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IN THE SUPREME COURT OF THE UNITED STATES

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ADRIAN MONCRIEFFE, :

Petitioner : No. 11-702

v. :

ERIC H. HOLDER, JR., ATTORNEY :

GENERAL :

- - - - - x

Washington, D.C.

Wednesday, October 10, 2012

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

APPEARANCES:

THOMAS C. GOLDSTEIN, ESQ., Washington, D.C.; on behalf of Petitioner.

PRATIK A. SHAH, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 11-702, Moncrieffe v. Holder. Mr. Goldstein.

ORAL ARGUMENT OF THOMAS C. GOLDSTEIN  
ON BEHALF OF THE PETITIONER

MR. GOLDSTEIN: Mr. Chief Justice, thank you very much. May it please the Court:

Today's undercard is an immigration case. Adrian Moncrieffe was convicted of possession with intent to distribute marijuana under Georgia law. The question in the case is whether he was thereby convicted of a controlled substances offense, which is a deportable offense, but also an aggravated felony of illicit trafficking in drugs, which would mean that the Attorney General has no discretion to cancel his removal.

Now, everyone agrees that under the Georgia statute, there is going to be some conduct that would be a Federal felony, but it's also undisputed that the Georgia statute regularly involves prosecutions that would be Federal misdemeanors.

JUSTICE SOTOMAYOR: Excuse me. You use that word, regularly. Do you have statistics on that? Were

1 they provided in the briefs?

2 MR. GOLDSTEIN: They were not. We do not --  
3 we attempted very hard to collect them. This is the  
4 information I can give you about Federal and state  
5 prosecutions of marijuana cases in the United States.

6 In the state system, the most recent  
7 available data -- it was published by the Department of  
8 Justice in 2006, but we have no reason to believe that  
9 it's changed materially -- in 2006, there were roughly  
10 750,000 prosecutions in the states for marijuana  
11 offenses.

12 By contrast, in the Federal system, we have  
13 data from 2010. And we have two different kinds of data  
14 here that is a little bit more granular, and that is for  
15 prosecutions under 841(b)(1), which is the trafficking  
16 provision, there were 6,200 cases.

17 For prosecutions under 841(b)(4), which is  
18 the provision we say you ought to look at here, and 844,  
19 which is the possession provision, combined, there were  
20 only 93 prosecutions in 2010.

21 And what we think that illustrates is that  
22 there is a massive amount of activity in the states  
23 doing things that show that this -- and this case is  
24 perfectly commonplace, we think. It's consistent with  
25 the other cases that we've seen published by the BIA.

1           Adrian Moncrieffe possessed --

2           JUSTICE KENNEDY: It's a massive amount of  
3           conduct that the statute contemplates? The statutory  
4           scheme -- I just didn't hear. I just didn't hear.

5           MR. GOLDSTEIN: Yeah. I apologize. Yes,  
6           Justice Kennedy, that's right.

7           The Georgia statute, which just refers to  
8           possession with intent to distribute, contemplates both  
9           social sharing of marijuana -- this case, for example,  
10          1.3 grams of marijuana, which is less than --

11          JUSTICE GINSBURG: Well, now, Mr. Goldstein,  
12          when you say this case, is there any proof in the record  
13          that there was a small amount and no remuneration?

14          MR. GOLDSTEIN: Yes, Justice Ginsburg,  
15          although this is -- we believe the case is proceeding  
16          under the categorical approach, the answer to your  
17          question is yes.

18          So let me take you to two places. One is  
19          going to be at the back of the blue brief, where we have  
20          the chemist's report. So page 19. This is from the --  
21          the record in the immigration proceedings.

22          And on page 19 of the appendix to our blue  
23          brief -- we just agreed, because there was so little  
24          record material, that we wouldn't have a joint appendix  
25          in the case. We just published it at the end of our

1 brief -- it says, "material weight less than 1 ounce;  
2 approximate weight is 1.3 grams."

3 And for those of us who've been fortunate  
4 enough not to experience the drug laws a lot, that's  
5 less than half the weight of this penny. So it's, I  
6 think everybody agrees, a small amount.

7 Now, on the question of no remuneration,  
8 what I have to offer you is the Georgia statute --

9 JUSTICE SCALIA: Excuse me. I don't  
10 understand.

11 MR. GOLDSTEIN: Sorry.

12 JUSTICE SCALIA: Material weight says less  
13 than 1 ounce --

14 MR. GOLDSTEIN: Yes.

15 JUSTICE SCALIA: -- parentheses, approximate  
16 weight is 1 -- 1 -- oh, I see, 1.3 grams.

17 MR. GOLDSTEIN: Yeah. 1.3 grams. 1.3.  
18 That's very, very, very, very little.

19 So then, on the question of remuneration --  
20 and I should just step back and explain, the reason  
21 we're talking about this is that the Federal misdemeanor  
22 provision, 841(b)(4), says that it's not a felony, and  
23 thus, it wouldn't be an aggravated felony, if it's a  
24 small amount and no remuneration. And Justice Ginsburg  
25 asked about the -- what's in the record about that.

1           Now, there isn't record evidence about no  
2 remuneration, but there is one significant fact. And to  
3 know that fact, you have to look at the Georgia statute,  
4 which is also at the end of our brief. It's on page 9  
5 of our appendix.

6           This is the statute he was prosecuted under.  
7 It's the second provision. Section 16-13-30(j)(1). And  
8 I'll just read it. "It is unlawful for any person to  
9 possess, have under his control, manufacture, deliver,  
10 distribute, dispense, administer, purchase, sell" --  
11 sell -- "or possess with intent to distribute  
12 marijuana."

13           And he was not charged with and he was not  
14 convicted of selling, and so we think that should  
15 negative any indication -- any implication that he might  
16 have gotten remuneration for this.

17           JUSTICE SOTOMAYOR: You -- we are discussing  
18 the categorical approach, but let's assume he had pled  
19 guilty, and in his allocution, he had admitted to not a  
20 smaller amount or to remuneration. Would -- would an  
21 immigration judge, under the argument you're making  
22 today, have to ignore that allocution, or would he be  
23 able to apply the modified approach and find this  
24 gentleman an aggravated felon?

25           MR. GOLDSTEIN: Under our rule, the plea

1 colloquy is irrelevant, but we would win under a rule in  
2 which it was relevant.

3           So, to start with the former, we say that  
4 the categorical rule applies. There's no -- the only  
5 reason that you would look at the modified categorical  
6 approach here is to know that it was a possession with  
7 intent to distribute conviction rather than a sale  
8 conviction, but that evidence would still come in. It  
9 would be highly relevant. It's the basis that this  
10 Court explained in *Carachuri-Rosendo*, that the  
11 immigration judge would deny cancellation of removal.  
12 Right?

13           That factor would still be highly relevant.  
14 The Attorney General would exercise his discretion in  
15 such a case.

16           Now --

17           JUSTICE SOTOMAYOR: That's the issue with  
18 this case. None of these immigrants are being let out  
19 automatically. They are still felons subject to  
20 removal. The only issue is whether --

21           MR. GOLDSTEIN: You said still felons.

22           We --

23           JUSTICE SOTOMAYOR: Well -- they're --

24           MR. GOLDSTEIN: That's exactly right.

25           JUSTICE SOTOMAYOR: -- they're still subject



1 to removal --

2 MR. GOLDSTEIN: Right.

3 JUSTICE SOTOMAYOR: -- either way.

4 MR. GOLDSTEIN: So, you know, lawyers often  
5 try and avoid the strength of the other side's case.  
6 And so let me just confront what I think is a big  
7 argument of theirs.

8 They say our position is underinclusive  
9 because the Georgia statute does include conduct that  
10 would be a felony. You just gave an example of it.

11 But our point is that our underinclusivity  
12 is a problem, but it's not a big problem. It's not as  
13 big as their problem. Because, as this Court explained  
14 in Carachuri-Rosendo, the offense still is removable,  
15 and the Attorney General will just deny cancellation of  
16 removal.

17 Now, the reason they have a much bigger  
18 practical problem is that their rule is overinclusive.  
19 It treats as felonies some convictions that should be  
20 misdemeanors.

21 JUSTICE BREYER: I see that. There's  
22 something I really don't understand in these cases,  
23 because the other cases, our precedent's been around a  
24 long time, so I would have guessed that under that  
25 precedent in these other statutes, the obvious thing to

1 do, the obvious puzzle here is not the Federal statute,  
2 it's the state statute, what is this thing he was  
3 convicted of about.

4 So you'd pick up the phone, and you'd phone  
5 at random four U.S. attorneys. Not U.S. attorneys, but  
6 four state attorneys --

7 MR. GOLDSTEIN: Okay.

8 JUSTICE BREYER: -- who work with the  
9 statute in Georgia, and say, now look, the indictment  
10 here says possession with intent to distribute, and I  
11 can show from the documents that it's a tiny amount.  
12 Now, is it your policy, if he was selling it, to charge  
13 under the sell? Is it your policy if he's not selling  
14 it to charge under intent to distribute? Is it totally  
15 random whether you say sell or intent to distribute?  
16 What's your policy? Okay? Then we get some answers.  
17 Then we'd have an idea whether what you're saying is  
18 right.

19 Now, you could do that, but they could do  
20 it, too. Anyone could do it. And then we'd have some  
21 actual facts about whether this charge -- really, it  
22 corresponds to the misdemeanor or the felony in the  
23 Federal statute.

24 So why -- I'm not -- I mean, that isn't a  
25 brain -- that isn't -- doesn't require -- it's not

1 rocket science, okay? So why has no one done it?

2 MR. GOLDSTEIN: Because I don't think  
3 anybody would believe me if I went to an immigration  
4 judge and I said, judge, I promise, I promise that the  
5 fact that this isn't a possession with intent to  
6 distribute case means that there are never cases in --

7 JUSTICE BREYER: You don't have to say  
8 never. The question is what kind of a statute is this  
9 state statute?

10 MR. GOLDSTEIN: We -- I think --

11 JUSTICE BREYER: And the kind of statute  
12 that it is, is a statute that is used to prosecute  
13 people --

14 MR. GOLDSTEIN: Yes.

15 JUSTICE BREYER: -- with small amounts when  
16 they don't sell.

17 MR. GOLDSTEIN: Right.

18 JUSTICE BREYER: If your version of what  
19 that felon intends to distribute, the distinction there  
20 is really picked up by the district attorneys.

21 And if it's not, then they may be right,  
22 because -- because then intent to distribute may well  
23 often include, as it does under Federal law, people who  
24 sell stuff.

25 MR. GOLDSTEIN: We have not read this

1 Court's cases to suggest that we call the state  
2 attorneys. We have read the Court's cases to engage in  
3 ordinary statutory construction, and felony --

4 JUSTICE BREYER: Okay. Okay. You didn't.  
5 In any words, nobody did it.

6 So my other question --

7 MR. GOLDSTEIN: Yeah.

8 JUSTICE BREYER: -- which is the only other  
9 one I really have, aside from making that suggestion,  
10 but here, what happened to this person?

11 MR. GOLDSTEIN: Yes.

12 JUSTICE BREYER: He was -- was he sentenced  
13 under 16-13-2(a)? That is, was he sentenced to  
14 probation, which would be evidence in your favor, I  
15 think.

16 MR. GOLDSTEIN: Yeah.

17 JUSTICE BREYER: But was he or wasn't he?

18 MR. GOLDSTEIN: Yeah.

19 JUSTICE BREYER: All right. If he was, what  
20 it says in this provision is that the Court may without  
21 entering a judgment of guilt. So there was no judgment  
22 of guilt.

23 MR. GOLDSTEIN: Yes.

24 JUSTICE BREYER: And it says, if he  
25 completes it, he then is discharged without court

1 adjudication of guilt.

2 MR. GOLDSTEIN: Yeah.

3 JUSTICE BREYER: And shall not be deemed a  
4 conviction, it says for purposes of this code.

5 MR. GOLDSTEIN: Yeah.

6 JUSTICE BREYER: Well, why are we saying he  
7 was convicted of anything?

8 MR. GOLDSTEIN: Sure. Because the  
9 government's position is, and the Eleventh Circuit has  
10 agreed with it -- and just to -- just to make sure  
11 everyone is on the same page, and that is, the Federal  
12 statute is triggered by a conviction.

13 Justice Breyer has just made the point that,  
14 as a matter of state law, he was not even convicted  
15 because he got first offender treatment here, which is a  
16 point in our favor. It does show that it was a small  
17 and non-serious offense.

18 The reason is that there is a Federal  
19 definition of convicted that's independent of the state  
20 definition of convicted.

21 CHIEF JUSTICE ROBERTS: And that question's  
22 not before us today.

23 MR. GOLDSTEIN: That's exactly right.

24 CHIEF JUSTICE ROBERTS: Okay. Well, isn't  
25 the reason we don't look at the particular facts and

1 particular case, and don't depose four district  
2 attorneys, is that the Court has adopted a categorical  
3 approach precisely to avoid that type of inquiry in,  
4 whatever it is, 750,000 cases?

5 MR. GOLDSTEIN: Yes. That's correct. And  
6 it's an even stronger point in our favor, because worse  
7 than interviewing four district attorneys is having a  
8 fact-bound inquiry into every one of these immigration  
9 cases.

10 Remember --

11 CHIEF JUSTICE ROBERTS: No, no, I'm sorry.  
12 We don't need that because we've adopted a categorical  
13 approach.

14 MR. GOLDSTEIN: Yeah.

15 CHIEF JUSTICE ROBERTS: 841(b)(1)(D) lists  
16 the elements, and conviction in -- Georgia, right?

17 MR. GOLDSTEIN: Yes.

18 CHIEF JUSTICE ROBERTS: -- conviction in  
19 Georgia under their provision satisfies -- has each of  
20 those elements. And under our categorical approach,  
21 that's the end of the inquiry.

22 MR. GOLDSTEIN: That is one way of looking  
23 at it. We disagree for reasons I'll explain.

24 I will note in our favor that the Attorney  
25 General doesn't even defend that position anymore.

1 Remember that they do not argue that you can  
2 just look at the conviction. They want to have the  
3 fact-bound inquiry into every one of these cases. And  
4 the reason is that if you apply the categorical approach  
5 to --

6 CHIEF JUSTICE ROBERTS: They want to do that  
7 at the tail end, right?

8 MR. GOLDSTEIN: No, they want to do it  
9 in every single case at the beginning.

10 So I can just make clear everybody's  
11 position. There really --

12 JUSTICE KENNEDY: Again, I didn't hear.

13 MR. GOLDSTEIN: Sorry.

14 JUSTICE KENNEDY: They want to do it in  
15 every --

16 MR. GOLDSTEIN: In every case at the  
17 beginning. So I'll --

18 JUSTICE KENNEDY: At the beginning of the  
19 state prosecution?

20 MR. GOLDSTEIN: No, in the middle -- at the  
21 beginning of the immigration proceedings.

22 JUSTICE KENNEDY: All right.

23 MR. GOLDSTEIN: So let me --

24 CHIEF JUSTICE ROBERTS: Before you get on --  
25 I didn't understand that to be their position at all. I

1     suppose we -- I certainly will ask them because they're  
2     probably better able to articulate their position, but  
3     --

4                   MR. GOLDSTEIN:    So let me explain.

5                   CHIEF JUSTICE ROBERTS:   Go ahead.

6                   MR. GOLDSTEIN:    So our position is it is a  
7     controlled substances offense, and you take account of  
8     the seriousness of the offense in cancellation.  Their  
9     position is that it is presumptively, but only  
10    presumptively, an aggravated felony.  And in every  
11    single immigration proceeding, when you have a case like  
12    this the noncitizen can come forward with fact-found  
13    evidence, not limited to the record of conviction --

14                   JUSTICE GINSBURG:   Mr. Goldstein, it's  
15    because they are trying to mirror the Federal statute,  
16    which makes the small amount and no remuneration, makes  
17    that like an affirmative defense.  The burden is on the  
18    defendant to show those two things to get out from under  
19    the main statute.

20                   MR. GOLDSTEIN:    That's correct.

21                   JUSTICE GINSBURG:   So what the Government is  
22    suggesting is as close to the Federal statute as you can  
23    get.

24                   MR. GOLDSTEIN:    Well, let me just say first,  
25    I do want to make -- just want to focus on what the



1 parties' positions are. And they do have this  
2 fact-found inquiry in every one, so I do want to turn to  
3 what I think is probably their second best argument. I  
4 was talking about the underinclusiveness as the first  
5 one.

6           Their second one is they want to draw an  
7 analogy between this and what would happen in a criminal  
8 case. So they say, take the conviction and imagine that  
9 the conviction is all the facts that you had in a  
10 Federal criminal prosecution, and then you would have a  
11 burden on the defendant to prove that he was subject to  
12 the misdemeanor.

13           We have several points about that. The  
14 first is this is not a Federal criminal prosecution.  
15 The Federal statute involved is the Immigration and  
16 Naturalization Act, and it tells you that you are  
17 supposed to look at the conviction itself and determine  
18 whether it corresponds to a Federal felony.

19           This further proceeding doesn't exist, and  
20 it's exactly the argument that was rejected in  
21 Carachuri-Rosendo. And let me talk about why --

22           JUSTICE GINSBURG: You said Carachuri. That  
23 case involved, in order to hold for the Government, you  
24 would have to go outside the record of the State  
25 conviction. You'd have to add something that wasn't in

1 the State conviction.

2 And it's the same thing here. To get to  
3 where you want to go, you have to add something that  
4 isn't in the State conviction.

5 MR. GOLDSTEIN: No, we disagree. What the  
6 Court said in -- I agree with the beginning of how you  
7 characterize the Carachuri case. What the Court said is  
8 we don't go beyond the -- the conviction itself.

9 And it's true that in that case the  
10 Government wanted to go beyond the record to go up. But  
11 here what they're saying is that you should go beyond  
12 the record to figure out if you should go down. And  
13 what the Court said is, no, you look at the conviction  
14 itself.

15 JUSTICE SCALIA: What is the conviction?

16 MR. GOLDSTEIN: Okay.

17 JUSTICE SCALIA: What does the conviction  
18 mean? You say the categorical approach.

19 MR. GOLDSTEIN: Yes.

20 JUSTICE SCALIA: Is it the categorical  
21 statute under which you have been convicted or, as you  
22 seem to be saying, the indictment?

23 MR. GOLDSTEIN: It is what you are convicted  
24 of. So here, he was convicted of possession with intent  
25 to distribute. The other side's argument is, well, if I

1 had just possession with intent to distribute, that  
2 would be a Federal felony. So we acknowledge the  
3 strength of that point. But our --

4 JUSTICE SCALIA: Is he convicted of that or  
5 is he convicted of violating Georgia Code 16-13,  
6 whatever it is?

7 MR. GOLDSTEIN: As I was -- I mentioned very  
8 briefly to Justice Sotomayor, when you have a divisible  
9 statute like this, that includes possession with intent  
10 to distribute, sell, possess, all of those things, you  
11 use the modified categorical approach to figure out  
12 which one applies.

13 And so we know he was convicted of  
14 possession with intent to distribute and that's common  
15 ground between the parties. It's not the whole statute.  
16 It's just the --

17 JUSTICE KAGAN: Well, Mr. Goldstein,  
18 assuming he was convicted of that, as you suggest, you  
19 have an underinclusiveness problem. The Government has  
20 an overinclusiveness problem.

21 MR. GOLDSTEIN: Yes.

22 JUSTICE KAGAN: If you assume that this  
23 statute covers and is regularly used to cover both sets  
24 of people, both people with these very minor offenses  
25 and people with much more major offenses --

1 MR. GOLDSTEIN: Yes.

2 JUSTICE KAGAN: -- the at least apparent  
3 attractiveness of the Government's position is that  
4 they've tried to cure their overinclusiveness problem,  
5 and they have done it by sticking on -- and, you know,  
6 one can ask where this comes from in the statute --

7 MR. GOLDSTEIN: I hope we will.

8 JUSTICE KAGAN: -- but they have done it by  
9 sticking on something that attempts to address their  
10 overinclusiveness problem, so that people who are really  
11 misdemeanants get classified as misdemeanants, and  
12 people who are really aggravated felons get classified  
13 that way.

14 And you have no similar cure for your  
15 underinclusiveness problem, so why shouldn't we go with  
16 their problem, which at least attempts to solve this  
17 problem?

18 MR. GOLDSTEIN: Well, two reasons. First,  
19 they don't have a real solution. And, second, Congress  
20 solved our problem.

21 And this is what Carachuri-Rosendo says, and  
22 that is, when you have an underinclusiveness problem  
23 just like ours, the statute fixes it because the statute  
24 treats the conviction as a controlled substances  
25 offense. The statute provides the backstop. You don't

1 have to make one up, which, I suggest to you, is the  
2 difficulty with their position.

3 JUSTICE GINSBURG: I don't follow --

4 MR. GOLDSTEIN: Okay.

5 JUSTICE GINSBURG: -- your answer because I  
6 think you have to concede that under your view a lot of  
7 people who are convicted under the Georgia statute who  
8 had a significant quantity which they intended to  
9 distribute --

10 MR. GOLDSTEIN: Yes.

11 JUSTICE GINSBURG: -- for remuneration --

12 MR. GOLDSTEIN: Yes.

13 JUSTICE GINSBURG: -- many of those people  
14 would -- under your view of the statute, many of those  
15 people would not have committed an aggravated felony.

16 MR. GOLDSTEIN: I agree with --

17 JUSTICE GINSBURG: So you have that --

18 MR. GOLDSTEIN: That is our problem. I  
19 agree with that problem.

20 JUSTICE GINSBURG: -- a large  
21 underinclusiveness problem which you haven't solved.

22 MR. GOLDSTEIN: Okay. That's the part we  
23 disagree with, Justice Ginsburg. Maybe I can just read  
24 to you what this Court said about this exact issue in  
25 Carachuri-Rosendo.

1           It said that when you have this very  
2 underinclusiveness problem, it is solved by the statute,  
3 because the attorney -- all that happens under our  
4 rule -- it's still a deportable offense and the Attorney  
5 General denies cancellation of removal.

6           So if could just read very briefly, and this  
7 is from the Supreme Court Reporter at page 2589: "We  
8 note that whether a noncitizen has committed an  
9 aggravated felony is relevant, inter alia, to the type  
10 of relief he may obtain from a removal order, but not to  
11 whether he is in fact removable. In other words, to the  
12 extent that our rejection of the Government's broad  
13 understanding of the scope of aggravated felony may have  
14 any practical effect on policing our Nation's borders,  
15 it is a limited one. Carachuri-Rosendo and others in  
16 his position may now seek cancellation of removal and  
17 thereby avoid the harsh consequence of mandatory  
18 removal, but he will not avoid the fact that his  
19 conviction makes him" --

20           JUSTICE GINSBURG: But all that follows from  
21 in Carachuri-Rosendo the Government wanted to go outside  
22 the record.

23           MR. GOLDSTEIN: No, Justice Ginsburg, it  
24 does not. I promise you it does not.

25           The upshot of our position is that

1 Mr. Moncrieffe has committed a controlled substances  
2 offense, and anyone else in his position has committed  
3 one. And if there is a serious drug amount, the  
4 Attorney General will deny him cancellation of removal.

5 JUSTICE KAGAN: Do you think that the  
6 Attorney General could just issue some kind of directive  
7 telling all administrative law judges and officials to  
8 deny cancellation of removal to anybody who commits  
9 these kinds of offenses?

10 MR. GOLDSTEIN: We -- it's an interesting  
11 question that I have puzzled about at length. I think  
12 the answer is no for a very particular reason, however,  
13 and that is the Attorney General has no such categorical  
14 rules.

15 We think it's a point in our favor that the  
16 Attorney General, in the application starting with  
17 212(c) before the 1996 Act, which is discussed in this  
18 Court's decision in *St. Cyr*, through the present has  
19 instead applied a holistic look at all of the  
20 circumstances.

21 What he certainly can do is direct the  
22 immigration judges to place special weight -- and this  
23 was the rule before 1996, by the way. If you had a  
24 serious offense, you had to show special equities that  
25 would justify your not being removed from the country.

1 And so we think that's the most likely outcome.

2 A per se categorical rule would be very  
3 unlike what we understand the Attorney General to do in  
4 any other circumstance.

5 JUSTICE KENNEDY: Would it be permissible --  
6 I had the same question. Would it be permissible --

7 MR. GOLDSTEIN: I think --

8 JUSTICE KENNEDY: -- or would you be back up  
9 here saying that this violates the statute.

10 MR. GOLDSTEIN: Well, we think we would win,  
11 so I wouldn't be back for this client. But I think  
12 there would be a substantial argument that it would be  
13 arbitrary and capricious, because it would be so unlike  
14 anything the Attorney General does in other  
15 circumstances. But they would have --

16 CHIEF JUSTICE ROBERTS: I'm sorry, could you  
17 remind me what the "it" is that you're talking about?

18 MR. GOLDSTEIN: Yes.

19 CHIEF JUSTICE ROBERTS: It's an order from  
20 the Attorney General --

21 MR. GOLDSTEIN: Yes.

22 CHIEF JUSTICE ROBERTS: -- to the  
23 immigration judges --

24 MR. GOLDSTEIN: Yes.

25 CHIEF JUSTICE ROBERTS: -- to?



1                   MR. GOLDSTEIN: To treat all of these cases  
2 as barring cancellation of removal. To get us on the  
3 back end, as it were, and that is --

4                   JUSTICE KAGAN: To do the exact same  
5 thing --

6                   MR. GOLDSTEIN: Yes.

7                   JUSTICE KAGAN: -- but through --

8                   MR. GOLDSTEIN: Right.

9                   JUSTICE KAGAN: -- an Attorney General  
10 directive.

11                   MR. GOLDSTEIN: And I think our argument  
12 that it's arbitrary would be supported by the fact that  
13 this Court would have ruled that he couldn't do the  
14 identical thing on the front end. But it's an open  
15 question, and it's not presented here.

16                   I had said that there were two flaws in the  
17 -- sort of their characterization of the over and  
18 underinclusiveness problem. The second one is they  
19 don't have a real solution. This is a big problem.

20                   Under these State convictions in which the  
21 amount of drugs and whether there was remuneration are  
22 irrelevant, it's going to be extremely difficult for  
23 uncounseled noncitizens who are in jail, who don't have  
24 access to tools of communication, to prove to an  
25 immigration judge this fact-found inquiry which they are

1 inserting into every single case, that their offense  
2 actually corresponds to a misdemeanor.

3 So while you say that they have provided the  
4 solution, I don't know where it comes from in the  
5 statute, but we think it is not a practical solution.  
6 And that problem is even worse in the many contexts that  
7 are not just straight removal.

8 We said in our opening brief, and the  
9 Government's response ignores, that there are many cases  
10 in which immigration officials have to make these  
11 decisions about whether it's an aggravated felony much  
12 more on the fly, without the opportunity to call  
13 everybody in and --

14 JUSTICE KENNEDY: Do you have any  
15 statistics, if you take the whole universe of  
16 convictions under the Georgia statute, what percentage  
17 of them are for these minor offenses and what are for  
18 the major? Do we have any handle on that at all?

19 MR. GOLDSTEIN: We don't. We tried. I'm  
20 sorry, we were unable to do it.

21 The Department of Justice has better  
22 relationships with prosecutors, and so maybe it will  
23 have that information for you. But I can say that  
24 the -- it is absolutely commonplace, from looking at the  
25 case law, for the states to tackle this small social

1 sharing of a couple of marijuana cigarettes. This is --  
2 that's the distinction between 93 prosecutions under --  
3 or convictions under (b)(4) and possession in the  
4 Federal system and 750,000 in the states. Federal  
5 prosecutors leave these to the states.

6 Which brings me back to my other  
7 answer to Justice Ginsburg's pointing out the  
8 government's argument about a parallel between this and  
9 a Federal criminal prosecution.

10 And the reason they want to do that, Justice  
11 Ginsburg, is that in a Federal -- actual Federal  
12 criminal prosecution, the burden of proof never matters,  
13 including because Federal prosecutors almost never bring  
14 these cases.

15 So here's what we tried to do.  
16 This statute, (b)(4), was enacted in 1970, some 42 years  
17 ago. We tried to identify one case in 42 years in which  
18 the burden of proof in the Federal case made any  
19 difference at all, and we were unable to. And I would  
20 be really interested to know if my friend is able to  
21 identify one case in 42 years which it actually made a  
22 difference.

23 And the reason is, in an actual  
24 Federal prosecution, the FBI agent would come in and  
25 say, here are the drugs, and they were trying to sell it

1 to an undercover officer. It's never the case that it  
2 actually -- the defendant is in a position of trying to  
3 prove that it was a misdemeanor.

4 But what they are trying to do is to take  
5 that rule which is derived from Apprendi, that there is  
6 a burden of proof so that the government doesn't have to  
7 indict that it wasn't a (b)(4) offense, and take the  
8 silence of the state record, where these facts are  
9 completely irrelevant, the quantity and remuneration,  
10 and transpose them into the Federal system and take  
11 great advantage of the fact that the record is silent.

12 JUSTICE SOTOMAYOR: Mr. Goldstein, there are  
13 at least 93 cases, all right. So --

14 MR. GOLDSTEIN: Yes.

15 JUSTICE SOTOMAYOR: And I don't know and I'm  
16 not going to ask you to prove to me how the burden of  
17 proof was met or not met in those. But let me give you  
18 a different hypothetical.

19 MR. GOLDSTEIN: Sure.

20 JUSTICE SOTOMAYOR: Let's assume Georgia has  
21 the Federal statute, but, differently than the Federal  
22 statute, it has a sale-distribution provision, and it  
23 has a small amount, no remuneration statute.

24 MR. GOLDSTEIN: Yeah.

25 JUSTICE SOTOMAYOR: What would happen in

1 those states?

2 MR. GOLDSTEIN: There are about 15 of those  
3 states, and in those states, if you weren't convicted  
4 under the small one, then you would infer it wasn't a  
5 small amount and no remuneration, and the person would  
6 have committed an aggravated felony.

7 Our issue arises only when you have a  
8 situation in which the state is prosecuting people under  
9 the statute that would be a Federal misdemeanor. If the  
10 state --

11 CHIEF JUSTICE ROBERTS: I'm sorry, go ahead.

12 MR. GOLDSTEIN: No. If the state has a  
13 different system, as a material number of states do, in  
14 which they track the Federal system, and they have a  
15 small provision or a remuneration provision, which  
16 another nine states have a remuneration provision, in  
17 those situations, if you have a conviction that isn't  
18 under that social sharing provision, it's an aggravated  
19 felony.

20 CHIEF JUSTICE ROBERTS: Your use of the  
21 statistics, I think, assumes that Georgia and other  
22 states are prosecuting every case that comes before  
23 them, because that's how you get, you know, at least  
24 750,000 nationwide, so much more than must involve tiny  
25 amounts.

1           But, of course, perhaps they don't prosecute  
2 the cases involving tiny amounts, so that most of those  
3 cases, or some percentage of them, may, in fact, also  
4 involve the serious type of conduct addressed by the  
5 Federal statute.

6           MR. GOLDSTEIN: Well, I have one really good  
7 example of a prosecution for a small amount. It's this  
8 case.

9           And we don't deny that there are --  
10 Mr. Chief Justice, please do not misunderstand me to be  
11 arguing that every Georgia conviction or that 80 or  
12 90 percent of them are the small ones. What I'm trying  
13 to tell you is that a lot of them are just like this  
14 one, and I think the data bears that out.

15           And the question before you is, under a  
16 categorical approach, is it fair to presume that they're  
17 all felonies? Is it fair to presume that what Congress  
18 recognized here is that there would be a correspondence  
19 between a conviction under this statute and the Federal  
20 aggravated felony of illicit trafficking in drugs, to  
21 strip the Attorney General of the United States of any  
22 opportunity whatsoever to consider the circumstances of  
23 the case? We think that is not the best reading of the  
24 statute.

25           CHIEF JUSTICE ROBERTS: Thank you, Counsel.

1 Mr. Shah.

2 ORAL ARGUMENT OF PRATIK A. SHAH

3 ON BEHALF OF THE RESPONDENT

4 MR. SHAH: Mr. Chief Justice and may it please the  
5 Court:

6 Petitioner's proposed rule would confer a free pass from  
7 aggravated felony treatment to criminal aliens convicted  
8 under a majority of state laws that require neither  
9 remuneration nor more than a small amount.

10 JUSTICE SOTOMAYOR: What's the free pass?  
11 The free pass is mandatory as opposed to discretionary  
12 deportation, correct? So the free pass is that --

13 MR. SHAH: The free pass is that you would  
14 never have an aggravated felony for this conviction  
15 under any state that did not make an element of the  
16 state offense to disprove -- no remuneration or more  
17 than a small amount.

18 JUSTICE SOTOMAYOR: But those convicted  
19 individuals would still be subject to deportation.

20 MR. SHAH: Yes, Your Honor, they would still  
21 be subject --

22 JUSTICE SOTOMAYOR: And nothing would stop  
23 the INS judge from considering the amount of drugs,  
24 correct, that the individual actually was involved in,  
25 and that could be introduced through hearsay, through

1 almost any document, correct?

2 MR. SHAH: Your Honor, you're talking about  
3 the discretionary cancellation of removal proceeding?

4 JUSTICE SOTOMAYOR: Yes.

5 MR. SHAH: It's true, Your Honor, that could  
6 come in there. But Congress specifically enacted this  
7 aggravated felony provision to take away that discretion  
8 from the Attorney General. The motivating factor behind  
9 --

10 JUSTICE SOTOMAYOR: Well, do you  
11 suggest that the immigration judges don't know that, and  
12 that they wouldn't weigh that desire heavily in a case  
13 in which a -- the convicted individual is proven to have  
14 sold the larger amount? You still think they are going  
15 to cancel?

16 MR. SHAH: What -- Your Honor, what Congress  
17 said when it passed this very provision was that  
18 immigration judges were granting too much discretionary  
19 relief to this very class of criminal aliens, and that  
20 is why it implemented this aggravated felony.

21 Now, Petitioner says it's not going to have  
22 a big deal on immigration -- big impact on immigration  
23 policy for the reason that you suggest: The Attorney  
24 General can do it at the back end. But that --

25 CHIEF JUSTICE ROBERTS: Well, will you pause



1 right there. I don't -- you just made the argument that  
2 your position on Castro-Rodriguez is wrong. You say  
3 Congress took away the Attorney General's discretion.  
4 Then you come back and say, well, we're going to  
5 exercise that discretion under Castro-Rodriguez, and  
6 this Petitioner in particular can take advantage of it.

7 MR. SHAH: Well, Your Honor, it's not an  
8 exercise of discretion under Castro-Rodriguez. We at  
9 the tail end have an inquiry that I think mirrors the  
10 CSA scheme.

11 Remember that this aggravated felony  
12 provision in the INA incorporates by reference the CSA  
13 scheme. What the CSA scheme provides is, as a default  
14 matter, any conviction for possession with intent to  
15 distribute marijuana will be a felony. But the CSA  
16 scheme also provides a narrow mitigating exception for  
17 those who distribute just a small amount socially.

18 What our scheme does is that --

19 CHIEF JUSTICE ROBERTS: Is that -- is the  
20 authority for that Castro-Rodriguez?

21 MR. SHAH: I'm sorry?

22 CHIEF JUSTICE ROBERTS: Is the authority for  
23 that the decision in Castro-Rodriguez?

24 MR. SHAH: To have that secondary  
25 proceeding?

1 CHIEF JUSTICE ROBERTS: Right.

2 MR. SHAH: Well, I think it comes from the  
3 statute, the INA, which incorporates the CSA scheme.  
4 Because many of the State provisions don't offer that  
5 same affirmative mitigating exception that the Federal  
6 scheme does, what Castro Rodriguez does is it looks to  
7 the INA, which incorporates the CSA, and then provides a  
8 similar mechanism in immigration court.

9 But it's not an unprecedented inquiry. The  
10 Board has been doing similar inquiries for at least a  
11 quarter of a century.

12 JUSTICE KAGAN: Well, Mr. Shah, the Board  
13 may have been doing these inquiries, but I just don't  
14 understand the statutory argument, because the way the  
15 statute -- the way your own statutory argument runs is  
16 that if the conviction, the state conviction, was a  
17 conviction for possession with intent to distribute,  
18 then those are the elements of a Federal -- of a Federal  
19 felony. And so the person -- and an aggravated felony.  
20 So you say under the elements approach, this person has  
21 committed an aggravated felony. And the statutory  
22 directive is that when a person has committed an  
23 aggravated felony, he is deportable, and there is no  
24 exercise of discretion that can come into play.

25 And so your whole back-end process, which

1 says, oh, well, maybe not, maybe he's not automatically  
2 deportable, it doesn't come from the statute, and it  
3 seems to run into the statutory language which says an  
4 aggravated felon must be deported, the end.

5 MR. SHAH: Your Honor, I agree, the  
6 Government could have taken the hard-line approach that  
7 it's game over under the categorical inquiry because the  
8 elements --

9 JUSTICE KAGAN: Well, that's what the  
10 statute says, and that's what your own statutory  
11 analysis says.

12 MR. SHAH: Your Honor, I don't think it's  
13 inconsistent with the statutory scheme. In fact, I  
14 think it's consistent.

15 And here's one way to think about it. This  
16 -- this particular aggravated felony is a little bit  
17 complicated because it incorporates by reference in two  
18 different levels the CSA.

19 Congress -- let's assume Congress rewrote  
20 the aggravated felony definition to eliminate the  
21 incorporation by reference. I think what the  
22 equivalent, the functionally identical formulation would  
23 be -- the definition of the aggravated felony is, "any  
24 distribution of a controlled substance, unless the  
25 defendant shows that it involved a small amount of

1 marijuana for no remuneration." That would incorporate  
2 both the presumptive felony provision, any distribution  
3 of controlled substance -- you have the same two  
4 elements -- and then it would add in the proviso that  
5 it's in the CSA mitigating exception. Functionally  
6 identical.

7 Aggravated felony is, "any distribution of a  
8 controlled substance, unless the defendant shows that it  
9 was a small quantity for remuneration."

10 CHIEF JUSTICE ROBERTS: This is --

11 MR. SHAH: What our inquiry does is --

12 CHIEF JUSTICE ROBERTS: Go ahead. I'm  
13 sorry.

14 MR. SHAH: What our inquiry does is allow  
15 the Board to get to that second part of the definition,  
16 the "unless" clause, and that mirrors exactly other  
17 aggravated felony provisions in the INA.

18 JUSTICE KENNEDY: But you've answered  
19 Justice Kagan's question by -- she said, doesn't your  
20 own interpretation of this statute require the opposite  
21 result and -- or the harsh result?

22 And you say, well, suppose Congress wrote a  
23 statute this way. But that wasn't her question. The  
24 question is --

25 MR. SHAH: Your Honor, I'm not positing --

1 JUSTICE KENNEDY: You -- you said that  
2 Congress could write a new statute. Of course Congress  
3 could write a new statute, but what about this one.

4 MR. SHAH: I'm not positing a new statute.  
5 I was simply taking out the incorporation by reference  
6 so we could look at it in a different way. I think it's  
7 functionally identical to the provision at issue here.  
8 And I think it's --

9 JUSTICE KAGAN: No, I'll just read you, Mr.  
10 Shah, this sentence from your brief, and I could read  
11 you a thousand of these in your brief: "Because  
12 Petitioner's Georgia conviction necessarily established  
13 that he knowingly possessed marijuana with the specific  
14 intent to distribute it, that conviction constitutes an  
15 aggravated felony."

16 Well, if that conviction constitutes an  
17 aggravated felony, he has to be deported and there is no  
18 exercise of discretion that this statute allows.

19 MR. SHAH: Well, Your Honor, I -- I would  
20 say that it presumptively creates the aggravated felony,  
21 and it's because of that --

22 JUSTICE KAGAN: Well, now you've just put in  
23 words into your brief.

24 MR. SHAH: Well, well --

25 JUSTICE KAGAN: -- and -- and really, truly

1 you say this 10 or 15 times.

2 MR. SHAH: Well, Your Honor, the heading to  
3 the brief says "presumptively," and so I didn't use that  
4 word every time, but I think the point is that it would  
5 be the -- the aggravated felony has that "unless"  
6 clause. And if you look at other aggravated felony  
7 provisions in the INA, such as the one reproduced on the  
8 top of page 34 of the Government's brief, it defines an  
9 aggravated felony as certain document fraud crimes, and  
10 then it has a clause that says, quote, "unless" --  
11 "unless the alien has affirmatively shown that the alien  
12 committed the offense for the purpose of assisting,  
13 abetting or abating only the alien's spouse, child or  
14 parent to violate a provision of the INA."

15 So you could say ball game over once you  
16 have shown the document fraud crime under the  
17 categorical approach. But the INA specifically has a  
18 provision that says unless the alien can show that he  
19 committed the offense for the purpose of assisting and  
20 abetting --

21 CHIEF JUSTICE ROBERTS: This is -- this is a  
22 new position for the Government. My understanding is  
23 that you -- your clients were on the other side of this  
24 position in Castro-Rodriguez itself; is that not  
25 correct?

1 MR. SHAH: Well, Your Honor, I don't think  
2 that we categorically deny that you could have this sort  
3 of proceeding, and in the op to this case, I know  
4 Petitioner says this is a new position in this case.  
5 Pages 13 through 16 of our op embrace Castro-Rodriguez  
6 as the right way to do it. I think --

7 CHIEF JUSTICE ROBERTS: But that was a  
8 change in the Government's position, wasn't it?

9 MR. SHAH: Your Honor, I can say that the --  
10 the Government did dispute the particular facts in  
11 Castro-Rodriguez. I can't say that they categorically  
12 rejected the availability of that sort of inquiry, and  
13 that sort of inquiry is not new. If you look at the  
14 Grijalva decision, which is discussed on -- in footnote  
15 23 of our brief on page 36, that was a precursor to the  
16 controlled substance ground of removability that is  
17 currently in effect. And so if you look at the language  
18 of that precursor provision, essentially it said any  
19 aliens deportable for a drug offense, unless that drug  
20 offense involves simple possession of marijuana of  
21 30 grams or less.

22 CHIEF JUSTICE ROBERTS: So what does -- in a  
23 case in which the Attorney General can cancel removal,  
24 putting aside this case, what are the sort of things he  
25 looks at in deciding whether or not to cancel removal?

1           MR. SHAH: It's a balance of equities.  
2 After, assuming that the -- the alien has established  
3 the three eligibility criteria set forth, it will be a  
4 balance. It's a favorable exercise of discretion; it's  
5 a balance of the equities.

6           CHIEF JUSTICE ROBERTS: So one of the things  
7 presumably is the amount of drugs involved, whether they  
8 were for intent to distribute for remuneration -- all  
9 the sorts of things that you say he can consider under  
10 the provision that says he does not have the authority  
11 to cancel removal.

12           MR. SHAH: Your Honor, those are the sorts  
13 of factors that might be open to consideration, but what  
14 Congress did is it took away the ability for the  
15 Attorney General to exercise that discretion. That was  
16 the main purpose of this very aggravated felony  
17 provision.

18           Now Justice Sotomayor, if I can go to  
19 your --

20           JUSTICE SOTOMAYOR: Each time you get -- you  
21 say that, you get back into the hole that Justice Kagan  
22 has been asking you to climb out of. If -- if  
23 Congress's intent was to bar discretion, then I'm not  
24 quite sure how you get to your alternative to get out of  
25 your --



1 MR. SHAH: Your Honor --

2 JUSTICE SOTOMAYOR: -- overinclusiveness  
3 argument.

4 MR. SHAH: Your Honor, this will bar  
5 discretion in the vast majority of cases, and here's  
6 why. If I could go back to the data question that you  
7 asked, Justice Sotomayor, we do have Federal data, and I  
8 interpret the data a little bit differently than my  
9 colleague.

10 What data we have is that over the last  
11 decade there have been over 60,000 convictions under --  
12 under section 841(a) for crimes involving something more  
13 than possession of marijuana, 60,000. There have been  
14 in those 10 years exactly 20 that have been sentenced  
15 under section 841(b)(4). My colleague combines 844(a),  
16 which is a possession offense, but if you isolate out of  
17 the data only those who qualify for the mitigating  
18 exception, those who are charged with distribution of  
19 marijuana but only have a small amount of remuneration,  
20 you have 20 out of over 60,000.

21 I think this is a fairly atypical case. To  
22 the extent this Petitioner --

23 JUSTICE GINSBURG: Do you agree with Mr.  
24 Goldstein when he says in reality it's not an  
25 affirmative defense, that the defendant never has to

1 prove the amount?

2 MR. SHAH: I -- I don't agree with that,  
3 because if it were in fact the case that the Government  
4 had to disprove the -- the small amount and, more  
5 importantly, the remuneration element, that would be a  
6 very different statute. Every court of appeals and lots  
7 of the Federal --

8 JUSTICE SOTOMAYOR: I'm sorry, counselor.  
9 I -- the Government can do it very easily. If you have  
10 less than an ounce of marijuana and nothing else from  
11 which you can infer an intent to sell or distribute, and  
12 you have no proof that this individual's engaged in drug  
13 trafficking, what more does a defendant have to show?

14 MR. SHAH: Oh, I --

15 JUSTICE SOTOMAYOR: How does it raise his  
16 burden of proof?

17 MR. SHAH: I'm not saying it -- the  
18 defendant has to show more. I believe Justice -- I  
19 thought Justice Ginsburg's question is what would the  
20 Government have to show to disprove it, and I think --

21 JUSTICE SOTOMAYOR: And I guess my point is  
22 that one, which is don't the facts that the Government  
23 have either show it or not show it in virtually every  
24 instance?

25 MR. SHAH: I think it's a very different

1 question. If you put the burden on the Government to  
2 show that in fact no remuneration was involved, the  
3 Government would have to meet its burden in a criminal  
4 case to show beyond a reasonable doubt that there was no  
5 remuneration at all. That is going to change the result  
6 in a large number of cases where there is a relative --  
7 it's going to be the universe of cases where there is a  
8 relatively small amount of drugs involved.

9 JUSTICE SOTOMAYOR: It would be less than an  
10 ounce.

11 MR. SHAH: Right. But in -- and in that  
12 universe of cases, in fact the presumption is probably  
13 going to be that it's not for a distribution or  
14 remuneration.

15 JUSTICE SOTOMAYOR: Can I go back to your  
16 substantive argument?

17 MR. SHAH: Yes.

18 JUSTICE SOTOMAYOR: All right. This is a --  
19 you are right; it's an unusually crafted statute, and  
20 really what the issue is, generally what you have with  
21 lesser included offenses is you have a base offense and  
22 then an enhancement that goes up. You commit the base  
23 offense --

24 MR. SHAH: Yes.

25 JUSTICE SOTOMAYOR: -- of burglary, but if

1 you did it with an explosive or you did it with a  
2 dangerous weapon, it goes up.

3 MR. SHAH: That's exactly right.

4 JUSTICE SOTOMAYOR: And applying the  
5 categorical approach is relatively easy there because  
6 either the State offense includes the addition or it  
7 doesn't.

8 This is sort of in reverse. You've got a  
9 statute with the same elements that can be either a  
10 misdemeanor or a felony, and you're saying it can be  
11 either under the CSA, but we have to assume it's the  
12 greater. Because --

13 MR. SHAH: Your Honor --

14 JUSTICE SOTOMAYOR: -- of Apprendi, because  
15 of -- of --

16 MR. SHAH: I -- I think it's because of the  
17 proper interpretation of the statute. Apprendi might  
18 have influenced that interpretation of the statute, but  
19 every court of appeals that has interpreted this statute  
20 has said that the -- the default punishment is the  
21 punishable up to 5 years.

22 JUSTICE SOTOMAYOR: But that's under  
23 Apprendi.

24 MR. SHAH: Well, both before and after  
25 Apprendi, Your Honor, this statute was interpreted the

1 same way. Apprendi didn't change anything because there  
2 were no sentencing factors or elements --

3 JUSTICE SOTOMAYOR: That's a --

4 MR. SHAH: To get to the 5-year --

5 JUSTICE SOTOMAYOR: Didn't we -- didn't we  
6 talk about the categorical approach in footnote 3 of our  
7 case in Carachuri?

8 MR. SHAH: Uh-huh.

9 JUSTICE SOTOMAYOR: Where we said that in  
10 talking about the generic Federal offense, whether it's  
11 a felony or not, that we can't look at just strictly the  
12 elements of the crime, but we have to also look at the  
13 sentencing factors, because when we're talking about  
14 what constitutes a misdemeanor or a felony under Federal  
15 law we have to look at both.

16 MR. SHAH: Well, Your Honor, what Carachuri  
17 involved was something very different. It involved a  
18 recidivism factor, an aggravating factor. When you are  
19 talking about an aggravating factor Apprendi  
20 jurisprudence has treated those somewhat equivalent to  
21 an element, because it raises the statutory maximum.  
22 And so when you are trying to decide whether something  
23 is punishable as a felony, it's natural to look at the  
24 aggravating factor.

25 The other thing I would say about Carachuri

1 is that it's easily distinguishable on the grounds that  
2 Justice Ginsburg raised. It -- the Government's  
3 argument in Carachuri was much more difficult. The  
4 Government was trying to rely on a recidivism factor  
5 that was not part of the predicate conviction, and it  
6 was trying to rely on that factor to elevate what was  
7 otherwise a misdemeanor under both State and Federal law  
8 to a felony.

9 Here, the predicate conviction itself has  
10 all the elements that are required for a Federal felony  
11 under the CSA, namely possession of marijuana and a  
12 specific intent to distribute it.

13 JUSTICE SOTOMAYOR: But the same elements  
14 would go to the misdemeanor. Really the issue for me is  
15 it could be one or both and when do we tell the  
16 immigration judge that he can, should, or should not --

17 MR. SHAH: I think there are --

18 JUSTICE SOTOMAYOR: -- choose between the  
19 two?

20 MR. SHAH: I think there are -- I think  
21 there are two ways, Your Honor, that -- two different  
22 lines of reasoning that show that the Government's  
23 approach to the categorical part of the inquiry is -- is  
24 the right approach, and not Petitioner's approach. The  
25 first is --

1 JUSTICE SOTOMAYOR: However you do it, the  
2 misdemeanor still has the same three elements.

3 MR. SHAH: Well, here's -- here's how --

4 JUSTICE SOTOMAYOR: So how do we choose  
5 between it being a misdemeanor or a felony?

6 MR. SHAH: Right. I think here are the two  
7 ways you get there. First is by looking at how this  
8 Court has consistently formulated the categorical  
9 inquiry. Starting with Taylor, pre-Apprendi case,  
10 compare the elements of the predicate offense to the  
11 those of the generic offense. Fast forward past  
12 Apprendi through all of the more recent cases, Lopez and  
13 not -- still the same inquiry, focusing on the elements  
14 of the predicate and the elements of the generic.

15 If that is not enough for you,  
16 Justice Sotomayor, if there is still some uncertainty as  
17 to when you have mitigating factors, like in this case,  
18 and the question is, well, does the predicate conviction  
19 have to affirmatively negate those narrow mitigating  
20 criteria, then this Court can look, if it wants to go to  
21 first principles, look at this Court's decision in  
22 Nijhawan.

23 There, it had a different aggravating  
24 felony, certain fraud and deceit offenses which resulted  
25 in a \$10,000 loss to the victim. What the Court said,

1 look, fraud and deceit, those are clearly elements, we  
2 are going to apply the categorical approach to figure  
3 out whether those elements are satisfied. But the  
4 \$10,000 loss factor, we're not sure. We're not sure  
5 whether the predicate offense has to affirmatively  
6 establish it or not.

7           And so what the Court did is it did a survey  
8 of the 50 states. It looked at the 50 states. And it  
9 turns out that in a vast majority of those states, the  
10 predicate conviction will never establish that \$10,000  
11 loss factor, and so you're going to have a vastly  
12 underinclusive aggravated felony, and that's something  
13 that Congress -- that Congress could not have intended.  
14 The Court said Congress would not have intended its  
15 aggravated felony provision to apply in such a limited  
16 and haphazard manner.

17           I submit that's exactly what you have here  
18 on pages 26 to 30 of our brief. And Petitioner does not  
19 take issue with a single one of the statutes that we  
20 cite, and we go through all 50 of them. We show that in  
21 a clear majority of the states, the predicate conviction  
22 will not establish that there is remuneration or more  
23 than a small amount.

24           Congress cannot --

25           JUSTICE KAGAN: Mr. Shah, I think the



1 problem with your main argument is that it leads you to  
2 a result that you don't want to accept, because your  
3 main argument is all we've done in our past cases, and I  
4 can argue with this, but your argument is all we've done  
5 is compare the elements.

6 But if all we do is compare the elements,  
7 then we don't get to your discretionary scheme in which  
8 we also admit evidence of the case-specific nature of  
9 the offense.

10 I mean, so your arguments all go towards a  
11 very purist solution. And then you say, oh, no, that's  
12 a crazy solution. It's a crazy solution because we  
13 would wind up saying that misdemeanants like this  
14 person, like people who are actually convicted under  
15 (b)(4) who are clearly misdemeanants, would wind up as  
16 aggravated felons and -- and must be deported.

17 MR. SHAH: Well, first, Your Honor, I am  
18 glad that we have an agreement on the first part of the  
19 categorical inquiry, because I think that is the main  
20 part of the inquiry that -- that would establish --

21 JUSTICE KAGAN: I don't think we really have  
22 an agreement --

23 MR. SHAH: Okay.

24 JUSTICE KAGAN: -- because it seems to me  
25 that Carachuri actually says we don't just look to

1 elements. But if we were just to look to elements in  
2 the way you're arguing for, we wouldn't get the result  
3 that you're arguing for.

4 MR. SHAH: Again, Your Honor, I think you  
5 have to look at this particular aggravated felony, which  
6 I think is structured similar to other aggravated  
7 felonies in the INA.

8 If you look at the aggravated felony in the  
9 INA that's on page -- top of page 34 of our brief, and  
10 that is the one about document fraud crimes, it says the  
11 alien -- then, if the alien then shows that that  
12 document fraud crime was perpetrated in order to help a  
13 family member, then no more aggravated felony.

14 How does the alien make that showing? He  
15 comes into immigration court -- after it's already been  
16 established that you have the predicate document fraud  
17 felony, he comes into immigration court. He has to  
18 bring forth evidence on his own that shows that it  
19 satisfied this familial exception to that document fraud  
20 aggravated felony. I think the --

21 CHIEF JUSTICE ROBERTS: And the whole  
22 point -- the whole point is that there is no similar  
23 provision in the statute at issue in this case, right?

24 MR. SHAH: I think the point is that there  
25 is a similar provision. In the -- the INA here

1 incorporates the CSA to define the aggravated felony.  
2 The CSA says it's a felony if you have possession plus  
3 intent to distribute, unless the defendant shows -- and  
4 this is how it has been interpreted by every court of  
5 appeals that has interpreted the CSA -- unless the  
6 defendant shows it was only a small amount for no  
7 remuneration.

8 That is an identical formulation to some of  
9 the other aggravated felonies in the provision, and how  
10 those other aggravated felony provisions have been  
11 interpreted is to allow the alien to come into  
12 immigration court to show the exception.

13 We are not aware of a single court decision  
14 that has ever interpreted any similar provision in any  
15 of the other aggravated felony provision to require the  
16 predicate conviction to affirmatively negate it.

17 And that's exactly what Petitioner's main  
18 submission is, that this predicate conviction has to  
19 affirmatively negate the possibility of a narrow  
20 mitigating exception. That is --

21 JUSTICE KAGAN: I don't think that that is  
22 quite right, Mr. Shah, because if you read this statute,  
23 what it most looks like is that Congress is simply  
24 classifying two different kinds of conduct.

25 Congress has the -- the social sharing

1 conduct, and that's in one section. And the everything  
2 else, the more dangerous conduct, is in another section.

3 And so it's not something where it's like,  
4 oh, you're trying to get them to negate a specific -- a  
5 point. Congress has created two separate sections,  
6 two -- and one is a felony, and one is a misdemeanor.  
7 And that's the real way to understand this statute.

8 And then, the categorical approach suggests,  
9 well, in that case, we accept the underinclusion rather  
10 than the overinclusion.

11 MR. SHAH: Well, Your Honor, I disagree with  
12 that characterization of that statute. Every court of  
13 appeals that has considered this statute has rejected  
14 the argument that we have two separate offenses and that  
15 the -- that the government, in order to get to the  
16 higher offense, the default felony provision, that the  
17 government would have to treat as elements the  
18 mitigating criteria of remuneration and small amount.  
19 Every court of appeals has rejected that.

20 If this statute were drawn as you suggest,  
21 and it were elements of a crime, that is, you had two  
22 separate offenses, one is possession with intent to  
23 distribute a small amount for no remuneration, or it  
24 could just say possession with intent to distribute  
25 marijuana, if that was one distinct offense that was a

1 misdemeanor, and then Congress created a second offense  
2 that says in cases where there is more than a small  
3 amount and which there is remuneration, then you get a  
4 five-year maximum instead of a one-year maximum, that is  
5 effectively making as an element the government to  
6 disprove both the possibility of no remuneration and  
7 more than a small amount.

8           If that was the statutory scheme that were  
9 at issue, I would agree with you, Petitioner would  
10 prevail under the categorical approach. That's not the  
11 cat -- that's not the statutory scheme here.

12           They do not disagree with that. They agree  
13 that every court of appeals that has interpreted this  
14 has interpreted it as one offense, and that those  
15 mitigating criteria are just that, they are mitigating  
16 exceptions and not offense elements.

17           I think the other point I would make, Your  
18 Honor, is that --

19           JUSTICE KAGAN: I guess I don't understand,  
20 Mr. Shah. That seems just a question of labeling to me.  
21 I mean, why should we -- why should we accept that  
22 labeling rather than, look, what Congress did here was  
23 to say that certain kinds of offenses are felonies  
24 deserving of grave punishment, and other kinds of  
25 offenses are misdemeanors deserving of less than a year

1 in prison, and we see those categories of conduct  
2 differently.

3 And if you are saying that if Congress had  
4 said two separate offenses, then the categorical  
5 approach means that Mr. Goldstein's client wins, I guess  
6 I just don't get what in this statute suggests something  
7 different for that.

8 MR. SHAH: Two things, Your Honor. One is I  
9 don't think it's a matter of labeling because Congress  
10 knows that these labels actually have big consequences.  
11 If you made those mitigating criteria elements, that  
12 would be a very different statute which the government  
13 in every case would have to show beyond a reasonable  
14 doubt that it's more -- more than a small quantity.  
15 That may not be difficult; but, in cases where there is  
16 a small quantity, it may, in fact, be difficult to  
17 disprove --

18 JUSTICE KAGAN: Counsel --

19 JUSTICE SCALIA: Counsel, I thought that  
20 when Congress enacted this provision there was not the  
21 distinction between elements and sentencing factors that  
22 we now have, that the statute was enacted, in other  
23 words, before Apprendi.

24 MR. SHAH: Your Honor, this statute was  
25 enacted before Apprendi, but Apprendi doesn't change the

1 interpretation of this statute. This statute -- in the  
2 relevant criteria.

3 This statute was interpreted -- interpreted  
4 both the same before and after Apprendi with respect to  
5 the default provision because the default provision  
6 doesn't require any factors or elements at all to get to  
7 the felony provision.

8 JUSTICE SCALIA: That may be, but it  
9 certainly goes to your argument that Congress had in  
10 mind some distinction between elements and sentencing  
11 factors.

12 MR. SHAH: Well, I think what Congress had  
13 in mind is that those mitigating criteria would not be  
14 treated as elements.

15 And, Justice Kagan, to get back to your  
16 question, how do we know. Well, we can look at the  
17 inquiry that the Court did in Nijhawan. It would not  
18 be -- it would not be consistent with congressional  
19 intent to assume that Congress intended that this  
20 aggravated felony provision would not have any effect in  
21 the clear majority of states that do not make either  
22 remuneration or more than a small quantity an element of  
23 the offense.

24 That is what Nijhawan was about. It was  
25 trying to figure out, did Congress intend this

1 particular piece of the aggravated felony description to  
2 be subject to the categorical approach or not; that is,  
3 did it require the predicate conviction to establish or  
4 negate it? And the right way to look at that is to look  
5 at the state of the State laws. And here we know that  
6 in a clear majority of States, they do not require  
7 remuneration, they do not require more than a small  
8 amount, you will never get an aggravated felony  
9 conviction out of a majority of States. Congress could  
10 not have intended that result. That's what Nijhawan  
11 stands for.

12 JUSTICE KENNEDY: If you do not -- if you do  
13 not prevail in this case, can you simply solve this  
14 problem in the discretionary removal proceedings?

15 MR. SHAH: Your Honor, I think that's --

16 JUSTICE KENNEDY: You just say we're going  
17 to -- we're going to order you removed unless you bring  
18 in evidence that this was a minor amount. Period.

19 MR. SHAH: Your Honor, I -- I think that  
20 that -- I think that's an open question. That's one  
21 that has not come up yet. I think Congress specifically  
22 --

23 JUSTICE KENNEDY: Well, don't you think  
24 it's -- it's under the law, and under administrative  
25 practice that it's an option available to you?



1 MR. SHAH: It may -- it may be -- be an  
2 option open to the Attorney General to do that. The  
3 Attorney General would have to issue an order to that  
4 ground. I imagine it would be challenged and we'd have  
5 to litigate it. But what we do know is that Congress  
6 didn't want those sort of discretionary determinations  
7 made. Congress knew that all of these areas --

8 JUSTICE SOTOMAYOR: Counsel, under the --  
9 under the -- do you have the same answer as Mr.  
10 Goldstein, that the modified categorical approach  
11 wouldn't permit the immigration judge to look at the  
12 plea allocution to determine the amount?

13 MR. SHAH: I think the modified categorical  
14 approach would allow -- would allow --

15 JUSTICE SOTOMAYOR: So that in -- in many of  
16 these cases that we're talking about, it is possible  
17 that the plea allocution itself would set out the  
18 amounts that the alien sold or show that he sold  
19 something --

20 MR. SHAH: Yes, Your Honor, I think --

21 JUSTICE SOTOMAYOR: -- and that would take  
22 care of this issue of how many people are escaping  
23 automatic removal.

24 MR. SHAH: I think if the plea agreement or  
25 plea colloquy set forth the amount and it was more than

1 a small amount, I think the modified -- our position  
2 would be that the modified categorical approach would  
3 allow you to reach that.

4 Petitioner's and his amici's argument are  
5 essentially that the plea agreements aren't going to say  
6 that in a large majority of these cases for the simple  
7 reason that a -- that a vast majority of the States  
8 don't make more than a small quantity an element of the  
9 crime and so it's going to be irrelevant. But that  
10 simply shows --

11 JUSTICE SOTOMAYOR: But the vast majority --  
12 the vast majority in my experience do -- do say whether  
13 the crime was for sale or distribution.

14 MR. SHAH: And if that's the case, then the  
15 Government would agree that if we were to lose this  
16 case, we could then look at -- look at that evidence  
17 to -- to show -- to disprove more than a small amount,  
18 something that's not an element in any of the State  
19 crimes.

20 JUSTICE GINSBURG: Are there any other  
21 consequences? We've been talking only about  
22 dispensation from removal. But are there any other  
23 consequences that matter?

24 MR. SHAH: Yes, Your Honor, there are other  
25 consequences that matter. For example, a person who's

1 not -- a person is not only removable and not only  
2 deprived of cancellation relief. There -- those who are  
3 aggravated felons are just essentially deprived of all  
4 forms of discretionary relief except for Convention  
5 Against Torture relief and withholding of removal.

6           It also has implications beyond the  
7 immigration context. At the same time that Congress  
8 enacted this aggravated felony provision, it made it a  
9 sentencing enhancement provision in criminal  
10 prosecutions for illegal reentry. And so in any illegal  
11 reentry prosecution, if the defendant is also -- has a  
12 prior conviction for marijuana distribution, they would  
13 be subject to a significant sentencing enhancement under  
14 both the guidelines and section 1326, the Illegal  
15 Reentry Statute.

16           If Petitioner's rule were to prevail in a  
17 significant number of those cases in any State in which  
18 it did not have those relevant elements, that sentencing  
19 enhancement would no longer have operative effect. So,  
20 Your Honor, it's not simply the case, as Petitioner  
21 would like to say, that the only thing here is -- is a  
22 difference between removability and cancellation of  
23 removal relief that the Attorney General can fix on his  
24 own. There are other ancillary consequences, and I  
25 think the criminal -- the consequence of the criminal

1 prosecution is a significant one.

2 CHIEF JUSTICE ROBERTS: Does that -- does  
3 the Castro-Rodriguez proceeding take care of those  
4 additional consequences?

5 MR. SHAH: If I may respond, Your Honor.

6 CHIEF JUSTICE ROBERTS: Sure. Oh, yes.

7 MR. SHAH: Thank you.

8 I don't -- I think what -- we haven't had  
9 any criminal cases where the -- where an alien has come  
10 in and tried to make the argument. I imagine if  
11 Petitioner prevails, it will be made in every single one  
12 of those 1326 reentry prosecutions. I think if the  
13 Court were to accept the Government's submission both on  
14 the threshold categorical inquiry and on the tail-end  
15 fact-specific inquiry, I think a defendant would  
16 probably be able to have the opportunity to try to make  
17 that showing in the Federal sentencing proceeding as  
18 well.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Goldstein, you have three minutes  
21 remaining.

22 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

23 ON BEHALF OF THE PETITIONER

24 MR. GOLDSTEIN: Mr. Chief Justice, I told  
25 you I was going to acknowledge the strengths of the

1 other side's case, and I want to just recognize that you  
2 can conceivably read the statute their way. But the  
3 question is if you actually adopt their statutory  
4 construction argument and you say we're going to look at  
5 the elements and it's an aggravated felony, we're  
6 comparing two different ways of reading it. And they  
7 admit that their way of reading the statute comes up  
8 with an answer that Congress couldn't possibly have  
9 intended by treating all these misdemeanants as  
10 aggravated felons.

11 Now, their solution is to add a whole  
12 'nother proceeding that isn't in the statute. Another  
13 solution is just to recognize their reading is wrong.  
14 If it produces this ridiculous result that Congress  
15 couldn't have intended and our reading is perfectly  
16 sensible and not only do you have the solution of the  
17 removal proceedings, but also Justice Kennedy's  
18 suggestion of the Attorney General's ability to issue an  
19 order; Justice Sotomayor's solution of being able to  
20 look at the plea allocution, questions that aren't  
21 presented here, but lots of ways of addressing any  
22 adverse consequences of our rule. What in statutory  
23 construction allows us just to add this procedure  
24 that --

25 JUSTICE BREYER: But it's the word

1 "punishable," I think.

2 MR. SHAH: Well, "punishable" is a good  
3 word --

4 JUSTICE BREYER: So you're thinking under  
5 Georgia law this is punishable as a felony only if it  
6 wasn't a small amount used for personal use, you see,  
7 and therefore, they go into the hearing. It's not  
8 punishable as an 841 felony, unless those two things are  
9 absent and therefore they have the hearing to find out.  
10 And the word "punishable" doesn't appear in the  
11 statutes, the other ones that we've construed. That's  
12 what I thought they were doing.

13 MR. GOLDSTEIN: Okay. But I don't think  
14 that's actually what they're doing because Mr. Shah did  
15 not deny Justice Kagan's questions about yeah, it would  
16 produce this ridiculous result and so we're going to add  
17 this other proceeding. When they say -- what they do  
18 with punishable is they say look at only the elements of  
19 the Federal offense. And that's how they say that any  
20 Georgia conviction, even though, Justice Ginsburg, lots  
21 of these convictions will just be equivalents to Federal  
22 misdemeanors, because they are the equivalent of --  
23 because they involve possession with intent to  
24 distribute, those are the only elements of the offense,  
25 then they're all punishable as felonies even if they

1 would be a misdemeanor.

2           So I don't think punishable helps them, and  
3 they don't seem to argue on the basis of punishable. So  
4 my base point to you is that why, in choosing between  
5 these two readings, we have strengths, they have  
6 strengths. Their argument starts from the proposition  
7 that theirs produces a result that Congress couldn't  
8 have intended.

9           And, Mr. Chief Justice, they did start out  
10 with the hardcore position. I can give you the example.  
11 It's our case. Remember, even though this is 1.3 grams,  
12 even though he was not convicted of selling, they  
13 ordered him mandatorily deportable without an inquiry  
14 into the underlying facts. They recognize that can't be  
15 right. And so they are trying to tack something on to  
16 the statute that doesn't appear in the statute.

17           The last point that I want to address is  
18 actually a very small one, and that's about  
19 Justice Thomas's dissent in the Lopez case on whether  
20 you should look to the State definition of whether this  
21 is a felony or instead, the Federal one, because the  
22 Government cites it in a footnote in their brief. And  
23 we would only say that the Government is not relying on  
24 the Lopez dissent. It invokes Lopez repeatedly in the  
25 Federal courts. And so, this is a situation in which

1 the Court's decision in Lopez should take hold as a  
2 matter of statutory -- stare decisis, and what matters  
3 here is the Federal treatment of it.

4           When you don't know if the Georgia  
5 conviction is a felony or a misdemeanor under Federal  
6 law, you don't know which one it is, what the  
7 categorical rule says is that the State conviction  
8 doesn't necessarily establish it's a Federal offense,  
9 the Federal felony here, and therefore, you don't treat  
10 it that way.

11           The arguments that my friend ended with,  
12 ended with about hey, this is going to be applied in  
13 Federal sentencing and lots of other contexts makes it  
14 worse, not better. How in the world are we going to  
15 have these others Castro Rodriguez proceedings, these  
16 other intermediate proceedings about determining the  
17 facts of the offense in Federal sentencing? It gets  
18 vastly more complicated.

19           Our rule addresses the core concern of  
20 Congress. It gets the right people deported. Their  
21 rule, because it's overinclusive, there will be  
22 noncitizens who can't prove their offense was a  
23 misdemeanor and they shouldn't be removed.

24           Thank you.

25           CHIEF JUSTICE ROBERTS: Thank you, counsel.



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Counsel, the case is submitted.

(Whereupon, at 11:03 a.m., the case in the  
above-entitled matter was submitted.)

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