No. 09-60

In The
Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,

Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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

BRIEF OF *AMICI CURIAE* ASIAN AMERICAN JUSTICE CENTER, AMERICAN IMMIGRATION LAWYERS ASSOCIATION, ASIAN AMERICAN INSTITUTE, ASIAN PACIFIC AMERICAN LEGAL CENTER, BANISHED VETERANS, CATHOLIC LEGAL IMMIGRATION NETWORK, ET AL. IN SUPPORT OF PETITIONER

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CASA OF MARYLAND

COALITION FOR HUMANE IMMIGRANT RIGHTS OF LOS ANGELES

DOMINICAN BAR ASSOCIATION

EL REFUGIO DEL RIO GRANDE

FLORENCE IMMIGRANT AND REFUGEE RIGHTS PROJECT

FLORIDA IMMIGRANT ADVOCACY CENTER

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND

NATIONAL COUNCIL OF LA RAZA

NATIONAL IMMIGRATION LAW CENTER

NORTHERN MANHATTAN COALITION FOR IMMIGRANT RIGHTS

NORTHWEST IMMIGRANT RIGHTS PROJECT

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STATEMENT OF INTEREST

Amici curiae are community groups, civil rights organizations, immigrant justice organizations and legal service providers whose members and clients face the severe consequences of applying the drug trafficking aggravated felony label to simple drug possession convictions.[1] As organizations that work closely with immigrants, their families and their communities, we have a profound interest in ensuring that their voices are included in the resolution of the legal issue in this case. This brief presents the stories of community members and clients whose lives will be touched by the Court's ruling. These stories will illustrate that the Fifth and Seventh Circuits' interpretation undermines Congress's graduated scheme of immigration consequences for drug-related conduct, and is contrary to Congress's intent that discretion should play a critical role in the removal process for those convicted of non-trafficking offenses.

Amici are comprised of the following organizations:

- Asian American Justice Center
- American Immigration Lawyers Association
- Asian American Institute

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[1] Amici state that no counsel for a party authored any part of this brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief. Both petitioner and respondent have consented to the filing of this brief. Pursuant to Rule 37.3(a), amici curiae have filed the letters of consent with the Clerk of the Court.

- Asian Pacific American Legal Center of Southern California
- Banished Veterans
- CASA of Maryland
- Catholic Legal Immigration Network
- Coalition for Humane Immigrant Rights of Los Angeles
- Dominican Bar Association
- El Refugio del Rio Grande
- Florence Immigrant and Refugee Rights Project
- Florida Immigrant Advocacy Center
- Mexican American Legal Defense and Education Fund
- National Council of La Raza
- National Immigration Law Center
- Northern Manhattan Coalition for Immigrant Rights
- Northwest Immigrant Rights Project

Detailed statements of interest for each organization are appended after the conclusion of this brief.

SUMMARY OF ARGUMENT

The statutory provision at issue in this case is part of a broad regime enacted by Congress to create a graduated scheme of immigration consequences for drug-related conduct. While nearly all convictions related to the unlawful possession, sale or distribution of drugs trigger significant negative consequences under the immigration statute, Congress designated only a specific subset of those crimes as "drug trafficking" aggravated felonies that warrant the further penalty of barring eligibility for various

forms of discretionary relief, in addition to other harsh consequences. The stories of our community members and clients illustrate that the application of the drug trafficking aggravated felony label to simple possession convictions would result in mandatory removal of individuals for minor crimes or non-criminal dispositions. Amici argue that Congress did not view these convictions and dispositions as meriting such severe treatment.

Furthermore, Congress's statutory scheme contemplates a critical role for the exercise of discretion in order to ensure just outcomes in immigration proceedings. To receive relief, immigrants must first demonstrate their statutory eligibility, and if they are able to do so, can then present evidence of their equities to an immigration judge. Based on that individualized showing, the judge can decide whether or not a grant of relief is in the national interest. The stories of our community members and clients illustrate that the application of the aggravated felony label to individuals with simple possession convictions blocks immigration judges from exercising discretion in cases where Congress clearly intended that they do so.

Finally, while amici contend that the statute is clear, the Court should employ the rule of lenity in favor of the noncitizen to resolve any lingering ambiguities. The severe results imposed on our community members and clients demonstrate that a narrow construction of the statute is warranted.

BACKGROUND

The scope of the "drug trafficking" aggravated felony label affects thousands of our community mem-

bers, many of whom are lawful permanent residents or asylum seekers. These individuals have been convicted of drug possession convictions offenses that already render them removable. However, labeling their simple possession offenses as "drug trafficking" aggravated felonies would impose the additional penalty of barring them from discretionary relief from removal, among other severe consequences.[2]

Despite previous decisions by this Court and the Board of Immigration Appeals (BIA)—the Government's own agency entrusted to interpret and apply the immigration statute—limiting the "drug trafficking" label to exclude most simple possession offenses, the Fifth and Seventh Circuits have issued incorrect decisions to the contrary, widening the label's scope against Congress's intent. As this Background explains, Petitioner's case presents this Court with the opportunity to correct those interpretations, ensuring that the immigration statute's most severe consequences are not automatically visited upon immigrants convicted of simple possession offenses.

This Court has previously corrected an overly expansive interpretation of the scope of the "drug trafficking" aggravated felony term. In *Lopez v. Gon-*

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[2] The Immigration and Nationality Act defines "illicit trafficking in a controlled substance" as an aggravated felony, including in that definition any "drug trafficking crime" as defined in 18 U.S.C. § 924(c). 8 U.S.C. § 1101(a)(43)(B). 18 U.S.C. § 924(c) in turn defines a "drug trafficking crime" as "any felony punishable under the Controlled Substances Act," which is codified in 21 U.S.C. § 801 et seq. 18 U.S.C. § 924(c)(2). See *infra* Part I for further explanation of this application's effect on immigrants seeking relief from removal.

zales,[3] the Government argued that even one-time simple possession of a controlled substance could be deemed an aggravated felony. This Court rejected that position, holding that a simple possession conviction that is punishable as a misdemeanor under federal law could not be labeled a drug trafficking aggravated felony, even if the state classifies the offense as a felony. Recognizing that the statute's plain language places limits on the label's application, the *Lopez* Court noted that "[r]eading § 924(c) the Government's way…would often turn simple possession into trafficking, just what the English language tells us not to expect, [which] makes us very wary of the Government's position."[4] This Court's decision permitted many of our community members and clients to pursue discretionary relief, in accordance with Congress's intent.

However, even before *Lopez* the Government had argued that any second or subsequent simple drug possession offense is automatically a recidivist possession drug trafficking aggravated felony, regardless of whether the immigrant was convicted of recidivism in his or her state criminal proceedings. After *Lopez*, the Government sought remand for many petitions for review on this issue pending in the circuits while continuing to pursue its expansive reading of the statute in pending sentencing cases.[5] Our

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[3] 549 U.S. 47 (2006).

[4] *Id.* at 53 (2006).

[5] *Compare Bharti v. Gonzales*, No. 06-60383 (5th Cir. May 1, 2007) (Government successfully obtained remand post-*Lopez* based on assertion that BIA should address issue in immigration context) *with United States v. Cepeda-Rios*, 530 F.3d 333, 335 (5th Cir. 2008) (noting and adopting Government's position

community members and clients continued to face bars to relief as this issue was litigated.

In 2007, the BIA addressed the issue in *Matter of Carachuri*, where they resoundingly rejected the improper expansion of the drug trafficking aggravated felony label in an en banc opinion.[6] Applying *Lopez,* the BIA concluded that for an immigrant's state simple possession convictions to warrant application of the drug trafficking aggravated felony label, the individual must have been convicted of recidivist drug possession under a statute that provided "notice and an opportunity to be heard on whether recidivist punishment is proper."[7] Noting that the Government itself was "troubled" by its previous litigation position, the BIA held that the immigration statute does not permit an immigration judge "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."[8] Nonetheless, the agency concluded that it was bound to apply contrary circuit decisions on the issue in cases arising in those jurisdictions.[9]

The First,[10] Second,[11] Third,[12] and Sixth[13] Circuits have issued rulings agreeing with the BIA's in-

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that second or subsequent simple possession offense is aggravated felony in sentencing context).

[6] *Matter of Carachuri*, 24 I&N Dec. 382 (B.I.A. 2007).

[7] *Id.* at 391.

[8] *Id.* at 391, 393.

[9] *Id.* at 386.

[10] *Berhe v. Gonzales*, 464 F.3d 74, 86 (1st Cir. 2006).

terpretation on this issue, allowing our community members in those circuits to apply for and win discretionary relief. In the Fifth[14] and Seventh[15] Circuits, however, litigation on this issue in the sentencing context proceeded and these circuits held that second or subsequent possession offenses are automatically drug trafficking aggravated felonies. While these sentencing cases were decided without the benefit of considering the issue in the immigration context, the Fifth and Seventh Circuits then adopted their sentencing precedent in later immigration decisions.[16] As a result, our community members and clients whose cases are heard within the Fifth and Seventh Circuits face the harsh consequences of the drug trafficking aggravated felony label.[17]

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[11] *Alsol v. Mukasey*, 548 F.3d 207, 210 (2d Cir. 2008).

[12] *Gerbier v. Holmes*, 280 F.3d 297, 300 (3d Cir. 2002); *Steele v. Blackman*, 236 F.3d 130, 136 (3d Cir. 2001).

[13] *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008).

[14] *Cepeda-Rios,* 530 F.3d at 333.

[15] *United States v. Pacheco-Diaz*, 506 F.3d 545, 550 (7th Cir. 2007).

[16] *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 266 (5th Cir. 2009); *Fernandez v. Mukasey*, 544 F.3d 862, 873 (7th Cir. 2008).

[17] See *infra* Part II for further discussion. Importantly, rulings in those circuits do not only apply to individuals who reside in those jurisdictions. Due to the system of detainee transfers, many individuals whose cases would have been decided under the law of other circuits are transferred to the Fifth in particular, where the Government's interpretation holds sway. *See* HUMAN RIGHTS WATCH, LOCKED UP AND FAR AWAY: THE TRANSFER OF IMMIGRANTS TO REMOTE DETENTION CENTERS IN THE UNITED STATES 6 (2009) (noting Fifth Circuit receives the most detainees); TRANSACTIONAL RECORDS ACCESS CLEARINGHOUSE, HUGE INCREASE IN TRANSFERS OF ICE DETAINEES (2009),

This Court now has the opportunity to correct this misapplication of law and ensure that, in accordance with Congress's intent, the immigration statute's most severe penalties are not imposed on individuals with simple possession convictions.

ARGUMENT

I. Applying the drug trafficking aggravated felony label and its harsh consequences to our community members and clients who have been convicted only of simple possession undermines Congress's graduated scheme of consequences for drug offenses.

The immigration statute recognizes that some types of drug-related conduct are relatively minor in gravity, and thus do not warrant the same treatment as more serious drug-related crimes. Most individuals with drug-related offenses are deportable but eligible for discretionary relief. Only individuals convicted of "drug trafficking" aggravated felonies are subject to the statute's most severe consequences, including bars on most forms of relief. As the stories below illustrate, the Fifth and Seventh Circuit's interpretation undermines Congress's graduated scheme.

A. Under the statute, immigrants convicted of non-trafficking drug offenses are subject to removal but remain eligible for discretionary relief.

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http://trac.syr.edu/immigration/reports/220 (noting that in FY 2008, 52.4% of detainees were transferred).

The immigration statute states that any immigrant convicted of "a violation of…any law or regulation of a State, the United States, or a foreign country relating to a controlled substance…other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable."[18] The statute also makes "drug abusers and addicts" removable, which intuitively should include individuals who have possessed or used drugs multiple times.[19] Finally, a violation of "any law or regulation of a State, the United States, or a foreign country relating to a controlled substance" renders an immigrant inadmissible to the U.S.[20] Therefore, individuals with more than one simple possession conviction are subject to deportability or inadmissibility on grounds other than "drug trafficking."

The statute ordinarily provides individuals convicted of drug-related offenses the opportunity to apply for various forms of discretionary relief. For example, cancellation of removal is a form of relief available to immigrants who have been lawful permanent residents for five years or more and have resided continuously in the United States for at least

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[18] 8 U.S.C. § 1227(a)(2)(B)(i).

[19] 8 U.S.C. § 1227(a)(2)(B)(ii).

[20] 8 U.S.C. § 1182(a)(2)(A)(II). The drug inadmissibility bar allows the government to put lawful permanent residents who travel abroad into removal proceedings when they attempt to return to the United States. Individuals who are put into proceedings in this fashion can also seek relief like cancellation. *See, e.g., Berhe*, 464 F.3d at 77 (describing lawful permanent resident who traveled abroad and was placed into proceedings when he attempted to re-enter).

seven years.[21] Immigrants who establish their eligibility may avail themselves of the opportunity to present positive equities to an immigration judge.[22]

Conviction of a drug trafficking aggravated felony automatically bars a lawful permanent resident from eligibility for cancellation.[23] None of the other broad drug-related grounds of removability, such as the controlled substance ground or "drug abuser or addict" ground, bar eligibility for relief *per se*. Treating simple possession offenses as grounds of removal, but not bars to relief, allows individuals convicted of minor offenses to present their equities. The stories of our community members and clients, such as Ms. Karen Alsol, demonstrate the importance of comporting with Congress's graduated scheme.

- Karen Nicola Alsol is a lawful permanent resident who emigrated from Jamaica to the United States over 16 years ago. She has significant family ties in the United States and has been consistently employed. Ms. Alsol was convicted of seventh degree possession of marijuana, the lowest level misdemeanor under New York law, on two separate occasions. She served a total of eight days of jail time for her offenses, which were her only two criminal convictions. Ms. Alsol successfully completed drug rehabilitation.

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[21] 8 U.S.C. § 1229b(a).

[22] *INS v. St. Cyr*, 533 U.S. 298, 307 (2001) (noting that "courts recognized a distinction between eligibility for discretionary relief, on the one hand, and the favorable exercise of discretion, on the other hand.")

[23] 8 U.S.C. § 1229b(a)(3).

After being put into removal proceedings because of her possession convictions, an immigration judge granted her cancellation of removal in light of her positive equities. The government appealed, arguing that she was ineligible for relief. The Second Circuit ultimately rejected the government's argument and remanded her case to the BIA, which directed that her grant of relief be reinstated.

Since her proceedings concluded, Ms. Alsol has been pursuing her education. Inspired by her previous work as a home health aide caring for elderly individuals, she graduated in January 2010 with a medical assistant's certificate. She also married her U.S. citizen partner.[24]

B. Application of the drug trafficking aggravated felony definition to simple possession offenses imposes Congress's most severe consequences, including a bar to most forms of discretionary relief, on individuals convicted of relatively minor offenses.

While the immigration statute provides for the institution of removal proceedings for nearly all drug possession offenses, Congress reserved the statute's

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[24] *Alsol*, 548 F.3d at 207 (2d Cir. 2008); Oral Decision of Immigration Judge at 15, *In re Alsol*, A43 732 327 (New York Imm. Ct. Oct. 31, 2006); Letter from Maria Navarro, Supervising Attorney, Legal Aid Society to Alina Das, Supervising Attorney, Washington Square Legal Services (Jan. 25, 2010) (on file with Washington Square Legal Services).

most serious consequences for a set of crimes designated as "drug trafficking" aggravated felonies. Crimes in the latter category not only make a person removable, but also impose additional penalties. For example, conviction of a "drug trafficking" aggravated felony bars individuals from obtaining U.S. citizenship because they cannot meet the statutory requirement of demonstrating "good moral character."[25] Furthermore, the drug trafficking aggravated felony label triggers significant criminal sentencing enhancements.[26]

Furthermore, conviction of an aggravated felony bars eligibility for most forms of discretionary relief, such as asylum and cancellation of removal. Asylum is available to certain immigrants who cannot return to their sending countries because of "persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[27] However, an indi-

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[25] 8 U.S.C. § 1427(a). A person with a drug possession conviction, other than a single offense of possession of less than 30 grams of marijuana, cannot demonstrate good moral character for a period of time of up to five years following the conviction. 8 U.S.C. § 1101(f)(3). Being convicted of an aggravated felony at any time after November 29, 1990 automatically and permanently bars an individual from establishing this requirement. 8 U.S.C. § 1101(f)(8).

[26] The immigration statute penalizes unlawful reentry into the United States following removal. 8 U.S.C. § 1326(a). The baseline sentence for this crime is a fine or imprisonment of up to two years, or both. 8 U.S.C. § 1326(a)(2). However, any individual who has unlawfully reentered the U.S. after being convicted of an aggravated felony faces up to 20 years in prison. 8 U.S.C. § 1326(b)(2).

[27] 8 U.S.C. § 1101(a)(42).

vidual convicted of a "particularly serious crime" is ineligible for asylum and an aggravated felony conviction is automatically classified as such a crime.[28] Thus, a person whose drug possession offense is deemed a drug trafficking aggravated felony is statutorily barred from presenting his or her case for relief.[29] The same bar applies to cancellation of removal.[30]

The Fifth and Seventh Circuits' rule treats even the most minor possession convictions as drug trafficking aggravated felonies. This injustice is emphasized by the fact that many of our community members with minor offenses, such as Mr. Martin Escobar, would be particularly strong candidates for discretionary relief because they can demonstrate that their positive equities outweigh their short criminal records.

- Martin Escobar is a lawful permanent resident who came to the United States almost 30 years ago and settled in the Chicago area. He worked as a tree trimmer to support his three

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[28] 8 U.S.C. § 1158(b)(2)(A)(ii); 8 U.S.C. § 1158(b)(2)(B)(i).

[29] Conviction of an aggravated felony can also presumptively bar eligibility for other forms of persecution-based relief, such as withholding of removal, which is available to immigrants who can demonstrate either past persecution or that they are "more likely than not" to face persecution in their sending countries. 8 U.S.C. § 1231(b)(3); 8 C.F.R. § 208.16(b)(1)(B)(iii); *see, e.g.*, *Bosede v. Mukasey*, 512 F.3d 946 (7th Cir. 2008) (Nigerian lawful permanent resident with simple possession convictions who applied for withholding).

[30] 8 U.S.C. § 1229b(a)(3).

> daughters as they attended high school and college. In the 1990s, Mr. Escobar was convicted of misdemeanor possession of marijuana and possession of a controlled substance. He never served jail time for either of these offenses, which are his only two criminal convictions. Eight years later, based on these convictions, an immigration judge found him ineligible for cancellation of removal based on his convictions. The Seventh Circuit dismissed his appeal and he was ordered removed. His wife and children remained behind in the United States, where they are doing their best to maintain mortgage payments on the family home Mr. Escobar purchased before he was deported.[31]

Many other clients and community members contend with the same barrier.[32] Barring such individu-

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[31] *Escobar v. Holder*, No. 08-3497 (7th Cir. Nov. 24, 2009); Brief for Petitioner for a Writ of Certiorari at 3–4, *Escobar v. Holder*, No. 09-203 (Aug. 17, 2009); Letter from Eleni Wolfe-Roubatis, Detention Project Supervising Attorney, Heartland Alliance's National Immigration Justice Center, to Alina Das, Supervising Attorney, Washington Square Legal Services (Feb. 1, 2010) (on file with Washington Square Legal Services) (hereinafter "NIJC Letter").

[32] *See, e.g.*, *Matter of Thomas*, 24 I.&N. Dec. 416, 417 (B.I.A. 2007) (60 days probation for one offense, fine for the other); *Matter of Elgendi*, 23 I.&N. Dec. 515, 516 (B.I.A. 2002) (time served and 6 month driver's license suspension for one offense, community service and driver's license suspension for the other); Certified Administrative Record at 8, *Lopez-Mendoza v. Holder*, No. 08-2916 (7th Cir. No. 25, 2009) (1 day jail time, probation and supervision for offenses); Brief of Petitioner at 3, *Garbutt v. Holder*, No. 08-4188 (7th Cir. Nov. 4, 2009) (probation and community service for both convictions).

als from discretionary relief collapses Congress's graduated scheme of consequences for drug-related conduct.

C. Application of the drug trafficking aggravated felony definition to simple possession offenses attaches these severe consequences even to non-criminal dispositions.

Treating simple possession offenses as "drug trafficking" aggravated felonies would attach the severe consequences of an aggravated felony conviction even to *non-criminal* drug offenses. For example, the Government has attached the aggravated felony label to dispositions under N.Y. Penal Law § 221.05, which punishes possession of a small amount of marijuana as a non-criminal violation and treats the offense similarly to a traffic infraction.

- Jerry Lemaine came to the United States when he was three years old and became a lawful permanent resident in 1996, at the age of 14. He grew up in the United States and finished high school. He spent his days training to become a nurse at the Hunter Business School Nursing Program and caring for his U.S. citizen sister, who suffers from hydrocephaly.

  Mr. Lemaine was charged with removability for two separate non-criminal violations under New York Penal Law § 221.05 for possession of a small amount of marijuana. He applied for cancellation of removal, asylum and relief under the Convention against Torture ("CAT"). Based on his two non-criminal violations, his

> request for cancellation of removal and asylum was pretermitted, his application for CAT relief was denied and he was placed in detention without the opportunity to seek release on bond.
>
> Mr. Lemaine has remained in detention for the past two and a half years, shuffled from one facility to another, thousands of miles from his home in New York. He currently awaits deportation to a country he has not seen since age three, a country that has recently suffered a great tragedy.[33] If sent back to Haiti, as a deportee with a criminal record, Mr. Lemaine will automatically be detained in a Haitian prison upon his arrival.[34]

As Mr. Lemaine's case illustrates, the government's position deems even an individual convicted of a *non-criminal* violation subject to removal without opportunity for relief. The extreme and absurd reach of the Fifth and Seventh Circuits' rule further highlights that applying the drug trafficking aggravated felony label to simple possession convictions would

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[33] While the government has announced that it is currently not deporting immigrants to Haiti in light of the recent earthquake, it has not stated that Haitian detainees will be released, nor does the announcement affect Mr. Lemaine's loss of legal status. *See* Department of Homeland Security, Statement by Deputy Press Secretary Matt Chandler (Jan. 13, 2010), http://www.dhs.gov/ynews/releases/pr_1263409824202.shtm (last visited Jan. 31, 2010).

[34] Brief for Petitioner at 4–9, *Lemaine v. Mukasey*, No. 08-60286 (5th Cir. Aug. 6, 2009). For another case involving non-criminal possession violations, see *Minto v. Mukasey*, 302 Fed App'x 13 (2d Cir. Dec. 5, 2008).

undermine Congress' graduated scheme of immigration consequences for drug-related conduct.

II. Application of the drug trafficking aggravated felony label to our community members and clients with simple possession offenses undermines Congress's intent that discretion play a critical role in ensuring just outcomes in removal proceedings that are based on non-trafficking offenses.

Discretion plays a crucial role in the two-step removal system described above. Generally, once immigrants who have non-aggravated felony offenses are found to be removable, an immigration judge can consider whether the individuals merit discretionary relief.[35] Based on this individualized determination, the judge can either grant relief or enter a removal order against the immigrant. The exercise of discretion is a crucial part of the system of immigration enforcement for those not deemed aggravated felons since it provides the only opportunity to balance the grounds of an individual's removal against the equities that weigh in favor of permitting him or her to remain in the United States.

In light of the development of the law on this issue in recent years, amici have witnessed the important role immigration judges' discretion has played in reaching fair and just outcomes for our community

[35] *See, e.g.,* 8 U.S.C. §§ 1229b, 1229c (authorizing various forms of discretionary relief).

members and clients.[36] The absence of that discretion in the Fifth and Seventh Circuits demonstrates the harsh results of such a rule for individuals with compelling equities.

A. Under the Rule of the Fifth and Seventh Circuits, immigration judges have no choice but to order deportation of individuals with simple possession offenses regardless of compelling equities.

The immigration statute categorically bars most forms of discretionary relief for noncitizens convicted of a drug trafficking aggravated felony. Individuals convicted of simple possession cannot reasonably be understood to fall within such a severe bar. The stories of our community members and clients illustrate the injustice of subjecting individuals to removal without affording them the opportunity to demonstrate their equities, no matter how extraordinary they are.

1. Immigration judges who apply the Fifth and Seventh circuits' rule are barred from considering longstanding family and community ties to the United States.

Lawful permanent residents in particular have strong family and community ties to the United States, and subjecting these individuals to removal without the opportunity to seek relief would separate them from beloved family members who would re-

[36] See *supra* Background.

main in the United States.[37] A significant number of noncitizens are members of families that include U.S. citizens, and they and their families have become deeply rooted in the United States over time. While exact data on family relationships is not available, Human Rights Watch has estimated based on the 2000 U.S. Census, that approximately 1.6 million spouses and children living in the United States have already been separated from their parent, husband, or wife because of deportations for criminal offenses.[38] If lawful permanent residents with simple possession convictions are labeled as drug traffickers, many more U.S. citizen children will be separated from their parents, and many more U.S. citizen parents will be separated from their spouses, regardless of the strength of these ties. The Ramirez-Solis family is but one example of the many families who are confronted with the emotionally wrenching and economically destabilizing ordeals that separation produces.[39]

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[37] *See* Michael Falcone, *100,000 Parents of Citizens Were Deported Over 10 Years*, N.Y. TIMES, Feb. 14 2009, at A16.

[38] HUMAN RIGHTS WATCH, FORCED APART: FAMILIES SEPARATED AND IMMIGRANTS HARMED BY UNITED STATES DEPORTATION POLICY 6 (2007), *available at* http://www.hrw.org/reports/2007/us0707/index.htm (last visited on Jan 31, 2009) (estimating that "at least 1.6 million family members, including husbands, wives, sons and daughters, have been separated from loved ones by deportations since 1997," approximately 540,000 of which were U.S. citizens by birth or naturalization).

[39] *See, e.g.*, *Ferreira v. Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (two U.S. citizen children, parents and siblings are citizens and LPRs); *Gerbier*, 280 F.3d at 300 (mother, brother and 3 U.S. citizen children); *Gonzales-Buitrago v. I.N.S.*, 5 F.3d

- Ruben Ramirez-Solis is a native of Mexico who arrived in the U.S. when he was three years old, and became a lawful permanent resident in 1987. He settled in Chicago, where he worked steadily to support his family. He has an extensive network of family in the United States, all of who are citizens or lawful permanent residents. Mr. Ramirez-Solis' wife is a lawful permanent resident, and they have three U.S. citizen children, all of whom are minors. His youngest daughter is nine years old.

  In 2002, Mr. Ramirez-Solis was twice convicted of possession of a controlled substance, after which he was detained and put into removal proceedings. Despite the fact that 25 family members, friends and employers submitted letters in support of his application for cancellation, he was deemed ineligible for relief. Mr. Ramirez-Solis has now been deported to Mexico, separated from the family and

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1495 (5th Cir. 1993) (U.S. citizen wife and daughter); *Gomez v. DHS*, No. 03-135 L, at *1 (D.R.I. 2003) (U.S. citizen grandparents, 2 U.S. citizen children, LPR mother and sisters); *Gomera v. Reno*, No. 00 Civ. 8731, at *1 (S.D.N.Y. 2000) (LPR mother and sisters, 2 U.S. citizen children); Petition for a Writ of Certiorari at 3, *Young v. Holder*, No. 09-733 (Dec. 21, 2009) (5th Cir. case involving LPR with U.S. citizen wife and 4 U.S. citizen children); Petition for Review of Decision of the Board of Immigration Appeals at 5, *Texeira Baptista v. Mukasey*, No. 08-60142 (5th Cir. Aug. 5, 2008) (U.S. citizen mother, LPR father, 3 U.S. citizen siblings, 1 U.S. citizen daughter); Reply Brief of Petitioner at 3–4, *Yanez-Garcia v. Ashcroft*, 388 F.3d 280 (7th Cir. 2004) (No. 02-2538) (LPR wife, 7 U.S. citizen children).

community he built in the United States for the 30 years he lived here.[40]

Many other lawful permanent residents who have built their entire lives in the United States, like Mr. Rodriguez-Diaz, face deportation to countries they cannot even remember.[41]

- Oscar Rodriguez-Diaz immigrated to the U.S. in 1975 when he was six months old and became a lawful permanent resident when he was 14. He has lived almost his entire life in this country, residing in the Chicago area, and has no recollection of his brief time in Mexico. During his time in the United States he has been steadily employed and has been active in his local faith community. He also has extensive family ties in the country – he has an

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[40] Certified Administrative Record at 144, 150–153, *Ramirez-Solis v. Holder*, No. 08-3497 (7th Cir. Nov. 24, 2009); NIJC Letter.

[41] *See, e.g.*, *Ferreira v. Ashcroft*, 382 F.3d 1045, 1047 (9th Cir. 2004) (LPR since age 11); *Valenzuela-Zamarano v. Ashcroft*, 11 Fed.Appx. 805, 806 (9th Cir. 2001) (LPR since age five); *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992) (LPR since age two); *Shurney v. INS*, 201 F.Supp.2d 783, 786 (N.D. Ohio 2001) (came to United States at age three); Brief for Petitioner at 4, *Minto v. Mukasey*, 302 Fed. Appx. 13 (2d Cir. Dec. 5, 2008) (No. 05-0007-ag) (came to U.S. at age eight); Brief and Required Short Appendix for Petitioners at 5, 8, *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008) (Nos. 06-3987, 06-3994, 06-3476) (describing two LPRs, one in United States since age nine, another in United States for over 40 years); *In re Collymore*, 2008 WL 4222241, at 1 (B.I.A. Aug. 28, 2008) (LPR since 1972); *In re Espinal*, 2008 WL 1734657, at 1 (B.I.A. Mar. 28, 2008) (LPR since 1973); *In re Flores-Gomez*, 2004 WL 2374449, at 1 (B.I.A. Jul. 27, 2004) (admitted to US in 1943).

> eight year-old U.S. citizen daughter, a U.S. citizen mother, a lawful permanent resident father, and is engaged to a U.S. citizen.
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> Mr. Rodriguez-Diaz was convicted twice of possession of marijuana and once of another controlled substance possession offense. In addition to family and friends, his pastor submitted a letter stating Mr. Rodriguez-Diaz's value to the community. However, his simple possession offenses rendered him ineligible for relief. He was deported and separated from his family and community.[42]

2. Immigration judges who apply the Fifth and Seventh circuits' rule are barred from considering service in the U.S. military.

The United States has an interest in protecting its veterans and service members. The linguistic and cultural diversity noncitizens bring to the armed forces is especially valuable in the context of national security.[43] In recognition of the benefits that noncitizens can offer the military, the government has been expanding its recruitment of noncitizens.[44] There

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[42] Certified Administrative Record at 111, 117–121, *Rodriguez-Diaz v. Holder*, No. 08-3309 (7th Cir. Nov. 24, 2009); NIJC Letter.

[43] ANITA U. HATTIANGADI ET AL., NON-CITIZENS IN TODAY'S MILITARY: FINAL REPORT 1 (2005), *available at* http://www.cna.org/documents/D0011092.A2.pdf (last visited on Jan. 31, 2009).

[44] Gerry J. Gilmore, *Military Recruits Non-citizen Health Care Workers, Linguists*, AMERICAN FORCES PRESS SERVICE, Dec. 5, 2008, *available at*

are approximately 29,000 non-citizens serving in the U.S. military, with another 8,000 enlisting each year.[45] Moreover, thousands of immigrants have already served tours of duty in the U.S. military. More than 660,000 military veterans became citizens through naturalization between 1862 and 2000.[46]

Unfortunately, some war veterans struggle with drug addiction, especially those who have suffered from post-traumatic stress disorder ("PTSD") after returning home.[47] War veterans are diagnosed with PTSD at a higher rate than the general population.[48] "Survivors may turn to alcohol and drug abuse when they want to avoid the bad feelings that come with

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http://www.defense.gov/News/newsarticle.aspx?id=52208 (last visited on Jan 31, 2009).

[45] *Id.*

[46] HATTIANGADI ET AL., *supra* note 36 at 19.

[47] JOSEF I. RUZEK, PH.D., ET AL., U.S. DEP'T OF VETERANS AFFAIRS, NAT'L CTR. ON PTSD, TREATMENT OF THE RETURNING IRAQ WAR VETERAN, http://www.ptsd.va.gov/professional/pages/treatment-iraq-vets.asp#learning (last visited Jan. 31, 2010).

[48] JESSICA HAMBLEN, U.S. DEP'T OF VETERANS AFFAIRS, NAT'L CTR. ON PTSD, WHAT IS PTSD?: A HANDOUT FROM THE NATIONAL CENTER ON PTSD, *available at* http://www.ptsd.va.gov/public/pages/handouts-pdf/handout_What_is_PTSD.pdf (last visited Jan. 31, 2010). Hamblen notes that about 30 percent of Vietnam veterans are diagnosed with full PTSD and an additional 20 to 25 percent of Vietnam veterans have had partial PTSD at some point in their lives. Estimates of PTSD from the Gulf War are as high as 10 percent; the war in Afghanistan, between 6 and 11 percent. Current estimates of PTSD for those who served in Iraq range from 12 to 20 percent.

PTSD symptoms."[49] With treatment, these individuals are able to recover from their addiction and live drug-free lives.

Noncitizen veterans with simple drug possession convictions should not – contrary to Congressional intent – be categorized as drug traffickers and barred from discretionary relief.

- Praxedis Castro-Rodriguez has been a lawful permanent resident for 53 years and has lived continuously in the United States since he was five years old, when his parents emigrated from Mexico. Mr. Rodriguez has served honorably in the military and is a Vietnam War-era veteran. His wife and children are all U.S. citizens. He and his wife own their home and he has a solid history of employment.

  In 1984, Mr. Rodriguez was convicted of possession of marijuana and was placed on probation for 18 months. He was later convicted of possession of cocaine and given a suspended sentence of ten years probation.

  Mr. Rodriguez was placed in removal proceedings and denied the opportunity to seek cancellation of removal relief. Currently, his appeal is pending before the Fifth Circuit. Not only would deportation tear apart his family and require him to return to a country he barely remembers, but deportation would strip

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[49] EVE B. CARLSON, PH.D. AND JOSEF RUZEK, PH.D., U,S. DEP'T OF VETERANS AFFAIRS, EFFECTS OF TRAUMATIC EXPERIENCES: A NATIONAL CENTER FOR PTSD FACTSHEET, *available at* http://www.tema.ca/lib/Effects%20of%20Traumatic%20Experiences.PDF (last visited Jan. 31, 2010).

> him of the Social Security benefits he has contributed toward for decades and the attendant Medicare benefits for which he qualifies.[50]

The case of Praxedis Castro-Rodriguez is but one example of the impact of over-expanding the scope of the aggravated felony definition. Some estimates are that hundreds of veterans – perhaps even thousands – have been deported, and many of these deportations appear to be based on drug possession convictions.[51]

3. Immigration judges who apply the Fifth and Seventh Circuits' rule are barred from considering rehabilitation to overcome past addiction.

An immigrant in proceedings who has a criminal record will typically be required to present evidence of rehabilitation before discretionary relief is granted as a matter of discretion.[52] In addition to evidence of treatment and formal rehabilitation, "[t]he recency of a conviction and the fact of confinement are matters relevant to the consideration of whether an alien has demonstrated his rehabilitation and whether relief should be granted as a matter of discretion."[53] Non-

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[50] Brief for the Petitioner at 2, 4, *Castro-Rodriguez v. Holder*, No. 08-60343 (5th Cir. Sept. 30, 2009).

[51] *See* Pilar Marrero, *U.S. War Veterans Fight Deportation,* LA OPINION, Jan. 19, 2010, at 6.

[52] *Matter of C-V-T-*, 22 I&N Dec. 7, 12 (B.I.A. 1998).

[53] *Matter of Marin*, 16 I&N Dec. 581, 581 (B.I.A. 1978). While Marin dealt with a predecessor to cancellation, it still

citizens with simple possession offenses who have taken steps to overcome their past drug abuse should have the opportunity to present those factors to an immigration judge if they have not been convicted of drug trafficking. However, they are not able to do so under the Fifth and Seventh Circuits' rule.

- Juan Carlos Cortinovis, his parents and his two siblings came to the United States from Argentina as lawful permanent residents when he was only five years old. They settled in Northern California, where he lived for 44 years. He worked at an international technology company, working his way up from temporary employee status to a management-level position.

  In the midst of marital problems that eventually led to divorce, Mr. Cortinovis began using drugs and was convicted three times in 14 months for controlled substances offenses. He stopped using substances and rebuilt his life. He made amends with his family, particularly his two teenage U.S. citizen daughters. He developed a very close relationship with them, never missing a single weekly visit, even when they moved 80 miles away with their mother. He regularly made the three-hour roundtrip drive to watch their basketball games during the week.

  Mr. Cortinovis has stayed off drugs since his last conviction and has not been charged with any more crimes. He moved into his parents'

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remains applicable to cancellation per *Matter of C-V-T-*, 22 I&N Dec. at 11.

home to help his elderly mother take care of his father, who was dying from lung cancer. He remained there for eight years, including four years after his father passed away.

However, nine years after his last conviction, ICE officers arrested Mr. Cortinovis at his home in California, then transferred to him to Texas. There, he was deemed ineligible for cancellation under Fifth Circuit precedent and was deported. He left behind his entire family in California, including a long term U.S. citizen girlfriend who he hoped to marry one day.[54]

- Barrington Morgan-White first entered the U.S. in 1981 with his family when he was eight years old. In 1988 he became a lawful permanent resident and remained in the United States until he was deported to Nicaragua. Mr. Morgan-White graduated from high school with more than a dozen academic and athletic awards. He worked continuously for various state agencies in Texas for almost ten years while he helped to support his family and completed certificate programs in a local community college. His U.S. citizen mother, who suffers from terminal malignant melanoma, his four sisters and all of his extended family members live in the United States.

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[54] Respondent's Motion for Remand to the Immigration Judge for Change of Venue Based on Ineffective Assistance of Counsel, at 4-9, *In re Cortinovis*, A014-707-441 (Falls Church Imm. Ct. Aug. 22 2009).

Mr. Morgan-White was convicted twice of attempted possession of less than one gram of cocaine. Mr. Morgan-White completed drug treatment programs and had a strong support network in Texas that facilitated his rehabilitation. About a dozen family members and former co-workers submitted letters of support for his cancellation of removal application. Nevertheless, his application for relief was pretermitted because the second drug offense was deemed to be an aggravated felony under the Fifth Circuit rule. The Fifth Circuit denied his appeal, and Mr. Morgan-White was deported to Nicaragua. His deportation has imposed great hardship on his family, particularly for his dying mother, who most needs his support.[55]

4. Immigration judges who apply the Fifth and Seventh Circuits' rule are barred from considering the positive equities of asylum seekers who face serious threats of persecution and discrimination in their sending countries.

[55] *Morgan-White v. Holder*, No. 08-60586 (5th Cir. Dec. 15, 2009); Application for Cancellation of Removal for Certain Permanent Residents, Respondent's Brief on Appeal at 2, *In re Morgan-White*, A90-395-622 (San Antonio Imm. Ct. June 4, 2008).

Mr. Lemaine's[56] asylum application was pretermitted due to the automatic bundling of his discrete non-criminal violations into a drug trafficking aggravated felony.[57]

- Mr. Lemaine has been detained in Texas for the past two and a half years awaiting deportation to Haiti due to the erroneous Fifth Circuit decision under review in this case. If he is removed, as a deportee with a criminal record, Mr. Lemaine will be detained indefinitely in a Haitian prison upon his arrival in Haiti and will likely face life-threatening conditions.[58] The U.S Department of State has documented the horrific prison conditions in Haiti.[59] No medical care is provided to the detainees in Haiti. Physical abuse by guards is pervasive. The Department of State has cited beating with fists, sticks, and belts; burning with cigarettes; choking; hooding; and "kalot marassa" (a severe boxing of the ears) as some of the forms of abuse against detainees that are rampant in Haiti.[60] It has also documented

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[56] *See supra* Part I.C. for a more detailed discussion of Mr. Lemaine's story.

[57] *See also Berhe*, 464 F.3d at 78–79 (involving Eritrean national who faced religious persecution if he were returned to sending country); *In re Haile-Mariam*, 2007 WL 4182339, at 2 (B.I.A. Oct. 22, 2007).

[58] Brief for Petitioner at 4–9, *Lemaine v. Mukasey*, No. 08-60286 (5th Cir. Aug. 6, 2009).

[59] *Id.*, citing the BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. DEP'T OF STATE, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES-2002: HAITI at 252, 352 (2007).

[60] *Id.*

isolated allegations of torture by electric shock.[61] These life-threatening conditions have severely worsened after the tragic earthquake in Haiti.[62]

B. In jurisdictions that have accepted the BIA's interpretation, immigration judges have exercised discretion to provide immigrants with non-trafficking convictions relief based on compelling equities, as Congress intended.

In jurisdictions that recognize that a second simple possession offense should not automatically be deemed an aggravated felony, immigration judges have exercised discretion in cases involving core U.S. interests and values such as fairness, proportionality and family unity.[63]

- Donald Overton Powell is a 60-year-old lawful permanent resident who arrived in the United States from Jamaica as a teenager over forty years ago. His mother and brother are U.S. citizens, and his two sisters are also lawful permanent residents. He has two U.S. citizen

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[61] *Id.*

[62] *See* Simon Romero, *Haiti Lies in Ruins: Grim Search for the Untold Dead,* N.Y. TIMES, Jan. 14, 2010 at A1.

[63] *In re Louisiaire*, 2008 WL 762757, at 1 (B.I.A. Feb. 28, 2008); *In re Saladrigas-Vergara*, 2008 WL 655766, at 1 (B.I.A. Feb. 7, 2008); *In re Beckford*, 2008 WL 339649, at 1 (B.I.A. Jan. 15, 2008); *In re Sandoval-Castillo*, 2006 WL 2391183, at 1 (B.I.A. Jun. 27, 2006); *In re Williams*, 2005 WL 3833033, at 1 (B.I.A. Nov. 17, 2005); *In re Jimenez*, 2005 WL 3016098, at 1 (B.I.A. Aug. 5, 2005).

> children and two grandchildren, whom he helps care for on a regular basis. His life in the United States has been marked by tragedy. For 15 years, he worked at a paper factory, where the inhalation of paper dust caused serious illness that required surgery. During this time, his father was shot and killed by a stray bullet.
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> Mr. Powell was convicted in 1997 and 2001 for misdemeanor possession of a controlled substance. Since those convictions, he has remained free of drugs, stating "he cannot do drugs and take care of his grandchildren." In light of his equities, an immigration judge granted him cancellation of removal. However, the Government appealed this determination and eventually Mr. Powell's case went to the Second Circuit, where his case was joined with Ms. Alsol's.[64] Following the Circuit's favorable decision, he is awaiting remand on his case so that his cancellation can be reinstated. In the meantime, he continues to maintain his connection to his family by helping care for his grandchildren.[65]

Immigration judges have also exerted discretion to uphold the longstanding humanitarian principles underlying the purpose of relief. The cases of Gary Anderson and Ancil Skeete illustrate the crucial role of discretion in ensuring fair outcomes in the immigration system.

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[64] Ms. Alsol's case is described *supra* Part I.A.

[65] Petitioner's Brief at 5–7, *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008) (No. 08-1112-ag).

- Gary Patrick Anderson is a lawful permanent resident who has lived in the United States since 1984 at the age of 17. He has significant family ties in the Unites States, including two U.S. citizen siblings, a number of nieces and nephews, and a mother and brother who are lawful permanent residents. Mr. Anderson is diagnosed with mental illness and mental retardation, and for years suffered through lengthy hospitalizations. However, he began exhibiting marked improvement after connecting with a community-based treatment provider that could address his mental health, substance abuse and housing needs.

  In the 2000s, Mr. Anderson pled guilty to two possession offenses. After his second plea, he was detained by Immigration and Customs Enforcement (ICE) and transferred to a facility in Texas, separated from his family and the support networks that were so crucial to his mental stability. He remained in detention for over two years, despite psychological evaluations finding that he was a limited flight risk, affidavits from relatives and psychiatrists, and no fewer than 98 letters of support from community members. His treatment providers eventually secured him counsel, who persuaded an immigration judge to transfer his case back to New York. He was finally granted cancellation of removal in early 2009 and was released from detention.[66]

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[66] Memorandum of Law in Support of Petitioner's Habeas Corpus Pursuant to 28 U.S.C. § 2241 at 5–15, *Anderson v. McGuire*, No. 2:09-cv-00340-DMC (D.N.J. Jan. 23, 2009); *DHS*

- Ancil John Darren Skeete is a lawful permanent resident who was born in Trinidad but immigrated to the U.S. over 30 years ago, when he was 12 years old. He has strong family ties to the Unites States, including his mother, stepfather and fiancée. Mr. Skeete also stays in regular contact with his 18-year-old son, who was adopted by another family but remains in his life. Mr. Skeete is diagnosed with HIV and manages a complex medication regimen in order to maintain his health.

  Mr. Skeete has been convicted twice of misdemeanor possession of controlled substances and once of misdemeanor possession of marijuana. He was kept in detention in Texas pending the resolution of his removal proceedings. He was initially barred from applying for both asylum and cancellation of removal because his possession conviction was deemed to be a drug trafficking aggravated felony. After his attorneys filed a successful motion for change of venue and his case was transferred back to New York, he finally received cancellation and was released from detention after 26 months.[67]

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v. Anderson – Center for Constitutional Rights, http://ccrjustice.org/ourcases/current-cases/dhs-v.-anderson (last visited Jan. 31, 2010).

[67] *See* Memorandum of Law in Support of Petitioner's Habeas Corpus Petition Pursuant To 28 U.S.C. § 2241 at 4–9, *Skeete v. Shanahan*, No. 1:09-cv-0523-RJH (S.D.N.Y. Jun. 4, 2009).

These cases are but a few examples of numerous individuals who have received discretionary relief based on their equities, who would be denied such relief under the Fifth and Seventh Circuits' interpretation.[68]

III. Given the harsh results for immigrants, any ambiguities regarding Congressional intent in the statute should be interpreted in favor of the noncitizen under the rule of lenity.

Amici first and foremost agree with the Petitioner that there is no ambiguity in the plain language of U.S.C. § 1101(a)(43)(B).[69] The statute cannot be read to automatically label any second or subsequent simple drug possession offense as a drug trafficking aggravated felony.

However, as Petitioner's brief discusses, should the Court conclude that U.S.C. § 1101(a)(43)(B) is ambiguous, any such ambiguity should be construed in favor of the noncitizen given the tremendously harsh immigration consequences faced by individuals with aggravated felony convictions.[70] The rule of len-

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[68] *See also* Certified Administrative Record at 2, *Beckford v. Holder*, No. 08-1355 (7th Cir. Nov. 24, 2009) (individual who received cancellation of removal, but was held ineligible for relief after Government's appeal); *In re Lousiaire*, 2008 WL 762757, at 1 (B.I.A. Feb. 28, 2008) (same).

[69] *See* Br. for Pet'r at 17.

[70] *Id.* at 38–40. The rule of lenity applies in the criminal context just as it applies in the immigration context. As mentioned *supra* Part I.B, immigrants who unlawfully reenter the United States after being convicted of an aggravated felony are subject to up to 20 years in prison, 8 U.S.C. § 1326(b).

ity applies with special force where it results in an interpretation of an underlying statute that is consistent with that statute's "humanitarian purpose."[71] The discretionary forms of relief set forth in the statutes authorizing asylum and cancellation of removal were built upon humanitarian principles that have saved the lives of many individuals fleeing from persecution and protected the integrity of countless of families. Validating the Fifth and Seventh Circuits' harsh rule undermines principles of proportionality and would be a step backward for human rights.

Amici have witnessed firsthand how the separation of spouses and children living in the United States from their parent, husband, or wife because of deportations has a particularly harmful effect on low-income families who lack resources. Removal may mean the withdrawal of financial support from the household breadwinner. Furthermore, these families may not have the economic means to take their children to visit their noncitizen parents or family members who have been deported. Therefore, removal creates severe emotional and financial difficulties for families.[72] Nir Masok's story is but one example.

- Nir Masok is an Israeli national who entered the United States in 1982 at the age of 13 and became a lawful permanent resident five years later. He has worked steadily for his father's catering company since 1994. Mr. Masok lives in Illinois with his U.S. citizen fiancée and her

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[71] *INS v. Errico*, 385 U.S. 214, 225 (1966) (interpreting INA provision saving noncitizens who obtained entry through misrepresentation from deportation under certain conditions).

[72] *See also* FORCED APART, *supra* note 31 at 44.

> two U.S. citizen sons who are ten and eleven years old; the latter has been diagnosed with an emotional disorder and Mr. Masok plays a major role in caring for him. His parents and sister are also U.S. citizens.
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> In the past, Mr. Masok had a drug abuse problem and was convicted several times of simple drug possession. After his last conviction in 2002 for misdemeanor possession of marijuana, he successfully completed drug rehabilitation after seeing the effects his drug use had on his family. He has not used drugs in seven years and has not been convicted of drug-related offenses since his 2002 conviction. However, he now faces removal without opportunity for relief because of his drug possession convictions under Seventh Circuit law, and his family is concerned about the effect his deportation would have on his fiancée's older son, who already requires significant attention and care.[73]

The Masok family is not alone. Labeling simple possession offenses – some of which are treated as non-criminal violations – as aggravated felonies would tear apart many families, as was the case of the Ramirez-Solis and Rodriguez-Diaz families. This interpretation implicates life and death issues, as in

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[73] See *Masok v. Achim*, No. 04C7503 (N.D.Ill. Apr. 28, 2005); Respondent's Pre-Hearing Statement, Memorandum of Law in Support of Application for Cancellation of Removal at 2, and Affidavit of Stephanie Graves in Support of Respondent's Pre-Hearing Statement at 3–5, *In re Masok*, A38-686-189 (Chicago Imm. Ct. Mar. 2, 2009).

the case of Mr. Lemaine. It would mean denying U.S. veterans such as Mr. Castro-Rodriguez the care and opportunity that they were promised when they took an oath to serve our country. And it forces the legal system to turn its back on individuals, such as Mr. Cortinovis and Mr. Morgan-White, who have overcome addiction and transformed their lives and those of their families and communities. These are precisely the harsh consequences against which the rule of lenity is meant to protect.

Applying the principles affirmed by this Court to the present case, the narrowest construction of 8 U.S.C. § 1101(a)(43), and the one consistent with the rule of lenity, does not construe "drug trafficking" to include simple possession, so as to elevate possession into an aggravated felony.

CONCLUSION

The stories of the community members and clients described in this brief demonstrate the harsh consequences that application of the "drug trafficking" aggravated felony label to simple possession offenses would inflict on individuals who should remain eligible for discretionary relief. Amici respectfully urge this Court to consider the unjust impact that this interpretation has on the immigrant communities we represent and find in favor of the Petitioner in this case.

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF AMICI CURIAE

The **Asian American Justice Center** ("AAJC") is a national non-profit, non-partisan organization whose mission is to advance the human and civil rights of Asian Americans through advocacy, public policy, public education, and litigation. Collectively, AAJC and its affiliates – the Asian American Institute, the Asian Law Caucus, and the Asian Pacific American Legal Center of Southern California – have over fifty years of experience in litigation, public policy, advocacy, and community education on discrimination issues. AAJC has advanced its long-standing concern for protecting the rights of immigrants – a significant proportion of whom are Asian Americans – by filing briefs in immigration cases, and educating policymakers and the public on the need for fair and humane immigration laws.

Founded in 1946, the **American Immigration Lawyers Association** ("AILA") is a national non-profit association of over 11,000 attorneys and law professors who practice and teach in the field of immigration and nationality law. AILA works to promote justice, advocate for fair and reasonable immigration law and policy, and advance the quality of immigration and nationality law and practice in the United States. AILA member attorneys represent tens of thousands of immigrant families and regularly appear before federal courts throughout the United States.

Asian American Institute ("AAI") is a pan-Asian, non-partisan, not for profit organization lo-

cated in Chicago, Illinois, whose mission is to empower the Asian American community through advocacy, coalition-building, education, and research. AAI's programs include legal advocacy, community organizing, and leadership development. Asian Americans are a diverse and often overlooked community, but they are one of the fastest-growing populations in the United States. AAI strives to put a human face on the challenges that immigrants experience and, accordingly, has an important interest in the fairness of criminal and other proceedings against immigrants. Mandating unduly harsh consequences for simple drug possession convictions, as the Fifth and Seventh Circuits have done, is unfair to immigrants and their families and violates applicable principles of law.

The **Asian Pacific American Legal Center of Southern California** ("APALC") was founded in 1983 and is the largest non-profit public interest law firm devoted to the Asian Pacific American community. APALC provides direct legal services and uses impact litigation, public advocacy and community education to obtain, safeguard, and improve the civil rights of the Asian Pacific American community. APALC serves 15,000 individuals and organizations each year through direct services, outreach, training, and technical assistance. Its primary areas of work include workers' rights, anti-discrimination, immigrant welfare, immigration and citizenship, voting rights, and hate crimes. APALC employs policy advocacy and case work to represent the interests and due process rights of individuals who could be repatriated and removed from the country. It is in this interest that we participate with amici in this brief.

Banished Veterans was founded to advocate for all members of the U.S. Military who serve of have served our nation and who face deportation or have been deported due to harsh immigration consequences. Veterans who have served during times of war or hostilities often lack a real opportunity to seek any form of discretionary relief due to the current erroneous interpretation of Congress' intent in the Fifth and Seventh Circuits. In our experience, this creates an injustice to these long-term permanent residents and has the potential to adversely affect national security. Therefore, Banished Veterans has a direct interest in the issues in this case.

CASA of Maryland is a non-profit agency founded in 1985 that provides multiple services including immigration assistance, employment rights legal representation, employment training and job placement, leadership training, and education to the immigrant and refugee community in Maryland. In addition to providing direct services, CASA organizes domestic workers and women, day laborers, and tenants to work together to build better neighborhoods and stronger communities. CASA also actively involves community members in advocacy efforts that include comprehensive immigration reform. CASA is an active member of the National Capital Immigration Coalition.

The **Catholic Legal Immigration Network, Inc.** ("CLINIC") is a non-profit organization comprised of 185 diocesan and other affiliated immigration programs with 290 field offices in 48 states. Its mission is to enhance and expand delivery of legal services to indigent and low-income immigrants, principally through diocesan immigration programs

and to meet the immigration needs identified by the Catholic Church in the United States. In recent years CLINIC affiliates and CLINIC's BIA Pro Bono Project have assisted hundreds of immigrant detainees in removal proceedings, including immigrants with minor drug-related offenses.

The **Coalition for Humane Immigrant Rights of Los Angeles** ("CHIRLA") is a nonprofit organization founded in 1986 to advance the human and civil rights of immigrants and refugees in Los Angeles. As a multiethnic coalition of community organizations and individuals, CHIRLA aims to foster greater understanding of the issues that affect immigrant communities, provide a neutral forum for discussion, and unite immigrant groups to more effectively advocate for positive change.

The **Dominican Bar Association** ("DBA") works to increase professional opportunities for Dominican-American, native Dominican and Latino attorneys in the U.S. legal profession and to partner with other bar associations, governmental agencies and community groups to foster greater participation in the U.S. legal system by the Dominican and Latino communities. The DBA also addresses issues of concern to the Dominican and Latino communities in the U.S. and safeguards the civil rights of the Dominican and Latino communities and to empower said communities to fully participate in American society through public education and outreach.

El Refugio del Rio Grande, Inc., is a §501(c)(3) organization devoted to furthering the rights of asylum-seekers and other immigrants. Recently, Refugio has focused increasingly on the impact of the 1996 amendments to the Immigration and

Nationality Act on lawful permanent residents and their families. Since their enactment, Refugio has represented well over 100 such clients in the federal district courts, Fifth Circuit, and Supreme Court, and many others before the Executive Office for Immigration Review.

The **Florence Immigrant and Refugee Rights Project** ("Project") is a Legal Orientation Program site of the Executive Office of Immigration Review. As such, it is one of more than 25 organizations across the country providing free legal information to detained citizens and non-citizens in removal proceedings. In 20081, nearly 10,077 individuals charged with removability observed a rights presentation given by Project attorneys. That same year, more than 3,342 people received targeted pro se support services from the staff. Every year, Florence Project attorneys directly represent approximately 50 Respondents before the Board of Immigration Appeals and support countless pro se appellants.

The **Florida Immigrant Advocacy Center** ("FIAC"), a non-profit law firm, was founded in 1996 when federal funding restrictions limited Legal Services' ability to handle immigration cases on behalf of indigent clients. FIAC serves the most vulnerable immigrant populations through direct services, federal court litigation, impact advocacy and education. For more than a decade, FIAC attorneys have represented individual clients in removal proceedings before immigration judges, the Board of Immigration Appeals, and the U.S. Court of Appeals for the Eleventh Circuit.

The **Mexican American Legal Defense and Education Fund** ("MALDEF") is a national civil

rights organization established in 1968. Its principal objective is to promote the civil rights of Latinos living in the United States through litigation, advocacy and education. MALDEF has represented Latino and minority interests in civil rights cases in federal courts throughout the nation. MALDEF is at the forefront of the battle to create and preserve the rights of those in search of economic opportunity and personal freedoms in America.

National Council of La Raza ("NCLR") is a private non-profit organization and the largest Latino constituency-based advocacy group in the United States. NCLR has nearly 300 member organizations in forty states. Founded in 1968, its mission is to reduce poverty and discrimination, and to improve opportunities for Latinos throughout the United States. It carries out its mission by focusing its education and advocacy work on issues related to education, economic development, electoral empowerment, healthcare, civil rights, and immigration.

The **National Immigration Law Center** ("NILC") is a national nonprofit legal advocacy organization dedicated to advancing and promoting the rights of low-income immigrants and their family members. NILC conducts trainings, produces legal publications, and provides technical assistance to nonprofit legal assistance organizations across the country concerning immigrants' rights. NILC also conducts litigation to promote the rights of low-income immigrants in the areas of immigration law, employment, and public benefits. A major concern of the organization is to ensure that the government treats immigrants with fairness and due process. NILC has a direct interest in the issues in this case.

Northern Manhattan Coalition for Immigrant Rights ("NMCIR") was founded in 1982 as a community response to the influx of immigrants settling in Northern Manhattan and the Bronx. Every year NMCIR helps keep thousands of immigrant families stay together by providing free and affordable, personalized support around a vast array of family-based immigration petitions. NMCIR also helps the immigrant community build visibility and political power via voter registration, civic education, and supporting its member-driven advocacy campaigns around deportation issues.

Northwest Immigrant Rights Project ("NWIRP") is a non-profit legal organization dedicated to the defense and advancement of the rights of noncitizens in the United States. NWIRP provides direct representation to low-income immigrants in removal proceedings both before the Executive Office for Immigration Review and before the federal courts of appeals. A central goal in NWIRP's work before the Federal Courts of Appeals is to help clarify general tenets of the law so that other persons in proceedings, both represented and unrepresented, may benefit from a clear set of rules implementing the Immigration & Nationality Act. Accordingly, NWIRP has a direct interest in the issues in this case.