken in civil cases involving the removal of aliens as aggravated felons, is likely to dissipate. In May 2002, the BIA reconsidered its application of the "aggravated felony" definition to drug possession convictions and concluded that the approach taken by the courts of appeals in criminal cases is the better-reasoned view. See *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 393-398 (BIA 2002) (en banc). The BIA stated that it would henceforth follow the law of the relevant circuit or, if the issue has not been decided in that circuit, apply the approach taken by the courts of appeals in criminal cases. *Id.* at 396-397. In light of the BIA's change of position, the Second and Third Circuits may well reconsider their approach to this issue in civil immigration cases.

b. There is no merit to petitioner's assertion (Pet. 5) that the limited and probably ephemeral conflict among the Second, Third, and Fifth Circuits in civil immigration cases "violates the United States Constitution's uniform rule of naturalization." Article I, Section 8, Clause 4 of the Constitution provides that "[t]he Congress shall have Power * * * To establish an uniform Rule of Naturalization * * * throughout the United States." Although that constitutional authorization supports the general federal authority to regulate the

status of aliens, see *Toll* v. *Moreno*, 458 U.S. 1, 10 (1982), it specifically addresses the grant of naturalized United States citizenship, see *Rogers* v. *Bellei*, 401 U.S. 815, 823, 828-829 (1971), which is not at issue here. The uniformity requirement, moreover, pertains by its terms to congressional law-making, not judicial decision-making.

Petitioner offers no support for his novel suggestion that it violates the Constitution for lower Article III courts to disagree about the correct interpretation of provisions of the immigration laws. Petitioner also is mistaken when he argues (Pet. 9) that a law is uniform in the constitutional sense only if the results of its application are identical throughout the Nation, and do not depend on state laws or local conditions. See, *e.g.*, *Stellwagen* v. *Clum*, 245 U.S. 605, 613 (1918) ("Notwithstanding [the Article I, § 8, Cl. 4] requirement as to uniformity [of the bankruptcy laws] the bankruptcy acts of Congress may recognize the laws of the State in certain particulars, although such recognition may lead to different results in different States."); *Nehme* v. *INS*, 252 F.3d 415, 429 (5th Cir. 2001) ("[T]he Constitution simply requires Congress to enact rules of naturalization that apply uniformly throughout the United States, even though those uniform federal rules may produce results that differ by state.").[3]

2. Finally, petitioner would not obtain relief from removal even if he prevailed in his argument that a first state felony conviction for possession of a controlled substance should not be treated as an aggravated felony under 8 U.S.C. 1101(a)(43)(B). The BIA also

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[3] The cases cited by petitioner (Pet. 9) involve federal preemption of state laws, not constitutional uniformity requirements for congressional action.

determined that petitioner is removable as an aggravated felon on the alternative ground that a conviction for recidivist possession of a controlled substance—here, petitioner's second conviction in January 2000—is an aggravated felony because it is punishable as a felony under the Controlled Substances Act. Pet. App. 11. That determination independently justifies petitioner's removal under 8 U.S.C. 1227(a)(2)(A)(iii) and his ineligibility for discretionary cancellation of removal.

This case therefore would not be an appropriate vehicle for consideration of the treatment of simple possession offenses under the immigration laws even if that issue otherwise warranted review by this Court, which it does not.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
Attorneys

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