

Nos. 06-3476, 06-3987, 06-3994

**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Omar C. Fernandez, Florencio Victor
Jimenez-Mateo, and Julio Calderon,
Petitioners,

v.

Michael B. Mukasey, Attorney General
of the United States,
Respondent.

Petitions for Review from decisions of the
Board of Immigration Appeals, Nos. A 43-771-790, A12-833-354,
and the Office of Immigration and Customs Enforcement, No. A70-563-201

**BRIEF OF *AMICUS CURIAE* IMMIGRANT DEFENSE PROJECT
IN SUPPORT OF PETITIONERS' PETITION FOR REHEARING**

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Appellate Court No: 06-3476, 3987, 3994

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INTRODUCTION AND STATEMENT OF INTEREST OF *AMICUS*

The divided panel decision in *Fernandez et al. v. Mukasey*, Nos. 06-3476, 06-3987, 06-3994 (Sept. 15, 2008)—in which the majority concludes that immigration courts may treat certain state simple drug possession convictions as “illicit trafficking” aggravated felonies even when identical possession convictions under federal law could not be so treated—has far-reaching ramifications and creates disuniformity within the case law of this Court and nationwide. This decision will subject thousands of lawful permanent resident immigrants whose cases are heard in the Seventh Circuit to mandatory deportation without the possibility of relief, as well as deny countless other immigrants the possibility of seeking refuge from persecution abroad or other important protections under the nation’s immigration laws. As dissenting Judge Rovner notes, these consequences will now often flow from low-level and potentially invalid state possession convictions that were never meant to have such drastic consequences. In so doing, the majority’s decision conflicts with Supreme Court precedent, creates a circuit split, and diverges from its own precedent accounting for the position of the Board of Immigration Appeals on similar issues. The Immigrant Defense Project (IDP) submits this proposed *amicus curiae* brief in support of the Petition for Rehearing and Petition for Rehearing *En Banc* filed in these cases on October 30, 2008 in order to bring these far-reaching ramifications to the attention of the Court and respectfully requests that the Court reconsider its decision.

The Immigrant Defense Project (IDP), a project of the New York State Defenders Association, is a leading national expert on the interplay between immigration and criminal law. IDP provides defense attorneys, immigration lawyers, criminal and immigration court judges, and immigrants nationwide—including those whose cases are being litigated within this

circuit—with expert legal advice, publications, and training on these issues. In seeking to improve the quality of justice for non-citizens accused of crimes, IDP has an interest in the fair and just administration of the nation’s immigration laws relating to individuals who have been convicted or accused of crimes. Federal courts, including the Supreme Court, have accepted and relied on *amicus curiae* briefs submitted by IDP in several important cases involving the application of immigration law to criminal dispositions. *See, e.g., Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004); *INS v. St. Cyr*, 533 U.S. 289 (2001) (Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, IDP, et al., cited at n.50). With respect to the specific issue before this Court in this case, IDP has submitted *amicus* briefing on this issue before the Board of Immigration Appeals in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) (Brief of *Amicus Curiae* IDP cited at n.1) and before several federal circuit courts, including the First, Second, Fourth, Fifth, and Sixth Circuits, *see, e.g., Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008) (Brief of *Amici Curiae* Criminal Defense Attorneys of Michigan and IDP cited at 447).

Proposed *amicus curiae* files this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. Petitioners consent to its filing. Respondent takes no position.

ARGUMENT

The divided *Fernandez* panel has addressed an issue of exceptional importance, affecting potentially thousands of immigrants whose cases are litigated in the Seventh Circuit. As Judge Rovner explains in her dissent, the majority decision marks an unwarranted departure from the reasoning of the Supreme Court and the Board of Immigration Appeals—the government’s own agency—on this issue. In so doing, the majority decision creates a split with the decisions of all of the circuits that have addressed this issue in the immigration context, including the First,

Third, and Sixth Circuits, and also conflicts with the Seventh Circuit’s own case law on how agency decisions should be treated. The reasoning in Judge Rovner’s dissent resolves these concerns and should be adopted by this Court upon rehearing. On these points, proposed *amicus curiae* supports the arguments that Petitioners made in their petition for rehearing and offers this brief to provide this Court with an additional perspective on the severe consequences of the divided panel’s decision and to advocate for a rule that promotes nationwide uniformity in both approach and result when interpreting aggravated felonies in the immigration context.

I. Rehearing is Merited Due to the Exceptional Importance of this Issue, Affecting Many Immigrants with Low-Level and Potentially Invalid Simple Drug Possession Offenses.

This case involves an issue of exceptional importance with respect to the role of relief and discretion in our immigration laws. As Judge Rovner notes in her dissent, the petitioners in this case all have lived in the U.S. for many years and have U.S. citizen families. *Op.* at 26. Each petitioner has simple drug possession convictions, none of which were prosecuted as recidivist offenses. *Id.* The question in this case is not whether they are deportable—drug convictions and drug addiction are already grounds for deportation. *See* 8 U.S.C. § 1227(a)(2)(B)(i) (“controlled substance” ground of deportability); 8 U.S.C. § 1227(a)(2)(B)(ii) (“drug abuser or addict” ground of deportability). The question is whether the petitioners may apply for relief from removal. *See Op.* at 27 (Rovner, J., dissenting, explaining that the majority’s decision means “the difference between the possibility of staying in this country or leaving behind family, children, and the homes the petitioners have known their whole lives” (emphasis added)).

Congress has deemed that only those individuals who have been convicted of drug trafficking aggravated felonies will lose the opportunity to seek relief—Congress did not apply

this bar to all individuals who have violated controlled substance laws or those who are addicted to drugs (important in this context since people with drug addictions necessarily possess drugs on more than one occasion). Yet, in the first decision of its kind in an immigration case, the majority in *Fernandez* has swept up the petitioners—and many more individuals like them who have been convicted of misdemeanor or even lesser simple possession drug offenses¹—into this limited category of immigrants who must face mandatory deportation. By concluding that two or three simple drug possession convictions may be automatically combined to form a “drug trafficking” aggravated felony conviction, the majority in *Fernandez* has issued a ruling that will bar potentially thousands of lawful permanent residents from seeking cancellation of removal, 8 U.S.C. § 1229b(a)(3), refugees from seeking asylum, 8 U.S.C. § 1158(b)(2)(B)(i), any immigrant from seeking voluntary departure, 8 U.S.C. § 1229c(b)(1)(D), and numerous other protections.

For example, under the majority’s decision, a person fleeing persecution on the basis of political opinion, religion, or nationality could be denied asylum and sent back to his or her persecutors because of a misdemeanor or lesser simple possession drug offense. This is because the immigration statute provides that, for purposes of the “particularly serious crime” bar to asylum, an asylum-seeker “who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime.” 8 U.S.C. § 1158(b)(2)(B)(i).² Even an

¹ The government previously has asserted that even two *non-criminal* marijuana possession violations would combine to become a drug trafficking aggravated felony under the rule that has now been adopted by the majority in this case. See, e.g., *In re: Conrad O’Neil Minto*, 2005 WL 1104172 (BIA Mar. 21, 2005).

² The potential asylum ineligibility consequence of a misdemeanor or lesser simple possession drug conviction is particularly noteworthy because such a result flies in the face of U.S. treaty obligations. The right to seek asylum in the United States exists in part in order to comply with United States obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968. 19 U.S.T. 6223, T.I.A.S. No. 6577. The “particularly serious crime” concept is derived from this and other international human rights conventions. A key source for interpreting such an international law concept is the United Nations Handbook on Procedures and Criteria for Determining Refugee Status. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (stating that, although the Handbook is not legally binding on U.S. officials, it nevertheless provides “significant guidance” in

individual who has been *granted* asylum after suffering persecution may later have his or her asylum terminated on the basis of an aggravated felony conviction—which, under the majority’s decision, would now include misdemeanor or lesser drug possession convictions. *See* 8 U.S.C. § 1158(c)(2)(B) (permitting termination of asylum when an individual has been convicted of an aggravated felony).

The severity of these consequences is particularly striking given the low-level and potentially invalid nature of many of the offenses that will now be labeled “drug trafficking” crimes and the large number of people who may be affected by this decision. In one year alone in Illinois, for example, approximately 100,000 individuals were arrested for drug crimes, the majority of which were possession offenses. *See* David E. Olson, *The Justice System’s Response to Drug Offenses and Substance Abuse*, ILLINOIS CRIMINAL JUSTICE INFORMATION AUTHORITY RESEARCH BULLETIN 1 (Aug. 2003), at http://www.icjia.state.il.us/public/pdf/bulletins/subabuse_vol2no1.pdf. Indeed, such drug arrests have exponentially increased over the last two decades, overwhelming the criminal justice system. *See id.* In the Chicago area alone, courts now handle over 350,000 criminal cases every year due in large part to the high number of drug arrests. *See* CHICAGO METROPOLIS 2020, 2006 CRIME AND JUSTICE INDEX 18 (Oct. 2006), at <http://www.chicagometropolis2020.org/documents/2006CrimeandJusticeIndex.pdf>.

The sheer volume of drug cases undermines the “confidence in the validity of convictions from . . . state courts,” a key factor at issue in this case. Op. at 36 (Rovner, J., dissenting). This lack of confidence is true not only in the large, overwhelmed metropolitan areas like Chicago,

construing the 1967 Protocol and in giving content to the obligations established therein). The Handbook does not specifically define a “particularly serious crime,” but it sets a minimum standard when it defines a “serious” offense as a “capital crime or a very grave punishable act.” If a “serious” crime is so defined under these standards, surely a “*particularly* serious crime,” including its aggravated felony subset, should not be interpreted to include a misdemeanor or lesser simple possession drug offense unless clearly required by the statute.

but in other areas as well. A recent analysis of the public defender system in Illinois found that the average caseload in all counties with a population less than 500,000 ranged as high as 474 per defender, far above the recommended maximum caseload under the American Bar Association Standards for Criminal Justice. *See* TASK FORCE ON PROFESSIONAL PRACTICE IN THE ILLINOIS JUSTICE SYSTEM, SUMMARY ANALYSIS OF THE SURVEY OF ILLINOIS PUBLIC DEFENDERS 3 (Mar. 9, 2000), at <http://www.state.il.us/Defender/reportfl.html>. In those counties, state expenditures for public defense averaged a mere \$135.94 per case, the lowest of a 15-state comparison in the study. *Id.* In a survey of public defenders, nearly 70 percent of those responding admitted that “they were unable to provide effective representation for their clients.” *Id.* at 11.

In this context—with a flood of drug arrests funneled into an already under-funded and overwhelmed criminal justice system—there is great cause to question the fairness and legality of taking any two simple drug convictions, presuming their validity, combining them to label the second as a drug trafficking crime, and relying on that drug trafficking label to prevent an immigration judge from even considering whether to grant relief for a longtime lawful permanent resident facing deportation. The majority dismisses these concerns by merely noting the problem—stating that “[s]uch a concern does not apply here, however, because ordinarily aliens in removal proceedings are not permitted to collaterally challenge their convictions.” *Op.* at 23 n.9. As Judge Rovner explains and the BIA itself has expounded, this is precisely why combining and analogizing two distinct state simple possession convictions to a federal recidivist possession felony conviction is untenable. *See Op.* at 32; *Carachuri*, 24 I&N Dec. at 391-393.

Under the Controlled Substances Act (CSA), a prior conviction that is invalid cannot serve as the basis for a recidivist enhancement. *See, e.g., United States v. Sanchez*, 138 F.3d

1410, 1416 (11th Cir. 1998) (vacating enhanced sentence where court did not hold a hearing in accordance with 21 U.S.C. § 851 to address defendant’s claims that his prior convictions were invalid and noting that “[t]he language of the statute is mandatory, requiring strict compliance”); *United States v. Ruiz-Castro*, 92 F.3d 1519, 1536 (10th Cir. 1996) (remanding case for resentencing where it was unclear whether the defendant fully “appreciated his ability to challenge the prior conviction for sentencing purposes” under § 851). This was the result of a change made by Congress in 1970 to eliminate the mandatory nature of the recidivist punishment in the CSA and put in place notice and proof requirements. *See United States v. Noland*, 495 F.2d 529, 530-533 (5th Cir. 1974) (discussing the legislative history of 21 U.S.C. § 851). As the Supreme Court has repeatedly made clear, this validity requirement is a unique feature of the CSA and, along with the rest of 21 U.S.C. § 851, defines the line between whether a second possession offense is punishable as a second albeit simple possession *misdemeanor* or a recidivist possession *felony* under federal law. *See, e.g., United States v. LaBonte*, 520 U.S. 751, 759-760 (1997) (holding that the maximum term of imprisonment authorized for an offense under the CSA is the “unenhanced maximum” if there was no compliance with 21 U.S.C. § 851); *Custis v. United States*, 511 U.S. 485, 491-492 (1994) (explaining that the scheme for enhancements in the CSA is unique because Congress enacted statutory provisions to give defendants the right to challenge the validity of their prior offenses under 21 U.S.C. § 851 prior to being subject to an enhanced maximum sentence).

This question of validity, as the *Fernandez* majority acknowledges, can only be addressed by a criminal court in the first instance. Indeed, the CSA requires that the validity of a prior conviction be open to challenge prior to an enhanced punishment for recidivist drug possession under 21 U.S.C. § 851. Yet the majority’s approach in *Fernandez* will permit immigration

courts reviewing state convictions to rely on “constitutionally infirm convictions” to elevate “minor infractions into felonies in a manner unintended by Congress.” Op. at 32 (Rovner, J., dissenting). Notably, this is one of the key concerns that places the *Fernandez* majority in conflict with its sister circuits and the BIA’s own reasoning in its precedent decision on this issue. *See Rashid*, 531 F.3d at 477 (observing the “compelling due process concerns” given the CSA’s requirements of notice and an opportunity to challenge the validity of a prior conviction); *Steele*, 236 F.3d at 137-38 (explaining that where the recidivist issue was never litigated in the actual criminal proceeding, then “[f]or all that the record before the immigration judge reveals, the initial conviction may have been constitutionally impaired”); *Carachuri*, 24 I&N Dec. at 391, 393 n.8 (noting that recidivism provisions must provide the defendant “with notice and an opportunity to be heard on whether recidivist punishment is proper” and that “allowing facts about recidivism to be determined by an Immigration Judge in the first instance could raise due process concerns”).

Indeed, given the fact that immigrants cannot challenge the validity of their prior convictions in their removal proceedings, the rule supported by the majority in this case will place further stress on the criminal justice system as immigrants with potentially invalid drug possession convictions will have no option but to seek to challenge their old convictions in criminal court. Unfortunately, for the vast majority of immigrants, such efforts will likely be unsuccessful as a matter of practice since immigration courts are unable to provide the type of lengthy adjournments that would be necessary for a person to pursue post-conviction relief in criminal court—thus, many immigrants will receive their deportation orders before their motions to challenge their old convictions are adjudicated by the criminal courts.

These burdensome and unfair results are avoided if, as the Supreme Court noted in *Lopez*, the scope of the “illicit trafficking” aggravated felony is interpreted in line with the term’s ordinary, “commonsense” meaning and only as Congress intended through its “clear statutory command.” *Lopez*, 127 S.Ct. at 629, 630 n.6. As explained above, Congress amended the definition of “recidivist possession” in the CSA so that it is not an automatic enhancement, and instead enacted unique and important statutory requirements that a defendant be able to litigate the validity of his or her prior conviction *before* being subject to a felony punishment. *See* 21 U.S.C. § 851. Ignoring this part of Congress’s definition of “recidivist possession” under the CSA will only engender the type of impractical and unfair results that will negatively affect both the immigration and criminal justice systems.

II. Rehearing Is Warranted to Bring Uniformity to the Case Law of this Court and Nationwide.

As this Court is aware, there has been significant disuniformity in courts’ interpretations of the “drug trafficking” aggravated felony term under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). *See Gonzales-Gomez v. Achim*, 441 F.3d 532, 535 (7th Cir. 2006) (applying the federal felony approach in light of conflicting case law on the “drug trafficking” aggravated felony term and noting that “[t]he only consistency that we can see in the government’s treatment of the meaning of ‘aggravated felony’ is that the alien always loses”). After ten years of litigation, the Supreme Court resolved the conflicting approaches to defining drug trafficking aggravated felonies in *Lopez v. Gonzales*, applying a strict federal felony standard to conclude that the first-time simple possession offense in that case was not an aggravated felony. 127 S. Ct. at 633. While this result was ultimately favorable for the immigrant petitioners, the preceding years of disuniformity wreaked havoc for the immigration and criminal justice systems. *See* Brief of *Amici Curiae* IDP et al., in *Lopez v. Gonzales*, 549 U.S. 47 (2006), 2006 WL 189960, at

*11-13. *Lopez* changed this by clarifying the proper interpretation of the term “drug trafficking” aggravated felony and presenting one rule for all jurisdictions.

In *Carachuri*, the BIA has attempted to provide that same uniformity for petitioners with more than one simple drug possession conviction. Under the rule in *Carachuri*, a second-time possession offense will not be deemed to correspond to a recidivist possession felony and therefore a “drug trafficking” aggravated felony unless recidivism was admitted or determined within the criminal prosecution for the second offense. 24 I&N Dec. at 394. Nonetheless, the *Fernandez* majority has rejected the agency’s approach, the first and only circuit to do so in the immigration context. This creates conflict with the position this Court recently took in *Ali v. Mukasey*, where it held that it must defer to the reasoning of the BIA on the question of “whether the agency may go beyond the record of conviction to characterize or classify an offense.” *Ali v. Mukasey*, 521 F.3d 737, 742-743 (7th Cir. 2008). Yet when faced with the same issue in this case—but where the BIA has instead chosen to apply a strict rule *limiting* its review to the record of the conviction for the offense being labeled an aggravated felony and providing immigration judges with the ability to consider relief before deporting immigrants—the *Fernandez* majority inexplicably rejects the reasoning of the BIA. This creates a conflict with this circuit’s own case law in *Ali*.

Moreover, the *Fernandez* majority recognizes that a second *federal* simple drug possession misdemeanor (one that was not prosecuted as a recidivist offense under the federal system) could not be considered an aggravated felony under the Immigration and Nationality Act. Op. at 25. Yet the majority does not arrive at the same conclusion with respect to a corresponding second *state* simple drug possession misdemeanor (one that was not prosecuted as a recidivist offense under the state system). *Id.* Even the U.S. Department of Homeland Security

(DHS) and the BIA have recognized that this is a problem. *See Carachuri*, 24 I&N Dec. at 391 (“DHS is troubled by the fact that a purely hypothetical approach, carried to its logical conclusion, could result in a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been used* as the basis for a recidivist enhancement. As the DHS now appears to acknowledge, it would likewise be anomalous to treat a second State conviction for simple possession as the hypothetical equivalent of a Federal ‘recidivist possession’ conviction when the State affirmatively elected not to proceed under its own available recidivism laws.”).

Now immigrants once again face the uncertainty and disuniformity of this system. The BIA and DHS would treat them the same, regardless of whether they receive their two simple possession convictions in the state system or federal system. This Court should do the same.

CONCLUSION

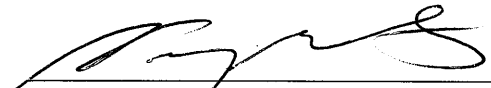
For the above reasons, proposed *amicus curiae* respectfully asks this Court to grant rehearing or rehearing *en banc* so that the Court may reconsider its decision on the exceptionally important issue in this case. If the petition for rehearing is granted, *amicus curiae* would be available to provide additional arguments at that stage if this Court is amenable to further briefing.

Dated: November 4, 2008
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 3,598 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

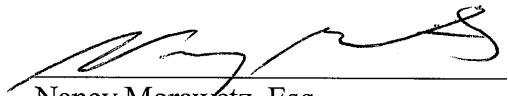
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I, Teresa L. Sulmers, hereby certify that on November 4, 2008, copies of this Motion for Leave to File Brief as *Amicus Curiae*, Declaration in Support of Motion for Leave to File Brief as *Amicus Curiae*, and *Amicus Curiae* Brief in Support of Petitioners' Petition for Rehearing and Rehearing *En Banc* were served by way of overnight mail to:

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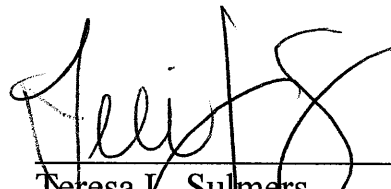
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