No. 11-___

IN THE

Supreme Court of the United States

ADRIAN MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Immigration and Nationality Act provides that an alien "who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). A state law offense may constitute an "aggravated felony" if it is the equivalent of a "felony punishable under the Controlled Substances Act." 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). Under the Controlled Substances Act, a person commits a felony if he possesses with intent to distribute "less than 50 kilograms of marihuana," 21 U.S.C. § 841, except that a person whose offense involves "distributing a small amount of marihuana for no remuneration" commits only a misdemeanor, *id.* §§ 841(b)(4), 844.

The Question Presented, which is also pending before the Court in No. 11-79, *Garcia v. Holder*, is:

Whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony, notwithstanding that the record of conviction does not establish that the alien was convicted of conduct that would constitute a federal law felony.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Adrian Moncrieffe respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The precedential opinion of the United States Court of Appeals for the Fifth Circuit (Pet. App. 1a-9a) is not yet published but is available at 2011 WL 5343694 (5th Cir. Nov. 8, 2011). The administrative decisions of the Immigration Judge (Pet. App. 14a-18a) and the Board of Immigration Appeals (Pet. App. 10a-13a) are unreported.

JURISDICTION

The Fifth Circuit issued its decision on November 8, 2011. Pet. App. 1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101, 1227, and 1229a, are reproduced at Pet. App. 19a-21a. The relevant portions of the Controlled Substances Act, 21 U.S.C. §§ 841, 844, are reproduced at Pet. App. 22a-24a. The relevant portions of Georgia law, Ga. Code Ann. §§ 16-13-2, 16-13-30(j), and 42-8-62, are reproduced at Pet. App. 25a-28a.

STATEMENT OF THE CASE

Petitioner, a lawful permanent resident of the United States, pleaded guilty to possession of marijuana with intent to distribute under Georgia law, an offense that may encompass (but is not

limited to) the distribution of small amounts of marijuana for no remuneration. The record of conviction did not specify the amount of marijuana petitioner possessed or whether petitioner received remuneration. The United States sought to deport petitioner on the ground that he had committed the "aggravated felony" of "drug trafficking." The Fifth Circuit upheld the deportation order, reasoning that federal law penalizes the distribution of an unspecified amount of marijuana as a felony.

I. Statutory Background

Under the Immigration and Nationality Act (INA), an alien "who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). Application of this provision to drug offenses requires navigating a "maze of statutory cross-references." *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2581 (2010).

The INA defines "aggravated felony" to include, among other things, a "drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c) in turn defines "drug trafficking crime" to mean "any felony punishable under the Controlled Substances Act" (CSA). 18 U.S.C. § 924(c)(2). A state law crime constitutes an aggravated felony if it describes a qualifying offense that is "punishable as a felony under that federal law." *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).

The CSA provides that, depending on the circumstances, a marijuana-related offense may be a felony or a misdemeanor. Under 21 U.S.C. § 841(b)(1)(D), a person commits a felony if his offense involves "less than 50 kilograms of

marihuana . . . except as provided in paragraph[] (4)." Under paragraph 4, a person commits a misdemeanor if his offense involves the distribution of "a small amount of marihuana for no remuneration." *Id.* § 841(b)(4) (such a violation "shall be treated as provided in" 21 U.S.C. § 844); *id.* § 844 ("simple possession" offense punished as a federal misdemeanor); *see also Carachuri-Rosendo*, 130 S. Ct. at 2581 ("a first-time simple possession offense is a federal misdemeanor" under Section 844).

II. Factual And Procedural History

1. Petitioner legally entered the United States from Jamaica at the age of three and became a lawful permanent resident in 1984. Pet. App. 2a. He has two children.

In 2008, Georgia police arrested petitioner while in possession of 1.3 grams of marijuana, which is roughly one-twentieth of an ounce, or one-half the weight of a penny. C.A. Admin. Rec. 37. Petitioner was charged with, and pleaded guilty to, the offense of "Possession of Marijuana With Intent to Distribute," pursuant to Ga. Code Ann. § 16-13-30(j)(1). That statute is not limited to any minimum amount of marijuana, nor does it require proof that the defendant obtained remuneration in exchange for the drugs. *See id.* ("It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.").

The Georgia court accepted his plea under the state's First Offender Act, Ga. Code Ann. § 42-8-62, and suspended the proceedings against him, subject

to his successful completion of five years of probation. C.A. Admin. Rec. 34.

2. In April 2010, DHS initiated removal proceedings against petitioner on the basis of his Georgia offense. Pet. App. 15a. DHS charged that petitioner had been convicted of an "aggravated felony," triggering his removal under the INA.

a. The Immigration Judge (IJ) agreed. Pet. App. 18a. The IJ applied the B.I.A.'s holding in *Matter of Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008), that a state offense constitutes an aggravated felony if "the 'elements' of the [state law] offense . . . correspond to the 'elements' of an offense that carries a maximum term of imprisonment of more than 1 year under the CSA." *Id.* at 456. In the B.I.A.'s view, the only "element[]" of the analogous felony punishable under Section 841(b)(1)(D) is possession of less than 50 kilograms of marijuana with intent to distribute. *Id.* at 456-57. The separate provision relating to small amounts intended to be distributed without remuneration, the B.I.A. held, describes "a 'mitigating exception' to the otherwise applicable 5-year statutory maximum," not a separate misdemeanor offense. *Id.* at 457. Under this logic, because the absence of remuneration and the possession of only a small amount of marijuana are mitigating sentencing factors and not "elements" of a Section 841(b)(4) misdemeanor offense, *every* state law marijuana distribution offense "qualifies as a drug trafficking crime and, by extension, an aggravated felony because its elements correspond to the elements of the Federal felony of conspiracy to distribute an indeterminate quantity of marihuana." 24 I. & N. Dec. at 458.

Applying the B.I.A.'s decision in *Aruna* to this case, the IJ held that petitioner had committed the aggravated felony of "drug trafficking," notwithstanding that there was no evidence in the record of conviction that petitioner's offense involved remuneration or more than a small amount of marijuana. Pet. App. 18a.

b. Petitioner appealed to the B.I.A.. He argued that because his Georgia offense "did not require a showing of remuneration" and because he had "submitted evidence demonstrating that he actually distributed only a small amount," Pet. App. 12a, the IJ should have applied the Fifth Circuit's decision in *Jordan v. Gonzales*, 204 Fed. Appx. 425, 428 (5th Cir. 2006), which held that a state law offense is not an aggravated felony if the state law can be violated by distributing a small amount of marijuana for no remuneration. The B.I.A. rejected that argument on the ground that *Jordan* was an unpublished Fifth Circuit opinion and therefore did not displace the B.I.A.'s own decision in *Aruna*. Applying *Aruna* to this case, the B.I.A. upheld the IJ's decision.

c. Petitioner filed a petition for review of his removal order with the Fifth Circuit, which affirmed. The court began by recognizing that "[w]hen a state criminal statute covers both the felony and misdemeanor conduct proscribed by Section 841, the courts of appeals are split on whether the conviction, if lacking specifics of the underlying criminal conduct, should be treated as a felony or a misdemeanor." Pet. App. 6a. The court explained that the Second and Third Circuits hold that a state law conviction under such circumstances should be treated as a federal misdemeanor. But the panel

rejected that conclusion and instead adopted the First and Sixth Circuits' rule that such an offense is an aggravated felony because "[t]he amount of marijuana is not . . . an element that prosecutors must establish for conviction under the felony provision." *Id.* 7a. The panel also reasoned that its decision followed from prior published Fifth Circuit precedent interpreting Section 841 as not requiring a prosecutor to prove drug quantity or remuneration to a jury. *Id.* 7a-8a.

The Fifth Circuit indicated that an alien can avoid deportation in such a case by demonstrating through acceptable evidence that "he was convicted of only misdemeanor conduct" by virtue of the small amount of marijuana and lack of remuneration involved in the offense. Pet. App. 9a. But the court held that in this case, petitioner "did not offer any proof of the allegedly small amount of marihuana involved in his crime until he appealed to the B.I.A." *Id.* 9a n.4.[1]

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[1] The Fifth Circuit's statement that petitioner did not offer proof of the small amount of marijuana involved in his crime until he appealed to the B.I.A. is not correct. *See* U.S. C.A. Br. 6-7 (acknowledging that petitioner placed the evidence in the record before the IJ during bond proceedings, and that the B.I.A. acknowledged that the evidence was before it); *see also* C.A. Admin. Rec. 25, 37. The factual error does not affect the outcome of the case, however, because petitioner would not be entitled to relief under the Fifth Circuit's standard in any event. Petitioner did not submit evidence that the transactions did not involve remuneration (the other component of the misdemeanor offense), and the evidence regarding the volume of the weight of the drugs is set forth in a police chemist report, not the state record of conviction, and therefore is not probative under this

3. This Petition followed.

REASONS FOR GRANTING THE WRIT

The Fifth Circuit's holding that a first-time offender's distribution of 1.3 grams of marijuana is an "aggravated felony" requiring his deportation conflicts with this Court's decisions in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), *Taylor v. United States*, 495 U.S. 575 (1990), and *Shepard v. United States*, 544 U.S. 13 (2005), as well as the text of the INA and CSA. The Fifth Circuit's decision also deepens an existing, acknowledged circuit conflict, pitting the First, Fifth, and Sixth Circuits, together with the B.I.A., against the Second and Third Circuits. This Court should grant certiorari to establish the correct interpretation of the INA and to restore uniformity among the lower courts on an issue that the United States acknowledges is the subject of "disagreement in the courts of appeals." BIO, No. 11-79, *Garcia v. Holder* 9.

This case is also an ideal vehicle in which to decide the question presented. In petitioner's case, the question arises in the context of petitioner's claim that he is not deportable because his offense does not constitute an "aggravated felony," as opposed to the claim that he is entitled to discretionary cancellation of removal, which may raise additional complications regarding the applicable burden of proof. The immigration judge and B.I.A. also did not indicate

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Court's "categorical approach." *See Shepard*, 544 U.S. at 16 (court may not "look to police reports" when applying the categorical approach).

that they would deny relief to petitioner on any other basis. Finally, to the extent that the structure of Georgia law suggests anything regarding the nature of petitioner's offense, it indicates that petitioner possessed only a small amount of marijuana.

I. The Fifth Circuit's Decision Conflicts With This Court's Holdings In *Carachuri-Rosendo*, *Taylor*, And *Shepard*.

A. Under This Court's Categorical Approach, State Drug Convictions Involving Indeterminate Amounts Of Marijuana And Remuneration Are Misdemeanors For Immigration Purposes Unless The Record Of Conviction Establishes Otherwise.

1. The federal courts have long applied what has come to be known as the "categorical approach" to determining whether a state offense equates to a federal offense requiring deportation under the immigration laws. If the record of conviction is unclear, the courts presume that the alien engaged in the least culpable conduct that would violate the state statute. *E.g.*, *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939) (alien not removable for a crime of "moral turpitude" because his actual conviction involved an offense that could have been for non-immoral purposes, and the court must presume the less culpable conduct) (opinion of Hand, J.).

In *Nijhawan v. Holder*, 129 S. Ct. 2294, 2301 (2009), this Court recognized that the INA's "aggravated felony" definition "contains some language that refers to generic crimes," so that the categorical approach would apply to determine

whether a state offense is equivalent to a federal crime. It placed "drug trafficking" offenses in that category. *Id.* at 2300. In *Carachuri-Rosendo*, 130 S. Ct. at 2587 n.11, this Court re-affirmed that the categorical approach governs the INA's application to drug offenses. The government must thus show from either the fact of conviction or the "record of conviction" that the defendant was convicted of conduct that would constitute a federal felony. *Id.* at 2586-87 n.12.

The categorical approach imposes the "demanding requirement" that the *government* must make "a showing that a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to [the relevant federal offense]." *Shepard*, 544 U.S. at 24 (plurality opinion); *see also Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010) (Court presumes less culpable conduct because "nothing in the record of [defendant]'s 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts"). That conclusion is reinforced by the INA, which provides that the government, not a lawful permanent resident, "has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable." 8 U.S.C. § 1229a(c)(3)(A).

Certain state offenses are defined more broadly than a parallel federal felony – *i.e.*, some violations of the state statute would amount to a federal felony, but others would amount only to a federal misdemeanor. The *fact* of the conviction itself then does not establish whether the underlying conduct would be punishable as a felony (which would permit

removal) or a misdemeanor (which would not). Because the least culpable conduct under the statute is equivalent to a federal misdemeanor, absent proof in the record of conviction, the offense is properly treated as a misdemeanor.

2. Applied to state laws like Georgia's, which proscribe possession of marijuana with intent to distribute, this Court's categorical approach requires the United States to prove through the record of conviction that the alien's state law conviction was for something other than the least culpable conduct under state law. The minimum culpable conduct under such a statute is possession with intent to distribute of a small amount of marijuana without any remuneration. *See* Ga. Code Ann. §§ 16-13-30(j)(1). Because that conduct is indisputably only a misdemeanor under 21 U.S.C. § 841(b)(4), state law convictions such as petitioner's are presumptively misdemeanors.

In petitioner's case, there is no evidence in the record of conviction that his state offense "'necessarily' involved . . . facts equating to" the federal felony analog. *Shepard*, 544 U.S. at 24 (plurality opinion). The conduct underlying petitioner's state conviction is accordingly deemed to encompass the least culpable conduct necessary to violate the state statute – a federal law misdemeanor. *Id.*; *see also, e.g.*, *Jeune v. Att'y Gen. of U.S.*, 476 F.3d 199, 204 (3d Cir. 2007) ("[W]e must assume that [the alien's] conduct was only the minimum necessary to comport with the statute and record.").

This Court has also observed that treating a simple possession offense as "illicit trafficking" under

the INA would be "incoheren[t] with any commonsense conception of 'illicit trafficking,'" since the "everyday understanding" of "trafficking" involves "some sort of commercial dealing." *Lopez*, 549 U.S. at 53; *see also Carachuri-Rosendo*, 130 S. Ct. at 2585 (it would be "unorthodox to classify . . . simple possession recidivism as an 'aggravated felony'"). Congress is particularly unlikely to have enacted such a regime here. An alien may well have had no incentive (or even opportunity) to present drug quantity evidence at his state trial, where drug quantity and remuneration were irrelevant as a matter of state law. At the same time, even if permitted to argue in the immigration proceeding that his conduct warranted only misdemeanor treatment under federal law, that is little comfort, as this Court's categorical approach limits any review to the state record of conviction.[2]

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[2] By contrast, this Court's categorical approach – under which a state law offense entails the minimum conduct necessary to comport with the state statute – has proven perfectly workable in removal proceedings arising in the two circuits in which it has been properly applied. In cases (unlike petitioner's), in which the alien is actually guilty of conduct that would arise to the level of the federal felony, DHS has routinely been able to point to the record of conviction for evidence of the amount of marijuana or remuneration to rebut the misdemeanor presumption. *See, e.g.*, *In Re: Kenrick Robinson A.K.A. Shabba*, A041 191 561 - NEW, 2009 WL 773185, at *3 (B.I.A. Feb. 27, 2009) (alien removable for aggravated felony because criminal complaint in state offense charged him with "possess[ion] with the intent to distribute Marijuana in a quantity of 5 pounds or more"); *In Re: Corwin Carl Catwell*, A036 475 730 - YOR, 2008 WL 4420099, at *2 & n.2 (B.I.A. Sept. 19, 2008) (alien's state law offense constituted an aggravated

In contravention of this Court's precedents, and of the plain text of the INA, which puts the burden on the government to prove deportability, the court of appeals assumed without any evidence in the record of conviction that petitioner possessed more than a small amount of marijuana or received remuneration. Pet. App. 9a. Certiorari is warranted to correct that conflict with this Court's decisions.

B. The Fifth Circuit Was Wrong To Depart From This Court's Categorical Approach.

The Fifth Circuit provided two explanations for departing from this Court's precedent. Neither is persuasive.

The Fifth Circuit maintained that Section 841(b)(4)'s misdemeanor provision is a "mitigating sentencing provision" and not a stand-alone offense, such that it is proper to presume that any state drug distribution offense is equivalent to a federal felony so long as it contains the "elements" of the federal felony offense. Pet. App. 7a.

This Court's holding in *Carachuri-Rosendo* establishes that the elements of a federal offense are not determinative of whether an alien commits an "aggravated felony." In that case, the Court held that an alien can be found to commit the aggravated felony of recidivist drug possession only if the record of conviction demonstrates that the defendant is a recidivist. The Court acknowledged that, as the United States emphasized, the relevant federal law

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felony because the "record of conviction clearly establishes the amount of marihuana possessed": 120.5 grams).

"define[d] simple possession by reference to statutory *elements*, but facts leading to recidivist felony *punishment*, such as the existence of a prior conviction, do not qualify as elements in the traditional sense." *Id.* at 2583-84 (emphasis in original) (internal quotation marks and citation omitted). But the Court held that in the immigration context, the question under the categorical approach is not whether the elements of a state offense match the elements of a federal offense, but rather whether the conduct underlying the state law conviction, as revealed in the record of conviction, is necessarily punishable as a felony. *Carachuri-Rosendo*, 130 S. Ct. at 2582-83 ("Our holding in *Lopez* teaches that, for a state conviction to qualify as an 'aggravated felony' under the INA, it is necessary for the underlying conduct to be punishable as a federal felony." (citing *Lopez* 549 U.S. at 60)). Thus, the Fifth Circuit's emphasis on the "elements" of the offense as stated in 21 U.S.C. § 841(a) – to the artificial exclusion of Congress's clear statement in 21 U.S.C. § 841(b)(4) that "any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as" a misdemeanor offender – cannot be reconciled with *Carachuri-Rosendo*.

The Fifth Circuit's "elements" theory also proves far too much. Taken to its logical conclusion, an alien would commit an "aggravated felony" under a statute such as Georgia's even if the record of conviction conclusively showed that he possessed only a small amount of marijuana and did not receive any remuneration. In such a case, the state offense's "elements" equally correspond to what the Fifth

Circuit deemed to be a distinct federal felony. That cannot be right, and the Fifth Circuit did not defend the conclusion that follows from its own reasoning.[3]

The Fifth Circuit also invoked its precedent holding that in a prosecution under Section 841 a federal prosecutor need not prove remuneration or quantity of marijuana to a jury under *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Pet. App. 7a-8a. But *Apprendi* is irrelevant here: the question is not *who* (the jury or the judge) must decide if the alien has been convicted of a felony, but *whether* the offense was a felony at all. The Sixth Amendment says nothing about that question. It makes no difference under the INA whether federal law classifies conduct as a misdemeanor by defining a separate misdemeanor offense or by subjecting a single offense to felony or misdemeanor punishment depending on sentencing factors.

II. The Courts Of Appeals Are Split Three Ways With Respect To The Question Presented.

The courts of appeals are in deep and acknowledged conflict with respect to the question

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[3] If an alien were prosecuted in federal court for conduct involving possession of a small amount of marijuana and no remuneration, the alien could introduce evidence regarding the lack of remuneration and quantity of marijuana and receive only misdemeanor punishment (and no removal as an aggravated felon). Under the logic of the "elements" argument, however, the same alien convicted of the same conduct and who introduced the same evidence under a *state* possession-with-intent-to-distribute statute would be removable as an aggravated felon.

presented. As the court below recognized, "[w]hen a state criminal statute covers both the felony and misdemeanor conduct proscribed by § 841, the courts of appeals are split on whether the conviction, if lacking specifics of the underlying criminal conduct, should be treated as a felony or a misdemeanor." Pet. App. 6a. The government itself concedes the "disagreement in the courts of appeals concerning the question presented." *Garcia* BIO 9.

There is no realistic prospect that the conflict can be resolved absent this Court's intervention, because the B.I.A. has acquiesced to the precedent of the Second and Third Circuits in cases arising in those jurisdictions. *Id.* 20 n.16. There is accordingly little chance that a case presenting the question can arise again in those courts. Certiorari is therefore warranted.

1. The Second and Third Circuits hold that a state law drug conviction involving no proof of either remuneration or a specified amount of marijuana is a misdemeanor for removal purposes unless the record of conviction establishes otherwise. In *Jeune v. Attorney General*, 476 F.3d 199, 200 (3d Cir. 2007), the Third Circuit considered the case of an alien who, like petitioner, had been arrested and charged with possession of marijuana with intent to distribute in violation of state law. The court applied this Court's categorical approach to determine whether the state law offense could be considered the equivalent of the federal felony described in Section 841. 476 F.3d at 201-02. The court began with the presumption that the alien's "conduct was only the minimum necessary to comport with the [state drug] statute and record." *Id.* at 204. The court then noted that the record of

the alien's state conviction contained "no indication that [the alien] was distributing marijuana for money," nor did it provide information as to "the amount of marijuana that [the alien] may have possessed." *Id.* at 205. The Third Circuit therefore refused to consider the alien's state law offense an aggravated felony under the INA. *Id.*; *see also Evanson v. Attorney Gen.*, 550 F.3d 284, 293-94 (3d Cir. 2008); *Wilson v. Ashcroft*, 350 F.3d 377, 382 (3d Cir. 2003).

The Second Circuit adopted the same rule in *Martinez v. Mukasey,* 551 F.3d 113 (2d Cir. 2008). The court explained that under the categorical approach "the singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant." *Id.* at 118 (citations omitted). The court determined that the alien's state law offense could not be considered an aggravated felony because his conviction "could have been for precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. § 841(b)(4)." *Id.* at 115, 120; *see also Dias v. Holder*, No. 08-73051, 2011 WL 4431099, at *1 (9th Cir. Sept. 23, 2011) (state law conviction for criminal sale of marijuana in the fourth degree is not automatically an aggravated felony because in view of Section 841(b)(4), such an offense is not "necessarily punishable as a felony under the federal drug laws").

2. The Board of Immigration Appeals, along with three courts of appeals, takes the opposite approach, holding that a state law drug conviction involving no

proof of remuneration or a specified amount of marijuana is at least presumptively an aggravated felony.

The B.I.A. adopted this rule – to which it adheres in every case arising outside of the Second and Third Circuits – in *Matter of Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008). In *Aruna*, the B.I.A. ruled that a state offense is an "aggravated felony" whenever its "elements" correspond to the "elements" of a federal law felony. *Id.* at 456. Because the presence of remuneration and more than a small amount of marijuana are merely a "mitigating exception" and not statutory elements as provided in 21 U.S.C. § 841(b)(4), the B.I.A. held that *every* state law marijuana possession with intent to distribute offense qualifies as "an aggravated felony because its elements correspond to" the actual elements of the federal felony described in Section 841(a). *Id.* at 457, 458.

The First, Fifth, and Sixth Circuits have adopted the B.I.A.'s position. Pet. App. 7a (agreeing with the First and Sixth Circuits); *Garcia v. Holder*, 638 F.3d 511, 519 (6th Cir. 2011) ("[B]ecause the amount of marihuana is not an element of the relevant federal felony, Garcia's state conviction is an aggravated felony under the categorical approach."); *Julce v. Mukasey*, 530 F.3d 30, 35 (1st Cir. 2008) ("[T]he same elements required under Massachusetts law to establish the offense of possession with intent to distribute marijuana, if proven in a federal prosecution under § 841, would establish a felony offense." (citation omitted)).

There is moreover a division among those courts as to whether, when a state law offense maps on to

the federal felony in Section 841, the alien may nevertheless prove that the facts of *his particular case* amount to a misdemeanor involving both a small quantity of marijuana and no remuneration. The logic of the B.I.A.'s decision in *Aruna* suggests that an alien can never make such a showing: even if there is conclusive evidence that the alien in fact distributed a small quantity of marijuana for no remuneration, the "elements" of the state offense still correspond to the "elements" of the aggravated felony of marijuana distribution. *Aruna*, 24 I. & N. Dec. at 456.[4] The Sixth Circuit adopted precisely such a *per se* position in *Garcia*. 638 F.3d at 516. That court reasoned that it would find a state law possession-with-intent-to-distribute offense to be an aggravated felony "even if we were to assume that the conduct

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[4] Notwithstanding the logic of its ruling in *Aruna*, that opinion contains a footnote suggesting that it may be possible for an alien to prove that his offense only involved misdemeanor conduct. 24 I. & N. Dec. at 458 n.5 (the alien "made no effort during his proceedings before the Immigration Judge to prove that the quantity of marijuana in his offense was 'small' or that his offense involved a conspiracy to distribute marijuana for no remuneration, beyond his mere assertion of such, nor does he request a remand for this purpose."); *see also In re Dudley*, No. A043-092-703 - BAL, 2011 WL 899580, at *4-*5 (B.I.A. Feb. 14, 2011). But the B.I.A. did not take this approach in petitioner's case, where the board acknowledged that petitioner "has submitted evidence demonstrating that he actually distributed only a small amount" of marijuana, but (applying *Aruna*) held categorically that he had committed an aggravated felony because "the elements of [his] offense correspond to the elements of the Federal felony offense of possession with intent to distribute an indeterminate quantity of marijuana." Pet. App. 12a, 13a.

underlying [Garcia's] state conviction was the minimum criminal conduct necessary to sustain the conviction," which is to say, conduct corresponding to the federal misdemeanor. *Id.* at 518.

By contrast, the First and Fifth Circuits have stated that the alien may attempt to prove that the facts of his individual case would constitute a federal misdemeanor. *See* Pet. App. 9a ("Moncrieffe bore the burden to prove that he was convicted of only misdemeanor conduct."); *Julce*, 530 F.3d at 35-36 (alien may attempt to "meet the burden, which is his to bear, that his conduct of conviction fell within § 841(b)(4)"). Thus, in the event that this Court grants review and rules in favor of the default felony approach, it should decide whether an alien may attempt to rebut that default presumption and, if so, on what evidence he may rely to make such a showing.

III. The Question Presented Is Of Substantial And Recurring Importance.

The question whether a conviction under a state statute that encompasses but is not limited to remuneration or a significant amount of marijuana nevertheless constitutes an aggravated felony is of paramount importance for several reasons. The question governs not only whether a lawful permanent resident may be removed from the United States, 8 U.S.C. § 1227(a)(2)(A)(iii), but also whether the alien may be eligible for discretionary cancellation of removal, *see id.* § 1229b(a)(3) (lawful permanent resident may seek such relief if convicted only of a controlled substance offense, but not if convicted of an aggravated felony). An aggravated

felony determination generates significant post-removal consequences as well. Such a person is permanently foreclosed from seeking readmission to the United States, 8 U.S.C. § 1182(a)(9)(A)(ii), cannot apply for asylum, 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i), and is barred from demonstrating the "good moral character" needed for naturalization, 8 U.S.C. § 1101(f)(8); 8 C.F.R. § 316.2(7).

The question presented also affects hundreds, if not thousands, of persons every year. Drug convictions constitute the number one criminal basis for removal of aliens from the United States. Of the 168,532 aliens removed from the United States in 2010 due to a criminal offense, 42,692 (roughly one out of every four) were removed for a drug crime. Department of Homeland Security, *Immigration Enforcement Actions* at 4, *available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement-ar-2010.pdf* (June 2011). The question presented thus arises with great frequency in the lower courts and the Board of Immigration Appeals, and this Court's intervention is needed to address this important and frequently recurring question of law.[5]

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[5] In the three-and-a-half years since the B.I.A. decided *Aruna*, that tribunal has issued twenty-nine additional rulings in cases raising similar basic facts as reported in *Administrative Decisions Under Immigration and Nationality Laws*, in addition to what are presumably numerous other unreported cases such as petitioner's.

IV. This Case Is An Ideal Vehicle For Deciding The Question Presented

This case also presents an excellent vehicle for this Court's resolution of the question presented. At every step of the proceedings, petitioner properly raised and preserved his argument that his state law conviction should not be considered an aggravated felony for removal. Although not admissible under this Court's "categorical approach," the evidence that petitioner possessed only 1.3 grams of marijuana also demonstrates the illogic of the government's position that petitioner committed the "aggravated felony" of "drug *trafficking*."

Further, the Georgia statutory scheme unambiguously encompasses the distribution of small amounts of marijuana for no remuneration. No provision of the statute suggests that petitioner distributed a larger quantity of drugs. To the contrary, the statute suggests that petitioner possessed only a small amount of marijuana. *See* Ga. Code Ann. §§ 16-13-30(j)(1), 16-13-2(b).

There also is no doubt that if this Court adheres to its precedent applying the categorical rule to this question, it will reverse the Fifth Circuit's judgment. As the court of appeals acknowledged, "[t]he charging document and Georgia judgment did not indicate how much marijuana Moncrieffe possessed [and] the government did not prove that there was remuneration or more than a small amount of marijuana." Pet. App. 3a.

Moreover, in this case, the question presented arises in the ordinary context in which the alien alleges that he is not subject to deportation because

he did not commit an aggravated felony. In other cases, by contrast, the alien seeks relief from the United States in the form of discretionary cancellation of removal. In such cases, complications may arise regarding the question whether the alien bears some further burden of proof. 8 U.S.C. §§ 1229b(a)(3), 1229a(c)(4)(A)(i); *see Garcia* BIO 15-16.

Relatedly, in cases that arise in the distinct context of requests for cancellation of removal, the immigration judge may suggest that the alien would be denied relief on other grounds. Given a choice, this Court's general practice has been to grant review in a case in which the question is certain to determine the eventual judgment. This is such a case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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