No. 10-149

In the Supreme Court of the United States

LEOPOLDO BAJALA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the California offense of marijuana cultivation, Cal. Health & Safety Code § 11358 (West 2007), qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(B).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-2) is not published in the *Federal Reporter* but is reprinted in 355 Fed. Appx. 986. The decisions of the Board of Immigration Appeals (Pet. App. 3-6) and the immigration judge (Pet. App. 7-11) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2009. A petition for rehearing en banc was denied on March 12, 2010 (Pet. App. 12). The petition for a writ of certiorari was filed on June 8, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides for the removal of an alien from the United States on a number of grounds, including that the alien has committed certain types of crimes. 8 U.S.C. 1182, 1227. The Attorney General may, in his discretion, cancel the removal of a permanent resident alien who satisfies certain statutory criteria. 8 U.S.C. 1229b(a). One of those statutory criteria is that the alien "has not been convicted of any aggravated felony." 8 U.S.C. 1229b(a)(3).

The INA defines the term "aggravated felony" to include any "drug trafficking crime" as defined in 18 U.S.C. 924(c). 8 U.S.C. 1101(a)(43)(B). Section 924(c), in turn, defines a "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)." 18 U.S.C. 924(c)(2). That definition encompasses not only a crime that was actually prosecuted federally, but also a state-law conviction for "a crime that is itself punishable as a felony under [relevant] federal law." *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010).

2. Petitioner, a native and citizen of the Philippines, was a lawful permanent resident of the United States. Pet. App. 8. While in the United States, he was convicted of animal cruelty, in violation of California Penal Code § 597b (West 2010); possession of cockfighting implements, in violation of § 597i; and owning, possessing, or keeping an animal for purposes of fighting, in violation of § 597j. Gov't C.A. Br. 4. He was also convicted of violating California Health & Safety Code § 11358 (West 2007), which provides that "[e]very person who plants, cultivates, harvests, dries, or processes any marijuana or any part thereof, except as otherwise provided

by law, shall be punished by imprisonment in the state prison." Gov't C.A. Br. 4.

3. The Department of Homeland Security charged that petitioner was removable on three alternative grounds: that he had committed crimes of moral turpitude, that he had committed a controlled substance offense, and that the Attorney General had reason to believe that he was an illicit trafficker in a controlled substance. Pet. App. 8; see 8 U.S.C. 1182(a)(2)(A)(i)(I)-(II) and (C)(i), 1227(a)(1)(A). The immigration judge agreed with the government that petitioner was removable on the first two grounds (because of the cockfighting and drug-related crimes), and found no need to address the third. Pet. App. 9-10; Gov't C.A. Br. 5. The immigration judge furthermore concluded that petitioner's conviction for marijuana cultivation was an aggravated felony that rendered petitioner ineligible to seek cancellation of his removal. Pet. App. 9-10.

The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 3-6. It reasoned that, because marijuana cultivation is punishable as a felony under the Controlled Substances Act (CSA), petitioner had been convicted of an "aggravated felony" and was not eligible for cancellation of removal. *Id.* at 5 (citing 21 U.S.C. 812(c), 841(a)(1) and (b)(1)(D), 802(15) and (22), 18 U.S.C. 3559(a)).

The court of appeals denied a petition for review. Pet. App. 1-2. It cited circuit precedent holding that the offense under California's marijuana-cultivation statute, Cal. Health & Safety Code § 11358 (West 2007), is an aggravated felony for purposes of eligibility for cancellation of removal. Pet. App. 2 (citing *United States* v. *Reveles-Espinoza*, 522 F.3d 1044, 1047 (9th Cir.), cert. denied, 129 S. Ct. 247 (2008)).

ARGUMENT

Petitioner contends (Pet. 4-7) that the court of appeals erred in denying his petition for review because marijuana cultivation for "personal use" is not an aggravated felony under the INA. That contention lacks merit.

As previously explained (p. 2, *supra*), the definition of an "aggravated felony" conviction in the INA includes a state-law conviction for a crime punishable as a felony under the CSA. See 8 U.S.C. 1229b(a)(3), 1101(a)(43)(B); 18 U.S.C. 924(c)(2); *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2589 (2010). Contrary to petitioner's contention, the CSA punishes marijuana cultivation as a felony, whether the cultivation was for commercial or personal use.

The relevant CSA provision, 21 U.S.C. 841(a)(1), provides that "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally * * * to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." The CSA expressly defines "manufacture" to include four of the five activities proscribed by California Health & Safety Code § 11358 (West 2007) ("plant[ing]," "cultivat[ion]," "harvest[ing]," and "process[ing]"), and the term has been interpreted to include the fifth activity ("dr[ying]") as well. 21 U.S.C. 802(15) ("manufacture" includes "production" and "processing"), (22) ("production" includes "planting," "cultivation," and "harvesting"); see *United States* v. *Reveles-Espinoza*, 522 F.3d 1044, 1047-1048 (9th Cir.) ("[T]he ordinary meaning of the terms 'production' and 'processing of a drug' includes the act of drying.") (citing cases and other authorities), cert. denied, 129 S. Ct. 247 (2008). A violation of Section 841(a)(1) is punishable

by up to five years of imprisonment. 21 U.S.C. 841(b)(1)(D); see 18 U.S.C. 3559(a) (classifying an offense with such a punishment as a "felony").

Petitioner errs in claiming that Section 841(a)(1) applies only to the manufacture of marijuana with "intent to sell or distribute." Pet. 5 (emphasis omitted). The words "intent to sell or distribute" appear nowhere in Section 841(a)(1). That provision does include the phrase "with intent to manufacture, distribute, or dispense," but that does not aid petitioner. First of all, the phrase modifies only the verb "possess," not the verb "manufacture." See 21 U.S.C. 841(a)(1) (crime for anyone "knowingly or intentionally * * * to manufacture, distribute, or dispense, or *possess with intent to manufacture, distribute, or dispense*, a controlled substance") (emphasis added). Furthermore, even if the phrase did modify the verb "manufacture," it would impose no meaningful limitation, because an "intent to manufacture" would by itself be enough to violate the statute, even without an intent to "distribute, or dispense."

Petitioner is accordingly mistaken in suggesting (Pet. 7) that the government was required to prove that the conduct underlying his particular marijuana-cultivation conviction involved cultivation for non-personal purposes. He identifies no court of appeals that would have required such proof. No further review is warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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