No. 05-547

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether an immigrant who is convicted in state court of a drug crime that is a felony under the State's law but a misdemeanor under federal law has committed an "aggravated felony" for purposes of the immigration laws.

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JURISDICTION

The judgment of the court of appeals was entered on August 9, 2005. Pet. App. 1a. The petition for a writ of certiorari was filed on Oct. 31, 2005, and was granted on April 3, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Relevant provisions of the Immigration and Nationality Act, 8 U.S.C. §§ 1101 *et seq.*, 18 U.S.C. §§ 924 and 3559, and the Controlled Substances Act, 21 U.S.C. §§ 802 *et seq.*, are reproduced in the appendix to this brief. App., *infra*, 1a-11a.

STATEMENT OF THE CASE

The Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101 *et seq.*, establishes the conditions under which noncitizens may enter and remain in the United States, as well as the circumstances in which they may or must be deported. This case concerns the provisions of the INA that apply to noncitizens who have attained the status of lawful permanent residents, and who are convicted of illegal possession of a controlled substance.

1. Deportability For Drug-Related Crimes. The INA provides that "[a]ny alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the

Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable." 8 U.S.C. § 1227(a)(2)(B)(i). The INA also provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." 8 U.S.C. § 1227(a)(2)(A)(iii). The INA defines the term "aggravated felony" to include (among other offenses) "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)." 8 U.S.C. § 1101(a)(43)(B). The INA further provides that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." *Id.*

Section 924 of title 18 is a criminal statute that defines and establishes punishments for various firearms-related offenses. Subsection (c) of section 924 provides an additional term of imprisonment whenever a person uses or carries a firearm during "any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c). Section 924(c) defines a "drug trafficking crime" 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.*)." *Id.*

The Controlled Substances Act defines a range of drug-related felonies under federal law, including the manufacture and distribution of a controlled substance and possession of a controlled substance with intent to distribute it. *See* 21 U.S.C. §§ 841-843. The Controlled Substances Act also proscribes knowingly possessing a controlled substance. 21 U.S.C. § 844(a). Most first-time "simple possession" offenses, including the offense at issue in this case, are punished as misdemeanors under

the Controlled Substances Act. *See id.*; 18 U.S.C. § 3559(a)(6) (federal offense with a maximum term of imprisonment of one year is a Class A misdemeanor).

2. Consequences Of An Aggravated Felony Conviction. Lawful permanent residents who are deportable under 8 U.S.C. § 1227(a)(2)(B)(i) for a drug-related conviction that is not an aggravated felony are eligible to apply for cancellation of removal and asylum, and may not be deported to a country where their life or freedom would be threatened. *See* 8 U.S.C. §§ 1158(a)(1) (asylum), 1229b (cancellation), 1231(b)(3) (withholding of removal).[1] If the individual is convicted of a drug offense that is an "aggravated felony," the consequences are much more severe:

- Permanent residents convicted of an aggravated felony are subject to mandatory deportation, no matter what their individual circumstances. An aggravated felony conviction renders a lawful permanent resident ineligible for cancellation of removal or asylum. *See* 8 U.S.C. §§ 1229b (cancellation of removal), 1158(b)(2)(B) (asylum). Individuals convicted of an aggravated felony and sentenced to at least five years' imprisonment are also ineligible for withholding of removal. *Id.* § 1231(b)(3)(B).
- Permanent residents convicted of aggravated felonies may not apply for voluntary departure as an alternative to deportation proceedings. *See* 8 U.S.C. § 1229c(a)(1).

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[1] The INA defines "alien" as "any person not a citizen or national of the United States." 8 U.S.C. § 1101(a)(3). The statute defines "lawfully admitted for permanent residence" as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws." *Id.* § 1101(a)(20).

- An aggravated felony conviction bars a permanent resident from ever becoming a naturalized citizen of the United States. *See* 8 U.S.C. §§ 1101(f)(8) (naturalized citizen must be of good moral character); 1427(a)(3) ("No person shall be regarded as, or found to be of good moral character who . . . has been convicted of an aggravated felony.").

- A permanent resident convicted of an aggravated felony is barred from ever returning to the United States. *See* 8 U.S.C. § 1182(a)(9)(A)(i). An individual who returns to the United States after deportation for an aggravated felony is subject to imprisonment for up to 20 years. *See* 8 U.S.C. §§ 1326(a)(2), (b)(1) & (b)(2).[2]

3. Interpretation Of Aggravated Felony Provision. When Congress first added an "aggravated felony" provision to the INA in 1988, it defined the term to include "any drug trafficking crime as defined in section 924(c)(2) of title 18." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70. Section 924(c) then, as now, provided that a "drug trafficking crime" is "any felony punishable under the

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[2] Under the Federal Sentencing Guidelines, an alien convicted of illegally reentering or remaining in the United States following conviction for an aggravated felony receives an 8-point sentence enhancement. *See* U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(C). Application note 3 states that "[f]or purposes of subsection (b)(1)(C), 'aggravated felony' has the meaning given that term in section 101(a)(43) of the Immigration and Nationality Act." *Id.* cmt. n.3. Application note 2 states that "'felony' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year." This definition applies, however, only to "subsection[s] (b)(1)(A), (B), and (D)," and not to subsection (C), the provision dealing with aggravated felonies. *Id.*

Controlled Substances Act," the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act. 18 U.S.C. § 924(c)(2) (1988).

In 1990, the Board of Immigration Appeals ("BIA") construed the aggravated felony provision and held that a conviction in state court for possession of a controlled substance with intent to manufacture or distribute was a "drug trafficking crime," even though the conviction was obtained under state law rather than federal law. *In re Barrett*, 20 I. & N. Dec. 171, 175 (B.I.A. 1990). The Board concluded "that the definition of 'drug trafficking crime' for purposes of determining drug-related 'aggravated felonies' within the meaning of the Immigration and Nationality Act encompasses state convictions for crimes analogous to offenses under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act." *Id.*

Within months after the BIA's decision in *Barrett*, Congress amended the definition of "aggravated felony" in the INA to provide that an aggravated felony means "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." Pub. L. No. 101-649 § 501, 104 Stat. 4978, 5048 (1990), codified at 8 U.S.C. § 1101(a). Congress also added a provision specifying that the term aggravated felony applies "to offenses described . . . whether in violation of Federal or State law." *Id.* Congress thus made clear that the term "aggravated felony" extends to state drug trafficking convictions like Barrett's. *See* S. Rep. No. 55, 101st Cong. 2d Sess. (1990); 136 Cong. Rec. S17,106, S17,117 (Oct. 26, 1990) (Statement of Sen. Graham) (The amendments "[e]xtend the definition of aggravated felony to include aliens convicted of like State crimes, codifying a recent ruling of the Immigration Board of Appeals.").

Two years later, the BIA interpreted the amended definition of "aggravated felony" in *In re Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992). In *Davis*, the government appealed an Immigration Judge's decision that a state-law misdemeanor conviction for conspiracy to distribute controlled substances was not a "drug trafficking crime" and therefore was not an aggravated felony. *Id.* The Board held that "for a finding of 'drug trafficking crime' the alien's offense must be a felony offense under one of the three statutes listed in 18 U.S.C. § 924(c)(2)" or it must be "analogous" to such an offense. *Id.* at 543.

The Board adhered to its decision in *Davis* for the next decade. In 1995, for example, the Board considered a simple possession conviction from Louisiana that, while classified as a felony under the state law, was a misdemeanor under federal law. *In re L--G--*, 21 I. & N. Dec. 89, 90-91 (B.I.A. 1995). The government argued that a state conviction is a drug trafficking crime under 18 U.S.C. § 924(c)(2) if it is a felony under state or federal law and the conduct is proscribed by the Controlled Substances Act. *Id.* at 93. The Board looked to title 18 for the meaning of the term "any felony" and determined that the language referred to any of the classes of federal felonies defined by 18 U.S.C. § 3559(a). The BIA concluded that its interpretation was consistent with congressional intent and the statutory history of § 924(c)(2). *Id.* at 94-95.

In the interval between the Board's decisions in *Davis* and *L--G--*, the Second Circuit decided *Jenkins* v. *INS*, 32 F.3d 11 (2d Cir. 1994). In *Jenkins*, the court held that a state-law felony drug possession crime was a "drug trafficking crime," and therefore an aggravated felony for immigration purposes, even if the offense was classified as a misdemeanor under the Controlled Substances Act. *Id.* at 13-14. In *L--G--*, the Board disagreed with the *Jenkins* court's analysis that a state-law drug possession felony is a "felony punishable under the Controlled

Substances Act" and found that a uniform federal definition of "felony" would prevent inconsistent results based on the States' varying punishment schemes for drug offenses. 21 I. & N. at 96-102. For this reason, the Board declined to follow *Jenkins* outside the Second Circuit. *Id.* at 101. The Second Circuit subsequently reconsidered its position and agreed with the BIA, concluding that the statutory interpretation question was "fairly debatable" and that the interest in "nationwide uniformity" outweighed the interest in adhering to circuit precedent. *Aguirre* v. *INS*, 79 F.3d 315, 317-18 (2d Cir. 1996).

Thereafter, two other circuits held that a state-law drug possession felony could constitute a drug trafficking aggravated felony for purposes of the Federal Sentencing Guidelines. *E.g.*, *United States* v. *Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 1997), *United States* v. *Briones-Mata*, 116 F.3d 308, 310 (8th Cir. 1997). The BIA held that these decisions under the Sentencing Guidelines did not preclude it from applying its own precedent for immigration and deportation purposes in the Fifth and Eighth Circuits. *See In re K-V-D-*, 22 I. & N. Dec. 1163, 1170 (B.I.A. 1999). The Board concluded that the need for uniformity in the immigration context is "paramount" because the aggravated felony provision sanctions "an existing violation of federal immigration law" civilly, whereas in the Sentencing Guidelines context, the primary goal is to punish recidivism. *Id.* at 1172.

In 2002, the Board changed course. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002). The Board noted that the circuits had split on the interpretation of "drug trafficking crime" under INA section 101(a)(43)(B). Some circuits agreed with the Board's prior decisions, while others disagreed in the Sentencing Guidelines context; the Board noted that the circuits were also split over the propriety of adopting different interpretations for sentencing and immigration.

Id. at 395-96. The Board concluded that "uniformity is presently unattainable" and "the best approach is one of deference to applicable circuit authority." *Id.* at 396. The Board decided that in all circuits that had not yet spoken, it would follow the approach that had been adopted in a majority of Sentencing Guidelines cases: that a state-law possession charge constitutes a "drug trafficking crime" if it is classified as a felony by the State. *Id.* at 397.

After the Board's decision in *In re Yanez-Garcia*, three additional circuits held that a state felony possession offense that is a federal misdemeanor is not a "drug trafficking crime" under section 101(a)(43)(B) of the INA. *See Gonzales-Gomez* v. *Achim*, 441 F.3d 532 (7th Cir. 2006); *United States* v. *Palacios-Suarez*, 418 F.3d 692 (6th Cir. 2005); *Cazarez-Gutierrez* v. *Ashcroft*, 382 F.3d 905, 910 (9th Cir. 2004). Thus, a total of five circuits (the Second, Third, Sixth, Seventh, and Ninth) now hold that a state-law drug possession felony is not an aggravated felony for federal immigration purposes, while two circuits (the Fifth and Eighth) hold to the contrary. *See* Pet. App. 9-13; *Gonzales-Gomez*, 441 F.3d at 533.[3]

4. Factual Background. Petitioner Jose Antonio Lopez first came to the United States in 1985, entering

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[3] In the Sentencing Guidelines context, eight circuits consider a state-law possession felony to be a drug trafficking crime, regardless of whether the offense is a felony under federal law, while one circuit recently held that only federal felonies are drug trafficking crimes. *Compare United States* v. *Wilson*, 316 F.3d 506, 513 (4th Cir. 2003); *United States* v. *Ibarra-Galindo*, 206 F.3d 1337, 1341 (9th Cir. 2000); *United States* v. *Pornes-Garcia*, 171 F.3d 142, 148 (2d Cir. 1999); *United States* v. *Simon*, 168 F.3d 1271, 1272 (11th Cir. 1999); *Hinojosa-Lopez*, 130 F.3d at 694; *Briones-Mata*, 116 F.3d at 309; *United States* v. *Cabrera Sosa*, 81 F.3d 998, 1000 (10th Cir. 1996); *United States* v. *Restrepo-Aguilar*, 74 F.3d 361, 365 (1st Cir. 1996) *with Palacios-Suarez*, 418 F.3d at 700.

San Diego, California from Mexico. J.A. 9; Pet. App. 18a. Petitioner initially worked on farms growing tomatoes, grapes, and grapefruit. R. 159. In 1988, Petitioner applied for residency through the Special Agricultural Worker program, 8 U.S.C. § 1160. J.A. 10; Pet. App. 2a. Petitioner was approved for temporary residency in 1988; his application for permanent residency was approved on December 1, 1990. J.A. 10.

In 1994, Petitioner married Maria Delaluz Lopez in Mexico. J.A. 11. She entered the country legally with a visa that same year. Pet. App. 14a. Petitioner and his wife have two children, both citizens of the United States. J.A. 15.

Petitioner eventually opened two businesses. He first opened a taco stand in Sioux Falls, South Dakota, for which he obtained the proper food service and department of revenue licenses. R. 267, 292-93. After a year, he sold the taco stand and opened a grocery store. J.A. 14, 28-29. Petitioner again applied for and received the appropriate licenses from the City of Sioux Falls and the State of South Dakota for his business. R. 263-64.

During his years in the United States, Petitioner was arrested once in Huron, South Dakota in 1997. Pet. App. 13a; J.A. 16. Petitioner admitted telling a third party where to find drugs and ultimately pleaded guilty to aiding and abetting possession of cocaine, though he maintained that he never possessed cocaine himself. J.A. 16, 20-21. Under the Controlled Substances Act, a first offense of possession of cocaine is a misdemeanor punishable by not more than one year of imprisonment. *See* 21 U.S.C. § 844(a). Under the applicable South Dakota law, however, possession of cocaine was a Class 5 Felony, punishable by up to 5 years in prison. S.D. Codified Laws § 22-42-5 (1997). (South Dakota law treats aiders and abettors the same as principals. S.D. Codified Laws § 22-6-1).

Petitioner was sentenced to five years' imprisonment, but was released after fifteen months because of good behavior. J.A. 22. Petitioner was granted a rare "Early Release" from parole for good behavior, which his parole officer stated is "something that does not happen often in South Dakota." R. 256; J.A. 22. Petitioner's parole officer wrote two letters of recommendation supporting Petitioner's application for cancellation of removal, stating that Petitioner was "one of the best parolees [he has] ever had." R. 256; *see also* R. 291.

5. Proceedings Before The Immigration Judge. On April 17, 1998, the INS instituted removal proceedings against Petitioner. The INS initially charged Petitioner as being removable under Sections 237(a)(2)(B)(i) and 237(a)(1)(A)(iii) of the INA, alleging that his aiding and abetting conviction was a drug crime, and that it also constituted an aggravated felony.[4] *See* 8 U.S.C. §§ 1227(a)(2)(B)(i), 1227(a)(2)(A)(iii).

Petitioner conceded that his conviction constituted a controlled substance violation and that he was removable for that reason, but denied the aggravated felony charge and applied for cancellation of removal under Section 240A of the INA. The Immigration Judge initially agreed that Petitioner's conviction did not constitute an aggravated felony and dismissed the aggravated felony charge. J.A. 7. The Immigration Judge thus accepted Petitioner's application for cancellation of removal. R. 272-98.

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[4] The INS later added charges that Petitioner had obtained his lawful resident status illegally. Pet. App. 10a-11a. The Immigration Judge found that the evidence was insufficient to sustain these charges, and therefore held that Petitioner was not removable on this ground. Pet. App. 19a, 20a. The INS did not appeal that ruling.

While Petitioner's case was pending before the Immigration Judge, the Board of Immigration Appeals issued its decision in *In re Yanez-Garcia*. As noted above (pages 7-8), *Yanez-Garcia* altered the Board's longstanding position on whether state-law felony drug convictions are aggravated felonies for immigration purposes. After receiving briefs and hearing argument, the Immigration Judge concluded that *Yanez-Garcia* required him to follow the Eighth Circuit's decision in *Briones-Mata*, in which the court held that a state-law possession felony was a "drug trafficking crime" and an aggravated felony for purposes of the Sentencing Guidelines, even though it was not a felony under the Controlled Substances Act. Pet. App. 16a, citing 116 F.3d at 308. The Immigration Judge rejected Petitioner's argument that applying the Board's decision in *Yanez-Garcia* to Petitioner was an impermissible retroactive application of that case. Pet. App. 17a-18a.

The Immigration Judge accordingly held that Petitioner's conviction of aiding and abetting the possession of cocaine constituted an aggravated felony. Pet. App. 16a-17a. On November 22, 2002, the Immigration Judge denied Petitioner's application for cancellation of removal and entered an order of removal. *Id.*

6. The Decision Of The Board Of Immigration Appeals. The Board of Immigration Appeals affirmed in a short opinion. Pet. App. 8a. The Board found "no error in the Immigration Judge's determination that [Petitioner] has been convicted of an offense falling within the definition of aggravated felony contained in section 101(a)(43)(B) of the [INA]." *Id.* at 9a. The Board also held that the Immigration Judge had "correctly relied on" *Briones-Mata*, and that the application of *Yanez-Garcia* was "not impermissibly retroactive." *Id.*

7. The Eighth Circuit's Decision. The Eighth Circuit affirmed. Pet. App. 1a-7a. The court first

addressed its jurisdiction to hear Petitioner's appeal. Pet. App. 2a. The court noted that the REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 231, conferred jurisdiction to review "questions of law raised in petitions for review of decisions made by the Attorney General under INA § 240A and other sections." *Id.* at 2a-3a. The court therefore concluded that it had jurisdiction to decide the appeal.

Turning to whether Petitioner's conviction constituted "illicit trafficking in a controlled substance," the court held that "the plain language of the INA, and of the other statutes it refers to, states that any drug conviction that would qualify as a felony under either state or federal law is an aggravated felony." *Id.* at 4a. The court traced the statutory language to section 924(c)(2)'s statement that a "drug trafficking crime" is "any felony punishable under the Controlled Substances Act." *Id.*, quoting 18 U.S.C. § 924(c)(2). The court noted that under the Controlled Substances Act, "felony" is defined as "any Federal or State offense classified by applicable Federal or State Law as a felony." 21 U.S.C. § 802(13). The court thus held that "Lopez's state-law drug conviction is an aggravated felony for INA purposes." *Id.* at 5a. The court noted that its holding was in accord with the Fifth Circuit, but conflicted with the Second, Third, and Ninth Circuits. *Id.* at 4a-5a. The court also rejected Petitioner's argument that applying *Briones-Mata*, rather than the BIA's decisions prior to *Yanez-Garcia*, was an impermissible retroactive application of a new rule. *Id.* at 6a.

This Court granted the petition for a writ of certiorari on April 3, 2006.[5]

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[5] The government deported Petitioner to Mexico on January 4, 2006. Resp. to Cert. Pet. at 6. The case is not moot, because if Petitioner prevails before this Court and his application for (...continued)

SUMMARY OF THE ARGUMENT

1. "[I]llicit 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)" is an "aggravated felony" for purposes of the immigration laws. 8 U.S.C. § 1101(a)(43)(B). "Illicit trafficking" cannot naturally be said to include simple possession of a small amount of a controlled substance. *Cf. Leocal* v. *Ashcroft*, 543 U.S. 1, 11 (2004) (the term "crime of violence in 8 U.S.C. § 1101(a)(43)(F) "cannot be said naturally to include DUI offenses").

Section 924(c) of title 18 is a criminal statute that provides an additional term of imprisonment for individuals who use or carry a firearm during a drug trafficking crime "for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(A). For purposes of section 924(c), "'drug trafficking crime' means any felony punishable under the Controlled Substances Act" or two other federal criminal statutes. 18 U.S.C. § 924(c)(2).

The text of section 924 indicates that the term "drug trafficking crime" is limited to federal felonies. First, a drug trafficking crime must be a crime "for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1). *See United States* v. *Gonzales*, 520 U.S. 1, 5 (1997) (by using this language, Congress "expressly limited the phrase 'any crime' to only federal crimes."). Second, section 924(c) provides for punishment "in addition to the punishment provided for" the drug trafficking crime. *Id.* at 4. Third, when

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discretionary cancellation of removal is granted, he will be allowed to return to the United States. *See* Br. of Respondent (Acquiesence) at 6 n.5.

Congress wished to include state offenses in other provisions of section 924, it expressly referred to them. Thus, subsections (e), (g), and (k) of section 924 replicate the language of subsection (c) ("conduct that is punishable under" or "an offense under" the Controlled Substances Act and the two other federal statutes specified in subsection (c)), but they also refer separately to conduct that violates state law. *See* 18 U.S.C. §§ 924(g) ("conduct which . . . violates any State law relating to any controlled substance"; *id.* § 924(k) ("conduct that . . . violates any law of a State related to any controlled substance"); *id.* § 924(e) ("an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance").

The phrase "felony punishable under the Controlled Substances Act" does not require an actual conviction, but it does require proof that the defendant in fact violated one of the felony provisions of the federal statute. A state felony conviction is not itself "punishable under" the federal Controlled Substances Act. Federal and state law may punish the same conduct, but it is not a federal crime to be convicted of a state crime.

The definition of "felony" in title 21 does not apply to the term "felony" in 18 U.S.C. § 924(c). Section 924(c) does not incorporate that definition. Moreover, the INA cross-references a provision of title 18, not title 21, to define "drug trafficking crime." Title 18, in turn, classifies federal crimes as felonies or misdemeanors based upon the maximum term of imprisonment. *See* 18 U.S.C. § 3559(a). In addition, the definition of "felony" in 21 U.S.C. § 802(13) is expressly limited to uses of the term "in this title." And even within title 21, the definition does not apply to offenses defined by the Controlled Substances Act (which are governed by the title 18 classification system), but only to sentencing enhancements for repeat offenders.

Section 1101(a)(43)'s provision that the term "aggravated felony" applies to an offense "described in" paragraph (43) "whether in violation of Federal or State law" does not alter the descriptions of the offenses in the preceding provisions of paragraph (43). Thus, "illicit trafficking" includes state as well as federal trafficking offenses, but state law cannot alter or expand the description of "illicit trafficking." Similarly, a state conviction may be a "drug trafficking crime," but only if it fits the description of such an offense, *i.e.*, only if it is a felony under one of the three specified federal drug statutes. A first offense of simple possession of cocaine is not a felony violation of any of the three federal statutes, and therefore it is not a "drug trafficking crime."

Further textual confirmation of this interpretation is found in the provision that a "single offense involving possession for one's own use of 30 grams or less of marijuana" is not a deportable offense. 8 U.S.C. § 1227(a)(2)(B)(i). It is extremely unlikely that Congress intended to authorize individual States to negate this provision by classifying simple possession of a small amount of marijuana as a felony, thereby rendering individuals convicted of a single offense of simple possession of marijuana not only deportable but subject to mandatory deportation and other draconian consequences as "aggravated felons."

2. The legislative history supports this interpretation of the statutory text. Prior to 1988, 18 U.S.C. 924(c) defined a "drug trafficking crime" as a felony violation of federal law involving distribution, manufacturing, or importation of controlled substances. The provision adopting the current definition was entitled "Clarification of Definition of Drug Trafficking Crimes," and the legislative history explains that the purpose of the amendment was to clarify that possession with intent to distribute a controlled substance, as well as attempts and conspiracies, are drug trafficking crimes. There is no

indication that Congress intended to expand the definition of "drug trafficking crime" to include state offenses that are neither trafficking offenses nor federal felonies.

In addition, Congress initially defined "aggravated felony" in the INA to include only drug trafficking crimes as defined in section 924(c). In 1990, Congress amended the aggravated felony provision to provide that "illicit trafficking" is an aggravated felony, and to specify that an offense described in section 1101(a)(43) is an aggravated felony "whether in violation of Federal or State law." The legislative history explains that these amendments were intended to extend the definition of aggravated felony in accordance with a decision of the BIA holding that "aggravated felony" includes state convictions for offenses analogous to offenses under the Controlled Substances Act. The amendments indicate Congress's understanding that a state conviction for a non-trafficking offense that is a misdemeanor under federal law is not a "drug trafficking offense" for purposes of section 924(c) or the INA.

3. Several established canons of construction also support this interpretation of the statutory text. First, federal immigration laws should be interpreted to accord uniform treatment to noncitizens. Pub. L. No. 99-603, § 115, 100 Stat. 3359, 3385 (1986). The court of appeals' interpretation leads to highly nonuniform treatment based on differences in state drug laws that likely arose without consideration of their potential immigration consequences. Second, ambiguities in immigration statutes are resolved against deportation. *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 439 (1987). Finally, ambiguities in criminal statutes—including criminal statutes with both criminal and noncriminal applications—are resolved in favor of lenity. *Leocal*, 543 U.S. at 12.

ARGUMENT

I. The Statutory Language Provides That Aggravated Drug Felonies Must Involve Illicit Trafficking Or Be Felonies Under Federal Law.

"Statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Engine Mfrs. Ass'n* v. *S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004), quoting *Park 'N Fly, Inc.* v. *Dollar Park & Fly, Inc.*, 469 U.S. 189, 194 (1985). Congress provided in section 101(a)(43) of the INA that the term "aggravated felony" means (among other offenses) "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)." 8 U.S.C. § 1101(a)(43)(B). Section 924(c) of title 18, in turn, provides that "the term 'drug trafficking crime' means 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). Section 101(a)(43) of the INA further provides that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." 8 U.S.C. § 1101(a)(43). Here, Petitioner's plea to aiding and abetting possession of a controlled substance was not "illicit trafficking." Nor was it a "drug trafficking crime" under section 924(c). As the language and function of that provision show, it applies only to federal felonies. Petitioner's offense was a non-trafficking misdemeanor under federal law, and therefore it was not an aggravated felony under the INA.

A. Simple Possession Of A Controlled Substance Is Not "Illicit Trafficking In A Controlled Substance."

Congress's definition of a drug-related "aggravated felony"—"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)," 8 U.S.C. § 1101(a)(43)(B)—plainly includes some drug crimes and excludes others. Specifically, it is "illicit trafficking" and "drug trafficking crime[s]" that "Congress sought to distinguish for heightened punishment [from] other crimes." *Leocal*, 543 U.S. at 11.

The statutory term "illicit trafficking" is not defined in the INA. The ordinary meaning of "traffic" is "[t]o trade or deal in goods esp. illicit drugs or other contraband." Black's Law Dictionary 1534 (8th ed. 2004). *See also* Webster's Third New Int'l Dictionary 2423 (1993) ("traffic" means "to engage in commercial activity; buy and sell regularly"); American Heritage Dictionary 1898 (3d ed. 1996) ("traffic" means "[t]he commercial exchange of goods; trade"). "Trafficking" thus connotes commercial activity, such as trading or dealing.

Simple possession of a controlled substance does not fall within the ordinary meaning of "illicit trafficking." "Possession" is "[t]he fact of having or holding property in one's power; the exercise of dominion over property." Black's Law Dictionary 1201. Possession of a controlled substance, without more, does not involve commercial activity and thus falls outside the ordinary meaning of "illicit trafficking." *See Urena-Ramirez* v. *Ashcroft*, 341 F.3d 51, 57 (1st Cir. 2003) ("Courts define 'illicit trafficking' as illegally 'trading, selling or dealing' in specified goods."); *Kuhali* v. *Reno*, 266 F.3d 93, 108 (2d Cir. 2001) (distinction between illicit trafficking and simple possession "comports well with the legal and everyday usages of that term"); *In re Davis*, 20 I. & N.

Dec. 536, 541 & n.5 (B.I.A. 1992) ("Essential to the term [trafficking] in this sense is its business or merchant nature, the trading or dealing of goods"; there is no trafficking if "the illegal substance was intended for personal use."). *See also* 21 U.S.C. § 862 (describing "drug traffickers" as "[a]ny individual who is convicted of any Federal or State offense consisting of distribution of controlled substances," and "drug possessors" as "[a]ny individual who is convicted of any Federal or State offense involving the possession of a controlled substance").

Indeed, it was established more than 50 years ago that the term "illicit traffic in narcotic drugs" in the immigration laws does not include simple possession offenses. *See In re L____*, 5 I. & N. Dec. 169, 171-72 (B.I.A. 1953) ("[A] conviction solely for possession, without more, . . . does not constitute a conviction of illicit traffic in narcotic drugs.") (interpreting 8 U.S.C. § 1182(a)(23) (1952). No court of appeals has held, and the government has not argued, that a conviction for simple possession of a controlled substance falls within the ordinary meaning of "illicit trafficking."

In *Leocal*, the Court faced a similar question of statutory construction: whether a drunk driving offense is a "crime of violence" (and therefore an aggravated felony) under section 101(a)(43)(F) of the INA. 543 U.S. at 3. The Court held that the ordinary meaning of "crime of violence" "cannot be said naturally to include DUI offenses." *Id.* In reaching that conclusion, the Court observed that "we cannot forget that we ultimately are determining the meaning of the term 'crime of violence.'" *Id.* at 11. Similarly, in this case, the Court ultimately is determining whether Petitioner's crime is "illicit trafficking in a controlled substance." And just as the phrase "crime of violence" cannot be said naturally to include DUI offenses, the phrase "illicit trafficking in a controlled substance" cannot be said naturally to include simple possession offenses.

Congress defined a drug-related aggravated felony not simply as "illicit trafficking in a controlled substance," but as "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)*." 8 U.S.C. § 1101(a)(43)(B) (emphasis added). The phrase "drug trafficking crime" repeats the term "trafficking," which of course has the same ordinary meaning as it does in the phrase "illicit trafficking." But rather than leaving the term "drug trafficking crime" undefined, Congress specified that it is defined by 18 U.S.C. § 924(c). The issue in this case thus reduces to whether Petitioner's state drug conviction is a "drug trafficking crime" as that term is defined in section 924(c).[6]

B. The Definition Of "Drug Trafficking Crime" In Section 924(c) Is Limited To Federal Felonies.

Section 924 of title 18 is a criminal statute, not an immigration statute. It defines and establishes punishments for various offenses involving firearms or ammunition. Section 924(c) provides that a person who "uses or carries a firearm" "during and in relation to any crime of violence or drug trafficking crime . . . for which the person may be prosecuted in a court of the United States" "shall, in addition to the punishment provided for such crime of violence or drug trafficking crime" be sentenced to an additional specified term of imprisonment. 18 U.S.C. § 924(c). Congress provided

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[6] The argument that "drug trafficking crime" should be construed according to its ordinary meaning to exclude non-trafficking offenses, including non-trafficking offenses that are punished as felonies under the Controlled Substances Act, is developed in the briefs of several of the *amici curiae* supporting Petitioner. *See, e.g.*, Br. of Immigrant Defense Project *et al.*

that "no term of imprisonment imposed" under section 924(c) "shall run concurrently with any other term of imprisonment imposed on the person." *Id.* Section 924(c)(2) provides that, "[f]or purposes of this subsection, the term 'drug trafficking crime' means 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). For several reasons, the term "drug trafficking crime" in section 924(c) is limited to federal crimes; state offenses are not "drug trafficking crimes" for purposes of section 924(c).

1. The Language And Structure Of Section 924(c) Limit The Definition Of "Drug-Trafficking Crime" To Federal Crimes.

Section 924(c) provides for an additional term of imprisonment when an individual uses or carries a firearm during and in relation to a drug trafficking crime "for which the person may be prosecuted in a court of the United States." 18 U.S.C. § 924(c)(1)(A). In *United States* v. *Gonzales*, 520 U.S. 1 (1997), this Court noted that "Congress explicitly limited the scope of the phrase 'any crime of violence or drug trafficking crime' to those 'for which [a defendant] may be prosecuted in a court of the United States." *Id.* at 5. The Court construed this statutory language as "expressly" limiting "the phrase 'any crime' to only federal crimes." *Id.; see also* Br. of United States in *United States* v. *Gonzales*, at 15 ("The first sentence [of section 924(c)] makes clear that the statute does not reach using or carrying a firearm during a state-law violation.").

This conclusion is confirmed by other portions of the statutory text and the structure of the statute. Section 924(c) provides for punishment "in addition to the

punishment provided for such crime of violence or drug trafficking crime," and further specifies that no term of imprisonment imposed under section 924(c) "shall run concurrently with any other term of imprisonment . . . including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed." 18 U.S.C. §§ 924(c)(1)(A), (D)(ii). This language indicates that federal courts impose sentences under section 924(c) on top of ("in addition to") a sentence for the crime of violence or drug trafficking crime. Because federal courts sentence defendants for federal offenses, not state offenses, this language provides a further indication that, for purposes of section 924(c), "drug trafficking crime" is limited to a federal drug crime.

Moreover, Congress specifically referred to state offenses in section 924 when it intended to include them. For example, section 924(g) proscribes traveling interstate to transfer a firearm with the intent to engage in specified "conduct." As in section 924(c), the prohibited "conduct" is defined as that which is "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(g). But subsection (g), unlike subsection (c), also applies to "conduct that violates any State law relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802)." *Id.* at § 924(g)(2)-(3). Section 924(k), which prohibits smuggling or knowingly bringing a firearm into the United States, parallels the language of subsection (g) and includes an express reference to conduct that violates state law. 18 U.S.C. § 924(k).

In addition, section 924(e)(1) prescribes a minimum punishment for any person who violates section 922(g) "and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent

felony or serious drug offense." 18 U.S.C. § 924(e)(1). Section 924(e)(2) defines "serious drug offense" to include not only "an offense under the Controlled Substances Act . . . the Controlled Substances Import and Export Act . . ., or the Maritime Drug Law Enforcement Act . . . for which a maximum term of imprisonment of ten years or more is prescribed by law," but also "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(i)-(ii).

When "'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.'" *Russello* v. *United States*, 464 U.S. 16, 23 (1983) quoting *United States* v. *Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972). Congress's inclusion of express references to state offenses in sections 924(e), (g), and (k), and its omission of any such reference in section 924(c), indicates that a "drug trafficking crime" (*i.e.*, a "felony punishable under the Controlled Substances Act" or the two other federal drug statutes) refers solely to felony violations of federal law.[7]

Accordingly, the definition of "drug trafficking offense" in section 924(c) is limited to federal offenses. Petitioner has not located a single case in which the government prosecuted an individual under section 924(c)

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[7] Congress enacted the current definition of "drug trafficking crime" in section 924(c) at the same time it enacted section 924(g) (originally section 924(f)). *See* Anti Drug-Abuse Act of 1988, Pub. L. No. 100-690, § 6211, 102 Stat 4181, 4359.

based on the carrying or use of a firearm during a state-law felony.[8]

2. A State Conviction, As Opposed To The Conduct Underlying The Conviction, Is Not "Punishable" Under The Federal Drug Laws.

Section 924(c) defines a "drug trafficking crime" as a "felony punishable under the Controlled Substances Act" or two other federal drug laws. In ordinary usage, conduct is "punishable under" a statute if the statute prohibits the conduct and prescribes a punishment for engaging in the conduct. Congress's use of the term "punishable" thus indicates that a defendant may be convicted under section 924(c) without actually being convicted of a felony violation of the Controlled Substances Act, so long as the government proves that the defendant in fact violated that Act. *See United States* v. *Rodriquez-Moreno*, 526 U.S. 275, 280 (1999) (To prove a violation of section 924(c), the government was required to show that the defendant committed "all the acts necessary to be subject to punishment for kidnaping"); *United States* v. *Hopkins*, 310 F.3d 145, 152 (4th Cir. 2002) (although a conviction under section 924(c) does not require that the defendant be convicted of the predicate offense, all the elements of the offense must be proved

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[8] In one case, the government brought a prosecution under 18 U.S.C. § 924(h) (which prohibits "transferring a firearm, knowing that such firearm will be used to commit a crime of violence (as defined in subsection (c)(3) or drug trafficking crime (as defined in subsection (c)(2)) alleging that the crime of violence was a state felony. The district court dismissed the indictment and the court of appeals affirmed. *United States* v. *McLemore*, 28 F.3d 1160, 1165 (11th Cir. 1994) (holding that "crime of violence" in Section 924(h) does not include convictions obtained under state law).

and found beyond a reasonable doubt); *see generally Sedima* v. *Imrex Co.*, 473 U.S. 479, 488 (1985) (RICO predicate acts, which must be "punishable under various criminal statutes" do not require a conviction, but must be "subject to criminal sanction.").

It does not follow, however, that a state felony conviction is itself "punishable under" the Controlled Substances Act or the other federal drug laws. As the Seventh Circuit has observed, "State crimes, as distinct from the acts constituting the crimes, are not usually punished by federal law." *Gonzales-Gomez* v. *Achim*, 441 F.3d 532, 534 (2006) (Posner, J.) Federal law and state law may and frequently do punish the same conduct, such as bank robbery. But federal law does not provide that "anyone who is convicted of bank robbery in state court is guilty of a federal offense." *Id.* (citing 18 U.S.C. § 2113). Consequently, one would not ordinarily say that a state felony conviction is itself punishable under the Controlled Substances Act. "The Controlled Substances Act does not purport to punish state drug felonies," although federal and state law may punish the same conduct. *Id.* A state felony conviction may be used to enhance the federal sentence of a defendant convicted of a violation of the Controlled Substances Act, as the Seventh Circuit noted. *Id.*, citing 21 U.S.C. 841(b)(1). But that is quite different from treating a state felony conviction as itself a violation of federal law.

3. Section 924(c) Of Title 18 Is Not Governed By The Definition Of "Felony" In Title 21.

The court of appeals construed the phrase "any felony punishable under the Controlled Substances Act" to mean "any felony, so long as it is punishable under the Controlled Substances Act as a felony or a misdemeanor." The court reached this result by observing that the Controlled Substances Act defines "felony" as "any

Federal or State offense classified by applicable Federal or State law as a felony," 21 U.S.C. § 802(13), and holding that this definition governs the meaning of "felony" in 18 U.S.C. § 924(c). *See* Pet. App. 4a; *Briones-Mata*, 116 F.3d at 309. The court's reliance on this provision of title 21 was misplaced for several reasons.

First, section 924(c)(2) does not incorporate the Controlled Substances Act's definition of "felony." Section 924(c) refers to a felony "punishable under" the Controlled Substances Act, not a felony "as defined in" that Act. Second, section 101 of the INA defines the term "drug trafficking crime" by referencing title 18 rather than the Controlled Substances Act. 8 U.S.C. § 1101(a)(43)(B). In drafting section 101, Congress readily incorporated definitions from other statutory provisions when it wished to do so. The fact that Congress did not incorporate the definition of "felony" from title 21 to define "drug trafficking crime" cuts against reading the title 21 definition into "drug trafficking crime."

Third, section 924(c) is a provision of title 18, and section 3559 of title 18 classifies federal crimes into felonies and misdemeanors depending upon the length of the authorized term of imprisonment. 18 U.S.C. § 3559(a). Thus, the most natural reading of the reference to "any felony" in 18 U.S.C. § 924(c) is that it means any felony as that term is used in title 18.

Fourth, the Controlled Substances Act specifically limits the application of its definitional provisions, including the definition of "felony," to uses of the defined terms "in this title," *i.e.*, title 21. 21 U.S.C. § 802. Moreover, the Controlled Substances Act generally does not use the term "felony" to describe offenses punishable under that Act. When the Controlled Substances Act defines particular crimes, it simply defines the applicable punishment. *See* 21 U.S.C. §§ 841-44. Those crimes are classified as misdemeanors or felonies based upon the definitions of title 18. *See id.*; 18 U.S.C. § 3559(a). The

term "felony" is used in the Controlled Substances Act to describe the circumstances in which statutory sentence enhancements for repeat offenders apply. *E.g.*, 21 U.S.C. § 841(b). Thus, crimes "punishable under" the Controlled Substances Act are themselves classified as felonies or misdemeanors based on the provisions of title 18, not on the Act's definition of "felony."[9]

For these reasons, the definition of "felony" in title 21 does not govern the meaning of the phrase "any felony punishable under the Controlled Substances Act" in 18 U.S.C. § 924(c).

C. The Description Of "Drug Trafficking Crime" Is Not Altered By The Provision That An Offense Described In The INA Is An Aggravated Felony "Whether In Violation Of Federal Or State Law."

Section 101(a)(43) of the INA provides that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." 8 U.S.C. § 1101(a)(43). By its clear terms, this provision does not alter or expand the descriptions of the offenses set forth earlier in section 101(a)(43). Thus, for example, section 101(a)(43)(B) describes the offense of "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act)." An offense that fits this description is an aggravated felony, whether it is a violation of federal or state law. But the description of the offense remains unchanged: it must be "illicit trafficking in a controlled substance."

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[9] The Controlled Substances Import and Export Act and the Maritime Drug Law Enforcement Act, like the Controlled Substances Act, use the term "felony" to mandate enhanced penalties for recidivists. *See* 21 U.S.C. § 960(b); 46 U.S.C. App. §1903(g).

Similarly, the definition of "drug trafficking crime" under section 924(c) is limited to felony violations of the Controlled Substances Act and two other federal drug statutes. A state law conviction may qualify as an aggravated felony, but only if it fits the description of a "drug trafficking crime"—*i.e.*, only if it can be proved and found that the individual's conduct violates every element of a felony offense under one of the three federal drug statutes. A first offense of simple possession of cocaine is not a felony under federal law, and therefore it is not a "drug trafficking crime" under section 924(c). *See* 21 U.S.C. §§ 844(a), 960-61; 46 U.S.C. App. § 1903. That conclusion does not change if state law classifies the offense as a felony rather than a misdemeanor, because the offense is described to include only federal felonies.

D. The Court Of Appeals' Interpretation Is Inconsistent With Congress's Treatment Of Simple Possession Of Marijuana In Section 237 Of The INA.

Congress provided in section 237 of the INA that a "single offense involving possession for one's own use of 30 grams or less of marijuana" does not constitute a "controlled substances" offense for which a noncitizen may be deported. 8 U.S.C. § 1227(a)(2)(B)(i). Under the court of appeals' decision, however, an individual convicted in a state court of a first offense of simple possession of marijuana in States that classify this offense as a felony would be subject not only to deportation, but to mandatory deportation and all the additional consequences of an aggravated felony conviction: including ineligibility for asylum or citizenship and effective banishment.[10]

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[10] Some States classify a first offense of simple possession of marijuana as a felony. *E.g.*, N.D. Cent. Code § 19.03.1-23(6); Fla. Stat. § 893.13(6)(a) (possession of more than 20 grams of (...continued)

It is highly unlikely that Congress, having made a considered and explicit determination that a first offense of simple possession of marijuana should not be a basis for deportation, would have intended to define the term "aggravated felony" in such a way that persons convicted of that offense are subject to mandatory deportation and other harsh consequences. It is even more incredible that Congress would have intended to make such nonuniform treatment turn on variations in state drug laws adopted for non-immigration purposes.

II. Congress Did Not Intend To Define State Drug-Possession Felonies As Drug Trafficking Aggravated Felonies.

The relevant statutory and legislative history supports the conclusion that a drug crime is an "aggravated felony" under the INA only if it involves "illicit trafficking" or is a felony under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act. In addition, the legislative history of section 924(c)(2) of title 18 reinforces the conclusion that Congress did not intend to include any state crimes, let alone all state drug possession felonies, within the definition of "drug trafficking crime."

A. The History Of Section 924(c) Indicates That Congress Did Not Intend To Define Conduct Constituting A Federal Misdemeanor As A Drug Trafficking Felony.

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marijuana is a felony in the third degree, punishable by up to 5 years under Fla. Stat. § 775.082(3)(d)). Other States define the offense as a felony, but provide a maximum of term of imprisonment of exactly one year. *E.g.*, Ariz. Rev. Stat. Ann. §§ 13-3405, 13-701 (defining possession of under 2 pounds of marijuana as a class 6 felony, punishable by one year in prison).

Prior to 1988, section 924(c) defined "drug trafficking crime" as "any felony violation of federal law involving the distribution, manufacture, or importation of any controlled substance." 18 U.S.C. § 924(c)(2) (1982 & Supp. 1986). This statutory language expressly limited drug trafficking crimes to violations of federal law. When Congress replaced this language with the current definition of "drug trafficking crime" in 1988, the new provision was entitled "Clarification of Definition of Drug Trafficking Crimes in which Use or Carrying of Firearms and Armor Piercing Ammunition is Prohibited." Pub. L. No. 100-690, § 6212, 102 Stat 4181, 4360 (1988). A "clarification," of course, is not usually understood as a radical change.

Senator Biden, the Chairman of the Senate Judiciary Committee and a principal drafter of the amendment, explained the purpose of the amendment: "The present definition of 'drug trafficking crime,' . . . covers offenses involving the distribution, manufacture, and importation of controlled substances, but does not cover either possession with intent to distribute, or attempt and conspiracy violations. The amendment makes clear that sections 924(c) and 929(a) cover all drug felonies." 134 Cong. Rec. 17360, S17,363.

Senator Biden's explanation makes perfect sense. The prior statutory language could be construed to omit possession with intent to distribute, as well as attempt and conspiracy offenses. Prior to the 1988 amendment, many defendants argued for such a narrow construction, and at least one district court agreed with them. *See United States* v. *Chaidez*, 916 F.2d 563, 565 (9th Cir. 1990) (defendant contended that "conspiracy to possess with intent to distribute does not 'involve . . . distribution,' as required by section 924(c)(2)"); *United States* v. *James*, 834 F.2d 92 (4th Cir 1987) (reversing district court holding that "[p]ossession with intent to

distribute . . . was essentially a possession offense, and thus outside Congress's intended reach").

The legislative history thus supports the conclusion that, in modifying the definition of "drug trafficking crime" in section 924(c), Congress did not intend to include state offenses within that definition, or turn over to the States the definition of what constitutes a drug-related "felony" in connection with which federal law prohibits using or carrying a firearm. Instead, Congress aimed at a more modest result: eliminating a possible ambiguity in the language of section 924(c)(2) by clarifying that the definition of "drug trafficking crime" includes federal drug felonies such as possession of a controlled substance with intent to distribute it.

B. The History Of Section 101 Of The INA Confirms That Congress Did Not Intend To Expand Section 924(c) To Include State-Law Crimes.

In addition to clarifying the definition of "drug trafficking crime" under section 924(c), the Anti-Drug Abuse Act of 1988 added the first "aggravated felony" provisions to the INA. Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469-70. Congress initially defined "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 any firearms or destructive devices as defined in section 921 of such title." *Id.* The initial definition included only "drug trafficking crimes" defined by section 924(c); it did not provide that "any illicit trafficking in any controlled substance" is an aggravated felony.

Two years after the "aggravated felony" provision was first added, the Board of Immigration Appeals issued its decision in *Barrett*. 20 I. & N. Dec. 171 (B.I.A. 1990). The Board held that "the definition of 'drug trafficking crime' for purposes of determining drug-related

'aggravated felonies' within the meaning of the [INA] encompasses state convictions for crimes analogous to offenses under the Controlled Substances Act." *Id.* at 177-78. That same year, Congress amended the definition of aggravated felony in section 101(a)(43). The Report of the House Judiciary Committee on the 1990 legislation specifically referred to the Board's decision in *Barrett*, noting that "the Board of Immigration Appeals in *Matter of Barrett* (March 6, 1990), has recently ruled" that a state drug trafficking conviction is an aggravated felony. H.R. Rep. No. 101-681 (1990). The Report states: "Because the Committee concurs with the recent decision of the Board of Immigration Appeals and wishes to end further litigation on this issue, [the Act] specifies that drug trafficking (and firearms/destructive device trafficking) is an aggravated felony whether or not the conviction occurred in state or Federal court." *Id.* Thus, the 1990 amendment extended the definition of "aggravated felony" to effectively codify the decision in *Barrett*. *See* 136 Cong. Rec. S17,106, S17,117 (Oct. 26, 1990) (Statement of Sen. Graham) (The amendments "[e]xtend the definition of aggravated felony to include aliens convicted of like State crimes, codifying a recent ruling of the Immigration Board of Appeals.").

To achieve this result, Congress made two changes to the language of section 101. First, it inserted a provision defining a drug-related aggravated felony as "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act)." Pub. L. No. 101-649 § 501, 104 Stat 4978, 5048 (1990). Second, it added a provision that the "term [aggravated felony] applies to offenses . . . whether in violation of Federal or State law." *Id.*

The two 1990 amendments work together to bring state crimes into the definition of aggravated felonies. First, the category of drug-related aggravated felonies is expanded from "any drug trafficking crime under section

924(c) of title 18" to "any illicit trafficking in any controlled substance . . . including any drug trafficking crime" under section 924(c). The definition of aggravated felony, which previously was limited to felonies "punishable under" federal law thus was expanded to include *any* "illicit trafficking." In addition, Congress specified that "any" trafficking crime included state-law offenses. If Congress had understood that the definition of "drug trafficking crime" in section 924(c) includes state drug trafficking crimes, it would not have needed to adopt an additional provision providing generally that "illicit trafficking" is an aggravated felony.

III. Canons Of Statutory Construction Support The Conclusion That A Drug Offense That Is Neither Illicit Trafficking Nor A Federal Felony Is Not An Aggravated Felony.

Several well-established rules of statutory construction also support the conclusion that a state conviction for simple possession of a controlled substance is not an aggravated felony unless it involves "illicit trafficking" or is a felony violation of federal law.

A. Immigration Statutes Are Construed To Ensure Uniform Treatment Of Immigrants.

Congress's power over immigration is "unquestionably exclusively a federal power." *De Cana* v. *Bica*, 424 U.S. 351, 354 (1976). *See also United States* v. *Wong Kim Ark*, 169 U.S. 649, 701 (1898) ("The power . . . to establish a uniform rule of naturalization, was long ago adjudged by this court to be vested exclusively in Congress."). The Constitution provides, "The Congress shall have the Power to . . . establish an uniform Rule of Naturalization." U.S. Const. art. I, § 8. Writing in The Federalist, Alexander Hamilton stated that the power is one of the few "EXCLUSIVELY delegated to the United States." The Federalist No. 32. Hamilton explained that the immigration power is exclusive precisely because it is

the power to establish uniform rules: The power "to establish a UNIFORM RULE of naturalization . . . must necessarily be exclusive; because if each State had a power to prescribe a DISTINCT RULE there could not be a Uniform Rule." *Id.*

Congress's exclusive power to "establish a uniform Rule of Naturalization" has given rise to a well-settled policy that federal immigration and naturalization laws should be applied uniformly throughout the country. Congress itself has endorsed this policy, declaring: "It is the sense of the Congress that . . . the immigration laws of the United States should be enforced vigorously and uniformly." Immigration Reform and Control Act of 1986, Pub. L. No. 99-603 § 115, 100 Stat. 3559, 3384 (1986). The federal courts have likewise recognized that immigration laws should be interpreted and applied uniformly. *See, e.g., Jaramillo* v. *INS*, 1 F.3d 1149, 1155 (11th Cir. 1993) ("The laws that we administer and the cases we adjudicate often affect individuals in the most fundamental ways. We think that all would agree that to the greatest extent possible our immigration laws should be applied in a uniform manner nationwide . . . ."); *Rosendo-Ramirez* v. *INS*, 32 F.3d 1085, 1091 (7th Cir. 1994) ("National uniformity in the immigration and naturalization laws is paramount: rarely is the vision of a unitary nation so pronounced as in the laws that determine who may cross our national borders and who may become a citizen."); *Cazarez-Gutierrez*, 382 F.3d at 912; *Gerbier* v. *Holmes*, 280 F.3d 297, 299 (3d Cir. 2002); *Aguirre*, 79 F.3d at 317.

The policy favoring uniform application of the immigration laws supports an interpretation of the statutory language that makes similarly-situated noncitizens subject to the same rules for asylum, cancellation of removal, and naturalization. Absent the clearest statutory language to the contrary, the Court should not conclude that Congress adopted a provision

that defeats Congress's own recognized goal of uniformity, and does so by effectively ceding a substantial part of its exclusive immigration power to the States. It is unlikely that Congress would delegate to individual States effective power to banish lawful permanent residents, and it is particularly unlikely that Congress intended States to exercise this power through non-immigration laws that probably were adopted without any consideration of their immigration consequences.

The court of appeals' interpretation has all those unlikely consequences. If a State classifies simple possession of a controlled substance as a felony rather than a misdemeanor, then under the court of appeals' interpretation noncitizens convicted of simple possession offenses in that State are subject to mandatory deportation, are permanently ineligible to become naturalized citizens, and are effectively banished. *See* 8 U.S.C. § 1427(a)(3). Noncitizens convicted of the same drug offense under federal law, or in States that classify the offense as a misdemeanor rather than a felony, are not subject to any of these immigration consequences.

Moreover, it is open to question whether Congress even has the power to adopt such an arrangement. By its terms, the Constitution grants Congress authority to "establish a uniform Rule." U.S. Const. art. I, § 8. It does not grant Congress authority to establish a nonuniform rule. The court of appeals' interpretation of section 101 thus may render that provision unconstitutional. *See* Iris Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of "Aggravated Felony" Convictions*, 74 N.Y.U. L. Rev. 1696 (1999) (arguing that the Naturalization Clause limits Congress's power to enact nonuniform immigration laws, and that making the definition of an "aggravated felony" turn on varying state laws is unconstitutional). When interpreting a statute, this Court prefers an interpretation that avoids serious constitutional issues. *Clark* v. *Martinez*, 543 U.S. 371,

380-81 (2005). That canon also weighs against the court of appeals' interpretation here.[11]

B. Ambiguities In Deportation Statutes Are Resolved Against Deportation.

Section 101 of the INA is also subject to the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). The Court has observed that "deportation is a drastic measure" that is "at times the equivalent of banishment or exile." *Fong Haw Tam* v. *Phelan*, 333 U.S. 6, 10 (1948). "It is the forfeiture for misconduct of a residence in this country," a "penalty." *Id*. While "[t]o construe this statutory provision less generously to the alien might find support in logic," where "the stakes are considerable for the individual, [the Court] 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." *Id.* at 10. *See also INS* v. *Errico*, 385 U.S. 214, 225 (1966); *Costello* v. *INS*, 376 U.S. 120, 128 (1964) (holding that if a matter of statutory construction were in doubt "we would nonetheless be constrained by accepted principles of statutory construction in this area of the law to resolve that doubt in favor of the [noncitizen] petitioner."). This canon of construction also favors Petitioner's construction of the statutory language and cuts against the interpretation of the court of appeals.[12]

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[11] As explained in the amicus brief of Human Rights First, the statutory language should also be interpreted to avoid a possible conflict with the treaty obligations of the United States. *See* Amicus Br. of Human Rights First at 17-25.

[12] The government's interpretation can result in severe hardship in individual cases. *See* Amicus Brief of Juvenile Law Center, *et al.*

The government's approach to the aggravated felony provisions is very nearly the opposite of resolving ambiguities in favor of the alien. As the Seventh Circuit, speaking through Judge Posner, recently observed: "The only consistency that we can see in the government's treatment of the meaning of 'aggravated felony' is that the alien always loses." *Gonzalez-Gomez*, 441 F.3d at 535. For example, the government takes the position that the definition of "sexual abuse of a minor," which is an aggravated felony under section 101(a)(43), is a matter of federal law rather than state law, and that "immigration authorities can redefine" a state misdemeanor conviction "as a felony, indeed as an aggravated felony." *Id.* (citations omitted). *See also United States* v. *Amaya-Portillo*, 423 F.3d 427, 431-32 (4th Cir. 2005) (rejecting government argument that a state drug misdemeanor is an aggravated felony if it is punishable by more than one year's imprisonment).

C. Federal Crimes Are Presumed To Have A Uniform Definition, And Ambiguities Are Resolved In Favor Of Lenity.

In interpreting federal criminal statutes such as section 924(c), the Court applies a presumption that Congress intends to adopt uniform federal definitions of offenses, and not to allow punishment for identical conduct to turn on variations in state law. *See Taylor* v. *United States*, 495 U.S. 575, 590-92 (1990) (interpreting "burglary" in 18 U.S.C. 924(e); *Jerome* v. *United States*, 318 U.S. 101, 104 (1943) ("[I]n the absence of a plain indication to the contrary, . . . Congress when it enacts a statute is not making the application of the federal act dependent on state law.").

Moreover, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States* v. *Bass*, 404 U.S. 336, 347 (1971) (marks omitted), quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971). The rule of lenity is founded on the policy of

fair warning as to what conduct is prohibited by the criminal laws, and the policy that legislatures, rather than courts, should determine what conduct is prohibited. *See id.* at 347-48 (When a "choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." (quoting *United States* v. *Universal C. I. T. Credit Corp.*, 344 U.S. 218, 221-222 (1952))).

The rule of lenity applies in this case. Section 924(c) is a criminal statute. In *Leocal*, as here, the Court interpreted a phrase in a criminal statute that was incorporated into the INA's definition of "aggravated felony." The phrase at issue in *Leocal* was "crime of violence" in section 16 of title 18; here the phrase is "drug trafficking crime" in section 924(c) of that title. In *Leocal*, the Court found that the text was not ambiguous, but that "[e]ven if [the statute] lacked clarity. . . [the Court] would be constrained to interpret any ambiguity in the statute in petitioner's favor." 543 U.S. at 12. The Court observed that while it was interpreting the statute "in the deportation context, [it] is a criminal statute, and it has both criminal and noncriminal applications." *Id.* Accordingly, the Court held, "[b]ecause we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies." *Id.* The same is true here. To the extent that section 924(c)'s definition of "drug trafficking crime" lacks clarity, the Court is "constrained to interpret any ambiguity in petitioner's favor." *Id.*

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Provisions of the Immigration and Nationalization Act (8 U.S.C. § 1101 *et seq.*)

§ 1101. Definitions

(a)

* * *

(43) The term "aggravated felony" means—

* * *

(B) 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);

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after the date of enactment of this paragraph.

§ 1227. General classes of deportable aliens

(a) Classes of deportable aliens. Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses.

(A) General crimes.

* * *

(iii) Aggravated felony. Any alien who is convicted of an aggravated felony at any time after admission is deportable.

* * *

(B) Controlled substances.

(i) Conviction. Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * *

§ 1229b. Cancellation of removal; adjustment of status

(a) Cancellation of removal for certain permanent residents. The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien—

(1) has been an alien lawfully admitted for permanent residence for not less than 5 years,

(2) has resided in the United States continuously for 7 years after having been admitted in any status, and

(3) has not been convicted of any aggravated felony.

* * *

Provisions of Title 18, U.S. Code

§ 924. Penalties

* * *

(c)

(1) (A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime--

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection--

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall--

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law--

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

(2) For purposes of this subsection, the term "drug trafficking crime" means 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*.).

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

(4) For purposes of this subsection, the term "brandish" means, with respect to a firearm, to display all or part of the firearm, or otherwise make the presence of the firearm known to another person, in order to intimidate

that person, regardless of whether the firearm is directly visible to that person.

(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section--

(A) be sentenced to a term of imprisonment of not less than 15 years; and

(B) if death results from the use of such ammunition--

(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.

* * *

(e) (1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

(2) As used in this subsection--

(A) the term "serious drug offense" means--

(i) an offense 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.), for which a maximum term of imprisonment of ten years or more is prescribed by law; or

(ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

(B) the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that--

(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or

(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

(C) the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.

* * *

(g) Whoever, with the intent to engage in conduct which--

(1) constitutes an offense listed in section 1961(1),

(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 (as defined in section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6))), or

(4) constitutes a crime of violence (as defined in subsection (c)(3)),

travels from any State or foreign country into any other State and acquires, transfers, or attempts 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.

* * *

(k) A person who, with intent to engage in or to promote conduct that--

(1) is 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.);

(2) violates any law of a State relating to any controlled substance (as defined in section 102 of the Controlled Substances Act, 21 U.S.C. 802); or

(3) constitutes a crime of violence (as defined in subsection (c)(3)),

smuggles or knowingly brings into the United States a firearm, or attempts to do so, shall be imprisoned not more than 10 years, fined under this title, or both.

* * *

§ 3559. Sentencing classification of offenses

(a) Classification. An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is--

(1) life imprisonment, or if the maximum penalty is death, as a Class A felony;

(2) twenty-five years or more, as a Class B felony;

(3) less than twenty-five years but ten or more years, as a Class C felony;

(4) less than ten years but five or more years, as a Class D felony;

(5) less than five years but more than one year, as a Class E felony;

(6) one year or less but more than six months, as a Class A misdemeanor;

(7) six months or less but more than thirty days, as a Class B misdemeanor;

(8) thirty days or less but more than five days, as a Class C misdemeanor; or

(9) five days or less, or if no imprisonment is authorized, as an infraction.

(b) Effect of classification. Except as provided in subsection (c), an offense classified under subsection (a) carries all the incidents assigned to the applicable letter designation, except that, the maximum term of imprisonment is the term authorized by the law describing the offense.

Provisions of the Controlled Substances Act
(21 U.S.C. § 801 *et seq.*)

§ 802. Definitions

As used in this title:

* * *

(13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

* * *

(44) The term "felony drug offense" means an offense that is punishable by imprisonment for more than one year under any law of the United States or of a State or foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, anabolic steroids, or depressant or stimulant substances.

* * *

§ 844. Penalty for simple possession

(a) Unlawful acts; penalties. It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this title or title III. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 303 of this title or section 1008 of title III if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or

phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $ 1,000, or both, except that if he commits such offense after a prior conviction under this title or title III, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $ 2,500, except, further, that if he commits such offense after two or more prior convictions under this title or title III, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $ 5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $ 1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not

more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, United States Code, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.