Nos. 05-547 and 05-7664

In the Supreme Court of the United States

JOSE ANTONIO LOPEZ,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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

REYMUNDO TOLEDO-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER JOSE ANTONIO LOPEZ

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INTEREST OF *AMICUS*[1]

The American Bar Association ("ABA") is the voluntary, national membership organization of the legal profession. Its more than 407,000 members, from every state and territory and the District of Columbia, include prosecutors, public defenders, private lawyers, legislators, law professors, law enforcement and corrections personnel, law students, and non-lawyer associates in allied fields.[2] Since its inception, the ABA has actively promoted improving the administration of justice. The ABA has also long been committed to protecting the constitutional and statutory rights of non-citizens. The ABA respectfully submits this brief *amicus curiae* because the question presented by this case implicates matters addressed by the ABA Standards for Criminal Justice and other policies adopted by its House of Delegates. Resolution of this case, furthermore, has implications for the administration of criminal justice and for the uniform application of immigration law.

Over more than thirty years, the Standards have been developed, refined, and approved by ABA task forces made up of prosecutors, judges, defense lawyers, academics, and others, and by the ABA's wider and diverse membership. An experienced group of prosecutors, defenders, and judges has agreed upon this considered collection of "best

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters consenting to the filing of this brief have been filed with the Clerk of this Court.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

practices."[3] This Court has relied upon the Standards as a guide to criminal justice administration. *See, e.g.*, *Town of Castle Rock v. Gonzales*, 125 S. Ct. 2796, 2805-06 (2005); *Rompilla v. Beard*, 125 S. Ct. 2456, 2465-66 (2005); *INS v. St. Cyr*, 533 U.S. 289, 322 n.48 (2001). Policy resolutions of the House of Delegates, a broadly representative forum for the legal profession, also represent a consensus of the ABA's diverse membership.

Among the ABA policies implicated by this case are, most directly: the Standards on Collateral Sanctions; policies concerning relief from deportation as a collateral consequence of a criminal conviction; and a recently adopted policy concerning the scope of the "aggravated felony" ground for deportation. Other relevant ABA policies are noted in the body of this brief.

The Standards on Collateral Sanctions recognize that the collateral consequences of a criminal conviction should be commensurate with the gravity of the offense. They further recognize that a relief mechanism should be available unless imposition of the collateral consequences at issue is warranted in all circumstances. These Standards state in relevant part:

> [T]he objectives of this chapter are to . . . limit collateral sanctions imposed upon conviction to those that are specifically warranted by the conduct constituting a particular offense . . . prohibit certain collateral sanctions that, without justification, infringe on fundamental rights, or frustrate a convicted person's chances of successfully reentering society . .

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[3] Chief Justice Warren Burger described the Criminal Justice Standards project as "the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history." Warren E. Burger, *Introduction: The ABA Standards for Criminal Justice*, 12 Am. Crim. L. Rev. 251, 251 (1974).

> . and . . . provide a judicial or administrative mechanism for obtaining relief from collateral sanctions.

ABA Standards for Criminal Justice, Collateral Sanctions and Discretionary Disqualification of Convicted Persons, Standard 19-1.2 (3d ed. 2004).

> The legislature should not impose a collateral sanction on a person convicted of an offense unless it determines that the conduct constituting that particular offense provides so substantial a basis for imposing the sanction that the legislature cannot reasonably contemplate any circumstances in which imposing the sanction would not be justified.

Id. Standard 19-2.2.

In addition, for over thirty years, ABA policy has advocated that discretionary relief from deportation be available to non-citizens convicted of crimes based on equities such as family ties and length of residence in the United States. *See* 100 ABA Ann. Rep. 642, 663 (1975); *see also* ABA Criminal Justice Section & Commission on Immigration, Report 300 to the House of Delegates, at 1 (Feb. 2006), http://www.abanet.org/crimjust/policy/my06300.pdf ("ABA Report 300") (urging restoration of discretion to immigration judges to grant deportation relief).

And in February 2006, the ABA House of Delegates adopted a resolution urging that low-level offenses not be deemed "aggravated felonies" (which carry the collateral consequence of mandatory deportation):

> [T]he American Bar Association urges federal immigration authorities to avoid interpretations of the federal immigration laws that extend the reach of the 'aggravated felony' mandatory deportation ground to . . . low-level state offenses that either are

> misdemeanors under state law or would be misdemeanors under federal law.

ABA Report 300 at 1.

SUMMARY OF ARGUMENT

The question presented in this case is whether a drug possession offense that is a felony under state law, but would be a misdemeanor under federal law, is an "illicit trafficking" "aggravated felony" within the meaning of the Immigration and Nationality Act (INA).[4] Resolution of this question also has implications for whether certain possession offenses that are not felonies under state law may nevertheless be deemed "illicit trafficking" "aggravated felonies." This *amicus curiae* brief offers an approach to the statute that is coherent as to both types of offenses.

Some courts have deemed offenses such as Petitioner's, that do not involve trafficking and would be misdemeanors under federal law, to be illicit trafficking aggravated felonies because the offenses are state-law felonies. Other courts have deemed offenses that do not involve trafficking and are second or subsequent state-law misdemeanors to be illicit trafficking aggravated felonies, because repeat misdemeanors may be prosecuted as federal-law felonies. Properly read, the illicit trafficking aggravated felony provision does not support including either type of offense.

The statutory text, structure, and history dictate reading the illicit trafficking aggravated felony provision as limited to felonies actually involving trafficking. Simple possession does not constitute "illegal trafficking." Also, in order to be

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[4] The ABA submits this brief in support of Petitioner Jose Antonio Lopez ("Lopez"), but arguments relevant to Petitioner Reymundo Toledo-Flores ("Toledo-Flores") also support reversal in that case. *See Leocal v. Ashcroft*, 543 U.S. 371, 380 (2004) ("[W]e must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context.").

an "aggravated felony," a state offense must as a threshold matter be a felony under state law. *See infra* Section I.

Imposing mandatory deportation and other harsh immigration consequences for low-level possession offenses results in a drastic disparity between the direct and collateral consequences of such convictions. This leads not only to individual injustices but also to unanticipated adverse consequences for the integrity and fair and regular operation of the criminal justice system. These concerns support application of the rule of lenity, which requires that any lingering ambiguities in the statute be construed against deportation. These same concerns also support application of the rule of constitutional avoidance, because reading the illicit trafficking aggravated felony provision to apply to low-level possession offenses may raise problems under the void-for-vagueness due process doctrine. In light of the disparity between direct and collateral consequences, a non-citizen may lack sufficiently definite warning that a low-level simple possession offense could result in extreme immigration consequences. *See infra* Section II.

The illicit trafficking aggravated felony provision moreover should be construed so as to avoid problems of non-uniformity in immigration law. Congress is presumed to legislate with uniformity in mind. Immigration law uniformity is also grounded in the "uniform Rule of Naturalization" clause of the U.S. Constitution. Applying the illicit trafficking aggravated felony provision to state-law possession offenses that are misdemeanors under either federal or state law raises non-uniformity problems. Immigration consequences may turn on the happenstance of which state law a non-citizen was convicted under. The doctrine of constitutional avoidance counsels that the statute be construed to avoid such problems. *See infra* Section III.

The ABA therefore supports Petitioner's argument that a simple possession offense, even if a state-law felony, cannot

be an illicit trafficking aggravated felony if it would be a federal misdemeanor. However, a state's classification of a possession offense as a misdemeanor may not be disregarded simply because the offense might be prosecuted as a federal felony. Deeming either type of offense to be an illicit trafficking aggravated felony: (1) cannot be reconciled with the aggravated felony definition's text; (2) adversely affects the administration of criminal justice and the uniformity of immigration law; and (3) is contrary to the rules of lenity and constitutional avoidance. We submit that Congress never intended such a result. The illicit trafficking aggravated felony provision should be construed to include only offenses that involve trafficking and that are not misdemeanors under either federal or state law.[5]

ARGUMENT

I. THE STATUTORY TEXT, STRUCTURE, AND HISTORY DICTATE A NARROW READING OF THE ILLICIT TRAFFICKING AGGRAVATED FELONY PROVISION LIMITED TO FELONIES THAT INVOLVE TRAFFICKING.

The INA provides that "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) . . .)" constitutes an aggravated felony. 8 U.S.C. § 1101(a)(43)(B). Section 924(c), Title 18, in turn defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act" and two other federal criminal statutes. 18 U.S.C. § 924(c). The INA defines neither "felony" nor "trafficking" as those terms relate to the "illicit trafficking" "aggravated felony" provision. The Board of Immigration Appeals (BIA) and federal courts have failed to develop a consistent and coherent view of how this provision applies to state simple possession offenses.

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[5] Because all trafficking is a felony under federal law, state-law felony trafficking offenses are necessarily federal felonies. *See* 21 U.S.C. § 841.

Initially, the BIA held that by including offenses covered under the federal criminal code's definition of "drug trafficking crime," the INA includes a state possession offense analogous to a federal felony, even if it is not a state-law felony. *See In re K-V-D*, 22 I. & N. Dec. 1163 (B.I.A. 1999); *In re L-G*, 21 I. & N. Dec. 89 (B.I.A. 1995); *In re Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992).[6] This is the "hypothetical federal felony" approach. The BIA then changed course, holding that it would follow the relevant circuit's rule or, if there was no circuit authority, the majority rule. The BIA viewed the majority rule as being that the state designation controls: if a drug offense is a state-law felony it is an aggravated felony, regardless of whether it involves trafficking. *See In re Yanez-Garcia*, 23 I. & N. Dec. 390 (B.I.A. 2002); *In re Santos-Lopez*, 23 I. & N. Dec. 419 (B.I.A. 2002).

Some federal appellate decisions follow the hypothetical federal felony approach. *See, e.g.*, *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002). Others apply the state law designation. *See, e.g.*, *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1st Cir. 1996). And one appeals court has taken an either/or approach, holding that an offense is an aggravated felony if it would be a felony under either state or federal law. *See United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *cert. denied*, 126 S. Ct. 1142 (2006).

Thus, depending on the jurisdiction, a non-citizen convicted of simple possession may be deemed to have committed an aggravated felony on the ground that (a) the offense is analogous to a federal drug felony; (b) the offense

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[6] The illicit trafficking aggravated felony provision was enacted in 1990. *See* Immigration Act of 1990 § 501, Pub. L. No. 101-649, 104 Stat. 4978, 5048, as corrected by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 § 306(a)(1), Pub. L. No. 102-232, 105 Stat. 1733, 1751.

is classified as a state-law felony; or (c) either one of these circumstances exists.

Yet a coherent approach faithful to the statutory text and applicable to a range of factual contexts is possible. That textually faithful approach encompasses but goes beyond the hypothetical federal felony approach. It requires including as illicit trafficking aggravated felonies only those offenses that actually involve trafficking and that are not misdemeanors under either federal or state law. As discussed in Section I, the statutory text, structure, and legislative history dictate this reading. And as discussed in Sections II and III, the problems caused by a broader reading for the administration of criminal justice and for uniformity in the immigration laws further support the proposed statutory construction. Indeed, neither the rule of lenity nor the principle of constitutional avoidance permit reading the illicit trafficking aggravated felony provision to include low-level possession-only crimes.

A. Simple Possession, Whether a Felony Under State Law or a Hypothetical Felony Under Federal Law, Does Not Constitute "Illicit Trafficking."

The statutory language compels the conclusion that simple possession offenses are not aggravated felonies because "illicit trafficking" does not include mere possession of a controlled substance. In *Leocal*, this Court, construing another aggravated felony provision, unanimously reaffirmed that statutory terms should be given their "ordinary or natural meaning." 543 U.S. at 9 (internal quotation marks and citation omitted).[7]

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[7] Thus, driving under the influence of alcohol and causing serious bodily injury is not a "crime of violence" aggravated felony, 8 U.S.C. § 1101(a)(43)(F), because "[t]he ordinary meaning of this term [crime of violence] . . . cannot be said naturally to include DUI offenses," *Leocal*, 543 U.S. at 11. This analysis reflects the long-established principle that the inquiry into statutory meaning necessarily begins with the plain language. *See, e.g.*, *Bailey v. United States*, 516 U.S. 137, 144 (1995).

Petitioner correctly explains that the natural reading of the statute is that a simple possession offense that is a state-law felony but a federal-law misdemeanor is not an illicit trafficking aggravated felony. *See* Lopez Br. I.A. *Leocal*, however, requires a further conclusion: because simple possession does not constitute trafficking, no simple possession offense, including one hypothetically punishable as a federal felony, constitutes an illicit trafficking aggravated felony.

The argument made for deeming state-law felony possession offenses to be aggravated felonies is that the INA refers to "drug trafficking (as defined in Section 924(c) . . .)"; Section 924(c) refers to "any felony punishable under the Controlled Substances Act"; and, allegedly, "any felony" includes any state-law felony. *See Lopez v. Gonzalez*, 417 F.3d 934 (8th Cir. 2005). The argument made for considering second or subsequent state-law misdemeanors is that, under federal criminal law, a second possession offense under certain circumstances may be prosecuted as a felony. *See* 21 U.S.C. § 844; *see also Sanchez-Villalobos*, 412 F.3d at 577. This is said to render such a misdemeanor offense a Section 924(c) "drug trafficking crime," and therefore an illicit trafficking aggravated felony. *Id.*

But the subcategory of Section 924(c) "drug trafficking crime[s]" "includ[ed]" in the principal category of "illicit trafficking" "aggravated felonies" may not swallow the principal "illicit trafficking" category. *See Federal Land Bank v. Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("[T]he term 'including' . . . connotes simply an illustrative application of the general principle."). And the "ordinary or natural" meaning of "illicit trafficking" requires more than mere possession. *See* Compact Oxford English Dictionary 2092 (2d ed. 1999) (defining "traffic" as "[t]he buying or selling or exchange of goods for profit; bargaining; trade"); *cf. Salinas v. United States*, 126 S. Ct. 1675, 1675 (2006)

(per curiam) (holding that simple possession does not constitute a "controlled substance offense" under the Sentencing Guidelines because the relevant Guideline pertains to "possession . . . with intent to manufacture, import, export, distribute, or dispense" (internal quotation marks and citation omitted)).

Thus, the natural reading of the aggravated felony provision is that it creates a single "illicit trafficking" category that "includ[es]" as a subset those felony violations of three designated federal statutes that themselves include a "trafficking element." In other words, even if all offenses punishable as felonies under the three statutes enumerated in Section 924(c) constitute Section 924(c) "drug trafficking crimes," it does not follow that all "drug trafficking crimes," including misdemeanor crimes hypothetically punishable as federal felonies, constitute "illicit trafficking" under 8 U.S.C. § 1101(a)(43)(B). Therefore, simple possession offenses, irrespective of their misdemeanor or felony classification, do not constitute illicit trafficking aggravated felonies.

B. To be an "Aggravated Felony," a State Offense Must Be a Felony Under State Law.

The ABA agrees with Petitioner that a state felony possession offense that would be a misdemeanor under federal law is not an "illicit trafficking" "aggravated felony." This conclusion should not be taken, however, to suggest that because a second or subsequent state-law misdemeanor possession offense might be prosecuted as a felony under federal law, the offense constitutes an aggravated felony.[8]

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[8] Petitioner does not address this issue because his offense is a state felony. The Court need not reach this question here. However, in other cases, it has been argued or courts have found that state misdemeanor drug possession offenses are aggravated felonies under the hypothetical federal felony approach. *See, e.g., Sanchez-Villalobos*, 412 F.3d 572. This is not a proper application of the hypothetical federal felony

The natural meaning of the term "aggravated" modifying "felony" is that "aggravated felony" includes only particularly serious felonies. *See* Compact Oxford English Dictionary 28 (defining "aggravated" as "Increased, magnified; Increased in gravity or seriousness: made worse or more grievous; intensified in evil character"); *see also Leocal*, 543 U.S. at 9.[9] The statutory structure and history further show that "aggravated felonies" do not include non-felony offenses.

Other INA amendments enacted simultaneously with the "aggravated felony" provision reflect that Congress intended that this provision include only felonies.[10] For example, Congress revised the immigration detention provisions to require detention of "any alien convicted of an aggravated felony," and directed that "the Attorney General shall not

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approach, *see infra* p.29; *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), and is incorrect for the other reasons set forth in this brief.

[9] As one circuit judge observed:

> 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.

United States v. Pacheco, 225 F.3d 148, 157 (2d Cir. 2000) (Straub, J, dissenting).

[10] *See* Anti-Drug Abuse Act of 1988 ("ADAA"), Pub. L. No. 100-690, § 7342, 102 Stat. 4181, 4469; *see generally Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) ("[I]n expounding a statute, we [are] not . . . guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." (internal quotation marks and citation omitted)).

release such felon from custody."[11] ADAA § 7343(a)(4), 102 Stat. at 4470. Congress also amended the criminal provision for illegal reentry after deportation to provide for different sentence enhancements depending on whether the prior deportation was subsequent to an aggravated felony conviction or, instead, to conviction for "a felony (other than an aggravated felony)." *Id.* § 7345(a)(2), 102 Stat. at 4471.[12] Congress later added an enhancement if the prior deportation followed a conviction for "three or more misdemeanors." Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b), 108 Stat. 1796, 2023. Thus, Congress distinguished between misdemeanors and aggravated felonies within the same statutory provision.[13] The legislative history of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), which amended the "aggravated felony" definition, further supports the distinction. *See* Pub. L. No. 104-208, Div. C, § 321, 110

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[11] *See also id.* § 7347(a), 102 Stat. at 4471-72 ("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.").

[12] In 1990 and 1991 amendments, Congress also clarified that state drug offenses may be deemed aggravated felonies and barred waiver of exclusion for aggravated felons, *see* Immigration Act of 1990, Pub. L. No. 101-649, §§ 501(a)(3), 511(a), 104 Stat. 4978, 5048, 5052, if the individual had served "for such felony or felonies" a five-year or more term of imprisonment, Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, § 306(a)(10), 105 Stat. 1733, 1751.

[13] Congress saw no need to add a parenthetical "(other than an aggravated felony)" to the "three or more misdemeanor" provision, plainly contemplating overlap between the terms "felony" and "aggravated felony" but not between "misdemeanor" and "aggravated felony." *See Leocal*, 543 U.S. at 12 (holding that the fact that the statute separately listed and distinguished between "crime of violence" and "DUI" for purposes other than the aggravated felony definition, "reinforc[ed]" the conclusion that a DUI is not a crime of violence aggravated felony).

Stat. 3009-546, 3009-627 to -628. Proponents of the IIRIRA amendments referred to the crimes and individuals they wished included as "felonious acts," "convicted felons," and "serious felonies," in addition to "aggravated felonies" and "aggravated felons." 142 Cong. Rec. S4592-01, S4598-S4600 (May 2, 1996).[14]

Thus, the statutory structure and legislative history reinforce that Congress knew how to, and did, distinguish between felons and misdemeanants. It intended that the aggravated felony provision apply only to felony offenses.

II. SUBJECTING NON-CITIZENS TO MANDATORY DEPORTATION FOR LOW-LEVEL SIMPLE POSSESSION OFFENSES ADVERSELY AFFECTS THE INTEGRITY OF THE CRIMINAL JUSTICE SYSTEM.

Any drug offense, including simple possession (other than a single offense of possession for personal use of 30 grams or less of marijuana), renders a non-citizen deportable. 8 U.S.C. § 1227(a)(2)(B)(i). In many cases the United States appropriately removes non-citizens for committing crimes, including drug offenses. But Petitioner and other non-citizens convicted of low-level possession offenses have not merely been deemed "deportable" (meaning there would still be the possibility of discretionary relief). Rather, they are subject to mandatory deportation and other extreme immigration consequences as "aggravated felons."

Imposing such harsh immigration consequences for low-level offenses has unanticipated adverse consequences for the

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[14] Also, in a colloquy about IIRIRA's restoration of eligibility for deportation relief to "aliens who have not committed aggravated felonies," Senator Hatch explained that this was in response to earlier restrictions barring relief "for virtually any alien who had been convicted of any crime, including some misdemeanors." 142 Cong. Rec. S12294-01, S12295 (Oct. 3, 1996).

justice system. Not only does it result in injustices for individual defendants, but it negatively affects the role of prosecutors, defense counsel, and judges. The statutory provision at issue should be construed, under the rules of lenity and constitutional avoidance, to maintain and promote the fairness and integrity of the justice system.

A. The Severity of the Collateral Consequences of Aggravated Felony Convictions is Disproportionate to the Criminal Justice System's Treatment of Low-Level Possession Offenses.

The immigration consequences of an aggravated felony conviction are myriad and severe. Such a conviction bars discretionary relief from deportation, known as cancellation of removal.[15] *See* 8 U.S.C. § 1229b(a). A non-citizen convicted of such an offense may not request that an immigration judge consider the offense's actual severity, the individual's equities, and the interests of the United States.[16] Aggravated felony convictions also bar asylum, *id.* § 1158(b)(2)(B), and may preclude withholding of removal, another type of deportation relief, *id.* § 1231(b)(3)(B).[17]

Commission of any crime is a serious matter, but not all crimes are of equal gravity. ABA policy recognizes that convictions for misdemeanors under either federal or state law should not result in mandatory, extreme immigration

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[15] Non-citizens have long been deportable for some crimes, but discretionary relief existed. *See St. Cyr*, 533 U.S. at 294-96. IIRIRA eliminated such relief for "aggravated felons."

[16] In a cancellation of removal hearing, the judge may waive deportation based on factors such as the non-citizen's family ties in the U.S., residence of long duration in this country, hardship to the family, service in the U.S. Armed Forces, history of steady employment, existence of property or business ties, proof of rehabilitation, and other equities such as value and service to the community. *See, e.g.*, *In re C-V-T*, 22 I. & N. Dec. 7 (B.I.A. 1998).

[17] A post-1990 aggravated felony also permanently bars naturalization. *See id.* §§ 1101(f)(8), 1427(a)(3).

consequences. *See* ABA Report 300 at 1. ABA policies also recognize that collateral consequences should correspond to the seriousness of the conduct involved. *See* ABA Criminal Justice Standards 19-1.2 and 19-2.2. Broadly construing the "illicit trafficking" "aggravated felony" provision to include offenses that do not involve trafficking, and that would be misdemeanors under either federal or state law, creates stark disproportionality between the offense and its collateral consequences.[18] As Petitioner's case illustrates, under the broad reading of the illicit trafficking aggravated felony provision currently being applied in immigration proceedings, a single simple possession offense triggers mandatory deportation. It is plainly legitimate for a state, such as South Dakota, to treat simple possession as a felony to effectuate local criminal justice policies. *See Heath v. Alabama*, 474 U.S. 82, 93 (1985). But states do not legislate criminal law with collateral immigration consequences in mind. Even if the state classifies an offense as a felony, traditional criminal justice goals are typically served by punishing the offender sufficiently to achieve retribution and deterrence, while at the same time permitting rehabilitation and reassimilation into society. Permanently and automatically banishing an individual from the country may go well beyond those goals.

The disproportionality that results from imposing mandatory deportation is even more apparent when

[18] Indeed, the term "conviction" as used in the INA includes dispositions for which the sentence was suspended, or for which the penalty consisted of participation in rehabilitative programs, community service, or fines. 8 U.S.C. § 1101(a)(48). Withheld adjudications and deferred prosecutions are also included. *In re Punu*, 22 I. & N. Dec. 224 (B.I.A. 1998). A disposition that is not a "conviction" under state criminal law may still be a "conviction" for immigration purposes. *In re Salazar-Regino*, 23 I. & N. Dec. 223, 231 (B.I.A. 2002) (en banc).

misdemeanor offenses are considered.[19] Misdemeanor possession charges tend to result in probation, time served, or lesser penalties, rather than incarceration.[20]

That some states have chosen to reduce sentences or otherwise ameliorate criminal justice consequences for drug possession offenses further illustrates the disparity between the criminal justice treatment of low-level possession crimes, and the severity of mandatory deportation as a collateral consequence.[21] Arizona, for example, mandates probation and treatment for certain first and second-time drug

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[19] Misdemeanor possession offenses exist in many jurisdictions. *See, e.g.*, Alaska Stat. § 11.71.050 (various controlled substances, including marijuana and barbituates); Del. Code 16 §§ 4753-4754 (any narcotic); Haw. Rev. Stat. § 712-1246.5 ("any harmful drug"); Mass. Gen. Laws 94C § 34 (any controlled substance except second heroin offense); Mich. Comp. Laws § 333.7403 (marijuana and various hallucinogens); N.Y. Penal Law § 220.03 (any controlled substance); Tenn. Crim. Code § 39-17-418 (cocaine); Wyo. Stat. § 35-7-1031(c) (any controlled substance).

[20] *See, e.g.*, Stephanie Morin, New York State Defenders Assoc., Analysis of New York State Division of Criminal Justice Services Misdemeanor Drug Offense Statistics for the Years 1995 Through 2004 (Oct. 15, 2005), http://www.nysda.org/idp/docs/05_Analysis.pdf; New York State Dispositions – 1995 through 2004, http://www.nysda.org/idp/docs/NYS.Conviction.Sent.and.Len.pdf (in over 60% of the 258,655 New York misdemeanor possession convictions from 1995-2004, the defendant received time served, probation, conditional discharge, or a fine); Mass. Dep't of Corr., New Court Commitments to Massachusetts County Correctional Facilities During 2004, at 16 tbl. 15 (Nov. 2005), http://www.mass.gov/Eeops/docs/doc/research_reports/2004cty.pdf (showing that persons convicted of simple possession represent a small fraction of those incarcerated in Massachusetts for drug offenses).

[21] *See* Jon Wool & Don Stemen, *Changing Fortunes or Changing Attitudes? Sentencing and Corrections Reforms in 2003*, at 1 (Mar. 2004), http://www.vera.org/publication_pdf/226_431.pdf (in 2003 "[t]hirteen states made significant changes, ranging from the repeal or reduction of mandatory minimum sentences for drug-related offenses to the expansion of treatment-centered alternatives to incarceration"); *see also id.* at 1-2, 14 (noting that some states have concluded that incarceration-focused approaches to possession crimes are unsuccessful).

possession offenders.[22] California passed a similar law,[23] and Texas has decided to punish low-level, first-time possession offenses classified as felonies with community supervision and substance abuse treatment, not incarceration.[24]

Finally, defendants charged with low-level possession offenses may receive minimal procedural protections. This reflects the high volume of such offenses and the expectation that minimal criminal law consequences will result. In New York State, for example, there are tens of thousands of misdemeanor possession arrests annually. New York State Div. of Crim. Just. Servs., Adult Arrests: N.Y. State by County and Region 1994, http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year1994.htm. New York City criminal court judges handle thousands of cases per year. Daniel Wise, *Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics Investigation*, N.Y. L.J., May 22, 2000, at 1. Most of these misdemeanors are of necessity processed extremely quickly and without substantial procedural protections. To varying degrees, this is true throughout the country. Providing relatively few procedural protections in a criminal case with low stakes may be appropriate; where mandatory deportation results, however,

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[22] Ariz. Rev. Stat. § 13-901.01; *see also State v. Gomez*, 127 P.3d 873, 877 (Ariz. 2006) (describing the intent behind the Arizona statute as being a desire to more effectively treat drug addicts and to save the state millions of dollars in incarceration costs).

[23] *See* Cal. Penal Code § 1210.1 (requiring probation for most first or second nonviolent drug possession convictions); *People v. Williams*, 131 Cal. Rptr. 2d 546, 549-50 (Cal. Ct. App. 2003).

[24] *See* Tex. Crim. P. Code art. 42.12 § 15(a)(1) (as amended by Texas H.B. 2668, Chapter 1122 (2003)); Tex. Health & Safety Code §§ 481.115(b), 481.1151(b)(1), 481.116(b), 481.121(b)(3), 481.129(g)(1); *see also Holcomb v. State*, 146 S.W.3d 723, 733 (Tex. App. 2004) ("The 2003 [Texas sentencing] amendment . . . require[s] mandatory clemency in the form of probation rather than leaving probation to the discretion of the trial court.").

the stakes are considerably higher than such treatment warrants.

B. Disproportionality Between Collateral and Direct Consequences Compromises the Integrity of the Criminal Justice System.

Where collateral immigration consequences greatly outweigh direct criminal consequences of a conviction, injustices for the defendant are not the only result. This disproportionality also adversely affects the administration of the criminal justice system and its key actors – prosecutors, defense attorneys, and judges. Robert Johnson, a former President of the National District Attorneys Association and a current officer of the ABA's Criminal Justice Section task force, has described these problems:

> Increasingly we see situations in which the collateral consequences of a criminal conviction exceed the consequences that are imposed by a judge upon sentencing. . . . . A foreigner legally in this country for many years, who may be married to a U.S. citizen and/or parent of U.S. citizens, can be deported for relatively minor offenses. . . .
>
> [A]s prosecutors, we see the effects of these collateral consequences. When the consequences are significant and out of anyone's control, victims of criminal conduct are less likely to cooperate. Defendants will go to trial more often if the result of a conviction is out of the control of the prosecutor and judge and is disproportionate to the offense and offender. . . . [M]any judges change their rulings, sentencing felonies as misdemeanors and expunging records to avoid what they believe to be an unjust result. A judge in my jurisdiction once allowed a felon to withdraw his plea of guilty after he served his prison sentence to avoid a deportation. . . .

> [T]he collateral consequences of a conviction are so severe that we are unable to deliver a proportionate penalty in the criminal justice system without disproportionate collateral consequences. As a prosecutor, you must comprehend this full range of consequences that flow from a crucial conviction. If not, we will suffer the disrespect and lose the confidence of the very society we seek to protect.[25]

Disproportionality between collateral and direct consequences adversely affects the prosecutorial function. "The duty of the prosecutor is to seek justice, not merely to convict." ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 3-1.2(c) (3d ed. 1993). In order to carry out that duty, prosecutors enjoy broad discretion to decide whether and what charges to bring against an individual. *See id.* Commentary to ABA Criminal Justice Standard 3-1.2(c) at 5. Taking into account collateral consequences goes hand in hand with these obligations.[26]

Where collateral consequences are excessive in relation to the offense and cannot be averted upon conviction, however, prosecutors may find themselves sacrificing traditional criminal justice principles. Pursuing a conviction may serve the goals of punishment or deterrence but cannot be reconciled with the duty to seek justice. This can lead

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[25] Message from the President Robert M.A. Johnson, Nat. Dist. Attys. Ass'n, The Prosecutor, May/June 2001, http://www.ndaa-apri.org/ndaa/about/president_message_may_ june_2001.html ("Message from the President, NDAA").

[26] *See id.* Standard 3-3.9(b)(iii) (in deciding whether to bring charges a prosecutor may consider disproportion of the authorized punishment to the particular offense or offender); NDAA, National Prosecution Standards 42.3 (2d ed. 1991) (prosecutors may consider "[u]ndue hardship caused to the accused" in deciding whether to bring charges).

prosecutors to change a charge's wording or which offense is charged, or even to decline to bring low-level charges.[27]

In the process, state criminal law enforcement may be distorted. The non-citizen may suffer injustice if harsh immigration consequences result from a low-level offense conviction. Yet averting such consequences can require extraordinary steps that impede the fulfillment of criminal justice goals. A prosecutor might charge a non-citizen with a lesser crime to avoid excessive collateral immigration consequences. Ironically, a U.S. citizen who engages in the same conduct may therefore be charged more severely and receive harsher treatment than a non-citizen. *See* Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. at 1424-25 & n.37.

Disproportionate collateral consequences also adversely affect the prosecutorial function because those consequences can dramatically alter defendants' incentives. The incentive to go to trial increases greatly where mandatory deportation will follow a plea, *see St. Cyr*, 533 U.S. at 323, even where criminal justice considerations (such as the likelihood of conviction or the prospect of an acceptable criminal sanction upon a plea) dictate otherwise. Yet prosecutors, like defense counsel, face resource constraints. Plea bargaining obviates the need for trial and concomitant expense, relieves uncertainty, and gives the parties some control over the resulting disposition. Resolving cases by plea in appropriate circumstances is therefore, as a practical matter, critical to the administration of criminal justice and to prosecutors' ability to manage their resources. Relatively minor offenses such as simple possession crimes are prime candidates for

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[27] *See* Robert A. Mikos, *Enforcing State Law in Congress's Shadow*, 90 Cornell L. Rev. 1411, 1454-55 (2005) (discussing examples in which prosecutors went to great lengths to circumvent defendant's deportation); Susan L. Pilcher, *Justice Without a Blindfold: Criminal Proceedings and the Alien Defendant*, 50 Ark. L. Rev. 269, 303-06 (1997)).

resolution by plea. Prosecutors face significantly increased resource pressures where defendants go to trial because a plea would trigger mandatory deportation.

The disparity between collateral and criminal consequences also affects defense counsel's role. Where mandatory deportation will result from a conviction, a defense attorney will often pursue any and all strategies to avoid that result. As one widely used criminal defense practice guide explains: "[T]he permanent immigration consequences greatly outweigh the criminal consequences in the vast majority of all criminal cases. . . . [M]ost defendants[] who . . . understand the exact meaning of the adverse immigration consequences of a proposed plea bargain, will be willing to sacrifice traditional criminal defense goals in order to protect their immigration status." Norton Tooby & Katherine A. Brady, *Criminal Defense of Immigrants* § 1.4 at 20 (3d ed. 2003). For example, assuming the non-citizen defendant considers avoiding mandatory deportation critical (almost invariably so), defense counsel is far more likely than in the ordinary case to advise that client to go to trial. *See id.* The more broadly the aggravated felony provision is construed, the more counsel's decisions are affected.

The defense function is also affected in other ways. Counsel should accurately advise clients of collateral consequences.[28] This is even more critical where the stakes are as high as mandatory deportation. *See St. Cyr*, 533 U.S. at 322 n.48; *see also, e.g.*, *People v. Correa*, 485 N.E.2d 307 (Ill. 1985). Indeed, inaccurate advice may be a basis for a defendant to withdraw or attack a plea, including by claiming

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[28] *See* ABA Standards for Criminal Justice, Pleas of Guilty, Standard 14-3.2(f) (3d ed. 1999) ("To the extent possible, defense counsel should determine and advise the defendant sufficiently in advance of the entry of any pleas, as to the possible collateral consequences[.]").

ineffective counsel.[29] Yet it is extraordinarily difficult to advise clients when the immigration statute is read in an overly broad and non-coherent manner. Deeming low-level possession offenses to be "illicit trafficking" "aggravated felonies" is such a reading. These offenses involve no trafficking and are misdemeanors under either federal or state law. So construed, the statute can be a labyrinth of traps for the unwary, even for counsel armed with manuals such as the ABA's *The Criminal Lawyer's Guide to Immigration Law – Questions and Answers*. That most defense counsel are under-funded public defenders or legal service providers with high caseloads renders the problem more acute.

Finally, where the offense is classified as a misdemeanor under state law, there is a realistic possibility that a defendant could be unrepresented. Many states permit conviction for a misdemeanor without counsel if there will be no incarceration.[30] The critical defense role of accurately

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[29] *See Rollins v. State*, 277 Ga. 488, 492 (Ga. 2004) (holding that defendant who was erroneously advised that drug possession plea under state's First Offender Act would not result in deportation was entitled to withdraw plea); *In re Resendiz*, 25 Cal. 4th 230, 248 (2001) (holding that misadvice regarding immigration consequences may constitute ineffective assistance); *Correa*, 108 Ill. 2d at 553 ("[E]rroneous and misleading advice on the crucial consequence of deportation [meant] the defendant's pleas of guilty were not intelligently and knowingly made and therefore were not voluntary[.]"). *See also* ABA Criminal Justice Standard 14-2.1 (providing that a court should permit withdrawal of a plea if involuntary).

[30] States in which misdemeanor possession convictions may be uncounseled include Florida, *see* Fla. Stat. § 893.13(6)(a) (first degree misdemeanor marijuana possession offense); Fla. R. Crim. P. 3.111(b)(1) (no right to counsel if judge certifies there will be no incarceration); Fla. Stat. § 27.512 (court may not appoint public defender if has issued no-incarceration order), Massachusetts, *see* Mass. Gen. Laws ch. 94C § 34; *id.* ch. 274 § 1 (first and second marijuana possession offenses are misdemeanors); *id.* ch. 211D § 2A (no counsel appointed of the judge states on the record that a misdemeanor defendant will not be sentenced to incarceration); and New Hampshire, *see* N.H. Rev. Stat. § 318-B:26

advising a defendant of immigration consequences is necessarily undermined where there is no counsel. *See* ABA Criminal Justice Standard 14-3.2(f). Yet second or subsequent misdemeanors have been deemed aggravated felonies. *See, e.g., Sanchez-Villalobos*, 412 F.3d 572.

Nor is the role of the judiciary unaffected. Judges recognize that extreme immigration consequences may not be warranted in every case. ABA Standards support this principal.[31] In order to render justice and avoid condemning non-citizen defendants to mandatory deportation, judges may exercise leniency or otherwise take steps not ordinarily taken. *See* Message from the President, NDAA.

Judges too are burdened by the incentives disproportionate collateral consequences create for non-citizen defendants. In criminal courts around the country, defendants charged with minor offenses may be arraigned, plead guilty, and be sentenced all on the same day. Judges may not have the luxury of spending more than a few minutes on each case. State criminal justice systems have come to rely heavily on plea bargaining to diminish the administrative burden of dealing with large numbers of cases, including low-level drug crimes. *See Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."). But defendants

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(class A misdemeanor marijuana possession offense); *id.* § 625:9 (VII) (a prosecutor may change a nonviolent class A misdemeanor charge to a class B misdemeanor charge) (amended in non-relevant part by 2006 N.H. Laws Ch. 64 (H.B. 1636)); *id.* § 604-A:2 (no right to appointed counsel for class B misdemeanors).

[31] *See* ABA Criminal Justice Standards 19-1.2 & 19-2.2; *see also id.* Standard 19-2.4 (courts should take into account collateral sanctions in determining a sentence, and should inform the defendant of those sanctions); *id.* Standard 19-2.5 (courts should be authorized to grant relief from collateral sanctions).

facing mandatory deportation are far more likely not only to go to trial but also to litigate post-conviction, such as by seeking to withdraw pleas or to appeal or collaterally attack their convictions. Judges, as well as prosecutors and defense counsel, therefore must expend valuable resources that might be better dedicated to matters other than intensive litigation over low-level charges.

In sum, the disproportionality between the collateral consequences of aggravated felony convictions and the direct consequences of low-level possession crimes produces myriad adverse affects on the fair and orderly administration of criminal justice.

C. The Rules of Lenity and Constitutional Avoidance, and the Fair and Regular Administration of Criminal Justice, Require a Narrow Reading of the Illicit Trafficking Aggravated Felony Provision.

Deeming low-level drug possession offenses to be illicit trafficking aggravated felonies creates a dramatic disparity between collateral and direct criminal consequences. Should the Court find the statute ambiguous, the rules of lenity and constitutional avoidance apply. Each canon compels the conclusion that the illicit trafficking aggravated felony provision only applies to felony offenses involving trafficking.

The well-settled rule of lenity requires that "any lingering ambiguities in deportation statutes [be construed] in favor of the alien." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987); *see also United States v. Bass*, 404 U.S. 336, 348-49 (1971) (rule of lenity applies to criminal law provisions). A key principle animating this rule is that "fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Bass*, 404 U.S. at 348; *see also St. Cyr*, 533 U.S.

at 321 (explaining that considerations of fair notice, reasonable reliance, and settled expectations properly play a role in statutory interpretation). Fair warning is sorely lacking when simple possession crimes trigger mandatory deportation for "illicit trafficking." Similarly, any ambiguity as to the meaning of "aggravated felony" must be resolved in favor of a narrow reading that does not include misdemeanors. Individuals charged with misdemeanor possession offenses lack fair notice that they will be deemed "aggravated felons." Indeed, the criminal justice system commonly treats these offenses in a summary fashion, with minimal procedural protections and speedy disposition by plea bargain in almost all cases. These defendants can reasonably expect relatively minor direct criminal consequences. For mandatory deportation to follow is quite another matter.[32]

The rule of constitutional avoidance also counsels that illicit trafficking aggravated felonies do not include low-level possession crimes. Assuming there were "two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail[.]" *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). This principle "rest[s] on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id.* at 381.[33] Deeming low-level simple possession to constitute an illicit trafficking aggravated felony threatens to run afoul of the void for

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[32] The rule of lenity compels reading the statute to exclude low-level possession crimes for additional reasons as well. *See* Lopez Br. at III.B & C; Toledo-Flores Br. at E.

[33] *See also* Adrian Vermeule, *Saving Constructions*, 85 Geo. L.J. 1945, 1960-61 (1997) (providing examples of cases where the Court construed a statute narrowly to avoid a constitutional question ultimately resolved in favor of the broader reading).

vagueness doctrine, itself based in the Due Process Clause. *See Jordan v. De George*, 341 U.S. 223, 230 (1951). That doctrine, applicable in the immigration context "in view of the grave nature of deportation," requires that a statute "convey[] sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Id.* at 231-32. Such warning is lacking in cases involving low-level possession offenses, including Petitioner's as well as second or subsequent misdemeanors.[34] The "illicit trafficking" "aggravated felony" statutory language does not convey that such offenses would be included. The manner in which the criminal justice system deals with such offenses further demonstrates this point. These offenses may be addressed in a fairly summary fashion; the direct criminal consequences are relatively low stakes.[35] A non-citizen in such circumstances lacks sufficient warning as to deportation consequences.

III. THE ILLICIT TRAFFICKING AGGRAVATED FELONY PROVISION SHOULD BE CONSTRUED TO AVOID NON-UNIFORMITY PROBLEMS.

Congress is generally presumed to legislate with uniformity in mind. *See 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, immigration law is quintessentially a matter of federal policy and should be uniform.

Uniformity in immigration law also has constitutional underpinnings. The one provision in the U.S. Constitution expressly referring to the federal immigration power

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[34] The constitutional avoidance principle applies "whether or not th[e] constitutional problems pertain to the particular litigant before the Court." *Clark*, 543 U.S. at 724.

[35] In some instances, convictions could even be obtained without counsel.

provides: Congress shall "establish a uniform Rule of Naturalization." U.S. Const. art. I, § 8. Congress's power over naturalization must "necessarily be exclusive [to the federal government]; because if each State had power to prescribe a Distinct Rule, there could be no Uniform Rule." The Federalist No. 32 at 199 (Alexander Hamilton) (Clinton Rossiter ed. 1961).[36] This Court has not construed the Uniform Rule provision, but has recognized the principle of uniformity in immigration law. *See Henderson v. Mayor of New York*, 92 U.S. 259, 273 (1875) ("The laws which govern the right to land passengers in the United States from other countries ought to be the same in New York, Boston, New Orleans, and San Francisco," requiring "a uniform system or plan[.]"); *Hines v. Davidowitz*, 312 U.S. 52, 73 (1941) ("[T]he treatment of aliens, in whatever state they may be located, [is] a matter of national moment.").[37]

ABA policy further counsels uniformity. Limiting collateral sanctions "to those that are specifically warranted by the conduct constituting a particular offense" necessarily means that immigration consequences should not vary based on the arbitrary fact of geography. ABA Criminal Justice Standard 19-1.2. ABA policy that the aggravated felony provision should not be read to include misdemeanors under

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[36] The Constitution refers to naturalization, but "the Federal Government['s]" "broad constitutional powers" include "determining what aliens shall be admitted to the United States, the period they may remain, regulation of their conduct before naturalization, and the terms and conditions of their naturalization." *Takahashi v. Fish & Game Comm'n*, 334 U.S. 410, 419 (1948). Also, aggravated felonies implicate naturalization. *See supra* p.14 note 17.

[37] *See also Graham v. Richardson*, 403 U.S. 365, 382 (1971) ("Congress' power is to 'establish a uniform Rule of Naturalization.' A congressional enactment construed so as to permit state legislatures to adopt divergent laws on the subject of citizenship requirements for federally supported welfare programs would appear to contravene this explicit constitutional requirement of uniformity.").

either state or federal law also recognizes that including such crimes raises non-uniformity problems. *See infra* pp.29-30.[38]

Thus, the illicit trafficking aggravated felony provision should be construed so as to avoid non-uniformity problems arising from attaching immigration consequences to state-law convictions. Constitutional concerns underscore that Congress did not intend to foster non-uniformity through the aggravated felony provision. *See Clark*, 543 U.S. at 380-81.

As presently applied, the illicit trafficking aggravated felony provision triggers varying immigration consequences depending on the geographical happenstance of where the non-citizen was convicted. On the one hand, as Petitioner's case illustrates, simple possession may be deemed an aggravated felony if the offense is a felony under state law. But while some states have made a local policy choice to classify possession crimes as felonies, others have chosen differently. Basing the aggravated felony designation on the state's felony classification has "the paradoxical result of allowing states, in effect, to impose banishment from the United States as a sanction for a violation of state law. For then if a state made the possession of one marijuana cigarette a felony, which it is perfectly entitled to do, it would be in effect annexing banishment from the United States to the criminal sanction." *Gonzales-Gomez v. Achim*, 441 F.3d 532, 535 (7th Cir. 2006).[39]

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[38] Uniformity is also a matter of basic fairness. *See Francis v. INS*, 532 F.2d 268, 273 (2d Cir. 1976) ("Fundamental fairness dictates that permanent resident aliens who are in like circumstances, but for irrelevant and fortuitous factors, be treated in a like manner.").

[39] *See also Gerbier*, 280 F.3d at 312 (noting the "real possibility" of "disparate results" that contravene the uniformity principle if the fact that a state classifies a drug offense as a felony suffices to make it an "aggravated felony"). Nor is this the first time the aggravated felony provision has been applied, at least initially, so as to compromise uniformity. *See, e.g.*, *Solorzano-Patlan v. INS*, 207 F.3d 869, 874 (7th Cir. 2000) (rejecting the former INS's argument that a non-citizen's

On the other hand, the approach adopted in some circuits of deeming second or subsequent state-law misdemeanors to be aggravated felonies also raises non-uniformity problems. Such offenses could be prosecuted as felonies under federal law. *See* 21 U.S.C. § 844. However, federal law imposes strict requirements on the government for doing so. The United States Attorney must file an information alleging, and then must subsequently prove, that the defendant had a valid final conviction for a prior drug offense. *See id.*; *Steele*, 236 F.3d at 137-38. The defendant may challenge the prior conviction as unlawfully obtained. *See* 21 U.S.C. § 851. States vary as to whether they have such procedural schemes for repeat misdemeanor offenses and whether those procedures are utilized.[40] Thus, depending on the state at issue, a non-citizen with a second misdemeanor may or may not have received those additional protections.[41]

Non-uniformity also results from deeming second misdemeanor possession convictions to be aggravated felonies for another reason. As described above, the procedural protections afforded during the criminal justice process can vary depending on whether the charge is for a felony or a misdemeanor. *See supra* pp.16-17. And while states typically classify all offenses actually involving trafficking as felonies, they vary as to how they classify and

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conviction was a "burglary offense" aggravated felony simply because he was convicted under an Illinois statute entitled "burglary," where other states would not apply that label and the Illinois offense did not correspond to the generic "burglary" definition).

[40] Massachusetts, for example, has an enhanced penalty provision for recidivists that imposes analogous requirements. *See* Mass. G.L. ch. 278, § 11A. But many states do not.

[41] Requiring that the state prosecution satisfied procedural requirements analogous to those existing under federal law is one approach to this problem, *see Steele*, 236 F.3d at 137-38, but does not ameliorate non-uniformity. This rule could only apply in states that have such procedural requirements, and only some states do.

treat simple possession offenses. In a state where the offense is a misdemeanor, mandatory deportation could result based on a conviction obtained with a lesser degree of due process than in other states. The variance in treatment could be dramatic in congested court systems where misdemeanor offenses may be resolved in a matter of minutes, or in states that may not always provide counsel for a misdemeanor.

The statute should be construed to avoid non-uniformity problems. *See Clark*, 543 U.S. at 380-81. Non-uniformity implicates the "uniform Rule" requirement.[42] Moreover, permitting the accident of geography to determine whether an offense is an aggravated felony leads to fair notice problems. A non-citizen cannot be expected to reasonably understand or be able to predict the collateral consequences of a low-level offense conviction in those circumstances. *See supra* pp.25-26. Adopting a narrower reading of the illicit trafficking aggravated felony provision avoids these constitutional doubts. The aggravated felony designation should apply only to state-law felonies and only where those felonies are not misdemeanors under federal law. Furthermore, the designation should apply only when trafficking is involved. In this manner, the non-uniformity introduced by sweeping individuals such as Petitioner, or second-time misdemeanants, into the "illicit trafficking" aggravated felony category would be avoided.

CONCLUSION

For the foregoing reasons, the ABA respectfully submits that the Court should reverse the decision of the Court below.

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[42] *See generally* Iris E. Bennett, *The Unconstitutionality of Nonuniform Immigration Consequences of 'Aggravated Felony' Convictions*, 74 N.Y.U. L. Rev. 1696 (1999).

Respectfully submitted,

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June 19, 2006