Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

LOPEZ *v.* GONZALES, ATTORNEY GENERAL

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 05–547. Argued October 3, 2006—Decided December 5, 2006

The Immigration and Nationality Act (INA) lists as an "aggravated felony" "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)," 8 U. S. C. §1101(a)(43)(B), but does not define "illicit trafficking." Title 18 U. S. C. §924(c)(2) defines "drug trafficking crime" to include "any felony punishable under the Controlled Substances Act" (CSA). Petitioner Lopez, a legal permanent resident alien, pleaded guilty to South Dakota charges of aiding and abetting another person's possession of cocaine, which state law treated as the equivalent of possessing the drug, a state felony. The Immigration and Naturalization Service (INS) began removal proceedings on the ground, *inter alia*, that Lopez's state conviction was for an aggravated felony. The Immigration Judge ultimately ruled that despite the CSA's treatment of Lopez's crime as a misdemeanor, see 21 U. S. C. §844(a), it was an aggravated felony under the INA owing to its being a felony under state law. The judge ordered Lopez removed in light of 8 U. S. C. §1229b(a)(3), which provides that the Attorney General's discretion to cancel the removal of a person otherwise deportable does not reach a convict of an aggravated felony. The Board of Immigration Appeals (BIA) affirmed, and the Eighth Circuit affirmed the BIA.

Held: Conduct made a felony under state law but a misdemeanor under the CSA is not a "felony punishable under the Controlled Substances Act" for INA purposes. A state offense comes within the quoted phrase only if it proscribes conduct punishable as a felony under the CSA. The Government argues that possession's felonious character as a state crime is enough to turn it into an aggravated felony under the INA because the CSA punishes possession, albeit as a misdemeanor, while §924(c)(2) requires only that the offense be punishable,

not that it be punishable as a federal felony, so that a prior conviction in state court will satisfy the felony element because the State treats possession that way. This argument is incoherent with any commonsense conception of "illicit trafficking," the term ultimately being defined. Because the statutes in play do not define "trafficking," the Court looks to the term's everyday meaning, *FDIC* v. *Meyer*, 510 U. S. 471, 476, which ordinarily connotes some sort of commercial dealing. Commerce, however, was no part of Lopez's South Dakota offense of helping someone else to possess, and certainly it is no element of simple possession, with which the State equates that crime. Nor is the anomaly of the Government's reading limited to South Dakota cases: while federal law typically treats trafficking offenses as felonies and nontrafficking offenses as misdemeanors, several States deviate significantly from this pattern. Reading §924(c) the Government's way, then, would often turn simple possession into trafficking, just what the English language counsels not to expect, and that result makes the Court very wary of the Government's position. Although the Government might still be right, there would have to be some indication that Congress meant to define an aggravated felony of illicit trafficking in an unorthodox and unexpected way. There are good reasons to think it was doing no such thing here. First, an offense that necessarily counts as "illicit trafficking" under the INA is a "drug trafficking crime" under §924(c), *i.e.,* a "felony punishable under the Controlled Substances Act," §924(c)(2). To determine what felonies might qualify, the Court naturally looks to the definitions of crimes punishable as felonies under the CSA. If Congress had meant the Court to look to state law, it would have found a much less misleading way to make its point. The Government's argument to the contrary contravenes normal ways of speaking and writing, which demonstrate that "felony punishable under the . . . Act" means "felony punishable as such under the Act" or "felony as defined by the Act," and does not refer to state felonies, so long as they would be punishable at all under the CSA. The Government's argument is not supported by the INA's statement that 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). Rather than wrenching the expectations raised by normal English usage, this provision has two perfectly straightforward jobs to do. First, it provides that a generic description of "an offense . . . in this paragraph," one not specifically couched as a state offense or a federal one, covers either one, and, second, it confirms that a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony. Thus, if Lopez's state crime actually fell within the general term "illicit trafficking," the state felony conviction would

count as an "aggravated felony," regardless of the existence of a federal felony counterpart; and a state offense of possessing more than five grams of cocaine base is an aggravated felony because it is a felony under the CSA, 21 U. S. C. §844(a). Nothing in the provision in question suggests that Congress changed the meaning of "felony punishable under the [CSA]" when it took that phrase from Title 18 of the U. S. Code and incorporated it into Title 8's definition of "aggravated felony." Yet the Government admits that it has never begun a prosecution under 18 U. S. C. §924(c)(1)(A) where the underlying "drug trafficking crime" was a state felony but a federal misdemeanor. This telling failure in the very context in which the phrase "felony punishable under the [CSA]" appears in the Code belies the Government's claim that its interpretation is the more natural one. Finally, the Government's reading would render the law of alien removal, see 8 U. S. C. §1229b(a)(3), and the law of sentencing for illegal entry into the country, see United States Sentencing Commission, Guidelines Manual §2L1.2, dependent on varying state criminal classifications even when Congress has apparently pegged the immigration statutes to the classifications Congress itself chose. Congress would not have incorporated its own statutory scheme of felonies and misdemeanors if it meant courts to ignore it whenever a State chose to punish a given act more heavily. Pp. 4–12.

417 F. 3d 934, reversed and remanded.

SOUTER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and STEVENS, SCALIA, KENNEDY, GINSBURG, BREYER, and ALITO, JJ., joined. THOMAS, J., filed a dissenting opinion.