No. 09-60

IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, THE NATIONAL ASSOCIATION OF FEDERAL DEFENDERS, THE IMMIGRANT DEFENSE PROJECT, THE IMMIGRANT LEGAL RESOURCE CENTER, THE NATIONAL IMMIGRANT JUSTICE CENTER, AND THE NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a lawful permanent resident who has been "convicted" of an "aggravated felony" is ineligible to seek cancellation of removal. 8 U.S.C. § 1229b(a)(3). The courts of appeals have divided 4-2 on the following question presented by this case: Whether a person convicted under state law for simple drug possession (a federal law *misdemeanor*) has been "convicted" of an "aggravated *felony*" on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession.

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INTERESTS OF *AMICI CURIAE*[1]

Amici are organizations of defense attorneys or organizations that advise defense attorneys whose clients could face removal and other severe immigration consequences following a guilty plea or conviction at trial. This case presents a mature and entrenched split among the courts of appeals concerning a critically important issue that has significantly hampered *amici*'s ability to effectively advise noncitizens and impacts the lives and families of immigrants throughout the United States: whether two disparate, unconnected, low-level possession adjudications can be combined to be deemed a conviction of "illicit trafficking in a controlled substance," and therefore an "aggravated felony," for purposes of federal immigration law. The "aggravated felony" label carries drastic consequences, triggering bars to asylum, citizenship, and relief from removal. The circuit split makes it essentially impossible for *amici* to effectively advise immigrants and their defense counsel about the immigration consequences of second or subsequent drug possession charges during either criminal proceedings or subsequent immigration proceedings.[2] *Amici* are also unable to properly train counsel and judges about the immigration consequences of low-level drug possession adjudications.

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[1] Letters of consent have been filed with the Clerk of the Court. Pursuant to Rule 37.6, *amici* state that no counsel for a party authored any part of the brief, and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

[2] Immigration judges are bound to apply the rule of the circuit in which they sit. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394–96 (BIA 2002).

As organizations concerned with the proper and consistent interpretation of the intersection of immigration and criminal law, *amici* respectfully urge the Court to resolve the important issues raised in this case.

The **National Association of Criminal Defense Lawyers** (NACDL) is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

The **National Legal Aid and Defender Association** (NLADA), a non-profit corporation, works to support indigent defender services and civil legal assistance to those who cannot afford lawyers. Through its Defender Legal Services division, NLADA provides training, information, and technical assistance to public defender offices and others who provide legal services to indigent criminal defendants. NLADA's American Council of Chief Defenders is a leadership council that is dedicated to promoting fair justice systems and ensuring that citizens who are accused of crimes have adequate legal representation. NLADA has approximately 680 program members, representing 12,000 lawyers, including non-

profit organizations, government agencies, legal aid organizations, and law firms; NLADA also has approximately 1,000 individual members. NLADA traces its roots to the National Alliance of Legal Aid Societies, which was formed by 15 legal aid societies in 1911. It is the oldest and largest national nonprofit membership association that devotes its resources exclusively to serving the equal justice community. NLADA is a leading voice in public policy debates on equal justice issues. In pursuit of that effort, NLADA has filed amicus curiae briefs in major constitutional cases before the United States Supreme Court and other federal and state courts involving the administration of the criminal justice system and the right to counsel.

The **National Association of Federal Defenders** (NAFD) was formed in 1995 to enhance the representation provided to indigent criminal defendants under the Criminal Justice Act, 18 U.S.C. § 3006A, and the Sixth Amendment to the United States Constitution. The NAFD is a nationwide, nonprofit, volunteer organization whose membership is composed of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act.

The **Immigrant Defense Project** (IDP) provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law. This Court has accepted and relied on amicus curiae briefs submitted by IDP in key cases involving the proper application of federal immigration law to immigrants with past criminal adjudications, including this Court's recent decision in *Lopez v. Gonzalez*, 549 U.S. 47, 127 S. Ct. 625 (2006). See Brief for *Amici Curiae* New

York State Defenders Association Immigrant Defense Project, et al., *Lopez v. Gonzales*, 549 U.S. 47 (2006) (No. 05-547), available at http://www.immigrantdefenseproject.org/webPages/drugLitigationInit.htm; see also Brief for *Amici Curiae* New York State Defenders Association Immigrant Defense Project, et al., *Leocal v. Ashcroft*, 543 U.S. 1 (2004) (No. 03-583); Brief for *Amici Curiae* New York State Defenders Association Immigrant Defense Project, et al., *INS v. St. Cyr*, 533 U.S. 289 (2001) (No. 00-767) (cited at *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001)).

The **Immigrant Legal Resource Center** (ILRC) is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status, and the immigration consequences of criminal adjudications.

Heartland Alliance's **National Immigrant Justice Center** (NIJC) is a Chicago-based organization working to ensure that the laws and policies affecting non-citizens in the United States are applied in a fair and humane manner. NIJC provides free and low-cost legal services to approximately 8,000 non-citizens per year, and represents hundreds of non-citizens who encounter serious immigration obstacles as a result of entering guilty pleas in state criminal court without realizing the immigration consequences. For nearly ten years, NIJC has offered no-cost trainings and consultation to criminal defense attorneys representing non-citizens, to advise them

on the likely immigration consequences resulting for their clients from various potential dispositions in the criminal case; NIJC also publishes manuals designed for criminal defense attorneys who defend non-citizens in criminal proceedings. Because of the severity of the immigration consequences for non-citizens, NIJC has a strong interest in ensuring that criminal convictions have consequences which are reasonable, predictable, and publicly known.

The **National Immigration Project of the National Lawyers Guild** (National Immigration Project) is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. The National Immigration Project provides legal training to the bar and the bench on the immigration consequences of criminal conduct and is the author of Immigration Law and Crimes and three other treatises published by Thomson-West. The National Immigration Project has participated as amicus curiae in several significant immigration-related cases before this Court.

SUMMARY OF ARGUMENT

The circuit courts now apply the aggravated felony label to simple drug possession offenses in dramatically different ways. The Fifth Circuit below has joined the Seventh Circuit in rejecting the considered position of the government's own Board of Immigration Appeals (BIA) and reaffirmed its commitment to one of the most sweeping and aggressive interpretations of the term "aggravated felony"—explicitly rejecting the holdings of four other circuit courts (the First, Second, Third, and Sixth Circuits)—when it opted to treat petitioner's misdemeanor conviction

for possession of one tablet of Xanax, with its ten day jail sentence, as a crime within the meaning of 8 U.S.C. § 1101(a)(43)(B) ("illicit trafficking in a controlled substance"), and therefore an "aggravated felony."[3]

The discord among the circuit courts impacts large numbers of immigrants nationwide. The Department of Homeland Security (DHS) often detains a non-citizen with a low-level drug possession conviction in a jurisdiction outside the circuit in which the adjudication occurred, and often transfers the non-citizen several times from one detention facility to another. Non-citizens with New York adjudications, for example, are regularly transferred to detention facilities in various circuits outside the Second Circuit including facilities in Pennsylvania (Third Circuit), Louisiana and Texas (Fifth Circuit) and New Mexico (Tenth Circuit). Because immigration judges apply the law of the circuit in which they sit, the combination of the circuit split and these routine transfers have rendered non-citizens and their counsel entirely unable to determine what law will apply to determine the immigration effect of low-level drug possession convictions.

Virtually all non-citizens, including lawful permanent residents, are deportable if they have been convicted of a drug-related offense. When that drug offense is labeled an "aggravated felony," however, immigration judges are barred from granting cancellation of removal for certain lawful permanent resi-

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[3] *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009). *Accord Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009).

dents, asylum, or several basic forms of relief from removal, no matter how harmful removal may be for the non-citizen or her family. There is no exception for lawful permanent residents who have spent most of their lives in the United States, asylum seekers who have experienced persecution in their home countries, members of the U.S. Armed Forces, or immigrants with U.S. families.

The Fifth Circuit's interpretation of the "illicit trafficking" definition sweeps low-level and non-criminal simple possession offenses within its ambit, amounting to a bait-and-switch for non-citizens facing such charges. In some states, limited procedural safeguards exist for these low-level adjudications, which may result in no more than a small fine and may leave a defendant with no "criminal record" as defined under state law. In New York State, for example, many such possession offenses are defined as non-criminal violations. The relatively perfunctory processing of low-level drug charges is rooted in the understanding that these defendants face less serious direct and collateral consequences. Essentially duped into believing that these charges were resolved with a quick plea, many non-citizens now find themselves subject to U.S. immigration law's most severe penalties, despite the fact that they were charged with the most minor drug possession offenses that exist within state penal codes.

Given the severity of the penalties that follow the application of the aggravated felony label, the uncertainty created by the circuit courts' divergent applications of the "aggravated felony" term should now be speedily resolved. The circuit split undermines the rule of law by making it impossible for counsel to advise their clients accurately about the potential consequences of a disposition because that disposition

can lead to vastly different consequences depending on where DHS elects to commence removal proceedings in immigration court.

Amici request that the Supreme Court grant certiorari to resolve this important issue, which impacts the lives and families of many legal permanent residents. The circuit split will continue to affect a growing number of non-citizens until the Supreme Court intervenes. Indeed, other similarly affected petitioners have already sought certiorari on this issue since the filing of the certiorari petition in this case. *See Escobar v. Holder*, No. __-___ (filed Aug. 17, 2009), *Fernandez v. Holder*, No. 09-5386; *Erazo-Villatoro v. United States*, No. 09-5589.

ARGUMENT

I. CERTIORARI IS WARRANTED TO RESOLVE THE CIRCUIT SPLIT DUE TO THE LARGE NUMBER OF LEGAL PERMANENT RESIDENTS WHO ARE CONVICTED OF LOW-LEVEL POSSESSION OFFENSES, OFTEN WITH MINIMAL PROCEDURAL PROTECTIONS.

The split among the circuit courts of appeals concerns how to determine whether a state-law drug possession offense fits the aggravated felony definition of "illicit trafficking in a controlled substance."[4] The circuits are divided over whether, under 8 U.S.C. §§ 1229b(a)(3) and 1101(a)(43)(B), immigration courts can transform two disparate, low-level controlled substance possession offenses into a "drug

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[4] For a complete summary of the circuit split, see Petition of Petitioner-Appellant for a Writ of Certiorari, *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 2009 WL 1492821 (5th Cir. 2009), *petition for cert. filed*, No. 09-50 (June 15, 2009).

trafficking" aggravated felony, dictating essentially mandatory removal from the United States.

Large numbers of legal permanent residents across the country are affected by the circuit split. The Fifth Circuit's decision in *Carachuri-Rosendo v. Holder* holds that a second or subsequent low-level state drug possession offense can qualify as an aggravated felony in immigration proceedings, because the immigration judge can refer back to prior conduct not covered by the actual statute of conviction.[5] This rule visits extremely harsh consequences on lawful permanent residents who may have quickly pled guilty to a low-level drug possession offense and received a small fine or several days in jail.

DHS apprehends and detains a large and growing number of non-citizens on the basis of low-level drug possession offenses. Over the past fifteen years, the size of the daily population in DHS detention facilities more than quadrupled, from 6,785 in 1994 to 31,244 in 2008.[6] In 2008, DHS detained approximately 379,000 non-citizens, removing approximately 97,100 due to alleged criminal convictions.[7] Drug related offenses accounted for 35.9% of these removals.[8]

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[5] 570 F.3d 263 (5th Cir. 2009).

[6] ALISON SISKIN, CONGRESSIONAL RESEARCH SERV., IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2008), available at http://bibdaily.com/pdfs/CRS%20detention%201-30-08.pdf.

[7] DEPARTMENT OF HOMELAND SECURITY ANNUAL REPORT, IMMIGRANT ENFORCEMENT ACTIONS (2008), available at http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_08.pdf.

[8] *Id.*

Across the country, low-level drug possession offenses are processed in great numbers and with great speed, placing severe demands on a strained indigent defense system. The New York criminal justice system illustrates this principle. The New York example is particularly relevant because non-citizens with New York convictions are regularly detained and placed in removal proceedings in other jurisdictions, including the Fifth Circuit. These New Yorkers face dramatic immigration consequences despite New York State's minimal procedural protections for low-level drug offenders.

Between 1995 and 2004, there were 258,655 convictions for Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor under New York law. Of this number, almost sixty percent resulted in sentences of time served, probation only, conditional discharge, or fines. Of the remainder, the median length of sentence imposed was between nineteen and twenty days.[9] In 2008, of the total 226,267 convictions following all misdemeanor arrests in New York State, less than twenty percent received jail or prison sentences.[10]

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[9] N.Y. STATE DEFENDERS ASS'N, ANALYSIS OF NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES MISDEMEANOR DRUG OFFENSE STATISTICS FOR THE YEARS 1995 THROUGH 2004 (2005), available at http://www.immigrantdefenseproject.org/docs/05_Analysis.pdf. A person is guilty of Criminal Possession of a Controlled Substance in the Seventh Degree when he knowingly and unlawfully possesses a controlled substance. N.Y. PENAL LAW § 220.03.

[10] N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT DISPOSITIONS OF ADULT ARRESTS 2004-2008: N.Y. STATE BY COUNTY AND REGION, available at http://criminaljustice.state.ny.us/crimnet/ojsa/dispos/index.htm.

Not surprisingly, most low-level drug offenses are processed quickly and without substantial procedural protections because of the understanding that serious direct and collateral consequences will not follow from a conviction. Defendants facing such charges often plead guilty at arraignment, and are arraigned, plead, and sentenced on the same day.[11] Because judges in New York Criminal Court handle approximately eighty criminal cases a day, judges can often spend only minutes per case.[12] Likewise, neither the defense nor the prosecution has the time to investigate the merits of each case. In New York City, indigent defendants may speak to a defense attorney for the first time only minutes before arraignment. Outside of New York City, the cases may be heard before Town or Village justices or police court judges, many of whom are not lawyers and have only minimal training.[13]

New York is not alone in processing huge numbers of low-level misdemeanor cases with minimal procedural protections. An April 2009 report of amicus National Association of Criminal Defense

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[11] *See* N.Y. STATE BAR ASS'N, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES 17–18 (2001).

[12] JUANITA BING NEWTON, WILLIAM H. ETHERIDGE III, CRIMINAL COURT OF THE CITY OF NEW YORK, ANNUAL REPORT 2007, available at http://www.nycourts.gov/courts/nyc/criminal/NYCCC%20Annual%20Report%20Final%20072508.pdf. Criminal possession in the 7th degree is the second most arraigned charge in 2007 in New York City. *Id.*

[13] TESTIMONY OF COREY STOUGHTON, STAFF ATTORNEY AT THE NEW YORK CIVIL LIBERTIES UNION BEFORE JUDICIARY COMMITTEE OF THE NEW YORK STATE ASSEMBLY REGARDING PROPOSALS TO REFORM THE NEW YORK STATE JUSTICE COURTS (Dec. 14, 2006), available at http://www.nyclu.org/node/748.

Lawyers found that "[t]he vast majority of jailable misdemeanor cases in Texas are resolved by uncounseled guilty pleas," with three-quarters of Texas counties appointing counsel in fewer than twenty percent of jailable misdemeanor cases.[14] In one Texas county, amicus NACDL's researchers observed court staff routinely directing uncounseled misdemeanor defendants to confer directly with the prosecutor regarding a possible plea; in some cases defendants pleaded to jail sentences without being informed of their right to counsel.[15]

Even when misdemeanor defendants are represented by counsel, crowded dockets and limited defender resources place enormous pressures on many criminal defendants to quickly enter guilty pleas to minor charges after only minimal consultation with counsel. The Knox County Public Defender in Tennessee reported that in 2006, six misdemeanor attorneys handled over 10,000 cases, averaging slightly under one hour per case.[16] Similarly, the Atlanta City Public Defender Office averaged 2,400 cases per attorney in 2008, calculating that each case received on average fifty-nine minutes of counsel's time; in 2009 that figure is projected to fall to forty-two min-

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[14] ROBERT C. BORUCHOWITZ ET AL., MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS 15 (2009) (internal quotation marks and citation omitted), available at http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf.

[15] *Id.* at 15-16.

[16] NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 68 (2009), available at http://tcpjusticedenied.org/.

utes.[17] Under these pressures, amicus NACDL has concluded, "[i]ndigent defenders . . . almost always prioritize felony cases, to the detriment of persons accused of misdemeanors."[18] As a result, misdemeanor prosecutions, including low-level drug possession offenses, are especially likely to be disposed by "meet-and-plead" guilty pleas at an initial court appearance.[19]

The current confusion among the circuits as to the appropriate application of the aggravated felony label will subject non-citizens with low-level state drug possession dispositions to consequences far more serious than are merited by the perfunctory treatment their cases receive.

II. CERTIORARI IS WARRANTED BECAUSE THE SEVERE CONSEQUENCES OF THE AGGRAVATED FELONY LABEL ARE DISPROPORTIONATE TO THE LOW-LEVEL AND SUMMARY NATURE OF THE SIMPLE POSSESSION DISPOSITIONS AT ISSUE.

The exceptionally harsh direct and collateral consequences that flow from the drug trafficking aggravated felony determination are wholly disproportionate to the low-level and summary nature of most simple drug possession adjudication proceedings.

Virtually every non-citizen convicted of a drug offense is deportable.[20] Congress has chosen to lessen

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[17] Boruchowitz, *supra* note 14, at 26.

[18] *Id.*

[19] *Id.* at 31.

[20] 8 U.S.C. § 1227(a)(2)(B) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country

the exceptionally broad impact of this law by allowing immigration judges to find that certain deportable non-citizens are eligible for cancellation of removal or asylum upon a showing of sufficient positive equities or a threat of persecution in their country of origin, respectively.[21] The aggravated felony determination acts as a per se bar to these forms of relief,[22] preventing immigration judges from granting relief even for those non-citizens who served in the Armed Forces, who have U.S. citizen family members, or who would face extreme hardship or personal danger in their country of origin. Most persons whose convictions are deemed "aggravated felonies" are also barred from obtaining U.S. citizenship.[23] For non-citizens other than lawful permanent residents, an aggravated felony conviction triggers administrative removal without the right to a hearing in immigration court before a neutral judge;[24] for all respondents in removal proceedings who have been released from custody for an aggravated felony conviction after October 9 of 1998, the law requires mandatory detention while in proceedings, regardless of the actual degree of flight risk or danger to the community posed by the individual.[25]

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relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

[21] 8 U.S.C. §§ 1153(b)(1)(A), 1229b(a).

[22] 8 U.S.C. §§ 1153(b)(2)(B)(i), 1229b(a)(3).

[23] 8 U.S.C. §§ 1101(f)(8), 1427(a)(3); Immigration Act of 1990 § 509(b), Pub. L. No. 101-649, 104 Stat. 4978, 5051 (Nov. 29, 1990).

[24] 8 U.S.C. § 1228(b).

[25] 8 U.S.C. § 1226(c)(1)(B); *In re Adenji*, 22 I. & N. Dec. 1102, 1107-11 (BIA 1999).

The case of Jerry Lemaine, whose final order of removal is currently before the Fifth Circuit, exemplifies the harsh consequences of the Fifth Circuit's approach. In 2000, Mr. Lemaine received an adjournment in contemplation of dismissal (known as an "ACD") under N.Y. Crim. Proc. Law § 170.56 following a charge of non-criminal possession of marijuana. The government has argued that, even though the charges were ultimately dismissed, the issuance of an ACD qualifies as a "conviction" under federal law. In 2007, Mr. Lemaine pled guilty to non-criminal possession of marijuana under N.Y. Penal Law § 221.05. The maximum penalty for this violation was $100. Nevertheless, he was subsequently arrested by DHS, denied bail, and has been shuffled from one detention facility to another, thousands of miles from New York, awaiting deportation to Haiti, a country he has not seen since age three.

At the time of his second conviction, Mr. Lemaine was attending the Hunter Business School Nursing Program and caring for his U.S. citizen sister, who suffers from hydrocephaly. Mr. Lemaine could not have anticipated that, as a result of a quick plea to a non-criminal violation, the severe consequences of the aggravated felony label would prevent him from presenting any of these positive equities to an immigration judge and would mandate a lengthy detention.

III. CERTIORARI IS WARRANTED BECAUSE THE GOVERNMENT MAY COMMENCE REMOVAL PROCEEDINGS AGAINST ANY NON-CITIZEN IN ANY CIRCUIT, LEADING TO THE ARBITRARY APPLICATION OF THE AGGRAVATED FELONY LABEL.

The circuit split does far more than simply subject individuals with similar dispositions to different law in different parts of the country. DHS's practice is to detain non-citizens, and to commence removal proceedings against them, in the location and circuit of DHS's choosing—regardless of the non-citizen's residence or the location of her alleged offense. The BIA has held that, in determining whether a drug conviction constitutes an aggravated felony, immigration judges must defer to the interpretation given to the phrase "illicit trafficking in a controlled substance" by the circuit in which they sit.[26] Because DHS detainees may be held anywhere in the country and are frequently transferred multiple times before proceedings are commenced by filing of the Notice to Appear with the immigration court, *amici* are unable to provide effective advice and guidance concerning the eligibility for relief of noncitizens convicted of second and subsequent possessory offenses.

Recognizing the grave problems created by this disuniformity, the BIA sought to provide "guidance" to the circuit courts that had not yet ruled on the issue by choosing the *Carachuri* "appeal as the vehicle for articulating our analytical approach."[27] The BIA flatly rejected the Fifth Circuit's approach as "an ex-

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[26] *Yanez-Garcia*, 23 I. & N. Dec. at 396.

[27] *In re Jose Angel Carachuri-Rosendo*, 24 I. & N. Dec., 382, 391 (BIA 2007).

pansive, and apparently noncategorical, inquiry," that "would authorize Immigration Judges to collect a series of disjunctive facts about the respondent's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be 'an offense' that could have been prosecuted as a Federal felony."[28] Yet roughly twenty-nine percent of all non-citizens detained are held in the Fifth Circuit, subject to its harsh minority rule regarding second and subsequent possession offenses.[29] Many of these detainees resided and were prosecuted, convicted, and taken into DHS custody in circuits that apply a different rule.

Mr. Lemaine's case again provides a vivid illustration of the effects of DHS's common practice of transferring detainees between circuits. Mr. Lemaine resided in New York from his original immigration in 1985. He was initially detained in New York, then transferred to a Monmouth County facility in New Jersey, and then to a facility in Los Fresnos, Texas, where he was finally issued a Notice to Appear before an immigration judge. Mr. Lemaine applied for, inter alia, cancellation of removal. However, under the Fifth Circuit rule, the immigration judge concluded that he was an aggravated felon, thereby pretermitting his claim for cancellation of removal and concluding that detention was mandatory.

Had DHS filed Mr. Lemaine's Notice to Appear with the immigration court in New York, where he resided and where his alleged offenses occurred, he

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[28] *Id.* at 393.

[29] U.S. DEP'T OF HOMELAND SECURITY, RESPONSE TO FOIA CASE NO. 09-FOIA-1243 (Feb. 6, 2009) (on file with counsel).

would have been able to present his claims for relief from removal. The Second Circuit made this clear in its decision in *Alsol v. Mukasey*, where it held "that a second simple drug possession conviction is not an aggravated felony for immigration purposes,"[30] reasoning: "[I]f one who was not convicted as a recidivist nonetheless faced removal as a recidivist, the [immigration judge] would have to determine, for the first time, that an alien was a recidivist. This is inappropriate not only because of the [immigration judge]'s lack of expertise in the criminal law but also because the alien cannot challenge the validity of his prior conviction in the removal proceedings."[31] However, simply because DHS elected to transfer Mr. Lemaine to the Fifth Circuit, he was subjected to mandatory detention and his claims for relief from removal were barred.

IV. CERTIORARI IS WARRANTED BECAUSE THE DISUNIFORMITY, PARTICULARLY COUPLED WITH DHS'S POLICY OF TRANSFERRING DETAINEES, MAKES IT IMPOSSIBLE FOR CRIMINAL COUNSEL TO EFFECTIVELY ADVISE CLIENTS.

The circuit split, coupled with DHS detention and transfer policies, presents an extreme difficulty to criminal defense attorneys attempting to counsel their clients as to the consequences that might flow from a guilty plea. As a result of the circuit split, a non-citizen with a low-level drug possession offense may be subject to drastically different consequences

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[30] *Alsol v. Mukasey*, 548 F.3d 207, 219 (2d Cir. 2008).

[31] *Id.* at 217.

depending upon where she is detained and placed in proceedings.

Amici are organizations composed of defense attorneys or that advise defense attorneys whose clients could face removal and other severe immigration consequences following a guilty plea or conviction at trial. Part of *amici*'s mission is to train attorneys to give sound legal advice to their clients, including non-citizen clients. To properly counsel immigrant clients about the consequences of taking a plea, criminal defense attorneys and the immigration law experts who train and advise them need the guidance of the Court in order to be able to predict reliably and accurately the impact of a drug possession disposition on the non-citizen's immigration status. The split among the circuits makes it all but impossible for *amici* to provide reliable advice when there is no guarantee that non-citizens will face removal proceedings in the same jurisdiction where they reside or their criminal charges are adjudicated.

The defense attorneys, prosecutors, and judges dealing with indigent defendants all carry massive caseloads. The over-burdened criminal court system usually depends on most cases, especially the sort of minor drug possession offenses at issue in this case, being disposed of quickly through plea bargains. Advocates frequently have only minutes to talk to their clients before a hearing. Thus, it is essential for attorneys to have clear rules to guide the immigration advice they provide, especially when the potential immigration consequences are likely to dwarf the criminal sanctions imposed for a low-level offense.

In short, a stable and uniform definition of the term "aggravated felony" is necessary for defense at-

torneys and immigrant advocates to advise non-citizens who are making life-altering decisions.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the petition for the writ of certiorari should be granted.

Respectfully submitted.

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