

# 00-1015

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

Carlos PACHECO,

Defendant-Appellant.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR  
THE NORTHERN DISTRICT OF NEW YORK

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**BRIEF OF *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT'S  
PETITION FOR REHEARING, PETITION FOR REHEARING EN BANC**

**American Immigration Lawyers Association  
National Immigration Project  
New York State Defenders Association**

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INTRODUCTION AND INTEREST OF AMICI

The majority's conclusion in this case -- that Congress intended for the 1996 amendments at issue to extend the reach of the aggravated felony term in the immigration statute to certain misdemeanors - has far-reaching ramifications. The aggravated felony definition determines who is denied asylum, which legal permanent residents are subject to automatic deportation, and who is permanently barred from returning. Under the majority's decision, these consequences will flow from mere misdemeanors. The majority acknowledges that this result is "incongruous," but saw itself bound by its view of Congress' apparent intent.

*Amici* submit this brief to demonstrate that there is strong evidence, of which the Court appeared unaware, that Congress did not intend for the 1996 amendments to turn misdemeanors into "aggravated felonies." In fact, the Senate Report presenting these amendments and the leading Senate proponents expressly referred to the amendments as affecting individuals with felony convictions.

*Amici* also submit this brief to demonstrate that the Court's summary discounting of the relevant Application Note in the United States Sentencing Guidelines conflicts with Supreme Court and Second Circuit precedent.

Finally, *amici* submit this brief to explain the broad implications and exceptional importance of the resolution of this issue not only for individuals in the appellant's situation but also for thousands of immigrants lawfully present in the United States.

The **American Immigration Lawyers Association** (AILA) is a national non-profit association of immigration and nationality lawyers. AILA is an Affiliated Organization of the American Bar Association. AILA was founded in 1946 and now has more than 6,000 members organized in 34 chapters across the United States and in Canada. Some 75 committees and task forces address substantive areas of law.

The **National Immigration Project** (NIP) is a national organization of immigration practitioners. Its members regularly practice before the Executive Office of Immigration Review, the Board of Immigration Appeals, and the federal courts. NIP provides technical assistance and training to bar organizations, state and federal public defender organizations, and the Immigration and Naturalization Service. It authors *Immigration Law and Crimes*, a treatise on the intersection of criminal and immigration laws.

The **New York State Defenders Association** (NYSDA) is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and other persons throughout the State of New York. Among other initiatives, NYSDA operates the Criminal Defense Immigration Project, which provides public defender, legal aid society, and assigned counsel program lawyers with legal research and consultation, publications, and training on issues involving the interplay between criminal and immigration law.

*Amici* file this brief pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure. All parties have consented to its filing.

**REASONS FOR GRANTING REHEARING**

*Amici* refer the Court to the compelling arguments presented by Judge Straub in his dissenting opinion in this case as reason alone to reconsider the Court's conclusion in this case. In addition, the Court should grant the appellant's petition for rehearing because (1) strong evidence of which the Court appeared unaware reveals that the majority misapprehended Congressional intent, (2) the majority opinion failed to follow Supreme Court and Second Circuit precedent on the legal authority of the Applications Notes in the Sentencing Guidelines, and (3) the issue presented here has far-reaching implications that go well beyond the resolution of this individual case.

**I. Strong evidence of which the Court appeared unaware shows that Congress did not intend for the 1996 IIRIRA amendments to turn misdemeanors into "aggravated felonies"**

This case addresses the meaning of Congress' 1996 reduction in the minimum prison sentence threshold for certain offenses to be deemed aggravated felonies from "at least five years" to "at least one year." Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 321(a)(3). The majority concluded that this reduction in the prison sentence threshold extends coverage of the aggravated felony definition to misdemeanors with one-year maximum prison sentences. The dissent concluded that this change only meant to extend the reach of the definition to additional felony convictions, i.e., those felony convictions resulting in prison sentences in the one to five year range.

In attempting to determine the meaning of the text of the 1996 amendments, both the majority and the dissent turned to

other sources of interpretative guidance, such as the legislative history of the amendments. However, both the majority and the dissent mistakenly assumed that there was no relevant legislative history. *United States v. Pacheco*, majority slip op. at 12-13 (finding "nothing in the legislative history" to cast doubt on the Court's conclusion); dissent slip op. at 7 (legislative history "reveals very little regarding the intended scope of the definition")(Straub, J., dissenting).

To the contrary, there is relevant and illuminating legislative history. The 1996 amendments to the aggravated felony definition originated in section 161 of Senate bill S. 1664. See S. 1664, 104<sup>th</sup> Cong., 2d Sess. § 161 (1996); see also H.R. Conf. Rep. No. 104-828, 104<sup>th</sup> Cong., 2d Sess. 223 (1996)(House recedes to Senate amendment section 161). The Senate Report on S. 1664 succinctly stated: "Because of the expanded definition of 'aggravated felony' provided by sec. 161 of the bill, aliens who have been convicted of most *felonies*, if sentenced to at least one year in prison, will be ineligible" for relief barred by conviction of an aggravated felony. S. Rep. No. 104-249, 104<sup>th</sup> Cong., 2d Sess. 17 (1996)(emphasis added). This language demonstrates that the Senate was concerned only with the range of sentences that would make a *felony* conviction an "aggravated felony." There is no suggestion that crimes classified as misdemeanors would be transformed into "aggravated felonies" merely because of the sentence imposed.

The Senate floor debate and comments by the major proponents of the criminal alien provisions in IIRIRA provide further evidence that Congress intended that the expanded aggravated

felony categories be limited to felony convictions. When discussing the types of crimes at issue, Senator Spencer Abraham, the architect of these provisions, and Senator William Roth, another lead proponent, made several references 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. S. 4598-4600 (May 2, 1996).

Indeed, a Senate floor interchange between Senator Abraham and Senator Orrin Hatch just three days after enactment of the IIRIRA expressly distinguishes between misdemeanors and crimes that could be aggravated felonies. In this colloquy, Senator Abraham asked about the import of the IIRIRA's restoration of eligibility for deportation relief to "aliens who have not committed aggravated felonies." 142 Cong. Rec. S12295 (October 3, 1996). Senator Hatch explained that this partial restoration of relief came in response to the fact that earlier restrictions in the Antiterrorism and Effective Death Penalty Act (AEDPA) - which barred 212(c) relief for many offenses outside of the aggravated felony definition -- had eliminated 212(c) relief "for virtually any alien who had been convicted of any crime, *including some misdemeanors*." *Id.* (emphasis added). The clear implication of this discussion, among even the most ardent supporters of IIRIRA's criminal provisions, is that the IIRIRA aggravated felony-only bar is not triggered by a misdemeanor.

This legislative history of the IIRIRA aggravated felony provisions conforms with the history of Congress' use of the aggravated felony term prior to 1996. This history shows that

Congress has over the years consistently considered or assumed aggravated felonies to be felony offenses.

Congress first employed the aggravated felony term in the INA in 1988. It defined the term to include "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 ..." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7342.

In 1990, Congress expanded the statutory definition of aggravated felony to add some new substantive categories of criminal offenses. Immigration Act of 1990, Pub. L. No. 101-649, § 501(a)(3) (adding certain federal money laundering offenses and crimes of violence for which the term of imprisonment imposed is at least five years). In that same legislation, Congress made aggravated felons ineligible for a waiver of exclusion if they had served a term of imprisonment of at least five years. *Id.*, § 511(a). In technical amendments the next year, this waiver restriction was amended to make ineligible an 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) (emphasis added).

Then, in 1993, Congressman Bill McCollum proposed adding three additional substantive categories of "alien *felons*," as he called them, to the definition of aggravated felony. 139 Cong. Rec. E749-50 (March 24, 1993) (emphasis added) (proposing to add felons who have committed serious immigration-related crime,

those who have participated in serious criminal activities and enterprises, and those who have committed serious white-collar crimes). At the same time, Congressman McCollum proposed the increased penalties for illegal reentry after deportation at issue in this case. He proposed increasing the maximum prison sentence from 15 years to 20 years for aggravated felons who re-enter the United States. *Id.* at E-750. As for "an alien convicted of a *felony* other than an aggravated felony," he proposed increasing the maximum sentence to 10 years, and extending this penalty also to "aliens convicted of three or more *misdemeanors*." *Id.* (emphasis added). Clearly, McCollum, one of the future sponsors of the IIRIRA amendments to the aggravated felony definition at issue in this case, did not contemplate that the aggravated felony term includes misdemeanors.

The next year, Congress enacted the expansions of the aggravated felony definition previously proposed by Congressman McCollum to cover additional classes of "alien *felons*." Immigration and Nationality Technical Corrections Act of 1994, Pub. L. No. 103-416, § 222(a). In that year, Congress also enacted the increased penalties proposed by McCollum for illegal reentry after deportation based on whether the prior deportation was subsequent to a conviction for (1) an aggravated felony, (2) a felony other than an aggravated felony, or (3) three or more misdemeanors. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 130001(b). The language and legislative history of these amendments show that Congress certainly contemplated overlap between its use of the term "felony" and the aggravated felony term, but contain no

indication that Congress contemplated any overlap between its use of the term "misdemeanor" and its use of the aggravated felony term.

Finally, in 1996, Congress twice enacted amendments to the aggravated felony definition, including those at issue in this case. First, AEDPA modified some existing categories of aggravated felonies, and added a few new substantive categories. See AEDPA, Pub. L. No. 104-132, § 440(e). Then, IIRIRA amended the aggravated felony definition, *inter alia*, to reduce the imprisonment threshold for certain offenses - including crimes involving violence or theft -- to fall within the definition from "at least five years" to "at least one year." IIRIRA, Pub. L. No. 104-208, § 321(a)(3). At the same time, IIRIRA greatly expanded the consequences of a crime being labeled an "aggravated felony." See Point III *infra*.

In light of the history of Congress' understanding of the aggravated felony term as limited to felonies, there can be little doubt that had Congress suddenly in 1996 intended to include misdemeanor offenses involving violence or theft within the aggravated felony definition, it would and could have expressly said so in IIRIRA. For example, had this been Congress' intent, it could have kept the aggravated felony label, but inserted the brief phrase "whether classified as a felony or misdemeanor" into the already existing sentence at the end of the aggravated felony definition, so that sentence would now read: "The [aggravated felony] term applies to an offense described in this paragraph whether in violation of Federal or State law and

*whether classified as a felony or misdemeanor ... ."* See 8 U.S.C. § 1101(a)(43) (insert added).

Absent such language, it would be much more sensible and consistent with the evidence of Congressional intent to interpret the new one year prison term threshold in the IIRIRA as solely but significantly expanding the number of *felony* convictions that may be deemed to fall within the aggravated felony definition, i.e., by including felony convictions with prison sentences in the one to five year range. Such an interpretation would give effect to the "at least one year" language used by Congress because it would include some individuals with exact one-year sentences - those whose underlying conviction was for a felony. At the same time, such an interpretation would also give effect to the plain meaning of the word "felony" by interpreting the term as applying only to offenses that meet applicable federal definitions of a felony. See Point II *infra*.

**II. The majority failed to follow Supreme Court and Second Circuit precedent on the controlling authority to be accorded to the United States Sentencing Guidelines Commentary**

As the majority opinion correctly observes, Application Note 1 in the Commentary to the United States Sentencing Guideline applicable in an unlawful reentry case states that "[f]elony offense' means any federal, state, or local offense punishable by imprisonment for a term exceeding one year." U.S. Sentencing Guidelines § 2L1.2, Commentary Application Note 1. Nevertheless, the majority opinion summarily discounts the authoritative guidance offered by this definition in interpreting the "aggravated felony" term for sentencing purposes, describing the

Application Note as "standing alone." *United States v. Pacheco*, slip op. at 14.

The United States Supreme Court has held that the interpretive aids in the Commentary to the U.S. Sentencing Guidelines are "controlling authority" and "binding" on the federal courts. *United States v. Stinson*, 508 U.S. 36, 42-47 (1993); *cf. United States v. Williams*, 503 U.S. 193 (1992) (same with respect to U.S. Sentencing Guidelines policy statements). In *Stinson*, the Court specifically held "that commentary in the Guidelines Manual that interprets or explains a guideline is authoritative unless it violates the Constitution or a federal statute, or is inconsistent with, or a plainly erroneous reading of, that guideline." 508 U.S. at 38. The Court explained:

According to this measure of controlling authority to the commentary is consistent with the role the Sentencing Reform Act contemplates for the Sentencing Commission. The Commission, after all, drafts the guidelines as well as the commentary interpreting them, so we can presume that the interpretations of the guidelines contained in the commentary represent the most accurate indications of how the Commission deems that the guidelines should be applied to be consistent with the Guidelines Manual as a whole as well as the authorizing statute.

*Id.* at 45.

The majority opinion's dismissal of the Sentencing Guidelines definition of "felony" thus violates the Supreme Court's requirement that sentencing courts treat the Commentary as binding authority except where it would be prohibited by statute or the Constitution. Here the Sentencing Guidelines definition is consistent with definitions of "felony" in federal law, *see, e.g.*, 18 U.S.C. § 3559(a), and with legislative intent regarding the scope of the aggravated felony term. *See Point I supra.*

Moreover, this Court itself just last year relied on the Commentary Application Note 1 definition of "felony" in interpreting the reach of the aggravated felony term. *See United States v. Pornes-Garcia*, 171 F.3d 142, 145 (2d Cir.)("[O]ur interpretation of 'aggravated felony' in the context of section 2L1.2 is informed by the commentary accompanying that guideline," referring to the 2L1.2 Commentary Application Note 1 definition of "felony"), *cert. denied*, 120 S. Ct. 191 (1999).

**III. The question presented here is of exceptional importance because it has far-reaching implications for lawfully present immigrants with misdemeanor convictions in several other contexts**

The Court's opinion has far-reaching implications beyond the illegal reentry sentencing context. Some of the many other significant consequences that may result from allowing a misdemeanor to be deemed an "aggravated felony" include:

**A. Ineligibility for asylum**

Under the Court's opinion, an individual who has come to the United States fleeing persecution in his or her country of nationality may be barred from seeking asylum in this country based on a misdemeanor conviction. This is because IIRIRA provided that, for purposes of the "particularly serious crime" bar to asylum, an asylum-seeker "who has been convicted of an aggravated felony shall be considered to have been convicted of a particularly serious crime." 8 U.S.C. § 1158(b)(2)(B)(I), as amended by IIRIRA, Pub. L. No. 104-208, § 604. Thus, for example, a Chinese dissident, an Iranian Jew, or an ethnic Albanian fleeing persecution on the basis of political opinion, religion, or nationality could be denied asylum and sent back to

his or her persecutors because of a misdemeanor shoplifting offense.<sup>1</sup>

#### **B. Mandatory detention and deportation**

Under the Court's opinion, lawful permanent residents with misdemeanor convictions are subject to arrest, mandatory detention, and placement in removal proceedings. See 8 U.S.C. §§ 1226 & 1227. Once in removal proceedings, a long-term lawful permanent resident immigrant is barred from asking an immigration judge for virtually any form of relief from removal if his misdemeanor conviction is deemed an aggravated felony. See 8 U.S.C. § 1229b(a)(3) (cancellation of removal); 8 U.S.C. § 1182(h) (waiver of inadmissibility); 8 U.S.C. § 1158(b)(2)(B)(i) (asylum); 8 U.S.C. § 1229c(a)(1) & (b)(1)(C) (voluntary departure).

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<sup>1</sup>The potential asylum ineligibility consequence of a misdemeanor conviction is particularly noteworthy because such a result flies in the face of international law. The right to seek asylum in the United States exists in part in order to comply with United States obligations under the 1967 United Nations Protocol Relating to the Status of Refugees, to which the United States acceded in 1968. 19 U.S.T. 6223, T.I.A.S. No. 6577. The "particularly serious crime" concept is derived from this and other international human rights conventions. A key source for interpreting such an international law concept is the United Nations Handbook on Procedures and Criteria for Determining Refugee Status. See *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987) (stating that, although the Handbook is not legally binding on U.S. officials, it nevertheless provides "significant guidance" in construing the 1967 Protocol and in giving content to the obligations established therein). The Handbook does not specifically define a "particularly serious crime," but it sets a minimum standard when it defines a "serious" offense as a "capital crime or a very grave punishable act." If a "serious" crime is so defined under international law, surely a "particularly serious crime," including its aggravated felony subset, should not be interpreted to include a misdemeanor offense.

**C. Permanent bar on return to the United States**

The immense consequence of removal from the United States is a permanent one. A noncitizen convicted of an aggravated felony who is removed from the United States or who departs while an order of removal is outstanding is permanently inadmissible to return to the United States. See 8 U.S.C. § 1182(a)(9)(A)(i) & (ii). Based on the Court's opinion, it will not matter if the aggravated felony conviction was only a misdemeanor.

**D. Additional adverse consequences for other immigrants**

The many other significant consequences of a misdemeanor deemed an aggravated felony conviction would be the following: no hearing before an immigration judge in some cases, 8 U.S.C. § 1228(b); conclusive presumption of deportability, 8 U.S.C. § 1228(c); and ineligibility for judicial review, 8 U.S.C. § 1252(a)(2)(C).

**CONCLUSION**

For the above reasons, *amici* respectfully urge this Court to reconsider whether IIRIRA turned the misdemeanor offenses at issue in this case into aggravated felonies. As Judge Calabresi has stated: "[W]hen Congress, in a definitional section, seems to say that bananas are apples, we should ask whether that is really what Congress meant . . . ." *Benjamin v. Jacobson*, 172 F.3d 144, 192 (2d Cir.) (en banc) (Calabresi, J., concurring), cert. denied, 120 S. Ct. 72 (1999). An examination of the history of IIRIRA and the aggravated felony term shows that Congress did not intend to depart from the time-honored distinction between misdemeanors and felonies. Accordingly, consistent with congressional intent and the U.S. Sentencing Guidelines, this

Court should apply the term only to offenses that meet applicable definitions of a felony.

Respectfully submitted,

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