07–3031-ag

United States Court of Appeals

for the

Second Circuit

ELVIS MARTINEZ,

Petitioner,

- v. -

ALBERTO R. GONZALES,

Respondent.

ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICUS CURIAE
IN SUPPORT OF PETITIONER

ALINA DAS
MANUEL D. VARGAS
NEW YORK STATE DEFENDERS ASSOCIATION
IMMIGRANT DEFENSE PROJECT
3 West 29th Street, Suite 803
New York, New York 10001
(212) 725-6422

NANCY MORAWETZ
ANJALI BHARGAVA, LEGAL INTERN
S. CAROLINE JOHNSON, LEGAL INTERN
WASHINGTON SQUARE LEGAL SERVICES
245 Sullivan Street, 5th Floor
New York, New York 11012
(212) 998-6430

Attorneys for Amicus Curiae

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PRELIMINARY STATEMENT

Amicus curiae submits this brief to bring to the Court's attention the wide import and unwarranted nature of the government's broad interpretation of the federal immigration law "drug trafficking" aggravated felony term in this case. The government here seeks to apply the "drug trafficking" label to a common and relatively minor New York misdemeanor offense that covers giving or offering a small amount of marihuana (between 2 and 25 grams) to another person for no remuneration. Notwithstanding that federal law mandates that transfers of small amounts of marihuana be treated as a misdemeanor, the decision below finds that this minor New York offense may be automatically deemed an aggravated felony by equating it with the serious federal felony—punishable by up to five years in prison—of distribution of up to 50 kilograms (50,000 grams) of marihuana.

The government's position not only defies logic but conflicts with the Supreme Court's decision in *Lopez v. Gonzales*, 549 U.S. __, 127 S. Ct. 625 (2006). In *Lopez*, the Supreme Court construed the term "drug trafficking" in accordance with its plain meaning, emphasizing that "ordinarily 'trafficking' means some sort of commercial dealing." *Id*. at 630. Applying a strict and narrow approach in light of the high stakes of applying the aggravated felony designation to nontrafficking offenses, the Court concluded that only those state convictions that specifically "proscribe[] conduct punishable as a felony under [] federal law" could be labeled

"drug trafficking" aggravated felonies. *Id.* at 633.

Nonetheless, the government maintains that the minor New York misdemeanor at issue here, which indisputably covers conduct treated as a misdemeanor under federal law, may be assumed to be a "drug trafficking" aggravated felony without any showing that the conduct proscribed by the actual conviction at issue would be punished as a felony under federal law. The government may rely alternatively on the flawed assertion, although not cited in the decision below, that the specific conviction here corresponds to a federal "recidivist possession" felony even though federal law does not treat a drug offense as a recidivist possession felony unless the fact, finality, and validity of any prior conviction has been established in the criminal proceedings. *Amicus curiae* respectfully submits that the government's arguments rely heavily on a misconstruction of the relevant statutory provisions, a mischaracterization of the strict federal felony standard in *Lopez*, and an abandonment of this Court's longstanding application of the categorical approach to assessing the immigration consequences of criminal convictions. *Amicus curiae* therefore urges this Court to clarify the proper approach to determining what offenses constitute "drug trafficking" aggravated felonies and hold that the Petitioner's nontrafficking offenses in this case are not aggravated felonies.

STATEMENT OF INTEREST

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

Federal courts, including the Supreme Court and this Court, have accepted and relied on *amicus curiae* briefs submitted by NYSDA's Immigrant Defense Project in several important cases involving application of the immigration laws to criminal dispositions. *See, e.g.*, Brief of *Amici Curiae* NYSDA Immigrant Defense Project, et al., in *Lopez v. Gonzales*, 549 U.S. __, 127 S. Ct. 625 (2006); Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, NYSDA, et al., in *Leocal v. Ashcroft*, 543 U.S. 1 (2004); Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, NYSDA, et al., in *INS v. St. Cyr*, 533

U.S. 289 (2001) (brief cited at n.50); Brief of *Amici Curiae* NYSDA Immigrant Defense Project, in *Dickson v. Ashcroft*, 346 F.3d 44 (2d Cir. 2003); Brief of *Amici Curiae* NYSDA Immigrant Defense Project, in *Jobson v. Ashcroft*, 326 F.3d 367 (2d Cir. 2003).

BACKGROUND

The potential scope of a decision adopting the government's arguments in this case is staggering. For example, thousands of individuals have convictions under the specific provision at issue in this case, N.Y. Penal Law § 221.40, for which they likely served little or no jail time.[1] Under the government's arguments, all of these individuals would be labeled "drug trafficking" aggravated felons based on even one such misdemeanor conviction at any time in the past.

Moreover, the implications of the government's arguments extend far beyond whether a N.Y. Penal Law § 221.40 conviction is a "drug trafficking" aggravated felony. The government has previously argued in this case and others that *any* drug

[1] According to state criminal justice data, there were at least 22,531 convictions under N.Y. Penal Law § 221.40, the specific misdemeanor provision at issue in this case, in the past decade (1995 to 2004). Of this number, over 56 percent (12,753) resulted in sentences of time served only, probation only, conditional discharge, or fines. *See* Analysis of New York State Division of Criminal Justice Services Misdemeanor Drug Offense Statistics for the Years 1995 Through 2004, *available at* http://www.nysda.org/idp/docs/05_Analysis.pdf. 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 id*. Thus, most N.Y. Penal Law § 221.40 convictions do not result in jail sentences and, of those that do, more than half result in jail sentences of less than one month.

possession offense is a "drug trafficking" aggravated felony if it is preceded by a prior drug offense, regardless of whether the prior offense may serve as a valid basis for a recidivist felony conviction under federal law and also regardless of whether the prior offense is a crime under state law. *See, e.g.*, *In re Minto*, 2005 WL 1104172 (BIA March 21, 2005) (deeming immigrant with two New York *non-criminal* marihuana possession "violations" to be an aggravated felon).

Based on the government's broad arguments in this case, many individuals with such minor nontrafficking drug convictions—even very old non-criminal dispositions from years ago—may be deemed "drug trafficking" aggravated felons and will thus be denied the opportunity to seek and obtain relief from removal no matter what favorable circumstances may exist, e.g., long residence in the U.S., family ties, or evidence of rehabilitation. Indeed, the government has already used its expansive "drug trafficking" arguments to attain the agency's *reversal* of judges' discretionary grants of relief for longtime lawful permanent residents. *See, e.g.*, Decision of Immigration Judge Brennan, *In re Powell*, A17 560 142 (October 29, 2004) at 10 (granting cancellation of removal, concluding that Mr. Powell's positive equities—particularly his nearly 40 years of lawful permanent residence and strong family ties in the U.S.—"far outweigh the adverse factors of his possessory criminal offense"), *overruled by Matter of Powell*, 2006 WL 3485636 (BIA 2006) (deeming misdemeanor possession conviction an aggravated felony barring eligibility for

cancellation of removal).

ARGUMENT

I. A conviction under N.Y. Penal Law § 221.40 is not automatically a "drug trafficking" aggravated felony.

Under *Lopez* and this Court's longstanding precedent applying the categorical approach, the inquiry for determining whether a state nontrafficking drug offense is a "drug trafficking" aggravated felony is straightforward. Taking a narrow approach in line with the plain meaning of "trafficking," a court must examine the state conviction at issue and determine whether federal law defines the offense proscribed by that conviction as a felony. If, based on the state statute and, if appropriate, the record of conviction, the court cannot necessarily conclude that the offense is defined as a federal felony, then the offense is not a "drug trafficking" aggravated felony.

N.Y. Penal Law § 221.40 is an offense that involves small quantities of marihuana and encompasses transfers for no remuneration. Federal law punishes distribution of "a small amount of marihuana for no remuneration" as a misdemeanor under 21 U.S.C. § 841(b)(4). Thus, the Board of Immigration Appeals ("BIA") misapplied the categorical approach in presumptively treating the conviction under N.Y. Penal Law § 221.40 in this case as being equivalent to a federal felony conviction. *Amicus curiae* urges this Court to join other Circuits that have properly applied the categorical approach in analyzing low-level state

marihuana convictions to determine whether they necessarily involve (1) distribution of more than "a small amount of marihuana," or (2) distribution for remuneration, before classifying them as "drug trafficking" aggravated felonies. *See, e.g.*, *Jeune v. Att'y Gen.*, 476 F.3d 199 (3d Cir. 2007) (examining a conviction under 35 Pa. Stat. Ann. § 780-113(a)(30)); *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003) (examining a conviction under N.J. Stat. Ann. § 2C:35-5b(11)); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001) (examining a conviction under N.Y. Penal Law § 221.40); *Jordan v. Gonzales*, 204 Fed. App'x 425 (5th Cir. 2006) (same); *Garcia-Echaverria v. United States*, 376 F.3d 507 (6th Cir. 2004) (examining a conviction under Ky. Rev. Stat. Ann. § 218A.1421(3)).

A. Under *Lopez*, courts must narrowly construe the "drug trafficking" aggravated felony provision in line with the plain meaning of "illicit trafficking" to apply only to state offenses that correspond to federal felonies.

In *Lopez*, the Supreme Court analyzed the terms of one type of aggravated felony in the Immigration and Nationality Act ("INA")—"illicit trafficking in a controlled substance... including a drug trafficking crime (as defined in section 924(c) of title 18)." INA § 101(a)(43)(B); 8 U.S.C. § 1101(a)(43)(B). The INA does not define "illicit trafficking," but does define "drug trafficking crime" by reference to 18 U.S.C. § 924(c) as "any felony punishable under the Controlled Substances Act" or under two other federal statutes. *Id.* In analyzing these terms, the Supreme Court applied a narrow approach, emphasizing that 8 U.S.C. §

1101(a)(43)(B) should be construed in accordance with the "commonsense conception of 'illicit trafficking,' the term ultimately being defined." *Lopez*, 127 S. Ct. at 629-30. The Court observed that "ordinarily 'trafficking' means some sort of commercial dealing." *Id.* at 630. Recognizing that adopting the government's broad interpretation of the provision would convert many nontrafficking offenses into "drug trafficking" aggravated felonies, the Court concluded that "any felony punishable under the Controlled Substances Act" referred to any state conviction that "proscribes conduct punishable as a felony under [] *federal* law." *Lopez*, 127 S. Ct. at 633 (emphasis added). The Court clarified that "punishable" in this context means "defined by," i.e., "felony as defined by the [CSA]." *Id.* at 631 ("[W]hen we read 'felony punishable under the... Act,' we instinctively understand 'felony punishable as such under the Act' or 'felony as defined by the Act.'"). Thus, the inquiry in *Lopez* requires courts to examine what the state statutory offense *proscribes* and to determine whether that is *defined by* federal law as a *felony*. Because "federal law typically treats trafficking offenses as felonies and nontrafficking offenses as misdemeanors," most nontrafficking offenses would not be "drug trafficking" aggravated felonies. *Id.* at 630.

Rather than acknowledging the Supreme Court's narrow approach, the government continues to urge courts to widen the net of state nontrafficking offenses that could be labeled "drug trafficking" aggravated felonies. By doing so, the

government ignores the Supreme Court's insistence that courts follow a strict inquiry into what state drug offenses could be defined as federal felonies. The conviction examined in *Lopez*, for example, was a South Dakota state felony for the aiding or abetting of another person's possession of cocaine. *Id.* at 629. The Supreme Court did not take a broad approach and conclude that such a state conviction somehow corresponds to a federal distribution felony given the involvement of more than one person in the offense. *Id.* The Supreme Court's approach to nontrafficking offenses is, at all times, a narrow one, and courts must be skeptical of any attempts to convert a state nontrafficking conviction into a "drug trafficking" aggravated felony.[2]

B. Courts must apply a strict categorical approach to determine whether a state conviction under N.Y. Penal Law § 221.40 corresponds to a federal felony and is therefore a "drug trafficking" aggravated felony.

Under the language of the INA, Congress left determinations about an individual's criminal conduct to the criminal courts by requiring that a person must be *convicted* of a crime before facing aggravated felony immigration consequences. *See* INA § 237(a)(2)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) ("Any alien who is *convicted* of an aggravated felony... is deportable." (emphasis added)); INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3) ("The Attorney General may cancel removal in the case of an

[2] A narrow and strict construction of the "drug trafficking" aggravated felony provision is further supported by the rule of lenity, which requires that any lingering ambiguities in criminal or immigration laws be resolved in favor of the immigrant. *See Leocal v. Ashcroft*, 543 U.S. 1, 12 n.8 (2004); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

alien... if the alien... has not been *convicted* of any aggravated felony." (emphasis added)). This language recognizes that "the BIA and reviewing courts are ill-suited to readjudicate the basis of prior criminal convictions," and has led this Court to "decline the invitation to piece together... [a] conviction by weighing evidence and drawing conclusions in a manner appropriate only for a criminal jury." *Dulal-Whiteway v. U.S. Dep't of Homeland Sec*., 501 F.3d 116, 132 (2d Cir. 2007); *Sui v. INS*, 250 F.3d 105, 119 (2d Cir. 2001).

Furthermore, as discussed in Point I.A above, *Lopez* directs courts applying the federal "drug trafficking crime" term to a state offense to examine the state conviction and determine whether federal law defines the offense proscribed by that conviction as a felony. If the state statute (or, where appropriate, the record of conviction) fail to demonstrate that the offense is defined as a federal felony, then the offense cannot be a "drug trafficking" aggravated felony.

These two important choices made by Congress in the INA—the choice to rely on criminal courts to adjudicate an individual's criminal conduct and the choice to rely on federal law to define what conduct constitutes a "drug trafficking" aggravated felony—both mandate application of the categorical approach. Under the categorical approach, this Court "look[s] to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime," to ensure that a criminal court necessarily convicted that petitioner of an aggravated felony.

Dulal-Whiteway, 501 F.3d at 121 (citations omitted); *Jobson v. Ashcroft*, 326 F.3d 367, 371-72 (2d Cir. 2003). "[T]he singular circumstances of an individual petitioner's crimes should not be considered, and only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant." *Dalton v. Ashcroft*, 257 F.3d 200, 204 (2d Cir. 2001) (citations omitted). Thus, if the minimum conduct needed to sustain a state drug conviction is not a felony under the CSA, then that conviction is not categorically a "drug trafficking" aggravated felony. *Cf. Dulal-Whiteway*, 501 F.3d at 126. As this Court recently observed, "permitting the BIA to remove *only* those aliens who have actually or necessarily pleaded to [or were found guilty of] the elements of a removable offense... promotes the fair exercise of the removal power." *Id.* at 133 (emphasis added).

Under some circumstances, a state statutory offense that "encompasses diverse classes of criminal acts—some of which would categorically be grounds for removal and others of which would not" is divisible into removable and non-removable offenses. *Dickson v. Ashcroft*, 346 F.3d 44, 48-49 (2d Cir. 2003) (citations omitted). In those cases, courts apply the "modified categorical approach," in which they may examine specific evidentiary documents in the conviction record for the limited purpose of determining which part of the statute applies to the individual's conviction. *See id.*; *Dulal-Whiteway*, 501 F.3d at 121. Yet even under the modified categorical approach, courts "cannot go behind the

offense as it was charged to reach [their] own determination as to whether the underlying facts amount to one of the enumerated crimes." *Sui*, 250 F.3d at 117-18 (citations omitted). If the record is inconclusive as to whether a state drug conviction corresponds to a federal felony, the petitioner has not *necessarily* been convicted of an aggravated felony. *See, e.g.*, *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1129-30 (9th Cir. 2007).[3]

Although *Lopez* and the cases of this Court require an examination of the Petitioner's conviction to determine whether it is categorically a felony under the CSA, the BIA only superficially compared the state statute of conviction to the federal statute. In doing so, the BIA failed to fully consider (1) the breadth of the New York statute of conviction, and (2) the full statutory scheme provided by Congress in the CSA. In this superficial analysis, the BIA missed the entire purpose of the categorical approach in the "drug trafficking" aggravated felony

[3] As this Court has observed, frequently finding statutes divisible would lead to increasing reliance on the record of conviction and "call into question the categorical approach's commitment to a limited review of the fact of conviction." *Dulal-Whiteway*, 501 F.3d at 127 (citations omitted). Thus, "[t]here are strong arguments for finding divisible only those statutes where the alternative means of committing a violation... are enumerated as discrete alternatives." *Id.* Here, the Petitioner raises the question of whether N.Y. Penal Law § 221.40 is divisible because the statute does not enumerate discrete forms of conduct. However, regardless of whether this Court decides that the statute is divisible (i.e., regardless of whether the categorical approach is or is not modified), the result is the same because the statutory offense involves a small amount of marihuana and the record does not establish *conclusively* that remuneration was involved. *See Sandoval-Lua*, 499 F.3d at 1130.

context—to determine what the individual was convicted of and whether that offense is defined as a felony under federal law. *See Lopez*, 127 S. Ct. at 631, 633. As described in the following sections, a proper analysis under the categorical approach would have shown the error of finding that the Petitioner's conviction under N.Y. Penal Law § 221.40—a low-level sale of marihuana statute that covers transfers of small drug quantities for no remuneration—corresponds to a federal marihuana distribution felony, when Congress specifically provided in the CSA that such conduct shall be punished as a misdemeanor.

C. N.Y. Penal Law § 221.40 penalizes distribution of a small amount of marihuana for no remuneration.

The New York misdemeanor offense at issue in this case, N.Y. Penal Law § 221.40 (criminal sale of marihuana in the fourth degree), penalizes the distribution of marihuana in quantities weighing 25 grams or less. The statute 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.

N.Y. Penal Law § 221.40. On New York's ladder of marihuana offenses, this offense falls between § 221.35 (criminal sale of marihuana in the fifth degree), which punishes the distribution of 2 grams or less of marihuana or a single marihuana cigarette for no consideration, and § 221.45 (criminal sale of marihuana in the third degree), which punishes the distribution of 25 grams or more. *Id*. §§ 221.35, 221.45. Thus, a person would be convicted under § 221.40 for "selling"

25 grams or less of marihuana for consideration, or for "selling" between 2 and 25 grams of marihuana for no consideration.

In all of these sections, the definition of the term "sell" expands "well beyond the ordinary meaning of that term" and "conspicuously excludes any requirement that the transfer be commercial in nature or conducted for a particular type of benefit or underlying purpose." *People v. Starling*, 650 N.E.2d 387, 390 (N.Y. 1995) (citations omitted); *see also* N.Y. Penal Law § 220.00(1). Thus, a conviction under N.Y. Penal Law § 221.40 could be sustained by the simple act of giving little more than 2 grams (less than one tenth of an ounce) of marihuana to an acquaintance for casual use.[4]

[4] Indeed, the broad reach of the New York definition of "sell" shows that the BIA was wrong to find that "[t]he New York offense of criminal *sale* of marijuana is comparable to the federal offense of *distribution*." (J.A. at 2). "Sell" in N.Y. Penal Law § 221.40 is broader than "distribute" in 21 U.S.C. § 841. For example, New York law broadly defines "sell" as being "to sell, exchange, give or dispose of to another, or *to offer or agree* to do the same." N.Y. Penal Law § 220.00(1) (emphasis added); *see also People v. Davis*, 408 N.Y.S.2d 748, 95 Misc. 2d 1010 (County Ct. 1978). Because this definition includes an *offer* to sell, exchange, give, or dispose in its definition of the word "sell," the New York statute is broader than the federal statute. *See Mendieta-Robles v. Gonzales*, 226 Fed. App'x 564, 570 (6th Cir. 2007) (concluding that an Ohio state law with an "offer to sell" component is not "analogous to a felony conviction under... the Controlled Substances Act"). Moreover, in summarily discussing the meaning of "distribute" under 21 U.S.C. § 841, the BIA fails to reference this Court's narrower definition of "distribute" in *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977), which found that "the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use" is not included in the definition of "distribute." 548 F.2d at 450-51; *compare with People v. Starling*, 650 N.E.2d at 390 (explaining that, in the New York statute's "sell" definition, "the Legislature

The current classification of state marihuana offenses was added to the New York Penal Law by the Marihuana Reform Act of 1977, which created a section of the Penal Law dealing exclusively with these offenses, designating lower-level penalties deemed appropriate for the minor nature of the crimes covered. *See People v. Houston*, 424 N.Y.S.2d 726, 727-28 (App. Div. 1980), *appeal denied*, 49 N.Y.2d 1004 (1980). Convictions under § 221.40 generally do not result in jail sentences and, of those that do, more than half result in jail sentences of one month or less. *See supra* Background.

D. Congress specifically chose to treat distribution of a small amount of marihuana for no remuneration, such as that punishable under N.Y. Penal Law § 221.40, as a misdemeanor under federal law.

The CSA punishes the distribution of controlled substances under 21 U.S.C. § 841. Similar to the New York Legislature's decision to ladder marihuana offenses as misdemeanors and felonies, Congress explicitly chose to include multiple levels of statutory offenses involving the distribution of marihuana, including felony offenses under § 841(b)(1) and a misdemeanor provision under § 841(b)(4). The federal felony categories define trafficking offenses that involve vastly larger quantities of marihuana than the low-level New York state marihuana offenses discussed in the previous section. Specifically, the CSA classifies felony marihuana distribution into distribution of 1000 kilograms or more, 21 U.S.C. §

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has evinced a clear intent to 'include any form of transfer of a controlled substance from one person to another'" (citations omitted)).

841(b)(1)(A)(vii); 100 kilograms or more, § 841(b)(1)(B)(vii); 50 kilograms or more, § 841(b)(1)(C); and amounts under 50 kilograms, § 841(b)(1)(D). *See also United States v. Outen*, 286 F.3d 622, 637 (2d Cir. 2002). Even the lowest felony offense, § 841(b)(1)(D), punishes distribution of up to 50 kilograms of marihuana, or *two thousand times* the statutory maximum of 25 grams under N.Y. Penal Law § 221.40. When this felony subsection is applied, the *lowest* drug quantity level referenced in the Federal Sentencing Guidelines is still ten times more than the statutory maximum under N.Y. Penal Law § 221.40. *See* U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(c)(17) (2007). Clearly, the trafficking felonies under the CSA and the misdemeanor provisions under New York law are crimes of different magnitudes.

However, Congress also created a federal misdemeanor provision for marihuana distribution, 21 U.S.C. § 841(b)(4), which is more analogous to the misdemeanor provisions under Section 221 of the New York Penal Law. Subsection (b)(4) states:

> Notwithstanding paragraph (1)(D) of this subsection, 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]…

21 U.S.C. § 841(b)(4). In interpreting this provision, this Court has stated that "there is reason to consider the activity mostly contemplated by § 841(b)(4)—

namely, the sharing of small amounts of marijuana in social situations—to be not just one of lesser degree than those covered by (b)(1)(D) but of a different type more akin to simple possession than to provisions intended to cover traffickers." *Outen*, 286 F.3d at 637. This interpretation coincides with the Supreme Court's observation that "federal law typically treats trafficking offenses as felonies and nontrafficking offenses as misdemeanors." *Lopez*, 127 S. Ct. at 630.

The penalty provisions in 21 U.S.C. § 841(b)(1)(D) and (b)(4) make clear that Congress designated some marihuana crimes as felonies and others as misdemeanors. In fact, subsection (b)(4) is referenced in subsection (b)(1)(D) itself. *See* 21 U.S.C. § 841(b)(1)(D) ("In the case of less than 50 kilograms of marihuana... such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years."). In turn, the misdemeanor provision begins, "Notwithstanding paragraph (1)(D) of this subsection..." *Id*. § 841(b)(4). The government's attempt to treat the New York statute as categorically equivalent to a federal felony under § 841(b)(1)(D) ignores the structure of the very section it cites and thereby undermines the statutory scheme established by Congress.

The statutory use of the word "shall" in 21 U.S.C. § 841(b)(1)(D) and (b)(4) further demonstrates that Congress intended to make these provisions mandatory and not optional. *See, e.g.*, *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101,

109 (2002) (citing *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) ("[T]he mandatory 'shall,'... normally creates an obligation impervious to judicial discretion")); *Levine v. Apker*, 455 F.3d 71, 82 n.7 (2d Cir. 2006); *Labarbera v. Clestra Hauserman, Inc.*, 369 F.3d 224, 226 (2d Cir. 2004). Subsection (b)(4) states that a person distributing a small amount of marihuana for no remuneration "*shall* be treated as provided in section 844 of this title," which is a federal misdemeanor provision. 21 U.S.C. § 841(b)(4) (emphasis added). A categorical analysis that merely compared N.Y. Penal Law § 221.40 with 21 U.S.C. § 841(b)(1)(D) would render this mandatory language meaningless.

In fact, two Circuits have already analyzed N.Y. Penal Law § 221.40 and found that, because of the small transactions it covers and the broad meaning of "sell" in New York, it is "not inherently a felony under federal law." *Steele*, 236 F.3d at 137; *see also McNeil v. Att'y Gen.*, 238 Fed. App'x 878, 883 (3d Cir. 2007); *Jordan*, 204 Fed. App'x at 427-28.[5] In other cases, even crimes involving

[5] The government has contended that this Court rejected *Steele*'s reasoning in *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002). However, the *Simpson* Court was not presented with the issues raised here and, in comparing N.Y. Penal Law § 221.40 to the CSA, the Court in that case never considered whether the defendant's convictions were co-extensive with 21 U.S.C. § 841(b)(4), presumably because an admissible part of the "record reveal[ed]" that at least some of them were remunerative sales to "a confidential informant working for the NYPD." *Simpson*, 319 F.3d at 83-84. Moreover, *Simpson* stated by its own terms that it "offer[ed] no comment on whether such convictions constitute 'aggravated felonies' for any purpose other than the [Federal Sentencing] Guidelines," *id.* at 86 n.7. To the extent that *Simpson* may have ever informed this Court's interpretation

larger quantities of marihuana were found to be possible counterparts to 21 U.S.C. § 841(b)(4), as they also could involve non-remunerative transfers. For example, in *Jeune*, the Third Circuit considered a conviction under 35 Pa. Stat. Ann. § 780-113(a)(30), which includes transfers of marihuana for no remuneration. 476 F.3d at 202-05. Because Pennsylvania law defines a lower-level offense for distribution of "a small amount of marihuana" up to 30 grams for no remuneration, Jeune's conviction implied that he had either sold marihuana for remuneration, or distributed more than 30 grams of marihuana for no remuneration. *See* 35 Pa. Stat. Ann. § 780-113(a)(31). The Third Circuit held that the conviction was not necessarily a felony under the CSA, since even 35 Pa. Stat. Ann. § 780-113(a)(30) encompasses conduct that would be treated as "distributing a small amount of marihuana for no remuneration" under 21 U.S.C. § 841(b)(4). *See Jeune*, 476 F.3d at 205. *See also Wilson v. Ashcroft*, 350 F.3d at 381-82 (holding that N.J. Stat. Ann. § 2C:35-5b(11), which punishes transfers of amounts over 1 ounce (28.3 grams) and under 5 pounds (2268 grams), is co-extensive with 21 U.S.C. § 841(b)(4)); *compare with Garcia-Echaverria v. United States*, 376 F.3d at 514 n.5 (holding that Ky. Rev. Stat. Ann. § 218A.1421(3) is too large to coincide with a

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of "drug trafficking" aggravated felonies in the immigration context, its reasoning was overruled by *Lopez*, which explicitly rejected the "state or federal felony approach" and introduced a new, narrower understanding of what constitutes a "drug trafficking" aggravated felony that was not available to this Court when *Simpson* was decided. *See Lopez*, 127 S. Ct. at 632-33; *compare Simpson*, 319 F.3d at 85-87.

federal provision "designed to address the casual sharing of marihuana" because the state statute punishes only quantities over 8 ounces (226.8 grams)).

E. The BIA has misapplied the proper approach and has, therefore, erroneously determined that the Petitioner's individual convictions constitute aggravated felonies.

The BIA's decision erroneously determines that the Petitioner's convictions under N.Y. Penal Law § 221.40 constitute aggravated felonies, because it fails to correctly apply the proper approach under *Lopez* and this Court's precedent. First, when N.Y. Penal Law § 221.40 is properly compared to marihuana distribution under the CSA, it is clear that it is co-extensive with 21 U.S.C. § 841(b)(4). As described above, N.Y. Penal Law § 221.40 penalizes the casual sharing of 2 to 25 grams of marihuana for no remuneration. This Court has held that "the activity mostly contemplated by 21 U.S.C. § 841(b)(4)" is "the sharing of small amounts of marijuana in social situations." *Outen*, 286 F.3d at 637. In designating the classifications of marihuana distribution, Congress clearly intended for the felony provisions to address serious drug trafficking crimes. By contrast, the distribution of up to 25 grams of marihuana is drastically smaller than the large-scale trafficking contemplated by the CSA, and when this distribution is for no remuneration, Congress has specifically provided that it is a misdemeanor. 21 U.S.C. § 841(b)(4); *Outen*, 286 F.3d at 637-38.

Second, the BIA also fails in its application of the modified categorical approach. Assuming arguendo that N.Y. Penal Law § 221.40 is divisible, *see supra* Point I.B, the modified categorical approach restricts courts' inquiry to materials included in the record of conviction. *See Dickson*, 346 F.3d at 52-53. The BIA itself has explained the dangers in abandoning the modified categorical approach and looking beyond the record of conviction:

> [T]he principle of not looking behind a record of conviction provides this Board with the only workable approach in cases where deportability is premised on the existence of a conviction. If we were to allow evidence that is not part of the record of conviction..., we essentially would be inviting the parties to present any and all evidence bearing on an alien's conduct leading to the conviction, including possibly the arresting officer's testimony or even the testimony of eyewitnesses who may have been at the scene of the crime. Such an endeavor is inconsistent both with the streamlined adjudication that a deportation hearing is intended to provide and with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence.

In re Pichardo-Sufren, 21 I. & N. Dec. 330, 335-36 (BIA 1996) (en banc) (citations omitted).

However, in this case the BIA distorts the modified categorical approach by stating that the Petitioner should produce "an evidentiary showing... that he would have qualified for this mitigating exception had he been prosecuted federally." (J.A. at 3 n. 1). The BIA, in essence, asks the immigration court to contemplate a hypothetical federal prosecution. Such a hypothetical approach is different from and incorrect under the modified categorical approach. Because the immigration

court should only consider those facts necessarily pled to or found by a jury, there is no need under the modified categorical approach to consider facts that fall outside the record of conviction. *See Sui*, 250 F.3d at 117-18. Here, the Petitioner's actual state conviction under N.Y. Penal Law § 221.40 includes conduct that could be a federal misdemeanor; therefore, he was not necessarily convicted of an aggravated felony. No further factual inquiry that breaches the modified categorical approach is appropriate in making this determination. *See Dulal-Whiteway*, 501 F.3d at 130 (explaining that "the court's inquiry should be limited to facts on which the plea had *necessarily* rested" (quoting *Shepard v. United States*, 544 U.S. 13, 20 (2005) (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990))) (internal quotation marks omitted)).

The BIA seemingly relied on this Court's discussion in *United States v. Outen* to rationalize its departure from the modified categorical approach (J.A. at 3 n.1); however, this application of *Outen* is misguided. *See Outen*, 286 F.3d at 638-39. In *Outen*, this Court compared 21 U.S.C. § 841(b)(4) and (b)(1)(D) for the purposes of determining which was the "'baseline' or 'default' provision," which is a determination guided by the Supreme Court's *Apprendi* decision. *Id.* at 638; *Apprendi v. New Jersey*, 530 U.S. 466 (2000). This Court determined that § 841(b)(1)(D) constituted the baseline provision while § 841(b)(4) was a "mitigating exception." *Outen*, 286 F.3d at 637. However, the BIA's reliance on

this "mitigating exception" description of (b)(4) is misplaced. The present case does not involve an *Apprendi* question about which facts must be included in a jury charge. Instead, it involves a categorical comparison of state law to federal laws in determining whether a state conviction is necessarily an aggravated felony. Since *Outen*, this Court has explained that the categorical approach in the immigration context is not dependent on Sixth Amendment principles, *see Dulal-Whiteway*, 501 F.3d at 132-33 (discussing U.S. Const. amend. VI), but is grounded in (1) the statutory focus on the "conviction," (2) limitations on immigration courts' inquiries into criminal convictions, (3) and principles of fundamental fairness. *Id.* at 131-33.

Therefore, *Apprendi*-based considerations remain outside categorical analysis in the immigration context. Instead, this Court need only consult the record of conviction. Should the record of conviction remain "inconclusive," as it does here, in determining whether the state conviction proscribes a federal misdemeanor or a federal felony, then the government does not meet its burden or, even if the burden could somehow be said to be on the respondent, the respondent "has affirmatively proven under the modified categorical analysis that he was not necessarily convicted of any aggravated felony." *Sandoval-Lua*, 499 F.3d at 1130 (citation omitted).

Thus, under the proper approach mandated by *Lopez* and this Court's precedent, the Petitioner's convictions under N.Y. Penal Law § 221.40 do not

constitute aggravated felonies. Each conviction proscribes an offense that punishes the non-remunerative transfer of a small amount of marihuana**,** which is defined by federal law to be a misdemeanor, and therefore cannot be labeled an aggravated felony.

II. A subsequent non-trafficking drug conviction is not automatically a "drug trafficking" aggravated felony.

Alternatively, in previous arguments in this case, the government has asserted that any second drug possession conviction is automatically a "drug trafficking" aggravated felony because it could have been prosecuted as a recidivist possession felony under the CSA—even if the person was not actually charged and convicted of a recidivist offense in the actual criminal proceeding. However, this issue was not the basis of the agency's decision in this case and therefore it cannot be the basis for affirming that decision. For this reason, *amicus curiae* will only briefly address this alternative argument.

In short, this alternative argument suffers from two fundamental flaws. First, it essentially asks an immigration court to combine two separate nontrafficking convictions to create one "drug trafficking" aggravated felony conviction. This approach runs contrary to *Lopez* and this Court's precedent requiring a strict categorical approach, which circumscribes the universe of factors a court may examine when determining whether a specific offense is an aggravated felony. *See supra* Point I. Under *Lopez* and this Court's precedent, the

government's alternative argument here fails unless the statute (and where appropriate, the record of conviction) for *the offense being labeled an aggravated felony* demonstrate that the defendant was convicted of recidivist possession. *See generally Lopez*, 127 S. Ct. at 631, 633; *Dulal-Whiteway*, 501 F.3d at 131.[6] Where the actual conviction is for simple possession and prior convictions were never at issue in the criminal proceeding, the determination is simple—the individual has not been convicted of a recidivist offense and therefore does not have an aggravated felony. *See Berhe v. Gonzales*, 464 F.3d 74, 85 (1st Cir. 2006) (holding that, under a categorical approach, Berhe's possession conviction could not be converted into an aggravated felony based on a prior offense "[b]ecause Berhe's [prior] conviction is not a part of the record of the 2003 conviction... [T]he government... must demonstrate, by reference only to facts that can be mined from the record of conviction, that the putative predicate offense constitutes a crime

[6] Rather than acknowledging the Supreme Court's strict conviction-based approach in *Lopez*, the government often attempts to support its position by citation to a footnote in the opinion. In footnote 6, the Court noted that "Congress did counterintuitively define some possession offenses as 'illicit trafficking,'" and mentions the recidivist felony under 21 U.S.C. § 844(a). *Lopez*, 127 S. Ct. at 630 n.6. However, this footnote does nothing more that identify some unusual federal felonies—it does not in any way suggest that every state possession offense preceded by another could automatically be equivalent to a recidivist felony. On the contrary, the Court noted that only those "state possession crimes that *correspond* to [these] felony violations" would be aggravated felonies. *Id.* (emphasis added). Thus, courts must still make the ultimate determination of whether a particular state conviction is an appropriate counterpart to the federal recidivist felony.

designated as an aggravated felony in the INA."); *Steele*, 236 F.3d at 137-38 (holding that, under a categorical approach, Steele's possession conviction could not be converted into an aggravated felony based on a prior offense because his "[recidivist] status was never litigated as a part of a criminal proceeding... [T]he record evidences no judicial determination that that status existed at the relevant time."); *see also United States v. Galvan-Lozano*, No. 06-41297, 2007 U.S. App. LEXIS 21849, at *3-4 (5th Cir. Sept. 12, 2007) (unpublished) ("The government provides no authority... to support its assertion that a court of appeals may affirm [an aggravated felony sentencing enhancement] based on drug convictions, which were not individually aggravated felonies, on the ground that the convictions together are the equivalent of a recidivist possession conviction....").[7]

The second flaw in the government's argument is that it miscomprehends the nature of the federal recidivist possession felony. The mere existence of a prior conviction is not enough for an offense to be defined as a recidivist felony under the CSA. Federal law only punishes a subsequent possession offense as a felony when the prosecutor has met requirements designed to ensure the fact, finality, and validity of a prior drug conviction. *See* 21 U.S.C. §§ 844(a), 851; *see also United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002) (discussing the mandatory

[7] The Second Circuit's prior case law on this issue in the criminal sentencing context—*United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002)—is no longer, if it ever was, binding. *See supra* Point I.D, n.5.

statutory language and legislative history of § 851). Indeed, the Supreme Court has held that compliance with 21 U.S.C. § 851 requirements is critical in determining the "maximum term authorized" for a drug conviction under federal law, even when the issue arises in a separate and subsequent proceeding. *United States v. LaBonte*, 520 U.S. 751, 758-60 (1997) ("[F]or defendants who have received the notice under § 851(a)(1), as respondents did here, the 'maximum term authorized' is the enhanced term. For defendants who did not receive the notice, the *unenhanced* maximum applies." (emphasis added)). Thus, under the CSA and Supreme Court case law interpreting it, the maximum term of imprisonment authorized for a possession offense where the fact, finality, and validity of a prior conviction was never at issue in the criminal proceeding does *not* exceed one year, and therefore such an offense is *not* defined as a felony. *See LaBonte*, 520 U.S. at 758-60. Otherwise, any second federal *misdemeanor* possession conviction would also have to be deemed an aggravated felony, a result clearly in conflict with the *Lopez* federal felony standard.

For these reasons and others, the government's alternative argument has no merit. In any event, it was not the basis for the agency's decision in this case and thus cannot serve as the basis for affirming that decision. Should the Court decide to consider this argument, however, *amicus curiae* would respectfully seek to submit full briefing on this issue.

CONCLUSION

For the aforementioned reasons, *amicus curiae* respectfully urges this Court to hold, consistent with the reasoning in *Lopez* and this Court's precedent, that nontrafficking offenses such as the Petitioner's may not categorically be deemed "drug trafficking" aggravated felonies.

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Respectfully submitted,

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Alina Das
Manuel D. Vargas
New York State Defenders Association
Immigrant Defense Project
3 West 29th Street, Suite 803
New York, New York 10001
(212) 725-6422

Nancy Morawetz
Anjali Bhargava, Legal Intern
S. Caroline Johnson, Legal Intern
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, New York 11012
(212) 998-6430

Attorneys for Amicus Curiae