

New York State Defenders Association Immigrant Defense Project

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Amicus Briefs in Support of Fair Treatment of Legal Immigrants

The cases of *Lopez v. Gonzales* and *Toledo-Flores v. U.S.*, which are being heard by the Supreme Court, will dramatically affect the rights of legal immigrants who are being unfairly and harshly punished for crimes that result in little or no jail time for others. Amicus briefs in favor of Lopez and Toledo-Flores have been filed by a wide range of organizations, including three former general counsels of the Immigration and Naturalization Service, the American Bar Association, and Human Rights First. The Immigrant Defense Project of the New York State Defenders Association filed an amicus brief and has coordinated litigation nationally on these issues. Highlights of the briefs appear below.

Brief of Former General Counsels of the Immigration and Naturalization Service

[http://www.nysda.org/idp/docs/06_Former%20General%20Counsels%20of%20INS%20\(Amicus\).pdf](http://www.nysda.org/idp/docs/06_Former%20General%20Counsels%20of%20INS%20(Amicus).pdf)

- This brief was filed by three former general counsels to INS: Owen B. Cooper, who served from 1999 to 2003; David A. Martin, who served from 1995 to 1998; and Paul W. Virtue, who served in various capacities at INS including general counsel from 1988 to 1999.
- Strong enforcement of the immigration laws requires that judges be allowed to consider individual facts and circumstances. A person may be subject to deportation, but the equities of his or her situation may not warrant permanent separation from home, family and livelihood.
- Congress decided that some crimes should be deemed *aggravated felonies* and make immigrants ineligible for discretionary relief from deportation. Legal immigrants should be subject to mandatory deportation only when Congress has clearly and unequivocally decided to treat a certain offense as an aggravated felony.
- In these cases, “[t]here is no clear indication that Congress intended the definition of aggravated felony to apply to drug offenses that are ... misdemeanors under the federal law and ... the consequences are severe if the definition is applied in such a way.” (Brief of Former General Counsels of the Immigration and Naturalization Service at pp. 17-18.)

Brief of the American Bar Association

[http://www.nysda.org/idp/docs/06_American%20Bar%20Association%20\(Amicus\).pdf](http://www.nysda.org/idp/docs/06_American%20Bar%20Association%20(Amicus).pdf)

- Simple possession does not constitute “illegal trafficking.” Congress used the words “aggravated” and “felony” to refer to the most serious felonies, not misdemeanors.
- Any drug offense, including simple possession, can render a non-citizen deportable. Making deportation mandatory and taking away judicial discretion in these cases is harsh and undermines the integrity of the criminal justice system.

- The immigration consequences of an offense – permanent separation from home, family and livelihood – can far exceed the criminal punishments. When this happens, the justice system breaks down: defendants plead to minor offenses without understanding the full consequences of their pleas; victims may refuse to cooperate; judges may reduce their sentences; even prosecutors’ and defense attorneys’ decision-making may be compromised.
- The “rule of lenity” applies in *Lopez* and *Toledo-Flores*. That rule requires “any lingering ambiguities in the statute be construed against deportation.” (See Brief of the American Bar Association at p. 5.)

Brief of The New York State Defenders Association Immigrant Defense Project, American Civil Liberties Union, American Immigration Lawyers Association, Immigrant Legal Resource Center, National Association of Criminal Defense Lawyers, and National Legal Aide and Defender Association

[http://www.nysda.org/idp/docs/06_IDP,%20ACLU,%20ACLU,%20ILRC,%20NACDL,%20NLAD A%20\(Amicus\).pdf](http://www.nysda.org/idp/docs/06_IDP,%20ACLU,%20ACLU,%20ILRC,%20NACDL,%20NLAD A%20(Amicus).pdf)

- The Immigration and Nationality Act, which makes “illicit trafficking in a controlled substance ... including a drug trafficking crime” an aggravated felony and subjects legal immigrants to mandatory deportation, does not encompass state-law simple possession offenses.
- According to dictionary definitions and case law, “illicit trafficking” and drug “trafficking” apply to the sale or dealing of drugs. Some element of commercial activity or exchange of money for drugs must be involved, not simple possession.
- Consequently, in construing the term “illicit trafficking,” the Board of Immigration Appeals has held, “the offense of simple possession would appear to be one example of a drug-related offense not amounting to the common definition of ‘illicit trafficking.’” (See Brief for The New York State Defenders Association Immigrant Defense Project, *et al.*, at p. 13.)

Brief of Human Rights First

[http://www.nysda.org/idp/docs/06_Human%20Rights%20First%20\(Amicus\).pdf](http://www.nysda.org/idp/docs/06_Human%20Rights%20First%20(Amicus).pdf)

- If the Government’s reading of the law is adopted by the Court, refugees who have fled political and religious persecution will be returned to nations where their lives and freedom are threatened, or even where they face death.
- Congress did not intend to include all drug-related offenses in its definition of “aggravated felony,” and certainly not offenses involving simple possession or those punished as misdemeanors under federal law. Simple possession is not a “particularly serious crime,” which bars asylum.
- By signing international treaties and protocols, the United States has promised not to return refugees to places where their lives or freedom would be threatened. The Court cannot construe a statute in a manner that would cause the U.S. to violate its international treaty obligations, unless the statute’s language “unambiguously compels that result.” (See Brief for Human Rights First at p. 6.)

Brief of 24 Civil Rights, Immigrants Rights and Legal Organizations on Community Impact [http://www.nysda.org/idp/docs/06_Community%20Impact%20\(Amicus\).pdf](http://www.nysda.org/idp/docs/06_Community%20Impact%20(Amicus).pdf)

- The immigrant community includes workers, employers, U.S. military veterans, parents and other valued members of American society. They raise families, pay taxes, own businesses and have deep roots in this country.
- Their first-time mistakes should not allow them to be characterized as aggravated felons subject to mandatory deportation. This label bars them from discretionary, humanitarian relief in the immigration courts. Congress has made a distinction between simple possession and drug trafficking; they are not the same and the Court should not treat them the same.
- This brief profiles actual families that are being torn apart by misapplication of this law. For example, Maurilio Garibaldi has been a lawful permanent resident for 16 years. If he is deported as a result of his first offense (for which he served probation with no jail time), he will be permanently separated from his wife and five children who are U.S. citizens.

Brief of The National Association of Federal Defenders and Families Against Mandatory Minimums

[http://www.nysda.org/idp/docs/06_National%20Association%20of%20Federal%20Defenders%20and%20FAMM%20\(Amicus\).pdf](http://www.nysda.org/idp/docs/06_National%20Association%20of%20Federal%20Defenders%20and%20FAMM%20(Amicus).pdf)

- Under the plain language of the statute at issue, simple possession is not an aggravated felony, triggering mandatory deportation.
- Even if the Court finds there is ambiguity in the statute, it must find in favor of Lopez and Toledo-Flores. The rule of lenity provides that “where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.” (See Brief at p. 11 quoting *United States v. Bass*, 404 U.S. 336, 348 (1971)).
- In the context of determining the proper punishment under a statute, Justice Scalia has stated, “where it is doubtful whether the text includes the penalty, the penalty ought not be imposed.” (Brief at pp. 12-13 quoting *United States v. R.L.C.*, 503 U.S. 291, 309 (1992)(Scalia, J., concurring) Age-old concepts about fairness require that people get notice of the law and the consequences for violating the law.

Brief of Center for Court Innovation and The New York Association of Drug Treatment Court Professionals

[http://www.nysda.org/idp/docs/06_CCI%20and%20NYADTCP%20\(Amicus\).pdf](http://www.nysda.org/idp/docs/06_CCI%20and%20NYADTCP%20(Amicus).pdf)

- If legal immigrants who have successfully completed drug court programs and treatment are automatically deported, non-citizens will have less incentive to enter drug rehabilitation programs.
- The Court should limit the term “drug trafficking crime” to offenses with a trafficking element. Any other result would undermine the ability of drug courts to reduce substance abuse in immigrant communities.

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The Immigrant Defense Project provides training, counseling and publishes reference materials on immigration law for defense lawyers and others who represent or assist immigrants in criminal justice and immigration systems, as well as to immigrants themselves.

To arrange an interview with legal experts or affected immigrant families, please call Margot Friedman at 202-330-9295.