PRELIMINARY STATEMENT

In this case, the Department of Homeland Security ("DHS") maintains that criminal sale of marihuana in the fourth degree, a New York misdemeanor that punishes giving or offering a small amount of marihuana to another person for no remuneration, is an "aggravated *felony*" as "illicit *trafficking* in a controlled substance." *Amicus curiae* respectfully submits that this interpretation defies the principle that statutory terms should be construed according to their "ordinary or natural meaning," recently unanimously affirmed by the Supreme Court in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004). The ordinary meaning of "aggravated felony" at 8 U.S.C. § 1101(a)(43) and its "illicit trafficking in a controlled substance" subcategory at § 1101(a)(43)(B) establish, and legislative history confirms, that this subcategory includes only offenses that are felonies and that, at least in general, cover only trafficking conduct.

The issues presented in this case may have repercussions that extend well beyond the question presented as to whether the specific offense in this case constitutes an aggravated felony. First, this Court's decision may reach the broader and critical questions—in dispute across the country—of whether the federal government may attach the "aggravated felony" and "illicit trafficker" labels to other low-level state drug offenses that are not felonies under state law or that involve simple drug possession and therefore have no proven nexus to trafficking. In New

York alone, there are five offenses that punish simple drug possession and are classified by the state as a misdemeanor or a violation (a New York disposition that is lower than a misdemeanor and not even a crime under New York law). *Amicus* urges the Court to take note of the extreme reach of the government's position in this case. In at least one recent New York immigration case known to us, the government has argued that even a marihuana possession *violation* may constitute an aggravated felony.

Second, this Court's resolution of the scope of the "illicit trafficker" and "aggravated felony" labels affects not only an immigrant's eligibility for cancellation of removal—an immediate issue in this case—but will also have other critical and far-reaching implications for many immigrants, including possibly barring asylum for non-citizens with a well-founded fear of persecution in their countries of removal, *see* 8 U.S.C. § 1158(b)(2)(B)(i), and possibly permanently barring citizenship for immigrants whose non-felony drug conviction took place years in the past, *see* 8 U.S.C. § 1101(f)(8).

Given the potentially broad reach of this Court's ruling to thousands of immigrants with non-felony drug offenses involving simple possession or other non-trafficking conduct, and the harsh consequences that result when an offense is deemed an aggravated felony, the Court's resolution of the issues in this case requires careful consideration. *Amicus* seeks to offer the Court a coherent framework for

considering and resolving the narrow issue respecting the specific offense in this case within the larger context of what the statutory language and legislative history dictate as to the scope of the "illicit trafficking in a controlled substance" aggravated felony definition.

STATEMENT OF INTEREST

Amicus New York State Defenders Association ("NYSDA") is concerned that court affirmance of the agency ruling in this case—that the New York misdemeanor marihuana offense at issue constitutes an "aggravated felony" for immigration purposes—will result not only in harsh and unjust consequences greatly disproportionate to the gravity of this offense but also in harsh and unjust consequences for other immigrants convicted at any time in the past of other state misdemeanor and lesser drug offenses. Many non-citizens convicted of New York Penal Law § 221.40 or other low-level New York marijuana and controlled substance offenses have not yet been placed in removal proceedings, in part because many have settled into law-abiding lifestyles and have not attracted law enforcement attention. Now, however, if the Court finds that this misdemeanor, as well as other non-felony drug offenses that cover only simple possession or other non-trafficking conduct, may be deemed aggravated felonies, these individuals will be at permanent risk of removal without any available removal relief—regardless of their individual equities—if they seek to naturalize, travel abroad, or have any other contact with

DHS.

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* 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.

BACKGROUND ON NYPL § 221.40 AND OTHER NEW YORK NON-FELONY DRUG OFFENSES

The New York misdemeanor at issue, like other New York non-felony drug offenses, is a commonly charged offense that involves a small amount, covers non-trafficking conduct, and is generally lightly penalized under state law and practice.

The petitioner was convicted of criminal sale of marijuana in the fourth degree in violation of NYPL § 221.40, which 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.[1]

The penal law defines "sell" 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 has held that this "sell" definition extends "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 (N.Y. 1995).

NYPL § 221.40 was added to the New York Penal Law by the Marihuana Reform Act of 1977. Prior to this Act, all marihuana "sale" offenses, regardless of amount, were classified as controlled substance felonies. The Marihuana Reform Act reduced the penalties for lower level marihuana sale offenses by creating a section of the Penal Law Section 221 dealing exclusively with possession or sale of marihuana, including NYPL § 221.40. New York classifies this offense as a Class A misdemeanor, for which the maximum sentence "shall not exceed one year." *See* NYPL §§ 221.40 and 70.15(1). Section 221 "was motivated by a desire to

[1] 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."

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).

The Court should be aware that NYPL § 221.40, as a misdemeanor, is a commonly charged offense that involves small quantities of marihuana. It covers weight amounts of less than 25 grams (i.e., .025 kilograms, or less than one ounce), s*ee* NYPL § 221.45 (next higher level offense, which penalizes sale of marihuana-containing substances weighing more than 25 grams), and stands in marked contrast with the weight amounts covered by federal felony marihuana distribution offenses. 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) (penalizing distribution of up to 50 kilograms of marihuana as the lowest level federal marihuana distribution felony, subject to a term of imprisonment of up to five years).

In addition, NYPL § 221.40 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) ("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]").

New York criminal justice statistics confirm that this misdemeanor is a common offense that is generally lightly penalized under state law and practice. According to state criminal justice data, there were at least 22,531 convictions under NYPL § 221.40 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, posted at www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/05_Analysis_NY_misdemeanor_drug_offense_data_10_05.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 NYPL § 221.40 convictions do not result in jail sentences and, of those that do, more than half result in jail sentences of one month or less. On the basis of this data, we estimate that there are thousands of lawful permanent resident immigrants currently residing in New York with past convictions of NYPL § 221.40 for which they served little or no jail time.

New York has five other offenses that punish simple marijuana or other drug possession and are classified by the state as a misdemeanor or a violation (a

disposition that is lower than a misdemeanor and not even a crime under New York law). Like NYPL § 221.40, these are very common offenses that New York law and practice generally treat with light punishment. Statistics reveal at least 313,219 convictions for these other non-felony drug offenses in the past decade. *See id.* More than 76% (238,279) of these convictions yielded sentences that involved no time in custody, and of the remaining convictions that resulted in jail sentences, the median length of sentence imposed was less than twenty days. *See id.*

ARGUMENT

I. STATUTORY LANGUAGE AND LEGISLATIVE HISTORY ESTABLISH THAT THE "ILLICIT *TRAFFICKING* IN A CONTROLLED SUBSTANCE" "AGGRAVATED *FELONY*" SUBCATEGORY INCLUDES ONLY FELONIES THAT COVER TRAFFICKING CONDUCT

Section 1101(a)(43)(B) of Title 8 of the U.S. Code 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 Immigration and Nationality Act does not define the word "felony" nor does it define the word "trafficking" as it relates to § 1101(a)(43)(B). However, the Supreme Court recently unanimously affirmed in *Leocal* the principle that statutory terms should be construed according to their "ordinary or natural meaning." 125 S. Ct. at 382. This principle, and rules of lenity in construing lingering ambiguities in criminal and deportation statutes, *see id.* at 384 n.8 (interpreting federal criminal statute); *INS v. St.*

Cyr, 533 U.S. 289, 320 (2001) (interpreting deportation statute), require that unless Congress otherwise made clear that the "aggravated felony" and "illicit trafficking" terms include offenses that are not felonies and do not relate to trafficking, these terms should not be stretched to include an offense such as the one at issue in this case, which is neither a felony nor even necessarily a trafficking offense.

A. The ordinary and natural meaning of the term "aggravated *felony*" includes only felonies, and other statutory and legislative history confirms this natural reading.

There can be little doubt that Congress' use of the "aggravated *felony*" term reflects congressional understanding that, at least in general, the controlled substance category of the aggravated felony term includes only felonies. If Congress intended otherwise, it could have used a term such as "aggravated offenses" or "aggravated crimes." Indeed, the word "aggravated" instructs us that Congress intended only to include serious felonies, and certainly not offenses that are not even classified as felonies.

In fact, other congressional language and legislative history confirm that Congress intended that an aggravated felony be at least a felony. When Congress introduced the term "aggravated felony" to the INA in the Anti-Drug Abuse Act of 1988 ("ADAA"), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 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 revisions to the INA that show this aggravated felony term was aimed only at "felons." It revised the custody provisions at former 8 U.S.C. § 1252(a) to require the Attorney General to detain "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 § 1252A to expedite the deportation of aliens convicted of aggravated felonies: "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).

Additional evidence of congressional intent came shortly thereafter. In 1990, Congress made amendments clarifying that state drug offenses—as well as federal drug offenses—may be deemed aggravated felonies (*see* discussion in Subpoint C below), expanding the aggravated felony definition to include new substantive categories of criminal offenses, and creating a bar to a waiver of exclusion for aggravated felons who had served a term of imprisonment of at least five years. 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), § 511(a). Through technical

amendments in 1991, Congress then amended the waiver restriction to make ineligible any 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 further expanded 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), 108 Stat. 4305 (emphasis added); *see* 139 Cong. Rec. E749-50 (March 24, 1993) (remarks of Representative Bill McCollum) (proposing to add "felons" who have committed serious immigration-related crimes, those who have participated in serious criminal activities and enterprises, and those who have committed serious white-collar crimes). In that year, Congress also increased penalties for the federal crime of illegal reentry after deportation based on whether the prior deportation followed 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 demonstrate that Congress certainly contemplated overlap between its use of the word "felony" and the aggravated felony term, but contain no hint that Congress contemplated overlap between misdemeanors and its use of the aggravated

felony term.

In sum, the Supreme Court's decision in *Leocal* requires that "aggravated felony" be construed to include only felonies, and not misdemeanors, to give the term its natural meaning. 125 S. Ct. at 382. The various other statutory references to "such *felons"* or "such *felonies*" in the same Act in which the term was introduced as well as in subsequent Acts and legislative history sources, and the INA's explicit reference to overlap between offenses covered by the aggravated felony category and the word "*felony*"—but not, in striking contrast, to any overlap between the aggravated felony category and the word "misdemeanor"—confirm congressional intent that the term include felonies only.

Had Congress intended to include non-felony offenses, it could and would have expressly said so. 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, for that sentence to read instead: "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* . . . ." In the absence of such a clear statement of congressional intent**,** and especially in light of the rule of lenity applicable when construing deportation statutes*, see St. Cyr*, 533 U.S. at 320, this

statute should be read in the immigration deportation context to find that a misdemeanor conviction under NYPL § 221.40 is not an aggravated felony.[2]

[2] *Leocal*'s statutory construction rules and *St. Cyr's* rules of lenity compel this result notwithstanding this Court's pre-*Leocal* and *St. Cyr* decision in *U.S. v. Pacheco*, 225 F.3d 148 (2d Cir. 2000). In that case, the Court held that Congress' reduction in the term of imprisonment threshold for a theft or a crime of violence to be deemed an aggravated felony from five years to one year meant that even a misdemeanor theft or violent offense with a one year sentence could be so deemed for purposes of the aggravated felony criminal sentence enhancement for illegal reentry after deportation. First, this Court has ruled that interpretations of the aggravated felony term in the criminal sentencing context do not prevent the Court's applying a different interpretation in an immigration context. *See U.S. v. Pornes-Garcia*, 171 F.3d 143 (2d Cir. 1999) (citing *Aguirre v. INS*, 79 F.3d 315, 317 n.1 (2d Cir. 1995), in which this Court declared that decisions interpreting "aggravated felony" in the sentencing context do not affect its interpretation of the same term in the immigration context). Second, in the present case the Court must apply the immigration rule of lenity that provides that, were the Court to decide that Congressional intent as to the reach of the aggravated felony term to non-felony offenses is ambiguous, the Court must adhere to "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *See St. Cyr*, 533 U.S. at 320 (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987)). Third, there has been no legislative action relating to the aggravated felony "illicit trafficking in a controlled substance" subcategory similar to the prison sentence threshold reduction from five years to one year for the theft and violent offense aggravated felony subcategories that persuaded the *Pacheco* majority to find that Congress now intended for these aggravated felony subcategories to include misdemeanors for criminal sentencing purposes. Finally, if the Court concludes that *Pacheco* forecloses consideration of this point, the Court should reconsider that decision. Such reconsideration is warranted in light of *Leocal*, in which the Supreme Court unanimously affirmed the principle that statutory terms should be construed according to the "ordinary or natural meaning" of the term. *See Leocal*, 125 S. Ct. at 382 (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* provides vindication of the dissenting opinion in *Pacheco*, which gave weight to the ordinary meaning of the term "aggravated

B. The ordinary and natural meaning of the term "illicit *trafficking* in a controlled substance" includes only drug offenses with a nexus to trafficking, and other statutory and legislative history confirms this natural reading

The INA includes as an aggravated felony any "illicit *trafficking* in a controlled substance . . . , including a drug *trafficking* crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. § 1101(a)(43)(B) (emphasis added). Although the term "drug trafficking crime" is defined (*see* Subpoint C below), the word "trafficking" itself is not defined, especially with regard to its use in the provision's overall "illicit trafficking in a controlled substance" phrase. As discussed in Subpoint A above, however, the Supreme Court's recent unanimous

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felony" to conclude that the term excludes non-felonies:

> Common sense and standard English grammar dictate that when an adjective—such as "aggravated"—modifies a noun—such as "felony"—the combination of the terms delineates a subset of the noun. One would never suggest, for example, that by adding the adjective "blue" to the noun "car," one could be attempting to define items that are not, in the first instance, cars. In other words, based on the plain meaning of the terms "aggravated" and "felony," we should presume that the specifics that follow in the definition of "aggravated felony" under INA § 101(a)(43) serve to elucidate what makes these particular felonies "aggravated"; we certainly should not presume that those specifics would include offenses that are not felonies *at all*.

Pacheco, id., at 157 (Straub, J., dissenting); *cf. Benjamin v. Jacobson*, 172 F.3d 144, 173 n.5 (Calabresi, J., concurring) ("When Congress, in a definitional section, seems to say that bananas *are* apples, we should ask whether that is really what Congress meant . . . .").

decision in *Leocal* requires that statutory terms be construed according to their "ordinary or natural meaning." 125 S. Ct. at 382. As the BIA itself has found, when interpreting whether an offense constitutes "illicit trafficking in a controlled substance," the ordinary meaning of "trafficking" covers the trading or dealing in certain goods. *Matter of Davis*, 20 I&N Dec. 536, 541 (1992). Drawing from dictionary definitions of "traffic" ("[c]ommerce; trade; sale or exchange of merchandise, bills, money, and the like" and "[t]he 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 BIA 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)); *see also Kuhali v. Reno*, 266 F.3d 93 (2d Cir. 2001) (offense must exhibit business or merchant nature to constitute trafficking). 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 Davis*, 20 I&N Dec. at 541; *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). Simply put, an offense that covers simple drug possession, or the transfer of drugs without any money or other remuneration in return for those drugs, such as NYPL § 221.40, does not constitute an "illicit trafficking in a controlled substance" aggravated felony.

C. The text and legislative history of the term "drug trafficking crime" show that it refers only to *federal* drug felonies.

The "illicit trafficking in a controlled substance" aggravated felony subcategory includes a "drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." 8 U.S.C. § 1101(a)(43)(B). When Congress first incorporated this term into the INA, the term included only *federal* felonies, and it continues to do so today. Therefore, whether a *state* drug offense is an aggravated felony should be determined as described in Subpoints A and B above, without regard to the term "drug trafficking crime" defined at 18 U.S.C. § 924(c).

Before 1988, "drug trafficking crime" was defined in 18 U.S.C. § 924(c) as "any *felony violation of Federal law* involving the distribution, manufacture, or importation of any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. § 802)." 18 U.S.C. § 924(c)(2) (1982 & Supp. IV 1986) (emphasis added). This "prior statutory language plainly reveals that a drug trafficking crime was limited to only federal felony offenses." *United States v. Palacios-Suarez*, 418 F.3d 692, 698 (6th Cir. 2005). It also reveals that the

term "drug trafficking crime" did not incorporate *all* federal felony drug offenses; rather, it was further limited to offenses that involved "distribution, manufacture, or importation."

In 1988, the ADAA amended the "drug trafficking crime" definition at the same time it introduced the term "aggravated felony" into immigration law. It amended the definition of "drug trafficking crime" to read:

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

ADAA § 6212. By making this amendment, Congress merely clarified the definition by replacing the general terms "distribution, manufacture, or importation" with the specific federal laws that punished such offenses. In fact, as the Sixth and Ninth Circuits have both noted, "this amendment was labeled '*Clarification* of Definition of Drug Trafficking Crimes . . . .'" *See Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 915 (quoting ADAA § 6212); *see also Palacios-Suarez*, 418 F.3d at 699 ("Congress never intended the amendment to be a substantive change in the definition but rather *merely a clarification*."); *United States v. Ibarra-Galindo*, 206 F.3d 1337, 1342 (9th Cir. 2000) (Canby, J., dissenting) ("[T]his 'clarification' did not represent a broadening of the definition of 'drug trafficking crimes.'"); *United States v. Contreras*, 895 F.2d 1241, 1244

(9th Cir. 1990) (rejecting proposition that the ADAA broadened the definition of drug trafficking crimes). As the Ninth Circuit observed:

> There is nothing in the legislative history to suggest that Congress intended this "clarification" to dramatically widen the scope of "drug trafficking crime" to include, for example, simple drug possession punished as a felony by a state. *See Chisom v. Roemer*, 501 U.S. 380, 396, 115 L. Ed. 2d 348, 111 S. Ct. 2354 (1991) (noting that the absence of any indication that Congress intended to make a major change in the statute can be considered as evidence that Congress did not intend the change).

Cazarez-Gutierrez, 382 F.3d at 915; *see also Palacios-Suarez*, 418 F.3d at 699. Thus, after this 1988 amendment, the term "drug trafficking crime" under 18 U.S.C. § 924(c) continued to cover only federal offenses.

Notably, a review of the ADAA shows that when Congress intended to cover *state* crimes, it did so expressly. For example, ADAA § 6211 amended subsection (f) of this same 18 U.S.C. § 924 to cover state law violations:

> Whoever, with the intent to engage in conduct which . . .
> (2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),
> (3) violates *any State law* relating to any controlled substance . . .
> travels from any State or foreign country into any other State and acquires, transfers, or attempt to acquire or transfer, a firearm in such other State in furtherance of such purpose, shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

102 Stat. at 4359 (emphasis added). Congress did not include such language in 18 U.S.C. § 924(c), which simply does not mention state crimes. "'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983) (further internal quotation omitted).

The ADAA also incorporated the term "aggravated felony" into immigration law, defining aggravated felony as:

> murder, any drug trafficking crime as defined in section 924(c)(2) of Title 18, United States Code, or any illicit trafficking in firearms or destructive devices as defined in section 921 of such title.

8 U.S.C. § 1101(a)(43) (1988). The most natural reading of this phrase includes only offenses that are "defined in section 924(c)(2)," that is, federal felonies involving trafficking. As the Third Circuit has stated, "18 U.S.C. § 924(c)(2) clearly provided the only source for the definition of 'drug trafficking crime.'. . . [N]o state offenses were included in the concept of 'aggravated felony.'" *Steele v. Blackman*, 236 F.3d 130, 136 n.5 (3d Cir. 2001).

In 1990, Congress amended the aggravated felony definition to include state drug offenses, but not by altering the "drug trafficking crime" definition. Instead it

added the new "illicit trafficking in a controlled substance" language, so that the aggravated felony subcategory now reads:

> illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)… whether in violation of state or federal law.

See Immigration Act of 1990, Pub. L. No. 101-649, § 501, 104 Stat. at 5048, *as corrected by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(1), 105 Stat. 1733, 1751 (1991). This change—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 the outcome of the BIA decision earlier that year in *Matter of Barrett*, 20 I&N Dec. 171 (1990), which concluded that *state* drug offenses may fall within this aggravated felony subcategory. *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."). But, to accomplish this

inclusion of state offenses, Congress did not amend the "drug trafficking crime" definition; rather, it added the new "illicit trafficking in a controlled substance" language, as well as the language "whether in violation of state or federal law." Thus, the phrase "drug trafficking crime" continued to cover only federal offenses, and does not cover state offenses such as NYPL § 221.40.

II. IF THIS COURT DECIDES THAT THE REFERENCE TO "DRUG TRAFFICKING CRIME" APPLIES TO STATE OFFENSES, THE RULE OF LENITY REQUIRES THAT THE OFFENSE BE BOTH A FELONY UNDER STATE LAW *AND* PUNISHABLE AS A FELONY UNDER FEDERAL LAW.

For the reasons given in Point I.C. above, analyzing a state drug offense by reference to the term "drug trafficking crime" is unwarranted, because that term is limited to federal drug offenses only. Should the Court nevertheless determine otherwise, the rule of lenity requires a finding that the misdemeanor drug offense at issue does not constitute a "drug trafficking crime."

"Drug trafficking crime" is defined as:

> any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

18 U.S.C. § 924(c)(2). When applied to a federal drug offense, this term is clear. When attempting to apply it to state offenses, however, its meaning is extraordinarily difficult to discern.

The numerous courts of appeal that have attempted to analyze state drug offenses by reference to "drug trafficking crime" at § 924(c)(2) have all struggled in interpreting the word "felony" in its definition. *See Aguirre*, 79 F.3d at 317 (noting that the "statutory point is fairly debatable"); *see also, e.g., Palacios-Suarez*, 418 F.3d at 700 (acknowledging "ambiguous statutory language"); *Gerbier*, 280 F.3d at 309 (same). These courts of appeal have arrived at divergent interpretations of the word "felony" by applying markedly different reasoning. Some gleaned meaning by reference to the legislative history behind 18 U.S.C. § 924(c) and 8 U.S.C. § 1101(a)(43)(B), and concluded that a state drug offense is a "felony" if it is equivalent to a felony drug offense under federal law. *See, e.g., Palacios-Suarez*, 418 F.3d at 700; *Cazarez-Gutierrez*, 382 F.3d at 905. Another court used legislative history in conjunction with a statute that classifies federal offenses, 18 U.S.C. § 3559(a)(5), to come to the same conclusion that a state drug offense must be equivalent to a federal felony drug offense. *See Gerbier*, 230 F.3d at 309. Yet other courts have overlooked legislative history entirely and looked only to the definition of "felony" in 21 U.S.C. § 801(13), as corroborated by the Sentencing Guidelines, concluding that a state offense is a "felony" if it is a felony under state law, even if punishable only as a misdemeanor under federal law. *See United States v. Wilson* 316 F.3d 506, 512-13 (4th Cir. 2003), *cert. denied*, 538 U.S. 1025 (2003); *United*

States v. Restrepo-Aguilar, 74 F.3d 361, 365 (1st Cir. 1996).[3] Also instructive is the fact that many of these courts address at length their sister courts' misapplication of the term "drug trafficking crime" to state offenses.

The ambiguity of the phrase "drug trafficking crime" as applied to state offenses—amply demonstrated by this circuit split—must be resolved by the rules of lenity recently reaffirmed by the Supreme Court, which require that we construe "lingering ambiguities" in criminal and deportation statutes in favor of the immigrant. *See Leocal*, 125 S. Ct. at 384 n.8; *St. Cyr*, 533 U.S. at 320; *INS v. Errico*, 385 U.S. 214, 225 (1966) (indicating that doubts as to the correct construction of a statute affording relief from deportation should be resolved in the immigrants' favor). *Chrzanoski v. Ashcroft*, 327 F.3d 188, 197 (2d Cir. 2003) (applying rule of lenity to find a state criminal conviction not to be an aggravated felony). As one circuit judge recently pointed out, "[t]here being two arguably permissible constructions of this statutory language, the rule of lenity requires us to adopt the construction that is more favorable to the defendant." *Palacios-Suarez*, 418 F.3d at 702 (Nelson, J., concurring); *see also United States v. West*, 393 F.3d 1302, 1315 (D.C. Cir. 2005).

[3] Notably, almost every court of appeals decision that has held that a state offense can be an aggravated felony simply by being a felony under state law was decided in the context of federal sentencing enhancements in criminal illegal reentry cases, not in immigration cases. *See, e.g.*, *Wilson*, 316 F.3d 506; *U.S. v. Hinojosa-Lopez*, 130 F.3d 691, 694 (5th Cir. 1997); *U.S. v. Cabrera-Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996), *cert. denied*, 519 U.S. 885 (1996).

The rule of lenity is particularly critical here, as "deportation is a drastic measure and at times the equivalent of banishment or exile . . . since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

Given the ambiguity in interpreting the statute and given the harsh and permanent consequences for an immigrant categorized as an "aggravated felon," the Court should apply the rule of lenity in determining what state offenses may be incorporated in the term "drug trafficking crime" by finding a state offense may be deemed a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) only if it is both a felony under state law *and* punishable as a felony under federal law. This is akin to the approach followed the D.C. Circuit when faced with a similar choice about the applicable definition for the term "felony." In *West*, the D.C. Circuit was considering whether a defendant's prior drug conviction was a felony for purposes of a federal sentence enhancement under 21 U.S.C. § 841(b)(1)(A). The court considered two possible sources to define "felony," 18 U.S.C. § 802(13) and 18 U.S.C. § 802(44). Despite the government's insistence that the term "felony" was wholly defined under the latter provision, that court applied the rule of lenity and held that the state offense would be considered a "felony" only if it met the terms of under *both* definitions of "felony." *See West*, 393 F.3d at 1315.

Under this approach, a state misdemeanor conviction for simple possession of a controlled substance is not an aggravated felony, not only because it is not a felony but also because it is not punishable as a felony under federal law as such offenses are treated as misdemeanors under federal law. *See* 18 U.S.C. § 844(a). Similarly, a state misdemeanor offense punishing "sale" of marijuana, where "sale" includes giving without remuneration, is also not a felony under federal law because federal law punishes such offenses as simple possession misdemeanors. *See Background on NYPL § 221.40, supra*.

A prior drug conviction does not change this analysis. Although a mechanism exists under federal law for a second simple possession offense to be punished as a felony, pursuant to the recidivist sentence enhancement set forth at 21 U.S.C. § 844(a), the government may not rely on recidivist sentencing enhancements to determine whether an offense is an "aggravated felony." In fact, the Supreme Court has ruled that "recidivism does not relate to the commission of the offense, but goes to the punishment only." *Almendarez-Torres v. United States*, 523 U.S. 244 (1998) ("prior commission of a serious crime… is as typical sentencing factor as one might imagine."); *see also Oliveira Ferrera v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (recidivist provision in 21 U.S.C. § 844(a) is inapplicable to aggravated felony inquiry, and thus a second state possession offense is not a felony, and therefore does not constitute an aggravated felony);

United States v. Corona-Sanchez, 291 F.3d 1201, 1209 (9th Cir. 2002) ("We must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements."). In addition, even if recidivist provisions may be considered, a second state misdemeanor possession offense must not be deemed analogous to an offense punishable as a felony under the Controlled Substance Act's enhancement for second and subsequent offenses unless the previous conviction was final at the time of the subsequent conviction, the defendant received notice of the prior conviction, as required by 21 U.S.C. § 851, and the prosecutor filed an information and proved the fact of the prior conviction. *See Steele*, 236 F.3d at 137-38.[4]

[4] In *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2003), this Court held that, in the illegal reentry sentencing context, a second simple possession misdemeanor offense is an aggravated felony. However, at that time, this Court was not presented with the issues raised here, regarding the effect of recidivist offenses and federal requirements that the prior offense and procedural requirements on whether a prior offense may be considered in determining whether a subsequent offense is a felony under federal law. In any event, this ruling was limited to the illegal reentry context. *See US v. Simpson*, 319 F.3d 81, 86 n.7 (2d Cir. 2003)("We offer no comment on whether such convictions constitute "aggravated felonies" for any purpose other than the Guidelines."). In fact, this Court recently declined the opportunity to rule, in an immigration case, whether a second misdemeanor possession offenses is an aggravated felony. *See Durant v. INS*, 393 F.3d 113, 114, n.1 (2d Cir. 2004) ('We are reluctant to adjudicate this complex issue without the benefit of full briefing . . . . Accordingly, we do not address [the issue]").

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully requests the Court to interpret the "illicit trafficking in a controlled substance" aggravated felony to exclude—at least in the immigration deportation context—state drug offenses that are not felonies or that lack any trafficking component. *Amicus* thus asks the Court to reverse the Immigration Judge's finding that the New York marihuana offense at NYPL § 221.40—a misdemeanor under New York law with no proven nexus to trafficking—is an aggravated felony.

Dated: October 13, 2005

Respectfully submitted,

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