CASE NO. 06-60383

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KIREN KUMAR BHARTI, also known as Kirenkumar Satish Bharti

Petitioner

v.

ALBERTO GONZALES, U.S. Attorney General

Respondent

APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR AMICI CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK STATE DEFENDERS ASSOCIATION IN SUPPORT OF PETITIONER

NANCY MORAWETZ
Washington Square Legal Services
245 Sullivan Street, Fifth Floor
New York, NY 10012
(212) 998-6430
Attorney for *Amici*

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PRELIMINARY STATEMENT

In its recent eight-one decision in Lopez v. Gonzales, the Supreme Court made clear that simple possession drug offenses ought not be included in the "trafficking" aggravated felony deportation category unless there is a "clear statutory command to override ordinary meaning." 549 U.S. ___, 127 S. Ct. 625,

630 n.6 (2006). This Court must now address the government's continued effort to treat state drug possession offenses as "drug trafficking" aggravated felonies.

In Lopez, the Supreme Court determined that a state drug possession offense may not be transformed into a "drug trafficking" aggravated felony unless its elements and requirements strictly correspond with a federal drug felony. Here, the government has taken the position that a low-level state misdemeanor marihuana possession offense is the equivalent of a serious federal recidivist possession felony because of a prior marihuana misdemeanor not at issue in the state criminal proceeding. Under the federal system, however, a second possession offense may be prosecuted as a felony only where the prosecutor provides notice and bears the burden of proving a final prior drug conviction during the criminal proceeding and the criminal court has provided the defendant with an opportunity to challenge the fact, finality, and validity of the prior conviction.

This Court and others have consistently mandated strict adherence to the federal requirements for enhancing a second possession offense into a recidivist felony. Nevertheless, the government has taken the position in this case that any state drug possession offense where the Department of Homeland Security presents information regarding a prior drug conviction should be treated as though a prosecutor had proven the fact, finality and validity of the prior conviction in the state criminal proceedings regardless of whether this, in fact, was the case. This

Court should apply the Supreme Court's strict federal felony standard and hold that a second or subsequent state possession conviction is not an aggravated felony where the state offense does not, in fact, correspond to the federal felony standard.

STATEMENT OF INTEREST

Amici curiae submit this proposed brief pursuant to Fed. R. App. P. 29, Local Rule 29, and pending permission of this Court. Petitioner in this case has consented to the filing of this proposed *amicus* brief while Respondent has opposed this motion because he states that the parties are discussing possible remand of the case.

Amici National Association of Criminal Defense Lawyers ("NACDL") and New York State Defenders Association ("NYSDA") have an interest in assisting the courts of the United States in reaching fair and accurate decisions when applying federal immigration law to immigrants with past criminal convictions.

Founded in 1958, NACDL is a nonprofit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. NACDL is dedicated to promoting criminal law research, encouraging integrity, independence, and expertise among criminal defense counsel, and advancing the proper and efficient administration of justice. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates.

NYSDA is a nonprofit 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. NYSDA operates the Immigrant Defense Project, which provides expert legal advice, publications and training nationwide on issues involving the interplay between criminal and immigration law.

The Supreme Court has accepted and relied on *amicus curiae* briefs prepared by NACDL and NYSDA in key cases involving the proper application of federal immigration law to immigrants with past criminal convictions, including Lopez. See Brief for *Amici Curiae* New York State Defenders Association Immigrant Defense Project, et al., Lopez v. Gonzales, 127 S. Ct. 625 (2006) (No. 05-547); see also Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, et al., Leocal v. Ashcroft, 125 S. Ct. 377 (2004) (No. 03-583); Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, et al., INS v. St. Cyr, 121 S. Ct. 2271 (2001) (No. 00-767) (brief cited at n.50).

BACKGROUND

The government's position that any second state drug possession offense may be treated as a serious federal recidivist felony has led to minor state possession offenses, some of which are not even crimes under state law, being deemed aggravated felonies. For example, prior to Lopez, the Board of

Immigration Appeals (BIA) held that two New York marihuana possession *violations*, which are not crimes under New York law, see N.Y. Penal Law §§ 10.00(3)-(6) (classifying violations as non-criminal offenses), constitute an aggravated felony. See In re: Conrad O'Neil Minto, 2005 WL 1104172 (BIA Mar. 21, 2005). Thus, aggravated felony consequences, under the government's approach, would apply even to offenses that rank below misdemeanors and are in the same category as traffic infractions. See N.Y. Penal Law § 1.20(39) ("'Petty offense' means a violation or a traffic infraction").[1]

The broad reach of the government's position is particularly troubling given how some misdemeanor or lesser convictions are processed under questionable circumstances and, if challenged under the federal recidivist possession law, may be found invalid. In Mississippi, where Petitioner in this case was convicted, all misdemeanor cases and the preliminary evidentiary hearings in felony cases are heard by justices of the peace in either a Justice Court or a Municipal Court. James L. Roberts, Jr., The Court System, County Government in Mississippi, Third Edition, 175, 176 (P. C. McLaurin, Jr. & Joseph N. Fratesi, ed., 2004), available at http://cgt.msstate.edu/publications/countygovtbook/chapter14.pdf. The Justice Court is the more common of the two courts and the only formal education requirement for Justice Court Judges is a high school diploma. Id. Municipal

[1] Violations are punishable by a maximum term of imprisonment of only fifteen days, N.Y. Penal Law §§ 10.00(3), and the maximum fine for a violation is $250. N.Y. Penal Law § 80.05(4).

Court Judges are more likely to be licensed lawyers, but law degrees are not required. Furthermore, these courts do not produce formal records because neither of these courts provides court reporters. Id. These Justice Courts are not an isolated phenomenon. For example, many New York misdemeanor cases are also 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, available at http://www.ajs.org/js/NY_methods.htm.

The process provided in many state misdemeanor or lesser violation cases makes them poor candidates to serve as predicates for felony recidivist enhancement under the strict requirements to which this Court adheres. This Court demands full compliance with 21 U.S.C. § 851, which requires that federal felony recidivist enhancements be limited to cases in which the individual was given notice and the opportunity to challenge the fact, finality and validity of a prior conviction. See infra Point I.A.2. Even if a prosecutor were to seek a felony recidivist enhancement based on a misdemeanor or lesser plea taken before a justice of the peace who lacked a law degree and conducted proceedings without any official court record, it is quite possible that, upon challenge under § 851, these criminal proceedings would suffer from deficiencies that would fail to meet the validity requirements of § 851. This Court now has the opportunity to consider

whether minor state offenses that were not charged and prosecuted as recidivist felonies can nevertheless automatically trigger an aggravated felony designation.

SUMMARY OF ARGUMENT

In Lopez, the Supreme Court held that a state drug possession offense constitutes a drug trafficking aggravated felony as a "felony punishable under the Controlled Substances Act" under the Immigration and Nationality Act (INA) § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), "only if it proscribes conduct punishable as a felony under that federal law." 127 S. Ct. at 633. The Supreme Court rejected the approach followed by several federal circuit courts, including this Court, that a possession offense that is a felony under state law, but not under federal law, could be treated as an aggravated felony. See United States v. Estrada-Mendoza, 475 F.3d 258 (5th Cir. 2007) (recognizing that Lopez overrules this Circuit's prior "state felony" approach). This Court now faces whether a *misdemeanor* state drug possession offense may be treated as the automatic equivalent of a federal recidivist felony even though the state criminal proceeding did not prove – or offer an opportunity equivalent to that required under federal law to challenge – the fact, finality and validity of the alleged prior conviction. This is an important question that this Court has not considered since the guidance provided by the Supreme Court in Lopez.

In Lopez, the Supreme Court required an ordinary reading of "illicit

trafficking" to exclude possession offenses, unless Congress permits the coerced inclusion of the possession offenses through a clear statutory command. Lopez also does not permit the government to deem an offense to be "a felony punishable under the Controlled Substances Act" based on a hypothetical prosecution, but instead takes a strict categorical approach consistent with this Court's jurisprudence based on what was proven by the actual state prosecution. Under Lopez and this Court's established jurisprudence regarding the federal recidivist conviction requirements, an individual may not be deemed convicted as a recidivist of "a felony punishable under the Controlled Substances Act" in the absence of notice, proof, and the opportunity to challenge the fact, finality, and validity of the prior conviction. See infra Point I.A.

Even before Lopez was decided, this Court and other federal circuit courts held that second or subsequent possession offenses cannot automatically be deemed aggravated felonies where the statutory requirements of 21 U.S.C. §§ 844(a) and 851 have not been met. In Smith v. Gonzales, 468 F.3d 272 (5th Cir. 2006), this Court recognized the finality requirement of § 844(a). This is in line with the positions of other federal circuits that second or subsequent possession offenses cannot automatically be deemed aggravated felonies where the federal statutory requirements have not been met. See infra Point I.B. Moreover, the government's argument that any second or subsequent state possession offense

should be automatically treated as a "drug trafficking" aggravated felony would lead to designating an immigrant an aggravated felon even though his or her prior conviction may have been invalid and not meet the federal requirements, a result that would be clearly in conflict with federal legislative intent. See infra Point I.C. It would also ultimately lead to the absurd result of treating a second or subsequent *federal* misdemeanor as a federal felony in the immigration context, even though it was not prosecuted as a felony in the federal court, another result in direct conflict with federal legislative intent. See infra Point I.D.

Finally, should the Court find any lingering ambiguities in interpretation of the federal "drug trafficking crime" definition, this Court should apply the rule of lenity to find that the simple drug possession offense at issue here should not be deemed a "drug trafficking" aggravated felony. See infra Point II.

ARGUMENT

I. UNDER THE FEDERAL FELONY STANDARD ADOPTED BY THE SUPREME COURT IN LOPEZ, A STATE DRUG POSSESSION CONVICTION CANNOT BE TRANSFORMED INTO A "DRUG TRAFFICKING" AGGRAVATED FELONY BASED ON A PRIOR CONVICTION WHERE THE STATE CRIMINAL PROCEEDING DID NOT PROVE – OR OFFER AN OPPORTUNITY EQUIVALENT TO THAT UNDER FEDERAL LAW TO CHALLENGE – THE FACT, FINALITY, AND VALIDITY OF THE ALLEGED PRIOR CONVICTION.

Under the Supreme Court's strict federal felony approach in Lopez v. Gonzalez, those state drug possession convictions that do not correspond to felony

convictions under the Controlled Substances Act ("CSA") cannot be treated as "drug trafficking" aggravated felonies. Lopez, 127 S. Ct. at 631. This Court promptly applied Lopez in Estrada-Mendoza, 475 F.3d at 261 (recognizing that Lopez overrules the "state felony" approach in United States v. Hinojosa-Lopez, 130 F.3d 691 (5th Cir. 1997)). Since Lopez, this Court has not considered the question of whether a state drug possession offense may be treated as the automatic equivalent of a federal recidivist felony, but it has denied a government motion to dismiss a petition for review of this issue and granted the petitioner's stay of deportation. Semedo v. Gonzales (5th Cir. Dkt. No. 06-61102). This Court also recently vacated a sentence in a criminal case where two drug possession offenses were at issue. United States v. Arevalo-Sanchez, No. 06-40449, 2007 WL 870362 (5th Cir. Mar. 21, 2007). The strict federal felony approach provided by Lopez now requires the Court to make an inquiry into whether the actual state conviction at issue is punishable as a felony under the CSA.

A. Under Lopez, this Court Must Carefully and Narrowly Approach the Coerced Inclusion of a Possession Offense in the Definition of "Drug Trafficking" By Requiring a Clear Statutory Command to Override Ordinary Meaning.

In Lopez, the Supreme Court expressed wariness over identifying drug possession offenses as "drug trafficking" aggravated felonies since the plain and commonsense meaning of "trafficking" does not support such a reading. Lopez, 127 S. Ct. at 629-30. The Supreme Court acknowledged an exception to the plain

meaning reading of "illicit trafficking" only in situations where Congress has made it clear that they have intended otherwise. Id. at 630. Thus, while recognizing that Congress counterintuitively defined "illicit trafficking" to include some possession offenses, the Court stated that "this coerced inclusion of a few possession offenses in the definition of 'illicit trafficking' does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning." Lopez, 127 S. Ct. at 630 n.6.

1. Lopez does not permit the government to deem an offense to be "a felony punishable under" the Controlled Substances Act based on a hypothetical prosecution, but instead takes a strict categorical approach consistent with this Court's jurisprudence based on what was proven by the actual state prosecution.

The Supreme Court held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law." Lopez, 127 S. Ct. at 633. Thus, the relevant inquiry under Lopez is not to determine whether some federal felony charge could have hypothetically been brought against the defendant based on the facts in his or her case, but to determine, through a strict comparison of the state conviction with the requirements for a federal conviction under the CSA, whether the state conviction meets the requirements for a federal felony conviction.

The reasoning in Lopez thoroughly undermines any argument that the phrase "felony punishable under the Controlled Substances Act" permits a court to

consider whether the offense is hypothetically punishable as a federal felony based on facts outside the record of conviction. Rather, the Supreme Court's reasoning clarifies that the focus of the analysis must be on whether the relevant statutory proscription is punishable as a federal felony, i.e., how federal law treats the offense as it was actually charged and decided in the state criminal proceeding. See Lopez, 127 S. Ct. at 633.

The Supreme Court makes this distinction between actually determined guilt and hypothetical liability clear in its discussion of possession and possession with intent to distribute. The Supreme Court observed that "some States graduate offenses of drug possession from misdemeanor to felony depending on quantity, whereas Congress generally treats possession alone as a misdemeanor whatever the amount (but leaves it open to charge the felony possession with intent to distribute when the amount is large)." Id. at 632. A defendant with a large quantity of drugs might be charged with a state felony for simple possession (a misdemeanor under federal law) or possession with intent to distribute (a felony under federal law), but for purposes of the Supreme Court's strict federal felony analysis, only the ultimate conviction and its statutory proscriptions are taken into consideration. In other words, the fact that a state simple possession offense could have been charged as possession with intent to distribute will not convert the conviction into an aggravated felony. The Supreme Court recognized that, under its analysis, a

defendant "convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation" since federal law requires that a prosecutor charge possession with intent to distribute, and not simple possession, to obtain a felony conviction. Id. While recognizing the anomalies in which its strict federal felony approach might result given different state practices, the Supreme Court found such anomalies preferable to the many others that would result if a more expansive approach was taken. Id.

This approach follows the "categorical approach" that the Supreme Court and this Court use to determine generally if an offense constitutes an aggravated felony. Under the categorical approach, reviewing courts "should normally look not to the facts of the particular prior case, but rather to the state statute defining the crime of conviction." Taylor v. United States, 495 U.S. 575 (1990); United States v. Calderon-Pena, 383 F.3d 254 (5th Cir. 2004) (en banc) (applying categorical approach in determining whether an offense meets the definition of a crime of violence); see also Gonzales v. Duenas-Alvarez, 127 S. Ct. 815 (2007) (making clear that the Taylor categorical approach applies in immigration cases). In making this categorical inquiry, an individual's actual conduct in committing a crime is irrelevant, even if it could be construed to satisfy the elements of the federal offense, because this inquiry is limited to looking only at the individual's conviction and the statutory definition. Calderon-Pena, 383 F.3d at 257.

Thus, under the Lopez decision and this Court's case law, a state possession conviction must actually correspond to a federal felony conviction to be deemed an aggravated felony based on the record of conviction and not merely reflect underlying conduct that could have possibly been prosecuted as a felony under federal law. To that end, the Court stated its willingness to tolerate "some disuniformity in state misdemeanor-felony classifications" that might result from insisting that the state conviction meet the requirements of the federal statute. Lopez, 127 S. Ct. at 629. They found this disuniformity preferable to allowing the States to supplant Congress' own misdemeanor-felony classifications when Congress specifically constructed its immigration law to turn on them. Id.

2. Under Lopez and this Court's established jurisprudence regarding 21 U.S.C. §§ 844(a) and 851, an individual may not be deemed convicted as a recidivist of "a felony punishable under the Controlled Substances Act" in the absence of notice, proof, and the opportunity to challenge the fact, finality, and validity of the prior conviction.[2]

Several strict requirements must be met to ensure the fact, finality, and validity of an alleged prior conviction in order for a drug possession offense to be punished as a felony under the recidivist possession provisions of 21 U.S.C. §§ 844(a) and 851, thereby coercing a simple drug possession offence into the

[2] Point I.A.2. is addressed in Petitioner's Brief 8-13, but *amici* present it here in the interest of making a complete argument. *Amici* has included this section in other post-Lopez *amicus* briefs which have been distributed to immigration attorneys throughout the country for use. See, e.g., Brief for *Amicus Curiae* New York State Defenders Association Immigrant Defense Project, Martinez v. Ridge, 2d Cir. Docket No. 05-3189.

definition of "illicit trafficking." First, the prosecutor must file an information with the court and serve a copy of such information on the defendant before he or she enters a guilty plea or trial commences. 21 U.S.C. § 851(a). This information must state the prior convictions to be relied upon, and thus provide the defendant notice of the potential 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 any allegation of a prior conviction or challenge the conviction as invalid by filing a written response to the prosecutor's information. Id. The court must then hold a hearing on the issues raised by the defendant – a hearing in which the government has the burden of proof beyond a reasonable doubt on any issue of fact. 21 U.S.C. § 851(c)(1). In addition, these requirements and their consequences must be explained to the defendant by the court. 21 U.S.C. § 851(b).

This Court has recognized that the § 851 provisions for a conviction under the recidivist possession provisions of the CSA are meaningful and mandatory. In discussing the legislative history of § 851, this Court recognized that before § 851 was enacted, a prior conviction typically resulted in mandatory, automatic sentencing enhancements, without any prosecutorial discretion. United States v. Dodson, 288 F.3d 153, 159 (5th Cir. 2002). By including the § 851 requirements, Congress intended to punish as a felony only those offenses in which, along with

notice and proof of the elements of the possession offense, there is also notice and proof of a prior conviction that can withstand collateral attack. Id. 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, and intended "to make more flexible the penalty structure for drug offenses. The purpose was to eliminate the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences." 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 committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences"). Thus, prosecutors were given the option not to seek sentencing enhancements in low-level cases. Furthermore, for cases where prosecutors did seek to use a prior conviction to enhance a sentence, Congress made the requirements of 21 U.S.C. § 851 strict and mandatory. See Dodson, 288 F.3d at 160, 161; Noland, 495 F.2d at 533 (discussing how Congress used mandatory language in the text of § 851).

Given this legislative history, the Supreme Court has repeatedly recognized

the importance of strictly adhering to the requirements of 21 U.S.C. § 851. In United States v. LaBonte, the Supreme Court considered the appropriate sentencing instrument for recidivist offenders who may receive a higher sentence under either a statutory sentence enhancement or under the "career offender" provisions of the United States Sentencing Commission's Sentencing Guidelines. LaBonte, 520 U.S. 751 (1997). In deciding that the Sentencing Commission had improperly favored the Sentencing Guidelines' "career offender" sentencing enhancements over the statutory enhancements, the Supreme Court declared that, "the imposition of [a statutory] enhanced penalty is not automatic," and can only be applied when the § 851 requirements have been satisfied. Id. at 754. The Supreme Court also warned against reading § 851 in such a way as to "[subsume] within a single category both defendants who have received notice under § 851(a)(1) and those who have not," because the enhanced maximum term authorized under the statute applies to defendants who receive notice under § 851 while the regular maximum term applies to defendants who do not receive the notice. Id. at 759-60.

Later, in Price v. United States, the Supreme Court addressed § 851 specifically in the context of the recidivist enhancement in § 844(a), holding that the petitioner's 21 U.S.C. § 844(a) drug possession offense could not be treated as a felony given the Government's failure to file a notice of enhancement under §

851(a), and remanding the case back to this Circuit to be reconsidered in light of LaBonte. Price, 537 U.S. 1152 (2003), vacating 31 Fed.Appx. 158 (5th Cir 2001). In Price, the Solicitor General's brief acknowledged that the petitioner's drug offense could not be treated as a felony given the government's failure to file a notice of enhancement under 21 U.S.C. § 851(a), a fact that both the opinion and the dissent, filed for other reasons, also noted. Id. at 1152.

The § 851 requirement of notice and an opportunity to challenge the prior conviction has been addressed by a number of other circuits in other contexts, with the courts consistently demanding strict adherence to § 851. See, e.g., United States v. Flowers, 464 F.3d 1127, 1131 (10th Cir. 2006); United States v. Martinez, 253 F.3d 251, 255 n.4 (6th Cir. 2001); United States v. Sanchez, 138 F.3d 1410, 1416 (11th Cir. 1998).

Just as § 851 must be strictly adhered to in the federal criminal context, it must also be strictly adhered to when considering whether a state criminal conviction corresponds to a federal recidivist felony conviction for immigration purposes. In the present case, however, the government argues that a Mississippi misdemeanor marihuana possession offense is the equivalent of a federal felony even though Petitioner's prior conviction was never charged and proven in the criminal proceedings, and he was not given an opportunity to challenge the fact, finality, and validity of the prior conviction. The government's argument thus

goes directly against Congress' clear statutory command for strict compliance with the § 851 requirements.

In short, automatically treating any second or subsequent possession offense as a recidivist possession conviction under 21 U.S.C. §§ 844(a) and 851 not only flouts Congress's chosen statutory scheme to punish as felonies only those offenses where the strict requirements of those provisions are met, but also disregards the Supreme Court's and this Court's longstanding demand for precise compliance with the requirements. Congress's "clear statutory command" explicitly requires that, for a defendant to be convicted of felony recidivist possession, the prosecutor must provide an information about a prior final conviction and the defendant must have an opportunity to attack the fact, finality, and validity of that conviction. Therefore, under Lopez and this Court's precedents, a conviction for simple possession where the criminal court never adjudicated or considered the fact, finality or validity of any prior convictions cannot be equated to a recidivist possession federal felony conviction.

B. Even Before Lopez Was Decided, This Court and Other Federal Circuit Courts Held That Second or Subsequent Possession Offenses Cannot Automatically Be Deemed Aggravated Felonies Where the Statutory Requirements of 21 U.S.C. §§ 844(a) and 851 Have Not Been Met.

Even before Lopez was decided, this Court and other federal circuit courts held that second or subsequent possession offenses cannot automatically be

deemed aggravated felonies where the statutory requirements of 21 U.S.C. §§ 844(a) and 851 have not been met. In Smith v. Gonzales, this Court read the aggravated felony designation narrowly when it recognized the 21 U.S.C. § 844(a) requirement that a prior conviction must be final before the recidivist enhancement is applied. 468 F.3d at 272. In applying the finality requirement of § 844(a), this Court rejected the government's reliance on the alternative basis for decision in United States v. Sanchez-Villalobos, 412 F.3d 572, 576-77 (5th Cir. 2005) (stating in a two-paragraph alternative basis for affirmance in a criminal sentencing case that petitioner's second possession offense "could have been punished" as a felony under federal law). In fact, this Court expressly questioned the effect of this part of the Sanchez-Villalobos decision. Smith, 468 F.3d at 276 n.3 ("The effect of Part B [the alternative basis for affirmance] in Sanchez-Villalobos is uncertain. The conclusion of the panel in Sanchez-Villalobos that the state conviction was a felony is fully explainable by the conclusion reached in Part A of the decision"). Indeed, even the Court in Sanchez-Villalobos acknowledged that the decision's alternative position did not reflect settled law. See Sanchez-Villalobos, 412 F.3d at 577 n.3. The strict federal felony standard adopted in Lopez, as well as this Court's decision in Smith, now make this even clearer.

Other federal circuits that carefully applied the federal felony standard in the immigration context even before Lopez have taken even clearer positions. The

First and Third Circuits both flatly rejected arguments that a second or subsequent possession offense can automatically be treated as a federal recidivist possession felony. See Berhe v. Gonzales, 464 F.3d 74, 85-86 (1st Cir. 2006), Steele v. Blackman, 236 F.3d 130, 137-38 (3d Cir. 2001). In reaching their holdings, both of these circuits emphasized that the inquiry must focus on the burden the prosecutor actually met in the state proceeding, and not on alleged underlying facts. The court in Steele noted that to allow reliance on the underlying facts to convert a state possession conviction into an aggravated felony would be "simply to ignore the requirement that there be a conviction" at all. See id. at 138 (rejecting the government's reliance on the fact that Steele admitted to the prior conviction before the immigration judge). Similarly, in Berhe, the First Circuit applied a federal felony analysis to hold that Berhe's second possession offense was not an aggravated felony because the prosecutor had not "met its burden of proving that Berhe had a prior conviction for a drug offense." Berhe, 464 F.3d at 85-86.

Moreover, in Steele, the Third Circuit specifically addressed the requirements of §§ 844(a) and 851 and found that Steele's conviction was not the equivalent of a federal recidivist possession felony because the prosecutor did not provide notice and proof of a final prior conviction and Steele did not have an opportunity to challenge that conviction in his criminal proceeding. Steele, 236

F.3d at 137-38. Those requirements are considered necessary by the court in Steele because without them, "the record evidences no judicial determination that [the prior conviction] existed at the relevant time. For all that the record before the immigration judge reveals, the initial conviction may have been constitutionally impaired." Id. In addition, the Ninth Circuit, applying different reasoning, has ruled out the possibility of treating a second or subsequent state possession offense as an aggravated felony, holding that only the statutory offense itself, without regard to recidivist sentencing enhancements, can be considered in determining whether an offense is an aggravated felony, and has also acknowledged the finality requirement of § 844(a). See United States v. Ballesteros-Ruiz, 319 F.3d 1101, 1104 (9th Cir. 2003).

Thus, even pre-Lopez, courts that carefully applied a federal felony standard found that a state possession offense may not be deemed an aggravated felony based solely on underlying facts indicating a prior conviction. Post-Lopez, it is even clearer that a second or subsequent possession cannot be considered an aggravated felony where the state criminal proceeding neither proved nor offered an opportunity equivalent to that under federal law to challenge, the fact, finality, and validity of any alleged prior conviction.

C. The Government's Argument Would Require Treating Individuals with a Potentially Invalid Prior Conviction that Might Not Serve As A Valid Basis For a Felony Enhancement Under Federal Law as Aggravated Felons, a Result Clearly in Conflict with Congressional Intent.

The conclusion that second or subsequent state drug possession offenses may not automatically be deemed aggravated felonies is further confirmed by the fact that such an interpretation leads to results that are inconsistent with Congressional intent. The Supreme Court in Lopez recognized that Congress intended for the definition of aggravated felonies to turn on a federal, rather than a state, standard. Lopez, 127 S. Ct. at 632 ("Congress has apparently pegged the immigration statutes to the classifications Congress itself chose"). In adopting the strict requirements of 21 U.S.C. § 851, Congress clearly intended to ensure that federal possession convictions that could not withstand a collateral attack on their validity would not be used as the basis for a federal felony recidivist possession conviction and therefore as the basis for an aggravated felony. See supra Point I.A.2. The government's position that any state possession offense where underlying facts indicate a prior conviction should be treated as an aggravated felony will allow invalid prior convictions to be the basis for an aggravated felony determination, a result in conflict with Congressional intent in adopting 21 U.S.C § 851 and with the federal standard set forth in Lopez.

An examination of the summary procedures often used to prosecute the high

volume of drug possession arrests indicates that many of the resulting convictions suffer from inadequacies that would lead to their invalidation under the federal requirements of § 851. For example, as was discussed in the Background, supra, some states process many misdemeanor criminal cases with justices of the peace, many of whom never received formal legal training. Furthermore, the procedures for prosecuting lesser non-criminal violations that may automatically be deemed valid predicates for an aggravated felony designation under the government's position are even less substantial. Indeed, New York defines its marihuana possession "violation" to be in the same category as a traffic infraction. N.Y. Penal Law § 1.20(39) ("'Petty offense' means a violation or a traffic infraction").

Within this context, those convicted of violations and misdemeanor possession offenses may have experienced legal defects in their proceedings that would, upon a § 851 type challenge, lead to a finding that a prior conviction was invalid. However, in state prosecutions that do not meet the federal notice and proof requirements, no notice of the consequences of that prior conviction or any opportunity for a hearing on claims of invalidity is available. The government's approach forces the Petitioner and others in a similar position to face the vast, negative consequences of an aggravated felony designation based on a possibly invalid prior conviction, a result clearly in conflict with the legislative intent in adopting the federal standard for a recidivist possession felony and therefore with

the decision of the Supreme Court in Lopez.

D. The Government's Position Would Lead to the Absurd Result of Treating a Second or Subsequent *Federal* Misdemeanor as a Federal Felony in the Immigration Context Even Though the Offense Was Not Prosecuted as a Federal Felony, another Result Clearly in Conflict with Lopez and Congressional Intent.

The government's position that any second or subsequent misdemeanor possession conviction can be held to correspond to a federal felony recidivist conviction – regardless of whether 21 U.S.C. §§ 844(a) and 851 requirements have been met in the criminal proceeding – leads to the absurd result that any second or subsequent federal misdemeanor possession conviction would also have to be considered the equivalent of a federal felony recidivist conviction even though the federal misdemeanor was not prosecuted as a federal felony.

It is well established that reviewing courts must avoid technically possible interpretations that produce absurd results. Rowland v. Cal. Men's Colony, 506 U.S. 194, 200 (1993); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 120 (1988); Carpenters Dist. Council v. Dillard Dep't Stores, 15 F.3d 1275, 1285 (5th Cir. 1994); Birdwell v. Skeen, 983 F.2d 1332, 1337 (5th Cir. 1993). In Birdwell, this Court reasoned that in deciding between different alternatives, courts should "reject interpretations which lead to unreasonable results in favor of those which produce reasonable results." Birdwell, 983 F.2d at 1337.

The government's argument should be rejected because its natural extension

is to treat federal misdemeanors as federal felonies for immigration purposes. This absurdity is accentuated by the fact that, in actual federal practice, the recidivist enhancement in § 844(a) is rarely used to enhance a second or subsequent federal misdemeanor possession conviction to felony recidivist status.[3] In our experience, to the extent that recidivist enhancements in the CSA based on prior convictions are used, they are applied to cases where the prior drug conviction is already a federal felony or where other more serious, non-drug-related charges are also involved. See, e.g., United States v. Fisher, 33 Fed. Appx. 933 (10th Cir. 2002) (not for publication). Given the infrequency with which the recidivist enhancement is used in the context of federal defendants whose prior convictions are only misdemeanor drug possession convictions, to automatically treat any second or subsequent misdemeanor conviction as equivalent to federal felony recidivist possession would not only be an absurd result but would be clearly in conflict with the Congressional intent reflected in the Lopez federal felony standard.[4]

[3] A comprehensive search on the major online legal search engine Westlaw has not yielded any cases, published or unpublished, where a federal recidivist enhancement was applied to a simple drug possession based on a prior misdemeanor simple drug possession conviction. The ALLFEDS database, meaning all federal cases, was searched for all cases that included references to 21 U.S.C. §§ 844 and 851 by using the search term: ("21 U.S.C. § 844" "21 U.S.C.A. § 844) & ("21 U.S.C. § 851" "21 U.S.C.A. § 851").

[4] There are several possible reasons for federal prosecutors to refrain from seeking a recidivist enhancement for a defendant who only has prior simple drug possession convictions. First, the prosecutor may not wish to undertake, or may not be able to meet, the specific requirements of 21 U.S.C. §§ 844(a) and 851. If a prosecutor chooses to charge the drug possession as a class A

II. SHOULD THE COURT FIND THAT THERE IS ANY LINGERING AMBIGUITY AS TO WHETHER A STATE SECOND OR SUBSEQUENT POSSESSION OFFENSE CAN AUTOMATICALLY BE TREATED AS AN AGGRAVATED FELONY, THE COURT SHOULD APPLY THE RULE OF LENITY TO FIND THAT SUCH OFFENSES ARE NOT AGGRAVATED FELONIES.

Under the federal felony standard adopted by the Supreme Court in Lopez, a state simple possession offense is not "punishable" as a felony under federal law, and therefore not an aggravated felony, without notice, proof, and an opportunity to challenge the fact, finality and validity of the alleged prior conviction. However, insofar as the Court finds that there is any lingering ambiguity as to whether a second or subsequent state possession conviction is "punishable" as a federal felony in the absence of the federal requirements; applicable rules of lenity require that such ambiguity be resolved in favor of the immigrant.

The compulsion to construe ambiguity in favor of the immigrant is particularly great where both criminal and immigration statutes are at issue,

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misdemeanor instead of a recidivist felony, he or she has the freedom to charge the person by complaint rather than indictment or information. See Fed. R. Crim. P. 58(b)(1). Moreover, the validity of the prior possession conviction may be questionable, and thus pose a barrier to meeting the strict requirements of § 851. See supra Part I.B. Second, prosecutors may exercise their discretion not to use the recidivist enhancement even in cases where it would be sustained because they believe it is not the appropriate punishment for a particular defendant. As the legislative history discussed above in Point I.A.2 makes clear, Congress rejected automatic recidivist enhancements where there were prior drug possession convictions because they might in some cases be unduly severe, and gave prosecutors the opportunity to exercise their discretion to determine in which cases such a serious penalty is appropriate. Any attempt to automatically treat second or subsequent possession offenses as aggravated felonies fundamentally undermines this prosecutorial discretion, a discretion that the Supreme Court has explicitly recognized in the context of recidivist enhancements under § 851. See LaBonte, 520 U.S. at 761-62.

because the criminal law and immigration law rules of lenity both demand that the adjudicator adopt from the reasonable interpretations the approach that encroaches least on the immigrant's liberty. See Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (noting that ambiguities in criminal statutes must be construed in favor of the immigrant in deportation proceedings); I.N.S. v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987) (applying the deportation rule of lenity to interpret a deportation statute); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (same); see also United States v. Elrawy, 448 F.3d 309, 316 (5th Cir. 2006) (applying the rule of lenity to find immigrant not subject to a federal criminal charge); United States v. Reedy, 304 F.3d 358, 368 n. 13 (5th Cir. 2002) (noting that the rule of lenity "has a long and established history in the Supreme Court and this circuit"). Therefore, insofar as there is any uncertainty over whether a conviction meets the definition of an aggravated felony as set forth in Lopez, any such ambiguity must be resolved in favor of the immigrant.

Any other interpretation of the aggravated felony designation may lend itself to expansive judicial interpretations that will create penalties not originally intended by the legislature. See Elrawy, 448 F.3d at 316. Even in situations when such penalties may be considered sound policy by the reviewing court, it is not the court's task to offer "supplementary and clarifying amendments" when Congress did not speak in clear and definite language. United States v. Orellana, 405 F.3d

360, 371 (5th Cir. 2005). Furthermore, in the context of deportation, where the stakes are considerable for an individual, the Supreme Court held that they could not "assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." Fong Haw Tan, 333 U.S. at 10.

The nature of a "drug trafficking crime" aggravated felony determination particularly counsels in favor of application of the rule of lenity because the designation results in severe consequences for the immigrant and for the policy goals of the INA. Aggravated felons are subject to deportation and are ineligible for cancellation of removal, asylum, and other forms of relief under the immigration statute. The removal process under the INA "normally, and critically, is premised upon individualized decisions about…whether particular circumstances warrant relief from removal." See Brief of Former General Counsels of the Immigration and Naturalization Service as *Amici Curiae* in Support of Petitioner Jose Antonio Lopez, 2006 WL 1706672, at *5. An aggravated felony designation removes this reasonable possibility of individualized decisions about eligibility for relief. See id.

CONCLUSION

For the aforementioned reasons, *amici curiae* respectfully urge the Court to hold that a second or subsequent state possession offense may not be deemed a "drug trafficking" aggravated felony where the prosecutor in the state criminal proceeding neither proved nor offered an opportunity equivalent to that under federal law to challenge, the fact, finality, and validity of the prior conviction.

Respectfully submitted,

NANCY MORAWETZ
Carlin Yuen, Legal Intern
Immigrant Rights Clinic
Washington Square Legal Services
Of Counsel
245 Sullivan Street, Fifth Floor
New York, NY 10012
(212) 998-6430

Manuel D. Vargas
Alina Das
Immigrant Defense Project
New York State Defenders
Association
25 Chapel Street, Suite 703
Brooklyn, New York 11201

Joshua Dratel
National Association of Criminal
Defense Lawyers
1150 18th St., NW, Suite 950
Washington, DC 20036

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