No. 11-702

In the Supreme Court of the United States

ADRIAN MONCRIEFFE, 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

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a state crime is an "aggravated felony" if it is equivalent to 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, possession of an unspecified quantity of marijuana with intent to distribute is a felony punishable by up to five years of imprisonment. 21 U.S.C. 841(b)(1)(D). If the defendant shows that he distributed only "a small amount of marihuana for no remuneration," however, the maximum punishment is one year of imprisonment (absent a recidivist finding). 21 U.S.C. 841(b)(4), 844, 885(a)(1).

The question presented is whether, when a defendant is convicted in state court of possession of marijuana with intent to distribute but the record of conviction does not disclose the quantity of marijuana or the existence of remuneration, the defendant has not been convicted of an "aggravated felony" merely because of the possibility that the offense involved "a small amount of marihuana for no remuneration."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 662 F.3d 387. The decisions of the Board of Immigration Appeals (Pet. App. 10a-13a) and the immigration judge (Pet. App. 14a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2011. The petition for a writ of certiorari was filed on December 7, 2011. 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-10a.

STATEMENT

This case concerns the "aggravated felony" provisions of the Immigration and Nationality Act (INA), which Congress passed to speed removal of certain criminal aliens. An alien previously admitted to the United States who has been "convicted of an aggravated felony" is, among other consequences, removable on that basis and ineligible for cancellation of removal. 8 U.S.C. 1227(a)(2)(A)(iii), 1229b(a)(3). The "aggravated felony" at issue here incorporates the term "drug trafficking crime," which is defined to include "any felony punishable under the Controlled Substances Act [CSA] (21 U.S.C. 801 *et seq.*)." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2). Under the relevant provision of the CSA, 21 U.S.C. 841(a)(1), a person who possesses a controlled substance with intent to distribute is subject to felony punishment, unless he or she shows that only a "small amount" of marijuana was involved for "no remuneration" (assuming no recidivist determination). 21 U.S.C. 841(b)(1)(D) and (4).

After obtaining lawful permanent residency in the United States, petitioner was convicted under Georgia law of possessing marijuana with intent to distribute. The Department of Homeland Security (DHS) charged petitioner with being removable. The immigration judge found petitioner both removable and ineligible for the discretionary relief of cancellation of removal, on the ground that he was convicted of an offense punishable as a felony under the CSA, *i.e.*, an "aggravated felony." The Board of Immigration Appeals (Board) affirmed. The court of appeals denied a petition for review, relying on the fact that absent a defendant's showing of a small amount of marijuana and no remuneration, the CSA

punishment is a felony-based maximum of five years. Pet. App. 1a-9a.

1. Under the INA, 8 U.S.C. 1101 *et seq.*, an alien who has been admitted to the United States is removable if he is thereafter "convicted of an aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). Certain removable aliens may seek the discretionary relief of cancellation of removal, but an alien convicted of an "aggravated felony" is ineligible for that 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. Any offense "described in" that list qualifies as an aggravated felony, regardless of 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). In turn, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the [CSA]," 21 U.S.C. 801 *et seq.* For these purposes, a "felony" is a crime punishable by more than one year of imprisonment. 18 U.S.C. 3559(a)(1)-(5); see *Lopez* v. *Gonzales*, 549 U.S. 47, 56 n.7 (2006).

One provision of the CSA, 21 U.S.C. 841(a)(1), prohibits certain acts including "possess[ion] with intent to * * * distribute * * * a controlled substance." The CSA defines "distribute" as, with exceptions not relevant here, "the actual, constructive, or attempted transfer of a controlled substance or a listed chemical." 21 U.S.C. 802(8) and (11). Penalties under the CSA for possessing a controlled substance with intent to distribute vary based on the type and amount of the controlled

substance involved, as well as other factors. See generally 21 U.S.C. 841(b)(1)(A)-(E). If the controlled substance is marijuana and weighs "less than 50 kilograms," the maximum penalty is five years of imprisonment, "except as provided in paragraph[] (4) * * * of this subsection." 21 U.S.C. 841(b)(1)(D). Paragraph (4), in turn, provides that "any person * * * distributing a small amount of marihuana for no remuneration shall be treated as provided in" 21 U.S.C. 844 and another statute not relevant here. 21 U.S.C. 841(b)(4). Section 844 prohibits the simple possession of a controlled substance and, unless the government proves recidivism in the prescribed manner, provides a maximum term of one year of imprisonment for simple possession of marijuana. See 21 U.S.C. 844(a), 851.

The CSA specifies that "[i]t shall not be necessary for the United States to negative any exemption or exception" in the CSA "in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding" under the CSA, and that "the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit." 21 U.S.C. 885(a)(1).

2. a. Petitioner is a native and citizen of Jamaica. In 1984, he was admitted to the United States as a lawful permanent resident. Pet. App. 2a, 11a.

In 2008, petitioner pleaded guilty in Georgia state court to one count of possession of marijuana with intent to distribute. Pet. App. 2a-3a, 11a; Administrative Record (A.R.) 83-84; Ga. Code Ann. § 16-13-30(j)(1) (2007).[1]

[1] Section 16-13-30(j)(1), in pertinent part, makes it unlawful to "possess with intent to distribute marijuana." It has no minimum quantity requirement, and "distribute" means "to deliver a controlled substance, other than by administering or dispensing it." Ga. Code

Although that offense is a felony under Georgia law punishable by up to ten years of imprisonment (Ga. Code Ann. § 16-13-30(j)(2) (2007)), petitioner was sentenced to five years of probation. Pet. App. 2a, 11a.[2]

In 2010, based on that conviction, DHS charged petitioner as an alien removable on two grounds: having been convicted of (1) an aggravated felony, 8 U.S.C. 1227(a)(2)(A)(iii); and (2) a controlled-substance offense, 8 U.S.C. 1227(a)(2)(B)(i). Pet. App. 2a, 15a. Petitioner admitted DHS's factual allegations but disputed whether they made him removable as charged. *Id*. at 16a.

After DHS produced certain conviction documents (A.R. 78, 83-85), the immigration judge ruled that petitioner was removable "as charged." Pet. App. 18a. Citing *In re Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008), the

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Ann. § 16-13-21(11) (2007). Section 16-13-30(j)(2) states that, except as provided in subsections inapplicable here, "any person who violates [Section 16-13-30(j)(1)] shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years."

[2] Petitioner's sentence was imposed under Ga. Code Ann. § 42-8-60(a) (2007), which confers discretion to sentence first-time felony offenders to probation. A.R. 84. (Although petitioner also cites Ga. Code Ann. § 16-13-2 with respect to his sentence, see Pet. Br. 6, 23, that provision—while analogous to Section 42-8-60(a)—applies only to simple possession offenses.) Such dispositions remain convictions for federal immigration purposes under the INA. A judgment is a "conviction" even when "adjudication of guilt has been withheld," if (as relevant here) "the alien has entered a plea of guilty" and "the judge has ordered some form of punishment * * * to be imposed." 8 U.S.C. 1101(a)(48)(A). Thus, "the mere fact that [an alien] was sentenced pursuant to Georgia's First Offender Act does not mean that he lacks a 'conviction' for purposes of the INA." *Ali* v. *U.S. Att'y Gen.*, 443 F.3d 804, 809-810 (11th Cir. 2006). Petitioner does not contend otherwise here. See Pet. Br. 6 n.2.

immigration judge determined that petitioner's Georgia conviction for possession of marijuana with intent to distribute "corresponds with 21 U.S.C. § 841(a)(1)" and thus "would be punishable as a federal felony." Pet. App. 18a. During proceedings to determine whether petitioner was removable, petitioner (represented by counsel throughout the process) did not argue that his Georgia offense had in fact involved a small amount of marijuana for no remuneration, as might be relevant under 21 U.S.C. 841(b)(4). During separate earlier proceedings concerning bond, petitioner apparently submitted a document purporting to establish drug quantity, but not the absence of remuneration. A.R. 25, 37; see 8 C.F.R. 1003.19(d) (bond proceedings "shall be separate and apart from, and shall form no part of, any deportation or removal hearing or proceeding").[3]

b. Petitioner appealed to the Board. He challenged the "aggravated felony" ground of removability, contending (*inter alia*) that he had established, during the bond proceedings before the immigration judge, that his Georgia conviction involved a small amount of marijuana. He did not point to any evidence regarding remuneration or challenge the separate controlled substance ground of removability. See A.R. 16-26.

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[3] The immigration judge's bond decision did not mention the document relating to drug quantity (see A.R. 66), but petitioner's appeal brief to the Board stated that he submitted "certified copies of [petitioner's] Georgia conviction" at the bond hearing and that the document is "[p]art of the record of conviction" (A.R. 25). In any event, petitioner did not offer or cite the document in the proceedings to determine his removability until he filed it with the Board. A.R. 37. Neither the amount of marijuana involved in petitioner's Georgia conviction nor the lack of remuneration was established during the removal proceedings.

The Board dismissed petitioner's appeal. Pet. App. 10a-13a. The Board explained that "[a] state offense constitutes a felony punishable under the [CSA]," and therefore an aggravated felony, "if it proscribes conduct punishable as a federal felony" under the CSA. *Id.* at 11a-12a (citing *Lopez*, *supra*). In this case, the Board held, petitioner's Georgia offense of possession with intent to distribute marijuana was "analogous to the federal offense of possession of marihuana with intent to distribute"—a felony. *Id*. at 12a.

The Board rejected petitioner's argument that his Georgia offense was not an "aggravated felony" because the elements of the offense could encompass some conduct that, in federal court, might be punished as a misdemeanor based on the sentencing provision of 21 U.S.C. 841(b)(4). Pet. App. 12a-13a. The Board relied on its controlling decision in *In re Aruna*, *supra*, which had previously considered and rejected that argument. *Id.* at 13a.

3. The court of appeals denied a petition for review. Pet. App. 1a-9a.[4]

At the outset of its analysis, the court of appeals stated that it "uses a categorical approach to determine whether a state conviction qualifies as a felony under the CSA" and, specifically, "whether the elements of the state statute are analogous to a federal felony." Pet. App. 5a. Possession of a controlled substance with intent to distribute is a felony under the CSA, *id*. at 6a, and the court of appeals reasoned that the existence of the mitigating exception in 21 U.S.C. 841(b)(4) for certain marijuana cases does not change that default felony

[4] The court of appeals noted that the "BIA did not rule on, and we do not consider, whether the Georgia conviction constituted a 'controlled substances' violation for purposes of removal." Pet. App. 3a n.2.

status. The court of appeals noted that under its precedent in criminal sentencing cases, when the controlled substance is marijuana but there is no evidence of drug quantity, the offense is a felony with a maximum term of five years of imprisonment—not a misdemeanor with a maximum term of one year. Pet. App. 7a-8a (citing 21 U.S.C. 841(b)(1)(D)). Only when the defendant in a criminal prosecution carries the burden of producing evidence that the mitigating exception applies can the conviction be treated as a misdemeanor. *Id*. at 8a. The court thus joined the First and Sixth Circuits in holding that evidence of drug quantity or remuneration is not necessary for a state conviction for possession with intent to distribute marijuana to be treated as a "felony punishable under the [CSA]." See *id*. at 6a-7a (citing *Garcia* v. *Holder*, 638 F.3d 511, 516 (6th Cir. 2011), petition for cert. pending, No. 11-79 (filed July 18, 2011); *Julce* v. *Mukasey*, 530 F.3d 30, 34-36 (1st Cir. 2008)).

Stating that petitioner bore the burden of proving that his conviction involved only a small amount of marijuana for no remuneration, but that he had not properly offered any evidence on the matter in immigration court, the court of appeals sustained the finding that he was removable as an aggravated felon. Pet. App. 9a & n.4.[5]

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[5] After the filing of the petition for a writ of certiorari, the Board issued a precedential decision making clear that an alien has the opportunity in immigration court to show that Section 841(b)(4)'s mitigating exception applies—*i.e.*, that the prior conviction involved distribution of (or possession with intent to distribute) only a small amount of marijuana for no remuneration—thereby defeating "aggravated felony" treatment. See *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 702 (B.I.A. 2012) (citing, *inter alia*, *Nijhawan* v. *Holder*, 557 U.S. 29 (2009)).

SUMMARY OF ARGUMENT

Petitioner's Georgia conviction for possessing with intent to distribute marijuana qualifies as an "aggravated felony" because it necessarily included all the elements of an offense constituting a "felony punishable under the [CSA]." An alien can avoid "aggravated felony" treatment if he affirmatively proves that his marijuana conviction involved distribution of only a small amount of marijuana for no remuneration, but the existence of that mitigating exception does not alter the felony determination under the categorical approach where the alien has not shown that he falls within the exception.

A. "[A] state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony." *Lopez* v. *Gonzales*, 549 U.S. 47, 57 (2006). The elements of the CSA felony at issue are the knowing possession of marijuana and the specific intent to distribute it; no proof of minimum quantity or remuneration is required. 21 U.S.C. 841(a)(1) and (b)(1)(D). Because petitioner's Georgia conviction necessarily established that he knowingly possessed marijuana with the specific intent to distribute it, that conviction constitutes an "aggravated felony" under the categorical approach.

B. 1. Although the punishment for a Section 841(a)(1) conviction can be reduced to a maximum of one year if the defendant affirmatively establishes that his crime involved distribution of only a "small amount of marihuana for no remuneration," 21 U.S.C. 841(b)(4), Section 841(b)(4) is only a mitigating exception. *E.g.*, *United States* v. *Outen*, 286 F.3d 622, 637 (2d Cir. 2002) (Sotomayor, J.). There is no requirement that the government negate the possibility of a "small amount" of

marijuana and no remuneration before a defendant can be convicted of marijuana distribution-related offenses under the CSA and be subject to felony punishment. Because neither drug quantity nor remuneration is an element of the CSA offense, neither is properly considered part of that "generic offense" for purposes of determining, under the categorical approach, whether a state drug conviction is an aggravated felony.

2. According to petitioner, a state marijuana distribution-related conviction constitutes an "aggravated felony" only if it necessarily rules out that the alien distributed a "small amount of marihuana for no remuneration." But the vast majority of state marijuana-distribution laws do not require proof of remuneration or more than a "small amount" of marijuana. Even states that make marijuana trafficking a separate offense also punish under less serious offenses, which do not differentiate based on quantity, the many cases involving more than a "small amount" but less than an amount sufficient to trigger the trafficking charge. See pp. 29-30 & nn.17-18, *infra* (surveying state laws). Given Congress's obvious purpose to ensure the removal of criminal aliens, it would not have intended the drug-trafficking "aggravated felony" provision "to apply in so limited and so haphazard a manner." *Nijhawan* v. *Holder*, 557 U.S. 29, 40 (2009). And petitioner's approach would create similar problems in other contexts where the generic offense contains narrow, fact-specific exceptions or defenses. See *Gil* v. *Holder*, 651 F.3d 1000, 1005 (9th Cir. 2011) (rejecting argument that categorical approach requires predicate state-law conviction to negate "antique firearms" exception to trigger removability under 8 U.S.C. 1227(a)(2)(C)).

3. Section 841(b)(4), however, is not irrelevant to the overall analysis: any risk that an alien who distributed a "small amount of marihuana for no remuneration" would be removed as an "aggravated felon" is alleviated by Board precedent allowing aliens to prove that Section 841(b)(4)'s exception applies in a specific case. *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 702 (B.I.A. 2012). That subsequent, "circumstance-specific" inquiry does not contravene the categorical approach but rather operates outside of it, *Nijhawan*, 557 U.S. at 40-42, and addresses any concern that the decision below would produce unintended or unfair results.

C. The decision below is fully consistent with *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577 (2010). The Court there held that when a defendant is convicted of simple possession in state court, his state-law crime is equivalent to the federal offense of simple possession (a CSA misdemeanor), not recidivist possession (a CSA felony), even if evidence outside the record could establish in immigration court that he was a recidivist. *Id.* at 2586-2589. In that case, the government, in order to support a CSA felony, would have had to separately establish recidivism because the state conviction itself did not do so. Here, by contrast, no finding beyond the elements of petitioner's Georgia conviction is necessary to establish a CSA felony. *Carachuri-Rosendo* thus does not support the broad proposition that mitigating exceptions or affirmative defenses should be considered part of the generic offense for purposes of the categorical approach.

D. Neither the rule of lenity nor petitioner's argument that ambiguities should be construed in favor of an alien facing deportation suggests a different result. The relevant provisions of the CSA are clear: possession

with intent to distribute marijuana is punishable as a felony, without proof of remuneration or quantity, neither of which is an offense element. It is also clear that Congress would not have wanted criminal aliens to evade "aggravated felony" treatment whenever (as is often the case) a predicate state offense does not require proof of remuneration or more-than-a-small amount of marijuana.

ARGUMENT

PETITIONER'S STATE CONVICTION FOR POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE CONSTITUTES A CONVICTION FOR A FELONY PUNISHABLE UNDER THE CSA

Under the INA, an alien is removable and ineligible for cancellation of removal if he has been "convicted of any aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii), 1229b(a)(3). Congress defined "aggravated felony" to encompass any "felony punishable under the [CSA]." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2). A person, like petitioner, who has been convicted of possession with intent to distribute marijuana is punishable as a felon under the CSA. 21 U.S.C. 841(a)(1) and (b)(1)(A)-(E); 18 U.S.C. 3559(a)(1)-(5). Petitioner does not dispute that the federal government would have to prove nothing more than the elements of the state offense of which he was convicted to obtain a felony conviction under the CSA. That is all that the categorical approach requires to establish that a state conviction is an "aggravated felony."

Nevertheless, relying on the CSA's mitigating exception for cases involving distribution of a "small amount of marijuana for no remuneration," petitioner argues that the state offense of which he was convicted cannot

qualify as an "aggravated felony" because the state offense does not require either remuneration or a minimum quantity. Such a result cannot be squared with the statutory text, this Court's precedents, or Congress's goal of removing aliens convicted of drug dealing. That is not to say the CSA's mitigating exception is of no aid to criminal aliens: although it does not factor into the threshold inquiry under the categorical approach, an alien can defeat an "aggravated felony" determination by producing evidence and carrying his burden of proof in immigration court that the exception applies to his state conviction. But the mere existence of the possible exception, without any proof by the alien that he comes within it, does not automatically confer a free pass from "aggravated felony" treatment for an alien convicted of distributing marijuana under the clear majority of state laws that require neither remuneration nor more than a "small amount."

A. Because the Elements Of The State Offense Correspond To The Elements Of The CSA Felony, Petitioner's Offense Of Conviction Is Presumptively An "Aggravated Felony" Under The Categorical Approach

1. The categorical approach focuses on the elements of the respective offenses

The question here is whether, upon being convicted in Georgia of possession with intent to distribute marijuana, petitioner was convicted of a "felony punishable under the [CSA]." 8 U.S.C. 1101(a)(43); 18 U.S.C. 924(c)(2). A state drug crime is a "felony" for these purposes (whether or not it is classified as a felony under state law) if it corresponds "to a crime punishable as a felony under the federal Act." *Lopez* v. *Gonzales*, 549 U.S. 47, 55 (2006).

As in related contexts, courts considering whether an offense constitutes an "aggravated felony" have used a "categorical approach," *i.e.*, comparing the elements of the offense of conviction, rather than the particular facts of the crime that led to the conviction, to the elements of the relevant "generic" crime (here, the CSA offense). See *Kawashima* v. *Holder*, 132 S. Ct. 1166, 1172 (2012) ("If the elements of the offenses establish that [the aliens] committed crimes involving fraud or deceit, then the first requirement of [the aggravated felony] is satisfied" under the categorical approach.); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186 (2007) ("[A] state conviction qualifies as a burglary conviction * * * as long as it has the 'basic elements' of 'generic' burglary.") (quoting *Taylor* v. *United States*, 495 U.S. 575, 599 (1990)); *James* v. *United States*, 550 U.S. 192, 202, 214 (2007) ("[W]e consider whether the *elements of the offense* are of the type that would justify its" qualification as a "violent felony" under the Armed Career Criminal Act.); *Shepard* v. *United States*, 544 U.S. 13, 19 (2005) ("[T]he categorical approach * * * refers to predicate offenses in terms not of prior conduct but of prior 'convictions' and the 'element[s]' of crimes.") (second brackets in original).[6]

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[6] In the immigration context, the Board has generally applied its own similar categorical analysis, independent of this Court's line of cases originating with *Taylor, supra*. See *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (B.I.A. 2008). Although not at issue here, in 2008 the Attorney General adopted a more flexible approach for crimes involving moral turpitude, allowing for examination of additional evidence if both a categorical analysis and a modified categorical analysis fail to resolve whether an offense is one of moral turpitude. See *In re Silva-Trevino*, 24 I. & N. Dec. 687 (A.G. 2008).

In the context of the drug-trafficking "aggravated felony," applying the categorical approach requires an immigration judge to determine whether the elements of the predicate offense of conviction correspond to the elements of a felony offense under the CSA. See, *e.g.*, *In re Aruna*, 24 I. & N. Dec. 452, 456 (B.I.A. 2008) ("The present aggravated felony determination is subject to the 'categorical approach,' meaning that the 'elements' of the [alien's] predicate offense must correspond to the 'elements' of an offense that carries a maximum term of imprisonment of more than 1 year under the CSA."). In other words, "a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony." *Lopez*, 549 U.S. at 57.[7]

Although petitioner strains to dismiss those established Court precedents as sometimes "loosely refer-[ring]" to offense elements (Pet. Br. 41), he fails to cite a single countervailing precedent holding that mitigating sentencing factors, exceptions, or affirmative defenses are properly considered part of the generic crime (here, the CSA offense) for purposes of the categorical approach. Instead, petitioner cites *Carachuri- Rosendo*

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[7] A predicate offense can sometimes be found to correspond to the relevant "generic" offense even if the predicate offense is broader (*i.e.*, proscribes more conduct) than the generic offense. Under the "modified categorical approach," a limited set of documents from the conviction record can be used to determine whether the particular defendant was actually convicted in a manner corresponding to the generic offense. See, *e.g.*, *Duenas-Alvarez*, 549 U.S. at 187; *Shepard*, 544 U.S. at 26. Under the government's view, however, the modified categorical approach has no role in this case because the Georgia offense (possession with intent to distribute marijuana) of which petitioner was convicted is not broader than the corresponding CSA offense under the categorical approach, notwithstanding Section 841(b)(4)'s exception. See pp. 18-23, *infra*.

v. *Holder*, 130 S. Ct. 2577 (2010), for the proposition that "whether a 'conviction' is a 'felony' under the CSA depends on an 'amalgam of elements, substantive *sentencing factors*, and procedural safeguards.'" Pet. Br. 40-41 (quoting 130 S. Ct. at 2583 (quoting *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 389 (B.I.A. 2007))). But that phrase appears only in the background section of the Court's opinion quoting the *Board's* decision in that case in explaining particular features of recidivist possession under the CSA. 130 S. Ct. at 2583. The Court never ratified that proposition in its own discussion, and, in any event, the recidivism factor at issue in *Carachuri-Rosendo* is readily distinguishable from the type of mitigating exception at issue here. See pp. 40-43, *infra*.

2. The elements of petitioner's state conviction correspond to the elements of a CSA felony

Marijuana is a schedule I controlled substance under the CSA. 21 U.S.C. 802(6); 21 C.F.R. 1308.11(d)(23). Possession of marijuana with intent to distribute is generally a felony under the CSA because it is punishable by imprisonment for more than one year. 21 U.S.C. 841(b)(1)(D). See pp. 3-4, *supra*. The elements of that offense are established if the defendant knowingly and intentionally possesses marijuana with the specific intent to distribute it. See *United States* v. *Burch*, 156 F.3d 1315, 1324 (D.C. Cir. 1998), cert. denied, 526 U.S. 1011 (1999). No proof of minimum quantity or remuneration is required.[8] Although a conviction can be treated

[8] "Distribute" means "the actual, constructive, or attempted transfer of a controlled substance" except in certain authorized circumstances, 8 U.S.C. 802(8) and (11), and "need not be for remuneration or profit." *United States* v. *Durham*, 464 F.3d 976, 981 n.7 (9th Cir. 2006). Any quantity of marijuana suffices to establish the felony, although quan-

as a misdemeanor under the CSA if the defendant establishes that his crime involved distribution of only a "small amount of marihuana for no remuneration," 21 U.S.C. 841(b)(4), that is a mitigating sentencing factor outside the elements of the offense. See pp. 18-23, *infra*.

As the Board and immigration judge determined below (Pet. App. 12a-13a, 18a), the elements of petitioner's Georgia conviction correspond exactly to the elements of the federal offense. See note 1, *supra*; see also *Hardeman* v. *State*, 453 S.E.2d 775, 775 (Ga. Ct. App. 1995) (referring to elements of state offense as possession and specific intent to distribute); *Allen* v. *State*, 324 S.E.2d 521, 526 (Ga. Ct. App. 1984) (possession must be knowing). Because petitioner was convicted of all the elements necessary to establish a felony offense under the CSA, his Georgia conviction is for an "aggravated felony" under the categorical approach.

B. Section 841(b)(4)'s Mitigating Exception Does Not Alter Application Of The Categorical Approach, But Does Allow The Alien To Avoid An "Aggravated Felony" Determination By Proving The Exception Applies

Petitioner contends that the existence of 21 U.S.C. 841(b)(4) precludes a determination under the categorical approach that he was convicted of a "felony punishable under the CSA." In particular, he argues that because the Georgia offense could theoretically cover possession with intent to distribute only a small quantity of marijuana for no remuneration, a conviction under that statute can never itself serve as the basis for an "aggravated felony" determination. Pet. Br. 18-20.

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tities of 50 kilograms or more trigger greater penalties. Compare 21 U.S.C. 841(b)(1)(D) with 21 U.S.C. 841(b)(1)(A)(vii) and (B)(vii).

Petitioner is incorrect. First, the categorical approach turns on the elements of a crime, and neither drug quantity nor remuneration is an element of the CSA felony. Second, in light of the fact that the vast majority of States (like Georgia) do not require remuneration or more than a "small amount" to make unlawful the distribution of marijuana, accepting petitioner's view would seriously undermine Congress's efforts to treat convicted alien marijuana dealers as aggravated felons. Petitioner's view would also pose a similar threat where Congress has attached immigration or sentencing consequences based on other statutes with narrow, fact-specific exceptions or affirmative defenses. Third, any risk that an alien who actually distributed a "small amount of marijuana for no remuneration" would be removed as an "aggravated felon" is alleviated by the Board's precedent allowing an alien to proffer evidence that Section 841(b)(4)'s exception applies in a specific case.

1. Neither drug quantity nor remuneration is an element of the CSA offense

Section 841(b)(1)(D) provides that a person convicted of possession with intent to distribute less than 50 kilograms of marijuana is subject to a term of imprisonment of up to five years, "except as provided" in Section 841(b)(4). Section 841(b)(4), in turn, states, in pertinent part, that "any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided" in 21 U.S.C. 844 (proscribing simple possession of controlled substances). Sections 841(b)(1)(D) and (4) thus allow a defendant, absent a recidivist finding, to have his offense treated as a simple-possession offense subject to

a maximum one-year sentence if he shows that he distributed only a small amount of marijuana for no remuneration.[9] Because Section 841(b)(4) undisputedly does not impose additional offense elements, but instead provides for *mitigation* of the sentence if the defendant carries his burden of proving that he comes within the exception, it does not alter application of the categorical approach in this context.

A criminal offense is defined by its statutory "elements," which consist of the facts that, absent a valid waiver, must be proved to a jury beyond a reasonable doubt to convict a defendant of the offense. See *United States* v. *Gaudin*, 515 U.S. 506, 510 (1995); *In re Winship*, 397 U.S. 358, 364 (1970); see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 477-478, 490 (2000) ("[A]ny fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). As explained above, cases that apply the categorical approach to sentencing-enhancement or aggravated-felony classifications limit the inquiry to the "elements" of the respective offenses. See pp. 14–15, *supra*; see also, *e.g.*, *Lopez*, 549 U.S. at 57 (holding that "a state offense whose *elements* include the *elements* of a felony punishable under the CSA is an aggravated felony") (emphasis added).

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[9] If the government follows the requisite procedures for establishing that the defendant is a recidivist, the maximum punishment exceeds one year of imprisonment. See 21 U.S.C. 844(a), 851. In that scenario, application of Section 841(b)(4) does not lead to misdemeanor treatment. Accordingly, in cases in which a defendant is charged and convicted as a recidivist drug offender under state law, "aggravated felony" status follows even under petitioner's view of the categorical approach. See *Carachuri-Rosendo*, 130 S. Ct. at 2585 n.10, 2587 n.12.

Section 841(b)(4) is not relevant when using the categorical approach to identify, as a threshold matter (see pp. 35-39, *infra*), whether a state conviction for marijuana distribution-related conduct constitutes a CSA felony. That paragraph does not define any element of any offense under the CSA. Rather, possession of marijuana with intent to distribute is the pertinent CSA offense, 21 U.S.C. 841(a), and the maximum penalty for violation of subsection (a) involving an unspecified amount of marijuana is five years, 21 U.S.C. 841(b)(1)(D). Although Section 841(b)(1)(D) expressly accounts for Section 841(b)(4), the latter provision is only a "mitigating exception" to the otherwise applicable sentencing provision. *United States* v. *Outen*, 286 F.3d 622, 637 (2d Cir. 2002) (Sotomayor, J.); see *Aruna*, 24 I. & N. Dec. at 457 (noting that Section 841(b)(4) does not define separate offense "elements" but is just a "mitigating exception").

Even petitioner acknowledges, as he must, that the crime under the CSA of distributing (or possessing with intent to distribute) marijuana—even without any proof of amount or remuneration—is a felony. See Pet. Br. 24 (Under the CSA, "distribution of marijuana is a felony."). As petitioner further acknowledges, only "*if the defendant proves* he distributed only a small amount for no remuneration" does Section 841(b)(4)'s lower sentencing provision apply. *Ibid.* (emphasis added). The alternative—treating the terms of Section 841(b)(4) as elements of a felony offense—is untenable. If a provision lowering an otherwise applicable maximum sentence for a subset of offenses meant that the prosecution had to negate the provision's applicability in every case, such a rule "would largely prohibit Congress from establishing facts in mitigation of punishment[;] * * * any

attempt to do so would necessarily result in having to submit to the jury the question of the *negating* of these mitigating facts in order to support a punishment greater than that prescribed in the mitigating provision." *United States* v. *Campbell*, 317 F.3d 597, 603 (6th Cir. 2003) (quoting *Outen*, 286 F.3d at 638); see also *Dixon* v. *United States*, 548 U.S. 1, 13 (2006) ("[A]n indictment or other pleading . . . need not negative the matter of an exception made by a proviso or other distinct clause . . . and it is incumbent on one who relies on such an exception to set it up and establish it.") (quoting *McKelvey* v. *United States*, 260 U.S. 353, 357 (1922)); 21 U.S.C. 885(a)(1) ("It shall not be necessary for the United States to negative any exemption or exception set forth in [the CSA] * * * , and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.").

For that reason, every court of appeals to have considered the question has held that, for *Apprendi* purposes, the statutory maximum penalty for possession of an unspecified amount of marijuana with intent to distribute is five years (under Section 841(b)(1)(D)), not one year (under Section 841(b)(4))—indicating that Section 841(b)(4) does not define the elements of any independent crime. See *United States* v. *Hamlin*, 319 F.3d 666, 670-671 (4th Cir. 2003); *Campbell*, 317 F.3d at 603; *United States* v. *Walker*, 302 F.3d 322, 324 (5th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1222 (2003); *Outen*, 286 F.3d at 638-639; see also *United States* v. *Eddy*, 523 F.3d 1268, 1271 (10th Cir. 2008) (Section 841(b)(4) does not create a lesser-included offense of Section 841(b)(1)(D)); *United States* v. *Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 53 (1st Cir.) (endorsing

Outen's analysis in the context of another statute with a mitigating exception), cert. denied, 543 U.S. 856 (2004).[10]

As a result, a federal jury can convict a defendant of the felony of possession of marijuana with intent to distribute under the CSA, without needing to find beyond a reasonable doubt that the amount was "not small" or that there was remuneration. Likewise, a court can accept a plea of guilty to felony possession of marijuana with intent to distribute under the CSA, without needing to find a factual basis to conclude that the amount was "not small" or that there was remuneration. And the mere absence of evidence on those points does not cap the defendant's sentence at one year. See *Hamlin*, 319 F.3d at 670-671; *Campbell*, 317 F.3d at 601-603; *United States* v. *Bartholomew*, 310 F.3d 912, 925 (6th Cir. 2002), cert. denied, 537 U.S. 1177 (2003); *Walker*, 302 F.3d at 323-324; *Outen*, 286 F.3d at 625-626, 635-636, 639. In short, there is no requirement that the trier of fact rule out the conditions of a "small amount of marihuana" and "no remuneration," to which Section 841(b)(4) refers, before a defendant can be convicted of a marijuana distribution-related offense under 21 U.S.C. 841(a)(1) and be subject to felony punishment under 21 U.S.C.

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[10] Case law from other contexts, including the affirmative "defense" provision of the federal three-strikes law (18 U.S.C. 3559(c)(3)(A)), also makes clear that *Apprendi* does not apply to affirmative sentencing-mitigation factors. See, *e.g.*, *United States* v. *Snype*, 441 F.3d 119, 150 (2d Cir. 2006) ("[A] paradigm that allows the defendant to raise an affirmative defense during the sentencing phase of criminal proceedings, but then shifts the burden of proof to him to establish the defense, does not violate due process.") (quoting *United States* v. *Bradshaw*, 281 F.3d 278, 295 (1st Cir.), cert. denied, 537 U.S. 1049 (2002)); accord *United States* v. *Contreras*, 536 F.3d 1167, 1174 (10th Cir. 2008), cert. denied, 555 U.S. 1117 (2009); *United States* v. *Brown*, 276 F.3d 930, 932 (7th Cir.), cert. denied, 537 U.S. 829 (2002).

841(b)(1)(D). Rather, to obtain the one-year maximum under Section 841(b)(4), the defendant himself must affirmatively establish that the mitigating exception applies. See, *e.g.*, *Outen*, 286 F.3d at 638; see also *Apprendi*, 530 U.S. at 491 n.16 (referring to "the defendant * * * showing" facts in mitigation of punishment).

Accordingly, at least when the record of a state conviction for possession with intent to distribute marijuana is silent as to drug quantity or remuneration, the proper federal analogue is a conviction subject to the five-year maximum sentence under Section 841(b)(1)(D). That makes the conviction one for a "felony punishable under the [CSA]" and, therefore, an aggravated felony.

2. Invoking exceptions such as Section 841(b)(4) to categorically preclude "aggravated felony" determinations would substantially undermine the statutory purpose

a. Congress intended the "aggravated felony" provision to apply broadly to render removable and bar immigration benefits for criminal aliens engaging in marijuana distribution

Starting in 1988, Congress responded to the serious threat to public safety and the substantial drain on societal resources posed by criminal aliens by making any alien convicted of an "aggravated felony" subject to removal and ineligible for certain immigration benefits. Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, §§ 7342-7349, 102 Stat. 4469-4473; see, *e.g.*, H.R. Rep. No. 22, 104th Cong., 1st Sess. 6-8 (1995). In particular, the "aggravated felony" provision at issue here, which despite its label has always extended beyond trafficking crimes (ADAA § 6212, 102 Stat. 4360), embodies Congress's determination that the involvement of

aliens in drug crimes presents 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). Moreover, the CSA reflects Congress's longstanding judgment that marijuana distribution (whether called trafficking or not) generally warrants felony punishment. See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, § 401(a)(1), (b)(1)(B) and (4), 84 Stat. 1260-1262. There is little reason to believe that Congress nevertheless intended to retain the eligibility for special relief from removal of an alien who was convicted of possessing with intent to distribute marijuana without any proof that the intended distribution was of a small amount and non-remunerative.

Under petitioner's view, however, the categorical approach precludes treating a state-law conviction for distributing or possessing with intent to distribute marijuana as an "aggravated felony," irrespective of drug quantity and illicit gain, unless state law requires a finding of remuneration or more than a "small amount." *E.g.*, Pet. Br. 10. Applying the categorical approach in that manner would curtail the reach of "aggravated felony" (and similar) provisions far more than Congress could have intended. That consequence further counsels against considering the requirements of Section 841(b)(4) (and other similar exceptions or affirmative defenses) as part of the "generic" offense for purposes of the categorical approach. See *Nijhawan* v. *Holder*, 557 U.S. 29, 39-40 (2009).

The "aggravated felony" at issue in *Nijhawan* was defined as "an offense that . . . involves fraud or deceit

in which the loss to the victim or victims exceeds $10,000." 557 U.S. at 32 (quoting 8 U.S.C. 1101(a)(43)(M)(i) (emphasis added by Court)). The Court faced the question whether the italicized loss factor must be an element of the prior fraud or deceit offense of conviction to trigger "aggravated felony" treatment. *Ibid.* In answering no, the Court relied in part on the fact that only eight States had fraud or deceit statutes with a $10,000 loss threshold—meaning that fraud or deceit convictions in the other 42 states would not ordinarily give rise to an aggravated felony if the categorical approach were applied.[11] See *id.* at 40. The Court "d[id] not believe Congress would have intended [the aggravated-felony provision] to apply in so limited and so haphazard a manner." *Ibid.*; see also *United States* v. *Hayes*, 555 U.S. 415, 427 (2009) (deeming it "highly improbable that Congress meant to extend [18 U.S.C.] 922(g)(9)'s firearm possession ban [for persons previously 'convicted' of a 'misdemeanor crime of domestic violence'] only to the relatively few domestic abusers prosecuted under laws rendering a domestic relationship an element of the offense"). As discussed below, the same is true here.[12]

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[11] Thirteen of the states had statutes with loss thresholds "significantly higher" than $10,000, so at least some fraud or deceit convictions in those states (in addition to the eight other states) would qualify as an "aggravated felony." *Nijhawan*, 557 U.S. at 40.

[12] In *Nijhawan*, the Court referred to the drug-trafficking "aggravated felony" at issue here as one that "must refer to generic crimes." 557 U.S. at 37. That statement simply supports applying the categorical approach in a way that compares the state-law conviction to the elements of the relevant CSA felony offense, *i.e.*, possession of marijuana with intent to distribute (see 21 U.S.C. 841(a) and (b)(1)(D)); it does not imply that mitigating conditions in Section 841(b)(4), which were not mentioned in *Nijhawan*, are part of the "generic crime."

b. Only a small minority of States require proof of remuneration and more-than-a-small amount for a marijuana distribution conviction

A minority of States (up to 15) treat separately—either through a lower sentencing provision/exemption similar to Section 841(b)(4) or through a distinct offense—distribution of a "small amount"[13] of marijuana for no remuneration.[14] Aliens convicted and sentenced

[13] The CSA does not define "small amount," "indicating that the determination should not be based purely on weight." *United States* v. *Damerville*, 27 F.3d 254, 259 (7th Cir.), cert. denied, 513 U.S. 972 (1994). The contextual nature of the "small amount" requirement substantiates the appropriateness of a circumstance-specific inquiry outside the categorical approach with respect to Section 841(b)(4). See pp. 35-39, *infra*. The Board has suggested, however, that 30 grams (a little over one ounce) "serve[s] as a useful guidepost." *In re Castro Rodriguez*, 25 I. & N. Dec. 698, 703 (B.I.A. 2012). Although courts have concluded that amounts less than 30 grams constitute more than a "small amount," see *Damerville*, 27 F.3d at 258-259 (17.2 grams not "small amount" in prison context), this brief uses 30 grams as a benchmark of "small amount" for purposes of describing relevant state laws unless otherwise noted. See Center on the Administration of Criminal Law, New York University School of Law Amicus Br. 4 n.3 (NYU Amicus).

[14] One of the amici supporting petitioner lists 10 state penal code provisions encompassing solely Section 841(b)(4) conduct. See NYU Amicus Br. 4 n.4 (citations omitted). Our search turned up 15 such provisions. See Cal. Health & Safety Code § 11360(b) (gift of 28.5 grams or less is a misdemeanor); Colo. Rev. Stat. Ann. § 18-18-406(5) (2 ounces or less for no consideration is a petty offense); Fla. Stat. Ann. § 893.13(2)(b)(3) (20 grams or less for no consideration is a misdemeanor); 720 Ill. Comp. Stat. 550/3, 550/4, 550/6 ("casual delivery"—delivery of 10 grams or less without consideration—is a misdemeanor); Iowa Code Ann. § 124.410 (less than one-half ounce for no consideration is a misdemeanor); Minn. Stat. Ann. § 152.027(4)(a) (42.5 grams or less for no remuneration is a petty misdemeanor); N.M. Stat. Ann. § 30-31-22(E) ("a small amount" for no remuneration is a petty misdemeanor);

under those provisions would not face "aggravated felony" treatment. See pp. 35-39, *infra*. Congress reasonably could have expected Section 841(b)(4) to affect the "aggravated felony" designation in that limited way.[15]

That leaves the many other marijuana-distribution offenses both in those States and in all the other States. Only a small number of States (9-11) have provisions requiring remuneration as an element with respect to distribution or possession with intent to distribute mari-

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N.Y. Penal Law § 221.35 (2 grams or less for no consideration is a misdemeanor); N.C. Gen. Stat. § 90-95(b)(2) (less than 5 grams for no remuneration does not constitute unlawful delivery); Ohio Rev. Code Ann. § 2925.03(C)(3)(h) (gift of 20 grams or less is a minor misdemeanor); Or. Rev. Stat. § 475.860(3) (less than 1 ounce for no consideration is a misdemeanor; less than 5 grams for no consideration is a violation); 35 Pa. Stat. Ann. § 780-113(a)(31) (distribution but not sale of 30 grams or less is a misdemeanor); S.D. Codified Laws § 22-42-7 (less than one-half ounce with no consideration is a misdemeanor); Tex. Health & Safety Code Ann. § 481.120(b)(1) (one-fourth ounce or less for no remuneration is a misdemeanor); W. Va. Code Ann. § 60A-4-402(c) (less than 15 grams without any remuneration as a first-time offense may result in probation).

These statutory provision were largely the same when the ADAA was passed in 1988. Missouri also had such a provision, but Iowa did not at that time. See Mo. Rev. Stat. § 194.200(1)(c) (1988); Iowa Code Ann. § 204.410 (1988).

[15] If an alien in one of those States were instead convicted of distributing marijuana under a different provision providing for harsher penalties, it would create the natural inference that the alien did not qualify for lesser punishment for distributing only a small amount of marijuana for no remuneration. See Gov't Br. in Opp. 20 & n.17, *Garcia* v. *Holder*, No. 11-79, petition for cert. pending (filed July 18, 2011). But, under petitioner's view, that would make no difference (unless the offense of conviction explicitly required remuneration and more than a small amount). There is no reason to believe that Congress intended to allow such an alien to evade the reach of the Act's "aggravated felony" provision.

juana, and even those States (with the exception of Arkansas) have other related provisions not requiring remuneration.[16] Except for convictions under the relevant provisions from those select States, the government would never be able to rely on the elements of an alien's offense of conviction to negate Section 841(b)(4)'s no-remuneration condition. That would dramatically reduce the reach of the "aggravated felony" provision at issue under petitioner's view of the categorical approach (see Pet. Br. 19-20).

Anticipating the argument that his theory precludes "aggravated felony" status for many criminal aliens who engaged in "substantial marijuana transactions," petitioner speculates that such crimes "will often result in convictions under separate provisions criminalizing drug 'trafficking,' which is a 'felony punishable under the Controlled Substances Act' because it establishes that the non-citizen distributed more than a small amount."

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[16] See Ariz. Rev. Stat. Ann. § 13-3405(A)(2); Ark. Code Ann. §§ 5-64-101(7), 5-64-436(a); Cal. Health & Safety Code § 11359; Haw. Rev. Stat. Ann. § 712-1247(1)(h); Me. Rev. Stat. Ann. tit. 17-A, §§ 1101(17)(C) and (D), 1103(1-A)(C) and (E); Nev. Rev. Stat. Ann. § 453.337(1); Or. Rev. Stat. § 475.860(2)(a); Tex. Health & Safety Code Ann. § 481.120(b)(2); Vt. Stat. Ann. tit. 18, § 4230(b)(1); see also NYU Amicus Br. 9 & n.8 ("Remuneration is irrelevant to applicable marijuana distribution offenses in at least 39 states, as well as in the District of Columbia and Puerto Rico.") (citations omitted). Some other jurisdictions require remuneration in separate offenses limited to the distribution of marijuana to a minor. See, *e.g.*, Colo. Rev. Stat. Ann. § 18-18-406(7)(a); D.C. Code § 48-904.06(b).

Similarly, only nine states had remuneration requirements when Congress enacted the ADAA in 1988. While Vermont did not treat remuneration as relevant at that time, see Vt. Stat. Ann. tit. 18, § 4205 (1988), Kentucky punished the sale or possession with intent to sell separately, see Ky. Rev. Stat. Ann. § 218A.990(4) (1988).

Pet. Br. 23. That speculative assertion, however, overlooks some critical points.

First, it ignores that even when a harsher, more specific criminal statute may be available, often defendants are charged under a lesser, more general provision. See *Hayes*, 555 U.S. at 427 & n.8 (noting continuing prosecution of domestic violence under generally applicable provisions despite increasing prevalence of statutes specifically proscribing domestic violence). Such charging and plea decisions are likely not uncommon for marijuana crimes where the trafficking penalties are significantly harsher.

Second, it ignores that several States (at least 9) punish marijuana distribution irrespective of amount, without either a separate marijuana-trafficking provision or a system of graduated statutory sentences keyed to quantity.[17] The quantity of marijuana involved in the

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[17] Our search turned up nine States (plus the District of Columbia) meeting those criteria (*i.e.*, that do not separately punish higher quantities of marijuana). See Cal. Health & Safety Code §§ 11359, 11360(a); D.C. Code § 48-904.01(a)(2)(B) (exception for first-time offense involving one-half pound or less); La. Rev. Stat. Ann. § 40:966(A) and (B)(3); Mont. Code Ann. § 45-9-101(1); Neb. Rev. Stat. Ann. § 28-416(1); Or. Rev. Stat. § 475.860(1)(a); Utah Code Ann. § 58-37-8(1)(b)(ii); Wash. Rev. Code Ann. § 69.50.401(1) and (2)(c); W. Va. Code Ann. § 60A-4-401(a)(ii); Wyo. Stat. Ann. § 35-7-1031(a)(ii). Cf. NYU Amicus Br. 9-10 & n.9 ("Drug quantity is irrelevant to applicable marijuana distribution offenses in at least 23 states and in Puerto Rico.").

At the time of the ADAA's enactment, six additional states punished distribution without regard to the quantity of marijuana involved. See Colo. Rev. Stat. Ann. § 18-18-106(8)(b)(I) (1988); Idaho Code Ann. § 37-2732(a) (1988); Md. Ann. Code art. 27, § 286(a)(1) (1988); Minn. Stat. § 152.09(1) (1988); Mo. Rev. Ann. Stat. § 195.020 (1988); Vt. Stat. Ann. tit. 18, § 4205 (1988).

crime, no matter how great, is irrelevant to the conviction in those States.

Third, it ignores that the CSA undisputedly punishes as a felony any marijuana distribution-related conduct involving greater than a "small amount." Because a "small amount" is far less than that required to trigger trafficking offenses or other statutorily graduated penalties, which often require pounds or kilograms rather than ounces or grams, that leaves a substantial gap between what Congress considers an amount sufficient to constitute a felony under Section 841(b)(1)(D)—and thus an "aggravated felony"—and the response petitioner provides. Many, if not most, marijuana distribution-related convictions fall within that gap (*i.e.*, between a "small amount" and the trafficking amount). Under Georgia law, for example, only distribution of more than 10 pounds of marijuana triggers the trafficking offense. Ga. Code Ann. § 16-13-31(c). Indeed, marijuana-distribution offenses in at least 25 States require a minimum quantity substantially above a "small amount" to trigger the graduated penalty or trafficking offense.[18]

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[18] See Ala. Code § 13A-12-231(1) (more than 2.2 pounds); Ariz. Rev. Stat. Ann. § 13-3405(B)(4)-(6) (2 pounds or more); Colo. Rev. Stat. § 18-18-406(6)(b)(III) (5 pounds or more); Conn. Gen. Stat. Ann. § 21a-278(b) (1 kilogram or more); Del. Code Ann. tit. 16, §§ 4751C, 4752-4754 (1,500 grams or more); Fla. Stat. Ann. § 893.135(1)(a) (more than 25 pounds); Ga. Code Ann. § 16-13-31(c) (more than 10 pounds); Idaho Code Ann. § 37-2732B(a)(1) (1 pound or more); Iowa Code Ann. § 124.401(1)(d) (more than 50 kilograms); Ky. Rev. Stat. Ann. § 218A.1421(3) (8 ounces or more); Me. Rev. Stat. Ann. tit. 17-A, § 1103(1-A)(E) (more than 1 pound); Md. Code Ann., Crim. Law § 5-612(a)(1) (50 pounds or more); Mass. Gen. Laws Ann. ch. 94C, § 32E(a) (50 pounds or more); Mich. Comp. Laws Ann. § 333.7401(2)(d) (5 kilograms or more); Minn. Stat. Ann. § 152.023(1)(5) (5 kilograms or more); Nev. Rev. Stat. Ann. § 453.339(1) (100 pounds or more); N.M.

Accordingly, many convictions for distributing marijuana in a clear majority of States would not result in an "aggravated felony" determination under petitioner's view, even for the substantial portion that involve more than a small amount for remuneration. "[T]o apply a categorical approach here would leave [Section 1101(a)(43)(B)'s 'aggravated felony' designation] with little, if any, meaningful application" to marijuana distribution offenses. *Nijhawan*, 557 U.S. at 39.[19]

Stat. Ann. § 30-31-22(A)(1)(a) and (c) (more than 100 pounds); N.C. Gen. Stat. § 90-95(h)(1) (more than 10 pounds); N.D. Cent. Code § 19-03.1-23.1(1)(c)(11) (500 grams or more); Ohio Rev. Code Ann. § 2925.03(C)(3) (200 grams or more); Okla. Stat. Ann. tit. 63, § 2-415(C)(1)(a) (25 pounds or more); 35 Pa. Stat. Ann. § 780-113(a)(30) and (f)(1.1) (more than 1,000 pounds); R.I. Gen. Laws §§ 21-28-4.01(a)(4), 21-28-4.01.1(a)(5), 21-28-4.01.2(a)(5) (1 kilogram or more); S.C. Code Ann. § 44-53-370(e)(1) (10 pounds or more); Wis. Stat. Ann. § 961.41(1m)(h) (more than 200 grams). See also Pet. Br. 22 n.3.

When Congress passed the ADAA in 1988, two additional states fell in this category. See Ark. Code Ann. § 5-64-401(a)(iv) (1988) (10 pounds or more); Kan. Stat. Ann. § 65-4127b (1988) (1500 grams or more). One drops out. Iowa Code Ann. § 204.410 (1988). Four other states listed above did not differentiate at all based on marijuana quantity at that time. See note 17, *supra* (adding Colorado, Idaho, Maryland, and Minnesota for 1988).

[19] Nor would application of the "modified categorical approach" remedy the problem. Given that many relevant state provisions do not depend on either remuneration or a specific quantity of marijuana (at least below a very large amount), the record of conviction presumably would not often include information disproving the applicability of Section 841(b)(4). Even petitioner does not rely on that possibility.

c. Applying petitioner's approach to other federal statutes containing similar fact-specific exceptions and affirmative defenses would seriously disrupt Congress's scheme

Mitigating exceptions and affirmative defenses in other federal criminal statutes would pose similar problems under petitioner's expanded categorical approach. Unless the elements (or at least sentencing provisions) of a state law map precisely onto the exception or defense provided in the corresponding federal statute (*i.e.*, the "generic offense"), that exception or defense would preclude a finding of equivalence under petitioner's view. That would be true no matter how narrow the federal-law exception, or how unlikely its applicability to a particular state-law conviction, because petitioner would require that the state conviction "necessarily" exclude the possibility that the mitigating exception or affirmative defense applied. Pet. Br. 23-26. Some examples from other statutes show how disruptive that would be.

The INA makes removable any alien convicted under "any law of purchasing, selling, offering for sale, exchanging, using, owning, possessing, or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device (as defined in section 921(a) of title 18)." 8 U.S.C. 1227(a)(2)(C); see also 8 U.S.C. 1101(a)(43)(C) (defining "aggravated felony" to include "illicit trafficking in firearms * * * as defined in section 921 of title 18"); 8 U.S.C. 1227(a)(2)(A)(iii) (alien convicted of "aggravated felony" is removable). Section 921(a), in turn, defines "firearm" to exclude "an antique firearm." 18 U.S.C. 921(a)(3); see also 18 U.S.C. 921(a)(16) (defining "an-

tique firearm"). Under petitioner's theory, for a state-law firearms conviction to qualify, the statutory definition of the state offense would have to negate the exceedingly remote possibility that the conviction was based on an antique firearm. The INA's provisions thus would lose all practical effect for any state firearm laws lacking a parallel "antique firearm" exception.

In *Gil* v. *Holder*, 651 F.3d 1000 (2011), the Ninth Circuit correctly rejected that untenable outcome. The alien in that case argued that the state firearms law under which he was convicted (Cal. Penal Code § 12025(a) (2004))[20] was broader than 8 U.S.C. 1227(a)(2)(C) because the state law did not contain an antique firearms exception. Applying the categorical approach, the court stated that it would "not consider the availability of affirmative defenses; the fact that there may be an affirmative defense under the federal statute, but not under the state statute of conviction, does not mean that the state conviction does not fall categorically within the federal statute." *Gil*, 651 F.3d at 1005; see also *United States* v. *Velasquez-Bosque*, 601 F.3d 955, 963 (9th Cir. 2010) ("The availability of an affirmative defense is not relevant to the categorical analysis.").[21]

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[20] Now codified at Cal. Penal Code § 25400 (West 2012).

[21] The Ninth Circuit reserved the question of whether the availability of an affirmative defense might require evaluating the state conviction under the "modified categorical approach" in cases where the alien claims that he fell within the antique firearm exception. *Gil*, 651 F.3d at 1005 n.2. The Board has addressed that issue through a burden-shifting framework: once the government demonstrates an alien was convicted of a firearms offense, the alien has the burden of presenting evidence that the firearm qualified as an antique firearm. See *In re Mendez-Orellana*, 25 I. & N. Dec. 254, 256 (B.I.A. 2010).

As another example, the INA treats certain document-fraud crimes as an "aggravated felony," "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 the INA. 8 U.S.C. 1101(a)(43)(P). The categorical approach should not, as petitioner would have it, allow aliens convicted of document fraud to evade the intended immigration consequences or criminal sentencing enhancement just because the underlying offense did not require *disproving* that familial exception. See *Roman* v. *Gonzales*, 204 Fed. Appx. 486, 487-488 (5th Cir. 2006), cert. denied, 549 U.S. 1347 (2007); see also *United States* v. *Guzman-Mata*, 579 F.3d 1065, 1070-1072 (9th Cir. 2009) (declining to treat the "family exception" in 8 U.S.C. 1101(a)(43)(N) as an element of the "generic offense" for purposes of the categorical approach). Congress would not have intended its sanctions to apply in "so limited and so haphazard a manner." *Nijhawan*, 557 U.S. at 40; see also *id.* at 37-38 (discussing 8 U.S.C. 1101(a)(43)(N) and (P)).

More broadly, petitioner's theory potentially requires the government, based on the underlying conviction alone, to disprove common-law affirmative defenses or mitigating exceptions (*e.g.*, duress or necessity in a murder or crime-of-violence case). That cannot be correct. But it is not clear why, for purposes of the categorical approach, those should be treated differently than a statutory defense or exception.[22]

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[22] Perhaps petitioner would argue that a conviction under state law, which presumably would be subject to the same common-law defense,

3. By providing aliens an opportunity to proffer evidence in immigration court that the circumstances identified in Section 841(b)(4) were present, the Board avoids unfair consequences

Excluding mitigating exceptions or affirmative defenses from the categorical approach, however, does not end the inquiry. The Board has made clear that an alien can defeat an "aggravated felony" finding if he carries his burden to prove in immigration court that his prior conviction involved only a small amount of marijuana for no remuneration. See *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 702 (B.I.A. 2012). That procedure answers any assertion (see Pet. 13-14, 18) that the decision below would result in unintended or unfair consequences.

In *Castro-Rodriguez*, the alien had been convicted of an offense whose elements consisted of possessing with intent to distribute less than half an ounce of marijuana. The alien testified in immigration court that he had bought the marijuana at a party. The immigration judge therefore found that the alien had possessed only a small amount of marijuana for no remuneration. 25 I. & N. Dec. at 699. The Board agreed that the alien could defeat the aggravated-felony finding by making such a showing, and that he could do so "by any probative evidence," including his own testimony. *Id.* at 702. The Board remanded for further factfinding on the circumstances of the particular case, *i.e.*, whether the alien had

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implicitly negates the defense. But the same result should follow in this context for any State that has an exception in its marijuana distribution laws parallel to Section 841(b)(4). Cf. note 15, *supra*.

in fact intended to distribute the marijuana for remuneration. *Id.* at 704.[23]

Petitioner contends that the Board's procedure "revert[s] to the fact-specific inquiry that the categorical approach rejects." Pet. Br. 31; see *id.* at 31-34. That criticism rings hollow given petitioner's own effort to *expand* the categorical approach: petitioner seeks to look beyond whether the conduct proscribed by state law (*i.e.*, knowing possession of marijuana and intent to distribute it) necessarily satisfies the elements of the CSA felony to whether that conduct might have implicated a mitigating exception (*i.e.*, distribution of a "small amount" of marijuana for no remuneration). *E.g.*, *id.* at 19-20, 26-28, 37-41. Indeed, the government's core categorical argument—hotly contested by petitioner—is

[23] At the time Congress added the drug-trafficking aggravated felony provision and made it a basis for removal, a preexisting law made aliens deportable for drug convictions but subject to a waiver if the alien proved the conviction involved simple possession of marijuana of "30 grams or less." 8 U.S.C. 1251(f)(2) (1982); see 47 Fed. Reg. 12,133 (Mar. 22, 1982) (providing that waiver may be sought before an immigration judge). Consistent with the Board's approach in this context, the alien could rely in immigration court on evidence beyond the conviction record. See *In re Grijalva*, 19 I. & N. Dec. 713, 718 (B.I.A. 1988) ("[W]here the amount of marihuana that an alien has been convicted of possessing cannot be readily determined from the conviction record, the alien who seeks section [1251](f)(2) relief must come forward with credible and convincing testimony, or other evidence independent of his conviction record, to meet his burden of showing that his conviction involved '30 grams or less of marihuana.'"). In enacting the present scheme, Congress presumably would have been familiar with this sort of framework for determining the immigration consequences of drug convictions.

that the fact of a marijuana-distribution conviction *alone* constitutes a CSA felony. See pp. 16-17, *supra*.[24]

More fundamentally, petitioner fails to recognize that the Board's procedure operates as a subsequent step *outside the categorical approach* in light of Section 841(b)(4)'s "circumstance-specific" nature. *Castro-Rodriguez*, 25 I. & N. Dec. at 702 (quoting *Nijhawan*, *supra*). A fact-specific inquiry naturally follows for such "circumstance-specific" factors, even when a categorical approach applies to other components of the same aggravated felony. See *Nijhawan*, 557 U.S. at 40-42 (applying categorical approach to fraud component but "circumstance-specific" approach to $10,000 loss component); see also *Kawashima*, 132 S. Ct. at 1172 & n.3.

Because Section 841(b)(4) operates as a mitigating exception (akin to an affirmative defense), it makes sense that the inquiry occurs only after determining presumptive felony status under Section 841(a) and (b)(1)(D) based on the categorical approach. Indeed, the Board's procedure is not unique to this particular statutory provision. See note 21, *supra* (noting similar Board procedure in context of firearms exception in Section 1227(a)(2)(C) cases); see also *Guzman-Mata*, 579 F.3d at 1072-1073 (placing burden on defendant in criminal sentencing-enhancement context to prove "family exception" in 8 U.S.C. 1101(a)(43)(N)); *United States* v. *Rabanal*, 508 F.3d 741, 743-744 (5th Cir. 2007) (holding

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[24] Contrary to petitioner's hyperbole (Pet. Br. 38), the government does not contend that "a non-citizen convicted in federal court directly under the misdemeanor distribution provision of the CSA would nonetheless be deemed to have committed an aggravated felony." Based on the sentencing judgment alone, any such alien obviously would defeat an aggravated-felony finding under the methodology described in this section.

that government must show relevant conviction to trigger sentencing enhancement based on 8 U.S.C. 1101(a)(43)(N), while "[t]he burden is on the defendant to 'affirmatively show[]' that the prior offense was a first offense involving only qualifying family members") (brackets in original); *Roman*, 204 Fed. Appx. at 488 (confirming alien's burden "to establish his affirmative defense that he was not deportable because he fell within § 101(a)(43)(P)'s exception").

Petitioner and amici supporting petitioner also contend that the record of conviction often will not address the Section 841(b)(4) factors, and that aliens would not have had the incentive to build the appropriate record. See Pet. Br. 12, 35; NYU Amicus Br. 8-10. Aliens facing marijuana-distribution charges, however, will be advised of the immigration consequences of a conviction and can take steps to avoid or mitigate such consequences. See *Padilla* v. *Kentucky*, 130 S. Ct. 1473, 1486 (2010) ("[C]ounsel must inform her client whether his plea carries a risk of deportation."). Indeed, one of the Court's reasons in *Padilla* for recognizing defense counsel's obligation to provide such advice was to facilitate plea bargaining "to craft a conviction and sentence that reduce the likelihood of deportation." *Ibid.*

In any event, permissible evidence in immigration court is not limited to documents from the conviction record (as in the modified-categorical approach); it also includes other probative evidence. See *Castro-Rodriguez*, 25 I. & N. Dec. at 702. Police and laboratory reports often include information on drug quantity, and, as to remuneration, the immigration court may rely on the alien's own testimony. *Id.* at 699, 702-704 & n.5. The alien's testimony is obviously readily accessible. Acquiring the former type of evidence from official files,

if not already in the alien's possession, generally is not unusually burdensome. And the immigration court may be able to facilitate the process where appropriate. Cf. *Nijhawan*, 557 U.S. at 41 (rejecting argument that alien would not have a "fair opportunity" to dispute government evidence outside the conviction record).

As the Court recognized in *Nijhawan*, its modified-categorical approach precedents (*e.g.*, *Taylor* and *Shepard*) developed a limited category of types of evidence "for a very different purpose"—*i.e.*, "determining which statutory phrase (contained within a statutory provision that covers several different generic crimes) covered a prior conviction"—not for a circumstance-specific inquiry in immigration court. 557 U.S. at 41-42. The Court also recognized that strictly limiting the evidence to conviction records on facts that are not offense elements would be "impractical." *Id.* at 42. Given the prevalence of state laws that require no proof of either remuneration or drug quantity, the same is true here. See pp. 26-31, *supra*; see also Pet. Br. 35 (deeming Section 841(b)(4) facts "*irrelevant*" under state laws of conviction); NYU Amicus Br. 8-10 (similar).[25]

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[25] Petitioner requests a further opportunity to prove that his conviction involved only a small amount of marijuana for no remuneration. Pet. Br. 41 n.7. Even if petitioner had preserved an argument on small drug quantity (but see Pet. App. 9a n.4), he has never clearly argued (let alone provided any evidence) that he intended to distribute marijuana for no remuneration. See p. 6 & n.3, *supra*. Generally, the proper way for an alien to raise new issues and evidence after the Board has issued a decision is by filing a timely motion to reopen and remand with the Board, but petitioner did not do that. See 8 C.F.R. 1003.1(d)(3)(iv); 1003.2(a) and (c). In light of the circumstances of this case (including the fact that *Castro-Rodriguez* was not decided until after the decisions below), however, the government is amenable to

C. The Decision Below Is Consistent With *Carachuri-Rosendo*

Relying principally on *Carachuri-Rosendo*, *supra*, petitioner argues that the categorical approach should turn not on whether the state conviction necessarily satisfies the elements of a CSA felony (*e.g.*, knowing possession of a controlled substance and specific intent to distribute it), but rather on whether the state conviction necessarily precludes treatment as a CSA misdemeanor (by *negating* Section 841(b)(4)'s exception). Pet. Br. 26-28, 37-41. Like the other precedents cited above (pp. 14-15, *supra*), however, *Carachuri-Rosendo* supports the court of appeals' application of the categorical approach here.

The Court in *Carachuri-Rosendo* considered a state offense that was punishable in two ways under the CSA: one a misdemeanor (simple possession) and one a felony (recidivist possession). The elements of simple and recidivist possession are identical because recidivism is not an element to be found by the jury beyond a reasonable doubt, see 130 S. Ct. at 2581 n.3, and the question in *Carachuri-Rosendo* was how to determine whether a state offense would have been "punishable" as a recidivist offense, and thus a felony, under the CSA. The Court held that when a defendant is convicted of simple possession in state court, but evidence outside the record of conviction could establish that he is a recidivist, his state-law crime nonetheless is analogous to the federal offense of simple possession, not recidivist possession. *Id.* at 2586-2589.

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petitioner's request for another opportunity to prove that the exception covers his conviction.

Nothing in *Carachuri-Rosendo* heralded a dramatic change in focus in the "aggravated felony" context from the elements of an offense (see pp. 13-16, *supra*) to the non-element "conduct underlying" an offense (Pet. 13); nor did it create any general rule that the predicate conviction must negate any possibility of a mitigating exception or affirmative defense to the generic offense. To the contrary, this Court has confirmed since *Carachuri-Rosendo* that the focus in an ordinary categorical-approach case is on the elements of the offenses. See *Kawashima*, 132 S. Ct. at 1172 ("If the *elements* of the offenses establish that [the alien] committed crimes involving fraud or deceit, then the first requirement of [the relevant aggravated felony] is satisfied" under the categorical approach.) (emphasis added).

The decision below is fully consistent with *Carachuri-Rosendo*. The Court there held that a conviction is for an offense "punishable" as a felony under the CSA only if the prosecutor takes all the requisite steps to trigger a statutory maximum sentence in excess of one year. 130 S. Ct. at 2587-2588.[26] Here, all the facts necessary to subject petitioner to a five-year sentence under the CSA were established by his Georgia conviction: he knowingly possessed marijuana with intent to distribute it. See 21 U.S.C. 841(b)(1)(D). No other fact had to be proved; the government was under no obligation to prove either quantity or remuneration. 21 U.S.C. 885(a)(1); see pp. 18-23, *supra*.

In *Carachuri-Rosendo*, the government advanced a theory under which it could have separately established recidivism in immigration court (because the state con-

[26] In the case of recidivist possession, those steps under the CSA include filing a criminal information alleging any prior convictions. See 21 U.S.C. 844(a), 851.

viction itself did not do so) to trigger the CSA felony. In rejecting that theory, the Court explained that it was asked "to consider facts not at issue in the crime of conviction (*i.e.*, the existence of a prior conviction) to determine whether [the alien] *could have* been charged with a federal felony." 130 S. Ct. at 2588. In this case, by contrast, no finding beyond the elements of petitioner's state conviction is necessary to establish a CSA felony. This case thus does not involve "[t]he mere possibility that the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law." *Id.* at 2589. Rather, because there was no proof in either the criminal or removal proceedings to bring the case within the exception in Section 841(b)(4), petitioner had been "*actually convicted* of a crime that is itself punishable as a felony under federal law." *Ibid.*; see also *id.* at 2591 (focusing on "elements [of the state crime] the alien has been 'convicted of'") (Scalia, J., concurring in judgment). The government's argument in this case therefore differs fundamentally from the one rejected in *Carachuri-Rosendo*.

This case differs from *Carachuri-Rosendo* in at least two other material ways. First, the Court relied in part on its observation that "apply[ing] an 'aggravated' or 'trafficking' label to *any* simple possession offense is, to say the least, counterintuitive and 'unorthodox.'" 130 S. Ct. at 2585 (quoting *Lopez*, 549 U.S. at 54). Here the crime at issue is possession with intent to distribute, which, unlike simple possession, is part of the CSA's

main criminal drug-distribution provision (21 U.S.C. 841(a)).[27]

Second, the Court noted that Congress "chose to authorize only a 1-year sentence for nearly all simple possession offenses, but it created a narrow exception for those cases in which a prosecutor elects to charge the defendant as a recidivist." *Carachuri-Rosendo*, 130 S. Ct. at 2586. Here the scheme is the opposite: Congress authorized a five-year sentence for nearly all distribution-related offenses (21 U.S.C. 841(b)(1)(D)), but it created a narrow exception for those cases in which a defendant affirmatively proves that he distributed only a small amount of marijuana for no remuneration (21 U.S.C. 841(b)(4)). That narrow exception should not swallow the statutory rule under the CSA when it comes to "aggravated felony" determinations based on the categorical approach.[28]

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[27] Relatedly, unlike the alien in *Carachuri-Rosendo* (130 S. Ct. at 2583), petitioner here was not convicted of a misdemeanor under state law. Rather, he was convicted of possession with intent to distribute marijuana under Ga. Code Ann. § 16-13-30(j)(1) (2007), a felony punishable under Georgia law by up to ten years of imprisonment irrespective of the amount involved, see *id.* § 16-13-30(j)(2) (2007). See pp. 4-5 & n.1, *supra*. Accordingly, petitioner's state conviction qualifies as a "felony punishable under the [CSA]" under Justice Thomas's separate opinion in *Carachuri-Rosendo* as well. See 130 S. Ct. at 2591.

[28] Petitioner attempts to analogize this case to *Carachuri-Rosendo* on the ground that his federal Sentencing Guidelines sentence "would not have exceeded one year, and very likely would have been less than 6 months." Pet. Br. 27-28 (quoting 130 S. Ct. at 2589). That is incorrect. The Guidelines range for a defendant convicted of possession with intent to distribute marijuana under the CSA, where the quantity is less than 250 grams of marijuana, is 0 to 18 months of imprisonment. See Sentencing Guidelines § 2D1.1(a)(5) and (c)(17); *id.* Ch. 5, Pt. A (sentencing table). Depending on his criminal history category, petitioner thus could have been sentenced to more than 12 months of imprison-

D. No Canon Of Construction Warrants A Different Conclusion In This Case

Contrary to petitioner's contention (Br. 17-18), there is no reason for the Court to 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* v. *Ashcroft*, 543 U.S. 1, 11 n.8 (2004). But resort to that principle 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.*, *Kawashima*, 132 S. Ct. at 1176 ("We think the application of the present statute clear enough that resort to the rule of lenity is not warranted."); *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 such ambiguity in this case. Nobody disputes that Section 841(b)(4)'s requirements are not offense elements. See pp. 18-23, *supra*. And the broader

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ment under the Guidelines. Petitioner mistakenly assumed a base offense level of 4, see Pet. Br. 28 (citing Sentencing Guidelines § 2D2.1), which applies only to simple possession of marijuana, not possession with intent to distribute marijuana. Petitioner apparently proceeded from the unproven premise that his offense qualified for Section 841(b)(4) treatment as involving only a small amount of marijuana for no remuneration. A federal sentencing court would not have done so unless petitioner carried his burden of establishing those conditions. See pp. 18-23, *supra*.

statutory framework strongly indicates that absent proof by the alien that his conviction falls within the narrow exception in Section 841(b)(4), Congress intended to treat all convictions for distribution of (or possession with intent to distribute) marijuana by aliens as an "aggravated felony." Petitioner's contrary view would impede Congress's goal by removing such aliens in a "haphazard" manner. *Nijhawan*, 557 U.S. at 40.

Petitioner also contends (Br. 17) that ambiguities should be construed in favor of an alien facing deportation. Application of such a proposition would be particularly misplaced here because Congress has made clear that it does not wish to give the benefit of the doubt to criminal aliens, see pp. 23-25, *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 using every interpretative tool at its disposal. *E.g.*, *Ruiz-Almanzar* v. *Ridge*, 485 F.3d 193, 198 (2d Cir. 2007). As just discussed, no such ambiguity remains here.[29]

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[29] Invoking the canon that "an act of congress ought never to be construed to violate the law of nations, if any other possible construction remains," one of the amici contends that the government's position would put the United States into conflict with its obligations under Article 33 of the Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223. See Human Rights First Amicus Br. 16 (quoting *Murray* v. *Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). In particular, amicus argues that Article 33 prohibits a contracting nation from returning a refugee to a territory where his "life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion" ("*refoulement*"), unless he is convicted of a "particularly serious crime." *Id.* at 17 (quoting Article 33(1) and (2)). Because an "aggravated felony"

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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conviction bars eligibility for asylum, 8 U.S.C. 1158(b)(2)(B)(i), amicus further argues, the government's position would permit *refoulement* even though the aggravated felony is not necessarily a "particularly serious crime." Human Rights First Amicus Br. 18-27. But an alien convicted of an aggravated felony generally may still seek (*inter alia*) withholding of removal, unless the term of imprisonment actually imposed for the conviction is five years or more (which would suggest a "particularly serious crime"). 8 U.S.C. 1231(b)(3)(B). Because withholding of removal prohibits the government from removing an alien to a country where the alien's "life or freedom would be threatened in that country because of the alien's race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. 1231(b)(3)(A), which tracks the language of Article 33's non-*refoulement* provision, the availability of such relief to aggravated felons like petitioner answers any *Charming Betsy* concern.

APPENDIX

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

Definitions

(a) As used in this chapter—

* * * * *

(43) The term "aggravated felony" means—

* * * * *

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

* * * * *

2. 8 U.S.C. 1227(a) 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.

* * * * *

3. 8 U.S.C. 1229b(a) provides:

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.

4. 18 U.S.C. 924(c) provides in pertinent part:

Penalties

* * * * *

(2) For purpose 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.

* * * * *

5. 21 U.S.C. 841 provides in pertinent part:

Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

* * * * *

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

* * * * *

(1)(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any per-

son commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provision of title 18 or $500,000 if the defendant is an individual or $2,000.000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

* * * * *

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

* * * * *

6. 21 U.S.C. 844(a) 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 mixture 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.

7. 21 U.S.C. 885(a)(1) provides:

Burden of proof; liabilities

(a) Exemptions and exceptions; presumption in simple possession offenses

(1) It shall not be necessary for the United States to negative any exemption or exception set forth in this subchapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this subchapter, and the burden of going forward with the evidence with respect to any such exemption or exception shall be upon the person claiming its benefit.

8. Ga. Code Ann. 16-13-2 (2007) provides:

Conditional discharge for possession of controlled substances as first offense and certain nonviolent property crimes; dismissal of charges; restitution to victims.

(a) Whenever any person who has not previously been convicted of any offense under Article 2 or Article 3 of this chapter or of any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, pleades guilty to or is found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug, the court may without entering a judgment of guilt and with the consent of such person defer further proceedings and place him on probation upon such reasonable terms and conditions as the court may require, preferably terms which require the person to undergo a comprehensive rehabilitation program, including, if necessary, medical treatment, not to exceed three

years, designed to acquaint him with the ill effects of drug abuse and to provide him with knowledge of the gains and benefits which can be achieved by being a good member of society. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may occur only once with respect to any person.

(b) Notwithstanding any law to the contrary, any person who is charged with possession of marijuana, which possession is of one ounce or less, shall be guilty of a misdemeanor and punished by imprisonment for a period not to exceed 12 months or a fine not to exceed $1,000.00, or both, or public works not to exceed 12 months.

(c) Persons charged with an offense enumerated in subsection (a) of this Code section and persons charged for the first time with non violent property crimes which, in the judgment of the court exercising jurisdiction over such offenses, were related to the accused's addiction to a controlled substance or alcohol who are eligible for any court approved drug treatment program may, in the discretion of the court and with the consent of the accused, be sentenced in accordance with subsection (a) of this Code section. The probated sentence imposed may be for a period of up to five years. No discharge and dismissal without court adjudication of guilt

shall be entered under this subsection until the accused has made full restitution to all victims of the charged offenses. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector.

9. Ga. Code Ann. 16-13-30(j) (2007) provides:

Purchase, possession, manufacture, distribution, or sale of controlled substances or marijuana; penalties.

(j)(1) 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.

(2) Except as otherwise provided in subsection (c) of Code Section 16-13-31 or in Code Section 16-13-2, any person who violates this subsection shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for not less than one year nor more than ten years.

10. Ga. Code Ann. 16-13-31(c) (2007) provides:

Trafficking in cocaine, illegal drugs, marijuana, or methamphetamine; penalties.

(c) Any person who knowingly sells, manufactures, grows, delivers, brings into this state, or has possession

of a quantity of marijuana exceeding 10 pounds commits the offense of trafficking in marijuana and, upon conviction thereof, shall be punished as follows:

(1) If the quantity of marijuana involved is in excess of 10 pounds, but less than 2,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of five years and shall pay a fine of $100,000.00;

(2) If the quantity of marijuana involved is 2,000 pounds or more, but less than 10,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of seven years and shall pay a fine of $250,000.00; and

(3) If the quantity of marijuana involved is 10,000 pounds or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall pay a fine of $1 million.

11. Ga. Code Ann. 42-8-60(a) (2007)

When applicable; violation of probation

(a) Upon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant:

(1) Defer further proceeding and place the defendant on probation as provided by law; or

(2) Sentence the defendant to a term of confinement as provided by law.