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P R O C E E D I N G S

(10:14 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in Case 09-60, Carachuri-Rosendo v. Holder.

Mr. Srinivasan.

ORAL ARGUMENT OF SRI SRINIVASAN  
ON BEHALF OF THE PETITIONER

MR. SRINIVASAN: Thank you, Mr. Chief Justice, and may it please the Court:

Long-time lawful permanent resident aliens with two convictions for minor drug possession offenses are subject to removal from the United States, but they are not categorically ineligible to seek discretionary relief from removal from the Attorney General based on their connections and deep family ties to the country. Categorical ineligibility for discretionary relief arises under the Immigration and Nationality Act when a permanent resident has been, quote, "convicted of an aggravated felony," close quote, with the relevant category here permanent residents who have been, quote, "convicted of a felony punishable under the Controlled Substances Act," close quote.

Individuals, such as Petitioner, who have been convicted of drug possession, but as to whom there

1 has been no finding of recidivism, have been convicted  
2 of a misdemeanor punishable under the Controlled  
3 Substances Act rather than a felony.

4 JUSTICE GINSBURG: Mr. Srinivasan, as a  
5 threshold question, is there a mootness problem here,  
6 because, as I understand it, the Petitioner came back to  
7 the country illegally and committed another minor crime?  
8 But his coming back illegally and being turned away  
9 again, as I understand the law, means that he cannot get  
10 any dispensation as a result of the illegal entry.

11 So even if we were to hold in your favor  
12 now, I take it that he could not -- he would not have  
13 any hope of getting any cancellation of removal or any  
14 other dispensation. Is that so?

15 MR. SRINIVASAN: That's not correct,  
16 Justice Ginsburg, in our view. And the government, it's  
17 notable, doesn't make a mootness argument. And I think the  
18 reason they don't is that the -- in Lopez, this Court  
19 understood that the initial removal doesn't annul the  
20 ability of an individual to get cancellation. And so,  
21 as Your Honor correctly observes, the question would be  
22 whether the reentry has an effect on the cancellation  
23 and the eligibility for cancellation. And it does not  
24 because Petitioner was removed again by reinstatement of  
25 the original removal order. And so, if there's an

1 argument that the initial removal order wasn't good  
2 because cancellation should have been granted, that also  
3 carries through to the reinstatement.

4 And as a consequence of that procedural  
5 context, there is no mootness argument and I think  
6 that's why the government doesn't make -- doesn't take  
7 that position.

8 So the question before the Court --

9 JUSTICE SCALIA: I -- I -- I'm not sure I  
10 understand what you're saying. You're saying that his  
11 reentry was not illegal because his removal was illegal?  
12 Is that what you are saying?

13 MR. SRINIVASAN: No, it's not that his  
14 reentry wasn't illegal. It's that when he was then  
15 again removed, that the -- the way that that was  
16 accomplished was by reinstatement of the original  
17 removal order.

18 JUSTICE SCALIA: I see.

19 MR. SRINIVASAN: And so, if the original  
20 removal order would have been extinguished by a grant of  
21 the cancellation order, then that carries forward to the  
22 reinstatement of the original removal -- removal order  
23 as well.

24 JUSTICE KENNEDY: But -- but does --

25 MR. SRINIVASAN: Nothing additional happens

1 because of the reentry.

2 JUSTICE KENNEDY: But does it make the --  
3 the second unlawful entry now lawful?

4 MR. SRINIVASAN: It doesn't make the --

5 JUSTICE KENNEDY: I thought -- I thought  
6 it's a separate offense to enter, to reenter improperly,  
7 and -- and that stays no matter, isn't that correct,  
8 regardless of the correctness of the prior removal  
9 order?

10 MR. SRINIVASAN: It does, Justice Kennedy --

11 JUSTICE KENNEDY: Or am I wrong?

12 MR. SRINIVASAN: -- but I think -- I think  
13 the way that gets taken into account is it would be one  
14 of the discretionary considerations that the Attorney  
15 General could take into account in determining whether  
16 to grant discretionary relief in the same way that the  
17 original conviction for drug possession could be taken  
18 into account. Our position --

19 JUSTICE GINSBURG: I -- I -- I think also in  
20 the picture is that he never contested removability.  
21 The only thing was the grace: Would -- would he qualify  
22 for discretionary relief by the Attorney General? So  
23 the -- the removal order itself, I take it, would stand.

24 MR. SRINIVASAN: The removal order would  
25 stand, but if cancellation were granted, then he

1 couldn't be removed pursuant to that removal order,  
2 because the -- the effect of granting cancellation would  
3 be that he's no longer removable. He gets favorable  
4 discretionary relief that enables him to stay in the  
5 country. And I think the predicate of Your Honor's  
6 question is correct, that we don't contest removability.  
7 He was removable because of his drug possession -- drug  
8 possession conviction.

9           The question is whether he retains  
10 eligibility to seek a favorable exercise of relief from  
11 the Attorney General based on affirmative equities in  
12 his -- in his favor, such as his deep family ties to the  
13 country, the presence of United States citizen children  
14 here, his lack of connections to the country to which he  
15 would be removed, his employment history, and  
16 considerations of that variety.

17           And the question before the Court is whether  
18 he and other individuals who are similarly situated  
19 should have an opportunity to make that case to the  
20 Attorney General. He is removable. The question is  
21 whether the Attorney General is in a -- is in a position  
22 to grant him a favorable exercise of discretion.

23           And we think the Attorney General is,  
24 because in order to be categorically ineligible for  
25 discretionary relief from removal, a permanent resident

1 alien has to have been convicted of a felony punishable  
2 under the Controlled Substances Act. And when you've  
3 been convicted of drug possession and there has been no  
4 finding of recidivism, you have been convicted of a  
5 misdemeanor punishable under the Controlled Substances  
6 Act.

7 JUSTICE SOTOMAYOR: What elements would a  
8 State conviction have to contain to qualify as a finding  
9 of recidivism in your view?

10 MR. SRINIVASAN: What elements?

11 JUSTICE SOTOMAYOR: Yes. What would have  
12 had to have been determined in a State conviction for  
13 you to recognize, under your argument, that it would  
14 qualify as a felony under the Controlled Substances Act?

15 MR. SRINIVASAN: Justice Sotomayor, at the  
16 very least what would have had to have happened is that  
17 he would have had to have been found to be a recidivist  
18 under a State provision that attaches sentencing  
19 consequences to being found to have been a recidivist.

20 And so, what you need is an analogous State  
21 offense to the Federal offense of recidivist possession.

22 JUSTICE SOTOMAYOR: Do you know of any State  
23 law that is analogous to the Federal law, precisely  
24 analogous?

25 MR. SRINIVASAN: Well, analogous enough to

1 count, in the sense that what you need under the Federal  
2 law is a finding of recidivism at least. That's our  
3 principal submission.

4 JUSTICE SOTOMAYOR: That's what I'm trying  
5 to -- to get to. What are the elements of that finding?  
6 What exactly -- because different labels are attached to  
7 different crimes that qualify you for recidivism under  
8 some State statutes, et cetera. I'm trying to get you  
9 to articulate what finding of recidivism counts, what  
10 are the underlying --

11 MR. SRINIVASAN: It's a determination by the  
12 court that --

13 JUSTICE SOTOMAYOR: Which court now, the  
14 State court?

15 MR. SRINIVASAN: By the State convicting  
16 court. In the case of a State conviction, it would be a  
17 determination by the State convicting court that the  
18 person in fact has a prior conviction. And then as a  
19 consequence under the State scheme, a sentencing  
20 consequence would attach.

21 JUSTICE SOTOMAYOR: So are you arguing that  
22 a State court has to make a finding of a valid prior  
23 conviction; is that it?

24 MR. SRINIVASAN: Yes, in -- in the context  
25 of a State conviction. It --

1 JUSTICE SCALIA: But it doesn't have to be a  
2 State felony?

3 MR. SRINIVASAN: It doesn't have to be a  
4 State felony, no.

5 JUSTICE SCALIA: The felony has to be a  
6 Federal felony, right?

7 MR. SRINIVASAN: That's correct. And that's  
8 the work done by the words "punishable under the  
9 Controlled Substances Act."

10 JUSTICE SCALIA: Punishable as a felony  
11 under the Federal Act.

12 MR. SRINIVASAN: Right.

13 JUSTICE SCALIA: But this was punishable as  
14 a felony because it was his second drug offense. He was  
15 a recidivist. And although it was only a misdemeanor  
16 under State law, under the Controlled Substances Act he  
17 could be prosecuted for a felony, for a Federal felony.  
18 I -- I -- I don't know why that doesn't fit the statute.

19 MR. SRINIVASAN: But -- but, Justice Scalia,  
20 he has to have been convicted of the felony. That's  
21 the critical distinction. He may have committed a  
22 felony --

23 JUSTICE SCALIA: He can't be convicted of a  
24 Federal felony in a State court. He has to be convicted  
25 of a crime --

1 MR. SRINIVASAN: He has to have been  
2 convicted of a crime --

3 JUSTICE SCALIA: -- which may be a misdemeanor,  
4 which would subject him to a felony conviction in  
5 Federal court under the Controlled Substances Act. And  
6 I think that's - that's what this is. He's convicted of  
7 a drug offense, and if - if he were prosecuted in Federal  
8 court, he would -- he was punishable as a felon --

9 MR. SRINIVASAN: He was --

10 JUSTICE SCALIA: -- in Federal court under  
11 the -- under the Controlled Substances Act.

12 MR. SRINIVASAN: He was not punishable as a  
13 felon in Federal court for two reasons: First, he was  
14 convicted of drug possession. A person in Federal court  
15 who is convicted of drug possession is a misdemeanor,  
16 not a felon, unless and until there's a finding that  
17 he's a recidivist. You have to have the finding of  
18 recidivist in order for a felony sentence even to  
19 conceivably attach to an individual, and you just don't  
20 have that in the context of this case, where all you  
21 have is a conviction of drug possession alone. A felony  
22 sentence doesn't even come into the picture unless there's  
23 a finding of recidivism.

24 JUSTICE ALITO: Isn't the --

25 MR. SRINIVASAN: That didn't happen in the

1 State court.

2 JUSTICE ALITO: Isn't the crux of your argument  
3 that for present purposes the term "conviction" must  
4 include a determination of recidivism?

5 MR. SRINIVASAN: For present purposes,  
6 that's correct. And Justice Alito, I think it's  
7 important to understand -- and this goes to the second  
8 response to your question, Justice Scalia -- that the  
9 statute, the Immigration and Nationality Act, defines  
10 "conviction" in a particular way. It defines  
11 "conviction" as "a formal judgment of guilt ... entered by  
12 a court."

13 As Your Honor's opinion for the Court in  
14 Deal v. United States understood, statutes could define  
15 convictions in one of two ways: It could define a  
16 conviction as a finding of guilty, or it could define a  
17 conviction as the formal judgment based on that finding.

18 JUSTICE ALITO: Well, what would you say --

19 MR. SRINIVASAN: Here we have the latter.

20 JUSTICE ALITO: What do you say about  
21 21 U.S.C. section 851, the Federal recidivism provision,  
22 which says: "No person who stands convicted of an offense  
23 under this part shall be sentenced to increased punishment  
24 by reason of one or more prior convictions."

25 So under that statute, the conviction does not

1 include the recidivism determination.

2 MR. SRINIVASAN: Under --

3 JUSTICE ALITO: Isn't that right?

4 MR. SRINIVASAN: Under that statute --  
5 different statutes conceive of it different ways, but  
6 the applicable definition of "conviction" here, because  
7 we're talking about an immigration consequence, is  
8 the definition of "conviction" under the Immigration and  
9 Nationality Act. And that definition is set forth at  
10 page 2a of the appendix to our brief, the blue brief,  
11 the opening brief. And it's 8 U.S.C. 1101(a)(48)(A),  
12 and it says that: "The term 'conviction' means, with  
13 respect to an alien, a formal judgment of guilt of the  
14 alien entered by a court."

15 And so, here you have "a formal judgment of  
16 guilt" as the operative definition of a conviction, and  
17 that formal judgment of guilt includes both the  
18 adjudication of guilt and the sentence. And so the  
19 important point to bear in mind is that at the time that  
20 the conviction, as defined by the Immigration and  
21 Nationality Act, is entered, we know whether the person  
22 has been found to have been a recidivist. At that point,  
23 the adjudication of guilt has happened, the sentence has  
24 been imposed, and we know whether a finding of recidivism  
25 has been made. In the absence of such a finding, the

1 maximum sentence they could attach under Federal law,  
2 Justice Scalia, is a misdemeanor sentence of 1 year of  
3 imprisonment.

4 A felony sentence is not on the table, and  
5 if the maximum sentence to which a person is subject is  
6 a misdemeanor sentence, the person has been -- has been  
7 convicted of a misdemeanor; they haven't been convicted  
8 of a felony. And that --

9 JUSTICE SCALIA: Let's assume we're not  
10 talking about immigration consequences. Let's -- let's  
11 assume we're talking about an American citizen who has  
12 committed a -- a misdemeanor drug offense. When he is  
13 brought up under the Controlled Substances Act, even  
14 though he wasn't found to have been a recidivist by the  
15 State conviction, couldn't he be prosecuted under the  
16 Controlled Substances Act for a felony because in fact  
17 he is a recidivist?

18 MR. SRINIVASAN: Oh, sure. But -- but I  
19 think -- I think that confuses two things. In that  
20 situation, the second proceeding is in Federal court --

21 JUSTICE SCALIA: Yes.

22 MR. SRINIVASAN: -- and in that Federal court  
23 proceeding, you can take account of the prior State court  
24 conviction, but in that second proceeding, the fact that  
25 he was convicted previously in State court would have to

1 have been found by the Federal court. That's the relevant  
2 finding of recidivism, and in the absence of that finding of  
3 recidivism, the Federal defendant wouldn't be subject to  
4 a felony sentence. He would only be subject to a  
5 misdemeanor sentence.

6 JUSTICE SCALIA: No, but -- the crucial word  
7 here is "punishable" as a felony under the Controlled  
8 Substances Act. And the fact is if indeed he's a  
9 recidivist, he could be punished for the -- for the  
10 felony. Now, you're quite correct that the Federal  
11 court would have to find the recidivism, but -- but  
12 still he would be punishable as a recidivist.

13 MR. SRINIVASAN: He has to be convicted of a  
14 felony, Justice Scalia, and in the absence of a finding  
15 of recidivism, he can't have been convicted of the  
16 felony. He may be punishable as a felon in the abstract  
17 ex ante. So I don't take issue with the proposition  
18 that a person commits recidivist possession when they  
19 commit possession and they have a prior conviction. In  
20 that abstract sense, the person has committed recidivist  
21 possession, and if they were charged and found to have  
22 been a recidivist, they would be convicted of recidivist  
23 possession. But in the absence of that finding, they  
24 haven't been convicted of recidivist possession, and --

25 CHIEF JUSTICE ROBERTS: Under the applicable

1 State law, what's required before the recidivist  
2 sentence is triggered? Is it a formal finding of  
3 recidivism by the -- by a jury?

4 MR. SRINIVASAN: It doesn't have to be by a  
5 jury, and I think it would depend on the State,  
6 Mr. Chief Justice. It doesn't necessarily have to be by  
7 a jury, because I think several States have the  
8 recidivism component of the offense as a finding that  
9 could be made by the court, but the --

10 JUSTICE SCALIA: And we've held that's  
11 okay --

12 MR. SRINIVASAN: And you've held --

13 JUSTICE SCALIA: -- that you don't need a jury.

14 MR. SRINIVASAN: -- that's okay as a  
15 constitutional matter. But --

16 JUSTICE KENNEDY: But we have five States,  
17 isn't it, that have no recidivist provisions?

18 MR. SRINIVASAN: There are --

19 JUSTICE KENNEDY: Is the thrust of your  
20 argument or the logical consequence of your argument, if  
21 you have one of those States with no recidivist  
22 provisions and you have ten separate possession  
23 convictions, they're still not a recidivist under the  
24 Federal rules?

25 MR. SRINIVASAN: It is in those five States,

1 Justice Kennedy, but I don't think that should give the  
2 Court a great deal of pause, for the following two  
3 reasons.

4 JUSTICE KENNEDY: No, no. In my  
5 hypothetical, what would happen if -- if there was a  
6 deportation proceeding?

7 MR. SRINIVASAN: What would happen is this:  
8 The person would not be categorically ineligible for  
9 discretionary relief.

10 JUSTICE KENNEDY: Because there is no  
11 recidivist finding.

12 MR. SRINIVASAN: They wouldn't have been  
13 convicted of recidivist possession. But it's important  
14 to note, Justice Kennedy, that doesn't mean that those  
15 prior convictions don't enter into the picture at all.  
16 They do, because, in the exercise of discretion by the  
17 Attorney General, the Attorney General can take into  
18 account any prior convictions, including those that  
19 don't render somebody categorically ineligible.

20 All we're talking about here is whether the  
21 person has a chance to make a discretionary case. They  
22 do have that chance in Your Honor's hypothetical, but  
23 those convictions would be taken into account.

24 Now, I want to point out, though, that there's  
25 another reason that I think the fact that in that

1 hypothetical it wouldn't render the defendant  
2 categorically ineligible for discretionary relief  
3 shouldn't give the Court a great deal of pause. And  
4 that's because the relevant category of aggravated  
5 felony that we're talking about here is illicit  
6 trafficking in a controlled substance. That's the  
7 category that's outlined by the statute.

8           Now, with respect to that category, every  
9 State has trafficking laws. Every State punishes drug  
10 trafficking. So every State's offenses do count for  
11 purposes of this category of aggravated felony. When  
12 we're -- that's the iceberg. The tip of the iceberg is  
13 recidivist possession, which is a subset of illicit  
14 trafficking in a controlled substance. Now, with respect  
15 to that tip, Federal convictions for recidivist possession  
16 still do count, so we have those. With respect to the State --

17           CHIEF JUSTICE ROBERTS: No, but the State  
18 prosecutors often prosecute when they have a recidivist  
19 provision under that, rather than the much more difficult  
20 illicit trafficking crime. I mean, if you're going to  
21 go to jail for a certain amount of years for a  
22 recidivist possession, that's easier to show than illicit  
23 trafficking.

24           MR. SRINIVASAN: Well, sure, but if a  
25 State -- two responses, Mr. Chief Justice: If a State

1 prosecutor does prosecute under an available recidivist  
2 possession offense, then that would count because the  
3 State prosecutor would have brought the charge, the  
4 finding by hypothesis would have been made. That would  
5 be felony recidivist possession under Federal law, and  
6 there would be categorical ineligibility.

7           Now, I think what may be -- what may be sort  
8 of lurking beneath Your Honor's question is the  
9 recognition that the Federal consequences of a State  
10 conviction are going to turn on State prosecutorial  
11 decisions. That's true. But that's a fixed feature of  
12 any scheme in which Federal immigration consequences  
13 turns on what happens in State court, and this Court's  
14 decision in Lopez recognizes that.

15           For example, States -- several States don't  
16 have a Federal offense of possession with intent to  
17 distribute drugs. That's a Federal offense. What  
18 States, some States, have instead is possession with a  
19 degree of penalty attached to the amount of drugs  
20 possessed. They don't have the separate offense of  
21 possession with intent to distribute.

22           Now, the fact that certain States don't have  
23 that offense doesn't mean that an individual who is  
24 convicted of state possession with no finding of an  
25 intent to distribute would be categorically ineligible

1 for discretionary relief from removal, because what  
2 Congress understood was that some States will have  
3 qualifying offenses and some States won't. In those  
4 States that do, where the State has the offense and  
5 where the State prosecutor makes the decision to charge  
6 under that offense will -- at that point the State  
7 conviction will count as a Federal felony. It will be a  
8 felony punishable under the Controlled Substances Act,  
9 and the person at that point would be categorically  
10 ineligible for discretionary relief.

11 JUSTICE BREYER: I don't know. It seems to  
12 me you go further than you need to and, moreover,  
13 imagine a State offense that just says possession of  
14 marijuana, zero to 5 years. Now, our problem is,  
15 reading those words, is that or is that not analogous to  
16 a Federal -- a Federal -- what a Federal law would make  
17 a felony? And suppose you discovered as a matter of  
18 fact that all the people who did have a prior conviction  
19 got more than a year. In simple possession, they got  
20 less than a year, which you'd have to do research to  
21 find out.

22 MR. SRINIVASAN: Right.

23 JUSTICE BREYER: Well, if those were the  
24 facts, I would say it is analogous to the Federal  
25 felony where this person was sentenced to more than a

1 year.

2 MR. SRINIVASAN: I don't think it would be,  
3 Justice Breyer, because --

4 JUSTICE BREYER: Well, we could argue that  
5 one --

6 MR. SRINIVASAN: Sure.

7 JUSTICE BREYER: -- but I don't see where --  
8 that there's a line, because it seems to me the rule is  
9 set forth -- we said in the last sentence here of --  
10 what's the case? You know --

11 MR. SRINIVASAN: Lopez?

12 JUSTICE BREYER: What?

13 MR. SRINIVASAN: Is it Lopez? Is that --

14 JUSTICE BREYER: Yes, Lopez. It says: "A  
15 state offense constitutes a 'felony punishable under the  
16 Controlled Substances Act' only if it proscribes  
17 conduct." So we're not looking at what happened in  
18 reality. We're reading some words from a State  
19 statute.

20 MR. SRINIVASAN: Correct.

21 JUSTICE BREYER: That's what proscribes  
22 conduct punishable as a felony under that Federal law.  
23 This would be normal. We get some words in the State  
24 statute, and you have to decide are the -- those  
25 words cover some events in the world. And you look at

1 those words, what -- the events they cover and discover,  
2 did they or are they analogous or not analogous to what  
3 is a felony under Federal law? Sometimes that's easy,  
4 sometimes it's not.

5 You have a case, I think, that's easy. But  
6 I can imagine the case you're talking about, not easy.

7 MR. SRINIVASAN: Well, I --

8 JUSTICE BREYER: So you say, what do you do?  
9 I see no rule there. I see no rule absolute how you treat  
10 it, so I probably would treat it by trying to look at what  
11 really happens under this statute in the world.

12 MR. SRINIVASAN: Well -- well, with respect,  
13 Justice Breyer, I don't think that's the inquiry that's  
14 called for even by this sentence. I think what this  
15 sentence called for is an inquiry into what the State  
16 offense captures in its offense elements to make up a  
17 conviction.

18 JUSTICE BREYER: Why -- where does it say  
19 "offense element"?

20 MR. SRINIVASAN: Because I think that's  
21 the -- the necessary inquiry that's --

22 JUSTICE BREYER: Where does it say that?

23 MR. SRINIVASAN: It's -- it's necessarily  
24 what's at issue. It --

25 JUSTICE BREYER: Why?

1 MR. SRINIVASAN: This sentence doesn't  
2 necessarily -- it asks whether --

3 JUSTICE BREYER: Well, where in the statute --

4 MR. SRINIVASAN: It asks whether it proscribes  
5 conduct.

6 JUSTICE BREYER: -- does it say "offense elements"?

7 MR. SRINIVASAN: It asks whether -- the  
8 sentence asks whether the State offense proscribes  
9 conduct.

10 JUSTICE BREYER: Yes.

11 MR. SRINIVASAN: And I read "proscribes  
12 conduct" to mean there would be offense elements  
13 of proscribed conduct.

14 JUSTICE BREYER: Well, you say that it says  
15 "elements." I don't see any of our cases that say  
16 "elements." And I -- and I think that -- that what we  
17 could do is look to the conduct that's likely to be at  
18 issue under these State words, and if in fact it's  
19 regular that the State does punish people for more than  
20 a year when in fact they do possess for the third time,  
21 at least there would be a good argument --

22 MR. SRINIVASAN: Justice Breyer --

23 JUSTICE BREYER: -- that that counts. You  
24 want to argue it doesn't count, okay. I don't know why  
25 you do.

1 MR. SRINIVASAN: No --

2 JUSTICE BREYER: But, I mean, I'm interested in  
3 why you do, since that isn't your case.

4 MR. SRINIVASAN: Yes, I don't want to take  
5 issue -- I don't want to argue against myself,  
6 certainly, but I would just make the following point:  
7 That if I'm understanding what Your Honor is saying  
8 correctly, and I'm not sure that I am, but if I'm  
9 understanding what you're saying correctly, I would just  
10 point out to the Court that the Court dealt with that  
11 sort of situation in the four corners of Lopez itself  
12 when it talked about -- talks about what happens with  
13 possession with intent to distribute.

14 Some States don't have possession with  
15 intent to distribute as an offense; they only have  
16 possession. Now, I -- as I understand what Your Honor  
17 is suggesting, you could look at all the -- the ken of  
18 individuals who have been convicted of State possession  
19 and you could ask as a matter of fact, do they in fact  
20 possess with intent to distribute? And then you could  
21 reach some consequence on that basis.

22 JUSTICE BREYER: I know, but the reason I  
23 ask my question is it seems to me your approach, which I  
24 think is consistent with Lopez and Nijhawan  
25 absolutely --

1 MR. SRINIVASAN: Okay.

2 JUSTICE BREYER: -- does raise the question  
3 you are talking about. So I want to know: Why are you  
4 talking about it? Because I might be missing something,  
5 because I don't think -- if I'm right, your case doesn't  
6 raise these issues. Or am I wrong about that?

7 MR. SRINIVASAN: I -- I have to confess, I'm  
8 not exactly sure what Your Honor is asking. So --

9 JUSTICE BREYER: Okay. Well, skip the  
10 question.

11 (Laughter.)

12 MR. SRINIVASAN: I think --

13 JUSTICE ALITO: Could I ask you this  
14 question --

15 JUSTICE SOTOMAYOR: Could I --

16 JUSTICE ALITO: If -- suppose a State makes simple  
17 possession a felony. Now, that doesn't make it a felony  
18 for these purposes, right?

19 MR. SRINIVASAN: Right.

20 JUSTICE ALITO: All right. But in  
21 sentencing the -- the defendant in State court for this  
22 felony, the -- the defendant concedes that he had a  
23 prior conviction, and the judge finds that and takes that  
24 into account in imposing the sentence. What would  
25 happen there?

1           MR. SRINIVASAN: It wouldn't constitute the  
2 analogy to the Federal offense of recidivist possession,  
3 Justice -- Justice Alito, because that could also happen  
4 in the Federal system. In the Federal system, you could  
5 have an individual who is convicted of possession, and  
6 then the fact that they had a prior conviction could  
7 have some role in the -- for example, in the  
8 presentencing report.

9           JUSTICE ALITO: But what's missing there?

10          MR. SRINIVASAN: You don't have --

11          JUSTICE ALITO: What is the difference  
12 between that and -- and a situation where, just because  
13 of the vagary of State law, recidivism is something that  
14 has to be proven in order to bring the offense into the  
15 -- into the felony level?

16          MR. SRINIVASAN: Two things are  
17 missing, Justice Alito: First, you don't have a formal  
18 judgment of guilt entered by the court, which is what  
19 a conviction requires. And the consequence of not  
20 having a formal judgment of guilt is that the statutory  
21 maximum penalty isn't raised. And I think what's  
22 relevant here is that when you have a finding of -- a  
23 formal judgment of guilt of recidivism in the Federal  
24 system, which happens when the prosecutor brings a  
25 charge and the court makes the finding at sentencing,

1 the maximum sentence that could be imposed against the  
2 defendant is raised from a misdemeanor sentence to a  
3 felony sentence.

4 But that doesn't happen in a situation in  
5 which the fact of a prior conviction is taken into  
6 account, for example, under a presentencing report. It  
7 doesn't raise the statutory maximum, and there's no  
8 formal judgment entered based on that determination by  
9 the court. And so that's the distinction.

10 And I think the relevant way to look at it  
11 is you take account of what would happen in the Federal  
12 system and you ask: Would it have the consequence in  
13 the Federal system of rendering somebody guilty of the  
14 felony of recidivist possession as opposed to the  
15 misdemeanor of simple possession? And it wouldn't in  
16 the Federal system, and by parity of reasoning it also  
17 would not have that consequence in the State system.

18 JUSTICE ALITO: That seems to be a totally  
19 formalistic distinction that's based on the vagaries of  
20 State law. What -- what is the difference between  
21 someone who is found by a court under a State recidivism  
22 provision to have -- to be eligible for an increased  
23 punishment as a result of that finding and someone who  
24 is found by a court in the context of sentencing,  
25 discretionary sentencing, to have a felony possession,

1 to have a prior -- a prior conviction and receives an  
2 increased sentence as a result of that?

3 MR. SRINIVASAN: Well --

4 JUSTICE ALITO: What is the -- is there any  
5 functional difference between those two situations?

6 MR. SRINIVASAN: Well, I think there is,  
7 Justice Alito, and let me just say as a preliminary  
8 matter it's not based on the vagaries of State law,  
9 because it's -- I'm applying the same analysis to State  
10 convictions as I do to -- to Federal convictions.

11 But one way to look at it is to ask, suppose  
12 that a State or even Federal law made it salient for  
13 sentencing purposes whether somebody intended to  
14 distribute when they possessed. They were convicted of  
15 drug possession. There is an offense of possession with  
16 intent to distribute, but they're not charged with that  
17 offense; they're charged with drug possession. And  
18 then sentencing somehow makes it salient, not for  
19 purposes of raising the statutory maximum, but just for  
20 purposes of sentencing within the range whether the  
21 person intended to distribute.

22 I don't think anybody would say that the  
23 individual was convicted of the felony of possession  
24 with intent to distribute because the -- the judge in  
25 sentencing took into account an intent to distribute

1 in some way under a sentencing scheme.

2 JUSTICE ALITO: But does it matter in that  
3 situation that that's an element, that has to be an  
4 element of the offense?

5 MR. SRINIVASAN: It has to be a sentencing  
6 factor that raises the statutory maximum. And the  
7 reason that matters is that under this statute, the  
8 person has to have been convicted of a felony, and the  
9 only way they're convicted of a felony is the offense  
10 of which they are convicted can lead to a felony  
11 sentence.

12 And the sentencing factor in this case of  
13 recidivism is necessary in order to give rise to a  
14 Federal sentence. In the absence of that finding, the  
15 person has been convicted of a misdemeanor, because the  
16 maximum sentence they can receive is a misdemeanor  
17 sentence of 1 year of imprisonment.

18 If the Court has no further questions, I'd  
19 like to reserve the balance of my time for rebuttal.

20 CHIEF JUSTICE ROBERTS: Thank you,  
21 Mr. Srinivasan.

22 Ms. Saharsky.

23 ORAL ARGUMENT OF NICOLE A. SAHARSKY

24 ON BEHALF OF THE RESPONDENT

25 MS. SAHARSKY: Mr. Chief Justice, and may it

1 please the Court:

2 Congress's judgment here was that all aliens  
3 who engage in the same serious conduct would be treated  
4 the same for immigration purposes. And Petitioner  
5 doesn't dispute that he has two convictions for drug  
6 possession, and he also doesn't dispute that had that  
7 second case been prosecuted in Federal court, he could  
8 have been punished as a felon. What he is saying is: I  
9 don't want my aggravated felony to count because of a  
10 difference in State law, because of a difference in the  
11 State prosecutor's decision.

12 But what this Court held in Lopez is that  
13 Congress's judgment controls about the seriousness of  
14 the offense.

15 JUSTICE BREYER: The exact words of  
16 Lopez, which I think are important: "We hold that a  
17 State offense constitutes a felony punishable under  
18 Controlled Substance ... only if it proscribes conduct  
19 punishable as a felony." Okay?

20 MS. SAHARSKY: Yes.

21 JUSTICE BREYER: Under Federal law. Now,  
22 there's an ambiguity when you use a word like "offense"  
23 or "crime." Sometimes you mean what this guy did, and  
24 sometimes you're referring to a statute. It's statutes  
25 that proscribe, not what this guy did. So we're

1 talking about the statute. So what it tells us to do --  
2 and we said the same thing in Nijhawan, and I have  
3 written in other opinions the same thing -- you go read  
4 the State statute. Forget what he's done. Read the  
5 statute and see if the statute proscribes conduct that  
6 would amount to a felony under Federal law.

7           So let us read the statute. We turn to the  
8 statute of conviction. What it says is it is a class A  
9 misdemeanor for which you are punishable of less than a  
10 year if you possess less than 28 grams or whatever. It  
11 says nothing about recidivism. There is no increased  
12 punishment for recidivism.

13           So all we did was read the statute. The  
14 statute does not proscribe conduct that would be a  
15 felony under Federal law; it proscribes conduct that  
16 would be a misdemeanor. QED. This person has not been  
17 punished in Texas under a statute that proscribes  
18 conduct that would be a felony under Federal law. End  
19 of case.

20           Now, what is the matter with what I just  
21 said?

22           MS. SAHARSKY: Because this is a two-step  
23 inquiry and you only did step one.

24           JUSTICE BREYER: What do you mean, "a  
25 two-step inquiry"?

1 MS. SAHARSKY: A two-step inquiry. There  
2 are two questions. The first is: Does the State  
3 offense correspond to an offense under the CSA? Does it  
4 correspond to a Federal offense, and that's based on  
5 the elements, and the Court said that that was based on  
6 the elements on page 51 of Nijhawan --

7 JUSTICE BREYER: Okay. Okay.

8 MS. SAHARSKY: But there's a second  
9 question, which is: If it corresponds to a Federal  
10 offense, how would that Federal offense be punishable?  
11 The "punishable" under the CSA language determines that  
12 we need to look at that second inquiry.

13 JUSTICE BREYER: No --

14 MS. SAHARSKY: If in addition to that --

15 JUSTICE BREYER: Where does it say  
16 that? Where does it say that in the language?

17 You are looking to the conduct that the  
18 statute proscribes, not what he engaged in. Suppose the  
19 State statute says it is a misdemeanor to steal a  
20 chicken, okay?

21 MS. SAHARSKY: Yes.

22 JUSTICE BREYER: It is a misdemeanor. He is  
23 convicted of stealing a chicken. It turns out that the  
24 way he stole the chicken was to burn down the farmhouse.

25 (Laughter.)

1 JUSTICE BREYER: That is a felony. Now,  
2 what we have written is: Forget the second. I've  
3 written it in five opinions or four or three, most of  
4 which had a majority.

5 (Laughter.)

6 JUSTICE BREYER: It is called -- it is  
7 written right here in this case. It is written in  
8 Nijhawan. What is it that tells us to go beyond the  
9 conduct that the State statute proscribes, not some  
10 other thing?

11 MS. SAHARSKY: The conduct is what the State  
12 statute proscribes, but there's an additional question  
13 of how it is punishable --

14 JUSTICE BREYER: Where is the additional  
15 question? Read me the words of the statute that --  
16 there might be. I'm not -- I'm being argumentative, but  
17 I want to know what words in the statute say there -- or  
18 what words in a case say go look to some other thing  
19 beyond what the State statute proscribes?

20 MS. SAHARSKY: Okay. This is on the gray  
21 brief, page 10a, and this is the definition that is  
22 incorporated into the aggravated felony definition in  
23 the INA, and it says that it encompasses, quote, "any  
24 felony punishable under the Controlled Substances Act."  
25 And in Lopez the Court interpreted that language to mean

1 an offense that is punishable as a felony under the  
2 Controlled Substances Act.

3 JUSTICE BREYER: Yes. What offense? The  
4 offense proscribed --

5 MS. SAHARSKY: Right.

6 JUSTICE BREYER: -- by State law. That's  
7 why I asked you: Where does the State statute proscribe  
8 something that has to do with recidivism? I've read  
9 that State statute three or four times.

10 MS. SAHARSKY: Recidivism isn't part of the  
11 offense. It is a sentencing factor. Justice Scalia  
12 mentioned that. That's something this Court has  
13 recognized on many occasions, that recidivism is  
14 something that can be established by the sentencing  
15 court.

16 You are right: The offense is drug  
17 possession. He was convicted of drug possession in  
18 State court. That's what he would have been convicted  
19 of in Federal court. But the fact that he was convicted  
20 of drug possession doesn't answer the separate question  
21 of how that offense is punishable. If it were his first  
22 offense, it would be punishable as a misdemeanor. If it  
23 was his second offense, it would be punishable as a  
24 felony.

25 And we think that that -- that approach is

1 dictated by two different opinions, the first of which  
2 is Lopez, which says we look for a correspondence  
3 between the State offense and the Federal offense, but  
4 then we also have this question of how the offense is  
5 punishable in Federal court, and this punishability  
6 question is extremely relevant. The entire basis for  
7 the Court's -- the entire basis for the Court's opinion  
8 was that Congress's judgment about the seriousness of  
9 the offense controls. It is not State by State  
10 judgment.

11 JUSTICE GINSBURG: Ms. Saharsky, do we take  
12 into account at all -- I mean, in Lopez as I understand  
13 it, the petitioner prevailed because it would not have  
14 been a felony under the Federal law. Is that right?

15 MS. SAHARSKY: Yes.

16 JUSTICE GINSBURG: Here we're talking about  
17 two crimes. One is a small amount of marijuana. He  
18 gets 20 days in jail. The other is a pill that I never  
19 heard of, a Xan-something, and then he gets, what, 10 days  
20 in jail for that. If you could just present this scenario  
21 to an intelligent person who didn't go to law school,  
22 as you're going to not only remove him from this  
23 country, but say never, ever darken our doors again  
24 because of one marijuana cigarette and one Xan-something  
25 pill -- it -- it just seems to me that if there's a way

1 of reading the statute that would not lead to that  
2 absurd result, you would want to read the statute.

3 If you are forced to read it because there's  
4 no other way -- but maybe there is another way.

5 MS. SAHARSKY: We don't think that there is  
6 another way, because the Court said in Lopez in  
7 interpreting the statutory language that the State's  
8 judgment about how an offense is punished does not  
9 control. What controls is Congress's judgment, and  
10 Congress has taken a hard line over the past 20 years on  
11 criminal aliens, particularly recidivist criminal  
12 aliens --

13 JUSTICE SOTOMAYOR: But it has --

14 JUSTICE KENNEDY: Can you tell me what --

15 MS. SAHARSKY: -- particularly --

16 JUSTICE KENNEDY: What would happen if  
17 there -- forget the State. There are two Federal offenses.  
18 The first Federal offense is drug possession; the second  
19 Federal offense, drug possession, but the prosecutor is  
20 not quite sure that he has a strong case or she has a strong  
21 case for recidivism because of the first conviction.

22 So the -- on the second go-around, the  
23 conviction is without the added finding of recidivism.  
24 What does the INA do with that case?

25 MS. SAHARSKY: That would count as an

1 aggravated felony, as punishable as a felony, because  
2 the aggravated felony language incorporates the word  
3 "punishable," how it could be treated under Federal law,  
4 not how it actually was punished. And that's because  
5 Congress made a -- a judgment in the immigration code  
6 that what it wanted to do was to take all individuals  
7 who had been engaged in the same conduct --

8 JUSTICE SOTOMAYOR: So you're telling us --

9 MS. SAHARSKY: -- repeated drug possession,  
10 and treat them the same.

11 JUSTICE KENNEDY: What -- what would --

12 JUSTICE SOTOMAYOR: So something's not a  
13 Federal felony and it's now subject -- because he hasn't  
14 been convicted in Federal court of recidivism -- now  
15 he's being punished under the INA or removed under the  
16 INA for what is not a felony under Federal law?

17 MS. SAHARSKY: Because it's punishable --  
18 yes, because it's punishable as a felony under Federal  
19 law, because Congress made a judgment that those two  
20 drug possession offenses, the fact of recidivism makes  
21 it serious enough that it could be--

22 JUSTICE SOTOMAYOR: Could I just ask you  
23 one --

24 JUSTICE KENNEDY: If -- if I could just  
25 finish on this one -- this one. In this hypothetical

1 that we're discussing, the -- the two Federal offenses  
2 but no finding of recidivism, does the INA have the  
3 authority to question the first conviction because it  
4 was uncounseled or in effect collaterally question the  
5 first conviction?

6 MS. SAHARSKY: It -- it's well established  
7 that those kind of challenges can't be brought in  
8 immigration court. What needs to happen is they need to  
9 be brought in the State court of conviction through the  
10 procedures that are --

11 JUSTICE KENNEDY: No, what -- our  
12 hypothetical here is Federal.

13 MS. SAHARSKY: Oh, I'm sorry.

14 JUSTICE KENNEDY: Right.

15 MS. SAHARSKY: In that case if it -- the  
16 individual would need to seek relief in Federal court in  
17 terms of getting his conviction --

18 JUSTICE GINSBURG: I thought if it's in  
19 the Federal court, and the -- they are going  
20 to use it as a recidivist offense, (a) the defendant is  
21 notified of that, and (b) is given an opportunity to say  
22 there's something infirm about that first conviction.  
23 That's totally absent from this picture.

24 You say, oh, well, that's just a matter  
25 of procedure, so he doesn't have to get that anyplace.

1 I think that Congress is requiring that. It's certainly  
2 an element of fundamental due process fairness, notice  
3 and opportunity to say, no, the first conviction  
4 shouldn't count.

5 MS. SAHARSKY: With respect, we disagree  
6 because Congress made different judgments in the  
7 immigration context and in the criminal context.  
8 Immigration is very different from criminal proceedings.  
9 This Court has said that on numerous occasions the  
10 rights in terms of due process and counsel and the like  
11 are very different.

12 And in immigration, Congress made a  
13 categorical judgment that individuals who have been  
14 convicted of conduct should all be treated the same and  
15 that they all should be removed from the United States  
16 and should be -- not be able to get discretionary  
17 relief. In the criminal sentencing context, which you  
18 are talking about, section -- the section 851 procedures,  
19 Congress made a judgment that those procedures which have  
20 criminal consequences and already are individualized, that  
21 there would be this notice provision. But that provision  
22 Congress did not apply anywhere in the immigration laws.  
23 And if you look --

24 JUSTICE BREYER: You go ahead.

25 MS. SAHARSKY: I was just going to say, if

1 you look all through the aggravated felony provisions --  
2 they are in our brief; there are 21 of them -- for none  
3 of those provisions was Congress concerned about notice  
4 or the like. It said the individual has engaged in  
5 this conduct that we think is serious.

6 JUSTICE GINSBURG: But my point is that if  
7 it all happened in the Federal court, if these two  
8 possession offenses all happened in the Federal court,  
9 at the time of the second one the -- the defendant would  
10 have gotten the notice and the opportunity to knock it  
11 out.

12 I'm not talking about immigration, but  
13 just -- and he doesn't have that opportunity the way you  
14 treat it. He doesn't -- didn't get that in the State  
15 court because nobody thought that this was a recidivist  
16 offense in the State court.

17 MS. SAHARSKY: That's right. And that's  
18 because Congress made the decision to have those types  
19 of notice procedures in criminal proceedings, but they  
20 are not applicable by their terms anywhere in the  
21 immigration laws. And just to make sure that I  
22 understand the hypotheticals that you and Justice  
23 Kennedy have been talking about, if there is a Federal  
24 prosecution and the person has sought to challenge the  
25 validity of his conviction and it has been proven to be

1 invalid, then in that case, yes, there would be a  
2 question whether that conviction could be used in the  
3 immigration proceedings. There is an entire body of law  
4 that when a conviction has been vacated, it doesn't  
5 count as a conviction under the immigration proceedings.

6 So the answer is if it is a person in State  
7 court and they think that there's a problem with their  
8 underlying conviction, they need to go to State court or  
9 use whatever procedures are available for challenging  
10 that. But, again, the Court has said on numerous occasions  
11 prior convictions are presumed valid. We do not -- we  
12 do not assume --

13 JUSTICE GINSBURG: Do we know practically,  
14 both on the State side and on the Federal side, do  
15 prosecutors presented with a simple possession case,  
16 do they -- do we ever see in real life this combination  
17 that somebody's going to be convicted as a recidivist  
18 when it's one marijuana cigarette on one time and one pill  
19 on another? Do prosecutors, Federal or State, do that?

20 MS. SAHARSKY: I -- I can't speak to State  
21 prosecutors. I know there are circumstances in which  
22 Federal prosecutors do it, although, quite honestly,  
23 most of the Federal drug prosecutions regard the more  
24 serious drug crimes. The persons that come to our  
25 attention usually can be charged with at least

1 possession with intent to distribute or drug trafficking  
2 or something like that. And when we do charge them with  
3 possession, it's usually because they pleaded down and  
4 we've agreed not to give them an enhanced sentence.

5 But the judgment here is the one that  
6 Congress made about whether two drug possessions is  
7 serious, serious enough to qualify as a felony. And  
8 Congress --

9 JUSTICE BREYER: Can I ask you a related  
10 question, which will show what I'm trying -- another  
11 thing that's worrying me. Suppose we're in the Armed  
12 Career Criminal Act.

13 Now, I have -- this is my hypothetical. You've  
14 heard of cat burglars. Well, this gentleman is  
15 called the pussycat burglar, and the reason is he's never  
16 harmed a soul. He only carries soft pillows as weapons.  
17 If he sees a child, he gives them ice cream.

18 (Laughter.)

19 JUSTICE BREYER: It is absolutely  
20 established that this person in breaking into that house  
21 at night only wanted to steal a pop gun, and he is the  
22 least likely to cause harm in the world.

23 Question: He is convicted of burglary. Is  
24 that a crime of violence? Answer?

25 MS. SAHARSKY: Well, to the extent that the

1 burglary definition depends on the Court's modified  
2 categorical approach, you just look to see what he  
3 had been convicted of and not the individual --

4 JUSTICE BREYER: Correct.

5 MS. SAHARSKY: -- circumstances of the case.

6 JUSTICE BREYER: The answer is of course,  
7 because we are not looking to whether he is the pussycat  
8 burglar or the cat burglar. We are to look to the  
9 statute of conviction and see what it is that that  
10 behavior forbids -- the statute forbids. Lewis,  
11 Nijhawan say -- do precisely the same thing with this part  
12 of that long list. Indeed, Nijhawan lists this  
13 provision as an example of what you would do the same  
14 thing for.

15 Now I'm back to my first question. Let's do  
16 it. Read the Texas statute. And where in that Texas  
17 statute does it say a word about recidivism or punish  
18 that conduct?

19 Now, if I adopt your position, am I not,  
20 not simply overturning Lewis and Nijhawan, but getting a  
21 very mixed up area of the law which we have tried to  
22 straighten out -- Taylor, ACCA -- once again totally  
23 mixed up. That's my concern.

24 MS. SAHARSKY: With respect, I think that  
25 our position is entirely consistent and, in fact,

1 follows from Lopez and Nijhawan and is consistent with  
2 the Court's modified categorical approach.

3 So, let me just talk about Lopez and  
4 Nijhawan, because I want to make sure there's not any  
5 confusion about that. Lopez said that we have a  
6 question here about whether the State offense -- and a  
7 State offense is made up of here drug possession;  
8 recidivism isn't something that you're convicted of,  
9 it's a sentencing factor.

10 You look at the State offense and you see  
11 does it correspond to a Federal offense? Here it does.  
12 There is State drug possession; there is Federal drug  
13 possession. And then you ask another question. And  
14 this Court said in Lopez that that's an important  
15 question because we care about what Congress thought,  
16 which is how is this offense punishable under Federal  
17 law.

18 This is a two-part inquiry where the first  
19 part, the offense elements, does need to be established  
20 in State court, and the second part, which goes to how  
21 it is punishable, does not need to be established in  
22 State court. And that's exactly what the Court  
23 recognized in its opinion under Nijhawan --

24 JUSTICE SOTOMAYOR: Under the Federal --

25 MS. SAHARSKY: -- albeit in a second --

1 JUSTICE SOTOMAYOR: Under the Federal statute,  
2 it's only punishable on -- for recidivism purposes if the  
3 prior conviction was valid, because, as Justice Ginsburg  
4 pointed out, the statute permits a defendant to object.  
5 Who has the burden of proof of proving validity is irrelevant.  
6 It's not punishable as recidivism unless the prior conviction  
7 was valid, constitutionally valid.

8 So why isn't that same standard or proof  
9 thereof required either in the State conviction under  
10 your -- under any theory, or by the IJ? The IJ fails to  
11 make that finding, how has he and on what basis has he  
12 ruled that there was a valid prior conviction?

13 MS. SAHARSKY: What makes an offense  
14 punishable as a felony under the Federal Controlled  
15 Substances Act is contained in section 844, which  
16 defines the substantive punishments available. It says  
17 that drug possession is punishable as a felony in  
18 certain circumstances. And this Court in Lopez,  
19 particularly in footnote 6, recognized that repeat drug  
20 possession qualifies as punishable as a felony and under  
21 the CSA and --

22 JUSTICE SOTOMAYOR: But only under a process  
23 that requires notice --

24 MS. SAHARSKY: Well, this is what is  
25 interesting.

1 JUSTICE SOTOMAYOR: -- And --

2 MS. SAHARSKY: I'm sorry. What's  
3 interesting is the Court cited for this provision  
4 section 844(a), which defines the substantive penalties  
5 available. It didn't cite -- no one thought was  
6 relevant section 851, which defines procedures that  
7 happen after a conviction to impose a certain  
8 punishment.

9 So, what we're talking about are these  
10 procedures that are necessary. And it's not a finding  
11 of a valid conviction. It's -- it's a long set of  
12 procedures. There doesn't necessarily need to be a  
13 finding of a valid conviction if the defendant doesn't  
14 object at all. There's burden shifting. It's very  
15 complicated. Congress did not apply it to the  
16 immigration code by its terms. It's not applicable to  
17 the States by its terms.

18 What the Court said in Lopez in saying, in  
19 footnote 6, that recidivist possession counts as  
20 punishable under the CSA, it pointed to section 844,  
21 which defines the penalties available and not anything  
22 about procedures. And even conviction --

23 JUSTICE SOTOMAYOR: Counsel, you would  
24 suggest, then, that even if a prior State court  
25 conviction was secured without the advice of counsel,

1 that would qualify as a Federal offense of recidivism.  
2 So let's assume this case, that in neither the  
3 conviction for the one marijuana stick or the conviction  
4 for the one sleeping pill, that if those convictions  
5 were secured without the advice of counsel, that would  
6 be enough to qualify him as a recidivist under the  
7 Federal law.

8 MS. SAHARSKY: Well, that -- that raises a  
9 very narrow question that, so far as we are aware, has  
10 never been addressed in the immigration context, which  
11 is whether there could be a proceeding to challenge the  
12 narrow question of a conviction obtained in the complete  
13 absence of counsel.

14 This Court said in *Custis* that there -- even  
15 though there is a very broad general rule that prior  
16 convictions are presumed valid, that in one narrow  
17 situation, the complete absence of counsel, that a due  
18 process type challenge could be brought.

19 Now, that question has never been raised in  
20 this case, whether such a challenge could be brought in  
21 immigration proceedings despite the general rule that  
22 there are no such collateral challenges, but that is a  
23 different rule and a different body of jurisprudence  
24 from this Court, the due process body, as opposed to  
25 importing all of the very complicated section 851

1 procedures into the -- the -- the inquiry here.

2 And just to get back to the --

3 JUSTICE ALITO: Could a -- could a defendant  
4 whose prior conviction was under a State recidivism  
5 statute claim that that conviction was invalid because  
6 that defendant was at that time deprived of the right of  
7 counsel? Do you see a difference between that situation  
8 and the situation in which -- and the situation in the  
9 sort of case we have here with respect to the issue of  
10 whether the prior conviction was invalid because of the  
11 deprivation of the right of counsel?

12 MR. SRINIVASAN: Yes, I think that they're  
13 potentially distinguishable. But, you know, this is --  
14 this is not a question that has ever come up in the  
15 immigration context. It would be a special rule that  
16 would be based on the Court's decision, we think, in  
17 *Custis* and not anything about "punishable" referring to  
18 section 851 procedures.

19 JUSTICE ALITO: Well, why are they  
20 distinguishable? You could -- you can -- you could  
21 -- a person faced with removal could challenge  
22 a prior conviction on the ground that there was a  
23 deprivation of the right of counsel, whether or not it  
24 was pursuant to a recidivism -- whether or not there was  
25 a recidivism issue in it, couldn't -- couldn't they?

1 MS. SAHARSKY: Yes, but I think  
2 recidivism -- I think there's some confusion in the  
3 Court's discussion, perhaps, that recidivism is not an  
4 element of the offense. You're never convicted of  
5 recidivism. You're convicted of an offense, and you  
6 might be subject to an increased punishment for that  
7 offense because you are a recidivist.

8 And that's essentially what Petitioner wants  
9 here, is to define the State court offense as having an  
10 element of recidivism, but there is one thing that's  
11 clear from this Court's jurisprudence to this point is  
12 that recidivism is separate and unique from anything  
13 else that might --

14 JUSTICE KENNEDY: What -- what case do I  
15 read to establish that?

16 MS. SAHARSKY: That recidivism is separate  
17 and unique?

18 JUSTICE KENNEDY: Right.

19 MS. SAHARSKY: Almendarez-Torres would be  
20 one. The Court's decision in Rodriguez would be  
21 another.

22 JUSTICE KENNEDY: Well, but  
23 Almendarez-Torres was a different offense; was it not?  
24 I mean this is -- this is a drug offender who -- it's  
25 not like a burglar who stops burglary to take up a new

1 trade. This is -- this is a drug offender who continues  
2 to repeat under the drug offense laws, and I thought the  
3 position was that this shows a particular propensity, a  
4 particular immoral attitude that's not being corrected.  
5 And so that the recidivism makes him a worse person.

6 MS. SAHARSKY: Well, what this Court said in  
7 Rodriguez generally about recidivist punishments is you're  
8 always being punished for the last offense, but  
9 you're being punished more severely because it's shown  
10 that incapacitation and deterrence isn't working for  
11 you.

12 JUSTICE BREYER: That's what was worrying  
13 me, that's why I asked the other question. But the --  
14 what was worrying me would be a statute where they --  
15 it's big enough in the State to cover possession with  
16 recidivism or not, and they deal with it at the  
17 punishment stage, and I can see your point in respect to  
18 that. But that isn't this statute.

19 This statute not only doesn't deal with it  
20 at the punishment stage; it's forbidden to take it into  
21 account because what this says is you can only get  
22 recidivism if you previously had a conviction for a  
23 class A misdemeanor, and the prior conviction here was a  
24 class B; and, therefore, one thing we know about the  
25 statute is that under this statute, his behavior as a

1 recidivist is as close to irrelevant as you could make  
2 it. That's why I'm back to the cat burglar.

3 MS. SAHARSKY: Right. And what -- what I'm  
4 suggesting about that State statute is that -- and this  
5 Court said this in Lopez -- that Congress didn't want  
6 those variations in State law to change the treatment  
7 for individual offenders.

8 What it wanted, and it did this in  
9 aggravated felony provisions, all throughout them, is to  
10 identify categories of persons who had done certain  
11 conduct that Congress thought was serious enough and  
12 treat them all the same for immigration purposes. And  
13 the Court said in Lopez, we're not going to make the  
14 way that State law treats recidivism -- or we're not  
15 going to make State law treats an offense change the  
16 outcome. The outcome is going to be based on how  
17 Federal law treats the offense.

18 And that's why, to get back to one of my  
19 earlier answers to your questions, we think that this  
20 Court's decision in Nijhawan is extremely important  
21 here, because what the Court recognized in that decision  
22 is that Congress, in defining an aggravated felony,  
23 sometimes talks about required elements of the offense,  
24 and it sometimes talks about extra facts that can be  
25 established in the immigration court. In Nijhawan, there

1 was a fraud or deceit offense with this extra fact of  
2 this loss amount of \$10,000 or more. And Congress did the  
3 same thing in this provision. They had --

4 JUSTICE BREYER: It did? Well, Nijhawan uses  
5 this provision as an example of where it didn't.

6 MS. SAHARSKY: Well, we think that that  
7 refers to the first part of the definition. There are  
8 actually two parts of the definition. This is I think  
9 on page -- right at the beginning of the appendix to our  
10 brief. If you look at page 1a of the gray brief.

11 You know, there are two different parts  
12 here. In 43(B), there is "illicit trafficking in a  
13 controlled substance ... including a drug trafficking crime  
14 (as defined in section 924(c))." So this -- this first  
15 part, illicit trafficking, is like a generic burglary  
16 type offense where you need to just look at whether  
17 the -- essentially elements correspond under a modified  
18 categorical approach.

19 But then the second part of it, the drug  
20 trafficking crime, is the one that's defined as a felony  
21 punishable under the Controlled Substances Act. And  
22 when you look at a felony punishable under the Controlled  
23 Substances Act, which this Court interpreted in Lopez as  
24 a -- an offense that is punishable as a felony under Federal  
25 law, it is just like Nijhawan. It is an offense with

1 a certain extra fact. In Nijhawan, it was a fraud --

2 JUSTICE GINSBURG: May I ask you --

3 MS. SAHARSKY: -- and deceit offense.

4 JUSTICE GINSBURG: -- because your time is

5 running out. I take it your answer would be the

6 same -- at least these two misdemeanors were

7 committed a year apart, but if they were 10 years apart,

8 your answer would still be the same?

9 MS. SAHARSKY: Yes, and I think that's

10 because Congress has said when it wants the -- the

11 timing to matter. For example, in the end of the

12 aggravated felony definitions, Congress said it didn't

13 want felony convictions that were more than 15 years old

14 to matter. You know, Congress -- when it wants something

15 old not to matter, it says so, an older conviction. So

16 we don't think that there would be a difference for that

17 purpose.

18 So I just want to make sure I've answered the

19 question. We just think this is like that situation

20 where you have a conviction for a certain type of

21 offense, which here is drug possession, and an extra fact,

22 how it's punishable in Federal court, and that extra

23 fact can be established in immigration court. It's not

24 the kind thing that this Court has said under

25 Almendarez-Torres needs to be treated like an offense

1 element.

2 I should note that --- and this is the point  
3 you made, Justice Breyer, that there was not a  
4 recidivist enhancement available in Texas court.  
5 Justice Kennedy, that just highlights some of the  
6 problems that you identified in terms of the wide  
7 variations that we would see in how similarly situated  
8 people who have done the same things, two drug possession  
9 offenses, would be treated differently under the  
10 immigration laws. And that's just not what Congress  
11 intended.

12 We talk in our brief -- and there's a long  
13 list of differences in State laws, not only in the  
14 State procedures, which vary widely from Federal court,  
15 but in the State laws in terms of, you know, if you can  
16 consider a second possession offense for recidivist  
17 enhancement, or only a third or fourth; whether the  
18 first offense has to be final, et cetera, et cetera,  
19 et cetera. That there -- these differences would just  
20 lead to a -- a patchwork application laws of the  
21 immigration laws, and if there's any place where we don't  
22 want that, it's -- it's in immigration, with respect to  
23 immigration consequences.

24 JUSTICE GINSBURG: There was another  
25 crime, I thought a more serious crime, though still a

1 misdemeanor, in this picture, but the Texas prosecutor  
2 didn't make anything of that. Remind me of what that  
3 was, but I thought it was a -- a more grave offense.

4 MS. SAHARSKY: You might be thinking of his  
5 prior offense for domestic violence.

6 JUSTICE GINSBURG: Yes.

7 MS. SAHARSKY: That that may have been able  
8 to be used to -- to enhance his -- his drug crime to an  
9 enhanced sentence, but that -- there wasn't an  
10 enhancement sought on that.

11 JUSTICE GINSBURG: Yes --

12 MS. SAHARSKY: That was a -- a 2003  
13 conviction.

14 JUSTICE GINSBURG: So we respect that  
15 judgment on the part of the prosecutor, not to make it a  
16 -- a ground for a recidivist charge, but we don't  
17 respect the prosecutor -- Texas prosecutor saying I'm  
18 just going to treat this like it's a first-time  
19 misdemeanor; that's it.

20 MS. SAHARSKY: In neither case does the  
21 prosecutor's judgment matter. What matters is the  
22 offense conduct that was established by the conviction  
23 in State court. What matters is the offense that the  
24 person was convicted of and if that corresponds to a  
25 Federal offense that was punishable as a felony in

1 Federal court.

2           It is true that some charges may be  
3 brought and some charges may not be brought, and that  
4 would impact what a person has been convicted of. So  
5 there could be disparities based on that. But what  
6 Congress decided was that it had to balance its need for  
7 uniformity with a rule that is administrable, and the rule  
8 that it picked as administrable is, let's look at the  
9 offense conduct that was established by the conviction.  
10 And when you look at that offense conduct, you have to ask  
11 how it could be punished in Federal court. And it's that  
12 "punishable" language that requires this more hypothetical  
13 inquiry on how the events -- how the offense could be  
14 treated.

15           And just to summarize, it is clear from the  
16 last 20 years that Congress has had a very serious  
17 concern about recidivist criminal aliens in the United  
18 States, and Congress has made a judgment since 1970 in  
19 the drug laws that two drug possession offenses should  
20 be punishable as a felony. And under those  
21 circumstances, a person who concededly has committed  
22 those two drug offenses and who concededly, if taken to  
23 Federal court, could have been punished as a felony, just  
24 should not be able to escape the aggravated felony  
25 designation that Congress intended for all aliens who

1 are similarly situated.

2 If the Court has no further questions, we  
3 submit the judgment below should be affirmed.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 Ms. Saharsky.

6 Mr. Srinivasan, you have 4 minutes  
7 remaining.

8 REBUTTAL ARGUMENT OF SRI SRINIVASAN  
9 ON BEHALF OF THE PETITIONER

10 MR. SRINIVASAN: Thank you --

11 JUSTICE KENNEDY: We usually think of  
12 recidivism when we talk about statistics as being  
13 repeated for any crime. This is a recidivism of a special  
14 kind. It's repeating the same -- the same thing. Is  
15 that essential to your argument? I know it's essential  
16 to the -- to the Federal statute.

17 MR. SRINIVASAN: Right, and because it's  
18 essential to the Federal statute, it's necessarily a part  
19 of our argument. I don't think our argument would be  
20 any different if the Federal statute read differently,  
21 but you can only be punishable as a felon under Federal  
22 law if you had a prior drug conviction, and if you had a  
23 prior drug conviction that was in fact found to exist.

24 And I think, Justice Kennedy, the first point  
25 I'd like to make in rebuttal -- there's two points I'd

1 like to make. The first addresses a question you  
2 raised concerning what happens in a situation in which  
3 the second proceeding is a Federal proceeding rather  
4 than a State proceeding.

5           And I think this is important to highlight  
6 the government's response, because if the second proceeding  
7 is a Federal proceeding, we have a person who has a prior  
8 conviction for drug possession. We have a person who is  
9 then prosecuted in Federal court for a second time for  
10 drug possession. The prosecutor by hypothesis never  
11 brings the initial conviction into play. The court  
12 therefore never finds that the person is a recidivist.  
13 As a consequence, that person cannot as a matter of law  
14 receive a felony sentence. They can only be sentenced  
15 as a misdemeanor. But nonetheless, the government would  
16 say that they have been, quote, "convicted of a felony,  
17 punishable under the Controlled Substances Act," close quote --

18           JUSTICE SCALIA: How do you --

19           MR. SRINIVASAN: -- even though no felony  
20 sentence could be imposed.

21           JUSTICE SCALIA: How do you distinguish  
22 Nijhawan? I mean, there what made it a Federal felony  
23 was the fact that more than \$10,000 was obtained from  
24 the victims. But that was not found in the -- in the  
25 State conviction. It simply was not.

1           MR. SRINIVASAN: There were -- there were  
2 two things that made it a Federal felony,  
3 Justice Scalia. First was it had to be an offense that  
4 involved fraud.

5           JUSTICE SCALIA: That's right.

6           MR. SRINIVASAN: And then -- and that had to  
7 be found by the convicting court.

8           JUSTICE SCALIA: Right.

9           MR. SRINIVASAN: There was no issue about  
10 that. Our --

11          JUSTICE SCALIA: No issue.

12          MR. SRINIVASAN: Our point is that --

13          JUSTICE SCALIA: Well, what about the  
14 \$10,000? That --

15          MR. SRINIVASAN: That's the --

16          JUSTICE SCALIA: He was never convicted of  
17 having obtained by fraud more than \$10,000 from the  
18 victim.

19          MR. SRINIVASAN: But -- but there's a very  
20 important textual distinction, Justice Scalia, because  
21 under the provision at issue in Nijhawan, the offense  
22 had to involve fraud, and then there was a separator in  
23 which the loss exceeds \$10,000. And the Court focused  
24 on the fact that the text read "in which." That was  
25 critical, and another thing that was critical in

1 Nijhawan was that if you looked at Federal statutes and  
2 asked, were there any that as to which the elements would  
3 require a loss in excess of \$10,000, there were none.

4 And because of that practical consequence,  
5 the Court reached the conclusion that Congress would  
6 have intended, that the \$10,000 be something that the  
7 immigration judge could have found.

8 We have the opposite situation here.

9 JUSTICE SCALIA: You still had the word  
10 "convicted."

11 MR. SRINIVASAN: You had -- sure.

12 JUSTICE SCALIA: Which is what you're  
13 relying on. That word was applicable there as much as  
14 it's applicable here, and we did not require him to  
15 have been convicted of having obtained more than \$10,000.

16 MR. SRINIVASAN: Because, again, the test --  
17 the text also had "in which," which the Court found  
18 critical -- that text is lacking here -- and because the  
19 statute would have had no practical consequence, absent  
20 the Court's interpretation.

21 JUSTICE BREYER: Well, that's -- that --

22 MR. SRINIVASAN: That's not true here.

23 JUSTICE BREYER: Because she got to that argument  
24 at the end, and she said my -- I wrote that, I think, and I --  
25 when I used as an example or the text uses an example, this

1 provision is one where you don't look to real conduct.

2 She said that was a mistake, really. It  
3 was overstated, because what they're saying is that  
4 recidivism analogous to the \$10,000 was meant to be a  
5 real conduct aspect, not just offense of conviction, and  
6 -- and she gave similar reasons. That's why -- similar  
7 reasons are that the States are too mixed up in  
8 this; it will be too difficult to look at that element  
9 itself. So she's trying to analogize that to the  
10 \$10,000.

11 Now, why isn't that a good analogy?

12 MR. SRINIVASAN: Because for both reasons  
13 that the Court found that you could look to the  
14 circumstances in Nijhawan, neither of those two reasons  
15 applies here. You don't have a textual separator. You  
16 don't have the words "in which." All you have is the  
17 word "convicted." And you also don't have the  
18 consequence that the -- the provision would cease to  
19 have any practical implications under our reading.

20 It would absolutely have practical  
21 implications under our reading, because anytime a person  
22 was found to have been a recidivist and their sentence  
23 was raised, their maximum sentence was raised as a  
24 consequence, they will have been deemed to have been  
25 aggravated felon. But here, that didn't happen. You'd

1 have to understand that in the Federal system, even  
2 though an individual could not as a matter of law be  
3 sentenced as a felon, they nonetheless would have been  
4 deemed to have been convicted of a felony, and at the  
5 very least -- and this is the second point I'd like to  
6 make, if I could just --

7 CHIEF JUSTICE ROBERTS: Make your second  
8 point short.

9 MR. SRINIVASAN: Thank you,  
10 Mr. Chief Justice.

11 Principles of lenity which the government  
12 agrees are potentially applicable here would dictate ruling  
13 in our favor even if you thought that the text was  
14 ambiguous. The principles of lenity do apply. An  
15 individual who pleads guilty to possession in exchange  
16 for a prosecutor's decision to refrain from charging him  
17 as a recidivist and, therefore, could only be sentenced as  
18 a misdemeanor I think should be allowed to be convinced  
19 that he has been convicted of a misdemeanor rather than  
20 a felony.

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
22 The case is submitted.

23 (Whereupon, at 11:15 a.m., the case in the  
24 above-entitled matter was submitted.)

25

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