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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS

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In the Matter of

Godfrey GRANT **A40 093 259**

In removal proceedings
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BRIEF *AMICUS CURIAE*

of the

NEW YORK STATE DEFENDERS ASSOCIATION

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This case raises the question of whether a New York State misdemeanor marihuana offense, criminal sale of marihuana in the fourth degree, that involves the mere giving or offering of a small amount of marihuana to another for no remuneration may be deemed an "illicit trafficking in a controlled substance" aggravated felony. Given the myriad harsh consequences that result when an offense is deemed not only an offense relating to a controlled substance but also an aggravated felony, [1] the Board's resolution of this issue requires careful consideration.

In deciding this issue, the Board should be aware that criminal sale of marijuana in the fourth degree (codified at NYPL 221.40) is a commonly charged offense in New York State that involves weight amounts of less than 25 grams (i.e., .025 kilograms, or less than one ounce), see NYPL 221.45 (next higher level offense, which penalizes sale of marihuana-containing substances weighing more than 25 grams), and which is generally lightly penalized. The offense covers conduct such as giving a small amount of marijuana to another with no remuneration, conduct that in the federal criminal justice system is treated as a low-level misdemeanor marihuana possession offense. See 21 U.S.C. 841(b)(4). In fact, under federal law, felony classification is reserved only for cases involving distribution of large quantities of marihuana. For example, the weight level maximum for the *lowest* level marihuana distribution felony under federal law is 50 kilograms (i.e., 50,000 grams or about 110 pounds). See 21 U.S.C. 841(b)(1)(D).

Thus, *amicus curiae* is concerned that the ruling below -- that NYPL 221.40 constitutes an "aggravated felony" for federal immigration purposes – will give rise to unjust consequences that

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[1] As the Board is aware, the deeming of a conviction to be an aggravated felony has huge and far-reaching implications beyond the deportability consequence that is attached to an offense relating to a controlled substance that is not an aggravated felony. These consequences include permanent ineligibility for citizenship, see INA 101(f)(8), ineligibility for cancellation of removal, see INA 240A(a)(3), ineligibility for asylum, INA 208(b)(2)(B)(i), and ineligibility for

are greatly disproportionate to the gravity of the offense as determined by state law and to the treatment of similarly situated offenders under federal law.

We estimate that there are thousands of lawful permanent resident immigrants in New York with past convictions of NYPL 221.40 for which they served little or no jail time. According to New York State criminal justice data, there were at least 22,397 convictions of this offense just in the past decade (*i.e.*, the ten-year period from 1995 to 2004). Of this number, over 55 percent (12,323) resulted in sentences of time served only, probation only, conditional discharge, or fines. *See* Dispositions of Top Disposition Charge of PL 221.40, Criminal Sale of Marihuana in the Fourth Degree, 1995-2004 data, compiled by New York State Division of Criminal Justice Services, Albany, New York (attached to this brief for the convenience of the Board). And, of the remaining convictions that resulted in jail sentences, the median length of sentence imposed for this offense during this period was less than 30 days. *See* Jail Sentences – Top Disposition Charge PL 221.40 – New York State, 1995-2004 data, compiled by New York State Division of Criminal Justice Services, Albany, New York (also attached to this brief for the convenience of the Board). Thus, most NYPL 221.40 convictions did not result in jail sentences and, of those that did, more than half resulted in jail sentences of a month or less.

Many of the noncitizens who have been convicted of this low-level marijuana offense have not as yet been identified for initiation of removal proceedings, in part because many have settled into a law-abiding lifestyle and have therefore not come again to the attention of law enforcement. Now, however, if the Board finds that this misdemeanor offense is an aggravated felony, many of these individuals will be forever deemed ineligible to naturalize as U.S. citizens. They will also be at permanent risk of being placed in removal proceedings and being deported without eligibility for

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voluntary departure, INA 240B(a)(1) & (b)(1)(C).

relief from deportation, regardless of the equities in their individual cases, if they ever seek to naturalize, travel abroad, or have any other contact with the Department of Homeland Security.

The **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 other persons throughout the State of New York. Its objectives are to improve the quality of public defense services in the state, establish standards for practice in the representation of poor people, and engage in a statewide program of community legal education. Among other initiatives, NYSDA operates the **Immigrant Defense Project**, which provides public defender, legal aid society, and assigned counsel program lawyers, as well as other lawyers and immigrants themselves, with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law. In seeking to improve the quality of justice for noncitizens accused of crimes in New York State, the NYSDA Immigrant Defense Project 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, and, with this brief, offers the Board its expertise in the intersection between New York State's criminal laws and practice and federal criminal and immigration law and practice. The Board, as well as the federal courts, including the United States Supreme Court, have accepted and relied on *amicus curiae* briefs submitted by NYSDA's Immigrant Defense Project in many key cases involving the proper application of federal immigration law to immigrants with New York and other state criminal convictions. *See, e.g.*, Brief of New York State Defenders Association in *Matter of Devison-Charles*, 22 I&N Dec. 1362 (BIA 2000, 2001)(brief acknowledged with appreciation in n.2 of Board's January 18, 2001 decision on government's motion for reconsideration), Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, New York State Defenders Association, et al, in *Immigration and Naturalization*

Service v. St. Cyr, 533 U.S. 289 (2001)(brief cited at n.50); Brief for National Association of Criminal Defense Lawyers, New York State Defenders Association, et al, in *Leocal v. Ashcroft*, 125 S.Ct. 377 (2004); *see also* Briefs *Amicus Curiae* submitted to United States Courts of Appeals in *Calcano-Martinez, et al. v. INS*, Docket No. 98-4033 (*amicus* brief cited in companion case of *St. Cyr v. INS*, 229 F.3d 406, n.7 (2d Cir. 2000)); *Pottinger, et al. v. Reno*, Docket No. 99-2684, 2000 U.S. App. LEXIS 33521 (2d Cir. 2000); *Zgombic v. Farquharson*, Docket No. 00-6165, 69 Fed. Appx. 2 (2d Cir. 2003); *Rankine et al. v. Reno*, Docket No. 01-2135, 319 F.3d 43 (2d Cir. 2003); *Jobson v. Ashcroft*, Docket No. 02-4014, 326 F.3d 367 (2d Cir. 2003); *Dickson v. Ashcroft*, Docket No. 02-4102, 346 F.3d 44 (2d Cir. 2003); *Ponnapula v. Ashcroft*, Docket No. 03-1255, 373 F.3d 480 (3d Cir. 2004).

NEW YORK STATE STATUTORY BACKGROUND

The misdemeanor offense at issue in this case – New York State criminal sale of marihuana in the fourth degree – was added to the New York Penal Law (NYPL) by the Marihuana Reform Act of 1977. Prior to this Act, all marihuana sales, regardless of amount, were classified as Class C controlled substance felonies. The Marihuana Reform Act reduced the penalties for lower level marihuana sale offenses by creating a section of the Penal Law dealing exclusively with possession or sale of marihuana, including the misdemeanor offenses of criminal sale of marihuana in the fourth and fifth degrees, NYPL 221.40 and 221.35. Section 221 of the New York Penal Law "was motivated by a desire to reduce the seriousness of the legal consequences surrounding convictions for possession or sale of marihuana." *People v. Houston*, 424 N.Y.S.2d 726, 727-28 (N.Y. Sup. Ct. 1980), app. Denied, 49 N.Y.2d 1004 (1980).

NYPL 221.40 - misdemeanor criminal sale of marihuana in the fourth degree - provides:

A person is guilty of criminal sale of marihuana in the fourth degree when he knowingly

and unlawfully sells marihuana except as provided in section 221.35 of this article.

NYPL 221.35 – misdemeanor criminal sale of marihuana in the fifth degree -- provides:

> A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, without consideration, one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of two grams or less; or one cigarette containing marihuana.

The term "sell" is defined broadly to mean: "to sell, exchange, give or dispose of to another, or to offer or agree to do the same." NYPL 220.00(1). The New York State Court of Appeals – the highest court in the state – has held that this definition expands the term "sell" for purposes of the New York Penal Law "well beyond the ordinary meaning of the term and conspicuously excludes any requirement that the transfer be commercial in nature or conducted for a particular type of benefit or underlying purposes." *People v. Starling*, 650 N.E.2d 387, 398 (1995).

FEDERAL STATUTORY BACKGROUND

An "aggravated felony" is defined under the Immigration and Nationality Act ("INA" or "the Act") as including "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code). *See* INA 101(a)(43)(B).

A "drug trafficking crime" is defined as "any felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act." *See* 18 U.S.C. 924(c)(2)(citations omitted).

The Controlled Substances Act penalizes as felonies distribution of 1000 kilograms or more, 100 kilograms or more, and up to 100 kilograms of a marihuana-containing substance, see

21 U.S.C. 841(b)(1)(A)-(C), and, as the lowest level felony for marihuana distribution, penalizes an offense involving up to 50 kilograms of marihuana. *See* 21 U.S.C. 841(b)(1)(D).

The Controlled Substances Act further provides: "Notwithstanding [21 U.S.C. 841(b)(1)(D)], any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title [Penalty for simple possession as misdemeanor] and section 3607 of Title 18 [Special probation and expungement procedures for drug possessors]." *See* 21 U.S.C. 841(b)(4).

ARGUMENT

In this case, the Respondent has been convicted in New York State of criminal sale of marijuana in the fourth degree, in violation of NYPL 221.40, which covers offenses involving up to 25 grams of a marihuana-containing substance (less than one ounce). *See* NYPL 221.45 (next higher level offense which penalizes offenses involving more than 25 grams). New York classifies this offense as a Class A misdemeanor, for which the maximum sentence "shall not exceed one year." NYPL 221.40 & 70.15(1). The immigration judge, persuaded by unpublished Board of Immigration Appeals ("BIA") decisions that found that a conviction under NYPL 221.40 requires receipt of consideration or remuneration in exchange for marijuana, concluded that a conviction under NYPL 221.40 constitutes "illicit trafficking in a controlled substance" within the meaning of INA 101(a)(43)(B). He accordingly sustained the government's charge that Respondent was deportable under INA 237(a)(2)(iii) as one who was convicted of an aggravated felony, pretermitted Respondent's application for cancellation of removal under INA 240A(a), and ordered Respondent removed from the United States.

The immigration judge erred in concluding that a conviction under NYPL 221.40 is an "illicit trafficking in a controlled substance" aggravated felony. First, a conviction under NYPL

221.40 is a misdemeanor that - as the Board has previously determined - Congress did not intend to include generally within the definition of aggravated felony, or at least not specifically in the "illicit trafficking in a controlled substance" category. *See* Point I below. Second, NYPL 221.40 penalizes the transfer of marijuana without consideration and, therefore, does not fall within the ordinary meaning of "trafficking" in drugs. That ordinary meaning—recognized and supported by the Board—excludes the transfer of drugs without consideration.[2] *See* Point II below.

I. THE NEW YORK MARIHUANA OFFENSE AT NYPL 221.40 MAY NOT BE DEEMED AN "ILLICIT TRAFFICKING" AGGRAVATED FELONY BECAUSE THIS OFFENSE IS A MISDEMEANOR THAT CONGRESS DID NOT CONTEMPLATE WOULD BE DEEMED AN AGGRAVATED FELONY

As concluded by the Board in its precedent decision in *Matter of Davis*, 20 I&N Dec. 536 (1992), Congress did not intend that a misdemeanor offense such as the New York offense at issue here be deemed an "illicit trafficking in a controlled substance" aggravated felony. The question presented here is whether the Board's decision in *Matter of Small*, 23 I&N Dec. 448 (BIA 2002), acceding to what the Board characterized as the weight of circuit court authority holding that the "sexual abuse of a minor" category extended to misdemeanor offenses, affects the continuing validity of *Davis* with respect to the "illicit trafficking in a controlled substance" category. *Amicus curiae* submits that *Davis* remains good law. First, as the recent Supreme Court decision in *Leocal v. Ashcroft* confirms, *Davis* correctly took heed of the ordinary meaning of the term being defined - "aggravated *felony*" - and found it to be strong evidence that Congress did not intend the word "felony" to include misdemeanor or lesser offenses.. To the extent that *Small* is in conflict with this

[2] The immigration judge also considered whether a conviction under NYPL 221.40 constitutes a "drug trafficking crime" aggravated felony as set forth in 18 U.S.C. 924(c). He correctly found, and the government does not dispute, that the conviction does not satisfy this definition. All that is at issue in this appeal is whether such a conviction may otherwise constitute an aggravated felony as "illicit trafficking" in a controlled substance.

conclusion of *Davis*, *amicus* respectfully suggests that the Board should reconsider its decision in *Small* in light of *Leocal*. *See* subpoint A below. However, the Board need not reach this broader issue of Congressional intent with respect to the aggravated felony term generally because this case presents the narrower question of whether the specific "illicit trafficking in a controlled substance" aggravated felony category at issue in *Davis* (as well as in this case) may include non-felony offenses. For the reasons explained in subpoint B below, *amicus* submit that *Davis* may be reaffirmed on this narrower point without any need to reconsider *Small*. Finally, the Board issued *Davis* as a published precedent decision over thirteen years ago. Many immigrants and their defense counsel have over the years relied on it when considering the consequences of a decision to plead guilty to a misdemeanor drug offense. If the Board departs from its ruling in *Davis*, the Board should do so prospectively only. *See* subpoint C below.

A. As the Board concluded in *Matter of Davis*, Congress' use of the aggravated felony term indicates that Congress generally did not intend for non-felony offenses to be deemed aggravated felonies

The Board's precedent decision in *Davis* correctly concludes, as reiterated in *Matter of Ponce de Leon*, 21 I&N Dec. 154 (1996), that Congress intended that the aggravated felony term would generally cover felonies only. If Congress intended otherwise, it could have used a term such as "aggravated offenses" or "aggravated crimes." In fact, other Congressional language and legislative history confirms that, at least until the 1996 vast expansion of the aggravated felony definition, Congress intended that an aggravated felony meant a felony conviction only.

When Congress first employed the aggravated felony term in amendments to the INA as part of the Anti-Drug Abuse Act of 1988 (ADAA), it defined the term to include only the offenses of "murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of

such title." The ADAA made other changes to the INA that clearly reveal that the aggravated felony term was aimed at "felons." The ADAA revised the custody provisions of former section 242(a) of the Act to require the Attorney General to take custody of "any alien convicted of an aggravated felony" and directed that "the Attorney General shall not release *such felon* from custody." ADAA 7343(a)(4), 102 Stat. at 4470 (emphasis added). In addition, the ADAA added a new section 242A to the Act, which was designed to expedite the deportation of aliens convicted of aggravated felonies. It provided in relevant part: "With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General . . ., the Attorney General shall, to the maximum extent practicable, detain *any such felon* at a facility at which other such aliens are detained." ADAA 7347(a), 102 Stat. at 4471, 4472 (emphasis added). As Board member Filppu has stated: "The natural meaning of the term 'aggravated felony' and these related statutory references to 'such felon,' which were part of the original enactment, seem to foreclose any reasonable argument that the term then was meant to include misdemeanors." Concurring opinion of Board member Lauri Steven Filppu in *Crammond*, 23 I&N Dec. 9 (BIA 2001).

Additional evidence of Congressional intent regarding the reach of the aggravated felony term came shortly thereafter. In 1990, Congress made clear that the drug trafficking category applied to state as well as federal offenses (*see* discussion in subpoint B below), and expanded the statutory definition of aggravated felony to add some new substantive categories of criminal offenses. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3) (adding certain federal money laundering offenses and crimes of violence for which the term of imprisonment imposed is at least five years). In that same legislation, Congress made aggravated felons ineligible for a waiver of exclusion if they had served a term of imprisonment of at least five years. *Id*., § 511(a). In technical amendments in 1991, this waiver restriction was amended to make ineligible an individual

convicted of one or more aggravated felonies if the individual had served "for such *felony or felonies*" a term of imprisonment of at least five years. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10) (emphasis added).

Then, in 1994, Congress enacted additional expansions of the aggravated felony definition to cover additional classes of "alien *felons.*" Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a); see remarks of Congressman Bill McCollum 139 Cong. Rec. E749-50 (March 24, 1993) (emphasis added) (proposing to add felons who have committed serious immigration-related crime, those who have participated in serious criminal activities and enterprises, and those who have committed serious white-collar crimes). In that year, Congress also enacted increased penalties for the federal crime of illegal reentry after deportation based on whether the prior deportation was subsequent to a conviction for (1) "an aggravated felony," (2) "a felony (other than an aggravated felony," or (3) "three or more misdemeanors." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b). The language and legislative history of these amendments show that Congress certainly contemplated overlap between its use of the term "felony" and the aggravated felony term, but contain no hint that Congress contemplated any overlap between its use of the term "misdemeanor" and its use of the aggravated felony term.

In light of the history of congressional understanding of the limited meaning of an aggravated felony, there can be little doubt that had Congress intended to include misdemeanor offenses within the aggravated felony definition, it would and could have expressly said so at some point. For example, had Congress so intended, it could have kept the aggravated felony label but inserted the phrase "whether classified as a felony or misdemeanor" into the already existing aggravated felony definition, so that sentence would instead read: "The [aggravated

felony] term applies to an offense described in this paragraph whether in violation of Federal or State law *and whether classified as a felony or misdemeanor … .*" *See* 8 U.S.C. 1101(a)(43) (insert added).

This evidence of Congressional intent that the aggravated felony term, at least before the 1996 expansion of the aggravated felony category, generally includes only felonies gives strong support to the Board's conclusion in *Davis.* To the extent that the Board concludes that its decision in *Small* concerning crimes relating to the "sexual abuse of a minor" category added by Congress in 1996 in any way undermines the continuing force of *Davis*, the Board should reconsider its decision in *Small.* Such reconsideration is warranted in light of the recent unanimous Supreme Court decision in *Leocal*, in which the Court gave support to the principle that statutory terms should be construed according to the "ordinary or natural meaning" of the term. *See Leocal v. Ashcroft,* 125 S. Ct. 377, 382 (2004)(finding that, in construing the "crime of violence" term referenced in the aggravated felony definition, it is appropriate to consider the "ordinary meaning" of the term in addition to the definitional language). Indeed, *Leocal* confirms that the Board in *Davis* was correct to give strong weight to the ordinary meaning of the term *under review* - in this case, "aggravated *felony*" - and to conclude that the term itself is the best evidence that Congress did not intend to include non-felonies.[3]

B. At a minimum, Congress did not intend for the specific "illicit trafficking in a controlled substance" aggravated felony category at issue here to include non-felony offenses such as misdemeanor NYPL 221.40

[3] Moreover, even were the Board to decide that Congressional intent as to the reach of the aggravated felony term to non-felony offenses is ambiguous, the Supreme Court has long adhered to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." See *INS v. St. Cyr*, 533 U.S. 289 (2001)(quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449(1987)).

Although *amicus curiae* believe Congressional intent concerning the meaning of "aggravated felony" is strong , the Board need not reach this broader issue with respect to the aggravated felony term generally. This case presents the narrower question of whether the specific "illicit trafficking in a controlled substance" aggravated felony category at issue in *Davis* (as well as in this case) may include non-felony offenses. That is, if the Board concludes that its decision in *Small* must stand despite *Leocal*, the Board can still uphold its decisions in *Davis* and *Ponce de Leon* on the basis of evidence that Congress intended the "illicit trafficking in a controlled substance" category to be generally limited to felony offenses. Thus, the Board can reaffirm and stand by its prior precedents in *Davis* and *Ponce de Leon* without any need to reconsider *Small*.

When Congress first employed the aggravated felony term in the INA in 1988, it included only the offenses of murder, drug trafficking, and illicit trafficking in firearms or destructive devices. Anti-Drug Abuse Act of 1988 (ADAA), Pub. L. No. 100-690, § 7342. The drug-related portion of this definition referred specifically to "any drug trafficking crime as defined in section 924(c)(2) of title 18 United States Code." *Id.* This definition, in turn, referred only to "any *felony* punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act." 18 U.S.C. 924(c)(2)(emphasis added). Then, in 1990, Congress amended the drug-related portion of the aggravated felony definition to read "any illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code . . . . Such term applies to offenses described in the previous sentence whether in violation of Federal or State law . . ." *See* section 501 of the Immigration Act of 1990, 104 Stat. at 5048, as corrected by section 306(a)(1) of the Miscellaneous and Technical Immigration and Naturalization

Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1751 (1991). This change – including adding descriptive language not tied solely to a federal "drug trafficking crime" definition that referred only to federal statutes, as well as adding the clause "whether in violation of Federal or State law" – was meant to codify and reinforce the Board's holding in *Matter of Barrett*, 20 I&N Dec. 171 (1990), which rejected a challenge that the federal law "drug trafficking crime" reference to did not extend to state offenses. *See* H.R. Rep. No. 681, pt. 1, at 147 (1990), reprinted at 1990 U.S.C.C.A.N. 6472, 6553 ("Because the Committee concurs with the recent decision of the Board of Immigration Appeals [in Matter of Barrett] and wishes to end further litigation on the issue [of whether a state drug trafficking conviction can render an alien an aggravated felon], section 1501 of H.R. 5269 specifies that drug trafficking . . . is an aggravated felony whether or not the conviction occurred in state or Federal Court."). Thus, Congress' only expressed intent with respect to these 1990 amendments was to clarify that state offenses, as well as federal offenses, that fit within this category could be deemed aggravated felonies.

Subsequently, in *Davis*, the Board considered the reach of the new "illicit trafficking in a controlled substance" language of the aggravated felony definition as it related to the referenced "drug trafficking crime" definition. *See* 20 I&N Dec. 536 (1992). The Board concluded that the "illicit trafficking in a controlled substance" language included offenses with a sufficient nexus to the trade or dealing of controlled substances, even if they did not fit within the "drug trafficking" crime" definition, but only if the offense "is a felony." *Id*. at 541. Conversely, the Board stated it "would not conclude, . . . considering that the ultimate term in question is 'aggravated felony,' that an offense that is not a felony . . . constitutes 'illicit trafficking' in a controlled substance." *Id*. at 541; *see also Matter of Ponce de Leon*, 21 I&N Dec. 154

(1996)(reiterating the requirement that an offense must be a felony in order to constitute an "illicit trafficking in a controlled substance" aggravated felony).

The *Davis* conclusion is supported by the fact that the "drug trafficking crime" definition referenced in the original 1988 statutory description of the drug aggravated felony category covers only "any felony" punishable under the listed federal controlled substance laws. Davis is also supported by legislative history, which reveals that the 1990 amendments to that statutory description were meant only to clarify that the reference to the federal "drug trafficking crime" definition also covered state offenses fitting within the definition. The *Davis* conclusion is further strongly supported by the statutory language and legislative history described in subpoint A above demonstrating Congressional intent (at least in the years before Congress in 1996 expanded the aggravated felony category) that the aggravated felony term generally covered felonies only, a conclusion buttressed by the fact that the "illicit trafficking in a controlled substance" aggravated felony category was inserted into the INA before 1996.

In addition, even when Congress made the vast changes to the aggravated felony definition in 1996, it did not legislatively override the *Davis* holding. For example, while Congress lowered the prison sentence threshold from five years to one year for certain non-drug categories of offenses to be deemed aggravated felonies and thereby arguably manifested an intent to include some misdemeanor convictions, the drug-related category remained unchanged. And while the 1996 addition of certain new categories of aggravated felony offenses, such as "sexual abuse of a minor," might arguably reflect Congressional intent to include misdemeanors within such categories, *see Small* and federal court decisions from other circuits cited therein, it remains the case that the drug-related category refers to a "drug trafficking crime" definition, *see* 18 U.S.C. 924(c)(2), limited to serious felony offenses such as 21 U.S.C. 841(b)(1)(A), (B), (C),

and (D) that penalize marihuana distribution involving 1000 kilograms or more, 100 kilograms or more, or less than 100 kilograms of a marijuana-containing substance, or less than 50 kilograms of marihuana. In contrast, misdemeanor NYPL 221.40 generally involves less than 25 grams (.025 kilograms) of a marihuana-containing substance, *see* NYPL 221.40 in conjunction with NYPL 221.45, and includes conduct covered by the federal offense of distribution of a small amount of marihuana for no remuneration, which is a misdemeanor that Congress must be assumed to know would not be covered by the federal "drug trafficking crime" definition. *See* 21 U.S.C. 841(b)(4).

Indeed, despite Congress' extensive expansions of, and additions to, the aggravated felony definition in 1996 and other years, Congress has not amended the drug-related category to expand its reach, except in 1990 amendments that simply clarified that state and federal offenses can be "drug trafficking crimes". As the Supreme Court has stated, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Loriallard v. Pons*, 434 U.S. 575, 580 (1978)(citing *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 414 n. 8 (1975); *NLRB* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co.* v. *United States*, 252 U.S. 140, 147 (1920); 2A C. Sands, Sutherland on Statutory Construction §49.09 and cases cited (4th ed. 1973)). Here, where Congress not only re-enacted the aggravated felony statute, but affirmatively overhauled other portions of that statute without amending the "illicit trafficking in a controlled substance" provision, it is thus even more clear that it must be presumed Congress intended to leave intact the Board's holding in *Davis* that this particular aggravated felony category remains limited to felony offenses. *See id*. at 581 ("[W]here, as here, Congress adopts a new law incorporating

sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute").

Finally, *Davis* is not undermined by the Board's 2002 decision in *Matter of Small*, which interprets a separate aggravated felony category – "sexual abuse of a minor" – that was added to the INA years after the "illicit trafficking in a controlled substance" category. When it added the sexual abuse of a minor category in the 1996 amendments, Congress did not provide any express guidance on the limits of the reach of this new category. In contrast, Congress provided express guidance on what it contemplated was covered by the illicit trafficking category – federal felony drug trafficking offenses and their state equivalents. The Board in *Davis* honored this unambiguous Congressional intent and should remain faithful to what Congress intended.

Moreover, it should be noted that, initially, the Board decided that even the "sexual abuse of a child" category did not reach non-felony offenses. *See Matter of Crammond*, 23 I&N Dec. 9 (BIA 2001). After vacating *Crammond*, however, upon learning that the respondent in that case had departed the United States, the Board reversed course and found that the "sexual abuse of a child" category could include non-felony offenses in the face of circuit court decisions that had disagreed with the Board's holding in *Crammond*. *See Small*, 23 I&N Dec. 448 (BIA 2002). The Board explained: "We consider it appropriate at this juncture to accede to the weight of appellate court authority in the interest of uniform application of the immigration laws." *Id*. at 450. *Small* thus represented a reversal of Board position based on circuit court precedent specific to the "sexual abuse of a minor" aggravated felony category at issue in that case. *See id*. (principally citing *Guerrero-Perez v. INS*, 256 F.3d 546 (7th Cir. 2001); *United States v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001); *United States v. Marin-Navarette*, 244 F.3d 1284 (11th Cir.), *cert. denied*, 122 S. Ct. 317 (2001)(all decisions dealing specifically with the reach of

the "sexual abuse of a minor" aggravated felony category)). In contrast, no circuit court has ruled contrary to *Davis*' felony requirement.

In sum, the Board's reversal of course in *Small* with respect to the separate "sexual abuse of a minor" aggravated felony category simply does not undermine the Board's decision in *Davis*. The *Small* decision dealt with a category for which Congress provided no express guidance as to its reach and which acceded to court rulings specific to this separate aggravated felony category. In contrast, Congress did provide express guidance as to the reach of the "illicit trafficking in a controlled substance" category at issue in *Davis* and, despite having numerous opportunities to legislatively overturn the Board's *Davis* interpretation of Congressional intent when it amended other provisions of the aggravated felony definition, Congress has not done so.

C. If the Board departs from *Matter of Davis*, the Board should do so prospectively only given that many immigrants over the years may have relied on *Davis* when deciding whether to plead guilty to misdemeanor drug offenses

If the Board departs from its decision in *Matter of Davis*, the Board should do so prospectively only because many immigrants and their defense counsel undoubtedly have relied on it when considering the consequences of giving up their right to a jury trial and pleading guilty to a misdemeanor drug offense. In fact, over 99 percent of individuals convicted of NYPL 221.40 criminal sale of marihuana in the fourth degree over the past ten years pled guilty to the offense. *See* Dispositions of Top Disposition Charge of PL 221.40, Criminal Sale of Marihuana in the Fourth Degree, 1995-2004 data, compiled by New York State Division of Criminal Justice Services, Office of Justice Systems Analysis, Bureau of Statistical Services, Albany, New York (attached to this brief for the convenience of the Board). Therefore, as a matter of due process, any new Board rule announced in this or another case relating to the deeming of misdemeanor drug offenses as aggravated felonies should not apply retroactively to past plea convictions. *Cf*.

Von Pradith v. Ashcroft, CV 03-1304-BR (D. Or. 2003)(finding retroactive application of Board decision in *Matter of Yanez-Garcia* to be contrary to due process); *Gonzalez-Gonzalez v. Weber*, Docket No. 03-RB-0678 (D. Colo. 2003)(finding retroactive application of *Yanez-Garcia* in conflict with Supreme Court decision in *INS v. St. Cyr*, 533 U.S. 289 (2001)); *Salazar-Regino v. Ashcroft*, Docket No. B-02-45 (S.D. Tex. 2003)(finding retroactive application of *Yanez-Garcia* to be contrary to due process). This due process requirement is especially necessary here given the low-level nature of the offense at issue in this case and the fair assumption of many noncitizen defendants and their criminal defense lawyers that a plea to such a misdemeanor offense would not have "aggravated felony" consequences even had they not been aware of *Davis*.

II. IN ANY EVENT, THE NEW YORK MARIHUANA OFFENSE AT NYPL 221.40 IS NOT AN "ILLICIT TRAFFICKING IN A CONTROLLED SUBSTANCE" AGGRAVATED FELONY BECAUSE THIS OFFENSE COVERS GIVING A SMALL AMOUNT OF MARIHUANA TO ANOTHER WITHOUT REMUNERATION

An offense that penalizes the transfer of drugs without any money or other remuneration in return for those drugs does not constitute an "illicit trafficking in a controlled substance" aggravated felony. Section 101(a)(43)(B) of the INA includes as an aggravated felony any "illicit *trafficking* in a controlled substance (as defined in section 102 of the Controlled Substances Act) . . . ." (emphasis added). The word "trafficking", as it relates to Section 101(a)(43)(B), is not defined at INA 101, nor in the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act. As discussed in Point I above, the Supreme Court's recent unanimous decision in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004), supports the principle that statutory terms should be construed according to their "ordinary or natural meaning". *Id.* at 382. Even before *Leocal*, the Board followed this basic principle of statutory construction in its precedent

decision *Matter of Davis*, 20 I&N Dec. 536 (1992). Interpreting whether an offense constitutes "illicit trafficking in a controlled substance, the Board employed the ordinary meaning of "trafficking"—*i.e*., the trading or dealing in certain goods—for purposes of determining whether a drug offense constitutes an "illicit trafficking in a controlled substance". Drawing from dictionary definitions of "traffic" ("[c]ommerce; trade; sale or exchange of merchandise, bills, money, and the like. The passing of goods or commodities from one person to another for an equivalent in goods or money.") and "trafficking" ("trading or dealing in certain goods and commonly used in connection with illegal narcotic sales"), the Board emphasized that "[e]ssential to the term in this sense is its business or merchant nature, the trading or dealing of goods . . . ." *Id.* at 541. (citing Black's Law Dictionary, 1340 (5th ed. 1979)). Any offense that lacks this essential element of trading or dealing, such as any offense that criminalizes the transfer of drugs without consideration, therefore does not fall within this ordinary meaning of "trafficking" and, accordingly, does not constitute "illicit trafficking in a controlled substance" within the meaning of Section 101(a)(43)(B). *See id.*; *see also Steele v. Blackman*, 236 F.3d 130, 135 (3d Cir. 2001)(noting that the definition of "trafficking" would exclude simple possession or transfer without consideration).

New York misdemeanor criminal sale of marijuana in the fourth degree (NYPL 221.40) penalizes the giving of a small amount of marijuana[4] to another without remuneration. NYPL 221.40 provides:

[4] That amount is 25 grams or less in aggregate weight of any mixture containing marijuana, since one must exceed the threshold aggregate weight of 25 grams (less than one ounce) to trigger a conviction under the New York State offense that is one level higher than NYPL 221.40—New York State criminal sale of marihuana in the third degree—which provides:

> A person is guilty of criminal sale of marihuana in the third degree when he knowingly and unlawfully sells one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of more than twenty-five grams.

> A person is guilty of criminal sale of marihuana in the fourth degree when he knowingly and unlawfully *sells* marihuana *except as provided in section 221.35 of this article*.

NYPL 221.40 (emphasis added).

To understand the scope of acts penalized under NYPL 221.40, we must look to at least two other provisions of the New York Penal Law: (1) the definition of "sell" at NYPL 220.00(1), which applies to all New York controlled substance offenses, including marijuana offenses,[5] that use the term; and (2) the offense of criminal sale of marihuana in the fifth degree at NYPL 221.35, which is one level lower than the offense at NYPL 221.40, and which identifies the sales of marijuana "excepted" from the scope of NYPL 221.40.

"Sell," defined at NYPL 220.00(1), means "to sell, exchange, give or dispose of to another [or to offer or agree to do the same]." NYPL 220.00(1). In *People v. Starling*, 650 N.E.2d 387 (1995), the New York Court of Appeals—the highest court in the state—has unequivocally affirmed that this broad definition of "sell" extends far beyond any ordinary meaning of the term and encompasses the transfer of drugs without consideration:

> By enacting a broad definition of the term "sell" to embrace the acts of giving or disposing of drugs, the Legislature has evinced a clear intent to "include any form of transfer of a controlled substance from one person to another" . . . . The statutory definition of that term conspicuously excludes any requirement that the transfer be commercial in nature or conducted for a particular type of benefit or underlying purpose . . . . Because the Legislature has chosen to supply its own definition of the term "sell" which is "expanded well beyond the ordinary meaning" of that term . . . , the trial court, in charging the jury here, properly declined to supplement that definition with defendant's proffered dictionary definition of "sell," which denotes a transaction that is commercial in flavor . . . .

NYPL 221.45.

[5] "Unless the context in which they are used clearly otherwise requires, the terms occurring in this article [relating to offenses involving marihuana] shall have the same meaning ascribed to them in article two hundred twenty [relating to controlled substance offenses] of this chapter." NYPL 221.00.

People v. Starling, 650 N.E.2d at 390 (1995)(citations omitted; emphasis added). Accordingly, in New York one may be convicted of "sale" of a controlled substance even if he receives no consideration for the transfer of drugs. "The fact that the transfer may have been unaccompanied by compensation or any verbal representations indicating an offer or intent to sell does not remove the act . . . from the scope of the prohibited conduct and does not render it less culpable than a transfer involving an immediate economic benefit to the seller . . . ." *Id*.

Notwithstanding *People v. Starling*, in this case the immigration judge found that because the Class B misdemeanor of NYPL 221.35 explicitly refers to transfers of marijuana "without consideration", a conviction under NYPL 221.40, which does not contain the phrase "without consideration", necessarily requires consideration. The immigration judge was wrong. Contrary to the finding below, the fact that NYPL 221.35 is the only New York marijuana sale offense that explicitly refers to transfers "without consideration" does not mean that other New York marijuana sale offenses, including NYPL 221.40, require consideration. Such a conclusion would fly in the face of the New York Court of Appeal's interpretation of "sell" in *Starling*, as well as the plain wording of NYPL 221.40.

A correct parsing of the statutory language reveals that consideration is not required for a conviction under NYPL 221.40. NYPL 221.35 provides:

> A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, without consideration, one or more preparations, compounds, mixtures or substances containing marihuana and the preparations, compounds, mixtures or substances are of an aggregate weight of two grams or less; or one cigarette containing marihuana.

NYPL 221.35. A plain reading of this statute reveals that in order to violate this statute the defendant must (1) knowingly and unlawfully (2) "sell" without consideration (3) marijuana mixtures with an aggregate weight of two grams or less, or one cigarette containing marijuana.

Reading NYPL 221.35 and NYPL 221.40 together, then, a defendant is guilty of the Class A misdemeanor of criminal sale of marihuana in the fourth degree (NYPL 221.40) when he knowingly and unlawfully "sells" marijuana, except if the transfer of marijuana: (1) involved an aggregate weight of two grams or less or was contained in one cigarette or less; and (2) was made without consideration.[6] To fall within that exception, a transaction must meet both the weight or amount limitations and the requirement that the transfer be made without consideration. A marijuana sale will not fall within that exception, then, if either the amount sold is greater than two grams or one cigarette, or the transfer was made for consideration. Stated differently, one may be convicted under NYPL 221.40 if he (1) transfers more than 2 grams or two or more marihuana cigarettes OR (2) transfers *any* amount of marijuana for consideration.

Consistent with the above plain reading of NYPL 221.40 and the definition of "sell" under New York law, the one federal circuit court of appeals that has squarely analyzed whether a conviction under NYPL 221.40 requires remuneration has found no such requirement. In *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), Mr. Steele, a long-time lawful permanent resident of the United States, had been convicted twice of NYPL 221.40. *Id.* at 131. Directly addressing the question of remuneration, the Third Circuit Court of Appeals reasoned that the New York Penal Law "defines 'sale' to include 'giving or disposing of to another' so that one

[6] Jury instructions for NYPL 221.40, prepared by the Committee on Criminal Jury Instructions of the New York State Office of Court Administration, confirm this plain reading of 221.40 and 221.35 read together:

> Under our law, a person is guilty of Criminal Sale of Marihuana in the Fourth Degree when that person knowingly and unlawfully sells marihuana; except if the marihuana was contained in one or more preparations, compounds, mixtures or substances of an aggregate weight of two grams or less, [or in one cigarette], *and* the sale was without consideration.

may be convicted of 'criminal sale' *without evidence of a sale as commonly understood*." *Id*. (emphasis added). Noting that the definition of "trafficking", for purposes of whether a state drug offense constitutes an "illicit trafficking" aggravated felony, would exclude simple possession or transfer without consideration, *id.* at 135 (citing *Davis*), the court concluded that because "the elements of the misdemeanor offense [of NYPL 221.40] are met if the defendant has distributed" a small amount of marijuana "without remuneration", *id*. at 137, Mr. Steele had not been convicted of an aggravated felony and therefore was eligible for cancellation of removal under INA 240A(a).[7]

CONCLUSION

For the reasons stated above, *amicus curiae* New York State Defenders Association Immigrant Defense Project urges the Board to grant the respondent's appeal and reverse the Immigration Judge's finding that the New York misdemeanor marihuana offense at NYPL 221.40 is an aggravated felony.

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Respectfully submitted,

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CJI2d [NY] Penal Law § 221.40 (emphasis added)(citations omitted).

[7] In *Steele*, the court also discussed whether a conviction under NYPL 221.40 would constitute a "drug trafficking crime" as defined in 18 U.S.C. 924(c) under a "hypothetical federal felony" approach and, for reasons explained therein, concluded that Mr. Steele had not been convicted of an aggravated felony, "hypothetical or otherwise." *Id*. at 138. In the instant case, the immigration judge correctly found, and the government does not dispute, that a conviction under NYPL 221.40 does not constitute a "drug trafficking crime" aggravated felony.

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