Nos. 05-547 & 05-7664

# In the Supreme Court of the United States

JOSE ANTONIO LOPEZ,
*Petitioner,*
v.
ALBERTO R. GONZALES,
*Respondent.*

REYMUNDO TOLEDO-FLORES,
*Petitioner,*
v.
UNITED STATES OF AMERICA,
*Respondent.*

On Writs of Certiorari to the
United States Courts of Appeals for the Eighth and Fifth Circuits

**BRIEF OF TEXAS, ARKANSAS, COLORADO, DELAWARE, IDAHO, KANSAS, NEW HAMPSHIRE, PENNSYLVANIA, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS**


GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

DON CLEMMER
Deputy Attorney General for Criminal Justice

R. TED CRUZ
Solicitor General
*Counsel of Record*

AMY WARR
Assistant Solicitor General

P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*
[Additional counsel listed on inside cover]

MIKE BEEBE
Attorney General of Arkansas

JOHN W. SUTHERS
Attorney General of Colorado

CARL C. DANBERG
Attorney General of Delaware

LAWRENCE WASDEN
Attorney General of Idaho

PHILL KLINE
Attorney General of Kansas

KELLY A. AYOTTE
Attorney General of New Hampshire

THOMAS W. CORBETT, JR.
Attorney General of Pennsylvania

MARK L. SHURTLEFF
Attorney General of Utah

ROBERT F. MCDONNELL
Attorney General of Virginia

## QUESTION PRESENTED

Whether prior state convictions for possession of a controlled substance constitute "aggravated felon[ies]" triggering (1) a recommended sentence enhancement under §2L1.2(b)(1)(C) of the Sentencing Guidelines or (2) negative immigration consequences under the Immigration and Naturalization Act when the prior conviction was a felony under state law but would have been a misdemeanor under federal law.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Constitutional Provisions, Statutes, and Rules

**Other Authorities**

## INTEREST OF *AMICI CURIAE*

No values are more central to the States than the preservation of law and order and the protection of the health and safety of the citizenry. Immigration policy embodies both. The States are united in welcoming legal immigrants to the melting pot that is America, while at the same time valuing a true and secure national border.

Enforcement of criminal laws has likewise traditionally been a core function of the States. *See, e.g.*, THE FEDERALIST No. 45 (James Madison) (Clinton Rossiter ed., 1961). And all of these state interests converge with respect to the illegal immigration of previously adjudged felons. Indeed, the States' interests are at their zenith concerning those individuals who have been found, under state law, to be felons. In proscribing and defining conduct as felonious, state legislatures have made the policy judgment that such conduct is the most objectionable and dangerous to the citizenry, and that normative judgment by the States is due considerable respect. Every State has a vital interest in securing our Nation's borders, including against the illegal immigration of aggravated felons.

Although recent years have seen a significant proliferation of federal criminal laws, particularly concerning the use and sale of drugs, the federal government lacks the resources to investigate and prosecute the full spectrum of criminal offenses. This function remains largely the province of the States.

When Congress wishes to account for individuals' past criminal behavior in making certain criminal or regulatory determinations, it cannot do so comprehensively without relying on state as well as federal convictions. Therefore, Congress increasingly incorporates consideration of state convictions into the scope and application of federal criminal and regulatory laws. In so doing, Congress may, as a matter of comity and efficiency, infuse federal law with the States' policy and normative judgments. This approach can be viewed as a natural outgrowth of increasing the federalization of

criminal and regulatory law while respecting the structure of our system of federalism.

This appeal involves two areas—sentencing enhancement and immigration—in which Congress has taken such an approach, choosing to rely on state convictions and state determinations as to the severity of the particular crime (felony or misdemeanor). The States have a strong interest in ensuring that their normative criminal-law judgments are respected as Congress intended.

These federalism concerns are particularly acute when the States have chosen to exercise their traditional police powers to label someone a "felon." This classification represents the States' most severe assessment of criminal conduct and is reserved for those individuals whom the States believe pose the highest degree of danger to their citizens. Although some States may differ as to whether individuals found in possession of cocaine or marijuana fall within this category, Congress has decided to give effect to each State's policy decision, the objective of which is to protect its citizens from the dangers it believes are posed by a certain category of criminals.

## STATEMENT

In 1988, Congress amended the Immigration and Nationality Act ("INA") to define a new class of aggravated felonies to determine the immigration consequences for aliens convicted of criminal offenses. Pub. L. No. 100-690, 102 Stat. 4181 (1988). The Federal Sentencing Guidelines similarly rely upon aggravated felonies to determine recommended sentence enhancements for some federal crimes. U.S.S.G. §2L1.2 (b)(1)(c).

The competing interpretations advanced by the parties as to which offenses Congress intended to be included as aggravated felonies can be distilled into two approaches: (1) the State Felony approach, which would give effect to a State's felony classification,

even if not mirrored by federal law, and (2) the Federal Felony approach, which would treat a state conviction as an aggravated felony only if the conviction would have been a felony under federal law. A brief description of the relevant federal statutes sheds additional light on these two approaches.

Under the Federal Sentencing Guidelines, aggravated felonies provide a baseline for sentencing enhancement:

> If the defendant previously was deported, or unlawfully remained in the United States, after a conviction for an aggravated felony, increase by 8 levels. U.S.S.G. §2L1.2 (b)(1)(c).

Under the INA, commission of an aggravated felony subjects an alien to deportation and also makes him ineligible for suspension of deportation and other equitable remedies available to other aliens. 8 U.S.C. §§1227(a)(2)(A)(iii) (deportation); 1229b (cancellation of removal); 1158(b)(2)(B) (ineligibility for asylum); 1229c(a)(1) (disqualification for voluntary departure).

Aggravated felonies serve distinct purposes in the Guidelines and the INA. Nonetheless, their definitions merge when the Guidelines define an aggravated felony by reference to the INA:

> For purposes of subsection (b)(1)(c), "aggravated felony" has the meaning given that term in 8 U.S.C. 1101(a)(43), without regard to the date of conviction for the aggravated felony. U.S.S.G. §2L1.2, comment. (n.2).

The INA, in turn, directs the reader to the federal criminal code, but first qualifies its definition by explicitly including state-law offenses:

> [T]he term "aggravated felony" means illicit trafficking in a controlled substance (as defined in section 802 of Title

> 21), including a drug trafficking crime (as defined in section 924(c) of Title 18). 8 U.S.C. §1101(a)(43)(B).
>
> The term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal *or State law*. . . . 8 U.S.C. §1101(a)(43) (emphasis added).

Because the INA includes a "drug trafficking crime" as an aggravated felony, this dispute centers around the federal criminal code's definition of a drug-trafficking crime as:

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 *et seq.*), the Controlled Substances Import and Export Act (21 U.S.C. 951 *et seq.*), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 *et seq.*). 18 U.S.C. §924(c)(2).

This provision concerns sentencing enhancement for defendants carrying a firearm during a drug-trafficking crime. *Id.* §§924(c)(1); 924(c)(5). The Controlled Substances Act, which §924(c)(2) specifically incorporates, defines a felony as "any Federal *or State* offense classified by applicable Federal *or State law* as a felony." 21 U.S.C. §802(13) (emphases added).

Thus, under the Federal Felony approach, courts classify state-law convictions as drug-trafficking crimes only if the underlying offense "would be punishable as a felony under the federal Controlled Substances Act." *Gerbier v. Holmes*, 280 F.3d 297, 299 (CA3 2002). Under the State Felony approach, courts interpret a drug-trafficking crime as encompassing "two separate elements: (1) that the offense be punishable under the Controlled Substances Act . . .; and (2) that the offense be a felony" under either state or federal law. *United States v. Restrepo-Aguilar*, 74 F.3d 361, 364 (CA1 1996).

## SUMMARY OF THE ARGUMENT

Our Nation must secure its borders, especially against convicted felons who enter illegally. National security and the rule of law require no less. Federal law therefore imposes serious penalties upon previously adjudged felons who choose to enter the country illegally. And that federal law should in turn be read to incorporate the standards of the prior state-law convictions, and to respect the policy judgments of state legislatures that have proscribed certain conduct as felonious.

To the maximum extent possible, federal law should be presumed to incorporate preexisting state-law standards. In support of the State Felony approach, the *amici* States set forth practical and structural reasons why Congress reasonably elected to incorporate state-law felony classifications into federal-law determinations concerning sentencing enhancement and immigration.

The first reason is comity. The State Felony approach effectuates the States' policy judgments to classify as felonies the crimes they consider to be the most serious within their jurisdictions. It therefore furthers the important interests of comity and cooperative federalism.

The second reason is efficiency. The Federal Felony approach requires federal courts to expend considerable judicial resources in performing a detailed comparative analysis of the state conviction and any potentially analogous federal offenses. This analysis can entail examination of state law at the time of the conviction as well as the state-court record, including transcripts, indictments, and plea agreements. The State Felony approach, in contrast, avoids this fact-intensive inquiry by simply deferring to the State's felony classification, which is evident on its face.

Because significant disparities in outcomes already inhere in our system of criminal adjudication, the State Felony approach's

advantages of comity and efficiency outweigh any marginal decrease in uniformity that might result. These considerations reasonably led Congress reasonably to select the State Felony approach instead of the Federal Felony approach.

## ARGUMENT

### I. CONGRESSIONAL INCORPORATION OF STATE LAW SHOULD BE PRESUMED TO BE COMPLETE.

When Congress chooses to incorporate state law, courts should presume that federal law absorbs state law in its entirety, absent unambiguous evidence to the contrary. For example, in *Robertson v. Wegmann*, 436 U.S. 584, 592-93 (1978), the Court held that, because 42 U.S.C. §1988 incorporates state law, courts must apply that state law in its entirety unless inconsistent with federal law or the Constitution. This approach makes sense. Courts should not expect Congress to speak to each individual aspect of the state law that is incorporated.

Of course, Congress is free to include or exclude specific portions of state laws from federal law as it desires. But if Congress makes a general incorporation, courts should presume it is complete. This approach obviates guesswork as to Congress's intent while affording proper respect to States' policy decisions. *Lehman Bros. v. Schein*, 416 U.S. 386, 393-94 (1974) (Rehnquist, J., concurring) (recognizing the importance of cooperative federalism and comity in our federal system). Accordingly, to the maximum extent possible, federal law should be presumed to incorporate preexisting state-law standards.

In the instant cases, federal law expressly and repeatedly refers to and incorporates state law. As with all statutory interpretation, the text should of course be the touchstone for the Court, and the parties will no doubt devote considerable energy to making the careful textual and structural analysis necessary to demonstrate the

proper reading of "aggravated felony." Rather than rehash those textual arguments, and the legislative history on either side, the *amici* States will instead focus on two overarching legislative interests that underlay Congress's reasonable choice to incorporate state-law definitions of "felony."

## II. THE MOST REASONABLE READING OF THE FEDERAL LAW AT ISSUE IS THAT CONGRESS CHOSE THE STATE-FELONY APPROACH BECAUSE IT ADVANCES IMPORTANT FEDERAL INTERESTS IN EFFICIENCY AND COMITY.

### A. The State Felony Approach Is More Efficient Than the Federal Felony Approach and Would Respect States' Policy Decisions Regarding the Severity of Crimes Committed Within Their Jurisdictions.

The State Felony approach gives effect not only to state convictions but also to the States' policy determinations to treat certain crimes as felonies.[1] By respecting States' normative judgments, the State Felony approach advances comity and "cooperative federalism," which are important considerations "inherent in a federal system," *Lehman Bros.*, 416 U.S., at 393-94 (Rehnquist, J., concurring).

Concerns about comity are especially appropriate in the criminal-justice arena. Traditionally, the States have assumed the primary role in administering criminal justice. *Abbate v. United States*, 359 U.S. 187, 195 (1959) ("The States under our federal

---

1. Deference can be given to the States' felony classification by either (1) adopting a State's designation of an offense as a felony, or (2) considering as a felony any conviction for which the maximum term of imprisonment under state law was more than one year, *see generally* Br. of United States.

system have the principal responsibility for defining and prosecuting crimes."); *see also Screws v. United States*, 325 U.S. 91, 109 (1945) (noting that federal system places administration of criminal justice with States except as Congress may exercise its delegated powers to create federal offenses); *Jerome v. United States*, 318 U.S. 101, 104-05 (1943) (same). And States process the lion's share of the nation's criminal offenders. *See* 1 WAYNE R. LAFAVE *ET AL.*, CRIMINAL PROCEDURE §1.2(b) (1999 & Supp. 2005) (arguing that the federal criminal justice system is a "bit player" compared to the States).

States have also played an important role in immigration regulation. One commentator has described immigration law in the first century of our country's history as "a complex hybrid of state and federal policy":

> Federal decision-makers validated certain local policies. [] Supreme Court Justices assigned some categories of immigration regulation to state police power in language that indicated approval rather than indifference; and the Executive urged foreign governments to respect policies whose only statutory embodiment was in state law. Gerald L. Neuman, *The Lost Century of American Immigration Law (1776-1875)*, 93 COLUM. L. REV. 1833, 1896-97 (1993).

In light of this situation, Congress's choice of the State Felony approach was eminently reasonable as the scheme that would best advance the "important considerations" of comity and cooperative federalism. *Lehman Bros.*, 416 U.S. at 393-94 (Rehnquist, J., concurring).

There is an even more practical consideration that undergirds the reasonableness of Congress's choice to employ the State Felony approach: conservation of judicial resources. Under the Federal Felony approach, courts must undertake a detailed comparative

analysis of the respective criminal codes to ascertain whether the state conviction would warrant felony treatment under federal law. *See generally* Wayne A. Logan, *Horizontal Federalism in the Age of Criminal Law Interconnectedness*, 154 U. PA. L. REV. 257, 269 (2005) (discussing States' treatment of convictions from other jurisdictions).

In contrast, under the State Felony approach, courts give dispositive effect to the State's felony characterization, avoiding the difficult case-by-case comparative analysis characterizing the Federal Felony approach.[2]

---

2. Of course, that state-defined "felonies" would be deemed felonies under the federal immigration laws does not necessarily imply the obverse. Indeed, the State Felony approach is altogether compatible with concluding that state misdemeanors that would themselves constitute felonies under the federal statutes listed in §924(c)(2) will also constitute aggravated felonies under federal immigration law. 8 U.S.C. §1101(a)(43)(B). Thus, courts may possibly be required to analyze state misdemeanor convictions to determine whether they would be treated as felonies under federal law. This policy decision by Congress could well be seen as a compromise between the interests of comity and efficiency and Congress's desire to be increasingly comprehensive in imposing criminal and immigration sanctions, *see e.g.* H.R. Conf. Rep. No 101-955, at 132 (1990), reprinted in 1990 U.S.C.C.A.N. 6784, 6797 (stating that purpose of Immigration Act of 1990 was to broaden list of "serious crimes." with immigration consequences), coupled with its desire to impose greater sanctions than States may have chosen for certain crimes, *cf.* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 CORNELL L. REV. 1411, 1457 (2005) (describing the enactment of the Lautenberg firearms ban, which extended federal gun control laws to individuals convicted of misdemeanor domestic abuse because of concern that many States did not punish domestic abusers as felons).

The analysis required by the Federal Felony approach can prove very difficult given the complexity of modern criminal codes, with outcomes turning on such questions as whether there is a federal-law analog to a particular state offense, and, if so, whether the elements of each offense are sufficiently similar. This "requires adjudicators to engage in an often-convoluted hypothetical analysis that can be difficult to apply in practice." *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 397-98, 2002 WL993589 (B.I.A. 2002). Moreover, the task is further complicated by the need to identify and construe the state criminal law in effect when the predicate conviction was obtained, which could require review of hard-to-find historic criminal codes. Logan, 154 U. PA. L. REV., at 271. The analysis could conceivably extend to examining the propriety of the state conviction itself. *Cf. Gerbier*, 280 F.3d, at 316-17 (analyzing whether state drug conviction was accompanied by procedural safeguards equivalent to those that would have been provided in federal court when used in sentence enhancement).

To determine whether a particular state conviction would have qualified as a federal felony, courts may also be required to examine the evidentiary record, such as accusatory instruments and plea transcripts. "This evaluative task itself can be quite difficult because the records supporting pleas or convictions (themselves often aged) are frequently ambiguous or incomplete." Logan, 154 U. PA. L. REV., at 272. In the comparable context of interstate analyses, New York's highest court has opined, "[d]etermining whether a particular out-of-State conviction is the equivalent of a New York felony may involve production and examination of foreign accusatory instruments and, conceivably, the resolution of evidentiary disputes, all in the context of comparisons with the law of other jurisdictions." *People v. Samms*, 731 N.E.2d 1118, 1122 (N.Y. 2000). This case presents a prime example of this burdensome inquiry: whether Lopez's conviction for possession of cocaine would have been a felony under federal law is unclear from

the face of the record because the state court documents do not reveal the form or amount of the cocaine, upon which the federal-felony classification would depend. Gonzales Resp. Br., at 4 n.3.

States are familiar with the choice Congress confronted between the Federal Felony and State Felony approaches. In applying their own recidivist sentencing regimes, States themselves had to decide how to account for prior convictions from other jurisdictions. Twenty-eight States employ systems similar to the Federal Felony approach, which requires substantive analysis of the other State's conviction to determine whether it satisfies the forum State's sentencing enhancement scheme. Logan, 154 U. PA. L. REV., at 269. Twenty-one States (and the District of Columbia) use an analog to the State Felony approach when assessing convictions from other jurisdictions. *Id.,* at 277. Under this approach, dispositive importance attaches to how the other jurisdiction treated the earlier conviction. If it was a felony in the convicting jurisdiction, the forum State will consider it for enhancement, even if the offense would not have been a felony in the forum State and thus would not trigger enhancement if it had been committed there. *Id.* The fact that a significant number of States have chosen the analog to the State Felony approach supports the conclusion that Congress's decision to select that same approach was eminently reasonable and appropriately reflective of comity and cooperative federalism.

### B. Any Marginal Decrease in Uniformity That the State Felony Approach Might Cause Is Outweighed by Its Substantial Efficiency and Comity Advantages.

The principal criticism of the State Felony Approach is that its reliance on differing state laws can lead to disparate outcomes for individuals who engaged in similar conduct. For example, a defendant convicted of a felony under state law for conduct that would have been a misdemeanor under federal law would be

considered an aggravated felon, whereas a defendant convicted for the same conduct, but in a State that considered such conduct a misdemeanor, would not be treated as an aggravated felon.

Petitioners and their *amici* argue that Congress cannot have intended such disparate results. *E.g.* Toledo-Flores Br., at 39-41; Lopez Br., at 33-36. But the ideal of uniformity that these parties attribute to Congress does not reflect the realities of criminal adjudication in our country.

Diverse outcomes inhere in our system of criminal adjudication. Mikos, 90 CORNELL L. REV., at 1428 & n.48. This occurs in part because all criminal convictions—whether state or federal—result from multiple discretionary decisions made by prosecutors, defendants, and juries. The most obvious example of similarly situated defendants receiving different outcomes is when two co-defendants are charged with the same crime, and one makes a plea bargain with prosecutors while the other is tried before a jury. Disparate results—as to the crime for which each defendant is convicted and the punishment each defendant receives—are virtually guaranteed in this instance.

Prosecutors exercise great discretion when making charging and plea-bargaining decisions. Various factors influence these decisions, including allocation of scarce prosecutorial and investigative resources and the desire to ensure that the punishment fits the crime.[3] These factors take on heightened importance in circumstances—such as immigration—where a state conviction can

---

3. Prosecutors have a duty "to seek justice, not merely to convict." Standards for Criminal Justice 3-1.2(c) (3d ed. 1993), available at WL SCJ 3-1.2; *see also* National Prosecution Standards §§43.6, 44.4, 68.1 (Nat'l Dist. Attorneys Ass'n, 2d ed. 1991) (encouraging prosecutors to consider the collateral consequences of conviction when making charging decisions).

lead to a supplemental federal sanction such as deportation. *See generally* Mikos, 90 CORNELL L. REV., at 1422-32.

Because the potential federal sanction of deportation is a significant consideration for an alien defendant, he may be less likely to accept a plea bargain that would subject him to that penalty. Conversely, prosecutors do not have the resources to try every case, and they may believe that the supplemental federal sanction is too harsh a punishment for the defendant's conduct. Thus, prosecutors have an incentive to offer such defendants plea bargains for lesser offenses than their conduct might ordinarily warrant. *Id.,* at 1426-27.

These factors may affect hundreds of thousands of cases every year. In 2003 alone, almost 80,000 aliens were deported because of criminal convictions, and most of these crimes were prosecuted by the States. *Id.,* at 1413. Moreover, drug crimes—like those at issue here—account for almost half of all criminal alien deportations. *Id.,* at 1445 & n.96. Therefore, the nature of our system of criminal enforcement—especially when aliens are accused of drug crimes—means that similarly situated defendants would have experienced disparate outcomes regardless of whether Congress had adopted the State Felony Approach or the Federal Felony Approach.

Moreover, and fundamentally, two defendants who committed the same crime in different States that differ as to the felony status of that particular conduct are not similarly situated: one is a felon, and the other is not. That is a distinction with consequence—and one on which the state legislatures can legitimately disagree—and it is altogether reasonable for Congress to give federal force and effect to state-law felony convictions, even if the conduct may not have been a felony in other States.

In other words, when Congress decided to adopt a statutory scheme that based current punishment on past state and federal convictions, it necessarily accepted the potential for heterogeneous

results intrinsic to the criminal adjudicatory system. Given this acquiescence, it would be unreasonable to assume that Congress rejected the State Felony approach because it introduced some added potential for disparate results. Congress reasonably decided to trade a marginal decrease in uniformity[4] for the considerable advantages in efficiency and comity afforded by the State Felony approach. *See* Part I.A., *supra*.

Adjudicating a criminal defendant as a felon is one of the most portentous determination a State can make. Congress reasonably chose to respect those state-law determinations, and to enact severe penalties to prevent the illegal immigration of aggravated felons. This Court should give force that congressional decision, and accordingly hold that individuals adjudged felons by state law are subject to the full penalties of federal immigration law.

## CONCLUSION

The Court should affirm the judgments below.

---

4. Congress's incorporation of state law in this context does not violate Article I, §8 of the Constitution. *See* U.S. CONST., art. I, §8 ("The Congress shall have Power . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States."). The Court has upheld a federal bankruptcy provision that defined exempt assets with reference to state law. *Hanover Nat'l Bank v. Moyses*, 186 U.S. 181 (1902). The Court described the uniformity requirement as "geographical" not "personal" and held that "[t]he general operation of the law is uniform although it may result in certain particulars differently in different states. *Id.,* at 190. The same result applies here.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for
Litigation

R. TED CRUZ
Solicitor General
*Counsel of Record*

AMY WARR
Assistant Solicitor General

Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

August 2006