No. 09-60

IN THE
Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF FEDERAL DEFENDERS AND FAMILIES AGAINST MANDATORY MINIMUMS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

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 Constitution. NAFD is a nationwide, non-profit, volunteer organization. Its membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. NAFD's members represent many indigent defendants who will be directly affected by the Court's decision in this case, including defendants subject to prosecution for illegal reentry under 8 U.S.C. § 1326.

Families Against Mandatory Minimums ("FAMM") is a national non-profit organization whose primary mission is to promote fair and proportionate sentencing policies, and to challenge excessive penalties required by inflexible mandatory minimum sentencing laws. Founded in 1991, FAMM has over 24,500 members, many of whom are prisoners serving mandatory minimum sentences, or their family members. In addition to advocating for change through the legislative process, FAMM participates in precedent-setting legal cases like this

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been filed with the Clerk of the Court pursuant to Rule 37.3.

one. FAMM's interest lies in ensuring that courts construe and apply mandatory minimum sentencing laws in a manner consistent with statutory and constitutional principles.

Amici are particularly concerned that the decision of the Fifth Circuit Court of Appeals in this matter, if allowed to stand, could lead to dramatically increased criminal sentences for noncitizen defendants in § 1326 cases in a manner that is contrary to congressional intent with respect to the treatment of recidivists, and that would result in dramatic and unjustified disparities between state-law and federal-law misdemeanants.

SUMMARY OF ARGUMENT

A person is an aggravated felon, within both the immigration and criminal contexts, if that person is convicted of "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43). Section 924(c) defines "drug trafficking crime" as a "felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2). The plain language of § 924(c) requires that the individual have been convicted of an offense that would be a felony under federal criminal law. Any argument that a conviction of a federal misdemeanor is transformed into a felony for purposes of the Controlled Substances Act ("CSA") simply because the misdemeanor could have been charged as a felony is misplaced. A person convicted, pursuant to 21 U.S.C. § 844(a), of a drug possession misdemeanor (and not as a recidivist felon) has not been convicted

of a "drug trafficking crime" under § 924(c) and is therefore not an aggravated felon. While possession can be prosecuted as a felony under § 844(a), doing so requires that the defendant be charged as a recidivist and that a finding of the prior offense and its validity be made in the subsequent case.

Under the government's reading of 8 U.S.C. § 1101(a)(43), however, a person who is convicted of a state misdemeanor for drug possession after a prior possession conviction has become final automatically and always is an aggravated felon, regardless of whether the validity, the finality or even the fact of the prior conviction was established as part of the state proceeding.

The government contends that this result is warranted because had the person in question been convicted in federal court, the federal prosecutor *could have* prosecuted the person as a recidivist under 21 U.S.C. § 844(a). However, the government's reading contravenes Congress's direction that the prosecution of a person for felony recidivist possession under § 844(a) is not automatic. Section 844(a) requires a finding that the recidivist conviction occurred "after . . . a prior conviction" under federal or state controlled substances law "has become final." 21 U.S.C. § 844(a). In addition, the government's reading ignores the import of 21 U.S.C. § 851, a statute which makes recidivist prosecution turn on the exercise of prosecutorial discretion and which provides strict statutory safeguards on the use of prior convictions to enhance penalties.

Prior to 1970, federal prosecutors were required by statute to charge recidivism. Recognizing that not all recidivist offenders merited such treatment, Congress reversed this default presumption by enacting 21 U.S.C. § 851 and gave federal prosecutors the discretion to decide which offenders should be prosecuted as recidivists. And, indeed, the experience of *amicus* NAFD is that federal prosecutors frequently exercise their discretion not to insist on recidivist convictions under § 851. The government's reading stands Congress's instruction, which is consistent with *amicus*'s experience of federal practice, on its head, effectively treating recidivist enhancements as if they were automatic and mandatory.

The government's argument also ignores the substantive safeguards that Congress established regarding the use of prior convictions to enhance sentences. Section 851 creates a mandatory, non-waivable requirement that a prosecutor take the affirmative step of filing an information stating the prior conviction(s) on which the prosecutor relies in exercising the discretion to seek a recidivist enhancement. And, Section 851 requires courts to find the fact, validity, and finality of the conviction beyond a reasonable doubt as part of the proceeding. If a prosecutor fails to comply with § 851, the sentence may not be enhanced.

The government's interpretation would nullify these requirements and safeguards by deeming a state conviction for simple possession to be a recidivist drug felony, and therefore an aggravated

felony, even though the defendant was not prosecuted as a recidivist in the state proceeding.

The government's reading also creates gross and unwarranted disparities in the treatment of federal and state misdemeanants in the illegal reentry context. Under the government's approach, a two-time, state-law misdemeanant who illegally reenters the United States and is convicted under 8 U.S.C. § 1326 faces penalties that are ten times greater than a two-time, federal-law misdemeanant who has been convicted of similar offenses. Furthermore, if a person has one federal and one state drug possession misdemeanor, the maximum sentence for an illegal reentry conviction differs drastically based solely on which conviction came first: if the state conviction was followed by a federal conviction, the maximum would be two years, but if the order of the convictions were reversed, the maximum would be twenty years. There is no evidence that Congress intended such a disparate result and no plausible justification for such a disparity.

Assuming *arguendo* that the government's reading of the aggravated felony drug trafficking provision were plausible, at most this provision is ambiguous. The criminal rule of lenity would require adoption of the narrower interpretation and rejection of the government's impermissibly broad interpretation. The government's interpretation does not satisfy the rule of lenity's requirements that defendants be given fair warning of what conduct is illegal and what punishments arise from illegal conduct. To determine that every state defendant

who is facing a second or subsequent drug possession misdemeanor conviction has fair warning that in the eyes of the federal government he is now an aggravated felon is unsustainable.

ARGUMENT

I. The "Aggravated Felony" Drug Trafficking Provision, 8 U.S.C. § 1101(a)(43)(B), Has Both Immigration and Criminal Law Applications.

Petitioner Jose Angel Carachuri-Rosendo was found subject to mandatory deportation based on the Board of Immigration Appeals' determination that it was required under Fifth Circuit precedent to conclude that Petitioner's Texas misdemeanor conviction for possession of a tablet of Xanax constituted an "aggravated felony" because Petitioner had a prior misdemeanor conviction for possession of marijuana, even though the fact of that conviction was not charged or found in the subsequent misdemeanor case. The Fifth Circuit Court of Appeals affirmed, and this Court granted certiorari to determine whether a person convicted under state law for simple drug possession has been "convicted" of a drug trafficking "aggravated felony" within the meaning of the Immigration and Nationality Act because 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 the subsequent prosecution for possession.

Like other aggravated felony definitional provisions, the drug trafficking aggravated felony provision, 8 U.S.C. § 1101(a)(43)(B), is located at the

intersection of immigration law and criminal law. In the immigration context, conviction of an aggravated felony renders a noncitizen subject to mandatory deportation and other immigration consequences. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (deportable); *id.* §§ 1229b(a)(3), 1229b(b)(1)(C) (cancellation of removal unavailable); *see also, e.g.*, *id.* § 1226(c) (mandatory detention). In the criminal context, prior conviction of an aggravated felony exposes a noncitizen to a far greater maximum prison sentence than other types of prior convictions if the noncitizen is subsequently convicted of illegal reentry after deportation based on the prior conviction. The illegal reentry statute, 8 U.S.C. § 1326, provides for a graduated sentencing scheme of increasing statutory maximums, the highest of which – 20 years' imprisonment – is triggered by a prior conviction for an aggravated felony. 8 U.S.C. § 1326(b)(2). Also, under the United States Sentencing Guidelines, the statutory concept of "aggravated felony" is utilized in the application of a steep offense level increase, regardless of what may have been charged in the indictment. U.S.S.G. § 2L1.2(b)(1)(C) & appl. note 3 (comment).

Pursuant to the teachings of this Court, a dual-use statute such as the aggravated felony definitional provision at issue here generally must be interpreted consistently as between the two contexts in which it applies. This dual-use principle was nowhere made more evident than in this Court's decision in *Lopez v. Gonzales*, 549 U.S. 47 (2006). *Lopez* concerned whether an offense that is a felony under state law but a misdemeanor under federal

law qualifies as an aggravated felony triggering mandatory deportation. At the same time that the Court granted certiorari in *Lopez*, it also did so in *Toledo-Flores v. United States*, 547 U.S. 1054 (2006), an illegal re-entry sentencing case raising the same statutory construction question. *Toledo-Flores* was subsequently dismissed as moot, but the *Lopez* decision clearly reflected the Court's intent that the holding would apply consistently in the immigration and criminal contexts. *Lopez*, 549 U.S. at 52 n.3 (citing and abrogating a series of both immigration removal and criminal sentencing cases).

As explained herein, the government's proposed reading of the drug trafficking aggravated felony definition cannot be squared with Congress's intent with respect to when an individual may be deemed to have been convicted of a recidivist drug offense, and therefore of an aggravated felony, for purposes of federal criminal and immigration law.

II. To Deem a Second State-Law Misdemeanor Possession Conviction As Automatically Constituting an Aggravated Felony Contravenes the Federal Statutory Scheme and Is in Tension With Federal Practice Pursuant to Which Few Federal Recidivists Are Prosecuted as Felons.

The INA defines "aggravated felony" to include "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43). In turn, 18 U.S.C. § 924(c) defines a "drug trafficking crime" to include "any felony punishable under the

Controlled Substances Act." 18 U.S.C. § 924(c)(2). At issue in this case is whether a second state-law misdemeanor drug possession offense automatically meets the definition of an aggravated felony because it *could have been* punished as a felony under federal law. *Amici* contend that the government's approach of treating second-time state-law misdemeanants automatically as recidivists, and therefore as felons, contravenes the statutory scheme because 1) Congress has directed that the prosecution of a second-time misdemeanant as a recidivist felon under federal criminal law should be a matter of prosecutorial discretion and is subject to strict statutory safeguards; and 2) the government would treat state-law defendants differently from federal-law defendants when Congress has sought to treat them alike.

A. A Second Simple Possession Conviction Is Not a Felony Under Federal Criminal Law Unless the Fact, Finality and Validity of a Prior Possession Conviction Have Been Established in the Second Criminal Proceeding.

Under the Controlled Substances Act, a first drug possession conviction is a misdemeanor. *See* 21 U.S.C. § 844(a) (authorizing maximum sentence of one year for first-time offense); 18 U.S.C. § 3559(a)(6)-(8) (classifying an offense as a misdemeanor where the maximum authorized prison term is one year or less, but more than five days). A second or subsequent drug possession conviction, including one following a prior state conviction, can

be either a misdemeanor or a felony.[2] Under the terms of § 844(a), in order for such a conviction to be a felony it must be obtained "after . . . a prior conviction" under federal or state controlled substances law "has become final." 21 U.S.C. § 844(a). Thus, there must necessarily have been a finding as to the existence of the prior conviction in the subsequent proceeding. *See id.*

Moreover, a second or subsequent possession conviction under § 844(a) cannot be treated as a felony under federal law unless the fact, finality and validity of a prior possession conviction have been established in the second or subsequent case in compliance with 21 U.S.C. § 851. "No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions," unless the prosecutor files an information stating the prior conviction to be relied upon and the court determines that the person has been convicted as alleged in the information and that the conviction is valid. 21 U.S.C. § 851(a)(1). Any factual dispute in this regard must be resolved by the court, after a hearing, upon the introduction of actual evidence, with the government bearing the burden of proof beyond a reasonable doubt. *Id.*[3]

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[2] Section 844(a) enumerates several exceptions to this general rule, such as possession of a certain amount of a mixture or substance containing cocaine base, which are felonies even for first-time offenders. None of these exceptions are relevant to this case.

[3] *Cf.* 21 U.S.C. § 850 (other sentencing disputes in a drug case may be resolved upon "information," not necessarily evidence, and with proof meeting a mere preponderance standard).

Only if the prosecutor complies with § 851 and the sentencing court determines that there was a prior valid conviction does the maximum punishment under § 844(a) for a second conviction increase to two years, making the conviction a felony. *See* 18 U.S.C. § 3559(a)(1)-(5) (classifying offense as a felony where maximum authorized prison term is more than one year).[4]

If a prosecutor chooses not to pursue charging the defendant as a recidivist in accordance with § 851, or if the sentencing court determines that the prosecution has not proven the fact of a prior valid conviction beyond a reasonable doubt, *see* 21 U.S.C. § 851(c)(1); *see also, e.g.*, *United States v. Green*, 175 F.3d 822, 835-36 (10th Cir. 1999); *United States v. Kellam*, 568 F.3d 125 (4th Cir.), *cert. denied*, 130 S. Ct. 657 (2009), then the maximum punishment under § 844(a) for a second drug conviction remains one year, making the conviction a misdemeanor. *See* 18 U.S.C. § 3559(a)(6); *United States v. LaBonte*, 520 U.S. 751, 754 n.1 (1997) (explaining that without proper notice under § 851, "the lower sentencing range [i.e., one year or less] will be applied even

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[4] In fact, not even all second-time violators of § 844 are eligible to be prosecuted for a felony. That is because under the Federal First Time Offense Act, 18 U.S.C. § 3607, a court may place a first-time violator of § 844 on probation "without entering a judgment of conviction." So long as that person does not violate the conditions of probation, the court will "without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation." 18 U.S.C. § 3607(a). Because this disposition cannot "be considered a conviction . . . for any . . . purpose," many second-time violators of § 844 can be prosecuted only for a misdemeanor.

though the defendant may otherwise be eligible for the increased penalty"); *Price v. United States*, 537 U.S. 1152, 1235 S. Ct. 986, 989 (2003) (Scalia, J., dissenting) (noting the government's concession that "petitioner's drug possession offense could not be treated as a felony . . . given the government's failure to file a notice of enhancement under 21 U.S.C. § 851(a)") (quotation marks omitted); *Steele v. Blackman*, 236 F.3d 130, 137 (3d Cir. 2001) (explaining that a second violation of § 844 "is not inherently a felony under federal law"). Indeed, the Government has previously acknowledged that "[a] drug possession offense is punishable as a felony under the Controlled Substances Act by virtue of the defendant's recidivism only if the government has filed a notice under 21 U.S.C. 851(a)." Brief for the United States in Opposition, at 12, *Price v. United States*, 537 U.S. 1152 (2003) (No. 01-10940). In effect, the default rule is that a second possession conviction under § 844(a) is a misdemeanor under the CSA.

Because a second misdemeanor possession conviction is not automatically a felony absent a finding that it comes "after a prior conviction," 21 U.S.C. § 844(a) – a finding that must be sought by the prosecutor and rendered in accordance with § 851 – such a conviction is also not an aggravated felony. As explained in more detail in Petitioner's brief, *see* Pet. Br. 20-21, and as held by this Court in *Lopez*, 549 U.S. at 57, a defendant has a "conviction" for a "drug trafficking crime," and therefore for an aggravated felony, when he has been convicted of a "felony punishable under the [CSA]." 18 U.S.C.

§ 924(c)(2). This language thus requires a conviction of an offense that would be a felony under federal law. Any argument that a second misdemeanor conviction under § 844(a) qualifies as a drug trafficking crime because it *could* have been charged as a felony is misplaced. The CSA's plain language does not support treating a conviction for an offense that would constitute only a federal drug misdemeanor as a federal drug felony.

B. Prosecution of Second-Time Possession as Felony Recidivist Possession Is a Matter of Prosecutorial Discretion and Is Subject to Strict Limitations, With the Result that Few Federal Second-Time Offenders Are Convicted as Felons.

Congress chose to give prosecutors the discretion to seek recidivist enhancements in drug cases, and in so doing required that a defendant be accorded substantive protections before a prior conviction may be used to increase the sentence attendant to a subsequent conviction. As a result, in the case of § 844(a), a second possession conviction is rendered a felony rather than a misdemeanor if, but only if, the second conviction was obtained in accordance with these protections. The Government's position that all persons convicted in state court of drug possession – conduct punishable only as a misdemeanor under § 844(a) – after a prior conviction for such possession are automatically and always aggravated felons contradicts the clear congressional scheme regarding recidivist enhancements under the CSA.

At one time, prosecutors were required to charge recidivism and federal courts were required to sentence defendants as recidivists unless the defendant could prove that a prior conviction did not exist. *See* 26 U.S.C. § 7237(c)(2) (1970) (providing that prosecutors "shall file an information setting forth the prior convictions"); *United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002). "The thrust of [this] prior law, which required minimum sentences, was mandatory enhancement." *United States v. Noland*, 495 F.2d 529, 532 (5th Cir. 1974). A federal prosecutor "was required to advise the court whether the defendant was a first offender. The court was required to enhance the sentence of a multiple offender[.]" *Id.*

Recognizing that not all recidivist drug offenders merited such treatment, in 1970 Congress reversed this default presumption. Instead of requiring recidivist prosecutions and their attendant sentencing enhancements, Congress gave federal prosecutors discretion to decide which drug offenders should be prosecuted as recidivists. *See Dodson*, 288 F.3d at 159 ("One goal of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which 21 U.S.C. § 851 is a part, was to make the penalty structure for drug offenses more flexible."). Absent the government's affirmative filing of an information under § 851, the recidivist penalty would not apply.

The introduction of the element of prosecutorial discretion represented a sharp break with previous law and practice. The earlier statute was silent as to the effect of a failure to timely file an information

giving notice of the prior conviction, and as a result had been interpreted by numerous courts of appeals as allowing the trial court to deem failure to timely file an information giving notice of the conviction(s) to be harmless error. *See United States v. Severino*, 316 F.3d 939, 953-54 (9th Cir. 2003) (Thomas, J., dissenting) (citing cases). The error could be deemed harmless because the default rule under the prior regime was that the defendant was to be prosecuted as a recidivist – just the opposite of current law. When Congress enacted § 851, it made a dramatic change in the federal drug laws, conditioning prosecution of a defendant as a recidivist (and therefore exposure to increased prison time) on a mandatory, non-waivable requirement that the prosecutor must exercise discretion to file an information stating the conviction or convictions to be relied upon, and on a requirement that the conviction be found to exist and to be valid by the court. The new law changed the default rule.

By making this change, Congress limited the scope of drug offenses subject to recidivist treatment under the CSA. In the § 844(a) context, the result of the statutory regime established by Congress is that an offender cannot be convicted as a felon based on a second or subsequent simple possession charge unless the prosecutor has chosen to pursue recidivist prosecution and has complied with the prerequisites of § 851. This is no mere formality: sentencing enhancements have been reversed due to the government's failure to comply with this statute. *See, e.g.*, *Green*, 175 F.3d at 835-36 (finding insufficient proof for enhancement where

government produced no physical evidence such as fingerprints or photographs to show that the persons previously convicted were the same person as defendant); *Kellam*, 568 F.3d at 144-45 (finding insufficient proof of prior conviction for enhancement where discrepancies in records of alleged prior meant government could not meet its burden to prove it was the same defendant).

In the experience of *amicus* NAFD, federal prosecutors frequently exercise their discretion not to insist on recidivist enhancements under § 851. In most relevant instances, prosecutors threaten to charge defendants with recidivist enhancements to encourage those defendants to plead to unenhanced charges. *Amicus* NAFD is aware of few, if any, § 844(a) cases in which the recidivist enhancement has been applied.

This prosecutorial approach is consistent with the Department of Justice's charging policies. The DOJ's general policy requires that federal prosecutors charge and pursue the most serious, readily provable offense. U.S. Dep't of Justice, United States Attorneys' Manual § 9-27.300(B) (1997); *see also* Memorandum from [Attorney General] John Ashcroft to all Federal Prosecutors Regarding Policy on Charging of Criminal Defendants (Sept. 22, 2003) ("Ashcroft Memo"), *reprinted in* 16 Fed. Sent. R. 129, 130. There are a limited number of exceptions to this policy, one of which is for statutory enhancements, including specifically recidivism enhancements like § 851. United States Attorneys' Manual § 9-27.300(B); *see also* Ashcroft Memo,

reprinted in 16 Fed. Sent. R. at 131 ("As soon as reasonably practicable, prosecutors should ascertain whether the defendant is eligible for any such statutory enhancement [as § 851]. In many cases, however, the filing of such enhancements will mean that the statutory sentence exceeds the applicable Sentencing Guidelines range, thereby ensuring that the defendant . . . will have no incentive to plead guilty . . . . Accordingly, [authorization may be given to] a prosecutor to forgo the filing of a statutory enhancement . . . in the context of a negotiated plea agreement."). Although they are encouraged to seek enhancements in appropriate cases, federal prosecutors may (and as just explained, frequently do) decline to charge a defendant as a recidivist "after giving consideration to the nature, dates, and circumstances of the prior convictions, and the extent to which they are probative of criminal propensity." Ashcroft Memo, *reprinted in* 16 Fed. Sent. R. at 131.

C. The Government's Approach Contravenes Congressional Intent Regarding Recidivist Enhancements.

In *Lopez*, this Court acknowledged Congress's intent that federal and state offenses be treated consistently for purposes of the INA's aggravated felony provision and, more specifically, that Congress intended that in order to constitute a drug trafficking aggravated felony the offense of conviction must be punishable as a felony under the CSA. *Lopez*, 549 U.S. at 57. Yet, under the government's approach here, any individual convicted in state court of simple drug possession

automatically would be deemed an aggravated felon if that conviction came after a previous possession conviction. The government's position cannot be reconciled with *Lopez*, because it would automatically treat a state possession conviction as if it were a federal felony in circumstances in which a federal possession conviction would be a federal misdemeanor, a result contrary to the CSA definitions that Congress made controlling. Moreover the government's position contravenes Congress's intent that a second-time misdemeanor drug offender is not a felon within the meaning of federal criminal law where there has been neither a charge nor finding of a prior drug possession offense in the subsequent drug possession proceeding. To contend that a second-time misdemeanant is an aggravated felon because the defendant "could have" been prosecuted as a felon under federal law is to upend the federal statutory regime, in which the default rule is that such an individual is a misdemeanant not a felon.

Moreover, although § 851 is best understood as a substantive limitation by Congress on the scope of recidivist drug prosecutions under the CSA, it should not be overlooked that the provision also serves an important due process function by requiring the defendant be provided with notice and an opportunity to be heard with respect to the fact and validity of the prior conviction upon which the government seeks to rely to charge the defendant as a recidivist. This Court has recognized, including with respect to state-law prosecutions, that due process requires "reasonable notice and an

opportunity to be heard relative to [a] recidivist charge." *Oyler v. Boles*, 368 U.S. 448, 452 (1962); *see also id.* at 454 ("[W]e may assume that any infirmities in the prior convictions open to collateral attack could have been reached in the recidivist proceedings, either because the state law so permits or due process so requires.") (footnote omitted). Yet the government contends that an individual may be subjected to the consequences of being deemed a recidivist felon, including, in the criminal law context, to a maximum prison term for illegal reentry that is ten times greater than would otherwise apply, without there having been any notice and opportunity to be heard on the recidivist issue in the underlying criminal proceeding. This result is inconsistent with the right to due process, a right which Congress has recognized in its federal recidivist scheme.[5]

D. The Government's Reliance on *Almendarez-Torres* Is Misplaced and Ignores Important Functions of § 851 in the Statutory Scheme at Issue Here.

Relying on this Court's ruling in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), the government denies the importance under federal criminal law of establishing the fact of a prior

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[5] As discussed by *amici* the National Association of Criminal Defense Lawyers, *et al.*, the vast majority of states also have recidivist possession statutes that require a finding of recidivism, with some form of notice and opportunity to be heard on the issue, before the defendant can be convicted as a recidivist. *See* Br. for *Amici Curiae* NACDL, *et al.* at I.B.

conviction in the criminal proceeding in order to convict a defendant as a recidivist drug offender. *Almendarez-Torres* addressed a different question, namely, whether as a matter of due process a prior conviction must be charged in the indictment and proven beyond a reasonable doubt to a jury in order to trigger a sentencing enhancement. *Almendarez-Torres* held that due process does not require that a prior conviction be deemed an "element" of a crime that must be charged and proven to a jury. It was implicit within the Court's holding, however, that somewhere within the judicial process there had to be a determination as to the existence and validity of the prior conviction, indeed, with potentially a heightened standard of proof required. *See* 523 U.S. at 248. To automatically deem a state-law defendant to be an aggravated felon based upon a prior misdemeanor conviction would be to abrogate this vital part of the judicial process, since neither a removal proceeding nor a § 1326 illegal reentry prosecution would afford any opportunity for such a determination. That is why § 851 plays such a crucial part in distinguishing between a felony conviction and a misdemeanor conviction under § 844.

Although not necessary to resolve this matter, *amici curiae* respectfully submit that this case provides just one more reason to revisit and overturn *Almendarez-Torres*, a decision which this Court has acknowledged may have been wrongly decided. *See Apprendi v. New Jersey*, 530 U.S. 466, 489-90 (2000). If a prior conviction were properly considered to be a constitutional element of the offense of recidivist

possession, there would be no doubt that the *Taylor* approach would apply here to assess whether the underlying state conviction constitutes an aggravated felony. Under *Taylor v. United States*, 495 U.S. 575 (1990), when determining whether an individual convicted of drug possession had in fact been convicted of recidivist possession, and therefore of an aggravated felony, the immigration court (in the removal context) or the sentencing court (in the illegal reentry context) would look to the elements of the offense of conviction. Only if one of the elements charged and proven was the fact of a prior conviction could the conviction be deemed an aggravated felony. *See generally id.* at 599. This Court would not have had need to hear this case, as it would have been disposed of easily under *Taylor*: Petitioner's state-law misdemeanor conviction for possession of Xanax did not have a prior conviction as an element.

III. The Government's Interpretation Would Lead To Arbitrary and Impermissible Disparities in Sentencing for the Federal Crime of Illegal Reentry Based Solely on Whether a Defendant's Prior Misdemeanor Drug Convictions Were Obtained in Federal or State Court.

In addition to the concerns articulated above about the contravention of Congress's statutory scheme for recidivism, *amici curiae* are particularly concerned about the effect of the government's position in the illegal reentry context. Under the government's approach, a two-time state-law drug misdemeanant who illegally reenters the United

States faces penalties that are ten times greater than a two-time federal-law drug misdemeanant. This drastic and unjustifiable disparity between individuals who have committed the exact same offenses provides further compelling evidence that Congress did not intend to automatically treat second-time, state-law possession convictions as aggravated felonies.

Congress has established a graduated sentencing scheme for individuals convicted of illegally reentering the United States. *See* 8 U.S.C. § 1326. Pursuant to that scheme:

(1) the base maximum sentence is two years in prison, *id.* § 1326(a);

(2) if the reentry was subsequent to three or more misdemeanors convictions "involving drugs, crimes against the person, or both," or any felony conviction, the maximum sentence increases to ten years in prison, *id.* § 1326(b)(1); and

(3) if the reentry was subsequent to an aggravated felony conviction, the maximum sentence increases to twenty years in prison, *id.* § 1326(b)(2).

The government's interpretation of the aggravated felony provision's drug trafficking definition upends this congressional sentencing scheme. Under the government's view, a person with two state misdemeanor possession convictions who violated § 1326 could receive a maximum of twenty years based upon having a prior aggravated felony

conviction. But if that same individual had two *federal* misdemeanor possession convictions the maximum sentence for a § 1326 violation would be only two years.

Perhaps even more surprising is the disparate treatment of individuals with one state and one federal misdemeanor possession conviction. If a person was convicted of a state misdemeanor first and then convicted of a federal misdemeanor, that person could receive at most a two-year sentence for a § 1326 violation. However, if that person was convicted of the federal misdemeanor first, followed by the state misdemeanor, the government's interpretation would result in that person receiving up to twenty years in prison for a § 1326 violation.[6]

There is no evidence that Congress intended such a disparate result between similarly situated state and federal misdemeanants, and no plausible justification for such a disparity. The purpose of treating analogous state law offenses as equivalent to federal felonies is to promote uniformity. *Cf. Lopez*, 549 U.S. at 58 (explaining that "Congress has apparently pegged the immigration statutes to the [federal criminal law] classifications Congress itself chose"). In enacting the aggravated felony provision,

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[6] The advisory Sentencing Guidelines likewise provide that a defendant convicted of illegal reentry receives an 8-level enhancement based on a prior aggravated felony conviction. *See* U.S.S.G. § 2L1.2(b)(1)(C). While this enhancement may not yield disparities in advisory sentencing ranges as large as with the statutory maximums, the disparities nevertheless remain substantial – typically a doubling, more or less, of the recommended sentence. *See* U.S.S.G. pt. 5.A (table).

Congress could not have wanted to create such an unwarranted disparity in sentencing for illegal reentry between state and federal offenders who have exactly the same type of prior convictions.

The legislative history of § 1326 further supports the argument that Congress did not believe that two misdemeanor drug convictions were equivalent to an aggravated felony. Section 1326 originally provided increased penalties only for those defendants with a prior felony or aggravated felony conviction. *See* 8 U.S.C. § 1326 (1998). In 1994, Congress amended this sentencing scheme to add increased penalties for three prior misdemeanors, now codified at § 1326(b)(1). *See* Pub. L. No. 103-322, Title XIII, § 130001(b), 108 Stat. 2023 (1994). Such an addition of "three misdemeanors involving drugs" would have been unnecessary if two drug misdemeanors already constituted an aggravated felony.

Moreover, it is hardly surprising that Congress would not deem a second drug misdemeanor to be an aggravated felony. Those charged with simple possession of drugs, whether in state or federal court, are typically addicts or other habitual users, as opposed to dealers. Congress properly refrained from punishing them as felons. Very few drug abusers, no matter how motivated, find it easy to break their illicit habit immediately after getting into trouble for the first time. The Court should not lightly infer that Congress intended a harsh and

unrealistic "two strikes and you're out" regime in this context.[7]

We note that, if the Government were to contend that a second federal misdemeanor conviction obtained under § 844(a) is itself an aggravated felony, even if the second conviction was not prosecuted as a felony under § 851, this would itself lead to absurd results. Section 1101(a)(43), through its incorporation of § 924(c), requires that the individual have been convicted of an offense that is a felony under federal law, which has not occurred in such a case. Perhaps even more telling, the § 1326 graduated sentencing scheme would be thrown awry. An illegal reentry defendant with two federal drug misdemeanors would be subject to a 20-year statutory maximum sentence even though § 1326 states that an illegal reentry defendant with three

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[7] The "drug trafficking crime" term that is incorporated into the aggravated felony definition at issue here also plays a role in other federal criminal law statutes, such as 18 U.S.C. § 924(c). Under § 924(c), a person "who, during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm" is subject to a 5-year minimum (consecutive) prison sentence. 18 U.S.C. § 924(c)(1); *see also id.* § 924(c)(2) (defining "drug trafficking crime" with reference to 21 U.S.C. § 801 *et seq.*, 21 U.S.C. § 951 *et seq.*, and chapter 705 of title 46). If the government's view of the "drug trafficking crime" term were applied to the § 924(c) context, it would mean that a 5-year *minimum* sentence would be triggered for an individual using or carrying a firearm merely by virtue of the fact that the person at the same time simply possessed (without distributing or possessing with intent to distribute) a controlled substance, so long as the person had a prior simple possession conviction. Nothing indicates that Congress intended such an absurd and textually unjustified result.

drug misdemeanor convictions is subject to only a 10-year maximum (meaning necessarily that those with fewer than three such convictions are subject not to the 20-year maximum for aggravated felons, but rather to the 2-year maximum for all others). Because such an argument regarding second federal misdemeanor convictions is untenable, our discussion of the unjustifiable disparity affecting state-law defendants assumes that a two-time federal misdemeanant is not, absent prosecution as a recidivist felon, an aggravated felon.

In sum, there is no reasonable justification for the large disparities in the sentences for illegal reentry between individuals convicted of the exact same misdemeanor offenses in federal and state court.

IV. The Criminal Rule of Lenity Further Requires Rejection of the Government's Interpretation Because of the Role Played by the Aggravated Felony Definition in the Criminal Illegal Reentry Statute.

Even assuming that the government's reading of the aggravated felony drug trafficking provision were plausible, that provision is at best ambiguous. This Court has recognized that a dual-use statute such as the aggravated felony definitional provision must be given a uniform meaning across the two contexts in which it applies, and that where there is ambiguity the criminal rule of lenity applies if the statute has criminal applications. For example, in *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004), this Court held in determining whether the individual in question was

an "aggravated felon" for purposes of immigration law that:

> we [are] constrained to interpret any ambiguity in the statute in petitioner's favor. Although we here deal with § 16 [the criminal law provision incorporated into the aggravated felony provision at issue] in the deportation context, § 16 is a criminal statute, and it has both criminal and noncriminal applications. Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies.

Id. at 11 n.8. Indeed, the question in *Leocal* is on all fours with the question raised in this case: the proper interpretation of a federal criminal law statute that is incorporated into an aggravated felony provision. *See id.*; *see also, e.g.*, *United States v. Santos*, 553 U.S. —, 128 S. Ct. 2020, 2030 (2008) (opinion of Scalia, Souter, Ginsburg, JJ.) (explaining that the rule of lenity provides powerful support for maintaining consistent meaning of words in statutes with multiple applications, "lest those subject to the criminal law be misled"); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) (plurality) (applying the rule of lenity in civil tax setting because the statute had criminal applications). As in *Leocal*, the criminal rule of lenity compels rejection of the government's reading of the aggravated felony provision at issue because that rule requires adoption of the narrower of two

plausible interpretations of an ambiguous criminal statute.

A. The Rule of Lenity Protects the Right To Fair Warning and the Separation of Powers.

The modern rule of lenity is a "canon of strict construction of criminal statutes," *United States v. Lanier*, 520 U.S. 259, 266 (1997), requiring that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *United States v. Bass*, 404 U.S. 336, 348 (1971). "[T]his principle of statutory construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). "Where it is doubtful whether the text includes the penalty, the penalty ought not be imposed." *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J. concurring); *see also Commissioner v. Acker*, 361 U.S. 87, 91 (1959) (explaining that "one is not to be subject to a penalty unless the words of the statute plainly impose it") (internal quotation marks omitted).

"Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). The first purpose has been interpreted as requiring that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain

line is passed. To make the warning fair, so far as possible the line should be clear." *Bass*, 404 U.S. at 348 (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

The rule of lenity is also necessary to preserve the separation of powers. *Bass*, 404 U.S. at 348. "[B]ecause of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Id.* Before punishing an individual for his conduct, the rule of lenity "assur[es] that the society, through its representatives, has genuinely called for the punishment to be meted out." *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring) (quotation marks omitted). This policy embodies "the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should." *Bass*, 404 U.S. at 348 (internal citations omitted). Even if statutory ambiguity "'effectively' licenses [the Court] to write a brand-new law, [the Court] cannot accept that power in a criminal case, where the law must be written by Congress." *Santos*, 128 S. Ct. at 2030-31.

B. Both Purposes of the Rule of Lenity Are Contravened by the Government's Reading.

Whether or not it is fair to assume that individuals do not read criminal statutes before acting in contravention of those statutes, fair warning of illegal conduct and corresponding punishment is nonetheless "required in any system of law." *See R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring). This requirement is especially strong in

the present scenario because the government's interpretation of the aggravated felony definition rests implicitly on the argument that a state drug misdemeanant has received fair warning that a second such conviction renders him a federal aggravated felon, with all of the resulting ramifications, even though the same conviction renders him simply a two-time misdemeanant in the eyes of the State of conviction. Furthermore, such a state defendant would only be a two-time misdemeanant if the same prosecution had been brought in federal court in the absence of the § 851 procedure.

Such an inconsistent and arbitrary result contradicts any notion of a meaningful fair warning. The contrast between the state two-time possession misdemeanant and the federal two-time possession misdemeanant, neither of whom was prosecuted as a recidivist, is exactly the kind of misleading of those subject to the criminal laws that the rule of lenity is intended to prevent. The need for consistency is highest when there are multiple consequences – in this case, both immigration and criminal – that arise from the same statutory provision. *See, e.g.*, *Santos*, 128 S. Ct. at 2030 (explaining that "the rule of lenity is an additional reason to remain consistent" in interpreting statutory provisions that have multiple applications, "lest those subject to the criminal law be misled").

There are simply too many variables in prosecuting state drug possession offenses to adopt the definition advanced by the government and

maintain any semblance of meaning in the concept of "fair warning." A state defendant might plead or be convicted at trial of a second state-law drug possession misdemeanor because the state prosecutor exercised discretion to not prosecute the individual as a felon under the state recidivist procedure, or even because such a procedure did not exist. As Justice Holmes noted, "it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle v. United States*, 283 U.S. 25, 27 (1931); *see also Bass*, 404 U.S. at 348 n.15 (noting the very real potential for a notice problem where federal law punishes conduct that state law permits); *United States v. Hayes*, 555 U.S. —, 129 S. Ct. 1079, 1093 (2009) (Roberts, C.J., dissenting) (explaining that "[i]f the rule of lenity means anything, it is that an individual should not go to jail for failing to conduct a 50-state survey or comb through obscure legislative history. Ten years in jail is too much to hinge on the will-o'-the-wisp of statutory meaning").

To determine that a state defendant who has been convicted of a second drug possession misdemeanor has fair warning that, in the eyes of the federal government, he is now an aggravated felon, subject to all the attendant consequences including under § 1326, defies logic. It would also be inconsistent with the separation of powers.

CONCLUSION

For the foregoing reasons, the decision of the Fifth Circuit should be reversed.

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