No. 05-547

IN THE

Supreme Court of the United States

JOSE ANTONIO LOPEZ,
Petitioner,
v.

ALBERTO GONZALES, ATTORNEY GENERAL
OF THE UNITED STATES,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: August 23, 2006

QUESTION PRESENTED

The Immigration and Nationality Act attaches a variety of immigration consequences to an alien's commission of an "aggravated felony," 8 U.S.C. § 1101(a)(43). In particular, if Petitioner Lopez's conviction for violation of a South Dakota felony statute constitutes an "aggravated felony," Lopez – who concedes that his conviction renders him deportable from the United States – is ineligible to apply for cancellation of removal, *see* 8 U.S.C. § 1229b(a)(3) and (b)(1)(C). The question presented is:

Whether the commission of a controlled substance offense that is a felony under state law, but that is generally punishable under the federal Controlled Substances Act only as a misdemeanor, constitutes an "aggravated felony," where the alien was sentenced under State law to more than one year of imprisonment.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Pages

Statutes:

Pages

Miscellaneous:

BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] While WLF engages in litigation in a wide variety of areas, it devotes a substantial portion of its resources to promoting America's national security. To that end, WLF has appeared in this and numerous other federal courts to ensure that aliens who engage in terrorism or other criminal activity are not permitted to pursue their criminal goals while in this country. See, e.g., *Clark v. Martinez,* 543 U.S. 371 (2005); *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335 (2005); *Demore v. Kim,* 538 U.S. 510 (2003); *Zadvydas v. Davis,* 533 U.S. 678 (2001); *Reno v. American-Arab Anti-Discrimination Committee,* 525 U.S. 471 (1999); *Al Najjar v. Ashcroft,* 273 F.3d 1330 (11th Cir. 2001); *Palestine Information Office v. Shultz,* 853 F.2d 932 (D.C. Cir. 1988).

The Allied Educational Foundation (AEF) is a non-profit charitable foundation based in Englewood, New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of study, such as law and public policy, and has appeared as *amicus curiae* in this Court on a number of occasions.

---

[1] Pursuant to Supreme Court Rule 37.6, amici state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than amici and their counsel, contributed monetarily to the preparation and submission of this brief. Letters of consent to this filing have been lodged with the Court.

Particularly in light of recent terrorist attacks in this country, *amici* believe that the political branches of government must be afforded broad power to deport aliens who have been convicted of serious crimes and have thereby demonstrated that they constitute threats to public safety. Yet, despite the clear intent of Congress that such alien felons be deported as quickly as possible, *amici* are concerned that courts and administrative judges have permitted the pace of deportations to slow to a crawl. *Amici* are filing a brief in this case because they believe that the rights of the public to be protected from the threat posed by dangerous alien felons outweigh whatever rights such felons may have to avoid removal.

STATEMENT OF THE CASE

Petitioner Jose Antonio Lopez is a citizen of Mexico who entered the United States illegally in 1985 or 1986.[2] In 1997, Lopez was indicted in South Dakota state court on serious drug charges: one count of possessing cocaine, one count of distributing cocaine, and one count of conspiracy to distribute cocaine. In September 1997, Lopez pleaded guilty to a felony under South Dakota law: aiding and abetting the possession of a controlled substance (cocaine), in violation of S.D. Codified Laws §§ 22-42-5, 22-6-1(7) (Michie 1988). *See* Pet. App. 2a. He was sentenced to five years incarceration and served 15 months.[3]

---

[2] In 1990, he adjusted his status to that of lawful permanent residence. There is evidence suggesting that Lopez obtained that change in status through fraud. However, the fraud issue is not before the Court.

[3] Five years was the maximum permissible sentence in 1997; South Dakota has since amended its law to increase the maximum (continued...)

The Immigration and Naturalization Service (INS) placed Lopez in removal proceedings in April 1998, while he was still serving his prison sentence. Lopez conceded that he was deportable based on his criminal conviction. *Id.* 12a-16a; *see* INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). He insisted, however, that his felony conviction was not an "aggravated felony" within the meaning of 8 U.S.C. § 1101(a)(43), and thus that he was eligible to seek cancellation of removal under 8 U.S.C. § 1229b(a).[4]

In his November 2002 decision, the Immigration Judge (IJ) disagreed. Pet. App. 10a-20a. The IJ held that Lopez's crime was a "drug trafficking crime" under Eighth Circuit precedent, and as such qualified as an "aggravated felony" as defined in 8 U.S.C. § 1101(a)(43)(B). *Id.* 17a. The IJ said that that holding was unaffected by the fact that at the time of Lopez's conviction the Board of Immigration Appeals (BIA) adhered to a position that only those State-law felony drug convictions that would have been felonies under the federal Controlled Substances Act (CSA), 21 U.S.C. §§ 801 *et seq.*, could qualify as "aggravated felon[ies]." The IJ noted that the BIA later reversed that position; he determined that Lopez did not act in reliance on the former BIA position at the time he pleaded guilty, nor could he reasonably have done so. *Id.* 17a-18a. Accordingly, the IJ held that Lopez was ineligible for cancellation of removal, and he ordered Lopez removed to Mexico. *Id.* 20a. Adopting the IJ's reasoning, the BIA dismissed Lopez's appeal in May 2003. *Id.* 8a-9a.

---

[3](...continued)
sentence to 10 years.

[4] Permanent resident aliens are not eligible for cancellation of removal if they have "been convicted of any aggravated felony." 8 U.S.C. § 1229b(a)(3).

Lopez thereafter sought relief in the Eighth Circuit, which affirmed in August 2005. *Id.* 1a-7a. The appeals court held that a "drug trafficking crime" is one that would be punishable under the CSA and would qualify as a felony under either State or federal law. *Id.* 4a. The court held that Lopez's conviction met that standard – the conduct to which Lopez admitted unquestionably was punishable under the CSA and was a felony under South Dakota law – and thus qualified as an "aggravated felony" that precluded an application for cancellation of removal. *Id.* 5a. The court rejected Lopez's claim that the BIA was acting improperly by "retroactively" applying to Lopez's case a rule that it did not adopt until five years after Lopez's conviction. The court said that there was nothing retroactive about the ruling, given that the Eighth Circuit's interpretation of "drug trafficking crimes" had been settled law within the circuit for several months by the time of Lopez's guilty plea. *Id.* 6a-7a.

This Court granted Lopez's certiorari petition on April 3, 2006, to resolve a conflict among the circuit courts regarding when a drug crime committed by an alien constitutes an "aggravated felony."

SUMMARY OF ARGUMENT

Lopez's felony offense should be deemed a "drug trafficking crime" within the meaning of 18 U.S.C. § 924(c) and thus an "aggravated felony" under 8 U.S.C. § 1101(a)(43). A "drug trafficking crime" is defined as "any felony punishable under the [CSA]." 18 U.S.C. § 924(c)(2). The crime for which Lopez was convicted was a felony under South Dakota law, punishable by up to five years in prison. Lopez also concedes that his conduct was punishable under the CSA. Accordingly, applying the ordinary meaning to the

words of § 924(c)(2), Lopez committed an "aggravated felony" that bars him from seeking cancellation of removal.

Lopez's alternative construction – that only those offenses that are proven felony violations of the CSA are "drug trafficking crime[s]" and thus "aggravated felon[ies]" – has little to recommend it. At the same time that Congress expanded the definition of "aggravated felony" to include any "drug trafficking crime," it added a specific admonition that the term "aggravated felony" should be applied to any offense so described, regardless whether the offense was "in violation of Federal or State law." 8 U.S.C. § 1101(a)(43). In light of that admonition, there can be little basis for concluding that Congress – without ever saying so – intended to adopt an unnaturally restrictive definition of the "felon[ies]" that could qualify as drug trafficking crimes. Moreover, Lopez's construction would exclude from the definition of "aggravated felony" all State-law drug felony convictions – even those that could have been prosecuted as felony violations of the CSA – unless the conviction independently meets the definition of "illicit trafficking in a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1101(a)(43)(B). At least some felony violations of the CSA arguable would not meet that definition.

There is nothing disproportionate about ordering the removal of an alien who has been convicted of a State-law drug felony and sentenced to five years in prison. For the past 18 years, Congress has regularly expressed its view that aliens adjudged by a criminal court (whether federal or State) to have committed a major crime should be removed, without regard to claimed extenuating circumstances. In this case, Lopez was indicted for distributing, and conspiracy to distribute, cocaine. Prosecutors clearly deemed him a major criminal: they agreed to drop the distribution and conspiracy charges only after

Lopez agreed to plead guilty to another felony drug charge. It is precisely such individuals that Congress had in mind when it took steps designed to ensure that alien felons are swiftly removed from the country.

There is no merit to Lopez's contention that giving effect to South Dakota's determination that Lopez is a major criminal results in an unwarranted non-uniform application of federal immigration law. To the contrary, the Eighth Circuit's decision mandates a uniform application: aliens are subject to removal as aggravated felons if they have been convicted of enumerated major violations of federal or State criminal law, regardless where in the country they are now located. Congress recognized, of course – when it included State felony convictions within the definition of "aggravated felony" – that criminal law varies from State to State. But the rule it adopted is uniformly applicable: aliens must conform their conduct to the laws of the State in which they live or suffer the consequences.

Also without merit are Lopez's attempts to invoke various rules of statutory construction to bias the interpretation of "drug trafficking crime" in his favor. Lopez asserts that ambiguous statutes touching on deportation/removal should be construed to favor the alien resisting deportation. To the contrary, the guiding principle in construing an immigration statute or any other federal statute ought to be to arrive at an interpretation that best captures congressional intent. In light of Congress's repeated efforts to expand the list of "aggravated felon[ies]" that render an alien felon subject to automatic deportation, there is little reason to conclude that Congress adopted those statutes with the intent that close cases should be decided in favor of the alien felon. The rule of statutory construction relied on by Lopez – which is quite limited in

nature and which has never been embraced as an actual holding of the Court – has no application here.

Similarly misplaced is Lopez's reliance on "the rule of lenity." That rule has been applied only in criminal cases, not to civil cases such as immigration proceedings. The rule of lenity is based on the notion that individuals have a due process right not to face criminal sanctions for their conduct unless they had clear advance notice that their conduct was proscribed by the criminal law. The rule of lenity interprets ambiguous criminal statutes against the prosecution based on the understanding that a contrary interpretation would apply criminal sanctions to conduct not clearly proscribed. There can be no argument that Lopez lacked fair warning either that his conduct was felonious or was a deportable offense. Lopez's alternative argument – that the rule of lenity should be invoked because the question presented in this case could have direct application in criminal cases involving 18 U.S.C. § 924(c) – is also without merit. There can be no such application, because sentence enhancement under § 924(c) cannot be based on a conviction in State court.

ARGUMENT

I. LOPEZ'S FELONY OFFENSE IS A "FELONY PUNISHABLE UNDER THE CONTROLLED SUBSTANCES ACT"

For at least 20 years, Congress repeatedly has expressed its displeasure over the slow rate at which alien felons have been removed from this country. *See, e.g.,* H. Rep. No. 109-345(I) (Dec. 13, 2005). Although federal law has long provided that all but the most minor criminal convictions render an alien deportable, provisions in the law permitting alien felons to plead extenuating circumstances as a reason to

avoid deportation have made it exceedingly difficult for immigration authorities to remove even the most hardened criminals from the country.

Among the steps taken by Congress to overcome the difficulty in removing alien felons has been adoption of legislation – beginning in 1988 – that has steadily increased the number of offenses for which deportation is *automatic.* Congress has provided that resident aliens, such as Lopez, who are subject to deportation are ineligible for "cancellation of removal" under 8 U.S.C. § 1229b(a) if they have "been convicted of an aggravated felony." 8 U.S.C. § 1229b(a)(3). The definition of "aggravated felony" has been expanded on numerous occasions since 1988, so that it now encompasses 21 categories of federal and State crimes, including such broad categories as "any crime of violence . . . for which the term of imprisonment is at least one year." 8 U.S.C. § 1101(a)(43)(F).

At issue here is whether Lopez's felony drug conviction falls within one of those 21 categories: "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)." 8 U.S.C. § 1101(a)(43)(B). A "drug trafficking crime" is defined in § 924(c)(2) as "any felony punishable under the [CSA]" or two other federal drug laws. Accordingly, if Lopez's crime is a "felony punishable under the [CSA]," he has committed an "aggravated felony" and thus is rendered ineligible for cancellation of removal by virtue of 8 U.S.C. § 1229b(a)(3).[5]

If one construes § 924(c)(2) based on the ordinary meaning of the words used in that statute, Lopez committed an

---

[5] Lopez concedes that he is deportable under 8 U.S.C. § 1227(a)(2)(B)(i) by virtue of having been convicted of a drug crime.

aggravated felony that bars him from seeking cancellation of removal. The most logical reading of § 924(c)(2) is that one has committed a "drug trafficking crime" if one has been convicted of a felony in any State or federal court and one's crime is a "punishable under the [CSA]." Lopez meets both of those conditions. The crime of which Lopez was convicted – S.D. Codified Laws §§ 22-42.5, 22-6-1(7) (Michie 1988) – was a felony under South Dakota law, punishable by up to five years imprisonment. Moreover, Lopez concedes that his crime was "punishable under the [CSA]."

A. Lopez's Previously Expressed Interpretation of § 924(c)(2) Is Without Merit

In the appeals court, Lopez argued that § 924(c)(2) limits "drug trafficking crimes" to those crimes that would be deemed felonies under the CSA itself. Pet. App. 4a. He argued that his crime did not meet that definition because, although it was a felony under South Dakota law, it would not have been punishable as a felony under the CSA. *Id.*[6] That reading of § 924(c)(2) cannot be squared with the words of the statute. If that had been Congress's intent, it is far more plausible that Congress would have drafted the statute to read, "a crime punishable as a felony under the CSA." But contrary to that hypothetical language, nothing in § 924(c)(2) suggests that Congress intended to limit "drug trafficking crime[s]" to a subset of offenses punishable under the CSA. Rather, the statutory language can only be read to mean that *any* felony "punishable under the CSA" qualifies as a "drug trafficking crime."

---

[6] That interpretation is the one adopted by several federal appeals courts and by the Board of Immigration Appeals in 1992. *See In re Davis,* 20 I. & N. Dec. 536 (BIA 1992). The BIA later abandoned that view. *See In re Yanez,* 23 I. & N. Dec. 390, 397 (BIA 2002).

Moreover, the interpretation espoused by Lopez in the appeals court creates difficult line-drawing issues. Under the interpretation accepted by the Eighth Circuit, it will usually be a straight-forward matter to determine whether the alien's drug conviction is deemed a "felony" in the State in which he was convicted. In contrast, if only a subset of such felony convictions qualify as drug trafficking crimes, it may often be difficult to determine which of the hundreds of potentially applicable State-law felonies include all the elements of a crime punishable as a felony under the CSA.

B. Lopez's Current Interpretation of § 924(c)(2) Is Without Merit

Lopez has adopted a new interpretation of § 924(c)(2) before this Court. He now asserts that an offense qualifies as a "drug trafficking crime" only if the offender has actually been charged and convicted of a felony violation of the CSA. Pet. Br. 20-27. It is not sufficient, in his view, to demonstrate that the offender has been convicted of a State-law felony, even if the crime could also have been prosecuted as a felony under the CSA. *Id.* Lopez's new position cannot be squared with § 924(c)(2)'s use of the word "punishable," which denotes an offense that is *subject to* punishment under the CSA – not one that has already resulted in federal charges and conviction under the CSA. *See, e.g.,* www.dictionary.reference.com/browse/punishable ("punishable" means "liable to or deserving punishment" or "subject to punishment by law"). Conviction in State court on criminal drug charges that are analogous to an offense under the CSA is *per se* evidence that one's offense is "punishable under the [CSA]."

Moreover, Lopez's interpretation is inconsistent with the history surrounding Congress's adoption of the relevant statutes. At the same time that Congress expanded the

definition of "aggravated felony" to include "any drug trafficking crime," it added to 8 U.S.C. § 1101(a)(43) an explicit admonition that the term "aggravated felony" should be applied to any offense described in § 1101(a)(43), regardless whether the offense was "in violation of Federal or State law." Pub. L. No. 101-649 § 501, 104 Stat. 4978, 5048 (1990). In light of that admonition, there can be little basis for concluding that Congress – without saying so – intended to adopt an unnaturally restrictive definition of the "felon[ies]" that could qualify as drug trafficking crimes.[7]

Furthermore, Lopez's construction would exclude from the definition of "aggravated felony" all State-law drug felony convictions – even those that could have been prosecuted as felony violations of the CSA – unless the conviction independently meets the definition of "illicit trafficking in a controlled substance (as defined in section 802 of Title 21)." 8 U.S.C. § 1101(a)(43)(B). At least some felony violations of the CSA (*e.g.,* manufacture of a controlled substance) arguably would not meet that definition.

Even if one accepted Lopez's view that all felony violations of the CSA and analogous State-law drug crimes would qualify as "illicit trafficking in a controlled substance,"

---

[7] Congress did not, of course, write § 924(c)(2) in 1990 when it expanded § 1101(a)(43)'s definition of an aggravated felony; § 924(c)(2) was already in the statute books. But one must assume that when, in 1990, Congress for the first time tied the definition of an "aggravated felony" to a term contained in § 924(c)(2), it intended that courts would adopt the ordinary meaning of the words contained in § 924(c)(2) when deciding whether an offense was an "aggravated felony." Congress's simultaneous adoption of the "in violation of Federal or State law" language indicates that Congress understood the word "felony" in § 924(c)(2) to refer to conduct in violation of either federal or State law.

that interpretation does not support Lopez's argument that Congress intended to exclude all State-law drug convictions from the term "any felony punishable under the [CSA]." Lopez argues that if "Congress had understood that the definition of 'drug trafficking crime' in section 924(c) includes state drug trafficking crimes, it would not have needed to adopt an additional provision providing generally that 'illicit trafficking' is an aggravated felony." Pet. Br. 33. But whether a statutory provision is absolutely "necessary" to achieve a congressional purpose has little or no bearing on how that provision should be interpreted. There is nothing at all unusual about Congress adopting provisions whose sole object is to add emphasis to Congress's intended purpose.

C. Deportation Is Not a Disproportionate Penalty for Lopez's Crime

The United States's brief thoroughly explains why Lopez should be deemed to have committed an aggravated felony. Rather than repeat all those arguments here, *amici* wish to focus on several additional points.

First, Lopez argues that deportation is disproportionate to his crime. To the contrary, there is nothing disproportionate about ordering the removal of an alien who has been convicted of a State-law drug felony and sentenced to five years in prison. For the past 18 years, Congress has repeatedly expressed its view that aliens adjudged by a criminal court (whether federal or State) to have committed major crimes should be removed, without regard to claimed extenuating circumstances. In 1988, Congress defined a relatively narrow category of "aggravated felon[ies]" – it included offenses such as murder, drug trafficking crimes, and firearms trafficking offenses – and provided that an alien who committed an aggravated felony was subject to automatic deportation. *See*

Anti-Drug Abuse Act of 1988, §§ 7342, 7344, 102 Stat. 4469, 4470. Since 1988, "Congress has frequently amended the definition of aggravated felony, broadening the scope of offenses which render an alien deportable." *Leocal v. Ashcroft*, 543 U.S. 1, 4 n.1 (2004).[8]

Lopez and his amicus supporters may view his deportation as a disproportionate response to his felonious conduct, but nothing in its actions over the past 18 years suggests that Congress shares that view. Indeed, many of the offenses included in 8 U.S.C. § 1101(a)(43)'s list of aggravated felonies are not federal crimes at all. Accordingly, in deciding which aliens should be subject to automatic deportation, Congress has demonstrated its willingness to accept the judgment of State officials that an alien has engaged in serious criminal misconduct, even when (unlike in Lopez's case) the alien's conduct has contravened no federal law.

Second, Lopez argues that his conduct does not meet common understandings of the word "trafficking," and thus that he should not be deemed to have committed a drug trafficking crime. Pet. Br. 20. Whether Lopez is correct regarding common usage of the word "trafficking" is beside the point, given that when Congress specified in § 1101(a)(43)(B) that a "drug trafficking crime" is an "aggravated felony," it provided its own detailed definition of what constitutes a "drug trafficking crime." In construing the term "drug trafficking crime," one should rely on the definition

---

[8] *See, e.g.,* Immigration Act of 1990, § 501, 103 Stat. 4978, 5048 (1990); Immigration and Nationality Technical Corrections Act of 1994, Pub. L. 103-416, 108 Stat. 4305 (1994); Antiterrorism and Effective Death Penalty Act of 1966, § 440(e), 110 Stat. 1277 (1996); Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, 110 Stat. 3009-546 (1996).

provided by Congress, not on how individuals might interpret the term in the absence of a statutory definition.

Finally, the Court should not permit Lopez to get away with portraying himself as anything other than a serious drug offender. Lopez is attempting to take advantage of the fact that prosecutors agreed to drop the most serious charges lodged against him – distributing cocaine and conspiracy to distribute cocaine – in return for his agreement to please guilty to another drug felony. What Lopez fails to note is that prosecutors agreed to drop the distribution and conspiracy charges with knowledge that in return they were obtaining a conviction on charges that South Dakota deemed extremely serious, and that led to imposition of a five-year prison sentence. Despite Lopez's effort to portray himself as a mere drug possessor who had the bad luck to be prosecuted in South Dakota instead of in a State with less harsh drug laws, he has provided no evidence that prosecutors would ever have dropped the distribution and conspiracy charges in the absence of his agreement to plead guilty to a serious felony. And as noted above, Congress has made abundantly clear that aliens who commit serious felonies should be subject to automatic deportation, regardless whether the conviction arises in federal or State court. Congress provided that aggravated felonies include "any felon[ies]" punishable under the CSA; now that the South Dakota courts have found Lopez guilty of a drug felony, he should not be permitted to second-guess that determination simply because prosecutors agreed to drop even more serious felony charges.

II. THE DECISION BELOW DOES NOT RESULT IN UNWARRANTED NON-UNIFORM APPLICATION OF FEDERAL IMMIGRATION LAW

Lopez also argues that the decision below results in unwarranted non-uniform application of federal immigration law. Pet. Br. 33-36. Lopez asserts, "The policy favoring uniform application of the immigration laws supports an interpretation that makes similarly situated noncitizens subject to the same rules for asylum." *Id.* 34.

Lopez's argument is without merit. The decision below subjects Lopez to the same immigration rules as every other deportable alien: all such aliens are ineligible for cancellation of removal under 8 U.S.C. § 1229b or asylum under 8 U.S.C. § 1158(b)(2)(B) if they have been convicted of an aggravated felony. *All* aliens nationwide are on notice that they may be subject to automatic deportation if they fail to conform their conduct to the penal code of the State in which they reside.

Lopez's argument is based on a misunderstanding of what this Court has meant by its rule of construction that Congress generally intends federal statutes "to have uniform nationwide application." *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989). The Court generally assumes that if A and B are identically situated except that they live in different States, Congress intends (in the absence of a plain indication to the contrary) that they will be identically treated under federal law. *Id.* 45. In other words, the application of federal law to A and B generally should not be deemed "dependent on state law." *Id.* 43 (quoting *Jerome v. United States,* 318 U.S. 101, 104 (1943)). But A and B cannot be deemed to be similarly situated if A has been convicted of an aggravated felony while B has not. Under those circumstances, the two individuals have behaved differently: B conformed his conduct to the penal code of his State, while A did not.

The inapplicability to this case of the uniformity principle set out in *Mississippi Band* is well illustrated by a comparison of the facts of the two cases. *Mississippi Band* involved the Indian Child Welfare Act of 1978 (ICWA), 25 U.S.C. § 1901 *et seq.*, a federal statute that sought to discourage adoption or foster care placement of Indian children into non-Indian homes. The ICWA gives exclusive jurisdiction to tribal courts over custody proceedings involving Indian children "domiciled within" a tribe's reservation. Notwithstanding the ICWA, the Mississippi Supreme Court exercised jurisdiction over custody proceedings involving two Indian children; it did so by applying Mississippi's unusually narrow definition of "domicile." This Court reversed, ruling *inter alia* that Congress intended to apply a uniform definition of "domicile" for purposes of the ICWA. *Mississippi Band,* 490 U.S. at 47. The Court noted that allowing the issue of domicile to be determined by reference to State law would lead to a non-uniform rule and that identically situated litigants could face different results based solely on the State in which the court proceedings arose. Indeed, the Court noted, litigants could alter the outcome of the "domicile" question by moving their Indian child to a new State. *Id.* 45-46. The Court concluded, "Congress could hardly have intended the lack of nationwide uniformity that could result from state-law definitions of domicile." *Id.* 45.

The absence of any similarity between this case and *Mississippi Band* is readily apparent. Lopez is subject to automatic deportation as an aggravated felon without regard to his State of residence at the time of his deportation proceedings. Accordingly, his deportation does not create a situation even remotely akin to the "lack of nationwide uniformity" that troubled the Court in *Mississippi Band.* Every State has its own penal code and its own list of crimes that qualify as "aggravated felon[ies]." But the immigration laws

are not being enforced non-uniformly, in the sense at issue in *Mississippi Band*, so long as federal courts apply a uniform deportation standard in all cases involving an alien convicted of an aggravated felony under either State or federal law, a standard that does not vary based on the State of residence of the alien. Affirming the Eighth Circuit's decision would ensure just such uniformity.

Lopez contends that immigration law is somehow rendered non-uniform if an alien's conduct in one State constitutes an aggravated felony (and thus results in automatic deportation), while his same conduct in another State would be deemed blameless. But federal recognition of State-to-State variations in criminal law has never been held to create the type of non-uniform application of federal law that Congress is thought to eschew. Indeed, given its knowledge that penal statutes are not uniform nationwide, Congress must be deemed to have accepted the type of "non-uniformity" that Lopez decries, by providing in § 1101(a)(43) that the term "aggravated felony" applies to any of 21 broad categories of offenses – some of which do not constitute violations of federal law.

That Congress recognized and accepted the type of non-uniformity that Lopez decries is readily apparent from a perusal of the offenses enumerated in § 1101(a)(43). For example, "sexual abuse of a minor" is included within the definition of "aggravated felony," 8 U.S.C. § 1101(a)(43)(A), but State laws vary widely regarding the definition of a "minor." In Texas, it is a felony to have sexual contact with an individual under 17, if the perpetrator is at least three years older than the victim. Texas Penal Code § 22.011. In Georgia, it is a felony to have sexual contact with an individual under 16. Ga. Code Ann., § 16-6-3. Accordingly, an alien who had consensual sexual contact with a 16-year-old in Texas could

face serious felony charges and, if convicted, would be subject to automatic deportation; but the same conduct would have no immigration consequences if committed in Georgia.

Similarly, a conviction that "relates to the owning, controlling, managing, or supervising of a prostitution business" is deemed an aggravated felony. 8 U.S.C. § 1101(a)(43)(K)(i). In virtually all States, engaging in such conduct is a felony and thus could result in a criminal conviction and automatic deportation for an alien. In contrast, running a prostitution business is wholly legal in Nevada, provided that the operator is licensed by government officials. Nev. Rev. Stat. 244.345. Thus, an alien who runs a prostitution business in California faces automatic deportation if convicted, while he would face neither criminal nor immigration sanctions if he moved his business across the border into Nevada. Congress clearly was aware of such differences in State penal laws when it mandated automatic deportation for those who commit aggravated felonies and therefore cannot be deemed to have sought to avoid the type of "non-uniformity" to which Lopez objects.

In sum, there is no reason to believe that Congress would be troubled by the classification of Lopez's crime as an aggravated felony even though similar misconduct by aliens in some other States would not be so classified. The decision below provides for uniform application of the immigration laws in the only meaningful sense: all aliens nationwide are subject to automatic deportation if they fail to conform their conduct to the penal code of the State in which they live and the resulting conviction qualifies as an "aggravated felony."

III. THERE IS NO BASIS FOR INVOKING A PRESUMPTION THAT AMBIGUOUS STATUTES

SHOULD BE CONSTRUED IN FAVOR OF AN ALIEN RESISTING DEPORTATION

Lopez attempts to invoke several alleged rules of statutory construction to bias the interpretation of "drug trafficking crime" in his favor. In particular, Lopez asserts that ambiguous statutes touching on deportation/removal should be construed in favor of the alien resisting deportation. Pet. Br. 36-37.

Lopez's efforts to invoke this alleged rule of statutory construction should be rejected for several reasons. First, the presumption relied on by Lopez should be invoked, if at all, only as a last resort in those cases in which normal rules of statutory construction fail to provide any basis for resolving the alleged ambiguity. Here, once those rules of statutory construction are applied, there is no remaining ambiguity. Second, no cases cited by Lopez embrace Lopez's presumption as a holding; in each case, the Court's discussion is dictum. Third, Lopez's presumption makes no sense as an accurate predictor of how Congress would want such issues resolved; to the contrary, all indications are that Congress would wish close cases to be resolved in *favor* of deportation.

The Presumption as a Last Resort. Lopez asserts that the presumption he seeks to invoke "favors Petitioner's construction of the statutory language and cuts against the interpretation of the court of appeals." *Id.* 36. But as this Court recently noted, that sort of argument "puts the cart before the horse." *Fernandez-Vargas v. Gonzales,* 126 S. Ct. 2422, 2430 (2006). The Court explained that any presumption favoring aliens facing deportation should be employed, if at all, as a *last* resort, not "as a tool for interpreting the statute" on a par with other, normally employed interpretive tools. *Id.* Such a presumption could be applicable, if at all, only where

Congress's purpose is largely inscrutable. It has no place where, as here, there are numerous *direct* indications of Congress's intent – including the statutory definition of "drug trafficking crime," Congress's admonition that a State-court felony conviction can constitute an "aggravated felony," and the circumstances surrounding the 1990 expansion of the definition of an "aggravated felony" to include a "drug trafficking crime."

No Full Embrace of the Presumption. In support of invoking a tie-goes-to-the-alien presumption, Lopez cites several decisions of this Court over the past 60 years. However, in none of those cases did the Court rely on such a presumption as part of its holding. Rather, only after deciding the cases in favor of the alien did the Court mention the presumption in *dicta*. *See, e.g., INS v. Cardoza-Fonseca,* 480 U.S. 421, 449 (1987) (Court overturns denial of asylum claim based on "the plain language of the [INA], its symmetry with the United Nations Protocol, and its legislative history. . . . We finds these canons of statutory construction compelling, even without regard to the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien."); *INS v. Errico,* 385 U.S. 214, 225 (1966) (after construing the INA as saving an alien from deportation despite the alien having misrepresented his status to gain entry into the United States, Court adds, "Even if there were some doubt as to the correct construction of the statute, the doubt should be resolved in favor of the alien."); *Costello v. United States*, 376 U.S. 120, 128 (1964) (Court construes statutory deportation provision in favor of alien, then adds that even if the statute's meaning were in doubt, that doubt should be resolved "in favor of the alien."). Accordingly, despite the Court's occasional reference to the presumption as "longstanding" in nature, it has never been fully embraced by the Court as part of a holding in a case.

No Reason to Presume that Congress Wishes Aliens to Prevail in Close Cases. It is worth noting that the presumption that Lopez seeks to invoke developed not as a result of any special solicitude for aliens facing deportation, but from a belief that Congress does not normally write irrational statutes. The Court first articulated the presumption in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), a deportation case that turned on whether petitioner Delgadillo had "entered" the United States within the previous five years; if so, he was subject to deportation. Although Delgadillo had lived continuously in the United States for 20 years, a ship on which he was working was torpedoed along the Florida coast in 1942, and survivors were brought to Havana, Cuba. The government argued that his arrival in Miami, Florida from Havana one week later should be deemed an "entry" for purposes of the relevant deportation statute. In rejecting that interpretation as "capricious," the Court explained:

> [T]he stakes are indeed high and momentous for the alien who has acquired his residence here. We will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are asked to subject the alien are too irrational to square with the statutory scheme.

Delgadillo, 332 U.S. at 391. In other words, the courts interpret statutes in a manner that favors aliens facing deportation when not doing so will lead to capricious yet momentous results, not because Congress necessarily intended that aliens be given the benefit of the doubt in close cases.

Later decisions of this Court erroneously pointed to *Delgadillo* as creating a tie-goes-to-the alien rule. But the only

rationale put forward in later decisions in support of such a rule was that the consequences of a deportation order are so heavy that it should not be issued in the absence of a clear mandate. For example, in a case involving efforts to deport a man convicted of two murders, the Court said:

> We resolve the doubts in favor of [the] construction [of the deportation statute presented by the alien] because deportation is a drastic measure and at times the equivalent of a banishment to exile, *Delgadillo v. Carmichael*, 332 U.S. 388. . . . [S]ince the stakes are considerable for the individual, 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).

Amici respectfully request that the Court use this case to extinguish the notion that aliens are entitled to special solicitude in deportation proceedings. Justice Douglas was no doubt correct in *Fong Haw Tan* that a deportation decision has major consequences, but that is not a reason to bias the outcome in favor of one party or the other. The outcome of a deportation proceeding is just as important to society at large as it is to an alien felon facing deportation – the safety of all Americans depends on the government's ability to deport such aliens as quickly as possible.

The guiding principle in construing an immigration statute or any other federal statute is to arrive at an interpretation that best captures congressional intent. *See, e.g., Gade v. National Solid Waste Management Ass'n,* 505 U.S. 88, 98 (1992) ("The purpose of Congress is the ultimate touchstone"). In light of Congress's repeated efforts to expand

the list of aggravated felonies that render an alien felon subject to *automatic* deportation, there is little reason to conclude that Congress adopted those statutes with the intent that close cases should be decided in favor of the alien felon. There may be immigration provisions in which Congress has indicated a desire that the alien be given the benefit of the doubt, but 8 U.S.C. § 1101(a)(43) is not one of them. In light of Congress's repeated efforts to increase the pace of deportations, particularly in cases involving convicted felons, there can be no basis for maintaining a blanket rule that Congress intended the courts to give the benefit of the doubt to the alien in all deportation cases.

III. THE RULE OF LENITY IS INAPPLICABLE TO THIS CASE

Lopez also seeks to bias the decision in his favor by invoking "the rule of lenity." Pet. Br. 37-38. That effort is misguided; the rule of lenity has no application to this case.

The rule of lenity is a tool of statutory construction used by courts to assist in ascertaining congressional intent regarding the scope of criminal statutes. As Lopez notes, the rule of lenity states that "'ambiguity concerning the scope of *criminal statutes* should be resolved in favor of lenity,'" Pet. Br. 37 (quoting *United States v. Bass,* 404 U.S. 336, 347 (1971) (emphasis added). Because 8 U.S.C. § 1101(a)(43) is not a criminal statute and deportation is not a criminal proceeding, the rule of lenity is of no benefit to Lopez.

Nor is the rationale underlying the rule of lenity applicable to Lopez. The rule is rooted in fundamental principles of due process, which mandate that no individual be forced to speculate, at peril of indictment, whether his or her conduct is prohibited. To ensure that a legislature speaks with

special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not "plainly and unmistakably" proscribed. *Dunn v. United States*, 442 U.S. 100, 107 (1979). Lopez has no basis for arguing that he lacked fair notice of the consequences of his misconduct. Lopez acted despite fair warning that his activities constituted a felony punishable by five years and prison and rendered him deportable under 8 U.S.C. § 1227(a)(2)(B)(i). Moreover, some months prior to Lopez's guilty plea, the Eighth Circuit ruled that all State drug felonies constituted "felon[ies] punishable under the [CSA]" amd thus an aggravated felony rendering the perpetrator subject to automatic deportation, regardles whether the State-law felony would also be a felony violation of the CSA. *United States v. Briones-Mata*, 116 F.3d 308, 310 (8th Cir. 1997). Accordingly, Lopez also had fair notice that his conviction would subject him to automatic deportation. In light of Lopez's receipt of fair notice of the consequences of his actions, Lopez cannot even lay claim to the rationale underlying the rule of lenity.

Lopez points alternatively to the fact that immigration law draws its definition of a drug trafficking crime from a criminal statute, 18 U.S.C. § 924(c)(2). Lopez cites to *Leocal* for the proposition that the rule of lenity should be applied in interpreting any statute that has both criminal and noncriminal applications because a single statute should not be given two inconsistent interpretations – one for use in criminal cases and one for use in noncriminal cases. *Leocal,* 543 U.S. at 12. Because § 924(c)(2) has criminal applications, this case must be decided in conformance with the rule of lenity, Lopez asserts. Pet. Br. 38.

Lopez's premise is incorrect: resolution of the issue before the Court cannot possibly have a bearing on application

of § 924(c)(2) to any criminal case. Section 924(c) is a criminal statute that provides for sentencing enhancements for individuals who use, carry, or possess a firearm in relation to "any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c)(1)(A). A "drug trafficking crime" is defined in § 924(c)(2); it is this definition that Congress borrowed in connection with its creation of a list of "aggravated felon[ies]." Importantly, Congress limited sentence enhancement to crimes for which the perpetrator "may be prosecuted in a court of the United States." *Id.* Federal courts do not, of course, have jurisdiction to hear criminal cases involving alleged violations of State penal codes; accordingly, even if the Court rules that a State-law felony conviction qualifies as a "felony punishable under the [CSA]," and thus as a "drug trafficking crime," that ruling could not affect any conceivable criminal case involving a sentencing enhancement under § 924(c)(1). Even under the Eighth Circuit's ruling, the only criminal proceedings that can arise under § 924(c)(1) in federal court are indictments alleging felony violations of the CSA,[9] and nothing the Court could say in resolving this case would affect the status of felony violations of the CSA as "drug trafficking crime[s]." In sum, the rule of lenity cannot be invoked by Lopez to bias the interpretation of a "drug trafficking crime" in his favor.[10]

---

[9] Or federal-law crimes of violence, as defined in § 924(c)(3).

[10] Lopez seems to believe that the government's case would be undercut by a finding that § 924(c)(1)'s provisions cannot be invoked to enhance sentences otherwise applicable to State-court criminal proceedings. *See, e.g.,* Pet. Br. 23-24 ("Petitioner has not located a single case in which the government prosecuted an individual under § 924(c) based on the carrying or use of a firearm during a state-law felony."). To the contrary, there is nothing inconsistent between a finding that a "felony punishable under the [CSA]" (§ 924(c)(2)) includes State-law felonies and a finding that § 924(c)(1) cannot be used to enhance penalties for violations of State criminal laws. When (continued...)

CONCLUSION

Amici curiae respectfully request that the Court affirm the judgment below.

Respectfully submitted,

Daniel J. Popeo
Richard A. Samp
(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave., NW
Washington, DC 20036
(202) 588-0302

Date: August 23, 2006

---

[10](...continued)
Congress amended § 1101(a)(43) in 1990 to include a reference to § 924(c)(2)'s definition of a "drug trafficking crime," one can assume that it intended to incorporate that definition in accordance with the plain meaning of the words used in § 924(c)(2). It would have made little difference to the 1990 Congress that not all crimes falling within the definition of a drug trafficking crime could actually be subjected to sentence enhancement under § 924(c)(1).