

THOMAS, J., concurring in judgment

SUPREME COURT OF THE UNITED STATES

No. 09–60

JOSE ANGEL CARACHURI-ROSENDO, PETITIONER *v.*
ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

[June 14, 2010]

JUSTICE THOMAS, concurring in the judgment.

A plain reading of 18 U. S. C. §924(c)(2) identifies two requirements that must be satisfied for Carachuri-Rosendo’s state conviction to qualify as a “‘drug trafficking crime’” that renders him ineligible for cancellation of removal:* “First, the offense must be a felony; second, the offense must be capable of punishment under the Controlled Substances Act (CSA).” *Lopez v. Gonzales*, 549 U. S. 47, 61 (2006) (THOMAS, J., dissenting). Carachuri-Rosendo’s offense of simple possession was “punishable under the [CSA],” §924(c)(2), and thus satisfied the second requirement, but his crime of conviction in state court was only a misdemeanor. Accordingly, that offense does not bar him from obtaining cancellation of removal.

The Fifth Circuit understandably felt constrained by this Court’s decision in *Lopez* to rule otherwise. In *Lopez*, this Court held that “a state offense constitutes a ‘felony punishable under the [CSA]’ only if it proscribes conduct

*See 8 U. S. C. §1229b(a) (permitting cancellation of removal); §1229b(a)(3) (barring aliens convicted of an “aggravated felony” from cancellation of removal); §1101(a)(43)(B) (defining “aggravated felony” as “illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in [18 U. S. C. §924(c)])”); 18 U. S. C. §924(c)(2) (defining “drug trafficking crime” to mean “any felony punishable under the Controlled Substances Act”).

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punishable *as a felony* under that federal law.” *Id.*, at 60 (emphasis added). Though *Lopez* addressed a felony conviction under state law that did not correlate to a felony under the CSA, the Court’s rule preordained the result in this case:

“[T]he Court admits that its reading will subject an alien defendant convicted of a state misdemeanor to deportation if his conduct was punishable as a felony under the CSA. Accordingly, even if never convicted of an actual felony, an alien defendant becomes eligible for deportation based on a hypothetical federal prosecution.” *Id.*, at 67 (THOMAS, J., dissenting).

Today, the Court engages in jurisprudential gymnastics to avoid *Lopez*. I will not contort the law to fit the case. *Lopez* was wrongly decided. But because a proper reading of the statutory text, see *id.*, at 60–63, supports the result the Court reaches today, I concur in the judgment.