No. 19-747

In the Supreme Court of the United States

FRANCISCO LOPEZ GAMERO, PETITIONER

v.

WILLIAM P. BARR, ATTORNEY GENERAL

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's convictions for possession of controlled substances with intent to deliver, in violation of Illinois law, are convictions for "aggravated felon[ies]" under 8 U.S.C. 1101(a)(43)(B).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-17) is reported at 929 F.3d 464. The decisions of the Board of Immigration Appeals (Pet. App. 18-28) and the immigration judge (Pet. App. 29-45) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2019. A petition for rehearing was denied on September 9, 2019 (Pet. App. 46-47). The petition for a writ of certiorari was filed on December 9, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, aliens who have been admitted to the United States are removable if they have

been convicted of, among other offenses, an "aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). Certain removable aliens may seek the discretionary relief of cancellation of removal, 8 U.S.C. 1229b(a), but an alien convicted of an aggravated felony is ineligible for that relief, 8 U.S.C. 1229b(a)(3).

As relevant here, the categories of aggravated felonies include "illicit trafficking in a controlled substance * * * , including a drug trafficking crime (as defined in [S]ection 924(c) of [T]itle 18)," 8 U.S.C. 1101(a)(43)(B), whether the offense is committed "in violation of Federal or State law," 8 U.S.C. 1101(a)(43) (penultimate sentence). In turn, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the Controlled Substances Act" (CSA), 21 U.S.C. 801 *et seq*.

One provision of the CSA, 21 U.S.C. 841(a)(1), prohibits possession of a controlled substance with intent to distribute. Penalties for violating this CSA provision vary based on the type and amount of the controlled substance involved, as well as other factors. See generally 21 U.S.C. 841(b)(1)(A)-(E).

b. The Illinois criminal code provides that "it is unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance," including "any substance containing cocaine," 720 Ill. Comp. Stat. 570/401 (2005), and that "it is unlawful for any person knowingly to manufacture, deliver, or possess with intent to deliver, or manufacture, cannabis," *id*. at 550/5. The penalties for both crimes vary based on the amount of the controlled substance involved. See *id*. at 550/5(a)-(g) and 570/401(a).

2. a. Petitioner, a native and citizen of Mexico, entered the United States in 1973 and became a lawful permanent resident in 1989. Pet. App. 2. In 1997, he was convicted of domestic battery under 720 Ill. Comp. Stat. 5/12-3.2(a)(1) (1994) after he "struck [M.L.] about the face and head with his fists causing laceration to her lip and bruises to her head, and kicked her in the stomach." Pet. App. 3; Administrative Record (A.R.) 1013-1014.[1] In 2005, he was convicted of possession of cocaine (between one and 15 grams) with intent to deliver, in violation of 720 Ill. Comp. Stat. 570/401(c)(2), and possession of cannabis (between 2000 and 5000 grams) with intent to deliver, in violation of 720 Ill. Comp. Stat. 550/5(f). Pet. App. 3, 23 n.2; A.R. 1004-1005, 1007, 1009-1012.[2]

b. On April 6, 2016, the Department of Homeland Security instituted removal proceedings against petitioner on the grounds that he had been convicted of aggravated felonies, controlled-substance offenses, a domestic-violence offense, and crimes involving moral turpitude. A.R. 998. Petitioner conceded the charges of removability except the one alleging that his drug convictions constituted aggravated felonies, and (as relevant here) applied for cancellation of removal. See A.R. 211-212, 221-223, 241-244, 998; Pet. App. 37; see also A.R. 904-956 (petitioner's motion to strike aggravated felony charge).

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[1] References to "A.R." are to the administrative record filed in C.A. Docket No. 18-1104 (Jan. 12, 2018).

[2] Petitioner's description of the facts underlying these offenses, Pet. 4, relies on petitioner's own affidavit prepared in connection with his removal. The administrative record does not otherwise describe the facts underlying petitioner's drug convictions.

The immigration judge (IJ) found petitioner removable and denied his application for cancellation of removal. Pet. App. 30-31. The IJ explained that petitioner was statutorily ineligible for cancellation of removal because his drug convictions were aggravated felonies. *Id.* at 37. The IJ rejected petitioner's argument that "his convictions for drug dealing are overbroad" because those convictions did not require proof of "remuneration," explaining that, in fact, "his convictions are a categorical match for a drug trafficking * * * felony under the Federal Controlled Substances Act." *Ibid.*

The Board of Immigration Appeals (Board) dismissed petitioner's appeal. Pet. App. 19, 28. As relevant here, the Board concluded that petitioner's drug crimes were aggravated felonies. The Board explained that, under 8 U.S.C. 1101(a)(43)(B), the terms "'[i]llicit trafficking' and 'drug trafficking crime' are distinct." Pet. App. 22. The Board acknowledged that petitioner's drug convictions did not require proof of any commercial transactions, *id.* at 22 & n.1, but observed that "[t]o be a 'drug trafficking crime,' rather than 'illicit trafficking' * * *, the delivery offense need not involve remuneration," *id.* at 23. The Board determined that petitioner's Illinois drug convictions were analogous to convictions under the CSA for the felony offense of possession with intent to distribute, and were therefore aggravated felonies. *Ibid.* (citing 21 U.S.C. 841(a)(1)).

c. The court of appeals denied petitioner's consolidated petitions for review. Pet. App. 1-17. The court noted that petitioner "concedes that his Illinois convictions match the analog drug felonies in the [CSA]," but nonetheless "argues * * * that his drug convictions do not qualify as 'illicit trafficking' offenses because they

do not involve remuneration." *Id.* at 9. The court rejected that argument, explaining that "[a]s used in federal and state controlled-substances statutes, 'trafficking' is a broad term casting a wide net and covering all manner of unlawful distribution of—and possession with intent to distribute—controlled substances, whether for value or otherwise." *Id.* at 10. Indeed, the court of appeals explained, "[f]ew drug-trafficking felonies require proof of remuneration; it's improbable that § 1101(a)(43)(B) covers only these." *Ibid.*

The court of appeals found that this Court's decision in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), supported its conclusion. The court of appeals acknowledged *Lopez*'s general statement—in "dicta"—that ordinarily "trafficking includes 'some sort of commercial dealing.'" Pet. App. 8, 10 (quoting *Lopez*, 549 U.S. at 53). But the court pointed to other language in *Lopez* specifically noting that "a conviction for a drug-related crime punishable as a felony under the Controlled Substances Act counts as an aggravated felony under § 1101(a)(43)(B) *regardless* of whether the crime entails remuneration," *id.* at 11:

> Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c)(2), such as possession of cocaine base and recidivist possession, *see* 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2), *regardless of whether these [crimes] constitute "illicit trafficking in a controlled substance" or "drug trafficking" as those terms are used in ordinary speech.*

Ibid. (quoting *Lopez*, 549 U.S. at 55 n.6) (emphasis and brackets added by court of appeals).

In the alternative, the court of appeals determined that if the term "illicit trafficking" in 8 U.S.C. 1101(a)(43)(B) is ambiguous, then the Board's interpretation is reasonable and consistent with *Lopez*. Pet. App. 11-12.

ARGUMENT

Petitioner contends (Pet. 7-26) that the court of appeals erred in determining that his Illinois convictions for possession of controlled substances with intent to deliver are convictions for aggravated felonies under 8 U.S.C. 1101(a)(43)(B). The court of appeals' decision is correct and does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. a. In *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), this Court considered whether a state drug conviction that was defined as a felony under state law, but that would be a misdemeanor under the CSA, qualifies as an "aggravated felony." The Court held that it does not, explaining 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." *Id.* at 60.

In the course of explaining what constitutes "illicit trafficking in a controlled substance" under 8 U.S.C. 1101(a)(43)(B), this Court observed that "ordinarily 'trafficking' means some sort of commercial dealing." *Lopez*, 549 U.S. at 53. But, the Court explained, "Congress can define an aggravated felony of illicit trafficking in an unexpected way," and it did just that by including certain possession offenses within the definition. *Id.* at 54, 55 n.6. In particular, the Court stated that state drug "crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c)(2) * * *

clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B)" even if the state drug crimes do not involve commercial dealing. *Id.* at 55 n.6.

b. Following *Lopez*'s guidance, the court of appeals correctly determined that petitioner's Illinois drug crimes are aggravated felonies under 8 U.S.C. 1101(a)(43)(B). There is no dispute that petitioner's convictions "correspond to felony violations of one of the three statutes enumerated in § 924(c)(2)." *Lopez*, 549 U.S. at 55 n.6. Indeed, petitioner "concedes that his Illinois convictions match the analog drug felonies in the Controlled Substances Act." Pet. App. 9. Under the plain text of Section 1101(a)(43)(B) and this Court's decision in *Lopez*, that is the end of the matter: A felony "drug trafficking crime" under the CSA, whether committed "in violation of Federal or State law," is an "aggravated felony" under the INA. 8 U.S.C. 1101(a)(43)(B); *Lopez*, 549 U.S. at 57 ("a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony").

c. Petitioner primarily contends (Pet. 7-12, 24-26) that the phrase "illicit trafficking" invariably requires a "commercial element," and that *any* aggravated felony under Section 1101(a)(43)(B) therefore must include such a "commercial element." But this Court foreclosed that interpretation of Section 1101(a)(43)(B) in *Lopez*. See 549 U.S. at 53, 55 n.6. And, as the court of appeals noted, petitioner's interpretation would have the implausible result of excluding from Section 1101(a)(43)(B) many felonies under the CSA, and their state counterparts, notwithstanding the statute's express incorporation of "a drug trafficking crime (as defined in [S]ection 924(c) of [T]itle 18)." 8 U.S.C. 1101(a)(43)(B); see Pet. App. 8. Indeed, the principal federal prohibition in the

CSA contains no "commercial element." See 21 U.S.C. 841(a)(1) ("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").

Petitioner also criticizes (Pet. 12-17) the Board's interpretation of Section 1101(a)(43)(B), under which "the Board has effectively split § 1101(a)(43)(B) into two parts": a drug conviction is an "aggravated felony" if (1) "the offense satisfies the 'commercial transaction' understanding of 'illicit trafficking,'" *or* if (2) "the offense qualifies as a drug-trafficking crime as defined in § 924(c)—that is, if it is a felony under the Controlled Substances Act (or a state analog)," Pet. App. 8-9. But here the court of appeals simply applied *Lopez* to conclude that petitioner's Illinois drug offenses, whose elements undisputedly include the elements of felonies punishable under the CSA, are aggravated felonies under Section 1101(a)(43)(B). *Id.* at 10-11. Under that approach, the court had no need to assess the Board's interpretation of Section 1101(a)(43)(B) as a whole.

Thus whether the Board correctly interprets "illicit trafficking" to invariably require a "commercial transaction," or correctly differentiates "drug trafficking" crimes from "illicit trafficking" crimes in Section 1101(a)(43)(B), is not squarely presented here.[3] At most, petitioner's arguments implicate the court of appeals' brief alternative holding that the Board's approach is reasonable if the term "illicit trafficking" is

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[3] By contrast, those questions might be important in a case in which the alleged aggravated felony is a state drug crime that neither requires remuneration *nor* categorically matches a federal drug-trafficking crime as referenced in 18 U.S.C. 924(c).

ambiguous. Pet. App. 11. But that alternative argument cannot help petitioner here, where the court of appeals' primary holding rests on the explicit statutory text, resolves this case, and is required by this Court's precedent. At the very least, that aspect of the Board's interpretation is reasonable under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

2. Petitioner contends (Pet. 3, 21-24) that the decision below creates an "indirect" conflict between the Seventh and Third Circuits. That is incorrect. To the contrary, no court of appeals has accepted petitioner's argument that *all* state drug convictions, including CSA analogs, must have a commercial element in order to constitute aggravated felonies. See, *e.g.*, *Flores-Larrazola* v. *Lynch*, 840 F.3d 234, 238 n.11 (5th Cir. 2016) (collecting cases), reh'g denied, 854 F.3d 732 (2017).

Petitioner attempts to find support (Pet. 22) in *Gerbier* v. *Holmes*, 280 F.3d 297 (3d Cir. 2002). But the Third Circuit's decision in *Gerbier* squarely rejected the same argument that petitioner now advances, "conclud[ing] that 'trafficking' is *not* an essential element of all state drug convictions in order for those convictions to constitute an aggravated felony under § 1101(a)(43)." *Id.* at 307 n.8; see also *id.* at 299 ("we reject the approach advanced by Gerbier that *all* state drug convictions must have a trading or dealing element in order to constitute 'aggravated felonies' under the INA"). The Seventh Circuit cited *Gerbier* in the decision below without noting any disagreement. Pet. App. 9.

Petitioner also alludes to another conflict "between the Board [] and several Courts of Appeals" mentioned

in *Gerbier*. Pet. 23 (citation omitted; brackets in original). That conflict, however, concerned whether a state drug felony involving no remuneration can constitute an "aggravated felony" under the INA when the state felony would only be punishable as a misdemeanor under federal law. *Gerbier*, 280 F.3d at 298-299. This Court resolved that conflict in *Lopez*, 549 U.S. at 50, 60, and it cannot support review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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