

# 05-2239

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIRST CIRCUIT

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HERMAN HENRY,

Petitioner,

v.

ALBERTO GONZALES, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

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ON PETITION FOR REVIEW FROM THE BOARD OF IMMIGRATION APPEALS

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**BRIEF OF *AMICI CURIAE***  
**COMMITTEE FOR PUBLIC COUNSEL SERVICES,**  
**NATIONAL IMMIGRATION PROJECT OF THE NATIONAL LAWYERS GUILD, &**  
**IMMIGRANT DEFENSE PROJECT**  
**OF THE NEW YORK STATE DEFENDERS ASSOCIATION**  
**IN SUPPORT OF PETITIONER AND IN SUPPORT OF REVERSAL**

---

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## PRELIMINARY STATEMENT

In this case and the companion case *Berhe v. Gonzales*, No. 05-1870, the government maintains that Massachusetts *misdemeanor* drug offenses that cover *non-trafficking* conduct are “aggravated *felony*” offenses involving “illicit *trafficking* in a controlled substance” for deportation purposes. Amici curiae respectfully submit that this interpretation defies the Supreme Court mandate that statutory terms be construed according to their “ordinary or natural meaning,” recently issued in *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

This Court has invited amicus curiae briefs on the question as to which law controls, federal or state, in determining whether the petitioner has been convicted of an “aggravated felony” and therefore is ineligible for cancellation of removal under 8 U.S.C. §1229b(a). Amici submit this brief in response to the invitation; however, amici respectfully submit that as a threshold matter, the Court must consider the effect of the Supreme Court’s recent decision in *Leocal*. The ordinary meaning of the “aggravated felony” and “illicit trafficking” terms establish, and statutory text and legislative history confirm, that these terms include only state drug offenses that are, in fact, felonies and that cover trafficking conduct. *See* Argument Point I.

Only if the Court decides that the aggravated felony definition’s reference to a federal criminal definition of “drug trafficking crime” in the first instance even applies to state offenses does the Court need to address the question it posed

regarding how to apply that federal criminal definition to state offenses. The scope of this “drug trafficking crime” term is clear as applied to federal crimes, but is ambiguous as applied to state offenses that the term was never designed to cover. This ambiguity—apparent from the conflicting interpretations in different circuits, within this circuit, and even within the agency—cries out for application of the rules of lenity required in interpreting ambiguous deportation and criminal statutes. Under lenity rules, a state drug offense may not be deemed a “drug trafficking crime” aggravated felony unless it is a felony under *both* state *and* federal law. *See* Argument Point II.

Given the potentially broad reach of this Court’s ruling to thousands of immigrants with low-level drug offenses, and the harsh consequences that result when such an offense is deemed an aggravated felony, the Court’s resolution of the issues in this case requires careful consideration. Amici offer the Court a coherent framework for considering and resolving the issues relating to the offenses in this case and in *Berhe* within the larger context of what the statutory language and legislative history show as to the scope of the “aggravated felony” term.

## STATEMENT OF INTEREST

This case may have repercussions that extend well beyond the particular individuals and specific offenses here and in *Berhe*. First, this Court’s decision may

reach the broader and critical question—in dispute across the country—of whether the federal government may attach the “aggravated felony” and “illicit trafficking” labels to state drug offenses that are not felonies under state law or that have no proven nexus to trafficking. Many states, like Massachusetts, classify, treat, and punish such lower level drug offenses as misdemeanors or lesser violations without any intent to trigger the harsh consequences of a felony conviction.

Massachusetts misdemeanor cases are handled in summary fashion, primarily through plea bargains and often without significant procedural safeguards. This relatively perfunctory processing is justified on the grounds that misdemeanor defendants face less serious direct and collateral consequences as a result of conviction. The government’s interpretation of the aggravated felony label nonetheless bars immigrants with such convictions from defenses to deportation that would otherwise be available to them. Amici have a profound interest in protecting the expectations on which misdemeanor pleas by noncitizens may have been based against overly broad interpretations of the “aggravated felony” label.

Second, this Court’s resolution of the scope of the “aggravated felony” and “illicit trafficking” labels affects eligibility for deportation relief of a long-time lawful permanent resident such as Mr. Henry, bars asylum for noncitizens who face persecution in their countries of removal, *see* 8 U.S.C. §1158(b)(2)(B)(i), such as Mr. Berhe, and permanently bar citizenship for immigrants whose convictions took place

long ago, *see* 8 U.S.C. §1101(f)(8).

Amici are concerned that court affirmance of the agency rulings in this case and *Berhe* will result not only in harsh and unjust consequences greatly disproportionate to the gravity of the offenses for the petitioners in these cases but also in harsh and unjust consequences for other immigrants convicted in the past of similar state non-felony drug offenses. Many noncitizens convicted of such lower level drug offenses in Massachusetts and elsewhere have moved on with their lives and not yet been placed in removal proceedings. Now, however, if the Court finds that non-felony drug offenses that cover only simple possession or other non-trafficking conduct may be deemed aggravated felonies, these individuals will be at permanent risk of deportation without any available relief—regardless of their individual equities—if they seek to naturalize, travel abroad, or have any other contact with governmental authorities.

The **Committee for Public Counsel Services (CPCS)** is statutorily mandated to provide counsel for indigent defendants in criminal proceedings in Massachusetts state courts. A significant percentage of CPCS' clients are noncitizens, many of who came to the United States as children, have lived in this country for many years, and have spouses and dependents here. CPCS has an interest in the fair application of federal immigration laws that directly affect its clients.

The **National Immigration Project** of the National Lawyers Guild is a non-profit membership organization of immigration attorneys, legal workers, grassroots advocates, and others working to defend immigrants' rights and to secure a fair administration of the immigration and nationality laws. It provides training to the bar and the bench on the immigration consequences of criminal conduct, is the author of four treatises on immigration law published by Thomson-West, and has participated as amicus curiae in cases before the Supreme Court and the First Circuit.

The **New York State Defenders Association (NYSDA)** is a not-for-profit membership association of public defenders, legal aid attorneys, assigned counsel, and others dedicated to developing and supporting high quality legal defense services. NYSDA's **Immigrant Defense Project (IDP)** provides defense attorneys, immigration attorneys, and immigrants, including those in the First Circuit, with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law.

#### **BACKGROUND ON MASSACHUSETTS MISDEMEANORS IN THIS CASE AND *BERHE***

Mass. Gen. Laws ch. 94C, §32C(a) (Mr. Henry's offense) provides:

Any person who knowingly or intentionally manufactures, distributes, dispenses or cultivates, or possesses with intent to manufacture, distribute, dispense or cultivate a controlled substance in Class D of section thirty-one shall be imprisoned in a jail or house of correction

for not more than two years or by a fine of not less than five hundred nor more than five thousand dollars, or both such fine and imprisonment.

Massachusetts law defines “distribute” as “to deliver other than by administering or dispensing a controlled substance.” Mass. Gen. Laws ch. 94C, §1(d).

Massachusetts courts interpret this term very broadly to include “all forms of physical transfer” including giving away a small amount or sharing a controlled substance with another person. *Commonwealth v. Johnson*, 602 N.E.2d 555, 559 (Mass. 1992).

The relevant portion of Mass. Gen. Laws ch. 94C, §34 (Mr. Berhe’s offense) provides:

No person knowingly or intentionally shall possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner while acting in the course of his professional practice, or except as otherwise authorized by the provisions of this chapter. Except as hereinafter provided, any person who violates this section shall be punished by imprisonment for not more than one year or by a fine of not more than one thousand dollars, or by both such fine and imprisonment.

Under this statute, a defendant may receive an enhanced penalty for a second or subsequent conviction for possession of a controlled substance. The enhanced penalty, however, may be imposed by a court *only* after the prior conviction has been alleged in a complaint or indictment, and after it has been proven by the government beyond a reasonable doubt or admitted to by the defendant. If a

defendant does not plead guilty to the portion of the complaint or indictment alleging a second or subsequent offense, “he shall be entitled to a trial by jury of the issue of conviction of a prior offense, subject to all of the provisions of law governing criminal trials.” Mass. Gen. Laws ch. 278, §11A.

Mr. Henry’s and Mr. Berhe’s convictions are misdemeanors. Under Massachusetts’ classification scheme, a felony is an offense that is punishable by death or imprisonment in the state prison. Mass. Gen. Laws ch. 274, §1. A misdemeanor is defined as an offense that is not a felony. *Id.* A violation of Mass. Gen. Laws ch. 94C, §32C or §34 is not punishable by death or imprisonment in a state prison, but rather by imprisonment in jail or a house of correction, or by a fine. As such, both offenses are misdemeanors under state law.

In Massachusetts, misdemeanor offenses involving possession of a controlled substance are commonly charged and usually do not result in incarceration.<sup>1</sup> In light of the likelihood that an individual charged with violating §32C(a) or §34 will not be incarcerated, the Massachusetts legislature has included these offenses as ones eligible for suspension of the right to appointed counsel. If

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<sup>1</sup> See Mass. Dep’t of Corr., *New Court Commitments to Massachusetts County Correctional Facilities During 2003*, 16 t.15 (2004), available at [http://www.mass.gov/Eeops/docs/doc/research\\_reports/2003cty.pdf](http://www.mass.gov/Eeops/docs/doc/research_reports/2003cty.pdf).

a judge asserts at arraignment that an indigent defendant charged with such misdemeanor offenses will not be sentenced to any period of incarceration should he be convicted, the judge *shall not* appoint counsel. Mass. Gen. Laws ch. 211D, §2A. It is therefore quite possible that noncitizens such as Mr. Henry and Mr. Berhe would be compelled to represent themselves against such low-level charges.

## ARGUMENT

### I. AS A THRESHOLD MATTER, STATUTORY LANGUAGE AND LEGISLATIVE HISTORY ESTABLISH THAT THE “AGGRAVATED *FELONY*” AND “ILLICIT *TRAFFICKING* IN A CONTROLLED SUBSTANCE” LABELS EXCLUDE STATE DRUG MISDEMEANORS THAT COVER NON-TRAFFICKING CONDUCT

Section 1101(a)(43)(B) of Title 8 of the United States Code includes as an “aggravated *felony*” any “illicit *trafficking* in a controlled substance (as defined in section 102 of the Controlled Substances Act) . . .” (emphasis added). The Immigration and Nationality Act (INA) does not define the word “felony” nor does it define the word “trafficking” as it relates to §1101(a)(43)(B). However, the Supreme Court recently unanimously affirmed in *Leocal* the principle that statutory terms should be construed according to their “ordinary or natural meaning.” 543 U.S. at 13 (finding that, in construing the “crime of violence” term referenced in the aggravated felony definition, one should consider the “ordinary meaning” of the term in addition to the definitional language). This principle, and the rule of lenity in construing

lingering ambiguities in deportation statutes, *see INS v. St. Cyr*, 533 U.S. 289, 320 (2001), require that the “aggravated felony” and “illicit trafficking” terms not be stretched to include offenses that are not felonies or do not relate to trafficking.

**A. The ordinary and natural meaning of the term “aggravated felony” includes only felonies, and other statutory language and legislative history confirm this natural reading.**

Congress’ use of the “aggravated *felony*” term reflects a congressional understanding that it includes only offenses actually classified and treated as felonies. If Congress intended otherwise, it could have used a term such as “aggravated offenses” or “aggravated crimes.” Indeed, the natural reading of the word “aggravated” modifying “felony” is to understand the term “aggravated felony” to include only particularly serious felonies, and certainly not offenses that are not even classified as felonies.<sup>2</sup>

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<sup>2</sup> As one circuit judge observed:

Common sense and standard English grammar dictate that when an adjective—such as “aggravated”—modifies a noun—such as “felony”—the combination of the terms delineates a subset of the noun. One would never suggest, for example, that by adding the adjective “blue” to the noun “car,” one could be attempting to define items that are not, in the first instance, cars. In other words, based on the plain meaning of the terms “aggravated” and “felony,” we should presume that the specifics that follow in the definition of “aggravated felony” under INA §101(a)(43) serve to elucidate what makes these particular felonies “aggravated”; we certainly should not presume that those specifics would include offenses that are not felonies *at all*.

In fact, the history of the aggravated felony term and references to it throughout the statute confirm Congressional understanding that it includes only felonies. When Congress introduced the term “aggravated felony” to the INA in the Anti-Drug Abuse Act of 1988 (“ADAA”), Pub. L. No. 100-690, §7342, 102 Stat. 4181, 4469, it included only the offenses of “murder, any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code, or any illicit trafficking in any firearms or destructive devices as defined in section 921 of such title.” The ADAA simultaneously made other INA revisions that show this aggravated felony term was aimed only at “felonies.” It revised the custody provisions at former 8 U.S.C. §1252(a) to require the Attorney General to detain “any alien convicted of an aggravated felony” and directed that “the Attorney General shall not release *such felon* from custody.” ADAA §7343(a)(4), 102 Stat. at 4470 (emphasis added). The ADAA also added a new §1252a to expedite deportation of aliens convicted of aggravated felonies: “With respect to an alien convicted of an aggravated felony who is taken into custody by the Attorney General . . . the Attorney General shall, to the maximum extent practicable, detain *any such felon* at a facility at which other such aliens are detained.” ADAA §7347(a), 102 Stat. at 4471-72 (emphasis added). In addition, the ADAA amended the federal criminal provision for illegal reentry

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*U.S. v. Pacheco*, 225 F.3d 148, 157 (2d Cir. 2000) (Straub, J., dissenting).

after deportation to provide a sentence enhancement if the prior deportation was subsequent to an aggravated felony conviction and a separate enhancement if the prior deportation was subsequent to a conviction “of a *felony* (other than an aggravated felony).” ADAA §7345(a)(2), 102 Stat. at 4471 (emphasis added).

Additional evidence of congressional intent came in the years thereafter. In 1990 Congress clarified that state as well as federal drug offenses may be deemed aggravated felonies (*see* Subpoint C), expanded the aggravated felony definition to include new substantive categories of criminal offenses, and created a bar to a waiver of exclusion for aggravated felons who had served a term of imprisonment of at least five years. *See* Immigration Act of 1990 (“IMMACT”), Pub. L. No. 101-649, §§501(a)(3), 511(a), 104 Stat. 4978, 5048, 5052. Through technical amendments in 1991, Congress then amended the waiver restriction to make ineligible any individual convicted of one or more aggravated felonies if the individual had served “for such *felony or felonies*” a term of imprisonment of at least five years. Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, §306(a)(10), 105 Stat. 1733, 1751 (emphasis added).

In 1994 Congress made even clearer that it never intended the aggravated felony term to include misdemeanors. It amended the sentence enhancement provisions for the federal crime of illegal reentry after deportation based not only on whether the prior deportation followed a conviction for (1) “an aggravated felony,” or

(2) “a felony (other than an aggravated felony),” but also on whether the prior deportation followed a conviction for (3) “three or more misdemeanors.” *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, §130001(b), 108 Stat. 1796, 2023. Significantly, Congress saw no need to add the parenthetical “(other than an aggravated felony)” to this “three or more misdemeanor” sentence enhancement provision. The amendment demonstrates that Congress contemplated some overlap between the word “felony” and the term “aggravated felony”, but no overlap between misdemeanors and “aggravated felony”.

Congress provided further evidence when it last substantially revised and expanded the aggravated felony definition through the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (“IIRIRA”), Pub. L. No. 104-208, §321, 110 Stat. 3009, 3231. Senator Spencer Abraham, the architect of these provisions, and Senator William Roth, another leading proponent, referred to the seriousness of the crimes targeted, using terminology such as “*felonious* acts,” “convicted *felons*,” and “serious *felonies*,” in addition to “aggravated felonies” and “aggravated felons.” 142 Cong. Rec. S4598-4600 (May 2, 1996) (emphasis added). Indeed, a Senate floor interchange days after IIRIRA’s enactment expressly distinguished between misdemeanors and crimes that could be deemed aggravated felonies. In this colloquy, Senator Abraham asked Senator Orrin Hatch about the import of the IIRIRA’s restoration of eligibility for deportation relief to “aliens who have not

committed aggravated felonies.” 142 Cong. Rec. S12294 (October 3, 1996). Senator Hatch explained that this partial restoration of relief came in response to earlier restrictions in the Antiterrorism and Effective Death Penalty Act (“AEDPA”), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which barred deportation relief for many offenses outside of the aggravated felony definition, eliminating such relief “for virtually any alien who had been convicted of any crime, *including some misdemeanors*.” 142 Cong. Rec. S12294 (October 3, 1996) (emphasis added). The clear implication of this discussion among IIRIRA’s architects is that the current aggravated felony bar on cancellation of removal is not triggered by a misdemeanor.

In sum, these numerous references in the INA and legislative history confirm congressional intent that the term includes felonies only. Moreover, *Leocal* requires that the term be given its natural reading, such that it does not include misdemeanors. 543 U.S. at 13. Had Congress intended to include non-felonies, it could and would have expressly said so. For example, Congress could have kept the aggravated felony label but inserted the phrase “whether classified as a felony or misdemeanor” into the aggravated felony definition at 8 U.S.C. §1101(a)(43). In the absence of such a clear statement of congressional intent, particularly in light of the rule of lenity applicable when construing deportation statutes, *see St. Cyr*,

533 U.S. at 320, the immigration statute should be read to find that the misdemeanor convictions in this case and *Berhe* are not aggravated felonies.<sup>3</sup>

**B. The ordinary and natural meaning of the term “illicit trafficking in a controlled substance” includes only drug offenses with a nexus to trafficking**

The INA includes as an aggravated felony any “illicit *trafficking* in a controlled substance . . . , including a drug *trafficking* crime (as defined in section

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<sup>3</sup> This Court’s decision in *U.S. v. Cordoza-Estrada*, 385 F.3d 56 (1st Cir. 2004) is distinguishable on its facts. In *Cordoza-Estrada*, a sentencing guidelines case which the Court decided a few months before *Leocal*, this Court followed the decisions of other circuit courts that had held that Congress’ 1996 reduction in the term of imprisonment threshold required for certain offenses to be deemed an aggravated felony from five years to one year (e.g., crime of violence or theft offenses) meant that such an offense with a one year sentence, even if a misdemeanor under state law, could be deemed an aggravated felony for purposes of the aggravated felony sentence enhancement for illegal reentry after deportation. *Cordoza-Estrada* does not, however, preclude this Court from finding that the misdemeanors at issue here and in *Berhe* should not be deemed aggravated felonies. There has been no legislative action relating to the aggravated felony “illicit trafficking in a controlled substance” category similar to the prison sentence threshold reduction from five years to one year for the aggravated felony category at issue in *Cordoza-Estrada*. In any event, the Court should reconsider that decision in light of *Leocal*’s affirmance of the principle that statutory terms should be construed according to their “ordinary or natural meaning.” *See Leocal*, 543 U.S. at 13. Indeed, *Leocal* provides vindication of the dissenting opinions filed in several of the circuit court cases cited by this Court in *Cordoza-Estrada*. These dissenting opinions gave weight to the ordinary meaning of the term being interpreted to conclude that the aggravated felony term does exclude non-felonies. *See, e.g., Pacheco*, 225 F.3d 148 at 158 (Straub, J. dissenting) (“To include misdemeanors within the definition of ‘aggravated felony’ turns the plain meaning of the word ‘aggravated’ entirely on its head, since in addition to not being felonies in the first place, misdemeanors are conventionally understood as being less severe than felonies, as well.”).

924(c) of title 18, United States Code).” 8 U.S.C. §1101(a)(43)(B) (emphasis added). Although “drug trafficking crime” is defined (*see* Subpoint C), the word “trafficking” itself is not defined with regard to its use in the phrase “illicit trafficking in a controlled substance.” As discussed in Subpoint A, however, *Leocal* requires that statutory terms be construed according to their “ordinary or natural meaning.” 543 U.S. at 13.

As the Board of Immigration Appeals (BIA) has found when interpreting whether an offense constitutes “illicit trafficking in a controlled substance,” the ordinary meaning of “trafficking” encompasses only the trading or dealing in certain goods. *Matter of Davis*, 20 I&N Dec. 536, 541 (1992). Drawing from dictionary definitions of “traffic” (“[c]ommerce; trade; sale or exchange of merchandise, bills, money, and the like” and “[t]he passing of goods or commodities from one person to another for an equivalent in goods or money”) and “trafficking” (“trading or dealing in certain goods and commonly used in connection with illegal narcotic sales”), the BIA emphasized that “[e]ssential to the term in this sense is its business or merchant nature, the trading or dealing of goods . . . .” *Id.* at 541.

Any offense that lacks this element of trading or dealing for business or mercantile purposes does not fall within this ordinary meaning of “trafficking” and, accordingly, does not constitute “illicit trafficking in a controlled substance.”

*Davis*, 20 I&N Dec. at 541; *Steele v. Blackman*, 236 F.3d 130, 135 (3d Cir. 2001) (noting that the definition of “trafficking” would exclude simple possession or transfer without consideration); *see also* 116 Cong. Rec. 35,555 (Oct. 7, 1970) (statement of Sen. Hughes in support of federal provision treating a transfer of a small amount of marijuana without remuneration as a misdemeanor rather than a felony) (“*trafficking* provisions should apply to the large distributor, rather than to the person who is only using the drug with his friends.”) (emphasis added). Simply put, an offense that covers simple drug possession, or mere intent to distribute without remuneration, such as the offenses in *Berhe* and this case, do not constitute an “illicit trafficking in a controlled substance” aggravated felony.<sup>4</sup>

**C. The text and legislative history of the referenced federal “drug trafficking crime” definition show that it refers only to *federal* drug felonies.**

The aggravated felony definition for “illicit trafficking in a controlled substance” states that the term “includes” a “drug trafficking crime (as defined in section 924(c) of title 18, United States Code).” 8 U.S.C. §1101(a)(43)(B). The plain implication of this language is that the conduct covered by the “included”

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<sup>4</sup> This Court in *U.S. v. Rodriguez*, 26 F.3d 4 (1st Cir. 1994), held that the “drug trafficking crime” term could be extended to non-trafficking state offenses, but did not consider as a threshold matter whether this term even applies to state offenses. *See* Point I(C) below. In any event, *Leocal* is intervening Supreme Court authority that requires that the term used by Congress—“illicit trafficking”— provide guidance as to congressional intent.

term is a subset of the conduct covered within the general definition and thus should clarify, not add to the general definition. As such, this reference to §924(c) should not change the threshold requirement—discussed in Points 1(A) and 1(B) above—that a drug offense must be a felony that covers trafficking conduct in order to be deemed an “aggravated felony” “illicit trafficking” offense.

In any event, even if reference to §924(c) could somehow be understood to expand the coverage of the general definition, it would do so only with respect to federal drug offenses, not state offenses. When Congress first incorporated this federal criminal term into the INA in 1988, it included only federal felonies. Congress has not made any change in the law since that date that alters this.

Indeed, before 1988 “drug trafficking crime” was defined in 18 U.S.C. §924(c) to be expressly limited to “any *felony violation of Federal law* involving the distribution, manufacture, or importation of any controlled substance . . . .” 18 U.S.C. §924(c)(2) (1982 & Supp. IV 1986) (emphasis added). This prior statutory language “plainly reveals that a drug trafficking crime was limited to only federal felony offenses.” *U.S. v. Palacios-Suarez*, 418 F.3d 692, 698 (6th Cir. 2005). It also reveals that the term “drug trafficking crime” did not incorporate *all* federal felony drug offenses; rather, it was further limited to offenses that involved “distribution, manufacture, or importation.”

In 1988 the ADAA amended the “drug trafficking crime” definition and also introduced the term “aggravated felony” into immigration law. It amended the definition of “drug trafficking crime” to read:

any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.).

ADAA §6212, 102 Stat. at 4360. By making this amendment, Congress merely clarified the definition by replacing the general terms “distribution, manufacture, or importation” with the specific federal laws that punished such offenses. In fact, as the Ninth Circuit observed,

[T]his amendment was labeled ‘*Clarification of Definition of Drug Trafficking Crimes*’ . . . There is nothing in the legislative history to suggest that Congress intended this “clarification” to dramatically widen the scope of “drug trafficking crime” to include, for example, simple drug possession punished as a felony by a state. *See Chisom v. Roemer*, 501 U.S. 380, 396, 115 L. Ed. 2d 348, 111 S. Ct. 2354 (1991) (noting that the absence of any indication that Congress intended to make a major change in the statute can be considered as evidence that Congress did not intend the change).

*Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905, 915 (9th Cir. 2004) (quoting ADAA §6212); *accord Palacios-Suarez*, 418 F.3d at 699 (same). Thus, after this 1988 amendment, “drug trafficking crime” under 18 U.S.C. §924(c) continued to cover only federal offenses.

A review of other ADAA provisions shows that when Congress intended to cover *state* crimes, it did so expressly. For example, ADAA §6211 amended subsection (g) of this same 18 U.S.C. §924 to cover state law violations:

Whoever, with the intent to engage in conduct which . . .  
(2) is punishable under the Controlled Substances Act (21 U.S.C. 802 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.),  
(3) violates *any State law* relating to any controlled substance . . . shall be imprisoned not more than 10 years, fined in accordance with this title, or both.

102 Stat. at 4359 (emphasis added). Congress did not include any language in 18 U.S.C. §924(c) to refer to violations of state law. “[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) (internal quotation marks and citation omitted).

Notably, the ADAA also introduced the term “aggravated felony” into immigration law, defining it to include “any drug trafficking crime as defined in section 924(c)(2) of Title 18, United States Code.” 8 U.S.C. §1101(a)(43) (1988). The most natural reading of this phrase includes only offenses that are “defined in section 924(c)(2),” that is, federal felonies. As the Third Circuit has stated, “18 U.S.C. §924(c)(2) clearly provided the only source for the definition of ‘drug

trafficking crime.’ . . . [N]o state offenses were included in the concept of ‘aggravated felony.’” *Steele*, 236 F.3d 130 at 136 n.5.

In 1990, Congress amended the aggravated felony definition to include state drug offenses, but not by altering the federal “drug trafficking crime” definition. Instead it did so by adding new language to the aggravated felony definition so that the aggravated felony drug category now reads:

*illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18) . . . whether in violation of Federal or State law.*

*See* IMMACT §501, 104 Stat. at 5048, *as corrected by* Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, §306(a)(1), 105 Stat. 1733, 1751 (1991) (language added by IMMACT of 1990 italicized). The italicized added language—the general “illicit trafficking in a controlled substance” language not tied solely to the federal “drug trafficking crime” definition referring only to federal statutes, as well as the “whether in violation of Federal or State law” clause—was meant to codify the outcome of the BIA decision earlier that year in *Matter of Barrett*, 20 I&N Dec. 171 (1990), which concluded that state drug offenses may fall within this aggravated felony drug category. *See* H.R. Rep. No. 101-681, pt. 1, at 147 (1990), *reprinted at* 1990 U.S.C.C.A.N. 6472, 6553. But, to accomplish this inclusion of state offenses,

Congress did not amend the “drug trafficking crime” definition; rather, it added the new language described above. Thus, the phrase “drug trafficking crime” continues to cover only federal offenses, and does not apply to state offenses such as those in this case and in *Berhe*.<sup>5</sup>

**II. IF THIS COURT DECIDES THAT REFERENCE TO “DRUG TRAFFICKING CRIME” APPLIES TO STATE OFFENSES, THE RULE OF LENITY REQUIRES THE OFFENSE TO BE BOTH A FELONY UNDER STATE LAW AND PUNISHABLE AS A FELONY UNDER FEDERAL LAW.**

For the reasons given in Point I.C. above, analyzing a state drug offense by reference to the term “drug trafficking crime” is unwarranted because that term is limited to federal drug offenses only. Should the Court nevertheless determine otherwise, the rule of lenity requires a finding that misdemeanor drug offenses such as Mr. Henry’s and Mr. Berhe’s do not constitute a “drug trafficking crime.”

“Drug trafficking crime” is defined as “any felony punishable under the Controlled Substances Act . . . the Controlled Substances Import and Export Act . . . or the Maritime Drug Law Enforcement Act.” 18 U.S.C. §924(c)(2). When applied to a federal drug offense, this term is clear. When attempting to apply it to state

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<sup>5</sup> Amici acknowledge that this Court has applied the “drug trafficking crime” term to state offenses, *e.g.*, *Amaral v. INS*, 977 F.2d 33 (1st Cir. 1992), but respectfully submit that such application of this referenced federal criminal term to state offenses—as opposed to application of the general “illicit trafficking in a controlled substance” terminology—should be reconsidered in light of the legislative history and historical use of the federal “drug trafficking crime” term.

offenses, however, its meaning is extraordinarily difficult to discern.

The numerous courts of appeals that have attempted to analyze state drug offenses by reference to “drug trafficking crime” at §924(c)(2) have all struggled in interpreting the word “felony” in its definition. *See, e.g., Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (noting that the “statutory point is fairly debatable”); *Palacios-Suarez*, 418 F.3d at 700 (acknowledging “ambiguous statutory language”); *Gerbier v. Holmes*, 280 F.3d 297, 309 (3d Cir. 2002) (same).

These courts of appeals have arrived at divergent interpretations of the word “felony” by applying markedly different reasoning. In *Amaral*, this Court held to be a drug trafficking crime a Rhode Island offense that was a felony under both state and federal law. *See Amaral*, 977 F.2d at 36.<sup>6</sup> Other courts have gleaned meaning by reference to the legislative history behind 18 U.S.C. §924(c) and 8 U.S.C. §1101(a)(43)(B), and concluded that a state drug offense is a “felony” if it is equivalent to a felony drug offense under federal law. *See, e.g., Palacios-Suarez*, 418 F.3d at 700; *Cazarez-Gutierrez*, 382 F.3d at 905. Another court used legislative history in conjunction with a statute that classifies otherwise unclassified federal offenses, 18 U.S.C. §3559(a)(5), to come to the same conclusion that a state drug

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<sup>6</sup> In *Amaral*, this Court did not have occasion to reach the issue of whether one or both tests *must* be applied and had no cause to consider whether and how to apply the rule of lenity. Furthermore, subsequent to the *Amaral* decision, the Supreme Court has twice affirmed the applicability of the rule of lenity in immigration cases. *See Leocal*, 543 U.S. at 13; *St. Cyr*, 533 U.S. at 320.

offense must be equivalent to a federal felony drug offense. *See Gerbier*, 280 F.3d at 309. Yet other courts, including this Court in the federal criminal sentencing context, have overlooked legislative history entirely and looked only to a definition of “felony” found at 21 U.S.C. §802(13) and commentary in the federal Sentencing Guidelines, concluding that a state offense is a “felony” if it is a felony under state law, even if punishable only as a misdemeanor under federal law. *See U.S. v. Wilson* 316 F.3d 506, 512-13 (4th Cir. 2003), *cert. denied*, 538 U.S. 1025 (2003); *U.S. v. Restrepo-Aguilar*, 74 F.3d 361, 365 (1st Cir. 1996). Also instructive is that often the courts address at length their sister courts’ misapplication of the term “drug trafficking crime” to state offenses, and at least one court has even reversed its position. *Compare Jenkins v. INS*, 32 F.3d 11 (2d Cir. 1994) *with Aguirre*, 79 F.3d at 317.<sup>7</sup>

The ambiguity of the phrase “drug trafficking crime” as applied to state offenses—amply demonstrated by this circuit split—must be resolved by the rules of lenity recently reaffirmed by the Supreme Court, which require that we construe “lingering ambiguities” in criminal and deportation statutes in favor of the immigrant. *See Leocal*, 543 U.S. at 13 n.8 (“if [the statute] lacked clarity... we would be constrained to interpret any ambiguity in the statute in petitioner’s favor.”);

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<sup>7</sup> In fashioning its rule in *Restrepo-Aguilar*, this Court discussed at length the Second Circuit decision in *Jenkins*, which the Second Circuit Court of Appeals subsequently overruled in *Aguirre*.

*St. Cyr*, 533 U.S. at 320; *Cardoza-Fonseca*, 480 U.S. at 449; *INS v. Errico*, 385 U.S. 214, 225 (1966). As one circuit judge recently pointed out, “[t]here being two arguably permissible constructions of this statutory language, the rule of lenity requires us to adopt the construction that is more favorable to the defendant.” *Palacios-Suarez*, 418 F.3d at 702 (Nelson, J., concurring); *see also U.S. v. West*, 393 F.3d 1302, 1315 (D.C. Cir. 2005).

The definition of “drug trafficking crime” comes from a criminal statute and is applied in both criminal and deportation contexts. This Court has consistently recognized the role of the rule of lenity in construing criminal statutes. *See, e.g., U.S. v. Rosa-Ortiz*, 348 F.3d 33 (1st Cir. 2003) (“[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.”) (quoting *Dowling v. U.S.*, 473 U.S. 207, 214 (1985)); *see also U.S. v. Guevara-Lopez*, 92 F.3d 1169 (1st Cir. 1996) (acknowledging that the rule of lenity “mandates the resolution of ambiguities”). The rule of lenity also applies in the deportation context. *See St. Cyr, supra*. As the Supreme Court has stated, “deportation is a drastic measure and at times the equivalent of banishment or exile . . . we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of

several possible meanings of the words used.” *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

Given the ambiguity in interpreting the statute and given the harsh consequences for an immigrant deemed an “aggravated felon,” the Court should apply the rule of lenity and find a state offense may be incorporated in the term “drug trafficking crime” only if it is both a felony under state law *and* punishable as a felony under federal law. This is akin to the approach followed by the D.C. Circuit when faced with a similar choice about the applicable definition for the term “felony.” In *West*, 393 F.3d at 1310, the D.C. Circuit considered whether a defendant’s prior drug conviction was a felony for purposes of a federal sentence enhancement under 21 U.S.C. §841(b)(1)(A). The court considered two possible sources to define “felony,” 21 U.S.C. §802(13) and 21 U.S.C. §802(44). *Id.*, at 1311. Despite the government’s insistence that the term “felony” was wholly defined under the latter provision, that court applied the rule of lenity and held that the state offense would be considered a “felony” only if it met the terms of “felony” under *both* definitions. *Id.*, at 1315.

In this case and *Berhe*, where the offenses are not felonies under *either* state *or* federal law, *a fortiori* these offenses should not be deemed aggravated felonies. First, these offenses cannot be deemed drug trafficking aggravated felonies because they are not felonies under state law. Alternatively, they are not

punishable as a felony under federal law. Simple possession of a controlled substance, such as the offense for which Behre was convicted, is punishable as a misdemeanor under federal law. *See* 21 U.S.C. §844(a).

Contrary to the government’s position in *Berhe*, a prior drug conviction does not convert his misdemeanor into an aggravated felony. Although federal law provides a mechanism to punish a second or subsequent simple possession offense as a felony, the government may not rely on recidivist sentencing enhancements to determine whether an offense is an “aggravated felony.”<sup>8</sup> Even if recidivist enhancement provisions may be used, a second state possession offense cannot be equivalent to this enhancement unless the previous conviction was final at the time of the subsequent conviction, the defendant received notice of the prior conviction, and the prosecutor filed an information and proved the fact of the prior conviction.<sup>9</sup>

In *Amaral*, this Court held a second state *felony* for simple drug possession to be a felony under federal law. *Amaral*, 977 F.2d at 36 n.3. This case, however, concerns two *misdemeanors* where a sentence enhancement for the second offense was not sought, despite a state statutory scheme that allowed such an enhancement. Additionally, the Court was not presented in *Amaral* with the issues raised here regarding the effect of recidivist offenses and federal procedural requirements

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<sup>8</sup> Amici support the reasoning of this argument in Appellant *Berhe*’s Brief at Point I.B.

<sup>9</sup> *Id.*

necessary in order for an offense to be charged as a felony. Finally, the *Amaral* Court did not have the benefit, as it has now, of these issues having been considered by sister circuits.<sup>10</sup>

Similarly, a state misdemeanor that penalizes possession with intent to distribute a small amount of marijuana without remuneration, such as the Massachusetts offense in this case, is also not a felony under federal law. Federal law punishes such offenses as simple possession misdemeanors. *See* Background; *see also* 21 U.S.C. §841(b)(4) (“Notwithstanding [21 U.S.C. §841(b)(1)(D)], any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title [Penalty for simple possession as misdemeanor] and section 3607 of Title 18 [Special probation and expungement procedures for drug possessors]”).

One may violate Mass. Gen. Laws ch. 94C, §32C(a) by possessing with intent to distribute even a minuscule amount of marijuana, and for no remuneration. *See* Background. The Supreme Court recently clarified that where a penal statute covers a range of offenses, a court determining the character of a conviction is “limited to examining the statutory definition, charging document,

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<sup>10</sup> The Ninth and Third Circuits held that second drug possession convictions are not “drug trafficking” aggravated felonies. *See Oliveira Ferreira v. Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004); *Steele*, 236 F.3d at 137-38. *See* Appellant Berhe’s Brief at Point I.B for a fuller discussion of these cases.

written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge,” but may not examine other documents, such as a police report. *Shepard v. United States*, 125 S.Ct. 1254, 1257 (2005). Although *Shepard* arose in the context of a criminal sentencing enhancement, the BIA has adopted such a categorical analysis to aggravated felony determinations in removal cases. *See, e.g., Matter of V-Z-S*, 22 I&N Dec. 1338 (BIA 2000); *Matter of Perez*, 22 I&N Dec. 1325 (BIA 2000). Mr. Henry’s administrative record of removal proceedings contains no documents that, under *Shepard*, establish he was convicted of anything other than possession with intent to distribute a small amount of marijuana for no remuneration. Therefore, Mr. Henry’s conviction, punishable only as a misdemeanor under federal law, is not a drug trafficking offense.

## CONCLUSION

For the reasons stated above, amicus curiae respectfully requests the Court to interpret the “illicit trafficking in a controlled substance” aggravated felony to exclude state drug offenses that are not felonies or that lack any trafficking component. Should the Court decline to so hold, amicus curiae urges the Court to apply lenity rules that would require a state drug offense to be a felony under *both* state *and* federal law to be deemed an aggravated felony.

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