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P R O C E E D I N G S

(10:02 a.m.)

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

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

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

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

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

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

1 Were they provided in the briefs?

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

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

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

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

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

1 Adrian Moncrieffe possessed --

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

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

8 The Georgia statute, which just refers to
9 possession with intent to distribute, contemplates both
10 social sharing of marijuana -- this case, for example,
11 1.3 grams of marijuana, which is less than --

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

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

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

24 And on page 19 of the appendix to our blue
25 brief -- we just agreed because there was so little

1 record material, that we wouldn't have a joint appendix
2 in the case. We just published it at the end of our
3 brief -- it says, "Material weight less than 1 ounce.
4 Approximate weight is 1.3 grams."

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

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

11 JUSTICE SCALIA: Excuse me. I don't
12 understand.

13 MR. GOLDSTEIN: Sorry.

14 JUSTICE SCALIA: Material weight says less
15 than 1 ounce --

16 MR. GOLDSTEIN: Yes.

17 JUSTICE SCALIA: -- parentheses,
18 "Approximate weight is 1" -- 1 -- oh, I see, 1.3 grams.

19 MR. GOLDSTEIN: Yeah. 1.3 grams. 1.3.
20 That's -- that's very, very, very, very little.

21 So then, on the question of remuneration --
22 and I should just step back and explain, the reason
23 we're talking about this is that the Federal misdemeanor
24 provision, 841(b)(4), says that it's not a felony, and
25 thus, it wouldn't be an aggravated felony, if it's a

1 small amount and no remuneration. And Justice Ginsburg
2 asked about the -- what's in the record about that.

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

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

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

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

1 gentleman an aggravated felon?

2 MR. GOLDSTEIN: Under our rule, the plea
3 colloquy is irrelevant, but we would win under a rule in
4 which it was relevant.

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

15 That factor would still be highly relevant.
16 The Attorney General would exercise his discretion in
17 such a case. Now --

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

22 MR. GOLDSTEIN: Oh, this -- you said still
23 felons. We --

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

25 MR. GOLDSTEIN: But that's exactly right.

1 JUSTICE SOTOMAYOR: -- they're still subject
2 to removal --

3 MR. GOLDSTEIN: Right.

4 JUSTICE SOTOMAYOR: -- either way.

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

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

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

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

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

1 precedent in these other statutes, the obvious thing to
2 do -- the obvious puzzle here is not the Federal
3 statute, it's the State statute, what is this thing he
4 was convicted of about?

5 So you'd pick up the phone, and you'd phone,
6 at random, four U.S. attorneys -- not U.S. attorneys,
7 but four State attorneys --

8 MR. GOLDSTEIN: Okay.

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

18 Then we get some answers. Then we'd have an
19 idea whether what you're saying is right. Now, you
20 could do that, but they could do it, too. Anyone could
21 do it. And then we'd have some actual facts about
22 whether this charge -- really, it corresponds to the
23 misdemeanor or the felony in the Federal statute.

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

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

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

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

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

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

14 MR. GOLDSTEIN: Yes. Yes.

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

17 MR. GOLDSTEIN: Right.

18 JUSTICE BREYER: If your version of what
19 that felon intends to distribute --

20 MR. GOLDSTEIN: Yes.

21 JUSTICE BREYER: The distinction there is
22 really picked up by the district attorneys.

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

1 sell stuff.

2 MR. GOLDSTEIN: We have not read this
3 Court's cases to suggest that we call the State
4 attorneys. We have read the Court's cases to engage in
5 ordinary statutory construction, and sell means sell --

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

8 So my other question --

9 MR. GOLDSTEIN: Yeah.

10 JUSTICE BREYER: -- which is the only other
11 one I really have, aside from making that suggestion.
12 But here, what happened to this person?

13 MR. GOLDSTEIN: Yes.

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

18 MR. GOLDSTEIN: Yes.

19 JUSTICE BREYER: But was he, or wasn't he?

20 MR. GOLDSTEIN: Yes.

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

25 MR. GOLDSTEIN: Yes.

1 JUSTICE BREYER: And it says, if he
2 completes it, he then is discharged without court
3 adjudication of guilt.

4 MR. GOLDSTEIN: Yes.

5 JUSTICE BREYER: And -- and shall not be
6 deemed a conviction, it says for purposes of this code.

7 MR. GOLDSTEIN: Yes.

8 JUSTICE BREYER: Well, why are we saying he
9 was convicted of anything?

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

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

20 The reason is that there is a Federal
21 definition of convicted that's independent of the State
22 definition of convicted.

23 CHIEF JUSTICE ROBERTS: And that question's
24 not before us today.

25 MR. GOLDSTEIN: That's exactly right.

1 CHIEF JUSTICE ROBERTS: Okay. Well, isn't
2 the reason we don't look at the particular facts and
3 particular case and don't depose four district
4 attorneys, is that the Court has adopted a categorical
5 approach precisely to avoid that type of inquiry in --
6 whatever it is, 750,000 cases?

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

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

15 MR. GOLDSTEIN: Yeah.

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

18 MR. GOLDSTEIN: Yes.

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

23 MR. GOLDSTEIN: That is one way of looking
24 at it. We disagree, for reasons I'll explain. I will
25 note in our favor that the Attorney General doesn't even

1 defend that position anymore.

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

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

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

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

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

14 MR. GOLDSTEIN: Sorry.

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

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

19 JUSTICE KENNEDY: At the -- at the beginning
20 of the State prosecution?

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

23 JUSTICE KENNEDY: All right.

24 MR. GOLDSTEIN: So let me --

25 CHIEF JUSTICE ROBERTS: Before you get on --

1 I didn't understand that to be their position at all. I
2 mean, I suppose we -- I certainly will ask them because
3 they're probably better able to articulate their
4 position, but --

5 MR. GOLDSTEIN: Yes. So let me explain.

6 CHIEF JUSTICE ROBERTS: Go ahead.

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

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

21 MR. GOLDSTEIN: That's correct.

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

25 MR. GOLDSTEIN: Well, let me just say first,

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

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

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

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

23 JUSTICE GINSBURG: You said Carachuri. That
24 case involved, in -- in order to hold for the
25 government, you would have to go outside the record of

1 the State conviction. You'd have to add something that
2 wasn't in the State conviction.

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

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

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

16 JUSTICE SCALIA: What -- what is the
17 conviction?

18 MR. GOLDSTEIN: Okay.

19 JUSTICE SCALIA: What does the conviction
20 mean? You say the categorical approach.

21 MR. GOLDSTEIN: Yes.

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

25 MR. GOLDSTEIN: It is what you are convicted

1 of. So here, he was convicted of possession with intent
2 to distribute. The other side's argument is, well, if I
3 had just possession with intent to distribute, that
4 would be a Federal felony. So we acknowledge the
5 strength of that point. But our --

6 JUSTICE SCALIA: Is he convicted of that?
7 Or is he convicted of violating Georgia Code 16-13,
8 whatever it is?

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

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

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

23 MR. GOLDSTEIN: Yes. Yes.

24 JUSTICE KAGAN: If you assume that this
25 statute covers and is regularly used to cover both sets

1 of people, both people with these very minor offenses
2 and people with much more major offenses --

3 MR. GOLDSTEIN: Yes.

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

9 MR. GOLDSTEIN: I hope we will.

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

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

20 MR. GOLDSTEIN: Well, two reasons. First,
21 they don't have a real solution; and, second, Congress
22 solved our problem.

23 And this is what Carachuri-Rosendo says, and
24 that is when you have an underinclusiveness problem just
25 like ours, the statute fixes it because the statute

1 treats the conviction as a controlled substances
2 offense. The statute provides the backstop. You don't
3 have to make one up, which, I -- I suggest to you, is
4 the difficulty with their position.

5 JUSTICE GINSBURG: I don't follow --

6 MR. GOLDSTEIN: Okay.

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

12 MR. GOLDSTEIN: Yes.

13 JUSTICE GINSBURG: -- for remuneration --

14 MR. GOLDSTEIN: Yes.

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

19 MR. GOLDSTEIN: I agree with --

20 JUSTICE GINSBURG: So you have that --

21 MR. GOLDSTEIN: That is our problem. I
22 agree with that problem.

23 JUSTICE GINSBURG: -- a large
24 underinclusiveness problem, which you haven't solved.

25 MR. GOLDSTEIN: Okay. That's the part we

1 disagree with, Justice Ginsburg. Maybe I can just read
2 to you what this Court said about this exact issue in
3 Carachuri-Rosendo.

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

9 So if could just read, very briefly -- and
10 this is from the Supreme Court Reporter, at page 2589.
11 "We note that whether a noncitizen has committed an
12 aggravated felony is relevant, inter alia, to the type
13 of relief he may obtain from a removal order, but not to
14 whether he is, in fact, removable.

15 "In other words, to the extent that our
16 rejection of the government's broad understanding of the
17 scope of aggravated felony may have any practical effect
18 on policing our Nation's borders, it is a limited one.
19 Carachuri-Rosendo and others in his position may now
20 seek cancellation of removal and thereby avoid the harsh
21 consequence of mandatory removal, but he will not avoid
22 the fact that his conviction makes him" --

23 JUSTICE GINSBURG: But all that follows
24 from, in Carachuri, the government wanted to go outside
25 the record.

1 MR. GOLDSTEIN: No, Justice Ginsburg, it
2 does not. I promise you it does not.

3 The upshot of our position is that
4 Mr. Moncrieffe has committed a controlled substances
5 offense, and anyone else in his position has committed
6 one. And if there is a serious drug amount, the
7 Attorney General will deny him cancellation of removal.
8 I have --

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

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

19 We think it's a point in our favor that the
20 Attorney General, in the application starting with
21 212(c) before the 1996 Act, which is discussed in St. --
22 this Court's decision in St. Cyr, through the present
23 has instead applied a holistic look at all of the
24 circumstances.

25 What he certainly can do is direct the

1 immigration judges to place special weight -- and this
2 was the rule before 1996, by the way. If you had a
3 serious offense, you had to show special equities that
4 would justify your not being removed from the country.
5 And so we think that's the most likely outcome.

6 A per se categorical rule would be very
7 unlike what we understand the Attorney General to do in
8 any other circumstance.

9 JUSTICE KENNEDY: Would it -- would it be
10 permissible -- I had the same question. Would it be
11 permissible --

12 MR. GOLDSTEIN: I think --

13 JUSTICE KENNEDY: Or would you be back up
14 here saying that this violates the statute?

15 MR. GOLDSTEIN: Well, we think we would win,
16 so I wouldn't be back for this client. But I think
17 there would be a substantial argument that it would be
18 arbitrary and capricious because it would be so unlike
19 anything the Attorney General does in other
20 circumstances.

21 But they would have --

22 CHIEF JUSTICE ROBERTS: I'm sorry. Could
23 you remind me what the "it" is that you're talking
24 about?

25 MR. GOLDSTEIN: Yes. Yes.

1 CHIEF JUSTICE ROBERTS: It's an order from
2 the Attorney General --

3 MR. GOLDSTEIN: Yes.

4 CHIEF JUSTICE ROBERTS: -- to the
5 immigration judges --

6 MR. GOLDSTEIN: Yes.

7 CHIEF JUSTICE ROBERTS: -- to?

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

11 JUSTICE KAGAN: To do the exact same
12 thing --

13 MR. GOLDSTEIN: Yes. To get --

14 JUSTICE KAGAN: -- but through --

15 MR. GOLDSTEIN: Right.

16 JUSTICE KAGAN: -- an Attorney General
17 directive.

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

23 I had said that there were two flaws in
24 the -- sort of their characterization of the over and
25 underinclusiveness problem. The second one is they

1 don't have a real solution. This is a big problem.

2 Under these State convictions in which the
3 amount of drugs and whether there was remuneration are
4 irrelevant, it's going to be extremely difficult for
5 uncounseled noncitizens who are in jail, who don't have
6 access to tools of communication, to prove to an
7 immigration judge this fact-bound inquiry, which they
8 are inserting into every single case, that their offense
9 actually corresponds to a misdemeanor.

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

15 We said in our opening brief, and the
16 government's response ignores, that there are many cases
17 in which immigration officials have to make these
18 decisions about whether it's an aggravated felony much
19 more on the fly, without the opportunity to call
20 everybody in and --

21 JUSTICE KENNEDY: Do you have any
22 statistics -- if you take the whole universe of
23 convictions under the Georgia statute, what percentage
24 of them are for these minor offenses and what are for
25 the major? Do we have any handle on that at all?

1 MR. GOLDSTEIN: We don't. We tried. I'm
2 sorry. We were unable to do it. The Department of
3 Justice has better relationships with prosecutors, and
4 so maybe it -- it will have that information for you.
5 But, I can say -- it's possible.

6 But I can say that the -- it is absolutely
7 commonplace, from looking at the case law, for the
8 States to tackle this small social sharing of a couple
9 of marijuana cigarettes. This is -- that's the
10 distinction between 93 prosecutions under -- or
11 convictions under (b)(4) and possession in the -- in the
12 Federal system and 750,000 in the States. Federal
13 prosecutors leave these to the States.

14 Which brings me back to my other answer to
15 Justice Ginsburg's pointing out the government's
16 argument about a parallel between this and a Federal
17 criminal prosecution.

18 And the reason they want to do that, Justice
19 Ginsburg, is that in a Federal -- actual Federal
20 criminal prosecution, the burden of proof never matters,
21 including because Federal prosecutors almost never bring
22 these cases.

23 So here's what we tried to do: This
24 statute, (b)(4), was enacted in 1970, some 42 years ago.
25 We tried to identify one case in 42 years in which the

1 burden of proof in the Federal case made any difference
2 at all, and we were unable to. And I would be really
3 interested to know if my friend is able to identify one
4 case in 42 years, which it actually made a difference.

5 And the reason is, in an actual Federal
6 prosecution, the FBI agent would come in and say, here
7 are the drugs, and they were trying to sell it to an
8 undercover officer. It's never the case that it
9 actually -- the defendant is in a position of trying to
10 prove that it was a misdemeanor.

11 But what they are trying to do is to take
12 that rule, which is derived from Apprendi, that there is
13 a burden of proof so that the government doesn't have to
14 indict that it wasn't a (b)(4) offense, and take the
15 silence of the State record, where these facts are
16 completely irrelevant, the quantity and remuneration,
17 and transpose them into the Federal system and take
18 great advantage of the fact that the record is silent.

19 JUSTICE SOTOMAYOR: Mr. Goldstein, there are
20 at least 93 cases, all right? So --

21 MR. GOLDSTEIN: Yes.

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

1 MR. GOLDSTEIN: Sure.

2 JUSTICE SOTOMAYOR: Let's assume Georgia has
3 the Federal statute, but in -- differently than the
4 Federal statute, it has a sale-distribution provision,
5 and it has a small amount, no remuneration statute.

6 MR. GOLDSTEIN: Yeah.

7 JUSTICE SOTOMAYOR: What would happen in
8 those States?

9 MR. GOLDSTEIN: There are about 15 of those
10 States, and in those States, if you weren't convicted
11 under the small one, then you would infer it wasn't a
12 small amount and no remuneration, and the person would
13 have committed an aggravated felony.

14 Our issue arises only when you have a
15 situation in which the State is prosecuting people under
16 the statute that would be a Federal misdemeanor. If the
17 State --

18 CHIEF JUSTICE ROBERTS: I'm sorry. Go
19 ahead.

20 MR. GOLDSTEIN: No. If the State has a
21 different system, as a material number of States do, in
22 which they track the Federal system, and they have a
23 small provision or a remuneration provision -- which
24 another nine States have a remuneration provision -- in
25 those situations, if you have a conviction that isn't

1 under that social sharing provision, it's an aggravated
2 felony.

3 CHIEF JUSTICE ROBERTS: Your use of the
4 statistics, I think, assumes that Georgia and other
5 States are prosecuting every case that comes before them
6 because that's how you get -- you know, of these 750,000
7 nationwide, so much more than must involve tiny amounts.

8 But, of course, perhaps they don't prosecute
9 the cases involving tiny amounts, so that most of those
10 cases, or some percentage of them, may in fact also
11 involve the serious type of conduct addressed by the
12 Federal statute.

13 MR. GOLDSTEIN: Well, I have one really good
14 example of a prosecution for a small amount. It's this
15 case.

16 And we don't deny that there are --
17 Mr. Chief Justice, please do not misunderstand me to be
18 arguing that every Georgia conviction or that 80 or
19 90 percent of them are the small ones. What I'm trying
20 to tell you is that a lot of them are just like this
21 one, and I think the data bears that out.

22 And the question before you is, under a
23 categorical approach, is it fair to presume that they're
24 all felonies? Is it fair to presume that what Congress
25 recognized here is that there would be a correspondence

1 between a conviction under this statute and the Federal
2 aggravated felony of illicit trafficking in drugs, to
3 strip the Attorney General of the United States of any
4 opportunity whatsoever to consider the circumstances of
5 the case?

6 We think that is not the best reading of the
7 statute.

8 CHIEF JUSTICE ROBERTS: Thank you, counsel.
9 Mr. Shah.

10 ORAL ARGUMENT OF PRATIK A. SHAH

11 ON BEHALF OF THE RESPONDENT

12 MR. SHAH: Mr. Chief Justice and may it
13 please the Court:

14 Petitioner's proposed rule would confer a
15 free pass from aggravated felony treatment to criminal
16 aliens convicted under a majority of State laws that
17 require neither remuneration nor more than a small
18 amount.

19 JUSTICE SOTOMAYOR: What's the free pass?
20 The free pass is mandatory as opposed to discretionary
21 deportation, correct? So the free pass is that --

22 MR. SHAH: The free pass is that you would
23 never have an aggravated felony for this conviction
24 under any State that did not make an element of the
25 State offense to disprove -- no remuneration or more

1 than a small amount.

2 JUSTICE SOTOMAYOR: But those convicted
3 individuals would still be subject to deportation.

4 MR. SHAH: Yes, Your Honor, they would still
5 be subject --

6 JUSTICE SOTOMAYOR: And nothing would stop
7 the INS judge from considering the amount of drugs,
8 correct, that the individual actually was involved in,
9 and that could be introduced through hearsay -- through
10 almost any document, correct?

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

13 JUSTICE SOTOMAYOR: Yes.

14 MR. SHAH: It's true, Your Honor, that could
15 come in there. But Congress specifically enacted this
16 aggravated felony provision to take away that discretion
17 from the Attorney General. The motivating factor
18 behind --

19 JUSTICE SOTOMAYOR: Well, do you -- do you
20 suggest that the immigration judges don't know that and
21 that they wouldn't weigh that desire heavily in a case
22 in which a -- the convicted individual is proven to have
23 sold the larger amount? You still think they are going
24 to cancel?

25 MR. SHAH: What -- Your Honor, what Congress

1 said when it passed this very provision was that
2 immigration judges were granting too much discretionary
3 relief to this very class of criminal aliens, and that
4 is why it implemented this aggravated felony.

5 Now, Petitioner says it's not going to have
6 a big deal on immigration -- big impact on immigration
7 policy for the reason that you suggest, the Attorney
8 General can do it at the back end. But that --

9 CHIEF JUSTICE ROBERTS: Well, will you pause
10 right there. I don't -- you just made the argument that
11 your position on Castro-Rodriguez is wrong. You say
12 Congress took away the Attorney General's discretion.
13 Then you come back and say, well, we're going to
14 exercise that discretion under -- under
15 Castro-Rodriguez, and this Petitioner in particular can
16 take advantage of it.

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

21 Remember that this aggravated felony
22 provision in the INA incorporates by reference the CSA
23 scheme. What the CSA scheme provides is, as a default
24 matter, any conviction for possession with intent to
25 distribute marijuana will be a felony. But the CSA

1 scheme also provides a narrow mitigating exception for
2 those who distribute just a small amount socially.

3 What our scheme does is that --

4 CHIEF JUSTICE ROBERTS: Is that -- is the
5 authority for that Castro-Rodriguez?

6 MR. SHAH: I'm sorry?

7 CHIEF JUSTICE ROBERTS: Is the authority for
8 that the decision in Castro-Rodriguez?

9 MR. SHAH: To -- to have that secondary
10 proceeding?

11 CHIEF JUSTICE ROBERTS: Right.

12 MR. SHAH: Well, I think it comes from the
13 statute, the INA, which incorporates the CSA scheme.
14 Because many of the State provisions don't offer that
15 same affirmative mitigating exception that the Federal
16 scheme does, what Castro-Rodriguez does is it looks to
17 the INA, which incorporates the CSA, and then provides a
18 similar mechanism in immigration court.

19 But it's not an unprecedented inquiry. The
20 Board has been doing similar inquiries for at least a
21 quarter of a century.

22 JUSTICE KAGAN: Well, Mr. Shah, the Board
23 may have been doing these inquiries, but I just don't
24 understand the statutory argument because the way the
25 statute -- the way your own statutory argument runs is

1 that if the conviction -- the State conviction, was a
2 conviction for possession with intent to distribute,
3 then those are the elements of a Federal -- of a Federal
4 felony.

5 And so the person -- and an aggravated
6 felony. So you say, under the elements approach, this
7 person has committed an aggravated felony. And the
8 statutory directive is that, when a person has committed
9 an aggravated, felony, he is deportable, and there is no
10 exercise of discretion that can come into play.

11 And so your whole back-end process, which
12 says, oh, well, maybe not, maybe he's not automatically
13 deportable, it doesn't come from the statute, and it
14 seems to run into the statutory language, which says an
15 aggravated felon must be deported, the end.

16 MR. SHAH: Your Honor, I agree. The
17 government could have taken the hard-line approach that
18 it's game over under the categorical inquiry because the
19 elements --

20 JUSTICE KAGAN: Well, that's what the
21 statute says, and that's what your own statutory
22 analysis says.

23 MR. SHAH: Your Honor, I don't think it's
24 inconsistent with the statutory scheme. In fact, I
25 think it's consistent.

1 And here's one way to think about it:
2 This -- this particular aggravated felony is a little
3 bit complicated because it incorporates by reference, in
4 two different levels, the CSA. Congress -- let's assume
5 Congress rewrote the aggravated felony definition to
6 eliminate the incorporation by reference.

7 I think what the equivalent -- the
8 functionally identical formulation would be -- the
9 definition of the aggravated felony is, "any
10 distribution of a controlled substance, unless the
11 defendant shows that it involved a small amount of
12 marijuana for no remuneration."

13 That would incorporate both the presumptive
14 felony provision, any distribution of controlled
15 substance -- you have the same two elements -- and then
16 it would add in the proviso that it's in the CSA
17 mitigating exception. Functionally identical.

18 Aggravated felony is, "any distribution of a
19 controlled substance, unless the defendant shows that it
20 was a small quantity for remuneration."

21 CHIEF JUSTICE ROBERTS: This is --

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

23 CHIEF JUSTICE ROBERTS: Go ahead. I'm
24 sorry.

25 MR. SHAH: Sorry. What our inquiry does is

1 allow the board to get to that second part of the
2 definition, the "unless" clause, and that mirrors
3 exactly other aggravated felony provisions in the INA.

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

8 And you say, well, suppose Congress wrote a
9 statute this way. But that wasn't her question. The
10 question is --

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

12 JUSTICE KENNEDY: You -- you said that
13 Congress could write a new statute. Of course, Congress
14 could write a new statute, but what about this one?

15 MR. SHAH: I'm not positing a new statute.
16 I was simply taking out the incorporation by reference,
17 so we could look at it in a different way. I think it's
18 functionally identical to the provision at issue here.
19 And I think it's --

20 JUSTICE KAGAN: No, I'll just read you,
21 Mr. Shah, this sentence from your brief -- and I could
22 read you a thousand of these in your brief. "Because
23 Petitioner's Georgia conviction necessarily established
24 that he knowingly possessed marijuana with the specific
25 intent to distribute it, that conviction constitutes an

1 aggravated felony."

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

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

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

10 MR. SHAH: Well, well --

11 JUSTICE KAGAN: -- and -- and really, truly,
12 you say this 10 or 15 times.

13 MR. SHAH: Well, Your Honor, the heading to
14 the brief says, "presumptively," and so I didn't use
15 that word every time, but I think the point is that it
16 would be the -- the aggravated felony has that unless
17 clause.

18 And if you look at other aggravated felony
19 provisions in the INA, such as the one reproduced on the
20 top of page 34 of the government's brief, it defines an
21 aggravated felony as certain document fraud crimes, and
22 then it has a clause that says, "unless" -- "unless the
23 alien has affirmatively shown that the alien committed
24 the offense for the purpose of assisting, abetting or,
25 abating only the alien's spouse, child, or parent to

1 violate a provision of the INA."

2 So you could say ball game over, once you
3 have shown the document fraud crime under the
4 categorical approach. But the INA specifically has a
5 provision that says, unless the alien can show that he
6 committed the offense for the purpose of assisting and
7 abetting --

8 CHIEF JUSTICE ROBERTS: But this is -- this
9 is a new position for the government. My understanding
10 is that you -- your clients were on the other side of
11 this position in Castro-Rodriguez itself; is that not
12 correct?

13 MR. SHAH: Well, Your Honor, I don't think
14 that we categorically deny that you could have this sort
15 of proceeding. And in the op to this case -- I know
16 Petitioner says this is a new position in this case.
17 Pages 13 through 16 of our op embrace Castro-Rodriguez
18 as the right way to do it. I think it's --

19 CHIEF JUSTICE ROBERTS: But that was a
20 change in the government's position, wasn't it?

21 MR. SHAH: Your Honor, I can say that the --
22 the government did dispute the particular facts in
23 Castro-Rodriguez. I can't say that they categorically
24 rejected the availability of that sort of inquiry. And
25 that sort of inquiry is not new.

1 If you look at the Grijalva decision, which
2 is discussed on -- in footnote 23 of our brief on page
3 36, that was a precursor to the controlled substance
4 ground of removability that is currently in effect. And
5 so if you look at the language of that precursor
6 provision, essentially, it said any aliens deportable
7 for a drug offense, unless that drug offense involves
8 simple possession of marijuana of 30 grams or less.

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

13 MR. SHAH: It's a balance of equities.
14 After, assuming that the -- the alien has established
15 the three eligibility criteria set forth, it will be a
16 balance. It's a favorable exercise of discretion. It's
17 a balance of the equities.

18 CHIEF JUSTICE ROBERTS: So one of the
19 things, presumably, is the amount of drugs involved,
20 whether they were for intent to distribute for
21 remuneration -- all the sorts of things that you say he
22 can consider under the provision that says he does not
23 have the authority to cancel removal.

24 MR. SHAH: Your Honor, those are the sorts
25 of factors that might be open to consideration, but what

1 Congress did is it took away the ability for the
2 Attorney General to exercise that discretion. That was
3 the main purpose of this very aggravated felony
4 provision.

5 Now, Justice Sotomayor, if I can go to
6 your --

7 JUSTICE SOTOMAYOR: Each time you get -- you
8 say that, you get back into the hole that Justice Kagan
9 has been asking you to climb out of. If -- if Congress'
10 intent was to bar discretion, then I'm not quite sure
11 how you get to your alternative to get out of your --

12 MR. SHAH: Your Honor --

13 JUSTICE SOTOMAYOR: -- overinclusiveness
14 argument.

15 MR. SHAH: Your Honor, this will bar
16 discretion in the vast majority of cases, and here's
17 why. -if I could go back to the data question that you
18 asked, Justice Sotomayor, we do have Federal data, and I
19 interpret the data a little bit differently than my
20 colleague.

21 What data we have is that, over the last
22 decade, there have been over 60,000 convictions under --
23 under Section 841(a), for crimes involving something
24 more than possession of marijuana. 60,000. There have
25 been, in those 10 years, exactly 20 that have been

1 sentenced under Section 841(b)(4).

2 My colleague combines 844(a), which is a
3 possession offense, but if you isolate out of the data
4 only those who qualify for the mitigating exception,
5 those who are charged with distribution of marijuana,
6 but only have a small amount of remuneration, you have
7 20 out of over 60,000.

8 I think this is a fairly atypical case. To
9 the extent this Petitioner --

10 JUSTICE GINSBURG: Do -- do you agree with
11 Mr. Goldstein when he says, in reality, it's not an
12 affirmative defense, that the defendant never has to
13 prove the amount?

14 MR. SHAH: I -- I don't agree with that
15 because if it were, in fact, the case that the
16 government had to disprove the -- the small amount and,
17 more importantly, the remuneration element, that would
18 be a very different statute. Every court of appeals and
19 lots of the Federal --

20 JUSTICE SOTOMAYOR: I'm sorry, counselor.
21 I -- the government can do it very easily. If you have
22 less than an ounce of marijuana and nothing else from
23 which you can infer an intent to sell or distribute, and
24 you have no proof that this individual's engaged in drug
25 trafficking, what more does a defendant have to show?

1 MR. SHAH: Oh, I --

2 JUSTICE SOTOMAYOR: How does it raise his
3 burden of proof?

4 MR. SHAH: I'm not saying it -- the
5 defendant has to show more. I believe Justice -- I
6 thought Justice Ginsburg's question is what would the
7 government have to show to disprove it. And I think --

8 JUSTICE SOTOMAYOR: I -- I guess my point is
9 that one, which is don't the facts that the government
10 have either show it or not show it in virtually every
11 instance?

12 MR. SHAH: I think it's a very different
13 question. If you put the burden on the government to
14 show that, in fact, no remuneration was involved, the
15 government would have to meet its burden in a criminal
16 case to show beyond a reasonable doubt that there was no
17 remuneration at all. That is going to change the result
18 in a large number of cases where there is a relative --
19 it's going to be the universe of cases where there is a
20 relatively small amount of drugs involved.

21 JUSTICE SOTOMAYOR: It would be less than an
22 ounce.

23 MR. SHAH: Right. But in -- and in that
24 universe of cases, in fact, the presumption is probably
25 going to be that it's not for a distribution or

1 remuneration.

2 JUSTICE SOTOMAYOR: Can I go back to your
3 substantive argument?

4 MR. SHAH: Yes.

5 JUSTICE SOTOMAYOR: All right. This is a --
6 you are right. It's an unusually crafted statute. And
7 really, what the issue is, generally, what you have with
8 lesser included offenses is you have a base offense and
9 then an enhancement that goes up. You commit the base
10 offense --

11 MR. SHAH: Yes.

12 JUSTICE SOTOMAYOR: -- of burglary, but if
13 you did it with an explosive or you did it with a
14 dangerous weapon, it goes up.

15 MR. SHAH: That's exactly right.

16 JUSTICE SOTOMAYOR: And applying the
17 categorical approach is relatively easy there because
18 either the State offense includes the addition or it
19 doesn't.

20 This is sort of in reverse. You've got a
21 statute with the same elements that can be either a
22 misdemeanor or a felony. And you're saying it can be
23 either under the CSA, but we have to assume it's the
24 greater because --

25 MR. SHAH: Your Honor --

1 JUSTICE SOTOMAYOR: -- of Apprendi, because
2 of -- of --

3 MR. SHAH: I -- I think it's because of the
4 proper interpretation of the statute. Apprendi might
5 have influenced that interpretation of the statute, but
6 every court of appeals that has interpreted this statute
7 has said that the -- the default punishment, is this
8 punishable up to 5 years --

9 JUSTICE SOTOMAYOR: But that's under
10 Apprendi.

11 MR. SHAH: Well, both before and after
12 Apprendi, Your Honor, this statute was interpreted the
13 same way. Apprendi didn't change anything because there
14 were no sentencing factors or elements --

15 JUSTICE SOTOMAYOR: That's the point.

16 MR. SHAH: -- to get to the 5-year --

17 JUSTICE SOTOMAYOR: Didn't we -- didn't we
18 talk about the categorical approach in footnote 3 of our
19 case in Carachuri?

20 MR. SHAH: Uh-huh.

21 JUSTICE SOTOMAYOR: Where we said that, in
22 talking about the generic Federal offense, whether it's
23 a felony or not, that we can't look at just strictly the
24 elements of the crime, but we have to also look at the
25 sentencing factors because, when we're talking about

1 what constitutes a misdemeanor or a felony under Federal
2 law, we have to look at both.

3 MR. SHAH: Well, Your Honor, what Carachuri
4 involved was something very different. It involved a
5 recidivism factor, an aggravating factor. When you are
6 talking about an aggravating factor, Apprendi
7 jurisprudence has treated those somewhat equivalent to
8 an element because it raises the statutory maximum. And
9 so when you are trying to decide whether something is
10 punishable as a felony, it's natural to look at the
11 aggravating factor.

12 The other thing I would say about Carachuri
13 is that it's easily distinguishable on the grounds that
14 Justice Ginsburg raised. It -- the government's
15 argument in Carachuri was much more difficult. The
16 government was trying to rely on a recidivism factor
17 that was not part of the predicate conviction. And it
18 was trying to rely on that factor to elevate what was
19 otherwise a misdemeanor under both State and Federal law
20 to a felony.

21 Here, the predicate conviction itself has
22 all the elements that are required for a Federal felony
23 under the CSA, namely possession of marijuana and a
24 specific intent to distribute it.

25 JUSTICE SOTOMAYOR: But the same elements

1 would go to the misdemeanor. Really, the issue for me
2 is it could be one or both. And when do we tell the
3 immigration judge that he can, should, or should not --

4 MR. SHAH: I think there are --

5 JUSTICE SOTOMAYOR: -- choose between the
6 two?

7 MR. SHAH: I think there are -- I think
8 there are two ways, Your Honor, that -- two different
9 lines of reasoning that show that the government's
10 approach to the categorical part of the inquiry is -- is
11 the right approach and not Petitioner's approach. The
12 first is --

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

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

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

18 MR. SHAH: Right. I think here -- here are
19 the two ways you get there. First is by looking at how
20 this Court has consistently formulated the categorical
21 inquiry. Starting with Taylor, pre-Apprendi case,
22 compare the elements of the predicate offense to the
23 those of the generic offense.

24 Fast forward past Apprendi through all of
25 the more recent cases, Lopez and not -- still the same

1 inquiry, focusing on the elements of the predicate and
2 the elements of the generic.

3 If that is not enough for you,
4 Justice Sotomayor, if there is still some uncertainty as
5 to when you have mitigating factors, like in this case,
6 and the question is, well, does the predicate conviction
7 have to affirmatively negate those narrow mitigating
8 criteria, then this Court can look, if it wants to go to
9 first principles, look at this Court's decision in
10 Nijhawan.

11 There, it had a different aggravating
12 felony, certain fraud and deceit offenses which resulted
13 in a \$10,000 loss to the victim. What the Court said,
14 look, fraud and deceit, those are clearly elements, we
15 are going to apply the categorical approach to -- to
16 figure out whether those elements are satisfied. But
17 the \$10,000 loss factor, we're not sure. We're not sure
18 whether the predicate offense has to affirmatively
19 establish it or not.

20 And so what the Court did is it did a survey
21 of the 50 States. It looked at the 50 States. And it
22 turns out that, in a vast majority of those States, the
23 predicate conviction will never establish that \$10,000
24 loss factor. And so you're going to have a vastly
25 underinclusive aggravated felony.

1 And that's something that Congress -- that
2 Congress could not have intended. The Court said
3 Congress would not have intended its aggravated felony
4 provision to apply in such a limited and haphazard
5 manner.

6 I submit that's exactly what you have here
7 on pages 26 to 30 of our brief. And Petitioner does not
8 take issue with a single one of the statutes that we
9 cite. And we go through all 50 of them. We show that,
10 in a clear majority of the States, the predicate
11 conviction will not establish that there is remuneration
12 or more than a small amount.

13 Congress cannot --

14 JUSTICE KAGAN: Mr. Shah, I think the
15 problem with your main argument is that it leads you to
16 a result that you don't want to accept because your main
17 argument is all we've done in our past cases -- and I
18 can argue with this, but your argument is all we've done
19 is compare the elements.

20 But if all we do is compare the elements,
21 then we don't get to your discretionary scheme in which
22 we also admit evidence of -- of the case-specific nature
23 of the offense.

24 I mean, so your arguments all go towards a
25 very purist solution. And then you say, oh, no, that's

1 a crazy solution. It's a crazy solution because we
2 would wind up saying that misdemeanants, like this
3 person, like people who are actually convicted under
4 (b)(4) who are clearly misdemeanants, would wind up as
5 aggravated felons and -- and must be deported.

6 MR. SHAH: Well, well, first, Your Honor, I
7 am glad that we have an agreement on the first part of
8 the categorical inquiry because I think that is the main
9 part of the inquiry that this -- that would establish --

10 JUSTICE KAGAN: I don't think we really have
11 an agreement --

12 MR. SHAH: Okay.

13 JUSTICE KAGAN: -- because it seems to me
14 that Carachuri actually says we don't just look to
15 elements. But if we were just to look to elements in
16 the way you're arguing for, we wouldn't get the result
17 that you're arguing for.

18 MR. SHAH: Again, Your Honor, I think you
19 have to look at this particular aggravated felony, which
20 I think is structured similar to other aggravated
21 felonies in the INA.

22 If you look at the aggravated felony in the
23 INA that's on page -- top of page 34 of our brief, and
24 that -- that is the one about document fraud crimes, it
25 says the alien -- then, if the alien then shows that

1 that document fraud crime was perpetrated in order to
2 help a family member, then no more aggravated felony.

3 How does the alien make that showing? He
4 comes into immigration court -- after it's already been
5 established that you have the predicate document fraud
6 felony, he comes into immigration court. He has to
7 bring forth evidence on his own that shows that it
8 satisfied this familial exception to that document fraud
9 aggravated felony. I think the --

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

13 MR. SHAH: I think the point is that there
14 is a similar provision. In the -- the INA here
15 incorporates the CSA to define the aggravated felony.
16 The CSA says it's a felony if you have possession plus
17 intent to distribute, unless the defendant shows -- and
18 this is how it has been interpreted by every court of
19 appeals that has interpreted the CSA -- unless the
20 defendant shows it was only a small amount for no
21 remuneration.

22 That is an identical formulation to some of
23 the other aggravated felonies in the provision. And how
24 those other aggravated felony provisions have been
25 interpreted is to allow the alien to come into

1 immigration court to show the exception.

2 We are not aware of a single court decision
3 that has ever interpreted any similar provision in any
4 of the other aggravated felony provision to require the
5 predicate conviction to affirmatively negate it.

6 And that's exactly what Petitioner's main
7 submission is, that this predicate conviction has to
8 affirmatively negate the possibility of a narrow
9 mitigating exception. That is --

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

14 Congress has the -- the social sharing
15 conduct, and that's in one section. And the everything
16 else, the more dangerous conduct, is in another section.

17 And so it's not something where it's like,
18 oh, you're trying to get them to negate a specific -- a
19 point. Congress has created two separate sections,
20 two -- and one is a felony, and one is a misdemeanor.
21 And that's the -- the real way to understand this
22 statute.

23 And then the categorical approach suggests,
24 well, in that case, we accept the underinclusion, rather
25 than the overinclusion.

1 MR. SHAH: Well, Your Honor, I disagree with
2 that characterization of that statute. Every court of
3 appeals that has considered this statute has rejected
4 the argument that we have two separate offenses and that
5 the -- that the government, in order to get to the
6 higher offense, the -- the default felony provision,
7 that the government would have to treat as elements
8 the -- the mitigating criteria of remuneration and small
9 amount. Every court of appeals has rejected that.

10 If this statute were drawn as you suggest,
11 and it were elements of a crime, that is, you had two
12 separate offenses, one is possession with intent to
13 distribute a small amount for no remuneration, or it
14 could just say possession with intent to distribute
15 marijuana, if that was one distinct offense that was a
16 misdemeanor, and then Congress created a second offense
17 that says, in cases where there is more than a small
18 amount, in which there is remuneration, then you get a
19 five-year maximum instead of a one-year maximum, that is
20 effectively making, as an element, the government to
21 disprove both the possibility of no remuneration and
22 more than a small amount.

23 If that was the statutory scheme that were
24 at issue, I would agree with you, Petitioner would
25 prevail under the categorical approach. That's not

1 the -- that's not the statutory scheme here.

2 They do not disagree with that. They --
3 they agree that every court of appeals that has
4 interpreted this has interpreted it as one offense and
5 that those mitigating criteria are just that, they are
6 mitigating exceptions and not offense elements.

7 I think the other point I would make, Your
8 Honor, is that --

9 JUSTICE KAGAN: I guess I don't understand,
10 Mr. Shah. That seems just a question of labeling to me.
11 I mean, why should we -- why should we accept that
12 labeling, rather than, look, what Congress did here was
13 to say that certain kinds of offenses are felonies
14 deserving of grave punishment, and other kinds of
15 offenses are misdemeanors deserving of less than a year
16 in prison, and -- and we see those -- those categories
17 of conduct differently.

18 And if you are saying that if Congress
19 had -- had said two separate offenses, then the
20 categorical approach means that Mr. Goldstein's client
21 wins, I guess I just don't get what in this statute
22 suggests something different from that.

23 MR. SHAH: Two things, Your Honor. One is I
24 don't think it's a matter of labeling because Congress
25 knows that these labels actually have big consequences.

1 If you made those mitigating criteria elements, that
2 would be a very different statute, which the government
3 in every case would have to show beyond a reasonable
4 doubt that it's more -- more than a small quantity.

5 That may not be difficult; but in cases
6 where there is a small quantity, it may, in fact, be
7 difficult to disprove --

8 JUSTICE SOTOMAYOR: Counsel --

9 JUSTICE SCALIA: Counsel, I thought that
10 when Congress enacted this provision, there was not the
11 distinction between elements and sentencing factors that
12 we now have, that the statute was enacted, in other
13 words, before Apprendi.

14 MR. SHAH: Your Honor, this statute was
15 enacted before Apprendi, but Apprendi doesn't change the
16 interpretation of this statute. This statute -- in the
17 relevant criteria.

18 This statute was interpreted -- interpreted
19 both the same before and after Apprendi, with respect to
20 the default provision, because the default provision
21 doesn't require any factors or elements at all to get to
22 the felony provision.

23 JUSTICE SCALIA: That may be, but it
24 certainly goes to your argument that Congress had in
25 mind some distinction between elements and sentencing

1 factors.

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

5 And, Justice Kagan, to get back to your
6 question, how do we know? Well, we can look at what --
7 the inquiry that the Court did in Nijhawan. It would
8 not be -- it would not be consistent with Congressional
9 intent to assume that Congress intended that this
10 aggravated felony provision would not have any effect in
11 the clear majority of States that do not make either
12 remuneration or more than a small quantity an element of
13 the offense.

14 That is what Nijhawan was about. It was
15 trying to figure out, did Congress intend this
16 particular piece of the aggravated felony description to
17 be subject to the categorical approach or not? That is,
18 did it require the predicate conviction to establish or
19 negate it? And the right way to look at that is to look
20 at the State of the State laws.

21 And here, we know that, in a clear majority
22 of States, they do not require remuneration, they do not
23 require more than a small amount. You will never get an
24 aggravated felony conviction out of a majority of
25 States. Congress could not have intended that result.

1 That's what Nijhawan stands for.

2 JUSTICE KENNEDY: If you do not -- if you do
3 not prevail in this case, can you simply solve this
4 problem in the discretionary removal proceedings?

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

6 JUSTICE KENNEDY: You just say we're going
7 to -- we're going to order you removed, unless you bring
8 in evidence that this was a minor amount, period.

9 MR. SHAH: Your Honor, I -- I think that
10 that -- I think that's an open question. That's one
11 that has not come up yet. I think
12 Congress specifically --

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

16 MR. SHAH: It may -- it may be -- be an
17 option open to the Attorney General to do that. The
18 Attorney General would have to issue an order to that
19 ground. I imagine it would be challenged and we'd have
20 to litigate it. But what we do know is that Congress
21 didn't want those sort of discretionary determinations
22 made. Congress knew that all of these areas --

23 JUSTICE SOTOMAYOR: Counsel, under the --
24 under the -- do you have the same answer as
25 Mr. Goldstein, that the modified categorical approach

1 wouldn't permit the immigration judge to look at the
2 plea allocution to determine the amount?

3 MR. SHAH: I think the modified categorical
4 approach would allow -- would allow --

5 JUSTICE SOTOMAYOR: So that in -- in many of
6 these cases that we're talking about, it is possible
7 that the plea allocution itself would set out the
8 amounts that the alien sold or show that he sold
9 something --

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

11 JUSTICE SOTOMAYOR: -- and that would take
12 care of this issue of how many people are escaping
13 automatic removal?

14 MR. SHAH: I think if the -- the plea
15 agreement or plea colloquy set forth the amount and it
16 was more than a small amount, I think the modified --
17 our position would be that the modified categorical
18 approach would allow you to reach that.

19 Petitioner's and his amici's argument are
20 essentially that the plea agreements aren't going to say
21 that in a large majority of these cases, for the simple
22 reason that a -- that a vast majority of the States
23 don't make more than a small quantity an element of the
24 crime, and so it's going to be irrelevant. But that
25 simply shows --

1 JUSTICE SOTOMAYOR: But the vast majority --
2 the vast majority, in my experience, do -- do say
3 whether the crime was for sale or distribution.

4 MR. SHAH: And if that's the case, then the
5 government would agree that, if we were to lose this
6 case, we could then look at -- look at that evidence
7 to -- to show -- to disprove more than a small amount,
8 something that's not an element in any of the State
9 crimes.

10 JUSTICE GINSBURG: Are there any other
11 consequences? We've been talking only about
12 dispensation from removal. But are there any other
13 consequences that matter?

14 MR. SHAH: Yes, Your Honor, there -- there
15 are other consequences that matter. For example, a
16 person who's not -- a person is not only removable and
17 not only deprived of cancellation relief. There --
18 those who are aggravated felons are just essentially
19 deprived of all forms of discretionary relief, except
20 for Convention Against Torture relief and withholding of
21 removal.

22 It also has implications beyond the
23 immigration context. At the same time that Congress
24 enacted this aggravated felony provision, it made it a
25 sentencing enhancement provision in -- in criminal

1 prosecutions for illegal reentry. And so in any illegal
2 reentry prosecution, if the defendant is also -- has a
3 prior conviction for marijuana distribution, they would
4 be subject to a significant sentencing enhancement under
5 both the guidelines and Section 1326, the Illegal
6 Reentry Statute.

7 If Petitioner's rule were to prevail in a
8 significant number of those cases, in any State in which
9 it did not have those relevant elements, that sentencing
10 enhancement would no longer have operative effect.

11 So, Your Honor, it's not simply the case, as
12 Petitioner would like to say, that the only thing here
13 is -- is a difference between removability and
14 cancellation of removal relief that the Attorney General
15 can fix on his own. There are other ancillary
16 consequences. And I think the criminal -- the
17 consequence of the criminal prosecution is a significant
18 one.

19 CHIEF JUSTICE ROBERTS: Does that -- does
20 the Castro-Rodriguez proceeding take care of those
21 additional consequences?

22 MR. SHAH: If -- if I may respond, Your
23 Honor?

24 CHIEF JUSTICE ROBERTS: Sure. Oh, yes.

25 MR. SHAH: Thank you.

1 I don't -- I think what -- we haven't had
2 any criminal cases where the -- where an alien has come
3 in and tried to make the argument. I imagine, if
4 Petitioner prevails, it will be made in every single one
5 of those 1326 reentry prosecutions.

6 I think, if the Court were to accept the
7 Government's submission, both on the threshold
8 categorical inquiry and on the tail-end fact-specific
9 inquiry, I think a defendant would probably be able to
10 have the opportunity to try to make that showing in the
11 Federal sentencing proceeding as well.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.

13 Mr. Goldstein, you have three minutes
14 remaining.

15 REBUTTAL ARGUMENT OF THOMAS C. GOLDSTEIN

16 ON BEHALF OF THE PETITIONER

17 MR. GOLDSTEIN: Mr. Chief Justice, I told
18 you I was going to acknowledge the strengths of the
19 other side's case. And I want to just recognize that
20 you can conceivably read the statute their way. But the
21 question is, if you actually adopt their statutory
22 construction argument and you say we're going to look at
23 the elements and it's an aggravated felony, we're
24 comparing two different ways of reading it.

25 And they admit that their way of reading the

1 statute comes up with an answer that Congress couldn't
2 possibly have intended by treating all these
3 misdemeanants as aggravated felons.

4 Now, their solution is to add a whole
5 'nother proceeding that isn't in the statute. Another
6 solution is just to recognize their reading is wrong.
7 If it produces this ridiculous result that Congress
8 couldn't have intended, and our reading is perfectly
9 sensible and not only do you have the solution of the
10 removal proceedings, but also Justice Kennedy's
11 suggestion of the Attorney General's ability to issue an
12 order, Justice Sotomayor's solution of being able to
13 look at the plea allocution, questions that aren't
14 presented here, but lots of ways of addressing any
15 adverse consequences of our rule.

16 What in statutory construction allows us
17 just to add this procedure that --

18 JUSTICE BREYER: But it's the word
19 "punishable," I think.

20 MR. SHAH: Well, "punishable" is a good
21 word --

22 JUSTICE BREYER: So you're thinking, under
23 Georgia law, this is punishable as a felony only if it
24 wasn't a small amount used for personal use, you see,
25 and therefore, they go into the hearing.

1 It's not punishable as an 841 felony, unless
2 those two things are absent, and therefore, they have
3 the hearing to find out. And the word "punishable"
4 doesn't appear in the statutes, the other ones that
5 we've construed. That's what I thought they were doing.

6 MR. GOLDSTEIN: Okay. But I don't think
7 that's actually what they're doing because Mr. Shah did
8 not deny Justice Kagan's questions about, yeah, it would
9 produce this ridiculous result, and so we're going to
10 add this other proceeding.

11 When they say -- what they do with
12 punishable is they say look at only the elements of the
13 Federal offense. And that's how they say that any
14 Georgia conviction, even though, Justice Ginsburg, lots
15 of these convictions will just be equivalents to Federal
16 misdemeanors because they are the equivalent of --
17 because they involve possession with intent to
18 distribute, those are the only elements of the offense,
19 then they're all punishable as felonies, even if they
20 would be a misdemeanor.

21 So I don't think punishable helps them. And
22 they don't seem to argue on the basis of punishable. So
23 my base point to you is that why, in choosing between
24 these two readings, we have strengths, they have
25 strengths. Their argument starts from the proposition

1 that theirs produces a result that Congress couldn't
2 have intended.

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

11 The last point that I want to address is
12 actually a very small one. And that's about
13 Justice Thomas' dissent in the Lopez case on whether you
14 should look to the State definition of whether this is a
15 felony or instead, the Federal one, because the
16 government cites it in a footnote in their brief.

17 And we would only say that the government is
18 not relying on the Lopez dissent. It invokes Lopez
19 repeatedly in the Federal courts. And so this is a
20 situation in which the Court's decision in Lopez should
21 take hold as a matter of statutory -- stare decisis, and
22 what matters here is the Federal treatment of it.

23 When you don't know if the Georgia
24 conviction is a felony or a misdemeanor under Federal
25 law, you don't know which one it is, what the

1 categorical rule says is that the State conviction
2 doesn't necessarily establish it's a Federal offense,
3 the Federal felony here, and therefore, you don't treat
4 it that way.

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

13 Our rule addresses the core concern of
14 Congress. It gets the right people deported. Their
15 rule, because it's overinclusive, there will be
16 noncitizens who can't prove their offense was a
17 misdemeanor, and they shouldn't be removed.

18 Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel,
20 counsel.

21 The case is submitted.

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

24

25

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