TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Amicus curiae submits this brief to bring to the Court's attention the wide import and unwarranted nature of the government's position in this and several other immigration cases raising the same issue that are currently pending before this Court. In these cases, the government takes the position—despite intervening precedent of the United States Supreme Court, this Court, and the Board of Immigration Appeals that point to a different conclusion—that one of this Court's past criminal sentencing decisions requires it to apply the "drug trafficking" aggravated felony label to simple possession offenses that contain no trafficking element. Under the government's position, a simple drug possession conviction—whether a felony, misdemeanor, or even a non-criminal violation under state law—preceded by another such offense must automatically be labeled a "drug trafficking" aggravated felony as corresponding to a federal "recidivist" possession felony, regardless of whether the individual was convicted of a recidivist offense or whether federal recidivist felony requirements were met.

The government's own Board of Immigration Appeals ("BIA") has recently arrived at the opposite position in *Matter of Carachuri*, 24 I&N Dec. 382 (BIA 2007) and *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007), in which the BIA held that, absent controlling adverse circuit precedent, a second simple possession conviction may *not* be labeled as a "drug trafficking" aggravated felony by virtue of a prior

offense unless the individual's "recidivist" status was admitted or determined within the criminal court proceeding for the second offense. As the BIA recognized in *Carachuri*, 24 I&N Dec. at 390, the government's prior position – and continued position in this and other Second Circuit cases – that it may disregard the various and important requirements for obtaining a recidivist felony under the federal law is at odds with the Supreme Court's analysis of the "drug trafficking" aggravated felony term in *Lopez v. Gonzales*, 549 U.S. ____, 127 S. Ct. 625 (2006). The Supreme Court applied a strict federal felony standard, holding that an offense cannot be labeled a "drug trafficking" aggravated felony unless it "proscribes conduct punishable as a felony under [] federal law." *Id.* at 633. Rather than applying this straightforward test to examine a simple possession conviction like the petitioner's in this case, the government takes the position in cases arising in this Circuit that immigration authorities must go beyond the conviction and consider factors never at issue in the state criminal proceeding, contravening *Lopez* and this Court's categorical approach. To support its interpretation, the government's arguments rely almost exclusively on *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002), a sentencing case that has been superceded by *Lopez*, that did not address the issues in this case, and which this Court has declined to apply in immigration cases.

The government's extreme and unwarranted interpretation leads to harsh results, preventing lawful permanent residents and other immigrants with minor

offenses from seeking various forms of relief from removal, such as cancellation of removal and asylum. Many of the petitioners with cases pending in this Circuit, some of whom were already granted discretionary relief from removal before the government stepped in with its expansive interpretation barring their relief, are longtime lawful permanent residents with significant ties to the United States and other positive equities. The convictions that the government is continuing to label as "drug trafficking" aggravated felonies are often misdemeanor and sometimes even non-criminal violations under state law—the types of convictions that may be obtained in local criminal courts through swift summary proceedings and often involve little or no jail time. Yet under the government's position, even an *invalid* prior offense that was not subject to challenge or even at issue in a person's subsequent proceeding for simple drug possession is enough to convert the subsequent offense into a "drug trafficking" aggravated felony and bar the individual from even seeking relief. Indeed, under the government's position, in clear contravention of *Lopez*, even an actual *federal misdemeanor* may be treated by an immigration court as if it were a federal felony based on a prior offense, even though the actual federal prosecutor in that case did not—or perhaps could not—pursue felony punishment.

Amicus curiae respectfully submits that the government's position in this and the other cases pending before this Court is untenable and should be rejected in light

of the relevant case law of the Supreme Court, this Court, and the BIA. *Amicus curiae* urges this Court to hold, as did the BIA, that under the Supreme Court decision in *Lopez*, as well as under the categorical approach followed by this Court, simple possession offenses may not be deemed aggravated felonies on the basis of recidivism where recidivism was never even at issue in the criminal proceedings.

STATEMENT OF INTEREST

Amicus New York State Defenders Association ("NYSDA") is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and others dedicated to developing and supporting high quality legal defense services for all people, regardless of income. Among other initiatives, NYSDA operates the Immigrant Defense Project, which provides defense attorneys, immigration lawyers, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. In seeking to improve the quality of justice for non-citizens accused of crimes, *amicus curiae* has an interest in the fair and just administration of the nation's immigration laws relating to individuals who have been convicted or accused of crimes.

Federal courts, including the Supreme Court and this Court, have accepted and relied on *amicus curiae* briefs submitted by NYSDA's Immigrant Defense Project in several important cases involving application of the immigration laws to

criminal dispositions. *See, e.g.*, Brief of *Amici Curiae* NYSDA Immigrant Defense Project, et al., in *Lopez v. Gonzales*, 549 U.S. __, 127 S. Ct. 625 (2006); Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, NYSDA, et al., in *Leocal v. Ashcroft*, 543 U.S. 1 (2004); Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, NYSDA, et al., in *INS v. St. Cyr*, 533 U.S. 289 (2001) (brief cited at n.50).

BACKGROUND

This case is one of several cases pending before this Court raising the issue of whether a simple drug possession offense may be labeled a "drug trafficking" aggravated felony based on government claims regarding a prior drug possession conviction. Each of the cases of which *amicus curiae* is aware involves lawful permanent residents who seek eligibility for relief from removal, and demonstrates the broad impact of the government's position.

In ***Minto v. Mukasey***, Docket. No. 05-0007-ag (2d Cir.) (pending since Jan. 3, 2005), the government successfully argued to the BIA that a longtime lawful permanent resident's two *non-criminal* marihuana possession violations made him an aggravated felon ineligible to seek cancellation of removal. *See In re Conrad O'Neil Minto*, 2005 WL 1104172 (BIA Mar. 21, 2005). Mr. Minto has been a lawful permanent resident for over seventeen years, since arriving in the United States as an eight-year-old child. *See Minto*, Docket. No. 05-0007-ag, Pet. Br. Mr. Minto's case

is particularly extreme because his New York marihuana violations represent the lowest-level drug offense under state law. Violations are punishable by a maximum term of imprisonment of only fifteen days, and constitute a category of offense distinct from misdemeanors and felonies. NYPL §§ 10.00(3)-(5). The maximum fine for a violation is $250. NYPL § 80.05(4). A violation is not regarded as a "crime." NYPL § 10.00(6) (defining a "crime" as a "misdemeanor or a felony"). Indeed, New York violations are defined as "petty offenses," in the same category as traffic infractions. *See* NYCPL § 1.20(39) ("'petty offense' means a violation or a traffic infraction"). Despite the non-criminal nature of this offense and despite the fact that Mr. Minto received no jail time for either of the violations, the government nonetheless applied the rule it seeks for this Court to uphold in this case to label Mr. Minto as an aggravated felon.

In ***Alegrand v. Mukasey***, Docket No. 08-0505 (2d Cir.) (pending since January 30, 2008), the government successfully persuaded the BIA to affirm the pre-termittance of Mr. Alegrand's application for cancellation of removal on the basis of his three drug possession convictions. *See In re Alegrand*, 2008 WL 339667 (BIA Jan. 4, 2008). Mr. Alegrand has been a longtime lawful permanent resident for over twenty years, having immigrated to the United States as a young child. *See Alegrand v. Mukasey*, Docket No. 08-0505 (2d Cir.), Pet. Br. at 6. The government pursued its argument despite the fact that the state statutory provisions under which Mr.

Alegrand was convicted had explicit recidivist sentencing enhancements, *see* Conn. Gen. Stat. § 21-279(a)&(c), but the state prosecutor did not invoke these provisions against Mr. Alegrand.

In ***Powell v. Mukasey***, Docket No. 08-1112 (2d Cir.) (pending since March 7, 2008), the government successfully persuaded the BIA to reverse a decision by the Immigration Judge granting Mr. Powell cancellation of removal, on the basis of two misdemeanor drug possession offenses. *See In re Powell,* 2006 WL 3485636 (BIA Oct. 20, 2006). Mr. Powell is a longtime lawful permanent resident with extensive family ties in the United States. *See Powell*, Docket No. 08-1112, Pet. Br. at 5-7. The Immigration Judge concluded that his positive equities merited cancellation of removal. *See id*. at 8. The government appealed, and the BIA reversed, holding that Mr. Powell's was ineligible for cancellation as an aggravated felon, citing this Court's *U.S. v. Simpson* sentencing precedent. Mr. Powell filed a petition for review with this Court, and the government stipulated to a remand to the BIA for reconsideration "in light of Lopez," suggesting that the Board consider the fact that the immigrant "was not charged under a recidivist statute." *See Powell v. Gonzales*, Docket No. 06-5315 (2d Cir. Feb. 7, 2007). However, despite this Court's post-*Lopez* remand order, the BIA again adopted the government's position that the Board was bound by pre-*Lopez* sentencing precedent. *See In re Powell*, A17-560-142 (BIA Feb. 25, 2008).

This Court may also reach this issue in ***Martinez v. Mukasey***, Docket No. 07-3031 (2d Cir.) (pending since July 17, 2007), in which the government successfully persuaded the BIA twice to affirm the pre-termittance of Mr. Elvis Martinez's application for cancellation of removal based on his three misdemeanor offenses under NYPL § 221.40 (prohibiting the transfer of a small amount of marihuana, including transfers for no remuneration). *See In re Martinez*, 2007 WL 2197555 (BIA July 6, 2007). Mr. Martinez came to the United States as a child and has been a lawful permanent resident for over eighteen years. *See Martinez*, Docket No. 07-3031, Pet. Br. at 18. After full briefing and argument of an earlier petition for review in this case, the earlier case was remanded to the BIA for consideration in light of *Lopez*. *See Martinez v. Ridge*, Docket No. 05-3189 (2d Cir.), Remand Order dated May 8, 2007. However, on remand, the BIA reaffirmed its earlier holding. *See In re Martinez*, *supra*.

The large and growing number of individuals affected by the government's extreme and unwarranted position in this and other cases pending before this Court is not surprising given the expansive nature of the government's position in these cases. In New York State alone, thousands of individuals have convictions under various low-level New York statutory provisions (misdemeanors and non-criminal violations) that would be deemed aggravated felonies under the government's position. *See* Analysis of New York State Division of Criminal Justice Services

Misdemeanor Drug Offense Statistics for the Years 1995 Through 2004, *available at* http://www.nysda.org/idp/docs/05_Analysis.pdf. Under the government's position, anyone with at least two of these convictions—even for non-criminal violations—would be an aggravated felon, ineligible to seek most forms of relief from removal, including cancellation of removal, asylum, and voluntary departure.

This result is particularly problematic given the quick and summary nature of the multitudes of criminal proceedings for these low-level offenses that take place in New York State each year, which calls into question the legality and fairness of treating such convictions as valid predicates for a so-called "recidivist" enhancement in immigration court. In 2007, for example, there were 101,754 misdemeanor drug arrests in New York State. *See* N.Y. State Div. of Criminal Justice Servs., Adult Arrests: New York State by County and Region 2007, http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year2007.htm (last modified February 5, 2008). These misdemeanor cases are processed quickly and without many of the procedural safeguards afforded to felony cases. Most misdemeanants are arraigned, plead guilty and are sentenced all on the same day. *See* N.Y. State Bar Ass'n, The Courts of New York: A Guide to Court Procedures 17-18 (2001). Many New York misdemeanor cases outside of New York City are heard by town or village justices, seventy-five percent of whom are not lawyers. *See* William Glaberson, *Broken Bench: In Tiny Courts of New York, Abuses of Law and Power*,

N.Y. Times, September 25, 2006, at 1; *see also* New York Judicial Selection, http://www.ajs.org/js/NY_methods.htm. In many of these town and village courts, the denial of defendants' right to counsel is widespread. *See* N.Y. State Comm'n on the Future of Indigent Def. Servs., Final Report to the Chief Judge of the State of New York (June 18, 2006), at 21-23.

ARGUMENT

I. This Court Should Adopt The Principles Of *Lopez* And *Carachuri* To Conclude That A Simple Drug Possession Conviction Is Not Categorically An Aggravated Felony Based On A Prior Offense.

A. Under the principles of *Lopez* and *Carachuri,* a simple possession offense cannot be converted into a "drug trafficking" aggravated felony by virtue of a prior offense not at issue in the criminal proceeding.

In *Lopez v. Gonzales*, 549 U.S.__, 127 S. Ct. 625 (2006), the Supreme Court resolved a circuit court split on the interpretation of the term "drug trafficking" aggravated felony under the Immigration and Nationality Act ("INA") § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). The Court held that an offense cannot be deemed a "drug trafficking" aggravated felony unless it "proscribes conduct punishable as a felony under [] *federal* law." *See id.* at 633 (emphasis added). The Supreme Court has clarified that "punishable" in this context means "defined by," i.e., "felony as defined by the [Controlled Substances Act]." *Lopez*, 127 S. Ct. 631 ("[W]hen we read 'felony punishable under the . . . Act,' we instinctively understand 'felony punishable as such under the Act' or 'felony as defined by the Act.'"). Thus, the inquiry in *Lopez* requires courts to examine what the state statutory offense proscribes, and determine whether that is defined by federal law as a felony. Applying this rule to a first-time non-trafficking offense in that case—aiding and abetting another person's possession of cocaine under South Dakota law—the Supreme Court held that the offense was defined as a misdemeanor

possession offense under federal law and thus was not a drug trafficking aggravated felony. *See id.* at 629, 633. In a footnote, the Supreme Court noted that federal law punishes "recidivist possession" as a felony, *see id.* at 630 n.6 (citing 21 U.S.C. § 844(a)), but did not discuss whether and under what circumstances a state offense would be deemed to correspond to such a recidivist federal felony.

In *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) and *Matter of Thomas*, 24 I& N. Dec 416 (BIA 2007), the BIA analyzed whether and under what circumstances a second-time drug possession offense would be deemed to correspond to a "recidivist possession" felony and therefore a "drug trafficking" aggravated felony in light of *Lopez*. The BIA examined the nature of the recidivist possession felony and concluded that "absent circuit law to the contrary . . . a State conviction cannot 'proscribe conduct punishable as' recidivist possession unless the State successfully sought to impose punishment for a recidivist drug conviction. This means that the respondent's status as a recidivist drug possessor must have been admitted or determined by a court or jury within the prosecution for the second drug crime." *Carachuri*, 24 I&N Dec. at 391 (quoting *Lopez*, 127 S. Ct. at 633). The BIA grounded its decision in its reading of "the most important lessons of *Lopez v. Gonzales*," concluding that, "[i]n light of these dictates, we find it inappropriate to treat a series of misdemeanor possession offenses as 'trafficking' felonies unless we are confident that the State offense corresponds in

a meaningful way to the essential requirements that must be met before a felony sentence can be imposed under Federal law on the basis of recidivism." *Id.* at 390.

B. Applying the analysis in *Lopez* and *Carachuri* comports with the statute and precedents interpreting the federal "recidivist" possession felony.

The BIA's application of *Lopez* to the recidivist possession issue in *Carachuri* reflects the statute and precedents interpreting the "recidivist possession" felony under the federal Controlled Substances Act ("CSA"). The mere existence of a prior conviction is not enough for an offense to be defined as a recidivist felony under the CSA. Federal law only punishes a subsequent possession offense as a felony when the prosecutor has sought a recidivist enhancement by choosing to place the prior conviction at issue and meeting several requirements designed to ensure the fact, finality, and validity of a prior drug conviction. *See* 21 U.S.C. §§ 844(a), 851. Specifically, a prosecutor is required by the CSA to file an information with the criminal court and serve a copy of such information on defendant before he or she enters a guilty plea or trial commences. 21 U.S.C. § 851(a). This information must state the prior conviction(s) to be relied upon and provide the defendant notice of the potential for increased punishment. *Id.* Upon receiving the information, the defendant has a statutory right to challenge the prior conviction. 21 U.S.C. § 851(c). Specifically, a defendant may deny the allegation of a prior conviction or challenge the conviction as invalid by filing a

written response to the prosecutor's information. *Id*. This gives the defendant an opportunity to challenge the existence of a prior conviction that is final and has not been reversed on appeal or successful collateral attack, and also gives many defendants the possibility of raising a challenge to validity of the prior conviction in the current criminal proceeding. The court must then hold a hearing on the issues raised by the defendant—a hearing in which the government generally has the burden of proof beyond a reasonable doubt on any issue of fact. 21 U.S.C. § 851(c)(1). These requirements and their consequences must be explained to the defendant by the court. 21 U.S.C. § 851(b).

These requirements reflect Congress's intention to ensure that, unlike an automatic enhancement, a possession offense cannot be prosecuted as a recidivist felony unless the defendant first has the opportunity to challenge the fact, finality, and validity of the prior conviction. Congress enacted 21 U.S.C. § 851 as part of the Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 513, §§ 1101(b)(4)(A), 1105(a), 84 Stat. 1292, 1295. Before this law, a prior conviction typically resulted in mandatory and automatic sentencing enhancements, with no additional proof or hearing requirements and no discretion given to the prosecutor even in many low-level cases. *See United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002) (discussing the legislative history of § 851). By enacting § 851, Congress intended "to make more flexible the penalty structure for drug offenses"

and provide prosecutors with discretion in deciding whether to seek an enhancement. *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1974) (internal quotation marks omitted); *see also* Report of House Committee on Interstate and Foreign Commerce, H. Rep. No. 91-1444, 91st Cong., 2d Sess., 1970 U.S.C.C.A.N. 4566, 4576 ("The severity of existing penalties . . . have [sic] led in many instances to reluctance on the part of the prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. . . . [S]evere penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain. . . . [M]aking the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties . . . ."). Moreover, Congress ensured that where a prosecutor did exercise discretion in seeking a recidivist punishment, the enhancement would apply only where the defendant has a right to be heard on the validity of the underlying prior conviction. *See Custis v. United States*, 511 U.S. 485, 491 (1994) (purpose of 21 U.S.C. § 851 is to provide defendant with an opportunity to "challenge the validity of a prior conviction used to enhance the sentence for a federal drug offense"); *see also Vadas v. United States*, No. 06-2087, 2007 WL 1288335, at *5 (2d Cir. May 3, 2007) (purpose is "to fulfill the due

process requirements of reasonable notice and an opportunity to be heard with regard to the prior conviction" (citation omitted)).

Thus, compliance with the requirements of 21 U.S.C. § 851 is critical in determining whether a drug possession offense is a misdemeanor or a felony. The Supreme Court addressed this issue in a related context in *United States v. LaBonte*, 520 U.S. 751 (1997). In *LaBonte*, the Supreme Court had to interpret the term "maximum term authorized" in 28 U.S.C. § 994(h) and U.S. Sentencing Guidelines Manual § 4B1.1, to determine the length of sentences for which defendants with multiple prior drug convictions were punishable. *See id.* The respondents in that case argued that the Court need not consider whether § 851 requirements were met in analyzing the "maximum term authorized" for their offenses. The Supreme Court rejected that argument and held that "for defendants who have received the notice under § 851(a)(1), as respondents did here, the 'maximum term authorized' is the enhanced term. For defendants who did not receive the notice, the *unenhanced* maximum applies." *Id.* at 759-760 (emphasis added).

The Supreme Court later applied this rule in *United States v. Price*, 537 U.S. 1152 (2003), remanding that case back to the Fifth Circuit. In its decision following that remand, the Fifth Circuit acknowledged, "[i]n our prior opinion, we concluded Price's 21 U.S.C. § 844 conviction could have been a felony because of

his prior convictions. However, Price did not receive notice that these prior convictions could be used. Thus his 21 U.S.C. § 844 conviction *could not be a felony*." *United States v. Price*, 31 Fed. Appx. 158, *2-3 (5th Cir. 2003) (not for publication) (emphasis added).

Applying the analysis in *Lopez* and *Carachuri* comports with this rule. As the BIA noted in rejecting an approach that would treat any second offense automatically as recidivist possession offense without consideration of what happened in the actual criminal proceeding, such an approach does not account for even the "minimal requirements governing findings of recidivism." *Carachuri*, 24 I&N Dec. at 391. Thus, under the CSA and the case law interpreting it, the maximum term of punishment for a possession offense where the fact, finality, and validity of a prior conviction was never at issue in the criminal proceeding does *not* exceed one year, and therefore such an offense does not correspond to a federal felony.[1]

C. Applying the analysis in *Lopez* and *Carachuri* comports with this Court's categorical approach.

In holding that a second-time simple possession offense is not automatically an aggravated felony under *Lopez*, the BIA concluded that it would be improper

[1] Inasmuch as the Court finds any ambiguity in the interpretation of the relevant statutory provisions at issue here, the rule of lenity would apply in favor of the immigrants' interpretation. *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (noting that ambiguities in criminal statutes referenced in the immigration statute must be construed in favor of the immigrant).

for the immigration court to combine separate possession offenses to convert the second into a recidivist offense. *See Carachuri*, 24 I&N Dec. at 393 (rejecting a "hypothetical approach [that] would authorize Immigration Judges to collect a series of disjunctive facts about the respondent's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be 'an offense' that could have been prosecuted as a Federal felony"). This approach comports with this Court's categorical approach to determining whether a person has been convicted of an aggravated felony.

Under this Court's categorical approach, courts must "look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime" to determine if the petitioner has been convicted of an aggravated felony. *Dulal-Whiteway v. United States Dep't of Homeland Sec.*, 501 F.3d 116, 121 (2d Cir. 2007) (internal quotation marks and citations omitted). Where a statutory offense is "divisible," i.e., with some divisible portion covering an offense that falls within the "aggravated felony" definition, courts may apply a "modified categorical approach" and examine the record of conviction for the limited purpose of determining whether the individual's conviction falls within that portion of the statute. *Id.* at 122. Even under the modified categorical approach, courts "cannot go behind the offense as it was charged to reach [their] own determination as to whether the underlying facts amount to one of the enumerated

crimes." *Sui v. INS*, 250 F.3d 105, 117–18 (2d Cir. 2001) (citations omitted). For convictions following a plea, courts may rely "only upon facts to which a defendant actually and necessarily pleaded in order to establish the elements of the offense, as indicated by a charging document, written plea agreement, or plea colloquy transcript." *Dulal-Whiteway*, 501 F.3d at 131. If the statute of conviction and record of conviction do not establish that the conviction meets the relevant INA definition, the conviction cannot have the corresponding immigration consequence. *Dulal-Whiteway*, 501 F.3d at 134. Thus, under this Court's categorical approach, it would be impermissible for an immigration court to consider a prior conviction that is not part of the record of conviction for the specific offense being labeled an aggravated felony.

II. Adopting The Government's Position for Cases Raising This Issue In This Court Undermines The Uniform and Fair Application of Immigration Law in This Context.

A. *Carachuri* presents the agency's effort to provide a uniform rule in this complex area of the law.

For several years, there was significant disuniformity in courts' interpretations of the "drug trafficking" aggravated felony term under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). The BIA had initially interpreted the term to hold that a state drug offense qualifies as a "drug trafficking" aggravated felony only if it is analogous to a felony under the federal Controlled Substances

Act (the so-called federal felony approach). *See Matter of LG-*, 21 I&N Dec. 89 (BIA 1995), *reaffirmed by Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999). Before and after *Matter of L-G-*, however, several federal circuit courts adjudicating criminal sentencing cases concluded that a state simple possession drug offense is an aggravated felony if it is classified as a felony under state law, even if it would not be classified as a felony under federal law (the so-called state felony approach). *See, e.g.*, *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001). In response to the growing circuit split in the federal criminal sentencing context, the BIA reversed course from *Matter of L-G-* and stated that immigration courts should follow the law of the circuit court in which the case arises, including sentencing case law. *See Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002). The conflict only increased over time, as courts applied different interpretations. *Compare Lopez v. Gonzales*, 413 F.3d 934 (8th Cir. 2005) (applying a state felony approach), *rev'd*, 127 S. Ct. 625 (2006); with *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7th Cir. 2006) (applying a federal felony approach). Some courts held that a state drug offense is an aggravated felony if it is a felony under either state or federal law (the so-called "either/or" approach). *See, e.g.*, *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002) (same) (applying the either/or approach in the immigration context).

After ten years of disuniformity in immigration removals, the Supreme Court resolved the conflict in *Lopez v. Gonzales*, applying a strict federal felony standard to conclude that the first-time simple possession offense in that case was not an aggravated felony. 127 S. Ct. at 633. While this result was ultimately favorable for the immigrant petitioners, the preceding years of disuniformity wreaked havoc for the immigration and criminal justice systems. *See* Brief of *Amici Curiae* NYSDA Immigrant Defense Project, et al., in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), at 12-13. Immigrants with drug possession convictions may be detained by the Department of Homeland Security in facilities anywhere in the United States. *See id.* at 12 (citing 8 U.S.C. § 1226(c)(1)(B)). Immigration courts apply the law of the circuit court in which they sit, even if that law is different than the law of the circuit in which the criminal conviction was obtained. *See id.* Thus, immigrants with the exact same criminal history faced vastly different consequences depending on which area of the country they were detained due to disuniformity in the interpretation of the laws. *See id.* at 13. *Lopez* changed that by clarifying the proper interpretation of the term "drug trafficking" aggravated felony and presenting one rule for all jurisdictions.

In *Carachuri*, the BIA has attempted to provide that same uniformity for petitioners with multiple simple drug possession convictions. Under the rule in *Carachuri*, a second-time possession offense will not be deemed to correspond to a

recidivist possession felony and therefore a "drug trafficking" aggravated felony unless recidivism was admitted or determined within the criminal prosecution for the second offense. 24 I&N Dec. at 394. The BIA stated that it could not apply this rule, however, in circuits with contrary controlling case law. *See id.*[2] In the interests of uniformity, the Second Circuit should adopt the BIA's approach. *See Sutherland v. Reno*, 228 F.3d 171, 174 (2d. Cir. 2000) (explaining that this Court may "voluntarily accept guidance [from the BIA] for the purpose of achieving a satisfactory statutory interpretation," and in the "interest of nationwide uniformity" (quoting *Aguirre v. I.N.S.*, 79 F.3d 315, 317 (2d Cir. 1996)).

B. Contrary to the government's assertion, *United States v. Simpson* is not controlling precedent in these cases.

[2] The three jurisdictions that the BIA identified as having contrary controlling prior case law are the Second, Fifth, and Seventh Circuits. As explained in this brief, *see infra* Point II(B), the BIA erroneously identified *United States v. Simpson*, 219 F.3d 81 (2d Cir. 2002) as controlling precedent on this issue in the Second Circuit. In any event, both *Simpson* and the Fifth Circuit in *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005) are pre-*Lopez* criminal sentencing decisions that apply a "state or federal felony" approach rejected by *Lopez*. The Seventh Circuit case, *United States v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007), *reh'g denied*, 513 F.3d 776 (7th Cir. 2008), is also a sentencing case that did not consider the issues in the immigration context and applied an erroneous, hypothetical approach. *See id.*, 513 F.3d at 781 (Rovner, J., dissenting). All other circuits either have not reached this issue or have case law that favors the BIA's approach in *Carachuri*. *See, e.g., Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3rd Cir. 2001); *see also Smith v. Gonzales*, 468 F.3d 272, 277 (5th Cir. 2006); *United States v. Palacios-Suarez*, 418 F.3d 692, 700 (6th Cir. 2005).

Both in the instant case and as dicta in *Carachuri*, 24 I&N Dec. at 388, n.4, the BIA stated that the Second Circuit has contrary controlling case law on this issue, citing *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002). However, the *Simpson* case is not binding on the issue here. First, *Simpson* is one of the pre-*Lopez* cases that applied the "either state or federal felony" approach that *Lopez* rejected. *See Simpson*, 319 F.3d at 85. Moreover, its hypothetical, noncategorical approach to the federal felony portion of its test was also rejected in *Lopez*. *See Lopez*, 127 S. Ct. at 633 (explaining that courts must focus on what a state statutory offense "proscribes," and then determine whether that is defined as a federal felony); *see also Carachuri*, 24 I&N Dec. at 393 (describing pre-*Lopez* analysis in *Simpson* as a "purely 'hypothetical' approach" that "discounts the importance of the respondent's actual offense . . . in favor of an expansive, and apparently noncategorical, inquiry into his larger criminal history"). In fact, the government itself has acknowledged in other cases that, after *Lopez*, the issue of how a second possession offense must be treated is an open one in this Court. *See Powell v. Gonzales*, Docket No. 06-5315-ag (2d Cir. Feb. 7, 2007) (stipulated remand of prior appeal in this case for consideration "in light of *Lopez*," suggesting that the Board consider the fact that the immigrant "was not charged under a recidivist statute").

Second, *Simpson* did not consider the various questions at issue in this case. The *Simpson* case was decided in the criminal sentencing context and explicitly did not consider the issues that immigrants face in the removal context. *See Simpson*, 319 F.3d at 86 n.7 ("We offer no comment on whether such convictions constitute 'aggravated felonies' for any purpose other than the [U.S. Sentencing] Guidelines."). Indeed, in a subsequent immigration case involving a pro se petitioner with multiple drug convictions facing removal, this Court did not apply *Simpson* and declined to resolve "this complex issue" due to the lack of full briefing. *See Durant v. INS*, 393 F.3d 113, 115 (2d Cir. 2004), *amended by Durant v. INS*, 2004 U.S. App. LEXIS 27904, at *2 n.1 (2d Cir. Dec. 16, 2004) ("We are reluctant to adjudicate this complex issue without the benefit of full briefing . . . . Accordingly, we do not address [the issue]").

Moreover, the appellant in *Simpson* did not challenge whether he was an aggravated felon. *See id.* at 82 (conceding aggravated felony designation). Rather, the appellant limited his arguments to the structure of the Sentencing Guidelines and the rule of lenity. *See United States v. Simpson*, Brief of Appellant, 2002 WL 32391097; Reply Brief of Appellant, 2002 WL 32391096. Thus, this Court is not bound by the statements made in *Simpson* regarding whether a subsequent possession offense may be an aggravated felony because the issue was not contested and the statements are *dicta*. *See Central Virginia Community College v.*

Katz, 546 U.S. 356, 363 (2006) ("[W]e are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated."); *Harper v. Virginia Dept of Taxation*, 509 U.S. 86, 118 (1993) (discussing "long-standing rule" that, if a prior decision does not "squarely addres[s]" an issue," the court "remains 'free to address [it] on the merits' at a later date" (citing *Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993)).

C. Adopting the government's position will result in irrational outcomes and fundamental unfairness for immigrants facing the "recidivist" label for the first time in immigration court.

The government's position in this case, contrary to the BIA's interpretation of the relevant statutory provisions in *Carachuri*, leads to irrational and fundamentally unfair outcomes for immigrants facing the "recidivist" label for the first time in immigration court. First, under the government's approach, any second-time simple possession offense may be considered a "recidivist" felony, whether or not the offense was determined to be a recidivist crime by the criminal court. If a state misdemeanor possession conviction may be considered sufficiently analogous to a recidivist possession felony to constitute an aggravated felony despite failure to meet the requirements for such a recidivist conviction, then a *federal* misdemeanor possession conviction failing to meet the federal requirements could also be treated as a recidivist felony and thus an aggravated felony despite the fact that such a conviction is clearly *not* a felony under federal

law. Similarly, under the government's argument, even in states that have a recidivist statute that may correspond to the federal recidivist possession felony statute, a second state possession offense could be considered a recidivist offense and therefore an aggravated felony even when state prosecutors declined—or were not able—to charge the offense under that state's recidivist statute.[3] These types of nonsensical results counsel against adopting the government's argument in this case. *See Rowland v. Cal. Men's Colony*, 506 U.S. 194, 200 (1993) (explaining the rule of statutory interpretation that counsels against adopting interpretations that lead to nonsensical or absurd results); *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 120 (1988) (same); *see also Carachuri*, 24 I&N Dec. at 391 ("[I]t seems that the [Department of Homeland Security (DHS)] is troubled by the fact that a purely hypothetical approach, carried to its logical conclusion, could result in a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been used* as the basis for a recidivist enhancement. As the DHS now appears to acknowledge, it would likewise be anomalous to treat a second State conviction for simple possession as the hypothetical equivalent of a Federal "recidivist possession" conviction when the State affirmatively elected not to

[3] For example, at least one of the cases pending before this Court involves state simple drug possession convictions that could have been prosecuted under state law as recidivist offenses, but were not. *See Alegrand v. Mukasey*, Docket No. 08-0505 (2d Cir.) (involving convictions under Conn. Gen. Stat. § 21-279(a)&(c)).

proceed under its own available recidivism laws.").

Second, under the government's approach, even an *invalid* prior conviction may be used by an immigration court to label a second-time simple possession offense as akin to a recidivist felony and therefore an aggravated felony. This is due to the fact that the government's approach does not look to the federal requirements for a recidivist conviction under 21 U.S.C. §§ 844(a) and 851, and thus makes no distinction between a second-time possession offense that followed an invalid prior conviction or an offense that followed a valid prior conviction. This raises significant due process concerns for immigrants who are facing this "recidivist" label for the first time in immigration court, having never been labeled as a recidivist in any criminal proceeding. As the BIA acknowledged in *Carachuri*, these due process concerns are significant because, unlike in criminal proceedings, immigrants do not have a right to government-appointed counsel to defend against such charges. *See Carachuri*, 24 I&N Dec. at 393 n.8 (noting that "allowing facts about recidivism to be determined by an Immigration Judge in the first instance could raise due process concerns").

Moreover, even for immigrants with counsel, immigration court does not provide a forum for immigrants to challenge the validity of the prior conviction being used to convert their drug possession offense into a recidivist offense as would be required under the 21 U.S.C. §§ 844(a) and 851. *See, e.g.*, *In re L-S-*, 22

I&N Dec. 645, 651 (BIA 1999) ("[W]e do not engage in retrial of the alien's criminal case or go behind the record of conviction to re-determine the alien's innocence or guilt."); *Matter of Khalik*, 17 I&N Dec. 518, 519 (BIA 1980) ("It is well established that, insofar as deportation proceedings are concerned, an immigration judge cannot go behind the judicial record to determine the guilt or innocence of an alien."); *Matter of Medina*, 15 I&N Dec. 611, 614 (BIA 1976) ("Counsel also seeks to have us look into the facts surrounding the respondent's conviction. In this regard, counsel claims that the respondent was not represented at the time of the 1971 Illinois conviction. We, however, may not go behind the record of conviction."). Thus, an immigrant who is being charged as an aggravated felon in removal proceedings based on an invalid prior conviction will not have the opportunity to establish that invalidity in his or her immigration proceedings—even though he or she would have had that opportunity in a criminal sentencing case. *Compare Burgett v. Texas*, 389 U.S. 109, 115 (1967) (permitting defendant in criminal sentencing enhancement case to challenge whether his prior conviction was obtained in violation of his right to counsel) with *Medina*, 15 I&N Dec. at 614 (refusing to go beyond record of conviction to assess respondent's claim in immigration court that his conviction was obtained in violation of his right to counsel).

These concerns are particularly important in the context of convictions that

may be misdemeanors, or even lesser, non-criminal offenses. *See, e.g., Minto v. Mukasey*, Docket. No. 05-0007-ag (2d Cir.) (discussed in Background section). As explained in the Background section, *supra*, some such convictions are obtained through the type of summary processing that indicate colorable claims of invalidity, such as ineffective assistance of counsel or other violations of constitutional or statutory rights. These serious due process concerns are avoided by requiring, at the very least, that "the State successfully sought to impose punishment for a recidivist drug conviction"—i.e., that recidivism be established in the criminal proceeding—before an individual has been deemed as having been convicted of a "drug trafficking" aggravated felony. *See Carachuri*, 24 I&N Dec. at 391; *see also Steele v. Blackman*, 236 F.3d 130, 137-38 (3rd Cir. 2001) (observing that careful adherence to Federal requirements for recidivism is important because "for all that the record before the immigration judge reveals, the initial conviction may have been constitutionally impaired").

CONCLUSION

For the foregoing reasons, amicus curie respectfully urges this Court to hold that under the Supreme Court decision in *Lopez*, as well as under the categorical approach followed by this Court, simple possession offenses cannot be deemed aggravated felonies on the basis of recidivism where recidivism was never at issue in the criminal proceedings.

Dated: New York, New York
June 27, 2008

Respectfully submitted,

_____

Joanne Macri, Director
Manuel D. Vargas, Senior Counsel
New York State Defenders Association
Immigrant Defense Project
3 West 29th Street, Suite 803
New York, New York 10001
(212) 725-6422

Attorneys for Amicus Curiae