No. 05-830

In the Supreme Court of the United States

LAURA ESTELA SALAZAR-REGINO, ET AL.,
PETITIONERS

v.

MARC MOORE, REGIONAL DIRECTOR,
DEPARTMENT OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS

PAUL D. CLEMENT
Solicitor General
Counsel of Record

PETER D. KEISLER
Assistant Attorney General

DONALD E. KEENER
JOHN ANDRE
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

The Immigration and Nationality Act attaches a variety of immigration consequences to an alien's commission of an "aggravated felony," 8 U.S.C. 1101(a)(43). The immigration law includes within its definition of "aggravated felony" "any felony punishable under the Controlled Substances Act," 18 U.S.C. 924(c)(2) (as incorporated into 8 U.S.C. 1101(a)(43)(B)). That term applies to offense conduct "whether in violation of Federal or State law." 8 U.S.C. 1101(a) (final paragraph). The question presented by petitioners is:

Whether a conviction for a controlled substance offense that is a felony under state law, but that is generally punishable under the Controlled Substances Act as a misdemeanor, constitutes an "aggravated felony."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases–Continued: Page

Statutes and regulation:

Statutes and regulation—Continued: Page

In the Supreme Court of the United States

No. 05-830

LAURA ESTELA SALAZAR-REGINO, ET AL.,
PETITIONERS

v.

MARC MOORE, REGIONAL DIRECTOR,
DEPARTMENT OF HOMELAND SECURITY, ET AL.

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

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-27) is reported at 415 F.3d 436. The opinion and order of the district court (Pet. App. 28-58) is unreported. The decision of the Board of Immigration Appeals in the case of petitioner Salazar-Regino (Pet. App. 108-157) is reported at 23 I. & N. Dec. 223. The decision of the Board of Immigration Appeals in the case of petitioner Rangel-Rivera (Pet. App. 162-164) is unreported. The decisions of the immigration judges in both petitioners' cases (Pet. App. 158-160, 165-172) are unreported.

JURISDICTION

The court of appeals entered its judgment on June 30, 2005. A petition for rehearing was denied on September 27, 2005 (Pet. App. 174-176). The petition for a writ of certiorari was filed on December 22, 2005. The

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

STATEMENT

1. Under the Immigration and Nationality Act (INA), an alien who commits an "aggravated felony," 8 U.S.C. 1101(a)(43), may be ordered removed from the United States, 8 U.S.C. 1227(a)(2)(A)(iii). The commission of an aggravated felony also limits the potential forms of relief from removal that are available to the alien, including, as relevant here, rendering the alien ineligible to apply for cancellation of removal, see 8 U.S.C. 1229b(a)(3) and (b)(1)(C).[1]

The INA defines an "aggravated felony" by reference to a lengthy list of criminal offenses, one of which is "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). The term "aggravated felony" applies to such offenses "whether in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (final paragraph).[2]

Section 924(c) of Title 18, in turn, defines "drug trafficking crime" as "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 the Maritime Drug Law Enforcement

[1] The Attorney General may, in his discretion, cancel the removal of an alien who (i) has been a lawfully admitted permanent resident for not less than five years, (ii) has resided in the United States after having been admitted in any status for a continuous period of seven years prior to commencement of the removal proceedings, and (iii) has not been convicted of any aggravated felony. 8 U.S.C. 1229(a)(1)-(3).

[2] Under the INA, a single offense of possessing 30 grams (approximately one ounce) or less of marijuana does not provide a basis for removal. 8 U.S.C. 1227(a)(2)(B)(i).

Act (46 U.S.C. App. 1901 et seq.)." Title 18 defines a "felony" as an offense for which "the maximum term of imprisonment authorized" exceeds one year. 18 U.S.C. 3559. The Controlled Substances Act defines "felony" generally as "any Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. 802(13). The Controlled Substances Act further defines a "felony drug offense" as "an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances." Anabolic Steroid Control Act of 2004, Pub. L. No. 108-358, § 2, 118 Stat. 1663 (to be codified at 21 U.S.C. 802(44)); see generally 21 U.S.C. 802(44).

2. a. Petitioner Salazar-Regino is a native and citizen of Mexico who entered the United States on a visitor's visa in 1977 and became a lawful permanent resident in 1981. Pet. App. 109. In 1997, Salazar-Regino pleaded guilty in Texas state court to the intentional and knowing possession of more than 5, but less than 50, pounds of marijuana. *Ibid.*; see Tex. Health & Safety Code Ann. § 481.121(a)(4) (West 2005). Under Texas law, that offense is a felony punishable by a minimum sentence of two years, but no more than ten years, of imprisonment. *Id.* §§ 12.34(a), 481.121(a)(4). Salazar-Regino received a deferred adjudication of guilt, pursuant to Tex. Code Crim. P. Ann. art. 42.12 (West 2005), and was placed on probation for 10 years. Pet. App. 109.

The Immigration and Naturalization Service subsequently commenced removal proceedings against Salazar-Regino, charging her with being removable as an alien convicted of both a controlled substance offense, 8 U.S.C. 1227(a)(2)(B)(i), and an "aggravated felony,"

8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. 109.[3] The immigration judge terminated the removal proceedings against Salazar-Regino on the ground that her deferred adjudication of guilt was not a "conviction" within the meaning of the INA's removal provisions. *Id.* at 159-160. The immigration judge also concluded that Salazar-Regino's felony drug possession offense did not constitute an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43)(B). Pet. App. 160.

b. The Board of Immigration Appeals (Board) reversed. Pet. App. 108-157. The Board first held that Salazar-Regino's deferred adjudication constituted a "conviction" for purposes of the removal provisions because, prior to Salazar-Regino's guilty plea, Congress had amended the INA to make clear that "conviction" includes a "plea of guilty" or "finding of guilt" when combined with some form of "restraint on the alien's liberty." *Id.* at 114-120 (citing 8 U.S.C. 1101(a)(48)).

With respect to whether Salazar-Regino's offense constituted an "aggravated felony," the Board held (Pet. App. 127) that a state felony drug possession offense constitutes an aggravated felony within the meaning of 8 U.S.C. 1101(a)(43)(B), applying the Fifth Circuit's decisions in *United States* v. *Hernandez-Avalos*, 251 F.3d 505, cert. denied, 534 U.S. 935 (2001), and *United States* v. *Hinojosa-Lopez*, 130 F.3d 691 (1997).[4]

---

[3] The Immigration and Naturalization Service's immigration-enforcement functions have since been transferred to United States Immigration and Customs Enforcement in the Department of Homeland Security. See 6 U.S.C. 251 (Supp. II 2002).

[4] Five Board members dissented from the Board's holding that Salazar-Regino's deferred adjudication is a "conviction." Pet. App. 131-157. No Board member dissented from the portion of the Board's decision holding that the offense was an "aggravated felony."

3. a. Petitioner Rangel-Rivera is a native and citizen of Mexico who entered the United States in 1985 and became a lawful permanent resident. Pet. App. 3, 165. In 1999, Rangel-Rivera pleaded guilty in Texas state court to the intentional and knowing possession of more than 50, but less than 2000, pounds of marijuana. Pet. App. 6; see Tex. Health & Safety Code Ann. § 481.121(a)(5) (West 2005). Under Texas law, that offense is a felony punishable by a minimum sentence of two years, but no more than twenty years, of imprisonment. *Id.* §§ 12.33(a), 481.121(a)(5). Rangel-Rivera received a deferred adjudication of guilt, pursuant to Tex. Code Crim. P. Ann. art. 42.12 (2005), was ordered to serve 55 days in the county jail, and was placed on probation for six years. Cert. Admin. R. 203.

The Immigration and Naturalization Service subsequently commenced removal proceedings against Rangel-Rivera on the ground that she was an alien who had been convicted of a controlled substances offense, under 8 U.S.C. 1227(a)(2)(B)(i). Rangel-Rivera applied for the discretionary relief of cancellation of removal, pursuant to 8 U.S.C. 1229b. Pet. App. 6.

The immigration judge granted Rangel-Rivera cancellation of removal. Pet. App. 165-172. The immigration judge first held that Rangel-Rivera's conviction for possession of a controlled substance was not an aggravated felony because it would have been only a misdemeanor offense under federal law. *Id.* at 167.

The immigration judge then found that Rangel-Rivera had knowingly engaged in "trafficking in a very large amount of marijuana" and had done so "for financial gain." Pet. App. 168. The immigration judge further found that Rangel-Rivera had taken her young children with her in the vehicle in which she was transport-

ing marijuana from Texas to Alabama "because she believed that it would be less likely for her to be arrested if she were with her children at the time," even though she "understood that she was engaging in conduct that could lead to danger." *Id.* at 168-169. The immigration judge nevertheless granted Rangel-Rivera the discretionary relief of cancellation of removal, noting her family ties to the United States. *Id.* at 169-171.

b. The Board reversed. Pet. App. 162-164. The Board concluded that, under the Fifth Circuit's decision in *Hernandez-Avalos*, *supra*, Rangel-Rivera's deferred adjudication was a "conviction" for immigration purposes, and, under recent Board decisions, her crime of felony drug possession was an aggravated felony. *Id.* at 163.

4. Rather than seek review of their orders of removal in the court of appeals, petitioners filed petitions for writs of habeas corpus in federal district court, and the cases were consolidated. Pet. App. 30. The district court then denied the habeas petitions. *Id.* at 28-58. The court first rejected the government's argument that the court lacked jurisdiction because Congress provided for the review of final orders of removal in the regional courts of appeals and petitioners had failed to exhaust that avenue of relief. The court found no sufficiently clear congressional direction to foreclose habeas review of statutory and constitutional challenges to a final order of removal. *Id.* at 42-43 (citing *INS* v. *St. Cyr*, 533 U.S. 289 (2001)).

On the merits, the court rejected petitioners' argument that their deferred adjudications did not constitute "convictions" for purposes of the INA's removal and discretionary relief provisions, finding the statutory text, 8 U.S.C. 1101(a)(48)(A), to be controlling. Pet.

App. 56. The district court further ruled that petitioners' state-law felony convictions were "aggravated felon[ies]" within the meaning of 8 U.S.C. 1101(a)(43)(B), based on the Fifth Circuit's decision in *Hernandez-Avalos*, *supra*.

5. The court of appeals affirmed. Pet. App. 1-27. The court first held (*id.* 8-15) that petitioner Salazar-Regino should have sought review in the court of appeals of the question whether her deferred adjudication for drug possession was a "conviction" for an "aggravated felony" within the meaning of the INA.[5] The court accordingly concluded that petitioner had failed to exhaust her administrative remedies before filing her petition for a writ of habeas corpus, and thus that the district court lacked jurisdiction to adjudicate her claims, *id.* at 12-14, although the court acknowledged a conflict in the circuits on that question, *id.* at 11-12.

The court of appeals nevertheless declined to dismiss the case. Instead, the court transferred the unexhausted claims to itself under 28 U.S.C. 1631, while retaining appellate jurisdiction over what it considered to be petitioner's properly raised constitutional challenge to the denial of discretionary relief and a claim under international law. Pet. App. 12-15.[6]

---

[5] The government did not challenge the court's jurisdiction over petitioner Rangel-Rivera's claim because she had conceded removability. See Pet. App. 8 n.7.

[6] At the time petitioners' habeas cases were filed, the courts of appeals were jurisdictionally barred from entertaining a petition for review when a final order of removal was predicated on an alien's conviction of an aggravated felony or a firearms offense. See 8 U.S.C. 1252(a)(2)(C) (2000). On May 11, 2005, while this case was pending in the court of appeals, Congress enacted the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231. Section 106(a) of that Act amended

Turning to the merits of petitioners' claims, the court of appeals held that a deferred adjudication is a "conviction" for purposes of the INA's removal and discretionary relief provisions. Pet. App. 17. The court explained that both the text of the statute and principles of deference to the Attorney General's interpretation of the immigration law compelled that conclusion. *Ibid.*

---

the INA's jurisdictional provisions to make clear that "a petition for review filed with an appropriate court of appeals" is the "sole and exclusive means for judicial review of an order of removal." § 106(a)(1)(B), 119 Stat. 310. That provision applies "[n]otwithstanding any other provision of law (statutory or nonstatutory)," including the federal habeas statutes. *Ibid.* That amendment took effect upon the date of enactment (May 11, 2005), and it expressly "appl[ies] to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division." § 106(b), 119 Stat. 311.

The REAL ID Act authorizes district courts to transfer pending habeas cases to an appropriate court of appeals, and further directs the courts of appeals to treat such transferred cases as timely filed petitions for review. § 106(c), 119 Stat. 311. While the REAL ID Act made no provision for the disposition of pending appeals in habeas cases, courts have concluded—and the government agrees— that the courts of appeals may convert a pending habeas appeal into a petition for review. See *Tostado* v. *Carlson*, 437 F.3d 706, 708 (8th Cir. 2006); *Ramirez-Molina* v. *Ziglar*, 436 F.3d 508, 512-513 (5th Cir. 2006); *Gittens* v. *Menifee*, 428 F.3d 382 (2d Cir. 2005); *Bonhometre* v. *Gonzales*, 414 F.3d 442, 446 (3d Cir. 2005), cert. denied, 126 S. Ct. 1362 (2006); *Alvarez-Barajas* v. *Gonzales*, 418 F.3d 1050, 1053 (9th Cir. 2005); see also *Ishak* v. *Gonzales*, 422 F.3d 22 (1st Cir. 2005) (treating habeas appeal as still pending in the district court within the meaning of the Real ID Act and transferring petition to court of appeals to be treated as a petition for review). The court of appeals' exercise of jurisdiction over petitioner' challenges to their removal orders thus was permissible in light of Congress's intervening enactment of the REAL ID Act.

The court of appeals also held (Pet. App. 17-19) that petitioners' state-law felony convictions constitute aggravated felonies within the meaning of 8 U.S.C. 1101(a)(43)(B), adhering to that court's earlier decision in *Hernandez-Avalos*, *supra*. The court explained that the "plain language" of Section 1101(a)(43) and the criminal law provisions that it incorporates "indicate[s] that Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only [] a misdemeanor under the [Controlled Substances Act]." Pet. App. 18-19 (brackets in original).[7]

The court subsequently denied petitioners' petition for rehearing and rehearing en banc. Pet. App. 174-177.

DISCUSSION

Petitioners seek review (Pet. i) of the court of appeals' determination that their state convictions for drug possession were "aggravated felon[ies]," under 8 U.S.C. 1101(a)(43)(B), which preclude them from obtaining the discretionary relief of cancellation of removal under 8 U.S.C. 1229b(a)(3) and (b)(1)(C).

On April 3, 2006, this Court granted certiorari in *Lopez* v. *Gonzales*, No. 05-547, and *Toledo-Flores* v. *United States*, No. 05-7664, to decide whether the commission of a controlled substance offense that is a felony

[7] The court of appeals separately rejected petitioners' contention that the Board's "retroactive" application of *Hernandez-Avalos* and the Board's own decision in *In re Roldan-Santoyo*, 22 I. & N. Dec. 512 (1999), vacated, 222 F.3d 728 (9th Cir. 2000), violated due process. See Pet. App. 19-25. The court also found petitioners' equal-protection-based challenges to the timing and locations of their removal proceedings to be "frivolous." *Id.* at 25-26. Petitioners have not renewed those claims before this Court. Nor have they reasserted the argument that their deferred adjudications are not "convictions."

under state law, but that is generally punishable under the Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony" within the meaning of 8 U.S.C. 1101(a)(43)(B). The *Lopez* case arises in the context of a removal proceeding under federal immigration law, and *Toledo-Flores* arises in the criminal sentencing context. Because the Court's decision in those consolidated cases will determine the proper statutory interpretation of the same statutory provision, 8 U.S.C. 1101(a)(43)(B), at issue here, the Court should hold this petition pending the Court's decision in *Lopez* v. *Gonzales*, No. 05-547, and *Toledo-Flores* v. *United States*, No. 05-7664.

We note, however, that there is substantial doubt that the conduct in which petitioners engaged would have been treated as misdemeanor cases of simple possession under federal law. Petitioner Rangel-Rivera admitted and the immigration judge found that she had engaged in the interstate "trafficking" of marijuana. Pet. App. 168; see also p. 6, *supra*. Trafficking in 50 to 2000 pounds of marijuana is a felony offense under federal law, 21 U.S.C. 841, and independently qualifies as an aggravated felony under the first clause of 8 U.S.C. 1101(a)(43)(B). Furthermore, because of the large amounts of marijuana that both petitioners were convicted of possessing—50 to 2000 pounds for Rangel-Rivera and 5 to 50 pounds for Salazar-Regino (Pet. App. 4, 6)—it is highly likely that the offense conduct to which they pleaded guilty would have been charged as possession with intent to distribute—which is a felony under federal law, see 8 U.S.C. 841(a) and (b)(1)—rather than misdemeanor simple possession. See Pet. App. 121 n.4 ("[I]t is wholly speculative that this respondent [Salazar-Regino], who was charged with possession of 5 to

50 pounds of marijuana, would have received such lenient treatment in the federal system.").[8]

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Lopez* v. *Gonzales*, No. 05-547, and *Toledo-Flores* v. *United States*, No. 05-7664, and then disposed of in accordance with the Court's decision in those consolidated cases.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
PETER D. KEISLER
Assistant Attorney General
DONALD E. KEENER
JOHN ANDRE
Attorneys

APRIL 2006

[8] See also, *e.g.*, *United States* v. *Haskins*, No. 05-4536, 2006 WL 314465, at * 1 (4th Cir. Feb. 10, 2006) (charging possession with intent to distribute 310.6 grams—approximately 11 ounces—of marijuana); *United States* v. *Enloe*, 153 Fed. App'x 215, 216 (4th Cir. 2005) (per curiam) (charging possession with intent to distribute 55.8 grams—two ounces—of marijuana); *United States* v. *Rangel*, 149 Fed. App'x 254, 255 (5th Cir. 2005) (per curiam) (charging possession with intent to distribute 771 grams—approximately 1.7 pounds—of marijuana); cf. 19 C.F.R. 171.51(b)(6)(i)(F) (possession of marijuana is presumed to be for personal use unless, *inter alia*, the quantity exceeds "[o]ne ounce of a mixture of substance containing a detectable amount of marihuana").