

CASE NO. 07-61006

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

JOSE ANGEL CARACHURI-ROSENDO
Petitioner

v.

MICHAEL MUKASEY, U.S. Attorney General
Respondent

APPEAL FROM THE BOARD OF IMMIGRATION APPEALS

**BRIEF FOR AMICUS CURIAE
NEW YORK STATE DEFENDERS ASSOCIATION
IN SUPPORT OF PETITIONER**

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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PETITIONER'S ATTORNEY:

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RESPONDENT:

Michael Mukasey, U.S. Attorney General

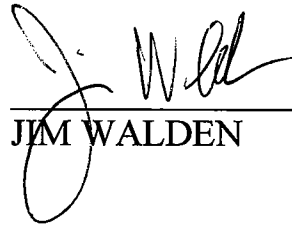
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PRELIMINARY STATEMENT

Every year, hundreds of thousands of Americans are arrested for possessing personal-use quantities of controlled substances. Often, these charges are resolved by criminal authorities through dismissal or deferral of prosecution, use of administrative “violations” (similar to traffic tickets for speeding), or misdemeanor dispositions. Often, these cases are resolved through summary proceedings with few procedural protections.

Although U.S. citizens suffer few collateral consequences from such dispositions, the same cannot be said for immigrants, including permanent residents, within this Court's jurisdiction. Under the decision reached below, even isolated, non-criminal, administrative "violations" for simple possession of controlled substances inexorably lead to mandatory deportation within the Fifth Circuit. Deportation is mandated, in this view, because of a statutory fiction resulting from a mind-numbing series of statutory cross-references: that two disparate instances of controlled substance possession transform the possessor into a "drug trafficker." This is true even, as here, where the separate possessions involved a *de minimis* quantity of marijuana and an anti-anxiety medicine (possessed without a prescription).

The BIA issued its ruling below despite its own determination that such violations should not lead to mandatory deportation. The BIA believed it was compelled to apply a different rule below based solely on this Court's decision in *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005). Because we believe *Sanchez-Villalobos* does not compel this harsh result, we ask the Court to reverse or remand for further consideration.

STATEMENT OF INTEREST

Amicus curiae submit this proposed brief pursuant to Fed. R. App. P. 29, Local Rule 29, and pending permission of this Court. Petitioner has consented to the filing of this proposed *amicus* brief.

Amicus New York State Defenders Association (“NYSDA”) is a nonprofit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and others dedicated to developing and supporting high-quality legal defense services for all people, regardless of income. NYSDA operates the Immigrant Defense Project, which provides expert legal advice, publications, and training nationwide on issues involving the interplay between criminal and immigration law.

The Supreme Court has accepted and relied on *amicus curiae* briefs submitted by NYSDA in key cases involving the proper application of federal immigration law to immigrants with past criminal convictions, including the Court’s critical recent decision in *Lopez v. Gonzalez*, 549 U.S. 47, 127 S. Ct. 625 (2006). *See, e.g.*, Brief for *Amici Curiae* New York State Defenders Association Immigrant Defense Project, et al., *Lopez v. Gonzales*, 127 S. Ct. 625 (2006) (No. 05-547), available at <http://www.nysda.org/idp/webPages/drugLitigationInit.htm>.

BACKGROUND

Several cases pending before this Court, including Carachuri's, raise the issue of whether, under 8 U.S.C. §§ 1229b(a)(3) and 1101(a)(43)(B), Congress intended to transform two disparate, low-level controlled substance possessions into a fictional "drug trafficking" offense, requiring mandatory removal from the United States. These cases generally involve permanent residents with two isolated possession offenses, which were prosecuted as state-law misdemeanors or non-criminal violations. *See, e.g., Donnoli v. Mukasey*, Docket No. 08-60168 (at government's request, held in abeyance pending this case); *Young v. Mukasey*, Docket No. 08-60278; *Lemaine v. Mukasey*, Docket No. 08-60286. The consequences of the aggravated label are severe, including but not limited to: (a) no possibility of having removal cancelled based on a strong showing of positive equities and rehabilitation, even for long-term lawful permanent residents; and (b) no possibility of asylum for those facing well-founded fears of persecution in their country of removal. *See generally Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006).

These cases will have far-reaching implications. By shoe-horning minor state possession offenses into the narrow, common sense understanding of drug "trafficking," this Court would provide a whole new avenue for deportation of hard-working immigrants—a result surely beyond Congress's intent under the immigration laws. Under this view, a permanent resident who has lived and

worked in this country continuously for 20 years with her family faces mandatory deportation for isolated possessions of low-level controlled substances, even if such possessions result in no criminal convictions. Cases pending before this Court demonstrate that this “slippery slope” is real. *See, e.g., Lemaine, supra* (applying aggravated felony label to controlled substance possession that amounted to a non-criminal violation).

This case is an example of the steepness of that slope. Carachuri was first convicted of a misdemeanor involving less than two ounces of marijuana, and he was subsequently convicted of a misdemeanor for possessing an anti-anxiety medicine without a prescription. We have searched for reported examples of federal prosecution of such cases—even as misdemeanors. We found none. We doubt such cases would survive the application of intake guidelines for federal offenses, which U.S. Attorney’s offices across the country commonly employ to screen out minor cases. Labeling such offenses as “aggravated felonies” stretches the phrase beyond the outer reaches of the law and common sense.

For the reasons set forth below, and based on the broad implications of the Court’s decision in this matter, we ask the Court to reverse the BIA’s determination or remand for further consideration.

SUMMARY OF ARGUMENT

The federal statute at issue in this matter—8 U.S.C. § 1229b(a)—does not require, and was never intended by Congress, to constrain the Attorney General from cancelling the removal of legal permanent residents with isolated simple drug possession convictions that individually would not bar consideration of their positive equities.

Although the BIA correctly reasoned that two possession offenses do not constitute an “aggravated felony” under 8 U.S.C. § 1229b(a), the BIA erred in holding that this Court’s sentencing decision in *Sanchez-Villalobos* requires the opposite conclusion in the immigration context. Even if *Sanchez-Villalobos* remains good law, it does not prohibit cancellation of removal for low-level controlled substance misdemeanants, who would likely not be prosecuted at all, let alone as felons, under federal law.

ARGUMENT

I. Congress Did Not Intend Mandatory Removal For Minor Drug Possession Offenses

At the heart of this case is a statute—8 U.S.C. § 1229b(a)—with a singular purpose: “to ameliorate the personal hardship inherent in deportation and exclusion.” *Blake v. Carbone*, 489 F.3d 88, 94 (2d Cir. 2007) (referring to relief under former 8 U.S.C. § 1182(c), the predecessor to 8 U.S.C. § 1229(b)). Through § 1229b(a), Congress authorized the Attorney General to cancel removal in

appropriate cases unless a permanent resident has been “convicted of any aggravated felony.” In the context of § 1229b(a), an interpretation of “aggravated felony” to include minor possession offenses is wholly at odds with the statute’s text and purpose.

A. Congress Defined Aggravated Felonies As The Most Serious Offenses

To distinguish between immigrants who could not apply for cancellation of removal and other forms of relief and those who could, Congress provided a specific list of crimes that could constitute “aggravated felonies.” On the list of aggravated felonies, Congress included felonies such as murder or rape of a child, espionage, slavery, racketeering and child pornography. *See* 8 U.S.C.

§ 1101(a)(43). Even property and tax crimes are limited to crimes above a certain loss threshold in order to be considered “aggravated.” *See id.* at

§ 1101(a)(43)(G),(M). As for drug offenses, Congress included “illicit trafficking in a controlled substance.” *See id.* at § 1101(a)(43)(B). A central question presented to this Court is whether Congress—despite its laundry list of what is deemed the most aggravated offenses, all of which inflict serious damage or death—included isolated possessions of *de minimis* quantities of low-level controlled substances as aggravated felonies.

The plain words of §§ 1229b and 1101(a)(43) do not capture low-level drug possessors within the aggravated felony rule. The Immigration and Nationality

