No. 09-60

In the Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

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 applied a recidivist enhancement in that second or subsequent conviction.

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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. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.,* an alien who has "been convicted of a violation of * * * any law * * * of a State

* * * relating to a controlled substance" is removable. 8 U.S.C. 1227(a)(2)(B)(i). Although certain aliens may seek discretionary cancellation of removal under 8 U.S.C. 1229b(a), an alien who has been convicted of an "aggravated felony" is ineligible for such relief. 8 U.S.C. 1229b(a)(3). The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses. 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), whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (penultimate sentence). In turn, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the Controlled Substances Act [(CSA)] (21 U.S.C. 801 et seq.)."

One provision of the CSA, 21 U.S.C. 844(a), makes it "unlawful for any person knowingly or intentionally to possess a controlled substance" without a prescription. Although in most circumstances a defendant is subject to imprisonment for "not more than 1 year" for his first possession conviction under Section 844, "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 shall be sentenced to a term of imprisonment for * * * not more than 2 years." *Ibid.*[1] The higher term of imprisonment for a second or subsequent conviction cannot, however, be

[1] Some first possession offenses are 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 subject to imprisonment for up to three years).

imposed on a defendant unless certain procedural steps have been followed. Section 851 of Title 21 provides that "[n]o person who stands convicted of an offense under [the CSA] 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 * * * stating in writing the previous convictions to be relied upon," and the defendant is afforded an opportunity to challenge the validity of the prior conviction in a hearing before the court. 21 U.S.C. 851(a) and (c).

2. a. In 2004, petitioner, a native and citizen of Mexico and a lawful permanent resident of the United States, 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). He was sentenced to 20 days in jail. Pet. App. 1a-2a, 13a; Administrative Record (A.R.) 540-542. Petitioner was again convicted of drug possession in Texas state court in 2005, 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), for which he received a 10-day jail sentence. Pet. App. 2a; A.R. 546-547. Although Texas has a recidivist enhancement statute applicable to some subsequent misdemeanor convictions, the statute did not provide an enhancement for petitioner's second controlled substance conviction (a Class A offense) based on his first such conviction (a Class B offense). See Tex. Penal Code Ann. § 12.43(a)(2) (Vernon 2003) (providing enhanced sentence for a recidivist Class A misdemeanor conviction, but only if it follows a prior conviction for a Class A misdemeanor or a felony).

b. In 2006, petitioner was charged with removability under 8 U.S.C. 1227(a)(2)(B)(i) for having been convicted of a controlled substance offense. Pet. App. 2a. The Notice to Appear identified each of petitioner's state possession convictions. *Id.* at 71a. Appearing pro se before the immigration judge (IJ), petitioner admitted the convictions, and the IJ found him removable as charged. *Ibid.*; A.R. 463.

Petitioner submitted an application for cancellation of removal under 8 U.S.C. 1229b(a). A.R. 527-535. The IJ denied the application on the ground that petitioner was ineligible for such relief. Pet. App. 70a-75a. In reaching that conclusion, 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 under the INA does not turn on the State's classification of the offense as a felony, but rather on whether the offense is punishable as a felony under federal law. See 549 U.S. at 55 & n.6, 58-60. The IJ determined that petitioner's second state drug possession offense constituted an "aggravated felony" because it "carries the potential for incarceration of more than a year under federal law," and that petitioner was therefore ineligible for cancellation of removal. Pet. App. 73a; see 8 U.S.C. 1229b(a)(3). The IJ ordered petitioner removed to Mexico. Pet. App. 75a.

c. 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 defer to precedent (if any) on the issue in the applicable federal court of appeals. *Id.* at 17a-18a. The majority concluded

that the Fifth Circuit, whose law governed petitioner's case, had held in the criminal sentencing context that a second possession conviction qualified as an "aggravated felony," even when the conviction had not "been entered in a proceeding that complied with the procedural requirements for Federal recidivist treatment." *Id.* at 20a (citing *United States* v. *Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), cert. denied, 546 U.S. 1137 (2006), overruled in part on other grounds by *Lopez* v. *Gonzales*, 549 U.S. 47 (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 determine what position the Board would adopt in cases arising in federal circuits that had not decided the issue. See Pet. App. 22a-31a. The Board majority concluded that in those cases, in order for a second or successive state drug possession conviction to qualify as an aggravated felony, "the respondent's status as a recidivist drug possessor must have been admitted or determined by a court or jury within the prosecution for the second drug crime." *Id.* at 28a. The majority emphasized 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." *Id.* at 23a. The majority acknowledged that the procedural steps set forth in Section 851 are not "elements" of the criminal violation. *Ibid.* But the majority determined that "recidivist possession" constituted "an amalgam of elements, substantive sentencing factors, and procedural safeguards," and that the Board was required to apply some version of the "categorical approach" established by this Court in *Taylor* v. *United*

States, 495 U.S. 575 (1990), to the "'nonelement' facts" that define recidivism possession. Pet. App. 24a.

Recognizing that state recidivism procedures will inevitably differ from those in Section 851, the majority determined that, in order to qualify as an aggravated felony, the state procedures must, at a minimum, have "provid[ed] the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper." Pet. App. 27a. The majority observed that it was leaving unresolved several questions that might arise in future cases, such as whether the State "must have afforded the alien an opportunity to challenge the *validity* of the first conviction in a manner consistent with" what Section 851 provides for in federal prosecutions, as well as "the timing of notice, or * * * the burdens and standards of proof." *Id.* at 32a n.10.

Two members of the Board concurred in the dismissal of petitioner's appeal, but found the majority's analysis inconsistent with *Lopez*. Pet. App. 33a-69a. In *Lopez*, the concurring members explained, this Court adopted what has since been called a "hypothetical Federal felony" rule, under "which a court examines the elements of the controlled substance offense as charged by the State and compares 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 reasoned, a second or subsequent drug possession offense constitutes an aggravated felony if the defendant had a final prior drug-related conviction before the commission of the subsequent offense. *Id.* at 42a-43a. 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." *Id.* at 61a. That possibility makes the offense "'analogous' to" a felony punishable under the CSA. *Ibid.* Thus, although the concurring members disagreed that the Board was bound by pre-*Lopez* Fifth Circuit precedent, *id.* at 40a, they agreed that petitioner's second state conviction for drug possession qualified as an aggravated felony, *id.* at 68a-69a.

3. Petitioner sought review in the Fifth Circuit, which denied his petition for review. Pet. App. 1a-10a. The court of appeals held that petitioner's claim that his second state possession conviction did not qualify as an aggravated felony was foreclosed by the court's decision in *United States* v. *Cepeda-Rios*, 530 F.3d 333, 335-336 (5th Cir. 2008) (per curiam), which held that *Lopez* did not overrule 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 the "'hypothetical' approach in *Sanchez-Villalobos*," 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 of appeals observed that *Lopez* had reaffirmed that "federal law should control" the determination whether the offense conduct qualifies as a drug trafficking offense and that this Court had specifically recognized that Congress had "define[d] some possession offenses as 'illicit trafficking,'" including "recidivist possession." *Id.* at 8a-9a & n.6 (quoting *Lopez*, 549 U.S. at 55 n.6). Because petitioner had been convicted in state court of conduct that "could have been punished as a felony under federal law," his second state possession conviction qualified as an aggravated felony. *Id.* at 6a; see *id.* at 5a (quoting *Lopez*, 549 U.S. at 60 ("a state offense constitutes a 'fel-

ony punishable under the [CSA]' only if it proscribes conduct punishable as a felony under that federal law")).

DISCUSSION

The court of appeals correctly determined that petitioner is ineligible for cancellation of removal under 8 U.S.C. 1229b(a)(3) because his second conviction under Texas law for drug possession is an "aggravated felony" as defined in 8 U.S.C. 1101(a)(43)(B). The United States agrees with petitioner, however, that the question presented is an important and recurring one on which there is a conflict among the courts of appeals. Review by this Court would therefore be appropriate.

1. a. The INA defines an "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). As relevant here, the list refers to "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). In turn, 18 U.S.C. 924(c)(2) defines "drug trafficking crime" in relevant part as "any felony punishable under the [CSA]."

b. In *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), this Court considered whether a state conviction that was defined as a felony under state law, but which would be a misdemeanor under the CSA, qualifies as an "aggravated felony." The Court held that it does not. The Court explained that the definition of a "drug trafficking crime" in Section 924(c)(2) requires that the offense be "punishable as a felony under the federal Act." *Id.* at 55. "[A] state offense constitutes a 'felony punishable under the Controlled Substances Act,'" the Court con-

cluded, "only if it proscribes conduct punishable as a felony under that federal law." *Id.* at 60 (citation omitted).

The Court emphasized that Congress did not intend the determination of what constitutes 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; see *id.* at 59 ("[I]t 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.").

Although observing that the phrase "drug trafficking crime" might appear not to include drug possession offenses, *Lopez*, 549 U.S. at 53-54, the Court recognized that by defining the phrase as it had—to encompass any "felony punishable under the [CSA]," 18 U.S.C. 924(c)(2)—Congress had included certain possession offenses within the definition. *Lopez*, 549 U.S. at 54 & 55 n.6. In particular, the Court explained:

> 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).

Id. at 55 n.6 (emphasis added).

c. The CSA generally treats a first offense for possession as a misdemeanor. 21 U.S.C. 844(a). But, as the Court recognized in *Lopez* in the passage just quoted, recidivist possession is punishable under the CSA as a felony. If the defendant possesses a controlled substance in violation of Section 844 after any prior state or

federal drug conviction "has become final, [the offender] shall be sentenced to a term of imprisonment for * * * not more than 2 years." *Ibid*.

In order to impose the felony sentence authorized by Section 844(a) on a recidivist possessor of controlled substances under the CSA, the government and court must follow a set of procedural steps set forth in Section 851 of Title 21. 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), and, if the defendant contests the allegations concerning the prior conviction, the court, sitting without a jury, must decide the issue, 21 U.S.C. 851(c)(1).[2]

2. The court of appeals correctly held that petitioner's second conviction for drug possession qualifies as an "aggravated felony" because that conduct was "punishable as a felony under [the CSA]." *Lopez*, 549 U.S. at 60; see Pet. App. 6a (petitioner's "second state possession offense * * * could have been punished as a felony under federal law"). Petitioner contends (Pet. 19) that his second state drug possession conviction does not qualify because the State of Texas did not apply a recidivism enhancement in connection with his second possession prosecution. But, as this Court has emphasized, whether a conviction qualifies as an aggravated felony does not depend on how the State chooses to treat the

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[2] If the defendant contends that the prior conviction was obtained in violation of the Constitution, the defendant must prove that claim by a preponderance of the evidence, 21 U.S.C. 851(c)(2), but the government otherwise has the burden of proving any issue of fact concerning the prior conviction beyond a reasonable doubt, 21 U.S.C. 851(c)(1). The defendant may not challenge the validity of a conviction that occurred more than five years earlier. 21 U.S.C. 851(e).

offense, but on "the classifications Congress itself chose" for the conduct at issue. *Lopez*, 549 U.S. at 58.

Congress has provided 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," subjects a defendant to imprisonment for up to two years for violating Section 844(a). See 21 U.S.C. 844(a) (emphasis added). Petitioner does not dispute that he was subject to treatment as a recidivist under Section 844(a) based on his prior state Class B conviction, and that he therefore could have received a felony sentence in federal court for his second possession offense. Pet. 18-19.

The Texas legislature has made a different policy choice than Congress. 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). Petitioner's second possession offense was a Class A misdemeanor. A.R. 547. But because petitioner's first possession conviction was a Class B misdemeanor, A.R. 542, that conviction could not support a recidivism enhancement for the second drug possession offense under Texas law.

How Texas chooses to treat recidivism enhancements is, however, irrelevant. Under *Lopez*, what matters is that the defendant's second possession offense was "punishable as a felony under [the CSA]." *Lopez*, 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 determines that petitioner's conviction qualifies as an aggravated felony.

Petitioner contends (Pet. 22-23) that the court of appeals' approach is inconsistent with 21 U.S.C. 851, which requires adherence to certain specified procedures to establish a prior conviction before a felony sentence can be imposed for a violation of Section 844(a). But those procedural steps for a recidivist enhancement in a federal prosecution are distinct from Congress's fundamental substantive classification determination under Section 844(a) that a second drug possession offense is "punishable as a felony under [the CSA]." *Lopez*, 549 U.S. at 60. It is that substantive classification that controls in concluding that petitioner's second drug offense is an aggravated felony.

Petitioner's contrary position, if adopted, would work a dramatic change in the way this Court has compared analogous federal and state crimes in other contexts. In adopting that position for cases arising in other circuits, the Board reasoned that, in light of Section 851, "'recidivist possession' is not defined in relation to 'elements,'" but rather "is an amalgam of elements, substantive sentencing factors, and procedural safeguards, many of which need never have been submitted to a jury." Pet. App. 23a. Although recognizing that the categorical approach developed by this Court in *Taylor* v. *United States*, 495 U.S. 575 (1990), had never been applied to such "'nonelement' facts," Pet. App. 24a, the Board proceeded to adopt just this approach. The Board concluded that a state conviction would be sufficiently comparable to a federal prosecution that complied with Section 851 only when "the respondent'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 Board acknowledged, however, that its decision to apply *Taylor* to federal procedural "nonelement[s]" raised a host of questions, such as whether the State "must have afforded the alien an opportunity to challenge the *validity* of the first conviction in a manner consistent with" Section 851, as well as "the timing of notice, or * * * the burdens and standards of proof." *Id.* at 32a n.10. Notably, the Board left all these questions for another day.

The Board erred in applying the analysis of *Taylor* in this context. The defendant's status as a recidivist for purposes of a sentencing enhancement is not an element of the crime, and therefore is permissibly assigned to the sentencing judge. See *Almendarez-Torres* v. *United States*, 523 U.S. 224, 243-244 (1998). As a consequence, the practices of States regarding when and how recidivism can be established vary widely. See Pet. App. 27a (acknowledging certain aspects of that variety). As the Board's own opinion shows, courts will quickly become mired in the intricacies of comparing different state procedural schemes with that established in Section 851. And this inquiry is in any event irrelevant given Congress's express determination that a conviction under Section 844(a) is a felony when the defendant has a final "prior conviction for any drug * * * offense chargeable under the law of any State." 21 U.S.C. 844(a). 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).[3]

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[3] In *Severino*, the Ninth Circuit reserved the question "whether a Section 851(a) error can be waived or forfeited by a defendant." 316

3. Since *Lopez*, a conflict has developed among the courts of appeals on the question presented in this case, as it arises in two different contexts. Four courts have addressed the issue in the civil immigration context in which this case arises. The Fifth Circuit (in the present case) and the Seventh Circuit have held that a second state conviction for drug possession qualifies as an "aggravated felony" regardless whether the second state prosecution relied upon the defendant's status as a recidivist. See Pet. App. 6a; *Fernandez* v. *Mukasey*, 544 F.3d 862, 867-869 (7th Cir. 2008), petition for cert. pending, No. 09-5386 (filed July 15, 2009). The Second and Sixth Circuits, by contrast, have held that, for an alien to have been convicted of an "aggravated felony," his status as a recidivist must have been adjudicated in the second or subsequent drug possession prosecution. See *Alsol* v. *Mukasey*, 548 F.3d 207, 217 (2d Cir. 2008); *Rashid* v. *Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008).[4] In addition, the Board of Immigration Appeals applies essentially the same construction in any case arising in

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F.3d at 947 n.5. With the exception of the Eleventh Circuit, every other court of appeals to decide the issue has held that a Section 851(a) error is not jurisdictional and therefore is subject to waiver and forfeiture. See Pet. at 17-18, *United States* v. *Bowden*, petition for cert. pending, No. 09-244 (filed Aug. 27, 2009) (discussing cases). The United States has petitioned for a writ of certiorari seeking summary reversal of the Eleventh Circuit's ruling. *Id.* at 23-24.

[4] Petitioner also cites (Pet. 9-10) two pre-*Lopez* decisions, *Berhe* v. *Gonzales*, 464 F.3d 74 (1st Cir. 2006), and *Steele* v. *Blackman*, 236 F.3d 130 (3d Cir. 2001), as further evidence of a conflict that warrants review. Because *Lopez* clarified the meaning and scope of a "drug trafficking crime," specifically stating that "recidivist possession * * * clearly fall[s] within the definition[]," 549 U.S. at 55 n.6, pre-*Lopez* decisions do not present a square conflict.

a circuit in which there is no controlling precedent to the contrary, Pet. App. 20a-21a.

Three of the courts of appeals that have resolved the issue in the immigration context have also addressed it and reached the same conclusions in the criminal sentencing context. Sentencing Guidelines 2L1.2 provides for a sentencing enhancement when an alien reenters the country illegally after "a conviction for an aggravated felony," which the commentary defines by reference to 8 U.S.C. 1101(a)(43). Sentencing Guidelines § 2L1.2(b)(1)(C); see *id.* comment. (n.3(A)). The Fifth and Seventh Circuits have held that, in applying the Guidelines, as in the immigration context, a second or subsequent state drug possession conviction qualifies as an "aggravated felony," whether or not the State applied its own recidivism provisions. See *United States* v. *Cepeda-Rios*, 530 F.3d 333, 335-336 (5th Cir. 2008); *United States* v. *Pacheco-Diaz*, 506 F.3d 545, 550 (7th Cir. 2007), rehearing denied, 513 F.3d 776, 778-779 (7th Cir. 2008) (per curiam). The Second Circuit, on the other hand, applies its contrary rule in the sentencing context, as it does in the immigration context. See *United States* v. *Ayon-Robles*, 557 F.3d 110, 112-113 (2009).

This Court has previously denied review of the issue in numerous cases in which it was presented in the Sentencing Guidelines context. See *Erazo-Villatoro* v. *United States*, cert. denied, No. 09-5589 (Nov. 2, 2009); *Cruz-Meza* v. *United States*, cert. denied, No. 08-10362 (Oct. 5, 2009); *Izaguirre-Meza* v. *United States*, 129 S. Ct. 2865 (2009) (No. 08-9580); *Guevara-Barrera* v. *United States*, 129 S. Ct. 2792 (2009) (No. 08-9160); *Gutierrez-Quintanilla* v. *United States*, 129 S. Ct. 2381 (2009) (No. 08-8537); *Del Real-Hurtado* v. *United States*, 129 S. Ct. 1986 (2009) (No. 08-8143); and

Pacheco-Sanchez v. *United States*, 129 S. Ct. 905 (2009) (No. 08-6673). In its briefs in opposition in those cases, the government noted that they concerned the proper interpretation of the Sentencing Guidelines, which are only advisory in light of this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), and that the Sentencing Commission could resolve conflicting interpretations of the Guidelines through its annual amendment process. See, *e.g.*, U.S. Br. in Opp. 12-14, *Erazo-Villatoro*, *supra*, No. 09-5589.

This is the first post-*Lopez* case in which the issue has been presented in the immigration context following final rejection of the alien's claim by the court of appeals.[5] Application of the "aggravated felony" definition in immigration cases is not advisory, as under the Sentencing Guidelines. In the view of the United States, the present case would serve as an appropriate vehicle for this Court to resolve the conflict in the immigration context. The present case arises out of a removal proceeding in which the en banc Board of Immigration Appeals addressed the question presented in light of this Court's decision in *Lopez*. A decision by this Court would resolve the circuit conflict and establish a uniform rule to be applied by both the Board and the courts of appeals.[6]

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[5] The Court denied certiorari in another immigration-related case, *Spence* v. *Holder*, cert. denied, No. 08-9882 (Oct. 5, 2009), but there petitioner sought certiorari before judgment.

[6] The issue is also presented in three other pending immigration petitions: *Fernandez* v. *Holder*, No. 09-5386 (filed July 15, 2009); *Escobar* v. *Holder*, No. 09-203 (filed Aug. 17, 2009); and *Cardona-Lopez* v. *Holder*, No. 09-539 (filed Oct. 31, 2009). The government suggests that the Court hold those petitions and dispose of them in light of the Court's resolution of the question presented in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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