No. 11-702

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The government does not dispute that this petition is an ideal vehicle to resolve the recurring circuit conflict over whether a state marijuana offense that encompasses conduct that would be a federal law misdemeanor is nonetheless automatically an "aggravated felony" under the immigration laws. The government's suggestion that the conflict may resolve itself without this Court's intervention lacks the slightest merit. Certiorari accordingly should be granted.

1. The Solicitor General frankly acknowledges the three-to-two circuit conflict over the question presented. *See* BIO 16-17. The First, Fifth, and Sixth Circuits – along with the BIA – hold that such an offense is a felony; each has recognized the conflict. *See* Pet. App. 8a; *Garcia v. Holder*, 638 F.3d 511, 518 (6th Cir. 2011), *pet. for cert. pending*, No. 11-79 (filed July 18, 2011); *Julce v. Mukasey*, 530 F.3d 30, 35 & n.6 (1st Cir. 2008); *In re Aruna*, 24 I. & N. Dec. 452, 455-57 & n.4 (B.I.A. 2008). The Second and Third Circuits hold that the offense is a misdemeanor; the latter has recognized the split. *See, e.g.*, *Martinez v. Mukasey*, 551 F.3d 113, 121 (2d Cir. 2008); *Evanson v. Attorney Gen.*, 550 F.3d 284, 289 (3d Cir. 2008).

That conflict is intolerable, given Congress's determination that "the immigration laws of the United States" should be "uniform[]." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3384. The results here are uniquely arbitrary. The BIA decides indistinguishable cases based on the happenstance of

where the alien lived or was moved and detained by the government when it initiated deportation. *Compare, e.g.*, *In re Velez-Vargas*, No. A092-991-943, 2011 WL 3665687, at *1 (B.I.A. Aug. 5, 2011) (alien in Louisiana committed aggravated felony) *with In re Johnson*, No. A089-013-402, 2011 WL 7071049, at *3 (B.I.A. Dec. 22, 2011) (holding just a few months later that alien in Connecticut had not). And despite the Sixth Circuit's holding that a Michigan offense is an aggravated felony, *Garcia*, 638 F.3d at 518, an alien convicted under Ohio's statute prevailed because he happened to be in New York, *In re Massaquoi*, No. A029-723-049, 2009 WL 1800120, at *1 (B.I.A. June 10, 2009).

But it gets worse. Aliens convicted for the *identical* offense under the *same* state law are subject to conflicting rules. For example, the courts and the BIA have recently considered the cases of six aliens convicted under New York's marijuana statute, N.Y. Penal Law § 221.40. But the government routinely moves aliens detained in the Northeast to facilities in the South. So three aliens who remained within the jurisdiction of the Second Circuit, as well as one within the Third Circuit, prevailed. *Wright v. Attorney Gen.*, 376 Fed. Appx. 190, 193-94 (3d Cir. 2010); *Martinez*, 551 F.3d at 122; *Beckford v. Filip*, 308 Fed. Appx. 556, 557-58 (2d Cir. 2009); *In re Taylor*, No. A079-110-293, 2010 WL 2601509, at *1 (B.I.A. June 8, 2010). The two others lost because they happened to be in Louisiana and Texas. *In re Mascoll*, No. A072-748-004, 2010 WL 4972424, at *1 (B.I.A. Nov. 12, 2010); *In re Bastardo*, No. A042 889 306, 2008 WL 4146726, at *1 n.1 (B.I.A. Aug. 20, 2008), *vacated on other grounds*, *Bastardo v. Holder*,

384 Fed. Appx. 383 (5th Cir. 2010). Those were all cases decided on appeal; no doubt, many more have been subject to the same disparate treatment by immigration judges. That inconsistency is completely unacceptable.

The petition furthermore demonstrated the vital importance of the question presented. *See* Pet. 19-20. A massive number of individuals have been convicted for marijuana offenses, and such drug crimes are the principal basis invoked by the government in deportation proceedings. The Solicitor General does not dispute that the question determines the fate of hundreds of aliens every single year.

The issue has dramatic implications. It determines not only whether the individual may be eligible for discretionary cancellation of removal, *see* 8 U.S.C. § 1229b(a)(3), but whether he will be barred from seeking readmission, *id.* § 1182(a)(9)(A)(ii), from requesting asylum, *id.* §§ 1158(b)(2)(A)(ii), (B)(i), and from being naturalized, *id.* § 1101(f)(8); 8 C.F.R. § 316.2(a)(7).[1]

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[1] Thus, while the government notes that petitioner (like the alien in every case presenting this question) is also removable on the ground that his offense involved a controlled substance, *see* BIO 20 n.11, the issue has great significance, because it determines whether he can avoid deportation. That is why the question arises so often before the BIA and the courts of appeals. The government correctly does not suggest either that the question would never warrant review or that this particular case is an inappropriate vehicle to decide the question. *See also, e.g.*, *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580, 2589 (2010) (review granted in identical posture under the same statutory scheme).

Individuals convicted of minor marijuana offenses, who often have lawfully lived in this country for decades, thus may be forever ripped from their loved ones. They often are deported to nations in which they have no ongoing relationships, no jobs, and no family. Petitioner, for example, came to this country as a lawful permanent resident twenty-eight years ago, at the age of *four*. He has two children here. Yet as an adult he has been forcibly removed to Jamaica, entirely because of the happenstance that the government did not choose to detain him within the Second or Third Circuit.

2. There is no merit to the suggestion, BIO 19, that the Second and Third Circuits might reverse themselves. The Third Circuit has applied its rule in an uninterrupted line of *nine* decisions over the course of a decade, in panels composed of eleven of that court's thirteen active judges, without any judge ever suggesting that the question be reconsidered.[2]

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[2] In five cases, the court invalidated the aggravated felony determination. *Steele v. Blackman*, 236 F.3d 130, 138 (3d Cir. 2001) (McKee, Rendell, Stapleton, JJ.); *Wilson v. Ashcroft*, 350 F.3d 377, 382 (3d Cir. 2003) (Alito, Ambro, Chertoff, JJ.); *Jeune v. Attorney Gen.*, 476 F.3d 199, 205 (3d Cir. 2007) (Smith, Roth, JJ.; Irenas, D.J.); *Evanson*, 550 F.3d at 293-94 (Sloviter, Fuentes, Aldisert, JJ.); *Wright*, 376 Fed. Appx. at 193-94 (Rendell, Fisher, Garth, JJ.). In four others, the Third Circuit held that the government had proven through appropriate evidence that the defendant's state offense corresponded to a federal felony. *Garcia v. Attorney Gen.*, 462 F.3d 287, 293 (3d Cir. 2006) (Fisher, Chagares, Reavley, JJ.); *Santos v. Attorney Gen.*, 352 Fed. Appx. 742, 744-45 (3d Cir. 2009) (Scirica, Jordan, Cowen, JJ.); *Catwell v. Attorney Gen.*, 623 F.3d 199, 207 (3d Cir. 2010) (Rendell, Jordan, Greenaway, JJ.); *Miller v. Attorney*

The government backhandedly disparages the Third Circuit's reasoning, BIO 17-18, but fails to acknowledge that the court has given this precise question extraordinary consideration. In its second decision on the question, the panel (Alito, Ambro, Chertoff, JJ.) directed the parties to submit special briefing on this question. Order of Sept. 4, 2003, *Wilson*, 350 F.3d 377 (No. 03-1414). The next panel to hear the question did the same. Order of Nov. 17, 2006, *Jeune*, 476 F.3d 199 (No. 05-3103). A third panel subsequently remanded its case to the BIA for additional consideration of the issue, then issued its decision in the alien's favor after the BIA's further ruling; the case took an extraordinary five years to decide. Order of Dec. 8, 2005, *Wright*, 376 Fed. Appx. 190 (No. 05-2536) (decided April 16, 2010). Each time, the Third Circuit adhered to its settled rule without any expression of doubt.

Nor is there any prospect that the Second Circuit will reverse itself. That court announced its rule after the circuit split developed and after the BIA decided *In re Aruna*. *See Martinez*, 551 F.3d 113. Like the Third Circuit, the court gave the question detailed consideration, remanding the case to the BIA for further consideration of this issue; after the BIA adhered to its position, the court of appeals reversed. *See id.* at 117, 122. Subsequently, another panel unhesitatingly applied the court's precedent to reverse an order of deportation. *Beckford*, 308 Fed. Appx. at 557-58 (Miner, Sotomayor, Katzmann, JJ.).

Gen., 439 Fed. Appx. 172, 175-76 (3d Cir. 2011) (Fuentes, Greenaway, Greenberg, JJ.).

No less important, the Second Circuit leaves the resolution of inter-circuit conflicts like this one to this Court. Its en banc practice is almost entirely limited to resolving intra-circuit disagreements. *See generally* Jon O. Newman, *In Banc Practice in the Second Circuit, 1984-1988*, 55 BROOK. L. REV. 355, 357-65 (1989). Here, there is no realistic prospect of en banc review, because the Second Circuit's precedent is uniform.

The United States unduly minimizes the significant limitations on the opportunities for this question to ever give rise to en banc review in either court. Now that the precedent of the Second and Third Circuits is firmly settled, the BIA has completely given up on contesting it, while in every other case it continues to firmly adhere to the rule applied by the Fifth Circuit. *See* Pet. 15-17. But in any event, the Solicitor General's argument is belied by the government's litigating practice. While this question was being actively litigated in the Second and Third Circuits, the government lost on this precise issue in seven different cases. Four (two in each court) post-date both the circuit conflict and the published BIA ruling on which the United States relies. Yet the government has *never* sought rehearing en banc in *either* court. In fact, it seems conspicuously to have avoided making such a request. Even now, the Solicitor General – who must approve every such petition – pointedly declines to say any more than that the government "ha[s] the opportunity to" make such a request. BIO 19. Conspicuously missing is any representation that if it ever gets the chance it "will" do so.

3. Nothing has happened that would cause either the Second or Third Circuit to reconsider its well-settled position. The government does not seriously argue otherwise. The fact that the BIA issued its precedential decision in *Aruna* after "[t]he *original* circuit precedents" of those courts, BIO 19 (emphasis added), has no significance for several reasons: federal appellate courts review the BIA, not the other way around; neither circuit affords any deference to the BIA on such a question[3] (and no circuit has ever deferred to *Aruna* in particular); *Aruna* contains no argument or authority that the Second and Third Circuits have not considered; and (not surprisingly, given all that) both circuits have multiple *subsequent* circuit precedents – two in each court – firmly adhering to their position. The Department of Justice seemingly agrees that *Aruna* is a nonstarter since, when given the opportunity, "the government ha[s] *not* requested that the court revisit it pre-*Aruna* precedent in light of the Board's decision." *Id.* 19 (emphasis added).

The Board's more recent decision in *In re Castro-Rodriguez*, 25 I. & N. Dec. 698 (B.I.A. 2012), similarly would receive no deference. But in any event, *Castro-Rodriguez* simply confirms what *Aruna* had already suggested well before: that an alien may to try to

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[3] *See, e.g.*, *Almeida v. Holder*, 588 F.3d 778, 785 (2d Cir. 2009) ("we owe no deference to [the BIA's] decision that a particular crime, defined by state law, constitutes [an aggravated felony]"); *Singh v. Gonzales*, 432 F.3d 533, 538 (3d Cir. 2006) (BIA's interpretations of state and federal criminal laws for purposes of aggravated felony determination are "not entitled to deference by this Court").

prove that his individual marijuana offense was not an aggravated felony through proof that is not admissible under this Court's precedents articulating the modified categorical approach. *See In re Aruna*, 24 I. & N. Dec. at 457 ("the defendant . . . bears the burden of proving the additional facts, i.e., the 'smallness' of the amount of marijuana and the absence of remuneration").

If anything, the BIA's ruling would only reinforce the Second and Third Circuits' conclusion that the government's position is insupportable. It cannot be squared with the government's unqualified position that the misdemeanor provision of "Section 841(b)(4) is *irrelevant* in using a 'categorical approach' to identify state convictions that constitute CSA felonies [because t]hat paragraph does not define any element of any crime, and the CSA authorizes a felony sentence without regard to that paragraph." BIO 9 (emphasis added). On that view, the alien can never negate the "aggravated felony" finding in an individual case; instead, even if an alien is convicted under state law for conduct that equates with a federal misdemeanor, he has committed an "aggravated felony." *Castro-Rodriguez* also cannot be reconciled with this Court's precedents strictly limiting the documents admissible under the "modified categorical approach"; the BIA's ruling instead invites precisely the mini-trials that this Court's decisions insist on avoiding. *See Shepard v. United States*, 544 U.S. 13, 23 (2005); *Taylor v. United States*, 495 U.S. 575, 601 (1990).

Finally, the government's suggestion that this Court's decision in *Carachuri-Rosendo* "lends additional support" to the position of the Fifth

Circuit, BIO 19, is insupportable. The proof is in the pudding: the government's brief on appeal twice *disclaimed* that decision as "inapplicable to the [present] case." Gov't C.A. Br. 9, 20. The suggestion that the Second and Third Circuits would reverse themselves on the basis of a decision the government says is "inapplicable" obviously lacks any merit.

In reality, *Carachuri-Rosendo* significantly reinforces the precedent of the Second and Third Circuits, as it rejects all three pillars of the government's argument. First, whereas the government asserts that every such marijuana offense is an aggravated felony because the only applicable "offense" is the felony defined by Section 841(a)(1), BIO 7-9, *Carachuri-Rosendo* holds that under the provision at issue here, Section 844(a), "a first-time simple possession offense is a federal misdemeanor." 130 S. Ct. at 2581; 21 U.S.C. § 841(b)(4) (distribution of "a small amount of marihuana for no remuneration shall be treated as provided in section 844"). Second, *Carachuri-Rosendo* concludes that the relevant immigration statutes' references to "aggravated felony" and "illicit trafficking" must be given their "everyday understanding," *id.* at 2585, which cannot fairly encompass possessing or sharing small amounts of marijuana for no remuneration. Third, this Court's decision specifically rejects the government's argument that any state offense that is "punishable" under the elements of Section 841(a)(1) is an "aggravated felony," BIO 8, 11, emphasizing that the INA instead applies only when the defendant has

actually been "*convicted* of a[n] aggravated felony." *Carachuri-Rosendo*, 130 S. Ct. at 2586-87.[4]

The Solicitor General's suggestion that the Second and Third Circuits would be persuaded by the government's arguments on the merits also fails to account for the significant points that the Brief in Opposition completely fails to address. *See* Pet. 8-14. Thus, even if one accepts the contestable premise that a defendant in the distinct context of a criminal drug case would have to prove that his marijuana offense was a misdemeanor, BIO 10-11, under the "categorical approach," the government is subject to the "demanding requirement" that it "make a showing that a prior conviction 'necessarily' involved (and a prior plea necessarily admitted) facts equating to" the federal felony. *Shepard*, 544 U.S. at 24 (plurality opinion). In *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010), the Court presumed that the defendant had engaged in the least culpable conduct under the state offense because "nothing in the record of [defendant]'s 2003 battery conviction

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[4] Thus, the government errs in arguing that only the "elements" of Section 841(a)(1) are relevant because decisions applying the "categorical approach" "generally focus[] on the 'elements' of offenses." BIO 8 (citing cases). Any such "general focus" cannot answer the question presented, because the "elements" of Section 841(a)(1) only describe an offense, not whether a particular "conviction" for that offense constitutes a felony or instead a misdemeanor. Under the modified categorical approach, the court assumes the defendant committed the least culpable conduct under the state charge, which here corresponds to a federal law misdemeanor. *See generally* Pet. 8-10.

permitted the District Court to conclude that it rested upon anything more than the least of these acts."

The government also does not dispute that Congress could not have intended the grossly unfair regime that its interpretation requires. Aliens charged in state court – as opposed to federal court under the CSA – often will have had no incentive to develop, introduce, and preserve evidence that their offenses involved small amounts of marijuana and no remuneration – facts that are irrelevant to the state charges. So the state record of conviction that is relevant under the modified categorical approach often will not reflect the facts that on the government's view are required to find the alien did not commit a felony. Similarly, the position of the United States compels an implausible discrimination between aliens charged in federal rather than state court. An alien convicted in federal court under Section 844(a) with possessing or sharing a small amount of marijuana for no remuneration commits only a misdemeanor. But an alien charged under state law for the *identical* conduct commits a federal "aggravated felony," for which he will be deported. *See* Pet. 14 n.3.

The government's remaining arguments on the merits do not otherwise require discussion. None is a point that that the Second and Third Circuits has not fully considered. Even if the United States were correct that those circuits misapply the governing statutes and this Court's precedents, that would only be a reason to grant certiorari and correct that recurring error.

In the two most analogous cases, this Court granted less compelling certiorari petitions. *Carachuri-Rosendo* involved a two-to-two circuit conflict that had existed only for a single year. *See generally* Brief for the U.S. (certiorari stage) at 14, *Carachuri-Rosendo*, 130 S. Ct. 2577 (No. 09-60). *Lopez v. Gonzales* involved a three-to-one conflict that had existed for four years. *See generally* Brief for the U.S. (certiorari stage) at 7, *Lopez v. Gonzales*, 549 U.S. 47 (2006) (No. 05-547). As in both those cases, this petition should be granted.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

Respectfully submitted,

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