No. 09-60

In the Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
MICHAEL R. DREEBEN
Deputy Solicitors General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
DONALD E. KEENER
W. MANNING EVANS
SAUL GREENSTEIN
ANDREW MACLACHLAN
HOLLY M. SMITH
Attorneys
Department of Justice
Washington, D.C. 20530
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

An alien who has been convicted of an aggravated felony is ineligible, *inter alia*, for cancellation of removal. Under 8 U.S.C. 1101(a)(43)(B), an "aggravated felony" includes any "drug trafficking crime," which is defined in 18 U.S.C. 924(c)(2) to include any "felony punishable under the Controlled Substances Act." Under one provision in the Controlled Substances Act, 21 U.S.C. 844(a), a person who commits a drug possession offense after his conviction for a prior drug offense has become final may be punished as a felon.

The question presented is whether a second or subsequent state conviction for possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State actually applied a recidivist sentencing enhancement, using procedures like those applicable in federal court, in the prosecution for the second or subsequent offense.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 570 F.3d 263. The opinion of the Board of Immigration Appeals (Pet. App. 11a-69a) is reported at 24 I. & N. Dec. 382. The opinion of the immigration judge (Pet. App. 70a-75a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 29, 2009. The petition for a writ of certiorari was filed on July 15, 2009, and was granted on December 14, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-20a.

STATEMENT

This case concerns the "aggravated felony" provisions of the Immigration and Nationality Act, which Congress put in place in order to speed removal of certain criminal aliens. An alien who has been convicted of an aggravated felony is ineligible for cancellation of removal. 8 U.S.C. 1229b(a)(3). The "aggravated felony" at issue here is a "drug trafficking crime," which is defined to include any offense that is "punishable under the Controlled Substances Act [CSA]" as a "felony." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2). Under one provision in the Controlled Substances Act, 21 U.S.C. 844(a), a person who commits a drug possession offense after his conviction for a prior drug offense has become final may be punished as a felon.

Petitioner is a citizen of Mexico. After obtaining lawful permanent residency in the United States, he committed a variety of crimes. He was convicted, *inter alia*, of two state drug possession offenses. The Department of Homeland Security charged petitioner with being removable, which he did not contest. Petitioner sought cancellation of removal, but the immigration judge found him ineligible for that discretionary relief because his second drug possession offense was punishable as a felony under the CSA and therefore qualifies as an "aggravated felony." The Board of Immigration Appeals, following circuit precedent, affirmed. The court of appeals denied petitioner's petition for review, holding that his second drug offense is an aggravated felony because he could be punished for that offense as a felon under federal law.

1. In the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, Congress defined a variety of crimes as "aggravated felon[ies]," and then provided for

certain immigration consequences if an alien is convicted of such an offense.[1] Congress took this step to respond to ongoing concerns about the serious problems caused by aliens who commit crimes in the United States, especially those who engage in repeated criminal activity. See pp. 38-41, *infra*.

The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses. Any offense "described in" that list qualifies as an aggravated felony, regardless whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (penultimate sentence). As relevant here, the list includes "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. 1101(a)(43)(B). Under 18 U.S.C. 924(c)(2), the term "drug trafficking crime" includes

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[1] See, *e.g.*, 8 U.S.C. 1227(a)(2)(A)(iii) (removability), 1158(b)(2)(A)(ii) and (B)(i) (asylum ineligibility), 1229b(a)(3) (cancellation ineligibility), 1101(f)(8) and 1229c(b)(1)(B) (voluntary departure ineligibility), 1326(a) and (b)(2) (increased statutory maximum penalty for illegal re-entry following conviction for an aggravated felony).

A conviction for an aggravated felony does not preclude all immigration relief, however. Withholding of removal is available unless the sentence imposed for the aggravated felony was five years or more, 8 U.S.C. 1231(b)(3)(B)(ii), and an alien with an aggravated felony conviction remains eligible for deferral of removal under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. 19 (1988), 1465 U.N.T.S. 85, see 8 C.F.R. 208.16(d)(2)-(3), 208.17, 1208.16(d)(2)-(3), 1208.17. Although an alien convicted of an aggravated felony is barred from seeking readmission following removal, the bar is subject to waiver by the Attorney General. 8 U.S.C. 1182(a)(9)(A)(i)-(iii).

"any felony punishable under the Controlled Substances Act." 18 U.S.C. 924(c)(2).

The CSA in turn makes it "unlawful for any person knowingly or intentionally to possess a controlled substance" without a prescription. 21 U.S.C. 844(a). Although generally a defendant is subject to imprisonment for "not more than 1 year" for a drug possession offense, "if [the defendant] commits such offense after a prior conviction under [chapter 13 of Title 21] * * *, or a prior conviction for any drug * * * offense chargeable under the law of any State, has become final," he is subject to imprisonment for "not more than 2 years." *Ibid.*[2] A federal offense is a "felony" if the "maximum term of imprisonment authorized" for the offense is "more than one year." 18 U.S.C. 3559(a). Thus, a second or subsequent drug possession offense may be punished as a felony under federal law.

In order to impose the longer term of imprisonment for a second or subsequent drug possession conviction under the CSA, certain procedures must be followed. See 21 U.S.C. 851.[3] Such a sentence may not be imposed unless, "before trial, or before entry of a plea of guilty, the United States attorney files an information with the court * * * stating in writing the previous convictions to be relied upon," and the defendant is afforded an op-

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[2] Some first possession offenses are also subject to a felony sentence. See 21 U.S.C. 844(a) (first possession of more than five grams of substance containing cocaine base subject to five-year minimum sentence; first possession of flunitrazepam—a substance commonly known as a date-rape drug—subject to imprisonment for up to three years).

[3] These procedures are not unique to Section 844; they are required to sentence any person convicted of an offense under 21 U.S.C. 841-865 to enhanced punishment based on the fact of a prior conviction. See 21 U.S.C. 851(a)(1).

portunity to challenge the validity of the prior convictions in a hearing before the court, except that a prior conviction may not be challenged if it was entered more than five years earlier. 21 U.S.C. 851(a)(1), (c) and (e).

The Attorney General, in his discretion, may cancel the removal of an alien who is found to be removable. 8 U.S.C. 1229b(a). Cancellation of removal is akin to "a judge's power to suspend the execution of a sentence, or the President's to pardon a convict." *INS* v. *Yueh-Shaio Yang*, 519 U.S. 26, 30 (1996) (internal quotation marks omitted). To obtain cancellation of removal, the alien must demonstrate in the removal proceedings both that he is statutorily eligible for such relief and that he warrants a favorable exercise of discretion. See *In re C-V-T-*, 22 I. & N. Dec. 7 (B.I.A. 1998). A favorable exercise of discretion is warranted only when, after "balanc[ing] the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his [or her] behalf," "the granting of . . . relief appears in the best interest of this country." *Id.* at 11 (brackets in original) (quoting *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978)). Congress has determined that aliens who have been "convicted of any aggravated felony" are not eligible for cancellation of removal. 8 U.S.C. 1229b(a)(3).

2. Petitioner is a native and citizen of Mexico. Pet. App. 13a. In 1993, he became a lawful permanent resident of the United States. *Id.* at 1a. By 2006, petitioner had accumulated two convictions for possessing illegal drugs, one conviction for domestic violence assault, and two convictions for driving with an invalid license. J.A. 43a-44a, 88a-89a, 105a-109a; see J.A. 121a (observation by immigration judge (IJ) that petitioner "got in trouble every year for the last five years").

At issue here are petitioner's two state convictions for drug possession. In 2004, petitioner was convicted in Texas state court of possessing two ounces or less of marijuana, a Class B misdemeanor, in violation of Tex. Health & Safety Code Ann. § 481.121(a) and (b)(1) (Vernon 2003). J.A. 16a-27a. He was sentenced to 20 days in jail. Pet. App. 1a-2a, 13a; J.A. 20a. In 2005, petitioner was again convicted of drug possession in Texas state court, this time for possessing less than 28 grams of alprazolam (known commercially as Xanax), a Class A misdemeanor, in violation of Tex. Health & Safety Code Ann. § 481.117(a) and (b) (Vernon 2003). J.A. 28a-39a.[4] Petitioner received a 10-day jail sentence for that offense. Pet. App. 2a; J.A. 32a-33a.

Although Texas law provides increased penalties for some recidivist drug offenses, no such enhancement was available here. The Texas recidivist enhancement statute authorizes an enhanced sentence if the defendant's second drug offense is in the same class as the first offense or was a felony, but not if the second offense is in a different offense class. See Tex. Penal Code Ann. § 12.43(a)(2) (Vernon 2003). Thus, the statute did not permit an enhancement for petitioner's second controlled substance conviction because that conviction was for a Class A misdemeanor offense, whereas his first conviction was for a Class B misdemeanor offense.

3. Following those convictions, petitioner was charged with being removable from the United States under 8 U.S.C. 1227(a)(2)(B)(i), which provides for re-

[4] See U.S. Drug Enforcement Admin., *Benzodiazepines* <http://www.justice.gov/dea/concern/benzodiazepines.html> (noting that "[a]lprazolam" is one of "the two most frequently encountered benzodiazepines on the illicit market" and that "adolescents and young adults" often "take benzodiazepines to obtain a 'high'").

moval of aliens convicted of most drug offenses. Pet. App. 2a. The Notice to Appear identified each of petitioner's state drug possession convictions. *Id.* at 71a; see J.A. 45a-53a.[5] Petitioner admitted the convictions, and the immigration judge (IJ) found him removable as charged. Pet. App. 71a; J.A. 58a, 60a. Petitioner then submitted an application for discretionary cancellation of removal. Administrative Record (A.R.) 527-535; see 8 U.S.C. 1229b(a).

After a hearing, the IJ denied the application on the ground that petitioner's second drug conviction is an "aggravated felony" that makes him ineligible for cancellation of removal. Pet. App. 70a-74a. The IJ relied on this Court's decision in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), which held that the determination whether a state drug offense constitutes an aggravated felony turns on whether the offense is punishable as a felony under federal law, not whether the State classifies the offense as a felony. See *id.* at 55 & n.6, 58-60. The IJ explained that petitioner's second offense is an aggravated felony because it "carries the potential for incarceration of more than a year" under federal law. Pet. App. 72a-73a. The IJ therefore ordered petitioner removed to Mexico. *Id.* at 73a-75a.

4. The Board of Immigration Appeals (Board) affirmed in a divided en banc decision. Pet. App. 11a-69a. The majority stated that, because the question whether petitioner's second conviction for drug possession constituted an "aggravated felony" concerned the interpretation of criminal statutes, the Board would follow precedent (if any) on the issue in the applicable federal court

[5] The Notice to Appear erroneously listed the year of petitioner's second conviction as 2003, J.A. 52a, but the parties understand the Notice to Appear as referring to petitioner's second conviction, see Pet. 6.

of appeals. *Id.* at 17a-18a. The majority observed that the Fifth Circuit had held in the criminal sentencing context that a second state possession conviction qualifies as an "aggravated felony" because that offense could be punished as a felony under federal law. *Id.* at 19a-20a (citing *United States* v. *Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), cert. denied, 546 U.S. 1137 (2006)). On that basis, the Board dismissed petitioner's appeal. *Id.* at 32a-33a.

Although the issue was not presented in petitioner's case, the Board majority went on to consider the position the Board should adopt in cases arising in federal circuits that had not decided the issue. See Pet. App. 22a-31a. The Board majority decided that in those cases, a second state drug possession conviction would qualify as an aggravated felony only if the alien'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 28a. The majority reached that conclusion even though acknowledging that a prior conviction is not an element of the criminal offense but a "sentencing factor[]," *id.* at 23a-24a; that no State "prosecutes recidivist offenses in a manner that exactly parallels the CSA's recidivist requirements," *id.* at 27a; and that some states have no recidivist enhancements for drug offenders at all, *ibid.*

The majority also observed that, under federal law, Section 851 "precludes a Federal judge from enhancing a drug offender's sentence on the basis of recidivism absent compliance with a number of safeguards." Pet. App. 23a. The majority recognized that the procedural steps set forth in Section 851 are not elements of the criminal violation but "procedural safeguards," and that state recidivism procedures will inevitably differ. *Ibid.*

But the majority decided that, in order to qualify as an aggravated felony, the state conviction must have been entered in compliance with state procedures that similarly "provid[ed] the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper." *Id.* at 23a, 27a. In so holding, the majority observed that it was leaving unresolved what other aspects of the Section 851 procedures—including "the timing of notice," the "manner" in which the defendant could challenge the validity of a prior conviction, and the "burdens and standards of proof"—a state court would have to follow. *Id.* at 32a n.10.

Two members of the Board concurred in the dismissal of petitioner's appeal. Pet. App. 33a-69a (Pauley, Board Member, joined by Hurwitz, Acting Vice Chairman). They concluded independent of Fifth Circuit precedent that petitioner's second state conviction for drug possession should qualify as an aggravated felony. *Id.* at 68a-69a. Those Board members reasoned that under *Lopez*, whether an offense is punishable as a felony under the CSA is determined by "examin[ing] the elements of the controlled substance offense as charged by the State and compar[ing] that offense * * * to see whether, if federally prosecuted under such a corresponding statute, the State offense would be a felony." *Id.* at 36a-37a. Under that method of analysis, the two Board members explained, the relevant question is whether a federal prosecutor "presented with the elements of such an offense *could* elect to use 21 U.S.C. § 844(a) * * * to bring a felony prosecution"; "the penalty assigned by the State to the drug offense" and the state procedures followed in prosecuting that offense are "irrelevant." *Id.* at 41a, 57a, 61a.

One other Board member concurred in the judgment, stating that while he believed that Fifth Circuit precedent controlled this case, in the absence of such precedent he would take the analytical approach outlined by the other two concurring Board members. Pet. App. 69a (Hess, Board Member).

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-10a. The court found petitioner's claim that his second state possession conviction did not qualify as an aggravated felony to be foreclosed by *United States* v. *Cepeda-Rios*, 530 F.3d 333, 335-336 (5th Cir. 2008) (per curiam), which reaffirmed after *Lopez* the circuit's earlier holding in *United States* v. *Sanchez-Villalobos*, 412 F.3d 572, 576-577 (5th Cir. 2005), cert. denied, 546 U.S. 1137 (2006). Pet. App. 6a. Under *Sanchez-Villalobos*, the court explained, a second possession conviction for conduct that "could have been punished as a felony under federal law qualifie[s] as an aggravated felony." *Ibid.* The court found that approach consistent with the *Lopez* Court's explanation that because "federal law should control" whether the offense conduct qualifies as an aggravated felony, *id.* at 8a-9a, a state offense is an aggravated felony if it "proscribes conduct punishable as a felony under th[e] [CSA]," *id.* at 5a (quoting *Lopez*, 549 U.S. at 60).

6. After certiorari was granted, Immigration and Customs Enforcement reported the following information to this Office: In January 2008—about one month after the Board's decision in this case—petitioner was removed from the United States. On March 1, 2008, petitioner reentered the United States illegally. In August 2008, petitioner was convicted of a third drug possession offense in Texas state court, for possessing two ounces or less of marijuana, and was sentenced to 6 days

of imprisonment. See *State* v. *Rosendo*, No. 1546660 (County Crim. Ct. No. 7, Harris County, Tex. Aug. 28, 2008). Petitioner's removal order was reinstated under 8 U.S.C. 1231(a)(5), and he was again removed from the United States.

SUMMARY OF ARGUMENT

Petitioner's second drug possession offense qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(B) because that offense is "punishable" as a "felony" under the federal Controlled Substances Act. Accordingly, petitioner's second drug possession conviction renders him ineligible for cancellation of removal under 8 U.S.C. 1229b(a)(3).

A. Under the text of 8 U.S.C. 1229b(a)(3), 8 U.S.C. 1101(a)(43)(B), and 18 U.S.C. 924(c)(2), an alien who is "convicted" of an offense that is "punishable" as a felony under the CSA is ineligible for cancellation of removal. That is true here. In 2005, petitioner was convicted of drug possession in Texas state court. Drug possession is a federal offense under the CSA. How that offense is punishable depends on the offender's criminal history. Here, because petitioner committed his 2005 drug offense after his 2004 conviction for drug possession had become final, he could have been punished by up to two years of imprisonment under the CSA. Petitioner's second drug offense thus was "punishable" as a felony under the CSA, and qualifies as an aggravated felony.

That conclusion follows from *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), which also considered whether a state drug offense was an "aggravated felony" under 8 U.S.C. 1101(a)(43)(B). The Court explained that, in hinging the application of that statutory provision on how an offense is "punishable" under federal law, Congress made the

immigration consequences of a state conviction turn on how Congress viewed the seriousness of the offense, rather than how the State punished the offense.

B. Petitioner makes two arguments for why his offense does not qualify as an aggravated felony, neither of which is correct.

First, petitioner contends that his offense is not an aggravated felony because the state court did not establish that he was a recidivist in convicting him of drug possession. But under the terms of 8 U.S.C. 1101(a)(43)(B), no such state-court finding is necessary. If the elements of the offense established in state court correspond to the elements of a federal drug possession offense, and the offense is a second or subsequent such offense, then it is "punishable" as a felony under the federal CSA. That is precisely the approach this Court outlined in *Lopez*. It also is consistent with this Court's decisions in *Nijhawan* v. *Holder*, 129 S. Ct. 2294 (2009), and *United States* v. *Hayes*, 129 S. Ct. 1079 (2009), in which the Court rejected the view that the word "convicted" requires that every fact relevant to categorization of an offense must be established in the underlying state conviction. And that approach is supported by *United States* v. *Rodriquez*, 128 S. Ct. 1783 (2008), which explained the important distinction between offense elements and sentencing factors, and confirmed that a prior conviction is a sentencing factor, relevant to how an offense is "punishable" for a given offender. By ignoring the fundamental distinction between offense elements and sentencing factors, petitioner turns the definition of "aggravated felony" on its head, making it depend on how an offender actually was punished in state court, rather than, as the statute specifies, on how

the offense was "punishable" as a general matter under federal law.

Second, petitioner contends that an offense is "punishable" as a felony in federal court only if the state court followed procedures like those required for imposing a recidivist enhancement in federal court. But this argument fails for much the same reason. Whether an offense is an aggravated felony depends on how it could be punished in federal court, not how it actually was punished in state court. The procedures contained in 21 U.S.C. 851 do not apply on their own terms in state court, and the relevant federal statutory provisions offer no basis to require that States follow similar procedures before an offense can be considered "punishable" as a felony in federal court. No State has procedures identical to those in Section 851, and the procedures for convicting and sentencing a defendant vary widely both among the States and between state and federal court.

C. Treatment of a second or subsequent drug possession as an aggravated felony furthers Congress's important purposes. Congress enacted the "aggravated felony" provision of the INA to address the serious threat to public safety and the significant costs imposed on society by criminal aliens in the United States. Section 1101(a)(43)(B) reflects Congress's judgment that an alien who commits serious drug offenses should not be allowed to remain in the United States. Congress has long viewed recidivist possession as a serious drug offense.

D. Petitioner's position should be rejected because it would unnaturally constrict the statute's scope and result in a patchwork application of federal immigration law. Aliens who committed the exact same offense conduct—repeatedly possessing drugs—would be subject to

different federal immigration consequences based on state sentencing schemes and procedures. As this Court recognized in *Lopez*, the statutory design makes plain that Congress intended uniform treatment of aliens based on how their offenses could be punished in federal court.

Petitioner contends that he should escape classification as an aggravated felon because Texas law did not permit a sentence enhancement in his second drug case. But what matters is Congress's judgment about the seriousness of a second drug possession offense, and Congress has long viewed recidivist possession as an offense warranting felony punishment.

E. There is no need to resort to any canon of construction to resolve this case. The rule of criminal lenity comes into play only if, after the Court has employed every tool of statutory interpretation at its disposal, a grievous ambiguity remains. No such ambiguity exists in this case. The statute's reference to how an offense is "punishable" under the federal CSA, read in light of this Court's decisions in *Lopez*, *Nijhawan*, *Hayes*, and *Rodriquez*, makes plain that what matters is the potential federal treatment of a second possession offense, not the actual state treatment. The judgment of the court of appeals should be affirmed.

ARGUMENT

PETITIONER'S SECOND DRUG POSSESSION CONVICTION IS A CONVICTION FOR AN "AGGRAVATED FELONY" UNDER 8 U.S.C. 1101(a)(43)(B)

Under 8 U.S.C. 1229b(a)(3), an alien is ineligible for cancellation of removal if he has been convicted of any aggravated felony. As relevant here, Congress defined an "aggravated felony" to encompass any "felony pun-

ishable under the Controlled Substances Act." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c). A person who commits a drug possession offense after a conviction for a prior drug offense has become final is punishable as a felon under the federal CSA. 21 U.S.C. 844(a). Petitioner acknowledges that he has been convicted of two drug possession offenses, the second of which he committed after the first conviction became final. But he says that because the state court did not actually sentence him as a recidivist or employ procedures like those used to do so in federal court, his second offense should not count as an aggravated felony. Petitioner is wrong.

A. Under The Statutory Text and *Lopez*, A Second Drug Possession Offense Is An "Aggravated Felony" Because It Is "Punishable" As A Felony Under The Controlled Substances Act

As in any case of statutory construction, the analysis "begin[s] with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Gross* v. *FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2350 (2009) (internal quotation marks omitted). Here, the language Congress chose makes clear that any offense that could have been punished as a felony under the federal CSA is an aggravated felony, regardless of how that offense was actually punished.

1. To be eligible for cancellation of removal, an alien must demonstrate, *inter alia*, that he "has not been convicted of any aggravated felony." 8 U.S.C. 1229b(a)(3). Congress defined the term "aggravated felony" by reference to a list of categories of qualifying criminal offenses. Any offense "described in" that list, "whether in violation of Federal or State law," is an aggravated

felony. 8 U.S.C. 1101(a)(43) (penultimate sentence).[6] As relevant here, the list includes "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)(2) in turn defines a "drug trafficking crime" to "mean[] any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)" or two other statutes. 18 U.S.C. 924(c)(2). A crime is punishable as a "felony" if the "maximum term of imprisonment authorized" is "more than one year." 18 U.S.C. 3559(a); see also *Lopez* v. *Gonzales*, 549 U.S. 47, 54 n.4 (2006). Thus, an offense that is "punishable" by more than one year of imprisonment under the CSA qualifies as an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43)(B).

The statutory text makes plain Congress's view that whether a drug crime qualifies as an aggravated felony depends on the punishment that could be imposed if the drug crime were prosecuted under federal law. That much is apparent from the key term "punishable." "Punishable" means "deserving of, or liable to, punishment" or "capable of being punished by law." *Webster's Third New International Dictionary of the English Language* 1843 (1993); see also *Black's Law Dictionary* 1269 (8th ed. 2004) (*Black's*) (a crime need only "giv[e] rise to a specified punishment," and a person need only be "subject to a punishment," to be "punishable"). This Court has considered the word "punishable" on numerous occasions, and it has understood that word to signal a potential—not actual—punishment. See, *e.g.*, *Burgess* v. *United States*, 128 S. Ct. 1572, 1576-1577 & n.2 (2008)

[6] In some circumstances, offenses in violation of "the law of a foreign country" also qualify as aggravated felonies. 8 U.S.C. 1101(a)(43) (penultimate sentence).

("punishable by imprisonment for more than one year" refers to potential punishment of more than one year) (quoting 21 U.S.C. 802(44)); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 482-483 & n.3, 488 (1985) ("punishable under any law of the United States" does not require actual punishment). Thus, if the offense conduct would be subject to a sentence of more than one year under federal law, then that offense is "punishable" as a felony under the CSA.

2. This Court has previously construed the statutory language at issue in precisely that manner. In *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), the Court addressed whether the language "felony punishable under the [CSA]" includes an offense that was punished as a felony under state law but could only be punished as a misdemeanor under the CSA. *Id.* at 50, 53-60. The Court concluded that such an offense is not an aggravated felony and therefore did not render the petitioner ineligible for cancellation of removal. See *id.* at 51-52. "[A] state offense constitutes a 'felony punishable under the Controlled Substances Act,'" the Court concluded, "only if it proscribes conduct punishable as a felony under that federal law." *Id.* at 60.

The Court thus held in *Lopez* that the touchstone for determining whether an offense is an aggravated felony is how it could be punished under federal law. The Court explained: "[I]f we want to know what felonies might qualify" as aggravated felonies, "the place to go is to the definitions of certain crimes punishable as felonies under the CSA." 549 U.S. at 55. The Court then provided guidance for that assessment. A judge should compare the state offense to possible federal offenses, and "a state offense whose elements include the elements of a felony punishable under the CSA is an aggra-

vated felony." *Id.* at 57. Put another way, the Court stated, if the state offense "proscribes conduct" that may be punished as a felony under the CSA, that offense qualifies as an aggravated felony. *Id.* at 60.

The Court emphasized that Congress did not intend the determination of what counts as a qualifying drug trafficking offense to vary with state criminal classifications. Congress instead intended the determination to be based on "the classifications Congress itself chose." *Lopez*, 549 U.S. at 58. The Court determined that "it is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers," *id.* at 59; see *id.* at 58, 60, or "that Congress was courting any such state-by-state disparity," *id.* at 59.

3. Applying the statutory text and the *Lopez* framework to the circumstances of this case, petitioner is ineligible for cancellation of removal because his second state possession offense is punishable as a felony under the CSA.

a. Texas law criminalizes drug possession. Six different drug possession offenses are defined based on the type of drugs involved.[7] Petitioner was convicted of two such offenses in state court. Pet. App. 2a; J.A. 16a-27a (first offense in 2004), 28a-39a (second offense in 2005). The offense at issue here is his second one, under Tex. Health & Safety Code Ann. § 481.117(a) (Vernon 2003), which makes it a crime to "knowingly or intentionally possess[] a controlled substance listed in Penalty Group

[7] See Tex. Health & Safety Code Ann. § 481.115 (Vernon 2003) (possession of substance in Penalty Group 1); *id.* § 481.1151 (Penalty Group 1-A); *id.* § 481.116 (Penalty Group 2); *id.* § 481.117 (Penalty Group 3); *id.* § 481.118 (Penalty Group 4); *id.* § 481.121 (marijuana).

3" without a prescription or doctor's order. See *id.* § 481.104(a)(2) (alprazolam is in Penalty Group 3). Although petitioner was a repeat drug offender, he could not be sentenced as a recidivist under Texas law. That is because petitioner's second offense was a Class A misdemeanor, and an enhanced sentence is available for a Class A misdemeanor only if the offender previously was convicted of a Class A misdemeanor or a felony. Tex. Penal Code Ann. § 12.43(a) (Vernon 2003). Petitioner's first offense—possession of two ounces or less of marijuana—was a Class B misdemeanor. See p. 6, *supra*.

b. As this Court explained in *Lopez*, what matters is not how petitioner was charged and sentenced in state court, but how his second offense could have been punished in federal court.

The CSA makes it unlawful "for any person knowingly or intentionally to possess a controlled substance" without a prescription or other legal authorization under the CSA. 21 U.S.C. 844(a). For most drugs, a first offense is punishable by up to one year of imprisonment, *ibid.*—*i.e.*, punishable as a misdemeanor, 18 U.S.C. 3559(a)(6).[8] But a second or subsequent drug offense may be punished more severely. If a person "commits [a Section 844(a)] offense after a prior [federal drug] conviction * * * or a prior conviction for any drug, narcotic or chemical offense chargeable under the law of any State[] has become final," that second offense is punishable by up to two years of imprisonment, 21 U.S.C. 844(a)—*i.e.*, punishable as a felony, 18 U.S.C. 3559(a)(5).

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[8] That is not universally the case. See note 2, *supra* (noting first possession offenses that are punishable as felonies).

In order for the felony sentence authorized by Section 844(a) to be imposed on a recidivist possessor of controlled substances, certain procedures (set out in 21 U.S.C. 851) must be followed. The government must give notice, by way of an information, of the prior conviction on which the government intends to rely. 21 U.S.C. 851(a)(1). Before sentencing, the court must give the defendant the opportunity to contest the allegations concerning the prior conviction, and the court, sitting without a jury, imposes sentence. 21 U.S.C. 851(b) and (c)(1). Section 851 sets out a variety of other procedural rules, relating to such matters as the burden of proof. 21 U.S.C. 851(c)(1) and (2). The section also provides that the defendant may not challenge the validity of a conviction that occurred more than five years earlier. 21 U.S.C. 851(e). But contrary to petitioner's contention (Br. 34), none of those procedural steps is a "precondition[] to a conviction under" Section 844(a); rather, they are prerequisites to being "sentenced to increased punishment" for the crime of which the defendant has been convicted. 21 U.S.C. 851(a)(1).

c. If petitioner's second drug offense had been prosecuted under federal law, it could have been punished as a felony. Section 844(a) requires proof of knowing, unauthorized possession of a controlled substance. See 21 U.S.C. 844(a); see also, *e.g.*, *United States* v. *Lacy*, 446 F.3d 448, 454 (3d Cir.), cert. denied, 549 U.S. 1013 (2006). Petitioner's second state conviction established each of those elements. Tex. Health & Safety Code Ann. § 481.117(a) (Vernon 2003); see, *e.g.*, *Batiste* v. *State*, 217 S.W.3d 74, 79 (Tex. App. 2006); see also 21 U.S.C. 802(6), 812(b)(4); 21 C.F.R. 1308.14(c)(1) (alprazolam is a controlled substance under the CSA). Further, for petitioner, a sentence of up to two years would have been

appropriate. Petitioner's first conviction was for a "drug, narcotic, or chemical offense" because it was in violation of a law prohibiting possession of a substance that cannot be possessed legally under the CSA. 21 U.S.C. 844(c); see 21 U.S.C. 812(c) (Schedule I, para. (c)(10)), 844(a) (prohibiting possession of marijuana). And petitioner's first conviction had become final at the time he committed his second offense. J.A. 28a-30a; see Tex. R. App. P. 26.2(a). Petitioner's second offense was therefore an "aggravated felony" for immigration purposes.

Indeed, this Court in *Lopez* understood the statutory scheme to apply to a second drug possession offense in exactly this way. The Court observed that although the term "drug trafficking crime" may not appear on its face to include drug possession offenses, Congress included certain possession offenses by defining the phrase to encompass any "felony punishable under the [CSA]," 18 U.S.C. 924(c)(2):

> 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).

549 U.S. at 55 n.6 (emphasis added); see also *id.* at 54 n.4; *id.* at 64 (Thomas, J., dissenting).[9] That conclusion

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[9] Relying on *Lopez*, petitioner contends (Br. 17-18) that a "clear statutory command" is required to find that a second possession offense qualifies as an aggravated felony. But the *Lopez* Court found that such a clear statutory command exists with respect to recidivist possession. The Court observed that "Congress did counterintuitively define some possession offenses as 'illicit trafficking' "—including "recidivist posses-

follows directly from the Court's approach, which treated as critical Congress's (rather than any State's) judgment about the seriousness of an offense, see *id.* at 58-59, and therefore focused on how the conduct established through the state conviction could be punished under federal law, see *id.* at 55, 60.

4. Petitioner does not dispute that he was convicted of two drug possession offenses. He also does not dispute that his second drug offense could have been prosecuted under federal, rather than state law. And petitioner cannot dispute that an enhanced felony penalty would have been available in federal court because of his recidivism. For those reasons, the offense for which petitioner was "convicted" in 2005 was "punishable" as a felony under the CSA.

B. Whether An Offense Is "Punishable" As A Federal Felony Does Not Depend On Whether The State Court Actually Sentenced The Offender As A Recidivist Or Followed Certain Procedures

Petitioner makes essentially two arguments for why his second offense is not "punishable" as a felony under the CSA. First, he observes that he is ineligible for discretionary cancellation of removal only if he has been "convicted" of an aggravated felony, see 8 U.S.C. 1229b(a)(3), and he argues that the word "convicted" means that all facts included in the aggravated felony definition—including the fact of his prior offense—must have been established in the state proceeding. Pet. Br. 17-29. Second, he contends that a second state drug possession offense is "punishable" as a felony only if proce-

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sion"—and it stated that a "clear statutory command" would be required before the statute would be "read[] * * * to cover *other*[]" possession offenses. 549 U.S. 55 n.6 (emphasis added).

dures like those in 21 U.S.C. 851 have been followed in state court. Pet. Br. 29-34. Neither argument is correct.

1. Petitioner argues that he has not been "convicted" of an aggravated felony because the state court convicted him of "simple possession," not "recidivist possession." Pet. Br. 18-24. In petitioner's view, unless the state court in the second proceeding established his prior conviction, that conviction cannot be considered in deciding how his offense would be "punishable" under federal law. *Id.* at 24 & n.3 (contending that the word "conviction" means that an IJ "must look solely to conduct found by the convicting court"). Petitioner is mistaken.

The requirement in the INA's cancellation-of-removal provision, 8 U.S.C. 1229b(a)(3), that an alien show that he has not been "convicted" of an aggravated felony itself says nothing about whether his offense of conviction is an aggravated felony. Under the INA, a "conviction" is a "formal judgment of guilt" (8 U.S.C. 1101(a)(48)) that occurs when all elements of the crime have been established beyond a reasonable doubt. See, *e.g.*, *Fiore* v. *White*, 531 U.S. 225, 228-229 (2001) (per curiam); *Richardson* v. *United States*, 526 U.S. 813, 817 (1999); see also, *e.g.*, *Black's* 559 (defining "elements of crime" as "[t]he constituent parts of a crime * * * that the prosecution must prove to sustain a conviction"). Thus, the state offense of conviction is defined solely by the elements of the offense. Here, as explained above, petitioner's second conviction established all the elements necessary to make out a drug possession offense under Section 844(a). See p. 20, *supra*.

The word "punishable" incorporated into the INA's definition of "aggravated felony" from 18 U.S.C.

924(c)(2) then requires consideration of how the offender could be punished for that offense under federal law. Here, because of an additional fact—that petitioner committed the offense after a prior drug offense had become final—he could be punished as a felon under the federal CSA. 21 U.S.C. 844(a). Contrary to petitioner's contention (Br. 24), that additional fact need not be established in the state court proceeding. The term "punishable" directs an IJ to look beyond the elements of the offense to criminal history. In the CSA, a prior conviction is the predicate for an enhanced sentence, not an element of the offense. See *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1788 (2008) ("[P]rior convictions required for recidivist enhancements are not typically offense elements."); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 244 (1998) ("Congress * * * has never, to our knowledge, made a defendant's recidivism an element of an offense where the conduct proscribed is otherwise unlawful."). Thus, a prior conviction may be considered in determining how an offense is "punishable," even if it was not considered by the state court in actually punishing the offense.[10]

Petitioner's view reads the word "punishable" out of the definition of "aggravated felony." See, *e.g.*, *Carcieri* v. *Salazar*, 129 S. Ct. 1058, 1066 (2009) (the Court is "obliged to give effect, if possible, to every word Congress used" (internal quotation marks omitted)). By

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[10] Petitioner's observation (Br. 24-25) that a state conviction for drug possession would not correspond to a federal offense of possession with intent to distribute under 21 U.S.C. 841 is accurate, but perfectly consistent with this approach. Intent to distribute the drugs is a necessary element of the federal offense, see, *e.g.*, *United States* v. *Iglesias*, 535 F.3d 150, 156 (3d Cir. 2008), cert. denied, 129 S. Ct. 2813 (2009), which would not have been established by the state conviction.

making the definition of "aggravated felony" turn on how an offender *actually was punished* in state court, petitioner ignores Congress's direction that what matters is whether an offense is "punishable"—*i.e.*, *could be punished*—as a felony in federal court.

Petitioner's only response (Br. 28) is that the distinction between offense elements and sentencing predicates is relevant only for "constitutional purposes," and not for purposes of determining whether an offense is an aggravated felony under the statute. But that is incorrect. This Court has distinguished between offense elements and other facts in numerous decisions, including *Nijhawan*, *Hayes,* and *Rodriquez*, all of which involved statutory interpretation rather than constitutional issues. See pp. 26-31, *infra*. Indeed, *Nijhawan* involved the same question as here—whether an alien had been "convicted" of a particular "aggravated felony." See pp. 26-28, *infra*.[11]

In *Lopez* as well, the Court considered whether an alien had been convicted of the "aggravated felony" defined in 8 U.S.C. 1101(a)(43)(B), and therefore was ineligible for cancellation of removal. 549 U.S. at 51-52. The Court explained that if the conduct for which the person was convicted—as defined by the elements of the state offense—can be punished as a felony under the CSA, the offense is an aggravated felony. *Id.* at 57.

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[11] Petitioner argues in the alternative (Br. 29) that if the word "convicted" defines the elements of the offense, then "*no* conviction for simple possession could count as an aggravated felony because the *elements* of simple possession never make it a felony." But that is mistaken because, as explained above, a statutory sentencing prerequisite (made relevant because of the word "punishable"), rather than offense elements, is what makes a second possession offense punishable as a felony in federal court.

The *Lopez* Court never suggested that the word "convicted" in the INA's cancellation-of-removal provision somehow modifies or narrows the definition of "aggravated felony" in 8 U.S.C. 1101(a)(43)(B). Instead, the Court emphasized the importance of basing the "aggravated felony" determination on Congress's judgment about the seriousness of the offense, reflected in how the offense is "punishable" in federal court. 549 U.S. at 55-58. Petitioner's use of "conviction" to negate the effect of the word "punishable" in the definition of "aggravated felony" would make the meaning of that term depend on varying state classifications, rather than on Congress's judgment—directly contrary to this Court's holding. See *id.* at 58-60.

2. In addition to *Lopez*, this Court's decisions in *Nijhawan*, *Hayes,* and *Rodriquez* confirm that the word "convicted" in 8 U.S.C. 1229b(a)(3) does not limit the term "aggravated felony," and that only offense elements need be established in the underlying conviction.

a. This Court has already considered—and rejected—petitioner's argument that all facts relevant to whether an offense counts as an aggravated felony must be established in the state proceeding. In *Nijhawan*, the Court addressed the same question at issue here—whether an alien was "convicted" of an "aggravated felony." The aggravated felony at issue was defined as "an offense that * * * involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. 1101(a)(43)(M)(i), and the question before the Court was whether the fact of a $10,000 loss must be established as an element of the offense of conviction, 129 S. Ct. at 2297. The Court held that the loss amount need not be established as an element of the fraud or deceit crime. *Id.* at 2302.

In so holding, the Court necessarily rejected the view that the word "convicted" requires every fact in the definition of "aggravated felony" to have been established in the state court proceeding. The petitioner there argued that the word "convicted" in 8 U.S.C. 1227(a)(2)(A)(iii)—which makes an alien convicted of an aggravated felony removable—requires that all of the facts in the definition of "aggravated felony" be established by the state court. Pet. Br. at 22-26, *Nijhawan*, *supra* (No. 08-495). By contrast, the government argued that the requirement of a "conviction" does not mean that "all of the qualifying criteria mentioned in the 'aggravated felony' definition[] * * * must be elements of the relevant offense," Gov't Br. 17-18, *Nijhawan*, *supra* (No. 08-495). The Court's holding endorsed the government's approach by concluding that the petitioner had been "convicted" of the "aggravated felony" at issue, even though the loss amount had not been proved to the jury. *Nijhawan*, 129 S. Ct. at 2301-2302.

The *Nijhawan* Court explained that the phrase "in which the loss to the victim or victims exceeds $10,000" "refers to the specific circumstances in which a crime was committed" but does not help to define the crime itself. 129 S. Ct. at 2301-2302. The same is true here: a drug possession offense may be punished as a felony based on the circumstances in which the crime was committed—*i.e.*, if it was "commit[ted] * * * after a prior conviction" for a state or federal drug offense "has become final." 21 U.S.C. 844(a). And in this context, Congress's reference to how a crime is "punishable" underscores the need to look to federal sentencing criteria that are not part of the offense of conviction.

Petitioner contends (Br. 26 n.4) that this case is different from *Nijhawan* because "[t]he need for a finding

of fraud or deceit [under 8 U.S.C. 1101(a)(43)(M)(i)] * * * mirrors the need for a finding of recidivism." But those two facts differ markedly, because fraud or deceit is an element that defines the offense at issue in *Nijhawan*, see 129 S. Ct. at 2298 (referring to the "fraud or deceit crime"); *id.* at 2302 (same); and *id.* at 2298 (loss threshold "does not refer to an element of the fraud or deceit crime"), while a defendant's prior conviction is a sentencing predicate, see *Almendarez-Torres*, 523 U.S. at 244. A finding of a final prior conviction is required for felony punishment, but not for conviction of a drug possession offense under Section 844. The Court's holding in *Nijhawan* cannot be reconciled with petitioner's contention that the word "convicted" in 8 U.S.C. 1229b(a)(3) requires every fact in the definition of "aggravated felony" in 8 U.S.C. 1101(a)(43) to have been established in the state court proceeding.[12]

b. The Court's decision in *Hayes* likewise rejected the broad view of "conviction" espoused by petitioner. That case addressed whether 18 U.S.C. 922(g)(9), which bars firearm possession by a person previously "convicted" of a "misdemeanor crime of domestic violence,"

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[12] Petitioner suggests in passing (Br. 25-26) that the categorical approach developed in *Taylor* v. *United States*, 495 U.S. 575 (1990), and *Shepard* v. *United States*, 544 U.S. 13 (2005), for assessing whether to apply a criminal sentencing enhancement based on a generic crime, applies here. Even assuming that the same categorical approach must apply in the immigration context, the portion of 8 U.S.C. 1101(a)(43)(B) at issue here does not refer to a "generic crime," but instead to a specific definition in 18 U.S.C. 924(c). In any event, the categorical approach focuses on whether the generic crime and the predicate crime have the same offense elements, which is essentially the inquiry the government advocates here; a sentencing factor such as recidivism is not an element that would need to be present under the categorical approach.

required that the domestic relationship be established as an element of the underlying offense. 129 S. Ct. at 1082. After reviewing the statutory text, the Court determined that Congress did not intend to require the domestic relationship to have been established as an element in the underlying state proceeding; that relationship could instead be established in the later federal proceeding for firearm possession. *Id.* at 1084-1089. In so holding, the Court distinguished between facts that Congress intended to have been established as elements of the underlying offense (such as the use of force) and facts that may be established in the subsequent proceeding (such as the domestic relationship). *Id.* at 1084-1085. That distinction applies here: the facts that make a drug offense "punishable" as a felony need not have been established in the prior state court proceeding, but only in the later immigration proceeding.

c. This Court's recent decision in *Rodriquez* also underscores the distinction between offense elements and sentencing factors in determining the effect of an offender's prior conviction on the sentence for his second offense. At issue in *Rodriquez* was a provision of the Armed Career Criminal Act of 1984 that sets a 15-year minimum sentence for a person who has "three previous convictions" for a violent felony or serious drug offense, where a "serious drug offense" includes a state drug offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 128 S. Ct. at 1787 (quoting 18 U.S.C. 924(e)(1) and (2)(A)). The question before the Court was whether the "maximum term of imprisonment for the offense" is the maximum punishment for a first-time offender or for the respondent in that case, who was a recidivist offender. *Ibid.*

The Court concluded that the "maximum term of imprisonment" for a repeat offender is the maximum term prescribed by law for recidivists. *Rodriquez*, 128 S. Ct. at 1787-1788. That is because the term "maximum term of imprisonment"—just like the word "punishable" here—refers to the potential punishment that a particular offender would face. *Ibid.* The Court rejected the view that the "maximum term" was limited to the punishment available for simply committing the elements of the offense, divorced of any additional facts. *Id.* at 1788. In reaching that conclusion, the Court recognized that the punishment available for an offense requires consideration not only of the offense elements but also of sentencing factors such as prior offenses. The same is true here: to determine how an offense is "punishable" under the CSA, a court must look beyond the offense elements to sentencing factors relevant to the particular offender. In this case, petitioner's prior conviction exposes him to an enhanced punishment under the CSA.

Petitioner's approach cannot be squared with *Nijhawan*, *Hayes*, and *Rodriquez*. *Nijhawan* and *Hayes* establish that the word "convicted," standing alone, does not define or limit the phrase "aggravated felony." In each of those cases—as here—there was indisputably a "conviction" for an offense; the question was whether the offense qualified as an "aggravated felony" (in *Nijhawan*) or a "misdemeanor crime of domestic violence" (in *Hayes*). If the elements of the state offense corresponded to the elements of the federal offense, and the required additional facts (the amount of loss in *Nijhawan*, the domestic relationship in *Hayes*) were present, then the offense qualified; the additional facts did not need to be established in the prior proceeding. *Rodriquez* confirms the validity of that approach. It explains

that even though sentencing factors are not established as part of the underlying conviction, they are relevant to the maximum punishment available for an offense. In light of these decisions, petitioner is mistaken in contending that the distinction between offense elements and sentencing factors is irrelevant to the question presented here.

3. Petitioner also argues (Br. 29-34) that because Section 851 procedures must be followed for felony punishment to be imposed in federal court, an offense is only "punishable" as a federal felony if the state court followed those same procedures. That is incorrect.

a. Whether a drug offense is an "aggravated felony" depends on whether it is "punishable" as a felony in federal court (*i.e.*, on whether the sentence imposed there could be more than one year), not on how the offense actually was punished in state court. See pp. 16-18, *supra*; *Lopez*, 549 U.S. at 59-60. A court need look no further than 21 U.S.C. 844(a) to ascertain the maximum punishment that an alien would face in federal court for a second drug possession offense.

By contrast, Section 851 does not state factors relevant to the maximum possible sentence for an offense. That provision defines *procedures* that must be followed for "[i]mposition of sentence" on a "person who stands convicted of an offense under [21 U.S.C. 841-865]," 21 U.S.C. 851(d) and (e)—*i.e.*, after the elements of the offense have already been found. See *United States* v. *Severino*, 316 F.3d 939, 943 (9th Cir.) (en banc) ("Section 851 is a procedural statute; the facts and the law either exist to enhance defendant's sentence or they don't—section 851(a) doesn't change that."), cert. denied, 540 U.S. 827 (2003). By requiring that these or similar procedures be followed in state court, petitioner's view

makes critical the manner of imposing the sentence in state court, not the possible term of imprisonment available in federal court.[13] But the statutory text requires a "felony *punishable* under" the CSA, not a "felony that was punished under" the CSA or was punished following procedures like those in the CSA. If Congress had intended the unusual meaning petitioner claims, it could be expected to have said so.

b. Aside from its lack of textual basis, petitioner's approach is unworkable. Petitioner would determine whether a state offense may qualify as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(B) by reference to a statute (Section 851) that has no application in state court and that sets out numerous detailed procedural requirements. The Section 851 procedures address the specific format for informing a defendant of a potential sentence enhancement, 21 U.S.C. 851(a)(1); the time for filing the information, 21 U.S.C. 851(a); the method by which the defendant may challenge the proposed enhancement, 21 U.S.C. 851(c)(1); the timing for such a challenge, 21 U.S.C. 851(b); the impact of a failure to file a timely challenge, 21 U.S.C. 851(b), (c)(2) and (d)(1); the procedures for the hearing on whether an enhancement is warranted, 21 U.S.C. 851(c)(1); the burdens of proof in that proceeding, 21 U.S.C. 851(c)(1) and (2); and the rights of the government to challenge a decision not to enhance a sentence, 21 U.S.C. 851(d)(2). Section 851

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[13] The Court's decision in *United States* v. *LaBonte*, 520 U.S. 751 (1997), cited by petitioner (Br. 34), is consistent with the government's view. The statute at issue there, 28 U.S.C. 994(h), gave direction to the Sentencing Commission about the circumstances in which the Guidelines should recommend a higher sentence for recidivists, see 520 U.S. at 753, as opposed to a judgment about the maximum term by which an offense is "punishable."

also provides a statute of limitations: a person may not challenge the validity of a prior conviction that is more than five years old. 21 U.S.C. 851(e).

Petitioner does not argue that every aspect of these procedures must be followed before a state conviction can count as an "aggravated felony" under Section 1101(a)(43)(B). But that is the logical implication of his position, which is that a second drug offense is "punishable" as a felony only if procedures like those in Section 851 are followed in state court. Pet. Br. 29-30. On that view, for a state offense to count as an aggravated felony, the State not only would have to provide the defendant with notice of and an opportunity to challenge his prior conviction, but also would have to use the same type of notice and the same time limitations as in Section 851, allocate the burdens of proof as in Section 851, and follow all the other procedures Section 851 prescribes. See Pet. App. 32a n.10. That approach would largely nullify Congress's determination that state crimes may qualify as "aggravated felon[ies]" by virtue of recidivism. Cf. *Hayes*, 129 S. Ct. at 1084-1089. Petitioner does not identify *any* State with sentencing procedures identical to those in Section 851; and although the Board requested supplemental briefing on that issue below, it also was unable to identify any State that utilizes such procedures. Pet. App. 27a. And requiring immigration judges to sort through varying state procedures (on which they have no expertise) to determine which are sufficiently similar to those in Section 851 would complicate and protract immigration proceedings.

Moreover, petitioner's argument logically would go beyond even all the procedures specified in Section 851. Unanimous verdicts are required in federal court, see Fed. R. Crim P. 31(a), but not in some state courts, *e.g.*,

Johnson v. *Louisiana*, 406 U.S. 356, 362 (1972). Petitioner's argument therefore suggests that a state drug possession offense cannot count as "punishable" as a federal felony unless the offender was convicted by unanimous verdict. And the unanimous verdict requirement is only one of many procedural requirements that apply in federal court but not in some state courts. See Pet. App. 55a (Pauley, Board Member, concurring) (listing differences between state and federal procedure). There is no reason to think that Congress intended treatment of an offense for federal immigration purposes to depend upon a state's decision to adopt federal criminal and sentencing procedures.

4. Petitioner suggests (Br. 26-27) that an interpretive anomaly would result from the government's reading of the statute. The illegal reentry statute provides that an alien whose removal followed "a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony)," may be sentenced to up to 10 years of imprisonment, 8 U.S.C. 1326(b)(1), while an alien whose removal followed "a conviction for commission of an aggravated felony" may be sentenced to up to 20 years of imprisonment, 8 U.S.C. 1326(b)(2). Petitioner argues (Br. 27) that because the government considers a second drug possession offense to be an "aggravated felony," Section 1326(b)(1)'s reference to "three or more misdemeanors involving drugs" would have limited application.

Petitioner is mistaken. As an initial matter, Congress enacted the portion of Section 1326 referring to three misdemeanors in 1994, well after the aggravated felony definition at issue here, and it therefore cannot be read to modify or constrict the definition of "aggravated

felony" in 8 U.S.C. 1101(a)(43)(B). See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 2023; see also, *e.g.*, *United States* v. *Garcia-Olmedo*, 112 F.3d 399, 401 n.4 (9th Cir. 1997), abrogated on other grounds by *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc).

And in any event, the government's position would not vitiate Section 1326(b)(1). By quoting only a portion of Section 1326(b)(1), petitioner fails to acknowledge that none of the three misdemeanors referred to there need be drug-related: that provision could apply to three "crimes against the person" or to a combination of drug crimes and crimes against the person. Even assuming a situation in which at least two of the three misdemeanors "involv[ed] drugs," the provision would retain meaning. For example, three drug possession misdemeanors would not qualify as an aggravated felony if the offenses concerned substances that are illegal under state law but not listed as controlled substances under the CSA. *Ibid.*; see also, *e.g.*, *Ruiz-Vidal* v. *Gonzales*, 473 F.3d 1072, 1078 & n.6 (9th Cir. 2007) (discussing substances regulated by California's narcotics laws but not by the CSA). And if an alien committed three drug possession offenses in succession, each before the last became final, neither his second nor third offense would qualify as an aggravated felony. See 21 U.S.C. 844(a); see also *United States* v. *Castro-Coello*, 474 F. Supp. 2d 853, 864 (S.D. Tex.), aff'd, 234 Fed. Appx. 319 (5th Cir. 2007) (per curiam), cert. denied, 128 S. Ct. 1472 (2008).

Moreover, the term "misdemeanors involving drugs" is not limited to possession crimes but would apply to any state misdemeanor drug crimes, including those crimes, such as solicitation, not covered by the CSA.

See, *e.g.*, Cal. Health & Safety Code § 11360(b) (West 2007); *United States* v. *Rivera-Sanchez*, 247 F.3d 905, 908-909 (9th Cir. 2001) (en banc) (noting that California law prohibits solicitation, which is not prohibited by the CSA). Accordingly, Section 1326(b)(1) would have numerous applications under the government's position.

Petitioner also observes (Br. 22) that if an offense need only be "punishable" as a felony, then a second federal possession offense would count as an aggravated felony even if the prosecutor did not seek an enhanced sentence for that offense. That is true, but hardly anomalous. Such a result would appropriately reflect Congress's judgment that—regardless how a second possession offense in fact is punished—it is serious enough to warrant denial of immigration benefits. See pp. 38-42, *infra*. In effect, Congress decided that two aliens who were convicted of the same serious drug-related conduct should be treated the same way for immigration purposes, even if one but not the other receives an enhanced sentence. Whether the second offense is prosecuted in state or federal court, the Section 851 procedures need not be followed for the offense to be "punishable" as a felony and thus qualify as an aggravated felony.

5. Petitioner's reading of the terms "convicted" and "punishable" would create substantial uncertainties and anomalies in the aggravated felony provisions of the INA.

The "aggravated felony" definition at issue here appears in a list of serious offenses for which Congress specified certain immigration consequences. A "conviction" for any one of these offenses makes an alien ineligible for certain immigration benefits. Under petitioner's view, "the term 'conviction' * * * limits the IJ to the conduct adjudicated by the convicting court." Pet.

Br. 24 n.3. But many of the aggravated felony definitions include facts that will rarely, if ever, be established as part of the underlying conviction, because they "refer to the particular circumstances in which an offender committed the crime on a particular occasion." *Nijhawan*, 129 S. Ct. at 2301. If petitioner's reading of "convicted" were correct, it would create significant uncertainty about the reach of these provisions.

For example, one "aggravated felony" is the fraud or deceit offense in 8 U.S.C. 1101(a)(43)(M)(i). The Court already has decided that the loss amount included in that definition need not be established as an element of the offense of "conviction." See *Nijhawan*, 129 S. Ct. at 2302. The same should be true for the fraud or deceit offense in 8 U.S.C. 1101(a)(43)(M)(ii), which requires a loss to the government exceeding $10,000. The "aggravated felony" in Subparagraph (D), which covers money laundering, likewise contains a loss threshold. 8 U.S.C. 1101(a)(43)(D). Similarly, the "aggravated felony" in Subparagraph (K)(ii) depends on a particular circumstance of the offense—there, that the offense be "committed for commercial advantage." 8 U.S.C. 1101(a)(43)(K)(ii).

Other aggravated felony definitions refer to circumstances that are even less likely to be established in a prior proceeding. Subparagraphs (N) and (P) exclude from the covered immigration-related offenses "a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding the alien's spouse, child, or parent." 8 U.S.C. 1101(a)(43)(N) and (P); see *Nijhawan*, 129 S. Ct. at 2300-2301. Because those provisions place the burden on the alien, such circumstances will almost never be established as part of a prior "conviction." In-

terpreting "convicted" as petitioner suggests, then, would have anomalous implications for several aggravated felonies beyond the one at issue.

There is no reason to adopt a statutory construction that would lead to these interpretive problems, particularly when a straightforward and commonsense reading of the statute reveals an easily administrable rule: if the alien was convicted of a second drug possession offense, and he committed that offense after a prior drug offense had become final, his second offense is an aggravated felony.

C. Treating A Second Drug Possession Offense As An Aggravated Felony Furthers Congress's Purposes

Through the INA's "aggravated felony" provisions, Congress responded to the serious threat to public safety and the substantial drain on societal resources that criminal aliens pose. The particular provision at issue here embodies Congress's determination that aliens who commit serious drug crimes should be removable from the United States and should not be eligible for immigration benefits. Congress long has regarded recidivist drug possession as a serious crime. Indeed, it has authorized felony punishment for that crime since at least 1970. There is little reason to doubt that Congress intended to deny immigration benefits to an alien like petitioner, who has repeatedly committed crimes —including multiple drug possession offenses—in the United States.

1. In 1988, Congress first provided that an alien who had been convicted of an "aggravated felony" would be subject to removal and other immigration consequences. Anti-Drug Abuse Act of 1988 (Anti-Drug Abuse Act), Pub. L. No. 100-690, §§ 7342-7349, 102 Stat. 4469. The

provision at issue here—"any drug trafficking crime as defined in section 924(c)(2) of title 18"—was included in the aggravated felony definition from the outset. *Id.* § 7342, 102 Stat. 4469 (8 U.S.C. 1101(a)(43) (1988)).

The inclusion of the drug trafficking aggravated felony responded to the recognition that the commission of crimes by aliens was "complicating and frustrating an already overburdened legal and penal system," and that the involvement of aliens in drug crimes presented an especially "difficult and dangerous problem." *Illegal Alien Felons: A Federal Responsibility: Hearing Before the Subcomm. on Federal Spending, Budget, & Accounting, of the Senate Comm. on Governmental Affairs*, 100th Cong., 1st Sess. 1 (1987) (statement of Sen. Chiles). That problem was especially acute with respect to criminal aliens who were recidivists. See, *e.g.*, 133 Cong. Rec. 28,840 (1987) (statement of Rep. Smith) ("All too often, these aliens—whether here legally or illegally —who are arrested for various felonious crimes, evade deportation, dodge trials, and continue with their recidivist activities."). Thus, from the outset, Congress intended to reach through the definition of "aggravated felony" aliens who have committed drug crimes, especially those who have done so repeatedly.

Since 1988, Congress has expanded the INA's definition of "aggravated felony" on numerous occasions.[14] In doing so, Congress continued to recognize that "[t]he

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[14] See Immigration Act of 1990, Pub. L. No. 101-649, § 501(a), 104 Stat. 5048; Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222, 108 Stat. 4320; Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 440(e), 110 Stat. 1277; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, Div. C, § 321, 110 Stat. 3009-627; see also *INS* v. *St. Cyr*, 533 U.S. 289, 295-296 & n.4 (2001).

number of criminal aliens incarcerated in Federal and State prisons has grown dramatically in recent years," imposing significant costs on society. H.R. Rep. No. 469, 104th Cong., 2d Sess. Pt. 1, at 118 (1996).[15] And "many aliens who committed serious crimes were released into American society after they were released from incarceration, where they then continue to pose a threat to those around them." H.R. Rep. No. 22, 104th Cong., 1st Sess. 6 (1995) (*1995 House Report*). See also 140 Cong. Rec. 4985 (1994) (statement of Sen. Roth) (criminal aliens who are not incarcerated pose "a serious threat to our public safety").

Congress therefore determined that aliens who have committed aggravated felonies—crimes that "clearly demonstrate a disregard for this nation's laws"—"have no legitimate claim to remain in the United States." *1995 House Report* 8. And Congress defined the class broadly, encompassing more than 20 categories of criminal conduct. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 4 n.1 (2004). Indeed, Congress defined "aggravated felon[ies]" to be not just "a subset of felonies," because in some cases, "a misdemeanor can be an 'aggravated felony.'" *United States* v. *Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002) (citing cases).

2. The CSA reflects Congress's longstanding judgment that repeated drug possession warrants enhanced punishment. In the Act that originally added the "aggravated felony" provision, Congress also amended Section 924(c), providing that "the term 'drug trafficking crime' means any felony punishable under the Con-

[15] See also, *e.g.*, H.R. Rep. No. 22, 104th Cong., 1st Sess. 6 (1995) (noting "the high number of aliens, both legal and illegal, who commit crimes while enjoying the benefits of this country" and "[t]he significant cost [of] incarcerating those criminals").

trolled Substances Act" or two other laws. Anti-Drug Abuse Act, § 6212, 102 Stat. 4360. Congress did not intend to limit the term "drug trafficking crime" only to offenses strictly involving trafficking, but instead wished it to apply to "all drug felonies." 134 Cong. Rec. 32,695 (1988) (statement of Sen. Biden); see 134 Cong. Rec. 13,785 (1988) (statement of Sen. Kennedy) (definition of "drug trafficking crime" includes "all felony violations of the Controlled Substances Act"). And Congress specifically wished to reduce the "use" of illegal drugs, see Anti-Drug Abuse Act § 1010(3), 102 Stat. 4188; see also *id.* pmbl., 102 Stat. 4181, recognizing the societal costs imposed by demand for illegal drugs, and not just the supply, see, *e.g.*, 134 Cong. Rec. 32,652 (statement of Sen. Helms).

At the time Congress adopted that definition of "drug trafficking crime," a second drug possession offense was already punishable as a felony under the CSA. See 21 U.S.C. 844(a) (1988). Indeed, the enhanced punishment for recidivist possession has been a feature of federal law since at least 1970. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 404(a), 84 Stat. 1264 (second possession offense punishable by up to two years of imprisonment).[16] Congress's decision to provide harsher punishment for recidivist drug offenders reflects the commonsense judgment that a repeated offense is "more serious

[16] As early as 1914, Congress began taxing and requiring registration of narcotics and imposed penalties for those who possessed narcotics without registering or paying the necessary taxes. See *Gonzales* v. *Raich*, 545 U.S. 1, 10-11 (2005) (citing Harrison Act of 1914, ch. 1, 38 Stat. 785 (repealed 1970)). As part of that scheme, Congress authorized enhanced penalties for persons who repeatedly possessed narcotics in violation of federal law. See 26 U.S.C. 7237(a) (1958).

because it portends greater future danger and therefore warrants an increased sentence for purposes of deterrence and incapacitation." *Rodriquez*, 128 S. Ct. at 1789; see also, *e.g.*, *Blanton* v. *City of N. Las Vegas*, 489 U.S. 538, 541 (1989) ("[T]he severity of the maximum authorized penalty" constitutes a legislative "judgment about the seriousness of the offense.") (internal quotation marks omitted).[17] Thus, it has been Congress's longstanding and consistent view that a person who possesses illegal drugs after being convicted of a prior drug offense has engaged in serious criminal activity justifying felony punishment.

3. Congress's decision to deny immigration benefits to aliens who commit serious crimes, combined with its judgment that repeated drug possession is a serious crime, confirms that Congress did not want an alien who has been repeatedly convicted of state drug possession offenses to be able to remain in the United States, where he would "portend[] greater future danger." *Rodriquez*, 128 S. Ct. at 1789.

Petitioner is just such an alien. He was twice convicted of drug possession in state court, in addition to being convicted of a variety of other crimes, including domestic violence assault. See pp. 5-6, *supra*; see also J.A. 114a (IJ's remark that petitioner has "been dancing

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[17] Petitioner claims (Br. 21) that Congress did not want to distinguish between "a person convicted of simple possession who has no prior drug conviction" and "a person convicted of simple possession who has a prior drug offense." To the contrary: Congress determined that both persons could be prosecuted in federal court for the offense of drug possession, but the first-time offender could be punished only for a misdemeanor, while a repeat offender could be punished as a felon because of his greater culpability, dangerousness, and need for deterrence. See 21 U.S.C. 844(a).

with the law for a long time"). During the pendency of this case, he was removed from the United States. Even though petitioner had been convicted of several offenses and removed from the United States, he did not conform his conduct to United States law. He illegally reentered the United States (an act which is itself a federal felony, see 8 U.S.C. 1326(a)(2)) and was convicted of a third state drug possession offense. His original removal order (the order under review in this Court) was reinstated pursuant to 8 U.S.C. 1231(a)(5), and he was once again removed from the United States.[18] Petitioner has demonstrated a disregard for this Nation's laws, and as

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[18] The INA provides:

> If the Attorney General finds that an alien has reentered the United States illegally after having been removed or having departed voluntarily, under an order of removal, the prior order of removal is reinstated from its original date and is not subject to being reopened or reviewed, the alien is not eligible and may not apply for any relief under this chapter, and the alien shall be removed under the prior order at any time after the reentry.

8 U.S.C. 1231(a)(5). The directive in Section 1231(a)(5) that "the prior order of removal * * * is not subject to being reopened or reviewed" means that the prior order may not be collaterally attacked when it is reinstated under that provision. The quoted language does not bar review of the prior order on direct judicial review under 8 U.S.C. 1252(a)(1) where, as here, such proceedings remain pending at the time of the reinstatement of the prior order of removal. If the Court reverses the judgment below and holds that petitioner's second drug offense is not an aggravated felony that renders him ineligible for cancellation of removal, the case would then be remanded to the Board. The Board, or the IJ on further remand, could then consider the effect of petitioner's illegal reentry and subsequent removal pursuant to 8 U.S.C. 1231(a)(5) on his application for cancellation of removal. See, *e.g.*, *Gonzales* v. *Thomas*, 547 U.S. 183, 186-187 (2006) (per curiam); *INS* v. *Ventura*, 537 U.S. 12, 16-17 (2002) (per curiam).

a result, he has "no legitimate claim to remain" here. *1995 House Report* 8.

4. Petitioner nonetheless points to Section 851 (Br. 30-32) as evidence that Congress did not want to make all aliens who are recidivist drug offenders ineligible for immigration benefits. But the procedural requirements specified there do not affect Congress's judgment in 21 U.S.C. 844(a) as to how severely the offenses are "punishable." And Section 851 has no application to immigration law, which implements Congress's judgment by rendering aliens who are recidivist drug offenders ineligible for many immigration benefits.

Congress's decision to allow prosecutorial flexibility in seeking enhanced punishment in federal criminal cases does nothing to lessen its longstanding judgment that criminal aliens (especially recidivists) should not be permitted to remain in the United States under the immigration laws. These laws implement a congressional judgment, separate and apart from any individual prosecution decision, concerning which aliens should be excluded from the country. See, *e.g.*, *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984). Petitioner identifies nothing in the legislative record suggesting that Congress intended an alien's treatment under the immigration laws to depend on whether a state actually sentenced the alien as a recidivist. Congress in fact made a contrary judgment: it decided that *all* aliens who commit offenses serious enough to qualify as aggravated felonies—including repeat drug offenders—should be excluded from the United States.

Petitioner similarly fails to show (Br. 32-33) that Congress was concerned about aliens' ability to challenge the validity of their prior criminal convictions. If an alien believes his state criminal conviction was ob-

tained unlawfully, then he should seek direct review in the state of conviction or seek habeas review in state or federal court. See, *e.g.*, *Trench* v. *INS*, 783 F.2d 181, 184 (10th Cir.) (aliens may not collaterally attack state court convictions in removal proceedings but instead must bring such a challenge in the jurisdiction of conviction), cert. denied, 479 U.S. 961 (1986); cf. *Daniels* v. *United States*, 532 U.S. 374, 381-382 (2001); *Custis* v. *United States*, 511 U.S. 485, 497 (1994). There is no evidence to suggest that aliens are being removed based on invalid convictions, and petitioner has made no challenge to the validity of his convictions here. And Congress's repeated expansion of the "aggravated felony" provisions since 1988 makes plain its intention that criminal aliens be removed from the United States expeditiously.

D. Requiring A State Court To Find Recidivism Or Follow Federal Procedures Would Unnaturally Constrict The Statute's Scope And Result In A Patchwork Application Of The Immigration Laws

Congress intended the definition of "aggravated felony" in Section 1101(a)(43)(B) to depend upon "the classifications Congress itself chose," *Lopez*, 549 U.S. at 58, not varying state judgments about the seriousness of an offense. Petitioner's reading of the statute would subvert that intent.

1. As this Court explained in *Lopez*, by defining the aggravated felony in Section 1101(a)(43)(B) by reference to how a drug offense could be punished under the federal CSA, Congress "pegged the immigration statutes to the classifications Congress itself chose" and the judgments underlying those classifications. 549 U.S. at 58. This Court found "no hint in the statute's text" that Congress intended the aggravated felony definition to vary

based on how seriously a State treated a given offense. *Id.* at 59. Indeed, the Court "[could not] imagine that Congress took the trouble to incorporate its own statutory scheme" if it had "meant courts to ignore it whenever a State chose to punish a given act" differently. *Id.* at 58.

Yet that is precisely what would happen under petitioner's approach. In petitioner's view, if a State's laws do not authorize enhanced recidivist punishment for an offense, or if a state prosecutor decided not to pursue an available recidivist enhancement, then the offense does not count as an "aggravated felony." Under that view, the state legislature or a state prosecutor may "overrule [Congress's] judgment"—embodied in 21 U.S.C. 844(a)—that possession of a controlled substance following a prior drug conviction is serious criminal conduct. *Lopez*, 549 U.S. at 59.

In this case, Congress's policy judgment differs from Texas's policy judgment about the seriousness of petitioner's repeated drug offenses. Congress decided that "a prior conviction under [chapter 13 of Title 21], or a prior conviction for *any* drug, narcotic, or chemical offense chargeable under the law of any State" should subject a defendant to felony punishment. See 21 U.S.C. 844(a) (emphasis added). But under Texas law, a recidivism enhancement may be applied to a Class A misdemeanor only when "the defendant has been before convicted of a Class A misdemeanor or any degree of felony." Tex. Penal Code Ann. § 12.43(a)(2) (Vernon 2003). Because petitioner's first possession offense involved a type and amount of drugs that Texas placed in a different category (making it a Class B misdemeanor), A.R. 542, his first conviction could not support a recidivism enhancement for the second drug possession offense

under Texas law. See Pet. Br. 5 (acknowledging no enhancement was available here).[19]

Under *Lopez*, what matters is that the defendant's second possession offense was "punishable as a felony under [the CSA]." 549 U.S. at 60. Federal law does not distinguish between different kinds of prior drug offenses for purposes of subjecting a second or subsequent possession conviction to punishment as a felony. The State's choice not to impose a recidivism enhancement does not alter this feature of federal law, which is controlling for purposes of determining whether petitioner's conviction qualifies as an aggravated felony.

2. Petitioner's reading of the statute would create a patchwork application of federal immigration law, because state laws vary widely as to recidivist sentencing for drug offenders. As an initial matter, some States do not provide for enhanced recidivist sentences for a second drug possession offense at all.[20] Under petitioner's view, an alien can be convicted for drug possession again and again in those States and never qualify as an "aggravated felon."

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[19] In several pending petitions that raise the question presented here, a recidivist enhancement similarly was unavailable in state court. See, *e.g.*, Gov't Br. at 3-4, *Escobar* v. *Holder*, petition for cert. pending, No. 09-203 (filed Aug. 17, 2009) (no enhancement applicable under Illinois law); Gov't Br. at 3-4, *Cardona-Lopez* v. *Holder*, petition for cert. pending, No. 09-539 (filed Oct. 31, 2009) (no enhancement applicable under Texas law).

[20] Those states are New Jersey, Oregon, Washington, West Virginia, and Wyoming. Although Washington, West Virginia, and Wyoming provide for recidivist enhancements for drug offenses, they specifically exempt possession offenses. See Wash. Rev. Code Ann. §§ 69.50.408(3), 69.50.4013 (West 2007); W. Va. Code Ann. §§ 60A-4-401(c), 60A-4-408(c) (LexisNexis 2005); Wyo. Stat. Ann. §§ 35-7-1031(c), 35-7-1038(c) (2009).

In States that authorize enhanced sentences for recidivist drug possessors, the circumstances that support enhancement vary widely. For example, some States permit an enhanced sentence only if the offense was committed within a certain period of time after the initial conviction or release from custody.[21] That judgment contrasts with Congress's authorization of an enhancement in 21 U.S.C. 844(a) regardless when the first offense occurred. Moreover, while federal law long has allowed a prior conviction to be "under the law of any State," 21 U.S.C. 844(a) (1988), some States authorize sentence enhancements only when the prior drug possession conviction occurred within the State.[22]

Further, as this case demonstrates, some state enhancements are limited based on the type of drugs involved in the two offenses,[23] even though federal law authorizes an enhanced sentence for recidivist possession of *any* controlled substance (unless the initial pos-

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[21] See, *e.g.*, Cal. Health & Safety Code § 11357(b) (West 2007); Minn. Stat. Ann. §§ 152.01, Subdiv. 16a, .021, Subdiv. 2 and 3(b) (West Supp. 2010); N.Y. Penal Law § 70.06(1)(b)(iv) (McKinney Supp. 2010), *id.* § 221.05 (McKinney 2008).

[22] See, *e.g.*, Del. Code Ann. tit. 16, §§ 4751-4752, 4763 (Supp. 2008); Mass. Gen. Laws Ann. ch. 94C, § 34 (West Supp. 2009); Tenn. Stat. Ann. § 39-17-418(a) and (e) (2006); Utah Code Ann. § 58-37-8 (Supp. 2009); Vt. Stat. Ann. tit. 18, §§ 4232(a), 4235(b), 4238 (2002); *id.* §§ 4230(a)(1), 4231(a), 4233(a), 4234(a) (Supp. 2009); Va. Code Ann. § 18.2-250.1(A) (2009).

[23] See pp. 46-47, *supra*; see also, *e.g.*, Cal. Health & Safety Code § 11357 (West 2007); Ky. Rev. Stat. Ann. §§ 218A.1415(1) and (2)(b), .1416(1) and (2)(b), .1417(1) and (2)(b) (LexisNexis 2007); Mass. Gen. Laws Ann. ch. 94C, § 34 (West Supp. 2009); Okla. Stat. Ann. tit. 63, § 2-402(B)(1) and (2) (West Supp. 2010); Vt. Stat. Ann. tit. 18, §§ 4232(a), 4235(b), 4238 (2002); *id.* §§ 4230(a)(1), 4231(a), 4233(a), 4234(a) (Supp. 2009); Va. Code Ann. §§ 18.2-250, -250.1 (2009).

session offense for that substance was a felony), see 21 U.S.C. 844(a). In addition, some States permit recidivist enhancements only for third, fourth, or subsequent possession convictions, rather than for a second possession conviction.[24] Finally, Section 1101(a)(43) applies to foreign convictions that are less than 15 years old, 8 U.S.C. 1101(a)(43) (penultimate sentence), notwithstanding that other countries vary widely in how they treat drug offenses.

The application of the "aggravated felony" provisions would further fragment if courts were to consider petitioner's second argument, which is that the state court must enter a second drug possession conviction in compliance with procedures like those in 21 U.S.C. 851. Before the Board, the parties were unable to "identif[y] any State that prosecutes recidivist offenses in a manner that exactly parallels the CSA's recidivist requirements." Pet. App. 27a. The Board therefore recognized that, under petitioner's view, immigration judges would need to compare state and federal procedures as to the form and timing of notice of a recidivist enhancement and the allocation of burdens of proof. *Id.* at 32a n.10. Similarly, immigration judges would have to address whether state statutes of limitations for challenging prior convictions correspond to the limitations period in 21 U.S.C. 851(e). And immigration judges would have to figure out how to answer all of these questions for foreign convictions. See 8 U.S.C. 1101(a)(43) (penultimate sentence).

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[24] See, *e.g.*, Cal. Health & Safety Code § 11357(b) (West 2007); Cal. Penal Code § 1210.1(b)(5) (West Supp. 2010); Ind. Code Ann. § 35-50-2-10(e) and (f) (LexisNexis 2009); Neb. Rev. Stat. Ann. §§ 28-416, 29-2221(1) (LexisNexis 2009); N.C. Gen. Stat. §§ 14-7.1, 14-7.6, 90-95(a) (2007); Tenn. Stat. Ann. § 39-17-418(e) (2006).

Petitioner provides no explanation for why Congress would have wanted immigration judges to undertake such complicated inquiries in otherwise straightforward removal cases—inquiries far removed from Congress's essential judgment in 21 U.S.C. 844(a), incorporated into the INA, about the seriousness of a successive drug possession offense. Petitioner also nowhere identifies which States have drug possession offenses that would qualify as aggravated felonies under his view. His failure to address the consequences of his view speaks volumes. There is simply no reason to believe that Congress expected an alien's treatment as an aggravated felon to require any inquiry into the myriad variations of state and foreign law. This Court on a number of occasions has rejected statutory constructions that would lead to such an uneven and cumbersome application of federal law. See, *e.g.*, *Nijhawan*, 129 S. Ct. at 2301-2302; *Hayes*, 129 S. Ct. at 1087-1088; *Burgess*, 128 S. Ct. at 1579-1580. It should do the same here by recognizing that Congress determined that any second drug possession conviction (an offense long punishable under the CSA as a felony) qualifies as an aggravated felony.

E. No Canon of Construction Is Required To Resolve This Case

Contrary to petitioner's contention (Br. 38-40), the Court should not resort to any canon of construction to resolve this case. Because the definition of "aggravated felony" depends on an interpretation of the criminal laws, the rule of lenity is potentially applicable. See *Leocal*, 543 U.S. at 11 n.8.[25] But resort to that principle

[25] Petitioner contends (Br. 38) that this case implicates the proposition that any ambiguities should be construed in favor of the alien. Application of such a rule would be particularly odd here, because Con-

is appropriate only if there is a "grievous ambiguity" in the statutory text, such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted); see also, *e.g.*, *Moskal* v. *United States*, 498 U.S. 103, 108 (1990) (before resorting to the rule of lenity, the Court considers the "the language and structure, legislative history, and motivating policies of the statute") (internal quotation marks omitted)).

There is no grievous ambiguity in this case. The statutory text makes plain that Congress intended to treat a second drug possession offense as an aggravated felony. Petitioner's contrary view would thwart Congress's goal of removing recidivist criminal aliens, and would lead to a patchwork application of federal immigration law.

Moreover, petitioner cannot claim that his conduct is so innocent or innocuous as to trigger fair warning concerns. See, *e.g.*, *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703-704 (2005). Petitioner does not dispute that he is a repeat drug offender, that he could have been prosecuted as a felon in federal court for his second offense, and that he is removable on the basis of his second drug offense. Contrary to petitioner's contention

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gress has made clear that it does not wish to give the benefit of the doubt to criminal aliens, see pp. 38-42, *supra*, and the "aggravated felony" provision at issue applies only to aliens who are convicted drug offenders. In any event, a court may properly consider whether remaining ambiguities should be resolved in favor of the alien only *after* the court had used every interpretative tool at its disposal. *E.g.*, *Ruiz-Almanzar* v. *Ridge*, 485 F.3d 193, 198 (2d Cir. 2007). No such ambiguity remains at the end of the interpretive process here.

(Br. 39-40), an alien who repeatedly fails to conform his conduct to United States law is on notice that his crimes could have immigration consequences. There is no warrant for application of the rule of lenity here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
EDWIN S. KNEEDLER
MICHAEL R. DREEBEN
Deputy Solicitors General
NICOLE A. SAHARSKY
Assistant to the Solicitor General
DONALD E. KEENER
W. MANNING EVANS
SAUL GREENSTEIN
ANDREW MACLACHLAN
HOLLY M. SMITH
Attorneys

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APPENDIX

1. 8 U.S.C. 1101 provides in pertinent part:

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

(A) murder, rape, or sexual abuse of a minor;

(B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18);

(C) illicit trafficking in firearms or destructive devices (as defined in section 921 of Title 18) or in explosive materials (as defined in section 841(c) of that title);

(D) an offense described in section 1956 of Title 18 (relating to laundering of monetary instruments) or section 1957 of that title (relating to engaging in monetary transactions in property derived from specific unlawful activity) if the amount of the funds exceeded $10,000;

(E) an offense described in—

(i) section 842(h) or (i) of Title 18, or section 844(d), (e), (f), (g), (h), or (i) of that title (relating to explosive materials offenses);

(ii) section 922(g)(1), (2), (3), (4), or (5), (j), (n), (*o*), (p), or (r) or 924(b) or (h) of Title 18 (relating to firearms offenses); or

(iii) section 5861 of Title 26 (relating to firearms offenses);

(F) a crime of violence (as defined in section 16 of Title 18, but not including a purely political offense) for which the term of imprisonment at[1] least one year;

(G) a theft offense (including receipt of stolen property) or burglary offense for which the term of imprisonment at[2] least one year;

(H) an offense described in section 875, 876, 877, or 1202 of Title 18 (relating to the demand for or receipt of ransom);

(I) an offense described in section 2251, 2251A, or 2252 of Title 18 (relating to child pornography);

(J) an offense described in section 1962 of Title 18 (relating to racketeer influenced corrupt organizations), or an offense described in section 1084 (if it is a second or subsequent offense) or 1955 of that title (relating to gambling offenses), for which a sentence of one year imprisonment or more may be imposed;

(K) an offense that—

(i) to the owning, controlling, managing, or supervising of a prostitution business;

(ii) is described in section 2421, 2422, or 2423 of Title 18 (relating to transportation for the purpose of prostitution) if committed for commercial advantage; or

(iii) is described in any of sections 1581-1585 or 1588-1591 of Title 18 (relating to peonage, slavery, involuntary servitude, and trafficking in persons);

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[1] So in original. Probably should be preceded by "is".

[2] So in original. Probably should be preceded by "is".

(L) an offense described in—

(i) section 793 (relating to gathering or transmitting national defense information), 798 (relating to disclosure of classified information), 2153 (relating to sabotage) or 2381 or 2382 (relating to treason) of Title 18;

(ii) section 421 of Title 50 (relating to protecting the identity of undercover intelligence agents); or

(iii) section 421 of Title 50 (relating to protecting the identity of undercover agents);

(M) an offense that—

(i) involves fraud or deceit in which the loss to the victim or victims exceeds $10,000; or

(ii) is described in section 7201 of Title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000;

(N) an offense described in paragraph (1)(A) or (2) of section 1324(a) of this title (relating to alien smuggling), except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter[3]

(O) an offense described in section 1325(a) or 1326 of this title committed by an alien who was previously deported on the basis of a conviction for an offense described in another subparagraph of this paragraph;

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[3] So in original. Probably should be followed by a semicolon.

(P) an offense (i) which either is falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument in violation of section 1543 of Title 18 or is described in section 1546(a) of such title (relating to document fraud) and (ii) for which the term of imprisonment is at least 12 months, except in the case of a first offense for which the alien has affirmatively shown that the alien committed the offense for the purpose of assisting, abetting, or aiding only the alien's spouse, child, or parent (and no other individual) to violate a provision of this chapter;

(Q) an offense relating to a failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of 5 years or more;

(R) an offense relating to commercial bribery, counterfeiting, forgery, or trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

(S) an offense relating to obstruction of justice, perjury or subornation of perjury, or bribery of a witness, for which the term of imprisonment is at least one year;

(T) an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed; and

(U) an attempt or conspiracy to commit an offense described in this paragraph.

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was

completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

* * * * *

2. 8 U.S.C. 1227 provides in pertinent part:

Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * * * *

(2) Criminal offenses

(A) General crimes

* * * * *

(iii) Aggravated felony

Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * * * *

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * * * *

3. 8 U.S.C. 1229b provides in pertinent part:

Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * * * *

(e) Annual limitation

(1) Aggregate limitation

Subject to paragraphs (2) and (3), the Attorney General may not cancel the removal and adjust the status under this section, nor suspend the deportation and adjust the status under section 1254(a) of this title (as in effect before September 30, 1996), of a total of more than 4,000 aliens in any fiscal year. The previous sentence shall apply regardless of when an alien applied for such cancellation and adjustment, or such suspension and adjustment, and whether such an alien had previously applied for suspension of deportation under such section 1254(a) of this title. The numerical limitation under this paragraph shall apply to the aggregate number of decisions in any fiscal year to cancel the removal (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien, or suspend the deportation (and adjust the status) of an alien under this section or such section 1254(a) of this title.

* * * * *

4. 8 U.S.C. 1326 provides:

Reentry of removed aliens

(a) In general

Subject to subsection (b) of this section, any alien who—

(1) has been denied admission, excluded, deported, or removed or has departed the United States while an order of exclusion, deportation, or removal is outstanding, and thereafter

(2) enters, attempts to enter, or is at any time found in, the United States, unless (A) prior to his reembarkation at a place outside the United States or his application for admission from foreign contiguous territory, the Attorney General has expressly consented to such alien's reapplying for admission; or (B) with respect to an alien previously denied admission and removed, unless such alien shall establish that he was not required to obtain such advance consent under this chapter or any prior Act,

shall be fined under Title 18, or imprisoned not more than 2 years, or both.

(b) Criminal penalties for reentry of certain removed aliens

Notwithstanding subsection (a) of this section, in the case of any alien described in such subsection—

(1) whose removal was subsequent to a conviction for commission of three or more misdemeanors involving drugs, crimes against the person, or both, or a felony (other than an aggravated felony), such alien shall be fined under Title 18, imprisoned not more than 10 years, or both;

(2) whose removal was subsequent to a conviction for commission of an aggravated felony, such alien shall be fined under such title, imprisoned not more than 20 years, or both;

(3) who has been excluded from the United States pursuant to section 1225(c) of this title because the alien was excludable under section 1182(a)(3)(B) of this title or who has been removed from the United States pursuant to the provisions of subchapter V of

this chapter, and who thereafter, without the permission of the Attorney General, enters the United States, or attempts to do so, shall be fined under Title 18 and imprisoned for a period of 10 years, which sentence shall not run concurrently with any other sentence.[1] or

(4) who was removed from the United States pursuant to section 1231(a)(4)(B) of this title who thereafter, without the permission of the Attorney General, enters, attempts to enter, or is at any time found in, the United States (unless the Attorney General has expressly consented to such alien's reentry) shall be fined under Title 18, imprisoned for not more than 10 years, or both.

For the purposes of this subsection, the term "removal" includes any agreement in which an alien stipulates to removal during (or not during) a criminal trial under either Federal or State law.

* * * * *

(d) Limitation on collateral attack on underlying deportation order

In a criminal proceeding under this section, an alien may not challenge the validity of the deportation order described in subsection (a)(1) of this section or subsection (b) of this section unless the alien demonstrates that—

(1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;

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[1] So in original. The period probably should be a semicolon.

(2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and

(3) the entry of the order was fundamentally unfair.

5. 18 U.S.C. 924 provides in pertinent part:

Penalties

* * * * *

(c)(2) For purposes of this subsection, 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 chapter 705 of Title 46.

* * * * *

6. 21 U.S.C. 844 provides:

Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person

knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mix-

ture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

(b) Repealed. Pub. L. No. 98-473, Tit. II, § 219(a), Oct. 12, 1984, 98 Stat. 2027

(c) "Drug, narcotic, or chemical offense" defined

As used in this section, the term "drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation,

sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

7. 21 U.S.C. 851 provides:

Proceedings to establish prior convictions

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1) of this section. The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution

of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

8. Section 481.104 of the Tex. Health & Safety Code Annotated (Vernon 2003) provides:

Penalty Group 3

(a) Penalty Group 3 consists of:

* * * * *

(2) a material, compound, mixture, or preparation that contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

a substance that contains any quantity of a derivative of barbituric acid, or any salt of a derivative of barbituric acid not otherwise described by this subsection;

a compound, mixture, or preparation containing amobarbital, secobarbital, pentobarbital, or any salt of any of these, and one or more active medicinal ingredients that are not listed in any penalty group;

a suppository dosage form containing amobarbital, secobarbital, pentobarbital, or any salt of any of these drugs, and approved by the United States Food and Drug Administration for marketing only as a suppository;

Alprazolam;

* * * * *

9. Section 481.117 of the Tex. Health & Safety Code Annotated (Vernon 2003) provides:

Offense: Possession of Substance in Penalty Group 3

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a controlled substance listed in Penalty Group 3, unless the person obtains the substance directly from or under a valid prescription or order of a practitioner acting in the course of professional practice.

(b) An offense under Subsection (a) is a Class A misdemeanor if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, less than 28 grams.

(c) An offense under Subsection (a) is a felony of the third degree if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 28 grams or more but less than 200 grams.

(d) An offense under Subsection (a) is a felony of the second degree, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 200 grams or more but less than 400 grams.

(e) An offense under Subsection (a) is punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than five years, and a fine not to exceed $50,000, if the amount of the controlled substance possessed is, by aggregate weight, including adulterants or dilutants, 400 grams or more.

10. Section 481.121 of the Tex. Health & Safety Code Annotated (Vernon 2003) provides:

Offense: Possession of Marihuana

(a) Except as authorized by this chapter, a person commits an offense if the person knowingly or intentionally possesses a usable quantity of marihuana.

(b) An offense under Subsection (a) is:

(1) a Class B misdemeanor if the amount of marihuana possessed is two ounces or less;

(2) a Class A misdemeanor if the amount of marihuana possessed is four ounces or less but more than two ounces;

(3) a state jail felony if the amount of marihuana possessed is five pounds or less but more than four ounces;

(4) a felony of the third degree if the amount of marihuana possessed is 50 pounds or less but more than 5 pounds;

(5) a felony of the second degree if the amount of marihuana possessed is 2,000 pounds or less but more than 50 pounds; and

(6) punishable by imprisonment in the institutional division of the Texas Department of Criminal Justice for life or for a term of not more than 99 years or less than 5 years, and a fine not to exceed $50,000, if the amount of marihuana possessed is more than 2,000 pounds.

11. Section 12.43 of the Tex. Penal Code Annotated (Vernon 2003) provides:

Penalties for Repeat and Habitual Misdemeanor Offenders

(a) If it is shown on the trial of a Class A misdemeanor that the defendant has been before convicted of a Class A misdemeanor or any degree of felony, on conviction he shall be punished by:

(1) a fine not to exceed $4,000;

(2) confinement in jail for any term of not more than one year or less than 90 days; or

(3) both such fine and confinement.

(b) If it is shown on the trial of a Class B misdemeanor that the defendant has been before convicted of a Class A or Class B misdemeanor or any degree of felony, on conviction he shall be punished by:

(1) a fine not to exceed $2,000;

(2) confinement in jail for any term of not more than 180 days or less than 30 days; or

(3) both such fine and confinement.

(c) If it is shown on the trial of an offense punishable as a Class C misdemeanor under Section 42.01 or 49.02 that the defendant has been before convicted under either of those sections three times or three times for any combination of those offenses and each prior offense was committed in the 24 months preceding the date of commission of the instant offense, the defendant shall be punished by:

(1) a fine not to exceed $2,000;

(2) confinement in jail for a term not to exceed 180 days; or

(3) both such fine and confinement.

(d) If the punishment scheme for an offense contains a specific enhancement provision increasing punishment for a defendant who has previously been convicted of the offense, the specific enhancement provision controls over this section.